IN THE COURT OF THE
LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS
LAC DU FLAMBEAU RESERVATION

Lake of the Torches Economic Development Corporation and Lac du Flambeau Band of Lake Superior Chippewa Indians,

Plaintiffs,

v. No. 13 CV 115

Saybrook Tax Exempt Investors, LLC; LDF Acquisition, LLC; Stifel, Nicolaus & Company, Inc.; Stifel Financial Corporation; Godrey & Kahn, S.C.; and Wells Fargo Bank, N.A.,

Defendants.

Matthew L.M. Fletcher, *Judge Pro Tempore*[1]

ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND RELATED MATTERS

[1] *See* LAC DU FLAMBEAU BAND TRIBAL CODE § 80.103(3) (providing for the selection of judges pro tempore).

Introduction

The Court denies the three motions to dismiss the Statement of Claim brought by the plaintiffs and a related motion to stay the proceedings pending the outcome of federal and state court litigation. It is important to note that this Order is not a complete resolution of the complex jurisdictional questions raised by the defendants in the motions to dismiss, nor is this Order a resolution of the merits of the Statement of Claim. This Order is merely a decision that the plaintiffs' Statement of Claim has alleged material facts not admitted by the defendant that establish this Court's jurisdiction under tribal law, the relevant contracting documents, and federal Indian law.

Because the plaintiffs have alleged jurisdictional facts sufficient to survive a motion to dismiss on the pleadings, the Court will not at this time address the substantive merits of the Statement of Claim; namely, whether the transaction documents at issue are void. The fact that the Court has analyzed and reviewed the transaction documents for purposes of the defendants' motions to dismiss is not a judgment about the validity of the transaction documents, with the exception of one document. At this time, the Court expresses no opinion on the substantive merits of the plaintiffs' Statement of Claim.

Procedural History

On April 25, 2013, Plaintiffs Lac du Flambeau Band of Lake Superior Chippewa Indians ("Band" or "Tribe") and the Lake of the Torches Economic Development Corporation ("EDC") (collectively, "Tribal Parties") filed a Statement of Claim in accordance with LAC DU FLAMBEAU BAND TRIBAL CODE § 80.310. On May 24, 2013, Defendants Saybrook Tax Exempt Investors, LLC; LDF Acquisition, LLC; and Wells Fargo Band, N.A. (hereinafter "Saybrook") filed a Special and Limited Appearance and Motion to Dismiss for Lack of Jurisdiction, and accompanying brief ("Saybrook Motion to Dismiss").[2] Also on May 24, 2013, Defendants Stifel Nicolaus & Company, Inc. and Stifel Financial Corporation (hereinafter "Stifel") filed a Motion to Adopt Federal Rule of Civil Procedure 12(b)(1) and Motion to Dismiss Plaintiffs' Statement of Claim for Lack of Jurisdiction Or, In the Alternative, to Stay Proceedings, and an

[2] Saybrook attached a document to its Motion to Dismiss titled "Plaintiffs Saybrook and Wells Fargo's Brief in Support of Their Rule 65 Motion for Preliminary Injunctive Relief" in a pending federal court case captioned *Stifel, Nicolaus & Company, Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 13-CV-372 (W.D. Wis.), that it requests this Court treat as a memorandum in support of its motion. *See* Saybrook, Special and Limited Appearance and Motion to Dismiss for Lack of Jurisdiction at 2.

accompanying brief ("Stifel Motion to Dismiss"). Similarly, Defendant Godfrey & Kahn, LLC (hereinafter "Godfrey") filed a Notice of Special Appearance for Purpose of Contesting Jurisdiction, and accompanying brief ("Godfrey Motion to Dismiss"). On July 3, 2013, Plaintiffs filed a Tribal Parties' Combined Memorandum Opposing Defendants' Motion to Dismiss ("Tribal Memorandum"). On August 5, 2013, Saybrook filed its reply brief, Defendants Saybrook and Wells Fargo's Reply to Tribal Parties' Combined Memorandum Opposing Defendants' Motion to Dismiss ("Saybrook Reply"). On August 6, 2013, Godfrey filed its reply, Defendant Godfrey & Kahn, S.C.'s Reply Brief in Support of Its Motion to Dismiss Plaintiffs' Statement of Claim for Lack of Subject Matter Jurisdiction ("Godfrey Reply"), and Stifel filed one as well, its Reply Brief of Stifel, Nicolaus & Company, Inc. and Stifel Financial Corporation in Support of Motion to Dismiss Plaintiffs' Statement of Claim for Lack of Jurisdiction or, In the Alternative, to Stay Proceedings ("Stifel Reply").

The Tribal Parties' Statement of Claim arises from contractual obligations that the Tribal Parties alleges "are illegal and unenforceable under the Tribe's Gaming Control Ordinance and the Indian Gaming Regulatory Act...." Statement of Claim ¶ 1. According to the Tribal Parties, these contractual obligations are memorialized in a "Trust Indenture,"[3] and other related documents including a "Bond Purchase Agreement,"[4] a "Lake of the Torches Economic Development Corporation Resolution No. 1(08)" ("Bond Resolution"),[5] a "Tribal Agreement,"[6] a Lac du Flambeau Band of Lake Superior Chippewa Indians Resolution No. 1(08) ("Tribal Resolution"),[7] a "Limiting Offering Memorandum,"[8] the "Bonds,"[9] and other documents. *Id.* at ¶¶ 3-4. The documents involve a complicated and massive commercial transaction involving the parties and the development of gaming and other economic development opportunities in Natchez, Mississippi. *See Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 688-89 (7th Cir. 2011) ("Several years ago, the Tribe decided to diversify its operations by investing in a project to build a riverboat casino, hotel and bed and breakfast in Natchez, Mississippi. In order to secure funding for that investment and to refinance $27.8

[3] Statement of Claim, Exhibit 1.
[4] Statement of Claim, Exhibit 2.
[5] Statement of Claim, Exhibit 3.
[6] Statement of Claim, Exhibit 4.
[7] Statement of Claim, Exhibit 5.
[8] Statement of Claim, Exhibit 6.
[9] Statement of Claim, Exhibit 9.

million of existing debt, Lake of the Torches issued $50 million in taxable gaming revenue bonds."). We are here, obviously, because the deal went south.

Wells Fargo Bank, N.A., as trustee, brought the first suit on December 21, 2009 in the Western District of Wisconsin. *See Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010), *on reconsideration*, 2010 WL 1687877 (W.D. Wis., April 23, 2010), *aff'd in part and rev'd in part*, 658 F.3d 684 (7th Cir. 2011). The district court held that the trust indenture was void *ab initio*. *See* 677 F. Supp. 2d at 1062. After Wells Fargo moved to amend its complaint to seek enforcement of the remainder of the transaction documents, the court denied the motion, holding that the entirety of the transaction documents were also void. *See* 2010 WL 1687877, at *6-7. The Seventh Circuit affirmed that the Trust Indenture was void *ab initio*, but vacated other aspects of the federal district court's decision. *See* 658 F.3d at 699-702. After the Seventh Circuit's remand, Wells Fargo filed an amended complaint seeking to add Saybrook Tax Exempt Investors, LLC and LDF Acquisition, LLC as new plaintiffs and the Tribe as a new defendant. Eventually, Wells Fargo moved to dismiss its complaint without prejudice, a motion the court accepted on April 9, 2012. *See Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Economic Development Corp.*, No. 09-cv-768-RTR (W.D. Wis., April 9, 2012), Affidavit of Paul R. Jacquart, Exhibit 10.

Prior to dismissing its federal court suit, Saybrook filed suit against the Band, the EDC, and Stifel in the Circuit Court of Waukesha County, Wisconsin on January 16, 2012. *See* Complaint, *Saybrook Tax Exempt Investors, LLC v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 12CV187 (Waukesha County Cir. Ct., Jan. 16, 2012), Affidavit of Paul R. Jacquart, Exhibit 1. According to the Band, that case remains pending. *See* Tribal Memorandum at 18. *See also Saybrook Tax Exempt Investors, LLC v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 2013AP1324 (Wis. Ct. App. – Dist. 2).

On April 9, 2012, the same day that the plaintiffs successfully dismissed the original federal court suit without prejudice, Saybrook Tax Exempt Investors, LLC and LDF Acquisition, LLC brought another federal suit in the Western District of Wisconsin, this time naming the EDC, Stifel, and Godfrey & Kahn, S.C. as defendants. *See* Complaint, *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Economic Development Corp.*, No. 3:12-cv-255 (W.D. Wis., April 9, 2012). The court dismissed that suit on March 11, 2013 without prejudice for lack of subject matter jurisdiction. *See* Opinion and Order at 14, *Saybrook Tax Exempt Investors, LLC*

v. Lake of the Torches Economic Development Corp., No. 3:12-cv-255 (W.D. Wis., March 11, 2013), Affidavit of Paul R. Jacquart, Exhibit 39.

And now in April of this year, the Tribal Parties bring their own suit before this Court.[10] This Court will now address the pending motions to dismiss by the defendants.

I. Rules Governing Motions to Dismiss for Lack of Jurisdiction

In cases where this Court orders the application of Federal Rule of Civil Procedure 12 ("FRCP 12") to a particular matter, this Court adopts tribal and federal law interpreting and applying FRCP 12 in accordance with the tribal code.[11] *See* LAC DU FLAMBEAU TRIBAL CODE § 80.306(2) ("If an issue arises that is not addressed by this Code or any other duly enacted tribal law, or any custom or tradition of the Tribe, then the Court may apply the statutes, regulations, or case law of any tribe or the federal government."). This Court adopts and applies, in accordance with LAC DU FLAMBEAU TRIBAL CODE §§ 80.306(2) and (3), the blackletter common law from other tribal, federal, and state courts (in that order) relating to questions not governed by Lac du Flambeau law. Section 80.306(1) also allows this Court to apply the law of the Lac du Flambeau Band, including "all customs and traditions of the Tribe." But, since no party has identified applicable tribal law in this matter, this Court need not *and does not* utilize tribal customary and traditional law.

The Court recognizes that numerous transaction documents identified Wisconsin law as the applicable law for the interpretation of the documents and for other purposes. *See* Bond Purchase Agreement § 14(a) (invoking Wisconsin law); Bond Resolution at 3 (invoking Wisconsin law and the Wisconsin Uniform Commercial Code); Tribal Agreement § 9(a) (same); Tribal Resolution at 3 (same). However, it is far from clear what law governs in a FRCP 12 motion to dismiss, where the Court is obligated to construe the plaintiff's complaint liberally and to assume the allegations of the complaint are true. *See infra*, Part I(A). The tribal code requires the Court to apply a choice of law hierarchy, and the Court will do as instructed, but with an eye toward Wisconsin law. Even so, as the parties will see, the outcome here likely is unaffected by

[10] On May 24, 2013, Stifel brought suit in the Western District of Wisconsin seeking to enjoin the instant action. *See* Complaint, *Stifel, Nicolaus & Company, Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 3:13-cv-372-WMC (W.D. Wis., May 24, 2013), Affidavit of Paul R. Jacquart, Exhibit 22.

[11] The Court previously granted the Tribal Parties' motion to adopt FRCP 12 in this matter. *See* Order Adopting Federal Rule of Civil Procedure 12 (July 15, 2013).

the competing choice of law provisions as Wisconsin law and the tribal law are not substantively different.

And with that, Stifel has filed a motion to dismiss for lack of subject matter jurisdiction in accordance with FRCP 12(b)(1), and Saybrook and Godfrey have filed motions to dismiss for lack of jurisdiction in general.

A. Liberal Construction of Complaint

As other tribal courts have done, this Court will decide upon a motion to dismiss for lack of subject matter jurisdiction by construing the complaint "broadly and liberally." *American Commercial Finance Corp. v. Whipple*, 5 Mash. 214, 217, 2002 WL 34249780 (Mashantucket Pequot Tribal Court 2002) (citation omitted). That court further articulated standards for addressing motions to dismiss on the pleadings:

> If the record, on its face, shows that the court lacks jurisdiction, the complaint must be dismissed. ... Whenever the Court's subject matter jurisdiction is challenged, the party asserting jurisdiction carries the burden of establishing the Court's jurisdiction. ... The Court must accept all well plead uncontroverted facts as true, and impart all reasonable inferences of the same in the non-moving party's favor.
>
> On a motion to dismiss for failure to state a claim under [Rule 12], the Court must accept as true the material facts alleged in the complaint. All doubts and inferences are to be resolved in the Applicant's favor and the pleading is viewed in the light most favorable to the Applicant. The Applicant must still allege facts, either directly or inferentially, that satisfy each element required for recovery under some actionable legal theory.

Id. (citations and quotation marks omitted). Other tribal courts have adopted substantially similar rules governing motions to dismiss. *E.g.*, *Metcalf v. Coquille Indian Tribal Council*, 9 Am. Tribal Law 1, 5-6 (Coquille Indian Tribal Court 2009) ("The court reviews plaintiff's complaint liberally with a view of substantial justice between the parties. ... The 'substantial justice' test may be found in the civil pleading codes of multiple jurisdictions. As noted by the United States Supreme Court, it is a 'modification of the common law rule which construes all pleadings most strongly against the pleader.' ... This court adheres to it and in ruling on defendants' motion to dismiss for lack of jurisdiction over the subject matter construes the allegations in the complaint favorably to the plaintiff, without compensating for pleading defects or allegations that are missing. ... The court disregards an error or defect in a pleading that does not affect the

substantial rights of the defendants and does not disregard an error or defect that affects their substantial rights.") (quoting *Gillette v. Bullard*, 87 U.S. 571 (1874)) (other citations, footnotes, and most quotation marks omitted); *Bartha v. Mohegan Tribal Gaming Authority*, 6 Am. Tribal Law 615, 618 (Mohegan Gaming Disputes Trial Court 2006) ("In ruling on whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.... A motion to dismiss tests ... whether, on the face of the record, the court is without jurisdiction."); *Kimsey v. Reibach*, 6 Am. Tribal Law 119, 122 (Confederated Tribes of the Grand Ronde Community Tribal Court 2005) ("[T]he Court will construe the complaint liberally and will presume, for the purposes of the motions only, that all the allegations of the complaint are true and will draw any inferences in favor of the Plaintiff.") (citations omitted); *Goggleye v. Wilson*, No. CV-04-122, 2005 WL 6717798, at *1 (Leech Lake Trial Court, Feb. 22, 2005) ("In ruling on a motion to dismiss, this Court must accept as true the factual assertions made by the Plaintiffs in their complaint.") (citations and quotation marks omitted); *In re O'Bregon*, 7 Okla. Trib. 157, 165 (Kaw Nation District Court 2000) ("On a Motion to Dismiss, the Court takes the Petition's allegations as all true and construes all reasonable inferences in the pleader's favor.") (citation omitted); *Funmaker v. Jones*, 1 Am. Tribal Law 223, 229 (Ho-Chunk Nation Trial Court 1997) ("This Court entertains Motions to Dismiss by accepting all well pleaded factual allegations as true and drawing all reasonable inferences in favor of the non-movant, in this case the plaintiff.") (citation omitted). "Moreover, the Court is permitted to look beyond the jurisdictional allegations to the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* (citations and quotation marks omitted). *See also* 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3rd ed.) ("When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other additional matter to support the motion. Conversely, the pleader may establish the actual existence of subject matter jurisdiction through extra-pleading material.").

In short, plaintiffs have enormous advantages in defending against a motion to dismiss in that this Court will interpret the complaint liberally and assume all facts alleged to be true for purposes of analyzing the motion to dismiss. However, plaintiffs also carry the burden of

persuasion in cases where the court's jurisdiction over the subject matter and the defendants is challenged.

B. Subject Matter Jurisdiction

Motions to dismiss for lack of subject matter jurisdiction typically involve courts with limited jurisdiction; that is, courts that are not courts of general jurisdiction. Federal courts, created by and subject to Article III of the United States Constitution, are courts of limited jurisdiction. *See* 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3rd ed.) ("It always must be remembered that the federal courts are courts of limited jurisdiction and only can adjudicate those cases that fall within Article III of the Constitution and a congressional authorization enacted thereunder.") (footnote omitted). Some tribal courts are also courts of limited jurisdiction, such as the Mashantucket Pequot Tribal Court. *See American Commercial Finance Corp.*, 5 Mash. at 15 ("The Mashantucket Pequot Tribal Court is a court of limited jurisdiction that only has jurisdiction over subject matter which has been specifically and expressly granted to it by the Mashantucket Pequot Tribal Council.") (citing 1 MASH. PEQUOT TRIBAL LAW § 2).

This Court's jurisdiction appears to be broader than the jurisdiction of courts of limited jurisdiction such as the federal courts and tribal courts like those of the Mashantucket Pequot. The Constitution of the Lac du Flambeau Band of Lake Superior Chippewa Indians establishes the authority of this court. Article X, Section 2 of the Constitution vests the "judicial power" of the Band in the tribal judiciary. The judicial power includes the powers "to interpret and apply the Constitution and laws of the Lac du Flambeau Band...." *Id.* Section 3 empowers the tribal judiciary to decide "all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Lac du Flambeau Band ... and cases in which the Tribe, or its officials and employees shall be a party." *See also* LAC DU FLAMBEAU BAND TRIBAL CODE § 80.102 (same). As such, this Court declares that it has subject matter jurisdiction over all cases and controversies in which the Tribe is a party, and those cases and controversies that involve a tribal law question. *Cf.* 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3rd ed.) ("A Rule 12(b)(1) motion most typically is employed when the movant believes that the claim asserted by the plaintiff does not involve a federal question....").

C. Personal Jurisdiction

This Court agrees with other tribal courts that, at bottom, "[p]ersonal jurisdiction pertains to the power of the Court over a party's person, property[,] or thing that is the subject of the suit." *In re A.H.*, 6 Am. Tribal Law 164, 166 (Fort Peck Court of Appeals 2006). *See also In re C.T.*, 8 Am. Tribal Law 386, 391 (Cherokee Court for the Eastern Band of Cherokee Indians 2010) ("Personal jurisdiction is the power of a court to enter a judgment against a party to the litigation.") (citation omitted). "To survive a jurisdictional challenge on a motion to dismiss, the plaintiff need only make a prima facie showing of jurisdiction." *Coeur d'Alene Tribe v. AT&T Corp.*, 23 Indian L. Rep. 6060, 6063 (Coeur d'Alene Tribal Court 1996) (citation omitted).

Motions to dismiss claims brought in tribal court for lack of personal jurisdiction involve questions of fundamental due process, especially where the underlying claims implicate the rights of defendants who are not tribal members and that are domiciled off-reservation. *See generally* David A. Castleman, Comment, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1269 (2006) ("A court's acquisition of jurisdiction over a particular defendant is limited by both the internal law of the jurisdiction and the external due process requirements."). *Cf.* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351 (noting that motions to dismiss for lack of personal jurisdiction under FRCP 12(b)(2) raise "a question as to whether the controversy or the defendant has sufficient contacts, ties, or relationships with the forum to give the court the right to exercise judicial power over the defendant—an issue that typically implicates a jurisdictional statute or rule and quite frequently the Due Process Clause of the Constitution as well") (footnote omitted). Other tribal courts also review questions of personal jurisdiction in light of due process, often invoking the Indian Civil Rights Act's due process clause, 25 U.S.C. § 1302(a)(8), or other tribal law. *E.g.*, *Gobin v. Tulalip Tribes' Board of Directors*, 6 NICS App. 101, 105, 2002 WL 34506023, at *3 (Tulalip Tribal Court of Appeals 2002) (invoking the Indian Civil Rights Act); *Ho-Chunk Nation v. Olsen*, 2 Am. Tribal Law 299, 306-07 (Ho-Chunk Nation Trial Court 2000) (invoking both federal and tribal constitutional law); *Muscogee (Creek) Nation ex rel. Beaver v. American Tobacco Co.*, 5 Okla. Trib. 401, 410-16 (Muscogee (Creek) Nation District Court 1998) (applying federal and tribal law), *appeal dismissed*, 5 Okla. Trib. 447 (Muscogee (Creek) Nation Supreme Court 1998). *See generally* Frank Pommersheim, *Due Process and the Legitimacy of Tribal Courts*, *in* THE INDIAN CIVIL

RIGHTS ACT AT 40, at 105, 11-14 (Kristen Carpenter at al., eds. 2002) (discussing tribal court decisions involving due process rights in cases involving nonmember defendants).

Tribal courts often borrow from federal constitutional law on the contours of personal jurisdiction, and this Court has adopted FRCP 12 and the law interpreting it for the purposes of this litigation. Typically, tribal courts apply the foundational rules articulated by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As the Ho-Chunk Nation trial court wrote:

> *International Shoe* articulated the principle that a court may assert personal jurisdiction over a defendant not located within the territory of the forum so long as the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." The progeny of *International Shoe* focused on defining "fair play and substantial justice." One line of cases elucidating this phrase premised the finding of personal jurisdiction on whether a defendant had purposely availed themselves of the chance to do business in the forum state.

Olsen, 2 Am. Tribal Law at 306-07 (citations omitted). *See also Jackson v. Leech Lake Band of Ojibwe Council Members*, No. CV–04–113, 2004 WL 6012166, at *7-8 (Leech Lake Band of Ojibwe Tribal Court, Dec. 12, 2006) (quoting *International Shoe*); *Muscogee (Creek) Nation v. American Tobacco Co.*, 5 Okla. Trib. at 410 ("Under the due process clause of the Fifth Amendment of the United States Constitution, personal jurisdiction over a party does not exist unless that party has sufficient minimum contacts with the jurisdiction.... Therefore, the exercise of jurisdiction must not offend 'traditional notions of fair play and substantial justice.'") (quoting *International Shoe*); *Rosebud Housing Authority v. LaCreek Electric Cooperative, Inc.*, 13 Indian L. Rep. 6030, 6031-32 (Rosebud Sioux Tribal Court 1986) (applying *International Shoe*). This Court is mindful that some state and federal courts eschew application of the minimum contacts test in tribal court contexts. According to one state court, "[m]ore in the way of 'minimum contacts' is required for a tribal court to exercise long-arm jurisdiction over a non-Indian 'than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state.'" *Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993) (citations omitted).

As the Tribal Parties point out, the Saybrook defendants do not contest personal jurisdiction. *See* Tribal Parties Memorandum at 106-08.

II. Under Tribal Law, the Tribal Court Has Presumptive Jurisdiction over the Band's Statement of Claim

The Court first determines whether tribal law authorizes the Court to assert jurisdiction over the Statement of Claim. *See* CONSTITUTION AND BYLAWS OF THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS art. I, § 2 (territorial jurisdiction of the Band); *id.* art. X, § 3 (tribal judiciary's jurisdiction); LAC DU FLAMBEAU BAND TRIBAL CODE § 80.102 (same). This Court's jurisdiction for claims arising on the territory of the Band is extensive and plenary.

A. Subject Matter Jurisdiction

Here, the codified law of the Lac du Flambeau Band of Lake Superior Chippewa Indians expressly authorizes this court to assert jurisdiction over the Band's Statement of Claim, fulfilling the mandate that this Court determine subject matter jurisdiction.

The Tribal Parties have alleged the violation of two express provisions of tribal codified law in the Statement of Claim, alleging violations of both "the Constitution and the Gaming Control Ordinance." Statement of Claim ¶ 20. First, according to the Tribal Parties, the Tribal Agreement document and the Tribal Resolution in question must be approved by a referendum vote of the tribal membership under Article VI, Section 1(v) of the Tribal Constitution. *See* Statement of Claim ¶¶ 105-08. That constitutional provision states:

> The Tribal Council shall have the power, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and Bylaws ... (v) [t]o pledge tribal assets, except tribal lands, as collateral to secure loans but only with the approval of a referendum vote of the members of the Tribe and with approval of the Secretary of the Interior.

Second, the Tribal Parties also have alleged that enforcement of the underlying transaction would violate the tribal Gaming Control Ordinance through its violation of the Indian Gaming Regulatory Act. *See* Statement of Claim ¶¶ 92-93, 100-02, 104. *See also* LAC DU FLAMBEAU BAND TRIBAL CODE § 43.103 ("The purpose of this ordinance is to regulate the conduct of Class II and Class III gaming conducted on Indian Lands of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin in accordance with the Indian Gaming Regulatory Act....").

Godfrey argues that this Court's jurisdiction under the tribal code did not "permit ... jurisdiction over this dispute when Saybrook filed its action in January 2012, or at any other point until shortly before the Tribe's filing" of the Statement of Claim. Godfrey Motion to Dismiss at 13. The Tribal Parties respond by pointing out that the tribal code provided for this Court's jurisdiction in Section 80.102(3) of the tribal code. *See* Tribal Memorandum at 23. Godfrey offered no response in its Reply, and the Court finds the Tribal Parties' position tenable. *Cf. Attorney's Processes and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 933, 946 (8th Cir. 2010) (affirming tribal court jurisdiction over nonmember conduct alleged to have occurred in 2003 even though tribe did not establish tribal court until 2004), *cert. denied*, 131 S. Ct. 1003 (2011).

This Court construes the Statement of Claim liberally, although it need not do so here. The Tribal Parties have identified at least two express provisions of tribal law under which the Claim arises, and that is sufficient for the purpose of properly alleging subject matter jurisdiction. *Cf. Kelly v. Kelly*, No. CV 08-013, 2008 WL 7904116, at *8 (Standing Rock Sioux Tribal Court, June 23, 2008) ("Subject matter jurisdiction is determined at the time of commencement of an action.") (citation omitted).

B. Personal Jurisdiction

The Tribal Parties sufficiently alleged conduct by the defendants in the Statement of Claim that indicates the defendants purposefully directed its activities at residents (in this case, the Tribe) of the forum, those purposeful activities allegedly caused an injury, and that this Court's exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. As such, this Court has personal jurisdiction over the defendants.

The analysis begins with the minimum contacts in question. As noted above, for purposes of this case, this Court "may assert personal jurisdiction over a defendant not located within the territory of the forum so long as the defendant has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Ho-Chunk Nation v. Olsen*, 2 Am. Tribal Law 299, 306-07 (Ho-Chunk Nation Trial Court 2000) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), other citations omitted).

The most critical "contact" here is the business transaction between the Tribal Parties and the defendants, the enforcement of which implicates the heart of the governance of the Lac du Flambeau Reservation. For example, as the Tribal Parties allege, the EDC pledged to the defendants "as collateral all gross revenue from the Casino, including revenue necessary to pay Casino expenses...." Statement of Claim ¶ 34(h). The Tribal Parties also allege that Saybrook "sought extensive control over the Tribe's Casino to protect its investment." *Id.* at ¶ 40. *See also id.* at ¶¶ 41-44 (alleging the various aspects of control over the Tribe's Casino Saybrook sought in order to obtain "control over the Tribe's Casino"). As to Stifel, according to the Tribal Parties, those defendants "acknowledged ... a fiduciary responsibility" to the Tribal Parties during the transaction negotiations. *Id.* at ¶ 51. Stifel representatives also "traveled to the Lac du Flambeau Reservation and appeared at a joint meeting of the Tribal Councils and the Boards of the [EDC] to present the final Bond Documents to the Tribe and the [tribe's federal corporation] for the first time, and to pressure the Tribe and the [EDC] to approve the Bond Transaction at that same meeting." *Id.* at ¶ 57. *See also id.* at ¶¶ 57-74 (alleging Stifel made statements at a January 2, 2008 meeting intended to induce the Tribal Parties to execute the underlying transaction). These contacts meet the first prong of the minimal contacts test. *See Olsen*, 2 Am. Tribal Law at 307 ("The defendant purposefully engaged in contact with the Ho–Chunk Nation for the purpose of doing business, and it is reasonable and fair for him to be haled into the Ho–Chunk Nation's courts to answer the plaintiff's claims.").

Additionally, according to the Tribal Parties, the collapse of the underlying transaction directly impacted on-reservation government services. *See id.* at ¶¶ 76-85. It goes without saying that the Tribe and the EDC – and the Tribe's Casino – are located on the tribal trust land on the Lac du Flambeau Reservation. *See* Affidavit of Brooks Big John ¶¶ 3-4. The EDC deposited funds derived from the Tribe's Casino operations into a restricted depository account at Chippewa Valley Bank from January 18, 2008 until December 11, 2009. *See* Affidavit of Karen M. Maki, at ¶¶ 7-8. Wells Fargo Bank acted as Trustee for the bondholders, "perform[ing] monthly sweeps of Casino funds, disbursed the funds into the various accounts as outlined by the ... bond indenture, and returned any excess funds to the Casino Operating Department." *Id.* at ¶ 9. The transaction required tribal financial officials to "prepare and file monthly unaudited Financial Statements to Wells Fargo within 30 days of the end of the month." *Id.* "This filing also included a Certificate signed by an Authorized representative of the Tribe attesting to the

compliance with various financial covenants of the Bonds." *Id.* During the "winter months" between January 2008 and December 2009, "the Casino income was not sufficient to meet both the debt service on the Bonds and to distribute funds to the Tribe" needed for the provision of government services." *Id.* at ¶ 11. *See also id.* ("In eight of those months, there was literally no money left over the Corporation or the Tribe once the bond payments were made. In addition there were three months in which there were some excess funds to transfer to the Tribe, but these transfers remained insufficient to meet the needs of the essential Tribal Government monthly operational costs."). The lack of revenue impacted the Tribal Parties' ability to reinvest in the Casino while making bond payments. *See id.* at ¶¶ 12-13. According to the plaintiffs, the lack of revenue dramatically affected the Tribe's ability to operate as a government. *See id.* at ¶¶ 17-29. The Tribal Parties' alleged injuries appear directly related to the on-reservation actions of the defendants.

In short, while the dispute over a very large sum of money appears to range both on and off the Reservation, the focus of the dispute is on-reservation – the Tribe's Casino revenues are the prize, and that revenue stream is by definition entirely an on-reservation contact. *See* 25 U.S.C. §§ 2710(b)(1) (requiring Class II gaming to occur on "Indian lands"), 2710(d)(1) (requiring Class III gaming to occur on "Indian lands"); LAC DU FLAMBEAU TRIBAL CODE § 43.103 ("The purpose of this ordinance is to regulate the conduct of Class II and Class III gaming conducted on Indian Lands of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin...."). *Cf. Booppanon v. Harrah's Rincon Casino & Resort*, No. 06CV1623 BTM(BLM), 2007 WL 433250, at *3 (S.D. Cal., Jan. 23, 2007) ("The Casino operations are intertwined with Tribal welfare. The creation and operation of the Casino was designed to promote 'tribal economic development, self-sufficiency, and strong tribal governmen[t].'") (quoting 25 U.S.C. § 2702(1)).

And for the Tribe, the Casino revenues appear to be the most important economic activity on the reservation. Prior to the establishment of the Tribe's Class III gaming operations, "[m]ost reservation residents live[d] in households with income below the poverty level. Of the on-reservation member population at Flambeau, 63% [were] unemployed. Of those employed, 23% [had] incomes below $7,000 a year." *Lac du Flambeau Band of Lake Superior Chippewa Indians*

v. State of Wisconsin, 743 F. Supp. 645, 646 (W.D. Wis. 1990).[12] According to the Tribe, the tribal government "depended ... on transfers from the [EDC] in the range of $17 to $18 million annually." Affidavit of Karen M. Maki, at ¶ 23. However, in FY2009, the EDC "was only able to transfer about $4.0 million to the Tribe." *Id.* at ¶ 24. As a result, the tribal government alleges that it was forced to cut tribal government employee wages and eliminate 100 jobs, *id.* at ¶ 26(a); and eliminate or severely cut the budgets of a plethora of housing, job training, social services, education, judicial, child support, child welfare, and other government programs, *id.* at ¶¶ 26(b)-(y). Finally, the Tribal Parties allege that if the Tribe is forced to resume payments on the bonds, tribal government programs "would have to be cut or eliminated again." *Id.* at ¶ 29. Taking the allegations of the Tribal Parties as true, and construing the Statement of Claim liberally, this Court's assertion of personal jurisdiction over the defendants – which is really the assertion of jurisdiction over the rights to the large majority of the Tribe's casino revenues – comports with

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[12] That same court found that Tribal Casino revenues were critically important to the operation of the Tribal government:

> The Lac du Flambeau Band supplies many essential governmental services such as housing, water, sewer and related sanitation services, education, medical, dental, psychological, counselling and sanitarium services. Its total annual operating expenditures for the provision of services and the operation of tribal government are approximately $4 million annually. Although it receives funds to operate its governmental programs and services from a variety of sources including the federal government, its ability to provide a full range of services to its members is limited by restrictions on the use of the funds.
>
> The band has only a few, very limited taxing opportunities within the reservation. Consequently, it tries to raise unrestricted funds to fill the unmet needs of its members through the leasing of tribal land, cigarette sales and licenses of various kinds, and the casino operation. Without casino revenue, the band will not be able to support tribal programs and services. Casino revenues are projected to produce over 15.79% of the General Fund revenues available for tribal expenditure in FY 1990. In fact, however, actual casino revenues have exceeded projections, and have accounted for a larger share of the General Fund revenues than originally anticipated.

Lac du Flambeau, 743 F. Supp. at 647. *See also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Williquette*, 629 F. Supp. 689, 690-91 (W.D. Wis. 1986):

> Plaintiff has 2,138 members, two-thirds of whom live on the reservation. Of those who are eligible for employment, two-thirds are unemployed. One-fourth of those who are employed earn less than $7000.00 a year. In addition to program-specific funds which it receives from federal or state sources, plaintiff receives revenues from several sources which are unrestricted in use, and which comprise plaintiff's general fund. The largest single source of the general fund, accounting for well over half its revenues, is the net profit from plaintiff's bingo and raffle operations.
>
> The general fund is appropriated by the Tribal Council annually to fund a variety of tribal programs and services, including various general governmental expenses, the President's salary, the Enrollment Department, the Realty and Natural Resources Department, the library and museum, water and sewer service, a youth alcohol and drug program, the elderly nutrition program, tourism promotion, the tribal attorneys, and the Ojibway Cultural Association.
>
> In addition to the annually budgeted amounts, during the fiscal year the Tribal Council appropriates by resolution general fund monies for a variety of purposes of a charitable, educational, spiritual, or governmental nature.

fair play and substantial justice. *See Coeur d'Alene Tribe v. AT&T Corp.*, 23 Indian L. Rep. 6060, 6064 (Coeur d'Alene Tribal Court 1996) (noting that a tribe's interest in its gaming revenues, "with associated expenditures to improve the health and welfare of tribal members," meets the fair play and substantial justice requirement).

In conclusion, this Court presumptively has both subject matter and personal jurisdiction over the defendants. Nonetheless, the defendants raise powerful objections to this Court's jurisdiction, to which the Court now turns.

III. Defendants' Motions to Dismiss Based on the Transaction Documents Must Be Denied.

In this part, the Court concludes that relevant portions of the transaction documents are ambiguous as to this Court's jurisdiction, requiring this Court to deny the defendants' motions to dismiss.

A. The Trust Indenture is Conclusively Void *ab Initio*.

The Tribal Parties argue that each of the contract documents, collectively and individually, are void *ab initio*, rendering the forum selection clauses unenforceable. *See* Tribal Parties Memorandum 49-99. This line of argument goes to the heart of the Statement of Claim, and does not need to be resolved here to address the defendants' collective motions to dismiss. Nonetheless, this Court holds that at least one document – the Trust Indenture – is void *ab initio*, and therefore the Court will not address claims relating to that document.

This question – whether the documents constituting the entirety of the underlying transaction are void *ab initio* – appears to have been conclusively decided by the federal courts. *See Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010), *on reconsideration*, 2010 WL 1687877 (W.D. Wis., April 23, 2010), *aff'd and rev'd*, 658 F.3d 684 (7th Cir. 2011). The Seventh Circuit directly addressed "whether the Indenture, which governs the terms of the bond offering, is a management contract for the operation of a gaming facility within the meaning of the [Indian Gaming Regulatory] Act." *Wells Fargo*, 658 F.3d at 694. Under federal law, an Indian gaming-related contract "'for the operation of a Class III gaming activity'" is valid only if the "contract has been submitted and approved by the Chairman of the [National Indian Gaming] Commission." *Id.* (quoting 25 U.S.C. §§

2710(d)(9) and 2711(a)(1)). Management contracts not approved by the Chairman are void, according to federal regulations promulgated by the Department of Interior. *See* 25 C.F.R. § 533.7, *cited in Wells Fargo*, 658 F.3d at 699. *See also* Saybrook Motion to Dismiss at 5 n. 2 (noting that "management contracts that have not been approved by the National Indian Gaming Commission are void *ab initio*."). Tribal courts addressing similar questions have reached the same conclusion about gaming management contracts. *See United States ex rel. Auginaush v. Medure*, 8 Am. Tribal Law 304, 322-23 (White Earth Band of Chippewa Indians Tribal Court 2009). The Seventh Circuit found that the Indenture constitutes an unenforceable gaming management contract. *See Wells Fargo*, 658 F.3d at 694-700.

We need not tread much over the same ground walked by the Seventh Circuit in reviewing its determination that the Indenture constituted an unenforceable management contract. Neither Stifel nor Saybrook challenge that holding, and a quick review of the Seventh Circuit's analysis confirms its reasonableness.[13] This Court holds that the Trust Indenture is void

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[13] This Court incorporates by reference the critical portions of the Seventh Circuit's analysis, and reprints that analysis here:

> Upon examination of the Indenture Agreement, it becomes apparent that there are provisions that militate in favor of characterizing the document as a management contract and other provisions that support the contrary characterization. Supporting the latter characterization, it is notable that the Indenture does not transfer explicitly to Wells Fargo or to Saybrook, the bondholder, wholesale responsibility over the daily operations or maintenance of the Casino, let alone compensate them for doing so. Further, it makes no explicit provision for the transfer of responsibility over the Casino's employment, accounting or financial procedures. In fact, the Indenture requires Lake of the Torches to "continue to ... operate ... [,] maintain, repair and preserve the Casino Facility," to ensure that the operation of the Casino complies with legal requirements and to pay operating expenses and taxes. ... The Indenture also contemplates that Lake of the Torches will maintain control over Casino licenses, permits, financial records, accounting records, budgetary statements, accounts payable and "all other documents, instruments, reports and records ... relating to the operation of the Casino Facility." ... It does not involve provisions for development or construction costs, does not set a term limit for the transfer of rights (which will be extinguished upon repayment) and does not allocate to Saybrook or Wells Fargo a percentage of the Casino's revenues. The Indenture sets a fixed repayment schedule that, although secured by gaming revenues, is not set as a proportion of it.
>
> On the other hand, there are provisions that are far more problematic. As we have noted, section 5 of the Indenture requires that gross revenues from the Casino be deposited daily in a trust fund, sets numerous conditions on the allocation and disposition of the revenues and gives Wells Fargo ultimate control over withdrawals. We need not determine here the appropriateness of such an arrangement other than to note that, without some limitation on Wells Fargo's discretion to allocate or condition the release of the Casino's gross revenues even to pay operating expenses, this provision bestows a great deal of authority in an entity other than the Tribe to control the Casino's operations. Furthermore, as the district court noted, section 6.18 of the Indenture provides that the Corporation cannot incur capital expenditures in excess of 25% of the previous year's capital expenditures without the consent, which may not be "unreasonably withheld," of 51% of the bondholders. ... This provision allows the bondholders to control the amount that the Corporation can spend on capital expenditures related to the Casino, a major prerogative in

ab initio, and will not analyze this void document whatsoever. But that holding alone does not answer the challenges to this Court's jurisdiction raised by the defendants.

B. Relevant Portions of the Forum Selection Clauses in the Remaining Contract Documents are Ambiguous, Foreclosing Dismissal on the Pleadings.

Defendants argue that the transaction documents, which contain numerous clauses providing for a waiver of tribal sovereign immunity in state and federal courts, governing law clauses providing for the application of non-tribal law, forum selection clauses providing for state and federal court jurisdiction, and other stipulations relating to the situs of the transaction, forecloses tribal court jurisdiction. The Tribal Parties respond that the transaction documents do not prohibit claims brought by the Tribe and the EDC in the Lac du Flambeau tribal court. This Court largely agrees with the Tribal Parties, but holds that at least one of the forum selection clauses is ambiguous. Even so, an ambiguous forum selection clause cannot foreclose this Court's jurisdiction over the Statement of Claim.

> determining the present and future direction of any corporate entity. Indeed, the NIGC has enumerated "[m]aintaining and improving the gaming facility" as the very first responsibility that must be allocated in any management contract. See 25 C.F.R. § 531.1(b)(1).
>
> In addition, section 6.19 of the Indenture specifies that, if the debt-service-coverage ratio "falls below 2.00 to 1," the bondholders can require the Corporation to "promptly retain an Independent management consultant with sufficient experience in and knowledge of the gaming industry approved by the Bondholder Representative" to conduct a review of Casino operations and to submit a report making "recommendations as to improving the operations and cash flow of the Casino." ... This provision requires, furthermore, that the Corporation "use its best efforts to implement the recommendations" of the consultant within 90 days. ... We agree with our colleague in the district court that this provision implicates the apportionment of management responsibilities for the Corporation. It permits the consultant, who must be approved by a representative of the bondholders, effectively to direct the operations of the Casino and thereby transfers management responsibility over the gaming operation into the hands of a party other than the tribe. *Cf.* United States ex rel. Bernard, 293 F.3d at 425 ("The issue is whether Casino Magic, in fact, had managerial control." (emphasis added)).
>
> The Indenture further provides that the Corporation will not remove or permit the replacement of the Casino's general manager, controller or chairman or executive director of the gaming commission for any reason without the consent of 51% of the bondholders. ... This requirement applies to removal for any reason, thus potentially tying the hands of the Tribe to replace key officers even when sound management or even regulatory compliance concerns require their removal. This provision gives the bondholders truly powerful authority over the management of the Corporation and ensures that they will be able to exercise strong control over management and compliance issues that arise in the normal course of the Casino's operation.
>
> The provisions that we have discussed to this point affect the day-to-day management of the Corporation when it is meeting its debt obligations. The Indenture permits, however, even greater control by the bondholders in the case of default. Specifically, the bondholders can require the Corporation to hire new management of its choosing. ... As the district court held, this provision places very significant management authority in the hands of the bondholders.

Wells Fargo, 658 F.3d at 697-99 (citations to the federal court record omitted).

As so many other tribal courts have done in reviewing contract disputes, the court must first identify and apply the rule that "in construing a statutory provision, we first look to its language, and if that language is plain and unambiguous, the court need look no further." *Grimes v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. Rep. 99, 102, 1997 WL 34639434 (Mashantucket Pequot Tribal Court 1997) (citations and quotation marks omitted). *See also Begay v. Chief*, 6 Am. Tribal Law 655, 659 (Navajo Nation Supreme Court 2005) ("[W]e still apply a statute's plain language when that language is clear."). If, however, the court finds that the contract terms are ambiguous, the court will look first to the intent of the parties. *See* RESTATEMENT OF THE LAW – CONTRACTS § 202(1) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight."). *See also Schoen v. Oneida Airport Hotel Corp.*, No. No. 98–EP–0022, 2000 WL 35779918, at *15 (Oneida Tribal Judicial System Appellate Court, Aug. 16, 2000) ("A primary element of a contract is the intent of the parties.").

Courts addressing motions to dismiss based on forum selection clauses apply a four-part test:

> The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires us to classify the clause as mandatory or permissive, *i.e.*, to decide whether the parties are required to bring any dispute to the designated forum or simply permitted to do so. Part three asks whether the claims and parties involved in the suit are subject to the forum selection clause.
>
> If the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching."

Magi XXI, Inc. v. Stato della Citta del Vaticano, 714 F.3d 714, 721 (2d Cir. 2013) (citation omitted). *See also AAR Int'l, Inc. v. Nimelias Enters., S.A.*, 250 F.3d 510, 525 (7th Cir. 2001) ("[W]e have ruled that a forum selection clause is presumptively valid and enforceable unless (1) [its] incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court; or (3)[its] enforcement ... would contravene a strong public policy of the forum in which the suit is brought,

declared by statute or judicial decision.") (citation and quotation marks omitted). The Tribal Parties' allegations relating to the forum selection clauses at issue here implicate the last three factors of *Magi XXI* test.

Courts have "frequently classified forum selection clauses as either mandatory or permissive." *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMV")*, 314 F.3d 494, 498 (10th Cir. 2002) (citations and quotation marks omitted). "Mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum. ... In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere." *Id.* (citations omitted). "[W]here venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive." *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992). *See also Converting/Biophile Laboratories, Inc. v. Ludlow Composites Corp.*, 722 N.W.2d 633, 640-41 (Wis. Ct. App. 2006) ("Clauses in which a party agrees to 'submit' to jurisdiction are not necessarily mandatory. ... Such language means that the party agrees to be subject to that forum's jurisdiction *if sued there.* It does not prevent the party from bringing suit in another forum." ... The language of a mandatory clause shows more than that jurisdiction is appropriate in a designated forum; it unequivocally mandates exclusive jurisdiction.... Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.") (emphasis in original) (citation and quotation marks omitted). Federal appellate courts hold that where a forum selection clause is not clearly and unequivocably mandatory, it is permissive. *See Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 128 (5th Cir. 1994); *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985); (11th Cir.1985); *K & V Scientific*, 314 F.3d 500-01. *Cf.* Marjorie A. Shields, *Permissive or Mandatory Nature of Forum Selection Clauses Under State Law*, 32 A.L.R.6TH 419 (2008) (collecting state cases). *See generally* Maxwell J. Wright, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1636 (2011) (noting that "a clause that merely authorizes

jurisdiction in a specified forum, but does not clearly prohibit litigation elsewhere, will be interpreted as permissive") (footnotes omitted).

1. The Bonds, the Limited Offering Memorandum, and the Portions of the Tribal Agreement Include Unambiguously Permissive Forum Selection Clauses.

The Court holds that, with one exception discussed in the next subpart, each of the forum selection clauses raised by defendants in support of their motions to dismiss is unambiguously permissive, allowing the Tribal Parties to bring a separate suit in this Court against the defendants.

The defendants argue that "[n]ot only did the Tribe and the EDC repeatedly consent to jurisdiction in Wisconsin federal and state courts ..., they also agreed to that choice of forum *to the exclusion of the jurisdiction of this Court.*" Stifel Motion to Dismiss at 6 (emphasis in original). *See also id.* at 8 (arguing that the Tribal Parties agreed to "exclude Tribal Court jurisdiction over disputes arising out of or in connection with the 2008 Bond Transaction."); Saybrook Motion to Dismiss at 11 ("Numerous deal documents confirm that Saybrook, EDC, and the Tribe expressly agreed *not* to litigate in the Tribal Court.") (emphasis in original); Godfrey Motion to Dismiss at 5 ("Perhaps the most fundamental reason for dismissing the Tribe's statement of claim and requiring it to proceed in state court, and not in this Court, is as simple as this: it agreed to.").

Stifel first points to the Tribal Agreement, which reads in relevant part:

> The Tribe hereby expressly waives it sovereign immunity from suit and any requirement for exhaustion of tribal remedies should an action be commenced on this Agreement or regarding the subject matter of this Agreement. The Tribe expressly *consents* to the levy of judgment by the appropriate federal or state court. This waiver:
>
> (i) shall terminate upon payment in full of the Bonds,
>
> (ii) is *granted solely to the Trustee and the Holders* from time to time of the Bonds,
>
> (iii) *shall extend only to a suit to enforce the obligations of the Tribe under this Agreement*,
>
> (iv) shall be enforceable only in a court of competent jurisdiction and only to the extent the Tribe has consented to the jurisdiction of such court as set forth in this Section 9,

(v) shall not be deemed as a waiver of or consent to any lien on lands or moneys held in trust for the benefit of the Tribe by the United States, and

(vi) shall remain in full force and effect notwithstanding that the governing shall be as set forth in subparagraph (a) above.

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

Tribal Agreement § 9(b) (emphasis added). *See also* Godfrey Motion to Dismiss at 6. Godfrey also points to other transaction documents that do not include the exclusion language; for example, the Bond Resolution, which provides in relevant part:

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

Bond Resolution at 3, Statement of Claim Exhibit 3. Stifel also points to the Bonds,[14] which provide in relevant part:

The Corporation expressly *submits to and consents to the jurisdiction* of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the Federal District Court of Wisconsin may be appealed), and, in the event (but only in the event) the said federal court

[14] Saybrook and Godfrey reference the Bonds as well. *See* Saybrook Motion to Dismiss at 11; Godfrey Motion to Dismiss at 6.

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

Bonds at 5 (emphasis added). Stifel then points to the Limited Offering Memorandum, which reads in relevant part:

> Indian tribes and their wholly-owned corporate subsidies enjoy sovereign immunity from suit; as such, they cannot be sued in any court unless the tribe, corporation or Congress expressly waives that immunity. In connection with the issuance of the Bonds, the Corporation and the Tribe will waive their sovereign immunity to a limited extent for the purpose of any suit by the Trustee to enforce the obligations of the Corporation or the Tribe under the Bond Documents. In no event will tribal trust resources be subject to attachment, execution or other similar processes. The Corporation and the Tribe *expressly submit and consent to the jurisdiction* of the federal court for the Western District of Wisconsin (and to the jurisdiction of all courts to which decisions may be appealed) and in the event (but only in the event) the federal district court fails to exercise jurisdiction, the courts of the State of Wisconsin where jurisdiction and venue are proper, for the adjudication of disputes arising under the Bond Documents or the Bond Purchase Agreement, *to the exclusion of the jurisdiction of any court of the Tribe.* With the waiver of sovereign immunity, the Tribe and the Corporation expressly consent to the levy of judgment or attachment of the assets of the Corporation and the Tribe wherever located or maintained, including within the boundaries of the Lac du Flambeau Reservation, by appropriate federal or State court. Nevertheless, enforcement of a final judgment against the Tribe could be affected by disputes over the waivers of sovereign immunity and will be subject to limitations imposed by federal law.

Limited Offering Memorandum at 19 (emphasis added).[15]

For the sake of argument, this Court finds that these provisions are intended to accomplish at least one task – to waive the sovereign immunity of the Tribal Parties from suit by the Trustee and the Holders in federal and conditionally in state court. But the defendants argue that the language of each waiver also vests exclusive jurisdiction over *all* disputes that could ever possibly arise involving this transaction and the related documents in federal or state court, to the exclusion of this Court. Each of the three documents, with minor and irrelevant variations,

[15] Godfrey cites to the Limited Offering Memorandum as well. *See* Godfrey Motion to Dismiss at 6.

identifies federal and state courts to which the Tribal Parties agreed to submit to suit, but the Tribal Parties argue that they are silent as to whether, where, and over what subject matter *the Tribal Parties* may sue.

With one possible exception discussed in the next subsection, the plain language of the forum selection clauses does not expressly prohibit a tribal suit in tribal court. The Tribal Agreement language is the most damning to the defendants' claims of mandatory exclusivity. That document not only identifies the specific plaintiffs that have standing to sue the Tribal Parties, but identifies the specific relief available to those plaintiffs in suing the Tribal Parties (the other two forum selection provisions are silent in this respect). The language in Section 9(b)'s subsections provides that the waiver:

> (ii) is granted solely to the Trustee and the Holders from time to time of the Bonds,
>
> (iii) shall extend only to a suit to enforce the obligations of the Tribe under this Agreement,
>
> (iv) shall be enforceable only in a court of competent jurisdiction and only to the extent the Tribe has consented to the jurisdiction of such court as set forth in this Section 9,
>
> (v) shall not be deemed as a waiver of or consent to any lien on lands or moneys held in trust for the benefit of the Tribe by the United States....

Tribal Agreement § 9(b). To be clear, the first full paragraph and the subsections in Section 9(b) are plainly silent as to a possible tribal suit.

In comportment with the notion that the waiver of immunity applies only to a suit by the Trustee and the Holders, other transaction documents also include provisions allowing for the enforcement of money damages against the Tribal Parties. *See* Limited Offering Memorandum at 19 ("In no event will tribal trust resources be subject to attachment, execution or other similar processes. ... With the waiver of sovereign immunity, the Tribe and the Corporation expressly consent to the levy of judgment or attachment of the assets of the Corporation and the Tribe wherever located or maintained, including within the boundaries of the Lac du Flambeau Reservation, by appropriate federal or State court."); Bond Purchase Agreement § 14(b) ("The Corporation expressly submits and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin ... and the Lac du Flambeau Tribal Court ... with respect to any dispute or controversy arising out of this Agreement....").

Applying the law of forum selection clauses, it would appear that tribal consent to suit in Wisconsin federal and state courts here does not mandate exclusive jurisdiction in those courts for suits brought by the Tribal Parties. In *Converting/Biophile Laboratories*, the Wisconsin Court of Appeals held that the following contract term was unambiguously permissive:

> Buyer hereby *consents to and submits to* the jurisdiction of the courts of the State of Ohio and further consents to venue of any such proceeding in the Common Pleas Court of Sandusky, Ohio, or the United States District Court for the Northern District of Ohio, Western Division, based upon the location of Seller's principal place of business.

722 N.W.2d at 636 (emphasis added); *see id.* at 640-42 (holding the language was unambiguous and permissive). Similarly, in *Utah Pizza Service, Inc. v. Heigel*, 784 F. Supp. 835, 837-38 (D. Utah 1992), a case cited in approval by the Wisconsin court, the court held that this clause – "The parties agree that in the event of litigation between them, Franchise Owner stipulates that the courts of the State of Michigan shall have personal jurisdiction over its person, that it shall *submit to such personal jurisdiction*, and that venue is proper in Michigan." (emphasis added) – was not a mandatory forum selection clause. The *Converting/Biophile Laboratories* forum selection clause requires one party (Buyer) to consent to the jurisdiction and venue specified in the clause and nothing more; the *Utah Pizza Service* clause similarly required Little Caesar's Pizza to submit to Michigan courts and nothing more. The forum selection clause at issue in this case is similar in that tribal consent (and submission) to suit in Wisconsin federal and state court drives them. The Tribal Parties merely have consented to and submitted to the jurisdiction and venue of Wisconsin federal and state courts in the event they are sued to enforce the transaction documents. The fact that the "exclusion" language in the first full paragraph and the subjections of Tribal Agreement § 9(b) and in the Limited Offering Memorandum appears only in the provisions providing for suits brought by the Trustee and the Holders strongly supports this holding.

Numerous other courts – all discussed at length by the Wisconsin Court of Appeals, *see* 722 N.W.2d at 641-42 – have reached the same conclusion that forum selection clauses merely requiring consent and submission to a particular jurisdiction are permissive. *E.g.*, *John Boutari and Son, Wines and Spirits S.A. v. Attiki Importers and Distributors Inc.*, 22 F.3d 51, 52-53 (2d Cir. 1994) (holding that the forum selection clause there, "Any dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically

of the Thessaloniki Courts[,]" was permissive); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-77 (9th Cir. 1987) (holding that the forum selection clause there, "Buyer and Seller expressly agree that the laws of the State of California shall govern the validity, construction, interpretation and effect of this contract. The courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract[,]" was permissive); *K & V Scientific*, 314 F.3d at 495-96 (holding that the forum selection clause there, "Jurisdiction for all and any disputes arising out of or in connection with this agreement is Munich. All and any disputes arising out of or in connection with this agreement are subject to the laws of the Federal Republic of Germany[,]" was permissive); *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1231-32 (11th Cir. 1985) (holding that the forum selection clause there, "This constitutes an executory contract between the exporter and the above-indicated buyer. Place of jurisdiction is Sao Paulo/Brazil[,]" was permissive).

In sum, the exclusion language in the Limited Offering Memorandum – "*to the exclusion of the jurisdiction of any court of the Tribe*" – and in the Bonds – "*to the exclusion of the jurisdiction of any court of the Corporation*" – is not definitive proof that the parties to these agreements agreed to foreswear all possibility of tribal court jurisdiction. That language is mandatory, to be sure, but applicable only to suits brought by the Trustee and the Holders to validate rights under those transaction documents. The exclusivity language ensures that Saybrook cannot sue in tribal court to vindicate its rights, and the Tribal Parties cannot use the tribal court exhaustion doctrine to force a federal or state court suit against them into tribal court. Moreover, other transaction documents expressly recognize circumstances in which tribal court jurisdiction could be necessary, *see* Bond Purchase Agreement § 14(b) ("The Corporation expressly submits and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin ... *and the Lac du Flambeau Tribal Court* ... with respect to any dispute or controversy arising out of this Agreement....") (emphasis added), possibly rendering even the strong language of exclusivity ambiguous or absurd. In any event, these clauses do not forcelose anything about a suit where the Tribal Parties are the plaintiffs. *Converting/Biophile*

Laboratories holds that the language as it pertains (if at all) to a suit brought by Tribal Parties is permissive.[16]

Saybrook further points to the language in the Bond Purchase Agreement and the Indenture in which the Tribe "expressly waives ... any requirement for exhaustion of tribal remedies should an action be commenced on this Agreement or regarding the subject matter of this Agreement." Saybrook Motion to Dismiss at 11. Given the context of the entire tribal waiver – that is, the fact that the exclusion language appears in the same sentences specifically designed to effectuate a tribal waiver of immunity – it is apparent that these provisions taken as a whole are designed to allow the Trustee and the Holders to effectuate rights under the transaction documents in federal or state courts, and not be forced to bring suit in tribal court, even under a tribal court exhaustion doctrine theory. This makes sense because at least some courts have held that tribal exhaustion is necessary even in the face of a forum selection clause. *See Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 63-64 (2d Cir. 1997); *Ninigret Development Corp. v. Narrangansett Indian Wetoumuck Housing Authority*, 207 F.3d 21, 33 (1st

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[16] It is worth digressing to review several of the cases cited by Godfrey, *see* Godfrey Motion to Dismiss at 7-8; Godfrey Reply at 10 & n. 6, for the proposition that the forum selection clauses in these transaction documents comport with the clauses found by other courts to be mandatory:

- FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1233 (8th Cir. 1995): "In the event there is *any dispute between the parties arising out of this agreement*, it shall be determined in the Oglala Sioux Tribal Court or other court of competent jurisdiction." (emphasis added)
- Larson v. Martin, 386 F. Supp. 2d 1088 (D. N.D. 2005): "*No suit or action shall* be commenced hereunder by any claimants, 'other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere.'" (emphasis added)
- Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana, 992 So.2d 446, 450 (La. 2008), *cert. denied*, 129 S. Ct. 1908 (2009): "The interim agreement stated, among other things, that the two agreements and 'amendments thereto shall be interpreted, governed and construed under the laws of the State of Louisiana without regard to applicable conflict of laws provisions,' that the Tribe 'irrevocably consent[ed] to the jurisdiction of the courts of the State of Louisiana,' that '*any dispute arising hereunder shall be heard by a court of competent jurisdiction in the Parish of Allen, or any other Parish mutually agreed to*,' and that the 'CTOL, specifically waives any rights, claims, or defenses to sovereign immunity it may have as it relates to this Agreement except this waiver is limited at this time to Development Phase 2 Services.'" (emphasis added)
- Jackson v. Payday Financial, LLC, No. 11 C 9288, 2012 WL 2722024, at *2 (N.D. Ill., July 9, 2012), *appeal pending* (7th Cir.) (No. 12-2617), *quoted in entirety in* Motion to Dismiss or Stay the Case, *Jackson v. Payday Financial, LLC* (N.D. Ill.) (No. 11 C 9288), 2012 WL 8233045: "You agree that *any Dispute*, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." (emphasis added).

All of these cases are consistent with the proposition that a forum selection clause subjecting a potential defendant to a particular jurisdiction is permissive. Saybrook also cites to cases, *K & V Scientific*, 314 F.3d at 499, and *Paper Express, Ltd. v. Pfankush Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992), that support this general proposition. *See* Saybrook Reply at 15.

Cir. 2000). *Contra Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 815-16 (7th Cir. 1993), *cert. denied*, 510 U.S. 1019 (1993).

The defendants' reading of the forum selection clauses requires the Court to find ambiguity in the contract documents where plain language will do. The exclusivity language referring to "any" suit upon which defendants' rely most naturally refers to a federal or state court suit brought by the Trustee or the bondholders. It is an unnatural reading to interpret the exclusivity language to mean every potential suit where that language is tacked on to the end of a waiver of tribal immunity.

2. The Second Full Paragraph of the Tribal Agreement § 9(b) is Ambiguous as the Mandatory or Permissive Character of that Section's Forum Selection Clause.

The Court holds that the second full paragraph of the Tribal Agreement § 9(b) is ambiguous, and could be interpreted in two ways – as a mandatory forum selection clause applying to all suits arising under that document or as being inapplicable to a suit brought by the Tribal Parties. As such, the Court cannot grant a motion to dismiss on the pleadings. *See Fletcher v. Mashantucket (Western) Pequot Tribe*, 2 Mash. 135, 135-36, 1997 WL 34639438 (Mashantucket Pequot Tribal Court 1997) ("All doubts and inferences are resolved in the pleader's favor, and the pleading is viewed in the light most favorable to the pleader.") (citation omitted). Perhaps in a motion for summary judgment, the defendants might provide conclusive evidence that the parties intended the second full paragraph to foreclose tribal court jurisdiction in all instances, but on the record now before the Court, that evidence is not there.

Generally, language existing in the same section of a contract should be interpreted in each other's light. As the Restatement notes, "Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole." RESTATEMENT OF THE LAW – CONTRACTS § 202, *cmt. d. See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) ("The text must be construed as a whole.").

Stifel and Saybrook argue that the exclusion language found in the third paragraph of Section 9(b) of the Tribal Agreement is a mandatory forum selection clause covering all disputes

arising under the contract documents. *See* Stifel Reply at 4 & n. 3; Saybrook Motion to Dismiss at 11. That paragraph reads:

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

Id. (emphasis added). This language taken out of the context of the entire document could constitute a mandatory forum selection clause as to *all* suits brought under the transaction documents. *See Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 815 (7th Cir. 1993) ("In the Letter of Intent, Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois."), *cert. denied*, 510 U.S. 1019 (1993); *QEP Field Services Co. v. Ute Indian Tribe of Uintah and Ouray Reservation*, 740 F. Supp. 2d 1274, 1281 (D. Utah 2010) ("Article 17 contemplated the possibilities not only of arbitration but also of suit in a court of law, dictated that QEP could seek injunctive relief, and determined where disputes would be settled.").[17] But that is not the entire provision, as there is preceding this a full paragraph and numerous subsections that detail the now-familiar waiver of tribal immunity "granted solely to the Trustee and the Holders from time to time of the Bonds [and] shall extend only to a suit to enforce the obligations of the Tribe under this Agreement...."

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[17] The forum selection clause in *Altheimer* provided:

> *[Sioux Manufacturing] and the Fort Totten Tribe of the Sioux Nation (the "Tribe") will waive all sovereign immunity in regards to all contractual disputes.* This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois. [Sioux Manufacturing], [Health Care] and the Tribe agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois and agree to be bound by final and unappealable judgments rendered by such courts. [Sioux Manufacturing] and the Tribe appoint [a named designee] to accept service of process in any such dispute. [Sioux Manufacturing], [Health Care] and the Tribe hereby waive their respective rights to demand a jury trial.

Altheimer & Gray v. Sioux Manufacturing Corp., 780 F. Supp. 504, 508 (N.D. Ill. 1991) (emphasis added), *withdrawn from N.R.S. bound volume.* The clause in *QEP Field Services* provided: "*The Tribe expressly grants a limited waiver of Tribal sovereign immunity for the limited purpose of adjudicating any and all claims*, disputes or causes of action arising out of or relating to this Concession Agreement and consents to arbitration and suit solely for such limited purposes." *QEP Field Services*, 740 F. Supp. 2d at 1281 (emphasis added).

Tribal Agreement §§ 9(b),(b)(ii), (b)(iii). In fact, the heading of Section 9 is "Waiver of Sovereign Immunity, Arbitration; Consent to Jurisdiction." *See* SCALIA & GARNER, *supra*, at 221 ("The title and headings are permissible indicators of meaning."). However, as there appears to be no provision in Section 9 allowing for arbitration, it is not entirely clear what the heading here means, further supporting the Court's holding that the second full paragraph is ambiguous.

Section 9(c) does *implicitly* suggest that the parties did intend to foreclose this Court's jurisdiction by locating the negotiations, execution, and delivery of this contract off the reservation. That provision reads:

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

Tribal Agreement § 9(c). *See also* Bond Purchase Agreement § 14(c):

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

Still, Section 9(c) of the Tribal Agreement contains the same type of language that this Court has already held is indicative of a permissive forum selection clause – "the willingness of the Tribe to *submit* to the jurisdiction" (emphasis added). *See also* Bond Purchase Agreement § 14(c) (demonstrating the "willingness of the Corporation to *submit* to the jurisdiction of both the federal courts and the courts of the State of Wisconsin") (emphasis added). Section 9(c) of the Tribal Agreement and Sections 14(b)-(c) of the Bond Purchase Agreement follow a similar structure – a waiver followed by a representation about the off-reservation location of the transaction.

Moreover, the Tribal Parties allege that the bond documents include the waivers, which are intertwined with the forum selection clauses, "[a]t Saybrook's insistence." Statement of Claim ¶ 46. Even with that bare assertion, it seems reasonable to assume at the motion to dismiss on the pleadings stage that the Saybrook and Stifel defendants could have been the drafters requesting that the forum selection clauses be included with an eye toward limiting tribal court jurisdiction, especially given Stifel's representation that it sought to exclude tribal court jurisdiction. *See* Stifel Motion to Dismiss at 8. If that is the case, then an important canon of construing ambiguous forum selection clauses – that they are to be interpreted against the drafter – further supports the Court's ambiguity holding. *See K & V Scientific*, 314 F.3d at 500-01; *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 957 (5th Cir. 1974) (holding a forum selection clause with "opposing, yet reasonable, interpretations" should be interpreted against the drafter); *Prestige Capital Corp. v. Pipeliners of Puerto Rico, Inc.*, 849 F. Supp. 2d 240, 246 (D. Puerto Rico 2012).

The Court holds that the second full paragraph in Section 9(b) of the Tribal Agreement is ambiguous as to whether the forum selection clause applies to suits brought by the Tribal Parties. It is reasonable to interpret the second full paragraph as constituting a mandatory or a permissive forum selection clause, rendering the clause ambiguous. *See Atkinson ex rel. Atkinson v. Northwestern National Insurance Co.*, 4 Am. Tribal Law 286, 291 (Fort Peck Court of Appeals 2003) ("[W]e believe the policy provisions at issue are ambiguous in that a reasonable person could interpret 'sub-paragraph a' as defining both an uninsured and underinsured motorist notwithstanding the fact that 'sub-paragraph b' provides a more straightforward definition of underinsured motorist."); *Converting/Biophile Laboratories*, 722 N.W.2d at 643 ("Contractual language that is reasonably and fairly susceptible of more than one construction is ambiguous.") (citation omitted).

The defendants' additional arguments are unhelpful. Stifel asserts, without evidence, that the parties "specifically bargained to ... litigate in federal ... or Wisconsin court and ... exclude Tribal Court jurisdiction over disputes arising out of or in connection with the 2008 Bond Transaction" as a means of addressing its "concern of unfamiliarity" with tribal courts. *See* Stifel Motion to Dismiss at 8 (citing *Nevada v. Hicks*, 533 U.S. 353, 384-85 (2001) (Souter, J.)). Additionally, in its Reply, Godfrey suggests that to not enforce the forum selection clauses here

would negatively impact tribal court legitimacy from the point of view of state and federal courts. Specifically, Godfrey argues:

> "If contracting parties cannot trust the validity of choice of law and venue provisions" like these, the result will be to "undercut" rather than promote the goals of tribal self-government, self-determination, and economic development. ... Moreover, a tribal court cannot expect the courts of other sovereigns to enforce forum selection clauses providing for jurisdiction *in* the tribal court if that court is not, in turn, willing to enforce such clauses providing for jurisdiction elsewhere."

Godfrey Reply at 3 (quoting *Altheimer*, 983 F.2d at 815) (emphasis in original). *See also id.* at 9-10. These arguments cannot be dispositive in a motion on the pleadings. Moreover, neither argument is an answer to the ambiguity in the second paragraph of Section 9(c) of the Tribal Agreement, or to the plain language of the permissive forum selection clauses.

At the motion to dismiss stage, contract ambiguities must be resolved to the benefit of the nonmoving party. As such, the defendants' motion to dismiss on the basis of the forum selection clause cannot be granted.

IV. The Court Denies the Defendant's Motions to Dismiss under Federal Indian Law Principles.

This Court finds that federal Indian law likely authorizes the Court to assert jurisdiction over the defendants, although the record is incomplete as to important jurisdictional facts relating to the defendants' activities and property rights on tribal lands. In any event, the Statement of Claim will survive the motions to dismiss.

While this Court is first obligated to address tribal law questions as to its jurisdiction over the defendants, the restrictions of federal Indian law are important as well as imposing. This Court is bound to find, interpret, and apply dispositive tribal law in the first instance, with the law of other tribes, federal, and state law rounding out the choice of law hierarchy. *See* LAC DU FLAMBEAU TRIBAL CODE § 80.306(2) and (3). The parties have fully briefed the federal Indian law questions to this Court's jurisdiction over the nonmember defendants, and so the Court will make a preliminary determination on the question of jurisdiction.

Defendants assert that *Montana v. United States*, 450 U.S. 544 (1981), and its progeny – which includes *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997), and *Plains Commerce Bank*

v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) – forecloses tribal court jurisdiction over them. *See* Stifel Motion to Dismiss at 7-8, 15-18; Saybrook Motion to Dismiss at 9-10, 14-19. *Cf.* Godfrey Motion to Dismiss, at 5 (quoting *Plains Commerce Bank*, 554 U.S. at 324). The Tribal Parties argue that the Ninth Circuit's reasoning in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (per curiam), is more in line with the facts of this case. *See* Tribal Memorandum at 31-34. The Court agrees with the Tribal Parties on that point.[18]

As such, the Court first holds that the line of cases starting with *Montana v. United States*, 450 U.S. 544 (1981), apply only to assertions of tribal jurisdiction over nonmembers *on nonmember-owned fee lands within the reservation.* The Court holds that the proper rule of law is derived from treaty rights preserving tribal governance authority over all persons and activities within tribal trust lands, the rule adopted recently by the Ninth Circuit in *Water Wheel*, 642 F.3d 802, subject only to limitations articulated in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Under this formulation, the Court will not dismiss the Statement of Claim on the pleadings due to a lack of dispositive jurisdictional facts about the defendants' activities on tribally owned and controlled lands.

However, because the Supreme Court has not explicitly adopted the *Water Wheel* formulation for tribal trust lands, the Court will also analyze and apply the *Montana* line of cases. The Court also holds that even under the *Montana* general rule and its exceptions, this Court need not dismiss the Statement of Claim.

A. Analysis under the *Water Wheel* Formulation.

In the September 30, 1854 Treaty with the Chippewa, 10 Stat. 1109, *reprinted at* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 648 (1904) ("1854 Treaty"), the "United States agree[d] to set apart and withhold from sale, for the use of the Chippewas of Lake Superior," the

[18] The Court declines to address Saybrook's allegation of "bad faith" that could excuse tribal court exhaustion. *See* Saybrook Motion to Dismiss at 18. It is alleged too soon in the proceedings, and perhaps in the wrong court. The Ninth Circuit has held that "where ... a tribal court has asserted jurisdiction and is entertaining a suit, the tribal court must have acted in bad faith for exhaustion to be excused. Bad faith by a litigant instituting the tribal court action will not suffice." *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1201 (9th Cir. 2013).

Lac du Flambeau Reservation. 1854 Treaty art. 2 & § 3.[19] The "set apart" language of the 1854 Treaty constitutes recognition of broad tribal governance authority over the lands within the reservations created by the treaty. *See* John Bowes Affidavit ¶ 5 ("George Manypenny[, Commissioner of Indian Affairs and American negotiator of the 1854 Treaty,] stated that the Indians ... are not to be interfered with in the peaceful possession and undisturbed enjoyment of their land...."). *Cf. Williams v. Lee*, 358 U.S. 217, 221 (1959) (interpreting similar language in the Navajo Nation's 1868 Treaty of Fort Sumner to foreclose state court jurisdiction over a suit against tribal members for claims arising on Indian lands). In *Williams*, the Supreme Court noted that the "set apart" language guarantees exclusive tribal governance over reservation lands:

> In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. State of Georgia*, [31 U.S. 515 (1832),] was the understanding that the internal affairs of the Indians remained *exclusively* within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts.

358 U.S. at 221-22 (emphasis added). In line with this interpretation, the Sixth Circuit held the "set apart" language of the 1854 treaty to mean that the Ojibwe did not consent to either forced alienation of their lands, nor to state taxation of those lands or activities on those lands. *See Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514, 524-26 (6th Cir.), *cert. denied*, 549 U.S. 1053 (2006). *See also Keweenaw Bay Indian Community v. State of Michigan*, 784 F. Supp. 418, 428 (W.D. Mich. 1991) (affirming the validity of reservation boundaries established in the 1854 Treaty).

As the Tribal Parties' expert witness alleges, the 1854 Treaty guaranteed general control over the Lac du Flambeau Reservation by the tribe, and supports a general power to exclude nonmembers:

> Given that the federal government's intent was to provide a permanent home for the Lac du Flambeau Band, that the lands were set aside for the Band's ability to exercise governmental authority over the lands includes the full range of

[19] It is well established that the Lac du Flambeau Band, along with others, retains usufructary hunting, fishing, and gathering rights on territory ceded in the 1854 Treaty. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 362-65 (7th Cir.), *appeal dismissed*, 464 U.S. 805 (1983).

> powers associated with tribal sovereignty, combined with the specific treaty-based rights that came with their Reservation. This broad range of sovereign and governmental powers includes the right to exclude.

John Bowes Affidavit ¶ 14. United States Supreme Court jurisprudence confirms that the tribal power to exclude derives from treaty language setting aside reservation lands for the use of Indians and tribes. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is ... well established."); *Water Wheel*, 642 F.3d at 812 ("We must therefore conclude that the [Colorado River Indian Tribe]'s right to exclude non-Indians from tribal land includes the power to regulate them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government."). *See also Monestersky v. Hopi Tribe*, 4 Am. Tribal Law 424, 427 (Hopi Tribe Appellate Court 2002) ("It is well settled that the Hopi Tribe, and all Indian tribal governments, have the inherent power to exclude nonmembers as an exercise of their sovereign power in order to protect the health and safety of tribal members."); *Nigrelli v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. Rep. 183, 185, 1996 WL 34402644 (Mashantucket Pequot Tribal Court 1996) (holding that even absent a treaty right, "Indian tribes possess the power to determine who can enter their reservation and under what conditions they can remain. Indian tribes have the power to exclude") (citations omitted); *Duro v. Reina*, 495 U.S. 676, 696–97 (1990) ("The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.... Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.") (citations omitted); *South Dakota v. Bourland*, 508 U.S. 679, 687-88 (1993) (finding that a treaty "use and occupation" right conferring "the implicit 'power to exclude others' from the reservation and thereby 'arguably conferr[ing] upon the Tribe the authority to control fishing and hunting on those lands'") (quoting *Montana v. United States*, 450 U.S. 544, 559-59 (1981)). *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133-34 (1982) (implicitly affirming the tribal power to exclude in the context of a reservation set aside in an Executive Order for Indian use).

The "set aside" language, coupled with the reality that the United States only enters into treaties with nationalities under the Treaty Power of the United States Constitution, *see*

Worcester v. Georgia, 31 U.S. 515, 561-62 (1832), and the history of the 1854 Treaty, confirms that the Lac du Flambeau Band retains significant governance rights over its lands and people, and those nonmembers who come onto the Indian lands of the reservation. The Seventh Circuit also has repeatedly recognized that Indian tribes retain significant inherent authority over nonmembers in the context of regulating and enforcing treaty rights. *See Wisconsin v. EPA*, 266 F.3d 741, 748-750 (7th Cir. 2001) (Wood, C.J.), *cert. denied*, 535 U.S. 1121 (2002); *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490 494 (7th Cir. 1993) ("The courts have spoken of the "inherent sovereignty" of Indian tribes and have held that it extends to the kind of regulatory functions exercised by the Commission with respect to both Indians and non-Indians.") (Posner, C.J.).

As is well known to federal Indian law observers and practitioners, the Supreme Court in *Montana v. United States* articulated a general rule and two exceptions on the question of tribal civil jurisdiction over nonmembers. The Court wrote:

> [T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. ... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. ...

Montana, 544 U.S. at 565-66 (citation omitted). *Montana* arose when the Crow Tribe sought to regulate nonmember activity on non-Indian-owned land bordering a river running through its reservation. *See id.* at 566 ("Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe."). Other Supreme Court decisions adopting and applying *Montana* also arose on nonmember-owned land within reservation boundaries. *E.g.*, *Plains*

Commerce Bank, 544 U.S. at 320 (rejecting tribal court authority over "the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals"); *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 647 (2001) (rejecting tribal taxing authority over nonmember activities on "non-Indian fee land" within the Navajo Nation Reservation); *Strate v. A-1 Contractors*, 520 U.S. at 442 (holding that a tribal court action arising from an accident that "occur[ed] on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land"); *South Dakota v. Bourland*, 508 U.S. 679, 681-82 (1993) (holding that a tribal regulation applying to nonmember on "lands and overlying waters located within the Tribe's reservation but acquired by the United States for the operation of the Oahe Dam and Reservoir" is invalid). *Cf. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that the tribe may regulate nonmember-owned lands in a part of the reservation largely owned or controlled by the tribe, but not on a part of the reservation where the United States allotted most of the lands to nonmembers).[20]

Conversely, in every case where the Supreme Court held that a tribe retains civil jurisdiction over nonmembers, those cases arose on tribally-owned or controlled reservation or trust lands. For example, tribes retain general authority to tax nonmember activities on trust lands. *See Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 196, 197 (1985) (holding that "the Navajo Tribe of Indians may tax business activities conducted on its land without first obtaining the approval of the Secretary of the Interior"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-37 (1982) (recognizing "an Indian tribe's [inherent] authority to tax non-Indians who do business on the reservation"); *Washington v. Colville Confederated Tribes*, 447 U.S. 134 (1980). Tribes also retain authority to regulate nonmember hunting and fishing on Indian lands. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 300 (1983) ("New Mexico concedes that *on the reservation the Tribe* exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and *may also regulate the hunting and fishing by nonmembers*.") (emphasis added).

In *Water Wheel*, the Ninth Circuit explicitly tied the tribal power to exclude nonmembers from tribal lands to the tribal power to regulate nonmembers, even without nonmember consent.

[20] *Nevada v. Hicks*, 533 U.S. 353 (2001), which involved tribal court jurisdiction over a federal civil rights action brought against a state law enforcement official, is best regarded as being non-conclusive. The majority opinion noted that its "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 358 n. 2.

See 642 F.3d at 812 ("We must therefore conclude that [a tribe]'s right to exclude non-Indians from tribal land includes the power to regulate them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government."). The case involved a trespass action by the tribe against a nonmember-owned corporation that had overstayed its lease on tribal trust lands. *See id.* at 804 ("A tribal court system exercised jurisdiction over a non-Indian closely held corporation and its non-Indian owner in an unlawful detainer action for breach of a lease of tribal lands and trespass."). The court held that *Montana* does not apply to tribal government regulation of nonmember conduct *on lands owned or controlled by Indian tribes*. *See id.* at 811-13.[21]

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[21] The court will set down the bulk of the Ninth Circuit's reasoning here in the margin:

> Here, through its sovereign authority over tribal land, the [Colorado River Indian Tribes] had power to exclude Water Wheel and Johnson, who were trespassers on the tribe's land and had violated the conditions of their entry. Having established that the tribe had the power to exclude, we next consider whether it had the power to regulate. The authority to exclude non-Indians from tribal land necessarily includes the lesser authority to set conditions on their entry through regulations. *Merrion*, 455 U.S. at 144 ... (noting that the power to exclude "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct"); *Bourland*, 508 U.S. at 689 ... (noting that in opening up the Cheyenne Sioux Tribe's tribal lands for public use, Congress "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe"); *id.* at 691 n. 11 ... ("Regulatory authority goes hand in hand with the power to exclude."); *see also Montana*, 450 U.S. at 557 ... (recognizing a tribe's inherent authority to condition the entry of non-Indians on tribal land through regulations).
>
> As a general rule, both the Supreme Court and the Ninth Circuit have recognized that *Montana* does not affect this fundamental principle as it relates to regulatory jurisdiction over non-Indians on Indian land. *See Bourland*, 508 U.S. at 688–89 ... (describing *Montana* as establishing that when tribal land is converted to non-Indian land, a tribe loses its inherent power to exclude non-Indians from that land and thereby also loses "the incidental regulatory jurisdiction formerly enjoyed by the Tribe"); *see also Merrion*, 455 U.S. at 144–45 ... (upholding a tribal tax on non-Indians operating a business on tribal land as a condition of entry derived from the tribe's inherent power to exclude, without applying *Montana*); *Strate*, 520 U.S. at 456 ... (noting that the land in question was equivalent to non-Indian land and that "Montana, accordingly, governs this case"); *Mescalero Apache Tribe*, 462 U.S. at 330–31 ... (determining that *Montana* did not apply to the question of a tribe's regulatory authority over nonmembers on reservation trust land because "*Montana* concerned lands located within the reservation but not owned by the Tribe or its members"); *McDonald v. Means*, 309 F.3d 530, 540 n. 9 (9th Cir. 2002) (as amended) (rejecting the argument that *Montana* applies to tribal land because *Montana* limited its holding to non-Indian lands and *Strate* confirmed that limitation); *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1062–63 (9th Cir. 1999) ("The threshold question in this appeal is whether Montana's main rule applies, that is, whether the property rights at issue are such that the land may be deemed 'alienated' to non-Indians.").
>
> We must therefore conclude that the CRIT's right to exclude non-Indians from tribal land includes the power to regulate them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government. *Iowa Mut. Ins. Co.*, 480 U.S. at 18 ... ("Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty

Water Wheel's articulation of a rule in support of tribal court jurisdiction over nonmembers on tribal lands should not be all that surprising. Numerous lower federal courts have held a tribe retains jurisdiction over nonmembers where the action arises on trust or reservation lands controlled by Indians and tribes. *E.g.*, *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010) (affirming tribal court jurisdiction over tribal trespass claim against nonmember arising on tribal lands), *cert. denied*, 131 S. Ct. 1003 (2011); *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir.) (en banc) (affirming tribal court jurisdiction over tort claim against nonmember arising on tribal lands), *cert. denied*, 547 U.S. 1209 (2006); *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) (affirming tribal court jurisdiction over tribal member tort claims against nonmember arising on Bureau of Indian Affairs road); *DolgenCorp, Inc. v. Mississippi Band of Choctaw Indians*, 846 F. Supp. 2d 646 (S.D. Miss. 2011) (affirming tribal court jurisdiction over tribal member tort claim against another nonmember arising on tribal lands), *appeal pending*.[22]

> provision or federal statute." (internal citations omitted)); *Merrion*, 455 U.S. at 146 ... (noting the "established views that Indian tribes retain those fundamental attributes of sovereignty ... which have not been divested by Congress or by necessary implication of the tribe's dependent status"); *Santa Clara Pueblo* [*v. Martinez*], 436 U.S. [49,] 56 [1978] ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

Water Wheel, 642 F.3d at 811-13 .

[22] Moreover, lower federal courts have long distinguished between suits against nonmembers arising on nonmember lands, where *Montana* applies, from suits against nonmembers arising on Indian lands in tribal court exhaustion cases. *E.g.*, *DISH Network, LLC v. Laducer*, __ F.3d __, 2013 WL 3970245, at *6 (8th Cir., August 5, 2013) ("Even if the alleged abuse of process tort occurred off tribal lands, jurisdiction would not clearly be lacking in the tribal court because the tort claim arises out of and is intimately related to DISH's contract with Brian [Laducer] and that contract relates to activities on tribal land."); *Ninigret Development Corp. v. Narrangansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 32 (1st Cir. 2000) (holding no tribal court exhaustion required in suit involving off-reservation activities; and stating: "Civil disputes arising out of the activities of non-Indians *on reservation lands* almost always require exhaustion if they involve the tribe.") (emphasis added); *Enlow v. Moore*, 134 F.3d 993, 996 (10th Cir. 1998) (holding nonmember exhausted tribal court remedies in suit involving tribal trust allotments; and stating that "civil jurisdiction over non-Indians *on reservation lands* 'presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute'") (emphasis added); *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994) (requiring nonmembers to exhaust tribal court remedies in tax and employment regulation dispute arising on tribal trust lands; and stating: "Civil jurisdiction over tribal-related activities *on reservation land* presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute. [*Iowa Mutual.*] The deference that federal courts afford tribal courts concerning such activities occurring on reservation land is deeply rooted in Supreme Court precedent.") (emphasis added), *cert. denied*, 513 U.S. 1103 (1995). *See also Stock West Corp. v. Taylor*, 964 F.2d 912, 922 (9th Cir. 1992) (en banc) (O'Scannlain, C.J., dissenting) (dissenting from decision affirming immunity of reservation attorney; but stating: "Tribal authority over the activities of non-Indians *on reservation lands* is an important part of tribal sovereignty, and thus civil jurisdiction over such activities presumptively lies in the tribal courts.") (emphasis added) (citations, quotation marks, and brackets removed).

In comportment with *Water Wheel*, this Court finds that federal Indian law recognizes presumptive tribal court jurisdiction over nonmembers in cases arising on trust lands. This is all consistent with Supreme Court statements. In dicta in a case involving a challenge to tribal court jurisdiction over a tort claim arising on nonmember-owned land on the Blackfeet Indian Reservation, the Supreme Court suggested that tribal court jurisdiction over nonmembers is "presume[ed]"[23]:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. ... Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence ... is that the sovereign power ... remains intact."

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (citations omitted). The presumption of tribal court can be overcome if the nonmember can demonstrate, to borrow from a related case, *National Farmers Union*:

> [that the] assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

471 U.S. at 856 n. 21 (citations omitted).

Defendants' strongest argument here is that there is no on-reservation nonmember conduct. Saybrook points to representations in the transaction documents in which the contracting parties agreed that the negotiations, execution, and delivery of the transaction documents occurred off-reservation. The Tribal Agreement between the Tribe and Wells Fargo reads in relevant part:

> To demonstrate the willingness of the Tribe to submit to the jurisdiction of both the federal courts and the courts of the State of Wisconsin, the Tribe affirms that the transaction represented by the Agreement has not taken place on Indian Lands. As evidence thereof, the Tribe represents that the negotiations regarding this Agreement have occurred on lands within the jurisdiction of the courts of the State of Wisconsin, and the execution and delivery of this Agreement have not

[23] Certainly, one could argue that the Supreme Court has retreated from this statement, but the Court continues to repeat it. *See Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (citing *Iowa Mutual*'s "presumption" language); *Strate v. A-1 Contractors, Inc.*, 520 U.S. at 453 (same); *Brendale*, 492 U.S. at 454 (Blackmun, J., concurring and dissenting) (same).

> occurred on Indian Lands, but rather on lands within the jurisdiction of the courts of the State of Wisconsin, and the Tribe has appointed an agent for service of process in a location not on Indian Lands.

Tribal Agreement § 9(c). Saybrook also points to the Bond Purchase Agreement between the EDC and Stifel, which reads in relevant part:

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

Bond Purchase Agreement § 14(c).

These provisions appear, once again, in the context of tribal waivers of sovereign immunity, and should be construed in the context of a possible suit by the Trustee and Holders against the Tribal Parties in federal or state court. The contract representations that the negotiations, execution, and delivery of the transaction documents have "not taken place on Indian Lands," Tribal Agreement § 9(c), or "have occurred in the State of Wisconsin," Bond Purchase Agreement § 14(c), might be useful to establishing jurisdiction in federal or state court as to suits by the Trustee and the Holders to enforce the contract terms, but do not automatically foreclose suits brought by the Tribal Parties. Even so, at least one transaction document expressly recognizes that tribal assets are generated and/or located on the reservation. *See* Bond Purchase Agreement § 14(b) ("The Corporation expressly submits and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin ... *and the Lac du Flambeau Tribal Court* ... with respect to any dispute or controversy arising out of this Agreement....") (emphasis added). Under the terms of this document, if the federal courts do not have jurisdiction, presumably to enforce a money judgment arising from a dispute over the transaction, then the beneficiaries of this provision (the Trustee and the Holders) can proceed to the Lac du Flambeau tribal court to enforce the judgment. After all, the casino revenues are the prize, and that money is – and must be, under federal law – generated and located on Indian lands.

A tribal court should first be allowed to address whether the court has jurisdiction over events that occurred partially on and off the reservation. The Ninth Circuit held that it would require nonmember plaintiffs suing a tribal official under tort law to initially sue in tribal court under a version of the tribal court exhaustion doctrine, even where most relevant events occurred off-reservation. *See Stock West Corp. v. Taylor*, 964 F.2d 912, 919-20 (9th Cir. 1992) (en banc). There, nonmember plaintiffs argued that the tribal official, a reservation-based attorney employed by the tribe, engaged in legal malpractice in issuing an opinion letter on a question of tribal law without exercising reasonable care. *See id.* at 916. The opinion letter involved the financing of the construction of an on-reservation sawmill to be owned by a tribally-chartered corporation, but was delivered off the reservation. *See id.* at 919. The Ninth Circuit, sitting en banc, held that the federal court should abstain from hearing the case in the first instance:

> Whether Colville Tribal law applies to a tort that involved certain acts committed on reservation land and other acts committed outside its territorial jurisdiction to induce another to perform a contract on tribal lands presents a colorable question that must be resolved in the first instance by the Colville Tribal Courts. Section 148(f) of the Restatement (Second) of Conflict of Laws provides that a factor to be considered in determining the proper forum for an action for fraud and misrepresentation is "the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant." ... Abstention in this matter will permit the Colville Tribal Courts to explain whether this principle is a part of its statutory or common law.

Id. at 920. As the Tribal Parties have alleged fraud, the place of performance of the party alleging fraud is important. *See generally* Statement of Claim ¶¶ 51-75. Here, the Tribal Parties allege that the place of performance appears to largely be the tribal casino and the tribal government, from whence the transaction documents require payment of large sums from the tribal coffers to the defendants. *See id.* ¶ 46 ("In its final form, the Bond Transaction ... included terms that ... secured the Bond Transaction with gross revenues from the Casino.").

Here, the Tribal Parties bring suit to declare invalid an agreement (or a series of agreements) with nonmembers that would require the plaintiffs to divert tribal casino revenues from the reservation to the nonmember defendants located off the reservation. *See* Statement of Claim ¶¶ 76-88 (alleging a $32 million loss to the tribal government and resulting impacts on tribal governance). The assertion of this Court over claims involving millions of dollars of the tribal government's revenues comport with well settled United States Supreme Court precedent

that dictates suits seeking money damages against individual Indians must be brought in tribal forums. *See Williams v. Lee*, 358 U.S. 217, 223 (1959). While the defendants are located off the reservation, the focus of this agreement and the related lawsuits – tribal gaming revenues – are generated and located on trust lands on the reservation. Even though nonmembers located outside of Indian country seek access to those resources, this Court presumably enjoys jurisdiction over the Statement of Claim because it most directly involves tribal resources located on Indian lands.

Federal courts routinely find that nonmember parties with legal claims pending (or potentially pending) against tribal interests, often with tribal coffers as the prize, at least require tribal court exhaustion. *E.g.*, *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (requiring exhaustion where nonmember sued tribal corporation for contract breach, alleging over $50 million in damages); *Bank One, N.A. v. Shumake*, 281 F.3d 507, 510-12 (5th Cir. 2002) (requiring exhaustion where tribal members sued to avoid arbitration with creditor); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 63-64 (2d Cir. 1997) (requiring exhaustion where gaming management company sued tribe); *Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1227-28 (D. N.M. 2013) (requiring tribal court exhaustion where nonmember brought claims against tribal officials over tribal casino consultant contracts); *Grand Canyon Skywalk Development, LLC v. Vaughn*, No. CV11–8048–PCT–DGC, 2011 WL 2491425, at *2-4 (D. Ariz., June 23, 2011) (requiring tribal court exhaustion where nonmember sued tribal officials to enjoin application of tribal ordinance); *Paddy v. Mulkey*, 656 F. Supp. 2d 1241, 1247 (D. Nev. 2009) (requiring exhaustion where nonmember sued tribal government, noting that "this action arises out of Paddy's employment relationship with the Reno-Sparks Indian Colony"); *Fidelity and Guaranty Ins. Co. v. Bradley*, 212 F. Supp. 2d 163 (W.D. N.C. 2002) (requiring tribal exhaustion in construction contract claim against tribal member contractor for on-reservation conduct); *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas*, 72 F. Supp. 2d 717 (E.D. Tex. 1999) (requiring tribal exhaustion in contract claim against tribe for on-reservation conduct); *Calumet Gaming Group—Kansas v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1329 (D. Kan. 1997) (requiring tribal court exhaustion in suit over gaming management contract brought against tribe and holding: "The present action is such a reservation affair' because it concerns performance of contracts relating to a gaming operation located on the Tribe's reservation."). *Cf. Petrogulf Corp. v. ARCO*

Oil & Gas Co., 92 F. Supp. 2d 1111, 1117 (D. Colo. 2000) (holding that suit between nonmembers involving assets derived from Indian trust lands "must be brought first in the tribal court"). State courts do, too. *E.g.*, *Drumm v. Brown*, 716 A.2d 50, 67 (Conn. 1998) (requiring exhaustion of tribal remedies, and ordering a stay of state court proceedings, where nonmember suit brought against tribal officials "is a close and substantial connection between the positions of the trial court defendants and the entities that are the defendants in the tribal court action").

Nonetheless, there is a significant conflict between the parties about the jurisdictional facts necessary for this Court to conclusively decide this question. The parties to the transaction warranted in the documents that the negotiation, execution, and delivery of the transaction occurred off the reservation, but the Tribal Parties have effectively alleged that much of the performance of the transaction must occur on the reservation, even in the absence of the defendants from the reservation. Significant questions of jurisdictional fact compel additional fact-finding to determine whether there is sufficient nonmember activity on the Lac du Flambeau Reservation to conform to the *Water Wheel* formulation. *Cf. Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 775 (9th Cir. 2003) (reversing a grant of summary judgment where "a more complete record is necessary to the resolution of the dispute at issue"). The *Water Wheel* formulation is heavily fact-dependent, and the Court cannot dismiss the Statement of Claim on the pleadings. As the Court noted earlier, the allegations contained in the Statement of Claim strongly implicate the efforts of the defendants to enter Lac du Flambeau Indian country and do business with the Tribal Parties – facts that tend to justify the assertion of personal jurisdiction by any court.[24]

As such, the Court will not grant the defendants' motion to dismiss for lack of jurisdiction under principles of federal Indian law due to the relative dearth of jurisdictional facts

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[24] Professor Katherine J. Florey noted that the *Water Wheel* formulation relies more on personal jurisdiction principles that the *Montana* analysis:

> Another interesting feature of *Water Wheel*, however, is the way in which it succeeds in replacing the *Montana* test with a personal jurisdiction analysis. *Water Wheel* suggests, perhaps, some wiggle room in the *Montana/Strate/Hicks* framework, under which cases in which the Supreme Court has not strictly forbidden tribal jurisdiction may be understood – as an alternative – in personal jurisdiction terms. Further, it illustrates the ready adaptability of personal jurisdiction principles to Indian country. Of course, the contours of this approach are not entirely clear, and *Water Wheel* leaves standing many of the problems with current law – it does nothing to enhance tribal authority over non-Indian land, and it continues *Strate*'s linkage of adjudicative and regulatory jurisdiction.

Katherine J. Florey, *Beyond Uniqueness: Reimaging Tribal Courts' Jurisdiction*, 101 CAL. L. REV. (forthcoming 2013), manuscript at 69-70 (footnotes omitted), *available at* http://ssrn.com/abstract=2224227.

about the activities of the defendants on tribal trust lands, and the intention of the parties in siting the negotiation, execution, and delivery of the transaction documents off the reservation.

B. Analysis of the *Montana* Formulation.

Even if this Court applied the *Montana* line of cases to the Statement of Claim, the so-called *Montana 2* exception probably would support tribal court jurisdiction over the nonmember defendants.[25] The second *Montana* exception states, "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 544 U.S. at 566 (citations omitted). Recent Supreme Court decisions have fleshed out the Court's understanding of what fulfills the second exception. In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), the Court noted nonmember conduct that implicates the second exception must be "catastrophic" to tribal governance:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." ... The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. ... One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." [COHEN'S HANDBOOK OF FEDERAL INDIAN LAW] § 4.02[3][c], at 232, n. 220 [2005 ed.].

Plains Commerce Bank, 554 U.S. at 341. Additionally, the Supreme Court noted in a tribal tax case that a severe "drain" on tribal resources could be sufficient to meet the second *Montana* exception. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 657 n. 12 (2001) ("The [second *Montana*] exception is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, *unless the drain of the nonmember's conduct upon tribal*

[25] The Court expresses no opinion on the Tribal Parties' argument that this Court also enjoys jurisdiction under the first *Montana* exception. However, there is authority for the proposition that even a nonconsensual transactional relationship between a tribal gaming operation and a nonmember could provide colorable tribal court jurisdiction based on the "actions" of the nonmember. *See Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008); *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013); *Booppanon v. Harrah's Rincon Casino & Resort*, No. 06CV1623 BTM(BLM), 2007 WL 433250, at *3 (S.D. Cal., Jan. 23, 2007).

services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.") (emphasis added).

The Supreme Court has not yet held in its limited experience that nonmember conduct met the high threshold of the second *Montana* exception, but the Court has never seen a case quite like this one. Here, the Tribal Parties have alleged well-nigh catastrophic consequences to forcing the Tribe and the EDC to comply with the defendants demands under the terms of the transaction documents. Earlier in this opinion, the Court documented the alleged impacts on the tribe that have occurred since the Tribe and the EDC began complying with the transaction documents (in other words, 2008 and 2009). To recap:

> During the "winter months" between January 2008 and December 2009, "the Casino income was not sufficient to meet both the debt service on the Bonds and to distribute funds to the Tribe" needed for the provision of government services." *Id.* at ¶ 11. *See id.* ("In eight of those months, there was literally no money left over the Corporation or the Tribe once the bond payments were made. In addition there were three months in which there were some excess funds to transfer to the Tribe, but these transfers remained insufficient to meet the needs of the essential Tribal Government monthly operational costs."). The lack of revenue impacted the Tribal Parties' ability to reinvest in the Casino while making bond payments. *See id.* at ¶¶ 12-13. According to the plaintiffs, the lack of revenue dramatically affected the Tribe's ability to operate as a government. *See id.* at ¶¶ 17-29.

See generally Tribal Parties Memorandum, at 44-46 (alleging additional impacts on the tribal government and tribal employees). It is hard to see how the uncontrolled shutdown of tribal government services alleged by the Tribal Parties could be anything but a significant imperilment of the political integrity of the Lac du Flambeau Band.

Defendants' remaining argument that none have expressly consented to tribal court jurisdiction is meritless. Under either the *Water Wheel* formulation or the second exception to the *Montana* formulation, consent is irrelevant. Under *Water Wheel*, the Tribal Parties have alleged sufficient nonmember activity implicating tribal governance to invoke tribal court jurisdiction. Under the second *Montana* exception, assuming it applies, the Tribal Parties have alleged that defendants' actions may trigger potentially catastrophic consequences to the governance of the Lac du Flambeau Reservation, therefore meeting the second *Montana* exception. Nonmember conduct that undermines tribal self-governance, such as the defendants' demand that the Tribal

Parties continue to pay millions of tribal casino revenues to them, supports this Court's jurisdiction over them. As the United States Supreme Court noted in *Plains Commerce Bank*,

> The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may *intrude on the internal relations of the tribe or threaten tribal self-rule*. To the extent they do, such activities or land uses may be regulated. ... Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. *While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations*.

554 U.S. at 334-35 (emphasis added). *See also Nevada v. Hicks*, 553 U.S. 353, 361 (2001) ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them."). The "logic of *Montana*" obviates the need for the Tribal Parties to prove defendants' consent to this Court's jurisdiction.

Even so, much like the analysis of the *Water Wheel* formulation, the Court cannot dismiss this matter on the pleadings with an incomplete record on the jurisdictional facts and the intention of the parties in crafting its situs language.

V. Remaining Issues.

Two final threads of argumentation remain.

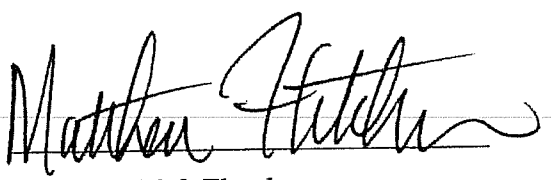
First, the Court denies as moot Stifel's motion to stay in favor of pending federal court litigation. *See* Stifel Motion to Dismiss at 18-19; Stifel Reply at 37-40. The parties have already extensively briefed the jurisdictional questions arising here, and no other party joined Stifel's motion. This Court's proceedings may be soon be subject to an injunction by the federal court in *Stifel, Nicolaus & Company, Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 3:13-cv-372-WMC (W.D. Wis.), it is true, but this opinion demonstrates that the Lac du Flambeau tribal court retains colorable jurisdiction over the Statement of Claim. Moreover, Stifel's motion depends on the ultimate resolution of this matter.

Second, Godfrey argues, without citation, that the Statement of Claim should be "barred by principles, of estoppel, laches, delay, acquiescence, waiver, and other equitable remedies." Godfrey Motion to Dismiss at 13. The Tribal Parties responded by arguing that they believed the now-dismissed federal court cases would decide the relevant questions, and that the parallel state

court matter likely will be dismissed for lack of jurisdiction. *See* Tribal Memorandum at 99-100, 105. Whatever the merits of the Tribal Parties' position on this matter, Godfrey offers no response. Finding the Tribal Parties' response to be reasonable, the Court rejects Godfrey's equities argument.

In conclusion, the defendants' motions to dismiss and related motions must be denied.

Dated: August 27, 2013



Matthew L.M. Fletcher
Judge Pro Tempore