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

MEMPHIS BIOFUELS LLC,	)	
	)	
Plaintiff,	)	No. Civil Action No. 2:08-cv-2253
	)	
v.	)	
	)	
CHICKASAW NATION INDUSTRIES, INC.	)	
	)	
Defendant.	)	

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM

COMES NOW the Plaintiff, Memphis Biofuels, LLC ("MBF"), and respectfully submits this Memorandum in further support of its opposition to the Motion of the Defendant, Chickasaw Nation Industries, Inc. ("CNI"), to dismiss pursuant to Rules 12(b)(1) and/or 12(b)(6) or, in the alternative, to stay for failure to exhaust tribal remedies ("the Motion").

MBF's arguments, in summary, are:

This Court has subject matter jurisdiction for three reasons:

- There is a question of the jurisdiction of the tribal court;
- There is federal question jurisdiction in that federal common-law applies; and
- There is diversity jurisdiction, notwithstanding that CNI is owned by the Chickasaw Nation.

Further, CNI had no immunity to waive – try as it might, CNI cannot overcome the paramount fact that its treasury is separate from the Nation's – and if it did have immunity, it

waived it, at least insofar as must be determined based on this record, for the purposes of this Motion.

Finally, exhaustion is not required; indeed, exhaustion is not even permitted, because the tribal court has no personal jurisdiction over MBF.

ARGUMENT

I. This Honorable Court Has Subject Matter Jurisdiction

A. This Court has Federal Question Jurisdiction

This Court has federal question subject matter jurisdiction that arises in two distinct ways. First, this Court has federal question jurisdiction to determine whether the tribal court can exercise jurisdiction over MBF. Second, federal question jurisdiction is present because of the necessary applicability of federal common-law to the determinative issues of this case.

(1) This Court has Federal Question Jurisdiction to Determine Whether the Tribal Court Can Exercise Jurisdiction over MBF

This Court undoubtedly has federal question jurisdiction to determine whether MBF, a non-Indian entity, must first exhaust its remedies in the tribal court, as CNI argues. This very issue creates federal question jurisdiction, as the Supreme Court explained:

> **The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331.** Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331. The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852-53 (1985). See also DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 513 (8th Cir. 1989) (emphasis added).[1] Thus, CNI's exhaustion claim in and of itself gives this court federal question jurisdiction.

(2) This Court has Federal Question Jurisdiction via the Necessary Application of Federal Common Law to Resolve the Internal Affairs of the CNI Corporation

Alternatively, and although not discussed at length at the hearing, this Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 via the necessary application of federal common law to the pivotal issue in this case. MBF's four-part argument on this point is simple:

a. CNI is a federally-chartered corporation. CNI does not dispute this.

b. The threshold issue in this case – whether CNI's waiver of sovereign immunity (to the extent that sovereign immunity existed at all) was valid – requires the scrutiny and analysis of the internal affairs of the corporation. CNI does not dispute this and, in fact, specifically placed the internal procedures of the corporation at issue by claiming that its President and Chief Executive Officer's written assurance that all internal procedures were satisfied in the negotiation and execution of the contract between MBF and CNI was not effective.

c. The internal affairs of a corporation are governed by the law of incorporation, which in this case, will be the federal common-law doctrines of estoppel, apparent authority and unclean hands (see MBF's original brief at p. 10); and

[1] Although both National Farmers and DeMent apply the doctrine of tribal exhaustion, its application is not required in this case where it would violate express jurisdictional prohibitions for the reasons set forth herein below at pages 21-28 of MBF's original Memo. As the Supreme Court has recognized, "the exhaustion rule stated in Nat'l Farmers was 'prudential,' not jurisdictional," and, therefore, does not affect this Court's assertion of subject matter jurisdiction. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

d. It is well established that the application of federal common-law is a basis which will support federal question jurisdiction. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 850, (1985); See also Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("We see no reason not to give 'laws' its natural meaning, and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common-law as well as those of a statutory origin"); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4514, p. 455 (2d ed. 1996) ("A case 'arising under' federal common-law presents a federal question and as such is within the original subject-matter jurisdiction of the federal courts").

Accordingly, and incorporating the more thorough analysis set forth in MBF's original brief at pp. 9-12, this Honorable Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1331.

