UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CORPORATE COMMISSION OF THE MILLE LACS BAND OF OJIBWE INDIANS,

Plaintiff,

v.

MONEY CENTERS OF AMERICA, INC., MCA OF WISCONSIN, INC., CHRISTOPHER WOLFINGTON, MARK WOLFINGTON, SEAN WOLFINGTON, JONATHAN ZIEGLER, BAENA ADVISORS, LLC, and REAL ESTATE EMPOWERED, LLC,

Defendants.

No. 0:12-cv-01015-RHK-LIB

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANTS MONEY CENTERS OF AMERICA, INC. AND MCA OF WISCONSIN, INC. FOR SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CLAIMS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases

State Cases

Rules

Treatises

Defendants Money Centers of America, Inc., and MCA of Wisconsin, Inc., (together, "MCA"), respectfully submit this Memorandum of Law in Support of their Motion for Summary Judgment on the Breach of Contract Claims asserted by Plaintiff Corporate Commission of the Mille Lacs Band of Ojibwe Indians (the "Commission").

I. INTRODUCTION & SUMMARY OF ARGUMENT

The unanimous evidence from the Commission's own witnesses confirms that Commission waived the alleged 4-6 day settlement period in the parties' Vault Cash settlement schedule by accepting on a daily basis ***for more almost three years*** Settlement Fund reimbursements in excess of that timeframe. Because there is no genuine issue of disputed fact that the Commission accepted "late" payments on hundreds of occasions (totaling hundreds of millions of dollars) across three years, the Commission is foreclosed from pursuing its breach of contract claim against MCA on the basis of a 4-6 day timeframe.

For those reasons and the reasons set forth below, MCA respectfully requests that the Court grant MCA's Motion for Summary Judgment on Breach of Contract Claims.[1]

[1] The Commission has separately sued individuals who work at MCA on a veil-piercing theory. To the extent the Commission's breach of contract claims are dismissed as to MCA, they can also be dismissed as moot as to the Individual Defendants.

II. FACTUAL BACKGROUND

A. MCA Reimburses Vault Cash Advances With Settlement Funds Without Incident Between June 2009 and March 2012

Beginning in 2009, MCA received Vault Cash advances from the Commission, provided those advances to casino patrons, and later settled back to the Commission Settlement Funds[2] in the amount of the advances, minus MCA's fees.

Pursuant to their Financial Services/OnSwitch Agreement dated April 17, 2009 (the "Agreement"), MCA and the Commission entered into a three-year contract whereby MCA would provide cash access services for the Commission at the Casinos. See Amended Complaint, (Dkt. 48-2, Ex. A).[3] The Agreement provided in Section 8(a) for the Commission to advance funds known as "Vault Cash" to MCA to facilitate MCA's cash access operations. Id. The Vault Cash advances were to be later settled back to the Commission with Settlement Funds. Agreement, § 8(a).

Plaintiff has contended that the parties agreed to a Vault Cash Settlement Schedule with a strict timetable of 4-6 days, Second Am. Compl. (Dkt. 129), at ¶ 24, but it is undisputed that in the years following the 2009 exchange of the Vault Cash Settlement Schedule, MCA and the Commission never adhered to such a strict timeframe during the course of their three-year contractual relationship. For ***each and every day*** for ***three***

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[2] Vault Cash – money provided by the Commission to MCA to provide to patrons – was promptly provided by MCA to the Commission's own casino customers, requiring MCA to later settle back to the Commission a different amount owed: the amount advanced minus fees (the "Settlement Funds").

[3] MCA cites to the Amended Complaint only to refer to the Exhibits thereto, which were not attached to the Second Amended Complaint.

years, it is undisputed that every time MCA reimbursed Settlement Funds later than 4-6 days, the Commission accepted the Funds and provided MCA additional Vault Cash to distribute to the casino patrons.

