

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALLEGANY CAPITAL ENTERPRISES, LLC
and
SENECA MANUFACTURING COMPANY,

Civ. No. 19-cv-160

Plaintiffs,

-v-

GRETCHEN COX,
STACY DIXON, and
JOLENE ROBLES,

Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

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Plaintiffs Allegany Capital Enterprises, LLC and Seneca Manufacturing Company (collectively, “Plaintiffs”), by counsel, for their memorandum of law in opposition to the motion to dismiss filed by Defendants, Gretchen Cox, Stacy Dixon, and Jolene Robles (collectively, “Defendants”), state:

PRELIMINARY STATEMENT

In their motion, Defendants try to deflect the Court’s attention away from the allegations against them individually by raising red herring arguments that are not relevant to the claims asserted in this action. Plaintiffs have sufficiently pleaded facts to support their tort and fraud claims against Defendants.

Defendants’ arguments all rely on two unsustainable positions: (1) the referenced contracts bar claims against the named individual Defendants, and (2) Defendants cannot be held individually liable for their actions taken because they were in New York while on business for others. These arguments fail under the law and the pleadings. First, there are no breach of contract claims being asserted in this action. The contracts are evidence of Defendants’ individual fraud and tortious conduct, but there are no breach of contract claims asserted against the Defendants (who were not individual parties to the contracts). Second, New York does not recognize the fiduciary shield doctrine, and individuals may be held individually liable for damages caused by their tortious and fraudulent acts and conduct.

ARGUMENT

I. THIS COURT SHOULD APPLY THE PROPER STANDARD OF REVIEW ON A MOTION TO DISMISS, AND REJECT DEFENDANTS' PRESENTATION OF DOCUMENTS ATTACHED TO AN ATTORNEY DECLARATION WHICH CAN CARRY NO EVIDENTIARY VALUE.

A. Standard of Review on a Motion to Dismiss

The standard of review for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is well-settled: the motions must be denied unless “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations” in the plaintiffs’ Complaint. Swierkiewicz v. Sorema NA., 534 U.S. 506, 514 (2002). In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Nicholson v Allied Interstate, LLC, 91 F. Supp. 3d 365, 368 (E.D.N.Y. 2015). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) “are generally viewed with disfavor.” Freudenberg v. E*Trade Financial Corp., 712 F. Supp. 2d 171, 178 (S.D.N.Y. 2010), and the issue is not whether plaintiffs will prevail ultimately, but whether they are entitled to offer more evidence in support of their claims. Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998).

B. This Court must reject Defendants' attorney declaration beyond the reference to the docket number of the pleading.

A motion to dismiss is decided on the face of the pleadings unless converted to a motion for summary judgment. Defendants have not asked for such conversion, and conversion would be inappropriate at this stage. Determination of Plaintiffs' claims require findings of fact. No discovery has been conducted, and the documents attached to Defendants' attorney declaration, with no personal knowledge, carry no evidentiary weight and are insufficient to establish entitlement to summary judgment. Moreover, the attorney declaration is improperly filled with mostly argument, perhaps in an attempt to work around the 25-page rule of this Court.

Importantly, as can be seen on the face of the amended complaint, there is no breach of contract claim asserted against any of the Defendants in this action. Even if this Court were to consider the contracts attached to the attorney declaration as part of this motion, which it should not, the documents do not at all bar the tort and fraud claims asserted against the individual Defendants. As set forth below, the law is clear that such claims are sustainable, the Defendants' conduct in New York establishes jurisdiction, and New York does not recognize the fiduciary shield defense, upon which Defendants' arguments rely. Plaintiffs are entitled to litigate these claims.

II. THE COURT HAS SUBJECT MATTER JURISDICTION BECAUSE THE INDIVIDUAL DEFENDANTS ARE NOT PROTECTED BY TRIBAL SOVEREIGN IMMUNITY