B. This Court has Diversity Jurisdiction that is Not Affected by CNI's Claim of Immunity

For jurisdictional purposes, a corporation is considered to be a citizen of the State in which it is chartered, as well as the state in which it maintains its principal place of business. 28 U.S.C. § 1332(c)(1). This applies equally to federally-chartered tribal corporations. American. Vantage Cos., Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1095 n. 1 (9th Cir. 2002) ("An incorporated tribe, or an incorporated arm of a tribe, is, like any other corporation, ordinarily a citizen of the state in which it resides.") (citations omitted). CNI's argument that it has sovereign immunity and that this precludes this Court's exercise of diversity jurisdiction is not well-taken, as subject matter jurisdiction and sovereign immunity are different questions entirely. See, e.g. In re Prarie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir. 1994) ("sovereign immunity is a jurisdictional consideration separate from subject matter jurisdiction"); see also Nair v. Oakland County Community Mental Health Authority, 443 F.3d 469, 476 (6th Cir. 2006) (distinguishing

between sovereign immunity and subject matter jurisdiction). (This is set forth in more detail in MBF's original Brief at pp. 13-15 and rather then repeat that here, MBF respectfully directs the Court to that). The point is that CNI has no sovereign immunity, but even if it did, this would not mean that this Court has no subject matter jurisdiction.

II. The tribal immunity of the Chickasaw Nation does not extend to CNI or, alternately, was expressly waived by contract.

A. CNI Does Not Have Immunity Because it is a Distinct Legal Entity Separate From the Chickasaw Nation Tribe

1. Because the liabilities of CNI will not reach the assets of the Chicksaw Nation, the Chickasaw Nation is not the real party in interest.

The tribal immunity of the Chickasaw Nation does not extend to CNI because the Chickasaw Nation is not the real party in interest. *Runyan v. Assoc. of Village Council Presidents*, 84 P.3d 437, 440 (Alaska 2004) (finding that non-profit corporation comprised of tribes was not entitled to sovereign immunity). *See also McNally CPAs & Consultants v. DJ Host*, No. 03-1159, 2004 Wis. App. LEXIS 960 at *12 (Wisc. Ct. App. Nov. 24, 2004) (finding no immunity for state chartered corporation owned by tribe). Because "protecting tribal assets has long been held crucial to the advancement of the federal polices advanced by immunity [t]he entity's financial relationship with the tribe is therefore of paramount importance." *Runyan*, 84 P.3d at 440. As *Runyan* court stated: "[I]f a judgment against [an entity] will not reach the tribe's assets or if it lacks the 'power to bind or obligate the funds of the [tribe],' it is unlikely that the tribe is the real party in interest." *Id.* at 441 (finding no immunity after considering only that the entity's liabilities were wholly its own). "[T]ribes' use of the corporate form protects their assets from being called upon to answer the corporation's debt. But *this protection means that they are not the real party in interest*." *Id.* at 441 (emphasis added).

The key to resolving this issue is to consider what CNI really is. As previously established, CNI is a distinct legal entity and its corporate activities, transactions, obligations, liabilities and properties are not those of the Chickasaw Nation. Claims against CNI, cannot, by virtue of an express provision of CNI's charter, reach the assets of the Chickasaw Nation. (See MBF's original brief at pp. 17-18; CNI's Charter, Art. 1.03) MBF is not attempting to assert any claims against the Chickasaw Nation, nor to hold it liable for any of the actions of CNI. Accordingly, the Chickasaw Nation is not the real party in interest and the analysis is complete under the *Runyan* standard, and thus CNI is not protected by the Chickasaw Nation's immunity.

Even if the Court extends its analysis beyond the "paramount" factor of whether CNI's liabilities reach the tribe, the additional factors that courts have considered further indicate that the Chickasaw Nation is not the real party in interest. These factors include:

1. Whether the corporation is organized under the tribe's laws or constitution;

2. Whether the corporation's purposes are similar to or serve those of the tribal government;

3. Whether the corporation's governing body is comprised mainly or solely of tribal officials;

4. Whether the tribe's governing body has the power to dismiss corporate officers;

5. Whether the corporate entity generates its own revenue;

6. Whether a suit against the corporation will affect the tribe's fiscal resources;

7. Whether the corporation has the power to bind or obligate the funds of the tribe;

8. Whether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments; and

9. Whether the corporation is analogous to a tribal governmental agency or instead more like a commercial enterprise instituted for the purpose of generating profits for its private owners.

McNally, 2004 Wis. App. Lexis 960 at * p.12.

