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Michael St. Patrick Baxter, as Chapter 11 trustee (“**Trustee**”) for Money Centers of America, Inc. (“**MCA**”) and Check Holdings, LLC (“**Check Holdings**” and, together with MCA, “**Debtors**”), submits this memorandum of law in opposition to the *Motion to Dismiss* filed by Thunderbird Entertainment Center, Inc. (“**Defendant**”) [Adv. Dkt. #5] (“**Motion to Dismiss**”) based on sovereign immunity.

I. Introduction

In its Motion to Dismiss, Defendant states that it is a corporation wholly owned and chartered by the Absentee-Shawnee Tribe of Oklahoma (“**ASTO**”), a federally recognized Indian Tribe. (Defendant Br. at 2). By this admission, Defendant acknowledges that it is *not* a “governmental unit,” and thus, lacks sovereign immunity. Even if the Defendant is a “governmental unit,” its sovereign immunity is abrogated by Section 106 of the Bankruptcy Code.

First, there is a threshold question of whether the Defendant is a sovereign covered by the doctrine of sovereign immunity, which cannot be resolved on a motion to dismiss. If the Defendant is not a sovereign, the Court need not reach the issue of abrogation of immunity. The Defendant is a corporation that manages ASTO’s casino gaming operations. (Defendant Br., Ex. A). It is not a tribal government. Tribal sovereign immunity only extends to subdivisions of a tribe if the “relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe’s immunity.” *In re Whitaker*, 474 B.R. 687, 696 (B.A.P. 8th Cir. 2012) (“**Whitaker**”). This determination involves a number of factual inquiries into the structure and management of the tribal entity. The Defendant’s purported entitlement to immunity depends on such

facts, which Defendant will have the burden of proving at trial. They cannot be assumed true on a motion to dismiss.

Second, assuming, *arguendo*, that tribal sovereign immunity applies to the Defendant, its Motion to Dismiss still must be denied because the Bankruptcy Code expressly abrogates any such immunity. Section 106(a) of the Bankruptcy Code broadly abrogates the sovereign immunity of any “governmental unit.” Section 101(27), in turn, defines “governmental unit” to include every conceivable type of governmental entity, both foreign and domestic, including at the federal, state and municipal level. *See* 11 U.S.C. §§ 101(27) and 106(a). The “governmental units” as to which immunity is abrogated include a “State; Commonwealth; District; Territory; municipality; foreign state; department, [or] agency,” as well as any “*other foreign or domestic government*.” 11 U.S.C. § 101(27) (emphasis added). The term “other . . . domestic government” clearly encompasses Indian tribes, which the Supreme Court has referred to as “*domestic dependent nations that exercise inherent sovereign authority*.” *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030 (2014) (emphasis added, citations omitted) (“**Bay Mills**”); *see also id.* at 2041-42 (“Tribes are domestic governments”) (Sotomayor, J., concurring). Recognizing this, the majority of courts, including the only Court of Appeals to address the issue, have held that Indian tribes are among the “governmental units” whose sovereign immunity is abrogated by Section 106 of the Bankruptcy Code. *See, e.g., Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004), *cert. denied*, *Navajo Nation v. Krystal Energy Co., Inc.*, 543 U.S. 871 (2004) (“**Krystal**”).

In sum, the Defendant either lacks sovereign immunity, or its immunity has been abrogated. Either way, its Motion to Dismiss must be denied.

II. Background

On March 21, 2016, the Trustee initiated the above-captioned adversary proceeding by filing a complaint (“**Complaint**”) [Adv. Dkt. #1] against the Defendant seeking to avoid and recover no less than \$220,633.80 in transfers pursuant to Sections 547, 548, and 550 of the Bankruptcy Code and to disallow Defendant’s claims pursuant to Section 502 of the Bankruptcy Code.

On May 5, 2016, Defendant filed the Motion to Dismiss [Adv. Dkt. #5] seeking to dismiss the Complaint on the grounds that it is entitled to sovereign immunity.

III. Argument

A. Defendant’s Motion Must Be Denied Because It Is Based on Facts Beyond the Pleadings, Which Defendant Will Have the Burden of Proving at Trial.

The Motion to Dismiss must be denied because it depends on purported facts that are not contained in the pleadings and which the Defendant must prove at trial.

