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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

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

INTRODUCTION

Not every debtor can find relief in bankruptcy court. Congress made the policy decision to exclude "governmental units" from entities eligible for chapter 11. In filing this bankruptcy petition on behalf of the Casino, the Iipay Nation of Santa Ysabel (the "Tribe") seeks an end-run around Congress's policy decision and a way to resolve certain claims against certain of its assets. The Tribe contends that its Casino[1] enjoys a separate legal existence as an "unincorporated company" and is therefore eligible for chapter 11. However, the Casino serves the critical governmental functions of promoting "tribal economic development, self-sufficiency, and strong tribal government[]." 15 U.S.C. § 2702(1). The Tribe never evidenced any intention or took any steps prior to the bankruptcy filing to establish the Casino as a separate legal entity and retains sole ownership thereof. This Court should thus neither strain the limits of the Bankruptcy Code and current case law to subject the Casino to the Court's jurisdiction nor permit the Tribe to submit only Casino-related assets and liabilities to the power of this Court.

I. Because The Tribe Is A "Governmental Unit," The Court Should Not Treat The Operations Of The Tribe As An "Unincorporated Company."

Because the Tribe is a governmental unit ineligible for chapter 11,[2] the Court should not stretch applicable case law defining "unincorporated company" to allow the Tribe or certain assets and liabilities of the Tribe to exploit the powers of chapter 11 while clinging to other rights uniquely available because of the Tribe's sovereign status.[3] Although Congress specially crafted a

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[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the YAN's motion to dismiss the Debtor's bankruptcy case, filed on August 2, 2012 [Docket No. 57] (the "YAN Motion").

[2] The brief filed in opposition to the YAN Motion [Docket No. 76] (the "Opposition") essentially admits that the Tribe cannot be a debtor and requests that the Court dismiss this bankruptcy case if it finds that the Tribe and the Casino are functionally the same entity. See id. at 2:9-2:15, 3:14-3:18.

[3] Although the YAN believes the YAN Motion adequately preserved the argument that the Casino is also a "governmental unit" because it is an "arm" or "instrumentality" of the Tribe, the YAN will not brief the issue here because the YAN understands that the issue will be addressed in the forthcoming response briefs of the County and/or the United States Trustee. For brevity and avoidance of doubt, the YAN maintains all bases for dismissal contained in the YAN Motion not discussed herein and adopts the additional arguments made by the County and the United States Trustee.

chapter of the Bankruptcy Code for a limited subset of governmental units, which gives due respect and deference to such entities' decision-making authority, the Tribe is ineligible for chapter 9 relief because it is not a "municipality." However, the concerns motivating the structure of chapter 9 explain why Congress made "governmental units" generally ineligible to participate in chapter 11 and why the Casino's bankruptcy case should be dismissed – the powers available to both creditors and the court in chapter 11 create an irresolvable tension with the sovereign status and non-bankruptcy rights of the Tribe.

Consistent with Congress's policy of avoiding bankruptcy court interference with governmental affairs, the term "governmental unit" is broadly construed. See T I Fed. Credit Union v. DelBonis, 72 F.3d 921, 930-31 (1st Cir. 1995) ("Legislative history suggests that Congress intended to define 'government[al] unit' in the broadest sense." (citing H. Rep. No. 95-595, 95th Cong. 311 (1977)) (internal quotation omitted)); In re Marcano, 288 B.R. 324, 332 (Bankr. S.D.N.Y. 2003) (same). Courts have thus denied chapter 11 access to commercial entities related to governmental units by concluding that they are also "governmental units."

For example, in United States Trustee v. Hospital Authority of Charlton County (In re Hospital Authority of Charlton County), the bankruptcy court refused to convert a debtor hospital authority's unauthorized chapter 9 case into a voluntary chapter 11 case. See No. 12-50305, 2012 Bankr. LEXIS 3042, *23-24 (Bankr. S.D. Ga. July 3, 2012). In so doing, the court acknowledged that "not every entity is entitled to relief from its debts through bankruptcy" and that "'Congress did not intend that the Bankruptcy Code could solve all problems, least of all the financial problems of governmental units.'" Id. (quoting In re N. Mariana Islands Ret. Fund, No. 12-00003, slip op. at 7 (Bankr. D.N.M.I. June 13, 2012)). In Northern Mariana Islands Retirement Fund, the bankruptcy court dismissed the government employee retirement fund's voluntary chapter 11 petition after analyzing the interrelatedness of the retirement fund with certain governmental functions. Both decisions resulted in the total denial of bankruptcy relief to commercial debtors because their governmental function justified placing them in the category of "governmental unit."

The policies motivating a broad interpretation of "governmental unit" support dismissal here. The Tribe has admitted that it developed the Casino "to promote and support tribal economic

development, tribal self-sufficiency and strong self-government." San Diego MOU at 2. The Casino thus clearly serves a governmental function. Indeed, the Tribe fought the YAN's attempt to exercise remedies against casino assets on the basis of the Tribe's sovereign immunity, losing such argument because the Tribe waived its own immunity as against the YAN. See Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel, 201 Cal. App. 4th 190, 196 (Ct. App. 2011).

If the Casino is permitted to be a chapter 11 debtor, the Court will be faced with inevitable clashes among the powers and rights the Tribe will continue to assert, the remedies and protections afforded to creditors by the Bankruptcy Code, and the limitations potentially imposed on the parties and the Court by federal Indian gaming regulatory law. For example, the Tribe will continue to assert its sovereign immunity as protection for itself and the Casino, notwithstanding this voluntary petition. It may also seek to pass legislation (or its Chairman may make unilateral decisions) impacting the governance or operation of the Casino. Finally, the Tribe may seek to limit the options and protections of creditors in chapter 11 (such as the appointment of a trustee or the application of the absolute priority rule) on the basis of either its unique sovereign status or the requirements of federal Indian gaming law.[4] For these reasons, any policy favoring broad access to chapter 11 is outweighed by the competing policy of broadly interpreting "governmental unit" to minimize either the potential impact the chapter 11 process would have on a sovereign nation or a chapter 11 process stripped of important creditor protections.

The cases cited by the Tribe finding the existence of an "unincorporated company" do not support a liberal application of that concept here. In each of those cases, creditors sought the jurisdiction and protections available in bankruptcy court. See Chicago Title & Trust Co. v. Ryan (In re Midwest Athletic Club), 161 F.2d 1005, 1007 (7th Cir. 1947) (involuntary petition); Nikolas v. Witter (In re Peer Manor Bldg. Corp.), 143 F.2d 769, 771 (7th Cir. 1944) (original petition filed by indenture trustee who took possession of debtor upon default; subsequent involuntary petition); In re Tidewater Coal Exch., 280 F. 638, 639 (2d Cir. 1922) (involuntary petition); Vadakin v. Cass

[4] If this case is not dismissed, the pervasive risk of conflict between the Bankruptcy Code and federal Indian gaming law and regulations may ultimately require the withdrawal of this case to the district court under 28 U.S.C. § 157(d).

(In re Order of Sparta), 242 F. 235, 236 (3d Cir. 1917) (same). To the extent these cases reflect a broad interpretation of "unincorporated company," that policy should be limited to "business enterprises . . . whose creditors had more faith in a reorganization than in" a non-bankruptcy liquidation. In re Peer Manor Bldg. Corp., 143 F.2d at 772. Here, the Tribe's primary creditors, as well as the United States Trustee, oppose the Tribe's attempt to shelter and resolve a subset of its assets and liabilities in chapter 11. See County of San Diego's Mot. to Dismiss Debtor's Bankruptcy Case [Docket No. 66]; Acting United States Trustee's Mot. to Dismiss Case [Docket No. 65]. Further, because "Congress did not intend that the Bankruptcy Code could solve all problems, least of all the financial problems of governmental units," In re N. Mariana Islands Ret. Fund, slip op. at 7, this Court should recognize the interrelatedness of the Casino and Tribe and should accept the Tribe's invitation to dismiss this case.

II. The Casino Has Not Shown It Satisfies Any Test For "Unincorporated Company."

As the petitioner, the Debtor bears the burden of proving eligibility. See Koch v. Hankins Judgment Creditor Trust, No. 06-02112, 2006 Bankr. LEXIS 2923, *6-7, *11 (Bankr. D. Ariz. Oct. 24, 2006) (dismissing case upon debtor's failure to establish eligibility under 11 U.S.C. § 101(9)); In re Karoly Vendal Foldesi & Margaret Foldesi Family Land Trust #3, No. 02-03410, 2003 Bankr. LEXIS 2247, at *21-22 (Bankr. D. Idaho Feb. 25, 2003) (dismissing debtor land trust's case because it "ha[d] not sustained its burden to establish eligibility" under § 101(9)). Here, the Debtor cannot satisfy its burden of proving eligibility because the factual record, which is set forth in the appendix attached hereto,[5] demonstrates that the Debtor has no separate existence from the Tribe and is not an "unincorporated company" under 11 U.S.C. § 101(9)(a)(iv).

The Opposition tries to recast the case law cited in the YAN Brief as containing a burdensome and inapposite test for "unincorporated company." See Opp'n 8:11-8:22. The cases cited by the Opposition do not adopt a substantively different test from those cited by the YAN.[6]

[5] The YAN submits that, even if all facts are construed in the Casino's favor for purposes of the YAN Motion, this Court has sufficient evidence before it to dismiss this case based on the legal significance of such facts and the undisputed authenticity of the documents submitted.

[6] Indeed, two of the three cases the Debtor relies on for its purported standard cite favorably to the YAN's precedent as informing their analysis of the term "unincorporated company." See In re Order of Sparta, 242 F. at 239 (citing In re Assoc. Trust, 222 F. 1012 (D. Mass. 1914)); In re

In any event, the Casino fails to satisfy two hallmarks of "unincorporated companies" common to the cases cited by both parties: (i) concrete and objective steps taken to establish an independent entity and (ii) multiple persons engaged jointly in a commercial endeavor. The totality of facts and circumstances here also demonstrate that the Casino is not an "unincorporated company."

A. The Tribe took no steps to establish the Casino as a separate entity.

The Casino first fails to fall within the rulings it cites because the Tribe never took any steps to establish the Casino as a separate entity. Nor does the Opposition contend otherwise. Instead, the Opposition essentially argues that, although the Casino "could not exist as an unincorporated company in 2005 when it was not open for business," its mere act of "[c]onducting business" – without any documentation, contractually-required notice to third parties, or regulatory approval – somehow transmuted the Casino into an "unincorporated company." See Opp'n 20:18-21:6. This argument has no factual or legal basis and is contradicted by the evidence in the record.

The Opposition bases its contrived argument on the fact that, in a handful of pre-Bankruptcy Code cases, an entity determined to be an "unincorporated company" happened to be conducting business. See Opp'n 20:11-21:6. While that might be true, the Debtor's interpretation ignores that in all of the cited cases, concrete steps had been taken to formally establish the debtor's independent legal existence to engage in the business activity long before the bankruptcy. See In re Order of Sparta, 242 F. at 236 (debtor fraternal beneficial association was governed by a legislative and executive body and had been "organized" more than 35 years before bankruptcy); In re Peer Manor Bldg. Corp., 143 F.2d at 771 (debtor originally a "duly organized Illinois corporation"); In re Midwest Athletic Club, 161 F.2d at 1007 (debtor originally "organized under the laws of Illinois as a nonprofit corporation"); In re Tidewater Coal Exch., 280 F. at 640-41 (debtor exchange was "organized at the instance of the Council of National Defense" whose members subscribed to specific agreements). These cases make clear that some affirmative action to separately establish the existence of an independent entity, such as the execution of a written membership agreement or establishment of a charter of conduct, must be taken before a court will

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Tidewater Coal Exch., 280 F. at 642 (same).

find that the parties acting jointly in such capacity constitute an "unincorporated company."

In contrast, the evidence to which the Debtor points for its separate existence is consistent with the conclusion that the Tribe operates the Casino as a d/b/a, rather than that some type of "unincorporated company" inexplicably sprang into existence and began operating the Casino and the casino assets. First, the Tribe obtained the name "Santa Ysabel Resort and Casino" years before the Casino allegedly sprung into a separate legal existence as the Santa Ysabel Resort and Casino. See Decl. of Ira Bibbero in Supp. of Mot. to Dismiss for Lack of Eligibility and Authority [Docket No. 57] ("Bibbero MTD Decl.") Exh. 14 (Tribe's d/b/a filings). Use of a d/b/a does not create a separate entity. See Pinkerton's, Inc. v. Sup. Ct., 49 Cal. App. 4th 1342 (Ct. App. 1996) ("Use of a fictitious business name does not create a separate legal entity. . . . [T]he designation [DBA] means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name." (internal quotation omitted)); YAN Mot. 15:6-15:18. Second, over half of the agreements appended to the Opposition name the "Santa Ysabel Casino" as a party, rather than the Santa Ysabel Resort and Casino. Invoices and vendor contracts naming an entity other than the Tribe do not demonstrate that the Casino exists as a separate legal entity, since such contracts are not even consistent as to the purported name of their contractual counterparty.

Nor do the Tribe's other legal documents provide any support for the Opposition's position regarding the Casino's legal status. Even if the Tribe's loan documents permitted it to create a separate entity to run the Casino, the Tribe has not done so. Indeed, it has not taken any of the steps that would be expected had it intended to form a separate entity. The Casino has not alleged, and has submitted no evidence indicating, that the Tribe could have or has assigned to it (i) the Compact authorizing the Casino's operation; (ii) the MOU necessary for the Casino's operation; or (iii) the Loan Documents under which the YAN, JPM and National City Bank financed the construction of the Casino, which give rise to the purported "joint" liability of the Casino and the Tribe. Nor has the Casino alleged that the Tribe sought the necessary approval from the NIGC for a different Casino owner or operator. The Opposition's claim that violations of applicable law are irrelevant to debtor eligibility is beside the point. The fact that a violation of law and breach of contract is necessary to explain the Casino's theory of eligibility itself indicates that the Tribe

never intended that the casino assets be owned and operated by a separate entity – until the Tribe realized that an "unincorporated company" was its only argument for bankruptcy eligibility.