To analyze these factors under the present state of the record:

1. CNI is not a corporation formed under the tribe's laws or constitution. It is organized under federal law, which favors a finding that the tribe is not the real party in interest.

2. The purpose of CNI is "to engage in any type of lawful business, enterprise or venture, or any lawful act or activity for which corporations may be organized under the Oklahoma Indian Welfare Act; [t]o promote the economic development of the Chickasaw Nation; and, [t]o enable the development of tribal resources for the benefit of the Chickasaw Nation." (Charter, Art. II) Although one role of government is to promote economic development, given CNI's otherwise broad corporate purpose, this factor should not be seen as weighing in favor of CNI. CNI is a separate entity which runs its own affairs and, if it has any profits, is to give them to the Nation – this is not a governmental function such as providing police protection or developing playgrounds.

3. There is no requirement that CNI's governing body be comprised mainly or solely of tribal officials. Though the charter requires that directors be citizens of the Chickasaw Nation, they need not be "tribal officials". (Charter, Art. IV) Accordingly, this factor weighs in favor of MBF.

4. Apparently, the tribe's governing body has the power to dismiss corporate officers, and so this factor is in CNI's favor.

5. CNI generates its own revenue, which favors a finding that the tribe is not the real party in interest.

6. As previously discussed, a suit against CNI will not affect the tribe's assets. This paramount factor weighs heavily in favor of a finding that the tribe is not the real party in interest, and thus that there is no immunity.

7. CNI does not have the power to bind the tribe or obligate the funds of the tribe. This factor further weighs heavily in favor of a finding that the tribe is not the real party in interest.

8. CNI was established "to engage in any type of lawful business, enterprise or venture, or any lawful act or activity for which corporations may be organized under the Oklahoma Indian Welfare Act; [t]o promote the economic development of the Chickasaw Nation; and, [t]o enable the development of tribal resources for the benefit of the Chickasaw Nation." (Charter, Art. II) It is likely that any economic development would enhance the health, education or welfare of tribal members; therefore, MBF concedes that this factor weighs slightly in favor of CNI.

9. CNI is most closely analogous to a commercial enterprise for the purpose of generating profits for its private owners. CNI is a diverse, for-profit corporation with thousands of employees engaged in "a variety of products and services that include professional services, construction, manufacturing, property management, technologies, logistics and medical/dental staffing," spread over several businesses. (www.chickasaw.com, June 18, 2008). None of these qualities is indicative of a government agency. Therefore, this final factor again weighs in favor of finding that the CNI is not entitled to claim the tribe's immunity.

Because the majority of these factors indicate that the Chickasaw Nation is not the real party in interest, and certainly the "paramount" one does so, the Nation's immunity does not encompass CNI, a distinct corporate entity whose liabilities do not affect the Nation. Just as tribal sovereign does not apply to individual members of tribes, but only to tribes, it does not extend to corporations as artificial individuals that the tribe creates. *Dixon v. Picopa Construction Co.*, 772 P. 2d 1104, 1111, (Ariz. 1989). Therefore, CNI does not have immunity.

When the Supreme Court of Arizona determined that a tribal corporation did not have tribal immunity even though a tribal government had created the organization and was its sole stockholder, it considered only four of the factors listed above. *Dixon*, 772 P. 2d at 1110. First, whether the corporation had a board of directors separate from the tribal government. *Id.* Second, whether the corporation's charter insulated the tribe's assets from the corporation's debts. *Id.* Third, whether the corporation's activities were related to tribal self-governance or promotion of tribal interests. *Id.* And, fourth, whether the corporation was formed for the purpose of carrying out tribal governmental functions. *Id.* Again, relying on these factors from the above analysis, the immunity of the Chickasaw Nation simply does not extend to CNI.

2. The Department of Interior does not have the authority to extend the Chickasaw Nation's tribal immunity to CNI as CNI contends was accomplished by approval of its corporate charter.

