UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Corporate Commission of the Mille Lacs Band of Ojibwe Indians, Plaintiff, vs. Money Centers of America, Inc. and MCA of Wisconsin, Inc., Christopher Wolfington, and Mark Wolfington, Defendants.	Court File No.: 12-cv-01015 (RHK/LIB) **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

MCA does not dispute that it never repaid the Commission $5,623,690.83.

MCA and the Commission agree on all of the material facts. MCA took money from the Commission on a daily basis to facilitate MCA's provision of check-cashing services to Commission customers. The Agreement did not identify a specific dollar amount that MCA could have outstanding at any particular time. Instead, MCA promised to return funds advanced within 4-6 days. This meant that the receivable owed by MCA to the Commission should have been limited to the amount required to cash customer checks at the Commission's Casinos in any 4-6 day period. But MCA did not return the Commission's funds in the promised timeframe, and continued to take funds from the Commission on a daily basis. As a result, MCA owed the Commission substantially more money than contemplated by the Agreement.

After giving MCA numerous opportunities to become current on its payments, the Commission terminated the Agreement. At the time, there was more than $5.6 million outstanding, which MCA has not repaid at all.

These undisputed facts entitle the Commission to summary judgment on its breach of contract claim and require dismissal of all of MCA's counterclaims.

ARGUMENT

I. The Court Should Grant the Commission Summary Judgment On Its Contract Claim Because MCA Failed to Repay the Commission $5.6 Million.

MCA promised to repay the Commission $5,623,690.83 and did not. (*See* Dkt. No. 23, Declaration of Roxanne Hemming, July 17, 2012; *see also* Dkt. No. 24, Declaration of Vernon Robertson, July 17, 2012, and accompanying exhibits.) MCA does not dispute this. (*See, generally*, MCA Opp.) In fact, MCA does not mention its failure to repay more than $5.6 million *once* in its 38-page Opposition to the Commission's Motion.[1]

MCA's failure to repay the Commission more than $5.6 million entitles the Commission to summary judgment on its breach of contract claim. MCA's arguments that the Commission waived its right to timely repayment, or that the Commission

[1] By contrast, MCA mentions three separate times that the Commission voluntarily dismissed without prejudice those defendants who challenged personal jurisdiction in Minnesota. (MCA Opp. at 1, 17, n.7.) Contrary to MCA's assertions, the Commission's dismissal of those defendants does not indicate the Commission "retreated" or "back-tracked" from any factual allegation in the Second Amended Complaint. The facts alleged remain unchanged. The Commission just chose not to engage in an unnecessary argument about personal jurisdiction when Pennsylvania courts provide an equally appropriate forum for those claims.

breached the Agreement, do not preclude summary judgment. (MCA Opp. at 20-23.) To be clear: the Commission did not waive its right to timely repayment or breach the Agreement. (*See* Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 169 ("Commission's Summary Judgment Motion") at 17-20.) But regardless of whether the Commission "waived" its right to timely payment, MCA does not contend that the Commission waived the right to be repaid *at all*. (MCA Opp. at 20-23.) The Commission moves for summary judgment based on MCA's failure to repay $5.6 million *at all*. (Commission's Summary Judgment Motion at 12-14.)

And, even if the Commission had breached the Agreement, MCA cannot keep the $5.6 million. (*Compare* MCA Opp. at 23.) MCA *never* had a right to keep the $5.6 million advanced by the Commission. MCA promised to return that money within 4-6 days of the time it was advanced. (2nd Am. Compl., Ex. A ("Agreement" at § 8), Ex. B; Answer and Counterclaims at p. 4, ¶ 24.) No breach or allegedly improper termination by the Commission can suddenly give MCA a right that it never had.

MCA ignores the fundamental premise: "[u]nder no circumstances may the non-breaching party stop performance *and* continue to take advantage of the contract's benefits." *S & R Corp v. Jiffy Lube Int'l, Inc*., 968 F.2d 371, 376 (3d Cir. 1992). The premise is not limited to franchise disputes. (*Compare* MCA Opp. at 23-24, and n. 5 w*ith, e.g., Beutel v. Wells Fargo Bank, N.A.*, 2011 WL 5025118, at *3 (N.D. Cal. Oct. 20, 2011) (mortgagor-homeowner "was not allowed to stop making payments while continuing to take advantage of the contract's benefits by remaining in possession of the

home"). MCA is not entitled to benefit from funds the Commission advanced to MCA for the sole purpose of facilitating services that MCA no longer provides. *Id*.

