UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Corporate Commission of the Mille Lacs Band of Ojibwe Indians,

Plaintiff,

v.

Money Centers of America, Inc. et al,

Defendants,

Civ. No. 12-1015 (RHK/LIB)

ORDER

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of 28 U.S.C. § 636(b)(1)(A), and upon Movant Melanie Benjamin's motion to quash a subpoena for her deposition. A hearing on the motion was held on July 18, 2013. For the reasons outlined below, Ms. Benjamin's motion is **GRANTED**.

I. PROCEDURAL BACKGROUND

In April 2012, the Plaintiff, Corporate Commission of the Mille Lacs Band of Ojibwe Indians, commenced this action against Defendants, Money Centers of America, Inc., and MCA of Wisconsin, Inc., asserting claims of breach of contract, unjust enrichment, conversion, and seeking declaratory relief for a constructive trust. (Compl. [Docket No. 1, Ex. 1] ¶¶ 11-26). The Complaint originally filed in Minnesota state court alleged that Plaintiff and Defendants entered into a contract, as part of which Defendants "agreed to provide, among other things, check cashing services, credit and debit card services and related financial, operational, technology and training services" to Plaintiff and its gaming customers. (Id. ¶¶ 5-6). Plaintiff alleges that after

providing Defendants with a notice of breach and allowing Defendants 30 days to cure their breach, it "formally terminated the Agreement." (Id. ¶ 9).

On April 24, 2012, Defendants removed the matter to this Court. (Notice of Removal [Docket No. 1]).

Upon Plaintiff's motion, the Court issued an order permitting Plaintiff to amend the Complaint. (Order [Docket No. 47]). Plaintiff's Amended Complaint included some additional alleged facts, all of Plaintiff's previously asserted claims, and two new claims for replevin and fraud. (See Am. Compl. [Docket No. 48]).

On November 7, 2012, upon Defendants' motion to dismiss, the Honorable Richard H. Kyle issued an Order dismissing only Plaintiff's claim that Defendants breached the contract "by failing to provide a Vault Cash Settlement Schedule." (Order [Docket No. 88] at 15).

On November 21, 2012, Defendants answered the Amended Complaint and asserted several counterclaims: 1) five breach of contract claims on separate grounds; 2) anticipatory breach of contract; 3) unjust enrichment; 4) promissory estoppel; and 5) intentional interference with personal property. (Answer [Docket No. 89] at 20-27). Defendants filed an amended counterclaim on December 12, 2012, asserting some additional facts but restating only the same counterclaims. (Am. Counterclaim [Docket No. 99]). Plaintiff filed its Amended Answer to the counterclaims on January 2, 2013. (Am. Answer [Docket No. 111]).

On January 8, 2013, Judge Kyle denied Plaintiff's motion for preliminary attachment and motion for temporary restraining order. (Order [Docket No. 112] at 11).

On January 22, 2013, pursuant to stipulation between the parties, Plaintiff filed its Second Amended Complaint, adding as parties Defendants Christopher Wolfington, Mark Wolfington, Sean Wolfington, Jonathan Ziegler, Baena Advisors, LLC, and Real Estate Empowered, LLC.

(Second Am. Compl. [Docket No. 129]). In addition to the previously pled claims, Plaintiff asserted a new veil piercing theory for its breach of contract claim and numerous other claims for fraudulent transfers and breach of fiduciary duty. (Id. at 29-32, 38-50).

On April 17, 2013, pursuant to the notice of voluntary dismissal, the Court dismissed without prejudice all claims against Defendants Sean Wolfington, Jonathan Ziegler, Baena Advisors, LLC, and Real Estate Empowered, LLC. (Order [Docket No. 179]).

On May 16, 2013, Judge Kyle heard and took under advisement the parties' motions to dismiss and motions for partial summary judgment. (See Minute Entry [Docket No. 192]).

Presently before the Court is Movant Melanie Benjamin's motion to quash a subpoena for a deposition served on her by Defendants on June 14, 2013. (See Motion [Docket No. 197] at 1).

II. MOVANT'S MOTION TO QUASH THE SUBPOENA

Ms. Benjamin asserts three grounds for why the subpoena served upon her by Defendants should be quashed:

> 1) The scheduled deposition poses an undue burden upon the movant and will inevitably cause annoyance, embarrassment, and oppression; 2) The doctrine of tribal sovereign immunity from suit bars compelled deposition testimony of a non-party tribal official acting in her official capacity; and 3) The scheduled deposition would subject a senior tribal official to an unnecessary discovery procedure despite the absence of unique knowledge held by the official and the presumed presence of less intrusive alternatives.

