COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	FILED IN THE SUPREME COURT JUN 25 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
District Court, City And County Of Denver Hon. Robert S. Hyatt, 05CV1143 Colorado Court of Appeals, Hon. Steven L. Bernard, Hon. Russell E. Caparelli, and Hon. Karen S. Metzger (sitting by assignment of the Chief Justice), Case No. 07CV0582	
STATE OF COLORADO ex rel. JOHN W. SUTHERS, Attorney General, and LAURA E. UDIS, Administrator, Uniform Consumer Credit Code, Respondents/Cross-Petitioners, v. CASH ADVANCE and PREFERRED CASH LOANS, Petitioners/Cross-Respondents.	▲COURT USE ONLY▲
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PETITIONERS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g):

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.___, p.___), not to an entire document, where the issue was raised and ruled on.

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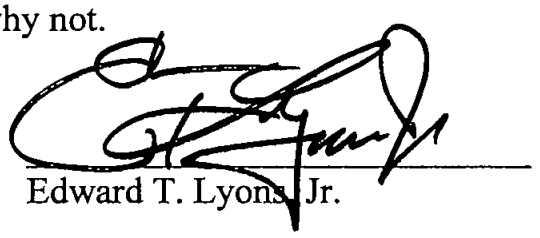
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.



Edward T. Lyons, Jr.

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The Petitioners, Miami Nation Enterprises d/b/a Cash Advance ("MNE") and SFS, Inc. d/b/a Preferred Cash Loans ("SFS"), which are entities of the federally-recognized Miami Tribe of Oklahoma and the Santee Sioux Nation, respectively, (collectively, "Tribal Entities"), submit their Opening Brief in the present proceeding on certiorari to review the July 10, 2008 opinion of the Court of Appeals in this case, as modified on denial of rehearing, 205 P.3d 389.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This Court granted certiorari to review the judgment of the Court of Appeals on the following issues in response to the petition for a writ of certiorari filed by the Petitioners Tribal Entities.

I. Whether the Court of Appeals erred in holding petitioners do not have tribal sovereign immunity from Colorado trial court orders compelling them to produce information regarding their eligibility for tribal sovereign immunity.

II. Whether the Court of Appeals contravened Congress's plenary power over Indian tribes by implementing its own test to determine if a tribe's commercial enterprise is sufficiently connected to the tribe such that the enterprise is protected by tribal sovereign immunity.

III. Whether the Court of Appeals erred by stating that tribal officers are not protected by tribal sovereign immunity when acting outside state authority.

IV. Whether the Court of Appeals erred by stating petitioners may have waived sovereign immunity against Colorado's enforcement actions by including arbitration clauses in loan agreements with Colorado consumers.

STANDARD OF APPELLATE REVIEW

The resolution of each of the foregoing issues calls for application of the United States Constitution and federal Indian law and presents questions of law involving immunity which this Court reviews de novo. *City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006); *North Colorado Medical Center, Inc. v. Nicholas*, 27 P.3d 828, 838 (Colo. 2001).

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

This case is about the relationship between the State of Colorado and our nation's Indian tribes, and the means for resolving disputes between them. It is about whether the State will be required to honor the status of Indian tribes as sovereign governmental entities as mandated by the United States Constitution and solemn treaties, or will be permitted to treat Indian tribes as something less, akin to a private membership club. It is also about the rule of law, and whether the State will honor the United States Constitution and federal court rulings on tribal sovereignty, or continue the jurisprudential secession begun by the courts below.

The Petitioners before the Court are wholly-owned subdivisions of two federally-recognized Indian Tribes, the Santee Sioux Nation and the Miami Tribe of Oklahoma. Over a century ago, these Tribes were stripped of their economic vitality and forced to relocate to remote wastelands that are incapable of sustaining these Tribes' respective populations. The Miami and Santee are not blessed with lands that harbor valuable minerals or rich soil for agriculture, nor are they located in populated areas that harbor economic opportunities such as gaming. Though these Tribes have miraculously managed to survive wars, famine, disease, and less than benign neglect and over the decades, mere survival has never been their objective, much less an acceptable result. And, though countless valiant efforts to reverse their fortunes have failed, these Tribes have continuously sought to provide a better way of life for their members.

In recent years the Internet has offered the Tribes a meaningful opportunity to participate in our nation's economy despite their desolate locations. One such opportunity that each of these Tribes took advantage of is the business of making small, unsecured loans to consumers via the Internet. Sometimes referred to as "payday" lending, this is a business that is permitted across the country, including

"payday" lending, this is a business that is permitted across the country, including in Colorado.[1]

The present case began when the Respondents here, the Colorado Attorney General and the Administrator of the Colorado Uniform Consumer Credit Code (collectively, the "State"), commenced an action in the Denver district court to enforce administrative subpoenas as a first step in an admitted effort to force the Tribes out of business nationwide. The Tribal Entities appeared specially and moved to dismiss the proceeding based on their sovereign immunity from suit and the trial court's lack of subject matter jurisdiction. (R.Supp., pp. 4, 22.) At the same time, from the outset of the proceeding, the Tribal Entities have offered to

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[1] Though the State characterizes the Tribal Entities' lending business as "usurious," the interest rates charged by the Tribal Entities are far less costly than the fees that the State allows banks to charge for short-term loans that result from an overdrawn bank account if such fees were converted to an annualized interest rate. The FDIC reports that the average APR on a $20.00 two-week debit overdraft is 3,520%; and that the average APR on a $60.00 two-week ATM overdraft equals 1,173%. *FDIC Study of Bank Overdraft Programs* 79 (Nov. 2008).http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf. The Community Financial Services Association of America reports that the current permissible APR for a $100.00 payday cash advance in the State of Colorado is 521.43%. http://www.cfsa.net/knowyourfee/index.html. Furthermore, a recent study indicates that nearly 90% of the payday borrowers surveyed said they were either "very satisfied" or "somewhat satisfied" with the loan transaction. Gregory Elliehuasen, An Analysis of Consumers' Use of Payday Loans, George Washington Univ. School of Business 41 (Jan. 2009), reprinted at http://www.business.gwu.edu/research/centers/fsrp/pdf/m41.pdf.

engage in a government-to-government negotiated resolution of the matter. Rather than engage in sovereign-to-sovereign dispute resolution, however, the State has chosen instead to wage a protracted, caustic assault on the Tribal Entities' status, replete with false allegations and innuendo.

