

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL, NICOLAUS & COMPANY, INC.,

Plaintiff,

v.

Case No. 13-CV-121

LAC COURTE OREILLES BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS OF WISCONSIN,

Defendant.

**STIFEL, NICOLAUS & COMPANY, INC.'S BRIEF IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT AND FOR DECLARATORY JUDGMENT**

INTRODUCTION

Stifel, Nicolaus & Company, Inc. (“Stifel”) brings this motion seeking two forms of relief: (1) reformation of a contract between Stifel and the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the “Tribe”) to correct a scrivener’s error that resulted in a non-final draft of the contract being executed by the parties, and (2) a declaration that the Lac Courte Oreilles Tribal Court lacks jurisdiction over a lawsuit filed by the Tribe against Stifel.

This lawsuit arises out of the issuance and sale of two series of bonds in 2006 by the Tribe. In December 2012, the Tribe filed a lawsuit in its tribal court against Stifel, which purchased the bonds from the Tribe pursuant to a Bond Purchase Agreement (the “Tribal Court Action”). Because the Tribal Court Action violated multiple forum selection provisions excluding tribal court jurisdiction and otherwise exceeded the narrow parameters of tribal court jurisdiction over non-members, Stifel commenced this lawsuit seeking a declaration that the Tribal Court lacks jurisdiction.

In opposing this action, the Tribe has argued that jurisdiction properly lies in its tribal court because the Bond Purchase Agreement's forum selection clause identifies the Tribal Court as a permissible forum for its lawsuit. Documents produced during discovery, however, establish beyond genuine dispute that the Tribe's position lacks merit. As detailed below, shortly before the transaction closed, the *Tribe* proposed (and Stifel agreed) to *remove* the Tribal Court from the Bond Purchase Agreement's forum selection clause. The Tribal Court was removed from the final draft of the agreement presented to the Tribe. At closing, however, the parties inadvertently executed an earlier draft of the agreement, which still listed the Tribal Court in the forum selection clause. This non-final draft also listed a principal amount of the bonds different from the final principal amount and lacked a repayment schedule added in a subsequent draft. As a result of this mistake, the executed Bond Purchase Agreement does not accurately reflect the parties' agreement to remove the Tribal Court as a possible forum for dispute resolution. This mutual mistake warrants reformation of the Bond Purchase Agreement to correctly embody the parties' agreement.

Applying the version of the Bond Purchase Agreement that the parties intended to execute confirms the Tribal Court's lack of jurisdiction over Stifel and the Tribal Court Action. In the Bond Purchase Agreement and other documents connected to the bond issuance, the Tribe consented repeatedly to jurisdiction solely in Wisconsin state and federal courts for the adjudication of disputes arising out of the transaction. Because the allegations and claims asserted in the Tribal Court Action fall within the scope of these forum selection clauses, Stifel is entitled to a declaration that the Tribal Court lacks jurisdiction over Stifel and the Tribal Court Action.

UNDISPUTED FACTS

I. The 2006 Bond Transaction.

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 that the Tribe had issued in 2003.

(Stifel’s Proposed Finding of Fact (PFOF) ¶ 1). The 2006 Bonds were issued and sold pursuant to SEC Rule 144A, exempting them from registration requirements under federal securities law.

(Stifel PFOF ¶ 2). 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 Rule 144A. (Stifel PFOF ¶ 3). This transaction will be referred to in this brief as the 2006 Bond Transaction.

In connection with the 2006 Bond Transaction, the Tribe entered into, issued or caused to be issued the following documents:

- 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;
- A Trust Indenture (the “Indenture”), dated December 1, 2006, between the Tribe and Wells Fargo Bank, N.A., which establishes the means by which the Tribe would repay principal and interest on the 2006A Bonds and the 2006B Bonds;
- A Preliminary Limited Offering Memorandum, dated December 7, 2006;
- A Limited Offering Memorandum, dated December 15, 2006;
- 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 (the “Tribal Resolution”); and
- The 2006A Bonds and the 2006B Bonds, issued on December 22, 2006, which contain the Tribe’s promise to pay principal and interest;

(Stifel PFOF ¶ 4).