(Motion [Docket No. 197] at 2). Because the question of tribal sovereign immunity is a threshold question, the Court addresses it first.

Ms. Benjamin primarily relies on Alltel Commc'ns, LLC v. DeJordy, 675 F.3d 1100, 1102-05 (8th Cir. 2012) to argue that she is immune from the subpoena served upon her. (Mem. of Law in Supp. of Mot. to Quash [Docket No. 199]).

Defendants argue that because "Ms. Benjamin is a full member of the corporate body politic that is the [Plaintiff] Commission . . . the authorities provided by her counsel regarding discovery of third-party tribes are completely off point." (Defs.' Mem. of Law in Opp'n [Docket No. 205] at 6). Essentially, Defendants argue that Ms. Benjamin is a party witness and the subpoena is "garden-variety discovery subject to the normal limitations set forth in Fed. R. Civ. P. 26(b)(1)." (Id.)

The Court believes DeJordy does control here.

In DeJordy, 675 F.3d at 1101, the plaintiff, Alltel Communications, sued the Defendant, Eugene DeJordy, a former senior vice president of the plaintiff, alleging that DeJordy "breached the terms of a Separation Agreement by, *inter alia*, assisting the Oglala Sioux Tribe in a tribal court lawsuit to enjoin Alltel . . . ." DeJordy, 675 F.3d at 1101. The plaintiff in DeJordy served third-party subpoenas *duces tecum* on the Tribe and Joseph Red Cloud, a tribal administrator, seeking production of documents "that might establish a connection between DeJordy and the Tribe's [separate] lawsuit against Alltel." Id. at 1102. The Eighth Circuit reversed the district court's ruling giving effect to the subpoena and instead held that tribal immunity barred the enforcement of the subpoenas. Id.

The Eighth Circuit first held that "a third-party subpoena in private civil litigation is a 'suit' for purposes of the Tribe's common law sovereign immunity." Id. It then explained that "[i]t is well-established that 'Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers.'" Id. (quoting United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir. 1987)). The Court explicitly limited the question before it, however, to only the situation in which the tribe was not a party to the litigation:

> We note initially that the question is not whether sovereign immunity, as applied by the Supreme Court to Indian tribes as a matter of federal law, limits discovery

> under the Federal Rules of Civil Procedure in cases in which the tribe is a party. In those cases, the threshold immunity question has been answered—by tribal consent or waiver when the tribe is a plaintiff, or by a valid waiver or abrogation of immunity when it is a defendant.

Id. at 1102-03. The question the Court addressed in DeJordy was "a very different" question from when the tribe is considered a party and would be "subject to the rules of discovery." Id. at 1103. DeJordy's applicability here is dependent then on whether Ms. Benjamin can be considered a "party" to the proceedings now before the Court or whether she is to be deemed a non-party.

Obviously, the Corporate Commission of the Mille Lacs Band of Ojibwe Indians (the Commission) is a party to this litigation. Equally true is that the Mille Lacs Band of Ojibwe Indians (the Band) is not a party to this litigation—nor is Ms. Benjamin herself a named party. While Defendants, in mere conclusory fashion state, that "this is a garden-variety subpoena served on a party, not a third party," given that Ms. Benjamin herself is clearly not a named party, they fail to explain why or how they believe she herself is a party to this litigation. (Defs.' Mem. of Law in Opp'n [Docket No. 205] at 6). Reading the argument broadly, Defendants appear to assert that Ms. Benjamin is a party to these proceedings by virtue of being a member of the Commission. They provide no argument or authority, however, for why her mere membership on the Commission makes her, specifically, a party to this litigation. For the reasons to follow, the Court believes that she is not a party to these proceedings.

The Mille Lacs Band Statutes provide that the Plaintiff Commission is, "[a]s a Corporate Body Politic, . . . both a political subdivision . . . and a separately chartered corporation under 16 MLBSA § 1101(1))." 16 M.L.B.S.A § 101[1]; see also Reuer v. Grand Casino Hinckley, No. 09-1798 (MJD/RLE), 2010 WL 3384993, at *2 (D. Minn. Jul. 12, 2010). A Corporate Body Politic

[1] 16 M.L.B.S.A. § 101, available at http://www.narf.org/nill/Codes/mlcode/mltitle16 htm (last visited August 1, 2013).

is "a political subdivision of the Band conferred with all privileges and immunities contained as such" and which has "members instead of shareholders." 16 M.L.B.S.A. § 1101(b)(1) and (2).

Viewing the Commission in the corporate lens, the Court finds that Ms. Benjamin is not herself a party.

