No. 14-2150

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

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

On Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 3:13-cv-372-wmc
The Honorable William M. Conley, Chief Judge

BRIEF OF APPELLEES STIFEL, NICOLAUS & CO., INC. AND STIFEL FINANCIAL CORP.

Brian G. Cahill
Beth Ermatinger Hanan
David J. Turek
Daniel J. Kennedy
GASS WEBER MULLINS LLC
309 North Water Street
Milwaukee, Wisconsin 53202
Ph. 414-223-3300
Counsel for Appellees Stifel Nicolaus & Co., Inc. and Stifel Financial Corp.

October 6, 2014

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2150

Short Caption: Stifel, Nicolaus & Company, Inc., et al. v. Lac du Flambeau Band of Lake Superior Chippewa Indian

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

(a) Stifel Financial Corp.

(b) Stifel, Nicolaus & Company, Incorporated

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gass Weber Mullins LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

(a) N/A; (b) Stifel Financial Corp. is the parent of Stifel, Nicolaus & Company, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

(a) N/A; (b) Stifel Financial Corp.

Attorney's Signature: s/ Brian G. Cahill Date: 06/05/2014

Attorney's Printed Name: Brian G. Cahill

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: Gass Weber Mullins LLC
309 North Water Street, Suite 700, Milwaukee, Wisconsin 53202

Phone Number: (414) 223-3300 Fax Number: (414) 224-6116

E-Mail Address: cahill@gasswebermullins.com

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(a) N/A; (b) Stifel Financial Corp.

Attorney's Signature: s/Beth Ermatinger Hanan Date: 06/09/14

Attorney's Printed Name: Beth Ermatinger Hanan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Gass Weber Mullins LLC
309 North Water Street, Suite 700, Milwaukee, Wisconsin 53202

Phone Number: (414) 223-3300 Fax Number: (414) 224-6116

E-Mail Address: hanan@gasswebermullins.com

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(a) N/A; (b) Stifel Financial Corp.

Attorney's Signature: s/David J. Turek Date: 06/09/14

Attorney's Printed Name: David J. Turek

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Gass Weber Mullins LLC
309 North Water Street, Suite 700, Milwaukee, Wisconsin 53202

Phone Number: (414) 223-3300 Fax Number: (414) 224-6116

E-Mail Address: turek@gasswebermullins.com

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Attorney's Signature: s/Daniel J. Kennedy Date: 06/09/14

Attorney's Printed Name: Daniel J. Kennedy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Gass Weber Mullins LLC
309 North Water Street, Suite 700, Milwaukee, Wisconsin 53202

Phone Number: (414) 223-3300 Fax Number: (414) 224-6116

E-Mail Address: kennedy@gasswebermullins.com

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JURISDICTIONAL STATEMENT

Appellants Lac du Flambeau Band of Lake Superior Chippewa Indians' (the "Tribe") and Lake of the Torches Economic Development Corporation's ("EDC") (together, the "Tribal Parties") Jurisdictional Statement is complete and correct as to appellate jurisdiction. App. Dkt.21, at 1.[1]

The Tribal Parties' Jurisdictional Statement concerning the district court's jurisdiction is not complete and correct. The district court has subject matter jurisdiction over this action under 28 U.S.C. §1331. The claim pleaded by Appellees Stifel, Nicolaus & Co., Stifel Financial Corp. (together, "Stifel" unless otherwise distinguished), Saybrook Fund Investors, LLC, LDF Acquisition, LLC (together, "Saybrook" unless otherwise distinguished), Wells Fargo Bank, N.A. ("Wells Fargo") and Godfrey & Kahn, S.C. (collectively, "Appellees") seeks a declaration that the Lac du Flambeau Tribal Court (the "Tribal Court") lacks jurisdiction over them and over a lawsuit filed by the Tribal Parties. The Tribal Parties' lawsuit sought declarations that certain documents related to EDC's issuance of $50 million in Taxable Gaming Revenue

[1] In this brief, citations to docket entries in this appeal are identified as "App. Dkt.__." Citations to Appellants' Short Appendix are identified as "A-__." Citations to Appellants' Separate Appendix are identified as "SA-____." Citations to materials in the Record on Appeal but not included in Appellants' Short Appendix or Appellants' Separate Appendix are identified as "Dkt.__." All citations are followed, where appropriate, by a comma and pinpoint cite to the relevant section, paragraph, page or lines of testimony.

Bonds in January 2008 (the "Bond Transaction") are void under the Indian Gaming Regulatory Act ("IGRA") and tribal law (the "Tribal Court Action"). SA-0001, ¶1.

As pleaded in the Complaint, the question of whether an Indian tribe retains the power to compel nonmembers such as Appellees to submit to the civil jurisdiction of its tribal court arises under federal law for the purpose of 28 U.S.C. §1331. SA-0004, ¶13; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985). That Appellees challenged the jurisdiction of the Tribal Court in part based on forum selection and other provisions in documents executed or issued in connection with the Bond Transaction does not deprive the district court of subject matter jurisdiction. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 28 (1st Cir. 2000) (federal courts have authority to determine limits of tribal court jurisdiction as matter "arising under" federal law and "fact that a plaintiff's claims are not premised on federal law does not alter this result.").

STATEMENT OF THE ISSUES

1. Given the parties' characterization of the Bond Transaction as an off-reservation transaction, did principles of comity require the district court to refrain from deciding the motions for preliminary injunction until after the parties exhausted their remedies on the issue of jurisdiction in the tribal court system?

2. Did the district court correctly determine that the Bond Documents contain valid waivers of tribal immunity that applied to Appellees' declaratory judgment claim?

3. Did Stifel show more than a negligible chance of success in establishing that the Tribal Court lacked jurisdiction over it?

STATEMENT OF THE CASE

I. The Tribal Parties Enter Into the Bond Transaction.

In January 2008, the Tribal Parties issued $50 million in gaming revenue bonds to consolidate existing debt and to provide additional financing for a riverboat gambling venture that EDC and the Tribe were pursuing in Mississippi. A-30. On January 18, 2008, EDC issued the bonds under SEC Rule 144A and sold them to Stifel, Nicolaus & Company, Inc., as the initial purchaser of the bonds. SA-0324, ¶¶3, 7; SA-1066. In purchasing the bonds, Stifel, Nicolaus became the holder of the beneficial ownership interest in the bonds. SA-1013, 68:12-69:8; SA-1028, 125:23-126:12, 126:22-25; SA-1068. Later that day, Stifel, Nicolaus sold the bonds to LDF Acquisition, LLC, a special purpose vehicle created by Saybrook. SA-324, ¶4; SA-1028, 126:13-21, 127:1-6; SA-1067.

