

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 and LAC COURTE
OREILLES TRIBAL COURT,

Defendants.

Case No. 13-CV-121

**STIFEL’S BRIEF IN OPPOSITION TO DEFENDANTS’ MOTIONS TO DISMISS
OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS**

Stifel, Nicolaus & Company, Incorporated (Stifel), by its attorneys, Brian G. Cahill, David J. Turek, and Daniel J. Kennedy of Gass Weber Mullins LLC, submit this brief in response to the motions to dismiss or stay filed by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the Tribe) (Dkt. #9) and the Lac Courte Oreilles Tribal Court (the Tribal Court) (Dkt. #12).

INTRODUCTION

The motions to dismiss or stay filed by the Tribe and the Tribal Court should be denied because the Tribal Court is not immune from suit and Stifel is not required to exhaust its remedies in the Tribal Court with respect to the issue of jurisdiction.

The Tribal Court is not immune from suit because this action falls within the recognized exception to tribal sovereign immunity for suits seeking prospective relief in connection with violations of federal law. The Tribal Court’s exercise of jurisdiction exceeds the limitations

imposed by federal law on tribal court jurisdiction over nonmembers, and Stifel seeks prospective declaratory and injunctive relief in this action to redress that violation.

Stifel is not required to exhaust tribal court remedies with respect to the issue of jurisdiction for three reasons. First, the Tribe waived any requirement that Stifel exhaust tribal remedies in the Bond Purchase Agreement. The Tribe's argument that the waiver does not apply is premised on a misreading of the waiver provision. Second, the action commenced by the Tribe in the Tribal Court (the Tribal Court Action) violates the express prohibitions on Tribal Court jurisdiction contained in multiple documents connected to the transaction underlying the Tribal Court Action. Third, because it is plain that the Tribal Court lacks jurisdiction over the Tribal Court Action under *Montana v. United States*, 450 U.S. 544 (1981), exhaustion would only delay the adjudication of the Tribe's claims and is therefore unnecessary.

BACKGROUND

This action arises out of the Tribe's issuance of two series of bonds in 2006 pursuant to SEC Rule 144A, a transaction in which Stifel acted as the "Initial Purchaser" and which will be referred to herein as the 2006 Bond Transaction. (Complaint, Dkt. #1, ¶¶ 8-9). In connection with the 2006 Bond Transaction, the Tribe entered into or caused to be issued the documents attached as Exhibits A-J to Stifel's Complaint. In these documents, the Tribe repeatedly consented to jurisdiction in this Court or an appropriate Wisconsin state court for any disputes arising out of the 2006 Bond Transaction, to the exclusion of the jurisdiction of the Tribal Court.

Notwithstanding that contractual exclusion, the Tribe commenced the Tribal Court Action against Stifel on December 13, 2012, seeking monetary and other relief against Stifel in connection with Stifel's alleged failure to disclose certain information to the Tribe regarding the consequences of the 2006 Bond Transaction. (Complaint, Dkt. #1, ¶¶ 23-27 & Ex. K). Because

the Tribal Court lacks jurisdiction over Stifel and the Tribal Court Action, Stifel commenced the present action seeking a declaratory judgment concerning the Tribal Court's lack of jurisdiction and an injunction against further proceedings in the Tribal Court.

ARGUMENT

I. Sovereign Immunity Does Not Bar This Action Against the Tribal Court.

Stifel respectfully disagrees with the Tribal Court's assertion that it should be dismissed under the doctrine of tribal sovereign immunity.¹ That doctrine does not apply to the Tribal Court because Stifel's Complaint seeks only prospective relief in connection with an ongoing violation of federal law – the unlawful exercise of jurisdiction by the Tribal Court.

Indian tribes generally enjoy sovereign immunity from suit absent a waiver or congressional abrogation. *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)). No Seventh Circuit decision appears to have held that a tribe's sovereign immunity extends to a tribal court, but even if the Tribal Court enjoys the protection of the Tribe's sovereign immunity, the present case falls within a well-established exception for suits seeking prospective relief from an ongoing violation of federal law.

This exception is rooted in the Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123, 159-160 (1908), which recognized an exception to Eleventh Amendment immunity for suits against state officials which seek to enjoin ongoing violations of federal law. In light of the similarities between tribal immunity and the immunity afforded to states under the Eleventh

¹ To be clear, Stifel named the Tribal Court as a defendant because this action seeks a declaration regarding the Tribal Court's jurisdiction, an issue in which the Tribal Court unquestionably has an interest. See, e.g., *Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co.*, 416 F.2d 707, 710 (7th Cir. 1969) ("To avoid a partial disposition of a controversy, all persons who have an interest in the determination of the questions raised in a declaratory judgment suit should be before the court. "); *Lee v. Board of Regents of State Colleges*, 306 F. Supp. 1097, 1100 (W.D. Wis. 1969).

