IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JOHNNY C. MORGAN,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 01-1043
	)	
HARDEMAN COUNTY, TENNESSEE, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION OF
DEFENDANT SOUTHEASTERN BOLL WEEVIL ERADICATION FOUNDATION

Plaintiff Johnny C. Morgan has filed this action against Defendants Hardeman County, Tennessee, Dave Perrin, individually, and d/b/a/ P&A Aviation, Sammy Nuckolls, individually, and as county executive of Hardeman County, Tennessee, and Southeastern Boll Weevil Eradication Foundation, Inc. ("Foundation"), pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff has also asserted a supplemental state law claim of breach of contract against Defendant Foundation. Defendant Foundation has filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff has filed a response to the motion, and Defendant has filed a reply to the

response. For the reasons set forth below, Defendant's motion to dismiss is GRANTED.[1]

Lack of subject matter jurisdiction is an affirmative defense that a defendant may assert in a motion to dismiss. See Fed. R. Civ. P. 12(b)(1)[2]; *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir. 1993). "Where subject matter jurisdiction is challenged under Rule 12(b)(1), . . . the plaintiff has the burden of proving jurisdiction in order to survive the motion." Rogers v. Stratton Indus., Inc., 798 F.2d 913, 915 (6th Cir. 1986). See also Tarleton v. Meharry Medical Hospital, 717 F.2d 1523, 1529 (6th Cir. 1983)(if allegations of subject matter jurisdiction "are controverted," a plaintiff "must proceed to demonstrate by submission of evidence beyond the pleadings that the jurisdictional requirements . . . are satisfied"). In considering a factual, rather than a facial, jurisdictional attack, a district court may resolve disputed questions of fact bearing on the court's jurisdiction. Rogers, 798 F.2d at 915. In so doing, the district court is afforded "wide discretion" to consider affidavits and other documentary evidence or to conduct a limited evidentiary hearing. Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir.1990). See also Land v. Dollar, 330 U.S.

---

[1] Because the court has determined that it does not have subject matter jurisdiction over Defendant Foundation, the court does not reach the issue of whether Plaintiff has failed to state a claim. See Galvan v. Federal Prison Industries, Inc., 199 F.3d 461 (D.C. Cir. 1999) (The court may not proceed to the merits of the case without first satisfying itself that it has subject matter jurisdiction and that sovereign immunity does not bar the action.)

[2] Fed. R. Civ. P. 12 provides as follows:

> (b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; ....
>
> (h) .... (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

731, 735 (1947) (recognizing the use of affidavits in addition to pleadings in determining questions of jurisdiction).

In the present case, Defendant asserts that the court does not have subject matter over it because it is an agency of the federal government for the purpose of eradication activities and, thus, entitled to sovereign immunity except to the extent that its immunity has been waived by Congress. According to Defendant, the claims asserted against it are governed by the Tucker Act, 28 U.S.C. § 1491, and the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq.*, and must be brought before the Court of Federal Claims. See Up State Federal Credit Union v. Walker, 35 F. Supp. 2d 222 (N.D.N.Y. 1999), and Spodek v. United States Postal Service, 35 F. Supp. 2d 160 (D. Mass. 1999) (The Tucker Act requires that certain non-tort claims against the United States be tried in the Court of Federal Claims while the CDA grants that court jurisdiction over claims against the United States that are founded upon express or implied contracts with an executive agency of the United States.) Defendant also contends that, as an agency of the federal government, it is not amenable to suit under § 1983.

Plaintiff responds that (1) Defendant has not met the administrative prerequisites for asserting that it is a federal agency; (2) Defendant, as an Alabama corporation, may sue and be sued and, thus, has waived any claim to sovereign immunity; (3) Defendant's agreement with the federal government has changed in recent years such that it is no longer considered to be a federal agency; and (4) Defendant cannot establish through its own documents or its

own make-up that it is a federal agency.

It is well-settled that the United States may not be sued without its express consent and that the existence of such consent is a prerequisite for jurisdiction of federal courts. United States v. Mitchell, 463 U.S. 206, 212 (1983). The Tucker Act waives the sovereign immunity of the United States and provides jurisdiction in the Court of Federal Claims for claims against the United States "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). The Tucker Act is limited in its jurisdictional sweep by the CDA which waives sovereign immunity for actions arising out of express or implied executive agency contracts and gives the Court of Federal Claims exclusive jurisdiction over such actions. 41 U.S.C. §§ 602, 609. Therefore, if Defendant Foundation is an agency of the federal government, then this court does not have subject matter jurisdiction over Plaintiff's claims which arise from its contractual dispute with Defendant.

Additionally, because § 1983 provides a remedy for violations of federal law by persons acting pursuant to state law, federal agencies and officials are ordinarily exempt from § 1983 liability since they act pursuant to federal law. See District of Columbia v. Carter, 409 U.S. 418, 425 (1973). Although federal officials may be subject to § 1983 liability when sued in their official capacity if they have acted under color of state law in conspiracy with state officials, see, e.g., Melo v. Hafer, 912 F.2d 628, 638 (3rd Cir.1990), *aff'd on other*

grounds, 502 U.S. 21 (1991), in the present case, the allegations are against an agency. A federal agency is not a "person" subject to § 1983 liability, whether or not in an alleged conspiracy with state actors. See Hindes v. F.D.I.C., 137 F.3d 148 (3rd Cir. 1998). Thus, Plaintiff cannot maintain a § 1983 action against Defendant Foundation if Defendant is found to be a federal agency.[3]

The following facts are undisputed.[4] The United States Department of Agriculture ("USDA") was authorized by Congress to "carry out programs to destroy and eliminate cotton boll weevils in infested areas of the United States." 7 U.S.C. § 1444a(d). Section 284 of Title 7 authorizes the Secretary of Agriculture to cooperate with the states concerned and directs that the "State or local agency shall be responsible for the authority necessary to carry out the operations or measures on all lands and properties within the ... State." The Animal and Plant Health Inspection Service is the branch of the USDA which oversees the boll weevil eradication program. Stewart v. State Crop Pest Commission, 414 S.E.2d 121, 123 (S.C. 1992). The Foundation was incorporated as a non-profit Alabama corporation in 1988 to promote, facilitate, and assist in the implementation of boll weevil eradication and suppression programs sponsored by the USDA across the southeastern United States. Articles of Incorporation, Defendant's Exhibit 3. At the time of the incorporation, the members of the Foundation were the Boll Weevil Eradication Foundations of Alabama,

[3] Although an action may be brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), against federal officers who allegedly violate a person's constitutional rights, a Bivens action may not be maintained against a federal agency. F.D.I.C. v. Meyer, 510 U.S. 471,473 (1994).

[4] The facts are stated for the purpose of deciding this motion only.

Florida, Georgia, North Carolina, and South Carolina and the Virginia Department of Agriculture and Consumer Services. Upon their formation, the Tennessee Boll Weevil Eradication Foundation,[5] the Mississippi Boll Weevil Management Corporation, and the Missouri Cotton Growers Association became members of the Foundation. Fiscal Year 2000 Work Plan, Defendant's Exhibit 1.

The court in Salter v. United States, 880 F. Supp. 1524 (M.D. Ala. 1995), explained the work of Defendant Foundation as follows:

> The [Southern Boll Weevil Eradication Program] is a cooperative effort by the federal government, several state governments, and cotton producers to eradicate the boll weevil, a cotton-destroying pest.
>
> Each state participating in the Program has a nonprofit corporation known as a foundation. Each foundation consists of cotton growers, state regulators, and technical advisors. The various state foundations send representatives to the regional Southeastern Boll Weevil Eradication Foundation ("Foundation"). Each year, the Foundation signs a "Cooperative Agreement" with the United States Department of Agriculture Animal and Plant Health Inspection Service ("APHIS"). The Program is conducted in accordance with the Cooperative Agreements which specify the duties assigned to the Foundation and the duties assigned to APHIS. The Foundation pays approximately seventy percent of the Program's operating expenses, and the federal government pays the remaining thirty percent of the expenses.

Id. at 1527-28. The cooperative agreements are continued from year to year. Defendant's Exhibits 4, 5.

---

[5] See T.C.A. § 43-6-401 *et seq.* (Establishing the Tennessee Boll Weevil Eradication Foundation because "[d]ue to the interstate nature of boll weevil infestation, it is necessary to secure the cooperation of cotton growers and other state and federal governments to carry out a program of boll weevil suppression or eradication. The purpose of this part is to secure the suppression or eradication of the boll weevil and to provide for certification of a cotton grower's organization to cooperate with state and federal agencies in the administration of cost sharing programs for the suppression or eradication of the boll weevil.")

The payment of salaries, benefits, per diem, travel, vehicles, equipment use and maintenance, insecticide, and aerial and ground insecticide application are shared between the Foundation and APHIS. Continuation of Cooperative Agreement, Defendant's Exhibits 4 and 4A. Monthly accounting of costs are completed by each party's designated representative. APHIS provides, through loans, the use of APHIS-owned property and equipment, including vehicles that are used by the Foundation. Id.

The cooperative agreements provide that the Foundation is to furnish employees, purchase program materials, maintain records, submit to APHIS a semi-annual report regarding program activities, and provide routine maintenance to federally owned or leased property and equipment. Id. Additionally, the Foundation must (1) notify APHIS prior to the application for any patent which is paid for by funds provided by APHIS; (2) give APHIS an irrevocable license to exercise the rights of the federal government to copyrighted materials developed under the agreement; and (3) submit the final draft of any funded publication or audio-visuals to APHIS prior to final printing for approval. Id. at Exhibits 4, 4A, and 5.

In return, APHIS designates a representative who is responsible for collaboratively administering the activities conducted under the cooperative agreements, provides funds and the use of resources such as equipment and vehicles and provides technical advice, training, radio, and other operational support. Id. APHIS provides full-time technical personnel to advise Foundation management in program field operations which includes developing and

providing technical operational criteria, monitoring the program activities at all levels, providing specific advice on trapping and spraying, and providing training as required. Work Plan Fiscal Year 2000, Defendant's Exhibit 1. APHIS also monitors program expenditures through periodic audits, monthly reports, and quarterly cash flow statements and communicates with program cooperators including cotton growers, the USDA Farm Service Agency, the USDA Agricultural Research Service, and the US Department of Interior, Fish & Wildlife Service. Id.

The Foundation's employees are "responsible to and under the direction of the Chairman of Southeastern Foundation and its Board of Directors as well as the Program Director for USDA/APHIS and the Executive Director of the Southeastern Foundation. The Executive Director shall work with USDA/APHIS/PPQ in the day-to-day management of the Program." Agreement, Defendant's Exhibit 6 at p. 5.

Plaintiff, a crop duster, alleges that he contracted with Defendant Foundation to spray insecticides as part of Defendant's efforts to eradicate the boll weevil. To carry out his contractual obligations, Plaintiff had to use the Bolivar/Hardeman County Airport. Plaintiff alleges that the Foundation's co-defendants placed restrictions on his use of the airport that were not placed on other crop dusters. According to Plaintiff, "[a]s a result of Plaintiff's complaints about his inequitable treatment and his efforts to lawfully circumvent its consequences, Defendant Nuckolls informed Defendant Boll Weevil (with whom Plaintiff had a contract for his flying service to crop dust large amounts of acreage), that neither

Plaintiff nor any others contracting with Boll Weevil would be permitted to use the airport, which resulted in Defendant Boll Weevil canceling Plaintiff's contract." Complaint at ¶ 1. Plaintiff's alleges that he suffered "heavy financial losses" when the contract was canceled. Id.

Plaintiff's argument that Defendant is not entitled to sovereign immunity because it has not met the administrative prerequisites for asserting that it is a federal agency is without merit. Plaintiff contends that, because Defendant did not comply with the administrative requirements of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, it is not entitled to sovereign immunity.

The doctrine of sovereign immunity bars claims for money damages against the United States except in cases in which the United States consents to be sued. See, e.g., United States v. Mitchell, 445 U.S. 535, 538 (1980). When it enacted the FTCA, Congress consented to suits against the United States for certain tort claims, but only under the terms specified by the statute. United States v. Orleans, 425 U.S. 807, 814 (1976). Under the FTCA, the United States may be held liable for injuries caused by the "negligent or wrongful act or omission" of government employees acting "within the scope of [their] office or employment." 28 U.S.C. § 1346(b).

In 1988, Congress passed The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall legislation"), which amended 28 U.S.C. § 2679. The purpose of the Westfall legislation was to provide for immunity of federal employees for

common law torts committed in the scope of their employment while also providing an injured plaintiff with a means of obtaining a judgment against the United States. Stewart v. State Crop Pest Commission, 414 S.E.2d 121, 124 (S.C. 1992) (citing 134 Cong. Rec. S15,599 - 15,600 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley)).

Section § 2679(c) directs the United States Attorney General to defend any federal employee for torts committed in the scope of his employment and requires that the federal employee deliver all process to his superior who, in turn, must deliver the process to the Attorney General. After the Attorney General has certified that the suit is against a federal employee who was acting within the scope of employment, the case is to be removed from state court to federal district court, and the United States is substituted for the federal employee as the defendant. 28 U.S.C. § 2679(d)(2). Certification is reviewable by the federal district court. Id. at § 2679(d)(3). If the district court finds that the certification was improper, either because the "employee" was not a federal employee or because the incident did not occur within the scope of federal employment, the case is remanded to state court. Id. If, however, the district court determines that certification was proper, then the case proceeds under the FTCA. Id. at § 2679(d).

In the present case, it is undisputed that Defendant Foundation failed to comply with the administrative requirements of the FTCA in that it did not receive certification from the Attorney General. However, Plaintiff has not asserted tort claims against Defendant Foundation, and, thus, the requirements of the FTCA are inapplicable because the FTCA

does not extend subject matter jurisdiction to breach of contract claims. See Haney v. Castle Meadows, Inc., 868 F. Supp. 1233 (D. Colo. 1994) (To allow suit under the FTCA in a breach of a contract action would "destroy the distinction between contract and tort claims preserved in the federal statutes and render illusory the separation of contract claims under the Tucker Act and tort claims under the FTCA."). Accordingly, Defendant's failure to submit the case to the Attorney General for certification does not defeat its claim to sovereign immunity.

Next, Plaintiff asserts that since Defendant, as an Alabama corporation, may sue and be sued, it has waived any claim to sovereign immunity.[6] In support of his argument, Plaintiff relies on F.D.I.C. v. Meyer, 510 U.S. 471 (1994). Plaintiff cites Meyer for the proposition that "in a 42 U.S.C. § 1983 case involving constitutional torts, a federal agency with authority to 'sue and be sued' has no sovereign immunity." Plaintiff's Response at p. 11. Plaintiff's reliance on Meyer is misplaced.

A waiver of sovereign immunity must be "unequivocally expressed in statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (internal citations omitted). If ambiguous, a statute must be construed in favor of immunity. See United States v. Williams, 514 U.S. 527, 531 (1995). If a statute that supposedly waives immunity has a "plausible" alternate reading, a finding of waiver must be rejected. United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992) ("plausible" alternate reading is enough to establish that

[6] The court will assume for the purpose of addressing Plaintiff's first two arguments that, absent a waiver, Defendant Foundation is entitled to sovereign immunity.

a "reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted.").

Although neither the Foundation's Articles of Incorporation nor Title 7 of the United States Code contain a "sue and be sued" clause, § 10-3A-20(2) of the Alabama Code provides that an Alabama non-profit corporation may sue and be sued in its corporate name.[7] Thus, Plaintiff's argument is weakened by the fact that the "sue and be sued" clause at issue is a state statutory provision applying to Alabama's non-profit corporations in general rather than a specific waiver of immunity by the Foundation itself or by Congress.[8] See 54 *Am.Jur.* "United States" § 132 ("The United States may waive its exemption from suit by legislative enactment giving its consent to be sued. Generally, it is said that the consent of the United States to suit against it can be obtained only through an act of Congress. No officer of the government can waive the exemption of the United States from judicial process, or submit the United States or its property to the jurisdiction of the court in a suit brought against its officers, where jurisdiction has not been conferred by an act of Congress. Neither can a state authorize a suit against the Federal government in the state courts." (footnote omitted)).

In Galvan v. Federal Prison Industries, Inc., 199 F.3d 461 (D.C. Cir. 1999), a prison inmate filed an action against the Federal Prison Industries, Inc. ("FPI"), under the False

---

[7] Plaintiff cites Defendant's Articles of Incorporation for the proposition that Defendant's charter has a "sue and be sued" clause. Apparently, Plaintiff is relying on the recitation in the charter that Defendant Foundation is organized under the Alabama Non-Profit Corporation Act. See Articles of Incorporation, Defendant's Exhibit 3.

[8] The waiver of immunity in Meyer was provided for in 12 U.S.C. § 1819(a) (The F.D.I.C. "shall have power ... [t]o sue and be sued, and complain and defend, in any court of law or equity, State or Federal").

Claims Act. The Court of Appeals affirmed the dismissal of the action on the ground that the FPI was entitled to sovereign immunity and Congress had not waived that immunity. Id. at 462.

The plaintiff had argued that Congress waived FPI's immunity in FPI's enabling statute, 18 U.S.C. § 4121. According to the plaintiff, by establishing FPI as "a government corporation of the District of Columbia," Congress intended "to give FPI the legal characteristics of an ordinary corporation established under the general corporation law of the District of Columbia" which "states that such corporations are 'capable of suing and being sued in any court of law or equity in the District.'" Id. at 464 (citing § 4121 and D. C. Code Ann. § 29-203 (1999)). The plaintiff contended that this language constituted a waiver of sovereign immunity. Id.

The Court of Appeals acknowledged that "[o]n the surface . . . § 4121 seems capable of the meaning Galvan proposes." Id. at 466. However, "there are alternative meanings that seem plausible--namely readings of § 4121 as intended to establish a different kind of link with the District of Columbia. Thus Congress may have intended to specify that the headquarters of FPI should be in the District . . . ." Id. The court reasoned that "[b]ecause 28 U.S.C. § 1391(e) provides venue for suits against 'an agency of the United States' in any judicial district where the defendant 'resides,' a congressional purpose simply to establish the central administration in Washington would have the consequence of locating venue in the District for any case against FPI brought under general waivers of sovereign immunity

such as the Tucker Act." Id. (citation omitted). The court then determined that

> In short, reading § 4121 as an incorporation of the details of the District's general corporation law (including its "sue and be sued" clause) is not especially plausible. That law has a variety of specific features that are either irrelevant to FPI or contradict provisions in its organic statute; the organic statute contemplates intra-governmental resolution of conflicts with FPI's primary customers; and the language of § 4121 is nowhere near as specific as in the recognized instances of such incorporation. More limited readings than Galvan's, simply locating FPI in the District, are at least as plausible. We find no waiver here.

Id. at 467.

In the present case, Plaintiff's proposed reading of Defendant's charter, i.e., that Congress intended to waive Defendant's sovereign immunity implicitly through Alabama's non-profit incorporation statute, "is not especially plausible." A "more limited reading" that is "at least as plausible" is that Defendant's incorporation under the state statute is for the purpose of obtaining "all of the rights, powers and privileges of a corporation organized under the Alabama Non-Profit Corporation Act." See Articles of Incorporation, Defendant's Exhibit 3.

Moreover, Meyer does not support Plaintiff's argument because that court held that the waiver of immunity created by the F.D.I.C. "sue and be sued" language was limited by the FTCA with regard to tort claims. "In order to place torts of 'suable' agencies ... upon precisely the same footing as torts of 'nonsuable' agencies, ... Congress, through the FTCA, limited the scope of sue-and-be-sued waivers ..." Meyer, 510 U.S. at 476 (internal quotation marks omitted). This analysis is also applicable to claims brought pursuant to the Tucker Act

or the CDA. See, e.g., Campanella v. Commerce Exchange Bank, 137 F.3d 885 (6th Cir. 1998).

In Campanella, the plaintiffs premised subject matter jurisdiction and waiver of sovereign immunity for their contract claims on the Small Business Administration's ("SBA") "sue and be sued" clause, which provides that the SBA "may--(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy." 137 F.3d at 890 (citing 15 U.S.C. § 634(b)(1)). According to the plaintiffs, this clause waived the SBA's sovereign immunity. Id.

The district court rejected the plaintiff's argument and found that exclusive jurisdiction over the plaintiffs' contract claims was in the Claims Court pursuant to the CDA because "the CDA preempts the general sue-and-be-sued clause." Id. at 889 - 90. The district court and the Court of Appeals accepted the reasoning of A & S Council Oil Co. v. Lader, 56 F.3d 234 (D.C. Cir. 1995), which held that "the CDA trumps the SBA's sue-and-be-sued clause." 137 F.3d at 891.

> In A & S Council, the court reasoned that the CDA grants exclusive jurisdiction to the Claims Court for any contract actions over $10,000 "except to the extent that Congress has 'granted any other court authority to hear the claims that may be decided by the Claims Court.'" A & S Council, 56 F.3d at 241 (citation omitted). In A & S Council, as here, "the only plausible source of such alternative authority is the SBA's 'sue and be sued' clause." Id. The court concluded that the CDA nullified this grant of authority:
>
> > The Contract Disputes Act, however, appears to be the paradigm of a "precisely drawn, detailed statute" that preempts more

> general jurisdictional provisions. It purports to provide final and exclusive resolution of all disputes arising from government contracts covered by the statute....
>
> By its express terms, the CDA applies to "executive agenc[ies]," which § 601(2) defines as encompassing not only "executive department[s]" but also (1) "independent establishment[s]" as defined in 5 U.S.C. § 104, namely "an establishment in the executive branch [with certain irrelevant exceptions] which is not an Executive department, military department [or] Government corporation," plus (2) a variety of other entities including many of the entities excluded from the definition in 5 U.S.C. § 104, such as Government corporations, the U.S. Postal Service and the Postal Rate Commission. Despite these sweeping terms, it might still be the case that the SBA's sue-and-be-sued clause permitted review of contract disputes outside the CDA framework. Congress's explicit exceptions from the CDA, however, render any such inference highly improbable. Although a sue-and-be- sued clause governs the Tennessee Valley Authority, Congress expressly exempted a limited class of TVA contracts from the CDA. The exemption would have been wholly unnecessary unless Congress assumed that a sue-and-be-sued clause would not trump the CDA's exclusivity provisions.

Id. at 241-42. Thus, the court concluded, the contract claims at issue in its case fell under the exclusive terms of the CDA.

> We conclude that the district court was correct in holding that it lacked subject-matter jurisdiction over the contract claims against the SBA. We find the reasoning of A & S Council to be sound, and we agree with it.

Campanella, 137 F.3d at 891 (some citations omitted).

Accordingly, this court finds that Alabama's statutory "sue and be sued" clause for non-profit incorporations does not "trump" the CDA and cannot be relied on by Plaintiff as a waiver of sovereign immunity.

In support of its claim that it is a federal agency entitled to sovereign immunity for eradication purposes, Defendant has cited Hovey v. Southeastern Boll Weevil Eradication Foundation, Inc., No. 91-A-911-S (M.D. Ala. May 4, 1992). The Hovey court determined that an employee of the Foundation was considered to be an employee of a federal agency. See also Salter v. United States, 880 F. Supp. 1524 (M.D. Ala. 1995) (Applying the requirements of the FTCA to an action brought by an employee of the boll weevil eradication program who alleged negligence and misrepresentation resulting in the employee's exposure to excessive amounts of pesticide.)

Plaintiff acknowledges that the holding in Hovey supports Defendant's position. However, according to Plaintiff, Defendant's agreement with the federal government has changed in recent years such that it is no longer considered to be a federal agency. Plaintiff contends that, at the time of the Hovey decision, APHIS as a branch of the federal government had control over the day-to-day activities of the Foundation. In support of its argument, Plaintiff quotes the portion of Defendant's work plan for fiscal year 2000 which provides as follows:

> Through FY 1996 APHIS provided technical and supervisory personnel and co-managed the overall program. Beginning in FY 1997 APHIS provided and will continue to provide advisory personnel only. The Foundation will provide personnel for supervision of the operations of the program.

Defendant's Exhibit 1. Additionally,

> The Southeastern Boll Weevil Eradication Foundation, Inc., provides personnel for supervision of the operational aspect of the program and APHIS provides personnel in an advisory role only.

Fiscal Year 2001 Work Plan, Defendant's Exhibit 2.

Defendant Foundation agrees that, subsequent to the Hovey decision, it has assumed more control of its daily activities. However, Defendant points to the following as evidence that it is an agency of the federal government and, thus, entitled to sovereign immunity. The Articles of Incorporation state that the purpose of the Foundation is to carry out programs of boll weevil eradication and "to promote, facilitate and assist in the implementation of boll weevil eradication and suppression programs sponsored or recommended by the USDA." Defendant's Exhibit 3. Under each agreement and work plan, Defendant and APHIS have entered into detailed plans regarding the operation, funding, and supervision of the eradication program. Specifically, the APHIS: (1) provides for advisory personnel; (2) coordinates an interstate team to eradicate the boll weevil from participating states; (3) coordinates a means to assist the United States cotton growers' ability to compete in world markets, in addition to stimulating local economies and reducing environmental impact from cotton pesticide; (4) provides full-time technical personnel to advise Foundation management in program field operations; (5) develops and provides technical operational criteria; (6) monitors the eradication program activities at all levels; (7) provides advice on trapping density, number of acres assigned each trapper, and placement of the traps; (8) provides spray threshold, interval, and crop phonology related criteria as necessary; (9) provides training material, text, and instruction for program personnel; (10) monitors the Foundation's expenditures; and (12) loans equipment necessary to conduct the program. Defendant's

Exhibits 1, 1A, and 2. Additionally, the USDA/APHIS provides 30% of the Foundation's funding, with the remaining 70% derived from federal loans and assessments on cotton growers. Defendant's Exhibits 4, 4A, and 5.

The mere fact that Defendant Foundation receives federal funding or must comply with federal standards or regulations is not sufficient to transform Defendant into an agent of the United States. United States v. Orleans, 425 U.S. 807, 819 (1976). Instead, the pivotal factor used to distinguish a federal agency is whether the government has the power "to control the detailed physical performance of the contractor." Id. at 814 (citing Logue v. United States, 412 U.S. 521, 528 (1973)).

For example, a contractor's use of government-owned property does not, by itself, transform that contractor into an agent of the government. Brooks v. A. R. & S. Enterprises, Inc., 622 F.2d 8, 11 (D.P.R. 1980). If, however, the government supervises or controls the manner in which the contractor uses government property, the contractor may in fact be acting on behalf of the government. Id. Likewise, the general right to inspect of the United States does not subject the government to liability for its contractors' torts, but evidence of the United States' "daily supervision and inspection of the activities of the [contractor may] satisfy the test of liability under Orleans." Id. at 11-12.

In Orleans, suit was brought against the United States for injuries received by a child en route to a recreational outing sponsored by a local community action agency that received all of its operating funds from the Office of Economic Opportunity ("OEO"), a federal

agency. The OEO "suppl[ied] ... financial aid, advice, and oversight only to assure that federal funds not be diverted to unauthorized purposes." Orleans, 425 U.S. at 818. The question, according to the Supreme Court, was "not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815.

In holding that the community action agency was not a federal agency, the Orleans court stated as follows:

> Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well. The federal government in no sense controls the detailed physical performance of all the programs and projects it finances by gifts, grants, contracts, or loans.

Id. at 816.

The facts in Orleans are inapposite to those in the present case. In Orleans, although the federal government provided funding for the community action agency, the local agency selected the means of program implementation. Id. at 813. Here, the USDA/APHIS determines the means by which the boll weevil eradication program is to be conducted. Although the daily supervision by the USDA/APHIS is more limited than it was at the time of the Hovey decision, the policies and means by which the boll weevil eradication program operate have not changed. Furthermore, even though Defendant's work plan states that, beginning in fiscal year 1997, APHIS began providing advisory personnel only, see Defendant's Exhibit 1, the agreement among the various state boll weevil eradication foundations for that same fiscal year states that the executive director of the Foundation

"shall work with USDA/APHIS/PPQ in the day-to-day management of the Program." Defendant's Exhibit 6.

Therefore, this court finds that the limitations placed on the USDA/APHIS/PPQ in its day-to-day supervision of Defendant's program subsequent to Hovey do not negate its status as a federal agency for eradication purposes.

Finally, Plaintiff argues that Defendant cannot establish through its own documents or its own make-up that it is a federal agency. Specifically, Plaintiff refers to an indemnification clause with requires Defendant to indemnify the United States for any damage or injury caused by Defendant's employees resulting from the use of vehicles and a general indemnification clause found in the Articles of Incorporation. Defendant's Exhibit 3. According to Plaintiff, "it would be an absurdity for the government to indemnify itself." Plaintiff's Response at p. 19. Plaintiff also notes that Defendant is required to notify APHIS of any inventions or patents which have been funded by APHIS and that APHIS has a royalty-free, non-exclusive irrevocable license to copyrighted materials developed by Defendant. Articles of Incorporation, Defendant's Exhibit 3. Additionally, Plaintiff points to the assessment of fines against Defendant by the state of Tennessee's Department of Agriculture. Plaintiff argues that state governments do not have the authority to fine the federal government. Lastly, Plaintiff notes that the federal government has no power to appoint any board members and no veto or any other power over actions by Defendant's board of directors. Id.

As to the indemnification clause, Plaintiff has cited no law in support of his argument. Defendant has cited A. F. Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973), which held that a contractor who operated a TNT plant, which was owned by the federal government, was entitled to sovereign immunity and that the United States did not waive its immunity by placing an indemnity provision in its contract with the contractor. "Under the undisputed facts in this case it would appear clear that the United States has not and could not lawfully waive its sovereign immunity by the action of the military in placing an indemnity provision within its contract with I.C.I." Id. at 1267. C.f. HBE Leasing Corp. v. Northeastern Pa. Health Corp., 678 F. Supp. 493 (M.D. Pa.1988) (agreement by state to indemnify state agency does not waive immunity); Ragosta v. State of Vermont, 556 F. Supp. 220 (D. Vt.1981) (insurance policy purchased by state and statutory obligation to defend and indemnify state employees does not waive immunity), *aff'd mem.* 697 F.2d 296 (2nd Cir.1982); Space Age Products, Inc. v. Gilliam, 488 F. Supp. 775 (D. Del.1980) (indemnity statute does not waive immunity). If an indemnity clause does not waive sovereign immunity, then likewise it does not negate federal agency status.

Plaintiff has also failed to cite any authority for his argument that Defendant's duty to notify APHIS of any inventions or patents which have been funded by APHIS and the granting to APHIS of a royalty-free, non-exclusive irrevocable license to copyrighted materials developed by Defendant show that Defendant is not a federal agency. As noted by Defendant, these obligations strengthen Defendant's ties to APHIS.

The assessment of fines against Defendant by the state of Tennessee's Department of Agriculture does not militate against Defendant's status as a federal agency. Clearly, a state may assess a civil penalty against the United States under certain circumstances. See, e.g., United States v. Tennessee Air Pollution Control Bd., 185 F.3d 529 (6th Cir. 1999) (Clean Air Act waived United States' sovereign immunity from state civil penalties for past violations of state air pollution laws.)

Lastly, Plaintiff relies on the federal government's lack of power to appoint board members and to veto actions by Defendant's board of directors as evidence of Defendant's non-federal status. Defendant's Articles of Incorporation, dated May 13, 1988, provide that the board of directors is to be comprised of three directors from each state foundation that has been accepted as a member of the corporation. Defendant's Exhibit 3 at p. 3. Although, as Plaintiff notes, the federal government's power or lack of power to appoint board members may be evidence of an entity's status as either a federal agency or a non-federal agency, that one factor is not outcome determinative. See Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976) (setting forth the standard for that circuit to apply in determining whether a corporation is a government-controlled entity but pointing out that the existence of any one of the characteristics, by itself, is not determinative). In light of the other evidence presented, this court finds that the composition of Defendant's board of directors does not affect the finding that Defendant is a federal agency for the purpose of boll weevil eradication.[9]

[9] The Articles of Incorporation pre-dates the Hovey decision; therefore, the composition of the board of directors was not a factor that decision.

Defendant Foundation was established and organized for the purpose of furthering the Congressional objective set forth in Title 7 of the United States Code - specifically, the detection, eradication, and suppression of plant pests. 7 U.S.C. § 147a. The Secretary of Agriculture is authorized to accomplish this mandate independently or in cooperation with states, political subdivisions, farmers' associations, or similar organizations. Id. Section 1444a(d) of Title 7 authorizes the Secretary of Agriculture to reduce the cost of cotton production in the United States by eliminating the insect commonly known as the boll weevil. To carry out this mandate, APHIS, a branch of the Department of Agriculture, implemented the boll weevil eradication program for the southeastern United States. Defendant Foundation was incorporated for the purpose of furthering the Congressional objective set forth above by assisting in this program. Articles of Incorporation, Defendant's Exhibit 3. Defendant fulfils that objective by acting jointly with APHIS with regard to training, technological development and assistance, and financial support.

Because Defendant is furthering a Congressional mandate and is under federal governmental control as to how that mandate is carried out, this court finds that Defendant is a federal agency for the purpose of its eradication activities. See Auction Co. of America v. F.D.I.C., 132 F.3d 746, 752 (D.C. Cir.1997) ("Federal agencies or instrumentalities performing federal functions always fall on the 'sovereign' side of [the] fault line....") Consequently, pursuant to the Contract Disputes Act, this court lacks subject matter jurisdiction over Plaintiff's claims based on its contract with Defendant. The court also lacks

subject matter jurisdiction over Plaintiff's § 1983 claim against Defendant. For those reasons, Defendant's motion to dismiss for lack of subject matter is GRANTED, and Southeastern Boll Weevil Eradication Foundation, Inc., is DISMISSED as a defendant.

Defendant's motion to dismiss for failure to state a claim is DENIED as moot.

IT IS SO ORDERED.

_____
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

_____
DATE