Nos. 18-1165, 18-1166

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: GREEKTOWN HOLDINGS, LLC, Debtor

BUCHWALD CAPITAL ADVISORS, LLC,
Litigation Trustee to the Greektown Litigation Trust,
Plaintiff-Appellant,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS;
KEWADIN CASINOS GAMING AUTHORITY,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Michigan,
Case Nos. 14-cv-14103, 16-cv-13643, Hon. Paul D. Borman

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1165,18-1166 Case Name: Buchwald v. Sault Ste. Marie et al.

Name of counsel: Michael K. Kellogg

Pursuant to 6th Cir. R. 26.1, Buchwald Capital Advisors LLC, Plaintiff-Appellant
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Buchwald Capital Advisors LLC is not a subsidiary or affiliate of a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Buchwald Capital Advisors LLC is the Trustee of the Greektown Litigation Trust, which was created pursuant to the confirmed plan of reorganization of Greektown Holdings, LLC, et al. The beneficiaries of the Greektown Litigation Trust, which are identified in the attached list, have a financial interest in the outcome of this appeal. The listed entities include or may include publicly owned corporations or affiliates thereof. Other than the listed entities, there is no publicly owned corporation not a party to the appeal that has a financial interest in the outcome.

CERTIFICATE OF SERVICE

I certify that on February 21, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michael K. Kellogg
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe, et al.,
Case Nos. 18-1165, 18-1166

Known Beneficiaries of Greektown Litigation Trust

John Hancock Bond Fund
John Hancock Income Securities Trust
John Hancock Investors Trust
John Hancock Funds III Leveraged Companies Fund
John Hancock Funds II Active Bond Fund
John Hancock Funds Trust Active Bond Trust
Manulife Global Fund U.S. Bond Fund
MGF US Special Opportunities Bond Fund
Manulife Global Fund Strategic Income
John Hancock Trust Strategic Income Trust
John Hancock Trust High Income Trust
John Hancock Funds II High Income Fund
John Hancock Funds II Strategic Income Fund
John Hancock High Yield Fund
John Hancock Strategic Income Fund
Oppenheimer Champion Income Fund
Oppenheimer Strategic Income Fund
Oppenheimer Strategic Bond Fund V/A
Oppenheimer High Income Fund V/A
ING Oppenheimer Strategic Income Port
Brigade Leveraged Capital Structures Fund Ltd.
Sola Ltd.
Solus Core Opportunities Master Fund Ltd.
Brookville Horizons Fund LP
Front Part Brookville Capital Master Fund LP
Halbis Distressed Opportunities Master Fund Ltd.
Standard General Focus Fund LP
Standard General Master Fund LP
Standard General OC Master Fund LP
Mariner Tricadia Credit Strategies Master Fund Ltd.
Structured Credit Opportunities Fund II LP
Tricadia Distressed and Special Situations Master Fund
Black Rock High Income VI Fund
Black Rock High Income Portfolio
Black Rock Corporate High Yield Fund Inc.

Black Rock High Income Shares
Black Rock High Income Fund
Black Rock Corporate High Yield Fund III
Black Rock Corporate High Yield Fund VI
Black Rock Corporate High Yield Fund V Inc.
Black Rock Income Opportunity Trust
Black Rock High Yield Trust
Black Rock Core Bond Trust
Black Rock Strategic Bond Trust
Black Rock Limited Duration Income Trust
Black Rock Floating Rate Income Trust
Black Rock High Yield Bond Portfolio
BGF US Dollar High Yield Bond Fund
RB-U-Fonds-Hybo
BAV RBI Renten US HYI
Managed Account Series High Income Portfolio
Regiment Cap

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument will likely be helpful to the Court because this case involves important legal issues related to tribal sovereign immunity, including issues of first impression in this Circuit concerning congressional abrogation of such immunity under the Bankruptcy Code and waiver of such immunity by litigation conduct.

STATEMENT OF JURISDICTION

Plaintiff-Appellant Buchwald Capital Advisors LLC, solely in its capacity as Litigation Trustee for the Greektown Litigation Trust (the "Trustee"), seeks to avoid certain transfers of property under 11 U.S.C. § 544(b), including transfers to Defendants-Appellees Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") and Kewadin Casinos Gaming Authority (the "Authority"), and to recover those transfers under 11 U.S.C. § 550. The district court had subject-matter jurisdiction under 28 U.S.C. § 1334(b). The bankruptcy court had subject-matter jurisdiction under 28 U.S.C. § 157. Referral to the bankruptcy court was authorized by E.D. Mich. L.R. 83.50(a).

On August 13, 2014, the bankruptcy court denied the motion of the Tribe and the Authority to dismiss on the basis of tribal sovereign immunity. The Tribe and the Authority appealed to the district court, which had appellate jurisdiction under 28 U.S.C. § 158(a)(1) and the collateral-order doctrine. *See Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147, 149-50 (6th Cir. 1993) (denial of sovereign immunity immediately appealable). On June 9, 2015, the district court reversed and remanded without entering final judgment.

On September 29, 2016, the bankruptcy court granted the motion of the Tribe and the Authority to dismiss on the basis of tribal sovereign immunity. The Trustee appealed to the district court, which had appellate jurisdiction under 28

U.S.C. § 158(a)(1). On January 23, 2018, the district court affirmed and entered final judgment in favor of the Tribe and the Authority.

On February 14, 2018, the Trustee filed timely notices of appeal from the district court's final judgment, which were docketed as Nos. 18-1165 and 18-1166. This Court has appellate jurisdiction in both appeals under 28 U.S.C. § 1291. The two appeals were consolidated by this Court on February 22, 2018.

INTRODUCTION

This case arises from the bankruptcy of a Detroit casino run by Defendant-Appellee Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") and its political subdivision Defendant-Appellee Kewadin Casinos Gaming Authority (the "Authority").[1] From 2000 to 2008, under the Tribe's management and control, the casino and various related corporate entities (collectively, the "Debtors") borrowed hundreds of millions of dollars, made ambitious promises to the City of Detroit that would take years (and cost additional hundreds of millions of dollars) to complete, and generally sank into financial ruin.

In 2005, the Tribe orchestrated an operational and financial restructuring of the casino. As part of that transaction, the Tribe caused one of the Debtors to transfer more than $150 million to various entities, including $6 million that went to the Tribe. The transfers pushed the Debtors' troubled financial condition into abject insolvency – as of the end of 2005, the entity that made the transfers had negative equity of $138.4 million. In 2008, to avoid a forced sale of its interests in the casino and the impending loss of the casino's gaming license, the Tribe caused the Debtors to seek Chapter 11 bankruptcy protection and filed claims against them as a creditor.

[1] For simplicity, this brief generally uses "Tribe" to refer to both Defendants.

Plaintiff-Appellant Buchwald Capital Advisors LLC acts solely as the litigation trustee (the "Trustee") in this case and was appointed under the Debtors' confirmed plan of reorganization to pursue the claims of the unsecured creditors. At issue in this appeal are the Trustee's claims that the 2005 transfers were fraudulent and that the Tribe should be forced to repay the amounts it took. The Tribe defends against those claims by asserting tribal sovereign immunity. The Trustee responds by contending that (1) Congress abrogated tribal sovereign immunity in the Bankruptcy Code, and (2) in the alternative, the Tribe waived any immunity it might have had. The district court ruled for the Tribe on both issues and granted its motion to dismiss.

Part I of this brief contends that Congress abrogated tribal sovereign immunity in 11 U.S.C. § 106(a), which expressly abrogates immunity as to any "governmental unit," and § 101(27), which defines "governmental unit" to include any "foreign or domestic government." It is well settled that Congress can set aside tribal immunity by speaking clearly, and here the language of the statute conveys an unequivocal intent to include Indian tribes in the abrogation. The only other circuit to resolve the issue agrees. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004). The district court reached a contrary conclusion based on the mistaken legal premise that Congress must always refer to "Indian tribes" in so many words in order to abrogate immunity.

Part II of this brief contends in the alternative that the Tribe waived its immunity by causing the Debtors, acting under its control as its alter egos and agents, to file bankruptcy petitions that invoked federal bankruptcy jurisdiction. Both the bankruptcy court and the district court accepted the Trustee's factual allegations as sufficient to establish an alter-ego relationship between the Tribe and the Debtors. But both courts found those allegations legally insufficient, misreading this Court's decisions as holding the Tribe could waive its immunity only through a resolution adopted by its governing Board of Directors. The correct view – well grounded in precedent – is that a sovereign's voluntary invocation of federal jurisdiction operates as a clear waiver of sovereign immunity and that the acts of a sovereign's alter ego can be attributed to the sovereign itself. Based on those principles, this case should proceed.

STATEMENT OF THE ISSUES

1. Whether Congress abrogated tribal sovereign immunity in 11 U.S.C. § 106(a) by expressly abrogating the sovereign immunity of "governmental unit[s]," which include any "domestic government."

2. Whether tribal sovereign immunity may be waived by a tribe's litigation conduct (including the conduct of an alter ego or agent of the tribe), even though the tribe's code states that any waiver must be express.

STATEMENT OF THE CASE

I. Statement of Facts

Because this Court is reviewing the district court's affirmance of the bankruptcy court's decision granting the Tribe's motion to dismiss, it assumes the facts alleged in the complaint to be true. *See Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 795 (6th Cir. 2016); Complaint, RE 5, PageID ## 50-86.[2] In this case, by agreement of the parties, both the bankruptcy and district courts also assumed to be true certain additional facts set forth in the Trustee's opposition to the Tribe's motion. *See* RE 5, PageID ## 361-369.[3]

A. The Tribe, the Debtors, and the Debtors' Financial Obligations

The Tribe is a federally recognized Indian tribe organized under section 16 of the Indian Reorganization Act, 25 U.S.C. § 5123. Const. and Bylaws, RE 5, PageID # 280. The Authority is a political subdivision of the Tribe. RE 5, PageID # 54. This case arises from the 2008 bankruptcies of Greektown Casino, LLC (the

[2] Except as otherwise indicated, record citations refer to the record in district court action No. 16-cv-13643.