Amendment, federal courts have recognized *Ex parte Young* as an exception to tribal sovereign immunity. *E.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-1155 (10th Cir. 2011); *Vann v. Kempthorne*, 534 F.3d 741, 749-750 (D.C. Cir. 2008); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (citing *Ex Parte Young* and finding that tribal officer not immune from suit to enjoin enforcement of tribal ordinance that allegedly violated federal law). More specifically, the Tenth Circuit in *Crowe & Dunlevy* recently held that *Ex Parte Young* applied to a suit challenging the allegedly unlawful exercise of jurisdiction by a tribal court, a violation of federal common law. *Crowe & Dunlevy*, 640 F.3d at 1155-1156; *see also BNSF Ry. Co. v. Ray*, 297 Fed. Appx. 675, 676-677 (9th Cir. 2008) (unpublished) (“Because Plaintiffs have alleged on ongoing violation of federal law – the unlawful exercise of tribal court jurisdiction – and seek prospective relief only, tribal sovereign immunity does not bar this action.”). This action raises the same issue.

The *Ex Parte Young* doctrine is applicable where a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Verizon Maryland, Inc. v. Public Serv. Comm’n*, 535 U.S. 635, 645 (2002); *Indiana Protection & Advocacy Servs. v. Indiana Family & Social Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010). Stifel’s Complaint satisfies these two criteria. First, Stifel has alleged that the Tribal Court’s exercise of jurisdiction over Stifel and the Tribal Court Action “exceeds the narrow limitations imposed on tribal court jurisdiction over non-members by federal law.” (Complaint, Dkt. #1, ¶ 28). Second, Stifel seeks a declaration that the Tribal Court lacks jurisdiction over Stifel and the Tribal Court Action and injunctive relief against further proceedings in the Tribal Court

Action, both of which are prospective in nature. *Kroll v. Board of Trustees of University of Illinois*, 934 F.2d 904, 908 (7th Cir. 1991); *Crowe & Dunlevy*, 640 F.3d at 1155. Accordingly, Stifel's claim against the Tribal Court is not barred by sovereign immunity. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, --- F. Supp. 2d ----, 2012 WL 6731812, at *8 (D.S.D. Dec. 28, 2012) (tribal court's sovereign immunity subject to *Ex Parte Young* exception; "if the tribal court acts beyond the scope of its authority, the tribal court is not entitled to sovereign immunity.")

II. Stifel is Not Required to Exhaust its Remedies in the Tribal Court.

Contrary to the arguments of the Tribe and the Tribal Court, this Court need not—and should not—dismiss or stay proceedings in this case until Stifel has exhausted its remedies in the Tribe's court system with respect to the issue of jurisdiction. Exhaustion is not required in the present case for three reasons. First, the Tribe waived any requirement of exhaustion in the Trust Indenture and Bond Purchase Agreement. Second, the Tribal Court Action violates the express terms of the documents connected to the 2006 Bond Transaction, under which the Tribe consented to jurisdiction in Wisconsin state and federal courts for disputes arising out of the 2006 Bond Transaction to the exclusion of the jurisdiction of the Tribal Court. Third, the Tribal Court lacks jurisdiction over the Tribal Court Action, and thus a stay of proceedings in this case would only delay the inevitable – a declaration from this Court that the Tribal Court lacks jurisdiction.

A. Exhaustion is a Prudential Doctrine Subject to Multiple Exceptions Applicable to Stifel's Federal Action.

The principle of exhaustion is not an inflexible requirement; it is a prudential doctrine based on comity. *Strate v. A-1 Contractors*, 520 U.S. 430, 453 (1997). Where applicable, exhaustion serves the recognized interests in promoting tribal self-government and self-

determination and prevents interference with a tribal court's authority over reservation affairs. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987); *Alzheimer & Gray*, 983 F.2d at 815. To determine whether the Tribal Court Action implicates these interests, and thus is "truly a reservation affair entitled to the exhaustion doctrine," the Court must examine the factual circumstances underlying the Tribal Court Action. *Alzheimer & Gray*, 983 F.2d at 814.

As the Tribal Court acknowledges, the Supreme Court has identified four situations in which exhaustion is not required: (1) where the assertion of tribal jurisdiction is motivated by a desire to harass or is made in bad faith; (2) where an action patently violates express jurisdictional prohibitions; (3) where the lack of an adequate opportunity to challenge the tribal court's jurisdiction would render exhaustion futile; or (4) where exhaustion would serve no purpose other than delay because it is plain that the tribal court lacks jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985); *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (citing *Strate*, 520 U.S. at 459-460 & n.14). As explained in Sections C and D below, this action falls within exceptions (2) and (4). Before turning to those exceptions, however, Stifel addresses the Tribe's argument that the Tribe's waiver of exhaustion in the Bond Purchase Agreement is inapplicable.

B. The Tribe's Waiver of Exhaustion Applies Because The Underlying Lawsuit is About the Bonds and Stifel Seeks to Enforce the Tribe's Obligations under the Bond Purchase Agreement.

