UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: MONEY CENTERS OF AMERICA, INC., *et al.*, Debtors.	Bankruptcy Case No. 14-10603 (CSS)
MARIA APRILE SAWCZUK, as Trustee of the Liquidating Trust of Money Centers of America, Inc. and Check Holdings LLC, Appellant, v. THUNDERBIRD ENTERTAINMENT CENTER, INC., et al., Appellees.	Civil Action No. 17-319-RGA

APPELLANT'S OPENING BRIEF

GOLDSTEIN & McCLINTOCK LLLP
Maria Aprile Sawczuk (No. 3320)
1201 N. Orange Street, Suite 7380
Wilmington, Delaware 19801
Telephone: (302) 444-6710

GOLDSTEIN & McCLINTOCK, LLLP
Robert Michaels
111 West Washington St., Suite 1221
Chicago, Illinois 60602
Telephone: (312) 219-6741

Counsel for Appellant

Dated: June 23, 2017

TABLE OF CONTENTS

Page

I. Introduction 1

II. Factual Background and Nature and Stage of Proceedings 2

III. Argument 5

A. Standard of Review 5

B. Congress Has Abrogated any Applicable Tribal Sovereign Immunity 6

C. Quapaw Fully Waived Any Sovereign Immunity by Filing its Adversary Complaint and Proof of Claim. 12

Conclusion 16

TABLE OF AUTHORITIES

Page(s)

Cases

995 Fifth Ave. Assoc., L.P. v. NY State Dept. of Taxation and Fin. (*In re 995 Fifth Avenue Assoc., L.P.),*
963 F.2d 503 (2d Cir. 1992).....14, 16

Arecibo Cmty. Health Care, Inc. v. Commonwealth of Puerto Rico,
270 F.3d 17 (1st Cir. 2001).....12, 14, 15, 16

Bank of NY v. Epic Resorts – Palm Springs Marquis Villas, LLC (In re Epic Capital Corp.),
307 B.R. 767 (D. Del. 2004) 5

Berrey v. Asarco Inc.,
439 F.3d 636 (10th Cir. 2006) 15

Bucher v. Dakota Fin. Corp. (In re Whitaker),
474 B.R. 687 (B.A.P. 8th Cir. 2012)…….....9, 11

Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC),
532 B.R. 680 (D. Mich. 2015) 9, 11

College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999).....14

F.A.A. v. Cooper,
566 U.S. 284, 132 S.Ct. 1441 (2012).....2, 6, 11

Gardner v. New Jersey,
329 U.S. 565 (1947).....16

Int'l Fin. Corp. v. Kaiser Group Int'l Inc. (In re Kaiser Group Int'l, Inc.),
399 F.3d 558 (3d Cir. 2005).....12, 13, 16

Jicarilla Apache Tribe v. Andrus,
687 F.2d 1324 (10th Cir. 1982) 15

Krystal Energy Co. v. Navajo Nation,
357 F.3d 1055 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004).....7, 10, 11

Lazar v. State of Calif. (In re Lazar),
237 F.3d 967 (9th Cir. 2001) 14, 16

Michigan v. Bay Mills Indian Cmty.,
134 S.Ct. 2024 (2014).....7, 9

In re Platinum Oil Props., LLC,
465 B.R. 621 (Bankr. D.N.M. 2011) 8

Russell v. Fort McDowell Yavapai Nation (In re Russell),
293 B.R. 34 (D. Ariz. 2003).....8, 11

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978). 6, 11

Schlossberg v. Maryland (In re Creative Goldsmiths of Washington D.C., Inc.),
119 F.3d 1140 (4th Cir. 1997) 14

Steinberg v. IL Dept. of Mental Health and Developmental Disabilities (In re Klingberg Schools),
68 B.R. 173 (N.D. Ill. 1986) 14

Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.,
292 F.3d 384 (3d Cir. 2002). 13

TRW Inc. v. Andrews,
534 U.S. 19 (2001). 8, 11

Turning Stone Casino v. Vianese (In re Vianese),
195 B.R. 572 (Bankr. N.D.N.Y. 1995) 8

Univ. Med. Ctr. v. Sullivan (In re Univ. Med.Ctr.),
973 F.2d 1065 (3d Cir. 1992).....12

