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

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| [1] THE UNITED STATES FOR THE USE AND BENEFIT OF MORGAN BUILDINGS & SPAS, INC., and [2] MORGAN BUILDINGS & SPAS, INC., a Nevada corporation. | ) | |
| Plaintiffs, | ) | Case No.: CIV-09-730-M |
| v. | ) | |
| [1] IOWA TRIBE OF OKLAHOMA D/B/A BKJ SOLUTIONS, INC. a federally-recognized Indian tribe, [2] THE ROSS GROUP LLC, an Oklahoma limited liability company, and [3] EMPLOYERS MUTUAL CASUALTY COMPANY, an Iowa corporation, | ) | |
| Defendants. | ) | |

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

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

The United States for the use and benefit of Morgan Buildings & Spas, Inc. and Morgan Buildings & Spas, Inc. (collectively, "Morgan") submit this joint Response and Brief against the Renewed Motion to Dismiss (Doc. No. 67) filed by the Iowa Tribe of Oklahoma ("Tribe"). The Motion should be denied because jurisdictional discovery has confirmed that the Tribe and "BKJ Solutions, Inc." ("BKJ") are an integrated enterprise and alter egos of each other, because treating BKJ as a separate entity would condone the Tribe's abuse of the corporate form, and because the Tribe cannot assert sovereign immunity against the claims of the United States *ex rel* Morgan.

## FACTS

Discovery has revealed the following facts:

1. The Iowa Tribe's Constitution and Bylaws create two branches of government. One branch is the "Council" consisting of all adult tribal members. Ex. 1, Tribal Constitution and Bylaws, Art. III. The other branch is the "Business Committee" consisting of five members elected by the Council. Ex. 1, Art. V. The power to enact "long range" laws is reserved to the Council, which can pass "Ordinances." Day-to-day functional decisions and virtually all other aspects of governance are vested with the Tribe's "Business Committee," which can act by "Resolutions." Ex. 1, Art. V and Art. XIV.

2. In 1989 the Tribal Business Committee enacted a "Resolution" adopting a "Corporations Act." Ex. 2. However, the "Corporations Act" was never ratified or adopted by an Ordinance as required by the Iowa Tribe's Constitution. Ex. 3, Deposition of Lydia Renee Prince, pp. 41, line 2 to 48, line 17.

3. On November 25, 2003, the Tribe's Business Committee enacted a series of Resolutions purporting to create "BKJ Solutions, Inc." as a corporation with one share of stock priced at $1.00, owned by the Tribe. Exs. 4-5. The Tribe's Business Committee also adopted a Resolution "transferring" all of the assets and business of the Tribe's "division" known as "BKJ Solutions" to the new BKJ. Ex. 6; Ex. 3, pp. 29, line 10 to 30, line 16; p. 53, lines 2-19.

4. The BKJ "Articles of Incorporation" are written for execution by the "Secretary of the Iowa Tribe," but they were not signed by a person authorized to act as the Secretary of the Tribe. Ex. 7; Ex. 3, pp. 105, line 2 to 108, line 7.

5. The BKJ "Board of Directors" has been identical at all times to the membership of the Tribe's Business Committee. Ex. 7; Ex. 3, pp. 53, line 20 to 55, line 7; 58, line 20 to 59, line 19.

6. Substantial control of BKJ has been exercised directly by the Tribe's Business Committee, including the following:

   (a.) Approval of annual operating budgets for BKJ (Ex. 8).

   (b.) Substantial dividends paid out from BKJ's funds directly to tribal members (Ex. 9; Ex. 3, pp. 67, line 12 to 82, line 12).

   (c.) Distribution of over $683,956.00 from BKJ to the Tribe's General Fund in a three-year period from 2007 to 2009, as reflected by the Tribe's integrated financial records (Ex. 10).

   (d.) Hiring and staffing decisions, especially as to BKJ's "CEO" (Exs. 11, 12, 13, 14; Ex. 3, pp. 97, line 2 to 106, line 16).

