UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Brenda Jo Musel,

Debtor.

Chapter 7
BKY Case No. 20-42761-MER

SUPPLEMENTAL BRIEF

Pursuant to the Court's order dated April 6, 2021, trustee Julia A. Christians (the "Trustee") submits this supplemental brief in support of her motion for turnover of property of the estate (the "Motion"). *See* Doc. Nos. 20 and 10. The facts upon which this motion are based are set out in the Motion and the parties' Stipulation of Facts and Exhibits. Doc. No. 19. Defined terms shall have the same meaning as set forth in the motion.

INTRODUCTION

Although there are a number of cases from around the country analyzing the issue of whether the right to receive tribal per capita payments falls within the ambit of Section 541(a), the general consensus appears to be that the right to such payments is part of a debtor's bankruptcy estate unless the language of tribal gaming allocation ordinances and other related statutes explicitly state that a tribal member's right to receive such payments is not a property interest.

LEGAL ARGUMENT

a. Cases Holding that Right to Receive Per Capita Payments is Estate Property

The majority of cases analyzing this issue have found that the right to receive per capita tribal payments is property of a debtor's estate pursuant to 11 U.S.C. § 541(a). While these decisions differ in the routes they've taken to reach this destination, this position appears to be the rule and holdings to the contrary are exceptions.

1. *In re Meier*

The most apposite case to the facts of the present case is the decision in *In re Meier* out of the Eastern District of North Carolina. In that case, the trustee brought a turnover motion regarding the debtor's right to receive per capita payments from the Pokagon Band of Potawatomi Indians, the same tribe to which the Debtor in this case belongs. *In re Meier*, 2013 Bankr. LEXIS 4928, at *10 (Bankr. E.D.N.C. Nov. 21, 2013.)

Unfortunately, the *Meier* court primarily sidestepped the issue of whether the debtor's right to receive per capita payments was property of her bankruptcy estate because it found that the "trustee's turnover motion presents a question that is both more narrowly focused and dispositive: specifically, whether the debtor's expectation of future gaming payments is precluded from turnover on grounds that it is of inconsequential value or benefit to the estate." *Id.* Despite the *Meier* court's apparent reluctance to wade into the 541 issue, other courts have read this decision as a presumption that tribal per capita payments are property of a debtor's bankruptcy estate. *See In re McDonald*, 519 B.R. 324, 338 (Bankr. D. Kan. 2014).

2. *In re Kedrowski*

Although the court in *Kedrowski* analyzed this issue regarding payments from a different tribe, the Ho-Chunk Nation, that decision provides perhaps the most in-depth analysis of this issue to date, including a thorough review of both federal and tribal law and the history of Tribal Gaming laws. *See In re Kedrowiski*, 284 B.R. 439 (Bankr. W.D. Wis. 2002).

The *Kedrowski* court found that, although certain circumstances could potentially come to pass which would prevent per capita distributions being made in the future, the debtor's right to receive such payments was analogous to a debtor's interest in a business entity and thus favored inclusion of that right in the bankruptcy estate:

> Someone who owns stock in a company, or holds a limited partnership interest in a business, may never receive a distribution on that interest. The business may encounter a poor economic climate, may find expenses outpacing revenues, and may even fail. But should the company ever issue a dividend, all stockholders receive an appropriate amount in relation to their interest. Clearly, those who hold a "right" to receive payment from the operation of a business hold some sort of intangible property under Wisconsin law. *See Larson*, 538 N.W.2d 802 (intangible property is "such property as has no intrinsic and marketable value, but it is merely representative or evidence of value."); *Sampson*, 111 F.Supp.2d at 1065 (partner's right to receive distribution from partnership constituted a "general intangible" under Wisconsin law.

Id. at 447.

