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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:)	Case No.: 12-09415-PB11
SANTA YSABEL RESORT AND CASINO,	)	ACTING UNITED STATES TRUSTEE'S
	)	REPLY TO OMNIBUS OPPOSITION TO (I)
	)	COUNTY OF SAN DIEGO'S MOTION TO
	)	DISMISS BANKRUPTCY CASE AND (II)
	)	ACTING UNITED STATES TRUSTEE'S
	)	MOTION TO DISMISS CASE
Debtor.)	
	)	Date: September 4, 2012
	)	Time: 11:00 a.m.
	)	Dept.: Four
	)	Judge: Hon. Peter W. Bowie

The Acting United States Trustee ("United States Trustee"), through counsel, respectfully replies to the Omnibus Opposition filed by the Santa Ysabel Resort and Casino ("Debtor") to (I) County of San Diego's Motion to Dismiss Bankruptcy Case and (II) Acting United States Trustee's Motion to Dismiss Case ("Omnibus Opposition").

I. INTRODUCTION

The Debtor has failed to meet its burden of proof that the Debtor is eligible to be a Debtor in this Chapter 11 bankruptcy proceeding under 11 U.S.C. §109(a). The Debtor has not shown

1 that it is not an inclusive part of the Iipay Nation of Santa Ysabel, which is a domestic
 2 government and thus falls within the definition of a "governmental unit". Governmental units
 3 are specifically excluded from the definition of "person" which is eligible to file for bankruptcy
 4 relief. Thus, the court should dismiss this chapter 11 bankruptcy case.

5 The Omnibus Opposition raises issues in opposition to both the County of San Diego's
 6 Motion to Dismiss ("County Motion") and the United States Trustee's Motion to Dismiss ("UST
 7 Motion"). The United States Trustee will address those issues germane to the UST Motion in
 8 this Reply Brief.

9 II. ARGUMENT

10 A. The Debtor has the Burden of Proof that it is Eligible to File for Bankruptcy 11 Protection under 11 U.S.C. §109.

12 As set forth in the UST Motion, only entities which fall within the definition of
 13 "persons" and "municipalities" are eligible to file for bankruptcy. 11 U.S.C. §109(a).
 14 The threshold issue in any bankruptcy case is whether the party filing for bankruptcy relief is
 15 eligible to be a debtor in the chapter under which the bankruptcy petition was filed. *In re First*
 16 *Assured Warranty Corporation*, 383 B.R. 502, 518 (Bankr. D. Co. 2008).¹

17 The Debtor has the burden of proof to establish its eligibility for relief under the
 18 provisions of 11 U.S.C. §109. *In re County of Orange*, 193 B.R. 594, 599 (Bankr. C.D. Cal.
 19 1995) (the burden of proving eligibility under 109(c) is on the party filing the petition); *Koch v.*
 20 *Hankins Judgment Creditor Trust*, 2006 WL 3040765 *2 (Bankr. D. Ariz. 2006) (Debtor bears
 21 the burden that it qualifies as a business trust under 11 U.S.C. §109); *In re the Karoly Vendal*
 22 *////*

24 ¹ The United States Trustee requests that the court take judicial notice of the court's docket and all pleadings/records
 25 filed in this bankruptcy case pursuant to Federal Rule of Evidence ("Fed. R. Evid.") 201.

1 *Foldesi & Margaret Foldesi Family Land Trust #3*, 2003 WL 25273865 (Bankr. D. Idaho)(case
 2 dismissed because Debtor Trust did not sustain its burden to establish eligibility); *In re Global*
 3 *Ocean Carriers Limited*, 251 B.R. 31, 37(Bankr. D. Del. 2000)(debtor filing a chapter 11 petition
 4 has the burden of establishing eligibility). The eligibility requirements of 11 U.S.C. §109 are not
 5 jurisdictional. *In re Hargrove*, 465 B.R. 507, 509 (E.D. Ark. 2011). Thus, the Debtor has the
 6 burden of proof that it is eligible to file for bankruptcy protection under 11 U.S.C. §109.

