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

1.	TEAM SYSTEMS INTERNATIONAL, LLC Plaintiff	§ § § § § §	
v.		§	CIVIL ACTION NO. CIV-14-1018-D
1.	JEFF HAOZOUS, ALSO KNOWN AS JEFF HOUSER, INDIVIDUALLY, AND AS PRESIDENT OF FORT SILL APACHE INDUSTRIES AND CHIEF EXECUTIVE OFFICER OF FORT SILL APACHE	§ § § § § § §	
2.	FORT SILL APACHE INDUSTRIES BOARD OF DIRECTORS AS MANAGERS OF FORT SILL APACHE INDUSTRIES	§ § § § § §	
3.	FORT SILL APACHE INDUSTRIES Defendants	§ § § §	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Team Systems International, LLC, Plaintiff (sometimes hereinafter "TSI"), files this its Response to Defendants' Motion to Dismiss (the "Motion") (Doc. No. 19) and would respectfully show the Court as follows:

I. GENERAL STATEMENT OF THE CASE.

In order to recover the dismissal of this action under Rule 12, Federal Rules of Civil Procedure, the Defendants would have to convince this Court first to nullify a clearly worded contract between Team Systems International, LLC ("TSI") and Fort Sill Apache Industries ("FSAI"), that being the Engagement Agreement (the "Agreement") attached as Exhibit "A" to Plaintiff's Second Amended Complaint (the "Complaint") (Doc. No. 12) wherein FSAI waived sovereign immunity and consented to the jurisdiction of this Court. To prevail on their Motion, Defendants must convince this Court that Plaintiff has failed to plead the elements of a recognized legal cause of action, and then convince this Court to find that Defendants Jeff Haozous, who is also known as and who executed case relevant documents from time to time as Jeff "Houser," and the Fort Sill Apache Industries Board of Directors are not, in fact, the alter egos of Fort Sill Apache Industries ("FSAI"). In their quest, the Defendants would also have to convince this Court to ignore a clear line of authority established by the United States Supreme Court over many years upholding the jurisdiction of this Court when a tribe or tribal corporation waives sovereign immunity. Instead, the Defendants riddle their Motion with arguments disputing *facts*, arguments which might be appropriate in the context of a summary judgment motion, if at all, but not a motion to dismiss where the standard tests the pleadings and the law, rather than facts. Defendants' motion, therefore, should be denied.

II. ARGUMENT AND AUTHORITIES.

A. Plaintiff's Complaint Establishes Subject Matter Jurisdiction and a Waiver of Sovereign Immunity.

This is a breach of contract lawsuit in which Plaintiff's claims arise out of FSAI's breach of its obligations to pay TSI as set out in the Agreement. The Agreement contains an express waiver of sovereign immunity and an express consent to this Court's jurisdiction in Article 7.5. In actuality, no more need be said.

Nevertheless, the test for determining Defendants' Motion is neither new nor complex. In order to prevail, the Defendants must show the Court that Plaintiff's Complaint alleges no set of facts which support Plaintiff's claim for relief which is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff TSI need not plead detailed facts under Rule 8(a), Fed. R. Civ. P., but it need only plead a set of facts which allows the Court, drawing upon its experience and common sense, to draw a reasonable inference that a defendant is liable for the claim alleged. *Id.*; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). TSI's Complaint meets the standard.

The United States Court of Appeals for the Tenth Circuit has addressed the pleadings standard question on a number of occasions, and it views the standard as being between bare notice offered in the trial pleading and the heightened standard of proof actually required at a trial on the merits. *See, e.g., Kan. Penn Gaming, LLC v. Collins*,

656 F.3d 1210, 1214 (10th Cir. 2011). The Tenth Circuit, in fact, refers to it as a "refined standard," requiring the Plaintiff to state a "plausible claim" considering the context of the dispute. *See Khalik v. United Airlines*, 671 F.3d 1188, 1191 (10th Cir. 2012). As the *Khalik* court demonstrated, in evaluating the plausibility of Plaintiff's claims, the elements of the pleaded cause of action for breach of contract must be considered. *Id.* at 1192. In Oklahoma, those elements are "1) formation of a contract; 2) breach of the contract; and 3) damages as a direct result of the breach." *Digital Design Grp., Inc. v. Information Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834, 843. Plaintiff's Complaint more than meets that standard.

TSI's Complaint meets the standard because it arises strictly out of the written Agreement, Exhibit "A" to the Complaint, with factual allegations of breach and damages directly related to the Agreement. Furthermore, the Agreement itself clearly includes a waiver of sovereign immunity and a consent to this Court's jurisdiction encompassing this action.

Although the Defendants attempt a half-hearted criticism of Article 7.5 by claiming that the phrase "this Article 12" does not make sense because it is included in the middle of Article 7.5, that phrase does not affect the substantive import of the waiver, a waiver which is clear on its face. The phrase "By this Article 12," does not affect the substance of Article 7.5, which entire provision reads as follows:

Controlling Law. The validity, construction, scope and performance of this

> Agreement shall be governed by the laws of the state of Oklahoma and the United States as interpreted and applied by the United States District Court for the Western District of Oklahoma, or the United States District Court for the Eastern District of Oklahoma, whichever has comparable jurisdiction. Remedies shall include, but are not limited to injunctive relief and specific performance. By this Article 12 *FSAI specifically agrees that the defense of sovereign immunity from suit is waived for itself and enforcement of this Agreement and that FSAI may be sued in a court of competent jurisdiction for the enforcement and performance of this Agreement and submits to the choice of law and forum set forth herein.*
> Agreement at Article 7.5, p. 7 (emphasis added).

Whereas it is accurate to assert that Indian tribes enjoy sovereign immunity from suit, as the Defendants assert in their Motion, that immunity is not absolute. Congress may enact legislation which limits such immunity, and immunity may also be waived. The Supreme Court of the United States has clearly established a two-pronged disjunctive test to determine if sovereign immunity exists in a given matter, or if it does not. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). As the Supreme Court decreed, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa,* 523 U.S. at 754. In fact, the act of expressly agreeing to a certain dispute resolution procedure or to a choice of law applicable to a contract dispute has been sufficient to waive immunity. *C & L Enters. Inc.,* 532 U.S. at 419-420. Such is the operative set of facts in this case. FSAI, in its Agreement with TSI, expressly waived sovereign immunity and it further

expressly agreed to jurisdiction and venue in this Court.[1]

Defendants make a stray comment regarding authority to execute the Agreement, but they offer no evidence and no support at all for such a comment. The Agreement, however, is signed by Don Wauahdooah, and Mr. Wauahdooah is identified on page eight (8) of the Agreement as the President of FSAI, Inc. The Agreement, including the waiver and consent to jurisdiction provision was "approved," by the Board of Directors, including Mr. Haozous, which also authorized Don Wauahdooah to sign and return the Agreement to TSI. And furthermore, as it shows on its face, it was sent back to TSI from the offices of the Business Committee and the FSAI Board of Directors, inasmuch as they were all one and the same. *See infra* Section "C." And, clearly, FSAI lived and operated under the Agreement, thereby ratifying the same for four (4) years until September 2009, when FSAI breached the Agreement causing its termination.

Furthermore, when the Fort Sill Apache Tribe (not a Party to this cause) enacted the 2003 Amendments (Exhibit "B" to the Complaint), in effect also amending its Constitution (Exhibit "C" to the Complaint), it waived sovereign immunity and created interlocking boards and executive leadership including the Business Committee and the FSAI Board of Directors. The result led directly to the authorization for FSAI's waiver of sovereign immunity and Don Wauahdooah's authority as President to agree to and

[1] In fact, as the evidence will ultimately show, FSAI participated in the SBA 8(a) program and, as such, was required to waive sovereign immunity and include "sue and be sued" language in its contracts. *See* 13 C.F.R. § 124.109(c)(1) (2005).

execute the Agreement (Exhibit "A" to the Complaint). Everything mentioned herein is raised in and relates directly to the matters pleaded in the Complaint.

Defendants' Motion, therefore, should be denied.

B. Inaccurate and Irrelevant Reference to Other Litigation.

For reasons apparent only to themselves, the Defendants draw in three other lawsuits and one American Arbitration Association case involving FSAI and TSI.[2] No comment would be made but for the fact that, as described by the Defendants, a negative and unfairly inaccurate impression of TSI might result. Accordingly, TSI hereby sets the record straight.

First, it is obvious from the listing of those actions that it was FSAI, not TSI, who initiated each filing. In addition, the "2010 Action"[3] which FSAI unwisely brought against TSI's principal, Deborah Evans Mott, was tried to the Court and resulted in an adjudication which completely exonerated Ms. Mott. Finally, the Defendants distort the truth in describing the dismissal of the AAA arbitration proceeding[4] as having been caused by "TSI's refusal to pay its portion [of the arbitration fees]." In fact, as this Court can see

---

[2] Another action which was filed in the District Court of Caddo County, State of Oklahoma, without service ever attempted, was also mentioned, but that action has now been dismissed.

[3] Civil Action No. 1:10-cv-1422; *Fort Sill Apache Industries vs. Deborah Evans Mott*; In the United States District Court for the Eastern District of Virginia, Alexandria Division.