[3] RE 5, PageID # 361 n.3 (Trustee's statement that Tribe had agreed to "accept Plaintiff's factual recitation and inferences as true for the purposes of this Motion"); RE 5, PageID ## 447, 455-457 (bankruptcy court's summary of Trustee's allegations and assumptions that they are true); Transcript, RE 22, PageID # 796 (Tribe's counsel acknowledging that the bankruptcy court "did consider evidence outside the complaint and essentially assumed it all to be true" and declining to "quibble with . . . either the stipulation or the procedure"); Opinion and Order, RE 16, PageID ## 720-721 (district court adopting same assumptions as bankruptcy court).

"Casino") and related entities, all owned (directly or indirectly) and controlled by the Tribe.[4]

In 2000, the Tribe caused the Casino to seek a license from the Michigan Gaming Control Board ("MGCB") to own and operate a gaming facility in downtown Detroit. RE 5, PageID ## 362-364. At that time, the Tribe indirectly owned half of the Casino. *Id.*, PageID # 363.[5] The other half was owned by Monroe, a limited liability company in turn owned almost entirely (97%) by Dimitrios and Viola Papas (the "Papases") and Ted and Maria Gatzaros (the "Gatzaroses"). Monroe's membership interest in the Casino was its only asset. *Id*.

During the licensing process, the MGCB told the Casino that it would not approve the license if the Papases and Gatzaroses were owners (including indirect owners) of the Casino. *Id.* Accordingly, in June 2000 the Tribe agreed to purchase the Papases' and Gatzaroses' interests in Monroe for $265 million – substantially more than actual market value. *Id.* The amounts required to pay the Papases and Gatzaroses made the Debtors financially vulnerable. *See id.* From June 2000

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[4] The Debtors in those jointly administered cases include the Casino; Greektown Holdings, LLC ("Holdings"); Kewadin Greektown Casino, LLC ("Kewadin"); Monroe Partners, LLC ("Monroe"); Greektown Holdings II, Inc. ("Holdings II"); Contract Builders Corporation ("Builders"); Realty Equity Company Inc. ("Realty"); and Trappers GC Partner, LLC ("Trappers").

[5] Kewadin owned 50% of the Casino, and the Tribe (through the Authority, its political subdivision) owned 100% of Kewadin. RE 5, PageID # 363.

through March 2005, the Tribe caused the Papases and Gatzaroses to be paid more than $66 million in connection with the purchase of their membership interests in Monroe. *Id.*, PageID # 364.

In 2002, the Tribe caused the Casino to enter into a Revised Development Agreement (the "Development Agreement") with the City of Detroit and the City's Economic Development Corporation. The Development Agreement required the Casino to build a 400-room hotel with a theater, a ballroom, a convention area, and a parking facility for at least 4,000 vehicles. RE5, PageID ## 55, 366. If the Casino failed to do so, it would lose its gaming license, which would destroy its business (and the value of the Tribe's ownership interest). *Id.*, PageID # 366. By a contemporaneous estimate, the Casino's obligations under the Development Agreement would cost at least $200 million to perform. *Id.*, PageID ## 55, 366.

B. The 2005 Restructuring and Refinancing

Combined with the debt to the Papases and Gatzaroses, the Development Agreement put the Tribe's businesses under increasing financial strain. In response to that strain, the Tribe in 2005 restructured the Casino's ownership, refinanced existing debt, and caused the Debtors to take on new debt to raise capital. RE5, PageID ## 55-56, 367. The Tribe formed a new entity, Holdings, which became the owner of the Casino. *Id.*, PageID ## 55, 367. Monroe and Kewadin became Holdings' owners. *Id.*, PageID ## 367.

In the 2005 refinancing, Holdings took on a total of $375 million of senior debt: a term loan of $190 million, a revolving credit facility of $100 million, and $185 million in senior notes. *Id.*, PageID # 56. The refinancing was subject to the approval of the MGCB. The MGCB granted approval, but only after imposing strict financial covenants and other conditions. *Id.*, PageID # 367. If those covenants and conditions were not met, the MGCB would have the right to force the Tribe to sell its interests in the Casino, or (if such a sale did not occur) to place the Casino into conservatorship. *Id.*

On December 2, 2005, when the refinancing closed, the Tribe caused Holdings to transfer (to repay obligations owed by neither Holdings nor the Casino) a total of more than $150 million to or for the benefit of the Papases and Gatzaroses, including direct transfers of $90.5 million to the Papases and $55 million to the Gatzaroses; as well as $6 million to Kewadin, which transferred that money to the Authority. *Id.*, PageID # 367; *see also id.*, PageID ## 57-59 (additional details about transfers). On December 31, 2005, less than a month later, Holdings' audited consolidated financial statements showed that it was balance-sheet insolvent, with assets of $324.3 million and liabilities of $462.7 million, yielding negative equity of $138.4 million. *Id.*, PageID # 56.

The auditors' already grim assessment did not take into account the Casino's further liability resulting from its $200 million obligation under the Development

Agreement. *Id.* Holdings also lacked access to other sources of capital sufficient to meet those building obligations – on which its license depended, but which, in December 2005, remained largely incomplete. *Id.*; *see id.*, PageID # 366 ("[c]onstruction . . . began in earnest in 2006").

C. The Debtors' Financial Distress and Chapter 11 Petition

By November 2006, the Tribe knew that Holdings would not be able to comply with the MGCB's financial covenants. RE 5, PageID # 368. In addition, the Casino was in default under the Development Agreement. *Id.* In 2007, the Tribe attempted to infuse more capital into Holdings, but the amount was insufficient. *Id.* By mid-2008, the Tribe was in immediate danger of losing its equity interest in the Casino (through failure to comply with the MGCB's conditions on the 2005 refinancing) and the Casino's gaming license (through failure to comply with the Development Agreement). *Id.*

On May 29, 2008, the Tribe caused the Debtors – including not only Holdings and the Casino, but also a broad range of related entities owned and controlled by the Tribe – to file voluntary petitions under Chapter 11 of the Bankruptcy Code. *Id.* The Tribe later filed proofs of claim against the Casino, *id.*, PageID # 54 ($1,357,612.25); Kewadin, *id.* ($191,590.91); and Holdings, *id.* ($263,217.67). The Authority also filed a separate proof of claim against the Casino. *Id.* ($550,000).

D. The Tribe's Control and Domination of the Debtors

From the buyout of Monroe in 2000 through the bankruptcy filings in 2008, the Tribe wholly owned both the Casino and (after the 2005 restructuring) Holdings. RE 5, PageID ## 364, 367. During the relevant period, the members of the Tribe's Board of Directors, the members of the Authority's Management Board, and the members of each of the debtor entities' Management Boards were identical or substantially so. *Id.*, PageID # 364. A Management Services Agreement between the Tribe and the Casino – signed for both parties by the Tribe's Chairman, who was also the Casino's Manager – further enabled the Tribe to provide substantially all key management personnel to the Casino, including the chief executive officer, accounting and financial management staff, and risk and compliance staff. *Id.*

In addition to the Management Services Agreement, Casino employees also reported to and took day-to-day operational direction from specific tribal officials. Those officials included the Tribe's Chief Financial Officer and, in connection with the performance of the Development Agreement, the Tribe's Budget Director. *Id.*, PageID # 365. The Tribe's Chairman and its counsel were also officers of a separate affiliated entity (132 Associates, LLC) that owned parking facilities and leased them to the Casino. *Id.* And the Tribe's counsel and other professional advisors represented the Casino (which had no independent advisors) in the MGCB

licensing proceedings, the purchase of the Papases' and Gatzaroses' interests, the negotiation of the Management Services Agreement, and ultimately the bankruptcy proceedings. *Id.*, PageID ## 363-365, 369.

II. Procedural History

A. The Adversary Proceeding and the Tribe's Motion To Dismiss

On May 28, 2010, the official committee of the Debtors' unsecured creditors began this adversary proceeding. The adversary complaint alleges that $177 million was fraudulently transferred by Holdings to or for the benefit of the Tribe, the Authority, the Papases, the Gatzaroses, and to other parties for no or inadequate consideration, and that the fraudulent transfers from Holdings may be avoided and recovered under §§ 544 and 550 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, as well as under the Michigan Uniform Fraudulent Transfer Act, Mich. Comp. Laws § 566.31 *et seq*. RE 5, PageID ## 59-85. The Trustee later substituted for the creditors' committee. *Id.*, PageID ## 162-163.

On June 25, 2010, the Tribe moved to dismiss on the grounds of sovereign immunity. RE 5, PageID ## 87-88. The parties stipulated to bifurcate the motion, so that the bankruptcy court first would decide whether Congress had abrogated the Tribe's immunity in the Bankruptcy Code; and then, if necessary, whether the Tribe had waived its immunity. The bankruptcy court agreed to bifurcation. *Id.*, PageID ## 189-192.

