UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

In re BRIAN W. COUGHLIN, Debtor	IN PROCEEDINGS UNDER CHAPTER 13 CASE NO. 19-14142-FJB

MEMORANDUM OF LAW IN RESPONSE TO THE REPLY BRIEFS NIIWIN, LLC D/B/A "LENDGREEN", LDF HOLDINGS, LLC, AND THE LAC DU FLAMBEAU BUSINESS DEVELOPMENT CORPORATION AND THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS MOTION TO DISMISS THE MOTION OF DEBTOR TO ENFORCE THE AUTOMATIC STAY

NOW COMES the Debtor, and in support of the Debtor's Opposition to the Motions of Niiwin, LLC d/b/a "LendGreen", LDF Holdings, LLC, and the Lac du Flambeau Business Development Corporation and the Lac Du Flambeau Band of Lake Chippewa Indians (collectively, the "Respondents") to Dismiss the Debtor's Motion to Enforce the Automatic Stay, hereby submits the following Memorandum of Law in response to the Reply Briefs of the Respondents.

I. THE CONCEPT OF "TRIBAL IMMUNITY" IS A COMMON-LAW DOCTRINE OF THE SUPREME COURT OF THE UNITED STATES WHICH HAS OUTLIVED ITS USEFULNESS AND OUGHT TO BE REVISITED AND OVERTURNED BY IT.

To be clear, for the purposes of this proceeding and contested matter, and for the record created within that proceeding, the Debtor does not accept and expressly seeks to overturn the proposition that an Indian tribe engaged in off-reservation commercial activity ought to be entitled to any form of common-law immunity for injuries or other wrongs occasioned by such commercial activity, including violations of the Automatic Stay. The debtor reserves the right to

challenge any such proposition in any further appellate litigation that should arise from these proceedings.

Thus, the Debtor believes that the holding in the case of **Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.** [1] ought to be overruled. The Debtor expressly states for the record that the Supreme Court should act to dismantle this "judge-made" tribal immunity law because Congress has not acted to do so. A tribe should enjoy no broader immunity than the federal government, the states, or foreign nations. Tribal immunity must not be used as a shield for questionable conduct, and it must not be used as a mechanism to mitigate risk in a business venture.

II. LENDGREEN AND ITS PARENT ENTITIES ARE "ARMS OF THE TRIBE" AND THEREFORE NONE OF THE RESPONDENTS ENJOY ANY LEGAL BENEFIT OF CLAIMED "COPORATE SEPARATENESS"

Based upon the factors set forth in **Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort** [2], it is clear that, as an "Arm of the Tribe", Lendgreen, all of its parent entities, including the Tribe itself, are so intertwined as to be deemed one single, unified entity, such that the Tribe and its subsidiaries should be deemed to be one single entity for the purposes of this contested matter and proceeding. Thus, Lendgreen, LLC, BDC, LLC and Holdings, LLC ("tribal entities") are susceptible to suit.

The Debtor is not "disregarding corporate structure," as in the manner that the Respondents have claimed. While it is true that "…a parent corporation … is not liable for the

[1] 523 U.S. 751 (1998).

[2] 629 F.3d 1171, 1185 (10th Cir. 2010).

acts of its subsidiaries… beyond the assets of the subsidiary…"[3] Yet, the "veil may be pierced and the [parent entity] held liable for the corporation's conduct when…the corporate form would otherwise be misused to accomplish certain wrongful purposes…"[4] and when the parent company uses the subsidiary "as a mere agency or instrumentality of the owning company."[5] In this case, given it's status as "Arms of the Tribe" as defined by federal case law, the Respondents necessarily act and are viewed for all legal purposes as a single entity.

A. The "Breakthrough Test"

The test set forth in **Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort** [6] is widely accepted to determine if a tribal entity is a "mere agency or instrumentality" of a tribe[7]. The elements of that test are as follows:

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[3] **United States v. Bestfoods**, 524 U.S. 51, 61-62 (U.S. 1998).

[4] *Id.* at 62.

[5] **Chicago, M. & St. P. R. Co. v. Minneapolis Civic and Commerce Assn.**, 247 U.S. 490, 494 (1918) (While stating that determining whether a subsidiary and parent companies are merely one in the same is a question "of both fact and law," the Supreme Court concluded that subsidiary railroad companies that had different managing members and owned distinctly separate assets were not "mere [agents]…of the owning company.")

[6] 629 F.3d 1171, 1185 (10th Cir. 2010).

[7] **Williams v. Big Picture Loans**, LLC, 929 F.3d 170, (4th Cir. 2019); **See also McCoy v. Salish Kootenai College, Inc.**, 785 Fed.Appx 414, 415 (9th Cir 2019) No. 18-35729, citing **White v. Univ. of Cal.**, 765 F.3d 1010, 1025 (9th Cir. 2014) (In an unpublished decision, stating that "To determine whether an entity is entitled to sovereign immunity as an "arm of a tribe," this circuit considers the [**Breakthrough**] factors: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.")

1. **Method of creation**: whether they are created by the tribe as part of larger scheme of corporate organization or was the company formed independently, and whether incorporation was under tribal law[8];

2. **Purpose of the company**: whether or not the companies serve the interests of the tribe's "broader goals" of self-governance[9];

3. **Control over the company**: whether there is tribal control over the entity. "…[R]elevant to this factor are the entities' formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities"[10];

4. **Tribal intent:** whether the tribe's intent is "to extend its immunity to the entities. In some cases, the tribal ordinances or articles of incorporation creating the entities will state whether the tribe intended the entities to share in the tribe's immunity."[11] ; and

5. **Financial relationship**: whether "a judgment against an entity would reach the tribe's [and to what] extent to which the Tribe depends on these entities for revenue to fund its governmental functions and other tribal development." [12]

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[8] **Williams v. Big Picture Loans, LLC**, 929 F.3d 170, 177 (4th Cir. 2019), citing **Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort**, 629 F.3d 1173 (10th Cir. 2010).

[9] *Id.* at 178.

[10] *Id.* at 183.

[11] *Id.* at 184.

[12] *Id.*

B. Applying the Breakthrough Test to the Case at Bar

1. Method of creation. The Tribe incorporated Lendgreen, BDC, and Holdings all under tribal law, organized so that Holdings wholly owns BDC, and BDC wholly owns Lendgreen. Through this chain, the Tribe owns them all, demonstrating that these entities are arms of the Tribe. Additionally, all of these companies are formed under tribal law, further validating that these companies, including Lendgreen, are arms of the Tribe.

2. Purpose. The purpose of Lendgreen, LLC is to operate a payday loan company to generate revenue for the Tribe. BDC and Holdings hold Lendgreen and serve as pass-through entities which stream revenue to the Tribe. This structure serves the Tribe's purpose of using its arms to collect revenue, and after doing so, to funnel those revenues to the Tribe.

3. Control. Lendgreen, BDC, and Holdings are all run by members of the Tribe. Holdings has complete control over its subsidiary, BDC; likewise, BDC has complete control over its subsidiary, Lendgreen. Formed by the Tribe, Holdings and all subsidiary companies are subservient to it. Therefore, Tribe's absolute control over these entities demonstrates that they are arms of the Tribe.

4. Intent. The Tribe's intent is clear: Lendgreen is to serve the Tribe. Lendgreen's formation documents indicate that it shares tribal immunity with the Tribe, further demonstrating the Tribe's intent that Lendgreen is an extension of itself.

5. Financial Relationship. A financial current directs money from Lendgreen to the Tribe. Lendgreen's sole stated purpose is to generate revenue for the Tribe. This fact, alone, satisfies the financial prong of the "**Breakthrough** Test." In addition, any suit against Lendgreen for monetary damages would be a direct attack on Tribe's profit margin. Lendgreen only maintains $500.00 and all other profits it generates are up-streamed to BDC, Holdings, and then

to the Tribe.[13] This financial structure demonstrates that Lendgreen exists solely to do the Tribe's bidding and is, therefore, an "Arm of the Tribe".

III. THE COURT MAY PROPERLY CONSIDER THE DOCUMENTS OFFERED AND ATTACHED TO THE MEMORANDUM OF LAW IN SUPPORT OF THE DEBTOR'S OPPOSITION TO THE RESPONDENTS MOTIONS TO DISMISS.

The documents offered as part of the Debtor's Memorandum of Law in Support of his Opposition to the Respondents' Motions to Dismiss t are derived from the affidavit of Lendgreen in the case of **Walker v. Lendgreen**[14], a United States District Court case before the Middle District of Florida. As part of the docket, a court may take judicial notice of those records as they are official records of court proceedings.[15] Furthermore, and in any event, at this early stage of the proceedings, there is nothing to prevent the Debtor from amending his motion to provide additional detail in a more formal fashion if the Court so requires. Therefore, the documents referenced by the Debtor may be properly taken into account with respect to the instant Motions to Dismiss.

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[13] *See* Tribal Code, Chapter 44a, Tribally-Owned Business Organization Code, §44a.406(2) (Tribal assets not specifically pledged to the Tribally-owned limited liability company…shall not be considered an asset of the company…")

[14] Case #8:16-CV-00862-JDW-AAS

[15] **See Waterson v. Page,** F.2d 1, 4 (1st Cir. 1992) (Stating that the Court is allowed to take judicial notice with documents for which "authenticity [is] not disputed…for official public records, for documents central to plaintiffs' claim or for documents sufficiently referred to in the complaint.") *See also* **Khoja v. Orexigan Therapeutics, Inc.**, 899 F.3d 988, 1002 (9th Cir. 2018). (Stating The Court must treat "documents as though they are part of the complaint itself.")

For all of these reasons and those set forth in the Debtor's previously submitted Memorandum of Law, the Respondents' Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED,

BRIAN W. COUGHLIN, Debtor
By his attorney,

Date: 9/18/2020

/s/ Richard N. Gottlieb, Esq.

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