

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT MASSACHUSETTS
(Eastern Division)**

In re:

BRIAN W. COUGHLIN,

Debtor.

Chapter 13

Case No. 19-14142-FJB

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Introduction

Faced with insurmountable deficiencies in his claim against the Lac du Flambeau Band of Lake Superior Chippewa Indians (the “Tribe”), Brian Coughlin tries to draw in new allegations and over 30 pages extrinsic documents and tries to add a claim. And for good measure, he asks this Court to disregard the U.S. Supreme Court’s decades-old heightened standard for abrogation of tribal sovereign immunity. The Tribe respectfully asks the Court to reject Coughlin’s procedural and legal errors.

Argument

I. Coughlin’s allegations do not support any claim against the Tribe.

A. Coughlin cannot supplement his allegations and introduce over 30 pages of extrinsic documents on a motion to dismiss for failure to state a claim.

When reviewing a motion to dismiss for failure to state a claim, a court may “consider the complaint, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. Finally, the jurisprudence of Rule 12(b)(6) permits courts to

consider matters that are susceptible to judicial notice.” *Rodi v. Southern New England School of Law*, 389 F.3d 5, 12 (1st Cir. 2004) (citations omitted). But notably, while a court “may take judicial notice of court records and judicial proceedings . . . , it may not do so in order to discern the truth of the facts asserted within that filing.” *Giardiello v. Marcus, Errico, Emmer & Brooks, P.C.*, 261 F. Supp. 3d 86, 89-90 (D. Mass. 2017).

Coughlin’s sole allegation against the Tribe is that it wholly owns and operates the LDF Business Development Corporation, and his sole claim is for a direct violation of the automatic stay. ¶¶ 3, 12-17. But now Coughlin asks the Court to consider a host of new allegations about the nature of the relationship between the Tribe and the tribal entities, as well as raise a new claim against it. *See generally* Resp. Br. Moreover, Coughlin asks the Court to consider the *substance* of over 30 pages of documents that he did not mention in his original allegations and that are from a four-year-old case. The Court should not consider these new allegations, documents, and claim.

B. Coughlin’s new allegations do not support his original or new claims.

On response to the Tribe’s motion to dismiss, Coughlin asks the Court to draw the monumental conclusion that because the Tribe’s sovereign immunity is shared by the tribal entities, it is *per se* not entitled to recognition of the corporate separateness of those entities. Coughlin cites zero authority that supports this proposition. Indeed, *Ninigret Development v. Narragansetts Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 (1st Cir. 2000), the only case relied on by Coughlin, says nothing about the corporate separateness of tribal entities. It merely says that the Court “shall not distinguish

between the Tribe and the Authority *in discussing concepts such as tribal sovereign immunity and tribal exhaustion.*" *Id.* at 29 (emphasis added).

As the Tribe previously explained, "[a] basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). "Corporate owners are allowed to avoid liability beyond the extent of their investment because of the fiction that the corporation is a separate entity." *In re Indus. Comm. Elec., Inc.*, 319 B.R. 35, 49 (D. Mass. 2004). It is "[o]nly in rare instances, in order to prevent gross inequity," that courts "will look beyond the corporate form." *In re Indus. Comm. Elec., Inc.*, 319 B.R. 35, 49 (D. Mass. 2005). Coughlin has not identified the elements or alleged facts to look beyond the corporate form of *all three tribal entities* or explained why doing so is necessary to prevent gross inequity.

Though not clearly laid out, Coughlin also appears to introduce a new claim for vicarious liability. Again, Coughlin has not identified the elements necessary to establish vicarious liability, nor has he alleged facts to support a claim under that theory. Instead, he makes a passing reference to it and cites *In re Ramirez*, No. 13-3067, 2014 WL 2522148 (S.D. Tex. June 4, 2014), an unpublished decision in a case that has absolutely no applicability to the facts of this case. The Court should not entertain this eleventh-hour, undeveloped, and unpled claim for relief against the Tribe.

II. The Bankruptcy Code does not abrogate tribal sovereign immunity.

Coughlin asks this Court to *deduce* that Congress abrogated tribal sovereign immunity under Section 106(a) and 101(27). Resp. Br. at 6-9. Coughlin misses the mark.

“Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (quotation omitted). “That immunity . . . is a necessary corollary to Indian sovereignty and self-governance.” *Id.* (quotation omitted). And while that aspect of tribal self-governance, like others, is subject to Congress’s plenary authority, there remains “an enduring principle of Indian law” that “courts will not lightly assume that Congress in fact intends to undermine Indian self-government.” *Id.* at 790.

To that end, when faced with the question of whether Congress has abrogated tribal sovereign immunity, the U.S. Supreme Court has long required that Congress “unequivocally express that purpose.” *Id.* (quotations omitted). That is the “rule of construction” that the U.S. Supreme Court requires this Court to apply. *Id.* And that rule accords with the generations-old Indian law canon of construction: “Ambiguities in federal law [are] construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

Coughlin refers to *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), as the “seminal appellate case” on whether Sections 101(27) and 106(a) abrogate tribal sovereign immunity. That is an odd characterization, considering that every circuit court to review *Krystal Energy* has outright rejected it, including the Sixth, Seventh, and the Eighth Circuits. *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir.

2019); *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 824 (7th Cir. 2016); *In re Whitaker*, 474 B.R. 687 (8th Cir. 2012). Even the Tenth Circuit has stated that Section 106 “probably does not apply to . . . an Indian nation.” *In re Mayes*, 294 B.R. 145, 148 n.10 (10th Cir. 2003). And numerous bankruptcy courts outside of these circuits have agreed with these circuit courts. *See, e.g., In re Money Center of America, Inc.*, 565 B.R. 87, 103 (D. Del. 2017); *In re Star Group Communications, Inc.*, 568 B.R. 616, 624-25 (D.N.J. 2016). This Court should not be deceived. *Krystal Energy* is an outlier, not a leader. And it remains a serious deviation from U.S. Supreme Court precedent.

Coughlin’s reliance on *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2000), and *Ninegret Development v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000), serves his position no better. Neither of those cases involve the question of whether a federal statute that makes absolutely no reference to Indian tribes or even hints at its application to Indian tribes evidences Congress’s unequivocal purpose to abrogate tribal sovereign immunity. Those cases do not in any way suggest that the First Circuit will break from U.S. Supreme Court precedent.

Because Sections 101(27) and 106(a) do not evince Congress’s unequivocal purpose to abrogate tribal sovereign immunity, the Tribe’s immunity remains a bar to Coughlin’s claims against it.

Conclusion

The Tribe respectfully asks the Court to disregard Coughlin’s new allegations, new claim, and erroneous application of the law, and to dismiss the claim against it.

Dated: September 4, 2020

Respectfully submitted,

/s/ Adrienne K. Walker

Adrienne K. Walker, Esq.

Aaron M. Williams, Esq.

MINTZ, LEVIN, COHN, FERRIS,

GLOVSKY AND POPEO, P.C.

One Financial Center

Boston, Massachusetts 02111

Tel: 617-542-6000

Fax: 617-542-2241

E-mail: awalker@mintz.com

amwilliams@mintz.com

Andrew Adams III, Esq. (pro hac vice)

Peter J. Rademacher, Esq. (pro hac vice)

Hogen Adams PLLC

1935 County Road B2 West, Suite 460

St. Paul, Minnesota 55113

Tel: 651-842-9100

Fax: 651-842-9101

E-mail: aadams@hogenadams.com

prademacher@hogenadams.com

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CERTIFICATE OF SERVICE

I, Adrienne K. Walker, do hereby certify that on the 4th of September, 2020, I caused copies of the *Reply Memorandum in Support of Motion to Dismiss* to be served through the ECF system, and that copies will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants as of the date herein and to the parties on the attached service list.

Dated: September 4, 2020

/s/ Adrienne K. Walker
Adrienne K. Walker, Esq.