No. 14-2150

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellees,

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

Defendants-Appellants.

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

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RESPONSE BRIEF OF PLAINTIFF-APPELLEES SAYBROOK FUND INVESTORS, LLC, LDF ACQUISITION, LLC, AND WELLS FARGO BANK, N.A.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2150

Short Caption: Stifel, Nicolaus & Co., et al. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, et al.

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):

Saybrook Fund Investors, LLC (successor to Saybrook Tax Exempt Investors, LLC);

LDF Acquisition, LLC; and Wells Fargo Bank, NA

(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:

Grippo & Elden LLC

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

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

None for Saybrook Fund Investors LLC, LDF Acquisition; Wells Fargo & Co. for Wells Fargo Bank N.A.

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

None for Saybrook Fund Investors LLC, LDF Acquisition; Wells Fargo & Co. for Wells Fargo Bank N.A.

Attorney's Signature: s/ Charles S. Bergen Date: October 6, 2014

Attorney's Printed Name: Charles S. Bergen

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

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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 not complete or correct.

The District Court had subject-matter jurisdiction over the declaratory judgment action filed by Appellees Stifel, Nicolaus & Co., Stifel Financial Corp.[1], Saybrook Fund Investors, LLC (as successor to Saybrook Tax Exempt Investors, LLC) ("Saybrook Fund Investors"), LDF Acquisition, LLC ("LDF")[2], and Wells Fargo Bank, N.A. ("Wells Fargo") under 28 U.S.C. § 1331.

Stifel, Saybrook, and Wells Fargo[3] seek a determination that the Lac du Flambeau Tribal Court (the "Tribal Court") lacks jurisdiction over the them in an action by the Tribal Parties (the "Tribal Court Action") that seeks declarations pertaining to the issuance of $50 million in Taxable Gaming Revenue Bonds in January 2008 (the "Bond Transaction"). SA-0001, ¶1. That question "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).

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1 Stifel, Nicolaus & Co. and Stifel Financial Corp. are referred to collectively as "Stifel."

2 Saybrook Fund Investors, LLC and LDF Acquisition, LLC are referred to collectively as "Saybrook."

3 Stifel, Saybrook, and Wells Fargo are referred to collectively as "Plaintiffs" and "Appellees."

This Court has appellate jurisdiction and the appeal is timely for the reasons set forth in the Appellants' brief. App. Dkt.21 at 1.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined that tribal exhaustion is not required where the Tribal Parties waived exhaustion, the Tribal Court plainly lacks jurisdiction over the parties, and the Tribal Court Action was brought in bad faith.

2. Whether the District Court correctly determined that the Tribal Court lacks jurisdiction over the nonconsenting, nonmember Appellees for a suit relating solely to off-reservation conduct.

3. Whether the District Court correctly determined that the Tribal Parties have waived their sovereign immunity for this action, where at least eight of the transaction documents contain enforceable express waivers of sovereign immunity for disputes arising out of the Bond Transaction.

STATEMENT OF THE CASE

In order to avoid duplication, Saybrook and Wells Fargo incorporate by reference the Statement of the Case contained in Appellee Stifel's Brief. Stifel Br. at 3–17.

SUMMARY OF THE ARGUMENT

In the opinion below, the District Court correctly determined that Saybrook, Wells Fargo, and Stifel were not required to go through the pointless exercise of first litigating this dispute, through appeal, in the Tribal Court before bringing an injunction action in federal court seeking to ban the Tribal Court pursuant to *National Farmers Union*. This ruling was proper for three independent reasons: First, the Tribal Parties repeatedly and explicitly waived any right to demand tribal exhaustion and agreed to litigate exclusively in non-tribal courts. Second, Tribal Court jurisdiction over Saybrook, Wells Fargo, and Stifel is plainly absent. Third, the Tribal Court action was brought in bad faith. *See* Section I, pages 4–14.

The District Court also correctly held that the Tribal Court lacked jurisdiction over Saybrook and Wells Fargo. Because tribal sovereignty exists outside the basic structure of the Constitution, the Supreme Court has ruled in *Montana v. United States*, 450 U.S. 544 (1981) and its progeny that tribal jurisdiction may not be exercised over nonmembers without their consent. Here, Saybrook and Wells Fargo took no on-reservation action giving rise to litigation and never consented to suit in the Tribal

Court. Under the circumstances, Supreme Court case law squarely forecloses tribal court jurisdiction. Therefore, the District Court's Order granting Saybrook and Wells Fargo's motion for preliminary injunction should be affirmed. *See* Section II, pp. 14–18.

Finally, the District Court properly determined that the Tribal Parties have waived their sovereign immunity for this action. No fewer than eight of the transaction documents contain express waivers of sovereign immunity for disputes arising out of the Bond Transaction. The District Court correctly determined that these documents, including the Tribal Resolution and Bond Resolution, are not management contracts and are not void under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2711(a). The immunity waivers in these documents are therefore valid and enforceable. *See* Section III, pp. 21–37.

ARGUMENT

I. The District Court Correctly Held That Plaintiffs Were Not Obliged To Exhaust Tribal Remedies.

Time and again in the transactional documents, the Tribal Parties agree to submit to the jurisdiction of Wisconsin's federal and state courts, to the exclusion of Tribal Court, for disputes arising out of the Bond Transaction. More than that, the Tribal Parties waive any right to demand tribal exhaustion, and they affirm that no negotiation, execution, or delivery of the bonds took place on tribal lands. Respecting the Tribal Parties' right to make these choices and relying on this Court's decision in

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993), the District Court correctly held that Saybrook was not obliged to exhaust tribal remedies before moving to enjoin the Tribal Court. A-46–48.

The District Court's conclusion that exhaustion is not required is correct for two additional, independent reasons. First, exhaustion is not required because tribal court jurisdiction is clearly lacking. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (exhaustion excused where "it is clear . . . that tribal courts lack jurisdiction," and thus "adherence to the tribal exhaustion requirement . . . 'would serve no purpose other than delay[.]'" (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 460 n.14 (1997)). Second, exhaustion is not required because the Tribe's "assertion of tribal jurisdiction [wa]s . . . conducted in bad faith[.]" *Nat'l Farmers Union*, 471 U.S. at 856 n.21 (quotation omitted).