   (e.) Correspondence seeking SBA §8(a) BD certification as a tribally-owned enterprise. In particular, the SBA §8(a) BD certification of BKJ was originally applied for before BKJ's purported formation. The Tribe had explained to the SBA that the business now known as "BKJ" was organized as a division of a non-stock corporation "owned in common" by the Tribe's

members but otherwise separate from Tribal government, with the Business Committee constituting the managing Board of this "federal corporation." Ex. 15, Letter dated 10/23/2003. The Tribe also submitted financial information to the SBA using the information of the unincorporated "division" but titling its reports to be the financial data of "BKJ Solutions, Inc." -- for dates prior to BKJ's purported formation. Ex. 16, "BKJ Solutions, Inc." Income Statement 1/1/2003 to 9/30/2003.

7. The Tribe has "loaned" money to BKJ. Ex. 17; Ex. 3, pp. 65, line 18 to 67, line 21.

8. The Tribe has indemnified various sureties regarding the business of BKJ. Exs. 18, 19. The Tribe has expressly waived sovereign immunity regarding suits by such sureties, consenting to jurisdiction and venue in state and federal courts for the liabilities that BKJ may incur. Ex. 18 at ¶ 20; Ex. 19 at ¶ 21.

9. Functional employees, including a "CEO," have been shared across numerous Tribal enterprises. At various times, the person functioning as the "CEO" of BKJ was paid from the funds of the Tribe's other businesses, including its casino, "smoke shop," gift shop and "cleaning and maintenance services" businesses. Ex. 14; Ex. 3, pp. 92, line 1 to 106, line 15; Ex. 20, Depo. of S. Caruso, pp. 13, line 24 to 19, line 9. At other times, BKJ's CEO was paid from the Tribe's general fund or other Tribe-controlled accounts. *Id.*

10. Employees have been moved between various positions of Tribal government and various Tribal enterprises within a single, integrated human resources system, and hiring of BKJ personnel has been performed directly by the Tribe. Exs. 11, 12, 13, 14, and 21; Ex. 3, pp. 92-106.

11. The persons with authority to access the bank accounts of BKJ are designated officers of the Tribal Business Committee. Ex. 3, pp. 17, line 9 to 19, line 7.

12. BKJ has been repeatedly described as a "division" of the Tribe or as the Tribe's business, instead of being consistently described as a separate corporate entity. Examples are found:

(a.) In the Tribe's official newsletters, even as late as August, 2010. Ex. 22 (marked portions); Ex. 3, pp. 133, line 11 to 134, line 5.

(b.) In the United States Central Contractor Registration ("CCR") system, where "BKJ Solutions, Inc." has not been identified as a separate entity, but only as a "d/b/a" of the Tribe. Ex. 23.

(c.) In other federal construction contract awards similar to the one at issue in this case. Ex. 24.

(d.) On the Tribe's public website, which has prominently featured the "BKJ Solutions" name without clearly or consistently identifying it as a separate entity. Ex. 25.

(e.) Further, on January 8, 2010, the Tribe obtained a domain name registration for "BKJSOLUTIONSINC.COM". Ex. 26, domain registration record.

13. Accounting services for the Tribe, BKJ and other tribal enterprises are performed by the same firm. Ex. 20, pp. 22, lines 1-10.

14. Starting in June 2007, the Tribe's Business Committee formed another "corporation" called "Bah Kho Je Solutions, Inc." Ex. 27. The business purpose of "Bah Kho Je" is the same as that of BKJ. Ex. 3, pp. 29, line 10 to 35, line 25. BKJ and Bah Kho Je have the same CEO. Ex. 3, pp. 35, lines 20-25. They have the same principal office. Ex. 3, pp. 61, line 6 to 62, line 13. At least $5,000,000.00 was transferred from BKJ to Bah Kho Je between the formation of the latter enterprise and the end of 2008. Ex. 28; Ex. 3, pp. 33 line 20 to 35, line 25. No loan instruments or business records showing actual repayment as between Bah Kho Je and BKJ has been provided. The BKJ "Board of Directors" also controlled the process of seeking a separate §8(a) certification for "Bah Kho Je." Ex. 29.

15. The offices of BKJ are on the grounds of the Tribal government complex. Ex. 3, pp. 60, line 7 to 64, line 24. Despite request, no documents that would demonstrate an arms-length lease relationship have been produced. Ex. 30, Request/Response No. 28.

16. The "Corporations Act" of the Tribe (assuming its validity, *arguendo*) requires specific annual activity reports to be filed with the Tribe. Ex. 31, § 801. Despite request, no such annual reports of BKJ have been produced. Ex. 30, Request/Response No. 10.

