

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL, NICOLAUS & COMPANY, INCORPORATED,)	No.: 13-CV-121
)	
)	
)	
Plaintiff,)	DEFENDANT’S REPLY
vs.)	MEMORANDUM IN SUPPORT OF
)	MOTION TO DISMISS OR, IN THE
LAC COURTE OREILLES BAND OF)	ALTERNATIVE, TO STAY
LAKE SUPERIOR CHIPPEWA INDIANS)	PROCEEDINGS
OF WISCONSIN; LAC COURTE)	
OREILLES TRIBAL COURT,)	
)	
Defendants.)	

Defendant Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the “Band”) by its undersigned attorneys, respectfully submits this Reply Memorandum of Law in Support of its Motion to Dismiss, or in the Alternative, to Stay Proceedings.

INTRODUCTION

The Band sued Stifel, Nicolaus & Company, Incorporated (“Stifel”) in Lac Courte Oreilles Tribal Court (the “Tribal Court”) before Stifel commenced the above-captioned action, and Stifel responded by bringing a Motion to Dismiss the Tribal Court Action for lack of jurisdiction (the “Tribal Court Action”). Briefing on Stifel’s Tribal Court motion is now complete and a hearing is scheduled for May 9, 2013 at 10:00 a.m. Rather than letting the Tribal Court motion run its course, Stifel instead sued the Band (and the Tribal Court itself) seeking a declaratory judgment that the Tribal Court lacks jurisdiction and otherwise seeking to enjoin the Band from proceeding against Stifel in Tribal Court (hereinafter the “District Court Action”).

Despite Stifel's protestations to the contrary, the District Court Action is premature. The case law clearly provides that a party challenging a tribal court's power to exercise jurisdiction over non-Indians must first exhaust its tribal court remedies before the claim will be entertained by a federal court, subject to a few limited exceptions. Here, there is no question that: (a) Stifel has failed to exhaust its remedies in the Tribal Court, (b) none of the exceptions to exhaustion apply, and (c) the Band did not waive the exhaustion requirement under the relevant contract. As such, this Court should dismiss Stifel's premature Complaint or, in the alternative, stay the District Court Action until after the Tribal Court has first ruled on Stifel's currently pending jurisdictional challenge.

ADDITIONAL BACKGROUND

Multi-million dollar bond transactions, like the 2006 bond transaction underlying this matter, are comprised of a series of different contracts between a series of different parties. (*See, e.g.* Compl.) In Stifel's Brief in Opposition to Defendants' Motion to Dismiss or, in the Alternative, to Stay Proceeding ("Stifel's Brief"), Stifel cuts and pastes excerpts from the various contracts, defines those excerpts as the "2006 Bond Transaction" and then uses those excerpts to make the erroneous claim that exhaustion is not required in this case. In order to give the Court some proper context, the contracts underlying the 2006 bond transaction are summarized here as follows:

A. THE DECEMBER 15, 2006 BOND PURCHASE AGREEMENT.

On December 15, 2006, Stifel and the Band entered into a Bond Purchase Agreement pursuant to which Stifel agreed to purchase bonds (totaling in excess of \$31,000,000) issued by

the Band. (*See* Compl., Ex. A.)¹ On the issue of jurisdiction, the Bond Purchase Agreement provides, in relevant part, as follows:

This BOND PURCHASE AGREEMENT (the “Agreement”) is made and entered into as of December 15, 2006, between LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN (the “Tribe”) and STIFEL, NICOLAUS & COMPANY, INCORPORATED, a Missouri corporation (the “Initial Purchaser”).

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 Lac Courte Oreilles Tribal Court, and in the event that the United States District Court for the Western District of Wisconsin lacks jurisdiction, then the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise prior, with respect to any dispute or controversy arising out of the Agreement and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(Compl., Ex. A at Introduction and §14(b).) (Emphasis added.) With respect to jurisdiction, the Bond Purchase Agreement also expressly states:

The provisions of the Bond Documents that purport to constitute a waiver of sovereign immunity and that expressly submit and consent to jurisdiction as set forth therein are effective to permit an action to be brought against the Tribe in United States District Court for the Western District of Wisconsin (including all federal courts to which decisions may be appealed), and the Lac Courte Oreilles Tribal Court . . . to enforce or