Contrary to the Defendant’s assertion, sovereign immunity is an affirmative defense — not an issue of subject matter jurisdiction. *See Christy v. Pennsylvania Turnpike Comm’n*, 54 F.3d 1140, 1144 (3d Cir. 1995); (“[Sovereign] immunity. . . does not implicate federal subject matter jurisdiction” but “should be treated as an affirmative defense.”); *Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999) (sovereign immunity “is an affirmative defense and the burden is thus on the DA’s Office to establish its immunity from suit”). “(A) court cannot consider an affirmative defense on a motion to dismiss,” unless the “defense appears on the face of the complaint.” *See OHC Liquidation Trust v. Credit Suisse First Boston (In re Oakwood Homes Corp.)*, 340 B.R. 510, 536 (Bankr. D. Del. 2006) *citing Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001).

The Defendant's sovereign immunity defense is based on facts that are *not* alleged in the Complaint and that the Defendant will need to prove at trial. The defense thus cannot be resolved on a motion to dismiss.

Specifically, the Defendant asserts that it is a corporation wholly owned and chartered by ASTO. (Defendant Br. at 2). The Trustee does not dispute that ASTO qualifies for sovereign immunity (absent abrogation of such immunity under Section 106 and/or waiver). However, that does not resolve whether the Defendant, a wholly owned corporation of ASTO, also qualifies.

Tribal sovereign immunity may extend to subdivisions of a tribe, "including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity." *See Whitaker*, 474 B.R. at 696; *Breakthrough Mgmt. Group v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). The "most commonly accepted test" for determining whether the relationship between a tribe and an economic subdivision is "sufficiently close" for purposes of extending sovereign immunity to the subdivision is the "subordinate economic entity test." *Whitaker*, 474 B.R. at 697; *Breakthrough Mgmt. Group*, 629 F.3d at 1187. In applying that test, courts look to the following factors:

- 1) The method of creation of the economic subdivision;
- 2) The purpose of the economic subdivision;
- 3) The structure, ownership, and management of the economic subdivision, including the amount of control the tribe has over it;
- 4) The tribe's intent with respect to sharing its sovereign immunity;
- 5) The financial relationship between the tribe and the economic subdivision;
- 6) The policies underlying tribal sovereign immunity, and whether these policies are served by extending such immunity to the economic subdivision.

Id.

These issues are obviously factual. There is no basis in the pleadings for the Court to conclude that the factual predicates for extending ASTO's immunity to the Defendant are satisfied. Instead, the Defendant has the burden of proving them at trial. *See Carter*, 181 F.3d at 347. Accordingly, the Motion to Dismiss should be denied. *See, e.g., Posen Construction, Inc. v. Lee Cty.*, 921 F. Supp. 2d 1350, 1359 (M.D. Fla. 2013) (application of sovereign immunity to purported subdivision of sovereign entity could not be resolved on motion to dismiss where motion was based on unresolved facts).

B. Congress Has Abrogated any Applicable Tribal Sovereign Immunity.

Even assuming *arguendo* that ASTO's sovereign immunity extends to the Defendant, Congress has clearly and unequivocally abrogated tribal sovereign immunity with respect to the counterclaims at issue here by enacting Section 106 of the Bankruptcy Code.

Section 106(a) abrogates sovereign immunity for any "governmental unit" with respect to a wide variety of actions under the Bankruptcy Code, including preference and fraudulent transfer claims. 11 U.S.C. § 106(a)(1). Section 101(27), in turn, defines "governmental unit" broadly to include entities that exercise sovereign authority like the United States; a state; a commonwealth; a municipality; a territory; a foreign government; or any department, agency, or instrumentality of such entities. Section 101(27) then includes a final catch-all for any "other foreign or domestic government." 11 U.S.C. § 101(27). The inclusion of this broad catch-all makes abundantly clear that *any* foreign or domestic entity exercising sovereign authority counts as a "governmental unit" under the Bankruptcy Code.

As noted above, the Supreme Court has specifically described Indian tribes as “domestic dependent nations that exercise inherent sovereign authority.” *Bay Mills*, 134 S.Ct. at 2030. (emphasis added and citations omitted). That leaves no doubt that tribes are a kind of “domestic government” under Section 101(27). Indeed, Justice Sotomayor said precisely that in her concurrence in *Bay Mills*, explaining flatly that “Tribes are domestic governments.” *Id.* at 2041-42. As Indian tribes are domestic governments, they unambiguously are “other . . . domestic governments” within the meaning of 11 U.S.C. § 101(27).