17. Several BKJ Board meeting agendas and minutes were produced, but several of them were printed on Tribal letterhead. Ex. 32, Ex. 33. At several of these meetings of the "BKJ Board", the Business Committee members considered (a) using the Tribe's collective buying power to obtain favorable bonding rates to meet BKJ's obligations, and (b) re-allocating Tribal accounting staff from "Enterprise" to BKJ, to enable BKJ to claim that it can provide accounting services. Ex. 33.

18. No Stock Certificate representing the one (1) share of BKJ Solutions owned by the Tribe has been produced, despite request. Ex. 30, Request/Response No. 10.

**ARGUMENT AND AUTHORITIES**

When this case was first filed, Morgan had no information showing that "BKJ Solutions, Inc." existed apart from the Tribe. Thus, Morgan pled that the Tribe was "doing business as" BKJ for purposes of liability upon the Miller Act and contract claims at issue in this case. The Tribe's Renewed Motion contends that BKJ, but not the Tribe, obtained the federal contract award, signed the Subcontract[1] with Morgan, and obtained the Miller Act surety bond at issue in this case. The Tribe contends that it is entirely separate from BKJ. Morgan submits that BKJ factually and legally acts as an instrumentality and alter-ego of the Tribe. BKJ has relied on its Tribal "root" to invoke sovereign immunity when it wants to do so. The Tribe should not be entitled to disavow

[1] As used herein, the "Subcontract" refers collectively to the written Subcontract Agreement along with the Purchase Orders and Change Orders executed thereunder and the prime contract documents incorporated by reference therein.

either its liability for the conduct it controlled through one of its "branches" or the immunity waiver that was freely given in connection with the conduct of that business.

The Court has preliminarily found that a "fact issue" exists concerning whether the Tribe and BKJ are alter egos. Order, Doc. No. 40, p. 3. The Tribe has not disputed that if the Tribe and BKJ are alter egos, the Subcontract's terms consenting to this Court's jurisdiction permit this suit to be maintained against the Tribe. *See, Id.*.

BKJ and the Tribe are co-defendants in a similar pending case concerning a different public works project. *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. BKJ sought dismissal from that case by asserting that BKJ is entitled to assert the Tribe's sovereign immunity as a "subordinate economic entity" of the Tribe. Ex. 34 at p. 2 (Doc. No. 67 in 5:09-CV-1046W). Comark argued that BKJ should be considered a separate entity, not covered by sovereign immunity. Judge Lee West has held that BKJ is indeed a "subordinate economic entity" of the Tribe. *Id.* at pp.7-9. However, he has also found that BKJ's Articles of Incorporation include a self-executing consent to suit in federal court, waiving that immunity. *Id.* at p. 13; Ex. 7, § 5. Though Judge West has said that Comark's limited evidence has not established "alter ego" status between the Tribe and

BKJ, he has requested further briefing on whether the Tribe can assert sovereign immunity in Miller Act cases.[2]

In this case, Morgan has ample evidence of "alter ego" behavior – more than enough to meet its ultimate "preponderance" burden. *See, Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003). Virtually every factor for evaluating whether the Tribe and BKJ are "alter egos" favors Morgan's position.

Morgan also has evidence that the Tribe's use of the incorporation privileges it created for itself has been abused to perpetrate fraud or inequity. The Tribe has placed money payable to Morgan beyond reach by paying out large "dividends" from BKJ's funds, moving BKJ capital to the Tribe's general fund, and by giving millions of dollars of BKJ's funds to another ostensibly separate entity equally under the Tribe's total control.

As observed by Judge West in the *Comark* litigation, an additional fundamental reason exists to deny the Tribe's Renewed Motion: The United States is a real plaintiff in this case, against which the Tribe cannot invoke sovereign immunity. The United States has standing to seek recovery for Morgan's benefit against both EMC (as the Miller Act surety) and against the Tribe as the real principal on the surety bond.

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[2] Because Judge West has requested further briefing on whether the Tribe can assert sovereign immunity to avoid a Miller Act lawsuit (*Id.* at pp. 15-19), his Order in the *Comark* case is not final or preclusive as to any issue in this case.

