Nos. 14-2150 & 14-2287

IN THE

United States Court of Appeals for the Seventh Circuit

STIFEL, NICOLAUS & COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

AND

GODFREY & KAHN, S.C.,
Plaintiff-Appellee & Cross-Appellant,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,
Defendants-Appellants & Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 13 CV 372
The Honorable William M. Conley, Chief Judge

BRIEF FOR APPELLEE AND CROSS-APPELLANT GODFREY & KAHN, S.C.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff-appellee and cross-appellant Godfrey & Kahn, S.C. furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party that the attorneys represent in this case:

   Godfrey & Kahn, S.C.

2. The name of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this Court:

   Foley & Lardner LLP

3. Any parent corporation and any publicly held company that owns 10% or more of stocks or shares:

   none

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JURISDICTIONAL STATEMENT

The appellants' jurisdictional statement is not complete and correct. Wells Fargo Bank, Saybrook Fund Investors, Saybrook's subsidiary LDF Acquisition (all three of whom we collectively call "Saybrook"), Stifel, Nicoalus & Co., Stifel Financial (likewise, "Stifel"), and Godfrey & Kahn, S.C. all brought suit in the United States District Court for the Western District of Wisconsin, seeking an injunction to prevent the Lac du Flambeau Tribe of Lake Superior Chippewa Indians and the tribe's Lake of the Torches Economic Development Corporation (as to the latter, the "EDC" and collectively the "Tribal Parties") from proceeding against them in an action filed in the Lac du Flambeau Tribal Court, wherein all the plaintiffs in this case were named by the Tribal Parties as defendants. SA-0001 to SA-0022.[1] The Tribal Parties sought a judgment from their Tribal Court declaring that certain documents entered into as part of their 2008 issuance of $50 million in taxable Indian gaming revenue bonds were invalid under the Indian Gaming Regulatory Act ("IGRA"). *See Lake of the Torches Econ. Dev. Corp. v. Saybrook Tax Exempt Investors*, No. 13 CV 115 (Lac du Flambeau Tribal Ct. filed Apr. 25, 2013); SA-0289 to SA-0322.

[1] Citations herein to "A-__" are to the Tribal Parties' required short appendix, bound with their principal brief, and citations to "SA-__" are to their supplemental appendices. Citations to "Supp.SA-__" are to Saybrook's Supplement Separate Appendix. Citations to "Dkt." are to the docket and, where appropriate, page number of a document from the proceeding that the parties have appealed from in the United States District Court for the Western District of Wisconsin, namely, no. 13 CV 372. Citations to docket materials from other proceedings are noted accordingly.

The District Court had jurisdiction to hear this action under 28 U.S.C. § 1331. "The question whether an Indian tribe retains the power to compel a non-Indian . . . 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." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985); *see also* cased cited *infra* Section II.A.

Nevertheless, the District Court erroneously believed that its jurisdiction pursuant to § 1331 extended solely to determining whether the Tribal Court had "inherent" tribal authority, under *Montana v. United States*, 450 U.S. 544 (1981), over the non-Indian plaintiffs that ultimately filed suit in the District Court, not to whether any such inherent authority had been extinguished. A-61 to A-65. In the District Court's view, it had federal question jurisdiction over Saybrook's and Stifel's claims because they disputed the Tribal Court's authority under *Montana*. *Id.*

On the other hand, after much back-and-forth, the District Court "[a]ssum[ed]" that it lacked federal question jurisdiction over Godfrey's claim because Godfrey, unlike the other plaintiffs, for purposes of its preliminary injunction motion only, has not challenged the Tribe's "inherent" sovereignty but instead contends that any "inherent" sovereignty the Tribe *might* have had has been waived pursuant to the multiple forum selection clauses and other dispute resolution mechanisms set forth in the various bond

documents. SA-968 to SA-969.[2] The District Court deemed this "waiver" defense to be a mere "state *contract law*" issue "involv[ing] ordinary contract law principles" and lacking a sufficient "federal law component." A-62 to A-64 (emphasis in original).

The Court then proceeded to debate whether to "exercise" its supplemental jurisdiction over Godfrey's claim pursuant to 28 U.S.C. § 1367(a). Though the District Court found that the underlying bond litigation and the tribal claims against Godfrey clearly derive from the "same common nucleus of operative facts," ultimately it decided to leave the firm by itself in Tribal Court. A-65 to A-67 & n.16, A-76. On May 16, 2014, the District Court granted the motion for a preliminary injunction filed by Saybrook and Stifel, and it denied the motion filed by Godfrey. A-80.

The Tribal Parties filed a timely notice of appeal from that order on May 22, 2014. Dkt. 177. Godfrey filed a timely notice of appeal from the same order on June 10, 2014. Dkt. 190. This Court assigned case no. 14-2150 to the Tribal Parties' appeal and no. 14-2287 to Godfrey's appeal and then ordered the appeals consolidated. 7th Cir. Dkt. 17.

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[2] More specifically, Godfrey stipulated that it "will not contend in connection with the motion for a preliminary injunction in this action that the Tribal Court does not have jurisdiction over it under *Montana v. United States*, 450 U.S. 544 (1981)," subject to the qualification that "[t]his stipulation in no way prejudices Godfrey's claim that, despite this stipulation, the Tribe and its Tribal Court may not exercise jurisdiction over Godfrey with respect to matters arising out of the Transaction which is the subject of the motion for preliminary injunction in this litigation, in light of the forum selection provisions contained in the [bond documents] as well as other legal and equitable principles, a position Godfrey maintains and can assert without qualification in any action." A-61 to A-65.

This Court has jurisdiction over both appeals pursuant to 28 U.S.C. § 1292(a)(1), for the District Court's order was one "granting, continuing, modifying, refusing or dissolving injunctions."

STATEMENT OF THE ISSUES

1. Do the multiple mandatory forum selection clauses, in which the Tribal Parties agreed not to bring disputes "arising out of" the bond transaction in their own Tribal Court and to submit to jurisdiction in the United States District Court for the Western District of Wisconsin or, failing that, in the courts of the State of Wisconsin, bar the Tribal Parties from pursuing their Tribal Court action against Godfrey despite their claim that the transactional documents are void and unenforceable?

2. Did the District Court err in concluding that it did not have federal question jurisdiction over Godfrey's claim, or, alternatively, did the District Court abuse its discretion in failing to exercise supplemental jurisdiction over Godfrey's claim pursuant to 28 U.S.C. § 1367 and to include Godfrey within the scope of its preliminary injunction against the Tribal Parties proceeding in Tribal Court?

3. Assuming this Court decides that it needs to resolve these issues, do the multiple mandatory forum selection clauses and other dispute resolution provisions in the transactional documents operate to waive the Tribal Parties' sovereign immunity from suit and to eliminate any need to exhaust Tribal Court remedies before commencing suit in Wisconsin federal or state court?

4. Assuming this Court decides that it needs to resolve this issue, are any of the remaining transactional documents void and unenforceable "management contracts"?

COUNTERSTATEMENT OF THE CASE

The complex procedural history of this case and the Tribal Parties' inadequate statement of the case require this counterstatement. To put these appeals in context it is necessary to set forth the history of (1) Godfrey's role in the underlying events, (2) the federal cases preceding this action, (3) the proceedings in the courts of the State of Wisconsin and in the Lac du Flambeau Tribal Court, and (4) the action in the Western District of Wisconsin to enjoin the proceeding in the Tribal Court.

A. Godfrey & Kahn's Role in the Underlying Events. Godfrey & Kahn, S.C. represented the Tribal Parties, and served as bond counsel in a transaction that provided the tribe's EDC with the proceeds from the issuance of $50 million in taxable Indian gaming revenue bonds. A-30 to A-31. The bond transaction closed in January 2008. *Id.* Stifel served as placement agent and first purchaser of the bonds. *Id.* Saybrook purchased the bonds from Stifel. *Id.* Wells Fargo served as the bonds' trustee under the terms of an indenture. *Id.*

B. The Federal Cases Preceding This Action. In 2009 the Tribal Parties stopped paying under the bonds. That decision spawned two federal lawsuits: the first filed in 2009 and a second filed in 2012. A-32 to A-34.

Wells Fargo, as trustee, sought relief from the bond default against the EDC in the United States District Court for the Western District of Wisconsin in 2009. *Id.* The district court concluded that the trust indenture was void (along with the waivers of

sovereign immunity contained therein) as an unapproved management contract under regulations issued pursuant to the IGRA, and this Court ultimately affirmed that part of the district court's decision. *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011), *aff'g in part and rev'g in part* 677 F. Supp. 2d 1056 (W.D. Wis. 2010). IGRA and its regulations require that management contracts must be approved by the National Indian Gaming Commission. Because the indenture was determined to be a management contract and had not been submitted for approval, the Seventh Circuit determined that the indenture was not enforceable. *Id.* at 698–99.

This Court held, however, that the district court erred by (1) holding that the waivers in the collateral documents, such as the bonds themselves, were necessarily dependent on the validity of the indenture and therefore void, and (2) denying Wells Fargo leave to amend its complaint. 658 F.3d at 699–702. It remanded for a determination of whether the bonds and other remaining collateral documents, when "read separately or together," showed an intent to waive sovereign immunity with respect to claims brought by Wells Fargo on its own or on the bondholders' behalf. *Id.* at 701. Following remand, Wells Fargo voluntarily dismissed this case. *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, No. 09 CV 768, dkt. no. 123 (W.D. Wis. filed Dec. 21, 2009).

In April 2012 the bonds' buyer, Saybrook, along with Wells Fargo, brought the second federal lawsuit, again in the Western District of Wisconsin. *Saybrook Tax Exempt*

Investors v. Lake of the Torches Econ. Dev. Corp., No. 12 CV 255 (W.D. Wis. filed Apr. 9, 2012). This time the suit was brought suit against the tribe's EDC, Stifel, and Godfrey. The district court dismissed this suit for lack of subject-matter jurisdiction, however, because there was no federal question as the complaint was pleaded and because the parties were not completely diverse. 929 F. Supp. 2d 859 (W.D. Wis. 2013); No. 12 CV 255, Dkt. 72 (Apr. 1, 2013).

C. The Proceedings in the Courts of the State of Wisconsin and in the Lac du Flambeau Tribal Court. In accordance with the terms of the forum selection clauses in the transaction documents, which provide for exclusive jurisdiction and venue in "the courts of the State of Wisconsin . . . in the event (but only in the event) the [Western District of Wisconsin] fails to exercise jurisdiction," Saybrook also had filed an action in Wisconsin's Circuit Court for Waukesha County on January 16, 2012 against the Lac du Flambeau, the EDC, Stifel, and Godfrey. *Saybrook Tax Exempt Investors v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 12 CV 187 (Cir. Ct. Waukesha Cnty. filed Jan. 16, 2012). This action was stayed during the resolution of the jurisdictional issues in Saybrook's federal case. *See* 929 F. Supp. 2d at 862.

