SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

SEAPORT LOAN PRODUCTS, LLC and
ALDWYCH CAPITAL PARTNERS, LLC,

Index No. 651492/12

Plaintiffs,

- against -

LOWER BRULE COMMUNITY DEVELOPMENT
ENTERPRISE, LLC,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendant Lower Brule Community Development Enterprise, LLC ("LBCDE" or "Defendant") respectfully submits this memorandum of law in support of its motion, pursuant to Civil Practice Law and Rule ("CPLR") 3211(a)(1),(2) and (7), to dismiss Plaintiffs Seaport Loan Products, LLC ("Seaport") and Aldwych Capital Partners, LLC's ("ACP") (collectively, "Plaintiffs") May 2, 2012 Complaint (the "Complaint"). The Court is also respectfully referred to the April 4, 2013 Affidavit of R. Dennis Ickes ("Ickes Aff."), April 5, 2013 Affidavit of Gavin Clarkson ("Clarkson Aff."), and April 5, 2013 Affirmation of Robert A. Giacovas, Esq.

As an initial matter, the Court must dismiss Plaintiffs' Complaint because this Court lacks subject matter jurisdiction over LBCDE. First, as a wholly-owned subsidiary of the Lower Brule Corporation ("LBC"), a tribal corporation formed under a federal charter granted pursuant to Section 17 of the Indian Reorganization Act, LBCDE cannot be sued in any court outside its own, unless it waives its well-established right to sovereign immunity, which it did not do in this case. As shown below, the federally-issued charter of LBC makes clear that subsidiaries, like LBCDE, enjoy the same rights and privileges – including immunity from suit – of the parent. And based upon federal law and basic principles of contract construction, this Court must give effect to the LBC charter as drafted and refrain from exercising jurisdiction over LBCDE.

Second, even if the LBC charter were not clear on its face, every federal and state court that has been faced with the question of whether a tribal corporation is entitled to sovereign immunity is guided by factors that examine the corporation's formation, purpose and manner of operation. As shown below, an examination of these factors as applied to LBCDE makes it abundantly clear that LBCDE is an "arm" of the Lower Brule Sioux Tribe and thus entitled to tribal sovereign immunity.

Third, even assuming LBCDE was not entitled to sovereign immunity (and it is), Plaintiffs' complaint utterly fails to allege a breach of contract or any other valid claim. Seaport seeks to recover for breach of an alleged "trade confirmation," claiming that it had an "exclusive" right to sell a certain note held by LBCDE and that it had in fact "confirmed" a sale that would have occurred but for LBCDE's bad faith in selling the note to another party. As shown, however, the document that forms the basis of Seaport's entire claim is nothing more than a notification of a ***possible*** trade that was subject to a host of conditions. The Complaint fails to allege (because it cannot) that any of the conditions to the proposed trade took place before the purported agreement, by its terms, expired. For this reason alone, Seaport's claims must be dismissed.

Recognizing that it failed to perform, Seaport attempts to re-write the purported "trade confirmation" to insert an "exclusivity" provision in order to argue that LBCDE's negotiations and the subsequent sale of the loan to a third party somehow breached a duty to use "best efforts." However, by its terms, the purported "trade confirmation" was ***non-exclusive*** and thus LBCDE was always free to market the loan to other parties – a fact that was even confirmed to Seaport in writing.

Nor can Seaport sustain its claim for unjust enrichment. At a minimum, LBCDE was not enriched at Seaport's expense – it performed no services for LBCDE that resulted in a closing of the loan at issue. Indeed, the purported "trade confirmation" did not even have a provision for compensating Seaport – a fact which belies any "reasonable expectation of compensation" from LBCDE that Plaintiffs now claim.

The only other claim, by plaintiff ACP, based upon an alleged third-party beneficiary theory, must fail because, as shown, with no breach of the purported "trade confirmation" between LBCDE and Seaport, ACP's derivative claim fails as a matter of law.

For these reasons, and as discussed further below, Defendant LBCDE respectfully requests that its motion to dismiss be granted in its entirety.

FACTUAL BACKGROUND*

The Parties

Plaintiffs

Seaport alleges that it is a limited liability company in the business of buying and selling loans. ACP similarly alleges it is a limited liability company and further that it provides "investment advisory services to institutions seeking to raise capital." (Complaint ¶¶ 2, 3). They collectively allege that they are entitled to over $1 Million in damages from LBCDE stemming from a business deal that they acknowledge was never consummated. (Complaint ¶¶ 1, 16, 22).

LBCDE

Formation as a Section 17 Corporation via Terms of the LBC Charter

LBCDE was formed as a wholly-owned subsidiary of Lower Brule Corporation ("LBC"), a federally chartered corporation under Section 17 of the Indian Reorganization Act of 1934 (the "IRA"), 25 U.S.C., § 461 *et seq.* (Ickes Aff. ¶ 18; Clarkson Aff. ¶ 5). Specifically, the LBC board of directors established LBCDE pursuant to the authority granted by Art. XXI.A of LBC's Federal Charter of Incorporation (the "LBC Charter"). (Ickes Aff. ¶ 18, Exhs. "B" and "C"). Under the terms of the LBC Charter, LBCDE possesses all of the rights, privileges and

* Except where otherwise noted, the factual allegations recited herein are taken from the Complaint and are accepted as true solely for purposes of this motion. A true and correct copy of the Complaint is attached as Exhibit "A" to the April 5, 2013 Affirmation of Robert A. Giacovas, Esq.

immunities possessed by "Section 17 corporations," including sovereign immunity. (Ickes Aff. ¶ 7, Exh. "B"). Specifically, the LBC Charter provides:

> Each subsidiary of Lower Brule Corporation that is wholly-owned by [LBC] or the [Lower Brule Sioux Tribe], is a federal corporation within the meaning of [the IRA,] 25 U.S.C. § 477, as amended, and possesses all of the rights, privileges and immunities possessed by such corporations, including sovereign immunity, exemption from the payment of federal income tax and any other exemptions.

(Ickes Aff. ¶ 14; Clarkson Aff. ¶ 6, Exh. "B" at p.20, Art. XXI.A).

Notably, the LBC Charter was the result of a stringent approval process. (Ickes Aff. ¶¶ 4-17). In 2005, the Tribal Council, which is the governing body for the Lower Brule Tribe, directed R. Dennis Ickes ("Ickes") to prepare a petition to submit to the Secretary of the Interior (the "Secretary") to form a corporation under Section 17 of the IRA. (Ickes Aff. ¶ 5). Section 17 states, in pertinent part:

> The Secretary of the Interior may . . . issue a charter of incorporation to such tribe . . . Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property . . . and such further powers as may be incidental to the conduct of corporate business, not inconsistent with the law.

Corporate formation under Section 17 of the IRA, 25 U.S.C., § 477, is exclusively regulated by the Secretary. Once (and only if) the Secretary approves the charter provisions, the final step to corporate formation is ratification by the governing body of the tribe. All charter provisions are carefully reviewed by the Secretary to determine whether those terms are consistent with Section 17 and congressional intent underlying the statute. (Ickes Aff. ¶ 6).

In connection with the LBC Charter, Ickes met with the Regional Director, the Deputy Regional Director, and other staff for the Great Plains Region of the Bureau of Indian Affairs (the "BIA") in Aberdeen, South Dakota to discuss the Lower Brule Tribe's concept for a prospective corporate charter. He explained the key elements of the corporate charter the Lower

Brule Tribe hoped to have issued by the Secretary, including provisions that would encourage private capital to invest with the Lower Brule Tribe in its business endeavors. (Ickes Aff. ¶ 7).

In its proposal for the LBC Charter, the Lower Brule Tribe relied heavily upon the general body of federal Indian law, the legislative history of Section 17 of the IRA, general corporation law and Section 6 of the 2005 Model Business Corporations Act (the "MBCA"). (Ickes Aff. ¶ 8). In particular, the Lower Brule Tribe wanted to incorporate from the MBCA all provisions necessary for a successful corporation, including the rights to raise equity and debt from any source. (Ickes Aff. ¶ 8). The BIA representatives agreed that a Section 17 corporation should have the same abilities as any mainstream corporation and all such necessary provisions should be included in the LBC Charter. (Ickes Aff. ¶ 9).

