CASE NO. 22-15298

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDARVILLE RANCHERIA OF NORTHERN PAIUTE INDIANS, DBA 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 REPLY BRIEF

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I. INTRODUCTION

Appellee Diven ("Diven") spends the majority of his answering brief addressing the sovereign immunity and waiver issues. However, Diven fails to acknowledge that *Krystal Energy*'s reasoning was overruled by this Court in 2018. He also fails to acknowledge how distinguishable this case is from *Krystal Energy*. The sovereign on-reservation intra-tribal activities, sovereign self-governance considerations, and sovereign Tribal judicial independence considerations were not implicated in *Krystal Energy*, whatsoever.

Diven also fails to acknowledge the simple and important fact that the Bankruptcy Code does not contain any "unambiguous" references to "Indian Tribes". Diven simply cannot tease the words "Indian Tribe" out of the Code. Further, at no time in any of the Code's forms throughout its existence has the Code ever referenced "Indian Tribes." This is an undeniable fact. As set forth below, when finding a waiver of immunity, the Supreme Court has held immunity waivers must be "unequivocal" and without doubt.

Appellant Tribe ("Tribe")[1] did not waive its sovereign immunity when it filed a proof of claim in the bankruptcy case because the Tribe has consistently maintained and asserted its sovereign immunity from the initiation of the bankruptcy case.

[1] Every reference to Appellant or Tribe subsumes both the Tribe and NUMA Corp.

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 treats the Tribe as an ordinary bankruptcy creditor. The Tribe and the Tribal Court, in adjudicating claims against Diven, are exercising the Tribe's inherent sovereignty which has, for over one hundred years in Supreme Court jurisprudence, been afforded *a special place* by United States Supreme Court Indian law precedent.

The Bankruptcy Court, by finding the Tribe violated the automatic stay by its Tribal Court simply inquiring into its ability to adjudicate a tribal claim in the Tribe's judicial forum, ignores core principals of tribal sovereignty and federal Indian law precedent. For these reasons, the Bankruptcy Court's sanctions against the Tribe require reversal.

Given that Diven did not brief in his answering brief the overruling of *Krystal Energy*, merely stating that *Krystal Energy* could not have been overturned, this Court should grant an *en banc* review of this case and the overruling of *Krystal Energy*.

II. DISCUSSION

A. Diven's Assertion that This Court Must Follow *Krystal Energy* is Wrong Because This Court Has Already Overruled *Krystal Energy*

Diven's assertion that that this Court must follow *Krystal Energy* is wrong

because this Court has already overturned *Krystal Energy*. As already referenced in the Tribe's opening brief, since *Krystal Energy*, the Ninth Circuit has adopted the Seventh Circuit's reasoning in *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 825-27 (7th Cir. 2016) 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." This Court then has already overruled *Krystal Energy*. Accordingly, the reasoning in *Daniel* and *Meyers* with respect to Congressional intent for the abrogation of sovereign immunity applies here.

Lastly, even though *Daniel*'s overruling of *Krystal Energy*'s reasoning did not involve an *en banc* panel of this Court, *Daniel*'s analysis on the same point is sharply different from *Krystal Energy*'s short-hand presumption of waiver of sovereign of immunity, despite there being no reference to Indian tribes in the Bankruptcy Code. This approach to analyzing sovereign immunity was rejected by *Daniel*.

B. **Moreover, *Krystal Energy* is Quite Distinct from the Case at Bar, Not Involving On-Reservation Activities Implicating Sovereign Self-Governance Interests, Thus Compelling a Conclusion that Tribal Immunity Exists Under the Facts Here**

In *Krystal Energy*, Krystal had leased lands owned by The Navajo Nation for drilling purposes. Krystal thereafter filed bankruptcy and an adversary proceeding in the bankruptcy court, of which The Navajo Nation desired to be dismissed. The allegations were that The Navajo Nation had removed valuable property, owned by Krystal Energy, from well sites which were likely part of Krystal's bankruptcy estate. The Navajo Nation attempted to dismiss the bankruptcy adversary proceeding via a motion to dismiss based on tribal sovereign immunity. However, the Ninth Circuit in its *Krystal* decision determined that Bankruptcy Code Section 106 waived the Tribe's immunity. Said opinion was made in a short decision that analyzed waiver only under traditional government waiver precedent. Waiver was not analyzed considering longstanding principles of federal Indian law and policy requiring the utmost "clarity and unambiguity" when finding waiver.

In this case, on the other hand, the Tribe contracted with Diven to perform work on the Tribe's trust lands. Diven was specifically contracted to complete construction of tribal housing, paid for with grant funds provided by the Federal Department of Housing and Urban Development. Diven breached his contract and

the Tribe filed suit in its Tribal Court to recover the grant funds paid to Diven, in addition to the cost to complete the housing. Recovery of the grant funds would accomplish the core mission of the federal government's provision of the funds to the Tribe for tribal on-reservation member housing.

