UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	:	
	:	Case No. 08-53104
GREEKTOWN HOLDINGS, LLC, *et al.*,	:	Chapter 11
	:	Jointly Administered
Debtors,	:	
----------	:	Honorable Walter Shapero
BUCHWALD CAPITAL ADVISORS, LLC, solely in its capacity as Litigation Trustee for the Greektown Litigation Trust,	:	Adv. Pro. No. 10-05712
Plaintiff,	:	
v.	:	
DIMITRIOS ("JIM") PAPAS, *et al.,*	:	
Defendants.		

RENEWED AND SUPPLEMENTED MOTION TO DISMISS OF DEFENDANTS SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND KEWADIN CASINOS GAMING AUTHORITY (SOVEREIGN IMMUNITY)

Defendants Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") and Kewadin Casinos Gaming Authority ("Kewadin Authority") (collectively the "Tribe Defendants") renew and supplement their Motion to Dismiss, filed June 28, 2010. Attempts by the parties to reach a settlement of this Adversary Proceeding have failed, and the Tribe therefore requests that its Motion to Dismiss be ruled upon by the Court (allowing time for Plaintiff to respond to this renewed and supplemented motion and time for a reply by the Tribe). This renewed and supplemented Motion is supported by the pleadings and the following Memorandum.

Dated: June 9, 2014

Respectfully submitted,

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MEMORANDUM IN OPPOSITION

I. INTRODUCTION

The Court is familiar with this Adversary Proceeding. Shortly after being sued, the Tribe moved to dismiss the claims against it on the grounds of sovereign immunity. (Corrected Memorandum in Support of Motion to Dismiss, Doc 9-1, 6/28/10) ("Tribe Motion"). Plaintiff responded and opposed the Tribe Motion and the Tribe filed a Reply. (Response and Brief in Opposition to Motion to Dismiss, Doc 56, 8/9/10; Reply to Response, Doc 69, 8/23/10). The Court heard oral argument on the Tribe Motion on December 29, 2010, but did not issue a ruling.

In 2012, Plaintiff and the Tribe reached a settlement agreement. On April 13, 2012, Plaintiff filed a Corrected Motion for Order Approving Settlement between Plaintiff and the Tribe. (Correction Motion to Approve Settlement, Bankr. Doc 3359, 4/13/12). The proposed settlement between Plaintiff and the Tribe was conditioned on a claims bar order, which bar order was objected to by Defendants Papas and Gatzaros. The District Court approved the settlement, including the claims bar order, and Papas and Gatzaros appealed. The Sixth Circuit Court of Appeals remanded the case to the District Court for further consideration of the claims bar order. Thereafter, the parties agreed to voluntary mediation before the Honorable Chief Judge Shefferly. Negotiations took place over a period of months, but ultimately, the mediation concluded without a settlement. (Mediator's Certification, Doc 449, 6/2/14).

The Tribe seeks to renew and supplement the Tribe Motion. Since the filing of the Tribe Motion, two important decisions have been rendered regarding tribal immunity. Those decisions are the subject of this renewed and supplemented Motion to Dismiss.

II. SUMMARY OF ARGUMENT

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. Oklahoma Tax Commission v. Citizen Band of Potawatomi

Indian Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112, (1991); Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct. 1700 (1998) (as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity) ("Potawatomi"); Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F.3d 917, 920-921 (6th Cir. 2009) (unless Congress abrogates a tribe's immunity, or the tribe waives its immunity, the tribe's immunity remains intact). The Tribe contends that Congress has not authorized the Adversary Proceeding filed by the Litigation Trust and the Tribe has not waived its sovereign immunity.

The key issue in this case is whether Congress abrogated the sovereign immunity of Indian tribes in 11 U.S.C. 106, which provides that sovereign immunity is abrogated as to a "governmental unit" with respect to certain sections of the Bankruptcy Code, including Sections 544 and 550 (the sections pursuant to which Plaintiff asserts fraudulent transfer claims against the defendants). It is undisputed that congressional abrogation of tribal sovereign immunity must be clear and may not be implied. Potawatomi, 498 U.S. at 509; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978) ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") ("Santa Clara"). The Sixth Circuit has held that Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention "unmistakably clear." Michigan v. The Sault Ste. Marie Tribe of Chippewa Indians, 737 F.3d 1075, 1078-79 (6th Cir. 2013), quoting Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1242 (11th Cir. 1999). The abrogation of sovereign immunity must be unequivocally expressed in the statutory text—legislative history cannot supply a waiver that is not clearly evident from the language of the statute—and any ambiguities

in the statutory language must be construed in favor of immunity. Federal Aviation Administration v. Cooper, 132 S.Ct.1441, 1448 (2012).

The Bankruptcy Code's definition of "governmental unit" does not refer to Indian tribes. Thus, the only way to conclude that Congress abrogated the sovereign immunity of Indian tribes in Section 106 is to conclude that Congress implied that Indian tribes are a domestic or foreign government, even though they have never been referred to as such by the Supreme Court. Therefore, because Congress did not make its intent to abrogate the sovereign immunity of Indian tribes unmistakably clear in the statute, and because one would have to infer that Congress intended to abrogate the sovereign immunity of Indian tribes, the Tribe's sovereign immunity remains intact, and the claims against should be dismissed.