On April 25, 2013, after more than three years of litigation in other courts, and despite clear language in the transaction documents waiving the jurisdiction of the Tribal Court and any requirement to exhaust tribal remedies, the Tribal Parties filed a "statement of claim" in their Tribal Court, seeking a series of declarations that the bond

documents were void and unenforceable under federal, state, and tribal law. *Lake of the Torches Econ. Dev. Corp. v. Saybrook Tax Exempt Investors*, No. 13 CV 115 (Lac du Flambeau Tribal Ct. filed Apr. 25, 2013); SA-288 to SA-322. The Tribal Parties then promptly claimed that it was necessary to stay the action in state court to facilitate a judicial conference to "allocate" jurisdiction between the state and tribal courts under *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians* (*Teague II*), 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709. The circuit court heard argument on that motion and denied it. The Tribal Parties nevertheless sought leave for an interlocutory review of that decision in Wisconsin's court of appeals, which that court promptly denied. *Saybrook Tax Exempt Investors v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 2013 AP 1324-LV (Wis. Ct. App. July 16, 2013); *see also* A-05. The Tribal Court subsequently denied motions to dismiss filed by Saybrook, Stifel, and Godfrey, finding that it had "presumptive" personal and subject matter jurisdiction based on the allegations in the complaint. SA-0638 to SA-0643.

The action in Waukesha County remains pending. Godfrey, as a third-party plaintiff in that case, has filed a cross claim for contribution against Saybrook's former lawyers, Dentons. No. 12 CV 187 (Cir. Ct. Waukesha Cnty. filed Apr. 22, 2014). That court currently has pending before it a number of motions to dismiss, including two from the Tribal Parties (one to dismiss Saybrook's complaint and another to dismiss Stifel's cross claims), one from Godfrey (to dismiss one count in Saybrook's case against

it), and one from Dentons (to dismiss Godfrey's third-party complaint). The court has scheduled a hearing to decide all those motions on October 23, 2014.

D. The Action in the Western District of Wisconsin to Enjoin the Proceedings in Tribal Court. Immediately after being sued in Tribal Court, Saybrook, Stifel, and Godfrey filed an action and sought a preliminary injunction in the Western District of Wisconsin, asking that court to enjoin the Tribal Parties from proceeding with their claims in Tribal Court. *See Stifel Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 13 CV 372 (W.D. Wis. May 24, 2013); SA-001 to SA-022. The District Court denied the Tribal Parties' motion to dismiss, holding that it has subject matter jurisdiction under § 1331 and that exhaustion of tribal remedies was unnecessary. *See* 980 F. Supp. 2d 1078 (W.D. Wis. Oct. 29, 2013). The Tribal Parties attempted to appeal that decision, relying on the collateral-order doctrine, but this Court dismissed that appeal earlier this year. *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 13-3451 (7th Cir. dismissed Jan. 13, 2014).

The District Court held a hearing on the plaintiffs' motions for a preliminary injunction on March 14, 2014 and issued an order granting Saybrook's and Stifel's motions and denying Godfrey's motion on May 16, 2014. No. 13 CV 372, 2014 U.S. Dist. LEXIS 67474 (W.D. Wis. May 16, 2014). The Tribal Court has since stayed its proceedings indefinitely against *all* defendants in an order dated May 28, 2014.

SUMMARY OF ARGUMENT

The fundamental question in these appeals is one of jurisdiction and venue—are the plaintiffs here entitled to a preliminary injunction preventing the Tribal Parties from proceeding in their Tribal Court to obtain a determination of the validity of the bond documents under the IGRA and related laws?

As currently pleaded, the plaintiffs' complaint in this case does not seek a resolution of liability or any determination of the merits of the issues in the underlying dispute. Putting to one side all the arguments of the Tribal Parties on the merits and all the questions involved in determining "inherent" tribal authority under *Montana v. United States*, 450 U.S. 544 (1981), there is a straightforward and efficient path to resolving the threshold question of which court should resolve the merits: *Enforce the multiple mandatory forum selection clauses and waivers of tribal court jurisdiction included in the bonds and transactional documents at issue here.* In those clauses, the Tribal Parties specifically and repeatedly agreed that "*any* dispute or controversy arising out of" the bond, indenture, and related documents and "*any* transaction in connection therewith" would be adjudicated in the Western District of Wisconsin or Wisconsin state courts, "*to the exclusion of the jurisdiction of any court of the Tribe*." *See* nn.3–4 *infra*. They likewise expressly waived "any requirement of exhaustion of tribal remedies." *Id.*

This Court repeatedly has held, in a variety of contexts, that mandatory forum selection clauses like those here must be enforced according to their terms even if the

underlying documents are alleged to be invalid, illegal, or even fraudulently obtained. *See, e.g., Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006) (rejecting the "absurd[]" argument that a contractual forum selection clause should not be enforced because the underlying contract allegedly violated RICO, federal securities laws, the Illinois Consumer Protection Act, and various Illinois criminal statutes); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) (alleged illegality of gaming-related contract did not "infect[] the arbitration clause" or the sovereign immunity waiver contained within it). Those decisions are squarely on point here, and the District Court erred in reading this Court's *Wells Fargo* decision as possibly creating an "exception" to these decisions for cases brought under IGRA. The purpose of these forum selection clauses clearly was to prevent the plaintiffs, including Godfrey, from having to litigate issues related to the obligations of the Tribal Parties under the bond documents, or under established equitable principles, in Tribal Court.

Moreover, plaintiffs' claim to be immune from actions in Tribal Court pursuant to these multiple mandatory forum selection clauses presents a federal question under 28 U.S.C. § 1331. The District Court erred as a matter of law in concluding that its federal question jurisdiction extended only to Saybrook and Stifel since they disputed the Lac du Flambeau's "inherent" tribal authority whereas Godfrey, for purposes of its preliminary injunction motion only, did not. Whether there has been an effective tribal

waiver of federally recognized sovereign authority is *itself* a matter of federal common law falling squarely within the scope of the federal question presented whenever a tribe attempts to subject a non-Indian to tribal jurisdiction.

In all events, even if the District Court only had supplemental jurisdiction over Godfrey's claim pursuant to 28 U.S.C. § 1367, it abused its discretion by failing to "*exercise*" that jurisdiction so as to include Godfrey within the scope of its preliminary injunction against Tribal Court proceedings against Saybrook and Stifel. A-76. As a result of its decision, all parties *except* Godfrey must now litigate the underlying contract validity and interpretation issues in federal or state court, while Godfrey remains subject to tandem Tribal Court litigation over those same key issues (and in the absence of indispensable parties like the bondholder). That inexplicable outcome goes far beyond any reasonable bounds of deference, comity, or foreseeability, and violates the basic goals of supplemental jurisdiction to avoid duplicative and overlapping litigation in different courts growing out of the same underlying transaction. Indeed, the District Court itself acknowledged that this result is "odd," "inefficient," and "somewhat nonsensical[]." A-66 to A-67 & n.16. The District Court's failure to "exercise" jurisdiction over Godfrey's claims therefore must be reversed.

The multiple mandatory forum selection clauses not only resolve *where* the underlying claims may be litigated—in federal or state but not tribal court—but also operate by their own force to waive the Tribal Parties' sovereign immunity and any

need that might otherwise exist to exhaust Tribal Court remedies. As this Court emphasized in *Sogaogon*, "to agree to be sued is to waive any immunity one might have from being sued." 86 F.3d at 659. And as *Sokaogon* demonstrates, such a waiver stands even where the Tribal Parties claim that the underlying document containing the waiver is itself illegal, void, and unenforceable. *Id.* As for the Tribal Parties' exhaustion arguments, the various forum selection clauses *explicitly* waive any requirement to exhaust Tribal Court proceedings. Even apart from those explicit waivers, by agreeing that all disputes would be resolved exclusively in federal or state court and by waiving any Tribal Court jurisdiction that might otherwise exist, the Tribal Parties left no tribal remedies to exhaust. Requiring exhaustion in these circumstances would nullify the forum selection clauses and waivers of tribal jurisdiction.

Finally, given the enforceability of the forum selection provisions and their applicability to the claims asserted against Godfrey in Tribal Court, this Court need not address issues related to the enforceability of the remaining transactional documents or the right of the bondholder (Saybrook) to other equitable relief. Those issues can and should be left for resolution by one of the courts designated by the parties to decide them (federal district court or, if it is without jurisdiction, state court). However, if this Court determines that it needs to resolve the issue of the enforceability of the remaining transactional documents, none of the remaining transactional documents are "management contracts," and they can and should be enforceable on their own terms

independent of the voided trust indenture. This Court has already rejected the argument of the Tribal Parties that, by virtue of being part of the same transaction as the voided trust indenture, all the collateral agreements are also void because they did not have NIGC approval. *See Wells Fargo*, 658 F.3d at 700–02. Moreover, none of the remaining documents, standing alone, contain provisions that reasonably lead to the conclusion that they are "management contracts." And, even if viewed collectively, the provisions in these remaining transaction documents do not combine to create a "management contract." The combination of restrictive provisions that caused this Court to find the Trust Indenture to be a "management contract" is found *only* in the Trust Indenture, and none of the other transactional documents at issue can or should be deemed void and unenforceable.

ARGUMENT

I. *Muzumdar* and *Sokaogon* Are Controlling and Require the Tribal Parties To Abide by the Mandatory Forum Selection Clauses in which They Agreed Explicitly Not To Litigate in Tribal Court.

The multiple forum selection clauses in the transactional documents plainly and repeatedly provide that "*any* dispute or controversy arising out of" the Bond, Indenture, and related documents and "*any* transaction in connection therewith" will be adjudicated in the Western District of Wisconsin or Wisconsin state courts, "*to the exclusion of the jurisdiction of any court of the Tribe*." SA-028 to SA-0281 (Tribal Agreement § 9(b)) (emphasis added).[3] The parties likewise expressly waived "any requirement for exhaustion of tribal remedies should an action be commenced on this Agreement or regarding the subject matter of the Agreement." *Id.*[4]

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[3] *See also* SA-0028 (Bond) ("The Corporation expressly submits to and consents to the jurisdiction of" the Western District and state courts "for the adjudication of any dispute or controversy arising out of this Bond, the Indenture, or the Bond Resolution . . . or to any transaction in connection therewith, to the exclusion of the jurisdiction of any court of the Corporation."); SA-0054 (Ltd. Offering Mem.) ("The Corporation and the Tribe expressly submit and consent to the jurisdiction of the federal court for the Western District of Wisconsin" and Wisconsin state courts "for the adjudication of disputes arising under the Bond Documents or the Bond Purchase Agreement, to the exclusion of the jurisdiction of any court of the Tribe.").

