No. 14-2150

In the
United States Court of Appeals
for the Seventh Circuit

STIFEL, NICOLAUS & COMPANY, INC., et al.,

Plaintiffs-Appellees,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:13-cv-00372-wmc.
The Honorable **William M. Conley**, Judge Presiding.

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Appellate Court No: 14-2150

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JURISDICTIONAL STATEMENT

1. Appellate Jurisdiction

On May 16, 2014, the district court denied the Lac du Flambeau Band of Lake Superior Chippewa Indians' ("the Tribe") and Lake of the Torches Economic Development Corporation's ("the Corporation") (together "the Tribal Parties") sovereign-immunity defense. On the same day, the district court also granted a preliminary injunction to Stifel, Nicolaus & Co., Inc., Stifel Financial Corp. (together "Stifel"), Saybrook Fund Investors, LLC,[1] LDF Acquisition, LLC (together "Saybrook"), and Wells Fargo Bank, N.A. ("Wells Fargo"), but denied Godfrey & Kahn, S.C.'s ("Godfrey") (collectively "the Tribal-Court Defendants") preliminary-injunction motion.

The Tribal Parties filed a timely notice of appeal on May 23, 2014. This Court has jurisdiction over this appeal from the final order of May 16, 2014 denying the sovereign-immunity defense under 28 U.S.C. §1291 and granting a preliminary injunction under 28 U.S.C. §1292(a)(1).

2. District Court Jurisdiction

The district court lacked subject-matter jurisdiction. After the Tribal Parties sued the Tribal-Court Defendants in the Lac du Flambeau Tribal Court, the Tribal-Court

[1] Saybrook Fund Investors, LLC alleges it is successor to Saybrook Tax Exempt Investors, LLC.

Defendants filed suit in the district court seeking a declaration that the tribal court lacked jurisdiction over them. SA-0020, ¶68.[2]

Although the existence and extent of a tribal court's jurisdiction "is one that must be answered by reference to federal law and is a 'federal question' under §1331," *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852, 855-56 (1985), the Tribal-Court Defendants' complaint did not allege facts demonstrating a lack of tribal-court jurisdiction under federal law. Instead, the district-court complaint sought to enforce forum-selection clauses which purportedly provided "that disputes arising out of the Transaction would proceed outside tribal court." SA-0006, ¶18; *see also* SA-0006-10, ¶¶19-25. Even if the Tribal-Court Defendants had accurately described the forum-selection clauses (they did not), such provisions as a matter of law cannot "oust" the tribal court of jurisdiction, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972), or confer jurisdiction on the district court. "[U]nder *National Farmers*, the determination of the existence of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (1st Cir. 2000).

[2] Citations to the Circuit Rule 30(a) Short Appendix are "A-_." Citations to Appellants' Separate Appendix are "SA-_." When applicable, citations to the Short Appendix and Separate Appendix will also contain a pincite to the relevant section, paragraph, or page(s) and line(s) as designated in the original document. Citations to documents in the Record on Appeal are "Doc._," referencing the CM/ECF System Document Number.

The district court based its exercise of subject-matter jurisdiction on the Tribal-Court Defendants' "motions for preliminary injunction." A-50, n.8. But the well-pleaded-complaint rule confines the search for federal-question jurisdiction to the face of the complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 10 (1983) (citing *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914) (whether federal question exists ". . . must be determined from what necessarily appears in the plaintiff's statement of his own claim[.]")).

STATEMENT OF THE ISSUES

1. Whether the district court violated the Supreme Court's rule "requir[ing] that the issue of jurisdiction be resolved by the tribal courts in the first instance," *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 19 (1987), when it enjoined the Tribal Parties from proceeding in the earlier-filed tribal-court action, barring the tribal court from determining its jurisdiction.

2. Whether federal law permits the tribal court to exercise jurisdiction over the Tribal-Court Defendants who contracted with the Tribal Parties and engaged in conduct on tribal trust land as part of a bond transaction, when the transaction may violate tribal law and, if enforced, would threaten the viability of the tribal government.

3. Whether purported sovereign-immunity waivers in certain transaction documents are void under the Indian Gaming Regulatory Act ("IGRA"), or otherwise unenforceable.

STATEMENT OF THE CASE

This case is the latest in a series of lawsuits stemming from a bond transaction executed in January 2008 ("Bond Transaction"). This Court previously held that the trust indenture governing the Bond Transaction ("the Indenture") was an unapproved management contract under IGRA, 25 U.S.C. §§2710(d)(9), 2711(a)(1), and therefore void *ab initio*. *See Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 699 (7th Cir. 2011).

I. The Bond Transaction.

The Bond Transaction was Stifel's idea, not the Tribe's. SA-1003, 28:16-29:17. In 2005, a developer wanting to build a riverboat casino and hotel in Mississippi known as Grand Soleil-Natchez contacted Stifel Vice-President David Noack about financing the project. SA-1002, 24:4-23; SA-1007, 44:19-23. The developer sought "a partner with gaming experience and money." SA-1002, 25:3-12. Noack used his tribal contacts to pitch the project to the Tribe. SA-1002, 24:18-23. Noack's then subordinate was another Stifel Vice-President, Kevin Shibilski. SA-1003, 27:17-25.

Beginning in 2005, Stifel persuaded the Tribe to invest over $16.3 million in the project. SA-1162-63, 59:20-60:5. Unbeknownst to the Tribe, however, Shibilski also began investing in the project in 2005 and eventually acquired a seven-figure stake. SA-

0755-68; *see also* SA-0770-912 (Tax Returns).[3] Shibilski never disclosed his substantial investment in the project to the Tribal Parties, who learned of it only after they executed the Bond Transaction. SA-0401, ¶17; SA-1095-96.

By 2007, the Grand Soleil-Natchez project remained unbuilt and needed money. SA-0398, ¶6. Shibilski, Stifel's "relationship lead" with the Tribe, suggested the Tribal Parties invest more money into the project while refinancing existing debt. SA-0398, ¶7; SA-1004, 33:5-22. Stifel considered the Grand Soleil-Natchez project "part and parcel" of its discussions with the Tribe regarding the Bond Transaction. SA-1003, 27:9-14.

A. Stifel Brokers the Bond Transaction.

On May 29, 2007, a team from Stifel, including Shibilski and David DeYoung, a Senior Vice-President, traveled to the Tribe's Reservation for the first of five in-person meetings with Tribal officials (all on tribal trust land) regarding what would become the Bond Transaction.[4] SA-1002-03, 28:16-31:15. At that meeting, Stifel presented its opinions and projections on the project's budget, what tribal debt should be refinanced, and the amount of debt the Tribe could afford. SA-1003-04, 28:25-30:3. After that meeting, Shibilski negotiated with tribal officials regarding Stifel's fees for the Bond

[3] After their motion to dismiss was denied, on February, 12, 2014, the Tribal Parties filed an answer, affirmative defenses and conditional counterclaims, preserving their immunity defense, claiming, *inter alia*, that Stifel fraudulently induced their assent to the Bond Transaction. SA-0680.

[4] DeYoung assumed oversight of the Bond Transaction shortly after Noack left Stifel in 2007. SA-1003, 27:15-25. DeYoung was deposed on March 3, 2014 during the one-month timeframe allotted for pre-hearing discovery. SA-0996.

Transaction and reached an agreement with the Tribe to broker the Bond Transaction. SA-1004, 31:16-32:14.

Shibilski and DeYoung returned to the Tribe on September 25, 2007 to present tribal officials with proposals from two parties, including Saybrook, interested in funding the Bond Transaction. SA-1005, 35:6-25. Saybrook proposed the Tribe issue $50 million in bonds. SA-1005, 35:18-36:10; SA-1005-06, 37:15-38:1. Based on Stifel's analysis, the Tribe authorized Stifel to proceed with Saybrook, and Stifel then circulated an "Executive Summary" to the Tribal Parties and Saybrook outlining the preliminary terms of the Bond Transaction. SA-1006, 41:5-15; SA-1008, 47:18-24; SA-0976-95. The terms included the Corporation's pledge of all Casino revenues to the bondholders if it did not meet its obligations, along with a mortgage of all the Casino's furniture, fixtures, and equipment, including gaming machines. SA-0980.

B. Saybrook Enters Tribal Trust Land to Conduct Due Diligence.

In November 2007, Saybrook principal Scott Bayliss visited tribal trust land with Shibilski, DeYoung, and another Stifel representative. SA-1008, 48:13-23. Bayliss' visit to the Tribe was part of Saybrook's due diligence on the Bond Transaction—in DeYoung's words, to "kick the tires" on the Tribe's Casino, Saybrook's proposed security in the deal. SA-1008, 49:8-19.

After Bayliss' due diligence, Saybrook insisted that the Bond Transaction include provisions allowing it to exercise control over Casino management if the Tribal Parties

defaulted or did not meet certain revenue requirements specified in the Bond Transaction. SA-0914-24. Indeed, Bayliss emailed Stifel to insist that these management covenants be inserted in the Indenture. SA-0914-24.

C. Godfrey Served as the Tribe's General Counsel and Bond Counsel.

Godfrey partner Brian Pierson was the Tribe's general counsel when the parties negotiated and executed the Bond Transaction. SA-1061-63. At the time, Pierson was also a member of the tribal-court bar. SA-1061, ¶7.

Godfrey also served as bond counsel to the Bond Transaction. SA-0926-27. In this dual capacity, Godfrey drafted the Bond Transaction documents and authored an Issuer Opinion Letter and Bond Counsel Opinion Letter (collectively "the Bond Documents"). SA-0926-39. Godfrey opined, *inter alia*, that the Tribal Parties' waivers of sovereign immunity were valid, that the Bond Documents were not "management contracts" under IGRA, and thus the Bond Transaction did not require review or approval by the National Indian Gaming Commission ("NIGC"). SA-0935-37, ¶¶29, 31. As discussed below, Godfrey's opinions proved to be wrong.

D. Stifel, Through Shibilski, Repeatedly Lied to the Tribal Parties About the Terms of the Bond Transaction to Induce Their Assent.

On January 2, 2008, Shibilski (for Stifel) and Pierson (for Godfrey) attended a joint meeting of the Tribal Parties on tribal trust land concerning whether to approve the Bond Transaction. *See* SA-1104-1293. DeYoung did not attend. SA-1011, 59:19-60:5. At the meeting, which was recorded, Shibilski made a series of representations to the

Tribal Parties that Stifel has since conceded were false or misleading in order to persuade them to approve the Bond Transaction.

First, Shibilski informed the Tribal Parties that Stifel had analyzed the projected cash flow of the Project, and that Saybrook looked to the project's cash flow as security for the Bond Transaction: "[o]ur analysts look at your existing [Casino] cash flow as well as the projected cash flow of your investment in Natchez and it is all of that that's securing the bond buyer who is willing to invest as your partner . . ." SA-1129, 26:9-14. Yet when Stifel was asked in deposition "did Stifel do the analysis on the level of cash flow that would be generated by Grand Soleil-Natchez?" Stifel answered: "[w]e did not."[5] SA-1022, 105:19-22. In fact, Stifel did not perform *any* due diligence on the project and admitted it was in not in a position "to advise the tribe on the risks or benefits or wisdom of investing in the Grand Soleil project." SA-1011, 58:17-23. Stifel also admitted that "[t]here's a factual misstatement here by [Shibilski] that . . . the investor in these bonds, was taking comfort in the Natchez's ability to make loan payments to the [Corporation], that is not an accurate description of this—of the bond transaction." SA-1021, 100:15-22.

Second, Shibilski promised the Tribal Parties that the Grand Soleil project would yield "substantial positive profit margin." SA-1130, 27:12-17. Stifel later stated,

[5] DeYoung testified as a FRCP 30(b)(6) witness on behalf of both Stifel entities. SA-0998, 6:7-9.

however, that it "[didn't] know where [Shibilski] got that information." SA-1021, 99:15-100:7.

Third, Shibilski assured the Tribal Parties that the Bond Transaction would provide "positive arbitrage, which is greater interest than you're paying going back to the tribe as well as a million dollars." SA-1116-17, 13:18-14:5. A Tribal Council member asked Shibilski for clarification: "[s]o we need to borrow $20 million so they will give us a kick back of $1 million?" Shibilski assured the Tribe it would receive "[m]any more millions than that—you have a 1.5 percent positive arbitrage, so you may get something like $3 million a year." SA-1135, 32:8-12. The Tribal Council member inquired, "[s]ome day?" to which Shibilski replied, "[n]o, no, no immediately." SA-1135, 32:13-14. Asked in deposition what Shibilski was referring to by this promise, Stifel's representative answered, "I don't know," and commented on Shibilski's "inability to properly do the math." SA-1022, 105:8-18.

Fourth, Shibilski reassured the Tribal Parties that if they approved the Bond Transaction "[t]he net effect is that you will have cash, the debt [the Tribe was refinancing] will be at the same rate you are at now, plus you get the million dollars." SA-1240, 137:5-7. Stifel, though, admitted that if Shibilski was "referring to the rate that they were currently paying on the debt that was refinanced, the [Bond Transaction] increased the interest rate. It was not at the same rate." SA-1026, 120:14-20. In fact, the Bond Transaction's interest rate was 12%—a higher rate than any of the debt being

refinanced under the Bond Transaction. SA-0399, ¶13b. And Stifel likewise conceded there was no basis for Shibilski's statement the Tribe would get cash plus a million dollars. SA-1026, 120:2-4.

Fifth, Shibilski pressured the Tribal Parties by advising that failing to execute the Bond Transaction would have dire consequences for the Tribe's investment in the Grand Soleil project: "You will absolutely kill the project . . . anybody who walked in this room would know that you would instantly endanger or jeopardize your money invested so far." SA-1164, 61:2-7. When later deposed, however, Stifel again admitted that "[Shibilski's] drawing conclusions that would be outside the scope of [Stifel's] normal—our role as placement agent" and that Stifel provided no information to Shibilski to enable him to make that statement. SA-1023, 107:23-108:15.

Sixth, Shibilski admonished the Tribal Parties that if they did not approve the Bond Transaction: "[y]ou are going to ruin not only your project, but you are going to ruin your partner's project if you do nothing . . . [t]hat's a fiduciary fact, and I am obliged to tell you that." SA-1187, 84:11-14. Shibilski told the Tribe that one of its business partners in the project, Bill Bayba, "is immediately on the hook for that too, with you, as 50/50 partners . . . [y]ou have a very good partner, Mr. Bayba." SA-1186, 83:16-20. What Shibilski failed to disclose was that Bayba was *his* partner and that Shibilski stood to lose *his* investment if the Tribe failed to execute the Bond Transaction. SA-0755-68, SA-0776, SA-0815, SA-0848, SA-0888. Stifel's representative confirmed that Shibilski's

statements were outside of the proper scope of Stifel's role in the Bond Transaction and that he had no obligation, fiduciary or otherwise, to make those statements. SA-1023, 109:4-20.

Seventh, Shibilski assured the Tribal Parties that the loans from the Bond Transaction would be "secured debt . . . [s]o should there not be sufficient funds, you have recourse." SA-1131, 28:3-13. But DeYoung admitted at the Stifel deposition that he "didn't know how the loan to Grand Soleil was being secured," "did not know everything that [Shibilski] was discussing with regard to this transaction," and "Stifel did not know those things either." SA-1022, 103:6-10, 104:8-11.

Lastly, Shibilski represented to the Tribal Parties that "$30 million of this [Bond Transaction] is refinancing [of existing debt]." SA-1177, 74:12-13. In fact, only $12 million of the bond proceeds refinanced the Tribal Parties' existing debt; the rest was directed to the Grand Soleil project and absorbed by fees. SA-0399-400, ¶13d.-f.

Stifel summarized its position on Shibilski's on-reservation misrepresentations by conceding "[w]e would have liked him to be more careful in his responses" and "I wouldn't say we're fine with the [representations Shibilski made to the Tribal Parties]." SA-1024, 113:9-24.

On the basis of Shibilski's misrepresentations, the Tribal Parties voted to approve the Bond Transaction at the end of that January 2, 2008 meeting. SA-0400-01, ¶¶16-18.

Shortly afterwards, tribal officials executed the Bond Transaction on the Tribe's reservation. SA-1053, SA-1078.[6]

II. The Disastrous Consequences of the Bond Transaction.

A. The Tribal-Court Defendants Controlled the Bond Transaction Proceeds.

The Corporation issued $50 million in bonds with a 12% interest rate and the Tribe guaranteed the Corporation's Bond debts. SA-0399-400, ¶¶12, 13b, 13j. Stifel purchased the Bonds and immediately resold them to Saybrook, which retained $5.5 million of the Bond proceeds and disbursed the remaining $44.5 million. SA-0399, ¶13d. Approximately $32 million of the Bond proceeds were directed to the Grand Soleil project. SA-0399, ¶¶13c, 13e. Stifel and Godfrey retained $375,000 and $125,000 respectively as their fees for the transaction. SA-0400, ¶13f-g. Only about $12 million of the Bond proceeds refinanced existing tribal debt—at a higher rate than they were paying before. SA-0399-400, ¶13. The Tribal Parties received no cash from the Bond Transaction. *See* SA-0399-400, ¶13.

B. The Bond Payments Consume the Tribal Government's Finances.

The Bond Transaction had disastrous results for the tribal government, which is funded primarily by Casino revenue and depends on annual transfers totaling between

[6] The Closing Index for the Bond Transaction binder contains a Schedule of Closing Documents consisting of twenty-two Bond Documents. SA-0395-96.

$17 and $18 million. SA-0338, ¶6. The Bond Transaction pledged all of the gross revenue from the Casino as security, and the Corporation could not distribute any money to the Tribe until the monthly Bond payments were satisfied. SA-0400, ¶13h-i. The Casino deposited its gross revenues into a tribal bank account from which Wells Fargo as trustee swept the Bond payments—approximately $782,000 per month. SA-0339-40, ¶¶7-11; SA-0543, §2. Per the Bond Transaction's terms, Wells Fargo also held certain funds for the benefit of the Casino's operation, and the Corporation had to ask Wells Fargo to disburse these funds to the Casino's operating account. SA-0339-40, ¶9.

Contrary to Shibilski's representations to the Tribal Parties, the Grand Soleil-Natchez project was never completed and never generated revenue for the Tribal Parties. SA-0401, ¶21. By the end of 2008, the Corporation was already struggling to make payments under the Bonds. SA-0342, ¶¶17-18. The Bond payments consumed so much of the Casino's revenue that the Corporation was unable to transfer sufficient funds to the Tribe. SA-0342, ¶¶17-25. For example, in fiscal year 2008, the Corporation transferred to the Tribe only about half the funds expected. In 2009 it only transferred $4 million to the Tribe, 80% less than ordinary budget expectations. SA-0343, ¶22-24. As a result, the tribal government struggled to maintain essential government services. SA-0341, ¶15, SA-0342, ¶21, SA-0346, ¶28.

In fact, the Tribal Council considered shutting down the tribal government because it could not afford to keep open the Tribal Government Center and pay the

governmental staff. SA-0401, ¶20. In addition to layoffs and staffing cuts, the Tribe was forced to make severe cuts to governmental programs, including to law enforcement and health-and-welfare benefits programs. SA-0343-46, ¶26a-y. Further, if the bondholders obtain judgment for the entire remaining principal and interest due under the Bonds, the Casino would be unable to fund the tribal government, forcing it to shut down. SA-0341-42, ¶¶15, 17.

In 2009, the Tribal Parties met with Saybrook representatives, including Bayliss, to explain the Bond payments' crippling effects on tribal-government services and attempt to restructure the Bonds. SA-0346, ¶27. Saybrook refused to renegotiate. SA-0346, ¶27. By that point, the Corporation had already paid over $17 million on the Bonds and could no longer afford to make the Bond payments. SA-0339-40, ¶¶7-8, 11. When Casino officials stopped making daily deposits into the Wells Fargo-controlled account, Saybrook directed Wells Fargo to bring suit to enforce the Indenture. SA-1088, ¶3.

III. The Litigation and Tribal-Court Case.

Per Saybrook's instructions, Wells Fargo, as trustee, sued the Corporation in the district court for breach of the Indenture and sought appointment of a receiver to manage the Casino on the bondholders' behalf. *See Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 685-86 (7th Cir. 2011). The district court held that it lacked jurisdiction because the Indenture was a void unapproved management

contract, and thus the Corporation's waiver of sovereign immunity in the Indenture was also void. This Court affirmed that decision. *Id.* at 702.

The district court also held that Wells Fargo's attempt to amend its complaint to enforce other Bond Documents was futile, reasoning that the waivers of sovereign immunity in the other Bond Documents were void because the "documents are interdependent and support but one basic transaction, of which the Indenture was a crucial part." *Id.* at 701. This Court reversed that aspect of the district court's holding and remanded, stating that it "believe[d] that the district court's reliance on this ground was premature," because these issues "are not susceptible to resolution on the face of the amended complaint, and Wells Fargo's opportunity to file a reply brief was not an adequate opportunity for the thorough litigation required to resolve them." *Id.*

On remand, Wells Fargo (and Saybrook) filed an amended complaint naming the Tribe and other parties and causes of action not authorized by the district court's remand order, prompting the court to issue a show-cause order why Wells Fargo should not be sanctioned. Doc. 54-9. Wells Fargo and Saybrook also filed a nearly-identical suit in Wisconsin state court. SA-0479-529. Wells Fargo then dismissed the remanded district-court case and filed a new complaint in the district court alleging that court lacked subject-matter jurisdiction because it presented only state-law breach-of-

contract claims. SA-0581-627. The district court agreed, dismissing that complaint for lack of subject-matter jurisdiction.[7] Doc. 54-11. The state-court case remains pending.

In April 2013, the Tribal Parties filed suit against the Tribal-Court Defendants in tribal court seeking a declaration that the Bond Documents were void under IGRA and tribal law. SA-0289-322. The Tribal-Court Defendants moved to dismiss for lack of jurisdiction in the tribal court contending, *inter alia*, that purported forum-selection clauses in the Bond Documents precluded tribal-court jurisdiction. A-46.

The tribal court denied those motions on August 27, 2013, preliminarily finding that it had personal and subject-matter jurisdiction based on the allegations of the complaint. SA-0638-43. The tribal court further found the other Tribal-Court Defendants did not show—in the context of the motion to dismiss—that the forum-selection clauses precluded tribal-court jurisdiction, (SA-0645-59), but held open the issue of its jurisdiction "due to the relative dearth of jurisdictional facts," and asked for additional factual support to resolve the issue. SA-0671-72.

IV. The District-Court Injunction Giving Rise to this Appeal.

On the same day that they filed their motions in tribal court to dismiss the Tribal Parties' case for lack of jurisdiction, the Tribal-Court Defendants filed suit in the district court seeking a declaration "that the Tribal Court lacks subject-matter jurisdiction over

[7] The instant complaint similarly seeks to enforce contractual forum-selection clauses in the Bond Documents. SA-0001-22.

[the Tribal-Court Defendants] and the Tribal Court Action" and injunctive relief "enjoining [the Tribal Parties] from proceeding against [the Tribal-Court Defendants] in the Tribal Court." SA-0021.

Following briefing and a hearing, the district court issued an order ("the Order") holding that: (1) the Tribal Parties had waived their sovereign immunity; (2) comity did not require the Tribal-Court Defendants to exhaust tribal-court remedies; and (3) the Tribal Parties are preliminarily enjoined from proceeding against Stifel, Saybrook and Wells Fargo.[8] *See generally*, A-29-80. The district court also found it had supplemental jurisdiction over Godfrey's contract-based claim, but denied Godfrey's preliminary-injunction motion. A-66.

Regarding sovereign immunity, the district court found that two Bond Documents—the Tribal Resolution and Bond Resolution—broadly waived the Tribal Parties' immunity from suit by any party for any claim related to the Bond Transaction. A-42-45. The district court also held that the Resolutions were enforceable under IGRA. A-45-46.

With respect to the tribal-court-exhaustion doctrine, the district court observed that "a tribal court should be given the opportunity to determine its jurisdiction first, before this court weighs in," but nonetheless held that because the Bond Documents contained

[8] No party posted a bond, nor did the Order fix a bond amount, as required under FRCP 65(c). A-80.

forum-selection clauses, exhaustion was unnecessary under *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993). A-46-48.

Finally, the district court held that Stifel, Saybrook and Wells Fargo would likely succeed on the merits of their claim that the tribal court lacked jurisdiction over them because their contacts with the Tribal Parties, including their on-reservation conduct, were insufficient to demonstrate such jurisdiction over them under federal law. A-50-61.

The district court never distinguished or mentioned the tribal court's jurisdictional analysis or its conclusion that one of the forum-selection clauses in the Bond Documents expressly permits a tribal-court action. A-29-80. It also did not acknowledge that the tribal-court action included significant questions of tribal statutory and constitutional law. A-29-80. Nor did it consider the Tribal Parties' claim that the Bond Documents and their waivers of sovereign immunity, even if not void as part of an unapproved management contract under IGRA, were fraudulently induced and unenforceable. A-29-80.

