SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: [redacted] **J.S.C.** **PART** 3
Justice

Index Number : 651492/2012
SEAPORT LOAN PRODUCTS, LLC
vs
LOWER BRULE COMMUNITY
Sequence Number : 004
DISMISS ACTION

INDEX NO. 651492/2012
MOTION DATE 7/29/13
MOTION SEQ. NO. 004

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2

Replying Affidavits _____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-22-13

Eileen Branston, J.S.C.

HON. EILEEN BRANSTEN
J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

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

Plaintiffs,

-against-

LOWER BRULE COMMUNITY DEVELOPMENT
ENTERPRISE LLC,

Defendant.

----------X

Index No. 651492/12
Motion Date: 7/29/13
Motion Seq. No.: 004

BRANSTEN, J.:

Defendant Lower Brule Community Development Enterprises LLC ("LBCDE" or "defendant") moves to dismiss the complaint, pursuant to CPLR 3211(a)(2), arguing that the court lacks subject matter jurisdiction based on the doctrine of tribal sovereign immunity. Defendant also seeks dismissal, pursuant to CPLR 3211(a)(1) and (7), based on documentary evidence and failure to state a claim.

I. FACTUAL ALLEGATIONS & PROCEDURAL HISTORY

On October 20, 2010, LBCDE loaned its affiliate, LBC Western Holdings, LLC ("Western Holdings"), the sum of $22,519,638 (the "Loan"). (Compl. ¶ 5.) The United States Department of the Interior ("DOI") guaranteed 90% of the Loan's principal and interest. *Id.* ¶ 6. In the Fall 2011, LBCDE entered into an agreement with non-party Eagle Private Equity, LLC's ("Eagle") to seek a buyer for the Loan. *Id.* ¶ 7. On September 13, 2011, Eagle allegedly entered into a written agreement with plaintiff Aldwych Capital

Partners, LLC ("ACP") to market the Loan and to introduce buyers to Eagle and LBCDE. *Id.* ¶ 8. The complaint alleges that ACP, in turn, entered into an agreement with plaintiff Seaport Loan Products, LLC ("Seaport") "to assist in finding a potential buyer of the Loan." *Id.* ¶ 9. The complaint also states that "ACP was disclosed to Defendant as a direct beneficiary of any transaction involving the agreement between Defendant and Seaport, and ACP worked directly with Defendant to sell the Loan." *Id.* ¶ 10.

In September 2011, Seaport located a buyer for the guaranteed portion of the Loan. (Compl. ¶ 11.) The buyer was Farm Credit Services of America, PCA ("Farm Credit"). *Id.* The complaint alleges that, on January 20, 2012, Seaport and LBCDE reached an agreement by which LBCDE agreed to sell Seaport/Farm Credit the guaranteed portion of the Loan. *Id.* ¶¶ 13-14. Seaport and LBCDE "memorialized the material terms of their agreement in a trade confirmation dated January 20, 2012." *Id.* ¶ 14. Pursuant to the trade confirmation, the parties agreed to use their best efforts to complete the close or "settle in 5-10 business days after January 26, 2012." *Id.* ¶ 16. The complaint alleges that, although both Seaport and ACP worked diligently to close the transaction, LBCDE was and had been secretly working to sell the same loan interest to another buyer, *id.* ¶¶ 17-23, 27, and, on March 19, 2012, LBCDE announced that it had sold the entire Loan to Great American Insurance Group at a higher price. *Id.* ¶¶ 24-26.

On May 12, 2012, Seaport and ACP commenced the instant action against LBCDE, asserting causes of action for breach of contract and unjust enrichment. On July 17, 2012,

LBCDE moved to dismiss the complaint on the ground, inter alia, that LBCDE enjoys tribal sovereign immunity as a wholly-owned subsidiary of a Section 17 corporation under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461, *et seq.* LBCDE is a wholly-owned subsidiary of the Lower Brule Corporation ("LBC"), and was formed in September 2009, as a Delaware for-profit limited liability company. LBCDE's sole member is LBC, and LBC, in turn, is wholly-owned by the Lower Brule Sioux Tribe (the "Tribe"), a federally-recognized Indian tribe with between 2500 and 3500 members. In response to the motion, plaintiffs moved, by order to show cause, for jurisdictional discovery, pursuant to CPLR 3211(d), on the issue of LBCDE's claimed immunity from suit.

