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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND FOR DECLARATORY JUDGMENT

Stifel, Nicolaus & Company, Inc. ("Stifel") submits the following reply brief in support of its Motion for Summary Judgment and For Declaratory Judgment (Dkt. #37) against the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the "Tribe").

INTRODUCTION

The following undisputed facts demonstrate that the Tribal Court lacks jurisdiction over the Tribal Court Action:

- In the 2006A Bonds and the Trust Indenture, the Tribe agreed to exclude Tribal Court jurisdiction over "any dispute or controversy arising out of . . . any transaction in connection" with the Bonds, the Indenture, or the Bond Resolution. (Stifel's Stmt. of Proposed Findings of Fact ("Stifel PFOF") (Dkt. #39), ¶¶ 15, 39; Tribe's Resp. to Stifel PFOF (Dkt. #47), ¶¶ 15, 39).

- In the Preliminary Limited Offering Memorandum and the Limited Offering Memorandum, the Tribe represented that its exclusion of Tribal Court jurisdiction extended to "any dispute arising under . . . the Bond Purchase Agreement." (Stifel PFOF (Dkt. #39), ¶ 39; Tribe Resp. to Stifel PFOF (Dkt. #47), ¶ 39).

- To confirm its willingness to submit to federal or state court jurisdiction, the Tribe affirmed that the Indenture transaction "has not taken place on Indian

Lands." (Stifel PFOF (Dkt. #39), ¶ 36; Tribe Resp. to Stifel PFOF (Dkt. #47), ¶ 36). For the same purpose, the Tribe affirmed that the Bond Purchase Agreement transaction took place in the State of Wisconsin, which elsewhere the parties distinguished from Indian Lands. (Stifel PFOF Dkt. #39), ¶¶ 36-37; Tribe Resp. to Stifel PFOF (Dkt. #47), ¶¶ 36-37).

- At the instruction of the Tribe, the Tribe's attorney requested that Stifel "get rid of references to tribal court" in the Bond Purchase Agreement's forum selection clause. (Stifel PFOF (Dkt. #39), ¶ 22; Tribe Resp. to Stifel PFOF (Dkt. #47), ¶ 22). The Tribe's attorney agreed this request was made to eliminate the Tribal Court as a possible forum for litigation. (Stifel PFOF (Dkt. #39), ¶ 49; Tribe Resp. to Stifel PFOF (Dkt. #47), ¶ 49).

These facts establish the Tribe's firm commitment to pursue any litigation related to the 2006 Bond Transaction in federal or state court, not its own Tribal Court.

The Court should reject the Tribe's efforts to avoid this commitment. Contrary to the Tribe's arguments, Stifel has a direct right to enforce the forum selection provisions in the Indenture and the 2006A Bonds, both as a matter of contract and as a matter of law. Stifel is a party to the Bond Purchase Agreement, which expressly incorporates the Tribe's covenants from the Indenture, meaning that Stifel can directly enforce the forum selection provision in the Indenture. Even if the documents did not give Stifel the direct right to enforce the forum selection provisions, courts permit non-parties to enforce forum selection provisions against parties who agreed to them.

As to the scope of the exclusions, the Tribe inexplicably disregards key language from the forum selection clauses that broadly extends their applicability to "any transaction in connection with" the 2006A Bonds. These clauses encompass the Tribe's claims against Stifel in Tribal Court, all of which pertain to the issuance of the Bonds.

The Court should hold the Tribe to its multiple exclusions of Tribal Court jurisdiction, its request to omit the Tribal Court as a potential venue in the Bond Purchase Agreement, and its representations that no relevant negotiations or other parts of the 2006 Bond Transaction

occurred on Tribal Land. It also follows that the Court should grant Stifel's Motion for Summary Judgment and Declaratory Judgment and declare that the Tribal Court has no jurisdiction over the Tribal Court Action.

ARGUMENT

I. The Tribal Court Lacks Jurisdiction Over Stifel and the Tribal Court Action.

In its response brief, the Tribe addresses tribal court jurisdiction by first discussing the Supreme Court's test in *Montana v. United States*, 450 U.S. 544 (1981) and then proceeding to the applicable forum selection provisions. (Resp. Br. (Dkt. #44), 13-15). This inverts the proper order of argument. The Court should start – and end – its analysis with the multiple exclusions of Tribal Court jurisdiction in the forum selection clauses. The Court need not examine jurisdiction under *Montana* because the Tribe is bound by the jurisdictional covenants it negotiated in the transaction documents.

As part of the 2006 Bond Transaction, the Tribe executed four different agreements that expressly exclude "the jurisdiction of any court of the Tribe" and specifically requested to "get rid of references to tribal court" in yet another document, the Bond Purchase Agreement. (Stifel PFOF (Dkt. #39), ¶¶ 15, 22, 38, 39). The Tribe argues that these exclusions of tribal court jurisdiction do not apply to the Tribal Court Action principally for two reasons. First, the Tribe contends that Stifel cannot rely on the exclusions of tribal court jurisdiction in the Indenture, the 2006A Bonds, the Preliminary Limited Offering Memorandum or the Limited Offering Memorandum because Stifel was not a party to those agreements. Second, relying on an incomplete reading of the forum selection provisions, the Tribe argues that the exclusions of Tribal Court jurisdiction do not apply to its claims in this case. Because these arguments are contrary to the plain terms of the applicable transaction documents and well-settled law, they

should be rejected and the Court should declare that the Tribal Court lacks jurisdiction over the Tribal Court Action.

A. The Tribe is Bound by its Exclusions of Tribal Court Jurisdiction in the Indenture, the Bonds, and the Offering Materials.

There is no dispute that the Tribe agreed, in multiple documents composing the 2006 Bond Transaction, to exclude "the jurisdiction of any court of the Tribe" over certain disputes. (Stifel PFOF (Dkt. #39), ¶¶ 15, 38, 39). The Tribe, however, contends that Stifel may not enforce these promises because Stifel is not a party to these agreements – namely, the Indenture, the 2006A Bonds, the Preliminary Offering Memorandum and the Limited Offering Memorandum. (Resp. Br. (Dkt. #44) at 18). This argument misses the mark for several reasons.

First, Stifel has a direct right to enforce the forum selection clause in the Indenture through the express terms of the Bond Purchase Agreement, to which Stifel is a party. Section 7(a) of the Bond Purchase Agreement states that the Tribe "will observe all covenants of the Tribe in the Indenture." (Stifel Resp. to Tribe Add'l PFOF, ¶ 18). Thus, the Bond Purchase Agreement expressly incorporates the Tribe's agreement in the Indenture to exclude tribal court jurisdiction. Section 16(g) of the Bond Purchase Agreement further connects Stifel to the Indenture by stating that any conflict between the Bond Purchase Agreement and the Indenture "shall be resolved in favor of the Indenture."[1] (*Id.*). Pursuant to these sections of the Bond Purchase Agreement, Stifel can directly enforce the Tribe's promise in the Indenture to not litigate the Tribal Court Action in Tribal Court.

Second, Stifel has a right to enforce the Indenture's exclusion of Tribal Court jurisdiction because Stifel was a "Holder" of the Bonds under the Indenture. The Tribe acknowledges that

[1] Pursuant to Section 16(g) of the Bond Purchase Agreement, the forum selection provision in the Indenture shall control to the extent it conflicts with the forum selection provision in the Bond Purchase Agreement.

Stifel, as the initial purchaser of the 2006 Bonds, was a Holder of those bonds under the Indenture. (Resp. Br. (Dkt. #44) at 18). As a Holder, Stifel obtained the benefits of all "covenants, stipulations and agreements" in the Indenture – including the benefit of the Tribe's agreement in Section 13.02 to exclude Tribal Court jurisdiction. (Stifel Resp. to Tribe Add'l PFOF, ¶ 14). Moreover, regardless whether Stifel is presently a Holder, the Tribe's claims directly implicate that role by attacking the validity of the Bond Purchase Agreement under which Stifel became a Holder. (Tribal Court Complaint (Dkt. #34-13), ¶¶ 10, 23). To defend its status as a Holder of the 2006 Bonds, Stifel is afforded the protections given to Holders under the Indenture, including the Indenture's forum selection clause.

Third, in addition to Stifel's direct contractual right to enforce the forum selection clause in the Indenture, the law also permits Stifel to enforce the forum selection clauses in the Indenture, the 2006 Bonds, and the offering memoranda. Instead of dwelling on whether the enforcing party (here, Stifel) signed the agreement, courts focus on whether the forum selection clause is being enforced against a party **who did sign** the agreement (here, the Tribe). *See, e.g.*, *Organ v. Byron*, 434 F. Supp. 2d 539, 542 (N.D. Ill. 2005) (relying on *American Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt., Ltd.*, 364 F.3d 884, 889 (7th Cir. 2004)). In *Organ*, the district court permitted three individuals to enforce a forum selection provision in a contract to which they were not parties. 434 F. Supp. 2d at 540. Following the Seventh Circuit's decision in *American Patriot*, the court focused on the commitment of the signatory party rather than the status of the party seeking to enforce that commitment:

> *American Patriot* suggests a different analysis is required in these situations, *i.e.*, when a non-signatory seeks to benefit from a forum selection clause to which the signatory agreed to be bound. Though not explicitly stated as such in *American Patriot*, the analysis could be considered a form of equitable estoppel. In this case, the terms of the Merger Agreement are clear: disagreements related to the agreement are to be litigated "only" in the federal or state courts of Delaware,

> which hold "exclusive" jurisdiction over those disputes. **Plaintiff bargained for and agreed to that term as part of his contract with Mosaic. Defendants do not lack standing to argue that Plaintiff is bound to that promise.**

Id. at 542 (citations omitted, emphasis supplied). This result prevents a plaintiff, like the Tribe in the Tribal Court Action, from strategically characterizing its claims as arising only under certain agreements in hopes of avoiding other relevant forum selection provisions. *American Patriot*, 364 F.3d at 888 (refuting notion that "plaintiff can defeat a forum-selection clause by its choice of provisions to sue on, of legal theories to press, and of defendants to name in the suit.").

The incontrovertible facts here allow Stifel to enforce the Tribe's agreement to litigate its claims outside Tribal Court. The Tribe made numerous commitments, in multiple documents, to litigate any claims arising from the 2006 Bond Transaction outside its Tribal Court. As explained in Section II.B, *infra*, those commitments apply to the Tribe's claims against Stifel in this case. Stifel, moreover, is not some far-removed party with no interest in the 2006 Bond Transaction. In addition to being the initial purchaser of the Bonds, Stifel has a direct, contractual right to enforce the forum selection clause in the Indenture via Section 7(a) of the Bond Purchase Agreement. As a party directly involved in the 2006 Bond Transaction, Stifel has the right to enforce the Tribe's exclusions of Tribal Court jurisdiction.

B. The Tribal Court Action Falls Within the Forum Selection Provisions Excluding Tribal Court Jurisdiction.

The Tribe next attempts to avoid the forum selection clauses by arguing that they do not apply to the Tribal Court Action. This argument relies on an incomplete and absurdly narrow reading of the various forum selection provisions. To start, the provisions excluding Tribal Court jurisdiction apply to the following disputes:

- Indenture: "**[A]ny dispute or controversy arising out of this Indenture, the Bonds**[2] **or the Bond Resolution . . . or to any transaction in connection therewith**." (Stifel PFOF (Dkt. #39), ¶¶ 14-15) (emphasis supplied).

- 2006A Bonds: "**[A]ny dispute or controversy arising out of this Bond, the Indenture, or the Bond Resolution . . . or to any transaction in connection therewith**." (Stifel PFOF (Dkt. #39), ¶ 39) (emphasis supplied).

- Preliminary Offering Memorandum: "[A]ny dispute arising under the Bond Documents[3] or the **Bond Purchase Agreement.**" (Stifel PFOF (Dkt. #39), ¶ 38) (emphasis supplied).

- Limited Offering Memorandum: "[A]ny dispute arising under the Bond Documents[4] or the **Bond Purchase Agreement.**" (Stifel PFOF (Dkt. #39), ¶ 38) (emphasis supplied).

In the Tribal Court Action, the Tribe alleges that Stifel made two misrepresentations in connection with the issuance of the 2006 Bonds (which Stifel denies): (1) that interest, commissions and other charges would increase if the Tribe "were to issue the new 2006A Bonds and the 2006B Bonds and use a portion of the proceeds to refund the 2003A Bonds and purchase the 2003B Bonds"; and (2) that the Tribe "could raise the capital it desired without refunding the 2003A Bonds and purchasing the 2003B Bonds, by instead simply issuing new bonds." (Tribal Court Complaint (Dkt. #34-13), ¶¶ 8-9, 15). These allegations establish a dispute "arising out of . . . the Bonds" that falls within the exclusions of Tribal Court jurisdiction in the Indenture and 2006A Bonds. *See, e.g., American Patriot*, 364 F.3d at 889 ("[A] dispute over a contract does not cease to be such merely because instead of charging breach of contract the plaintiff charges a fraudulent breach, or fraudulent inducement, or fraudulent performance"); *Wellborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 639 (7th Cir. 2002) (noting expansive scope of "arising out of" language in contract).

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[2] The Indenture defines "Bonds" to include the "Series 2006 Bonds," which in turn include the Series 2006A and 2006B Bonds. (Dkt. #46-2 at 5, 12)

[3] The Preliminary Limited Offering Memorandum defines "Bond Documents" to mean the Indenture and the Bond Resolution (Dkt. #34-5 at 5).

[4] See note 3, *supra.* (Dkt. #34-6 at 5).

In response, the Tribe attempts to shoehorn its allegations into a claim exclusively under the Bond Purchase Agreement and thus outside the preceding forum selection provisions. This argument fails for numerous reasons.

First, the forum selection clauses in the Indenture and 2006A Bonds encompass even the Tribe's narrow characterization of its claims. The Tribe attempts to limit the scope of those forum selection provisions through selective, partial quotation of the Indenture's and 2006A Bonds' forum clauses. Specifically, the Tribe suggests that the clauses apply only to disputes "arising out of the Indenture, the Bonds, or the Bond Resolution." (Resp. Br. (Dkt. #44) at 19) (underline in original). But this quote cuts off the remaining language in the sentence further extending the clause to disputes arising out of "**any transaction in connection therewith.**"[5] (Stifel PFOF (Dkt. #39), ¶¶ 14-15, 39) (emphasis supplied). Of course, "any transaction in connection" with the Indenture, the Bonds, or the Bond Resolution would necessarily include the Tribe's sale of the 2006A Bonds to Stifel pursuant to the Bond Purchase Agreement. Even if the Tribe's claims are confined to the Bond Purchase Agreement, those claims are still subject to the exclusion of Tribal Court jurisdiction because they arise from a transaction connected to the Indenture, the 2006A Bonds, and the Bond Resolution.

Second, the Tribe's representations in the Preliminary Limited Offering Memorandum and Limited Offering Memorandum confirm that claims arising under the Bond Purchase Agreement are covered by the exclusions of Tribal Court jurisdiction. In those offering memoranda, the Tribe represented that the exclusions of Tribal Court jurisdiction extended to "any dispute arising under . . . the **Bond Purchase Agreement**." (Stifel PFOF (Dkt. #39), ¶¶ 38-

[5] The full, applicable portion states, "The Tribe expressly submits to and consents to the jurisdiction of the [federal court or, alternatively, state court] 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." (Stifel PFOF (Dkt. #39), ¶¶ 14-15, 39).

39) (emphasis supplied). Thus, at the time of the 2006 Bond Transaction, the Tribe understood and acknowledged that its forum selection commitments applied to disputes related to the Bond Purchase Agreement. Although the Tribe contends that its offering memoranda are not "contracts" (Resp. Br. (Dkt. #44) at 17 n.5), it nevertheless "reviewed . . . [and] approved all such information for use" in those memoranda. (Am. Compl., Ex. C (Dkt. #34-5) at 28; Ex. D (Dkt. #34-6) at 28). As a matter of estoppel, equity, or otherwise, the Tribe is bound by its representations in the offering memoranda that any disputes arising from the Bond Purchase Agreement would not be litigated in Tribal Court.

Ultimately, the forum selection clauses in the Indenture, 2006A Bonds, and offering memoranda preclude Tribal Court jurisdiction over the Tribe's lawsuit against Stifel. When construing substantively identical clauses, this Court recently held that the exclusions in the Bonds and offering memoranda are clear and mandatory:

> [T]he 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 tribal court jurisdiction**.
>
> . . . .
>
> The clause plainly permits jurisdiction in the Western District of Wisconsin, and in Wisconsin state court only should the Western District decline to exercise it. **It also explicitly forecloses the tribal court option.**

Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, No. 13-CV-372-wmc, --- F. Supp. 2d ---, 2013 WL 5803778, at *8 & n.8 (W.D. Wis. Oct. 29, 2013) (discussing language essentially identical to the 2006A Bonds in this case) (emphasis supplied). The same result exists here because the Tribal Court Action arises out of the issuance of the 2006 Bonds. Further, the clauses apply here because the Tribe's claims against Stifel arise out of a "transaction in connection" with the Bonds, the Indenture, and the Bond Resolution. Because the Tribe's claims against Stifel fall within the scope of the various forum selection clauses, the

Court should declare that those clauses "foreclose[] the tribal court option" being pursued by the Tribe. *See id.*

C. The Situs of Transaction Clauses Support the Exclusion of Tribal Court Jurisdiction.

In addition to the forum selection provisions, the "Situs of Transaction" clauses in the Indenture and Bond Purchase Agreement also confirm the Tribe's agreement to litigate outside Tribal Court. For example, in the Indenture, the Tribe expressly affirmed "that the transaction represented by this Indenture has not taken place on Indian Lands." (Stifel PFOF (Dkt. #39), ¶ 36). The clause further states that "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." (*Id.*).

The Tribe tries to distance itself from these clauses by claiming they pertain to venue rather than jurisdiction. (Resp. Br. (Dkt. #44) at 23-24). These clauses, however, begin with the same prefatory language confirming their relevance to the issue of jurisdiction: "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…" (Stifel PFOF (Dkt. #39), ¶¶ 36-37) (emphasis supplied). Neither clause refers to venue. The parties' decision to link the Situs clauses to jurisdiction is not surprising considering the important connection between tribal geography and tribal jurisdiction. *See, e.g.*, *Progressive Spec. Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("Indian tribes are not permitted to exercise jurisdiction over the activities or conduct of non-Indians occurring outside the reservation."). The Tribe's re-characterization of these clauses contradicts their plain language and should be rejected.

The Tribe also contends that the Situs clause in the Bond Purchase Agreement does not preclude Tribal Court jurisdiction because the Tribe affirms that the agreement and its preceding

negotiations occurred in the State of Wisconsin, within which the Tribe's reservation is located. While correct as a matter of geography, the Tribe's argument fails to recognize that tribal land is primarily subject to the authority of another sovereign – the Tribe – and is considered to be separate and distinct from land under the primary jurisdiction of the State. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 45, 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). This distinction is also apparent from the Situs clause in the Indenture, where the parties carefully distinguished between Tribal Land and the State of Wisconsin. (Stifel PFOF (Dkt. #39), ¶ 36).

In short, the Tribe's representations in the Situs of Transaction clauses further corroborate the Tribe's agreement to litigate its claims against Stifel in state or federal court, not Tribal Court.

D. The Confidentiality Agreement Does Not Support Tribal Court Jurisdiction Over Stifel.

Confronted with several express exclusions of Tribal Court jurisdiction, the Tribe references a wholly irrelevant "Confidentiality Agreement" to suggest that "Stifel should have anticipated that a lawsuit could be brought in the Tribal Court." (Resp. Br. (Dkt. #44) at 17). The jurisdictional clause in the Confidentiality Agreement merely requires Stifel (identified as "Consultant") to bring any claims arising "in connection" with that agreement in the Tribal Court. (Tribe Add'l PFOF (Dkt. #48), ¶ 11). That provision is immaterial here because (1) Stifel is not the plaintiff in the Tribal Court Action and (2) the Tribal Court Action has nothing to do

with the Confidentiality Agreement. The Tribe's claims against Stifel are not based on any allegations that Stifel disclosed any information designated as "Confidential" under the agreement or breached any other provision of that agreement. (Stifel PFOF (Dkt. #39), ¶¶ 44-45; Stifel's Resp. to Tribe Add'l PFOF ¶ 11). In addition, the Tribe misreads the terms of the Confidential Agreement, which provide only that a party identified as "Tenant," consents to Tribal Court jurisdiction "for any action, claim or suit arising in connection with this Agreement." (Tribe Add'l PFOF ¶ 11). The clause in the Confidentiality Agreement is a red-herring and does not override the applicable forum selection clauses and Situs of Transaction clauses in the bond transaction documents.

E. Alternatively, There is No Tribal Court Jurisdiction Under *Montana*.

Even if the Court were to look beyond the multiple exclusions of Tribal Court jurisdiction (which it should not), it should still declare that the Tribal Court lacks jurisdiction over the Tribal Court Action. The Tribe's reliance on the narrow *Montana* exceptions fails to overcome the presumption that tribal court jurisdiction over non-members is invalid. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

The first exception in *Montana* acknowledges a tribe's ability to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members." *Id.* at 343 (quoting *Montana*, 450 U.S. at 565-66). This exception limits tribal regulation to "nonmember conduct inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332. The Tribe alleges in the Tribal Court Action that a representative of Stifel failed to disclose certain facts while on the Tribe's reservation,[6] but these allegations do not supersede the Tribe's representations in the Indenture and the Bond Purchase Agreement that

[6] Though not relevant to the issue of jurisdiction, Stifel disputes the allegations underlying the Tribe's claims in the Tribal Court Action. (Stifel Resp. to Tribe Add'l PFOF ¶¶ 5-6).

the transaction and negotiations preceding its consummation occurred entirely within the State of Wisconsin and not within the boundaries of the Tribe's reservation. (Stifel PFOF (Dkt. #39), ¶¶ 36-37); *see also Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993) ("To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination").

Even if the Tribe had not made these representations, the Tribe's allegations would still not fall within the first *Montana* exception. To fit within that exception, the assertion of tribal regulation must have a nexus to the consensual relationship – the claim must directly regulate the alleged relationship. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) ("A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'"). No such nexus is present here. The Tribe's request to rescind the 2006 Bond Purchase Agreement seeks to dismantle, rather than regulate, the alleged consensual relationship between Stifel and the Tribe. (Stifel PFOF (Dkt. # 39), ¶ 45). Accordingly, even if an on-reservation consensual relationship existed, the first *Montana* exception does not apply to the Tribe's suit to rescind the parties' relationship. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 456-57 (1997) (rejecting tribal jurisdiction over a tort claim brought against nonmembers because claim did not regulate nonmember's consensual relationship with tribe).

The Court also lacks jurisdiction over this lawsuit under the second *Montana* exception because there is no evidence that Stifel's conduct threatened the Tribe's political integrity, economic security, or the health and welfare of its members. *Montana*, 450 U.S. at 566. This exception is narrowly construed because "virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *County*

of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998) (*en banc*). It "authorizes the tribe to exercise civil jurisdiction when non Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 341 (citation omitted). Stifel has not engaged in any conduct that "menaced" the Tribe and has not engaged in any conduct implicating the Tribe's inherent powers over tribal members. Although the Tribe alleges that unspecified costs increased as a result of the 2006 Bond Transaction, it has come forward with no evidence that these costs have imperiled the Tribe's economic security or ability to govern itself. *See Big Horn County Elec. Coop. Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) (rejecting argument that tribe had jurisdiction to impose utility tax on nonmembers' property because revenues created by tax supported important tribal services and were essential to tribe's continued well-being).

In addition, Stifel's conduct does not trigger the second exception because it does not impact the Tribe's inherent power to "punish tribal offenders, to determine tribal membership, to regulation domestic relations among members, and to prescribe rules of inheritance for members." *Strate*, 520 U.S. at 459 (identifying these categories as "key to [the] proper application" of the second exception). Tribal Court jurisdiction over the claims against Stifel does not fall within the narrow second exception.

II. The Undisputed Evidence of a Mutual Mistake Compels Reformation of the Forum Selection Clause in the Bond Purchase Agreement.

The Indenture, 2006A Bonds, and the offering memoranda conclusively demonstrate there is no Tribal Court jurisdiction over the Tribal Court Action. The Tribe's covenants in those documents, by themselves, control the Court's decision whether there is Tribal Court jurisdiction. Nevertheless, to the extent the Tribe relies on the reference to "the Lac Courte Oreilles Tribal Court" in version 6 of the Bond Purchase Agreement to support Tribal Court

jurisdiction, the Court should reform the Bond Purchase Agreement to reflect the parties' mutual intent to exclude that reference and to eliminate the Tribal Court as a potential venue for litigation.

A. The Tribe Specifically Requested the Elimination of Tribal Court as a Potential Venue and Intended That Request to be Reflected in the Final Bond Purchase Agreement.

In its opening brief and proposed findings of fact, Stifel detailed the communications between Stifel and the Tribe prior to the closing of the 2006 Bond Transaction that culminated in the parties agreeing to (1) add language to the Indenture excluding Tribal Court jurisdiction and (2) remove the Tribal Court from the forum selection clause in the Bond Purchase Agreement. (Stifel's Br. (Dkt. #38) at 4-9; Stifel PFOF (Dkt. #39), ¶¶ 5-31). Stifel also submitted evidence showing that version 6 of the Bond Purchase Agreement was mistakenly executed by the parties because it did not reflect their mutual intent to exclude the tribal court in the forum selection clause. (Stifel PFOF (Dkt. #39), ¶¶ 21-22, 26, 34-35). Finally, Stifel submitted evidence – including admissions from the Tribe's own counsel – that version 8 of the Bond Purchase Agreement, the last version of the agreement to be circulated before closing, was the version the parties intended to sign. (*Id.* at ¶¶ 30-31, 48-49). This undisputed evidence is "clear and convincing" and establishes the mutual mistake necessary to compel reformation. *Newmister v. Carmichael*, 29 Wis. 2d 573, 583, 139 N.W.2d 572 (1966).

The Tribe disputes virtually none of the facts (Tribe Resps. to Stifel's PFOF (Dkt. #47) ¶¶ 5-31, 34-35, 48-49), but instead argues that Stifel was required to present additional evidence concerning "what actually occurred" between the circulation of version 8 and the closing to foreclose the possibility that the execution of version 6 was something other than a mistake. (Resp. Br. (Dkt. #44) at 11). The Tribe has it backwards. Stifel's evidence shows the parties (1)

agreed to remove the Tribal Court from the forum selection clause in the Bond Purchase Agreement prior to closing, (2) intended the final version of the Bond Purchase Agreement to reflect this agreement, but (3) mistakenly executed an earlier non-final version of the agreement that does not reflect their shared intent. This uncontroverted evidence demonstrates the absence of a genuine issue of material fact concerning each element of Stifel's claim for reformation. Fed. R. Civ. P. 56(a).

The Tribe may not avoid summary judgment by suggesting, without evidence, that the parties had a last-minute change of heart before closing and agreed to re-insert the Tribal Court into the forum selection clause – and then blame Stifel for not disproving it. To the extent evidence of any such change of heart existed, it was the Tribe's burden to come forward with it. *Goodman v. National Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010) (summary judgment is the "put up or shut up moment in litigation" when "the non-moving party is required to marshal and present the court with evidence she contends will prove her case."). Of course, no such change of heart occurred here, as evidenced by the Tribe's counsel's concession that the parties intended to execute version 8 of the Bond Purchase Agreement:

> Q Do you believe that Version 8 of the bond purchase agreement should have been the version that was signed by all the parties at the closing.
>
> [Objection by counsel]
>
> **THE WITNESS**: Not being aware of any other conversations to the contrary, I would expect that the final circulated version of the document was intended to be the signature version that would be executed.
>
> . . . .
>
> Q Now, looking back on all these facts, all the versions of these agreement, all of the history we've gone through today as well as your own independent recollection as you're sitting here, do you believe that the tribe intended for the Lac Courte Oreilles Tribal Court to be a potential venue in the forum selection clause included within the bond purchase agreement?

> [Objection by counsel]
>
> **THE WITNESS**: Based on Paul's email, I would think not. I'm sorry, based on my email to Reed reflecting my conversation with Paul Shagen, I would think not.

(Stifel PFOF (Dkt. #39), ¶¶ 30-31, 35, 48-49).

Because the uncontroverted evidence demonstrates that both Stifel and the Tribe intended to exclude the Tribal Court from the forum selection clause in the final Bond Purchase Agreement, the Court should reform that Agreement to accord with the parties' mutual intent.

B. The Tribe's Legal Arguments Regarding Mutual Mistake Are Also Meritless.

Having failed to present evidence that might create a genuine issue of fact as to the existence of a mutual mistake, the Tribe resorts to two legal arguments, neither of which is sufficient to deny Stifel's request for reformation.

First, the Tribe relies incorrectly on the generic proposition that an executed contract is the best evidence of the parties' intent. (Resp. Br. (Dkt. #44) at 11). As explained in Stifel's opening brief, that proposition does not apply where, as here, the parties' shared intent is not accurately memorialized in a written contract due to a mutual mistake. (Stifel's Br. (Dkt. #38) at 14-15). In that circumstance, the executed contract is **not** the best evidence of the parties' intent because reformation is necessary to conform the executed contract to the parties' actual agreement. *See Providence Square Ass'n, Inc. v. Biancardi*, 507 So.2d 1366, 1370 (Fla. 1987). If the Tribe's argument were accepted (which it should not), the entire concept of mutual mistake would be eliminated because courts would be required to enforce the signed agreement, mistakes and all, merely because it was executed by the parties. The Tribe's reliance on the "best evidence" proposition is misplaced in this case of mutual mistake.

Second, the Tribe contends that Stifel failed to act with reasonable diligence and waived its ability to seek reformation.[7] (Resp. Br. (Dkt. #44) at 11). The Tribe filed the Tribal Court Action nearly six years after the Bond Purchase Agreement was executed. (Dkt. #34-13 at p. 1 and ¶ 10) (noting December 13, 2012 filing and December 15, 2006 execution)). The filing of the Tribal Court Action in December 2012 was the first breach of the forum selection clauses. The law did not require Stifel to discover the mistake in the Bond Purchase Agreement any sooner in order to pursue its claim for reformation. *See Stadele v. Resnick*, 274 Wis. 346, 353, 80 N.W.2d 272 (1957) ("Where the circumstances are such that a party fails to read an instrument after he has called the attention of the drafter to written terms to be included, he may be excused for signing without reading and not be precluded from seeking reformation of the instrument."); *State Bank of LaCrosse v. Elsen*, 128 Wis. 2d 508, 518, 383 N.W.2d 916 (Ct. App. 1986) ("The fact that a written instrument was signed or accepted without reading it is not sufficient ground for refusing a decree of reformation if its contents are at a variance with the antecedent agreement and understanding of the parties.").

The Tribe's "reasonable diligence" argument also misidentifies the relevant time period. *See Barly v. Public Fire Ins. Co.*, 203 Wis. 338, 234 N.W. 361, 364 (1931). Whether a party seeking reformation has acted with "reasonable diligence" is determined by examining the party's actions **following its discovery of the mistake** upon which its request is based. *Id.* It is not, as the Tribe suggests, merely a matter of counting the days between the execution of the non-conforming writing and the filing of claim for reformation. The Tribe's own case law undermines its argument on this point. In discussing the concept of reasonable diligence in

[7] The Tribe did not plead waiver as an affirmative defense in its Answer. (Dkt. #36 at 11); *see also* Fed. R. Civ. P. 8(c) (identifying waiver as affirmative defense) & 12(b) (every defense to a claim must be asserted in responsive pleading). Even setting aside this omission, the Tribe's waiver argument nevertheless fails on its merits.

Emmco Ins. Co. v. Palatine Ins. Co., 263 Wis. 558, 569, 58 N.W.2d 525 (1953), the Wisconsin Supreme Court cited with approval its decision in *Barly*, 234 N.W. 361. The *Barly* court held that an insured had not relinquished its right to seek reformation of an insurance policy even though it failed to discover errors in the policy until after the insured vehicle had been stolen. 234 N.W.2d at 364. Similarly, in *Stadele*, 274 Wis. at 353, the Wisconsin Supreme Court held that a plaintiff had not delayed unduly in seeking reformation in 1954 of a deed executed in 1951, where the plaintiff did not file suit until the defendant acted inconsistent with the terms of an agreement mistakenly omitted from the deed.

In this case, Stifel acted promptly by amending its Complaint to assert a claim for reformation within three weeks following its discovery that the parties had not executed the final version of the Bond Purchase Agreement at closing. Stifel first discovered the mistaken Bond Purchase Agreement in July 2013, when its counsel met with attorney Reed Groethe in connection with responding to the Tribe's written discovery requests in this action. (Stifel Resp. to Tribe Add'l PFOF ¶ 30).[8] The same day it learned of the parties' mistake, Stifel's counsel informed counsel for the Tribe of the mistake in the Bond Purchase Agreement. (*Id.*) After the Tribe declined to dismiss this lawsuit, Stifel and the Tribe negotiated a stipulation to permit Stifel to amend its Complaint, which was filed on August 13, 2013. (Dkt. #34).

In addition to Stifel's prompt action, the Tribe has wholly failed to identify any prejudice it has suffered due to the timing of Stifel's request for reformation. In *Rowell v. Smith*, 123 Wis. 510, 102 N.W. 1, 6 (1905), another case cited by the Tribe, the Wisconsin Supreme Court held that delay in asserting one's right to reformation "as to a mistake known to exist" is not a bar "in the absence of circumstances rendering the late assertion of the right so prejudicial to the adverse

[8] Stifel did not discover the parties' mistake in the course of litigating the Tribal Court Action because that action was stayed before any written discovery took place.

party, that it would be inequitable to permit it to be done successfully." Given that only three weeks passed between Stifel's discovery of the parties' mistake and its submission of an amended pleading asserting a claim for reformation (the filing of which was stipulated by the Tribe), the Tribe's failure to adduce any evidence of prejudice is not surprising because there is none.

Stifel's claim of mutual mistake is amply supported by the evidence and its request for reformation is supported by Wisconsin law. Stifel's motion for summary judgment on this claim should be granted.

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 23rd day of January, 2014.

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