IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, **v.** **MNE d/b/a AMERILOAN, US FAST CASH and UNITED CASH LOANS, et al.** Defendants and Respondents.	Case No. B242644

Los Angeles County Superior Court, Case No. BC373536
Hon. Yvette Palazuelos, Assigned Judge

APPELLANT'S OPENING BRIEF

MARY ANN SMITH
Deputy Commissioner
UCHE L. ENENWALI
Senior Corporations Counsel
State Bar No. 235832
320 West 4th Street, Suite 750
Los Angeles, CA 90013-2344
Telephone: (213) 576-7586
Fax: (213) 576-7181
E-mail: uenenwal@corp.ca.gov
Attorneys for Plaintiff/Appellant

Service on Attorney General required by California Rules of Court, rule 8.29

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN	Court of Appeal Case Number: B242644
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): UCHE L. ENENWALI SBN: 235832 320 West Fourth Street, Suite 750 Los Angeles, California 90013-2344 TELEPHONE NO.: (213) 576-7586 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): People of The State of California	Superior Court Case Number: BC 373536 FOR COURT USE ONLY
APPELLANT/PETITIONER: People of The State of California RESPONDENT/REAL PARTY IN INTEREST: MNE dba Ameriloan, et. al.	
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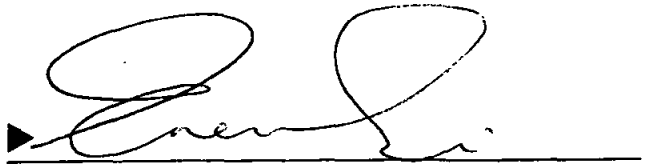
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INTRODUCTION

This case involves Internet payday lenders engaged in egregious, deceptive, and exploitive practices that California law prohibits. They charge annual interest rates in excess of one thousand percent, illegally roll loans over multiple times, and use threats and other unlawful techniques to collect loan payments. But, to date, California has been powerless to stop the unlawful practices.

The Internet payday lending operations involved here are the sole activities of two corporations incorporated under the laws of two out-of-state Indian tribes. The corporations seek to use those affiliations to avoid California's consumer protection laws and cloak themselves with the tribes' sovereign immunity. As commercial entities separate and distinct from the tribes, the corporations are not entitled to the tribes' sovereign immunity. Instead, the corporations are merely Internet payday lenders subject to California consumer protection laws. Their attempts to use sovereign immunity to shield their unlawful practices undermine the appropriate government-to-government relationship that underlies the legitimate application of tribal sovereign immunity.

After receiving numerous consumer complaints and its orders to cease unlicensed operations were ignored, the People of the State of California sued to stop the payday lenders' abusive practices. Relying on their incorporation under the laws of, and stock ownership by, the tribes, the corporations acted to halt the state's enforcement action. They claimed that even though they did business under several names as payday lenders and were separate legal entities, they were protected by the tribes' sovereign immunity from suit.

However, evidence developed during litigation revealed that the tribes, as direct or indirect shareholders, do not control the corporations' Internet payday lending activities. The corporations display their

independence by acting in derogation of the tribes' laws. Additionally, non-tribal third parties control and run the businesses and receive most of the monies from their operations. Not surprisingly, these third parties started and operated the Internet payday lending businesses for years before—and only after attracting the attention of several states' regulators—teaming up with tribes to keep the states from shutting down their lucrative unlawful operations.[1]

In this attempted enforcement action, the trial court initially held that the payday lenders were not entitled to the tribes' sovereign immunity because they operated off of the tribes' reservations. This Court reversed that ruling and remanded the matter to the trial court with specific instructions to determine if the payday lenders qualified for tribal sovereign immunity under the factors denominated in *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632 (*Trudgeon*). Upon remand, the trial court applied the *Trudgeon* factors incorrectly and dismissed the People's lawsuit against the payday lenders. Relying on the doctrine of tribal sovereign immunity, the court determined that it lacked jurisdiction over the case. This appeal followed.

ISSUE PRESENTED

The issue on appeal is whether two corporations, which (a) were formed under the laws of two Indian tribes and (b) are involved in the off-reservation commercial activity of Internet payday lending in violation of California law, can take advantage of the tribes' sovereign immunity to avoid an enforcement action by the People of the State of California.