Ickes also raised the ability of the Section 17 corporation to form subsidiaries, an essential element of corporate power. Specifically he discussed the right to form subsidiaries that would have the same attributes as the Section 17 parent, including immunity from suit, exemption from federal income taxation and other attributes unique to Section 17 corporations. (Ickes Aff. ¶ 10). The BIA representatives were also receptive to the Lower Brule Tribe's requests in this regard and noted, again, that a Section 17 corporation should have the same privileges as any mainstream corporation. Moreover, if the LBC Charter did not so provide for the creation of subsidiaries with the same attributes as the Section 17 parent, the intended value of Section 17 would be lost to the Lower Brule Tribe. (Ickes Aff. ¶ 10).

In reliance on – and guided by – his meeting with the BIA, Ickes drafted the LBC Charter. (Ickes Aff. ¶¶ 11-13, Exh. "B"). He specifically included provisions reflecting 1) LBC's connection to the Lower Brule Tribe; 2) the corporation's right to sovereign immunity; and 3) the corporation's right to form subsidiaries with entitlement to the same rights and

privileges of LBC. (Ickes Aff. ¶¶ 11-13, Exh. "B"). Upon completion, Ickes submitted the draft to the Tribal Council, which approved it for submission to the Secretary, who had delegated his authority to the Regional Director of the BIA for the Great Plains Region. (Ickes Aff. ¶ 14). Ickes had numerous discussions with the Regional Director's staff concerning the draft. He also had one or two telephone discussions with the Department of the Interior ("DOI") Associate Solicitor of Indian Affairs regarding the draft. (Ickes Aff. ¶ 14).

In or around late February 2007, Ickes attended a meeting in Washington, D.C. with the Regional Director for the BIA-Great Plains Region and the Associate Solicitor of Indian Affairs in the Office of the Solicitor for the DOI. (Ickes Aff. ¶ 15). They again discussed the LBC Charter (as drafted), which included Article XXI.A (conferring sovereign immunity on any subsidiary of LBC) (see supra). (Ickes Aff. ¶ 15). The Associate Solicitor's attorney representative noted the charter provisions were in accord with Section 17 of the IRA and complimented the Lower Brule Tribe for its innovations, *i.e.* to enable investors to provide equity capital while the Lower Brule Tribe retained 100 percent ownership and control. (Ickes Aff. ¶ 15, Exh. "B"). He suggested a couple of non-substantive adjustments in the language of the LBC Charter, advised the Regional Director to take his suggestions into account and then proceed to propose the LBC Charter to the governing body of the Lower Brule Tribe for its approval and ratification. (Ickes Aff. ¶ 15).

Throughout the process of review with the DOI, every provision was discussed, vetted, reviewed, and ultimately approved by the designated representative of the Secretary. To that end, the Secretary's representative is charged with conforming his actions to previous DOI Solicitor opinions. (Ickes Aff. ¶ 16, Exh. "D" at p. 1846 and p. 1563).

In mid-April 2007, the Regional Director formally submitted to the Tribal Council a draft charter that he was prepared to sign, provided the governing body accepted its terms and conditions. (Ickes Aff. ¶ 17). The Tribal Council so accepted. In addition to the goals discussed above, the LBC Charter is in all respects consistent with the Lower Brule Tribe's laws and constitution. (Ickes Aff. ¶ 17). Thus, on April 18, 2007, at a meeting between the Tribal Council and the Regional Director (again, the Secretary's delegated authority for approving the LBC Charter), the Regional Director signed the LBC Charter. (Ickes Aff. ¶ 17). The Lower Brule Tribe's Tribal Council ratified the LBC Charter immediately thereafter. (Ickes Aff. ¶ 17).

LBCDE Operates as an Arm of the Lower Brule Tribe

LBCDE is a limited liability company. Its sole member is LBC, *i.e.* it is wholly-owned by LBC – and, in turn, LBC is wholly-owned by the Lower Brule Sioux Tribe (the "Lower Brule Tribe").[1] (Ickes Aff. ¶ 18, Exh. "B;" Clarkson Aff. ¶ 8, Exhs. "E" and "F"). LBCDE was formed pursuant to federal law under Section 17 of the IRA. It was also incorporated as a Delaware limited liability corporation. (Clarkson Aff. ¶ 9, Exhs. "E" and "F"). The Lower Brule Tribe did this so that in the limited instance when LBCDE chose to waive its sovereign immunity (via the procedure outlined in the LBC Charter and LBCDE Operating Agreement), it would operate under the well-developed body of Delaware corporate law – which would best enable LBCDE to achieve its corporate purpose, *i.e.* raising capital for ventures intended to improve the welfare of tribal members. (Clarkson Aff. ¶ 9).

LBCDE's stated mission, like that of the Lower Brule Tribe, is to "improve the social and economic conditions of the tribal members." (Clarkson Aff. ¶ 10, Exhs. "E" and "F"). LBCDE's specific goals, which all aim to better the Lower Brule Tribe's economy and the

[1] The Lower Brule Tribe is the sole shareholder of LBC. (Clarkson Aff. ¶ 8, fn 2, Exh. "B").

financial stability of its members, are explicitly detailed in the company's Articles of Organization. (Clarkson Aff. ¶ 10, Exh. "E"). Moreover, the "Purpose of the Company," as set forth in LBCDE's Operating Agreement, is similarly intended to improve the welfare of the Lower Brule Tribe and its members. (Clarkson Aff. ¶ 11, Exh. "F").

LBCDE is governed by a Board of Directors (the "Board"), which was appointed pursuant to resolution adopted by LBC. (Clarkson Aff. ¶ 12, Exhs. "F" and "G"). The Board is comprised of eight members, six of which are members of the Lower Brule Tribe, including Boyd Gorneau (Chairman), Michael Jandreau, Darrell Middletent, John McCauley, Orville Langou, Sean Deloache. . (Clarkson Aff. ¶ 12). These six individuals also make-up the Lower Brule Tribe's Tribal Council. The remaining two Board members are Walter Hillabrant and Gavin Clarkson ("Clarkson").[2] (Clarkson Aff. ¶ 12).

In its management of LBCDE, the Board must act via majority or consent of the whole and, since six of the eight Board members make-up the Tribal Council, LBCDE is *de facto* controlled by the Tribal Council. (Clarkson Aff. ¶ 13, Exh. "F"). The Board also cannot adopt any rule or regulation inconsistent with the LBC Charter. (Clarkson Aff. ¶ 14, Exh. "F"). Further, LBCDE cannot take certain actions without LBC's approval, *i.e.* merger, dissolution, amendment of its Articles of Organization or Operating Agreement or hiring legal counsel. (Clarkson Aff. ¶ 14, Exh. "F"). Again, in this manner, LBCDE is subject to tribal control in its governance and administration.

The Lower Brule Tribe also controls the manner by which Board members can be removed, *i.e.* "the determination and process of cause for removal of any Board member shall be at the sole discretion of the Board of LBC and shall proceed under the mechanisms established

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[2] While I am not a member of the Lower Brule Tribe, I am a member of the Chocktaw Tribe. Similarly, Mr. Hillabrant is not a member of the Lower Brule Tribe, but is a Native American with a tribal affiliation.

by the [LBC Charter]".[3] (Clarkson Aff. ¶ 15, Exhs. "B" and "F"). Moreover, resignation of Board members cannot take effect until the Tribal Council is notified and accepts. (Clarkson Aff. ¶ 15, Exh. "F").

LBCDE does not own any real property and, in fact, 100 percent of the property used by LBCDE is owned by the Lower Brule Tribe LBCDE uses the Lower Brule Tribe's office facilities – its principal office is located on the Lower Brule Tribe's reservation at 187 Oyate Circle, Lower Brule, South Dakota. (Clarkson Aff. ¶ 16). In addition, it solely uses tribal resources (*i.e.* computers, Federal Express account) and participates in cost-sharing agreements with the Lower Brule Tribe. For instance, LBCDE contributes to the salary of its office administrator, Patty Gorneau, a tribal member and employee of the Lower Brule Tribe. (Clarkson Aff. ¶ 16).

LBCDE generates revenue and maintains certain bank accounts. However, those accounts are controlled by the Tribal Council in that any checks or withdrawals must be approved (and signed) by two members of LBCDE's Board, one of whom must be a member of the Tribal Council. (Clarkson Aff. ¶ 17, Exhs. "F" and "H"). Clarkson, himself, or acting with Mr. Hillabrant, cannot take any binding action on behalf of LBCDE – including the payment or transfer of LBCDE funds – without the approval and consent of the Tribal Council. (Clarkson Aff. ¶ 18, Exh. "H"). LBCDE's assets and any money in LBCDE's bank accounts thus belong to the Lower Brule Tribe. LBCDE is also subject to tribal control of its accounting activities in that it is required to make annual and quarterly reports to LBC, including budgets, funding requests, audit statements, quarterly balance sheets and profit and loss statements. (Clarkson Aff. ¶ 19, Exh. "F").

