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

TEAM SYSTEMS INTERNATIONAL, LLC,	)	
Plaintiff,	)	
vs.	)	Case No. CIV-14-1018-D
JEFF HAOZOUS, ALSO KNOWN AS JEFF HOUSER, INDIVIDUALLY, AND AS PRESIDENT OF FORT SILL APACHE INDUSTRIES AND CHIEF EXECUTIVE OFFICER OF FORT SILL APACHE INDUSTRIES BOARD OF DIRECTORS, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

In its Response to Defendants' Motion to Dismiss ("Motion"), Team Systems International, LLC ("TSI") failed to address, and has conceded, that there is a lack of capacity to sue the Board of Directors. Thus, the issues pending for resolution for the Defendants' Motion are:

(1) Whether pursuant to the Doctrine of Sovereign Immunity, TSI can sue Defendants Jeff Haozous ("Chairman Haozous"), Fort Sill Apache Industries Board of Directors (the "Board of Directors"), and Fort Sill Apache Industries Incorporated, incorrectly named in this suit as "Fort Sill Apache Industries" ("FSAI") (collectively "Defendants");

(2) Whether the Engagement Agreement entitles TSI to the contingent compensation claimed;

(3) Whether the Statute of Limitations bars TSI's claims; and

(4) Whether TSI's arguments for alter ego liability as to Chairman Haozous and the Board of Directors fail as a matter of law.

As set forth below, and as discussed in Defendants' Motion, (1) the Doctrine of Sovereign Immunity bars TSI's claims against Defendants; (2) the Engagement Agreement does not entitle TSI to compensation; (3) TSI's claims are time barred; and (4) TSI's alter ego theory as to Chairman Haozous and the Board of Directors fails as a matter of law. Additionally, as TSI conceded, there is a lack of capacity to sue the Board of Directors. Accordingly, TSI's claims fail at the outset and should be dismissed.

ARGUMENT AND AUTHORITIES

A. TSI CONCEDED THAT THERE IS NO CAPACITY TO SUE THE BOARD OF DIRECTORS

As stated above, TSI failed to directly address the argument in its Response Brief that there is a lack of capacity to sue the Board of Directors. Thus, TSI has conceded that argument. However, it should be noted that TSI misconstrues certain authority cited by the Defendants in the Motion concerning whether a member of a board of directors can be sued. Specifically, in addressing sovereign immunity, TSI includes a quote implying that a corporate director may be named in a suit. (*See* Response at p. 11-12 (citing *Flarey v. Youngstown Osteopathic Hosp.*, 783 N.E.2d 582 (Ohio Ct. App. 2002); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296-97 (10th Cir. 2008))).

For clarity's sake, neither *Flarey* nor *Native American Distributing* provides that a board of directors can be a proper party in a lawsuit. Instead, *Flarey* and *Native American Distributing* hold only that an individual board member may be sued for their

own conduct. In fact, *Flarey* explicitly states that "a non-profit corporation's board of directors as an entity is not capable of being sued." *Flarey*, 783 N.E.2d at 586. This decision was based on the finding that: "A board of directors is not a separate entity or an alter ego of the corporation. Instead, it is an integral part of the corporation." *Id.* In rendering this ruling, the court recognized that a specific board member may be sued in their individual capacity for tortious conduct. *Id.* However, because the plaintiff had named the *board as a whole*, rather than a specific individual, the suit was improper. *Id.* Here, just as in *Flarey*, TSI is attempting to sue the Board of Directors – as a whole – rather than a specific board member. As the Board of Directors is not an entity capable of being sued, and as conceded by TSI, TSI's claims are improper and should be dismissed.

B. TSI FAILED TO ESTABLISH SOVEREIGN IMMUNITY

It is TSI's burden to establish a waiver of sovereign immunity, which TSI failed to do. Tribal sovereign immunity is a matter of subject matter jurisdiction which can be challenged in a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). TSI is attempting to sue the Fort Sill Apache Tribe ("FSA") by suing its officials, which is impermissible under *Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F.3d. 1288 (10th Cir. 2008). TSI's arguments actually support the fact that FSAI is a subordinate economic organization of the FSA, which enjoys immunity from suit itself. *See Breakthrough*

Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1185 (10th Cir. 2010).

TSI, without any legal support, attempts to equate FSAI to the Tribe's Board of Directors and Business Committee, including Chairman Haozous, to try to establish a waiver of sovereign immunity in a round-about way to attempt to sue FSA through its officials.[1] However, TSI's arguments ignore the legal significance and purpose of FSAI and FSA. There is no legal support that allows TSI to simply ignore these legal entities and equate the FSAI's alleged waiver of sovereign immunity, which is not conceded, to FSAI's Board of Directors to the Tribe and then to the Business Committee and Chairman Haozous. In fact the opposite is true; the Tribe's sovereign immunity extends to its officials and subordinate economic entities. *Native American,* 546 F.3d. 1288.

Moreover, "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263 (10th Cir. 1998). There is no evidence of an express waiver of sovereign immunity as to the Tribe, its officials or any of the entities.

TSI also attempts to create an "alter ego" argument, but TSI has cited no legal authority for the proposition that a tribal corporation can be the alter ego of the Tribe and result in a waiver of sovereign immunity. *United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Okla*., 2011 U.S. Dist. LEXIS 7840 (W.D. Okla. Jan. 26,

[1] Defendants do not concede that the Board of Directors constitutes an entity that can be sued in its own name.

2011). Further, TSI failed to show that the alleged waiver of sovereign immunity extended to others.

Additionally, Plaintiff claims that it can sue the Board of Directors and Chairman Haozous under a tort claim, but, even under a liberal review of the Complaint, Plaintiff has not made any tort claims against the Board of Directors or Chairman Haozous.[2] Thus, there is no individual liability as to those Defendants and they must be dismissed under *Native American Distributing*, 546 F.3d. 1288 (10th Cir. 2008).

Because TSI failed to establish any valid waiver of sovereign immunity, TSI's claims fail and should be dismissed.

C. TSI CANNOT OVERCOME THE FACT THAT THE ENGAGEMENT AGREEMENT DOES NOT ENTITLE TSI TO CONTINGENT COMPENSATION

Dismissal is appropriate because the plain terms of the Engagement Agreement do not entitle TSI to the contingent compensation sought in TSI's Second Amended Original Complaint ("Complaint").[3] Defendants' Motion details that the acquisition of payment and performance bonds cannot be considered "financing." *See Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002) (holding that the issuance of payment and

[2] It is important to note that any tort claims that TSI might improperly allege are time barred. Oklahoma law, if that were the applicable law in this case, would provide for a statute of limitations for tort claims of two (2) years. 12 Okla. Stat. § 95(A)(3). Under tribal law, it would be three years. 25 CFR § 11.116(B). If there were any claims by TSI, through its own admissions, TSI was aware of these claims as of 2009. Thus, the alleged claims were barred as of 2011 under Oklahoma law and 2012 under Tribal law. TSI has no claims against the Board of Directors or Chairman Haozous.

[3] While not dispositive of the Motion, it is important to point out that FSAI did not receive any type of project or compensation related to Ft. Bliss.

performance bonds cannot be considered "financing"). In addition, it is acknowledged that P&J was a subcontractor retained by TSI, and not engaged in any partnership with FSAI. *See Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, No. 11-cv-02861-SC, 2013 U.S. Dist. LEXIS 100795, *5 (N.D. Cal. July 18, 2013) (finding that "strategic partners" assisted with business ventures, sharing in profits and losses).

TSI offers no law in dispute. Instead, TSI reaches the conclusion, without any support, that the facts of this situation are different than those cases. The authorities cited in Defendants' Motion, however, establish that payment and performance bonds do not qualify as "financing" and that a subcontract does not qualify as a "strategic partner." TSI cannot defeat the above established authority through its conclusory declarations. Because the law does not support recovery by TSI, even if all facts pled are assumed to be true, TSI still fails to state a claim and its claims should be dismissed.

D. TSI'S CLAIMS ARE TIME BARRED

In its Response Brief, TSI merely offered the Court a one sentence response to Defendants' Motion regarding the expiration of the statute of limitations. However, the one sentence failed to offer any support for TSI's position, but, instead, TSI concluded that "the cause of action did not accrue until on or after the September 25, 2009, termination letter …, meaning the statute of limitations did not expire until September 25, 2014." (Response, at p. 13, ¶ 1.) Under TSI's conclusion, ***all*** causes of action would be virtually stayed until the contract was terminated. TSI's conclusion is wrong. Pursuant to the terms of the Engagement Agreement, contingent compensation for obtaining financing is due "upon the first closing date" of the financing. (Ex. A to Complaint,

Engagement Agreement Appendix, at ¶ 1.) According to TSI, the payment and performance bonds, or "financing", were acquired in 2007. Accordingly, the contingent compensation (if any) would have been due and accruing in 2007 and those claims would have expired in 2012. *See* 12 Okla. Stat. § 95(A)(1). The same is true with regard to TSI's "strategic partner" claim; the contingent compensation would have been due in 2007, when P&J was retained. Thus, the claim is time barred.

The Engagement Agreement also provides that TSI's billing shall occur on a monthly basis. (Ex. A to Complaint, Engagement Agreement, at § 6.2.1.) Even giving TSI the benefit and applying Section 6.2.1, the cause of action would accrue when the payments were due and owing. Here, the payments would have been due within the month that the services were provided, once again, 2007. Pursuant to 12 Okla. Stat. § 95(A)(1), the time to bring those claims would have run in 2012, and, are time barred.

The statute of limitations in this case expired over two years ago. TSI has offered no tenable argument otherwise. Thus, the claims should be dismissed.

E. TSI'S CLAIM FOR ALTER EGO LIABILITY FAILS AS A MATTER OF LAW

As set forth in Defendants' Motion, TSI fails to state a claim against Chairman Haozous and the Board of Directors based on alter ego liability. In an attempt to complicate the issue, TSI makes the conclusory allegation in its Response Brief that "discovery and factual development in this case will evidence the lack of separation among any Defendants." (Response at p. 8, ¶ 3.) No amount of factual development, however, will change the fact that the alter ego claims are ***legally*** impermissible.

Alter ego liability cannot be brought in suits involving tribal entities such as FSAI. *See Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285, 1287 (10th Cir. 1983). In addition, Oklahoma law prohibits alter ego claims from being brought against officers and directors ***until judgment has been obtained*** from the corporate party. 12 Okla. Stat. § 682(B); *Racher v. Westlake Nursing Home Ltd. P'ship*, No. CIV-13-364-M, 2014 U.S. Dist. LEXIS 65940, *9 (W.D. Okla. May 14, 2014). TSI fails to make any attempt to address these legal hurdles, but instead, chooses to ignore them. TSI's avoidance and reference to discovery does not change the fact that a claim for alter ego cannot be asserted against Chairman Haozous or the Board of Directors. Accordingly, the claims against Chairman Haozous and the Board of Directors must be dismissed.

CONCLUSION

WHEREFORE, for the reasons set forth above and in the Defendants' Motion, the Defendants respectfully request that this Court enter an order dismissing TSI's Second Amended Original Complaint and for such other and further relief deemed just and equitable by the Court.

Respectfully submitted,

/s/ Amy D. White

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2014, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrant:

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