

FILED

SEP 14 2004

UNITED STATES  
BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

In Re	)	Chapter 7
DAVIS CHEVROLET, INC.,	)	No. B-9/-12542-PHX-GBN
Debtor.	)	
<hr/>		
LAWRENCE J. WARFIELD, Chapter 7	)	Adversary No. 01-01314
Trustee,	)	
Plaintiff,	)	
vs.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
THE NAVAJO NATION,	)	
Defendant.	)	

The December 17, 2001 adversary complaint of Chapter 7 Trustee Lawrence J. Warfield ("trustee" or "plaintiff") seeking disallowance of two bankruptcy claims filed by the Navajo Nation ("Nation") and money damages for alleged violations of Navajo business preference and procurement law was tried to the court as a bench trial on April 6 2004. Post trial briefing was completed. An interim order was entered on September 1, 2004 announcing the court's decision.

1 The court has considered the stipulated pretrial  
2 statement of April 6, 2004, sworn witness testimony, admitted  
3 exhibits and the facts and circumstances of this case. The  
4 following findings and conclusions are now entered:

5  
6 **FINDINGS OF FACT**

7  
8 1. Plaintiff is the appointed chapter 7 trustee for  
9 the bankruptcy estate of Davis Chevrolet, Inc., ("debtor") a non-  
10 operating automobile dealership located within the boundaries of  
11 the Navajo Nation, a federally recognized Indian tribe. Debtor's  
12 September 12, 1978 articles of incorporation list Donald and Eula  
13 Davis as its sole incorporators and directors and its place of  
14 business as Tuba City, Arizona. Admitted exhibit PP at articles  
15 of incorporation. Debtor filed a voluntary chapter 11 bankruptcy  
16 petition in the United States Bankruptcy Court for the District  
17 of Arizona on September 16, 1997. The case was converted to a  
18 chapter 7 liquidation on May 15, 1998. Plaintiff was appointed  
19 trustee shortly thereafter. The Nation filed two claims against  
20 the estate, docketed as bankruptcy claims 35 and 36. Joint  
21 Pretrial Statement ("JPS") of April 6, 2004 at ¶ 82, 86 and  
22 III.A.1, p. 34: adversary docket item ("Dkt") 58.

23  
24 2. Bankruptcy claim 36 in the amount of \$ 253,283,  
25 dated April 6, 1998, is based on a \$400,000 Navajo Nation  
26 Business and Industrial Development Fund Promissory Note, signed  
27  
28

1 by Donald and Eula Davis, dated February 16, 1993. The note is  
2 secured by Business Site Lease TC-75-69 and other dealership  
3 assets. JPS at ¶ 31-33. Admitted exhibit ("Ex.") X. The address  
4 for Mr. and Mrs. Davis is listed as Davis Chevrolet, Inc. at the  
5 corporation's Tuba City, Arizona business address. Ex. X at  
6 unnumbered page 3. In applying for the loan, the Nation was  
7 provided with dealership business projections for 1993 through  
8 1995 in connection with " . . . the \$400,000 loan for Davis  
9 Chevrolet, Inc." Letter of CPA Mark Frost of February 11, 1993,  
10 Ex. SSSS; April 16, 2004 trial testimony ("test") of Phillip S.  
11 Scott.

12

13 Mr. and Mrs. Davis signed the security agreement for  
14 the loan on May 13, 1993, again using the Davis Chevrolet  
15 business address. Ex. W at last unnumbered page. The collateral  
16 was described as Business Site Lease TC-75-69 and the dealership  
17 showroom building, gas station and parts/service building,  
18 located on the leased premises. Id. at first page. No personal  
19 property of Mr. or Mrs. Davis is pledged as security. Ex. W.

20

21 The Nation approved the secured business loan by  
22 resolution EDCAP-33-93 of its Economic Development Committee on  
23 April 27, 1993. Ex. V. The resolution identified the borrowers as  
24 Donald and Eula Davis, " . . . d.b.a. Davis Chevrolet, Inc." Id.  
25 at unnumbered first page. Davis Chevrolet was described as " . .  
26 , a 100% Navajo-owned business, the first and only auto

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1 dealership located on the Navajo Nation . . . " Id. The purpose  
2 of the loan was to provide working capital to pay business  
3 creditors, including inter alia a General Motors Acceptance  
4 Corporation ("GMAC") showroom loan, pay GMAC repossession charges  
5 and provide equipment for the service department. Id. at last  
6 page. Debtor was identified as " . . . a recourse dealership  
7 under the General Motors Acceptance Corporation (GMAC) Retail  
8 Plan and is totally responsible for all unpaid balances to GMAC  
9 for repossessions . . . " Id. at first page. Loan collateral,  
10 consisting of equity in the dealership showroom building and the  
11 tribal business lease, are described as belonging to Davis  
12 Chevrolet, Inc. Id. Repayment of the loan was obviously  
13 contemplated to come from the corporation, as its past  
14 profitability and the viability of its business plan are  
15 discussed in the resolution. Ex. V at unnumbered page 2.

16  
17 The \$400,000 loan proceeds were made payable by the  
18 Nation to Davis Chevrolet, Inc. through check 448892 dated May  
19 20, 1993. Ex. PPPP at p. 2. The loan disbursement invoice listed  
20 the payment as made to Davis Chevrolet, as well. Ex. PPPP. Scott  
21 test.

22  
23 3. Bankruptcy claim 35 in the amount of \$382,899.96  
24 dated April 6, 1998, is based on a Business Site Lease arrearage.  
25 JPS at III, p.34. The lease was approved by the Bureau of Indian  
26 Affairs on June 11, 1975, between Donald Davis and the Navajo  
27  
28

1 Tribe of Indians. JPS at ¶ 1. The instrument is dated July 18,  
2 1974. Ex. A at 1. On June 5, 1990, Donald Davis submitted a  
3 notice of his intent to transfer his interest in lease TC-75-69  
4 to Davis Chevrolet, Inc. JPS at ¶ 19, Ex. K. On June 6, 1990, the  
5 Nation's Economic Development Committee approved the transfer and  
6 assignment in Resolution EDCJN-48-90. Ex. L. Nation Vice  
7 President Irving Billy approved the assignment and assumption on  
8 July 11, 1990. **Ex. K** at p. 2 of lease assignment, JPS at 19(c).  
9 Acting Bureau of Indian Affairs Area Director T.R. Tippeconnic  
10 approved the transfer on September 17, 1990. Id.

