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, AND MARK WOLFINGTON, Defendants.	No. 0:12-cv-01015-RHK-LIB **REPLY BRIEF IN FURTHER SUPPORT OF MCA'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CLAIMS**

DUANE MORRIS LLP
James L. Beausoleil, Jr., Esq.
Luke P. McLoughlin, Esq.
Erin M. Carter, Esq.
30 S. 17th St.
Philadelphia, PA 19103
215.979.1000

PATTERSON LAW OFFICE, P.A.
Robert B. Patterson, Jr., #169146
5101 Thimsen Avenue, Suite 200
Minnetonka, MN 55345
952.224.2851

Counsel for Money Centers of America, Inc., and MCA of Wisconsin, Inc.

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In its Opposition to MCA's Motion for Partial Summary Judgment, the Commission ignores the fact that its own witnesses unanimously testified that the Commission repeatedly waived the alleged 4-6 day Vault Cash settlement period. The facts are uncontroverted that:

1) the Commission accepted Vault Cash settlements from MCA in excess of 4-6 days on a daily basis for almost three years;

2) the Commission for almost three years continued to advance Vault Cash on a daily basis despite clear knowledge that the reimbursement for such amounts would not occur within 4-6 days; and

3) the Commission did not follow the contract and provide notice and opportunity to cure when the Commission evicted MCA in April 2012.

As a result of this unbroken three-year pattern of transacting hundreds of millions of dollars in excess of any 4-6 day period, the Commission is now foreclosed from pursuing its breach of contract claim against MCA on the basis of such a time frame. 24 MLBS § 119(b) ("The Court of Central Jurisdiction shall recognize the following as excuses or defenses for the breach of a contract, []and 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."). And because the Commission failed to comply with the Agreement's notice and cure provisions, it cannot maintain any claim for breach (let alone its own claim for summary judgment). 24 MLBS § 119(b)(3) (recognizing "the following as excuses or defenses for the breach of a contract" as including "[t]he other contracting parties['] prior breach of the provisions of a contract").

A. The Undisputed Facts Show the Commission Knew of the Alleged "Late" Payments and Knowingly Accepted Them

The Commission asserts that because it periodically complained to MCA about "late" settlement payments, it should now be immune to MCA's defense of waiver. Dkt. 181, at 14. The undisputed facts and the applicable case law direct the opposite.

A party cannot accept late funds – even grudgingly – for three years and then ask the Court to ignore that acceptance based on a claimed reluctance to have done so. First Nat'l Bank v. Strimling, 308 Minn. 207, 212 (Minn. 1976); Brack v. Brack, 218 Minn. 503, 510 (Minn. 1944); cf. Milgram Food Stores, Inc. v. Gelco Corp., 550 F. Supp. 992, 996 (W.D. Mo. 1982) ("Actions speak louder than words, and the facts clearly establish an implied waiver."). Milgram is directly on point: there Feld continued its dealings with Milgram, even though "Feld knew all too well that Milgram adamantly refused to pay the disputed sums." Id. at 996. Feld unsuccessfully sought to defend his actions in the same way the Commission has: "characteriz[ing] the arrangement as a pragmatic attempt to resolve as much of the dispute as possible without litigation because 'Feld needed its money.'" Id. Yet implied waiver was found all the same.

The Vault Cash advancement and settlement process between MCA and the Commission was in place pursuant to the Agreement for three years. During that three year period, the Commission advanced Vault Cash funds on a near-daily basis to MCA, and MCA reimbursed those advances in the form of Settlement Funds, not once being told——let alone required——to reduce all reimbursements to 4-6 days in order to continue

receiving advances. 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.").

