IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EAGLESUN SYSTEMS PRODUCTS, INC. Plaintiff, v. ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, Defendant.	)	No. 13-CV-438-CVE-PJC

DEFENDANT'S REPLY BRIEF IN RESPONSE TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW Defendant, Association of Village Council Presidents ("AVCP"), and, for its reply in response to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss and Brief in Support (Doc. # 25), alleges and states as follows:

INTRODUCTION

The history of Alaska and Alaska Native groups and their relationship with the United States is unique and fundamentally different from the United States' relationship with Indian tribes in the lower-48 states. As stated by the Solicitor General for the U.S. Department of Interior in a 1993 report:

> [T]he complexity of questions concerning the sovereign powers of Alaska Native groups arises in considerable measure from Alaska's unique circumstances and history. Alaska was the last territorial acquisition of the United States on the North American continent. The remote location, large size and harsh climate of Alaska further delayed the need to confront questions concerning the relationship between the Native peoples of Alaska and the United States.

Op. Sol. M-36975, *Governmental Jurisdiction of Alaska Native Village Over Land and Nonmembers* at 3 (January 11, 1993). There is only one recognized Alaska Native reservation in the state. *Id*. at 111. There were no treaties between the Alaska Native tribes and the United States as there were with many of the Indian tribes in the contiguous states. "Although Alaska Natives were

recognized as subject to general Indian law principles, and there had been some dealings with groups, the absence of treaties and a pervasive reservation system meant that there had been no formal definition of Native groups." *Id*. at 53. However, due to the unique circumstance of Alaska Native tribes imposed upon them by the Alaska Native Claims Settlement Act ("ANCSA") in 1971, see 43 U.S.C. §1601, *et seq.*, the federal trust responsibility has been primarily carried out through specific agreement with mandated regional corporations such as AVCP. Specifically, § 1606 mandated that regional corporations be formed to oversee money and land given from the settlement and § 1607 required that each Alaska Native village incorporate to receive any share of the settlement. This unusual chapter in the history of federal-Tribal relations that led to AVCP's incorporation under state law, the nature of the vital governmental services and benefits it provides, and AVCP's role in the federal government's relations with its member tribes all support a finding by this Court that AVCP is entitled to assert tribal immunity, either independently or on behalf of its member tribes.

1. Inclusion or exclusion from the U.S. Department of Interior's list of federally recognized tribes is not dispositive as to whether AVCP is entitled to tribal immunity under federal law. Plaintiff asserts that AVCP is not entitled to sovereign immunity because it is not listed on the Department of the Interior's ("DOI") list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs ("List"). (Response (Doc. # 25) at 6-7). However, with regard to Native Alaskan tribes, villages, and regional corporations, the List has varied from year to year and from one administration to the next. Indeed, the first List to include Native Alaskan tribes was published in 1982. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 425 (3d. Ed. 2012). In 1988, the List was expanded to include Alaska Native regional corporations recognized or organized under the Alaska Native Claims Settlement Act ("ANCSA"). 53 Fed. Reg. 52829, 52832-52833 (Dec. 29, 1988). However, the DOI

stated in 1988 its position that:

> [I]nclusion on a list of entities already receiving and eligible for Bureau funding and services does not constitute a determination that the entity either would or would not qualify for Federal Acknowledgement under the regulations, but only that no such determination is necessary in order to preserve eligibility. **Furthermore, inclusion on or exclusion from this list should not be construed to be a determination by this Department as to the extent of the powers or authority of that entity.**

Id. at 52832 (emphasis added). The DOI further acknowledged in the 1988 List that applying the criteria for federal recognition to Alaska Native tribes and organizations was, unlike making such determinations as to groups in the lower-48 states, "unduly burdensome" due to "small pockets" of Alaska Native tribes "living in isolated locations scattered throughout the state." *Id.* at 52833. The DOI also acknowledged in its 1988 List that the main purpose of the List was to provide the Bureau of Indian Affairs ("BIA") and other federal agencies "a list of organizations which are eligible for their funding and services based upon their inclusion in categories frequently mentioned in statutes concerning federal programs for Indians." *Id.* The DOI specifically noted that all recent Indian statutes enacted by Congress specifically included Alaska Native villages, village corporations, and regional corporations. *Id.*

Then, in 1993, the DOI changed direction and, in its List published that year, concluded that inclusion on the List required an Alaska Native tribe or group to meet the criteria for Federal Recognition applicable to tribes in the lower-48 states. 58 Fed. Reg. 54364, 54365-66. By virtue of this pronouncement, even though Congress and the BIA had been providing benefits and services to Alaska Native tribes for nearly 50 years, this was the first time the BIA had explicitly acknowledged Alaska Native tribes as federally recognized tribes. *See id.*; Op. Sol. M-36975, *Governmental Jurisdiction of Alaska Native Village Over Land and Nonmembers* (January 11, 1993). However, Alaska Native regional corporations were not included on the 1993 List or subsequent lists.

