S203763

NO. _____

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

**AMERICAN PROPERTY MANAGEMENT CORPORATION,**
Defendant/Cross-Complainant/Petitioner

v.

**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,**
**COUNTY OF SAN DIEGO,**
Respondent

**U.S. GRANT HOTEL VENTURES, LLC**
Plaintiff/Cross- Defendant/Real Party in Interest



APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
HONORABLE RANDA TRAPP

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# PETITION FOR REVIEW

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Re: Decision of the Court of Appeal, Fourth Appellate District, Division One, filed May 24, 2012 (Court of Appeal No. D060868) San Diego Superior Court Case No. GIC 845130

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*TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAYUE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:*

I.

## PETITION FOR REVIEW

U.S. Grant Hotel Ventures, LLC hereby petitions for review of an opinion and order of the Court of Appeal for the Fourth Appellate District filed on May 24, 2012 ("Opinion"). The Opinion issued a writ of mandate directing the trial court to vacate its order dismissing a cross-claim against Petitioner on the basis of tribal sovereign immunity.

This Petition raises several substantial issues dealing with the sovereign immunity of wholly-owned entities of federally-recognized American Indian tribes, the corresponding immunity accorded those subordinate entities, and the bases for limiting that immunity. This Court's intervention on these issues is needed to settle important questions of law, secure uniformity of decision, and preserve equal treatment of litigants. Cal. R. Ct. 29(a)(1).

This Court accordingly is requested to: (1) intervene, grant review and resolve the issues presented; or (2) intervene and retransfer the matter to the Court of Appeal with directions to resolve those issues consistent with the arguments made in the Petition. Cal. R. Ct. 29.3(a), 29.3(d).

## II.

## ISSUES PRESENTED FOR REVIEW

A. Whether California courts are required to give deference to existing federal authority on tribal sovereign immunity rather than relying upon sister state decisions.

B. Whether California courts may determine a tribal entity's entitlement to sovereign immunity solely on the basis of the entity being formed as a California limited liability company.

## III.

## WHY REVIEW SHOULD BE GRANTED

### A. Review Is Necessary to Settle Important Questions of Law Regarding the Scope of the Federally Mandated Lawsuit Immunity For Wholly-Owned Entities of Federally Recognized Indian Tribes.

Petitioner, U.S. Grant Hotel Ventures, LLC ("U.S. Grant"), seeks review by this Court to settle important questions of law concerning the application of federal law on tribal sovereign immunity to wholly-owned entities of federally-recognized Indian Tribe. U.S. Grant is a wholly-owned subsidiary of Sycuan Tribal Development Corporation ("STDC") which is the development corporation owned by the Sycuan Band of the Kumeyaay Nation ("Sycuan"), a federally recognized Native American Tribe. For historical and economic reasons, in 2003, Sycuan purchased the U.S. Grant Hotel in downtown San Diego. Sycuan hired American Property Management Corporation and its subsidiary, American Property

Management Company-San Diego Hotel Management, LLC (collectively, "APMC") to manage the day-to-day operations of the hotel under a hotel management agreement. In February 2005, STDC and Sycuan became dissatisfied with APMC's management, terminated the management agreement and then filed suit for, inter alia, breach of the agreement and conversion. APMC filed a counter-claim against U.S. Grant which is the subject of this Petition.

After an initial trial, appeal and remittitur, U.S. Grant brought a motion to dismiss APMC's counter-claim on the basis of U.S. Grant's sovereign immunity flowing from Sycuan and STDC. On June 3, 2011, the trial court granted U.S. Grant's motion to dismiss, confirming an earlier issued tentative order. The trial court reviewed the evidence presented and found that U.S. Grant was entitled to Sycuan's sovereign immunity as the Tribe's subordinate economic entity. The trial court further found that U.S. Grant had not waived its sovereign immunity. APMC then filed a writ of mandate to the Court of Appeal seeking to have the trial court's order vacated.

In a departure from established federal law concerning tribal sovereign immunity, the Court of Appeal relied upon a single factor – formation as a state limited liability company – as the basis for determining that U.S. Grant was not entitled to sovereign immunity. This Court has yet to examine the extent to which a tribal entity is entitled to be imbued with a

tribe's sovereign immunity. There is a multitude of conflicting decisions among the various sister states. However, there are multiple lower federal court decisions that address both the issue of sovereign immunity with respect to entities of Indian tribes and other circumstances where sub-entities have been determined to be entities of Indian tribes. Those lower federal court decisions, along with the Supreme Court's oft-repeated policies for extending tribal sovereign immunity, compel the states to adopt a far broader approach to sovereign immunity than the one-issue approach taken by the Court of Appeal.

## IV.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Background of Sycuan and Its Development Corporation.

The Sycuan Band of the Kumeyaay Nation ("Sycuan") is a federally-recognized Indian tribe. (APMC's Petition for Writ of Mandate to Court of Appeal ("Pet.") Ex. 4, pp.0579:28-0580:15). The people of the Sycuan Band have been in existence for approximately 12,000 years. (*Id.*) Sycuan, as a federally-recognized tribe, runs and functions as a governmental entity. (*Id.*)

In 1990, Sycuan created the Sycuan Tribal Development Corporation ("STDC") as a tribally formed corporation for the purpose of "enhancement of the welfare of [Sycuan] through the acquisition and development of real and personal property, investment of funds and all other lawful activities appropriate to such purpose." (Pet. Ex. 4, p.0124)

STDC invested Sycuan's resources in developing businesses off the reservation that were distinct from its casino operations. (*Id.*, pp.0511-0518, 0524) STDC's assets are the only sources of revenue for the Tribe beyond its casino. (*Id.*, p.0563:6-22)

**B. Sycuan's Acquisition of the U.S. Grant Hotel.**

In the fall of 2003, STDC became aware the U.S. Grant Hotel ("the hotel") would soon be available for sale. (*Id.*, pp.0524-0525). The hotel was an attractive investment to Sycuan because it advanced the Tribe's desire to diversify its revenue sources with investments off the reservation and reduce its dependency on gaming revenues. (*Id.*, pp.0513:5-10; 0524:22-25). The purchase of a hotel bearing President Ulysses S. Grant's name was especially meaningful to Sycuan because it was President Grant who signed the presidential order placing Sycuan on its reservation. (*Id.*, pp.0583-0584, 0551:12 – 0552:5) The acquisition provided the opportunity for the Tribe to reclaim property in downtown San Diego they believed was previously taken from them. (*Id.*, pp.0551:12 – 0552:5)

The president of STDC, John Tang, made a recommendation to the board of STDC that they consider the purchase of the hotel. (Pet. Ex. 4, pp.0516:14-0517:17) The STDC board approved the recommendation and subsequently presented the recommendation to the Tribal Council of Sycuan. (*Id.*) The Tribal Council's approval was required because all funding for STDC's investments came from the tribal government. (*Id.*,

p.0517:8-10). The Tribal Council then approved the purchase of the hotel and gave the authority to STDC to make the purchase. (*Id.*, pp.0516:14-0517: 17) Sycuan viewed the U.S. Grant Hotel as a business entity of the tribe. (*Id.*, pp.0461-0462)

In purchasing the hotel, STDC invested $18 million towards the purchase of the hotel which came from revenue generated by Sycuan's resort and casino. (Pet. Ex. 4, pp.0565:12–0567:17) STDC is also a guarantor on the $31 million loan obtained by U.S. Grant from Corus Bank, N.A. ("Corus") to purchase and renovate the hotel. (*Id.*, pp.0259-0341) Sycuan further provided all necessary financial backing for U.S. Grant for the operation of the hotel. (*See id.*, pp.0488:25 – 0489:21).

STDC's purchase of the hotel was structured such that STDC was the sole owner of the hotel through intermediate limited liability companies, each wholly-owned by STDC. (Pet. Ex. 4, p.0542:2-16) Further, only members of the Sycuan tribe can be shareholders and directors of STDC. (*Id.*, pp.0666-0672). Thus, U.S. Grant is wholly-owned by Sycuan. (*Id.*, p.0356:2-16).

### C. Sycuan and STDC Hire APMC to Manage the U.S. Grant Hotel.

At the time of STDC's purchase of the hotel, STDC entered into a hotel management agreement ("HMA") with APMC under which APMC would manage and operate the hotel for a 10-year term, subject to certain

rights of termination by either party. (Pet. Ex. 4, pp.0695-0741). As early as November 19, 2003, STDC's president, John Tang, received drafts of the HMA to review from APMC's in-house counsel, William Littlefield. (*Id.*, pp.0530:1-0533:4). The agreement was signed on December 3, 2003. (*Id.*, p.0695).

While STDC was negotiating the HMA with APMC, STDC was also negotiating the terms of U.S. Grant's loan to finance the hotel from Corus and a licensing agreement with Starwood Hotel Company ("Starwood"). (*Id.*, pp.0153-0197, 0252-0341) Under the terms of the loan agreement with Corus, STDC and U.S. Grant were both required to "unconditionally and irrevocably waive any defense upon the doctrine of sovereign immunity." (*Id.*, p.0338) Likewise, Starwood required U.S. Grant to "unconditionally, unequivocally and irrevocably" waive sovereign immunity as part of the licensing agreement because it recognized U.S. Grant was owned "100% by a tribe." (*Id.*, pp.0156, 0192, 0609). These agreements were entered into on the same date as the HMA, December 3, 2003. (*Id.*, pp.0156, 0252, 0695)

APMC's in-house counsel was actively involved in STDC's negotiations with Corus and Starwood for U.S. Grant's waiver of sovereign immunity. He sent emails to both companies providing language to be incorporated into the final agreements waiving U.S. Grant's sovereign immunity. (Pet. Ex. 4, pp.0061, 0602-607) Despite APMC's actual

knowledge of Corus' and Starwood's concerns about U.S. Grant's right to claim sovereign immunity and the fact the final agreements all contained language requiring U.S. Grant to waive sovereign immunity, APMC chose not to request a waiver. (*Id.*, pp.0695-0741) In fact, the HMA does not even mention the term "sovereign immunity." (*Id.*)

As the sole owner of U.S. Grant, STDC was responsible for its governance and financial backing. STDC executed the operating agreement for U.S. Grant on December 1, 2003 that expressly provided STDC significant control over the operations and management of U.S. Grant. (Pet. Ex. 4, pp.0612-0613) The operating agreement also indicates that Chairman Daniel Tucker, President John Tang, and Vice-President Tina Muse – all tribal members who were also members of STDC's Board of Directors and Officers – would be responsible for overseeing the hotel's management. (*Id.*, pp.0611-0641)

STDC regularly required APMC's management report to the Sycuan's offices to discuss the hotel's financial status and progress on its renovation. (Pet. Ex. 4, pp.0464-0465, 0482:22 – 0483:21, 0488:14-24) APMC performed a wide array of tasks at the direction of the tribe including attending renovation committee meetings, providing budgeting information to Starwood (*Id.*, pp.0493-0497), pausing the renovation project (*Id.*, pp.0406-0411), and issuing checks to pay various vendors (*Id.*, pp.0588:15 – 0589:25). APMC would contact Sycuan directly to make

capital calls. (*Id.*, p.0489:3-21) APMC recognized that Sycuan was the "singular owner of the U.S. Grant." (*Id.*, pp.0485:7-0486:2)

### D. STDC and U.S. Grant Terminate APMC and Subsequently Sue APMC.

In February 2005, U.S. Grant notified APMC that it was terminating the HMA for cause effective immediately due to "numerous instances of mismanagement, misappropriation of funds and breach of fiduciary duty." The HMA was terminated by single individual, Mr. Tucker, Chairman of the Board for STDC, acting on behalf of STDC, American Property Investors, Sycuan Investors, and U.S. Grant with a single signature.

U.S. Grant filed suit against APMC on April 1, 2005, seeking to recover the $1.35 million that had been transferred out of the hotel's operating account and to obtain an injunction to prevent defendants from disposing of the disputed funds. The trial court granted U.S. Grant's request for injunctive relief with respect to $950,000, pending resolution of U.S. Grant's claims. APMC filed a cross-complaint against U.S. Grant seeking $5 million in liquidated damages on the ground that U.S. Grant had terminated the HMA without cause and without notice. U.S. Grant answered the cross-complaint on May 13, 2005.

The case proceeded to trial on the complaint and cross-complaint in January 2006. The jury returned a verdict in favor of U.S. Grant on its breach of contract, breach of fiduciary duty, and conversion claims. In

October 2008, the Court of Appeal reversed the judgment "in its entirety," concluding that the trial court erred in failing to consider the extrinsic evidence proffered by APMC concerning how the termination provisions of the HMA should be interpreted. The Court remanded the case to the trial court for further proceedings on the complaint and cross-complaint. U.S. Grant Files Motion to Dismiss on the Basis of Sovereign Immunity.

On May 4, 2011, U.S. Grant filed a motion to dismiss APMC's cross-complaint for lack of subject matter jurisdiction because U.S. Grant was a subordinate economic entity of Sycuan and entitled to tribal sovereign immunity, which has not been waived. The trial court issued a written tentative ruling on June 2, 2011, granting the motion to dismiss on the ground that U.S. Grant was protected by tribal sovereign immunity. (Pet. Ex. 10) On June 3, 2011, the trial court confirmed its tentative ruling at a hearing on the motion to dismiss and then issued a minute order reflecting its final ruling. (Pet. Ex. 11 & 12).

APMC filed its petition for a writ of mandate from the Court of Appeal on November 9, 2011. On May 14, 2012, the Court of Appeal heard oral arguments and issued a decision granting APMC's writ on May 24, 2012. The Court determined U.S. Grant "is not an arm of the Sycuan tribe entitled to sovereign immunity" and "the dispositive fact throughout our analysis is that U.S. Grant, LLC is a California limited liability company." (Opinion., p. 12)

On June 8, 2012, U.S. Grant filed a petition for rehearing to bring the Court's attention to the factual omissions and errors in the Opinion. The Court of Appeal denied U.S. Grant's petition for rehearing on June 15, 2012.

## V.

## ARGUMENT

### A. This Court Should Grant Review to Settle Important Issues of Law Regarding Tribal Sovereign Immunity, and Whether State Courts Must Give Deference to Federal Authority Rather than Relying upon the Opinions of Sister States

The Court of Appeal erred by creating a new standard under tribal sovereign immunity which has never been endorsed by the United States Supreme Court or any lower federal court. The Court of Appeal also erred by not placing appropriate emphasis on federal court decisions on an issue which is exclusively federal law. While lower federal court decisions are not completely binding on California courts, case law establishes that they are entitled to great weight.

This is particularly so where, as here, the issue to be determined exclusively involves federal law. In *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320, this Court held that, on issues implicating federal law, federal appellate court opinions "are persuasive and entitled to great weight." (See also *People v. Bradley* (1969) 1 Cal.3d 80, 86 [federal appellate court decisions "are persuasive and entitled to great weight"];

*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 150 [53 Cal.Rptr.2d 336] ["on questions of federal law, decisions of the lower federal courts are entitled to great weight"].).

The unique nature of tribal sovereign immunity illustrates the importance of following federal court authority. In particular, United States Supreme Court precedent makes it clear that "tribal sovereign immunity is a matter of federal law and is not subject to diminution by the States." (*Kiowa Tribe of Okl. v. Manufacturing Technologies, Inc.* (1999) 523 U.S. 751, 756 (hereafter *Kiowa*).) The imperative of consistency, coupled with the quintessentially federal character of American Indian law, necessarily requires the ultimate decision regarding the application of tribal sovereign immunity be founded on federal law. (See *In re Greene* (9th Cir. 1992) 980 F.2d 590, 595 [commenting on a decision from the New Mexico Supreme Court, the court stated that "the court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law."]; see also *Chilkat Indian Village v. Johnson* (9th Cir. 1989) 870 F.2d 1469, 1473.)

The U.S. Supreme Court has broadly and repeatedly proclaimed that the canons of Indian law are unique and do not follow typical construction and interpretation. Rather, Indian law is constructed to protect the uniquely federal interests regarding American Indians. Thus, Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties,

legislation, and an "intricate web of judicially made Indian law." (*Oliphant v. Squamish Indian Tribe* (1978) 435 U.S. 191, 206)].) Attempts by the states to construe Indian law narrowly and against the interests of Indian sovereigns have been specifically rejected by the Supreme Court. In *Kiowa*, the Supreme Court reversed the earlier state court's decision to "confine immunity from suit to transactions on reservations and to governmental activities, [because] our precedents have not drawn these distinctions." (*Kiowa, supra,* 523 U.S. at p. 755.) Even where interpretation of statutes is considered, the Supreme Court has ruled "the standard principles of statutory interpretation do not have their usual force in cases involving Indian law." (*Montana v. Blackfeet Tribe of Indians* (1985) 471 U.S. 759, 766 ("*Blackfeet*").)

> [T]he relation of the Indian tribes living within the borders of the United States . . . (is) an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

(*McClanahan v. State Tax Commission of Arizona* (1973) 411 U.S. 164, 173 [93 S.Ct. 1257, 1263, 36 L.Ed.2d 129].)

The Opinion ignores the Supreme Court's consistent mandate that a waiver or abrogation of sovereign immunity must be unequivocal and explicit. (See, e.g., *Santa Clara Pueblo v. Martínez* (1978) 436 U.S. 49, 58

[98 S.Ct. 1670, 56 L.Ed.2d 106] [noting that "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed" (internal quotation marks and citations omitted)].) Even assuming that there was some ambiguity about whether there has been an abrogation of sovereign immunity by the form of entity taken by Petitioner, the Court of Appeal failed to take into account the so-called Indian canon of construction – i.e., that "[laws] are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (*Blackfeet Tribe , supra*, 471 U.S. at p. 766.)

The Opinion by the Court of Appeal created a new judicial standard for determining sovereign immunity rights, ignoring the long-standing principal that only the United States Congress can regulate the extent of tribal sovereignty. "[T]ribal sovereignty is dependent on and subordinate to, only the Federal Government, not the States." (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207 (hereafter *Cabazon Band*); see also *U.S. v. Lara* (2004) 541 U.S. 193, 202 ["the Constitution's 'plenary' grants of power" authorize Congress "to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority"].)

Further, ambiguities in federal law have been construed generously to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. (*White Mountain*

*Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143-44 [100 S.Ct. 2578, 2584, 65 L.Ed.2d 665] [Supreme Court rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required.].)

Even if California state courts are "left to decide from themselves whether a separate entity related to an Indian tribe shares in the tribe's sovereign immunity" (Opinion, p. 9), they are compelled to preserve the tribe's property rights and sovereignty unless Congress clearly and unambiguously indicates otherwise. (See also *Kiowa, supra*, 523 U.S. at p. 752 ["The wisdom of perpetuating the doctrine may be doubted, but the Court chooses to adhere to its earlier decisions in deference to Congress, which may wish to exercise its authority to limit tribal immunity through explicit legislation." (citations omitted); Cohen's Handbook of Federal Indian Law (2005) 119-20 ["basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians . . . agreements are to be construed as the Indians would have understood them; and tribal **property** rights and **sovereignty** are preserved unless Congress's intent to the contrary is clear and unambiguous" (emphasis added)].)

The Ninth Circuit has aptly summarized the deference which should be given by the courts to the treatment of tribal sovereign immunity.

The actions of the states and the United States

> in limiting their own immunity, and the action of Congress in limiting the immunity of foreign states underscore the original scope of sovereign immunity. Against this background of nearly two hundred years of recognizing sovereign immunity's extra-territorial reach, **and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor**. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

(*In re Greene*, *supra*, 980 F.2d at p. 594 (emphasis added).)

The Opinion establishes a new standard, under federal law, for determining whether an entity is entitled a tribe's immunity. No federal court has ever determined that formation under state law is dispositive regarding sovereign immunity. Further, the federal courts routinely examine a broader set of facts than merely looking at a select set of organizational documents. The Court of Appeal's narrow examination of the factors to consider on this important federal law question should not be the standard for trial courts in California. Accordingly, review is necessary to set a more appropriate standard for reviewing such cases under federal law.

## B. This Court Should Grant Review to Settle the Law on Whether a California Court May Determine a Tribal Entity's Entitlement to Sovereign Immunity Solely on the Basis of Being Formed as a California Limited Liability Company.

The Court of Appeal erred by finding that the formation of a limited liability company by a Tribal entity automatically determines whether that entity is entitled to that Tribe's sovereign immunity from suit. In finding that U.S. Grant is not entitled to sovereign immunity the Court held: "the dispositive fact throughout our analysis is that U.S. Grant, LLC is a California limited liability company." (Opinion, p. 11.) The Court's opinion is a radical departure from established federal law which requires more balanced approach that considers the overall purposes of the Indian sovereign immunity doctrine to wit: "encouraging tribal self-sufficiency and economic development." (*Kiowa, supra,* 523 U.S. at p. 757.)

Federally-recognized Indian tribes enjoy a unique status in our system of jurisprudence. That status flows from their independent sovereignty -- a sovereign status that precedes that of the individual states. (See *Pan American Co. v. Sycuan Band of Mission Indians* (9th Cir. 1989) 884 F.2d 416, 418 [tribal sovereignty "substantially pre-dates our Constitution"].) This independent sovereign status, in turn, subjects the tribes only to the superior sovereignty of the United States. As one federal district court aptly stated: "[t]he only entities that can determine the extent to which the immunities and protections are afforded to tribes are Congress

and the applicable tribes themselves. The [states] have no such right." (*Multimedia Games, Inc. v. WLGC Acquisition Corp.* (N.D. Okla. 2001) 214 F. Supp. 2d 1131, 1141.)

Courts accordingly uniformly hold that only federal law can define or limit the scope of tribal sovereignty. (*Cabazon Band*, *supra*, 480 U.S. at p. 207 ["The Court has consistently recognized that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'"]; *American Vantage Companies, Inc. v. Table Mountain Rancheria* (9th Cir. 2002) 292 F.3d 1091, 1096 ["Indian tribes fall under nearly exclusive federal, rather than state, control. Moreover, tribal sovereignty and federal plenary power over Indian affairs, taken together, sharply circumscribe the power of the states to impose citizen-like responsibilities on Indian tribes." (citations omitted)].) There also is no dispute that tribal sovereignty includes a corresponding immunity from lawsuits: "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*, *supra*, 523 U.S. at p. 754; see, e.g., *Puyallup Tribe v. Washington Game Dept.* (1977) 433 U.S. 165, 172.)

The sovereign immunity from suit extends to entities owned by Indian tribes that are "subordinate economic entities" of a tribe or, as is alternatively stated, "arms of the tribe." While the Court of Appeal recognized that immunity extends to Tribal entities, it departed significantly

from federal law in conducting its analysis. Moreover, it ignored significant facts in the record which compel a finding that U.S. Grant is a subordinate economic entity of Sycuan. The Court of Appeal correctly consulted federal law as encompassed in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort* (10th Cir. 2010) 629 F.3d 1173. *Breakthrough* articulates factors to consider in determining whether an entity is a subordinate economic entity of a tribe. *Id.* at p. 1187. The Court of Appeal Opinion then severely departed from federal law when applying those factors, instead relying upon sister state determinations that tend to diminish the doctrine of tribal sovereign immunity. Moreover, it determined that a single factor, formation of an entity under state law, was dispositive on the question of whether immunity should apply to the entity. As illustrated below by looking at just a few of the *Breakthrough* factors analyzed by the Court of Appeal, the approach taken by the Court was too narrow and did not comport with federal law.

### 1. Federal Law Concerning Tribal Sovereign Immunity Compels Courts to Extend the Doctrine of Tribal Sovereign Immunity Where It Furthers the Tribe's Purposes for Preserving Their Economic and Preservation Interests.

The broad goals underlying the doctrine of tribal sovereign immunity "can trace its origins to Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." (*Oklahoma Tax Com'n v.*

*Citizen Band Potawatomi Indian Tribe* (1991) 498 U.S. 505, 510 (hereafter *Potawatomi*) (citing *Cabazon Band, supra,* 480 U.S. at p. 216; see also *Breakthrough*, supra, 629 F.3d at p. 1182 ["Not only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but 'immunity [also] is thought [to be] necessary to promote federal policies of tribal self[-]determination, economic development, and cultural autonomy.'" (quoting *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe* (8th Cir. 1985) 780 F.2d 1374, 1378)].)

U.S. Supreme Court precedent states that owning and operating for-profit businesses are necessary for tribal self-government and economic self-sufficiency. In *Potawatomi*, the State of Oklahoma asked the Court to reverse the Court of Appeals dismissal of its counterclaims against an Indian tribe, which owned an operated a convenient store that failed to pay $2.7 million in cigarette taxes, which it owed under state law. (*supra*, 498 U.S. at pp. 507-08.) Oklahoma urged the Court to "construe more narrowly, or abandon entirely, the doctrine of sovereign immunity . . . because tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the [] doctrine no longer makes sense in this context." (*Id.* at p. 909.) The state argued that the doctrine "should be limited to the tribal courts and the internal affairs of tribal government." (*Id.* at p. 910.) The High Court declined to "modify the long-established principle of tribal sovereign immunity" after citing federal legislation

reflecting Congress' ongoing approval of the tribal immunity doctrine. (*Id.* at p. 910.)

Similarly, in *Cabazon Band*, *supra*, 480 U.S. at p. 205, the State of California sought to apply state gambling laws to two federally recognized tribes that were conducting gambling operations on their reservations. California argued that the "Tribes are merely marketing an exemption from state gambling laws," and that the State's interest of "preventing the infiltration of the tribal games by organized crime" outweighed the federal and tribal interests underlying the doctrine of tribal sovereign immunity. (*Id.* at pp. 219-20.) In describing the Tribes' interests at stake, the Court noted that the "tribal games at present provide the sole source of revenues for the operation of the tribal government and the provision of tribal services." (*Id.* at pp. 218-19.) In upholding the lower federal courts' dismissal of the state's claims on the ground of tribal sovereign immunity, the Court explained that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." (*Id.* at p. 219.)

Lower federal courts, in determining whether an economic entity owned by an Indian tribe is entitled to sovereign immunity from suit, adhere to the principle that raising revenues is a legitimate governmental purpose that weighs heavily in favor of extending immunity. The Ninth Circuit, for example, explicitly recognized that immunity for subordinate

economic entities "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." (*Allen v. Gold County Casino* (9th Cir. 2006) 464 F.3d 1044, 1047; see also *Cabazon Band of Mission Indians v. County of Riverside* (9th Cir. 1986) 783 F.2d 900, 906, *aff'd*, (1987) 480 U.S. 202) [reasoning that the tribes were "exercising their inherent sovereign government authority" of "raising revenue" through bingo operations]; *In re Green*, *supra*, 980 F.2d at pp. 592, 598 ["Given the Court's demonstrated concern for protecting tribal opportunities for economic development, we believe the Court would hold that tribal immunity does not stop at the reservation boundaries" in a suit involving a "wholly-owned and operated business of the Yakima Indian Nation."].) In *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood* (5th Cir. 1966) 361 F.2d 517, 521, the Fifth Circuit stated that the fact that a tribe is "engaged in an enterprise private or commercial in character, rather than governmental, is not material." The court reasoned that "[i]t is in such enterprises and transactions that the Indian tribes and the Indians need protection." (*Id.*)

Further, considerations of the purpose of the activity conducted by Tribes have been flatly rejected by the Supreme Court. In that regard, the Supreme Court ruled: "[i]n our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's

commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." (*Kiowa, supra,* 523 U.S. at p. 758.)

Thus, the Court of Appeal erred by considering the operation of a hotel, even if for profit, a substantial factor in denying U.S. Grant sovereign immunity. The Court of Appeal cited, approvingly, to *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 639, where that court noted that "it is possible to imagine situations in which a tribal entity may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself." (Opinion. at 15.) The Court of Appeal then *negatively* considered the operating agreement for U.S. Grant, which stated the purpose of the entity was the acquisition and operation of the hotel.

There are two problems with the Court's approach to this evidence. First, it ignores other facts in the record in support of immunity and considered by the trial court. U.S. Grant was formed to enhance the economic welfare of the tribe and diversify the tribe's sources of revenue, lessening the tribe's reliance on its gaming revenue. (Pet. Ex. 4, pp.0513-0517.) The ultimate approval by the Tribal Council was required to give STDC authority to purchase the hotel. (Pet. Ex. 4, pp.0511-0518)

Sycuan's decision to purchase the hotel was to advance the Tribe's desire to diversify its revenue sources with investments off the reservation and reduce the Tribe's economic dependency on gaming revenue. (Pet. Ex.

4, p.0513:5-10). STDC's assets, including U.S. Grant, were the only other sources of revenue for the Tribe besides the casino. (Pet. Ex. 4, p.0563:6-22) The Tribe's desire to diversify its assets and reduce dependency on gaming revenue directly promotes the financial welfare of the Tribe. (See *Breakthrough, supra;* 629 F.3d at pp. 1192-93)

The second problem with the Court of Appeal's analysis is that the commercial considerations of the Tribe's activity (i.e., whether or not the activity is for profit) has been plainly rejected under *Kiowa.* The Supreme Court specifically declined to draw a distinction between commercial and noncommercial activities. (*Kiowa, supra*, 523 U.S. at pp. 758, 760 [Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."].) Thus, the Court of Appeal erred by dismissing the activity of Sycuan's entity as being an "ordinary for profit business enterprise" and drawing a distinction with an entity that may have been formed "to provide housing or social services to tribal members." (Opinion, at 16.)

Indeed, negatively characterizing the enterprise as merely "for profit" and being less entitled to tribal sovereign immunity runs counter to the express purposes for the federal doctrine. The Supreme Court has carefully examined congressional intent with regard to the perpetuation of the doctrine and determined that Congress has consistently reiterated its

approval of the doctrine (*Potawatomi, supra,* 498 U.S. at p. 510), and that congressional intent is to promote the "goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." (*Id.* (citing *Cabazon Band, supra,* 480 U.S. at 216).)

### 2. Consideration of Identity in Structure, Ownership and Management Should Encompass More Than Formation Documents and Should Necessarily Include Evidence of Tribe's Actual Interaction With the Entity.

In finding that the relationship between Sycuan and U.S. Grant was distant, the Court of Appeal narrowly focused upon a small portion of the formation documents. In assessing the "structure, ownership and management," the Court of Appeal only considered some of the formation documents and ignored evidence from APMC that Sycuan and STDC exerted complete control over U.S. Grant. Federal law teaches that courts must consider testimonial and circumstantial evidence showing that an entity was created and managed under the control and directives of tribal leadership acting in its governmental capacity.

In *Native American Distributing*, the Tenth Circuit reviewed the district court's factual findings regarding whether a "tobacco company" created by the defendant-Tribe's "Business Committee" was entitled to the Tribe's sovereign immunity. (*Native American Dist. v. Seneca-Cayuga Tobacco Co.* (10th Cir. 2008) 546 F.3d 1288.) The district court granted

the defendants' motion to dismiss on the basis that the company was an enterprise of the Tribe entitled to sovereign immunity, rejecting the argument that the company was subject to the Tribal Corporation's "sue and be sued" clause. (*Id.* at p. 1291.) The district court relied upon the Business Committee's resolution creating the company, which expressly invoked the Committee's "constitutional powers" to act on behalf of the Tribe, declared that the company will function as "an economic development project" and that its activities are "essential government functions of the [] Tribe," and approved a separate agreement with another entity that expressly waived the Tribe's immunity to suit with respect to that agreement only. (*Id.* at pp. 1291-94.) In addition, the district court had relied on an affidavit by the Chief of the Tribe and Project Developer for the company's creation stating that the company "was created as an operating division of the Tribe in its governmental capacity" and that the Tribe "never waived its sovereign immunity" for the company in its dealings with plaintiff. (*Id.* at p. 1294.)

Here, U.S. Grant presented considerable evidence concerning the structure, ownership and management by Sycuan. U.S. Grant is wholly owned by Sycuan and STDC through intermediate limited liability companies, each wholly owned by Sycuan and STDC. (Pet. Ex. 4, p.0542:2-16) All operating agreements for the intermediate limited liability companies were executed by same three officers and/or directors of STDC:

Daniel Tucker as the Chairman of the STDC Board of Directors, John Tang, its president and Tina Muse its secretary.[1] (Pet. Ex. 4, pp.0622)

The evidence is uncontroverted that there is a clear, unbroken chain in identity of ownership, management, and control among the entities separating Sycuan from U.S. Grant. This identity in ownership and management is further evidenced by the fact the HMA between U.S. Grant and APMC was terminated by single individual, Daniel J. Tucker, Chairman of the Board for STDC, acting on behalf of STDC and U.S. Grant with a single signature. (Pet. Ex. 4, p.0458)

In addition, STDC executed the operating agreement for the U.S. Grant on December 1, 2003, which indicated that Chairman Daniel Tucker, President John Tang, and Vice-President Tina Muse, who were members of STDC's Board of Directors and Officers, would be responsible for overseeing the hotel's management (Pet. Ex. 4, pp.0611-0625). In this capacity, STDC regularly required that APMC's management report to the Sycuan's offices to discuss the hotel's financial status and progress on its renovation. (Pet. Ex. 4, pp.0464-0465, 0482:22 – 0483:21, 0488:14-24). These facts were ignored by the Court of Appeal.

