Nos. 14-2150 & 14-2287

In the United States Court of Appeals for the Seventh Circuit

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

Plaintiffs-Appellees,

and

GODFREY & KAHN, S.C.,

Plaintiff-Appellee/Cross-Appellant,

v.

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

Defendants-Appellants/Cross-Appellees.

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

REPLY AND RESPONSE BRIEF OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES

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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 Indians, et al.*

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(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:

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Attorney's Signature: s/Timothy M. Hansen Date: 06/02/2014

Attorney's Printed Name: Timothy M. Hansen

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Attorney's Signature: s/Vanya Hogen Moline Date: 09/03/2014

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

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INTRODUCTION

The Tribal-Court Defendants'[1] briefs do not alter the way this Court should resolve this appeal. If the Court reaches beyond the threshold inquiry of whether the district court ever properly had jurisdiction over this matter (it did not), there are three issues for this Court to decide, each of which requires reversal of the district court's order.

1. The district court's decision flies in the face of Supreme Court precedent and federal policy requiring the exhaustion of tribal-court remedies. The district court erred in enjoining the Tribal Parties[2] from proceeding in the first-filed tribal-court action, particularly when the tribal court was in the midst of determining its jurisdiction. If a federal court can extinguish a tribal court's power to determine its own jurisdiction over a case applying tribal law to a transaction induced by fraud that threatens the existence of the tribal government, there is little purpose in having a tribal court at all.

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[1] "Tribal-Court Defendants" refers collectively to Plaintiffs-Appellees Stifel, Nicolaus & Co., Inc. and Stifel Financial Corp. (together, "Stifel"); Plaintiffs-Appellees, Saybrook Tax Exempt Investors, LLC, LDF Acquisition, LLC, and Wells Fargo Bank, National Association ("Wells Fargo") (together, "Saybrook"); and Plaintiff-Appellee and Cross-Appellant Godfrey & Kahn, S.C. ("Godfrey"). Citations to the appellate briefs filed by Stifel, App. Dkt. 32, Godfrey, App. Dkt. 35, and Saybrook, App. Dkt. 37, are indicated by the party's name, followed by "Br." and the page number where the cited information is located. *E.g.*, "Godfrey Br. ___."

[2] "Tribal Parties" refers to Defendants-Appellants and Cross-Appellees Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") and Lake of the Torches Economic Development Corp. (the "Corporation") Citations to the Tribal Parties' Brief, App. Dkt. 23, are indicated by "Tribal Br. ___."

If this Court reverses the district court on the basis of the exhaustion doctrine, it would not need to reach any of the remaining issues in this case. To follow the route charted by the Tribal-Court Defendants, this Court would have to resolve their arguments as to tribal-court jurisdiction and sovereign immunity.

2. If this Court finds that exhaustion is not required, it should proceed to the second question—whether the Tribal-Court Defendants are subject to the tribal court's jurisdiction. To answer anything but "yes," this Court would have to ignore the Tribe's treaty rights, its authority to regulate and therefore adjudicate the validity of the Bond Transaction, and the undisputed facts demonstrating that the tribal court's jurisdiction over the Tribal-Court Defendants satisfies the requirements of federal law. The district court's injunction should accordingly be vacated.

3. The third question presented by the district court's order is: do the Resolutions validly waive the Tribal Parties' sovereign immunity? The answer is clearly "no." The Resolutions are void as part of an unapproved management contract and do not waive immunity from this or any other suit. The path suggested by the Tribal-Court Defendants conflicts with this Court's holding in *Wells Fargo*, ignores former NIGC officials' testimony regarding agency practice, and misconstrues IGRA. Also, the Resolutions when narrowly construed do not allow this suit brought by these Tribal-Court Defendants. Thus, if this Court reaches the third issue, it should vacate the injunction, dismiss the Tribal Parties for lack of jurisdiction, and dismiss the case.

ARGUMENT

I. The District Court Lacked Federal-Question Jurisdiction.

Godfrey argues that the district court had federal-question jurisdiction. Godfrey Br. 29-40. Stifel and Saybrook maintain the same in their jurisdictional statements. Stifel Br. 1-2; Saybrook Br. 1. But the Tribal-Court Defendants did not follow the usual approach of simply suing the tribal judge, as a tribal officer, under *Ex parte Young*, 209 U.S. 123 (1908), and seeking to enjoin him for allegedly violating federal law by exercising jurisdiction over them. *Michigan v. Bay Mills Indian Cmty.*, ___U.S.___, 134 S. Ct. 2024, 2035 (2014) ("[T]ribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.") (emphasis in original). Doing so would have avoided the thicket of sovereign-immunity issues thrust unnecessarily before the Court. The Tribal Parties' sovereign immunity is irrelevant to the issue of whether the tribal court can exercise jurisdiction over the Tribal-Court Defendants.

Instead of suing the tribal-court judge under *Ex parte Young*, the Tribal-Court Defendants chose to sue the immune Tribal Parties, seeking specific performance of purported forum-selection provisions in the Bond Documents. Their complaint fails to raise a federal question.

To invoke federal-question jurisdiction, a complaint challenging tribal-court jurisdiction must allege how "federal law has curtailed the powers of the Tribe[.]" *Nat'l*

Farmers Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).[3] The federal question is "whether a tribal court has exceeded the lawful limits of its jurisdiction[,]" *id* at 853, based solely on the contents of the "well-pleaded complaint." *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 840-41 (1989) (citing cases) (stating no federal-question jurisdiction over state-law claims even when case implicated tribal-immunity defense).

Under the well-pleaded complaint rule "a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].'" *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009). Conclusory statements of law do not suffice; the complaint "must state *facts* showing that the case does in fact arise under federal law." *Kirkland Masonry, Inc. v. C. I. R.*, 614 F.2d 532, 533 (5th Cir. 1980) (emphasis added); *Martinez v. U.S. Olympic Comm.*, 802 F.2d 1275, 1280 (10th Cir. 1986); *Canadian Imperial Bank of Commerce Trust Co. v. E.R. Fingland*, 615 F.2d 465, 466 (7th Cir. 1980).

The Tribal-Court Defendants' complaint pleaded no facts whatsoever regarding their contacts with the Tribe as would be expected to demonstrate that the tribal court

[3] *National Farmers* did not hold that federal-question jurisdiction is automatically conferred every time a non-Indian is sued in tribal court. Rather, only a challenge to the federal-law limitations on tribal-court jurisdiction creates a federal question. A claim alleging only contractual limitations on tribal-court jurisdiction does not raise a federal question. *National Farmers Ins. Co.*, 471 U.S. at 856.

lacked jurisdiction over them.[4] *See infra* at 28-35. Accordingly, the complaint presents solely a contract-enforcement action that does not arise under federal law and should be dismissed for lack of subject-matter jurisdiction.

II. The District Court Erred by Failing to Determine whether Record Evidence of Stifel's On-Reservation Fraud Rendered the Resolutions Unenforceable.

Stifel argues that this Court should ignore record evidence of its on-reservation fraud, mischaracterizing the statements of its own Fed. R. Civ. P. 30(b)(6) witness, David DeYoung, as mere "aspersions." Stifel Br. 19. According to Stifel, DeYoung's testimony was not "properly before the district court because the Tribal Parties failed to include it in their proposed findings of fact." *Id.* Stifel is incorrect. Every fact in the Tribal Parties' statement of the case was admitted into the record.

Although the district court refused to permit the Tribal Parties to introduce evidence of Stifel's fraud as a defense to the enforceability of the Bond Documents at the preliminary injunction hearing, after the hearing the Tribal Parties moved to admit DeYoung's deposition, including his concessions regarding fraud, as "relevant to the Court's determination of the myriad pending issues." Dkts. 162, 162-1. The district court overruled Stifel's objections and admitted DeYoung's testimony into "the record on preliminary injunction[.]" Dkt. 176. Thus, contrary to Stifel's assertion, the testimony of DeYoung regarding Stifel's fraud was properly before the district court.

[4] The Tribal-Court Defendants included no facts regarding their contacts with the Tribal Parties in their proposed findings of fact either. *See generally*, SA-0323-36.

The district court recognized that if the Bond Documents were fraudulently induced, then any waivers of immunity contained in them would be unenforceable. SA-0958, 19:16-20. Yet, instead of taking up that issue before ruling on the Tribal Parties' immunity, it directed the Tribal Parties to argue it "later in the case." SA-0946. But waiting until later in the case to address the impact of fraud was error. Because sovereign immunity is "immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits[,]" *Enahoro v. Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005), the district court's decision to take up fraud after the fact defeats a central purpose of the Tribal Parties' sovereign immunity—avoiding the burdens of litigation in the first place. *See id.*

The prejudice to the Tribal Parties is not limited to this case. The same issues surrounding the validity of the Bond Documents are being litigated in the state court. Thus, the Tribal Parties face the prospect of litigating their fraud claims in two courts simultaneously, all while they may be immune from suit based on the same fraud. This Court should not permit this to occur. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Neither Stifel, nor any other party, contests the Tribal Parties' argument that it was error for the district court to defer the threshold issue of the validity of the waivers until after it held the Tribal Parties waived their immunity. Saybrook makes no mention of fraud whatsoever in its brief. Godfrey argues that fraud does not bear on the validity and enforceability of forum-selection clauses, but makes no similar argument regarding

fraudulent inducement of sovereign-immunity waivers. Godfrey Br. 22-23. The evidence in the record demonstrates that the Resolutions are unenforceable due to fraud. By failing to address the Tribal Parties' argument, the Tribal-Court Defendants have conceded the point. *See Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994).

III. The Tribal-Court Defendants Misinterpret the Exhaustion Doctrine.

The district court cut off the tribal court's determination of its jurisdiction midstream and made rulings "in direct competition with" the tribal court. *Compare* Tribal Br. 26-27 *with Iowa Mut. Ins. Co v. LaPlante,* 480 U.S. 9, 16 (1987). To defend this error, the Tribal-Court Defendants misapply this Court's precedent and ignore controlling law. This Court should vacate the district court's order and direct it to stay or dismiss this case so that the "jurisdictional issues [can] be resolved by the tribal courts in the first instance[.]" *Iowa Mut. Ins. Co.*, 480 U.S. at 19.