The only case MCA cites in support of the proposition that it can keep the millions advanced by the Commission is *Soderbeck v. Ctr. For Diagnostic Imaging, Inc.*, 793 N.W.2d 437, 441 (Minn. Ct. App. 2010). (MCA Opp. at 24.) *Soderbeck* involved a plaintiff who sought interest from a defendant after the plaintiff breached a settlement agreement by refusing to settle the case. *Id.* The defendant sought specific performance of the settlement agreement, obtained it, and promptly paid the plaintiff the settlement amount. *Id*. The court did not relieve the defendant of its obligation to pay the plaintiff. *Id.* The court merely held that plaintiff was not entitled to interest in light of plaintiff's initial refusal to settle the case. *Id.* Nothing about *Soderbeck* suggests MCA can retain the millions it owes to the Commission. *Id*.

The Commission is entitled to damages of $5.6 million plus prejudgment interest on its breach of contract claim.[2]

II. Alternatively, Retention of the $5.6 Million Constitutes Unjust Enrichment.

If the Court grants the Commission full recovery on its breach of contract claim, the Court need not address the Commission's unjust enrichment claim. But, one way or another, MCA must repay the Commission $5,623,690.83 plus prejudgment interest.

[2] Under Minnesota Statute § 549.09, claimants may obtain prejudgment interest on summary judgment. *See, e.g., O'Brien & Wolf, LLP v. Liberty Ins. Underwriters, Inc.*, 2012 WL 3156802, at *10 (D. Minn. Aug. 3, 2012) (awarding prejudgment interest under Minn. Stat. § 549.09 on contract claims at summary-judgment stage).

Contrary to MCA's assertions, the Commission's unjust enrichment claim is not dependent upon whether MCA distributed the "Vault Cash" to customers. (MCA Opp. at 25-26.) MCA received something of value to which it is not entitled: $5,623,690.83. There is no disputed fact. (*Compare* MCA Opp. at 26-27, and n. 10.) Under Minnesota law, "recovery for unjust enrichment is measured by the *value* of what the enriched person has received." *Navickas v. Quilling*, 2010 WL 5290552, at *7 (Minn. Ct. App. Dec. 28, 2010) (emphasis added).

Kranz v. Koenig is inapposite. (MCA Opp. at 28 *citing* 2007 U.S. Dist. LEXIS 94199 (D. Minn. Dec. 20, 2007).) In *Kranz*, the plaintiff asserted that the defendant received $270,000 on a sale; the defendant denied that it received the money. *Id*. at * 8. That factual dispute precluded summary judgment. *Id.* Here, by contrast, MCA does not dispute that it received, and failed to repay, more than $5.6 million.

III. The Court Should Dismiss MCA's Counterclaims.

a. The Commission Properly Terminated the Agreement (Counterclaims 1, 3, 5, and 6).

MCA's counterclaims based on the "wrongful termination" of the Agreement (Counterclaims 1, 3, 5, and 6) fail. MCA does not dispute that: (1) it breached the Agreement by making late payments; (2) the Commission communicated that MCA's late payments were not acceptable and engaged in a "constant conversation" about the need for timely payments; (3) the Commission provided notice of MCA's breach; (4) the Commission gave MCA more than 30 days to cure the breach; and (5) MCA did not cure the breach. (MCA Opp. at 30-31; Commission's Summary Judgment Motion at 16-18.)

MCA argues that disputed facts exist regarding: (1) whether the Commission "waived" its right to enforce the Vault Cash Settlement Schedule; and (2) the "Commission's actions in April 2012 when it evicted [MCA] without giving it opportunity to cure." (MCA Opp. at 30-31.) But there are legal disputes, not factual disputes. (*Id*.) And MCA is wrong on the law. (*Id.*)