Wells Fargo served as the trustee for the bondholders. SA-0324, ¶5; SA-1028, 127:1-15. Godfrey & Kahn, S.C., a Wisconsin law firm ("Godfrey"), served as counsel to the Tribal Parties and as bond counsel. SA-0324, ¶6.

In connection with the issuance and sale of the bonds, the parties in this case executed, approved, adopted or issued the following documents (collectively, the "Bond Documents"):

1. A specimen bond, issued on January 18, 2008 (the "Bond").

2. A Limited Offering Memorandum, dated January 18, 2008 and signed by the president of EDC (the "LOM").

3. A Bond Purchase Agreement, dated January 18, 2008, between EDC and Stifel (the "Bond Purchase Agreement").

4. A Trust Indenture, dated January 18, 2008, between EDC and Wells Fargo (the "Indenture").

5. Resolution No. 1(08), adopted by EDC's Board of Directors on January 2, 2008 (the "Bond Resolution").

6. An Opinion Letter, dated January 18, 2008, issued by Godfrey as counsel for EDC and the Tribe and addressed to Stifel, Wells Fargo and Saybrook (the "Issuer Opinion Letter").

7. An Opinion Letter, dated January 18, 2008, issued by Godfrey as Bond Counsel and addressed to EDC, Stifel, Wells Fargo and Saybrook (the "Bond Counsel Opinion Letter").

8. A Tribal Agreement, dated January 1, 2008, between the Tribe and Wells Fargo (the "Tribal Agreement").

9. Resolution No. 1(08), adopted by the Tribe's Tribal Council on January 2, 2008 (the "Tribal Resolution").

SA-0324-0325, ¶8.

II. The Tribal Parties Waive Immunity and Tribal Exhaustion and Exclude Jurisdiction in Tribal Court.

In the Bond Documents, the Tribal Parties provided multiple waivers of tribal immunity, agreed not to litigate any disputes arising from the Bond Transaction in Tribal Court, and agreed that exhaustion of tribal remedies was unnecessary. With

respect to tribal immunity, the district court's May 16, 2014 Opinion and Order (the "Order") focused on waivers in two documents, the Tribal Resolution and the Bond Resolution. A-42-43. The Tribal Resolution addresses the Tribe's waiver of immunity as follows:

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

SA-0285-0286 (bold in original, italics supplied).

The Bond Resolution addresses EDC's waiver of immunity in the following terms:

> **WHEREAS**, the Board of Directors has been advised that as a condition to the issuance of the Bonds, the Corporation will be required to agree to various legal provisions (the "Legal Provisions") that will provide for (a) a limited waiver of its sovereign immunity with respect to suits or other legal actions or proceedings arising because of disputes related to the Bonds or the foregoing named documents or other agreements related thereto . . . .
>
> ****
>
> **RESOLVED**, that all Legal Provisions in the Bond Documents are hereby approved, *more specifically and expressly the Corporation (i) waives its immunity from suit . . . .*

SA-0273-0274 (bold in original, italics supplied). The Tribal Parties also expressed their intent to waive sovereign immunity in other Bond Documents, including the Bond, the

LOM, the Bond Purchase Agreement, and the Tribal Agreement. SA-0027-0028; SA-0039; SA-0262, §14(b); SA-0280-0281, §9(b).

Several Bond Documents also confirm that the Tribal Parties agreed to litigate any disputes arising from the Bond Transaction in federal or state court, "to the exclusion" of the Tribal Court. SA-0028; SA-0054; SA-0281, §9(b). For example, the Bonds state as follows:

> [EDC] expressly submits to and consents to the jurisdiction of . . . the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper, for the adjudication of any dispute or controversy arising out of this Bond, the Indenture, or the Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith, *to the exclusion of the jurisdiction of any court of the Corporation*.

SA-0028 (emphasis supplied).

In addition to these forum selection provisions, the Tribal Parties waived any requirement to exhaust tribal remedies should a dispute arise in connection with the Bond Transaction. SA-0027-0028; SA-0262, §14(b); SA-0280, §9(b). In the Bonds, for instance, the Tribal Parties "expressly waive . . . any requirement for exhaustion of tribal remedies should an action be commenced on this Bond, the Indenture, the Security Agreement, or the Bond Resolution . . . ." SA-0028.

Finally, the Bond Documents memorialized the parties' intent that the transaction be treated as an off-reservation matter. The Bond, Bond Purchase Agreement, Bond Resolution, Tribal Agreement and Tribal Resolution each provide that they will be

governed by, and construed in accordance with, Wisconsin law. SA-0027; SA0262, §14(a); SA-0273-0274; SA0280, §9(a); SA-0285-0286. Moreover, EDC affirmed in the Bond Purchase Agreement that the negotiations, execution and delivery of the agreement had occurred in the State of Wisconsin. SA-0262, §14(c). For its part, the Tribe affirmed in the Tribal Agreement that the transaction represented by that agreement had not taken place on Indian lands; that the negotiations preceding the agreement took place in Wisconsin; and that the agreement had not been executed or delivered on Indian lands. SA-0281, §9(c).

III. Stifel, Saybrook and Wells Fargo Did Not Participate in Any Negotiations on Tribal Land.

Consistent with the statements in the Bond Documents, Stifel did not participate in any negotiations of the terms or structure of the Bond Transaction on Tribal land. SA-1010-1011, 57:8-58:7. Although Stifel visited the reservation prior to the closing of the Bond Transaction, those visits were unrelated to the circumstances underlying the Tribal Parties' claims in the Tribal Court Action. A-57-58.

Stifel visited the Tribe's reservation four times in connection with the Bond Transaction. SA-1073. These visits included the initial visit to discuss the Tribe's financing needs, SA-1002, 23:6-16; SA-1003, 28:16-24; SA-1027, 122:24-123:18; SA-1028, 128:1-15, a meeting to discuss proposals from potential bond investors, SA-1027, 123:19-124:17; SA-1005, 35:6-17, accompanying Saybrook on its due diligence visit,

SA-1006, 41:5-15; SA-1008, 48:13-49:16, and attending the Tribal Council meeting where the Bond Transaction was approved, SA-1027, 124:18-125:17, SA-1009-1010, 53:12-54:10. The Tribal Parties acknowledged at the injunction hearing they had no evidence that any of these visits included negotiations about the Bond Transaction:

> THE COURT: Just to play devil's advocate because I'm sure I'm going to have this distinction highlighted by the plaintiffs, nowhere in these visits were there any negotiations of terms. I guess the closest you would get was when they visited the second time to lay out options in terms of refinancing. But the actual negotiation of the terms of the transaction did not take place at any of these visits.
>
> MS. HOGEN-MOLINE: Well, I think that's a little bit unclear. And the other point, Your Honor –
>
> THE COURT: Well, have you presented evidence that they were negotiated while on tribal lands? I didn't see that in your proposed findings.
>
> MS. HOGEN-MOLINE: No, Your Honor.