7 **B. The Case Law Supports the United States Trustee's Argument that the Debtor is a**
 8 **"Governmental Unit" because it is an Inclusive Part of the Iipay Nation of Santa**
 9 **Ysabel.**

10 The Debtor argues that it is an unincorporated company and thus eligible for protection
 11 under the Bankruptcy Code.² The United States Trustee disagrees with this characterization;
 12 however, even if it were correct, the Debtor is also an inclusive part of the Iipay Nation of Santa
 13 Isabel ("Tribe") , which is a governmental unit ineligible to file bankruptcy under §109 of the
 14 Bankruptcy Code.³

15 In the Omnibus Opposition, the Debtor focuses its attention on the argument in the UST
 16 Motion that the Debtor is an inclusive part of, or arm of, the Tribe. The Debtor addresses the
 17 case law cited in the UST Motion and states that the Ninth Circuit's use of the term "arm of the

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 21 ² The specific issue of whether the Debtor is an "unincorporated company" was briefed in the Debtor's Opposition
 22 to the Yavapai-Apache Nation's ("YAN") Motion to Dismiss Bankruptcy Case for Lack of Eligibility and
 Authority("YAN Opposition") (Docket No. 76) and in the YAN's Response to the YAN Opposition ("YAN
 Response") thereto. (Docket No. 86).

23 ³ The Debtor also spends numerous pages arguing that §101(27)'s definition of "governmental unit" does not
 24 include instrumentalities of a domestic government. [Omnibus Opposition; pp. 6-10; 14]. The UST Motion does not
 25 argue that the Debtor is an "instrumentality" and the United States Trustee does not find this issue to be relevant in
 the court's ruling on the UST Motion.

1 tribe” refers to both unincorporated entities and incorporated entities.⁴ The Debtor states that
2 because an incorporated entity is clearly its own entity, the use of the term “arm of the tribe”
3 cannot imply that the tribe and the “arm of the tribe” are the same entity. The Debtor concludes
4 by stating that, “As used by the Ninth Circuit, ‘arm of the tribe’ only means that a separate entity
5 has a close relationship to the tribe. Thus, even if the Debtor is an arm of the tribe of the Iipay
6 Nation, it is still a separate entity.”[Omnibus Opposition; pp. 12].

7 The Debtor’s analysis fails for the following reason – the Debtor is focusing on the type
8 of entity involved, not its actual relationship to the Tribe. The relationship of the Debtor and the
9 Tribe in this case clearly make the Debtor an inclusive part of the Tribe.

10 Both the *Allen* and the *Cook* cases found that the entities involved were arms of the Tribe
11 based upon similar specific attributes. In the *Cook* case, the tribal corporation, a casino, was
12 deemed to be an arm of the Tribe because it was created pursuant to a tribal ordinance and
13 intergovernmental agreement, the tribal corporation was wholly owned and managed by the
14 Tribe, and the economic benefits produced by the tribal corporation, including the casino, inured
15 to the Tribe’s benefit. *In re Cook*, 548 F. 3d at 725. In the *Allen* case, the court found that the
16 casino, a tribal business entity, was an arm of the tribe where the tribe authorized its existence
17 through a tribal ordinance and interstate gaming contract, and the economic advantages created
18 by the casino inured to the benefit of the tribe. *In re Allen*, 464 F. 3d at 1046-47. As the UST
19 Motion points out, the same attributes are present in the relationship between the Debtor and the
20 Tribe in the present case. The Debtor’s existence is the result of the Tribe’s entry into a Tribal-
21 State Compact with the State of California to conduct gaming activities upon tribal land. The

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24 ⁴ The Debtor cites two cases used in the United States Trustee’s Motion for its comparison: *Cooke v. Avi Casino*
25 *Enterprises, Inc.*, 548 F. 3d 718(9th Cir. 2008) (casino as tribal corporation) and *Allen v. Gold Country Casino*, 464
26 F. 3d 1044(9th Cir. 2006)(casino as a tribal business entity).

1 Debtor is wholly owned by the Tribe, and was formed to provide economic benefit to the Tribe
 2 through gaming revenues. The Debtor's activities are regulated by Tribal ordinance. See UST
 3 Motion; p. 6 and accompanying references.⁵

4 The Debtor's argument that the *Cook* and *Allen* cases only apply to an analysis of
 5 whether a related entity has sovereign immunity, and not to an analysis of whether the Debtor is
 6 an inclusive part, or an arm of, the Tribe for the purposes of filing bankruptcy, is misplaced. The
 7 Debtor concedes that the Tribe is a domestic government, and thus a "governmental unit" which
 8 is ineligible to file bankruptcy. (Omnibus Opposition; p. 4, 14). The *Cook* and *Allen* cases
 9 determine that, by virtue of the relationship between the entities and the Tribe, the sovereign
 10 immunity held uniquely by the Tribe should extend to these entities. Similarly, under the same
 11 analysis, by virtue of the relationship between this Debtor and the Tribe, the Debtor is an
 12 inclusive part of the Tribe, and falls within the ambit of a governmental entity not eligible for
 13 bankruptcy protection.

