

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

**UNITED STATES OF AMERICA FOR
THE USE AND BENEFIT OF MORGAN
BUILDINGS & SPAS, INC. a Nevada
corporation, and MORGAN BUILDINGS
& SPAS, INC., a Nevada corporation**

Plaintiffs,

v.

**IOWA TRIBE OF OKLAHOMA d/b/a
BKJ SOLUTIONS, a federally-recognized
Indian Tribe, et. al.**

Defendants.

Case No. CIV-09-730-M

**IOWA TRIBE OF OKLAHOMA'S REPLY TO MORGAN'S RESPONSE
AND BRIEF IN OPPOSITION TO IOWA TRIBE'S
RENEWED MOTION TO DISMISS**

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I.
Introduction

The Iowa Tribe of Oklahoma, a federally recognized Indian Tribe (the “Tribe”), submits its Reply to Plaintiff Morgan Building & Spas, Inc.’s (“Morgan”) *Response and Brief in Opposition to the Iowa Tribe’s Renewed Motion to Dismiss* [Dkt. No. 70] (hereinafter “Morgan Response”). Contrary to Morgan’s strained assertions and interpretations of 18 “FACTS” comprising the first seven pages of its brief and more than 100 pages of attachments, Morgan has not and cannot support its claim that BKJ Solutions, Inc. (“BKJ”) and the Tribe are “alter egos of each other”. The Court must, therefore, grant the Tribe’s Motion to Dismiss.

II.
Arguments and Authorities

In its response to the Tribe’s motion to dismiss, Morgan does not argue that BKJ is not an entity created separate and apart from the Tribe. Instead, Morgan asserts that the Tribe and BKJ form an “integrated enterprise” because “treating BKJ as a separate entity would condone the Tribe’s abuse of the corporate form.” See Morgan Response, p. 1. Morgan further argues that the Tribe cannot assert sovereign immunity against the “claims of the United States *ex rel* Morgan.” Id.

Morgan’s arguments fail in each instance. First, by admitting that BKJ is an entity separate and apart from the Tribe, Morgan cannot claim that BKJ’s signature on the subcontract and the payment bond constitute a waiver of the Tribe’s sovereign immunity. Second, Morgan’s arguments made in an attempt to pierce the corporate veil of BKJ and impose liability on the Tribe fail because if the corporate veil were pierced, the Court

would have to make a determination as to whether BKJ is a subordinate economic entity which, again, would not have the authority to waive the sovereign immunity of the Tribe. Third, and finally, Morgan's argument that the Miller Act prohibits the Tribe from raising its sovereign immunity must fail because the Tribe is not a principal on the payment bond, thereby depriving this court of jurisdiction.

1. BKJ, AN INDEPENDENT ENTITY INCORPORATED UNDER THE LAWS OF THE IOWA TRIBE OF OKLAHOMA, EXECUTED THE SUBCONTRACT WITH MORGAN

It is uncontroverted that BKJ is an entity separate and apart from the Tribe.¹ On November 25, 2003, the Tribe, acting through its Business Committee, formed BKJ Solutions, Inc. under the Tribe's Corporation Act and the Constitution. See Iowa Tribe of Oklahoma's Renewed Motion to Dismiss [Dkt. No. 67] Ex. 1 (hereinafter "Iowa Motion"); See also Iowa Motion, Ex. 4, Affidavit of Renee Prince, ¶ 5 (hereinafter "Prince Affidavit"). It is BKJ that obtained SBA approval for participation in the SBA 8(a) program. See Prince Affidavit, p. 2, ¶ 8. It is BKJ that entered into the subcontract with Morgan that is at issue in this case. See Prince Affidavit, p. 2, ¶ 9. It is BKJ that appears as the principal on the payment bond secured pursuant to the Miller Act, 40

¹ In its recitation of "FACTS", Morgan begins by setting forth selective language from the Iowa Tribe of Oklahoma Constitution and its interpretation thereof that initially appears to challenge the validity of the Corporation Act under which BKJ was incorporated. See Morgan Response, p. 2, **Facts 1, 2, and 4**. However, Morgan "acknowledges that the question of whether the above-described irregularities render BKJ's existence invalid solely as a matter of Tribal law would normally be an issue referred to the Tribe's adjudicative process. *See, Sac & Fox Tribe v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006)." See Morgan Response, p. 15. Morgan is correct that this issue would have to be determined by the Tribal Court. Thus, Morgan does not dispute the validity of the formation of BKJ under Tribal law.

U.S.C. § 3133 (b) et seq. Id. The Tribe did not execute any payment or performance bond in connection with the subcontract. See Prince Affidavit, p. 2, ¶ 10. Morgan entered into a subcontract with BKJ, an entity created under the laws of the Iowa Tribe of Oklahoma. See Complaint, p. 3, ¶ 10. BKJ secured the Miller Act payment bond. See Complaint, p. 3, ¶ 9. Whatever claim Morgan may believe it has, must be asserted against BKJ—Not the Iowa Tribe of Oklahoma.