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[3] The Board of LBC acts by majority and must be made up of a majority of tribal members. (Clarkson Aff. ¶ 15, fn 4, Exh. "B").

Moreover, LBCDE's fiscal success – as well as financial detriment, *i.e.* a judgment against LBCDE – directly impacts the Lower Brule Tribe. (Clarkson Aff. ¶ 20, Exh. "F" at Arts. VIII and XI). As detailed in LBCDE's Operating Agreement, "all distributions of cash or other property shall be made to the Lower Brule Tribe, as the sole Member . . . [except] no distribution shall be declared and paid if, after the distribution is made: (1) [LBCDE] would be unable to pay its debts . . . or (2) [LBCDE's] total assets would be less than the sum or its total liabilities." (Clarkson Aff. ¶ 20, Exh. "F" at Art. XI). Thus, if LBCDE suffers a financial setback there will be a decrease in distributions made to the Lower Brule Tribe – *i.e.* if LBCDE is liable for a judgment, the monies in LBCDE's bank accounts, which would otherwise have been distributed to benefit the Lower Brule Tribe, will be paid to a judgment creditor. Stated differently, only the Lower Brule Tribe benefits from LBCDE's financial success. (Clarkson Aff. ¶ 20).

Finally, LBCDE's Charter explicitly states that it is entitled to the same sovereign immunity as the Lower Brule Tribe – and there can be no waiver of this right without approval of the Tribal Council. (Clarkson Aff. ¶ 21, Exh. "B" at Art. XVII.D and "F" at Art. VI). There was no such waiver with respect to the transaction here at issue. (Ickes Aff., ¶¶ 20-22; Clarkson Aff., ¶ 22).

The Loan and Related Relevant Agreements[4]

In order to raise much-needed capital, in or about September 2011, LBCDE began the process of selling a certain loan agreement and negotiable promissory note in the principal

[4] LBCDE has attached certain documents that are referenced but not included by the Plaintiffs in order to provide the Court with a fuller and more accurate picture of the facts and circumstances surrounding this transaction and to put the Plaintiffs' claims in their proper context. See Lore v. New York Racing Ass'n, 12 Misc. 3d 1159A, 819 N.Y.S.2d 210 (N.Y. Sup. Ct. 2006) (stating "[i]n assessing the legal sufficiency of a claim, the Court may consider. . . documents attached as an exhibit therefor or incorporated by reference . . . and even documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference"); see also Pullman Group, LLC v. Prudential Ins. Co. of Am., 288 A.D.2d 2, 3, 733 N.Y.S.2d 1, 2 (1st Dep't 2001) (relying on "the contents of the documents referenced" in the complaint to dismiss a claim). Their inclusion should not be interpreted as an intent by LBCDE to turn this 3211 motion into one for summary judgment. LBCDE's factual and legal bases for the motion to dismiss are found within the four corners of the Complaint and Exhibit "A" thereto.

amount of $22,519,683 (the "Loan"), which LBCDE had made to LBC Western Holdings, LLC ("LBC Western"). (Complaint ¶ 5). The Loan was guaranteed in the amount of $20,267,674 representing 90 percent of the principal amount and interest, (the "Guaranteed Portion") by the DOI (Complaint ¶ 6).

To effectuate the sale of the Loan, LBCDE and Eagle Private Equity, LLC ("Eagle") entered into a certain "Fee Agreement" on August 25, 2011 ("Eagle I"). Eagle was a company that represented it could assist LBCDE in monetizing the Loan into cash by identifying potential buyers, and thus in the Eagle I fee agreement, LBCDE authorized Eagle to identify buyers for the Loan. (Complaint ¶ 7; Clarkson Aff. ¶ 25, Exh. "I"). Thereafter, on September 22, 2011, in furtherance of their efforts to "monetize" the Loan, Eagle and LBCDE entered into a certain "Confidentiality & Non-Disclosure, Non-Competition, Non-Defamation, Non-Circumvention and Fee & Compensation Agreement" ("Eagle II"). The Eagle II agreement set forth certain additional terms, including the computation of compensation for Eagle's introduction of a buyer and successful sale of the Loan. (Clarkson Aff. ¶ 26; Exh. "J").

The Complaint alleges on September 13, 2011, Plaintiff ACP entered into a separate agreement with Eagle to "market" the Loan. The Complaint also alleges ACP entered into a second contract with Seaport "to assist in finding a potential buyer" for the Loan. (Complaint ¶¶ 8, 9). However, neither Plaintiff disclosed the terms of these separate contracts to Clarkson (President and CEO of LBCDE) or anyone else at LBCDE. (See generally Complaint; Clarkson Aff. ¶ 6). Thus, LBCDE was unaware that Seaport and ACP had agreed that "upon the Loan's transfer to a third-party, ACP and Seaport were to share the difference between the price paid by a third-party and the proceeds paid to [LBCDE]." (Complaint ¶ 9). Plaintiffs allege ACP was "disclosed to [LBCDE] as a direct beneficiary of any transaction involving the agreement

between [LBCDE] and Seaport..." but fail to allege how and at what point in time this disclosure was allegedly made. (Complaint ¶ 10). Nor do Plaintiffs allege that LBCDE *intended* to make ACP a beneficiary of any agreement made between LBCDE and Seaport. In fact, ACP did not have *any* contractual relationship with LBCDE – direct or otherwise. (See generally Complaint).

As 2011 was coming to a close, Eagle had not successfully identified a buyer for the Loan. As LBCDE was still in need of the capital, it decided to enter into a third agreement with Eagle on December 23, 2011. This third agreement, also called "Mutual Confidentiality & Non-Disclosure, Non-Competition, Non-Disparagement, Non-Circumvention and Fee & Compensation Agreement" ("Eagle III"), provided Eagle with an enhanced commission (now 6% instead of 5%) if Eagle could identify a buyer and close a sale of the Loan by January 30, 2012. (Clarkson Aff. ¶ 28, Exh. "K"). Notably, and because Eagle had failed to yet identify a buyer, the Eagle III agreement also contained a "non-circumvention" provision, meaning that LBCDE could not sell the Loan to a party *that had been previously identified by Eagle*. Stated differently, LBCDE was always free to sell the Loan to any party not introduced by Eagle and the Eagle III agreement made clear that LBCDE was, in fact, "offering sale of the Note [the Loan] to others." (Clarkson Aff. ¶ 29; Exh. "K," p. 3 of 5).

The Proposed Farm Credit Transaction

In January 2012, LBCDE received a document from Seaport purporting to "confirm" Seaport's intention to buy the Guaranteed Portion of the Loan and contemporaneously sell it to a buyer identified as Farm Credit Services of America, PCA ("Farm Credit"). (Complaint ¶ 13; Clarkson Aff. ¶ 30, Exh. "L"). This trade notification (dated January 20, 2012) specified that the parties were to use "best efforts" to close within "5-10 days." (Clarkson Aff. ¶ 30, Exh. "L"). However, on January 30, 2012, Seaport asked for an extension running from January 26, and

provided a revised "trade confirmation" (still dated January 20, 2012) specifying, among other conditions, "best efforts to settle in 5-10 business days after January 26, 2012." (Complaint ¶¶ 14-16, Exhibit "A" thereto). Thus, by its terms (and Seaport's request), the deadline for consummation of the proposed sale of the Loan to Farm Credit was February 9, 2012. (Clarkson Aff. ¶ 31; Complaint ¶ 16, Exh. "A" thereto). These two trade notifications (both dated January 20, 2012) are the only writings between LBCDE and Seaport concerning the attempted sale of the Loan to Farm Credit. (Clarkson Aff. ¶ 32).