The United States Supreme Court recently held, in Lewis v. Clarke, that tribal sovereign immunity does not preclude lawsuits against tribal officers or employees sued in their individual capacity, notwithstanding that the individual committed the tortious actions giving rise to the suit while acting within the scope of his or her employment with an entity formed by the tribe under tribal law. 137 S. Ct. 1285, 1288 (2017). A personal capacity claim may proceed against a tribal

official if allegations indicate that the tribal official acted outside the scope of its *delegated* authority. Garcia v. Akwesasne Housing Authority, 105 F. Supp. 2d 12, 18 (N.D.N.Y. 2000) (noting that personal capacity claim may proceed against tribal official if allegations indicate that tribal official acted outside the scope of his delegated authority), *vac'd. on other grounds*, 268 F.3d 76 (2d Cir. 2001); Romanella v. Hayward, 114 F.3d 15 (2d Cir. 1997). Plaintiffs sufficiently plead that Defendants acted outside the scope of their authority. As stated in the pleadings, and admitted in Defendants' moving papers, Defendants had no authority to waive to sovereign immunity. Yet, as Plaintiffs have sufficiently pleaded, Defendants individually represented, repeatedly, that they had such authority in their positions. By Defendants' own positions, such representations were false and were made outside of their corporate or tribal authority.

The Defendants' argument relies on Long v. Barrett, which is not instructive for several reasons. 2018 WL 1617702 (D.N.J. Apr. 3, 2018). First, Plaintiffs are not requesting that the court order the Defendants to direct money from the tribe. The relief sought is against the individual Defendants, and the suit will not require action by the sovereign or disturb the sovereign's property. See Lewis v. Clarke, 137 S. Ct. 1285, 1288 (2017). Further, the Long v. Barrett court reasoned that the Defendant was immune from suit because he acted with the powers delegated to him as Director of Finance. See 2018 WL 1617702, at *5 (D.N.J. Apr. 3, 2018). Unlike the Defendant in Long v. Barrett, whose official capacity as Director of Finance provided the power to enter loan agreements, Plaintiffs sufficiently plead facts to support that the Defendants' positions did not provide the power to waive tribal sovereign immunity. DMM and the Defendants' argument at arbitration was that the Defendants, in their official capacity, were not delegated the authority to waive tribal sovereign immunity, and the arbitrator agreed. The Defendants' material misrepresentation that they could waive tribal sovereign immunity clearly

conflicts with their authority delegated by the sovereign. Because the Defendants were not authorized to waive tribal immunity, this conduct cannot be said to be on behalf of the sovereign; rather, this conduct could only be taken in their individual capacity. See id. Thus, the Defendants do not have tribal immunity because they acted manifestly beyond their authority. See Frazier v. Turning Stone Casino, 254 F. Supp. 2d 295, 309 (N.D.N.Y. 2003) (noting a tribal official is stripped of tribal immunity when he acts manifestly or palpably beyond his authority). Sovereign immunity does not bar Plaintiffs' claims against the individual Defendants.

III. DEFENDANTS HAVE NOT MET THE REQUIREMENTS OF RULE 19

A. DMM Is Not A Necessary Party Under Rule 19(a)(1)

For required joinder of a nonparty, Fed. R. Civ. P. 19(a) requires a showing that:

- (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede that person's ability to protect his interest, or (ii) leave any of the parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a)(1).

Applying the first prong of Rule 19(a), DMM's absence will not prevent the court from granting complete relief between the parties. Defendants' argument that DMM is the real party to this dispute is misplaced and is simply untrue. The United States Supreme Court has held that "[O]fficers sued in their personal capacity come to court as individuals, and the real party in interest is the individual, not the sovereign." Lewis, 137 S. Ct. at 1291 (citations omitted). Under New York's "Commission of Tort" doctrine, an officer of a corporation is personally liable for the wrongs he or she commits on the corporation's behalf, regardless of whether the corporate veil may be pierced. Capax Discovery, Inc. v. AEP RSD Inv'rs, LLC, 285 F. Supp. 3d 579, 589-

90 (W.D.N.Y. 2018) (citations omitted); Anchor v. Diaz Intermediates Corp., 2011 WL 13213549, at *4 (W.D.N.Y. Mar. 14, 2011) (citing Clark v. Pine Hill Homes, Inc., 112 A.D.2d 755 (4th Dept 1985) (defendant held individually liable because he personally supervised or participated in the negligent conduct which gave rise to plaintiff's damages)). The doctrine imposes personal liability on a corporate officer due to his or her misfeasance or malfeasance, i.e. an affirmative tortious act, regardless of whether the officer was acting pursuant to his or her corporate duties. See Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Monarch Payroll, Inc., 2016 WL 634083, at *7 (S.D.N.Y. Feb. 17, 2016) (citing Peguero v. 601 Realty Corp., 58 A.D.3d 556, 559 (1st Dept. 2009)). The injured party is generally entitled to hold both the corporation and the officer liable. FLB, LLC v. 5Linx, 821 F. Supp. 2d 548, 558 (W.D.N.Y. 2011), aff'd. sub nom. FLB, LLC v. Cellco Partnership, 536 Fed. Appx. 132 (2d Cir. 2013). Thus, Plaintiffs are entitled to bring claims against the Defendants for their tortious conduct in negotiating and executing the Agreement on behalf of DMM. While the causes of action against the Defendants arise from torts they committed while acting on DMM's behalf, any judgment against them "will not operate against the Tribe." See Lewis, 137 S. Ct. at 1291. The suit will be against the Defendants "to recover for [their] personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'" Id.

In interpreting Rule 19(a)(1), "necessary parties are only those parties whose ability to protect their interests would be impaired because of that party's absence from the litigation." MasterCard Intern. Inc. v. Visa Intern. Serv. Ass'n, Inc., 471 F.3d 377, 387 (2d Cir. 2006). Plaintiffs' claims are against the Defendants individually, not against the sovereign, and therefore, DMM is not subject to a substantial risk of inconsistent obligations. Thus, Defendants' claim that this action should be dismissed for failure to join DMM must be denied.

B. DMM is Not An Indispensable Party Under Rule 19(b)

Only if a party is ruled necessary and cannot be joined is the second part of the Rule 19 test reached, which asks “whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” Fed. R. Civ. P. 19(b). Because DMM is not a necessary party, the Court need not decide whether DMM’s absence requires dismissal under Rule 19(b). Jonesfilm v. Lion Gate Intern., 299 F.3d 134, 139 (2d Cir. 2002). (A party cannot be indispensable unless it is a “necessary party” under Rule 19(a)). Nevertheless, even if this court were to determine that DMM is a necessary party, it is nonetheless not an indispensable party, which would require that the instant action be dismissed.

Defendants have failed to establish the elements required to show that DMM is a necessary party and have additionally failed to meet their burden of showing that DMM is indispensable. See Eli Attia Architects v. Safra, 1996 WL 480721, at *8 (S.D.N.Y. 1996) (holding when a defendant moves to dismiss an action based on plaintiff’s failure to join a party, the burden is on the defendant to establish indispensability). Rule 19(b) provides following factors to be considered:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b)

Defendants overlook the fact that the individual Defendants are the real party in interest, not DMM. Because the outcome of the suit “will not require action by the sovereign or disturb

the sovereign's property," DMM will not suffer prejudice in its absence. Plaintiffs, upon proving their claims, will be able to recover complete relief from the Defendants. See Universal Reins. Co., Ltd. v. St. Paul Fire and Mar. Ins. Co., 312 F.3d 82, 88 (2d Cir. 2002) ("[D]ismissal of a claim for an inability to join additional parties is not warranted where complete relief is available from a remaining party.").

IV. THIS COURT HAS PERSONAL JURISDICTION OVER THE DEFENDANTS

A. This Court Has Jurisdiction Over Defendants Under New York's Long Arm Statute

"To determine whether it has personal jurisdiction over a non-domiciliary in a diversity action, a district court must engage in a two-step inquiry. First, the court must decide if the defendant is subject to personal jurisdiction under the law of the forum state; here, New York's long-arm statute." Zelouf Int'l Corp. v. Na El, Inc., 2014 WL 1318372, at *2 (S.D.N.Y. Mar. 28, 2014) (*citing* N.Y. C.P.L.R. § 302; Bank Brussels Lambert v. Fiddler, Gonzalez & Rodriguez, 305 F.3d 120, 124 (2d Cir. 2002)). "If it is, then the court must consider whether the exercise of that jurisdiction comports with the Due Process Clause of the Fourteenth Amendment." Id. (*citing* Bank Brussels Lambert, 305 F.3d at 124).

1. New York C.P.L.R. § 302(a)(2) provides jurisdiction over Defendants' fraudulent and tortious acts.

This Court has long-arm jurisdiction over the Defendants under C.P.L.R. §302(a)(2), which provides that a court may exercise personal jurisdiction over a non-domiciliary when that party "commits a tortious act within the state." C.P.L.R. §302(a)(2). It is well-established that individuals are subject to jurisdiction in this state when claims of "tortious actions which, if

established, would constitute common-law fraud.” CPC Int’l Inc. v. McKesson Corp., 70 N.Y.2d 268, 286-287 (1987).