Instead, the Tribe expressly represented in connection with the loan obligations it now seeks to resolve in bankruptcy that it "operates the Casino as a 'tribal enterprise,' which has no separate legal existence from [the Tribe]." See YAN Mot. 9:14-9:18; see also Bibbero MTD Decl. Exh. 15 ("Since an unincorporated commercial enterprise of the tribe is acting as an extension of the tribe it is not set up as a separate legal entity from the tribe itself."). The Tribe similarly represented to the NIGC and the County that it, not a separate entity, owned and operated the Casino. See YAN Mot. 11:19-13:3. Although the Debtor repeatedly cites to In re Las Vegas Monorail Co., 429 B.R. 770, 790-91 (Bankr. D. Nev. 2010) for the proposition that "[p]repetition statements made by a debtor in a non-bankruptcy context have no bearing on acknowledgement of eligibility or ineligibility for chapter 11," see, e.g., Opp'n 18:7-18:8, the Debtor misconstrues that court's holding. The Las Vegas Monorail court rejected the argument that the debtor's isolated statement that it was an "instrumentality" for tax purposes per se rendered it an "instrumentality" under the Bankruptcy Code. See 429 B.R. at 789-91. The court did not dismiss the debtor's statement as irrelevant and carefully examined whether the level of control required to render an entity an 'instrumentality" for tax purposes was sufficient to warrant similar classification under the Bankruptcy Code. See id. at 791-95. Here, overwhelming evidence indicates the Tribe's intention that the Casino be operated by it directly, and the Tribe has not cited to one affirmative step it took to change that situation before it began preparing for bankruptcy. Notwithstanding Debtor's urging this Court to ignore "paper trails, pre-bankruptcy and non-bankruptcy statements, preconceived notions about an entity, or even activities that would be deemed to violate the law," see Opp'n 2:26-2:27, the Tribe's representations to its creditors and regulators are probative of its intent that the Casino lack separate legal existence.

B. The Casino is not "a group of individuals doing 'business' in the same sense as business when carried on by a corporation."

An "unincorporated company" must also comprise multiple persons acting jointly. See, e.g., Opp'n 12:1-12:7. The Opposition argues that the Casino satisfies this requirement because it

"is a business of 120 employees comprised of management, mid-level management, its own accounting department, and service employees." Id. at 14:4-14:6. Yet the Tribe acknowledges that it is the sole owner of the Casino.[7] See id. at 3:15. In mouthing how it satisfies the requirement of multiple persons, the Casino overlooks the specific type of joint activity it would need to demonstrate in order to be an "unincorporated company."

To qualify as an "unincorporated company," multiple persons must jointly undertake some common commercial goal, either through joint ownership or some other structure providing members with "common rights inter se." See, e.g., In re Tidewater Coal Exch., 280 F. at 641-42 (clearing house had members who subscribed to agreements governing handling of coal through debtor); In re Order of Sparta, 242 F. at 236-37 (fraternal organization had members who made contributions in exchange for certificates entitling members to certain payments); In re Peer Manor Bldg. Corp., 143 F.2d at 771-72 (corporation in dissolution continued to have stockholders); In re Midwest Athletic Club, 161 F.2d at 1007 (dissolved non-profit corporation continued to have members). The mere fact that multiple people work at the Casino in a hierarchical structure does not give those people "common rights inter se," nor convert them into an "unincorporated company." See In re Midwest Athletic Club, 161 F.2d at 1008 (noting that "[m]ere community of interest is not sufficient" to render a group of individuals an "unincorporated company"); Pope & Cottle Co. v. Fairbanks Realty Trust, 124 F.2d 132, 135 (1st Cir. 1941) (holding that trust was not an "unincorporated company" because "the beneficiaries have not associated themselves together for the conduct of a business with powers similar to those of stockholders in corporations"). Otherwise, under the Casino's reasoning, the Tribe itself would not and could not own the "unincorporated company" managing the Casino; rather, it (and all of the assets it allegedly owns) would be held by the persons acting jointly to conduct the Casino's business – its employees.[8]

[7] Indeed, "IGRA specifies that a tribe (not its members) must have the sole proprietary interest" in its casino operations, and "stock ownership in a tribal gaming operation by individual tribal members would . . . be inconsistent with the IGRA." Purpose and Scope; Service; Approval of Class II and Class III Gaming Ordinances; Background Investigations and Gaming Licenses Under the Indian Gaming Regulatory Act, 58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

[8] This, of course, would violate federal law, tribal law and the Tribe's compact with California. See 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 58 FR 5802-01; Bibbero MTD Decl. Exh. 6 at § 6.2 (State Compact), id. Exh. 7 at § IV (Gaming Ordinance).

Ultimately, the Opposition's contention of how the term "unincorporated company" should be applied would yield troubling and extreme results. Under the Opposition's analysis, any entity "doing business" through multiple employees using certain assets, even a sole proprietorship, would by legal fiat miraculously become a brand new legal entity, without any affirmative action or notice to creditors, doing violence to creditor expectations and wreaking havoc on the secured financing market. The Opposition cites no law for its radical proposition, and such a theory contradicts established legal principles. Cf. In re Federal-Mogul Global, Inc., 411 B.R. 148, 164 (Bankr. D. Del. 2008) (explaining that an unincorporated division, which operated an independent business line, was not a separate legal entity for purposes of independent or successor liability).

C. The Totality Of The Facts And Circumstances Illustrate That The Debtor Is Not An "Unincorporated Company."

This Court and others have also found it appropriate to consider the totality of the facts and circumstances in determining whether a given debtor falls within the various sub-categories of "corporation" under 11 U.S.C. § 101(9)(a). See, e.g., In re Sec. Assets Trust, No. 07-04501, 2008 Bankr. LEXIS 4427, at *2-8 (Bankr. S.D. Cal. May 12, 2008) (examining general facts and circumstances in concluding that entity was not entitled to chapter 11 relief as "business trust" under 11 U.S.C. § 101(9)(a)(v)); In re Sung Roo Rim Irrevocable Intervivos Trust, 177 B.R. 673, 676-79 (Bankr. C.D. Cal. 1995) (looking to "the nature and function, as well as the form, of the entity at issue" in concluding that entity was not "business trust" under 11 U.S.C. § 101(9)(a)(v)); In re T.W. Koeger Trucking Co., 105 B.R. 512, 515 (Bankr. E.D. Mo. 1989) ("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." (quoting Pope & Cottle Co., 124 F.2d at 134)). In applying this test, "the Court must look beyond the label selected by the debtor to determine whether to extend the protection of the Bankruptcy Code." Sung Roo Rim, 177 B.R. at 677.

Two cases considering the totality of facts and circumstances illustrate why the Tribe's filing of a bankruptcy petition in respect of the Casino cannot be maintained. First, in T.W. Koeger, an individual filed a chapter 11 petition on behalf of his unincorporated sole proprietorship and scheduled only the proprietorship's assets and liabilities. 105 B.R. at 513.

When the United States Trustee moved to dismiss the case, the individual argued that the sole proprietorship was a proper debtor because it was an "unincorporated company." Id. The court dismissed the case because the term "unincorporated company" "denotes a group of individuals." Id. The court justified that interpretation and its ramifications because "[a]llowing the sole proprietor to file only in his company's name may present him with an opportunity to shield unjustifiably his personal assets from creditors by hiding behind the 'corporate veil.'" Id. Second, in Sung Roo Rim, the court dismissed the voluntary bankruptcy case of a self-identified "business trust" that failed to satisfy § 101(9) because "[i]t would contravene both the letter and the spirit of the Bankruptcy Code if individuals could file a bankruptcy case on behalf of an alter-ego [entity], thereby bringing in a 'partial entity' to resolve liability problems without also subjecting all the assets relevant to the issue to the reorganization process and the supervision of the bankruptcy court." 177 B.R. at 679 (internal quotation omitted).

Like the sole proprietorship at issue in T.W. Koeger and the trust at issue in Sung Roo Rim, the Tribe holds the sole proprietary interest in the Casino. Permitting the Tribe to obtain partial bankruptcy protection through the artificial construct of the Debtor would enable it to selectively shield assets from the bankruptcy process (as it has sought with respect to the RSTF Funds and its non-Casino bank accounts). This case would thus present the Tribe "with an opportunity to shield unjustifiably [its] . . . assets from creditors by hiding behind the 'corporate veil.'" T.W. Koeger, 105 B.R. at 113. For the reasons set forth above and in the YAN Motion, the YAN requests that the Court enter an order dismissing this case and granting all other necessary and appropriate relief.

Dated: August 27, 2012

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

In re: SANTA YSABEL RESORT AND CASINO, Debtor.	Case No. 12-09415-PB11 **APPENDIX CONTAINING FACTUAL RECORD IN SUPPORT OF RESPONSE OF THE YAVAPAI-APACHE NATION TO OPPOSITION TO MOTION TO DISMISS BANKRUPTCY CASE FOR LACK OF ELIGIBILITY 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

Factual Record

The following is a summary of the factual record relating to the YAN's motion to dismiss the Debtor's bankruptcy case, filed on August 2, 2012 [Docket No. 57] (the "YAN Motion"). All facts not marked with an asterisk are undisputed. With respect to the facts marked with an asterisk, the YAN does not concede these facts as undisputed and submits that they should be rejected as undocumented, self-serving statements by the Tribe. However, for the purposes of the pending hearing, the YAN has included these disputed facts in the above summary because the YAN believes that the court should grant the YAN Motion, even if the disputed facts are accepted as true. The YAN reserves the right to contest these disputed facts in the event the YAN Motion is not granted.

I. Tribe's Status as "Governmental Unit"

Facts Relied on by YAN	Facts Relied on by Debtor
• The Constitution of the Iipay Nation of Santa Ysabel identifies the Tribe[1] as "possess[ing] inherent sovereign powers of government" (YAN Mot. 6:17-6:19). • The Tribe states in the San Diego MOU that it is a "governmental entity" (YAN Mot. 6:19-6:23). • The Tribe contested the YAN's ability to sue it in tribal and state court in respect of Casino-related obligations on the basis that the Tribe is entitled to sovereign immunity (YAN Mot. 6:23-7:1). • The Tribe stated in the San Diego MOU that its intent in developing the Casino was "to promote and support tribal economic development, tribal self sufficiency and strong self government" (YAN Mot. 7:2-7:4).	

[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the YAN Motion or the YAN reply to the Debtor's Opposition filed concurrently herewith (the "YAN Reply"), as applicable.

II. Requirements for "Unincorporated Company" Status

A. Multiple Persons Acting Jointly with Ownership or Common Rights "Inter Se"

Facts Relied on by YAN	Facts Relied on by Debtor
• The Tribe is the sole owner of the Casino. (YAN Mot. 8:7-8:9; Opp'n 3:14-3:16). • The Casino's management and employees are subordinate to the Tribe, and operate under a controlled, hierarchical structure. (Opp'n 15:19, 27:15-27:17). • The Tribe filed Fictitious Business Name Statements with the San Diego County Recorder registering "Santa Ysabel Resort and Casino" and "Santa Ysabel Gaming Enterprise" as fictitious business names of the Tribe. (YAN Mot. 15:6-15:18, Opp'n 31:22-31:26).	• The Casino has multiple employees, management, mid-level management, an accounting department, and service employees. (Opp'n 14:4-14:7).

B. Affirmative Steps/Intent to Establish Separate Existence

Facts Relied on by Both Parties	
• The Tribe is a party to the Loan Documents, including the JPM Agreement. (YAN Mot. 9:5-9:20; Opp'n 20:18-20:22, 21:7-24:26). • The Casino did not exist as a separate entity when the Tribe executed the JPM Agreement. (Opp'n 21:2-21:5). • The Tribe commissioned an audit of the Casino as an enterprise fund of the Tribe. (YAN Mot. 14:18-14:20; Opp'n 30:13-30:27).	
Facts Relied on by YAN	**Facts Relied on by Debtor**
• The JPM Agreement represents that the Casino is a tribal enterprise with no separate legal existence and requires any separate entity formed for the purpose of owning and operating the Casino to execute a joinder to the JPM Agreement as an additional Borrower. (YAN Mot. 9:10-9:23; Opp'n 24:23-25:20). • The Casino did not execute any joinder to the JPM Agreement, nor did the Tribe provide any formal notice of the Casino's separate existence. (YAN Mot. 9:20-9:23).	• The JPM Agreement separately defines "Casino" and contains various provisions acknowledging the possible existence of affiliates or other separate entities from the Tribe. (Opp'n 21:7-21:23). • The JPM Agreement refers in various instances to separate assets and liabilities of the Casino. (Opp'n 21:24-22:6).

Facts Relied on by YAN	Facts Relied on by Debtor
• The JPM Agreement contains various provisions representing that the Tribe is the sole owner of the Casino and its assets, and both the JPM Agreement and other Loan Documents restrict the Tribe's ability to transfer Casino assets. (YAN Mot. 9:24-10:26; Opp'n 24:3-24:22).	• The closing of the JPM Agreement was conditioned upon searches reflecting no UCC filings against the Casino or its assets and searches reflecting no bankruptcies, tax liens, and judgments relating to the Casino. (Opp'n 22:10-22:22).
• The Tribe is also a party to the State Compact and the San Diego MOU. (YAN Mot. 1:5-1:10, 6:19-6:23, 12:16-12:23; Opp'n 26:12-26:17).	• The Casino has multiple employees, management, mid-level management, an accounting department, and service employees. (Opp'n 14:4-14:7).
• The Compact provides that the gaming operations authorized thereunder shall be solely by the Tribe and that the Tribe receives revenues from the Casino. (YAN Mot. 12:16-12:23; Opp'n 26:12-26:17).	• In addition to the Tribe's tax ID number there is a different tax ID number associated with the Casino under which employee-related taxes are paid. (Opp'n 15:6-15:8, 19:2-19:4).
• The San Diego MOU provides that Casino revenues are assets of the Tribe. (YAN Mot. 12:23-12:28; Opp'n 26:12-26:17).	• The NIGC has not appeared in the Debtor's bankruptcy case or alleged that the Tribe is in violation of IGRA. (Opp'n 29:24-30:1).*
• The Casino is not a party or a third-party beneficiary to the Loan Documents, the Compact, or the San Diego MOU. (YAN Mot. 1:15-1:16, 13:1-13:3; Opp'n 26:12-26:17).	• "Santa Ysabel Resort and Casino," "Santa Ysabel Resort & Casino," or "Santa Ysabel Casino" is a party to various contracts with vendors and insurers, and is listed as a named insured. (Opp'n 15:25-15:26, Exh. D).*
• The Tribe did not execute any separate management contract or other agreement with the Casino effectuating ownership and/or operation of the Casino separate from the Tribe. (YAN Mot. 9:20-9:23).	• The Debtor's bankruptcy petition attached a resolution stating that the Casino was an unincorporated company (YAN Mot. 13 n.8; Opp'n 2:17-2:18).
• The Tribe never asserted that the Casino was an unincorporated company in prepetition litigation with the YAN, the County, or any other parties. (YAN Mot. 2:21-2:26; Opp'n 18:5-18:7).	• The Casino is a for-profit business. (Opp'n 15:8-15:9).
• The Tribe's legislation authorizing the Casino and its financing provide that the Tribe owns and operates, and has a sole proprietary interest in, the Casino. (YAN Mot. 13:5-13:17; Opp'n 28:15-28:19, 29:12-29:16).	• The Casino pays sales taxes to the Tribe. (Opp'n 15:6-15:7).*
	• David Chelette, General Manager of the Casino, executed a document acknowledging a loan from the Tribe to the Casino on October 19, 2011. (Opp'n 19:11-19:13).*

Facts Relied on by YAN	Facts Relied on by Debtor
• The Tribe's General Council Resolutions provide that the Casino is an "enterprise of the Tribe." (YAN Mot. 13:18-14:11; Opp'n 28:19-28:24). • The Tribe's chairman referred to "our Casino" and to matter such as the net operating loss "we recorded" in an August 28, 2009 letter to the YAN. (YAN Mot. 14:20-14:24). • The Tribe filed Fictitious Business Name Statements with the San Diego County Recorder both before and after the Casino opened for business. (YAN Mot. 15:6-15:18, Opp'n 31:22-31:26). • The UCC searches run LNBYB returned several financing statements filed against the Tribe, but only one filed against the Casino. (YAN Mot. 16:4-16:9; Opp'n 33:8-33:14). • LNBYB signed an engagement letter stating that LNBYB would represent the Tribe, an alleged creditor of the Debtor, yet sought retention as Debtor's counsel. (YAN Mot. 16:2-16:4; Opp'n 32:26-33:5). • The Tribe admitted in a 2009 settlement agreement with the NIGC that the Tribe was the economic entity liable to pay quarterly fees and issue quarterly statements to the NIGC, which liability derives from operating the Casino. (YAN Mot. 11:19-12:12). • The Office of the Assistant Secretary of Indian Affairs has published a Tribal Business Structure Handbook stating that an unincorporated tribal enterprise is not a separate entity from the tribe itself. (YAN Mot. 14:25-15:2; Opp'n 31:17-31:21). • The Tribe has not alleged that the Casino became a separate entity on any specific date or pursuant to any specific agreement. (YAN Mot. 7:11-7:12, 8:20-8:23).	• The Casino has scheduled approximately $1.5 million in personal property. (Opp'n 14:26-14:27).* • The Casino has scheduled various debts, and has only listed the Tribe as a co-debtor for certain of those debts. (Opp'n 15:1-15:5, 15:21-15:23, Exh. A).*

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

In re: SANTA YSABEL RESORT AND CASINO, Debtor.	Case No. 12-09415-PB11 **APPENDIX OF UNPUBLISHED DECISIONS IN SUPPORT OF RESPONSE OF THE YAVAPAI-APACHE NATION TO OPPOSITION TO MOTION TO DISMISS BANKRUPTCY CASE FOR LACK OF ELIGIBILITY 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

The Yavapai-Apache Nation hereby submits the following unpublished decisions in support of its concurrently-filed Response of the Yavapai-Apache Nation to Opposition to Motion to Dismiss Bankruptcy Case for Lack of Eligibility and Authority:

1. In re Karoly Vendal Foldesi & Margaret Foldesi Family Land Trust #3, No. 02-03410, 2003 Bankr. LEXIS 2247 (Bankr. D. Idaho Feb. 25, 2003), a true and correct copy of which is attached hereto as Exhibit A.

2. Koch v. Hankins Judgment Creditor Trust, No. 06-02112, 2006 Bankr. LEXIS 2923 (Bankr. D. Ariz. Oct. 24, 2006), a true and correct copy of which is attached as Exhibit B.

3. In re Northern Mariana Retirement Fund, Case No. 12-00003, slip op. (Bankr. D.N.M.I. June 13, 2012) [Docket No. 153], a true and correct copy of which is attached hereto as Exhibit C.

4. In re Secured Assets Trust, No. 07-04501, 2008 Bankr. LEXIS 4427 (Bankr. S.D. Cal. May 12, 2008), a true and correct copy of which is attached as Exhibit D.

5. United States Trustee v. Hospital Authority of Charlton County (In re Hospital Authority of Charlton County), No. 12-50305, 2012 Bankr. LEXIS 3042 (Bankr. S.D. Ga. July 3, 2012), a true and correct copy of which is attached as Exhibit E.

Dated: August 27, 2012

Respectfully submitted,

SIDLEY AUSTIN LLP

By: /s/ Richard W. Havel
Richard W. Havel
Attorneys for Yavapai-Apache Nation

List of Exhibits to Appendix of Unpublished Decisions

1. **Exhibit A** – In re Karoly Vendal Foldesi & Margaret Foldesi Family Land Trust #3, No. 02-03410, 2003 Bankr. LEXIS 2247 (Bankr. D. Idaho Feb. 25, 2003) (page 4)

2. **Exhibit B** – Koch v. Hankins Judgment Creditor Trust, No. 06-02112, 2006 Bankr. LEXIS 2923 (Bankr. D. Ariz. Oct. 24, 2006) (page 13)

3. **Exhibit C** – In re Northern Mariana Retirement Fund, Case No. 12-00003, slip op. (Bankr. D.N.M.I. June 13, 2012) [Docket No. 153] (page 17)

4. **Exhibit D** – In re Secured Assets Trust, No. 07-04501, 2008 Bankr. LEXIS 4427 (Bankr. S.D. Cal. May 12, 2008) (page 26)

5. **Exhibit E –** United States Trustee v. Hospital Authority of Charlton County (In re Hospital Authority of Charlton County), No. 12-50305, 2012 Bankr. LEXIS 3042 (Bankr. S.D. Ga. July 3, 2012) (page 30)

EXHIBIT A

FOCUS - 5 of 9 DOCUMENTS

IN RE THE KAROLY VENDAL FOLDESI AND MARGARET FOLDESI FAMILY LAND TRUST # 3, Debtor.

Case No. 02-03410

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF IDAHO

2003 Bankr. LEXIS 2247

February 25, 2003, Decided
February 25, 2003, Filed

COUNSEL: [*1] The Karoly Vendal Foldesi and Margaret Foldesi Family Land Trust # 3, Debtor, Pro se, Mountain Home, ID.

For The Karoly Vendal Foldesi and Margaret Foldesi Family Land Trust # 3, Debtor: John B Todd, Boise, ID.

Richard E Crawforth, Boise, ID, Trustee.

JUDGES: TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: TERRY L. MYERS

OPINION

MEMORANDUM OF DECISION

I. INTRODUCTION

A voluntary chapter 7 petition for relief was filed on October 15, 2002 by The Karoly Vendal Foldesi and Margaret Foldesi Family Land Trust # 3 (hereafter the "Debtor Trust"). The Office of the United States Trustee ("UST") moved for dismissal of the case on November 5, 2002 under *§ 707(a)* for "cause" contending that the Debtor Trust was not eligible for such relief under *§ 109(d)*. *See* Doc. No. 5. The Debtor Trust filed an opposition to the UST's motion together with an "alternative" motion to convert the case to a chapter 11 reorganization. See Doc. No. 11 (November 23, 2002). In the interim, secured creditor Washington Mutual Finance, successor in interest to First Community Industrial Bank ("Creditor"), filed a motion for relief from the *§ 362(a)* automatic stay. *See* Doc. No. 9 (November 20, 2002).

[*2] Both the UST's dismissal motion and the Debtor Trust's request to convert came on for hearing pursuant to notice on December 16, 2002. [1] The chapter 7 trustee and the UST appeared at the time set for hearing, as did counsel for Creditor. Counsel for the Debtor Trust, John B. Todd ("Counsel"), did not appear, despite having affirmatively scheduled the hearing for that date and time. *See* n. 1, *supra*.

> 1 The UST initially set the hearing on its motion for December 2. Counsel for the Debtor Trust moved to vacate that hearing due to a scheduling conflict, *see* Doc. No. 8 (Motion to Vacate Hearing), even though he later set his client's conversion request for hearing on the same date. *See* Doc. No. 14 (Notice of Hearing). The UST agreed to reschedule the dismissal motion for December 16. *See* Doc. No. 16. Counsel for the Debtor Trust then issued an amended notice of hearing setting the conversion request for December 16 as well. *See* Doc. No. 18.

For the reasons stated on the record at that hearing, [*3] [2] the Court held that the UST's motion would be granted and the case would be dismissed with prejudice to refiling for a period of 180 days. [3]

> 2 Doc. No. 28 herein is the transcript of the December 16, 2002 hearing. That transcript was filed of record on January 13, 2003. *See also* Doc. No. 21 (minute entry, 12/16/02 hearing).

3 The Court noted that relief from stay could not be granted to Creditor at the time of the December 16 hearing because, as of that date, the necessary time had not lapsed under *§ 362(c)* for Creditor to receive automatic relief. *See* Doc. No. 28, at 9-11.

On January 2, the Debtor Trust filed a "Motion to Reinstate; Motion to Convert to Chapter 11" (Doc. No. 24), and Counsel filed an Affidavit (Doc. No. 25) in support of that Motion. The motion and affidavit contended that the Debtor Trust's failure to appear at the December 16 hearing was solely and completely the fault of Counsel. By Summary Order entered January 3, 2003, Doc. No. 26, the Court set the motion for hearing.

[*4] At this hearing on January 14, the Court granted the motion to reconsider the December 16 ruling, and it rescheduled the hearing on the UST's dismissal motion for February 12, 2003. *See* Doc. No. 29 (minute entry). The Court also orally granted the Debtor Trust's request to convert the case to a chapter 11 reorganization. *Id.* [4]

4 As yet, the Debtor Trust has not provided a form of written order regarding conversion.

As of the date of the Motion to Reinstate, no dismissal order had been submitted. As this Court noted in its Summary Order of January 3, there was no dismissal or closing of the case because there had been no appropriate Order entered and, therefore, the case had at all times remained open and there was nothing to "reinstate." *Cf. § 350(b)* (reopening a closed case).

A hearing was held on February 12, 2003 on the UST's dismissal motion. In addition, a number of other matters were raised or came on for hearing on February 12. The Court addresses all such matters herein, and this disposition [*5] constitutes the Court's findings of fact and conclusions of law to the extent required by Rule. *See Fed. R. Bankr. P. 9014, 7052*. [5]

5 The Court's decision today supplements its previous findings of fact and conclusions of law entered orally on August 21, 2002, in the related chapter 13 proceeding of David Foldesi, Case No. 01-01134, and the same are incorporated herein by this reference.

II. BACKGROUND AND FACTS

In addition to the foregoing procedural history, certain other facts are relevant to the present disposition. They are established by the record herein, including the testimony at the February 12 hearing. In some regards, the facts are established by the record in the chapter 13 case of David Foldesi ("Foldesi"), Case No. 01-01134, of which judicial notice has been taken. [6] In all regards where testimony is addressed, the Court's findings include its evaluation of the witnesses' credibility.

6 The Court announced its intention to take judicial notice of this file at the December 16 hearing. *See* Doc. No. 28, at 10. Under *Fed. R. Evid. 201(e)*, interested parties are entitled to be heard. The Court provided the Debtor Trust such an opportunity to be heard at the February 12 hearing not only due to the Court's prior indication but also because Creditor expressly requested on February 12 that such notice be taken. Counsel did not object.

[*6] In July 1998, Creditor made a real estate secured loan to Karoly and Margaret Foldesi ("Borrowers"). The principal amount of the obligation was $ 177,625.00, bearing interest at a variable rate, and maturing in 20 years. *See* Doc. No. 9, at Exhibit A (Variable Rate Commercial Promissory Note). The note was secured by a deed of trust on a multiple unit residential apartment complex in Mountain Home, Idaho (the "Property"). *Id.* at Exhibit B (Real Estate Deed of Trust). Creditor was assigned all rents and profits, and leases and subleases, of the Property. *Id.* at paragraph 14. Title to the Property was, at the time of the note and deed of trust, in the Borrowers [7] and they were the obligors on the note.

7 Under paragraph 6 of the deed of trust, the Borrowers warranted their title.

Foldesi is the Borrowers' son. He was not an obligor on the note, nor in title to the Property at that time, but was the "resident manager" of the Property. Subsequent to this loan, title to the Property passed several times, [*7] either to foldesi or to corporations owned and controlled by him. The transfers occurred without Creditor's written consent or approval, and, according to Foldesi's testimony, many of the transfers were without any consideration.

The obligation went into default, and Creditor commenced foreclosure proceedings in 2001, with a sale scheduled for August of that year. In March, 2001, title to the Property was conveyed by a Foldesi-controlled corporation to Foldesi. The foreclosure sale was then stayed by the filing of Foldesi's chapter 13 case, Case No. 01-01134, on April 19, 2001.

Creditor and Foldesi struck a deal in the chapter 13 case which allowed Foldesi to remain in possession of the Property and obligated him to service Creditor's secured debt. The agreement was documented by an August, 2001 stipulation, which was then incorporated into an order of confirmation of Foldesi's chapter 13 plan in

September, 2001. The agreement included cure of default through plan payments; maintenance of ongoing payments "outside" the plan (*i.e.*, directly to Creditor rather than through the chapter 13 trustee); compliance by Foldesi with all terms and conditions of the note and deed of trust; [*8] and provisions for automatic relief in favor of Creditor in the event of default (colloquially, a "drop dead" provision).

In June, 2002, Foldesi was in breach of the agreement. In late July, this Court heard Creditor's request for relief pursuant to the terms of the stipulation and the plan confirmation order, and Foldesi's opposing request to modify the plan under *§ 1329* in order to cure the post-confirmation breaches. In an oral decision entered August 21, 2002, this Court denied Foldesi's modification request, granted Creditor's request, and upheld the parties' earlier settlement agreement which had been incorporated into the confirmed plan. [8] An order was entered on August 29, 2002 granting stay relief to Creditor.

> 8 The Court's decision was in large part based on *In re Burrows*, 95 I.B.C.R. 26, 28,(Bankr. D. Idaho 1995), and *In re Wald, 211 B.R. 359, 361-62 (Bankr. D. N.D. 1997)*. The balance of the authorities relied upon and the Court's analysis are matters of record.

On September [*9] 11, at a subsequent hearing in Foldesi's case, Foldesi made an oral motion to voluntarily dismiss his chapter 13 case. The Court granted the request. An order of dismissal was submitted, executed and entered of record on September 17, 2002. [9]

> 9 Because Foldesi requested dismissal after Creditor filed a stay relief request, Foldesi was barred from filing another Title 11 case for 180 days. *See § 109(g)(2)*.

Immediately following the Court's August 21 oral ruling and its August 29 stay relief order, Foldesi commenced a series of actions related to the Property. On September 10, 2002, Foldesi executed a "grant deed" transferring the Property to the Debtor Trust. This deed was recorded on September 11, 2002. *See* Exhibit C. The chapter 13 case, however, had not yet been dismissed or closed. [10]

> 10 Though Creditor had received stay relief, the Property remained property of the estate. *Catalano v. CIR, 279 F.3d 682, 686-87 (9th Cir. 2002)* (stay relief does not constitute abandonment; property not expressly abandoned under *§ 554(a)* remains property of the estate until closing and abandonment under *§ 554(c)*). The attempted conveyance of the Property on September 11 was without authority and thus was void. *Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992)*.

[*10] On September 24, 2002, Foldesi executed another "grant deed" transferring the Property to the Debtor Trust. This deed was recorded on September 30, 2002. *See* Exhibit D.

The Debtor Trust was formed under a "Land Trust Agreement," Exhibit A. This agreement bears a September 15, 2002 date, though execution of the agreement by the beneficiaries (Foldesi and his brother, Michael) and by the trustee, Melissa Estes ("Estes"), was acknowledged on October 11, 2002. [11]

> 11 The first grant deed referred to the Debtor Trust's formative agreement as being dated "the day of September, 2002" and identified Robi V. Foldesi as trustee. *See* Ex. C. The second grant deed uses a September 10 date for the trust agreement, and again identifies Robi Foldesi as trustee. *See* Ex. D. The Land Trust Agreement introduced into evidence has, as noted, a September 15 date, an October 11 acknowledgment, and identifies Estes as trustee. *See* Ex. A.

The sole asset of the Debtor Trust is the Property. Any "business" [*11] of the Debtor Trust is limited to operating the apartment complex.

On October 15, 2002, four days after execution of the Land Trust Agreement was acknowledged and two weeks after the operative grant deed was recorded, the Debtor Trust filed the voluntary chapter 7 petition commencing the instant case. This filing halted a rescheduled foreclosure sale that Creditor had set for October 17, 2002.

Testimony at the February 12 hearing sheds limited light on how the Debtor Trust actually operates. The trustee, Estes, is to be paid compensation of $ 100.00 for the first year of the Debtor Trust's existence. This amount, of less than $ 9.00 per month, is her compensation not only for performing her duties as trustee, but also for managing operations at the complex, including finding tenants, collecting rents, paying utilities and other obligations, and supervising maintenance and repair. She lives at the complex, but she was previously a tenant and still pays the same rent she paid prior to becoming trustee.

Notwithstanding the Debtor Trust's creation (somewhere between September 15 and October 11), it was only in February, 2003, that the Debtor Trust opened its own bank account. Throughout [*12] this entire period, the Debtor Trust used Foldesi's personal bank account. Even as of the February 12 hearing, tenants had not been advised to pay rent to the Debtor Trust instead of Folde-

si. During this entire period, the Debtor Trust was subject to Bankruptcy Court jurisdiction and the obligations of Title 11.

Estes testified that tenant rent income averaged around $ 4,000.00 per month and that monthly operating expenses averaged $ 1,700.00 or so. This would leave a net income of about $ 2,300 per month. Estes indicated, though, that after repairs, she believed the monthly net income to the Debtor Trust was between $ 1,500.00 and $ 2,000.00.

From this testimony, for the 5 months from mid-September to hearing in mid-February, [12] approximately $ 20,000.00 in gross income would have been received, and approximately $ 7,500.00 to $ 10,000.00 in net income should have been realized. However, Estes testified that at the time of hearing she was aware of only $ 500.00 in the Debtor Trust's newly opened checking account, about $ 600.00 in uncashed checks, and some uncertain amount in Foldesi's checking account. Foldesi testified that he had only about $ 1,100.00 of the Debtor Trust's funds [*13] in his possession.

12 If rent is paid on the first of the month, tenants' payments would have been due October 1, November 1, December 1, January 1 and February 1, covering the period the Debtor Trust was allegedly in existence through the hearing date.

III. DISCUSSION AND DISPOSITION

A number of issues are expressly raised, and several more are necessarily implicated. The Court elects to address them in the following order.

A. Stay relief for Creditor

The Court concludes that Creditor has already obtained relief from *§ 362(a)*'s automatic stay in this case by virtue of operation of *§ 362(e)*, and is free to proceed with foreclosure. Additionally, and perhaps alternatively, the Court concludes that if not previously relieved of the automatic stay, Creditor is entitled to an order terminating and annulling the stay for two additional reasons.

1. Relief under § 362(e)

This Court has for some time recognized the self-executing nature of *§ 362(e)*. *Jones v. Wood (In re Wood), 33 B.R. 320,* [*14] *83 I.B.C.R. 112 (Bankr. D. Idaho 1983)*, established that stay relief was automatic in favor of a creditor unless the Court entered an order, within 33 days of the filing of the motion, continuing the stay in effect. [13] The burden on a party opposing stay relief (generally the trustee or debtor) is not just to object to the motion or to request a preliminary hearing but, rather, to ensure that an order is timely entered as a result of such a hearing. *Wood* also established that, once terminated by operation of law, the automatic stay could not be reinstituted. *33 B.R. at 322-23, 83 I.B.C.R. at 114-15.* [14]

13 The statute speaks of a 30 day deadline. *Wood* notes that operation of *Fed. R. Bankr. P. 9006(f)* adds 3 days to that period if, as here, the motion was served by mail.

14 *Wood* was discussed and followed in *United States v. Marine Power & Equipment Co. (In re Marine Power & Equipment Co.), 71 B.R. 925, 928-30 (W.D. Wash. 1987)*, and cited with approval in *Official Creditors' Committee v. Metzger (In re Dominelli), 788 F.2d 584, 586 (9th Cir. 1986)*.

[*15] Here, Creditor properly filed a motion requesting stay relief on November 20. It provided to the Debtor Trust and its Counsel, as well as to the chapter 7 trustee, notice of the motion, and it provided the express notice of the operation of *§ 362(e)* that Local Bankruptcy *Rule 4001.2(e)* requires. *See* Doc. No. 11. The Debtor Trust did not timely request a hearing, nor did it obtain an order continuing the stay in effect. On Monday, December 23, the stay was automatically terminated by operation of the Code. No order was required. From and after that date, Creditor was entitled to pursue continued foreclosure, unimpeded by the stay.

The Debtor Trust has sought to "reinstate" the stay. *See* Doc. No. 41 (Motion for Continuance of Stay). No credible legal basis for such relief is stated in the motion, and no authority supporting the request was otherwise proffered by Counsel. That the Court should not reimpose or reinstate the stay was made clear by *Wood* which remains good law. *Accord, Canter v. Canter (In re Canter), 299 F.3d 1150, 1155 n.1 (9th Cir. 2002)*; *see also, Ramirez v. Whelan (In re Ramirez), 188 B.R. 413, 415 (9th Cir. BAP 1995)* [*16] (a new *§ 362(a)* stay does not arise upon conversion of the case), *and* 416 (if authority exists for "reimposition" of stay, it requires proper adversary proceeding seeking injunction) (Klein, J, concurring). [15] Therefore, the Debtor Trust's motion to "reinstate" the stay will be denied.

15 The concurrence in *Ramirez* indicates that *§ 105(a)* may provide authority for such relief. However, *§ 105(a)* states that it is to be used to "carry out the provisions of [Title 11]" not to contradict or negate them, and it does not support relief that is inconsistent with specific Code provisions. *See, e.g., Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1124-25 (9th Cir. 2000)*; *In re American Hardwoods, 885 F.2d 621, 625 (9th Cir. 1989)*.

2. Relief under § 362(d)(3)

Section 362(d)(3) provides that, in a single asset real estate case, stay relief shall be granted in favor of a creditor secured by estate property [*17] unless, within 90 days of filing of the petition, [16] the debtor has filed a plan that has a reasonable possibility of being confirmed within a reasonable time, or the debtor has commenced making monthly payments to such creditor in an amount equal to the current fair market rate on the value of the creditor's interest in such property. This provides a separate basis, independent from "cause" under *§ 362(d)(1)*, for entry of an order of stay relief. *Duvar Apt., Inc. v. Fed. Deposit Ins. Corp. (In re Duvar Apt., Inc.), 205 B.R. 196, 199-200 (9th Cir. BAP 1996).* [17]

16 Even if this case has been properly converted to a chapter 11, the relevant date for calculating the 90 day period is not the date of conversion, but rather the date of the original filing. *§ 348(a), (b).*

17 The language of *§ 362(d)(3)* is rather clearly oriented toward chapter 11 reorganization cases. *See also § 101 (51B).* However, the provision also applies in chapter 7 cases. *See § 103(a).*

The stay is already [*18] gone by reason of *§ 362(e)*. If it were not, an order would be fully proper under *§ 362(d)(3)* as the Debtor Trust has not shown that it has complied with the requirements of that section in order to prevent such relief.

3. Relief under § 362(d)(1)

Were the stay not already terminated by operation of *§ 362(e)*, or subject to termination under *§ 362(d)(3)*, this Court would also enter an order finding that the stay should be terminated and annulled for cause under *§ 362(d)(1)*. The conduct of the Debtor Trust and Foldesi, as described above and discussed further below in connection with dismissal, establishes cause. Cases addressing bad faith filings and the "new debtor syndrome" note that conduct supporting dismissal for cause also supports stay relief under *§ 362(d)(1)*. *See, e.g., United Enterprises, Ltd. v. ACI Sunbow, LLC (In re ACI Sunbow, LLC), 206 B.R. 213, 219 (Bankr. 5.D. Cal. 1997)* (citing *In re Can-Alta Props. Ltd., 87 B.R. 89 (9th Cir. BAP 1988))*. This is an independent and, if needed, alternative basis for an order in favor of Creditor.

The Court will therefore entertain submission of an order by Creditor, acknowledging and holding [*19] that the stay was automatically terminated on December 23 and further providing that, to the extent the stay was not lifted under *§ 362(e)*, it will be terminated and annulled under *§ 362(d)*. For the reasons discussed in this decision, including those addressed below in connection with dismissal, the Court will order that the stay relief to which Creditor is entitled be entered *in rem*, and be effective as regards the Property regardless of any subsequent transfer or attempted transfer of title.

B. Dismissal

1. Dismissal for cause

The Court may, under either *§ 707(a)* or *§ 1112(b)*, dismiss a case for "cause." Cause is a broad concept, and examples of cause set out in the Code are not exclusive. *See § 102(3)* ("includes" or "including" are not limiting phrases). While the UST focused on eligibility, Creditor joined in the UST's motion and took a broader view of "cause" supporting dismissal. Further, even in the absence of identification and prosecution by parties in interest, the Court has the ability to evaluate any factor regarding cause for dismissal. *See § 105(a)* ("No provision of this title providing for the raising of an issue by a party in interest [*20] shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.")

a. Cause based on stay relief

The instant case is a single asset real estate case. The Debtor Trust's schedules list only the Property, and no other assets. It scheduled only three creditors (at least one of which appears to be an insider), and all are secured in the Property. There are no unsecured creditors scheduled. The automatic stay protecting the Property has been terminated by operation of *§ 362(e)* or, alternatively, will be terminated and annulled under *§ 362(d)*.

Thus, if the Debtor Trust seeks to reorganize under chapter 11, it cannot. Nor is there any function to a chapter 7 liquidation under these circumstances. Sufficient cause exists to dismiss the case. *See § 707(a), § 1112(b).*

b. Cause based on lack of eligibility

The UST seeks dismissal of the chapter 7 case on the basis that the Debtor Trust is not eligible to be a debtor. Its argument is made in light of and under *§ 109(b)* which provides that only a "person" may be a debtor under [*21] chapter 7; under *§ 101(41)* which defines person as including a "corporation" as well as individuals and partnerships; and under *§ 101(9)(A)* which defines corporation in such a way as to exclude trusts unless they are "business trusts" under *§ 101(9)(A)(v)*. The UST's motion applies whether the case is a chapter 7 liquidation or a chapter 11 reorganization because *§ 109(d)* ad-

dresses chapter 11 eligibility by incorporating chapter 7 requirements.

The Court has evaluated the Land Trust Agreement, the testimony, and the briefing submitted by both the Debtor Trust and the UST. It is not persuaded that the Debtor Trust is a business trust and thus eligible to be a debtor. Assuming for the purposes of this decision that the Debtor Trust was formed for a business purpose (despite other evidence indicating the primary purpose was to forestall Creditor's pursuit of foreclosure under prior orders of this Court), there is still an issue relating to the transferability of ownership or investor interests. *In re Star Trust, 237 B.R. 827, 831 (Bankr. M.D. Fla. 1999)*; *In re Sung Soo Rim Irrevocable Intervivos Trust, 177 B.R. 673, 677 (Bankr. CD. Cal. 1995)*; [*22] *In re Parade Realty, Inc., 134 B.R. 7, 10 (Bankr. D. Hawaii 1991)*. The question is in some ways a close one, but the Court concludes that the Debtor Trust has not sustained its burden to establish eligibility. [18] The UST's motion will therefore be granted. [19]

18 *Montgomery v. Ryan (In re Montgomery), 37 F.3d 413, 415 (8th Cir. 1994).*

19 The Debtor Trust sought "leave to amend the trust entity" in order to cure any defects that might keep it from being a valid and eligible business trust through post-bankruptcy amendments to the Land Trust Agreement. *See* Doc. No. 33. Counsel could point to no authority whatsoever supporting the idea that such a post-filing change in the structure of a debtor entity could cure eligibility problems, though this did not deter him from repeatedly advancing the argument. *Cf. Fed. R. Bank. P. 9011(b)* (presenting and advocating legal positions through pleadings constitutes a certification by counsel that such positions are formed only after an inquiry reasonable under the circumstances), and *9011(b)(2)* (the claims and legal contentions asserted by a party or its counsel are warranted by existing law or by a nonfrivolous argument for the modification, extension or reversal of existing law). The Court rejects the unsupported argument, and denies the Motion for Leave to Amend.

[*23] **c. Cause based on conduct and history**

The Debtor Trust views this case as a chapter 11. If in fact this case is a chapter 11 case, the record in this case and the record in the predecessor case (No. 01-01134) adequately and sufficiently, and indeed persuasively, establish a basis to dismiss it as a bad faith filing. [20]

20 The Ninth Circuit has said that "bad faith as a general proposition does not provide 'cause' to dismiss a Chapter 7 petition under *§ 707(a)*." *Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1191 (9th Cir. 2000)*. However, the bankruptcy court may still evaluate whether "cause" exists for dismissal. *Id. at 1192*. The following analysis primarily, though perhaps not exclusively, applies in the event the case is viewed, consistent with the Debtor Trust's views, as a chapter 11.

In *In re Erkins, 253 B.R. 470, 00.4 I.B.C.R. 171 (Bankr. D. Idaho 2000)*, Chief Bankruptcy Judge Pappas explained that the decision to dismiss a case as a bad faith [*24] filing is subject to the discretion of the bankruptcy court. *253 B.R. at 474, 00.4 I.B.C.R. at 172* (citing *In re St. Paul Self Storage Ltd. P'ship, 185 B.R. 580, 582 (9th Cir. BAP 1995)*). Once a genuine issue is presented, the debtor bears the burden of proving good faith by a preponderance of the evidence. *Id.* "'The existence of good faith depends on an amalgam of factors and not on a specific fact.'" *Id.* (quoting *In re Arnold, 806 F.2d 937, 939 (9th Cir. 1986)*). "'The test is whether a debtor is attempting to unreasonably deter and harass creditors or attempting to effect a speedy, efficient reorganization on a feasible basis.'" *Id.* (quoting *In re Marsch, 36 F.3d 825, 828 (9th Cir. 1994)*); *see also In re The Tischer Co.*, 02.2 I.B.C.R. 102 (Bankr. D. Idaho 2002).

The Panel in *St Paul Self Storage* stated:

> To determine whether a debtor has filed a petition in good faith, courts weigh a variety of circumstantial factors such as whether:
>
> (1) the debtor has only one asset;
>
> (2) the debtor has an ongoing business to reorganize;
>
> (3) there are any unsecured creditors;
>
> (4) the debtor has any cash flow [*25] or sources of income to sustain a plan of reorganization or to make adequate protection payments; and
>
> (5) the case is essentially a two-party dispute capable of prompt adjudication in state court.

185 B.R. at 582-83. Many of these factors are clearly present here. And many are also factors which have been identified as evidencing the "new debtor syndrome":

> The term 'new debtor syndrome' identifies a pattern of conduct which exemplifies bad faith cases. *[In re] Laguna [Assoc. Ltd. P'ship], 30 F.3d [734,] 738 [(6th Cir. 1994)]* (citing *In re Little Creek Dev. Co., 779 F.2d 1068, 1073 (5th Cir. 1986)).* 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. *In re Yukon Enter., Inc., 39 B.R. 919, 921 (Bankr. C.D. Cal. 1984).* [*26]

Duvar Apt., Inc., 205 B.R. at 200. Once a prima facie case is established by showing a transfer of distressed property to the debtor within close proximity to the bankruptcy filing, the burden shifts to the debtor to demonstrate good faith. *Id. See also Udall v. Federal Deposit Ins. Corp. (In re Nursery Land Devel., Inc.), 91 F.3d 1414, 1416 (10th Cir. 1996)* (finding bankruptcy court's conclusion that the purpose of filing was to frustrate creditor's efforts to foreclose on property transferred to debtor immediately prior to filing amply supported by the evidence; noting that the debtor (1) had but one asset; (2) had one creditor; (3) acquired property which was posted for foreclosure and the prior owner had been unsuccessful in defending against foreclosure; (4) was revitalized on eve of foreclosure in order to acquire the property; (5) had no ongoing business or employees; (6) lacked a reasonable possibility of reorganizing; and (7) stopped the foreclosure by filing; all "classic badges" of a bad faith bankruptcy filing); *ACI Sunbow, LLC, 206 B.R. at 217-19* (similar factors and analysis).

The Court is aware of Foldesi's [*27] contention that the transfer of the Property to the Debtor Trust was designed to free the business operations of the Property from his personal financial difficulties. This attempted justification is not only belied by the history of serial transfers without consideration, including those which frustrated Creditor's attempts to foreclose, but it is also directly impeached by the fact that, after the creation of the Debtor Trust, Foldesi never separated the financial affairs of the Properly from his own, and in fact ran the income and expenses of the apartments through his personal bank account.

The creation of the Debtor Trust immediately before filing the case; the transfer of the Property to the Debtor Trust without consideration; the timing of that transfer immediately after stay relief in Foldesi's prior chapter 13 case; the immediate commencement of this bankruptcy staying the rescheduled foreclosure sale; the lack of assets of the Debtor Trust other than the Property; the absence of non-insider creditors other than the foreclosing secured party; the lack of employees except, perhaps, Estes and Foldesi; the absence of threshold proof of an ability to reorganize; the failure of [*28] the Debtor Trust to conduct its affairs as an entity separate and apart from Foldesi; the inability of Estes and Foldesi to account for the income generated by the apartment complex since filing; and the other facts identified in this decision and in the August 21 decision in Case No. 01-01134, all support the conclusion that the instant petition was filed in bad faith.

Though the Debtor Trust evidently believes itself to be a debtor in possession, *see, e.g.,* Doc. No. 41 (Motion For Continuance of Stay), it has not properly behaved as one. Nothing in the present record indicates any attempt by the Debtor Trust to comply with the requirements imposed upon debtors in possession under chapter 11 of the Code. [21] The Debtor Trust failed to create separate DIP accounts, deal with the income of the Debtor Trust as a fiduciary for creditors, account for the property of the estate, appropriately segregate cash collateral and use it only upon consent or court order, or file monthly reports. Since the Debtor Trust believed it was in chapter 11, its cavalier approach to the fiduciary duties of a chapter 11 debtor in possession is therefore itself indicative of a lack of good faith. Dismissal [*29] is therefore appropriate.

> 21 Even though no order of conversion was ever submitted by the Debtor Trust or its Counsel, the UST issued its detailed "Guidelines to Debtors in Possession" addressed to the Debtor Trust and its Counsel soon after the January 14 hearing. *See* Doc. No. 30. The Debtor Trust was thus made aware of its responsibilities as a chapter 11 debtor in possession.

If the Debtor Trust contends that chapter 11 requirements are not applicable due to the absence of an order of conversion, then it faces the consequence that the Property and its rents and profits are property of the estate subject to the exclusive control of the chapter 7 trustee. *§ 541(a)(1), (6).* The failure to turnover all property of the estate to the chapter 7 trustee, as required by *§ 521(4),* and the Debtor Trust's unauthorized use of property of the estate, support dismissal for "cause" under *§ 707(a).*

The Court has found dismissal warranted on several grounds. Upon the entirety of the record herein, dismissal, when [*30] ordered, will be with prejudice to any refiling for a period of 180 days from entry of that order. However, as has been seen, a bar on one debtor from refiling does not appear to deter a transfer of the Property to another entity, thus evading the restriction. This is additional support for the *in rem* stay relief previously discussed.

IV. CONCLUSION

Creditor may submit a proposed order providing (1) that automatic termination of stay under *§ 362(e)* occurred on December 23, and that such stay may not be and is not reinstated; (2) that the stay is terminated and annulled under *§ 362(d)(3)*; and (3) that the stay is terminated and annulled under *§ 362(d)(1)*. All stay relief shall be *in rem* and apply to the Property regardless of any bankruptcy filing purporting to effect it.

The UST may submit a proposed order dismissing this case, with prejudice, for cause under *§ 707(a)*, and alternatively under *§ 1112(b)*, such cause being set forth in this decision.

The Debtor Trust's motions are and shall be denied, and the orders of the UST and Creditor [*31] shall so provide.

Dated this 25th day of February, 2003.

TERRY L. MYERS

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

In re KOCH V. HANKINS JUDGMENT CREDITOR TRUST, Debtor.

Chapter 11 Proceedings, Case No. 06-02112-PHX-CGC

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

2006 Bankr. LEXIS 2923

October 24, 2006, Decided

COUNSEL: [*1] For Koch v Hankins Judgment Creditor Trust, Debtor: KEVIN J. RATTAY, RANDY NUSSBAUM, THOMAS A. CONNELLY, JABURG & WILK, P.C., SCOTTSDALE, AZ.

For U.S. TRUSTEE, U.S. Trustee: RICHARD J. CUELLAR, OFFICE OF THE U.S. TRUSTEE, PHOENIX, AZ.

JUDGES: CHARLES G. CASE II, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: CHARLES G. CASE II

OPINION

UNDER ADVISEMENT DECISION

RE: MOTION TO DISMISS

Movant Carlon Properties, Inc., ("Carlon") seeks dismissal of this bankruptcy case on two primary grounds: First, that Debtor Koch v. Hankins Judgment Creditor Trust ("Debtor") is not a business trust and, therefore, is ineligible to file a bankruptcy petition under *11 U.S.C. section 109* and, second, that the case was filed in bad faith, relies on misrepresentations of material fact, and is filed improperly to delay or frustrate pending state forfeiture actions and post-judgment attorneys' fee proceedings. At the October 3, 2006, hearing on the motion, the Court noted that a dismissal on bad faith grounds would require an evidentiary hearing and, therefore, would not be ruled on at this time. With respect to the question of whether Debtor is an eligible debtor under *Section 109*, the [*2] Court questioned whether an evidentiary hearing would be necessary or whether a decision could be rendered on the pleadings. That is the issue currently presented.

Historically, very little is disputed. In the early 1980s, a group of professionals formed a variety of general partnerships that purchased farmland in California. For reasons not important here, these professionals filed a series of lawsuits beginning in 1998 against Carlon and a variety of other defendants in California state court. Eventually, through a series of dismissals and appeals, two of the lawsuits were consolidated and resulted in a judgment in favor of the plaintiff professionals in 1993. As a result of the judgment, the plaintiffs formed the Koch v. Hankins Judgment Creditor Trust as a vehicle through which to collectively enforce the judgment and pay their legal fees. The beneficiaries of the trust were the individual plaintiffs/judgment creditors.

In 1997, the judgment in plaintiffs' favor was reversed and vacated on appeal. On remand, the trial court barred the plaintiffs' remaining claims. The court further refrained from deciding the cross-complaints without prejudice to them being decided in a separate [*3] action. The defense judgment was affirmed on appeal in 2002, and all that remains now is the final phase of the ancillary post-judgment motion for attorneys' fees against the plaintiffs.

With respect to the Trust specifically, the parties agree that the governing trust document, the Declaration of Koch v. Hankins Judgment Creditor of Trust," states expressly as its purpose in Paragraph 2.2:

> **Purpose.** The purpose of the Trust is to collect efficiently and distribute equitably the Proceeds of the Judgment in Koch v. Hankins, and to insure, timely payment of legal fees for services rendered in pursuing collection of the Judgment.

The Trust estate is defined as "the right to payment under the Judgment, and any actual proceeds collected pursuant to the Judgment and any Reserves held in trust for the uses set forth herein." Further, the Trust was set to terminate on full satisfaction of the Judgment, including payment of all post-judgment interest and payment of all post-judgment interest and the payment of all of the Trust's obligations or the revocation of the Trust by a vote of the Settlors, whichever occurred first. Neither condition has ever occurred.

According [*4] to Carlon, the express purpose for the trust is now moot as a result of the judgment being vacated. Further, as the Trust carries on no other business, there is no income from any business and nothing to reorganize. Carlon also points out that the Trust does not satisfy the requirements of California law governing business trust by not filing the required registration.

Debtor admits that it was formed for the primary purpose of enforcing plaintiffs' judgment. Nonetheless, it argues that it qualifies as a business trust for several reasons. For example, although the Trust was formed primarily to enforce the judgment, "it was also intended that the Trust would soon thereafter hold title to, administer and manage the real property located in the Harquahala Valley." Subsequently, in the fall of 1994, the Trust acquired several parcels of jojoba-farming property in the Harquahala Valley from entities related to the plaintiffs/beneficiaries. The Trust currently owns seven such parcels, which are considered property of the estate. According to Debtor, it has managed and administered these parcels ever since. Part of the management of these parcels has included receiving payments in the form [*5] of distributions of excess proceeds of the sale of water rights by the Harquahala Valley Irrigation District. These distributions were the subject of some litigation in Maricopa County Superior Court, which the Trust says it undertook the prosecution of at its own expense and in which it was successful in obtaining over $ 330,000 in distributions. The Trust also contends that it conducts business by the fact that it has leased some of the parcels, under agricultural leases, to unrelated third parties since at least 1995. Not only did the Trust receive rent and payments of portions of the property taxes, it also received various improvements by way of removal of jojoba crops to the installation of cotton and other crops. Debtor also points to the fact that it was named as a defendant in several forfeiture cases involving various parcel. Last, the Trust also points to the fact it filed annual federal and state tax returns as further evidence of its business purpose.

It is well settled that business trusts qualify as eligible debtors within the definition of corporation in *11 U.S.C. section 101*. *See Brady-Morris v. Schilling (In re Kenneth Alan Knight Trust), 303 F.3d 671 (6th Cir. 2002)*; [*6] *Shawmut Bank Conn. v. First Fidelity Bank (In re Secured Equipment Trust of Eastern Airlines), 38 F.3d 86 (2d Cir. 1994)*. Debtor bears the burden of establishing that it qualifies as a business trust under *11 U.S.C. section 109*. *In re Secured Equipment Trust of Eastern Air Lines, Inc., 38 F.3d 86,89 (2d Cir. 1994)*; *Tim Wargo & Sons, Inc., 869 F.2d 1128, 1130 (8th Cir. 1989)*.

Unfortunately, the Bankruptcy Code does not define business trust and the courts have not adopted a uniform definition of the term for bankruptcy eligibility. *Id.* However, because a business trust is eligible as a corporation, it must have attributes of a corporation to qualify as a business trust. A primary characteristic of a business trust is whether it was created with the primary purpose of transacting business or carrying on commercial activity for a profit. *In re Dayton Title Agency, Inc., 292 B.R. 857, 876 (Bankr. S.D. Ohio 2003)*. Uniformly courts have held that trusts created solely to preserve the trust res for the beneficiaries do not satisfy the definition of a business trust. *Id.; In re Knight, 303 B.R. at 680*. [*7] Courts have also looked to a variety of other factors to determine eligibility of business trusts, such as whether the trust is actively engaged in and doing business and whether the trust has significant attributes of a corporation. *In re Parade Realty, Inc. Employees Retirement Pension Trust, 134 B.R. 7, 8-11 (Bankr. D. Haw. 1991)*; *In re BKC Realty Trust, 125 B.R. 65 (Bankr. D.N.H. 1991)*.

The Court finds that Debtor has not sustained its burden, particularly in light of Paragraph 2.2 in the Declaration of Trust that states that the purpose of the Trust is solely to enforce the judgment that has now been vacated. Debtor's attempts to argue to the contrary simply do not overcome this hurdle.

Debtor contends that, regardless of the stated purpose of the Trust, it actually conducted business by leasing the various parcels of land and collecting the water rights distributions. It provides little to no evidence, however, of any true *business* operations. The exhibits attached to its response do little to prove anything. For example, the Trust provides copies of a handful of checks written to the Trust from Catron Cotton in 2001 and 2003 for approximately [*8] $ 65,000, along with some correspondence between co-trustee of the Trust, Floyd Koch, and an unidentified gentleman named "Frank." Neither at the pleading nor hearing stage was any testimony given to explain the Debtor's business operations or how these leases were negotiated, what their terms were, how much rent for how many years was paid by Catron Cotton (let alone any other lessee, if any), how much profit the Trust made on the leases, etc. In

fact, no copies of the leases themselves were provided. What was provided does little to counter Carlon's argument that the leasing of the land was simply an incidental part of the Trust.

The Trust also argues that it paid taxes as a Trust, yet failed to provide copies of any tax returns to allow the Court to see what business it actually conducted and what taxable earnings it really had, if any, and how much. Nothing in the record indicates that these indicia of doing business were anything other than incidental to the stated primary purpose of the Trust - collecting the judgment. As was stated in *In re Sung Soo Rim Irrevocable Intervivos Trust, 177 B.R. 673, 678 (Bkrtcy. C.D. Cal.,1995)*, "[t]he mere fact that the trust [*9] happens to engage in business does not make it a 'business trust.'"

The Court also disagrees with the Trust that there is an underlying and implict intent to conduct business contained in the language of the Declaration. In reading the Declaration itself from start to finish, the Court simply does not see it. In further support of its conclusion that the Trust does not qualify as a business trust is the fact that the Trust does not satisfy California's requirements to be a valid operating business trust. While the Court acknowledges that the Trust's failure to qualify under state law does not automatically mean it does not qualify under *section 109*, it is one additional factor in support of this decision. *See id*. "[W]hile the mere failure to comply with a state law technicality may not be entirely dispositive of whether a trust is eligible for relief in bankruptcy, this Court shall consider such non-compliance a significant factor in analyzing the nature of a trust." *See In re Morgantown Trust No. I, 155 B.R. 137 (Bankr. N.D.W.Va. 1993)*; *In re St. Augustine Trust, 109 B.R. 494, 496 (Bankr. M.D. Fla. 1990)*

The Trust contends that if the Court [*10] is leaning toward dismissing the case on this ground, that nothing in the Trust prevents it from going back to amend the Declaration of Trust to bring it in line with the Trust's actual operations over the last few years. A similar argument was raised in *In re Karoly Vendal Foldesi & Margaret Foldesi Family Land Trust # 3, 2003 Bankr. LEXIS 2247, 2003 WL 25273865 (Bankr. D. Idaho 2003)*, which the court rejected. In *Foldesi*, the debtor trust sought leave to amend the trust entity postbankruptcy so as to cure any defects that might keep it from being a valid and eligible business trust. The court concluded, however, that because counsel could not point to any authority in support of such a post-filing change in the structure of a debtor entity in order to cure eligibility problems, the court denied the requested relief.

Finally, the Court concludes that a full evidentiary hearing would not change the outcome in this case. Even if the various allegations of "business" were to be fully supported by the evidence, the acts of owning property obtained from entities related to the beneficiaries, and thereafter collecting rent from those properties and obtaining benefits arising from the ownership of those properties would be insufficient [*11] to turn what was clearly intended to be a non-business trust into a business trust. Those are activities at best incidental to the primary, indeed sole, purpose of the trust that was clearly defined at its formation. The plaintiffs/beneficiaries had the option of enforcing their judgment through various forms of collective ownership. They happened to choose one that would not be eligible at a later time to be a debtor in bankruptcy. Although it is undoubtedly true that bankruptcy was not in the parties' contemplation at the time of formation, the result is the same. As the debtor is ineligible under *Section 109 of the Bankruptcy Code*, this case must be dismissed.

For the foregoing reasons, movant's motion to dismiss is granted. Counsel for movant is to lodge a form of order consistent with this decision for the Court's signature.

So ordered.

DATED: October 24, 2006

CHARLES G. CASE II

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

In re NORTHERN MARIANA ISLANDS RETIREMENT FUND, Debtor.	Case No. 12-00003 Chapter 11 Re: Docket Nos. 24, 50, 53, 79, 81, 90

MEMORANDUM OF DECISION ON MOTIONS TO DISMISS

The motions to dismiss this case primarily argue that the Northern Mariana Islands Retirement Fund (the "Fund") is a "governmental unit" which is not eligible for relief under chapter 11 of the Bankruptcy Code. I agree and will grant the motions.

Only a "person" may be a debtor in a chapter 11 case. 11 U.S.C. § 109(d), (b). "The term 'person' . . . does not include governmental unit . . . ." Id. § 101(41).

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state, department, agency, or instrumentality of the United States . . ., a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. § 101(27)(emphasis added). The question thus boils down to whether the Fund is an "instrumentality" of the government of the Commonwealth of the Northern

Mariana Islands.

The Bankruptcy Code does not define the term "instrumentality." Under established principles of statutory interpretation,[1] the next step is to look to the "plain meaning" of the word. Ransom v. FIA Card Servs., N.A., 131 S.Ct. 716, 724 (2011).

The dictionary defines "instrumentality" as "the quality or state of being instrumental" and "instrumental" as "serving as a means, agent, or tool . . . ." Merriam-Webster's Collegiate Dictionary 605 (10th ed. 2001). See also Black's Law Dictionary 720 (5th ed. 1979) (defining "instrumental" as "serviceable, helpful; serving as a means or agent; something by which an end is achieved.")

The dictionary definitions are too indefinite to be useful. Governments use many "agents" to accomplish their goals. Congress could not have intended to exclude every "agent" of a government (for example, construction contractors and

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[1]Some decisions suggest that there are three approaches, or tests, to determine whether a particular entity is a "governmental unit." First, the "independent classification" test is "essentially statutory construction by another name." In re Family Health Svcs., Inc., 101 B.R. 618, 621 (Bankr. C.D. Cal. 1989). Second, the "state classification" test examines whether applicable nonbankruptcy law places a debtor in one of the excluded categories. Id. at 622. Third, the "alternate relief" test considers whether bankruptcy is a satisfactory method, compared with nonbankruptcy alternatives, to address the entity's financial distress. Id. at 626.

The "three tests" are puzzling. "Governmental unit" and "instrumentality" are statutory terms. The court's job is to interpret those terms. The "three tests" suggest that courts must interpret those terms using unique techniques. But no one has explained why the usual tools of statutory construction are inadequate or inapplicable. The third test is particularly suspect, because it is completely unmoored from the statutory text.

employees hired by the government) from bankruptcy relief. Unfortunately, the word "instrumentality" has "no unique or canonical meaning" and no single "plain meaning." In re Las Vegas Monorail Co., 429 B.R. 770, 777 (Bankr. D. Nev. 2010).

Therefore, one must look to extrinsic aids.[2] The legislative history is instructive.

> [Section 101(27)] defines "governmental unit" in the broadest sense. . . . "Department, agency, or instrumentality" does not include an entity that owes its existence to State action, such as the granting of a charter or license but that has no other connection with a State or a local government or the Federal Government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function.

H.R. Rep. No. 595, 95th Cong. 311 (1977); S. Rep. No. 989, 95th Cong. 24 (1978).

Reading the term "governmental unit" in the broadest sense, as Congress intended, and emphasizing the function of the Fund, I hold that the Fund is an "instrumentality" of the Commonwealth. The government formed the Fund as a means of carrying out the government's obligations to its current and retired employees. Providing compensation and benefits to government employees is a

[2]The terms "governmental unit" and "instrumentality" do not necessarily have the same meaning in all statutes. United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213 (1996). Cases interpreting those terms in other contexts must therefore be read with caution. Aguon v. Commonwealth Ports Auth., 316 F.3d 899 (9th Cir. 2003).

quintessential governmental function. This is particularly true in the Commonwealth, where government employees' and retirees' pension rights enjoy constitutional protection.

The Fund argues that many entities provide retirement benefits and administer retirement plans. This argument scants the key fact that, unlike the other entities to which the Fund refers, the Fund administers a plan that benefits only the government's employees and retirees. The Fund also argues that if it is an "instrumentality" of the government, then so must be the companies the Fund hires to help it carry out its duties. The Fund's contractors presumably have clients other than the Fund. Unlike the contractors, the Fund acts solely as an intermediary between the government and its employees and retirees.

Further, the Commonwealth has significant ongoing influence over the Fund. The governor appoints its trustees, the legislature specifies (and from time to time changes) to whom the Fund must pay benefits and in what amounts, and, perhaps most importantly, the government provides (or rather, is supposed to provide) virtually all of its funding and resources.[3] The Fund has no "customers" other than the government and its employees and retirees. The Fund exists for the

[3]The Fund also receives investment income and mandatory contributions from employee's salaries and wages, but events have proven that these sources of income are not nearly enough to cover the Fund's obligations.

sole purpose of receiving money from the government, investing the money until it is needed, and paying out the money to government employees and retirees in accordance with the law governing the relationship between the government and its employees. The Fund does literally nothing other than carry out the government's duties.

In re Nortel Networks, Inc., 669 F.3d 128 (3d Cir. 2011), supports the view that the Fund is a governmental unit. In the Nortel case, the court held that an entity established by the United Kingdom government to guaranty certain obligations of failed private pension plans was not a "governmental unit." The U.K. entity was funded entirely by private employers and benefitted only nongovernmental employees. The only connection between the entity and the U.K. government was the fact that the government had established it. The court said that the requisite "active" relationship between the government and the entity was lacking because the entity "stands in the shoes of a private party [i.e., the insolvent private pension plan]." Id. at 138. In this case, the Fund acts solely as an intermediary between the government and its employees and retirees. No private employer and no nongovernmental employees are involved. The Fund does not stand in the shoes of any private party.

All parties cite and rely on Las Vegas Monorail, which held that a particular

entity was not a "municipality" under section 101(40) of the Bankruptcy Code. Las Vegas Monorail is helpful because "instrumentality," the key word in section 101(27), also appears in section 101(40)'s definition of "municipality." But it would be a mistake to rely too heavily on Las Vegas Monorail in this case. As the Las Vegas Monorail court emphasized, many English words have multiple meanings; one cannot assume that the same word always has the same meaning regardless of the context. 429 B.R. at 778. Here, the difference in context is important. If "instrumentality" means exactly the same thing in both definitions, absurd results would follow. Most people would agree that a state police force is an "instrumentality" of the state government and therefore is a "governmental unit." Most people would also agree that a state police force is not a "municipality" under any reasonable definition of that word, even though it is an "instrumentality" of the state. In other words, since every "instrumentality of . . . a State" is a "governmental unit," but not every "instrumentality of a State" is a "municipality," the word "instrumentality" must have a different meaning in the two contexts.

The trustees of the Fund should be praised, not criticized, for commencing this case. The trustees find themselves in an intolerable position. The Fund for which they are responsible is caught between an irresistible force – obligations to

retirees which it cannot pay – and an immovable object – the government, which has persistently failed to pay its debt to the Fund. The trustees' attempt to find a solution to this dilemma is creative and praiseworthy even though it cannot succeed. Congress did not intend that the Bankruptcy Code could solve all problems, least of all the financial problems of governmental units. The dismissal of this case will leave the Fund and its beneficiaries at the mercy of the Commonwealth government, but Congress intended that the local government, rather than a federal court, should address such problems.

Some administrative issues must be resolved in conjunction with the dismissal of this case.

All professionals retained by the Fund and any other party wishing to assert an administrative expense must file an appropriate application or motion not later than June 29, 2012. The Debtor shall promptly give notice of all such applications and motions. The notice shall provide that, if an objection to any such application or motion is filed by a date certain (which shall be not sooner than 14 days after notice is given), the court will consider the contested application or motion at a hearing on July 27, 2012, at 9:30 a.m., and that, if no timely objection is filed to any of the applications or motions, the court will consider the uncontested applications and motions without a hearing. The order dismissing this case will be

entered after orders on the applications and motions are entered and all approved compensation, reimbursement, and administrative expenses are paid.

When the court enters the order dismissing this case, the court will also enter orders dismissing without prejudice all adversary proceedings and remanding all removed proceedings.

/s/ Robert J. Faris
United States Bankruptcy Judge
Dated: **06/13/2012**

EXHIBIT D

In re SECURED ASSETS TRUST, Debtor.

Case No. 07-04501-B11

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2008 Bankr. LEXIS 4427

May 12, 2008, Decided
May 12, 2008, Filed, Entered

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: *In re SAIF, Inc., 2008 Bankr. LEXIS 4714 (Bankr. S.D. Cal., May 9, 2008)*

COUNSEL: [*1] For Debtor: Richard S. Van Dyke, Esq., Van Dyke & Associates, APLC, Carlsbad, CA.

For U.S. Trustee: Haeji Hong, Esq., Department Of Justice, San Diego, CA.

For Manal Naoom, Afshin Kashani, Auto Finance Group, M. Khomamizadeh, Parvis Ghadimi: Richard Miller, Esq., San Diego, CA.

For Official Committee of Unsecured Creditors: Daren Brinkman, Esq., Brinkman Portillo, PC, Westlake Village, CA.

For Chapter 11 Trustee for Secured Assets Trust: James C. Bastian, Jr., Esq., Shulman Hodges & Bastian LLP, Foothill Ranch, CA.

Chapter 11 Trustee: Richard M. Kipperman, La Mesa, CA.

JUDGES: PETER W. BOWIE, Chief Judge.

OPINION BY: PETER W. BOWIE

OPINION

ORDER ON MOTION TO DISMISS

This chapter 11 case was filed as a related case to SAIF, Inc., No. 07-04500, by the same counsel. The cover sheet of the petition asserted that Secured Assets Trust (hereinafter SAT) is a "business trust". The petition was signed by Thomas Sterling as trustee.

Debtor's schedules revealed that debtor owed no taxes, has no unsecured creditors, does have a bank account, and has secured creditors of almost $16 million. Debtor also listed as an asset accounts receivable owned by SAIF in the same amount owed the secured creditors.

In mid-October, 2007, the United [*2] States Trustee filed a motion to dismiss or appoint a Chapter 11 trustee. In the two-page motion, the trustee raised as an additional argument, the issue of whether the debtor is eligible to be a debtor, by saying "this entity may not be a 'business trust' that is eligible to be a debtor." The United States Trustee amplified on the argument in its reply papers. At the hearing on the motion, without ruling on the eligibility issue, the Court ordered the appointment of a Chapter 11 trustee.

Now the issue has been raised, again, this time by the Official Committee of Unsecured Creditors for SAIF. It is recognized that *11 U.S.C. § 109* limits eligibility to a "person", as that term is defined in *§ 101*, which includes corporations. In turn, *§ 101(9)* defines "corporation" to include a "business trust", but does not go on to define what constitutes a "business trust".

The most useful case discussing what constitutes a "business trust" for purposes of the Bankruptcy code is *In re Sung Soo Rim Irrevocable Intervivos Trust, 177 B.R. 673 (Bankr. CD. CA 1995)*. There, the court undertook a multi-step analysis, beginning with whether relevant state law recognizes such an entity. Because the

court concluded [*3] that state law could not dictate access to the federal bankruptcy courts, whether an entity fit the state's definition of a "business trust" could not be conclusive. But it can be, in effect, "a rebuttable presumption which must be tested against the fundamental federal purpose of the restrictions on eligibility to file a bankruptcy petition." *177 B.R. at 676.*

California defines a "business trust" to include:

> [E]very business organization consisting essentially of an arrangement whereby property is conveyed to one, or more than one, trustee for purposes other than the mere conservation of assets, collecting and disbursing of fixed or periodic income, or the securing of an obligation.

Revenue & Taxation Code *§ 23038(b)(1)*. Under California law there are a number of attributes of a qualified "business trust", including compliance with applicable fictitious name statutes, taxation by the state as a corporation, the creators of the trust share in the profits, and management is vested in one or more trustees.

The trust in *Sung Soo Rim* was easily identified as a probate trust, not a "business trust" under California law. The trust in this case - if, indeed, it even is a trust - is different [*4] in multiple ways. First, it appears from concessions made at oral argument that there are no traditional documents creating the entity of the trust, much less ones incorporating the California Probate Code. On the other hand, the uncontroverted evidence is that SAT has not filed any tax returns or paid any taxes. It has not complied with any applicable fictitious name statutes. It appears its sole purpose is to borrow funds which it "loans" to SAIF, Inc., which SAIF then loans to used auto dealers, primarily. As those loans are repaid to SAIF distributions are made to SAT to make payments to its lenders.

Based on the record developed to date, the Court finds and concludes that SAT does not qualify as a "business trust" under applicable California law. As already noted, however, that does not end the inquiry. Rather, the Court looks to what Congress contemplated when it decided only a "person" could be a debtor, and excluded a "trust" from the definition of "person" while at the same time including "business trust" within the meaning of "corporation", which in turn is included in the definition of "person".

Federal tax law also recognizes "business trust" as an entity with certain attributes. [*5] They include:

> (1) creation and maintenance for a business purpose or function;
> (2) title to property held by trustee;
> (3) centralized management;
> (4) continuity of business existence uninterrupted by death among beneficial owners;
> (5) transferability of interests; and
> (6) limited liability.

177 B.R. at 677. Assessing SAT against those attributes also leads to the conclusion that SAT is not a "business trust" as that term is used in the Bankruptcy Code. Among other factors, the evidence is uncontroverted that the sole beneficiary has no control over management of SAT. Further, it appears that the beneficiary's interest in SAT is not transferable, nor has it been shown that SAT would continue to exist if something happened to her.

The Chapter 11 trustee's argument, in essence, is that for a number of years SAT has, in fact, been doing business and is therefore a de facto business trust. Perhaps in the lower case sense, SAT may be a business trust - that is, a trust that is doing business. But as the Sung Soo Rim court explained: "The mere fact that the trust happens to engage in business does not make it a "business trust". *177 B.R. at 678.*

The difficulty in grappling with the concept of a "business [*6] trust" is that there are many shadings. The trust in Sung Soo Rim was a classic example of a probate-type trust. On the other hand, one court has noted: "The less restrictive view is that a trust can be classified as a business trust if it merely conducts business." *In re Parade Realty, Inc. Employees Retirement Pension Trust, 134 B.R. 7 (Bankr. D. HI 1991).* That court cited to *In re Medallion Realty Trust, 103 B.R. 8* (Bankr. D. MA 1989 (for the proposition, but Medallion found the debtor to be a partnership, not a business trust. Medallion did include a useful discussion of the genesis of "Business trust", and it concluded "the test should be simpler - whether the trust was created to transact business for the benefit of investors." *103 B.R. at 11*. While the Medallion court stated:

> I conclude, therefore, that Congress intended to permit bankruptcy relief for all trusts which are created for the purpose of transacting business and whose beneficiaries make a contribution in money or money's worth to the enterprise, without regard to whether the trust has characteristics of a corporation such as separate certificates of ownership.

(Id. At 11-12), the Medallion court also concluded that [*7] the entity before it was a partnership because the so-called beneficiaries controlled the entity's operations and the so-called trustee carried out their directions and "[t]his so-called 'trust' is a creature of the beneficiaries and a mere conduit for their income." Id.

This Court does not have to choose between the "less restrictive" or other views of a "business trust" because SAT is not an investment entity. Rather, the Trustee's declaration makes clear that people loan money to SAT and receive a promissory note fixing a rate of return and a maturity date. The form of the transaction is clearly not an investment in SAT for some equity participation, much less sharing in any up-side profit. Moreover, it does not appear that SAT receives any up-side profit notwithstanding the money SAIF purports to make off its loans (of SAT's borrowed funds). As already noted, SAT does not pay taxes.

Conclusion

For all the foregoing reasons, the Court finds and concludes that Secured Assets Trust (SAT) is not a "business trust" within the meaning of California law, federal tax law, or the Bankruptcy-Code. Therefore, it is not a "person" for purposes of eligibility to file a bankruptcy petition. Therefore, [*8] the motion of the OCC of SAIF, Inc. to dismiss this Chapter 11 case shall be, and hereby is, granted.

Counsel for the OCC shall prepare and lodge a separate form of judgment consistent with the foregoing within fifteen (15) days of the date of entry of this Order.

IT IS SO ORDERED.

DATED: MAY 12 2008

/s/ Peter W. Bowie

PETER W. BOWIE, Chief Judge

United States Bankruptcy Court

ORDER ON MOTION TO DISISS

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

SEE ATTACHED LIST.

Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on May 12, 2008.

/s/ Barbara J. Kelly

BARBARA J. KELLY, Judicial Assistant

EXHIBIT E

IN RE: HOSPITAL AUTHORITY OF CHARLTON COUNTY, Debtor; UNITED STATES TRUSTEE, Movant v. HOSPITAL AUTHORITY OF CHARLTON COUNTY, Respondent; HOSPITAL AUTHORITY OF CHARLTON COUNTY, Movant v. UNITED STATES TRUSTEE, Respondent

CHAPTER 9, CASE NUMBER 12-50305

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, WAYCROSS DIVISION

2012 Bankr. LEXIS 3042

July 3, 2012, Decided
July 3, 2012, Filed

COUNSEL: [*1] For Hospital Authority of Charlton County, Debtor: C. James McCallar, Jr., Tiffany Elizabeth Caron, McCallar Law Firm, Savannah, GA; Ronald B. Thomas, Thomas & Settle, Waycross, GA.

JUDGES: JOHN S. DALIS, United States Bankruptcy Judge.

OPINION BY: JOHN S. DALIS

OPINION

OPINION AND ORDER DENYING HOSPITAL AUTHORITY OF CHARLTON COUNTY'S MOTION TO CONVERT AND GRANTING U.S. TRUSTEE'S MOTION TO DISMISS

This matter is before me on the Motion to Dismiss (ECF No. 6) filed by the U.S. Trustee and the Motion to Convert from Chapter 9 to Chapter 11 (ECF No. 7) filed by the Hospital Authority of Charlton County ("Hospital Authority"). The parties agree that the Hospital Authority is not eligible for chapter 9, but the parties differ in their theories. According to the U.S. Trustee, the Hospital Authority is not eligible to be a debtor under chapter 9 because the Bankruptcy Code requires specific state authorization for an entity to file chapter 9, and the state of Georgia explicitly prohibits authorities created pursuant to state law from filing a petition for debt relief. See *11 U.S.C. § 109(c)(2)*; *O.C.G.A. § 36-80-5*. According to the Hospital Authority, it is not eligible for chapter 9 because it is not a "municipality" as [*2] required by *11 U.S.C. § 109(c)(1)*. See *11 U.S.C. § 101(40)* (defining "municipality" to mean a "political subdivision or public agency or instrumentality of a State").

The Hospital Authority seeks to convert the case to chapter 11. However, the U.S. Trustee argues that the Hospital Authority is not eligible for chapter 11 because it is a "governmental unit," and therefore not a "person" entitled to chapter 11 relief. See *11 U.S.C. §§ 109(d)*, *101(41)*. A hearing was held on May 29, 2012, after which the parties submitted briefs outlining their positions. After reviewing the briefs, and as a matter of law, the Motion to Convert is denied and the Motion to Dismiss is granted for the reasons that follow.

FINDINGS OF FACT

The state of Georgia's "Hospital Authorities Law" provides for the creation and operation of hospital authorities in cities and counties within the state. *O.C.G.A. §§ 31-7-70 to 31-7-96*. According to the law, upon adoption of a resolution by a county or municipal corporation's governing body declaring there is a need for such authority, each hospital authority shall be a "public body corporate and politic" and shall consist of a board appointed by the governing body of the [*3] county or municipal corporation in which it is located. *O.C.G.A. § 31-7-72*. The board members "shall receive no compensation for their services, . . . but may be reimbursed for their actual expenses . . . ." *O.C.G.A. § 31-7-74*. In addition, hospital authorities "shall be granted the same exemptions and exclusions from taxes as are now granted

to cities and counties for the operation of [similar] facilities." *O.C.G.A. § 31-7-72 (e) (1).*

The functions and powers of hospital authorities are as follows:

> Every hospital authority ***shall be deemed to exercise public and essential governmental functions*** and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including, but without limiting the generality of the foregoing, the following powers:
>
> (1) To sue and be sued;
>
> (2) To have a seal and alter the same;
>
> (3) To make and execute contracts and other instruments necessary to exercise the powers of the authority;
>
> (4) To acquire by purchase, lease, or otherwise and to operate projects;
>
> (5) To construct, reconstruct, improve, alter, and repair projects;
>
> (6) To sell to others, or to lease to others . . . , any lands, buildings, structures, [*4] or facilities . . . . In the event a hospital authority undertakes to sell a hospital facility, such authority shall, prior to the execution of a contract of sale, ***provide reasonable public notice of such sale and provide for a public hearing to receive comments from the public concerning such sale***. . . .
>
> (7) To lease . . . for operation by others any project, provided that the authority shall have first determined that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community . . . ;
>
> (8) To extend credit or make loans to others for the planning, design, construction, acquisition, or carrying out of any project . . . ;
>
> (9) To acquire, accept, or retain equitable interests, security interests, or other interests in any property, real or personal, by mortgage, assignment, security agreement, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;
>
> (10) To establish rates and charges for the services and use of the facilities of the authority;
>
> (11) To accept [*5] gifts, grants, or devises of any property;
>
> (12) To acquire by the exercise of the ***right of eminent domain*** any property essential to the purposes of the authority;
>
> (13) To sell or lease within 20 years after the completion of construction of properties or facilities operated by the hospital authority where grants of financial assistance have been received from federal or state governments, after such action has first been approved by the department in writing;
>
> (14) To exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein;
>
> (15) To mortgage, pledge, or assign any revenue, income, tolls, charges, or fees received by the authority;
>
> (16) To ***issue revenue anticipation certificates*** or other evidences of indebtedness for the purpose of providing funds to carry out the duties of the authority; provided, however, that the maturity of any such indebtedness shall not extend for more than 40 years;
>
> (17) To borrow money for any corporate purpose;
>
> (18) To appoint officers, agents, and employees;
>
> (19) To make use of any facilities afforded by the federal government or any agency or instrumentality thereof;
>
> (20) To receive, from the governing body of political [*6] subdivisions issuing the same, proceeds from the sale of general obligation bonds or other county obligations issued for hospital authority purposes;
>
> (21) To exercise any or all powers now or hereafter possessed by private corporations performing similar functions;

> (22) To make plans for unmet needs of their respective communities;
>
> (23) To contract for the management and operation of the project by a professional hospital or medical facilities consultant or management firm. . . .
>
> (24) To provide management, consulting, and operating services . . . ;
>
> (25) To provide financial assistance to individuals for the purpose of obtaining educational training in nursing or another health care field if such individuals are employed by, or are on an authorized leave of absence from, such authority or have committed to be employed by such authority upon completion of such educational training; . . . ;
>
> (26) To exercise the same powers granted to joint authorities in subsection (f) of Code *Section 31-7-72*; and
>
> (27) To form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through [*7] such networks . . . .

O.C.G.A. § 31-7-75 (emphasis added).

In addition, hospital authorities are prohibited from "operat[ing] or construct[ing] any project for profit." *O.C.G.A. § 31-7-77*. Instead, hospital authorities must adjust their prices to produce only enough revenue to cover costs with reasonable reserves. Id. They are authorized to issue revenue anticipation certificates, which are "declared to be issued for ***an essential public and governmental purpose*** and, together with interest thereon and income therefrom, shall be exempt from all taxes." *O.C.G.A. § 31-7-79* (emphasis added).

Although a hospital authority does not have the power to tax, cities and counties can contract with hospital authorities to provide medical care to indigent residents, and the cities and counties are authorized to pay for such services from the general fund or by levying an ad valorem tax. *O.C.G.A. §§ 31-7-84(a)*, *31-7-85*. Finally, the dissolution of a hospital authority requires joint action of the authority's board of trustees and the county's governing body. *O.C.G.A. § 31-7-89*. Upon dissolution, a hospital authority cannot, in the absence of other specific legislation, convey any of its property to a [*8] private person, association, or corporation. Id.

In 1970, the Charlton County Board of Commissioners adopted an ordinance ("Ordinance") establishing the Hospital Authority. (ECF No. 58-1 at 3-6.) In accordance with the Hospital Authorities Law, the Ordinance created a "public body corporate and politic" consisting of "nine trustees to be appointed by resolution of the governing body of Charlton County." (Id. at 3.) According to the Ordinance, the Board of Commissioners "deem[ed] it to be in the best interest of Charlton County and the interest and general welfare of the citizens residing therein" to activate the Hospital Authority. (Id. at 4.)

The Hospital Authority filed a petition for chapter 9 bankruptcy on April 30, 2012. (ECF No. 1.) Shortly thereafter, on May 3, 2011, the U.S. Trustee filed the Motion to Dismiss and the Hospital Authority filed the Motion to Convert, the motions at issue here.

CONCLUSIONS OF LAW

According to *11 U.S.C. § 109(c)(2)*, an entity may be a debtor under chapter 9 only if, among other things not relevant here, the entity is "specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law . . . ." *11 U.S.C. § 109(c)(2)*. [*9] Georgia law states that

> [n]o county, municipality, school district, authority, division, instrumentality, political subdivision, or public body corporate created under the Constitution or laws of this state shall be authorized to file a petition for relief from payment of its debts as they mature or a petition for composition of its debts under any federal statute providing for such relief or composition or otherwise to take advantage of any federal statute providing for the adjustment of debts of political subdivisions and public agencies and instrumentalities.

O.C.G.A. § 36-80-5(a). Accordingly, the U.S. Trustee argues that the Hospital Authority does not have specific authorization to file chapter 9 bankruptcy as required by *11 U.S.C. § 109(c)(2)*.

The Hospital Authority states in its Motion to Convert that "[p]ursuant to *O.C.G.A. §36-80-5*, it would appear that a Chapter 9 is not applicable." (ECF No. 7 at 1.) Instead, the Hospital Authority contends that it is eligible for chapter 11 relief because "pursuant to [*O.C.G.A.] § 31-7-75(21)*, hospital authorities have the power, 'to exercise any or all powers now or hereafter possessed by private corporations performing similar functions.' [*10] Since a private corporation has the power to file a Chapter 11 and the [Hospital Authority] may exercise

any or all powers of a private corporation, [the Hospital Authority] is permitted to file a case under Chapter 11 of the Bankruptcy Code." (ECF No. 7 at 1.)

Obviously, an entity cannot convert a bankruptcy case to a different chapter unless it is eligible to be a debtor under the new chapter. See *11 U.S.C. §§ 706, 1307* (stating that a case may not be converted to another chapter unless the debtor may be a debtor under such chapter). Therefore, whether this case can be converted to chapter 11 turns on whether the Hospital Authority is eligible to be a debtor under chapter 11.[1]

> 1 Because I find that the Hospital Authority is not eligible to be a debtor under chapter 11, I do not reach the issue of whether conversion from chapter 9 to chapter 11 is procedurally possible without a Bankruptcy Code provision that provides for conversion of a case from chapter 9 to another chapter.

An entity is eligible for chapter 11 if it is "a person that may be a debtor under chapter 7." *11 U.S.C. § 109(d)*. The term 'person' includes individual, partnership, and corporation, but does not include governmental [*11] unit . . . ." *11 U.S.C. § 101(41)*.

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or ***instrumentality of*** the United States . . . , a State, a Commonwealth, a District, a Territory, ***a municipality***, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27) (emphasis added).

A county is a political subdivision of a state. *O.C.G.A. § 50-15-1(1)* (defining "political subdivision" to include counties); *In re Cnty. of Orange, 183 B.R. 594, 602 (Bankr. C.D. Cal. 1995)*. A political subdivision of a state is a municipality. *11 U.S.C. § 101(40)* ("'municipality' means political subdivision . . . of a State"). Therefore, Charlton County is a municipality. Accordingly, if the Hospital Authority is an instrumentality of Charlton County, then it is a governmental unit, and therefore not eligible to be a debtor under chapter 11.

The Bankruptcy Code does not define "instrumentality." Therefore, principles of statutory construction dictate that I apply the plain meaning of the word. See *In re Yates Dev., Inc., 256 F.3d 1285, 1288-89 (11th Cir. 2001)*. However, dictionary definitions of "instrumentality" [*12] are too general to be instructive. See Black's Law Dictionary (9th ed. 2009) (defining "instrumentality" as "[a] thing used to achieve an end or purpose" or "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body"); Oxford English Dictionary (2d ed. 1989) ("instrumentality" means "the fact or function of serving or being used for the accomplishment of some purpose or end; agency"); see also *In re Las Vegas Monorail, Co., 429 B.R. 770, 777 (Bankr. D. Nev. 2010)* (stating that "no unique or canonical meaning of 'instrumentality' exists").

Because the Bankruptcy Code is ambiguous with respect to the definition of "instrumentality," I must consult extrinsic aids to determine Congress's intent. Legislative history can be a useful guide when a statute's purpose is obscured by ambiguity. *Burlington N. R.R. Co. v. Okla. Tax Comm., 481 U.S. 454, 461, 107 S. Ct. 1855, 95 L. Ed. 2d 404, (1987)*. The legislative history of *§ 101* states,

> Paragraph (21) defines "governmental unit" in the broadest sense. The definition encompasses the United States, a State, Commonwealth, District, Territory, municipality, or foreign state, and a department, agency, or instrumentality of any [*13] of those entities. "Department, agency, or instrumentality" does not include an entity that owes its existence to State action, such as the granting of a charter or a license but that has no other connection with a State or local government or the Federal Government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function.

S. Rep. No. 95-989, at 24 (1978). Unfortunately, the definition of "instrumentality" remains vague. It is unclear what constitutes an "active" relationship with government or when an entity is considered to be "carrying out some governmental function."

There is little case law dealing with the issue of whether an entity is an instrumentality for establishing if it qualifies as a governmental unit. In 2010, the Nevada bankruptcy court held that the Las Vegas Monorail Company, which was formed under general nonprofit corporation statutes, was not a governmental unit because it was not an instrumentality of the State. *Las Vegas Monorail, 429 B.R. 770*. Therefore, the court held that the company was eligible for chapter 11 relief. Id.

In reaching its decision, the court noted that "statutory [*14] or caselaw guidance on what constitutes an instrumentality, or even a municipality, is scarce." *Id. at*

775. As a result, the court examined cases that addressed whether entities were eligible for chapter 9 as municipalities.[2] The court identified three factors that affect whether an entity is considered a municipality: 1) the extent to which the entity possesses traditional government powers or attributes; 2) the extent of control over the entity possessed by the city, state, or county; and 3) the state's classification of the entity. *Id. at 795*.

> 2 According to the Las Vegas Monorail court, "[t]he definition of 'municipality' is somewhat redundant in that it includes an 'instrumentality of the State,' which is a phrase the Code already uses in *Section 101 (27)*'s definition of 'governmental unit.'" *429 B.R. at 775, n.6*.

Here, however, the question is not whether the Hospital Authority is a municipality, but rather whether it is a governmental unit. The definition of "governmental unit" is broader than the definition of "municipality." If an entity is a municipality, then it must be a governmental unit. The converse is not true. An entity may be a governmental unit but not a municipality. [*15] See *11 U.S.C. § 101(27)* (defining "governmental unit" to include "a municipality" and other entities, including instrumentalities of a State or municipality). Nonetheless, I find that the factors identified by the *Las Vegas Monorail* court are relevant in determining whether an entity is a governmental unit.

Traditional Government Attributes

The first factor examines whether the entity possesses attributes that traditional government entities typically possess. Attributes that tend to establish that an entity is governmental in nature include: that it is a creature of specific legislative enactment, that it has sovereign immunity, that it may exercise the right of eminent domain, that it is tax-exempt, that it has the power to tax, and that it receives tax revenues. See, e.g., *Crosby v. Hosp. Auth. of Valdosta and Lowndes Cnty., 93 F.3d 1515, 1525 (11th Cir. 1996)*; *Las Vegas Monorail, 429 B.R. 770*; *In re Westport Transit Dist., 165 B.R. 93, 96 (Bankr. D. Conn. 1994)*; *In re Pleasant View Utility Dist. Of Cheatham Cnty., 24 B.R. 632, 635 (Bankr. M.D. Tenn. 1982)*; *In re N. and S. Shenango Joint Mun. Auth., 14 B.R. 414, 415-16 (Bankr. W.D. Pa. 1981)*; *Cox Enters., Inc. v. Carroll City/Cnty. Hosp. Auth., 247 Ga. 39, 273 S.E.2d 841, 845 (Ga. 1981)*.

Here, [*16] the Hospital Authority is a creature of specific legislative enactment. It was created pursuant to the Hospital Authorities Law. The Hospital Authority can exercise the right of eminent domain to acquire property. It is exempt from paying taxes in the same way cities and counties are exempt from taxes for the operation of similar facilities. It is authorized to receive tax revenues from the County's general fund or from an ad valorem tax.

The Hospital Authority is also authorized to issue tax-exempt revenue anticipation certificates which are declared to be issued for an essential public and governmental purpose. In County of Orange, the court explained that the development of revenue bond financing, like the revenue anticipation certificates the Hospital Authority is authorized to issue,

> brought into existence a new type of municipality known as an authority. In some instances they are called commissions or districts, but essentially they are all of the same character that is, a public agency authorized to construct or acquire a revenue-producing utility and to issue bonds for such purpose payable solely out of the revenues derived from the utility."

183 B.R. at 602.

At hearing, the Hospital [*17] Authority argued that it is not a governmental unit because it does not have sovereign immunity. However, this is only one of many traditional government attributes that an entity may possess. In fact, courts have found that certain entities are municipalities or governmental units even though the entities did not have sovereign immunity. See *Crosby, 93 F.3d at 1519-20*; *Cox Enters., 273 S.E.2d at 845-46*; see also *Thomas v. Hosp. Auth., 264 Ga. 40, 440 S.E. 2d 195, 196 (Ga. 1994)* (holding that a hospital authority is an instrumentality of the government and not entitled to sovereign immunity).

The state of Georgia has "clothed . . . [hospital] authorities with certain necessary governmental qualities. Although hospital authorities may not possess all of the powers enjoyed by municipalities or by the State, they enjoy numerous governmental powers." *Crosby, 93 F. 3d at 1525* (citations omitted).

Extent of the County's Control

The second factor examines "whether the authority or agency is subject to control by public authority, state or municipal." *In re Green Cnty. Hosp., 59 B.R. 388, 389 (S.D. Miss. 1986)* (quoting *Ex Parte York Cnty. Natural Gas Auth., 238 F. Supp. 964, 976 (W.D.S.C. 1965)*). A board [*18] of supervisors appointed by a public authority demonstrates that the government possesses some amount of control over the entity. See *Westport Transit Dist., 165 B.R. 93, 95-96*; *In re Barnwell Cnty. Hosp., No. 11-06207, 2012 Bankr. LEXIS 2340, 2012 WL 1890260, at *7 (Bankr. D.S.C. 2012)*; cf. *In re Ellicott*

Sch. Bldg. Auth., 150 B.R. 261, 264 (Bankr. D. Colo. 1992) (finding there was no governmental control when the government did not have any power to appoint the authority's directors, and the authority's articles of incorporation provided that the directors could not be elected officials or employees of the school district).

Here, according to the Ordinance, the Hospital Authority "shall consist of a board of nine trustees to be appointed by resolution of the governing body of Charlton County." (ECF No. 58-1 at 3.) Furthermore, courts in Georgia have held that members of a hospital authority's board of trustees are public officials. *United States v. Wingo, 723 F. Supp. 798, 803-05 (N.D. Ga. 1989)*; *Richmond Cnty. Hosp. Auth. v. Richmond Cnty., 255 Ga. 183, 336 S.E.2d 562, 567 (Ga. 1985)*.

Governmental control also exists when a public authority has powers related to the dissolution of an entity or the disposition of assets. [*19] See *Cox Enters., 273 S.E.2d at 845*; see also *In re Kent, 190 B.R. 196, 204 (Bankr. D.N.J. 1995)* (considering whether the state has authority to dissolve the entity and who receives assets upon dissolution when determining whether entity was a governmental unit for *§ 523(a)(7)* purposes). Here, the Hospital Authority must provide public notice and a hearing prior to the sale of any hospital facility. In addition, the Hospital Authority may be dissolved only by joint action of the board of trustees and the Charlton County Board of Commissioners. Upon dissolution, the Hospital Authority cannot convey any of its property to a private person, association, or corporation.

The Hospital Authority argues that it is not controlled by Charlton County because the County does not control the daily operations of the facility. (ECF No. 47 at 6.) However, in Green County Hospital, the court held that a county hospital was subject to control by a public authority, the county's board of supervisors, even though the hospital controlled its own day-to-day operations. See *59 B.R. at 390*. The court found that the board of supervisors' control of issues relating to property management was sufficient to find [*20] that the hospital was a municipality. Id.

Stats Classification

The final factor considers the state's own classification or description of the entity. When an entity is created as a "body corporate and politic," courts generally find that the entity is a governmental unit. See *Westport Transit Dist., 165 B.R. at 95-96*; *In re Sullivan Cnty. Reg'l Refuse Disposal Dist., 165 B.R. 60, 73 (Bankr. D.N.H. 1994)*, *Pleasant View Utility Dist. Of Cheatham Cnty., 24 B.R. at 635*.

Here, the Hospital Authority is a "public body corporate and politic," which was created because the Charlton County Board of Commissioners "deem[ed] it to be in the best interest of Charlton County and the interest and general welfare of the citizens residing therein." (ECF No. 58-1 at 3-4.) In addition, Georgia's Hospital Authorities Law states that all hospital authorities "shall be deemed to exercise public and essential governmental functions." *O.C.G.A. § 31-7-75*.

According to the Eleventh Circuit, "the legislature has unambiguously stated that [hospital authorities] are "public bodies" which exercise "public and essential governmental functions." *Crosby, 93 F.3d at 1525* (citations omitted). Moreover, the Supreme Court [*21] of Georgia has held that hospital authorities are instrumentalities created by the State and county for a special purpose. See *Thomas, 440 S.E. 2d at 196*.

The Hospital Authority is a Governmental Unit

After weighing the three factors, I find that the Hospital Authority is a governmental unit because it is an instrumentality of Charlton County. The Hospital Authority possesses a number of traditional government attributes, including the power of eminent domain, exemption from taxation, and the ability to receive tax revenues. The Hospital Authority is subject to control by Charlton County because the County appoints the board of trustees and must authorize the Hospital Authority's dissolution. It is also clear, as evidenced by the language of the Hospital Authorities Law, that the state of Georgia intends for all hospital authorities to be considered governmental units.

The Hospital Authority argues that it "essentially stands in the shoes of a private hospital." (ECF No. 47 at 5.) According to the Hospital Authority, because it acts like a private hospital when it treats patients, charges and collects for services, buys and sells property, and deals with physicians, it does not have traditional [*22] government powers. (Id.) While I agree that the Hospital Authority does act, in many ways, like a private hospital, the Hospital Authority ignores the differences between the Hospital Authority and a private hospital. Unlike a private hospital, the Hospital Authority has some traditional government attributes, is subject to control by Charlton County, and is classified by the state as a governmental unit. When an entity possesses powers that are the same as those afforded private companies, "it does not transform an otherwise governmental entity into a private actor . . . ." *Crosby, 93 F.3d at 1525*.

Furthermore, the Hospital Authority fits the description provided by the United States Supreme Court in the context of the Foreign Sovereign Immunities Act:

> Increasingly during this century, governments throughout the world have es-

> tablished separately constituted legal entities to perform a variety of tasks. The organization and control of these entities vary considerably, but many possess a number of common features. A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies [*23] that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 624, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983).

Accordingly, the Hospital Authority is ineligible for chapter 9 relief because the state of Georgia has not specifically authorized it to file for relief under chapter 9. Additionally, the Hospital Authority is ineligible for chapter 11 relief because it is a governmental unit, and therefore not a person eligible to be a debtor under chapter 11.

The reality is that not every entity is entitled to relief from its debts through bankruptcy. Some entities, like the Hospital Authority, may not be eligible for chapter 9 or chapter 11 relief. "Congress [*24] did not intend that the Bankruptcy Code could solve all problems, least of all the financial problems of governmental units." In re N. Mariana Islands Ret. Fund, No. 12-00003, slip op. at 7 (Bankr. D.N.M.I. June 13, 2012).

ORDER

IT IS THEREFORE ORDERED that the Hospital Authority of Charlton County's Motion to Convert from Chapter 9 to Chapter 11 is **ORDERED DENIED**, and

FURTHER ORDERED that the U.S. Trustee's Motion to Dismiss is **GRANTED**.

/s/ John S. Dalis

JOHN S. DALIS

United States Bankruptcy Judge

Dated at Brunswick, Georgia,
this 3rd day of July, 2012.

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

In re: SANTA YSABEL RESORT AND CASINO, Debtor and Debtor in Possession.	Case No. 12-09415-PB11 **PROOF OF SERVICE** Date: September 4, 2012 Time: 11:00 a.m. Place: 325 West F Street Dept. 4, Courtroom 328 Judge: Hon. Peter W. Bowie

I, Patrice C. Gonzalez, declare as follows:

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is 555 West Fifth Street, Suite 4000, Los Angeles, California 90013.

A true and correct copy of the foregoing document entitled (*specify*): **RESPONSE OF THE YAVAPAI-APACHE NATION TO OPPOSITION TO MOTION TO DISMISS BANKRUPTCY CASE FOR LACK OF ELIGIBILITY AND AUTHORITY; APPENDIX OF UNPUBLISHED DECISIONS IN SUPPORT OF RESPONSE OF THE YAVAPAI-APACHE NATION TO OPPOSITION TO MOTION TO DISMISS BANKRUPTCY CASE FOR LACK OF ELIGIBILITY AND AUTHORITY; and APPENDIX CONTAINING FACTUAL RECORD IN SUPPORT OF RESPONSE OF THE YAVAPAI-APACHE NATION TO OPPOSITION TO MOTION TO DISMISS BANKRUPTCY CASE FOR LACK OF ELIGIBILITY AND AUTHORITY** will be served or was served in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): The foregoing document will be served by the court via NEF and hyperlink to the document. On **August 27, 2012**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

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2. SERVED BY UNITED STATES MAIL: On **August 27, 2012**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows.

SEE ATTACHED SERVICE LIST.

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling Local Bankruptcy Rules, on **August 27, 2012**, I served the

following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Served by Overnight Mail

The Honorable Peter W. Bowie
United States Bankruptcy Court
Jacob Weinberger U.S. Courthouse
325 West F Street, Room 328
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

August 27, 2012	Patrice C. Gonzalez	/s/ Patrice C. Gonzalez
Date	Printed Name	Signature

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