## I. BKJ IS AN INTEGRATED ENTERPRISE / ALTER EGO OF THE TRIBE.

"One corporation may be held liable for the acts of another under the theory of alter-ego liability if (1) the separate existence is a design or scheme to perpetuate a fraud, or (2) one corporation is merely an instrumentality or agent of the other." *Gilbert v. Security Finance Corp.*, 2006 OK 58, 152 P.3d 165, 175 (citations omitted). The review of a "mere instrumentality" or "alter ego" issue, by which corporate limited liability may be "pierced," involves consideration of multiple factors, including:

> 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

The Tenth Circuit has applied virtually the same factors for over sixty years. *Fish v. East,* 114 F.2d 177, 191 (10th Cir. 1940). Discovery has enabled Morgan to show that nearly all of these factors support disregarding BKJ's alleged separate existence in this case.

This Court initially found a "fact issue" upon meager preliminary materials, before discovery was authorized. The same result should be reached on the enhanced evidentiary record. Unless the "alter ego" evidence permits no reasonable inferences in

Morgan's favor, Morgan should be allowed to proceed to trial against the Tribe. *Gilbert*, 152 P.2d at 175 (affirming submission of "alter ego" issue to jury). *See also, Ponca Tribe v. Continental Carbon Co.*, 2008 WL 5205679 (W.D.Okla., Dec. 11, 2008) (holding fact issue on alter ego issue prevented summary judgment sought by parent corporation).

***A. The Tribe owns all of BKJ.***

The Tribe concedes that it is the sole owner of BKJ.

***B. The Tribe and BKJ have a common governing body.***

The common identity of the Tribe's Business Committee and the BKJ Board of Directors favors finding that the Tribe and BKJ are one. BKJ's formative document automatically designates the Tribe's Business Committee as BKJ's Board. The Tribe admits that there has never been a variance between the membership of the Tribe's Business Committee and BKJ's ostensibly separate Board of Directors.

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

Applying the alter-ego doctrine is especially appropriate when a business owner forms new companies in series, transferring assets of the underlying business from one to the next. *See, e.g., Lopez v. TDI Services, Inc.,* 631 So.2d 679, 93-619 (La.App. 1994). BKJ's business was formerly conducted as an unincorporated "division" also called "BKJ Solutions." In November 2003, the Business Committee transferred all of the assets and business of this "division" to the "new" BKJ. To the extent that the Tribe's "federal corporation" had owned this business, no separate action or approval by the so-called "federal corporation" appears to have occurred. The financial reports of the "old" BKJ

were adopted as those of the "new" BKJ. The "old" BKJ's pending SBA §8(a) application apparently became the "new" BKJ's approved certification.

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

For part of the time since BKJ's putative formation, BKJ's "offices" were located within a room in the Tribe's main administrative office building in Perkins, Oklahoma. Recently, BKJ has moved its office to a portable building – but that building is still located on the grounds of the Tribal headquarters complex as one of approximately eight structures. Ex. 3, pp. 59, line 20 to 64, line 19; p. 106, line 17 to 20. There is no evidence that the Tribe has ever collected rent from BKJ, as one would expect from a truly separate business entity. Ex. 3, pp. 63, line 1 to 64, line 4.

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

Most of Morgan's evidence before discovery was allowed focused on this factor. The previously submitted examples remain applicable: (a) BKJ's website is a subset of the Tribe's website, (b) the Tribe's website and newsletters – even as late as August, 2010 – have referred to BKJ as a "division" or described BKJ's business as a commercial activity *of the Tribe* (c) the SBA's listing for "BKJ" describes it as a "d/b/a" used by the Tribe, and (d) other government contracts have been executed or reported as being entered into by the Tribe "d/b/a" BKJ.

***F. BKJ takes management direction from the Tribe.***

The Tribe, through its Business Committee, has reviewed and approved BKJ's annual budgets, decided what business BKJ should pursue, repeatedly agreed to

indemnify sureties for BKJ liabilities, and picked key personnel to serve BKJ from within the Tribe's own staff. The Business Committee has also controlled BKJ's assets, including taking money out of BKJ and paying it to the Tribe's members as "dividends."

