

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,

Defendant.

Case No. 13-CV-121

**MEMORANDUM OF LAW IN OPPOSITION TO STIFEL, NICOLAUS & COMPANY,
INC.’S MOTION FOR SUMMARY JUDGMENT AND FOR DECLARATORY
JUDGMENT**

Defendant Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the “Band”), by its undersigned attorneys, respectfully submits this memorandum of law in opposition to Plaintiff Stifel, Nicolaus & Company, Inc.’s (“Stifel”) motion for summary judgment and for declaratory judgment.¹

INTRODUCTION

This action arises out of a case originally filed in the Lac Courte Oreilles Tribal Court (“Tribal Court”). The Band filed a lawsuit against Stifel in Tribal Court on December 13, 2012 (the “Tribal Court Action”). Stifel subsequently: (a) filed, in the Tribal Court Action, a Motion to Dismiss the Band’s Complaint, and (b) filed, in the United States District Court for the Western District of Wisconsin, a lawsuit (hereinafter the “District Court Action”) wherein Stifel

¹ Pursuant to the Amended Scheduling Order issued by the Court on August 14, 2013, the Band will also be filing a sur-reply (limited to 15 pages) on January 30, 2014. (Dkt. #35.)

seeks to reform the Bond Purchase Agreement between the parties and seeks a declaratory judgment that the Tribal Court lacks jurisdiction over the Tribal Court Action. After the Tribal Court held that it has jurisdiction and denied Stifel's motion to dismiss, the parties agreed to stay further proceedings in the Tribal Court pending a final determination of the jurisdictional issues raised by Stifel in the District Court Action. (*See* Stipulation (Dkt. #29)).

Now before this Court is Stifel's motion for summary judgment with respect to its claim for reformation and motion for declaratory relief ("Stifel's Motion"). In Stifel's Motion, Stifel claims that this Court should reform a fully executed agreement to make it match the language contained in an unsigned version of the agreement – seven years after the transaction at issue closed. Stifel also asks the Court to declare that the Tribal Court lacks jurisdiction over the Tribal Court Action. Stifel's Motion should be denied in its entirety.

As set forth below, Stifel's Motion with respect to its claim for reformation fails because Stifel has not met its heavy burden of proof and has otherwise waived its right to seek reformation at this late date. Moreover, Stifel's motion with respect to its claim for declaratory judgment should be denied as well. The Tribal Court has jurisdiction over the Tribal Court Action, the Tribal Court has personal jurisdiction over Stifel, and (despite Stifel's efforts to "blend" all of the bond documents together into one that suits its purpose) the relevant documents clearly do not preclude Tribal Court jurisdiction. As such, Stifel's Motion should be denied in its entirety.

FACTUAL BACKGROUND

A. THE PARTIES.

The Band is a federally recognized Indian Tribe organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, et seq. (Defendant's Statement of Additional

Proposed Findings of Fact in Opposition to Stifel, Nicolaus & Company, Inc.’s Motion for Summary Judgment and Declaratory Judgment (“Band PFOF”) ¶1.) In December of 2006, the Band issued in excess of \$31,000,000 in general obligation bonds, and Stifel acted as initial purchaser of the bonds in the transaction. (Stifel’s Proposed Findings of Fact (“Stifel PFOF”) ¶3 and ¶50.)

B. DOCUMENTS UNDERLYING THE 2006 BOND TRANSACTION.

Multi-million dollar bond transactions, like the 2006 bond transaction at issue in this case, are comprised of a series of different documents, between a series of different parties. (Stifel PFOF ¶4.) Stifel was represented by Foley & Lardner in the negotiation of the relevant documents, and the Band was represented by Godfrey & Kahn. (Stifel PFOF ¶5 - ¶7.) The documents from the 2006 bond transaction are summarized as follows:

1. The December 15, 2006 Bond Purchase Agreement Between Stifel and the Band.

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. (Band PFOF ¶7.) The parties executed version 6 of the Bond Purchase Agreement, as signified by the document identifier number “MILW_2121571.6” (Band PFOF ¶7.) On the issue of jurisdiction, version 6 of 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 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.

(Band PFOF ¶8.) Version 6 of the Bond Purchase Agreement does not contain the phrase “to the exclusion of any court of the Tribe” or any language similar thereto. (Band PFOF ¶8.)² This version of the Bond Purchase Agreement also contains a “situs” clause which provides as follows:

(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.)

2. The Confidentiality Agreement Between Stifel and the Band.

In addition to the Bond Purchase Agreement, Stifel and the Band entered into a Confidentiality Agreement. (Band PFOF ¶9.) In the Confidentiality Agreement, Stifel agreed that it performed work as a “Consultant” for the Band in connection with the “General Obligation Tribal Purpose and Refunding Bonds, Series 2006A and General Obligation Taxable Economic Development and Refunding Bonds, Series 2006B (the ‘Engagement’).” (Band PFOF

² The jurisdiction clauses contained in version 6 and version 8 of the Bond Purchase Agreement are identical, except for the fact that the words “the Lac Courte Oreilles Tribal Court, and” were removed from version 8. (Stifel PFOF ¶24 and ¶28.)

¶10.) On the issue of jurisdiction, the Confidentiality Agreement provides, in relevant part, as follows:

Consultant shall bring all actions, claims or suits arising in connection with this Agreement solely in the LCO Tribal Court. Tenant (sic) consents to the personal jurisdiction of the LCO Tribal Court for any action, claim or suit arising in connection with this Agreement.

(Band PFOF ¶11.)

3. The Trust Indenture Between the Band and Wells Fargo Bank, N.A.

In addition to entering into the Bond Purchase Agreement and the Confidentiality Agreement with Stifel, on December 1, 2006, the Band and Wells Fargo Bank, N.A. entered into a separate Trust Indenture as part of the 2006 bond transaction. (Stifel PFOF ¶4.) Under the Trust Indenture, the Band agreed to pay Wells Fargo Bank, N.A. the principal and interest due on the bonds, and Wells Fargo Bank, N.A. agreed to hold that amount in trust for the bond holders. (Band PFOF ¶13.) Under the Trust Indenture, Wells Fargo Bank, N.A. has the right to seek remedies against the Band should the Band fail to, among other things, make payments on the bonds. (Band PFOF ¶14.) 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.

(Band PFOF ¶15.) (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.

(Band PFOF ¶16.) (Emphasis added.) The Trust Indenture’s jurisdiction clause does not specifically mention the defined Bond Purchase Agreement. (Band PFOF ¶17.) 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 bonds. (Band PFOF ¶18.)³

The Trust Indenture, like the Bond Purchase Agreement, contains a situs provision. The Trust Indenture’s situs provision provides:

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.

³ “Holder” is defined in the Trust Indenture as “the person in whose name such Bond shall be registered.” (Band PFOF ¶19.)

(Stifel PFOF ¶36.) Whereas the Bond Purchase Agreement's situs provision states that the events took place in "the State of Wisconsin," the Trust Indenture's provision states that the events did not take place on "Indian Lands." (Stifel PFOF ¶36 - ¶37.)

4. Tribal Governing Board Resolution Between the Band and Wells Fargo Bank, N.A.

On December 15, 2006, the Band's Tribal Governing Board issued Resolution No. 06-110 ("Resolution No. 06-110"). (Stifel PFOF ¶4.) Resolution No. 06-110 plainly states that it "shall constitute a contract with the Trustee [Wells Fargo Bank, N.A.]" (Band PFOF ¶22.) Pursuant to Resolution No. 06-110, the Tribal Governing Board approved the 2006 bond transaction. (Stifel PFOF ¶4.) On the issue of jurisdiction, Resolution No. 06-110 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 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.

(Stifel PFOF ¶41.) Resolution No. 06-110 does not contain the phrase "to the exclusion of any court of the Tribe," or any language similar thereto. (Band PFOF ¶24.)

Like in the Trust Indenture, the "Indenture," the "Bonds," the "Bond Resolution," and the "Bond Purchase Agreement" are defined in Resolution No. 06-110 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. (Band PFOF ¶23.)

5. 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. (Band PFOF ¶25.) On the issue of jurisdiction, the 2006A bonds state, 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.

(Stifel PFOF ¶39) (emphasis added.) On the issue of jurisdiction, the 2006B bonds state, 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 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.) The 2006B bonds do not contain the phrase “to the exclusion of any court of the Tribe,” or any language similar thereto. (Stifel PFOF ¶40.)

As with both the Trust Indenture and Resolution No. 06-110, “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. (Band PFOF ¶26.)

The 2006 bonds make no reference whatsoever to the Bond Purchase Agreement. (Band PFOF ¶27.)