11  
12 On June 5, 1990 Davis Chevrolet collaterally assigned  
13 its interest in lease TC-75-69 to GMAC to secure a \$394,422  
14 promissory note. Ex. M. The Davis Chevrolet collateral assignment  
15 was approved respectively by Economic Development Committee  
16 Resolution on **June 6**, 1990, Ex. N: Vice President Billy on  
17 October 31, 1990, Ex. M at p. 6 and Acting Bureau of Indian  
18 Affairs Area Director Wilfred D. Frazier on November 30, 1990.  
19 Id. at P. 7. Debtor warranted it was the sole owner of the  
20 lessee's interest in lease TC-75-69. Ex. M at p, 2, ¶ 2 (a).

21  
22 4. Debtor became delinquent in lease payments prior to  
23 the 1993 \$400,000 Nation loan. On December 2, 1992 Economic  
24 Development **Committee** Resolution EDCD-112-92 approved a lease  
25 modification requested by debtor. Ex. T at ¶ 10, 11. Approval by  
26 Nation Vice President Marshall Plummer on December 11, 1992 and  
27  
28

1 by the Bureau of Indian Affairs on January 21, 1993 followed. Ex.  
2 U. The modification was made to cure debtor's delinquency of  
3 \$251,978.73 in rental payments and interest through 74 months of  
4 payments of \$3,211.37 to \$ 4, 406.16 per month. Id. at second  
5 page. Additional assistance to debtor was rendered by adjusting  
6 rental computations and waiving charges. Ex. U at p. 1.

7  
8 5. On July 30, 1985 the Nation adopted **the Navajo**  
9 Business Preference Law 5 N.N.C. § 201 *et seq.* The Act provides  
10 preference priorities to qualified Navajo owned or controlled  
11 economic entities. Sections 201 C, 204 A, *supra*. To be certified  
12 as eligible under the Act, the entity must demonstrate full  
13 compliance with all applicable requirements of Navajo Employment  
14 Preference Laws and the rules and regulations of the Nation. 5  
15 N.N.C. § 204 B. No individual, corporation or partnership is  
16 eligible to do business **with** the Nation or receive any  
17 certification or advantage under Navajo law, if previously the  
18 entity has defaulted, conducted materially deficient business  
19 practices, failed to meet a material contractual or financial  
20 obligation to the Nation or failed to materially comply with  
21 applicable laws. 12 N.N.C. § 1505 B. See *generally*, The Navajo  
22 Business and Procurement Act, 12 N.N. C. § 1501 *et seq.*

23  
24 6. On May 16, 1988, Davis Chevrolet was recertified  
25 under the Navajo Business Preference Program as a first priority,  
26 100% Navajo owned firm by the Nation's Real Estate Management  
27

1 Department. Ex. J. Controversies developed and debtor sent  
2 letters of complaint to various Nation authorities in 1986, 1987,  
3 1988 and twice in 1989 alleging unfair treatment in bidding  
4 opportunities. Ex. I. No evidence was submitted establishing how  
5 or whether debtor's complaints were addressed. JPS at ¶ 17. It is  
6 clear that debtor never sought the judicial review available in  
7 the Navajo Court system. 5 N.N.C. § 208 C. *See, Warfield v.*  
8 *Navajo Nation (In re Davis Chevrolet, Inc.)* 282 B.R. 674, 684-86  
9 (Bankr. D. Az. 2002) (Not requiring exhaustion of judicial review  
10 remedies in tribal court).

11

12 7. Debtor's April 14, 1992 application for  
13 recertification was denied on November 5, 1992 due to delinquency  
14 on its business site lease, an unresolved labor dispute and  
15 failure to provide banking information. Ex. R.

16

17 8. On August 21, 1996 debtor submitted an application  
18 seeking expedited certification as a qualified economic entity  
19 entitled to preference, in order to submit a bid to supply goods  
20 and services to the Nation on August 23, 1996. Ex. PP. The Nation  
21 granted a priority one preference effective August 22, 1996  
22 through August 21, 1997. Ex. QQ. Debtor was also granted  
23 preference priority effective February 22, 1997 through February  
24 21, 1998, Ex. WW. Plaintiff complains that notwithstanding the  
25 preference certifications, debtor did not obtain awards of  
26 business opportunities including fleet purchases of vehicles in

27

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1 November of 1997, Ex. GGGG, and February of 1998, Ex. IIII.  
2 Plaintiff complains of additional circumstances where debtor was  
3 not the successful bidder, allegedly in violation of its  
4 preference rights. Complaint of December 17, 2001 at second cause  
5 of action. Dkt. 1.

6  
7 9. As previously noted, debtor sent letters of  
8 complaint to various Nation authorities in 1986, 1987, 1988 and  
9 twice in 1989 alleging unfair treatment in bidding. Ex. I.  
10 However, plaintiff produced no evidence debtor complied with the  
11 protest or appeal requirements of the Navajo Business Preference  
12 Act. 5 N.N.C. § 208 B, C.

13

14 Appeals by non-Nation entities or individuals of final  
15 decisions of the Economic Development Committee can be made to  
16 the Navajo Nation Courts. Such appeals are limited to questions  
17 of law. The Committee's findings of fact are not to be disturbed,  
18 provided they are supported by credible evidence, even if  
19 reasonable minds could differ. If the Nation's Courts determine  
20 the Committee's findings are unsupported by any credible evidence  
21 or are arbitrary and capricious, the Court may remand the matter  
22 back to the Committee for rehearing or reconsideration. 5 N.N.C.  
23 § 211. Plaintiff produced no evidence it obtained a final order  
24 from the Economic Development Committee or appealed to the  
25 Nation's Courts.