MCA ignores the key issue -- the dramatic increase in the receivable MCA owed to the Commission as a result of MCA's "late" payments. (*See* Dkt. No. 23, Declaration of Roxanne Hemming, July 17, 2012.) MCA also ignores that the Commission repeatedly objected to its late payments, arguing instead that the Commission "waived" timely payments by accepting the late payments and continuing to advance funds. (MCA Opp. at 30-31.) MCA does not cite a single case in which a court found a party who objected to late payments waived its right to timely payment merely by accepting the late payment. (*Id*.) And numerous courts have held that objecting to late payments preserves a party's right to enforce timely payments. *See, e.g., Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC*, 2006 WL 1375106, at **3-5, 9 (Del. Ch. May 8, 2006) (applying Utah law) (no waiver where non-breaching party accepts late payments but makes it clear that "late payments are unacceptable"); *Servicios Aereos Del Centro S.A. v. Honeywell Int'l, Inc.*, 252 Fed. Appx. 849, 850 (9th Cir. 2007) ("[Non-breaching party] withdrew any arguable waiver by giving [the opposing party] notice that it intended to strictly enforce the termination deadline."); *Bank of Amer. v. Princeton Park Assocs.*, 2012 WL 5439006, at *4 (N.J. Super. App. Div. 2012) (no waiver where non-breaching

party "always made clear to [opposing party], through letters . . . that its acceptance of the late payments did not constitute a waiver of any of its rights").

The *only* case MCA cites is *Milgram Food Stores, Inc. v. Gelco*, 550 F. Supp. 992 (W.D. Mo. 1982.) (MCA Opp. at 22.) But *Milgram* has nothing to do with late payments. *Id.* Instead, it involves a car lessor who transferred a car title to a lessee after receiving what the lessor argued was only partial payment. *Id.* at 993-94. The lessor admitted that it "elected not to utilize the protection afforded by the contractual provisions," and the court held that the lessor therefore waived the right to sue for remaining amounts. *Id.* at 995. Nothing about *Milgram* suggests that the Commission waived its right to timely repayment, especially in light of the Commission's continuous objections to MCA's late payments.

Likewise, nothing required the Commission to "re-notice" MCA's breach after noticing it in the fall of 2011. (*Compare* MCA Opp. at 23-24.) The Agreement provides that if any breach "is not cured or corrected within thirty (30) days . . . this contract may be canceled by the other party effective on written notice of cancellation." (Agreement at § 28.) In other words, the Agreement requires the Commission to give MCA *at least* thirty days notice, but does not prevent the Commission from giving MCA *more than* thirty days notice. (*Id.*)

It is undisputed that MCA failed to cure the breach after receiving notice in the fall of 2011. The notice explained that MCA breached the Agreement "by failing to adhere to the current Vault Cash Settlement Schedule of 4-6 days reimbursement." (2nd Am. Compl., Ex. E.) Regardless of whether "all Settlement Funds outstanding at the time of

the November 2011 notice of breach had been reimbursed," MCA does not dispute that it continued to fail to meet the Schedule after receiving notice and up until the time when the Commission terminated the Agreement. (*Compare* MCA Opp. at 31.)

b. <u>The "POS Option" Did Not Alter the Commission's Right to Terminate the Agreement (Counterclaims 4, 7, and 8).</u>

MCA cannot state a claim based on any actions it took as a result of the Commission's "exercise" of the "POS Conversion." (Counterclaims 4, 7, and 8.)

Neither MCA nor the Commission dispute what occurred. On February 17, 2012, Vernon Robertson sent an email to MCA indicating that the Commission was "planning on taking over the POS Operations." (Counterclaims at p. 26, ¶ 30.) Mr. Robertson, and two other Commission witnesses, testified that the Commission was planning on taking over the Point of Sale Operations if MCA became current on the Vault Cash Settlement Schedule. (Maschka Decl. R at 84:1 – 88:3, 114:9-12; Ex. S at 84:15-85:10; Ex. T. at61:10-64:21.)

But the Commission's intentions in sending that email do not matter. Even if, as MCA contends, Mr. Robertson's email constituted an unconditional exercise of the POS Option, MCA cannot sustain claims for breach of contract, unjust enrichment or promissory estoppel.

The Commission did not breach the Agreement (Counterclaim 4) by declining to go forward with the "POS Conversion" after Mr. Robertson's email. The Agreement gave the Commission the right to terminate the Agreement (Agreement at § 28), and expressly provided the Commission's decision regarding the Point of Sale Operations did

not change that right. (Agreement at § 10 (a) (governing the Point of Sale Operations and stating "all other terms of this Agreement shall remain in affect [sic]").) In other words, even if the Commission "exercised the POS Option," the Commission retained the right to terminate the Agreement as it did on April 2, 2012.

MCA cannot maintain claims for promissory estoppel (Counterclaim 8) and unjust enrichment (Counterclaim 7) because the "doctrine of promissory estoppel only applies where no contract exists." *Lukovsky v. Bautch*, 2012 WL 3086142, at *3 (Minn. Ct. App. July 30, 2012). Likewise, "equitable relief cannot be granted where the rights of the parties are governed by a valid contract." *See U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981).