14 **C. The Facts Support that the Debtor is an Inclusive Part of the Tribe.**

15 The bankruptcy schedules and other documents filed in this bankruptcy case support the
 16 fact that the Debtor is an inclusive part of the Tribe. The Debtor's bankruptcy schedules list
 17 Yavapai-Apache Nation (YAN) claims against the Tribe.⁶ The largest YAN claim of the Tribe
 18 listed in the amount of \$40,514,558.45 is secured by a "Blanket Lien" on "All Debtor's personal
 19

20 ⁵ The Debtor attempts to separate the Tribe from the Debtor by stating that the Debtor has its own middle
 21 management structure whose members are not part of the Tribe, and pays sales taxes to the Iipay Nation. [Omnibus
 22 Opposition; pp. 6, 10]. The Ordinance established by the Tribe provides that "The Tribe shall have the sole
 23 proprietary interest in and responsibility for the conduct of any gaming operation, gaming facilities and gaming
 24 enterprises authorized by this Ordinance". The Ordinance makes a provision for the Tribe to designate primary
 management officials. Further, the Ordinance specifies the purposes for which gaming revenues are to be used. [See
 Vencill Declaration filed in Support of the UST Motion; Ordinance attached as Exhibit A; pp. 1, 4-5]. Oversight,
 regulation and revenue of the Debtor are controlled by the Tribe under the terms of the Ordinance.

25 ⁶ See Vencill Declaration filed in Support of the UST Motion; p. 3; and Schedule D; Docket No. 46.
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1 property".⁷ The Omnibus Opposition states that the Debtor was required to list this claim under
 2 the Bankruptcy Code, because a "claim against the debtor" includes claim against property of the
 3 debtor." (Omnibus Opposition; p. 14, citing 11 U.S.C. §102(2)). The Omnibus Opposition
 4 further points out that the claim against property of the Debtor arose because the Tribe, as part of
 5 its loan agreements with the Yavapai-Apache Nation (YAN), pledged collateral of the casino to
 6 secure the claims. (Omnibus Opposition; pp. 14-18).

7 Although the United States Trustee has not reviewed the actual loan documents
 8 evidencing the YAN claims against the Tribe, the Tribe must have considered the Debtor to be
 9 an inclusive part of the Tribe by pledging the Debtor's assets as collateral for the claims against
 10 the Tribe.⁸ Additionally, the Omnibus Opposition points out that the Tribe also waived
 11 sovereign immunity to allow recovery against the Debtor's assets arising out of any judgment.⁹
 12 (Omnibus Opposition; pp. 15, 16). The Tribe's pledge of the Debtor's collateral and its waiver
 13 of sovereign immunity made the Debtor's assets a source of recovery in the event of a lawsuit
 14 and judgment against the Tribe. Courts have held, "an action against a tribal enterprise is, in
 15 essence, an action against the tribe itself. *In re Vianese*, 195 B.R. 572, 575 (N.D.N.Y. 1995),
 16 citing *Barker v. Menominee Nation Casino*, 897 F. Supp. 389(E.D. Wis. 1995). In this case, a
 17 creditor's action against the Debtor's assets under the loan agreements would constitute an action
 18 against the Tribe itself.

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21 ⁷ *Id.*

22 ⁸ The Appendix Containing Factual Record attached to the YAN's Response provided that the Tribe is a party to the
 23 JP Morgan Chase Loan ("JPM Agreement") and that the casino did not exist as a separate entity when the Tribe
 24 executed the JPM Agreement, nor was the casino a party or third-party beneficiary to the loan documents. YAN
 25 Response; Appendix; Docket No. 86-1; pp. 3,4.

26 ⁹ The Tribe has not stated nor produced any written authorization from the Debtor allowing it to pledge the Debtor's
 27 collateral for its claim, nor waive its sovereign immunity from suit.
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1 The Debtor makes a plea that it did not have sufficient time to prepare its schedules, so
2 that its use of "shorthand terms and summary" cannot reflect the true and full significance of the
3 YAN's claim or amount to admissions that the Debtor is the same as entity as the Iipay Nation.
4 (Omnibus Opposition; p. 20). The Debtor signed its petition and schedules under penalty of
5 perjury. The very integrity of the bankruptcy system relies upon the accuracy of information
6 provided by the Debtor in documents filed before the court. The Debtor's attempt to argue that
7 the very information it put in its bankruptcy schedules signed under penalty of perjury should not
8 be used as admissions is untenable.