[1] Daniel Tucker also serves as the Tribal Chairman of the entire Sycuan Tribe.

Further, U.S. Grant's operating agreement expressly reserved STDC's control over the management of the company regarding: "(i) Approval of any matter under the Hotel Management Agreement that requires approval of the 'Owner' as defined in the Hotel Management Agreement (as defined in Section 2.6); (ii) Material construction at the Grant Project; (iii) Any debt not in the ordinary course of business, including the mortgage, refinancing or encumbrance of the Grant Project; (iv) Approval, amendment or termination of any form of franchise agreement; (v) Disposal of all or substantially all of the Company's assets . . . ; (vi) Sale, assignment, lease, exchange, or other transfer or disposition of any interest in the Grant Project; (vii) Determination of the amount of cash available for, and the timing of, distribution; (viii) Amendment of this Agreement; (ix) Amendment of the Hotel Management Agreement; (x) Admission of an Additional Member; (xi) Merger of the Company with another entity; (xii) Dissolution of the company; (xiii) Any action that would constitute a material breach of any form of [loans]; or (xiv) Filing any petition [for bankruptcy].:" (Pet. Ex. 4, p.0612) The operating agreement also expressly declares "[t]he Manager may be removed by the Member at any time." (Pet. Ex. 4, p.0613) Therefore, Sycuan and STDC maintained complete control over the operations and management of U.S. Grant.

The Court of Appeal ignored testimonial evidence from APMC demonstrating the management and control of U.S. Grant by the Sycuan and STDC. Sycuan communicated to APMC that it viewed the U.S. Grant Hotel as a business entity of the Tribe. (Pet. Ex. 4, pp.0461-0462) APMC itself viewed Sycuan as the sole owner of the U.S. Grant Hotel. (Pet. Ex. 4, pp.0485:7-0486:2) Michael S. Gallegos, APMC's principal executive, testified that APMC performed a wide array of tasks at the direction of the Tribe including attending renovation committee meetings, providing budgeting information to Starwood (Pet. Ex. 4, pp.0493-0497), pausing the renovation project (Pet. Ex. 4, pp.0406-0411), and issuing checks to pay various vendors. (Pet. Ex. 4, pp.0588:15 – 0589:25)

APMC's deference to STDC was largely due to the fact that STDC was responsible for funding the Hotel's operations and maintenance. (Pet. Ex. 4, pp.0572:1 – 0573:14, 0746:2 – 0747:21). APMC would contact Sycuan directly to make capital calls. (Pet. Ex. 4, p.0489:3-21) In fact, Mr. Gallegos expected Sycuan to provide extra operating cash that the hotel needed, and when he began to run out of money for balancing the hotel's accounts, he solicited funds directly from Sycuan in the form of a capital call. (See, Pet. Ex. 4, pp.0591:19 – 0592:23, 0488:25 – 0489:21). Ultimately, when Sycuan decided that it wanted the hotel shutdown, it made that decision unilaterally. (Pet. Ex. p.0458)

Under federal law, these factors should have been provided considerable weight when considering the ownership, structure and management of U.S. Grant by Sycuan. Indeed, APMC's own admissions in that regard should have been given substantial weight, especially where its principal, wishing to sue U.S. Grant, viewed it as a business of the tribe. The Court of Appeal did not give regard to the total control and dominion that Sycuan had over U.S. Grant. Accordingly, review should be granted to direct the courts to give consideration to these factors as is required under federal law.

### 3. The Scope of the "Method of Creation" Under Federal Law Was Misconstrued by the Court of Appeal.

The Court of Appeal considered the "method of creation" of the entity as one of the factors to examine to determine whether U.S. Grant was a subordinate economic entity. While the Court of Appeal placed inordinate emphasis on this factor, it also misconstrued this factor and viewed it far too narrowly. The Court essentially equated "method of creation" with the *type* of entity formed. However, a review of federal law demonstrates that this factor is intended to encompass other considerations in addition to the structural form of the entity.

For example, in *Breakthrough,* the court gave considerable weight to the fact that the entity was a "wholly owned. . . enterprise of the Tribe." (*Breakthrough*, *supra*, 629 F.3d at p. 1192.) The *Breakthrough* court also

considered that the entity was created pursuant to the authority of the Tribal Government, through a governmental resolution. (*Id.*)

As mentioned above, U.S. Grant is a wholly owned entity of Sycuan. Its acquisition was directed by the Tribal government, the Sycuan Tribal Counsel. Further, U.S. Grant was formed under STDC's authority and directive to develop sources of revenue for the Tribal government that were not dependent upon gaming. The Court of Appeal gave no consideration to those factors or to STDC's documents that allowed for the formation of U.S. Grant.

**4. The Scope of the "Purposes" for Creating the Entity Under Federal Law Was Misconstrued by the Court of Appeal.**

The *Breakthrough* court also identified the purposes for creating the entity as a significant factor. In that regard, the court considered the fact that the entity (a casino) was created for the financial benefit of the Tribe and to engage in the Tribe's governmental functions. (*Breakthrough*, *supra*, 629 F.3d at p. 1192.) Here, importantly, part of the purpose of acquiring the U.S. Grant Hotel was based upon historical tribal considerations in that the namesake of the hotel was the president who placed the Tribe onto the reservation. It was an opportunity to reclaim their historical home. In fact, that historical aspect to the acquisition was more significant to Sycuan than the prospect of making financial gain. Indeed, the hotel also functioned as a historical museum for the Tribe. Therefore,

Sycuan's desire to form U.S. Grant and acquire the hotel was not simply to obtain an ordinary for-profit business, but also to diversify the tribe's sources of revenue and to regain a vital historical link to the Tribe's modern formation as a sovereign entity.

The Court of Appeal, again, narrowed application of federal law. It deemed the "purpose" as having to be for a governmental function or statutorily promoted (i.e., casinos). There are no federal cases that support this narrow interpretation of this factor. Here, the purpose was largely historical and cultural for the Sycuan Tribe. Review should be granted to clarify that these are substantial factors to consider under federal law.

## VI.

## CONCLUSION

Thus, federal law is clear that the scope of tribal sovereign immunity is not subject to diminution by the states. State courts are obligated to follow that principal and may not create new standards for abrogating Native Tribes' rights to be free from suit. The Court of Appeal Opinion does exactly that. The Opinion creates a dispositive one-factor test that dominates over other considerations established by federal law. Rather than relying upon established federal law, the Opinion relies upon determinations made by other states.

Review is necessary here to establish for the courts how they may examine these important doctrines of federal law. The Opinion allows the

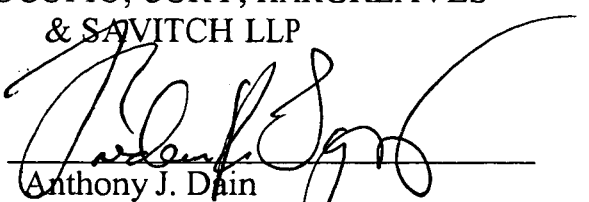
lower courts to ignore factors that are requisites under federal law. Moreover, the Opinion opens the door for courts to find that Tribal entities must be formed and organized only under their own laws or federal law in order to be imbued with sovereign immunity. The lower courts may also deny sovereign immunity to entities unless they have a governmental purpose which meets the approval of a particular court.

Petitioner respectfully asserts that review of this case is warranted to shed light on these questions. Given the expansion of Indian Tribal businesses in California, this record provides a useful fact pattern with which to develop the law on this important question.

Respectfully submitted,

DATED: July 3, 2012

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

Anthony J. Dain
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U.S. Grant Hotel Ventures, LLC

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court, Rule 8.504(d)(1), I certify that U.S. Grant Hotel Ventures, LLC's Petition for Review is proportionately spaced, has a typeface of 13 points or more, and contains 7,367 words.

DATED: July 3, 2012

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: _____

Anthony J. Dain
Frederick K. Taylor
Attorneys for Real Party in Interest
U.S. Grant Hotel Ventures, LLC

# Exhibit A

Filed 5/24/12

CERTIFIED FOR PUBLICATION

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| AMERICAN PROPERTY MANAGEMENT CORPORATION,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF SAN DIEGO COUNTY,<br><br>Respondent; | D060868<br><br>(San Diego County Super. Ct. No. GIC845130) |
| U.S. GRANT HOTEL VENTURES, LLC,<br><br>Real Party in Interest. | |

THE COURT:

Petition for writ of mandate following an order of dismissal in the Superior Court of San Diego County, Randa Trapp, Judge. Petition granted.

Boudreau Williams LLP and Jon R. Williams for Petitioner.

No appearance for Respondent.

Procopio, Cory, Hargreaves & Savitch LLP, Anthony J. Dain, Frederick K. Taylor and Heather A. Cameron for Real Party in Interest.

The petition for writ of mandate filed by American Property Management Corporation (APMC)[1] challenges the trial court's ruling that the cross-complaint against U.S. Grant Hotel Ventures, LLC (U.S. Grant, LLC) — a limited liability company organized under California law — is barred by tribal sovereign immunity because of U.S. Grant, LLC's relationship with the Sycuan Band of the Kumeyaay Nation (Sycuan), a federally recognized Indian tribe.

We conclude that APMC is entitled to writ relief. U.S. Grant, LLC is not an arm of the tribe protected by Sycuan's sovereign immunity. Accordingly we will direct a writ of mandate to issue requiring the superior court to vacate its order dismissing the cross-complaint against U.S. Grant, LLC.

## I

## FACTUAL AND PROCEDURAL BACKGROUND

In 2003, Sycuan Tribal Development Corporation (STDC), a corporation chartered under Sycuan's tribal laws, invested in the purchase of the U.S. Grant Hotel in downtown

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1 The writ petition was filed by APMC, but this lawsuit also involves two related parties — APMC San Diego Hotel Management, LLC and Michael Gallegos — who filed the cross-complaint that is the subject of the dismissal order challenged in this writ proceeding. As U.S. Grant, LLC has not challenged APMC's standing to file the writ petition, and the writ petition refers to "APMC (and related entities)," we will treat the writ petition as having been filed by APMC, APMC San Diego Hotel Management, LLC and Gallegos collectively. When describing the arguments asserted in this writ proceeding, we will refer to those three parties together as "APMC."

San Diego (the hotel) but created several layers of California limited liability companies to stand between it and the entity that took ownership of the hotel.

Specifically, U.S. Grant, LLC — a California limited liability company — purchased the hotel in 2003. U.S. Grant, LLC is wholly owned by its sole member Sycuan Investors – U.S. Grant, LLC (Sycuan Investors, LLC), a California limited liability company. Sycuan Investors, LLC, in turn, is wholly owned by its sole member American Property Investors – U.S. Grant, LLC (American Property Investors, LLC), a California limited liability company. American Property Investors, LLC is wholly owned by its sole member STDC. All three limited liability companies were organized in late 2003 in connection with the transaction to purchase the hotel.