A. The Tribal-Court Defendants Read *Altheimer* too Broadly.

The Tribal-Court Defendants try to recast *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 814 (7th Cir. 1993), as an inflexible bar that takes every case with an arguable forum-selection clause out of the exhaustion rule. Saybrook Br. 8-11[5]; Godfrey Br. 47-50. But *Altheimer* instructed district courts to "examine the factual circumstances of each case . . . to determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine." *Altheimer*, 983 F.2d at 814. Although it placed

[5] Stifel adopted Saybrook's exhaustion arguments in their entirety. Stifel Br. 36.

importance on choice-of-law and venue provisions, *Altheimer* also looked to whether the dispute concerned tribal law, whether there had been a direct attack on the tribal court's jurisdiction, and whether there was a case already pending in tribal court. *Id*. Thus, whether the tribal-court action raises issues of tribal law, involves tribal actors, and impacts tribal affairs is not "beside the point," Saybrook Br. 9. It is an inquiry central to *Altheimer*'s holding.

Moreover, unlike in *Altheimer* over two-thirds of the divergent forum-selection clauses here are silent regarding a tribal-court suit, or expressly allow it.[6] SA-0006-10. Under these circumstances, Saybrook's attempt to distinguish the bevy of cases across the country requiring exhaustion is unpersuasive. *Compare* Tribal Br. 25-26 *and* App. Dkt. 30 at 6-12 *with* Saybrook Br. 9-10. The Tribal-Court Defendants should not be permitted to complain they "cannot trust" these clauses when they drafted and approved them. *Cf. Altheimer*, 983 F.2d at 815.

All the circumstances *Altheimer* identified as appropriate for tribal-court exhaustion are present here. Tribal Br. 21-24. Indeed, as this Court recently confirmed: (1) "activities of non-Indians *on reservation lands* almost always require exhaustion *if they*

[6] Two purport to exclude certain actions from being heard in the tribal court, SA-0054 (Limited Offering Memorandum); SA-0280-81 (Tribal Agreement), but another purports to exclude actions from being heard in the nonexistent "court of the Corporation[,]"SA-0027-28 (Bonds), still others have no exclusionary language, SA-0039 (Limited Offering Memorandum); SA-0273 (Bond Resolution); and SA-0286 (Tribal Resolution), and one expressly contemplates suit in the tribal court, SA-0262 (Bond Purchase Agreement).

involve the tribe[,]" and (2) exhaustion is appropriate where off-reservation conduct . . . impact[s] directly upon tribal affairs[.]" *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 785 (7th Cir. 2014) (emphasis in original, internal quotation and alteration removed). This case fulfills these requirements. Tribal Br. 4-14.

The Tribal-Court Defendants cannot plausibly explain how "strong federal policy concerns favoring resolution in the nonfederal forum[,]" *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8, are "better supported," Saybrook Br. 10, by the route they encourage this Court to follow. Under their reasoning, this Court must ignore the tribal court's 48-page rejection of their motions to dismiss, disregard that court's considered interpretation of the forum-selection clauses, and usurp its role "thereby impairing the latter's authority over reservation affairs." *Iowa Mut. Ins. Co.*, 480 U.S. at 16; Tribal Br. 26-27. The Tribal-Court Defendants' argument is foreclosed by settled precedent.

B. The Forum-Selection Clauses Do Not Excuse Exhaustion.

The Tribal-Court Defendants' sole response to the mountain of law requiring exhaustion is to rely on some (but not all) of the forum-selection clauses contained in void Bond Documents. *See supra* at 7-9. Because forum-selection clauses (particularly void ones) cannot divest a court of jurisdiction, the district court's reliance on these clauses was error.

1. Exhaustion Requires that the Tribal Court Determine the Validity of the Forum-Selection Clauses First.

Although forum-selection clauses are presumptively valid, courts do not apply them blindly. *Compare* Godfrey Br. 19-27 *with Jackson*, 764 F.3d at 776. Validity is a threshold question; only an *enforceable* forum-selection clause can affect the tribal-court action. *See Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court*, 571 U.S. ___, 134 S. Ct. 568, 581 n.5 (2013)(presupposing a "contractually valid forum-selection clause").

Both IGRA and Stifel's fraud render the Bond Documents and their clauses unenforceable. Tribal Br. 41-44, 48-58. And when this Court considers whether to apply a potentially void jurisdictional clause, it determines the contract's validity before applying the clause. *Wells Fargo Bank, Nat'l. Ass'n. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 702 (7th Cir. 2011) ("*Wells Fargo*"); *Altheimer*, 983 F.2d at 810-12, 814-15; *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759-60 (7th Cir. 2001) (refusing to apply arbitration clause of contract that failed for lack of mutuality of obligation).[7] Indeed, in prior related litigation, the Indenture included the same sort of forum-

[7] Godfrey's reliance on *Muzumdar v. Wellness International Network, Limited*, 438 F.3d 759 (7th Cir. 2006), and cases concerning fraudulently induced contracts is misplaced. Godfrey Br. 22-24. Each concerned voidable contracts that could retain some legal effect, *see Laborers' Pension Fund v. A & C Envtl., Inc.*, 301 F.3d 768, 779 (7th Cir. 2002), whereas a contract that is void *ab initio* under IGRA is treated as though it never existed. *Wells Fargo*, 658 F.3d at 699, 702; 25 C.F.R. § 533.7.

selection language that the Tribal-Court Defendants advance here.[8] *Wells Fargo*, 658 F.3d at 699-700. This Court specifically declined to sever provisions from the Indenture because the parties' failure to comply with IGRA "renders the Indenture void in its entirety[.]" *Id.* at 702.

Godfrey alone argues that *Sokaogon Gaming Ent. Corp. v. Tushie-Montgomery Assocs. Inc.*, 86 F.3d 656 (7th Cir. 1996), creates a different rule. Godfrey Br. 16-27. But that opinion's aside concerning arguments that the tribe "d[id] not argue," *Sokaogon*, 86 F.3d at 659, is not essential to its holding. In the face of *Wells Fargo*'s holding on the same facts as this case, *Sokaogan*'s *dicta* is beside the point. *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582 (7th Cir. 2005).

Federal courts require tribal-court exhaustion where, as here, a clause may be void *ab initio* and no exception applies. *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 844-45 (8th Cir. 2003) (at-issue clause potentially void under IGRA); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420-21 (8th Cir. 1996) (same); *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1224 (9th Cir. 1989)) (at-issue clause potentially void under 25 U.S.C. § 81); *cf. Altheimer*, 983 F.2d at 815 (not

[8] Godfrey argues that the Indenture's forum-selection clause was "not even in dispute[,]" Godfrey Br. 17, but the same clause that addressed sovereign immunity also addressed forum-selection. Dkt. 1-4, § 13.02.

presenting validity issues).[9] Godfrey's attempt to distinguish this authority by segregating arbitration-clause cases from forum-selection cases, Godfrey Br. 50-51, ignores that "an agreement to arbitrate is a type of forum selection clause." *Jackson*, 764 F.3d at 773. The district court erred in refusing exhaustion under these circumstances.

Contrary to the Tribal-Court Defendants' arguments, *Muzumdar v. Wellness International Network, Limited*, enables the tribal court, not the district court, to interpret and apply the forum-selection clauses first. *See generally* 438 F.3d 759 (7th Cir. 2006) (Illinois court had power to apply forum-selection clause directing suit in Texas). Thus, even if a forum-selection clause directed the Tribal Parties to commence suit outside of the tribal court, the tribal court retains jurisdiction to apply those clauses itself, just as every other court does. *E.g.*, *M/S Bremen*, 407 U.S. 1, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy *of the forum in which suit is brought*[.]"); *Jackson*, 764 F.3d at 776 (same and applying Indiana unconscionability law to clause directing arbitration); *See also Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 389 (1st Cir. 2001). Enjoining the tribal court from undertaking this inquiry was error.

[9] The *Jackson* court held that tribal-court jurisdiction was not "colorable" on the facts of that case, and so fell within an established exception to the exhaustion rule. *Jackson*, 764 F.3d at 784-85. In contrast, the tribal court here has a colorable claim to jurisdiction. SA-0629; Tribal Br. 28-41; *see infra* at 18.

2. The Forum-Selection Clauses are Inconsistent and Permissive.

The Tribal-Court Defendants seek to merge divergent and conflicting Bond Document clauses into one forum-selection clause. Saybrook Br. 6-7; Godfrey Br. 16. But there is no *single* forum-selection clause. Five of the seven different forum-selection clauses relied upon by the Tribal-Court Defendants are silent concerning—or expressly contemplate—a tribal-court suit. SA-0006-09; *see supra* at 7-9.

Although the Tribal-Court Defendants characterize the clauses as "mandatory," *e.g.*, Godfrey Br. 5, Saybrook Br. 7, the tribal court correctly recognized that the plain language of the Bond Resolution's, Bonds', and Limited Offering Memorandum's forum-selection clauses are "unambiguously permissive[,]" because they are "silent as to whether, where, and over what subject matter the Tribal Parties may sue." SA-0648, 0651.

The district court ignored this ruling and the Bond Purchase Agreement, which expressly contemplates tribal-court suit. Dkt. 73-1 at 26 (citing Bond Purchase Agreement, SA-0262). In relying on "*the* forum selection clause" to hold "that venue and jurisdiction are foreclosed in any court of the Tribe" the district court sidestepped the multiple other forum-selection clauses included in the Bond Documents that either do not mention the tribal court at all or expressly permit litigation in tribal-court. A-17 (emphasis added). Neither the district court nor any Tribal-Court Defendant cited authority allowing it to elevate one clause over competing and contrary clauses. The

district court's order violates the basic principle that "courts do not simply rewrite" contracts. *Penn*, 269 F.3d at 761.

Further, considering the same forum-selection clause as in the Resolutions, the district court allowed a different tribal-court action to proceed because the clause "neither authorizes nor precludes litigation" in tribal court. *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). The district court's *Lac Courte Oreilles* decision cannot be reconciled with its conclusion in this case that permissive forum-selection clauses bar the tribal-court action here.

C. No Exception to the Exhaustion Rule Applies Here.

The Tribal-Court Defendants do not dispute that the district court did not rely on any of the four exceptions to the exhaustion rule recognized by the Supreme Court. *See generally* A-46-48. Instead, they try to shoehorn the district court's opinion into an exception after the fact. But their efforts fail because "the exceptions are applied narrowly[,]" and parties invoking them must "make a substantial showing of eligibility." *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238-39 (10th Cir. 2014). The Tribal-Court Defendants' after-the-fact arguments do not pass this bar.

1. The "Express Jurisdictional Prohibition" Exception Is Inapplicable.

The Tribal-Court Defendants argue exhaustion is unnecessary because the tribal-court action violates "express jurisdictional prohibitions" in the Bond Documents.

Godfrey Br. 51-52; Saybrook Br. 6-12. But this exception applies only where the assertion of tribal-court jurisdiction is "found by a federal court to be in patent violation of express *federal* law." *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 67 (2d Cir. 1997) (emphasis added); *see also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85 (1999) (exhaustion of tribal-court remedies was not required where tribal-court claims were preempted by an "unusual" section of the Price-Anderson Act that "transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident.'") (quoting 42 U.S.C. § 2210(n)(2)). No Tribal-Court Defendant argued—and the district court did not find—that any federal law forbids the tribal-court suit. Thus, this exception does not apply.

Godfrey's reliance on Eighth Circuit law is unavailing. That circuit does not require litigants to commence tribal-court litigation where an *unchallenged* forum-selection clause allows suit in federal court. *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995); *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.N.D. 2005). In *Bruce H. Lien Co. v. Three Affiliated Tribes*, the Eighth Circuit held that where (as here) a party "challeng[es] the very validity of the agreement" purporting to preclude tribal-court jurisdiction, exhaustion applies. 93 F.3d at 1420-21.

The other nonbinding cases relied on by Godfrey are similarly distinguishable. For example, *QEP Field Services Co. v. Ute Indian Tribe of the Uintah & Ouray Reservation* applied an unchallenged forum-selection clause without considering federal case law

limiting the exception. 740 F. Supp. 2d 1274, 1280 (D. Utah 2010). Similarly, *Meyer & Assoc., Inc. v. Coushatta Tribe of Louisiana* rightly questioned whether exhaustion applies to state courts and enforced an unchallenged forum-selection clause because the "dispute d[id] not involve tribal governance or political integrity." 992 So. 2d 446, 450, 452 (La. 2008). These cases are of no moment here.

2. The "Bad Faith" Exception is Inapplicable.

Arguments that "bad faith" excuses exhaustion in this case are similarly misplaced. To fit within the "bad faith" exception, a tribal court—not a tribe or tribal corporation—must assert jurisdiction in bad faith. *E.g.*, *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196 (9th Cir. 2013). Saybrook lodges unsupported suppositions about the tribal court's partiality, but such cavils cannot satisfy the "bad faith" exception. *Iowa Mut. Ins. Co.*, 480 U.S. 9, 19 (1982). Moreover, the tribal court's actions in this case belie any claim of "bad faith." Its 48-page opinion preliminarily denying the Tribal-Court Defendants' motions to dismiss was thoroughly reasoned and expressly invited discovery concerning additional jurisdictional facts. SA-0628-75. Indeed, even though the tribal court had already denied the Tribal-Court Defendants' motions to dismiss, when it learned of the district court's injunction, it immediately stayed the case as to all Tribal-Court Defendants. Godfrey Br. 10.

Nor have the Tribal Parties acted in bad faith. *Contra* Saybrook Br. 13. It was Saybrook's forum-shopping odyssey that led to the tribal-court action and delays.

Saybrook commenced the state-court case after dismissing its first federal suit fearing it would receive an unfavorable ruling. *See* Dkt. 54-9 (March 30, 2012 Western District show-cause order in Case No. 09-cv-768); Dkt. 54-10 (Saybrook's April 9, 2012 Notice of Dismissal of Case No. 09-cv-768). It then filed another federal case alleging the district court lacked jurisdiction over its complaint and stayed its state-court case. SA-0478-529. The Tribal Parties commenced the tribal-court action soon after the district court dismissed Saybrook's second federal case lifting the stay on the state-court case.[10] SA-0288-322; Dkt. 71-7.

Moreover, the assertion that the Tribe "grant[ed] itself the power" to "handpick" judges, Saybrook Br. 13-14, ignores that the Tribal Court Code amendments *limited* the Tribe's authority to select judges. Like other sovereigns, the Tribe selects its judicial officers. Before the amendment, the Tribal Council possessed (and exercised) the power to appoint lay judges for any case before the tribal court. After the amendment, the Tribal Council could still appoint judges, but in certain cases (including this dispute),

[10] The Tribal Parties moved to dismiss the state-court case, *inter alia*, on grounds of infringement and preemption. A "deeply rooted" federal policy "of leaving Indians free from state jurisdiction and control[,]" has resulted in two independent but related barriers to the state's exercise of jurisdiction in Indian-law cases. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168 (1973) (citation omitted). Under the infringement rule, state authority must not unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980) (citation and quotation omitted). Further, "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citation omitted). The Waukesha court denied the motion to dismiss.

could select only a judge who is law-trained and licensed, and has practiced or judged for at least ten years. Saybrook fails to address how this change constitutes "bad faith," but its argument highlights the need for exhaustion. Concerns with tribal law must be addressed to the tribal court itself. *Iowa Mut. Ins. Co*., 480 U.S. at 17.

3. The Tribal Parties' "Colorable Claim" of Tribal-Court Jurisdiction Requires Exhaustion.

The Tribal-Court Defendants' reliance on *Strate* to argue that the tribal court "clearly lack[s]" jurisdiction, Saybrook Br. 12; Godfrey Br. 52, ignores that the exception applies "*only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law.* In circumstances where the law is murky or relevant factual questions remain undeveloped, the prudential considerations outlined in *National Farmer's Union* require that the exhaustion requirement be enforced." *DISH Network Serv. LLC v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013).

Where tribal-court jurisdiction is "colorable," courts require exhaustion. *Jackson*, 764 F.3d at 784-85; *Rincon Mushroom Corp. v. Mazzetti*, 490 Fed. Appx. 11, 13 (9th Cir. 2012); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000). As the Tribal Parties have described, Tribal Br. 28-41, and the tribal court held, SA-0629, tribal-court jurisdiction here is, at a minimum, colorable, so the "clearly lacking" exception in *Strate* is inapplicable. The remaining jurisdictional questions identified by the tribal court should thus be resolved by that court in the first instance.

4. Lower Courts May Not Stray Outside of the Exhaustion Rule.

Without an exception applicable to this case, Godfrey urges this Court to allow district courts to ignore the exhaustion requirement any time a litigant thinks exhaustion would not serve the rule's purposes. Godfrey Br. 52-53. The Supreme Court never adopted such an approach. *See Nevada v. Hicks*, 533 U.S. 353, 369 (2011) (noting that the "plainly lacking" exception was technically inapplicable, but making the exception applicable by extending *Montana*'s main rule to the unique circumstances of that case); *El Paso Natural Gas Co.*, 526 U.S. at 484-88 (applying the "express jurisdictional prohibition" exception)).

This Court should not carve a new exception to the Supreme Court's exhaustion rule. *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014) (refusing to create "financial insolvency" exception to exhaustion rule); *Basil Cook Ent. Inc.*, 117 F.3d at 66 ("In the absence of one or more of these circumstances, however, exhaustion is required."). By failing to conform its decision to one of the rule's four well-defined exceptions, the district court erred, improperly putting the Tribal Parties to "substantial expense simply to receive the benefit of settled law." *Heath v. Varity Corp.*, 71 F.3d 256, 257 (7th Cir. 1995). This Court should reverse the district court and require tribal-court exhaustion.

IV. The Tribal Court Has Jurisdiction over the Tribal-Court Action.

Because tribal-court jurisdiction is co-extensive with tribal regulatory jurisdiction, *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), a tribal court can adjudicate disputes enforcing regulations against nonmembers if the tribe has jurisdiction to regulate the nonmembers. Tribal jurisdiction does not, as Stifel and Saybrook suggest, depend solely on nonmember conduct, although the *source* of tribal authority varies depending on the circumstance.[11] Here, the Tribe exercised its treaty rights and its rights as a landowner to exclude and regulate the Tribal-Court Defendants. Exercising those treaty rights is sufficient and this Court need not address the *Montana* exceptions. If it reaches those exceptions, however, it is clear that the Tribe also exercised its retained inherent sovereignty to regulate the Tribal-Court Defendants under them.

A. The Tribe Has Jurisdiction to Regulate the Bond Transaction, so the Tribal Court Has Jurisdiction to Adjudicate Contract-Based Disputes Arising from the Bond Documents.

When faced with the question of whether a tribal court may exercise jurisdiction over nonmembers in a particular case, the first inquiry is "'whether the actions at issue

[11] LDF Acquisition, LLC (which is included in the shorthand "Saybrook") is a special-purpose limited-liability company created and managed by Saybrook Fund Investors to hold the Bonds. SA-0003 at ¶¶ 7-8. As such, LDF Acquisition's interests and Saybrook Fund Investors' interests are identical. *See, e.g., Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802, 818 (9th Cir. 2011) (noting identity of interests between corporate agent and corporation for tribal-court-jurisdiction purposes). So in addition to LDF Acquisition's separate consensual relationship with the Corporation by purchasing the bonds, LDF Acquisition shares the conduct and relationships of Saybrook Fund Investors for purposes of the tribal-court-jurisdiction analysis.

in the litigation are regulable by the tribe.'" *Attorney's Process and Investig. Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 936 (8th Cir. 2010) (quoting *Hicks*, 533 U.S. at 367 n.8). Contrary to the suggestions of Stifel and Saybrook, when this Court examines the actions at issue in the tribal-court action, the Tribe's authority to regulate is clear.