Contrary to the Tribe's contention, the Tribe expressly waived any exhaustion requirement in both the Trust Indenture and the Bond Purchase Agreement. In Section 13.02 of the Trust Indenture, the Tribe expressly waived exhaustion for any action related to the subject matter of the Indenture:

Section 13.02 Limited Waiver of Sovereign Immunity, Jurisdiction. The Tribe hereby expressly waives its sovereign immunity from suit and any requirement for exhaustion of tribal remedies should an action be commenced on this Indenture or the Bond Resolution, or regarding the subject matter of this Indenture. The Tribe expressly consents to the levy of judgment or attachment of the Pledge Casino Revenues wherever located or maintained, including within the boundaries of the Lac Courte Oreilles Reservation, by the appropriate federal or state court. This waiver:

- (a) shall terminate upon payment in full of the Bonds and all other amounts payable by the Tribe under the Indenture,
- (b) is granted solely to the Trustee and the Holders from time to time of the Bonds,
- (c) shall extend only to a suit to enforce the obligations of the Tribe under the Indenture or the Bond Resolution or Bond Purchase Agreement,
- (d) 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 13.02,
- (e) 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
- (f) shall remain in full force and effect notwithstanding that the governing law shall be as set forth in Section 13.01.

(Complaint, Dkt. #1, Ex. B, p. 65, § 13.02) (emphasis supplied).

In the Tribal Court Action, the Tribe alleged that Stifel failed to disclose certain information in relation to the issuance of the 2006 Bonds. (Complaint, Dkt. #1, ¶¶ 23-27 & Ex. K). The Indenture is the key document related to the issuance of the Bonds. (*E.g.*, Complaint, Dkt. #1, Ex. B, p. 2) (“That [the Tribe], in order to secure the payment of the principal of, premium (if any) and interest on the **Bonds issued under this Indenture . . .**”) (emphasis supplied); *Black’s Law Dictionary* 773 (7th ed. 1999) (defining corporate indenture as a “document containing the terms and conditions **governing the issuance of debt securities, such as bonds** or debentures.”) (emphasis supplied). Thus, because the Tribal Court Action focuses

on the issuance of the Bonds and that issuance is the “subject matter of th[e] Indenture,” the Indenture’s waiver of exhaustion is applicable here.

Similarly, Section 14(b) of the Bond Purchase Agreement contains another waiver of exhaustion by the Tribe for actions commenced under that Agreement:

(b) Limited Waiver of Sovereign Immunity; Jurisdiction. The Tribe hereby expressly waives its sovereign immunity from suit and any requirement for exhaustion of tribal remedies should an action be commenced under this Agreement or regarding the subject matter hereof. This waiver: (i) shall terminate upon payment in full of the Bonds and all other amounts payable by the Tribe under this Agreement; (ii) is granted solely to the Initial Purchaser or its assignee; (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 Subsection (b); (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 law shall be as set forth in Subsection (a).

(Complaint, Dkt. #1, Ex. A, p. 23, § 14(b)) (emphasis supplied). The Tribal Court Action centers on the Bond Purchase Agreement, which is mentioned 12 times in the Complaint. (Complaint, Dkt. #1, Ex. K, pp. 3-9). Moreover, Stifel is the “Initial Purchaser” in the Bond Purchase Agreement. (Complaint, Dkt. #1, Ex. A, at p. 1).

The Tribe argues the waiver in Section 14(b) is not applicable because the condition in subparagraph (iii) is not satisfied, namely that the Tribal Court Action does not constitute a suit to enforce the Tribe’s obligations under the Bond Purchase Agreement.² The Tribe’s argument misses the mark because the relevant “suit” for the purpose of subparagraph (iii) is this federal action, not the Tribal Court Action. The Tribe is not requesting that the Tribal Court Action be dismissed or stayed pending exhaustion; it is asking that this federal action be dismissed or stayed pending exhaustion. Thus, the question before the Court is not whether the Tribal Court

² A similar condition appears in subpart (c) of the waiver present in Section 13.02 of the Indenture. (Complaint, Dkt. #1, Ex. B, p. 65, § 13.02).

Action is a “suit to enforce” the Tribe’s obligations under the Bond Purchase Agreement, but instead whether this federal action is a “suit to enforce” those obligations. It is.

Stifel filed this federal action seeking a declaration that the Tribal Court lacks jurisdiction over the Tribal Court Action and an injunction against further proceedings in the Tribal Court Action. Specifically, Stifel is asking this Court to enforce the obligation of the Tribe to litigate disputes arising out of the 2006 Bond Transaction in a non-tribal forum. That is one of the Tribe’s obligations under the Bond Purchase Agreement.

In Section 7(a) of the Bond Purchase Agreement, the Tribe agreed to “observe all covenants of the Tribe” contained in the Trust Indenture. (Complaint, Dkt. #1, Ex. A, p. 10, § 7(a)). The Trust Indenture, in turn, requires the Tribe to “faithfully perform at all times any and all covenants, undertakings, stipulations and provisions contained in this Indenture and the Bond Resolution and in each and every Bond executed, authenticated and delivered hereunder[.]” (Complaint, Dkt. #1, p. 40, § 6(a)). In the Trust Indenture, the Bond Resolution, and the Bonds, the Tribe promised to litigate disputes arising out of any transaction connected to the Indenture or the Bonds in this Court or an appropriate Wisconsin state court, but *not* in the Tribal Court.