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[1] A comprehensive study of the business model of payday lenders affiliating with tribes to take advantage of the tribes' sovereign immunity is found at Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* (2012) 69 Wash. & Lee L. Rev. 751.

STATEMENT OF THE CASE

In 2005, the California Department of Corporations (Department) started receiving complaints about several lenders offering payday loans over the Internet. (2 CT 3, p. 638 ¶ 9.[2]) The Department's investigation revealed that the lenders were not licensed by the California Corporations Commissioner (Commissioner)[3] to conduct deferred deposit transactions, also known as "payday loans," in California and were unlawfully advertising and extending payday loans to the public. (2 CT 3, p. 638 ¶ 9.)

The main provisions of the California's payday loan law being violated were those that:

(i) limit loan amounts to $300 (Fin. Code, § 23035, subd. (a));

(ii) limit loan fees to 15 percent of the loan amount (Fin. Code, § 23036, subd. (a));

(iii) require written loan contracts, which must disclose the fee as an Annual Percentage Rage (APR) (Fin. Code, § 23001, subds. (a), (e)); and

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[2] The following references to the record will be used, followed by the volume number and page number:
CT = "Clerk's Transcript"
CTSA = "Clerk's Transcript Re Sanctions Appeal"
SCT = "Supplemental Clerk's Transcript"
2 CT = "Second Supplemental Clerk's Transcript."

[3] The Commissioner is the Chief Officer and head of the Department. (Corp. Code, § 25600.) The Department licenses and regulates a variety of financial services including, but not limited to, payday lenders. (See Fin. Code, §§ 23005, subd. (a) [licensing], 23015 [rules and regulations].) The Commissioner is authorized under Government Code section 1118 and Financial Code section 23051, subdivision (a), to bring both civil and administrative actions to enforce violations of California's payday loan statute, which is known as the "California Deferred Deposit Transaction Law." (Fin. Code, § 23000 et seq.)

(iv) limit a consumer to one loan at a time in effect with a lender (Fin. Code, § 23036, subd. (c)).

On August 22, 2006, the Commissioner issued a Desist and Refrain Order to five Internet payday lenders, ordering them to cease their unlicensed payday loan activities. (See Motion for Judicial Notice, Exh. 1 attached to Declaration of Uche L. Enenwali filed in support thereof and in conjunction with this brief.) The lenders disregarded the order, and in 2007, the Commissioner, on behalf of the People of the State of California, filed a complaint and request for a temporary restraining order and preliminary injunction against the five payday lenders: Ameriloan, U.S. Fast Cash, United Cash Loans, One Click Cash and Preferred Cash Loans (collectively, Payday Lenders). The People's suit sought to enjoin the Payday Lenders from further violating the Commissioner's order and California's payday loan law. (CT 1, pp. 27-47.) At that time, the People had no indication that the Payday Lenders were affiliated in any way with any tribes.

The Payday Lenders violated California's payday lending law by:

(i) imposing exorbitant interest rates of up to 1095 percent APR (CT 2, p. 439);

(ii) issuing loans in excess of the $300 statutory limit (CT 16, pp. 3889-3890, ¶¶ 6, 7; 3902, CT 2, pp. 408 ¶ 6, 412, 443-444 ¶ 4);

(iii) illegally rolling over loans multiple times (CT 2 pp. 401, 452 ¶ 4); and

(iv) using threats and harassment to collect loan payments (CT 2, pp. 444 ¶ 5, 452 ¶ 5, 456 ¶ 6).[4]

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[4] Numerous California consumer declarations detailing the problems experienced with the Payday Lenders are found in the record at (continued...)

Two non-party entities, Miami Nation Enterprises and SFS, Inc. (SFS), specially appeared and moved to quash service of summons and to dismiss the complaint on the basis that they, doing business as the Payday Lenders, were entitled to the sovereign immunity of the tribes that owned Miami Nation Enterprises and SFS. (CT 1, pp. 54-55.) The trial court denied their motion and granted the People's request for a preliminary injunction. (CT 1, pp. 240-244.) Miami Nation Enterprises and SFS filed a petition for review, which this Court summarily denied. (CT 3, p. 604.) They then filed a petition for review with the Supreme Court. The Supreme Court granted the petition and transferred the matter to this Court with directions to vacate its order denying review and issue an alternative writ. (CT 3, p. 606.)

