STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 WAUKESHA COUNTY

SAYBROOK TAX EXEMPT INVESTORS, LLC; LDF ACQUISITION, LLC, *et al.*,

Plaintiffs,

v.

Case No. 2012-CV-0187
Consolidated with

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, *et al.*,

Defendants,

and

GODFREY & KAHN, S.C.,

Defendant-Third Party Plaintiff,

v.

DENTONS US LLP,

Third Party Defendant.

LDF ACQUISITION LLC and SAYBROOK TAX EXEMPT INVESTORS, LLC,

Plaintiffs,

v.

Case No. 2015-CV-0302

DENTONS US LLP, as successor-in-interest to SONNENSCHEIN, NATH & ROSENTHAL, LLP,

Defendant.

DECISION AND ORDER (PHASE I – COURT TRIAL)

Way back in January, 2008, the parties participated in, drafted, advised upon, or entered into a $50 million bond transaction to—in part—establish a riverboat casino, hotel, and bed and breakfast in Natchez, Mississippi to be run by the Lac Du Flambeau Band of the Lake Superior Chippewa Indians. That never came to pass; leaving instead a tangled web of repudiated, void *ab initio*, and potentially void

documents, unpaid obligations, and allegations of breach, fraud and legal malpractice, among others.

Not content to attempt to resolve all of the various disputes in one venue, these parties with these same claims and defenses have also appeared in the Western District of Wisconsin federal court, the Seventh Circuit Court of Appeals, as well as in the Tribal Court of the Lac Du Flambeau Band of Lake Superior Chippewa Indians.[1] Finally, as of February 11, 2016, all other legal actions were either dismissed or stayed so that this Court could reach a final determination on all pending issues.

The matter was divided into two Phases, the first of which concerns solely equitable or legal issues that were tried to the Court between October 17-27, 2016. All remaining issues, including the question of damages, have been left for a Phase II, seven-week jury trial to commence on January 31, 2017, and conclude by March 17, 2017. This Decision and Order concerns only the Phase I issues.

During the nine-day court trial, 23 witnesses testified (live or by video deposition), 3 experts testified, stipulations[2] were filed, and the parties bundled up all of their arguments in two days of closing statements.

Notwithstanding the complexities of the issues, the intermix of federal and state law, and the large amount in controversy, when all was said and done—and in this case, "all" encompasses quite a bit—the decision is rather straightforward: there were no express warranties made by the Stifel Parties, but there were implied warranties; the Bond documents are not void as *ultra vires* acts of the Tribal Parties, they are not invalid or void under the Tribal Constitution, but at least some of the Bond documents constitute financial schemes that are void *ab initio* as management contracts under the federal Indian Gaming Regulation Act ("IGRA").

BACKGROUND

As noted, this is a convoluted legal endeavor that has coursed through the federal courts, a tribal court and the state circuit court here in Waukesha County over a period of more than four years, and this Decision is not the end of the cases. Because there are two Phases, some facts were not fully addressed by the parties

[1]Throughout this Decision, due to the references to federal statutes with Indian in their titles, there will be reference to "Indians" and "Indian tribes" in lieu of the more current practice of using the phrase "Native American."

[2]The parties filed a Limited Stipulation for Use at Trial and an Amended Stipulation Between the Tribal Parties, Godfrey & Kahn, and Dentons Related to Certain Factual Matters. Some of these stipulations will be more relevant during the jury trial in Phase II of this case.

during the court trial, nor shall they be deemed found—or to have preclusive effect—at this time. Only those facts necessary to allow for deliberation and the conclusions on the relevant, Phase I equitable or legal issues, are set forth here; facts still in dispute will be noted as such, if addressed at all, in this Decision.

I. FACTS.[3]

The events that ultimately culminated in these lawsuits started prior to January, 18, 2008, when the Lake of the Torches Economic Development Corporation (hereinafter "EDC")—a corporation chartered under the Tribal Constitution of, and owned by, the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally recognized[4] Indian tribe (hereinafter the "Tribe")[5] issued and sold Taxable Gaming Revenue Bonds with a face value of $50 million (hereinafter the "Bonds") in order to refinance and consolidate certain debt associated with the operation of the Lake of the Torches Resort Casino (hereinafter the "Casino")[6] and to loan funds to the "Grand Soleil" project for the construction of a gaming complex in Natchez, Mississippi that was to contain a riverboat casino, hotel, and bed and breakfast.

On March 4, 1999, the Tribe's members approved a referendum "authoriz[ing] the Tribal Council to borrow an amount not to exceed $500 million dollars for off-reservation gaming sites." That referendum had not been rescinded when the Bond Documents[7] were signed in 2008. EDC has the authority to issue and sell bonds for specific purposes and to pledge any revenues received from the Casino as security.

Stifel, Nicolaus & Company, Inc., a brokerage and investment banking company and wholly owned subsidiary of Stifel Financial Corp., a financial services holding company, (hereinafter "Stifel"), was retained in May, 2007, to market the Bonds. The Tribe retained Godfrey & Kahn, S.C., a law firm with offices in Wisconsin, to

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[3]Additional facts will be interspersed throughout the Decision where necessary.

[4]The Tribe is organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, and recognized by the federal government. The Tribe and the Casino are located on the Lac Du Flambeau reservation in northern Wisconsin and is operated pursuant to a tribal-state compact with the State of Wisconsin.

[5]Collectively, EDC and the Tribe shall be referred to as the "Tribal Parties." William Guelcher has been the Chief Executive Officer of EDC and General Manager of the Casino since 1999.

[6]EDC runs the Casino, a class II and class III gaming facility.

[7]In the transaction for the sale of the Bonds, on January 18, 2008, (the "Bond Transaction" or "Transaction") various parties executed several documents that will be referred to throughout as the "Bond Documents."

serve as Bond Counsel and as Counsel to the Tribe (and EDC) with respect to the Bond Transaction.

On May 30, 2007, the Tribe and Stifel entered into an Investment Banking Agreement pursuant to which Stifel agreed to "serve as Senior Underwriter and/or Placement Agent ('Financing Agent')." As part of its retention, Stifel . . .

> . . . as Financing Agent, [was to] provide services necessary, on a best efforts basis, to obtain financing for the Project including, but not limited to, facilitating the placement of any bonds.

Investment Banking Agreement, ¶ 1.

As part of its obligations under the Investment Banking Agreement, Stifel marketed the Bonds by providing materials to various potential investors, including an October 22, 2007 Executive Summary;[8] none were interested until Saybrook Tax Exempt Investors, LLC (a private equity firm that purchases distressed and defaulted municipal bonds) and its special purpose entity, LDF Acquisition, LLC (which is managed by Saybrook Fund Investors, LLC) (collectively referred to as "Saybrook") entered the picture after being solicited by Stifel.

Negotiations between Stifel and Saybrook proceeded apace with both sides drafting responses and emails. On November 2, 2007, Saybrook sent a version of a Preliminary Terms Sheet to Stifel which forwarded it to the Tribe's contact and main negotiator for this transaction, Richard Lindsley (the Tribe's then Chief Financial Officer).

Perhaps realizing that there was only this one interested investor, on November 6, 2007, the Tribe signed an Authorization to Proceed directing Stifel, on behalf of the Tribe, to negotiate with Saybrook to effectuate a sale of the Bonds "on terms that [would] meet the Tribe's credit and cash flow needs." The Authorization to Proceed further stated:

> **It is therefore agreed,** that Stifel Nicolaus is authorized by the Tribe to utilize its best efforts to complete negotiations with Saybrook to reach a final agreement on the terms and conditions of financing, and
>
> **It is further agreed**, that upon completion of negotiations with Saybrook on behalf of the Tribe, Stifel Nicolaus is authorized to direct legal counsel at Godfrey & Kahn, Milwaukee, Wisconsin, and Balch & Bingham, Jackson, Mississippi, to proceed with the preparation of all necessary, appropriate, and convenient documents to move the financing to a closing as expeditiously as sound and careful legal practice permits.

[8]The Executive Summary that on its face states it was "prepared by Stifel" contained a "Preliminary Term Sheet."

Stifel's Public Finance Department employees, David DeYoung (Senior Banker) and Kevin Shibilski (Relationship Manager) were assigned to this project/solicitation along with Brian Lehky (analyst) and Paul Patrie[9] (back-up for Mr. DeYoung). Mr. DeYoung drafted the 2007 Investment Banking Agreement and the 2007 Authorization to Proceed; he testified that neither were "typical documents." Godfrey & Kahn partner and one of the attorneys involved in these negotiations, Brian Pierson, testified that Stifel was the "principal architect" of the project/transaction and that his firm took direction[10] from Stifel. Godfrey & Kahn drafted most of the Bond documents, including the Indenture and Bond.

Negotiations between Stifel and Saybrook continued through and after November 7, 2007, at which time Saybrook sent a second Preliminary Terms Sheet to Stifel. On November 21, 2007, Stifel emailed a second draft Executive Summary[11] to Saybrook.

Additional emails and revised documents were exchanged through the end of December, 2007. Mr. DeYoung testified that he reviewed all of the documents and that he was in "regular contact" with the Tribe, constantly discussing options, timing, and the overall Transaction. All of these negotiations culminated in the execution of the Bond documents.

Godfrey & Kahn, acting as Issuer's Counsel and as Bond Counsel (for EDC and the Tribe) in connection with the sale, issued two opinion letters as to the meaning of several bond-related documents and as to the underlying legality of the Bond Transaction.

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[9]Mr. Patrie testified regarding his role in the Bond Transaction. Aside from explaining his lack of experience in Indian gaming contracts, the Court found his testimony to be incredible in certain instances and notes his refusal to answer obvious questions. For instance, Mr. Patrie hedged on whether he "drafted" any of the documents, espousing the view that he had no involvement when it appeared evident he at least "reviewed" all of the documents. He further declined to answer whether it was Stifel's original template. To the contrary, the Court found the testimony of Steve Bell, Stifel's Director of Public Finance, to be credible. But, the issue as to whether Mr. DeYoung told Mr. Bell that the Tribe's operating line of credit ($12 million) had been carved out of the Pledged Revenues (it hadn't been), is one for Phase II.

[10]Mr. Pierson, a non-disinterested party, claims that Stifel was "driving the bus."

[11]Mr. DeYoung asserts that there was a never a "final" Executive Summary.

The Tribal Council, the decision-making body of the Tribe as well as the directors of the EDC board, was composed of individuals who lacked finance background. This was the first and largest bond transaction contemplated by the Tribe.[12]

Saybrook retained Dentons US LLP,[13] a law firm, to advise it during the negotiations. Saybrook conducted due diligence and then decided to purchase the Bonds through LDF, but only if Stifel was the initial purchaser/underwriter. This requirement was relayed from Saybrook to Stifel and agreed upon as early as November 7, 2007. One of Saybrook's Managing Director and its main negotiator in the transaction, Scott Bayliss, testified that absent this initial purchase by Stifel, Saybrook would not have invested.

The first draft of the Offering Memorandum, together with certain other drafts of the Bond Documents (consisting of 211 pages), were first sent by Stifel's legal counsel (Balch & Bingham) to Godfrey & Kahn, among others, at the close of business on December 27, 2007, the Thursday before the four-day holiday weekend. A meeting of the Tribal Council was set for the next business day, January 2, 2008. There are still issues of fact as to which Tribal Council members, if any, received drafts of the Bond Documents and when, but it is undisputed that there was a Tribal Council meeting on January 2, 2008, to address and approve the Bond Documents and/or the Bond Transaction itself.

The Tribal Council met privately[14] together right before the January 2, 2008, meeting that was lead by Stifel (Mr. Shibilski) and Godfrey & Kahn (attorney Pierson). The official Tribal Council meeting on January 2, 2008, was the only pre-closing meeting held by the Tribe.[15] Mr. Pierson admits that at some point during the meeting he stopped reading the various resolutions and otherwise cut short his anticipated presentation. The questions of what was said at the meeting, how

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[12]As an aside—and not a finding of fact—there appears to be some support for the theory that, due to, or perhaps in spite of, the overlap of all the legal entities involved in this Transaction, the Tribal Parties were somewhat disserved. Their interests may have fallen through the cracks. That, however, doesn't excuse or justify their non-performance on their contracts, nor is it relevant or was it fully argued in Phase I.

[13]One of Dentons' employees, attorney Alan Fedman—who advised Saybrook in connection with the Bond Transaction—had previously worked for 15 years as Director of Enforcement for the National Indian Gaming Commission. Mr. Fedman testified that he had substantial experience and understanding of IGRA and its corresponding regulations while he was employed by NIGC.

[14]The amount of disclosure about the proposed Transaction as well as whether the Tribal Council was given more than "a few bits and pieces" to consider, is a subject for Phase II.

[15]Interestingly, Mr. Lindsley, the Tribe's Chief Financial Officer was asked to leave the January 2, 2008, meeting during the discussions, but Mr. Shibilski was permitted to stay.

strongly Mr. Shibilski urged approval, whether Mr. Shibilski disclosed his potential interest in the transaction's outcome, if any, and how much attorney Pierson addressed the content of the Bond Documents are also in dispute.[16] Suffice to say, the Tribe voted[17] to approve the Bond Transaction at the conclusion of the January 2, 2008, meeting.[18] The closing was effected 16 days later.

The transaction (hereinafter referred to as the "Bond Transaction") was structured as an unregistered private sale[19] under SEC Rule 144A, with Stifel as the Initial Purchaser of the Bonds. On January 18, 2008, EDC issued the Bonds (with a principal amount of $50 million) and sold them to Stifel for $49,125,000. Stifel immediately that day sold the Bonds to Saybrook for $49,500,000—retaining $375,000 of the sales proceeds.

At no time prior to the sale of the Bonds were any of the Bond Documents submitted to the Secretary of Interior for approval. At no time prior to the sale of the Bonds were any of the Bond Documents submitted to the National Indian Gaming Commission ("NIGC") in order to determine whether they were unlawful management contracts contrary to IGRA. The Bond Documents were not approved by a referendum vote by the Tribe.

The Bonds were secured by the revenues and related assets of the Casino and were accompanied by a trust indenture (hereinafter the "Indenture") that

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[16]These questions of fact shall be addressed in the Phase II trial. The witnesses did, however, testify that there was debate, there were statements that by taking no action the Tribe might face severe consequences, and there were inquiries by the Tribal Council as to whether the deal could be restructured for a lesser amount with a prompt payment (the answer was "no"). Mr. Pierson does also recall that urgency was raised and reinforced by the presenters.

