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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.	COUNTY OF SAN DIEGO'S MOTION TO DISMISS DEBTOR'S BANKRUPTCY CASE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
	Date: September 4, 2012 Time: 11:00 a.m. Dept.: 4 Judge: Honorable Peter W. Bowie

The County of San Diego ("County") hereby moves this Court for an Order dismissing the voluntary Chapter 11 Petition filed by Santa Ysabel Resort and Casino ("Debtor") because Debtor is ineligible for relief under Chapter 11 of the United States Bankruptcy Code and instituted the instant bankruptcy proceedings in bad faith. This motion is based on the accompanying Memorandum of Points and Authorities, the Declaration and Supplemental Declaration of Thomas Bunton, the Notice of Self-Authenticating Evidence filed and served concurrently herewith, and such other evidence as may be presented at the hearing hereon.

I.

INTRODUCTION

This case must be dismissed for cause. In addition to the reasons set forth by the Yavapai-Apache Nation ("YAN") in its Motion to Dismiss,[1] cause for dismissal exists based on the following two reasons.

First, even if Debtor is able to establish that it is its own entity and is not the Iipay Nation of Santa Ysabel, previously known as the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation ("Tribe"), Debtor still does not qualify as a person who may be a debtor under § 109 of the United States Bankruptcy Code ("Code"). Instead, Debtor is a "governmental unit" because it is an arm of the Tribe and is thereby excluded from obtaining relief under Chapter 11 of the Code.

Second, the Tribe's apparent creation of Debtor for the purposes of transferring its struggling assets just prior to the bankruptcy filing and for the purposes of relitigating issues already adjudicated constitutes a bad faith filing under the Fifth Circuit's holding in In re Little Creek Development Co., 779 F.2d 1068 (5th Cir. 1986) and its progeny.

II.

FACTUAL BACKGROUND

In September of 2003, the Tribe and the State of California entered into a Tribal State Gaming Compact (Compact") to allow the Tribe to provide Class III gaming on tribal lands under the Indian Gaming Regulatory Act ("IGRA"). (See Compact, Exhibit A to the Declaration of Thomas Bunton filed concurrently herewith ("Bunton Decl.").) Section 10.8.1.1 of the Compact requires the Tribe to consult with the County of San Diego to develop "site-or project specific terms and conditions" and to contract for "the identification and implementation of feasible mitigation measures" and project alternatives. (Exhibit A, section 10.8.1.1, p. 36.)

[1] For the sake of brevity, the County hereby incorporates by reference the points and authorities raised by the YAN's Motion to Dismiss Bankruptcy Case for Lack of Eligibility and Authority filed on August 2, 2012. [Docket No. 57.]

On January 12, 2005, the Tribe and County executed the Intergovernmental Agreement pursuant to section 10.8 of Santa Ysabel's Tribal-State Gaming Compact ("Intergovernmental Agreement"). (Intergovernmental Agreement, Exhibit B to Bunton Decl.) The negotiated terms of the Intergovernmental Agreement required the Tribe to pay fees to the County as mitigation for off-reservation impacts of its Casino operations in the community.[2] (Exhibit B, section A.)

Since its opening in 2007, the Tribe's casino has been unable to meet its operating expenses or pay the County the amounts required by the Intergovernmental Agreement. (Motion for Final Agency Action, Exhibit 1 to the Supplemental Declaration of Thomas Bunton filed concurrently herewith ("Suppl. Bunton Decl."), 2:8-9.) The Intergovernmental Agreement contained a waiver of the Tribe's sovereign immunity and an arbitration provision. (Exhibit B.) After the Tribe defaulted on its payment obligations under the Intergovernmental Agreement, the County filed a demand for arbitration in January of 2010. (Exhibit 1, 2:10-11.) In defense of the arbitration action, the Tribe asserted that the Intergovernmental Agreement was void and unenforceable based on the following: (1) a lack of consideration; (2) mutual mistake of fact; (3) illegal because it was a de facto tax on the Tribe in violation of the IGRA; (4) impracticability and impossibility; (5) violation of public policy; (6) unjust enrichment; (7) conscionability; and (8) bad faith. (Arbitration Award, Exhibit C to Bunton Decl., p. 2.) Despite the Tribe's counterclaim regarding the Intergovernmental Agreement's viability, the Arbitrator found the Intergovernmental Agreement was valid and enforceable and awarded the County more than three million dollars in unpaid mitigation measures that were required under the Intergovernmental Agreement. (Exhibit C.)

On December 28, 2011, the San Diego Superior Court confirmed the arbitration award and entered judgment in the amount of approximately $3 million in favor the County ("Judgment").[3] (Judgment, Exhibit D to Bunton Decl.) After entry of the Judgment, the County commenced collection efforts against the Tribe. (Suppl. Bunton Decl., ¶ 4.)

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[2] "Casino" as used herein refers to the Casino as Debtor's business operation and property as opposed to Debtor itself.

[3] Under California law, the Judgment is final and unappealable. Cal. Ct. R. 3.827-3.828. Debtor's schedule's list the County's debt as both secured and undisputed. [Docket No. 46.]

On June 22, 2012, apparently in response to the County's collection efforts, the Tribe filed a Notice of Motion for Final Agency Action (the "NIGC Motion") to be heard before the National Indian Gaming Commission ("NIGC"). (Suppl. Bunton Dec., ¶ 5; Exhibit 1.) The NIGC Motion again claims that the Intergovernmental Agreement is void and unenforceable based on the Tribe's assertion that it violates the IGRA. (Exhibit 1, 6:9-11:10.)

On June 27, 2012, less than a week after filing its NIGC Motion, in which the Tribe claims that it owns and operates the Casino, the Tribe executed Resolution No. 10-12. (Resolution 10-12, attached to the Bankruptcy Petition [Docket No. 1].) In Resolution 10-12, the Tribe authorized the "Santa Ysabel Casino," an unincorporated company, wholly owned by the Tribe to file for bankruptcy under Chapter 11 of the Title 11 of the United States Code. (Id.) On July 2, 2012, Debtor filed for Chapter 11 relief, claiming for the first time that it, and not the Tribe, is responsible for the Casino's operations and debts related to the same. (Bankruptcy Petition [Docket No. 1].) It is this lack of delineation between the Tribe and Debtor, as well as the apparent transfer of the Tribe's distressed assets on the eve of this bankruptcy case that warrants this Court's dismissal of the Bankruptcy Case.

III.

EVEN IF DEBTOR IS SEPARATE ENTITY OWNED BY THE TRIBE, IT IS STILL INELIGIBLE FOR BANKRUPTCY RELIEF

A threshold issue in any bankruptcy case is whether the debtor is eligible for the relief it seeks. In re First Assured Warranty Corp., 383 B.R. 502, 518 (Bankr. D. Colo. 2008). The analysis and determination of eligibility for bankruptcy relief is the sole and exclusive responsibility of the bankruptcy court. Id. The debtor bears the burden of establishing eligibility. In re General Growth Properties, Inc., 409 B.R. 43, 70 (Bankr. S.D.N.Y. 2009). A debtor's ineligibility to be a debtor constitutes "cause" to dismiss a case. In re Borges, 440 B.R. 551, 562 (Bankr. D.N.M. 2010).

A. Debtor Is a "Governmental Unit" Because it Is an Arm of the Tribe.

Pursuant to § 109 of the Code only a "person" can file for Chapter 11 relief. 11 U.S.C. § 109(d). A person is specifically defined to exclude any governmental unit. 11 U.S.C. § 101(41). In turn, a governmental unit is defined as the "United States; . . . department, agency, or instrumentality of the United States, . . . or other foreign or domestic government." 11 U.S.C. § 101(27). As fully

set forth by the YAN in its Motion to Dismiss [Docket No. 57], an Indian Tribe is a domestic government and therefore qualifies as a governmental unit under § 101, paragraph 27. Krystal Energy Company v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004) ("So the category 'Indian Tribes' is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate [under section 106]"). As such, any arm or instrumentality of the Tribe would likewise qualify as a governmental unit and would not qualify as a "person" under the Code, denying Debtor any entitlement to relief. See 11 U.S.C. §§ 101(27) & 109(d).

Here, since Debtor is considered an arm of the Tribe under Federal Indian Law, Debtor is precluded from seeking relief under the Code. While no bankruptcy court has specifically addressed the issue of whether an entity created and wholly owned by the tribe to run its casino operations qualifies as an arm or instrumentality of the tribe, the Ninth Circuit has held that a tribe's casino operations is an arm of the tribe for purposes of applying the tribe's sovereign immunity to the entity. See Allen v. Gold County Casino, 464 F.3d 1044 (9th Cir. 2006); see also Breakthrough Management Group, Inc. v. Chuckhansi Gold Casino and Resort, et al., 629 F.3d 1173, 1184 (10th Cir. 2010) ("The tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure.").

In Allen, the Ninth Circuit was faced with determining whether or not the tribe's immunity extended to the casino owned and operated by the Tribe. The Ninth Circuit held that when a tribe establishes an entity to conduct certain activities, such as a casino, "the entity is immune if it operates as an arm of the tribe. 464 F.3d at 1046. In this regard, the Ninth Circuit explained:

> The Casino's creation was dependent upon government approval at numerous levels, in order for it to conduct gaming activities permitted only under the auspices of the Tribe. The IGRA required the Tribe to authorize the Casino through a tribal ordinance and an interstate gaming compact. The Tribe and California entered into such a compact "on a government-to-government basis."
>
> These extraordinary steps were necessary because the Casino is not a mere revenue-producing tribal business (although it is certainly that). The IGRA provides for the creation and operation of Indian casinos to promote "tribal economic development, self sufficiency, and strong tribal governments." One of the principal purposes of the IGRA is to insure that the Indian Tribe is the primary beneficiary of the gaming operation. The compact that created the Gold Country Casino provides that the Casino will "enable the Tribe to develop self-sufficiency,

> promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs."
>
> With the Tribe owning and operating the Casino there us no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. Cf. Alden v. Maine, 527 U.S. 706, 750, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (noting that sovereign immunity protects the financial integrity of States, many of which "could have been forced into insolvency but for their immunity from private suits for money damages"). In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, **there can be little doubt that the Casino functions as an arm of the Tribe**.

Id. at 1046-47 (emphasis added). This is precisely the scenario here.

As specified in Tribal Resolution 10-12, filed in support of Debtor's Chapter 11 petition, the Tribe wholly owns Debtor and is paying for the retention of Debtor's counsel. [Docket No. 1] The Chairman of the Tribe, Mr. Virgil Perez, serves as Debtor's Designated Officer. (Id.) The Chairman of the Tribe authorized Debtor's filing for bankruptcy as opposed to obtaining authorization from any directors, officers or managers of Debtor. (Id.) Debtor is charged with operating the Tribe's Casino for the exclusive benefit of the Tribe. Under the IGRA, Debtor (if it is actually authorized to operate the Casino) would be obligated to operate the Casino for benefit of the Tribe and it is only under the Tribe's Compact with the State of California that Debtor is able to operate the Casino. 25 U.S.C. §§ 2702, 2710(b)(2) & 2710 (d)(1).

Indeed, the evidence available in the public record indicates that, at least until very recently, the Tribe operated the Casino pursuant to a fictitious business name, which is the same as the Debtor's name. (See Fictitious Business Name Statement attached as Exhibit 1-3 of the Notice of Self Authenticating Evidence.) On multiple occasions, the Tribe filed Fictitious Business Names Statement ("FBN") with the San Diego County Recorder representing that "Santa Ysabel Resort and Casino" is simply a fictitious business name of the Tribe itself, and not as an independent separate and distinct entity. See Allen, 464 F.3d at 1046 (recognizing a casino as an arm of the tribe since the casino was a dba of the tribe); Pinkertons, Inc. v. Superior Court, 49 Cal. App. 4th 1342, 1348 (1996) ("Use of a fictitious business name does not create a separate legal entity.") Under controlling Ninth Circuit authority, Debtor is undeniably an arm of the Tribe and therefore precluded from seeking

bankruptcy relief as a "governmental unit."

B. Debtor Is Ineligible for Relief Because it Cannot Comply with the Necessary Provisions of Chapter 11.

The limitations on management imposed by the IGRA run directly contrary to the Code's Chapter 11 provisions: namely, those sections that authorize the appointment of a trustee, the ability to propose and seek confirmation of a plan competing with any plan proposed by the Debtor. The IGRA's regulation and oversight of Indian gaming preclude Debtor from qualifying for relief under Chapter 11.

Under the Code, a Trustee "shall" be appointed if it is in the interest of creditors and, once appointed, the Trustee has authority to operate the debtor's business. 11 U.S.C. §§ 1104 & 1108. Yet, any operation of a Tribe's casino operations by someone other than the Tribe requires NIGC approval and may violate the IGRA's sole proprietary interest provisions. 25 U.S.C. §§ 2102(2), 2710(b)(2) & 2710(d)(1). Similarly, the entire plan confirmation process, which currently allows creditors to accept or reject a plan and, in some instances, propose their own, plan runs directly contrary to the provisions of the IGRA that require the Tribe to be the sole beneficiary of the Casino's gambling operations and have sole control over its operations. Id.

In fact, these issues were previously raised by the Tribe in its attempt to have the County's Intergovernmental Agreement deemed void by the NIGC. In its NIGC Motion, filed two weeks before Debtor commenced this bankruptcy case, the Tribe stated that a receiver would violate the IGRA:

> . . . the use of a receiver is highly suspect under IGRA, as demonstrated by existing legal authority. For instance, when *Lake of the Torches* was decided by the district court, the court held that appointment of a receiver was very problematic because it suggests that an entity other than the tribe itself would have the power to make management decisions, which the court found to be a management activity in need of NICG approval. 677 F.Supp.2d 1056, 1060 (W.D. Wis. 2010).

(Final Agency Motion, Exhibit 1, 13:24-14:2.) As a result of these unresolvable conflicts between the Code and the IGRA, Debtor is precluded from obtaining relief under Chapter 11.

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IV.

DEBTOR'S FILING IS IN BAD FAITH

A bankruptcy court has broad discretion to dismiss a Chapter 11 petition for "cause" under 11 U.S.C. § 1112(b). In re Silberkraus, 253 B.R. 890, 903 (Bankr. C.D. Cal. 2000). Section 1112(b) lists several grounds for dismissal of the case. 11 U.S.C. § 1112(b). The grounds for dismissal in § 1112(b) are not exclusive. See In re Consol Auto Recyclers, Inc., 123 B.R. 130, 137 n.41 (Bankr. D. Me. 1991) (citations omitted).

It is well established law in the Ninth Circuit, as well as in various other circuits, that lack of "good faith," or existence of "bad faith" in commencing a bankruptcy case, constitutes "cause" for either dismissing the bankruptcy case pursuant to § 1112(b) or for granting relief from stay pursuant to 11 U.S.C. § 362(d). See In Re Arnold, 806 F.2d 937, 939 (9th Cir. 1986). There are numerous factors to be considered in reviewing a claim of bad faith. The most cited factors to be considered as indicia of a bad faith filing were set forth in In re Little Creek Development Co., 779 F.2d 1068 (5th Cir. 1986). The standards set forth in Little Creek, which have been cited with approval by the Ninth Circuit in Arnold, are an amalgam of factors which together are colloquially referred to as the "new debtor syndrome." See Arnold, 806 F.2d at 939. Indicia of the new debtor syndrome include: (1) transfer of distressed property into a newly created corporation; (2) transfer occurring within a close proximity to the bankruptcy filing; (3) transfer for no consideration; (4) the debtor has no assets other than the recently transferred property; (5) the debtor has no or minimal unsecured debt; (6) the debtor has no employees and no ongoing business; and (7) the debtor has no means, other than the transferred property, to service the debt on the property. California Mortgage Service v. Yukon Enterprises, Inc. (In re Yukon Enterprises, Inc.), 39 B.R. 919, 921 (Bankr. C.D. Cal. 1984); In re Eighty South Lake, Inc., 63 B.R. 501, 509 (Bankr. C.D. Cal. 1986). "Once the creditor establishes that the transfer of the distressed property to the debtor was in close proximity to the filing of the case, a prima facie showing of bad faith has been shown, thus creating a rebuttable presumption of bad faith." Yukon Enterprises, 39 B.R. at 921.

Here, there is a prima facie showing of bad faith since the Tribe apparently only recently transferred its gaming operations to Debtor. As of June 22, 2012, when the Tribe submitted its Final

Motion to the NIGC, the Tribe declared that the "**Iipay Nation operates** a class III gaming facility ... on its reservation" and that "**the Tribe's casino** has not been able to meet its operating expenses or make payments to the County pursuant to the Agreement." (Final Agency Motion , Exhibit 1, 1:23-24, 2:8-9 (emphasis added).) Sometime after June 22, 2012, but before Debtor's bankruptcy filing on July 2, 2012, the Tribe apparently attempted to transfer the Casino to Debtor as an "unincorporated company." The immediate pre-petition transfer of the Casino to Debtor for unknown consideration coupled with the fact that the Casino is Debtor's only mean by which to service its debts is enough to create a prima facie showing of bad faith, thereby shifting the burden to Debtor to demonstrate a good faith business reason for the transfer and filing. (Reply to Oppositions To Emergency First Day Motion for Order Approving Operating Budget, [Docket No. 55] ("Reply"), 3:1.) This is a burden Debtor has not and cannot satisfy.

Debtor's motive in filing this case is clear. Prior to the bankruptcy filing, the Tribe and County arbitrated the Tribe's monetary obligations due under the Intergovernmental Agreement. As part of the arbitration action, the Tribe asserted the Intergovernmental Agreement was an invalid contract for a litany of reasons. The arbitrator specifically addressed each and every ground raised by the Tribe and ultimately held the contract was valid and enforceable. Now, in an effort to circumvent the confirmed arbitration,[4] the Tribe has apparently transferred the Casino, and apparently assigned the County's Intergovernmental Agreement to the Debtor. In fact, in response to the County's objection to Debtor's proposed Operating Budget on the grounds that the ongoing obligations due under the Intergovernmental Agreement were not accounted for, Debtor asserted that it again "disputes the validity of the MOU" and the County "must avail itself of the procedures for filing proofs of administrtive [sic] claims subject to objections and hearing. The Debtor disputes any such administrative priority claim states asserted by the County." (Reply, 4:4-8.) A filing for such

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[4] "In determining the collateral estoppel effect of a state court judgment, federal courts must, as a matter of full faith and credit, apply that state's law of collateral estoppel." In re Bugna, 33 F.3d 1054, 1057 (9th Cir. 1994). A confirmed arbitration award has the same force and effect as a state court judgment. Cal. Civ. Proc. Code § 1287.4; Early Walter v. Nat'l Indem. Co., 3 Cal. App. 3d 630, 634 (1970). Here, since the arbitration award was confirmed, its determination of the validity of the contract acts as res judicata and collateral estoppel on the claims currently being made by Debtor and the Tribe.

illegitimate purposes is indicative of bad faith, thereby warranting this Court's dismissal of Debtor's bankruptcy petition.

V.

CONCLUSION

Based on the foregoing, the County respectfully requests that this Court enter an order dismissing Debtor's Chapter 11 bankruptcy case.

Dated: August 7, 2012

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