



does not have jurisdiction to hear the Tribe's claims against Stifel. However, that is not the standard this Court must apply. The presumption is that exhaustion is required *unless* one of the exceptions to Tribal Court jurisdiction is met. It is not enough that Tribal Court jurisdiction may be a close call; it must be "automatically foreclosed." *National Farmers Union*, 471 U.S. 845, 855 (1985). Stifel has not met this high burden and is required to litigate in the Tribal Court unless one of the four exceptions is present. None are.

### ARGUMENT

1. *The Ex Parte Young doctrine applies to tribal officials and does not provide a waiver against tribal entities such as the Tribal Court.*

Stifel's reliance on *Ex Parte Young*, 209 U.S. 123 (1908), is misplaced. No case has ever held that the *Ex Parte Young* doctrine means a tribal court is subject to suit in federal court. *Ex Parte Young* stands for the proposition that state officials acting in their official capacity can be enjoined for violations of federal law.<sup>1</sup> *Id.* at 155-56. While some courts have extended the doctrine to tribal officials, Stifel can cite only one that has extended it to a tribal judge, *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140 (10<sup>th</sup> Cir. 2011), and none that have applied it to a tribal court. Therefore, Stifel has gained no ground in its effort to overcome the Tribal Court's sovereign immunity.

Almost as an aside in its discussion of sovereign immunity, Stifel implies the Tribal Court may not possess sovereign immunity by stating there are no Seventh Circuit cases holding that a tribe's sovereign immunity extends to a tribal court. (Brief in Opposition, Dkt. #14 at 3.)

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<sup>1</sup> Stifel sued the Tribal Court, not Lac Courte Oreilles Tribal Court Judge James Mohr, who is hearing the Tribal Court action. Although Stifel's attorneys' Notice of Appearance (Notice of Appearance, Dkt. #3) lists Judge Mohr as a Defendant, this appears to be mistake. Judge Mohr was not served with a copy of the complaint and his name does not appear as a party on the complaint or any other pleadings.

There may be no cases in the Seventh Circuit because it is so obvious a proposition it has rarely, if ever, been litigated in this Circuit.

Nevertheless, in *Melby v. Grand Portage Band of Chippewa*, the Minnesota Federal District Court acknowledged that tribal courts, as entities, are immune from suit and dismissed the Tribal Court as a party. No. 97-CV-2065, 1998 WL 1769706, at \*3 (D. Minn. Aug. 13, 1998).

The breadth and depth of federal case law establishing a wide scope of tribal immunity is considerable. Tribal housing authorities, tribal colleges and tribal casinos have all been held to share in an Indian tribe's immunity from suit. See e.g., *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040 (8<sup>th</sup> Cir. 2000) (tribal college); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581 (8<sup>th</sup> Cir. 1998) (housing authority); *Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10<sup>th</sup> Cir. 2010) (casino). Closer to home, tribal enterprises have been found to share in an Indian tribe's sovereign immunity. *Local IV-302 Int'l Woodworkers Union v. Menominee Tribal Enters.*, 595 F.Supp. 859, 862 (E.D. Wis. 1984).

In fact, tribal sovereign immunity may extend to an organization even when created by more than one tribe. See *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8<sup>th</sup> Cir. 2011).

These cases leave little doubt that the Tribal Court is immune from suit. Stifel cannot use *Ex Parte Young* to overcome the Tribal Court's jurisdiction and Stifel's Complaint against the Tribal Court must be dismissed.

2. *Tribal Court exhaustion is required because Stifel cannot establish an exception to the exhaustion requirement.*

The Tribal Court emphasizes again that by virtue of the argument presented here, it is not deciding or prejudging the issue of whether the Tribal Court has jurisdiction over the parties in this case. Rather, its purpose here is only to establish that Stifel is required to exhaust its Tribal Court remedies before seeking relief in a federal forum. If the case is permitted to proceed in Tribal Court, the Tribal Court judge will determine the jurisdictional issues under the applicable tribal law and *Montana*.

The standard for requiring exhaustion is not that Tribal Court jurisdiction must be established. It is only that Tribal Court jurisdiction is not “automatically foreclosed.” *National Farmers Union*, 471 U.S. 845, 855 (1985). More specifically, Stifel must establish an exception to the presumption of exhaustion. The only two possible exceptions are that Tribal Court jurisdiction is patently violative of any express jurisdictional prohibitions or that Tribal Court jurisdiction is plainly lacking. *Iowa Mutual Insurance Co. v. LaPlante et al.*, 480 U.S. 9, n. 21, (1987); *Strate v. A-1 Contractors*, 520 U.S. 438, 459-460 (1997). Stifel has shown neither.

Stifel argues the forum selection clauses in the various transaction documents automatically foreclose Tribal Court jurisdiction. However, looking a little closer at those clauses shows that the questions before the Court are not nearly as clear as Stifel argues.