[4] *See also* SA-0027 to SA-0028 (Bond) ("The Corporation hereby expressly waives its sovereign immunity from suit and any requirement for exhaustion of tribal remedies should an action be commenced on this Bond, the Indenture, the Security Agreement, or the Bond Resolution, or regarding the subject matter of the Indenture."); SA-0262 (Bond Purchase Agreement § 14(b)) ("The Corporation hereby waives its sovereign immunity from suit and any requirement for exhaustion of tribal remedies should an action be commenced under this Agreement or regarding the subject matter hereof.").

A. The District Court Incorrectly "Assume[d] Without Deciding" that This Court's *Wells Fargo* Decision Created an "Exception under IGRA."

The District Court's order recognized the general rule from *Muzumdar* "that forum selection clauses are enforceable unless obtained by fraud, even when the underlying contracts in which they are contained are void." A-73 n.21. No allegations of fraud in this case concern the forum selection clauses. This rule should have been the beginning and the end of the District Court's analysis. But, given what the District Court perceived to be "tension with the Seventh Circuit's holding in *Wells Fargo*, . . . which concluded that the Indenture was 'void in its entirety[,]'" it "assume[d] without deciding that there is an exception under IGRA to the general rule of *Muzumdar*." *Id.*

There is no good basis for this "assumption." It is certainly not the holding of *Wells Fargo*, for the mandatory forum selection clauses were not even in dispute there. Plaintiffs in that case had brought their action in the Western District of Wisconsin, as required by those clauses. Thus, the issue of whether or not to enforce the forum selection clauses was neither briefed, argued, nor even considered.

Moreover, the reasoning of *Sokaogon* confirms that there is no "exception under IGRA." The tribe in *Sokaogon* tried to invalidate its contract for architectural services, claiming that the contract was "null and void" in its entirety under 25 U.S.C. § 81, a federal statute that, like IGRA, requires prior federal approval of certain agreements

with tribes. This Court emphasized that the arbitration clause and its waiver of sovereign immunity were enforceable despite the allegations that the agreement was invalid due to a lack of prior federal approval. *See* 86 F.3d at 659. That is exactly the case here. *Sokaogon* predates *Muzumdar* by a decade, but applies the same rule—forum selection clauses are enforced according to their terms even where the contracts containing them are alleged to be illegal, fraudulent, or against public policy (except where the clauses *themselves* were obtained through fraud). Far from suggesting any kind of exception to this rule for contracts involving tribes and requiring prior federal approval, *Sokaogon* held that this rule extends to such tribal contracts. *Id.* The federal approval requirements in IGRA and 25 U.S.C. § 81 are functionally identical and serve the same underlying protective purposes. Nothing in *Wells Fargo* suggests an "IGRA exemption" to this otherwise-universal jurisdictional rule.

The rule of *Muzumdar* and *Sokaogon* applies here, and the District Court below did not have to address the many issues that it thought it had to resolve in order to determine the threshold issue of which court will decide the underlying dispute. The District Court's decision accomplished exactly what forum selection clauses are designed to avoid—confusion over threshold jurisdictional issues, simultaneous claims in the courts of different sovereigns involving identical issues, and having to evaluate the merits in order to figure out jurisdiction. More than anything else, that is the

fundamental error in the District Court's decision below not to extend the preliminary injunction to Godfrey.

B. The Tribal Parties Cannot Avoid the Mandatory Forum Selection Clauses By Arguing That They Are Contained in Illegal and Unenforceable Agreements.

Forum selection clauses are "an indispensable element" in modern "trade, commerce, and contracting." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985) (citation omitted). Because of their "indispensable" role in promoting "comity," "predictability," and conservation of litigant and judicial resources, *id.* at 629–30, forum selection clauses are *prima facie* valid and enforceable, and will only be set aside if they were procured through fraud or overreaching, or if their enforcement would violate public policy. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991).

The Tribal Parties have not argued that these provisions were obtained through fraud or overreaching. Nor could they credibly make such "implausible, as well as condescending" arguments.[5] Rather, the Tribal Parties' principal argument is that every

[5] *Sokaogon*, 86 F.3d 656, 660 (7th Cir. 1996) ("[W]e must ask whether the language of the arbitration clause might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity from suit without realizing that he was doing so. We think this an extremely implausible, as well as condescending, suggestion. The arbitration clause could not be much clearer. It says that if there is a dispute under the contract it must be submitted to arbitration and that the arbitrator's decision is final and is enforceable in court. No one reading this clause could doubt that the effect was to make the tribe suable."); *see also C&L Enters., Inc. v. Citizen Bnad Potowatomi Tribe of Oklahoma*, 532 U.S. 411, 421 n.4, 422 (2001) ("The [arbitration] clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute

one of these forum selection provisions is void *ab initio* because the entire transaction is illegal under IGRA and tribal law.

The Tribal Parties cannot so easily escape the binding force of their forum selection clauses and jurisdictional waivers. Forum selection clauses serve vital interests. "[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." *Carnival Cruise Lines*, 499 U.S. at 593–94.

This Court's decision in *Muzumdar* is closely on point. The parties entered into distributorship contracts that contained mandatory forum selection clauses providing that "any disputes arising out of" the contracts would be litigated in Texas federal or state courts. Although there was "no ambiguity about where the parties agreed to litigate this dispute," plaintiffs sought to litigate in the U.S. District Court for the Northern District of Illinois. *Id.* at 761. They argued that the forum selection clauses

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resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. . . . [T]he Tribe has plainly consented to suit in Oklahoma state court."); *see also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) ("courts must take a practical, commonsense approach" in construing contract language; forum selection clause was "nose-on-the-face plain" in waiving tribal sovereign immunity).

were invalid and inoperative because they were contained in distributorship agreements that were part of an "illegal pyramid scheme" and violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, federal securities laws, the Illinois Consumer Fraud Act, and various state criminal laws. 438 F.3d at 760–61. As Judge Evans emphasized for this Court in *Muzumdar*, to argue that a forum selection clause should be ignored because the underlying agreement is illegal is putting the cart before the horse:

> 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?

Id. at 762; *see Sokaogon*, 86 F.3d at 659 (enforcing arbitration clause containing sovereign immunity waiver because, "[a]lthough the arbitration clause is contained in a contract that the tribe contends is illegal [for failure to obtain federal approval], the tribe rightly does not argue that the illegality of the contract infects the arbitration clause").

Likewise, forum selection clauses cannot be avoided by arguing that they are included in contracts that allegedly were entered into through fraud or other improper means. As this Court emphasized in one case:

> [E]ven if the contracts of sale to the plaintiffs that contain the [forum selection] clause are fraudulent, it doesn't follow that the clause is. . . . The clause is not unclear, in illegible print, in Sanskrit or hieroglyphics, or otherwise suggestive of fraudulent intent. . . . And there is no evidence that the defendants tried to mislead the plaintiffs concerning the meaning of the clause, or selected a foreign forum to make it difficult for the plaintiffs to enforce their rights under the contracts[.]

Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436, 443 (7th Cir. 2012); *see also Stephan v. Goldinger*, 325 F.3d 874, 879 (7th Cir. 2003) ("Even if [the contract as a whole] were procured by fraud, the venue provision would be valid by analogy to the arbitrability of disputes arising out of contracts procured by fraud when there is no argument that the arbitration provision itself was procured by fraud.").[6]

This is an inescapable point for the Tribal Parties. They have failed to explain why a forum selection clause in a contract that allegedly violates RICO and federal

[6] *See also Medrad, Inc. v. Sprite Dev., LLC*, No. 08 CV 5088, 2010 WL 3700826, at *3–4 (N.D. Ill. Sept. 8, 2010) (enforcing forum selection clause even though entire contract was allegedly illegal due to fraud because "none of the asserted misrepresentations is connected to the forum selection clause," the parties had engaged in "protracted negotiations" over the contract, defendants "clearly were aware of the clause," and defendants "had ample opportunity to reject the forum selection clause"); *De David v. Alaron Trading Corp.*, 796 F. Supp. 2d 915, 927 (N.D. Ill. 2010) ("Although a basis of plaintiffs' factual allegations is that defendants misled them into investing, they nowhere argue that the forum-selection clause itself was fraudulently induced.").

securities laws is nevertheless enforceable (per *Muzumdar*) while an identical clause in a contract that allegedly violates the IGRA is supposedly not enforceable. And even more perplexingly, why would such a clause be enforceable for gaming-related tribal contracts under 25 U.S.C. § 81 (per *Sokaogon*), but unenforceable for gaming-related tribal contracts under IGRA? Under clear Seventh Circuit law, the Tribal Parties may avoid the forum selection clauses only if they demonstrate that the clauses *themselves* were obtained through fraud or similar misconduct. The Tribal Parties have not and cannot reasonably make such an argument or offer any evidence in support of such an argument.

What the Tribal Parties have done is argue that contracts made void *ab initio* by the National Indian Gaming Commission's "voiding regulation"[7] are somehow exempt from *Muzumdar* and *Sokaogon*. This has no authoritative or sensible basis. Certainly *Sokaogon* does not support this point. The tribe there claimed that a contract for architectural services was "null and void" in its entirety under § 81 and § 5(f) of the tribe's corporate charter because it was never approved by the Bureau of Indian Affairs.

[7] The issue of whether 25 C.F.R. § 533.7, the "voiding regulation," is enforceable under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it conflicts with its authorizing provision in the IGRA, 25 U.S.C. § 2711(f), has been raised below. *See, e.g.*, Saybrook's Resp. to Tribal Parties' Mot. to Dismiss, Dkt. 62 at 34–36. However, the District Court did not address the issue in connection with the motions for a preliminary injunction presumably, at least in part, because it is an issue that is wound up in the merits of the dispute. *See also Wells Fargo*, 658 F.3d at 699 n.15 (assuming without deciding that the regulation was valid because Wells Fargo had not challenged it under *Chevron*). This is an issue that remains open for further consideration and resolution on remand.

That was the functional equivalent of arguing that the contract was void *ab initio*, for the tribe relied on one decision from the this Circuit and one decision from the Ninth Circuit to argue "that parties to a contract that violates Sec. 81 obtain no contract right." Sokaogon Tribe's Br. at 1 n.1, No. 95-3036 (7th Cir. Jan. 30, 1996); Sokaogon Tribe's Mot. to Dismiss at 5–6, 9 (Nov. 16, 1995); *see also Sokaogon*, 86 F.3d at 658.