A. Exhaustion Is Not Required Because The Tribal Parties Agreed To Exclusive Non-Tribal Jurisdiction.

The Supreme Court has long held that tribal exhaustion is not required where it would violate "express jurisdictional prohibitions." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 n.12 (1987); *see also Altheimer & Gray*, 983 F.2d at 815 (exhaustion not required where tribe has "agreed to submit to the venue and jurisdiction of federal and state courts").

Here, as the District Court found, "the Tribe and the Corporation alike agreed to litigate . . . in Wisconsin's federal or state courts, and they agreed that the law of Wisconsin should apply to such litigation." A-47–48. This jurisdiction is "to the

exclusion of the jurisdiction of any court of the Tribe." SA-0280–81 § 9(b); *see also* SA-0027–28 at 4–5. Moreover, the Tribal Parties expressly waived "any requirement for exhaustion of tribal remedies," SA-0262 § 14(b); SA-0280 § 9(b), and affirmed that no relevant actions occurred on tribal land. SA-0262 § 14(b); SA-028 § 9(c);.

As this Court has long held, "where venue is specified with mandatory or obligatory language, the clause will be enforced." *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006). The Tribal Parties attempt to avoid this language by quoting from *Stifel, Nicolaus & Co., Inc. v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis.*, No. 13-cv-121-wmc, 2014 WL 2801236, at *6 (W.D. Wis. June 19, 2014), which required exhaustion because the jurisdictional language in that case "neither authorize[d] nor preclude[d] litigation in the [tribal court.]"

The jurisdictional language in the *Lac Courte Oreilles* documents was quite different from the language here, however. The *Lac Courte Oreilles* documents specified only that the tribe "consented to jurisdiction in Wisconsin federal and state courts, without any indication that this jurisdiction is *exclusive*." *Id.* at *13 (emphasis in original). Here, in contrast, both the Bonds and the Tribal Agreement specify that the jurisdictional grant is "to the exclusion of the jurisdiction of any court of the Tribe." SA-0280 § 9(b); SA-0027–28. The District Court correctly determined that this exclusionary language, unlike the language in *Lac Courte Oreilles*, made litigation in state or federal court the only option for the Tribal Parties. A-16–17 & A-17 n.8.

The Tribal Parties assert that *Altheimer & Gray* requires exhaustion when the tribal action is filed prior to the non-tribal action. App. Dkt.21 at 22. Nothing in *Altheimer & Gray* supports any such hard-and-fast rule, however, and the non-controlling cases cited by the Tribal Parties make no such claim. For example, in *Bank One, N.A. v. Shumake*, the Fifth Circuit examined application of an arbitration clause "that attempt[ed] to foreclose any and all access to courts" and thus bore "little resemblance to a forum selection clause." 281 F.3d 507, 516 (5th Cir. 2002). In *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 396 n.6 (E.D. Wis. 1995), the district court quoted *Altheimer & Gray* for the point that the court must consider "the factual circumstances of each case . . . in order to determine whether the issues in dispute is truly a reservation affair." Finally, in *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 83 (2d Cir. 2001), the Second Circuit ruled only that exhaustion was not required where no tribal proceeding was pending. In fact, *Garcia's* statement that "[i]f a tribal proceeding were pending, [its] analysis *might* well be different" demonstrates that there is no such inflexible rule. *See id.* (emphasis added).

The Tribal Parties also attempt to distinguish *Altheimer & Gray* by asserting that the District Court lacks jurisdiction "over the underlying dispute," referencing a previous lawsuit by Saybrook and Wells Fargo to enforce the bonds. App. Dkt.21 at 23. This claim confuses the nature of the instant action, which seeks not to enforce the bonds, but to enjoin an unlawful suit filed by the Tribal Parties in Tribal Court.

SA-0020–21. The "underlying dispute" is the Tribal Court Action's unlawful assertion of authority over nonmembers, making federal jurisdiction proper under 28 U.S.C. § 1331. *Nat'l Farmers Union*, 471 U.S. at 852.

Finally, the Tribal Parties attempt to distinguish *Altheimer & Gray* on the grounds that the Tribal Court Action raises issues of tribal law, involves tribal actors, and impacts tribal affairs. App. Dkt.21 at 23–26. Whether or not the Tribal Court Action indeed raises those issues[4] is beside the point. As described above, the dispute in this case is whether the Tribal Parties may obtain Tribal Court jurisdiction over absent nonmembers despite agreeing to exclusive jurisdiction in non-tribal courts. That is entirely an issue of federal, not tribal, law. *Nat'l Farmers Union*, 471 U.S. at 852.

The Tribal Parties cite seven cases to support their claim that exhaustion should be required here. None are on point. Three involved tribal parties that neither waived exhaustion nor agreed to litigate in a non-tribal forum. *See Nat'l Farmers Union*, 471 U.S. at 855–56; *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999);

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[4] In the Tribal Court Action, Counts II–VII rely on the argument that various Bond Documents are void because they are unapproved management contracts. SA-0316–19. That argument is based on the IGRA, a federal statute. Count I purports to sound in tribal law, but it asserts that all of the Bond Documents are void "because they are inextricably intertwined with and reliant upon the void Indenture." SA-0316. Hence, that count, too, depends on IGRA analysis. Finally, Counts VIII and IX allege that the Tribal Agreement and Tribal Resolution, respectively, are void under the tribal constitution because they were not approved by referendum. The number and complexity of legal or factual issues raised in these two narrow counts, however, are far outweighed by those in the claims requiring an IGRA analysis.

U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987). Two others addressed disputes arising from the construction and operation of on-reservation businesses. *See Bruce H. Lin Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420 (8th Cir. 1996) (design, construction, and operation of casino); *Stock W. Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (suit against attorney over representation letter researched and drafted on a reservation, to obtain a loan that was itself negotiated on tribal land, to pay for the construction and operation of an on-reservation sawmill by the plaintiff, who was the president of a tribal corporation). The final two cases included no waiver of exhaustion. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (1st Cir. 2000); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997).

The Tribal Parties implicitly ask this court to overrule *Altheimer & Gray* on the basis of "federal policies." App. Dkt.21 at 26-28. The Tribal Parties claim that requiring exhaustion will minimize "direct competition with the tribal courts," promote "respect for tribal legal institutions," and recognize "the tribal court's 'vital role in self-government.'" *Id.* (citations omitted). These goals, however, are better supported by enforcing the holding in *Altheimer & Gray* and thereby honoring the Tribal Parties' contractual agreements.