*a. The Indenture*

Stifel cites and makes much of Section 13.02 of the Indenture. The Indenture states: “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.” (Complaint, Dkt. #1, Ex. B, p. 65,

§ 13.02). Stifel then asserts that because the Tribe's suit against Stifel in Tribal Court is related to the Indenture, there should be no requirement for exhaustion in Tribal Court.

In reply, consider the following: (1) The Indenture, a pledge of the Tribe's assets, is between the Tribe and Wells Fargo Bank, N.A. Section 14.03 expressly states that the Indenture does not confer any benefit beyond the parties and the Holders of the Bonds; Stifel is not a party to the Indenture and there is no evidence Stifel is currently a bond holder.<sup>2</sup> (2) Section 13.02 specifically states the waiver of exhaustion only applies to a suit to enforce the obligations of the Tribe under the Indenture. The Tribal Court suit does not implicate the obligations of the Tribe. The suit is about Stifel's alleged breach of obligations to the Tribe. (3) The subject matter of the Tribe's suit against Stifel is arguably not the Indenture. The Tribe is not seeking to repudiate any of its obligations under the Indenture or the bonds. (Complaint, Dkt. #1, Ex. K.) Rather, the Tribe alleges Stifel fraudulently non-disclosed important information, breached its fiduciary duty to the Tribe and was unjustly enriched as a result. It is Stifel's pre-transaction advice and conduct related to the Bond Purchase agreement that are at issue.

*b. The Bond Purchase Agreement*

The Bond Purchase Agreement, the one agreement that is between Stifel and the Tribe, expressly includes the Lac Courte Oreilles Tribal Court as a possible forum. (Complaint, Dkt. #1, Ex. A, Sec. 14(b)).

Yet Stifel argues the waiver and jurisdiction language mandate no Tribal Court jurisdiction. It would seem to be a prima facie argument that a forum selection clause expressly mentioning the Tribal Court in the only document to which Stifel and the Tribe are parties

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<sup>2</sup> Though Stifel was the Initial Purchaser of the Bonds (Complaint, Dkt. #1, Ex. A, at 3), there is no evidence presented thus far indicating Stifel retained any of the bonds.

supports at least colorable Tribal Court jurisdiction and does not “automatically foreclose” it, as Stifel is required to show. *See National Farmers Union*, 471 U.S. at 855.

Stifel then asserts that the language in the Bond Purchase Agreement limiting the waiver to suits to enforce the obligations of the Tribe does not mean what it says. Stifel argues the relevant “suit” is the federal action because Stifel is seeking to enforce the Tribe’s obligation to waive exhaustion. (Stifel’s Brief in Opposition, Dkt. # 14, at 8). Stifel is wrong.

It makes no sense for the relevant suit to be the federal action. The federal action only exists because of the Tribal Court action. Stifel would not be suing the Tribe but for the Tribe having sued Stifel first in Tribal Court.

The suit at issue in the federal litigation and the one where exhaustion is an issue is the Tribal Court action. The Tribal Court action is not a suit to enforce an obligation of the Tribe. It is a suit against Stifel for alleged fraud, breach of fiduciary duty and unjust enrichment. Therefore, there is at least a colorable argument that Section 14(b) of the Bond Purchase Agreement and any other similar language in the transaction documents is not applicable to the Tribal Court action. The Tribe is not obligated under any of the transaction documents to refrain from bringing a suit as a plaintiff in Tribal Court.

*c. Stifel’s discussion of Tribal Court jurisdiction under Montana.*

Stifel spends about a third of its Brief in Opposition arguing the Tribal Court does not have jurisdiction under *Montana v. U.S.*, 450 U.S. 544 (1981) and its progeny. (Brief in Opposition, Dkt. #14, pp 16-23.) That issue is pending before the Tribal Court and the Tribal Court does not wish to prejudge the issue.

Whether Tribal Court jurisdiction can be established under *Montana* is not the issue before this Court. The issue at this stage is only whether the Tribal Court's jurisdiction is automatically foreclosed. It is clearly not.

The question of Tribal Court jurisdiction is a complicated one. Stifel has filed hundreds of pages of documents containing multiple waiver and jurisdiction clauses which all contain different language and conflict in some places. The Tribe is a plaintiff in the suit, a circumstance clearly not contemplated in the transaction documents. Furthermore, the waivers are limited to suits to enforce the Tribe's obligations and only one of the documents is actually between Stifel and the Tribe. In essence, Stifel is asserting that the Tribe's sovereignty has been altered by these documents and is asking the federal court to enforce that alteration.

This type of complexity is exactly why the U.S. Supreme Court stated that the 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. ... We believe that examination should be conducted in the first instance in the Tribal Court itself." *National Farmers Union*, 417 U.S. at 855-56.

### CONCLUSION

The Tribal Court should be dismissed because it is immune from suit, has not waived its immunity and is not subject to suit under the *Ex Parte Young* doctrine. 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 litigate in Tribal Court because Tribal Court jurisdiction is not automatically foreclosed and Stifel has not established one of the exceptions excusing tribal court exhaustion.

Dated this 14<sup>th</sup> day of April, 2013.

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