This appeal followed.[9] The tribal and district courts have stayed their cases pending this appeal, but the state court did not.

[9] The Tribal Parties appeal the Order and all prior rulings of the district court including its Order denying the Tribal Parties' motion to dismiss. A-01-23.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court, vacate the Order, and dismiss this case, or, alternatively, direct that the case be stayed while the Tribal-Court Defendants exhaust their tribal-court remedies.

First, the Order unlawfully invades tribal sovereignty by denying the tribal court the opportunity to determine its own jurisdiction in the first instance, contrary to Supreme Court precedent requiring tribal-court exhaustion. Should this Court reverse the district court on this basis, it need go no further to resolve this appeal, because all of the remaining questions would first be decided by the tribal court.

Second, the Order incorrectly held that the tribal court likely lacked jurisdiction. The Order ignores the undisputed consensual business relationships between Stifel, Saybrook, Wells Fargo and the Tribal Parties, the evidence of significant conduct by those parties on tribal trust land, and the devastating impact the Bond Transaction had and will have on the tribal government. Because the tribal court's exercise of jurisdiction over the Tribal-Court Defendants satisfies the requirements of federal law, this Court should reverse the district court and vacate the Order.

Third, the Order incorrectly held the Tribal Parties waived their sovereign immunity in the Tribal and Bond Resolutions without first determining whether those documents were enforceable. The open question regarding the enforceability of the

Resolutions—on the existing record of fraud alone—requires the dissolution of the injunction and dismissal of the Tribal Parties from this case.

Fourth, the Order incorrectly held the Tribal and Bond Resolutions contained waivers of the Tribal Parties' sovereign immunity that are valid under IGRA, misapplying this Court's holding in *Wells Fargo v. Lake of the Torches*, 658 F.3d 684 (7th Cir. 2011). Because there is no valid waiver of sovereign immunity, the Tribal Parties are immune from this suit, so this Court should vacate the Order and dismiss this case.

ARGUMENT

I. This Court Should Dismiss, or Alternatively, Stay the District-Court Case and Require the Tribal-Court Defendants to Exhaust their Tribal-Court Remedies.

When, as here, a pending tribal-court case is "challenged by a later-filed action in federal court[,]" the Supreme Court's "tribal exhaustion rule" applies. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993) (citations omitted). The exhaustion rule "requires that jurisdictional issues be resolved by the tribal courts in the first instance" and instructs a federal court to "stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction." *Iowa Mut.*, 480 U.S. at 16, 19 (quotation omitted).[10] The district court did not stay its hand to permit the tribal court to

[10] There are only four exceptions to the exhaustion rule, but the Order does not hold that any apply. *See Iowa Mut.*, 480 U.S. at 19 n.12 (allowing exceptions to tribal-court exhaustion only where (1) "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith[;]" (2) "where the action is patently violate of express jurisdictional prohibitions[;]" or (3) "where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction.") (internal quotation omitted); *Strate v. A-1 Contractors*, 520 U.S. 438, 459

determine its own jurisdiction. Rather, it ignored the tribal court's forty-eight-page decision weighing Tribal-Court Defendants' jurisdictional contacts with the Tribe, prevented the tribal court from concluding its jurisdiction analysis, and bypassed the exhaustion requirement altogether. A-46-48. Because the district court did not follow the tribal exhaustion rule, it must be reversed. *See e.g.*, *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014).

This Court reviews the district court's exhaustion decision *de novo*. *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1301-02 (9th Cir. 2013); *Valenzuela v. Silversmith*, 699 F.3d 1199, 1205 (10th Cir. 2012); *Garcia v. Akwesanse Housing Auth.*, 268 F.3d 76, 79 (2d Cir. 2001). Exhaustion is a threshold, non-merits issue, so by correcting the district court's error this Court would resolve this appeal without reaching more "arduous inquir[ies]" presented by the merits of this case. *Valenzuela*, 699 F.3d at 1204-05 (10th Cir. 2012).

A. *Altheimer* Requires Tribal-Court Exhaustion of this Case.

The district court erroneously interpreted *Altheimer* to excuse exhaustion whenever a tribal party consents to be sued in a non-tribal forum—regardless of whether there is a tribal-court case pending. A-46-48. *Altheimer* says no such thing and acknowledged that

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n.14 (1997) (adding exception (4) "when it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule," so exhaustion "would serve no purpose other than delay.").

controlling law requires tribal-court exhaustion where, as here, a tribal court's jurisdiction is challenged by a later-filed federal action. *Altheimer*, 983 F.2d at 814 (observing that other circuits require exhaustion even absent a first-filed tribal-court case).

Comparing this case to *Altheimer*, the district court found "no material difference in the facts of these cases." A-47. In *Altheimer*, however, "there ha[d] been no direct attack on a tribal court's jurisdiction, there [wa]s no case pending in tribal court, and the dispute d[id] not concern a tribal ordinance as much as it d[id] state and federal law." *Altheimer*, 983 F.2d at 814. This case is a direct attack on the pending tribal-court case. SA-0020-21. This fact alone distinguishes *Altheimer*.[11] *Bank One, N.A. v. Shumake*, 281 F.3d 507, 515 n.32 (5th Cir. 2002) (finding *Altheimer* inapplicable where tribal-court case is pending); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 396 n.6 (E.D. Wis. 1995) (same); *accord Garcia*, 268 F.3d at 83 ("If a tribal proceeding were pending, our analysis might well be different.").

Not only was the tribal-court case pending, the Tribal-Court Defendants appeared and filed motions to dismiss in the tribal court raising the same issues as in their federal complaint. SA-0629-33. The tribal court issued a lengthy, thoughtful opinion denying

[11] This Court's only other exhaustion case and the only other case on which the district court relied, A-47, are inapposite for the same reason. *See Jackson v. Payday Financial, LLC*, __ F.3d __, 2014 WL 4116804, *12 (7th Cir. 2014); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1232-33 (8th Cir. 1995).

the motions that the district court disregarded. SA-0628-75. The district court's decision to ignore the tribal court's opinion defied the federal policy of "encouraging tribal self-government" by allowing the tribal court "'to determine its own jurisdiction.'" *Altheimer*, 983 F.2d at 813 (quoting *Iowa Mut.*, 480 U.S. at 11).

Also, in *Altheimer* the district court had jurisdiction over the underlying dispute and the question was whether to keep the case in federal court or order the plaintiff to commence a new suit in tribal court.[12] *Id.* at 808. Here, in contrast, the district court previously determined it lacks jurisdiction to hear Saybook's contract claims, *Saybrook Tax Exempt Investors, LLC v. Lake of Torches Econ. Dev. Corp.*, 929 F. Supp. 2d 859, 866 (W.D. Wis. 2013), and the only question is the tribal court's jurisdiction.

Atheimer is further distinguishable because the tribal-court action raises significant issues of *tribal* law. Tribal law regulates the Casino "in accordance with the Indian Gaming Regulatory Act," so an unapproved management contract violates both IGRA and tribal law. SA-0430, §40.103. Moreover, the Tribe's federally approved constitution allows the Tribal Council to "pledge tribal assets . . . 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[,]" SA-408, art. VI, § 1(v). These conditions precedent to the Bond Transaction did not occur. The tribal-court action seeks to enforce

[12] In *FGS Constructors* and *Jackson*, too, the federal courts took jurisdiction over the underlying claims and exhaustion only arose as a defense to those claims. *Jackson*, 2014 WL 4116804, at *2; *FGS Constructors*, 64 F.3d at 1232-33.

these laws, SA-0316-19, and the Supreme Court has clearly stated that "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut.*, 480 U.S. at 16. This Court agrees exhaustion is appropriate in suits where tribal ordinances are at issue, as here. *Altheimer*, 983 F.2d at 814. The district court's decision to halt the tribal-court action leaves the Tribal Parties without a forum to address important tribal-law questions, making exhaustion a "necessity." *Altheimer*, 983 F.2d at 814 (citing *Burlington N. R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) ("[T]he Crow tribe must itself interpret its own ordinance and define its own jurisdiction.").

Finally, in *Altheimer* the tribal corporation "explicitly agreed to submit" to the jurisdiction and venue of the Illinois courts. *Altheimer*, 983 F.2d at 815. "[W]here venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced[.]" *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006). In contrast, the forum-selection clauses here did not specify venue, so they "d[id] not mean that the tribal court necessarily *lacks* jurisdiction." A-67-68 (emphasis in original); *accord Stifel, Nicolaus & Co., Inc. v. Lac Courte Oreilles Band of Lake Superior Chippewa of Wis.*, 13-cv-0012, #76 ("LCO Order"), at 11 (W.D. Wis. June 19, 2014) (identical language in a similar transaction "neither authorizes nor precludes litigation in the [tribal court].").

For all these reasons, the district court misapplied the law and facts of *Altheimer* and its exhaustion decision must be reversed.

B. The Factual Circumstances of this Case Require Exhaustion.

"[T]o determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine[,]" it is "necessary to examine the factual circumstances of each case." *Altheimer*, 983 F.2d at 815. Here, the tribal-court action implicates the heart of reservation affairs—the validity of a fraudulently induced Bond Transaction executed in violation of both tribal and federal law, which, if enforced, will consume the tribal Casino's revenues and cripple the tribal government. SA-0295-309; SA-0340-46. In contrast, *Altheimer*'s $167,000 breach-of-contract claim did not threaten the Tribe's economic independence or tribal government. *Altheimer*, 983 F.2d at 807, 814.

Moreover, appellate courts across the country have found exhaustion especially appropriate where, as here, a dispute concerns:

- Tribal actors, *e.g.*, *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420 (8th Cir. 1996) (tribal entities and members); *U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987) (tribal housing authority);
- Tribal immunity, *Nat'l Farmers,* 471 U.S. at 855–56; *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999); *Stock W. Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992);
- Tribal business partners, *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61, 66 (2d Cir. 1997); and

- Disposition of on-reservation tribal resources, *Ninigret Dev. Corp.*, 207 F.3d at 32; *Basil Cook,* 117 F.3d at 66.

All these issues are present here, rendering this case "a reservation affair entitled to the exhaustion doctrine." *Altheimer*, 983 F.2d at 814.

C. Federal Policies Require Exhaustion Here.

The district court's decision also ignored important federal policies not at issue in *Altheimer*, but served by tribal-court exhaustion in this case. Exhaustion is a comity doctrine, and, unlike in *Altheimer* where there was no pending tribal-court action, the district court here owed comity to the tribal court. *Iowa Mut.*, 480 U.S. at 16. The tribal court—not the district court—should have been allowed to interpret the forum-selection clauses in the first instance. *Ninigret Dev. Corp.*, 207 F.3d at 33.

Similarly, bypassing exhaustion placed the federal court "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs[,]" which is exactly what the Supreme Court has cautioned against. *Altheimer*, 983 F.2d at 815 (quoting *Iowa Mut.*, 480 U.S. at 16). Heedless of the warning, the district court disregarded the tribal court's rulings and made contrary rulings:

- *After* the tribal court determined that the Bond Documents do not divest the tribal court of jurisdiction, SA-0643-59, the district court held that they did. A-48.

- *After* the tribal court determined that the Tribe's 1854 Treaty supports its jurisdiction over the tribal-court action, SA-0660-67, the district court held that it did not. A-51-52.
- *After* the tribal court determined that it could assert jurisdiction over the Tribal-Court Defendants under federal law, SA-0639-43, SA-0659-74, the district court held that it likely could not. A-50-61.
- *After* the tribal court denied the Tribal-Court Defendants' motions to dismiss the tribal-court action (which seeks a declaration concerning the validity of the Bond Documents under federal *and* tribal law), SA-0675, the district court found two of the Bond Documents were valid, substituting its judgment for the tribal-court's and disregarding the still-open issues of tribal law. A-46.

Thus, the district court usurped the tribal court's role.

The district court's exhaustion analysis also undermines other policies furthered by the exhaustion rule, such as federal "respect for tribal legal institutions." *Iowa Mut.*, 480 U.S. at 16. By ignoring the tribal-court decision regarding the scope of its jurisdiction, the district court ran roughshod over the tribal court's "vital role in self-government" defying the federal policy of encouraging tribal-court development. *Iowa Mut.*, 480 U.S. at 14. Moreover, whereas the Supreme Court has relied on and cited the scholarly works of the judge presiding over the tribal-court action, the district court dismissed him as a "blogger[,]" ignoring his extensive experience and scholarship. *Compare Michigan v. Bay*

Mills Indian Cmty., ___ U.S. ___, 134 S. Ct. 2024, 2044-45 (2014) (Sotomayor, J., concurring) *with* A-35.

Finally, exhaustion in this case will further federal courts' institutional interests. "Allowing tribal courts to make an initial evaluation of jurisdictional questions serves several important functions, such as assisting in the orderly administration of justice, providing federal courts with the benefit of tribal expertise, and clarifying the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation." *Colombe*, 747 F.3d at 1024 (citing *Nat'l Farmers Union*, 471 U.S. at 845, 856-57). By halting the tribal-court action, the district court prevented the tribal court from developing the factual record and its analysis of relevant tribal law, disregarding the "strong federal policy concerns favor[ing] resolution in the nonfederal forum." *Iowa Mut.*, 480 U.S. at 16 n.8.

"Until petitioners have exhausted the remedies available to them in the tribal court system, it [was] premature for a federal court to consider *any* relief." *Nat'l Farmers*, 471 U.S. at 857 (emphasis added). Accordingly, this Court should reverse the district court and require exhaustion.

II. The Tribal Court has Jurisdiction over the Tribal-Court Action.

The district court's decision that the tribal court lacked jurisdiction is premised on erroneous interpretations of federal law governing the scope of the tribal court's jurisdiction. The Order disregards the Tribe's retained Treaty rights, which allow the

tribal court to exercise jurisdiction over the Tribal-Court Defendants. The Order misinterprets the main rule of *Montana v. United States*, 450 U.S. 544, 557 (1981), which presumes a lack of tribal-court jurisdiction over nonmembers *unless* they are engaging in conduct on tribal *trust* land. The Order also incorrectly held that both exceptions to that rule, allowing tribal-court jurisdiction over nonmembers: (1) with consensual business relationships to the Tribe; and (2) who engage in conduct threatening political integrity, economic security, health and welfare of Tribe, were inapplicable. *Id.* This Court reviews the district court's decision to enjoin the Tribal Parties from proceeding with their tribal-court case *de novo*. *United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers*, 243 F.3d 349, 361 (7th Cir. 2001) ("[A] preliminary injunction that is premised on an error of law is entitled to no deference and must be reversed."); *Water Wheel Camp Rec. Area v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) ("A decision regarding tribal court jurisdiction is reviewed *de novo*.").

A. The Tribal Court has Jurisdiction Based on the Tribe's Treaty Rights.

The district court disregarded the Tribe's treaty rights when it held that the tribal court likely lacked jurisdiction over Stifel and Saybrook under *Montana*. This was error. *Strate*, 520 U.S. at 449 (*Montana* only applies "in the absence of a delegation of tribal authority by treaty or statute.").

The Tribe's Reservation was created by the Treaty with the Chippewa in 1854. SA-0364, ¶3. Under the treaty, the Tribe retained the right to exclude nonmembers from its

reservation. SA-0366, ¶11. The Supreme Court has held that this right includes "the lesser power to place conditions on entry, on continued presence, or on reservation conduct," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982), and a tribe retains this power even if it is not specifically reserved in a contract. *Id.* at 147. The Tribe's right to regulate on-reservation conduct is co-extensive with its adjudicatory jurisdiction over that conduct. *Strate*, 520 U.S. at 453.

The district court ignored this precedent when it found "no logic in the assertion that because defendants retain the power to *exclude* nonmembers from their reservations, they necessarily have the power to hale them *into* tribal court." A-52. The logic is straightforward: if a tribe can regulate a nonmember through legislation, it can enforce that legislation by haling the nonmember into tribal court. *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 938 (8th Cir. 2010).

No party contested the Tribe's treaty rights in this case. The district court acknowledged them, but opined that "nonmember conduct on tribal land surrounding the issuance of the Bonds at issue here is virtually non-existent, making . . . any claimed treaty right inapplicable." A-52. That conclusion is unsustainable. As shown above, the Tribal-Court Defendants all engaged in substantial conduct on tribal land that directly resulted in the Bond Transaction. *See supra* at 7-15.

The tribal-court action seeks to regulate this conduct by enforcing the Tribe's Gaming Ordinance and Constitution. SA-0316-22. The Tribe's Gaming Ordinance regulates all facets of Indian gaming, including management contracts and licensing of management officials. *See generally* 25 U.S.C. §2710; SA-0425-77. Among other things, the Gaming Ordinance prohibits entering into a management contract without NIGC approval. *See* 25 U.S.C. §2711; SA-0430, §43.103. The tribal-court action seeks to enforce this prohibition.

The tribal-court action also seeks to regulate the Tribal-Court Defendants' conduct by preventing illegal Casino management. Taking over a tribal-gaming facility without a license—as Wells Fargo attempted to do on behalf of Saybrook in 2009 and as Saybrook seeks to do in the ongoing state-court action—violates 25 U.S.C. §2710(b)(2)(E) *and* tribal law. SA-0454, §43.408. There is no exception to the management-contract approval requirement or the licensing requirements for an off-reservation manager and one cannot avoid those laws by directing management activity from off the reservation. *See generally* 25 U.S.C. §2710, SA-0425-77.

In addition, the Tribe's Constitution gives the Tribal Council power "[t]o 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." SA-0408, art. VI, §1(v). The Constitution therefore regulates the Tribal

Agreement's pledge of tribal assets and the Tribal-Court Defendants' efforts to enforce that pledge.

And the tribal court has jurisdiction to determine whether the Tribal Agreement is enforceable without Secretarial or membership approval. *Iowa Mut.*, 480 U.S. at 16 ("[T]ribal courts are best qualified to interpret and apply tribal law."); *Basil Cook*, 117 F.3d at 66 (federal courts lack competence to decide questions of tribal law). Consequently, the district court's decision that the Tribe's treaty rights do not afford the tribal court jurisdiction was erroneous.

B. The Tribal Court has Jurisdiction Under Montana's Main Rule.

Even if the Tribe were not exercising its treaty rights, the tribal court would have jurisdiction because the tribal-court action arises from the Tribal-Court Defendants' conduct on tribal *trust* land.[13] In *Montana*, the Supreme Court first announced a "general proposition" that, for activities on nonmember *fee* lands, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. With respect to nonmember conduct on tribal *trust* lands, however, the *Montana* court "readily agree[d]" with the Ninth Circuit that the tribe had jurisdiction. *Id.* at 557. The Ninth Circuit recently confirmed this is still the rule. *See Water Wheel*, 642 F.3d at 809-10. And the Eighth Circuit acknowledges "'the critical importance of land

[13] Unlike fee lands, which a tribe, its members, or nonmembers own and may convey without restriction, trust lands are owned by the United States for the benefit of the tribe. *See generally* 25 U.S.C. §461 *et seq.*

status to questions of tribal jurisdiction under *Montana*." *Sac & Fox*, 609 F.3d at 940 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008)). It recognizes that '[t]ribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner." *Id.* (citations omitted).

The Tribal Parties have established that the tribal-court action arises from the Tribal-Court Defendants' conduct on tribal trust lands. *See supra* at 7-15. Indeed, the Bond Transaction would not have occurred but for that conduct. Accordingly, the tribal court possesses jurisdiction.

C. The Tribal Court has Jurisdiction under *Montana*'s First *E*xception.

The tribal court also has jurisdiction under both "*Montana* exceptions" identified by the Supreme Court. Under the first exception:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Montana, 450 U.S. at 565. Since the Court first announced this exception, it has confirmed that it "requires that the . . . regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

Here, each Tribal-Court Defendant entered into consensual relationships with the Tribal Parties with respect to the Bond Transaction.[14] The district court did not dispute that the Tribal-Court Defendants' relationships with the Tribal Parties were consensual, but held that "the mere fact of a commercial relationship" was insufficient to satisfy the exception because the Tribal Parties "do not allege in tribal court that plaintiffs have taken any action by way of their commercial relationship with the Tribe and Corporation that necessitates regulation." A-58. The district court misstated the rule and misapprehended the nature of the tribal-court action. The tribal-court action seeks to enforce tribal and federal law governing the Tribal-Court Defendants' consensual relationships with the Tribal Parties. *See* SA-0316-21.

1. Stifel had a Consensual Relationship with the Tribal Parties.

Stifel representatives attended multiple meetings on the Tribe's Reservation, including the fateful meeting at the Tribe's headquarters (on trust land) in which Stifel misrepresented material terms of the Bond Transaction to convince the Tribal Parties to approve it. *See supra* at 10-15. Stifel admitted that "it entered into a contractual relationship with the Tribe . . . to assist [the Tribe] with respect to its efforts to secure financing in 2007." SA-1074. It also admitted "that it entered into a contractual relationship with [the Corporation] in connection with the Bond Transaction—the Bond Purchase Agreement[,]" and that the tribal-court action is related to those contractual

[14] Godfrey stipulated it met the consensual-relationship test under *Montana.* SA-0968-69.

relationships. SA-1073-75. The Bond Purchase Agreement's terms expressly permit suit in tribal court. SA-0262.

2. Saybrook had a Consensual Relationship with the Tribal Parties.

Saybrook went to the Casino to conduct due diligence on the Bond Transaction. *See supra* at 9-10. It then paid $44.5 million for the Bonds and is suing the Tribal Parties for the principal and interest. *See supra* at 15; SA-0501-12. During the negotiations of the Bond Documents, it was Saybrook that insisted on or bargained for the contractual management covenants directly affecting the on-reservation Casino. *See supra* at 9-10. Saybrook, through Wells Fargo, also exercised control over the Casino's revenues by demanding Corporation officials explain and justify Casino operating expenses each month before it permitted officials to pay them. *See supra* at 15-16, SA-0339, ¶9. Once the Corporation stopped paying on the Bonds, Saybrook directed Wells Fargo to sue to enforce them. SA-1097-1101. Saybrook still seeks to enforce the Bond Documents in the pending state-court case. Saybrook's relationship with the Tribal Parties was consensual.

3. Wells Fargo had a Consensual Relationship with the Tribal Parties.

Wells Fargo served as the "Trustee" under the Indenture, and several of the Bond Documents are between the Corporation and Wells Fargo: the Indenture, the Bond Resolution, the Tribal Resolution, the Security Agreement, the Account Control

Agreement, and the Tribal Agreement. SA-0395-96. Relying on its consensual-relationship role as "trustee," Wells Fargo also:

- Told the Corporation it would exercise or reserve every remedy available under the Indenture, the Security Agreement, and other Bond Documents. *See* SA-1097-1101.
- Relied on Bond Documents to sweep tribal accounts starting in 2008. *See supra* at 16; SA-0972-74, ¶¶3-11; SA-0543-44, §2.
- Distributed an accelerated principal and interest payment of $6.3 million to LDF Acquisition. SA-0973, ¶7.
- Currently withdraws "trustee fees" from a tribal account. *See* SA-0972-74, ¶¶7-11.

Wells Fargo (with Saybrook) also still seeks to enforce the Bond Documents in the pending state-court case.

4. The First Exception is Not Limited Solely to On-Reservation Conduct.

The district court held that the only "conduct" relevant to *Montana's* first exception is conduct occurring on tribal lands. A-58. It also held that, by seeking to have the Bond Documents declared invalid, the Tribe was not "regulating nonmember conduct" in bringing the tribal-court action. A-57. Both holdings are in error.

First, as the district court acknowledged, *Montana* did not purport to limit its first exception to on-Reservation conduct. A-55. The district court held that *Plains Commerce*

Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008), added this limitation. A-55. But *Plains Commerce Bank* examined whether a tribal court could exercise jurisdiction over the sale of non-member fee land within reservation boundaries. 554 U.S. at 320. It reasoned that *sale of* and *conduct on* fee lands "are two very different things[,]" but did not purport to change *Montana*'s first exception. *Id*. at 340. It only held it inapplicable to sales of fee land. *Id*.

The Eighth Circuit recently confirmed that when a "claim arises out of and is intimately related to [the nonmember's] contract with [the tribal member] and that contract relates to activities on tribal land[,]" the first *Montana* exception does not require all conduct to occur on the reservation. *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 844 (8th Cir. 2013). The declaratory-judgment claim in the tribal-court action arises out of Tribal-Court Defendants' contracts with the Tribal Parties that relate to their conduct on tribal land.

Indeed, the district court recently ruled that Stifel *is* subject to tribal-court jurisdiction in another tribal court for virtually the same conduct as in this case:

> [I]t is undisputed here that Stifel entered into a consensual commercial transaction with the Band, as memorialized in the Bond Purchase Agreement, following on-reservation negotiations and discussion of financing options. Moreover, the Band now seeks to hold Stifel accountable for its on-reservation actions (or failures to act) in connection with that same relationship—that is, its alleged fraudulent omissions and the resultant breach of its fiduciary duty.