CNI argues vociferously that because its charter contains the off-hand phrase, "…notwithstanding the immunity possessed by [CNI] as a wholly-owned corporation of the

Chickasaw nation," this means that the Secretary of the Interior has conferred immunity upon CNI (notwithstanding that the charter also provides that CNI cannot commit the Nation's assets). This is incorrect; the Department of Interior's issuance of CNI's corporate charter cannot extend the Chickasaw Nation's tribal immunity to CNI. No federal department or agency has the legal authority to extend tribal immunity under any delegation of legislative authority. As provided by 25 U.S.C. § 476:

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 948) as amended [the IRA], or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

25 U.S.C. § 476 (f). Any regulation, administrative decision or department or agency determination that previously classified, enhanced or diminished the privileges and immunities available to a federally recognized Indian tribe "shall have no force or effect." 25 U.S.C. § 476 (g). As acknowledged by the Department of Interior's Certificate of Approval in CNI's corporate charter: "nothing in this approval shall be construed as authorizing any action under this document that would be contrary to federal law." (Charter, p. 6.) The statement in CNI's charter, that CNI is authorized and empowered "to sue in its corporate name and, notwithstanding the immunity possessed by the Corporation as a wholly owned corporation of the Chickasaw Nation, to permit…," therefore, could not validly extend the Chickasaw Nation's immunity under any interpretation of the language. Accordingly, CNI is not immune.

3. There are no distinctions between the IRA and the OIWA that would justify disparate treatment for any purposes.

CNI has asserted that its incorporation under the Oklahoma Indian Welfare Act [OIWA] as opposed to the Indian Reorganization Act [IRA], justifies treating it differently for purposes of

both immunity and diversity than corporations organized under the IRA. There is no reason to distinguish between corporations organized under the IRA and those organized under the OIWA. Judicial precedent previously discussed in Plaintiff's Response to Defendant's Motion to Dismiss, and incorporated herein, establishes that the purpose of the OIWA was to extend the IRA to the tribes of Oklahoma after a reverse in federal policy regarding assimilation. (MBF's original brief at pp. 15-16.) Therefore, CNI, incorporated under the OIWA, should be treated as not immune and diverse, as are corporations under the IRA.

The OIWA extends the IRA's provisions allowing tribes to adopt constitutions and to incorporate to Oklahoma tribes, which were previously excluded from the IRA. 25 U.S.C. § 473 (excluding several Oklahoma tribes, including the Chickasaw Nation, from the IRA). Section 3 of the OIWA additionally grants Oklahoma tribes the right "to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984)[25 U.S.C. 461 et. seq.]," the IRA. 25 U.S.C. § 503 (extending all privileges of the IRA to the tribes of Oklahoma). The OIWA, through explicit reference and by including "any other rights or privileges," necessarily gave Oklahoma tribes the right to organize constitutional entities under Section 16 of the IRA, codified at 25 U.S.C. § 476, and distinct corporate entities under Section 17 of the IRA, codified at 25 U.S.C. § 477. Accordingly, there is no reason to distinguish between diversity or immunity based on the statue under which CNI is incorporated.

The federal government regulates tribal organization under the IRA and the OIWA with a single section of the Code of Federal Regulations that applies to organization under the IRA, the OIWA and the Alaska Native Reorganization Act. 25 C.F.R. § 81. These regulations were promulgated for the purpose of creating uniformity in organizing constitutions, ratifying amendments and charter, and calling for elections. 25 C.F.R. § 82.2. Their uniform procedures

and treatment for organization under both the IRA and the OIWA further supports MBF's contention that CNI should be treated as diverse and not immune, as would a corporation organized under the IRA.

MBF is not aware of any legal authority whatsoever that distinguishes between incorporation under the OIWA and incorporation under the IRA for determining immunity or diversity, nor has CNI cited to any. Rather, all authority suggests that they should be treated identically. Therefore, CNI is a resident of Oklahoma, creating diversity with MBF, and the Chickasaw Nation's immunity does not extend to CNI as a distinct legal entity.

B. Even if CNI possessed sovereign immunity, it was waived by the "clear and unmistakable" waiver contained in the Agreement.

Even assuming that CNI was entitled to sovereign immunity, (Paragraphs 19 and 16 of the Agreement, prior Exhibit "B") contains a clear and unmistakable waiver of sovereign immunity that in most circumstances would be effective to waive the tribe's immunity. See C&L Enter., Inc. v. Citizen Bank of Potawatomi Indian Tribe of Okla., 532 U.S. 411, 419 (2001). CNI does not dispute that the language of the waiver is effective to waive sovereign immunity. Rather, CNI argues that a waiver of sovereign immunity is only effective when the official who enters into the contract had the expressed authority to waive immunity, regardless of the tribe's subsequent actions. However, none of the cases cited by CNI support that proposition in this case.