¹The Band used the proceeds from the sale of the 2006 bonds “to undertake certain tribal purpose projects . . . and certain economic development projects . . . all located on the Lac Courte Oreilles Reservation.” (Compl., Ex. B at p. 1.) (Emphasis added.) Specifically, the Band used the proceeds to, among other things: (a) acquire land for the purpose of restoring the Band’s land base, including the acquisition of Moonshine Island in the Chippewa Flowage and 1,947 acres known as the Plum Creek property; (b) complete the construction of the Band’s Headstart building; (c) pay outstanding invoices for health services rendered to tribal members by third-party providers; (d) refinance a loan made to the Band’s Ojibwe School in 2005 to cover an operating deficit in the 2004 through 2005 school year; (e) renovate and improve facilities owned by the Band, including the Band’s Quick Stop convenience store and The Landing, a resort owned by the Band; (f) refinance a loan made to the Band in connection with the Band’s acquisition of a hydro-electric facility; (g) fund the hydro-electric facility; (h) refinance two loans which financed various Band purposes, including the acquisition of The Landing; and (i) refund bonds it had issued three years before. (*Id.*, Ex. D, A-9.)

with respect to any dispute or controversy arising out of any and each of the Indenture, the Bonds and this Agreement.

(*Id.*, Ex. A at §6(i).) (Emphasis added.) On the issue of exhaustion of remedies, the Bond Purchase Agreement provides:

The Tribe hereby expressly waives . . . any requirement for exhaustion of tribal remedies should an action be commenced under this Agreement or regarding the subject matter hereof. This waiver: . . . (iii) shall extend only to a suit to enforce the obligations of the Tribe under [the Bond Purchase Agreement][.]

(*Id.*, Ex. A at §14(b).) (Emphasis added.)

Lastly, the Bond Purchase Agreement states that “[a]ny conflict between the terms of this Agreement and the Indenture shall be resolved in favor of the Indenture.” (*Id.*, Ex. A at §16(g).)

B. THE TRUST INDENTURE.

In addition to entering into the Bond Purchase Agreement with Stifel, on December 1, 2006, the Band and Wells Fargo entered into a separate Trust Indenture agreement as part of the 2006 bond transaction. (Compl., Ex. B.) Under the Trust Indenture, the Band agreed to pay Wells Fargo the principal and interest due on the bonds, and Wells Fargo agreed to hold that amount in trust for the bond holders. (*Id.*, Ex. B at p. 3.) Under the Trust Indenture, Wells Fargo has the right to seek remedies against the Band, should the Band fail to, among other things, make payments on the bonds. (*Id.*, Ex. B at p. 46.) On the issue of jurisdiction, the Trust Indenture provides, in relevant part, as follows:

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.

(*Id.*, Ex. B at p. 65) (Emphasis added.) Pursuant to the Trust Indenture:

“Bonds” means the Series 2006 Bonds and any Additional Bonds issued under a supplement to this Indenture.

“Bond Purchase Agreement” means the Bond Purchase Agreement dated December 15, 2006, between the Tribe and [] [Stifel].

“Bond Resolution” means the resolution of the Tribe adopted by Tribal Governing Board on December 15, 2006, authorizing the Series 2006 Bonds, as the same may be amended, modified or supplement by any amendments or modifications thereof.

“Indenture” means this Trust Indenture between the Tribe and Trustee, dated as of December 1, 2006, under which the Bonds are authorized to be issued, and including any amendments or supplements thereto.

(*Id.*, Ex. B at p. 5, 8.) (Emphasis added.) The Trust Indenture’s jurisdiction clause does not specifically mention the defined “Bond Purchase Agreement.” (*See id.*, Ex. B at p. 65.) The Trust Indenture also expressly states that it does not confer any benefit beyond the parties to the Trust Indenture and the “Holders” of the 2006 of the Bonds. (*Id.* at §14.03.)²

C. TRIBAL GOVERNING BOARD RESOLUTION.

On December 15, 2006, the Band’s Tribal Governing Board issued Resolution No. 06-110. (*Id.*, Ex. E.) Pursuant to Resolution No. 06-110, the Tribal Governing Board approved the 2006 bond transaction. (*Id.*, Ex. E.) On the issue of jurisdiction, Resolution No. 06-110 provides, in relevant part, as follows:

² “Holder” is defined in the Trust Indenture as “the person in whose name such Bond shall be registered.” (*Id.* at §1.01.)

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, and to any transaction in connection therewith.

(*Id.*, Ex. E at §4.1.) (Emphasis added.) Like in the Trust Indenture, the “Indenture,” the “Bonds,” the “Bond Resolution,” and the “Bond Purchase Agreement” are defined as the December 1, 2006 Trust Indenture, the Series 2006 bonds, the December 15, 2006 Tribal Governing Board Resolution, and the December 15, 2006 Bond Purchase Agreement, respectively. (*Id.*, Ex. E.) The Tribal Governing Board Resolution’s jurisdiction clause does not specifically mention the defined “Bond Purchase Agreement.” (*See id.*, Ex. E at §4.1.)