Plaintiffs only attach the second document to the Complaint (as Exhibit A), and continually refer to it as a "trade confirmation."[5] The document doesn't actually confirm any "trade" however. Instead, it sets forth a host of conditions in order to close a proposed sale of the Loan to Farm Credit, and merely required the parties to the document (*i.e.* LBCDE and Seaport) to use "best efforts" to close the sale of the Loan within "5-10 days." (Clarkson Aff. ¶ 33; Complaint ¶ 16, Exh. "A" thereto). The Complaint contains no allegation that Seaport complied with any of the conditions contained in the purported "trade confirmation," including, specifically, meeting the time frame for closing the sale of the Loan with Farm Credit. (Complaint ¶ 16, Exhibit "A" thereto; and see generally Complaint). Indeed, Plaintiffs admit the sale to Seaport and Farm Credit did not close by the agreed-upon deadline or at any time thereafter. (See generally Complaint). Moreover, during this "5-10 day" period, LBCDE heard nothing further from Seaport or Farm Credit. (Clarkson Aff. ¶ 33). Additionally, and because Seaport was brought into the transaction by Eagle, the purported "trade confirmation" between

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[5] While the purported "trade confirmation" attached as Exhibit "A" to the Complaint is signed by a representative of Seaport, neither Clarkson, nor anyone else at LBCDE, ever received such a signed copy before the expiration of the "5-10" period referenced therein. In fact, LBCDE did not see a signed copy of the purported "trade confirmation" until it received the instant Complaint. (Clarkson Aff. ¶ 31, fn 5).

LBCDE and Seaport did not contain any provision for compensation to either Seaport or ACP upon completion of any purported sale. (Complaint ¶ 14, Exhibit "A" thereto).

The gravamen of Plaintiffs' claims is that LBCDE continued its own efforts to market the Loan and ultimately sold the Loan to Great American Life Insurance Company ("GAI"). (Complaint ¶ 24). However, the definitive trade agreement with GAI was signed on or about March 19, 2012, a full forty days after the proposed Farm Credit trade agreement, which Seaport said was going to occur, had expired. (Complaint ¶ 28). Moreover, the purported "trade confirmation" upon which Seaport bases its claims did not contain any provision which required LBCDE to deal exclusively with Seaport in connection with any sale. (Complaint ¶¶ 14-16, Exhibit "A" thereto). As noted, the Eagle III agreement did contain a "non-circumvention" provision, which simply meant that LBCDE was liable to pay a fee if it sold the Loan to a party previously identified by Eagle. The party that LBCDE ultimately sol the Loan to – GAI – was not a "buyer" that had been previously identified by Eagle and there is no allegation to the contrary in the Complaint. (Clarkson Aff. ¶ 35; Exh. "K").

ARGUMENT

I.

THIS COURT LACKS SUBJECT MATTER JURISDICTION, AS SUCH, THE COMPLAINT SHOULD BE DISMISSED

A motion invoking sovereign immunity is properly brought as one to dismiss for lack of subject matter jurisdiction. Kiowa Tribe of Okla. v. Mfg. Techs., Inc, 523 U.S. 751 (1998); see Morell v. Balasubramanian, 70 N.Y.2d 297 (1987). Here, as a threshold matter, Plaintiffs' Complaint should be dismissed as LBCDE is entitled to sovereign immunity from suit in any state or federal court. It is well established that "Indian tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S.

49, 58 (1978); see Kiowa, 523 U.S. at 754 (1998); Puyallup Tribe, Inc. v. Dep't of Game of the State of Wash., 433 U.S. 165, 172-73 (1977). Tribal sovereign immunity extends to business activities of the tribe, not merely to governmental activities. Kiowa, at 760. See also, Am. Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091, 1100 (9th Cir. 2002). And it exists for commercial activity whether it occurs on *or off* the reservation. Kiowa, at 754.

When the tribe establishes an entity to conduct certain business activities, "the entity is immune if it functions as an arm of the tribe." See, e.g., Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 978 (9th Cir. 2006) (Blackfeet Tribe's sovereign immunity extends to Blackfeet Housing Authority); Redding Rancheria v. Super. Ct., 88 Cal. App. 4th 384, 388-89, (2001) (off-reservation casino owned and operated by tribe was arm of the tribe, and entitled to sovereign immunity). The question is not whether the activity may be characterized as a business, which is irrelevant under Kiowa, "but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. Cal. 2006).

As shown below, LBCDE is, without more, entitled to sovereign immunity because it was formed as a wholly-owned subsidiary of LBC, a federally-chartered Section 17 corporation. However, and even if the LBC Charter were ignored, the formation, purpose and operations of LBCDE makes clear that it is an arm of the Lower Brule Sioux Tribe and thus entitled to sovereign immunity.

A. LBCDE, Formed Pursuant to the Terms of a Federal Charter Granted to LBC Under Section 17 of the IRA, is Entitled to Sovereign Immunity

Under Section 17 of the IRA, "[t]he Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe." A Section 17 corporation is, as a matter of law, an "arm of the tribe." Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d

917, 920-921 (6th Cir. Tenn. 2009) ("the language of [§ 477] itself-by calling the entity an 'incorporated tribe'—suggests that the entity is an arm of the tribe"); Bales v. Chickasaw Nation Indus., 606 F. Supp. 2d 1299, 1304-1306 (D. N.M. 2009) (deciding that solely by virtue of status as § 503 tribal corporation (which mirrors § 477) entity enjoyed sovereign immunity as arm of tribe unless expressly waived in charter; and distinguishing cases that did not deal with § 503 or § 477 corporations thereby requiring application of "subordinate economic organization test"); Sanchez v. Santa Ana Golf Club, Inc., 136 N.M. 682, 685, 2005 NMCA 3, 6, 104 P.3d 548, 551 (N.M. Ct. App. 2004) (stating "[c]orporations formed under Section 17 enjoy sovereign immunity"). Further, Section 17 corporations maintain the sovereign immunity held by the tribe itself, which is only waived if done so expressly by the corporation. Memphis Biofuels, LLC, 585 F.3d at 920-921.

1. **The Court Must Give Deference to the BIA and Enforce the LBC Charter According to its Terms**

"Generally a court should accord great weight to the construction of a statute by an agency responsible for its administration." Roberson v. Confederated Tribes of the Warm Springs Reservation of Or., 1980 U.S. Dist. LEXIS 9991, *5; 103 L.R.R.M. 2749 (D. Or. 1980) (*citing* California v. United States, 438 U.S. 645, 676 (1978)). The IRA states, in pertinent part:

> The Secretary of the Interior may . . . issue a charter of incorporation to such tribe . . . Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property . . . *and such further powers as may be incidental to the conduct of corporate business, not inconsistent with the law.*

Id., (*citing* 25 U.S.C. § 477) (emphasis added) (hereinafter "Section 17").

Further, in discussing the authority conferred to the BIA by Section 17 – and the congressional purpose of the statute – the Solicitor of the DOI opined:

> . . . Congress has, by Section 17, empowered the Secretary to charter corporations having "far-reaching powers with respect to the conduct of business activities," including the making of contracts subject only to the limitations by such section and by its charter. . . the purpose of Section 17 was to authorize the Secretary, in his discretion, to grant any or all powers incidental to the conduct of business which a corporation can legally exercise. . .

(Ickes Aff. ¶ 16, Exh. "D" at p. 1846, Separability of Tribal Organizations Organized Under Secs. 16 and 17 of the IRA, Solicitor Opinion No. M-36515, Nov. 20, 1958; see also Exh. "D" at p. 1563, Contracts for the Employment of Managers of Indian Tribal Enterprises, Solicitor Opinion No. M-36119, Feb. 14, 1952).

Thus, it is clear that Congress conferred absolute authority to the Secretary of the DOI to grant whatever powers he sees fit to the tribal corporation (limited only by the confines of the law). This furthers the purpose of the IRA, namely to enable tribes to achieve economic self-sufficiency and conduct business through the "modern device" – a corporation. See Exh. "D."

Here, the Court must give effect to the LBC Charter – and, in particular, the provision conferring sovereign immunity on LBC's subsidiaries, *i.e.* LBCDE. As the Ickes Affidavit establishes, LBCDE *is* just such an arm of the Lower Brule Tribe. LBCDE's parent company, LBC, is a federal corporation organized by the Lower Brule Tribe pursuant to the IRA. (Ickes Aff. ¶ 5, Exh. "B"). Under the terms of the LBC Charter issued by the DOI on February 28, 2007, all wholly-owned subsidiaries of LBC, of which LBCDE is one, are entitled to the same rights, privileges and immunities possessed by LBC under the IRA. (Ickes Aff., ¶ 5, Exh. "B," p. 20, Art. XXI.A). Thus, as a wholly-owned subsidiary of LBC, LBCDE is a Section 17 corporation – and possesses sovereign immunity as a matter of law.