LCO Order at 20-21.

Second, as discussed above, the Tribal-Court Defendants had substantial contact with the Tribal Parties on tribal trust land. Both Stifel and Saybrook visited there in connection with the Bond Transaction. *See supra* at 7-15. Wells Fargo also sought the appointment of a receiver "to exercise oversight over the revenues, issues, payments, and profits of defendant Lake of the Torches Economic Development Corporation until such time as the outstanding principal and interest on the Bonds, as referenced in the Complaint, are repaid to the Bondholders," *Wells Fargo v. LOTEDC*, Case No. 09-cv-768, Dkt. 4, at 1 (W.D. Wis. Dec. 21, 2009), which would have given them the right to seize the Corporations' revenues, fixtures, and equipment. *See, e.g.*, SA-0533-34, §4; SA-0277-79, §3. Wells Fargo swept the Corporation's account from a bank on tribal lands to collect its claimed trustee fees even after this Court declared the Indenture void and still pays itself fees from these funds. *See* SA-0973-74, ¶¶7-11.

The tribal court's jurisdiction over the Tribal-Court Defendants is not limited solely to on-reservation conduct—and certainly not to transactions where the entire transaction was negotiated by all sides while on tribal lands, as the district court implied. A-56-57. Where, as here, there is an on-reservation connection to the consensual relationship and the tribal-court suit arises from that consensual relationship, the tribal court has jurisdiction under the first *Montana* exception. *See DISH Network Serv.*, 725 F.3d at 884.

D. The Tribal Court also has Jurisdiction Under *Montana*'s Second Exception.

The second *Montana* exception provides that tribes retain inherent authority over nonmembers on non-Indian fee lands within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The tribal-court action addresses Saybrook's and Wells Fargo's attempts to exercise management and operational control over the Tribal Parties' most important resource, its trust-land-based Casino, without following either tribal or federal law. *See generally*, SA-0289-322. If unchecked, those efforts will severely impact the Tribe's health and welfare, economic security, and political integrity.

Before the Indenture was declared void, the Bond Transaction already had devastating effects on the Tribe's political integrity, its economic security, and its members' health and welfare. *See supra* at 15-17. In fact, the Tribe was seriously considering closing the Tribal Government Center and sending home all government staff. SA-0401, ¶20. Moreover, if the Corporation were required to resume making Bond payments (or if all Casino revenues were swept to satisfy a judgment), the Tribal Parties would be in an even worse financial position than before, leaving insufficient funds to operate the tribal government. SA-0341-42, ¶¶15, 17.

No party below disputed these facts. The district court ignored them and faulted the Tribal Parties for not demonstrating that "the case at issue involves consequences

that are 'catastrophic' for *tribal self-government*.'" A-61. However, that is not the test for the second *Montana* exception, and even if it were, the Tribal Parties satisfied that test by showing that the impact of the Bond Transaction will be catastrophic for tribal self-government.

Although the Court in *Plains Commerce Bank* noted in passing that a tribe's inability to regulate the sale of non-Indian land in that case could not "fairly be called 'catastrophic' for tribal self-government," the Court did not hold that such an impact was necessary to satisfy the second exception. 554 U.S. at 342. Instead, the Court reiterated that "[t]he second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* (quoting *Montana*, 450 U.S. at 566). It held that in the case before it, a tribe's inability to regulate a non-Indian owner's sale of a parcel of fee land within the reservation to another non-Indian did not impact tribal self-government and did not "'imperil the subsistence or welfare of the Tribe.'" *Id.* (quoting *Montana*, 450 U.S. at 566).

Here, by contrast, the Tribe's economic security is genuinely imperiled. Casino revenues are essential to the Tribe's political integrity and economic security, and to the health and welfare of its members. *See Montana*, 450 U.S. at 566; *Bay Mills Indian Cmty.*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) ("[T]ribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes'

core governmental functions," because "tribal business operations are critical to the goals of tribal self-sufficiency."). Indeed, the Casino is the lifeblood of the tribal government, which could not function without Casino revenues. SA-0338-46, ¶¶4, 11, 15, 17, 18-26.

Furthermore, both tribal and federal law mandate that the Tribe must possess the sole proprietary interest in its Casino and that the NIGC approve all management contracts. *See* 25 U.S.C. §§2710(b)(2)(A), 2711; SA-0451, §43.403. Tribal law also requires that pledges of tribal assets be approved by the tribal membership and the Secretary of the Interior. SA-0408, art. VI, §1(v). The tribal-court action seeks to enforce these tribal laws in the only forum where they can be enforced and protect the resources that fund the tribal government itself. Put another way, the tribal-court action seeks to regulate conduct that "imperil[s] the subsistence [and] welfare of the Tribe," satisfying the second *Montana* exception.

For these reasons, the district court's conclusion that the tribal court likely lacked jurisdiction is erroneous and should be reversed.

III. The District Court Erred by Holding that the Resolutions Waived the Tribal Parties' Immunity without First Determining Whether they were Enforceable Against the Tribal Parties.

This Court held that the sovereign-immunity defense "depends on the enforceability of the bond documents" and approved the district court's decision to "set aside the sovereign-immunity defense to be addressed at the preliminary-injunction

hearing." SA-0679. In limited pre-hearing discovery, however, Stifel admitted misrepresenting material terms of the Bond Transaction to the Tribal Parties, thus calling into question the enforceability of the Bond Documents. *See supra* at 10-15.

Indeed, the district court acknowledged that fraud "seems like a legitimate defense to the enforceability of the documents," SA-0946, 7:1-3, and that "the central question for this Court is whether or not the documents are enforceable" because "if they are not enforceable there's been no waiver of sovereign immunity and there's nothing else for the Court to decide." SA-0958, 19:11-15. The district court further explained "[s]hould the Court find the documents enforceable, including that there was not fraud in the inducement . . . then there's a question about whether there's a waiver of sovereign immunity." SA-0958, 19:16-20; s*ee Archdiocese of Milwaukee v. Doe*, 743 F.3d 1101, 1105 (7th Cir. 2014) ("A contract induced by fraud is voidable at the option of the party whose assent was fraudulently induced.").

Nevertheless, the district court refused to consider the issue of whether Stifel's fraud renders any of the Bond Documents unenforceable. A-25.[15] This Court reviews the District Court's order denying the Tribal Parties' sovereign immunity *de novo*. *See Wells Fargo*, 658 F.3d at 692; *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 929 (7th Cir. 2008).

[15] The Tribal Parties contested the district court's decision, grounded in its interpretation of a local rule governing proposed findings of fact in preliminary-injunction motions. SA-1090-96.

Because sovereign immunity is "immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits," *Enahoro v. Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005), enforceability is a threshold issue. By refusing to consider the effect of fraud on the purported waivers, the district court improperly stripped the Tribal Parties of their immunity. This was error.

The open question of enforceability also goes to the intent of the Tribal Parties to waive their sovereign immunity. Sovereigns can only "waive their immunity 'knowingly, cognizant of the consequences of their participation.'" *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 340 (7th Cir. 2000) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The Tribal Parties could only have intended to waive immunity for the Bond Transaction Stifel sold them: one secured by the Natchez project, SA-1129, 26:9-14, SA-1131, 28:3-13, SA-1186, 83:11-20; from which cash flow would fund the bond payments and provide millions to spare without affecting the Casino's funding of tribal governance, *id.* at SA-01116-17, 13:18-14:5, SA-1135, 32:8-14; and that would refinance $30 million of existing debt at the same rate that the Tribal Parties had been paying, SA-1240, 137:5-7.

Stifel's misrepresentations left the Tribal Parties with a different deal, leveraging the lifeblood of the Tribe's government to refinance $12 million at a higher interest rate and incurring an additional $32 million obligation for an unsecured interest in the Grand Soliel project. *See supra* at 15. The Tribal Parties could not knowingly waive immunity

for a deal Stifel fraudulently induced. Moreover, if they were defrauded, then the issue of whether Bond Documents "evince an intent on the part of the [Tribal Parties] to waive sovereign immunity" remains unresolved. A-38 (citing *Wells Fargo*, 658 F.3d at 702). A void Bond Document cannot evince any intent when all of its provisions are invalid. *See Wells Fargo*, 658 F.3d at 702.

Because the district court did not determine whether the Bond Documents are enforceable, it was error to enjoin the Tribal Parties and the injunction should be vacated. The existing record of fraud also demonstrates that the Tribal Parties did not waive their sovereign immunity in the Resolutions with the requisite unequivocal intent. This Court should accordingly dismiss this case because the district court lacked jurisdiction.

IV. The District Court Erred by Finding that the Resolutions waived the Tribal Parties' Sovereign Immunity.

Waivers of immunity "cannot be implied[,]" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and immunity is "strictly construed in favor of the sovereign." *Orff v. United States*, 545 U.S. 596, 601-02 (2005). This Court reviews the district court's denial of the Tribal Parties' immunity *de novo*. *See supra* at 45. If this Court reaches the question of whether the Tribal Parties waived their sovereign immunity in the Resolutions, it should reverse and direct the district court to dismiss the case with prejudice for lack of jurisdiction over the Tribal Parties.

A. The Resolutions do not Themselves Waive the Tribal Parties' Sovereign Immunity.

The district court identified only two Bond Documents that it believed provided "an unequivocal, independent waiver of the Tribe's sovereign immunity": the Tribal Resolution and the Bond Resolution. A-42-43. Neither Resolution waives immunity.

The Tribal Resolution does not itself waive the Tribe's immunity, but instead references provisions in the Tribal Agreement, resolving that "all Legal Provisions in the Tribal Agreement *are hereby approved*; more specifically and expressly, *those by which* the Tribe (i) provides a limited waiver of sovereign immunity from suit," and a host of other provisions, all of which appear in the Tribal Agreement. SA-0286 (emphasis added).

The Bond Resolution similarly "approved" the "Legal Provisions in the Bond Documents," defined as the Indenture, the Bonds, the Security Agreement, and the Bond Purchase Agreement, each of which contained their own limited waiver provisions for the Corporation. SA-0274. Both Resolutions refer to waivers in *other* Bond Documents, and do not themselves waive the Tribal Parties' sovereign immunity. This Court has recognized this operative-versus-authorizing distinction. *State of Wis. v. Baker*, 698 F.2d 1323 (7th Cir. 1983). Although a tribal resolution authorized attorneys to waive sovereign immunity, because the attorneys did not exercise the power, the tribe's immunity remained intact. *Id.* at 1331-32. Here, the Resolutions authorize waivers, but the operative waivers appear in other documents.

It would have made little sense for the Tribal Parties to have negotiated specific waivers for specific parties and specific claims in individual Bond Documents while simultaneously granting blanket waivers to any party for any possibly related claims in the Resolutions. As the district court recognized in a case similar to this one, clauses in separate transaction documents "give rights to different parties and deal with controversies arising from different sets of bond documents." LCO Order at 29. Each clause must be analyzed on its own. For these reasons, the district court's decision that the Resolutions waive the Tribal Parties' immunity is erroneous.

B. Even Assuming the Resolutions Waive Immunity, they do not Consent to this Suit.

Even if the Resolutions included operative waivers of immunity, they do not confer any rights on the Tribal-Court Defendants here. Sovereigns routinely limit waivers of immunity to particular beneficiaries, and courts are bound to uphold those limitations. *Orff*, 545 U.S. at 601-02. For example, this Court has recognized that a congressional waiver of immunity for "claim[s] which the Creek Nation may have against the United States" did not support a suit by Creek *members* against the United States. *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156, 1162 (7th Cir. 1983). Here, both Resolutions "constitute a contract with the Trustee" named in the Indenture, Wells Fargo.[16] SA-0274;

[16] This language is important to the transaction because both Resolutions promise that they "shall not be rescinded or modified without the written consent of the Trustee[,]" and the Trustee could not enforce those rights except as a matter of contract. SA-0274; SA-0287.

SA-0287. Construing this limitation narrowly, as the law requires, the Resolutions do not waive immunity from Saybrook, Stifel, or Godfrey. And Wells Fargo is no longer "Trustee" because the Indenture is void *ab initio*. *See Wells Fargo* at 702. Thus, no party can enforce the purported waivers in these Resolutions.

The district court's reasoning that "[n]othing in either resolution indicates any intent by the Tribe or the Corporation to limit its waiver of sovereign immunity only to a particular *party*[,]" A-43 (emphasis in original), ignores both this plain language and controlling law requiring it to "strictly construe" limitations on waivers "in favor of the sovereign." *Orff*, 545 U.S. at 601-02.

Moreover, sovereigns may limit waivers of immunity to certain types of claims. For example, by agreeing in its gaming compact to maintain insurance for gaming activities and to waive its immunity for suit against the insurer, a tribe did not consent to an employee's suit for injuries sustained at the tribe's casino. *Taylor v. St. Croix Chippewa Indians of Wis.*, 229 Wis. 2d 688, 694-95, 599 N.W.2d 924, 927 (Ct. App. 1999). Consent to one sort of case is not consent to every case.

If the Resolutions authorize suit, they only do so "with respect to any dispute or controversy arising out of" various Bond Documents or "any transaction in connection therewith[.]" SA-0274; SA-0286. The district court reasoned that this suit "unquestionably arises out of" the Bond Documents and Bond Transaction. A-44. But a suit "arises out of" the law that creates the cause of action. *Empire Healthchoice Assur.*,

Inc. v. McVeigh, 547 U.S. 677, 696 (2006) (Breyer, J., dissenting) (citing cases). If the district court is correct that this suit arises under the Bond Documents, it is a breach-of-contract case that the district court lacked jurisdiction to hear. *See Saybrook Tax Exempt Investors*, 929 F. Supp. 2d at 862 (holding in earlier litigation between these non-diverse parties that the district court lacked jurisdiction to hear contract claims). If this suit arose under federal law instead, *see* A-62, then the suit does not arise under the Bond Documents and falls outside of the waiver's consent to suit. Either way, the district court lacks jurisdiction over this case.

C. The Bond Documents are Void Under IGRA.

Even if the Resolutions could be interpreted to allow this suit, they are nonetheless void under IGRA. As this Court recognized, Congress enacted IGRA "to ensure that the tribes retain control of gaming facilities set up under the protection of IGRA and of the revenue from these facilities." *Wells Fargo*, 658 F.3d at 700. To enable this goal, IGRA "provides for pre-screening of contracts between the tribes and parties desiring to establish business relationships with the tribes that might impair this fundamental purpose . . ." *Id.* The Chairman of the NIGC oversees this pre-screening process. 25 U.S.C. §2711; 25 C.F.R. §533.1. The NIGC must approve "*any*" agreement that "provides for the management[17] of *all or part* of a gaming operation." 25 C.F.R. §502.15 (emphasis

[17] The NIGC broadly defines "management" as encompassing "many activities (*e.g.* planning, organizing, directing, coordinating, and controlling). The performance of any one of such

added). Without the NIGC's approval, management contracts are void *ab initio*. *Wells Fargo*, 658 F.3d at 700. The NIGC did not approve any of the Bond Documents, including the Resolutions. So, if they provide for the management of all or part of a gaming operation, they are void *ab initio* and so are any waivers of sovereign immunity. *See id.*

1. The District Court's Refusal to Follow Precedent and the Parties' Intent to Construe the Bond Documents Together was Error.

To determine whether a transaction creates a management contract, courts consider the "combined effect of all [the] agreements." *U.S. ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 425 (8th Cir. 2002).[18] The district court agreed that "courts have found that the documents *taken together* can constitute a 'management contract,'" A-41, and that "a contract may be void not because its own terms impinge on casino management, but because the terms of other interrelated documents or agreements do." A-40. Indeed, in earlier proceedings, this Court directed the district court to determine whether Bond Documents, "taken alone or together," waive sovereign immunity. *Wells Fargo*, 658 F.3d

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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." *Wells Fargo*, 658 F.3d at 696 (citing SA-0393).

[18] The district court distinguished *Casino Magic* because its loan agreement "*mandate[ed]* the Tribe's compliance with recommendations made by Casino Magic under the Consulting Agreement," unlike certain Bond Documents. A-41-42. (emphasis in original). Courts, though, have rejected the argument that management occurs "only when those functions are performed as a matter of right[.]" *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1175 (10th Cir. 2005). Even the opportunity to manage is management. *Id.*; *New Gaming Sys. Inc. v. Nat'l Indian Gaming Comm'n*, 896 F. Supp. 2d 1093, 1105 (W.D. Okla. 2012).

at 702. Yet the district court refused to review the Resolutions together with the remaining Bond Documents, believing they merely referenced related management contracts. A-40-45. The Resolutions do not merely reference other Bond Documents; they are essential to the validity and enforceability of the Bond Documents because they authorize and approve them. The parties could not have intended—and did not intend—for the Resolutions to stand apart from the rest of the Bond Transaction when they served this purpose.

The Bond Documents were executed contemporaneously by the same group of contracting parties "for the same purpose, and in the course of the same transaction," and should be "considered and construed together, since they are, in the eyes of the law, one contract or instrument." *James Talcott, Inc. v. P & J Contracting Co.*, 27 Wis. 2d 68, 133 N.W.2d 473, 477 (1965).[19] Even Saybrook cannot dispute it intended for the Bond Documents to constitute a unitary transaction as it "would not have purchased the Bonds had it known that *any* document related to the Bonds . . . was a management contract, and therefore not enforceable against the [Corporation]." SA-0498, ¶82 (emphasis added).

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[19] *See also Racine Harley-Davidson, Inc. v. State, Div. of Hearings & Appeals*, 2006 WI 86, 292 Wis. 2d 549, 612, 717 N.W.2d 184, 215 (construing contracts together); *Harris v. Metro. Mall*, 112 Wis. 2d 487, 496, 334 N.W.2d 519, 523 (1983) (construing contract for the sale of a building and a lease on that building together "[a]lthough neither agreement referred to the other[.]"); *Wipfli v. Bever*, 37 Wis. 2d 324, 327, 155 N.W.2d 71, 73 (1967); *Seaman v. McNamara*, 180 Wis. 609, 193 N.W. 377, 380 (1923) (construing mortgage and note as a single instrument because "although in form there were two writings, there was in fact one agreement[.]").

Indeed, the district court itself construed and considered the Bond Documents together in its immunity analysis. A-44-45. (relying on "the context of the larger transaction here."). There was no legally justifiable basis for the district court to refuse to apply the same test to determine whether the Resolutions are part of a management contract.

2. The District Court Erred by Refusing to Follow the NIGC's Practice of Construing the Bond Documents Together.

Because the Bond Transaction was not submitted to the NIGC, the district court was required to review the Bond Documents to determine if they contained unlawful management. Informal views of NIGC officials were relevant to the district court's task "because they embody the considered view of an officer whose responsibilities include the application of the statute and the regulations." *Wells Fargo*, 658 F.3d at 696.

The Tribal Parties offered undisputed agency guidance and uncontradicted testimony from former NIGC officials demonstrating that the agency would have reviewed the entire set of Bond Documents together and considered them as a group to ensure that *none* conveyed management authority. *See* SA-0393-94 (urging parties to send in all related and referenced agreements); SA-0351-52, ¶¶15-18. The NIGC would have determined whether the Bond Documents—collectively or individually—allow outside management of the Casino. *See* SA-0351, ¶17; SA-0379, ¶14; *see also New Gaming Sys. Inc.*, 896 F. Supp. 2d at 1096 (describing request "seeking an opinion on whether the two documents constituted a management agreement within the meaning of IGRA").

After reviewing the Bond Documents together, the NIGC would have issued a "declination letter" that applied to *all* of the Documents, or would refuse to issue a declination letter concerning *any* of the documents. SA-0351, ¶17; SA-0353, ¶24; SA-0379-85, ¶¶15-17. Under the NIGC's analysis, even if an agreement is not a management contract, it becomes one if it is intertwined with, and dependent upon, other agreements that do provide for management. *Compare* SA-0353, ¶25 *with Casino Magic Corp.*, 293 F.3d at 422-23. And the Bond Documents here depended upon each other. SA-0355, ¶30.

The district court did not consider this evidence, reasoning that this Court "already held" that the Bond Documents cannot rise and fall together because "'[i]t is not immediately apparent that the waivers contained in the documents . . . when read separately or together, ought to be construed as dependent on the validity of the waiver in the Indenture[.]'" A-41 (quoting *Wells Fargo*, 658 F.3d at 701). But this Court did not *reject* the Tribal Parties' argument in the prior *Wells Fargo* appeal. It only held that the question was "not immediately susceptible to resolution on the face of the amended complaint[,]" and required "thorough litigation" to resolve. *Wells Fargo*, 658 F.3d at 701.

The district court's refusal to consider the NIGC's internal processes was error. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and

judicial understandings of what a national law requires.") (citing cases); *Gulley v. Markoff & Krasny*, 664 F.3d 1073, 1074 (7th Cir. 2011) (agency commentary based on informal staff letters was "entitled to respectful consideration.") (quotation omitted); *First Am. Kickapoo Operations, L.L.C.* 412 F.3d at 1174 (affording NIGC bulletins and opinion letters of P. Coleman *Skidmore* deference). If the district court had properly considered NIGC practices, it would have determined that the Bond Documents, including the Resolutions, constitute an unapproved and therefore void management contract.

3. Even without the Indenture, the Bond Documents Enable the Bondholders to Manage the Casino.

This Court previously identified a host of contractual provisions in the Indenture that "transfer[red] significant management responsibility to Wells Fargo[,]" rendering it void for lack of NIGC approval. *Wells Fargo*, 658 F.3d at 699. The other Bond Documents also contain all the provisions cited by this Court as rendering the Indenture void, including:

- Setting numerous conditions on the allocation and disposition of gross Casino revenues, *compare Wells Fargo*, 658 F.3d at 698 *with* SA-0050; SA-0077; SA-0083, §(r); SA-0084, §(z); SA-0251, §7(a); SA-0279, §3(f); SA-0533, §4(f); SA-0543, §2(c); SA-0547, §9(a);

- Limiting the Corporation's discretion to incur certain capital expenditures without bondholder consent, *compare Wells Fargo*, 658 F.3d at 698 *with* SA-0083, §(u); SA-0251, §7(a);
- Allowing the bondholders to require the Corporation to retain a management consultant and use best efforts to follow the consultant's recommendations, *compare Wells Fargo*, 658 F.3d at 698 *with* SA-0027; SA-0083, §(v);
- Forbidding the Corporation from removing or replacing key Casino personnel without bondholder consent, *compare Wells Fargo*, 658 F.3d at 698-99 *with* SA-0027; SA-0083, §(w); SA-0280, §4(b); SA-0287;
- Allowing the bondholders to hire new Casino management of their choosing, *compare Wells Fargo*, 658 F.3d at 699 *with* SA-0027; SA-0086; and
- Allowing the bondholders to seek appointment of a receiver to exercise control over the Casino's gross revenues, *compare Wells Fargo*, 658 F.3d at 699 n.14 *with* SA-0027; SA-0533, §4(a).

The other Bond Documents include additional provisions not contained in the Indenture that permit even greater management control over the Casino, such as:

- Forbidding the Tribe from amending its trust-land lease with the Casino without bondholder consent, SA-0083, §(y); SA-0280, §4(d);
- "[I]rrevocably appoint[ing]" the Trustee as the Corporation's attorney-in-fact, SA-0534, §9;

- Forbidding the Corporation from removing *any* equipment from the Casino without the Trustee's written consent, SA-0532, §2(c)(ii);
- Allowing the Trustee to enter the Tribe's trust land "at any time" to remove or repossess any of the gaming machines or anything else required to operate the Casino., SA-0088; SA-0280, §4(c);
- Allowing the Trustee to sell or dispose of Casino assets without notice to the Corporation or Tribe, SA-0278, §3(b);
- Forbidding the Corporation from incurring any additional debt without bondholder consent; SA-0051; SA-0081-82, §(j); SA-0084, §(z); SA-0533, §2(h);
- Giving the Trustee "sole dominion and control" over the account into which all Casino revenues had to be deposited, to the exclusion of the Tribe or the Corporation, SA-0543-44, §2;
- Allowing the Trustee to modify any instrument evincing the Bond Transaction "without notice to the Tribe[,]" SA-0278, §3(b); and, remarkably,
- Permitting the bondholders to unilaterally alter the "terms and provisions of the Indenture, or of any instrument supplemental thereto . . . by the assent or authority of the registered owners of at least sixty-six and two-thirds percent . . . of the Bonds." SA-0028 (enabling Bondholders to insert additional management provisions in any Bond Document at any time).

In sum, the Bond Documents constitute an unapproved management contract because they "provide[] for the management of all or part of a gaming operation" by granting even more authority for "planning, organizing, directing, coordinating, and controlling" to outside parties than the Indenture did. *See Wells Fargo 7th Cir.*, 658 F.3d at 695-96 (citing 25 C.F.R. §502.15 and SA-0393).