As this Court discussed in *Altheimer & Gray*, tribal exhaustion is a comity-based doctrine, designed to "further Congress's policy of 'supporting tribal self-government

and self-determination.'" 983 F.2d at 813 (quoting *Nat'l Farmers Union*, 471 U.S. at 856). In cases where tribal parties agree to litigate in a non-tribal forum, however, requiring exhaustion would defeat that purpose and "undercut the [t]ribe's self-government and self-determination." *Altheimer & Gray*, 983 F.2d at 815. Indeed, "[i]f contracting parties cannot trust the validity of choice of law and venue provisions, [a tribe] may well find itself unable to compete and [its] efforts to improve the reservation's economy may come to naught." *Id*.[5]

The Tribal Parties' reliance on the First Circuit's decision in *Ninigret* to counter *Altheimer & Gray*'s strong policy rationale is misplaced. In *Ninigret*, the First Circuit rejected this Court's decision in *Altheimer & Gray*, holding that even where parties expressly agree to litigate only in a non-tribal forum, they must still exhaust their tribal remedies. 207 F.3d at 33. Because controlling Seventh Circuit precedent is expressly to the contrary, the Tribal Parties' reliance on *Ninigret* should also be rejected.

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[5] Other courts agree. *See, e.g., FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (there is "no significant comity reason to defer this . . . litigation first to the tribal court" where a forum-selection clause stated that suit could be brought in tribal court "or other court of competent jurisdiction"); *QEP Field Servs. Co. v. Ute Indian Tribe*, 740 F. Supp. 2d 1274, 1280 (D. Utah 2010) ("[B]ecause there was a clear and unambiguous waiver of Tribal Court jurisdiction in the Agreement, the litigation in Tribal Court is patently violative of the parties' written agreement and exhaustion is unnecessary."); *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.N.D. 2005) (there is "no legally justifiable reason to disrupt the parties' agreed-upon forum by way of the tribal exhaustion doctrine" when "the negotiating parties have agreed to an appropriate forum").

The Tribal Parties conclude by arguing that their proposed detour into Tribal Court will serve this Court's institutional interests in developing the factual record and "assisting in the orderly administration of justice." App. Dkt.21 at 28. Such "assistance" is unnecessary. If development of a factual record is required to confirm that the Tribal Court Action is an unlawful exercise of jurisdiction, the procedures of the District Court were surely up to the task. Neither justice nor order would be advanced by forcing parties through legally-superfluous rounds of litigation that they specifically contracted to avoid.

B. Exhaustion Is Not Required Because Tribal Court Jurisdiction Is Clearly Lacking.

Exhaustion of tribal remedies is not required where tribal court jurisdiction is clearly lacking. *Hicks*, 533 U.S. at 369; *Strate v. A-1 Contractors*, 520 U.S. at 459 n.14 (no exhaustion requirement when it is "plain that no federal grant provides for tribal governance of nonmembers' conduct on land governed by *Montana*'s main rule" and exhaustion would thus "serve no purpose other than delay"). This Court's recent decision in *Jackson v. Payday Financial, LLC*, No. 12-2617, 2014 WL 4116804 (7th Cir. Aug. 22, 2014) underscored this long-established rule. There, as here, the parties' dispute concerned off-reservation conduct of nonmembers. *See id.* at *12. As a result, tribal court jurisdiction was not even "colorable" and exhaustion was unwarranted.

For the reasons discussed in Section II, *infra*, the Tribal Court Action easily satisfies this exception to any exhaustion requirement. The Tribal Court lacks even

colorable jurisdiction over Saybrook and Wells Fargo, and as a result, exhaustion would serve only to further delay resolution of this dispute.

C. Exhaustion Is Not Required Because The Tribal Parties Asserted Tribal Jurisdiction In Bad Faith.

Finally, exhaustion is not required because the Tribal Parties asserted Tribal Court jurisdiction in bad faith. *See Nat'l Farmers Union*, 471 U.S. at 856 n.21 ("We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith.'") (quoting *Judice v. Vail*, 430 U.S. 327, 338 (1977)). Litigation relating to the Bond Transaction against the Tribal Parties has been pending in Wisconsin federal and state courts since 2009. *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 690 (7th Cir. 2011); SA-0479–0529. For more than three years, the Tribal Parties participated in those actions without ever raising the possibility of suing in Tribal Court. Only in April 2013, mere days before they had to finally answer Saybrook's state court complaint, did the Tribal Parties initiate the unlawful Tribal Court Action in a naked act of forum shopping.

Equally egregious was the Tribe's conduct leading up to its April 2013 filing. In March 2013, the Tribe amended its Tribal Court Code to expand the Tribal Court's subject-matter jurisdiction and to permit the Tribe to handpick a "judge *pro tempore*" to preside over the Tribal Court Action. Dkt.28-8 § 80.103(3)(a)(iii). The Tribe exercised that power by selecting an Indian-law professor and blogger, whose published views on

tribal court jurisdiction are contrary to Supreme Court precedent, and who urges tribal courts to ignore Supreme Court authority. *See*, *e.g.*, M. Fletcher, 81 U. COLO. L. REV. 973, 977, 1003 (proposing "active, strategic resistance to federal court orders enjoining the activities of tribal courts" and stating that "[i]t is time" for such resistance). At the same time, the Tribe amended its Code to grant itself the power to select appellate judges *pro tempore* who would rule upon any appeal from Professor Fletcher's decisions. Dkt.28-8 § 80.201.

In sum, the Tribal Parties' assertion of Tribal Court jurisdiction is part of a calculated effort to prevent an impartial court of competent jurisdiction from resolving the parties' disputes. Using the exhaustion doctrine as a pretext, the Tribal Parties seek to drive the dispute as far as possible into a Tribal Court proceeding before a handpicked and biased judge, not subject to any Constitutional constraints. This bad faith conduct does not warrant any deference, and exhaustion is properly denied.

II. The District Court Correctly Held That The Tribal Court Lacks Jurisdiction Over Appellees.

Saybrook and Wells Fargo incorporate by reference the discussion of tribal jurisdiction in Appellee Stifel's Brief. Stifel Br. at 21–36 [Section II through the end of SECTION II.b.1.]