Much the same is true of *Muzumdar*, where the appellants argued that their contracts with Wellness were "void and unenforceable" because they were "inherently illegal and contrary to public policy" for allegedly forming the basis of a pyramid scheme. Muzumdar Appellants' Br. at 24–25, Nos. 05-2636, 05-2686 & 05-2827 (7th Cir. filed Aug. 15, 2005); *see also Muzumdar*, 438 F.3d at 760. Again, the forum selection clauses were enforceable, despite the underlying contracts' alleged illegality.

The same is true here, and there is no basis to "assume" an "IGRA exception" to this foundational rule of jurisdiction. If anything, it is even more important to enforce that rule here given the potentially overlapping jurisdiction of three sovereign judicial systems and the complexity of federal Indian law issues.

As to the Tribal Parties' contention that the forum selection clauses are permissive as opposed to mandatory in nature, this also has no merit. The Tribal Parties have argued repeatedly (and without success in any court but their own) that the multiple forum selection clauses "*only limit[] where the Plaintiffs can sue the Tribal Defendants*," and that "[t]here is *no restriction on where the Tribal Defendants can sue anyone*

else, including the Plaintiffs." *E.g.*, Tribal Parties' Opp. to Prelim. Inj. Mot. Dkt. 56, at 11 (emphasis in original).[8] According to the Tribal Parties, "*none* of [the forum selection clauses] dictate where the Tribal Parties can or cannot file a lawsuit, including a suit in Tribal Court Action [*sic*]." *Id.* (emphasis in original). In other words, "these provisions only dictate where the Tribal Defendants *can be sued*—not where they *can sue* others." *Id.* at 11–12 (emphasis in original). We are asked to believe that "[t]he Tribal Defendants never agreed to forgo filing suit in Tribal Court as plaintiffs; rather they declined to consent to jurisdiction there as defendants." *Id.* at 12; *see also id.* at 16 ("There is no restriction on where the Tribal Defendants may sue signatories to the Bond Documents.").

This reading of the forum selection clauses is specious. To begin, far from being styled as restrictions on the plaintiffs, the clauses are expressly cast as restrictions *on the Tribal Parties—e.g.*, "*[t]he tribe expressly submits to and consents to* the jurisdiction of" the Western District and Wisconsin state courts "to the exclusion of the jurisdiction of any court of the Tribe"; "*[t]he Corporation expressly submits to and consents to* the jurisdiction" of federal and state courts to the exclusion of tribal court; "*[t]he Corporation and the Tribe expressly submit and consent to* the jurisdiction of" federal and state courts "to the

[8] Judge Fletcher (sitting *pro tempore*) used this same rationale to deny the motions to dismiss in the Tribal Court. SA-0645 to SA-0659.

exclusion of the jurisdiction of any court of the Tribe."[9] Given this language of "express" tribal submission and consent, it is unreasonable for the Tribal Parties to argue that the forum selection clauses impose "no restriction" on them at all, only on the other parties.

Moreover, the forum selection clauses broadly apply to "*any* dispute or controversy *arising out of*" the bond transaction, not simply to a subset of claims filed by the non-Indian parties against the Tribal Parties. *See* p. 17 & nn. 2–3 *supra.* This Court has emphasized that the phrase "arising out of" is a broad contractual term of art that "reaches *all disputes having their origin or genesis in the contract*, whether or not they implicate interpretation or performance of the contract *per se*." *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993) ("In fact, any dispute between contracting parties that is *in any way connected with their contract* could be said to 'arise out of' their agreement and thus be subject to . . . a provision employing this language.") (emphasis added).

The Tribal Parties' central argument here is that all the transactional documents are null and void because of the failure to obtain the signoff of the National Indian Gaming Commission. That clearly constitutes a dispute "arising out of" the transactional documents. "[A] dispute, which has as its object the nullification of a

[9] SA-0280 to SA-0281 (Tribal Agreement § 9(b)) (emphasis added); SA-0027 to SA-0028 (Bond) (emphasis added); SA-0262 (Ltd. Offering Mem.) (emphasis added).

contract, 'arise[s] out of' that same contract." *Id.* at 641; *see also Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000) (claims that challenged agreement violated the federal Commodity Exchange Act "arise out of" that agreement within the meaning of arbitration clause).

The forum selection clauses also repeatedly stipulate that federal and state court jurisdiction is "*to the exclusion of the jurisdiction of any court of the Tribe*" or the EDC. *See supra* n.9. These clauses are "mandatory" because their "language is obligatory" and "clearly manifests an intent to make venue compulsory and exclusive." *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 756 (7th Cir. 1992); *see also Muzumdar*, 438 F.3d at 762. There is no better way to say that a chosen forum is "exclusive," and thus "mandatory," than to say that the chosen forum is "*to the exclusion of the jurisdiction of*" the alternative forum.

In sum, the Tribal Parties' reading of the forum selection clauses is "implausible" and untethered to the "real world objective[s]" of the parties. The Tribal Parties' argument that the clauses were only intended to keep the *non-Indian parties* from bringing suit in the Tribal Court (as if they ever would want to do such a thing), while leaving the Tribal Parties free to hale the non-tribal parties into the Tribal Court whenever they wish (*precisely* what the non-Indian parties were seeking to avoid), is an irrational reading. The mandatory forum selection clauses clearly and unequivocally bar tribal court jurisdiction.

C. Godfrey Has Standing To Enforce the Forum Selection Clauses as to Claims Against It Arising Out of Its Role In the Underlying Bond Transaction.

As bond counsel and counsel for the Tribal Parties in the underlying transaction at issue in this litigation, Godfrey has a right to the protections of the forum selection clause, choice-of-law, and other dispute resolution mechanisms agreed to by the contracting parties. The District Court recognized that the forum selection clauses are "drafted broadly enough to encompass the current dispute" involving Godfrey's role in the bond transaction. A-72 n.20. The claims in the Tribal Court statement of claim against Godfrey are a "dispute or controversy arising out of th[e] Bond[s]" and related documents, and involve "transactions in connection therewith." SA-0028 (Bond); SA-00281 (Tribal Agreement § 9(b)).

The District Court correctly emphasized that the Tribal Parties may not "oblige[] Godfrey to defend the Bond Documents' validity in tribal court" and then object to Godfrey's reliance on the forum selection clauses and other dispute resolution mechanisms contained in those documents. A-72 n.20; *see id.* ("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"). Numerous decisions in this Circuit and elsewhere make clear that lawyers and other "transaction participants" who are "closely related" to the transaction may invoke forum selection clauses in the transactional documents when the claims against them

grow out of the transaction governed by those documents, especially when litigation among the parties already is pending in the forum the parties selected.[10]

II. The District Court Had Federal Question and Supplemental Jurisdiction over Godfrey's Claim, as well as the Obligation To Exercise that Jurisdiction by Enjoining the Tribal Parties from Proceeding with Their Action against the Firm in Tribal Court.

The District Court acknowledged that the Tribal Parties are seeking the identical relief against all the non-Indian parties in the Tribal Court action—a declaratory judgment invalidating "*all* of the Bond Documents, including the Tribal Agreement and the Bonds." A-68 (emphasis in original); *see also* A-72 ("Godfrey is a defendant in that [Tribal Court] suit for the sole purpose of binding them [*sic*] to any determination regarding the validity of the Bond Documents"). The District Court also recognized that the non-Indian plaintiffs in this case all seek the identical relief—a federal injunction barring the Tribal Parties from pursuing their Tribal Court action against the

[10] *See, e.g., Adams*, 702 F.3d at 439–43 (applying "closely related" test to allow affiliated entities to invoke forum selection clause); *Freitsh v. Refco, Inc.*, 56 F.3d 825, 827 (7th Cir. 1995) ("[C]ourts in this country . . . enforce forum selection clauses in favor of nonparties 'closely related' to a signatory."); *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993) (two companies that were controlled by a party to the contract were sufficiently "closely related" as to be bound by that contract's forum selection clause); *see also Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1106 (6th Cir. 1997) (law firm could invoke a contractual forum selection clause if the claims against it were "integrally related" to claims being made in the same litigation against a party to the contract, and if the law firm's alleged wrongdoing occurred while it was acting as "agent" for one of the contracting parties); *Bugna v. Fike*, 95 Cal. Rptr. 2d 161, 165 (Ct. App. 1st Dist. 2000) (attorney for one of the contracting parties had "standing" to invoke the contract's forum selection clause when sued for his role in the contractual relationship; he met the "closely related" standard because he was one of the "key transaction participants"—one of "the deal makers who negotiated, evaluated and otherwise put together the very . . . transactions that [defendants] now attack").

plaintiffs and requiring that the underlying contractual dispute be resolved in either Wisconsin federal or state court instead.

Despite this identity of claims and requested relief, the District Court held that it has federal question jurisdiction over the Saybrook and Stifel parties' claims but not over Godfrey's. *See* A-61 to A-65. And, although it recognized that at the very least it had supplemental jurisdiction over Godfrey's claim pursuant to 28 U.S.C. § 1367(a), the District Court elected to grant injunctive relief only to the Saybrook and Stifel parties, deciding for various reasons not to "exercise" its supplemental jurisdiction to extend that same relief to Godfrey. A-76. The Court acknowledged that this produces what it called the "odd," "inefficient," and "somewhat nonsensical[]" result of requiring the contract parties to litigate their claims in federal or state court, while allowing the Tribal Parties "to proceed alone against Godfrey" in Tribal Court on the same underlying contract validity and interpretation issues. A-66 to A-67 & n.16. Though the District Court cautioned that it might change its mind—particularly if the Tribal Court does not exercise appropriate comity toward state proceedings by engaging in the so-called *Teague* process, *see* A-76—the Court has left Godfrey alone in Tribal Court, in jurisdictional limbo.

The District Court devoted 15 pages of its decision to reaching this "somewhat nonsensical[]" result. A-67 n.16. After much back-and-forth, it "[a]ssum[ed]" that it lacked federal question jurisdiction over Godfrey's claim because, unlike the other

plaintiffs, Godfrey for purposes of its preliminary injunction motion has not challenged the Tribe's "inherent" sovereignty but instead contends that any "inherent" sovereignty the Tribe *may* have had has been waived pursuant to the multiple forum selection clauses and other dispute resolution mechanisms set forth in the various bond documents. *See supra* nn.3–4. The District Court deemed this "waiver" defense to be a mere "state *contract law*" issue "involv[ing] ordinary contract law principles" and lacking a sufficient "federal law component." A-62 to A-64 (emphasis in original). From this fundamentally mistaken assumption, the District Court proceeded to debate whether to "exercise" its supplemental jurisdiction over Godfrey's claim pursuant to 28 U.S.C. § 1367(a), ultimately deciding to leave the firm by itself in Tribal Court "at this time" and "at this stage," "without prejudice" to revisiting the matter, which "is by no means set in stone," even though such a result "seems odd (or at least inefficient)," if not "somewhat nonsensical[]." A-66 to A-67 & n.16, A-76.