In a published opinion, this Court remanded the matter to the trial court with directions to conduct an evidentiary hearing. (*Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 101 (*Ameriloan*).) The trial court was directed to determine whether under the criteria of *Trudgeon* and *Redding Rancheria,* the Payday Lenders[5] were sufficiently related to the tribes to be entitled to the benefit of their sovereign immunity. (*Id.* at p. 98, citing and discussing *Trudgeon, supra,* 71 Cal.App.4th 632 and *Redding Rancheria v. Superior Court of Shasta County* (2001) 88 Cal.App.4th 384 (*Redding Rancheria*).) The Court also authorized the parties to conduct

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(...continued)
Clerk's Transcript, volume 2, pages 410 through 488 and volume 16, pages 3857 through 3902A.

[5] Although Miami Nation Enterprises and SFS specially appeared as defendants in the trial court and asserted that the Payday Lenders were only "dbas" of the corporations, this Court referenced the Payday Lenders as the "petitioners" and the entities to which the jurisdictional inquiry should be directed. (*Ameriloan, supra,* 169 Cal.App.4th at p. 100.)

limited discovery pertinent to subject matter jurisdiction. (*Id.* at pp. 98-99.) The parties engaged in protracted discovery that required the appointment of a discovery referee.[6] (CT 10, pp. 2223-2225.)

Miami Nation Enterprises[7] and SFS again moved to quash the summons and the complaint. On May 10, 2012, the trial court held an evidentiary hearing, granted their motion, and dismissed the complaint. (CT 24, pp. 5754-5769.) This appeal followed.

STATEMENT OF APPEALABILITY

On July 5, 2012, the People filed a timely notice of appeal from the order granting the motion to dismiss the complaint. (CT 25, p. 6074.) An order granting a motion to dismiss and quashing service of summons is appealable under Code of Civil Procedure section 904.1, subdivision (a)(3). (*Strathvale Holding v. E. B. H.* (2005) 126 Cal.App.4th 1241, 1248.)

STATEMENT OF FACTS

I. THE PAYDAY LENDERS' AFFILIATION WITH THE TRIBES ORIGINATED WITH SCOTT TUCKER

The Internet payday lending model used here was the brain child of Scott Tucker. Starting in approximately 2002, Tucker began registering multiple trade names—including the Payday Lenders' names—to advertise and make payday loans over the Internet. (E.g., CT 23, p. 5529

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[6] In October of 2011, the People appealed the referee's award of sanctions against it in connection with its motion to compel further responses. (*People v. MNE dba Ameriloan, et al.* (No. B236547, app. pending).) On July 24, 2012, this Court, on its own motion, ordered that it would consider this appeal and the sanctions appeal concurrently for purposes of oral argument and decision.

[7] At the time of filing the renewed motion to quash and, as described below, Miami Nation Enterprises was no longer engaged in payday lending activities.

[Ameriloan], CT 24, pp. 5620 [One Click Cash], 5705 [United Cash Loans], 5720 [U.S. Fast Cash].)

In early 2003, the State of Kansas issued a cease and desist order against two of Tucker's businesses, United Cash Loans and Cash Advance, for engaging in payday lending activities in violation of Kansas law. (CT 17, p. 3964.) In late 2003—after Kansas began investigating Tucker's payday lending activities—he solicited two federally-recognized tribes, the Miami Tribe of Oklahoma (Miami Tribe) and the Santee Sioux Nation[8] (collectively, the Tribes), with a "proposal for a "fast cash operation." (2 CT 3, p. 594, ¶ 7 E.) The Miami Tribe Business Enterprise's (MTBE) Board of Directors' minutes reflect that it reviewed a "fast cash proposal" and "expressed concerns re [sic] the ethics of the operation." (2 CT 3, p. 594, ¶ 7 E.) Despite those concerns, MTBE ultimately accepted Tucker's offer to participate in the Internet payday loan business, as did the Santee Sioux Nation.[9]

II. SFS WAS CREATED TO OFFER PAYDAY LOANS

Presently, two corporations are involved in the unlawful payday lending activities that the People seek to stop. Those corporations are SFS and MNE Services, Inc. The organization of SFS is simple. In March 2005, it was incorporated under the laws of the Santee Sioux Nation. (2 CT 4, pp. 800-801.) SFS is 100 percent-owned by the Santee Sioux Nation. (*Id.* at p. 802.) SFS's articles call for it to "provide and/or administer short-term loans and cash advance services ('payday loans') . . . ." (*Ibid.*) SFS

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[8] Formerly the Santee Sioux Tribe of Nebraska.

