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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
APPEAL NO: 2022AP937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

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

OPENING BRIEF OF PLAINTIFF-APPELLANT LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.

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STATEMENT OF THE ISSUES

Issue One: Whether the Legend Lake Property Owners Association, Inc.'s (the "Association") declaratory judgment claim regarding the enforceability of restrictive covenants on real property is precluded by Guy F. Keshena ("Mr. Keshena") and the Menominee Indian Tribe of Wisconsin's (the "Tribe") claimed sovereign immunity?

Disposition Below: The circuit court held the Tribe's sovereign immunity barred the Association's declaratory judgment claim. (R.163:3-4, App.349-350.)[1] The circuit court further held there was no *in rem* exception to sovereign immunity, and that sovereign immunity was not waived. (R.163:3, App.349.)

Issue Two: Whether the Association's restrictive covenants are preempted by the Menominee Restoration Act, PL 93-197, 87 Stat. 770 (December 22, 1973) (the "Act")?

Disposition Below: The circuit court held that the Act preempts the Association's restrictive covenants. (R.163:3-4, App.349-350.)

[1] Record citations are noted as "R.", and Appendix citations are noted as "App."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be decided on the briefs; while oral argument may be helpful, it is not necessary.

This case meets the criteria for publication under Rule 809.23(1) as the opinion of this case clarifies existing rules, will apply established rules of law to a factual situation significantly different from that in published opinions, and is a case that is of substantial and continuing public interest.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case arises from the Association's declaratory judgment claim concerning the validity and enforceability of restrictive covenants properly and duly recorded on all the Association's properties within the Legend Lake development in Menominee County, Wisconsin on June 18, 2009 (the "Restrictive Covenants"). (R.1, App.001-018.) Sometime after 2017 – following the recording of the Restrictive Covenants – "Guy F. Keshena, a single person for and on behalf of the Menominee Indian Tribe of Wisconsin" acquired and took title to 33 lots within the Legend Lake development (the "Properties") for the express purpose of conveying title to those Properties to be held by United States of America in trust for the Menominee Indian Tribe of Wisconsin. (R.1:9-10, App.009-010; R.14:18-55, App.; R.15:1-6, App.059-064.)

The Restrictive Covenants that are recorded and binding on the Properties[2] include restrictions on certain transfer actions taken by the owner that – without the consent of the Association – could or would remove or

[2] The Restrictive Covenants, and their restrictions on transfer, are "*binding upon all parties acquiring or holding any right, title or interest*[2] in [the Properties], their heirs, personal representatives, successors, or assigns . . . ." (R.1:13, App.013.)

eliminate the Properties from the tax rolls of Menominee County, Wisconsin; remove zoning authority and general municipal jurisdiction; and remove the Properties from the obligations and/or restrictions imposed by duly adopted bylaws of the Association, including the obligation to pay all dues and assessments properly levied by the Association. (R.1:12-18, App.012-018.) The restrictions on transfer also apply to any application to have the Properties placed into federal trust. (R.1:14, App.014.) Under the Restrictive Covenants, any such transfers in violation of the restrictions would be null and void. (R.1:14, App.014.)

As part of the express language of the Restrictive Covenants, a waiver of sovereign immunity and consent to suit in the Circuit Court of Menominee County, State of Wisconsin is included. (R.1:17, App.017.) Neither Mr. Keshena, nor the Tribe refute having notice of the Restrictive Covenants – including the restrictions and wavier of sovereign immunity – prior to Mr. Keshena's acquisition of the Properties. (R.20:56 at 20-22, App.257.)

For its appeal, the Association respectfully requests this Court reverse the circuit court's decision dismissing the Association's declaratory judgment claim. The circuit court erred when determining that (1) sovereign

immunity applied to bar the Association's claim, and (2) the Restrictive Covenants were preempted by the Menominee Restoration Act.

II. PROCEDURAL HISTORY AND CIRCUIT COURT DISPOSITION

The Association filed this action against Mr. Keshena and the Tribe on October 25, 2018, seeking a declaratory judgment from the circuit court that (1) the Restrictive Covenants are valid and legally enforceable; (2) the Restrictive Covenants apply and are of force and effect concerning the Properties; and (3) any purported transfer of the Properties in violation of the Restrictive Covenants shall be null and void. (R.1:11 at ¶ 24, App.011.)

After the Association filed its complaint, Mr. Keshena and the Tribe moved to dismiss the complaint for lack of personal and subject matter jurisdiction, pursuant to Wis. Stat. §§ 802.06(2)(a)(2), 802.06(2)(a)3), for failure to join an indispensable party, pursuant to Wis. Stat. §§ 802.06(2)(a)(7), 803.03, and for failure to state a claim, pursuant to Wis. Stat. § 802.06(2)(a)(6). (R.10:1, App.019.) Relevant to this appeal, Mr. Keshena and the Tribe argued they were entitled to sovereign immunity and that the Restrictive Covenants were preempted by the Menominee Restoration Act. (R.16:15-21, 30-37, App. 035-041,050-057.)

After briefing and oral argument on Mr. Keshena and the Tribe's motion to dismiss, the circuit court, the Honorable James R. Habeck, presiding, denied the motion to dismiss. (R.20, App.202-275; R.25, App.221-224; *see also* R.16, App.021-058; R.18, App.140-173; R.19, App.174-201.) In his written order, Judge Habeck first noted that the Restrictive Covenants were "of broader application and scope than just the particular lots involved in this case and concern real property situated in Menominee County." (R.25:2, App.222.) Therefore, Judge Habeck held that the *in rem* exception to sovereign immunity applied, subjecting Mr. Keshena and the Tribe to the circuit court's jurisdiction. (*Id.* at ¶ 2.) Judge Habeck also considered this Court's decision in *Wisconsin Department of Natural Resources v. Timber & Wood Products*, 2018 WI App 6, 379 Wis. 2d 690, 906 N.W.2d 707, and found it to be distinguishable for the reasons set forth in the Association's brief in opposition to the motion to dismiss. (*Id.*) Judge Habeck also noted he was "not persuaded" by Mr. Keshena and the Tribe's preemption arguments and instead found *Baylake Bank v. TCGC, LLC*, 2008 WL 4525009 (E.D. Wis. Oct. 1, 2008) (Griesbach, J.) persuasive. (R.25:3 at ¶ 5, App.278; *see also* App.355-364.) Ultimately, Judge Habeck denied the motion to dismiss in its entirety. (R.25:2 at ¶ 1, App.277.)

After Judge Habeck denied Mr. Keshena and the Tribre's motion to dismiss, the parties filed cross-motions for summary judgment.[3] (*See* R.67; R.69.) However, on the same day that Mr. Keshena and the Tribe filed their response to the Association's motion for summary judgment, they also filed a motion for reconsideration of Judge Habeck's order denying their motion to dismiss. (R.140, App.279-282.) Mr. Keshena and the Tribe argued that, since Judge Habeck's ruling, recent cases were issued that reflected an "emerging consensus" on the issues of sovereign immunity and preemption that ran "directly contrary to [Judge Habeck's] March 6, 2019 decision." (R.140:2 at ¶ 7, App.280.)