Therefore, the DOI's interpretation of the criteria for inclusion of an Alaska Native tribe or

organization on the List, as well as the purpose and effect of being on the List has varied over the last 70 years. However, as acknowledged by the DOI in its 1988 list, it is clear that what has not changed is that Indian legislation enacted by Congress since and including ANCSA has explicitly recognized Alaska Native regional corporations such as AVCP as Indian tribes. The Plaintiff even concedes in its Response that the federal government defines AVCP as an Indian tribe for the purpose of many statutes applying to Native Americans. (Response (Doc. # 25) at 7.) Moreover, likely due to the fact that most Alaska Native tribes are small and located in isolated areas, it is also equally clear that Congress and federal agencies have largely carried out their relationship and interactions with Alaska Native tribes through the tribes' nonprofit regional corporations, rather than with the individual tribes. Plaintiff concedes this point, as well. (*Id*.)

In a report published in 2005, the Government Accountability Office ("GAO") found that between 1998 and 2003 over 86% of the funds provided by federal agencies to Alaska Native tribes and organizations, including funds provided by the DOI, during that time period were distributed to Alaska Native regional nonprofit corporations such as AVCP. GAO-05-719, *Federal Assistance to Alaska Native Villages* at 16 (Aug. 2005). Therefore, it is AVCP's position that Congress' inclusion of AVCP and other Alaska Native regional corporations within the definition of Indian tribes, along with the fact that the majority of Congress and federal agencies' interaction with Native Alaskan tribes in the 40 or so years since ANCSA was enacted has been through the Alaska Native regional corporations, rather than with the individual tribes, demonstrates that AVCP is recognized as an Indian tribe by the federal government entitled to assert tribal immunity either independently or on behalf of its member tribes. It is further of note that, because nearly all of the government benefits and services that are available to AVCP's member tribes are provided almost exclusively through AVCP, an award against AVCP in this case would have a direct impact on funds that are designated for the provision of vital services to AVCP's member tribes.

2. AVCP qualifies for the subordinate economic entity test because it did not voluntarily submit to the sovereignty of the state of Alaska to avoid liability or to participate in for-profit ventures. As stated in its Motion to Dismiss, unlike the corporate entity in *Somerlott*, AVCP did not "*voluntarily* subject themselves to the authority of another sovereign which allows them to be sued." *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149-50 (10th Cir. 2012) (emphasis added). AVCP originally formed as an unincorporated association to assert its member tribes' claims to tribal lands. (Motion to Dismiss (Doc. # 22), Statement of Facts at ¶ 3.) AVCP then incorporated as a business entity under Alaska law because it was required to do so to receive benefits for its member tribes from the federal and state governments. (*Id*. at ¶¶ 5-7.) As Plaintiff points out in its Response, AVCP later incorporated as an Alaska non-profit corporation in 1977. However, AVCP remained incorporated so it could continue to receive and distribute state and federal funds and provide governmental services and benefits to its member tribes pursuant to the requirements of ANCSA and other federal laws. (Declaration of Myron Naneng, Exhibit "1." at ¶ 5.; 43 U.S.C. §1601, *et seq.*) The circumstances surrounding AVCP's original and continued incorporation is certainly distinguishable from the for-profit limited liability company at issue in *Somerlott* and, therefore, it is AVCP's continued contention that it is also entitled to tribal immunity as a subordinate economic entity of its member tribes for which it provides governmental and tribal services.

3. AVCP's investment in a Native American bank and local hotel are for the purpose of furthering the interests of its member tribes and does not preclude this Court from finding that AVCP is entitled to tribal immunity. Plaintiff points to AVCP's investment in a Native American Bank and ownership of a hotel in Bethel, Alaska, to assert that, like the company at issue in *Somerlott*, AVCP participates in these businesses in order to generate funds to provide services to its member tribes. (Response (Doc. # 25) at 3, 11.) As Plaintiff asserts, any profits from

these entities would be utilized to fund the services it provides to its member villages. However, AVCP's decision to invest in these two businesses was not primarily for the purpose of generating additional sources of funding for AVCP; rather AVCP invested in these businesses in order to further the purpose and mission of AVCP and to help assure needed services are available to its member tribes. (Naneng Decl., Exh.1 at ¶¶ 5-6.)