Warfield v. Navajo Nation (*In re Davis Chevrolet, Inc.*),
282 B.R. 674 (Bankr. D. Ariz. 2002) 8

WJM, Inc. v. Massachusetts Dept. of Pub. Welfare,
840 F.2d 996 (1st Cir. 1988).....13

Wyo. Dep't of Transp. v. Straight (In re Straight),
143 F.3d 1387 (10th Cir. 1998), *cert. denied*, 525 U.S. 982 (1988).....12, 14, 15, 16

Statutes

11 U.S.C. § 101(27) ..... *passim*

11 U.S.C. § 106.....1, 8, 9

11 U.S.C. § 106(a) ..... *passim*

11 U.S.C. § 106(b) ..... *passim*

11 U.S.C. § 502(d) 14

Other Authorities

2 *Collier on Bankruptcy* ¶ 101.27 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016) 8

Fed. R. Civ. P. 13(a) 13

Maria Aprile Sawczuk ("*Trustee*"), solely in her capacity as Trustee of the Liquidating Trust of Money Centers of America, Inc. ("*MCA*") and Check Holdings LLC ("*Check Holdings*"), submits this brief in support of her appeal of the opinion of the United States Bankruptcy Court for the District of Delaware ("*Bankruptcy Court*") dated February 28, 2017. That opinion granted a motion to dismiss the Trustee's clam to avoid and recover preferential transfers from Appellee Thunderbird Entertainment Center, Inc. ("*Thunderbird*") and granted in part a motion to dismiss the Trustee's counterclaim to avoid and recover preferential transfers from Appellee Quapaw Casino Authority ("*Quapaw*"), both on the ground that Appellees enjoy sovereign immunity from suit. As explained below, the Bankruptcy Court's opinion is incorrect as a matter of law and should be reversed.

Introduction

Appellees try to have it both ways. They claim to be subdivisions of Indian tribal governments entitled to sovereign immunity but deny they are covered by the broad abrogation of sovereign immunity for all "governmental units" in Section 106 of the Bankruptcy Code (11 U.S.C. § 106(a)). The Bankruptcy Court agreed, holding that the Code's definition of "governmental unit" (in 11 U.S.C. § 101(27)) – which covers the United States, states, municipalities, foreign states, and any "other foreign or domestic government" – does not reach Appellees because it does not use the words "Indian tribes." *See* Opinion (Quapaw Adv. D.I. 114) at 22-27.[1]

[1] "Quapaw Adv. D.I." refers to docket entries in Bankruptcy Adversary Case No. 14-50737 (CSS). As used later in this brief, "Thunderbird Adv. D.I." refers to docket entries in Bankruptcy Adversary Case No. No. 16-50410 (CSS). "D.I." without additional reference refers to docket entries in the instant appeal of the Bankruptcy Court's decision.

As explained below, however, the Supreme Court has made clear that Congress need not use any special or particular language (or "magic words") to abrogate sovereign immunity; any "unmistakable statutory expression of congressional intent" is sufficient. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). Most courts to consider the issue agree that Sections 106(a) and 101(27) provide just such an "unmistakable statutory expression"; indeed, if the phrase "other foreign or domestic government" does not reach Indian tribes, it would have no meaning at all. The Bankruptcy Court, however, incorrectly followed two non-binding cases that treated the absence of the phrase "Indian tribes" as dispositive – effectively requiring the use of "magic words" despite the Supreme Court's admonition to the contrary – and never explains why the phrase "other foreign or domestic government" in the Bankruptcy Code does not encompass Indian tribes or what that phrase could mean if it did not do so.

In any event, as further explained below, even without Section 106(a), Quapaw waived any sovereign immunity by filing both an adversary case against the Check Holdings bankruptcy trustee and a proof of claim in the Check Holdings bankruptcy. And contrary to the Bankruptcy Court's ruling, that waiver is not limited to recoupment claims but instead includes the full scope of the Trustee's counterclaim.

Factual Background and Nature and Stage of Proceedings

MCA provided credit card processing equipment to casinos. When casinos advanced payment on patrons' approved credit card transactions, MCA would obtain the payment amount from credit card issuers and pay it to the casino, retaining its fee. Check Holdings, a wholly-owned subsidiary of MCA, provided casinos with automated teller machines ("*ATMs*") and cash advance transaction services. Casinos would stock the ATMs with their own cash and also use their own funds to cash patrons' checks. Check Holdings would then process those transactions

through the patrons' financial institutions, transmit the advanced amounts to the casinos while retaining its fee. *See generally* Opinion (Quapaw Adv. D.I. 114) at 7-9.

