CASE NO. 22-15298

In The
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

CEDARVILLE RANCHERIA OF NORTHERN PAIUTE INDIANS, d.b.a. NUMA CORP.,

Plaintiff-Appellant

v.

JASON DIVEN

Defendant-Appellee

On Direct Appeal from the United States Bankruptcy Court
for the Eastern District of California
Case No. 20-24311-E-13
The Honorable Ronald H. Sargis

APPELLANT'S OPENING BRIEF

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Disclosure Statement Pursuant to F.R.A.P. 26.1

Appellant NUMA Corp. is not owned by any parent corporation or another entity, whether publicly or closely held.

The only debtor in the underlying bankruptcy case is named in the caption. The debtor is the Appellee.

Dated: June 17, 2022

DURAN LAW OFFICE, P.C.

/s/Jack Duran, Jr.
Attorney for Appellant, Cedarville Rancheria of N. Paiute Indians, d.b.a. NUMA Corp.

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 158(d)(2)(A), as the Court granted the Parties' Petition for Permission to Appeal under § 158(d)(2)(A).

II. STATEMENT OF THE ISSUES

A. Whether Appellant's sovereign immunity was waived for purposes of enforcement of the automatic stay?

Appellant responds, No.

B. Does the Bankruptcy Code (including Section 106 and the Code's automatic stay provisions) waive tribal sovereign immunity such that the automatic stay and penalties for its violation are applicable to a federally-recognized Indian tribe, an action pending in tribal court, and the tribal court, when the tribal debtor has filed a bankruptcy case? Appellant responds, No.

C. Whether Appellant, as a foreign government, and whether the tribal court, as a foreign court, are subject to the automatic stay provisions of the Bankruptcy Code?

Appellant responds, No.

D. Whether Appellant's sovereign immunity precludes the Bankruptcy Court from holding Appellant liable for violation of the automatic stay?

Appellant responds, Yes.

E. Whether a foreign government, like Appellant, asking a foreign court to

determine whether that court is subject to the automatic stay injunction, violated the automatic stay?

Appellant responds, No.

III. STATEMENT OF THE CASE

A. The Underlying Tribal Court Case NUMA Corp. et al. v. Jason Diven Construction et al.

In November 2017, Debtor and Appellee, Jason Diven ("Mr. Diven" or "Appellee"), entered into a construction contract with NUMA Corporation ("NUMA Corp." or "Appellant"), a Section 17 chartered corporation wholly owned and operated by the Cedarville Rancheria of Northern Paiute Indians, a federally recognized Indian Tribe ("Tribe" or "Appellant"). 3-ER-105, 141. The contract required Mr. Diven to build a home within the Tribe's federal trust lands, located in Cedarville, Modoc County, California. *Id.* Mr. Diven was provided $74,000 to start work, out of a total contract of $148,166. *Id.*

The funds at issue were not tribal revenue or funds received from tribal commercial activities, but were grant funds received from the United States Department of Housing and Urban Development ("HUD"), which the United States provides to Indian tribes pursuant to its *fiduciary* duty to the Tribe.[1] *Id.* The

[1] The Tribe's breach of contract and tort claims against Mr. Diven are related to tribal on-reservation activities. The claims relate to Mr. Diven's failure to complete a HUD grant-funded home within the Tribe's reservation. 3-ER-105-06.

federal trust responsibility is a *legally enforceable fiduciary obligation* of the United States to carry out the mandates of federal law specific to American Indian tribes and Alaskan Native Communities. *Id.*

B. The Diven-Numa Corp. Contract

The contract at issue required a tribal home, on tribal lands, to be built by Mr. Diven within a specific period of time. 3-ER-106, 142. Mr. Diven did not build the home within that time and requested additional time, on several occasions, which the Tribe graciously granted. *Id.* On or about March 1, 2019, the Tribe issued Mr. Diven a "Stop Work" Order and the home was still not completed two (2) years *after* Mr. Diven entered into the contract. *Id.* The Tribe through HUD thereafter completed the work Mr. Diven failed to complete, at a considerable and increased expense to the Tribe as the work completed by Mr. Diven was sub-par. *Id.* This additional completion work required the Tribe to use grant funds that *could have been used* for other tribal purposes.[2] *Id.* But due to Mr. Diven's failure to do what he promised, the Tribe was required to use such grant funds to complete the home. *Id.*

On November 13, 2019, NUMA Corp., via the Tribe (equivalent to the Tribal attorney general), filed in its Tribal Court ("Tribal Court") a suit for

[2] Mr. Diven is reportedly back in business as a construction contractor. 3-ER-106.

damages against Mr. Diven, for breach of contract and construction negligence ("Tribal Action"). 3-ER-106, 109-121, 142.

C. The Bankruptcy Proceeding and Request for Determination from the Tribal Court

On September 11, 2020, Mr. Diven filed a chapter 13 bankruptcy case in the United States Bankruptcy Court for the Eastern District of California ("Bankruptcy Case"). 3-ER-106, 142. Appellant (through NUMA Corp.), filed a proof of claim, Proof of Claim 6-1, on November 19, 2020 in the Bankruptcy Case, in the amount of $200,000. *Id.;* 3-ER-305-07.

On or about December 11, 2020, Mr. Diven's bankruptcy counsel forwarded to the undersigned a notice regarding the automatic stay. In an abundance of caution, Appellant agreed to stay the Tribal Action . *Id.* In February 2021, the Bankruptcy Court granted Mr. Diven's motion to confirm his chapter 13 plan. 3-ER-107, 142. On May 13, 2021, the Bankruptcy Court entered an order confirming Mr. Diven's chapter 13 plan. 3-ER-203-04.