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

The lack of any real separation between the Tribe and BKJ is illustrated by the employment history of Sam Caruso. Caruso was hired by the Tribe in 2004 to perform accounting services for the Tribe. His payroll was allocated out of a general "administrative" part of the Tribe's overall budget. His duties were soon expanded to include accounting for the Tribe's various business enterprises, ranging from its "smoke shop" to BKJ. When the allocation of Caruso's pay was changed, it was allocated among several business units, but none of it was charged to BKJ, even though services for BKJ were included in his duties. Caruso then served for a time as the Tribe's interim "Tribal Administrator." In 2006, the Tribe's Business Committee appointed him "CEO" of "tribal enterprise." Next, he was made BKJ's CEO, again by a decision of the Business Committee. All of these changes in roles, responsibilities and allocations of payroll were recorded within a single integrated human resources system of the Tribe. His job as BKJ CEO was even advertised by the Tribe in a manner similar to the way that a government agency posts civil service job openings.

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

The records of BKJ's corporate acts are incomplete, but of those produced, examples of "BKJ Board meeting agendas" are nearly always on Tribal letterhead, and the putative "minutes" are frequently also found with the Tribe's name and logo at the

top. Some of the most important corporate acts – the decision to issue dividends, in particular – are not even found on BKJ resolutions, but are recorded directly as acts of the Business Committee.

If BKJ were actually operated as a separate entity, its Board of Directors would have passed resolutions authorizing the payment of dividends to BKJ's sole *shareholder* – the Tribe. The Tribe's Business Committee would then have decided whether to distribute such dividends to tribal members or to use them for other purposes. Instead, these "dividends" have been directly approved by the Business Committee, as payments from the funds of BKJ and other tribal business units directly to Tribal members.

The Tribe produced documents purporting to create a tribal law authorizing the formation of public and private[3] corporations within the tribe's jurisdiction and, later, creating "BKJ Solutions, Inc." pursuant to that ostensible law. Those documents, coupled with the Tribe's Constitution and By-Laws, are defective to the point that it is possible that BKJ is not a valid entity. The Tribe's "Corporations Act" was "enacted" in 1989 by a "Resolution" of the Business Committee, even though such "long term" legislation could only be "drafted" by the Business Committee and would have to be passed by a vote of the entire membership of the Tribe as an "Ordinance" -- which never occurred. Further, the putative "Articles" of BKJ's formation are signed by someone who

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[3] Despite ostensibly enabling both public and private entities, no private company has ever been formed under the "Corporations Act." Ex. 3, pp. 50, lines 19 to 25.

is not a tribal member and thus unable to execute documents as the "Secretary" of the Tribe itself.

Another example of the Tribe's lack of respect for required formalities is that the Tribe's putative "Corporations Act" requires annual filing of activity reports. Despite request, no such reports have been produced for BKJ (or any other Tribal enterprise).

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). However, Morgan does not rely on establishing that the Tribe's "Corporation Act" or the putative records of BKJ are *ultra vires* or invalid *per se*. In this case, these irregularities are further evidence that the Tribe has not consistently respected the formalities required for establishing and maintaining separate corporate existence for its enterprises.

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

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.

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

The Tribe's Business Committee has issued "dividends" from BKJ, reducing BKJ's capital by approximately $600,000.00 in a 16-month span. From 2007 to 2009, another $680,000 was removed from BKJ and transferred to the Tribe's general fund, even while Morgan's claims for payment accrued and went unpaid. In that same period, the Tribe's

Business Committee created "Bah Kho Je Solutions, Inc."[4], with a management structure and business purpose indistinguishable from that of BKJ. At least $5,000,000.00 of BKJ's capital was diverted to this entity within its first 18 months of ostensible existence. Despite request, no loan instruments have been produced to show that this "inter-company" transfer of funds was in any way a legitimate arms-length transaction. The Tribe could have no reason for creating a separate entity directly competitive to its existing business except to prevent the recovery of judgments that may be obtained against its BKJ business.

Control is the "essential issue" of "alter ego" analysis, and facts showing both ownership and practical control justify disregarding the separate existence of the subservient entity, even if not every factor has been demonstrated. *Pennmark Resources Co. v. Oklahoma Corp. Com'n*, 2000 OK CIV APP 63, 6 P.3d 1076, 1981-82. Despite the importance of control, merely showing ownership or overlapping boards could be deemed insufficient. *See, Hamilton v. Water Whole Intern. Corp.*, 2006 WL 2942809 *2 (W.D. Okla. Sept. 5, 2006) (finding that plaintiff showed common control, but no other factors.) Morgan has shown the Tribe's complete control over BKJ plus numerous examples of "something more". *Id.* The Tribe's direct control over BKJ's capitalization, finance, staffing, human resource administration, and corporate decisionmaking is so comprehensive that BKJ should be deemed an entirely integrated enterprise and mere

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[4] In the Iowa dialect, "*Bah Kho Je*" means "people of the grey snow" and is the name of the Tribe itself.

instrumentality of the Tribe. It is appropriate to say that the Tribe "does business as" BKJ, making the Tribe a proper defendant in this case.