B. Rulings on Abrogation

1. The Bankruptcy Court's Ruling

On August 13, 2014,[6] the bankruptcy court denied the Tribe's motion to dismiss. RE 1 (No. 14-cv-14103), PageID ## 29-47. The court relied on 11 U.S.C. § 106(a), which provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . [11 U.S.C. §§] 544 . . . [and] 550." The term "governmental unit" is further defined as

> mean[ing] 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 in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27). The bankruptcy court reasoned that "Indian tribes are clearly and unequivocally 'governments'" because, "[b]y the very definition of sovereign immunity, only *governmental* entities hold it," RE 1 (No. 14-cv-14103), PageID ## 36-37; and that tribes are "domestic" because the Supreme Court has consistently referred to them as such "for almost two centuries" and because the statutory phrase "foreign or domestic" creates a "dichotomy": any government must fit into one category or the other, *id.*, PageID ## 37-39.

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[6] Between 2010 and 2014, the Trustee and the Tribe reached an agreement to settle the case, but the settlement order was later overturned and the case was reopened. *See* RE 1 (No. 14-cv-14103), PageID ## 30-31.

The bankruptcy court rejected the Tribe's argument that tribes are unlike the federal and state governmental entities that are the other domestic sovereigns mentioned in § 101(27). Tribes, the court concluded, are like other domestic governments in the relevant respect that they are capable of asserting sovereign immunity. *Id.*, PageID ## 41-42. The court also rejected the Tribe's argument that Congress's choice not to use "the words 'Indian tribe' (or similar language)" in § 106(a) made its intent unclear. *Id.* The court explained that Congress is not required to use any special "'magic words'" in order to abrogate sovereign immunity (whether federal, state, or tribal), but need only make its intent "clearly discernable from the statutory text in light of traditional interpretive tools." RE 1 (No. 14-cv-14103), PageID # 43 (quoting *FAA v. Cooper*, 566 U.S. 284, 291 (2012)). Here, Congress expressed in § 106(a) "the clear, unequivocal, and unambiguous intent to abrogate tribal sovereign immunity." *Id.*

2. The District Court's Ruling

The Tribe appealed to the district court. On June 9, 2015, that court reversed, concluding that it could not "say 'with perfect confidence' that Congress intended, by using the generic phrase 'other domestic governments' in § 101(27), to clearly, unequivocally, unmistakably and without ambiguity abrogate tribal sovereign immunity in § 106(a)." RE 5, PageID # 203. The court treated as dispositive the points that §§ 106(a) and 101(27) "do not specifically mention

'Indian tribes'"; that in no case has "the Supreme Court . . . found that Congress intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute"; and that, "in many instances, when Congress did mean to abrogate tribal immunity, it did use the 'magic words' 'Indian tribes' in doing so." *Id.*, PageID ## 208, 216-217 (emphasis omitted).

The district court acknowledged that "[t]here cannot be reasonable debate that Indian tribes are both 'domestic' . . . and . . . are fairly characterized as possessing attributes of a 'government.'" *Id.*, PageID # 216. It further acknowledged that the bankruptcy court's decision was in accord with *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), the one circuit-level decision to address the abrogation issue, but found more persuasive the reasoning of *In re Whitaker*, 474 B.R. 687 (B.A.P. 8th Cir. 2012). *Id.*, PageID ## 217-218. Following *Whitaker*, the district court opined that to determine whether the phrase "other . . . domestic government" in § 101(27) includes tribal governments requires a "logical inference," and that "logical inference is insufficient to divine Congressional intent to abrogate tribal sovereign immunity." *Id.*, PageID # 223. Accordingly, the district court remanded the case to the bankruptcy court to address, in the first instance, whether the Tribe had waived immunity.

C. Rulings on Waiver

1. The Bankruptcy Court's Ruling

On September 29, 2016, the bankruptcy court granted the Tribe's motion to dismiss on the basis of sovereign immunity. RE 5, PageID ## 444-465. The court assumed that the Trustee could prove that the Tribe had so pervasively controlled the Debtors (including the Casino and Holdings) that the Debtors were acting as the Tribe's alter egos and agents when they filed their underlying bankruptcy petitions – and even assumed that the Tribe "actually or effectively filed the bankruptcy petitions on behalf of the Debtors." *Id.*, PageID ## 455, 457-458. But the bankruptcy court nevertheless read this Court's decision in *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), to compel the conclusion that any conduct of the Tribe Defendants in connection with these bankruptcy proceedings "was insufficient to waive its sovereign immunity" because neither the Tribe nor the Authority had passed a board resolution waiving sovereign immunity with respect to the claims at issue or entered into any relevant contract waiving sovereign immunity.[7] RE 5, PageID ## 446-447, 449-450.

[7] The Tribe's governing Tribal Code, which also applies to the Authority, provides for waiver only "in accordance with [Code Sections] '44.105 or '44.108." RE 5, PageID # 307. Section 44.105 requires a "resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe," *id.*, with respect to specific claims. Section 44.108, at the relevant time, waived sovereign immunity for contract claims arising from written contracts involving "a proprietary function" of the Tribe. *Id.*, PageID ## 308-309.

The bankruptcy court further ruled that even if the Tribe had actually or effectively filed the Debtors' petition, that would not waive "tribal sovereign immunity as to an adversary proceeding subsequently filed" against the Tribe, *id.*, PageID ## 455-456; and that even if the Debtors had acted as alter egos and agents of the Tribe, their conduct could not waive tribal immunity because "any such waiver . . . must by its nature be considered to be 'implied' and that would be legally insufficient," *id.*, PageID ## 463-464.

2. The District Court's Ruling

On January 23, 2018, the district court affirmed. RE 16, PageID ## 710-745. That court (like the bankruptcy court) assumed that the Tribe and Authority

> exerted complete dominion and control of the Debtors, used the Debtors as their agents in connection with the fraudulent transfers alleged in this Adversary Proceeding and directed the Debtors to initiate the underlying Bankruptcy proceedings in order to forestall an action by the Michigan Gaming Control Board ("MGCB") against the Tribe Defendants, thereby becoming one with the Debtors under principles of agency and alter ego/piercing the corporate veil.

RE 16, PageID ## 720-721. Nevertheless, the district court concluded that *Memphis Biofuels* prohibits a finding of waiver "in the absence of a board resolution expressly waiving immunity," *id.*, PageID # 730, and further prohibits the use of alter-ego liability (which the court termed an "equitable doctrine") to find waiver through "imputed conduct," *id.*, PageID ## 737, 741.

This appeal followed.

SUMMARY OF ARGUMENT

I. Congress has the authority to abrogate tribal sovereign immunity through unequivocal statutory language. Congress exercised that authority here in 11 U.S.C. § 106(a), which abrogates the immunity of any "governmental unit" from certain actions, and in § 101(27), which defines the term "governmental unit" to include any "domestic government." Because the meaning of those provisions plainly includes Indian tribes, no further inquiry is required. The only other circuit to decide the issue now before this Court has reached the same conclusion. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004).

A. The common and ordinary meaning of §§ 106(a) and 101(27) controls this case. Read together, those provisions abrogate the immunity of a broad range of governments, including the United States, the states, any foreign state, and any "other foreign or domestic government." Indian tribes are "government[s]" because they are political organizations that exercise authority; they are "domestic" because they are within the United States and subject to Congress's plenary control. Any ordinary speaker of English would recognize that tribes are covered by the abrogation provisions at issue. That should end this Court's inquiry.

B. Surrounding provisions of the Bankruptcy Code confirm that Congress clearly intended to abrogate tribal sovereign immunity. If Indian tribes were not "governmental unit[s]," then they would not be "creditor[s]" recognized

by the Code, which would mean they could not file proofs of claim (as the Tribe did here). Similarly, if tribes were not "governmental unit[s]," then they could not seek payment of administrative expenses (as the Tribe also did). They would also be denied other special rights that the Code grants to governmental units. Those perverse consequences cut against the district court's reading of the statute and reinforce the importance of adhering to its plain meaning.

C. The district court erred in concluding that Congress must refer to "Indian tribes" in so many words in order to abrogate tribal sovereign immunity. Congress is not required to state its intent in any particular way to abrogate immunity. In abrogation cases (as in all other statutory interpretation cases), courts apply the traditional tools of statutory construction to determine what Congress meant. If those tools yield a clear answer, then that answer controls. No decision of the Supreme Court or this Court supports the district court's requirement that Congress use particular words to speak clearly.

II. The Tribe also waived any immunity it might have had by voluntarily invoking the jurisdiction of the bankruptcy court. Indian tribes, like other sovereigns, waive immunity when they appear voluntarily in federal court. Under settled principles, such an invocation counts as waiver regardless of whether the Tribe acts in its own name or through a subordinate entity that (like the Debtors here) is the Tribe's alter ego or controlled agent.

A. Precedent firmly establishes that a sovereign entity can waive immunity through litigation conduct in the federal courts. The Supreme Court's decisions in *Gardner v. New Jersey*, 329 U.S. 565 (1947), and *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), both illustrate the point. As *Lapides* explains, a voluntary invocation of federal jurisdiction amounts to a clear waiver of sovereign immunity even though the sovereign party (like the Tribe here) might actually prefer to assert an immunity defense in federal court. The Eighth, Ninth, Tenth, and D.C. Circuits have all recognized that tribal immunity, like state sovereign immunity, can be waived by litigation conduct. This Court's decision in *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), is not to the contrary: that case did not involve any litigation conduct and did not consider the doctrine at issue.