On December 14, 2012, the court granted plaintiffs' motion, in part, ordering limited document production and the deposition of Gavin Clarkson, LBCDE's chief executive officer and president, on the question of jurisdiction ("Decision"). The court rejected LBCDE's contention that it is entitled to sovereign immunity as a matter of law under Section 17 of the IRA, because LBCDE was not incorporated under the IRA, but under Delaware state law. LBCDE has also argued that it was immune from suit, because its parent company, LBC, was incorporated under Section 17 of the IRA and LBC's "Federal Charter of Incorporation" ("LBC's Charter") provides that each wholly-owned subsidiary of LBC "is a federal corporation within the meaning of 25 USC § 477, . . . and possesses all of the rights, privileges and immunities possessed by such corporations, including sovereign immunity."

(Decision at 6, quoting Section XXI.A of LBC's Charter). The court also rejected this argument, on the grounds that the defendant had not furnished any legal authority permitting LBC to bestow its status as a Section 17 corporation upon its subsidiaries nor established that it may simultaneously incorporate under both Section 17 and under Delaware law. *Id.* Thus, the court concluded that the question of whether LBCDE is entitled to sovereign immunity as an arm of the Tribe must be analyzed under the multi-factor test enunciated by the Court of Appeals in *Matter of Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, 86 N.Y.2d 553, 559 (1995) ("*Ransom*").

Following the deposition of Clarkson on February 17, 2013 and the production of documents by LBCDE, the latter withdrew its prior motion to dismiss, and filed the present motion to dismiss.

II. DISCUSSION

A. *Tribal Sovereign Immunity*

Tribal businesses "have no inherent immunity of their own," and enjoy immunity only to the extent the tribe's immunity is extended to them. *Am. Prop. Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 500 (Cal. Ct. App. 2012). As this Court previously has held, whether LBCDE enjoys the sovereign immunity of the Tribe requires a comprehensive, fact-based analysis utilizing the factors set forth in *Ransom* to determine whether the company functions as an arm of the Tribe. *See* Decision at 4. These factors are whether:

> the entity is organized under the tribe's laws or constitution rather than Federal law; the organization's purposes are similar to or serve those of the tribal government; the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the subentity has the power to bind or obligate the funds of the tribe

Ransom, 86 N.Y.2d at 559 (internal citations and quotations omitted). "'[T]he burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe.'" *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 109 A.D.3d 80, 87 (4th Dep't 2013) (quoting *Gristede's Foods, Inc. v Unkechuage Nation*, 660 F. Supp. 2d 442, 466 (E.D.N.Y. 2009)).

In support of its current motion to dismiss, LBCDE again submits an affidavit from Rodney Dennis Ickes, who claims to be the authorized representative of the Tribe for all of its federal corporations formed pursuant to the IRA, and their subsidiaries. (Affidavit of Rodney Dennis Ickes ("Ickes Aff.") ¶ 1.) Both Ickes and Clarkson, who also submits a new affidavit in support of defendant's motion to dismiss, aver that although LBCDE is a Delaware limited liability company, it was formed pursuant to Section 17 of the IRA. (Ickes Aff., ¶ 19; Affidavit of Gavin Clarkson ("Clarkson Aff.") ¶ 9.) As stated above, the court has previously rejected this argument and although LBCDE attempts to reargue the point and offer new evidence, defendant has not moved for appropriate relief under CPLR 2221.

In addition, defendant's new evidence does not justify a change in the court's ruling. Ickes' recollections of his conversations from 2005-2007 with unidentified staff of the DOI's Bureau of Indian Affairs regarding LBC's proposed charter, and LBC's right to form subsidiaries, is merely undocumented hearsay and not evidence that this federal agency has a formal opinion on whether or not a subsidiary formed, not as a separate Section 17 corporation, but as a Delaware limited liability company enjoys, as a matter of law, sovereign immunity. Indeed, the evidence before the court is that LBCDE never applied to the DOI for recognition as a Section 17 corporation. *See* Affirmation of Ronald G. Blum ("Blum Affirm."), Ex. 4 at 32 (Clarkson deposition transcript or "Clarkson Tr."). The power to confer Section 17 privileges rests exclusively with the Secretary of the Interior (25 U.S.C § 477), and not with LBC.

Turning to the *Ransom* factors, plaintiffs do not dispute that at least three of those factors support a finding of sovereign immunity. First, LBCDE's eight-member board of directors is comprised mainly of tribal officials, and only Clarkson and Walter Hillabrant are not members of the Tribe. *See* Clarkson Tr. at 20-21, 49-50; Clarkson Aff., Exs. G & H; Blum Affirm., Ex. 14. Second, the Tribal Council has the power to dismiss members of LBCDE's board. Third, LBCDE's bank accounts are controlled by the Tribal Council in that any checks and withdrawals must be approved (and signed) by two members of LBCDE's board, one of whom must be a member of the Tribal Council. *See* Clarkson Tr. at 273;

Clarkson Aff. ¶ 17 & Ex. H. Nevertheless, all of the remaining *Ransom* factors suggest that LBCDE operates as an independent for-profit enterprise.