As the Ickes Affidavit also establishes, the entire LBC Charter, including Article XXI.A, was the result of extensive review and vetting by the BIA. (Ickes Aff. ¶¶ 4-17). The Lower Brule Tribe engaged in a lengthy approval process and much consideration was given to the LBC

Charter's drafting and the method by which its provisions could fulfill – and give meaning to – the aforementioned legislative intent. (Ickes Aff. ¶¶ 4-17). By approving the LBC Charter, the Secretary specifically recognized that LBC, like any other parent corporation, would have the ability to form subsidiaries with the same attributes of the parent-tribal corporation., *i.e.* immunity from suit. (Ickes Aff. ¶ 10). Indeed, if the LBC Charter did not so provide and, for instance, LBC was not entitled to grant its subsidiaries the same benefits to which it is entitled, the intended benefits of Section 17 would be lost to the Lower Brule Tribe.

Moreover, interpretation of the LBC Charter which denies LBC the right to form subsidiaries with the same benefits to which it is entitled would render meaningless the unambiguous language of a contract. A corporate charter, like that here as issue, is a contract. See Relational Investors LLC v. Sovereign Bancorp, Inc., 2006 U.S. Dist. LEXIS 9415, *17 (S.D.N.Y. 2006) (stating that "a corporate charter is a dual contract – one between the state and the corporation and its stockholders, and the other between the corporation and its stockholders"). "[T]the initial interpretation of a contract 'is a matter of law for the court to decide'. . . Included in this initial interpretation is the threshold question of whether the terms of the contract are ambiguous." Cooper v. Gottlieb, 2000 U.S. Dist. LEXIS 12936 (S.D.N.Y. Sept. 4, 2000) (*citations omitted*). Further, "[a] contract is unambiguous if it 'has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." Id.

Courts have frequently employed such principles of contract interpretation in the tribal context. See e.g., Inglish Interests, LLC v. Seminole Tribe of Florida, Inc., 2011 U.S. Dist. LEXIS 6123, *16 (M.D. Fla. 2011) (noting that the court must "[look] to the language of the charter to see if sovereign immunity has been abrogated and finding that there had been no such

waiver via the terms of the tribal corporation's charter); Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co., 491 F.Supp.2d 1056 (N.D. Okla. 2007), aff'd 546 F.3d 1288 (10th Cir. 2008) (finding the defendant-entity was arm of tribe established by express terms of tribal resolution and, as such, waiver of immunity in tribal corporate charter did not apply).

Here, Article XXI.A is indisputably *unambiguous* – it clearly mandates that LBCDE is entitled to sovereign immunity as a wholly-owned subsidiary of LBC – and, as such, LBCDE's right must be enforced. See Waldman v. Riedinger, 423 F.3d 145, 149 (2d Cir. 2005) (stating "[i]f a contract is unambiguous on its face, the parties' rights under such a contract should be determined solely by the terms expressed in the instrument itself rather than from extrinsic evidence . . . or judicial views as to what terms might be preferable). To do otherwise would render the provision meaningless, which is contrary to well-established case law. See Ronnen v. Ajax Elec. Motor Corp., 88 N.Y.2d 582, 671 N.E.2d 534, 648 N.Y.S.2d 422 (1996) (*citations omitted*).

For all of the foregoing reasons, the Court must give effect to Article XXI.A of the LBC Charter and find that LBCDE is a Section 17 corporation entitled to sovereign immunity.

B. **LBCDE Is an "Arm of the Tribe" Entitled to Sovereign Immunity**

As shown above, LBCDE is entitled to sovereign immunity by virtue of its formation as a Section 17 corporation under the clear provisions of the LBC Charter. See Section I.A, supra. However, and even in the absence of the LBC Charter, LBCDE qualifies as an "arm of the tribe" under the factors enumerated in Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc., 86 N.Y.2d 553, 559, 658 NE.D.2d 989, 992, 635 N.Y.S.2d 116, 119 (1995). Indeed, as detailed below, virtually every one of the "Ransom" factors for determining whether a corporate entity is an arm of a tribal entity weighs heavily in favor of finding that LBCDE is an arm of the Lower

Brule Tribe. See Ransom, 86 N.Y.2d at 559; Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co., Inc., 2005 Conn. Super. LEXIS 3295, *9 (Sup. Ct. 2005) (citing Ransom). Specifically:

(1) ***Whether the entity is organized under the tribe's laws or constitution rather than federal law***;

LBCDE was formed by resolution duly adopted by the LBC board of directors under a federal charter, *i.e.* the LBC Charter, which was granted to the Lower Brule Tribe pursuant to Section 17 of the IRA. (Ickes Aff. ¶ 18; Clarkson Aff. ¶¶ 5, 9, Exhs. "B," "E" and "F"). The LBC Charter, upon approval by the Secretary of the DOI, was ratified by the Tribal Council – and is in all respects consistent with the Lower Brule Tribe's laws and constitution. (Ickes Aff. ¶ 17, Exh. "B").

(2) ***Whether the organization's purposes are similar to or serve those of the tribal government***;

LBCDE's stated mission, goals and purpose exclusively serve the Tribal government, *i.e.* to "improve the social and economic conditions of the tribal members" and "create and stimulate the economy of the Tribe and . . . generate surpluses to promote growth and continuity . . . for distribution to the tribal government" (Clarkson Aff. ¶¶ 10-11, Exhs. "E" and "F").

(3) ***Whether the organization's governing body is comprised mainly of tribal officials***;

LBCDE's Board is almost identical to that of the Tribal Council. The Board is comprised of eight members, six of which are members of the Lower Brule Tribe – and make-up the Tribal Council – Boyd Gorneau (Chairman), Michael Jandreau, Darrell Middletent, John McCauley, Orville Langou and Sean Deloache. (Clarkson Aff. ¶ 12, Exhs. "F" and "G").

(4) ***Whether the tribe has legal title or ownership of property used by the organization***;

The Lower Brule Tribe owns *all* property and business resources used by LBCDE (Clarkson Aff. ¶ 16). LBCDE does not own any real property and, in fact, uses the Lower Brule Tribe's office facilities and other tribal resources (*i.e.* computers, Federal Express account) and participates in cost-sharing agreements with the Lower Brule Tribe. (Clarkson Aff. ¶ 16).

(5) ***Whether tribal officials exercise control over the administration or accounting activities of the organization;***

The Tribal Council exercises control over LBCDE's administration and accounting activitics – first and foremost, any action can only be taken by majority vote of the Board, which is, in effect, a majority of the Tribal Council. (Clarkson Aff. ¶ 13, Exh. "F"). Further, the Board cannot adopt any rule or regulation inconsistent with the LBC Charter and certain actions explicitly require LBC's approval. (Clarkson Aff. ¶ 14, Exh. "F"). Moreover, signatory authority for bank accounts lies with the Tribal Council, and the Board is charged with making annual and quarterly reports to LBC (Clarkson Aff. ¶¶ 17-19, Exhs. "F" and "H");

(6) ***Whether the tribe's governing body has power to dismiss members of the organization's governing body***; and

The Tribal Council has the power to dismiss members of the LBCDE Board, indeed it controls the process (Clarkson Aff. ¶ 15, Exhs. "B" and "F"). Moreover, resignation of Board members cannot take effect until the Tribal Council is notified and accepts such resignation. (Clarkson Aff. ¶ 15, Exh. "F").

(7) ***Whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the sub-entity has the power to bind or obligate the funds of the tribe.***

With respect to this final factor, LBCDE's Operating Agreement makes clear that all cash distributions belong to the Lower Brule Tribe. (Clarkson Aff. ¶ 20, Exh. "F"). If a judgment is entered against LBCDE, the payment of any monies in satisfaction of that judgment from LBCDE's bank account would directly impact the Lower Brule Tribe's fiscal resources. This is because the monies in LBCDE's bank accounts, which would otherwise have been distributed to benefit the Lower Brule Tribe, will be paid to a judgment creditor. (Clarkson Aff. ¶ 20).

Stated differently, only the Lower Brule Tribe benefits from LBCDE's financial success – and this is precisely what courts have held supports a finding that the corporation is entitled to sovereign immunity. See e.g. Breakthrough Mgmnt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1195 (10th Cir. 2010) (reversing lower court and finding entitlement to sovereign immunity based on multi-factor analysis where evidence revealed "one hundred percent of Casino's revenue goes to the Authority and then to the [t]ribe . . . [thus] any reduction in the Casino's revenue that could result from an adverse judgment against it would therefore reduce the [t]ribe's income); Wright v. Colville Tribal Enterprise Corp., 159 Wn.2d 108, 124, 147 P.3d 1275, 1284 (2006) (Madsen, J., concurring) (finding corporation protected by sovereign immunity and stating despite corporate status, "any liability imposed on the corporation could still affect the tribe's finances . . . [because] 25 percent of [the corporation's] net income is distributed to the tribe [and therefore] [a]nything . . . that reduces [this] net income reduces the tribe's income as well"); Seneca Niagara Falls Gaming Corp., 2005 Conn. Super. LEXIS at *13 (finding the corporation met the Ransom test and stating "[b]ecause the plaintiff is a corporation,

suit against it will not directly impact the [tribe's] fiscal revenues, [but] if a large judgment is entered against plaintiff as a result of a suit, payment of such judgment could result in the [tribe] being unable to make . . . monthly rental payments to the [tribe] thereby substantially impacting the tribe").