While abrogation of sovereign immunity “requires an unmistakable statutory expression of congressional intent . . . Congress need not state its intent in any particular way.” *F.A.A. v. Cooper*, 132 S.Ct. 1441, 1448 (2012) (“*Cooper*”). The Supreme Court has “never required that Congress use magic words” of abrogation. *Id.* “To the contrary, [the Court has] observed that the sovereign immunity canon ‘is a tool for interpreting the law’ and it does not displace the other traditional tools of statutory construction.” *Id.* (citing *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)). It is only necessary “that the scope of Congress’ waiver be clearly discernable from the statutory text in light of traditional interpretive tools.” *Cooper*, 132 S.Ct. at 1448.

By defining “governmental unit” to include any “other foreign or domestic government” in addition to the governmental entities specifically listed in the statute, Congress clearly expressed its intent in the Bankruptcy Code that the term cover *any* entity exercising sovereign authority. That includes Indian tribes. *See Bay Mills*, 134 S.Ct. at 2030 (tribes are “domestic dependent nations that exercise inherent sovereign authority”) (citations omitted). While Congress has used the term “Indian tribe” in other

statutes addressing jurisdiction over Indian tribes (*see, e.g., Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989)), there simply is no requirement that such “magic words” be used where, as here, Congress’ intent is otherwise clear.

Against this backdrop, the majority of courts, including the only Court of Appeals to address the issue, have held that Sections 106(a) and 101(27) of the Bankruptcy Code clearly and unequivocally abrogate tribal sovereign immunity.

In *Krystal*, recognized as the “leading” case on this issue,² the Ninth Circuit held it to be clear from the face of Sections 106(a) and 101(27) that Congress intended to abrogate “the sovereign immunity of *all* ‘foreign and domestic governments.’” 357 F.3d at 1057 (emphasis in original). The Ninth Circuit correctly recognized that “the Supreme Court’s decisions do not require Congress to utter the magic words ‘Indian tribes’ when abrogating tribal sovereign immunity.” *Krystal*, 357 F.3d at 1061, *citing Cooper*, 132 S.Ct. at 1448. The court noted that “Indian tribes are certainly governments” and “logically” must be either foreign or domestic because there is “no other form of government outside” of that “dichotomy.” *Krystal*, 357 F.3d at 1057. The Ninth Circuit further observed that the Supreme Court has specifically recognized Indian tribes as “‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories” and that an Indian tribe was simply a “specific member of the group of domestic governments, the immunity of which Congress intended to abrogate.” *Id.* at 1058, *citing Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). The court explained that Congress had legislated

² See *Whitaker*, 474 B.R. at 693.

“against the back-drop of [these] prior Supreme Court decisions, which do define Indian tribes as domestic nations, *i.e.*, governments, as well as against the ordinary, all-encompassing meaning of the term “other foreign or domestic governments.” *Id.* at 1059. The court concluded that simple logic thus dictates that Congress abrogated immunity for Indian tribes: “Congress explicitly abrogated the immunity of any ‘foreign or domestic government.’ Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes.” *Id.* at 1058.

The Ninth Circuit in *Krystal* rejected the notion that the absence of the word “Indian tribes” in Section 101(27) means that Congress did not intend to include tribes as governmental units. *Id.* Because Indian tribes clearly are “domestic governments,” there was no need for Congress to list Indian tribes as a specific instance of all “foreign and domestic governments” as to which immunity was abrogated — just as there was no need for Congress to specifically list “Wyoming” as one of the states for which immunity was abrogated. *Id.*

A majority of other courts addressing the issue have similarly held that Sections 101(27) and 106(a) clearly and unequivocally abrogate tribal sovereign immunity. *See In re Russell*, 293 B.R. 34, 44 (D. Ariz. 2003) (Section 106(a) “unequivocally” abrogates tribal sovereign immunity) (“*Russell*”); *In re Platinum Oil Props., LLC*, 465 B.R. 621, 644 n. 18 (Bankr. D.N.M. 2011) (Section 106(a) expressly abrogates tribal sovereign immunity); *In re Davis Chevrolet, Inc.*, 282 B.R. 674, 683 n. 5 (Bankr. D. Ariz. 2002) (“It seems to this court that ‘other domestic government’ is broad enough to encompass Indian tribes”); *In re Vianese*, 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995) (Section 106(a) abrogates the sovereign immunity of Indian tribes because Indian nations “are

considered ‘domestic dependent nations’ and as such comprise ‘governmental units’ within the meaning of Code § 106(a)’).