4. Refusing to Construe the Bond Documents Together would Frustrate IGRA.

If this Court permits piecemeal enforcement of the Bond Documents, it would create a roadmap for circumventing the congressional regulatory scheme. Contracting parties could evade IGRA by spreading a comprehensive management program among a series of contracts, as Saybrook did here. Selective enforcement of individual documents without regard for their collective effect grants Saybrook the benefit of an illegal bargain—the precise result Congress and the NIGC sought to prevent. SA-0393-94 ("The Commission stands ready to make a decision as to whether or not a particular contract or agreement is a 'management contract' . . . before doing so, the Commission must see the entire document *including any collateral agreements and referenced instruments*.") (emphasis added). By cherry-picking documents from a transaction that the NIGC would have considered as a whole under IGRA, the district court "hobble[d] the statute." *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986) (interpreting predecessor statute to IGRA).

5. The District Court Incorrectly Determined that the Tribal Resolution is not itself a Void Management Contract.

The Tribal Resolution called for the Tribe to "'covenant[] not to replace key management of the Casino Facility without obtaining the requisite [51%] consent of the holders of the Bonds.'" SA-0285. The district court held that the provision only "acknowledge[d] that bondholders will have limited input into the *tribal parties*' decision on replacement of key managers[,]" and that this "single provision . . . standing alone, does not 'transfer significant management responsibility to the bondholder[.]'" A-45-46. This Court, reviewing a comparable provision of the Indenture, held the opposite:

> This requirement applies to removal for *any* reason, thus potentially tying the hands of the Tribe to replace key officers even when the sound management or even regulatory compliance concerns require their removal. This provision gives the bondholders truly powerful authority over the management of the Corporation and ensures that they will be able to exercise strong control over management and compliance issues that arise in the normal course of the Casino's operation.

Wells Fargo, 658 F.3d at 698-99. The district court's dismissal of this reasoning as applying to the totality of the Indenture's management provisions instead of the single replacement provision has no support in the text of this Court's decision. *Compare* A-45 *with Wells Fargo*, 658 F.3d at 698-99.

Under IGRA, limiting the Tribe's decision-making authority *is* management, even if a tribe remains the ultimate decision-maker. *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 668 (W.D. La. 2005) (provision requiring joint approval of the

casino's bank "provides for . . . management" of the casino); SA-0393-94. Management of "all or part" of a casino's operation requires NIGC approval, even if that management arises in but one provision of an agreement. 25 C.F.R. §502.15; *Machal, Inc.*, 387 F. Supp. 2d at 669-70 (voiding settlement agreements based on single management provision of each agreement). Even when viewed in isolation, the Tribal Resolution affords "the bondholders truly powerful authority over the management of the Corporation[,]" so its purported wavier of the Tribe's immunity was void *ab initio. Wells Fargo*, 658 F.3d at 698-99, 702.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court, vacate the Order, and dismiss the Tribal-Court Defendants' action, or alternatively, direct that the case be stayed while they exhaust their tribal-court remedies.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Defendants-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,706 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 97-2003 in 12 point Palatino Linotype font.

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2014, the Brief of Defendants-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL, NICOLAUS & COMPANY, INC., STIFEL FINANCIAL CORP., SAYBROOK FUND INVESTORS, LLC, LDF ACQUISITION, LLC, WELLS FARGO BANK, N.A., and GODFREY & KAHN, S.C.

Plaintiffs,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

OPINION & ORDER

13-cv-372-wmc

In this civil action, plaintiffs seek (1) a declaration that a Tribal Court for the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") lacks subject-matter jurisdiction over them and (2) an injunction preventing any further action by the Tribe and the Lake of the Torches Economic Development Corporation in a recently-filed matter against plaintiffs in that forum. Before the court now is defendants' motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). (Dkt. #46.) The court will deny defendants' motion because (1) the arguments defendants advance go directly to the merits of the underlying disputes; and (2) neither logic nor law supports resolving the merits under the guise of a jurisdictional challenge.

BACKGROUND

A. The Commercial Transaction

Defendant Lake of the Torches Economic Development Corporation ("Lake of the Torches") is a corporation established under tribal law and wholly owned by defendant Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally-recognized Indian tribe organized under Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. §§ 461 *et seq.*). In January 2008, Lake of the Torches issued $50 million in bonds and sold them to a brokerage firm, plaintiff Stifel, Nicolaus & Company, Inc. ("Stifel Nicolaus"). In turn, Stifel Nicolaus sold the bonds to plaintiff LDF Acquisition, LLC ("LDF"), a special purpose vehicle created by plaintiff Saybrook Tax Exempt Investors, LLC, predecessor in interest to plaintiff Saybrook Fund Investors, LLC ("Saybrook"). Plaintiff Godfrey & Kahn, S.C., a law firm, advised the parties on this complex transaction (the "Transaction").

The Transaction involved multiple written contracts. Among other contracts, these included the terms of the bonds themselves, a bond purchase agreement and a Trust Indenture Agreement, the latter of which provided a description of the means by which Lake of the Torches would repay its debt. The Trust Indenture Agreement designated plaintiff Wells Fargo Bank as the trustee. The Tribe and Wells Fargo also executed a Tribal Agreement dated January 1, 2008, in which the Tribe guaranteed payment of the obligations of Lake of the Torches for payment of both principal and interest on the bonds.

Unfortunately, the various contracts include slightly differing versions of the Tribe's waiver of sovereign immunity, as well as consent to the jurisdiction of the District Court for the Western District of Wisconsin and, should the district court fail to exercise jurisdiction, of Wisconsin state courts. For example, only some documents specified that the forum

selection clause was "to the exclusion of the jurisdiction of any court of the [Tribe]." (*See, e.g.*, Specimen Bond 5 (dkt. #1-1); Limited Offering Memorandum 19 (dkt. #1-2); Tribal Agreement 5 (dkt. #1-9).)

B. Federal Litigation

When Lake of the Torches allegedly repudiated the bonds in 2009, Wells Fargo brought suit against it in the Western District of Wisconsin for breach of the Indenture. In answering, Lake of the Torches alleged sovereign immunity as an affirmative defense, arguing that the Trust Indenture Agreement in which it had allegedly waived its sovereign immunity was void as an unapproved "management contract" that violated the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), and the corresponding regulations.

Judge Rudolph Randa, sitting by designation in the Western District of Wisconsin, agreed, finding that the Trust Indenture Agreement was void under IGRA and dismissing the suit for lack of jurisdiction over Lake of the Torches. *Wells Fargo Bank, N.A. v. Lake of Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010) (hereinafter *Wells Fargo Bank I*). Wells Fargo then sought leave to amend its complaint, arguing that even if the Indenture was void, the bonds and other documents surrounding the transaction (collectively, the "Transaction Documents") were not, and those documents also purported to waive sovereign immunity. The district court rejected this argument as well and denied the motion to amend. *Wells Fargo Bank, N.A. v. Lake of Torches Econ. Dev. Corp.*, 09-CV-768, 2010 WL 1687877 (W.D. Wis. Apr. 23, 2010) (hereinafter *Wells Fargo Bank II*).

The Seventh Circuit affirmed the holding that the Indenture was void as an unapproved management contract, but also found that the district court had abused its discretion in denying Wells Fargo leave to amend its complaint based on the Transaction Documents. *Wells Fargo Bank, N.A. v. Lake of Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011) (hereinafter *Wells Fargo Bank III*). Accordingly, the case was remanded to determine whether the Transaction Documents, "read separately or together," waived Lake of the Torches' sovereign immunity. *Id.* at 702.

The Seventh Circuit also identified another, "more fundamental" issue for consideration on remand: whether Wells Fargo had standing to seek the return of the funds to the bondholder, given that the Trust Indenture Agreement was void. *Id.* at 701. When attempts to avoid the standing issue failed, Wells Fargo voluntarily dismissed its suit pursuant to Federal Rule of Civil Procedure 41(a)(1).

C. State Court Litigation

Saybrook and LDF then took up the fight in Wells Fargo's stead, filing a 24-count complaint in Waukesha County Circuit Court that asserted a breach of bond claim against Lake of the Torches and various alternative claims for misrepresentation, securities fraud, malpractice and equitable recission. *Saybrook Tax Exempt Investors, LLC v. Lac du Flambeau Band of Lake Superior Chippewa Indians,* Case No. 12-CV-187 (Waukesha Cnty. Cir. Ct.). Saybrook also filed a new action in the District Court for the Western District of Wisconsin reciting essentially the same complaint with the intent of establishing that this court lacked jurisdiction, thereby triggering a contractual waiver of Lake of the Torches' sovereign immunity in state court.

The Waukesha County Circuit Court stayed its proceedings, awaiting this court's determination of its own jurisdiction. In March of 2013, this court determined that it lacked federal question jurisdiction over the new action under 28 U.S.C. § 1331, because the claim at issue was "unambiguously one for breach of contract under Wisconsin common law." *Saybrook Tax Exempt Investors, LLC v. Lake of Torches Econ. Dev. Corp.*, 929 F. Supp. 2d 859 (W.D. Wis. 2013). The court also ordered plaintiffs Saybrook and LDF to submit proof of Wisconsin citizenship of one of LDF's members in order to demonstrate that the court lacked diversity jurisdiction under 28 U.S.C. § 1332. On April 1, 2013, with unchallenged proof that LDF shared Wisconsin citizenship with one or more defendants, this court dismissed that action for lack of subject matter jurisdiction.

D. Tribal Litigation

On April 25, 2013, Lake of the Torches and the Tribe commenced an action against defendants in the Lac du Flambeau Tribal Court, seeking a declaration that all of the documents connected with the transaction were void.[1] (Statement of Claim, dkt. #1-14.) Lake of the Torches and the Tribe also moved to stay the state court case pending a *Teague* Inter-Jurisdictional conference. The State Court denied that motion on May 30, 2013. Defendants moved for leave to appeal this non-final order the same day. The Waukesha court denied that petition on July 17, 2013. On September 9, 2013, the Waukesha court

[1] Specifically, the Tribal Court action seeks declarations that (1) the documents are void under Tribal law and IGRA because they are inextricably intertwined with the Trust Indenture Agreement; (2) the documents are void as unapproved management contracts themselves; and (3) the Tribal Agreement and Tribal Resolution are void because they were not approved by a referendum vote of Tribe members or by the Secretary of the Interior, as required by the Tribal Constitution.

noted that it was satisfied a Teague conference was "warranted/mandated" "once the courts (state circuit court and tribal court) have overlapping jurisdictions."

The plaintiffs, meanwhile, filed a motion to dismiss in the Tribal Court for lack of jurisdiction and, on May 24, 2013, filed the present suit in this court seeking to enjoin the Tribal Court action. On the same day, Stifel Financial Corp. and Stifel Nicolaus ("Stifel plaintiffs"), as well as LDF, Saybrook, and Wells Fargo ("Saybrook plaintiffs") filed for preliminary injunctions. (Dkt. ##5, 17.) Godfrey & Kahn filed for a preliminary injunction on May 29, 2013. (Dkt. #37.)

On June 13, 2013, defendants filed a motion to dismiss this suit pursuant to Rules 8(a) and 12(b)(1) and (2) or, in the alternative, to stay the case pending either exhaustion of tribal remedies or resolution of jurisdictional issues through the *Teague* conference. (Dkt. #45.) On August 27, 2013, the Tribal Court issued an order and opinion denying the motion to dismiss filed by plaintiffs in this case and determining it had jurisdiction over them. (Dkt. #72-1.) In light of the Tribal Court's decision, plaintiffs moved this court to set their motions for a preliminary injunction for hearing as soon as possible. (Dkt. #73.) Defendants opposed this request for many of the same reasons they seek dismissal under Rule 12(b)(1). (Dkt. #75.)

OPINION

Before this court can rule on the preliminary injunction, it must determine whether it has jurisdiction. It is to that question the court now turns.

As a preliminary matter, plaintiffs argue, and defendants do not appear to dispute, that this court has federal question jurisdiction under 28 U.S.C. § 1331. Plaintiffs' suit

seeks a determination as to whether the Tribal Court has jurisdiction over them -- a federal question that must be answered by reference to federal law. *See, e.g.*, *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27-28 (1st Cir. 2000) (collecting cases). Defendants acknowledge that in *National Farmers*, "the Supreme Court held that the complaint [as to whether federal law divested the tribe of an aspect of its sovereignty] raised a federal question." (Defs.' Reply (dkt. #70) 11.) This court finds as a first step, therefore, that it has subject-matter jurisdiction over this action under 28 U.S.C. § 1331.

What defendants *do* dispute is this court's authority to *continue* to exercise jurisdiction over this case or, at least, to address the merits of this case while Tribal Court proceedings are pending. As an initial argument, they argue that plaintiffs have not properly pled their case under Fed. R. Civ. P. 8. Next, defendants argue that the doctrine of tribal exhaustion compels this court to defer to the Tribal Court, allowing it to determine the extent of its own jurisdiction.[2] Additionally, defendants contend that even if the doctrine of tribal exhaustion does not bar the present suit, there has been no valid waiver of sovereign immunity such that this court can exercise jurisdiction over them. Finally,

[2] As already noted, the Tribal Court found that it had jurisdiction over plaintiffs on August 27, 2013. This does not necessarily moot the tribal exhaustion issue: "[o]nce in the tribal court system, an action is generally required to exhaust all levels including tribal appellate review." Deborah F. Buckman, *Construction and Application of the Federal Tribal Exhaustion Doctrine*, 186 A.L.R. Fed. 71, 85 (2003); *e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987) ("The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."). The Lac du Flambeau Band of Lake Superior Chippewa Indians does have a Court of Appeals, whose jurisdiction is "limited to review of final orders, sentences, and judgments of the trial court." Tribal Code Ch. 80.202 (dkt. #1-13).

defendants argue that even if this court should find neither tribal exhaustion nor sovereign immunity bars the suit, the court should exercise its discretion to decline jurisdiction and stay this case. The court addresses each of these arguments below.

I. Adequacy of Pleadings

Defendants first contend that plaintiffs have failed to plead this court's exercise of jurisdiction over them. In particular, defendants point to the heightened pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), requiring plaintiffs to allege facts that "plausibly suggest an entitlement to relief." *Iqbal*, 556 U.S. at 678. Under this analysis, they argue, plaintiffs must plausibly suggest that defendants are not immune from suit by virtue of their tribal sovereignty, making insufficient plaintiffs' mere conclusory allegation that defendants waived their sovereign immunity. (Defs.' Br. (dkt. #46) 14-15.)

Whether *Twombly* and *Iqbal* apply to statements of jurisdiction under Rule 8(a)(1) is far from certain, but it is also beside the point.[3] Rule 8(a)(1) requires a short and plain

[3] There is some debate as to whether the heightened pleading standard of *Twombly* and *Iqbal* applies in the context of Rule 8(a)(1), which requires that a pleading stating a claim for relief contain "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). Defendants point out that several circuits apply the "plausibility" test to jurisdictional allegations, though they also acknowledge that the Seventh Circuit has not made a similar determination. (Defs.' Reply (dkt. #70) 4-5.) Nevertheless, defendants urge this court to follow those other circuits and apply the heightened standard of *Twombly* and *Iqbal* to Rule 8(a)(1) as well as Rule 8(a)(2). This court is reluctant to take up this question unless necessary, particularly when there remains a real question as to what pleading standard should apply. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1206 (2013 Supplement) ("A subset of judges has compounded the error by extending Twombly-Iqbal's plausibility standard to Rule 8(a)(1), but this ignores the absence of Rule 8(a)(2)'s 'showing' requirement in Rule 8(a)(1), which contributed to the holdings of Twombly and Iqbal."). Here, it need not do so since even under a heightened

statement of the grounds for *subject-matter jurisdiction*. Plaintiffs' complaint states that this court has federal question jurisdiction "because the question whether an Indian tribe retains the power to compel non-Indians such as Plaintiffs to submit to the civil jurisdiction of its [T]ribal [C]ourt is one that 'arises under' federal law." (Compl. (dkt. #1) ¶ 13.) Whether the heightened pleading standards of *Twombly* and *Iqbal* apply or not, this short plain statement of the grounds for federal question jurisdiction tracks settled Supreme Court precedent, *see Nat'l Farmers*, 471 U.S. at 852, and is sufficient to satisfy Rule 8(a)(1).

Defendants maintain that plaintiffs must also plausibly plead waiver of sovereign immunity to satisfy the jurisdictional pleading requirement of Rule 8(a)(1), but this proves too much. In fairness, defendants cite various cases suggesting that sovereign immunity is "jurisdictional" in nature, particularly relying on a Tenth Circuit decision, *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007). In *Miner Electric*, the court held that "§ 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal immunity or the tribe unequivocally waives its immunity." *Id.* at 1011. Thus, defendants argue, plaintiffs must plead both a federal question *and* a waiver of tribal immunity here for this suit to survive a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Defendants' argument is unavailing in at least two fundamental respects. First, the Seventh Circuit has noted that "sovereign immunity does *not* diminish a court's subject-matter jurisdiction," suggesting that waiver of sovereign immunity need not be pled to satisfy Rule 8(a)(1). *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008) (emphasis

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pleading standard, this court's analysis as to whether plaintiffs have properly pled jurisdiction is unchanged as explained more fully above.

added) (citing *United States v. Cook Cnty.*, 167 F.3d 381 (7th Cir. 1999)); *see also Chasensky v. Walker*, No. 11-C-1152, 2012 WL 1287659, at *2 n.1 (E.D. Wis. Apr. 16, 2012) (noting that a motion to dismiss that raises a sovereign immunity defense is properly brought under Rule 12(b)(6), not Rule 12(b)(1)). The Supreme Court's holding in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989) (per curiam), also suggests that sovereign immunity need not be pled, noting that "[t]ribal immunity may provide a federal defense" but that it is not a requirement of a well-pled complaint. *Id.* at 841-42; *see also New York v. Shinnecock Indian Nation*, 686 F.3d 133, 138 (2d Cir. 2012); *Ninigret Dev. Corp.*, 207 F.3d at 28 ("[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction.").

Second, even assuming plaintiffs did need to plead waiver of sovereign immunity, they have done so adequately by Rule 8 standards. The complaint states that the Tribe and Lake of the Torches "unequivocally and expressly waived their sovereign immunity, both in the Bond Purchase Agreement and in several other Transaction Documents." (Compl. (dkt. #1) ¶ 26.) Moreover, it incorporates by reference and attaches all the documents in which the waiver appears, allowing this court to consider those documents in ruling on defendants' motion to dismiss. *See Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013). While defendants argue that the incorporation of the documents is not sufficiently detailed and that plaintiffs needed to "explain *why* they are valid and enforceable in light of the voiding of the Indenture and their independent management provisions" (Defs.' Reply (dkt. #70) 3-4), this would essentially require that plaintiffs lay out their entire case on the merits as to the documents' validity and meaning at the pleading stage -- a requirement unsupported by case law.

Twombly and *Iqbal* require only that the contents of the pleadings "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Applying this same standard to the jurisdictional statement (which, again, may or may not be appropriate), requires that plaintiffs do no more than allege enough facts to allow this court to draw the reasonable inference that defendants have waived their sovereign immunity. Plaintiffs have not only incorporated numerous contract provisions purporting to waive sovereign immunity, but have also pled the fact that the Transaction Documents' validity does remain an open question. (Compl. (dkt. #1) ¶ 37.) From these pleadings, the court can draw a reasonable inference that the Tribe and Lake of the Torches have waived their sovereign immunity without having to decide that question on the merits.

II. Exhaustion of Tribal Remedies

Next, defendants argue that this court may not yet exercise jurisdiction over plaintiffs' case because plaintiffs have failed to exhaust their Tribal Court remedies. Specifically, defendants contend that the Tribal Court must first be allowed to determine that (a) it has jurisdiction over the dispute (which has now occurred at the Tribal Court level but has not moved through the appellate process); (b) none of the exceptions to the tribal exhaustion doctrine applies; (c) any forum-selection clauses in the Transaction Documents cannot be enforced since those documents are void; and (d) the forum selection clauses are not mandatory in any event, so they would not be enforceable here.

Plaintiffs respond to these expansive arguments in a variety of ways. All plaintiffs argue that the forum selection clauses in the Transaction Documents foreclose Tribal Court

jurisdiction. As a result, plaintiffs maintain that this case falls into one of the exceptions to Tribal Court exhaustion described by the Supreme Court: "where the action is patently violative of express jurisdictional prohibitions." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting *Nat'l Farmers*, 471 U.S. at 856 n.21). This court agrees that the Transaction Documents are the appropriate place to begin its analysis. The Seventh Circuit has explained that in cases in which a tribe has "actively [sought] the federal forum" by submitting to the venue and jurisdiction of federal and state courts, "the application of the tribal exhaustion rule would not serve the policies articulated in *Iowa Mutual* and *National Farmers*." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814-15 (7th Cir. 1993). Thus, should valid forum selection clauses exist in the Transaction Documents, *Altheimer & Gray* would appear to compel all courts to respect those clauses.[4]

[4] Defendants also argue that *Altheimer & Gray* does not change the general rule requiring litigants to exhaust their tribal remedies. First, they contend that the *Altheimer & Gray* court held only that exhaustion is not required where there is has been no direct attack on tribal jurisdiction because no case was then pending in tribal court. (Defs.' Br. (dkt. #46) 58.) The court finds this rationale unpersuasive. The language in *Altheimer & Gray* that defendants point to is actually a distinction between that case and the earlier decisions in *Iowa Mutual* and *National Farmers.* The Seventh Circuit also explained that whether exhaustion forwards the *policies* of *Iowa Mutual* and *National Farmers* is "[m]ore important[]" than those factual distinctions. 983 F.2d at 814. Next, defendants argue that *Altheimer & Gray* requires an examination of "the factual circumstances of each case," *Altheimer & Gray*, *id*. at 814, and that the circumstances of *this* case make it an excellent candidate for application of the tribal exhaustion doctrine, because it "indisputably concerns the very heart of reservation affairs." (Defs.' Reply (dkt. #70) 50.) Without opining on that argument, the court does not believe it changes the jurisdictional analysis here. The Seventh Circuit's decision was predicated on the policy justifications that "economic independence is the foundation of a tribe's self-determination" and that "[t]o refuse enforcement of [the forum selection clause] would be to undercut the Tribe's self-government and self-determination." *Altheimer & Gray*, 983 F.2d at 815. Defendants have offered no reason why similar *forum selection clauses* in this case differ from those that drove the *Altheimer & Gray* decision. Thus, this court finds *Altheimer & Gray* to be binding precedent.

Defendants argue that the clauses are not valid because (1) the Transaction Documents are void; and (2) the forum selection clauses are not mandatory and are thus unenforceable. As for the first and broader of these arguments, defendants content that because the Transaction Documents are void, the forum selection clauses are likewise void and wholly irrelevant to an exhaustion analysis. Plaintiffs responded by pointing out that even where contracts are potentially void and unenforceable, forum selection clauses therein are not, citing *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006) in support of this proposition.

In *Muzumdar*, the Seventh Circuit considered a provision in a series of contracts that required parties to submit to the non-exclusive jurisdiction of Texas courts, which defendants argued trumped a forum selection clause in those same contracts. In that case, the subject contracts were allegedly void and unenforceable as against public policy because they constituted a pyramid scheme. Thus, the question arose as to whether the forum selection clauses were themselves void and unenforceable, just as the contracts were alleged to be. In holding that the forum selection clauses were enforceable, the Seventh Circuit observed that:

> Appellants also spend a good deal of time trying to convince us that because the contracts themselves are void and unenforceable as against public policy – i.e., they set out a pyramid scheme – the forum selection clauses are also void. The logical conclusion of the argument would be that the federal courts in Illinois would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. An absurdity would arise if the courts in Illinois determined the contracts were not void and that therefore, based on valid forum selection clauses, the cases should be sent to Texas – for what? A determination as to whether the contracts are void?

Muzumdar, 438 F.3d at 762.

The same logic applies directly to this case, particularly given that the question of the Transaction Documents' validity is complex and unresolved. The complicated questions surrounding their claimed validity should not and need not be decided now, as part of a challenge to subject matter jurisdiction.[5] It would result in the same "absurdity" the Seventh Circuit identified were this court to find the Transaction Documents (and their forum selection clauses) void as a matter of law so that the Tribal Court could then exercise jurisdiction to determine -- for a second time -- whether the Transaction Documents are void as a matter of law. The court declines to precipitate such an illogical and inefficient result. Instead, just as the Seventh Circuit held in *Muzumdar,* this court finds the ultimate validity of the Transaction Documents is generally immaterial to an analysis of the documents' forum selection clauses and obviates the need to decide the merits of the underlying dispute at the Rule 12(b)(1) stage of litigation.[6]

Alternatively, defendants argue that even if the forum selection clauses are valid, they do not trump the exhaustion doctrine. First, defendants contend that the forum selection clauses establish only where defendants may be sued, not where they may sue others. Even

[5] Even the cases defendants cite in arguing against the forum selection clauses did not hold that the federal courts lacked *subject matter jurisdiction* over the controversy. *See, e.g., Gaming World Int'l, Ltd. v. White Earth Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003) (error was in granting motion to compel arbitration when question existed as to validity of contracts containing arbitration clause); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421-22 (affirming that district court had subject matter jurisdiction but reversing on the merits of whether exhaustion was required). The court's holding today is simply that it has subject matter jurisdiction, not that the Transaction Documents are either valid or invalid as a matter of law.

[6] *Muzumdar* does point out that "a forum selection clause can be found invalid because the clause itself was procured by fraud." 438 F.3d at 762. Defendants do not argue that the clauses in question were procured by fraud, however, and so the court need not address that exception.

assuming it were so, that is exactly what has happened here: plaintiffs have sued defendants in this court seeking declaratory and injunctive relief. That defendants have also sued plaintiffs *elsewhere* does not change those facts. If anything, defendants have again put forth an argument more properly directed to the question of whether plaintiffs are likely to succeed on the *merits* of this lawsuit -- that is, arguments potentially affecting the propriety of the preliminary injunction plaintiffs seek. That is not the motion the court is currently considering. So this argument, correct or not, has no impact on the question of this court's jurisdiction.

Second, defendants argue that the forum selection clauses are permissive, not mandatory, and therefore are not enforceable, pointing again to *Muzumdar* as support. In that case, the Seventh Circuit stated that "where venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive." *Muzumdar*, 438 F.3d at 762. While defendants maintain that the forum selection clauses in the Transaction Documents contain just this fault, they ignore the waiver of tribal exhaustion also present in various Transaction Documents. (*See, e.g.*, Specimen Bond (dkt. #1-1) ("The Corporation hereby expressly waives its sovereign immunity from suit and any requirement for exhaustion of tribal remedies should an action be commenced . . . regarding the subject matter of the Indenture."); Limited Offering Memorandum (dkt. #1-2) ("The Corporation expressly waives its sovereign immunity from suit and any requirement for exhaustion of tribal remedies should an action be commenced . . . regarding the subject matter of the Indenture.").) The court can find no case, and defendants offer none, suggesting that a

tribal entity may not waive exhaustion of tribal remedies in this way. Given that the primary purpose of the tribal exhaustion doctrine is to foster tribal self-sufficiency, *Nat'l Farmers*, 471 U.S. at 856, the opposite makes sense: "a tribe should be able to waive the exhaustion requirement whenever it determines that waiver is in its best interests." Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Trial Courts*, 29 Ariz. State L.J. 705, 731 (1997).[7]

Even assuming the tribal exhaustion issue turns solely on the forum selection clauses themselves, the court does not find the clauses to be "discretionary." The forum selection clause in the Specimen Bond, for example, reads:

> The Corporation expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the Federal District court for the Western District of Wisconsin may be appealed), and, in the event (but only in the event) the said federal court fails to exercise jurisdiction, the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper, *for the adjudication of any dispute or controversy arising out of this Bond, the Indenture, or the Bond Resolution* and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith, *to the exclusion of the jurisdiction of any court of the Corporation*.

(Specimen Bond (dkt. #1-1) (italics and underlining added).) While the clause may not contain express language that this court has "exclusive" jurisdiction, *see, e.g.*, *Paper Exp., Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 756-57 (7th Cir. 1992) (collecting cases with language manifesting an intent to make venue compulsory and exclusive), the clauses'

[7] As in *Muzumdar*, 438 F.3d at 762, it would also defy logic for this court to find that the documents containing these waivers are void, meaning exhaustion in Tribal Court is required, only to require that court to decide whether the documents are void.

express language makes jurisdiction in this court and, where jurisdiction does not lie here, in Wisconsin state courts, the only option and expressly excludes tribal court jurisdiction.[8]

In contrast, the proposition considered by the Seventh Circuit in *Muzumdar* involved situations in which a lawsuit is brought in one forum, but dismissed pursuant to a forum selection clause providing for exclusive venue elsewhere. *See Muzumdar*, 438 F.3d at 760 ("The cases were filed in the United States District Court for the Northern District of Illinois. . . They were dismissed without prejudice pursuant to forum selection clauses found in the relevant contracts. Both judges found that the proper forum was Dallas County, Texas."); *see also Paper Express*, 972 F.2d at 754 ("Paper Express . . . appeals from the dismissal for want of proper venue of a breach of warranty action brought in the district court [for the Northern District of Illinois]. The principal issue on appeal is whether the parties' contract included a valid forum-selection clause providing for exclusive venue in Germany."); *accord Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762 (9th Cir. 1989). This case is not factually analogous. Rather, in this case, the forum selection clause provides simply that jurisdiction and venue are appropriate here, in the Western District of Wisconsin, or failing that in state court, and that venue and jurisdiction are foreclosed in any court of the Tribe. Neither *Muzumdar* nor *Paper Express* directs this court to ignore those contractual provisions simply because the clause makes jurisdiction here permissible, rather than

[8] Given that the entities in this case are Wisconsin-based, the parties have only three options for purposes of this suit: (1) Wisconsin federal court, (2) Wisconsin state court, and (3) tribal court. The clause plainly permits jurisdiction in the Western District of Wisconsin, and in Wisconsin state court only should the Western District decline to exercise it. It also explicitly forecloses the tribal court option. Thus, as a practical matter, jurisdiction in this court *is* exclusive for the parties contracting here.

mandating a single court to the exclusion of *all others*, and defendants cite no cases suggesting that this is unenforceable.

III. Sovereign Immunity

Finally, defendants advance an argument closely connected with their Rule 8 argument: jurisdiction over them is lacking because the Tribe and Lake of the Torches have not validly waived their sovereign immunity.[9] It is well-established that Indian tribes are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). This immunity applies to a tribe's activities regardless of where they took place and regardless of whether they are governmental or commercial. *Id.* at 754-55.

Defendants contend that the documents on which plaintiffs rely are void as a matter of law and advance multiple arguments in support of their position, including: (1) that the documents are inextricably bound with one another and so the voiding of the Trust Indenture Agreement voids all the other documents as well; (2) even excluding the Trust Indenture Agreement, the documents taken together constitute a void, unapproved management contract under IGRA; and (3) each document standing alone fails to waive

[9] Among the many disputes between the parties is whether the Tribe, as well as the Corporation, has waived sovereign immunity pursuant to the waivers in the Transaction Documents since the documents are not consistent and not all of them purport to waive the sovereign immunity of both the Corporation and the Tribe. This could well present an additional hurdle for plaintiffs, at least as far as proceeding against the Tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("[A] waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotation marks omitted); *Ramey Constr. Co. v. Apache Tribe of Mescalevo Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (consent of tribal corporate entity to be sued did not waive sovereign immunity of the Tribe as a constitutional entity). Again, however, this argument would require further inquiry into the merits, and the court declines to go any further down that road at this time.

defendants' sovereign immunity. (Defs.' Br. (dkt. #46) 59-97.) They devote almost 40 pages of their initial Memorandum and over 30 pages of their Reply to these arguments, all of which are predicated primarily on the purported invalidity of the Transaction Documents.

The court has already discussed its reasons for declining to resolve the underlying merits in the context of determining subject matter jurisdiction and will not repeat itself here. Additionally, the court finds support for its decision in other case law. For instance, while a district court may resolve disputed factual issues in the context of deciding a Rule 12(b)(1) motion, the Seventh Circuit has advised it "[does] not want district courts to resolve the merits of a dispute under the guise of jurisdiction." *Pratt Cent. Park Ltd. P'ship v. Dames & Moore, Inc.*, 60 F.3d 350, 361 n.8 (7th Cir. 1995); *see also Elektra Indus., Inc. v. Honeywell, Inc.*, 58 F.R.D. 118, 120 (N.D. Ill. 1973) ("Where jurisdictional issues are inextricably intertwined with the merits of the case it is proper for the court to deny a motion to dismiss or for summary judgment for want of subject matter jurisdiction on the basis that there are genuine issues of material fact, the resolution of which will not only affect jurisdiction but also the very merits of the case.") (citing *Land v. Dollar*, 330 U.S. 731 (1947)); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, at 245-49 (3d ed. 2004) ("If, however, a decision of the jurisdictional issue requires a ruling on the underlying substantive merits of the case, the decision should await a determination of the merits either by the district court on a summary judgment motion or by the fact finder at the trial.").

Here, the material claim that underlies the controversy before this court is whether the Tribal Court has jurisdiction over the plaintiffs. Going directly to the merits of that

question is the validity and enforceability of the Transaction Documents, since they contain, among other things, the clauses purporting to foreclose Tribal Court jurisdiction over any controversies arising out of the Bonds Transaction. To hold the Transaction Documents invalid would, therefore, in the Seventh Circuit's words "resolve the merits of [the] dispute under the guise of jurisdiction." *Pratt Cent. Park Ltd. P'ship*, 60 F.3d at 361 n.8.[10]

IV. Request to Decline Jurisdiction or Stay

This leaves defendants' alternative argument that, should this court find it *does* have subject matter jurisdiction and that jurisdiction has been properly pled, it should nevertheless exercise its discretion to decline that jurisdiction under the Declaratory Judgment Act. The central reason they offer is that a conference between the tribal and state courts must occur before the case can move forward, as they apparently have now agreed to do, pursuant to *Teague v. Bad River Band of Chippewa Indians*, 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709. To assert jurisdiction over this case now, defendants assert, would "chart a course for future litigants who wish to avoid [the *Teague* process] by running to federal court whenever parallel actions proceed in tribal and state court." (Defs.' Br. (dkt. #46) 101.) Defendants, therefore, request that this court enter a stay while Tribal Court remedies are exhausted or while the state court and the Tribal Court work out jurisdiction between them in the *Teague* conference, whichever comes first.

[10] Defendants also make a number of other arguments that relate to whether the waivers themselves unambiguously waive sovereign immunity. Before ruling on the enforceability of *portions* of the Transaction Documents, the court will rule on the enforceability of the Transaction Documents themselves, since the latter determination could moot the need to consider the former. Thus, the court will defer ruling on the validity of individual provisions of each individual document at this time.

In *Teague*, the Wisconsin Supreme Court considered whether a Tribal Court judgment could be denied full faith and credit because a complaint concerning the same subject matter had been first filed in state court. The court found that the real question was one "of judicial allocation of jurisdiction pursuant to principles of comity," 2000 WI 79, ¶ 34, but that "the law currently provides no protocols for state or tribal courts to follow in this situation." *Id.* The *Teague* court ultimately "conclude[d] that comity in this situation required that the circuit court and tribal court confer for purposes of allocating jurisdiction between the two sovereigns." *Id.* ¶ 37.

Plaintiffs argue that the present case is different from *Teague* in a critical way: here, the sole issue before this court is "whether the Tribal Court has jurisdiction over the Plaintiffs and the Tribal Court Action." (Stifel Pls.' Resp. (dkt. #68) 46.) Unlike in *Teague*, where there was "concurrent subject matter jurisdiction in state and tribal court," 2000 WI 79, ¶ 30, and all that remained was to allocate jurisdiction between the two, this action questions whether the Tribal Court has *any* jurisdiction over a suit arising from the Transaction and seeks a determination of that specific issue. Since states play "a limited role . . . in matters of tribal sovereignty," and this court is the "only court empowered to act" on this question, plaintiffs argue that to await the not-yet-convened *Teague* conference makes no sense. (Stifel Pls.' Resp. (dkt. #68) 63.)

To a point, the court agrees with plaintiffs. State law requires a *Teague* conference between the state and tribal courts to ensure that they decide jurisdictional allocation "in an atmosphere of mutual respect and cooperation." *Teague*, 2000 WI 79, ¶ 38. But, as plaintiffs point out, *Teague* assumes two courts with concurrent jurisdiction; plaintiffs' suit here alleges that, in a suit challenging the validity of the Transaction Documents, the Tribal

Court has *no* jurisdiction. Awaiting the results of a *Teague* conference would, therefore, tell this court nothing regarding whether the Tribal Court *actually* has jurisdiction, and that is the specific, limited question this court has been asked to decide. To enter a stay pending a *Teague* conference would, therefore, serve only to delay the present dispute before this court.[11]

In light of pending motions for preliminary injunction before this court, which include the allegations of irreparable harm, the court sees no value and potential harm in staying its own determinations further. "[T]he pendency of another suit is not a sufficient reason to decline declaratory jurisdiction if that suit will not necessarily determine the controversy between the parties." *Sears, Roebuck & Co. v. Am. Mut. Liab. Ins. Co.*, 372 F.2d 435, 438 (7th Cir. 1967). Additionally, as previously discussed, "the 'extent to which Indian tribes have retained the power to regulate the affairs of non-Indians' is governed by federal law." *Hicks*, 533 U.S. at 398 (quoting *Nat'l Farmers Union Ins. Co.*, 471 U.S. at 851-52). Thus, this court is in a better position than the state court to answer the question plaintiffs have posed in this case. Since the *Teague* conference will not definitively resolve the controversy of whether the Tribal Court can exercise jurisdiction over plaintiffs -- and in fact begins with the promise that it may -- and since this is a oure question of federal law, the court will exercise declaratory jurisdiction over that controversy.[12]

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[11] In fact, the Waukesha County Circuit Court only recently indicated that in its view, a *Teague* conference must wait until the state and tribal courts have "overlapping jurisdiction."

[12] Defendants' alternative ground for justifying a stay -- that this court should await exhaustion of Tribal Court remedies, has already been substantially addressed above -- and the court will not repeat that discussion here.

ORDER

IT IS ORDERED that:

(1) defendants Lac du Flambeau Band of Lake Superior Chippewa Indians and Lake of the Torches Economic Development Corporation's Motion to Dismiss or in the Alternative to Stay is DENIED; and

(2) a preliminary injunction hearing will proceed on November 26, 2013, at 8:30 a.m., during which the parties may offer additional argument and stand on their paper submissions or offer additional evidence as they deem fit.

Entered this 28th day of October, 2013.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL, NICOLAUS & COMPANY, INC., STIFEL FINANCIAL CORP., SAYBROOK FUND INVESTORS, LLC, LDF ACQUISITION, LLC, WELLS FARGO BANK, N.A., and GODFREY & KAHN, S.C.,

Plaintiffs,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

OPINION & ORDER

13-cv-372-wmc

On February 28, 2014, the court held a telephonic status conference at the request of the parties to discuss matters related to the upcoming preliminary injunction hearing and to address the parties' recently-filed motions in limine. Consistent with that discussion, the court rules as follows.[1]

The Stifel plaintiffs moved to strike the affidavits of Perry Israel, Penny J. Coleman, Elaine Trimble Saiz and Kevin Washburn as inadmissible legal analysis and legal conclusions. (Dkt. #102.) To the extent that those affidavits contain legal analysis or legal opinions, that motion is well founded and will be granted.

The Saybrook plaintiffs also moved to strike the Washburn and Trimble Saiz affidavits (dkt. #105), on the grounds that neither is available for a deposition, nor will they be available for cross-examination at the preliminary injunction hearing. That motion

[1] The court is also in receipt of plaintiff Godfrey & Kahn's motion in limine (dkt. #108). That motion is essentially a status report and was neither granted nor denied, because it does not request any relief.

is granted in part and denied in part. These witnesses' affidavits may stand (to the extent they are do not include impermissible legal analysis or conclusions) if the affiants are available either: (1) for deposition; *or* (2) for cross-examination at the hearing. If the witnesses are entirely unavailable, however, the court will grant the motion and exclude their affidavits. For those affiants who have had their depositions taken, the party taking the deposition must file a full deposition transcript four days before the preliminary injunction hearing, along with designated pages and lines upon which they rely. Counter designations will be due one day before the hearing. If transcripts are unavailable due to this short time frame, the parties should attempt to obtain a "dirty copy" and order expedited transcripts, as well as reach an agreement among counsel with regard to the testimony of the witnesses in question, and the court will do its best to accommodate the parties and consider that testimony.

Finally, the Saybrook plaintiffs have moved to prohibit defendants from presenting evidence and argument regarding fraud in the inducement at the preliminary injunction hearing. (Dkt. #109.) That motion is also granted in part and denied in part: defendants may raise fraud at the hearing, but only to the extent they have proposed facts in response to plaintiffs' proposed findings of fact that support this claim. Of course, this ruling is limited to the merits of the pending motion for preliminary injunction and does not preclude defendants from pleading fraud in the inducement as a defense in the case.

With respect to defendants' motions in limine, they would bar evidence and argument by all plaintiffs with respect to various bond documents unless a named party to the document. (*See* dkt. ## 110, 111, 112, 113.) Those motions are denied. All of the plaintiffs have a substantial interest in the outcome of this matter, and the court declines to

prohibit them from participating in arguments on the merits of the pending preliminary injunction motion. While finding that plaintiffs all have standing, the court has not resolved the underlying question as to the extent plaintiffs may benefit from any rights granted in the documents at issue.

Finally, the court set the following deadlines for the parties in the time leading up to the preliminary injunction hearing:

- Plaintiffs are to submit exhibit lists by 5:00 p.m. on Thursday, March 6, 2014.
- Defendants are to provide a list of any additional exhibits by 5:00 p.m. on Wednesday, March 12, 2014.
- The court will hear all objections with regard to deposition designations and exhibits at the preliminary injunction hearing itself.
- The preliminary injunction hearing will take place on Friday, March 14, 2014 beginning at 8:30 a.m.

ORDER

IT IS ORDERED that:

1) Plaintiff Stifel Financial Corp. and Stifel, Nicolaus & Company's motion to strike and bar testimony from defendants' experts (dkt. #102) is GRANTED IN PART and DENIED IN PART consistent with the opinion above.

2) Plaintiff LDF Acquisition, LLC and Saybrook Fund Investors, LLC's motion to strike the affidavits of Kevin Washburn and Elaine Trimble Saiz (dkt. #105) is GRANTED IN PART and DENIED IN PART consistent with the opinion above.

3) Plaintiff LDF Acquisition, LLC and Saybrook Fund Investors, LLC's motion to exclude evidence and argument regarding alleged fraud as a defense to entry of a preliminary injunction (dkt. #109) is GRANTED IN PART and DENIED IN PART, consistent with the opinion above.

4) Defendants Lac du Flambeau Band of Lake Superior Chippewa Indians and Lake of the Torches Economic Development Corporation's motions to bar evidence and argument regarding irrelevant contracts (dkt. ##110, 111, 112, 113) are DENIED.

5) Plaintiff Godfrey & Kahn, S.C.'s motion in limine (dkt. #108) is DISMISSED as moot.

Entered this 4th day of March, 2014.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

03/06/2014	132	** TEXT ONLY ORDER ** Defendants' motion for clarification 129 is DENIED, except to note that the defendants' response to the Stifel plaintiffs' proposed finding of fact is just that: a response. It contains no alternative proposed findings of fact on its face or by reference. (*See* Procedure to be followed on Motions for Injunctive Relief before Judge Conley.) Signed by District Judge William M. Conley on 3/6/2014. (arw) (Entered: 03/06/2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL, NICOLAUS & COMPANY, INC., STIFEL FINANCIAL CORP., SAYBROOK FUND INVESTORS, LLC, LDF ACQUISITION, LLC, WELLS FARGO BANK, N.A., and GODFREY & KAHN, S.C.,

Plaintiffs,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

OPINION & ORDER

13-cv-372-wmc

In what is only the latest chapter of litigation arising out of an ill-fated bond transaction executed in January of 2008 (the "Bond Transaction"), plaintiffs seek injunctive relief precluding defendants from pursuing a related lawsuit in the Tribal Court of the Lac Du Flambeau Band of Lake Superior Chippewa Indians. Plaintiffs argue that based on both federal law and on various documents executed as part of the Bond Transaction, the Tribal Court lacks jurisdiction over them. In response, defendants argue that they are immune from the current suit and that, in the alternative, the tribal court may exercise jurisdiction over plaintiffs.

Currently before this court are plaintiffs' various motions for preliminary injunctive relief. (*See* dkt. ##5, 17, 42.) The court held a hearing on those motions on March 14, 2014, and for the reasons discussed below, now holds that: (1) defendants waived their sovereign immunity; (2) comity does not require exhaustion of tribal court remedies; and (3) based on the record before it, defendants should be preliminary enjoined from

proceeding against plaintiffs Stifel, Nicolaus & Company and Stifel Financial Corp. (collectively, "the Stifel plaintiffs"); and Saybrook Fund Investors, LLC, LDF Acquisition, LLC and Wells Fargo Bank, N.A. (collectively, "the Saybrook plaintiffs") in Tribal Court pending a final resolution of this lawsuit. Because plaintiff Godfrey & Kahn, S.C. has not demonstrated a similar likelihood of success on the merits, however, the court will deny its motion for a preliminary injunction at this time.

SUMMARY OF FACTS*

The Lake of the Torches Economic Development Corporation ("the Corporation") is a wholly-owned corporation of the Lac Du Flambeau Band of Lake Superior Chippewa Indians, a federally-recognized Indian Tribe ("the Tribe"). The Corporation is chartered by the Tribe and, among other things, has the authority to issue and sell bonds for specific purposes and to pledge any revenues received from the Lake of the Torches Resort Casino as security. Pursuant to this authority, in January of 2008, the Corporation entered into a bond transaction in order to refinance and consolidate certain outstanding bank loans and loan funds to the Lake of the Torches Federal Development Corporation ("FDC"), so that the FDC could then loan funds to Grand Soleil for a gaming complex in Natchez, Mississippi. Stifel, Nicolaus & Company ("Stifel") is a financial services company that acted as initial purchaser of the bonds issued. Stifel alleges, and defendants purport to dispute, that it sold the bonds to LDF Acquisition, LLC, a special purpose vehicle created by

* Based on the parties' submissions and the record to date, the following brief summary of facts and the other facts set forth in the opinion below are essentially undisputed for purposes of deciding plaintiffs' motions for preliminary injunction except as otherwise noted.

Saybrook Tax Exempt Investors, LLC. Plaintiff Godfrey & Kahn, S.C. served as counsel to the Corporation and as Bond counsel in connection with the sale.

Pursuant to the Bond Transaction, various of the parties in this lawsuit executed a multitude of documents (collectively, the "Bond Documents"). Those documents include:

1. A specimen bond, issued on January 18, 2008. (Compl. Ex. A (dkt. #1-1) (hereinafter "Specimen Bond").)
2. A Limited Offering Memorandum, dated January 18, 2008, which was signed by the president of the Corporation. (Compl. Ex. B (dkt. #1-2) (hereinafter "LOM").
3. A Bond Purchase Agreement, dated January 18, 2008, between the Corporation and Stifel. (Compl. Ex. C (dkt. #1-3) (hereinafter "Bond Purchase Agreement").)
4. A Trust Indenture, dated January 18, 2008, between the Corporation and Wells Fargo Bank, N.A. (Compl. Ex. D (dkt. #1-4) (hereinafter "Indenture").)
5. Resolution No. 1(08), adopted by the Corporation's Board of Directors on January 2, 2008. (Compl. Ex. E (dkt. #1-5) (hereinafter "Bond Resolution").)
6. An Opinion Letter, dated January 18, 2008, issued by Godfrey & Kahn as counsel for EDC and the Tribe and addressed to Stifel, Wells Fargo and Saybrook. (Compl. Ex. F (dkt. #1-6) (hereinafter "Issuer Opinion Letter").)
7. An Opinion Letter, dated January 18, 2008, issued by Godfrey & Kahn as the Bond Counsel and addressed to the Corporation, Stifel, Wells Fargo and Saybrook. (Compl. Ex. G (dkt. #1-7) (hereinafter "Bond Counsel Opinion Letter").)
8. A Tribal Agreement dated January 1, 2008, between the Tribe and Wells Fargo. (Compl. Ex. I (dkt. #1-9) (hereinafter "Tribal Agreement").)

9. Resolution No. 1(008), adopted by the Tribe's Tribal Council on January 2, 2008. (Compl. Ex. J (dkt. #1-10) (hereinafter "Tribal Resolution").)

The parties agree that the Bond Documents were to be governed by and construed in accordance with Wisconsin law. There is also no dispute that plaintiffs executed the documents off-reservation. Although the documents themselves represent otherwise, defendants nevertheless maintain that they executed the documents on-reservation.

At some point in 2009, defendants failed to meet their obligations as contemplated by the Bond Documents. Acting as trustee to enforce the Indenture, Wells Fargo then filed suit in the Western District of Wisconsin. In that lawsuit, this court originally determined that: (1) the Indenture was void as an unapproved management contract; (2) the various transactional documents at issue here were merely collateral to the Indenture, making them similarly void; and (3) the bonds themselves incorporated by reference the Indenture's terms, rendering them void on those grounds as well. The court also concluded that the collateral documents were interdependent, supporting only a single transaction, and that the Indenture was a crucial part. On those grounds, the court held that the entire transaction had required the approval of the National Indian Gaming Commission ("NIGC") and that there could be no valid waiver of sovereign immunity without it. *See Wells Fargo Bank., N.A. v. Lake of the Torches Econ. Dev. Corp.*, No. 09-cv-768, 2010 WL 1687877, at *5-7 (W.D. Wis. Apr. 23, 2010).