The first *Ransom* factor is whether "the entity is organized under the tribe's law or constitution rather than Federal law." *Ransom*, 86 N.Y.2d at 559. "Essentially, tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe and created under its own tribal laws." *Wright v. Colville Tribal Entm't. Corp.*, 159 Wash. 2d 108, 113 (2006), *cert. dismissed* 550 US 931 (2007). LBCDE was formed in 2009 by its parent company, LBC, itself a federally-chartered company, pursuant to Delaware's Limited Liability Company Act, Del. Code 6 § 18-101 *et seq*. These factors cut decisively in favor of a finding that LBCDE is not an arm of the Tribe. S*ee Somerlott v. Cherokee Nation Distrib., Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012) (["a separate legal entity organized under the laws of another sovereign, Oklahoma, cannot share in the Nation's immunity from suit"); *Am. Prop. Mgmt.*, 206 Cal. App. 4th at 502 (defendant's status as a California limited liability company weighs heavily against a finding of sovereign immunity).

The second factor focuses on "whether the organization's purposes are similar to or serve those of the tribal government." Plaintiffs allege that LBCDE's principal activities since 2009 appear to involve investing in a failed attempt to enter the New York financial services industry. While the financial activities of LBCDE can only be described as murky, several undisputed facts are apparent. LBCDE was created the same day that its affiliate,

Western Holdings, acquired Westrock Group, Inc., a New York-based financial services holding company with independent broker-dealer, asset management and wealth management subsidiaries ("Westrock"). *See* Blum Affirm. Exs. 2 & 10. Notably, the resolution of LBC's board authorizing the creation of LBCDE was signed in New York. *See* Blum Affirm. Ex. 2 at 000004. Although it was announced at the time of the acquisition that Westrock would be creating a "Tribal Services Advisory Group," headed by Clarkson, *id.* Ex. 2, Clarkson testified that this was "an aspirational sentence" and that "there wasn't any tribal finance business to direct." (Clarkson Tr. at 149-151). In October 2010, LBCDE made the $22.5 million Loan to Western Holdings in an attempt to rescue the struggling Westrock. *Id.* at 174. However, the Loan was not a cash disbursement to Western Holdings, merely a restructuring of Western Holdings' subsidiaries' (i.e., Westrock's) debt, with LBCDE issuing three classes of its own notes totaling $22,678,625 in exchange for Western Holdings' note. *See* Blum Affirm. Ex. 7 at 000051; *id.* Ex. 14; Clarkson Tr. at 152-157, 162-165, 191-194. But Westrock ended up in bankruptcy, and Western Holdings is a major unsecured creditor. *See* Clarkson Tr. at 119, 133, 141-145, 151-152, 164-165, 202. When the Loan was sold to Great American Insurance Group in March 2012 for slightly over $20 million, it appears that the Loan proceeds were disbursed primarily to redeem the $12,803,803 Class A notes, some of which were held by members of LBCDE's board, and

to pay various other fees and expenses, including legal and consulting fees to Ickes and Clarkson. *See* Blum Affirm. Ex. 8 at 000060-061; Clarkson Tr. at 211-212, 220-223.

LBCDE's other activities do not appear to "serve those of the tribal government." *Ransom*, 86 N.Y.2d at 559. Other than loaning money to affiliated companies, such as Western Holdings or LBC and earning interest on those loans, LBCDE's only other apparent business activity is earning fees for transferring federal "New Market Tax Credits" to companies unrelated to the Tribe. *See* Blum Affirm. Ex. 9; Clarkson Tr. at 257-258. Although LBCDE has been in existence since September 2009 and one of its stated missions or goals, as set forth in its Articles of Organization, is to make loans to individual members of the tribe, *see* Blum Affirm. Ex. 2, Clarkson testified that, as of February 2013, LBCDE had yet to get its micro-loan program underway. *See* Clarkson Tr. at 20, 51, 87, 114, 262. Indeed, LBCDE's contact with the Tribe seems rather limited, since it has no dedicated office space on the Tribe's reservation, no full-time employees and no website. *See* Clarkson Tr. at 83-87, 209. Its presence on the Lower Brule reservation is limited to paying a monthly fee to the Tribe for the part-time services of a tribal employee at the office of the Tribal Council and the use of its office facilities. *See* Clarkson Aff. ¶ 16; Clarkson Tr. 83-86. LBCDE's for-profit activities are vastly different from the not-for-profit fund at issue in *Ransom*, which had been established "to provide educational, health care, social and historical services to the residents of the St. Regis Mohawk Reservation." *Ransom*, 86 N.Y.2d at 557.

