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

REPLY BRIEF FOR PLAINTIFF-APPELLANT BUCHWALD CAPITAL ADVISORS LLC

Joel D. Applebaum
Lisa M. Watson
CLARK HILL PLC
151 S. Old Woodward Avenue
Suite 200
Birmingham, Michigan 48009
Tel: (248) 642-9692

Mark N. Parry
MOSES & SINGER LLP
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
Tel: (212) 554-7800

Michael K. Kellogg
Gregory G. Rapawy
Katherine C. Cooper
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 326-7900
Fax: (202) 326-7999
mkellogg@kellogghansen.com
grapawy@kellogghansen.com
kcooper@kellogghansen.com

Counsel for Plaintiff-Appellant Buchwald Capital Advisors LLC

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INTRODUCTION

The plain language of the Bankruptcy Code compels the conclusion that the government of an Indian tribe – like the federal and state governments – cannot assert a defense of sovereign immunity against an action by a trustee in bankruptcy to avoid and recover transferred property. Congress expressed its unequivocal intent to abrogate tribal immunity through clear language "abrogat[ing]" the "sovereign immunity" of any "governmental unit," which Congress in turn defined to include all "foreign or domestic government[s]," 11 U.S.C. §§ 101(27), 106(a). As the only circuit court that has ruled on this issue has agreed, any ordinary speaker of English would understand Indian tribes to be both "domestic" and "government[s]." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004). Accordingly, the statute's plain language places Indian tribes among the "domestic government[s]" included in the term "governmental unit."

The Tribe[1] has no persuasive response to the plain language of §§ 106(a) and 101(27). It relies primarily on the inconclusive contention that Congress could have referred narrowly to "Indian tribes," as it has in some other statutes, rather than to "foreign or domestic government[s]" as a broad class. But it should come as no surprise that Congress used broad language in the Bankruptcy Code to effect

[1] In this reply, short forms such as "Trustee," "Tribe," and "Debtors" have the same meanings given in the Trustee's opening brief, ECF No. 22 ("Trustee Br."). References to the Tribe's brief are to ECF No. 23 ("Tribe Br.").

a broad abrogation of the immunity of all governments, while sometimes using narrower language in other statutes to refer to tribal governments specifically. And the use of different words in different statutes certainly does not warrant disregarding the common meaning of the words that Congress used here.

Further, and in the alternative, the Tribe waived any immunity it might have had when it caused the Debtors in this case (acting, on the present record, as the Tribe's agents and alter egos) to file Chapter 11 petitions invoking the bankruptcy jurisdiction of the federal courts. By doing so, the Tribe brought itself within the longstanding rule that a sovereign that comes voluntarily to the federal courts cannot assert immunity to protect itself from an unfavorable resolution of the very matters it has asked the courts to decide. Filing a bankruptcy petition asks the courts to determine what property is in the debtor's estate and to make an equitable distribution of that property among the creditors as a group. By making that request here, the Tribe gave up the right to assert immunity against a judicial decision that the Tribe itself should return property it took from the Debtors so that the court may distribute it appropriately.

ARGUMENT

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

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

As the Trustee demonstrated in its opening brief (at 24-27), § 106(a) broadly provides that "sovereign immunity is abrogated as to a governmental unit," which term includes the "United States" and its "department[s], agenc[ies, and] instrumentalit[ies]," the "State[s]" and their "department[s], agenc[ies, and] instrumentalit[ies]," and also any "other foreign or domestic government." 11 U.S.C. § 101(27). Congress's use of the sweeping phrase "other foreign or domestic government" makes clear its intent to abrogate the sovereign immunity of all government entities, including Indian tribes. *See Krystal Energy*, 357 F.3d at 1057 (noting that there can be "no other form of government outside the foreign/domestic dichotomy"). More than that, because the common and ordinary meanings of "domestic" and "government" encompass Indian tribes, Congress's intent to abrogate tribal immunity in particular is plain.

