

<p>UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY</p> <p>Caption in Compliance with D.N.J. LBR 9004-1(b)</p> <p>McCARTER & ENGLISH, LLP Kate R. Buck 100 Mulberry Street Four Gateway Center Newark, New Jersey 07102 Telephone: (973) 622-4444 Email: kbuck@mccarter.com</p> <p>- and -</p> <p>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</p> <p><i>Co-Counsel for Navajo Times Publishing Company, Inc.</i></p>	
<p>In re:</p> <p>STAR GROUP COMMUNICATIONS, INC.,</p> <p>Debtor.</p>	<p>Chapter 7</p> <p>Case No. 15-25543 (ABA)</p>
<p>THOMAS J. SUBRANNI, CHAPTER 7 TRUSTEE,</p> <p>Plaintiff,</p> <p>v.</p> <p>NAVAJO TIMES PUBLISHING COMPANY, INC.,</p> <p>Defendant.</p>	<p>Case No. 15-02497 (ABA)</p>

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Defendant NAVAJO TIMES PUBLISHING CO., INC., (the “Navajo Times”), respectfully moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). As shown below, the Plaintiff’s Thomas J. Subranni, Chapter 7 Trustee (the “Plaintiff”) claims fail because the Navajo Times is an entity of the Navajo Nation, a federally recognized Indian tribe, who has not waived its Sovereign Immunity with regards to the claims of the Plaintiff.

I. BACKGROUND

Plaintiffs have sued the Navajo Times, a subordinate economic entity of the Navajo Nation, a federally recognized Indian tribe. Incorporation of the Navajo Times was authorized by resolution of the Navajo Nation Council, CO-68-03, whereby the Council directed that the Navajo Times Program within the Division of Economic Development be established as a tribal enterprise. *See* Certification of Patrick T. Mason in Support of Motion to Dismiss (“Mason Certification”) at Ex. A and Ex. B. The Navajo Nation Council reorganized the Navajo Times Program into an entity “wholly owned by, but independent of the political control or influence of the Navajo Nation.” Mason Certification, Ex. A at ¶ 8. This was done to “provide a quality newspaper serving the Navajo Nation and surrounding communities,” which newspaper, “if freed from the construction of a governmental program, will flourish, grow, and return dividends to the Navajo Nation.” *Id.*

The Navajo Times Articles of Incorporation provide that:

The Navajo Nation for its benefit and [that of] its enrolled members shall own all shares in the Corporation. No individual or legal entity other than the Navajo Nation shall acquire any shares in the Corporation and its interest may not be sold, transferred, pledged, or hypothecated, either voluntarily or involuntarily.

Mason Certification, Ex. C, Art. V.

The Bylaws provide:

Shareholder Representatives. Pursuant to the Incorporation, the Navajo Nation owns all shares in the corporation. As the sole shareholder, the Navajo Nation’s shares in the Corporation shall be exercised by eleven (11) “shareholder representatives,” composed of one member from each of the eleven (11) standing committees of the Navajo Nation Council.... Each standing committee shall elect a shareholder representative.

Mason Certification, Ex. D, Article I, Section 1.01.

The Shareholder Representatives elect the board of directors. Mason Certification, Ex. D, Art III, Section 3.02. Furthermore, the Bylaws explicitly state:

Claims against the corporation. The Corporation is an instrumentality of the Navajo Nation and is entitled to all of the privileges and immunities of the Navajo Nation.... The Corporation and its directors, officers, and employees and agents while acting in their official capacities are immune from suit

Mason Certification, Ex. D, Article X, Section 10.01.

II. ARGUMENT

A. SOVEREIGN IMMUNITY IS AN INHERENT ATTRIBUTE OF THE NAVAJO NATION THAT HAS NOT BEEN GRANTED BY ANY GOVERNMENT.

“Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation by any other nation or government.” Navajo Nation Sovereign Immunity Act, 1 N.N.C 553(A),(B), and (C) (2009). “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (internal citations omitted).

Sovereign nations “possess other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent.” *United States v. Thompson*, 98 U.S. 486, 489, 25 L. Ed. 194 (1878) (emphasis added) (internal citations omitted). This sovereignty flows from the very nature of being a sovereign nation. The Navajo Nation has long been regarded as possessing the attributes of sovereignty, except where they have been taken away by Congressional action. *Williams v. Lee*, 358 U.S. 217, 219, n. 4, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 458 (10 Cir., 1951); *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 653, 10 S.Ct. 965, 34 L.Ed. 295 (1890); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 133 (10 Cir., 1959); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89, 92 (8 Cir., 1956).

“Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization.” *Maryland Cas. Co. v. Citizens Nat. Bank of W. Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, *supra*; *Cf. Williams v. Lee*, *supra*; *Haile v. Saunooke*, 246 F.2d 293, 297 (4 Cir., 1957); *Colliflower v. Garland*, 342 F.2d 369, 376 (9 Cir., 1965).

B. ABSENT GOVERNING LAW TO THE CONTRARY, COURTS LACK SUBJECT MATTER JURISDICTION OVER CLAIMS AGAINST THE NAVAJO NATION AND ITS ENTITIES.

Generally speaking, “statutes passed for the benefit of dependent Indian tribes... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (internal quotation marks and quoted authority omitted). Waivers of the inherent sovereignty enjoyed by the Navajo Nation “cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (internal citations and quotations omitted). The Sovereign Immunity Act of the Navajo Nation allows for only two types of waivers of Navajo Sovereign Immunity; waiver by act of the Navajo Nation Council and waiver by act of U.S. Congress:

B. The Navajo Nation may be sued in the courts of the Navajo Nation
when explicitly authorized by applicable federal law.

C. The Navajo Nation may be sued only in the courts of the Navajo Nation
when explicitly authorized by Resolution of the Navajo Nation Council.

Navajo Nation Sovereign Immunity Act, 1 N.N.C. 554 (B) and (C) (emphasis added).

In the case of waiver by act of the Navajo Nation Council, the Sovereign Immunity Act explicitly states that such cases can be brought “only in the courts of the Navajo Nation”. In the case of waiver by act of U.S. Congress, such cases may be brought in Navajo Courts or they may be brought in any other courts permitted by that congressional waiver. The Sovereign Immunity Act of the Navajo Nation does not allow for waiver by any other means or any other person (i.e., not by contract, not by stipulation, and not by any individual or entity other than the Navajo Nation Council or U.S. Congress).

Similarly, under Federal law, ““Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence... is that the sovereign power... remains intact.”” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982)). See also *Santa Clara Pueblo*, 436 U.S. at 60 (“[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress . . . cautions that we tread lightly in the absence of clear indications of legislative intent.”). In the present case, there has been no explicit waiver of Sovereign Immunity by Resolution of the Navajo Nation Counsel, nor has there been an explicit waiver of Sovereign Immunity by the U.S. Congress. This Court lacks subject matter jurisdiction over the Plaintiff’s claims against the Navajo Times, and the Plaintiff has failed to state a claim upon which relief can be granted.

III. CONCLUSION

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

Dated: January 25, 2016
Newark, New Jersey

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