On appeal, the Seventh Circuit affirmed this court's conclusion that the Indenture was void based on various problematic provisions in the Indenture, including: (1) a provision requiring the Casino's gross revenues to be deposited in a trust fund, setting conditions on revenue allocation and disposition, and giving Wells Fargo ultimate control

over withdrawals, which allowed the bondholders to control the Corporation's capital expenditures; (2) a provision permitting bondholders to retain an independent consultant, whose recommendations the Corporation was required to "use its best efforts to implement," if the debt-service-coverage ratio fell below "2.00 to 1"; and (3) a provision requiring defendants to obtain the consent of the bondholders to replace the casino's management. *See Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 698 (7th Cir. 2011). "[T]aken together," the Seventh Circuit held these provisions "transfer significant management responsibility to Wells Fargo and the bondholder and therefore render the Indenture a management agreement subject to the approval of the Chairman." *Id.* at 699.

At the same time, the Seventh Circuit rejected the notion that the collateral documents were void simply because they referred to the Indenture. The court explained that collateral documents would require agency approval *"only if* [they] 'provide[] for the management of all or part of a gaming operation'" -- that is, if they, too, meet the definition of a "management contract." *Id.* at 701 (quoting *Catskill Dev.*, 547 F.3d at 130) (emphasis in original). The Seventh Circuit also found the district court's conclusion that the documents were interdependent, and thus void, was "premature."

> It is not immediately apparent that the waivers contained in the documents attached to the proffered amended complaint, when read separately or together, ought to be construed as dependent on the validity of the waiver in the Indenture and that they do not make clear the Corporation's intent to render itself amenable to suit for legal and equitable claims in connection with the bond transaction.

Id. Accordingly, the Seventh Circuit held that on remand, the district court should address "whether the transactional documents, taken alone or together, evince an intent on the part of the Corporation to waive sovereign immunity." *Id.* at 702.

Following remand, Wells Fargo made several unsuccessful attempts to amend the complaint to establish its standing to sue before voluntarily dismissing its original lawsuit. The next day, plaintiffs Saybrook and LDF Acquisition filed a new federal lawsuit in the Western District of Wisconsin, invoking federal-question jurisdiction under 28 U.S.C. § 1331, but alerting the court to a split in authority as to whether such jurisdiction existed. While the Corporation argued jurisdiction was present, this court concluded in March of 2013 that it was not and asked the parties for proof of diversity jurisdiction under 28 U.S.C. § 1332. *See Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev. Corp.*, 929 F. Supp. 2d 859 (W.D. Wis. 2013). In April, the court concluded that diversity jurisdiction was also lacking and dismissed that case as well. *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev. Corp.*, No. 12-cv-255-wmc, 2013 WL 2300991 (W.D. Wis. Apr. 1, 2013). Plaintiffs then brought suit in Wisconsin state court.

On March 27, 2013, the Tribe amended the portion of its code governing procedures in the tribal court. The previous version of the Tribal Code read:

> The Tribal Court shall have jurisdiction over:
>
> (1) All actions in which the provisions of the Indian Child Welfare Act of 1978, 25 U.S.C. s. 1901, *et seq.*, are applicable;
>
> (2) All matters which the Tribal Council of the Lac du Flambeau Band of Lake Superior Chippewa invests, by appropriate ordinance, the Court with jurisdiction; [and]
>
> (3) All actions brought under the provisions of this Code.

(Compl. Ex. L (dkt. #1-12) § 80.102.) The amended version read in relevant part:

> The Tribal Court shall have jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Lac du Flambeau Band of Lake Superior Ojibwe.

(Compl. Ex. M (dkt. #1-13) § 80.102.

The amendments also created the position of "judge *pro tempore.*" The Tribal Code provides that the Tribal Council may appoint such a judge *pro tempore* "[t]o fill the role of a standing Trial Judge in any case to which the Tribe or a tribal agency or enterprise is a party and the opposing party is a non-member of the Tribe, except cases involving traffic and other criminal offenses, Indian-child welfare, child support, family law, natural resources, land management, or the Tribe's housing authority." (*Id.* at § 80.103(3)(a)(iii).) Appellate judges reviewing the decisions of judges *pro tempore* would also be appointed by the Tribal Council. The Tribal Court Code does not provide for a trial by jury.

On April 25, 2013, the Tribe and Corporation then filed suit in tribal court against Saybrook, Wells Fargo, Stifel Financial Corp., Stifel Nicolaus & Company, and Godfrey & Kahn, seeking a declaration that *all* Bond-related documents are void under the Indian Gaming Regulatory Act ("IGRA") and tribal law. The Tribe also appointed as judge *pro tempore* Professor Matthew L.M. Fletcher, an Indian law expert and blogger from Michigan State University College of Law.[1]

[1] Professor Fletcher's published papers include *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. Colo. L. Rev. 973 (2010).

OPINION

I. Sovereign Immunity

A. Application and Waiver

Plaintiffs initially argue that because this is a suit for injunctive and declaratory relief, the defense of tribal sovereign immunity does not apply. There is a circuit split on this question. *Compare Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571-72 (5th Cir. 2001) (finding that tribes are not entitled to sovereign immunity in suits for injunctive or declaratory relief), *with Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) ("It is absolutely clear that the Pala Band, as an Indian tribe, possesses 'the common-law immunity from suit traditionally enjoyed by sovereign powers.' The immunity extends to suits for declaratory and injunctive relief.") (internal citation omitted).

This court need not delve into these competing analyses, however, since the Seventh Circuit stated as recently as 2008 that "[t]ribal sovereign immunity is 'a necessary corollary to Indian sovereignty and self-governance,' and extends to suits for injunctive or declaratory relief." *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 929 (7th Cir. 2008) (internal citations omitted). Since that decision binds this court, it will proceed to consider whether defendants have waived their sovereign immunity here.[2]

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Ho-Chunk Nation*, 512 F.3d at 928. Here, neither

[2] The Saybrook plaintiffs also argue that no waiver of sovereign immunity is required, but provide no persuasive legal or evidentiary support. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), on which they rely, says nothing of the sort, having resolved the case on tribal exhaustion grounds without even mentioning sovereign immunity.

party contends that Congress has abrogated the Tribe's immunity. Rather, the dispute centers on whether the Tribe waived its sovereign immunity in the Bond Documents.[3]

To relinquish its sovereign immunity, a tribe's waiver must be "clear." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Both the Supreme Court of the United States and the Seventh Circuit have found waivers to be sufficiently clear when an Indian tribe agreed by express contract "to adhere to certain dispute resolution procedures" via an arbitration clause. *See id.* at 420; *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660-61 (7th Cir. 1996). Put another way, "[t]o agree to be sued is to waive any immunity one might have from being sued." *Sokaogan Gaming,* 86 F.3d at 659.

As an initial matter, there can be little dispute that the waivers of sovereign immunity in the Bond Documents are sufficiently "clear." Each unambiguously states not only that defendants have waived sovereign immunity but also that they consent to jurisdiction in this court. (*See, e.g.*, Specimen Bond 4-5 ("The Corporation hereby expressly waives its sovereign immunity from suit[.] . . . The Corporation expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin[.]"); Bond Purchase Agreement 19 (same); Bond Resolution 3 ("RESOLVED, that all Legal Provisions in the Bond Documents are hereby approved; more specifically and

[3] A waiver of sovereign immunity need not be by contract. For example, courts have found that a tribe validly waived its sovereign immunity (1) where "the Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court," *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980); and (2) by corporate charter, which gave it the power "[t]o sue and be sued in courts of competent jurisdiction within the United States," *Fontenelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970).

expressly the Corporation (i) waives its immunity from suit[.]"); Tribal Agreement 4-5 (waiving Tribe's sovereign immunity and consenting to jurisdiction of Western District of Wisconsin); Tribal Resolution 2 ("RESOLVED, that all Legal Provisions in the Tribal Agreement are hereby approved; more specifically and expressly, those by which the Tribe (i) provides a limited waiver of sovereign immunity from suit[.]").

Instead, defendants argue that the court cannot reach the question of the clarity of these waivers because all the Bond Documents, whether read separately or together, are void as unapproved management contracts under IGRA, 25 U.S.C. §§ 2701 to 2721. In light of the Seventh Circuit's *Wells Fargo* decision, the court agrees that if the Bond Documents are void, so too are the waivers of sovereign immunity contained within them, such that the tribe would not be subject to suit in this court.[4] Accordingly, the court turns to an analysis of those documents, keeping in mind the Seventh Circuit's direction to determine whether the Bond Documents, "alone or together, evince an intent on the part of the [Tribe and/or] Corporation to waive sovereign immunity." *Wells Fargo*, 658 F.3d at 702.

B. Unapproved Management Contracts

The general purpose of IGRA is to provide a statutory basis for the operation and regulation of gaming by Indian tribes. *See* 25 U.S.C. § 2702; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996). Section 2710 of IGRA permits an Indian tribe to "enter into a management contract for the operation of a class III gaming activity if such contract has

[4] In *Wells Fargo,* the Seventh Circuit found that the Bond Indenture containing the waiver of sovereign immunity was void as an unapproved management contract and then considered whether the indenture could be reformed by severing the illegal terms. It concluded that the "Commission's regulation is not subject to reformation by excision of offending provisions." 658 F.3d at 700. Accordingly, the court held that because the Indenture was void, the "waiver of sovereign immunity contained in that document [was] also void." *Id.* at 686.

been submitted to, and approved by, the Chairman" of the National Indian Gaming Commission ("NIGC"). 25 U.S.C. § 2710(d)(9). Likewise, section 2711 permits an Indian tribe to enter into a management contract for the operation and management of a class II gaming activity "[s]ubject to the approval of the Chairman." 25 U.S.C. § 2711(a)(1). Management contracts that are *not* approved by the Chairman are void *ab initio* and, at least in the Seventh Circuit, cannot be enforced as a whole or in part. *Wells Fargo*, 658 F.3d at 700.

The regulations provide guidance as to what constitutes a "management contract." The Commission has defined the term to include "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. "Collateral agreement" means "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5.

While "management" itself is not defined in the regulations, the NIGC has produced an informal bulletin distinguishing between management contracts and consulting agreements consistent with the broad definition in § 502.15:

> 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.

Wells Fargo, 658 F.3d at 696 (quoting NIGC Bulletin No. 94-5, at 1 (Oct. 14, 1994)). As an informal agency pronouncement, this bulletin is not entitled to *Chevron* deference.[5] Still, the Seventh Circuit found it "of relevance" to the management contract inquiry, *Wells Fargo*, 658 F.3d at 696, and so this court will consider it as well.

Other courts have interpreted the definition of the term "management contract" broadly. *See, e.g., New Gaming Sys., Inc. v. Nat'l Indian Gaming Comm'n*, 896 F. Supp. 2d 1093, 1105 (W.D. Okla. 2012) (a management contract need not strip a tribe of decision-making authority entirely). Moreover, a contract may be void not because its own terms impinge on casino management, but because the terms of other, interrelated documents or agreements do. In *United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002), for example, even though a consulting agreement stipulated that Casino Magic had no management power over the gaming enterprise, the agreement was held void because other documents, including a Participation Agreement and a Construction and Term Loan Agreement purported to (1) transfer more power to Casino Magic than the consulting agreement indicated, and (2) strip the tribe of its ultimate decision-making authority by mandating compliance with Casino Magic's recommendations. *Id.* at 424-25.

C. Bond Documents

Relying on this precedent, defendants argue that because the Indenture is void as a management contract, the Bond Documents, which reference the Indenture, are void as well. The court rejects this argument as a general principle. As plaintiffs point out, the principle that all documents signed in conjunction with a void management contract are "inextricably intertwined," such that they necessarily rise or fall together, appears nowhere

[5] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

in IGRA or its regulations. More important for this court's present purposes, the Seventh Circuit already held otherwise with respect to the Bond Documents at issue in this case: "[i]t is not immediately apparent that the waivers contained in the documents . . . when read separately or together, ought to be construed as dependent on the validity of the waiver in the Indenture and that they do not make clear the Corporation's intent to render itself amenable to suit for legal and equitable claims in connection with the bond transaction." *See Wells Fargo Bank*, 658 F.3d at 701.

For similar reasons, the court also declines to void all of the Bond Documents across the board based on admittedly problematic provisions contained in only a few of those documents. As the Seventh Circuit held in *Wells Fargo Bank*, while collateral agreements *may* constitute management contracts, "a document collateral to a management contract 'is subject to agency approval . . . only if it provides for the management of all or part of a gaming operation.'" *Wells Fargo Bank*, 658 F.3d at 701. While courts have found that the documents taken together can constitute a "management contract," defendants cite no case in which *every* document from a transaction -- including those that provide for *no* management authority under any circumstance -- is necessarily void simply because they were connected to a common, larger transaction.

The Eighth Circuit's decision in *Casino Magic* arguably comes the closest to such a proposition. While the parties' Consulting Agreement purported to give ultimate authority to the tribe, in that case the court found the Construction and Term Loan Agreements actually revoked that supposed authority by *mandating* the Tribe's compliance with recommendations made by Casino Magic under the Consulting Agreement. 293 F.3d at 424-25. The parties' Participation Agreement also gave Casino Magic a percentage

ownership interest in the Tribe's indebtedness. *Id.* The *Casino Magic* court, therefore, held that these three agreements, when taken together, laid out a comprehensive management scheme in which Casino Magic Corporation had ultimate decision-making authority in violation of IGRA. *See id.* at 426 (noting that "the series of agreements constituted a management agreement").

Here, defendants can only point to individual provisions in *some* of the Bond Documents that, if taken together, arguably would transfer some management authority away from the Tribe and the Corporation under certain circumstances. But nothing in *Casino Magic* suggests that other documents not arguably part of this "comprehensive scheme" are "infected" and void as well. Were this not so, the Seventh Circuit's statement that "the mere reference to a *related* management contract does not render a collateral document subject to the Act's approval requirement" would make little sense. *Wells Fargo Bank*, 658 F.3d at 701.

Two individual Bond Documents in particular stand out as providing an unequivocal, independent waiver of the Tribe's sovereign immunity: the Tribal Resolution and the Bond Resolution. The Tribal Resolution, adopted by the Tribal Council of the Lac du Flambeau Band of Lake Superior Chippewa Indians, states in pertinent part:

> WHEREAS, the Tribal Council has been advised that as a condition to the purchase of the Bonds, the bondholders require that the Tribe agree to various legal provisions (the "Legal Provisions") that will provide for (a) a limited waiver of its sovereign immunity with respect to suits or other legal actions or proceedings arising because of disputes related to the Tribal Agreement or other agreements related thereto . . .
>
> RESOLVED, that all Legal Provisions in the Tribal Agreement are hereby approved; more specifically and expressly, those by which the Tribe (i) provides a limited waiver of sovereign

> immunity from suit, (ii) agrees that the laws of the State of Wisconsin shall apply including, specifically, the Wisconsin Uniform Commercial Code, (iii) consents to the jurisdiction: of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the United States District Court for the Western District of Wisconsin may be appealed), and the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper, with respect to any dispute or controversy arising out of the Tribal Agreement, this Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith[.]

(Tribal Resolution, at 1-2.)

Similarly, the Bond Resolution adopted by the Board of Directors of the Lake of the Torches Economic Development Corporation states:

> RESOLVED, that all Legal Provisions in the Bond Documents are hereby approved; more specifically and expressly the Corporation (i) waives its immunity from suit, (ii) agrees that the laws of the State of Wisconsin shall apply including, specifically, the Wisconsin Uniform Commercial Code, and (iii) consents to the jurisdiction of the United States District Court for the Western District of Wisconsin . . . with respect to any dispute or controversy arising out of the Indenture, the Security Agreement, the Bond Placement Agreement, the Bonds, this Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith[.]

(Bond Resolution, at 3.)

Despite these broad unambiguous waivers, defendants argue that their resolutions evince an intent to waive sovereign immunity only with respect to a non-existent "Trustee" for a now void Indenture and not with respect to any of the plaintiffs in this case. The plain language in the resolutions is, however, to the contrary. Nothing in either resolution indicates any intent by the Tribe or the Corporation to limit its waiver of sovereign immunity only to a particular *party*. Rather, the Tribal Resolution state that the Tribe's

waiver extends to *any* dispute or controversy arising out of the Tribal Agreement, the Resolution or any transaction in connection therewith. So, too, does the Corporation's waiver extend to *any* dispute or controversy arising out of the Bond Documents. There is no hint of intent in either Resolution to narrow, much less language *actually* narrowing, these broadly-phrased waivers to extend only to suits brought by the "Trustee."

Moreover, the present case falls well within the express terms of that waiver. Indeed, the controversy between the parties in this case unquestionably arises out of: (1) the various Bond Documents, in that it implicates their validity as well as the enforceability of defendants' representations that they have waived tribal court jurisdiction; and (2) the Bond Transaction itself, in that the Stifel and Saybrook plaintiffs contend that the circumstances surrounding the Transaction do not permit the tribal court to exercise jurisdiction over them. Even strictly construing the above waivers in defendants' favor, they have waived sovereign immunity for purposes of this case and, in particular, for purposes of vindicating or denying the interests of the bondholders.

Defendants also argue that the Bond Resolution entered into by the Corporation merely references but does not incorporate the waivers of sovereign immunity in other documents and so cannot be construed to waive the Corporation's sovereign immunity on a stand-alone basis. First, it is not immediately apparent that defendants are correct: the Bond Resolution both approves the provisions in other documents and goes on to state that "more specifically and expressly the Corporation (i) waives its immunity from suit." (Bond Resolution, at 3.) The Tribal Resolution *does* contain the language defendants point out, but even so, the relevant question in analyzing a waiver of sovereign immunity is one of *intent*. *See Wells Fargo Bank*, 658 F.3d at 701. No "magic words" are required to evince such

an intent. *See Sokaogon Gaming*, 86 F.3d at 660; *see also Val-U Constr. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 577 (8th Cir. 1998) (noting that the Supreme Court has "never required the invocation of 'magic words'" for a waiver of sovereign immunity). In the context of the larger transaction here, the Corporation and Tribe's intent to waive its sovereign immunity to facilitate the $50 million Bond Transaction speaks loudly in the Bond Resolution and Tribal Resolution, respectively.

Finally, defendants argue that the Tribal Resolution, standing on its own, constitutes a "management contract" and is void under IGRA. However, the only problematic provision the Tribe identifies in that Resolution is the Tribal Council's approval of "covenants not to replace key management of the Casino Facility without obtaining the requisite consent of the holders of the Bonds." (Tribal Resolution, at 2.) The court does not believe that this provision *alone* gives bondholders the authority to plan, organize, direct, coordinate or control casino operations. All the Resolution does is acknowledge that bondholders will have limited input into the *tribal parties'* decisions on replacement of key managers.

While the Seventh Circuit considered a comparable provision when analyzing the Indenture, it did so *in conjunction* with other provisions giving Wells Fargo ultimate control over disposition of gross revenue and capital allocation, as well as permitting the bondholders under certain circumstances to retain an independent consultant whose recommendations the Corporation had to implement, before concluding that the Indenture gave the bondholders "truly powerful authority over the management of the Corporation." *Wells Fargo Bank*, 658 F.3d at 698-99. In contrast, a single provision in the Resolution requiring approval of a simple majority of bondholders, standing alone, does not "transfer

significant management responsibility to . . . the bondholder and therefore render the [Tribal Resolution] a management agreement subject to the approval of the Chairman." *Id.* at 699. The entire document is by definition a "Resolution," not an enforceable contract, management or otherwise, and establishes the Tribe's *intent*, whether or not it is a binding agreement.[6]

At a minimum then, the Bond and Tribal Resolutions evince an intent on the part of the Corporation and the Tribe, respectively, to waive their sovereign immunity for purposes of the current suit. Because the court has rejected defendants' argument that the waivers are void as part of unapproved management contracts, it concludes that these are valid waivers of sovereign immunity and that neither the Tribe nor the Corporation is immune from this lawsuit.

II. Exhaustion of Tribal Remedies

Having determined that both defendants have consented to this court's exercise of jurisdiction over them on matters related to the Bond Documents and Transaction, the court turns next to defendants' argument under the doctrine of tribal exhaustion, which asserts that, based on principles of comity, a tribal court should be given the opportunity to determine its jurisdiction first, before this court weighs in. The Seventh Circuit considered this doctrine in some detail in *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), ultimately rejecting a tribal corporation's similar defense of failure to exhaust tribal

[6] In fairness, while the Resolutions are only signed by representatives from the Tribal Council and the Corporation, respectively, there is a provision in each one stating that they shall "constitute a contract with the Trustee." Since this provision runs counter to the remainder of the document, and there is no countersignature, it is doubtful the Resolutions would constitute enforceable "contracts." Even if they were deemed to be contracts between a "Trustee" and the Tribe and Corporation, respectively, that would not alter the stated intent of each resolution. Furthermore, whether enforceable or not, other Bond Documents evince this same intent.

remedies. In *Altheimer*, the Seventh Circuit began by noting that courts must "examine the factual circumstances of each case ... to determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine." *Id.* at 814-15. In that case, the tribal corporation defendant, Sioux Manufacturing Corporation ("SMC"), had entered into a formal "Letter of Intent" that "explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois." *Id.* at 815. Based on that provision, the Seventh Circuit held that requiring tribal exhaustion would not serve the policies behind the rule:

> To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. The Tribe created SMC to enhance employment opportunities on the reservation. As the Ninth Circuit recognized, economic independence is the foundation of a tribe's self-determination. If contracting parties cannot trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught. We therefore affirm the district court's denial of SMC's motion for a stay of proceedings based on the tribal exhaustion rule.

Id.; *accord FGS Constructors, Inc. v. Carlow*. 64 F.3d 1230, 1233 (8th Cir. 1995) ("The contracting parties agreed that a plaintiff could sue either in the federal district court of South Dakota (a court of competent jurisdiction) or in the tribal court. By this forum selection clause, the Tribe agreed that disputes need not be litigated in tribal court. The district court, therefore, had no significant comity reason to defer . . . first to the tribal court.").

While defendants argue that the current dispute "is truly a reservation affair entitled to the exhaustion doctrine," and as such distinguishable from *Altheimer,* the court finds no material difference in the facts of these cases. As in *Altheimer,* the Tribe and the

Corporation alike agreed to litigate disputes involving the Bond Documents or the Bond Transaction, like this one over enforcement of the provisions of the Bonds themselves, in Wisconsin's federal or state courts, and they agreed that the law of Wisconsin should apply to such litigation. In the words of the *Altheimer* court, by doing so, the defendants apparently "wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum." *Altheimer & Gray,* 983 F.2d at 815. To refuse to enforce those explicit contract provisions would "undercut the Tribe's self-government and self-determination." *Id.*

The legal reasoning in *Altheimer* also applies with equal, if not greater, force here. Indeed, the Resolutions here state that the waiver provisions in question were *required* in order for the original transaction to take place. (*See, e.g.*, Bond Resolution, at 2 ("WHEREAS, the Board of Directors has been advised that as a condition to the issuance of the Bonds, the Corporation will be required to agree to various legal provisions . . . that will provide for (a) a limited waiver of its sovereign immunity . . . [and] (b) consent by the Corporation to the jurisdiction of the United States District Court for the Western District of Wisconsin[.]"); Tribal Resolution, at 1 (same, for Tribal Council).) If courts in turn refuse to enforce those clauses, contracting parties may conclude they "cannot trust the validity of choice of law and venue provisions, [and defendants] may well find [themselves] unable to compete." *Id.* For this reason, the court holds that plaintiffs need not exhaust their tribal court remedies with respect to disputes regarding the Bond Documents and Transaction.[7]

[7] In their reply to Godfrey's supplemental briefing on subject-matter jurisdiction, defendants raised

III. Preliminary Injunction

Having concluded that this court has jurisdiction over the party's dispute and need not defer to the Tribal Court, the court turns to plaintiffs' request for a preliminary injunction. Plaintiffs bear the burden of demonstrating that: (1) they have a reasonable likelihood of success on the merits of their underlying claim; (2) they have no adequate remedy at law; and (3) they will suffer irreparable harm without injunctive relief. *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 803 (7th Cir. 2002). If they meet this burden, plaintiffs must then show that the harm they will suffer outweighs any harm defendants will suffer due to the entry of an injunction and that the preliminary injunction will not harm the public interest. *Id.* at 803-04.