Dkt.158, 103:20-104:8; *see also* A-57.

As for Saybrook, on November 15, 2007, Scott Bayliss of Saybrook Fund Investors briefly visited the reservation of the Tribe. SA-1086, ¶1. Bayliss visited the reservation to gather information regarding the Lake of the Torches Resort and Casino ("Casino"). SA-1087. While present on the reservation, Bayliss spoke with operational casino personnel and Tribe CFO Rick Lindsley about the Casino's operations and was introduced to Carl Edwards. *Id.* Bayliss was on the reservation for approximately five to six hours and did not stay the night. *Id.* Bayliss's brief visit to the Tribe's reservation was for no purpose other than to gather information. *Id.* While present on the Tribe's

reservation, Bayliss did not engage in any negotiations with the Tribal Parties. *Id.* Bayliss had never been on the reservation prior to the visit described above, and he has never returned. *Id.* No other representative of Saybrook Fund Investors has ever visited the reservation. *Id.*

Bayliss' visit occurred at least two weeks before Saybrook and the Tribal Parties agreed to enter into exclusive negotiations. SA-1086. It also pre-dated the existence of LDF Acquisition (the entity created to hold the Bonds), which was formed on or about January 10, 2008. *Id*. The visit also pre-dated any commitment to loan money to the Tribe Parties by more than two months. SA-1086-87.

In its capacity as trustee, Wells Fargo received funds from EDC in accordance with the Bond Documents. SA-0972, ¶3. EDC's payments to Wells Fargo originated in EDC's account at Chippewa Valley Bank, whose address was listed as P.O. Box. 37, Bruce, Wisconsin 54819—land outside the reservation. SA-0542-53.

The Bond Transaction closed on January 18, 2008. SA-0395. The "trade ticket" memorializing Saybrook's purchase of the Bonds demonstrates that Saybrook acquired the Bonds in an off-reservation sale out of Stifel's Brookfield, Wisconsin, office. SA-0333, ¶13.

IV. The Tribal Parties' Default and Onset of Litigation.

In 2009, the Tribal Parties stopped depositing casino revenues into an account established by the Indenture. SA-0333; Dkt.1 at ¶28. Acting as trustee to enforce the

Indenture, Wells Fargo then filed suit against EDC in the Western District of Wisconsin alleging breach of the Indenture and seeking appointment of a receiver. SA-0333; Dkt.1 at ¶29. The district court ruled that the Indenture was void because it was an unapproved management contract under IGRA, 25 U.S.C. §§2701-2721. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1060-61 (W.D. Wis. 2010). The court subsequently ruled that many of the other bond documents were similarly void based on the management provisions in the Indenture. *See Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, No. 09-cv-768, 2010 WL 1687877, at *5-7 (W.D. Wis. Apr. 22, 2010).

On appeal, this Court affirmed in part and reversed in part the judgment of the district court. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 698 (7th Cir. 2011). The Court agreed that the Indenture was void because certain provisions, considered collectively, rendered the Indenture a management contract that should have been submitted to the National Indian Gaming Commission (NIGC) for review. *Id.* at 699. This Court declined, however, to invalidate the other bond documents simply because they referred to the Indenture. *Id.* at 701. The Court reversed the district court's decision to void those bond documents and remanded for further proceedings to determine whether the waivers of sovereign immunity in those documents could be enforced against EDC. *Id.* at 702.

V. Federal Suits are Dismissed and Saybrook Sues in Wisconsin State Court.

After remand, Wells Fargo voluntarily dismissed its lawsuit against EDC. SA-0333. On January 16, 2012, Saybrook and Wells Fargo filed a new action in the Western District of Wisconsin against the Tribal Parties, Stifel and Godfrey in accordance with the forum-selection provisions in the Bond Documents. To prevent limitation clocks from running, Saybrook and Wells Fargo filed a parallel action in the Circuit Court for Waukesha County, Wisconsin, asserting the same claims against the Tribal Parties, Stifel and Godfrey that were asserted in the 2012 federal court action. *E.g.*, SA-0028; SA-0334; 479-529; *see also* *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev. Corp.*, 929 F. Supp. 2d 859 (W.D. Wis. 2013).

When it filed the 2012 federal action, Saybrook immediately alerted the district court to a potential jurisdictional defect: courts had split on whether federal-question jurisdiction existed over Saybrook's complaint, and the parties were non-diverse. SA-0334, ¶22. EDC argued that the federal court had subject-matter jurisdiction. *Id.*, ¶23. The district court, however, concluded it did not have subject-matter jurisdiction over Saybrook's state law claims and dismissed that case. *Id.*; *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev. Corp.*, No. 12-cv-255-wmc, 2013 WL 2300991 (W.D. Wis. Apr. 1, 2013).

The state court lawsuit remains active, and the parties are presently litigating their various claims and defenses surrounding the Bond Transaction in that forum.

VI. The Tribal Parties File Suit in Tribal Court, Prompting This Action in Federal Court.

At no time during the pendency of litigation in federal court—from 2009 to 2013—did either Tribal Party contend that the parties' dispute should be litigated in Tribal Court. That changed on April 25, 2013, when the Tribal Parties filed a Statement of Claim in their Tribal Court against Saybrook, Wells Fargo, Stifel, and Godfrey. SA-0289. The Tribal Parties' Statement of Claim asserted nine counts for declaratory judgment: Counts I and II sought declarations that the Bond Documents were void under "tribal law" and IGRA; Counts III through VII sought declarations that various individual Bond Documents are void management contracts; and Counts VIII and IX requested declarations that the Tribal Agreement and Tribal Resolution were void because they were not approved in accordance with the Tribe's Constitution. SA-0316-319.

A month before filing the Tribal Court Action, the Tribe amended the portion of its code governing procedures in the Tribal Court. SA-0335, ¶28.[2] The amendments purport to expand the jurisdiction of the Tribal Court and created a position known as "judge *pro tempore*." *Id.*, ¶29. A judge *pro tempore* is now specifically appointed by the Tribe in most cases "to which the Tribe or a tribal agency or enterprise [such as EDC] is

[2] On April 30, 2013, the Tribe amended Chapter 80 again. However, the differences between the March 27, 2013, version of Chapter 80 and the April 30, 2013, version are not relevant for present purposes. For more on this point, see note 3 below.

a party and the opposing party is a nonmember of the Tribe." *Id.*, ¶30.[3] Appellate judges reviewing decisions of judges *pro tempore* also would be appointed by the Tribal Council. *Id.*, ¶31. In other words, the Tribe gave itself the authority to appoint the judge in most Tribal Court lawsuits to which the Tribe is a party and the opponent is an outsider.

