

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, NICOLAUS & COMPANY, INC.'S BRIEF IN  
SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Stifel, Nicolaus & Company, Incorporated (Stifel), by its attorneys Brian G. Cahill, David J. Turek and Daniel J. Kennedy of Gass Weber Mullins LLC, submits the following brief in support of its motion for preliminary injunction.

**INTRODUCTION**

This Court should immediately enjoin proceedings in the action filed by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (the Tribe) against Stifel in the Lac Courte Oreilles Tribal Court. Stifel brings this motion in the wake of a hearing held by the Tribal Court on May 9, 2013, during which the Tribal Court ruled that it had jurisdiction over the Tribe's claims against Stifel notwithstanding specific written agreements excluding Tribal Court jurisdiction over such claims. The Tribal Court has set a scheduling conference for June 14, 2013, after which Stifel will be forced to litigate in a forum lacking jurisdiction unless this Court enjoins the Tribal Court proceedings.

Stifel satisfies the requirements for preliminary injunctive relief. First, Stifel has a strong likelihood of success on its claim in this case, which seeks a declaration that the Tribal Court lacks jurisdiction over the Tribe's claims. As explained below, the Tribe repeatedly consented to jurisdiction solely in Wisconsin state and federal courts for the adjudication of disputes arising out of the bond transaction at issue in the Tribal Court Action, and the Tribe's claims against Stifel do not fall within the narrow confines of tribal court jurisdiction over non-members.

Second, the Tribal Court's incorrect finding of jurisdiction exposes Stifel to irreparable harm. Absent injunctive relief, Stifel will be forced to spend time and money litigating the Tribe's claims in a forum Stifel and the Tribe bargained to avoid. Moreover, there is no adequate legal remedy for Stifel to challenge the Tribal Court's erroneous jurisdictional decision.

Third, injunctive relief will be consistent with the public interest in enforcing forum selection clauses like those in the documents connected to the bond transaction at issue in this case. An injunction also furthers the public interest in having legal claims adjudicated by a court that has jurisdiction over the litigants, including the opportunity to have claims decided by a jury rather than a judge hired by the Tribe. For these reasons, an injunction against further proceedings in the Tribal Court Action is warranted.

## **BACKGROUND**

### **I. PARTIES AND JURISDICTION**

Stifel is a corporation formed under Missouri law with its principal place of business in St. Louis, Missouri. (Statement of Proposed Facts (SPF) ¶ 1)

The Tribe is a federally recognized Indian Tribe organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* (SPF ¶ 2) The Tribe's reservation is

located within the geographic boundaries of the Western District of Wisconsin and its government headquarters is located at 13394 Trepania Road in Hayward, Wisconsin. (SPF ¶ 3)

The Tribal Court is the judicial entity established by the Tribe's Governing Board pursuant to Article V, Section 1 of the Amended Constitution of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin and Section 1.3 of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin Tribal Court Code. (SPF ¶ 4)

This Court has jurisdiction over this action because the question of whether an Indian tribe retains the power to compel a non-Indian, such as Stifel, to submit to the civil jurisdiction of its tribal court arises under federal law. 28 U.S.C. § 1331; *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985).

## **II. THE ISSUANCE AND SALE OF THE 2006 BONDS.**

In December 2006, the Tribe issued and sold two series of bonds (the 2006A Bonds and the 2006B Bonds) (together, the 2006 Bonds) as a means of raising revenue to fund various projects, including the refinancing of two series of bonds the Tribe had issued in 2003. (SPF ¶ 5) This transaction will be referred to herein as the 2006 Bond Transaction. The 2006 Bonds were issued and sold pursuant to SEC Rule 144A, exempting them from registration requirements under federal securities law. (SPF ¶ 6) Under Rule 144A, Stifel acted as the Initial Purchaser of the 2006 Bonds, with the ability to resell them to qualified institutional buyers as defined in SEC Rule 144A. (SPF ¶ 7)

As part of the issuance and sale of the 2006 Bonds, the Tribe entered into, issued, or caused to be issued the following documents:

- a. A Bond Purchase Agreement, dated December 15, 2006, between the Tribe and Stifel, which sets the terms, warranties and conditions under which Stifel agreed to purchase the 2006A Bonds and the 2006B Bonds. (Attached to the Complaint as Exhibit A)