## II. THE TRIBE'S DEPLETION AND COMMINGLING OF BKJ'S CAPITAL ABUSES "LIMITED LIABILITY" TO THE EXTENT THAT BKJ'S SEPARATE EXISTENCE SHOULD BE DISREGARDED.

The Miller Act seeks to ensure viable remedies, in lieu of liens, for subcontractors within its scope. *Clifford F. McEvoy Co. v. United States* ex rel. *Calvin Tompkins Co*., 322 U.S 102, 107 (1944). Allowing the Tribe to frustrate Morgan's recovery through depletion of BKJ's assets would defeat this important public policy goal. "[T]he corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably [constructive] fraud, on the shareholder's behalf." *U.S. v. Bestfoods*, 524 U.S. 51, 62 (1998) (piercing to impose federal anti-pollution law liability). In Oklahoma, *Thomas v. Vertigo, Inc*., 1995 OK CIV APP 45, 900 P.2d 458, held that a sole shareholder/director/officer who took substantial funds out of his company would be held liable as the company's alter ego, so that a workers' compensation judgment would not be left unsatisfied. In this case, the Tribe should be required to defend as BKJ's alter ego because it has similarly used its complete control to raid BKJ's accounts.

The discovery this Court allowed has revealed that the Tribe has removed over $6,250,000.00 in assets from BKJ, distributing money that should be available to satisfy Morgan's claims (a) directly to Tribe members, (b) to the Tribe's "General Fund," and (c) to another putative corporation – "Bah Kho Je Solutions" – which is also owned and

controlled by the Tribe. Even if some of these funds might be restored to BKJ, the Tribe's conduct in depleting and commingling assets demonstrates that the Tribe could and likely would prevent any actual judgment recovery by Morgan. Allowing the Tribe to avoid or limit payment of Morgan's Miller Act claim by letting over $6,000,000 of BKJ assets remain beyond reach would frustrate public policy. Therefore, the Tribe's fiscal conduct supports "piercing the veil" as between BKJ and the Tribe.

## III. THE TRIBE CANNOT INVOKE SOVEREIGN IMMUNITY AGAINST THE UNITED STATES.

Indian tribes cannot invoke sovereign immunity against claims made *by the United States*. The Miller Act's exclusive grant of federal court jurisdiction, 40 U.S.C. §3133(b)(3)(B), coupled with its requirement that suits be brought *in the name of the United States*, 40 U.S.C. §3133(b)(3)(A), comprehensively expresses Congressional intent to prevent any person, including Indian tribes or their instrumentalities, from claiming any form of immunity for claims arising under the Miller Act.

Though *applicability* of a federal statute to a tribe and the *ability to bring suit* against the tribe may be different questions (*see, Florida Paraplegic Ass'n v. Miccosukee Tribe*, 166 F.3d 1126, 1130 (11th Cir.1999)), this distinction relates to whether a *private citizen* can sue a tribe. Express abrogation of tribal sovereign immunity is typically needed when *private parties* assert claims. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). However, when the question is whether the United States can maintain an action based on federal law, the answer is "yes."

***A. A Miller Act principal can be joined as co-defendant with its surety.***

The Miller Act permits suits against both sureties and contractors. *See, e.g., United States* ex rel. *Owens v. Olympic Marine Services, Inc.,* 827 F.Supp. 1232 (E.D.Va. 1993). *See also, Durant v. Changing, Inc.*, 1995 OK CIV APP 20, 891 P.2d 628, 631 (holding that principal is a proper defendant on a claim involving a surety). The liability of a Miller Act surety is based on that of the contractor, making it proper to subject the contractor to federal court jurisdiction. *U.S.* ex rel. *Polied Environmental Services, Inc. v. Incor Group*, 238 F.Supp.2d 456, 461-61 (D.Conn. 2002) (collecting cases).