Another factor the *Kedrowski* court considered to favor inclusion was the treatment of tribal per capita payments under the Internal Revenue Code which treats these payments as standard income and does not afford them any special exempt status:

> As indicated previously, the per capita distributions are specifically subject to federal income tax. A recent I.R.S. publication offering guidelines on "Gaming Tax Law" for Indian tribes provides as follows:
>
> Per capita payments do not include payments authorized by a tribe for special purposes or programs, such as social welfare, medical assistance, or education. Even though a tribal member may receive payments from net revenue for social welfare, medical assistance, or education, a tribe's designation of these payments is not determinative of their tax status.
>
> Certain "need"-based payments are not taxable. Although there is no express statutory exclusion for a welfare benefit, government disbursements promoting the general welfare of a tribe are not taxable. Grants received under social welfare programs that did not require recipients to establish *individual need* have not qualified for tax-exempt status.
>
> *Gaming Tax Law for Indian Tribal Governments* at 15-16 (Internal Revenue Service), Publication No. 3908 (5-2002).

Id. at 447-48.

The *Kedrowski* court also examined how these per capita payments were treated for other purposes, such as seeking need based aid or determining liability for child support, and found that here it was also treated as standard income:

> In addition, per capita payments have been included when calculating a tribal member's "income" for a variety of purposes. *In Stevens v. Dir. Of Dep't of Soc. Servs.*, 572 N.W.2d 41

> (Mich.Ct.App. 1997), the court concluded that a tribal member's per capita distribution could be considered in determining the member's eligibility for aid to families with dependent children (ACD) benefits. The court stated that "there is no federal statute specifically authorizing the exclusion of tribal gaming revenues from consideration as income." *Id.* at 63, 572 N.W.2d 41. Similarly, in *Seymour v. Hunter*, 603 N.W.2d 625 (Iowa 1999), the Supreme Court of Iowa ruled that the per capita payments to a tribal member could be used to calculate his "income" for child support purposes despite his contention that the payments were "unguaranteed, speculative, and left totally to the whim of the tribal council." The court stated that income "need not be guaranteed" to be considered in the support determination. Id. at 626.

Id. at 448.

Another factor the court considered was how the right to receive these payments was treated by the tribe itself, examining a case in which a tribal member was denied a per capita distribution while she was still on the tribal rolls. The *Kedrowski* court noted that in *Hendrickson v. HCN Enrollment*, CV 99-10 (Ho-Chunk Nation Trial Court 1999):

> the court concluded the plaintiff's rights had in fact been violated since the tribe had refused to issue her per capita distribution even though she remained on the tribal rolls at the time her membership was initially contested; her "absolute right" to receive per capita continued until the time that the Office of Enrollment had provided her with both notice of withholding and hearing. (Internal citation omitted).

Id. at 449.

The holding that the plaintiff in *Hendrickson* was entitled to due process before she could be deprived of the right to receive per capita payments was in spite of the fact that such distributions do "not become property of each tribal member unless and until it is declared, since the amount may vary from quarter to quarter. (Internal citation omitted)." *Id.*

The *Kedrowski* court also found that the right to receive tribal per capita payments, although not devisable and possibly lacking "intrinsic or marketable value", ultimately this does not preclude this right from being recognized as property. *Id.* "The debtor's "right" to receive distributions from the tribe's gaming operations is "representative" of value and constitutes a "property right" within the meaning of 11 U.S.C. § 541(a)." *Id.*

Regarding the debtor's claim that her distributions should be excluded from her bankruptcy estate pursuant to § 541(c)(2), the *Kedrowski* court concluded that:

> [q]uite simply, the federal government does not regard those revenues as "trust funds." Therefore, as the per capita distributions are not "trust funds," they are not subject to the anti-alienation provisions of 25 U.S.C. § 117b(a), and that section does not qualify as "applicable nonbankruptcy law" under § 541(c)(2)…
> …
>
> [T]his "nonbankruptcy law" does not seem to contain any specific anti-alienation provision that would trigger the application of § 541(c)(2). As there is no "applicable nonbankruptcy law" that restricts the transfer of the debtor's per capita distribution, it cannot be excluded from the debtor's bankruptcy estate.

Id. at 450.