MCA's customers included Thunderbird, which claims to be a wholly-owned entity of the Absentee Shawnee Tribe of Oklahoma, a federally-recognized Indian tribe. *See* Thunderbird Adv. D.I. 5, Ex. A. Thunderbird was also a customer of Check Holdings, as was Quapaw, which claims to be "governmental subdivision of [the Quapaw Tribe of Oklahoma,] a federally recognized Indian Tribe." Quapaw Adv. D.I. 66 at 1. Check Holdings provided its services to Appellees pursuant to a series of Financial Services Agreements. *See* Opinion (Quapaw Adv. D.I. 114) at 7.

MCA filed a voluntary bankruptcy petition on March 21, 2014. On April 28, 2014, the Bankruptcy Court appointed Michael St. Patrick Baxter ("*Baxter*") as the chapter 11 trustee for MCA. Baxter caused Check Holdings, a wholly-owned subsidiary of MCA, to file a voluntary bankruptcy petition on May 23, 2014, and the Bankruptcy Court subsequently entered an order to jointly administer the two cases.

On July 7, 2014, four gaming enterprises and creditors of Check Holdings brought an adversary action against it (Adv. Case No. 14-50437), seeking to recover funds they claimed were not rightful property of the Check Holdings bankruptcy estate. On January 28, 2016, the Bankruptcy Court granted Quapaw leave to intervene as an additional plaintiff in that adversary case. Quapaw's complaint ("*Adversary Complaint*") alleges that under its Financial Services Agreement, Check Holdings was merely a "pass through" for funds collected from casino patrons' banks, making Quapaw the rightful owner of $502,018 held by the Check Holdings bankruptcy estate. *See* Adv. Compl. (Quapaw Adv. D.I. 60), ¶¶ 15-22. Quapaw also filed a proof of claim for $502,018 ("*Proof of Claim*"). *See* Quapaw Adv. D.I. 67-1.

Baxter denied Quapaw's allegations, taking the position that the Financial Services Agreement created an ordinary debtor-creditor relationship between Check Holdings and Quapaw, making the disputed amount property of the Check Holdings estate. Baxter also asserted counterclaims against Quapaw ("*Counterclaim*"), seeking to recover more than $1 million of preferential transfers paid to Quapaw during the 90 days before Check Holdings' bankruptcy filing. Baxter also sought disallowance of Quapaw's proof of claim unless the preferential transfers were returned to the estate. Counterclaim (Quapaw Adv. D.I. 64), ¶¶ 11-17.

On March 21, 2016, Baxter filed an adversary case against Thunderbird (Adv. Case No.: 16-50410 (CSS)), seeking to avoid and recover $230,633.80 in preferential transfers that MCA paid to Thunderbird during the 90 days before its bankruptcy filing. *See* Thunderbird Adv. D.I. 1.

Thunderbird moved to dismiss Baxter's adversary case and Quapaw moved to dismiss the Counterclaims. Appellees argued that certain tribal documents established their status as agencies and/or subdivisions of Indian tribes entitled to tribal sovereign immunity from suit, which, they argued, deprived the Bankruptcy Court of subject matter jurisdiction. Baxter opposed the motions, arguing: (a) sovereign immunity is an affirmative defense, not a bar to subject matter jurisdiction; (b) that meant the Bankruptcy Court could not look past the pleadings, which failed to establish that Quapaw and Thunderbird were, in fact, tribal agencies or subdivisions entitled to their affiliated tribes' sovereign immunity; (c) in any event, Congress abrogated tribal sovereign immunity in Section 106(a) of the Bankruptcy Code; and (d) Quapaw fully waived any sovereign immunity by filing its adversary complaint and proof of claim.

