IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Elizabeth Rassi,	)	
	)	Civil Action No. 1:12-cv-00354
Plaintiff	)	
	)	Judge Jon D. Levy
v.	)	
	)	
Federal Program Integrators LLC. and Penobscot Indian Nation Enterprises,	)	
	)	
Defendants	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

SUMMARY OF ARGUMENT

Ordinarily, a Native American Tribe is entitled to sovereign immunity. However, this case involves a corporation, Federal Program Integrators, LLC,[1] organized under the laws of the State of Maine with provisions in its articles of incorporation that effectively waive sovereign immunity and associated concepts like tribal court exhaustion. Specifically, these organizational documents include a "sue and be sued" clause which expressly recognizes federal court jurisdiction. Pursuant to FPI's own organizational documents and applicable federal laws and regulations, FPI has waived tribal sovereignty and the related requirement of tribal jurisdiction as a condition of its right to receive federal contracts with the United States Small Business Administration and other federal agencies.

[1] Plaintiff agrees that Penobscot Indian Nation Enterprises ("PINE") was not her direct employer, nor has PINE waived its sovereign immunity. Accordingly, Plaintiff agrees that any claims against PINE may be dismissed without prejudice.

STATEMENT OF FACTS

Defendant FPI is a Maine limited liability corporation (See Exhibits A and B attached to declaration of Brett D. Baber). As alleged in the complaint, Defendant FPI has numerous Federal government contracts under the Small Business Administration's § 8(a) Business Development Program with various agencies and at various job sites across the country. The Section 8(a) Business Development Program established pursuant to 15 U.S.C. § 637(a) provides federal contracts to businesses with minority owned businesses, including but not limited to Native American Tribes. (See Complaint, Par. 8). Consistent with Section 8(a) regulations, 13 C.F.R. § 124.109 (c)(1), FPI adopted its "Fourth Article of Articles of Organization of Federal Program Integrators, LLC." which provides:

> **"Federal Program Integrators may sue and be sued in any of the United States Federal Courts which are hereby designated to be among the courts of competent jurisdiction, for all matters relating to SBA programs including, but not limited to 8(a) program participation, loans and contract performance. . . ."**

(Exhibit C, emphasis added). An identical provision is found in a subsequent filing by FPI with the State of Maine Secretary of State on June 29, 2009. (Exhibit D).

Plaintiff Elizabeth Rassi alleges in her third amended complaint that she was the senior accountant for FPI and during her tenure she was subjected to race discrimination and false claims whistleblower retaliation, including but not limited to a hostile work environment and wrongful termination. Compliance with the Civil Rights Act of 1964 is required of all recipients of federal financial assistance provided by the SBA. 13 C.F.R. § 112.1, 112.2. Accordingly, Defendant FPI recognized its obligation to follow federal equal employment opportunity laws[2]

[2] Applicable regulations require an applicant for SBA assistance to provide assurances that it will comply with equal opportunity laws. 13 C.F.R. § 112.8.

by adopting various non-discrimination policies found throughout its employee handbook (Exhibit E). In the introduction to FPI's employee handbook, FPI states:

> Affirmative Action Employer: FPI is a Government Contractor and is an equal employment opportunity and affirmative action employer in all aspects of employment. FPI expressly prohibits any form of employee discrimination. (Exhibit E, Introduction)

In its statement of business conduct and ethics provisions, FPI recognizes that it is required to follow all federal laws:

> It is policy of FPI, LLC to conduct its business in accordance with applicable laws and regulations of the U.S. Government, as well as state and local laws in which it may operate and with high moral and ethical standards. As a Government contractor, FPI must also comply with Federal Procurement Laws. (Exhibit E at p. 12)

Likewise, FPI's EEO policy provides, in pertinent part:

> FPI, LLC is committed to provide equal employment opportunity to all individuals regardless of race, color, religion, gender, age, national origin, disability, veteran status or any other protected class under relevant federal, state and local laws. FPI expressly prohibits any form of employee discrimination or harassment as defined within the guidelines of this and other related Policies. (Exhibit E at p. 30).