After oral argument on the motion for reconsideration, the circuit court, the Honorable Katherine Sloma, presiding, granted the motion and subsequently dismissed the case on its merits, with prejudice. (R.163, App.347-350.) In her order for judgment and judgment of dismissal, Judge Sloma indicated, without citation to any authority, that "new case law has

[3] The parties' summary judgment arguments, along with other arguments raised in the motion to dismiss, are not issues to be considered on this appeal. Because the circuit court dismissed the matter on sovereign immunity and preemption grounds, the circuit court further decided it was "unnecessary to address the remaining arguments of the parties, including the parties' cross-motions for summary judgment." (R.163:4 at ¶ 14, App.350.) As such, the issues for this appeal are limited to: (1) sovereign immunity and (2) preemption.

addressed issues of preemption and tribal sovereignty." (R.163:2 at ¶ 3, App.348.) Judge Sloma first held that "the Menominee Restoration Act preempts the Restrictive Covenant . . . ." (R.163:2 at ¶ 7, App.349.) Next, and despite already having ruled *on the merits* on preemption, Judge Sloma concluded that the *in rem* exception to sovereign immunity was not applicable and that tribal sovereign immunity had not been waived. (*Id.* ¶¶ 10-11.) Notably, Judge Sloma did not explain in her oral ruling or order for judgment how recent caselaw compelled the circuit court to grant the motion for reconsideration on the sovereign immunity and preemption issues, and enter judgment accordingly. (*See* R.161, App. 337-346; R.163, App.347-350.)

After the circuit court entered final judgment, this appeal followed.

III. STATEMENT OF FACTS

The Legend Lake area, located in Menominee County, Wisconsin, was initially developed in the late 1960s. (R.1:4 at ¶ 4, App.004.)[4] The Association was created in 1972 through the filing of articles of incorporation with the State of Wisconsin and the Menominee County Register of Deeds.

[4] The facts are generally not in dispute. Because this case is before the Court on a motion to dismiss, however, the Court must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693.

(*Id.* ¶¶ 5-6.) Per the articles, the Association's period of existence was deemed perpetual and membership was deemed mandatory for all record owners. (*Id.* ¶ 6.) Membership in the Association was declared appurtenant to, and inseparable from, lot ownership. (*Id.*) Since its inception, the principle purpose of the Association has been the collective and efficient management, maintenance, preservation, and operation of properties within Legend Lake, which are carried out by the Association's bylaws. (*Id.* ¶ 7.)

On June 13, 2009, the Association, via an amendment to its bylaws, adopted the Restrictive Covenants, constituting "covenants, conditions and restrictions running with the land as to any plot of land designated as a 'lot' or 'out lot' as set forth on the plat of Legend Lake, and any additions or amendments there to." (*Id.* ¶ 12.) The Restrictive Covenants were recorded with the Menominee County Register of Deeds on June 18, 2009, as Document No. 29803. (*Id.*) The Restrictive Covenants were intended to preserve the tax base of Menominee County as well as increase the property values of Legend Lake properties by ensuring compliance with state and local governance and with the membership responsibilities of the Association. (*Id.* ¶ 13.)

All Legend Lake properties subject to the Restrictive Covenants could only be "held, sold, or conveyed in accordance with th[e] Restrictive Covenants." (*Id.* ¶ 14.) The Restrictive Covenants were recorded and are "binding upon all parties acquiring or holding any right, title or interest in [the Properties] (or any part thereof), their heirs, personal representatives, successors or assigns." (*Id.*) Article 1 of the Restrictive Covenants contain the following restrictions on transfer:

> B. Without the express written consent of the Association, which to be effective must be duly voted upon and approved by the Association's membership by amendment to the bylaws, no owner of any interest in the Subject Real Estate (or any part thereof) shall transfer any interest in the Subject Real Estate to any individual, entity (whether corporation, limited liability company, limited partnership, limited liability partnership, general partnership or otherwise), organization, or sovereign or dependent sovereign nation, or during the period of ownership take any action, the result of which could or would
>
> (1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls of Menominee County, Wisconsin,
>
> (2) diminish or eliminate the payment of real estate taxes duly levied or assessed against the Subject Real Estate (or any part thereof),
>
> (3) remove the Subject Real Estate (or any part thereof) from the zoning authority and general municipal jurisdiction of Menominee County, Wisconsin,
>
> (4) remove the Subject Real Estate (or any part thereof) from the general municipal jurisdiction of the State of Wisconsin, to include administrative regulations duly adopted,
> and/or
>
> (5) remove the Subject Real Estate (or any part thereof) from the obligations and/or restrictions imposed on the Subject Real Estate (or any part thereof) by the duly adopted bylaws and resolutions of the

> Association, to include, without limitation, the obligation to pay all dues and assessments properly levied by the Association.
>
> C. This Restriction on Transfer of Paragraph 1 shall apply to the transfer of an interest in an entity that is an owner of the Subject Real Estate if, as a result of the transfer, any of items (1) — (5) above could or would occur This restriction shall, among other things, expressly apply to any application to have the Subject Real Estate (or any part thereof) placed into federal trust pursuant to the Indian Reorganization Act.
>
> D. Any owner of an interest in the Subject Real Estate (or any part thereof) shall at all times comply with any and all municipal and Association laws, rules, regulations and obligations as set forth in the foregoing restrictions, to include, without limitation, the property tax collection laws set forth in Chapters 74 and 75 of the Wisconsin Statutes The Subject Real Estate remains subject to said municipal and Association laws, rules, regulations and obligations, in rem, notwithstanding a transfer to an owner not otherwise subject to them.
>
> E. Any purported transfer of any interest in the Subject Real Estate (or any part thereof) in violation of these restrictions shall be null and void.

(*Id.* ¶ 15; *see also* R.1:12-18, App.012-018.)

Article 4F of the Restrictive Covenants provides that actions or proceedings seeking to enforce the covenants running with the land "shall be brought against a party in the Circuit Court of Menominee County, State of Wisconsin (sitting in Shawano, Wisconsin)." (R.1:17, App.017.) Article 4G further provides that, by accepting a deed transferring title ownership of any portion of the subject real estate, "the title owner waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity, and expressly consents to suit as provided for

in Paragraph 4F above, and enforcement of any judgment rendered therein." (*Id.*)

Sometime after 2017, Guy F. Keshena acquired title to 33 designated lots, otherwise referred to as the Properties, and is the current title owner of the Properties within the Legend Lake development. (R.1:9-10, App.009-010; R.15:1-6, App.059-064.) Pursuant to a Tribal authorization, Mr. Keshena took title to those Properties as "Guy F. Keshena, a single person for and on behalf of the Menominee Indian Tribe of Wisconsin." (R.15:6, App.064.) Mr. Keshena took title to the Properties, after the Restrictive Covenants were duly recorded with the Menominee County Register of Deeds, for the express purpose of further conveyance of the Properties to the United States of America in trust for the Menominee Indian Tribe of Wisconsin. (R.15:1-4, App.059-062; *see also* R.14:18-55, App.082-119.) Neither Mr. Keshena, nor the Tribe refute having notice of the Restrictive Covenants and its restrictive conditions on transfer at the time the Mr. Keshena acquired the Properties. (R.20:56 at 20-22, App.257.)

LEGAL STANDARD

This Court reviews a circuit court's decision to dismiss for lack of jurisdiction independently of any prior decision. *Wis. Dep't of Nat. Res. v.*

Timber & Wood Prods., 2018 WI App 6, ¶ 17, 379 Wis. 2d 690, 906 N.W.2d 707 ("Where, as here, the underlying facts are essentially undisputed, whether the circuit court properly granted a motion to dismiss for lack of personal jurisdiction based on sovereign immunity is a question of law that we review independently.").