STDC is a corporation that was created under Sycuan's own tribal laws in 1990, rather than under the laws of any state. As stated in its articles of incorporation, STDC's overall purpose is "the enhancement of the welfare of [Sycuan] through the acquisition and development of real and personal property, investment of funds and all other lawful activities appropriate to such purpose." Eligible enrolled members of Sycuan are shareholders in STDC.

According to deposition testimony of Sycuan's controller, STDC invested $18 million toward the purchase of the hotel. Although the record does not specifically reflect the structure of the transaction by which STDC invested in the hotel, we infer that it was accomplished through the capitalization of American Property Investors, LLC, when STDC organized that entity in December 2003 for the purpose of acquiring the

hotel.[2] STDC acted as one of the guarantors of the $31 million bank loan that U.S. Grant, LLC obtained to purchase and renovate the hotel,[3] but U.S. Grant, LLC took title to the hotel in its own name.

Shortly after U.S. Grant, LLC purchased the hotel, it entered into a hotel management agreement with APMC San Diego Hotel Management, LLC, under which that entity would manage and operate the hotel for a 10-year term, subject to certain rights of termination by either party (the Agreement). In February 2005, U.S. Grant, LLC notified APMC San Diego Hotel Management, LLC that it was terminating the Agreement effective immediately due to alleged "mismanagement, misappropriation of funds and breach of fiduciary duty."

In response, APMC[4] asserted (1) it was entitled to retain $1.35 million that had previously been transferred from the hotel's operating account to an unrelated hotel account; (2) U.S. Grant, LLC owed APMC approximately $400,000 in management,

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2 As we have noted, American Property Investors, LLC created Sycuan Investors, LLC, which in turn created U.S. Grant, LLC. Based on our close reading of documents contained in the record, the purpose for the creation of Sycuan Investors, LLC was to create an entity that would enter into a mezzanine loan with CRMV, LLC, a Delaware limited liability company. It appears from a description contained in certain loan documents that the mezzanine loan was in an amount up to $9 million and, as a result of the mezzanine loan, CRMV, LLC obtained a "collateral assignment of the constituent membership interests in [U.S. Grant, LLC]."

3 The other guarantor of the bank loan was Gallegos. Gallegos is APMC's sole shareholder and the managing member of APMC San Diego Hotel Management, LLC.

4 We refer generally to APMC here because the record does not permit us to be more specific as to who made the assertions that we describe.

accounting, promotional, marketing and legal fees; and (3) APMC was entitled to $5 million in liquidated damages under the terms of the Agreement because U.S. Grant, LLC terminated the Agreement without cause and without the notice that was required pursuant to the express terms of the Agreement.

U.S. Grant, LLC filed suit against APMC, APMC San Diego Hotel Management, LLC and Gallegos on April 1, 2005, seeking to recover the $1.35 million that had been transferred out of the hotel's operating account and to obtain an injunction to prevent defendants from disposing of the disputed funds. The trial court granted U.S. Grant, LLC's request for injunctive relief with respect to $950,000, pending resolution of U.S. Grant, LLC's claims. Prior to trial, U.S. Grant, LLC amended its complaint to add, among other claims, causes of action for breach of contract and breach of fiduciary duty.

APMC San Diego Hotel Management, LLC and Gallegos filed a cross-complaint against U.S. Grant, LLC seeking $5 million in liquidated damages on the ground that U.S. Grant, LLC had terminated the Agreement without cause and without notice. U.S. Grant, LLC answered the cross-complaint on May 13, 2005. U.S. Grant, LLC's answer did not raise tribal sovereign immunity as an affirmative defense.

The case proceeded to trial on the complaint and cross-complaint in January 2006. The jury returned a verdict largely in favor of U.S. Grant, LLC on its causes of action for breach of contract, breach of fiduciary duty and conversion. The jury denied any relief on the cross-complaint. After posttrial motions, including a successful motion for attorney fees by U.S. Grant, LLC, a notice of appeal was filed by APMC, APMC San Diego Hotel Management, LLC and Gallegos.

We reversed the judgment in an October 2008 opinion, concluding that the trial court erred "in failing to consider the extrinsic evidence proffered by APMC" concerning how the termination provisions of the Agreement should be interpreted. (*U.S. Grant Hotel Ventures, LLC v. American Property Management Corp.* (Oct. 16, 2008, D048746) [nonpub. opn.].) We explained that if the trial court had not erroneously refused to consider extrinsic evidence, it might have determined that the APMC parties were entitled to notice and an opportunity to cure any defects in performance prior to termination of the Agreement. We remanded the case to the trial court for further proceedings on the complaint and cross-complaint.

In May 2011, U.S. Grant, LLC filed a motion to dismiss the cross-complaint on the ground of tribal sovereign immunity, contending that it was entitled to Sycuan's sovereign immunity as a subordinate economic entity of the tribe. The trial court issued a written tentative ruling on June 2, 2011, granting the motion to dismiss on the ground that U.S. Grant, LLC was protected by tribal sovereign immunity. The tentative ruling further rejected the contention that U.S. Grant, LLC waived its claim of sovereign immunity with respect to the cross-complaint by agreeing to choice of law and arbitration provisions in the Agreement and by filing this lawsuit.

The trial court confirmed its tentative ruling at a hearing on the motion to dismiss and then issued a minute order reflecting its final ruling. The record contains no indication that the trial court or U.S. Grant, LLC served APMC, APMC San Diego Hotel Management, LLC or Gallegos with notice of the final ruling.

APMC filed its petition for a writ of mandate in this court on November 9, 2011, which was 159 days after the hearing on the motion to dismiss. We issued an order to show cause on December 22, 2011.

II

DISCUSSION

A. *Standard of Review*

"On a motion asserting sovereign immunity as a basis for dismissing an action for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists. [Citations.] In the absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has subject matter jurisdiction over an action against an Indian tribe is a question of law subject to our de novo review." (*Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 183.)

B. *The Writ Petition Is Timely*

As a preliminary matter, we address U.S. Grant, LLC's contention that we should deny writ relief without reaching the merits of the sovereign immunity issue because the writ petition is untimely.

"A petition for extraordinary writ may be considered at any time, however it is properly denied in the discretion of the court when it has not been sought within the time which an appeal could have been sought had the order been appealable." (*Nelson v. Superior Court* (1986) 184 Cal.App.3d 444, 450.)

Here, U.S. Grant, LLC did not establish that the period applicable to an appeal expired before APMC filed its writ petition. Under California Rules of Court, rule 8.104(a)(3), if a party has not been served with the order from which it is appealing, it has 180 days from the date that the order was entered to file an appeal. The record does not reflect that APMC was served — either by the trial court or U.S. Grant, LLC — with notice of the trial court's final ruling on the motion to dismiss. Therefore, the period applicable to an appeal is 180 days. APMC's writ petition was filed 159 days after entry of the minute order dismissing the cross-complaint against U.S. Grant, LLC. Given these circumstances, the petition for writ of mandate was timely, and we will consider it on the merits.

C. *U.S. Grant, LLC Is Not an Arm of the Sycuan Tribe Protected by Tribal Sovereign Immunity*

The doctrine of tribal sovereign immunity is "settled law" developed through years of United States Supreme Court precedent (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 756 (*Kiowa*)), and is based on the premise that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." (*Oklahoma Tax Comm'n v. Potawatomi Tribe* (1991) 498 U.S. 505, 509.) "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. [Citations.] This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.'" (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58.) "[A]n Indian tribe

is not subject to suit in a state court — even for breach of contract involving off-reservation commercial conduct — unless 'Congress has authorized the suit or the tribe has waived its immunity.'" (*C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.* (2001) 532 U.S. 411, 414.)

Although it is settled that an Indian tribe is entitled to sovereign immunity from suit — even for off-reservation commercial activity (*Kiowa, supra*, 523 U.S. at p. 760)[5] — the United States Supreme Court has not squarely addressed the circumstances, if any, in which a *separate entity* related to an Indian tribe is protected by that tribe's sovereign immunity.[6] In the absence of United States Supreme Court authority, the federal and state courts have been left to decide for themselves whether a separate entity related to an Indian tribe shares in the tribe's sovereign immunity.

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5 The United States Supreme Court's decision in *Kiowa* "teaches that the nature and the location of the activity of the Indian tribe at issue in a suit is not relevant to determining whether a tribe is immune from suit, but it did not address whether the tribal entity [also mentioned in *Kiowa*] enjoyed the same immunity." (*Bittle v. Bahe* (Okla. 2008) 192 P.3d 810, 826.)

6 In *Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony* (2003) 538 U.S. 701 (*Inyo County*), the United States Supreme Court touched on the issue of whether an entity related to a tribe is entitled to sovereign immunity, but did not otherwise explore the issue. In that case, an Indian tribe and a gaming corporation "chartered and wholly owned" by the tribe filed a federal civil rights lawsuit claiming that principles of tribal sovereignty had been violated when local law enforcement executed a search warrant covering tribal casino payroll records. (*Id.* at p. 704.) As the Supreme Court explained in a footnote, "The United States [as amicus curiae] maintains, and [the petitioner county] does not dispute, that the [tribally chartered gaming corporation] is an 'arm' of the Tribe for sovereign immunity purposes." (*Id.* at p. 705, fn. 1.)

"It is clear from the cases involving tribal entities that such entities have no inherent immunity of their own. Instead, they enjoy immunity only to the extent the immunity of the tribe, which does have inherent immunity, is extended to them." (*Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 639 (*Trudgeon*).) "[M]ost courts have rejected, implicitly if not explicitly, the suggestion that courts should 'confer tribal immunity on every entity established by an Indian tribe, no matter what its purposes or activities might have been.' [Citation.] These decisions hold that whether tribal immunity should be extended to a tribal business entity should depend on the degree to which the tribe and entity are related in terms of such factors as purpose and organizational structure. Applying that standard, courts have reached various conclusions on the immunity issue, depending on the facts." (*Trudgeon*, at p. 638.) The analytical inquiry is often summarized as whether the tribally-related entity is "an arm of the tribe" for sovereign immunity purposes (*Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046 (*Allen*); *Inyo County*, *supra*, 538 U.S. at p. 705, fn. 1; *Cash Advance & Preferred Cash Loans v. Colo. ex rel. Suthers* (Colo. 2010) 242 P.3d 1099, 1109 (*Cash Advance*)), and we will use that terminology. (But see *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort* (10th Cir. 2010) 629 F.3d 1173, 1185, fn. 9 (*Breakthrough*) [explaining differing terminology used by courts, but using the term "subordinate economic entity" of the tribe].)

