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| COLORADO SUPREME COURT<br>Colorado State Judicial Building<br>Two East 14th Avenue<br>Denver, Colorado 80203 | FILED IN THE<br>SUPREME COURT<br>OF THE STATE OF COLORADO<br>MAR 15 2010<br>SUSAN J. FESTAG, CLERK |
| District Court, City And County Of Denver<br>Hon. Robert S. Hyatt, 05CV1143<br><br>Colorado Court of Appeals, Hon. Steven L. Bernard, Hon. Russell E. Caparelli, and Hon. Karen S. Metzger (sitting by assignment of the Chief Justice),<br>Case No. 07CV0582 | |
| CASH ADVANCE and PREFERRED CASH LOANS,<br><br>Petitioners/Cross-Respondents.<br><br>v.<br><br>STATE OF COLORADO ex rel. JOHN W. SUTHERS, Attorney General, and LAURA E. UDIS, Administrator, Uniform Consumer Credit Code,<br><br>Respondents/Cross-Petitioners. | ▲COURT USE ONLY▲ |
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**PETITIONERS' RESPONSE TO RESPONDENTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to the Court's Order of February 25, 2010, 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"), file this Response to the Notice of Supplemental Authority filed by the Respondents/Cross-Petitioners (the "State"). The unpublished supplemental authority proffered by the State, *D.F., Jr. v. SWST Fuel, Inc.*, No. CV-18-18-07, slip op. (N. Plains Intertribal Ct. App. July 24, 2009), is of no moment to the case at bar and should be disregarded.[1]

1. The Northern Plains Intertribal Court of Appeals ("NPICA") is a consortia court which hears appeals from tribal courts of certain Indian tribes located in the States of North Dakota, South Dakota and Nebraska which have consented to its jurisdiction. Neither the Santee Sioux Nation nor the Miami Tribe of Oklahoma has consented to the jurisdiction of that tribunal.

2. The NIPCA opinion in *SWST Fuel* simply adopted, without any reasoned analysis, but for readily apparent reasons having nothing to do with the merits, the eleven-part test for determining whether a subordinate tribal

[1] The *SWST Fuel* slip opinion is attached to State's Notice of Supplemental Authority and is referred to herein as "Slip op."

organization enjoys the same sovereign immunity from suit as its parent Indian tribe which was announced in the decision of the Colorado Court of Appeals that is currently under review in the present proceeding. The decision in *SWST Fuel* appears to have been the product of the tribal court's concern to preserve at least some tribal trial court jurisdiction to remedy "a terrible tragedy" that injured or killed six young Indian children on the reservation. Slip op. at 2. The complaints in that case alleged that SWST Fuel was negligent in servicing the propane heater that caused the injuries and deaths of the sleeping children. *Id.* at 3. SWST Fuel was the only defendant in the case that could be made to stand trial for the tragic accident, but that could be done only if, for purposes of the case, it was denied immunity from suit as a tribal "corporation." *Id.* at 10. The other defendants in the case could not be held to answer for the tragedy because the claims against them had to be dismissed in obedience to federal statutes that deprived the tribal court of jurisdiction. *Id.* at 8 - 9.

3. Thus, rather than a situation like that in the present case of a state attempting to enforce its will on a sovereign Indian tribe through an action in the state's own courts, *SWST Fuel* was a case in which Indians were suing a tribal organization in a tribal court for a wrong committed against their children by an

economic instrumentality of their own tribe. A remedy for the intra-tribal tragedy that was presented could be provided only if the sovereign immunity of the alleged perpetrator was disregarded for purposes of the case. The only way that could be done, short of repudiating immunity altogether, was to adopt, at least for purposes of the case, a diminished test of immunity like the Court of Appeals came up with in the present case, which effectively limits tribal immunity to governmental, rather than economic, activities.

4. The decision in *SWST Fuel* thus suffers from the same fundamental legal deficiencies as the Court of Appeals' order on review in this case. Most importantly, the Court of Appeals' eleven-part test, which was cobbled together from state court cases that mostly predated the Supreme Court's decision in *Kiowa Tribe v. Mfg. Techs., Inc.,* 523 U.S. 751 (1998), conflicts directly with *Kiowa Tribes'* holding that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Id.* at 756. The eleven-part test developed by the Court of Appeals, and now erroneously adopted in *SWST Fuel,* would do just that. See Petitioner's Opening Brief at pp. 26-29.