D. THE 2006 BONDS.

On December 22, 2006, the Band executed General Obligation Tribal Purpose and Refunding Bond Series 2006A in the principal amount of \$2,160,000, General Obligation Tribal Purpose and Refunding Bond Series 2006A in the principal amount of \$10,990,000, and General Obligation Taxable Economic Development and Refunding Bond Series 2006B in the principal amount of \$18,285,000 (hereinafter sometimes referred to as the “2006 Bonds”). (Compl., Ex. F, Ex. G, and Ex. H.) On the issue of jurisdiction, each of the 2006 Bonds states, in relevant part:

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 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 Tribe.

(*Id.*, Ex. F at p. 5, Ex. G at p. 5, and Ex. H at p. 5) (Emphasis added.) As with both the Trust Indenture and the Tribal Governing Board Resolution, “Bond,” the “Indenture,” and the “Bond Resolution,” refer to the 2006 Bonds, the December 1, 2006 Trust Indenture, and the December 15, 2006 Tribal Governing Board Resolution, respectively. (*Id.*, Ex. F at p. 3, Ex. G at p. 3, and Ex. H at p. 3.) The 2006 Bonds make no reference whatsoever to the “Bond Purchase Agreement.” (*Id.*)

ARGUMENT

A. STIFEL MUST EXHAUST ITS REMEDIES IN TRIBAL COURT.

Generally, a party challenging a tribal court’s power to exercise jurisdiction over non-Indians must first exhaust its tribal court remedies before the claim will be entertained by a federal court. *Nat. Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). Tribal court exhaustion is not required where: (1) an assertion of tribal jurisdiction is designed to harass or is conducted in bad faith; (2) the action patently violates express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction; or (4) exhaustion would serve no purpose other than delay because it is plain that the tribal court lacks jurisdiction. *Iowa Mut. Ins. Co. v. LaPlant et al.*, 480 U.S. 9, n.21 (1987); *Strate v. A-1 Contractors*, 520 U.S. 438, 459–60 (1997). Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is “colorable,” provided there is no evidence of bad faith or harassment. *See, e.g., Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008). 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).

In its brief, Stifel claims that exhaustion of tribal court remedies is not required in this case because it believes the Tribal Court Action patently violates the jurisdiction provisions of the 2006 bond documents and because it believes the Tribal Court plainly lacks jurisdiction over this case. (Stifel's Brief at p. 6.) Stifel's claims lack merit. Stifel must exhaust its remedies in the Tribal Court and its Complaint should therefore be dismissed, or at a minimum, stayed.

1. The Tribal Court Action Does Not Patently Violate Any Relevant Jurisdiction Provision.

Throughout its Brief, Stifel incorrectly and repeatedly claims that the Tribal Court Action patently violates the jurisdiction provisions of the 2006 bond documents because, according to Stifel, the Band agreed to litigate all disputes only in the federal or state courts of Wisconsin. (*See, e.g.*, Stifel's Brief at p. 14.) As mentioned above, Stifel makes these contentions by block citing the jurisdiction clauses from several of the different contracts underlying the 2006 bond transaction, defining those blurbs as the "2006 Bond Transaction," and then jumbling those blurbs together. Stifel then claims that the Court should conclude that the Band agreed to litigate all disputes only in the federal or state courts of Wisconsin. When the actual documents are reviewed and considered in the proper context, Stifel's claims obviously fail.

Simply put, the "patently violates" exception to the exhaustion requirement is inapplicable because the Band did not agree to litigate disputes under the Bond Purchase Agreement only in the federal and state courts of Wisconsin. As set forth above, the Bond Purchase Agreement unambiguously states that the Band "expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin . . . and the Lac Courte Oreilles Tribal Court . . . with respect to any dispute or controversy arising out of

the Agreement.” (Compl., Ex. A at §14(b).)³ (Emphasis added.) The allegations of the Band’s Tribal Court Complaint against Stifel plainly relate to a “dispute or controversy” under the Bond Purchase Agreement, given that the gravamen of the Band’s Complaint is that Stifel fraudulently induced it to enter into the Bond Purchase Agreement. (*See* Compl., Ex. K.) Nothing in the Bond Purchase Agreement precludes Tribal Court jurisdiction; rather, for disputes arising under the Bond Purchase Agreement, the Band expressly agreed to the jurisdiction of the federal or state courts of Wisconsin and the Tribal Court.