***B. In Miller Act cases, the United States is a plaintiff.***

Many federal statutes expressly create rights of action for private persons. *See, e,g.,* 42 U.S.C. §2000(e). Some of these statutes expressly exempt tribes from their scope. *See, Duke v. Absentee Shawnee Tribe Housing Authority*, 199 F.3d 1123 (10th Cir. 1999). However, the Miller Act is different. The Miller Act mandates that suits to collect payments owed to public works subcontractors be brought in the name of the United States. 40 U.S.C. §3133(b)(3)(A). Federal district courts have exclusive jurisdiction over such claims. 40 U.S.C. §3133(b)(3)(B). The Miller Act applies generally to "any person" who undertakes a federal construction project. 40 U.S.C. §3131(a) (defining "contractor"). This definition plainly applies to artificial "persons" such as corporations, and no exceptions are indicated. Tribes should therefore be treated as covered "persons."

The relator status of the United States as plaintiff pursuant to the Miller Act is not merely nominal or salutary. In *Barnard-Curtiss Co. v. U.S.* ex rel. *D.W. Falls Constr.*

*Co.*, 252 F.2d 94 (10th Cir. 1958), *cert. denied,* 358 U.S. 906, and in *U.S.* ex rel. *Romero v. Douglass Constr. Co.*, 531 F.2d 478 (10th Cir. 1976), unpaid subcontractors would have had their appeals barred as untimely as private litigants. However, because the United States is allowed 60 days, instead of 30, to initiate appeals, the appeals were deemed timely. The Miller Act's provision for suits to be brought in the name of the United States was held to be intentional and meaningful. *Barnard-Curtiss*, 252 F.2d at 95-96 (rejecting contrary authorities). Congress's intent was "to assure those who furnish … materials and supplies [on public works projects] that the government would exert its power directly for their protection." *United States* ex rel. *Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1328 (10th Cir. 1978). Thus, a Miller Act claim can be maintained in the name of the United States against any contractor subject to its provisions, including Indian tribes who are doing business as contractors through alter-ego enterprises.

***C. Tribes are not immune from the United States' Miller Act claims.***

The Tribe cannot invoke sovereign immunity for itself or its integrated enterprises for its commercial activities on non-tribal land, especially when those activities are subject to the Miller Act. The Tribe's sovereignty is not threatened by subjecting it to suit in this case in the same manner as any other public works contractor.

In *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), a tribal commercial enterprise was held subject to federal Occupational Safety and Health Administration ("OSHA") regulations, preventing it from invoking sovereign immunity

against agency enforcement of generally applicable federal statutes. *See also, Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996). *Coeur d'Alene* holds that federal statutes of general application apply to tribes and their enterprises unless one of three exceptions applies. The exceptions are based on whether the regulated activity is occurring entirely within the tribe's territory, whether subjecting the tribe to the federal law conflicts with a recognized treaty with the tribe, and whether the tribe can show that Congress intended to exempt tribes from the law. 751 F.2d at 1116-18. The Tenth Circuit applies the *Coeur d'Alene* rule. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462-63 (10th Cir.1989). *See also, Donovan v. v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (applying same exceptions to jurisdiction later set forth in *Coeur d'Alene* to an on-reservation tribal business based on treaty-protected internal affairs sovereignty.)

Other generally applicable federal laws also prohibit sovereign immunity defenses. *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007) upheld enforcement of the National Labor Relations Act to a tribe's casino business. *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176 (10th Cir. 2007) held that a 2006 amendment to ERISA[5] had exempted some, but not all tribal employment benefit plans from its provisions, thereby partially restoring sovereign immunity that had previously been held inapplicable. *See also, Vandever v. Osage Nation Enterprise, Inc.*, 2009 WL 702776, *2, n.1 (N.D.Okla. Mar. 16, 2009) (copy attached). In *Miccosukee Tribe of*

*Indians of Florida v. U.S.* __ F.Supp.2d __, 2010 WL 3195661 (S.D.Fla., Aug. 11, 2010) (correcting prior order, copy attached), the tribe that succeeding in invoking sovereignty in *Florida Paraplegic*, 166 F.3d 1126 (see Prop. III) was prevented from invoking sovereignty to avoid an I.R.S. subpoena issued pursuant to 26 U.S.C.A. §§ 7602-7609, even though the I.R.S. summons statutes say nothing about tribes. *U.S. v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987) similarly involved a lawsuit to recover certain government records from a sovereign tribe. Again, the superior sovereignty of the United States overcame the tribe's assertion of immunity.

