UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
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ALLEGANY CAPITAL ENTERPRISES, LLC and
SENECA MANUFACTURING COMPANY,

Plaintiffs,

Case No.: 19-CV-160 (WMS)

-against-

GRETCHEN COX, STACY DIXON and
JOLENE ROBLES,

Defendants.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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POINT I

THE DOCUMENTS ATTACHED TO THE MARTINGALE DECLARATION ARE PROPERLY BEFORE THE COURT AND MAY BE CONSIDERED ON THIS MOTION TO DISMISS.

Plaintiffs argue that the documents annexed to the May 20, 2019 Declaration of Andrew Martingale (Electronic Docket Entry ("DE") No. 17-1) (the "Martingale Dec.") — as well as the Martingale Dec. itself, "beyond reference to the docket number of the pleading" — should be "rejected," as this is not a summary judgment motion, but a motion to dismiss. *See,* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (DE No. 21) ("Memo In. Opp."), Point I(B), p. 3. The law is well-settled, however, that when deciding a motion to dismiss, it is appropriate for the court to review "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, *and any documents incorporated in the complaint by reference*." *See* McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007) (emphasis added); *accord* Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006). It is thus appropriate for this court to consider documents outside of the complaint when such documents are integral to the complaint, are partially quoted in the complaint, or were relied upon by plaintiff in drafting the complaint. Faulkner, 463 F.3d at 134. Moreover, when a document is referenced in, but not appended to the complaint, "the defendant may produce [it] when attacking the complaint for its failure to state a claim, because plaintiff should not be allowed to escape the consequences of its own failure" to attach it to the complaint. Cortec Indus. Inc. v. Sum Holding. L.P., 949 F.2d 42, 47 (2d Cir. 1991).

Here, there are six exhibits attached to the Martingale Dec. Exhibits "A," "B" and "C" are the three agreements that are referenced throughout the Amended Complaint,[1] and for which the Amended Complaint even assigns a defined term — the "Tobacco Deal Contracts." *See* Comp. ¶¶ 41. Plaintiffs cite to and *even quote from* these agreements in their Amended Complaint. *See e.g.*, Comp. ¶¶ 35 – 36, 56. These agreements are the entire basis for and measure of plaintiffs' damage claim — a point made in Defendants' Memorandum of Law in Support of its Motion to Dismiss ("Memo in Chief") and not refuted by plaintiffs (*see generally,* Memo in Opp.). Plaintiffs seek to hold defendants liable for the alleged contract damages plaintiffs suffered at the hands of defendants' employer, DMM, after the arbitrator held DMM was immune from suit, thus preventing plaintiffs from collecting from DMM. *Id.* For plaintiffs to now argue that these agreements are not "integral" and/or "incorporated by reference" into the Complaint, and thus not properly before the Court on this motion to dismiss, is disingenuous, erroneous and should be rejected.

The other three exhibits attached to the Martingale Dec. — Exhs. "D," "E" and "F" — consist of the Arbitration Award in the action between plaintiff ACE and DMM, holding that DMM is entitled to sovereign immunity, and the two parties' letter briefs submitted in support and opposition thereto. Like the "Tobacco Deal Contracts," these documents are also referenced throughout the Amended Complaint, which expressly discusses the arbitration (Comp. ¶ 57), the arguments made by the parties (Comp. ¶¶ 57 –

[1]It is noted that although Defendants referenced the correct docket entry number and date of filing of the "Complaint" they seek to dismiss, this is actually Plaintiffs' "Amended Complaint." Plaintiffs original "Complaint" was filed on February 1, 2019, and amended 21 days thereafter. Throughout this Reply Memorandum, defendants' citations to the "Complaint" continues to be to plaintiffs' Amended Complaint (DE. No. 8).

62), and the decision reached by the arbitrator (Comp. ¶ 63). Thus, they are properly submitted to this Court, and any notion that the Court cannot consider the actual documents which plaintiffs describe and cite to in the Amended Complaint, is erroneous. Plainly, these documents are integral to the Amended Complaint, incorporated by referenced thereto, and are properly before the Court.

As to the statements in the Martingale Dec. itself, plaintiffs argues that it is "improperly filled with mostly argument, perhaps in an attempt to work around the 25-page rule of this Court." Memo. In Opp., p. 3. The Martingale Dec. appropriately cites to and quotes from relevant provisions of the referenced documents to bring them to the Court's attention, and every relevant paragraph of the declaration contains a supporting citation to those documents, or the Amended Complaint itself. *See*, Martingale Dec. ¶¶ 5 – 25. None of the paragraphs in the Martingale Dec. are bare or unsupported allegations or argument, and no facts are alleged independent of the referenced documents. Thus, the Martingale Dec. and the exhibits annexed thereto, are proper.

POINT II

THE DEFENDANTS ARE PROTECTED BY SOVEREIGN IMMUNITY.

Defendants' Memo in Chief demonstrates that defendants are protected by tribal sovereign immunity. *See*, Memo in Chief, Point I(A). Plaintiffs nonetheless attempt to avoid that clear conclusion by arguing that the Amended Complaint asserts "individual capacity" claims against defendants. What plaintiffs are actually asking the Court to do, is grant every plaintiff who fails to obtain a binding waiver of sovereign immunity a second

bite at the apple, by allowing fraud-based suits to proceed against the individuals who negotiated or signed a contract on behalf of the immune corporation, simply through alleging that oral representations were made that there were binding waivers. Plaintiffs' arguments are not borne out by the cases upon which they seek to rely.

Plaintiffs attempt to distinguish the instructive decision in Long v. Barrett, and instead rely principally on the Supreme Court's inapposite decision in Lewis v. Clarke, 137 S.Ct. 1285 (2017). In Lewis, a tribal employee was sued when he allegedly caused a motor-vehicle accident, through his personal negligence, on an interstate highway on non-tribal lands, while driving for his employer. The Supreme Court held that, although at the time of the accident the employee was acting within the scope of his official duties (*i.e.*, driving clients), the complaint sought damages for his personal negligence in operating the motor vehicle, (*i.e.*, rear-ending another car), and thus, was unrelated to the tribe and the tribe's sovereign immunity. Lewis, 137 S.Ct. 1285, 1291. Here, by contrast, the allegations at the very heart of the Amended Complaint center upon facts and circumstances directly related to the tribe's sovereign immunity, and the function and operation of its business. As such, they are much more akin to those in Long v. Barrett, where, despite his alleged oral and written representations to the contrary, a tribe's Director of Finance who failed to properly effectuate the transfer of a tribal dividend to a tribe member's creditor, was found to be immune from suit. See, Memo in Chief, pp. 5 – 6.

Plaintiffs also cite to Garvia v. Akewsasne Hous. Auth., 105 F.Supp.2d 12 (N.D.N.Y. 2000) for the proposition that tribal officials lack the protection of sovereign immunity if they act "outside the scope of its delegated authority." Memo. in Opp. p. 3 – 4.

Tellingly, plaintiffs' paraphrase of this proposition disingenuously removes the critical component that a defendant is required to have acted "completely" outside their authority. Garcia instructs: "Generally, a tribal official lacks the protection of sovereign immunity if he acts *completely* outside the scope of his delegated authority." Garcia, at 18 (emphasis added). This distinction regarding "*completely* outside one's authority" played a critical role in Garcia. There, plaintiff alleged that her supervisor terminated her employment in violation of the Age Discrimination in Employment Act, and Indian Civil Rights Acts. Despite such allegations of discrimination — which would clearly be outside *any employee's* authority — the Court held that the supervisor had tribal immunity because hiring and firing, generally, fell within the purview of defendant's delegated authority. Even if alleged to be discriminatory, such actions were not "completely" outside of the supervisor's delegated authority.

Here, plaintiffs complain that in negotiating contracts on behalf of their employer, DMM, defendants made misrepresentations regarding their authority to waive sovereign immunity. Clearly, negotiating those contracts, and the ancillary work related thereto, are part of each of the defendants' scope of duty, and delegated authority. If those statements were made, that does not transform their actions from actions on behalf of their employer and in their official capacity, into actions in their individual capacity. Indeed, as set forth in defendants' Memo in Chief, the allegations of Plaintiffs' Amended Complaint make clear that defendants' actions were performed in their official capacities. *See*, Memo in Chief, Point I, p. 6 (*citing* Comp. ¶¶18 – 20, 29 – 31). Again, holding otherwise, would essentially subject any employee or officer who negotiates or signs a contract on behalf of

their employer to personal liability should any clause in that agreement be contrary to alleged oral representations made during negotiations. This is not the law.

POINT III

DMM IS AN INDESPENSIBLE PARTY.

Defendants demonstrated in their Memo in Chief that their employer, DMM, is an indispensable party under Rule 19. *See,* Memo in Chief, Point II. Among other things, defendants cited World Touch Gaming, Inc. v. Massena Mgmt., 117 F.Supp.2d 271 (N.D.N.Y. 2000), describing this decision as "instructive and on point." *See,* Memo in Chief, pp. 10 – 11. Yet, plaintiffs completely ignore that decision, and never attempt to distinguish it whatsoever.

As explained more fully in their Memo in Chief, the "Tobacco Deal Contracts," and whether they were breached by non-party DMM is at the heart of this matter. Although plaintiffs allege that their inability to proceed with suit against DMM has damaged them in the amount of $107,328.00 as to ACE and $187,328.00 as to SMC — measured by the underlying contract *with DMM.* (*see* Comp. ¶¶ 59, 116) — if it turns out that DMM did not breach the Tobacco Deal Contracts, then ACE's and SMC's inability to proceed with suit against DMM has not caused plaintiffs to suffer *any* monetary damage. Allowing this action to proceed without DMM, the individual defendants — who plaintiffs concede and emphasize were not obligated under the Tobacco Deal Contracts whatsoever (*e.g.*, Memo in Opp., p. 13) — would be forced to defend against plaintiffs' threshold breach of contract allegations *against* DMM, on *behalf of* DMM. Despite plaintiffs' repeated assertion that they

have no claim for breach of contract, they cannot evade the fact that they must demonstrate damages resulting from the purported underlying breach of contract as a threshold matter, and that the contract and its alleged breach is the measure of their alleged damages. Plainly, DMM is the quintessential "indispensable party." Thus, in the event that the Court holds that the defendants are not protected by sovereign immunity — which it should not — this matter should be dismissed for failure to join DMM.

POINT IV

DUE PROCESS PREVENTS A FINDING OF PERSONAL JURISDICTION.

In an apparent effort to distract the Court from the operative issues presented, plaintiffs take four pages to argue that jurisdiction lies either under CPLR §§ 301 or 302 — a point which defendant do not argue in their Memo in Chief. Such argument does not change the fact that any finding of jurisdiction must "comport with the requirements of due process." *See, e.g.*, Hume v. Lines, 2016 WL 1031320, *10 (W.D.N.Y. 2016). In urging the Court to make such a due process finding, plaintiffs' entire argument is as follows:

> 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.

Memo in Opp. p. 12.

This *does not* overcome the demonstration made by defendants in their Memo in Chief. Again, (1) all of the defendants reside in California; (2) there are no allegations

that defendants' own property or have any contacts with New York outside of the visits to plaintiffs' Indian Reservation in New York, in connection with their employment with DMM (three times for Cox, and once each for Dixon and Robles); (3) the Tobacco Deal Contracts contain a forum selection clause for California; and (4) none of the services were to be performed in New York — DMM's land is located in California, where their cigarettes were to be sold. Memo in Chief, Point III, pp. 15 – 17. It is disingenuous for plaintiffs to argue that none of these factors are relevant because they are allegedly being sued in their "individual capacity," so their relationship to DMM is irrelevant. The only reason any of the defendants had any contact whatsoever with plaintiffs was due to their positions with DMM. It is likewise disingenuous for plaintiffs to characterize as "conclusory" and "without factual basis" defendants' argument that defending an action in the Western District of New York would be unduly burdensome, particularly in light of the defendants' clear demonstration that a finding of personal jurisdiction would not "comport with the requirements of due process."

POINT V

PLAINTIFFS HAVE NOT ADEQUATELY PLED "JUSTIFIABLE RELIANCE."

As defendants have demonstrated, plaintiffs' four causes of action all fail to demonstrate "justifiable reliance" — a necessary element of each claim. *See,* Memo in Chief, Point IV(A), (D). Plaintiffs' entire argument in opposition consists of a plea that a jury should decide whether plaintiffs were justified in relying on the alleged oral representations of defendants. *See*, Memo in Opp. Point VI. This is not the law and fails to meet the required

pleading standards, as "[t]he asserted reliance must be found to be justifiable under all the circumstances *before* a complaint can be found to state a cause of action in fraud." Granite Partners, L.P. v. Bear Stearns & Co. Inc., 58 F.Supp.2d 228, 259 (S.D.N.Y. 1999) (emphasis added). Again, "[i]n assessing the reasonableness of a plaintiffs' alleged reliance, courts in this Circuit consider the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them." McBeth v. Porges, 171F.Supp.3d216, 225 (S.D.N.Y. 2016). The Court should not, as plaintiffs tacitly argue, ignore the facts that as an Indian LLC and Indian General Partnership, ACE and SMC, respectively "[are] or should be well aware of the rules which govern waivers of sovereign immunity," as concluded in the Arbitration Decision. Martingale Dec., Exh. "D"; *see also*, World Touch Gaming, 117 F.Supp.2d at 276 ("[a]s a sophisticated distributor of gaming equipment that frequently deals with Indian gaming enterprises, [plaintiff] should have been careful to assure that either the Management Company had express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the [agreements]. [Plaintiff] is not a novice in matters relating to Indian gaming enterprises and Indian sovereign immunity, and cannot now rely upon naiveté . . . .") This is particularly true in light of the heightened pleading standards governing claims of fraud. Rule 9(b). Plainly, plaintiffs' four causes of action each fail as a result.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that defendants' motion to dismiss be granted, together with such other and further relief as the Court deems just and proper.

Dated: Melville, New York
July 3, 2019

Respectfully submitted,

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