CNI cites first to U.S. v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 657 (1940). While U.S. Fidelity & Guaranty Co. does state that "immunity cannot be waived by [U.S. government] officials," this does not mean that a waiver cannot arise by an equitable doctrine. In fact, one of the cases cited by U.S. Fidelity & Guaranty Co. implies that it can. In U.S. v. Finn, the Supreme Court held that the government cannot waive a statute of limitations defense by failing to raise it

because "the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the court of claims." 123 U.S. 227, 233, 8 S. Ct. 82, 31 L. Ed. 128 (emphasis added). Specifically, there was no Act of Congress (or lack of action) through which a waiver could be inferred. Id. ("since [the U.S.] has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the court of claims for the amount of a claim which the record or evidence shows to be barred by the statute would be erroneous."). These cases, involving government officials, are easily distinguishable-as the court is well aware, there is a separate body of law pertaining to alleged waivers by government officials of rights or benefits owned by the government. This is not a claim against the government nor an Indian tribe, it is a claim against a corporation with a separate existence, and as such, the question of whether there was a waiver is not affected by the cases cited by CNI.

Another case cited by CNI, Red Lake Band of Chippewa Indians v. American Arbitration Ass'n, 8 Indian L. Rep. 3114 (D. Minn. Jul 13 1981), also bears no precedential value. In that case, the court stated:

> The Magistrate recognized authority for the proposition that the officers of a recognized Indian Tribe have no power to effect a waiver of the tribe's sovereign immunity. Such a waiver must be made by Congress.

Id. (emphasis added). In essence the court held that only Congress could waive a tribes sovereign immunity. This is a mistake, as the Supreme Court has repeatedly held that the tribe may waive its own sovereign immunity. See C&L Enter., Inc., 532 U.S. at 419. Further, again, this would be a different case if MBF's claim were against the Nation. Because it is not, Red Lake does not bear on this case.

None of the other cases cited by CNI support this proposition either. In Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council, 170 Cal. App. 3d 489, 493 & 495 (Cal. Ct. App. 1985), the court found a lack of consent to suit because the plaintiff was told at the time that the tribal official signed the contract, that the tribal council still needed to approve the contract and that it was being signed for a limited bookkeeping purpose. There was no "representation and warranty" by the President and CEO that the approval had been obtained, as there was here. In World Touch Gaming, Inc. v. Massena Mgmt., LLC, 117 F. Supp. 2d 271 (N.D.N.Y. 2000), the agreement was with an unincorporated entity owned by a tribe, and there was no warranty that authority had been obtained. In Danka Funding Co. v. Sky City Casino, 747 A.2d 837 (N.J. Super. Ct. 1999), the contract was not signed by a tribal official. Further, the contract did not even contain a clear and unequivocal waiver of sovereign immunity. 747 A.2d at 359.

These cases do not stand for the proposition that a waiver executed by a President and CEO, who "represented and warranted" that he had obtained full authorization, cannot be valid. There is no argument in this case that the language of the waiver itself was not "clear and unequivocal." Thus, resolution of this issue, involving the apparent authority of the President and CEO of a corporation with a separate existence, whose acts cannot commit or even affect in any way, the assets of the tribe, will necessitate application of federal common-law principles of corporate law. Should MBF prevail on that analysis, the immunity was waived. Thus, this Motion, a Motion to Dismiss, as to which MBF's version of the events must be taken as true, cannot be granted on the basis of immunity.

III. Tribal exhaustion does not apply because the tribal court lacks personal jurisdiction over MBF

A. Tribal exhaustion does not apply when the tribal court's jurisdiction was invoked despite "express jurisdictional prohibitions," such as lack of personal jurisdiction.

Initially, it is well-settled that tribal exhaustion does not apply when the action in the tribal court is "violative of express jurisdictional prohibitions." National Farmers Union Ins. Co., 471 U.S. at 856 n21. Thus, where the tribal court does not have a "colorable claim of jurisdiction," tribal exhaustion is not required.

Section 1302(8) of the Indian Civil Rights Act – just like the Fifth and Fourteenth Amendments to the U.S. Constitution – prohibits tribal courts from exercising jurisdiction over a person in a manner that would deprive the defendant of due process. 25 U.S.C. § 1302(8); See also DeMent v. Oglala Sioux Tribal Ct., 874 F.2d 510, 516 (8th Cir. 1989) (considering whether the tribal court lacked personal jurisdiction over a non-member defendant before deciding that defendant was required to exhaust tribal remedies). In order to satisfy due process, the Plaintiff must show that:

(1) the Defendant "purposefully availed" itself of the privilege of acting in the forum or causing a consequence in the forum;

(2) the cause of action "arises from" the Defendant's activities in the forum; and

(3) the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the Defendant reasonable.