For the Tribal Court Action, the Tribe appointed as Judge *Pro Tempore* Indian law professor and blogger Matthew L.M. Fletcher, among whose writings is *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 976 (2010) ("I argue for a theory of tribal consent and resistance to federal government control embodied in the Supreme Court's assertion of federal court supervision over tribal court civil jurisdiction."). SA-0335, ¶34. In that writing, Professor Fletcher urges tribal courts to continue to exercise jurisdiction over nonmembers even in the face of federal court orders enjoining tribal proceedings. *Id.* ("Tribal judges, in carefully chosen instances, can and should resist such federal court decrees by simply refusing to comply.")

In response to the Tribal Court Action, Stifel, Wells Fargo, Saybrook and Godfrey commenced this action seeking (1) a declaration that the Tribal Court lacks jurisdiction

[3] The April 30 version of the Code amended Section 80.103(3)(a)(iii) to exclude certain cases from automatic assignment of a judge *pro tempore*—specifically, "cases involving traffic and other criminal offenses, Indian-child welfare, child support, family law, natural resources, land management, or the Tribe's housing authority." The Tribal Court Action falls within none of these categories.

over them in the Tribal Court Action; and (2) an injunction against the Tribal Parties from proceeding against Stifel, Wells Fargo, Saybrook and Godfrey in Tribal Court. SA-0020-21. On the same day the Complaint was filed, Stifel and Saybrook filed motions for a preliminary injunction to stop all proceeding in Tribal Court. Dkt.5, 17. Five days later, Godfrey filed its own motion for preliminary injunction. Dkt.37.

The Tribal Parties moved to dismiss the Complaint for lack of subject-matter jurisdiction or, alternatively, for a stay pending the outcome of the Tribal Court Action. Dkt.45. The district court denied this motion, focusing primarily on the Tribal Parties' argument that Stifel, Saybrook, and Godfrey must exhaust their remedies in Tribal Court before seeking relief in federal court. A-11-18. After examining the tribal exhaustion doctrine and its exceptions, the district court concluded that the forum selection provisions in the Bond Documents (which expressly excluded the Tribal Court as a forum) rendered exhaustion unnecessary. *Id.*

The Tribal Parties appealed the district court's denial of their motion to dismiss, Dkt.78, but this Court dismissed that appeal for lack of appellate jurisdiction. Appeal No. 13-3451, Dkt.21. The district court then scheduled a preliminary injunction hearing for March 14, 2014.

VII. The District Court's Preliminary Injunction Decision.

After conducting a five-hour hearing, Dkt.157, the district court issued a fifty-two page decision granting Stifel's and Saybrook's motions for preliminary injunction and

denying Godfrey's motion. A-29-80. In addition to ruling that Stifel and Saybrook were likely to succeed on their claims that the Tribal Court lacked jurisdiction over them, the district court rejected the Tribal Parties' immunity and exhaustion defenses. A-36-48.

With respect to immunity, the district court concluded that the Tribal Parties made "clear" waivers of their immunity in multiple Bond Documents. A-37-38 (quoting waivers in Bond, Bond Purchase Agreement, Bond Resolution, Tribal Agreement, and Tribal Resolution). Focusing primarily on the Bond Resolution and Tribal Resolution, the district court explained that the waivers in those documents "stand out as providing an unequivocal, independent waiver of the Tribe's sovereign immunity." A-42-44. The district court also ruled that the waivers were enforceable, rejecting the Tribal Parties' argument that the resolutions were void management contracts under IGRA. A-38-46.

Turning to exhaustion for the second time, the district court relied heavily on this Court's analysis in *Altheimer & Gray v. Sioux Manufacturing Corporation*, 983 F.2d 803 (7th Cir. 1993). Like this Court in *Altheimer*, the district court concluded that exhaustion was not required in light of the Tribal Parties' express agreements to litigate disputes about the Bond Documents in state or federal court, not tribal court. A-47-48. The district court explained that it would "undercut the Tribe's self-government and self-determination" to refuse enforcement of those explicit forum-selection provisions and allow continued litigation in Tribal Court. A-48 (quoting *Altheimer & Gray*, 983 F.2d at 815).

The district court then addressed the elements for a preliminary injunction. A-49-79. First, it concluded that Stifel and Saybrook were likely to succeed on their objections to Tribal Court jurisdiction because (1) there was no "express authorization" of tribal jurisdiction over nonmembers such as Stifel and Saybrook and (2) the Tribal Parties lacked inherent authority to compel Stifel and Saybrook to litigate in Tribal Court. A-51-61. To resolve the latter issue, the district court analyzed the two exceptions to the general rule against tribal jurisdiction over nonmembers established by the Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981). A52-61. After comparing the Tribal Court Action to Stifel's and Saybrook's alleged contacts with Tribal land, the district court concluded that tribal jurisdiction was not available under either exception because "[n]one of this requested relief [in the Tribal Court Action] seeks to regulate *plaintiffs' conduct on the reservation*." A-58 (emphasis in original).

After concluding that Stifel and Saybrook had demonstrated a reasonable likelihood of success, the district court found that Stifel and Saybrook had satisfied the other elements for injunctive relief: irreparable harm, a balance of harms weighing in their favor, and that injunctive relief would further the public interest. A-76-79.[4] Accordingly, the district court preliminarily enjoined the Tribal Parties "from participating in any

[4] The Tribal Parties do not contest these portions of the district court's ruling.

tribal court proceeding against the Stifel and Saybrook plaintiffs regarding a dispute or controversy arising out of the Bond Documents or related transactions." A-80.

SUMMARY OF ARGUMENT

This Court should affirm the district court's entry of a preliminary injunction preventing the Tribal Parties from prosecuting their claims against Stifel in Tribal Court. The district court correctly ruled that the Tribal Court had no jurisdiction over Stifel. Moreover, the district court adhered to this Court's decision in *Altheimer & Gray* by concluding it was unnecessary for Stifel to waste time and resources exhausting its remedies in tribal court before seeking an injunction in federal court. Finally, the district court properly construed the Tribal Parties' various waivers of sovereign immunity and found them enforceable notwithstanding the Tribal Parties' *post hoc* claim that the entire Bond Transaction was void.

This brief focuses on the Tribal Court's lack of jurisdiction over Stifel. Saybrook's response brief addresses the issues of tribal court exhaustion and the Tribal Parties' waivers of immunity, and Stifel adopts those arguments.[5]

With respect to jurisdiction, the general rule is that non-tribal members like Stifel are not subject to tribal jurisdiction. The Supreme Court recognized two exceptions to this rule, but has repeatedly emphasized that they are "limited" and should not be

[5] Although aligned here, Stifel and Saybrook are adverse parties in the underlying dispute pending in Wisconsin state court.

construed to swallow the rule. As the district court found, those limited exceptions do not apply to Stifel, primarily because the Tribal Court Action does not attempt to regulate Stifel's conduct on Tribal land. The district court analyzed the facts properly before it, followed the controlling law, and ultimately determined that Stifel was reasonably likely to prevail on the merits of its declaratory judgment claim. This Court should affirm the district court's Order.

STANDARD OF REVIEW

This Court reviews the district court's decision to grant a preliminary injunction for abuse of discretion. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). More specifically, the district court's findings of fact are reviewed for clear error and its legal conclusions are reviewed *de novo*. *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012). A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Girl Scouts of Manitou Council*, 549 F.3d at 1086.

The Tribal Parties challenge the district court's conclusion that Stifel had a reasonable likelihood of success on the merits of its claim. To establish a likelihood of success, Stifel must show only a "better than negligible" chance of success. *Id.* at 1096. "This is an admittedly low requirement and is simply a threshold question." *Id.*

ARGUMENT

I. The Court Should Disregard the Tribal Parties' Allegations of Fraud Because They Were Not Properly Raised During the Preliminary Injunction Process.

Before reaching the merits of the Tribal Parties' arguments, there is an important issue that must be addressed at the outset. The Tribal Parties fill their opening brief with "facts" and argument about Stifel's allegedly fraudulent statements in the lead up to the Bond Transaction. App. Dkt.21 at 4-6, 7-12, 34, 42-44. Lost in these aspersions is the fact that none of this purported evidence was properly before the district court because the Tribal Parties failed to include it in their proposed findings of fact. A-25; *see also* Dkt.109 at 1-3. Because of this omission, the Tribal Parties' allegations of fraud were not subject to extensive discovery, were not tested on cross-examination during the preliminary injunction hearing, and were not considered by the district court. This Court should reject the Tribal Parties' attempt to distort the factual record upon which the district court's Order rests.

On June 14, 2013, the Tribal Parties filed their responses to the Stifel's proposed findings of fact and a brief opposing Stifel's preliminary injunction motion. Dkt.56 & 59. Though the Tribal Parties had the burden of showing that any alleged fraudulent inducement foreclosed injunctive relief, *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006), the Tribal Parties did not propose any facts in

support of this affirmative defense. Dkt.59. Nor did they argue fraud as a ground for denying Stifel's motion for preliminary injunction. Dkt.56.

Instead, the Tribal Parties waited until one month before the hearing to reveal their fraud defense, which spans hundreds of paragraphs in their Conditional Counterclaims and hundreds of pages of exhibits attached to that pleading. Dkt.99, at 14, ¶11 & at 16-53, ¶¶1-163. Even then, the Tribal Parties' intent to raise fraud as an affirmative defense at the injunction hearing was not made explicit until a February 21, 2014 email exchange with counsel for Saybrook. Dkt.109, at 1-3.

On March 5, 2014, the district court ruled that the Tribal Parties could argue fraud as a defense "but only to the extent they have proposed facts in response to plaintiffs' proposed findings of fact that support this claim." A-25; *see also* SA-0945-46. This effectively ruled out fraud as an issue in the injunction proceedings, but did not foreclose the Tribal Parties from pursuing the defense later in the case; the district court limited its ruling "to the merits of the pending motion for preliminary injunction." A-25.

The district court acted within its discretion in limiting the issues before it to those for which proposed findings and evidence had been submitted. *Pepsico, Inc. v. Raymond,* 54 F.3d 1262, 1267 n.4 (7th Cir. 1995) (approving district court reliance on parties' proposed findings given "the time pressures of a preliminary injunction"); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 23 (7th Cir. 1992). The Tribal Parties do not

challenge the district court's decision limiting the parties to their proposed findings of fact, nor would they have succeeded in doing so. *See F.T.C. v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 633 (7th Cir. 2005) (because local rules serve important functions of organizing evidence and identifying disputed facts, "we have consistently upheld the district court's discretion to require strict compliance with those rules.").

Despite not challenging the district court's decision, the Tribal Parties litter their brief with fraud-related evidence they did not properly raise below. This tactic distorts the factual record before the district court and makes the Tribal Parties' untested and underdeveloped assertions of fraud appear unassailable when they are certainly not. The Court should disregard any deposition testimony or other alleged evidence of fraud by Stifel when evaluating the Tribal Parties' arguments because that information was irrelevant to the district court's preliminary injunction decision.

II. The District Court Correctly Determined that the Tribal Court Lacked Jurisdiction Over Stifel.

As this Court recognized recently, "tribal courts have a unique, limited jurisdiction that does not extend generally to the regulation of nontribal members whose actions do not implicate the sovereignty of the tribe or the regulation of tribal lands." *Jackson v. Payday Financial, LLC*, No. 12-2617, 2014 WL 4116804, at *1 (7th Cir. Aug. 22, 2014). This observation comports with the latest Supreme Court precedent noting that Indian tribes generally do not "possess authority over non-Indians who come within their borders."

Plains Commerce Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 328 (2008). As a result, tribal regulation of nonmember activities on the reservation is "presumptively invalid." *Id.* at 330 (quoting *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001)).

In a line of cases starting with *Montana v. United States*, 450 U.S. 544 (1981) through *Plains Commerce Bank*, 554 U.S. 316, the Supreme Court has defined the narrow parameters in which tribal courts can exercise jurisdiction over nonmembers. The district court concluded that Stifel had shown that the Tribal Court Action fell outside these parameters. This conclusion is firmly rooted in fact and law and should be upheld.

A. The Tribe's 1854 Treaty Does Not Expressly Authorize the Exercise of Tribal Court Jurisdiction.

The Tribal Parties' arguments regarding the Tribe's treaty rights are factually unsupported and, as the district court recognized, logically unsound. Depending on its terms, a treaty can overcome the presumption against tribal jurisdiction over nonmembers, but here the Tribal Parties fail to explain how the Tribe's treaty provides a basis for tribal court jurisdiction over Stifel. Moreover, the district court correctly rejected the labored reasoning used by the Tribal Parties to derive from its purported right to *exclude* nonmembers from its reservation the power to hale nonmembers *into* the reservation to defend themselves in tribal court. Finally, even if the treaty allows

regulation over nonmembers, the Tribal Parties fail to show how their claims in tribal court regulate Stifel's on-reservation conduct.

A treaty may overcome the presumption against tribal jurisdiction over nonmembers by expressly authorizing such jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.") Consistent with the narrow scope of tribal jurisdiction over nonmembers, the treaty must *specifically authorize* jurisdiction over the nonmember. *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 934 (8th Cir. 2010) (tribal jurisdiction must derive from inherent sovereignty if jurisdiction is "not specifically authorized by federal statute or treaty").

Here, the Tribal Parties generally invoke an 1854 treaty between the United States and the Chippewa Indians of Lake Superior and the Mississippi, which extinguished the Chippewa Indians' occupancy rights in certain lands in exchange for annual payments and occupancy rights in reservations to be created in the future. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 183-184 (1999); *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 2 F.3d 219, 223-24 (7th Cir. 1993). But the Tribal Parties fail to cite any provision in the treaty or explain how the treaty expressly authorizes the Tribe to exercise jurisdiction over Stifel in light of the facts found by the district court.

Instead, the Tribal Parties rely on an affidavit from John Bowes, a history professor, who avers that "evidence" indicates that the United States intended to allow the Tribe to exclude nonmembers from its reservation. SA-0366, ¶11. Like the Tribal Parties, however, Professor Bowes does not cite terms of the treaty as support for his averment, but merely offers his opinion that the 1854 treaty gave the Tribe the right to exclude based on statements and other materials outside the treaty itself. SA-0366, ¶¶11-17. By resting on materials outside the treaty, Professor Bowes' opinion confirms that the treaty itself does not *expressly* include a right to exclude nonmembers. *See Strate*, 520 U.S. at 445.

But even if the treaty did authorize the Tribe to exclude nonmembers, that would not expressly confer tribal jurisdiction over nonmembers. The Tribal Parties cite no authority for the proposition that the right to exclude carries with it the right to exercise adjudicative jurisdiction over nonmembers. App. Dkt.21 at 29-32. The closest the Tribal Parties come is their cite to *Attorneys' Process* for the proposition that legislative jurisdiction over nonmembers may include a concomitant right to adjudicative jurisdiction. *Id*. at 30 (citing 609 F.3d at 938). *Attorneys' Process* presumed that a tribe's legislative and adjudicative powers would be identical and overlapping. 609 F.3d at 938 ("If the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims"). The Eighth Circuit, however, did not address whether the generic

right to exclude nonmembers would include the distinct right to compel them to appear and defend themselves in tribal court. Because tribal jurisdiction over nonmembers is "presumptively invalid," the Court should not allow a generic and unstated right to exclude to act as a hook for tribal jurisdiction over Stifel. *Plains Commerce Bank*, 554 U.S. at 330.

Finally, even if the Court liberally applied the treaty to authorize tribal court jurisdiction over nonmembers, the Tribal Parties concede that right would allow regulation only of Stifel's conduct on Tribal land. App. Dkt.21 at 30. As explained below, however, the claims in the Tribal Court Action do not seek to regulate Stifel's conduct on Tribal land. *See infra* at 32-33. The absence of meaningful nonmember conduct on the Tribe's reservation distinguishes the present case from the decisions cited by the Tribal Parties allowing regulation of nonmember conduct. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 135-136 (1982) (affirming tribe's ability to tax nonmember production of oil and gas from tribal land); *Attorney's Process*, 609 F.3d at 939-940 (upholding tribal jurisdiction to regulate alleged violent tortious conduct committed by nonmembers against tribal members on tribal land).

B. The Tribal Parties' Trust Land Argument is Contrary to Supreme Court Precedent and Unsupported by the Record.

The Tribal Parties next attempt to avoid *Montana*'s presumption against tribal jurisdiction by arguing that Stifel's conduct occurred on lands held in trust for the Tribe.

The district court correctly found this argument to be legally unsound and factually unsupported. A-52-54.

The Tribal Parties' position misreads *Montana* and ignores subsequent Supreme Court decisions confirming the breadth of *Montana's* application to all reservation land. Although the nonmember hunting and fishing activities at issue in *Montana* took place on nonmember fee land, the presumption against jurisdiction announced in *Montana* was not so limited. Rather, as the Supreme Court later recognized in *Nevada v. Hicks*, "the general rule of *Montana* applies to both Indian and non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (*citing Montana*, 450 U.S. at 565). The Supreme Court reaffirmed this conclusion in *Plains Commerce Bank*:

> This general rule restricts tribal authority over nonmember activities taking place *on the reservation*, and is particularly strong when the nonmember's activity occurs on land owned in fee simply by non-Indians—what we have called "non-Indian fee land."

554 U.S. at 328 (emphasis supplied). As the district court correctly observed, "[t]his language suggests that, while the presumption against tribal court jurisdiction is *stronger* on fee land, at a minimum it *applies* on tribal trust land as well." A-53 (emphasis in original).

The Tribal Parties do not argue that the district court's analysis of *Hicks* and *Plains Commerce Bank* was incorrect. Instead, they merely restate their argument that two federal appellate decisions have recognized *Montana*'s inapplicability to nonmember

conduct on trust land. App. Dkt.21 at 32-33 (citing *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) and *Attorney's Process*, 609 F.3d at 940). Given the apparent tension between *Water Wheel*'s interpretation of *Montana* and the foregoing statements in *Hicks* and *Plains Commerce Bank*, the district court correctly followed the binding Supreme Court decisions. A-53. Moreover, *Attorney's Process* does not help the Tribal Parties because it directly contradicts their attempt to limit *Montana* to nonmember fee land. 609 F.3d at 936 ("*Montana*'s analytic framework now sets the outer limits of tribal civil jurisdiction-both regulatory and adjudicatory-over nonmember activities *on tribal and nonmember land*.") (emphasis supplied). The Tribal Parties' cramped reading of *Montana* is contrary to controlling precedent and was correctly rejected by the district court.

Even if *Montana* were limited to conduct occurring on nonmember fee land, the Tribal Parties' argument would still fail because it lacks factual support in the record. The Tribal Parties rely almost entirely on evidence they did not make part of the record before the district court. *Compare* App. Dkt.21 at 33 *with* Dkt.59. As discussed above, the district court correctly concluded that the Stifel Parties' isolated contacts with tribal land were insufficient to support tribal court jurisdiction. A-54, 57. At the preliminary injunction hearing, counsel for the Tribe also relied on the Tribe's execution of the transaction documents on trust land. Dkt.158 at 106:9-16. This is immaterial, however, because the existence of tribal court jurisdiction "is tethered to the *nonmember's* actions,

specifically the nonmember's actions on the tribal land." *Jackson*, 2014 WL 4116804, at *11 n.42 (emphasis supplied). Thus, even if the Tribal Parties have greater authority to regulate conduct on tribal trust land, they still fail to show how the Tribal Court Action regulates Stifel's conduct on the land.