Notwithstanding the plain language of the Bond Purchase Agreement, Stifel refers to language contained in the Trust Indenture, the Tribal Governing Board Resolution, and the 2006 Bonds themselves in support of its claim that Tribal Court jurisdiction patently violates “the express exclusions of the jurisdiction of the Tribal Court contained in the documents executed or issued by the Band in connection with the 2006 Bond Transaction.” (*See* Stifel’s Brief at p. 11–12.) Stifel’s claim fails for a number of reasons.⁴

First, the jurisdiction clauses set forth in the Trust Indenture, the Tribal Governing Board Resolution, and the 2006 Bonds do not apply to claims between the Band and Stifel under the Bond Purchase Agreement. Stifel is not even a party to the Trust Indenture, the Tribal Governing Board Resolution, or the 2006 Bonds, and Stifel has not and cannot explain how it

³ The Bond Purchase Agreement defines the word “Agreement” as the Bond Purchase Agreement. (Compl., Ex. A at p. 1.)

⁴ In Stifel’s Brief, Stifel also erroneously references the Preliminary Limited Offering Memorandum and the Limited Offering Memorandum in support of its claim that Tribal Court jurisdiction patently violates the parties’ agreement. (Stifel’s Brief at p. 15.) However, as plainly stated in both of these documents: (a) “[t]he summaries or descriptions of . . . materials not purporting to be quoted in full, are only brief outlines of some of the provisions” of the materials and (b) nothing contained in either of these documents “is to be construed as a contract[.]” (Compl., Ex. C at p. 27, Ex. D at p. 27.) As such, neither the Preliminary Limited Offering Memorandum nor the Limited Offering Memorandum are in any way relevant to determination of the issues before this Court and should be disregarded.

would be entitled to enforce these agreements. (Compl., Ex. B, Ex. E, Ex. F, Ex. G, and Ex. H.) The Trust Indenture also expressly states that it does not confer any benefit beyond the parties and the “Holders” of the 2006 of the Bonds. (*Id.* at §14.03.) Stifel is not a party to the Trust Indenture and there is no evidence that Stifel is currently a Holder of any of the 2006 Bonds.⁵

Second, Stifel’s claim that the jurisdiction provisions set forth in the Trust Indenture, the Tribal Governing Board Resolution, and the 2006 Bonds apply to claims under the Bond Purchase Agreement is contrary to Wisconsin law (which governs this dispute). Wisconsin law “presumes that parties understood the import of their contract and that the parties had the intention which its terms manifest.” *Seitzinger v. Comty. Health Network*, 676 N.W.2d 426, 440 (Wis. 2004) (*citing* 11 Richard A. Lord, *Williston on Contracts* §31:4 (4th ed. 1999)). Wisconsin law also provides the “basic rule” that when interpreting a contract the contract “must be considered as a whole in order to give each of its provisions the meaning intended by the parties.” *McCullough v. Brandt*, 148 N.W.2d 718, 720 (Wis. 1967). Therefore, “[t]he meaning of particular parts or words in a contract should be determined in light of and consistent with the general purpose of the agreement,” not as isolated or particular parts of the contract. *Carey v. Rathman*, 200 N.W.2d 591, 594 (Wis. 1972).

Here, as set forth above, these heavily negotiated documents contain a number of defined terms, including “Indenture,” the “Bonds,” the “Bond Resolution,” and the “Bond Purchase Agreement,” and some or all of those defined terms are used in the jurisdiction provisions underlying this transaction. The Trust Indenture’s jurisdiction provision, for example, specifically provides that it relates to “any dispute or controversy arising out of the Indenture, the Bonds or the Bond Resolution.” (Compl., Ex. B at p. 5.) (Emphasis added.) Similarly, the

⁵ Though Stifel was the Initial Purchaser of the Bonds (Compl., Ex. A, at ¶ 9), Stifel has submitted no evidence that it currently holds any of the 2006 Bonds.

jurisdiction clauses set forth in the Tribal Governing Board Resolution and the 2006 Bonds themselves relate to claims “arising out of the Indenture, the Bonds, this Bond Resolution” and claims “arising out of the Bond, the Indenture or the Bond Resolution,” respectively. (*Id.*, Ex. E at §4.1, Ex. F, Ex. G, and Ex. H.)