Southern Machine Co. v. Mohasco Indus. Inc., 401 F.2d 374, 381–82 (6th Cir. 1968); *see also* Cole v. Mileti, 133 F.3d 433, 436 (6th Cir. 1998). Thus, unless CNI can show that MBF has the requisite contacts with the Chickasaw Nation to satisfy due process, exhaustion is not applicable.

The most important prong of the Mohasco test is purposeful availment. "The emphasis in the purposeful availment inquiry is whether the defendant has engaged in some overt actions connecting the defendant with the forum state." Fortis Corporate Ins., v. Viken Ship Mgmt., 450

F.3d 214, 218 (6th Cir. 2006) (citations and internal quotations omitted). It requires "something more than a passive availment of the forum state's opportunities." Bridgeport Music, Inc. v. Still N The Water Pub., 327 F.3d 472, (6th Cir. 2003) (quoting, Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 891 (6th Cir.2002)). Thus, the purposeful availment test focuses on the quality of the contacts with the forum, not the number. LAK, Inc. v. Deer Creek Enterprises, 885 F.2d 1293, 1301 (6th Cir. 1989).

Here, the only connection between MBF and the Chickasaw Nation is the contract with CNI. However, it is beyond dispute that the sole act of entering into a contract with a forum resident is insufficient to satisfy the purposeful availment test. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). In such a case, the court must analyze the entire course of dealing and the business relationship contemplated by the parties to determine whether MBF intended to "reach out" beyond Tennessee to create a "continuous relationship or obligation" with the forum state. Walker Motorsport, Inc. v. Henry Motorsport, Inc., 110 F.3d 66, 1997 WL 148801 at *3 (6th Cir. 1997). Two cases, Calphalon Corp. v. Rowlette, 228 F.3d 718, 722 (6th Cir. 2000), Hillerich & Bradsby, Co. v. Hall, 147 F. Supp. 2d 672 (W.D. Ky. 2001) are instructive in this regard.

In Calphalon, 228 F.3d at 722, the Sixth Circuit held that the Northern District of Ohio lacked personal jurisdiction over the defendant despite an 18-year business relationship with the plaintiff, an Ohio resident. In so holding, the Sixth Circuit stated:

> In this case, the agreement and previous association between [Plaintiff] and [Defendant] centered on [Defendant] representing [Plaintiff] in the states of Minnesota, Iowa, South Dakota, North Dakota, and Nebraska. [Defendant's] performance of the agreement was not focused on exploiting any market for cookware in the state of Ohio. Moreover, [Defendant's] phone, mail, and fax contact with [Plaintiff] in Ohio and [Defendant's] physical visits there occurred solely because [Plaintiff] chose to be headquartered in Ohio, not because [Defendant] sought to further its business and create "continuous and substantial"

> consequences there. Arguably, [Defendant] would have served as [Plaintiff's] representative in the designated states, regardless of [Plaintiff's] base of operation. Thus, [Defendant's] contacts were precisely the type of "random," "fortuitous," and "attenuated" contacts that the purposeful availment requirement is meant to prevent from causing jurisdiction.

Id. at 723.

Similarly in Hall, 147 F. Supp. 2d at 678, the Western District of Kentucky found that it lacked personal jurisdiction over the defendant despite a six-year contractual relationship with the plaintiff, a Kentucky corporation. 147 F. Supp. 2d at 676–78. The Court noted that the defendant initiated the contact with the plaintiff, ordered goods from Kentucky, and received payments from Kentucky in exchange for "consulting services." Id. at 676–77. However, the court found these contacts to be relatively insignificant. Id. at 677. Rather:

> [Defendant] performed his part of the Agreement – exclusively using [Plaintiff's] baseball products – entirely outside of Kentucky. He performed no services in Kentucky nor did he or his team travel to Kentucky. More importantly for this analysis, [Defendant's] efforts were never purposefully directed toward Kentucky. He did not profit by work or efforts directed toward Kentucky. In fact, almost every one of the Kentucky connections which [Plaintiff] cites are those arising from [Plaintiff's] own presence in the state, rather than [Defendant's] purposeful reaching out to the state or to [Plaintiff's]. The unilateral activities of those who have a relationship with a non-resident defendant cannot satisfy the requirement of sufficient contact with the forum state.