LEGAL ANALYSIS

As a threshold matter, sovereign immunity is not available to a corporation organized under state law such as FPI. The Tenth Circuit Court of Appeals and other courts have recognized that an Indian tribal corporation incorporated under state law is a "separate legal entity organized under the laws of another sovereign . . . [which] cannot share in the Nations' immunity from suit . . . ." *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012). The Tenth Circuit distinguished corporations organized under tribal law, from the defendant corporation which had been organized under state law. Id. at 1149. The court

reasoned that the latter were akin to entities created by the U.S. government under state law which were not entitled to sovereign immunity. *Id*. at 1150.[3]

In *Eaglesun Systems Products, Inc., v. Association of Village Council Presidents*, 2014 U.S. Dist. LEXIS 36659 (D. Ok. 2014) the court rejected a defense of tribal immunity asserted by a native regional corporation organized under the laws of the State of Alaska to facilitate the delivery of federal benefits for native villages and tribes. The court disagreed with the defendant's argument that it was a subordinate economic entity of the tribes, holding that "AVCP is not entitled to claim tribal sovereign immunity as a tribal economic entity." *Cf. Seaport Loan Products, LLC. v. Aldwych Capital Partners, LLC*, 41 Misc. 3d 1218(A); 981 N.Y.S.2d 6238 (2013) (independent, state incorporated for-profit enterprise not entitled to tribal sovereign immunity under factors analysis). Based on these authorities, sovereign immunity should not be extended to FPI as a corporation organized under the laws of the State of Maine.

Assuming *arguendo* that FPI is regarded as a tribal entity, the limited record before the court on the motion to dismiss demonstrates that FPI has expressly waived any claim to sovereign immunity or to proceeding in tribal court. The regulations for Native American Tribe involvement in the Small Business Administration Section 8a program require a tribal corporation to waive its sovereign immunity and must agree to be subject to suit in federal court as a precondition to the receipt of benefits under the Section 8a program. Code of Federal Regulations § 124.109(c)(1) which provides:

> The applicant . . . must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation . . . or limited liability company articles of organization must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction

[3] Notwithstanding the court's refusal to recognize sovereign immunity, the Court of Appeals affirmed the dismissal of the plaintiff's employment discrimination claim against her former employer because she had not preserved the argument in the district court. *Id.* at 1150-1152.

> for all matters relating to the SBA's programs including, but not limited to, 8a BD program participation, loans and contract performance. . . .

Id. (emphasis added). Consistent with these SBA regulations, FPI amended its "Fourth Article of Articles of Incorporation" which included the "sue and be sued" clause quoted in full above. This language tracks precisely the language required by C.F.R. § 124.109(c)(1). Thus, FPI has intentionally waived its right to object to federal enforcement of the SBA regulations, including the EEO requirements set forth in 13 C.F.R. Part 112.[4]

The United States Supreme Court recognizes that Indian tribes are "'domestic dependent nations' that 'exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Comm.*, ___ U.S. ___, 134 S. Ct. 2024, 2030 (2014). Notwithstanding sovereign immunity, tribes are subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). *Cf. Michigan v. Bay Mills Indian Comm,* 134 S. Ct. at 2032, n. 4 (parties did not contend that the tribal corporation waived immunity). For example, in *C &L Enterprises, Inc. v. Citizens Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411 (2001), the Supreme Court held that a tribe waived sovereign immunity by entering into a contract that required the parties to arbitrate their disputes with judicial enforcement in any court having jurisdiction. *Id*. at 423. *See also Ningret Dev. Corp. v. Narragansett Indian Housing Wetuomuck Housing Authority,* 207 F.3d 21, 31 (1st Cir. 2000) (forum selection clause in construction agreement waives sovereign immunity).[5]

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[4] Any entity that receives benefits from the SBA, including government contracts, is prohibited from discrimination in employment. 13 C.F.R. § 112.4.

[5] In *Ningret*, the First Circuit rejected the plaintiff's argument that a tribal ordinance alone had waived tribal sovereignty. That ordinance, based on a HUD requirement, specified that the Tribal Council granted irrevocable consent to allow the Housing Authority "to sue and be sued in its corporate name, upon any contract, claim or obligation arising gout (sic) of its activities . . . ." Id. at 30. The court reasoned that this ordinance merely authorized the Authority to waive immunity when it entered into future contracts, thus the ordinance itself was not a waiver. *Id.*

In contrast, the "sue and be sued" clause in FPI's corporate articles does not contemplate a two-step approach: the clause states only that FPI "may sue and be sued in the Federal Courts . . . ."

Various courts have recognized the validity of express waivers of sovereign immunity or the adoption of "sue and be sued clauses" in contracts as a sufficient basis to hold Indian tribes or tribal companies answerable in non-tribal courts. *See Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008) (broad "sue and be sued clause" waives sovereign immunity); *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 921-922 (6th Cir. 2009). In *Native American Distributing*, the Tenth Circuit determined that a Tribe had "unequivocally waived" its immunity with respect to a tribal corporation through a "'sue or be sued' clause in the Corporate Charter . . . ." 546 F. 3d at 1293. The Sixth Circuit Court of Appeals recognized that "a tribe may choose to expressly waive its tribal –sovereign immunity either in its charter or by agreement." *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d at 921. The court recognized that other "courts have held that a broad sue-and-be-sued clause does waive tribal-sovereign immunity." *Id.* (citations omitted). Similarly, in *State of Oklahoma v. Hobia,* 2012 U.S. Dist. LEXIS 58211 (D. Okla. 2012), the court held that "the 'sue and be sued' language in the Town Corporation's Corporate Charter results in a waiver of sovereign immunity by the Town Corporation." Thus, where a waiver of sovereign immunity pursuant to a "sue and be sued" clause is an express condition for participation in a federal program, FPI should be deemed to have waived its sovereign immunity as a matter of federal law.

FPI's argument that the court should require Plaintiff Rassi to exhaust any available remedies in Tribal Court is not well founded under the circumstances. Because the requirement of exhaustion of tribal remedies derives from principles of tribal sovereignty, see Defendant's motion to Dismiss at 11-12, it is likewise subject to waiver. *Cf. Ningret Dev. Corp. v. Narragansett Indian Housing Wetuomuck Housing Authority,* 207 F.3d 21, 31 (1st Cir. 2000)(in the absence of an explicit waiver, courts lack discretion to relieve party of tribal remedies

exhaustion requirement).[6] *Cf. also Marceau v. Blackfeet Housing Auth*., 519 F.3d 838, 843 (9th Cir. 2007) (tribal jurisdiction may be forfeited). In this instance, FPI has recognized federal court jurisdiction. Conversely, there is no attempt in its organizational documents to retain tribal jurisdiction.

Ningret Dev. Corp. v. Narragansett Indian Housing Wetuomuck Housing Authority, 207 F.3d 21 (1st Cir. 2000), is the primary case relied upon by Defendant FPI in support of its request for exhaustion of remedies in the Tribal Court. In *Ningret*, the plaintiff was a construction firm that entered into an agreement with the Defendant, a housing authority established by the Narragansett Indian Tribe to construct a low income housing development. When a dispute arose during the installation of water and sewerage lines, the Housing Authority cancelled the project. The Tribal Council notified the parties that it would hold a hearing pursuant to a "forum selection clause contained in the contract." *Id*. at 26. When the contractor did not appear, the Tribal Council issued a decision in favor of the Housing Authority, subject to a right to binding arbitration. *Id*. Rather than undertaking arbitration in accordance with the contractual terms, the contractor brought suit in U.S. District Court. *Id.*

The Housing Authority moved to dismiss the federal complaint for lack of jurisdiction. *Id*. Plaintiff moved to stay the proceedings pending arbitration. *Id.* The district court ruled that the forum selection clause was enforceable, and dismissed the action because the plaintiff had failed to proceed in accordance with the clause. *Id*. After the claims against a non-tribal entity were resolved, the plaintiff contractor appealed. *Id*. at 27.

[6] In footnote 7 to its decision, the First Circuit observed that "[t]here is virtually no case law as to the effectiveness *vel non* of an express disclaimer of tribal court remedies." In contrast to the record before the court in *Ningret*, the record here contains an express waiver of tribal court jurisdiction in favor of federal court jurisdiction. *Compare Eaglesun Syst. Prod., Inc. v. Association of Village Council Presidents*, 2014 U.S. Dist. LEXIS 36659 (D. Okla. 2014) (by agreeing to court of competent jurisdiction, parties intended state or federal court, not tribal court).

On appeal, the First Circuit initially determined that the Tribe had effectively waived tribal sovereignty based on a tribal ordinance giving authority to the Housing Authority to sue and be sued, coupled with the arbitration agreement. *Id*. at 30-31. It then turned its attention to the tribal exhaustion doctrine. The court described the tribal exhaustion doctrine as a

> . . . doctrine [that] is not jurisdictional in nature, but, rather, is a product of comity and related considerations. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987). . . . The tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims. *See El Paso Natural Gas*, 119 S.Ct. at 1437; *National Farmers*, 471 U.S. at 856-57. The doctrine rests on three pillars. First, Congress long has advocated "a policy of supporting tribal self-government and self-determination . . . [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers*, 471 U.S. at 856. Second, exhaustion fosters administrative efficiency. *See id*. Third, exhaustion provides other decisionmakers with the benefit of tribal courts' expertise, thus facilitating further judicial review. See id. at 857.

Id. at 31. The court observed that "the tribal exhaustion doctrine does not apply mechanistically to every claim brought by or against an Indian tribe." Explicit waivers may apply. *See id*. at 31-32.

In this instance, there are a number of factors that distinguish this case from *Ninigret* and which weigh in favor of resolution of this dispute in federal court, rather than in Tribal Court. First, the defendant is a corporation organized under the laws of the State of Maine; it is not the Penobscot Tribe itself or a direct subsidiary thereof. In contrast, the defendant in *Ninigret* was a tribal housing authority whose mission was to provide housing for tribal members. Second, there is no showing that FPI itself maintains a tribal court system. *Compare Eaglesun Syst. Prod., Inc. v. Association of Village Council Presidents*, 2014 U.S. Dist. LEXIS 36659 (D. Okla. 2014) (company that claims tribal sovereignty failed to show access to a tribal court system). Third, FPI expressly consented to federal court jurisdiction as a precondition to its ability to seek

federal benefits pursuant to the Small Business Administration's 8a program as specified by the applicable regulations. In contrast, *Ninigret* involved a private contractual forum selection clause that specified tribal jurisdiction.

In summary, as a participant in the SBA 8a program, Defendant FPI was required by federal regulation to include a waiver of tribal sovereignty and consent to federal court jurisdiction in its foundational corporate documents, requirements which it adopted. As a Section 8a participant, it cannot have it both ways – it is not entitled to reap the benefits of the program while ignoring its own obligations to comply with the equal employment obligations it voluntarily assumed when it entered into the 8a program. Defendant FPI expressly consented to federal court jurisdiction.

Furthermore, the Supreme Court has ruled that tribal sovereignty may be waived by a tribe or tribal entity. The requirement of tribal court exhaustion is but a corollary to tribal sovereignty. Accordingly, the subsidiary concept of tribal court exhaustion should likewise be subject to waiver, particularly when a waiver is required by federal law as a precondition to the participation in a federal program.

For these reasons, Defendant FPI's motion to dismiss should be denied.

Dated: August 6, 2014

/s/ Brett D. Baber
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2014, a copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and Declaration of Brett D. Baber with attached Exhibits A-E will be sent via First Class United States mail and through the ECF filing system to the following counsel of record:

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Dated: August 6, 2014

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