III. IN RE WHITAKER

On July 19, 2012, the Bankruptcy Appellate Panel for the Eighth Circuit issued a decision directly on point, in In re Whitaker, 474 B.R. 687 (8th Cir. B.A.P 2012). Whitaker involved four adversary proceedings against the Lower Sioux Indian Community. The tribe contended sovereign immunity protected it from suit by the trustee. The bankruptcy court and the appellate panel agreed, concluding that Congress did not abrogate tribal immunity in 11 U.S.C. 106. The court framed the issue as follows:

> The issue here, simply put, is whether, by enacting § 106(a) of the Bankruptcy Code, Congress unequivocally expressed its intent to abrogate the sovereign immunity of Indian tribes, in explicit language, by providing for such abrogation as to 'other foreign or domestic governments.'

Whitaker, 474 B.R. at 692. In concluding that Congress did not abrogate tribal immunity in Section 106, the court agreed with and relied upon the holding in In re National Cattle Congress, 247 B.R. 259 (Bankr. N.D. Iowa 2000). The Whitaker court quoted from National Cattle Congress, where it was noted that courts have found abrogation of tribal immunity "where

Congress has included 'Indian tribes' in definitions of parties who may be sued under specific statutes." Whitaker, 474 B.R. at 691. However, where the language of a federal statute does not include "Indian tribes" in the definitions of parties subject to suit or does not specifically assert jurisdiction over "Indian tribes," "courts find the statute insufficient to express an unequivocal abrogation of tribal sovereign immunity." Id.

The Whitaker court noted that, despite the fact that Santa Clara (which reaffirmed that abrogation must be unequivocally expressed in the statutory text) was decided six months before the 1978 Bankruptcy Code was enacted: "Congress did not mention Indian tribes in the statute. Nor did it do so when it amended § 106 to clarify its intent with respect to the sovereign immunity of states following [two Supreme Court decisions] which held that former § 106(c) did not state with sufficient clarity a congressional intent to abrogate the sovereign immunity of the states and federal government." Whitaker, 474 B.R. at 693.

The Whitaker court further supported its conclusion by recognizing that, "while the Supreme Court has referred to Indian tribes as 'sovereigns,' 'nations,' and even 'distinct, independent political communities, retaining their original natural rights,' the trustees cite no case in which the Supreme Court has referred to an Indian tribe as a 'government' of any sort—domestic, foreign or otherwise." Whitaker, 474 B.R. at 695. The same applies here: Plaintiff has not cited a single Supreme Court decision that refers to Indian tribes as "governments." The Whitaker court expounded on the significance of this point:

> The apparent care taken by the Supreme Court *not* to refer to Indian tribes as 'governments' reinforces Justice Marshall's pronouncement in Cherokee Nation that Indian tribes are exceptionally unique, unlike any other form of sovereign, which is why he coined the phrase 'domestic dependent nation.' If the Supreme Court considered an Indian tribe to be a 'government,' it would not go to such great lengths to avoid saying so.

Id. (emphasis in original). The court concluded that "since the Supreme Court does not refer to Indian tribes as 'governments,' a statute which abrogates sovereign immunity as to domestic governments should not be interpreted to refer to such tribes." Id.

Finally, the Whitaker court flatly rejected the holding and reasoning of the Ninth Circuit in Krystal Energy Company v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004), cert. denied, Navajo Nation v. Krystal Energy Co., Inc., 543 U.S. 871, 125 S.Ct. 99, 160 L.Ed.2d 118 ("Krystal Energy"), the case relied upon by Plaintiff in its opposition to the Tribe Motion. The Whitaker court provided a cogent analysis of the Krystal Energy decision and concluded that the cases on which that decision were based do not support its holding. Whitaker, 474 B.R. at 993.

The Whitaker court reached the correct result. Section 106 of the Bankruptcy Code does not abrogate tribal sovereign immunity. The Tribe respectfully requests this Court follow the Whitaker decision and reach the same conclusion.

IV. BAY MILLS

On May 27, 2014, the Supreme Court rendered a decision confirming again the sovereign immunity of Indian tribes. Michigan v. Bay Mills Indian Community, 12-515, 2014 WL 2178337 (U.S. May 27, 2014) ("Bay Mills"). The Bay Mills court held:

- "As 'domestic dependent nations,' Indian tribes exercise sovereignty subject to the will of the Federal Government."
- Among the core aspects of sovereignty that tribes possess—subject to congressional action—is the common law immunity from suit traditionally enjoyed by sovereign powers.
- The Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)."
- Supreme Court decisions establish that congressional abrogation of sovereign immunity "must be clear," with tribal immunity being the "baseline position" and to abrogate such immunity, Congress must unequivocally express that purpose.

- The rule of construction (favoring sovereign immunity) "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."

- Tribes across the country, as well as entities and individuals doing business with them, have for many years relied upon Supreme Court decisions upholding tribal immunity, "negotiating their contracts and structuring their transactions against a backdrop of tribal immunity."

Although the Bay Mills decision did not involve Section 106 of the Bankruptcy Code, the Supreme Court's continued recognition of the importance of tribal sovereign immunity adds further support to the contention of the Tribe that Plaintiff's claims against it are barred by sovereign immunity and the Tribe should be dismissed from this Adversary Proceeding.

Dated: June 9, 2014

Respectfully submitted,

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