[17]The vote was not unanimous and several Tribal Council members testified they either wanted to wait, to seek a lesser Bond amount, or that they just weren't given enough information and/or that "nobody read the four inches of paperwork" before the vote was taken. That, however, is a matter for Phase II—as well as the legal effect of the vote giving the Tribal President the authorization to sign the documents binding the Tribal Parties.

[18]There is also a dispute as to whether there were any material alterations to the Bond Documents after the January 2, 2008, meeting and prior to the re-signing of several of the Bond Documents by the Tribe's President on or before January 16-17, 2008. That affirmative defense is the subject of a pending motion for summary judgment. Expert Timothy Kincaid, an attorney with extensive experience in Indian debt financing, opined that, while things do change in these documents, they cannot do so dramatically if underwriters expect to keep purchasers in future transactions.

[19]All parties agree that the Bonds were exempt from registration requirements under federal securities laws. Further, the Bonds state that they "shall be governed by and construed in accordance with the law of the State of Wisconsin."

designated Wells Fargo Bank, National Association, a national banking association, as Trustee on behalf of the bondholders. The Bond Documents[20] executed pursuant the Bond Transaction, include:

1. A specimen bond. (issued 1/18/08)
2. A Limited Offering Memorandum signed by EDC's President. (1/18/08)
3. A Bond Purchase Agreement, between EDC and Stifel. (1/18/08)
4. A Trust Indenture, between EDC and Wells Fargo. (1/1/08)
5. A Bond Resolution. (1/2/08)
6. Opinion Letters by Godfrey & Kahn – as counsel for EDC and the Tribe (addressed to Stifel, Wells Fargo, and Saybrook) and as Bond Counsel (addressed to EDC, Stifel, Wells Fargo, and Saybrook). (1/18/08)
7. A Security Agreement between EDC and Wells Fargo. (1/1/08)
8. A Tribal Agreement. (1/1/08)
9. A Tribal Resolution. (1/2/08)

The Tribal Parties received and used the proceeds from the Bonds for the Tribe's and EDC's business purposes.

The Tribal Parties have alleged that almost immediately they were aware that the revenue from the Casino would not be sufficient to meet the debt service on the Bonds while still sustaining the tribal government and reinvestments in the Casino.[21] EDC substantially performed on the Bonds until October, 2009, paying $20,462,801.70 in principal and interest. There was an unsuccessful attempt to restructure the transaction in February, 2008, during which the Tribal Parties, for the first time, raised concerns that the Indenture, Security Agreement, and Tribal Agreement may contain *indicia* of management, and thus, be void under IGRA. On August 14, 2009, the Tribal Parties wrote to Saybrook seeking to renegotiate the Bond Documents. The restructure negotiations were unsuccessful.

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[20]There is no dispute that the Bond Documents are to be governed by and construed in accordance with Wisconsin law. Several of the Bond Documents also contained waivers of sovereign immunity on behalf of the Tribal Parties. While the Western District of Wisconsin federal court and the Seventh Circuit—as well as this Court—have determined that that waiver was effective, the Tribal Parties have consistently renewed their objection and have preserved that argument for appeal.

[21]These allegations were not addressed in the Phase I trial and shall be determined by a jury in Phase II. In addition, there is the allegation that in October, 2009, the Tribe elected a new governing Tribal Council that had campaigned on a pledge to repudiate the Bonds, and that there were some requests for operating expenses that may—or may not—have been necessary, before the Tribal Parties notified Wells Fargo that they did not intend to continue to honor the Bonds. These issues, too, will be resolved in Phase II.

In November, 2009, the Tribal Parties repudiated their obligations under the Bonds and other Documents, ceased depositing revenues into the trust account, and refused to pay the remaining $46,615,000 principal and interest. The Tribal Parties were declared in default[22] in December, 2009.

Acting as trustee, on December 21, 2009, Wells Fargo initiated the first of many lawsuits in the Western District of Wisconsin[23] shortly after that declaration of default for breach of the Indenture and seeking to appoint a receiver to take over the Casino. Ultimately, the Seventh Circuit Court of Appeals affirmed[24] the District Court's decision[25] that had declared the Indenture void *ab initio* as an unapproved management contract due to the parties' failure to have the Indenture approved by NIGC as required by IGRA. The remaining Bond Documents were not, however, automatically declared void *ab initio* merely due to their connection to the Indenture. The question of their validity was left—ultimately—for this Court together with allegations of legal malpractice, fraud, breach of contract and warranty.

II. PROCEDURAL HISTORY.

These two Waukesha County cases have had their own twists and turns before they finally rested at the conclusion of the Phase I court trial on October 27, 2016.

First, the initial action—*Saybrook Tax Exempt Investors, LLC, et al. v. Lac Du Flambeau Band of the Lake Superior Chippewa Indians, et al.*, Case No. 12-CV-0187—was commenced on January 16, 2012,[26] with Saybrook and Wells Fargo suing the Tribe, EDC, Stifel, and Godfrey & Kahn. A Third-Party Complaint was filed by Godfrey & Kahn, on April 22, 2014, against Dentons US LLP. Numerous cross-claims and counterclaims have also been filed.

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[22]The Limited Stipulation for Use at Trial contains additional facts, not all of which are relevant to Phase I.

[23] *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, W.D. Wis. Case No. 3-09-cv-768.

[24] *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011) (hereinafter "*Wells Fargo Bank II*").

[25] *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010) (hereinafter "*Wells Fargo Bank I*").

[26]Throughout the course of this action, four Waukesha County circuit court judges have presided over this matter: the Honorable Lee S. Dreyfus, Jr. (January 16, 2012, through November 25, 2014); the Honorable Linda Van de Water (November 25, 2014, through November 26, 2014); the Honorable James R. Kieffer (November 25, 2014, through July 30, 2015); and the current Court from July 31, 2015.

A multitude of motions were filed and heard—the Tribe's Motion for Stay Pending *Teague*[27] Inter-Jurisdictional Conference (denied on May 14, 2013), and various motions to dismiss the initial complaint, cross-claims, certain claims in the initial complaint, or for lack of jurisdiction over the Tribe (some granted/some denied in late 2014). There were also several discovery motions, motions *in limine*, and motions regarding waiver of attorney-client privilege. An Amended Third-Party Complaint and a First Amended Complaint were filed on October 30, 2015—those are the operative pleadings that, in part, form the gravamen of the Phase I trial.

Several petitions for leave to appeal circuit court decisions have been filed and all have been denied (July 17, 2013–regarding *Teague* Inter-Jurisdictional Conference; January 30, 2015–regarding dismissal for lack of jurisdiction over the Tribe; and July 25, 2016–regarding setting early, separate trial/Phases).

The second action—*LDF Acquisition LLC, et al. v. Dentons US LLP*, Case No. 15-CV-0302—was filed on February 12, 2015.[28] A motion to consolidate the two cases was granted on May 13, 2015.

On November 13, 2015, Saybrook filed a Motion to Set Early Separate Trial. That motion was heard with four motions to dismiss aspects of the First Amended Complaint and the Tribal Parties' First Amended Conditional Cross-Claim on several Mondays in February, 2016. In most part, those motions to dismiss were denied by oral ruling on March 16, 2016, but the Motion to Set Early Separate Trial was granted[29] pursuant to this Court's inherent discretion to order early or separate trials, and after "consider[ing] the potential prejudice to the parties, the complexity of the issues, the potential for jury confusion and the issues of convenience, economy and delay." *Dahmen v. Am. Fam. Mut. Ins. Co.*, 2001 WI App 198, ¶ 11, 247 Wis. 2d 541, 635 N.W.2d 1. *See also* Wis. Stat. § 805.05. (a court has the authority to order a separate trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy. . .")

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[27]So named after the decision in *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 236 Wis. 2d 384, ¶ 37, 612 N.W.2d 709 (2000), in which the Wisconsin State Supreme Court held that, as a matter of judicial comity, when there are concurrent state and tribal actions the two courts should confer "in an atmosphere of mutual respect and cooperation" for the purposes of allocating jurisdiction between the two sovereigns. *Id.* at ¶ 38.

[28]Only two judges—the Honorable James R. Kieffer and this Court—have presided over the second action.

[29]This oral ruling was later memorialized in an Order for Separate Trial Scheduling, dated May 25, 2016.

Ultimately two phases of trials (the first to the Court in October, 2016, and the second to a jury from the end of January to mid-March, 2017) were set.

Prior to the Phase I court trial, on August 12, 2016, four motions for summary judgment were filed. They were heard and an oral ruling was made on October 10, 2016. The Court held[30] that (1) Godfrey & Kahn, Stifel, and Dentons had standing to present their motions with respect to the Tribal Parties' affirmative defenses, (2) any Tribal Party affirmative defenses based upon 25 U.S.C. § 81 were dismissed, (3) the Bond documents were not invalid or unenforceable due to a lack of an indenture trustee, (4) the Tribe dismissed their affirmative defenses based upon 25 U.S.C. §§ 464 and 477, (5) challenges to the Court's jurisdiction over the Tribe were dismissed, (6) motions concerning the Tribal Parties' sole proprietary interest and 1991 Tribal-State Gaming Compact arguments were held in abeyance, and (7) Saybrook's motion regarding Stifel's alleged implied warranty and on Count I of the First Amended Complaint were held in abeyance pending the court trial.

Pursuant to the Court's Order For Separate Trial Scheduling, dated May 25, 2016, no judgments shall be entered against the Tribal Parties or the Stifel Parties following the Phase I trial.

A nine day trial to the Court was held from October 17, 2016, through October 27, 2016. This Decision and Order concerns only the Phase I issues heard during that trial. In the meantime, motions for summary judgment with respect to Phase II continue to be filed and have been or shall be heard on December 2, and 20, 2016.

III. PHASE I ISSUES.

Phase I addressed the following five issues:

1. Whether there were any implied or express warranties made by the Stifel parties to Plaintiffs as alleged in Count 1 of the First Amended Complaint.

2. If so, which document or documents contain those implied or express warranties.

3. Whether certain Bond documents are void *ab initio* under the Indian Gaming Regulatory Act as management contracts.

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[30] *See* Order of Summary Judgment Motions and Motions to Exclude Experts, dated October 17, 2016.

4. Whether certain Bond documents are invalid or void as they violate the Tribal Constitution.

5. Whether certain Bond documents are void as *ultra vires* acts of the Tribal Parties.

IV. OTHER DECISIONS RELEVANT TO THIS CASE.

There have been additional lawsuits in the Western District of Wisconsin federal court, decisions by the Seventh Circuit and even an action filed in the Tribal Courts for the Tribe after part of their Tribal Code was amended to afford jurisdiction over similar disputes. All of those cases have now since terminated by Stipulated Final Judgment for Permanent Injunction, filed on February 11, 2016, in Western District Case No. 13-CV-372, pursuant to which all appeals were waived. The Tribal Court Action, Case No. 13-CV-115, in the Court of the Lac du Flambeau Band of Lake Superior Chippewa Indians was also dismissed. The issues of claim and issue preclusion, if any, were left to be determined by this Court.

Of interest to this Court—as persuasive albeit not precedential[31] authority—are several of the federal court decisions, including the decision by the Seventh Circuit in *Stifel, Nicolaus & Company, Inc., et al. v. Godfrey & Kahn*, 807 F.3d 184 (7th Cir. 2015); the May 16, 2014, Opinion and Order by Judge William Conley in *Stifel, Nicolaus & Company, et al. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, Western District of Wisconsin Case No. 13-cv-372; *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Economic Development* Corporation, 929 F. Supp. 2d 859 (W.D. Wis. 2013); and the decision in *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corporation*, 658 F.3d 684 (7th Cir. 2011) ("*Wells Fargo Bank II*").

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[31] *See Thompson v. Hales Corners*, 115 Wis. 2d 289, 307, 340 N.W.2d 704 (1983), quoting *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970):

> The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.

THE DOCUMENTS

For the purposes of Phase I, the following sections of the Bond documents are relevant.[32]

1. The Bond.

> The Bonds of this series (the 'Bonds'), are equally and ratably secured by the Pledged Revenues pursuant to the Indenture. Reference is hereby made to the Indenture and the Bond Resolution, and any amendments or supplements thereto, for a description and limitation of the property, revenues and funds pledged and appropriated to the payment of the Bonds, the nature and extent of the security thereby created, the rights of the owners of the Bonds, the rights, duties and immunities of the Trustee, and the rights, immunities and obligations of the Corporation thereunder.

2. The Bond Purchase Agreement.

§ 6(h)

> ". . . the benefit and security of the Indenture and Security Agreement and the Tribal Agreement will be enforceable with their terms, . . ."

§ 7(a)

> EDC "covenants and agrees [it] will observe all covenants of the [EDC] in the Indenture."

3. The Tribal Agreement.

§ 3(b)

> 3(b). The Trustee is expressly authorized (i) to exchange, surrender or release with or without consideration any or all collateral and security which may at any time be placed with it by the Corporation or by any other person, or to forward or deliver any or all such collateral and security directly to the Corporation for collection and remittance or for credit, or to collect the same in any other manner without notice to the Tribe; and (ii) to amend, modify, extend or supplement the Indenture or other instrument evidencing the Obligations or any part thereof and any other agreement with respect to the Obligations, waive compliance by the Corporation or any other person with the respective terms thereof and settle or compromise any of the Obligations without notice to the Tribe and without in any manner affecting the absolute liabilities of the Tribe hereunder.

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[32]As needed, other sections will be quoted throughout the Decision.

§ 4(b)

4(b). The Tribe agrees that it will not replace the Casino Facilities' General Manager, Controller or Executive Director of the Gaming Commission without first obtaining the prior written consent of 51% of the Holders of the Bonds.

§ 4(c)

4(c). The Tribe hereby grants to the Trustee, or any agent of the Trustee, the right at any time to enter upon the trust lands of the Tribe for the purposes of inspecting the intangible personal property comprising the Trust Estate and the Collateral (as defined in the Security Agreement) and repossessing and removing the same from said trust lands when the Trustee is authorized to do so under the Indenture or the Security Agreement; provided that any such inspection shall be performed upon notice to the Tribe and any such removal shall be conducted in conformity with any applicable NIGC rules and regulations.