B. In considering whether a sovereign entity has waived its immunity, courts will take into account the conduct of a subordinate entity that acts as the sovereign's alter ego or agent. The leading case is *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), which treated the Republic of Cuba and its state-owned bank as alter egos in order to avoid injustice to a U.S. bank whose assets Cuba had nationalized. Although *Bancec* involved foreign sovereign immunity, its holding is persuasive in the context of tribal immunity, and the Supreme Court has recognized that cases about

one doctrine shed light on the other. Both the bankruptcy and district courts here accepted the Trustee's allegations as sufficient to establish that the Tribe and the Debtors were alter egos under *Bancec*.

C. When a sovereign consents to the exercise of federal bankruptcy jurisdiction – as the Tribe did here by causing its alter-ego Debtors to seek bankruptcy protection – it waives immunity as to fraudulent-transfer actions seeking to recover property of the debtor. As the Supreme Court explained in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), actions like this one are an integral part of the historical understanding of bankruptcy jurisdiction. That teaching compels the conclusion that an Indian tribe cannot cause its agents to initiate a bankruptcy proceeding without giving up its right to immunity against actions like this one.

D. In this case, the Trustee's allegations (taken as true) establish that the Tribe controlled the Debtors from the highest level to the lowest; managed the financial transactions that forced them into insolvency; and then caused them to file for bankruptcy protection to benefit the Tribe by avoiding a forced sale of the Tribe's interests in the Casino or the loss of the Casino's gaming license. Those allegations made out a plausible case of waiver through litigation conduct.

STANDARD OF REVIEW

On appeal from a district court's decision reviewing a bankruptcy court order granting a motion to dismiss, this Court reviews the bankruptcy court's decision directly under a *de novo* standard of review. *In re McKenzie*, 716 F.3d 404, 411-12 (6th Cir. 2013). It likewise "review[s] questions of subject matter jurisdiction, including issues of sovereign immunity, *de novo*." *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 515 (6th Cir. 2010).

ARGUMENT

I. CONGRESS ABROGATED TRIBAL SOVEREIGN IMMUNITY IN SECTION 106 OF THE BANKRUPTCY CODE

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("*Potawatomi Tribe*")). One "aspect" of that sovereignty is "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But tribal sovereign immunity, "like all other[ ]" tribal sovereign attributes, "is subject to the superior and plenary control of Congress." *Id.*

"To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). Congress did that in 11 U.S.C. § 106(a), which

"abrogate[s]" the "sovereign immunity" of any "governmental unit"; and in § 101(27), which defines the already broad term "governmental unit" to include any "domestic government." Tribes are clearly "domestic" and clearly "government[s]." This case thus turns on the "cardinal canon before all others" that "a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The only circuit court that has ruled on this issue followed the statute's plain language to conclude that Indian tribes are clearly among the "domestic government[s]" included in the term "governmental unit," and thus that Congress expressly abrogated tribal immunity in § 106(a). *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004). Most other courts have agreed,[8] as did the bankruptcy court here. This Court should reach the same conclusion.

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[8] *See In re Platinum Oil Props., LLC*, 465 B.R. 621, 643 (Bankr. D.N.M. 2011) ("11 U.S.C. § 106 together with 11 U.S.C. § 101(27) embodies Congress' clear and unequivocal abrogation of tribal sovereign immunity."); *In re Russell*, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003) ("'[O]ther foreign or domestic government' in § 101(27) unequivocally, and without implication, includes Indian tribes as 'governmental units.'"); *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995) (tribes "comprise 'governmental units' within the meaning of Code § 101(27)"); *In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981) (tribe was a "governmental unit" under the definition then in effect). *But see In re Whitaker*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012) ("Congress did not unequivocally express its intent"); *In re Nat'l Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000) ("The Code makes no specific mention of Indian tribes."); *In re Mayes*, 294 B.R. 145, 148 n.10 (B.A.P. 10th Cir. 2003) (dictum) (§ 106 "probably does not apply" to tribes).

A. Sections 106 and 101(27) Clearly Abrogate Tribal Immunity

Section 106(a) provides that, "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . [s]ections . . . 544 . . . [and] 550" of the Bankruptcy Code. That language is unequivocal and categorical: any defendant that is a "governmental unit" may not assert a sovereign immunity defense in a proceeding where (as here) a trustee seeks to avoid a transfer under § 544 and to recover the transferred amount under § 550. The term "governmental unit" would be broad even without further definition; but Congress then went further, giving the term "governmental unit" a sweeping statutory definition. As defined in § 101(27), "governmental unit" includes not only the "United States" and its "department[s], agenc[ies, and] instrumentalit[ies]," and not only the "State[s]" and *their* "department[s], agenc[ies, and] instrumentalit[ies]," but also any "other foreign or domestic government." 11 U.S.C. § 101(27).

Tribes are "government[s]" in the common and ordinary meaning of that term: "the organization, machinery, or agency through which a political unit exercises authority and performs functions." *Webster's Third New International Dictionary* 982 (2002) ("*Webster's Third*"). The Supreme Court has long used the term "government" when referring to the political organization of a tribe that is entitled to assert immunity from suit. *See, e.g., Kiowa Tribe of Okla. v. Mfg.*

Techs., Inc., 523 U.S. 751, 758 (1998) (suggesting that the "doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States"); *Santa Clara Pueblo*, 436 U.S. at 59-60 (applying tribal sovereign immunity to protect "tribal autonomy and self-government," including "a tribal government's ability to maintain authority"); *see also Turner v. United States*, 248 U.S. 354, 357-58 (1919) ("Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace."). Even the district court conceded that "Indian tribes are fairly characterized as possessing attributes of a 'government.'" RE 5, PageID # 216.

Tribes likewise fit within the common and ordinary meaning of the term "domestic": "belonging or occurring within the sphere of authority or control or the fabric or boundaries of [an] indicated nation or sovereign state." *Webster's Third* at 671. Indian tribal lands "compose a part of the United States" and are within its "jurisdictional limits," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); and it is well settled that the authority of Congress over Indian tribes is "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200 (2004) – both of which make them "domestic" from the perspective of the United States. And the Supreme Court has repeatedly referred to tribes as "domestic" in various contexts. *See, e.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991)

("Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic."); *Potawatomi Tribe*, 498 U.S. at 509 ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories.") (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17); *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) (concluding that "the Cherokee territory" is "not a foreign, but a domestic territory," because it "originated under our constitution and laws").

Congress's use of the term "domestic" within the phrase "foreign or domestic government" confirms its intent to include any government at all. That is because the terms "foreign" and "domestic," especially when paired together, are opposites: any government must be one or the other. *See Krystal Energy*, 357 F.3d at 1057 (observing that, "logically, there is no other form of government outside the foreign/domestic dichotomy"). More broadly, any entity that is capable of asserting sovereign immunity in litigation must be a government, because sovereign immunity by definition limits suits against governments. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (federal sovereign immunity limits "[j]urisdiction over any suit against the Government"); *Bay Mills*, 134 S. Ct. at 2030 (describing "a tribe's immunity" from suit as one of its "governmental powers and attributes").

Because Congress – like any ordinary speaker of English – would have understood the phrase "other foreign or domestic government" to include Indian tribes, its intent to abrogate tribal immunity is unambiguous. *See Krystal Energy*, 357 F.3d at 1058, 1060 (holding that "Congress expressly abrogated the immunity of Indian tribes" because "the category 'Indian tribes' is simply a specific member of the group of domestic governments," whose immunity "Congress explicitly abrogated"). Accordingly, this Court can and should reverse without further inquiry. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (where a statute has a "clear meaning . . . as written," courts "begin and end [their] inquiry with the text, giving each word its ordinary, contemporary, common meaning"); *see also United States v. Ospina*, 18 F.3d 1332, 1335 (6th Cir. 1994) (where Congress's language is "not ambiguous" but "simply broad," courts have "no basis to read a qualification" into it).

B. Statutory Context Confirms That "Governmental Unit" Includes Indian Tribes

Although §§ 106(a) and 101(27) are clear enough standing alone, this Court may also look to surrounding provisions of the Bankruptcy Code to confirm Congress's unequivocal intent to abrogate tribal sovereign immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56-57 (1996) (looking to "various provisions" of statute in order to "dispel[]" any "conceivable doubt" that Congress intended to abrogate state sovereign immunity); *Richard Anderson Photography v.*

Brown, 852 F.2d 114, 118 (4th Cir. 1988) (in determining whether Congress unequivocally intended to abrogate state sovereign immunity, "focus[ing] on the language of the statute as a whole"); *accord Lane v. First Nat'l Bank of Boston*, 871 F.2d 166, 171 (1st Cir. 1989) (same); *cf. Bay Mills*, 134 S. Ct. at 2032-33 (considering "numerous provisions" of statute weighing for and against abrogation). Here, the surrounding Code provisions amply reinforce the conclusion that the term "governmental unit" includes Indian tribes. Indeed, in this litigation the Tribe itself has asserted rights that it only possesses because it qualifies as a "governmental unit."

If the district court and the Tribe were correct that Indian tribes are not "governmental unit[s]" within the meaning of § 101(27), then tribes could not be "creditor[s]" under the Bankruptcy Code. Under the Code, "[t]he term 'creditor' means" an "entity" that has one of several types of claims against a debtor or the debtor's estate. 11 U.S.C. § 101(10). "The term 'entity,'" in turn, "includes person, estate, trust, governmental unit, and United States trustee." *Id*. § 101(15). And "[t]he term 'person' includes individual, partnership, and corporation." *Id.* § 101(41). A tribe, which is not an individual, a partnership, or a corporation, is not a "person" under the Code.[9] Neither is it an "estate" or a "trust" (and certainly

[9] *See* Steven T. Waterman, *Tribal Troubles – Without Bankruptcy Relief*, 28-JAN Am. Bankr. Inst. J. 44, 45-46 (2010) ("There is no reported decision in which a federally recognized Indian tribe has been explicitly found to be a 'person'

not a "United States trustee"). Accordingly, if tribes did not fit within the definition of a "governmental unit," they would not fit within any of the statutory categories of potential "creditor[s]."