Opinions from the federal and state courts have identified a range of factors that are helpful in analyzing whether an entity related to an Indian tribe should be considered an arm of the tribe for sovereign immunity purposes. The United States Court of Appeals

for the Tenth Circuit recently surveyed some of the applicable opinions, concluding that a court "should look to a variety of factors when examining the relationship between the economic entities and the tribe, including but not limited to: (1) their method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." (*Breakthrough*, *supra*, 629 F.3d at p. 1181; see also *id.* at pp. 1187-1188.) We agree that the list of factors set forth by the Tenth Circuit is helpful and, although the factors overlap somewhat when applied, they accurately reflect the general focus of the applicable federal and state case law. Here, when we apply those factors we conclude that U.S. Grant, LLC is not an arm of the Sycuan tribe entitled to sovereign immunity. As we will explain, the dispositive fact throughout our analysis is that U.S. Grant, LLC is a California limited liability company.

The first factor in the Tenth Circuit's list is "the method of creation of the economic entit[y]." (*Breakthrough*, *supra*, 629 F.3d at p. 1187.) As the Colorado Supreme Court recently explained after reviewing applicable federal authorities, the relevant consideration with respect to this factor is "whether the tribes created the entities pursuant to tribal law." (*Cash Advance*, *supra*, 242 P.2d at p. 1110.) "Essentially, tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe and *created under its own tribal laws*." (*Wright v. Colville Tribal Enter. Corp.* (Wash. 2006) 147 P.3d 1275, 1279 (*Colville*).) Thus, for example, the Tenth Circuit in

*Breakthrough* stated that because the tribally-associated entities were created under tribal law pursuant to the tribe's constitution, the method of their creation "weigh[ed] in favor of the conclusion that these entities are entitled to tribal sovereign immunity." (*Breakthrough*, at p. 1191.) Similarly, other courts have considered creation of an entity under tribal law as a factor weighing significantly in favor of a conclusion that the entity shares in the tribe's sovereign immunity. (*Trudgeon*, *supra*, 71 Cal.App.4th at pp. 640, 641 [discussing significance of the fact that the tribal casino at issue was organized under tribal law rather than state law]; *Gavle v. Little Six, Inc.* (Minn. 1996) 555 N.W.2d 284, 295 [concluding that a tribal casino was protected by sovereign immunity based in part on the fact that it was incorporated under tribal law, rather than under the "corporate laws of Minnesota"]; *Cook v. AVI Casino Enterprises, Inc.* (9th Cir. 2008) 548 F.3d 718, 726 [sovereign immunity applied to tribal casino corporation based, in part, on the fact that it was created under tribal law].)[7]

In contrast, creation of a separate legal entity pursuant to *state law*, rather than tribal law, weighs heavily against a finding that an entity related to an Indian tribe is an arm of the tribe protected by sovereign immunity. (See, e.g., *Runyon v. Ass'n of Village Council Presidents* (Alaska 2004) 84 P.3d 437, 441 (*Runyon*) [nonprofit corporation

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7 In addition to incorporating a business entity under tribal law, an Indian tribe may also obtain a charter of incorporation under federal law pursuant to section 17 of the Indian Reorganization Act of 1934, creating an "incorporated tribe" with the power to issue interests in corporate property. (25 U.S.C. § 477.) Case law generally concludes that, absent waiver, such entities are entitled to tribal sovereign immunity. (*Amerind Risk Management Corp. v. Malaterre* (8th Cir. 2011) 633 F.3d 680, 685 [citing cases].)

formed under Alaska law by a group of Indian tribes was not protected by sovereign immunity because of the "legal insulation" created by state incorporation]; *Airvator, Inc. v. Turtle Mountain Mfg. Co.* (N.D. 1983) 329 N.W.2d 596, 604 (*Airvator*) [majority Indian-owned North Dakota corporation was not entitled to sovereign immunity because of its incorporation under state law]; *Wright v. Prairie Chicken* (S.D. 1998) 579 N.W.2d 7, 10 [incorporation under state law by tribal social service organization would weigh against claim of sovereign immunity by corporate directors].) Indeed, one law review article advocates that tribes should form corporations under state law to unambiguously communicate to potential business partners their desire to forego sovereign immunity with respect to a specific enterprise. (Bernardi-Boyle, *State Corporations for Indian Reservations* (2001) 26 Am. Indian L.Rev. 41, 58 (hereafter Bernardi-Boyle).) Similarly, the Washington Supreme Court has pointed out that a tribe may effectively communicate an intention to waive sovereign immunity for a tribal enterprise by creating a business entity under state law. (*Colville*, *supra*, 147 P.3d at p. 1280 ["a tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law"].)[8]

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8 In its briefing in the trial court and in its informal response to the writ petition, U.S. Grant, LLC cites authority for the proposition that "mere organization of an entity under state law does not preclude its characterization as a tribal organization." However, in none of those cases is sovereign immunity at issue. Instead, those cases discuss whether a tribally created entity is an "Indian tribe" within the meaning of the tribal exemption contained in title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (*Duke v. Absentee Shawnee Tribe of Okl. Hous. Auth.* (10th Cir. 1999) 199 F.3d 1123), or is an "Indian tribal organization" for the purposes of a federal law making it a crime to steal from such an organization (*United States v. Logan* (10th Cir. 1981) 641

The North Dakota Supreme Court's long-standing opinion in *Airvator*, *supra*, 329 N.W.2d 596, contains a detailed explanation of why a tribe's creation of an entity under state law weighs against a finding that the entity is protected by the tribe's sovereign immunity. As *Airvator* points out, a corporation formed under state law is an entity that is legally separate from its shareholders. (*Id.* at p. 603.) Such an entity exists by virtue of the sovereign power of the state that created it, and its powers are defined and limited by state laws, including — in the case of North Dakota corporations — a provision specifying that a corporation has the power to sue and be sued. (*Ibid.*) In light of these facts, *Airvator* concluded that a corporation chartered under state law should be subject to the jurisdiction of the state where it is incorporated. (*Ibid.*)

The same analysis applies to U.S. Grant, LLC as a California limited liability company. U.S. Grant, LLC was created pursuant to California's Beverly-Killea Limited Liability Company Act (Corp. Code, § 17000 et seq.). "A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of one or more members (Corp.C. 17001(t), (x)), who own membership interests (Corp.C. 17001(z))."

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F.2d 860; *United States v. Crossland* (10th Cir. 1981) 642 F.2d 1113). Because of the different policy questions and statutory language involved, "[w]hether an entity is a tribal entity depends on the context in which the question is addressed." (*Smith v. Salish Kootenai College* (9th Cir. 2006) 434 F.3d 1127, 1133; see also *Dille v. Council of Energy Resource Tribes* (10th Cir. 1986) 801 F.2d 373, 376 ["the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration"].) Indeed, all of the cases that U.S. Grant, LLC cites are from the Tenth Circuit, which, as we have explained, is the same court that set forth the various factors for considering whether tribal *sovereign immunity* applies to an entity associated with an Indian tribe, and one of those factors is "the method of creation of the economic entit[y]." (*Breakthrough*, *supra*, 629 F.3d at p. 1187.)

(9 Witkin, Summary of Cal. Law (2011 supp.) Corporations, § 36, p. 150.) "The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders (Corp.C. 17101), but permits the members to actively participate in the management and control of the company (Corp.C. 17150)." (9 Witkin, Summary of Cal. Law (10th ed. 2005) Corporations, § 36, p. 813.) According to statute, among the powers of a California limited liability company is to "[s]ue, be sued, complain and defend any action . . . in its own name." (Corp. Code, § 17003, subd. (b).) Further, a California limited liability company is required to maintain an "agent in this state for service of process on the limited liability company" (*id.*, § 17057); is statutorily subject to orders by California courts to produce books and records (*id.*, § 17061, subd. (e)); and, according to statute, may be sued by the California Attorney General in an action to enforce the rights of the company's members (*id.*, § 17107). In light of these considerations, U.S. Grant, LLC's status as a California limited liability company weighs heavily in favor of finding it subject to the jurisdiction of California courts, regardless of its relationship to the Sycuan tribe.

Turning to the second factor identified by the Tenth Circuit, we examine the purpose served by U.S. Grant, LLC. (*Breakthrough*, *supra*, 629 F.3d at p. 1181.) As *Trudgeon* noted, "it is possible to imagine situations in which a tribal entity may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself. Such an entity arguably should not be immune, notwithstanding the fact it is organized and owned by the tribe." (*Trudgeon*,

*supra*, 71 Cal.App.4th at p. 639.) According to its operating agreement, the purpose for the formation of U.S. Grant, LLC was to acquire title to the hotel and operate it. Thus, U.S. Grant, LLC exists purely for the purpose of participating in an ordinary for-profit business enterprise. In contrast stand cases in which a tribe created an entity to provide housing or social services to tribal members (see, e.g., *Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc.* (N.Y. 1995) 658 N.E.2d 989, 993 (*Ransom*) [nonprofit entity organized by Indian tribe to provide educational, health care and social services to residents of tribe's reservation was protected by tribal sovereign immunity because those were functions "traditionally shouldered by tribal government"]; *Weeks Const., Inc. v. Oglala Sioux Housing Auth.* (8th Cir. 1986) 797 F.2d 668, 671 [housing authority created by tribe to develop housing projects on reservation was entitled to sovereign immunity as an arm of the tribal government]). This case is also not similar to those involving tribal casinos, such as *Trudgeon*, *supra*, 71 Cal.App.4th 632, in which a tribe expressly created a tribally chartered entity to operate a casino "'in its quest for self-determination.'" (*Id.* at p. 640, italics omitted.) A tribe's operation of a casino presents a unique situation because the federal Indian Gaming Regulatory Act (the IGRA) (25 U.S.C. § 2710(b)(2)(B)) provides that gaming revenue is required to be used for the benefit of the tribe;[9] "[t]he IGRA provides for the creation and operation of Indian casinos to

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9 Specifically, *Trudgeon* pointed out that the IGRA provides that revenue from Indian gaming is required to be used only "'(i) to fund tribal government operations or programs; [¶] (ii) to provide for the general welfare of the Indian tribe and its members; [¶] (iii) to promote tribal economic development; [¶] (iv) to donate to charitable

promote 'tribal economic development, self-sufficiency, and strong tribal governments[,]' [(25 U.S.C. § 2702(1))]"; and "[o]ne of the principal purposes of the IGRA is 'to insure that the Indian tribe is the primary beneficiary of the gaming operation.' (*Id.*, § 2702(2))." (*Allen*, *supra*, 464 F.3d at p. 1046 [explaining that the casino at issue was "not a mere revenue-producing tribal business"].) We perceive nothing comparable in the purpose of creating U.S. Grant, LLC to tip the balance in favor of a finding that it is protected by tribal sovereign immunity. (See *Dixon v. Picopa Const. Co.* (Ariz. 1989) 772 P.2d 1104, 1110 (*Dixon*) [purpose of tribal corporation did not weigh in favor of finding sovereign immunity when the corporation "was not formed to aid the [tribe] in carrying out tribal governmental functions" and appeared to be "simply a for-profit corporation involved in construction projects"].)