- b. A Trust Indenture (Indenture), dated December 1, 2006, between the Tribe and Wells Fargo Bank, N.A., which establishes the means by which the Bank would repay principal and interest on the 2006A Bonds and the 2006B Bonds. (Attached to the Complaint as Exhibit B)
- c. A Preliminary Limited Offering Memorandum (Preliminary LOM), dated December 7, 2006. (Attached to the Complaint as Exhibit C)
- d. A Limited Offering Memorandum (LOM), dated December 15, 2006, which is signed by the Tribe's Tribal Chairman. (Attached to the Complaint as Exhibit D)
- e. Resolution No. 06-110, adopted by the Lac Courte Oreilles Tribal Governing Board on December 15, 2006, which approved the issuance of the 2006A Bonds and the 2006B Bonds. (Attached to the Complaint as Exhibit E)
- f. The 2006A Bonds and the 2006B Bonds, issued on December 22, 2006, which contain the Tribe's promise to pay principal and interest. (Three specimen bonds are attached to the Complaint as Exhibits F, G, and H)
- g. An Opinion Letter dated December 22, 2006 issued by Godfrey & Kahn as Bond Counsel and addressed the Tribe, Wells Fargo and Stifel (the Bond Counsel Opinion Letter). (Attached to the Complaint as Exhibit I)
- h. An Opinion Letter dated December 22, 2006 issued by Godfrey & Kahn as counsel for the Tribe and addressed to Stifel and Wells Fargo (the Issuer Opinion Letter). (Attached to the Complaint as Exhibit J)

(SPF ¶ 8)

**III. THE TRIBE CONSENTED TO JURISDICTION IN WISCONSIN FEDERAL AND STATE COURTS FOR THE ADJUDICATION OF DISPUTES ARISING OUT OF THE 2006 BOND TRANSACTION.**

In numerous documents associated with the 2006 Bond Transaction, the Tribe agreed to litigate disputes arising out of the 2006 Bond Transaction in the United States District Court for the Western District of Wisconsin, and if this Court fails to exercise jurisdiction, then in Wisconsin state court. In several of these documents, the Tribe agreed to jurisdiction in this Court or a Wisconsin state court *to the exclusion of the jurisdiction of the Tribal Court*.

For example, in Section 13.02 of the Trust Indenture, the Tribe consented to jurisdiction in Wisconsin federal and state courts and specifically excluded jurisdiction in the Tribal Court

over any dispute or controversy arising out of “any transaction” connected to the Indenture or the Bonds:

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.**

(SPF ¶ 9) (emphasis added) This exclusion is immediately followed by a stipulation by the Tribe that, for purposes of jurisdiction, negotiations of the Indenture took place on lands within the jurisdiction of the State of Wisconsin. (SPF ¶ 10) Also, the Indenture was executed and delivered off Tribal lands and in the jurisdiction of the State of Wisconsin:

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.

(SPF ¶ 10)

Other agreements and obligations of the Tribe connected to the 2006 Bond Transaction contain similar exclusions of Tribal Court jurisdiction. In the Series 2006A Bonds, the Tribe again confirmed that “any dispute or controversy arising out of this Bond . . . or to any transaction in connection therewith” would be excluded from the Tribal Court’s jurisdiction:

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.**

(SPF ¶ 11) (emphasis added) The Tribe provided similar assurances in the Preliminary Limited Offering Memorandum and Limited Offering Memorandum, acknowledging that the Tribal Court would not have jurisdiction over “any dispute arising under the Bond Documents or the Bond Purchase Agreement.” (SPF ¶ 12)

In addition to excluding Tribal Court jurisdiction, the Tribe repeatedly confirmed its submission and consent to jurisdiction in this Court or Wisconsin state court for disputes arising from the 2006 Bond Transaction. (SPF ¶ 13) For example, on page 23 of the Bond Purchase Agreement, the Tribe agreed to the jurisdiction of this Court, the Lac Courte Oreilles Tribal Court, or an appropriate Wisconsin state court with respect to “any dispute or controversy arising out of [the Bond Purchase Agreement].” (SPF ¶ 14) Like the Trust Indenture, the Bond Purchase Agreement also contains a “Situs of Transaction” provision in which the Tribe confirmed its agreement to litigate in non-tribal forums by stipulating that the transaction represented by the Agreement (and the related negotiations) took place in the State of Wisconsin:

(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.