On or about March 25, 2021, the Tribe requested a status conference in the Tribal Action, regarding the applicability of the automatic stay in the Tribal Action. 3-ER-107, 142. The Tribal Court ordered briefing on the issues of tribal sovereign immunity, whether the Bankruptcy Code waived such immunity, and if the automatic stay applied to the Tribe. *Id.* The Bankruptcy Court defines in its

findings of fact and conclusions of law the conduct violating the stay as "[r]equesting a status conference and briefing schedule to determine the scope of the automatic stay in the tribal court. . . ." 1-ER-28 (quoting Appellee's motion for sanctions). On or about May 18, 2021, after the assertion of the automatic stay violation, the parties agreed to stay the Tribal Action until the Bankruptcy Court could rule on Appellee's motion for sanctions for violation of the stay ("Appellee's Motion"). 3-ER-107, 123-31, 142. The Bankruptcy Court heard the Appellee's Motion on July 1, 2021 and entered its order granting the Motion on July 7. 1-ER-7, 3-4. The Appellant filed its Notice of Appeal on July 14. 4-ER-555-60. Certification to this Court was filed October 18, 2021. 4-ER-549-53.

IV. SUMMARY OF THE ARGUMENT

The Bankruptcy Court incorrectly decided that a federally-recognized Indian tribe and its tribal court are subject to the Bankruptcy Code's automatic stay. In so holding, the Bankruptcy Court turned on its head over one-hundred years of federal tribal legal precedent, ignoring core principals of tribal sovereignty and the federal law requirements for abrogation of tribal immunity, including clarity, unambiguity, and demonstrable intent for abrogation.

The Bankruptcy Court had no subject matter jurisdiction to sanction the Appellant for violation of the bankruptcy stay because the Appellant has sovereign

immunity in bankruptcy proceedings. There is no *clear* and *unequivocal* Congressional intent in the Bankruptcy Code indicating that Indian tribal immunity is abrogated in bankruptcy proceedings. In the past, Congress has repeatedly demonstrated that it knows how to abrogate tribal immunity, *unequivocally*. Yet, the definition of "governmental unit" in Section[3] 106 of the Bankruptcy Code does not include the unequivocal language Congress has used in the past to abrogate tribal immunity. The Sixth Circuit, Seventh Circuit, and Bankruptcy Appellate Panel for the Eight Circuit Courts have rejected abrogation of tribal immunity in the bankruptcy context. "[T]here is not one example in all of history where the Supreme Court has found that Congress has intended to abrogate sovereign immunity without expressly mentioning Indian tribes somewhere in the statute." *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 824 (7th Cir. 2016) (declining to find waiver of tribal immunity in Section 106(a)) (quoting *In re Greektown Holdings, LLC*, 532 B.R. 680, 693 (E.D. Mich. 2015)).

Moreover, in a 2018 decision this Court has already tacitly overruled the Congressional intent analysis of *Krystal Energy Company v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004), the decision the Bankruptcy Court relied upon to reject the Appellant's sovereign

[3] Unless otherwise noted, all references to sections are to title 11 of the United States Code.

immunity defense. *Krystal Energy* ignored the long-held legal axioms concerning waivers of tribal immunity—namely, the need for such waivers to be *express* and *unambiguous*. *Krystal Energy* failed to recognize the Bankruptcy Code's omission of any mention of American Indian tribes or Congress' clear intent to abrogate tribal immunity. As such, the Court should revisit its tribal immunity waiver analysis in *Krystal Energy*.

Just the fact that several federal courts have substantially contrasting analyses and conclusions regarding the waiver of tribal immunity in the Bankruptcy Code, establishes absence of unequivocal intent from Congress to abrogate tribal sovereign immunity.

Additionally, not only that there is no express language of tribal immunity abrogation in the Bankruptcy Code, but the legislative history of bankruptcy laws going back over 100 years is also devoid of any support for tribal immunity waiver.

Finally, the Bankruptcy Court had no constitutional authority to award sanctions for the Appellant asking the Tribal Court to determine itself whether the stay deprived it of authority over the Tribal Action. The Tribal Court cannot be deprived of its constitutional mandate to examine whether it has authority to adjudicate cases pending before it. This Court should overturn the Bankruptcy

Court's award of sanctions against the Tribe, upholding tribal sovereign immunity in the bankruptcy context.

V. ARGUMENT

A. STANDARD OF REVIEW

The existence of sovereign immunity is a question of law reviewed de novo. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158 (9th Cir. 2021) (addressing tribal sovereign immunity); *Walden v. Nevada*, 945 F.3d 1088, 1092 (9th Cir. 2019); *Barapind v. Gov't of Republic of India*, 844 F.3d 824, 828 (9th Cir. 2016) (addressing foreign sovereign immunity); *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (addressing sovereign immunity). The Bankruptcy Court's conclusions of law are also reviewed *de novo*, including its conclusions about the state of the law on tribal sovereign immunity in the bankruptcy context. *See Landis v. Washington State Major League Baseball Stadium Pub. Facilities Dist.*, 11 F.4th 1101, 1105 (9th Cir. 2021); *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020); *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017).

B. DISCUSSION

Appellee has asserted that the automatic stay triggered by the Bankruptcy Case filing barred continued litigation of the Tribal Action. The Tribe denies that the stay binds the Tribe or that the stay prohibits the Tribal Court's adjudication of

the Tribal Action or prohibits the Tribal Court's own determination of whether the stay applies to the Tribal Action. Nor has the Tribe waived its sovereign immunity in the Bankruptcy Case.

1) THE TRIBE HAS SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT AND CIVIL PROCESS; IT HAS NOT WAIVED IT

The principle that Indian tribes and their entities enjoy sovereign immunity from civil suit is well-settled and the Bankruptcy Court lacks subject matter jurisdiction over the Tribe and NUMA Corp., unless Congress has unequivocally waived immunity. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and territory *and the jurisdiction to resolve internal tribal disputes*. For instance, interpreting tribal membership determinations lies with Indian tribes and their courts, and not in United States courts. *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) (citing *United States v. Wheeler*, 435 U.S. 313, 323-36 (1978) (superseded by statute on other grounds)).