The *Collier* treatise likewise concludes that Indian tribes are “governmental units” whose immunity is abrogated by the Bankruptcy Code because they are a form of “other . . . domestic government.” *Collier* explains that “[t]he use of the catch-all phrase, ‘or other foreign or domestic government’ has been read as meaning that ‘all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered ‘governmental units’ for the purpose of the Bankruptcy Code.’ Thus, Indian tribes are governmental units because they are domestic governments.” 2 *Collier on Bankruptcy* ¶ 101.27 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016) (emphasis added, citations omitted); *see also id.* ¶ 106.04 (“Section 106(a) provides that 59 specified provisions of title 11 are applicable to federal, state, local and foreign governments, *including Indian Tribes*”) (emphasis added, citations omitted); *accord In re Mayes*, 294 B.R. 145, 159-60 (10th Cir. B.A.P. 2003) (McFeeley, J., dissenting) (“The fact that Indian tribes have been referred to as ‘domestic dependent nations’ incorporates them into § 106(a). If an Indian tribe is a ‘domestic dependent nation’ then it is also an ‘other . . . domestic government.’”).

These authorities echo the Ninth Circuit’s recognition in *Krystal* that the words “other . . . domestic government” in Section 101(27) unequivocally apply to Indian tribes. The court in *Russell* indeed noted that there is no other plausible construction of that phrase. *Russell*, 293 B.R. at 41. The court explained that “other . . . domestic government” necessarily must refer to Indian tribes because there is nothing else to which the phrase *could* plausibly refer. *Id.* In the court’s words: “[S]ince the meaning of ‘or

other foreign or domestic government’ cannot include the United States, or a State, Commonwealth, Territory or District, or a municipality, or a foreign state, or an agency, department or instrumentality of any of them, because they are all expressly mentioned, it is difficult if not impossible to come up with any possible meaning for ‘other domestic government’ except Indian tribes. Without another reasonable plausible alternative meaning, the abrogation of sovereign immunity as to all domestic governments is not equivocal. It could hardly be more absolute.” *Id.*

The contrary cases on which the Defendant relies reflect a poorly-reasoned minority view that gives short shrift to the critical facts that (a) no specific “magic words of abrogation” are required to abrogate sovereign immunity; (b) Section 101(27) defines “governmental unit” broadly to include any “other foreign or domestic government;” and (c) Indian tribes have long been recognized by the Supreme Court as “domestic dependent nations that exercise inherent sovereign authority,” *i.e.*, as a kind of domestic government. *See Bay Mills*, 134 S.Ct. at 2030. None of the cases cited by the Defendant coherently explains why an Indian tribe, which indisputably exercises sovereign authority within the borders of the United States, is not an “other . . . domestic government” within the plain meaning of Section 101(27).

Indeed, the court in *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, upon which the Defendant relies, expressly acknowledges that an Indian tribe is both “domestic” and a “government.” 532 B.R. 680, 697 (D. Mich. 2015). Yet it somehow concludes that a tribe nonetheless does not qualify as a “domestic government” under Section 101(27). *Id.* That conclusion makes no sense. If an entity is both “domestic” and a “government,” then it unambiguously is a “domestic government”

under any plausible construction of those words. There is nothing about Indian tribes that requires abandoning the most basic rule of statutory construction that a statute must be interpreted in accordance with its plain meaning.

In short, if the Defendant is indeed a “governmental unit” covered by sovereign immunity, then it is also part of a “domestic government” whose sovereign immunity has been abrogated pursuant to the unambiguous words of Bankruptcy Code Section 106(a). Accordingly, the Motion to Dismiss based on sovereign immunity should be denied.

Conclusion

For the foregoing reasons, the Defendant’s Motion to Dismiss should be denied.

Dated: May 20, 2016

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