The Bankruptcy Court issued a combined opinion granting Thunderbird's motion to dismiss and granting Quapaw's motion to dismiss in part. *See generally* Opinion (Quapaw Adv. D.I. 114). It found that sovereign immunity is a subject matter jurisdiction issue, making it

proper to consider Appellees' evidentiary submissions, which, the Bankruptcy Court held, established their status as tribal agencies/subdivisions.[2] The Bankruptcy Court then held that Section 106(a) did not abrogate tribal sovereign immunity and that any waiver of sovereign immunity by Quapaw was limited to claims that sounded in equitable recoupment to the claims in the Quapaw Adversary Complaint. The Bankruptcy Court then found it lacked sufficient information to determine if Baxter's claims satisfied the test for equitable recoupment, but held that even if they did, his recovery could not exceed the amount of Quapaw's claim (*i.e.*, the estate could not obtain any affirmative recovery from Quapaw; it could only bring Quapaw's proof of claim/recovery on its adversary claim to zero). *Id*. at 36.

Baxter timely filed a Notice of Appeal of the Bankruptcy Court's decision. D.I. 1. On April 18, 2017, the MCA/Check Holdings Combined Plan went effective, which brought the Liquidating Trust of Money Centers of America, Inc. and Check Holdings, LLC ("*Trust*") into existence and transferred all assets of the combined estate to the Trust. Acting as Trustee of the Trust and successor-in-interest to Baxter, Maria Aprile Sawczuk filed a motion to substitute counsel in this appeal on May 17, 2017.

Argument

I. Standard of Review

This Court reviews "the Bankruptcy Court's legal conclusions under the *de novo* standard of review and its factual determinations under the clearly erroneous standard of review." *Bank of NY v. Epic Resorts – Palm Springs Marquis Villas, LLC (In re Epic Capital*

[2] Although the Trustee disagrees with the Bankruptcy Court's determination that sovereign immunity is a subject matter jurisdiction issue and that it was proper to look beyond the pleadings to establish Appellees' entitlement to sovereign immunity, the Trustee does not contest those findings on this appeal.

Corp.), 307 B.R. 767, 771 (D. Del. 2004). This appeal concerns three legal conclusions made by the Bankruptcy Court: (a) Bankruptcy Code Section 106(a) does not abrogate tribal sovereign immunity; (b) Quapaw's undisputed conduct in filing the Adversary Complaint and Proof of Claim did not waive sovereign immunity under Bankruptcy Code Section 106(b); and (c) any waiver under common law is limited to claims in recoupment. This Court should thus review the Bankruptcy Court's decision *de novo*.

II. Congress Has Abrogated any Applicable Tribal Sovereign Immunity.

Although "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . [t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59, (1978). Abrogation or "waiver of sovereign immunity cannot be implied [and] must be unequivocally expressed." *Id*. As the Supreme Court explained, however, this does not require use of any special or particular language:

> Although this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive [sovereign] immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words. To the contrary, we have observed that the sovereign immunity canon "is a tool for interpreting the law" and that it does not "displac[e] the other traditional tools of statutory construction." What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools.

F.A.A. v. Cooper, 566 U.S. 284, 291 (2012) (quoting *Richlin Sec. Serv. Co. v.* Chertoff, 553 U.S. 571, 589 (2008)).

Section 106(a) of the Bankruptcy Code provides just such an "unmistakable statutory expression of congressional intent" to waive tribal sovereign immunity. That section abrogates sovereign immunity for any "governmental unit" with respect to a wide variety of actions under

the Bankruptcy Code, including preference claims. 11 U.S.C. § 106(a)(1). Section 101(27), in turn, defines "governmental unit":

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department; agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee under this title), a State, a Commonwealth, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

The final, catch-all phrase – any "other foreign or domestic government" – unmistakably includes Indian tribes. The Supreme Court has described Indian tribes as "domestic dependent nations that exercise inherent sovereign authority" (*Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030 (2014) (internal citations omitted)), that is, a type of "domestic government." Indeed, Justice Sotomayor said precisely that in her *Bay Mills* concurrence, stating "Tribes are domestic governments." *Id.* at 2041-42. Sections 106(a) and 101(27) thus reflect unequivocal Congressional intent to abrogate tribal sovereign immunity.

The only court of appeals to address the issue agreed. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004). The Ninth Circuit explained "[i]t is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of *all* 'foreign and domestic governments." *Id*. at 1057 (emphasis in original). "Indian tribes are certainly governments," which the Supreme Court has described as "'domestic dependent nations that exercise inherent sovereign authority over their members and territories.'" *Id*. (quoting *Okla Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Consequently, "the category 'Indian tribes' is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate." *Krystal Energy*, 357 F.3d at 1058.