This began when the trial court issued ex parte orders enforcing the State's administrative subpoenas and, thereafter, citations for contempt when the subpoenas were not obeyed. (R. vol. 1, pp. 27, 52.) The State's all-out assault on tribal sovereignty continued throughout the time the case was in the trial court, ultimately leading to the State seeking, and the court issuing, warrants for the arrest of two tribal officials, Don Brady and Robert Campbell, who had submitted affidavits in support of the Tribal Entities' motion to dismiss. (R. vol. 6, pp. 10-11, 25; Supp. p. 41). Although the trial court stayed the arrest warrants pending the outcome of the appeal now before this Court (R.Supp., pp. 109, 111), the warrants overhang the case like a blade ready to fall.

In the meantime, acting in good faith, and in order to substantiate their claims of sovereign immunity from suit, the Tribal Entities voluntarily agreed to respond to limited discovery on that jurisdictional issue. The State responded by propounding an overbroad 107-category request for production of documents, the vast majority of which were irrelevant to the issue of sovereign immunity and

instead sought to pry into the internal affairs of the Tribes. (R. vol. 1, pp. 240-295.) Although the Tribal Entities objected to the requests as excessive and beyond the scope of the issue of sovereign immunity, in the interest of resolving the matter, they provided the State with documents relevant to the issue of sovereign immunity. (R. vol. 2, pp.377-378.)[2]

Not satisfied with this, the State subsequently moved the court to compel the Tribal Entities to produce the remaining documents contained in the 107-category request. (R. vol. 1, p.219; R. vol. 2, pp.379-80.) The trial court granted in part and denied in part the motion to compel. (R. vol. 2, p.365.) Thereafter, the Tribal Entities provided the State with over 3,000 pages of additional documents establishing beyond cavil their immunity from suit. (R. vol. 3, p.744)

Still unsatisfied the State requested sanctions against the Tribal Entities, alleging the Tribal Entities failed to comply with the trial court's orders. (R. vol. 3, p.636.) The trial court denied the Motion, finding that the Tribal Entities had substantially complied "with those discovery requests related to the issue of

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[2] Some of the documents the Tribal Entities produced to the State in discovery were later made a part of the record before the trial court in connection with a motion for relief filed by the Tribal Entities. (R. vol. 2, pp. 373-384.) Those documents, which clearly demonstrate that the Tribal Entities are in fact doing business as arms of federally-recognized Indian tribes, were exhibits to the motion. (*Id.*, pp. 386-520.)

sovereign immunity," and had provided the State with sufficient evidence to respond to the Tribal Entities' Motion to Dismiss. (R. vol. 3, p.935.)

The trial court then denied the Tribal Entities' motion to dismiss, holding that as a matter of law, "the existence or non-existence of tribal sovereign immunity in this matter is not determinative of this Court's power to proceed." (R. vol. 5, p.1417.) The court reasoned that tribal sovereign immunity does not bar the State of Colorado from "investigat[ing] and prosecut[ing] violations of its own laws, committed within the State of Colorado, by tribal entities acting outside of tribal lands." (R. vol. 5, p.1417.)

The Tribal Entities appealed the trial court's order to the Court of Appeals as an immediately appealable order involving sovereign immunity, which would otherwise effectively be lost. *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 405-06 (Colo. App. 2004), *cert. denied* (Jan. 10, 2005). Notably, it was after this appeal was filed that the State saw fit to obtain the aforementioned warrants for the arrest of tribal officials. (R. vol. 5, p. 1422; vol. 6, pp. 10-11.)

The Court of Appeals reversed and remanded the trial court's order with instructions, correctly holding as a preliminary matter that the doctrine of tribal sovereign immunity precludes any action, whether criminal, civil or injunctive, that

the State might bring in Colorado courts against the Santee Nation and the Miami Tribe, as well as tribal entities which function as arms of these Indian tribes, to enforce state lending laws. 205 P.3d at 397, 398-99. This part of the appeals court's decision is consistent with the Supreme Court's holding in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). However, the remaining parts of the appeals court's order, and the instructions accompanying the remand of the case, constitute a drastic departure from controlling federal law on the issue of sovereign immunity.

First, contrary to established federal law, the court held that the trial court has "authority to compel tribes to produce documents, particularly when the purpose of producing the documents is to enforce the law and protect the constitutional rights of defendants." *Id.* at 402. Next, in determining whether a tribal organization "is entitled to share in tribal immunity," the court erroneously promulgated an eleven-factor test, key parts of which are contrary to binding United States Supreme Court precedent on the issue. *Id.* at 406. Third, although the appeals court recognized that tribal sovereign immunity also bars claims for damages against tribal officers, the court erroneously held that tribal officers are not protected by immunity when they act contrary to state law. *Id.* at 406 - 07.

Finally, the court mistakenly assumed that an arbitration clause contained in a contract between the Tribal Entities and their customers or other Tribal dealings with third parties could constitute a waiver of sovereign immunity as to the State (thereby allowing the State to maintain the case at bar). *Id.* at 407 – 08.

The Court of Appeals, while paying lip service to the Tribes' status as sovereign governments, all but eradicated the doctrine of tribal sovereign immunity in this jurisdiction, ruling for the first time in the jurisprudential history of this Country that the sovereign immunity of Indian tribes and tribal officials can be unilaterally abrogated by a state. For the reasons set forth below, the decision of the Court of Appeals must be reversed.

II. STATEMENT OF THE FACTS

The Indian tribes involved in this case are the federally-recognized Santee Sioux Nation ("Santee Nation") and the Miami Tribe of Oklahoma (also known as the "Miami Nation"). 70 Fed. Reg. 71,194 (Nov. 25, 2005); 67 Fed. Reg. 46,328 (July 12, 2002); (R. vol. 2, pp.395, 401, 483-94; R.Supp., p.20, ¶¶ 3, 4; 38, ¶ 4.) Like any government, the Miami and Santee Nations strive to develop their economy in order to provide for the welfare of their people (R. vol. 2, pp.421, 424-39, 483). However, unlike state governments, the Miami and Santee Nations lack a tax base to provide a revenue base for their government and people. *See* Matthew

L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L.Rev. 759, 771-72 (2004).

In order to achieve the objectives of developing their economy and providing for the critical needs of their members, the Santee and Miami Nations must develop viable economic ventures to fund their governmental and social programs. *Id.* at 775. Thus, the Nations' respective Constitutions recognize the necessity of developing tribally-owned business to provide for the essential needs of their members, including housing, health care, education and law enforcement. (*see* R. vol. 2, p.424, § 1(k), 484 § 1.)