The Native American Bancorporation ("NAB") is the only Native American-owned national financial institution whose mission is "assisting Native American and Alaskan Native Individuals, enterprises and governments reach their goals by providing affordable and flexible banking and financial services." (NAB Annual Report 2012, Exhibit "2," at 4.) NAB also has a non-profit affiliate that provides counseling and borrower consulting services for Native Americans. (*Id*. at 6.) AVCP invested in Native American Bancorporation Co. ("NABC") in order to help assure that its member tribes would have access to banking and financial services in order to further promote the tribes' economic independence and welfare and their right to self-determination. (Naneng Decl., Exh. 1 at ¶ 6.) Although AVCP would utilize any returns on this investment to provide further services to its member tribes, NABC has operated at a loss for most of its existence and no such returns have been realized. (*Id*.; *see also* NAB Annual Report, Exh. 2 at 6.)

As to the hotel, it was purchased by AVCP in 2006 to help ensure that AVCP's service recipients have a place to stay when they travel to Bethel to seek or receive assistance, benefits or participate in AVCP's programs. Travel between AVCP's member villages and Bethel is challenging. Only two of AVCP's fifty-six villages are connected by road, and none of the member villages are connected to the rest of Alaska. To save on travel costs, service recipients must often find a place to stay overnight while receiving health services, attending educational workshops or classes, or to address general assistance issues before returning to their village. The hotel also serves as a subsidized housing unit for other critical service-related uses. The operation of the hotel

is, therefore, an important component of, and is substantially related to, AVCP's mission and the services and assistance it provides to its member tribes. (*Id.*) Although the hotel does generate some modest revenue, any revenues remain part of AVCP's general fund, which is used to provide services to the member tribes.

As stated in *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001) (citing *Kiowa Tribe of Oklahoma,* 523 U.S. at 757–58 (1998), a case cited by Plaintiff in its Response, tribal immunity extends to governmental and commercial activities of tribes or its subordinate entities. Therefore, there is nothing about AVCP's investment in these two businesses that would operate to defeat AVCP's assertion of tribal immunity as a federally recognized tribe or as a subordinate economic entity of its member tribes.

4. Issue preclusion does not prevent AVCP from asserting the defense of tribal immunity in this case. The doctrine of collateral estoppel or issue preclusion applies only in cases where an issue is decided in a prior proceeding and "the controlling facts *and* applicable legal rules remain unchanged." *Spradling v. City of Tulsa*, 198 F.3d 1219, 1223 (10th Cir. 2000) (citing *Commissioner v. Sunnen*, 333 U.S. 591, 599–600 (1948) (emphasis in original). "Consequently, res judicata and collateral estoppel are inapplicable where, between the first and second suits, an intervening change in the law or modification of significant facts create new legal conditions." *Id.* Here, Plaintiff seeks to invoke the doctrine on the issue of tribal immunity based upon the holding of the Alaska Supreme Court in *Runyon v. Ass'n. of Village Council Presidents*, 84 P.3d 437 (Alaska 2004). However, as was mentioned in AVCP's Motion to Dismiss, the Tenth Circuit's holding in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010), which came over six years after the *Runyon* decision, expressly rejected the "real party in interest" test applied by the *Runyon* court. Therefore, as was the case in *Spradling*, where the Tenth Circuit held that a subsequent U.S. Supreme Court decision precluded the

application of collateral estoppel, the *Breakthrough* decision "constitutes an intervening change in the law sufficient to render collateral estoppel and res judicata inapplicable to the present case." *Spradling*, 198 F.3d at 1223.

5. The arbitration clause contained in the 2008 agreement was not a waiver of AVCP or its member tribes' sovereign immunity or consent to jurisdiction for claims against AVCP in this Court. "When consent to be sued is given, the terms of the consent establish the bounds of a court's jurisdiction." *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). Here, Plaintiff appears to assert that the arbitration clause is a blanket waiver of sovereign immunity as to any claims it may assert against AVCP. However, at most, this clause represents a limited waiver to the extent that claims arising from the agreement between the parties, "including disputes regarding arbitrability," that will be submitted to binding arbitration." (Complaint (Doc. # 2) at Exh. 1, ¶ 6.8.) Therefore, other than a potential entry of a judgment on any award in arbitration, per the parties' agreement, the arbitration clause does not act as a blanket waiver of tribal immunity by AVCP, and does not confer any jurisdiction upon this Court to decide any of Plaintiff's substantive claims or the issue of arbitrability of the claims.

