IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COUNCIL FOR TRIBAL EMPLOYMENT RIGHTS,	)	
Plaintiff,	)	
v.	)	No. 12-326C (Judge Charles F. Lettow)
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

STUART F. DELERY
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

DONALD E. KINNER
Assistant Director

OF COUNSEL

CHARLES WALLACE
Acting Assistant Solicitor

WILLIAM B. BLAKE
Attorney-Advisor

Branch of Acquisitions and
Intellectual Property
Solicitor's Office – Division of
General Law
U.S. Department of the Interior

JOSEPH E. ASHMAN
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
(202) 353-7578 (telephone)
(202) 353-7988 (facsimile)

Attorneys for Defendant

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Pursuant to Rule 7.2(b) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in support of our motion to dismiss or, in the alternative, motion for summary judgment. As we explain below, plaintiff, Council for Tribal Employment Rights' (CTER), response to our motion fails to show that CTER's complaint offers a basis upon which the Court may grant relief. Accordingly, the Court should grant our motion and dismiss plaintiff's complaint.

The dispositive issue in this case is whether the Government official who signed the agreements at issue in CTER's complaint possessed the requisite authority to bind the United States in contract with plaintiff. We demonstrated in our motion that the Office of Indian Energy and Economic Development (IEED) "Awarding Official" who signed the agreements, Ms. Lynn Forcia, possessed no authority to bind the United States in contract. Accordingly, CTER's breach of contract claims must fail because Ms. Forcia could not create privity of contract between the Government and IEED. For the same reason CTER's third party beneficiary claims must also fail. It is a fundamental legal principal that a Government official without authority cannot accomplish indirectly through a third party beneficiary that which she has no authority to

accomplish directly – *i.e.*, confer upon an entity contractual rights enforceable against the United States. Because Ms. Forcia possessed no authority to contract, CTER cannot be in privity of contract with the Government and is not a third party beneficiary to any agreement to which the Government is a party. The Court should dismiss plaintiff's complaint.

ARGUMENT

I. THERE IS NO PRIVITY OF CONTRACT BETWEEN IEED AND CTER

In our motion, we demonstrated that Counts I and IV of CTER's complaint should be dismissed because the IEED Awarding Official who signed the agreements at issue, Ms. Forcia, lacked the requisite authority to bind the United States in contract. Def.'s Mot. at 20-24. We demonstrated first that a Level 1 Awarding Official's authority was strictly limited to issuing only self-determination agreements under the Indian Self-Determination Act (ISDA). Def.'s Mot. at 21-23. We explained that CTER does not allege that the agreements at issue are self-determination agreements and, furthermore, the agreements indeed are not self-determination agreements because they do not possess any of the statutorily required terms and conditions that Congress prescribed in the ISDA. *See* 25 U.S.C. § 450(l); Def.'s Mot. at 22.

In response, CTER does not assert that the agreements at issue are self-determination agreements but, rather, states that "[p]laintiff will not be able to put a designation on the agreement until it has completed discovery." Pl.'s Resp. at 34. Given the procedural history of this case, this statement is remarkable. Based upon CTER's assertion that plaintiff must take discovery from the Government in order to respond to our dispositive motion, the Court authorized discovery "related to all aspects of this case." Order, dated Jan. 10, 2013 at 2. CTER served the Government with comprehensive document requests and requests for admissions related to all aspects of plaintiff's complaint. Prior to CTER filing its response to our motion,

the Government completed its production efforts and provided plaintiff with over 10,000 pages of documents – the vast majority of which related to the two agreements at issue. Despite having taken comprehensive discovery, CTER does not offer a single page of evidence that suggests the agreements at issue are self-determination agreements. We filed our motion on December 11, 2012. Although being free to do so, CTER, over the past 5 months, has not sought any additional discovery from the Government related to the specific arguments raised in defendant's motion. Nor does plaintiff offer a rationale for what specific type of further discovery would be necessary to resolve whether – in the face of 25 U.S.C. § 450(l) – the agreements at issue are self-determination agreements under the ISDA. CTER's insistence that some further discovery remains necessary is simply dilatory.

