IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT MASSACHUSETTS

In re:	Chapter 13
BRIAN W. COUGHLIN,	Case No. 19-14142-FJB
Debtor.	

RESPONSE TO DEBTOR'S SUR-REPLY [DOC. 97]

Niiwin, LLC d/b/a Lendgreen ("Lendgreen"), L.D.F. Business Development Corporation ("BDC"), L.D.F. Holdings, LLC ("LDF" and together with Lendgreen and BDC, the "Respondents"),[1] pursuant to this Court's order dated September 23, 2020 [Doc. 107], file this response to debtor Brian Coughlin's ("Debtor") sur-reply filed on September 18, 2020 [Doc. 97] (the "Sur-Reply"). In support, the Respondents state as follows:

PRELIMINARY STATEMENT

1. While Debtor received leave to file the Sur-Reply, the new allegations and legal theories in the Sur-Reply are improper and should not be considered for purposes of the Court's resolution of the Motion to Dismiss [Doc. 74]. Even if considered, the Sur-Reply's new allegations and legal theories do not save the Stay Motion from this Court's proper dismissal.

ARGUMENT

A. The Sur-Reply's New Theories and Allegations Should Not be Considered.

2. As detailed in the Motion to Strike [Doc. 104], it is well settled in the First Circuit that arguments and issues raised for the first time in a reply should not be considered by the court. *See, e.g., Johnson v. Indymac Mortg. Serv'g*, No. 12-10808-MBB, 2014 WL 1652594, at *5 n.14

[1] The Tribe retained separate counsel and it is anticipated the Tribe will file its own response to the Sur-Reply, which Respondents incorporate herein by reference.

(D. Mass. Apr. 22, 2014) ("Although a litigant may use a reply brief to clarify arguments previously made or to respond to an argument an opposing party raises in an opposition, ordinarily it is not appropriate to use a reply brief to raise a new argument."); *Del. County Employees Retirement Fund v. Portnoy*, No. 13-10405-DJC, 2014 WL 1271528, at *9 n.6 (D. Mass. Mar. 26, 2014) ("The Court need not address substantive arguments raised in the Plaintiffs' reply that were available to them at the time they filed their motion and which do not respond to the arguments raised by the Defendants in their oppositions."); *Napert v. Gov't Employees Ins. Co.*, No. 13-10530-FDS, 2013 WL 3989645, at *2 n.4 (D. Mass. Aug. 1, 2013) ("Where, as here, a moving party raises an argument for the first time in a reply brief, that argument is waived."); *Noonan v. Wonderland Greyhound Park Realty LLC*, 723 F. Supp. 2d 298, 349 (D. Mass. 2010) (concluding that arguments raised for the first time on reply were waived, noting that "[t]he purpose of a reply memorandum is not to file new arguments that could have been raised in a supporting memorandum") (citing cases). "Sur–reply briefs, too, may not be used to offer new arguments or to renounce previously agreed-upon facts or legal premises." *Genereux v. Hardric Laboratories, Inc*., 2013 WL 12303198 (D. Mass. May 29, 2013).

3. There is no reason Debtor could not have raised his new allegations or legal theories in the Stay Motion. Debtor does not even state a basis or justification for his failure to include the new allegations and legal theories in the Stay Motion. Debtor had every opportunity to raise the new theories and allegations but failed to do so. He has waived them. The purpose of a sur-reply is not to raise new arguments and allegations that could have been raised previously and the Court should not consider them for purposes of resolving the Motion to Dismiss.

4. The Sur-Reply's new theories and allegations include (i) challenging the United States Supreme Court's holding in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,

523 U.S. 751, 760 (1998) that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation"; (ii) arguing that *Breakthrough Management Group Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1171 (10th Cir. 2020) supports treating four distinct entities as one; (iii) requesting that the Court should take judicial notice of pleadings in an unrelated case (*Walker v. Lendgreen*, Case No. 8:16-CV-00862-JDW-AAS (M.D. Fla. 2016)) despite the complete absence of allegations in the Stay Motion on the facts sought to be judicially noticed; and (iv) attempting to introduce new allegations regarding the Respondents' alleged creation, purpose, intent, and corporate structure, among other allegations. Debtor's new legal theories and allegations raised in the Sur-Reply do not save the Stay Motion from dismissal.

B. The Sur-Reply's New Challenge to *Kiowa* Fails.

5. Debtor's new challenge to *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) is raised for the first time in the Sur-Reply and is an apparent attempt to preserve an appellate argument. Any challenge to *Kiowa* is not properly before the Court or preserved for appeal. As addressed in the Motion to Strike and as addressed herein, new arguments cannot be raised in sur-replies. Motion to Strike p. 2-4. Moreover, Debtor does not even request that this Court overturn *Kiowa*. Instead, Debtor appears to state that he does not accept *Kiowa* and "reserves the right" to raise his argument on appeal and specifically argues that the Supreme Court should dismantle it; not this Court. *See* Sur-Reply p.1-2. Because Debtor is not asking this Court for a ruling on this challenge, it is forfeited and waived. *See U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1142 (10th Cir. 2009) ("An issue is not preserved for appeal unless a party alerts the district court to the issue *and seeks a ruling*." (emphasis added)).

6. Notwithstanding the improper nature of Debtor challenging *Kiowa* for the first time in the Sur-Reply, and his waiver of such challenge as a practical matter, the Supreme Court and Congress have consistently upheld tribal immunity for off-reservation commercial activity. *See e.g., Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014) ("*Kiowa* itself was no one-off . . . . [it] reaffirmed a long line of precedents, concluding that the doctrine of tribal immunity—without any exceptions for commercial or off-reservation conduct—is settled law.").

7. Congress has had several years to reflect on *Kiowa* and *Bay Mills*, yet, it has not acted to abrogate that precedent or to otherwise limit tribal sovereign immunity in the context of off-reservation commercial activity. Debtor's vague policy argument is unpersuasive and flies in the face of the foundation of *Kiowa* and *Bay Mills*.

8. Tribal sovereign immunity applies to off-reservation commercial activity, the same as it does in other contexts. *E.g., Bay Mills*, 572 U.S. 782; *Kiowa*, 523 U.S. 751. Congress has not unequivocally expressed its intention to change this Supreme Court precedent, and the doctrine of stare decisis binds this Court. *United States v. Moore-Bush*, 963 F.3d 29, 37 (1st Cir. 2020) ("The doctrine [of stare decisis] is commonly divided into horizontal and vertical precedent. Vertical precedents are decisions in 'the path of appellate review,' meaning Supreme Court decisions control all lower federal courts and circuit court decisions control federal district courts in their circuits.") (citations omitted)).

C. The Sur-Reply's New Reliance on *Breakthrough Management* is Misplaced.

9. Debtor argues that based on *Breakthrough Management*, the Court should deem Lendgreen, BDC, Holdings, and the Tribe as one entity susceptible to suit, and should therefore hold the four distinct entities each liable for the alleged actions of Lendgreen. The argument fails as both a legal and factual matter.

10. First, *Breakthrough Management* does not address disregarding corporate form and separateness, which Debtor is ostensibly attempting to accomplish here. This was not even an issue in *Breakthrough Management.* Instead, *Breakthrough Management* addressed the circumstances under which a tribe's economic entity qualifies as a subordinate economic entity entitled to share in the tribe's immunity—*i.e.*, when an entity is an arm of the tribe. *Id*. at 1187. Debtor concedes, however, that Lendgreen, BDC, and Holdings are arms of the Tribe (Stay Motion ¶ 3; Objection p.14; Sur-Reply p.2), and does not dispute that Lendgreen, BDC, and Holdings are otherwise entitled to the Tribe's tribal immunity. Thus, *Breakthrough Management*, which merely addresses the circumstances under which an entity is an arm of the tribe, is irrelevant to Debtor's apparent attempt to disregard the Respondent's corporate form and separateness.

11. Moreover, *Breakthrough Management* does not support Debtor's argument that as arms of the Tribe, Lendgreen, BDC, and Holdings cannot also retain corporate form and separateness. When and whether an entity is an arm of a tribe entitled to tribal immunity is a separate and distinct legal determination from when and whether to disregard corporate form and separateness. While the proximity of a relationship may be one of several factors a court might consider in weighing whether to disregard corporate form and separateness pursuant to a recognized legal theory, it is not dispositive on the issue. More importantly, Debtor fails to cite a single case that holds that being an arm of the tribe is a *per se* forfeiture of corporate form and separateness. Again, these are distinct legal concepts that Debtor is attempting to conflate. Neither *Breakthrough Management* nor any other case cited by Debtor provides a legal basis for disregarding the Respondents' corporate form and separateness.

12. Second, even if *Breakthrough Management* provided a legal basis for holding BDC, Holdings, and the Tribe liable for Lendgreen's alleged actions—which Respondents strongly

deny—the Stay Motion fails to allege facts to support any legal basis for disregarding corporate form and separateness. In an apparent recognition of this flaw, Debtor requests the Court take judicial notice of facts not alleged in the Stay Motion. Specifically, Debtor requests the Court take judicial notice of pleadings filed in an unrelated case four years ago in an attempt to introduce new allegations concerning the Respondents' alleged creation, purpose, intent, and corporate structure, among other allegations.

13. These new allegations are conspicuously absent from the Stay Motion and Debtor's attempt to use judicial notice to cure this failure similarly fails. "Judicial notice is a rule of convenience, intended to save time and resources by dispensing *with the presentation of evidence*, and is intended to avoid the formal introduction of evidence in limited circumstances where the fact sought to be proved is so well known that evidence in support thereof is unnecessary." AM. JUR. EVIDENCE § 24. (citations omitted) (emphasis added). Judicial notice does not cure a party's failure to allege facts as an initial matter, as Debtor has here. The Stay Motion fails to allege facts Debtor now requests the Court take judicial notice. Moreover, the contents of the filings are not susceptible to judicial notice. Judicial notice of four-year-old filings in an unrelated case merely operates to introduce that parties in an unrelated case filed certain pleadings on certain dates. *Global Network Communications, Inc. v. City of New York*, 458 F.3d 150 (2d Cir. 2006) ("A court may take judicial notice of a document filed in another court *not for the truth of the matters asserted* in the other litigation, but rather to establish the fact of such litigation and related filings.") (emphasis added). The Sur-Reply's new allegations are improper, and not subject to consideration for purposes of the Motion to Dismiss.

14. Finally, Debtor's passing reference to corporate veil piercing is not plausibly pled. *See* Sur-Reply p. 2-3.[2] As an initial matter, ***Breakthrough Management*** did not address veil piercing and does not provide a basis for applying that doctrine here. *United States v. Bestfoods*—a case Debtor relies on—explains that corporate ownership and its concomitant control are not bases for piercing the corporate veil:

> It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Thus it is hornbook law that the exercise of the "control" which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary. That "control" includes the election of directors, the making of by-laws and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal.

524 U.S. 51, 61-62 (1998) (quotations and citations omitted). Rather, piercing the corporate veil is appropriate when "the corporate form would otherwise be *misused* to accomplish certain *wrongful purposes*, most notably fraud, on the shareholder's behalf." *Id.* at 62 (emphasis added). The Stay Motion does not allege that Respondents have misused corporate form to accomplish any wrongful acts. While Debtor may attempt to cure this fatal flaw by attempting to introduce pleadings from an unrelated case, he has not argued that the Court should consider his new allegations, or that there is even a basis for the

[2] For the avoidance of doubt, the Respondents argue it is improper for Debtor to raise a veil piercing theory (along with the other new theories and allegations) for the first time in the Sur-Reply, and the Respondents reserve all rights to challenge any consideration of new legal theories or allegations for purposes of resolving the Motion to Dismiss.

Court to consider his new allegations. Moreover, these new allegations do not support application of veil piercing.

D. The Sur-Reply does not cure the fatal flaws of the Stay Motion.

15. The Stay Motion's fatal flaws include the failure to allege a factual or legal basis for treating Lendgreen, BDC, Holdings, and the Tribe as one entity. Of course, the Court must accept all well-pleaded factual allegations in the Stay Motion as true, drawing reasonable inferences in Debtor's favor. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court can dismiss the Stay Motion, however, if Debtor has failed to demonstrate a plausible entitlement to relief. *Id*.

16. The inquiry into plausibility is a two-step process, whereby the Court must first "sift through the averments in the complaint, separating conclusory legal allegations (which may be disregarded) from allegations of fact (which must be credited)" and then "consider whether the winnowed residue of factual allegations gives rise to a plausible claim to relief." *In re Blast Fitness Group, LLC*, 2020 WL 2027219 (Bankr. Mass. April 27, 2020) (quoting *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 53 (1st Cir. 2013) (citing *Morales–Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012)). "Plausible, of course, means something more than merely possible, and gauging a pleaded situation's plausibility is a 'context-specific' job that compels [a court] 'to draw on' [its] 'judicial experience and common sense.' " *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012) (quoting *Iqbal*, 556 U.S. at 679). "'Moreover, *each* defendant's role in the adverse action must be sufficiently alleged to make him or her a plausible defendant. After all, we must determine whether, *as to each defendant*, a plaintiff's pleadings are sufficient to state a claim on which relief can be granted.'" *Blast Fitness*, 2020 WL 2027219 *2 (quoting *Rodriguez-Ramos v. Hernandez-Gregorat*, 685 F.3d 34, 40-41 (1st Cir.

2012) (quoting *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 16 (1st Cir. 2011) (alteration in original); *see also Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 594 (1st Cir. 2011) ("[S]ave under special conditions, an adequate complaint must include not only a plausible claim but also a plausible defendant.").

17. The Stay Motion does not plead a plausible entitlement to relief against BDC, Holdings, or the Tribe. As detailed in the Motion to Dismiss and the Reply [Doc. 93], Lendgreen is the party Debtor alleges committed a willful violation of the automatic stay, not BDC, Holdings, or the Tribe. *See* Motion to Dismiss at 4-8; Reply at 3-5. Moreover, the Stay Motion fails to plead a plausible entitlement—both a factual and legal basis—for holding BDC, Holdings, and the Tribe liable for the alleged actions of Lendgreen. *Id*. The Sur-Reply does not—and for the reasons addressed herein, cannot—change this inescapable conclusion.

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WHEREFORE, Lendgreen, BDC, and Holdings respectfully request this Court enter an order (i) granting the Motion to Dismiss; and (ii) granting such other and further relief as the Court deems just and proper.

Dated: September 30, 2020

Respectfully submitted,

/s/ *Adrienne K. Walker*

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CERTIFICATE OF SERVICE

I, Adrienne K. Walker, do hereby certify that on the September 30, 2020, I caused a copy of the foregoing to be served through the ECF system, and that copies will be sent electronically to registered participants and paper copies will be sent to those indicated as non-registered participants requesting notice as of the date herein.

Dated: September 30, 2020

/s/ *Adrienne K. Walker*