Specifically, in Section 13.02 of the Trust Indenture, the Tribe agreed that the Tribal Court would not have jurisdiction over disputes arising out of the Indenture, Bond Resolution or the Bonds, or to any transaction connected to those documents:

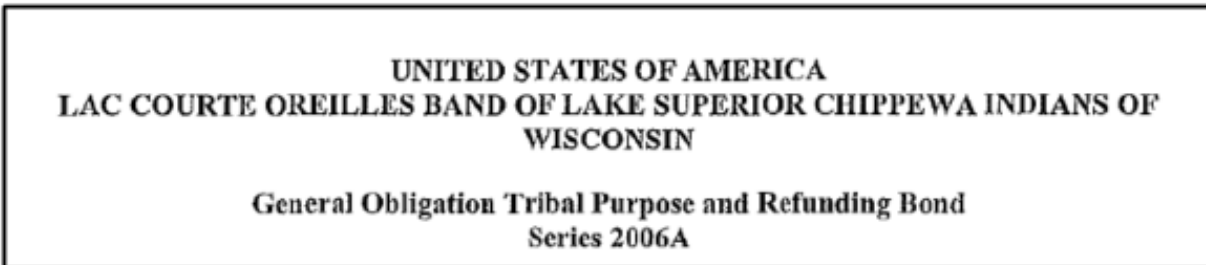
The Tribe expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the Federal District Court for the Western District of Wisconsin may be appealed), and, in the event (but only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

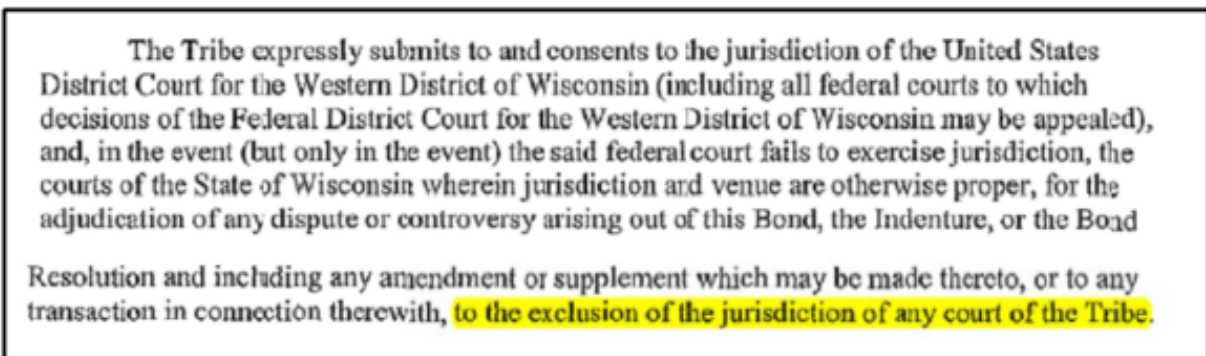
(Complaint, Dkt. #1, Ex. B, p. 65, § 13.02) (emphasis supplied). Similarly, the Bond Resolution passed by the Tribe's Governing Board acknowledges and approves the requirement that the Tribe consent to jurisdiction in non-tribal forums as a condition to the 2006 Bond Transaction:

1.11 The Tribal Governing Board has been advised that as a condition to the issuance of the Series 2006 Bonds, the Tribe will be required to agree to various legal provisions (the "Legal Provisions") that will provide for (a) a limited waiver of its sovereign immunity with respect to suits or other legal actions or proceedings arising because of disputes related to the Series 2006 Bonds or the foregoing named documents or other agreements related thereto, (b) consent by the Tribe 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 such disputes and the enforcement of remedies related thereto, and (c) consent by the Tribe to apply the laws of a given state in the interpretation of the foregoing documents. The specific state law that applies to each one of the foregoing documents is the law of the State of Wisconsin.

4.1 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 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 of the Indenture, the Bonds, this Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(Complaint, Dkt. #1, Ex. E, §§ 1.11 and 4.1) (emphasis supplied). Finally, the Tribe also consented to jurisdiction in Wisconsin federal and state courts and excluded jurisdiction in the Tribal Court in the Bonds themselves:





(Complaint, Dkt. #1, Ex. F, pp. 1, 5-6; *see also id.*, Ex. G, pp. 1, 5-6) (emphasis supplied).

Through Section 7(a) of the Bond Purchase Agreement, the Tribe's repeated and express agreements to litigate disputes arising out of the 2006 Bond Transaction in Wisconsin federal or state courts contained in the Indenture, the Bond Resolution and the Bonds are "obligations of the Tribe" under the Bond Purchase Agreement. Stifel commenced this action to enforce those obligations. Thus, the Tribe's waiver of exhaustion contained in the Bond Purchase Agreement applies to this federal action.