The tribal-court action seeks declaratory judgments that various Bond Documents are void under IGRA, the Tribe's Gaming Ordinance, and the Tribe's Constitution because the Tribal-Court Defendants failed to obtain the approvals required by those laws. SA-0289-322. The issue, then, is whether the Tribe had regulatory authority over the Bond Transaction, under which (a) the bonds were secured entirely by gaming revenues generated on Tribal trust land, and (b) the bondholders and Trustee were given a high degree of control over the gaming revenues and the Casino itself. Tribal Br. 12-13, 48-58.

1. The Tribe Regulated the Bond Transaction under Its Gaming Ordinance.

The Tribe regulates transactions like this one under its NIGC-approved Gaming Ordinance, which mandates compliance with IGRA, including that all management contracts be approved by the NIGC Chairman and that everyone with management authority over a tribal casino (whether on site or not) be licensed by the Tribe. SA-0425-77; Tribal Br. 31. In fact, IGRA *requires* tribes to regulate gaming by enacting tribal gaming ordinances, 25 U.S.C. § 2710, and licensing "primary management officials" of tribal gaming enterprises (who need not be, and often are not, on-site at tribal casinos).

25 U.S.C. § 2710(b)(2)(F). Thus, when it comes to regulating gaming and gaming-related contracts, Congress has not only *recognized* tribal authority over nonmembers (both on- and off-reservation), it has *mandated* it. Neither Stifel nor Saybrook refutes this point in their briefs.[12]

IGRA gave federal regulators authority over tribal gaming operations, but Congress also confirmed that:

> Nothing in this [Act] precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission.

25 U.S.C. § 2713(d). The Tribe's gaming ordinance mandated compliance with IGRA, and the Tribe therefore had regulatory jurisdiction over the Bond Transaction because it was tied directly to Indian gaming and secured by Casino revenues.

2. The Tribe Regulated the Bond Transaction under its Constitution.

The Tribe also regulates transactions secured by tribal assets under its federally approved Constitution by requiring that they be approved by both a referendum of the Tribe and the Secretary of the Interior. SA-0408; *see also* Tribal Br. 26-27. The approval requirement is mandated by the Indian Reorganization Act ("IRA"). 25 U.S.C. §§ 361 *et seq.*; *see also* SA-0003 at ¶ 11. The IRA provides that, "in addition to all powers vested in

[12] Stifel and Saybrook merely contend that the tribal court can only exercise jurisdiction over activities that occur on tribal lands under the first *Montana* exception. Stifel Br. 30-33; Saybrook Br. 15-18. The Tribal Parties respond specifically to those arguments *infra* at 32-33. Godfrey did not challenge the Tribal Court's jurisdiction over it under *Montana* for purposes of the preliminary-injunction motion. *See* A-54 n.9.

any Indian tribe or tribal council by existing law, the constitution . . . shall also vest in such tribe or its tribal council the following rights and powers . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. § 476(e). By requiring a tribal referendum as "tribal consent" before the Tribe could pledge Tribal assets such as Casino revenues (as is purported in the Tribal Agreement) as collateral, the Tribe was regulating contractual activity as expressly anticipated by Congress.

Under the IRA and its Constitution, the Tribe also had authority to regulate the pledge of tribal assets at issue in the Bond Documents and the tribal-court action. Again, no Tribal-Court Defendant refutes this point. Because the Tribe had the power to regulate the pledge of assets, the Tribal Court had jurisdiction to hear the case enforcing that regulation. *Strate*, 480 U.S. at 18.

B. The Tribal Court Has Jurisdiction to Adjudicate the Tribal-Court Action based on the Tribe's Treaty Rights.

Another basis for the Tribe's jurisdiction to regulate the Bond Transaction—and therefore for tribal-court jurisdiction—is the Treaty of 1854. Stifel contends that the Tribe's treaty rights are not specific enough to encompass regulating the Bond Transaction, Stifel Br. 23, but it is hardly surprising that a treaty entered into in 1854 did not enumerate regulation of a bond transaction as among the rights the Tribe specifically reserved. And treaties are not to be read so narrowly. The Supreme Court has cautioned that Indian treaties are to be interpreted "as the Indians themselves

would have understood them[,]" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (citations omitted), and courts often look to expert testimony and contemporaneous historical documents, such as those relied on by the Tribal Parties' uncontested expert, John Bowes, to ascertain what the Indians understood. *See, e.g.*, *Mille Lacs Band*, 526 U.S. at 176-85 (citing numerous expert reports and historical documents); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341 (7th Cir. 1983) (relying on extensive historical documents to interpret Chippewa treaty).

The evidence in this case about how the Tribe understood its treaty rights is uncontroverted. The Tribe understood it was reserving lands (the Reservation) that would be its "permanent home." SA-0365 at ¶ 10. In *Williams v. Lee,* the Supreme Court examined similar treaty language setting aside a land for a "permanent home" for the Navajo, and found that "[i]mplicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." 358 U.S. 217, 221-222 (1959). As a result, the Court upheld tribal-court jurisdiction to adjudicate a breach-of-contract action between nonmembers and members. *Id.*

Not only did the Tribe understand that it was reserving a permanent homeland in the Treaty of 1854, but the Tribe also understood that the treaty preserved the Tribe's right to exclude outsiders from its lands. SA-0366 at ¶ 11. When the treaty was ratified

and the Tribe was receiving its first annuity payment under it, treaty commissioner Henry Gilbert told the assembled Indians that:

> [Y]ou can rest assured that no white man shall enter your reservation to claim or to hold any portion of it, except it be such ones as the chief desires should live there, and that all the land embodied in these several tracts are yours, to be your permanent homes.

Id. (internal citation omitted). The Lac du Flambeau Chippewa thus understood that they had a right to exclude non-Indians from their reservation. SA-0366-67 at ¶¶ 11-17. The Supreme Court has explicitly confirmed that the right to exclude includes the right to regulate. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982).[13]

Stifel responds that it had no "meaningful" on-reservation conduct in this case. Stifel Br. 25.[14] But Stifel's on-reservation pressuring the Tribal Parties into taking this deal was a but-for cause of the Bond Transaction. *See* Tribal Br. 7-12. Stifel's on-reservation conduct was not only meaningful, it was crucial. Similarly, Saybrook insisted on (and Wells Fargo tried to enforce) the right to control on-reservation Casino revenues and management. *Id.* at 6-7, 12-16. The tribal-court action seeks to prevent them from exercising that illegal control.

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[13] This right-to-exclude power to regulate is distinct from the Tribe's inherent authority, limited in *Montana* and its progeny, to regulate nonmembers. *See generally Merrion*, 455 U.S. 130 (discussing the difference between the power to exclude and inherent sovereignty).

[14] Saybrook incorporates these arguments by reference. Saybrook Br. 14.

C. The Tribal Court Has Jurisdiction over the Tribal-Court Action because the Bond Transaction Took Place on Tribal Land and is a "Reservation Affair."

Even if the Tribe's treaty rights did not confer jurisdiction on the Tribe to regulate the trust-land-based Bond Transaction, the Tribe's rights as the beneficial owner of its trust lands would do so. *See* Tribal Br. 32-33. As Stifel acknowledges, the circuit courts do not agree on whether tribes can regulate nonmember conduct on tribal lands without meeting the *Montana* exceptions. Stifel Br. 26-27. But this Court need not resolve all aspects of that disagreement to find jurisdiction on the facts of this case.

The *Montana* Court "readily agree[d]" that tribes could exercise authority over nonmembers on tribal trust lands, 450 U.S. at 557, and established the exceptions specifically for cases arising on nonmember fee lands. *Id* at 565-66. Stifel's argument rests on a misreading of *Nevada v. Hicks*, where the Court suggested that trust-land status would not be dispositive of tribal jurisdiction in all cases. 553 U.S. at 359-60. But in *Hicks*, "[t]he Court's main emphasis" was "the paramount importance of the state's interest in investigating off-reservation crime." Sarah Krakoff, *Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. Colo. L. Rev. 1187, 1190 (2010). As a result, "[w]hether tribal land status might weigh in favor of tribal jurisdiction in future cases therefore remains an open question." *Id.* at 1190-91. Because *Hicks* arose in such special circumstances involving substantial state's rights (to enforce search warrants on trust land for crimes committed off-reservation), several lower courts have agreed that in cases (like this one) without such circumstances, the fact that a tribal-court action

arises on trust lands can still be dispositive. Tribal Br. 32-33; *see also* App. Dkt. 30 at 17. Indeed, it makes sense that tribes would have more authority in such cases given that they can rely not only on their inherent sovereignty, but also their rights as landowners to control what occurs on their lands.

Where the tribe is the landowner, the power to exclude nonmembers "exists independently of [a tribe's] general jurisdictional authority." *Water Wheel*, 642 F.3d at 810 (citing *Duro v. Reina*, 495 U.S. 676, 696-97 (1990)); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (tribe loses plenary jurisdiction over land once it is converted to non-Indian fee land). Moreover, the Tribe's "'[r]egulatory authority goes hand in hand with the power to exclude.'" Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate NonMember Conduct in Indian Country*, 50 Tulsa L. Rev. 193, 215 (2014) (internal citations omitted) (alteration in original).

The Tribal-Court Defendants do not deny the Tribe's power to exclude. Stifel contends that the facts on which the Tribal Parties rely to demonstrate Stifel's trust-land conduct were not in the record. Stifel Br. 27. But as explained *supra* the district court admitted into the record the relevant evidence establishing jurisdiction. Stifel cannot deny that the record reflects it made five trips to tribal trust land to construct, sell and consummate the Bond Transaction. *See* Tribal Br. 5-7; SA-1019.

The undisputed facts establish that the Bond Transaction was a "reservation affair." *See Calumet Gaming Grp.-Kan. v. Kickapoo Tribe of Kan.*, 987 F. Supp. 1321, 1329 (D. Kan. 1998) ("The present action is a 'reservation affair' because it concerns performance of contracts relating to a gaming operation located on the Tribe's reservation."). The Bond Transaction was sold to the Tribal Parties on tribal trust land, Tribal Br. 7-12, and secured by trust-land-based assets (the Casino and its fixtures and equipment). SA-0531-32. Further, the Bond Documents' terms controlled virtually every aspect of Casino revenues, *e.g.*, SA-0542-53, and many aspects of Casino operations. Tribal Br. 53-56.

Stifel relies on *dicta* from *Jackson v. Payday Financial, LLC*, where a tribal-member-owned lender with no connection to a tribal government or any tribal regulations made unsecured "payday" loans to borrowers off the reservation, in suggesting that only nonmember conduct is relevant when examining tribal jurisdiction. Stifel Br. 27-28 (citing No. 12-2617, 2014 WL 4116804, at *11 n.42 (7th Cir. Aug. 22, 2014)); Saybrook Br. 14. But *Jackson* involved a dispute that did "not arise from the actions of nonmembers on reservation land and [did] not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources." 2014 WL 4116804, at *13. In contrast, this dispute arose from Stifel's on-reservation actions selling the Bond Transaction to the Tribal Parties, and raises issues of tribal self-government (*e.g.*, enforcing the tribal laws

described *supra*) and allocation of tribal resources, *e.g.*, SA-0337-47. It thus fits within the Tribe's power to exclude and regulate by virtue of its landowner status.

D. The Tribal Court Has Jurisdiction over the Tribal-Court Action because it Arose Directly from the Consensual Relationships the Tribal-Court Defendants Entered into with the Tribal Parties.

Even if this Court finds that it must apply a *Montana* exception as a basis for tribal-court jurisdiction, both exceptions apply here. The first exception asks whether nonmembers have a consensual relationship with the Tribal Parties and the tribal-court action has "a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 654, 656 (2001). That test is met. No party disputes having a consensual relationship with the Tribal Parties, or that the tribal-court action has a nexus to those relationships. Stifel Br. 29-35;[15] Saybrook Br. 15-18. Nor could they; the tribal-court action tests the validity of those consensual relationships, which are memorialized by the Bond Documents. SA-0293-95.

Stifel, however, contends that the nexus must be to specific actions that took place on tribal lands instead of to the consensual relationship itself. Stifel Br. 25. That is not the test for the "nexus" requirement. In *Strate*, for example, the Court examined whether the tort claims that were the subject of the tribal-court action were related to the consensual relationship that the tribal-court defendant had with the tribe. 520 U.S. at

[15] Stifel's brief contains a heading disputing that a nexus exists, Stifel Br. 29, but does not actually discuss the nexus requirement.

457. The Court found that the torts at issue in the case (involving a nonmember plaintiff who had been injured on a state highway running through the reservation) had nothing to do with the only consensual relationship between the nonmember defendant and the tribe—a subcontract to do landscaping with a tribally owned construction company. *Id.* at 443. In this case, by contrast, the dispute centers on the consensual relationships at issue. As the district court noted about the tribal-court jurisdiction question before it: "the controversy between the parties in this case unquestionably arises out of: (1) the various Bond Documents, in that it implicates their validity . . . and (2) the Bond Transaction itself . . ." A-44. The same is true of the tribal-court action, thereby satisfying the nexus requirement.

1. The First *Montana* Exception Does Not Require Explicit Nonmember Consent.

Saybrook contends that the tribal court can exercise jurisdiction only if it explicitly consented to tribal-court jurisdiction. Saybrook Br. 18.[16] Saybrook bases this assertion on language in *Plains Commerce Bank* explaining the limits on tribal jurisdiction. But while *Plains Commerce Bank* does suggest that nonmembers must consent to tribal jurisdiction "expressly or by [their] actions," 554 U.S. at 337, the Court's analysis demonstrates that freely entering into a commercial relationship can constitute consent to tribal-court jurisdiction for matters with a close nexus to that relationship, so

[16] Saybrook's reliance on conflicting, permissive, and potentially void forum-selection clauses to demonstrate a lack of consent, fails for reasons discussed *supra* at 9-12.

long as the assertion of tribal-court jurisdiction is not over the *sale* of non-Indian fee lands.[17]

Plains Commerce Bank itself was an off-reservation company. *See Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 491 F.3d 878, 880 (8th Cir. 2007), *rev'd by Plains Commerce Bank*, 554 U.S. 316. Just as is the case here, Plains Commerce made loans to a company that was located on a reservation and majority-owned by members of a tribe. *Id.* The Court noted, without deciding, that "[t]he Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions." 554 U.S. at 338. If the Court had intended to add a new explicit consent requirement to the analysis, there would have been no reason for this statement. In fact, the consent language cited by Saybrook is better understood as simply reiterating the first-*Montana*-exception requirement that the consensual relationship be directly related to the tribal action at issue. This is borne out by the lower courts interpreting *Plains Commerce Bank*, which have not required explicit consent. *See, e.g., Dolgencorp, Inc. v. Miss. Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014) (applying first *Montana* exception even though tribal-court defendant did not expressly consent to tribal-court jurisdiction); *Water Wheel*, 642 F.3d at 818 ("For

[17] *See* Tinker, 50 Tulsa L. Rev. at 216 ("[T]he law recognizes many types of consent, and the Supreme Court has never required the regulated party under the [*Montana*] test to expressly consent to suit in tribal court."); Krakoff, 81 U. Colo. L. Rev. at 1223 ("*Plains Commerce Bank* left *Strate's* doctrinal approach intact, but carved out one particular category of nonmember action—ownership of non-Indian land—from qualifying for the *Montana* exceptions.").

purposes of determining whether a consensual relationship exists under *Montana's* first exception, consent may be established "expressly or by [the nonmember's] actions.") (citing *Plains Commerce Bank*, 554 U.S. at 337).

2. The First *Montana* Exception Does Not Require That All Conduct at Issue Occur on the Reservation.

While acknowledging their consensual relationships with the Tribal Parties, Stifel and Saybrook contend that the tribal court can exercise jurisdiction only over those aspects of the relationships involving on-reservation conduct by them. *See* Stifel Br. 32-34; Saybrook Br. 15-18. For example, Stifel contends that even if its representatives came to the Reservation and cajoled the Tribal Parties into executing the Bond Documents, the tribal court may regulate only Stifel's conduct *at the meeting* where the Bond Documents were approved. Stifel Br. 32. Likewise, Saybrook suggests that the Tribe could regulate only its conduct during its due-diligence visit to vet the Bond Transaction, but not the direct result of that visit—the Bond Transaction itself. Saybrook Br. 15-18. And Wells Fargo argues that, despite taking cash from the tribal casino on a daily basis, it engaged in no on-reservation "conduct" at all. Saybrook Br. 18.[18]

These arguments would gut the first exception, and the cases Saybrook and Stifel cite are distinguishable. They generally involve situations where tribes are attempting

[18] The district court made no factual findings whatsoever regarding Wells Fargo. *See generally* A-01-81. In fact, the Corporation's bank account from which Wells Fargo daily swept Casino revenues under the Bond Documents is on tribal trust land. *See* Aff. of Z. Mayo, Ex. 249 to Tribal Parties Revised Exhibit List for Preliminary Injunction Hearing, Dkt. 153.

to regulate what nonmembers do *off-reservation*, not situations where a tribe is regulating how a nonmember interacts with the tribe or accesses on-reservation tribal resources. *Jackson*, cited by both Stifel and Saybrook, is a good example. Other than involving a corporation owned by a tribal member who happened to live on a reservation, the case had virtually nothing to do with an Indian reservation, and *nothing* to do with a tribal government or tribal laws. *Jackson*, 2014 WL 4116804. *Philip Morris USA, Inc. v. King Mt. Tobacco Co., Inc.*, 569 F.3d 932 (9th Cir. 2009), cited by Stifel is also distinguishable. The Ninth Circuit found that the Yakama tribal court could not exercise jurisdiction over claims by a tribal-member-owned tobacco company for a declaratory judgment that it had not infringed on Philip Morris's trademark because the suit involved determinations about whether King Mountain had distributed cigarettes nationwide and Philip Morris had no consensual relationship with the tribal-member-owned tobacco company. *Id.* at 943. The present case differs significantly from those suits because the center of the Bond Transaction is on tribal trust land and the center of the tribal-court action is the Tribal-Court Defendants' consensual relationships with the Tribal Parties.

Contrary to the Tribal-Court Defendants' assertions, non-reservation-based parties who enter into consensual relationships with tribes and tribal members can be hailed into tribal court to litigate those relationships. *See Laducer*, 725 F.3d 877; *see also Dish Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437 (D. Ariz. Nov. 1,

2012) (tribal court had a colorable claim to jurisdiction against Dish Network to enforce regulations requiring tribal business licenses even though Dish Network was based off the reservation, provided services from off the reservation, and only entered the reservation at the time of installation of the satellite decoder boxes on the members' homes); *Luckerman v. Narragansett Indian Tribe*, 965 F. Supp. 2d 224, 231 (D.R.I. 2013) (colorable claim to tribal-court jurisdiction over contract dispute between off-reservation-based nonmember attorney and tribe because attorney "reached out to the reservation by entering into a consensual relationship with the Tribe, and, accordingly, the tribal court has at least a colorable claim of jurisdiction over suits arising from that relationship."); Tribal Br. 36-38. Here, Stifel and Saybrook reached out to the Tribal Parties on their reservation and established a consensual relationship with them, the Bond Transaction. The tribal court therefore has a colorable claim of jurisdiction over the tribal-court action, which arises directly from that transaction.

E. The Tribal Court Has Jurisdiction over the Tribal-Court Action because the Tribal-Court Defendants' Actions—Entering into and Enforcing the Bond Documents—Imperil the Tribal Government.

Under *Montana's* second exception (assuming *Montana's* main rule applies), the tribal court can exercise jurisdiction "when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 342 (quoting *Montana*, 450 U.S. at 566). The Tribal-Court Defendants do not dispute that the Bond Transaction wreaked catastrophic financial

consequences of on the Tribe's government and members in 2009, or that the same consequences will occur again if the Bond Documents are enforced. Tribal Br. 12-14.