A. THE MIAMI TRIBE OF OKLAHOMA

The Miami Nation has a rich history that dates back prior to the 1600s. Its ancestral homelands are located in the States of Indiana, Illinois, Ohio, lower Michigan and lower Wisconsin. Like many Indian tribes that became the subject of the United States' removal policy, the Miami Nation was officially removed from their homelands in 1846, and many times thereafter. Finally, in 1936 the federal government formally recognized the Miami Nation pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501. The Miami Nation is governed by a Constitution and By-Laws that have been approved by the Secretary

of the Interior. 70 Fed. Reg. 71,194 (Nov. 25, 2005); (R. vol. 2, pp.395, 401, 483-94; R.Supp., p.20, ¶ 4.)

The Miami Nation headquarters is located on land that is held in trust by the United States for the benefit of the Miami Nation in rural northeastern Oklahoma (R.Supp., p.20 ¶ 3), far from major metropolitan areas (the nearest major city is Tulsa, Oklahoma, which is approximately ninety miles from the Miami Nation's headquarters). The area where the Miami Tribe is located has been designated by the United States Small Business Administration as a "Historically Underutilized Business Zone" or "HUBzone."[3]

Due to the Miami Tribe's relative geographic isolation, and lack of economic opportunities, coupled with dramatic decreases in federal funds over the past decade, the Tribe has been compelled to develop tribally-owned economic ventures in order to build a tribal economy and sustain itself, thereby fulfilling tribal and federal policies of promoting tribal economic development and self-sufficiency. (*See* R. vol. 2, pp. 466-67 §§ 101-102.)

The Miami Tribe, recognizing "a critical need for the development of economic activities . . . to provide for the well being of the citizens of the Miami Tribe," organized "Miami Nation Enterprises" or "MNE," as a wholly owned and

[3] *See* http://www.sba.gov/hubzone/section05d.htm

controlled Tribal entity. (R. vol. 2, pp.466-83 §§ 2(a), 101(a).) MNE "serves as an essential government function of the Miami Tribe of Oklahoma by allowing the Miami Tribe to provide directly for the development of tribal revenue-generating activities and to acquire property." (R. vol. 2, p.467 § 101(c).) MNE is wholly-owned by the Miami Nation and enjoys Miami Nation's sovereign immunity. (R. vol. 2, pp.473-74 §§ 302 (b)-(c), 481.) The profits from MNE enable the Miami Tribe to fund critical governmental services to its members, such as tribal law enforcement, poverty assistance, housing, nutrition, preschool, elder care programs, school supplies and scholarships. (*See* R. vol. 2, pp.466-80 §§ 101(b), 102(a)-(e), 305.)

The Miami Tribe, through MNE, transacts its Internet lending business under the trade name "Cash Advance." (R.Supp., p.20 ¶¶ 5, 7; R. vol. 2, pp.495-511, 512-14, 515-16, 517-20.) MNE d/b/a Cash Advance is governed by Miami tribal law, including Miami Tribe of Oklahoma's statutes governing Interest Rates and Loans and Cash Advance Services (R.Supp., p.20 ¶ 7; R. vol. 2, pp. 497-506 §§ 101-227) and Miami Business Regulatory Act (R. vol. 2, pp.509-11). The Tribe strictly regulates the lending activities in accordance with tribal law. (R. vol. 2, pp.509-11; R.Supp., p.20 ¶ 7.). MNE also complies with federal laws governing lending activities. (R.Supp., p.20 ¶ 7); *See, e.g.* 15 U.S.C. § 1604.

As part of its business, MNE accepts on-line applications for short-term loans from qualified individuals who desire to enter into loan transactions with MNE. (*See* R.Supp., p.20 ¶ 6.) All applications are approved by MNE on federal trust land under the sovereign jurisdiction of the Tribe. (*See* R.Supp., p.20 ¶¶ 6, 8.)

B. THE SANTEE SIOUX NATION

The Santee Sioux Nation (formerly the Santee Sioux Tribe of Nebraska) was uprooted many times from its aboriginal territory and was eventually relocated to Knox County, Nebraska, which is a rural region of the State of Nebraska. Located in this isolated rural region of Nebraska, the Santee Sioux Reservation is severely economically depressed, and in a "HUBzone."[4]

The Santee Nation is governed by a Constitution that has been approved by the Secretary of the Interior. (R. vol. 2, pp.421-51; R.Supp., p.37, ¶ 2.) The Santee Nation is organized "for the common welfare of ourselves and our posterity and to insure domestic tranquility . . . to form businesses and other organizations . . . and establish this constitution according to the act of Congress, dated June 18, 1934 (48 Stat. 984)." (R. vol. 2, p.421.)

The Santee Nation's governing body is the "Tribal Council," which consists of eight elected members. (R. vol. 2, p.422 § 1.) The Santee Nation's Constitution

[4] See http://map.sba.gov/hubzone/hzqry.asp?IR=1525834

vests the tribal council with the authority to "charter subordinate organizations for economic purposes" (R. vol. 2, p.424 § 1(k)), and to "safeguard, regulate and promote the peace, safety, morals and general welfare of the nation by regulating the conduct of trade . . . ." (R. vol. 2, p.424 § 1(i)).

The Santee Nation, acting through its Tribal Council, created SFS, Inc. ("SFS"), which is a wholly-owned and controlled tribal corporation of the Santee Sioux. (R. vol. 2, pp.408-20, 452-63.) SFS's sole purpose is to generate revenue to help fund the Santee Sioux's governmental operations and social welfare programs. (R. vol. 2, p.410 ¶ 3.1.) SFS's Articles of Incorporation specially provide that SFS enjoys the Santee Sioux's sovereign immunity from suit, which can be waived only by a resolution of the Santee Sioux Tribal Council. (R. vol. 2, p.413 ¶ 13.2.) SFS is licensed pursuant to the laws of the Santee Sioux to operate an online lending business utilizing the trade name "Preferred Cash Loans." (R. vol. 2, pp. 415-20.) This business is the primary source of revenue for SFS. (R. vol. 2, p.410 ¶ 3.1.) The profits garnered by SFS go directly to the Santee Sioux as the owner of this tribal corporation. (*See* R. vol. 2, p.410 ¶ 4.1, 413 ¶ 13.2.)

All loan applications are approved by SFS on reservation land under the sovereign jurisdiction of the Tribe. (R.Supp., p.38 ¶ 7.) The transactions that

the State complains of thus are consummated on tribal lands, and are subject to, and fully compliant with, the laws and regulations of the Tribe. (R.Supp., p.38 ¶¶ 7-8.) SFS also complies with federal laws governing lending activities. *See e.g* 15 U.S.C § 1604. (R.Supp., p.38 ¶ 8.)