II. BKJ IS NOT, AS MORGAN ASSERTS, AN ALTER EGO OF THE TRIBE BUT EVEN IF AN ALTER EGO, THIS CONTENTION, AT BEST, REQUIRES THAT BKJ BE DECLARED A SUBORDINATE ECONOMIC ORGANIZATION OF THE TRIBE THAT STILL CANNOT WAIVE THE SOVEREIGN IMMUNITY OF THE TRIBE

Recognizing that BKJ is an entity created under Tribal laws and thus not the “Iowa Tribe of Oklahoma d/b/a BKJ Solutions, Inc.” as pleaded in its Complaint, Morgan switches theories and now attempts to assert that BKJ is an alter ego of the Tribe. Morgan then proceeds to set forth “FACTS” to demonstrate that the Tribe is liable for the acts of BKJ “under the theory of alter-ego liability.” See Morgan Response, p. 10. Morgan contends the corporate veil of BKJ can be pierced because of the existence of the following factors:

“1) the parent corporation owns all or most of the subsidiary's stock, 2) the corporations have common directors or officers, 3) the parent provides financing to its subsidiary, 4) the dominant corporation subscribes to all the other's stock, 5) the subordinate corporation is grossly undercapitalized, 6) the parent pays the salaries, expenses or losses of the subsidiary, 7) almost all of the subsidiary's business is with the parent or the assets of the former were conveyed from the latter, 8) the parent refers to its subsidiary as a division or department, 9) the subsidiary's officers or directors follow directions from the parent corporation and 10) legal formalities for keeping the entities separate and independent are observed. *Frazier v. Bryan Memorial Hospital Authority*, 1989 OK 73, ¶ 17, 775 P.2d at 288”

See Morgan Response, p. 10. Morgan then addresses the ten factors set forth in *Fraizer* in support of its strained assertion that the Tribe should be found to have unequivocally waived its sovereign immunity from unconsented suit. However, Morgan has demonstrated nothing in its set of “FACTS” is that would cause the actions of BKJ to waive the sovereign immunity of the Tribe.

In fact, the 10 factors listed above support a finding that, even if BKJ were not an entity separate and apart from the Tribe, it would still be a subordinate economic entity of the Tribe and its actions would still not waive the sovereign immunity of the Tribe. When determining whether an entity is a subordinate economic organization or arm of a Tribe, the Courts apply the following factors:

(1) the announced purpose for which the entity was formed; (2) whether the entity was formed to manage or exploit specific tribal resources; (3) whether the federal policy designed to protect Indian assets and tribal cultural autonomy is furthered by the extension of sovereign immunity to the entity; (4) whether the entity is organized under the tribe’s laws or constitution rather than federal law; (5) whether the entity’s purpose are similar to or serve those of the tribal government; (6) whether the entity’s governing body is comprised mainly of tribal officials; (7) whether the tribe has legal title or ownership of property used by the entity; (8) whether the tribal officials exercise control over the administration or accounting activities of the organization; (9) whether the tribe’s governing body has power to dismiss members of the organization’s governing body, and (10) whether the entity generates its own revenue, whether a suit against the entity would impact the tribe’s fiscal resources, and whether it may bind or obligate tribal funds.

Somerlott v. Cherokee Nation Distributors, Inc. 2010 WL 1541574 (W.D.

Okla.). As a subordinate economic organization of the Tribe, BKJ’s actions do not waive the sovereign immunity of the Tribe. Hereafter, the Tribe addresses the 10 factors identified by Morgan in support of its argument to “pierce” the corporate veil of BKJ and confer liability on the Tribe. The Tribe will show that the “FACTS”

alleged by Morgan, at best, support a finding that BKJ is a subordinate economic “arm” of the Tribe, and cannot result in a waiver of the Tribe’s sovereign immunity.

A. *The Tribe owns all of BKJ.*
*[the announced purpose for which the entity was formed]*²

Morgan implies wrongdoing because the Tribe is the sole owner of BKJ. See Morgan Response, p. 2, **FACT 3**. In order to qualify as a Small Business Administration certified 8(a) entity, the Tribe “must own as least a 51 percent interest” in the corporate entity. 13 C.F.R. § 124.109 (c)(3). The Tribe opted to own 100 percent.