Rather, they contend that the second exception permits tribes to regulate only certain *kinds* of conduct. Stifel Br. 36; Saybrook Br. 20. They base this argument on the list of examples the Supreme Court used when it established this exception in *Montana*. But that list is not exclusive. For example, the Supreme Court upheld tribal jurisdiction under the second exception over zoning (which was not on the list). *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 444 (1989). And multiple courts, including this one, have upheld tribal environmental regulations (also not on the list) under the second exception. *See Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998); *Wisconsin v. EPA*, 266 F.3d 741, 748-50 (7th Cir. 2001).

These environmental cases are also significant because they recognize that, contrary to Stifel's and Saybrook's contentions, even a nonmember's off-reservation actions can meet the second exception. *See Wisconsin v. EPA*, 266 F.3d at 750; *see also City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir.1996) (confirming that tribe could enact more stringent water-quality standards than the state, even though they would apply to upstream off-reservation water usage). Moreover, as discussed in the Tribal Parties' opening brief at 1-14, Stifel and Saybrook *did* engage in on-reservation conduct and the tribal-court action seeks to prevent them from engaging in even more by enforcing the

invalid agreements (purporting, for example, to give them rights to enter the Tribe's trust property and remove the collateral, *see, e.g.*, Tribal Agreement at SA-0280).

V. The Tribal Parties Are Immune From this Suit.

A. Intent to Waive, without a Valid Waiver, Is Insufficient.

The Tribal-Court Defendants insist that the Tribal Parties clearly intended to waive their sovereign immunity and that nothing more must be examined. Godfrey Br. 45-47, Saybrook Br. 22-24[19]. But waivers must be strictly construed, with the waiver examined to determine what parties and what claims it covers. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1658, 179 L. Ed. 2d 700 (2011); *Orff v. United States*, 545 U.S. 596, 601-02 (2005); *Seneca-Cayuga Tribe of Okla. v. Okla. ex rel. Thompson*, 874 F.2d 709, 715 (10th Cir. 1989).

Even where a tribe waives immunity, it sets the limits of the waiver with any doubts as to the waiver's scope resolved in favor of preserving immunity. *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (citing *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)); *see also Sossamon*, 131 S. Ct. at 1658; *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156 (7th Cir. 1983). For example, in *Coleman*, this Court recognized that "[i]t is elementary that when consent to sue [a sovereign] is granted, the precise terms, conditions, and qualifications of such consent must be scrupulously followed." *See Coleman*, 715 F.2d at 1161.

[19] Stifel incorporated Saybrook's arguments on this point. Stifel Br. 37.

Moreover, *Wells Fargo*'s direction to look for intent did not disturb its holding that waivers contained in void documents are void.[20] 658 F.3d at 702. When this Court remanded the case to the district court with directions to examine intent to waive contained in the various Bond Documents, it did not indicate that waivers should be enforced *even if* the documents containing such waivers were void as unapproved management contracts, either individually or collectively. *Id*. Nor did this Court indicate that other standards imposed on waivers of sovereign immunity—e.g., strict construction in favor of the sovereign, contained with valid documents—no longer need apply. *Id.* The Tribal-Court Defendants' insistence that "intent" alone is sufficient to effectuate waiver would require this Court to overrule its precedent. *Id.*

B. If the District Court Wished to Discern the Tribal Parties' Intent, It Should Not Have Ignored Stifel's Fraud.

The Tribal-Court Defendants do not address the Tribal Parties' argument that any examination of the Tribal Parties' intent to waive their immunity must consider Stifel's fraud. *See Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 07-C-0012-C, 2007 WL 3287848, at *7 (W.D. Wis. Nov. 7, 2007) *rev'd on other grounds*, 557 F.3d 469 (7th Cir. 2009), *as amended* (Mar. 18, 2009) (stating that the court may consider the parties' conduct, negotiations, and the transaction's circumstances to determine the parties'

[20] Godfrey attempts to recast the forum-selection clauses as stand-alone waivers, but like waivers in void documents, forum-selection clauses in void documents are also void.

intent) (internal citations omitted); *C&B Invs. v. Wis. Winnebago Health Dept.*, 198 Wis. 2d 105, 108, 542 N.W.2d 168 (1995) ("[A] surrender of sovereign immunity by a nation must be advertent."). If the Bond Documents were fraudulently induced they cannot "evince an intent on the part of the [Tribal Parties] to waive sovereign immunity[.]" *Wells Fargo*, 658 F.3d at 702. Thus, Stifel's fraud is not only relevant to the enforceability of the waivers, *see supra* at 5-7, it also negates the Tribal Parties' purported intent to waive their immunity relied on so heavily by the Tribal-Court Defendants.

C. The Resolutions Do Not Waive the Tribal Parties' Immunity from this Case.

1. The District Court's Decision Was Limited to the Resolutions.

The district court recognized that the scope of the various Bond Documents' purported waivers "are not consistent[,]" A-18 n.18, but only addressed the scope and validity of the two Resolutions in its ruling. A-40-46. This Court's review of that decision is similarly circumscribed.[21] *See Baker v. Kingsley*, 387 F.3d 649, 659-60 (7th Cir. 2004); *see also Eragen Biosciences, Inc. v. Nucleic Acids Licensing LLC*, 540 F.3d 694, 702 (7th Cir. 2008). The Court should accordingly reject the Tribal-Court Defendants' reliance on other Bond Documents for sovereign-immunity waivers. Saybrook Br. 22-23; Godfrey Br. 54-60.

[21] If this Court finds that other Bond Documents contain possible waivers, the case should be remanded for decision on the validity of those documents and the scope of their purported waivers because the district court has not had an opportunity to interpret the other Bond Documents. *See Baker*, 387 F.3d at 659-60 (7th Cir. 2004); *see also Eragen Biosciences, Inc.*, 540 F.3d at 702.

2. The District Court Did Not Strictly Construe the Resolutions.

When examining the Resolutions, the district court failed to follow controlling law requiring it to strictly construe waivers of immunity. *Sossamon*, 131 S. Ct. at 1658; *Orff*, 545 U.S. at 601-02; *Coleman*, 715 F.2d at 1161. *First*, neither Resolution waived the immunity of the Tribal Parties. By their terms, they "approved" the Tribal Parties' respective execution of waivers of immunity in *other* documents, Tribal Br. 42-46; SA-0274; SA-0286, a distinction this Court recognized in *State of Wis. v. Baker*, 698 F.2d 1323, 1331-32 (7th Cir. 1983). Godfrey does not address this at all. Saybrook's attempt to do so garbles immunity principles. Saybrook Br. 24. Contrary to Saybrook's claims, *Baker* did not hold that a band lacked immunity—it held that the band's *officials* lacked immunity in an *Ex Parte Young* suit. *Id.* at 1333. This case is not an *Ex Parte Young* suit. *Baker* then went on to note that, even if the Band could waive immunity after judgment, the resolution in question "purport[ed] only to delegate to defendants' appellate attorneys the power to waive the Tribe's immunity," which was not an actual waiver of immunity from suit. *Id.* at 1331-32. The Resolutions here similarly provided authority to waive immunity, but did not waive immunity themselves.

Second, finding broad waivers in the Resolutions cannot be squared with the inclusion of separate narrow waivers throughout the Bond Documents. Analyzing similar documents in a contemporaneous Indian-gaming-bond case, the district court noted that the divergent sovereign-immunity waivers in its bond documents "give

rights to different parties and deal with controversies arising from different sets of bond documents." *Lac Courte Oreilles Band*, 2014 WL 2801236, at *15. The Tribal-Court Defendants cannot reconcile that decision with the order under review. Nor can they explain why the district court's reading of the Resolutions' waivers in this case would not render the separate waivers superfluous. *See Sonday v. Dave Kohel Agency, Inc.*, 2006 WI 92, ¶ 21, 293 Wis. 2d 458, 471, 718 N.W.2d 631, 637.

Third, the district court did not "scrupulously follow[]" the Resolutions' "precise terms, conditions, and qualifications[.]" *Coleman*, 715 F.2d at 1161. The Tribal-Court Defendants do not address the fact the Resolutions state that they "shall constitute a contract with the Trustee," and that none of them is the "trustee" to which the waiver of immunity is limited.[22] A-43-44.

Fourth, to support the district court's ruling that the Resolutions allow any suit arising out of the Bond Transaction, the Tribal-Court Defendants rely on cases interpreting arbitration clauses, all of which hinged on the law's presumption in favor of arbitration. Godfrey Br. 25 (citing *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l,*

[22] Under the plain text of the clauses, none of the Tribal-Court Defendants have standing to enforce the forum-selection clauses of either Resolution. Both expressly state that they constitute "contract[s] with the Trustee," not Saybrook, Stifel, or Godfrey. SA-0247; SA-0287. Moreover, "[a]n indenture trustee's responsibilities and powers are strictly limited by the terms of the governing indenture[.]" 69 Am. Jur. 2d Securities Regulation—Federal § 805. The district court believed that Wells Fargo may be a *de facto* trustee of a resulting trust, A-69, but if a resulting trust arose, it only allows Wells Fargo to "hold . . . title for the benefit of another." 90 C.J.S. Trusts § 122. So even if Wells Fargo is a *de facto* trustee, it cannot enforce or fulfill the Trustee's *contract* rights.

Ltd., 1 F.3d 639 (7th Cir. 1993)); Saybrook Br. 25. For example, Saybrook relies upon this Court's opinion in *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634, 639 (7th Cir. 2002). *MedQuist* involved an arbitration provision, however, and as this Court noted such clauses are to be construed with a very strong pro-arbitration tilt. *Id.* at 639. *Sweet Dreams* is similarly irrelevant because its decision was expressly couched "in the light of the heavy presumption in favor of arbitration[.]" 1 F.3d at 643. There is no such presumption in favor of finding a waiver of sovereign immunity; on the contrary the presumption is toward preserving immunity. *Orff*, 545 U.S. at 601-02. These arbitration cases are not persuasive here.