In sum, the multi-factor analysis clearly established that LBCDE was established by the Lower Brule Tribe and is managed by the Lower Brule Tribe for the benefit of the Lower Brule Tribe. See e.g. City of New York v. Golden Feather Smoke Shop, Inc., 2009 U.S. Dist. LEXIS 20953 (E.D.N.Y. March 16, 2009). "The common element running through these factors is that an arm of the tribe operates 'not as a mere business,' but rather as an extension of the tribe's own economic activity, 'so that its activities are properly deemed to be those of the tribe' itself." Id. at *16 (citations omitted). LBCDE so functions as an "arm of the Lower Brule Tribe" and, accordingly, must be afforded sovereign immunity.

Despite these facts, the slim reed to which Plaintiffs are expected to cling is that LBCDE was incorporated as a Delaware LLC. As Clarkson explained, the only reason that LBCDE was incorporated in Delaware was for the eminently practical reason of having an established body of corporate law when and if LBCDE determined to waive sovereign immunity. Nonetheless, the fact that LBCDE was formed under Delaware law – standing alone – is ultimately irrelevant to the question of sovereign immunity. (Clarkson Aff. ¶ 9). Indeed the corporation in Ransom was a District of Columbia corporation. See Ransom, 86 N.Y.2d at 556. The Court of Appeals ignored this fact (as this Court should here) and looked to the *balance* of factors – and in particular the fact that the goals of the tribal corporation were in accord with those of the tribe – in finding the corporation was entitled to sovereign immunity. Id., see also J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163, 1176 (S. Dist. S.D.

2012) (enforcing right to sovereign immunity despite fact that tribal corporation was incorporated under South Dakota law and a suit against it would not directly affect any particular tribe's resources where the remaining factors, including the entity's purpose in furtherance of tribal goals, established that defendant was "the sort of tribal entity entitled to sovereign immunity").

Thus, even under Ransom, LBCDE is entitled to sovereign immunity.

C. **LBCDE Has Not Waived Sovereign Immunity**

Absent congressional abrogation (which has occurred in very limited circumstances, breach of contract not being one of them, see Kiowa, 523 U.S. at 760)[6] or an *express* waiver by the tribe, "sovereign immunity deprives the federal courts of jurisdiction to entertain lawsuits against an Indian tribe, its subdivisions, or its officials acting within their official capacities." Cohen v. Winkelman, 302 Fed. Appx. 820, 823 (10th Cir. 2008). See also Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1293 (10th Cir. 2008); Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering, P. C., 476 U.S. 877, 890 (1986); Santa Clara Pueblo, 436 U.S. at 58. Nor do state courts have jurisdiction over such lawsuits. See generally Kiowa, 523 U.S. 751 (lawsuit originally brought in Oklahoma state court and dismissed for lack of subject-matter jurisdiction).

Here, the Ickes and Clarkson Affidavits make it clear that LBCDE has not waived its right to sovereign immunity in regards to any alleged business relationship with either Plaintiff. (Ickes Aff. ¶¶ 20-22; Clarkson Aff. ¶¶ 21-22). Indeed, nothing in the single, three-page trade agreement that Plaintiffs assert governs the parties' business relationship *could* act as a waiver, express or otherwise, of LBCDE's sovereign immunity. *Any* waiver must have been obtained by following the procedures set forth in Art. XVII.D of the LBC Charter and Art. VI of LBCDE's

[6] See, e.g., 25 U.S.C. § 450f(c)(3) (mandatory liability insurance); § 2710(d)(7)(A)(ii) (gaming activities).

Operating Agreement – by resolution duly adopted by LBC or LBCDE's Board of Directors and with the concurrence of the Tribal Council. (Ickes Aff. ¶ 12; Clarkson Aff. ¶ 21, Exhs. "B" and "F"). No such resolution was ever adopted (or even contemplated by the LBCDE Board). (Ickes Aff., ¶¶ 20-22; Clarkson Aff., ¶ 22). Thus, LBCDE is entitled to full immunity from suit for Plaintiffs' claims and the Complaint must be dismissed with prejudice.

II.

THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAIL TO STATE ANY VALID CAUSES OF ACTION

Even assuming that the Court has subject matter jurisdiction over LBCDE (which it does not), as shown below, the Complaint should be dismissed as Plaintiffs' allegations do not state a valid cause of action and are flatly contradicted by the unambiguous terms of the trade agreement and other documentation.

On a motion to dismiss, "[t]he sole criterion [for determination] is whether from the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Gershon v. Goldberg, 30 A.D.3d 372, 373, 817 N.Y.S.2d 322, 323 (2d Dep't 2006) (internal modifications omitted). The pleading is to be construed liberally, however, vague and conclusory allegations are generally insufficient to sustain a claim. See Fowler v. American Lawyer Media, Inc., 306 A.D.2d 113, 761 N.Y.S.2d 176 (1st Dep't 2003). Further, "[w]hile the allegations in the complaint are to be accepted as true . . . allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." Garber v. Bd. of Tr. of State Univ. of New York, 38 A.D.3d 833, 834, 834 N.Y.S.2d 203, 204-05 (2d Dep't 2007) (internal quotation marks and citations omitted) (affirming grant of motion to dismiss on the grounds that

the "conclusory allegations" in the complaint were refuted by the documentary evidence); see also CPLR § 3211(a)(1).

Where, as here, the material allegations in the Complaint are flatly contradicted by documentary evidence, the Court may properly dismiss the Complaint. See CPLR §§ 3211(a)(1),(5) and (7); see also Beattie v. Brown & Wood, 243 A.D. 3d 395 (1st Dep't 1997). Indeed "the court is not required to accept [such contradictory] factual allegations or legal conclusions that are unsupported in the face of undisputed facts." UBS Securities LLC v. Angioblast Sys., Inc., 35 Misc.3d 1201A (N.Y. Sup. Ct. Jan. 30, 2012) (citing Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495, 496, 815 N.Y.S.2d 547 (1st Dep't 2006). See also Gershon, 30 A.D.3d at 373, 817 N.Y.S.2d at 323 (noting that "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration."); Doria v. Masucci, 230 A.D.2d 764, 765-66, 646 N.Y.S.2d 363, 365 (2d Dep't 1996) (same).

A. **Plaintiffs Have Failed to Plead Breach of Any Enforceable Contract**

"It is axiomatic that in order to prevail on a breach of contract claim, a plaintiff must establish: (1) the existence of a binding contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) resulting damages." ALJ Capital I, L.P. v. David J. Joseph Co., 2007 N.Y. Misc. LEXIS 2806 at *9 (Sup. Ct. N.Y. Co. March 13, 2007) (citing Furia v. Furia, 116 A.D.2d 694, 695, 498 N.Y.S.2d 12, 13 (2d Dep't 1986)). See also Castrol, Inc. v. Parm Trading Co. of N.Y.C., Inc., 228 A.D.2d 633, 645 N.Y.S.2d 825 (2d Dep't 1996). As shown below, Seaport has not -- and cannot -- allege facts that satisfy the second, third or fourth elements. In fact, its breach of contract claim is belied by the Complaint's allegations, as well as the unambiguous terms of the purported "trade confirmation." (Complaint ¶¶ 33, 34).

1. **Seaport (and Other Non-Parties) Failed to Perform Conditions Precedent**

As an initial matter, although Plaintiffs refer to the document attached as Exhibit A to the Complaint as a "trade confirmation," the document, on its face, does not "confirm" any "trade."[7] The document, instead, is nothing more than a proposed transaction (sale of the Loan) that was subject to a host of conditions being met by a host of different parties (not just LBCDE and Seaport). Specifically, the document, as pre-conditions to any potential sale, required:

> 1. Mutually acceptable transfer documents among Seller [LBCDE], Buyer [Seaport] and [Farm Credit] ("Buyer's buyer"), where applicable;
>
> 2. Mutually acceptable three-way agreement between Seller, DOI and Buyer's buyer . . .;
>
> 3. Loan being current on payments and not in default;
>
> 4. All Parties provide evidence of authority to enter into transaction, reasonably acceptable to other parties;
>
> 5. All parties to use best efforts to settle in 5-10 business days after January 26, 2012. . .