In any event, the issue of whether further discovery is required for CTER to know whether the agreements that it claims to be a party to are self-determination agreements is a red herring. As we explained in our motion, Def.'s Mot. at 22, Congress mandated the precise form that self-determination agreements must follow. *See* 25 U.S.C. § 450(l); *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1082 (Fed. Cir. 2003). A cursory comparison of the agreements at issue with the ISDA's model agreement demonstrates that the agreements are not self-determination agreements. *Compare* 25 U.S.C. § 450(l)(c) *with* A 114-24 and A 187-93. CTER, in its response, does not address the import of 25 U.S.C. § 450(l)(c). As a matter of law, the agreements at issue are not self-determination agreements, and are beyond the scope of authority for an IEED Level 1 Awarding Official to enter into.

We next explained in our motion, Def.'s Mot. at 23, that BIA further restricted Ms. Forcia's authority to issuing only grants, and she therefore lacked the authority to bind the United States in contract of any kind. A 1-2 ("Lynn Forcia [i]s delegated the authority to award

only P.L. 102-477 grants . . ." (emphasis added).). In response, CTER does not argue that Ms. Forcia possessed the requisite authority to bind the United States in contract. Pl.'s Resp. at 30-31. Rather, CTER asks the Court to hold that where a Government contracting official possesses a warrant of any kind, then the Government is bound by the official's actions even if the actions are beyond the scope of the official's delegated authority. *Id*. at 31.

CTER's request directly contravenes the fundamental tenant of Government contract law that "any party entering into an agreement with the Government accepts the risk of correctly ascertaining the authority of the agents who purport to act for the Government." *Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001); *see also Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). Accordingly, the law placed the burden on CTER to correctly ascertain the authority of the IEED Awarding Official with whom plaintiff dealt, and the Government cannot be estopped from asserting that Ms. Forcia exceeded the authority delegated to her. *Shearin v. United States*, 25 Cl. Ct. 294, 297 (1992).[1]

Finally, we explained in our motion that even if the agreements at issue were self-determination agreements, CTER could not be a party to those agreements because it did not satisfy the ISDA statutory prerequisite that an "organization" performing services benefitting more than one Indian tribe must obtain each tribes' approval in the form of a tribal resolution prior to "the letting or making of such contract or grant." 25 U.S.C. §§ 450b(l), 450l(f)(1); Def.'s Mot. at 25-27. In its response, CTER does not deny that plaintiff did not obtain the requisite tribal resolutions from each tribe that would receive the vocational job training under

[1] CTER's insistence that requiring a party to correctly ascertain the scope of authority of a Government official "would impose huge delays and burdens on the Federal contracting process," Pl.'s Resp. at 31, is without import. The Federal Acquisition Regulations require that "[i]nformation on the limits of the contracting officers' authority shall be readily available to the public and agency personnel." 48 C.F.R. § 1.602-1(a). Accordingly, upon request, an agency is required to provide information detailing the scope of a Government official's contracting authority to the public for inspection.

the agreements prior to the "letting or making" of the agreements. Pl.'s Resp. at 34-35. Indeed, CTER agrees with the Government's reading of 25 U.S.C. § 450b(l). *Id*. at 34. CTER argues, however, that 25 U.S.C. § 450b(l) should not apply here because IEED's amendments to the Spirit Lake Tribe's (SLT) self-determination agreement – to which CTER was the sub-grantee – suffered from the same statutory infirmity vis-à-vis obtaining the required tribal resolutions. *Id*. at 35. Plaintiff asserts that "[d]efendant cannot assert its argument on the resolution issue against CTER so long as it continues to assert that IEED had valid Self-Determination Contracts with the Tribe." *Id*.

We agree with CTER's application of 25 U.S.C. § 450b(l) to Amendments 2, A 83, and 6, A 150, to SLT's self-determination agreement – *i.e.*, because the necessary tribal resolutions were not obtained by SLT prior to the "letting or making" of those amendments, they are not valid. We will discuss further below the impact of the amendments' invalidity on CTER's third-party beneficiary claims. However, with regards to the issue of whether *plaintiff* entered into valid self-determination agreements with IEED, as we explained in our motion, it is clear that under 25 U.S.C. § 450b(l), CTER did not because plaintiff did not obtain the necessary tribal resolutions from each of the Indian tribes to be benefitted under the agreements at issue prior to the "letting or making" of the agreements.