The Seventh Circuit has oft instructed that this analysis involves a sliding scale, so that "the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position." *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). This approach "is not mathematical in nature[;] rather[,] 'it is more properly characterized as subjective and intuitive, one which permits district courts to

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an additional argument with respect to *Altheimer,* pointing out that the *Altheimer* court had subject matter jurisdiction over the merits of the underlying contract dispute between the parties. So, defendants note the question of tribal court exhaustion arose in the context of determining whether to keep the case in the federal forum as the parties had contractually agreed. In contrast, the case before this court is intended *solely* to determine tribal court jurisdiction, a question which is traditionally addressed first by the tribal court itself for comity reasons. *See Nat'l Farmers Union*, 471 U.S. at 856. Given the importance of *Altheimer*, defendants' failure to raise this distinction during briefing on the plaintiffs' motions for preliminary injunction is troubling. To the extent the court will consider it now, it is relevant only with respect to Godfrey, since it was raised in that context. Moreover, *Altheimer* still supports this court's conclusion that plaintiffs need not exhaust their tribal remedies in this lawsuit. As in *Altheimer*, defendants entered into contracts calling for a federal or state forum in connection with *any* dispute arising out of the Bond Documents or related transactions, including defendants' tribal court suit to void the Bond Documents. Defendants' own actions, therefore, have characterized the current suit as one not requiring tribal court exhaustion under *Altheimer*, even if the question this court is being asked would otherwise be an excellent candidate for the tribal court to answer in the first instance.

weight the competing considerations and mold appropriate relief.'" *Id.* (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)). In performing this balancing, "the court bears in mind that the purpose of a preliminary injunction is 'to minimize the hardship to the parties pending the ultimate resolution of the lawsuit.'" *AM Gen. Corp.*, 311 F.3d at 804 (quoting *Platinum Home Mortgage Corp. v. Platinum Fin. Grp., Inc.*, 149 F.3d 722, 726 (7th Cir. 1998)).

A. Likelihood of Success on the Merits

In determining whether the tribal court has jurisdiction over plaintiffs, it is appropriate to consider the basic principles of tribal court jurisdiction. "[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). This doctrine arises from the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), which established both the general presumption against tribal court jurisdiction absent express authorization, as well as two "exceptions" to that presumption. Before reaching *Montana*, however, the court must first address defendants' arguments against the application of that rule.[8]

[8] Defendants have maintained that this case is "really about" the forum selection clauses within the contracts and that plaintiffs should be held closely to that theory, given that their proposed findings of fact focused on the contracts and not on *Montana*. The Stifel and Saybrook plaintiffs did brief *Montana* in their motions for preliminary injunction, however, putting defendants on notice of that theory. (*See* Stifel Br. (dkt. #6) 16-19; Saybrook Br. (dkt. #18) 14-17.) To the extent defendants argue that plaintiffs should have explicitly proposed additional facts relating to *Montana*, defendants actually stipulated to the fact on which Saybrook centrally relies -- that it only made a single visit to the reservation -- and the Stifel plaintiffs did propose facts regarding the off-reservation nature of their conduct and negotiations. (*See* Stifel PFOF (dkt. #7) ¶¶ 14-15.)

1. Express Authorization

Defendants first argue that the court need not address the *Montana* presumption or exceptions in this case, because IGRA "expressly authorizes" tribal court jurisdiction here. *See Strate,* 520 U.S. at 449 ("As the Court made plain in *Montana*, the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute."). Defendants contend that Congress has specifically delegated the authority to regulate gaming to the tribes through IGRA, which also allows the tribal court to exercise jurisdiction over gaming-related disputes. Certainly, IGRA gives general authority to tribes to regulate gaming activities on their lands. *See, e.g.*, 25 U.S.C. § 2702(2) ("The purpose of this chapter is . . . to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players[.]").

Unfortunately for defendants, the case currently proceeding in tribal court has nothing to do with the Tribe's and Corporation's rights to regulate gaming as established by IGRA. Rather, the tribal court action is intended to void the Bond Documents for failure to comply with *federal law*, which required the parties to submit those documents for approval by a *federal agency.* It goes too far to say that through IGRA, tribes have been delegated the authority to regulate *any* action that tangentially touches upon gaming, even when its own regulatory power plays *no* role in the outcome.

Similarly, defendants argue that they retain treaty rights to exclude nonmembers from their land, which translates into the right to regulate nonmember conduct on their

land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct[.]"). As the court will discuss further below, however, nonmember conduct on tribal land surrounding the issuance of the Bonds at issue here is virtually non-existent, making *Merrion* and any claimed treaty right inapplicable. Moreover, there is no logic in the assertion that because defendants retain the power to *exclude* nonmembers from their reservations, they necessarily have the power to hale them *into* tribal court.

2. *Montana*'s Applicability on Tribal Land

Defendants also argue that *Montana* is inapplicable for another reason: its general presumption against jurisdiction and its exceptions only apply in actions involving conduct on *nonmember fee land* and this lawsuit involves conduct on tribal *trust lands*. The Ninth Circuit, at least, has embraced the importance of this distinction, holding that *Montana* applies only in cases arising on non-Indian land in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011). Specifically, the Ninth Circuit held that on tribal land, tribes maintain the sovereign authority to exclude nonmembers, which in turn permits them to regulate by setting conditions on nonmembers' entry. *Id.* at 811-12. Thus, the Ninth Circuit concluded that where the tribal court exercised jurisdiction over a non-Indian corporation and its owner for breach of their lease of tribal lands and trespass, the inherent power to exclude, coupled with the "necessarily include[d] . . . lesser authority to set conditions on [nonmembers'] entry," justified the exercise of tribal court jurisdiction over those parties without reference to *Montana*. *Id.* at 811.

Plaintiffs respond that the Supreme Court rejected this same argument in *Nevada v. Hicks*, 533 U.S. 353 (2001), finding instead that *Montana* applies regardless of land status. In *Hicks*, the Court held that a tribal court lacked jurisdiction over a claim under 42 U.S.C. § 1983 arising out of state police officers' execution of a search warrant on tribal lands. In doing so, the court stated:

> *Montana*, after announcing the general rule of no jurisdiction over nonmembers, cautioned that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," 450 U.S. at 565—clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations."

Hicks, 533 U.S. at 359-60; *see also id.* at 387 (O'Connor, J., concurring) ("Today, the Court finally resolves that *Montana v. United States* governs a tribe's civil jurisdiction over nonmembers regardless of land ownership.") (citation omitted). In *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316 (2008), the Supreme Court provided further support for plaintiffs' position, stating that the general rule of *Montana* "restricts tribal authority over nonmember activities taking place on the reservation, and is *particularly strong* when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id.* at 328 (emphasis added). This language suggests that, while the presumption against tribal court jurisdiction is *stronger* on fee land, at a minimum it *applies* on tribal trust land as well.

To the extent the *Water Wheel* decision conflicts with those of the Supreme Court in *Hicks* and *Plains Commerce Bank* which the Ninth Circuit disputed, the latter cases obviously

control. Moreover, there is no evidence in this case that plaintiffs' conduct took place on tribal trust land, at least with respect to the Stifel and Saybrook plaintiffs.[9] The tribal court action at issue here arises from the Bond Documents, but the evidence adduced at the hearing establishes that the Stifel and Saybrook plaintiffs' conduct in relation to those documents took place almost exclusively off-reservation. Although defendants argue that the Bond Documents themselves purport to grant significant control over tribal land to plaintiffs, the tribal court action challenges neither plaintiffs' exercise of that control nor any attempt to do so. Instead, the tribal court action is intended simply to invalidate the documents based on the failure to acquire proper federal approval. Defendants' inherent power to exclude parties from tribal trust land and set conditions on nonmembers' entry simply does not come into play here. Thus, regardless of whether *Montana* applies only to cases involving nonmember conduct on non-Indian land, it applies here.

3. *Montana* Presumption and Exceptions

In *Montana*, the Supreme Court delineated two specific exceptions to the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[10] 450 U.S. at 565. The first exception states that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* This exception requires

[9] The court does not include Godfrey & Kahn in this analysis, because Godfrey stipulated for the purposes of its motion for preliminary injunction that the tribal court could assert jurisdiction consistent with *Montana*. (*See* dkt. #131.) Moreover, Godfrey's relationship as defendants' counsel appears to have been different in character and scope than that of the other plaintiffs.

[10] Though *Montana* specifically addressed a tribe's *regulatory* authority, the Supreme Court confirmed in *Strate* that *Montana* applies to a tribe's adjudicative authority as well. *Strate,* 520 U.S. at 453.

that the regulation imposed by the tribe have some nexus to the consensual relationship itself. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 (2001); *see, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008) (bank's lengthy on-reservation commercial relationship with tribal party did not support jurisdiction, because it was unrelated to tribal party's attempt to regulate the bank's sale of land it owned in fee simple); *Strate*, 520 U.S. at 457 (though defendant in traffic accident case had contract with the tribe, plaintiff was not party to the subcontract, and tribe was not party to the accident, so case did not fall within *Montana*'s first exception).

Recently, the Supreme Court addressed the application of the *Montana* exceptions in *Plains Commerce Bank*. The Court explained that in analyzing whether the first *Montana* exception supports tribal court jurisdiction, courts should focus on the *conduct* of the nonmember parties that the tribe seeks to regulate:

> *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers," allowing these to be regulated to the extent necessary "to protect tribal self-government [and] to control internal relations[.]"

Id. at 332 (emphasis in original) (internal citations omitted). As reflected in the first sentence of the quote above, even though the first *Montana* exception does not on its face limit the relevant inquiry to conduct *on Indian land,* unlike the second exception, the Supreme Court explained both exceptions are similarly limited. First, the *Plains Commerce Bank* court pointed out that the four cases originally cited to explain *Montana*'s first exception all involved "regulation of non-Indian activities *on the reservation*": a contract dispute arising from an on-reservation sale of merchandise from a non-Indian to an Indian,

and three cases involving taxes on non-members' economic activities on Indian land. *Id.* at 332 (emphasis added). The Court further pointed out that the cases since *Montana* "have followed the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land." *Id.* at 333. Finally, the Court noted that "[t]ellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*."[11] *Id.* at 333 (quoting *Hicks*, 533 U.S. at 360) (emphasis in original). The Court concluded that discussion by reaffirming the importance of looking at the *nonmember conduct* the action seeks to regulate.

Consistent with these observations, the *Plains Commerce Bank* court concluded that regardless of land status, "*Montana* cases have always concerned nonmember conduct on the land." *Id.* at 334. For this reason, the *Montana* exceptions did not extend to the mere *sale* of the land at issue in *Plains Commerce Bank*. According to the Court, this distinction is consistent with the touchstone of *Montana:* the tribe's interests in protecting internal relations and self-governance. "[T]he logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated." *Plains Commercial Bank,* 554 U.S. at 334-35. To the extent the activity *itself* does not threaten the tribe's sovereign interests, then the first *Montana* exception does not allow regulation of that activity in tribal court. *Id.* at 336-37.

[11] In that case, *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408 (1989), six Justices concluded that *Montana* did not authorize the Yakima Nation to impose zoning regulations on non-Indian fee land located on the reservation where nearly half the acreage was nonmember-owned, but five Justices concluded that *Montana* allowed the Nation to impose zoning restrictions on "nonmember fee land isolated in 'the heart of [a] closed portion of the reservation.'" *See Plains Commerce Bank*, 554 U.S. at 334 (summarizing *Brendale*) (alteration in original).

Applying the framework of *Plains Commerce Bank* to the facts of this case, the court finds that the Stifel and Saybrook plaintiffs' activities likely do not support the exercise of tribal court jurisdiction. As explained at the preliminary injunction hearing, the parties' on-reservation conduct is minimal, particularly with respect to Saybrook. Indeed, the parties have stipulated for purposes of the present motions that the *only* visit to the reservation by Saybrook or LDF Acquisitions was a single visit by a Saybrook representative, Scott Bayliss, and that Bayliss engaged in no negotiations with the Tribe or the Corporation during that visit. (*See* Limited Stipulation (dkt. #154) ¶ 1.) In fact, defendants have stipulated that the sole purpose of his visit was to gather information as part of Saybrook's due diligence. (*Id.*) With respect to the Stifel plaintiffs, the question is arguably closer, since Stifel representatives apparently visited the reservation on multiple occasions to make presentations related to the Bond Transaction, but even as to Stifel there has been no evidence presented that any *negotiations* with respect to the Bond Transaction or Documents took place on tribal land. At the very most, defendants have established that the Stifel plaintiffs engaged in a not-insignificant amount of conduct on the reservation.

In any event, the final step in establishing the applicability of the first *Montana* exception to both the Stifel and Saybrook plaintiffs is missing: the tribal court action does not seek to regulate nonmember *conduct*. As Stifel pointed out at the preliminary injunction hearing, the tribal court action seeks declaratory judgments that: (1) all the Bond Documents are void as inextricably intertwined with the Indenture; (2) each separate document is an unapproved management contract under IGRA; and (3) the Tribal Agreement and Tribal Resolution are void as unapproved by a referendum vote of members

of the Tribe. (*See* Statement of Claim (dkt. #1-14).) None of this requested relief seeks to regulate *plaintiffs' conduct on the reservation*.[12]

Defendants also do not allege in tribal court that plaintiffs have taken any action by way of their commercial relationship with the Tribe and the Corporation that necessitates regulation. Neither do they contend that plaintiffs have breached the terms of the Bond Documents, nor seek to hold plaintiffs liable for conduct connected with the negotiation and execution of the Bond Documents.[13] Similarly, they do not allege trespass, nor are they asking plaintiffs to comply with particular conditions of entry onto tribal land.

In the end, all defendants offer is the mere fact of a commercial relationship, which they now seek to invalidate. Based on the Supreme Court's explicit warning that *Montana's* exceptions are limited and "cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink it,'" the court concludes that this relationship alone, without more, is likely not enough. *See Plains Commerce Bank*, 554 U.S. at 330 (internal citations omitted).

This result is also consistent with the "sovereign interests" touchstone of the *Montana* analysis as articulated in *Plains Commerce Bank*. As noted above, the overarching inquiry in

[12] Defendants argue that that the court should consider not only plaintiffs' on-reservation conduct but also: (1) the activities of the Tribe and the Corporation; and (2) the rights that the Bond Documents purport to give plaintiffs to manage the on-reservation casino. The first proposition is unsupported by law. If *Montana's* consensual relationship exception allowed for tribal court jurisdiction whenever *any* party to the relationship, including a tribal party, took action on tribal land, the exception would swallow the rule. Indeed, the Supreme Court has explicitly cautioned against broadly construing the *Montana* exceptions in this manner. *See Plains Commerce Bank*, 554 U.S. at 330. The second proposition is superficially appealing, but it strays from *Montana*'s emphasis on regulation of nonmember *conduct*. The tribal court action is not trying to regulate conduct; it seeks simply to invalidate the Bond Documents. That the alleged grounds for invalidation are provisions purportedly transferring management authority to plaintiffs does not appear relevant to application of the first *Montana* exception, which only allows for the regulation of nonmember activity on tribal lands.

[13] Although the Statement of Claim in tribal court refers to alleged "misrepresentations" and "false and misleading statements," defendants bring no claims for misrepresentation, nor do they seek any relief on those grounds. (*See* Statement of Claim ¶¶ 139-65.)

Montana is whether the activities "intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities . . . may be regulated." *Id.* at 335. Here, plaintiffs' actual activities amount to nothing more than entrance into a commercial transaction with defendants -- a transaction defendants now challenge in tribal court upon purely legal grounds. (*See* Statement of Claim ¶¶ 139-65.) This sort of regulation "cannot be justified by reference to the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 336. While the validation or invalidation of the Bond Documents may well have an impact on defendants, that is not enough to establish tribal court jurisdiction. *Id.* ("This is not to suggest that the sale of the land will have no impact on the tribe. . . . But the key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale."). Here, any threat to the Tribe's ability to govern itself as sovereign does not flow from plaintiffs' conduct in entering into the commercial deal, and so *Montana*'s first exception does not permit tribal court jurisdiction over the Stifel and Saybrook parties.

Under the second *Montana* exception, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Unlike the first *Montana* exception, which the Supreme Court has narrowed through case law, the second exception expressly grants tribal authority over non-Indians' *conduct on reservation land*. As previously discussed, the tribal court action here does not seek to regulate plaintiffs' conduct *at all*, let alone their conduct on reservation land. Thus, for the same

reasons discussed above, the second *Montana* exception is unlikely to support tribal court jurisdiction over the Stifel and Saybrook plaintiffs in that action.

Furthermore, although the terms of this exception are otherwise broad, the Supreme Court has held its actual application is fairly narrow. For example, in *Strate*, a traffic accident occurred on a highway within reservation land, although neither the allegedly negligent driver nor that driver's employer was a member of the tribe. The Supreme Court concluded that the second *Montana* exception did not allow the tribal court to exercise jurisdiction over the nonmember parties.

As an initial matter, the *Strate* Court recognized that "[u]ndoubtedly, those who drive carelessly on a public reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members." *Id.* at 457-58. However, the Court also recognized that "if *Montana's* second exception requires no more, the exception would severely shrink the rule." *Id.* at 458. Accordingly, the Court looked to *Montana*'s citations to determine "the character of the tribal interest" at stake, concluding that the second exception was effectively intended to "protect tribal self-government or to control internal relations." *Id.* at 458-59 (quoting *Montana*, 450 U.S. at 564). Where a case will not affect a tribe's ability "to preserve 'the right of reservation Indians to make their own laws and be ruled by them,'" the Court found the second *Montana* exception does not apply. *Id.* (quoting *Williams*, 358 U.S. at 220).

While a large sum of money is undoubtedly at stake here, *Montana*'s second exception requires that the harm "do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008). "[T]h[e] elevated threshold for application of the second

Montana exception suggests that tribal power must be necessary to avert catastrophic consequences." *Id.* (quoting F. Cohen, Handbook of Federal Indian Law § 4.02[3][c], at 232 n.220). The central question, as articulated by the Supreme Court, is whether the case at issue involves consequences that are "'catastrophic' for *tribal self-government.*" *Id.* (emphasis added).

Here, defendants are unlikely to meet such a high standard. In particular, although they have offered evidence that making payments on the Bonds will require cuts to tribal programming, defendants have not even attempted to demonstrate that the commercial dispute at the center of the tribal court action requires regulation to preserve the tribe's right to *self-governance*. The tribal court action seeks to void the Bond Documents for failure to acquire proper federal approval and will not itself affect the Tribe's ability to make its own laws and be ruled by them. Thus, the Stifel and Saybrook plaintiffs are likely to succeed in demonstrating a lack of tribal court jurisdiction under either of the *Montana* exceptions to the presumption against the tribal court's exercise of jurisdiction over them.

4. Forum Selection

This does not end the merits inquiry, however, since plaintiff Godfrey & Kahn has stipulated for purposes of its motion for preliminary injunction that *Montana* does not insulate it from tribal court jurisdiction. Rather, Godfrey relies on forum selection provisions within various Bond Documents to foreclose tribal court jurisdiction, an alternative argument also advanced by the Stifel and Saybrook plaintiffs.

As a preliminary matter, defendants contend that because Godfrey relies entirely on contract law, rather than on federal law, Godfrey's claims do not "arise" under federal law

for purposes of 28 U.S.C. § 1331. Godfrey disputes this characterization, arguing that the federal question of inherent tribal authority over non-Indians is not exclusively governed by *Montana,* but also arises in determining whether a Tribe has waived any such inherent authority.[14]

The answer to this question is by no means clear-cut. The oft-quoted language upon which both plaintiffs and defendants rely comes from *National Farmers Union*, which stated:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331.

Nat'l Farmers Union, 471 U.S. at 852-53. Unlike the Stifel and Saybrooke plaintiffs, Godfrey's claims do not fall neatly within that language, since Godfrey does not contend that *federal law* has divested the tribal court of jurisdiction over it. Instead, Godfrey contends that state *contract law* has foreclosed defendants from invoking tribal court jurisdiction.

In support of its argument that *National Farmer* still applies, Godfrey principally relies on cases involving the enforcement of arbitration provisions in contracts between tribes and private parties. While the court agrees the circumstances are analogous, the absence of a

[14] The fact that part of this dispute requires the court to interpret IGRA does not provide a basis for subject matter jurisdiction. *See Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 659-60 (7th Cir. 2006), *abrogated in part on other grounds by Vaden v. Discover Bank*, 556 U.S. 49 (2008); *Saybrook Tax Exempt Investors, LLC*, 929 F. Supp. 2d at 863 (defendants must raise IGRA as an affirmative defense). Nor does the question of sovereign immunity present such a question. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841-42 (1989) (possible existence of tribal immunity defense does not convert claims into federal questions for subject matter jurisdiction purposes).

federal law component is not. For instance, Godfrey points to *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003). In that case, Gaming World filed a suit seeking a declaratory judgment that its agreement with the White Earth Band was valid as approved by the Interior Board of Indian Appeals (IBIA) and an order compelling arbitration pursuant to the agreement. In holding that federal question jurisdiction existed over the parties' dispute, the Eighth Circuit explained that "the petition in this case raises the issue of whether the March 6, 1992 contract received valid federal approval under the IGRA regulatory scheme." *Id.* at 848. In so holding, the *Gaming World* court actually used language suggesting that a claim like Godfrey's, which is contract-based, does not present an underlying federal question. *See id.* ("If a management company alleges only a 'routine contract action' against a tribe, such as a claim that the tribe has violated a consulting agreement not subject to regulation under IGRA, the complaint does not invoke federal jurisdiction.").

Certainly, *Gaming World* and another case Godfrey cites, *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), appear to interpret *National Farmers Union* more broadly than its plain language would appear to support. For instance, *Gaming World* goes on to state as an alternative basis for federal question jurisdiction that "an action filed in order to avoid tribal court jurisdiction necessarily asserts federal law." *Gaming World*, 317 F.3d at 848. Similarly, although *Bruce H. Lien* involved an action to compel arbitration pursuant to a properly-approved management agreement, the court stated that "[t]he existence of tribal court jurisdiction itself presents a federal question," citing to the same language in *National Farmers Union* quoted above. *See Bruce H. Lien*, 93 F.3d at 1422. At the same time, neither of these courts considered the distinction suggested by that language

between cases alleging that *federal law* has divested a tribal court of jurisdiction (e.g., those brought pursuant to *Montana*) and cases alleging that contract law makes invocation of tribal court jurisdiction improper, making Godfrey's argument for independent subject-matter jurisdiction over its claims substantially less persuasive -- at least in this court's view.

Both *Gaming World* and *Bruce H. Lien* are distinct from the present case in another arguably important respect. Each involved the invocation of federal law, the Federal Arbitration Act, to divest the tribal court of jurisdiction. While Godfrey rightly points out that the FAA does not itself *create* jurisdiction, to the extent that the FAA's policy in favor of arbitration supported divestment of tribal jurisdiction, the defendants in both cases "relied" on federal law "as a basis for the asserted right of freedom from Tribal Court interference." *National Farmers Union*, 471 U.S. at 853. In contrast, this case involves ordinary contract law principles.

Another case both parties cite, *Ninigret Dev't Corp. v. Narragansett Indian Wetuomuch Housing Authority*, 207 F.3d 21 (1st Cir. 2000), does little to resolve the question of this distinction's importance. In *Ninigret*, the First Circuit found federal question jurisdiction to decide whether an Indian tribe may compel a non-Indian to submit to the civil jurisdiction of a tribal court, even when the plaintiff's claims are not premised on federal law. *Id*. at 27-28. Nevertheless, the First Circuit went on to fault the district court for ruling on the enforceability of the forum-selection clause, stating that:

> [U]nder *National Farmers*, the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract. At that stage, the pivotal question is not which court the parties agreed would have jurisdiction, but which court should, in the first instance, consider the scope of the tribal

> court's jurisdiction and interpret the pertinent contractual clauses (including any forum-selection proviso).

Id. at 33. *Ninigret*, therefore, is at best ambiguous as to a federal district court's exercise of subject matter jurisdiction over a contractual forum selection clause.

Assuming defendants are correct and the question of a tribe's arguable waiver of its own forum to resolve a contract dispute is not subject to federal jurisdiction, this court may still exercise supplemental jurisdiction over Godfrey's claim under 28 U.S.C. § 1367(a).[15] Section 1367(a) states that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution," even if those claims "involve the joinder or intervention of additional parties." Two claims are part of the same case or controversy if they derive from a common nucleus of operative facts, with a loose factual connection between them generally sufficing for § 1367(a) purposes. *Sanchez & Daniels v. Koresko*, 503 F.3d 610, 614 (7th Cir. 2007). Here, Godfrey's claim that the Tribal Defendants have waived their right to proceed in tribal court arises from the same operative facts as the *Montana* questions over which this court has already found it has subject-matter jurisdiction over the other plaintiffs' claims. In addition, those plaintiffs raise the very same contractual waiver claim as Godfrey. Finally, whether the pending tribal

[15] Additionally, Godfrey has only agreed not to contest jurisdiction under *Montana* for purposes of the current preliminary injunction motion. It is, therefore, not necessarily accurate to say that Godfrey has *no* claim that federal law precludes tribal court jurisdiction over it. Still, although Godfrey has not waived its right to challenge the exercise of tribal court jurisdiction under *Montana*, the nature and extent of its relationship with the Tribe and the Corporation would also appear to make the likelihood of success on that question less than the other plaintiffs', which is likely part of Godfrey's reasoning in not pressing *Montana* as a basis for a preliminary injunction.

court action brought against all plaintiffs may proceed is the only matter in dispute. This more than satisfies the requirement of a "loose factual connection."

