

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

THE CHEROKEE NATION,	)	
	)	
Cherokee,	)	
	)	
v.	)	No. 5:16-CIV-1354-C
	)	
DEPARTMENT OF THE INTERIOR,	)	Judge Robin J. Cauthron
<i>et al.</i>	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS' BRIEF IN OPPOSITION TO  
PLAINTIFF'S MOTION TO STRIKE (ECF No. 55)  
EXHIBITS SUPPORTING DEFENDANTS' MOTION TO DISMISS (ECF No. 51)**

**I. INTRODUCTION**

On April 7, 2017, Defendants moved to dismiss this case on jurisdictional grounds. ECF No. 51. Among other things, Defendants submitted the following exhibits in support of their motion: (1) periodic statements of performance ("PSPs") that the Interior Department ("Interior") had furnished to Plaintiff Cherokee Nation ("Cherokee" or "the Nation") for the Nation's trust accounts for the period from March, 2002, to fiscal year 2017 (ECF No. 51-2); (2) documentation published by Interior from October 1, 1995, to September 30, 2016, regarding Interior's annual auditing obligations relating to Cherokee's and other Indian trust funds managed by Interior, which include financial statements and auditor's reports on internal controls for financial reporting and compliance (ECF No. 51-3, "Annual Audit Letters"); (3) letters from the Secretary of the Interior to members of Congress and tribal leaders (including Cherokee's) in 1996, informing them of the status

of Interior's Trust Reconciliation Project and its various processes (ECF No. 51-4, "Trust Reconciliation Project ("TRP") reports"); and (4) a letter from the Secretary of the Interior to members of Congress proposing legislation to resolve trust account balance disputes based on the TRP results (ECF No. 51-5, "Proposed Legislative Options for Resolution of Trust Account Balance Disputes").

On April 14, 2017, Cherokee moved to strike Defendants' supporting exhibits in their entirety. ECF No. 55. Cherokee asserted that this Court cannot consider the exhibits or their contents without converting Defendants' motion to dismiss into one for summary judgment. *Id.* Further, Cherokee asserted, even if the Court were to convert Defendants' motion, Defendants' exhibits would be inadmissible under Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). *Id.*

Cherokee's motion to strike is without merit. The exhibits that Cherokee seeks to strike are documents that Cherokee references in the Complaint in this case. It is well-established that "where a plaintiff refers to documents central to its argument in a complaint, and a defendant then attaches those documents to a motion to dismiss, 'district courts have discretion in deciding whether to consider such materials' without converting the motion to one for summary judgment." *State Farm Fire and Casualty Co. v. Ireland*, No. 15-184, 2016 WL 3920470, at \*2 (W.D. Okla. July 15, 2016) (quoting *Prager v. LaFever*, 180 F.3d 1185, 1189 (10th Cir. 1999)). Additionally, this Court has the discretion to consider exhibits that are integral to Cherokee's claims in a "facial" challenge to the Court's jurisdiction, as Defendants have presented herein (ECF No. 51). Further, inasmuch as Defendants have asserted a "factual" challenge to the Court's jurisdiction under the

Administrative Procedure Act (“APA”) as well, Defendants can submit exhibits to further bolster its jurisdictional challenge. Thus this Court should deny Cherokee’s motion to strike, and it should consider the exhibits supporting Defendants’ motion to dismiss in determining the threshold matter of whether it has jurisdiction over Cherokee’s claims.

## **II. STANDARD OF REVIEW**

“As a general rule, Rule 12(b)(1) motions to dismiss for lack of jurisdiction take one of two forms: (1) facial attacks and (2) factual attacks. Under a facial attack, the movant merely challenges the sufficiency of the complaint requiring the district court to accept the allegations in the complaint as true.” *Paper, Allied-Industrial, Chemical and Energy Workers Int’l. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005) (internal citations omitted). In a factual attack, “a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends” and “a district court may not presume the truthfulness of the complaint’s factual allegations.” *Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995) (holding that a defendant’s Rule 12(b)(1) motion raised a permissible factual challenge to the existence of subject matter jurisdiction). Instead, “[a] court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).” *Id.* Moreover, “[i]n such instances, a court’s reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.” *Id.* (citing *Wheeler v. Hurdman*, 825 F.2d 257, 259 n. 5 (10th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987)). “Under this ‘factual attack,’ the court may not presume the truthfulness of the [amended] complaint’s factual allegations. Instead, the court must make its own findings of fact. In

doing so, the court retains wide discretion to rely on materials outside the pleadings and the court's reference to evidence outside the pleadings does not convert the motion [to dismiss] to a Rule 56 motion [for summary judgment]. *McCrary v. Jones*, No. 13-573, 2015 WL 873641, at \*2 (W.D. Okla. Feb. 27, 2015) (internal citations and quotations omitted).

In moving to dismiss Cherokee's claims under Rules 12(b)(1) and 12(b)(6), Defendants have mounted "facial" and "factual" challenges to the jurisdictional bases of this case. ECF No. 51. Accordingly, this Court has the clear discretion to consider Defendants' exhibits when it is evaluating Defendants' jurisdictional challenges and to do so without having to convert Defendants' motion to dismiss to one for summary judgment.

### **III. ARGUMENT**

#### **A. The Exhibits Supporting Defendants' "Facial" Challenge Under Rule 12 Are Not Only Referenced in the Complaint But Also Central to Cherokee's Claims.**

In its motion to strike, Cherokee asserts that this Court could not consider the exhibits supporting Defendants' motion to dismiss because the exhibits are not referenced in the Complaint. ECF No. 55 at 5. Cherokee's assertion is baseless and should be rejected.

The exhibits supporting Defendants' motion to dismiss (ECF Nos. 51, 51-2 to 51-5) are clearly referenced in the Complaint (ECF No. 1). Cherokee cited to the PSPs that constitute Defendants' Exhibit 1 (ECF No. 51-2) in making allegations about the requirements of the American Indian Trust Fund Management Reform Act. ECF No. 1, ¶ 135 ("25 U.S.C. § 4011 provides: . . . (b) Periodic statement of performance."). Also, Cherokee cited to the PSPs in alleging various violations of law and breaches of trust by

Defendants and requesting various forms of relief. *Id.*, ¶ 144 (“Interior has not and is not preparing and supplying the Nation with periodic statements of its account performance and with balances of its account available on a daily basis”); ¶ 149 (“As a remedy, the Nation seeks an injunction requiring that the United States . . . (4) Provide periodic, timely reconciliations to assure the accuracy of accounts managed or controlled for the Nation by the United States . . . (6) Prepare and supply the Nation with periodic statements of its account performance and with balances of its account . . .”); and ¶ 155 (“Interior has not and is not preparing and supplying the Nation with periodic statements of its account performance and with balances of its account available on a daily basis”). Similarly, Cherokee cited to the Annual Audit Letters that make up Defendants’ Exhibit 2 (ECF No. 51-3). *Id.*, ¶ 135 (“25 U.S.C. § 4011 provides: . . . (c) Annual Audit . . . The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to The Act of June 24, 1938 . . .”). Further, Cherokee cited to the TRP and associated documentation that comprise Defendants’ Exhibit 3 (ECF No. 51-4).<sup>1</sup> *Id.*,

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<sup>1</sup> As to this exhibit, Cherokee admits that it referred to “the Arthur Anderson reconciliation process” in the Complaint but states that “the TRP results” are not central to the Nation’s claims in that “the TRP results” were not an accounting of the Nation’s trust funds and assets.” ECF No. 55, footnote 1. Cherokee’s attempt to distinguish or justify its reference is at best unpersuasive. As explained in Defendants’ motion to dismiss (ECF No. 51-1, at 23-25, 32-33), “[t]he Arthur Anderson reconciliation process” is the TRP, which produced certain results and associated documentation and data relating to the Interior Department’s reconciliation of Cherokee and other tribal trust accounts, one relevant portion of which documentation constitutes Defendants’ Exhibit 3. This Court should not countenance Cherokee’s effort to preclude Defendants from defensive reliance on the same documents that Cherokee cited prominently in the Complaint.

¶¶ 122-125. As to the Interior Department’s proposal for legislative resolution of tribal trust account balance disputes based on the TRP results, as documented in Defendants’ Exhibit 4 (ECF No. 51-5), the proposal is a major significant consequence of Interior’s TRP work that was referenced by Cherokee. *Id.* By Cherokee’s own admission, Defendants’ exhibits are central to Cherokee’s claims in this case. ECF No. 55, at 7 (“The two statutes referenced by Defendants—26 U.S.C. § 4011 and 4044—are relied on by the Nation for its substantive claims.”).

Given the foregoing, this Court can and should consider Defendants’ supporting exhibits in evaluating the adequacy of the jurisdictional basis of this case under Fed. R. Civ. P. 12 and further do so without having to convert Defendants’ motion to dismiss to one for summary judgment. *See, e.g., State Farm Fire*, No. 15-184, 2016 WL 3920470, at \*2 (declining to convert the defendant’s motion to dismiss into a motion for summary judgment where the two exhibits at issue were referred to by the plaintiff in its complaint and were central to the plaintiff’s argument).

**B. The Court Can Consider the Exhibits Supporting Defendants’ “Factual” Challenge Under Rule 12 Without Having to Convert Defendants’ Motion to One for Summary Judgment.**

In evaluating Defendants’ “factual attack” on the jurisdictional basis of this case, this Court may “weigh the evidence and make factual findings.” *Los Alamos Study Group v. Dept. of Energy*, 692 F.3d 1057, 1063 (10th Cir. 2012) (citing *Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995)). When presented with a Rule 12 motion to dismiss for lack of subject matter jurisdiction, as in this case, “the district courts have wide discretion to consider affidavits and other documents to resolve disputed jurisdictional facts. In such

instances, a court's reference to evidence outside the pleadings does not convert the motion [to dismiss] to a Rule 56 motion [for summary judgment].” *The Cherokee Nation West v. U.S. Army Corps of Engineers*, No. 14-612, 2016 WL 4548441, at \*2 (N.D. Okla. Aug. 31, 2016) (internal citations omitted).

In their motion, Defendants explained that Cherokee failed to identify the substantive statute that allegedly confers APA jurisdiction on this Court to hear Cherokee’s claims. *See* ECF No. 51-1, at 21. Notwithstanding that failure, Defendants posited that Cherokee would likely identify Sections 4011 and 4044 of the American Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 4011, 4044, as the substantive bases of Cherokee’s APA claim, which, Defendants contended, would be unavailing. *Id.* (“To the extent that Cherokee identifies section 4011 and 4044 of the Trust Fund Management Reform Act, 25 U.S.C. §§ 4011 and 4044, as the bases for the discrete statutory created historical duties by which Cherokee can legitimately invoke this Court’s jurisdiction under §702, Cherokee’s claims still fail because the essential factual predicate for subject matter jurisdiction does not exist.”). As Defendants noted, 5 U.S.C. § 702 confers APA jurisdiction when coupled with a statute that outlines Cherokee’s substantive legal rights. *Id.* at 16 (“The APA . . . is not an independent grant of jurisdiction to review agency action.”). Defendants submitted their four exhibits (ECF No. 51-2 to 51-5) in support of the foregoing “factual attack” to whether this Court has subject matter jurisdiction to hear Cherokee’s claims.

Cherokee concedes in its motion to strike that it relies on Sections 4011 and 4044 of the Trust Fund Management Reform Act for its substantive claims, albeit without specifying the particular claims or counts to which the statutory provisions should attach.

ECF No. 55 at 7. In any event, this Court is well within its discretion to take into account Defendants' supporting exhibits in determining whether Cherokee has adequately established the jurisdictional basis for its claims in this case. *See Meadows v. U.S.*, No. 12-367, 2013 WL 656885 (W.D. Okla. Feb. 22, 2013) (where "jurisdictional issues are not intertwined with the merits of Cherokee's . . . claim, [the] Motion may properly be decided under Rule 12(b)(1) by considering matters outside Cherokee's complaint."). Certainly, Cherokee has the affirmative obligation to demonstrate that it is entitled to relief from the Court under Section 702 of the APA and identify the relevant statute(s) supporting the alleged trust duties and responsibilities that Defendants purportedly breached or failed to uphold. To the extent that Cherokee relies on Sections 4011 and 4044 of the Trust Fund Management Reform Act as the substantive legal bases for its invocation of APA jurisdiction under Section 702, the Court can consider Defendants' supporting exhibits as part of its adjudication of Defendants' "factual attack" on Cherokee's invocation.<sup>2</sup>

#### **IV. CONCLUSION**

The materials that Defendants submitted in support of their motion to dismiss (ECF No. 51, 51-2 to 51-5) are not only documents that Cherokee cited in the Complaint but also central and integral to Cherokee's claims regarding a "full and complete" historical trust accounting required by law. Additionally, the supporting exhibits bolster Defendants' argument that this Court lacks subject matter jurisdiction over Cherokee's claims. Given

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<sup>2</sup> In the event that the Court is willing to allow Cherokee's invocation of Section 702 of the APA, the Court should at least require Cherokee to state more definitely the statutes that allegedly confer the substantive trust duties, responsibilities, and the Court's subject matter jurisdiction over Cherokee's claims.



Defendants' "facial" and "factual" challenges under Fed. R. Civ. P. 12 to the jurisdictional bases of this case, this Court can and should consider Defendants' exhibits and do so without needing to convert Defendants' motion to dismiss to one for summary judgment. In short, the Court should deny Cherokee's motion to strike.

Respectfully submitted this 5th day of May 2017.

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