26

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1           10. Defendant produced no evidence that it formally  
2 decertified debtor as an economic entity entitled to a preference  
3 in business dealings with the Nation during the relevant time  
4 periods.' Nonetheless defendant argues debtor was not entitled to  
5 a preference certification in its dealings with the Nation. An  
6 express condition of certification is that the entity demonstrate  
7 it is in full compliance with all Nation rules and regulations,  
8 as well as with the Navajo Employment Preference laws. 5 N.N.C.  
9 § 204 B. Further, defendant's fiscal law prohibits an entity  
10 from receiving any certification or advantage if it owes a valid  
11 delinquent account receivable debt to the Nation. 12 N.N.C. §  
12 1505 A. Defendant asserts the repeated failure of Davis Chevrolet  
13 to honor its financial commitments rendered it ineligible to do  
14 business with or receive preference from the Nation.

15  
16           11. Ms. Carnelia Owens, employed with the Nation for  
17 28 years in account receivables identified her May 27, 1997  
18 accounting report. Ex. AAA., Test. She testified the report  
19 calculated a \$253,283.91 delinquency in the Davis Chevrolet  
20 business site lease, even after the December 11, 1992 lease  
21 modification. She reported a \$ 13,147.12 delinquency in the  
22 \$400,000 loan and a further delinquency through a lack of filed  
23 financial statements. Her report states Mr. Davis should not  
24

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25           1Procedure for Business Regulatory Department preference  
26 certification, decertification, revocation, modification or  
27 suspension of certification and appeals are codified at 5 N.C.C.  
28 § 208 A-C.

1 seek further business or advantages from the Nation until these  
2 delinquencies are cured. Although the report is captioned as "DBA  
3 Davis Chevrolet," on occasion, it uses terminology that "Mr.  
4 Davis" owes a delinquency or is in default of his lease or loan.  
5 Ex. AAA at p.1. A similar report was made on November 6, 1997.  
6 Ex. DDD. When questioned, the witness testified that although she  
7 had handled debtor's account since 1992 or 1993, she was still  
8 treating the lease as held by Mr. Davis and was not reflecting  
9 the transfer to Davis Chevrolet in her paperwork. Test. The fact  
10 finder concludes this testimony is credible.

11

12 Frank D. Nez, Jr. testified he was the manager of the  
13 Division of Economic Development and responsible for enforcement  
14 of the preference law and Navajo business code. He identified  
15 debtor's procurement application of August 21, 1996. Ex. PP.  
16 Based on the recommendation of compliance officer Mel Sanderson,  
17 Davis Chevrolet was certified on August 22, 1996. Ex. RR, test.  
18 His division is to be informed of debts owing by applicants, as  
19 well as any deficient business practices or law violations. He  
20 recalls no such reports concerning Davis Chevrolet. He received  
21 a copy of a February 17, 1997 letter from Don Davis to the  
22 Nation's Purchasing Service Department regarding a dispute  
23 concerning a bid withdrawn by Davis Chevrolet. Ex. TT. Mr. Nez  
24 took no action on the letter, as Purchasing Services was the lead  
25 agency in the dispute. Later, Mr. Nez learned that debtor's bid  
26 for a major vehicle purchase was not considered because of

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1 disputes. He personally knows of no reason why debtor would not  
2 have been eligible as a preference bidder. Vince Bohanan of the  
3 purchasing department would be the person who would take action  
4 against Davis Chevrolet as an ineligible business. Copies of  
5 records Mr. Nez would receive concerning disputes would have been  
6 routinely destroyed by the date of his testimony. The witness had  
7 not previously seen a September 11, 1996 letter from Mr. Bohanan  
8 **advising that debtor's bid for a prospective vehicle purchase**  
9 would not be considered, because of debtor's 1994 withdrawal of  
10 a bid after the Nation's acceptance. Ex. SSS. Mr. Bohanan, as  
11 Director of the Purchasing Services Department, had the authority  
12 to make such a decision. Mr. Nez did not handle this dispute. He  
13 is not aware if debtor was denied other bid opportunities with  
14 the Nation as well. Test.

15

16 On **cross** examination the witness testified debtor's  
17 1996 application made no mention of a pending labor dispute. Ex.  
18 PP. In Mr. Nez's opinion, a labor dispute should be brought to  
19 his attention by a certification applicant. He was not aware of  
20 a labor dispute that was resolved by a December 24, 1996 decision  
21 of the Navajo Nation Labor Commission, awarding money judgments  
22 against Davis Chevrolet in favor of eight employees for violation  
23 of the Navajo Preference in Employment Act. 15 N.N.C. § 601 et.  
24 *seq.* Ex.SS. **Damages** of \$265,985.10 were ordered. JPS at ¶ 61. Had  
25 Mr. Nez known of this pending matter, he would not have certified

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27

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1 debtor as being in compliance with the Nation's law and  
2 regulations. Test.

3  
4 12. An entity owned or controlled by a non-Indian is  
5 not entitled to priority certification. See 5 N.C.C. § 204 A.  
6 (Requiring 100% to 51% Navajo ownership and control for  
7 preference priorities). Mr. Nez was unaware of allegations made  
8 by the trustee in other bankruptcy litigation that non-Navajo  
9 Marvin Hatch was in control of Davis Chevrolet and was making all  
10 significant decisions no later than January of 1996. Ex. EEEEE at  
11 p. 15, ¶ 53. *Also see* First amended complaint filed October 13,  
12 1998 in *Warfield v. General Motors Acceptance Corporation (In re*  
13 *Davis Chevrolet)* adversary no. 98-00593 dkt. 11 at p. 15, ¶ 53.  
14 Had Mr. Nez known of this allegation, it would have been a  
15 material factor in determining eligibility. If true, it would be  
16 a basis for denying certification.

17  
18 Paragraph 54 A, Id., alleging Mr. Hatch induced Mr.  
19 and Mrs. Davis to relinquish control of Davis Chevrolet, if true,  
20 would disqualify Davis Chevrolet. Paragraph 54 G, alleging a  
21 breach of fiduciary obligations, and allegations in paragraph 55  
22 that Mr. Hatch controlled Davis Chevrolet revenues, if true and  
23 if known, would also be disqualifying. Debtor's 1338 application  
24 makes no mention of these matters, nor identifies delinquent  
25 obligations owed to the Nation. Ex. EEE. If the plaintiff's  
26 allegations in adversary 98-00593 are true, Mr. Nez believes

1 debtor would have misrepresented its status as an eligible Navajo  
2 owned and controlled entity. Test.