(Complaint ¶ 16, Exhibit "A" thereto).

Under New York law, "no action for breach of contract lies where the party seeking to enforce the contract has failed to perform a specified condition precedent." Navilia v. Windsor Wolf Road Props. Co., 249 A.D.2d 658, 659, 671 N.Y.S.2d 184, 185-86 (3d Dep't 1998). "A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is

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[7] The purported "trade confirmation" is in reality nothing more than a notification of a potential trade that could occur upon the fulfillment of a number of conditions (most of which are not alleged to have occurred). As such, the document that Plaintiffs seek to recover on is not even a binding contract. In making this determination, the question should be asked "[does] the agreement contemplat[e] the negotiation of later agreements and [is] the consummation of those agreements a precondition to a party's performance." Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423,427, 894 N.Y.S.2d 47, 48 (1st Dep't 2010) (citing IDT Corp. v. Tyco Group, S.A.R.L., 13 N.Y.3d 209, 918 N.E.2d 913, 890 N.Y.S.2d 401 (2009)); see also Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 73 (2d Cir. 1989) (stating "[t]here is a strong presumption against finding [a] binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents"). Here, the "trade confirmation" contemplated further agreement as to transfer terms, approvals from outside parties and the execution of additional agreements. This lack of certainty as to material terms calls into question the enforceability of the purported "trade confirmation."

excused, must occur before a duty to perform a promise in the agreement arises." DBT GmbH v. J.L. Mining Co., 544 F.Supp. 2d 364, 380 (S.D.N.Y. 2008). Express conditions precedent must be literally performed. See Preferred Mortgage Brokers, Inc. v. Byfield, 282 A.D.2d 589, 723 N.Y.S.2d 230 (2d Dep't 2001). See also 2004 Bowery Partners, LLC v. E.G. West 37th LLC, 32 Misc.3d 1210A (N.Y. Sup. Ct. 2011) (stating that performance is a necessary element to a breach of contract cause of action).

Here, the sale of the Loan required more than just "best efforts" by the two parties (Seaport and LBCDE) to the trade notification. The Complaint, however, does not (and cannot) state allegations that each and every condition to the proposed sale occurred during the 5-10 day period required by the document. Specifically, Seaport makes no reference to having provided authority to enter into the transaction, nor a "mutually acceptable three-way agreement between LBCDE, Farm Credit and the DOI." Further, and although Plaintiffs allege that "mutually acceptable transfer documents" were exchanged amongst Seaport, ACP and LBCDE, (Complaint ¶ 19), they do not allege the required agreement to the transfer documents by Farm Credit. Also fatal to its claims, Seaport admits (as it must) that the sale of the Loan did not occur within the requisite time frame – by February 9, 2012 – as the DOI did not even respond to requests until March 2012. (Complaint ¶ 22). Based upon nothing more, Seaport cannot state any claim for breach of contract.

2. **Even if Seaport is Deemed to Have Performed, LBCDE Did Not Breach the Purported "Trade Confirmation" As it Expired on February 9, 2012**

Seaport baldly alleges that LBCDE breached the purported "trade confirmation" by "selling the Loan to GAI on or around March 19, 2012." (Complaint ¶ 33). However, the so-called "trade confirmation" specified the date of contract expiration at "5-10 business days after January 26, 2012" and made no provision for renewal or extension of said contract. (Complaint

¶ 16, Exhibit "A" thereto). Thus, under its unambiguous terms, the trade agreement expired on February 9, 2012. Because the contract between Seaport and LBCDE had admittedly expired by the time of sale to GAI, there can be no breach. See Goldman v. White Plains Ctr. For Nursing Care, LLC, 43 A.D.3d 251, 253, 840 N.Y.S.2d 788, 789-90 (1st Dep't 2007) (dismissing breach of contract claim where the contract expired by its own terms before the alleged breach because "where. . . the terms of an agreement are clear and unambiguous, its plain meaning should be enforced. . ."); Petrelli Assocs., Inc. v. Germano, 268 A.D.2d 513, 702 N.Y.S.2d 360 (2d Dep't 2000) (dismissing breach of contract claim where the documentary evidence indicated that contract expired); Meyer Assocs., L.P. v. Conolog Corp., 19 Misc.3d 1104A, 859 N.Y.S.2d 904 (N.Y. Sup. Ct. Mar. 5, 2008) (finding that breach of contract claim failed because, by its own terms, the contract at issue expired well before the alleged breaching activity).

3. **Seaport's Claim That LBCDE Did Not Use "Best Efforts" is Belied by Both the Terms of the Purported "Trade Confirmation" as well as the Allegations of the Complaint**

To try and salvage a claim for breach of an expired notice of intent to trade, whose multitude of conditions went unfulfilled, Seaport sets up a "straw man" – alleging that LBCDE acted in "bad faith" and that by this conduct, LBCDE did not use "best efforts" to close the Loan.

The entirety of Seaport's "bad faith" claim is contained in Paragraph 36 of the Complaint, which complains of LBCDE's:

> i) [executing the] trade confirmation with GAI despite its ongoing obligation to sell the Guaranteed Portion to Seaport; ii) [negotiating with] GAI to sell the entire Loan . . . after it signed the Trade Confirmation; iii) [failing to] disclose its ongoing negotiations regarding the sale of the Loan to GAI before or after signing the Trade Confirmation; iv) [failing to disclose] that it entered into [an agreement with GAI] . . . thereby falsely inducing Seaport to continue their performance under the Trade Confirmation; v) [making] false and misleading statements regarding its intention to settle . . . with Seaport; and vi) [abandoning] the transaction with Seaport solely because it [got] a higher price from GAI.

(Complaint ¶ 36). None of these alleged activities (even if true) can support Seaport's breach of contract claim.

First, as shown, by the time LBCDE offered the Loan for sale to GAI, the proposed trade with Seaport had already expired. Thus, as here, allegations of conduct that occurred after the proposed contract had expired are belied by the terms of the document and cannot support a claim for breach of contract. See Zurich Depository Corp. v. Iron Mountain Info. Mgmt, 61 A.D.3d 750, 751, 879 N.Y.S.2d 143, 145 (2d Dep't 2009) (affirming dismissal of breach of contract claim where allegations of conduct in breach occurred after the agreement had expired).

Second, the allegation that LBCDE had been contemporaneously talking to GAI and Seaport (and Farm Credit) about a potential sale of the Loan cannot be the basis of any "bad faith" (or lack of "best efforts") because there is nothing in the purported "trade confirmation" – or any of the Eagle-LBCDE agreements – that required LBCDE to deal exclusively with either Eagle or Seaport.[8] See e.g. UBS Secs. LLC, 35 Misc.3d at 1201A. Indeed, and because the Eagle III agreement expressly stated that it was non-exclusive, LBCDE was free to negotiate with any party concerning the sale of the Loan *at any time*.[9] (supra, pp. 13-14, Exh. "K").

Finally, the fact that LBCDE sold the Loan to GAI (after the purported trade confirmation had expired) cannot form the basis of any claim unless GAI had been previously identified as a "buyer" by Eagle and there is no such allegation in the Complaint. Here,

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[8] In the Eagle III agreement, LBCDE even confirmed that it was continuing to sell the Loan to other parties. (supra, p. 14, Exh. "E," p. 3 of 5).

[9] Seaport's allegations that LBCDE's omissions "falsely induced" it to continue performance and LBCDE otherwise made false and misleading statements is flawed. Such "bare legal conclusions are not entitled" to a presumption that they are true. See Gershon, 30 A.D.3d at 373; UBS Secs. LLC, 35 Misc.3d at 1201A (". . . bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true on a motion to dismiss for legal insufficiency"). Nowhere in the Complaint are there substantive factual allegations concerning falsity or under-handedness by LBCDE. As such, these allegations should be disregarded.

LBCDE's alleged decision to "abandon" the transaction with Seaport for a more favorable deal with GAI was a permissible business decision – not a breach of a contractual duty. See e.g. Taylor-Warner Corp. v. Minskoff, 167 A.D.2d 382, 561, 561, N.Y.S.2d 797, 799 (2d Dep't 1990) (finding defendant was not in breach of contract and "did not act in bad faith" when it terminated land-sale agreement and sold to another party after plaintiff was unable to secure financing for project); Abrasive-Tool Corp. v. Cystic Fibrosis Foundation, 1991 U.S. Dist. LEXIS 7198, *10-11 (W.D.N.Y. May 6, 1991) (finding there was no breach and that termination of requirements contract in order to channel goods in an "economically superior" manner was a valid business judgment and "in good faith").