C. Exhaustion is not Required Because the Tribal Court Action Patently Violates Express Jurisdictional Prohibitions in the Transaction Documents.

Separate and apart from the Tribe's waiver of exhaustion, Stifel's federal action should not be dismissed or stayed because the Tribal Court Action violates the express exclusions of the

jurisdiction of the Tribal Court contained in the documents executed or issued by the Tribe in connection with the 2006 Bond Transaction. *See National Farmers Union*, 471 U.S. at 856 n.21.

Federal courts, including the Seventh Circuit, have recognized that contractual provisions that express a preference or requirement that disputes between the parties be litigated in non-tribal forums can excuse exhaustion. For example, in *Alzheimer & Gray*, 983 F.2d at 814-815, the Seventh Circuit held that an action filed in state court for breach of contract against a tribal corporation was not barred by the exhaustion requirement because (1) the parties' principal dispute concerned the application of a federal statute and the interpretation of a contract governed by state law; and (2) the tribe had made a contractual promise to submit to the venue and jurisdiction of Illinois federal and state courts. These facts led the Seventh Circuit to conclude that the dispute was not "truly a reservation affair entitled to the exhaustion doctrine." *Id.* at 814. Moreover, the Court of Appeals observed that refusing to enforce the parties' agreement to litigate disputes in a non-tribal forum would "undercut the Tribe's self-government and self-determination," contrary to the policy underlying the exhaustion rule. *Id.* at 815.

Courts outside the Seventh Circuit have also concluded that a contractual forum selection or consent to jurisdiction clause can excuse exhaustion of tribal remedies. *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (reversing district court's ruling that nonmember's breach of contract action against tribal members was subject to exhaustion requirement because dispute resolution clause in contract permitting disputes to be determined in tribal court or other court of competent jurisdiction removed any "significant comity reason" to defer litigation to tribal court); *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.S.D. 2005) (exhaustion of tribal remedies not required in breach of contract action brought against tribe member in federal court where forum selection and consent to jurisdiction clauses in parties'

contracts required litigation of disputes in state or federal courts); *QEP Field Servs. Co. v. Ute Indian Tribe*, 740 F. Supp. 2d 1274, 1280 (D. Utah 2010) (exhaustion of tribal remedies unnecessary because clear and unambiguous waiver of tribal court jurisdiction in dispute resolution clause of contract between plaintiff and tribe rendered litigation in tribal court patently violative of contract).

The material considerations that led the Seventh Circuit to conclude that exhaustion was not required in *Alzheimer & Gray* are also present in this case. First, the terms of the Trust Indenture and the Bond Purchase Agreement reflect the parties' agreement that the 2006 Bond Transaction is not a "reservation affair." Each of these documents contains a "Situs of Transaction" provision in which the Tribe affirms that the 2006 Bond Transaction and its preceding negotiations occurred in the State of Wisconsin, *not* on tribal lands:

Trust Indenture

Section 13.03 Situs of Transaction. To demonstrate the willingness of the Tribe to submit to the jurisdiction of both the federal courts and the courts of the State of Wisconsin, the Tribe affirms that the transaction represented by this Indenture has not taken place on Indian Lands. As evidence thereof, the Tribe represents that the negotiations regarding this Indenture have occurred on lands within the jurisdiction of the courts of the State of Wisconsin, and the execution and delivery of this Indenture 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.

(Complaint, Dkt. #1, Ex. B, pp. 65-66, § 13.03).

Bond Purchase Agreement

(c) Situs of Transaction. To demonstrate the willingness of the Tribe to submit to the jurisdiction of both the federal courts and the courts of the State of Wisconsin, the Tribe affirms that the transaction represented by this Agreement has taken place in the State of Wisconsin. As evidence thereof, the Tribe 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 Tribe has appointed an agent for service of process in the State of Wisconsin.

(Complaint, Dkt. #1, Ex. A, p. 24, § 14(c)).³

In addition, the Tribe's claims against Stifel are governed by Wisconsin law, not tribal law. The Bond Purchase Agreement, the Trust Indenture, the Bond Resolution, and the Bonds themselves all contain choice of law provisions stating that Wisconsin law governs the documents and their construction. (Complaint, Dkt. #1, Ex. A, p. 23, § 14(a); Ex. B, p. 65, § 13.01; Ex. E, § 1.11; Ex. F, p. 5; Ex. G, p. 5; Ex. H, p. 4). Paragraph 15 of a letter from the Tribe's counsel dated December 22, 2006 also confirms that the "construction and enforcement of the Bond Documents are governed by the laws of the State of Wisconsin." (*Id.*, Ex. J, p. 4, ¶ 15). Thus, the Tribe's claims against Stifel will not be governed by tribal law in which the Tribal Court may have greater expertise.