The problem is that supplemental jurisdiction does not lie indefinitely. Under 28 U.S.C. § 1367(c)(3), a court may decline to exercise supplemental jurisdiction over a claim if it has dismissed all claims over which it has original jurisdiction. If those federal claims are resolved before trial, as this court has already found is likely, a presumption arises in favor of relinquishing jurisdiction. *Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007). Moreover, it may well make little sense to retain jurisdiction over Godfrey's contract-based claims at that point. Certainly resolution of Godfrey's contract-based claim will likely involve a substantial amount of additional work for this court, given that the issues are altogether different than the issues involved in the Stifel and Saybrook plaintiffs' *Montana* arguments. As importantly, these *same* contract issues will likely have to be resolved by the state court with respect to the Stifel and Saybrook plaintiffs. Thus, while the court will continue to exercise supplemental jurisdiction over Godfrey's claim at this stage, it may end up dismissing that claim without resolving its merits. This is by no means set in stone, given the substantial investment the court has already been required to make and may yet be required to make in assessing the merits of Godfrey's claims, as set forth below.

Admittedly, it seems odd (or at least inefficient) to enjoin defendants from proceeding in tribal court against the Stifel and Saybrook plaintiffs under *Montana*, while permitting defendants to proceed in that court against Godfrey -- particularly since defendants concede that they named Godfrey in the tribal court suit principally to bind it to the judgment against the principal plaintiffs, ensuring complete relief and avoiding the

possibility of inconsistent results should their efforts to invalidate the Bond Documents prove unsuccessful. *See City of Chicago v. Int'l College of Surgeons,* 522 U.S. 156, 173 (1997) ("[Section 1367] reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.") (internal quotation marks omitted). Indeed, Godfrey arguably ought not be named a defendant in the tribal court action at all, at least given defendants' position that Godfrey is not party to, and has no rights under, the Bond Documents. Still, the question of whether Godfrey is a "proper defendant" in the tribal court action may well prove something for another court to decide. Indeed, with respect to Godfrey, the state and tribal courts may ultimately need to apportion jurisdiction via a *Teague* conference before proceeding to resolve the *merits* of the action.[16] *See Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709

Even if this court were to ignore its jurisdictional concerns with Godfrey's claim, Godfrey has also not yet established a substantial likelihood of success on the merits. Preliminarily, the forum selection language vary among the Bond Documents. For example, the Tribal Resolution, the Bond Resolution and the Bond Purchase Agreement state only that the Tribe and the Corporation, respectively, consent to the jurisdiction of Wisconsin federal and state courts. Thus, Wisconsin courts are not "specified with mandatory or obligatory language," "only jurisdiction is specified." *Paper Exp., Ltd. v. Pfankuch Maschinen*

[16] Even so, the court would be remiss not to point out that with respect to contract claims under the Bond Documents or other claims related to the Bond Transaction, a strong argument can be made for allocating jurisdiction to the state court, since it will have to resolve those issues anyway (for Saybrook and Stifel) and the tribal court need not unless the Tribe and Corporation insist somewhat nonsensically to proceed alone against Godfrey.

GmbH, 972 F.2d 753, 756 (7th Cir. 1992). The mere fact that Wisconsin courts have jurisdiction over claims arising from the Bond Documents pursuant to that clause does not mean that the tribal court necessarily *lacks* jurisdiction. That court might still be an appropriate forum for resolution of the dispute (subject, of course, to the *Montana* analysis).

As plaintiffs point out, the Tribal Agreement goes a step further, stating:

> The Tribe expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the Federal District Court for the Western District of Wisconsin may be appealed), and, in the event (but only in the event) the said federal court fails to exercise jurisdiction, the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper, for the adjudication of any dispute or controversy arising out of this Agreement and including any amendment or supplement which may be made hereto, or to any transaction in connection therewith, *to the exclusion of the jurisdiction of any court of the Tribe*.

(Tribal Agreement, at 5 (emphasis added).) The Specimen Bond mirrors this language, including a provision in which the Corporation consents to the jurisdiction of the Wisconsin courts "for the adjudication of any dispute or controversy arising out of [the] Bond, the Indenture, or the Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith, to the exclusion of the jurisdiction of any court of the Corporation." (*See* Specimen Bond, at 5.)

This language appears to constitute an unambiguous consent to the exclusive jurisdiction of Wisconsin courts. Certainly, it excludes the possibility of tribal court jurisdiction for a certain category of lawsuits, including that currently before the tribal court in which defendants' attempt to void *all* of the Bond Documents, including the Tribal Agreement and the Bonds, based on the failure to acquire proper federal approval.

Despite this unambiguous consent, plaintiff Godfrey has other hurdles to overcome before establishing its entitlement to injunctive relief similar to the other plaintiffs. *First*, defendants argue that because the Indenture has been found by the Seventh Circuit to be void *ab initio,* both the Tribal Agreement and the Bonds are unenforceable as there is no longer -- and indeed never was -- a "Trustee" appointed under the Indenture. Specifically, the Tribal Agreement purports to be a contract between the Tribe and Wells Fargo as the Trustee, but defendants point out that no Trust ever existed. According to defendants, the Bonds are unenforceable for this same reason: because each Bond provides that it "shall not be valid or become obligatory for any purpose until it shall have been authenticated by the execution of the certificate hereon endorsed by the Trustee under the Indenture." (Specimen Bond, at 5.) Without a Trustee, defendants contend, the Bond never became valid or obligatory, so the forum selection provisions within that Bond cannot now be enforced.

There are a number of flaws in this argument. As a practical matter, Wells Fargo was *acting as trustee* throughout this transaction and all the parties proceeded on that basis. Although the Trust as contemplated ultimately failed after the Indenture was determined to be void *ab initio*, a constructive trust still arose at the time $50 million changed hands, making Wells Fargo at the very least the *de facto* trustee, albeit with none of the powers granted under the Indenture. *See* Restatement (Second) of Trusts § 422 cmt. a ("[I]t is just that a resulting trust should be imposed in order to prevent the transferee from being unjustly enriched at the expense of the transferor."). Indeed, the parties stipulated for purposes of the pending preliminary injunction motions that on January 18, 2008, the Corporation issued an Order to Wells Fargo directing it to "authenticate, register, and

deliver the Bonds" to Stifel. (*See* Defs.' Limited Stipulation (dkt. #154) ¶ 2.) Defendants' current contention that this authentication, which they directed, rendered the Bonds unenforceable is inconsistent with principles of equity and with the way the Uniform Commercial Code (which Wisconsin has adopted) is generally interpreted. *See* Uniform Commercial Code § 8-202 cmt. 1 ("Nor is a defect in form or the invalidity of a security normally available to the issuer as a defense."); Wis. Stat. § 408.202 (adopting UCC language). Thus, defendants are unlikely to succeed in invalidating the Tribal Agreement or Bonds themselves based on the voiding of the Indenture.

Second, defendants argue that Godfrey is not a party to *any* of the contracts or documents in this case, including the Tribal Agreement and Bonds, and so it cannot invoke their forum selection language.[17] In the Seventh Circuit, a non-party to a contract can be bound by a forum selection clause if it is "'closely related' to the dispute, such that it becomes 'foreseeable' that it will be bound." *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993).[18] For this reason, a plaintiff-signatory cannot defeat a forum selection

[17] The court continues to focus on Godfrey for this analysis because the Stifel and Saybrook plaintiffs have proven a likelihood of success on the merits under *Montana* and need not rely on the forum selection language.

[18] Much of defendants' written argument on this point is based on the premise that Godfrey must be a third-party beneficiary to the contracts before invoking the forum selection clause. While third-party beneficiary status is sufficient to satisfy the "closely related" and "foreseeability" standards, the Seventh Circuit has indicated that it is not necessary. *Hugel*, 999 F.2d at 209 n.7. At the preliminary injunction hearing, defendants contended that the Seventh Circuit held forum-selection clauses may only be enforced by non-parties to a contract if they are: (1) affiliates of a signatory; or (2) "secret" principals or agents. (Hr'g Tr. (dkt. #158) 190:11-191:5.) The court does not believe the case defendants cite, *Adams v. Raintree Vacation Exchange, LLC*, 702 F.3d 436 (7th Cir. 2012), stands for this proposition. *Adams* sought to clarify the "closely related" standard by distilling it into "two reasonably precise principles" -- affiliation and mutuality. *Id.* at 439. Affiliation means the companies in question are under common ownership. *Id.* at 439-40. Mutuality means where a party could be *bound* by the forum selection clause, it is also entitled to invoke that clause itself. *See id.* at 443 ("So the plaintiffs, because they alleged that Starwood . . . controlled DTR, could have held Starwood to the forum selection clause had they wanted to sue in Mexico – and from this it follows that Starwood can hold the plaintiffs to the clause in the opposite situation and thus defend the suit

clause by suing a related defendant who was not a party to the contract. *Am. Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt., Ltd.*, 364 F.3d 884, 888 (7th Cir. 2004); *see also Organ v. Byron*, 434 F. Supp. 2d 539, 541-42 (N.D. Ill. 2005) ("Plaintiff bargained for and agreed to [forum selection clause] as part of his contract with Mosaic. [Non-signatory] Defendants do not lack standing to argue that Plaintiff is bound to that promise.").

Godfrey appears to fall somewhere in the middle of being a "complete stranger" to the Bond Documents, as defendants contend, and being a mere substitute sued to avoid the forum selection clause, as the defendants in *American Patriot* apparently were. Godfrey is certainly no "stranger" to this transaction. In fact, Godfrey served as counsel to the Corporation and as Bond Counsel for this transaction and is now facing potential liability for playing that role. Defendants' counsel represented at the hearing that Godfrey actually drafted most of the Bond Documents and provided defendants legal advice with respect to those documents. (*See* Hr'g Tr. (dkt. #158) 193:6-12.) At the same time, Godfrey cites no case, nor could the court find a case, where a law firm successfully invoked a forum selection clause in a transactional document, which it presumably drafted on behalf of its former client, *against* that same client. Godfrey's citation to a California case in which a court permitted a similar suit does little to assuage the court's misgivings on that point. *See Bugna v. Fike*, 95 Cal. Rptr. 2d 161 (Cal. Dist. Ct. App. 2000) (allowing non-signatories to invoke forum selection clause when they were the "deal makers who negotiated, evaluated and

in Mexico."). Nowhere did the *Adams* court say that *only* secret relationships give rise to this principle of mutuality.

otherwise put together the very SCN transactions" under attack, despite the previous fiduciary relationship between appellants and respondents).[19]

On balance, Godfrey may nevertheless show that it could invoke the forum selection clauses with respect to the lawsuit currently in tribal court. As previously noted, while defendants have sued Godfrey in that court, they assert no claims against Godfrey. Rather, Godfrey is a defendant in that suit for the sole purpose of binding them to any determination regarding the validity of the Bond Documents, even though defendants contend in this court that Godfrey is a "stranger" to those documents. (*See* Hr'g Tr. (dkt. #158) 192-95.) Essentially, defendants have obliged Godfrey to defend the Bond Documents' validity in tribal court while maintaining in *this* court that those documents give Godfrey no enforceable rights. Those positions are inconsistent, and the court would be disinclined to foreclose Godfrey from the benefit of the documents' forum selection clause given the nature of the tribal court action.[20]

Third, and most troubling, the Seventh Circuit's earlier decision appears to hold that if the Bond Documents are deemed void as unapproved management contracts, then so too

[19] The Supreme Court's decision in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 2013 WL 6231157 (U.S. Dec. 3, 2013), which reaffirmed the presumption in favor of enforcing selection clauses, also leaves open the question of enforceability where "public-interest factors" outweigh the parties' contractual choice. Here, there is a policy question as to Godfrey's right to enforce this provision not only as a non-party, but also as a law firm against its former client. *See* Brian F. Spector, *Predispute Agreements to Arbitrate Legal Malpractice Claims: Skating on Thin Ice in Florida's Ethical Twilight Zone?*, 82 Florida Bar J. No. 4 (2008); Michael M. Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*; 34 Duquesne L. Rev. 1009 (1996).

[20] As indicated at the hearing, the court would have far less hesitance in allowing defendants to proceed in tribal court were the claim against Godfrey in that court not so targeted at the meaning and enforcement of the Bond documents. (*See* Hr'g Tr. (dkt. #158) 194:11-18.) But it is, and the court concludes that defendants' decision to sue Godfrey for a declaratory judgment on the documents' validity justifies permitting it to benefit from the provisions within those documents it is being obliged to defend. This conclusion is strengthened by the fact that the forum selection clause is drafted broadly enough to encompass the current dispute in this court. *Cf. Adams*, 702 F.3d at 444; *Am. Patriot*, 364 F.3d at 889.

is the forum selection language contained within them.[21] *See Wells Fargo*, 658 F.3d at 700. Defendants challenge both the Tribal Agreement and the Bond on this basis, and it is here that Godfrey's case is most likely to break down.

Taking first the Tribal Agreement, defendants point to the provision prohibiting the Tribe from replacing the general manager, controller or executive director without the prior written consent of 51% of the bondholders. As the Seventh Circuit recognized, this is a problematic provision that weighs in favor of characterizing the Tribal Agreement as a management contract. *Wells Fargo,* 658 F.3d at 698-99. As discussed above, the court does not believe this "veto provision" *alone* is sufficient to render the Tribal Agreement a management contract, but the Tribal Agreement contains other provisions that are problematic as well. For instance, Section 3(b) gives the Trustee extensive authority to manage collateral, including surrendering or collecting it without notice, and Section 4(c) allows the Trustee to inspect and repossess collateral when authorized to do so by other documents; the collateral in question apparently includes all the furnishings and equipment of the casino itself. Section 4(d) requires the Tribe to obtain the prior written consent of 51% of the bondholders before it may modify its land lease with the Corporation; the land in question is the land on which the casino, hotel and convention center sit. Although these

[21] This remains something of an open question. The general rule is that forum selection clauses are enforceable unless obtained by fraud, even when the underlying contracts in which they are contained are void. *See Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006). This general rule appears somewhat in tension with the Seventh Circuit's holding in *Wells Fargo*, however, which concluded that the Indenture was "void in its entirety" and could not even support a waiver of sovereign immunity (which generally need only be evinced by a clear manifestation of intent) contained therein. *Wells Fargo*, 658 F.3d at 702. While *Muzumdar* may support an argument that documents void under IGRA should not void forum selection clauses contained therein, given the Seventh Circuit's more recent *Wells Fargo* holding, which took an all-or-nothing approach to unapproved management contracts, the court assumes without deciding that there is an exception under IGRA to the general rule of *Muzumdar*.

provisions exist in the context of the Tribe's guaranty of the Corporation's obligations and are aimed at protecting the bondholders' investments after default, rather than providing control over the casino, taken together, they arguably involve a troubling amount of control over the gaming operation similar to the Indenture found void by the Seventh Circuit.[22] While the court declines to hold that the Tribal Agreement *is* void at this stage, Godfrey has not established that it is substantially likely to prevail in demonstrating that document is enforceable.

The grounds on which defendants seek to void the Specimen Bond are somewhat less persuasive.[23] Defendants argue that it provides a security interest in the operating and gross revenues of the casino, but that in no way allows for the management of all or part of a gaming operation; indeed, in the Seventh Circuit's *Wells Fargo* decision, the court was not troubled by the fact that the Indenture provided for a repayment schedule secured by gaming revenues. *Wells Fargo*, 658 F.3d at 698 (listing provisions favoring characterization of Indenture as non-management contract and including "fixed repayment schedule that, although secured by gaming revenues, is not set as a proportion of it").

[22] Defendants also point to § 3(b)'s provision allowing the Trustee to "amend, modify, extend or supplement the Indenture or other instrument evidencing the Obligations [payments]" without notice to the Tribe, so long as it does not affect the Tribe's liabilities. If interpreted broadly, this provision could potentially give rise to problems, since it arguably would allow for the Trustee to modify *any* of the Bond Documents to take away some or all of the Tribe's management authority. However, the court does not find such an interpretation reasonable, at least in the context in which it arose (the Tribe's guarantee of the Corporation's debt and the Trustee's ability to modify written instruments with respect to required payments). The alternative interpretation would be absurd given that it would virtually sweep away all of the other provisions of the Bond Documents.

[23] Defendants point out that the Specimen Bond is not an actual bond, and that there is no guarantee that it reflects the language in the actual Bonds themselves. They have presented no evidence to the contrary beyond this single speculative remark, however, and there is no reason to believe the terms of the Specimen Bond diverge in *any* material way from the actual Bonds, so this unsupported argument has little bearing on plaintiffs' likelihood of success.

Defendants also argue that the Specimen Bond incorporates the default remedies from the Indenture -- remedies which the Seventh Circuit found to be problematic. The Indenture has been declared void *ab initio*, however, and as the Stifel plaintiffs pointed out in the motion to dismiss briefing, "the Bond cannot incorporate the Indenture's remedies for default if those remedies never existed." (Stifel Pls.' Opp'n (dkt. #68) 45.) Furthermore, the Seventh Circuit has already held in the context of the Bonds themselves that "the mere reference to a related management contract does not render a collateral document subject to the Act's approval requirement." *Wells Fargo*, 658 F.3d at 701. Rather, each document must *independently* provide for the management of all or part of a gaming operation. *Id.* Far from functioning as agreements through which plaintiffs could gain the authority to control defendants' gaming operation, the Bonds are debt instruments representing a promise to repay fixed sums of money to the lenders. To enforce the obligation to repay borrowed funds on a fixed schedule with set interest will not affect defendants' ability to control the day-to-day operation of the casino, just how the profits of that operation are distributed.

Unfortunately for Godfrey, the Bond does *not* provide a forum selection clause that applies to the Tribe. It specifically states only that the *Corporation* consents to the jurisdiction of Wisconsin federal and state courts, to the exclusion of any court of the Corporation. At most, Godfrey has, therefore, established a likelihood of obtaining a permanent injunction against the Corporation proceeding against it in a tribal court action

seeking to void the Bonds themselves. This is partial success at best, and it would not protect Godfrey from litigating both in state and tribal court simultaneously.[24]

Overall, Godfrey's case falters in too many ways for the court to conclude it has demonstrated the requisite likelihood of success on the merits, particularly with respect to the Tribe. In any event, it makes little sense to *exercise* supplemental jurisdiction over Godfrey's claims given that there is a reasonable likelihood that this court will not ultimately reach the merits of its claims. Accordingly, the court will not enter a preliminary injunction on Godfrey's behalf at this time, but without prejudice to revisiting this question should the Corporation attempt to press its claim in tribal court without participating in a *Teague* conference.

B. Irreparable Harm

Next, the court must consider whether the Stifel and Saybrook plaintiffs will suffer irreparable harm absent entry of a preliminary injunction. Generally, harm that can be redressed via monetary compensation does not qualify as irreparable harm. *Wis. Cent. Ltd. v. Pub. Serv. Comm'n of Wis.*, 95 F.3d 1359, 1370 (7th Cir. 1996). In the same vein, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975)).

[24] Neither party meaningfully addressed the impact of the LOM, which also contains exclusivity language. As Godfrey pointed out in its brief in opposition to the tribe's motion to dismiss, the LOM is evidence of defendants' intent to waive sovereign immunity. Still, it is not a binding contract, and no one has argued to date that a forum selection clause is enforceable without a contract. In fact, Stifel specifically argues that the LOM is not a contract so as to avoid it being voided on the basis of its providing management authority over the casino.

To classify the harm plaintiffs will suffer if the tribal court were allowed to proceed as merely requiring plaintiffs' expenditure of money and time, however, is an oversimplification. *First,* plaintiffs will not merely be forced to litigate in two forums, expending significant effort and resources: they will be deprived of the benefits of the forum for which they expressly contracted. Federal courts have found that the loss of such a bargain can constitute irreparable harm. *See, e.g., Gen. Protecht Grp., Inc. v. Leviton Mfg. Co., Inc.*, 651 F.3d 1355, 1363-65 (Fed. Cir. 2011) (affirming district court's finding of irreparable harm based on deprivation of bargained-for forum and litigation of the same issue on multiple fronts simultaneously); *see also Push Pedal Pull, Inc. v. Casperson*, 971 F. Supp. 2d 918, 929 ("A party to a bargained-for forum selection clause suffers harm whenever that party does not receive the benefit of his bargain."). *Second*, plaintiffs will be forced to litigate before, and submit to the judgment of, a court that likely lacks jurisdiction over them. *See Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989). While they can later challenge the tribal court's jurisdiction in a collateral proceeding, unless a federal court determines that the tribal court lacked jurisdiction entirely, they will be unable to litigate any of the merits issues in the forum for which they contracted. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987).

Defendants attempt to turn this argument on its head, asserting that "it is the Tribal Defendants – sovereign entities – who have endured more than three years of litigation in state, federal and appellate courts, all the while contesting jurisdiction." (Defs.' Br. Opp'n Prelim. Inj. (dkt. #56) 14-15.) Given this court's determination that at least some of the Bond Documents are likely valid, including those that contain express waivers of sovereign immunity and consent to Wisconsin federal and state courts, this argument rings hollow.

C. Balancing of Harms

Defendants contend that the harm they will suffer from entry of a preliminary injunction far exceeds any harm that plaintiffs might face if the tribal court suit is allowed to proceed on a parallel track to any state lawsuit. In particular, defendants argue that any entry of an injunction will undercut the autonomy both of the Tribe, as a sovereign nation, and of the state court (presumably because enjoining the tribal court would prevent the tribal and state courts from engaging in a *Teague* conference). In contrast, defendants argue, the harm plaintiffs suffer will be minimal, since they will be free to seek plenary review of any tribal court decision regarding its jurisdiction in federal court after the tribal proceedings are complete.

Defendants' position is severely weakened by the fact that this court has already found at least some of the Bond Documents are likely valid. *See* discussion *supra*. To enforce the various waivers of sovereign immunity, as well as forum selection clauses, is not to undercut the autonomy of a sovereign nation; it is to hold the Tribe and the Corporation to the terms to which they agreed when entering into the Bond Transaction. In light of that fact, the balance of the harms weighs in plaintiffs' favor.

D. Public Interest

Finally, the Tribal defendants contend that the entry of an injunction would be detrimental to the public interest. First, defendants point to the "Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Second, they point out that the *Teague* protocol was established to allow state and tribal courts to allocate jurisdiction in order to "foster the greatest amount of respect" between those courts. *Teague*, 2000 WI 79, ¶ 38.

Like many of defendants' other arguments, these interests assume that the Bond Documents are invalid. Certainly, the public interest favors encouraging tribal sovereignty and self-government, as well as respect and cooperation between state and tribal courts. But to "refuse enforcement of . . . routine contract provision[s] would be to *undercut* the Tribe's self-government and self-determination." *Altheimer & Gray*, 983 F.2d at 815 (emphasis added). As the Seventh Circuit recognized in *Altheimer & Gray*, if contracting parties cannot trust the validity of choice of law and venue provisions, Tribes and their corporations may quickly find themselves unable to compete in the marketplace, as both will be shunned by parties wary of entering into commercial relationships uncertain as to who will enforce their contractual rights should the relationship sour. *See Sokaogan Gaming*, 86 F.3d at 660 (noting that "the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions"); *Altheimer & Gray*, 983 F.2d at 815. Indeed, there is an unhealthy air of latent paternalism in the notion that Tribes and their corporations are unable to protect their interests in arms-length commercial transactions, especially when represented by legal counsel.

The defendants' reliance on the *Teague* protocol fails for the same reason: it makes little sense to encourage state and tribal courts to apportion jurisdiction between them when this court has found it unlikely that the tribal court has *any* jurisdiction over the Stifel and Saybrook plaintiffs with respect to the subject matter in suit. Even if it did, those courts have delayed far too long their obligation to allocate responsibilities efficiently and fairly.

ORDER

IT IS ORDERED that:

1. Plaintiffs Stifel Financial Corp. and Stifel, Nicolaus & Company's Motion for Preliminary Injunction (dkt. #5) is GRANTED.

2. Plaintiffs LDF Acquisition, LLC, Saybrook Fund Investors, LLC and Wells Fargo Bank, N.A.'s Motion for Preliminary Injunction (dkt. #17) is GRANTED.

3. Plaintiff Godfrey & Kahn's Amended Motion for Preliminary Injunction (dkt. #42) is DENIED.

4. Defendants are preliminary enjoined from participating in any tribal court proceeding against the Stifel and Saybrook plaintiffs regarding a dispute or controversy arising out of the Bond Documents or related transactions, including without limitation the lawsuit filed on April 25, 2013.

5. A telephonic scheduling conference will be held on June 13, 2014, at 10:30 a.m. to establish a schedule for an expedited resolution of this case on the merits. The parties shall meet and confer in advance of this date.

Entered this 16th day of May, 2014.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge