IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MEMPHIS BIOFUELS LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 08-2253 Ma/P**
	)	
CHICKASAW NATION INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Memphis Biofuels LLC ("MBF") sues Defendant Chickasaw Nation Industries, Inc., ("CNI").[1] Plaintiff seeks a declaratory judgment under 28 U.S.C. § 2201 that CNI's waiver of sovereign immunity in its contract with MBF is binding, an order compelling arbitration under the contract's arbitration clause in accordance with the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, et seq., and a temporary restraining order prohibiting CNI from proceeding with its case against MBF in the Chickasaw Nation District Court.

On April 25, 2008, Plaintiff MBF moved for a temporary restraining order prohibiting CNI from proceeding with its

[1] Originally Plaintiff's suit also named the American Arbitration Association ("AAA") as a Defendant. Plaintiff moved to voluntarily dismiss the AAA on June 18, 2008. The motion was granted on June 30, 2008. CNI is now the only Defendant remaining.

action against MBF in the Chickasaw Nation District Court. CNI responded in opposition on June 6, 2008.

On May 7, 2008, Defendant CNI filed a motion to dismiss for lack of jurisdiction or, in the alternative, to stay based on MBF's failure to exhaust tribal remedies.[2] MBF responded in opposition on June 5, 2008.

A hearing on the temporary restraining order was held on June 10, 2008. At the hearing, the parties emphasized the threshold issue of whether this action survives CNI's motion to dismiss and, in particular, whether the court has jurisdiction. At the close of the hearing, the court withheld judgment on the temporary restraining order and ordered additional briefing on the jurisdictional issue.

The parties submitted supplemental memoranda on June 20, 2008, and reply memoranda on June 27, 2008.[3]

For the following reasons, Defendant CNI's motion to dismiss is GRANTED.

I. BACKGROUND

Plaintiff MBF is a biodiesel refining company incorporated in Delaware with its principal place of business in Memphis,

[2] The court lacks subject matter jurisdiction in this matter and therefore does not address Defendant CNI's alternative argument that this action must be stayed because of MBF's failure to exhaust tribal remedies.

[3] Eight briefs (four from each party) have been filed in this case. For purposes of citation, memoranda on the temporary restraining order are abbreviated as "MBF/CNI TRO Mem.," memoranda on the motion to dismiss are abbreviated as "MBF/CNI MTD Mem.," the supplemental memoranda are abbreviated as "MBF/CNI Supp. Mem.," and the reply memoranda are abbreviated as "MBF/CNI Reply Mem."

Tennessee. Defendant CNI is a federally-chartered tribal business corporation organized under the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. § 503, with its principal place of business in Oklahoma.[4] Although wholly owned by the Chickasaw Nation Indian tribe, CNI is an entity separate and distinct from the Chickasaw Nation. (CNI Charter, Ex. A to MBF TRO Mem., ¶ 1.03.) CNI is as a diversified corporation engaged in numerous business enterprises.

In 2006, CNI entered into the biodiesel business and contacted MBF through a consultant. After initial talks, the parties negotiated an agreement that CNI would deliver diesel fuel and soybean oil to MBF's Memphis facility for refinement and later resale as biodiesel.

MBF was aware that, should a dispute arise between the parties, CNI might attempt to claim sovereign immunity. To avoid that outcome and preserve its right of redress, MBF insisted on a contractual provision expressly waiving any sovereign immunity as well as a representation and warranty that CNI's waiver was valid, enforceable, and effective. In its final form, the provision reads as follows:

> TO THE EXTENT THAT [CNI] OR [MBF] HAS OR HEREAFTER MAY ACQUIRE ANY IMMUNITY FROM SUIT IN OR JURISDICTION OF ANY COURT NAMED ABOVE OR FROM ANY LEGAL PROCESS FROM OR RELATING TO ANY SUCH COURT WHETHER BY REASON OF LAW

[4] CNI contends that it is a domestic dependent nation, and MBF argues that CNI is a corporate citizen of Oklahoma, *infra*.

> APPLICABLE TO AMERICAN INDIANS, THROUGH SERVICE OR NOTICE, ATTACHMENT PRIOR TO JUDGMENT, ATTACHMENT IN AID OF EXECUTION OR OTHERWISE) [sic] WITH RESPECT TO ITSELF OR ITS PROPERTY, SUCH PARTY HEREBY IRREVOCABLY WAIVES SUCH IMMUNITY. EACH PARTY REPRESENTS AND WARRANTS THAT SUCH WAIVER BY IT IS VALID, ENFORCEABLE, AND EFFECTIVE.

(Contract, Ex. B to MBF TRO Mem., ¶ 19) (emphasis in original).

Throughout the negotiations, draft versions of a contract styled INTERNAL AUTHORIZATION AND CONTRACT FOR CONVERSION OF PRODUCT BY MEMPHIS BIOFUELS (the "Contract") were exchanged between the parties. On October 5, 2006, CNI forwarded MBF a draft of the Contract that had been electronically edited by CNI's in-house lawyers.

Among the edits shown in the draft Contract were five separate comments (superimposed on the margins of the draft itself) to various contractual provisions. Two such comments addressed the provision waiving CNI's sovereign immunity. The first stated, "[w]aiver of Sovereign Immunity requires board approval." (Draft Contract, Ex. C to MBF TRO Mem., at 9.) The second read, "[a]gain, [sovereign immunity] cannot be waived without board approval." (Id.)

Despite these comments, the e-mail to which the draft was attached indicated that "the major issue is, as a federally chartered corporation, [CNI] will not submit disputes to state

court. Other than that, it looks like we are both on the same wavelength." (E-mail, Ex. C to MBF TRO Mem., at 2.)

Ultimately the Contract was signed by MBF's CEO Ken Arnold and CNI's President and CEO Deryl Wright. Although MBF had noticed the draft comments that approval from CNI's Board of Directors was required to waive sovereign immunity, "MBF believed that it was an internal comment from one of CNI's lawyers to CNI's management, as a reminder." (Decl. of MBF President Ken Arnold ¶ 2.) Relying on the statement in the e-mail accompanying the draft that state court jurisdiction was the only "major issue" and the signature of CNI's President and CEO on the Contract, which includes representations and warranties that the waiver of sovereign immunity is "VALID, ENFORCEABLE, AND EFFECTIVE," MBF assumed that the required approval had been obtained. (Contract, Ex. B to MBF TRO Mem., ¶ 19, see also Decl. of MBF President Ken Arnold ¶ 2, MBF "believ[ed] that Deryl Wright, CNI's President and CEO, would not lie to MBF by way of that representation and warranty that he had obtained all necessary approvals, including…Board approval of the waiver of sovereign immunity.").

Sometime after the Contract was signed, CNI repudiated the agreement. MBF began mediation procedures through the American Arbitration Association ("AAA"), as required by the Contract. (See Contract, Ex. B to MBF TRO Mem., ¶ 19.) CNI initially

participated in the mediation, sending its President and CEO, a second corporate officer, two corporate counsels, and outside counsel to attend a day-long mediation session with MBF. Afterward, the parties engaged in direct negotiations. Throughout the process, no mention was made of the alleged invalidity of CNI's waiver of sovereign immunity.

Unable to resolve the dispute through mediation and negotiation, MBF filed a demand for arbitration with the AAA on March 10, 2008. The AAA attempted to arrange a scheduling conference for the arbitration process, but CNI refused to participate.

On April 15, 2008, CNI filed suit against MBF and the AAA in Chickasaw Nation District Court. The lawsuit seeks a declaratory judgment that the Contract's waiver of CNI's sovereign immunity is invalid for want of board approval and injunctive relief to prevent the arbitration between MBF and CNI before the AAA from continuing.

II. STANDARD OF REVIEW

Defendant CNI moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Where a defendant raises the issue of lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion to dismiss. DXL, Inc. v. Kentucky, 381 F.3d

511, 516 (6th Cir. 2004), Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990).

Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks. United States v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack goes to whether the plaintiff has properly alleged a basis for subject matter jurisdiction, and the trial court takes the allegations of the complaint as true. Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990). A factual attack is a challenge to the factual existence of subject matter jurisdiction. No presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. Ritchie, 15 F.3d at 598, Moir, 895 F.2d at 269. Here, Defendant CNI attacks the factual basis for jurisdiction.

III. ANALYSIS

CNI argues that this court lacks subject matter jurisdiction over MBF's claim. CNI attacks diversity jurisdiction, claiming that it enjoys sovereign immunity and is not a diverse party under 28 U.S.C. § 1332. CNI also argues that the internal affairs doctrine does not mandate the application of federal common law sufficient to create federal question jurisdiction under 28 U.S.C. § 1331. CNI concedes that

this court has jurisdiction to consider whether the Chickasaw Nation District Court has jurisdiction over MBF, but argues that the issue is not presently before the court.

MBF responds that CNI lacks sovereign immunity and that it is therefore a corporate citizen of Oklahoma, amenable to suit in this court under 28 U.S.C. § 1332. In the alternative, MBF claims that CNI waived its immunity under the terms of the Contract, rendering it a diverse party. MBF also alleges that federal common law under the internal affairs doctrine applies and provides a basis for federal question jurisdiction. Finally, MBF claims that the court has federal question jurisdiction to consider whether the tribal court has jurisdiction over it.

For the reasons that follow, the court finds that there is no basis for diversity jurisdiction or federal question jurisdiction in this case. Therefore, Defendant CNI's motion to dismiss for lack of jurisdiction is GRANTED.

A. Sovereign Immunity and Diversity Jurisdiction

CNI is an Indian business corporation federally chartered under the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §§ 501, et seq., an expansion of the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461, et seq.

The IRA was passed in 1934. Before then, the policy of the United States government had been to encourage Indians to

assimilate.[5] As efforts at assimilation failed, the IRA was passed to facilitate tribal self-governance and economic organization. See Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1442 (D.C. Cir. 1988). Section 16 of the IRA permits Indian tribes to adopt constitutions. 25 U.S.C. § 476. Section 17 of the IRA allows the incorporation of tribal business entities. It provides:

> The Secretary of the Interior may, upon petition by any tribe, 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 of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law….

Id. § 477.

The Chickasaw and rest of the "Five Civilized Tribes"[6] were initially denied privileges under sections 16 and 17 because they were thought to be assimilating. See D. Jay Hannah, *The 1999 Constitution Convention of the Cherokee Nation*, 35 ARIZ. ST. L.J. 1, 5 n.27 (2003). In 1936, however, the IRA's privileges were extended to the Five Civilized Tribes by the OIWA, which

[5] The scheme was then known as the policy of allotment, by which Indian lands were divided into individual parcels for ownership by individual families. This was intended to hasten the deterioration of the communal lifestyle of the Indian tribes. See Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 130-31 (2008).

[6] The Five Civilized Tribes included the Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Lane R. Neal, *Highway Appropriations Bill Shapes Tribal Sovereignty*, 32 AM. INDIAN L. REV. 219, 226-27 (2008).

"incorporated by reference" the rights and privileges of the IRA.[7] Kirke Kickingbird, *"Way down yonder in the Indian Nations, rode my pony cross the reservation!"*, 29 TULSA L.J. 303, 335 (1993), see also Morris v. Watt, 640 F.2d 404, 409 (D.C. Cir. 1981), Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 479-80 (2002), Charlotte M. Emery, *Tribal Government in North America: The Evolution of Tradition*, 32 URB. LAW. 315, 333 (2000).

The parties agree that the Chickasaw Nation Indian tribe enjoys sovereign immunity. At the hearing on the temporary restraining order, CNI argued that it explicitly retained this baseline immunity in its own corporate charter. MBF protested that Indian business entities incorporating under Section 17 of the IRA lose their sovereign immunity, to which CNI responded that it is treated differently because it incorporated under the OIWA. The court asked why this mattered, given that the OIWA simply extended rights earlier withheld under the IRA. CNI

[7] The Five Civilized Tribes, *supra*, had by 1936 relocated to reservations in Oklahoma. The section of the OIWA extending sections 16 and 17 of the IRA to the Oklahoma tribes, under which CNI incorporated, reads as follows:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation…. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the [Indian Reorganization] Act of June 18, 1934….

25 U.S.C. § 503.

answered that it incorporated under Section 16, tacitly conceding that entities incorporating under Section 17 lose their immunity.

In its supplemental briefings after the hearing, CNI abandoned its earlier assertions that business entities incorporating under the OIWA are treated differently than those incorporating under the IRA and that it incorporated under Section 16 of the IRA (which applies to tribal government entities, not business entities).

CNI now claims that it incorporated under Section 17 and that tribal business entities incorporating under that section--whether under the IRA or the OIWA--retain sovereign immunity unless express waiver occurs (e.g. through a "sue and be sued" clause in a corporate charter).[8] (See CNI Supp. Mem. at 8, n.4.)

CNI's supplemental and reply briefings focus on the immunity of tribal business organizations incorporated under Section 17 of the IRA. MBF argues that the act of incorporation itself divests Section 17 business entities of tribal sovereign immunity. CNI argues that Section 17 corporations retain tribal sovereign immunity *unless* it is expressly waived. Each party offers legal support for its position.

[8] This is in contrast to CNI's earlier statement that, "it has been noted that tribal corporations which are organized under 25 U.S.C. § 477, Section 17 of the Indian Reorganization Act, are not immune and are citizens of the states in which they are located." (CNI MTD Mem. at 5.)

MBF cites three principal cases opposing CNI's argument that Section 17 corporations retain sovereign immunity unless waived.[9] For the reasons that follow, each is unavailing.

In Gaines v. Ski Apache, the Tenth Circuit held that a Section 17 corporation "*may* be considered a citizen of the state of its principal place of business for diversity jurisdiction." 8 F.3d 726, 729 (10th Cir. 1993) (emphasis added). The permissive "may" contrasts with the court's later comment that "[a] tribe may also charter a corporation pursuant to its own tribal laws, and such a corporation *will* be considered a citizen of a state for purposes of diversity jurisdiction."[10] Id. (emphasis added). That the distinction is intentional is established by the case the court cites in support, Enterprise Elec. Co v. Blackfeet Tribe of Indians, 353 F.Supp. 991 (D. Mont. 1973). In Enterprise, a Section 17 corporation was deemed a citizen of Montana under 28 U.S.C. § 1332 because it had explicitly waived immunity through a sue and be sued provision in its charter. Id. at 992.

[9] MBF also cites Runyon ex rel. B.R. v. Assoc. of Village Council Presidents, in which the Alaska Supreme Court analyzed whether a non-profit corporation representing various Indian tribes had sovereign immunity by considering whether the tribes themselves were the "real parties of interest." 84 P.3d 437, 440 (Alaska 2004). The real party of interest test is inapplicable in this case because the defendant in Runyon was not incorporated under section 17 of the IRA. Although the Runyon court explicitly referenced its holding in Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977), that section 17 tribal corporations may waive sovereign immunity, the court did not abrogate that holding.

[10] The parties agree that tribal business entities incorporated under tribal or state law automatically lose their sovereign immunity.

In GNS, Inc. v. Winnebago Tribe of Nebraska, the United States District Court for the Northern District of Iowa wrote that "[t]his court has held that a Section 17 corporation waives sovereign immunity." 866 F.Supp. 1185, 1188-89 (N.D. Iowa 1994). For support, the court cited an earlier opinion in which it held that, "[c]ourts of this district have held that a Section 17 corporation waives sovereign immunity." Veeder v. Omaha Tribe of Nebraska, 864 F.Supp. 889, 900 (N.D. Iowa 1994). That language, in turn, was based on an earlier, unpublished case in which the court wrote: "Section 17 corporations waive sovereign immunity." Investment Finance Management Co., Inc. v. Schmit Industries, Inc., 1991 WL 635929, at *5 (N.D. Iowa 1991). To support this claim, the Schmidt court cited Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood. 361 F.2d 521 (5th Cir. 1966). That case does not support the proposition. It ties the waiver of sovereign immunity not to incorporation under Section 17, but instead to the inclusion of an explicit sue and be sued clause in the corporate charter. Id. at 521.

In American Vantage Companies, Inc. v. Table Mountain Rancheria, the Ninth Circuit commented that "[a]n incorporated tribe, or an incorporated arm of a tribe, is, like any other corporation, ordinarily a citizen of the state in which it resides." 292 F.3d 1091, 1095 n.1 (9th Cir. 2002). The Ninth Circuit cited Stock West, Inc. v. Confederated Tribes of the

Colville Reservation, 873 F.2d 1221 (9th Cir. 1989). In Stock West, the defendant tribal corporation organized under *tribal* law, not Section 17. Id. at 1223 n.3. Despite this distinction, the Stock West court observed that, "[t]here is authority for the proposition that for purposes of diversity jurisdiction, an Indian corporation is a citizen of the state in whose borders the reservation is located." Id. at 1226. As with the previous examples, this statement is unavailing because each of the cases cited in support considers corporations that organized under tribal law, had express waivers of immunity in their charters, or both. See R.C. Hedreen Co. v. Crow Tribal Hous. Auth., 521 F.Supp. 599, 602-03 (D. Mont. 1981) (corporation organized under tribal law, not Section 17), R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 n.2 (9th Cir. 1983) (corporation organized under tribal law and charter contained sue and be sued clause), Parker Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127, 1138 (D. Alaska 1978) (corporation organized under Section 17, but charter contained explicit sue and be sued clause).

CNI cites three main cases. They support the propositions for which they are offered.

In Atkinson v. Haldane, the Alaska Supreme Court considered the interrelation between Section 16 governmental units and Section 17 business entities, and their respective claims to

sovereign immunity. 569 P.2d 151 (Alaska 1977). Relying on several opinions from the Solicitor of the Department of the Interior and the legislative history of the IRA, the court concluded:

> [T]he section 16 governmental unit and the section 17 corporate unit are distinct legal entities…. Recognition of two legal entities, one with sovereign immunity, *the other with the possibility for waiver of that immunity*, would enable the tribes to make maximum use of their property. The property of the corporation would be at risk, presumably in an amount necessary to satisfy those with whom the tribe deals in economic spheres.

Id. at 174-75 (emphasis added). In short, the Atkinson court held that waiver was not a necessary consequence of corporate formation under Section 17, but was a possibility.

The following year, the United States District Court for the District of Alaska adopted the Atkinson interpretation, holding:

> Congress, in enacting the Indian Reorganization Act provided for the creation of two separate tribal entities. The entity created by § 16 of the Act, the governmental organization, was allowed the protection of sovereign immunity traditionally afforded Indian tribes. Recognizing that the protection of sovereign immunity would put the Indian tribe at a competitive disadvantage in obtaining credit and entering into business transactions Congress provided for the separate and distinct Indian corporation in § 17. This corporation has the ability to waive the protection of sovereign immunity.

Parker Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127, 1131 (D. Alaska 1978) (citing Atkinson, 569 P.2d 174-75).

The New Mexico Court of Appeals recently relied on Atkinson and Parker Drilling, holding that "[s]ection 17 authorizes tribes to incorporate pursuant to a corporate charter in order to operate as a business entity. Corporations formed under Section 17 enjoy sovereign immunity, but may waive such protection." Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548, 551 (N.M. Ct. App. 2004).

The court finds additional support for CNI's position in two scholarly publications. See David B. Jordan, Note, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After* Kiowa Tribe v. Manufacturing Technologies, Inc., 52 OKLA. L. REV. 489, 506 (1999) ("[L]egislative history of the Indian Reorganization Act reveals that two types of tribal entities were created so that tribal interests could be protected as section 16 corporations, while section 17 corporations would be open to limited liability [through sue and be sued clauses]."), Kenton Pettit, Note, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court*, 10 ALASKA L. REV. 363, 378-79 (1993) (same).

A recent practitioner's article explains that Section 17 of the IRA "has as its animating purpose enabling tribes 'to conduct business through th[e] modern device' of corporations." Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50 ADVOCATE 19,

20 (May 2007). Although tribal business entities may also incorporate under state or tribal law, Smith notes that "[t]he principal legal difference is that, while section 17 corporations retain their tribal status--and, accordingly, sovereign immunity in the absence of a "sue and be sued" waiver--the other species of corporations are not imbued automatically with such status." Id. at 20-21.

The more persuasive authority favors CNI's position. CNI was chartered under 25 U.S.C. § 503, which, *inter alia*, extended the right of corporate formation under Section 17 of the IRA. As a Section 17 corporation, CNI enjoys sovereign immunity unless it is explicitly waived.

1. Waiver In Corporate Charter

Section 17 corporations often waive immunity in the corporate charter itself. On the subject of immunity, CNI's charter states that it shall have the power:

> To sue in its corporate name and, notwithstanding the immunity possessed by the Corporation…, to permit *by written resolution of the board of directors* enforcement of…contracts…to which the Corporation is a party, against the Corporation in tribal court, or any court of competent jurisdiction by agreement of the board of directors; provided, however, that this limited waiver of sovereign immunity does not authorize the levy of any judgment, lien, garnishment or attachment upon any property or income of the Corporation, the Chickasaw Nation, or any agency thereto, *other than property or income of the Corporation specifically and in writing duly mortgaged, pledged or assigned as collateral for the debts or liabilities of the*

> *Corporation related to the…contract…to be enforced*. The authority provided herein is not intended to nor shall it be construed to waive the immunity of the Corporation, the Chickasaw Nation, or any agency thereof.

(CNI Charter, Ex. A to MBF TRO Mem., ¶ 3.02.) (emphasis added).

A general sue and be sued clause, if sufficiently clear and explicit, can waive baseline sovereign immunity. See, e.g., Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. 2002). The charter in this case contains no such waiver. Waiver of CNI's sovereign immunity is strictly limited to cases where there is a "written resolution by the board of directors" to that effect, and to levies on property or income where there is a specific pledge of assets "in writing" as collateral for the "debts or liabilities of the Corporation related to the…contract…to be enforced." (CNI Charter, Ex. A to MBF TRO Mem., ¶ 3.02.) Given the preconditions for waiver, the charter itself does not waive CNI's sovereign immunity.

2. Waiver By Contract

The Contract purports to waive CNI's immunity, stating:

> TO THE EXTENT THAT [CNI] OR [MBF] HAS OR HEREAFTER MAY ACQUIRE ANY IMMUNITY FROM SUIT IN OR JURISDICTION OF ANY COURT NAMED ABOVE OR FROM ANY LEGAL PROCESS FROM OR RELATING TO ANY SUCH COURT WHETHER BY REASON OF LAW APPLICABLE TO AMERICAN INDIANS, THROUGH SERVICE OR NOTICE, ATTACHMENT PRIOR TO JUDGMENT, ATTACHMENT IN AID OF EXECUTION OR OTHERWISE) [sic] WITH RESPECT TO ITSELF OR ITS PROPERTY, SUCH PARTY HEREBY IRREVOCABLY WAIVES SUCH IMMUNITY. EACH PARTY REPRESENTS AND WARRANTS THAT

> SUCH WAIVER BY IT IS VALID, ENFORCEABLE, AND EFFECTIVE.

(Contract, Ex. B to MBF TRO Mem., ¶ 18) (emphasis in original).

The parties agree that CNI's board did not adopt a written resolution waiving the corporation's sovereign immunity and that it did not make a specific pledge of assets (in writing or otherwise) to cover a potential judgment against it arising out of the Contract. Under the terms of the charter, the purported waiver of immunity is ineffective. Nevertheless, MBF argues that the waiver should be enforced because the contractual language is explicit.

A waiver of sovereign immunity must be "clear." Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991), see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed."), United States v. Testan, 424 U.S. 392, 399 (1976) (same).

MBF cites C&L Enter., Inc. v. Citizen Bank of Potawatomi Indian Tribe of Okla., for the proposition that an arbitration clause can waive tribal sovereign immunity. 532 U.S. 411, 419 (2001). By implication, MBF argues that the unambiguous waiver language in the Contract in this case effectively waives CNI's immunity. C&L, however, is not dispositive because the Supreme Court explicitly reserved judgment on whether the waiver would

have been valid if those who executed the contract on the tribe's behalf had lacked the authority to do so. Id. at 523 n.6. That is precisely the issue before the court.

CNI argues that sovereign immunity cannot be waived by the unauthorized acts of an agent. It cites several cases, notably, U.S. v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 513 (1940), and World Touch Gaming, Inc. v. Massena Manag., LLC, 117 F.Supp.2d 271 (N.D.N.Y. 2000).

CNI cites U.S. Fidelity for the general proposition that sovereign immunity cannot be waived by the unauthorized acts of subordinate officials. In that case, the Supreme Court wrote that:

> It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this [sovereign] immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of its responsible officers.

309 U.S. at 513. MBF distinguishes the case on the ground that a separate body of law applies to waiver of government immunity by government officials. Although this may be true, U.S. Fidelity addressed waiver of both government and tribal immunity. Id. at 512-13. Thus, the preceding language remains persuasive. MBF adds that U.S. Fidelity does not foreclose the possibility of waiver through the application of an equitable doctrine, *infra*.

World Touch Gaming considered a casino that was a wholly owned subsidiary of an Indian tribe and was operated by a management company. 117 F.Supp.2d at 272-73. The management company entered into a contract to buy and lease gaming machines that purported to waive the tribe's immunity from suit for actions arising out of the contract. As here, waiver required the consent of the tribal council but was not obtained. The court declined to enforce the waiver provision on the basis of apparent authority. Id. at 276.

MBF distinguishes World Touch Gaming, arguing that the contract was not signed by an official tribal employee and did not contain a representation and warranty about the waiver's validity. The purported distinction between the management company and CNI's President and CEO is not material. The management company in World Touch Gaming had the authority to run the casino just as CNI's President and CEO was charged with overseeing the corporation. See id. at 275. In each case their power was insufficient to waive sovereign immunity.[11] That the Contract here included a representation and warranty about the waiver makes this a closer case, but it does not negate the fact

[11] The Management Agreement between the management company and the tribe in World Touch Gaming did not authorize the company to waive sovereign immunity. 117 F.Supp.2d at 275. Similarly, CNI's corporate charter reserves the power to waive sovereign immunity to its board of directors.

that the attempt to waive CNI's sovereign immunity by its President and CEO was *ultra vires*.[12]

Although, given the actions of the parties surrounding the formation of the Contract, waiver might arise under an equitable doctrine, that is a separate inquiry. The Contract does not waive CNI's sovereign immunity.

3. Conclusion

As a Section 17 corporation under the IRA, CNI retains the sovereign immunity of its tribe. General waivers of immunity can be made through a provision in the corporate charter, but CNI's charter contains no waiver. The charter permits waiver only upon a written resolution by CNI's board of directors and by a specific pledge of assets as collateral.

The parties agree that the board did not approve a waiver resolution or make a specific pledge of assets. The parties also agree that, under its charter, CNI's President and CEO lacked the power to waive the corporation's immunity. MBF argues, however, that because the Contract purports to waive immunity and contains a representation and warranty that the waiver is valid, the waiver should be enforceable.

To rule that the Contract's waiver of immunity is, on its face, enforceable would circumvent the express requirements of

[12] This fact might be relevant when considering the applicability of any equitable doctrines, *infra*. Standing alone, however, it does not suffice to make an invalid action valid.

the corporate charter, effectively obviating them. The Court would divest CNI's board of its sole authority to waive sovereign immunity. MBF cites no any authority suggesting that this is permissible.

As a Section 17 corporation, CNI is immune from suit. Its immunity was not waived by its corporate charter or the Contract with MBF. CNI remains an immune tribal entity and is thus a nondiverse party. See, e.g., Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation, 495 F.3d 1017, 1020-21 (8th Cir. 2007), Gaming World Int'l v. White Earth Band of Chippewa Indians, 317 F.3d 840, 847 (8th Cir. 2003), Worrall v. Mashantucket Pequot Gaming Enterprise, 131 F.Supp.2d 328, 329 (D. Conn. 2001). This court lacks diversity jurisdiction under 28 U.S.C. § 1332.[13]

B. Federal Question Jurisdiction and Waiver by Estoppel

In the absence of diversity jurisdiction, MBF argues that the court has federal question jurisdiction. MBF makes two arguments. First, it argues that, because CNI is a federally-chartered corporation, the internal affairs doctrine requires that questions about CNI's conduct (which might prevent CNI from challenging the enforceability of the Contract) must be analyzed

[13] Whether, by the imposition of an equitable doctrine, CNI could be prevented from challenging the Contract's waiver of immunity remains undecided. Contrary to MBF's position, this inquiry would not entail the use of federal common law, but would turn instead on the law of Oklahoma (or, perhaps, the law of Tennessee, depending on one's interpretation of the enforceability of the Contract's forum selection clause), *infra*.

under federal common law. Second, MBF argues that this court has federal question jurisdiction to consider whether the Chickasaw Nation District Court has personal jurisdiction over it.

1. Federal Common Law and The Internal Affairs Doctrine

Federal question jurisdiction under 28 U.S.C. § 1331 extends to claims based on federal common law. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972). Under the "internal affairs doctrine," the internal affairs of a corporation are generally governed by the laws of its jurisdiction of incorporation. Edgar v. MITE Co., 457 U.S. 624, 645 (1982). CNI is a federally chartered corporation. MBF argues that CNI's internal affairs must be considered under the federal common law doctrines of estoppel, unclean hands, and apparent authority, thus creating federal question jurisdiction.

Citing Atherton v. FDIC, CNI argues that the internal affairs doctrine does not justify the application of federal common law to federally chartered entities. 519 U.S. 213 (1997). In Atherton, the FDIC sued the officers and directors of a failed federally chartered bank. The Supreme Court considered whether state law or federal common law should determine the appropriate legal standard for the alleged

wrongdoing. The FDIC argued that federal common law should apply based on the internal affairs doctrine.[14]

The Supreme Court described the internal affairs doctrine as a "conflict of laws principle which recognizes that only one State should have the authority to regulate a *corporation's* internal affairs…because otherwise a *corporation* could be faced with conflicting demands." Id. at 224 (quoting Edgar, 457 U.S. at 645) (emphasis added). Summarizing its application, the court continued:

> States normally look to the State of a *business'* incorporation for the law that provides the relevant corporate governance general standard of care. And by analogy, it has been argued, courts should look to federal law to find the standard of care

[14] The FDIC also argued for the application of federal common law on the grounds of uniformity and the defendant's federal charter. MBF does not raise these arguments, but they are equally applicable--albeit unavailing--in this case.

On uniformity, the Supreme Court held that, given the number of federally and state chartered banks, "a federal standard that increases uniformity among the former would increase disparity with the latter." Id. at 220. The court also minimized the need for uniformity because the American banking system has survived despite "divergent state-law governance standards applicable to banks chartered in different states." Id. These factors are equally applicable to federally chartered corporations. That is, the application of federal common law to their activities would increase disparity between federal and state corporations and appears unnecessary given the "divergent state-law governance standards [already] applicable" to businesses incorporated in different states. Id.

The Atherton court also rejected the argument that federal common law applied because the defendant bank was federally chartered, holding that "[t]o point to a federal charter by itself shows no conflict, threat, or need for 'federal common law'…[and] does not answer the critical question." Id. at 223. The "critical" question, when considering whether to apply federal common law, is whether there is a "significant conflict between some federal policy or interest and the use of state law." Id. at 218. MBF does not allege any conflict between the use of state law and federal policy or interest in this case, and the court finds none. Absent such a conflict, this is not one of the "few and restricted" cases in which the use of federal common law is appropriate. O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994).

> governing officers and directors of federally chartered banks.

Atherton, 519 U.S. at 224 (internal citations omitted) (emphasis added). The Court rejected an interpretation of the internal affairs doctrine that would require the application of federal law simply because of a federal charter:

> To find a justification for federal common law [in the internal affairs doctrine]…is to substitute analogy or formal symmetry for the controlling legal requirement, namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest. The internal affairs doctrine shows no such need, for it seeks only to avoid conflict by requiring that there be a single point of legal reference. Nothing in that doctrine suggests that the single source of law must be federal.

Id. (internal citation omitted).

The Atherton court found that the internal affairs doctrine does not warrant the use of federal common law. In its place, the Court held that the aim of the internal affairs doctrine--holding corporate affairs to a single, predictable standard--is accomplished by applying the state law of wherever "the federally chartered bank has its main office or maintains its principal place of business." Id. at 224-25.

Applying Atherton in this case would require the court to apply the law of Oklahoma--CNI's principal place of business--in

addressing the role of CNI's president and board of directors in making the Contract.[15]

MBF argues that Atherton should not apply because it considers federally chartered banks, not federally chartered corporations. Although banks and corporations are not interchangeable, Atherton's analysis of the internal affairs doctrine applies to both.

Atherton rejects the application of federal common law based on the internal affairs doctrine, not because banks are unique, but because federal common law can only be used where there is a "significant conflict between some federal policy or interest and the use of state law." Id. at 218. There is no such conflict here. Therefore, this court cannot base the application of federal common law on the internal affairs doctrine and would be required to look to Oklahoma law, where CNI has its principal place of business, to resolve the equitable issues MBF raises.

Application of the internal affairs doctrine does not require the use of federal common law and thus does not create federal question jurisdiction in this case.

[15] The Contract states that it shall be "governed and construed in accordance with the law of the State of Tennessee, without regard to other choice of law provisions." (Contract, Ex. B to MBF TRO Mem., ¶ 21.) The court reads this provision to require the application of Tennessee law in interpreting the Contract only, and not in determining its validity. Even were it otherwise, this provision would preclude reliance on the internal affairs doctrine, which MBF argues is the basis for applying federal common law and for federal jurisdiction.

2. Power to Hear Challenges to Tribal Court Jurisdiction

MBF argues that this court has federal question jurisdiction to consider whether the Chickasaw Nation District Court has personal jurisdiction over MBF in CNI's case against it. CNI agrees that this court has federal question jurisdiction to address this narrow issue. Nevertheless, it argues that the court's federal question jurisdiction has not been invoked because the complaint does not seek a declaration that the Tribal Court is without jurisdiction.

In its complaint, Plaintiff MBF requests a declaratory judgment that CNI's contractual waiver of sovereign immunity is binding, an order compelling arbitration under the contract's arbitration clause, and a temporary restraining order against CNI from proceeding with its case against MBF in the Chickasaw Nation District Court. Of these three claims, only the third suggests a challenge to the jurisdiction of the Chickasaw Nation District Court.

Arguing for a temporary restraining order, MBF stated that it would be irreparably harmed by having to appear before the Chickasaw Nation District Court. MBF noted the threat of a Tribal Court ruling inconsistent with that of this court or of arbitrators, and the potential disruption to business operations from having to appear in separate jurisdictions. MBF did not

assert lack of jurisdiction as a basis for a temporary restraining order.[16]

Although the court would have jurisdiction to consider a challenge to the Chickasaw Nation District Court's personal jurisdiction over MBF, Plaintiff has made no such challenge.

Even if MBF had sought a declaration that the Chickasaw Nation District Court lacked jurisdiction over it, this court would have been likely to permit the Tribal Court to rule on the issue first (i.e. through a challenge filed by MBF in that court). The Supreme Court has held that a court being asked to rule on the jurisdiction of a Tribal Court should "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

The holding of Nat'l Farmers is limited in that it is tied to the tribal exhaustion doctrine, which holds that claims against Indians must first be brought against them in their respective Tribal Courts. See id. at 856-57. The doctrine does not apply if Tribal Court jurisdiction is contrary to a

[16] MBF formally alleges that the Chickasaw Nation District Court lacks personal jurisdiction over it. (Compl. ¶ 31.) This claim, however, appears in the complaint's "Allegations of Law" section and is not tied to the request for a temporary restraining order or any other prayer for relief. (Id. ¶¶ 32-35.)

contractual forum selection clause to the contrary. See Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997).

The Contract between MBF and CNI states that Federal Courts sitting in Tennessee and Oklahoma State Courts shall have plenary jurisdiction over disputes arising out of the Contract. (Contract, Ex. B to MBF TRO Mem., ¶ 21.) CNI's lawsuit in the Tribal Court seeks a declaratory judgment that the waiver of immunity is invalid and injunctive relief to prevent arbitration before the AAA. These claims arise out of the Contract. Therefore, the tribal exhaustion doctrine would apply only if the forum selection clause were unenforceable.

Although neither party addresses the issue, CNI's charter suggests that board approval may be required to submit CNI to the jurisdiction of a non-Tribal Court. The charter states that CNI's immunity can be waived "by written resolution of the board of directors [for] enforcement of…contracts…against the Corporation in tribal court, or any court of competent jurisdiction by agreement of the board of directors…." (CNI Charter, Ex. A to MBF TRO Mem., ¶ 3.02.)

The text contains two references to consent of the board of directors. It is possible that the second merely reiterates the requirement of board approval for waiving immunity, but that would be redundant. To interpret the text so as to avoid redundancy suggests that board approval would be required for

consent to suit in a non-Tribal forum. If so, the Contract's forum selection clause would be invalid, and the tribal exhaustion doctrine would require that MBF's challenge to Tribal Court jurisdiction be adjudicated first in the Chickasaw Nation District Court.

C. Conclusion

As a sovereign entity, CNI is not a diverse party under 28 U.S.C. § 1332. Therefore, this court does not have diversity jurisdiction.

Reliance on federal common law would create a federal question sufficient to vest this court with jurisdiction under 28 U.S.C. § 1331, but the internal affairs doctrine does not permit the use of federal common law and thus does not create federal question jurisdiction. This court does have federal question jurisdiction to consider whether the Tribal Court has jurisdiction over MBF, but that issue is not presently before the court. Even if it were, it is probable that the tribal exhaustion doctrine would require this court to await a preliminary ruling on the issue by the Tribal Court before passing on the issue. There is no federal question jurisdiction in this case

This case presents neither diversity nor federal question jurisdiction. Therefore, the court lacks subject matter jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Defendant CNI's motion to dismiss for lack of jurisdiction is GRANTED.

So ordered this 13th day of August, 2008.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE