RON BENDER (SBN 143364)
JOHN-PATRICK M. FRITZ (SBN 245240)
LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.
10250 Constellation Boulevard, Suite 1700
Los Angeles, California 90067
Telephone: (310) 229-1234
Facsimile: (310) 229-1244
Email: RB@LNBYB.COM; JPF@LNBYB.COM

Proposed Counsel for Chapter 11 Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT

Southern District of California

In re:	Case No. 12-09415-PB11
SANTA YSABEL RESORT AND CASINO,	Chapter 11
Debtor and Debtor in Possession.	**OPPOSITION TO MOTION TO DISMISS BANKRUPTCY CASE FOR LACK OF ELIGIBLITY AND AUTHORITY**
	Date: September 4, 2012 Time: 11:00 a.m. Place: 325 West F. Street Dept. 4, Courtroom 328
	Judge: Hon. Peter W. Bowie

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I.

INTRODUCTION

Santa Ysabel Resort and Casino (the "Debtor"), the chapter 11 debtor and debtor in possession in the above-captioned bankruptcy case, hereby submits its opposition (the "Opposition") to the *Motion to Dismiss Bankruptcy Case for Lack of Eligibility and Authority* (the "Motion") [docket entry no.57] filed by the Yavapai-Apache Nation (the "YAN"). Capitalized terms used herein shall have the same meaning as ascribed to them in the Motion unless otherwise defined with specificity or implied by context.

Without deciding or addressing the issue, the Debtor does not argue with the YAN's assertion that the Iipay Nation of Santa Ysabel (the "Iipay Nation") is a governmental unit under section 101(27) of the Bankruptcy Code and therefore would be ineligible to be a debtor under section 109 of the Bankruptcy Code. The Iipay Nation has never intended for itself to be the debtor in this bankruptcy case, and if the Court determined the Debtor and the Iipay Nation to be one and the same, then the Debtor and Iipay Nation voluntarily would request dismissal of the case.

However, the Debtor does dispute the YAN's contention that the Debtor and the Iipay Nation are one and the same. The Debtor maintains, by fact and law, that it is a separate entity, an unincorporated company, and eligible to be a chapter 11 debtor. The YAN's Motion is inadequate in its legal analysis of the meaning of "unincorporated company," and, consequently, its examination of the facts is misguided and uninformative on the issue. Decades of case law from numerous Circuit Courts of Appeal have developed a test for finding that an entity is an unincorporated company as long as there is a multiplicity of people engaged in a common business under a common name. The Debtor is a business of approximately 120 people engaged in the business of running a casino under the Debtor's name, "Santa Ysabel Resort and Casino." The inquiry is made by reference to the facts operating in the real world and cannot be determined by resorting to paper trails, pre-bankruptcy and non-bankruptcy statements, preconceived notions about an entity, or even activities by the entity that would be deemed to violate the law. As

explained in greater detail below, the Court should find that the Debtor is an unincorporated company, separate from, though wholly owned by, the Iipay Nation, and eligible to be a chapter 11 debtor.

The Debtor did not file the case in bad faith, there is no "new debtor syndrome" under these facts, and the filing is not a litigation tactic. Furthermore, the Debtor had proper authority to file its bankruptcy case, and the filing was not in violation of tribal, federal, or any other law. Accordingly, the Court should deny the Motion and permit the Debtor to continue with its reorganization.

II.

THE IIPAY NATION HAS NO INTENT TO BE THE DEBTOR IN THIS OR ANY OTHER BANKRUPTCY CASE

The Debtor neither accepts nor opposes the YAN's arguments and theories regarding whether the Iipay Nation is a governmental unit as defined in 11 U.S.C. § 101(27) and therefore ineligible to be a chapter 7 or chapter 11 debtor. The intent of the Debtor, and of the Iipay Nation as 100% owner of the Debtor, was to file the chapter 11 bankruptcy for the Santa Ysabel Resort and Casino only. If the Court determines that the Santa Ysabel Resort and Casino is not its own entity as an unincorporated company separate and apart from the Iipay Nation, then the Iipay Nation voluntarily requests that the Court dismiss the bankruptcy case.

Accordingly, the arguments as to whether the Iipay Nation is a governmental unit or eligible to file bankruptcy are moot, and the inquiry as to the Motion should start with whether the Debtor is an unincorporated company and is itself eligible for bankruptcy.

III.

THE DEBTOR IS AN UNINCORPORATED COMPANY UNDER THE BANKRUPTCY CODE

The Debtor is an unincorporated company because it is an enterprise of numerous people joined in a common business and conducting its affairs somewhat after the pattern of a corporation under a common name. By virtue of being an "unincorporated company," the Debtor

is a "corporation" under the Bankruptcy Code, and thus eligible to be a chapter 11 debtor. *See* 11 U.S.C. § 101(9) (defining "corporation" to include "unincorporated company"), § 101(41) (defining "person" to include a "corporation" and specifically exclude a "governmental unit"), and §§ 109(b) and (d) (setting forth that a "person" may be a chapter 11 debtor, except in certain instances involving certain brokers, banks, and insurance companies, which are irrelevant here).

This Opposition does not discuss the issue of whether the Debtor would be a "governmental unit" under the Bankruptcy Code because the YAN did not assert that the Debtor was a governmental unit separate and apart from the Iipay Nation but rather that the Debtor was one in the same with the Iipay Nation, which would be a governmental unit. The Debtor's separate opposition to the separately filed *County of San Diego's Motion to Dismiss Debtor's Bankruptcy Case* will address the issue of whether the Debtor as a separate entity is a "governmental unit" under the Bankruptcy Code. This Opposition to the YAN's Motion refutes the YAN's argument that (1) the Debtor is not an unincorporated company and (2) that the Debtor and the Iipay Nation are one and the same entity.

As explained below, the Court should find that the Debtor is an unincorporated company, separate and apart from the Iipay Nation, and eligible to be a chapter 11 debtor under the Bankruptcy Code.

A. Defining Unincorporated Company

The Bankruptcy Code does not define unincorporated company. Neither did its predecessor, the Bankruptcy Act of 1898. *Pope & Cottle Co. v. Fairbanks Realty Trust*, 124 F.2d 132, 134 (1st Cir.1941). Nonetheless, we are guided by case law from multiple Circuit Courts of Appeal to look for indicia of an unincorporated company. These cases, though written under the old Bankruptcy Act, are instructive nonetheless because the definitions and practices of bankruptcy law under the Bankruptcy Act were not eroded by the Bankruptcy Code absent a clear indication that Congress intended such a departure. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 777 (Bankr.D.Nev.2010) (citing *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992); *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 454 (2007); *Cohen v. de la Cruz*,

523 U.S. 213, 221 (1998); and *Penn. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 563 (1990)). "The definition of 'corporation' in paragraph (9) [of the Bankruptcy Code] is similar to eh definition under Section 1(8) of the [Bankruptcy] Act." 2 COLLIER ON BANKRUPTCY ¶ 101.09, at 101-67 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.).

The YAN's Motion gives inadequate analysis to the primary question in determining whether the Debtor is an unincorporated company. The YAN propose a two-part test from *In re T.W. Kroeger Trucking Co.*, 105 B.R. 512 (Bankr.E.D.Mo.1989), and cases cited therein from the First Circuit, to limit the finding of an unincorporated company to one that (i) consists of multiple persons joining together and (ii) provides some form of limited liability for its members. Motion at p.7 ln.18-20. The YAN then proceed to analyze these two points – and only these two points – in short shrift in a single paragraph. Motion p.8 ln.6-19. The test and inquiry into whether an entity is an unincorporated company, though, is much more involved, and the majority of Circuits that address the issue depart markedly from the analysis relied on in *T.W. Kroeger Trucking* and the First Circuit cases upon which the YAN relies.

1. The First Circuit's Test for an Unincorporated Company Is Not Appropriate Due to Its Focus on Trusts and Partnerships

Leading cases in the First Circuit examine the existence of unincorporated companies on a case-by-case basis and based upon each case's particular facts but include particular criteria that are not included in the tests developed by other Circuit Courts of Appeal. As one leading case in the First Circuit stated:

> The courts have not attempted to give any comprehensive definition of "unincorporated company" but have inclined to decide each case on its facts as it arose. In general, the organizations which they have held to be subject to involuntary bankruptcy in this category have been unincorporated associations of persons joining together at least in part for some common business or commercial purpose, and conducting their affairs somewhat after the pattern of corporations.

Pope & Cottle Co. v. Fairbanks Realty Trust, 124 F.2d 132, 134 (1941). In another leading case, the First Circuit also stated:

> . . . as to the words "unincorporated company," . . . "company" would seem to imply an association of individuals, not partners, carrying on business under a distinct name, and having common rights inter se, but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked, and no direct individual liability for the company's debts.

Gallagher v. Hannigan, 5 F.2d 171, 175 (1st Cir.1925). Synthesizing these two cases, the following criteria would indicate an unincorporated company (at least in the First Circuit):

1. An association of persons or individuals, not partners;
2. Joined together at least in part of some common business or commercial purpose;
3. Carrying on business under a distinct name;
4. Conducting their affairs somewhat after the pattern of corporations;
5. Having common rights inter se;
6. Having no individual ownership in the joint property;
7. Having no individual control over the business in which their joint capital is embarked; and
8. Having no direct individual liability for the company's debts.

The first four (4) of the above-enumerated points from the First Circuit's analysis is similar to the analysis used by the other Circuits and instructive on whether an entity is an unincorporated company. The last four (4) points, however, depart markedly from the other Circuits' analyses and are not instructive for determining whether an entity is an unincorporated company unless a court also is addressing the potential existence of a trust or partnership. This line of cases in the First Circuit derives from bankruptcy cases filed in Massachusetts where the courts were asked to determine whether debtors named as "trusts" under Massachusetts state law were eligible for bankruptcy as unincorporated companies or otherwise ineligible trusts or partnerships. *Gallagher* cites with some prominence to the case of *In re Associated Trust*, 222 F. 1012 (1914), and *Pope & Cottle* cites to both *Gallagher* and *In re Associated Trust*, with importance in its analysis. *In re Associated Trust* involved an unusual question of whether a

Massachusetts real estate trust is a trust, an unincorporated company, or a partnership, and this analysis is not particularly helpful for courts outside of the First Circuit, because the Massachusetts real estate trust is "a form of business organization which is not uncommon in this state [Massachusetts] and is very uncommon elsewhere." 222 F. at 1013. These entities were sometimes treated as partnerships and sometimes as trusts under Massachusetts law for tax purposes, and, thus, the court's analysis of whether it was a trust, partnership, or otherwise an unincorporated company would necessarily involve questions bearing on all three types of entities. *See id.*

Both of the courts in *Gallagher* and *Pope & Cottle* picked up on these inclusive points in their respective analyses as both cases also involved trusts organized in Massachusetts. *Pope & Cottle*, 124 F.2d at 133 (finding the entity in question to be nothing other than a family trust); *Gallagher*, 5 F.2d at 172-73 (noting that the entity in question had established itself formally in the manner of a trust under Massachusetts law but went on to conduct no other business except a Ponzi scheme in the day and age when Charles Ponzi was caught and arrested for doing so). Importantly, the court in *Gallagher* cited prominently to *In re Samuels*, 215 F. 845 (2d Cir.1914), a case that gave great analysis to the issue of whether partnerships were eligible for bankruptcy, and tied that analysis into the examination of unincorporated companies. *Gallagher*, 5 F2d at 175.

The relevance of the First Circuit's inclusion of the partnership and trust analysis when examining the Massachusetts trust is shown by reference to the Bankruptcy Act's definition of "corporation" as enacted at the time of those cases:

> "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument.

Pope & Cottle, 124 F.2d at 134-35 (quoting Section 1(6) of the Bankruptcy Act (as amended in 1926) (emphasis added)).

> Corporations shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument.

Id. at 135 (quoting Section 1(8) of the Bankruptcy Act (as amended in 1938) (emphasis added)). As shown by the qualifying language linked to trusts and partnerships in the definition, only certain types of trusts or partnerships were eligible to be "corporations" and, thus, eligible for bankruptcy. In the context of examining entities under Massachusetts law that were sometimes considered trusts and at other times partnerships under state law, and at the same time alleged to be unincorporated companies by creditors seeking to have them adjudicated bankrupt debtors, the Court had to devise a test that would speak to the possibility of all three of these types of entities and ensure that it would not grant an entity bankruptcy eligibility as an unincorporated company when it was to be denied eligibility due to its status as a partnership or trust.

The Court should find that the YAN's proposed test – that there should be (i) multiple persons joining together (ii) with some form of limited liability for its members – is wrong because it focuses on the partnership inquiry and ignores the factors relevant to the inquiry on unincorporated companies. A partnership, logically, must have multiple persons, and limited liability was necessary to distinguish those "partnerships" that were classified as "corporations" from other partnerships subject to special rules of insolvency. As explained in *In re Samuels*, a partnership cannot be adjudicated a bankrupt without involving the assets and liabilities of both the partnership and its individual partners:

> There are many decisions that a partnership is not insolvent within the meaning of the Bankruptcy Act unless all its members are insolvent . . . the rule that there can be bankruptcy of a partnership without bankruptcy of all the partners (save in exceptional cases) is

> based, not upon the words of the statute, but upon general principles of law.
>
> It is impossible . . . to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all its partners.
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> ***
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> The reason for the requirement is that every member of a partnership is liable in solido for all of the firm debts, regardless of any agreement between the partners. . . . But if in fact there is a partner whose individual estate is ample to pay the firm debts, as well as his own, the firm is not insolvent under a law which defines insolvency as a condition where the property of the debtor at a fair valuation is insufficient to pay his debts.
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> We must therefore accept it as established law that a partnership is not bankrupt so long as any of the members who compose it is individually solvent.

In re Samuels, 215 F. at 847-49 (internal quotations and citations omitted). Consistent with this explanation of partnerships and bankruptcy, the Bankruptcy Act specified that to be a "corporation" partnerships would have to be "partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." *See* Section 1(6) of the Bankruptcy Act (as amended in 1926) and Section 1(8) of the Bankruptcy Act (as amended in 1938) above. Therefore, the YAN's proposed test of a multiplicity of individuals with limited liability is nothing more than the test to distinguish between eligible and ineligible partnerships under the Bankruptcy Act. This is not surprising since the YAN's proposed test relies heavily on First Circuit case law examining Massachusetts trusts that were sometimes trusts, sometimes partnerships, and sometimes unincorporated companies, but it is wholly inappropriate in that it ignores the other factors in the analysis.

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The Court should find that the YAN's citation to Collier is equally misplaced. Motion p.8 ln.4-5. The YAN cite Collier as stating: "Under the Code, when personal liability co-exists with capital liability, such body will not be deemed a corporation for purposes of section 101(9)." 2 COLLIER ON BANKRUPTCY ¶ 101.09, at 101-70. However, this quote speaks to partnerships, not unincorporated companies, as the quote is bookended with comments on partnerships at both sides. In full context, the quote reads:

> The exclusion of the limited partnership from the definition of corporation is a departure from the former Bankruptcy Act. Section 4 of the Act included a limited partnership, which was therefore deemed a "corporation" within the meaning of the statute. Under the Code, when personal liability co-exists with capital liability, such body will not be deemed a corporation for purposes of section 101(9). Thus, general partnerships are also excluded, because the partners' liability extends beyond their capital contribution.

2 COLLIER ON BANKRUPTCY ¶ 101.09, at 101-70. Collier goes on to discuss unincorporated companies in the next paragraph without any discussion on limited liability like in its discussion of partnerships. Therefore, the YAN's citation to Collier is neither informative nor useful unless the entity in question is potentially a partnership, which the Debtor is not.

The First Circuit's analysis is markedly different from that of other Circuits where the partnership/trust issue is absent, and, where, as here, there is no issue as to the existence of a trust or partnership. Therefore, the Court should look to the tests developed by the other Circuits' as the far more appropriate tests for identifying an unincorporated company.

2. The Second, Third, and Seventh Circuits' Tests Form the Appropriate Test for Determining Whether the Debtor Is an Unincorporated Company

The Second Circuit and Seventh Circuit have proposed a test for determining whether an entity is an unincorporated company as follows:

> A company is defined in the Century Dictionary as "a number of persons united for performing or carrying on anything jointly." If such a number of persons are united for carrying on any kind of business enterprise jointly, and are not incorporated, and do not constitute a partnership, they are an "unincorporated company"

> within the trust intent and meaning of the acts of Congress relating to bankruptcy.

Nickolas v. Witter (In re Peer Manor Bldg. Corp.), 143 F.2d 769, 771 (7th Cir.1944) (quoting and citing *In re Tidewater Coal Exchange*, 280 F. 638, 643 (2d Cir.1922).

In applying this test to one case at hand, the Seventh Circuit noted certain indicia of an entity found to be an unincorporated company: (1) It carried on a business; (2) It held property and conducted all the business which the management of its property demanded; (3) It had debts; (4) Insurance was paid; (5) Taxes were paid; (6) It was a business conducted for profit, although the profits were largely imaginary; and (7) Agents of representatives of the company did the business. *In re Peer Manor Bldg. Corp.*, 143 F.2d at 772.

In another case, the Second Circuit in *In re Tidewater Coal Exchange*, took note that the debtor was engaged in a commercial enterprise, even though it was nothing more than a clearing house, that it did no trading, and that it was not designed to earn a profit for itself, but the Court still found that entity to be an unincorporated company. 280 F. at 643. To be an unincorporated company and eligible for bankruptcy, it sufficed that there was "an association of individuals in pursuit of a common business object, under a control agreed to by all its members, and capable of having debtors and creditors." *Id.*

The Third Circuit stated the test for an unincorporated company in much simpler terms:

> Whatever may be the full scope of the word "company," it does include at least any unincorporated association or group of individuals whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a moneyed business, or commercial corporation. A corporation is also a group of individuals, and the fact that one group has a charter, while another group with an identical object has none, hardly furnishes a sufficient reason for exempting the latter from the scope of the [Bankruptcy] act. . . . In a word, if "any unincorporated company" includes at least a group of individuals doing "business" in the same sense as business when carried on by a corporation, then such a company is certainly subject to the [Bankruptcy] act.

Vadakin v. Cass (In re Order of Sparta), 242 F. 235 (3d Cir.1917).

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Synthesizing these leading cases from the Second, Third, and Seventh Circuits, the test of whether an entity is an unincorporated company focuses on inquiries as to the existence of an enterprise of many people engaged in a common business, even where that business is not necessarily set up for profit or even profitable. These indicia of an unincorporated company are shared in the first four (4) points taken from the First Circuit analysis, but the last four (4) points of the First Circuit analysis are not present because there is no inquiry into whether the entities might be trusts or partnerships.

In this case, no party argues or asserts that the Santa Ysabel Resort and Casino is a partnership or a trust. Therefore, the analysis set forth by the First Circuit is not appropriate and the Court should look to the analysis set forth by Second, Third, and Seventy Circuits as the proper test for whether the Debtor is an unincorporated company.

3. <u>The Court Should Employ a Broad and Expansive Reading of Corporations and Unincorporated Companies</u>

In applying the test for an unincorporated company, the Court should do so with a broad and expansive reading of the terms "corporation" and unincorporated company." A broad and expansive reading of the terms "corporation" and "unincorporated company" is necessary and appropriate so as to give effect to Congress' intent to offer creditors and debtors bankruptcy protection (by way of voluntary as well as involuntary petitions) to most all businesses. *Nickolas v. Witter (In re Peer Manor Bldg. Corp.)*, 143 F.2d 769, 772 (7th Cir.1944). In addressing the definition of corporation under the Bankruptcy Act, "[n]umerous courts have considered what businesses are thus included. They have uniformly given a broad, inclusive construction to the language used." *Id.* at 771. In *Witter*, the Seventh Circuit noted that one unincorporated business entity was not a corporation, was not a partnership, and was not an individual, but nonetheless had recourse to bankruptcy protection:

> Congress seemingly intended to include all business enterprises within the reach of this Chapter [X of the Bankruptcy Act]. Congress was not satisfied with including corporations and partnerships. It added joint stock companies. Nor did it stop here. It included "unincorporated companies and associations." We

> think Congress intended to include all business enterprises which were unable to meet their debts and whose creditors had more faith in a reorganization than in a mortgage foreclosure.

Id. at 772.

Indeed, if Congress had sought to limit the availability of bankruptcy to businesses, it would not have included the widely undefined and amorphous term "unincorporated company" in the definition of corporation as an entity eligible for bankruptcy protection dating back to the Bankruptcy Act of 1898 and all of its successor iterations through the current Bankruptcy Code of 1978.

The Second Circuit, too, gave a broad and expansive reading to "unincorporated company" as applied to businesses and bringing them into the fold of entities eligible for bankruptcy:

> If each word in the phrase "any unincorporated company" is given its ordinary and popular meaning, the [Debtor] is unquestionably included therein; and considering the phrase as a whole and in the light of the subject-matter of the [Bankruptcy] act, we can see no reason for giving it a restricted meaning which would exclude it. It is not a corporation, not having been incorporated at the time involved. It is not a partnership, there being no agreement to divide the profit and bear the loss. It is not a joint-stock company, for there is no stock. It is simply an unincorporated company or association engaged in the prosecution of a business enterprise, as distinguished from one which is charitable, or religious, or educational, or social.

In re Tidewater Coal Exchange, 280 F. 638, 643 (2d Cir.1922). Therefore, the Court should give the term unincorporated company" as broad a reading as possible to extend bankruptcy protection to as many businesses as possible, as intended by Congress.

B. The Court Should Find that the Debtor Is an Unincorporated Company, Eligible for Bankruptcy Protection, and Separate from the Iipay Nation

Applying the test set forth by synthesizing the case law from the Second, Third, and Seventh Circuits with a broad reading to give effect to Congress' intent to protect businesses under the auspices of the Bankruptcy Code, the Court should find that the Debtor is an

unincorporated company. An entity is an unincorporated company if there are many people engaged in a business under a common name, even where that business is not necessarily set up for profit or even profitable.

Here, the Debtor is an unincorporated company because it is a business of 120 employees comprised of management, mid-level management, its own accounting department, and service employees. These many people carry on a business in gaming operations and the running of a casino, and the money generated from the operation of the business is used to fund the business. The Debtor pays its payroll to its 120 employees from the funds generated from its own business operations at the casino and no other funds. The Debtor has its own tax ID number. The Debtor has its own contracts with vendors, its own insurance where it is the named insured, and it has its own debts owed to creditors.

Much like what happened prepetition, if San Diego County levies the Debtor's bank account, the Debtor cannot cut checks to pay its employees and vend ors, and the Debtor's business will be severely hindered, if not shut down. If the YAN pull up to the Casino with a number of flat-bed trucks to foreclose on the personal property and gaming equipment at the Casino, the Debtor's business will shut down. There will be no business to operate, no funds will be generated, no employees will be paid, 120 people will lose their jobs, and they very real business of running and operating the Casino will be destroyed.

The Debtor is an unincorporated company according to certain criteria that the Seventh Circuit applied in its analysis. The Seventh Circuit noted certain indicia of an entity found to be an unincorporated company: (1) It carried on a business; (2) It held property and conducted all the business which the management of its property demanded; (3) It had debts; (4) Insurance was paid; (5) Taxes were paid; (6) It was a business conducted for profit, although the profits were largely imaginary; and (7) Agents of representatives of the company did the business. *Nickolas v. Witter (In re Peer Manor Bldg. Corp.)*, 143 F.2d 769, 771, 772 (7th Cir.1944). Here, the Debtor (i) carries on a business of operating a casino with 120 employees; (ii) the Debtor holds approximately $1.5 million of personal property (as listed on schedule B of its Bankruptcy

Schedules) without which it cannot carry on its business; (iii) the Debtor has debts owed to dozens of creditors that are not co-debts of the Iipay Nation (compare schedules F and H of the Debtor's Bankruptcy Schedules, showing only five debts where the Iipay Nation is a co-debtor) (a true and correct copy of schedules F, G, and H of the Debtor's Bankruptcy Schedules are attached as Exhibit "A" hereto); (iv) the Debtor pays for its own insurance, and the named insured is "Santa Ysabel Resort & Casino" (see Exhibit "B" hereto); (v) the Debtor pays sales taxes to the Iipay Nation, and the Debtor pays employee related taxes by way of its own tax ID number, which is different from the Iipay Nation's tax ID number (see Exhibit "C" hereto); (vi) the Debtor operates the casino for the purpose of making a profit, even though its recent cash flow breaks even; and (vii) David Chelette and Charles Bauman, along with 120 employees, over half of which are not members of the Iipay Nation, conduct the business at the casino. Therefore, the Debtor is an unincorporated company under the analysis employed by the Seventh Circuit.

The Debtor is also an unincorporated company according to the analysis applied by the Second Circuit in *In re Tidewater Coal Exchange*, 280 F. 638 (2d Cir.1922). An entity is an unincorporated company where there is "an association of individuals in pursuit of a common business object, under a control agreed to by all its members, and capable of having debtors and creditors." *Id.* at 643. The Debtor has 120 employees in pursuit of the common business object of running a casino, which provides sufficient revenue to pay its ordinary operating costs and payroll, operating under a controlled structure with a hierarchy of management, middle management, an accounting department, and a recognized decision-making structure through its management. Additionally, it has its own debtors and creditors, specifically, it has contracted with several entities in its own capacity, separate and apart from the Iipay Nation, as shown on Schedule G of the Bankruptcy Schedules, and the Debtor has several trade creditors that are creditors of the Debtor alone and not the Iipay Nation, as shown by reference to schedules F and H of the Bankruptcy Schedules. Contracts between the Debtor (not the Iipay Nation), on the one hand, and various third parties, on the other hand, are attached as Exhibit "D" hereto. Therefore, the Debtor is an unincorporated company under the Second Circuit's analysis.

The Debtor does not need to be formally formed as a "legal entity" to be an unincorporated company eligible for bankruptcy protection. The YAN in its Motion often uses the phrase "separate legal entity," without defining what a "legal entity" is, and implies that such a formation is necessary to exist as a separate entity. However, no formal formation is necessary to be adjudged an unincorporated company. The Third Circuit compared the situation of an unincorporated company with that of a corporation and stated that "the fact that one group has a charter, while another group with an identical object has none, hardly furnishes a sufficient reason for exempting the latter from the scope of the [Bankruptcy] act." *Vadakin v. Cass (In re Order of Sparta)*, 242 F. 235, 238 (3d Cir.1917). The Third Circuit found the entity in question to be an unincorporated company and eligible for bankruptcy. *Id.* Indeed, the very formal establishment of a business entity by way of filing articles of incorporation would take it out of the realm of unincorporated entities and would make this entire issue moot. Congress has made clear, as noted by the Second, Third, and Seventh Circuits, that an unincorporated company is an eligible debtor under the Bankruptcy Code and has been for over a hundred years.

The fact that Santa Ysabel Resort and Casino has filed d/b/a papers and has not incorporated or taken other traditional stops for the formation of a corporation, LLC, or other entity has no bearing on its eligibility as an unincorporated company. Whatever entities may or may not be under state law, "it does not at all follow that under federal law they cannot be property adjudicated bankrupt as unincorporated companies." *Gallagher v. Hannigan*, 5 F.2d 171, 174 (1st Cir.1925). Moreover, the Seventh Circuit found that a dissolved corporation that continued to do business was an unincorporated company eligible for bankruptcy relief. *In re Peer Manor Bldg. Corp.*, 143 F.2d at 772. The Debtor, which has held itself out as a business by way of its name, its operations, its employees, payroll, contracts with creditors in its own name, and debts with creditors in its own name, is an unincorporated company even without a "formal" legal status under state (or tribal) law. Even a debtor that is organized for a fraudulent purpose may be deemed an unincorporated company and eligible for bankruptcy, as the court found in *Gallagher v. Hannigan*, where the debtor was classic Ponzi scheme. *Gallagher*, 5 F.2d at 174. If

a company formed for illegal business operations, a company that let its corporate status lapse, and a company not properly formed under state law can be determined to be an unincorporated company and eligible for bankruptcy, then certainly the Debtor, which carries on a legitimate business with employees, vendors, contracts, and creditors, is an unincorporated company and eligible for bankruptcy. Therefore, the Court should find that the Debtor is an unincorporated company and eligible for bankruptcy.

It is of no consequence that the YAN thought it was dealing at all times with the Iipay Nation and not the Santa Ysabel Resort and Casino as an unincorporated company. The fact that an entity is known to a creditor in a capacity other than an unincorporated company "is no reason for holding that bankruptcy may not be invoked in order to provide equality of treatment of all creditors of this separate entity." *Id.* (finding that debtor was eligible to file bankruptcy as an unincorporated company despite creditors' expectation that the debtor was a partnership or trust that would be ineligible for bankruptcy).

It is also of no consequence that the prepetition litigation has been between the Iipay Nation (rather than the Debtor), on the one hand, and the YAN or San Diego County, on the other hand. The Third Circuit addressed this objection and dismissed it as being no bar to bankruptcy eligibility for an unincorporated company:

> Two minor objections may be briefly noticed. The first is that the order [i.e, the Order of Sparta, the debtor] is not a legal entity, and cannot be sued qua order. To this it is enough to answer that, as Congress has permitted a suit in bankruptcy to be brought against such a company, no reason is apparent why the proceeding should not bring the company into court under its own name – of course with notice to the proper officials.

Vadakin v. Cass (In re Order of Sparta), 242 F. 235, 239 (3d Cir.1917). Thus, although the Order of Sparta was not known to other parties to be an entity capable of being sued, and therefore not sued, there was no reason to prevent it from being an unincorporated company and eligible for bankruptcy. Here, though the YAN and San Diego County sued and litigated against the Iipay Nation under non-bankruptcy law, that is no bar to the Debtor's eligibility for bankruptcy

protection as an unincorporated company under bankruptcy law. It is entirely two different matters to be the subject of suit for breach of contract and to be a chapter 11 debtor. Therefore, the Court should find that the Debtor is eligible for bankruptcy completely apart from the YAN's prepetition litigation strategy, which had nothing to do with bankruptcy eligibility.

Similarly, it is inconsequential that the Debtor never asserted itself as an unincorporated company in the prepetition litigation with the YAN, the County of San Diego, or any other parties. Prepetition statements made by a debtor in a non-bankruptcy context have no bearing on acknowledgment of eligibility or ineligibility for chapter 11. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 790-91 (Bankr.D.Nev.2010) (stating that debtor's disclosure and description of itself as "instrumentality of the State of Nevada" in its tax certificate was no evidence of it being an "instrumentality" or "municipality" under the Bankruptcy Code because "it is critical to note that [the debtor] did not make its representation in connection with an acknowledgment that it was ineligible for Chapter 11"). Therefore, the various defenses that the Iipay Nation and its attorneys made prior to the Debtor's bankruptcy filing, completely outside of the Bankruptcy Code, have no bearing on the question of whether the Debtor is an unincorporated company under the Bankruptcy Code.

IV.

CONTRARY TO THE YAN'S ASSERTIONS, THE COURT SHOULD FIND THAT THE DEBTOR AND THE IIPAY ARE SEPARATE ENTITIES

The YAN is incorrect in its assertion that the Iipay Nation and the Debtor are the same entity. The Debtor first reiterates the differences between the Iipay Nation and the Debtor, and then refutes the YAN's allegations in turn. The Court should find that the Debtor and the Iipay Nation are two separate entities and that the Debtor is an unincorporated company eligible for bankruptcy protection.

A. The Santa Ysabel Resort and Casino Is Not the Iipay Nation

The Iipay Nation is a federally recognized Indian tribe, comprised of approximately 918 enrolled tribal members. The Iipay Nation occupies the Santa Ysabel Indian Reservation,

consisting of 15,500 acres of Indian reservation land. The Iipay Nation has a tribal government with a tribal council and chairman that see to its government functions. The Iipay Nation pays its tribal government employees, and it has its own tax ID number (953215892) separate from the Debtor and its tax ID number.

Wholly owned, but separate and apart from the Iipay Nation, the Debtor operates a casino gaming business. The Debtor has 120 employees, approximately half of which are tribal members of the Iipay Nation and half which are not. The Santa Ysabel Resort and Casino is not a federally recognized Indian tribe. The Santa Ysabel Resort and Casino owns no land and has no tribal government. The Santa Ysabel Resort and Casino maintains insurance in its own name, enters into contracts in its own name, and generates revenue to pay its operating expenses and 120 employees. The Debtor pays sales taxes to the Iipay Nation. Furthermore, the Debtor has entered into loan agreements with the Iipay Nation, recognizing one as lender and the other as borrower and as two separate entities (see Exhibit "E" hereto). If the YAN and San Diego County foreclose on the casino and the Debtor's accounts, the Iipay Nation is not shut down – the Debtor is.

Case law supplies us with examples treating businesses associated with Indian tribes as entities that are related to the tribe but are not the tribe itself. *Cabazon Indian Casino v. IRS (In re Cabazon Indian Casino)*, 57 B.R. 398 (9th Cir.B.A.P.1986), involved an Indian casino that was an unincorporated company (which was the chapter 11 debtor in the case), and it was owned by the Cabazon Band of Mission Indians. *Id.* at 399. Additionally, *Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir.2010), involved an Indian casino that was a "subordinate economic entity" and an "unincorporated entity" created by and wholly owned by the Indian tribe but no the tribe itself. *Id.* at 1180. The Tenth Circuit did not conclude that the casino and tribe were one in the same but instead concluded that "the Casino [has] a sufficiently close relationship to the Tribe to share in its [sovereign] immunity." *Id.* at 1181. Therefore, there is federal precedent to find an Indian casino to be an unincorporated company with an identity separate from the tribe itself.

B. The Loan Documents Are No Bar to the Finding of the Debtor as an Unincorporated Company Separate from the Iipay Nation

The loan documents' reference to the Iipay Nation do not answer the question of whether the Debtor is an unincorporated company. Prepetition statements made by a debtor in a non-bankruptcy context have no bearing on acknowledgment of eligibility or ineligibility for chapter 11. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 790-91 (Bankr.D.Nev.2010) (stating that debtor's disclosure and description of itself as "instrumentality of the State of Nevada" in its tax certificate was no evidence of it being an "instrumentality" or "municipality" under the Bankruptcy Code because "it is critical to note that [the debtor] did not make its representation in connection with an acknowledgment that it was ineligible for Chapter 11").

Nor would the Iipay Nation's or Debtor's alleged violation of the terms of the loan documents be a bar to finding the Debtor to be s separate entity and unincorporated company. The Seventh Circuit found that a dissolved corporation that continued to do business was an unincorporated company eligible for bankruptcy relief. *Nickolas v. Witter (In re Peer Manor Bldg. Corp.)*, 143 F.2d 769, 771, 772 (7th Cir.1944). Even a company engaged in no other business but an illicit Ponzi scheme can still be adjudicated an unincorporated company and eligible for bankruptcy. *Gallagher v. Hannigan*, 5 F.2d 171, 174 (1st Cir.1925).

The YAN point to the Amended and Restated Loan Agreement (the "Loan Agreement") to prove that the Debtor does not exist as an unincorporated company and that the Iipay Nation is the only entity in existence. However, the Loan Agreement is dated as of April 22, 2005, approximately two years before the Debtor opened for business. Conducting business is a key component of being an unincorporated company. In the case of *Chicago Title & Trust Co. v. Ryan (In re Midwest Athletic Club)*, 161 F.2d 1005 (7th Cir.1947), the Seventh Circuit compared its case at hand with its prior ruling in *In re Peer Manor Building Corp.*, 143 F.2d 769 (7th Cir.1944), and noted that both entities were dissolved companies, but that the debtor in *Peer Manor* was an unincorporated company eligible for bankruptcy relief because it carried on an active business, and the debtor in *Midwest Athletic Club* was not an unincorporated company (and

thus not eligible for bankruptcy protection) because it carried on no business at all after its dissolution. *In re Midwest Athletic Club*, 161 F.2d at 1007-08. Because the proper test for an unincorporated company is a multiplicity of people carrying on a business under a common identity, the Debtor could not exist as an unincorporated company in 2005 when it was not open for business, and thus the Loan Agreement is of little value in the inquiry as to an unincorporated company.

Even if the Loan Agreement were of use in this inquiry, the Loan Agreement indicates the separate existence of the Debtor from the Iipay Nation in several places. To start, the Debtor is recognized by name: "'Casino' means, collectively, all gaming and related retail, lodging, dining and entertainment facilities owned or operated by Borrower or any Affiliate of Borrower, including but not limited to the facility commonly referenced or to be known as the Santa Ysabel Resort and Casino, and any replacements, improvements or expansions thereof." Loan Agreement p.4. Not only does this definition recognize the Casino, but it also recognizes that it could be operated by an affiliate of the Iipay Nation. The defined terms "Casino Assets" and "Casino Operations" also recognize operations conducted by an affiliate of the Iipay Nation. Loan Agreement p.4. In turn, "'Affiliate' of any Person means any other Person directly or indirectly controlling, controlled by or under common control with such Person." Loan Agreement p.1. The defined term "Person" is defined very broadly to mean, amongst others, "corporation . . . association, enterprise, tribe, trust or other entity or organization." Loan Agreement p.15. With such a broad definition, inclusive of the catch-all "or other entity or organization," the Debtor would be Person, and by common control, an Affiliate, and recognized under the Loan Agreement, and named "Santa Ysabel Resort and Casino," in connection with the operation of the Casino.

The Loan Agreement suggests the Iipay Nation and the Debtor would or could be separate entities in several other places, as well. The defined term "'Excluded Assets' means any Cash, Cash Equivalents, or Property of Borrower [Iipay Nation] that is not Casino Assets." Loan Agreement p.7. And " 'Net Income' means . . . the net income of Borrower [Iipay Nation] from

Casino Operations . . ." Loan Agreement p.12. These definitions focus on the Casino apart from the tribe and suggest a division between the Debtor and the Iipay Nation. Similarly, "Operating Lease Obligations" refers to "lease payments due under all Operating Leases of Borrower [Iipay Nation] or the Casino Operations." Loan Agreement p.13. If the Iipay Nation and the Debtor are one and the same in operating the Casino, then there is no reason for the Loan Agreement to refer separately to the lease obligations of both "Borrower or the Casino Operations."

If the Loan Agreement is to be considered in answering the bankruptcy law question of whether a separate unincorporated company exists in the Debtor, then it is most important to look at the provisions speaking to secured claims, liens, bankruptcy, and insolvency, all of which reference the existence of the Debtor as separate from the Iipay Nation. Sections 4.01(a)(iv) and (v) of the Loan Agreement state:

> (a) Borrower [Iipay Nation] shall have delivered each of the flowing items to Agent for approval, and Agent shall have approved each item:
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> ***
>
> (iv) UCC lien searches covering the name of the Borrower, the Casino, and Guarantor, reflecting no Liens or encumbrances of Casino Assets, other than Permitted Encumbrances, with the Bring Down Certificate.
>
> (v) Searches evidencing no bankruptcies, tax Liens or judgments relating to Borrower, any Affiliate of Borrower or the Casino, or the Guarantor, with Bring Down Certificate.

Loan Agreement p.30 (emphasis added). With respect to liens, secured claims, and bankruptcy filings, the Loan Agreement recognizes the possible separate existence of the Casino from the Borrower, as well as its affiliates, otherwise there is no reason to use any defined term other than "Borrower" because, as the YAN have tried to assert, there would be no separate legal entity apart from Borrower [Iipay Nation]. Yet, this section specifically separates the Borrower [Iipay Nation] from the Casino, which is defined "to be known as the Santa Ysabel Resort and Casino."

Moreover, Section 5.18 of the Loan Agreement, addressing solvency, again speaks to two separate entities in the Iipay Nation and the separate Santa Ysabel Resort and Casino:

> (a) . . . (i) the fair value of the assets of Borrower and the Casino on a consolidated basis, at a fair valuation, will exceed the debts and liabilities, subordinated, contingent or otherwise, of Borrower and the Casino on a consolidated basis; (ii) the present fair saleable value of the Property of Borrower and the Casino on a consolidated basis will be greater than the amount that will be required to pay the probable liability of Borrower and the Casino on a consolidated basis on their debts and other liabilities, subordinate, contingent or otherwise, as such debts and other liabilities become absolute and matured; (iii) Borrower and the Casino on a consolidated basis will be able to pay their debts and liabilities, subordinated, continent or otherwise, as such debts and liabilities become absolute and matured; and (iv) Borrower and the Casino on a consolidated basis will not have unreasonably small capital with which to conduct the business in which they are engaged as such businesses are now conducted and are proposed to be conducted after the date hereof.
>
> (b) Borrower does not intend to, and does not believe that it or the Casino will, incur debts beyond its ability to pay such debts as they mature, taking into account the timing of and amounts of cash to be received by it or the Casino and the timing of the amounts of cash to be payable on or in respect of its Indebtedness or the Indebtedness of Borrower or the Casino Operations.

Loan Agreement p.46 (emphasis added). Section 5.18(a) speaks to the assets, liabilities, and solvency the Borrower and the Casino as separate entities and requires that such calculations be made on a consolidated basis. If the Borrower and the Casino (i.e, the Iipay Nation and the Debtor) were the same entity, there would be no need to specify that the calculations be done on a consolidated basis. Moreover, there would be no reference both the Borrower and the Casino, as reference to the Borrower alone would encompass both and suffice. Additionally, Section 5.18(b) speaks to the separate indebtedness of multiple entities – the indebtedness of the Casino, the indebtedness of the Borrower, and the indebtedness of the Casino Operations. Therefore, to the extent that the Loan Agreement can be used to show the existence of an unincorporated company

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separate from the Iipay Nation, the provisions regarding bankruptcy, solvency, secured claims, and liens show that multiple entities exist.

Contrary to the YAN's contentions, it would not be a violation of the Loan Agreement for the Iipay Nation to conduct its business through the Debtor, which it wholly owns. Section 6.17 specifically carves out an exception to allow the Iipay Nation to enter into transactions with Affiliates involving casino assets in the ordinary course of business. Loan Agreement p.53. Given the definition of Affiliate as used in the Loan Agreement, the Debtor would be an affiliate of the Iipay Nation, and the conduct of the Debtor's business is absolutely within the ordinary course. The existence of an unincorporated company being determined by reference to many people carrying on a business under a common name, neither the Iipay Nation nor the Debtor violated any terms by conducting business in the ordinary course through an unincorporated company. Furthermore, the YAN cannot forbid the Iipay Nation from operating and managing the gaming operations through the Debtor (which is wholly owned by the Iipay Nation) because section 15.04 of the Loan Agreement states in all-capital lettering: "NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION HEREIN, AGENT AND LENDERS [THE YAN] ACKNOWLEDGE AND AGREE THAT THE LOAN DOCUMENTS DO NO CREATE . . . (B) ANY RIGHTS ON THE PART OF AGENT AND LENDERS [THE YAN] TO INTERFERE WITH BORROWER'S RIGHT TO DETERMINE STANDARDS OF OPERATION AND EFFICIENT MANAGEMENT OF THE CASINO . . ." Loan Agreement p.75. The Iipay Nation and the Debtor are not violating the Loan Agreement by the Debtor's existence as an unincorporated company conducting business at the Casino, and the YAN has no power under the Loan Agreement to forbid it.

Section 6.27 of the Loan Agreement, stating that the Iipay Nation operates the Casino as a "'tribal enterprise,'" which has no separate legal existence," is no bar to finding the Debtor as an unincorporated company because it was not made in connection with the existence of an unincorporated company or eligibility for bankruptcy protection. Prepetition statements made by a debtor in a non-bankruptcy context have no bearing on acknowledgment of eligibility or

ineligibility for chapter 11. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 790-91 (Bankr.D.Nev.2010) (stating that debtor's disclosure and description of itself as "instrumentality of the State of Nevada" in its tax certificate was no evidence of it being an "instrumentality" or "municipality" under the Bankruptcy Code because "it is critical to note that [the debtor] did not make its representation in connection with an acknowledgment that it was ineligible for Chapter 11"). The representation that "Borrower currently operates the Casino as a 'tribal enterprise,' which has no separate legal existence from Borrower," which the Debtor made in connection with securing financing in a non-bankruptcy context is exactly the same sort of non-bankruptcy, pre-bankruptcy representation made by the debtor in *In re Las Vegas Monorail Company* in connection with securing bond financing, and which the court in that case found to be completely useless in answering the question of what sort of entity the debtor might be and whether it is eligible for bankruptcy.

Moreover, a word or phrase used in one legal context does not have the same meaning and trappings of the same word in another legal context, especially in the realm of bankruptcy law. *Id.* at 790 (noting the Bankruptcy Code's differing use and meaning of words such as "tax" and "lease" and "security interest" and "instrumentality" when compared with other areas of state and federal law). Thus, "tribal enterprise" may be an unincorporated company under the Bankruptcy Code if it fits the test synthesized by the Circuit Courts as shown above. Therefore, these statements outside of the bankruptcy context have little to no bearing on whether the Debtor is a separate entity as an unincorporated company under the Bankruptcy Code.

Despite the overcomplicated test it developed, even the First Circuit noted that "courts have not attempted to give any comprehensive definition of 'unincorporated company' but have inclined to decide each case *on its facts* as it arose." *Pope & Cottle Co. v. Fairbanks Realty Trust*, 124 F.2d 132, 134 (1941) (emphasis added). As case law has borne out, an unincorporated company exists where multiple people carry on a common business under a common name – here, the 120 employees conducting a gaming business as the Santa Ysabel Resort and Casino.

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No papered statement can undo those facts. The Court should find that, under the Bankruptcy Code, the Debtor is an unincorporated company with a separate existence from the Iipay Nation.

C. The Debtor Is an Unincorporated Company Separate from the Iipay Nation Without Any Violation of Federal, State, or Tribal Law

The Court should find that the Debtor's separate existence as an unincorporated company is not barred merely by reference to prepetition documents, much less ones entered into prior to the Debtor commencing business. Conducting business is a key component of being an unincorporated company. *See Chicago Title & Trust Co. v. Ryan (In re Midwest Athletic Club)*, 161 F.2d 1005, 1007-08 (7th Cir.1947) (comparing two dissolved companies and finding the one that continued to conduct a business was an unincorporated company eligible for bankruptcy protection while the other conducted no business and thus was not an unincorporated company and, consequently, not eligible for bankruptcy protection). The Tribal-State Compact was entered in December 2003 and the Intergovernmental Agreement with the County of San Diego was entered in January 2005, long before the Debtor commenced business operations. The proper test for an unincorporated company being a multiplicity of people carrying on a business under a common identity, certainly the Debtor could not exist as an unincorporated company in 2003 and 2005 when it was not open for business. Furthermore, to the extent the Debtor or Iipay Nation were in violation of these state and county agreements (which is for the sake of argument and which neither the Debtor nor the Iipay Nation admit), that has no bearing on the existence of an unincorporated company separate from the Iipay Nation. Even a company engaged in no other business but an illicit Ponzi scheme can still be adjudicated an unincorporated company and eligible for bankruptcy. *Gallagher v. Hannigan*, 5 F.2d 171, 174 (1st Cir.1925). Therefore, reference to these state and county agreements has no place in determining the existence of the Debtor as an unincorporated company separate from the Iipay Nation.

The YAN is incorrect in its contention that, by reference to the Indian Gaming Regulatory Act ("IGRA"), the Debtor and the Iipay Nation must be one single entity. The Debtor and the Iipay Nation are not in violation of IGRA simply because the Debtor is an unincorporated

company under the Bankruptcy Code and thus a separate entity (though wholly owned entity) involved in the operation of the Casino. Indian tribes can conduct gaming operations through their business entities. The cases cited by the YAN for its contention that the Debtor and Iipay Nation have violated IGRA, actually address IGRA violations by third party lenders that were wholly outside of the Indian tribe structure because their financial loan documents and contracts were so onerous as to rise to the level of unauthorized management contracts in violation of IGRA.

It is permissible for an Indian tribe to operate its casino through its affiliated entity. For example, the Lac du Flambeau Band of Lake Superior Chippewa Indians formed Lake of the Torches as a corporation chartered under tribal law to own and operate the Lake of the Torches Resort Casino, and the tribe entered into a state compact with Wisconsin and received approval from the National Indian Gaming Commission. *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 688 (7th Cir.2011). That case, held a financing agreement by Wells Fargo to be completely void because its controls over the tribe's gaming operations in the event of default were so severe as to rise to the level of a management contract impermissible under IGRA. *See id.* at 698-99. This is hardly the case before this Court, where the Debtor's management answers to the chairman of the Iipay Nation, and the chairman sets the manager's salary and has the power to hire and fire him. Another example comes from *Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir.2010), where the Picayune Rancheria of the Chukchansi Indians set up the Chukchansi Economic Development Authority to own and operate the Chukchansi Gold Resort & Casino, and the Tenth Circuit noted that these were "subordinate economic entities" to the tribe and closely related to the tribe, though not the tribe itself. *See id.* at 1195; *see also Allen v. Gold Country Casino*, 464 F.3d 1044, 1045 (9th Cir.2006) ("Gold Country Casino is a tribal entity formed by a compact between the federally recognized Tyme Maidu Tribe and the State of California. The Casino is wholly owned and operated by the Tribe."). The Debtor's and Iipay Nation's structure regarding the Casino is not a violation of IGRA. Regardless, though, whether there is any violation of IGRA, which the Debtor would dispute strongly, that is not an issue to be decided by

the Bankruptcy Court, much less in the Motion on the issue of dismissal. It has no bearing on the test of an unincorporated company.

Furthermore, the YAN's reliance on communications between the National Indian Gaming Commission ("NIGC") and Iipay Nation is misplaced, as those communications do not disprove the Debtor's separate existence. The YAN cite to a letter from the NIGC referring to the Iipay Nation's "gaming employees" in paragraph 20 of the letter to assert that the Iipay Nation alone owns and operates the gaming operations without the Debtor, but the NIGC also refers to "employees of the Santa Ysabel Resort and Casino" specifically in paragraph 24 of the same letter. Exhibit 16 to Bibbero Declaration. Additionally, it would not necessarily be a violation of IGRA for the Iipay Nation to operate through its wholly owned unincorporated company in the Debtor pursuant to 25 C.F.R. § 502.10.[1] That section provides, in pertinent part, that "[a] gaming operation may be operated by a tribe directly; by a management contractor; or, under certain conditions, by another person or other entity." There is nothing to say that the situation between the Debtor and the Iipay Nation would not fit into this third category.

It is consistent that the Debtor is a separate entity as an unincorporated company and that "[t]he Iipay Nation of Santa Ysabel owns and operates the Santa Ysabel Resort and Casino," as stated in the Iipay Nation of Santa Ysabel Gaming Ordinance. Exhibit 7 p.1 to Bibbero Declaration. All along the Debtor has stated that it is wholly owned by the Iipay Nation and that it operates the Casino. Furthermore, it is consistent that "the Casino shall be operated as an enterprise of the Tribe" and be an unincorporated company where it is named the "Santa Ysabel Resort and Casino." See Exhibit 11 to Bibbero Declaration, General Council Resolution 05-13. The Santa Ysabel Resort and Casino is a business enterprise wholly owned by the Iipay Nation in the form of an unincorporated company carrying on that business with a multiplicity of people under its name. They logically exist together and are not mutually exclusive. Entities are often referred to by one name under state law but are deemed to be other entities when tested by the

[1] For ease of reference, the YAN's Motion, at p.12 ln.3, transposed two numbers in citing to "25 C.F.R. § 520.10" to define "gaming operation." The correct cite is 25 C.F.R. § 502.10.

Bankruptcy Code. For example, the court in *In re Las Vegas Monorail Co.*, 429 B.R. 770 (Bankr.D.Nev.2010), found that the debtor in that case was not an "instrumentality" or "municipality" under the Bankruptcy Code even though that debtor named and described itself as an "instrumentality of the State of Nevada" in its tax certificate because "it is critical to note that [the debtor] did not make its representation in connection with an acknowledgment that it was ineligible for Chapter 11." *Id.* at 790-91. Another example comes from *Gallagher v. Hannigan*, 5 F.2d 171 (1st Cir.1925), where the court found an entity formed as a Massachusetts trust to be an unincorporated company when examined through the lens of the Bankruptcy Act. *Id.* at 172-73. Therefore, the Court should find that the Debtor is an unincorporated company despite prepetition references to a tribal enterprise and, furthermore, find this to be logically consistent and not mutually exclusive.

The Iipay Nation's Gaming Ordinance focuses on regulation of the gaming activity by establishing the Santa Ysabel Gaming Commission, and most of the document addresses the Commission's existence, gaming, and licensing. See Exhibit 9 to Bibbero Declaration. It would not address the Debtor's separate existence from the Iipay Nation as an unincorporated company and therefore has no bearing on the issue. Moreover, the General Council Resolution #07-31 of the Iipay Nation does not direct the Iipay Nation's employees to carry out the operation of the Casino, as the YAN represent, but that the Tribal Council and officials and employees of the Tribe are directed "to take the necessary actions to carry out the directives of the General Council to obtain the benefits of Class III gaming through the construction and operation of the Casino." Exhibit 10 to Bibbero Declaration p.2, at 2nd ¶. The General Council directed the Iipay Nation's officials and employees to facilitate the constructing and operation of the Casino, not to conduct the Casino operations themselves.

Regardless, as discussed further below, the NIGC is listed in the Debtor's bankruptcy case for notice purposes and has received notice of the bankruptcy petition. Neither the Debtor nor the Iipay Nation has been contacted by the NIGC with any allegation that the Debtor or Iipay Nation has violated IGRA by way of the bankruptcy filing or the Debtor's independent existence as an

unincorporated company.

The Court, though, should not consider alleged violations of IGRA in determining that the Debtor is an unincorporated company under the Bankruptcy Code. Compliance with IGRA, or any other law, is not part of the analysis as to whether an entity is an unincorporated company. Even a debtor that is organized for a fraudulent purpose may be deemed an unincorporated company and eligible for bankruptcy, as the court found in *Gallagher v. Hannigan*, where the debtor was a classic Ponzi scheme. *Gallagher*, 5 F.2d at 174. Therefore, the Court should find that the Debtor is an unincorporated company, a separate entity, and eligible for bankruptcy protection, irrespective of alleged IGRA violations.

D. Other Actions of the Debtor, the Debtor's Proposed Bankruptcy Counsel, and the Iipay Nation Do Not Bar the Finding of an Unincorporated Company

The various other documents that the YAN alludes to are of no avail in its attempt to refute the separate existence of the Debtor from the Iipay Nation. The financial report attached as Exhibit 1 to the Kwail Declaration does just the opposite. The financial report from McGladrey & Pullen, CPA, refers to the Santa Ysabel Reosrt and Casino as an enterprise fund of the Iipay Nation, and the report specifically analyzes the assets and liabilities of the Santa Ysabel Resort and Casino and specifically does not analyze the assets and liabilities of the Iipay Nation. Exhibit 1 to Kwail Declaration p.1 ("the financial statements present only the Santa Ysabel Resort and Casino, and do not purport to, and do not, present fairly the financial position of the Iipay Nation"). Separate assets and liabilities and financial reports strongly evidence a business, in the form of the Santa Ysabel Resort and Casino, separate and apart from the Iipay Nation, as this independent auditor analyzed the financials by separating out the Casino's assets and liabilities from the tribe's. Moreover, the auditor acknowledges a separate entity by reference to the Debtor as "an enterprise fund of the Iipay Nation of Santa Ysabel." While this may have been insignificant in a pre-bankruptcy, non-bankruptcy context, under bankruptcy law, this fits squarely into a finding of an unincorporated company – a common business conducted by over 100 people under a common name. Therefore, the Court should find that, under bankruptcy law,

there has been and is a separate entity in the Debtor as an unincorporated company.

The Court should find that the legal opinion letters attached as Exhibits 3, 4, and 5 and the Tribal Business Structure Handbook attached as Exhibit 15 to the Bibbero Declaration are no evidence in support of the YAN's assertion of the Debtor's non-existence as an unincorporated company apart from the Iipay Nation and ineligible for bankruptcy protection. The meanings, analysis, and representation as to certain words and phrases made in one context, particularly in the non-bankruptcy context, have no prejudice on determining the same words and phrases in the bankruptcy context. *See In re Las Vegas Monorail Co.*, 429 B.R. 770, 789-91 (Bankr.D.Nev.2010) (stating that "the Supreme Court has rejected [creditor's] basic premise – that a word used in one federal statute necessarily has the same meaning in another federal statute," and finding that debtor's admission of being an "instrumentality of the state" prepetition had no bearing on whether it was an "instrumentality" or "municipality" under the Bankruptcy Code because the debtor "did not make its representation in connection with an acknowledgement that it was ineligible for Chapter 11" but rather "in connection with its efforts to ensure that interest on the Bonds would be free from federal taxation."). Much like the debtor's statements in *Las Vegas Monorail Company*, the legal opinion letters were written as part of securing financing and without reference to bankruptcy eligibility. Likewise, the Tribal Business Structure Handbook does not discuss bankruptcy law, bankruptcy eligibility, or unincorporated companies under bankruptcy law in any fashion, focusing instead mainly on sovereign immunity, taxation, and financing for various forms of potential organizational structures. Therefore, it is of no guidance on the issue of the Debtor as an unincorporated company under the Bankruptcy Code.

The filing of the d/b/a papers does not bear upon the existence of an unincorporated company, as shown by the case law developed by the Circuit Courts and explained above. Thus, the YAN's citation to cases dealing with sole proprietorships with d/b/a's are inapplicable, uninformative, and should be disregarded because the facts involving sole proprietorships are so markedly different from those with unincorporated companies. *In re Lewis*, 461 B.R. 414 (Bankr.E.D.Ky.2011), discusses whether an entity is a sole proprietorship or a partnership under

Kentucky state law, then discusses the effect of preferential transfers and liens. It has no bearing on unincorporated companies, bankruptcy eligibility, or dismissal. Similarly, *In re Christenberry*, 336 B.R. 353 (Bankr.E.D.Tenn.2005), merely discusses a hapless *pro se* debtor's misguided bankruptcy filing for her sole proprietorship with herself as an alleged joint debtor, eventually leading to conversion to chapter 7 in her individual capacity by reference to Tennessee state law based on the law that a sole proprietorship is not an eligible entity for bankruptcy, though the underlying individual is.

The YAN ignore the reality that, where a business is operating as an unincorporated company, it is in essence doing business as the name it holds out to the world without having incorporated under that particular name by way of filing articles of incorporation or forming a charter. "[T]he fact that one group has a charter, while another group with an identical object has none, hardly furnishes a sufficient reason for exempting the latter form the scope of the [Bankruptcy] act." *Vadakin v. Cass (In re Order of Sparta)*, 242 F. 235, 238 (3d Cir.1917). Whether the Debtor has a d/b/a filing or not, has articles of incorporation or not, or has a charter or not, is not part of the analysis of whether the unincorporated company exists:

> Congress seemingly intended to include all business enterprises within the reach of this Chapter [X of the Bankruptcy Act]. Congress was not satisfied with including corporations and partnerships. It added joint stock companies. Nor did it stop here. It included "unincorporated companies and associations." We think Congress intended to include all business enterprises which were unable to meet their debts and whose creditors had more faith in a reorganization than in a mortgage foreclosure.

Nickolas v. Witter (In re Peer Manor Bldg. Corp.), 143 F.2d 769, 771, 772 (7th Cir.1944). Therefore, the Court should find that this Debtor – which is a business of 120 people – is not a sole proprietorship with a d/b/a, but an unincorporated company eligible for bankruptcy protection.

The Debtor's proposed counsel, Levene, Neale, Bender, Yoo & Brill L.L.P. ("LNBYB"), explained at great length in its reply to oppositions on the *Debtor's Application to Employ Levene,*

Neale, Bender, Yoo & Brill L.L.P. as General Bankruptcy Counsel that LNBYB was always intended to be counsel for the Debtor, not the Iipay Nation. Those arguments do not bear repeating again here. Additionally, as suggested and instructed by the Court, LNBYB will be filing an amended retainer agreement to clarify that it is employed by the Debtor, not the Iipay Nation.

There is no merit in the YAN's conjecture and presumption that LNBYB considered the Iipay Nation and the Santa Ysabel Resort and Casino to be the same entity, and, as such, only conducted searches for liens under the name of the Iipay Nation. In fact, prior to the bankruptcy filing, LNBYB conducted a UCC search under the name "Santa Ysabel Resort Casino." A true and correct copy of the search, dated June 21, 2012, is attached as Exhibit "_____" hereto. However, because this search turned up only one recorded lien by Sysco San Diego (a food and catering vendor and creditor of the Debtor), which lien the Debtor disputes (though the amount of the debt is undisputed), it seemed too self-serving for the Debtor to attach this UCC search to its first-day pleadings and argue that only Sysco had an alleged lien. Knowing that the YAN had filed a UCC shortly before the petition date, and knowing that the YAN would be a contentious party, the Debtor and LNBYB determined that it should attach the UCC searches that reflected the YAN's recording. Attaching the UCC search for the name "Santa Ysabel Resort Casino" seemed unnecessary because Sysco's filing already appeared on the UCC search for the name "Santa Ysabel Band of Diegueno Mission Indians." If the UCC search under the name of the Santa Ysabel Resort Casino had turned up more than one baseless UCC-1 filing, or a filing that was not covered by the other UCC searches, then the Debtor and LNBYB would have attached the Santa Ysabel Resort Casino UCC search result, too.

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V.

THE DEBTOR HAS PROPER AUTHORITY TO FILE BANKRUPTCY AND BE A DEBTOR IN POSSESSION

A. The Debtor Has Proper Authority for Its Bankruptcy Filing

The Debtor has proper authority for the filing of its bankruptcy petition. Prior to the Debtor's bankruptcy filing, the Iipay Nation's chairman, Virgil Perez, met with the Iipay Nation's legislators and General Council and discussed the filing of the Debtor's bankruptcy. The Chairman and the legislators consulted with the Iipay Nation's general counsel, Huggy Lamar Price, Esq. regarding the decision to file the Debtor's bankruptcy case. The General Council and legislators supported the decision and authorized the Chairman to commence the Debtor's bankruptcy case by signing the resolution to authorize the filing.

It is the Iipay Nation's tradition for the Chairman to make major, high-end business decisions regarding the Debtor, such as whether to file for bankruptcy. In keeping with that tradition, the Iipay Nation's legislators, Chairman, and general counsel determined that no resolution of the legislative branch or General Council would be needed to authorize the bankruptcy filing. Therefore, the Debtor's bankruptcy filing has proper authorization. After the bankruptcy filing, the Chairman and legislators discussed the bankruptcy filing with the General Council at a regularly scheduled Tribal Council meeting, there was no opposition, and the Tribal Council showed general support.

Even if the Debtor's authorization were technically deficient, the Court should find that it is no reason to dismiss the case because the Iipay Nation will take actions necessary to ratify the filing. Deficient resolutions authorizing a bankruptcy filing can be ratified and made valid *post de facto*. *See In re Avalon Hotel Partners,* 302 B.R. 377, 381 (Banrk.D.Or.2003) (finding that a board of directors can and did ratify by consent resolution a bankruptcy filing that was initially deficient and without corporate authority). Although the Iipay Nation believes that it is wholly unnecessary, so as to eliminate any doubt as to proper authorization, the Iipay Nation's legislature is preparing a legislative bill to ratify the authorization to file the Debtor's bankruptcy. The

legislative process will take approximately 45 days for the bill to become law. The Iipay Nation is strongly confident that the law will pass due to the legislature's and General Council's support for the Debtor's bankruptcy filing. Under the Iipay Nation's current constitution, General Council authorization is not necessary to authorize the Debtor's bankruptcy filing. The General Council resolutions cited to by the YAN were made under the repealed Articles of Association. Therefore, the Court should find that the Debtor had proper authority to file for bankruptcy but, even if the authorization were deficient, it will be cured, and thus there is no reason to dismiss the bankruptcy case.

B. The Debtor's Bankruptcy Filing and Status as a Debtor in Possession Does Not Violate IGRA

The Debtor does not need permission from the NIGC under IGRA to file for bankruptcy. The management and control of the Casino and gaming operations has not changed by virtue of the Debtor being a debtor in possession. The Supreme Court has stated that when dealing with specialized areas of federal non-bankruptcy law, it does not behoove the process to become overly involved in the distinctions between debtors and debtors in possession when they are essentially the same entity, as these distinctions often have little bearing on the non-bankruptcy area of the law. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527-28 (1983) (discussing whether the debtor in possession was an "alter ego" or "successor employer" of the debtor pre-bankruptcy and deciding: "We see no profit in an exhaustive effort to identify which, if either, of these terms represents the closest analogy to the debtor in possession . . . . For our purposes, it is sensible to view the debtor in possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing."). Therefore, the Court should find that the distinction (if any) between the Debtor and debtor in possession in this case should be no bar to filing bankruptcy.

There is no violation of IGRA by way of the Debtor operating under the Bankruptcy Code with respect to use of its cash and subject to its operating budget. The Debtor has been operating

without incident or interference since the petition date. In fact, due to the imposition of the automatic stay under section 362 of the Bankruptcy Code, operations have been smoother than before the bankruptcy filing because the Debtor is operating with a bank account and without fear that its property will be seized by the YAN and its bank accounts levied and frozen by San Diego County.

Moreover, the Debtor listed the NIGC on its bankruptcy filing master mailing list and included it as a noticed party, with notice mailed to the National Indian Gaming Commission, Attention: Lawrence S. Roberts, 1411 L Street NW, Suite 9100, Washington, DC 2005. If the NIGC believes that the creation of the debtor in possession violates IGRA or that NIGC permission was required for bankruptcy filing, then it could make such an argument, but it has not.

VI.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court: (i) overrule the YAN's Motion in its entirety, (ii) find that the Debtor is an unincorporated company eligible for relief under the Bankruptcy Code, (iii) find that the Debtor's bankruptcy filing is valid, and (iv) grant such other and further relief as the Court may deem just and proper under the circumstances.

Dated: August 20, 2012

SANTA YSABEL RESORT AND CASINO

By: */s/ Ron Bender*
RON BENDER
JOHN-PATRICK M. FRITZ
LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.
Proposed Counsel for Debtor and Debtor in Possession