A. The Tribal Court Lacks Jurisdiction Over Saybrook Under *Montana*'s First Exception.

The Tribal Court lacks jurisdiction under *Montana* because it seeks to adjudicate off-reservation conduct by nonmembers who did not consent to tribal jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (holding that tribes have civil authority over nonmembers "only if the nonmember has consented, either expressly or by his actions"); *Jackson*, 2014 WL 4116804, at *11 (7th Cir. 2014) (finding no jurisdiction under *Montana* because "the Plaintiffs have not engaged in *any* activities inside the reservation" (emphasis in original)).

1. This Dispute Does Not Arise From Any On-Reservation Conduct By Saybrook Or Wells Fargo.

a) Saybrook Fund Investors Did Not Engage On-Reservation Conduct Giving Rise To The Tribal Court Action.

The Tribal Parties claim "Saybrook went to the Casino [on the reservation] to conduct due diligence on the Bond Transaction" and "visited there in connection with the Bond Transaction." App. Dkt.21 at 35, 38. In fact, a single Saybrook representative made only one half-day visit to the reservation. As the Tribal Parties stipulated, on November 15, 2007, two weeks before the parties agreed to enter into exclusive negotiations, Scott Bayliss of Saybrook Fund Investors briefly visited the reservation to gather information regarding the casino. SA-1086–87. He was on the reservation for approximately 5 to 6 hours and did not stay the night. *Id*. The visit pre-dated any commitment to loan money to the Tribe or the EDC by more than two months. *Id.*

While present on the Tribe's reservation, Bayliss did not engage in any negotiations with the Tribe or the EDC. *Id.* No other representative of Saybrook Fund Investors has ever visited the reservation. *Id.*

None of the allegations in the Tribal Court Action arise out of conduct during this brief visit. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001) (requiring a nexus between the "consensual relationship" and the tribe's basis for jurisdiction); *see also* [Stifel Br. at 7–9.]

Moreover, in the transaction documents, the Tribe affirmed that no negotiations took place during this visit. For example, in the Tribal Agreement containing the Tribe's guaranty of the Bonds' repayment, the Tribe stated:

> To demonstrate the willingness of the Tribe to submit to the jurisdiction of both the federal courts and the courts of the State of Wisconsin, *the Tribe affirms that the transaction represented by this Agreement has not taken place on Indian Lands. As evidence thereof, the Tribe represents that the negotiations regarding this Agreement have occurred on lands within the jurisdiction of the courts of the State of Wisconsin,* and the execution and delivery of this Agreement have not occurred on Indian Lands, but rather on lands within the jurisdiction of the courts of the State of Wisconsin, and the Tribe has appointed an agent for service of process in a location not on Indian Lands.

SA-0281 § 9(c) (emphasis added). Similar representations appear in the Bond Purchase Agreement. SA-0262 § 14(b).

Without specific evidence of conduct by Saybrook giving rise to this dispute taking place on the reservation, the Tribal Parties cannot satisfy *Montana*'s first

exception. *See Hicks*, 533 U.S. at 360 ("[T]he absence of tribal [land] ownership has been virtually conclusive of the absence of tribal civil jurisdiction[.]"); *Plains Commerce*, 554 U.S. at 333 (save one "minor exception," the Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*" (emphasis in original)); *Jackson*, 2014 WL 4116804 at *11 n.42 (7th Cir. 2014) (no jurisdiction because "a tribal court's *subject matter jurisdiction* over a nonmember . . . is tethered to the *nonmember's* actions, specifically the *nonmember's actions on tribal land*" (emphasis in original)).

b) LDF Did Not Engage On-Reservation Conduct Giving Rise To The Tribal Court Action.

LDF was formed on January 10, 2008. SA-1086–87. The Tribal Parties have stipulated that no LDF representative ever visited the reservation after that date. *Id.* Scott Bayliss' visit, described above, pre-dated the existence of plaintiff LDF Acquisition, the entity created to hold the Bonds, by almost two months. Without specific evidence of conduct by LDF giving rise to this dispute taking place on the reservation, the Tribal Parties cannot satisfy *Montana*'s first exception.

c) Wells Fargo Did Not Engage On-Reservation Conduct Giving Rise To The Tribal Court Action.

In their appellate brief and in the court below, the Tribal Parties presented no evidence (or indeed, any specific allegations) that Wells Fargo has ever visited the reservation with respect to the Bond Transaction. The Tribal Parties have stipulated

that the funds Wells Fargo received from the EDC originated from the EDC's account at Chippewa Valley Bank in Bruce, Wisconsin—land outside the reservation. SA-0972, ¶ 4; SA-0553. With no evidence of any on-reservation conduct by Wells Fargo giving rise to this dispute, the Tribal Parties cannot satisfy *Montana*'s first exception.

2. Saybrook and Wells Fargo Did Not Consent To Tribal Court Jurisdiction.

Tribes have jurisdiction over nonmembers "only if [nonmembers have] consented, either expressly or by [their] actions." *Plains Commerce*, 554 U.S. at 337. Such consent is absent here. Indeed, by requiring the Tribal Parties to waive exhaustion and agree to exclusive jurisdiction in the Wisconsin federal or state courts, Saybrook and Wells Fargo demonstrated a clear intention *not* to proceed in Tribal Court. There can be no inference from these terms that the parties consented to Tribal Court jurisdiction.

B. The Tribal Court Lacks Jurisdiction Under *Montana*'s Second Exception.

Montana provides a second, narrow exception to the general rule prohibiting tribal jurisdiction over nonmembers: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

As with the first *Montana* exception, the language of the second exception makes clear that it applies only to "conduct of non-Indians on fee lands within its reservation." *Montana*, 450 U.S. at 566. The Supreme Court re-emphasized this requirement for both *Montana* exceptions in *Plains Commerce*: "By their terms, the [*Montana*] exceptions concern regulation of 'the *activities* of nonmembers' or 'the *conduct* of non-Indians on fee land.'" 554 U.S. at 330 (emphasis in original). For the reasons stated in Section II.A.1 above, the Tribal Parties cannot meet this element of *Montana*'s second exception because no on-reservation conduct by Saybrook, LDF, or Wells Fargo gave rise to this litigation.