Indian tribes in the United States, including tribal officials, are entitled to sovereign immunity and are immune from civil suit, unless Congress has issued *an*

unequivocal abrogation of that immunity or there is a *clear* tribal waiver. *C & L Enterprises, Inc. v Citizens Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2000); *Oklahoma Tax Comm'n v. Citizens Band Potowatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Tribal sovereign immunity is a mandatory doctrine that a court must honor and invoke, as it implicates that court's subject matter jurisdiction. Both state and federal courts have made it clear that sovereign immunity involves a right, which in the absence of waiver, courts must recognize. *People of the State of California v. Quechan Tribe*, 595 F.2d 1153, 1155 (9th Cir. 1979). This means a court must recognize a tribe's inherent immunity from suit irrespective of the merits of the alleged claims. *See Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2nd 416, 418 (9th Cir 1989); *Quechan* at 1155. That is, the threshold issue of a tribe's sovereign immunity must be satisfied before addressing the merits of the factual allegations in the complaint.

a. The Cedarville Rancheria of Northern Paiute Indians

The Cedarville Rancheria of Northern Paiute Indians is a federally recognized Indian Tribe with a tribal constitution adopting the Indian Reorganization Act of 1934, executed by the United States Secretary of the Department of the Interior. 3-ER-105; 4-ER-468, 487-91. The Tribe appears on the annual federal register of Indian Tribes eligible to receive federal benefits. 4-

ER-468, 472-73; https://www.federalregister.gov/documents/2021/01/29/2021-01606/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of

b. NUMA Corp.

NUMA Corp. is a Section 17 Corporation created by the Tribe, its bylaws, and charter, approved by a Tribal Resolution and by the Secretary of the Department of the Interior or their lawful designee. 4-ER-487-91. Pursuant to the NUMA Corp. bylaws, NUMA is wholly-owned by the Tribe and it is governed by the same officers that comprise the Tribe's Executive Committee (*i.e.*, Tribal Council). 4-ER-490-91.

NUMA Corp.'s bylaws permit it, as an arm of the Tribe, to have and waive tribal sovereign immunity. 4-ER-490-91. No other entity or government, with the exception of Congress or the Tribe itself, may waive the Tribe's immunity. Thus, as an arm of the Tribe, NUMA Corp. shares in the Tribe's immunity

It has been undisputed that the Tribe, as a federally-recognized Indian Tribe, and NUMA Corp., as a Section 17 chartered corporation, are entitled to tribal immunity. *See Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183-85 (10th Cir. 2010). In summary, both the Tribe and NUMA Corp. are entitled to sovereign immunity against unconsented civil suit or process, unless immunity has been *unequivocally* waived by Congress or the Tribe

itself has *clearly* waived it. Neither NUMA Corp., nor the Tribe has waived immunity before the Bankruptcy Court.

2) CONGRESS HAS NOT WAIVED IMMUNITY AS TO THE TRIBE OR NUMA CORP.

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit (or the tribe has waived its immunity). *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc*., 523 U.S. 751, 754 (1998); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.,* 585 F.3d 917, 920-21 (6th Cir. 2009) (noting that "unless Congress abrogates a tribe's immunity, or the tribe waives its immunity, the tribe's immunity remains intact").

In the absence of waived tribal immunity, federal courts do not have subject matter jurisdiction over the claims asserted against the tribe, for tribal sovereign immunity is deemed to be *coextensive* with the sovereign immunity of the United States. *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007) (discussing federal question jurisdiction under 28 U.S.C. § 1331). Congressional abrogation of tribal sovereign immunity must be clear and unequivocal, and may not be implied. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509 (1991) (qualifying the necessity for Congressional waiver as "clear"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (noting that to abrogate tribal immunity, Congress must "unequivocally"

express that purpose; waiver cannot be implied); *Memphis Biofuels*, 585 F.3d at 921.

Moreover, there is a strong presumption against waiver of tribal sovereign immunity. *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1159 (9th Cir. 2021); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016).

Moreover, statutes are to be construed liberally in favor of the Indian tribes, with ambiguous provisions being interpreted to their benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Memphis* Biofuels at 921.

Tribal sovereign immunity is not dependent upon the distinction between the governmental and commercial activities of a tribe. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (holding that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation").

Under Section 106(a) of the Bankruptcy Code, sovereign immunity is abrogated as to a "governmental unit" to the extent set forth in Section 106, with respect to claims asserted under various sections of the Bankruptcy Code. Under Section 106(b) of the Bankruptcy Code, a *governmental unit* that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to

a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such *governmental unit* arose.

Section 101(27) defines the term "governmental unit" to mean "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).

There is nothing in either the definition of "governmental unit" or the language of Section 106 which *clearly* and *unequivocally* expresses that Congress intended to abrogate tribal sovereign immunity. Nowhere does the Bankruptcy Code *refer to* Indian tribes. There is *no mention* of Indian tribes in the legislative history for Section 101(27) either. *See* Senate Report 95-989.

In contrast, Congress has made unequivocally clear its intent to include Indian tribes in other statutes that refer to local governments or units of local government. For example:

- The definition section of the Intergovernmental Personnel Program, 42 U.S.C. § 4762(4), provides in pertinent part that a "***local government***" means "a city, town, county, or other subdivision or district of a State, including agencies, instrumentalities, and authorities of any of the foregoing and any combination of such units

or combination of such units and a State," and a "general local government" means "a city, town, county, or comparable general-purpose political subdivision of a State." (emphasis added);

Congress further provided, in 42 U.S.C. §4762(5), that a "local government" and a "general local government" ***also mean "the recognized governing body of an Indian tribe***, band, pueblo, or other organized group or community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. §§ 1601 *et seq.*], which performs substantial governmental functions." (emphasis added);

- The provisions of the Animal Health Protection Act, at 7 U.S.C. § 8310(a), provide that, to "carry out this subtitle, the Secretary may cooperate with other Federal agencies, States or political subdivisions of States, national governments of foreign countries, local governments of foreign countries, domestic or international organizations, domestic or international associations, ***Indian tribes***, and other persons." (emphasis added);

- The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides that the term "natural resources" means "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 USCS §§ 1801 *et seq.*]), any State or local government, any foreign government, ***any Indian tribe***, or, if such resources are subject to a trust restriction on alienation, ***any member of an Indian tribe***." 42 U.S.C. § 9601(16) (emphasis added);

- The definition section of the Energy Conservation Program for Buildings Owned by units of Local Government and Public Care Institutions (42 U.S.C. § 6372(2)) provides that the term "unit of local government" means "the government of a county, municipality, or township, which is a unit of general-purpose government below the State (determined on the basis of the same principles as are used by

the Bureau of the Census for general statistical purposes) and the District of Columbia. Such term also means the recognized governing body of ***an Indian tribe*** (as defined in section 6862 of this title) which governing body performs substantial governmental functions." (emphasis added);