The Tribe's action against Diven was filed in Tribal Court in September 2019, and had been pending for over a year prior to Diven's filing for bankruptcy in September 2020. Upon being notified by Diven's counsel of the bankruptcy filing and automatic stay, the Tribe requested the Tribal court to set a status conference, with briefing, to determine what it could or could not do, given the automatic stay. Diven's motion for sanctions for violation of the automatic stay then followed. The motion was granted and this appeal followed.

The facts in the case at bar are quite different from the facts in *Krystal Energy* because here the Bankruptcy Court's decision encroaches upon tribal self-governance, upon the Tribe's ability to resolve its own intra-tribal affairs specifically delegated to the Tribe by Congress, and it encroaches upon the Tribal Court's judicial independence to determine its own authority and power over intra-tribal affairs. *Krystal Energy* did not involve intra-tribal affairs and did not involve a challenge to a tribal court's determination of its own authority and power over intra-tribal affairs. The actions of the Bankruptcy Court here clearly encroach on

the Tribe's self-governance, with respect to intra-tribal affairs. Such intrusions were not implicated in *Krystal Energy*.

C. The Tribe's Attempt to Hold Diven Accountable in Its Own Tribal Court System Has Tribal Sovereignty and Self-Governance Implications; Encroaching Upon These Encroaches Upon the Tribe's Most Basic Sovereignty; *Krystal Energy* Did Not Involve These

The fact that the Tribe's case against Diven was pending in the Tribe's Tribal Court, and was pending for over a year before Diven filed his bankruptcy case, is a critical distinction from *Krystal Energy* because the United States Supreme Court has stated that tribes can regulate the conduct of non-Indians in commercial relations with Indians on the reservation. *Montana v. United States,* 450 U.S. 544, 565-66 (1981). Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and legal claims are a form of acceptable regulatory power. *Id.*; *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152-53 (1980); *Fisher v. District Court,* 424 U.S. 382, 386-89 (1976). Civil jurisdiction over such activities presumptively lies in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute. "As we consider questions of tribal jurisdiction, we are mindful of 'the federal policy of deference to tribal courts' and that '[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts.' " *Water Wheel Camp Recreational Area,*

Inc. v. LaRance, 642 F.3d 802, 808 (9th Cir. 2011) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)) (citing also *United States v. Wheeler*, 435 U.S. 313, 332 (1978) (superseded by statute on other grounds) (recognizing that "tribal courts are important mechanisms for protecting significant tribal interests")).

"Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 n.14 (1982); *see also Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 60 (1978) (sounding the warning that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

In this instance, because core on-reservation tribal sovereignty and self-government are implicated and because the Bankruptcy Code lacks clarity as to whether it applies to Indian tribes, the Tribal Court determining its own authority to move forward or refrain due to the automatic stay, should not be deemed a violation of the stay and the Bankruptcy Court's decision should be reversed.

D. The United States Supreme Court Has Stated that the Waiver of Tribal Sovereign Immunity Must be "Unequivocal"

To abrogate tribal sovereign immunity, Congress must "unequivocally" express that purpose. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790

(2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). "The baseline position [however], [the Supreme Court] [has] often held, is tribal immunity . . . ." *Id.* Thus, Indian tribes possess this "core aspect[] of sovereignty" unless and until Congress "unequivocally" expresses a contrary intent. *Id.* at 788, 790, 794.

E. Neither Section 106 Nor Any Other Provision of the Bankruptcy Code "Unequivocally" Identifies Indian Tribes as Being Subject to the Code

Indian Tribes are not identified anywhere within any form of the Bankruptcy Code since its passage into law. Words do matter. The Framers of the Constitution, when drafting the United States Constitution 200 years earlier, knew how to identify the subject of its plenary power: Art. I, Sec. 8 Clause 3 of the United States Constitution reads as follows: **"**To regulate Commerce with foreign Nations, and among the several States, and with the *Indian Tribes***"**.

In the United States Constitution, the Framers specifically identified "Indian Tribes" in addition to foreign nations, as to which Congress could regulate commerce. The Framers were *unambiguous* in the identification of "Indian Tribes" as the subject of its regulatory and plenary power. There is no ambiguity in the identification of "Indian Tribes and Foreign Governments" as being the subject of Clause 3.

Clause 3 does not identify, as Section 106 identifies, "domestic governments" or any of the other examples of governments of which immunity is

waived. The Bankruptcy Code is at best ambiguous as to its application to Indian Tribes. If the Framers of the Constitution, 200 years ago, identified "Indian Tribes" in the subject of their power, Congress would have identified "Indian Tribes" as having immunity waved under the Bankruptcy Code. But such clear and unambiguous language is absent from the Code. The only logical conclusion is that "Indian Tribes" were not included as a "government or other example" as to which immunity was waived in the Bankruptcy Code.