4. **Seaport Cannot Claim Any Damages as a Result of LBCDE's Alleged Breach**

Finally, Seaport's conclusory assertion that "by reason of [LBCDE's] breach, [it] has been damaged in an amount to be determined" is insufficient to plead the damages element of its breach of contract claim. (Complaint ¶ 38). "In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint. . . [t]he pleadings must set forth facts showing the damage upon which the action is based." Gordon v. Dino De Laurentiis Corp., 141 A.D.2d 435, 436, 529 N.Y.S. 2d 777, 779 (1st Dep't 1988) (dismissing breach of contract claim "contain[ing] only boilerplate allegations of damage"); Fowler v. Am. Lawyer Media Co., 306 A.D.2d 113, 113, 761 N.Y.S.2d 176, 177 (1st Dep't 2003) (affirming dismissal of breach of contract claim because "even if there were allegations sufficient to show [an enforceable contract], the complaint still fails as it lacks allegations showing any damages").

Here, however, Seaport's claim for damages fails for an even more fundamental reason – Seaport cannot allege that it was damaged by any alleged breach on the part of LBCDE. Indeed,

as shown, the purported "trade confirmation" includes no provision for commission or compensation of any kind to be paid by LBCDE to Seaport. Seaport's claim, if any, for damages appears to be derivative of damages, if any, suffered by Eagle. Because none of the agreements with Eagle and LBCDE are at issue in this lawsuit, Seaport's breach of contract claim should be dismissed. See e.g. Lexington 360 Assocs. v. First U. Nat'l Bank of N.C., 234 A.D.2d 187, 651 N.Y.S.2d 490 (1st Dep't 1996) ("[i]n the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint.").

B. **Plaintiffs Cannot Sustain Their Claim for Unjust Enrichment**

To state a cause of action for unjust enrichment, a plaintiff must allege all of the following: "1) the performance of the services in good faith, 2) acceptance of the services by the person to whom they are rendered, 3) an expectation of compensation therefor, and 4) the reasonable value of the services." Blue Rock Props, LLC v. Mann, 2011 N.Y. Misc. LEXIS 1249 (N.Y. Sup. Ct. Mar. 24, 2011) (citations omitted). Each element must be plead – indeed, in order to invoke the equitable powers of the Court, "[c]ritical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust." McGrath v. Hilding, 41 N.Y.2d 625, 629 (1977). Plaintiffs have failed to plead that any alleged enrichment to LBCDE was unjust.

"It is not enough that the defendant received a benefit from the activities of the plaintiff." Kagan v. K-Tel Entertainment, Inc., 568 N.Y.S. 2d 756, 757 (1st Dep't 1991); Graystone Material, Inc. v. Pyramid Chaplain Co., 604 N.Y.S. 2d 295, 296 (3d Dep't 1993) ("[t]hat defendant knowingly accepted the benefits of plaintiff's labor, without more, does not render it liable to plaintiff"). Rather, to state a cause of action for unjust enrichment, a plaintiff must show that he performed services "*for the defendant* ... for which plaintiff can reasonably expect

compensation. . . It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery." Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103, 108, 744 N.Y.S.2d 384, 389 (1st Dep't 2002); Heller v. Kurz, 228 A.D.2d 263, 265, 643 N.Y.S. 2d 580, 582 (1st Dep't 1996) (same); USA Bridge Constr. Co. v. Amtrak, No. 98-CV-7713 (JG), 1999 U.S. Dist. LEXIS 20822, at *11 (S.D.N.Y. Aug. 30, 1999) (no cause of action for unjust enrichment will lie "[a]bsent evidence that [defendant] consented to pay, or by its actions assumed the obligation to pay, for [plaintiff's] performance").

Here, neither Seaport nor ACP can demonstrate that it performed activities for *LBCDE* for which it can "reasonably expect compensation." By the Complaint's allegations, ACP contracted first with Eagle and then with Seaport to market the Loan. Seaport thereafter identified Farm Credit "in reliance on its agreement with ACP." (Complaint ¶¶ 8, 9, 11).

Thus, at best, the Complaint alleges that Plaintiffs acted *at Eagle's behest* and, accordingly, must look to Eagle for compensation. See e.g. Pine Street Assocs., L.P. v. Hicks, 35 Misc.3d 1213A (N.Y. Sup. Ct. May 24, 2012) (dismissing unjust enrichment claim which was based on agreement between plaintiff and a non-party and finding that plaintiff need look to said non-party for relief). The Complaint contains no facts to show that Plaintiffs had any reasonable expectation of compensation from LBCDE or any other basis for finding that LBCDE was unjustly enriched. Indeed, the purported "trade confirmation" makes no provision for payment of any kind to either Seaport or ACP. (*supra*, pp. 4-5, 7, Exhs. "C," "D" and "E"). (Complaint ¶ 9). Further, the Complaint is devoid of any allegation that LBCDE profited from Plaintiffs alleged services – indeed the sale to Farm Credit did not close.

Finally, the existence of a "valid and enforceable contract governing a particular subject matter. . . precludes recovery in quasi contract." Blue Rock, 2011 N.Y. Misc. LEXIS at *8. The purported "trade confirmation" (if it is a valid contract) is the only document that governs Plaintiffs' claims for any amount allegedly lost as a result of LBCDE's sale of the Loan to GAI. For this reason as well, Plaintiffs should not be permitted to proceed on an unjust enrichment (*i.e.* quasi contract) theory against LBCDE. See e.g. Samiento v. World Yacht, Inc., 10 N.Y.3d 70, 81, 854 N.Y.S.2d 83, 89 (2008) (upholding dismissal of unjust enrichment cause of action where plaintiffs had an adequate remedy at law); Hoeffner v. Orrick, Herrington & Sutcliffe LLP, 61 A.D.3d 614, 615, 878 N.Y.S.2d 717, 719 (1st Dep't 2009) (affirming the dismissal of such a claim when it is "duplicative of [the] breach of contract claim, since [plaintiff] alleges no duty owed him by defendants independent of the contract").

Accordingly, the unjust enrichment claim should be dismissed.

C. **ACP's Third-Party Beneficiary Claim Fails as a Matter of Law**

ACP contends that it is entitled to recover as a third-party beneficiary of the purported "trade confirmation." "A beneficiary's rights, like the rights of the promisee, are absolutely defined by the terms of the contract. To the same extent that third parties can take advantage of beneficial and favorable terms of the contract, they are also bound by any inadequacies of the contract" Diamond Lease [USA], Inc. v Travelers Indem. Co., 6 Misc. 3d 1013(A), 800 N.Y.S.2d 345 (N.Y. Sup Ct, 2004). Therefore, ACP, as an alleged third-party beneficiary of the trade agreement is bound by all of its terms and, further, to the extent there has not been a breach of the agreement (as here, *see supra* pp. 11-18), then its claim would fail as well. See Egnotovich v. Katten Muchin Zavis & Roseman LLP, 18 Misc.3d 1120A, 856 N.Y.S.2d 497 (N.Y. Sup. Ct. 2008).

Moreover, in order to recover as the third-party beneficiary of the trade agreement, ACP must establish that it was the specific intent of the contracting parties, *i.e.* Seaport and LBCDE, to confer a benefit on ACP. See Sclafani v. Romano, 2012 N.Y. Misc. LEXIS 466 (N.Y. Sup. Ct. Jan. 23, 2012). A third-party who is only an incidental beneficiary to the contract may not sue to enforce the contract. See Amin Realty, LLC v. K&R Construction Corp., 306 AD2d 230, 762 N.Y.S.2d 92 (2d Dep't. 2003). ACP has not alleged any such intent. Indeed the only allegation is that "ACP was disclosed to [LBCDE] as a direct, intended beneficiary of the transaction involving Seaport under the [Trade Confirmation]." (Complaint ¶¶ 10, 43). There is no claim that LBCDE intended to bestow a benefit to ACP. Plaintiff's own allegations therefore do not support a third party beneficiary claim for breach of contract.

Accordingly, as a matter of law, ACP's third-party beneficiary claim should be dismissed.

CONCLUSION

For the reasons stated herein and in the accompanying affidavits, Defendant respectfully asks the Court to grant this motion and dismiss the Complaint in its entirety.

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