If tribes could not be "creditor[s]" under the Bankruptcy Code, then they could not avail themselves of the rights of a "creditor" under the Bankruptcy Code. For example, only a "creditor" may "file a proof of claim" against a debtor. 11 U.S.C. § 501(a). If an Indian tribe could not file a proof of claim, then it would effectively lose the right to payment on any claim against any debtor in bankruptcy. No one thinks that is so, including the Tribe itself in this case: On November 26, 2008, the Tribe filed proofs of claim against the Casino and Kewadin, and, on the same day, the Authority also filed a proof of claim against the Casino. RE 5, PageID # 91.

Similarly, if Indian tribes were not "governmental unit[s]" for the purposes of the Bankruptcy Code, tribes also could not file requests for payment of administrative expenses. That right is available only to "entit[ies]." 11 U.S.C.

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as defined in the Bankruptcy Code."). That is consistent with the "longstanding interpretive presumption that 'person' does not include the sovereign," *Vt. Agency of Nat'l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) (holding that a state is not a "person" subject to *qui tam* liability under the False Claims Act), a presumption that applies to Indian tribes, *see Inyo Cty. v. Paiute-Shoshone Indians of Bishop Cmty.*, 538 U.S. 701, 711-12 (2003) (holding that a tribe was not a "person" who could bring an action under 42 U.S.C. § 1983).

§ 503(a) ("An entity may timely file a request for payment of an administrative expense . . . ."). As shown above, only one of the terms Congress used to define "entity" within the meaning of the Bankruptcy Code – "governmental unit" – encompasses Indian tribes. Yet, on May 7, 2010, the Tribe acted as an "entity" under § 503(a) by filing a request for payment of an administrative expense against the Casino. RE 5, PageID # 95.

Other provisions of the Bankruptcy Code also use the term "governmental unit" to convey special rights to governments. As examples, "governmental unit[s]" are permitted to bypass the automatic stay for certain police and regulatory enforcement actions, 11 U.S.C. § 362(b)(4); to take extra time to file proofs of claim, *id.* § 502(b)(9); to obtain priority for certain unsecured tax debts, *id.* § 507(a)(8); and to assert exemptions from discharge for certain "fine[s], penalt[ies], or forfeiture[s]," *id.* § 523(a)(7).[10] Indian tribes can take advantage of those special rights. *See Sandmar*, 12 B.R. at 916 (accepting the Navajo Nation's argument that it was a governmental unit under § 362(b)(4), although finding other prerequisites of § 362(b)(4) not met). If they could not, Congress would have

[10] *See also*, *e.g.*, 11 U.S.C. § 107(c)(2) (governmental units acting under police or regulatory power may obtain ex parte access to otherwise protected personally identifying information); *id.* § 1129(d) (governmental unit can oppose plan confirmation "if the principal purpose of the plan is the avoidance of taxes"); *id.* § 1521(d) (court may not enjoin "a police or regulatory act of a governmental unit" in connection with a foreign bankruptcy proceeding).

shown less regard to the tribes' dignity as sovereigns than it showed to the federal and state governments – whose immunities are abrogated by § 106(a), but whose governmental interests are recognized throughout the Code. *See Krystal Energy*, 357 F.3d at 1060 (describing the "myriad" Code provisions that provide "special treatment" for governmental units as supporting the conclusion that Congress meant to include tribes in that term).

C. Congress Need Not Use Special Words To Abrogate Immunity

The district court erred in concluding that § 106(a) does not unequivocally express Congress's intent to abrogate the sovereign immunity of Indian tribes because the Code does not specifically refer to Indian tribes. The Supreme Court has not insisted that Congress "state its intent in any particular way" or "use magic words" to abrogate sovereign immunity of any kind. *FAA v. Cooper*, 566 U.S. 284, 291 (2012) (federal sovereign immunity); *see Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000) ("our cases have never required that Congress make its clear statement in a single section"); *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (no "explicit reference to state sovereign immunity or the Eleventh Amendment" required for a statute to "clearly subject[ ] States to suit for monetary damages"). Instead, the clear-statement requirement for waiver or abrogation of sovereign immunity "'is a tool for interpreting the law' . . . that . . . does not 'displac[e] the other traditional tools of statutory construction.'" *Cooper*,

566 U.S. at 291 (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)) (third alteration in *Cooper*).

C&L Enterprises, 532 U.S. 411, is instructive. In that case, the Supreme Court considered the requirement that a tribal waiver of immunity must be "'clear'" – a requirement that the Court described as "[s]imilar[]" to the clear-statement requirement for congressional abrogation of immunity. *Id.* at 418. The tribe in that case had consented to arbitration and to enforcement of an arbitral award, but had never said in so many words that it "waived its sovereign immunity." *Id.* at 421. The Court rejected the argument that "a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity,'" quoting with approval the Seventh Circuit's decision in *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 660 (7th Cir. 1996). *Id.* at 420. In the present case, this Court confronts a statute that does specifically use the words "sovereign immunity" but does not use the words "Indian tribes." The same principle applies: what matters is the clarity of intent, not the particular form of words.

Both the First and Ninth Circuits have expressly held that no particular form of words is required for Congress to abrogate tribal immunity. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (en banc) (citing *C&L Enterprises* and explaining that "an effective limitation on tribal sovereign

immunity need not use magic words" and that "there is no requirement that talismanic phrases be employed"); *Krystal Energy*, 357 F.3d at 1061 ("[T]he Supreme Court's decisions do not require Congress to utter the magic words 'Indian tribes' when abrogating tribal sovereign immunity."). Neither the district court nor the Tribe in its briefing below identified any persuasive reason that Congress's intent can only be determined if Congress uses special words.

The district court's conclusion that Congress must use special words to abrogate tribal immunity rests on four legal errors. *First*, that court erred in giving weight to the observation that, in some abrogating provisions, Congress has specifically referred to "Indian tribes." RE 5, PageID # 226 (citing cases about the Safe Drinking Water Act, the Fair Debt Collection Practices Act, and the Resource Conservation and Recovery Act). The same thing can be said about federal sovereign immunity: Congress sometimes expressly refers to that immunity in waiving it,[11] but, as *Cooper* teaches, Congress need not do so for the waiver to work. Rather, Congress need only make its intent "clearly discernable from the statutory text in light of traditional interpretive tools." 566 U.S. at 291.

[11] *See, e.g.*, 15 U.S.C. § 1122(a) ("[t]he United States . . . shall not be immune from suit" for trademark violations); 22 U.S.C. § 6713(c) ("the United States may not raise sovereign immunity as a defense" to certain takings claims); 43 U.S.C. § 390uu ("[t]he United States, when a party to any suit" involving certain land reclamation contracts, "shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty").

Second, the district court erred in emphasizing the absence of any Supreme Court decision "f[inding] that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." RE 5, PageID ## 216-217. The Court's modern cases involving abrogation or waiver of tribal immunity consist of *Santa Clara Pueblo*, which involved a statute that did refer to Indian tribes, but did not authorize suits against them, *see* 436 U.S. at 58 (discussing Indian Civil Rights Act of 1968); *C&L Enterprises*, which involved a generic arbitration agreement that did not mention tribes or immunity but did authorize suit against the party that signed it (which happened to be a tribe), *see* 532 U.S. at 420-21; and, most recently, *Bay Mills*, which involved a statute that referred to Indian tribes and authorized certain suits against them, but did not authorize the particular kind of suit at issue, *see* 134 S. Ct. at 2032-35 (discussing Indian Gaming Regulatory Act).[12] Neither individually nor together do those cases support the district court's contention that, to abrogate tribal immunity, Congress must refer to "Indian tribes" in so many words.

Third, the district court erred in relying on *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and *Florida Paraplegic Ass'n, Inc. v. Miccosukee*

[12] *Santa Clara Pueblo* and *Bay Mills* are the only cases cited in the district court's opinion or the Tribe's briefing below in which the Supreme Court considered and rejected a party's argument that Congress had abrogated tribal immunity. Our research has identified no other examples. Some other cases discuss abrogation, but only in dictum. *See, e.g.*, *Kiowa Tribe*, 523 U.S. at 758-59.

Tribe of Indians of Florida, 166 F.3d 1126 (11th Cir. 1999), neither of which is on point. *Atascadero* held that Congress did not clearly abrogate state sovereign immunity when, in the Rehabilitation Act, it authorized suit against "any recipient of Federal assistance." 473 U.S. at 245-46 (quoting 29 U.S.C. § 794a(a)(2)). To lump states in with "any other class of recipients of federal aid," the Court reasoned, would fail to take account of their special "constitutional role." *Id.* at 246. Here, by contrast, Congress specifically authorized a limited class of actions against a broad group of sovereigns. There is no lack of recognition for the tribes' status in treating them the same as the United States, the states, and any "other foreign or domestic government." 11 U.S.C. § 101(27).

As for *Florida Paraplegic Ass'n*, that case held that Congress's express abrogation of state sovereign immunity in the Americans with Disabilities Act ("ADA") did not imply abrogation of tribal immunity. *See* 166 F.3d at 1133 (discussing 42 U.S.C. § 12202, which provides that "[a] State shall not be immune under the eleventh amendment . . . from [certain] action[s] in Federal or State court"). But, unlike §§ 106(a) and 101(27) of the Bankruptcy Code, the ADA does not abrogate sovereign immunity as to all "domestic government[s]." A reference to states does not by its ordinary meaning include Indian tribes because tribes are not states. A reference to "domestic government[s]," on the other hand, does include Indian tribes, under the common and ordinary meaning of that phrase.

Further, the Eleventh Circuit acknowledged that the standard for determining abrogation of tribal immunity is the "same" as the "standard [that] applies in determining whether Congress has abolished federal and state governments' protection from suit." *Id.* at 1131. As *Cooper* makes clear, that standard does not require Congress to "state its intent in any particular way." 566 U.S. at 291.

Fourth, and finally, the district court erred in reasoning that classifying tribes as "domestic government[s]" because they are undisputedly domestic and undisputedly governments would be a prohibited "logical inference." RE 5, PageID ## 222-223. It purported to derive a ban on logic from *Dellmuth*, which refused to find abrogation of state sovereign on immunity based on a mere "permissible inference" that states would be "logical defendants" in actions under the Education of Children with Handicaps Act because of their "important role in securing an appropriate education for handicapped children." *Id.*, PageID # 221 (quoting 491 U.S. at 232). When *Dellmuth* is read in context, it teaches that courts should not infer congressional intent to abrogate immunity based merely on an inference that doing so would serve the statute's overall purpose. It does not prohibit reading plain statutory terms together and giving those terms their logical consequences.

Indeed, Justice Scalia sought to ward off the exact mistake the district court made here when he stated in his concurrence in *Dellmuth* that the Court's

"reasoning d[id] not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." 491 U.S. at 233 (Scalia, J., concurring). Because Justice Scalia was the "fifth vote in the [*Dellmuth*] majority, [his] view as to the meaning of the Court's opinion (as expressed in his concurrence) is entitled to substantial, if not controlling, weight." *Alaska v. EEOC*, 564 F.3d 1062, 1066 n.3 (9th Cir. 2009) (en banc).[13] The district court therefore erred in refusing to apply clear statutory language based on the incorrect assumption that it was barred from giving that text its ordinary (and logical) meaning.

II. THE TRIBE WAIVED ITS IMMUNITY BY CAUSING THE DEBTORS TO FILE FOR BANKRUPTCY

The Tribe is also subject to suit because it has waived any immunity it might otherwise have had. *See C&L Enters.*, 532 U.S. at 418 (a tribe's "'clear'" waiver "relinquish[es] its immunity") (quoting *Potawatomi Tribe*, 498 U.S. at 509). Like other sovereign entities, an Indian tribe waives sovereign immunity if it "voluntarily invokes [the federal courts'] jurisdiction" or "makes a 'clear declaration' that it intends to submit itself to [federal] jurisdiction." *Coll. Sav.*

[13] *See also Thiokol Corp. v. Mich. Dep't of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993) (citing Justice Scalia's concurrence to show that the Supreme Court has stopped "short of requiring Congress to explicitly annul state immunity by making reference to the Eleventh Amendment or state sovereign immunity").

Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-76 (1999) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)); *see also In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (tribe's invocation of federal jurisdiction serves as an unequivocal expression of waiver).

Further, as with other sovereigns, the conduct attributable to the Tribe includes not only acts the Tribe admits to be its own, but also those of a "corporate entity [that] is so extensively controlled by its owner that a relationship of principal and agent is created." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) ("*Bancec*"). Here, the Trustee alleged facts (which this Court must accept as true, as did the bankruptcy and district courts) showing that the conduct of the Debtors could be attributed to the Tribe under principles of alter ego, piercing the corporate veil, and agency. The Tribe comprehensively dominated and controlled the Debtors in matters both large and small, and it ultimately used that control to cause them to invoke federal bankruptcy jurisdiction by filing Chapter 11 petitions.

The district court avoided a finding of waiver by concluding erroneously that such conduct could not amount to waiver of the Tribe's sovereign immunity because the only means by which Indian tribes can effect waiver is through a written board resolution expressly waiving sovereign immunity for the claims at issue. Neither this Circuit's law nor the law of any other circuit supports the

court's mistaken legal premise, which runs counter to the Supreme Court's repeated admonitions that the doctrine of waiver by litigation conduct must be applied to "avoid inconsistency, anomaly, and unfairness." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

A. Indian Tribes Can Waive Sovereign Immunity by Litigation Conduct That Invokes Federal Jurisdiction

The Supreme Court has applied the doctrine of waiver by litigation conduct in sovereign immunity cases at least since *Clark v. Barnard*, 108 U.S. 436 (1883), which held that a state's "voluntary appearance" in federal court as an intervenor waives sovereign immunity. *Id.* at 447 (Rhode Island's "appearance in a court of the United States w[as] a voluntary submission to its jurisdiction"); *see also Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a state voluntarily become[s] a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment."); *see also Hankins v. Finnel*, 964 F.2d 853, 858 (8th Cir. 1992) (courts will find waiver by litigation conduct whenever a sovereign "seeks to take advantage of [a] suit for" its own benefit) (emphasis omitted).

Gardner v. New Jersey, 329 U.S. 566 (1947), and *Lapides*, 535 U.S. 613, provide guidance on waiver. In *Gardner*, a railroad company filed a bankruptcy petition after receiving notice that New Jersey's attorney general would apply to

state court for the debtor's unpaid taxes and would seek to force the debtor to sell its property to satisfy the judgment. *See* 329 U.S. at 568. The State filed a proof of claim in the bankruptcy court for all taxes owing it, and the debtor and trustee both objected. *Id*. at 570. When the trustee petitioned for an adjudication of the State's tax claims against the debtor, the State claimed that the petition was barred by its sovereign immunity. *Id*. at 571. The Supreme Court disagreed, holding that "[w]hen the State becomes the actor" in a bankruptcy proceeding, "it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id*. at 574. As the Court observed, "[i]t is traditional bankruptcy law that he who invokes the aid of the bankruptcy court . . . must abide the consequences of that procedure." *Id*. at 573.

In *Lapides*, a professor sued a Georgia university and its officials in state court, and the defendants (including the university, represented by Georgia's attorney general) removed the case to federal court in order to obtain certain procedural "litigating advantages" for the individual defendants. 535 U.S. at 616, 621. Georgia then asserted that its university was immune from federal jurisdiction under the Eleventh Amendment. *See id.* at 617. The Supreme Court held unanimously that, under these circumstances, the "general legal principle requiring waiver ought to apply" because the university had "voluntarily invoked the federal court's jurisdiction." *Id.* at 620.

The *Lapides* Court also made two points that have particular significance here. *First*, it rejected Georgia's argument that "recent cases . . . requir[ing] a 'clear' indication of the State's intent to waive its immunity," such as *College Savings Bank*, overrode earlier litigation-conduct cases such as *Gunter*, *Gardner*, and *Clark*. *Id.* Not so, the Court explained:

> *College Savings Bank* distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct. And this makes sense because an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of "immunity" to achieve litigation advantages. The relevant "clarity" here must focus on the litigation act the State takes that creates the waiver. And that act – removal – is clear.

Id. (citations omitted).

Second, the Court also rejected Georgia's argument that, as a matter of state law, its attorney general (who had decided to remove the case) was not "authorize[d] . . . to waive the State's Eleventh Amendment immunity." *Id.* at 621. The Court held that "whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law," and that – as a matter of federal law – "a state attorney general's invocation of federal-court jurisdiction" does indeed constitute waiver. *Id.* at 623.

The doctrine of waiver by litigation conduct "equally applies to Indian tribes." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982)

(tribe's filing of a claim waives immunity against recoupment based on a counterclaim arising from the same transaction or occurrence). Courts have found waiver of tribal immunity with respect to a variety of tribal litigation conduct. *See, e.g.*, *White*, 139 F.3d at 1271 (tribal agency, although an arm of the tribal sovereign, waived its immunity "by actively participating in the reorganization court," including acknowledging its claim and seeking an order denying confirmation); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) (tribe waived its immunity by filing suit to quiet title); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) (tribe waived its immunity by intervening in litigation); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) (same).[14]

Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F.3d 917 (6th Cir. 2009), on which the district court relied, RE 16, PageID ## 724-728, is not to the contrary. In *Memphis Biofuels*, a refiner of biodiesel had entered into a contract with a tribally owned corporation. 585 F.3d at 918-19. The contract included an express waiver of tribal sovereign immunity; but, under the corporation's charter, only its board could authorize such a waiver, and the

[14] *See also Berrey v. Asarco Inc.*, 439 F.3d 636, 643 (10th Cir. 2006) (when an Indian "tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment"); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 874 F.2d 550, 552-53 (8th Cir. 1989) (same).

corporation's board never authorized the agreement. *Id.* at 921-22. This Court held that without the required board approval, the purported contractual waiver was a mere "unauthorized act[]" that was "insufficient to waive tribal-sovereign immunity." *Id.* at 922.

Memphis Biofuels did not involve any tribal invocation of federal jurisdiction (voluntary or otherwise) and did not consider or address the doctrine of waiver by litigation conduct. Likewise, none of the cases it cited for the proposition that unauthorized acts cannot waive tribal immunity involved any voluntary invocation of federal jurisdiction.[15] *Memphis Biofuels* also did not discuss *Clark*, *Gunter*, *Gardner*, or *Lapides*, nor did the parties in *Memphis Biofuels* cite any of those cases to this Court.[16] Accordingly, *Memphis Biofuels* cannot be read to answer the question whether a tribe's voluntary invocation of

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[15] *See Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (no waiver based on "misrepresentations of [tribal] officials or employees"); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001) ("applications . . . for federal funding"); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 274-75 (N.D.N.Y. 2000) (contractual provisions); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 841-44 (N.J. Super. Ct. Law Div. 1999) (same). The district court in this case also cited *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012), which refused to infer waiver from a tribe's application for a state liquor license, *id.* at 1234-36, with no reference to any litigation conduct.