The District Court's assumption that it lacked federal question jurisdiction over Godfrey's claim to be immune from tribal jurisdiction is wrong as a matter of well-settled law. Unlike its discretion with respect to supplemental jurisdiction, the District Court had a "virtually unflagging obligation" to exercise its federal question jurisdiction over Godfrey's claim. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 80, 83 (2d Cir. 2001). And even if the Court only had supplemental jurisdiction, it abused its

discretion in choosing not to "exercise" that jurisdiction, A-76, so as to provide Godfrey with the same injunctive relief it granted to the other non-Indian plaintiffs.

A. Godfrey's Challenge to Tribal Jurisdiction Presents a Federal Question, and the District Court Did Not Have Discretion To Decline To Exercise Federal Question Jurisdiction and Decide Godfrey's Claim.

"The question whether an Indian tribe retains the power to compel a non-Indian . . . 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." *Nat'l Farmers Union Ins. Co.*, 471 U.S. at 852; *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) ("whether a tribal court has adjudicative authority over nonmembers is a federal question").[11] This federal common law question of tribal "power" and "authority" over non-Indians is not governed exclusively by the principles of *Montana v. United States*, 450 U.S. 544 (1981). *Montana* and cases applying it involve the extent of a Native American tribe's "inherent" or "residual" authority to exercise

[11] *See also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) ("the existence of tribal court jurisdiction present[s] a federal question within the scope of 28 U.S.C. § 1331); *Thlopthlocco Tribal Town v. Stidham*, __ F.3d __, 2014 WL 4345420, *5 (10th Cir. Sept. 3, 2014) ("whether a tribal court has exceeded its jurisdictional authority is a question of federal common law") (collecting authorities); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010) ("Whether a tribal court has authority to adjudicate claims against a nonmember is a federal question within the jurisdiction of the federal courts."); *Ninigret Dev. Corp.*, 207 F.3d at 27–28 (collecting authorities); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 683 (5th Cir. 1999) (federal district court had "subject matter jurisdiction to determine whether the tribal court was improperly exercising jurisdiction" over a non-tribal member's federal statutory claim).

regulatory and adjudicatory jurisdiction over non-Indians. *See id.* at 563, 565 ("inherent sovereignty" and "inherent sovereign power"); *see also Plains Commerce*, 554 U.S. at 327–28 (*Montana* defines scope of tribe's "residual sovereignty" and "plenary jurisdiction").

But as the Supreme Court repeatedly has emphasized, a tribe's "inherent" or "residual" authority is simply the default, or baseline, of tribal jurisdiction. That authority may be expanded, restricted, or eliminated altogether, including through a waiver that meets the *federal* standards for abrogation of a federally protected sovereign prerogative. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982) (a tribe "retains all inherent attributes of sovereignty that have not been divested by the Federal Government," including the authority to regulate contracts subject to its jurisdiction, "*unless surrendered in unmistakable terms*") (emphasis added); *see also Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035 (2014) (non-Indians "need only bargain for a waiver of immunity" in order to sue tribe, in which instance the scope of the tribe's common law sovereign immunity makes "no earthly difference"); *C&L Enters.*, 532 U.S. at 420, 422 (upholding enforcement of tribal "agree[ment], by express contract, to adhere to certain dispute resolution procedures," including arbitration and "judicial enforcement of the resolution arrived at through arbitration").

Contrary to the District Court's fundamentally mistaken premise, whether a federally protected right, privilege, or immunity has been waived "is, of course, a federal question controlled by federal law." *Brookhard v. Janis*, 384 U.S. 1, 4 (1966); *see*

also Lapides v. Board of Regents of University System, 535 U.S. 613, 623 (2002) ("whether a particular set of state laws, rules, or activities amounts to a waiver of [sovereign] immunity is a question of federal law"); *Union Pacific Ry. Co. v. Pub. Serv. Comm'n of Mo.*, 248 U.S. 67, 69–70 (1918) (federal question presented by request "for a finding that the federal right has been waived").[12]

This basic principle of federal jurisdiction applies to the specific issue presented by Godfrey's appeal—whether federal question jurisdiction includes not only the determination whether a tribe has *inherent* authority over a non-Indian, but whether that authority has been waived or otherwise abrogated. The District Court dismissed the cases cited by Godfrey as "principally . . . involving the enforcement of arbitration provisions in contracts between tribes and private parties," an issue the Court thought distinguishable given that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, "divest[ed] the tribal court of jurisdiction." A-62, A-64. The District Court reasoned that "the FAA's policy in favor of arbitration supported divestment of tribal jurisdiction,"

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[12] *See also Carty v. State Office of Risk Mgmt.*, 733 F.3d 550, 553–54 (5th Cir. 2013) (whether particular sovereign conduct amounts to a waiver of federally protected sovereign immunity is a federal question decided under federal common law); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 205 (3d Cir. 2012) (determination whether First Amendment rights have been waived raises a federal question); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988) (whether party waived its First and Fourteenth Amendment rights pursuant to a contractual release is not governed by "[state] contract principles as we normally would in analyzing a release, . . . because 'the question of a waiver of a federally guaranteed constitutional right is . . . a federal question controlled by federal law'"); *Ruetz v. Lash*, 500 F.2d 1225, 1227 (7th Cir. 1974).

whereas the plaintiffs in this case are supposedly arguing that tribal jurisdiction has been divested solely through "ordinary contract law principles," which are questions of state law that do not present federal questions. A-64.

The District Court's analysis is flawed on many levels. To begin, Godfrey did not "principally" rely on Federal Arbitration Act cases. The principal authority that Godfrey cited—and the Court failed to acknowledge—was *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), which is squarely on point with this case.[13] The sole basis for federal subject matter jurisdiction in *Aspaas* was the federal question of whether the tribe had the authority to regulate a private utility's employment practices at a power plant operating on leased tribal trust lands, notwithstanding the tribe's waiver of any such authority in the governing lease. *Id.* at 1132–33. The Ninth Circuit reviewed *Montana*'s standards for determining "inherent sovereign power" over non-Indians, but held that it need not determine whether any such "inherent" power existed since the governing lease contained a "Non-regulation Covenant" in which the tribe had agreed not to regulate the non-Indian company's employment practices beyond enforcing certain contractual commitments:

> We need not determine in this case the precise limits of the Navajo Nation's inherent power to regulate employment relations of a non-Indian employer and Indian employees.

[13] *See* Plaintiff Godfrey & Kahn, S.C.'s Supplemental Brief on Subject Matter Jurisdiction, at 6–7, Dkt. 161 (Mar. 21, 2014) (discussing *Aspaas*).

> Assuming arguendo, such authority exists, *the dispositive question in this case is whether the Navajo Nation has agreed to a valid waiver of such a right*. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Supreme Court discussed the differences and similarities among federal, state, local and Indian sovereigns. It held that all these sovereigns can waive sovereign power if they do so in sufficiently clear contractual terms.

Id. at 1134–35 (emphasis added). The Ninth Circuit went on to hold that the "clear language" in the parties' lease documents "evidences the requisite 'unmistakable waiver'" required under federal law. *Id.* at 1135. That is precisely the situation here.

This principle is further illustrated by *QEP Field Servs. Co. v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 740 F. Supp. 2d 1274 (D. Utah 2010), another decision cited by Godfrey below but ignored by the District Court.[14] The sole basis for federal subject matter jurisdiction in *QEP* was the federal question of whether a tribe that had a contractual relationship with a non-Indian firm could sue that firm in tribal court. *See id.* at 1279. The district court reviewed the "general" rules of tribal authority set forth in *Montana*, but decided that "the question of the Tribal Court's jurisdiction" did not "rest[] on an analysis of the jurisdictional bounds set forth in *Montana*" since the parties' agreement contained a mandatory forum selection clause that constituted "a clear and unambiguous waiver of Tribal Court jurisdiction." *Id.* at 1280. Whatever the tribe's "residual" authority under *Montana* might have been, the tribal court litigation was

[14] *See* Godfrey Supplemental Brief, n.5 *supra*, at 6 (discussing *QEP*).

"'patently violative of express jurisdictional prohibitions'" included in the agreement, exhaustion was unnecessary, the tribal court was "without jurisdiction" over the dispute, and the non-Indian firm was entitled to preliminary injunctive relief. *Id.* at 1280, 1284; *see also Salt River Project Agric. Improvement & Power Dist. v. Lee*, No. CV-08-08028, 2013 WL 321884, *16 (D. Ariz. Jan. 28, 2013) (holding pursuant to § 1331 federal question jurisdiction that, although tribe had "inherent" regulatory authority under *Montana*, that inherent authority had been "expressly waived" by the tribe).

The District Court also was wrong in its reading of the decisions involving contractual arbitration clauses. A careful reading of those decisions shows that the reason they found a federal question was not because of the federally protected status of arbitration, but because of the federally protected right of non-Indians not to be subject to tribal jurisdiction except in narrow circumstances. In *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), for example, a non-Indian casino management company sought to enforce an arbitration clause in its gaming management contract with the Three Affiliated Tribes. The tribes, in turn, filed an action in their tribal court for a declaration that the contract was "null and void under Tribal law due to lack of proper authority." *Id.* at 1415. The Eighth Circuit held that, although the tribes' invalidity argument was not grounded on federal law, it nevertheless fell within the federal question of whether the tribes had adjudicatory authority over the non-Indian company. "The existence of tribal court jurisdiction itself

presents a federal question within the scope of 28 U.S.C. § 1331." *Id.* at 1421–22 (emphasis added). The Eighth Circuit's analysis did not rely in the slightest on the Federal Arbitration Act. *See also Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003) (where non-Indian party filed action in federal court seeking declaration of validity of contract with Indian tribe and order compelling arbitration pursuant to provision in contract, district court had subject matter jurisdiction because "an action filed in order to avoid tribal court jurisdiction necessarily asserts federal law").[15]

The conclusion that waiver of tribal jurisdiction over non-Indians presents a federal question is bolstered by *Ninigret Dev. Corp.*, 207 F.3d 21, another case involving a tribal attempt to exercise jurisdiction over non-Indians despite a waiver of tribal jurisdiction in the parties' contract. Although the case involved an arbitration clause, the First Circuit placed no weight on the supposedly special federal rights created by the Federal Arbitration Act—it did not even cite the Act. Instead, the court rested its

[15] As the District Court acknowledged (*see* A-64), Section 4 of the FAA provides for federal enforcement of an arbitration agreement *only* where a federal district court, "save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983) (FAA "does not create any independent federal-question jurisdiction," but authorizes an order compelling arbitration "only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the [arbitration] order can issue."); *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 659 (7th Cir. 2006).