The lawyers who drafted the documents underlying this \$31,000,000 transaction clearly knew how to use defined terms. Although the jurisdiction clauses contained in the Trust Indenture, the Tribal Governing Board Resolution, and the 2006 Bonds include language that the clauses apply “to any transaction in connection therewith,” these documents clearly do not reference the “Bond Purchase Agreement,” a defined term in the 2006 bond documents. (*See* Compl., Ex. B at p. 5, Ex. E at p. 3, Ex. F at p. 3, Ex. G at p. 3, and Ex. H at p. 3.) If the parties had intended to include the Bond Purchase Agreement in those jurisdiction provisions, they could have and would have specifically done so.

Furthermore, under Wisconsin law, contract language should be construed to give meaning to every word, avoiding constructions which render portions of a contract meaningless, inexplicable, or mere surplusage. *See, e.g., Maryland Arms Ltd. P’ship v. Connell*, 786 N.W.2d 15, 25 (Wis. 2010). The jurisdiction clause in the Bond Purchase Agreement—the fraudulently induced contract between Stifel and the Band—expressly preserves the jurisdiction of “the Lac Courte Oreilles Tribal Court” for claims arising under the Bond Purchase Agreement. (Compl., Ex. A at §§ 6(i), 14(b).) If this Court were to construe the Trust Indenture, the Tribal Governing Board Resolution and the 2006 Bonds as precluding Tribal Court jurisdiction over the Band’s claim against Stifel arising out of the Bond Purchase Agreement, this Court would be improperly striking the words “and the Lac Courte Oreilles Tribal Court” from Sections 6(i) and 14(b) of the Bond Purchase Agreement. This Court should refuse to do so.

The Bond Purchase Agreement also expressly states that the provision of the “Bond Documents that . . . expressly submit to and consent to jurisdiction . . . are effective to permit an action to be brought against” the Band. (Compl. Ex. A at §6(i).) (Emphasis added.) Construing the Bond Purchase Agreement as a whole and in conjunction with the other 2006 bond documents, the parties’ intent becomes clear—the parties included the various jurisdictional provisions to ensure that a suit could be brought against the Band in the state or federal courts of Wisconsin if the Band failed to make principle and interest payments under the 2006 Bonds. As Stifel acknowledges in its brief, “[s]uits against Indian Tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993) (Stifel’s Brief at p. 3.) The jurisdiction clauses were not intended to restrict the Band from initiating an action against Stifel in the Band’s own forum when the entire bond transaction was induced by Stifel’s fraud.⁶

Throughout Stifel’s Brief, Stifel also repeatedly refers to the “Situs” provision of various 2006 bond documents to support its claim that the Tribal Court lacks jurisdiction. Stifel’s reliance on this “Situs” provision is misplaced. “Situs” is defined as the “location or position (of something),” and it relates to whether a court is the proper venue for a lawsuit. *Black’s Law Dictionary* 660, 756 (3d pocket ed. 2006); *see also Sunbeam Prods. Inc. v. Homedics*, 587 F.Supp.2d 1055, 1057 (W.D. Wis. 2008) (holding that when evaluating the convenience of a

⁶ Stifel cites Section 16(g) of the Bond Purchase Agreement in support of the claim that, to the extent there is any conflict between the jurisdiction clauses contained in the Bond Purchase Agreement and the Indenture Agreement, the jurisdiction clause contained in the Indenture Agreement should govern. (Stifel’s Brief at p. 15.) Stifel’s claim again lacks merit because there is no conflict between these two provisions as they cover different claims between different parties. As stated, the Bond Purchase Agreement’s jurisdiction clause applies to claims between Stifel and the Band under the Bond Purchase Agreement, and the jurisdiction clause contained in the Indenture Agreement applies to claims between the Band and Wells Fargo arising out of the Indenture, the 2006 Bonds, and the Tribal Governing Board Resolution. (*Compare* Compl., Ex. A at §14(b), *with* Ex. B at p. 65.)

venue, a factor to be considered is the situs of material events). Venue and jurisdiction are two distinct concepts. See *Shopper Advertiser, Inc. v. Wis. Dep't of Revenue*, 344 N.W.2d 115, (Wis. 1984) (holding that “[s]ubject matter jurisdiction relates to the power of the court to entertain a particular type of action; venue relates to which court of those having the power to entertain the action should render judgment in the matter”); *Cabanaw v. Cabanaw*, 648 N.E.2d 694, 697 (Ind. Ct. App. 1995) (“Jurisdiction involves a court’s power to hear a particular group of cases; venue connotes the proper situs for the trial of an action.”); see also 77 Am. Jur. 2d *Venue* § 2 (2013) (“[S]ubject matter jurisdiction require[s] compliance with constitutional mandates; in contrast, venue issues are not so burdened and the situs of an action may be located anywhere within the geographical jurisdiction of the court as deemed appropriate by applicable statute or rule.”) Therefore, situs has no bearing on whether or not the Tribal Court has jurisdiction over this case.