Additionally, the nonmembers' conduct alleged here fails to satisfy the second *Montana* exception because it did not "menace[] the 'political integrity, the economic security, or the health and welfare of [a] tribe.'" *See Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). As the Supreme Court explained, "The conduct must do more than injure the tribe, it must '*imperil the subsistence*' of the tribal community." *Plains Commerce,* 554 U.S. at 341 (emphasis added). "[T]he elevated threshold for application of the second *Montana* exception suggests that tribal power must be *necessary to avert catastrophic consequences*." *Id.* (emphasis added) (internal quotes omitted) (alteration omitted) (quoting *Montana*, 450 U.S. at 566).

The Supreme Court cautioned against reading the second exception in isolation. In *Strate*, it emphasized that the "[k]ey" to this exception's "proper application" is the

following language from *Montana*: "'Indian tribes retain their inherent power [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 459 (quoting *Montana*, 450 U.S. at 564) (brackets in original). Consequently, the tribe's "'[inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.'" *Id*. (alteration in original) (quoting *Montana*, 450 U.S. at 564); *accord Atkinson Trading*, 532 U.S. at 658.

The nonmember conduct alleged in the Tribal Court Action relates to the negotiation and execution of contractual documents.[6] SA-0296–0316. Plaintiffs cite nothing to suggest that the mere negotiation or issuance of securities creates the type of "menace" to tribal sovereignty or internal relations addressed by *Montana*'s second exception.

In their appellate brief, the Tribal Parties focus on the alleged financial impacts of their decision to enter into the Bond Transaction. App. Dkt.21 at 39. They also discuss rights the Tribal Parties granted to the nonmembers through the various transactional documents. Id. at 39–40. Based on these allegations, the Tribal Parties argue essentially

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[6] To the extent that the Tribal Parties are referring to Wells Fargo's attempt to enforce the terms of the Indenture, that conduct was the subject of the *Wells Fargo* litigation. 658 F.3d 684. The District Court rejected enforcement of the Indenture more than three years before commencement of the Tribal Action, and as a result, no actions relating to the Indenture could constitute a threat to tribal sovereignty as of the date of suit.

that the second *Montana* exception creates a type of quasi-bankruptcy jurisdiction in Tribal Court, permitting a tribe to reject any contract it enters into but later finds too burdensome. That approach, however, fails to meet the plain test of this exception because these consequences of bargained-for contracts are not "conduct by non-Indians."

Moreover, reading the second exception to allow a tribe to avoid commercial agreements that it views – in hindsight – to be too burdensome would materially and impermissibly expand the reach of this exception. The Supreme Court in *Plains Commerce* cautioned against any such construction "that would 'swallow the rule.'" 554 U.S. at 330 (quoting *Atkinson* 532 U.S. at 655).

In sum, the second exception does not apply. The nonmember conduct did not take place on fee lands within the reservation, and the alleged conduct does not threaten the Tribe's sovereignty, economic security, health or welfare. This exception cannot provide the tribal court with jurisdiction over the Appellees.

III. The District Court Properly Held That The Tribal Parties Waived Sovereign Immunity With Respect To All Actions Arising Out Of The Bond Transaction

In the transaction documents, the Tribal Parties clearly and unequivocally waive their sovereign immunity for all matters arising out of the Bond Transaction. The District Court carefully reviewed each of the transactional documents and properly gave effect to the Tribal Parties' knowing waivers. A-37–38.

On appeal, the Tribal Parties seek to avoid the consequences of their clear waivers. Yet, as the Supreme Court has explained, sovereign immunity waivers are not "game[s] lacking practical consequences" but have "real world objective[s]." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 422 (2001).

No magic language is required to effect an immunity waiver. Indeed, tribes may evince a clear intent to waive their immunity, even without using the words "sovereign immunity." *C & L Enters., Inc.*, 532 U.S. at 420. Here, the Tribal Parties went well beyond what the Supreme Court requires, explicitly waiving sovereign immunity in virtually every document associated with the sale of the Bonds. They are thus amenable to suit in this action.

A. The Bond Resolution And Tribal Resolution, Along With Other Bond Documents, Contain Unequivocal Independent Waivers of Immunity.

Where a tribe waives immunity, its waiver must be "clear." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). In *C & L Enterprises*, the Supreme Court held that an Indian tribe waived its immunity "with the requisite clarity" where the tribe agreed to resolve contract disputes through arbitration and have the award enforced in any court that had jurisdiction. 532 U.S. at 418. The waiver did not use the words "sovereign immunity" or specify that any court in fact had jurisdiction. *Id*. at 420–21.

In their brief, the Tribal Parties claim that the District Court "identified only two Bond Documents [the Bond Resolution and Tribal Resolution] that it believed provided

an unequivocal, independent waiver of the Tribe's sovereign immunity." (App. Dkt.21 at 45.) Not so. The District Court quoted, by way of example, from (1) the Specimen Bond[7]; (2) the Bond Purchase Agreement[8]; (3) the Bond Resolution[9]; (4) the Tribal Agreement[10]; and (5) the Tribal Resolution[11] and found that each of these documents "unambiguously states not only that defendants have waived sovereign immunity but also that they consent to jurisdiction in this court." A-37.

In addition, the EDC signed the Limited Offering Memorandum[12] that stated the "[EDC] and the Tribe have waived their sovereign immunity and consented to suits against them . . . in connection with the Bonds and the Bond Documents." SA-0039. The EDC also waived sovereign immunity in the Bond Purchase Agreement. SA-0262,

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7 "'The Corporation hereby expressly waives its sovereign immunity from suit[.] . . . The Corporation expressly submits to and consents to the jurisdiction of the United States District court for the Western District of Wisconsin.'" A-37.

8 "'The Corporation hereby expressly waives its sovereign immunity from suit[.] . . . The Corporation expressly submits to and consents to the jurisdiction of the United States District court for the Western District of Wisconsin. '" A-37.

9 "'RESOLVED, that all Legal Provisions in the Bond Documents are hereby approved; more specifically and expressly the Corporation (i) waives its immunity from suit[.]'" A-37–38.

10 "waiving the Tribe's sovereign immunity and consenting to jurisdiction of Western District of Wisconsin" A-38.

11 "'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[.]'" A-38.

12 Limited Offering Memorandum, at 24 ("The Corporation has reviewed the information contained in this Limited Offering Memorandum and has approved all such information for use herein.") SA-0059.