II. During the Negotiations Over the 2006 Bond Transaction, Stifel and the Tribe Agree to Exclude the Tribal Court as a Forum for Dispute Resolution.

In negotiating the terms of the various documents memorializing the 2006 Bond Transaction, the Tribe was represented by Godfrey & Kahn attorneys Brian Pierson and Tom Griggs. (Stifel PFOF ¶ 5). An in-house attorney, Paul Shagen, also worked on the transaction on behalf of the Tribe. (Stifel PFOF ¶ 6). Stifel was represented in the negotiations by Reed Groethe, an attorney at Foley & Lardner. (Stifel PFOF ¶ 7).

a. The Parties Agree to Exclude Tribal Court Jurisdiction in the Indenture.

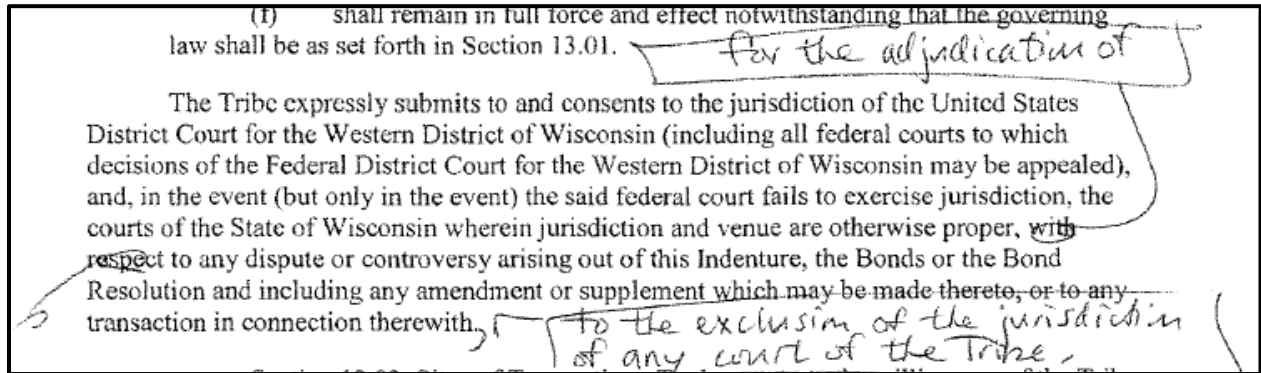
On October 30, 2006, Mr. Griggs sent an email to Mr. Groethe, Mr. Pierson, Mr. Shagen and Norma Ross, a member of the Tribe who served as its Executive Director, attaching the first draft of the Indenture for the 2006 Bond Transaction. (Stifel PFOF ¶ 8). Section 13.02 of the draft Indenture contained a waiver of the Tribe's sovereign immunity and a forum selection clause which identified the United States District Court for the Western District of Wisconsin and Wisconsin state court as possible forums for disputes arising out of the Indenture or "any transaction in connection therewith":

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, with respect to 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.

(Stifel PFOF ¶ 9). No reference to the Lac Courte Oreilles Tribal Court appeared in this first draft of Section 13.02. (Stifel PFOF ¶ 10).

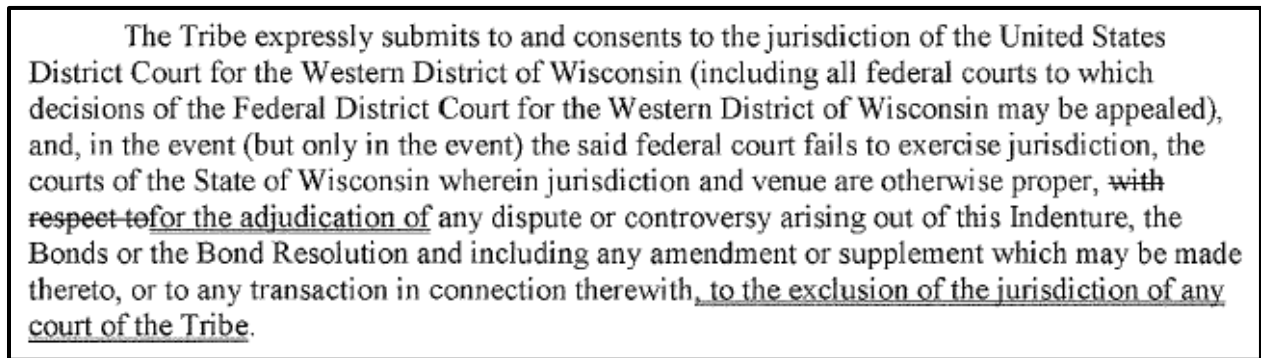
Two days later, on November 1, 2006, Mr. Groethe sent an email to Mr. Griggs attaching his revisions (on behalf of Stifel) to the Indenture. (Stifel PFOF ¶ 11). Among Mr. Groethe's