Under Section 302(a)(2), fraudulent misrepresentations made in New York are sufficient to confer personal jurisdiction. See Borumand v. Assar, 192 F. Supp. 2d 45, 51 (W.D.N.Y. 2001) (holding that C.P.L.R. §302(a)(2) was satisfied where the plaintiff made a prima facie showing that, on two occasions, in New York, the defendant engaged in fraudulent conduct which was the basis of the plaintiff’s claim). Here, Plaintiffs plead facts to support its claims against the individual Defendants, including dates, conduct, and misrepresentations made at multiple meetings in New York. Taking these allegations as true, and drawing all reasonable inferences in favor of Plaintiffs, as this Court is required to do, Plaintiffs have pleaded sufficient facts to support their claims for fraud and tort against Defendants. It cannot be emphasized enough that Defendants have admitted that they did not have authority to waive sovereign immunity for DMM as they repeatedly misrepresented to Plaintiffs in so many ways at so many times.

2. Defendants admittedly acted outside their scope of authority and their actions fall within the jurisdictional purview of C.P.L.R. § 302(a)(1).

Once personal jurisdiction is established under C.P.L.R. § 302(a)(2), “[i]t is unnecessary to decide whether personal jurisdiction was also acquired under C.P.L.R. § 302(a)(1).” CPC Int’l, 70 N.Y.2d at 287. However, jurisdiction can also be found under C.P.L.R. § 302(a)(1).

A transaction of business under C.P.L.R. §302(a)(1) “does not require an exchange of money, goods or services, or the formation of a contract.” Scholastic, Inc. v. Stouffer, 2000 WL 1154252, at *4 (S.D.N.Y. Aug. 14, 2000). Rather, a non-domiciliary transacts business within the state when he or she purposefully conducts activities within the forum state, thus invoking the benefits and protections of its laws. Levisohn, Lerner, Berger & Langsam v Med. Taping Sys., Inc., 10 F. Supp. 2d 334, 339 (S.D.N.Y. 1998).

To determine whether a claim arises out of the business transacted, “[t]here need only be some ‘articulable nexus’ or ‘substantial relationship’ between the transaction and the claim asserted.” Newmont Mining Corp. v. AngloGold Ashanti Ltd., 344 F.Supp.3d 724, 741 (S.D.N.Y. 2018). As the Southern District of New York recently held, New York’s long-arm statute is triggered against the individual under a transacting business prong whether he or she was doing business individually or on behalf of an employer. Id. at 740 (“It matters not whether such transactions are on his own or his employer’s behalf, or whether the employer directed him to do so.”).

3. It is well-established that the fiduciary shield doctrine does not prevent New York from establishing long-arm jurisdiction over Defendants.

Defendants’ arguments rely on the mistaken assumption that they are not individually subject to long-arm jurisdiction because they allege they were in New York on business of their employer(s) or acting in their official capacities. This argument is unavailing because New York does not recognize the fiduciary shield doctrine. Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460 (1988). See also, LaChapelle v. Torres, 1 F.Supp.3d 163, 171 (S.D.N.Y. 2014) (“The fiduciary shield doctrine has been abolished in New York, and corporate officers who transact business or commit a tort in New York while acting on behalf of their employer are subject to personal jurisdiction in New York.”) (multiple citations omitted); Newmont Mining Corp., 344 F. Supp.3d at 740 (noting that under the rulings of New York’s Court of Appeals, the fiduciary shield doctrine has “no place – statutory or equitable – under New York law” [citations omitted]). The United States Supreme Court has also rejected the use of the fiduciary shield doctrine as a basis for attacking the constitutional validity of properly acquired long-arm jurisdiction. CPC Int’l, 70 N.Y.2d at 287 (citing Calder v. Jones, 465 U.S. 783 (1984), among others).

Here, Plaintiffs sufficiently plead that this Court has personal jurisdiction over the Defendants under Section 302(a)(1) of the New York long-arm statute based on the multiple visits and fraudulent representations made in New York. Plaintiffs allege facts that each individual defendant purposefully availed itself to the forum state. Defendants continuously misrepresented their authority to waive tribal immunity in the course of transacting business in New York. See Chloe v Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 171 (2d Cir. 2010) (citing Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757 (2d Cir.1983) (holding Section 302(a)(1) may be invoked where a defendant commits a commercial tort against a plaintiff in the course of transacting business)).