SUMMARY OF THE ARGUMENT

The Court of Appeals failed to follow federal law governing tribal sovereign immunity, and its failure results in a unilateral abrogation of the Tribal Entities' sovereign immunity. First, contrary to binding Supreme Court precedent, the Court of Appeals determined that the trial court has authority to compel the production of documents to assist the State's investigation. 205 P.3d at 403. In so doing, the Court of Appeals failed to recognize the distinction between the State's power to investigate and the State's ability to enforce its regulations. The Supreme Court has repeatedly held that while a state may have the power to investigate, it does not have the power to bring enforcement proceedings to enforce that right. *Kiowa Tribe*, 523 U.S. at 755; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (*Potawatomi I).*

Next, in order to determine whether the Tribal Entities are "arms of the tribes" entitled to sovereign immunity, the Court of Appeals disregarded binding precedent in creating an arduous eleven-part "test." 205 P.3d at 406. The court's

test is objectionable for numerous reasons. To begin with, in promulgating the test, the court relied upon an aberrant dissent found in a state court decision, *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275 (Wash. 2006), disregarding that tribal sovereign immunity is a matter of federal law. *Kiowa Tribe*, 523 U.S. at 756; U.S. Const. art. I, § 8, cl. 3. The test fashioned from that dissent is out of step with governing federal law on several counts, most conspicuously in focusing on the "purpose" of the tribal entity, which the Supreme Court has expressly rejected as determinative of whether a tribal organization is entitled to immunity. *Kiowa Tribe*, 523 U.S. at 754-55.

Next, the Court of Appeals effectively gutted the doctrine of tribal sovereign immunity by determining that tribal officials are not entitled to tribal sovereign immunity if the state alleges they are violating state law. 205 P.3d at 406 – 07. Such a finding renders tribal sovereign immunity illusory in any dispute between a state and an Indian tribe, giving the state the power to unilaterally abrogate tribal sovereign immunity simply by alleging a tribal official is acting contrary to state law. As such, the Court of Appeals' ruling violates the federal prohibition of state diminishment of tribal sovereign immunity. *Kiowa Tribe*, 523 U.S. at 756.

Finally, the court of appeal's order disregards the federally-mandated rule that waivers of sovereign immunity must be clearly and unequivocally expressed.

205 P.3d at 407 – 08. The court disregarded this tenet by determining that arbitration agreements with *third parties* and other extraneous conduct may constitute a waiver of sovereign immunity as to the State's claim at bar. *Id.* This determination is contrary to binding precedent that waiver of immunity must be clear and unequivocal, and cannot be implied by conduct. *C & L Enter., Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (*Potawatomi II*).

For all of these reasons, the Court of Appeals' order must be vacated.

ARGUMENT

I. BINDING PRECEDENT DICTATES THAT TRIBAL SOVEREIGN IMMUNITY PREVENTS COURTS FROM ENFORCING STATES' ADMINISTRATIVE SUBPOENAS, AND THE COURT OF APPEALS' FINDING TO THE CONTRARY IS ERRONEOUS AS A MATTER OF LAW

As a matter of federal law, absent congressional abrogation or a clear and unequivocally expressed waiver of sovereign immunity, Indian tribes are not subject to civil suit in any state, federal, or arbitral tribunal. *Potawatomi II,* 532 U.S. at 418. Tribal immunity is a matter of federal law and is not subject to diminution by the States. *Kiowa Tribe*, 523 U.S. at 756. Sovereign immunity presents a jurisdictional question and, absent a waiver, presents an absolute bar to suits against tribes. *Kiowa Tribe,* 523 U.S. at 754; *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052-53 (9th Cir. 1985). The

United States Supreme Court has made it clear that tribal sovereign immunity applies to *off-reservation, commercial activities*, as well as traditional governmental functions. *Kiowa Tribe*, 523 U.S. at 754-755, 758; *see also Potawatomi I*, 498 U.S. at 514 (reaffirming tribal immunity from suit arising from state's attempt to impose taxation over cigarette sales). Indeed, the court in *Kiowa Tribe* held, "[t]hough respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions."

Contrary to the Court of Appeals, the Supreme Court has made it clear that tribal sovereign immunity from suit prevents the trial court from compelling the production of documents to assist the State's investigation. In *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), a state court ordered an Indian tribe to provide information about tribal members' off-reservation fishing activities in an effort to enforce state fishing regulations. The tribe appealed this order. The Supreme Court held that: "[T]he Tribe has attacked [the Washington state court] order as an infringement on its sovereign immunity . . . . The attack is well founded. Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian Tribe." *Id.* at 172.

Tribal sovereign immunity is a mandatory doctrine that courts must honor and invoke. As the Supreme Court conclusively held in *Kiowa,* absent a valid waiver of sovereign immunity, a tribe, or a subdivision thereof, cannot be sued in any court. *Kiowa Tribe*, 523 U.S. at 754 (noting that even where a state has the power to regulate a tribe's activities, it still does not have authority to enforce state laws through judicial proceedings). In sum, under the constitutional framework clearly articulated by the Supreme Court, the doctrine of sovereign immunity is mandatory and prevents all unauthorized suits against a tribe. *Kiowa Tribe,* 523 U.S. at 754-57.

Also, tribal entities that that embark on a commercial enterprise are still considered to be part of the tribe and enjoy the tribe's sovereign immunity from suit. *E.g., Am. Vantage Co., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir. 2002) (citing *Ninigret Dev. Corp. v. Narragansett Indian Wetumuch Hous. Auth.* 207 F.3d 21 (1st Cir. 2000) and *Gaines v. Ski Apache*, 8 F.3d 726 (10th Cir. 1993)); *Native Am. Dist. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292-96 (10th Cir. 2008) (citing cases); *see also Barker v. Menominee Nation Casino*, 897 F.Supp. 389 (E.D. Wis. 1995) ("commission" that was issued a corporate charter under tribal law was an arm of the tribe and thus suit against it was a suit against the tribe itself); *Local IV-302 International Woodworkers Union*

of American v. Menominee Tribal Enterprises, 595 F.Supp. 859 (E.D.Wis. 1984) (action against tribal enterprise is an action against the tribe itself).