Generally, board members, directors, officers, or managing agents of a corporate party need not be subpoenaed for deposition but may be required to appear with a notice under Rule 30. See Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385, 392 (E.D. Pa. 1991) ("If the person to be deposed is a party to the action, or an officer, director, or managing agent of a party to the action, a subpoena is not required and a notice is sufficient to require his attendance."); Reese v. Virginia Int'l Terminals, Inc., 286 F.R.D. 282, 287 (E.D. Va. 2012); Stone v. Morton Int'l, Inc., 170 F.R.D. 498, 503-04 (D. Utah 1997). However, this does not apply to lower-level corporate employees. See Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minnesota, 187 F.R.D. 578, 588 (D. Minn. 1999) ("Except where the employee has been designated by the corporation under Rule 30(b)(6), or is an officer, director, or managing agent, an employee is treated in the same way as any other witness, and his or her presence must be obtained by subpoena rather than notice." (internal quotation marks omitted)); RP Family, Inc. v. Commonwealth Land Title Ins. Co., 2011 WL 6020154, at *2 (E.D. N.Y. Nov. 30, 2011) ("An employee of a corporate party who is not an officer, director, or managing agent is not subject to deposition by notice."); O'Connor v. Trans Union Corp., 1998 WL 372667, at *2 (E.D. Pa. May 11, 1998). Nor is a mere shareholder generally considered a party merely because the corporation is a named party in the litigation. See DeVolk v. JBC Legal Group, P.C., 2008 WL 1777740, at *1 (M.D. Fla. Apr. 18, 2008) (characterizing the president and sole shareholder of the defendant professional corporation as a "nonparty"); Peoria Day Surgery Ctr. v. OSF

Healthcare Sys., 2008 WL 724798, at *2 (C.D. Ill. Mar. 17, 2008) (analyzing the relevance of subpoenas served to shareholders of the plaintiff); see also Benfield Inc. v. Talbott, 2006 WL 3833461, at * 3 (S.D. N.Y. Dec. 22, 2006) (finding that the chief executive of the parent corporation of the defendant entities could not be deposed by notice and required a subpoena). Were such a rule not observed, virtually every mere stockowner of any corporation would automatically be subject to deposition any time the corporation was involved in a lawsuit; the Court has found no authority for such a broad proposition as advanced in the present case by Defendants in opposition to the motion to quash.

The Chief Executive of the Band, currently Ms. Benjamin, is a general member of the Commission. 16 M.L.B.S.A. § 1101(b)(2). The other general members are the Speaker of the Band Assembly and the District Representatives of Districts 1, 2, and 3. Id. However, these elective, general members serve "as members in their official capacity as elected leaders of the Mille Lacs Band of Chippewa Indians" and have no voting rights. 16 M.L.B.S.A. § 1101(b)(2) and (3). Thus, although Ms. Benjamin is a general member of the Commission, there is no allegation or evidence in the record that she is an officer or member of the board of directors of the Commission.

Here, the Mille Lacs Band Statutes, which establish the governance structure of the Plaintiff Commission, dictate that as a mere member—not a board of directors member—Ms. Benjamin is essentially nothing more than a shareholder. See 16 M.L.B.S.A § 1101(b)(2) ("Such Corporate Body Politic will have members instead of shareholders."). The general members of the Commission have no voting rights and appear to only have the power "to appoint or delegate the appointment of the board of director[s] . . . ." 16 M.L.B.S.A. § 1101(b)(3). While the Chief Executive is tasked with appointing the Commissioner for Corporate Affairs, who serves as the

Chief Operating Officer of the Commission, and nominating the five board of director members, see 16 M.L.B.S.A. §§ 2, 103, there is nothing to indicate that the Chief Executive in any way maintains control, governs, or acts in any managerial capacity over the business of the Plaintiff Commission. To the contrary, an opinion from the Mille Lacs Band Solicitor General states that the Chief Executive has no control whatsoever over "the day-to-day operations of the Corporate Commission." (See Docket No. 201, Ex. 1 at 2). And, in fact, one of the purposes of the Commission is "to make sound business and economic development decisions in a way that is insulated from day to day political considerations faced by Band elected leaders." 16 M.L.B.S.A. § 102(d). Although Defendant may be correct that "a witness need not 'control' others to have discoverable evidence," the initial question before the Court is not the discoverability of any information Ms. Benjamin may or may not possess, but whether she is a party subject to subpoena.