- In 16 U.S.C. § 698v-11(b)(3)(C)(iii) (establishing the Valles Caldera Trust), Congress provided that the purposes of the Trust include "consultation[s] with— (I) the Secretary of Agriculture; (II) State and local governments; (III) ***Indian tribes*** and pueblos, including the Pueblos of Jemez, Santa Clara, and San Ildefonso; and (IV) the public." (emphasis added);

- In 49 U.S.C. § 5121, dealing with the transportation of hazardous substances, Congress provides that the Secretary of Transportation "may enter into grants and cooperative agreements with a person, agency, or instrumentality of the United States, a unit of State or local government, ***an Indian tribe***, a foreign government (in coordination with the Department of State), an educational institution, or other appropriate entity—(1) to expand risk assessment and emergency response capabilities with respect to the security of transportation of hazardous material…." (emphasis added);

- In the definition section of the Biomass Energy and Alcohol Fuel Act, 42 U.S.C. § 8802(17), Congress defined the term "person" to mean "any individual, company, cooperative, partnership, corporation, association, consortium, unincorporated organization, trust, estate, or any entity organized for a common business purpose, any State or local government (including any special purpose district or similar governmental unit) or any agency or instrumentality thereof, or ***any Indian tribe or tribal organization***." (emphasis added).

Thus, where Congress *intends* to include Indian tribes in statutory provisions relating to federal, state, and local governments, *it has done so with clear and unequivocal language*. Congress has also made clear by way of legislative history,

in other acts, that Indian tribes are to be included in a particular statutory definition of governmental units. For example, in connection with P.L. 99-80, extending and amending the Equal Access to Justice Act, Congress stated in the House Report:

> In the second change in Subsection (c)(1), the Committee has added the term 'Unit of Local Government' to the definition of 'Party' in 5 U.S.C. 2412(B)(1)(b)(and later in Subsection 2(B)(1) of the Bill which amends 28 U.S.C. 2412(D)(2)(b))). The term is intended to have broad applicability and includes cities, counties, villages, parishes, ***Indian Tribes***, and incorporated or unincorporated towns or townships.

House Report No. 99-120(1) (May 15, 1985) (emphasis added).

Congress' *failure to make any reference* to Indian tribes in the Bankruptcy Code, including Sections 101(27) and 106, or the legislative history relating to those provisions or other provisions of the Bankruptcy Code, demonstrates that Congress did not ***clearly*** and ***unequivocally*** intend to abrogate the sovereign immunity of Indian tribes in connection with proceedings prescribed by the Bankruptcy Code.

Other courts have considered the question of whether Congress unequivocally abrogated the sovereign immunity of Indian tribes when it enacted Section 106, and they have concluded that Section 106 does not abrogate the sovereign immunity of Indian tribes.

"Courts have found abrogation of tribal sovereign immunity in cases where Congress has included 'Indian tribes' in definitions of parties who may be sued under specific statutes." "Where the language of a federal statute does not include 'Indian tribes' in definitions of parties subject to suit or does not specifically assert jurisdiction over 'Indian tribes,' courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity."

> Based on the foregoing, the Court concludes that Congress has not unequivocally abrogated the Tribe's sovereign immunity to suit under the Bankruptcy Code. The Code makes no specific mention of Indian tribes. Unlike States and foreign Governments, Indian tribes are not specifically included in the § 101(27) definition of "governmental unit". In order to conclude Congress intended to subject Indian tribes to suit under the Code, *the Court would need to infer such intent from language which does not unequivocally and unambiguously apply to Indian tribes*.

In re National Cattle Congress, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000) (emphasis added).

> [T]he term Indian tribe is *conspicuously absent from the definition of governmental unit*. On the other hand, the definition does include all "domestic governments," and the statutory and historical notes indicate that a governmental unit is defined in the broadest sense. The Court could infer that an Indian tribe is a "domestic government" and that Congress intended to abrogate tribal sovereign immunity by defining governmental unit using that terminology.

Confederated Tribes of the Colville Reservation Tribal Credit v. White, 1996 WL 33407856 at *2 (E.D. Wash. 1996) (emphasis added). However,

> The Supreme Court has stated that courts should "*tread lightly in the absence of clear indications of legislative intent*" in deciding whether tribal sovereign immunity has been waived by statute. The Court further stated that "*a waiver* of sovereign immunity '*cannot be implied but must be unequivocally expressed*.' "
>
> . . .
>
> There is *no express mention of Indian tribes* anywhere in the Bankruptcy Code, and *the Court could only infer* that an Indian tribe is a "domestic government" under the definition of governmental unit. For these reasons, the Court concludes that Congress has not unequivocally expressed clear legislative intent to abrogate tribal sovereign immunity pursuant to the Bankruptcy Code.

Id. at *2, 3 (citations omitted) (emphasis added).

3) THE *KRYSTAL ENERGY* DECISION FAILED TO CONSIDER MANY ASPECTS OF TRIBAL LAW *STARE DECISIS*

The Ninth Circuit in *Krystal Energy Company v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004), *in a five (5) page opinion*, reached a different conclusion. The Tribe and NUMA Corp., submit that the *Krystal Energy* decision is not only sparse but severely flawed as it relates to the application of the Supreme Court's federal Indian law precedent.

In *Krystal Energy*, that Court concluded that *it is clear* from the face of Sections 106(a) and 101(27) that Congress intended to abrogate the sovereign immunity of "all" foreign and domestic governments, and because, according to the court, "Indian tribes are certainly governments, whether considered foreign or domestic," Congress intended to include Indian Tribes in the definition of "governmental units".

However, Indian tribes are not "similar in nature" either to any "domestic government" listed in § 101(27) or to any "foreign state" or "foreign government" as that provision uses that term. Indian tribes are not similar to a "domestic government" because domestic governments are typically interpreted to have territorial ties to the United States, with origins in the United States Constitution, whereas Indian tribes are nations in and of themselves, without such territorial and constitutional ties to the United States.