(SPF ¶ 15)

**IV. THE TRIBE WAIVED SOVEREIGN IMMUNITY AND ANY OBLIGATION TO EXHAUST TRIBAL REMEDIES.**

Along with the foregoing jurisdictional covenants, the Tribe also waived its sovereign immunity and any requirement for exhaustion of tribal court remedies with respect to disputes arising out of the 2006 Bond Transaction. The Trust Indenture contains the following waivers of both sovereign immunity and tribal exhaustion:

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.

(SPF ¶ 16) The Tribe provided a similar waiver of both sovereign immunity and exhaustion in the Bond Purchase Agreement. (SPF ¶ 17)

To confirm the enforceability of the Tribe's various promises, the Tribe's attorneys issued a Bond Counsel Opinion Letter and Issuer Opinion Letter to Stifel. (SPF ¶ 18) The Bond

Counsel Opinion Letter informed Stifel that the Series 2006 Bonds “are valid and binding general obligations of [the Tribe] enforceable in accordance with their terms and the terms of the Indenture.” (SPF ¶ 19) The Issuer Opinion Letter similarly affirmed that “each of the Bond Documents . . . constitute valid and binding obligations of the Tribe enforceable in accordance with their terms.” (SPF ¶ 20)

**V. THE TRIBAL COURT EXERCISES JURISDICTION OVER THE TRIBAL COURT ACTION.**

On December 13, 2012, the Tribe commenced the Tribal Court Action against Stifel, alleging that Stifel undertook to advise the Tribe regarding its financing options in 2006 but failed to disclose certain information to the Tribe before it issued the 2006 Bonds. (SPF ¶ 21) In the Tribal Court Action, the Tribe alleges three causes of action against Stifel: (1) fraudulent concealment or non-disclosure; (2) breach of fiduciary duty; and (3) unjust enrichment. (SPF ¶ 22) The fraudulent concealment and breach of fiduciary duty claims are based on Stifel’s alleged failure to disclose material facts about the 2006 Bond Transaction. (SPF ¶ 23) The claim for unjust enrichment is premised on Stifel’s allegedly inequitable retention of commissions and fees paid by the Tribe. (SPF ¶ 24) The Tribe seeks rescission of the Bond Purchase Agreement or, in the alternative, a judgment for money damages in connection with its claim for fraudulent concealment. (SPF ¶ 25)

On February 15, 2013, Stifel filed a motion to dismiss the Tribal Court Action for lack of subject matter jurisdiction and lack of personal jurisdiction. (SPF ¶ 26) On May 9, 2013, the Tribal Court held a hearing on Stifel’s motion. (SPF ¶ 27) In an oral ruling, the Tribal Court denied Stifel’s motion to dismiss and concluded that it had jurisdiction over Stifel and the Tribal Court Action. (SPF ¶ 28) The Tribal Court set a scheduling conference for June 14, 2013, to establish a schedule for the remainder of the case. (SPF ¶ 29)

## ARGUMENT

Preliminary injunctive relief is appropriate upon a showing that the moving party has a reasonable likelihood of success on the merits, lacks an adequate legal remedy, and will suffer irreparable harm. *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana Dep't of Public Health*, 699 F.3d 962, 972 (7th Cir. 2012). Once these threshold requirements are met, the Court weighs the balance of harm to the parties if the injunction is granted or denied and determines whether the injunction serves the public interest. *Id.* In conducting this analysis, the Court employs a sliding scale approach: “The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor.” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1087 (7th Cir. 2008).

### **I. STIFEL HAS ESTABLISHED THE THRESHOLD REQUIREMENTS FOR A PRELIMINARY INJUNCTION.**

#### **A. Stifel is Likely to Succeed in Establishing that the Tribal Court Lacks Jurisdiction Over the Tribal Court Action.**

Stifel satisfies the “admittedly low requirement” that it show a “better than negligible” chance of success on the merits of its claim that the Tribal Court lacks jurisdiction over the Tribal Court Action. *Girl Scouts*, 549 F.3d at 1096. As the Supreme Court has stated, tribal court jurisdiction over non-members such as Stifel is extremely limited: “[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders.” *Plains Commerce Bank v. Long Fam. Land & Cattle Co., Inc.*, 554 U.S. 316, 324 (2008). The Court’s analysis starts with the presumption of invalidity that attaches to a tribe’s efforts to regulate non-members. *Id.* at 330. This presumption reflects the Supreme Court’s repeatedly demonstrated “concern that tribal courts not require defendants who are not tribal members to defend

[themselves] in an unfamiliar court.” *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9<sup>th</sup> Cir. 2006) (*en banc*) (tracing Supreme Court precedent).