Finally, the court examined the bearing of tribal sovereign immunity, if any, upon a trustee's action to recover estate property from a debtor who is a tribal member and found that such immunity did not extend to tribal members except, perhaps, in specific circumstances:

> The Indian tribes themselves enjoy immunity from suit, and individual tribal members who are acting as representatives of the tribe may similarly be immune from suit. *See Stringer v. Chrysler (In re Stringer)*, 252 B.R. 900 (Bankr.W.D.Pa.2000). However, **a member of an Indian tribe is amenable to suit if the subject of the suit is not related to a tribal officer's performance of official duties**. *Id.* at 901.

Id. (emphasis added).

Ultimately, the *Kedrowski* court found that the debtor's right to receive tribal per capita distributions was property of the debtor's bankruptcy estate because it was akin to income and proceeds from a business interest and that none of the debtor's claimed exemptions were applicable:

> In conclusion, the Court finds that the debtor's "right" to receive a per capita distribution from the gaming revenues of the Ho-Chunk Nation does constitute property of her bankruptcy estate. No provision of federal law, the gaming compact between the tribe and the state of Wisconsin, or the tribe's per capita distribution ordinance suggests a contrary result. In fact, when taken together, these sources compel the result reached by the Court. Quite simply, the debtor holds an "absolute right" to receive net revenues from the operation of a tribal business. The mere possibility that the tribe might not choose to make a distribution may mean that the debtor's right does not have any intrinsic or marketable value, but that does not alter the fact that it is "representative" of value.

Id. at 451-52.

3. *In re McDonald*

In *McDonald*, the court analyzed this issue regarding a member of the Prairie Band of the Potawatomi Tribe rather than the Pokagon Band to which the present Debtor is a member. Like the other decisions which examined the right to receive per capita distributions from the Potawatomi Tribe, the *McDonald* court found that the right to receive tribal per capita payments was "clearly" property of the debtor's estate. *In re McDonald*, 353 B.R. 287, 291 (Bankr. D. Kan. 2006). Unfortunately, the *McDonald* court did not provide much guidance in how it reached that conclusion and instead most of its analysis examines the debtor's claimed exemptions.

4. *In re Hutchinson*

Hutchinson is another case examining this issue through the lens of the Prairie Band of the Potawatomi Tribe. Although the debtors did not contest the issue of whether their right to tribal per capita payments was estate property, the *Hutchinson* court agreed with the *McDonald* court (which issued its decision on the same date) and the *Kedrowiski* court (which analyzed this issue regarding payments from another tribe) that the right to such payments was estate property:

> The first issue the Court must determine is whether the per capita distributions, including the right to receive them in the future, constitute property of the estate. Debtors do not appear to contest this issue, instead focusing on the exemption issues and their right to use the property during the pendency of the Chapter 13. Nevertheless, the Court finds it useful to state, for the record, that it finds that the per capita distributions do constitute property of the estate, as the Court has more fully explained in the opinion issued today in *In re McDonald*. This issue was thoroughly addressed in *In re Kedrowski*, albeit concerning distributions from a different tribe, and the Court adopts the holding and reasoning of the *Kedrowski* opinion as it relates to the issue of whether per capita distributions constitute property of the estate.

In re Hutchinson, 354 B.R. 523, 527-28 (Bankr. D. Kan. 2006).

5. *In re Howley*

In *Howley* the court examined the issue of per capita tribal distributions from the Prairie Band

of Potawatomi Indians and found that the debtor had "a life-time right to distribution of gaming proceeds based upon membership status" and that "[t]ribal membership status, once established based upon ancestry, is fixed and is not dependent upon future events" and "the right to share in each distribution is based upon status as an enrolled member, nothing else." *In re Howley*, 446 B.R. 506, 510 (Bankr. D. Kan. 2006).