3  
4 13. Mr. Nez testified his division was lenient in  
5 enforcement of business rules and regulations, when infractions  
6 are known. Vincent Bohanan, Director of Purchasing Services and  
7 Ray Martin, Director of Fleet Management would be the officers  
8 making the adverse agency decisions against debtor. Mel Sanderson  
9 of Mr. Nez's office would simply monitor the matters as to bid  
10 procedures. Test. The court finds this to be credible testimony.

11  
12 14. Ben R. Hatch testified he was the Davis Chevrolet  
13 Sales Manager beginning in August of 1996. His brother Marvin  
14 Hatch was a consultant for Davis Chevrolet, a business qualified  
15 to do business on Navajo Nation trust lands. The witness helped  
16 prepare debtor's 1996 application for certification as a priority  
17 bidder on Nation vehicle purchases. Ex. PP. Debtor bid on a 340-  
18 vehicle purchase by the Nation, expecting to make an average  
19 \$1500 per vehicle profit. Mr. Hatch did not attend the bidding  
20 event, but was later told the bid was rejected. Exhibit PPP is a  
21 spreadsheet reflecting bid information for participants in the  
22 340 vehicle fleet purchase. Exhibit PPP lists "Davis Chevrolet  
23 (Ford)" as the bid participant. Mr. Hatch also assisted in the  
24 preparation of the Ford bid component. The Fords were to be  
25 supplied by Ames Ford, a dealership owned by Marvin Hatch, Ben R.  
26 Hatch's brother and previous employer. Mr. Hatch reviewed a July

1 21, 1992 letter from CPA Mark Frost, calculating average per  
2 vehicle gross profit by debtor. Ex. QQQQ. Mr. Hatch is not  
3 acquainted with Mr. Frost. Mr. Hatch has participated in  
4 discussions concerning improving the fortunes of Davis Chevrolet  
5 by use of the Navajo Preference Law. Test.

6

7 15. Phillip S. Scott testified he has been the Chief  
**Financial Officer for Navajo Economic Development for 16 years.**

9 He oversaw the industrial development loan fund that made a  
10 committee-approved loan to Davis Chevrolet of \$400,000. Exhibit  
11 X is the February 16, 1993 promissory note signed by Mr. and Mrs.  
12 Davis as "borrowers" and listing "Davis Chevrolet Inc." as  
13 "borrower(s)' mailing address." Id. at last page. Exhibit W is  
14 the May 13, 1993 security agreement, also signed by Mr. and Mrs.  
15 Davis as "debtors" and again listed their mailing address as  
16 "Davis Chevrolet Inc." Id. at last page. Mr. Scott signed his  
17 concurrence on a July 24, 1996 statement that the Davis Chevrolet  
18 loan was current and that debtor had " . . . indicated how they  
19 will make payments on their Business Site Lease." Ex. NN. He  
20 understood debtor was trying to come into compliance with the  
21 Nation's preference law. Debtor was granted a preference in July  
22 of 1996. Test.

23

24 Mr. Scott recalls there were times when Davis  
25 Chevrolet was delinquent on its loan with the Nation. He cannot  
26 recall the loan delinquency dates. He does recall that the Nation

27

28

1 performed offsets on moneys owed to Davis Chevrolet due to  
2 debtor's delinquencies.' He also recalls meetings in 1995 or 1996  
3 with debtor's officers and Edward S. Richards of the Small  
4 Business Development Department regarding the delinquency. At the  
5 meeting, Marvin Hatch mainly spoke on debtor's behalf. Mr. Davis  
6 was quiet and may have been recovering from a stroke. The witness  
7 identified a July 24, 1996 letter from debtor's attorney to Mr.  
8 Richards memorializing a July 23 meeting, which included Mr.  
9 Scott. Ex. NN at attached letter. Debtor's counsel asserted in  
10 the **letter** that by making three payments in April covering  
11 periods from 1994 to 1996, debtor became current on one  
12 obligation owed the Nation. Counsel also asserted debtor was  
13 current or had overpaid on the \$400,000 loan and that the parties  
14 had agreed that debtor should receive a priority certification.<sup>3</sup>  
15 Id. Test.

16  
17 The witness did not oversee delinquencies on tribal  
18 **business leases**. He is responsible for supervising 75 employees  
19 in ten separate office sites. Test. The fact finder views Mr.  
20 Scott as a credible witness. However, his personal knowledge  
21

22  
23 <sup>2</sup>The parties stipulated that Davis continued to receive some  
24 business preference awards and that payments for such business  
were applied by the Nation towards delinquent accounts through  
and including 1988. JPS at ¶ 40.

25  
26 <sup>3</sup>The parties agree that payments on the \$400,000 loan were  
27 current in December 1995 and July 1996.. Defendant asserts that  
delinquencies on the business site lease are not included in  
28 billings on the loan. JPS at ¶ 43, 48. See e.g. Ex. HH.

1 concerning the dates that debtor was delinquent in its Nation  
2 obligations or under Nation law is unclear.

3  
4 16. In a March 6, 1997 memorandum to Compliance  
5 Officer Mel Sanderson, Vincent Bohanan as Director of Purchasing  
6 Services asserted his department was in full compliance with the  
7 Navajo Business Preference Act in regard to dealings with Davis  
8 **Chevrolet**. He **advised** that in cooperation with the Department of  
9 Justice and the Navajo Business Regulatory Department, his  
10 department had not considered any bids from debtor based on its  
11 nonperformance on a previously awarded vehicle contract. Although  
12 he could not find reference to such a circumstance within the  
13 Nation's laws, policies and procedures, his department had  
14 suspended purchasing from debtor. Given the passage of time,  
15 Director Bohanan stated he would again work with debtor, provided  
16 debtor sent a letter assuring that nonperformance would not  
17 again occur and expressing understanding that a probationary  
18 period would be imposed. Ex. XX.

19  
20 17. As previously noted, Nation accountant Carnelia  
21 Owens (Tsinajinnie) has testified she prepared a May 27, 1997  
22 accounting memorandum reporting Davis was in default of the  
23 business lease repayment plan in the amount of \$253,283.91 and  
24 \$13,147.12 on the business loan. She asserted Davis could not  
25 depend on the Nation to offset small payables due from the Nation  
26 to the business loan. Further, he must become current before



1 seeking business advantages from the Nation. Finding of fact  
2 ("finding") 11. Also see JPS at ¶ 77.

