UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL, NICOLAUS & COMPANY INCORPORATED, Plaintiff, v. LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN; LAC COURTE OREILLES TRIBAL COURT, Defendants.	)	Case No. 13-cv-121

DEFENDANT LAC COURT OREILLES TRIBAL COURT BRIEF IN SUPPORT OF ITS MOTION TO DISMISS OR IN THE ALTERNATIVE, TO STAY THE PROCEEDINGS

INTRODUCTION

The Lac Courte Oreilles Tribal Court ("Tribal Court") is in a difficult position because rather than serving in its assigned role as adjudicator of claims between the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin ("Band") and Stifel, Nicolaus & Company Incorporated ("Stifel"), Stifel has taken the unusual step of making the Tribal Court a party in a federal lawsuit.

The Tribal Court should be dismissed from this suit because it is immune from suit and did not waive its immunity. Further, regardless of whether the Tribal Court is dismissed from the case, this case should be dismissed or stayed so the jurisdictional analysis can be conducted in the first instance in the Tribal Court itself.

ARGUMENT

1. *The Tribal Court should be dismissed because it is immune from suit and has not waived its immunity.*

a. Legal Standard

The Tribal Court's request for dismissal is based on Rule 12(b)(1) and the Tribal Court's sovereign immunity is a facial challenge, not a factual one, to the Court's jurisdiction. Therefore, there is no need to look outside the complaint. "Facial challenges require only that the court look to the complaint and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Apex Digital Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009) citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir.1990).

b. Sovereign immunity discussion

The complaint does not allege how the Tribal Court is subject to this Court's jurisdiction nor does it allege the Tribal Court has waived its immunity from suit.

The Tribal Court has not waived its immunity from suit and therefore cannot be sued by Stifel. One of the seminal cases addressing sovereign immunity is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978):

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'"*

Santa Clara Pueblo v. Martinez, 436 U.S. at 58-59 (emphasis added, internal citations omitted).

Stifel does not assert the Tribal Court has waived its immunity from suit. It cannot because the Tribal Court does not appear anywhere in the transaction documents between the

Band and Stifel except when referenced as a forum for dispute resolution, see e.g. Ex. A, p. 23, § 14(b). In fact, a closer look at the waiver language in the Bond Purchase Agreement (Ex. A) shows a limited waiver that does not include the Tribal Court.

Section 14(b)(ii) of the Bond Purchase Agreement states the waiver "shall extend only to a suit to enforce the obligations of the Band under this Agreement." (Ex. A, § 14(b)(ii)). This limitation excludes the Tribal Court as a party because it did not have any obligations under the Bond Purchase Agreement. Pursuant to Rule 12(b)(1), the Tribal Court seeks dismissal from the case because it is immune from suit and its immunity has not been waived.

2. *Tribal Court exhaustion is required because Stifel cannot show the Tribal Court action is "patently violative of express jurisdictional prohibitions."*

Further, regardless of whether the Tribal Court is dismissed because it has sovereign immunity, the case should be dismissed or stayed and Stifel required to exhaust its remedies in the Tribal Court.

a. Legal Standard

The applicable federal rule of procedure is Rule 12(b)(6). In evaluating a dismissal request under Rule 12(b)(6), the Court accepts all facts in the complaint as true, views them in the light most favorable to the Plaintiff and draws all reasonable inferences in Plaintiff's favor. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010). "Although the bar to survive a motion to dismiss is not high, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.*, quoting *Ashcroft v. Iqubal*, 556 U.S. 662 (2009) (internal quotation marks omitted).

b. Under National Farmers Union *and* Iowa Mutual, *federal courts defer to allow the litigation to proceed in tribal court, unless tribal court jurisdiction is automatically foreclosed.*

Exhaustion of tribal court remedies was first established in *National Farmers Union v. Crow Tribe*, 417 U.S. 845 (1985). In that case the Court found that the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty and whether a tribe's sovereignty has been altered, divested or diminished. *National Farmers Union*, 417 at 855. In addition, determining a tribal court's jurisdiction requires a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. *Id.* at 856. The Court continued:

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

Id. at 856, (footnotes omitted).

Tribal Court exhaustion is required unless Stifel can show one of the exceptions to the rule is applicable here. Exhaustion is not required where: (1) an assertion of tribal jurisdiction is designed to harass or is conducted in bad faith; (2) where the action is patently violative of express jurisdictional prohibitions; or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Iowa Mutual Insurance Co. v. LaPlante et al.*, 480 U.S. 9, n. 21, (1987). A fourth exception was later added which states exhaustion is not required when "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," so that the exhaustion

requirement "would serve no other purpose that delay." *Strate v. A-1 Contractors*, 520 U.S. 438, 459-460 (1997).

Stated another way, a party is only relieved of the exhaustion requirement when tribal court jurisdiction is "automatically foreclosed." *National Farmers Union*, 471 U.S. at 855. In the ensuing years, courts have also characterized the test as whether tribal court jurisdiction is "colorable" or "plausible." *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009). The Court need not make a definitive determination of whether tribal court jurisdiction exists; it need only decide whether jurisdiction is plausible. *Id*. at 849.

None of the exceptions to exhaustion apply here.[1] The only remotely possible exceptions would be the second and fourth: that the action is patently violative of express jurisdictional prohibitions or that it is plain that no federal grant provides for tribal governance of nonmember's conduct on land covered by *Montana's* main rule. The Tribal Court assertion of jurisdiction meets the very low bar of having colorable or plausible jurisdiction over the parties and the suit.

Before discussing the only two potentially relevant exceptions to exhaustion, it should be noted that the precise question at issue here is before the Tribal Court on Stifel's motion to dismiss filed in Tribal Court. Comp., ¶30. The Tribal Court has not interpreted or issued a decision on the question of Tribal Court jurisdiction. The Tribal Court is not taking a position on the final answer to its own jurisdiction, but rather asserts that its jurisdiction is at least colorable and plausible and therefore under *National Farmers Union* and *Iowa Mutual*, the jurisdictional

[1] The case law makes clear that the exceptions to exhaustion are few and far between. *Krempel v. Prairie Island Indian Community*, 125 F.3d 621 (8th Cir. 1997) (Exhaustion not required where the Tribe did not have a tribal court); *Admiral Ins. Co. v. Blue Lake Rancheria et al.*, Case No. 5:12-cv-01266-LHK (Exhaustion required even where out-of-state insurance company was not original party to underlying transaction or tribal court action); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) (Exhaustion not required for claims brought in tribal court under the Price-Anderson Act).

analysis "should be conducted in the first instance in the Tribal Court itself." *See National Farmers Union*, 471 U.S. at 856.

i. The "patently violative" exception does not apply

Two cases from the Eighth Circuit illustrate the limited application of the "patently violative" exception. In *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), tribal court exhaustion was not required where the Resource Conservation and Recovery Act of 1976 (RCRA) granted federal courts exclusive jurisdiction for claims. Likewise, in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993), the court ruled that the federal Hazardous Materials Transportation Act (HMTA) preempted application of a tribal ordinance to the conduct at issue.

These cases demonstrate that a garden variety contract waiver or forum selection clause, such as the one in the Bond Purchase Agreement, do not come close to the type of situations in *Blue Legs* and *Northern States Power*, where a federal statute essentially pre-empted the tribal court's jurisdiction.

ii. Tribal Court jurisdiction under Montana *is colorable.*

Montana v. U.S., 450 U.S. 544 (1980), is considered the "pathmarking" case concerning tribal civil authority over nonmembers. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The presumption is that tribal court jurisdiction over nonmembers is disallowed unless one of two exceptions is met. First, 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." *Montana*, 450 U.S. at 565. Second, 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." *Id.* at 566.

Here there cannot be any reasonable argument that Tribal Court jurisdiction is at least colorable under the first exception because Stifel entered a consensual relationship with the Tribe through a contract.

To the extent that Stifel relies on *Altheimer & Gray v. Sioux Manufacturing Corp.* 983 F.2d 803 (7th Cir. 1993), for the proposition that exhaustion is not required, that reliance will be misplaced. In that case a subordinate economic entity of a North Dakota Indian Tribe, Sioux Manufacturing Corp ("SMC"), and an Illinois Corporation, Medical Supplies & Technology ("MST"), entered into agreements under which the two would collaborate to manufacture medical supplies on a reservation in North Dakota. The agreement contained language in which the Tribe and SMC waived "all sovereign immunity in regards to all contractual disputes." *Altheimer*, 983 F.2d at 807. Language was also included which stated the agreements were to be executed and interpreted under Illinois law and that all parties "agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois." *Id.*

The Court held exhaustion was not required for two reasons: 1) SMC explicitly consented to the jurisdiction of federal and state courts and 2) the application of the exhaustion rule would not serve the policies articulated in *National Farmers Union* and *Iowa Mutual*. *Altheimer*, 983 F.2d at 814-15. Neither of those reasons excuses exhaustion here.

There are three important differences between *Altheimer* and the case at bar. First, the waiver language in *Altheimer* is different from the language in the Bond Purchase Agreement at issue here. In the former, SMC waived immunity for "all" disputes, see 983 F.2d at 807; in the Bond Purchase Agreement, the waiver only extends to the Tribe's obligations under the

Agreement. Complaint, Ex. K, § 14(b)(iii). Second, the Bond Purchase Agreement explicitly includes the Tribal Court as a possible forum and the Band, as the plaintiff, chose that forum. Complaint, Ex. K, § 14(b). In *Altheimer*, SMC actively sought the federal forum by agreeing federal and state courts without mention of tribal court. *Id.*, 983 F.2d at 815. Third, the *Altheimer* court reasoned that the policies of *National Farmers Union* and *Iowa Mutual* would not be served because there was no case pending in tribal court and the main issues in the litigation did not involve tribal law. *Altheimer*, 983 F.2d at 814. In the instant case, there is a pending claim in Tribal Court.

The explicit mention in the Bond Purchase Agreement of the Tribal Court as a possible forum is, by itself, a clear enough signal that this Court should avoid the Supreme Court's fear that "unconditional access to the federal forum would place it in direction competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16.

For the foregoing reasons, this case should be dismissed or stayed to allow the Tribal Court litigation to go forward.

CONCLUSION

The Tribal Court should be dismissed because it is immune from suit and has not waived its immunity. Further, regardless of whether the Tribal Court is dismissed as a party under *National Farmers Union* and *Iowa Mutual*, the case should be dismissed or stayed and Stifel should be required to exhaust its Tribal Court remedies.

Dated this **15th** day of March, 2013.

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