As with the above examples, none of the *Coeur d'Alene* exceptions apply in this case. The Tribe's federal construction contracts, acquired through its wholly owned and controlled alter ego, are commercial. They are performed outside of tribal land. Enforcing the Miller Act by making the Tribe amenable to suit in this Court does not impair any legitimate sovereign function of the Tribe. It would not involve any "intramural" matters or abrogate any treaty rights. In fact, it would respect the legislative intent of the Miller Act.

Confirming that the federal government expects tribes to be subject to Miller Act cases in federal courts, the SBA's regulations for the SBA §8(a) BD (tribal preference) program mandate that when tribal enterprises seek federal contracts, they must consent to suit in federal court "for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance." 13 C.F.R.

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[5] Employment Retirement Income Security Act, 29 U.S.C. §1002 *et seq*.

§124.109(c)(1). The full force of the United States' power as a sovereign nation are available to vindicate the rights of qualifying subcontractors – the persons protected by the Miller Act – even when a tribe is involved.

The Tribe's primary governing body – its "Business Committee" – has comprehensively managed and dominated the affairs of BKJ, disregarded corporate formalities (including those required by its own lawmaking) and misappropriated BKJ's assets to benefit tribal members and its other enterprises. It cannot invoke immunity from suit by the United States regarding its conduct as the true contractor, for both practical and legal purposes, in this Miller Act case.

**IV. THE SUBCONTRACT WAIVES SOVEREIGN IMMUNITY.**

The Subcontract at issue in this case explicitly states, twice, that "[t]his Subcontract shall be governed by and interpreted in accordance with the laws of the State of Oklahoma" and that "venue of any action hereunder shall lie exclusively in either the District Court for Lincoln County, State of Oklahoma, or in the United States District Court for [the] Western District of Oklahoma, as the case may be." Complaint, Ex. 1 (Doc. 1-3), pp. 6, 8. This is sufficiently clear to constitute a waiver of immunity and consent to jurisdiction in this Court. *Cossey v. Cherokee Nation Enterprises, LLC*, 2009 OK 6, 212 P.3d 447 (holding that tribal gaming compact term consenting to tort claim suits in any "court of competent jurisdiction" waived tribe's immunity to tort suits in state courts); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) (holding arbitration clause in construction contract waived immunity); *FGS*

*Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995), cert. denied, 517 U.S. 1134 (accepting jurisdiction where Miller Act subcontract selected venue in either tribal or federal court); *Bradley v. Crow Tribe of Indians*, 67 P.3d 306, 308, 311-12 (Mont. 2003) (holding sovereign immunity waived by construction contract term for choice of law and venue); and *Rush Creek Solutions, Inc. v. Ute Mountain Tribe*, 107 P.3d 402, 404, 406 (Colo.Ct.App. 2004) (similar).

Further, an SBA-requested immunity waiver paragraph is incorporated in BKJ's Articles of Incorporation. Judge West has found this waiver self-executing. Order, Ex. 33, pp. 14-15. Further still, the express incorporation of the terms of the prime contract in the Subcontract and each Purchase Order executed thereunder also makes Morgan's claims subject to suit in this Court. Complaint, Ex. 1 (Doc. 1-3), ¶ 1. The prime contract made BKJ – and thus the Tribe as its alter ego – amenable to suit in this Court as a Miller Act principal.

## CONCLUSION

The Complaint alleges that the Tribe was the true contractor, "doing business as" BKJ, when it ventured beyond its tribal territory to enter into a public works contract, when it obtained a Miller Act surety bond as required by federal law, when it entered into the Subcontract with Morgan, and especially when it breached the Subcontract by failing to timely and fully pay Morgan for the materials and labor Morgan provided. Recognizing any distinction between the Tribe and BKJ would permit the Tribe to continue avoiding just liabilities with impunity.

This case is exclusively subject to this Court's jurisdiction pursuant to the Miller Act. The Miller Act requires the Tribe, as the true "contractor," to answer to the United States for the use and benefit of its subcontractor, Morgan. The Tribe's Renewed Motion should be denied.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS
THE UNITED STATES
FOR THE USE AND BENEFIT OF
MORGAN BUILDINGS & SPAS, INC. and
MORGAN BUILDINGS & SPAS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2010, I electronically transmitted the attached document to the clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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