Further, Plaintiffs sufficiently plead that the claims arise from the meetings transacted in New York; thus, create a substantial nexus between the business transacted and the cause of action. See Chloe, 616 F.3d 167 (noting the nexus requirement merely requires the cause of action to “relate to” defendants’ minimum contacts with the forum). Plaintiffs’ owners made it clear to Defendants throughout these meetings that waiver of tribal sovereign immunity was a necessary term of any agreements they may reach, and the Defendants, as officers of SIRCO and DMM, repeatedly represented that SIRCO and DMM had full authority to provide a waiver of sovereign immunity and did not need authorization from the Susanville Indian Rancheria Tribal Business Council. That Defendants later took a conflicting position does not provide a basis to dismiss this action. To the contrary, such conflicting position emphasizes Defendants’ misrepresentations to Plaintiffs.

B. The Court Has Specific Jurisdiction Over Defendants Under the Federal Due Process Clause

The federal due process analysis for determining whether a court has personal jurisdiction over a party “consists of two related components: the ‘minimum contacts’ inquiry and the

‘reasonableness’ inquiry.” See Chloe, 616 F.3d at 164. “The minimum contacts test asks whether a defendant has engaged in ‘purposeful availment’ -- i.e., whether the contacts indicate the defendant’s intent to invoke the benefits and privileges of New York law.” Ge Dandong v. Pinnacle Performance Ltd., 966 F. Supp. 2d 374, 384 (S.D.N.Y. 2013) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). “The second part of the due process analysis asks ‘whether the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice’, i.e. whether it is reasonable under the circumstances of the particular case.” Porina v. Marward Shipping Co., Ltd., 521 F.3d 122, 127 (2d Cir. 2008).

Plaintiffs sufficiently plead allegations to support that this Court's assertion of personal jurisdiction over Defendants would comport with the minimum contacts requirement “for the same reasons that it satisfies New York's long-arm statute.” See Chloe, 616 F.3d 158, 171 (2d Cir. 2010); see also, United States v. Montreal Trust Co., 358 F.2d 239, 242 (2d Cir. 1966) (finding that under New York’s long-arm statute, exercising personal jurisdiction does not present constitutional concerns because it is narrower than the Due Process Clause). The Defendants sought out the Plaintiffs to assist in the development of a new tobacco manufacturing business. While seeking out the Plaintiffs to transact business, the Defendants purposefully availed themselves to New York by visiting Plaintiffs’ facilities in New York, seeking knowledge from the Plaintiffs, engaging in negotiations on multiple occasions, and representing that they had the authority to waive tribal sovereign immunity. These facts, pleaded by the Plaintiffs, demonstrate purposeful actions by the Defendants that are not the kind of “random, fortuitous, or attenuated contacts” or “unilateral activity of another party or a third person” that the purposeful availment requirement is designed to eliminate as a basis for jurisdiction. See Burger King, 471 U.S. at 475.

As to reasonableness, the court has held that dismissals based on the reasonableness inquiry should be “few and far between.” See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir. 1996) Nevertheless, the Asahi factors favor New York as the forum state. Asahi Metal Industries Company v. Superior Court of California, Solano County, 480 U.S. 102 (1987) (The Supreme Court set forth five factors that must be considered when determining the reasonableness of a particular exercise of jurisdiction.). Moreover, “where a plaintiff makes the threshold showing of the minimum contacts required for the first test, a defendant must present ‘a compelling case that the presence of some other considerations would render jurisdiction unreasonable.’” Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996) (quoting Burger King, 471 U.S. at 477).

The Defendants make the conclusory assertion that personal jurisdiction in New York would impose a severe burden on the Defendants without any factual basis. Therefore, that argument fails. Defendants’ arguments rely solely on the forum selection clauses agreed to with DMM. This argument is misplaced because the Complaint does not seek to enforce the agreement against DMM, nor does it seek to enforce provisions of any contract whatsoever against Defendants.

A reading of the allegations in the Complaint shows that this action seeks damages from the individual Defendants for their individual conduct (which has been established was outside the scope their authority) and damages caused by the Defendants’ fraudulent and tortious acts. Thus, this Court’s exercise of jurisdiction over the Defendants comports with federal due process.