The Court finds that given the specific governing structure of the Commission and Ms. Benjamin's lack of any control over the business affairs of the Plaintiff Commission by her mere general membership—rather than board of director membership—she is not a party to this litigation, and therefore, she cannot be deposed without a valid subpoena.[2]

[2] The Court is aware that the Commission is both a corporate entity and a political subdivision. 16 M.L.B.S.A. § 101. However, even, viewing the Commission as a political subdivision, the Court again finds that Ms. Benjamin is not a party. Neither the statute, nor anything else presented to the Court, indicates that Ms. Benjamin's role as a mere, general member is different in any sense when viewing the Commission as a political subdivision rather than a corporation. Indeed, the general structure of the Commission remains the same: the Commission is comprised of five board of director members and several general members; the latter of which appear to only have "the power to appoint or delegate the appointment of the board of director of such Corporate Body Politic in accord with applicable Band Statutes." 16 M.L.B.S.A § 1101(b)(3). There is no indication that by virtue of being the Chief Executive of the Band Ms. Benjamin has any greater authority on the Commission such as to make her a decision maker or the equivalent of a board of director member. To the contrary, as discussed above, she does not have any control over the day-to-day operations of the Commission. Therefore, the Court finds that she cannot be considered a party to this litigation under this lens either. See Salter v. McNesby, 2007 WL 221392, at *2 (N.D. Fla. Jan. 25, 2007) (finding that the deputy sheriffs were not exempt from the subpoena requirement even though the sheriff was the named defendant because it appeared "that the deputies Plaintiff [sought] to depose [were] none other than ordinary fact witnesses").

Having found that Ms. Benjamin is herself not a party to this litigation, the Court also finds that Ms. Benjamin's subpoena is therefore more appropriately considered a subpoena served on a non-party or mere third-party witness. In DeJordy, the Eighth Circuit's holding was clearly focused and premised on the immunity from non-party subpoenas of the tribe and individuals who are acting as officials of the tribe. 675 F.3d at 1102-05. Therefore, the Eighth Circuit's holding in DeJordy appears here to be controlling. With no showing on the present record that the Band, as opposed to the separate Corporate Commission, has waived its immunity, Ms. Benjamin, as the elected Chief Executive of the Band, is immune from a deposition subpoena in her official capacity. See DeJordy, 675 F.3d at 1106; see also Catskill Dev., LLC v. Park Place Entm't Corp., 206 F.R.D. 78, 86-87 (S.D.N.Y. 2002) (finding that tribal immunity applied to non-party subpoenas in the civil suit); United States v. Menominee Tribal Enters., 2008 WL 2273285, at *10 (E.D. Wis. Jun. 2, 2008) ("Tribal sovereign immunity does not extend to individual members of a tribe just because of their status as members. But it does extend to tribal officials acting within the scope of their authority." (internal citation omitted)). The Court does not have a copy of the subpoena in the record before it, but, at the hearing, the Court asked Defendants to specifically identify the information they sought to acquire from Ms. Benjamin through her deposition. They identified the following categories of information: 1) her personal, professional relationship with Christopher Wolfington from 1995 through the present; 2) Defendant MCA's business performance under the contract at issue in this litigation; 3) the credibility of Christopher Wolfington; 4) the Commission's termination of the contract and eviction of Defendant MCA from the casino premises; 5) the Commission's alleged conversion of Defendant MCA's employees following the termination of the contract at issue; and 6) submission of an alleged fraudulent bid to the Commission in 2008.

Ms. Benjamin asserts that she "had no involvement whatsoever in matters underlying this suit" because they "transpired entirely before her term of office." (Mem. of Law in Supp. at 9-10).

Defendants do not dispute that Ms. Benjamin was not a tribal elected official, nor a board member (nor even a general member) of the Commission from 2008 through July 2012;[3] it is further undisputed that the contract at issue was effective from April 2009 through April 2012—and therefore, Ms. Benjamin could have had no personal involvement or personal knowledge about either the execution of or the termination of the contract at issue by the Commission. Consequently, inquiring of her as to the topic of Defendant MCA's business performance under the contract between its execution (April 2009) and termination (April 2012) dates would be discovery of information from Ms. Benjamin, a non-party, which she could only have acquired in her role as the elected Chief Executive of the Band after the start of her term of office in July 2012. The same would be true of the topic of the Commission's termination of the contract and eviction of Defendant MCA from casino premises/operations.

While it is possible that Ms. Benjamin may have some knowledge about the case at issue due to her becoming a general member of the Commission only a little more than two months after the contract at issue was terminated, such knowledge would have been gained directly through her role as Chief Executive of the Band, which, as already discussed above, falls within the ambit of DeJordy. Therefore, Ms. Benjamin is immune from subpoena in this present case. This would also be true for any relevant information she may have regarding the alleged

[3] Indeed, Defendants acknowledge, at the very least, that "Ms. Benjamin was not a tribal official between 2009 and April 2012 (the period MCA contracted with the Commission)." (Defs.' Mem. of Law [Docket No. 205] at 3).

fraudulent bid submitted in 2008 while she was previously serving as the Chief Executive of the Band and not as a member of the board of directors of the Plaintiff Commission.[4]

Additionally, Defendant has not disputed that Ms. Benjamin's only personal, professional relationship directly with Christopher Wolfington arises out of some limited discussions in the 1990s about a possible retirement plan for tribal elders—discussions which did not result in any contract being executed between any Christopher Wolfington entity or any entity of the Band. There was nothing presented to the Court to show or suggest that Ms. Benjamin had any personal, professional relationship with Christopher Wolfington thereafter. Nonetheless, any personal, professional relationship between Christopher Wolfington and Ms. Benjamin has no relevance to the execution, performance, or termination of the contract at issue—all such relevant circumstances occurred between Defendants and the Plaintiff Commission during a time (April 2009 through April 2012) when Ms. Benjamin was neither a tribal elected official nor even a general member of the Commission.

As to the last topic Defendants seek to inquire into: the general character for truthfulness or the credibility of Christopher Wolfington—first, to the extent this line of inquiry might be intended to relate to the April 2009 execution, subsequent performance, or April 2012 termination of the contract at issue, for the reasons already addressed, Ms. Benjamin's lack of any personal involvement in or knowledge of the execution, subsequent performance and termination of the contract at issue between April 2009 and April 2012, such inquiry would not be discoverable under Fed. R. Civ. P. 26 because it would not be reasonably calculated to lead to

[4] Additionally, even if Ms. Benjamin may have any information regarding the allegedly fraudulent 2008 bid submitted while she was previously a member of the Commission, which was not obtained directly in her official capacity as the Chief Executive, Defendants have not asserted that they seek any information from Ms. Benjamin that any other member of the Commission at that time would not be able to provide; as such, any limited relevance does not justify her deposition for all of the reasons more fully explained below in addressing Defendants' desire to inquire regarding Chris Wolfington's credibility.

the discovery of admissible evidence even without considering the various specific grounds put forth for quashing the subpoena.

Second, to the extent the line of inquiry regarding Christopher Wolfington's credibility was meant to prepare only for a possible attack at trial under Federal Rule of Evidence 608 upon the credibility of Christopher Wolfington, should he testify as a witness at trial, the Court finds that even if Ms. Benjamin may have some opinion on Defendant Wolfington's reputation for having a character for truthfulness or untruthfulness, such limited relevance does not overcome the significant harm and burden of deposing the current Chief Executive of a sovereign Indian Band. This is particularly true given the unique context of seeking to depose the current Chief Executive of a sovereign tribe that is herself not a party to this litigation. See Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985) (explaining the importance of tribal immunity); DeJordy, 675 F.3d at 1104 ("[P]ermitting broad third-party discovery in civil litigation threatens to contravene 'federal policies of tribal self determination, economic development, and cultural autonomy' that underlie the federal doctrine of tribal immunity." (quoting Am. Indian Agric. Credit Consortium, Inc.)). This is even more true when Ms. Benjamin was not personally involved in the events underlying this litigation and Defendants have made no showing that they cannot acquire such generic character evidence from other sources. See Fed. R. Civ. P. 45(c)(3)(A)(iv); Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999) ("Even if relevant, discovery is not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information." (quoting Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1323 (Fed. Cir. 1990)); Cardenas v. Prudential Ins. Co., No. 99-1421 (JRT/FLN), 2003

WL 21293757, at *1 (D. Minn. 2003) ("[C]ourts frequently restrict efforts to depose senior executives where the party seeking the deposition can obtain the same information through a less intrusive means, or where the party has not established that the executive has some unique knowledge pertinent to the issues in the case."); Menominee Tribal Enters., 2008 WL 2273285, at *13 ("Depositions of high-level governmental officials are permitted . . . upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his or her governmental duties." (quoting New York v. Oneida Indian Nation, 2001 WL 1708804, *3 (N.D. N.Y. 2001)).

For the reasons set forth more fully above, the motion by Ms. Benjamin to quash the subpoena served upon her by Defendants is granted.

III. CONCLUSION

NOW, THEREFORE, It is –

ORDERED:

1. That Movant's motion to quash the subpoena [Docket No. 197] is **GRANTED** as more fully described above.

BY THE COURT:

Dated: August 14, 2013

s/Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE