UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Caption in Compliance with D.N.J. LBR 9004-2(c) Jeffrey Kurtzman, Esquire (JK-7689) KLEHR HARRISON HARVEY BRANZBURG LLP 457 Haddonfield Road, Suite 510 Cherry Hill, NJ 08002 Telephone: (856) 486-7900 Facsimile: (856) 486-4875 Special Counsel to Thomas J. Subranni, as Chapter 7 Trustee	
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.	Adv. Pro. No. 15-02497 (ABA)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Thomas J. Subranni (the "Trustee" or the "Plaintiff"), as chapter 7 trustee of the estate of Star Group Communications (the "Debtor"), by and through his undersigned special litigation counsel, respectfully submits the following memorandum of law in opposition to the motion to dismiss of Defendant Navajo Times Publishing Company, Inc. (the "Defendant").

I. BACKGROUND

1. On August 17, 2015 (the "Petition Date"), certain creditors of the Debtor filed an filed an involuntary Chapter 7 petition pursuant to §303 of Title 11 of the United States Code (the "Bankruptcy Code") against the Debtor.

2. On September 14, 2015, this Court entered an order for relief against the Debtor, nunc pro tunc to September 10, 2015.

3. On September 17, 2015, the Trustee was appointed interim trustee of the Debtor's estate, has duly qualified and is presently so acting.

4. On December 18, 2015, the Trustee filed a complaint initiating this adversary proceeding against the Defendant (the "Complaint"). In general, the Complaint seeks to avoid transfers of money and/or property made by the Debtor to or for the benefit of the Defendant pursuant to 11 U.S.C. §§ 547 and 550.

5. On January 25, 2016, the Defendant filed a motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (the "Motion").

6. The Motion asserts that the Defendant is an entity "wholly owned by, but independent of the political control or influence of the Navajo Nation[,]" and as such, the Defendant is entitled to sovereign immunity as a federally recognized Indian tribe, which has not waived its sovereign immunity with regard to the Plaintiff. Certification of Patrick T. Mason ("Mason Certification"), at ¶ 1-2; Mason Certification, Ex. A at ¶ 8.

7. For the reasons hereinafter set forth, the Motion should be denied in all respects.

II. ARGUMENT

A. STANDARD ON A MOTION TO DISMISS UNDER RULE 12(b)(1) and 12(b)(6)

8. Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) are applicable in adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012. *In re Norvergence, Inc.*, 405 B.R. 709, 724 (Bankr. D.N.J. 2009); *Zenith Lab., et al., v. Sec. Pac.Nat'l Trust Co. (N.Y.)*, 104 B.R. 667, 668 (Bankr. D.N.J. 1989).

9. Pursuant to Rule 12(b)(1), a court must dismiss for lack of subject matter jurisdiction. *In re N.J. Affordable Homes Corp.*, 2013 WL 6048836, at *18 (Bankr. D.N.J. Nov. 8, 2013). However, a court should only grant dismissal for lack of subject matter jurisdiction where the claim is "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Id.* (citation omitted). A Rule 12(b)(1) motion may challenge the court's subject matter jurisdiction by a facial challenge or a factual challenge. *Id.* In reviewing a facial challenge, the court must accept as true all factual allegations in the complaint. *Id.* On the other hand, when considering a factual challenge, the court is free to consider the evidence concerning jurisdiction without any presumption of truth of the allegations in the complaint. *Id.*

10. A motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) "serves to test the sufficiency of the factual allegations in the plaintiff's complaint." *In re Norvergence*, 405 B.R. at 724. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his [or her] claims." *Syncsort Inc. v. Sequential Software, Inc.*, 50 F.Supp.2d 318, 325 (D.N.J. 1999) (internal quotation marks omitted). In reviewing a Rule 12(b)(6) motion, the trial court must construe the complaint liberally, accept all factual allegations as true, and draw all inferences in

favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). A trial court may only grant a motion to dismiss if the court finds that the plaintiff "will be unable to prevail even if [he or she] proves all of the allegations in the complaint, basing its decisions solely on the legal sufficiency of the complaint." *Poling v. K. Hovnanian Enter.*, 99 F.Supp.2d 502, 507 (D.N.J. 2000).

B. THE MOTION MUST BE DENIED BECAUSE CONGRESS HAS WAIVED THE DEFENDANT'S SOVEREIGN IMMUNITY RELATING TO 11 U.S.C. §§ 547 AND 550

11. Congress intended to and did in fact waive the Defendant's sovereign immunity, as an entity of the Navajo Nation, by enacting Section 106 of the Bankruptcy Code.

12. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights'[,]" including common law sovereign immunity. *Santa Clara Pueblo, et al., v. Martinez, et al.*, 436 U.S. 49, 55-58 (1978).

13. However, tribal sovereign immunity is not absolute, and an Indian tribe is subject to suit "...where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) ("*Kiowa* Tribe"). The Defendant has itself acknowledged that Congress may waive tribal immunity, as noted in the Sovereign Immunity Act of the Navajo Nation. *See* Navajo Nation Sovereign Immunity Act, 1 N.N.C. 554 (B).

14. In order to abrogate tribal sovereign immunity, Congress must unequivocally express that purpose. *Santa Clara Pueblo*, 436 U.S. at 58 (citing *U.S. v. Testan*, 424 U.S. 392, 399 (1976)).

15. Congress unequivocally expressed its intent to abrogate tribal sovereign immunity under the Bankruptcy Code by enacting Section 106, which is entitled "Waiver of sovereign immunity." 11 U.S.C. § 106.

16. Section 106(a) provides, "[n]othwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a *governmental unit* to the extent set forth in this section with respect to the following:

> (1) Sections…547, …550….

11 U.S.C. § 106(a) (emphasis added).

17. "Governmental unit" is defined as:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department; agency; or instrumentality of the United States…, 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).

18. Based on a plain reading of Sections 106(a) and 101(27) of the Bankruptcy Code, Congress has unequivocally expressed its intent "to abrogate the sovereign immunity of *all* 'foreign and domestic governments.' " *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004), *cert. denied*, *Navajo Nation v. Krystal Energy Co. Inc.*, 543 U.S. 871 (2004) (holding that Congress expressly and unequivocally waived the Navajo Nation's sovereign immunity).

19. The Supreme Court has continually described Indian tribes as "domestic dependent nations…." *Krystal Energy*, 357 F.3d at 1057 (citing *Okla. Tax Comm. V. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)).

20. In addition, Justice Sotomayor recently described both states and Indian tribes as "domestic governments." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2042 (2014) (Sotomayor, J. Concurring).

21. Regardless of an exact definition, "Indian tribes are certainly governments, whether considered foreign or domestic...." *Krystal Energy*, 357 F.3d at 1057.

22. When abrogating the immunity of states, Congress need not list every state from Alabama to Wyoming in order unequivocally to express its intent to effectuate such an abrogation. *Id.* at 1059. Likewise, Congress does not have to utter the magic words "Indian tribes" to abrogate the sovereign immunity of the Navajo Nation or the Defendant because "Congress has abrogated the sovereign immunity of *all foreign and domestic governments* in § 106(a) of the Bankruptcy Code." *Id.* (emphasis added).

23. Therefore, Congress has expressly abrogated the immunity of Indian tribes under the Bankruptcy Code, including Sections 547 and 550. *See id.*; *see also In re Russell*, 293 B.R. 34, 44 (D.Ariz. 2003); *In re Davis Chevrolet, Inc.*, 282 B.R. 674, 683 n.5 (Bankr. D.Ariz. 2002); *In re Vianese*, 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995).

24. As such, the Defendant, as a wholly owned entity of the Navajo Nation, does not possess sovereign immunity under the Bankruptcy Code, and the Motion should be denied as this Court has proper subject matter jurisdiction.

C. EVEN IF THE NAVAJO NATION IS ENTITLED TO SOVEREIGN IMMUNITY, THE DEFENDANT HERE IS NOT

25. The Defendant here is a for profit corporation engaged in commercial publishing activity. As such, whether it is an entity owned by the Navajo Nation, it is separate and distinct from the Navajo Nation itself. While this observation is largely superfluous in light of the fact that sovereign immunity does not exist in this adversary proceeding by operation of § 106 of the Bankruptcy Code, the Plaintiff nevertheless wishes this Court to understand the distinction between the Defendant and its corporate parent. Extending sovereign immunity to commercial enterprises purely on the basis of their ownership by a sovereign is not only poor policy, but bad

law as well. As such, the Defendant is fully subject to litigation in this Court and for liability under Chapter 5 of the Bankruptcy Code.

III. CONCLUSION

26. For the foregoing reasons, the Motion should be denied.

Dated: February 5, 2016

KLEHR | HARRISON | HARVEY |

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By: _____

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