[9] During discovery, the People sought to take depositions pertaining to the Payday Lenders' set up and their financial relationships with the Tribes. (CT 15, pp. 3652-3655.) The People were ordered to not take these depositions or conduct any further third party (non-party) discovery on the jurisdictional issue. (2 SCT 3, p. 468:9.)

does its payday lending business under two names—One Click Cash and Preferred Cash Loans. (2 CT 4, p. 764 ¶ 10.)

SFS does no business other than Internet payday lending. (2 CT 4, p. 765 ¶ 13.) SFS is imbued with some of the usual attributes of a corporation as a separate entity. Its officers, shareholders, and directors are not personally liable to creditors or claimants of the corporation for corporate actions. (Santee Sioux Tribe of Nebraska Business Corporation Code, § 11-1092, 2 CT 5, p. 915.) Recovery against SFS is limited to its assets. (*Id.* at § 11-1003, subd. (3)(b), 2 CT 5, p. 912.) SFS cannot consent to waive the Santee Sioux Nation's sovereign immunity. (2 CT 4, p. 800.) Neither the Santee Sioux Nation nor any member of its tribal council is obligated to or liable for the obligations of SFS. (Santee Sioux Tribe of Nebraska Business Corporation Code, § 11-1022, 2 CT 5, p. 913.)

III. MNE WAS CREATED TO OFFER PAYDAY LOANS

The history leading up to the organization of MNE is not as simple. In August 2008, Miami Nation Enterprises formed MNE Services, Inc. as a corporation under the laws of the Miami Tribe. (2 CT 6, pp. 1315-1320.) MNE Services, Inc. is 100 percent-owned by Miami Nation Enterprises. (2 CT 6, p. 1315.) Miami Nation Enterprises' existence dates back to May 2005 when it was created as part of a restructuring of MTBE. (2 CT 6, pp. 1214-1215.)

Even though Miami Nation Enterprises was not formally created as a corporation,[10] it was independent of the Miami Tribe. Since only the

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[10] Although not actually incorporated, Miami Nation Enterprises was authorized to use the name "Miami Nation Enterprises, Inc." in its business activities. (Amended Miami Nation Enterprises Act, p. 12, § 305, subd. (t), CT 17, p. 4060, emphasis added.) The terms "Inc." and "Corp." were used indiscriminately and without relationship to the entity's true legal structure as would be expected in usual business activities. (Compare, (continued...)

majority of its board of directors was required to be members of the Tribe, non-tribal persons could sit on its board. (See Amended Miami Nation Enterprises Act, p. 4, § 202, subd. (b), CT 17, p. 4052.) Additionally, its independence from the tribal leadership was shown by prohibiting members of the Miami Tribe's Business Committee from sitting on the board of directors. (*Ibid.*) Neither the Miami Tribe nor the Tribe's property could be liable for any debts, liabilities, or obligations of Miami Nation Enterprises. (*Id.* at p. 9, § 302, subd. (d), CT 17, p. 4057.)

Until January 2009, Miami Nation Enterprises conducted the payday lending activities that MNE Services, Inc. performs now. Miami Nation Enterprises did so through the entity Tribal Financial Services (TFS). (See 2 CT 3, p. 486.) Even though TFS was referred to from time to time as "TFS, Inc." or "TFS Corp.," TFS was a division of Miami Nation Enterprises that was responsible for the payday lending activities and was not incorporated under the laws of the Miami Tribe or any other jurisdiction. (See Declaration of Don Brady in Support of Renewed Motion to Quash and Dismiss for Lack of Subject Matter Jurisdiction, p. 4, ¶ 9, 2 CT 6, p. 1216.)

MNE Services, Inc. was created expressly to "further the financial lending business of Miami Nation Enterprises." (2 CT 6, p. 1322.) MNE Services, Inc. took over the payday lending business of Miami Nation Enterprises and TFS. (See *id.* at pp. 1321-1322.) MNE Services, Inc. does its payday lending business under three names—Ameriloan, US Fast Cash, and United Cash Loans. (2 CT 6, p. 1216 ¶ 9.)