The immunity of tribal entities was most recently addressed in *Ameriloan v. Superior Court*, 169 Cal. App. 4th 81, 89 (Cal. Ct. App. 2009), which involved Internet lending by the same Indian tribes and tribal entities that are the petitioners here. The court in that case reiterated that "[t]he doctrine of tribal sovereign immunity is not limited to government-related activity occurring on tribal lands, but also protects the tribe's off-reservation, for-profit commercial conduct." *Id.* at 89. The court also adhered to the Supreme Court's holding in *Kiowa Tribe* concerning the distinction between a state's right to demand compliance with state laws and the means available to enforce them. *Id.*

A. THE COURT OF APPEALS ERRONEOUSLY IGNORED AND MISCONSTRUED FUNDAMENTAL PRINCIPLES OF SOVEREIGN IMMUNITY

Fallaciously conflating a state's right to regulate with its right to sue for violations of the regulation, the Court of Appeals erroneously determined that "tribal sovereign immunity does not prevent the trial court from enforcing the Attorney General's subpoenas." 205 P.3d at 403. As the Supreme Court held in *Kiowa Tribe*, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." 523 U.S. at 755. The Court

explained that while a state's substantive laws may apply to a tribe or its entity's off-reservation conduct, "is not to say that a tribe no longer enjoys immunity from suit." *Id.* The Court also reiterated its holding in *Potawatomi I*, noting that in the earlier case "we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to non-members, the Tribe enjoys immunity from a suit to collect unpaid state taxes." *Id.*

Tribal immunity from state lawsuits is a necessary aspect of sovereignty; immunity from suit between states and tribes runs in the other direction as well. *See White Earth Band of Chippewa Indians v. County of Mahnomen*, 605 F.Supp.2d 1034 (D. Minn. 2009) (holding that a state's Eleventh Amendment immunity barred suit by an Indian tribe for a refund of over one million dollars in taxes, even though the court found that the taxes had been erroneously assessed). *Id.* at 1040, 1043-44, 1049. *See also Seminole Tribe v. Florida*, 517 U.S. 44 (1996)(determining that because the state had not waived immunity from suit, the court lacked jurisdiction of an Indian tribe's suit under the Indian Gaming Regulatory Act). Here, like in *Seminole Tribe* and *White Earth Band*, a judicial remedy does not necessarily exist for every right, and the Court of Appeals failed

to recognize this crucial distinction. The State has solutions available to it, namely negotiation, which other states have done and is appropriate here.[5]

B. COURTS ARE NOT AT LIBERTY TO DISREGARD THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY

Contrary to binding Supreme Court decisions, including *Kiowa*, *Puyallup* and *Potawatomi*, the Court of Appeals erroneously created a new exception to sovereign immunity for instances "when the purpose of producing the documents is to enforce the law[6] and protect the constitutional rights of defendants." 205 P.3d at 402. The appeals court is simply wrong—no state has any such authority because without an express waiver of immunity or abrogation by Congress, "Indian tribes enjoy immunity against suits by States." *E.g., Blatchford*, 501 U.S. at 782.

The laundry list of cases that the Court of Appeals cited to support its decision, 205 P.3d at 402, are easily distinguishable on their face and demonstrate the court's failure to appreciate fundamental concepts of federal Indian law. All of

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[5] Also, as the Supreme Court has stated, another solution available to states is to petition the political branches of the federal government. *Kiowa Tribe*, 523 U.S. at 757-59.

[6] It should be noted that federal law permits certain lending institutions to export their home state's interest rate to citizens in other states (including Colorado), where such rates would otherwise be "usurious" under the latter state's laws. *See Marquette Nat'l Bank of Minn. v. First Omaha Serv. Corp.*, 439 U.S. 233, 301 (1978).

those cases involved either a federal statute or an action against an Indian tribe *by the federal government.* The court completely disregarded that Indian tribes, like states, may not assert sovereign immunity in actions brought by a superior sovereign—the federal government. *E.E.O.C. v. Karuk Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001); *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 154. Indeed, not a single case the Court of Appeals relied upon involved a suit brought by a state against an Indian tribe in the absence of an authorizing federal statute.[7]

Also, the "grounds" the appeals court relied upon to support its untenable decision that "tribal sovereign immunity does not prevent the trial court from enforcing the Attorney General's subpoenas", 205 P.3d at 403, find no support in the law. The court reasoned that "[v]iolations of the UCCC and CCPA would have significant off-reservation effects that would require the Attorney General's intervention," citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 329-30 (1983). However, *Mescalero Tribe* involved a suit *by* an Indian tribe *against a state*, and because the tribe invoked the court's jurisdiction to decide the issue in

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[7] *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) was brought by the State of Rhode Island against an Indian tribe, but only because there was a federal statute permitting such an action. *Id.* at 19. No such federal statute exists in this case, and the Court of Appeals thus erred in relying on *Narragansett*.

that case, the issue of tribal sovereign immunity was never before the court. *Id.* 462 U.S. at 329-30. That is not the situation at hand. There is no exception to tribal sovereign immunity for "significant off-reservation effects," in fact, the Supreme Court in *Kiowa Tribe* expressly held to the contrary. Tribal sovereign immunity applies to conduct that occurs both on and *off* the reservation. *Kiowa Tribe*, 523 U.S. at 755.

The second ground—that "the subpoenas do not authorize the state agents to invade the territory of the reservation to obtain documents"—also stands as an impermissible state abrogation of sovereign immunity. Again, the appeals court completely ignored one of the clearest statements on sovereign immunity that the Supreme Court has pronounced: "Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions." *Kiowa Tribe*, 523 U.S. at 755. The Court of Appeals' rationale—that a state official can unilaterally override tribal sovereign immunity by simply sending a subpoena commanding the Tribe to appear outside of reservation boundaries with whatever documents and evidence the state official desires—represents a shockingly radical and unlawful departure from binding Supreme Court precedent, and would permit state bureaucrats to eradicate tribal sovereign immunity with a pen and a postage stamp.

The Court of Appeals also held that the Tribal Entities waived immunity because they voluntarily provided the State with documents relevant to the issue of whether the court had subject matter jurisdiction. 205 P.3d at 403. This holding is nonsensical and ignores binding precedent. Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *Martinez*, 436 U.S. 49, 58 (1978). *See Cotterill v. City and County of San Francisco*, No. 08-02295, 2009 WL 1324064, *4 (N.D. Cal. May 8, 2009) (participating in discovery to prepare the defense of sovereign immunity does not establish waiver).

Moreover, an attempt to enforce a right cannot possibly result in the ipso facto loss of that right. Incredulously, the Court of Appeals' opinion does just that. It establishes a bizarre proposition that parallels the logic of a medieval witch trial. Holding that an Indian tribe automatically loses its immunity by providing limited evidence to establish its sovereign immunity is the logical equivalent of requiring that a person accused of witchcraft light themselves on fire at the stake to prove themselves not a witch—either way, they lose.