Second, the Tribe repeatedly agreed to jurisdiction in Wisconsin federal and state courts to the exclusion of the jurisdiction of the Tribal Court in documents connected to the 2006 Bond Transaction. (Complaint, Dkt. #1, ¶¶ 11-22). Stifel seeks only to hold the Tribe to its promises. As in *Alzheimer & Gray*, "[t]o refuse enforcement of th[ese] routine contract provision[s] would be to undercut the Tribe's self-government and self-determination." *Alzheimer*, 983 F.2d at 815.

The Tribal Court's three attempts to distinguish *Alzheimer* are unavailing. First, as explained above, the waiver of exhaustion in the Bond Purchase Agreement is applicable to this action because it seeks to enforce the Tribe's obligations under the Bond Purchase Agreement. Second, the *Tribe's* apparent consent to Tribal Court jurisdiction is not controlling. Importantly,

³ By reference to the "State of Wisconsin," these clauses confirm that none of the negotiations occurred on tribal lands. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) ("Indian tribes are 'distinct, independent political communities, retaining their own natural rights' in matters of local self-government."); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989) (recognizing that Indian tribes are distinct from states under U.S. Constitution); see also *Fisher v. District Court*, 424 U.S. 382, 389 (1976) (an Indian's domicile on the reservation is not an "in-state" contact which grants jurisdiction to state courts).

this consent is not binding on Stifel, who has never consented to be sued in Tribal Court.⁴ In addition, the Tribe's consent to jurisdiction conflicts with its repeated exclusions of the Tribal Court's jurisdiction in the Trust Indenture, the Preliminary Limited Offering Memorandum, the Limited Offering Memorandum, and the Series 2006A Bond. But reading further, Section 16(g) of the Bond Purchase Agreement resolves any conflict by directing that "any conflict between the terms of [the Bond Purchase] Agreement and the Indenture shall be resolved in favor of the Indenture", which excludes jurisdiction in the Tribal Court. (Complaint, Dkt. #1, Ex. A, p. 25, § 16(g)) Third, because the Tribe's claims against Stifel are governed by Wisconsin law, not tribal law, exhaustion is not warranted out of deference to the Tribal Court's role in adjudicating cases arising under tribal law.

Finally, the Tribal Court's reliance on the Eighth Circuit's decisions in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) and *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993) to define the scope of the "patently violative" exception is misplaced. In *Blue Legs*, the Eighth Circuit held that exhaustion was not required with respect to claims brought under a federal statute because the statute placed exclusive jurisdiction over the claims in the federal courts. *Blue Legs*, 867 F.2d at 1098. In *Northern States*, 991 F.2d at 463, the court found that the plaintiff was incapable of exhausting its tribal remedies because those remedies arose under an ordinance that was preempted by a federal statute. Neither case mentioned the "patently violative" exception or purported to define its scope.

⁴ Although the Tribal Court argues that Section 14(b) of the Bond Purchase Agreement "explicitly includes the Tribal Court as a possible forum," (Tribal Court Br., Dkt. #13, at p. 8), the express terms of that section provide only that the *Tribe* consents to jurisdiction in the Tribal Court. Section 14(b) does not state, and cannot be interpreted, to constitute consent by *Stifel* to the jurisdiction of the Tribal Court.

These decisions could be construed to arise out of situations in which tribal jurisdiction was “patently violative” of express jurisdictional prohibitions, but they do not support the proposition that such prohibitions can *only* be found in federal statutes. *Alzheimer* suggests that a forum selection clause can also be an express jurisdictional prohibition, and the district court in *QEP Field Servs. Co.*, 740 F. Supp. 2d at 1280, concluded that a contractual waiver of tribal court jurisdiction was an express jurisdictional prohibition. Consistent with this authority, the “Situs of Transaction” provisions in the Trust Indenture and the Bond Purchase Agreement and the Tribe’s repeated consents to jurisdiction in Wisconsin state and federal courts, to the exclusion of Tribal Court jurisdiction, expressly prohibit the Tribal Court from exercising jurisdiction over the Tribal Court Action, thus rendering exhaustion unnecessary.

D. Exhaustion Will Serve No Purpose Other Than Delay Because Federal Law Places the Tribal Court Action Outside the Tribal Court’s Jurisdiction.

Finally, this federal action is not subject to the exhaustion principle because it falls within the exception identified by the Supreme Court in *Strate* and *Hicks* for cases in which it is plain that a tribal court lacks adjudicatory authority over nonmembers’ conduct under the analysis set forth in *Montana v. United States*, 450 U.S. 544 (1981). *Strate*, 520 U.S. 438, 459 n.14; *Hicks*, 533 U.S. at 369.

In *Montana v. United States*, the “pathmaking case concerning tribal civil authority over nonmembers,” *Strate*, 520 U.S. at 445, the Supreme Court held that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Montana*, 450 U.S. at 565; *see also Hicks*, 533 U.S. at 361 (tribe’s assertion of jurisdiction over nonmembers “must be connected to that right of the Indians to make their own laws and be governed by them.”). The Court in *Montana* held that “the inherent

sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”

Id. at 565.