federal question jurisdiction exclusively on the authority of federal courts "to determine, as a matter arising under federal law, the limits of a tribal court's jurisdiction. *The fact that a plaintiff's claims are not premised on federal law does not alter this result.*'" 207 F.3d at 28 (emphasis supplied, internal citations and quotations omitted). Thus, even if Godfrey's reliance on the forum selection clauses as a basis for the ouster of tribal court jurisdiction is, as the District Court characterizes it, akin to an "ordinary" state law contract claim, A-64, it still suffices to raise a federal question because those clauses help define the limits of the Tribal Court's jurisdiction over plaintiffs and the claims being made against them.[16]

The District Court therefore had federal question jurisdiction to determine whether the multiple forum selection clauses waive any civil adjudicatory authority the Tribe might otherwise have over Godfrey. But that is far from the only federal question

[16] The District Court downplayed the significance of *Ninigret* by noting that, although the First Circuit explicitly based federal question jurisdiction on the waiver issue, it also required the non-Indian party to exhaust its tribal court remedies despite a contractual forum selection clause placing jurisdiction elsewhere. *See* A-64 to A-65. But as the First Circuit emphasized, subject matter jurisdiction and exhaustion of tribal remedies are distinctly different issues, and the court was clear that *waiver* was the federal question vesting federal question jurisdiction in the federal courts. 207 F.3d at 27–28. And as the First Circuit itself recognized, its decision squarely conflicts with this Court's decision in *Altheimer & Gray* with respect to whether a forum selection clause overrides the tribal exhaustion requirement. *See id.* at 33. In addition, the Tribal Parties have eliminated any requirement that plaintiffs present their arguments regarding Tribal Court jurisdiction to the Tribal Court in the first instance by (1) expressly waiving "any requirement for exhaustion of tribal remedies," and (2) expressly waiving the jurisdiction of their Tribal Court, making tribal jurisdiction plainly non-existent. *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997).

presented by the Tribal Parties' "statement of claim" against the law firm. That Statement pleads no distinct claims for relief against the firm, and simply seeks a declaratory judgment that the Bonds and other bond documents are invalid. *See* A-72. But Godfrey does not own any of the bonds, is not a party to any of the transactional documents, is not making any claims against anyone relating to the bond documents, and has no duty to defend those documents in Tribal Court by itself in the absence of the indispensable bondholders.

The Tribal Court therefore lacks jurisdiction under federal common law because there simply is no case or controversy between the Tribal Parties and Godfrey regarding the validity or meaning of the bond documents. Nor are the Tribal Parties under any reasonable apprehension of litigation from Godfrey regarding the validity or meaning of the bond documents. Godfrey has asserted no claims against the Tribal Parties in the state court litigation, but is a co-defendant of theirs on claims brought by Saybrook and Wells Fargo in state court. *See supra* pp. 8–10.

Whatever the scope of the Tribe's "inherent" authority under *Montana* to regulate consensual relationships, there is no conceivable way that Godfrey could "*reasonably have anticipated*," *Plains Commerce*, 554 U.S. at 338 (emphasis added), being required to defend the validity of the Bond Documents in Tribal Court all by itself in the absence of indispensable parties like the bondholder itself, even though it has no interest in the Bonds and makes no claims against the Tribal Parties other than its right to stay out of

Tribal Court. Godfrey has a federally protected and enforceable right to stay out of Tribal Court in these circumstances.

B. The District Court Abused Its Discretion in Failing To Exercise Its Supplemental Jurisdiction To Include Godfrey within the Scope of Its Preliminary Injunction against the Tribal Court Proceedings.

Even if Godfrey's claims for declaratory and injunctive relief did not fall within federal question jurisdiction, they clearly fall within supplemental jurisdiction under 28 U.S.C. § 1367(a), as the District Court ultimately recognized. *See* A-65 to A-66. Federal supplemental jurisdiction "include[s] claims that involve the joinder or intervention of additional parties" where such claims "are so related to claims in the action within [the Court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). As the District Court emphasized, the underlying bond litigation and the tribal claims against Godfrey clearly derive from the "same common nucleus of operative facts." A-65 to A-66.[17]

[17] *See also In re Repository Techns., Inc.*, 601 F.3d 710, 725–28 (7th Cir. 2010) (district court had § 1367 supplemental jurisdiction over state law claims against attorneys for debtor in federal bankruptcy proceedings; given the degree of "entanglement" of the key issues and the "federal-court investment in this litigation," district court abused its discretion in declining to exercise its supplemental jurisdiction over the state law claims against the attorneys); *REP MCR Realty, L.L.C. v. Lynch*, 200 Fed. App'x 592, 593 (7th Cir. 2006) (where federal court already had jurisdiction over contract dispute, third-party claims for indemnity and contribution from lawyer and law firm for alleged mistakes in drafting and negotiating the disputed contract fell within § 1367 supplemental jurisdiction).

Although the District Court has supplemental jurisdiction over Godfrey's claims, and Godfrey has standing to invoke the multiple mandatory forum selection clauses in the transactional documents it is being "oblige[d]" to defend (*see supra* section I.C.), the Court nevertheless declined to "exercise" its supplemental jurisdiction and extend its preliminary injunction against the Tribal Court proceedings to include Godfrey. A-76. The District Court's reasoning fails to make a persuasive case for leaving the law firm as the *only* non-Indian defendant in Tribal Court while all other transactional participants litigate the same issues in federal or state court.

First, the District Court thought there was a "problem" because "supplemental jurisdiction does not lie indefinitely"—if all of the federal claims are at some future point resolved before trial, a presumption would then arise that the supplemental claims should be dismissed, and "it may well make little sense to retain jurisdiction over Godfrey's contract-based claims *at that point*." A-66 (emphasis added). That may or may not be so when that time comes, but does not explain why the District Court would enjoin tribal litigation against the bondholder and other transaction participants *at this time* but allow that litigation to proceed against outside counsel in the absence of necessary and indispensable parties like the bondholder whose bonds are being challenged in Tribal Court. *That* is the outcome that "make[s] little sense." A-66.

Second, in deciding whether to enforce the forum selection clauses in Godfrey's favor and include it within the scope of the preliminary injunction against further Tribal

Court proceedings, the District Court did exactly what this Court's *Muzumdar* and *Sokaogon* decisions held may not be done—condition the enforceability of a forum selection clause on predictions about whether the underlying documents are likely to be held valid or not. The District Court concluded that the Bonds are probably valid, and thus the EDC is likely subject to the forum selection clauses in the bonds. *See* A-74 to A-75. But the Court was troubled about one of the provisions in the tribal agreement, and for that reason concluded that Godfrey could not likely enforce the *identical* forum selection clause in the tribal agreement. *See* A-73 to A-74. Thus, although the identically worded forum selection clauses in both documents involving the same transaction provide what the District Court described as "unambiguous consent to the exclusive jurisdiction of Wisconsin courts," the District Court decided not to apply the forum selection provision in the document it deemed likely enforceable (the bonds) because of concerns it had about the enforceability of the other document (the tribal agreement).

That is precisely the kind of "absurd[]" result this Court cautioned against in *Muzumdar*—"hav[ing] to determine whether the contracts were void" in order to decide "whether, based on the forum selection clauses, [the court] should be considering the cases at all." 438 F.3d at 762. This approach must be rejected for all the reasons set forth in Part I.

Finally, "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.'" *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 173 (1997) (citation omitted). The District Court's outcome here serves none of those values. It makes absolutely no sense for the parties to the bond transaction to litigate the validity, meaning, and enforceability of the bonds in Wisconsin federal or state court, while Godfrey simultaneously is exposed to litigating these same issues in Tribal Court in which it would be the sole non-Indian party and the only party expected to defend the validity of the bond transaction even though the actual bondholder is litigating the same issues at the same time in federal or state court. That is neither economical, convenient, nor fair. Rather, in the District Court's own words, "it seems odd (or at least inefficient)" and "somewhat nonsensical[]." A-66 to A-67 & n.16.

III. The Forum Selection Clauses and Other Dispute Resolution Mechanisms Operate as Independent Waivers of Sovereign Immunity and Make Exhaustion of Tribal Court Remedies Unnecessary and Inappropriate.

The enforcement of the forum selection clauses represents, once again, the straightforward means of resolving the issues raised by the Tribal Parties regarding their sovereign immunity and tribal exhaustion (assuming this Court decides it needs to address those issues). *First*, the forum selection clauses in the various collateral documents *themselves* are sufficient evidence of the Tribal Parties' intent to waive their

sovereign immunity. *Second*, the forum selection clauses *themselves* explicitly eliminate any need for the plaintiffs to exhaust any tribal remedies.

A. The Forum Selection Clauses and Other Dispute Resolution Mechanisms Are Themselves Independent Waivers of Sovereign Immunity.

At one point in its *Wells Fargo* discussion, this Court pointedly observed that "[i]t is not immediately apparent" why the bonds and related documents do not on their face "make clear the Corporation's intent to render itself amendable to suit for legal and equitable claims in connection with the bond transaction." 658 F.3d at 701 (citing *C&L Enters.* and *Sokaogon*). Indeed, the bonds and related documents in this case are even more clear and unequivocal than the instruments in *C&L Enterprises* and *Sokaogon* in expressing tribal consent to be sued in Wisconsin federal and state courts in the event of disputes arising out of the bond transaction. Taken together, the forum selection clauses, the choice-of-law provisions, the waivers of tribal court jurisdiction and exhaustion requirements, and the express waivers of sovereign immunity unmistakably evidence the Tribal Parties' "commitment to adhere to the [agreed-upon] dispute resolution regime," including "judicial enforcement." *C&L Enters.*, 532 U.S. at 421 n.4, 422. Even more than in *Sokaogon*, "[n]o one reading th[ese] clause[s] could doubt that the effect was to make the tribe suable." 86 F.3d at 660; *see Ninigret Dev. Corp.*, 207 F.3d at 31 (forum selection clause was "nose-on-the-face plain" in waiving tribal sovereign immunity).

Yet *Sokaogon* makes clear that it is not even necessary to read these clauses "taken together." In *Sokaogon*, this Court, relying solely on a contract's arbitration clause, held that "to agree to be sued is to waive any immunity one might have from being sued." 86 F.3d at 659. In other words, no independent waiver was required. *Id.* at 659–60. The arbitration clause in *Sokaogon* was "at least as perspicuous as the statement . . . that . . . '[t]he tribe will not assert the defense of sovereign immunity if sued for breach of contract.'" *Id.* at 660. The clause need not use the phrase "sovereign immunity" in order to be a valid waiver, for "[n]o one reading this clause could doubt that the effect was to make the tribe suable." *Id.*; *see also C&L Enters.*, 532 U.S. at 420–21 (quoting *Sokaogon*, 86 F.3d at 659–60) ("'The [tribal immunity] waiver . . . is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words "sovereign immunity." No case has ever held that.' That cogent observation holds as well for the case we confront.").

The same is true here. Even if this Court were to accept the misguided assertion of the Tribal Parties that the remaining bond documents are invalid and unenforceable, the forum selection clauses remain valid according to *Muzumdar* and *Sokaogon*, and those clauses—*standing alone*—operate as waivers of sovereign immunity. "[W]e must ask whether the language of the arbitration clause might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity from suit without realizing that he was doing so." *Sokaogon*, 83 F.3d at 660. The Tribal Parties have not

and could not credibly have argued that the forum selection clauses did so here. For an effective waiver, nothing more is required.

B. Exhaustion Is Unnecessary and Inappropriate under *Altheimer & Gray*, Given the Mandatory Forum Selection Clauses.

Although there are other reasons why exhaustion of Tribal Court remedies is not required, which have been addressed in the briefs filed by the other plaintiffs, the mandatory forum selection clauses in the transaction documents by *themselves* also make exhaustion unnecessary. Requiring exhaustion of tribal court remedies where the parties clearly and unambiguously waived tribal court jurisdiction in their underlying agreement would, in practical effect, render forum selection clauses and jurisdictional waivers a complete nullity. Such clauses and waivers are either effective and controlling, or they are not. The District Court rightly determined that the clauses here were controlling. A-46 to A-48.

This Court has come down resoundingly on the side of honoring forum selection clauses and jurisdictional waivers, without requiring the parties to exhaust the tribal remedies they previously waived. *See especially Altheimer & Gray v. Sioux Mfr. Corp.*, 983 F.2d 803, 812–15 (7th Cir. 1993). The defendant in that case was the Sioux Manufacturing Corporation ("SMC"), "a wholly-owned tribal corporation and governmental subdivision" of the Devils Lake Sioux Tribe, a federally recognized tribe in North Dakota. *Id.* at 806. SMC, the Tribe, and a non-Indian Illinois corporation

entered into a letter of intent to form a manufacturing venture on the North Dakota reservation. That agreement waived tribal sovereign immunity, agreed to the application of Illinois law, and agreed that all disputes would be subject "to the venue and jurisdiction of the federal and state courts located in the State of Illinois." *Id.* at 807.

After the deal fell apart and litigation was brought in both Illinois state and federal court, SMC argued that the agreement was "null and void" because it had not been approved by the federal government—an argument very similar to the Tribal Parties' claims here. *Id.* The district court and this Court both rejected SMC's defense that plaintiffs had failed to exhaust their tribal court remedies, reasoning that, in accordance with the forum selection clause, the Devils Lake Sioux Tribal Court had no jurisdiction to exhaust. *Id.* at 814–15.

The Tribal Parties repeatedly have attempted to brush *Altheimer & Gray* aside on the grounds that there was no case pending in tribal court at the time the motion to exhaust tribal remedies was filed. Tribal Parties' Br. 21–24. But this Court did not place much weight on the absence of current tribal court litigation. To the contrary, it strongly suggested that the tribal exhaustion rule *should* apply in appropriate circumstances even to "cases in which there existed no first-filed tribal court action." 983 F.2d at 814 (emphasis added) (citing approvingly to Eighth, Ninth, and Tenth Circuit cases holding that exhaustion is "mandator[y]" in some types of cases regardless of whether tribal court proceedings are actually pending).

Rather than placing much weight on who filed first, this Court emphasized that a "[m]ore important[]" consideration precluded exhaustion:

> *More importantly*, we believe the application of the tribal exhaustion rule would not serve the policies articulated in *Iowa Mutual* and *National Farmers.* As discussed above, the Supreme Court was concerned with implementing Congress's policy of tribal self-government. The Court feared that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."
>
> In this case, however, the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum. In the Letter of Intent, Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. *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. at 814–15 (emphasis added, citations omitted).

The principles in *Altheimer & Gray* have been widely embraced and applied, regardless of whether tribal court proceedings were currently pending at the time the motion to exhaust tribal remedies was filed. Thus, "when the negotiating parties have agreed to an appropriate forum, exhaustion of tribal remedies is not required," and

there is "no legally justifiable reason to disrupt the parties' agreed-upon forum by way of the tribal exhaustion doctrine." *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.N.D. 2005). Where a tribe or tribal entity has agreed to "a clear and unambiguous waiver of tribal court jurisdiction" in the underlying contract documents, any attempt to pursue tribal court litigation "is patently violative of the parties' written agreement and exhaustion is unnecessary." *QEP Field Servs. Co.*, 740 F. Supp. 2d at 1280.[18]

Some courts have criticized the weight that *Altheimer & Gray* places on the sanctity of forum selection clauses, but this should not in any respect prevent this Court from following its earlier authority. Many of the cases in other circuits that have not followed *Altheimer* presented the issue whether to require tribal exhaustion in the face of an *arbitration* clause, which is a significantly different issue than enforcement of a clause designating the mandatory venue for *judicial* resolution of disputes. *See, e.g.*, *Bank One, N.A. v. Shumake*, 281 F.3d 507, 516 (5th Cir. 2002) (declining to apply *Altheimer & Gray* and similar cases as "hav[ing] no application" to the tribal exhaustion vs.

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[18] *See also FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) ("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 this . . . litigation first to the tribal court. . . . No provision in the agreement gave these defendants the right to override a plaintiff's choice of forum under the forum selection clause. *Since [they] agreed to be sued in the federal district court[, they] are not privileged to force the dispute into the tribal court.*") (emphasis added); *Meyer & Assocs., Inc. v. Coushatta Tribe of La.*, 992 So. 2d 446, 450 (La. 2008) (enforcing "unequivocal[]" forum selection clauses in various contracts and memoranda of understanding over tribe's objections that tribal court remedies should first be exhausted), *cert. denied*, 556 U.S. 1166 (2009).

commercial arbitration issue because "[a]n arbitration clause that attempts to foreclose any and all access to courts bears little resemblance to a forum selection clause").[19] Many of these cases also involved situations in which "individual tribal members" had agreed to waive the protections of their tribal courts in consumer transactions, as opposed to situations in which the tribal government and its corporate alter ego have *themselves* waived tribal jurisdiction and exhaustion pursuant to intensively bargained commercial agreements. *Id.* at 515. Just as the sanctity of forum selection clauses is an "*indispensable* element in international trade, commerce, and contracting," *Mitsubishi Motors*, 473 U.S. at 630 (emphasis added), so too must parties to complex commercial transactions with tribes and tribal entities be able to "trust the validity of choice of law and venue provisions," *Altheimer & Gray*, 983 F.2d at 815.

The Tribal Parties claim that none of these concerns falls within any of the recognized exceptions to the tribal exhaustion doctrine. Tribal Parties Br. at 20 n.10; Nat'l Congress of Am. Indians *Amici Curiae* Br. at 12–15. Once again, the Tribal Parties are wrong on many grounds. The Supreme Court repeatedly has emphasized that exhaustion of tribal proceedings is not required "where the action is *patently violative of express jurisdictional prohibitions*." *Nat'l Farmers Union*, 471 U.S. at 857 n.21 (emphasis added); *see also Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Thus, where there are "clear

[19] Many of the cases cited by the Tribal Defendants are distinguishable on these grounds. *See, e.g., Gaming World Int'l Ltd.*, 317 F.3d 840, and *Bruce H. Lien Co.*, 93 F.3d 1412.

and unambiguous" forum selection clauses and jurisdictional waivers barring suit in tribal court, an attempt to litigate in tribal court "is patently violative of the parties' written agreement and exhaustion is unnecessary." *QEP Field Servs. Co.*, 740 F. Supp. 2d at 1280. The Supreme Court also has emphasized that, where it is "evident that tribal courts lack adjudicatory authority," any "otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14. That is precisely the case here. *See also Larson v. Martin*, 386 F. Supp. 2d at 1088 ("[T]he Court finds no legally justifiable reason to disrupt the parties' agreed-upon forum by way of the tribal exhaustion doctrine."). None of these recognized exceptions to the exhaustion rule is in any respect dependent on a finding of "bad faith."

Even more fundamentally, the Supreme Court has repeatedly cautioned that the tribal exhaustion rule must be applied consistent with its underlying purposes, and that exhaustion should *not* be required where it would interfere with those purposes. The tribal exhaustion doctrine seeks to respect "tribal self-government and self-determination," promote "the orderly administration of justice," and minimize risks of "'procedural nightmare[s]'" when multiple jurisdictions are asked to rule on the same underlying issues. *Nat'l Farmers Union*, 471 U.S. at 856; *see also Iowa Mut. Ins. Co.*, 480 U.S. at 15–16. But like similar abstention and exhaustion principles, exhaustion of tribal court remedies "is required as a matter of comity, not as a jurisdictional prerequisite."

Iowa Mut., 480 U.S. at 16 n.8. When application of the doctrine would not serve its underlying purposes of promoting comity, orderly dispute resolution, and wise judicial administration, but instead would lead to "'procedural nightmare[s],'" *Nat'l Farmers Union*, 471 U.S. at 856 (citation omitted), federal courts must follow their "'virtually unflagging obligation . . . to exercise the jurisdiction given them,'" reject tribal exhaustion, and decide the disputed issues of federal law themselves. *Garcia*, 268 F.3d at 80, 83 (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 817) (denying motion to require exhaustion of tribal remedies where jurisdictional and procedural "uncertainty" might result, the substantive rules of decision "are grounded (if anywhere) on federal and state law, not 'tribal law,'" and none of the parties previously had "taken the initiative to seek adjudication of this dispute within the tribal nation"). Here again, these principles do not turn upon the presence or absence of tribal "bad faith."

Thus, requiring tribal court exhaustion is inappropriate even where the exemptions that have been articulated by other courts are "technically inapplicable" but tribal exhaustion would not promote the "reasoning behind" the doctrine. *Nevada v. Hicks*, 533 U.S. at 369; *see also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484–88 (1999).

IV. The Collateral Documents Are Valid, Including the Waivers of Sovereign Immunity within Them.

Muzumdar, Sokaogon, and the parties' multiple mandatory forum selection clauses resolve the preliminary-injunction issues in this case and make it unnecessary for this Court to resolve questions concerning the likely enforceability of the remaining transaction documents or any other issues going to the merits of the underlying dispute. Nevertheless, if this Court decides to address it, the contention that every one of the remaining transaction documents are void and unenforceable is without merit.