§ 4(d)

4(d). The Tribe will not cancel or terminate the land leases granted to the Corporation with respect to the land on which the casino, hotel and convention center comprising the Casino Facility are located nor will it amend said leases without first obtaining the prior written consent of 51% of the Holders of the Bonds.

4. The Security Agreement.

§ 1

1. Grant of Security Interest. As security for the payment of the Bonds and performance of the Corporation's Obligations under the Indenture, direct or indirect, absolute or contingent, joint or several, howsoever created, arising or evidenced, now or hereafter at any time created, arising or evidenced under or pursuant to the Indenture (hereinafter collectively referred to as the "Obligations"), Corporation does hereby transfer, assign and grant to Trustee a security interest in all of the Corporation's right, title and interest in and to the following (hereinafter collectively referred to as the "Collateral"), whether now owned or hereafter acquired or arising:

(a) the "Pledged Revenues" as defined in the Indenture;

(b) the Corporation's accounts, deposit accounts, general intangibles, chattel paper, instruments and investment property whether now owned or hereafter acquired and

the proceeds of each of the foregoing and all books, records and files relating to all or any portion of the Collateral;

(c) the Equipment;

§ 2(c)(ii)

2(c) Performance by Corporation. Corporation shall not, unless Corporation obtains Trustee's written consent to the contrary, or as otherwise permitted by the Indenture;

(i) sell, transfer or assign, or offer to sell, transfer or assign all or any part of the Collateral or permit all or any part of the Collateral to be sold, transferred or assigned,

(ii) consent to the removal of any of the Equipment from the Casino Facility,

§ 2(h)

2(h) Negative Pledge. The Corporation agrees that it will not create, issue, incur, make or guaranty any additional indebtedness of any kind or character creating or purporting to grant or create a lien, pledge or security interest on any of its assets, including its leasehold interest in the Casino Facility, without the prior written consent of the holders of the at least 51% of the outstanding principal amount of the Bonds.

§ 4

4. Remedies. Subject to the provisions of Section 8.07 of the Indenture, upon an Event of Default, Trustee may, at its option, without notice,

(a) either in person or by agent, with or without bringing any action or proceeding, or by a receiver to be appointed by a court, enforce and exercise all of the rights of Corporation and all of the rights of Trustee hereunder;

(b) without demand, advertisement or notice of any kind (except such notice as may be required under the applicable Uniform Commercial Code (the "Code")) and all of which are, to the extent permitted by law, hereby expressly waived, sell, lease or dispose of the Collateral by public or private sale;

(c) exercise any of the remedies available to a secured party under the Code;

(d) proceed immediately to exercise each and all of the powers, rights, and privileges reserved or granted to Trustee under this Security Agreement;

(e) proceed to protect and enforce this Security Agreement by suits or proceedings or otherwise, and for the enforcement of any other legal or equity available to Trustee;

(f) take possession of the Collateral.

§ 9

9. Attorney in Fact. Upon the occurrence of any Event of Default and at any time during the continuance thereof, Corporation hereby irrevocably appoints Trustee and its successors and assigns as its agent and attorney-in-fact, which appointment is coupled with an interest, to exercise any rights or remedies with respect to the Collateral or to endorse any checks which constitute part of the Collateral.

5. The Tribal Constitution.

Article VI, Section 1

The enumerated power of the Tribal Council is "subject to any limitations imposed by the statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and Bylaws[.]

Article VI, Section 1(v)

The Tribal Council may "pledge tribal assets, except tribal lands, as collateral to secure loans but only with the approval of a referendum vote of the members of the Tribe and with the approval of the Secretary of the Interior."

DISCUSSION

The Phase I portion of these cases can be divided into two sections; that of the warranty claims by Saybrook against Stifel, and that of certain Tribal Party defenses. But, first, the Court must address its jurisdiction to hear these matters.

I. The Court has jurisdiction over these consolidated cases.

First, and perhaps foremost, the question of state court jurisdiction was previously considered through motions to dismiss filed in Waukesha County in 2014, and the prior Court—on October 23, 2014—concluded "that this Court does have jurisdiction to deal with and address the issues before it for a variety of reasons including there has been waiver of sovereign immunity that allows for matters to be addressed in the state court."[33] This conclusion is further supported by the parties' Stipulated Final Judgment for Permanent Injunction and Order of Dismissal, in *Stifel*, Western District of Wisconsin Case No. 13-cv-372, dated February 11, 2016, in which the parties declared a "desire to simplify and expedite the ultimate resolution of the remaining disputes between the parties in state court, . . ."[34]

As part of that same Stipulation, the parties agreed to dismiss the tribal court action, to the entry of a permanent injunction enjoining the Tribal Parties from pursuing any tribal court actions with respect to the Bond Transaction, and to the dismissal of all remaining claims pending in federal court. *Id.*

If that weren't sufficient basis to put to rest the question of jurisdiction, the federal district court of Wisconsin, upon an examination of the Bond Documents, concluded that "[g]iven that the Tribal Entities have consented to the jurisdiction of the Wisconsin courts (federal or state) *to the exclusion of any tribal courts*, and given that the Tribal Entities do not suggest that *any* other courts have jurisdiction over bond-related disputes, these disputes *must* be resolved in the federal or state courts of Wisconsin." *Stifel*, 807 F.3d at 198. *See also Saybrook*, 929 F. Supp. 2d at 865-66.

Accordingly, jurisdiction over this matter lies with this Court.

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[33]Transcript of Hearing and Oral Ruling, October 23, 2014, at 16. *See also* Order, dated November 18, 2014 (memorializing decision on jurisdiction).

[34]Document # 212, at 3 (*Stifel*, W.D. Wis. Case No. 13-cv-372).

II. Warranty claims by Saybrook.

Saybrook, in its First Amended Complaint, asserts that there are both implied and express warranties and that Stifel breached both. Phase I centers only upon the first question: whether there are any implied or express warranties.

A warranty—be it implied or express—is "an assurance by one party to a contract of the existence of a fact upon which the other party may rely." *Hocking v. City of Dodgeville*, 2010 WI 59, ¶ 28, 326 Wis. 2d 155, 785 N.W.2d 398 (quoting *Dittman v. Nagel*, 43 Wis. 2d 155, 160, 168 N.W.2d 190 (1969)). A warranty need not be written, nor must it be labeled as such. In this case, the requirement that there be a contract is not in dispute: Stifel was the initial purchaser of the Bonds who then sold the Bonds to Saybrook. Phase I concerns only whether there were any warranties by Stifel and in which document they lie.

A. Implied Warranties.

Saybrook alleges that two implied warranties, that arose as a result of Stifel's transfer of the rights in the Bond and Indenture to Saybrook, were breached—that of validity and of title. Saybrook contends that Stifel impliedly warranted that the Bonds were what they purport to be and that they conform to the description that appears on their face: that were secured under the Indenture and were "equally and ratably secured by the Pledged Revenues pursuant to the Indenture." Saybrook further contends that Stifel impliedly warranted a valid Indenture by transferring rights under the Indenture.

Stifel, on the other hand, counters that the parties did not intend for Stifel to impliedly warrant that the Indenture would be valid or that the Bonds would be secured pursuant to the Indenture when it sold the Bonds to Saybrook. Stifel asserts that language in other documents (such as the warnings contained in the Limited Offering Memorandum, and the legal opinion letters by Godfrey & Kahn), taken together with the legal advice Saybrook received from Dentons evidences that the parties did not intend any such implied warranties. Stifel further asserts that it was Saybrook—through the insertion of clauses that have raised possible *indicia* of management—that bears the responsibility for the defect.

1. The law.

The elements of a count for breach of implied warranty are: (1) a contract; (2) an implied warranty; (3) the absence of a disclaimer; (4) breach; and (5) resulting injury. *See, e.g.*, Wis. JI-Civil 3220; Restatement (Second) of Contracts § 333; *Mack*

Trucks, Inc. v. Sunde, 19 Wis. 2d 129, 133, 119 N.W.2d 321 (1963); *Prinsen v. Russos*, 194 Wis. 142, 144, 215 N.W. 905 (1927).

Both Saybrook and Stifel point to the Restatement (Second) of Contracts § 333 as the starting point for the Court's analysis. It provides:

> (1) Unless a contrary intention is manifested, one who assigns or purports to assign a right by assignment under seal or for value warrants to the assignee
>
> . . .
>
> (b) that the right, as assigned actually exists and is subject to no limitations or defenses good against the assignor other than those stated or apparent at the time of the assignment; [and]
>
> (c) that any writings evidencing the right which is delivered to the assignee or exhibited to him to induce him to accept the assignment is genuine and what it purports to be.
>
> . . .
>
> (4) An assignment of a right to a sub-assignee does not operate as an assignment of the assignee's rights under his assignor's warranties unless an intention is manifested to assign the rights under the warranties.

Wisconsin courts recognize that implied warranties under Restatement § 333 can exist. *See State v. Machon*, 112 Wis. 2d 47, 51, 331 N.W.2d 665 (Ct. App. 1983) (adopting Restatement § 333 and applying it to the purported assignment of a check). The courts also utilize various sections of the Restatement (Second) Contracts when applying Wisconsin law. *See Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶ 26, n.18, 348 Wis. 2d 360, 842 N.W.2d 240 (applying § 357 to a stock-repurchase agreement); *Wamser v. Bamberger*, 101 Wis. 2d 637, 642-43, 305 N.W.2d 158 (Ct. App. 1981) (applying § 90 to an agreement to sell stock). Implied warranties, thus, may exist in situations such as this Bond Transaction. The State Supreme Court in *Giffert v. West*, 33 Wis. 617, 623 (1873), notably held that "in the assignment of an instrument or other contract in writing, even not negotiable, for a full and fair price, the assignor impliedly warrants that it is valid, and that the maker or obligor is liable upon it, unless it clearly appears that the parties intended to the contrary." *See Giblin v. N. Wis. Lumber Co.*, 131 Wis. 261, 265-66, 111 N.W. 499 (1907).

2. The Uniform Commercial Code does not supersede the Restatement.

Stifel, in its pre-trial briefing (summary judgment and otherwise), contends that Restatement (Second) of Contracts § 333 is superseded by the Uniform Commercial

Code (the "UCC"), in particular Article 8. This argument has been rejected[35] by this Court in the course of the motions to dismiss and for summary judgment. It is again rejected and the Court adopts its reasoning from the March 16, 2016, Summary Judgment ruling.

Absent a clearly expressed legislative intent to displace the common law, causes of action available at common law exist alongside statutorily created rights that address the same subject matter. *Gaugert v. Duve*, 2001 WI 83, ¶¶ 40-41, 244 Wis. 2d 691, 628 N.W.2d 861. *See also Esser Distrib. Co. v. Steidl*, 149 Wis. 2d 64, 69-70, 437 N.W.2d 884 (1989); *Met-Al, Inc. v. Hansen Storage Co.*, 844 F. Supp. 485, 488-89 (E.D. Wis. 1994) (considering Wisconsin case law).

Perhaps most telling here is that, applying Wisconsin law, the Seventh Circuit in this very matter also applied the Restatement to this Bond Transaction. *See Stifel, Nicolaus & Company, Inc., et al. v. Godfrey & Kahn, S.C.*, No. 14-2150, 2015 WL 7454484, at *13 (7th Cir. Nov. 24, 2015) (applying § 164). Its application is not truly in doubt.

There being no express legislative intent in the Wisconsin UCC to displace common law, and based upon the established case law directly on point, the Court concludes (again) that the Wisconsin UCC does not conflict with the common-law implied warranties asserted herein.

3. **Disclaimers do not apply.**

There is some confusion as to whether there are any valid disclaimers, but first, there is an issue as to whether Stifel—not having plead that as an affirmative defense—is even arguing that a disclaimer exists. The question is really one of interpretation or perhaps semantics. At a previous hearing, this same argument was raised. At that time, the Court understood it had been resolved. But, Saybrook again raises it—and then argues why it doesn't apply.

Saybrook asserts that, because Stifel didn't plead disclaimer, it may not be at issue. Stifel, in the past hearing, agreed that it hadn't plead disclaimer. Moreover, Mr. DeYoung, Stifel's other employees and attorneys including Christian Waddell (attorney for Balch & Bingham, Stifel's lawyers), as well as Stifel's expert, S. Lane Genatowski, all testified that Stifel did not make any disclaimers in the context of

[35]It may well be that Stifel has abandoned this argument as it is not covered in its Proposed Findings of Fact and Conclusions of Law, but did mention this in their opening statement. In the event that that is not the case, the Court addresses it in this Decision.

negotiations or the Bond Transaction itself. That should have resolved the matter. But, Saybrook is converting Stifel's argument that it "manifested a contrary intention" into one of disclaimer and further asserting that such contrary intent may only consist of a specific disclaimer in writing that uses the words "disclaim" or "disclaimer." The Court does not agree that these two concepts may be conflated, nor that a failure to plead "disclaimer" as an affirmative defense bars Stifel from asserting that it never made any implied warranties precisely because it manifested a contrary intent.

Finally, Saybrook argues that Stifel may not rely upon its own express warranties, the express warranties of EDC, and Godfrey & Kahn's opinion letters as a means by which to "disclaim" Stifel's implied warranties. Again, these defenses are more appropriately considered in the context of whether there was a contrary intent; they will, thus, be addressed below.

Accordingly, the only question left as to implied warranties is whether—by virtue of the written documents themselves, or the conduct of the parties—Stifel manifested that contrary intent.

4. The question of "contrary intent" is the key.

So, what precisely happened here? The Court concludes that the transaction was unique in several respects. First, this was not a direct purchase of the Bonds by Saybrook from the Tribal Parties. Next, Stifel wore several hats in this transaction: it entered into an agreement with the Tribal Parties to act on their behalf in attempts to solicit investors for this project. It agreed to act as both Underwriter (purchaser) and Purchasing Agent; it was the purchaser of the Bonds from EDC and then it was the seller to Saybrook. Despite these dual roles, Stifel continued to act as the agent for the Tribal Parties through all the negotiations.

