UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
Caption in Compliance with D.N.J. LBR 9004-1(b) **McCARTER & ENGLISH, LLP** Kate R. Buck 100 Mulberry Street Four Gateway Center Newark, New Jersey 07102 Telephone: (973) 622-4444 Email: kbuck@mccarter.com - and - **MASON AND ISAACSON, P.A.** Patrick T. Mason 104 E Aztec Avenue PO Box 1772 Gallup, NM 87305-1772 Telephone: (505) 722-4463 Email: p.mason@milawfirm.net *Co-Counsel for Navajo Times Publishing Company, Inc.*	
In re: STAR GROUP COMMUNICATIONS, INC., Debtor.	Chapter 7 Case No. 15-25543 (ABA)
THOMAS J. SUBRANNI, CHAPTER 7 TRUSTEE, Plaintiff, v. NAVAJO TIMES PUBLISHING COMPANY, INC., Defendant.	Case No. 15-02497 (ABA)

REPLY IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Defendant NAVAJO TIMES PUBLISHING CO., INC., (the "Navajo Times"), and respectfully submits the following *Reply in Support of its Motion to Dismiss*.

I. ARGUMENT

A. CONGRESS DID NOT EXPLICITY ABROGATE TRIBAL IMMUNITY IN 11 U.S.C. 106.

1. Random House defines "explicit" as "fully and clearly expressed or demonstrated; leaving nothing merely implied; unequivocal". *Dictionary.com Unabridged,* Random House, Inc. (accessed: February 09, 2016).

2. The key issue in this case is whether Congress abrogated the sovereign immunity of Indian tribes in 11 U.S.C. 106, which provides that sovereign immunity is abrogated as to a "governmental unit" with respect to certain sections of the Bankruptcy Code, including Sections 544 and 550. The parties agree that "[a]brogation by Congress of sovereign immunity 'cannot be implied,' but must be 'unequivocally expressed' in 'explicit legislation.'". *In re Whitaker*, 474 B.R. 687, 691 (B.A.P. 8th Cir.2012) (emphasis added); *citing Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); and *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 759, 118 S. Ct. 1700, 1705, 140 L. Ed. 2d 981 (1998). *See also Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905 (1991). The question is whether, by enacting § 106(a) of the Bankruptcy Code, Congress unequivocally and explicitly expressed its intent to abrogate the sovereign immunity of Indian tribes by providing for such abrogation as to "other foreign or domestic governments." *See In re Whitaker*, 474 B.R. 687, 692 (B.A.P. 8th Cir. 2012).

3. Under Section 106(a) of the Bankruptcy Code, sovereign immunity is abrogated as to a "governmental unit" to the extent set forth in Section 106, with respect to claims asserted under Sections 544 and 550 of the Bankruptcy Code. Section 101(27) defines the term "governmental unit" to mean "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. § 101(27). Neither the definition in Section 101(27) nor the sovereign immunity waiver language of Section 106 mention or refer to Indian Tribes.

The Plaintiff instead relies upon *Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055 (9th Cir.2004)[1] and the ***implication*** that "other foreign or domestic government" includes Indian tribes as a governmental unit under section 101(27).

4. Indian tribes are neither domestic nor foreign governments; "they remain 'separate sovereigns pre-existing the Constitution.'". *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014). They may best be characterized as "tribal governments," which is precisely how the Supreme Court refers to the self-governing authority of Indian tribes. *See, e.g., Santa Clara*, 436 U.S. at 62 (referring to the "unique political, cultural, and economic needs of tribal governments.") (emphasis added); *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering,* 476 U.S. 877, 891, 106 S.Ct. 2305, 2313 (1986) ("By requiring that the Tribe open itself up to the coercive jurisdiction of state courts for all matters occurring on the reservation, the statute [North Dakota statute] invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws.") (emphasis added). No Supreme Court decision has ever referred to Indian tribes as "domestic governments."

5. Additionally, Congress considers Indian tribes something different and separate from state and local governments (i.e., domestic governments), and when Congress seeks to include Indian tribes along with federal, state, and local governmental units, it specifically says so by using the term "Indian tribe." *See, e.g., Osage Tribal Council v. United States*, 187 F.3d 1174, 1182 (10th Cir. 1999) (concluding that Congress intended in the Safe Drinking Water Act to abrogate tribal sovereign immunity where agency jurisdiction is granted over all "persons," "persons" is defined to include "municipality," and "municipality" is defined to include "Indian Tribes"); *Northern States Power Company v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 462 (11th Cir. 1993) (concluding that Congress intended in the Hazardous Materials Transportation Act to abrogate tribal sovereign immunity where every relevant section of the preemption rules contained the language "state or political subdivision thereof or Indian tribe"); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th

[1] Both the Eight Circuit and the Tenth Circuit disagree with the Ninth Circuit's opinion, *infra*.

Cir. 1989) (concluding that Congress intended in the Resource Conservation and Recovery Act to abrogate tribal sovereign immunity where the statute authorized citizens to bring suit against any "person," "person" is defined to include a "municipality," and "municipality" is defined to include an "Indian tribe"); *United States v. Weddell*, 12 F.Supp.2d 999, 1000 (D.S.D. 1998) (concluding that Indian tribe was subject to garnishment under Federal Debt Collection Procedure Act where "garnishee" is defined as a "person" and "person" is defined to include "an Indian tribe"); *Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community*, 827 F.Supp. 608 (D.Ariz. 1993) (citizen suit provision in Clean Water Act unequivocally waived tribal immunity by defining term "person" to include "Indian tribe.").

6. *In re Whitaker*, 474 B.R. 687 (8th Cir. B.A.P 2012) stands directly on point, and in stark contradiction to the *Krystal Energy* case. *Whitaker* involved adversary proceedings against the Lower Sioux Indian Community, in which the tribe contended sovereign immunity protected it from suit by the trustee. The bankruptcy court and the appellate panel agreed, concluding that Congress did not abrogate tribal immunity in 11 U.S.C. 106. The *Whitaker* court notes that courts have found abrogation of tribal immunity "where Congress has included 'Indian tribes' in definitions of parties who may be sued under specific statutes." *Whitaker*, 474 B.R. at 691; *quoting In re National Cattle Congress*, 247 B.R. 259 (Bankr. N.D. Iowa 2000). However, where the language of a federal statute does not include "Indian tribes" in the definitions of parties subject to suit or does not specifically assert jurisdiction over "Indian tribes," "courts find the statute insufficient to express an unequivocal abrogation of tribal sovereign immunity." *Id.* The *Whitaker* court further noted that, despite the fact that *Santa Clara* (which reaffirmed that abrogation must be unequivocally expressed in the statutory text) was decided six months before the 1978 Bankruptcy Code was enacted: "Congress did not mention Indian tribes in the statute. Nor did it do so when it amended § 106 to clarify its intent with respect to the sovereign immunity of states following [two Supreme Court decisions] which held that former § 106(c) did not state with sufficient clarity a congressional intent to abrogate the sovereign immunity of the states and federal government." *Whitaker*, 474 B.R. at 693.

7. Similarly, in *In re Mayes*, 294 B.R. 145, 148, fn. 10 (B. A.P. 10th Cir. 2003), the Bankruptcy Appellate Panel of the Tenth Circuit concluded that Section 106(a) "probably does not apply to the Appellee, an Indian nation." The court stated:

> "Section 101(27) does not refer to Indian nations or tribes. The only portion of that section that could be said to apply to an Indian nation or tribe is its reference to a 'domestic government.' While several bankruptcy courts have either expressly or impliedly held that Indian nations or tribes are 'domestic governments' to which §§ 101(27) and 106 apply, we conclude that they probably are not. Accordingly, § 106(a) likely could not abrogate Appellee's immunity even if it were constitutional. Our conclusion comports with the general proposition that Congress must make its intent to abrogate an Indian nation's immunity clear and unequivocal, and actions against tribes cannot merely be implied." (citations omitted) (emphasis added)

Id.

8. If Congress had wished to waive the Sovereign Immunity of Indian tribes under 11 U.S.C. 106., it could have easily done so by using the same language it used countless other times in countless other statutes. It did not do so however, and without "explicit legislation" to the Contrary, this Court lacks Subject Matter Jurisdiction. *Whitaker*, 474 B.R. at 692.

B. THE NAVAJO TIMES IS A COMMERCIAL ACTIVITY OF THE NAVAJO NATION, WHICH ENJOYS THE SAME SOVEREIGN IMMUNITY GRANTED TO THE TRIBE ITSELF.

9. The question of whether a tribe's commercial activities enjoy the same immunities as the tribe itself, appears to be a matter of first impression in the Third Circuit. However, the Supreme Court has made it clear that the sovereign immunity of a tribe applies equally to the commercial activities of that tribe. *See, Kiowa Tribe,* 523 U.S. at 760, 118 S.Ct. 1700.

10. The Ninth Circuit has similarly ruled that "immunity applies to the tribe's commercial as well as governmental activities... tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself...." *Miller v. Wright*, 705 F.3d 919, 923-24 (9th Cir. 2013) (emphasis added). The Eighth Circuit has also ruled that "[t]ribal sovereign immunity extends to arms and agencies of Indian tribes." *In re Whitaker*, 474 B.R. 687, 696 (B.A.P. 8th Cir. 2012), *citing Hagen v. Sisseton–Wahpeton Community College,* 205 F.3d 1040, 1043 (8th Cir.2000) (holding that tribal immunity extended to a community college which was chartered, funded, and controlled by the tribe); *Dillon v.*

Yankton Sioux Tribe Hous. Auth., 144 F.3d 581, 583 (8th Cir.1998) (tribal housing authority established by tribal counsel is a tribal agency entitled to sovereign immunity); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 670–71 (8th Cir.1986) (tribal housing authority created by tribal ordinance to develop and administer housing projects on the reservation was a tribal agency entitled to sovereign immunity).

11. There is no split among the Courts on this point, and if the Navajo Nation is immune from the action, so too is its commercial enterprise, the Navajo Times.

II. CONCLUSION

For all the forgoing reasons, the Navajo Times respectfully requests the Court grant its motion to dismiss.

Dated: February 10, 2016
Newark, New Jersey

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