3  
4 18. In an August 25, 1997 memorandum, Ms. Genevieve  
5 Keetso-Bighorse of the Tuba City Regional Business Development  
6 Office asked the accounts receivable section of the Nation's  
7 Finance Department to provide information under the Navajo  
8 Business Procurement Act whether Davis Chevrolet was current in  
9 its obligations. The purpose of the clearance request was to  
10 determine if the Nation and the Bureau of Indian Affairs would  
11 approve an encumbrance on business site lease TC-75-69. Attorneys  
12 for Davis' accounting firm wanted to secure a promissory note for  
13 accounting fees signed by Donald Davis. Ex. BBB. No formal action  
14 or response was made to this request. JPS at ¶ 81.

15  
16  
17 19. In 1996 through 1998, Davis Chevrolet engaged in  
18 business with the Nation and its entities. In 1996 through the  
19 conversion of debtor's case to a Chapter 7 liquidation on May 15,  
20 1998, debtor attempted to solicit or submit bids for vehicle  
21 sales and service as an eligible preferred vendor. The Nation  
22 offered business opportunities in the aggregate amount of  
23 \$7,673,469.76 in 1996 through 1998 to non preference entities,  
24 including one or more non-Native American enterprises. The  
25 parties are unable to submit any additional documents  
26 establishing whether a formal or informal determination was made

1 concerning debtor's preference eligibility, other than exhibits  
2 currently in evidence. JPS at ¶ 87-90.

3  
4 20. To the extent any of the following conclusions of  
5 law should be considered findings of fact, they are hereby  
6 incorporated by reference.

7  
8 **CONCLUSIONS OF LAW**

9  
10 1. To the extent any of the above findings of fact  
11 should be considered conclusions of law, they are hereby  
12 incorporated by reference.

13  
14 2. Pursuant to 28 U.S.C. § 1334 (a)(1994), jurisdiction  
15 of debtor's bankruptcy case is vested in the United States  
16 District Court for the District of Arizona. That Court has  
17 referred all cases under Title 11 of the United States Code and  
18 all adversary proceedings arising under Title 11 or related to a  
19 bankruptcy case to this Court. 28 U.S.C. § 157 (a)(1994); Amended  
20 District Court General Order 01-15. This proceeding having been  
21 appropriately referred, this court has core bankruptcy  
22 jurisdiction to enter a final judgment regarding the trustee's  
23 objections to the Nation's claims and the trustee's complaint. 28  
24 U.S.C. § 157 (b) (2) (B), (C). See *also* JPT at ¶ I. (stipulating  
25 to jurisdiction as a core proceeding); *Warfield v. Navajo Nation*  
26 (*In re Davis Chevrolet*) 282 B.R. 674, 676-86 (Bankr.D.Az. 2002)

1 (rejecting Nation's sovereign immunity and exhaustion of tribal  
2 remedies argument).

3  
4 3. This Court's conclusions of law are reviewed de  
5 novo and its factual findings for clear error. *Hanf v. Summers*  
6 (*In re Summers*) 332 F. 3d 1240, 1242 (9<sup>th</sup> Cir. 2003). The  
7 appellate court accepts the bankruptcy court's findings, unless  
8 upon review, it is left with the definite and firm conviction  
9 that a mistake has been committed. *Ganis Credit Corp. v. Anderson*  
10 (*In re Jan Weilert RV, Inc.*) 315 F. 3d 1192, 1196 (9<sup>th</sup> Cir.)  
11 amended by 326 F.3d 1028 (9<sup>th</sup> Cir. 2003).

12  
13 4. A proof of claim filed in bankruptcy is *prima facie*  
14 valid. 11 U.S.C. § 502 (a) (1994). Federal Bankruptcy Rule 3001  
15 (c) requires a creditor to attach a writing to its claim, if the  
16 claim is based on a writing. An executed claim filed in  
17 conformity with the bankruptcy rules constitutes *prima facie*  
18 evidence of the validity and amount of the claim. Rule 3001 (f),  
19 F.R.B. P. A claim that alleges facts sufficient to support a  
20 legal liability to the claimant satisfies the creditor's initial  
21 obligation to go forward. The claim's allegations are taken as  
22 true. If the allegations set forth all necessary facts to  
23 establish a claim and are not self-contradictory, they *prima*  
24 **facie** establish the claim. Should an objection be made, the  
25 objector must produce evidence and facts to defeat the claim by  
26 probative force equal to that of the claim's allegations. *Hardin*

1 v. *Gianni (In re King Street Investments Inc.)*, 219 B.R. 848, 858  
2 (9<sup>th</sup> Cir. Bankr. 1998) (citing cases). The Court concludes that  
3 Nation bankruptcy claims 35 and 36 are properly filed and  
4 supported, as required by the Federal Bankruptcy Rules.  
5 Accordingly, they are entitled to *prima facie* validity.

6  
7 5. Plaintiff argues claim 35, alleging a business  
8 lease arrearage of \$382,899.96 is not a valid claim against the  
9 estate of this corporate debtor. Trustee first questions the July  
10 11, 1990 approval of the transfer of business site lease TC-75-69  
11 from Donald Davis to Davis Chevrolet Inc. by the Nation's Vice  
12 President, rather than its President, complaining defendant  
13 produced no evidence that the President was absent or otherwise  
14 unable to approve the transfer. Tribal law authorizes the  
15 Nation's Vice President to execute the powers and duties of the  
16 President, during the latter's **absence**. 2 N.N.C. §1005 (D).  
17 Creditor is not required to produce further evidence until  
18 objector properly rebuts the *prima facie* claim. *Hardin id.*  
19 Plaintiff produced no evidence the Nation's President was  
20 personally available to approve the transfer in 1990.

21  
22 Trustee also notes the Nation's approval of the  
23 transfer to Davis Chevrolet contemplated a new lease would be  
24 created. Debtor's former employee Mary K. Bradley testified this  
25 did not occur. Direct test. The new lease was to include the same  
26 term as the original transferred lease. Ex. K at ¶ 6. Nation

1 accountant Carnelia Owens credibly testified that, in her  
2 experience, when a business is delinquent on debts to the Tribe,  
3 it will **not** be issued a new business site lease until the  
4 accounts are brought current. Direct test. Plaintiff did not  
5 establish how, under applicable law, the parties' failure to  
6 create a new lease for the same term voids the transfer approval  
7 given to debtor. Trustee has not carried his burden on this  
8 issue. *Hardin* id.

9  
10 Trustee argues that any assignment of the lease  
11 contractually required the approval of a surety. The original  
12 lease required Donald Davis as lessee, to guarantee his  
13 performance by obtaining a \$3,000 corporate surety bond. Ex. A at  
14 p.7, ¶ 10. The surety was to consent in writing to any subsequent  
15 transfer for the assignment to be valid. Id. at ¶ 11. No evidence  
16 was submitted by any party establishing that Mr. Davis originally  
17 obtained the requisite \$3,000 surety bond in 1974, much less  
18 that there was a valid bond in place requiring a surety's consent  
19 for the 1990 transfer to Davis Chevrolet.<sup>4</sup> Objector did not  
20 establish the identity of the allegedly missing signatory,  
21 assuming one exists. Clearly the bonding is for the protection of  
22 the Nation and the United States. Id. at p. 17, ¶ 25. Just as  
23 clearly, the requirement of a surety's written consent to  
24

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25 4A surety's approval does appear on a December 11, 1992  
26 modification of Lease TC-75-69. Ex. U. The modification  
27 identifies the lessee as Davis Chevrolet, Inc., not Mr. and Mrs.  
28 Davis. See Legal Conclusion 6., *infra*.

1 transfers is to keep the protection in place for these parties.  
2 It is unclear whether the government entities waived such  
3 protections or if they were resolved in other documents not in  
4 evidence. It is sufficient to conclude the protected parties  
5 chose to approve the lease transfers, through the Nation's Vice  
6 President and the Area Director of the Bureau of Indian Affairs,  
7 without the inclusion of a surety's consent. Plaintiff presented  
8 no legal authorities establishing those parties cannot legally  
9 waive such protection in approving the transfer. Plaintiff has  
10 not carried his burden.

11

12 6. Plaintiff's additional objection is that business  
13 site lease TC-75-69 was not validly encumbered as an obligation  
14 of the debtor. Objector cites no legal authorities in support of  
15 this argument.<sup>5</sup> The security agreement is signed by Mr. and Mrs.  
16 Davis as "debtors," without indication if they are signing in  
17 their individual or corporate capacities as debtor's only  
18 officers. Ex. W at last page. Throughout the instrument, Mr. and  
19 Mrs. Davis are referred to in the singular as "debtor," except at  
20 the signature line, where they are referred to as "Debtor(s)."  
21 Their mailing address and physical location list only debtor's  
22 business location. Id. Collateral for the May 13, 1993 security  
23 agreement was the business lease, (which Mr. Davis had requested

24

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25 5The security agreement granted the Nation all the rights of  
26 a secured party under the Uniform Commercial Code of the Navajo  
27 Nation. Ex. W at ¶ III, p. 4. The secured promissory note states  
it is governed by the laws of the Navajo Nation. Ex. X at p. 2.

28

1 be transferred to Davis Chevrolet, Inc. on June 5, 1990) and the  
2 dealership buildings belonging to Davis Chevrolet, Inc. on the  
3 lease site. Ex. W at ¶ I. , Ex. K. No personal property of Mr.  
4 and Mrs. Davis was pledged as security. Ex. W, Id.

5  
6 The parties' conduct clearly indicates the corporation  
7 held the lease. A lease modification, signed by Mr. Davis on  
8 December 11, 1992, identifies the lessee as Davis Chevrolet, Inc.  
9 Ex. U. Earlier on June 5, 1990, Davis signed as president of  
10 Davis Chevrolet, Inc. a collateral assignment of debtor's  
11 interest in lease TC-75-69 as security for a corporate debt of  
12 \$394,422 owed to GMAC. Ex. M. The collateral assignment by debtor  
13 was approved by the Nation's Economic Development Committee the  
14 next day. Ex. N. Approval by the Nation's Vice President and the  
15 Bureau of Indian Affairs for the Davis Chevrolet transaction  
16 subsequently occurred. Ex. M at 6-7. When debtor became  
17 delinquent on lease payments, a restructuring agreement was  
18 created for debtor, not Mr. and Mrs. Davis individually. Ex. T.  
19 The modification request was made by the corporate debtor. Id. at  
20 ¶ 10, 11.

21  
22 Occasionally officers dealing with debtor carelessly  
23 referred to Mr. Davis, rather than his corporation in internal  
24 communications. See, e.g., Ex.AAA (Internal Nation accounting  
25 report dealing with debtor's subsequent default in restructuring  
26 payments, but reporting: "Mr. Davis is in default of his

1 repayment plan toward his delinquent Business Site lease . . . "  
2 Id. at p.1. The report itself is captioned as dealing with "Davis  
3 Chevrolet." Id. The report's author credibly testified the lease  
4 obligation was held by debtor. Cross and redirect test. of  
5 Carnelia Owens. The Court concludes plaintiff did not meet his  
6 burden in objecting to claim 35.

7  
8 7. Plaintiff's case against claim 36, an arrearage  
9 claim of \$ \$253, 283 based on a promissory note dated February  
10 16, 1993, asserts similar issues of non corporate liability. The  
11 loan is secured by *inter alia*, business site lease TC-75-69. Ex.  
12 W at ¶ I. The Nation approved a \$400,000 business loan for  
13 applicants Donald Davis and Eula Davis " . . . dba Davis  
14 Chevrolet Inc . . . " by resolution of its Economic Development  
15 Committee on April 27, 1993. Ex. V at 1. Paragraphs 5 through 10  
16 of the resolution exclusively discuss the corporation's business  
17 operations, assets, its business lease TC-75-69, its debts owing  
18 to GMAC, profitability, proposed repayment plan and use of loan  
19 proceeds to pay debtor's GMAC debt and creditors. Id. There is no  
20 discussion of Mr. & Mrs. Davis' personal assets, income or a  
21 proposed use of funds to pay their individual debts.

22  
23 The note is signed by Mr. and Mrs. Davis, with no  
24 indication either that they are married individuals, or that they  
25 are corporate officers. Ex. X at p. 3. Their mailing address is  
26 listed as the Davis Chevrolet, Inc. address. Id. While the note



1 recites it is governed by Navajo Nation law and is to be  
2 litigated in Navajo Nation courts, trustee provides no legal  
3 authorities for his argument the note is an individual obligation  
4 only of the Davis signatories. Id. at p. 2. Again there is loose  
5 language by officers in internal Nation communications suggesting  
6 Mr. Davis is the debtor. See, e.g., February 8, 1996 financial  
7 analyst memorandum: ". . . Davis has been making irregular  
8 payments . . . " Ex. II. Yet the document is titled " Davis  
9 Chevrolet Loan Payment Analysis." Id. Other documents clearly  
10 indicate the loan is a corporate liability. See, e.g., Invoice of  
11 February 22, 1996 (addressed only to Davis Chevrolet and  
12 requiring a \$5,591.78 payment). Ex. HH. Accountant Owens credibly  
13 testified the obligation was owed by Davis Chevrolet. Test. Mr.  
14 and Mrs. Davis were not presented by plaintiff as witnesses to  
15 affirm the debt was their personal obligation alone. Plaintiff  
16 has failed to meet his burden in objecting to the claim.

17  
18 8. Count two of plaintiff's complaint seeks money  
19 damages of not less than \$ 5,000,000 under the Navajo Business  
20 Preference Act and the Navajo Business and Procurement Act.  
21 ("The Acts"). Dkt. 1 at pgs. 4- 8. Generally plaintiff alleges  
22 debtor submitted bids for sales of individual and fleet vehicles  
23 and service as an eligible business under the Acts. Despite  
24 eligibility, the Nation allegedly denied business opportunities.  
25 Further, on information and belief, trustee alleges the Nation  
26 violated its own statutory law by tendering automobile rental and

27

28

1 repair service business to non-Indian enterprises, to debtor's  
2 economic detriment. Id.

3  
4 The parties attempted to resolve the litigation  
5 through extensive briefing of cross motions for partial summary  
6 judgment. At the July 28, 2003 oral argument, the court denied  
7 the cross motions, finding disputed issues of material fact.  
8 Minutes of July 28, 2003, dkt. 43. Nonetheless, it was possible  
9 to reach some conclusions. First, then as now, the trustee argued  
10 debtor was not liable for defaults in the business lease,  
11 suggesting the lease obligation was the individual responsibility  
12 of Mr. and Mrs. Davis. At the hearing, the court rejected that  
13 contention based on Navajo law prohibiting transacting business  
14 with any entity " . . . either in its present form or in any  
15 identifiable capacity as an individual, business, corporation,  
16 partnership or any other entity . . . " that defaulted on an  
17 account receivable, had a money judgment against it in favor of  
18 the Nation, had materially deficient business practices, failed  
19 to meet a material contractual or financial obligation to the  
20 Nation, failed to comply with applicable laws or engaged in  
21 illegal conduct. Navajo Business and Procurement Act at § 1505  
22 (A)-(C). 12 N.N.C. § 1505 (A)-(C). Clearly Mr. and Mrs. Davis, as  
23 the only officers and stockholders of debtor, would act in an  
24 identifiable capacity to the extent they previously engaged in  
25 the proscribed activities. Following trial, the court now  
26 additionally finds and concludes that the lease and promissory

1 note were the debts of debtor. See findings at 2-4, 11, 17-18,  
2 conclusions at 5-7.

3  
4 Second, the court was able to find at the summary  
5 judgment hearing that the Navajo Nation Labor Commission ruled  
6 that debtor violated the Navajo Preference in Employment Act and  
7 that debtor's appeal was dismissed on April 30, 1997. To be  
8 certified as eligible for any business preference, debtor must  
9 demonstrate full compliance with all applicable Navajo employment  
10 preference laws. 5 N.N.C. § 204 B. While it appeared clear debtor  
11 was in violation of the Employment Preference Act and had  
12 defaulted previously on its lease and note payments, the court  
13 could not grant summary judgment to defendant. This was because,  
14 based on the parties' evidence submittals, the court found the  
15 facts jumbled and complex, requiring an evidentiary hearing.  
16 Minutes, *Id.*

17  
18 9. Plaintiff does not propose an evidentiary standard  
19 for evaluating his damage suit against the Nation. The Navajo  
20 Business and Procurement Act, cited as jurisdiction for his  
21 complaint, provides that judicial review is limited to questions  
22 of law and that administrative findings of fact are to be  
23 sustained, provided there is some basis in the evidence for such  
24 findings. 12 N.N.C. § 1509, Complaint at ¶¶ 12, 11-17. Also see 5  
25 N.N.C. § 211 (Judicial review of decisions under the Navajo  
26 Nation Business Preference Law limited to questions of law,  
27  
28

1 administrative findings of fact will not be disturbed, provided  
2 they are supported by any credible evidence, upon which  
3 reasonable minds may differ). If, for some reason, state tort law  
4 would be applicable, the evidentiary burden would be a  
5 preponderance of the evidence. *Harvest v. Craig*, 195 Ariz. 521,  
6 990 P. 2d 1080, 1082 (Ariz. App. 1999). The stringent review  
7 standard established in the Acts invoked by plaintiff provides  
8 the appropriate legal standard. However, the court will review  
9 plaintiff's evidence under the more lenient preponderance of the  
10 evidence test as well.

11  
12           Weighing the trial evidence, the court finds itself  
13 where it was when evaluating the parties' summary judgment  
14 evidence. The facts are again jumbled and complex. Clearly there  
15 were repeated instances when the debtor, a troubled business,  
16 was in extended default in payments to the Nation under both the  
17 business lease and promissory note. Additionally, it was formally  
18 in violation of the Navajo Employment Preference Act, as found by  
19 the Nation's labor board. All these incidents formally disqualify  
20 debtor from the business preferences and opportunities for which  
21 damages are sought. Evidence failed to establish whether these  
22 periods of ineligibility corresponded with periods in which  
23 debtor was actively seeking business opportunities as a preferred  
24 business. It is likewise difficult to judge the quality of the  
25 Nation's response to debtor's bidding requests and complaints.  
26 Some of the Nation's officers, who may or may not have been in a  
27

1 position to know, could not recall a reason why debtor would be  
2 disqualified for a continued preference. Others, responsible for  
3 maintaining financial records, definitively indicated otherwise.

4  
5  
6 No clear administrative record documenting the  
7 Nation's official actions was presented. Was debtor wronged in  
8 some of the administrative decisions made by tribal officers?  
9 Possibly. Was the Nation too informal in its determinations of  
10 ineligibility? Possibly. Would the record have greatly benefited  
11 by formal invocation by debtor of its administrative and tribal  
12 judicial review rights? Undoubtedly. Did Plaintiff carry its  
13 burden of proof? Not to the satisfaction of this fact finder.  
14 Under either the stringent evidentiary burden established in the  
15 Nation's law, invoked by plaintiff or even the more generous  
16 standard of preponderance of the evidence, plaintiff did not  
17 prove his case.

18  
19 10. There is a final legal difficulty with plaintiff's  
20 liability case. He sues under the Navajo Business and Procurement  
21 Act. Complaint Id. Whether this act creates an implied private  
22 right of action is traditionally determined by a four-part test:  
23 (1) Plaintiff must belong to the class for whose special benefit  
24 the statute was created: (2) the legislature must have  
25 demonstrated an explicit or implicit intent to create a private  
26 remedy; (3) finding an implied cause of action must be consistent

1 with the underlying purpose of the statute and (4) the cause of  
2 action must not be one traditionally left to (tribal) law. *Cort*  
3 *v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087 (1975), *Stupy v.*  
4 *U.S. Postal Service*, 951 F.2d 1079, 1081 (9<sup>th</sup> Cir. 1991)  
5 (Declining to find a private right of action in employee  
6 promotion and transfer section of the Postal Reorganization Act).  
7 See also *Fisher v. City of Tucson*, 663 F.2d 861, 863-67 (9<sup>th</sup> Cir.  
8 1981) (Even though Congress intended to create federal rights on  
9 behalf of disabled individuals in the Rehabilitation Act of 1973,  
10 it did not create an implied private action right).

11

12 An evaluation of the other elements is not necessary  
13 if the court finds the legislature did not intend to create a  
14 private action right. *California v. Sierra Club*, 451 U.S. 287,  
15 298, 101 S.Ct. 1775, 1781 (1981), *Stupy*, 951 F.2d at 1081. Of the  
16 four factors, the most important by far is Congressional intent.  
17 Because the issue is one of statutory construction, it is  
18 appropriate to begin with the language of the statute itself.  
19 *East v. Bullock's Inc.*, 34 F.Supp.2d 1176, 1182 (D. Ariz. 1998)  
20 (Employee record keeping requirements of the Fair Labor Standards  
21 Act does not create a private right of action). Unless  
22 legislative intent can be inferred from the statute's language,  
23 the statutory structure or some other source, the essential  
24 predicate for implication of a private remedy does not exist.  
25 *Thompson v. Thompson*, 484 U.S. 174, 179, 108 S.Ct. 513, 516

26

27

28

1 (1988) (Parental Kidnapping Prevention Act does not provide an  
2 implied cause of action).

3  
4 The Navajo Business and Procurement Act is intended "  
5 . . . to protect the resources and financial integrity of the  
6 Navajo Nation and to promote sound governmental practices." 12  
7 N.N.C. § 1502. (Statement of 'purpose). Compliance with the Act is  
8 a condition precedent to transacting or granting any business  
9 opportunity, contract, processing any lease or considering any  
10 loan application by or from the Nation to any individual or  
11 entity other than the Nation. Id. Given this direct statement of  
12 purpose, it is clear it is the Nation itself, not debtor, for  
13 whose benefit the Act was created. This explains the stringent  
14 evidentiary standard imposed for judicial review of the Nation's  
15 administrative decisions. Cf. *First Pacific Bancorp, Inc. v.*  
16 *Helper*, 224 F. 3d 1117, 1177 (9<sup>th</sup> Cir. 2000) (Shareholders granted  
17 private accounting remedy under Federal Deposit Insurance Act  
18 when they are specifically listed as beneficiaries in the  
19 statute).

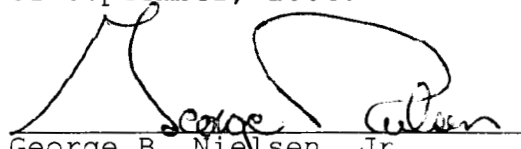
20  
21 Further, the Act is a comprehensive business  
22 regulatory scheme that provides an administrative review process,  
23 utilizing short time lines, by a hearing officer appointed by  
24 the Nation's President. § 1508. A final appeal may be taken from  
25 the hearing officer's decision to the Nation's Courts. § 1509.  
26 Appeals are limited to questions of law. The hearing officer's

1 findings are to be sustained if there is "some basis" in the  
2 evidence for such findings. Id. There is no provision for a  
3 private damage action in the statute. Given these express  
4 administrative remedies for a limited review<sup>6</sup> and expressed  
5 purpose to benefit the Nation, not contracting businesses, it  
6 would be improper to hold that the Nation's law makers intended  
7 to confer a private right of action for damages under the Act.  
8 *See* Stupy, 951 F.2d at 1082. The court concludes plaintiff has no  
9 standing to prosecute a private action under the invoked statute.

10  
11 **ORDER**  
12

13 The court finds for defendant and against plaintiff.  
14 Plaintiff's complaint and causes of action are dismissed with  
15 prejudice. A judgment will be issued forthwith. Each party will  
16 bear its own costs and fees.

17 Dated this 24<sup>th</sup> day of September, 2004.

18  
19   
20 George B. Nielsen, Jr.  
United States Bankruptcy Judge  
21  
22

23 <sup>6</sup>The presence of statutory enforcement provisions provides  
24 evidence that private means of enforcement are not intended.  
25 *First Pacific Bancorp, Inc.*, 224 F.3d at 1126, citing  
26 *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134,  
27 139-44, 105 S.Ct. 3085, 3088-91 (1985) (Statutory provisions  
allowing plan beneficiaries to bring a civil suit, but making no  
mention of a damages remedy, indicate no private damage cause of  
action was intended).



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Copies mailed this 14th day  
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