This rule is subject to two narrow exceptions in which tribes may exercise civil jurisdiction over nonmembers on their reservations. 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.

1. The Tribal Court Action Does Not Fall Within the Consensual Relationships Exception.

The Tribal Court construes the “consensual relationships” exception too broadly in arguing that the mere existence of a contract between Stifel and the Tribe is sufficient. The “consensual relationships” exception limits tribal regulation to “nonmember *conduct* inside the reservation that implicates the tribe’s sovereign interests”; such conduct can be regulated only to the extent necessary to protect tribal self-government and to control internal relations. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008). Thus, tribal courts have jurisdiction over lawsuits against nonmembers that arise out of contractual or other consensual relationships where the nonmembers’ performance of the contract occurs on the tribe’s reservation. *E.g.*, *Williams v. Lee*, 358 U.S. 217 (1959) (tribal court had jurisdiction over contract dispute arising out of sale of merchandise by nonmember who owned a store on reservation to tribal members).

The present case does not fall within the “consensual relationships” exception because, unlike in *Williams*, Stifel performed no services on the Tribe’s reservation. The Tribe has not alleged that Stifel engaged in any conduct or activities on its land pursuant to the Bond Purchase Agreement or any other document prepared in connection with the 2006 Bond Transaction. To the contrary, the Tribe represented in the Bond Purchase Agreement and the Trust Indenture that the transaction and negotiations preceding its consummation occurred entirely within the State of Wisconsin, *not* within the boundaries of the Tribe’s reservation. (Complaint, Dkt. #1, Ex. A, p. 24, § 14(c); Ex. B, pp. 65-66, § 13.03). Because the dispute underlying the Tribal Court Action involves nonmember activities or conduct that occurred outside the Tribe’s reservation, “the policies behind the tribal exhaustion rule are not so obviously served.” *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993).

Even if Stifel’s alleged conduct had occurred on the Tribe’s land, the Tribe’s claims still would not fall within the first *Montana* exception. To fit within that exception, the Tribe must establish some ““commercial dealing, contracts, leases, or other [private consensual relationship]”” between the nonmember defendant and the tribe or its members. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001) (internal citation omitted); *see also Hicks*, 533 U.S. at 359 n.3. And the Tribe’s regulation must have a nexus to the consensual relationship itself – that is, the claim must directly regulate the alleged consensual relationship. *Atkinson*, 532 U.S. at 656 (“A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another – it is not ‘in for a penny, in for a Pound.’”).

Even if the Tribe was to establish that Stifel’s alleged conduct occurred on Tribal land, and could further show that the 2006 Bond Purchase Agreement or some other tangential communication constituted a “consensual relationship,” the Tribe’s claims in the Tribal Court

Action do not bear a nexus to that relationship sufficient to invoke the first *Montana* exception. The Tribe's claim that Stifel fraudulently induced it to enter the Bond Purchase Agreement, and request for rescission of that agreement, seeks to disavow, rather than regulate, the relationship between Stifel and the Tribe. (Complaint, Dkt. #1, Ex. K, ¶¶ 14-23). Consequently, the Tribe's allegations negate any potential nexus between Stifel's alleged conduct and regulation of any relationship based upon the Bond Purchase Agreement. Accordingly, even if an on-reservation consensual relationship existed, the first *Montana* exception would not apply. *See, e.g., Strate*, 520 U.S. at 456-57 (rejecting tribal jurisdiction over a tort claim brought against nonmembers because claim did not regulate nonmember's consensual relationship with tribe).

2. The Tribal Court Action Does not Fall Within the Second *Montana* Exception.

The Tribal Court also lacks jurisdiction over the Tribal Court Action under the second exception recognized in *Montana*, which extends tribal jurisdiction to nonmember conduct on a reservation that threatens a tribe's political integrity, economic security, or the health and welfare of tribe members. *Montana*, 450 U.S. at 566. Although broadly framed, this exception is narrowly construed because "virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (*en banc*); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 943 (9th Cir. 2009) (generalized threat of torts by or against tribal members "is not what the second *Montana* exception is intended to capture."). Instead, this 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.'" *Plains Commerce Bank*, 554 U.S. at 341 (citation omitted). In other words, nonmember conduct "must do more than injure the tribe, it must imperil the subsistence of the tribal community." *Id.*

(exercise of jurisdiction under second exception must be “necessary to avert catastrophic consequences”); *see also Attorney’s Process & Investigative Servs., Inc. v. Sac & Fox Tribe of the Mississippi*, 609 F.3d 927, 939-40 (8th Cir. 2010) (holding that tribal court jurisdiction over assault and other tort claims brought against nonmember corporation whose agents allegedly entered tribal land unlawfully, stormed buildings “vital to the Tribe’s economy and its self-government,” committed violent acts against tribe members and seized sensitive information concerning tribal finances and gaming operations because agents’ conduct sufficiently “menaced” tribe’s political integrity, economic security, health and welfare).

