UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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| CORPORATE COMMISSION OF THE MILLE LACS BAND OF OJIBWE INDIANS,<br><br>Plaintiff,<br><br>v.<br><br>MONEY CENTERS OF AMERICA, INC. and MCA OF WISCONSIN, INC.,<br><br>Defendants. | No. 0:12-cv-01015-RHK-LIB<br><br>**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S SECOND AMENDED COMPLAINT** |

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February 12, 2013

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Defendants Money Centers of America, Inc. and MCA of Wisconsin, Inc. (collectively, "MCA") respectfully submit this memorandum of law in support of their motion to dismiss Counts II-V (unjust enrichment, replevin, conversion / intentional interference with personal property, and constructive trust) and Count VI (fraud, to the extent the claim concerns loan payments to a creditor, Baena Advisors, LLC) of the Second Amended Complaint filed by Plaintiff Corporate Commission of the Mille Lacs Band of Ojibwe Indians (the "Commission").

Because the Commission has already filed two previous Complaints, the dismissal of these claims should be with prejudice.

## I. PRELIMINARY STATEMENT

On January 8, 2013, the Commission lost its motion in which it demanded that the Court (1) order prejudgment attachment of MCA's out-of-state bank accounts and (2) enjoin MCA from conducting its business. Dkt. 112. Just days later, and despite the Court's explicit recognition that this suit for $5.6 million dollars is not a suit about fraud, *id*. at 8-9, the Commission filed a Second Amended Complaint bringing fraud claims against MCA's corporate officers in their individual capacities, seeking to pierce the corporate veil, and launching multiple attacks on MCA's lenders as well as other entities and persons. Notably, the new allegations principally attack events in 2007 and 2009, despite the fact that the Commission admits it was fully reimbursed with Settlement Funds as of March 9, 2012, and only seeks monies from after March 10, 2012.[1]

[1] *See* Dkt. 23, Declaration of Grand Casino Hinckley CFO Roxanne Hemming, ¶ 10 (outstanding receivable as of April 2, 2012 "consists of Vault Cash provided to MCA

Respectfully, the Commission's multiplying of these proceedings with new claims and new defendants cannot change the fundamental fact that this is a breach-of-contract case for $5.6 million that MCA allegedly failed to timely reimburse between March 10, 2012 and April 2, 2012 (and for which MCA counterclaims a similar amount based on the Commission's unlawful termination of the contract, tortious interference with MCA's contractual employees, and related business torts). That fundamental fact precludes the additional causes of action the Commission seeks to add to this suit, and MCA requests that the Court dismiss these allegations and thereby pare down the Second Amended Complaint to reflect the actual dispute at hand.

The new defendants sued by the Commission will no doubt respond to the new allegations in the time required by the Federal Rules.[2] As for MCA, it now moves to dismiss on the pleadings the claims against it for (1) unjust enrichment, (2) replevin, (3) conversion / intentional interference with personal property, (4) constructive trust, and (5) fraud as it pertains to loan payments to Baena Advisors, LLC ("Baena").

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dating back to March 10, 2012, that has not been returned to the Grand Casino Hinckley minus deductions for service fees due each day to MCA."); Dkt. 24, Declaration of Mille Lacs Casino CFO Vernon Robertson, ¶ 10 (outstanding receivable as of April 2, 2012 "consists of Vault Cash provided to MCA dating back to March 10, 2012, that has not been returned to the Grand Casino Mille Lacs, minus deductions for service fees due each day to MCA.").

[2] Each of the Commission's 15 separate Counts itemizes the specific defendant(s) each Count targets. Only Counts I-VI are directed at MCA. *See* 2d Am. Compl. pp. 29-50 (identifying each applicable defendant under each Count).

## II. FACTUAL BACKGROUND

The Court is familiar with this case and thus MCA will concisely summarize the facts as they pertain to this motion.

MCA has been a well-established cash-services provider to numerous casinos around the country for the past 15 years. MCA's services allow casinos to facilitate their customers' transactions (and thereby spend more money on the casino floor) by using the casino's own monies to complete transactions (i.e. cash checks, use debit cards, and obtain credit card advances, among others) without paying fees or interest to outside banks or lenders.