As to "foreign states" or "foreign governments", Indian tribes have long been understood to be *sui generis* precisely because they uniquely possess attributes characteristic of "*nations*" without themselves being "foreign state[s]." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 803, 805-06 (2014) (Sotomayor, J., concurring and explaining that "[t]wo centuries of jurisprudence therefore weigh against treating Tribes like foreign visitors in American courts"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (referring to Indian tribes as

"*domestic dependent nations*") (emphasis added). Indian tribes have been "marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation*, 30 U.S. at 16; *see also Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 621 (1st Cir. 2022) (Barron, C.J., dissenting).

The foregoing points are also supported by the Code of Federal Regulation's reading of these terms. *See* 7 C.F.R § 205.2 (defining "Governmental entity" as: "domestic government, tribal government, or foreign governmental subdivision ...."). *Coughlin*, 33 F.4th at 621 (Barron, C.J., dissenting).

Further, Congress has on numerous other occasions defined Indian tribes as something other than federal, state, local, or foreign governments (and thus set apart Indian tribes from the generic definition of a governmental unit). For example, CERCLA applies to natural resources belonging to (a) the United States; (b) any State or local government; (c) any foreign government; and (d) any Indian tribe. 42 U.S.C. § 9601(16).

Thus, by implication, Congress—at least in CERCLA—does not consider Indian tribes to be a foreign or domestic government. Similarly, in the legislation establishing the Valles Caldera Trust, Congress drew a clear distinction between Federal, State, and local governmental units and "Indian Tribes and Pueblos." 16 U.S.C. § 698v-11(b)(3)(C)(iii).

To conclude that Congress, in enacting Section 106 of the Bankruptcy Code, intended the abrogation of sovereign immunity to apply to Indian tribes, a court would have to infer that Congress intended such abrogation *by implication*, *i.e.*, that Congress intended to include Indian tribes within the terms "foreign or domestic government." Such inferences *are not permissible when it comes to a purported Congressional abrogation of an Indian tribe's sovereign immunity*—which requires *unequivocal* intent. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978) (noting that waiver of sovereign immunity cannot be implied).

In concluding that the Indian Civil Rights Act (25 U.S.C. §§ 1301 *et seq.*) did not abrogate tribal sovereign immunity, the Supreme Court said "[i]t is settled that a waiver of sovereign immunity '*cannot be implied* but must be *unequivocally expressed*.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (citing and quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) and *United States v. King*, 395 U.S. 1, 4 (1969)); *Memphis Biofuels*, 585 F.3d at 921 (noting that "[t]he Supreme Court has also held that abrogation of tribal-sovereign immunity must be clear and may *not* be implied") (quoting *Oklahoma Tax Comm'n* at 509).

This is particularly true where Congress has repeatedly referred to Indian tribes in other statutes as something other than a foreign or domestic government.

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4) SIXTH CIRCUIT'S *GREEKTOWN HOLDINGS* DECISION IS SUPPORTED BY A MORE THOUROUGH APPLICATION OF TRIBAL LAW PRECEDENT

Juxtaposed against the 2004 *Krystal Energy decision* is the recent 2019 Sixth Circuit Court of Appeals decision in *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In Re Greektown Holdings, LLC)*, 917 F.3d 451 (6th Cir. 2019), decided about 15 years *after Krystal Energy*. *Greektown Holdings* concerned avoidance claims asserted against the Tribe and the Tribe's political subdivision, Kewadin Casinos Gaming Authority ("Kewadin"), pursuant to 11 U.S.C. §§ 544, 550, two other provisions listed in Section 106 (just as section 362 is listed). The trustee believed debtor's funds had been illegally transferred to the Tribe and Kewadin prior to the bankruptcy filing. The Tribe filed a motion to dismiss based on tribal sovereign immunity.

The bankruptcy court held that Section 106 of the Bankruptcy Code waived the Tribe's immunity, based on the reasoning of *Krystal Energy*, holding that Congress had expressed its "clear, unequivocal, and unambiguous intent to abrogate tribal sovereign immunity" in 11 U.S.C. §§ 106, 101(27). On appeal, the district court reversed, holding that Congress had not "clearly, unequivocally, unmistakably, and without ambiguity abrogate[d] tribal sovereign immunity" in those provisions. *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In Re Greektown Holdings, LLC)*, 532 B.R. 680, 684 (E.D.

Mich. 2015). After the remand to and dismissal by the bankruptcy court, the trustee appealed to the Sixth Circuit Court of Appeals, which affirmed the district court's dismissal, holding that Section 106 *does not waive tribal immunity*.

The Sixth Circuit recited the district court's analysis that began with a review of precedent for abrogating tribal sovereign immunity. The Court stated that:

> Because Indian tribes are subject to Congress' plenary authority, Congress can abrogate tribal sovereign immunity "as and to the extent it wishes." . . . . To do so, Congress must "unequivocally" express that purpose. . . . . "The baseline position [however], [the Supreme Court] [has] often held, is tribal immunity . . . ." . . . . Thus, Indian tribes possess this "core aspect[] of sovereignty" unless and until Congress "unequivocally" expresses a contrary intent.

Greektown Holdings, 917 F.3d at 456 (citations omitted) (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803-04, 790, 788 (2014) (quoting in turn *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))).

Greektown Holdings framed the issue before it as "whether Congress unequivocally expressed [ ] an intent [to waive tribal sovereign immunity] in the Bankruptcy Code of 1978, 11 U.S.C. §§ 106, 101(27)." *Greektown Holdings* at 456.

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5) THERE IS NO UNEQUIVOCAL CONGRESSIONAL INTENT TO ABROGATE TRIBAL IMMUNITY

The natural place to start analysis is Supreme Court's *Santa Clara Pueblo* decision, which was decided conterminously with the enactment of the Bankruptcy Code. *Santa Clara Pueblo* held that an ***unequivocal*** expression of intent to waive immunity must exist for immunity to be waived. *Santa Clara Pueblo*, 436 U.S. at 58.