[16] *See* Br. of Appellant, *Memphis Biofuels*, No. 08-6145 (6th Cir. filed Feb. 25, 2009) (no such citation); Br. of Appellee, *Memphis Biofuels*, No. 08-6145 (6th Cir. filed Apr. 13, 2009) (same); Reply Br. of Appellant, *Memphis Biofuels*, No. 08-6145 (6th Cir. filed May 18, 2009) (same).

federal jurisdiction – like a state's – is a "litigation act . . . that creates [a] waiver" with the "clarity" required by federal law. *Lapides*, 535 U.S. at 620.

B. The Acts of a Tribal Alter Ego or Agent Can Waive Immunity

When a sovereign party otherwise entitled to immunity voluntarily invokes federal jurisdiction, it waives sovereign immunity regardless of whether the sovereign acts in its own name or acts through a subordinate entity that is the sovereign's alter ego or agent. *See In re Charter Oak Assocs.*, 361 F.3d 760, 768 (2d Cir. 2004) ("[I]t is indisputable that the state of Connecticut waived its sovereign immunity when its agency, DRS, filed a proof of claim against Charter Oak's estate."); *In re Innes*, 184 F.3d 1275, 1280 (10th Cir. 1999) ("a state agent acting with proper authorization can effectuate a waiver by filing a proof of claim or initiating an adversarial action in federal court"); *cf. Miller v. Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 348 (5th Cir. 2005) (en banc) (under "hornbook contract and agency law," a state agency's authority to accept federal funds "necessarily includes the authorization to accept the conditions that come along with those funds," including "waiver of Eleventh Amendment immunity").

The leading case on alter-ego or agent status in the sovereign context is *Bancec*, 462 U.S. 611, which involved a Cuban bank (Bancec) that had a letter of credit from a U.S. bank (Citibank). *Id.* at 614. The Republic of Cuba later nationalized Bancec and exerted complete control over it. *Id.* at 615. Cuba also

expropriated Citibank's Cuban assets. *Id.* at 614. Bancec later appeared in federal court to collect on its letter of credit. Citibank asserted a setoff based on the asset seizure. *Id.* at 615. Bancec responded that Cuba – the sovereign that had seized the assets – was a separate juridical entity from Bancec and was not a party to the case. *Id.* at 619-23. The Supreme Court held that, as to Citibank's expropriation claim, Bancec's separate juridical status should be disregarded because

> [g]iving effect to Bancec's separate juridical status in these circumstances . . . would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets – a seizure previously held by the Court of Appeals to have violated international law.

Id. at 632. The *Bancec* Court stated that it would not "adhere blindly to the corporate form where doing so would cause such an injustice." *Id.*

Cases following *Bancec* have generally identified "five factors" to "aid in th[e] analysis" of whether the separate juridical status of a government-controlled corporation should be disregarded. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018). As recently summarized by the Supreme Court, those factors include (1) the government's "level of economic control"; (2) the destination of the controlled entity's "profits"; (3) the involvement of "government officials" in the entity's "daily affairs"; (4) "whether the government is the real beneficiary of the entity's conduct"; and (5) whether the government has sought to obtain "benefits in

United States courts while avoiding its obligations." *Id.* As both the bankruptcy and the district courts concluded, the facts that the Trustee has alleged would support – at least for purposes of the present motions to dismiss – a finding that the Debtors were acting as the Tribe's alter egos and agents when the Tribe caused the Debtors to file the bankruptcy petitions that began this case.

Bancec arose in the context of foreign sovereign immunity, but the principles of law it discusses apply in the present context of tribal immunity. The Supreme Court has stated that the "law governing waivers of immunity by foreign sovereigns" is "[i]nstructive" in cases involving tribal immunity. *C&L Enters.*, 532 U.S. at 421 n.3; *see also Kiowa Tribe*, 523 U.S. at 759 (similarly stating that "the problems of sovereign immunity for foreign countries" are "instructive" as to tribal immunity because both foreign sovereign immunity and tribal immunity "began as a judicial doctrine"); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86-87 (2d Cir. 2001) (applying cases about state and foreign sovereigns to construe waiver of tribal immunity). To be sure, foreign sovereign immunity is now largely governed by statute (the Foreign Sovereign Immunities Act of 1976, or "FSIA"), while tribal immunity remains judge-made. But *Bancec*'s rule that a sovereign cannot avoid waiving immunity by invoking federal jurisdiction through an alter ego is based on "principles of equity common to international law and federal

common law," 462 U.S. at 613, not on any particular provision of the FSIA.[17] There is no reason those principles should not apply here.

The district court erroneously suggested that a tribe's "imputed conduct" cannot be considered in connection with the doctrine of waiver because imputed conduct cannot "unequivocally and clearly express[ ] [the sovereign's] desire to waive [its] sovereign immunity." *See* RE 16, PageID # 737. That confuses two rules: the holding of *Lapides* and similar cases that a sovereign's voluntary invocation of federal jurisdiction waives immunity (even if the sovereign would prefer otherwise), and the holding of *Bancec* that the conduct of a controlled agent can be attributed to a sovereign where necessary to prevent injustice. The requirement of "'clarity,'" as *Lapides* explains, is met by a clear invocation of jurisdiction, and it is independent of the sovereign's "actual preference or desire" to be held liable. 535 U.S. at 620. If the Tribe, through the Debtors, urged the bankruptcy court to take jurisdiction over this case – and, on the present record, this Court must assume that it did – that is enough.

[17] The district court suggested that cases involving the FSIA could be distinguished because the FSIA permits waiver of foreign sovereign immunity "by implication," 28 U.S.C. § 1605(a)(1), while Congress has not passed a similar statute concerning tribal immunity. *See* RE 16, PageID ## 742-743. But *Bancec*'s analysis based on federal common law did not cite or rely on § 1605(a)(1).

C. Filing a Bankruptcy Petition Waives Immunity as to a Fraudulent-Transfer Action by the Trustee

Sovereigns can generally invoke federal bankruptcy jurisdiction in a variety of ways: by filing a proof of claim, *see Gardner*, 329 U.S. at 573-74; by commencing an adversary proceeding, *In re Platter*, 140 F.3d 676, 679 (7th Cir. 1998); or by objecting to the debtor's plan of organization and seeking an order denying confirmation, *see White*, 139 F.3d at 1271. Each of those different types of litigation conduct "necessarily establishes consent" to federal jurisdiction by operation of law. *Id*. (quoting *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989)). The scope of the resulting waiver depends on the nature of the consent; thus, filing a proof of claim waives immunity as to the adjudication of that claim. *See Gardner*, 329 U.S. at 574.

Ordinarily, a sovereign entity cannot file a bankruptcy petition, because only a "debtor" can do so, and a debtor must be either a "person" or a "municipality." 11 U.S.C. § 109. The present case, however, presents a rare situation in which the filing of bankruptcy petitions can be attributed to the sovereign because the petitions were filed by the sovereign's controlled alter egos and agents. It is thus necessary to look to more general principles about bankruptcy jurisdiction and sovereign consent to determine the result of the Tribe's litigation conduct here.

Those principles are supplied by *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), which makes clear that such a waiver extends to the

type of action the Trustee has brought. *Katz* held that Congress's power to make "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4, gave Congress "the power to authorize courts to avoid preferential transfers and to recover the transferred property," and that such a power "operates free and clear of [a] State's claim of sovereign immunity." 546 U.S. at 372-73.[18] In reaching that conclusion, the Court determined that such authority "has been a core aspect of the administration of bankrupt estates since at least the 18th century," so that when the Constitution gave Congress the ability to create a uniform bankruptcy jurisdiction, it manifested "the States[']agree[ment] in the plan of the Convention not to assert . . . immunity." *Id.*

To be sure, Indian tribes "were not . . . parties" to the Constitutional Convention and therefore did not at that time "surrender[ ] immunity" in the same ways as the states. *Blatchford*, 501 U.S. at 782. But the Tribe here (through its Debtor alter egos) voluntarily invoked the jurisdiction of this particular bankruptcy court over this particular bankruptcy case. And *Katz* stands for the proposition that

[18] *Katz* itself involved a voidable-preference action under 11 U.S.C. § 547 and recovery of the transfer under § 550, but its description of bankruptcy jurisdiction also applies to actions that, like this one, seek avoidance under § 544 and recovery under § 550. *See In re Allen*, 768 F.3d 274, 280 (3d Cir. 2014) (describing an order "grant[ing] relief pursuant to . . . [§] 544 (avoidance) and [§] 550 (recovery)" as "fall[ing] into th[e] area identified in *Katz*"); *In re Harnett*, 558 B.R. 655, 659-60 (Bankr. D. Conn. 2016) (applying *Katz* to § 544 / § 550 case); *In re DBSI, Inc.*, 463 B.R. 709, 714-16 (Bankr. D. Del. 2012) (same).

a sovereign's consent to bankruptcy jurisdiction includes consent to the exercise of jurisdiction over fraudulent-transfer claims, even when those claims seek to recover from the sovereign itself.

D. The Tribe's Alleged Conduct Clearly Waived Its Immunity

The relevant litigation conduct here is the filing of the underlying bankruptcy petitions, which voluntarily invoked federal jurisdiction by seeking from the bankruptcy court first an automatic stay and later a plan-confirmation injunction. The Tribe "bec[ame] the actor" with respect to those petitions, *Gardner*, 329 U.S. at 574, through its comprehensive control of the Debtors; through its orchestration of the various financial transactions and transfers that ultimately forced the Debtors into bankruptcy; and through the bankruptcy filing itself. Under these circumstances, the doctrine of waiver by litigation conduct requires the Tribe to "abide the consequences" of its request for federal bankruptcy relief. *Id*. at 573. The Tribe thus "waive[d] any immunity which it otherwise might have had respecting the adjudication of the" bankruptcy petitions, *id*. at 574 – which includes, under *Katz*, adjudication of the Trustee's claims to avoid transfers and recover property of the Debtors' estates.

Throughout the relevant period, the Tribe exerted many forms of control over the Debtors, including through shared board members, high-level management personnel who were Tribe members, direct reporting lines between

the Debtors' employees and the Tribe's officers, and day-to-day control of the Debtors' activities. RE 5, PageID ## 364-365. The Tribe's direction and control extended to the financial transactions that ultimately (and foreseeably) caused the Debtors' bankruptcy, including the 2000 debts to the Papases and Gatzaroses; the 2002 Development Agreement with the City of Detroit; and the 2005 refinancing of the Debtors and restructuring of their ownership. *Id.*, PageID ## 55-56, 367. Those transactions included the fraudulent transfers that the Trustee now seeks to avoid and recover, which paid the Debtors' obligations to the Papases and Gatzaroses and which transferred money directly to the Authority, while rendering the Debtors insolvent and unable to pay other creditors. *Id.*, PageID ## 57-59, 367.

Ultimately, the Tribe controlled the Debtors' decision to seek bankruptcy protection, as well as the conduct of the bankruptcy proceedings through Debtors' counsel (who also represented the Tribe). *Id.*, PageID ## 55, 363-365, 369. In doing so, the Tribe sought and obtained a substantial benefit from the bankruptcy court: the imposition of an automatic stay that temporarily prevented the Tribe from losing control of the Casino and the Casino from losing its license (a very important tribal asset). *Id.*, PageID ## 56-57, 368. But the consequence of seeking that benefit – like New Jersey's claim in *Gardner*, like Georgia's removal in *Lapides*, and like Cuba's claim on its letter of credit in *Bancec* – is that the Tribe can no longer hold itself apart from the bankruptcy proceeding and avoid

accountability to other creditors for its conduct. The principles set forth in those cases prevent a tribal sovereign, just as much as a state sovereign or a foreign sovereign, from coming into the federal courts and asking for "law free from the claims of justice." *Bancec*, 462 U.S. at 632 (quoting *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 362 (1955)).

CONCLUSION

The Court should reverse the district court's judgment dismissing the Tribe and the Authority from this case and should remand for further proceedings.

Respectfully submitted,

/s/ *Michael K. Kellogg*

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April 25, 2018

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/s/ **Michael K. Kellogg**

Attorney for **Buchwald Capital Advisors LLC**

Dated: **April 25, 2018**

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c) and Sixth Circuit Rule 25(f), I certify that I have this day caused a true and correct copy of the foregoing Brief for Plaintiff-Appellant Buchwald Capital Advisors LLC to be served upon all counsel of record through the Court's CM/ECF system.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

April 25, 2018

ADDENDUM

Designation of Documents for Plaintiff-Appellant Buchwald Capital Advisors LLC

RE#	Description of Entry	PageID ##
Case No. 14-cv-14103		
1	Notice of Appeal and Designated Bankruptcy Record:	1-720
	Notice of Appeal, including Sovereign Immunity Order (Aug. 26, 2014)	4-28
	Opinion Denying Renewed and Supplemented Motion To Dismiss of Defendants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority (Dkt. 453) (entered Aug. 13, 2014)	29-47
	Appellants' Designation of Record on Appeal and Statement of Issues Presented on Appeal (Sept. 8, 2014)	48-50
	Complaint (filed May 27, 2010)	51-87
	Consent Order for Substitution of Party Pltf. Under Fed. R. Civ. P. 25(c) & Fed. R. Bankr. P. 7025 (Aug. 14, 2010)	195-196
	Renewed and Supplemented Motion to Dismiss (Sovereign Immunity) (June 9, 2014)	197-210
	Greektown Litigation Trust Resp. & Brief in Opp. to the Renewed & Supplemented. Motion to Dismiss (Sovereign Immunity) with exhibits (June 27, 2014)	211-272
	Reply in Support of Renewed & Supplemented Motion to Dismiss (Sovereign Immunity) (July 14, 2014)	279-284
	Docket Sheet, No. 10-05712-wsd (Bankr. E.D. Mich.)	312-317
3	Additional Transmittal of Bankruptcy Matter to include transcripts designated as part of appellee's designation	722-846
8	Brief on Appeal of Appellants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority in Support of Tribe's Motion to Dismiss (Jan. 5, 2015)	851-884
10	Corrected Brief of Plaintiff-Appellee Buchwald Capital Advisors LLC (Feb. 9, 2015)	919-951
12	Reply Brief on Appeal of Appellants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority in Support of Tribe's Motion to Dismiss (Feb. 24, 2015)	955-965
14	Transcript of Bankruptcy Appeal Hearing held April 1, 2015	967-1010

RE#	Description of Entry	PageID ##
15	Opinion and Order Reversing the Bankruptcy Court's August 13, 2014 Order Denying the Tribe's Renewed Motion to Dismiss on the Grounds of Sovereign Immunity and Remanding for Further Proceedings (June 9, 2015)	1011-1042
20	Notice of Appeal by Buchwald Capital Advisors LLC (Feb. 14, 2018)	1072-1074
25	Transcript of Bankruptcy Appeal Hearing held April 12, 2017	1088-1151
Case No. 16-cv-13643		
1	Notice of Appeal from Bankruptcy Court (Oct. 13, 2016)	1-29
5	Designated Bankruptcy Record:	33-522
	Designation of Record on Appeal	34-43
	Docket Sheet, No. 10-05712-wsd (Bankr. E.D. Mich.)	44-49
	Complaint (filed May 27, 2010)	50-86
	Motion to Dismiss of Defs. Sault Ste. Marie Tribe of Chippewa Indians & Kewadin Casinos Gaming Authority and Memorandum in Support (June 25, 2010)	87-122
	Consent Order for Substitution of Party Pltf. Under Fed. R. Civ. P. 25(c) & Fed. R. Bankr. P. 7025 (Aug. 14, 2010)	162-163
	Order Upon Stipulation Regarding Bifurcation of Argument on Motions To Dismiss and Plaintiff's Motion for Limited Discovery (Dec. 23, 2010)	189-192
	Order and Opinion Reversing the Bankruptcy Court's August 13, 2014 Order (June 9, 2015)	198-229
	Stipulated Order Establishing Procedures & Briefing Schedule to Address Issue of Waiver of Sovereign Immunity Following Remand from District Court (Aug. 26, 2015)	249-251
	Motion to Dismiss of Defendants on Grounds of Sovereign Immunity (No Waiver) & Memorandum in Support (Sept. 4, 2015): Supplemental Affidavit of Joanne I. Carr ; Affidavit of Candace A. Blocher with attached exhibits – (A) Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, and (B) Chapter 44 of Tribal Code in effect in 2005 and 2008	252-343 269-275 276-336
	Stipulated Order Modifying Procedures & Briefing Schedule to Address Issue of Waiver of Sovereign	350-351

RE#	Description of Entry	PageID ##
	Immunity Following Remand from District Court (Sept. 29, 2015)	
	Buchwald Capital Advisors LLC Response & Brief in Opposition to Motion to Dismiss of Defs. on Grounds of Sovereign Immunity (No Waiver) (Oct. 23, 2015)	357-385
	Reply Brief in Support of Motion to Dismiss of Defs. Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority on Grounds of Sovereign Immunity (No Waiver) (Nov. 9, 2015)	399-416
	Order Permitting the Parties to File Suppl. Briefs in Connection with Motion to Dismiss of Defs. on Grounds of Sovereign Immunity (No Waiver) (Dec. 23, 2015)	424-425
	Buchwald Capital Advisors LLC Sur-Reply in Opposition to Motion to Dismiss of Defs. on Grounds of Sovereign Immunity (No Waiver) (Dec. 29, 2015)	426-434
	Response of Defs. to Plaintiff's Sur-Reply Concerning Tribe Motion to Dismiss (No Waiver) (Jan. 8, 2016)	435-443
	Opinion on Remanded Sovereign Immunity Waiver Issue (Dkt. 649) (Sept. 29, 2016)	444-465
	Statement of the Issues to be Presented on Appeal (Oct. 25, 2016)	468-473
	Transcript of Hearing held January 14, 2016	474-522
9	Amended Brief of Plaintiff-Appellant Buchwald Capital Advisors LLC (Dec. 2, 2016)	583-639
11	Brief on Appeal of Appellees Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority in Support of the Bankruptcy Court's Order Granting the Tribe's Motion to Dismiss (Waiver Issue) (Jan. 3, 2017)	641-678
14	Reply Brief of Plaintiff-Appellant, Buchwald Capital Advisors LLC (Feb. 7, 2017)	686-706
16	Opinion and Order Affirming Bankruptcy Court's Sept. 26, 2016 Opinion and Order Granting the Tribe Defendants' Motion To Dismiss and Dismissing Them with Prejudice from the Adversary Proceeding (Jan. 23, 2018)	710-745
17	Judgment (Jan. 23, 2018)	746-747
18	Notice of Appeal (Feb. 14, 2018)	748-750
22	Transcript of Bankruptcy Appeal Hearing held April 12, 2017	762-825