5. For example, the second factor of the eleven-part test (i.e., "[w]hether the purposes of the corporation are similar to the tribe's purpose") flies in the face

of the Supreme Court's holding that sovereign immunity does not depend on the purpose of the tribal activity. *Id.* at 755 ("Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions"). Sovereign immunity applies no less to tribal economic development than to traditional governmental activities. *Id.* at 757-58. Thus, the Colorado Court of Appeals' ill-conceived eleven-part test, which would seriously diminish tribal immunity by, among other things, limiting it to tribal governmental activities, is contrary to governing federal law and cannot stand. Rather than furnishing support, the decision in *SWST Fuel* only points up why the decision of the Colorado Court of Appeals is wrong and must be reversed so as to prevent other unwary courts from mistakenly adopting its erroneous reasoning.

6. The *SWST Fuel* decision lacks a coherent rationale in any event. First, the court erroneously equates an Indian tribe to the shareholders of a corporation, stating that "because a shareholder has sovereign immunity does not confer such immunity on the corporation." Slip op. at 11. The court then went on to base its decision upon the wholly immaterial proposition that a *state's* sovereign immunity does not extend to "private entities." *Id.* These legal malapropos by the court

once again indicate that the tribal court of appeals was more concerned with finding a defendant which could be held accountable in tribal court for a "terrible tragedy" that occurred in Indian country, than it was in redefining the parameters of tribal immunity. Thus, the *SWST Fuel* decision is unsound and should, at best, be confined to its peculiar facts.[2] It is in no event persuasive precedent in the present case.

6. Nor for that matter does *SWST Fuel* comport with the decisions of other tribal courts. Contrary to the misguided eleven-part test that the *SWST Fuel* court in adopted, in order to determine if a tribal organization is an arm of the tribe, and is therefore entitled to the same immunity as the tribe, other tribal courts, like the federal courts, properly consider only whether the organization is created under tribal law and is owned and controlled by the tribe. *See, e.g., Johnson v. Mashantucket Pequot Gaming Enter.*, No. CV-AA-1995-0155, 1 Mash. Rep. 165, 170-71, 1995 WL 17826922 (Mashantucket Pequot Tribal Ct. Dec. 11, 1995) and

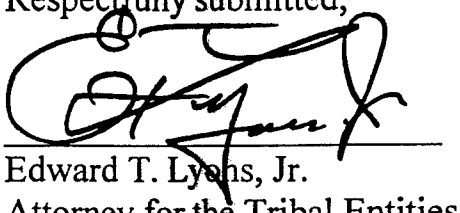
[2] The *SWST Fuel* court itself went out of the way to limit its holding to the facts of the case. Thus, after acknowledging that the eleven-part test it was adopting conflicted with the test it had previously employed in such cases, the court explained that, in the case currently before it, the tribe was not organized under the Indian Reorganization Act, 25 U.S.C. § 461, *et seq.* Slip op. at 14 n 4. This further distinguishes *SWST Fuel* from the present case. The record in the present case shows that the Santee Sioux Nation was organized under the Indian Reorganization Act, while the Miami Tribe of Oklahoma was organized under the essentially equivalent provisions of the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501. *See* Tribal Entities' Opening Brief at 10, 13.

*Yannett v. Grand Traverse Band of Ottawa Chippewa Indians*, No. 95-11-147-CV, 2004 WL 5715387, *2 (Grand Traverse Tribal Ct. June 19, 2004).

## CONCLUSION

For the foregoing reasons, the *SWST Fuel* decision is not sound authority and should disregarded in the present case.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2010, a copy of **PETITIONERS' RESPONSE TO RESPONDENTS' NOTICE OF SUPPLEMENTAL AUTHORITY** 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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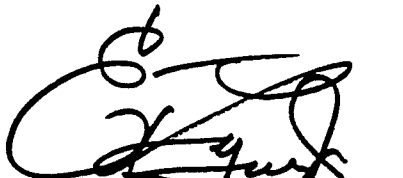

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