Stifel's Public Finance Department supervisor DeYoung drafted the 2007 Investment Banking Agreement and the 2007 Authorization to Proceed; he testified that neither were "typical documents." Both of these documents indicated that Stifel was to use its "best efforts" to obtain financing for the Tribal Parties and to facilitate the placement of the Bonds. Stifel, thus, had a broad grant of authority to act on behalf of the Tribal Parties in the course of the negotiations, but was also bound by a duty of good faith, pursuant to *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶ 35, 291 Wis. 2d 393, 717 N.W.2d 58, to use such "reasonable diligence" as to effect the best deal for the Tribal Parties. *Denil v. deBoer, Inc.*, 748 F. Supp. 2d 967, 976 (W.D. Wis. 2010), *aff'd,* 650 F.3d 635 (7th Cir. 2011).

Godfrey & Kahn partner and one of the attorneys involved in these negotiations, Brian Pierson, testified that Stifel was the "principal architect" of the project/transaction and that his firm took direction from Stifel,[36] even though Godfrey & Kahn drafted the documents.

Added to this mix, however, is the fact that Dentons, who was retained to advise Saybrook, had in their employ attorney Fedman, who had previously worked at NIGC as its Director of Enforcement, and thus, was arguably familiar with both NIGC and IGRA. And, the fact that Godfrey & Kahn, representing the Tribal Parties issued two opinion letters with respect to the validity of the Bonds and the Indenture—and that there was no necessity to seek prior approval from NIGC.[37]

Saybrook, no doubt a savvy investor, did its own due diligence, relied upon the advice and counsel of Dentons as well as its own experience, and opted to purchase the Bonds—not from the Tribal Parties—but from Stifel. In essence, it sought to secure an intermediary so that it would avoid the complications that might arise through the potentially turbulent and uncharted waters of tribal law. The Court finds credible Mr. Bayliss' testimony that, absent such an agreement, Saybrook would not have ventured into this transaction. Stifel was aware of this request to serve as purchaser and seller from the very start—November 7, 2007 to be exact.

So Stifel, knew—at least from November 7, 2007 on—that it was more than just the agent for the Tribal Parties, it was the purchaser. It agreed to stand in the line of title. It agreed to accept the liabilities that flow from being a seller of Bonds. Stifel is not able to discount that responsibility, nor may it evade its consequences. As such, Stifel itself had an underlying responsibility to conduct its own due diligence to ensure that the Bonds and other Documents were valid, that they didn't violate any provisions of IGRA, and that there would be a party against whom to seek recourse upon a breach.

Just as any purchaser, Saybrook is entitled to rely upon certain assurances (warranties) from a seller. Saybrook purchased the Bonds upon the understanding that these Bonds and the rights of recourse upon breach of the Bonds actually existed. "Whoever takes a negotiable security . . . has the right to believe, without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note." *Giffert*, 33 Wis. at 623. Balch & Bingham (Stifel's counsel)

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[36]Again, this statement is made by a party who has an interest in the Phase II try that is at odds with Stifel. No finding has been made for the purposes of the Phase I trial.

[37]It is here that we head close to issues that will be resolved in Phase II—the reliance upon legal advice and how that interplays, if at all, with the obligations and responsibilities of the other parties. None of the conclusions in this Decision impact issues that are within the jury's prerogative.

attorney, Christian Waddell, testified that it was reasonable for an ultimate purchaser to rely upon the Bonds.

The Bonds claim on their face that they are secured by the Indenture—an Indenture that has now been declared to have never existed. This is the first implied warranty Saybrook argues was made by Stifel.

The second implied warranty is that Stifel—who as purchaser of the Bonds from the Tribal Parties had obtained certain rights under the Indenture—transferred those rights under the Indenture to Saybrook when it acted as the seller. "An unqualified assignment of a debt or chose in action ordinarily carries with it, as incidents . . . all collateral securities or liens, together with all rights incidental thereto, previously held by the assignor to obtain or secure payment of the debt." *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 327, 260 N.W.2d 680 (1978). *See also Moutsopolous v. Am. Mut. Ins. Co. of Boston*, 607 F.2d 1185, 1189 (7th Cir. 1979) (citing Wisconsin law) ("Elementary contract law provides that upon a valid and unqualified assignment the assignee stands in the shoes of the assignor and assumes the same rights, title and interest possessed by the assignor.")

Thus, by virtue of established law, implied warranties *could* have been made by Stifel in this Transaction. The sole remaining issue is whether a contrary intention was manifested. The answer to that question requires a review of the relevant language in the documents.

Stifel's employees and attorneys testified that the Indenture was critical to the Bond Transaction, and conceded that no one recalls expressing an intent contrary to the existence of a valid Indenture. Stifel, however, asserts that there are several statements[38] in the Limited Offering Memorandum that serve—not as "disclaimers"—but rather manifestations of intent contrary[39] to any implied warranty of validity of the Indenture.

First, in language considered "boilerplate" by Saybrook, the Limited Offering Memorandum states:

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[38]Saybrook references five such statements; Stifel discusses those five, but also includes four more. All will be addressed.

[39]Stifel's corporate representative, David Minnick, testified that the Limited Offering Memorandum directly states that the Bonds might not be secured by the Indenture and/or that the Indenture might not exist. He, however, never pinpoints any sections of the documents that make such statements.

> THIS LIMITED OFFERING MEMORANDUM DOES NOT CONSTITUTE AN OFFER TO SELL OR A SOLICIATION OF ANY OFFER TO BUY ANY OF THE BONDS DESCRIBED HEREIN IN ANY JURISDICTION TO ANY PERSON TO WHOM IT IS UNLAWFUL TO MAKE SUCH AN OFFER OR SOLICIATION IN SUCH JURISDICTION. NO DEALER, SALESMAN, OR PERSON, OTHER THAN THE CORPORATION AND THE TRIBE, HAS BEEN AUTHORIZED IN CONNECTION WITH THIS OFFERING TO GIVE ANY INFORMATION OR TO MAKE ANY REPRESENTATION NOT CONTAINED IN THIS LIMITED OFFERING MEMORANDUM. INFORMATION OR REPRESENTATIONS NOT CONTAINED HEREIN OR OBTAINED DIRECTLY FROM THE CORPORATION MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED.

Limited Offering Memorandum, at i.

This language does not provide the contrary intent that Stifel asserts. First, the language is indeed "boilerplate,"[40] but more than that, it was included in the document signed by EDC and protects EDC from any statements that might be made by EDC/Tribal members during the course of negotiation. Second, it does not eliminate or disclaim or manifest an intent contrary to statements actually made in the document. Mr. DeYoung testified that this section doesn't address the validity of the Indenture; expert Genatowski agreed and added that it was not, in his view, a disclaimer of any warranty. It does not reference the Indenture or its potential invalidity. The experts who testified agreed that it really was standard language that could be found in most such Memorandum.

The next reference is found under the Enforceability of Obligations section, and it provides:

> The practical realization of value of the Pledged Revenues and the Collateral upon any default will depend on the exercise of various remedies specified in the Indenture. These and other remedies may, in many respects, require judicial findings which are often subject to discretion and delay. Under existing law, the remedies specified in the Indenture may not be readily available or may be limited. A court may decide not to order the specific performance of covenants contained in these documents.

Id. at 19.

Stifel argues that this section shows that Saybrook understood and accepted the risk that remedies in the Indenture might not be available or may be limited. That is true. Stifel further argues that this shows that Saybrook understood and accepted the risk that remedies in the Indenture might require judicial findings that may be

[40]Mr. DeYoung testified that it was indeed common language and was even likely in the template that Stifel gave to Balch & Bingham from which that law firm assisted in drafting the document. Mr. Waddell testified that the Limited Offering Memorandum contained "standard terms."

subject to discretion or delay. Also true. Stifel then argues that this shows that Saybrook understood and accepted the risk that a court may not decide to order the specific performance of covenants in the Indenture. True, again. But, then Stifel asserts that the disclosure of these risks shows that the parties did not intend for Stifel to impliedly warranty that the Indenture would be valid or that the Bonds would be secured pursuant to the Indenture when Stifel sold the Bonds to Saybrook. Not true.

This language is in "Enforceability of Obligations" section. It concerns statements about the risks that might ensue if there a breach of the Indenture, not if the Indenture never existed. The very disclosure of these risks presupposes that there *is* an Indenture against which remedies might be needed. In practical terms, it advises purchasers—starting with the initial purchaser, Stifel—that they may need to seek recourse from the courts (that it cautions are somewhat notorious for being slow). It does not manifest an intent contrary to the implied warranty that the Indenture exists—to the contrary, it implies that *because* the Indenture exists and even though there are certain remedies, buyers should be aware that the wheels of justice move slowly. Even Mr. Genatowski agreed and testified that this section would not place anyone on notice that the Indenture itself might be invalid.

The third reference in found under "Miscellaneous:"

> The summaries or descriptions of provisions of the Bonds and the Indenture, and all references to statutes and other materials not purporting to be quoted in full, are only brief outlines of some of the provisions thereof and do not purport to summarize or describe all of the provisions thereof.
>
> So far as any statements made in this Limited Offering Memorandum involve matters of opinion or estimates, whether or not expressly stated, they are set forth as such and not as representations of fact, and no representation is made that any of such statements will be realized. Neither this Limited Offering Memorandum nor any statements which may have been made orally or in writing is to be construed as a contract with the owner of the Bonds.

Id. at 22.

Stifel asserts that this shows that the general purpose of the Limited Offering Memorandum was to summarize all of the underlying documents; its witnesses and experts agree. But, they also agreed that this provision was not a "disclaimer" as to any warranties—implied or express.

Also found under "Miscellaneous," the fourth reference provides:

> Each investor must rely on its own evaluation and investigation of the Corporation, the Casino Facility and the Pledged Revenues and the terms of the offering, including the merits and risks involved in making an investment decision with respect to the Bonds offered hereby. The Bonds described herein are illiquid and involve a high degree of risk.

Id. at 23.

Stifel asserts, in one of its best arguments, that this section—taken together with the fact that there were to be legal opinion letters—this evidences an extraordinary manifestation of contrary intent that the Indenture and the Bonds may simply be invalid. However, Mr. DeYoung and expert Genatowski testified that this evidences that things could go awry in the transaction and that investors might not be paid. They did not testify that it clearly evidenced that the investor might not be paid because the underlying Indenture was invalid; they were contemplating the more common reasons for non-payment (*e.g.*, breach by the parties, lack of revenues to the Casino, and so forth). Even Mr. Genatowski testified that, while the reader was being cautioned to do their own investigation, it did not indicate that the Indenture may be invalid. Those are standard business risks that are inherent in every business transaction. Interestingly enough, these are the standard business risks that *Stifel* as initial purchasers also had to consider.

The fifth reference is found under the "Limitation on Recourse Against the Corporation and the Tribe and the Corporation's and Tribe's Assets; Enforceability Risk" heading:

> The Bonds are to be secured by the Pledged Revenues and Collateral. The practical realization of value of the Pledged Revenues and Collateral upon any default will depend on the exercise of various remedies specified in the Indenture. Purchasers of the Bonds should understand that upon the occurrence of an Event of Default by the Corporation under the Bond Documents, the remedies provided in the Bond Documents may be limited or unenforceable due to the application of principles of equity or state and federal laws relating to bankruptcy, moratorium, reorganization and creditors' rights generally. The enforcement of any remedies provided in the Bond Documents could prove both expensive and time consuming.

Id. at 4.

Stifel's corporate representative, David Minnick testified that this section does not reference the existence or non-existence of the Indenture at all. Mr. DeYoung and expert Genatowski testified that this was not a disclaimer of any warranty. Mr. Genatowski further testified that it didn't put any readers on notice that the

Indenture might be invalid; he felt that such language about the legal system in general is common and is included in most such documents. The Court agrees.[41]

The references to the possible applicability of state and federal laws arise only upon the event that there is a default on the Bonds—it does not relate at all to whether the Indenture is void. It merely advises potential purchasers that recourse through the courts may take time—not that there is no Indenture. Moreover, the first sentence—relied heavily upon by Stifel—doesn't bolster its argument. In fact, it implies that there are Bonds, there is an Indenture, and the documents are valid.

Stifel also raises the following sections as exemplars of the "manifestation of contrary intent:"

> "Certain Bondholders' Risks"
>
> Nevertheless, enforcement of a final judgment could be affected by disputes over the waiver of sovereign immunity, and will be subject to limitations imposed by federal law.

Id. at 4.

> There is no expectation that the Bonds will be registered under the Securities Act, the Corporation does not intend to list the Bonds on any securities exchange, the Initial Bondholder will not effect a secondary market in the Bonds, and neither the Corporation, the Initial Purchaser nor any other party described herein is obligated to repurchase any Bonds except as specifically described herein.

Id. at 5.

> There is no trading market for the Bonds and no such trading market is expected to develop, and there is no assurance that investors will be able to resell the Bonds at the offering price or at any price. Accordingly, an investor will be required to bear the economic risks of its investment in the Bonds for an indefinite period of time.

Id.

> **Lack of Secondary Market**
>
> Neither the Initial Purchaser, nor any other party described herein, is obligated to repurchase any Bonds except as specifically described herein. It is not expected that an active trading market for the Bonds will ever develop. The Bonds are not

[41]The Court further finds the testimony of expert Timothy Kincaid—an attorney with extensive experience in Indian debt financing—to be credible. Mr. Kincaid opined that there is a great difference between typical debt financing/securities transactions and Indian debt financing transactions; they are "quite dissimilar." He further opined that because the Indian tribes (as clients) have less experience and lower sophistication than a typical issuer, there is a greater need for an underwriter and that the primary responsibility for getting the transaction off the ground lies with that underwriter.

> rated by a nationally recognized rating agency. Unrated bonds may lack liquidity in the secondary market in comparison with rated bonds. The Bonds should not be purchased by any investor who, because of financial condition, is unable to bear a loss of an investment in the Bonds, or who, because of investment policies or otherwise, does not desire to assume, or have the ability to bear, the high degree of risk inherent in an investment in the Bonds.

Id. at 6.

> **LEGAL MATTERS**
>
> Legal matters incident to the issuance of the Bonds are subject to the approving legal opinion of Godfrey & Kahn, S.C., Bond Counsel. Certain other legal matters will be passed upon by the Corporation by its Counsel, Godfrey & Kahn, S.C. Certain legal matters related to this Limited Offering Memorandum will be passed upon by Balch & Bingham LLP.

Id. at 19.