C. This Case Falls Outside *Montana's* Narrow Exceptions to Tribal Jurisdiction Over Non-Members.

The district court correctly determined that *Montana* and its progeny governed the jurisdictional analysis in this case. A-54. In *Montana*, the Supreme Court established two "limited" exceptions to the general rule that Indian tribes cannot regulate nonmember activity on the reservation. *See Plains Commerce Bank*, 554 U.S. at 329-330. Under the first exception, tribes may "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. The second exception permits tribal jurisdiction over nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Tribal Parties carry the burden of establishing one of the *Montana* exceptions, which are not to be construed in a manner that would "swallow the [general] rule" or "severely shrink" it. *Plains Commerce Bank*, 554 U.S. at 330.

The district court properly applied the limited exceptions in *Montana* to conclude that the Tribal Court lacked jurisdiction over Stifel. The district court found the first

exception inapplicable because the Tribal Court Action does not attempt to regulate Stifel's contacts with the Tribe's land. A-57-58. Absent any nexus between the claims in the Tribal Court Action and Stifel's contacts with Tribal land, the first *Montana* exception does not apply. *Plains Commerce Bank*, 554 U.S. at 338. Similarly, the district court correctly found the second exception inapplicable because the Tribe had no evidence demonstrating any threat to its right of self-governance. A-61. Absent evidence of an imminent catastrophe or peril to the "subsistence of the tribal community," the Tribe could not establish the factual prerequisites for the second exception. *Id.* at 341. The Tribal Parties fail to show that the district court's conclusions were incorrect.

1. The Tribe Cannot Establish a Nexus Between the Tribal Court Action and Stifel's Contacts with the Reservation.

The first *Montana* exception has two elements: (1) there must be a consensual relationship between the nonmember and the tribe, established by nonmember activity or conduct on tribal land; and (2) the tribe's exercise of authority (here, invocation of tribal judicial proceedings) must have "a nexus to the consensual relationship itself." *Atkinson Trading*, 532 U.S. at 656; *Plains Commerce Bank*, 554 U.S. at 330. The "starting point for the jurisdictional analysis is to examine the specific conduct the Tribe's legal claims would seek to regulate." *Attorney's Process*, 609 F.3d at 937. The Tribe focuses on the existence of Stifel's limited contacts with tribal land but continues to gloss over the

second part of the exception requiring a nexus between those contacts and the claims asserted in the Tribal Court Action.[6] Because the Tribal Court Action does not seek to regulate Stifel's contacts with Tribal land, the first *Montana* exception does not apply here.

The Supreme Court has confirmed repeatedly that tribal court jurisdiction exists only where the litigation directly and specifically seeks to regulate nonmember activities on tribal land. In *Plains Commerce Bank*, for example, an Indian couple (the Longs) sued a non-Indian bank claiming that the bank discriminated against the couple by selling land they had been leasing from the bank to a non-Indian. 554 U.S. at 320. The Longs argued that tribal jurisdiction over the bank existed based on the bank's "lengthy on-reservation commercial relationships" with them and their company. *Id.* at 321, 337-38. The Supreme Court rejected this argument, concluding that such relationships were irrelevant to whether the tribal court had jurisdiction over the particular sale at issue. *Id.* at 338 ("But whatever the Bank anticipated, whatever 'consensual relationship' may have been established through the Bank's dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land.").

[6] Similarly, the amicus parties supporting the Tribe do not reference, much less discuss, the nexus requirement. App. Dkt.30 at 18-19.

To underscore its conclusion, the Court examined each of the Longs' tribal court claims to determine whether it had the requisite nexus to the bank's alleged relationship with the Longs:

> The Longs attempt to salvage their position by arguing that the discrimination claim is best read to challenge the Bank's whole course of commercial dealings with the Longs stretching back over a decade—not just the sale of the fee land. That argument is unavailing. The Longs are the first to point out that their breach-of-contract and bad-faith claims, which *do* involve the Bank's course of dealings, are not before this Court. Only the discrimination claim is before us and that claim is tied specifically to the sale of the fee land. . . . The Longs' discrimination claim, in short, is an attempt to regulate the terms on which the Bank may sell the land it owns.

Id. at 339-40 (emphasis in original, citations omitted). This approach was not new or novel. Prior to *Plains Commerce Bank*, the Supreme Court consistently compared the nonmembers' on-reservation contacts with the specific claims asserted in the tribal court action to determine whether the requisite nexus existed. *See Atkinson Trading*, 532 U.S. at 656 (ruling that lawsuit challenging hotel tax did not seek to regulate nonmember's status as licensed "Indian trader"); *Strate*, 520 U.S. at 457 (concluding that lawsuit arising from car accident did not seek to regulate contractor's historical work on the reservation). From these decisions, the following rule emerged: "A non-member's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Atkinson Trading*, 532 U.S. at 656; *see also Plains Commerce Bank*, 554 U.S. at 338.

The district court applied this rule correctly when determining that the Tribal Parties were not likely to succeed in establishing the first *Montana* exception. A-57-59. The Tribal Court Action seeks declaratory judgments that (1) all of the Bond Documents are void because they are inextricably intertwined with the Indenture; (2) each of the Bond Documents is void as an unapproved management contract under IGRA; and (3) the Tribal Agreement and Tribal Resolution are void because they were not approved by a referendum vote of tribal members. A-57; SA-0316-319. These claims do not attempt to regulate Stifel's conduct on Tribal land. The first two categories of claims arguably seek to regulate the effect or operation of the various Bond Documents. But the Tribal Parties presented no evidence that Stifel was involved in negotiating any of the provisions at issue, much less any evidence that any such negotiations occurred on Tribal land.[7] The third category of claims seeks to regulate the actions (or inactions) of the Tribe's leadership and members, which has nothing to do with Stifel's conduct on or off the reservation.

Recognizing the limitations of its claims in Tribal Court, the Tribal Parties attempt to expand the scope of the Tribal Court Action to include alleged misrepresentations by

[7] The Tribal Parties claim that the district court "implied" that the Bond Transaction was "negotiated by all sides while on tribal lands." App. Dkt.21 at 38. The district court did no such thing. The district court explicitly found the contrary: "[A]s to Stifel, there has been no evidence presented that any *negotiations* with respect to the Bond Transaction or Documents took place on tribal land." A-57 (emphasis in original).