The court's holding that the Tribal Entities waived immunity by producing documents relevant to subject matter jurisdiction also violates the well-settled rule that the defense of sovereign immunity may be raised at any time throughout the proceedings. *See Lombardo v. Pa. Dep't of Public Welfare*, 540 F.3d 190, 198 n.7

(3rd Cir. 2008) (issues of sovereign immunity may be raised at any time, even for the first time on appeal); *see also Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir. 1995) (sovereign immunity may be raised for the first time on appeal). Thus, if participation in litigation on the merits does not waive immunity, *a fortiori*, production of documents in response to a discovery request cannot waive immunity. *Id.*; *cf. Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974). Clearly, for all of these reasons, the Court of Appeals' decision must be reversed.

II. BY PROMULGATING AN ELEVEN-PART TEST TO DETERMINE WHETHER A TRIBAL ENTITY IS ENTITLED TO SOVEREIGN IMMUNITY, THE COURT OF APPEALS ERRONEOUSLY DISREGARDED THAT THE SCOPE OF TRIBAL SOVEREIGN IMMUNITY IS GOVERNED BY FEDERAL LAW

Tribal sovereign immunity and its bounds are exclusively a matter of federal law. *Kiowa Tribe*, 523 U.S. at 756. The United States Constitution grants Congress "plenary and exclusive" power to regulate commerce with Indian tribes and to legislate in respect to Indian tribes. U.S. Const., Art. 1, § 8, cl. 3; *U.S. v. Lara*, 541 U.S. 193, 200 (2004). The Court of Appeals erroneously ignored binding Supreme Court precedent, however, and, instead, relied upon a dissenting opinion from a court of another state, *Wright v. Colville Tribal Enter. Corp.*, *supra,* to fashion an elaborate eleven-part "test" that the trial court should employ to determine whether the Tribal Entities are arms of the Tribes (and, thereby, entitled to sovereign immunity). 205 P.3d at 406.

The most objectionable factors of the test include "whether the purposes of Cash Advance and Preferred Cash are similar to the Tribes' purposes," and "the announced purposes of Cash Advance and Preferred Cash." *Id.* These factors, among others, are objectionable because the "purpose" of the entity—governmental or commercial—may not be considered in determining whether an entity shares a tribe's immunity. *Kiowa Tribe*, 523 U.S. at 756. These factors are particularly objectionable because, as discussed *supra*, tribes are required to engage in off-reservation commercial activities to raise revenue to promote tribal self-sufficiency and facilitate tribal government programs and services. Not only are these factors objectionable for socioeconomic reasons, but consideration of this factor is erroneous as a matter of law.

Tribal entities that are engaged in off-reservation commercial conduct are not instantly stripped of immunity, as the Court of Appeals' test falsely assumes. In *Kiowa Tribe*, the Supreme Court specifically noted that it had declined an invitation "to abandon or at least narrow the doctrine," due to a litigant's assertion that "tribal businesses ha[ve] become far removed from tribal self-governance and internal affairs." *Kiowa Tribe*, 523 U.S. at 757. Instead, the Court determined that its cases upheld tribal immunity without drawing a distinction based on where the

tribal activities occurred, or whether the activities are governmental or commercial. *Id.* at 754-55.

Federal cases decided after *Kiowa Tribe* recognize the Supreme Court's refusal to limit immunity based upon the entity's purpose. *Cook v. AVI Casino Enterp., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *Am. Vantage Co., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir. 2002) (citing *Ninigret Dev. Corp. v. Narragansett Indian Wetumoch Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000) and *Gaines v. Ski Apache,* 8 F.3d 726 (10th Cir. 1993)). The question is not the purpose of the activity—governmental or commercial—but whether the entity acts as an arm of the tribe. *E.g. Allen v. Gold County Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). Thus, the Court of Appeals' test is contrary to binding federal precedent.

The out-of-step state court precedents the Court of Appeals chose to follow,[8] which emanate from the dissent in *Wright v. Colville Tribal Enter. Corp., supra,* are flatly at odds with, and trumped by, the Supreme Court's pronouncements in *Kiowa Tribe* that tribal immunity does not depend upon whether the tribal

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[8] *See Gavle v. Little Six, Inc.,* 555 NW2d 84 294-95 (Minn. 1996); *Ransom v. St. Regis Mohawk Educ. & Cmty Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995); and *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1984); and *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437 (Alaska 2004).

activities take place within or outside of Indian country, or whether those activities are governmental or commercial. 523 U.S. at 754-55. The state cases relied upon by the Court of Appeals are therefore no longer good law, and, in reality, never were.

Instead of the Court of Appeals' ill-conceived eleven-part test, this Court should simply inquire whether the Tribal Entities are subdivisions of the respective tribal governments, and whether there has been a waiver of sovereign immunity. This inquiry comports with *Kiowa Tribe* and other federal court decisions addressing sovereign immunity of tribal entities. *See Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046, 1047 (9th Cir. 2006); *Duke v. Absentee Shawnee Tribe of Okla. Housing Authority*, 199 F.3d 1123, 1125 (10th Cir. 1999); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1187 (9th Cir. 1998); *Unkeowannulack v. Table Mountain Casino*, No. CV F 07-1341, 2007 WL 4212775 (E.D. Cal. Nov. 28, 2007).

Thus, because the Court of Appeals' eleven-part test does not comport with paramount federal law, the test must be rejected by this Court.

III. THE SCOPE OF A TRIBAL OFFICIAL'S IMMUNITY IS NOT PRESCRIBED BY STATE LAW

The Court of Appeals eviscerated tribal sovereign immunity by erroneously holding that the scope of a tribal official's authority is governed by state law. Contrary to the Court of Appeals' holding, the scope of a Tribal Official's immunity can no more be governed by Colorado law than the scope of a Colorado official's immunity may be governed by tribal law. In reaching its flawed conclusion, the court misconstrued the law concerning official immunity.

The law is clear that, "tribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority." *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271, 278 (D.Conn. 2002). Immunity applies regardless of whether the officials acted *ultra vires* of their authority. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984). Actions of tribal officials lie outside of the scope of tribal immunity only when the action exceeds the authority granted *by the sovereign. Chemehuevi Indian Tribe,* 757 F.2d at 1051-52; *Bassett*, 221 F.2d at 281 n.15 (finding that in order to overcome tribal sovereign immunity plaintiffs must allege that tribal officials were acting "on their own account or for their own personal benefit."). Thus, even if a tribal official is sued in an individual capacity,

that official is only stripped of immunity when acting "without any colorable claim of authority" *granted by the Tribe*. *Bassett*, 221 F.Supp.2d at 281.

The scope of a tribal official's authority is not dictated by state law. Several federal courts have discussed in detail the reach of tribal sovereign immunity for individual defendants and concluded that immunity is not waived by a claim that the individual violated state law. *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 309 (N.D.N.Y. 2003); *Bassett*, F.Supp.2d 271; *see State of Oklahoma ex rel. Okla. Tax Comm'n v. Graham*, 822 F.2d 951, 957 (10th Cir. 1987), *rev'd on other grounds*, 484 U.S. 973 (1987) (finding that the failure to comply with state law does not take an action outside of the scope of immunity). In *Frazier*, the plaintiff brought an action against employees of a tribal casino and others for violating New York law regarding willful misappropriation of an image. *Fraizer*, 254 F.Supp.2d at 309. The court found that the tribal employees were entitled to immunity and that the plaintiff failed to state a claim against them individually because the plaintiff's allegation that the employees violated state law was insufficient. *Id.* at 310.

Likewise, the court in *Bassett* explicitly recognized that state law cannot limit the scope of a tribal official's authority, recognizing that such an approach would effectively eliminate the doctrine of tribal sovereign immunity, stating:

> The Court concludes, however, that it is insufficient for the plaintiffs merely to allege that Bell and Campisi violated state and federal law in order to state a claim that Bell and Campisi acted beyond the scope of their authority; it would be tantamount to eliminating tribal immunity from damages actions because a plaintiff must always allege a wrong in order to state a claim for relief. Rather, the Court finds that to state a claim for damages against Bell and Campisi, the plaintiffs would have to allege and prove that Bell and Campisi acted 'without any colorable claim of authority,' apart from whether they acted in violation of federal or state law.

Bassett, 221 F.Supp.2d at 280-81. Accordingly, like *Bassett*, the State's allegations here that tribal officials violated Colorado state law cannot serve as a basis to impose a waiver of tribal official immunity or punish these tribal officials for contempt of court.

The Court of Appeals' reliance on *Larsen v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), is misplaced. *Larsen* involved a suit against a federal official seeking an injunction based upon a violation of federal law. In the portion of the opinion relied on by the Court of Appeals, the *Larsen* court examined the limited situations when a suit for injunctive relief against a government officer would not be deemed to be a prohibited suit against the sovereign -- for example, as was true in that case, where a federal officer's powers are limited *by federal statute* and the allegation is that he acted in *a manner not authorized by the federal statute*. *Id.* at 690. Thus, the question on which immunity hinges is whether the officer is "exercising the powers delegated to him by the sovereign. If he is

exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented." *Larsen*, 337 U.S. at 693. Applied to the present case, this means that tribal, not state, law defines the officer's powers and, thus, the scope of official immunity. *Frazier*, 254 F.Supp.2d at 310.

To hold otherwise would make the Indian tribes subservient to the states, which more than a century and a half of federal Indian law makes clear is not true. *Kiowa Tribe*, 523 U.S. at 756 (reiterating that because tribes were not at the Constitutional Convention, tribal immunity is not subject to diminution by the states); *Washington v. Confederated Tribes of Colville Reservation*, 477 U.S. 134, 154 (1980) (tribal sovereignty is subordinate only to the federal government, not the states).

When a suit is brought against a tribal official, if the relief would flow against the tribe, as it would here, the action is barred. *See Pennhurst*, 465 U.S. at 101 ("relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter"); and *Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997) (stating that there is no reason to treat tribal immunity different from state or federal immunity). "[T]ribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority." *Bassett*, 221 F.2d at 278. Immunity applies regardless of

whether the officials acted *ultra vires* of their authority. *Pennhurst*, 465 U.S. at 102 n.11. Actions of tribal officials will lie outside of the scope of tribal immunity only when the action exceeds the authority granted by the sovereign, *i.e., the Tribe. Chemehuevi Indian Tribe*, 757 F.2d at 1051-52; *Bassett*, 221 F.2d at 281 n.15 (finding that in order to overcome tribal sovereign immunity, plaintiffs must allege that tribal officials were acting "on their own account or for their own personal benefit").

The Supreme Court's opinion in *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) is consistent with the foregoing. In that case, the Supreme Court held that individual defendants did not possess tribal sovereign immunity because they were acting as fishermen and not tribal governmental officials. *Id.* at 173. The Court of Appeals simply ignored this important distinction.

The fundamental theory underlying all of the authority relied on by the Court of Appeals on this issue emanates from the seminal case of *Ex Parte Young*, 209 U.S. 123 (1908), wherein the Supreme Court found that State officials may be subject to suit for prospective injunctive relief for violation of *federal* law. The Court reasoned that a state may not "impart to the official immunity from responsibility to the *supreme authority of the United States*." *Id.* at 167 (emphasis added). This does not allow a state to assert its law as "supreme authority" over

Indian tribes and tribal officials, which is precluded by U.S. Const. Art. I, § 8, cl. 3 and controlling Supreme Court precedent.

All of the cases the Court cites to support the conclusion that tribal officials lose immunity where their official actions are in violation of the law involve violations of federal law, *not* state law.[9] As set forth above, it is clear that violations of state law cannot serve to abrogate official immunity because such a determination "would be tantamount to eliminating tribal immunity . . . because a plaintiff must always allege a wrong in order to state a claim for relief." *Frazier*, 254 F.Supp.2d at 309. Unless reversed, the Court of Appeals' decision will effectively authorize the State to unilaterally abrogate tribal sovereign immunity, and punish tribal officials for carrying out their tribal duties, simply by *alleging* a

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[9] *Larsen*, 337 U.S. at 690 (discussing unconstitutional action); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (Indian Civil Rights Act, 25 U.S.C. §§ 1301-41); *Vann v. Kempthorne*, 467 F.Supp.2d 56 (D.D.C. 2006) (Thirteenth Amendment); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572 (10th Cir. 1984) (U.S. Secretary of the Interior regulations); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (25 U.S.C. § 1708); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 878-88 (2d Cir. 2001) (allowed plaintiff to amend complaint to add federal claim); *Ariz. Pub. Serv. Co. v. Aspass*, 77 F.3d 1128 (9th Cir. 1995) (federal question of tribal court limits); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F.Supp.2d 1043 (E.D. Wis. 1999) (court dismissed claims against officials based upon sovereign immunity); *State v. Velky*, 821 A.2d 752 (Conn. 2003) (tribe was not real party against whom relief was sought); *cf. In re Waters of Humboldt River*, 59 P.3d 1226, 1228 (Nev. 2002) (holding the Tribe waived immunity).

violation of state law by those officials. For all of these reasons, the court's decision concerning tribal official immunity is contrary to law and must be vacated.