changes was the addition of language at the end of the forum selection clause specifically excluding “the jurisdiction of any court of the Tribe:”



(Stifel PFOF ¶ 12). Mr. Groethe proposed the same addition to the forum selection clauses in the forms of the 2006A and 2006B Bonds that were exhibits to the Indenture. (Stifel PFOF ¶ 13).

On November 13, 2006, Mr. Griggs circulated a new draft of the Indenture to Mr. Groethe, Mr. Pierson, Mr. Shagen and Ms. Ross which incorporated the language proposed by Mr. Groethe excluding Tribal Court jurisdiction in the forum selection clause:



(Stifel PFOF ¶ 14). The final version of the Indenture signed by the parties contained the language Mr. Groethe proposed that excluded Tribal Court jurisdiction. (Stifel PFOF ¶ 15).

b. The Tribe Proposes, and Stifel Agrees, to Exclude Tribal Court Jurisdiction in the Bond Purchase Agreement.

On December 10, 2006, Mr. Groethe sent an email to Mr. Griggs attaching a draft of the Bond Purchase Agreement between the Tribe and Stifel. (Stifel PFOF ¶ 16). Section 14(b) of this draft contained a forum selection clause similar to the clause in the Indenture, in which the Tribe (but not Stifel) consented to jurisdiction of the United States District Court for the Western District of Wisconsin and the Lac Courte Oreilles Tribal Court for disputes arising out of the Bond Purchase Agreement or any connected transaction:

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 proper, with respect to any dispute or controversy arising out of this Agreement and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(Stifel PFOF ¶ 17).¹

Five days later, on December 15, 2006, Mr. Pierson (another attorney for the Tribe) sent an email to Mr. Groethe stating that “Paul Shagen just called and seems to think he needs the final B[ond] P[urchase] A[greement]” for a meeting that day. (Stifel PFOF ¶ 18). Approximately 30 minutes later, Mr. Groethe sent an email to Mr. Griggs, Mr. Pierson, Mr. Shagen and Ms. Ross which attached a revised draft of the Bond Purchase Agreement. (Stifel PFOF ¶ 19). Mr. Groethe stated in his email that “[a]dditional changes will be made later in the day to reflect the final structure of the bond issue.” (*Id.*). The draft of the agreement attached to Mr. Groethe’s email contained the document identifier number “MILW_2121571.6” in the bottom left corner of

¹ This language was carried over from the Bond Purchase Agreement for the Tribe’s issuance of bonds in 2003. (Stifel PFOF ¶ 17).

each page, signifying that this was the sixth version of the agreement. (Stifel PFOF ¶ 20). The forum selection clause in version 6 of the agreement still identified the Lac Courte Oreilles Tribal Court as one of the forums to which the Tribe consented. (Stifel PFOF ¶ 21).

Approximately two hours later, at 11:32 a.m., Mr. Pierson sent another email to Mr. Groethe stating that *the Tribe* wanted to remove the Tribal Court as a possible venue in the Bond Purchase Agreement's forum selection clause, consistent with the other transaction documents:

-----Original Message-----

From: Brian Pierson [Bpierson@gklaw.com]
Sent: Friday, December 15, 2006 11:32 AM
To: Groethe, Reed
Cc: Tom Griggs
Subject: RE: changes to offering doc

Reed

We just got off the phone with Paul Shagen. He wants us to be uniform on all documents with jurisdiction in federal court, state court fall back and get rid of references to tribal court.

On reflection, I agree. From the Tribe's point of view, it doesn't add anything but gives the bondholder a potential extra remedy. But from the bondholder's point of view, that extra remedy is at the price of giving the tribe the right to preempt any state court action with a tribal court declaratory judgment action.

I think we can assume that the Tribe, having submitted to federal/state court jurisdiction, will comply with any orders or judgments issued by those courts.

Sorry for the inconvenience. Can you make the changes?

Thanks

Brian

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(Stifel PFOF ¶ 22). In response to this email, at 2:04 p.m., Mr. Groethe circulated an updated draft (version 7 as signified by the document identifier number “MILW_2121571.7”) of the Bond Purchase Agreement to Mr. Pierson, Mr. Griggs, Mr. Shagen, Ms. Ross and representatives of Stifel. (Stifel PFOF ¶ 23). Consistent with Mr. Pierson’s request, version 7 struck the phrase “Lac Courte Oreilles Tribal Court” from the agreement’s forum selection clause:

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 proper, with respect to any dispute or controversy arising out of this Agreement and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.~~

(Stifel PFOF ¶ 24). In addition, version 7 included the final principal amounts of the 2006 Bonds and the mandatory sinking fund redemption amounts for the Bonds, which were not included in prior versions of the agreement. (Stifel PFOF ¶ 25). There was no objection from Mr. Shagen or Ms. Ross to the deletion of the Tribal Court from the forum selection clause. (Stifel PFOF ¶ 26).

Two hours later, at 4:09 p.m., Mr. Groethe sent an email to Mr. Griggs, Mr. Pierson, Mr. Shagen, Ms. Ross and representatives of Stifel attaching another version of the Bond Purchase Agreement, version 8. (Stifel PFOF ¶ 27). Like its counterpart in version 7, the forum selection clause in version 8 of the Bond Purchase Agreement also omitted the Tribal Court as a possible forum, consistent with the Tribe’s request:

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 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 proper, with respect to any dispute or controversy arising out of this Agreement and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(Stifel PFOF ¶ 28). Again, the Tribe made no objection to the omission of the Tribal Court in version 8 of the agreement. (Stifel PFOF ¶ 29). Version 8 was the last draft of the agreement circulated before the closing for the 2006 Bond Transaction. (Stifel PFOF ¶ 30).

Based upon their experience with this transaction and other transactions, in which the final circulated version of a document is intended to be the version that is signed, and the drafting history of the Bond Purchase Agreement, Mr. Pierson and Mr. Groethe believed that the Tribe intended that the Bond Purchase Agreement exclude the Tribal Court as a possible forum for dispute resolution. (Stifel PFOF ¶ 31). Stifel shared this same intention. (*Id.*)

III. The Parties Execute Non-Final Version 6 of the Bond Purchase Agreement.

The closing of the 2006 Bond Transaction took place at the offices of Godfrey & Kahn in Milwaukee. (Stifel PFOF ¶ 32). Mr. Groethe did not attend the closing because he was out of town. (Stifel PFOF ¶ 33). Representatives of Stifel and the Tribe executed version 6 of the Bond Purchase Agreement, notwithstanding the existence of version 8. (Stifel PFOF ¶ 34). As Mr. Pierson acknowledged, version 6 is not the final, circulated version of the agreement and pre-dates his conversation with Mr. Shagen about removing the Tribal Court from the forum selection clause. (Stifel PFOF ¶ 35).

IV. The Tribe Consents to Jurisdiction in Wisconsin Federal and State Courts in Other Bond Documents for the Adjudication of Disputes Arising out of the 2006 Bond Transaction.

In addition to the exclusion of Tribal Court jurisdiction in the Indenture's forum selection clause, Section 13.03 of the Indenture contains a "Situs of Transaction" clause which discusses the Tribe's willingness to submit to the jurisdiction of Wisconsin state and federal courts:

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.

(Stifel PFOF ¶ 36). Versions 6 and 8 of the Bond Purchase Agreement contain a similar "situs" clause in which the Tribe represented that the transaction and its negotiations occurred 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.

(Stifel PFOF ¶ 37).

a. The Preliminary Limited Offering Memorandum and Limited Offering Memorandum.

Like the Indenture and the Bond Purchase Agreement, the Preliminary Limited Offering Memorandum and the Limited Offering Memorandum issued by the Tribe contain statements of its consent to jurisdiction in Wisconsin federal and state courts and its exclusion of jurisdiction in

the Tribal Court with respect to any disputes arising under the Bond Purchase Agreement and other transaction documents:

Agreement. In no event will tribal trust resources be subject to attachment, execution, or other similar process. The Tribe expressly submits and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin (and to the jurisdiction of all courts to which decisions may be appealed) and in the event (but only in the event) the federal district court fails to exercise jurisdiction, the courts of the State of Wisconsin where jurisdiction and venue are proper, for the adjudication of any dispute arising under the Bond Documents or the Bond Purchase Agreement, **to the exclusion of the jurisdiction of any court of the Tribe.** With its waiver of sovereign

(Stifel PFOF ¶ 38) (emphasis supplied).

b. The 2006A Bonds and 2006B Bonds.

Language excluding jurisdiction in the Tribal Court also appears in the Series 2006A 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 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.**

(Stifel PFOF ¶ 39) (emphasis supplied). The Tribe also consented to jurisdiction in Wisconsin federal and state courts in the Series 2006B 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 judgment, 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.

(Stifel PFOF ¶ 40).

c. The Tribal Resolution.

The Tribe also acknowledged twice in the Tribal Resolution that Wisconsin federal and state courts would have jurisdiction over disputes arising out of the 2006 Bond Transaction:

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

Section 4. Enforcement.

4.1 The Tribe expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the United States District Court for the Western District of Wisconsin may be appealed), and the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper, with respect to any dispute or controversy arising out of the Indenture, the Bonds, this Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(Stifel PFOF ¶ 41) (emphasis supplied). The Tribal Resolution does not consent to jurisdiction, or authorize litigation, in the Tribal Court arising from the 2006 Bond Transaction. (Stifel PFOF ¶ 42).

V. The Tribe Commences an Action Against Stifel Arising out of the 2006 Bond Transaction in the Tribal Court.

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 the 2006 Bond Transaction. (Stifel PFOF ¶ 43). The Tribe alleges three causes of action against Stifel in the Tribal Court Action: (1) fraudulent concealment or non-disclosure; (2) breach of fiduciary duty; and (3) unjust enrichment. (Stifel PFOF ¶ 44). The Tribe seeks rescission of the Bond Purchase Agreement or, in the alternative, a judgment for money damages. (Stifel PFOF ¶ 45).

SUBJECT MATTER JURISDICTION

This Court has subject matter jurisdiction over Stifel's claim for declaratory judgment under 28 U.S.C. § 1331 because the question whether a tribal court has jurisdiction over nonmembers "arises under" federal law. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Stifel, Nicolaus & Co. Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, --- F. Supp. 2d ----, 2013 WL 5803778, at *3 (W.D. Wis. Oct. 29, 2013) (Conley, J.).

This Court has jurisdiction over Stifel's claim for reformation of the Bond Purchase Agreement under 28 U.S.C. § 1367(a) because that claim forms part of the same case or controversy as Stifel's claim for declaratory judgment; specifically, it derives from a common nucleus of operative fact – the 2006 Bond Transaction and the Tribe's commencement of the Tribal Court Action. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008).

ARGUMENT

Summary judgment shall be granted when the record shows there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.

56(a); *Protective Life Ins. Co. v. Hansen*, 632 F.3d 388, 391-92 (7th Cir. 2011). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there is a genuine dispute for trial. *Carroll v. Lynch*, 698 F.3d 561, 564 (7th Cir. 2012). Not all disputes of fact preclude summary judgment; a *genuine* dispute of *material* fact exists only where there is evidence regarding a fact that is material under the governing substantive law that would be sufficient for a reasonable jury to return a verdict for the nonmoving party. *Id.*

I. The Bond Purchase Agreement Should be Reformed to Reflect the Parties' Agreement to Omit the Tribal Court from the Forum Selection Clause.

The Court should apply Wisconsin law in analyzing Stifel's reformation claim because the parties selected Wisconsin law to control the governance and construction of the Bond Purchase Agreement and there is no public policy reason to disregard this choice of law. (Stifel PFOF ¶ 46); *United Vaccines, Inc. v. Diamond Animal Health, Inc.*, 409 F. Supp. 2d 1083, 1090 (W.D. Wis. 2006).

Consistent with numerous other jurisdictions, Wisconsin follows the "general rule...that a contract may be reformed when the 'writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing.'" *Vandenberg v. Continental Ins. Co.*, 2001WI 85, ¶ 50, 244 Wis. 2d 802, 628 N.W.2d 876 (*quoting* Restatement (Second) of Contracts § 155 (1979)); *Protective Life*, 632 F.3d at 392. Reformation is proper where clear and satisfactory evidence shows that (1) the parties reached an agreement that (2) they intended to memorialize in writing but that (3) is not so memorialized due to a mutual mistake. *Frantl Indus., Inc. v. Maier Constr., Inc.*, 68 Wis. 2d 590, 593, 229 N.W.2d 610 (1975); *Buchholz v. Rural Cmty. Ins. Co.*, 402 F. Supp. 2d 988, 996-97 (W.D. Wis. 2005) (applying Wisconsin law). Where a mutual mistake has occurred, the rule

that a written contract is the best evidence of the parties' intent gives way to allow reformation so that the writing reflects the terms of the agreement actually reached. *See Providence Square Ass'n, Inc. v. Biancardi*, 507 So.2d 1366, 1370 (Fla. 1987). In the present case, the evidence establishes, beyond genuine dispute, the three factual predicates necessary to reform the Bond Purchase Agreement.

First, the testimony and documentary evidence show that the Tribe and Stifel reached an agreement before closing to eliminate the Tribal Court as a possible forum for the resolution of disputes arising out of the Bond Purchase Agreement. After Stifel's attorney circulated version 6 of the Bond Purchase Agreement, which included the Tribal Court as a possible venue in the forum selection clause, the Tribe's attorneys relayed that the Tribe wanted the Tribal Court removed from the clause, consistent with the Tribal Court's absence in the Indenture and the other transaction documents. (Stifel PFOF ¶¶ 19-22). Stifel agreed to the Tribe's proposal, and the Tribal Court was removed from the forum selection clauses in versions 7 and 8 of the Bond Purchase Agreement. (Stifel PFOF ¶¶ 23-24, 27-28).

Second, there is no dispute that the Tribe and Stifel intended the final, executed version of the Bond Purchase Agreement to omit the Tribal Court as a possible venue in the forum selection clause. Following the removal of the Tribal Court from the clause, Stifel's attorney circulated versions 7 and 8 of the agreement to three of the Tribe's attorneys and the Tribe's executive director. (Stifel PFOF ¶¶ 23-24, 27-28). Not surprisingly, Mr. Pierson, one of the Tribe's attorneys, recalled no objection from anyone at the Tribe to the removal of the Tribal Court. (Stifel PFOF ¶¶ 26, 29). Stifel's counsel was never informed of any such objection. (Stifel PFOF ¶ 47). Mr. Pierson acknowledged that he expected version 8 of the agreement, the final version that was circulated, to be executed by the parties. (Stifel PFOF ¶ 48). Mr. Pierson

agreed that the removal of the Tribal Court from the forum selection clause and the lack of any objection from the Tribe reflected the Tribe's intent to eliminate the Tribal Court as a possible forum for dispute resolution:

Q Does that striking of the LCO tribal court and the circulation to your client support the fact that the tribe did not intend for the final version of the bond purchase agreement to include the Lac Courte Oreilles Tribal Court as a venue?
A I think it does support that.

(Stifel PFOF ¶ 49).

There is additional evidence that the parties did not intend to execute version 6 of the Bond Purchase Agreement. For example, version 6 did not contain the final principal amounts of the 2006 Bonds.² (Stifel PFOF ¶ 25). The principal amounts from version 6 of the Bond Purchase Agreement were subsequently changed in version 7 and version 8 to reflect the final principal amounts of the 2006 Bonds as listed in the Indenture:

Bonds	Version 6 of BPA	Indenture	Version 8 of BPA
2006A Bonds	\$13,115,000	\$13,150,000	\$13,150,000
2006B Bonds	\$18,210,000	\$18,250,000	\$18,250,000

(Stifel PFOF ¶ 50). There is no evidence to rebut the conclusion that the parties intended anything other than version 8 to be the final, executed version of the Bond Purchase Agreement.

² As further evidence that version 6 was not the final embodiment of the parties' agreement, Mr. Groethe's email transmitting version 6 to the Tribe stated that "Additional revisions will be made later in the day to reflect the final structure of the bond issue." (Stifel PFOF ¶ 19). This email confirms that additional changes were expected to the Bond Purchase Agreement, demonstrating that version 6 was not intended to be the final, binding agreement of the parties.

Finally, there is no dispute that the signed version of the Bond Purchase Agreement does not reflect the parties' agreement to remove the Tribal Court from the forum selection clause.

Although Stifel accepted the Tribe's offer to "get rid of references to tribal court" in the Bond Purchase Agreement, the parties executed the non-final version 6 of the document, which predated their agreement to remove the Tribal Court. (Stifel PFOF ¶¶ 22-24, 34-35). The inclusion of language not agreed upon by the parties is a circumstance in which reformation is warranted. Richard A. Lord, 27 *Williston on Contracts* § 70:21 (4th ed. 1993) ("The error in expressing the agreement may consist of...the inclusion of a term not agreed upon."). The Tribe will be unable to present any evidence suggesting that the parties reversed course and decided to keep the Tribal Court in the forum selection clause after it had been removed.

In sum, the undisputed facts show that the parties mistakenly executed version 6 of the Bond Purchase Agreement, which does not embody their agreement to strike the Tribal Court from the forum selection clause. Wisconsin courts have reformed contracts to correct similar scrivener's errors that went unnoticed before execution. *See, e.g., Newmister v. Carmichael*, 29 Wis.2d 573, 139 N.W.2d 572 (1966) (upholding reformation of settlement agreement to conform to parties' prior oral agreement concerning distribution of estate); *Wisconsin Marine & Fire Ins. Co. Bank v. Mann*, 100 Wis. 596, 76 N.W. 777, 784 (1898); *Silbar v. Ryder*, 63 Wis. 106, 23 N.W. 106, 107 (1885) (affirming reformation of lease where drafter failed to include provision regarding repairs); *see also National Labor Relations Bd. v. Cook Cnty. Sch. Bus, Inc.*, 283 F.3d 888, 893-95 (7th Cir. 2002) (affirming reformation of collective bargaining agreement where neither party noticed prior to execution that provision concerning duration of agreement did not conform to parties' prior agreement). The Court should reform the Bond Purchase Agreement to comport

with version 8, which accurately reflects the parties' intent to exclude the Tribal Court as a forum for dispute resolution.

II. The Tribal Court Lacks Jurisdiction over Stifel and the Tribal Court Action.

Just as the undisputed facts support reformation of the Bond Purchase Agreement, they also warrant a declaration that the Tribal Court lacks jurisdiction over Stifel and the Tribal Court Action. Federal courts apply a presumption against tribal court jurisdiction over nonmembers such as Stifel. In this case, that presumption is reinforced by multiple forum selection clauses in the transaction documents. Even absent reformation, tribal court jurisdiction is absent here because the Tribe agreed, in the Bond Purchase Agreement and multiple other documents executed or issued in connection with the 2006 Bond Transaction, to litigate disputes arising out of the transaction in Wisconsin federal and state courts, and to exclude jurisdiction in the Tribal Court. The claims asserted against Stifel in the Tribal Court Action fall within the broad scope of these forum selection clauses.

At the outset, tribal court jurisdiction over nonmembers such as Stifel is "presumptively invalid." *Plains Commerce Bank v. Long Fam. Land & Cattle Co., Inc.*, 554 U.S. 316, 324, 330 (2008). This presumption exists because tribal courts have structures and procedures that are unfamiliar to nonmembers. *Id.* at 337; *Nevada v. Hicks*, 533 U.S. 384-85 (2001) (Souter, J., concurring) ("Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'"). Thus,

federal courts apply a presumption against tribal court jurisdiction to insure that nonmembers are “protected...from unwarranted intrusions on their personal liberty.” *Hicks*, 533 U.S. at 384 (internal quotations omitted and ellipses in original). Consistent with this presumption, this Court should declare that the Tribal Court lacks jurisdiction over Stifel and the Tribal Court Action.

As part of the 2006 Bond Transaction, the Tribe and Stifel specifically bargained to litigate disputes arising out of the Bond Purchase Agreement in this Court or an appropriate Wisconsin state court and, as the drafting history of the agreement shows, to exclude Tribal Court jurisdiction over such disputes. As courts and the Tribe’s own attorney have acknowledged, Indian tribes may contract for a forum for dispute resolution other than their tribal courts. (Stifel PFOF ¶ 51); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993); *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*, 983 F.2d at 814–15 (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 Indenture, the Bond Purchase Agreement and other transaction documents divest the Tribal Court of jurisdiction over the Tribe’s claims against Stifel. In the 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.*” (Stifel PFOF ¶¶ 14-15) (emphasis supplied). In the Bond Purchase Agreement, the Tribe submitted and consented to the jurisdiction of Wisconsin state and federal courts for the adjudication of “any dispute or controversy arising out of” the Bond Purchase Agreement “or to any transaction in connection therewith.” (Stifel PFOF ¶ 28). The Tribe made similar promises in the Bonds, the Preliminary Limited Offering Memorandum, the Limited Offering Memorandum and the Tribal Resolution to litigate disputes arising out of the 2006 Bond Transaction in state or federal court. (Stifel PFOF ¶¶ 38-42).

By their terms, these clauses apply to “any dispute” irrespective of who is prosecuting or defending the action. As this Court recognized recently, this language “makes jurisdiction in this court and, where jurisdiction does not lie here, in Wisconsin state courts, the only option and expressly excludes tribal court jurisdiction.” *Stifel, Nicolaus*, 2013 WL 5803778, at *8. Further, the use of the inclusive phrase “arising out of” renders these forum selection clauses applicable broadly to any claims related to the 2006 Bonds, the Bond Purchase Agreement or any transactions connected to them, including of course the 2006 Bond Transaction. In short, these clauses encompass the Tribe’s claims for misrepresentation, breach of fiduciary duty and unjust enrichment, which arise out of the Tribe’s issuance of the 2006 Bonds and sale of the bonds 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 forum selection clauses in the Indenture, the Bond Purchase Agreement and the 2006 Bonds mandate that no dispute arising out of the 2006 Bond Transaction shall be litigated in Tribal Court. *See Stifel, Nicolaus*, 2013 WL 5803778, at *8; *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, these bargained-for promises are binding on the Tribe. *Converting/Biophile*, 2006 WI App 187, at ¶ 22 (“Our common law obligates parties to a contract to perform their duties under the contract.”). As the Supreme Court reaffirmed recently, the “enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.” *Atlantic Marine Constr. Co., Inc. v. United States District Court*, 134 S. Ct. 568, 2013 WL 6231157, at *11 (Dec. 3, 2013) (*citing Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

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 Indenture, the Tribe affirmed “that the transaction represented by this Indenture has not taken place on Indian Lands.” (Stifel PFOF ¶ 36). Similarly, in the Bond Purchase Agreement, the Tribe affirmed “that the transaction represented by this Agreement has taken place in the State of Wisconsin.”³ (Stifel PFOF ¶ 37). The Tribe made these affirmations

³ 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).

“[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.” (Stifel PFOF ¶¶ 36-37). To effectuate the parties’ binding agreement to resolve the Tribe’s claims outside of Tribal Court, this Court should declare that the Tribal Court lacks jurisdiction over the Tribal Court Action.

CONCLUSION

For the reasons stated above, Stifel requests that the Court enter an order granting summary judgment on its claim for reformation of the Bond Purchase Agreement and declaring that the Tribal Court lacks jurisdiction over Stifel and the Tribal Court Action.

Respectfully submitted this 20th day of December, 2013.

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