II. CTER IS NOT A THIRD-PARTY BENEFICIARY

In our motion, we explained that Counts II, V and VI of CTER's complaint should be dismissed because "[i]t is apparent from the face of CTER's pleading that there was no intent by IEED, SLT or FHWA to benefit plaintiff directly through the agreements at issue." Def.'s Mot. at 12. CTER's theory for why it was a third-party beneficiary to Amendments 2 and 6 is insufficient to confer the "exceptional" status upon plaintiff because, as a sub-grantee under a

Federal grant program, CTER was in no different a position than any subcontractor working under a Government prime contract.

In response, CTER does not dispute that it was the sub-grantee under the grant agreements between IEED and SLT, with SLT the prime recipient of the grant funds. Rather, CTER focuses on the facts and circumstances leading to the formation of those relationships to argue that plaintiff was the intended beneficiary of the two agreements. CTER reasons that, had the law governing the grant programs – *i.e.*, the ISDA and the limits of Ms. Forcia's authority – been different, IEED would have contracted directly with CTER, and SLT would not have been involved in the programs. Pl.'s Resp. at 7-15.

While CTER emphasizes the facts and circumstances leading to the creation of the legal relationship between SLT and CTER, plaintiff ignores the fundamental principal that a Government official cannot do indirectly that which she has no authority to do directly – *i.e.*, confer contractual rights onto a party enforceable against the United States. It is CTER's position that a Government official without the proper authority to contract directly with an entity could get around this restriction by setting up a "straw-man," or pass through contract, and nevertheless create a legally binding relationship between the United States and that entity – a relationship which the Government official could not otherwise create directly. This is not the law, and CTER's "straw-man" argument should be rejected.

A. Amendments 2 And 6 To SLT's Self-Determination Agreement Are Not Valid; CTER Cannot Be A Third Party Beneficiary To Invalid Agreements

We explained in our motion, Def.'s Mot. at 25-27, and above, that pursuant to 25 U.S.C. § 450b(l), for IEED to enter into a self-determination agreement with an organization that will provide services to benefit more than one tribe, a prerequisite to the "letting or making" of such an agreement is for the organization to obtain tribal resolutions from each tribe authorizing the

tribe's participation in the program or service. As CTER correctly pointed out in its response, Pl.'s Resp. at 35, this statutory prerequisite applies to Amendments 2 and 6 to SLT's self-determination agreement because SLT is an "organization," and the amendments would provide "services benefiting more than one Indian tribe." 25 U.S.C. § 450b(l). It is not disputed that the requisite tribal resolutions were not obtained for either Amendment 2 or Amendment 6 prior to the "letting or making" of those agreements. Accordingly, Amendments 2 and 6 were not validly issued, and are not enforceable by either SLT or IEED.

"A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity." Restatement (Second) Contracts § 309 (1981). *See Ables v. United States*, 494, 501 (1983) ("This lack of capacity to bind the Air Force on the part of the Air Force signatories to the agreement precludes plaintiff from having any enforceable third party beneficiary right against the Air Force under said agreement."). Because Amendments 2 and 6 are not enforceable by IEED or SLT, CTER cannot be a beneficiary to those agreements. Accordingly, Counts II and V of its Complaint should be dismissed on that basis.[2]

B. The IEED Awarding Official Cannot Accomplish Indirectly That Which She Had No Authority To Accomplish Directly

As we explained in our motion, Def.'s Mot. at 20-25, and above, Ms. Forcia lacked the authority to bind the United States in contract of any kind. A 1 ("we have conditionally approved Ms. Forcia as a Level I Awarding Official to award *only Pub. L. 102-477 grants*"

[2] We recognize that we did not raise this argument in our opening brief. However, this argument addresses whether CTER is a third party beneficiary to a Government contract. Whether CTER is a third party beneficiary, and therefore maintains privity with the Government, is a jurisdictional issue. *Guardsman Elevator Co. v. United States*, 50 Fed. Cl. 577, 580 (2001). Challenges to the Court's jurisdiction may be raised at any time. *See* Rule 12(h)(3); *Kortlander v. United States*, 107 Fed. Cl. 357, 365 (2012).