9 Other documents presented by the Debtor also support the fact that the Debtor is an
10 inclusive part of the Tribe. As pointed out in the UST Motion, the Debtor's Application to
11 Employ Levene, Neale, Bender, Yoo and Brill, L.L.P., as General Bankruptcy Counsel and
12 Retention Agreement attached thereto evidence that the Debtor is an inclusive part of the Tribe.
13 (UST Motion; p. 7). The Debtor has conceded that the documents certainly support this
14 proposition, as the Debtor it states that it will be filing an amended retainer agreement to clarify
15 that the firm is employed by the Debtor, and not the Tribe.¹⁰

16 The Operating Report filed by the Debtor for the month ending July, 2012, evidences that
17 the Debtor is an inclusive part of the Tribe.¹¹ The bank statements attached to the Operating
18 Reports show that the bank account is in the name of the Santa Ysabel Band of Diegueno Indians
19 (a former name for the Tribe) as well as in the name of the Debtor, the Santa Ysabel Report and
20 Casino.

21 The Debtor states that the court should not consider the "7-Day Package" as evidence in
22 support of the UST Motion. (Omnibus Opposition; pp. 19-21). The Debtor provided this
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24 ¹⁰ See the YAN Opposition; Docket No. 76; p. 33.

25 ¹¹ See Operating Report for the Month ending July 31, 2012; Docket no. 77.

1 information voluntarily as requested by the United States Trustee as part of its Operating and
2 Reporting Requirements in Chapter 11 Cases. If the Debtor did not want to provide this
3 information, the Debtor should have objected to the provision of this information. To now argue
4 that this information should not be used against it in support of the UST Motion is unfounded.
5 The fact that the information was not produced through formal discovery procedures does not
6 mean that the information is not admissible evidence. The information contained in the 7-Day
7 Package constitutes admissions by the Debtor which are proper for consideration by this court.

8 The Debtor also argues that the “d/b/a filings” are insignificant regarding the Debtor’s
9 separate existence from the Tribe. (Omnibus Opposition; p. 22). As the UST Motion points out,
10 the Tribe’s chairman filed with the County of San Diego a Fictitious Business Name Statement
11 declaring the Debtor to be a fictitious business name for the Tribe.¹²

12 Under California law, every person transacting business in this state for profit under a
13 fictitious business name must file a fictitious business name statement within the time prescribed
14 by statute. Cal Bus. & Prof. Code §17910. Courts have held that the object of the fictitious
15 name statute “is simply to ensure that those who do business with persons operating under a
16 fictitious name will know the true identities of the individuals with whom they are dealing or to
17 whom they are giving credit or becoming bound”. *Hydrotech Systems, Ltd. v. Oasis Waterpark*,
18 52 Cal. 3d 988, 1001; 277 Cal. Rptr. 517, 803 P. 2d 370(1991). The law, “be it civil or criminal,
19 recognizes no distinction between an individual and a name under which he or she does
20 business”. *The People v. Eastburn*, 189 Cal. App. 4th 1501, 1506 (2010). Thus, the fictitious
21 business name statement filed in this case is clearly evidences that the Debtor is an inclusive part
22 of the Tribe.

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25 ¹² UST Motion; Docket No. 76; p. 8.

1 The documents referenced above were prepared and filed by the Debtor or the
2 representative of the Debtor. The facts set forth therein constitute admissions that the Debtor is
3 an inclusive part of the Tribe.

4 **D. The Debtor has failed to meet its burden of proof that it is Eligible to file for**
5 **Bankruptcy Relief under 11 U.S.C. §109.**

6 The Debtor has failed to meet its burden of proof that it is eligible to file for
7 bankruptcy relief under 11 U.S.C. §109. The United States Congress enacted the Bankruptcy
8 Code to allow bankruptcy relief for a "person". 11 U.S.C. §109(a). The Debtor must be a
9 "person" to qualify for bankruptcy relief. 11 U.S.C. §109(d). The term "person" does not
10 include "governmental unit". 11 U.S.C. §101(41). The term "governmental unit" includes a
11 "domestic government". 11 U.S.C. §101(27). Thus, an entity found to be a "governmental unit"
12 is not eligible for bankruptcy relief under 11 U.S.C. §109(a).

13 The Debtor has failed to meet its burden of proof that it is not a governmental unit. The
14 facts and law clearly evidence that the Debtor is an inclusive part of the Tribe, which is a
15 governmental unit. Thus, the Debtor has not met its burden of proving that it is eligible for
16 bankruptcy relief,

17 **CONCLUSION**

18 For the above stated reasons, the United States Trustee requests that the Debtor's
19 bankruptcy case be dismissed, as the Debtor is not eligible for bankruptcy relief under 11 U.S.C.
20 §109.

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22 Date: 8/29/12

Respectfully submitted,

Mary J. DuVoisin

Mary Testerman DuVoisin

Trial Attorney for the United States Trustee

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