The Tribal Parties and the amici have devoted considerable effort, and have relied on what purport to be "expert" affidavits, trying to convince this Court and the District Court that their clear intent to waive sovereign immunity, independent of the waiver in the voided trust indenture, should not be honored. *See, e.g.*, Tribal Parties' Br. 51–53 (relying on its allegedly "undisputed agency guidance and uncontradicted testimony from former NIGC officials"). As an initial matter, these "expert" opinions were by no means "undisputed" or "uncontradicted," as the Tribal Parties suggest. The District Court had before it the expert declarations of two experts that *did contradict* precisely these opinions. *See* Supp.SA-001 (Appleby Declaration); Supp.SA-011 (Papazian Declaration). But, more important, not only is this assertion immaterial to the question of whether the Tribal Court has jurisdiction to resolve the sovereign immunity

and other remaining federal issues, it flies directly in the face of this Court's decision in the initial action brought by Wells Fargo. *See Wells Fargo*, 658 F.3d 684.[20]

In *Wells Fargo*, this Court considered and rejected the EDC's argument that, by virtue of being part of the same transaction as the voided trust indenture, all the collateral agreements were also void because they were management contracts that did not have NIGC approval. *See* 658 F.3d at 700–02. The Court held that "the mere reference to a related management contract does not render a collateral document subject to the Act's approval requirement" and that a collateral agreement is void only

[20] Although this Court need not decide the issue in order to resolve these appeals, it should not be assumed that the Tribal Parties' liability rises or falls on the existence of a valid waiver of sovereign immunity. Sovereign immunity does not allow the Tribal Parties to repudiate their debt obligations on grounds of illegality without returning Saybrook's money. Saybrook might be limited in its remedies if the Tribal Parties have not waived sovereign immunity, but it still has a right in equity to its principal. The "undoubted[]" rule since at least the 19th century has been that, if a sovereign "obtains the money or property of others without authority, the law, *independent of any statute,* will compel restitution or compensation." *Marsh v. Fulton Cnty.*, 77 U.S. (10 Wall.) 676, 684 (1871) (emphasis added). This applies even where the sovereign obtains money or property pursuant to an *ultra vires* contract; in such circumstances courts will "permit[] property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 60 (1891) (emphasis added); *see also City of Louisiana v. Wood*, 102 U.S. 294, 299 (1880) (government that obtains money from investors through sale of illegal bonds must "return the money paid to it by mistake"). These principles govern federal, state, local, and foreign sovereigns, and there is no reason that they should not govern Native American tribes as well. *See, e.g.*, *Rita, Inc. v. Flandreau Santee Sioux Tribe*, 798 F. Supp. 586 (D.S.D. 1992) ("Plaintiff [an investor] clearly has some rights in the operation and its assets which the defendants cannot simply appropriate for their own use *regardless of the enforceability of the agreement*."); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) (tribes do not have "super-sovereign authority"); *Tri-Millennium Corp. v. Jena Band of Choctaw Indians*, 725 So. 2d 533, 537 (La. App. 1998) (tribe could not solicit money from investor then renounce the deal as null and void for lack of federal approval without return investor's money; "the Indians could not induce the plaintiff into investing in the project and accept money, without allowing the plaintiff a recourse for asserting its grievances").

if that particular agreement provides for the management of a gaming operation. *Id.* at 701; *see also Catskill Dev., LLC v. Park Place Entm't Corp.*, 547 F.3d 115, 130 & n.20 (2d Cir. 2008) (rejecting argument that NIGC approval is required for all collateral agreements); *Jena Band of Choctaw Indians*, 387 F. Supp. 2d at 678 ("even if one of the agreements entered into by the parties is a collateral agreement, pursuant to 25 C.F.R. § 502.5, because it is related to a management contract, it still would not be void for lack of NIGC approval unless it also provides for management of a gaming operation"). Even the expert used by the EDC in *Wells Fargo*, Kevin K. Washburn, has acknowledged that the NIGC "strictly has jurisdiction to review and approve only 'management contracts'" and that the Commission "does not intend that [unapproved collateral] agreements are void." Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval,* 8 Gaming L. Rev. 333, 334–45 (2004), cited in *Wells Fargo*, 658 F.3d at 701 n.16.

Arguments by the Tribal Parties as to how their experts or even the NIGC may now view the related nature of the collateral agreements are irrelevant given this holding in *Wells Fargo*. Moreover, arguments by the National Indian Gaming Association *amicus* here concerning "the severe consequences that may result" from "piecemeal analysis" if non-Indian parties were to use "various tactics," including "execut[ing] several related agreements, none of which standing alone constitute a management contract, but when viewed in totality" are a management contract, "in an effort to circumvent the NIGC's review process," are not probative. *See* Nat'l Indian

Gaming Ass'n *Amicus Curiae* Br. 13–17. The Association might rightly be concerned with this issue, but in this case it is nothing more than a straw man, and a court faced with those facts in a future case undoubtedly would address this sort of circumvention of the regulations in an appropriate fashion. Quite simply there are no facts to suggest that this happened here. None of the remaining documents shows any evidence of an attempt to divide covenants of the type that made the Trust Indenture a "management contract" among them in order to avoid triggering federal review.

In fact, none of the collateral documents, whether viewed separately or together, can in any reasonable respect be viewed as "management agreements." The resolutions relied upon by the District Court to find a waiver of sovereign immunity are simply certified resolutions of the Tribal Council and the Board of Directors of the Economic Development Corporation, which reflect the intent and approval of the Tribal Parties with respect to this bond transaction. *See* SA-0271 (EDC Resolution); SA-0284 (Tribal Resolution). As the District Court correctly held, the "only problematic provision in the tribal resolution" (namely, the covenant not to replace key management without the bondholder's consent) does not "*alone* . . . 'transfer significant management responsibility.'" A-45 to A-46 (quoting *Wells Fargo*, 658 F.3d at 699). The bonds, likewise, do not contain any restrictions that reasonably permit them to be viewed as "providing for the management of a gaming operation." "Far from functioning as agreements through which plaintiffs could gain the authority to control defendants'

gaming operation," the District Court held, "the Bonds are debt instruments representing a promise to repay fixed sums of money to the lenders." A-75.[21] The fact that the bonds refer to the indenture for a description of the property, revenues and funds pledged, and the nature and extent of the security created by the indenture does not even remotely make them agreements for the management of a gaming operation under the analysis in *Wells Fargo*. *See* A-74 to A-75.

Nor is the tribal agreement a management contract. The District Court noted that certain clauses in the tribal agreement "arguably involve a troubling amount of control," but it "decline[d] to hold that the Tribal Agreement *is* void at this stage." A-74 (emphasis in original). Section 4(b) of the tribal agreement—which provides that "the Tribe agrees that it will not *replace* the Casino Facilities' General Manager, Controller or Executive Director of the Gaming Commission without first obtaining prior written consent of 51% of the Holders of the Bonds"—is similar *but not identical* to one of the

[21] The bonds contain a specific promise to pay by the EDC to the bonds' registered owner the principal amount on a specified maturity date, with interest at a specified rate at various times specifically provided for on the face of the bonds themselves. *See* SA-0025 (Bond). The fact that the bonds contain references to clauses defining events of default in the indenture that could have given rise to an acceleration of repayment of the indebtedness at most precludes the registered owner from relying on these events as a basis for accelerating the repayment. It has no legal effect on the owners' right to recover on a breach of the promise to pay on the dates set forth in the bonds themselves. This obligation exists under Wisconsin law *independent* of the indenture. Section 403.412 of the Wisconsin Statutes plainly states that: "The issuer of a note . . . is obligated to pay the instrument according to its terms at the time that it was issued . . . ." *See, e.g., Day v. Morgan*, 184 Wis. 595, 599–600 (1924) (recognizing the right at common law to bring an action on a breach of a promise to pay); *see generally Conroe v. Case*, 79 Wis. 338 (1891) (same).

provisions in the indenture identified as problematic in *Wells Fargo*, which provided that the EDC "will not *replace or remove* and will not permit the replacement or removal" of these same three individuals. SA-280 (Tribal Agreement § 4(b)) (emphasis added); *see also Wells Fargo*, 658 F.3d 698–99 (emphasis added). This similar provision is not enough, alone, to create a management contract. The provision in the tribal agreement ("replace") is narrower than the provision in the indenture ("replace or remove"), thereby giving the bondholder less power. And, in the eyes of this Court in *Wells Fargo*, it was "the provisions discussed . . . *taken together* . . . [that] transfer[red] significant management responsibility to Wells Fargo." 658 F.3d 699 (emphasis added). This necessarily means that the "replace or remove" provision (the stronger of the two), standing alone, did not transfer significant management responsibility.

Simply stated, the clauses in the tribal agreement are reasonable non-management financing covenants. They are nothing more. It would be a mistake now, in the wake of *Wells Fargo*, to reverse course and to hold that these provisions, including a similar but less restrictive single clause in the very same transaction, could confer management authority.[22] In all events, resolving the enforceability of the tribal

[22] Moreover, invalidating the indenture does not make the trustee, and the obligation to repay the bonds, somehow magically disappear. The bonds expressly designate that Wells Fargo will be the trustee for purposes of receiving the payments due on the bonds and authenticating the bonds through an agreed-upon certificate. The trustee may no longer be able to exercise rights under the void indenture, but, as the District Court found, "Wells Fargo was *acting as trustee*," and "a constructive trust still arose at the time $50 million changed hands, making Wells Fargo

agreement is not necessary to entitle Godfrey to a preliminary injunction, and this Court need not address the issue until it has been considered fully and decided by the District Court on remand.

CONCLUSION

One need look no further than the forum selection clauses to resolve this case. The Tribal Parties agreed to waive the jurisdiction of their Tribal Court and to try all disputes arising out of the bond transaction in Wisconsin federal or state court. That waiver issue presents a federal question. This Court should remand to the district court with instructions to enter an injunction in favor of Godfrey and preventing the Tribal Parties from proceeding on their statement of claim against Godfrey in their Tribal Court.

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the *de facto* trustee." A-69 (citing RESTATEMENT (SECOND) OF TRUSTS § 422 (noting that courts have imposed resulting trusts to protect investors in similar situations)); *see also Nelson v. Madison Lutheran Hosp. & Sanatorium*, 237 Wis. 518, 526 (1941) ("If it becomes impossible or impracticable or illegal to carry out the trust, a resulting trust will arise."); *Levin v. Sec. Fin. Ins. Corp.*, 230 A.2d 93, 98–99 (Md. 1967) (applying § 422 and holding that if a trust fails for illegality, equity creates a resulting trust to protect the lender's right to obtain repayment of a loan that served as the consideration for the creation of the trust).

Dated: October 6, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(e)(3) and Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 16,291 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 12 point Palatino Linotype and complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and Circuit Rule 32(a).

3. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

Dated: October 6, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2014, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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