> . . . the Bonds are offered by the Corporation when, as and if delivered to and accepted by the purchaser, subject to the opinion as to validity of the bonds by Godfrey & Kahn, S.C., Milwaukee, Wisconsin ("Bond Counsel").

Id. at cover page.

None of these excerpts are sufficiently clear to evidence a contrary intent. Even the first, that arguably references federal law, does not put anyone on notice that the Indenture may be invalid; it merely indicates that even though sovereign immunity has been waived, that is always a complicated area and is subject to challenge notwithstanding such a waiver. The reference to the opinion letters[42] likewise does not place anyone on notice that the Indenture might be invalid; they actually opine the exact opposite. Furthermore, the Court agrees with expert Kincaid that a risk that the Indenture could be void *ab initio* is one that should have been disclosed to an investor/purchaser, to allow them to make a more complete analysis *before* investing.

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[42]In fact, Mr. Genatowski specifically noted the last paragraph of the January 18, 2008, Godfrey & Kahn Bond Counsel opinion letter to the Tribal Parties, Stifel, and Saybrook, and testified that that was what a disclaimer looks like:

> As Bond Counsel, we have not been engaged, and have not undertaken, to review the accuracy, completeness or sufficiency of the Limited Offering Memorandum or any other offering material relating to the Bonds, and, except as otherwise stated therein or in our separate letter of even date addressed to the Initial Purchaser, the Trustee and Saybrook Tax-Exempt Investors, LLC, we express no opinion relating thereto.

Accordingly, the Court concludes that Stifel impliedly warranted to Saybrook that the Bonds were secured pursuant to the Indenture and that the Indenture was valid.

As a final argument, Stifel asserts that because Saybrook—in the course of the negotiations had with Stifel on behalf of the Tribal Parties—proposed the management provisions that have jeopardized these documents, and thus began this controversy, Saybrook may not rely upon any implied warranties that may have been made. Stifel relies upon *Logeman Brothers Company v. R.J. Preuss Company*, 131 Wis. 122, 128, 111 N.W. 64 (1907), for the proposition that an implied warranty is not available if the purchaser dictates the terms of purchase or if the claimed defect is something that was as open and observable to the buyer as to the seller. In that case, however, the fabricator agreed to follow specifications on a model. Here, to the contrary, terms were thrown about by both sides in the course of a somewhat lengthy negotiation and both parties accepted the terms. At any point, Stifel, on behalf of the Tribal Parties or indeed on its own behalf as the initial purchaser and then seller, could have rejected the terms if it had concerns over their impact or if it believed that they were crossing over into management.

Stifel did not do so. *Logeman* is inapplicable.

B. Express Warranties.

1. The law.

"An 'express warranty' is an express statement of fact material to the transaction which is part of the contract between the parties. . . ." Wis. JI-Civil 3220. The seller must make an affirmation of material fact as an inducement to the buyer who, in turn relies upon that affirmation. *Id.*; *Malzewski v. Rapkin*, 2006 WI App 183, ¶ 14, 296 Wis. 2d 98, 723 N.W.2d 156. The elements for a breach of express warranty include that there was (1) a contract, (2) a direct and positive representation of fact material to the contract, an affirmation of such fact, or acts equivalent to such affirmation, (3) inducement, (4) reliance, (5) breach, and (6) resulting injury. *See* Wis. JI-Civil 3220 (relying upon *Mack Trucks, Inc.* and *Prinsen*).

The Court is to "take into consideration what the parties said at the time of the negotiations of the sale; the relation between the parties and what both parties fairly understood by the language that was used at the time of the sale, together with all other credible evidence in this case bearing upon this subject matter." *Id.*

The Jury Instructions further describe how, while there is no "magic word" requirement, there must be more than puffery or mere sales talk:

> No particular form of words or expression is necessary to constitute an express warranty; nor is it necessary that the seller use formal words such as "warrant" or "guarantee," or other words of precisely the same meaning. Any word of affirmation used in such a manner as to show that one party expects or desires that the other party rely thereon as a matter of fact, instead of taking it as an expression of opinion or mere sales talk, constitutes a warranty. But a statement purporting to be merely the seller's opinion or belief with respect to the transaction, not amounting to a positive statement or affirmation of fact, does not create a warranty.

Wis. JI-Civil 3220

Intent to actually provide a warranty is not relevant. In fact, "[t]he test in determining whether [defendant/Stifel] made an express warranty is not whether the seller actually intended to be bound by the statement but whether he or she made (an affirmation of a material fact) (a direct and positive representation of a fact) (a promise material to the transaction), the natural tendency of which was to induce a sale and which in fact did induce a sale." *Id.* Likewise, it does not matter that a seller (Stifel) relies upon other[43] entities or individuals; that extra-reliance does not negate or void the possible express warranty made by a seller (Stifel).

2. An examination of the credible evidence.

The Court considered the language in the various documents supplied by Saybrook in the context and purpose of the entire transaction because "a contract is to be interpreted in the manner that it would be understood by persons in the business to which the contract relates." *Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38, ¶ 12, 261 Wis. 2d 70, 661 N.W.2d 776. The Court also considered whether the language directly supports the claimed warranty, or whether the claimed warranty is an inference to be drawn from the language. A statement that requires the Court to draw an inference to arrive at the purported warranty is insufficient to support a claim for express warranty. "Express warranties are not presumed and will not be inferred from ambiguous, inconclusive or general discussions." 17A C.J.S. *Contracts* § 454.

The negotiations at issue here consisted of over 85 days of back and forth exchanges and resulted in several documents.

First, there were the initial negotiations that consisted of Executive Summaries and Preliminary Term Sheets. These documents were prepared by both Stifel and Saybrook and were exchanged for comments and revisions. Saybrook asserts that,

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[43]Stifel's arguments that, by the very presence of multiple parties in the Bond Transaction, they are somehow relieved of their obligations and duties. That is simply not the case.

while the first Executive Summary was the starting point of the negotiations, it should nevertheless be considered as a statement affirming that the Bonds would be secured by the Casino revenue because prior documents are relevant to the question of express warranties. *See Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wis. 1977), *aff'd*, 588 F. 2d 838 (7th Cir. 1978).

The drafts of the Executive Summaries (even with the Preliminary Term Sheets) are instructive in considering whether an express warranty was made, however, they do not contain language that—standing alone—could be considered an "express statement of fact" that the Indenture would be valid or that the Bonds would be secured by the Indenture. That language is absent. There are references to Casino revenues, and Saybrook took care to point out a Flow of Funds chart (that it had itself provided), but neither of those was an affirmation of fact that the Indenture would be valid or that the Bonds were secured by the Indenture. Rather, those preliminary terms were precisely that—preliminary. They had to have taken the next step and become part of the parties' bargain. *See* 67A Am. Jur. 2d *Sales* § 633.

Saybrook next contends that the Purchaser Letter, dated January 17, 2008, that provides that the Bonds were issued "under and pursuant to the terms and provisions of a Trust Indenture" is further support of an express warranty. While the Court agrees that there is no requirement that the word "warranty" be used, the Court finds that this is not an affirmation that the Indenture exists nor does the Court find that the parties fairly understood this to be the case. The statement is a definition, it is not an affirmation of any fact.

There were many drafts of a Limited Offering Memorandum—the key document that all experts and witnesses testified that bond buyers regularly rely upon, and that Mr. Bayliss testified that he, in fact, did rely upon. All of these state that the "Bonds are secured . . . as described in the Indenture" in different areas of that 211-page document. But, this again, is more akin to a definition rather than a statement that the Indenture was valid. While it is clear that there was an implied warranty that the Indenture was valid, in order to have an express warranty there must be more—there must be that express affirmation that is fairly understood by the parties. This Court is not to make inferences and that would be required in order to find that the general definitional phrases interspersed throughout the document constitute any more than definitions or explanation of terms.

Next, Saybrook asserts that the final Limited Offering Memorandum attached several documents (including the Bond Counsel Opinion Letter, Security Agreement, and Tribal Agreement) and states that the "attached Appendices are integral parts of this Limited Offering Memorandum . . . and must be read in their

entirety." Limited Offering Memorandum, at cover email and 22. Instead of supporting Saybrook's argument, this actually undercuts it. By having the Opinion Letters actually expressly state their opinions as to the validity of the Indenture and the lack of any need to seek, much less garner, NIGC approval, they cover the field and provide the statements that were relied upon by all parties.[44]

Saybrook also points to the fact that Stifel placed its logo on the cover page of the Limited Offering Memorandum, stated in the Bond Purchase Agreement that it would sell Saybrook the Bonds under the terms of the Limited Offering Memorandum, described the Bonds in that document, and delivered that document to Saybrook. This is insufficient on its own, and even when taken together with all of the other references pointed out by Saybrook is not enough to create any express warranties.

Next, Saybrook points to the Issuer Opinion Letter and argues, that even though it is not attached to the Limited Offering Memorandum, it is referenced in the Bond Counsel Opinion Letter and that is sufficient to bring it within the parameters of consideration. This is too far attenuated, and even if considered by the Court, it would not change the calculations and conclusions with respect to a lack of any express warranties.

Finally, Saybrook contends that delivery of documents from Stifel (the seller) to Saybrook (the buyer) may be, when all the evidence is considered together, the "equivalent to" an affirmation of the accuracy of the document contents. Stifel counters that, in *Hoffman v. Dixon*, 105 Wis. 315, 81 N.W. 491, 492 (1900), the case relied upon by Saybrook, the delivery of a product only constitutes an affirmation of material fact related to the product where the buyer relies exclusively on the seller's delivery as confirmation that the product is of the type requested. Here, the product was a Bond—but delivery alone is not the sole basis for confirmation that the Bonds were secured by the Indenture: there were a multitude of other documents that evidenced that fact and in particular there were the Opinion Letters of counsel.

Saybrook's reliance upon *CMFG Life Insurance Company v. R.B.S. Securities, Inc.*, 799 F.3d 729 (7th Cir. 2015) (Wisconsin law) is likewise not persuasive. First, in that case, the offering document was issued by defendant in a role as both underwriter and issuer—here, there is a separate issuer (EDC). Moreover, that case stands for the proposition that a Court (or fact-finder) has to make reasonable inquiries into all of the evidence surrounding whether a secondary purchaser was

[44]This statement is not seeking to preempt the jury from its determinations as to the effect, care, and/or negligence of any of the parties in creating the Opinion Letters or any other documents or whether any parties were within their rights to rely upon such letters.

warranting the actions of the initial drafter of a prospectus supplement. Here, the Court has made such a reasonable inquiry. It is true that Stifel could be affirming the statements of EDC from the Limited Offering Memorandum, but it is equally true that Stifel merely placed its name and logo on the document as part of its dual or triple duties in this transaction. That is not sufficient to find that Stifel was affirming by express warranty facts outlined in that document.

In addition, the Court is not persuaded by Stifel's argument that the Closing Statements (by EDC, the Tribe, and their other entity the Federal Development Corporation) rebut the issuance of an express warranty. These documents do not add anything to the discussion.

Contrary to the situation with the implied warranties, here, the multitude of express references to risk and the attachment of the legal Opinion Letters, lead the Court to the conclusion that there must have been a greater affirmation of fact than that outlined by Saybrook. Inferences are insufficient. Accordingly, the Court concludes that Stifel did not make any express warranties to Saybrook with respect to the validity of the Indenture.

III. Tribal Affirmative Defenses.

The Tribal Parties have asserted a multitude of Affirmative Defenses to the claims and counterclaims against them in this case. Only a few were covered in the Phase I trial. Tribal Parties Affirmative Defenses 4, and 9-11 to the First Amended Complaint and Affirmative Defense 5 to Stifel's Cross-Claims are in dispute by Stifel, Godfrey & Kahn, and Dentons. Saybrook has joined these motions, but does not adopt the substantive arguments made by the other non-Tribal Parties.

In addition to the relevant Affirmative Defenses, the Court has also considered and addressed two arguments raised during the course of summary judgment pleadings that had been left in abeyance pending the conclusion of this (or the Phase II trial): that of the Sole Proprietary Interest defense as well as a defense based upon the State Gaming Compact.

A. Tribal Constitution.

The Tribe attached its Tribal Constitution to the Closing Certificate of the Tribe; it is relevant to the Tribal Parties' Affirmative Defense Number 11. Tribal Constitution, Article VI, Section 1(v) requires a referendum vote of the members of the Tribe before the Tribe may "pledge tribal assets, except tribal lands, as collateral to secure loans." It further requires the "approval of the Secretary of the Interior."

Under this argument, the Tribal Parties assert that tribal assets were pledged, requiring a vote of the entire tribal membership and approval by the Secretary of the Interior—neither of which happened here. Absent these two events, the Tribal Parties assert that the Bond Transaction is invalid under tribal law.

The Court, repeating its earlier finding at the March 16, 2016, Summary Judgment ruling, concludes that no tribal assets were pledged in the Tribal Agreement. That document is a promise to pay, not a pledge. *See Prescott v. United States*, 731 F.2d 1388, 1391 (9th Cir. 1984). Next, the assets that could potentially have been pledged are assets of EDC and not of the Tribe. Contrary to the Tribe's arguments that these are one and the same, they are not. EDC is a separate entity and even if it were a wholly-owned subsidiary of the Tribe, it would still have it own assets. Without the pledge of tribal assets, this provision of the Tribal Constitution is never triggered.

For argument's sake, however, if there had indeed been a pledge of tribal assets, the Tribal Parties have stipulated to the fact that there was a March 4, 1999 Tribal referendum pursuant to which the Tribe members "authorized the Tribal Council to borrow an amount not to exceed $500 million dollars for off-reservation gaming sites." They further stipulated that this referendum was still in effect and had not been rescinded at the relevant time period of this Bond Transaction. Thus, there was a referendum and approval had been provided consistent with the Tribal Constitution.

Moreover, the Tribal Parties further stipulated that from 1994 through 2009, there were eight instances where the Tribe members voted, by referendum, prior to authorizing certain expenditures while at the same time, six Business or Promissory Notes were executed by the Tribe without referendum vote of the members. In none of these cases (either with or without referendum vote) did the Tribe ever seek approval of the Secretary of Interior.

It appears a pattern has been set whereby the Tribe has not, to its recollection, ever sought approval of the Secretary of Interior even when it arguably does pledge tribal assets. It further appears that only half the time the Tribe sought referendum votes of its members when tribal assets were pledged. Thus, even if there were tribal assets pledged in this case, given the 1994 $500 million dollar referendum, the Court would be hard pressed to conclude that Affirmative Defense Number 11 was valid. The matter is simpler, though because no tribal assets were pledged.