[4] Case No. 71-110-Y-948-10; *Fort Sill Apache Industries v. Team Systems International, LLC*; In the American Arbitration Association.

by Exhibits "1" and "2" attached hereto, the arbitration was indeed dismissed for the non-payment of deposits, but it was FSAI, *not* TSI, who failed to pay the deposits. In fact, by refusing to pay the deposits required by the American Arbitration Association, FSAI not only caused the dismissal of the case, it arguably did so in contempt of the June 21, 2012, "Order" of the United States District Court in Virginia.

C. Jeff Haozous and the Fort Sill Apache Industries Board of Directors.

The Defendants argue in their Motion that there is a distinction to be drawn between FSAI and Defendants Haozous and the Board of Directors insofar as the sovereign immunity waiver in the Agreement is concerned. They cite *Native American Distributing v. Seneca-Cayauga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), as the main support for their argument that the FSAI waiver ought not extend to the individual Defendants. The fundamental difference between the Defendants in this cause and the *Seneca-Cayuga* case, and other decisions in the area, however, is the complete lack of any separation between FSAI and the other Defendants. The approval and acceptance of the FSAI Agreement and the sovereign immunity waiver expressed therein also extended the waiver to all other Defendants.

TSI contends that discovery and factual development in this case will evidence the lack of separation among any Defendants. In support of this contention, TSI now asserts the following for the limited purpose of evidencing the authority of the Business

Committee and the FSAI Board of Directors:[5]

Fort Sill Apache Tribe Constitution (Exhibit "C" to the Complaint).

1. Article III Governing Body - States all tribal members are the governing body of the Tribe and defines them as the General Council. Also states that the Business Committee shall act as officer of the General Council (actually, the Tribe).

2. Article IV Powers - states the General Council has authority to act for the Tribe and the General Council may delegate specific powers to the Business Committee.

3. Article VII Powers and Duties of Business Committee - mentions the 2003 Amendments and pursuant to Article VII (f) states the Business Committee shall have such additional powers and duties as may be delegated or assigned to it by the General Council (the Tribe).

4. Article IX Amendments - gives the General Council the Authority to Amend the Constitution.

FSAI Amendments 2003 (Exhibit "B" to the Complaint).

In May 2003 a fourteen member Quorum of the members of the General Council (actually the Tribe itself) voted to approve the Amendments and the Tribal Secretary, Leland Darrow, signed the Certification. At the time, Leland Darrow was also Secretary of the Business Committee and the FSAI Board of Directors. This document is important because it links the provisions under which the Business Committee and its alter ego the FSAI Board of Directors may waive and did waive Sovereign Immunity. See:

---

[5] The Tribe is not a party to this litigation, and any references to it are merely to show the authority of the Business Committee and the FSAI Board of Directors.

1. See Section 1-070 in its entirety. It provides that the Fort Sill Apache Business Committee will also serve as the FSAI Board of Directors. No separation.

2. See Section 1-090 in its entirety. It states that the Fort Sill Apache Business Committee and the FSAI Board of Directors will have the same terms of office.

3. See Section 1-100. It states that the Fort Sill Apache Business Committee are the same as the FSAI Board of Directors .

4. See Section 1-130. States a quorum for the Business Committee is 4 members.

6. See Section 1-170 Power to Sue and be Sued. States FSAI can be sued with a Sovereign Immunity Waiver and also provides that the referenced Business Committee and Board of Directors have authority to waive sovereign immunity.

7. See Section 1-180 - This allows the referenced Business and Board of Directors to engage in 8(a) projects and to purchase Surety bonds, and it also is the authority under which the Agreement was signed.

8. See Section 1-190 - Securing Financial Assistance. Allowed FSAI to purchase Surety Bonds to secure the assistance of the SBA, an agency of the federal government, so FSAI, thereby leading to the award of both the Ft. Lee and the Ft. Bliss Projects. Without the bonds, there would have been no contract awards whatsoever.

9. See Section 1-300 This requires compliance with Federal Law, part of which required and directly caused the Sovereign Immunity waiver in order for FSAI to participate in the program and receive federal contracts.

10. See Section 1-360 Special Certificate of Incorporation. This section directs the Secretary of the Tribe (which was the same as the Business Committee), Leland Darrow, to issue a Certificate of Incorporation to FSAI.

In short, there was no separation between FSAI and the other Defendants. And with the core of Defendants' argument on this point being that Mr. Haozous and the Board of Directors are not alter egos of but the same as FSAI, then their waiver of sovereign immunity for FSAI also should extend to and include every part of the corporation, including Mr. Haozous and the Board.

It would also be inequitable, to say the least, if the Defendants were permitted to hide behind their claim to sovereign immunity protection when the corporation they served, FSAI, could not because *they* had *waived* its sovereign immunity. Although Defendants cite the Court to *Flarey v. Youngstown Osteopathic Hospital*, 783 N.E.2d 582 (Ohio Ct. App. 2002) in support of their argument against the joinder of the individual Defendants, Mr. Haozous and the Board of Directors, they do not apprise the Court of the greater significance of that decision. As the *Flarey* court stated:

> When someone thinks they have been wronged by a corporation and that the board of directors may be individually liable for that tortious conduct, *there will be times when that person will not have a clear idea of exactly what each member of the board knew* or could have known about that tortious conduct. Accordingly, *it would behoove that person to name each member of the board of directors individually in their capacity as members of the board* until the course of the case shows which directors are or are not liable.

Flarey, 783 N.E. 2d at 586 (emphasis added).

Furthermore, as the Tenth Circuit has noted in *Native American Distributing v. Seneca-Cayuga Tobacco Co., supra*, a corporate director, even a tribal director, may be

held accountable for his own tortious conduct. 546 F.3d 1288, 1296-97 (10th Cir. 2008). This arguably would include the bad faith, tortious breach of the Agreement caused by Mr. Haozous and the Board of Directors for the purpose of depriving TSI of the fruits of its contract, that being the Agreement and TSI's entitlements to compensation. *See also Robinson v. Southerland,* 2005 OK CIV APP 80, ¶ 38, 123 P.3d 35, 44.

Bearing in mind that the purpose of the Motion is not to test the merits of the dispute but to determine that, in fact, the Complaint presents a plausible cause of action upon which relief can be granted, this Court should find that the Complaint does indeed pass muster and deny the Motion.

D. Contingent Fee Liability and the Statute of Limitations.

Finally, the Defendants argue that TSI was not entitled to contingent fees under the Agreement and that the statute of limitations had expired, but neither contention is true. Defendants miss the mark when they argue, in words or substance, that a bond is a type of insurance rather than part of a financial package, and the primary case they cite, *United Fire & Casualty Co. v. Boulder Plaza Residential, LLC*, 633 F.3d 951 (10th Cir. 2011), is not at all in point. *United Fire* was a coverage dispute and its facts do not in any way line up with the facts and claims in this cause. Furthermore, TSI was responsible for bringing in Phillips & Jordan, Inc. as FSAI's "Designated Subcontractor," meaning it was FSAI's strategic partner, a fee generating action by TSI. *See* FAR 9.601. Furthermore, the Defendants' entire argument is centered around disputing facts of the case, which is

not appropriate for this Motion.

Accordingly, in the instant case, the Agreement itself, Exhibit "A" to the Complaint, establishes both TSI's entitlement to its earned fees and the fact that the cause of action did not accrue until on or after the September 25, 2009, termination letter (Exhibit "D" to the Complaint), meaning the statute of limitations did not expire until September 25, 2014. To echo the United States Supreme Court in *Ashcroft v. Iqbal*, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." 556 U.S. at 664.

III. CONCLUSION AND PRAYER.

WHEREFORE, PREMISES CONSIDERED, Team Systems International, LLC, Plaintiff, prays that Defendants' Motion to Dismiss be in all respects denied.

Respectfully submitted,

COKINOS, BOSIEN & YOUNG

BY: */s/ Michael B. Lee*

GREGORY M. COKINOS
Bar No. 04527250
Gmcokinos@cbylaw.com
MICHAEL B. LEE
Bar No. 12129500
OBA No. 14-139
mlee@cbylaw.com
Four Houston Center
1221 Lamar Street, 16th Floor
Houston, Texas 77010-3039
713.535.5500 Tel.
713.535.5533 Fax

ATTORNEYS FOR TEAM SYSTEMS INTERNATIONAL, LLC

MULINIX, OGDEN, HALL & LUDLAM, PLLC
ARMANDO ROSELL
OBA No. 18821
rosell@lawokc.com
3030 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73102
405.232.4800 Tel
405.232.8999 Fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of November 2014, 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 Electronically Filing to the following ECF registrants:

Armando J. Rosell
rosell@lawokc.com
dcedwards@lawokc.com
sramdas@lawokc.com

Lyndon W. Whitmire
Clayton D. Ketter
Phillips Murrah, P.C.
101 North Robinson Avenue, 13th Floor
Oklahoma City, Oklahoma 73102
lwwhitmire@phillipsmurrah.com
cdketter@phillipsmurrah.com

Eugene Bertman
McCormick & Bryan, PLLC
219 East Main Street
Norman, Oklahoma 73069
gbertman@mccormickbtyran.com

/s/ Michael B. Lee