Cohen v. Cowles Media Co., 479 N.W.2d 387 (Minn. 1992) is inapt. (MCA Opp. at 33-34.) The *Cohen* court held that a confidential informant's reliance on a reporter's promise to treat him as a confidential source constituted promissory estoppel. *Cohen*, 479 N.W.2d at 389-91. No written contract existed between the parties in *Cohen*. *Id.* Here, by contrast, a written Agreement gave the Commission the right to: (1) take over, or not take over, the Point of Sale Operations, at its sole discretion (Agreement at § 10); (2) reverse its decision to take over the Point of Sale Operations (Agreement at Exhibit A); and (3) terminate the Agreement regardless of whether it took over the Point of Sale Operations (Agreement at § 10).

MCA cannot sustain contract or equitable claims based upon the Commission's exercise of its express contractual rights.

c. The Commission's Decision to Replace MCA Does Not Give Rise to Any Claims.

MCA does not allege a single fact to support its conclusory allegation that "the Commission "allowed [Multi Choice Cash] to examine MCA's business procedures and confidential information." (MCA Opp. at 13 discussing Counterclaim 2 (Multi Choice Cash's tour of Casino) and Counterclaim 5 (breach of exclusivity provision).)

MCA alleges only that the Commission allowed Multi Choice Cash to tour a Casino, to which the public has access, and that a Commission employee suggested a vague response about the purpose for Multi Choice Cash's visit if anyone asked. (*Id.* at 11-13, 37.) There is no factual allegation suggesting that Multi Choice Cash was given improper access to MCA's "business procedures and confidential information." (*Id*.) There is no allegation that Multi Choice Cash was allowed to provide services at the Casinos prior to the termination of the Agreement. (*Id*.) Nothing in the Agreement precluded the Commission from talking to MCA's competitors or letting them on the floor of a Casino. (*See, generally*, Agreement.)[3] Counterclaims 2 and 5 therefore fail.

d. MCA Cannot State Claims Against the Commission Based on Multi Choice Cash's Hiring Decisions.

MCA cannot save its tortious interference counterclaim (Counterclaim 9). First, the Commission has sovereign immunity, and only counterclaims that arise from the same transaction or occurrence as the Commission's claims sound in recoupment. *See*,

[3] In fact, MCA knew that the Commission was soliciting bids in anticipation of the expiration of MCA's contract, and MCA had even submitted a bid to continue the Agreement after it expired by its terms. (Commission's Summary Judgment Motion at 10-11, Maschka Decl. Exs. N and O.) MCA therefore knew that the Commission was in conversations with competitors at the time Multi Choice Cash visited the Casino.

e.g., Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552 (8th Cir. 1989) (citations omitted). MCA's tortious interference claim is based on an entirely different contract than the Commission's claims (MCA's contract with its booth employees) and does not sound in recoupment.[4] MCA does not attempt to distinguish the cases holding that sovereign immunity bars counterclaims based on different transactions or facts. (MCA Opp. at 29; Commission's Summary Judgment Motion at 22-25.)

Even if the Commission did not have sovereign immunity, and even if the Commission encouraged Multi Choice Cash to hire MCA's employees, MCA still would not have a claim against the Commission. (MCA Opp. at 36-37.) MCA does not dispute that Multi Choice Cash, not the Commission, hired the booth employees. (*Id*.) MCA does not dispute that its booth employees were at-will employees. (*Id*.) MCA neither cites a case allowing a tortious interference claim based upon the hiring of an at-will employee to proceed nor distinguishes the cases barring such claims. (MCA Opp. at 36-37; Commission's Summary Judgment Motion at 26-27.) Finally, MCA does not explain how a claim of tortious interference can be a claim for conversion pursuant to Mille Lacs statutes. (*Id*.)

[4] MCA's assertion that the Commission waived sovereign immunity in the Agreement is wrong. (*Compare* MCA Opp. at p. 29, n. 11.) The Agreement states "Nothing in this Agreement shall be construed as a waiver of the sovereign immunity of the Mille Lacs Band of Ojibwe or the Corporate Commission." (Agreement at § 34.)

CONCLUSION

For the foregoing reasons, the Court should grant the Commission summary judgment against MCA on its breach of contract claim, and award the Commission judgment in the amount of $5,623,690.83 plus prejudgment interest. MCA's counterclaims should all be dismissed with prejudice.

Respectfully submitted,

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