F. Tribal Sovereign Immunity was Not Waived by the Tribe's Filing of a Proof of Claim

Here again, the cases cited by Diven were all analyzed under a similar "governmental entity" waiver analysis as that used in the 2005 *Krystal Energy* decision, distinguished by the Sixth Circuit's 2019 decision in *Buchwald Capital Advisors v. Sault Ste Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC),* 917 F.3d 451 (2019). The fact that the Tribe had filed a case in its own Tribal Court a year before Diven filed his bankruptcy petition is entirely inconsistent with the Tribe's having *waived* its immunity. The Tribe chose to resolve its intra-tribal affairs in its own Tribal Court. The Tribe's actions of filing a proof of claim were even less glaring than those of the tribe in *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011 (9th Cir. 2016), where the Shingle Springs Tribe removed a case to federal court.

The appellant Bodi asserted that in doing so the tribe in *Bodi* had waived its immunity. The Bodi Court, however, found that immunity was not waived because after removal the tribe immediately raised sovereign immunity as a defense. The *Bodi* court specifically stated:

> It is undisputed that the Tribe did not expressly state its intent to waive its immunity when it removed the case; to the contrary, it asserted its immunity defense promptly upon removal to federal court and neither it, nor any Defendant, ever voiced an intent to litigate on the merits. The only way in which removal can constitute a waiver, then, is if the voluntary act of removal is tantamount to an express waiver of tribal immunity.

Bodi 832 F.3d 1011 at 1017.

Here, at worst, the Tribe acted analogous to the tribe in *Bodi*, as it initially raised sovereign immunity by filing a motion to dismiss the bankruptcy case six (6) days after the bankruptcy action was filed. *See* 4-ER-176, 182-96, 201-02. The Tribe was afterwards brought into the bankruptcy case by the automatic stay, which under the *Krystal* decision allegedly applied to the Tribe irrespective of what the Tribe did or it did not do.

The Tribe thereafter requested a status conference on the issue of the automatic stay with its own Tribal court, after which it received notice of Diven's Motion for Sanctions for Violation of the Automatic Stay. The Tribe in response to Diven's motion raised sovereign immunity defense again in its opposition briefing. As held in *Bodi*, the Tribe's immunity was not waived by it merely filing

a claim. At all times, both before and after filing a proof of claim, the Tribe has been consistent in raising its sovereign immunity as a defense to the Bankruptcy Court's jurisdiction.

G. The Court Should Grant an *En Banc* Review Given that Diven Has Not Briefed the *Daniel* Decision

Diven glosses over *Daniel*'s application here and *Daniel*'s drastic departure from *Krystal Energy*'s reasoning. Diven does not even brief the *Daniel* decision. Diven simply says that this Court cannot overrule a prior decision via a three-judge panel. Appellee Brief at 18. However, this Court cannot ignore *Daniel*'s drastic departure in analyzing sovereign immunity from *Krystal Energy*'s reasoning on this issue. At worst, *Daniel*'s overruling of *Krystal Energy*'s reasoning was tacit and not express. This does not make *Daniel* irrelevant, though. This Court should address *Daniel* and it should do it *en banc*, to remove any doubt about its effect on *Krystal Energy* and its application here. As such, this Court should grant an *en banc* review, at a minimum to address *Daniel*'s impact on *Krystal Energy* and *Daniel*'s application to this case.

III. CONCLUSION

For the reasons set forth above, the Tribe is immune from the application of Bankruptcy Code Section 106, finding a waiver of the Tribe's sovereign immunity for purposes of enforcing the court's automatic stay. This Court overruled *Krystal*

Energy's reasoning in 2018. Moreover, this case is drastically different from *Krystal Energy*. The sovereign on-reservation intra-tribal activities, sovereign self-governance considerations, and sovereign Tribal judicial independence considerations were not implicated in *Krystal Energy*.

Further, Congress through the Bankruptcy Code has not demonstrated an *unequivocal* intent to abrogate the sovereign immunity of the Tribe. The Bankruptcy Code does not contain any "unambiguous" references to "Indian Tribes". The Tribe also did not waive its sovereign immunity when it filed a proof of claim in the bankruptcy case because the Tribe has consistently maintained and asserted its sovereign immunity from the very start of the bankruptcy case.

Accordingly, the Bankruptcy Court lacked jurisdiction over the Tribe when it sanctioned the Tribe. The Bankruptcy Court's decision requires reversal.

Dated: August 8, 2022

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Dated: August 8, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August 2022, I caused this Appellant's Reply Brief to be filed electronically with the Clerk of the Court using the EM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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