**1. The Tribe Agreed to Litigate the Claims in the Tribal Court Action in Federal or State Court, not Tribal Court.**

To address this concern of unfamiliarity, the Tribe and Stifel specifically bargained to (a) litigate in this Court or Wisconsin state court and (b) exclude Tribal Court jurisdiction over “any dispute or controversy arising out of . . . any transaction in connection” with the Bonds or other Bond Documents. (SPF ¶¶ 9, 11, 12) Like any other party to a contract, an Indian tribe may contract for a forum for dispute resolution other than its tribal court. *QEP Field Services Company v. Ute Indian Tribe of Uintah & Ouray Reservation*, 740 F. Supp. 2d 1274, 1280 (D. Utah 2010). Just as a tribe can waive its sovereign immunity from suit by contract, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 420 (2001), it can waive the jurisdiction of its tribal court by the same means. Federal courts have enforced forum selection clauses that effectively take the litigation out of tribal court. *See, e.g., Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814–15 (7th Cir. 1993) (observing that tribe “wished to avoid characterization of the contract as a reservation affair” by agreeing to submit to venue and jurisdiction of federal and state courts located in Illinois); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (“By this forum selection clause, the Tribe agreed that disputes need not be litigated in tribal court.”).

The jurisdiction and venue clauses in the Trust Indenture and other transaction documents prevent the Tribal Court from exercising jurisdiction over the Tribe’s claims against Stifel. In the Trust Indenture, the Tribe agreed that “any dispute or controversy arising out of this Indenture, the Bonds or the Bond Resolution . . . or to any transaction in connection therewith” should proceed in this Court or a Wisconsin state court, **“to the exclusion of the jurisdiction of**

**any court of the Tribe.”** (SPF ¶ 9) (emphasis supplied) The plain language of the clause applies to “any dispute” irrespective of who is prosecuting or defending the action.

Further, by using the inclusive phrase “arising out of,” the jurisdictional clause broadly applies to any claims related to the Bonds or to any transactions connected to the Bonds. This includes the Tribe’s claims for misrepresentation and breach of fiduciary duty concerning the issuance of the 2006 Bonds or their subsequent sale to Stifel. *See Wellborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 639 (7th Cir. 2002) (in reference to “arising out of” clause, stating “we have naturally been willing to read these admittedly expansive clauses quite broadly to include *all manner of claims* tangentially related to [an] agreement, including claims of fraud, misrepresentation, and other torts involving both contract formation and performance”) (emphasis supplied). The Tribe’s claims against Stifel fall within the plain language of the Trust Indenture’s exclusion of Tribal Court jurisdiction.

The Tribe may argue that the jurisdictional exclusion in the Indenture does not apply because its claims arise under the Bond Purchase Agreement, but any such contention overlooks the Tribe’s covenant in the Bond Purchase Agreement to “observe all covenants of the Tribe” contained in the Indenture. (SPF ¶ 30) Thus, the Bond Purchase Agreement expressly incorporates the jurisdictional limitations in the Indenture. As a party to the Bond Purchase Agreement, Stifel has a right to enforce the Tribe’s jurisdictional covenant in the Trust Indenture.

The jurisdictional exclusion in the Trust Indenture mandates that no dispute arising out of the 2006 Bond Transaction shall be litigated in Tribal Court. *Cf. Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, ¶ 26, 296 Wis. 2d 273, 722 N.W.2d 633 (requiring “specific language of exclusion” in order to make forum selection mandatory, rather than permissive). Like other forum selection clauses or arbitration clauses, this bargained-for

stipulation is binding on the Tribe. *Id.* at ¶ 22 (“Our common law obligates parties to a contract to perform their duties under the contract.”). To effectuate the parties’ binding agreement to resolve the Tribe’s claims outside the Tribal Court, this Court should enjoin the Tribe and Tribal Court from any further litigation in that excluded forum.

## **2. The Parties Also Stipulated that No Relevant Events Occurred on Tribal Land.**

To reinforce its commitment to litigate outside Tribal Court, the Tribe also stipulated that all relevant transactional events occurred within the jurisdiction of the courts of the State of Wisconsin. In the Trust Indenture, the Tribe affirmed “that the transaction represented by this Indenture has not taken place on Indian Lands.” (SPF ¶ 10). Similarly, in the Bond Purchase Agreement, the Tribe affirmed “that the transaction represented by this Agreement has taken place in the State of Wisconsin.”<sup>1</sup> (SPF ¶ 15) Both of these affirmations were made “[t]o demonstrate the willingness of the Tribe to submit to the jurisdiction of both the federal courts and the courts of the State of Wisconsin.” (SPF ¶¶ 10, 15)

By stipulating that no relevant events occurred within its jurisdiction, the Tribe effectively acknowledged that the lynchpin for tribal court jurisdiction – a connection between Stifel’s conduct and the Tribe’s land – is missing in this case. Federal courts across the country have recognized that a precondition to the exercise of tribal jurisdiction over nonmembers is conduct or activities that occur within tribal boundaries. *E.g., Philip Morris USA, Inc. v. King Mountain Tobacco, Inc.*, 569 F.3d 932, 938 (9th Cir. 2009) (“[T]ribal jurisdiction is, of course,

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<sup>1</sup> By affirming that the transaction occurred in the State of Wisconsin, the Tribe likewise agreed that no parts of the transaction occurred on the separate and distinct Tribal land. *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) (a reservation-Indian’s domicile on the reservation is not an “in-state” contact which grants jurisdiction to state courts).

cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries.”); *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10<sup>th</sup> Cir. 2007) (endorsing “notion that [tribal] inherent sovereignty ceases at the reservation’s borders”); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8<sup>th</sup> Cir. 1998) (“Neither [the Supreme Court’s decision in *Montana v. United States*] nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations.”); *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court*, 103 F. Supp. 2d 1161, 1166 (D.S.D. 2000) (“*Hornell Brewing* clearly held that tribal jurisdiction does not extend to . . . off reservation activities.”) *Yankton Sioux Tribe Head Start Concerned Parents v. Longview Farms, LLP*, 2009 WL 891866, at \*3 (D.S.D. Mar. 31, 2009) (“The Tribe does not have regulatory authority over the construction of the farrowing facility . . . because such facility is located on land which is not within reservation boundaries.”); *Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) (“Indian tribes are not permitted to exercise jurisdiction over the activities or conduct of non-Indians occurring outside the reservation.”).

Recognizing that tribal jurisdiction is closely tied to a non-member’s conduct on tribal land, the Tribe eliminated any debate about whether such a presence occurred here by agreeing to the “Situs of Transaction” clauses in the Trust Indenture and Bond Purchase Agreement. While the Tribe may seek to introduce evidence contradicting its representations in these clauses, any such parol evidence should be disregarded in light of the Tribe’s clear and unambiguous affirmations that, for jurisdictional purposes, nothing relevant occurred on Tribal land. It is essential that courts hold a party to its contractual promises in order to provide the commercial certainty for which both parties (and here, with the assistance of counsel) bargained. If the Tribe is permitted to sidestep its written representations through the mere submission of an after-the-

fact affidavit or other evidence, non-tribal entities may be reluctant to engage in business with the Tribe. *See Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993) (“If contracting parties cannot trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe’s efforts to improve the reservation’s economy may come to naught.”).

In both the Trust Indenture and Bond Purchase Agreement, the Tribe acknowledged that the key element for tribal court jurisdiction over the Tribe’s claims against Stifel – a connection to tribal land – did not exist for the 2006 Bond Transaction. Stifel relied on that representation, and, for six years, the Tribe abided by its promises. Because the Tribe affirmed that no events relevant to jurisdiction occurred on its land, there is a strong likelihood that Stifel will succeed on its claim that the Tribal Court lacks jurisdiction over the Tribe’s claims against Stifel.

### **3. There is No Tribal Court Jurisdiction Under the Limited Exceptions in *Montana v. United States*.**

Even if the Tribe had not contractually excluded litigation in Tribal Court, it would still be proper for this Court to enjoin proceedings in the Tribal Court action because the Tribe’s claims do not fall within either of the narrow exceptions for tribal court jurisdiction announced by the Supreme Court. In *Montana v. United States*, 450 U.S. 544 (1981), the “pathmaking case concerning tribal civil authority over nonmembers,” *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997), the Supreme Court established the general rule that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565. The Court also recognized two limited exceptions in which tribes may exercise civil jurisdiction over non-members 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.” *Id.* 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. Neither exception applies here.

The first *Montana* exception for “consensual relationships” limits tribal regulation to “nonmember *conduct* inside the reservation that implicates the tribe’s sovereign interests.” *Plains Commerce Bank*, 554 U.S. at 332 (emphasis in original). The present case does not fall within the “consensual relationships” exception because no relevant conduct occurred inside the reservation. In both the Trust Indenture and the Bond Purchase Agreement, the Tribe confirmed that the transaction and negotiations preceding its consummation occurred entirely within the State of Wisconsin, *not* within the boundaries of the Tribe’s reservation. (SPF ¶¶ 10, 15)

Nevertheless, 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 nexus between the Tribe’s claims and Stifel’s allegedly consensual relationship with the Tribe – 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.’”). No such nexus is present here. The Tribe’s claim that Stifel fraudulently induced it to enter into the 2006 Bond Purchase Agreement, and request for rescission of that agreement, seeks to disavow, rather than regulate, the alleged consensual relationship between Stifel and the Tribe. Accordingly, even if an on-reservation consensual relationship existed, the first *Montana* exception does not apply to the Tribe’s suit to rescind the parties’ relationship. *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).

The Court also lacks jurisdiction over this lawsuit 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 v. United States*, 450 U.S. at 566. 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*, 569 F.3d at 943 (generalized threat of torts by or against tribal members "is not what the second *Montana* exception is intended to capture."). It "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, non-member 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").

Stifel has not engaged in any conduct that "menaced" the Tribe or imperiled the Tribe's economic security or ability to govern itself. Nothing in the Complaint 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, after which 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 claims against Stifel is not within the narrow second exception.

#### **4. Stifel Does Not Have to Exhaust Its Tribal Remedies.**

Stifel will succeed in defending against any argument that it must exhaust its tribal remedies before challenging jurisdiction in this Court. The parties have already submitted briefs addressing the issue whether exhaustion is required in the Tribal Court. (*See* Dkt. ## 10, 13, 14, 18, and 19). Stifel incorporates its arguments that tribal exhaustion is unnecessary in this case because (1) the Tribe expressly waived any exhaustion requirement in the Bond Purchase Agreement and the Trust Indenture (Dkt. #14 at pp. 6-11); (2) the parties stipulated that the Tribal Court would not have jurisdiction over any disputes arising from the 2006 Bond Transaction (Dkt. #14 at pp. 11-16) and (3) the Tribal Court plainly lacks jurisdiction over the Tribe's claims under federal common law. (Dkt. #14 at 16-22).<sup>2</sup> As explained by the Seventh Circuit, the reasons for tribal exhaustion, namely self-government and self-determination, would be "undercut" if the courts "refuse[d] enforcement" of the choice of venue and jurisdiction clauses in the parties' agreements. *Alzheimer & Gray*, 983 F.2d at 815.

The Tribe cannot overcome the presumption against tribal court jurisdiction over non-members such as Stifel. The contractual jurisdiction provisions, the stipulations negating any connection to Tribal land, and the inapplicability of the two limited *Montana* exceptions establish that Stifel has a "better than negligible" chance of proving that the Tribal Court lacks jurisdiction over the parties' dispute. *Girl Scouts*, 549 F.3d at 1096.

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<sup>2</sup> Since Stifel will likely succeed in showing that exhaustion is unnecessary, the Court should also deny the Defendants' pending motions to dismiss which argue that Stifel must exhaust its jurisdictional arguments in Tribal Court. Indeed, requiring exhaustion here would only cause further irreparable harm to Stifel since it would be forced to litigate this entire matter to final judgment in Tribal Court before having a chance to appeal the Tribal Court's ruling on jurisdiction. (SPF ¶ 31)

**B. Stifel Has No Adequate Legal Remedy and Will be Irreparably Harmed if Forced to Continue Litigating in Tribal Court.**

Stifel is also entitled to injunctive relief because it has no adequate legal remedy in the Tribe's court system to challenge the Tribal Court's jurisdictional decision and it will be irreparably harmed if forced to continue litigating in Tribal Court.

The absence of an adequate legal remedy is evident in the Tribe's own Tribal Court Code, which permits appellate review only of final judgments or orders (i.e., interlocutory review of the jurisdictional decision is not available). (SPF ¶ 31) In the wake of the Tribal Court's denial of Stifel's motion to dismiss, Stifel now faces years of litigation in a tribal court system that lacks jurisdiction over the Tribe's claims. Moreover, it could take years to fully litigate this matter through the tribal court system before Stifel could challenge any judgment in federal court on jurisdictional grounds. In the meantime, witnesses' memories of the 2006 transaction will continue to fade, documents and other evidence may accidentally be lost, and Stifel's ability to eventually defend itself in a proper forum may be compromised.

Absent injunctive relief, Stifel will also be irreparably harmed in several respects. A harm is "irreparable" if it "cannot be prevented or rectified by the final judgment after trial." *Girl Scouts*, 549 F.3d at 1089-90. First, numerous courts have recognized that forcing a non-member to expend time, money, and resources to litigate in a tribal court that lacks jurisdiction causes irreparable harm. *See, e.g., Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011); *State of Washington v. Tribal Court for the Confederated Tribe & Bands of the Yakama Nation*, 2013 WL 139368, at \*3 (E.D. Wash. Jan. 10, 2013); *Koniag, Inc. v. Kanam*, 2012 WL 2576210, at \*5 (D. Alaska July 3, 2012); *Chiwewe v. The Burlington Northern & Santa Fe R.R. Co.*, 2002 WL 31924768, at \*2 (D.N.M. Aug. 15, 2002). Here, Stifel will incur attorneys' fees and other costs to defend the Tribal Court Action that it will not be able to

recover in any subsequent proceeding. Without any means to recover the costs of litigating in a court that has no jurisdiction, Stifel will suffer irreparable financial harm if it is forced to keep defending the claims in Tribal Court. *See Crowe & Dunleavy*, 640 F.3d at 1158 (“Crowe’s significant risk of financial injury arising from irrecoverable attorneys fees is an irreparable harm sufficient to support the issuance of a preliminary injunction.”).

Second, Stifel will be irreparably harmed by having the parties’ agreed-upon forum cast aside in favor of a venue that Stifel specifically contracted to avoid. In *Wells Fargo Bank, N.A. v. Maynahonah*, the district court recognized that ignoring the parties’ contractual choice of arbitration could itself constitute irreparable harm:

In this case, Plaintiff has made a sufficient showing of irreparable harm if the Commission goes forward with its proceeding. It is undisputed that the equipment lease executed by the Tribe contains a broadly worded arbitration agreement that, by its terms, requires any claim related directly or indirectly to the lease to be settled by binding arbitration administered by the American Arbitration Association. The agreement expressly reserves for decision by an arbitrator the question of whether a dispute is arbitrable. Plaintiff’s bargained-for right to proceed expeditiously through the arbitral process, and to have the arbitrability question decided by a neutral arbitrator, may be irretrievably lost if the Commission is permitted to determine issues integral to the contractual dispute under the guise of exercising its regulatory power.

2011 WL 3022261, at \*2 (W.D. Okla. July 22, 2011). The same rationale applies here: Forcing Stifel to litigate in Tribal Court deprives Stifel of its bargained-for right to litigate disputes in a more familiar setting of state or federal court. *See Ciena Corp. v. Nortel Networks Inc.*, 2005 WL 1189881, at \*7 (E.D. Tex. May 19, 2005) (recognizing irreparable harm because “Nortel will be deprived of its bargained-for forum—an Article III judge’s court and jury in the United States District Court for the Eastern District of Texas”).

Third, the Tribal Court Code also denies Stifel important procedural due process rights, such as the right to a jury trial, that Stifel would have if the Tribe’s claims were litigated in Wisconsin state or federal court. (SPF ¶ 32) Instead, the merits of the Tribe’s claims will be

determined by a Tribal Court judge whose appointment and compensation are controlled by the Tribe's Governing Board, the same entity that approved the Bond Purchase Agreement on behalf of the Tribe. (SPF ¶ 33)

To prevent the irreparable harms of lost time, lost money, loss of contractually-bargained for forum, and loss of procedural due process rights, the Court should enjoin the Tribe and the Tribal Court from any further proceedings in the Tribal Court Action. If no injunction is issued, Stifel will be forced to litigate in an unfamiliar forum that was specifically excluded from presiding over any disputes arising from the 2006 Bond Transaction. Injunctive relief is the only means for preventing the continued harm to Stifel of litigating the parties' dispute in Tribal Court.

## **II. THE BALANCE OF HARMS FAVORS STIFEL.**

The irreparable harm facing Stifel in the absence of an injunction substantially outweighs any potential harm that could result from enforcing the Tribe's promises to not litigate in Tribal Court. *See Girl Scouts*, 549 F.3d at 1086 (under this factor, "the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief."). As detailed above, Stifel will lose valuable time, unrecoverable financial losses, and the benefit of its bargained-for forum if no preliminary injunction is issued.

In contrast, the Tribe will suffer no harm if the Tribal Action is halted because the Tribe can immediately pursue its claims in the contractually agreed-upon state or federal forum. *See, e.g., Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938, at \*6 (D. Ariz. Jan. 26, 2012) ("Granting an injunction will not prevent Stover from pressing her claim against plaintiff in courts of competent jurisdiction."); *Yakima Nation*, 2013 WL 139368, at \*3 ("Defendants are not

deprived of a forum to entertain their claims because those claims will be heard in this court instead of tribal court”); *Koniag, Inc.*, 2012 WL 2576210, at \*5 (balance of equities favors granting injunction because it “would not preclude the Native Village of Karluk from seeking to have its claims addressed in state or federal court”); *UNC Resources v. Benally*, 514 F. Supp. 358, 363 (D.N.M. 1981) (no harm to non-movant whose “rights can be vindicated in a state or federal court of competent jurisdiction”). Unlike forcing Stifel to litigate in the contractually-excluded Tribal Court, the Tribe will not be harmed by an injunction requiring it to litigate its claims against Stifel in the forums to which it repeatedly agreed—namely, this Court or Wisconsin circuit court. Nevertheless, any “harm” in compelling the Tribe to litigate in a contractually-agreed upon forum pales in comparison to the harm of requiring Stifel to spend time, money, and resources defending claims in a court that it specifically contracted to avoid. The balance of harms tips decidedly in favor of enjoining any further proceedings in the Tribal Court.

### **III. ENJOINING THE TRIBAL COURT PROCEEDINGS WILL SERVE THE PUBLIC INTEREST.**

Finally, enjoining the Tribal Court Action advances at least three public interests. First, the law favors the enforcement of forum selection clauses: “Enforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring); *General Protecht Group, Inc. v. Leviton Manuf.*, 651 F.3d 1355, 1365 (Fed. Cir. 2011); *Wachovia Bank Nat. Ass'n v. EnCap Golf Holdings, LLC*, 690 F. Supp. 2d 311, 327 (S.D.N.Y. 2010) (“There is a ‘strong public policy’ in favor of enforcing forum selection clauses”); *see also Petroske, Inc. v. Globalcom, Inc.*, 2004 WI App 142, ¶ 1, 275 Wis. 2d 444, 685 N.W.2d 884 (“In Wisconsin, a forum selection clause is presumptively valid.”). This strong

public policy would be frustrated if the Tribe were permitted to continue litigating in Tribal Court despite the parties' express exclusion of Tribal Court jurisdiction for any disputes arising from the 2006 Bond Transaction.

Second, federal courts considering requests to enjoin lawsuits from proceeding in tribal courts have recognized a "strong public interest in not allowing court proceedings to go forward in a tribunal that is clearly without jurisdiction over the proceedings." *Koniag*, 2012 WL 2576210, at \*6; *see also State of Washington*, 2013 WL 139368, at \*3 ("It is in the public interest that the parties' dispute be resolved in the forum which is properly vested with subject matter jurisdiction over the dispute."). Enjoining further proceedings in the Tribal Court Action is consistent with this interest in preventing "an unlawful exercise of tribal power." *UNC Resources*, 514 F. Supp. at 363; *Rolling Frito-Lay Sales*, 2012 WL 252938, at \*6 ("[T]he public interest is not advanced by having a court that lacks jurisdiction determine a party's legal rights.").

Third, injunctive relief is also consistent with the long-standing and widely accepted importance of the right to a jury trial. *E.g., Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."). The Tribal Court Code denies Stifel this important right and requires that all trials "be to the court without a jury." (SPF ¶ 32) An injunction against further proceedings in the Tribal Court will preserve Stifel's right to have a jury decide the merits of the Tribe's claims.

## CONCLUSION

For the reasons stated herein, Stifel respectfully requests that the Court issue an order enjoining any and all further proceedings in the Tribal Court Action.

Respectfully submitted this 17th day of May, 2013.

s/Brian G. Cahill

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