Id. at 677 (emphasis added) (citations and internal quotations omitted). Thus, the Court found no purposeful availment of the Kentucky's jurisdiction, specifically because of "(1) [Defendant's] limited contacts with Kentucky generally, (2) the passive nature of those limited contacts with Kentucky, and (3) the absence of any obligations performed by [Defendant] in Kentucky." Id. Thus, under Calphalon and Hall, more than a long-term relationship with a forum resident is required to show purposeful availment.

This case is analogous to Calphalon and Hall. Like the plaintiffs in those cases, MBF agreed to perform a service for CNI, namely, to convert soybean oil into biodiesel. MBF's entire

course of performance was to take place in Tennessee. By the terms of the contract, CNI alone was responsible for procuring raw materials, transporting them to MBF, and transporting finished products from MBF to their final destination. (Agreement, paragraph 4 of prior Exhibit "B"). In addition, the Agreement designated Tennessee law as controlling, required the parties to arbitrate disputes, and required CNI to consent to jurisdiction in this Court. If anything, these facts show that MBF specifically avoided directing its corporate actions toward the Chickasaw Nation. Thus, the tribal court lacks personal jurisdiction over MBF, because any contacts MBF had with the Chickasaw Nation were "random, fortuitous, and attenuated," arising "only because [CNI] chose to reside there." Calphalon, 228 F.3d at 722 (citing International Techs. Consultants v. Euroglas, 107 F.3d 386, 395 (6th Cir.1997)).

CNI alleges that purposeful availment always is satisfied simply by negotiating a contract through phone calls and e-mails. CNI's original Brief at 12 (citing Tharo Sys., Inc. v. Cab Produkttechnik Gmbh & Co., KG, 196 Fed. Appx. 366, 370–71 (6th Cir. 2006); Cole v. Mileti, 133 F.3d at 436). However, both the Sixth Circuit and the Supreme Court have cautioned against "resort to 'talismanic jurisdictional formulas' for resolving questions of personal jurisdiction." LAK, 885 F.2d at 1294 (quoting Burger King Corp., 471 U.S. at 485). Instead, "the facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice." Id. (quoting Burger King Corp., 471 U.S. at 485; Kulko v. California Super. Ct., 436 U.S. 84, 92, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978)).

The present case is distinguishable from Cole and Tharo, the two cases cited by CNI. In both cases, the Sixth Circuit stated that "when a nonresident defendant transacts business by negotiating and executing a contract via telephone calls and letters to an Ohio resident, then the

defendant has purposefully availed himself of the forum by creating a continuing obligation in [the forum state]." Tharo, 196 Fed. Appx. at 370; Cole, 133 F.3d at 436 (emphasis added). However, this assumes that the contract gives rise to a significant obligation in the forum state. This was clearly satisfied in both Tharo and Cole. See Tharo, 196 Fed. Appx. at 370 (noting a number of actions performed under the contract by plaintiff and defendant); Cole, 133 F.3d at 436 (finding purposeful availment by engaging the plaintiff as a surety, thus creating a obligation of performance in the forum). By comparison, the contract between CNI and MBF does not create any obligations outside of Tennessee. Compare Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 151 (6th Cir. 1997) (holding that, where all performance occurred outside of the forum state, "it is immaterial that [Defendant] placed telephone calls and sent faxes to [Plaintiff] in [the forum]"); LAK, 885 F.2d at 1293–94 (finding no purposeful availment where the plaintiff solicited the defendant and all performance of the contract occurred outside of the state, despite various letters, phone calls, and personal visits directed by defendant toward the forum). Thus, the mere fact that a limited number of communications sent to CNI during the negotiation of the contract does not satisfy the purposeful availment prong for personal jurisdiction.

Conclusion

For the foregoing reasons, MBF respectfully submits that CNI's Motion should be denied.

Respectfully submitted,

s/John R. Branson

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CERTIFICATE OF SERVICE

This is to certify that I, John R. Branson, attorney for Plaintiff, have this day sent via e-mail, postage pre-paid, a true and correct copy of the foregoing pleading to Defendant to the following:

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CERTIFIED, this the 20th day of June, 2008.

s/John R. Branson
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