IV. WAIVER OF IMMUNITY TO SUIT BY THE STATE CANNOT BE IMPLIED FROM AN ARBITRATION CLAUSE IN A CONTRACT WITH CONSUMERS OR OTHER EXTRANEOUS CONDUCT

Finally, the Court of Appeals erred as matter of law by opining that Tribal Entities might have waived their immunity to the present suit by the State as a result of entering into arbitration agreements with individual borrowers, and by directing that, on remand of the case, the trial court should require the Tribal Entities to produce information concerning those agreements as well as "any other information that the Attorney General can identify" as being related to the issue of waiver of immunity, including "representations" made by the Tribal Entities to third parties, "statements" made to borrowers, and "evidence of conduct in other states." 205 P.3d at 408. None of these is relevant to the question of whether the Tribes have unequivocally waived their sovereign immunity to the present suit by the State. To allow the trial court to pursue such an inquiry would be an egregious assault on the sovereignty of the Tribes.

It is black letter law that waivers of sovereign immunity cannot be implied, but must be clearly and unequivocally expressed. *Santa Clara Pueblo v. Martinez*,

436 U.S. 49, 58 (1978). Moreover, "[b]ecause a waiver of immunity 'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001). "In addition, if a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.'" *Missouri River Services*, 267 F.3d at 852. Thus, a tribe, like any other sovereign, may limit the time, place and forum of a waiver in addition to limiting the persons to whom a waiver is granted.

Contrary to this essential attribute of sovereignty, the appeals court theorized that an agreement to arbitrate contained in a contract to which the State is not a party may constitute a waiver of sovereign immunity to suit by the state. This determination must be reversed because the court misconstrued the law. The Court of Appeals erroneously relied on *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) to support the proposition that an agreement to arbitrate a dispute may constitute a blanket waiver to civil suit by a non-party to the arbitration clause (in this case, the State). 205 P.3d at 407 – 408.

The Supreme Court's opinion in *C & L Enterprises* did not change the general rules on waiver of tribal sovereign immunity as set forth above. In fact, the

central holding states, "[w]e hold that . . . the Tribe is amenable to a state-court suit to enforce an arbitral award *in favor of* [the entity with whom the tribe made the arbitration agreement.]." *Id.* at 414 (emphasis added). Thus, *C & L Enterprises* stands for the unremarkable principle that where a tribe enters into an arbitration agreement that provides for *consent* to arbitration and *consent* to judicial enforcement of the arbitration award in a particular court, there is a waiver of immunity to *suit to enforce the arbitration award brought by a party to the arbitration agreement in the forum specified in the arbitration clause.* *C & L Enterprises*, 532 U.S. at 414.

The narrow concept of waiver announced by *C & L Enterprises* has no application in this case because: (1) the State does not *claim* to be a party to any contract with the Tribal Entities; and (2) this is not an arbitral forum, nor is it a judicial action seeking to enforce an arbitration agreement or award. Thus, *C & L Enterprises* cannot serve as a basis to find that the Tribal Entities clearly and unequivocally agreed to waive their sovereign immunity in this case by allegedly consenting to arbitrate contract disputes with its customers (non-parties to this

litigation).[10]

Finding that an arbitration clause constitutes a general waiver to all state court jurisdiction is not only contrary to federal law concerning waivers of tribal sovereign immunity, it runs counter to the very purpose of entering into an arbitration agreement, which is to *avoid* litigation. *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Colorado courts recognize arbitration as an "alternative to settling disputes by litigation." *City and County of Denver v. District Court in and for the City and County of Denver*, 939 P.2d 1353, 1362 (Colo. 1997). It simply defies reason that an agreement executed for the express purpose of avoiding litigation and to remedy specific contractual disputes would open the flood gates to allow *any* potential litigant to sue an entity that is otherwise immune from suit in *any* forum.

Waivers of sovereign immunity must be clear and unequivocal, narrowly construed, and may be conditioned and limited as the sovereign so chooses. *Missouri River Services*, 267 F.3d at 852. However, the Court of Appeals'

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[10] The evidence in the record, consisting of loan agreements, demonstrates that the loan agreements *do not* contain a waiver of sovereign immunity to this suit, and only allow arbitration of claims pertaining to *the customer*. (R. vol. 4, p.1030 ¶ 17; vol. 5, pp.1358-66.) The State has asserted that the agreements in the record are representative of all of the Tribal Entities' agreements, and asked the trial court to "infer[] that the lenders' loan agreement forms are also identical and contain identical mandatory arbitration clauses." (R. vol. 4, pp.1022-23.)

decision guts the law of sovereign immunity by indicating that an agreement to arbitrate one narrow type of dispute subjects the Tribal Entities to suit from a non-party to the arbitration agreement, in a forum the agreement never contemplated, concerning a dispute that the agreement never contemplated.

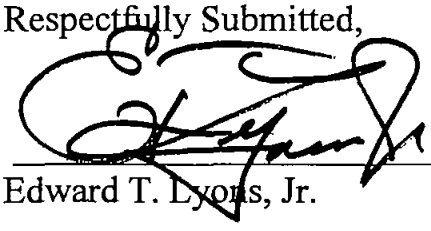
Likewise, the court's holding is contrary to law because the other information that the court deemed relevant to waiver—representations or statements made to third parties or borrowers and conduct in other states—cannot constitute a unequivocally expressed waiver of immunity. The information sought could not constitute an unequivocal waiver of immunity to suit by the State of Colorado because the information sought does not pertain to representations the Tribal Entities made *to* the State. Also, evidence of "conduct in other states" could not possibly constitute a clear waiver that the Supreme Court requires, because waivers of immunity cannot be implied by conduct. *See, e.g. C & L Enterprises*, 532 U.S. at 418; *Native Am. Dist. V. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (evidence regarding representations did not affect immunity from suit).

CONCLUSION

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olsen*, 324 U.S. 786, 789 (1945).

While paying lip service to binding precedent, the Court of Appeals' opinion abrogates the doctrine of sovereign immunity as to the Miami and Santee Nations, and threatens the doctrine of tribal sovereign immunity for all Indian tribes. This Court should vacate the judgment of the Court of Appeals and remand the case with instructions either to terminate and dismiss this ill-founded case in the trial court or, if any further proceedings are deemed to be warranted, specifying both the limited scope of those proceedings and the test to be followed by the trial court in determining the status of the Tribal Entities' entitlement to sovereign immunity from suit.

Respectfully Submitted,



Edward T. Lyons, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2009, a true and complete copy of the above **PETITIONERS' OPENING BRIEF** was served upon all parties via placing the same in the United States mail, with first class postage, addressed as follows:

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