### A. The Agreement

The parties in 2009 entered into an exclusive three-year contract called the Financial Services/ONSwitch™ Agreement (the "Agreement"). The Agreement governed (1) the cash-access services that MCA would initially provide and (2) the process by which the Commission would first take over control of the Point of Sale ("POS") Operations at the casinos (i.e., the non-technical aspects of the cash-access services, including the employment of booth agents) and eventually take over all of the technical services MCA was providing (paying MCA a license fee for the right to use MCA's proprietary ONSwitch™ System). After MCA began providing cash-access services, the Commission expressly agreed to take over the POS Operations, though it subsequently reneged on that agreement to the great detriment of MCA.

After the Agreement was signed, MCA received monies from the Commission to facilitate the cash services to customers. This money was called "Vault Cash."

Agreement, § 8(a) ("Vault cash for purposes of this Agreement is defined as cash used for purposes of providing check cashing, credit card advances, POS Debit, and related financial and business services in casinos."). As the contract states:

> CORPORATE COMMISSION shall provide to MCA vault cash in the amount specified by MCA, which shall be used by MCA for cash to, facilitate check casing, credit/debit card advances and other cash access services as are provided for in this Agreement. ***MCA shall electronically transfer funds to the CORPORATE COMMISSION's designate gaming facility in settlement of each vault cash advance in accordance with the Vault Cash Settlement Schedule to be provided by MCA to CORPORATE COMMISSION prior to the first advance*** in accordance with the Vault Cash Settlement Schedule to be provided by MCA to CORPORATE COMMISSION prior to the first advance.

Agreement, § 8(a) (emphasis added). Vault Cash was to be provided to casino patrons, and it was. Each time MCA received Vault Cash, it promptly provided casino patrons with those funds, such that MCA never possessed any Vault Cash for more than a few days and Vault Cash was never deposited into any MCA bank account.

The casino patrons made out their checks and debit/credit transactions to MCA ("Customer Funds"), and therefore MCA bore the risk for clearing those transactions. Agreement, ¶ 12. MCA would collect these funds from the casino patrons' banks and financial institutions over a number of days. These Customer Funds could then be used to settle the receivable owed to the Commission. The Commission did not restrict how MCA settled funds ("Settlement Funds") back to it, such as through escrow arrangements or account sweeps; it simply directed that Vault Cash was not to be disbursed other than to the casino patrons (and it was not).

MCA provided Settlement Funds back to the Commission equaling the total amount of Vault Cash, minus fees. The Agreement states:

> CORPORATE COMMISSION shall provide to MCA vault cash in the amount specified by MCA, which shall be used by MCA for cash to[] facilitate check cashing, credit/debit card advances and other cash access services as are provided for in this Agreement. **MCA shall electronically transfer funds** to the CORPORATE COMMISSION's designate[d] gaming facility **in settlement of each vault cash advance . . . .**"

Agreement, ¶ 8 (emphasis added).

In short, Vault Cash was wheeled by armed guards across the casino to MCA's booth, MCA then provided Vault Cash to the patrons, and MCA several days later electronically transferred Settlement Funds—not Vault Cash itself—back to the Commission in the amount of the Vault Cash advance minus MCA's fees (with fees set by Exhibit A to the Agreement ("Fees and Commissions")). *Id.*

From 2009 until early 2012, MCA received Vault Cash and provided it to the casino patrons without incident. MCA transferred hundreds of millions of dollars of Settlement Funds to the Commission in that time. In October 2011, the Commission indicated that it believed that monies should be returned on a 4-6 day timetable, but MCA reminded the Commission that no such Schedule with any such a timetable existed. The Commission dropped the matter and proceeded to move towards the next phase of the parties' Agreement.

### B. Plaintiff's Failure To Perform On The Contract And Its Unlawful Eviction Of MCA From The Casino Premises

As set forth more fully in MCA's Answer and Counterclaims, Dkt. 99, on April 2, 2012, and notwithstanding the fact that MCA was not in breach of the Agreement, the

Commission began evicting MCA from its premises. The Commission ousted MCA despite the fact that the Commission had exercised the contractual POS Option and the ONSwitch™ System was ready to be activated. All the equipment was fully installed and operational such that, at any moment, the Commission could take possession of the POS Operations and operate the ONSwitch™ System. But instead of proceeding as promised, the Commission reneged on the exercise of its POS Option and simply misappropriated MCA's employees and know-how. MCA has counterclaimed for damages as a result of the Commission's actions.

### C. The Commission's Suit Seeks Monies Advanced On or After March 10, 2012, and No Earlier

At the time of the eviction of MCA, after settling hundreds of millions of dollars in Settlement Funds to the Commission over three years, MCA's receivable to the Commission was roughly $5.6 million. The entire receivable pertained to Vault Cash advances made between March 10 and April 2. As the Commission's own Chief Financial Officers for its casinos swore in their declarations months ago, the sum of the outstanding receivables as of April 2, 2012 "consists of Vault Cash provided to MCA dating back to March 10, 2012, that has not been returned . . . minus deductions for service fees due each day to MCA." Dkt. 23-24.

In other words, ***none*** of the money the Commission now seeks is for advances made ***prior*** to March 10, 2012. All of the Vault Cash advances from prior to March 10, 2012 were undisputedly reimbursed with appropriate Settlement Funds. *Id*.

## III. PROCEDURAL HISTORY

After evicting MCA, the Commission filed a Complaint against MCA in state court on April 4, 2012. Dkt. 1. After removal, and faced with a motion to dismiss, the Commission amended its own pleading, creating the First Amended Complaint. Dkt. 48.

The Commission subsequently petitioned the Court to preliminarily attach MCA's out-of-state bank accounts and enjoin MCA from running its business. Dkt. 90. The Court denied the Commission's motion, holding that the gravamen of the Commission's suit is a breach-of-contract claim for money damages. Dkt. 112. The Commission chose not to appeal the Court's ruling to the Eighth Circuit Court of Appeals.

Just two days after the Court's denial of the Commission's motion, the Commission nevertheless moved the magistrate for leave to file a Second Amended Complaint adding fraud claims, claims based on veil piercing, new defendants, and new fraud-based theories. Dkt. 129. This motion followed.

## IV. ARGUMENT

The Court's January 8, 2013 ruling denying the Commission's motion confirmed that the core of this case is a breach-of-contract claim for money damages. The dismissal of several of the Counts flows directly from that simple fact.

Because the parties agree that a valid contract was in place, there can be no claim for unjust enrichment. As such, the claim for unjust enrichment (Count II) should now be dismissed.

The Commission's claim for "Conversion/Intentional Interference with Personal Property" should be dismissed on a similar basis. To state a valid claim for Intentional

Interference with Personal Property under the Mille Lacs statute (24 MLBS § 255(b)(1)), the Commission must allege that MCA dispossessed the Commission of property. *Id.* It is now confirmed that MCA did not defraud or dispossess the Commission of any Vault Cash—all of the Vault Cash went to the customers. Dkt. 112, at 10 (Money the Commission seeks "is not 'its own' because the Commission's vault cash was distributed to casino customers, not retained by MCA."). The Commission does not claim dispossession of its Vault Cash—only the failure to pay on a receivable—and thus its "Conversion/Intentional Interference with Personal Property" claim should be dismissed.

The claim for replevin (Count IV) should also be dismissed. Replevin is an action to "recover the possession of personal property wrongfully taken." Minn. Stat. 542.06.[3] MCA did not wrongfully take any Vault Cash, Dkt. 112 at 10; it provided all Vault Cash to the casino patrons. The claim against MCA for replevin of such Vault Cash should be dismissed.

The claim for constructive trust (Count V) follows the same pattern: it seeks Vault Cash that MCA does not have, and it duplicates the breach-of-contract suit. It should be dismissed.

Finally, the claim for "fraud" (Count VI) based on an alleged failure to disclose information in a 2007 bid (two years prior to the signing of the integrated contract in 2009) can be easily dismissed. The merger clause in the 2009 agreement disclaims all

[3] The Court previously held that the replevin claim was made pursuant to "either federal or state law," because Mille Lacs law was not applicable. Dkt. 88 at 11. When attaching or seizing property, federal courts apply the law of the state where the court is located. Fed. R. Civ. P. 64.

prior negotiations, and public filings show MCA's bid statements were accurate. Nor does the 2007 bid have anything to do with monies allegedly not returned on time in March 2012. There is no false statement, no reliance, no proper allegation of fraud. Thus, Count VI should be dismissed to the extent it is based on the Baena Loan.

### A. Counts II-V and Part of Count VI Should Be Dismissed on the Pleadings

To avoid dismissal for failure to state a claim, a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007); Fed. R. Civ. P. 12(b)(6). A "formulaic recitation of the elements of a cause of action" will not suffice. *Id.* at 555; *accord Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Rather, the complaint must set forth sufficient facts to "nudge[] the[] claim[] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Stated differently, the plaintiff must "assert facts that affirmatively and plausibly suggest that [he] has the right he claims . . . , rather than facts that are merely consistent with such a right." *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (citing *Twombly*, 550 U.S. at 554-57).

Claims that duplicate breach-of-contract claims with additional labels shall be dismissed on the pleadings. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip.*, LLC, 782 N.W.2d 263, 273 (Minn. Ct. App. 2010) (affirming dismissal of claim for unjust enrichment because proof of an express contract precludes recovery in quantum meruit).

**1. The Commission's Unjust Enrichment Claim (Count II) Should Be Dismissed Because All Parties Agree There Was a Valid Contract**

As the Court recently held, this is "fundamentally a contract dispute for money damages. Both parties acknowledge that the Agreement governs their relationship and that the Agreement sets forth MCA's promise to repay the Commission and the terms of that promise." Dkt. 112, at 9. The fact of an express contract precludes separate recovery on the same facts under an unjust enrichment theory, *U.S. Fire Ins. Co. v. Minn. Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981), and thus the unjust enrichment claim should be dismissed. *T.B. Allen & Assocs. v. Euro-Pro Operating LLC*, No., 11-3479, 2013 U.S. Dist. LEXIS 1414 (D. Minn. Jan. 4, 2013) (dismissing unjust enrichment claim on the pleadings because "this unjust enrichment claim is predicated upon the terms of the contract agreed upon between the parties").

As this Court held, "[t]he Commission's unjust-enrichment claim is merely a breach-of-contract claim clothed in equitable garb." Doc. 112 at 9. Generally, "equitable relief cannot be granted where the rights of the parties are governed by a valid contract." *Id.; Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1060 (D. Minn. 2001) ("The existence of an express contract between parties precludes recovery under theories of quasi-contract, unjust enrichment, or quantum meruit."); *Breza v. Thaldorf*, 276 Minn. 180, 183, 149 N.W.2d 276, 279 (1967) ("It is fundamental that proof of an express contract precludes recovery in quantum meruit."). Because both parties agree that the Commission is suing on a valid contract, and because the unjust enrichment claim does

not seek separate relief, the Commission's claim for unjust enrichment should now be dismissed.

**2. The Commission's Conversion Claim (Count III) Should Be Dismissed Because MCA Did Not Retain Vault Cash**

The Commission's claim for "Conversion/Intentional Interference with Personal Property" should also be dismissed. To state a claim for Intentional Interference with Personal Property under the Mille Lacs laws, the Commission must allege that MCA dispossessed the Commission of "personal property" or interfered with such "personal property." 24 MLBS § 255(b)(1).[4] It is now confirmed that MCA did not dispossess the Commission of any Vault Cash – all of the Vault Cash went to the casino patrons pursuant to the Agreement. Dkt. 112, at 10. Vault Cash was willingly and knowingly advanced from the Commission to MCA; MCA did not dispossess the Commission of Vault Cash or interfere with it in providing it to casino patrons. Dkt. 112, at 9 ("The parties agree that the Commission willingly and knowingly advanced MCA the cash and that MCA used it to provide cash-access services as directed by the Agreement.").

The Commission sues on a receivable—not for its personal property—created when it voluntarily gave MCA the Vault Cash to give to the casino patrons (which MCA did), and a claim of non-reimbursement of Settlement Funds is not a claim for conversion of "personal property." For that reason, the Commission cannot claim dispossession of its Vault Cash and its "Conversion/Intentional Interference with Personal Property" claim should be dismissed.

[4] *Available at* http://www.millelacsband.com/Page_BandStatutes.aspx.

### 3. The Commission's Replevin Claim (Count IV) Should Be Dismissed Because MCA Is Not In Possession of Vault Cash

A claim for "replevin" (Count IV) is an action to "recover the possession of personal property wrongfully taken." Minn. Stat. 542.06.[5] It is undisputed that MCA provided all Vault Cash to casino patrons, Dkt. 112 at 10, notwithstanding the Commission's repetition in its Second Amended Complaint of its earlier assertion that MCA had not done so. 2d Am. Compl. ¶ 125 ("The Corporate Commission is the owner of the Vault Cash wrongfully retained by MCA after the termination of the Agreement."). As such, the claim for replevin should be dismissed because it is now undisputed that all Vault Cash went to the casino patrons and there is no "Vault Cash wrongfully retained by MCA."

### 4. The Commission's Constructive Trust Claim (Count V) Should Be Dismissed Because MCA is Not In Possession of Vault Cash

Plaintiff's request for declaratory relief in the form of a constructive trust also must fail, as Plaintiff only requests declaratory judgment that "all Vault Cash . . . is to be held in a constructive trust for the benefit of the Corporate Commission." 2d Am. Compl. at ¶ 130. MCA is undisputedly not in possession of any Vault Cash, as the Commission's Vault Cash was distributed to casino customers and not retained by MCA. Dkt. 112, at 10. Therefore, there is no Vault Cash in MCA's possession, and thus the Commission's claim for constructive trust should be dismissed.

[5] The Court previously held that the replevin claim was made pursuant to "either federal or state law," because Mille Lacs law was not applicable. Dkt. 88 at 11. When seizing property, federal courts apply the law of the state where the court is located. Fed. R. Civ. P. 64.

**5. The Commission's "Fraud" Claim Related to the Baena Loan Should Be Dismissed Because It Fails To Allege or Show Fraud**

The Commission claims that MCA failed to disclose to the Commission in its May 2007 bid that it defaulted on the Baena Loan by failing to maintain the minimum borrowing base required under it, and that MCA thereby "defrauded" the Commission. 2d. Am. Compl. ¶¶ 78, 132. The Commission's claim that it was "defrauded" by MCA's statement in the May 2007 should be dismissed as failing to state a claim for relief. Fed. R. Civ. P. 9(b), 12(b)(6).

Truly grasping at straws, the Commission has elected to look back two years prior to the 2009 integrated Agreement (section 32, "Entire Agreement," disclaims all pre-contractual discussions and negotiations), and allege that it has been defrauded because "the Commission relied on MCA's [2007] representation that it was not in default in awarding MCA the contract to provide cash access services." 2d. Am. Compl. ¶ 83.

In other words, the Commission once again contends that the entire contractual relationship between MCA and the Commission was fraudulent beginning with the 2007 bid itself, and notwithstanding the hundreds of millions of dollars that MCA settled to the Commission between 2009 and 2012. Of course, the Commission does not allege any injury from March 2012 traceable to this purported misrepresentation from more than five years prior (and two years prior to the signing of the Agreement). *See* 2d. Am. Compl. ¶ 83 (boilerplate language that the Commission relied on the statement).

Fraud must be plead with particularity, Fed. R. Civ. P. 9(b). A "party must typically identify the 'who, what, where, when, and how' of the alleged fraud," *BJC*

*Health Sys. v. Columbia Cas. Co*., 478 F.3d 908, 917 (8th Cir. 2007), and the Commission has not done so.

The Mille Lacs laws require the following be part of any alleged fraudulent statement:

> (a) It was made as a statement of fact, not mere opinion;
>
> (b) It was ***untrue*** and known to be untrue by the party making it or else recklessly made;
>
> (c) That it was made with the intent to deceive and for the purpose of inducing the other party to act upon it;
>
> (d) That ***the plaintiff*** was reasonably entitled ***to rely*** upon said statement ***and did so***;
>
> (e) That he was thereby induced to act upon the statement; ***and***;
>
> (f) He suffered injury or damage.

Mille Lacs Band Stat. Ch. 24 § 402 (emphasis added).[6]

The Commission claims fraud based on a 2007 bid which predates its integrated contract by two years. It nowhere states how it has been harmed by the alleged false statement, or how the 2007 statement connects to the March 2012 Vault Cash advances. To be sure, publicly available documents show that MCA—then a publicly traded company—failed to maintain the minimum borrowing base required by the Baena Loan

[6] *Available at* http://www.millelacsband.com/pdf/mltitle24judicialproc.pdf.

as of September 30, 2008. *See* Nov. 21, 2008 10-Q,[7] at 10 ("As of September 30, 2008 the Company is in default under the December 28, 2006 Credit and Security Agreement with Baena as the result of our failure to maintain the required minimum borrowing base."). However, as evidenced by MCA's publicly available SEC filings, Baena expressly waived MCA's default. *Id.* ("In August 2008, the Company entered into an agreement with Baena pursuant to which Baena agreed, retroactive to January 1, 2008, to waive its noncompliance with this covenant provided that . . . the Company issue[s] to Baena warrants to purchase . . . common stock . . . [which] . . . the Company agreed to issue . . . with respect to the first three quarters of 2008.").

MCA was not in default of the Baena Loan, either when it submitted its bid to the Commission or when the contract was formally signed in April 2009. *Id.* Because the alleged statement in MCA's bid to the Commission is not untrue, it cannot be the basis for a fraud claim under Mille Lacs law. Mille Lacs Band Stat. Ch. 24 § 402(b). And even if it were false, the Commission does not allege any connection to the $5.6 million, or have any way around the "Entire Agreement" clause in the Agreement.

Persisting in its demand that the Court consider this breach-of-contract case a fraud case, the Commission adds entirely vague claims of "misrepresentations" in paragraph 133 of the Second Amended Complaint regarding the parties' discussion of labor costs in February 2011, none of which comports with the particularity requirements

[7] *Available at* http://www.sec.gov/Archives/edgar/data/1165271/000126645408000575/mca_10q-093008.htm

of Fed. R. Civ. P. 9(b). The Commission in essence contends it was defrauded in 2011, even though it was fully reimbursed with Settlement Funds every month that same year. This overreaching must be rejected.

The parties integrated their Agreement in 2009, disclaiming any prior representations. The parties then contracted successfully for three years. In the face of those facts, the Commission now asks the Court to allow it to sue for fraud based on a 2007 true statement. The Court should reject that request and dismiss this aspect of the Count. Dismissing these claims on the pleadings is precisely the benefit the parties bargained for when they integrated the contract and disclaimed any prior discussions.

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Counts II-V fail to properly state claims for relief, as does Count VI to the extent it concerns the Baena Loan. The Second Amended Complaint thus runs afoul of Fed. R. Civ. P. 12(b)(6), Fed. R. Civ. P. 8(a)(2), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Counts II-V should be dismissed entirely, and Count VI should be dismissed to the extent it is based on the Baena Loan.

## V. CONCLUSION

The Commission's latest pleading should be scrutinized and pared down to reflect the actual dispute at issue in this case. For that reason and for the other reasons set forth above, MCA respectfully submits that the Court should dismiss Counts II through V and part of Count VI. Because this is Plaintiff's Second Amended Complaint, and because Plaintiff already been given due opportunity to plead its case, dismissal should be with prejudice.

DATED: February 12, 2013

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