VI. PLAINTIFFS ALLEGE SUFFICIENT FACTS TO SUPPORT THAT THEY JUSTIFIABLY RELIED ON THE DEFENDANTS' MISREPRESENTATIONS

Whether a plaintiff's reliance was "reasonable" depends on the entire context of the transaction and is "often a question of fact for the jury rather than a question of law for the court." STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC, 648 F.3d 68, 81 (2d Cir. 2011). Though the sophistication of the parties is one factor to consider when assessing whether reliance was reasonable, justifiable reliance involves an examination of many factors, "no single one of which is dispositive." Id. at 81. Moreover, "even sophisticated plaintiffs are not required as a matter of law to 'conduct their own audit' or 'subject [their counterparties] to detailed questioning' where they have bargained for representations of truthfulness." DDJ Mgmt., LLC v. Rhone Group LLC, 931 N.E.2d 87, 92–93 (2010).

Plaintiffs sufficiently plead that they justifiably relied on the Defendants' misrepresentations. Viewing the "entire context of the transaction," the factual allegations set forth in the Complaint show that the Plaintiffs bargained for truthfulness on several occasions by making known throughout negotiations that waiver of tribal immunity was a necessary term of any agreement. Plaintiffs placed their faith in several high-level officers who DMM made responsible for entering contracts, not merely employees of DMM, and these high-level officers continuously pronounced that they had the authority to waive tribal immunity. Even considering the sophistication of the parties, the individual Defendants, as officers of DMM, do not have the unfettered authority to mispresent facts to induce reliance. Accordingly, Plaintiffs sufficiently plead justifiable reliance.

VIII. PLAINTIFFS SUFFICIENTLY PLEAD FRAUD BASED CLAIMS

Generally, to establish a fraud based claim, a plaintiff must prove “(1) misrepresentation or omission of a material facts; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonable relied; and (5) which caused injury to the plaintiff.” Wynn v. AC Rochester, 273 F.3d 153, 156 (2d Cir. 2001).

Defendants’ arguments related to Plaintiffs’ fraud claims are red herrings irrelevant to the claims sufficiently pleaded. There is no contract between the individuals and the Plaintiffs. In fact, Defendants’ fraudulent and deceitful acts outside the scope of their authority ensured that there was no contract Plaintiffs could enforce. That is evidence of Defendants’ fraud, but to be clear, the Complaint does not assert a breach of contract claim. Moreover, Defendants mischaracterized the nature of their misrepresentations. Plaintiffs plead that Defendants continually represented that they had the authority to waive DMM’s sovereign immunity and had done so.

Defendants’ misrepresentations that they had the authority to waive sovereign immunity are misrepresentations of material existing fact, not of a future intent. Plaintiffs sufficiently plead facts to show that the Defendants did not have the authority to waive DMM’s sovereign immunity at the time of negotiations and of the misrepresentations. Where a defendant makes a false statement of an existing fact, a cause of action for fraud can be maintained. D.S. America (East), Inc. v. Chromagrafx Imaging Systems, Inc., 873 F. Supp. 786, 796 (E.D.N.Y.1995) (“[A] misrepresentation of present fact, not of future intent, collateral or extraneous to the contract, but which is an inducement to the contract, can give rise to a separate claim of fraudulent inducement.”); PI, Inc. v. Quality Products, Inc., 907 F. Supp. 752, 761 (S.D.N.Y. 1995) (“A

cause of action for fraud can be maintained on the basis of allegations that a party made a collateral or extraneous misrepresentation that served as an inducement to the contract.”)

Deerfield Communications Corp. v. Chesebrough–Ponds, Inc., 502 N.E.2d 1003, 1004

(1986) (holding that a representation of present fact which was “the inducement for the contract” and which was “collateral to” that contract, could support a claim of fraud).

IX. PLAINTIFFS SUFFICIENTLY PLEAD FRAUD CLAIMS AND SATISFIES RULE 9(B)

To satisfy the rule on pleading fraud with particularity, a plaintiff must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. First Hill Partners, LLC v. BlueCrest Cap. Mgmt. Ltd., 52 F. Supp. 3d 625,637 (S.D.N.Y. 2014) (*quoting* Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004)). Nevertheless, Rule 9(b)’s requirement of particularity must be consistent with the flexibility in pleading permitted under Rule 8, which requires a “short and plain statement” with each pleading being “simple, concise and direct.” See Fed. R. Civ. P. 8; see also, Ouaknine v. MacFarlane, 897 F.2d 75, 79 (2d Cir. 1990). Plaintiffs’ allegations satisfy “the basic what, when, where, how and why requirements of Rule 9(b).” In re AnnTaylor Stores Sec. Litig., 807 F. Supp. 990, 1004 (S.D.N.Y. 1992).