C. SUMMARY OF CLAIMS RAISED BY THE BAND IN THE TRIBAL COURT ACTION.

On December 13, 2012, the Band filed a Complaint against Stifel in Tribal Court. (Band PFOF ¶33.) In the Complaint, the Band asserts claims against Stifel for fraudulent concealment, breach of fiduciary duty, and unjust enrichment. (Stifel PFOF ¶44.)

According to the Band, prior to December 15, 2006, Stifel (by, among others, its employee David Noack), personally appeared before the Tribal Governing Board, located on the Lac Courte Oreilles Reservation at 13394 West Trepania Road, Hayward, Wisconsin, for purposes of discussing a 2006 bond transaction. (Band PFOF ¶2.) Specifically, on at least June 28, 2006, and again on October 18, 2006, Stifel representatives (including David Noack) travelled to the Band's reservation land for purposes of discussing the financing options available to the Band. (Band PFOF ¶3 and ¶4.) During these personal appearances, Stifel (and Stifel by its employee David Noack), failed to disclose that the Band could raise the funds it desired without refunding and purchasing certain bonds previously issued by the Band, and by instead simply issuing new bonds. (Band PFOF ¶5.) Stifel (and Stifel by its employee David Noack) also failed to disclose to the Band that the interest, commissions, and other costs and charges associated with the capital raised from the bonds previously issued by the Band would increase dramatically if the Band were to issue the new bonds, and use a portion of the proceeds to refund and purchase the previously issued bonds. (Band PFOF ¶6.)

In the Tribal Court Complaint, the Band alleges that it was fraudulently induced to enter into the Bond Purchase Agreement. (Band PFOF ¶35.) As such, in the Tribal Court Action, the Band seeks rescission of the Bond Purchase Agreement or, in the alternative, a judgment for

money damages. (Stifel PFOF ¶45.) The Tribal Court Action is currently stayed pending the outcome of this District Court Action. (Band PFOF ¶36.)

D. SUMMARY OF CLAIMS RAISED BY STIFEL.

In this District Court Action, Stifel seeks a declaration that the Lac Court Oreilles Tribal Court lacks jurisdiction over the Tribal Court Action. (Stifel, Nicolaus & Company, Inc.’s Brief in Support of its Motion for Summary Judgment and for Declaratory Judgment (“Stifel’s Brief”) p. 1.) Stifel also seeks to reform version 6 of the Bond Purchase Agreement to comport with version 8 of the Bond Purchase Agreement “to correct a scrivener’s error.” (Stifel’s Brief p. 1.)

With respect to Stifel’s request for reformation, Stifel claims that it is entitled to reformation despite the fact that it has repeatedly declared and swore under oath and penalty of perjury that version 6 of the Bond Purchase Agreement was a true and correct copy of the Bond Purchase Agreement between Stifel and the Band. (Band PFOF ¶31 - ¶32.) Moreover, Stifel claims that it is entitled to reformation despite the fact that, after receiving the executed versions of all of the bond documents on or about January 10, 2007, no representative from Stifel, including David Noack and Reed Groethe, ever contacted Brian Pierson from Godfrey & Kahn to state that an incorrect version of the Bond Purchase Agreement was signed and included in the transcript. (Band PFOF ¶30.)

ARGUMENT

A. STIFEL’S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO ITS CLAIM FOR REFORMATION SHOULD BE DENIED.

Stifel requests that this Court reform version 6 of the Bond Purchase Agreement—the fully executed version of this agreement—to comport with an unsigned version 8 of that agreement. (Stifel’s Motion ¶1.) Stifel makes this request over seven years after the Bond Purchase Agreement was executed. (Band PFOF ¶7.) Stifel’s motion for summary judgment

should be denied because, not only has Stifel failed to meet its burden of proof, it has waived its right to request reformation.

To begin with, under Wisconsin law, the burden rests squarely on the party seeking reformation to “prove by clear and convincing evidence that the written agreement does not set forth the parties’ intentions due to a mutual mistake.” *Ivancevic v. Reagan*, 2013 WI App 121, ¶ 15, 351 Wis.2d 138, 839 N.W.2d 416. In order to do so, there must be “undisputed proof that is clear, plain, convincing, and beyond reasonable controversy,” that the parties intended the contract to contain the missing or different term or terms. *See Knowles v. Univ. of Wis.*, 2002 WI App 165, ¶ 21, 256 Wis.2d 694, 647 N.W.2d 468 (citing *Frantl Indus., Inc. v. Maier Constr., Inc.*, 68 Wis.2d 590, 594, 229 N.W.2d 610 (1975)).

Here, Stifel has failed to meet its burden of proof with respect to its claim for reformation. While there may be no dispute that version 7 and 8 of the Bond Purchase Agreement were created after version 6, and that version 7 and 8 omitted references to “the Lac Courte Oreilles Tribal Court,” the fact remains that version 6 of the Bond Purchase Agreement was the version actually executed by the parties. (Stifel’s PFOF ¶24, Band’s PFOF ¶7.) The best evidence of the parties’ intent is what is contained in the written contract. *KBS Constr., Inc. v. McCullough Plumbing, Inc.*, 2010 WI App 19, ¶25, 323 Wis.2d 276, 779 N.W.2d 723.

Moreover, Stifel presents no evidence of what actually occurred between the circulation of version 8 and the closing to establish that the parties did not intend to execute version 6, and Stifel has presented no evidence of what the alleged “scrivener’s error” was that resulted in the execution of version 6 instead of version 8. (*See* Stifel’s Brief pp. 1, 17; *see generally* Stifel’s PFOF.) Most importantly, no representative from Stifel ever complained that the wrong version of the Bond Purchase Agreement was signed and included in the transcript that was delivered in

January of 2007. (Band PFOF ¶30.) Stifel has failed to present clear, plain and convincing evidence that the parties executed version 6 as the result of a mutual mistake. As such, Stifel's Motion should be denied.

Furthermore, even if there was a mutual mistake, a party may only reform a contract "in the absence of facts or circumstances constituting a waiver of the remedy or an estoppel to the assertion of it." *Rowell v. Smith*, 102 N.W. 1, 6 (Wis. 1905) (quoting *Wis. Marine & Fire Ins. Co. Bank v. Mann*, 76 N.W. 777, 784 (Wis. 1898)). The "general rule" is that "one seeking to reform an instrument for mutual mistake must have exercised reasonable diligence." *Emmco Ins. Co. v. Palatine Ins. Co.*, 58 N.W.2d 525, 530 (Wis. 1953).

Here, Stifel has waived its right to seek reformation of the Bond Purchase Agreement. As discussed above, Stifel failed to object at the closing or at any point thereafter that the wrong version of the Bond Purchase Agreement had been signed and included in the transcript. (Band PFOF ¶30.). It is raising this argument for the first time almost seven years after the Bond Purchase Agreement was executed. (Band PFOF ¶7.) Moreover, Stifel has twice sworn under oath that version 6 is the "true and correct copy of the Bond Purchase Agreement." (Band PFOF ¶31, ¶32.) Stifel has waived its right to now argue that version 6 of the Bond Purchase Agreement is incorrect.

In any event, as set forth below, even if this Court were to reform version 6 of the Bond Purchase Agreement to comport with version 8, the Tribal Court would still have jurisdiction over the Tribal Court Action. As such, in addition to failing on the merits, Stifel's motion for summary judgment on the issue of reformation should also be denied as moot.

B. STIFEL’S MOTION FOR DECLARATORY JUDGMENT SHOULD BE DENIED BECAUSE: (1) THE TRIBAL COURT HAS JURISDICTION UNDER *MONTANA* v. *UNITED STATES*, (2) THE TRIBAL COURT HAS PERSONAL JURISDICTION OVER STIFEL AND (3) THE BOND DOCUMENTS DO NOT PRECLUDE TRIBAL COURT JURISDICTION.

Stifel also requests that this Court enter judgment declaring that the Tribal Court lacks jurisdiction over the Tribal Court Action. (Stifel’s Motion ¶2.) Stifel’s request lacks merit and its motion for declaratory judgment should be denied because: (1) the Tribal Court has jurisdiction under *Montana v. United States*, (2) the Tribal Court has personal jurisdiction over Stifel and (3) the bond documents do not preclude Tribal Court jurisdiction. Rather, because jurisdiction is proper in the Tribal Court, Stifel’s Amended Complaint should be dismissed with prejudice.⁴

1. The Tribal Court has Jurisdiction Over the Tribal Court Action.

The “pathmarking case” on tribal civil jurisdiction is *Montana v. United States*, 450 U.S. 544 (1981). *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). 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, it is clear that the Tribal Court has jurisdiction under both *Montana* exceptions.

⁴It is appropriate for this Court to enter judgment for the nonmoving party if there is no factual dispute and if the nonmoving party is entitled to judgment as a matter of law. *Kealey Pharmacy & Home Care Serv. v. Walgreen Co.*, 539 F.Supp. 1357, 1370 (W.D. Wis. 1982); *Cusumano v. Mapco Gas Prods.*, 85 F.3d 631, *7 (7th Cir. 1996). Here, while Stifel is the moving party, this Court should grant judgment in favor of the Band given the undisputed material facts and applicable law.

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 Tribal Court Action.

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. *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. (Stifel PFOF ¶3 and ¶50.) The Bond Purchase Agreement (whether it be version 6 or version 8) 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 and Stifel’s actions on the reservation. (Band PFOF ¶2 - ¶7, ¶35.) Specifically, the Band alleges Stifel (through its employee David Noack) entered reservation lands and fraudulently induced the Band to enter into the Bond Purchase Agreement, and in the Tribal Court Action the Band is seeking both money damages and rescission of the Bond Purchase Agreement. (Band PFOF ¶2 - ¶7, ¶35; Stifel PFOF ¶45.) Since Stifel entered into a consensual relationship with the Band (i.e. the Bond Purchase Agreement) and that relationship has a clear nexus to the Tribal Court Action

(i.e. the Band is seeking to rescind the Bond Purchase Agreement or money damages), the Tribal Court clearly has jurisdiction under the first *Montana* exception.

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. (Band PFOF ¶35.) 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 and purchase bonds previously issued by the Band. (Band PFOF ¶5 - ¶7.) By doing so, the interest, commissions, and other costs and charges associated with the capital raised from the sale of the previously issued bonds dramatically increased, and the Band has sustained significant money damages as a result. (Band PFOF ¶5 - ¶7.) 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.

2. The Tribal Court has Personal Jurisdiction Over Stifel.

The determination of whether the Tribal Court has personal jurisdiction over Stifel is a two-step process. First, the Tribal Court must determine whether Stifel is subject to jurisdiction

under the applicable long-arm statute. *Taurus IP, LLC, v. DaimlerChrysler Corp.*, 519 F.Supp.2d 905, 918 (W.D. Wis. 2007) (citing *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, ¶ 8, 245 Wis.2d 396, 629 N.W.2d 662). Second, if the answer is yes, the Tribal Court must then determine whether personal jurisdiction otherwise comports with due process requirements. *Id.* Here, the Tribal Court has personal jurisdiction over Stifel.

To begin with, Stifel is subject to jurisdiction under the Tribal Court Code's long-arm provision. Pursuant to the Tribal Court Code's long-arm provision, "[a]nyone entering the Lac Courte Oreilles Chippewa Reservation consents to the civil jurisdiction of the Lac Courte Oreilles Tribal Court." Tribal Court Code, Chapter 1, Subchapter III, § 1.5. Because Stifel entered the Lac Courte Oreilles Reservation to discuss the 2006 bond transaction, and committed fraudulent acts while on reservation land, the Tribal Court clearly has jurisdiction over Stifel under the Tribal Court code's long-arm provision. (Band PFOF ¶2 - ¶6, ¶35.)

Moreover, the Tribal Court's exercise of jurisdiction over Stifel also comports with due process requirements necessary to assert specific jurisdiction. "Specific jurisdiction is jurisdiction over a specific claim based on the defendant's contacts with the forum that gave rise to or are closely connected to the claim itself." *Abelesz v. OTP Bank*, 692 F.3d 638, 654 (7th Cir. 2012). A forum may assert specific jurisdiction over a nonresident defendant "if the defendant has purposefully directed [its] activities at residents of the forum, . . . and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quotations omitted). The "constitutional touchstone" is "whether the defendant purposefully established minimum contacts in the forum state." *Id.* at 474 (quotation omitted). The defendant's contacts with the forum state must be "such that [it]

should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Here, there is no dispute that Stifel purposefully directed its activities at the Band and that it should have reasonably anticipated being haled into Tribal Court. Based upon the jurisdictional language contained in the Confidentiality Agreement, Stifel should have anticipated that a lawsuit could be brought in the Tribal Court because it expressly consented to the jurisdiction of the Tribal Court. (Band PFOF ¶11.) Moreover, Stifel (through its employees) personally appeared on reservation land, fraudulently induced the Band to enter into the Bond Purchase Agreement and the Band’s claims against Stifel in the Tribal Court Action are directly based upon Stifel’s fraudulent acts on reservation lands. (Band PFOF ¶2 - ¶6, ¶35.) Since Stifel’s contacts with the Band on reservation land directly gave rise to the claims raised by the Band in the Tribal Court Action, the Tribal Court has specific jurisdiction over Stifel, and the exercise of jurisdiction comports with constitutional and statutory requirements.

3. The Bond Documents Do Not Preclude Tribal Court Jurisdiction

Stifel erroneously contends in its brief that the Band agreed to litigate all disputes in the United States District Court for the Western District of Wisconsin and the courts of the State of Wisconsin, to the exclusion of the Tribal Court. (Stifel’s Brief at p. 18.) Specifically, Stifel asserts that the jurisdiction clauses in the Trust Indenture, the Bond Purchase Agreement, the 2006 bonds, and Resolution No. 06-110 “mandate that no dispute arising out of the 2006 Bond Transaction shall be litigated in the Tribal Court.” (*Id.* at pp. 20–21) (emphasis added.)⁵ Stifel’s

⁵In Stifel’s Brief, Stifel also erroneously references the Preliminary Limited Offering Memorandum and the Limited Offering Memorandum in support of its claim that the Tribal Court lacks jurisdiction. (Stifel’s Brief at p. 20.) 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

claims again lack merit. Stifel is not a party to the Trust Indenture, the 2006 bonds, or Resolution No. 06-110 and, even if it was, the jurisdiction clauses do not apply to claims under the Bond Purchase Agreement. Moreover, the Bond Purchase Agreement – the only contract to which Stifel is a party – does not preclude Tribal Court jurisdiction.

a. Stifel is Not a Party to the Jurisdiction Clauses Set Forth in the Trust Indenture, the 2006 Bonds, and Resolution No. 06-110 and these Clauses Do Not Apply to Claims Under the Bond Purchase Agreement.

The jurisdiction clauses set forth in the Trust Indenture, the 2006 bonds, and Resolution No. 06-110 do not apply to claims between the Band and Stifel and do not apply to claims under the Bond Purchase Agreement. For starters, Stifel is not a party to the Trust Indenture, the 2006 bonds, or Resolution No. 06-110. (Stifel PFOF ¶4.) The Trust Indenture expressly states that it does not confer any benefit beyond the parties to the Trust Indenture (i.e. Wells Fargo Bank, N.A. and the Band) and the “Holders” of the 2006 of the bonds. (Band PFOF at ¶18, ¶19.) There is no evidence that Stifel is currently a Holder of any of the 2006 bonds.⁶ In addition, Resolution No. 06-110 expressly states that it is a “contract with the Trustee [Wells Fargo Bank, N.A.]” (Band PFOF ¶22.) Stifel has not explained, and cannot explain, how or why it would ever be entitled to enforce the jurisdiction clauses set forth in the Trust Indenture, the 2006 bonds, or Resolution No. 06-110, and neither Wells Fargo Bank, N.A. nor any of the Holders are party to the Tribal Court Action.

in either of these documents “is to be construed as a contract[.]” (Band PFOF ¶21.) 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.

⁶ Although Stifel was the Initial Purchaser of the Bonds, Stifel has submitted no evidence that it currently holds any of the 2006 Bonds.

Next, even if Stifel could convince the Court that it somehow has standing to assert rights under the Trust Indenture, Resolution No. 06-110 and the 2006 bonds, it is nevertheless plainly clear that the jurisdiction clauses contained in these agreements do not apply to claims under the Bond Purchase Agreement. 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*, 2004 WI 28, ¶ 54, 270 Wis.2d 1, 676 N.W.2d 426, 440 (citing 11 Richard A. Lord, *Williston on Contracts* §31:4 (4th ed. 1999)). Therefore, Wisconsin courts enforce plain and unambiguous contract terms as written. *McCullough*, 2010 WI App. At ¶ 25.

Here, the Band and Stifel were both represented by counsel during negotiations. (Stifel PFOF ¶5 - ¶7.) The 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. 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.” (Band PFOF ¶15.) (Emphasis added.) Similarly, the jurisdiction clauses set forth in the 2006A bonds and Resolution No. 06-110 relate to claims arising out of the “Bond,” the “Bonds,” the “Indenture” or the “Bond Resolution.” (Stifel PFOF ¶39 and ¶41.)

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 and the 2006 bonds include language that the clauses apply “to any transaction in connection therewith,” these clauses clearly do not reference the “Bond Purchase Agreement,” a term repeatedly defined in the 2006 bond documents. If the parties had intended to include the

claims arising out of the Bond Purchase Agreement in those jurisdiction provisions, they could have and would have specifically done so.

In any event, jurisdiction “cannot be ousted or waived absent a clear indication of such a purpose.” *Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 2006 WI App. 187, ¶ 23, 296 Wis.2d 273, 722 N.W.2d 633, 640 (quotation omitted). The Band’s agreement to preclude Tribal Court jurisdiction in different contracts between different parties certainly does not amount to a “clear indication” that the Band intended to preclude Tribal Court jurisdiction between it and Stifel for claims arising out of the Bond Purchase Agreement.

b. The Jurisdiction Clause Contained in The Bond Purchase Agreement – the only contract Between Stifel and the Band – Does Not Preclude Tribal Court Jurisdiction.

Under Wisconsin law, “[c]lauses in which a party agrees to ‘submit’ to jurisdiction are not necessarily mandatory. . . . Such language means that the party agreed to be subject to that forum’s jurisdiction *if sued there*. It does not prevent the party from bringing suit in another forum.” *Ludlow*, 2006 WI App. at ¶ 26 (quotation omitted). “Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.” *Id.*; *see also Muzumdar v. Wellness Int’l Network Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006) (“[W]here venue is specified with mandatory or obligatory language the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties’ intent to make venue exclusive.”) In other words, as noted by Stifel itself, a jurisdiction clause must contain exclusionary language in order to be mandatory. (*See Stifel’s Brief at p. 21*).

Here, the Bond Purchase Agreement (whether it be version 6 or version 8) does not contain exclusionary language that would make the United States District Court for the Western

District of Wisconsin or the courts of the State of Wisconsin, the mandatory venue.⁷ Version 8 of the Bond Purchase Agreement (the one which Stifel requests be enforced) provides:

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.)⁸

The lawyers representing the Band and Stifel in this transaction clearly knew how to draft language that makes jurisdiction exclusive or mandatory, as indicated by their use of the language “to the exclusion of the jurisdiction of any court of the Tribe” in both the Trust Indenture and the 2006A bonds. (Band PFOF ¶15; Stifel PFOF ¶39.) The Bond Purchase Agreement (whether it be version 6 or version 8) does not contain the exclusionary language that would make the United States District Court for the Western District of Wisconsin or the courts of the State of Wisconsin the mandatory venue. As such, and as a matter of law, the Tribal Court has jurisdiction over claims arising under the Bond Purchase Agreement, and therefore has jurisdiction over the Tribal Court Action. Stifel’s motion for declaratory judgment should be denied.

⁷ Resolution No. 06-110 and the 2006B bonds also do not contain exclusory language. (Stifel PFOF ¶40, ¶41.) As such, in addition to the fact that Stifel is not a party to those contracts, those contracts do not support Stifel’s jurisdictional claims because neither of those contracts make venue in the United States District Court or the courts of the State of Wisconsin mandatory.

⁸ The jurisdiction clauses contained in version 6 and version 8 of the Bond Purchase Agreement are identical, except for the fact that the words “the Lac Courte Oreilles Tribal Court, and” were removed from version 8. (Stifel PFOF ¶24 and ¶28.)

Throughout Stifel's Brief and supporting papers, Stifel repeatedly attempts to introduce evidence outside the four corners of the bond documents to support its claim that the parties intended to exclude the jurisdiction of the Tribal Court. (*See* Stifel's Brief at p. 19; Stifel PFOF ¶8 - ¶14, ¶16 - ¶25, ¶27 - ¶28, ¶31, ¶35 and ¶49.) While extrinsic evidence of the parties' intent may be admissible for purposes of determining whether there was a mutual mistake, *Badger Sav. Bldg. & Loan Ass'n v. Mut. Bldg. & Sav. Ass'n*, 283 N.W. 466, 469 (Wis. 1939), extrinsic evidence of intent is not admissible for purposes of contract construction or interpretation where the contract is clear and unambiguous. *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶ 33, 330 Wis.2d 340, 793 N.W.2d 476, 484 ("If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.") The jurisdiction provisions in the bond documents, including version 8 of the Bond Purchase Agreement, are "plain and unambiguous." As such, even if the Court were to reform version 6 of the Bond Purchase Agreement to comport with version 8, the Court should disregard all of the extrinsic evidence of intent submitted by Stifel when interpreting the jurisdiction provisions.

In its Brief, Stifel cites *Stifel, Nicolaus & Co. Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, -- F.Supp.2d --, 2013 WL 5803778, at *8 (W.D. Wis. Oct. 29, 2013) in support of the argument that, because the jurisdiction clauses in the bond transaction documents apply to "any dispute," tribal court jurisdiction is excluded. (Stifel's Brief at p. 20.) Stifel misconstrues the holding in *Stifel*.

In *Stifel*, this Court addressed the issue of whether jurisdiction clauses were permissive or mandatory. *Stifel*, 2013 WL at *7. The jurisdiction clause reviewed by the court stated that the Tribe (through its Corporation) "submits to and consents to the jurisdiction" of the Western

District of Wisconsin, or the Wisconsin state courts if the federal court does not have jurisdiction “to the exclusion of the jurisdiction of any court of the Corporation.” *Id.* at *8. The court held that although the jurisdiction clause did not “mandat[e] a single court to the exclusion of all others,” the clause was mandatory because “[w]hile the clause may not contain express language that the court has exclusive jurisdiction, . . . the clauses’ express language makes jurisdiction in this court and, where jurisdiction does not lie here, in Wisconsin state courts, the only option and expressly excludes the tribal court jurisdiction.” *Id.*

Stifel incorrectly asserts in its brief that the court in *Stifel* held that the jurisdiction clause excluded tribal court jurisdiction on the basis that the jurisdiction clause at issue applied to “any dispute or controversy arising out of this Bond, the Indenture, or the Bond Resolution,” when in fact the holding was clearly based on the forum selection clause’s “to the exclusion of the jurisdiction of any court of the Corporation” language. *Stifel* does not therefore support the argument that the jurisdiction clauses in Resolution 06-110 and the Bond Purchase Agreement exclude the jurisdiction of the Tribal Court, but rather reconfirms that because there is no exclusionary language, Tribal Court jurisdiction is not precluded.

Stifel finally argues that the “Situs” provision in the Bond Purchase Agreement confirms that the Band agreed to litigate outside of the Tribal Court. (Stifel’s Brief at p. 21.) According to Stifel, because the situs provision states that “the transaction represented by this Agreement has taken place in the State of Wisconsin,” no events took place on the reservation and the Tribal Court therefore lacks jurisdiction. Stifel’s argument again lacks merit.

To begin with, “situs” is defined as the “location or position (of something),” and it relates to whether a court is a proper venue for a lawsuit. *Black’s Law Dictionary* (9th ed. 2009); 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 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, 118 (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.

Next, even assuming that the situs provision of the Bond Purchase Agreement was relevant, it nevertheless does not preclude Tribal Court jurisdiction. The situs provision in the Bond Purchase Agreement states that “the transaction represented by this Agreement has taken place in the State of Wisconsin.” (Stifel PFOF ¶37) (emphasis added.) Indian reservations are considered to be geographically located within a state. See *McClanahan v. State Tax Comm’n of Arizona*, 411 U.S. 164, 173 (1973) (“The tribes have retained a ‘semi-independent’ position, not as states or nations, . . . but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside.”); Wis. Op. Att’y. Gen. 256 (Aug. 26, 1977) (noting that a non-taxable reservation was located “within” a Wisconsin town); *Frequently Asked Questions*, Bureau of Indian Affairs’ Website, <http://www.bia.gov/FAQS/> (“T[ribes] can enact and enforce stricter or

more lenient laws and regulations than those of the surrounding or neighboring state(s) wherein they are located.”)

Here, by agreeing that the relevant events took place in the State of Wisconsin, the Band was not agreeing that no events took place on reservation land because the reservation is located within the State of Wisconsin. Again, the lawyers involved in this transaction clearly knew how to draft language stating that no events took place on the reservation land – they did it in the Trust Indenture (i.e. “the transaction . . . has not taken place on Indian Lands.”) (Stifel PFOF ¶36.) In any event, activities did take place on reservation land, given that there is no dispute that Stifel (through its employee, David Noack) appeared on reservation land and fraudulently induced the Band to enter into the Bond Purchase Agreement. (Band PFOF ¶2 – ¶6, ¶35.)

CONCLUSION

Stifel’s Motion should be denied in its entirety. Rather, because the bond documents do not preclude Tribal Court jurisdiction, this Court should dismiss Stifel’s Amended Complaint with prejudice, and the parties can return to litigating this matter in Tribal Court.

Dated this 13th day of January, 2014

Respectfully submitted,

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