6. Johnson v. Cottonport Bank

In *Johnson* the court found that even though the right to receive tribal per capita distributions was intangible, it was still an interest in property under section 541. "Johnson's right to receive the monthly payments from the Tribe was a property right in existence when he filed for bankruptcy. Louisiana law recognizes intangible property, including an interest in the future income from a trust, a right to receive an annuity, and a share of ownership or the right to receive payments from an entity such as the Tribe. (internal citations omitted)." *Johnson v. Cottonport Bank*, 259 B.R. 125, 130-31 (2000).

b. Cases Holding that Right to Receive Per Capita Payments is not Estate Property

1. *In re Fess*

The court in *Fess* found that the debtor in that case "simply has an expectancy to which no legal rights attach" and therefore her right to collect per capita payments was not property of her bankruptcy estate. *In re Fess*, 408 B.R. 793, 799 (Bankr. W.D. Wis. 2009). The *Fess* decision reached this conclusion after analogizing the right to receive tribal per capita payments to a payment on death account because it found both interests to be "contingent interests". *Id* at 798-99.

Although the *Fess* court found that the debtor's per capita payments were not property of the estate, applying that conclusion to the facts of the present case would be in error both because the Ho-Chunk Code has been interpreted differently in *Kedrowski* and because the controlling language

from the tribal codes at issue in *Fess* and the present case are very different as explained by the court in *Howley*:

> The Court declines to follow *Fess*. The difference in the outcomes of *Kedrowski* and *Fess* clearly rests upon differing interpretations of the Ho-Chunk Nation Code. While *Kedrowski* rejected the debtor's argument that per capita payments were not property because under the tribal law members had no right or entitlement to gaming distributions, the *Fess* court found this position determinative.
>
> Since the Potawatomi Tribal Ordinance does not have provisions similar to those of the Ho-Chunk Nation Code which controlled the outcome in *Fess*, this Court is not faced with the same issues of construction.

In re Howley, at 513.

The *Hess* analysis seems flawed because there is one primary difference between tribal per capita payments and a payment on death account ("POD"). In the analogy used by the *Fess* court, the debtor's right to receive property did not arise until after the death of a third party. Here, the Debtor has a recognizable right to partake in all future per capita distributions from the Pokagon Band of the Potawatomi Tribe. This right arose when she was enrolled as a member of the tribe and cannot be taken away from her except on notice and hearing and a determination that her original enrollment was in error. In contrast, under a POD there are situations where the holder's right to receive payment never arises, such as the death of the holder before the third party.

2. *In re Barth*

The court in *Barth* found that the Lower Sioux Indian Community in Minnesota Gaming Revenue Allocation Ordinance (the "Ordinance") contained language[1] which prevented tribal

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1 "Anti-alienation/Spendthrift Provisions. The per capita payments made under this Ordinance are a personal benefit to the Community Members who qualify. The per capita payments are periodic payments, not a property right. The right to receive a per capita payments does not accrue or vest until the Community actually makes a payment to Community Members who qualify. Additionally, no benefit, right or interest of any Community Member under his (sic) Ordinance, including per capita payments, shall be subject to anticipation, alienation, sale, transfer, assignment pledge, encumbrance or charge, seizure, attachment or other legal, equitable, or other process. However, the restriction on transfer does not impair the ability of the community, its subdivisions or its wholly owned entities to exercise its right of setoff for loans or advances made to Community Members nor to child support payments governed under the Lower Sioux Indian Community Domestic Relations Code no to federal or state income tax liens. Nor shall this restriction prevent, impair,

members from obtaining any property rights to future per capita payments from the tribe, and therefore the right to such payments was found not to constitute a property right and was not estate property. *In re Barth*, 485 B.R. 919, 922 (2013).

As illustrated by the language of the Ordinance, the tribal payments at issue in *Barth* were subject to extensive "Anti-alientation/Spendthrift Provisions" which the court found to be the basis for finding that the right to those payments was not property of the debtor's estate. This is in stark contrast to the language contained in the allocation agreement involved here[2], which is much less expansive than the Ordinance and merely states that the Debtor has no vested rights in tribal gaming revenues until those revenues are disbursed as per capita payments. Here, the Trustee is not arguing that the Debtor has a vested interest tribal gaming revenues, she is arguing that the Debtor's right to receive regular payments from her tribe is itself an interest in property, similar to an interest in a business entity, that should be included in the Debtor's bankruptcy estate.

Additionally, because the agreements involved in *Meier*, *McDonald*, *Hutchinson*, and *Howley* involved the same tribe as the Debtor's, the language of the agreements examined by those courts would have been the same as or very similar to the language controlling here and those courts unanimously found that a debtor's rights to receive per capita distributions was property of their bankruptcy estates.

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the validity of, an assignment of per capita payments that is made by a Community Member to a financial institution, if such assignment is approved, in advance, by resolution of the Lower Sioux Community Council; and the recipient of any such approved assignment shall have the right to enforce the assignment, and to compel the Lower Sioux Indian Community to honor the terms of the assignment, in an action brought in the Court of the Lower Sioux Indian Community." *Barth* at 921-22.

2 "Nothing contained in this Code shall be construed to give any person a vested property right or interest in Band gaming revenues. All Band gaming revenues shall be held by the Band until disbursed pursuant to Band law and this Code. This Code ay be amended only through referendum or initiative vote of the Band's membership, subject to applicable law." Pokagon Band of Potawatomi Indians Gaming Revenue Allocation Plan, Section 17.

c. Tribal Sovereign Immunity

3. In re Whitaker

The court in *Whitaker* analyzed whether the filing of a bankruptcy by a member of the Lower Sioux Indian Community (the "Tribe") served to make that debtor's ongoing revenues from the Tribe available to the debtor's bankruptcy trustee for the benefit of creditors. The Bankruptcy Court held that the Tribe and Dakota Finance Corporation (named defendants in *Whitaker*) were protected by sovereign immunity and dismissed the adversaries as to those parties. That decision was affirmed on appeal by the Bankruptcy Appellate Panel of the Eighth Circuit. *In re Whitaker*, 474 B.R. 687 (2012). Although on the surface this case appears to be intertwined with the issues in the present case, the fact that *Whitaker* was determined on a tribal sovereignty basis is a major distinguishing factor. In the present case, the Trustee is seeking turnover from the Debtor only and the turnover motion therefore does not implicate sovereign immunity. That defense does not appear to be available to the Debtor as an individual despite her membership in the tribal rolls because her right to receive per capita distributions is a benefit of tribal membership but is not an action taken by her as an official representative of the tribe that would entitle her to claim sovereign immunity.

CONCLUSION

The weight of authority across the country falls on the side of including the right to receive tribal per capita payments in a debtor's bankruptcy estate. The cases finding to the contrary primarily rely upon the language of tribal codes to reach the conclusion that the right to receive these payments should be excluded from bankruptcy estates. Those cases looked at the tribal codes for the Lower Sioux Indian Community in Minnesota and the Ho-Chunk Nation which include lengthy and expansive anti-alienation ordinances that are very different from the language governing the Debtor's tribe's gaming revenue allocation plan. Additionally, all of the cases which have examined the

Potawatomi Tribe, albeit including different bands from the one the Debtor belongs to, have found that there is no language in the Potawatomi Tribal Code or Gaming Revenue Allocation Plan which precludes inclusion of the right to receive tribal per capita payments in a debtor's bankruptcy estate. Therefore, the Debtor's right to receive tribal per capita payments, although intangible, has value and should be included in her bankruptcy estate pursuant to 11 U.S.C. § 541(a).

Dated: April 16, 2021

LAPP, LIBRA, STOEBNER & PUSCH, CHARTERED

By *_/e/ Julia A. Christians_*

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

CHAPTER 7
BKY 20-42761-MER

Brenda Jo Musel,

Debtor.

UNSWORN CERTIFICATE OF SERVICE

I, Andrew J. Stoebner, declare under penalty of perjury that on April 16, 2021, I mailed copies of the attached **Supplemental Brief** by first class mail postage prepaid to each entity named below at the address stated below for each entity:

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Electronic Mail Notice List

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The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

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