While the Commission may have urged MCA to speed up Vault Cash reimbursements, these discussions do not alter the legal effect of the Commission's unbroken acceptance of ***all*** "late" payments dating back to 2009. The Commission's mere expression of discontent with the timing of Vault Cash reimbursement, absent corresponding statements that it intended to terminate the Agreement for breach, is not legally sufficient to allow the Commission to avoid waiver. See Brack v. Brack, 218 Minn. 503, 510 (Minn. 1944) (waiver found where the written notice of cancellation for late payments that was sent was deemed ineffective because the notice did not indicate intent to terminate the contract).

The Commission relies on Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC, 2006 WL 1375106 (Del. Ch. May 8, 2006) to suggest that its complaints to MCA were enough to ward off summary judgment in favor of MCA based on the Commission's waiver. But Shadewell is not instructive here, because in Shadewell, whenever a royalty payment was late, the recipient sent back a draft notice of termination indicating that failure to bring the account current would result in final termination. Id. The Commission's practice was exactly the opposite. Each time Settlement Funds arrived late, the Commission gave MCA more Vault Cash to distribute. It may have orally urged MCA to accelerate repayments, even to a 1-day reimbursement pace not

called for by the Agreement,[1] yet all the while it accepted every single reimbursement and advanced Vault Cash unhesitatingly upon request.

The Commission's criticism of Strimling is also misplaced and misleading. First, Strimling involved both misrepresentation and contract claims and the Court explicitly held "Strimling waived the misrepresentations ***and contract claims***." First Nat'l Bank v. Strimling, 308 Minn. 207, 212 (Minn. 1976) (emphasis added). Second, the facts in this matter are far more similar to the promissory note fact pattern in Strimling than the facts of the franchising cases proffered by the Commission. See MCA's Motion for Partial Dismissal, Dkt. 172 (demonstrating why franchise cases are of no help to the Commission). Unlike the franchise scenario, when the Commission unilaterally evicted MCA without notice, MCA could no longer transact business at the casinos or continue to profit from access to the Commission trademarks or facilities. Id.

Importantly, in October 2011, two years after the inception of the Agreement, the Commission sent MCA a formal notice of breach under the Agreement. But this notice and what transpired after it only confirmed MCA's waiver. MCA responded to the notice by denying that any such 4-6 day period applied, and the Commission dropped the matter without objection. Am. Compl. See Dkt. 48-2, Ex. F (November 2011 letter from MCA denying the applicability of any 4-6 day period). Nor did the Commission change its advance-and-reimbursement practice. In so doing, and especially after the Agreement's

[1] See Dkt 183-2 (Deposition of CFO Vernon Robertson, at p. 39) (Q. "[Y]ou were telling [MCA] it should be returned in one day, right? A. That's what I said here [in this email]. Q. Was there any contractual basis for that? A. There was not a contractual basis for that.").

30-day cure period elapsed after the 2011 notice, the Commission waived its right to terminate. All Vault Cash advanced in 2011 was fully reimbursed with Settlement Funds.

The Commission's election not to attempt to cancel the contract in November 2011, and instead continue to accept "late" settlement payments and advance Vault Cash to MCA, is the clearest evidence of waiver (if three years of unbroken acceptance of late payments were not enough). The Commission's subsequent failure in April 2012 (six months later and with all the "late" Settlement Funds that were the subject of the 2011 notice of breach having been fully reimbursed) to follow the Agreement's notice and cure provisions, confirms that Commission waived any claim of breach based on the 4-6 day period. Strimling, 308 Minn. at 212; Brack, 218 Minn. at 510. The facts undisputedly show a waiver of the 4-6 day time frame. Summary judgment should be granted to MCA.