When we consider the "structure, ownership, and management" of the entity (*Breakthrough*, *supra*, 629 F.3d at p. 1181), we observe that the ownership of U.S. Grant, LLC is not closely tied to the Sycuan tribe. As we have explained, U.S. Grant, LLC is owned by another California limited liability company and is separated by yet another layer of limited liability company ownership from the indirect ownership and control of the tribal corporation STDC.[10] The *indirect* nature of STDC's ownership weakens U.S.

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organizations; or [¶] (v) to help fund operations of local government agencies.'" (*Trudgeon*, *supra*, 71 Cal.App.4th at p. 640, quoting 25 U.S.C. § 2710(b)(2)(B).)

10 As the issue is not before us, we express no view on whether STDC, as a tribal corporation formed under Sycuan's laws, is protected by Sycuan's tribal sovereign immunity.

Grant, LLC's relationship with the Sycuan tribe for the purpose of a sovereign immunity analysis. With respect to management, U.S. Grant, LLC's operating agreement states that it is to be managed by a non-tribal entity — APMC San Diego Hotel Management, LLC. In contrast, the operating agreement for the first of the California limited liability companies created for the hotel purchase transaction (i.e., American Property Investors, LLC) states that the tribal corporation STDC is the manager. The designation of a non-tribal entity instead of STDC to manage U.S. Grant, LLC is an indication that U.S. Grant, LLC is *not* an arm of the Sycuan tribe protected by sovereign immunity. (See *Dixon*, *supra*, 772 P.2d at p. 1109 [tribally chartered corporation was not protected by sovereign immunity, in part, because "the tribal government does not manage the corporation"].) In light of these facts, the structure, ownership, and management of U.S. Grant, LLC does not weigh in favor of finding that entity to be an arm of the tribe for the purpose of sovereign immunity.

We also perceive no evidence in the record that "the tribe intended for [U.S. Grant, LLC] to have tribal sovereign immunity." (*Breakthrough*, *supra*, 629 F.3d at p. 1181.) On the contrary, we infer that STDC was not primarily concerned about sovereign immunity with respect to the entities that it created to facilitate its investment in the hotel, as it clearly understood — due to its own corporate origins — that it could create a business entity under Sycuan's tribal laws rather than under California law, but it chose not to do so. Further, we interpret U.S. Grant, LLC's six-year delay in asserting

sovereign immunity as further circumstantial evidence that Sycuan did not view U.S. Grant, LLC as an arm of the tribe protected by sovereign immunity.[11]

With respect to "the financial relationship between the tribe and the entities" (*Breakthrough*, *supra*, 629 F.3d at p. 1181), relevant considerations include "whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the subentity has the 'power to bind or obligate the funds of the [tribe]' [citation]. The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." (*Ransom*, *supra*, 658 N.E.2d at pp. 992-993.) In this regard, the limited liability created when U.S. Grant, LLC organized as a California limited liability company strongly indicates that U.S. Grant, LLC is not an arm of the tribe for sovereign immunity purposes. A member of a California limited liability company — like a corporate shareholder — is not personally liable for the debts, legal liability or obligations of the company unless liability attaches under an alter ego theory. (Corp. Code, § 17101.) U.S. Grant, LLC's operating agreement incorporates this principle, stating that "[t]he Member

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11 U.S. Grant, LLC submitted evidence that the bank loan agreement with the lender for the purchase of the hotel and the license agreement with The Sheraton Corporation for the branding of the hotel contained provisions waiving, for the purposes of those transactions, any sovereign immunity that U.S. Grant, LLC might possess. Neither of those documents are persuasive evidence that Sycuan or STDC intended U.S. Grant, LLC to be protected by tribal sovereign immunity and therefore asserted sovereign immunity as an issue during contractual negotiations. Significantly, (1) the waiver in the license agreement was suggested by Sheraton, not by U.S. Grant, LLC, and (2) with respect to the loan documents, the waiver applies expressly to the tribal corporation STDC, which acted as one of the guarantors of the loan and signed the loan documents in that capacity.

will not be liable to any creditor of the Company for Company liabilities or losses or for any amount in excess of the amount the Member originally agreed to contribute to the Company plus any contribution returned and recoverable under [the Beverly-Killea Limited Liability Company Act]." Thus, due to U.S. Grant, LLC's status as a California limited liability company, the Sycuan tribe's assets would not be exposed by any judgment against U.S. Grant, LLC. Further, even though the tribal corporation STDC indirectly owns U.S. Grant, LLC, it too is not exposed to liability for any judgment against U.S. Grant, LLC. STDC's financial risk is limited to the capital it contributed to U.S. Grant, LLC.[12] As with any person or entity making an investment in a limited liability company or a corporation, STDC's risk is completely cut off at the level of its voluntary investment in the entity. As the Alaska Supreme Court explained in *Runyon* when deciding that an entity incorporated by several tribes under state law was not protected by sovereign immunity, "[t]he tribes' use of the corporate form protects their assets from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest. . . . By severing their treasuries from the corporation, they have also cut off their sovereign immunity before it reaches [the corporation]." (*Runyon*, *supra*, 84 P.3d at p. 440.) The same is true here. The limited liability that arises from U.S. Grant, LLC's status as a California limited liability

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12 The record is not clear as to the total amount of STDC's financial investment in U.S. Grant, LLC. As we have explained, the initial capital investment was $18 million, and the record indicates that U.S. Grant, LLC's manager made subsequent requests for capital contributions pursuant to the procedure set forth in U.S. Grant LLC's operating agreement.

company weighs heavily against a finding that it is an arm of the tribe protected by sovereign immunity.

Further, we recognize that STDC — as the indirect owner of U.S. Grant, LLC — will reap the benefits of any favorable financial performance and will suffer a loss in the value of its investment if U.S. Grant, LLC performs poorly. However, this fact is not dispositive of whether U.S. Grant, LLC is an arm of the Sycuan tribe protected by sovereign immunity. "We reject this concept" because "[i]ts inevitable consequence would be to confer tribal immunity on every entity established by an Indian tribe . . . ." (*Dixon*, *supra*, 772 P.2d at p. 1108, fn. 7 [rejecting significance of the fact that the tribe would "reap the benefits" from a tribal construction company's financial performance, and concluding that the construction corporation, in which the tribe was the sole stockholder, was not an arm of the tribe protected by sovereign immunity].)

Our final consideration is "whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." (*Breakthrough*, *supra*, 629 F.3d at p. 1181.) The discussion in the case law of this factor overlaps significantly with other factors we have already discussed. As the Tenth Circuit noted in discussing whether the purposes of sovereign immunity were served in *Breakthrough*, "'[c]ases which have not extended immunity to tribal enterprises typically have involved enterprises formed "solely for business purposes and without any declared objective of promoting the [tribe's] general tribal or economic development."'" (*Id.* at p. 1195.) Here, as we have explained, the declared business purpose for forming U.S. Grant, LLC was to acquire and operate the hotel as a profitable enterprise rather than for any specific purpose related to tribal

development. Further, in determining whether the policy behind tribal sovereign immunity is furthered by conferring immunity on an entity related to an Indian tribe, cases look to whether immunity "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." (*Allen*, *supra*, 464 F.3d at p. 1047; see also *Breakthrough*, at p. 1195 [quoting *Allen*].) As we have already discussed, sovereign immunity is not necessary to protect the tribe's treasury because of the limited liability created by organizing U.S. Grant, LLC as a California limited liability company.

To the extent — as suggested by the Arizona Supreme Court — that the policies underlying sovereign immunity include "preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians" (*Dixon*, *supra*, 772 P.2d at p. 1111), those policies are not diminished by concluding that U.S. Grant, LLC — as an entity organized under California law — is subject to suit. Indeed, an Indian tribe's ability to create a legally distinct non-immune entity under state law promotes commercial dealings between Indians and non-Indians by allowing tribes to participate in commercial transactions without the added complexity and expense that sovereign immunity concerns bring to a transaction.[13]

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13 As has been acknowledged, "[n]on-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune from suit. [Citation.] This may well retard a tribe's economic growth." (*Dixon*, *supra*, 772 P.2d at p. 1112; see also Bernardi-Boyle, *supra*, 26 Am. Indian L.Rev. at pp. 46, 42 [noting that "[a] potential business partner of a tribe cannot easily predict whether . . .

In sum, considering all of the factors that courts have found helpful in determining whether an entity related to an Indian tribe is an arm of the tribe for the purpose of sovereign immunity, we conclude that the balance of factors weighs heavily *against* sovereign immunity for U.S. Grant, LLC. As we have explained, the most significant fact is U.S. Grant, LLC's organization as a California limited liability company. We therefore conclude that the trial court erred in dismissing the cross-complaint on the basis of tribal sovereign immunity.[14]

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tribal immunity will ultimately allow the tribe to escape the terms of its contracts" and advocating that "tribes can overcome the stigma of instability and attract capital by conducting business through corporations formed under state law"].)

14 We note that due to U.S. Grant, LLC's choice to defend the cross-complaint on the merits for six years — through trial and appeal — without raising sovereign immunity as a defense, serious issues arise as to whether that litigation conduct communicated a waiver of whatever sovereign immunity might have existed. However, because we have concluded that U.S. Grant, LLC is not protected by sovereign immunity, we need not, and do not, reach the issue of whether U.S. Grant, LLC's litigation conduct served as an express waiver of any sovereign immunity it might have possessed.

## DISPOSITION

Let a writ of mandate issue commanding the superior court to vacate its June 3, 2011 order granting U.S. Grant, LLC's motion to dismiss. Petitioner is entitled to recover the costs it incurred in this writ proceeding. (Cal. Rules of Court, rule 8.493(a)(2).)

IRION, J.

I CONCUR:

HUFFMAN, Acting P. J.

Aaron, J.,

I concur in the majority's conclusion that U.S. Grant Hotel Ventures, LLC (U.S. Grant, LLC) is not a subordinate economic entity of the Sycuan tribe. However, I do not believe that the resolution of this question in this case is nearly as clear cut as the majority opinion suggests.

The majority states at the outset of its analysis that the fact that U.S. Grant, LLC is a California limited liability company is "dispositive" in determining whether U.S. Grant is an "arm of the Sycuan tribe entitled to sovereign immunity." While the majority proceeds to address the factors set forth in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort* (10th Cir. 2010) 629 F.3d 1173 (*Breakthrough*) for analyzing whether an entity that is related to an Indian tribe should be considered to be an arm of the tribe for purposes of sovereign immunity, its discussion of these factors appears to be colored by its previously stated conclusion that incorporation under state law is "dispositive."

As to the first *Breakthrough* factor, " 'the method of creation of the economic entit[y],' " I would agree that the fact that U.S. Grant, LLC was created under California law as a limited liability company *weighs against* a finding that it is entitled to tribal sovereign immunity. However, I do not believe that this fact is or should be considered to be dispositive on the question. Rather, as *Breakthrough* indicates, it is one of several factors to be taken into consideration in the analysis.

In analyzing the second *Breakthrough* factor, the purpose served by the entity, the majority looks solely to the operating agreement of U.S. Grant, LLC, and notes that the agreement indicates that the purpose of the company was to acquire the U.S. Grant Hotel and operate it. Based on this limited review of the record, the majority concludes, "Thus, U.S. Grant, LLC exists purely for the purpose of participating in an ordinary for-profit business enterprise." In making this assertion, the majority overlooks the historical ties between the tribe and the hotel, which served as a motivating factor for the tribe's purchase of the hotel.