Next, the Tribal Parties assert that their Constitution (Article VI, Section 1) does not permit the Tribal Council to enter into any agreements that violate federal law

or the Tribal Constitution, because the Indenture was found to be void *ab initio* in violation of federal law, IGRA, the Constitution has been violated on this ground as well.

It is true that courts will not enforce an illegal contract "where its formation or performance is expressly forbidden by a civil or criminal statute or where a penalty is imposed for doing the act agreed upon." *Hiltpold v. T-Shirts Plus, Inc.*, 98 Wis. 2d 711, 716-17, 298 N.W.2d 217 (Ct. App. 1980). "Such a contract is void and courts will leave the parties where they find them." *Id.* "The rule in Wisconsin is that even though contracts that violate the constitution or state law or policy are void, the courts will not intervene in the relationships they have created." *Cornwell v. City of Stevens Point*, 159 Wis. 2d 136, 142, 464 N.W.2d 33 (Ct. App. 1990). But, that has already happened here.

The Seventh Circuit affirmed that the Indenture was an unapproved management contract, thus deeming it void *ab initio* under IGRA. That means that the parties are to act as if the Indenture never existed—it is not merely void, it is void *from the start.* The Tribal Parties' attempt to bootstrap the now non-existence of the Indenture into a violation of their Constitution is inappropriate. The Indenture—as well as any other document that the Court finds void *ab initio* under IGRA in this Decision—should not equitably operate to void all of the remaining documents in the Bond Transaction for violating the Tribal Constitution. The Indenture (and other documents) are not deemed illegal—they are deemed to have not existed.

The Affirmative Defense asserting violation of the Tribal Constitution is, thus, dismissed.

B. IGRA management contracts.

1. The law.

NIGC is the federal agency responsible for overseeing and regulating Indian gaming. *Wells Fargo Bank II,* 658 F.3d at 687-88. In 1988, Congress passed the Indian Gaming Regulatory Act "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," to "shield [tribes] from organized crime and other corrupting influences," as well as "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." *Id.*, at 687

(quoting 25 U.S.C. § 2702(1)-(2)). IGRA applies to the Tribe and to the EDC. *See Wells Fargo Bank II,* 658 F.3d at 686-88.[45]

Following the enactment of IGRA, Congress created the National Indian Gaming Commission to serve as an "independent Federal regulatory authority for gaming on Indian lands" and vested in NIGC the power "to promulgate such regulations and guidelines as it deems appropriate to implement [IGRA]." 25 U.S.C. §§ 2702(3), 2706(b)(10). "Congress explicitly expressed a concern that Indian tribes be the primary beneficiaries of fair and honest gaming operations." *Wells Fargo Bank II,* 658 F.3d at 694. Towards that goal, IGRA requires that an Indian tribe may only "enter into a management contract for the operation of a Class III gaming activity" or "enter into a management contract for the operation and management of a class II gaming activity" if the contract has been submitted to and approved by NIGC's Chairman. *Id.* (quoting 25 U.S.C. §§ 2710(d)(9), 2711(a)(1)).

Most significantly, a management contract that has "not been approved by the Chairman in accordance with the requirements of part 531 of [the CFR] and this part, are void." 25 C.F.R. § 533.7.

IGRA, however, does not itself define "management contract"—thus, the reason for this litigation and the crux behind this Decision. Resolution of the Tribal Parties' arguments under IGRA, "is fundamentally, a question of statutory interpretation." *Wells Fargo Bank II,* 658 F.3d at 694. Thus, the Seventh Circuit, in *Wells Fargo Bank II,* examined statutory language to discern that definition. *Id.* at 694-95.

NIGC "has defined the term 'management contract' by regulation 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." *Wells Fargo Bank II,* 658 F.3d at 695 (quoting 25 C.F.R. § 502.15). Congress was "intent on fostering and protecting tribal ownership of gaming facilities and concerned that third parties would take advantage of tribal entrepreneurial efforts." *Id.* at 697.

NIGC defines a "primary management official" as "any person who has the authority to set up working policy for the gaming operation." 25 C.F.R. § 502.19(b(2). In addition, "managerial employees" are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer." *N.L.R.B. v. Bell Aerospace Co.,* 416 U.S. 267, 288 (1974). Management and managerial employees are not created by a job title. *Waldo v.*

[45]The Court in *Wells Fargo Bank II,* at 686-88, does an excellent job in setting forth a primer on IGRA, NIGC, and Indian gaming in general.

Merit Sys. Prot. Bd., 19 F.3d 1395, 1399 (Fed. Cir. 1994). Rather, the Court must look to the terms of the employee's actual job responsibilities, authority, and relationship to management. *Id.*

Furthermore, the analysis and holding of *Wells Fargo Bank, N.A. v. Sokaogon Chippewa Community* (referred to colloquially as "*Mole Lake,*" 787 F. Supp. 2d 867 (E.D. Wis. 2011)) is very persuasive when considering what is and is not a management contract.

The Seventh Circuit in *Stifel,* as well as in *Altheimer & Gray v. Sioux Manufacturing Corporation*, 983 F.2d 803 (7th Cir. 1993), opined that we have to start treating Tribes as competent and equal partners—in the law, and in their negotiations. To that end, the Seventh Circuit instructs the Court to consider and walk this tightrope[46] when conducting contract interpretation and to take care not to leave Tribes unable to compete in the marketplace while still protecting their rights. "To refuse enforcement of this routine contract provision [choice of law and venue provisions] would be to undercut the Tribe's self-government and selfdetermination." *Stifel*, at 199 (quoting *Altheimer*, 983 F.2d at 815).

2. Deference to NIGC's bulletins, informal letters, and officers.

The Tribal Parties assert that decisions by NIGC or its former members should be entitled to deference as agency decisions such that certain Bond Documents should be declared void under IGRA. That is a misreading of the concept of agency deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Anderson v. Department of Natural Resources*, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1, among several cases.

Under Wis. Stat. ch. 227, the Court is to apply either great weight or due weight deference or to conduct a *de novo* review, in essence applying no deference to the agency's decision. *See Racine Harley-Davidson, Inc. v. Wis. DHA*, 2006 WI 86, ¶ 14, 292 Wis. 2d 549, 717 N.W.2d 184. The appropriate level of deference depends upon the agency's charge from the Legislature, the agency's length of time in interpreting an issue, and its specialized knowledge and expertise. The more factors that are present for consideration, the more the scale tips toward according more deference to the agency's conclusions of law.

[46]Even Tribal Parties' expert, Kevin K. Washburn, former NIGC General Counsel, noted that this paternalism is a controversial issue and that some tribes, wanting more self-determination, dislike its impact and implications.

There must, however, be an agency decision *to* weigh. There are no such decisions here. But, while statements made by former NIGC members or officers are not an agency decision, that does not end the discussion. The federal courts in this case looked to matters outside the four corners of the statute and even evaluated and relied upon the testimony of Tribal Parties' expert, Kevin K. Washburn, former NIGC General Counsel.[47]

When deliberating as to the meaning of "management contract," this Court looks to the statute, as well as to federal courts that have also interpreted this federal statute. *See Rao v. WMA Securities, Inc.*, 2008 WI 73, ¶ 48, 310 Wis. 2d 623, 752 N.W.2d 220. The Court in *Wells Fargo Bank II* advises that a court "must examine the 'language and design of the statute as a whole.'" *Wells Fargo Bank II*, 658 F.3d at 694 (quoting *United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008)). When the statutory language is reviewed, however, it does not "offer a precise answer to the question before us—whether Congress intended to include contract with third parties whose primary, or only, role is to infuse capital into a gambling operation and whose primary interest in participation in management matters is the protection of its investment." *Id.,* 658 F.3d at 695. Such an examination "does, however, make clear that Congress wrote in broad strokes in crafting this legislation." *Id.*

This Court agrees that "[t]here is no solid indication, in either the language or the structure of the statute, that Congress intended to limit is regulation of third-party contractual participation in Indian enterprises to a particular kind of activity." *Id.* That being the case, further review of background materials is appropriate.

This Court agrees with *Wells Fargo Bank II* that the first step is to look at NIGC pronouncements:

> [T]urn[ing] to the pronouncements of the NIGC, we find the same broad approach to regulation. [NIGC] has defined the term "management contract" by regulation as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of *all or part* of a gaming operation." 25 C.F.R. § 502.15 (emphasis added). Notably, this regulatory provision includes "collateral agreements," a term that [NIGC] has interpreted to include land purchase

[47]Mr. Washburn was appointed by the NIGC Chairman to serve as its third General Counsel from January, 2000, to July, 2002. In that role he led NIGC's enforcement branch and personally reviewed any documents presented to the Chairman regarding official action related to his regulatory responsibilities and provided legal advice regarding the same.

> agreements and development and construction agreements when those agreements "provide[ ] for the management of all or part of a gaming operation," *id. See Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 130-32 (2d Cir. 2008) (discussing regulatory provisions and deferring to the NIGC's decision that a land contract agreement and a development and construction agreement should be characterized as management contracts); *United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 424-25 (8th Cir. 2002) (deferring to the NIGC's view that a construction term loan agreement and a consulting contract, when read together, formed a management agreement).

Wells Fargo Bank II, 658 F.3d at 695-96. So, it is clear that the type of collateral agreements at issue here could contain enough *indicia* of management to be found to have violated IGRA. But, resort to the statute alone, as noted above, is not sufficient to answer the questions definitively.

The Tribal Parties urge the Court to consider NIGC Bulletins and informal declination letters, as well as the opinion of former NIGC officers. The non-Tribal Parties urge this Court to do the opposite: to disregard informal agency pronouncements of NIGC and consider only the language in IGRA.

This Court concludes that, due to the paucity of the IGRA text, taken with the lack of a clear definition of "management contract," there must be some limited recourse to outside sources with respect to NIGC's positions. As the federal court did in *Wells Fargo Bank II*, this Court shall, too, consider NIGC Bulletins, some informal declination letters[48]—but only with great caution—as well as the testimony of Mr. Washburn. *See id.* at 696-97. These sources, however are to be given less weight than the statute, they must be viewed with a critical eye, and their availability to the public must also be considered.

Clearly NIGC Bulletins are not entitled to *Chevron* deference (as they are not agency decisions), but as *Wells Fargo Bank II* notes, they are "of relevance" to the inquiry as to management contracts. *Id.* at 696. They will, therefore, be considered.

NIGC Bulletin No. 94-5 (October 14, 1994), "distinguish[es] between management contracts, which require approval, and consulting agreements, which do not," *Wells Fargo Bank II*, 658 F.3d at 696, as follows:

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[48]While the decisions by the federal courts concerning the Indenture and Bond Documents are relevant despite having been issued after the 2008 Bond Transaction, the same cannot be said for declination letters issued after that date. So, while the Court did review declination letters (giving them lesser weight considering their lack of scrutiny by the NIGC Chairman), it did not consider any letters issued after January, 2008, unless specifically noted.

> Management encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling). The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval.

NIGC Bulletin No. 94-5 at 1.

This Bulletin continues and notes that determinations "must be made on a case-by-case basis because they depend on the facts and circumstances of the individual situation and the actual day-to-day relationship between the tribe and the contractor." *Id.* at 2.

NIGC Bulletin No. 1999-3 at 1-2, regarding "Independence of Tribal Gaming Commissions," is also relevant. This Bulletin describes the importance of a tribal gaming commission, and how it must be completely independent from the "tribe's role as owner and operator of the tribe's gaming activities." It further explains that "[r]esponsibilities such as the adoption and establishment of rules and standards for the operation of gaming activity should be delegated to the tribal gaming commission." *Id.* at 2. These are important duties that are relevant to the discussion here, where the bondholders may obtain the right to determine who is hired as a Tribal Gaming Commissioner.

Of even less persuasive value, while yet of some limited relevance, are the informal declination letters from NIGC's General Counsel (or Acting General Counsel). These types of "informal agency pronouncement[s] . . . are not entitled to deference under the Supreme Court's decision in *Chevron*." *Wells Fargo Bank II*, 658 F.3d at 695. In addition to not being agency decisions, these letters are fraught with more issues: they are not formally scrutinized or reviewed[49] by the NIGC Chairman, and prior to 2011, were not formally posted on the internet or otherwise publically disseminated. True, attorneys who practiced in the field would share these letters, and per Mr. Washburn, create their own binders of "important letters." Mr. Fedman testified that this was a somewhat cumbersome practice, but that individuals or attorneys could always utilize the Freedom of Information Act to obtain relevant declination letters. But, that is a far cry from being a

[49]Both Mr. Fedman and Mr. Washburn testified that these declination letters are not circulated to the NIGC Chairman prior to their issuance, and Mr. Fedman testified that they were not discussed at NIGC meetings. Mr. Fedman and Mr. Washburn, however, disagreed as to whether the declination letters reflected NIGC's official philosophy or positions. It is not necessary to resolve that dispute as the Court is merely reviewing timely declination letters for limited guidance and, thus, affording them less weight than other more relevant sources.

pronouncement of NIGC. Mr. Fedman likened these letters to private correspondence and called them "involuntary guidance that was not binding on the agency." As with all decisions—formal or informal—Mr. Washburn agreed that there was an evolution to the positions taken in NIGC's declination letters.[50]

Another concern is the way the NIGC now publishes these declination letters. On their website, on a page entitled "Legal Opinions," NIGC states:

> From time to time, the National Gaming Commission's Office of General Counsel is asked to give its opinion on certain discrete legal questions from the gaming industry or other interested parties. The overwhelming majority of these requests seek the General Counsel's legal opinion that an agreement is not a management contract requiring the approval of the NIGC Chair and does not violate Indian Gaming Regulatory Act's sole proprietary interest mandate. Such legal opinions are more commonly referred to as "declination letters." . . .
>
> As a general matter, legal opinions are issued by the OGC as a courtesy, and neither IGRA nor NIGC regulations require the OGC to issue a legal opinion on any matter. Further the legal opinion of the General Counsel is not agency action and the issuance of a legal opinion is a voluntary process both for the party making the request and the OGC.

So, while NIGC is now publishing these letters, it cautions that they are merely courtesy responses and are not agency actions.