(emphasis added).). In its Response, CTER does not dispute that Ms. Forcia lacked the authority to bind the United States in contract. Pl.'s Resp. at 30-31. "What [Government officials] could not do directly they certainly should not be allowed to do indirectly under the guise of an intended third party beneficiary." *Ables v. United States*, 2 Cl. Ct. 494, 501 (1983); *see also H.F. Allen Orchards v. United States*, 4 Cl. Ct. 601, 612 (1984) ("What the federal officers have not been authorized to do directly they may not be deemed to have been authorized to accomplish indirectly by making district members third-party beneficiaries entitled to enforce the contracts on their own behalf.").

Here, Ms. Forcia possessed no authority to bind the United States in contract with CTER; she therefore could not accomplish indirectly under the guise of an intended third party beneficiary that which she could not accomplish directly – *i.e.*, confer upon CTER contractual rights enforceable against the United States. *See Flexfab, L.L.C. v. United States*, 62 Fed. Cl. 139, 150 (2004), *aff'd*, 424 F.3d 1254, ("In conclusion, [plaintiff's] third-party beneficiary claim here falls short because [plaintiff] has failed to present any evidence that a government employee *with actual authority* intended to benefit [plaintiff] through . . . the contract" (emphasis added).).

C. CTER Is Not A Third-Party Beneficiary To The Interagency Agreement Between FHWA And IEED

In our motion, we demonstrated that Count VI of CTER's complaint should be dismissed because plaintiff cannot be a third-party beneficiary to an inter-agency agreement that is not enforceable in this Court. Def.'s Mot. at 36-38. We discussed the Claims Court decision in *Tennessee Valley Authority (TVA) v. United States (TVA I)*, 13 Cl. Ct. 692 (1987), holding that the Court could entertain a dispute between two entities within the Executive Branch where the entities possessed sufficiently independent identities – *i.e.*, the Court emphasized that TVA possessed a separate corporate identity, independent litigation authority from the Department of

Justice (DOJ), and authority to sue to enforce its contracts. *Id*. at 698-99. We explained that in the present case, neither the Federal Highway Administration (FHWA) nor IEED possess any of these attributes that would allow the respective agencies to bring there own actions in this Court against another Federal entity. Accordingly, because the inter-agency agreement at issue here is not enforceable in this Court by either agency, CTER is not a third-party beneficiary to the agreement because plaintiff could not "step into the shoes" of either party to enforce their rights under the agreement. Def.'s Mot. at 37.

In response, CTER does not argue that FHWA or IEED possess sufficiently independent identities that would allow either of the agencies to pursue breach of contract actions in this Court against another entity within the Executive Branch. Rather, relying upon another decision from this Court involving TVA, *TVA v. United States (TVA II)*, 51 Fed. Cl. 284 (2001), CTER asserts that all that is necessary for one agency to sue another agency in this Court is for there to be a commercial-type dispute over money between the two entities. Pl.'s Resp. at 21-23. CTER misreads *TVA II*, however, as the Court there adopted the rationale in *TVA I* that for an Executive Branch entity to sue another Federal agency, the entity must possess a sufficiently independent identity to maintain its own actions in this Court.

Both *TVA I* and *TVA II* involved disputes between TVA and the Department of Energy (DOE). In both decisions, the Court concluded that TVA could bring a breach of contract action against the United States, acting through DOE, because there existed an actual case or controversy before the Court. *See TVA I*, 13 Cl. Ct. at 698-99; *TVA II*, 51 Fed. Cl. at 286-87. In reaching this conclusion, the Court in both *TVA I* and *TVA II* emphasized and found dispositive TVA's separate corporate identity from the Executive Branch. *See TVA I*, 13 Cl. Ct. at 698-99 ("The dispute between TVA and DOE is not illusory. TVA has a separate corporate identity

. . . ."); *TVA II*, 51 Fed. Cl. at 286-87 ("TVA can contract, sue and be sued, and represent itself in court. Those aspects of independence are precisely the characteristics implicated here."). CTER, however, asserts that the Court in *TVA II* "held just the opposite of [*TVA I*]" and "refuted the reasoning in [*TVA I*]." Pl.'s Resp. at 21. Plaintiff is wrong.

The reasoning that the Court in *TVA II* "refuted" was defendant's argument there that "if the heads of both agencies serve at the pleasure of the President, then the agencies are merely manifestations of a single real party in interest, the United States, and the dispute is non-justiciable." *TVA II*, 51 Fed. Cl. at 285. This is the same argument that defendant previously advanced in *TVA I*. *See TVA I*, 13 Cl. Ct. at 698 ("Thus, defendant argues, TVA, whose head serves at the pleasure of the President, should look to the Executive for resolution."). The Court in *TVA II* "refuted" this reasoning, explaining that "[c]ontrary to defendant's suggestion of a bright line test, we believe the Supreme Court suggests a broader and more circumstantial inquiry. Plainly the fact that the President can remove the heads of both agencies is highly relevant. But it is not controlling." *TVA II*, 51 Fed. Cl. at 286.

CTER is correct that, in holding that TVA's action did present a justiciable case or controversy against the United States, the Court in *TVA II* emphasized that "[t]his is not a fight over policy. It is a dispute over money – a circumstance virtually guaranteed to break up family harmony." *Id*. However, the *sine qua non* for the holdings in *TVA I* and *TVA II* was TVA's independent identity from the Executive Branch: "[t]his commercial nature of the controversy – a traditional breach of contract claim seeking money damages – makes more significant the ways in which *TVA is independent*. TVA can contract, sue and be sued, and *represent itself in court*. Those aspects of independence are precisely the characteristics implicated here." *Id*. (emphasis

added); *TVA I*, 13 Cl. Ct. at 697 ("Section 4 of the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831c(b) (1982) . . . , provides that TVA 'may sue and be sued in its corporate name.'").

Here, we are not asserting that the Court should adopt a "bright-line" test for whether an intra-branch dispute is justiciable in this Court based upon whether the agencies' heads serve at the pleasure of the President. Rather, our argument is in line with the reasoning in both *TVA I* and *TVA II*. As we explained in our motion, unlike TVA, "neither FHWA nor IEED possess their own corporate identities, the authority to represent themselves in litigation nor the authority to sue to enforce contracts." CTER does not respond to these points.

It is clear that the interagency agreement between FHWA and IEED is not an enforceable contract in this Court, as the FHWA does not have its own corporate identity nor the authority to bring its own, independent breach of contract action against the United States. *See* 28 U.S.C. § 516. Accordingly, the Court should dismiss Count VI because CTER can only be a third-party beneficiary to a contract.

III. CTER'S QUANTUM MERUIT AND PROMISSORY ESTOPPEL CLAIMS SHOULD BE DISMISSED

In Count III of its complaint, CTER seeks the recovery of damages "under the principles of *quantum meruit* . . . ." Compl. ¶ 105. CTER does not state in its complaint whether it is proceeding under an implied-in-law contract theory or implied-in-fact theory. In our motion, we explained that the Court does not have jurisdiction to entertain implied-in-law contract actions, and therefore plaintiff's Count III should be dismissed on that basis. Def.'s Mot. at 38. In its response, CTER asserts that Count III alleges an implied-in-fact contract, and it should therefore not be dismissed because evidence shows that the Government received the benefit of services from CTER for which plaintiff has not been compensated. Pl.'s Resp. at 23-25. CTER's response is without merit, and the Court should dismiss Count III.

"The elements of express and implied-in-fact contracts are identical; only the manner of proof differs . . . . A plaintiff must show: (1) mutuality of intent to contract, (2) consideration, (3) unambiguous offer and acceptance, and, (4) if the United States is a party to the contract, plaintiff must also show that the party who entered the contract on behalf of the United States had actual authority to bind the government." *Bussie v. United States*, 96 Fed. Cl. 89, 98 (2011) (Lettow, J.) (citing *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009)). Here, we have demonstrated in our motion, Def.'s Mot. at 20-24, and above, that the IEED Awarding Official that signed the agreements at issue did not possess the requisite authority to bind the United States in contract with CTER. Because the Awarding Official lacked the authority to bind the United States in contract with CTER, plaintiff's implied-in-fact contract theory fails.

CTER relies upon the Federal Circuit's decision in *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986), which held that a contractor could recover the value of the services or goods conferred to the Government under an implied-in-fact contract theory where the express contract was subsequently determined to be void for illegality. *Id*. at 393. *Amdahl*, however, is limited to situations where an otherwise valid, express contract was rendered void or a nullity during performance because one of its terms was illegal. The Federal Circuit explained in *American Tel. & Tel. Co. v. United States*, 124 F.3d 1471 (Fed. Cir. 1997), *over'd on other grounds*, 177 F.3d 1368 (Fed. Cir. 1999) (*en banc*), that *Amdahl* does not apply in situations where the Government official did not possess the requisite authority to bind the Government in contract, and therefore no contract existed to begin with:

> *Amdahl* is distinguishable from plaintiff's situation because contracting authority was not at issue in the case. The contract in *Amdahl* was eventually rescinded not because the government representative lacked authority, but because its continued performance violated statutory and regulatory requirements. *If the Government attempts to contract without authority, as in this case,*

> *there can be no contract on which to award relief for partial performance*. While it is true that the *Amdahl* court discussed the matter under the heading of *quantum meruit*, the circumstances of the case suggest it was more properly labeled equitable relief allowed under the Contract Disputes Act, 41 U.S.C. §§ 601-613, when a contract, express or implied-in-fact, is present.

Id. at 1480 (emphasis added); *see also Westin Riverwalk v. United States*, 2005 WL 6112639, at *10 (Fed. Cl. 2005) (declining to grant relief under *Amdahl* because the Government official "lacked the authority to enter into a contract modification on behalf of the Government.").

Here, there exists no express contract between the Government and CTER because the IEED Awarding Official did not possess the authority to bind the United States in contract with CTER. Accordingly, CTER's implied-in-fact contract theory does not survive under *Amdahl* because there was no valid, express contract between defendant and plaintiff to begin with, and, therefore, Count III should be dismissed.

Finally, we demonstrated in our motion, Def.'s Mot. at 38, that the Court should dismiss Count VII of CTER's complaint because the Court does not possess jurisdiction to entertain claims based upon the equitable principle of promissory estoppel. *See Steinberg v. United States*, 90 Fed. Cl. 435, 444 (2009). CTER did not respond to our argument. Count VII should be dismissed.

IV. THE GOVERNMENT'S MOTION TO DISMISS PRESENTS A FACTUAL CHALLENGE TO CTER'S COMPLAINT

In our motion, we explained that "[i]n finding the facts necessary for a determination of jurisdiction 'a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings . . . .'" Def.'s Mot. at 14 (quoting *O. Ahlborg & Sons, Inc. v. United States*, 74 Fed. Cl. 178, 188 (2006) (quoting *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993))). In its response, CTER denies this principal, and asserts that so

long as a complaint is "well pleaded," a Court may not look beyond the face of the pleading to determine whether it possesses jurisdiction to entertain the action. CTER is incorrect, as plaintiff's assertion is in direct contravention with Federal Circuit precedent and the established practice of this Court.

In *Cedars-Sinai*, the Federal Circuit clearly explained the difference between 12(b)(1) "facial" challenges to the sufficiency of a pleading – in which the factual allegations upon which jurisdiction relies are taken as true – and a "factual" challenge to the court's jurisdiction. In the latter case, "the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion." 11 F.3d at 1583 (citations omitted). In ruling on 12(b)(1) "factual" challenges, the Court explained that:

> All other facts underlying the controverted jurisdictional allegations are in dispute and are *subject to fact-finding* by the district court. In establishing the predicate jurisdictional facts, a court *is not restricted to the face of the pleadings*, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony.

Id. at 1584 (emphasis added, citations omitted); *see also Reynolds v. Army and Air Force Exchange Srvc.*, 846 F.2d 746, 747 (Fed. Cir. 1988); *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999); *North Hartland, L.L.C. v. United States*, 309 Fed. Appx. 389, 392 (Fed. Cir. 2009); *AG Route Seven Partnership v. United States*, 57 Fed. Cl. 521, 527 (2003), *affirmed*, 104 Fed. Appx. 184 (Fed. Cir. Jul. 9, 2004); *Record Steel and Const., Inc. v. United States*, 62 Fed. Cl. 508, 513(2004) (Lettow, J.).