D. The Resolutions Are Void as Part of an Unapproved Management Contract.

The Tribal-Court Defendants ask this Court to read the Bond Documents together to discern whether the Tribal Parties waived their immunity, but to read the Bond Documents in isolation to determine whether they allow for management of the Tribe's casino. The law requires the opposite. As noted, sovereign-immunity clauses must be narrowly construed in favor of the sovereign. Under IGRA, a set of agreements must be reviewed together so parties cannot escape management-contract approval by spreading management terms across many agreements. Allowing unapproved management through multiple agreements is precisely the improper result the Tribal-Court Defendants seek by viewing the Resolutions in isolation.

1. Reading the Resolutions in Isolation Contravenes Relevant NIGC Agency Practices and Would Undermine IGRA.

The Tribal-Court Defendants argue that the Bond Documents should be read separately, not as a single transaction, to decide if they comply with IGRA. Saybrook Br. 27-28; Godfrey Br. 55-56; A-40-41. But as this Court noted, a document is subject to agency approval even if it provides for only partial management of a gaming operation. *Wells Fargo*, 658 F.3d at 702. Even the district court recognized that "a contract may be void not because its own terms impinge on casino management, but because the terms of other interrelated documents or agreements do." A-40. The Tribal Parties accordingly introduced testimony from former NIGC officials regarding the agency's practice of construing the interrelated Bond Documents together to determine if they constitute a management contract.

Lacking its own expert testimony regarding NIGC agency practices, Saybrook attacks the testimony of the former NIGC officials, all of whom spent years reviewing management contracts for that agency.[23] Saybrook Br. 28-30. But this Court previously recognized that evidence of NIGC practices was relevant to evaluating these issues,

[23] Neither of Godfrey's proffered experts ever worked at the NIGC. *See* Supp. SA-001-18. Indeed, Ms. Appleby has never even submitted documents to the NIGC. Supp. SA-001-10. Without firsthand knowledge, these "experts" offer only legal opinions that were stricken by the District Court and not properly raised here.

Wells Fargo, 658 F.3d at 695-97, and the district court did not exclude the agency-practice opinions despite the Tribal-Court Defendants' relevance objections, A-39-40.

Saybrook argues that an "informal agency practice" cannot take precedence over the NIGC's voiding regulation, but this argument erroneously assumes the NIGC's practices conflict with the regulation. Saybrook Br. 30. Instead, the declination process is entirely consistent with the regulation promulgated by the NIGC and interpreted by this Court in *Wells Fargo*. The declination process provides this Court with insight into how the NIGC would view the Bond Documents together, not in isolation. Tribal Br. 51-53.

The Tribal-Court Defendants also fail to explain how construing the Resolutions apart from the rest of the Bond Transaction would not remove the "teeth" of the NIGC approval requirement. Contrary to Saybrook's assertions, Saybrook Br. 28, the reasoning behind the result in *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986) is also applicable here. Just as picking and choosing provisions from one contractual document to avoid voiding the entire document would "hobble the statute," so too would picking and choosing among the interrelated documents of a single transaction. Godfrey concedes as much, agreeing that the Indian-gaming industry should "rightly be concerned" about attempts to circumvent IGRA by hiding management provisions throughout a transaction to camouflage their effect. Godfrey Br. 57. Godfrey argues, however, that this issue is a "straw man" argument

because the facts here do not demonstrate that the Tribal-Court Defendants seek piecemeal enforcement of the Bond Documents. But that is exactly what the Tribal-Court Defendants maintain this Court should do. Godfrey Br. 54-60; Saybrook Br. 21-37; Stifel Br. 37.

Saybrook also relies on this Court's statement 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." Saybrook Br. 27-28. This Court went on to say, however, "In our view, the mere reference to a related management contract does not render a collateral document subject to the Act's approval requirement." *Wells Fargo*, 658 F.3d at 701 (internal citation, quotation, and alteration omitted). The Resolutions do not "merely reference" the Indenture and the other Bond Documents; they make clear that the Indenture is the center of the Transaction and authorize the Indenture and the other Bond Documents. They are the enabling authority without which the Tribal Parties could not have entered into the remaining Bond Documents (including the now-void Indenture). Tribal Br. 56-58.

2. Reading the Resolutions in Isolation Contradicts Wisconsin Law.

If the Court applies Wisconsin contract law to the Bond Transaction, the Tribal Court-Defendants do not contest that Wisconsin law construes the Bond Documents together, not as separate stand-alone agreements. *See James Talcott, Inc. v. P & J Contracting Co.*, 27 Wis. 2d 68, 133 N.W.2d 473, 477 (1965); *see also Seaman v. McNamara*,

180 Wis. 609, 193 N.W. 377, 380 (1923) (stating that "although in form there were [multiple] writings, there was in fact one agreement" in construing mortgage and note as a single instrument); *see also, e.g., Harris v. Metro. Mall*, 112 Wis. 2d 487, 334 N.W.2d 519, 523 (1983); Restatement (Second) of Contracts § 202(2) (1981).

The Tribal-Court Defendants also do not refute that Saybook stated that it would not have entered into the Bond Transaction if it had known that *any* component Bond Document was invalid, *see* Tribal Br. 50, offering further support for the notion that the Tribal-Court Defendants themselves sought an all-or-nothing transaction. Saybrook's argument now that the management provisions it insisted on spreading throughout the Bond Documents should be read apart from each other is not persuasive.

As the district court recognized, "if the Bond Documents are void, so too are the waivers of sovereign immunity contained within them." A-38. The Resolutions are part of one take-it-or-leave-it Bond Transaction that permits casino management. It was not approved by the NIGC, so it is void under IGRA.

E. The Tribal Resolution Is Itself a Void Unapproved Management Contract.

The district court held that the Tribal Resolution's requirement that the Tribe obtain Bondholder approval to replace any key management at the Casino, SA-0285, was not *enough* management to make it a "management contract."A-45-46. But the premise that the Tribal Resolution must cross an undefined threshold of "sufficient" management to offend IGRA is flat wrong. *Compare* Saybrook Br. 34 *with First Am.*

Kickapoo Operations, L.L.C. v. Multimedia Games, Inc., 412 F.3d 1166, 1175 (10th Cir. 2005) ("[T]he regulations' definition of a management contract as an agreement that provides for the management of 'all or part' of a gaming operation suggests a definition that is partial rather than absolute, contingent rather than comprehensive.") (quoting 25 C.F.R. § 502.15); *New Gaming Sys., Inc. v. Nat'l Indian Gaming Comm'n*, 896 F. Supp. 2d 1093, 1102 (W.D. Okla. 2012) (citing *Wells Fargo*, 658 F.3d at 694-99).

In any event, the ability to replace key management gives the Bondholders the practical ability to plan, control, and direct the Tribe's casino operations. Any attempt to distinguish control over key management from direct management is meaningless. *Contra* Saybrook Br. 31. Indeed, the Tribal Resolution's provision fits exactly the definition of "management" provided by Saybrook, which is governed by the regulatory definition of a primary management official. *Id.* As in *Machal, Inc. v. Jena Band of Choctaw Indians*, a joint-approval requirement affords management responsibility by preventing the Corporation from selecting its own leadership. *See* 387 F. Supp. 2d 659, 667-68 (W.D. La. 2005) (clauses in the Co-Managers Agreement affording: (1) joint-approval rights concerning construction, design, and naming; and (2) allowing an outside entity to co-select the bank for gaming-revenue deposits "[e]ach" assign management responsibility); *see also* Tribal Br. 57-58.

Saybrook's unsupported argument that a "resolution" cannot be a "management contract" under IGRA is also nonsensical. Saybrook Br. 33. Under Saybrook's logic,

parties could avoid IGRA's strictures entirely by legislating management rights instead of contracting for them, with the resulting resolutions enforceable against the tribes but not against the entities who negotiated for illegal management provisions—even when the tribe carefully limits the resolution to be a contract with a specific party (e.g., a trustee). That is not the law. SA-0393-94 (focusing on management substance, not naming form).

VI. The NIGC's Voiding Regulation Is Valid under *Chevron*.

To avoid compliance with IGRA, Saybrook attacks the NIGC's regulation, 25 C.F.R. § 533.7, mandating that unapproved management contracts are void. Saybrook Br. 35-37. Saybrook argues that 25 U.S.C. § 2711(f), which provides that the NIGC "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[,]"makes management contracts "merely 'voidable'" rather than "void[.]" Saybrook Br. 35. But this misinterprets the statute.

To review an agency's interpretation of a statute, the first question is: "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). In this case, IGRA requires approval of management contracts, 25 U.S.C. §§ 2710(d)(9), 2711(a)(1), but does not explicitly say that unapproved management contracts are either voidable or void.

Section 2711(f), on which Saybrook relies, requires that if the Chairman approves a management contract, he must hold a hearing before he voids a contract that he "subsequently determines" violates the statute. But it does not address contracts that were never approved in the first place. In *New Gaming Systems*, a gaming-machine vendor contended that the Chairman violated IGRA by declaring an unapproved machine-leasing agreement void without a hearing. The NIGC argued that § 2711(f) required a hearing only if the Chairman was taking action to void a previously approved contract, and the court agreed: "As explained by the Commission, § 2711(f), by its terms, 'applies only in those situations where the Chairman reaches out and voids or modifies a contract he already approved.'" *New Gaming Sys.*, 896 F. Supp. 2d at 1101 (quoting the administrative record). Indeed, if § 2711(f) were interpreted to apply to an initial determination concerning whether a management agreement should be approved, the word "subsequently" would have no meaning at all. *Cf. Rake v. Wade*, 508 U.S. 464, 471 (1993) (proper statutory construction requires courts to accord significance and effect to "every word").

Under *Chevron*'s second step, where, as here, a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The NIGC's regulation easily meets this test. In *Wells Fargo*, this Court examined Congress's intent in IGRA in depth and found that ensuring NIGC review and approval

of management contracts was key to effectuating that purpose. *Wells Fargo*, 658 F.3d at 700. Congress also expressly delegated "to the Commission the task of 'promulgat[ing] such regulations and guidelines as it deems appropriate to implement the provisions of [IGRA].'" *New Gaming Sys.*, 896 F. Supp. 2d at 1101 (alterations in original) (quoting 25 U.S.C. § 2706(b)(10)). The NIGC's voiding regulation supports Congress's intent and is based on a permissible reading of the statute, so it withstands scrutiny under *Chevron.*

VII. The District Court Lacked Jurisdiction over Godfrey's Claim and Godfrey Lacks Standing to Rely on the Forum-Selection Clauses.

Godfrey advances a variety of meritless arguments in an attempt to manufacture federal jurisdiction over its claim. This Court should reject Godfrey's federal-question and supplemental jurisdiction arguments because they are unsupported by the law. This Court should also reject Godfrey's reliance on purported forum-selection clauses that it lacks standing to enforce.

A. Godfrey's Arguments that the District Court Had Federal-Question Jurisdiction over its Claim Are Meritless.

Godfrey does not, and cannot, dispute that it is subject to the Tribal Court's jurisdiction because Godfrey was the Tribe's *general counsel*, and the Tribal Parties' counsel in the Bond Transaction, and Brian Pierson, the principal Godfrey partner in acting in these capacities, was a member of the tribal-court bar. Dkt. 1-6, SA-1061-63. Faced with these facts, Godfrey waived by stipulation any argument that the tribal court lacked jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981). A-54 n.9;

SA-0968-69. The district court accordingly concluded that it lacked federal-question jurisdiction over Godfrey's claim, but could nevertheless exercise supplemental jurisdiction over it. A-61-76.

All the Tribal-Court Defendants filed one complaint alleging one cause of action. Although the district court erred in finding that federal-question jurisdiction existed as to Stifel and Saybrook's claims, it was correct that no federal question existed with respect to Godfrey. Godfrey claims that holding was in error. Godfrey argues that the district court erred because whether a tribe has waived sovereign immunity, in and of itself, presents a federal question. Godfrey Br. 33. The Supreme Court, however, has said the opposite. *Okla. Tax Comm'n*, 489 U.S. at 841. ("Tribal immunity . . . does not convert a suit otherwise arising under state law into one which . . . arises under federal law.") In fact, Godfrey cited *Oklahoma Tax Commission* when it argued to the district court in earlier proceedings that "the defense of tribal sovereign immunity is not enough to create federal question jurisdiction" to the district court. Dkt. 67 at 22 n.14. The Court should follow this controlling precedent and ignore Godfrey's current position on the matter.

Lacking any supporting caselaw on point, Godfrey looks far afield to several cases in which the Supreme Court held that the waiver of U.S. Constitutional rights and the conflict between state law and the Constitution presents a federal question. Godfrey Br. 33-34 (citing *Brookhard v. Janis*, 384 U.S. 1 (1966); *Lapides v. Board of Regents*, 535 U.S.

613 (2002); and *Union Pac. Ry. Co. v. Pub. Serv. Comm'n of Mo.*, 248 U.S. 67 (1918)). These cases miss the mark by a wide margin. None has anything to do with federal Indian law and there is nothing in them to suggest that they control whether the waiver of a tribe's immunity raises a federal question. None overrides the Supreme Court's unambiguous statement that the issue of tribal immunity does not convert a state law case into a federal case. *Okla. Tax Comm'n*, 489 U.S. at 841.

Godfrey also fails to find support in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), *QEP Field Services Co.*, 740 F. Supp. 2d 1274, and *Ninigret Development Corp.*, 207 F.3d 21, to support its argument that a complaint seeking to enforce forum-selection clauses presents a federal question. In *Aspaas*, the Ninth Circuit found there was federal-question jurisdiction because "APS has alleged that certain Navajo officials violated federal law by acting beyond the scope of their authority" and so presented a federal question under *National Farmers* because "the issue of the tribal authority to regulate a non-Indian issue is a federal question." *Aspaas*, 77 F.3d at 1134. Similarly in *QEP*, the tribal court acted by issuing an injunction, and the federal question was whether the injunction violated federal law. *QEP Field Servs. Co.*, 740 F. Supp. 2d at 1279. In both cases, the non-tribal parties' complaints alleged that the tribal court did *something* that exceeded its authority under federal law. The Complaint here, however, does not allege any facts demonstrating that a tribal actor was acting outside of its authority; it only seeks to enforce contract clauses.

Likewise in *Ninigret*, the non-Indian construction company alleged that a tribal council had exceeded its authority under federal law when it issued a decision holding the company liable for damages. *Ninigret Dev. Corp.*, 207 F.3d at 26. The First Circuit held that this was sufficient to trigger the district court's jurisdiction, later emphasizing in support of its decision to require tribal-court exhaustion: "the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract." *Id* at 33. Here, in contrast, the only facts in the Complaint are directed to the allegation that the tribal court lacked jurisdiction under contractual forum-selection clauses, but breach-of-contract claims do not present a federal question.

B. The District Court also Lacks Supplemental Jurisdiction over Godfrey's Claim.

Because "original jurisdiction" is a prerequisite to supplemental jurisdiction under 28 U.S.C. § 1367(a), and the district court lacked federal-question jurisdiction, *supra* at 3-4, the district court could not have had supplemental jurisdiction over Godfrey's claim. This ends the supplemental jurisdiction inquiry. *See* 28 U.S.C. § 1367(a) (limiting grant of supplemental jurisdiction to "any civil action of which the district courts have original jurisdiction.").

In the alternative, if one were to assume, *arguendo*, that the district court had federal-question jurisdiction over the Complaint, then there cannot be a state-law claim over which the district court could assert supplemental jurisdiction because the

Complaint asserts only one claim for declaratory judgment. SA-0020-21. If the Court determines that claim presents a federal question over which the district court had "original jurisdiction" under 28 U.S.C. § 1367(a), then that sole claim cannot also be a claim over which the district court has supplemental jurisdiction. Thus, even if the district court had federal-question jurisdiction over the Complaint (it did not), it cannot have supplemental jurisdiction over the Complaint because it only asserts one claim for relief.

Because the district court lacked federal-question jurisdiction and supplemental jurisdiction over Godfrey's claim, this Court need not reach the issue of whether the district court erroneously exercised its discretion not to enjoin the Tribal Parties with respect to Godfrey.

C. Godfrey Lacks Standing under the Forum-Selection Clauses.

In the face of these jurisdictional problems, Godfrey turns to the forum-selection clauses in the Bond Documents. Godfrey's repeated reliance on these clauses is misplaced because it lacks standing to enforce them. Godfrey did not bargain for forum-selection rights in the Bond Documents *or* in the general-counsel contract that governed its relationship with the Tribal Parties. SA-1061-62. And as the district court recognized, allowing lawyers to enforce forum-selection clauses *against their own clients* would raise serious public-interest concerns. A-72 n.19. Adopting the "closely related" test Godfrey advances, Godfrey Br. 28-29, would place the interests of drafting

attorneys in conflict with their clients' interests by encouraging attorneys to include forum-selection clauses that may benefit the attorneys at the expense of their clients.

But the district court "le[ft] open" this question, A-72 n.19, reasoning—without supporting authority—that because the Tribal Parties obliged Godfrey to defend the Bond Documents' validity in tribal court, Godfrey must be able to assert the forum-selection clauses. A-72 n.20. That, however, is not the law. In *Adams v. Raintree Vacation Exchange LLC*, this Court recognized the vagueness of the "closely related" test and clarified that it includes only two situations: affiliation and mutuality. 702 F.3d 436, 439 (7th Cir. 2012). Neither applies to Godfrey.

Under the first prong, a nonparty must be an affiliate—typically a parent or subsidiary company—of a party to the contract. *Id.* at 439-40; *Hugel v. Corp. of Lloyds*, 999 F.2d 206, 210 (7th Cir. 1993). Godfrey cannot and does not argue that it owns or is owned by any of the other parties to the transaction.

Under the second "mutuality" prong, this Court has allowed a "secret principal," *Freitsch v. Refco, Inc.*, 56 F.3d 825, 827 (7th Cir. 1995), and "co-conspirator," *Adams*, 702 F.3d at 442-43, to enforce the forum-selection clause of its partner or puppet. But unlike in *Bugna v. Fike*, where the plaintiff alleged that its attorney "*conspired with*" the defendants with the forum-selection clause, 80 Cal. App. 4th 229, 235 (Cal. Ct. App. 2000) (emphasis in original), neither the Tribal Defendants nor any other party to this litigation alleges that Godfrey conspired with any other party. Without that connection,

an attorney is not "closely related" because there is no allegation that the attorney "controlled" the contracting party.[24] *Adams*, 702 F.3d at 443; *cf. Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1106 (6th Cir. 1997) (where attorneys did not assert that they conspired with contracting party, attorneys could not enforce contracting party's forum-selection clause). Every case Godfrey cites allowing a third-party to enforce forum-selection clauses involved either actual or alleged control over or conspiracy with the party to whom the forum-selection rights ran. *Hugel*, 999 F.2d at 210; *Adams*, 702 F.3d at 442-43; *Frietsch*, 56 F.3d at 827-28; *Bugna*, 80 Cal. App. 4th at 235. The case not allowing third-party enforcement did not involve conspiracy or control. *Baker*, 105 F.3d at 1106. This case is like the latter, barring Godfrey's reliance on any forum-selection clauses.

CONCLUSION

This Court should reverse the lower court, vacate its Order and dismiss this case for lack of jurisdiction. In the alternative to dismissal, this Court should direct the district court to stay the case pending tribal-court exhaustion.

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[24] The district court believed that *Adams* did not limit mutuality to secret principals, but its quotation from *Adams* removed this Court's reference to "conspiracy." A-70 n.17. Moreover, even with this deletion, *Adams* emphasized "control[]" as an essential element of the "closely related" test. *Id.* (quoting *Adams*, 702 F.3d at 443). No party has ever argued that Godfrey could control any other Tribal-Court Defendant. Moreover, there is no evidence that, if Godfrey sued the Tribal Parties, the Tribal Parties could enforce any Bond Document's forum-selection clause against Godfrey. *Contra* A-70 n.17.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Reply and Response Brief of Defendants-Appellants/Cross-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2014, the Reply and Response Brief of Defendants-Appellants/Cross-Appellees was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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