LBCDE's arguments ignore its actual activities, focusing instead on boilerplate language in its Articles of Organization and Operating Agreement that describe the economic benefits that LBCDE may provide to the Tribe. However, in reality, the evidence before the court is that a single cash distribution of $500,000 was made to LBC in 2012[1], and no proof is offered that this money made its way back to the 2500+ members of the Tribe. *See* Blum Affirm. Ex. 8 at 000057; Clarkson Tr. at 243. LBCDE argues that any adverse judgment will reduce distributions and consequently lower the Tribe's income, citing such cases as *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort,* 629 F.3d 1173 (10th Cir. 2010), *cert dismissed* 132 S.Ct 62 (2011). However, in that case, a gaming casino operated on Indian land was required to make monthly payments to the tribe of up to $1 million and those funds were specifically earmarked and allocated as follows: 50% for tribal programs such as education, health care, cultural preservation, child care, judicial systems, and law enforcement; 15% for tribal economic development; 10% to a tribal trust fund for the economic security of tribal families; and 25% was distributed among each eligible member of the tribe. *Breakthrough Mgmt.*, 629 F.3d at 1192-1193. When the subentity's activities are "several steps removed from the purposes of tribal government," *Sue/Perior*

[1] In 2012, LBCDE paid $327,500 in executive compensation to Clarkson and his company, Native American Capital, and $366,764 in legal, accounting and other professional fees (Blum Affirm., Ex. 8 at 000058; Clarkson Tr. at 241).

Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 109 A.D.3d at 89, a court will be hard-pressed to find that it should be entitled to the protection of tribal sovereign immunity.

The "more important" considerations are "whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the subentity has the power to bind or obligate the funds of the tribe." *Ransom*, 86 N.Y.2d at 559; *see also Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 109 A.D.3d at 88-89. "The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." *Ransom*, 86 N.Y.2d at 559-60. Each of these factors weigh against extending the Tribe's sovereign immunity to LBCDE, because there is no question that LBCDE, and not the Tribe, is the real party in interest in this litigation.

As a for-profit limited liability company registered to do business in New York (and not in South Dakota), LBCDE generates its own revenue and issues its own financial statements. *See* Blum Affirm. Exs. 7 and 8; Clarkson Tr. at 260. Although Clarkson claims that LBCDE is "required to make annual and quarterly reports to LBC, including budgets, funding requests, audit statements, quarterly balance sheets and profit and loss statements," *see* Clarkson Aff. ¶ 19 (citing (presumably) section 17.3 of LBCDE's Operating Agreement), he testified that LBCDE has never provided quarterly reports to LBC and has not produced annual reports for every year since 2009. *See* Clarkson Tr. 60-62. A lawsuit against

LBCDE will not impact the Tribe's fiscal resources, because LBCDE's Operating Agreement provides that LBC "shall not be liable for any debts or losses of the Company beyond its respective Capital Contribution." *See* Clarkson Aff. Ex. F, § 8.1. This comports with Delaware law. *See* Del. Code 6 § 18-303. LBC's liability for LBCDE's debts, and any potential judgment in this case, is capped at what it invested in the company – $100 and a portfolio of small consumer loans, *see* Clarkson Aff., Ex. F at 000024, 000026, many of which are "non-performing" and provide "de minimis" returns. *See* Clarkson Tr. at 233.

LBCDE argues that only the Tribe benefits from the company's fiscal success, citing section 11.2 of its Operating Agreement. Section 11.2, entitled "Distributions," provides, in pertinent part, that "[a]ll distributions of cash, or other property, shall be made to the Tribe, as the sole Member." *See* Clarkson Aff. Ex. F at 000020. However, this provision is ambiguous, since the defined terms of the Operating Agreement make clear that the sole member of LBCDE is LBC, not the Tribe. *Id.* at 000010-11. Indeed, Clarkson testified that the "Member Distribution" that LBCDE made in 2012 was to LBC. *See* Blum Affirm. Ex. 8 at 000057; Clarkson Tr. at 243. The limited discovery undertaken thus far suggests that the main benefactors of LBCDE's operations since 2009 have been the company's executive management, legal counsel, and the former note holders of Westrock.

The last *Ransom* factor is whether LBCDE "has the power to bind or obligate the funds of the tribe." *See Ransom*, 86 N.Y.2d at 559. LBC's Charter explicitly states that an

LBC subsidiary is not authorized to bind LBC, the Tribe or any other subsidiary of LBC or deal in the trust assets of the Tribe or any of its members, without "explicit written consent." *See* Clarkson Aff., Ex. B: LBC's Charter, §§ XXI.E, XXI.F.