Here, the Government's 12(b)(1) motion challenges certain factual allegations upon which the Court's jurisdiction to entertain CTER's complaint relies – *i.e.*, whether (1) the IEED Awarding Official possessed the requisite authority to contract with CTER, and (2) the necessary tribal resolutions were obtained by prior to the "letting or making" of the agreements at issue.

Accordingly, the Court "may examine evidence outside the face of the pleadings to resolve its jurisdiction." *Record Steel*, 62 Fed. Cl. at 513.

In its response, CTER does not discuss *Cedars-Sinai*, but, rather, relies upon Federal Circuit decisions springing from *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 686 (Fed. Cir. 1992), for the proposition that a "well pleaded-allegation in the complaint is sufficient to overcome challenges to jurisdiction." Pl.'s Resp. at 5. The principle that a plaintiff need only plead jurisdictional facts to establish the Court's jurisdiction to entertain an action is, however, the "minority" approach and is not controlling. *Maniere*, 31 Fed. Cl. 410, 414-15 (1994). The Federal Circuit panel's decision in *Spruill* contravenes the Court's earlier *en banc* decision in *Cruz v. Dept. of Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (*en banc*), which affirmed the Merit Systems Protection Board's dismissal of an action based upon factual findings necessary for the board's jurisdiction. *Id*. at 1247; *see Maniere*, 31 Fed. Cl. at 414-15 (explaining that the *en banc* decision in Cruz represents the "majority" approach that "if the movant challenges the pleader's facts . . . then the favorable presumption for the nonmovant's factual allegations ends."). "[T]his Court maintains no discretion to apply any law in conflict with that as recited by the binding precedent of the . . . en banc rulings of the Federal Circuit." *Id*. at 415 (citing *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982)).

A substantial weight of Court of Federal Claims decisions follow the "majority approach" represented by the Federal Circuit's decision in *Cedars-Sinai*, that a 12(b)(1) motion may present a factual challenge to the jurisdictional basis of a complaint. Indeed, this Court has applied that approach. *See, e.g., Furniture by Thurston v. United States*, 103 Fed. Cl. 505, 511 (2012) (Lettow, J.); *but see Liberty Ammunition, Inc. v. United States*, 101 Fed. Cl. 581, (2011) (Lettow,

J.) ("For the purposes of jurisdiction, a plaintiff need merely show that a contract with the government underlies its claim.").

Finally, citing the Court's decision in *Kawa v. United States*, 77 Fed. Cl. 294 (2007), CTER argues that the facts underlying its third party beneficiary claim go to, and are intertwined with, the merits of its case so that it is inappropriate to entertain our 12(b)(1) motion to dismiss. Pl.'s Resp. at 4-5. However, as explained above, when jurisdictional facts are challenged, the Court is permitted to review jurisdictional evidence extrinsic to the pleadings. *Cedars-Sinai Medical Center*, 11 F.3d at 1584. Here, the validity of CTER's third-party beneficiary claims hinge on whether the IEED Awarding Official possessed the requisite authority bind the United States in contract, and whether the required tribal resolutions were obtained by SLT prior to the "letting or making" of Amendments 2 and 6. The Court may go outside the pleadings to resolve these two discrete inquiries – an inquiry which will lead to the dismissal of CTER's complaint.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss plaintiff's complaint or, in the alternative, enter judgment in the Government's favor.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/Donald E. Kinner
DONALD E. KINNER
Assistant Director

s/Joseph E. Ashman
JOSEPH E. ASHMAN
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
(202) 353-7578 (telephone)
(202) 353-7988 (facsimile)

Attorneys for Defendant

OF COUNSEL

CHARLES WALLACE
Acting Assistant Solicitor

WILLIAM B. BLAKE
Attorney-Advisor

Branch of Acquisitions and
Intellectual Property
Solicitor's Office – Division of
General Law
U.S. Department of the Interior

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