(...continued)
e.g., Declaration of Don Brady in Support of Renewed Motion to Quash and Dismiss for Lack of Subject Matter Jurisdiction, p. 4, ¶¶ 9, 10, 2 CT 6, p. 1216 with 2 CT 6, p. 1315.)

MNE Services, Inc. has the usual attributes of a corporation as a separate entity. The board of directors is appointed by the chief executive officer of its shareholder. (2 CT 6, p. 1318.) The corporation has enumerated powers including the powers to sue and be sued in its name, to own and sell property, to exercise all powers necessary or convenient to do business, and to conduct business under an assumed name. (Miami Tribe of Oklahoma Business Corporation Ordinance, § 4.1, 2 CT 7, pp. 1376-1377.) Its officers, shareholders, and directors are not personally liable to creditors or claimants of the corporation for corporate actions. (*Id.* at § 15.10, 2 CT 7, p. 1456.) Any recovery against MNE Services, Inc. is limited to its assets. (*Id.* at § 15.3.3, subd. (b), 2 CT 7, p. 1452.) It cannot consent to waive the Miami Tribe's sovereign immunity. The Miami Tribe is not liable for the obligations of MNE Services, Inc. (2 CT 6, pp. 1317-1318.)

In view of this history and series of entities separate and distinct from the Miami Tribe, we will refer to the entity engaged in the payday lending activities as "MNE" throughout the remainder of this brief.

IV. THE UNLAWFUL AND INDEPENDENT PAYDAY LENDING OPERATIONS OF SFS AND MNE.

Thus, following Tucker's proposals for a "fast cash" business, corporations separate and distinct from the Tribes were formed for the purpose of engaging in the payday loan activities. They did so using names that Tucker had previously registered. The unlawful payday lending businesses of the corporations SFS and MNE operate independently of the Tribes. In July 2008, SFS and MNE entered into nearly identical management agreements with Tucker's N.M. Service Corp. (NMS) to manage the payday lending activities. (See 2 CT 3, pp. 509 [SFS]; 519 [MNE].) Under these agreements, SFS and MNE had final authority for

making the loans, but NMS could exercise that authority using "advance" instructions or approval parameters. (2 CT 3, p. 510 § 3.1.) Under the management agreements, SFS and MNE received one percent of the gross revenues from the respective payday loan businesses or "dbas"—while Tucker's NMS retained the "net cash flow of the Lending Business." (2 CT 3, pp. 517, 526.)

Demonstrating that they were separate corporate entities distinct from the Tribes, SFS and MNE acted in derogation of the respective Tribes' laws. They also ceded nearly absolute authority over the payday lending activities and the monies that were generated to Tucker and NMS. The corporations combined with Tucker and NMS to act independently of the Tribes in the areas of:

Interest Rates:

- The Santee Sioux Nation's lending ordinance prohibits charging more than 20 percent for interest on loans. (CT 17, p. 4019, § 102, subd. (1).) Yet in its payday lending businesses, SFS charged up to 1095 percent APR on payday loans extended to California consumers. (CT 2, p. 439.)
- For the Miami Tribe, section 102, subdivision (1) of its Interest, Loans, and Debt Code limits interest charged on loans to 20 percent. (CT 17, p. 4085.) In its payday lending business, MNE charged rates of up to 521 percent APR on payday loans extended to California consumers. (CT 2, p. 412.)

Account Control:

- Section 10.1, subdivision (b) of SFS's articles of incorporation provides that only the corporation's managers shall be authorized signatories of its accounts. (CT 17, p. 4013.) Bank records reveal Tucker is designated as the sole signatory on SFS's accounts and Tucker has listed himself, and has acted as, SFS's "secretary." (2

CT 3 pp. 632 ¶ 3, 635, 640.) Tucker and his brother, Blaine Tucker, signed most, if not all, the checks issued by SFS in connection with the payday loan businesses. (CT 18, p. 4170 ¶ 64.)

- MNE's corporate documents designated certain officers as the authorized signatories to the corporation's bank accounts. (CT 17, p. 4080.) Nonetheless, Tucker and his brother, neither of whom was named in the corporate documents, signed all checks drawn on MNE's account in connection with the payday loan business. (CT 18, p. 4170 ¶ 64; 2 CT 3, p. 636 ¶ 6H.)