Unlike the district court, which conceded that tribes "possess[ ] attributes of a 'government,' " RE 5, PageID # 216, the Tribe appears to contend (ECF No. 23, at, *e.g.*, 23) that tribes are not governments at all, but are "unique entities" that can only be properly referred to by the specific phrase "Indian tribe." That argument cannot be squared with the ordinary meaning of the term "government" (which

encompasses any "organization . . . through which a political unit exercises authority," Trustee Br. 24 (dictionary definition)), or with the Supreme Court's repeated use of the term "government" and "governmental" to refer to Indian tribes, including in some of the same decisions on which the Tribe itself relies, *see id.* at 24-25 (quoting, *inter alia*, *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978)); *see also United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940) (referring to Indian tribes' "governmental organization"), *cited in* Tribe Br. 3, 12, 14, 37. Nor does the Tribe answer the Trustee's point (at 26) that sovereign immunity is so closely linked to governmental status that an entity capable of asserting such immunity must by definition be a government.

That the term "government" naturally encompasses tribes is reinforced by other statutes in which Congress uses the phrase "tribal government" to refer to an Indian tribe. *See*, *e.g.*, 6 U.S.C. § 572 (directing cooperation with "State, local, and tribal governments"); 15 U.S.C. § 7451(a) (authorizing various cybersecurity activities that include "State, local, and tribal governments"); 19 U.S.C. § 4332(d)(4)(A)(i) (requiring sharing of best practices concerning a safety plan with "State, local, and tribal governments"); 23 U.S.C. § 202(a)(1)(B)-(C) (providing for funding of certain programs and projects "administered by" or "associated with a tribal government"); 51 U.S.C. § 60302(2) (authorizing research

and development "to enhance Federal, State, local, and tribal governments' use of" certain technologies); *see also* 25 U.S.C. § 4116(b)(2)(B)(ii)(I) (referring to a "government-to-government relationship between the Indian tribes and the United States"). Those provisions are consistent with the ordinary-language proposition that a tribe is a form of "government," exercising political authority on behalf of and over its members.

Nor can the Tribe seriously dispute that it and other tribes are "domestic" entities. To be domestic, from the perspective of the United States, means only to be "within the . . . boundaries" of the United States or its "sphere of authority or control, Trustee Br. 25 (quoting dictionary definition), and it is beyond dispute that Indian tribes meet both of those requirements and so "are . . . domestic," *id.* at 25-26 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991)). Indeed, the Supreme Court's description of tribes as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), on which the Tribe relies (at 1, 10, 24), highlights their domestic character – but does not, as the Tribe appears to believe, conflict in any way with describing an Indian tribe as a "government," just as there is no contradiction in describing the United States as "one nation, under one government." *Lane Cty. v. Oregon*, 74 U.S. 71, 76 (1868).

The Tribe responds by contending (at 17-18) that "Congress has drawn a distinction between Indian tribes and domestic governments." Yet the Tribe

cannot point to any statute in which Congress has used the phrase "domestic government" in a way that excludes Indian tribes. Of the three statutory provisions the Tribe highlights, two refer separately to "Indian tribe[s]" and to "State or local government[s]," 42 U.S.C. § 8802(17); *id.* § 9601(16). Those examples show only that Congress does not believe the phrase "State or local government" includes tribes; but the Trustee has never contended it does. The third example refers separately to "States or political subdivisions of States," to "domestic or international organizations," to "domestic or international associations," and to "Indian tribes." 7 U.S.C. § 8310. Again, no one is arguing that tribes are "States"; the other phrases "domestic . . . organizations" and "domestic . . . associations" refer to nongovernmental entities[2] (unlike the phrase "domestic government[s]") and do not naturally encompass Indian tribes. None of the Tribe's examples contains a reference to governments of all kinds, as the Bankruptcy Code does in § 101(27); therefore, none suggests that Congress would intend such a reference to exclude Indian tribes.