Most other courts addressing the issue have reached the same conclusion. *See Russell v. Fort McDowell Yavapai Nation (In re Russell),* 293 B.R. 34, 44 (D. Ariz. 2003) (Section 106(a) "unequivocally" abrogates tribal sovereign immunity); *In re Platinum Oil Props., LLC,* 465 B.R. 621, 644 n. 18 (Bankr. D. N.M. 2011) (same); *Warfield v. Navajo Nation (In re Davis Chevrolet, Inc.),* 282 B.R. 674, 683 n. 5 (Bankr. D. Ariz. 2002) ("'other domestic government' is broad enough to encompass Indian tribes"); *Turning Stone Casino v. Vianese (In re Vianese),* 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995) (Indian nations "are considered 'domestic dependent nations' and as such comprise 'governmental units' within the meaning of Code § 101(27)"). Indeed, as *Russell* explained, the phrase "other . . . domestic government" must refer to Indian tribes because there is nothing else to which it could plausibly refer:

> [T]he Nation has not suggested, either in its memoranda or at oral argument, any possible other meaning of "domestic government" that would not include Indian tribes. Indeed, since 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.

293 B.R. at 41. Consequently, reading Section 101(27) to exclude Indian tribes would violate the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc. v. Andrews,* 534 U.S. 19, 31 (2001).[3]

[3] *See also* 2 *Collier on Bankruptcy* ¶ 101.27 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016) (Indian tribes are "governmental units" whose immunity is abrogated by the Bankruptcy Code because they are a form of "other . . . domestic government").

The Bankruptcy Court rejected this approach in favor of two cases – *Bucher v. Dakota Fin. Corp. (In re Whitaker),* 474 B.R. 687 (B.A.P. 8th Cir. 2012) and *Buchwald Cap. Advisors, LLC v. Papas (In re Greektown Holdings, LLC),* 532 B.R. 680, 697 (D. Mich. 2015) ("*Greektown*") – that found Sections 106 and 101(27) insufficiently "unequivocal" to abrogate tribal sovereign immunity. But neither the Bankruptcy Court nor those two cases it relied upon explained how that could be, i.e., they do not identify what it is about Indian tribes that make them necessarily more or other than a "domestic government" such that Section 101(27) does not unequivocally encompass them. Indeed, as explained above, Justice Sotomayor expressly described Indian tribes as "domestic governments" in her *Bay Mills* concurrence, and the Supreme Court has repeatedly referred to them as "domestic dependent nations."[4]

The text and structure of the relevant Bankruptcy Code sections reinforce that conclusion. Section 106(a) states: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . ." On its face, this language unequivocally treats the universe of parties capable of making "an assertion of sovereign immunity" as identical to the universe of "governmental unit[s]"as to which that immunity is abrogated. The language in no way indicates that there might be parties who could assert sovereign immunity but not be "governmental units" for which it is abrogated. Indeed,

[4] As *Greektown* emphasizes (532 B.R. at 698), the Supreme Court has observed that Indian tribes are unique in the respect that they are neither "foreign states" nor states of the United States or subdivisions thereof. *See Bay Mills*, 134 S. Ct. at 2040-41 (Sotomayor, J., concurring) ("[T]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. Tribes [are] more akin to domestic dependent nations . . . than to foreign nations.") (internal citations omitted). But while that uniqueness would prevent Indian tribes from fitting into the specific categories of sovereigns listed in the first part Section 101(27) ("United States; State; Commonwealth; District; Territory; municipality; foreign state"), it does not put them outside the bounds of that Section's final catch-all phrase, "other . . . domestic government." Indeed, as explained above, by calling Indian tribes "domestic dependent nations that exercise inherent sovereign authority," the Supreme Court has put them squarely into that category.

Section 106(c) expressly confirms that only "governmental units" are capable of asserting sovereign immunity: "Notwithstanding any assertion of sovereign immunity by a governmental unit, ..." The catch-all phrase "any other foreign or domestic government" in the Code's definition of "governmental unit" (11 U.S.C. § 101(27)) thus ensures that no parties who might otherwise be entitled to sovereign immunity are beyond the reach of Section 106. In short, Congress unequivocally expressed that Section 106(a) abrogates sovereign immunity for any and all parties who could possibly assert it, and that includes Indian tribes.

Echoing *Greektown*, the Bankruptcy Court emphasized that no Supreme Court case has "found that Congress intended to abrogate a tribe's sovereign immunity without using the words "Indians" or "Indian tribes." Opinion (Quapaw Adv. D.I. 114) at 27. But the Supreme Court has not refused to abrogate tribal sovereign immunity based on the absence of those words either; nor has it required those words as a condition of doing so. To the contrary, as noted above, the Court has "never required that Congress use magic words [or] state its intent in any particular way." *Cooper*, 566 U.S. at 291. The intent to abrogate must simply be "clearly discernable from the statutory text in light of traditional interpretive tools." *Id.* As *Krystal Energy* explained, that is the case here. Congress drafted the Bankruptcy Code "against the back-drop of 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.'" *Krystal Energy*, 357 F.3d at 1059. "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 Bankruptcy Court also suggests the *Krystal Energy* approach improperly finds Congressional intent to waive sovereign immunity "solely by force of deduction." Opinion at 26

(quoting *Greektown*, 532 B.R. at 697). Not so. While sovereign immunity "cannot be implied [and] must be unequivocally expressed" (*Martinez*, 436 U.S. at 59), that does not preclude the straightforward deduction required to recognize that based on its plain, ordinary meaning, "other . . . domestic governments" includes Indian tribes. *See Russell*, 293 B.R. at 37-41, 44 (distinguishing "implication" from "deduction"; concluding: "The term 'other foreign or domestic government' in § 101(27) unequivocally, and without implication, includes Indian tribes as 'governmental units.' Section 106(a) unequivocally, and without implication, abrogates sovereign immunity as to governmental units, including Indian tribes . . . ."). As *Krystal Energy* recognized, reading "other . . . domestic governments" to include Indian tribes is no different than reading "State" to include Alabama or Wyoming; neither represents an improper "implication" of sovereign immunity in the absence of an express, unequivocal grant. *Krystal Energy*, 357 F.3d at 1059. *See also Cooper*, 566 U.S. at 291 ("sovereign immunity canon" is simply "'a tool for interpreting the law'"; it "does not displace the other traditional tools of statutory construction") (internal citations omitted).

Finally, neither the Bankruptcy Court nor the *Whitaker* or *Greektown* opinions identified what the phrase "other foreign or domestic government" in Section 101(27) could mean other than Indian tribes. Their reading of that provision thus violates the "cardinal principle of statutory construction" against reading statutes to contain superfluous language (*TRW*, 534 U.S. at 31), which, as just noted is not "displaced" by "the sovereign immunity canon." *Cooper*, 566 U.S. at 291.

In short, if Quapaw and Thunderbird are "governmental subdivisions" covered by sovereign immunity, as they claim to be, then they are also "domestic governments" whose sovereign immunity has been abrogated pursuant to the unambiguous words of Bankruptcy Code

Section 106(a). The Bankruptcy Court's grant of Appellees' Motions to Dismiss based on sovereign immunity should be reversed.

III. Quapaw Fully Waived Any Sovereign Immunity by Filing its Adversary Complaint and Proof of Claim.

Quapaw also waived any sovereign immunity it may have had concerning the Trustee's counterclaim by filing the Quapaw Complaint and Proof of Claim. As explained below, that wavier occurred under both Section 106(b) of the Bankruptcy Code and common law, and contrary to the Bankruptcy Court's ruling, it is not limited to recoupment claims.

Section 106(b) states:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction and occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 106(b). On its face, the waiver under this section is not limited to recoupment or any other subset of claims/relief and thus permits "affirmative recovery from the state." *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 27-28 (1st Cir. 2001) (rejecting limitation of Section 106(b) to recoupment claims). *Accord Wyo. Dep't of Transp. v. Straight (In re Straight)*, 143 F.3d 1387, 1389 (10th Cir. 1998), *cert. denied*, 525 U.S. 982 (1988). *See also Int'l Fin. Corp. v. Kaiser Group Int'l, Inc. (In re Kaiser Group Int'l, Inc.)*, 399 F.3d 558, 567 (3d Cir. 2005) (emphasizing breadth of waiver under Section 106(b)); *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1086 (3d Cir. 1992) ("so long as the debtor's claim against the government arises out of the same transaction or occurrence as the government's claim, sovereign immunity is waived by this section").

All elements of Section 106(b) waiver are present here. As shown above, assuming Quapaw is entitled to sovereign immunity, it is a "governmental unit" as defined in the

Bankruptcy Code, and Quapaw has never disputed that the Trustee's counterclaim is "property of the estate." The Trustee's counterclaim also arises from the same "transaction or occurrence" as Quapaw's claim. That standard is met so long as claims share a "logical relationship." *Kaiser Group*, 399 F.3d at 556. "[T]he logical relationship standard should be construed liberally" and requires only that claims "arise[] from the same aggregate set of operative facts." *Id*. at 569 (citations omitted). *See also Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 389–90 (3d Cir. 2002) ("logical relationship" exists where claims "are offshoots of the same basic controversy between the parties"). In *Kaiser Group*, for instance, the Third Circuit found that "[b]oth [the sovereign's] Proof of Claim and [debtor's] counterclaims arise out of the construction of the [same steel mill]. That fact alone – that all of the claims and counterclaims arise out of that one complex transaction – is sufficient to demonstrate a logical relationship between the claims." *Kaiser Group*, 399 F.3d at 569. *See also id.* ("it is not necessary that the parties' claims arise at the same moment [because a] transaction may comprehend a series of many occurrences").[5]

Here, Quapaw's claim and the Trustee's counterclaims not only arise out of the same overarching transaction – Check Holdings' provision of services to Quapaw – they arise from a single written contract, the Financial Services Agreement, and revolve around the same issue: whether that agreement established a debtor-creditor relationship between Check Holdings and Quapaw. That is more than enough to create a "logical relationship," making them part of the same "transaction or occurrence" under Section 106(b). *See, e.g., WJM, Inc. v. Mass. Dep't of*

[5] *Kaiser Group* explained that the phrase "same transaction or occurrence" in Section 106(b) is analogous to the same phrase in Fed. R. Civ. P. 13(a), which governs compulsory counterclaims, but that Section 106(b) is ultimately broader because, unlike Rule 13(a), it is not limited to claims that exist at the time the initial claim/pleading was filed. 399 F.3d at 567-68.

Pub. Welfare, 840 F.2d 996, 1005 (1st Cir. 1988) (sovereign immunity waived where proof of claim and preference claim related to payments under same contract); *Steinberg v. IL Dept. of Mental Health and Developmental Disabilities (In re Klingberg Schools),* 68 B.R. 173, 177 (N.D. Ill. 1986) (same). *See also e.g., Lazar v. State of Calif. (In re Lazar),* 237 F.3d 967, 979 (9th Cir. 2001) (state's claim for fees part of "same transaction or occurrence" as trustee's counterclaim for refunds from same state fund); *Straight*, 143 F.3d at 1389 (state's claim for unpaid taxes arose from same "transaction" as debtor's counterclaim that state improperly decertified her business). Indeed, Section 502(d) of the Bankruptcy Code bars any recovery on Quapaw's claim until any preferential transfers have been repaid to the estate. Quapaw's claim and the Trustee's counterclaims thus are not only logically related — they are inextricably intertwined.

The Bankruptcy Court, however, refused to apply Section 106(b) (or 502(d)) at all because of its finding that Quapaw was not a "governmental entity" as defined by Section 101(27). As explained in the prior section of this brief, that finding was incorrect. Sections 502(c) and (d) apply to Quapaw just as Section 502(a) does.

In any event, Section 106(b) "merely codifies an existing equitable circumstance under which a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim." *Arecibo*, 2070 F.3d at 28 (quoting *In re Straight*, 143 F.3d at 1392)). *Accord Lazar*, 237 F.3d at 978-79; *Schlossberg v. Maryland* (*In re Creative Goldsmiths),* 119 F.3d 1140, 1148 (4th Cir. 1997); *995 Fifth Ave. Assoc., L.P. v. NY State Dept. of Taxation and Fin. (In re 995 Fifth Avenue Assoc., L.P.),* 963 F.2d 503, 509 (2d Cir. 1992). *See also College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 n.3 (1999) (sovereign "waives its sovereign immunity by

invoking the jurisdiction of the federal courts"). Thus, even if Section 106(b) somehow did not apply (which, as explained above, it does), Quapaw still would have waived any sovereign immunity by filing its Complaint and Proof of Claim.