6. The 2013 Amendment does not contain a clear and unequivocal waiver of consent to a suit for equitable relief in this Court. Waiver of sovereign immunity "does not arise through silence, implication, or innuendo," must be "beyond doubt," *Multimedia Games, Inc.*, 214 F. Supp. 2d at 1140. Questions of waiver are to be strictly construed in favor of the tribe. *Ramey Const.*, 673 F.2d at 320. Here, Plaintiff asserts that AVCP has waived tribal immunity to the extent that Plaintiff is entitled to invoke the jurisdiction of this Court for claims of equitable relief arising from the agreement between the parties. (Response (Doc. # 25) at 16-17.) Although AVCP acknowledges that any claims under the agreement are to be governed by Oklahoma law, it is AVCP's position that the term "court of competent jurisdiction" is not a clear and unequivocal

waiver of AVCP's tribal immunity or consent to a claim for equitable relief in a federal court in Oklahoma, or any Oklahoma Court. (2013 Amendment, Plaintiff's Complaint (Doc. # 2), Exh. 1 at ¶ 10.; Naneng Decl., Exh. 1 at ¶ 7.) Indeed, in the analogous context of state sovereign immunity, the U.S. Supreme Court has held that a state statute which allowed taxpayers to bring suits against the state of Utah in a "court of competent jurisdiction" was not a sufficient waiver of Utah's immunity from such suits in federal court. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579-80 (1946). The Court held that the term "court of competent jurisdiction" is ambiguous and " f[e]ll short of the clear declaration by a state of its consent to be sued in the federal courts ..." *Id.*; *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76, 120 S. Ct. 631, 641, 145 L. Ed. 2d 522 (2000) (distinguishing *Kennecott* and holding that, unlike the statute at issue in *Kennecott*, the statute at issue there authorized employee suits against states "in any Federal or State court of competent jurisdiction.") Here, there is no forum selection clause to clarify this issue. (*See* Complaint (Doc. # 2), Exh. 1.) Therefore, the 2013 Amendment does not represent a clear and unequivocal consent by AVCP to a suit in this Court by Plaintiff seeking equitable relief. As such, AVCP has not waived tribal immunity with regard to Plaintiff's claims for equitable relief in this Court.

AVCP also specifically objects to Plaintiff's argument regarding the "fact" that AVCP had in-house legal counsel "review and negotiate" the terms of the contract with AVCP prior to Myron Naneng's execution of the 2013 Amendment, as well as Plaintiff's counsel's suppositions as to the competence and/or awareness of AVCP's in-house counsel with regard to the potential effect changes to the agreement requested by Plaintiff may have with regard to AVCP's assertion of tribal immunity. (Plaintiff's Response (Doc. # 25) at 4, 15-16.) In fact, the e-mails that Plaintiff submits in support of this proposition do not support the assertions of Plaintiff's counsel. In the first email dated June 12, 2013, the communication from AVCP's in-house counsel to Plaintiff merely states,

"*Your* proposed changes are acceptable." (*Id*. at Exh. 6 (emphasis added).) The second e-mail, also dated June 12, 2013, states, "Perfect. Thank You..." (*Id*.) These two e-mails do not in any way support Plaintiff's assertions. Moreover, Plaintiff's counsel's unsupported statements in a brief are not evidence. *Exeter Bancorporation, Inc. v. Kemper Sec. Group, Inc*., 58 F.3d 1306, 1312 n. 5 (8th Cir.1995). Therefore, even though Plaintiff and its attorney may have been fully aware of what its intentions were with regarding to these amendments, the only admissible evidence regarding the parties' intent with regard to the meaning of their agreement is Mr. Naneng's testimony that he did not intend to waive AVCP's sovereign immunity or consent to a suit seeking equitable relief in an Oklahoma federal court in executing the agreements. (Naneng Declarations, Motion to Dismiss (Doc. #22) at Exh. 1, ¶ 13 and Exh. 1 to this Reply at ¶ 7.) As such, AVCP requests the Court to disregard Plaintiff's unsupported assertions and find that the 2013 amendment is not a clear and unequivocal consent to Plaintiff's claims for equitable relief in this Court.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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