B. The Commission Mischaracterizes MCA's Waiver Defense

In an apparent attempt to sidestep the undisputed fact that the Commission waived the 4-6 day Vault Cash settlement period alleged in the Second Amended Complaint, the Commission presents a back-up argument based on the 30-days' notice provision. E.g., Dkt. 181, at 13. But the Commission never adhered to the 30-day period for notice and cure of the "late" repayment of any funds from after March 10, 2012 or from 2012 at all. The Commission's repeated acceptance of settlement funds in excess of 4-6 days, and unbroken advancement of more Vault Cash funds to MCA, constituted a waiver of the alleged 4-6 day Vault Cash settlement period. As a result of that waiver, the Commission could not terminate the parties' Agreement based on receivables from March 10 onward

without first providing notice and 30 days to cure any default, as provided by the terms of the Agreement. See 24 MLBS § 119(b)(3) (recognizing "the following as excuses or defenses for the breach of a contract" as including "[t]he other contracting parties[']prior breach of the provisions of a contract").

Notably, the Commission concludes its Opposition by asserting that "even if the Commission had waived its right to timely payment, nothing entitles MCA to forever keep the more than $5.6 million it owes the Commission." Dkt. 181, at 18. The Commission is missing the point. The basic flaw in the Commission's logic is that once the Commission waived the 4-6 settlement period, the Commission was bound by the terms of the Agreement to afford MCA proper notice of any alleged default and an opportunity to cure before terminating the Agreement, and it did not do so. See Agreement § 28. Instead, the Commission elected to unilaterally evict MCA in April 2012 without Notice of Breach and without affording MCA any opportunity to cure, and filed suit less than 48 hours later. It was therefore the Commission, not MCA, that breached the Agreement and MCA is entitled to its damages alleged in its Counterclaims. Any amount of the $5.6 million deemed by a finder of fact to be owed to the Commission shall be set off against an amount awarded to MCA on its counterclaims.

C. Regardless of Whether the Court Looks to Minnesota or Delaware Law to Interpret The Mille Lacs Waiver Defense, the Commission Clearly Waived

As previously noted in MCA's Motion, the Agreement directs that the law of the Mille Lacs Band shall govern disputes between the parties. See Agreement, § 30. The Mille Lacs statutes 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, []and 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."). Whether Minnesota or Delaware law informs the analysis of waiver, the outcome remain the same.

In its Motion for Partial Summary Judgment, MCA cited to both Delaware and Minnesota authorities in support of its position, and the case law cited by the Commission does not contradict those authorities. First, the main case cited by the Commission, Shadewell, does not apply Delaware law, it applies Utah law. Dkt. 181 at 15; citing Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC, 2006 WL 1375106 (Del. Ch. May 8, 2006) (applying Utah law). Moreover, the Shadewell case is factually distinguishable, as discussed above, because MCA at all times prior to March 10, 2012 was making payments (therefore no payment was due) and no payment plan was negotiated. Moreover, the other non-Delaware authorities proffered by the Commission—from the 9th Circuit (applying Arizona law) and New Jersey state court (applying New Jersey law)—are also inapplicable, as the Commission never gave MCA notice that it was going to strictly enforce a deadline. See contra, Dkt. 181, at 16.

As fully set forth in MCA's previous briefing, Dkt. 172, the Commission's reliance on franchise and licensing cases is factually misplaced, yet the Commission continues to rely on those authorities. See e.g., S&R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371 (3d Cir. 1992). In Jiffy Lube, the excuse of performance issue arose as part of a dispute between the franchisee and Jiffy Lube. Jiffy Lube terminated the franchise

agreement for failure to pay royalties and the court found that the franchisee could not stop making royalty payments while still using the Jiffy Lube name on their store. Id. at 376. Where, as here, the Commission evicted MCA thereby barring MCA from continuing to conduct its operations, there is no comparable continued use of a franchise name to draw any parallel analysis to this action. The same factual disconnect holds true for the other cases cited by the Commission.

For all of the foregoing reasons and the reasons set forth in MCA's opening brief, 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: April 25, 2013

DUANE MORRIS LLP

s/ Luke P. McLoughlin
James L. Beausoleil, Jr., Esq.
Luke P. McLoughlin, Esq.
Erin M. Carter, Esq.
30 S. 17th St.
Philadelphia, PA 19103
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