Plaintiffs allege what the Defendants misrepresented: that on behalf of DMM, they had authority to waive DMM’s sovereign immunity with regard to enforcement of contracts entered into by DMM. Plaintiffs allege where Defendants’ fraud took place: Cox personally visited SMC’s facility during April 15-17, 2015; Cox, Dixon, and Robles met with Plaintiffs on September 15, 2015 at SMC’s facility; Cox and SIRCO’s economic director made visits to SMC facility on January 26, 2016. Plaintiffs further allege both how and why: The Defendants used

their positions as high level officers to deceive Plaintiffs into believing they had the authority to waive tribal sovereign immunity to induce Plaintiffs into the contract and to take advantage of Plaintiffs' knowledge, licenses, and product. For Rule 9(b) purposes, "[t]he requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Minnie Rose LLC v. Yu, 169 F. Supp. 3d 504, 511-12 (S.D.N.Y. 2016). The alleged facts demonstrate that the Defendants had the motive and opportunity to misrepresent their authority. The Defendants' desired to transact business with the Plaintiffs, and they knew waiver of tribal immunity was a necessary element of any deal. Thus, the Defendants made the misrepresentations to induce the Plaintiffs into transacting business and achieve their desired goal of learning how to establish a tobacco manufacturing business. Moreover, the Defendants' positions as high level officers that were responsible for entering contracts gave them the opportunity to commit such fraud. Though these facts certainly show that the Defendants had both motive and opportunity, they also constitute strong circumstantial evidence of "conscious misbehavior or recklessness." See id.

X. PLAINTIFFS ALLEGE SUFFICIENT FACTS TO SUPPORT IMPLIED WARRANTY OF AUTHORITY AND TORTIOUS MISREPRESENTATION AND ASSURANCE OF PAYMENT CLAIMS

Under the "implied warranty of authority doctrine," a person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal. Mobitech Regenerative Med., Inc. v. Bakken Value Creators, LLC, 2016 WL 7192090, at *5-6 (S.D.N.Y. Dec. 12,

2016) (citing DePetris & Bachrach, LLP v. Srouf, 71 A.D.3d 460 (1st Dept. 2010) (holding that a viable claim for breach of the implied warranty of authority existed when defendant law firm represented to plaintiff law firm that defendant had client's authority to promise client's payment of \$75,000 when, in fact, they lacked such authority)); see also, Riverside Research Inst. v. KMGA, Inc., 68 N.Y.2d 689 (1986) ("An agent implicitly warrants its own authority to act and is liable for all damages which flow naturally from reliance upon its assertion of authority."). Similarly, under the "tortious misrepresentation and assurances of payment doctrine," if the person who falsely claims to have power to bind another knows that the claim is untrue, the person has made a fraudulent misrepresentation and is subject to liability to those who, justifiably relying on the representation, suffer a loss as a consequence. See DePetris at 460 (holding that a viable claim for tortious misrepresentation of authority and assurances of payment existed when defendant law firm falsely represented to plaintiff law firm that defendant specifically discussed with client the subject matter of defendant's authority and representations made on client's behalf).

Here, as discussed, Plaintiffs have sufficiently pleaded that the Defendants materially misrepresented that they had the authority to waive tribal immunity while binding DMM to an agreement with the Plaintiffs. The Plaintiffs clearly suffered a loss as a result of the fraudulent misrepresentation. Defendants contend that Plaintiffs' claims should be dismissed because the Plaintiffs cannot demonstrate justifiable reliance. However, established above, viewing the entire context of the transaction, the facts alleged demonstrate justifiable reliance. Accordingly, Defendants' motion to dismiss these claims should fail.

CONCLUSION

Plaintiffs have sufficiently plead factual allegations to state claims for relief against the individual defendants, including sufficient facts to support personal and subject matter jurisdiction. This Court should reject Defendants' attempts to improperly submit documents that are not relevant to the claims pleaded and which are submitted by an attorney declaration without personal knowledge. Applying the proper standard on a motion to dismiss, this Court must deny Defendants' Motion to Dismiss in its entirety. Alternatively, should this Court determine that any particular issue is insufficiently pleaded, leave to amend should be granted to Plaintiffs.

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