The Bankruptcy Court agreed that Quapaw effected a common law waiver of its sovereign immunity by filing the Complaint and Proof of Claim, but found that waiver was limited to "claims asserted by [the Trustee] in recoupment," which would prevent the Trustee from obtaining any affirmative recovery. Opinion (Quapaw Adv. D.I. 114) at 30-31, 36. The Bankruptcy Court based this conclusion on two Tenth Circuit cases – *Berrey v. Asarco, Inc.*, 439 F.3d 636 (10th Cir. 2006) and *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982) – which found that Indian tribes who bring suit waive their sovereign immunity only with respect to recoupment claims. Opinion (Quapaw Adv. 114) at 30-33.

Those cases, however, involved ordinary civil litigation; they did not arise in the bankruptcy context. As the First Circuit explained in *Arecibo*, this is a crucial difference because limiting the scope of waiver in bankruptcy cases would impose "concrete unfairness . . . on other bankruptcy creditors, whose pro rata share of the bankruptcy estate would be diminished because the estate cannot obtain the full amount of debt owed to it" by the sovereign. *Arecibo*, 270 F.3d at 29. *Arecibo* followed the lead of *Straight*, which, even apart from Section 106(a), rejected limiting a sovereign immunity waiver based on a bankruptcy claim to counterclaims in recoupment:

> [T]he law of bankruptcy is founded on principles of equity. That foundation requires all persons or entities in the same class to be treated alike. Thus, creditors coming to the bankruptcy court expect they will fare no better or no worse than the others of their stature. Moreover, the whole concept of bankruptcy cannot succeed without a careful application of these principles and a forthright dedication to their significance.

> For that reason, any governmental entity which elects to join the ranks of creditors seeking benefits the bankruptcy court can allocate must recognize that resort is subject to the mantle of equity. Indeed, "[w]hen the State becomes an actor and files a claim against the [bankruptcy] fund, it waives any immunity which it otherwise might have respecting the adjudication of the claim."

Straight, 143 F.3d at 1389-90 (quoting *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)).[6] *See also Kaiser Group*, 339 F.3d at 567-68 (justifying broad reading of Section 106(b) waiver because "the Bankruptcy Code is both remedial and quasi-equitable").

In short, whether under Section 106(b) or common law, a sovereign that "avails itself of the federal courts to protect a claim . . . waive[s] [its] immunity with respect to that claim *in toto*," including as to "compulsory counterclaims, even though they could require affirmative recovery." *Arecibo*, 270 F.3d at 28. *See also, e.g., 995 Fifth Ave.*, 963 F.2d at 509 (state's filing of $2.1 million claim effected waiver of immunity as to debtor's $2.6 million counterclaim). Thus, even if Congress hadn't fully abrogated Quapaw's sovereign immunity in Sections 106(a) and (b) (which it did), Quapaw waived that immunity by filing is Adversary Complaint and Proof of Claim, which all arise out of the same transaction or occurrence as the Trustee's Counterclaim.

Conclusion

For the foregoing reasons, the Bankruptcy Court's opinion and order granting Thunderbird's motion to dismiss and granting Quapaw's motion to dismiss in part should be reversed. The Trustee's adversary case against Thunderbird and her Counterclaims against Quapaw should be reinstated and remanded for litigation on the merits in the Bankruptcy Court.

---

[6] While *Gardner* addressed only the limited question of whether a state waived immunity for the debtor assert defensive objections to the state's claim, "nothing in [*Gardner*] precludes a broader rule of waiver." *Arecibo*, 270 F.3d at 17. *Accord Lazar*, 237 F.3d at 977-78.

Dated: June 23, 2017
Wilmington, Delaware

GOLDSTEIN & MCCLINTOCK LLLP

By: */s/ Maria Aprile Sawczuk*

Maria Aprile Sawczuk (No. 3320)
1201 Orange Street, Suite 7380
Wilmington, DE 19801
Telephone: (302) 444-6710
Facsimile: (302) 444-6709
marias@restructuringshop.com

-and-

Robert Michaels
111 West Washington St., Suite 1221
Chicago, IL 60602
Telephone: (312) 219-6741
Facsimile: (312) 896-7381
robm@goldmclaw.com

Counsel for the Liquidating Trust of Money Centers of America, Inc. and Check Holdings, LLC