Similarly, this Court's review of a circuit court's decision to dismiss for failure to state a claim is de novo. *German v. Wis. Dep't of Transp., Div. of State Patrol*, 223 Wis. 2d 525, 530, 589 N.W.2d 651 (Ct. App. 1998). The issue of the applicability of preemption to the Restrictive Covenant is question of law that is also reviewed de novo, independent of the circuit court's decision. *Nordstrom as Trustee for Stephan B. Nordstrom Living Trust v. Kane*, 2021 WI App 71, ¶ 15, 399 Wis. 2d 522, 966 N.W.2d 91; *Town of Delafield v. Cent. Transp. Kriewaldt*, 2020 WI 61, ¶ 4, 392 Wis. 2d 427, 944 N.W.2d 819.

ARGUMENT

I. THE CIRCUIT COURT'S DECISION DISMISSING THE CASE ON ITS MERITS IS PROCEDURALLY AND FUNDAMENTALLY ERRONEOUS.

As an initial matter, the circuit court erred by granting Mr. Keshena and the Tribe's motion for reconsideration for dismissal and holding that

(1) sovereign immunity applied (thus the circuit court lacked jurisdiction) *and* (2) the Restrictive Covenants were preempted by the Act. (R.163, App.347-350.) This fundamental error by the circuit court, which decided the case both on jurisdictional grounds and on the merits, requires this Court to vacate the circuit court's decision and remand for further consideration.

A. The Circuit Court Erred When Dismissing the Case, With Prejudice, Both On Jurisdictional Grounds and On the Merits.

In both its oral and written rulings, the circuit court, the Honorable Katherine Sloma, presiding, began by addressing the issue of preemption. (*See* R.163, App.347-350 *and* R.161, App.337-346.) The circuit court concluded, in short, that "the Menominee Restoration Act preempts the Restrictive Covenant, and that the Restrictive Covenant is not enforceable to prevent restoration of land to the United States of America in trust for the Menominee Tribe where that land is within the area addressed by the Menominee Restoration Act." (R.163:3 at ¶ 7, App.349.) But despite this ruling on the merits based on preemption, the circuit court then went on to hold that "tribal sovereign immunity bars this suit against these defendants." (*Id.* ¶ 12.) Ultimately, the circuit court dismissed the case "on its merits" with prejudice, and ordered that judgment be entered accordingly. (R.163:3-

4, App.349-350.) But this raises the question: how could the circuit court dismiss a case on the merits, with prejudice, and enter judgment where it lacked jurisdiction to do so?

Under Wisconsin law, when the circuit court concluded sovereign immunity applied, the circuit court lacked personal jurisdiction. *See Timber & Wood Prods.*, 2018 WI App 6, ¶ 17 ("A motion to dismiss based on sovereign immunity challenges a court's personal jurisdiction."); *see also Pries v. McMillon*, 2010 WI 63, ¶ 20, n.11, 326 Wis. 2d 37, 784 N.W.2d 648 ("Sovereign immunity is . . . procedural in nature. . . . A successful motion to dismiss on sovereign immunity grounds deprives the court of personal jurisdiction over the defendant, i.e., the state.") And, when the circuit court lacked jurisdiction to entertain the matter, it could not proceed to issue a decision on the merits and enter judgment accordingly. *See e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *Matter of Commitment of S.L.L.*, 2019 WI 66, ¶ 13, 387 Wis. 2d 333, 929 N.W.2d 140 ("Personal jurisdiction" embodies the court's power over a party, without

which it can enter no valid judgment."); *West v. West*, 82 Wis. 2d 158, 167-68, 262 N.W.2d 87 (1978) ("Because personal jurisdiction was not acquired over the defendant ... the trial judge correctly concluded that the judgment ... was void.") Mr. Keshena and the Tribe's counsel agree. (R.160:9, App.291 ("If there is no jurisdiction, the Court can't proceed.").) Despite these fundamental principles, the circuit court proceeded to do so.

Although the circuit court indicated that its ruling on sovereign immunity was "separate[] and in addition" to its ruling on preemption when it dismissed the action on its merits, (R.163:3-4 at ¶ 13, App.349-350), in this case such an alternative ruling holds no weight. That is because the alternative rulings are diametrically opposed—in one scenario, sovereign immunity applies and the circuit court lacks jurisdiction to issue a ruling, but in the other, the circuit court has jurisdiction, and thus has the authority to proceed to the merits and judgment. The answer to the jurisdictional question, of course, must be one or the other. It cannot be both. Once the court concluded sovereign immunity applied, it should have simply announced that fact and gone no further on the merits. *See Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 822 (7th Cir. 2016) ("[N]o matter whether we give sovereign immunity the label 'jurisdictional' or not, it is

nevertheless a 'threshold ground[] for denying audience to a case on the merits.'"); *cf Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 520 (7th Cir. 2021) ("[S]overeign immunity . . . is a jurisdictional defense."). Therefore, if the circuit court's decision was correct on sovereign immunity grounds (it was not for reasons stated *infra*), it should not have also made a decision on preemption grounds. The circuit court should have simply dismissed the case without prejudice.[5]

B. The Circuit Court's Decision to Reconsider and Grant Mr. Keshena and the Tribe's Motion to Dismiss was Incorrect.

Notably, when reconsidering and granting Mr. Keshena and the Tribe's motion to dismiss, Judge Sloma did not take issue with Judge Habeck's initial decision denying the motion to dismiss. Instead, in her oral ruling, Judge Sloma remarked that, since Judge Habeck made his ruling, "new case law citing binding precedent" addressed the topics of sovereign immunity and federal preemption. (R.161:5 at 20-23, App.341.)

[5] When a court lacks jurisdiction the case should be dismissed without prejudice. *See, e.g., Lauderdale-El v. Indiana Parole Board*, 35 F.4th 572, 576 (7th Cir. 2022) ("Other kinds of dismissals without prejudice, however, signal clearly that the district court has finished with the case but is leaving open the possibility that the parties may pursue the dispute in another forum. Such judgments, typically based on a lack of subject-matter or personal jurisdiction or improper venue, are final for purposes of appeal. The rule in such cases is so well established that we rarely even comment on appellate jurisdiction.").

However, Judge Sloma, in dismissing the Association's claim, improperly relied on two cases that have absolutely nothing to do with sovereign immunity or federal preemption: *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020). Furthermore, Judge Sloma did not identify any binding precedent that supported her conclusions to reconsider Judge Habeck's initial decision denying Mr. Keshena and the Tribe's request for dismissal.

In her oral ruling, Judge Sloma cited *McGirt* for her decision on both sovereign immunity and preemption. (R.161:5-7, App.341-343.) But even a cursory reading of *McGirt* reveals that it dealt with neither sovereign immunity nor federal preemption. Indeed, a simple text search for the terms "sovereign immunity" and "preemption" yield no results within the majority opinion.[6] That is because *McGirt* is a case fundamentally concerned with reservation diminishment and disestablishment under the Major Crimes Act, not general notions of sovereign immunity or federal preemption.[7] *See*

[6] The terms "preempted" and "pre-empt" each appear one time in the dissent authored by Chief Justice Roberts. *See McGirt*, 140 S. Ct. at 2501, 2501 n.10 (Roberts, C.J., dissenting). Those brief appearances, however, are not relevant to the issue here.