Stifel on Tribal land. App. Dkt.21 at 34. Setting aside the Tribal Parties' failure to introduce evidence of these statements in their proposed findings of fact, their argument fails because the Tribal Court Action does not seek to regulate anything Stifel may have said or not said while on Tribal land. As the district court observed, the Tribal Parties "bring no claims for misrepresentation, nor do they seek any relief on those grounds." A-58 n.13. This distinguishes the present case from the district court's decision in a separate jurisdictional dispute involving a different Indian tribe. *See Stifel, Nicolaus & Co., Inc. v. Lac Courte Oreilles Band of Lake Superior Chippewa of Wisconsin*, No. 13-cv-0012, 2014 WL 2801236, at *11 (W.D. Wis. June 19, 2014). In *Lac Courte Oreilles*, unlike here, the tribe asserted misrepresentation claims in its tribal court action that were based on statements allegedly made on tribal land. *Id.*

Having failed to plead any claims arising out of any alleged statements by Stifel while on Tribal land, the Tribal Parties now attempt to use Stifel's alleged statements in the same manner as the Longs attempted to use the bank's historical business dealings in *Plains Commerce Bank*. The Supreme Court rejected the Longs' bootstrapping efforts, confirming that events extraneous to the claims at issue cannot satisfy the first *Montana* exception. *Plains Commerce Bank*, 554 U.S. at 338-39; *accord Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 943 (9th Cir. 2009) ("The acts out of which this Lanham Act suit arises are completely independent of Philip Morris's contacts with the tribe."); *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1152-53 (10th Cir. 2011)

(refusing to apply first *Montana* exception because attorneys' relationship with tribe was unrelated to underlying tribal suit). Because Stifel's alleged statements are similarly extraneous to the claims actually asserted in the Tribal Court Action, those statements cannot create jurisdiction under *Montana's* first exception.

In addition, the Tribal Parties cannot satisfy *Montana's* first exception by claiming that the Tribal Court Action is merely "related to" the Bond Purchase Agreement between the EDC and Stifel.[8] App. Dkt.21 at 34-35. This argument ignores the Supreme Court's admonition that the tribal litigation must attempt to *regulate* the nonmembers' activities on tribal land, not just loosely relate to the parties' general relationship. *Plains Commerce Bank*, 554 U.S. at 330 ("By their terms, the exceptions concern regulation of 'the *activities* of nonmembers' or 'the *conduct* of non-Indians on fee land.") (emphasis in original). As explained above, none of the claims in Tribal Court seeks to regulate Stifel's conduct, much less anything Stifel did on Tribal land. Allowing the Tribal Parties to replace the Supreme Court's narrow "regulation" requirement with a more expansive "relate to" standard would contravene the limited scope of the *Montana*

[8] Contrary to the Tribe's expansive characterization, the Bond Purchase Agreement does not "expressly permit suit in tribal court." App. Dkt.21 at p. 35. The Bond Purchase Agreement allows *Stifel* to pursue a claim *against EDC* in Tribal Court, but the Bond Purchase Agreement contains no agreement or consent by Stifel to be sued in Tribal Court. SA-0262, §14(b) (stating the "[EDC] expressly submits and consents" to jurisdiction in Tribal Court, but containing no reciprocal language for Stifel).

exceptions and swallow the general rule against jurisdiction over nonmembers. *See Plains Commerce Bank*, 554 U.S. at 330.

In short, the district court correctly determined that the first *Montana* exception did not permit tribal jurisdiction over Stifel. The Tribal Parties have failed to explain how those claims seek to regulate Stifel's alleged activities on Tribal land. Absent a nexus between the Tribal Court Action and Stifel's on-reservation conduct, the first *Montana* exception does not apply.

2. The Tribal Court Action Does Not Fit Within *Montana's* Second Exception.

Although the Tribal Parties appear to direct their argument about the second *Montana* exception to only Saybrook and Wells Fargo, App. Dkt.21 at 39, Stifel will briefly address the second exception because the Tribal Parties' position is not entirely clear. Under the second *Montana* exception, a tribal court has jurisdiction over nonmember conduct that "menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 341. This exception is construed narrowly because "virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (*en banc*). The Tribal Parties have not identified any actions by Stifel that have menaced the Tribe, imperiled its subsistence, or resulted in catastrophic consequences.

The Supreme Court also has limited the second *Montana* exception to conduct implicating four categories of tribal authority, namely the right to "punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Strate*, 520 U.S. at 457-59. The allegations and claims in the Tribal Court Action do not fit within any of these categories. It is not enough to speculate that the Tribe may, at some uncertain point in the future, sustain economic losses that affect Tribal programs. *See Big Horn County Elec. Coop. Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) (rejecting argument that tribe had jurisdiction to impose utility tax on non-members' property because revenues created by tax supported important tribal services and were essential to continued well-being of tribe).

In the end, the Tribe cannot show that any of its core tribal functions have been compromised, let alone at the hands of Stifel. The district court correctly determined that the second *Montana* exception does not confer jurisdiction over Stifel.

III. The District Court Correctly Ruled that Tribal Exhaustion Was Unnecessary.

Stifel adopts the arguments in Saybrook's response brief concerning why the district court correctly found exhaustion of tribal remedies unnecessary in this case.

IV. The Tribal Parties Waived Their Immunity from Suit.

Stifel adopts the arguments in Saybrook's response brief concerning why the district court correctly found that the Tribal Parties validly waived their sovereign immunity with respect to this action.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's order granting preliminary injunctive relief to Stifel.

Respectfully submitted,

s/Brian G. Cahill
Brian G. Cahill
Beth Ermatinger Hanan
David J. Turek
Daniel J. Kennedy
GASS WEBER MULLINS LLC

Attorneys for Stifel, Nicolaus & Company, Inc. and Stifel Financial Corp.

Address:
309 N. Water Street, Suite 700
Milwaukee, WI 53202
Telephone: (414) 223-3300
Facsimile: (414) 224-6116

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned certifies that the foregoing Brief of Appellees Stifel, Nicolaus & Co., Inc. and Stifel Financial Corp. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,853 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: October 6, 2014.

s/Brian G. Cahill
Brian G. Cahill
Beth Ermatinger Hanan
David J. Turek
Daniel J. Kennedy
GASS WEBER MULLINS LLC

Attorneys for Stifel, Nicolaus & Company, Inc. and Stifel Financial Corp.

Address:
309 N. Water Street, Suite 700
Milwaukee, WI 53202
Telephone: (414) 223-3300
Facsimile: (414) 224-6116

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2014, I filed the foregoing with the Clerk of 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.

Dated: October 6, 2014.

s/Brian G. Cahill
Brian G. Cahill
Beth Ermatinger Hanan
David J. Turek
Daniel J. Kennedy
GASS WEBER MULLINS LLC

Attorneys for Stifel, Nicolaus & Company, Inc. and Stifel Financial Corp.

Address:
309 N. Water Street, Suite 700
Milwaukee, WI 53202
Telephone: (414) 223-3300
Facsimile: (414) 224-6116