§ 14(b) ("The Corporation hereby expressly waives its sovereign immunity from suit[.] . . . The Corporation expressly submits to and consents to the jurisdiction of the United States District court for the Western District of Wisconsin.").

With clear and unambiguous language in so many documents, the Tribal Parties cannot seriously contend that they did not intend to waive their sovereign immunity.

Nevertheless, the Tribal Parties argue that the waivers in the Bond and Tribal Resolutions are ineffective because they merely "approved" waivers in other documents. The Tribal Parties rely on *State of Wis. v. Baker*, 698 F.2d 1323 (7th Cir. 1983) to create an "operative-versus-authorizing distinction" that, they say, defeats waiver language. App. Dkt.21 at 45. Yet *Baker* made no such distinction and did not even address whether a resolution waived immunity. Instead, *Baker* examined whether a band of Indians entity was entitled to immunity in the first place (and found that it was not). 698 F.2d at 1333. *Baker* simply does not support the Tribal Parties' argument. The Resolutions, like so many of the other Bond documents, clearly and unambiguously evinced the Tribal Parties' intent to waive their immunity.

B. This Action Falls Within The Tribal Parties' Waivers of Immunity.

The Tribal Parties assert that this action falls outside the scope of the waivers of immunity, relying on *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156 (7th Cir. 1983) and *Orff v. United States*, 545 U.S. 596 (2005). App. Dkt.21, 45–46. Neither case is instructive here.

Coleman did not discuss sovereign immunity. Instead, it examined whether a statute provided a federal right of action. 715 F.2d at 1157. *Orff* held that sovereign immunity waivers must be strictly construed in favor of the sovereign, 545 U.S. at 601–02, but here, the documents' explicit and unambiguous statements of waiver easily satisfy that standard.

As the District Court correctly found, the Tribal Parties' waivers cover "any dispute or controversy arising out of" the Bond Documents or "any transaction in connection therewith." A-43–44. *See Wellborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 639 (7th Cir. 2002) (in reference to "arising out of" clause, stating "we have naturally been willing to read these admittedly expansive clauses quite broadly to include all manner of claims tangentially related to [an] agreement, including claims of fraud, misrepresentation, and other torts involving both contract formation and performance"). Even a cursory review of the Complaint here reveals that this dispute "arises out of" the Bond Transaction: all facts pertinent to the jurisdiction of the Tribal Court Action derive from the negotiation and contents of the Bond Transaction documents.

The Tribal Parties next assert that if this dispute "arises out of" a contract, it must be classified exclusively as a contract action, and as a result, there can be no subject matter jurisdiction. App. Dkt.21 at 47–48. This is not the law. The Supreme Court dissent cited by the Tribal Parties, *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S.

677, 706 (2006) (Breyer, J., dissenting), states only that for the purpose of determining federal jurisdiction, a claim is considered to have arisen "under" federal law if federal law created the cause of action. *Id.* Neither the dissent nor the majority mentions the phrase "arising *out of*." *See generally id.* at 677–714.

The Supreme Court has long held that the question of whether an Indian tribe retains power to compel non-Indians to submit to civil jurisdiction of its tribal court is one that "arises under" federal law and therefore satisfies 28 U.S.C. § 1331. *Nat'l Farmers Union*, 471 U.S. at 852–53. No authority supports the claim that including the words "arising out of" in an explicit sovereign immunity waiver, not only defeats the terms of that waiver but also divests the federal system of subject matter jurisdiction under *National Farmers Union*.

C. The Documents Containing Immunity Waivers Are Not Void Management Contracts.

The Tribal Parties next argue that the immunity waivers fail because the documents that contain them are, they say, void management contracts. App. Dkt.21 at 48-58. This argument cannot succeed. Under the legal framework enunciated by this Court in *Wells Fargo Bank*, 658 F.3d at 695, because the waiver-containing documents do not themselves provide for casino management, they are not void *ab initio* under IGRA.

Under IGRA, Tribes are authorized to enter into contracts for the management of their casino operations so long as the contracts comply with statutory requirements. *See, e.g.*, 25 U.S.C. § 2711(a). Agency regulations further provide that "[m]anagement

contracts . . . that have not been approved by the Chairman [of the National Indian Gaming Commission] . . . are void." 25 C.F.R. § 533.7. A separate regulation defines a management contract as "any contract, subcontract, or collateral agreement . . . [that] provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.

1. The District Court Properly Considered The Bond Documents As Independent Documents, Based On Their Terms.

The Tribal Parties assert that the District Court erred in not treating all of the transaction documents as a single transaction. App. Dkt.21 at 49-53. They cite a 1965 Wisconsin case, *James Talcott, Inc. v. P & J Contracting Co.*, 27 Wis.2d 68 (1965), for the proposition that contemporaneously-executed documents in a single transaction are "in the eyes of the law, one contract." App. Dkt.21 at 50 (internal quotes omitted). When it comes to the management contract analysis under IGRA, however, the eyes of the law have a different view.

a) Federal Statutes And Regulations Do Not Require That All Transaction Documents Rise Or Fall Together.

In *Wells Fargo Bank*, this Court addressed the issue of contemporaneously-executed documents being viewed as a single contract for purposes management-contract review. This Court stated that a "document collateral to a management contract is subject to agency approval . . . only if it provides for the management of all or part of a gaming operation." 658 F.3d at 701 (internal quotations omitted); *see also id.*

at 701, n.16 (collecting cases rejecting a requirement that collateral agreements that do not independently provide for management be approved by NIGC).

The Tribal Parties ignore this controlling authority and instead point to the Ninth Circuit's decision in *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986), for the proposition that failing to consider multiple documents as one transaction would "hobble the statute." App. Dkt.21 at 56. *A.K. Mgmt.* did not so hold. The transaction at issue in that case involved only a single document, and the quoted language refers to failure to consider together all the terms contained in that single document. *Id.* at 789 ("To give piecemeal effect to a contract . . . would hobble the statute.").

b) Opinion Testimony Regarding What NIGC Might Have Done If Asked To Opine On The Bond Transactions Is Inconclusive And Irrelevant.