Because Tribal Court jurisdiction over the Tribal Court Action is permissible under the Bond Purchase Agreement, the “patently violates” exception to the exhaustion requirement is inapplicable. As such, Stifel’s Complaint should be dismissed or, at a minimum, the District Court Action should be stayed.

2. It is Not Plain that the Tribal Court Lacks Jurisdiction.

The “pathmarking case” on tribal civil jurisdiction is *Montana v. United States*, 450 U.S. 544 (1981). *Strate*, 520 U.S. at 445. Under *Montana*, the general rule is that tribal court jurisdiction does not extend to nonmembers of the tribe, unless one of two exceptions is met. *Montana*, 450 U.S. at 565–66; see also *Strate*, 520 U.S. at 445–46. Here, the Tribal Court has jurisdiction under both of the *Montana* exceptions. As such, it is not plain that the Tribal Court lacks jurisdiction as Stifel suggests. In fact, the opposite is true.

a. The Tribal Court Has Jurisdiction Under *Montana's* First Exception Because Stifel Entered Into a Consensual Relationship With the Band and That Relationship has a Clear Nexus to the Present Lawsuit.

Under *Montana's* first exception, “[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. There must be a nexus or connection between the consensual relationship and the regulatory or adjudicatory authority asserted by the tribe. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). A nexus exists if a claim arises from the consensual relationship. *See Id.*

Here, the Tribal Court has jurisdiction under *Montana's* first exception. Stifel and the Band are parties to a Bond Purchase Agreement, pursuant to which Stifel purchased in excess of \$31,000,000 in bonds from the Band. (Compl., Ex. A.) The Bond Purchase Agreement is obviously a “consensual relationship” between the Band and Stifel (a nonmember), and any suggestion that it is not is absurd. Moreover, there is clearly a nexus between this consensual relationship and the suit brought by the Band in the Tribal Court because the Band’s claims arise directly out of the Bond Purchase Agreement. (Compl., Ex. K .) Specifically, the Band alleges in its Complaint, among other things, that it was fraudulently induced by Stifel to enter into the Bond Purchase Agreement. (*See Id.*) The Tribal Court therefore has jurisdiction under *Montana's* first exception.

In Stifel’s Brief, Stifel erroneously asserts that the Band’s claims do not bear a nexus to the Bond Purchase Agreement because one of the alternative remedies the Band seeks is rescission of the Bond Purchase Agreement. (Stifel’s Brief at pp. 18–19.) According to Stifel,

because the Band seeks to “disavow” rather than “regulate” the Bond Purchase Agreement, this case does not meet the “nexus” requirement set forth in *Atkinson*. Stifel’s argument fails.

The Bond Purchase Agreement provides that it is to be governed by and construed in accordance with the laws of the State of Wisconsin. (Compl., Ex. A at §14(a).) Under the laws of the State of Wisconsin, “a party fraudulently induced to enter a contract may affirm the contract and seek damages for breach or pursue the equitable remedy of rescission.” *Tietzworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 244 (Wis. 2004). The Tribal Court Code (which was established to “deal fairly and equitably” with all tribal members and nonmembers), expressly permits parties to bring in Tribal Court “[a]ny action that may be brought under federal law or the law of the State of Wisconsin[.]” Tribal Court Code, Chapter 1, Subchapter I and Chapter 1, Subchapter III, §1.8. Therefore, and contrary to Stifel’s claim, rescission is in fact one of the methods by which the Tribal Court (applying Wisconsin law) can “adjudicate” or “regulate” contracts like the Bond Purchase Agreement, which were induced by fraud. *See also Fed. Trade Comm’n v. Payday Fin., LLC*, __ F.Supp.2d __, __, 2013 WL 1309437, at *5 (D. S.D. Mar. 28, 2013) (“If the Tribe retains power under *Montana* to regulate nonmember conduct it makes no difference whether it does so through precisely tailored regulations or through litigation in tribal court.” (quotation omitted)).

Stifel attempts to argue that this case does not fall within the “consensual relationship” exception because Stifel did not perform any services on the Band’s reservation. (Stifel’s Brief p. 18.) But the proper focus under the consensual relationship exception is on Stifel’s “activities” not solely on Stifel’s physical location because “treating [Stifel’s] . . . physical presence as determinative ignores the realities of our modern world that a defendant, through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal

members without physically entering the reservation.” *Fed. Trade*, 2013 WL 1309437, at *11. Even assuming that Stifel did not enter the reservation – a fact that the Band does not concede⁷ – Stifel conducted business on the reservation by communicating with the Band about the Bond Purchase Agreement and by receiving commissions from the Band that were transferred from the reservation to Stifel. In addition, the money that Stifel paid to the Band when it purchased the bonds directly affected the Band because the money was used for on-reservation projects including to pay members’ medical bills, to refinance a loan made to the Band’s Ojibwe school, to renovate and improve facilities owned by the Band, and to complete construction of the Band’s Headstart building. (Compl., Ex. D, A-9.) The affect that Stifel would have had on the Band had it physically entered the reservation would have been no different (and the Band does not concede that Stifel never entered the reservation). Stifel’s activities therefore establish that Stifel conducted business on the reservation and that there was a consensual relationship between Stifel and the Band.

To the extent that this Court has any doubt about whether the Tribal Court has jurisdiction over this case under the consensual relationship exception, this Court should defer to the Tribal Court as a matter of comity in accordance with the policy supporting the exhaustion rule. The Supreme Court has recognized that allowing the tribal courts to decide the issue of jurisdiction first will provide for a more orderly administration of justice in the federal court because a full record will be developed in the tribal courts, and it “will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will . . . provide other courts with the benefit of their expertise in such matters in the event of further judicial review.”

⁷ As the Court is aware, the Band recently filed an Expedited Request for Leave to Present the Court With Matters Outside the Pleadings. Pursuant to that request, the Band seeks to introduce evidence that certain of Stifel’s fraudulent conduct occurred on reservation land.

Nat. Farmers, 471 U.S. at 856–857. Furthermore, the risks of a “procedural nightmare” (like the precise situation in the instant case where the parties are litigating jurisdiction on two fronts and where the Band has had to make an expedited request to admit evidence already before the Tribal Court) will be minimized when a federal court in which tribal court jurisdiction is challenged “stay(s) its hand” until after the tribal court has had a “full opportunity to determine its own jurisdiction.” *Id.* at 857.

b. The Tribal Court Also Has Jurisdiction Under *Montana’s* Second Exception Because Stifel’s Fraudulent Conduct Threatens the Economic Security and the Health and Welfare of the Tribe.

Under *Montana’s* second exception, “[a] tribe may . . . 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*, 450 U.S. at 566.

Here, the Tribal Court also has jurisdiction under *Montana’s* second exception. The Band has alleged, among other things, that it was fraudulently induced to enter into what is essentially a \$31,000,000 loan transaction. (*See, e.g.*, Compl., Ex. K at ¶¶14–23.) As a result of Stifel’s fraudulent conduct, the Band entered into the Bond Purchase Agreement and used a portion of the proceeds to refund the 2003A bonds and repurchase the 2003B bonds. (Compl., Ex. K at ¶10.) By doing so, the interest, commissions, and other costs and charges associated with the capital raised from the sale of the 2003A bonds and the 2003B bonds dramatically increased, and the Band has sustained significant money damages as a result. (*See, e.g.*, Compl., Ex. K at ¶13.) This lawsuit was only recently filed and as a result, the Band has not yet obtained a final expert opinion and report on the issue of damages. Nevertheless, based on preliminary analyses from the expert recently engaged in this matter, the Band’s damages appear to be

substantial. Because the Band has alleged that Stifel's fraudulent conduct occurred on the Lac Courte Oreilles Reservation, and because the fraudulent conduct resulted in a dramatic increase in interest, costs, and other charges, Stifel's conduct has adversely affected the economic security, and the health and welfare of the Band. The Tribal Court therefore also has jurisdiction under *Montana's* second exception.

Stifel argues that its fraudulent conduct did not damage the Band enough to give the Tribal Court jurisdiction under the second *Montana* exception. (*See, e.g.*, Stifel's Brief at pp. 19–20). Stifel's argument fails because the Band's allegations of substantial damages are enough to give rise to at least a "colorable" claim to Tribal Court jurisdiction. *See, e.g. Marceau*, 540 F.3d at 920. Moreover, as set forth above, to the extent that this Court has any doubt about whether the Tribal Court has jurisdiction over this case under the second *Montana* exception, this Court should defer to the Tribal Court as a matter of comity in accordance with the policy supporting the exhaustion rule.

Despite Stifel's claims, neither of the exceptions to the requirement of exhaustion of Tribal Court remedies applies in this case. As such, Stifel's Complaint should be dismissed or, at a minimum stayed, until after the Tribal Court rules on jurisdiction in the first instance.

B. The Band Has Not Waived the Exhaustion of Remedies Requirement.

Stifel also claims in its brief that the Band expressly waived any exhaustion of remedies requirement. (Stifel's Brief at p. 6.) According to Stifel, the Band waived exhaustion under the Trust Indenture and waived exhaustion under the Bond Purchase Agreement because the District Court Action is a "suit to enforce" the Band's obligations under the Bond Purchase Agreement. Stifel's claims lack merit. Contrary to Stifel's claims, the Band has not waived the exhaustion requirement.

While Stifel is not a party to the Trust Indenture and is not a current holder of any of the 2006 Bonds, it nevertheless erroneously argues that the exhaustion provisions of the Trust Indenture should apply to this dispute between Stifel and the Band because “[t]he Indenture is the key document related to the issuance of the Bonds.” (Stifel’s Brief at p. 7.) However, as set forth above, under the Trust Indenture, the Band agreed to pay Wells Fargo the principal and interest due on the bonds, and Wells Fargo agreed to hold that amount in trust for the bond holders. (Compl., Ex. B at p. 3.) Under the Trust Indenture, Wells Fargo has the right to seek remedies against the Band, should the Band fail to, among other things, make payments on the bonds. (*Id.*, Ex. B at p. 46.) Although the Trust Indenture is certainly an important part of the overall 2006 bond transaction, the simple fact remains that Stifel is not a party to the Trust Indenture and Stifel has not and cannot explain how it would be entitled to enforce agreements that may exist between the Band and Wells Fargo. Moreover, the Trust Indenture does not confer any benefit beyond the parties to the Trust Indenture and the “Holders” of the 2006 of the Bonds. (*Id.*, Ex. B at §14.03.) Stifel is not a party to the Trust Indenture and there is no evidence that Stifel is currently a Holder of any of the 2006 Bonds.

While Stifel is actually a party to the Bond Purchase Agreement, the Band likewise did not waive exhaustion under the Bond Purchase Agreement. Under the Bond Purchase Agreement, the Band’s exhaustion of remedies waiver only extends “to a suit to enforce the obligations of the Tribe under this Agreement” (Compl., Ex. A at §14(b).) (Emphasis added). According to Stifel, the Bond Purchase Agreement’s waiver applies because Stifel believes the District Court Action is “a suit to enforce” the obligations of the Band under the Bond Purchase Agreement to litigate “in a non-tribal forum.” (Stifel’s Brief at pp. 8–9.) Stifel’s claims again

fail because the Bond Purchase Agreement does not obligate the Band to litigate “in a non-tribal forum.”

As discussed above, the Bond Purchase Agreement unambiguously states that the Band “expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin . . . and the Lac Courte Oreilles Tribal Court . . . with respect to any dispute or controversy arising out of the Agreement.” (Compl., Ex. A at §14(b).) (Emphasis added.) The allegations of the Band’s Complaint clearly relate to a “dispute or controversy” under the Bond Purchase Agreement given that the Band’s entire Tribal Court Complaint is centered on its claim that Stifel fraudulently induced the Band to enter into the Bond Purchase Agreement. Since the Band is not obligated to litigate disputes under the Bond Purchase Agreement “in a non-tribal forum,” Stifel’s District Court Action cannot be considered a “suit to enforce the obligations” of the Band under the Bond Purchase Agreement.⁸ Therefore, the waiver of exhaustion set forth in the Bond Purchase Agreement has no application to this case.

CONCLUSION

Because Stifel is required to exhaust its Tribal Court remedies, the Band respectfully requests that this Court dismiss Stifel’s Complaint, or in the alternative, stay these proceedings pending the Tribal Court’s jurisdictional determination.

⁸As also set above, the jurisdiction clauses set forth in the Trust Indenture, the Tribal Governing Board Resolution, and the 2006 Bonds do not apply to claims between the Band and Stifel under the Bond Purchase Agreement. *See supra*, at pp. 8-13.

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Respectfully submitted,

WINTHROP & WEINSTINE, P.A.

By: s/Matthew R. McBride
Matthew R. McBride, #0261981
Kelly M. McBeain, #0392046
225 South Sixth Street
Suite 3500
Minneapolis, MN 55402
Telephone: (612) 604-6400
Facsimile: (612) 604-6800

AND

Kris Goodwill, WI SBN: 1020715
Kris.goodwill@lco-nsn.gov
Lac Courte Oreilles Legal Department
13394W Trepania Road
Hayward, WI 54843
Telephone: (715) 634-8934
Fax: (715) 634-0302

*Attorneys for Defendant Lac Courte
Oreilles Band of Lake Superior Chippewa
Indians of Wisconsin*

7821571v3