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.		

REPLY IN SUPPORT OF 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 and Kewadin Casinos Gaming Authority (collectively the "Tribe") submit this Reply in Support of their Renewed and Supplemented Motion to Dismiss.

I. Plaintiff's Resort To Legislative History and Web Pages and Other Ancillary Materials Proves That Congress Did Not Make Its Intent to Abrogate Tribal Sovereign Immunity Unmistakably Clear In the Language of the Statute

The Supreme Court has made clear—repeatedly—that a court may conclude that Congress intended to abrogate sovereign immunity only if its intention is "unmistakably clear in the language of the statute." Dellmuth v. Muth, 491 U.S. 223, 230, 109 S. Ct. 2397, 2401, 105 L. Ed. 2d 181 (1989). Evidence of congressional intent "must be both unequivocal and textual."

Id. In other words, Congress' intent to abrogate the sovereign immunity of Indian tribes in any statute must be unmistakably clear in the language of the statute. Id. ("If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile.."); United States v. Nordic Vill. Inc., 503 U.S. 30, 37, 112 S. Ct. 1011, 1016, 117 L. Ed. 2d 181 (1992) ("If clarity does not exist [in the language of the statute], it cannot be supplied by a committee report.").

Plaintiff Buchwald Capital Advisors LLC's Response Brief demonstrates quite clearly why the Tribe's Motion to Dismiss should be granted. In arguing that Congress intended to include Indian tribes in the definition of a "governmental unit," Buchwald cannot rely upon the language of the statute itself, but rather is forced to resort to legislative history[1], the Bureau of Indian Affairs website (which refers to "tribal governments"), a statement on American Indian Policy by the Reagan administration (which refers to "tribal governments"), a statement by the George H.W. Bush administration (which refers to "tribal governments"), and a publication from the National Congress of Indian Nations (which refers to "tribal governments").

What is clear from the attachments to Buchwald's Response Brief is that self-governing Indian tribes are commonly distinguished from foreign nations and state governments and are most often referred to as "tribal governments." Indeed, Congress has in numerous statutes used the very same language—"tribal governments"—when referring to Indian tribes. See e.g. 2 U.S.C.A. § 1552 (relating to the impact of federal mandates "on State, local, tribal, and Federal

[1] The legislative history of 11 U.S.C. 101(27) and 106 actually supports the Tribe's argument that Congress did not intend to abrogate the sovereign immunity of Indian tribes. In re Whitaker 474 B.R. 687, 693 (B.A.P. 8th Cir. 2012) (noting that, "[w]hile resort to legislative history should not be needed to conclude that a statute explicitly abrogates immunity," "the House Report for the Bankruptcy Reform Act of 1994 refers specifically to the sovereign immunity of the 'States and Federal Government,' neither of which could even remotely be interpreted to include Indian tribes.").

government objectives and responsibilities"); 25 U.S.C.A. § 4301 (recognizing that "the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes).

Yet, in the statute at issue, which Buchwald claims abrogates tribal sovereign immunity, the statute does not mention tribal governments. Thus, it is hard to understand how a bunch of attachments which use the term "tribal governments" demonstrates that Congress unequivocally evidenced its intent to abrogate tribal sovereign immunity in a statute which makes no mention of tribal governments (or Indian tribes or tribal immunity for that matter).

II. The Supreme Court Has Never Referred to Indian Tribes As Domestic Governments

It remains true today, as it did when the Tribe filed its Motion to Dismiss in 2010, that the Supreme Court has never referred to Indian tribes as a domestic government. Buchwald's response brief states that, "in the United States Supreme Court's most recent pronouncement on Indian sovereign immunity, Justice Sotomayor specifically refers to both States and Tribes as 'domestic governments.'" (Response Brief, pg. 10). But this suggestion is misplaced for several reasons. First, the Supreme Court's decision in Bay Mills, which is binding precedent, states: "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (citations omitted). The Supreme Court's decision makes no reference to Indian tribes being "domestic governments." Second, while Justice Sotomayor did use that term in her concurring opinion, the Supreme Court and the Sixth Circuit Court of Appeals have made clear that a statement contained in a concurrence is **not** binding precedent. Maryland v. Wilson, 519 U.S. 408, 413, 117 S. Ct. 882, 885, 137 L. Ed. 2d 41 (1997); Ayers v. Hudson, 623 F.3d 301, 308 (6th Cir. 2010). Finally, it is

hard to understand how Congress would have understood Indian tribes to be domestic governments in 1978 (when the statute was first passed) or 1994 (when the statute was amended) based on a statement made in a concurring opinion issued in 2014.

III. Indian Tribes Are Not A Commonwealth or Territory Under 11 U.S.C. 101(27)

Buchwald suggests that Indian tribes are perhaps a Commonwealth or Territory, thus bringing them within the definition of a "governmental unit" under 11 U.S.C. 101(27). But, this suggestion requires much more than judicial interpretation (which in itself would defeat the argument that the words of the statute are unmistakably clear)—it would require a complete retreat from common sense. The term "governmental unit" in 11 U.S.C. 101(27) means the "United States; State; Commonwealth, District; Territory; municipality; foreign state." The use of the term "Commonwealth" is necessary because there are four "states" that refer to themselves as a "Commonwealth." District is necessary to include the District of Columbia. And the term "Territory" is used because there are Territories of the United States, e.g., the U.S. Virgin Islands and Guam. 48 U.S.C.A. § 1541 (The Virgin Islands are declared an unincorporated territory of the United States of America); 48 U.S.C.A. § 1421a (Guam is declared to be an unincorporated territory of the United States).

Again, Buchwald's argument only serves to prove the Tribe's point. By having to resort to definitions in a dictionary—none of which mention Indian tribes—to try to suggest that Congress intended Indian tribes to be included in the definition of **both** a Commonwealth and a Territory, Buchwald demonstrates that the language of the statute is anything but unmistakably clear.[2]

[2] Indeed, the fact that, according to Buchwald, an Indian tribe may be **both** a Commonwealth and a Territory further illustrates the problems with Buchwald's argument. One would think that if it was "unmistakably clear" that an Indian tribe was a Commonwealth, it would be "unmistakably clear" that an Indian tribe is not also a Territory.

IV. The Tribe Has Not Manufactured an Ambiguity in the Statute

Buchwald suggests that the Tribe has attempted to manufacture an ambiguity in the statute. But, the ambiguity exists because (a) Indian tribes are extremely unique entities that are generally considered to be "tribal governments," not a "domestic government," and (b) recognizing this, Congress chose not to include Indian tribes or tribal governments in the definition of a "governmental unit." Just a few months before Congress passed the Bankruptcy Act, the Supreme Court reminded all that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.' " U. S. v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086, 55 L. Ed. 2d 303 (1978) (citation omitted) (emphasis added). Yet, recognizing and understanding that Indian tribes are unique entities and that Congress had on many prior occasions used the term "Indian tribe" or "tribal government" in other statutes when referring to tribes, Congress in the Bankruptcy Act chose not to use either term. The failure to do so at a minimum creates an ambiguity as to whether Congress intended to include Indian tribes in the definition of a "governmental unit." This ambiguity was not created or manufactured by the Tribe, but rather by Congress' failure to make unmistakably clear its intent to abrogate the sovereign immunity of Indian tribes in the Bankruptcy Act.

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Respectfully submitted,

By: */s/ David A. Lerner*

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