The Court in *Wells Fargo Bank II* echoed these same concerns, but likewise held that "because they embody the considered view of an officer whose responsibilities include the application of the statute and the regulations, the letters cannot be excluded entirely from our consideration." *Wells Fargo Bank II*, 658 F.3d at 696. This Court concurs.

An examination of these informal declination letters provides some further insight. For instance, in the May 2, 2003 letter from Acting General Counsel Penny J. Coleman to attorney Barry W. Brandon, the impact of standard remedial provisions typically found in commercial loan agreements, including the appointment of a receiver, are discussed. Ms. Coleman states:

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[50]Contrary to the non-Tribal Parties' arguments on this point, this is not proof that the letters should be disregarded in their entirety. There is evolution in most courts' decisions. Consistency is certainly a goal, but it is not an absolute. If that were the case, the Seventh Circuit would not have affirmed the decision finding the Indenture void *ab initio*. That view was one that has "evolved" over time.

> . . . the standard nature of the provisions is inapplicable here. Simply put, a loan in the context of government gaming, such as we have here, is not comparable to a standard commercial loan. IGRA recognizes the importance of tribal governments running gaming, and thus imposes certain limitations on Indian gaming operations. They have to be regulated by the tribe; they have to be owned by the tribe; and they have to be operated by the tribe. These are the fundamental underpinnings of Indian gaming, based on time-honored principles of tribal sovereignty, which distinguish it from gaming in the private arena. The above-cited remedial default provisions collectively permit regulation, operation and ownership by an entity other than the Nation. We are also completely unconvinced that a court can appoint a receiver for a tribal gaming operation; a court-appointed receiver would usurp a tribe's ability to own, regulate and operate its gaming enterprise.

Moreover, while it is dated January 23, 2009, the letter[51] from Acting General Counsel Coleman to attorney Kent E. Richey, is addressed by all parties and is worth discussing. Ms. Coleman concludes that it is NIGC's "legal position that an agreement containing a security interest in a gaming facilities future gross revenues, without further limitation, authorizes management of the gaming facility." She then provides a list of suggestions as to how to add the necessary "limitations" to the security agreement, thus creating a safe harbor and avoiding a management contract. Both sides contend that this letter supports their arguments, but in actuality, it supports the Tribal Parties.[52] It shows that a security agreement *may indeed* authorize management and be void *ab initio* under IGRA, but that—if certain provisions are included in the agreement (in the form of a negative covenant)—the management *indicia* is adequately addressed.

Finally, the Court in *Wells Fargo Bank II* has taken the statements of Mr. Washburn into account when conducting its deliberations regarding management *indicia* in contracts. *Wells Fargo Bank II*, 658 F.3d at 701, n.16. This Court shall do the same.

Therefore, after reviewing how other courts (and some on the very issues of this case) have conducted their evaluations of non-statutory materials, this Court concludes that such an evaluation is both appropriate and necessary. This Court, therefore, adopts the view on deliberations and relevant materials as espoused by *Wells Fargo Bank II*, 658 F.3d at 697, to wit:

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[51]Trial Exhibit 1018.

[52]The non-Tribal Parties assert that solely having a restriction that all of the revenues secure the loan is insufficient to create a management agreement, but they fail to take into account that Ms. Coleman states that there is no violation if that is the *sole* restriction. Here, the Tribal Parties assert many other restrictions. Thus, that section of the letter is inapt.

> Our review of these documents reveals the same pattern discernible in the statute and the regulations. There is a general concern that the participation of *any* party in the actual management of a tribal gaming facility—whether through a traditional contract to oversee the daily operations of the facility or through a financing scheme that permits the provider of funding intermittently to interject itself in the management decisions of the facility to ensure the security of its investment—should be subject to the [NIGC] Chairman's scrutiny and approval as a management contract.

Just as the *Wells Fargo Bank II* Court examined the Indenture, so must this Court now examine the Security Agreement, the Tribal Agreement, the Bond, and the Bond Purchase Agreement to ascertain whether any of these documents contained provisions that required approval by NIGC. But, the mere connection to the Indenture is not enough on its own. "[A] document that is collateral to a management contract in the sense that is related does not require approval; it is only when that related agreement also provides for 'the management of all or part of a gaming operation' that NIGC approval is required." *Stifel*, 807 F.3d at 203. Just as critical, the "agency's contrary practice cannot take precedence over the unambiguous language of the regulation." *Id.* at 204.

3. **The Bond Transaction documents.**

   (Tribal Affirmative Defense Nos. 4 and 9 to the First Amended Complaint and No. 5 to the Stifel Defendants' Restated Cross-Claims).

While, at first blush, it appears harsh to void an unapproved management contract—thus leaving one party with a windfall benefit and the other party with no recourse against the first party—the Legislature has deemed the protection of Indian tribes and their gaming facilities to be so important that they have accepted this strict outcome. Without such a "regulatory hammer," no one would bother to seek NIGC pre-approval of contracts. The Legislature and courts have a well-established pattern of affording more protection towards Indian tribes while still taking care not to diminish or denigrate the authority and autonomy of these sovereign entities.

In the context of management contracts, Congress took the view that "these management companies posed two concerns: first, that they would take advantage of the tribes and bilk them out of gambling revenues and, second, that they would allow organized crime to infiltrate Indian gaming operations." *Wells Fargo Bank II*, 658 F.3d at 686. This is the backdrop for this Decision.

There is no question that the Indenture is void *ab initio* as an unapproved management contract under IGRA. The Tribal Parties assert that the Security Agreement is also an unapproved management contract and is void *ab initio.* They assert the same for the Tribal Agreement, the Bond, and the Bond Purchase Agreement.

"The Indenture set forth several present and contingent provisions that vested in Wells Fargo and the bondholder the power to ensure that [EDC] satisfied its repayment obligations and that Casino revenues would be sufficient to repay the bonds." *Id.* at 689. The federal court described the Indenture terms' as follows:

> Under the terms of the Indenture, Wells Fargo assumed oversight of Casino revenues, which [EDC] was required to place into a deposit account controlled by Wells Fargo. Wells Fargo would use the funds in the account to repay the bondholders according to the repayment schedule. When [EDC] required funds to pay its operating expenses, it could certify its need to Wells Fargo and withdraw necessary amounts from the account.

Id.

But, equally important is what the Seventh Circuit found that the Indenture did *not* do and how that applies to these collateral documents. The Court in *Wells Fargo Bank II* found that:

- The Indenture did not explicitly transfer, to the Trustee or bondholders, "wholesale responsibility over the daily operations or maintenance of the Casino" or provide compensation for the same. *Id.* at 697 (quoting the Indenture).

- The Indenture did not explicitly transfer, to the Trustee or bondholders, "responsibility over the Casino's employment, accounting or financial procedures." *Id.* (quoting the Indenture).

- EDC was required to "continue to . . . operate . . .[,] maintain, repair and preserve the Casino Facility," and to ensure that the Casino obeys the law and pays its appropriate expenses and taxes. *Id.* (quoting the Indenture).

- EDC had to maintain control over licenses, permits, financial and accounting records, and other such documents. *Id.* at 697-98.

- The Indenture does not "involve provisions for development or construction costs, does not set a term limit for the transfer of rights (which will be

extinguished upon repayment) and does not allocate to Saybrook or Wells Fargo a percentage of the Casino's revenues." *Id.* at 698.

- "The Indenture sets a fixed repayment schedule that, although secured by gaming revenues, is not set a proportion of it." *Id.*

Therefore, there are still some boundaries as to what is an unapproved management contract. So, each document must be examined independently to see where it lies on the scale of management *indicia.*

a. The Security Agreement.

The Tribal Parties note that the Security Agreement grants the bondholder[53] an unlimited security interest in the Corporation's Collateral[54] (that is defined to include the Pledged Revenue,[55] all accounts, and the Equipment, including all gaming equipment).[56] The Tribal Parties contend that, because a bondholder may, upon a default under the Security Agreement, possess, sell, lease, or otherwise dispose of the Collateral, this provides the bondholders with the ability to control all of the Gross Revenues, thus affording them the power to limit and condition payment of operating expenses to the Casino. They assert it further provides the bondholders with the powers to decide whether to allow the Casino to continue operating, to make decisions as to what is necessary to continue running the Casino, to decide whether to release any of the Gross Revenues to allow for capital expenditures, and to plan, coordinate and direct those capital expenditures.

During his testimony, Mr. Guelcher stated that those were the powers and prerogatives of the Casino's CEO and General Manager. Mr. Guelcher further

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[53]The Tribal Parties have carefully crafted their arguments to reflect that they are not asserting that Saybrook would take any inappropriate steps or would act in a manner that disregards the Tribal Parties' input on, and overall management of, their Casino and gaming enterprise. Rather, they assert that the next bondholder might not be as circumspect and respectful of the Tribal Parties.

[54]Security Agreement, § 1. As defined, Collateral covers all things of value owned by EDC with the exception of the buildings housing the Casino and hotel. The tribal trust land is also not part of the Collateral.

[55]Pledged Revenue is defined as Gross Revenues (Security Agreement, § 1.01) that is defined to include "all receipts from the operation of the Casino Facility by the Corporation." *Id.* Mr. Bayliss testified that Gross Revenues are not net revenues, they are, instead, the "first dollar in the door." Mr. Bayliss further testified that Saybrook sought security in the form of Gross Revenues because it was more secure and it permits the bondholder to capture all of the revenues of the Casino.

[56]Security Agreement, § 1(a)-(c).

testified that EDC has the power to decide what strategic purchases to make, to organize gaming equipment and staffing, to direct hiring and firing of Casino employees, and to coordinate and control decisions as to gaming equipment leases, purchases and floor layouts. EDC, through Mr. Guelcher, also controls the hours and days of Casino operations, and is responsible for overseeing advertising and marketing decisions, controls the budget, and decides when and what capital expenditures to make on behalf of the Casino. EDC also has the rights to sell or trade gaming equipment.

The Tribal Parties point to Section 4(a) of the Security Agreement that gives the bondholder, upon default, possession of all of the Corporation's rights as described above. This, they assert, is an *indicia* of management. The Tribal Parties point to Section 2(c)(ii) that prevents EDC from selling, transferring, or assigning any part of the Collateral without the consent of the bondholder (upon default).

By having control over the Collateral, the Tribal Parties assert the bondholders could seize it upon default. Mr. Bayliss not only agreed, but he further testified that the bondholders could determine whether and upon what terms to conduct a sale of the Collateral. There is also a negative pledge in the Security Agreement that prevents the Corporation from creating, issuing, incurring, making or guaranteeing any additional debt.[57] This is a power that Mr. Guelcher testified currently belonged to him as General Manager.

Finally, the Security Agreement permits the bondholders to enter upon the Tribe's trust lands in order to repossess and remove the Collateral.[58] Mr. Bayliss testified that this power would give additional security to the bondholders.

Thus, pursuant to the January 23, 2009, Coleman letter to Mr. Richey, several actions she deems prohibited actions would be granted to the bondholders under certain circumstances: they may direct the purchase, lease, or substitution of any gaming device, and they may direct the floor plan layout of the Casino.

The non-Tribal Parties counter that these are the same conditions that are present in any commercial loan/financing agreement that would be entered into with the Tribe. In fact, Mr. Guelcher testified that when the Tribe purchased slot machines or other gaming devices it was common that they would be financed and that, in those financing agreements, there would be the right for the vendor to repossess the machines upon a default of payment obligations. But, this is belied by

[57]Security Agreement, § 2(h)(ii).

[58]Security Agreement, § 4(c).

the caution expressed by Ms. Coleman (as NIGC Acting Counsel) in the May 2, 2003, Brandon letter that standard commercial loan provisions are not viewed the same when they are issued in the context of a tribal gaming financial transaction. There is also a distinction between a commercial vendor and a financial investor.

A review of the five disputed provisions of the Security Agreement evidence more than a mere commercial loan transaction. Section 1 provides control over the Tribal Parties' gaming revenues including the bank accounts in which the revenues are placed. This is an *indicia* of management.[59] Section 2(c) prevents the dissipation of Collateral. The Court disagrees that it entitles a bondholder to determine the placement and floor layout of gaming equipment. It is not an *indicia* of management. Section 2(h) restricts EDC's ability to incur additional debt. It is not an *indicia* of management.

Section 4 provides remedies to the bondholders in the event of a default. It carries with it the right to exercise all of the rights of the Corporation, these could arguably include installing, placing and making changes to gaming equipment and floor layout plans. It further allows for the appointment of a Receiver;[60] another area of concern in several NIGC declination letters. This is an *indicia* of management.[61] Section 9 provides for the appointment of the bondholder to be attorney-in-fact for the Corporation. It, too is an *indicia* of management.

The main hesitancy in declaring that these provisions contain sufficient *indicia* of management was outlined in the non-Tribal Parties' "parade of horribles:" if the Court finds this Security Agreement to be a management contract, no one will ever again do business with any Tribe; Wisconsin will become an island of no Indian contracts; no lender will ever loan money to a tribe in Wisconsin; no vendor will ever sell any goods to a Wisconsin tribe; and capitalism will perish on Wisconsin tribal lands. This simply cannot be the case, else there would be no need for IGRA, NIGC would be a hollow entity, and no investors would ever seek to transact business in the Indian gaming enterprises.

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[59]*See* NIGC Notice of Violation 06-08 from Philip N. Hogan, NIGC Chairman, and Jo-Ann M. Shyloski, to Marc E. Dunn, dated March 8, 2006. Trial Ex. 1019.

[60]The Court agrees that merely granting an investor the right to the appointment of a receiver, standing alone, would likely not be sufficient to void a contract. It is, however, when this provision is taken with all the others. Moreover, the Court has concerns that the Security Agreement allows for the appointment of a receiver or for the investor to act in that capacity *without* court supervision. That is troubling.

[61]*See* NIGC Notice of Violation 07-02 from Mr. Hogan to Ivy Ong, dated May 16, 2007, Trial Ex. 1034, and Ms. Coleman's November 3, 2006, letter to Edward Fleisher and Kent Richey. Trial Ex. 1017.

Moreover, the solution is relatively simple: submit any and all significantly large contracts to NIGC for prompt consideration as to whether they take too many benefits away from a tribal gambling enterprise and, if there are concerns, amend the contracts to obtain NIGC approval.

Accordingly, due to the number of provisions that impede the fundamental underpinnings of Indian gaming, the fact that management powers are potentially to be removed from the Tribe upon a default, the ruling by the Seventh Circuit in *Wells Fargo Bank*, 659 F.3d at 697, the Court concludes that the Security Agreement is "a financing scheme that permits the provider of funding intermittently to interject itself in the management decisions of the facility to ensure the security of its investment" and it "should be subject to the [NIGC] Chairman's scrutiny and approval as a management contract."

The Security Agreement is, therefore, void *ab initio*.

b. The Tribal Agreement.

The Tribal Parties assert that the Tribal Agreement requires them to consent to the levy of judgment by an appropriate federal or state court,[62] and that this would inappropriately allow the bondholder to act as a judgment creditor and execute against the property, levy through garnishment, or use a receiver to aid in the execution and collection of the judgment. *See Associated Bank N.A. v. Collier*, 2014 WI 62, 355 Wis. 2d 232, 852 N.W.2d 443. They also complain that the bondholder may stonewall regarding the replacement of the Casino Facilities' General Manager,[63] the Controller, or the Executive Director of the Gaming Commission in contravention of NIGC Bulletin No. 1999-3.

The Tribal Parties further point to the ability of the bondholder to enter upon tribal trust lands[64] and to bar the Tribal Parties from cancelling or terminating any land leases for the Casino, hotel and convention center without prior bondholder consent.[65] Taken altogether, the Tribal Parties assert these provisions make the Tribal Agreement an unapproved management contract.

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[62]Tribal Agreement, § 9(b).

[63]Tribal Agreement, § 4(b).

[64]Tribal Agreement, § 4(c).

[65]Tribal Agreement, § 4(d).

The non-Tribal Parties dispute that there are any *indicia* of management and further point to the holding in *Stifel* that the Tribal Agreement hiring provision (Section 4(h)), unlike the provision in the Indenture, does not tie the hands of the Tribe.

Section 3(b) allows for the bondholders, upon default, to exchange, surrender, or release Collateral without notice to the Tribe, and allows them to amend any other financing agreements or to settle or compromise any of the Tribal Parties' Obligations (as that term is defined) without any notice to the Tribe and without affecting the liabilities of the Tribe. This, again, is a standard commercial loan remedy, but the problem is that it is made in the context of an Indian gaming contract and was entered into without the approval of NIGC. It is an *indicia* of management. Section 4(b) allows for the bondholders to have final say in the hiring of key management personnel; it further allows for the bondholders to impact the Tribal Gaming Commission that is required to be kept independent and away from any conflicts of interest. Taken alone, the Court agrees with the Seventh Circuit in *Stifel* that this is not sufficient *indicia* of management, but it can be considered along with other *indicia*, if any exist.

Section 4(c) allows for the right to enter tribal trust land to remove Collateral, however, it is expressly limited by the requirement that any such removal "be conducted in conformity with any applicable NIGC rules and regulations." That saving limitation prevents this Section from being an *indicia* of management. Section 4(d) prevents the Tribe from cancelling land leases, but it does not give operational control to the bondholders. That is not an *indicia* of management. Finally, Section 9 requires the Tribe to consent to a levy of judgment, but then places no limitations on the remedies that the bondholders could utilize against the Tribe. Without such limitation, this is an *indicia* of management.

When the two *indicia* of management (Sections 3(b) and 9) are taken together with the limitations on the hiring or replacement of key management personnel—and in particular individuals who control the day-to-day operation of the Casino (the Casino General Manager and its Controller) as well as the Executive Director of the Gaming Commission, there is just barely enough *indicia* of management to conclude that the bondholders are permitted to intermittently interject themselves into the management decisions of the Casino to ensure the security of their investment. The Tribal Agreement is, thus, an unapproved management contract.

The Tribal Agreement is, therefore, void *ab initio*.

c. The Bond.

The Tribal Parties assert that the Bond also requires consent to the levy of judgment,[66] and it allows for the attachment of Pledged Revenues by an appropriate federal or state court.[67] And, the Bond references the Indenture. But, that alone is no basis upon which to find the Bond void. The Court in *Wells Fargo Bank II* held that "the mere reference to a related management contract does not render a collateral document subject to [IGRA's] approval requirement" and that the document in question is void only if that particular agreement provides for the management of a gaming operation. *Id.* at 700-02. Accordingly, a mere reference to the Indenture does not render the Bond invalid.

While not conclusively ruling on the Bonds, the Court in *Stifel*, 807 F.3d at 205, n.57, noted that the replacement of management personnel provision in the Bond was not, standing alone, a problematic enough provision to transform the document into a management contract. There is no real opportunity for the bondholders to intermittently interject themselves into the management decisions for the Casino. There has to be more than alleged by the Tribal Parties.

In this case, the Bond lacks sufficient *indicia* of management. It is not void.

d. The Bond Purchase Agreement.

Here, the Tribal Parties again make note of the references to the Indenture; that is not grounds for voiding the document. And, if the sole problematic provision is that allowing for the replacement of key management personnel, the Court in *Stifel* has already opined that provision alone in the Bond Purchase Agreement did not "[t]ie the hands of the Tribe" and was not enough to tip the scale towards a management contract. *Stifel*, 807 F.3d at 205. Again, there is no ability for the intermittent interjection by the bondholders in the management decisions for the Casino.

The Court concludes, as with the Bond, that there are not sufficient *indicia* of management. The Bond Purchase Agreement is not void.

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[66]Bond, at 5. Trial Ex. 73 and 1001.

[67]Bond, at 5. Trial Ex. 73 and 1001.

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Notwithstanding the Court's conclusions that two of the four documents have been found to be valid, there is still the second Phase of this trial where other affirmative defenses and cross-claims will be pursued to determine whether and to what extent the non-Tribal Parties may enforce these two documents.

C. *Ultra Vires* Acts.
(Tribal Affirmative Defense No. 11)

The Tribal Parties next contend that because the Tribal Agreement was entered into *ultra vires*—by virtue of a violation of IGRA—it is unconstitutional and unenforceable. The Tribal Parties argue the unconstitutionality arises from a pledge of tribal assets, from the Tribe's inability to hold a referendum vote and to obtain approval from the Secretary of the Interior. It further arises from the violation of Tribal Constitution for violating federal statutes. However, all of these arguments have been addressed and previously rejected by the Court. Absent any *ultra vires* acts, this Affirmative Defense, likewise, fails.

Stifel, Godfrey & Kahn, and Dentons urge the Court to conclude that, even if there were any *ultra vires* acts, the Tribal Parties are equitably estopped[68] from asserting that as a defense due to their written representations that the Limited Offering Memorandum, the Bond Purchase Agreement, the Security Agreement, the Tribal Agreement, the Bond Resolution, and the Tribal Resolution were all lawful, binding, valid, and enforceable obligations of EDC and the Tribe. However, "once the elements of equitable estoppel have been established as a matter of law, the decision to actually apply the doctrine to provide relief is a matter of discretion." *Affordable Erecting*, 2006 WI 67, ¶ 30.

Typically, in those cases where a party to an agreement attempts to deny the validity of an agreement after it has already obtained the benefits of it, application of equitable estoppel is appropriate. *See McElroy v. Minn. Percheron Horse Co.*, 96 Wis. 317, 320-21, 71 N.W. 652 (1897); *Interior Woodwork Co. v. Prasser*, 108 Wis. 557, 561, 84 N.W. 833 (1901). But, that is typically; this is not a typical situation given the harsh remedies afforded parties under IGRA.

Because the Court has concluded that there were no *ultra vires* acts sufficient to warrant voiding of several Bond Documents, the Court declines to rule as to

[68]Equitable estoppel is found by "(1) action or non-action; (2) on the part of one against who estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; (4) which is to the relying party's detriment." *Affordable Erecting Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, ¶ 33, 291 Wis. 2d 259, 715 N.W.2d 312.

whether the concept of equitable estoppel is applicable when a document is rendered void *ab initio* under IGRA. That is left for another day—or another Court.

D. The Sole Proprietary Interest defense.
(Tribal Affirmative Defense Nos. 4 and 9 to the First Amended Complaint and No. 5 to the Stifel Defendants' Restated Cross-Claims).

First, Stifel, Godfrey & Kahn, and Dentons assert that the Tribal Parties have waived their right to present this affirmative defense (as well as the State Gaming Compact affirmative defense). The Tribal Parties, obviously, disagree. Without having to address whether this affirmative defense was waived, the Court concludes that it is not applicable. Thus, the question on waiver is irrelevant.

Mr. Washburn testified that the legal principal behind the sole proprietary interest theory first came to the forefront at NIGC in 2002—obviously prior to the 2008 Bond Transaction. He admits, however, that the factors are not altogether clear, instead they rely upon a "gut check" analysis and that there has only been occasional enforcement; he mentioned only knowing of three occasions to date.[69] Mr. Fedman testified that sole proprietary interest was not a priority or target of enforcement action for NIGC for many years; he could only recall one instance where it came into play. Mr. Washburn further admits that no one is required to submit documents to NIGC to get an "all clear" with respect to the sole proprietary interest rule.

The concept of "sole proprietary interest" is grounded in 25 U.S.C. § 2710(b)(2) that provides the NIGC "Chairman shall approve any tribal ordinance or resolution concerning the conduct or regulation of class II gaming on the Indian lands . . . if such ordinance or resolution provides that . . . (A) . . . the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." Like the concept of "management agreement," there is no NIGC regulation defining "sole proprietary interest."

The Tribal Parties assert that NIGC's Rules and Regulations mandate that a tribe may not grant a security interest in a gaming operation if such an interest would give a party other than the tribe the right to control gaming in the event of a

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[69] *City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff'd*, 702 F.3d 1147 (8th Cir. 2013); NIGC Notice of Violation 07-02 from Mr. Hogan to Ivy Ong, dated May 16, 2007. Trial Ex. 1034; and *In the Matter of J. Randy Gallo, Bettor Racing, Inc.*, Final Decision and Order, NIGC NOV and CFA 11-01 (September 12, 2012), at 10, *aff'd, Bettor Racing v. Nat'l Indian Gaming Comm'n*, 47 F. Supp. 3d 912 (D. S.D. 2014).

tribal default; they consider this the Sole Proprietary Interest Rule. They then cite to NIGC letters discussing this Rule,[70] that was arguably first raised in 1999.[71]

The Court in *City of Duluth*, provides that the factors to consider include "(1) term of the relationship (2) amount of revenue (3) right of control provided to third party over the gaming activity." That case, however, further provides that "until the NIGC initiates an enforcement action . . . and proceeds with that action to a final decision on the substantive issue of proprietary interest, this Court's view would constitute an advisory opinion." *City of Duluth*, 708 F. Supp. 2d at 901-02.

It is correct that this Court (as with a federal district court) may review final agency decisions of NIGC. 25 U.S.C. § 2714. But, in this case, NIGC has not taken any action with respect to whether the Bond Documents violate the sole proprietary interest rule. Without such an agency decision, there is no basis for judicial review. *See Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767 (9th Cir. 2008). The Tribal Parties have not presented sufficient authority to this Court to support the view that there is a stand-alone cause of action for violation of the sole proprietary rule absent a finding by NIGC.

Moreover, even if there was such a right to a private cause of action absent an NIGC finding, the Tribal Parties have failed to establish a meritorious claim. The Bond Documents reflect a fixed rate, fixed term loan transaction. There is no evidence that the remaining, valid Bond Documents transfer to a third party the "right to control gaming in the event of a default." Finally, even if these *remaining* documents did so transfer that right, there is no authority presented establishing that this Court may void a document for violating the sole proprietary interest rule. It is more likely that the offending provision would be severed from the document (as they all have severability clauses).

Accordingly, even if not untimely, the Tribal Parties cannot prevail on their sole proprietary interest rule violation defense. It is dismissed.

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[70] *See* Letter from Mr. Hogan to Senator John McCain, Chairman State Committee on Indian Affairs, et al., dated February 1, 2005 (Trial Ex. 1024); letter from Ms. Shyloski to Billy Evans Horse and Ryland L. Rivas, dated September 27, 2006 (Trial Ex. 1016) and NIGC letter to Mr. Brandon.

[71] *See* Notice of Violation NOV-99-33 from Margarita Ramos, NIGC, to Maxine Smith, dated November 18, 1999 (Trial Ex. 1032).

E. The State Gaming Compact.

As noted above, there are assertions that the Tribal Parties have waived this affirmative defense, and thus, it, too, should be denied as untimely. As with the sole proprietary interest defense, because this Court concludes that the State Gaming Compact argument is without merit, it need not address the timeliness concerns.

Unlike IGRA, the State Gaming Compact is a more all-encompassing restriction. It defines a "management contract" as "an agreement covering the overall management and operation" of a tribal gaming facility by a nontribal entity, "including all collateral agreements to such agreement that relate to gaming activity." State Gaming Compact § III-D. That is just not the case here.

The Bond Documents concerned the financing for the Tribal Parties, they do not cover the "overall" management of the Casino. Merely because some of the Bond Documents have been found to violate the management approval provisions of IGRA does not necessarily correlate to corresponding violation of the State Gaming Compact. There is no overall control. At best, there is the opportunity for intermittent interjection with respect to management decisions. There is thus, no violation of the State Gaming Compact.

CONCLUSION

Based upon the foregoing, the Court concludes that there were no express warranties made by the Stifel Parties, but Stifel did make implied warranties to Saybrook. The Court further concludes that the Bond documents are not void as *ultra vires* acts of the Tribal Parties, they are not invalid or void under the Tribal Constitution, but that the Security Agreement and the Tribal Agreement contain sufficient *indicia* of management so as to constitute a financial scheme allowing for inappropriate, intermittent interjection by the bondholders in the management decisions for the Casino that renders them void *ab initio* as management contracts under the federal Indian Gaming Regulation Act. The Bond and the Bond Purchase Agreement, however, are valid documents.

Moreover, the Court concludes that there are no violations of the Sole Proprietary Interest Rule or the State Gaming Compact. These defenses, howsoever plead, are dismissed.

The remaining matters in these actions are set for summary judgment motions on December 20, 2016, and a jury trial to commence on January 31, 2017, and run through March 17, 2017.

Dated this 13th day of December, 2016.

BY THE COURT:

Maria S. Lazar
Circuit Court Judge

c: Counsel of record