The foregoing analysis of the *Ransom* factors points to one conclusion -- that LBCDE is an independent, state-incorporated, for-profit enterprise that has been operating principally in New York's financial services markets, with separate assets, liabilities, purposes and goals, and thus cannot be considered an arm of the Tribe entitled to share in the Tribe's immunity from suit. Defendant's motion to dismiss the complaint for lack of subject matter jurisdiction is denied.

B. *Dismissal of the Claims Pursuant to CPLR 3211(a)(1) and (7)*

LBCDE also seeks dismissal of the complaint based on documentary evidence and failure to state a claim for relief. LBCDE argues that the complaint fails to allege a breach of contract claim or any other valid claim.

Counsel for LBCDE concedes that the trade confirmation dated January 20, 2012 is a valid contract between LBCDE and Seaport, but contends that the agreement expired by its terms through no fault of LBCDE on February 9, 2012 without all six of the stated conditions having been met. *See* 7/18/13 Oral Arg. Tr. at 29-31. However, the trade confirmation does not contain an expiration date, it merely requires that "[a]ll parties use best

efforts to settle in 5-10 business days after January 26, 2012." (Compl., Ex. A.) Plaintiffs argue that this is a standard and legally enforceable loan industry requirement and merely sets forth the parties' intent to close the transaction quickly. Plaintiffs also maintain that they were ready to close the deal on April 2, 2012 when LBCDE disclosed its sale of the Loan to Great American Insurance Group.

In New York, a "best efforts" clause imposes on each party "an obligation to act with good faith in light of one's own capabilities." *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613 n.7 (2d Cir. 1979); *see also Van Valkenburgh, Nooger & Neville v. Hayden Publ'g Co.*, 30 N.Y.2d 34, 46-47 (1972); *Maestro W. Chelsea SPE LLC v. Pradera Realty Inc.*, 38 Misc.3d 522, 527-530 (Sup. Ct. N.Y. Cnty. 2012). In the court's view, a determination of whether the best efforts clause of the trade confirmation was a strict deadline or not requires parol evidence of the parties' intentions and conduct as well as industry custom. Additionally, whether the trade confirmation was breached by LBCDE's alleged bad faith abandonment of the transaction and whether Seaport suffered any monetary damages are questions of fact that cannot be resolved on a motion to dismiss.

The second cause of action alleging unjust enrichment is dismissed. "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005) (citing *State of New York v. Barclays Bank of N.Y.*, 76 N.Y.2d 533, 540 (1990)). Here, the

trade confirmation governs the subject matter of Seaport's dispute with LBCDE, and, therefore, "precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987).

In the third cause of action, ACP contends that it is entitled to recover damages as a third-party beneficiary of the trade confirmation between Seaport and LBCDE. "One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental." *Edge Mgmt. Consulting, Inc. v. Blank*, 25 A.D.3d 364, 368 (1st Dep't 2006) (citing *State of Cal. Pub. Emp. Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434-435 (2000)); *Internationale Nederlanden [U.S.] Capital Corp. v. Bankers Trust Co.*, 261 A.D.2d 117, 123 (1st Dep't 1999). Even accepting all of the factual allegations of the complaint as true, ACP was, at most, only an incidental beneficiary of the sale of the Loan to Farm Credit. ACP was never in privity with LBCDE and functioned as a mid-level broker between Eagle and Seaport. The trade confirmation makes no mention of ACP's role in the proposed transaction, and any compensation ACP claims it is owed for its due diligence work stems from its agreement with Seaport. *See* Compl. ¶ 9. Accordingly, the third cause of action is dismissed.

III. CONCLUSION and ORDER

For the reasons set forth above, it is hereby

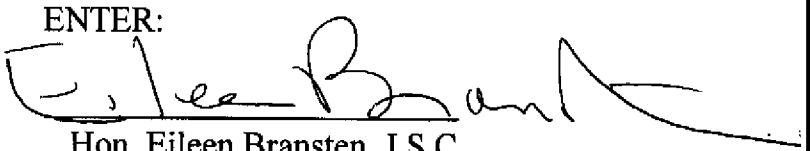
ORDERED that defendant's motion to dismiss the complaint, pursuant to CPLR 3211 (a)(2), based on lack of subject matter jurisdiction is denied; and it is further

ORDERED that defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7), is granted in part, and the second and third causes of action are dismissed; and it is further

ORDERED that defendant shall serve and file an answer to the complaint within 30 days from service of a copy of this order with notice of entry.

Dated: New York, New York
October 22, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.