B. The Commission Accepted "Late" Payments from MCA From the Inception of the Agreement

The Commission's witnesses – a designated Commission corporate representative and the two CFOs of the Commission's casinos – ***unanimously*** testified that Vault Cash advances were routinely settled in excess of 4-6 days, going back to the inception of the Agreement. See Exhibit A to March 28, 2013 Declaration of Luke P. McLoughlin ("McLoughlin Decl."), Oct. 22, 2012 Deposition of Gail Kulick, Designated Fed. R. Civ. P. 30(b)(6) Deponent for the Commission, ("Kulick Dep.") at 25:8-10; 32:23-34:7; Exhibit B to the McLoughlin Decl., Feb. 6, 2013 Deposition of CFO Vernon Robertson ("Robertson Dep.") at 39:23 – 40:21; Exhibit C to the McLoughlin Decl., Feb. 6, 2013 Deposition of CFO Roxanne Hemming ("Hemming Dep.") at 34:12-16.

As early as July 2009 – a mere three months after the Agreement was signed – MCA routinely and consistently made Vault Cash settlements to the Commission 6-10 days after receiving the funds from the Commission, and the Commission accepted these settlements. See Kulick Dep. at 25:8-10; 32:23-34:7. In fact, Gail Kulick, Plaintiff's Corporate Commissioner from June 2011 through October 2012 and the Commission's 30(b)(6) designee in this litigation, testified that she was unaware of ***any month*** in which all settlements by MCA for Vault Cash advances were made "on time**"** (i.e., in accordance with the 4-6 day settlement schedule posited by Plaintiff):

> Q: Was there any month that they – that all the payments [from MCA] were made on time?
>
> A: Not that I'm aware of.
>
> Q: So from September – from July of '09 through April of 2012, every single month there was a late payment?
>
> * * *
>
> A: I believe so.

Kulick Dep., 33:21 – 34:7 (objection to form omitted). See also Robertson Dep. at 39:23 – 40:21. Ms. Kulick testified that every time MCA was "late," the Commission accepted the Settlement Funds and provided MCA with new Vault Cash advances, despite the alleged tardiness of the settlements:

> Q: And when MCA did not return money at the speed that the Commission wanted in 2009, it continued to do business with MCA, correct?
>
> A. Yes.
>
> Q. And when MCA in 2010 didn't return it at the pace that the Commission wanted, it continued to do business with MCA; is that right?
>
> A. Yes.
>
> Q. Same question for 2011?
>
> A. Yes.
>
> Q. And same into the early part of 2012?
>
> A. Yes.

Kulick Dep., 113:12-19. See also Robertson Dep., 57.16-58:16.

There is no dispute that, despite the fact that parties did not adhere to the purported strict 4-6 day timetable for settlement, the Commission provided MCA with new Vault Cash advances ***each and every day for three years***. Indeed, the Commission has previously conceded that the average settlement timeframe was consistently greater than six days. See Declaration of Roxanne Hemming (Dkt. 23), at ¶ 7 (average timing of settlement funds for Hinckley Casino was approximately 7.74 days in June-July 2010, and 11.97 days in July 2011); Declaration of Vernon A. Robertson (Dkt. 24), at ¶ 7 (average timing of settlement funds for Grand Casino Mille Lacs was approximately 7.67 days in June-July 2010, and 12.45 days in July 2011).

Despite MCA's alleged routine "late" Vault Cash settlements, the Commission consistently continued to advance Vault Cash to MCA. See Kulick Dep., 33:14-20, 34:8-10, 108:6-11. Between April 2009 and October 2011, the Commission advanced hundreds of millions of dollars of Vault Cash to MCA, and MCA fully settled the Settlement Funds back to the Commission. See Kulick Dep., 33:11-33:20; 34:-34:10. During this period, between the two Casinos, advances and/or settlements occurred on a near-daily basis and the Commission never stopped advancing additional Vault Cash to MCA to facilitate its transactions with its customers. Kulick Dep., 34:11-18; Robertson Dep., 42:11-43:7, 44:20-24 ("Did you ever withhold additional advances until they -- A. Oh. Q. -- took care of a receivable? A. No.").

On October 13, 2011, the Corporate Commission contacted MCA, indicating that it believed that monies should be returned on a 4-6 day timetable and that failure to do so was a breach of the Agreement. Amended Complaint (Dkt. 48-2, Ex. E). The

Commission's notice of breach gave MCA 30 days to "cure" the alleged breach, pursuant to the Agreement's terms. Agreement, § 28. In response, MCA promptly reminded the Corporate Commission that no strict timetable existed. Amended Complaint (Dkt. 48-2, Ex. F). The Commission did not press its (mistaken) position. Upon the expiration of the 30-day cure period in or about November 12, 2011, the Commission took no action to terminate the Agreement or otherwise take action against MCA.

The parties continued their settlement practice for an additional six months. Kulick Dep. at 113:20-24. Until April 2, 2012, the Commission continued to advance Vault Cash to MCA; it continued to accept settlements of Vault Cash from MCA outside the alleged 4-6 settlement period; and it continued to facilitate MCA's provision of cash access services at the Casinos. Kulick Dep., 107:13-108:11; 113:20-24; Robertson Dep., 57:16-58:19. At no other time during the pendency of the Agreement did the Commission serve any other "notice of breach" on MCA.

On April 2, 2012, the Commission evicted MCA from its premises with neither notice nor the required 30-day opportunity to cure. Amended Complaint, (Dkt. 48-2. Ex G). Instead, a mere two days later on April 4, 2012, the Commission filed the complaint commencing an action against MCA alleging, among other things, breach of contract for failure to settle Vault Cash amounts within the alleged 4-6 settlement period. Plaintiff's Original Complaint, (Dkt. 1-1).

III. THE COMMISSION WAIVED ANY BREACH OF CONTRACT CLAIM BASED ON A 4-6 DAY TIMEFRAME

A. Summary Judgment Shall Be Granted Where Undisputed Facts Demonstrate Waiver

Summary judgment is appropriate when the evidence demonstrates that there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Smutka v. City of Hutchinson, 451 F.3d 522, 526 (8th Cir. 2006). A disputed fact is "material" if it might affect the outcome of the case, and a factual dispute is "genuine" if the evidence is such that a reasonably jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986).

The Agreement directs that the law of the Mille Lacs Band shall govern disputes between the parties. Agreement § 30. The Mille Lacs laws contain a defense of waiver against a claim of breach of contract. 24 MLBS 119(b) ("The Court of Central Jurisdiction shall recognize the following as excuses or defenses for the breach of a contract, sand said excuses shall not be exclusive.); *id*. at 119(b)(4) ("The waiver of non-performance of the provisions of a contract by the other contracting party.").

The defense of waiver is a long-standing and basic tenet of contract law. *See* Restatement (Second) Contracts, § 84 (1981). Waiver is the "intentional relinquishment of a known right." Slidell, Inc. v. Millennium Inorganic Chemicals, Inc., 460 F.3d 1047, (8th Cir. 2006) *citing* Illinois Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 798 (Minn. 2004); (Hedged Investment Partner, L.P. v. Norwest Bank Minn, N.A., 1999 Minn. App. LEXIS 989, *9 (Minn. App. August 24, 1999); *accord*, Rehoboth Mall Ltd

P'ship v. NPC Int'l, Inc., 953 A.2d 702, 705 (Del 2008). Defendants bear the burden of proving a waiver has occurred and the evidence must indicate Plaintiff's intention to waive. Id. Waiver need not be express, but may be inferred from the conduct of the parties. Murray on Contracts § 64[E][5] (2001) (Waiver may result from "conduct which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished").

Although waiver can sometimes be a question of fact, "where there is but one inference which can be drawn from the facts," waiver becomes a matter of law. Meagher v. Kavli, 251 Minn. 477, 486, 88 N.W.2d 871 (1958). Where there is no genuine issue of material fact, waiver may be decided as a matter of law on summary judgment. Physical Distrib. Servs., Inc. v. R.R. Donnelley & Sons Co., 561 F.3d 792, 795 (8th Cir. 2009) (affirming grant of summary judgment in favor of defendant that resulted in dismissal of plaintiff's breach of contract claims based on defense of waiver).

In order for to MCA to succeed on this Motion, MCA need only establish that the Commission knowingly disregarded the alleged 4-6 day settlement period while continuing to recognize the underlying Agreement as binding on the parties. Murphy Oil USA, Inc. v. Brooks Hauser, 820 F.Supp. 437, 442 (D. Minn. 1993).[4] The Commission's course of conduct since the inception of the Agreement unambiguously evidences the Commission's waiver of the 4-6 day settlement period on which it now sues.

[4] Detrimental reliance is not an element of waiver under Minnesota law. *See* Slidell, Inc. v. Millennium Inorganic Chems., Inc., 460 F.3d 1047, 1056 (8th Cir. 2006).

B. The Commission Consistently and Knowingly Waived MCA's Alleged "Late" Settlement of Vault Cash Advances

The Commission waived any claim for breach of an alleged 4-6 day settlement period by accepting "late" settlements on daily basis over the three-year pendency of the Agreement. See Amended Answer and Counterclaims of Defendants Money Center of America, Inc., and MCA of Wisconsin, Inc. to Plaintiff's Second Amended Complaint (Dkt. 111), Affirmative Defenses at ¶ 3. There is no genuine issue of material fact with respect to the Commission having accepted "late" payments for almost three years, and thus summary judgment should be granted to MCA on this claim.

The Commission's multi-year acceptance of "late" payments confirms that this is a textbook case of waiver. Indeed, Minnesota precedents have found waiver on facts far less straightforward than these. In Williams v. Allstate Ins. Co., 1990 Minn. App. LEXIS 377, *3-4 (Minn. App. April 24, 1990), the Court found that the insurer's acceptance of ***just three*** late payments over a 6-year period was sufficient custom to create a course of dealing for waiver. Id. (remanded for determination whether Plaintiff received a notice of cancellation with late payments). "[W]here [a party] varies the term of a contract by accepting premiums after they become due, long enough to amount to a custom, it waives strict enforcement of the contract." Id. at *3-4.

Applying Williams to the instant facts, there can be no doubt that a waiver has occurred. Here, the Commission accepted not just three, but literally ***hundreds*** of payments outside the 4-6 day settlement period between 2009 and 2012. Such repeated and consistent acceptance of payments from MCA is a textbook course of dealing

between the parties making a finding of waiver appropriate. See also, Barker v. SAC Osage Electric Coop., Inc., 857 F.2d 486 (8th Cir. 1988) ("[T]he continued acceptance of payments after an alleged breach is perhaps the clearest form of waiver."); Hedged Investment Partner, L.P. v. Norwest Bank Minn, N.A., 1999 Minn. App. LEXIS 989, *9 (Minn. App. August 24, 1999) (parties conduct is relevant to waiver analysis).[5]

Minnesota courts have found that even where the plaintiff is aware of ***one*** act of defendant's noncompliance with a contract, it can result in waiver. In First Nat'l Bank v. Strimling, 308 Minn. 207, 211 (Minn. 1976), Strimling executed several notes to a debtor, Dart, to be repaid from Dart's collateral account, pursuant to an agreement between Strimling and a former colleague. Despite the fact that the first note was not repaid, Defendant executed additional notes that also went unpaid. When the debtor filed for bankruptcy protection, Defendant sought repayment from the former colleague alleging misrepresentation and breach of contract. The Court found that Strimling waived his right to repayment from his colleague because "[e]ach time Strimling

[5] To the extent Delaware law were to apply, Agreement § 30, the waiver analysis is the same. The Delaware Supreme Court in Rehoboth Mall Ltd P'ship v. NPC Int'l, Inc., 953 A.2d 702 (Del 2008), held that landlord waived the right to enforce the "no default" provision in the parties' contract. In Rehoboth, tenant committed just 5 incidents of default over the course of the initial 15-year lease term (four late payments and one propane leak). Despite clear knowledge of the defaults, landlord executed a 5-year renewal lease, that the Court found constituted a waiver of the "no default" provision in the contract. Where, as here, the alleged late payments were accepted by the Commission ***hundreds*** of times over the duration of the parties' relationship, the Commission must be found to have waived the right to now assert breach of contract claims against MCA for the alleged late payments.

executed a note subsequent to the November 1970 note, he knew that [his colleague] had not lived up to the promise to satisfy the notes from Dart's account." Id. at 211-12.

The facts in Strimling and Williams are far outdistanced by the facts here, making this a textbook case of waiver. In this case, the Commission advanced funds daily to MCA under the terms of the parties' Agreement and, for a period of three years from 2009 to 2012, MCA consistently settled those advances to the Commission outside of the 4-6 settlement period (i.e. they did not "live[] up to the promise" the Commission posits). Given the frequency with which the Commission and MCA advanced and settled funds between 2009 and 2012, there can be no doubt that each time the Commission advanced funds to MCA, it did so knowing that MCA "had not lived up to the promise" to settle funds back within 4-6 days. See Kulick Dep., 32:23-34:7. *See also* Dayton Devel. Co. v. Gilman Financial Servs., Inc., 419 F.3d 852, 858 (8th Cir. 2005) ("Minnesota law treats the continued performance of a party following the failure of the other party to comply with a contract term as a voluntary waiver of that contract term…"); Creative Communications Consultants, Inc. v. Gaylord, 403 N.W.2d 654, 657 (Minn. App. 1987).

Where, as here, it is undisputed that the Commission engaged in an unbroken practice over three years of accepting Settlement Funds outside of the 4-6 day settlement period and advancing funds to MCA pursuant to the Agreement, the Commission has now waived the opportunity to claim a breach of contract based on a 4-6 day timeframe. The law is clear that "[c]ontinued recognition of a contract as still binding after default of payment provisions is a waiver of the default and the right resulting therefrom, if any, to rescind or to declare a forfeiture on that ground." Brack v. Brack, 218 Minn. 503, 16

N.W.2d 557, 560-561 (Minn. 1944); Murphy Oil USA, Inc. v. Brooks Hauser, 820 F. Supp. 437 (D. Minn. 1993); Appollo v. Reynolds, 364 N.W.2d 422, 424 (Minn. App. 1985) ("[W]aiver may be found where a party continues to exercise rights under a contract even though he knows a condition has not occurred or cannot be performed."); Creative Commc'ns Consultants, Inc. v. Gaylord, 403 N.W.2d 654 (Minn. App. 1987). The Commission continued to recognize the Agreement as binding from April 2009 until April 2012, notwithstanding what it now attempts to describe as daily "defaults" under that same Agreement. This is a classic case of waiver for which summary judgment should be granted to MCA.

In addition to waiving the 4-6 day settlement timeframe upon which it now sues, the Commission's unbroken acceptance of "late" Settlement Funds and the continued acts of advancing funds to MCA under the Agreement impliedly ratified the parties' settlement practice. Implied ratification occurs "[w]here the conduct of a complainant, subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that he has accepted or adopted it, [and] his ratification is implied through his acquiescence." Frank v. Wilson & Co., 32 A.2d 277, 283 (Del. 1943). The three-year duration of the parties' course of conduct under the Agreement leads to only one conclusion – that the Commission accepted MCA's later settlement time as a matter of course. Ratification of an unauthorized act may be found from conduct "which can be rationally explained only if there were an election to treat a supposedly unauthorized act as in fact authorized." Dannley v. Murray, 1980 WL 268061 at *4 (Del. Ch. July 3,

1980). As such, the Commission cannot now assert claims for breach of contract against MCA for alleged late settlements of Vault Cash advanced pursuant to the Agreement.

Notably, even after the Commission waived the 4-6 day settlement period, MCA was still entitled to the 30-day cure period under the Agreement for any claim by the Commission that MCA had failed to settle back the Settlement Funds. Agreement, § 28. But when the Commission elected to evict MCA in April 2012, the Commission did not give a Notice of Breach, nor did it give MCA any opportunity to cure. Instead it simply terminated the Agreement and filed suit two days later. As the Commission anticipatorily breached the Agreement in this manner, MCA was excused from performing on a terminated contract. Soderbeck v. Ctr. for Diagnostic Imaging, Inc., 793 N.W.2d 437, 441 (Minn. Ct. App. 2010) ("It is "elementary that a breach of a contract by one party excuses performance by the other.") (quoting Wasser v. W. Land Secs. Co., 107 N.W. 160, 162 (1906)). Because the Commission waived compliance with the 4-6 day timeframe, anticipatorily breached the contract, and did not properly follow the cure procedures in the Agreement, the Commission cannot recover on for claimed breach of a 4-6 day timeframe.

IV. CONCLUSION

For all of the foregoing reasons, MCA respectfully requests that this Court find that the Commission waived the alleged 4-6 settlement period under the Vault Cash settlement agreement and grant MCA's Motion for Summary Judgment on Plaintiff's Breach of Contract Claims.

Respectfully submitted,

DATED: March 28, 2013

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