Here, the Tribe has not alleged that Stifel engaged in *any* conduct or activities on its land, much less conduct or activities that “menaced” the Tribe or imperiled the Tribe’s economic security or ability to govern itself. Nothing in the Tribal Court Action suggests that the Tribe’s decision to issue the 2006 Bonds and sell them to Stifel has been “catastrophic” for the Tribe’s self-government. The transaction took place more than six years ago, during which time the Tribe’s self-government has proceeded without apparent interruption. Nor does Stifel’s alleged failure to make certain disclosures regarding the consequences of the issuance of the 2006 Bonds fit within the categories that define the scope of the second exception – punishment of tribal members, determination of tribal membership, regulation of domestic relations, and prescription of rules of inheritance. *See Strate*, 520 U.S. at 459.

Tribal Court jurisdiction over the Tribe’s claims against Stifel is not needed to preserve the Tribe’s right to make its own laws and to be ruled by them, and requiring Stifel to defend itself against these claims in an unfamiliar court is not crucial to the Tribe’s political integrity, economic security or health and welfare. *Strate*, 520 U.S. at 459. Because it is plain that the Tribal Court lacks jurisdiction over the Tribal Court Action under either *Montana* exception, the

exhaustion requirement is unnecessary and would serve no purpose other than to delay the adjudication of the Tribe's claims in a non-tribal forum.

3. Defendants' Claim that Tribal Court Jurisdiction is "Colorable" is Misplaced.

The Tribe and the Tribal Court contend that exhaustion is required because the Tribal Court Action presents a "colorable" case for Tribal Court jurisdiction, but the cases upon which they rely are materially distinguishable from this action. The "colorable" or "plausible" standard hails from a line of decisions by the Ninth Circuit and does not appear to have been adopted or endorsed by the Seventh Circuit or the Supreme Court. Instead, the Seventh Circuit has recognized the need for a case-by-case inquiry as to whether requiring exhaustion will serve its underlying policies. *Alzheimer*, 983 F.2d at 814. Even if the "colorable" standard did govern the Court's analysis, however, an examination of the cases in which the Ninth Circuit has found a "colorable" or "plausible" case for tribal court jurisdiction shows that the standard is not met here.

The Tribe and the Tribal Court cite *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009), which arose out of facts that placed the case squarely within the tribal court's jurisdiction. *Elliot* concerned a civil action brought against a nonmember who trespassed on tribal land, became lost, and negligently started a fire to attract rescue which consumed hundreds of thousands of acres of the tribe's land. *Id.* at 844-845. Because the tribe's claims stemmed directly from the tribe's ability to occupy and exclude others from its land, and sought to enforce regulations intended to protect the tribe's political and economic interests in its natural resources, the court concluded that a plausible case for tribal jurisdiction had been made, and thus exhaustion was required. *Id.* at 849-850.

The Tribe also cites *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008), but that case, like *Elliot*, is distinguishable. In *Marceau*, a group of plaintiffs sued a tribal housing authority and other non-tribal defendants after experiencing health problems due to the use of toxic chemicals in the foundations of their homes, which were built on tribal land. The Ninth Circuit found a “colorable” claim of tribal court jurisdiction because the plaintiffs were tribal members, one of defendants was a tribal entity and “at least some key events – construction of the homes, for instance – occurred on tribal lands.” *Id.* at 921.

Elliot and *Marceau* cited another Ninth Circuit decision for the “colorable” or “plausible” standard, *Atwood v. Fort Peck Tribal Court Assinboine*, 513 F.3d 943 (9th Cir. 2008), but that case again bears no resemblance to the present action. *Atwood* arose out of a custody dispute in which the parents of a child who was a tribe member had entered into a custody agreement that specifically provided for continued jurisdiction in the tribal court over their dispute. *Id.* at 948.

The facts that led the Ninth Circuit to find a “colorable” claim of tribal court jurisdiction in *Elliot*, *Marceau*, and *Atwood* are absent in the present action. Stifel is not a member of the Tribe and is not alleged to have engaged in any conduct on the Tribe’s lands. To the contrary, the Tribe affirmed in the Bond Purchase Agreement and the Trust Indenture that the 2006 Bond Transaction and its preceding negotiations occurred outside the Tribe’s land. The Tribe’s claims arise out of a securities transaction memorialized in multiple documents in which the Tribe repeatedly consented to have disputes arising out of the transaction resolved in non-tribal forums. These circumstances do not give rise to a “colorable” claim of jurisdiction in the Tribal Court.

CONCLUSION

Requiring Stifel to litigate the issue of jurisdiction in the Tribe's court system will needlessly consume time and resources that could be better directed to adjudicating the Tribe's claims on their merits in a non-tribal forum to which the Tribe repeatedly consented. For this and the foregoing reasons, Stifel requests that the Court deny the motions to dismiss or stay filed by the Tribe and the Tribal Court.

Dated this 5th day of April, 2013.

Respectfully submitted,

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