To support their assertion that the NIGC has an internal policy of considering all related documents as a single transaction, the Tribal Parties rely on hired-expert testimony, and point to an informal agency practice (the "declination process") that the Commission reportedly uses to determine if a given agreement must be submitted for agency approval. App. Dkt.21 at 51–52. Their citation to this informal practice is misplaced.[13] The declination process that the tribal defendants' hired experts describe

[13] Although courts defer to agency interpretations of statutes in certain circumstances, a "letter [whose] binding character as a ruling stops short of third parties" does not merit deference. *See United States v. Mead Corp.*, 533 U.S. 218, 230, 233 (2001).

is entirely voluntary and non-binding. Deposition of Penny Coleman ("Coleman Dep."), Dkt.141 at 31, 123:6–124:22.[14] Indeed, a formal procedure requiring parties to submit collateral documents "is neither contemplated . . . by statute nor authorized by regulation." *Wells Fargo Bank*, 658 F.3d at 696; *see also* William S. Papazian Declaration in Support of Plaintiff's Motion for Preliminary Injunction ("Papazian Declaration"), Dkt.125, at 2–3, ¶¶ 7(A)–(D); Affidavit of Nancy J. Appleby in Support of Plaintiffs' Motion for Preliminary Injunction ("Appleby Affidavit"), Dkt.124, at 3, ¶¶ 6–9.

Furthermore, when the NIGC has issued declination decisions, it has done so according to procedures applied on a case-by-case basis. Coleman Dep., Dkt.141 at 22, 87:11–88:6.[15] Thus, the fact that the Chairman has treated certain ancillary documents as part of a single management contract in one instance is not evidence of any customary practice. Appleby Affidavit at 3–6, Dkt.124 ¶¶ 9–11. Indeed, the Commission, by conducting reviews of transaction packages that were known to be less than complete, demonstrated that it does not uniformly consider collateral agreements to part of a management contract. *See* Appleby Affidavit at 7, Dkt.124 ¶ 16.

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[14] Coleman was asked whether the declination process is "a voluntary process . . . that is optional to the parties . . . to those agreements." Colemen Dep at 31, 124:19–21. She replied, "Yes." *Id*. at 124:22.

[15] Coleman was asked whether the NIGC practices for reviewing potential management contracts are "context-dependent." Coleman Dep. at 22, 88:1–3. Coleman replied, "If you mean that that they're very case by case? . . . Yes." *Id.* at 88:4–6.

The larger impediment to the Tribal Parties' argument is that allowing an informal agency practice to take precedence over a formal regulation would violate a bedrock rule of federal administrative law. As the Supreme Court has repeatedly held, an informal agency practice cannot trump a regulation issued pursuant to notice-and-comment rulemaking because administrative rules bind both the outside world and the agency until the rules are changed. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004) (ERISA plan was not entitled to make an amendment authorized by both an agency manual and an alleged longstanding agency practice because "neither . . . can trump a formal regulation with the procedural history necessary to take on the force of law"); *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 388–89 (1932) (after agency issued rules in its quasi-legislative capacity, it could not "ignore its own pronouncement" and hold private parties to a stricter standard than the announced rule).

This Court should follow the regulations that were promulgated by NIGC and interpreted by this Court in *Wells Fargo Bank*. It should reject the Tribal Parties' attempt to elevate their version of an informal agency practice to a prominence the practice cannot enjoy. A document collateral to a management contract is void only if it

independently qualifies as a management contract. None of the waiver-containing documents do.

2. The Waiver-Containing Documents Do Not Provide For Management.

Although neither IGRA's text nor its regulations define the term "management," the legislative history teaches that Congress was concerned with "agreements governing the overall management and operation of an Indian gaming facility by an entity other than the tribe or its employees." S. Rep. No. 100–446 at *15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3085. That meaning is confirmed by the regulatory definition of a "primary management official," which means any person "who has authority . . . [t]o set up working policy for the gaming operation." *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1172 (10th Cir. 2005) (quoting 25 C.F.R. § 502.19).

The meaning of the term "management" is informed to a lesser extent by an agency bulletin, NIGC Bulletin 94-5. The bulletin is an informal pronouncement entitled to only limited deference by this Court. *Wells Fargo Bank*, 658 F.3d 696; *First Am. Kickapoo*, 412 F.3d at 1174. The bulletin provides that "[m]anagement encompasses many activities (*e.g.*, planning, organizing, directing, coordinating, and controlling)." *Wells Fargo Bank*, 658 F.3d at 696 (quoting NIGC Bulletin 94-5 (Oct. 14, 1994)).

The Tribal Parties provide a bullet-point list of alleged management provisions, followed by string citations to various transaction documents. App. Dkt.21 at 53–55. In

many instances, including most references to the Bond, the alleged provision does not even appear in the document. Instead, the cited document includes a reference to the Indenture, and the provisions are included in that document.[16] The remainder of the chart is a patchwork, primarily from the Security Agreement, Account Control Agreement and Limited Offering Memorandum – none of which were relied upon by the District Court as a source of the Tribal Parties' immunity waivers. Although these documents also contain clear immunity waivers, the District Court based its ruling principally on the Bond Resolution and the Tribal Resolution, holding that in no event could those unilateral documents be considered contracts that provide for casino management. A-46.

3. The Bond Resolution and Tribal Resolution Are Not Void Management Contracts.

The Bond Resolution does not appear in the Tribal Parties' list, and the Tribal Parties have thereby conceded that the District Court was correct in holding that the document does not provide for management of any gaming activity.

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[16] The Tribal Parties cite to page 4 of the Specimen Bond, which states that in the event of default, the Bond may become due and payable "in the manner and with the effect and subject to the conditions provided in the Indenture." SA-0027. Based on that language, the Tribal Parties impute into the Bond conditions from the Indenture that allow bondholders to appoint a binding management consultant, limit replacement of key Casino personnel, hire new Casino management, or appoint a receiver. App. Dkt.21 at 54. Yet this language does not make the Bond dependent on the Indenture. It merely references that separate document, noting that "no owner of any Bond shall have any right to enforce the provisions of the Indenture, except as provided therein." SA-0027.