Daniel Tucker, chairman of the board of Sycuan Tribal Development Corporation (STDC) and chairman of the Sycuan Band of the Kumeyaay Nation, testified that purchasing the hotel "was a great historical thing for the tribe" because the tribe "got property in downtown San Diego that they took from us . . . ." He further explained that one of the reasons the tribe thought it would be significant to acquire the U.S. Grant Hotel, in particular, is because it was President Ulysses S. Grant who signed the order to place the Sycuan tribe on its reservation in 1875. Tucker stated that the tribe "looked at it as a historical moment for us all. And that was the tribe's interest in it. Sure, to make a profit of it. But still the historical part of it even was greater than that." Before the tribe was able to complete the deal to purchase the hotel, tribe members decided to create a museum of tribal artifacts in the hotel. The hotel displays genuine Indian artifacts and art and serves as a museum of tribal history. Thus, the record suggests that the tribe was motivated to purchase the hotel by both a desire to preserve and commemorate the tribe's history as well as profit making. For this reason, I cannot agree with the majority's

assertion that U.S. Grant, LLC exists "purely for the purpose of participating in an ordinary for-profit business." However, in view of the fact that investment in a hotel is inherently a for-profit enterprise, I would conclude that on balance, this factor weighs against a determination that U.S. Grant, LLC is an arm of the tribe entitled to tribal sovereign immunity.

The next *Breakthrough* factor is the structure, ownership, and management of the entity, including the amount of control that the tribe has over it. The majority concludes that "the ownership of U.S. Grant, LLC is not closely tied to the Sycuan tribe," and thus, that this factor "does not weigh in favor of finding [U.S. Grant, LLC] to be an arm of the tribe for the purpose of sovereign immunity." I disagree. STDC, which is wholly owned by the tribe and was formed under Sycuan's tribal laws, wholly owns American Property Investors, a limited liability company formed under California law. American Property Investors wholly owns Sycuan Investors, another limited liability company formed under state law, which in turn wholly owns U.S. Grant, LLC. Thus, the entity and the tribe are separated by an unbroken chain of wholly owned entities. Although there are several legal entities in the chain separating the tribe and U.S. Grant, LLC, the structure and ownership of these entities are all directly related to the tribe. Further, the operating agreements between these entities are all signed by the same three STDC board members: Daniel Tucker, chairman of the STDC board; John Tang, president of STDC; and Tina Muse, secretary of STDC. It is thus clear that all of these entities shared ownership and management.

With respect to the management of U.S. Grant, LLC, American Property Management Corporation (APMC) was hired as a management company to run the hotel. However, STDC board members were active in the extensive renovation of the hotel upon its purchase, and were in regular contact with APMC management regarding all aspects of the hotel's management, including the operational funding needs of the hotel and vendor complaints. Further, STDC and the tribe retained ultimate control over the hotel's management, as is reflected by the fact that Daniel Tucker, chairman of the board of STDC and tribal chairman of the Sycuan Band of the Kumeyaay Nation, terminated APMC's management contract, and signed the termination letter on behalf of *all* of the wholly owned entities (i.e., U.S. Grant, LLC, Sycuan Investors, American Property Investors, and STDC). The record discloses that even APMC believed that the owner of the hotel was the Sycuan tribe, and that as the owner, the tribe had final authority over the renovation and fiscal management of the hotel. In view of these facts, I conclude that this factor weighs in favor of extending the tribe's sovereign immunity to U.S. Grant, LLC.

As to the fourth *Breakthrough* factor, the *Breakthrough* court concluded that evidence in that case that the tribe intended that the entity at issue share in its sovereign immunity supported a finding of immunity for the entity. The absence of such evidence in this case supports a contrary conclusion here. In its analysis of this factor, the majority infers that STDC was "not primarily concerned about sovereign immunity with respect to the entities that it created to facilitate its investment in the hotel," citing the fact that STDC chose to create U.S. Grant, LLC under California law rather than under tribal law, and on this basis concludes that this factor weighs against according tribal sovereign

immunity to U.S. Grant, LLC. In my view, while the creation of U.S. Grant, LLC under state law might be relevant in determining the tribe's intent to share its sovereign immunity, this factor has already been effectively considered and weighed in considering the first *Breakthrough* factor, i.e., the " 'method of creation of the economic entit[y].' " Thus, while I agree that this factor, i.e., whether the tribe intended that the entity at issue share in its sovereign immunity, weighs in favor of concluding that U.S. Grant, LLC is not a subordinate entity of the tribe, I reach this conclusion because there is no evidence in the record that the tribe intended to share its immunity with U.S. Grant, LLC.

The next *Breakthrough* factor is the financial relationship between the tribe and the entity. Citing the formation of U.S. Grant, LLC as a limited liability company, the majority asserts that STDC's financial risk with respect to U.S. Grant, LLC is thus limited to the capital that STDC contributed to U.S. Grant, LLC, and, based on that assertion, states, "As with any person or entity making an investment in a limited liability company or a corporation, STDC's risk is completely cut off at the level of its voluntary investment in the entity." The majority also asserts, "[D]ue to U.S. Grant, LLC's status as a California limited liability company, the Sycuan tribe's assets would not be exposed by any judgment against U.S. Grant, LLC."

This analysis is similar to the analysis that the Tenth Circuit rejected in *Breakthrough*. The *Breakthrough* court noted that the district court in that case had found "dispositive" the fact that "a judgment against the [entities claiming tribal sovereign immunity] would not endanger the Tribe's right to receive profits." (*Breakthrough*, *supra*, 629 F.3d at p. 1186.) The *Breakthrough* court concluded that the

"district court applied the wrong legal standard" (*ibid.*), and that prior circuit precedent had not even considered "whether a judgment against [the entity claiming tribal sovereign immunity] would reach the tribe's monetary assets, much less designate that factor as a threshold determination." (*Id.* at p. 1187.)

The majority "recognize[s] that STDC—as the indirect owner of U.S. Grant, LLC—will reap the benefits of any favorable financial performance and will suffer a loss in the value of its investment if U.S. Grant, LLC performs poorly," and goes on to state that this fact is "not dispositive" of the question whether U.S. Grant is an arm of the tribe entitled to sovereign immunity. This fact may not be dispositive of the sovereign immunity issue, but the full extent and nature of the financial ties between the entities is clearly a factor to be weighed in the analysis. The majority's analysis of the financial relationship between the tribe and U.S. Grant, LLC is, in my view, incomplete and as a result, understates the tribe's investment and its involvement in the financial affairs of the entity. STDC funded $18 million of the purchase price of the hotel, representing the amount not financed by loans. The tribal controller testified that the source of the $18 million was from revenue that the tribe had taken in from its casino and resort. In addition, the tribe regularly met the financial obligations of the hotel with funds from the tribe's accounts. Given these undisputed facts, the financial relationship between the tribe and the hotel cannot fairly be analogized as that of "any person or entity making an investment in a limited liability company or a corporation."

In my view, the financial ties between the tribe and U.S. Grant, LLC, which go far beyond those of any investor in a limited liability company or corporation, weigh in favor of according tribal sovereign immunity to U.S. Grant, LLC.

The final *Breakthrough* factor is a consideration of the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entity. In applying this factor, the *Breakthrough* court observed,

> "The Authority and the Casino plainly promote and fund the Tribe's self-determination through revenue generation and the funding of diversified economic development. [Citations.] Not only has 'Congress . . . expressed a strong policy in favor of encouraging tribal economic development,' Note, *Tribal Sovereign Immunity: Searching for Sensible Limits* [88 Colum. L. Rev. 173,] 186, but extending immunity to the Authority and the Casino 'directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general' [citation]. In comparison, '[c]ases which have not extended immunity to tribal enterprises typically have involved enterprises formed "solely for business purposes and without any declared objective of promoting the [tribe's] general tribal or economic development." ' [Citation.]" (*Breakthrough*, *supra*, 629 F.3d at p. 1195.)

Noting that Congress has promoted tribal sovereignty through economic development by authorizing Indian gaming, that the Chukchansi tribe "depend[ed] heavily on the Casino for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities," and that 100 percent of the casino's revenues went to the entities involved, the *Breakthrough* court determined that the entities at issue in that case, a tribal casino and its governing

authority, should share in the tribe's sovereign immunity. (*Breakthrough, supra*, 629 F.3d at p. 1195.)

The record in this case contains a number of statements by John Tang, STDC president, and Mark Woelfel, the tribe's controller, to the effect that the Sycuan tribe purchased the hotel because it wanted to diversify its economic development. According to Tang, the tribe's purpose in forming STDC was to establish an entity that would be able to generate revenue for the tribe, and specifically, "create a diversified portfolio so the tribe isn't relying on gaming forever and ever." Tang said that he and the tribe were introduced to the idea of purchasing the hotel after discussing "Sycuan's . . . wish to—to be—to be economic[ally] diversified, to make investments off the reservation, and that we were actively looking for investments." Woelfel explained that before the purchase of the hotel, the tribe's only sources of revenue were the casino and the resort.

Thus, like the operation of the casino in *Breakthrough*, the Sycuan tribe's purchase of the hotel in the present case was intended to further the tribe's "self-determination through revenue generation and the funding of diversified economic development." (*Breakthrough*, *supra*, 629 F.3d at p. 1195.) However, the relationship between the tribe and the hotel is not as symbiotic as that of the tribe and the casino in *Breakthrough*, and it is difficult to ascertain to what extent the hotel "plainly promote[s] and fund[s] the Tribe's self-determination through revenue generation and the funding of diversified economic development" (*ibid.*), as opposed to being an enterprise "formed 'solely for business purposes and without any declared objective of promoting the [tribe's] general tribal or economic development.' [Citation.]" (*Ibid.*) While the question is, in my view, a close

one, I would ultimately conclude that this factor weighs neither in favor of, nor against, a determination that U.S. Grant, LLC is an arm of the Sycuan tribe for purposes of the sovereign immunity issue.

## CONCLUSION

I would not accord the fact of formation under state law as a limited liability company the dispositive effect that the majority does in analyzing whether U.S. Grant, LLC should be considered to be an arm of the tribe for purposes of sovereign immunity, and I would assess several of the *Breakthrough* factors differently. However, after weighing the *Breakthrough* factors, I conclude that on balance, the factors weigh against a determination that U.S. Grant, LLC is an arm of the tribe and is entitled to tribal sovereign immunity.

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AARON, J.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On July 3, 2012, I served the within document:

**PETITION FOR REVIEW**

☐ by transmitting via facsimile number (619) 235-0398 the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission confirmation report is attached hereto.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☐ by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at San Diego, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 530 "B" Street, San Diego, California 92101 in the ordinary course of business on the date of this declaration.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

*PLEASE SEE ATTACHED SERVICE LIST*

☒ *(State)* I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ *(Federal)* I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 3, 2012, at San Diego, California.

Tautalafua M. Akeli

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