Use and comingling of funds:

- Section 10.1, subdivision (b) of SFS's articles of incorporation prohibits the commingling of SFS's funds with "any other person or entity." (CT 17, p. 4013.) Nonetheless, SFS's funds were commingled with those of MNE and Tucker's other enterprises. (CT 18, pp. 4170 ¶ 64 – 4172 ¶ 68.)
- Funds derived from the two corporations' payday lending activities consistently were deposited to and commingled with accounts belonging to Tucker-affiliated or Tucker-controlled corporations and used by Tucker for his personal and business expenses. (2 CT 3, pp. 635-636; CT 18, pp. 4168-4173 ¶¶ 61-68, 4178-4182 ¶¶ 81-85.) Those uses include, among others, tens of millions of dollars paid to a Tucker-controlled company for his personal automobile and automobile racing (CT 18, pp. 4181-4182 ¶¶ 84-85, CT 23, p. 5395), purchase of a single family residence for $8 million (CT 18, p.4176 ¶ 74), maintenance of his private jet (CT 18, pp. 4173-4174 ¶¶ 70-72, 2 CT 3, pp. 636-637 ¶ 7), and "consulting fees" exceeding $3

million to an entity controlled by his brother (CT 18, p. 4180 ¶ 83, 4153 ¶ 12).[11]

In sum, the two corporations—MNE and SFS—are separate from the Tribes and operate independently of the Tribes. They combine with Tucker to operate the payday loan businesses without regard for the Tribes' laws or the corporate restrictions established by their shareholders.

STANDARD OF REVIEW

"On a motion asserting sovereign immunity as a basis for dismissing an action for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists. [Citations.] In the absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has subject matter jurisdiction over an action against an Indian tribe is a question of law subject to our de novo review." (*American Property Management Corp. v. Superior Court* (2012) 206 Cal.App.4th 491, 498 (*American Property*), quoting *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 183.)

Additionally, where the appellate court is required to "consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," those mixed questions are classified as ones of law and are reviewed de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801.)

Accordingly, de novo review by this Court is appropriate in this case.

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[11] The People attempted to obtain information pertinent to both entities' disposition of revenues, financial statements and account details. (CT 10, p. 2293¶¶ 48-53 [discovery requests, set one]; CT 10, p. 2320 ¶ 28-34 [requests set two]; CT 15, p. 3649 ¶¶ vii-xix [Plaintiff's Final Discovery Plan].) These items pertained to whether the entities are arms of the Tribes. With the exception of bank account signature cards, account applications and board resolutions, the court denied every other request. (CTSA 1 p. 38-70.)

SUMMARY OF ARGUMENT

California law looks at six factors for determining whether an entity that is related to an Indian tribe should be considered an arm of the tribe for sovereign immunity purposes. (See *American Property, supra,* 206 Cal.App.4th at p. 501.) In this case, four of these six factors weigh against according tribal sovereign immunity to the entities under review. The purpose of each entity is to conduct payday lending over the Internet through different trade names. However, despite their tribal affiliation, each entity operated in derogation of its organizational documents and tribal laws. Each entity delegated the management and control of its payday lending business to non-tribal members. Moreover, monies received from the payday lending businesses flow away from the entities and are commingled with the monies of non-tribal entities and persons. Further, the payday lending businesses do not subject the Tribes to liability and do nothing to preserve the Tribes' cultural autonomy. Finally, cloaking these entities and their lending businesses in sovereign immunity would discourage commercial dealings between Indians and non-Indians. Accordingly, under the *American Property* test, the entities do not qualify to share in the Tribes' sovereign immunity.

ARGUMENT

I. UNDER THE KEY *TRUDGEON* AND *AMERICAN PROPERTY* FACTORS MNE AND SFS ARE NOT ARMS OF THE TRIBES ENTITLED TO TRIBAL SOVEREIGN IMMUNITY.

Under federal law, Indian tribes enjoy sovereign immunity from suits based on their governmental and commercial activities. (*Trudgeon, supra,* 71 Cal.App.4th at pp. 636-637, citing and discussing *Kiowa Tribe of Okla., v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751.) A tribally-related business entity has no inherent immunity of its own—it has immunity only if the tribe's immunity is extended to it. (*Id.*) A tribe's

immunity "does not cover tribally chartered corporations that are completely independent of the tribe"; it only extends to entities that are so closely linked to the tribe that they qualify to be treated as, in legal effect, the tribe itself. (*Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247.)