B. *The Tribe and BKJ have a common governing body.*
[whether the entity’s governing body is comprised mainly of tribal officials]

Morgan states “the BKJ “Board of Directors” has been identified at all times to the membership of the Tribe’s Business Committee.” See Morgan Response, p. 3, **FACT 5**. SBA regulations state that management of the tribally-owned enterprise must be “controlled by one or more members of an economically disadvantaged tribe.” 13 C.F.R. § 124.109(c)(4)(A). The Iowa Tribe conferred that control to the members of the Business Committee. See Ex. 1, p. 5-6. *Defendant Iowa Tribe of Oklahoma’s Response to Plaintiff’s Combined Discovery Requests*, Answer to Interrogatories No. 2.

C. *BKJ’s initial assets came from the Tribe’s previous business.*

[whether the entity was formed to manage or exploit specific tribal resources]

In support of this proposition, Morgan focuses upon transfer of assets from the “old” BKJ to the “new” BKJ. See Morgan Response, p. 3-4, **FACT 6(e)**. As stated in

² The first statement is the factor Morgan cites from the *Fraiser* case. The bracketed statement is a factor to support the finding of subordinate economic organization.

the *Iowa Motion*, the Tribe had “developed” expertise over the years in providing construction, transportation, environmental and archaeological services” through the “old” BKJ and formed the “new” BKJ to take advantage of this expertise by transferring the assets to an entity that could obtain 8(a) certification. See Iowa Motion, Ex. 3 and Ex. 4, Prince Affidavit, p. 2 ¶ 8.

D. BKJ's office is located within the Tribal headquarters.

[whether the tribe has legal title or ownership of property used by the entity]

Morgan states BKJ's offices are located on tribal lands. See Morgan Response, p. 6, **FACT 15**. Morgan interprets this “FACT” to mean that BKJ is not a “truly separate business entity.” But even if this fact were somehow relevant, Morgan’s fact would lead to an analysis of whether BKJ is a subordinate economic organization of the Tribe. The answer for this factor would be “yes”.

E. The Tribe has repeatedly referred to BKJ as a "division" within the time it claims BKJ has maintained a separate existence.

[Whether the entity's purposes are similar to or serve those of the tribal government]

Morgan states that most of its evidence before discovery was allowed focused on this factor. See Morgan Response p. 5, **FACT 12**. The new evidence presented by Morgan makes reference to a statement made by a political candidate contained in a newsletter [**FACT 12(a)**], a reference in a news article in the tribal newspaper stating that “BKJ Construction [is] owned and operated by the Iowa Tribe” [**FACT 12(a)**] and that the Tribe obtained the “domain registration for “BKJSOLUTIONSINC.COM”

[**FACT 12(e)**]", hardly the "preponderance of evidence" necessary for Morgan to meet its burden of proof.

F. BKJ takes management direction from the Tribe.

[whether tribal officials exercise control over the administration or accounting activities;]

Morgan contends the Tribe undertakes certain activities such as reviewing and approving BKJ's annual budgets, deciding what business BKJ should pursue, repeatedly agreeing to indemnify sureties for BKJ liabilities³, and picking key personnel to serve BKJ from within the Tribe's own staff, and controlling BKJ's assets, including taking money out of BKJ and paying it to the Tribe's members as "dividends." See Morgan Response, p. 3, **FACT 6**. BKJ was created by and is regulated by the Tribe to "serve the governmental purposes of the Tribe. See Iowa Motion, Ex. 4, Prince Affidavit, p. 2, ¶ 7. The Tribe uses its "wholly-owned commercial enterprises (like BKJ) to produce revenue "to support tribal program and services." Id. at ¶ 4.

G. The Tribe has controlled BKJ's staffing and payroll.

[whether the tribe's governing body has power to dismiss members of the organization's governing body; whether tribal officials exercise control over the administration or accounting activities of the organization]

Morgan supports this assertion by pointing to the Tribe's involvement in changes in roles, responsibilities and allocations of BKJ employees and payroll as part of a single

³ Interestingly, Morgan's contention as to indemnifying sureties for liabilities demonstrates that the Tribe knows how to affirmatively waive sovereign immunity. The exhibits attached by Morgan in support of this proposition clearly show that BKJ is a principal on the surety bond and the Tribe, as an entity separate and apart from BKJ, indemnifies the principal (BKJ). No such affirmative exists here.

integrated human resources system of the Tribe. See Morgan Response, pp. 4-5, **FACT 9 and 10**. None of this is inconsistent with BKJ being a subordinate economic organization.

H. Legal formalities for BKJ's separate existence have been skipped.

[whether the entity is organized under the tribe's laws or constitution rather than federal law]

Morgan sets forth a series of "FACTS" to support its claim that BKJ is not an entity separate from the Tribe. See Morgan Response p. 3, 6, and 7, **FACT 4, 16, 17, and 18**. Morgan outlines how BKJ should have operated. However, as stated in footnote 1, *supra*, Morgan does not challenge the Tribal laws under which BKJ was incorporated and such a challenge, if it had been made, would have to be resolved in the Tribal court.