> In resolving this dispute, a useful place to start is Congress' knowledge and practice regarding the abrogation of tribal sovereign immunity in 1978. As *Bay Mills* and *Santa Clara Pueblo* indicate, an unequivocal expression of congressional intent is as much the requirement today as it was then. In fact, the Supreme Court decided Santa Clara Pueblo just six months before Congress enacted the Bankruptcy Code. Given this timing—and the fact that the Court in Santa Clara Pueblo simply reaffirmed a requirement already in existence . . . —the normal assumption that Congress was aware of this requirement when enacting the Bankruptcy Code is well-grounded.

Greektown Holdings at 456 (citations omitted).

Congress must have been aware of the requirement for an ***unequivocal*** expression of intent to waive immunity at the time it enacted the Bankruptcy Code, including Section 106 and 101(27). As to the word unequivocal the *Greektown* Court stated:

> We also need not hypothesize whether Congress understood the meaning of "unequivocal," as Congress kindly demonstrated as much in the years immediately preceding its enactment of the Bankruptcy Code. *See, e.g.,* Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13),

> 6903(15) (authorizing suits against an "Indian tribe"); Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits against an "Indian tribe"). The language used by Congress in these statutes accords with the Supreme Court's clear admonition that "[t]he term 'unequivocal,' taken by itself," ***means "admits no doubt."*** *Addington v. Texas*, 441 U.S. 418, 432, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (citing Webster's Third New International Dictionary (1961)). Taken in the context of tribal sovereign immunity—where an "eminently sound and vital canon" dictates that ***any doubt is to be resolved in favor of Indian tribes***, *Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976)—***that definition must be read literally***. In order to abrogate tribal sovereign immunity, Congress ***must leave no doubt about its intent***.

Greektown Holdings at 457 (emphasis added) (citing at 457 n.5 also *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012)). *Greektown* then analyzed Ninth Circuit's *Krystal Energy* decision via Seventh Circuit's analysis of *Krystal Energy* in *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 825-27 (7th Cir. 2016).

In *Meyers*, the Seventh Circuit made clear the flaw it saw in *Krystal Energy*'s reasoning. *Meyers* began with the unequivocal expression of Congressional intent requirement, and the canon that all doubt is to be resolved *in favor of Indian tribes*. *Meyers* at 824. The Court then listed statutes enacted around the time of the Bankruptcy Code in which Congress had unequivocally expressed such intent by authorizing suits against "Indian tribe[s]." *Id.*

"[T]here is not one example in all of history where the Supreme Court has

found that Congress has intended to abrogate sovereign immunity without expressly mentioning Indian tribes somewhere in the statute." *Meyers* at 824 (declining to find waiver of tribal immunity) (quoting *In re Greektown Holdings, LLC*, 532 B.R. 680, 693 (E.D. Mich. 2015)).

Turning to Meyers' argument about the phrase "any . . . government," the court reasoned that "[p]erhaps if Congress were writing on a blank slate, this argument would have more teeth, ***but Congress has demonstrated that it knows full and well how to abrogate tribal immunity***." *Id.* (emphasis added).

> Meyers has lost sight of the real question in this sovereign immunity case—whether an Indian tribe can claim immunity from suit. The answer to this question must be 'yes' ***unless Congress has told us in no uncertain terms that it is 'no***[,]' [as] ***[a]ny ambiguity must be resolved in favor of immunity***. Of course Meyers wants us to focus on whether the Oneida Tribe is a government so that we might shoehorn it into FACTA's statement that defines liable parties to include 'any government.' But ***when it comes to [tribal] sovereign immunity, shoehorning is precisely what we cannot do. Congress' words must fit like a glove in their unequivocality***.

Greektown Holdings at 459 (emphasis added) (quoiting *Meyers at* 826-27).

> It is one thing to say 'any government' means 'the United States.' That is an entirely natural reading of 'any government.' But ***it's another thing to say 'any government' means 'Indian Tribes,' Against the long-held tradition of tribal immunity ... 'any government' is equivocal in this regard***.

Greektown Holdings at 459 (emphasis added) (quoiting *Meyers at* 826, in turn quoting the district court).

Greektown Holdings adopted the reasoning of *Meyers*, with respect to waiver of tribal immunity, because *Krystal Energy* was moored to a *"generic abrogation*" of sovereign immunity based on the phrase "other foreign and domestic governments", which *Krystal Energy* reasoned was enough to satisfy tribal immunity abrogation. *Greektown Holdings* at 458, 459.

Krystal Energy supported its analysis by stating that it "can find no other statute in which Congress effected a generic abrogation of sovereign immunity and because of which a court was faced with the question of whether such generic abrogation in turn effected specific abrogation of the immunity of a member of the general class." *Krystal Energy* at 1059.

However, the Seventh Circuit in *Meyers* could and did find such a statute—the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. § 1601 *et seq*.

> FACTA authorizes suits against "person[s]" who accept credit or debit cards and then print certain information about those cards on receipts given to the cardholders. *See* 15 U.S.C. §§ 1681c(g)(1), 1681n, 1681o. FACTA in turn defines "person" as "*any* individual, partnership, trust, estate, cooperative, association, *government*, or governmental subdivision or agency, or other entity." *Id.* § 1681a(b) (emphasis added). In *Meyers*, Meyers argued that the phrase "any . . . government" unequivocally encompassed Indian tribes. 836 F.3d at 826. And in support of that argument, Meyers pointed to the functionally equivalent language at issue in *Krystal Energy*—"other foreign or domestic government" in 11 U.S.C. § 101(27). *Id.* The Seventh Circuit, however, was unconvinced. *Id.*

Greektown Holdings at 458. "Congress has demonstrated that it knows how to unequivocally abrogate immunity for Indian Tribes. It did not do so in FACTA." *Meyers* at 827. Thus, *Meyers* concluded that FACTA did not abrogate tribal sovereign immunity. *Id.*

6) SINCE *KRYSTAL ENERGY*, THE NINTH CIRCUIT HAS ALREADY ADOPTED *MEYERS'* REASONING ON CONGRESSIONAL INTENT AS TO TRIBAL SOVEREIGN IMMUNITY, FOR THE ABROGATION OF FEDERAL SOVEREIGN IMMUNITY

Since the 2004 *Krystal Energy* decision, the Ninth Circuit has already adopted the Seventh Circuit's reasoning in *Meyers* with respect to Congressional intent in the context of abrogating federal sovereign immunity in the Fair Credit Reporting Act. In *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018), the Ninth Circuit reasoned that "[t]he same logic in *Meyers* applies with respect to the United States. The 'real question' in this sovereign immunity appeal is not whether the United States is a government; it is whether Congress explicitly [abrogated] sovereign immunity." *Greektown Holdings* at 459 (quoting *Daniel* at 774).

"Having considered the structure of the FCRA as a whole, we cannot say with '*perfect confidence*' that Congress meant to abrogate the federal government's sovereign immunity. And because '[a]ny ambiguities in the statutory language are

to be construed in favor of immunity,' Daniel's suit was properly dismissed." *Daniel* at 774 (citing *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012)).

Meyers' reasoning on Congressional intent for the abrogation of tribal sovereign immunity should be applied to the case at hand as well, given that this Court has already tacitly overruled its reasoning in *Krystal Energy*.

7) *KRYSTAL ENERGY* DOES NOT FOLLOW THE ESTABLISHED PATTERN OF TRIBAL IMMUNITY WAIVER PRECEDENT

Krystal Energy does not follow the established pattern of tribal immunity waiver precedent. Numerous examples exist of courts finding that tribal sovereign immunity was abrogated where the statute specifically references an "Indian tribe", yet refusing to do so where the statute does not specifically reference an "Indian tribe". *Compare, e.g.*, *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding that tribal sovereign immunity was abrogated in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15)); *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999) (finding that tribal sovereign immunity was abrogated in the Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12)), *with Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2nd Cir. 2000) (finding that tribal sovereign immunity was not abrogated in the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999) (finding that tribal

sovereign immunity was not abrogated in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 *et seq.*).

In this case, it is undisputed that no provision of the Bankruptcy Code, whatsoever, specifically mentions "Indian tribes" As such, Appellant urges this Court to conclude that there is no abrogation of the Tribe's sovereign immunity under the Bankruptcy Code and to overturn the Bankruptcy Court's sanctions against the Tribe.

8) WHILE MAGIC WORDS ARE NOT REQUIRED, BANKRUPTCY CODE'S LANGUAGE LACKS SUFFICIENT CLARITY FOR ABROGATION OF TRIBAL SOVEREIGN IMMUNITY

Greektown Holdings dispensed with *Krystal Energy's* "magic words" argument as follows:

> While it is true that Congress need not use "magic words" to abrogate tribal sovereign immunity, ***it still must unequivocally express that purpose***. *F.A.A. v. Cooper*, 566 U.S. 284, 290–91, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012). The Trustee thus correctly states that "***what matters is the clarity of intent, not the particular form of words***." . . . ***We need not—and do not—hold that specific reference to Indian tribes is in all instances required to abrogate*** tribal sovereign immunity; rather we hold that 11 U.S.C. §§ 106, 101(27) ***lack the requisite clarity of intent to abrogate*** tribal sovereign immunity.

Greektown Holdings at 462 (emphasis added).

Most important, just the fact that there is such a disparity among courts in the reading of the Bankruptcy Code, including Sections 106 and 101(27) of the Code, as it concerns the abrogation of tribal immunity, is a testimony of the lack of

requisite clarity of Congressional intent over the abrogation of tribal sovereign immunity in the Bankruptcy Code. At a minimum, there is *a substantial doubt* that there was Congressional intent to abrogate tribal sovereign immunity in the Bankruptcy Code. With such contrasting readings of the Bankruptcy Code by many well-regarded judges—overall in favor of immunity abrogated—to say that Congressional intent over the abrogation of immunity is *unequivocal* would be a fallacy.

9) BANKRUPTCY LEGISLATIVE HISTORY SUPPORTS THE SIXTH, SEVENTH, AND EIGHTH BAP CIRCUITS' ANALYSES THAT NO INTENT OF WAIVER OF TRIBAL IMMUNITY EXISTS

Although there exists a clear split between the Sixth, Seventh, and Eight Circuits on one hand, and the Ninth and First Circuits, on the other hand, the Bankruptcy Code's legislative history is quite clear that the Congressional intent to abrogate tribal immunity is *far from unequivocal*. Historically, the first bankruptcy law, the 1800 Act, did not afford bankruptcy relief to all Americans; it essentially addressed commercial debts involving "traders, merchants, underwriters, and brokers," and was strictly involuntary, meaning that creditors-initiated bankruptcy against the debtor on its behalf. The 1841 and 1867 Acts were short lived and amended in 1874.

The Bankruptcy Act of 1898 established the basic framework of relief to individuals and businesses and expanded the role of "referees" to handle

bankruptcy cases. The 1898 Act was thereafter amended on several occasions, the most meaningful amendment being the 1938 Chandler Act, which revamped the 1898 Act, by adding chapters of bankruptcy filings. The twentieth century brought forth the appointment of the Commission on the Bankruptcy Laws of the United States which resulted in the Bankruptcy Reform Act of 1978 and thereafter the Bankruptcy Amendments and Federal Judgeship Act of 1984. The Code was amended again in 2005, as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Despite over one hundred years of Bankruptcy laws, there is only a *single* reference to "Indians" that has appeared in any of those laws and without any reference as to whether or how bankruptcy laws apply or should apply to Indian tribes. The single reference is to "Indian territory" and it appears in the 1898 Act.

However, since the 1898 Act, Congress has failed to include that phrase or other similar phrases referencing Indian tribes, in subsequently-enacted bankruptcy laws. *See* UNLV Gaming Law Journal, Vol. 2:255 citing *In re Sandmar Corp*., 12 B.R. 910, 913 (Bankr. D.N.M. 1981))[4].

[4] The 1898 Act also makes reference to the United States Court for the Indian Territory as being "courts of bankruptcy" at Section 1(8). This reference strengthens the Sixth Circuit's analysis as the Courts for Indian Territory lacked jurisdiction over Indians themselves; the courts of the Indian Territory were to handle disputes among citizens of the United States residing in those Indian Territories. *See* Von Russell Creel, Fifteen Men in Ermine: Judges of the United

Krystal Energy's basis for abrogating tribal sovereign immunity cannot be supported by a single reference to American Indians in outdated bankruptcy laws enacted over one hundred years ago, without any mention to American Indians in any presently-applicable bankruptcy laws. *Greektown Holdings*' holding that the Bankruptcy Code lacks evidence of Congressional intent to abrogate tribal immunity is fully consistent with the Code's history and absence of reference to Indian tribes. As such, *Greektown Holdings* supports the better-reasoned outcome for this question.

10) BANKRUPTCY COURTS HAVE NO CONSTITUTIONAL AUTHORITY TO SANCTION A GOVERNMENT WITH SOVEREIGNTY COEXTENSIVE WITH THAT OF THE UNITED STATES, FOR THAT GOVERNMENT'S COURT MERELY DETERMINING ITS OWN AUTHORITY TO ADJUDICATE A CASE

The sovereign immunity of Indian tribes is coextensive or on par with the sovereign immunity of the United States. *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007). This makes the Tribe's sovereign immunity on par with that of the United States. It is the same as if the case at hand involved the sovereign immunity of other countries, such as Italy, Spain, or the United Kingdom, for instance.

States Court for the Indian Territory, 1889–1907, *The Chronicles of Oklahoma* 86 (Summer 2008).

Moreover, in the instant case, it is not only tribal immunity that is concerned. The independence of the sovereign tribal judicial branch is concerned as well.

Just as the judicial branch in the United States is separate and independent from the other branches of government (executive, legislative), in order for the United States courts to interpret laws, determine their constitutionality, and apply such laws to individual cases. U.S. Const. Art. III, Sec. 2. The same is true for the judicial branch of the Appellant Tribe. The Tribal Court adjudicating the Tribal Action is separate and independent from the other branches of the Tribal government in order to interpret laws, determine their tribal constitutionality, and apply such laws to individual cases.

When the Bankruptcy Court sanctioned Appellant, it sanctioned Appellant for asking the Tribal Court simply itself to examine whether it is subject to the bankruptcy automatic stay.

The bankruptcy automatic stay cannot prevent a non-bankruptcy court, much more a court that is part of a sovereign government that is coextensive with the sovereignty of the United States government, from fulfilling its constitutional mandates as a judicial tribunal—to interpret laws, determine their constitutionality, and determine whether and how to apply such laws to the individual cases pending before that judicial tribunal.

The bankruptcy stay has never been interpreted to stop a foreign judicial tribunal from fulfilling its own constitutional mandate to decide where its judicial authority starts and ends, especially when the case pending before that judicial tribunal involves intra-sovereign matters.

In this case, the Tribal Action being adjudicated by the Tribal Court involves strictly intra-Tribal matters. The Tribal Action involves the use of funds appropriated strictly for the Tribe's needs; it involves a contract entered into between the Tribe and Appellee on Tribal land involving exclusively property rights of the Tribe; it involves the building of structures on Tribal lands, to be used exclusively for Tribal purposes; and it involves a breach of that contract exclusively within the confines of the borders of the Tribe. 3-ER-105-06, 111-14.

The automatic stay cannot preclude the Tribal Court from determining its own authority to adjudicate the Tribal Action—especially when such Action involves exclusively intra-Tribal affairs. To hold that the stay can preclude the Tribal Court from determining its own authority to adjudicate the Tribal Action is similar to holding that the bankruptcy stay of the U.S. Bankruptcy Code precludes an Italian court, a Spanish court, or a court in the United Kingdom from determining its own authority to adjudicate a case pending before such court.

It is important to note that the Tribal Court is not a party to the underlying bankruptcy case. Its position is neutral vis-à-vis the dispute between the Tribe and Mr. Diven.

Bankruptcy courts' constitutional authority is limited to the restructuring of debtor-creditor relationships. *Stern v. Marshall*, 564 U.S. 462, 477 (2011). That authority does not extend to sanctioning a government with sovereignty that is coextensive with that of the United States, for that government's court simply determining its own authority to adjudicate a case pending before it, involving matters that have taken place exclusively within that sovereign's borders. To hold otherwise would call into question any court's separateness and independence in applying laws and resolving cases pending before it.

VI. CONCLUSION

As outlined above, there is no *unequivocal* Congressional intent in the Bankruptcy Code indicating that American Indian tribal immunity is abrogated in bankruptcy proceedings. Congress has repeatedly demonstrated that it knows how to unequivocally abrogate tribal immunity in statutes and regulations. However, the Bankruptcy Code does not include the unequivocal language Congress has used in the past to abrogate tribal immunity.

Moreover, in *Daniel*, this Court has tacitly overruled the Congressional intent analysis of *Krystal Energy*, by adopting the reasoning of the Seventh Circuit

in *Meyers*—"Congress' words must fit like a glove in their unequivocality". *Daniel* at 774. Additionally, just the fact that various federal courts have substantially contrasting analyses and conclusions regarding the waiver of tribal immunity in the Bankruptcy Code establishes that there has been no clear or unequivocal intent from Congress to abrogate tribal sovereign immunity.

Not only that there is no express language of tribal immunity abrogation in the Bankruptcy Code, but the legislative history of bankruptcy laws going back over 100 years is also devoid of any support for tribal immunity waiver.

Accordingly, this Court should adopt its Congressional intent reasoning in *Daniel* and the Sixth and Seventh Circuit cases above, to overturn the Bankruptcy Court's award of sanctions against the Appellant Tribe. The Bankruptcy Court lacked subject matter jurisdiction to award stay violation sanctions against the Appellant.

Dated: June 17, 2022

DURAN LAW OFFICE, P.C.

/s/Jack Duran, Jr.
Attorney for Appellant, Cedarville Rancheria of N. Paiute Indians, d.b.a. NUMA Corp.

STATEMENT OF RELATED CASES

Appellant is unaware of any related cases all interested parties are party to this appeal.

Dated: June 17, 2022

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: June 17, 2022

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CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on the 17th day of June 2022, I caused this Opening Brief of Appellant to be filed electronically with the Clerk of the Court using the EM/ECF System, who will also send notice of such filing to the following registered CM/ECF users. My co-counsel and I also served this brief electronically on the parties below.

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