[7] The Tribe improperly suggested to the circuit court that *McGirt* "directly addresses the preemption issues in this case." (R. 140:2 at ¶ 4, App.280.) It does not.

McGirt, 140 S. Ct. at 2459 ("Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.").[8]

Likewise, *Oneida Nation* also fails to provide any guidance. As was the case above, a search for the term "sovereign immunity" does not yield a single result. And although the Seventh Circuit briefly recites general preemption principles, it provides no substantive analysis, meaning *Oneida Nation* could not have provided any new law on which the circuit court could have relied upon to grant Mr. Keshena and the Tribe's motion for reconsideration for dismissal. *See Oneida Nation*, 968 F.3d at 688 ("The general rule is that state or local regulation of tribes on reservations is preempted by federal law . . . Under exceptional circumstances, however, a State may assert jurisdiction over the on-reservation activities of tribal members.") The Seventh Circuit's lack of discussion surrounding sovereign

[8] The circuit court's decision appears to also have been motivated, at least in part, by the belief that adjudication would somehow involve it in the adjustment of the Menominee Reservation's borders. (R.161:8-9, App.344-345) ("So as per *McGirt*, the Court has no proper role in the adjustment of reservation borders."). But the specific issue in this case is not whether the court should be involved with the adjustment of reservation borders, but rather whether the Restrictive Covenants recorded on the Properties are valid and enforceable.

immunity and federal preemption makes sense because, as was the case in *McGirt*, *Oneida Nation* was a case concerned with reservation diminishment and disestablishment. *See id.* ("The Reservation was created by treaty, and it can be diminished or disestablished only by Congress. Congress has not done either of those things."). Therefore, to the extent the circuit court relied upon *McGirt* and *Oneida Nation* to support its conclusion that Mr. Keshena and the Tribe are entitled to sovereign immunity and that the Restrictive Covenants are preempted by the Act, such reliance is wholly erroneous. Neither case provides any guidance on sovereign immunity or preemption.

C. Judge Habeck's Decision to Deny the Motion to Dismiss Was Correct.

As noted, the circuit court's initial decision denying Mr. Keshena and the Tribe's motion to dismiss was correct. In his written order, Judge Habeck concluded that the *in rem* exception to sovereign immunity was applicable and that *Timber & Wood Products*, 2018 WI App 6, was distinguishable. (R.25:2 at ¶ 2, App.277.) Judge Habeck further held that the Restrictive Covenants were not preempted by federal law, finding *Baylake Bank v. TCGC, LLC*, 2008 WL 4525009 (E.D. Wis. Oct. 1, 2008) persuasive. (R.25:3 at ¶ 5, App.278.) In both his oral and written decisions, Judge Habeck thoroughly and cogently explained the reasoning behind his

conclusions. (*See* R.20:65-72, App.266-273; R.25, App.276-278.) Because no new law is controlling, these conclusions should not have been disturbed.

II. THE TRIBE AND MR. KESHENA DO NOT ENJOY SOVEREIGN IMMUNITY FROM THE RESTRICTIVE COVENANTS RECORDED AND BINDING ON THE PROPERTIES.

Tribal sovereign immunity is not absolute. It is derived from common law. *See Santa Carla Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018) (stating the United States Supreme Court has recognized "the sovereign authority of Native American tribes and their right to the common-law immunity from suit traditionally enjoyed by sovereign powers.") Because tribal sovereign immunity is derived from common law, it is not mandated. *Lundgren*, 138 S. Ct. at 1662 (Thomas, J., dissenting) ("Tribal immunity is 'a judicial doctrine' that is not mandated by the Constitution.") (citing *Kiowa Tribe of Okla. v. Mfg. Techns., Inc.*, 523 U.S. 751, 759 (1998)). And, because it is derived from common law, common law exceptions to sovereign immunity may apply, *see, e.g.*, *Lundgren*, 138 S. Ct. at 1654 (leaving open the question of whether the immovable property exception applies), and, such immunity

also may be waived. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Mr. Keshena and the Tribe are not immune from suit concerning the Association's request to declare the validity and enforceability of the Restrictive Covenants on the Properties because (1) the proceeding is *in rem* and sovereign immunity does not apply; (2) alternatively, the immovable property exception to sovereign immunity applies; and (3) to the extent sovereign immunity does apply, it has been waived.

A. Tribal Sovereign Immunity Does Not Apply to *In Rem* Proceedings.

As a general rule, an *in rem* proceeding "exercises jurisdiction over property, rather than persons" and its "essential function . . . is the determination of title to or the status of property located within the court's jurisdiction." 3 Wis. Prac. Civ. Pr. § 104.4 (4th ed.).

Wisconsin courts have not decided whether tribal sovereign immunity applies to an *in rem* proceeding that does not involve the taking of property. Instead, this Court has held – on much narrower grounds – that sovereign immunity prevents a party from bringing an *in rem* claim when seeking to take away and recover tribal property. *See Timber & Wood Prods.*, 2018 WI App 6, ¶ 1. Given this narrow holding, this Court should hold similar to

Judge Habeck, that under the facts of this case, sovereign immunity is not applicable when the *in rem* claim solely seeks to determine the validity and enforceability of recorded rights attached to that property. (*See* R.20:66, App.267.)

1. This Court's holding in *Timber & Wood Products* was limited to a claim seeking to take away and possess tribal property.

Both the facts and holding in *Timber & Wood Products* are distinguishable from the present case. In that case, the DNR sought to acquire a lien on timber and wood products on tribal property, which this Court reasoned would indisputably require a "physical invasion" on the land and interference with the tribe's "possession of its own property." 2018 WI App 6, ¶ 42. Accordingly, this Court held "the Tribe's sovereign immunity prevents the DNR from bringing an in rem claim pertaining to the timber and wood products located on the Tribe's property." *Id.* ¶ 1. That claim brought by the DNR, which amounted to a taking and possession of the Tribe's property in the form of timber and wood products, is not the same as the claim the Association brings against Mr. Keshena and the Tribe, which asks

the circuit court to declare that the Restrictive Covenants recorded on the Properties are valid and enforceable.

Moreover, the cases relied upon in *Timber & Wood Products* all involved the taking or possession of tribal property – whether in the form of a physical invasion or the direct claim for ownership of certain lands. *See* 2018 WI App 6, ¶¶ 32-34 (referring to foreclosure proceedings and right to use proceedings). Likewise, two other cases the Court found persuasive, *Zych v. Wrecked Vessel Believed to be the Lady Elgin,* 960 F.2d 665 (7th Cir. 1992) and *California v. Deep Sea Research, Inc.,* 523 U.S. 491 (1998), also involved dissimilar claims concerning the ownership and possession of shipwrecks. *See* 2018 WI App 6, ¶¶ 40-42.

This case is different. The Association does not seek to take ownership or possession to the Properties. Rather, the relief sought is a declaration that the Restrictive Covenants, which were recorded prior to Mr. Keshena acquiring the Properties, are valid and enforceable.

For those reasons, as Judge Habeck initially and correctly decided, the *Timber & Wood Products* case is not applicable here. (R. 25:2, App.277.)

2. The United States Supreme Court's decision in *Upper Skagit Indian Tribe v. Lundgren* left unresolved whether tribal sovereign immunity applies to *in rem* claims.

While this Court's decision in *Timber & Wood Products* discussed an *in rem* proceeding under the facts involving a claim for taking and possessing tribal property, much of that discussion considered the parties' reliance on the United States Supreme Court's decision in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Since *Timber & Wood Products* was decided, the United States Supreme Court in *Lundgren* granted certiorari to "set things straight" as to its decision in *Yakima*, which concerned a tax imposed on tribal fee land. *See* 138 S. Ct. at 1651. In *Lundgren*, the Court held that the Washington Supreme Court's rejection of the Upper Skagit tribe's claim for sovereign immunity based on *Yakima, see* 187 Wash. 2d 857 (2017), was an error because "*Yakima* did not address the scope of tribal sovereign immunity." *Id.* at 1652-53 (reasoning *Yakima* "resolved nothing about the law of sovereign immunity."). The Court determined that *Yakima* was limited to a "question of statutory interpretation concerning the Indian General Allotment Act of 1887," and accordingly, vacated and remanded the Washington Supreme Court's decision for further consideration. *Id.* at 1652, 1655. Consequently,

the United States Supreme Court in *Lundgren* left open the general question of whether sovereign immunity applied to *in rem* proceedings.

Even putting aside *Yakima*, however, other state courts across the nation have held sovereign immunity does not bar *in rem* proceedings – independent of those cases' reading of *Yakima*. *See, e.g., Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 ND 83, ¶¶ 19-20 (2002) (holding *in rem* condemnation action not barred by sovereign immunity as "the power to condemn does not depend upon the consent or suitability of the owner," and relying on *State of Georgia v. City of Chattanooga,* 264 U.S. 472 at 482, 44 S. Ct. 369 (1924) (holding State of Georgia did not enjoy sovereign immunity after purchasing property in State of Tennessee)); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation,* 130 Wash. 2d 862, 869-74 (1996) (reasoning, independent of *Yakima*, that "[b]ecause the res or property is alienable and encumberable . . . it should be subject to a state court *in rem* action . . . . Reacquisition of a portion of the land by a federally recognized Indian tribe does not alter this result because tribal reacquisition of fee land does not affect the land's alienable status."); *Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot.,* 78 So. 3d 31, 33-34 (Fla. Ct. App. 2011); *Smale v. Noretep,* 150 Wash.

App. 476 (2009). While these cases relied, in part, on *Yakima*, their holdings were not limited to such and clarification of *Yakima* does not change their results. Moreover, these decisions have not been overruled by the United States Supreme Court in *Lundgren* or any other court. Notwithstanding the prior review of those cases in *Timber & Wood Products*,[9] this Court should reexamine those state court cases in light of the similar facts of the present case. *See, e.g.*, *Anderson*, 130 Wash. 2d at 872-73 (reasoning plaintiff's "quiet title and partition action involves a much less intrusive assertion of state jurisdiction over reservation fee patented land than was involved in *County of Yakima*" and plaintiff's "action in this case involves no taking of property. It merely seeks a judicial determination" of interests.). This Court should hold that the circuit court erred, and that sovereign immunity does not bar the Association's declaratory judgment claim.

B. The Immovable Property Exception to Sovereign Immunity Applies to Bar the Immunity Defense.

The circuit court erred by failing to consider the immovable property exception. Because this Court's review is independent of that of the circuit

[9] This Court in *Timber & Wood Products* declined to follow the holdings of *Cass County*, *Miccosukee Tribe*, and *Anderson*. 2018 WI App 6, ¶ 31. Instead, this Court relied upon cases holding that the competing interpretation of *Yakima* applied. *See id.* ¶¶ 31, 38. Either way, *Yakima* should not be the primary focus.

court's, this Court should follow the guidance of United States Supreme Court Justice Clarence Thomas and hold that the immovable property exception applies to bar the Tribe's defense of sovereign immunity because the proceeding concerns the determination of rights in property held by a sovereign – the Tribe. The Tribe should not be permitted to assert immunity to preclude an action in the courts of Wisconsin involving interests in land that is subject to the jurisdiction of Wisconsin. Yet, that is precisely what the Tribe seeks do.

Whether the immovable property exception to sovereign immunity applies to a proceeding concerning land owned by a tribal member or tribe is an unanswered question under both federal and Wisconsin law. *See Lundgren*, 138 S. Ct. at 1654 ("We leave it to the Washington Supreme Court to address these arguments in the first instance.").[10] Similar to the common law grant of sovereign immunity, the immovable property exception to sovereign immunity also has a long history of being recognized under common law. *See Lundgren*, 138 S. Ct. at 1655 (Roberts, C.J., concurring);

[10] After remand, on September 19, 20218, the Washington Supreme Court terminated its review. *See Lundgren v. Upper Skagit Indian Tribe,* Case No. 91622-5, *available at* https://dw.courts.wa.gov/index.cfm?fa=home.casesearch&terms=accept&flashform=0&tab=clj (last visited October 12, 2022).

Cayuga Indian Nation of N.Y. v. Seneca Cnty., N.Y., 978 F.3d 829, 836 (2nd Cir. 2020)[11] (collecting cases). Under this centuries' old rule, when a sovereign acquired property that was subject to another sovereign's jurisdiction, that property was treated as if it were owed by a private individual. *Cayuga*, 978 F.3d at 836 (citing *Schooner Exch. v. McFadden*, 11 U.S. (7 Cranch) 116, 145 (1812)). The party asserting jurisdiction or a competing right to the property had a basic interest in determining any dispute as to the sovereign's competing claims to a right or interest of the property in that jurisdiction. *See Cayuga*, 978 F.3d at 836-37. That is because it has long been recognized that when sovereign owns real property that is subject to another's jurisdiction, that sovereign "must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 374 (2nd Cir. 2006), *affirmed*, 551 U.S.

[11] In the circuit court Mr. Keshena and the Tribe claimed *Cayuga* rejected the immovable property exception. (R.140:2 at ¶ 6, App.280.) The Second Circuit did not. Instead, it declined to decide the question and determined that the foreclosure actions instituted by the county were more akin to a money judgment. *See Cayuga*, 978 F.3d at 840 ("[w]e need not—and do not—decide whether an analogous exception limits the scope of tribal sovereign immunity from suit.").

Similarly, the circuit court's reliance on *Cayuga* for its holding being "essentially that sovereign immunity applies to in rem or foreclosures . . . ." was also erroneous. (R. 161:8, App.344.) The word "in rem" does not appear in the *Cayuga* decision, and the Second Circuit specifically stated that it need not decide whether other exceptions limit the scope of sovereign immunity from suit. *See Cayuga*, 978 F.3d at 840.

193 (2007); *see also City of Chattanooga*, 264 U.S. at 480 (reasoning "[l]and acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership.").

In *Lundgren* Justice Thomas was of the opinion that the United States Supreme Court should have applied the well-established immovable property exception to bar the Upper Skagit tribe's claim of sovereign immunity; reasoning that the exception "plainly extends to tribal immunity, as it does to every other form of sovereign immunity." 138 S. Ct. at 1657. Justice Thomas defined the exception as follows:

> The immovable-property exception has been hornbook law almost as long as there have been hornbooks. For centuries, there has been uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property.
>
> …
>
> The immovable-property exception is a corollary of the ancient principle of *lex rei sitae.* Sometimes called *lex situs* or *lex loci rei sitae*, the principle provides that "land is governed by the law of the place where it is situated." It reflects the fact that a sovereign "cannot suffer its own law . . . to be changed" by another sovereign. As then - Judge Scalia explained it is "self evident" that "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." And because "land is so indissolubly connected with the territory of a State," a State "cannot permit" a foreign sovereign to displace its jurisdiction by purchasing land and then claiming "immunity." An assertion of immunity by a foreign sovereign over real property is an attack on the sovereignty of "State of the situs."
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> …
>
> The Restatement of Foreign Relations Law reflects this unbroken consensus. Every iteration of the Restatement has deemed a suit

> concerning the ownership of real property to be "outside the scope of the principle of [sovereign] immunity of a foreign state."

Id. at 1658-60.

Justice Thomas reasoned the exception's application to tribes was "clear" while recognizing the majority's concern that applying it might be a "grave question" that "will affect all tribes, not just the one before us." *Id.* at 1657. By leaving the question unanswered, however, Justice Thomas reasoned "it casts uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories." *Id.*

In the present case, this Court should heed the United States Supreme Court's deference for a state court to decide the issue, and in doing so, this Court should follow the guidance of Justice Thomas and apply the immovable property exception. According to Justice Thomas, "the immovable-property exception clearly applies to both state and foreign sovereign immunity" and because the United States Supreme Court has "refused to extend tribal immunity 'beyond what common-law sovereign immunity principles recognize,'" this exception "obviously applies to tribal immunity." *Id.* at 1656, 1661 (quoting *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017)). In short, if this Court were to hold otherwise, that the immovable property exception does not apply and tribes are not subject to

the same sovereign immunity principles as other sovereigns, it would contradict bedrock principles and create a "clearly erroneous tribal-immunity claim: one that asserts a sweeping and absolute immunity that no other sovereign has ever enjoyed—not a State, not a foreign nation, and not even the United States." *Id.* at 1662-63.

Mr. Keshena and the Tribe may try to claim that the California State Court of Appeals case in *Self v. Cher-Ae Heights Indian Cmty. Of Trinidad Rancheria*, 60 Cal. App. 5th 209 (2021) is dispositive of the immovable property exception. While *Self* did decline to apply the exception, the court clarified its reasoning on the basis that "the facts of th[e] case make it a poor vehicle for extending the immovable property rule to tribes." *Id.* at 221.

In *Self*, the question presented was whether sovereign immunity barred a quiet title action to establish a public easement for costal access on property owned by an Indian tribe that was petitioned to be held in trust. *Id.* at 212. But two problems persisted: (1) the claimed harm was speculative (plaintiffs argued that the Tribe may in the future decline the public access), and (2) the plaintiffs sought to take away part of the Tribe's land. *Id.* at 214-15, 222. Neither of those two facts are present here. Rather, (1) the Association will be harmed if their Restrictive Covenants are deemed

invalid and unenforceable as to the Properties, and (2) the Association does not seek to take away or possess the Properties of the Tribe. In the present case, the Association seeks to determine its rights, pursuant to the Restrictive Covenants, in the Properties.

While common law provides for the exception, the Act also provides for it. In the explicit language of the Act, suit against the Properties is allowed – even after being transferred to trust: "The land transferred . . . *shall be subject to foreclosure or sale* pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin." (Act, § 6(c), App.354.) Despite this clear language in the Act allowing such actions—actions that even other courts have determined were subject to tribal immunity (e.g., foreclosure)—the circuit court erred by not considering an immovable property exception. This Court should follow the centuries long guidance under the immovable property exception as well as the persuasive rationale of Justice Thomas; tribal sovereign immunity is no different that foreign or State sovereign immunity. Because the immovable property exception fits well with the facts of this case, the circuit court's decision should be vacated and remanded.

C. Sovereign Immunity Was Waived Under the Clear Language of the Restrictive Covenants When the Properties Were Acquired By Mr. Keshena.

Another way the circuit court erred was determining that the Tribe's sovereign immunity was not waived. Tribal sovereignty can be, and in the present case was, waived by the Tribe. *C & L Enters., Inc.*, 532 U.S. at 418. *See also Oglala Sioux Tribe v. C & W Enters.,* 542 F.3d 224 (8th Cir. 2008); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.,* 86 F.3d 656, 661 (7th Cir. 1996).

When Mr. Keshena acquired the Properties on behalf of the Tribe, the Tribe became subject and agreed to the immunity waiver and exclusive forum provisions in the Restrictive Covenants. Article 4G of the Restrictive Covenants provides:

> Waiver of Defense. By acceptance of a deed transferring title ownership of any portion of the Subject Real Estate, the title owner waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity, and expressly consents to suit as provided for in Paragraph 4F above, and enforcement of any judgment rendered therein.

(R.1:17, App.017.)

Article 4F of the Restrictive Covenants also provided for exclusive venue in the Menominee County Circuit Court "and any purchaser and/or transferee of the land that is a party to any such action, by accepting the deed

thereto, consents to the exclusive jurisdiction and venue of such court (and the appropriate appellate courts therefrom) in any such action or proceeding and waives any objection to jurisdiction and venue laid therein." (*Id.*) Mr. Keshena and the Tribe do not dispute this language, nor do they dispute that they had notice of this language. (R.20:56 at 20-22, App.257.)

In a similar situation, in *C & L Enterprises,* the United States Supreme Court considered the issue of whether a tribe had waived its immunity from suit when it agreed to arbitrate disputes, to the governance of Oklahoma law, and to the enforcement of arbitral awards "in any court having jurisdiction thereof." 532 U.S. at 414. The Court ultimately held "that, by the clear import of the arbitration clause, the [t]ribe is amenable to a state-court suit . . . ." *Id.* The Court reasoned the arbitration clause "would be meaningless if it did not constitute a waiver of whatever immunity [the tribe] possessed." *Id.* at 422.

While the waiver in *C & L* did not specifically use the words "waiver of sovereign immunity," such language is explicitly found in the Restrictive Covenants binding on the Properties; meaning, the waiver of sovereign immunity via the Restrictive Covenants is even stronger than the facts presented and found to be a waiver in *C & L Enterprises.* The Tribe, of

course, rejects any waiver based on the Restrictive Covenants. The Tribe argues it was not the grantee of any of the Properties and, therefore, was not a contracting party which could be subject to a contractual waiver of sovereign immunity. (R.16:17, App.037.) While it is true that all the Properties were acquired by Mr. Keshena, the Tribe also argues that Mr. Keshena was authorized by the Tribe and acting in his official capacity to acquire the Properties with the objective of ultimately placing them in trust for the benefit of the Tribe. (R.16:17-19, App.037-039.) Indeed, the Menominee Tribal Legislature Resolution cited by the Tribe, which authorizes the appointment of Mr. Keshena, expressly provides that "all such authorized conveyances shall be of the same effect and force as if made to the Menominee Indian Tribe of Wisconsin." (R.15-4, 6, App.062, 064) Thus, the Tribe is not a stranger to the transaction.

For sake of argument, assuming that the Tribe is not a sufficient owner of the Properties – per its conflicting contention that it "has never accepted a deed to any of the properties at issue, and it is not now, and never has been, the title owner of any of the properties," (R.16:17, App.037) – the Tribe must then at least be a third-party beneficiary of Mr. Keshena's acquisitions.

Under Wisconsin law, the third-party beneficiary doctrine, provides that "when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act," is a third-party beneficiary. *State Dep't of Pub. Welfare v. Schmidt,* 255 Wis. 452, 455, 39 N.W.2d 392 (1949). The third-party beneficiary takes the right subject to all the terms and conditions of the contract creating the right. *See e.g., City of Mequon v. Lake Estates Co.,* 52 Wis. 2d 765, 773, 190 N.W.2d 912 (1971). Accordingly, the Tribe is bound by the Restrictive Covenants' sovereign immunity waiver as a third-party beneficiary of the transactions under which Mr. Keshena acquired the Properties.[12] Because there was a clear waiver of sovereign immunity in the Restrictive Covenants, the circuit court's decision was erroneous.

[12] The Tribe may also argue that Mr. Keshena, acting within his agency, was not authorized to make such a waiver per the Tribe's resolution granting him authority to receive title to the Properties. (*See* R.15:4, 6, App.62, 64.) However, the Tribe cannot distance itself from the Restrictive Covenants' waiver of sovereign immunity on that ground, while it contemporaneously claims Mr. Keshena properly acquired the Properties for the Tribe's benefit of later planned transfers into federal trust. Moreover, the authorization specifically provides that Mr. Keshena on behalf of the Tribe can acquire title in his individual name. (*Id.*) This would include the Restrictive Covenants. Because the Tribe tries advance inconsistent positions, the Tribe should be estopped from making such arguments in which the Tribe is acquiescing in, and enjoying the benefits of, a transaction, and then rejecting the accompanying burdens, i.e., the Restrictive Covenants. *See* 28 Am. Jur. 2d, *Estoppel and Waiver*, § 14. *See also Carter Oil Co. v. Delworth,* 120 F.2d 589 (7th Cir. 1941) ("Obviously, one purchasing land subject to an outstanding interest is estopped to deny its validity"); *Phillips Petroleum Co. v. Taggart,* 271 Wis. 261, 275, 73 N.W.2d 482 (1955) ("Generally speaking, a party will not be permitted to occupy inconsistent positions or to

D. Mr. Keshena, an Individual, Is Subject to the Association's Declaratory Judgment Claim.

Assuming, *arguendo*, that the Tribe is correct in asserting that Mr. Keshena did not waive the Tribe's sovereign immunity, it must follow then that Mr. Keshena was not acting as the Tribe's agent and he, individually, is subject to the circuit court's jurisdiction. In other words, because Mr. Keshena was acting in his individual capacity, as opposed to his official capacity for the Tribe, he is not entitled to tribal sovereign immunity. *See Clarke*, 137 S. Ct. at 1288 (holding that, "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated."). United States Supreme Court precedent establishes that, in the context of sovereign immunity, "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Id.* at 1290 (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). In making this assessment, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Clarke*, 137 S. Ct. at 1290.

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take a position in regard to a matter which is directly contrary to or inconsistent with one previously assumed by him").

As was true in *Clarke*, "[t]he distinction between individual- and official- capacity suits is paramount here." *Id.* at 1291. An official-capacity claim seeks relief "only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id.* Personal-capacity suits, on the other hand, "seek to impose *individual* liability upon a government officer for actions taken under the color of state law." *Id.* (emphasis in original). Officers sued in their individual capacity, then, come before the court as individuals and are the real party in interest. *Id.* Whereas officers in official-capacity actions may assert sovereign immunity, officers in individual-capacity actions may not. *Id.* All of the foregoing applies with equal force to tribal sovereign immunity as it does to other forms of sovereign immunity. *Id.*

In this case, the relief sought is narrow and easily definable—the Association seeks a declaration that the Restrictive Covenants are valid and enforceable as to the owners of the Properties. Importantly, and regardless of his motivation for doing so, Mr. Keshena took title to the Properties as an individual. Put simply, the relief sought has nothing to do with the Tribe and everything to do with Mr. Keshena, or more appropriately, the Properties

themselves. *See supra* Section II.A (discussing sovereign immunity claims are not applicable to *in rem* proceedings).

Furthermore, the relief sought by the Association "will not require action by the sovereign or disturb the sovereign's property." *Id.* (quoting *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 687 (1949)). This proposition is self-explanatory: a declaration of validity and enforceability would not require the Tribe to take any action or disturb its property because the Properties are Mr. Keshena's, not the Tribe's. Therefore, because this suit has been brought against Mr. Keshena in his individual capacity, and because Mr. Keshena, and not the Tribe, is the real party in interest, Mr. Keshena is not entitled to sovereign immunity and is subject to the jurisdiction of the circuit court. The circuit court erred by holding Mr. Keshena was entitled to immunity. (*See* R.163:3 at ¶ 9, App.349.)

III. THE RESTRICTIVE COVENANTS ARE NOT PREEMPTED.

Despite incorrectly determining that sovereign immunity applied,[13] the circuit court also erroneously held the Restrictive Covenants were

[13] For the reasons stated in Section I.A., if the Court determines Mr. Keshena and the Tribe enjoy sovereign immunity, the Court should still remand with directions to (1) vacate the circuit court's decision and judgment on the issue of preemption, and (2) dismiss the case for lack of jurisdiction without prejudice.

preempted by the Menominee Restoration Act. (R.163:3, App.349.) Specifically, the circuit court stated:

> The Court holds that the Menominee Restoration Act preempts the Restrictive Covenant, and that the Restrictive Covenant is not enforceable to prevent restoration of land to the United States of America in trust for the Menominee Tribe where that land is within the area addressed by the Menominee Restoration Act.

(*Id.* ¶ 7.) The circuit court, however, provided little to no analysis as to *why* or *how* the Act preempted the Restrictive Covenants,[14] nor did it look at the express language of the Act. For the reasons set forth below, the circuit court erred in concluding that the Restrictive Covenants are preempted by the Act.

A. The Act Does Not Preempt the Restrictive Covenants.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Fortunately, in this case, the question of preemption has been answered by Congress's own language – the Act specifically allows for the Restrictive Covenants.

Section 6(c) of the Act provides in full:

> (C) The Secretary shall accept the real property (excluding any real property not located in or adjacent to the territory constituting, on the effective date of this Act, the County of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners. Such property shall be subject to all valid

[14] Importantly, the doctrine of preemption takes many forms: express, field, and conflict. The circuit court made no effort to define the type of preemption that applied. In any event, regardless of how one may attempt to frame the preemption issue in this case, one thing is clear: the Act does not preempt the Restrictive Covenants under any form.

> existing rights including, but not limited to, liens, outstanding taxes, (local, State, and Federal), mortgages, and any other obligations. The land transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin. Subject to the conditions imposed by this subjection, the land transferred shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their reservation. The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred shall be under this section shall, as of the date of transfer, be exempt from all local, state, and federal taxation.

(Act, § 6(c), App.354.) Under this Section, the Act provides for the transfer of real property owned by Menominee Tribe members to the Secretary of the Interior, *subject to all valid existing rights and any other obligations* – such as the Restrictive Covenants.

Vitally, the Act contains several important phrases that demonstrate the lack of preemption. First, the Act states that "[s]uch property shall be *subject to all valid existing rights* including, but not limited to, liens, outstanding taxes (local, State and Federal)[,] mortgages, and *any other obligations*." (*Id.*) The terms "valid existing rights" and "any other obligations" are certainly broad enough to, and do, encompass the Restrictive Covenants. Second, the Act expressly reserves that the transferred land may be subject to *foreclosure* or *sale pursuant to the terms of existing obligations and in accordance with the of the State of Wisconsin*. Therefore, per this explicit language, the Act cannot possibly preempt the Restrictive

Covenants, because the Act itself specifically dictates that the property, even after it is taken into trust, is subject to all valid, existing rights and obligations, which includes the possibility of claims for foreclosure and sale, in accordance with the laws of the State of Wisconsin.

Given the text of the Act, Congress could not have intended to preempt the Restrictive Covenants at issue. The Act itself contemplates such restrictions on the land being transferred. And because "the purpose of Congress is the ultimate touchstone in every pre-emption case," this Court should conclude that the Restrictive Covenants are not preempted. *Wyeth,* 555 U.S. at 565 (2009) (discussing preemption doctrine).

Moreover, this understanding of the Act is confirmed by the fact that the Bureau of Indian Affairs ("BIA") notified its intent to accept the Properties into trust. (R.14:53-55, App.117-119.) Certainly, if the Act preempted the Restrictive Covenants, the BIA would have noted such a conflict in its decisions. It did not. This is further evidence that the already recorded Restrictive Covenants do not run afoul of the Act or any other provision of federal law. *See Friends of East Willits Valley v. Cnty. of Mendocino*, 101 Cal. App. 4th 191, 201 (2002) ("We hold that federal law

does not void prior restrictions on land agreed to before the land passed into trust.")

In sum, the Restrictive Covenants are not preempted by federal law. For one, Mr. Keshena and the Tribe seek to utilize the doctrine of preemption to invade a valid and enforceable private agreement, despite the fact that courts are cautioned against using preemption principles to do just that. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).[15] More importantly, the text of the Act leads to the exact opposite conclusion: the Restrictive Covenants are expressly permitted under Section 6(c), indicating that Congress did not intend for valid, existing obligations to be disregarded. Relying on the plain text of the Act, this Court should reverse the circuit court's decision and hold that the Restrictive Covenants are not preempted by the Act.

[15] Courts are also cautioned not to supersede the States' historic police powers by federal law, which includes the area of property law. *See e.g.*, *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) ("This court has explained that the presumption against preemption is applicable to 'areas of law traditionally reserved to the states, like police powers and property law.'").

B. *Baylake Bank* Provides Persuasive Authority for Why Federal Indian law Policy Does Not Preempt the Restrictive Covenants.

In addition to the Act's express language mandating that preemption does not apply here, in *Baylake Bank v. TCGC, LLC*, Judge Griesbach of the Eastern District of Wisconsin encountered a similar issue, albeit under the Indian Reorganization Act ("IRA"), Pub. L. 73-383, 48 Stat. 984 (1934). There, the court reviewed a restrictive covenant with the following language:

> *Restriction on Transfer*. Without the express written consent of the Village of Hobart, no owner of any interest in the Subject Real Estate ... shall transfer any interest in the Subject Real Estate to any individual, entity, ... organization, or sovereign nation, or during the period of ownership take any action the result of which would: (1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls of the Village of Hobart; (2) diminish or eliminate the payment of real estate taxes levied or assessed against the Subject Real Estate (or any part thereof) and / or (3) remove the Subject Real Estate (or any part thereof) from the zoning authority and / or jurisdiction of the Village of Hobart.

Baylake Bank, 2008 WL 4525009, at *1, *see also* App.355. The court determined that the restrictive covenant – which had substantially identical language to the ones in the present case – were not preempted by Federal Indian law under the IRA. *Baylake Bank*, 2008 WL 4525009, at *7-8, App.360-361.

In a well-reasoned decision, Judge Griesbach noted that, while a typical preemption argument involves an assertion that a state law or regulation is preempted by federal law, the Bank was attempting to argue that

a *private contract*, the restrictive covenant, was preempted by federal law. *Id.* at *7, App.360. Judge Griesbach recognized that "[s]uch an argument fits less snugly within the traditional considerations involved in the preemption doctrine, as the argument is not targeted at a specific law or claim apart from the state's general law of contracts or property (which would otherwise allow enforcement of the covenant)." *Id.* And "[a]lthough Congress possesses power to preempt even the enforcement of contracts about intellectual property . . . or railroads . . . courts usually read preemption clauses to leave private contracts unaffected." *See id.* (citing *Wolens*, 513 U.S. 219 (1995) and *Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

Next, Judge Griesbach noted that the IRA had "nothing whatsoever to say about how private entities go about creating property rights, even when those rights may have collateral effects on other parties who would otherwise be able to invoke the federal system." *Baylake Bank*, 2008 WL 4525009, at *8, App.360-361. And, just because "[t]he fact that the covenants might effectively decide the question before it may even be brought to the Secretary does not mean that their enforcement is inconsistent with the IRA and its regulations." *Id*. at *8, App.361. Ultimately, Judge Griesbach held that "nothing in the IRA affect[ed] the ability of private entities to enter into a

covenant that runs with the land, even though the covenant may adversely impact a given tribe's desire to purchase that land." *Id.* at *9, App.361.

Although the instant issue requires an analysis of the Menominee Restoration Act, Judge Griesbach's decision in *Baylake Bank* provides persuasive guidance for this case. As in *Baylake Bank*, the preemption challenge here centers not around a state law or regulation, but around a private agreement: the Restrictive Covenants. Mr. Keshena and the Tribe do not contend that it is a state law or regulation that must be preempted, but a valid and agreed-upon restrictive covenant. The mere fact that the private agreement has taken center stage in the context of federal Indian law does not mean it is entitled to any less deference than if it were raised in a more common area of federal law. *Cf. Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2494 (2022) ("State sovereignty does not end at a reservation's border."). As the Seventh Circuit has counseled, and as Judge Griesbach adhered to, courts typically construe preemption principles to leave such private agreements unaffected. This Court should do the same.

Judge Habeck correctly decided the Act does not preempt the Restrictive Covenants, and denied Mr. Keshena and the Tribe's motion to dismiss. (R.25:3, App.278.) However, Judge Sloma's decision

reconsidering that denial and then dismissal of the case on the merits on preemption grounds was an error. The Act expressly permits the Restrictive Covenants at issue in this case, and *Baylake Bank* provides helpful guidance.

CONCLUSION

The circuit court erred when dismissing the Association's complaint for declaratory judgment and entering judgment on the merits in favor of Mr. Keshena and the Tribe based on sovereign immunity and preemption grounds. Sovereign immunity does not apply to Mr. Keshena or the Tribe, and if it does, it was waived.[16] Additionally, the Restrictive Covenants are not preempted by the Menominee Restoration Act. Congress has said so. The case should be remanded for further proceedings after the circuit court's decision is reversed and the judgment is vacated.

[16] Alternatively, if the Court concludes there is sovereign immunity, the Court should still remand with directions for the circuit court to vacate from the decision and judgment its preemption holding. Under well-established rules of procedure, the circuit court should not decide a case on the merits while at the same time finding it lacked jurisdiction. *See supra* Section I.A.

Respectfully submitted this 12th day of October, 2022.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 10,604 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2022, I personally caused copies of the Opening Brief of Plaintiff-Appellant, Legend Lake Property Owners Association, Inc., to be served on counsel via the court's e-filing system.

Dated this 12th day of October, 2022.

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