I. The Tribe has actual control over BKJ's assets and bank accounts.

[whether tribal officials exercise control over the administration or accounting activities of the organization]

Morgan asserts "the Tribe's designated representative confirmed that three Tribal Business Committee officers have access to and control over BKJ's bank accounts, as they do over the accounts of all other Tribal businesses." See Morgan Response, p. 15. See also Id. at p. 5, **FACT 11**. As set forth above, the members of the Tribe's Business Committee are also members of BKJ's Board of Directors. Thus, it should not be a surprise to Morgan that the same names would appear on checking accounts for bank entities.

J. The Tribe has substantially depleted BKJ's capital.

[the announced purpose for which the entity is formed; whether the entity generates its own revenue, whether a suit against the entity would impact the tribe's fiscal resources, and whether it may bind or obligate tribal funds]

Morgan asserts the Tribe's Business Committee has issued "dividends" from BKJ, reducing BKJ's capital by approximately \$600,000.00 in a 16-month span. See Morgan Response, p. 3, **FACT 6(c)**. These dividends, which serve the purpose for which BKJ

was created, began in 2007 after BKJ had established its cash flow, and before Morgan asserted its claim. The payments have been consistent over the three years and meet the purpose for which BKJ was formed. In addition, approximately \$123,000 of the distribution constituted repayment of a loan owed to the Tribe by BKJ. See Ex. 2, “Affidavit of Renee Prince” (September 10, 2010), p. 4, ¶ 11.

Finally, Morgan asserts some nefarious action on behalf of BKJ and the Tribe arising from (1) formation of a new entity named Bah-Kho-Je Solutions, Inc. and (2) a \$5,000,000 loan from BKJ to another tribal entity. As for the formation of Bah-Kho-Je, BKJ was created in 2004 and has a life of nine years in the 8(a) program. Tribes can own an applicant “that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the tribe operates in the 8(a) BD program as its primary SIC code.” 13 C.F.R. §124.109(c)(3)(ii). In anticipation of BKJ’s graduation from the 8(a) program, the Tribe has begun the process of qualifying a second entity to continue in the 8(a) program. As for the loan, Morgan is aware that more than \$3.5 million has been repaid to BKJ and the remainder will be repaid upon completion of a contract. *Id.* at p.3, ¶ 9.

Morgan cites to Judge West’s decision in *U.S. for use and benefit of Comark Building Systems, Inc. v. Iowa Tribe of Oklahoma, et. al.*, W.D. Okla. Case No. 5:09-CV-1046-W (attached as Exhibit 33 to the *Morgan Response*. Contrary to Morgan’s assertion, in that case Judge West found that BKJ was a both a separate entity and a subordinate economic entity that waived its sovereign immunity but not the sovereign immunity of the Tribe. *Id.* at pp. 15-16.

Despite the Plaintiff’s assertions and protestations, the 100-plus pages of documents presented in its brief does not support its theory of “piercing” the corporate veil. At best, Plaintiffs mountain of “evidence” supports Judge West’s conclusion that BKJ is a subordinate economic organization of the Tribe. That does not waive the sovereign immunity of the Tribe.

3. THE TRIBE IS NOT A PARTY TO THE PAYMENT BOND AT ISSUE
IN THIS CASE AND THUS MORGAN'S ARGUMENTS
CONCERNING THE MILLER ACT ARE NOT RELEVANT

Morgan devotes a full seven pages to an argument that the Miller Act somehow prohibits the Tribe from invoking sovereign immunity against claims made by the United States. Apparently Morgan is relying upon an issue that presented itself before Judge West in the *Comark* case. While Morgan is correct that Judge West has not issued any "final or preclusive" order in that case, Morgan is raising an issue that is not present in this case. The Tribe is vigorously defending its position in the *Comark* case and believes it will prevail.

However, the same issue is not present in this case and Morgan's argument is not relevant. As Judge West stated, the "Tribe's signature on the Miller Act itself [appears] to operate[] as a waiver of immunity as it constitutes the principal's pledge of a specific asset." In the *Comark* case, a Payment Bond was issued in the name of "Iowa Tribe of Oklahoma d/b/a BKJ Solutions, Inc." Exhibit 3, Ex. B to the *Complaint* filed in *Comark*.

The Payment Bond was issued to "BKJ Solutions, Inc." Without the appearance of a signature, there is no issue whether the Tribe waived sovereign immunity.

Conclusion

BKJ is either an entity separate and apart from the Tribe or it is a subordinate economic arm of the Tribe. Whichever applies, BKJ has taken no action affecting the Tribe's sovereign immunity on the part of the Tribe. The Miller Act argument is not relevant because the Tribe is not a party to the payment bond. For all these reasons, the Tribe's motion to dismiss must be granted.

Respectfully submitted,

s/David McCullough

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served on the following persons through the court's CMF/ECF system:

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