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[2] *See Webster's Third New International Dictionary* 133 (2002) (defining an "association" as "a body of persons organized for the prosecution of some purpose, having no charter from the state, but having the general form and mode of procedure of a corporation"); *id*. at 1590 (defining an "organization" as "a group of people that has more or less constant membership, a body of officers, a purpose, and usu[ally] a set of regulations (representative of a local business)").

The Tribe thus fails to show that Congress meant the phrase "domestic government" to have anything other than "its ordinary, contemporary, common meaning"; and where, as here, that meaning is clear, a court should "begin and end [its] inquiry with the text." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017); *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms."). And the Tribe neither does nor could contend that it would be absurd to accord tribes the same treatment received by the federal and state governments.

The Tribe also errs in relying on (at 18-20) the abrogating provisions of several statutes that authorize suit against a "person" and that define a "person" to include an "Indian tribe." As the bankruptcy court observed, "an explicit reference to 'Indian tribes' in a statute is sufficient for Congress to clearly and unequivocally abrogate tribal sovereign immunity," but "just because that is *sufficient* does not mean it is *required*." RE 1 (No. 14-cv-14103), PageID # 21. Further, as the Supreme Court has repeatedly explained, "there is no 'canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 845-46 (2018) (quoting *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013)).

A fortiori, no canon forbids interpreting different words used in different statutes to mean similar things. *See United States v. Beasley*, 12 F.3d 280, 284 (1st Cir. 1993) (Breyer, C.J.) ("Congress can embody a similar . . . intent in different ways in different statutes.").

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

The surrounding provisions of the Bankruptcy Code – which this Court may consider to "dispel[ ]" any "conceivable doubt" that Congress intended to abrogate tribal immunity, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56-57 (1996) (state immunity) – reinforce the conclusion that the term "governmental unit" includes Indian tribes. As the Trustee explained in its opening brief (at 27-29), excluding tribes from the term "governmental unit" would also exclude them from the term "entity" as defined in § 101(15) and from the term "creditor" as defined in § 101(10). Those exclusions would have the perverse effect of preventing tribes from filing proofs of claim, requesting payment of administrative expenses, and exercising other important rights – rights that the Tribe clearly understands itself to possess, because it has exercised them in this very proceeding. *See* Trustee Br. 29, 30 (citing examples).

The Tribe fails (at 27-28) to show that, under its reading of the statute, tribes could still be "entit[ies]" or "creditor[s]." It points out that the word "includes," which appears in the definition of "entity," indicates in the Bankruptcy Code an

illustrative rather than an exhaustive list. *See* 11 U.S.C. § 101(15) ("The term 'entity' includes person, estate, trust, governmental unit, and United States trustee."); *id.* § 102(3) (" 'includes' and 'including' are not limiting"). But the Tribe overlooks the familiar principle that, where Congress defines a term with an illustrative list, courts interpret the term to include "only things similar to the specific items in the list." *Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996) (applying the canon of *ejusdem generis* to a similar statutory definition); *Donovan v. United States*, 580 F.2d 1203, 1207 (3d Cir. 1978) (unlisted items "must be of the same nature as those listed").

Here, the crux of the Tribe's argument for immunity is its (erroneous) contention that Indian tribes are so unlike the other governmental units listed in § 101(27) that the Court should exclude tribes from the common meaning of the phrase "domestic government" – despite ample reasons to consider them both domestic and governmental. Having made that argument, the Tribe is poorly positioned to argue that Indian tribes are so like other governmental units that they should be incorporated into the definition of "entity" merely through the use of the nonlimiting term "includes." Nor does (or could) the Tribe contend that Indian tribes are similar to the nongovernmental entities listed in § 101(15), such as

persons, estates, and trusts.[3] It thus can offer no coherent reading of the Bankruptcy Code that reconciles its admitted entitlement to be a creditor with its purported immunity from suit.

Further, the Tribe offers no response at all to the Bankruptcy Code's separate use of the term "governmental unit" independently to convey special rights to governments – such as the right to bypass the automatic stay for certain police and regulatory enforcement actions, 11 U.S.C. § 362(b)(4), the right to take extra time to file proofs of claim, *id.* § 502(b)(9), and others. *See* Trustee Br. 30-31. Nor does it deny that Indian tribes, specifically, can take advantage of those special rights. *See id.* (citing *In re Sandmar Corp*., 12 B.R. 910, 916 (Bankr. D.N.M. 1981)). That further supports the conclusion that Congress meant to include tribes in the term "governmental unit" – putting them on an equal footing with federal, state, local, and foreign governments.

C. Congress Need Not Use Special Words To Abrogate Immunity

Ultimately, the Tribe falls back (at 28) on the erroneous legal view taken by the district court: that the only way Congress can speak with sufficient clarity to abrogate tribal immunity is to use "the term 'Indian tribe.'" That view conflicts

[3] As the Trustee explained in its opening brief (at 28 n.9), the term "person" generally does not include a sovereign entity unless Congress specifically says so. *Cf.* Tribe Br. 18-20 (discussing statutes where Congress has overcome the general presumption by defining "person" to include Indian tribes).

with the Supreme Court's instruction that "Congress need not state its intent in any particular way" or "use magic words" to abrogate sovereign immunity. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). Rather, it is sufficient if "traditional tools of statutory construction," *id.* – foremost, the ordinary meaning of the words Congress chose – clearly indicate Congress's intent. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (finding "no need . . . to resort to the sovereign immunity canon" where "there [wa]s no ambiguity left . . . to construe").[4]

The Tribe fails (at 28-29) to distinguish *Cooper* and other cases that reject a special-words requirement by arguing that those cases concerned "intent to abrogate sovereign immunity" rather than "identif[ication of] the party whose sovereign immunity [is] argued to be waived." The Tribe cites no case adopting such a distinction and does not explain why one would make sense. If no "explicit reference to state sovereign immunity or the Eleventh Amendment" is required "clearly [to] subject[] States to suit for monetary damages," *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring), why should a reference to Indian tribes by name be required where Congress has used broader language that covers them by its clear, ordinary meaning? This Court should adhere to the Supreme

[4] As the Trustee has shown (at 31-32), cases such as *Cooper* and *Richlin* are persuasive here because the clear-statement rule for abrogations of sovereign immunity applies in the same way to federal, state, and tribal immunities. The Tribe does not appear to dispute the point and itself relies heavily (*e.g.*, at 29-30) on cases involving state immunity.

Court's guidance that the clear-statement requirement is merely a "tool for interpreting the law," *Richlin*, 553 U.S. at 589, not a license to disregard statutory text.

The cases from which the Tribe claims to draw its distinction – *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and *Dellmuth* – do not support its point. As the Trustee explained in its opening brief (at 34-35), *Atascadero* involved a statute that created a cause of action against "recipients of federal aid," 473 U.S. at 246, without mentioning any kind of government as defendant. *Dellmuth* similarly involved a statute that created a right to "bring a civil action," 491 U.S. at 228 (quoting former 20 U.S.C. § 1415(e)(2)), without any discussion of appropriate defendants in that action. The Tribe's mere assertion that those statutes can meaningfully be compared to the broad, clear abrogation language of §§ 106(a) and 101(27) lacks any persuasive force.

The Tribe's reliance (at 25-26) on *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 827 (7th Cir. 2016), fails for a similar reason. *Meyers* held that Congress did not unequivocally abrogate tribal immunity in the Fair and Accurate Credit Transaction Act ("FACTA"). FACTA provides a private right of action against a broad swath of defendants that might include some sovereigns but

clearly includes many more nonsovereigns.[5] It then creates civil liability for "[a]ny person" who fails to comply with the Act, *see* 15 U.S.C. §§ 1681n, 1681o, and a right to enforce that liability in federal court, *id*. § 1681p. Thus, FACTA – like the statutes in *Atascadero* and *Dellmuth*, but unlike §§ 106(a) and 101(27) – failed to "address abrogation in even oblique terms." *Dellmuth*, 491 U.S. at 231.

Further, as the Tribe fails to mention, *Meyers* declined to "weigh in," 836 F.3d at 826, on the question presented here. Instead, the Seventh Circuit quoted and discussed both the reasoning of the Ninth Circuit in *Krystal Energy* – which, as the Tribe does not contest, is the only circuit yet to decide whether § 106(a) abrogates tribal immunity – and the reasoning of the district court in this case and other courts. *See id.* at 824-26. *Meyers* then observed that "the interpretation of the specific definition of 'domestic government' in the Bankruptcy Code" is not "directly on point for purposes of interpreting a different definition in FACTA." *Id.* at 826. Accordingly, a ruling for the Trustee would not create a circuit conflict, while a ruling for the Tribe undisputedly would. That is an additional prudential reason (if one is needed) to follow the plain language of §§ 106(a) and 101(27) and

[5] Specifically, FACTA imposes certain credit reporting requirements on "person[s]," which it in turn defines to "mean[ ] any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b). The phrase "government or governmental subdivision or agency" includes nonsovereign governmental bodies such as municipalities, so reading it to exclude sovereigns would not render any part of the definition surplusage.

hold that Congress has clearly abrogated tribal immunity from actions like this one. *See Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 278 (6th Cir. 2010) ("[W]e do not create conflicts among the circuits without strong cause.").

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

The Trustee further showed in its opening brief that the Tribe also waived any immunity it might have had by causing the Debtors to file their Chapter 11 bankruptcy petitions. It has long been settled that a sovereign that voluntarily invokes the jurisdiction of the courts of another sovereign waives immunity against the jurisdiction it has invoked. Here, the Tribe has asked that its Debtor agents and alter egos be granted bankruptcy protection, voluntarily invoking a judicial process that for hundreds of years has included avoidance of transfers and recovery of transferred property. It follows that the Tribe has consented to federal adjudication of the Trustee's fraudulent-transfer claims, even if those claims lead to a recovery from the Tribe itself.

The Tribe does not dispute that at the present stage of this case this Court should assume (as the bankruptcy court and district courts assumed) that the Tribe completely controlled the Debtors and caused them to act as its alter egos and agents, both in the decision to seek federal bankruptcy protection and in the day-to-day management of their affairs. Nor does the Tribe appear to dispute that under

such circumstances, the actions of the Debtors can be attributed to the Tribe itself.[6] Instead, the Tribe argues that (unlike the immunity of states and foreign sovereigns) the Tribe's immunity cannot be waived by its voluntary invocation of federal jurisdiction, but only by express resolution of the Tribe's own governing body. The bankruptcy and district courts erred in accepting that sweeping proposition, and this Court should reject it now.

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

The Supreme Court has recognized as a "general principle" that where a state "voluntarily invoke[s] . . . federal . . . jurisdiction," it waives immunity from the adjudication it has requested. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002); *see also Gardner v. New Jersey*, 329 U.S. 566, 573-74 (1947); *see* Trustee Br. 39-41 (discussing *Lapides*, *Gardner*, and other cases). Many circuits have recognized that the same general principle applies to tribes, *see* Trustee Br. 41-42, and although the Tribe attempts to distinguish some cases on their facts, it fails to show that tribal immunity cannot be waived by litigation

[6] Although the Tribe attempts (at 43-44) to distinguish *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*") on its facts, it does not appear to dispute that the agency and alter-ego doctrines set forth in *Bancec* as background principles of federal law would also apply to Indian tribes. *Compare* Trustee Br. 46-47 (discussing *Bancec*'s reliance on "principles of equity common to international law and federal common law," 462 U.S. at 613) *with* Tribe Br. 44 (no such discussion).

conduct. To the contrary, the Tribe's own authority acknowledges that, at least to some extent, a tribe's voluntary invocation of federal jurisdiction waives immunity. *See Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017 (9th Cir. 2016) ("Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy.") (quoting *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989)).[7]

This Court's decision in *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), does not help the Tribe. As the Trustee has shown, *Memphis Biofuels* did not involve any voluntary invocation of federal jurisdiction by the tribal defendant, nor did any party in that case make any argument based on tribal litigation conduct. Trustee Br. 43-44 & n.16. The Tribe does not contend otherwise; it merely asserts that this Court in *Memphis Biofuels* rejected the doctrine of waiver by litigation conduct without saying so. Tribe Br. 31-33. But "cases cannot be read as foreclosing an argument that they never dealt with," *Waters v. Churchill*, 511 U.S. 661, 678 (1994), and "do not establish

[7] *Bodi* and *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1208 (11th Cir. 2012), on which the Tribe also relies, held that where a tribe is sued in state court, removes to federal court, and immediately moves to dismiss on the basis of tribal immunity, the removal alone is not a waiver because it is merely a means to assert the immunity defense. *See Bodi*, 832 F.3d at 1017-23; *Contour Spa*, 692 F.3d at 1204-08. Whether or not those holdings are correct, they have little bearing on the present case, where the Tribe, through its agents, invoked federal bankruptcy jurisdiction to obtain affirmative relief.

binding precedent on [an] unexamined point," *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010). The Tribe cannot prevail by relying on a case that did not even by implication address the question presented here.

In attempting to distinguish *Lapides* and *Gardner*, the Tribe relies on *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991), *cited in* Tribe Br. 34, but that case does not support the Tribe's position. The Potawatomis had sought a federal injunction to prevent Oklahoma from assessing state cigarette taxes against the tribe for on-reservation cigarette sales. *Id.* at 507. The Supreme Court held that the Potawatomis retained immunity against Oklahoma's monetary counterclaim for unpaid taxes. *Id.* at 509. But it further held that the Potawatomis were obligated to help Oklahoma collect taxes on sales to nonmembers and that Oklahoma could enforce that obligation through damages actions against tribal officials or agents. *Id.* at 511-14. The Supreme Court reached and decided that latter question – effectively granting declaratory relief against the Potawatomis – even though the Potawatomis urged the Court not to and contended that the question was not within the scope of their complaint for injunctive relief. *Id.* at 511-12. Thus, *Potawatomi* illustrates that a tribe, like a state, "cannot escape the result" of "voluntarily becom[ing] a party to a cause, and submit[ting] its rights for judicial determination." *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906).

The Tribe also relies (at 37-38) on *Fidelity & Guaranty* but overstates the breadth of its holding. That case involved a claim by the United States on behalf of the Choctaw and Chickasaw Nations to collect royalties on leases, to which the private lessee responded by filing a counterclaim. 309 U.S. at 510. The lessee obtained a judgment that it not only owed no royalties, but also was entitled to an additional credit from the Choctaw and Chickasaw. *Id.* Before the Supreme Court, the United States "conce[ded] . . . the validity of so much of the . . . judgment as satisfie[d] the Indian Nations' claim against the lessee," on a theory of recoupment. *Id.* at 511. Nevertheless, the United States contended (and the Court agreed) that the judgment could not go beyond recoupment to award affirmative monetary relief against the Choctaw and Chickasaw. *See id.* at 512.

Neither *Potawatomi* nor *Fidelity & Guaranty* held that tribes cannot waive immunity through litigation conduct. Instead, those cases applied much narrower rules: where a tribe seeks monetary relief (as in *Fidelity & Guaranty*), its waiver of immunity is limited to recoupment, and where it seeks an injunction (as in *Potawatomi*), it does not waive immunity against a monetary counterclaim. Neither case considered the question presented here: to what extent the Tribe waived immunity by causing the Debtors to seek bankruptcy protection, including an automatic stay and a post-confirmation injunction.

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

The scope of the Tribe's waiver of immunity when it voluntarily invokes federal jurisdiction depends on what the Tribe has asked the federal courts to do. *See In re White*, 139 F.3d 1268, 1272 (9th Cir. 1998) (by filing a proof of claim, a tribe "waived sovereign immunity for the case for that claim," even if the bankruptcy court ordered the claim discharged rather than paid); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) (by filing a quiet title action, a tribe "consent[s] to the district court exercising its equitable discretion to resolve the status of the disputed lands," even if the tribe loses). As the Trustee has explained (at 48-50), by filing a bankruptcy petition through the Debtors, the Tribe consented not only to the bankruptcy court exercising both its "*in rem* jurisdiction" over the debtor's estate but also to other, further proceedings "necessary to effectuate th[at] *in rem* jurisdiction," which include proceedings like this one to avoid and recover transfers. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 371-72, 378 (2006).

The Tribe misses the point in contending (at 41-43) that *Katz* itself did not directly concern tribal immunity and that Indian tribes (unlike states) did not consent to the creation of the federal bankruptcy regime at the time of the Constitutional Convention. *Katz* is relevant here because it establishes that consent to federal bankruptcy jurisdiction includes consent to avoidance-and-recovery

proceedings necessary to effectuate that jurisdiction. The states gave consent categorically to all federal bankruptcy proceedings at the time of the Framing. The Tribe gave consent to this particular bankruptcy proceeding when, through the Debtors, it voluntarily invoked the jurisdiction of the bankruptcy court. The scale is different, but the logic is the same.

Further, permitting the Tribe to seek bankruptcy protection for the Debtors while shielding its own transactions with them from judicial scrutiny would give rise to the "problems of inconsistency and unfairness" that underpin "the rule governing voluntary invocations of federal jurisdiction." *Lapides*, 535 U.S. at 622. Through its ultimate ownership and complete control of the Debtors, the Tribe has benefitted substantially from a stay of creditors' collection activities and a plan-confirmation injunction that enforced "the equitable distribution of [the Debtors'] property among [their] creditors," *Katz*, 546 U.S. at 364 – creditors that include the Tribe. But through its assertion of immunity, the Tribe has sought to foreclose the bankruptcy court from determining whether the Tribe itself received funds that should have been property of the estate and should have been part of that equitable distribution. This Court should reject that outcome as "anomalous and contrary to the [bankruptcy] court's broad equitable powers." *Rupp*, 45 F.3d at 1245 (refusing "[t]o hold that the district court could exercise its discretion . . . in favor of the plaintiff . . . but not the defendant").

The Tribe thus errs in relying (at 38-40) on cases holding that where a tribal plaintiff seeks monetary relief (through a proof of claim or otherwise), it waives immunity only to the extent of recoupment. Those cases are fully consistent with the Trustee's position here. When a sovereign asserts a straightforward claim for money (as in *Gardner* or *Fidelity & Guaranty*), it waives immunity from a judicial determination that no money is owed, which may include a recoupment defense. When a sovereign asserts a claim for an injunction, it waives immunity from a determination that no such relief is warranted, which may include (as in *Potawatomi*) a declaration of rights adverse to the sovereign's interests. But where a sovereign seeks broader equitable relief (as in *Rupp*, in *White*, and in this case), the scope of its waiver is necessarily broader, and the Tribe must "abide the consequences of th[e] procedure" it has invoked. *Gardner*, 329 U.S. at 573.

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*

Joel D. Applebaum
Lisa M. Watson
CLARK HILL PLC
151 S. Old Woodward Avenue
Suite 200
Birmingham, Michigan 48009
Tel: (248) 642-9692

Mark N. Parry
MOSES & SINGER LLP
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
Tel: (212) 554-7800

Michael K. Kellogg
Gregory G. Rapawy
Katherine C. Cooper
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 326-7900
Fax: (202) 326-7999
mkellogg@kellogghansen.com
grapawy@kellogghansen.com
kcooper@kellogghansen.com

Counsel for Plaintiff-Appellant Buchwald Capital Advisors LLC

June 7, 2018

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/s/ **Michael K. Kellogg**

Attorney for **Buchwald Capital Advisors LLC**

Dated: **June 7, 2018**

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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 Reply 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

June 7, 2018