The Tribal Resolution is just that: a resolution by the tribal council. SA-0285–0287. No other party signed the Tribal Resolution or otherwise agreed to be bound by any language in the Resolution. *Id.*

A unilateral resolution is not a contract, and thus cannot be a management contract. "[I]t is horn book law that to make a valid, executory contract, there must be at least two parties capable of contracting and both must be bound thereby. The promises of each must be concurrent and obligatory on both at the same time to render the promise of either binding." *Taller & Cooper v. Illuminating Electric Co.*, 172 F.2d 625, 626 (7th Cir. 1949); *see also* 25 C.F.R. § 502.15 ("Management contract means any contract . . . .") This reasoning applies with equal force to the Bond Resolution issued by the EDC.

Even if the Tribal Resolution were a contract, however, the Tribal Parties' argument would still fail. The Tribal Parties claim the Tribal Resolution is a management contract solely because the Tribe (unilaterally) covenants "not to replace key management of the Casino Facility without obtaining the requisite consent of the holders of the Bonds." App. Dkt.21 at 57. The District Court correctly found that this single provision, "standing alone, does not 'transfer significant management responsibility to . . . the bondholder,'" and therefore did not convert the Tribal Resolution into a management contract. A-45–46.

The Tribal Parties argue that in *Wells Fargo Bank*, this Court held that similar language in the Indenture transformed that document into a management contract. App. Dkt.21 at 54. On the contrary, the *Wells Fargo Bank* decision did not hold that any one term in the Indenture necessarily created a void management contract. Instead, this Court held that "*taken together*, the provisions discussed" in the opinion transferred sufficient management responsibility to render the Indenture a management agreement. 684 F.3d at 699 (emphasis added).

The Tribal Parties' citation to *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 669 (W.D. La. 2005), which addressed the impact of a single management provision, is unavailing as well because the provision at issue in *Jena Band* was qualitatively different from the single provision in the Tribal Resolution. App. Dkt.21 at 57–58. The *Jena Band* provision gave two non-Indian companies exclusive management rights over a tribe's first casino—excluding even the tribe itself—and the exclusive right to contract with the tribe to manage its other gaming activities. 387 F. Supp. 2d at 669. In contrast, under the Tribal Resolution, the Tribal Parties are not excluded from managing their casino, nor are they precluded from entering into gaming management contracts with other entities. This single term does not effect a total "alienation . . . of [the Tribal Parties'] right to manage gaming operations located on tribal lands," *id.*, and it is insufficient to convert the unilateral Tribal Resolution into a void management contract.

D. The Voiding Regulation Is Defective Under *Chevron*.

Even if this Court accepts the Tribal Parties' argument that any of the above documents qualify as a "management contract," the statute that Congress enacted (25 U.S.C. § 2711(f)) does not permit unilateral voiding without an agency hearing. And even then, an unapproved management contract is merely "voidable," resulting in rescission rather than a $50 million tribal windfall. Thus, the voiding regulation, 25 C.F.R. § 533.7, is itself defective under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which invalidates agency regulations that conflict with clearly worded federal statutes.

Once Congress authorizes an agency to adopt a rule "carrying the force of law" and the agency does so, the rule's validity is assessed under the *Chevron* doctrine. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). The inquiry comprises two steps. "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congressional intent is clear, the inquiry is complete and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Only if the statute is "silent or ambiguous" does the analysis reach *Chevron*'s second step, which assesses "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Although IGRA vests the Chairman of the NIGC with the authority to approve management contracts for tribal gaming, the Chairman's power to review management

contracts is cabined. Section 2711(f) limits the ability to void management contracts that do not comply with IGRA:

> The Chairman, *after notice and hearing*, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

25 U.S.C. § 2711(f) (emphasis added). This statutory provision marks the outer limit of the agency's power to invalidate unapproved management contracts. It is Congress's first and last word on the subject.

The voiding regulation, 25 C.F.R. § 533.7, departs in at least two ways from the unambiguous Congressional decree that the NIGC must wait until "after notice and hearing" before it may modify or void any non-compliant management contract. First, whereas Section 2711(f) renders unapproved management contracts merely voidable, the regulation goes a step further and voids such contracts *ab initio*. *Wells Fargo Bank,* 658 F.3d at 699–700; *see also Wells Fargo Bank, N.A. v. Sokaogon Chippewa Cmty.*, 787 F. Supp. 2d 867 (E.D. Wis. 2011) (observing that the voiding regulation "goes further" than Section 2711(f) and "makes all management contracts that have not been approved by the Chairman void").

The distinction between void and voidable matters: when an agreement is voidable, a party may rescind the contract or affirm it. *Baumgarten v. Bubolz*, 104 Wis. 2d 210, 216, 311 N.W.2d 230 (Ct. App. 1981). Were the NIGC to invalidate a "voidable" contract, basic contract law principles would require the parties to return the benefits

they had received. *See Estate of Luster v. Allstate Ins. Co.*, 598 F.3d 903, 907–08 (7th Cir. 2010). By contrast, when a contract is void *ab initio*, the contract (including any waivers contained therein) is a nullity. *See Wells Fargo Bank*, 658 F.3d at 699–700.

Second, the plain text of IGRA, as enacted in Section 2711(f) simply does not permit unilateral, blanket voiding of unapproved management contracts without notice and an agency hearing. *See Brooks v. Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) (agency exceeded its authority to issue construction permits where statute "clearly seem[ed] to require" a hearing).

Because "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear," the regulation is invalid. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994); *see also Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502–03 (1998) (agency's interpretation of statute failed at step one of Chevron when it had "the potential to read [certain] words out of the statute entirely"). Hence it cannot provide legal justification for voiding the collateral agreements and the waivers of sovereign immunity contained therein.

CONCLUSION

For the reasons stated above, Saybrook and Wells Fargo respectfully ask this Court to affirm the District Court's order granting preliminary injunctive relief.

October 6, 2014

Saybrook Fund Investors, LLC,
LDF Acquisition, LLC, and
Wells Fargo Bank, N.A.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Plaintiffs-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,017 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 2010 in 12 point Palatino Lino font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2014, I filed the foregoing **RESPONSE BRIEF OF PLAINTIFF-APPELLEES SAYBROOK FUND INVESTORS, LLC, LDF ACQUISITION, LLC, AND WELLS FARGO BANK, N.A. and SUPPLEMENTAL SEPARATE APPENDIX OF PLAINTIFFS-APPELLEES, SAYBROOK FUND INVESTORS, LLC, LDF ACQUISITION, LLC, AND WELLS FARGO BANK, N.A.** 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

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