

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TUNICA-BILOXI TRIBE OF LOUISIANA;)	
RAMAH NAVAJO SCHOOL BOARD, INC.,)	
)	
Plaintiffs,)	Case No. 1:02CV02413
)	Judge Reggie B. Walton
v.)	Magistrate Judge Deborah A.
)	Robinson
UNITED STATES of AMERICA;)	
CHARLES E. JOHNSON, Acting Secretary of the)	
United States Department of Health and Human)	
Services; KEN SALAZAR, Secretary)	
of the United States Department of the Interior, ¹)	
)	
Defendants.)	

**DEFENDANTS’ REPLY TO PLAINTIFFS’ RESPONSE
TO ORDER TO SHOW CAUSE**

Defendants, by and through undersigned counsel, hereby submit this Reply to Plaintiffs’ Response to the Order to Show Cause.

INTRODUCTION

As part of a settlement in a related case, Plaintiffs have executed a Contract Release that applies to and covers the claims they seek to bring in this case against the Secretary of the U.S. Department of the Interior (“DOI”). The plain terms of the Partial Settlement Agreement and the Release, approved and entered in Ramah Navajo Chapter v. Kempthorne, No. 90-957 (D.N.M.) (“RNC”), provide that the plaintiff-class, which includes Tunica-Biloxi Tribe (“Tunica”) and the

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Charles E. Johnson, Acting Secretary of the U.S. Department of Health and Human Services (“HHS”) and Ken Salazar, Secretary of the U.S. Department of Interior (“Interior”), in their official capacities, substitute for Mike Leavitt and Dirk Kempthorne.

Ramah Navajo School Board (“RNSB”), releases all claims for equitable relief against DOI related to the National Business Center’s (“NBC”) “carry-forward templates, policies, and practices” in effect prior to or on May 18, 2008 (NBC is an agency of DOI). Because Plaintiffs’ claims for prospective injunctive relief related to NBC’s carry-forward templates are all that remain of their case against DOI, Plaintiffs have failed to show cause why DOI should not be dismissed from this lawsuit.

Contrary to Plaintiffs’ suggestion, Defendants do not argue that the RNC Contract Release has any bearing on Plaintiffs’ claims against the U.S. Department of Health and Human Services (“HHS”) that the Indian Health Service (“IHS”) should have adjusted Plaintiffs’ indirect cost rates because the rates were calculated using a shortfall column in the carry-forward schedule that Plaintiffs allege violates the Indian Self-Determination and Education Assistance Act (“ISDA”) (sometimes called the “Carry-Forward Claim”). These claims were not released, and, for Tunica-Biloxi Tribe (“Tunica”) in 1995-2001 and the Ramah Navajo School Board (“RNSB”) in 1999-2003, they remain live in this case. The Order to Show Cause, and Defendants’ arguments here, are limited to a dismissal of the claims against the Secretary of DOI for prospective injunctive relief.

BACKGROUND

On May 18, 2008, a plaintiff class of Tribal contractors that contract with the Bureau of Indian Affairs (“BIA”), a component of DOI, entered into a partial settlement agreement (“PSA”) with DOI (docketed in RNC as #1138). On August 27, 2008, Judge Leroy Hanson approved the PSA, and, pursuant to its terms, the agreement went into effect on October 27, 2008. See PSA § II.E (attached as Ex. A to Defs.’ Notice of New Evidence, which was docketed in Tunica as

#169). As part of the PSA, DOI agreed to make certain modifications to the methodology that NBC uses to negotiate indirect cost rates with Tribal contractors. In exchange, the class plaintiffs, including Tunica and RNSB, released DOI and NBC from claims for equitable or injunctive relief related to the rate methodology.² See Release at 1 (attached as Ex. C to Defs.’ Notice of New Evidence); see also PSA § VI.

In this case, Plaintiffs have raised various claims against both the Secretary of HHS and the Secretary of DOI. After the Court’s most recent Order and Memorandum Opinion of September 22, 2008, the claims that remain for adjudication in this case are:³

(1) Plaintiffs’ claim for monetary relief (Tunica under its 1995-2001 contracts and RNSB under its 1999-2003 contracts) challenging IHS’s decision not to adjust their indirect cost rates to take into account that the rates were calculated using a shortfall column in the carry-forward schedule that Plaintiffs believe violates the ISDA;

(2) Plaintiffs’ claim for prospective injunctive relief against DOI related to NBC’s use of the shortfall column in the carry-forward schedule that Plaintiffs believe violates the ISDA.⁴

² The PSA specifies that the Release may be used as “a defense by any government agency to any claim that the agency believes was released” as part of the settlement. See PSA § XIX.C.iv. The PSA also specifies that the Secretary does not admit liability as to any of the claims, and that the PSA “may not be offered, taken, construed, or introduced as evidence of liability, as an admission of fact or legal proposition or statement of wrongdoing by either party . . . in any other action in which an agency or department of the United States Government is a party” PSA §§ XIX.A; XIX.C. The PSA also specifies that it does not have “collateral estoppel or res judicata effect in any case in which [IHS] or [HHS] is a party.” PSA § XIX.B.

³ Pending is Plaintiffs’ Motion to File Second Supplemental Complaint, which would greatly expand the claims in this seven-year old case, and Defendants’ Opposition thereto (docketed in Tunica as ##163, 166).

⁴ Defendants contest that this type of relief is available against DOI, as allowing prospective injunctive relief would circumvent the carefully crafted remedies in the ISDA as well

See Tunica-Biloxi Tribe v. United States, 577 F. Supp. 2d 382, 407-13 (D.D.C. 2008)

(dismissing all claims not previously presented to an IHS contracting officer); id. at 395 n.10 (agreeing with Plaintiffs that Plaintiffs’ “Shortfall Claims” were not raised in this action); id. at 424-25 (granting summary judgment to Defendants on all “Rate Dilution Claims”); id. at 394 (explaining that claims for breach of fiduciary duty and for breach of the implied covenant of good faith and fair dealing were dismissed in a prior Order); id. at 402-03 (declining to dismiss claims for prospective injunctive relief against DOI for lack of standing).

The Court’s Order to Show Cause, and this Reply, address Claim #3 above: Whether the parties to the PSA (including Plaintiffs Tunica and RNSB and Defendant the DOI Secretary) in RNC released all claims for prospective injunctive relief against DOI related to NBC’s carry-forward templates, policies, and practices such that Secretary Salazar must be dismissed from this case.

ARGUMENT

I. PLAINTIFFS HAVE RELEASED EQUITABLE CLAIMS AGAINST THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR AND THE NATIONAL BUSINESS CENTER RELATED TO THE RATE METHODOLOGY.

Contrary to Plaintiffs’ arguments, Plaintiffs have released claims against the Secretary of DOI and NBC challenging the indirect cost rate methodology. The Release in RNC provides: “[T]he Class, as defined in Section II.C.1 of PSA III, including each of the named Plaintiffs and each individual member of the Class, hereby release and discharge the Defendants as defined in Section II.C.2 of PSA III, from all Settled Claims as defined in VI.A of PSA III.” Release at 1.

as in Office of Management and Budget Circular A-87, 2 C.F.R. Pt. 225, App. E, § F.4, and are unripe.

The PSA, like any settlement agreement, is a contract. See Tiburzi v. Dep't of Justice, 269 F.3d 1346, 1351 (Fed. Cir. 2001).⁵ Contract interpretation begins with the plain language of the contract. See McAbee Const. Inc. v. United States, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996); Foley Co. v. United States, 11 F.3d 1032, 1034 (Fed. Cir. 1993); see also C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539, 1543 (Fed. Cir. 1993) (“A contract is read in accordance with its express terms and the plain meaning thereof.”). If the provisions of a contract “are clear and unambiguous, they must be given their plain and ordinary meaning,” Alaska Lumber & Pulp Co. v. Madigan, 2 F.3d 389, 392 (Fed. Cir. 1993), and courts may not resort to extrinsic evidence to interpret them, see McAbee, 97 F.3d at 1435. In other words, “extrinsic evidence will not be received to change the terms of a contract that is clear on its face.” Beta Sys., Inc. v. United States, 838 F.2d 1179, 1183 (Fed. Cir. 1988). Contract releases are construed in the same manner as contracts. See Dureiko v. United States, 209 F.3d 1345, 1356 (Fed. Cir. 2000). The plain language of the Contract Release provides that the Class includes Plaintiffs, that it applies to the DOI Secretary, and that it covers all claims for equitable relief related to NBC’s carry-forward template and its policies and practices.

A. The Release Applies to Claims Brought by Tunica and RNSB.

The Release applies to claims brought by Tunica and RNSB. As explained in the Contract Release, it applies to “the Class . . . the named Plaintiffs, and each individual member of the Class.” See Release at 1. The PSA in turn defines the Class as “all Indian Tribes and organizations that have contracted or compacted with the Secretary of the Interior under ISDA,

⁵ The Court of Federal Claims, and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, interpret government contracts almost exclusively, see 41 U.S.C. § 609, 28 U.S.C. § 1295. Thus, the decisions of these courts are cited herein.

and whose cognizant agency, as defined by [Office of Management and Budget (“OMB”)] Circular A-87, 2 C.F.R. Part 225, or other applicable OMB Circular, is the Department of the Interior.” PSA § II.C.1. Tunica and RNSB are both members of the RNC Class, as they both contract with DOI under the ISDA and have DOI as their cognizant agency for purposes of negotiating indirect cost rates. See, e.g., 2d Am. Compl. ¶ 12 (“Defendant [the Secretary of DOI] is charged by law with responsibility for implementing the ISDA, including serving as head of the cognizant agency for determining indirect cost rates for the vast majority of ISDA IHS contractors, including the named Plaintiffs.”); Pls.’ Ex. 2 in Support of Renewed Motion for Partial Summary Judgment and Opposition to Defendants’ Motion to Dismiss and for Summary Judgment (docketed in Tunica as #147) (a list submitted by Plaintiffs of the Tribes and Tribal organizations participating in RNC, including Tunica and RNSB).

Without disputing that Tunica and RNSB were members of the RNC Class, Plaintiffs argue that the group of contractors that contract with BIA is different from the group of contractors that contract with IHS. (Pls.’ Resp. at 4-5.) Defendants do not dispute this. The only question is whether Tunica and RNSB were members of the RNC Class, and as to this question, there can be no dispute. Plaintiffs also argue that Defendants’ interpretation of the Release would extinguish the claims of “entities not within the [RNC Class], entities that would have been unable to object to the settlement.” (Pls.’ Resp. at 4.) This argument is both irrelevant and meritless. The Contract Release is applicable against only the RNC Class, the named Plaintiffs, and any individual member of the Class. The Contract Release does not apply against entities not part of the Class, but it does, quite clearly, apply to the two plaintiffs in this case who were part of the RNC Class..

Finally, Plaintiffs urge that the RNC Class was not capable of raising claims against HHS in RNC, and thus that the Contract Release should not apply in this case. (Pls.' Resp. at 5-6.) Again, Defendants do not dispute that the RNC Class was incapable of raising claims against HHS; the defendants in RNC were DOI, BIA, and NBC and not HHS or IHS. In fact, the PSA largely reserved the Class's claims against HHS and IHS. See PSA § VI.B.4(b). But the Contract Release explicitly applies to claims for equitable relief against DOI that are identical to the claims raised against DOI here.

B. The Release Applies to Claims Brought Against the Secretary of DOI.

As explained above, the RNC Class released and discharged the DOI Secretary and the NBC Director. The Contract Release specifies that the Release applies to "Defendants", and the PSA defines "Defendants" as "Dirk A. Kempthorne, Secretary of [DOI], in his official capacity; Carl J. Artman, Assistant Secretary for Indian Affairs, in his official capacity; Douglas J. Bourgeois, Director of the National Business Center ("NBC") of DOI, in his official capacity."⁶ PSA § II.C.2. Defendants have asked that the Secretary of DOI be dismissed from this case on the basis of the Release, which specifically applies to the Secretary.

C. The Release Applies to Claims for Equitable Relief Related to the Indirect Cost Rate Methodology Used By NBC to Negotiate Indirect Cost Rates.

As explained above, the claims that were released in the PSA are the "Settled Claims." The "Settled Claims" are:

[A]ny and all claims, demands, rights, causes of action and counts for any type of equitable relief (including, but not limited to, injunctive or declaratory relief) under any theory of recovery encompassed in the Calculation Claim, the Shortfall Claim and the Direct CSC Claim, as defined in subsection II.F, above, that were or could have been

⁶ See supra n.1.

raised by the Class in this action against Defendants.

PSA § VI.A.1. Applicable to the Order to Show Cause and this Reply is the “Calculation Claim”, which is defined in the PSA as including:

[A]ny asserted or unasserted claims challenging NBC’s or DOI Office of the Inspector General’s carry-forward templates, policies, and practices previously in effect or in effect as of the date of execution of this PSA III.

In summary, Plaintiffs released DOI and NBC from any equitable claims related to the (Rate) Calculation Claim, which encompassed, among other things, asserted and unasserted claims challenging NBC’s carry-forward templates, policies, and practices previously in effect or in effect as of the date of execution of the PSA (May 18, 2008). In this case, Plaintiffs purport to bring claims against DOI that challenge NBC’s carry-forward templates, policies, and practices previously in effect or in effect as of May 18, 2008, which have now been released in RNC.

There is no caveat in the Release, as Plaintiffs argue, limiting it to NBC’s carry-forward templates, policies, and practices when applied to DOI (BIA) contracts. (Pls.’ Resp. at 1-3.) Nor is the Release limited to “claims arising out of [ISDA] contracts awarded by the Secretary of Interior.” (Pls.’ Resp. at 1.) In fact, if the Release were so limited, it would be inconsistent with the PSA itself, which provides that NBC will adjust its carry-forward templates for the RNC Class without regard to which agency any individual class member ultimately submits its rate, see PSA § III.B, and which provides that the new rates will constitute the RNC Class’s indirect cost rates pursuant to OMB Circulars to the same extent any rate negotiated by NBC in the past, see PSA § III.E. The PSA also anticipates that funding agencies such as IHS will accept indirect cost rates negotiated with NBC under the new policies. See, e.g., PSA § VI.A.3 (explaining that Plaintiffs agree to conditionally waive claims related to the use of indirect cost rates against the

United States and any other agency contracting under the ISDA, including IHS, if the agency accepted a rate negotiated under the PSA).

Moreover, interpreting the Contract Release as Plaintiffs suggest would have unintended (and negative) consequences. For example, if the Court permits the claims for prospective injunctive relief against DOI to remain in this case, and Defendants ultimately prevail on the Carry-Forward Claim, the Court necessarily would be endorsing the use of the shortfall column in the carry-forward schedule. NBC would thus be authorized to mandate that Tunica and RNSB negotiate two different indirect cost rates: one for submission to IHS utilizing the current methodology and one for submission to other agencies utilizing the PSA methodology. Conversely, if Plaintiffs' prevail, the Court could order injunctive relief that is not consistent with the PSA, which was the subject of negotiation, and similarly authorize NBC to mandate that Plaintiffs negotiate two different indirect cost rates. This result would be extremely burdensome to both Plaintiffs and NBC and would deprive all parties of the benefits of the PSA.

Notwithstanding their arguments, Plaintiffs appear to acknowledge that there was no such caveat or gloss on the Contract Release, because they argue in the alternative that the Court should decline to apply the Release because doing so would: (1) conflict with the Reserved Claims incorporated in the Contract Release; (2) violate the canon of construction that ambiguities be resolved in favor of Indians; and (3) apply to NBC's templates, policies, and practices in connection with non-ISDA contracts. (Pls.' Resp. at 3.) Each of these arguments is easily refuted.

First, Plaintiffs fail to identify which "Reserved Claim" covers its claims for prospective relief against DOI here and conflicts with Defendants' plain reading of the Contract Release. See

PSA § VI.B.1 (reserving certain claims for monetary relief); id. § VI.B.2 (reserving claims related to the exclusion of a particular type of cost or a mathematical error); id. § VI.B.3 (reserving challenges to BIA’s CSC Policy); id. § VI.B.4 (reserving claims against cognizant agencies other than NBC; certain contract claims against agencies other than DOI; and claims unrelated to CSC). The claims in this case are simply not reserved under § VI.B of the PSA.

Second, there is no basis to apply the canon of construction favoring Indians because the PSA and the Contract Release are not ambiguous.⁷ See South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506, 106 S. Ct. 2039, 2044 (1986); DeCoteau v. Dist. County Ct., 420 U.S. 425, 444-47, 95 S. Ct. 1082, 1093-95 (1975); Tunica, 577 F. Supp. 2d at 422.

Plaintiffs next argue that the Release could apply to non-ISDA contracts. (Pls.’ Resp at 3.) As explained above, the Release applies to a challenge to NBC’s templates, policies, and practices, and thus, whether the RNC Class negotiates rates with the intention of submitting the rates to IHS, HHS, or any other non-ISDA agency, the Release bars a claim against NBC, and its parent agency, DOI, on this basis.

Plaintiffs’ final argument is that they intended to craft the PSA to “preserve all claims in

⁷ There is also a serious question about whether this canon should apply to the PSA at all. The canon was originally developed as a tool of construction to interpret treaties entered into between the United States and Indians involving Indian property and was later extended to apply to statutes that affect Indian property rights, including property held in trust for Indians. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247, 105 S. Ct. 1245, 1258 (1985). The canon goes hand in hand with the trust relationship between the United States and Native Americans. See 470 U.S. at 247-48; 105 S. Ct. at 1258. The PSA, however, does not restrict Indian rights, does not involve the management of Indian property, and does not create a specific trust. Instead, the PSA is a settlement agreement between DOI and Tribal contractors, represented by counsel, that was endorsed by Plaintiffs and their attorneys and approved by the RNC Court as fair and adequate. There is no reason to apply any interpretive canon other than those applicable to the interpretation of contracts.

the Tunica litigation[.]” (Pls.’ Resp. at 6.) Plaintiffs’ intention, in the face of plain text, is of no consequence. The PSA was the result of extensive negotiations, and the final product was agreed to by Plaintiffs and the RNC Court. The plain language of the PSA and the Contract Release direct that Plaintiffs’ remaining claims against DOI in this case be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss with prejudice Secretary Salazar from this lawsuit.

Respectfully submitted,

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