Whether an entity is closely linked or sufficiently connected to a tribe to benefit from its immunity depends on whether the entity or business acts as an arm of the tribe such that its activities are properly deemed those of the tribe. (*Ameriloan, supra*, 169 Cal.App.4th at p. 98, see also *Cook v. AVI Casino* (9th Cir. 2008) 548 F.3d 718, 725.) Unlike Indian tribes, which possess inherent immunity, a tribal entity does not have innate immunity and immunity depends solely on whether the entity operates and conducts business as an arm of the tribe. (*Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047.) Importantly, "not all tribal businesses and corporations will function as 'arms of the tribe.'" (*Allen v. Mayhew* (E.D. Cal. 2009) U.S. Dist. LEXIS 25319, *4-5.) Courts should not "'confer tribal immunity on *every* entity established by an Indian tribe, no matter what its purposes or activities might have been.'" (*American Property, supra*, 206 Cal.App.4th 491 at p. 500, quoting *Trudgeon, supra*, 71 Cal.App.4th at p. 638, italics added.)

In deciding whether to extend immunity to subordinate economic entities, "a court must determine whether such entities are the kinds of tribal entities, analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether they are more like commercial business enterprises, instituted solely for the purpose of generating profits for their private owners." (*Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d 1173, 1183 (*Breakthrough*).) As *Trudgeon* stated,

> It is possible to imagine situations in which a tribal entity may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself. Such an entity arguably should not be immune, notwithstanding the fact it is organized and owned by the tribe.

(*Trudgeon, supra*, 71 Cal.App.4th at p. 639.)

Under the *Trudgeon* analysis, three factors are relevant to determining whether a tribe's sovereign immunity extends to a business entity:

> 1) whether the entity is organized for a purpose that is governmental in nature, rather than commercial;
>
> 2) whether the tribe and the entity are closely linked in governing structure and other characteristics; and
>
> 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the entity.

(*Trudgeon, supra,* 71 Cal.App.4th at p. 638, quoting *Gavle v. Little Six, Inc.* (Minn. 1996) 555 N.W.2d 284, 294.) "The analytical inquiry is often summarized as whether the tribally-related entity is 'an arm of the tribe' for sovereign immunity purposes." (*American Property, supra,* 206 Cal.App.4th at p. 500.)

American Property—decided only two weeks after the trial court order on appeal here was issued, and by the same Appellate District of this Court that decided *Trudgeon*—expanded and clarified *Trudgeon's* "arm of the tribe" analysis by adding factors, including an examination of the "the financial relationship between the tribe and the entities."[12] (*American Property, supra,* 206 Cal.App.4th at p. 501, citing *Breakthrough, supra,*

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[12] The Supreme Court denied the petition for review on August 22, 2012. (*American Property Management Corp. v. Superior Court* (2012) 2012 Cal. LEXIS 8069.)

629 F.3d 1173.) *American Property* largely adopted the factors set forth by the Tenth Circuit in *Breakthrough* to determine whether an entity should be considered an arm of the tribe for sovereign immunity purposes, finding that the Tenth Circuit's factors "accurately reflect the general focus of applicable federal and state case law." (*Ibid.*)

Based on *American Property*, the following is a non-exhaustive list of factors to be examined in the determination of whether an economic entity qualifies to share in a tribe's sovereign immunity:

1) the entity's method of creation;

2) the entity's purpose;

3) the entity's structure, ownership, and management, including the amount of control the tribe has over the entity;

4) whether the tribe intended for the entity to have tribal sovereign immunity;

5) the financial relationship between the tribe and the entity; and

(6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entity.

(*American Property, supra,* 206 Cal.App.4th at p. 501 citing *Breakthrough, supra,* 629 F.3d at pp. 1187-1188.)

Here, applying the *American Property* factors to SFS and MNE conducting business as Ameriloan, U.S. Fast Cash, United Cash Loans, One Click Cash and Preferred Cash Loans—factors two, three, five and six weigh strongly against a determination that SFS and MNE are arms of the Tribes and are entitled to tribal sovereign immunity.

Although the courts in *American Property* and *Breakthrough* considered the factors in the sequence listed above, none of the factors are

dispositive in themselves and, therefore, we will consider the factors in order of their importance to the facts of this case.[13]

A. SFS and MNE are not Closely Linked to the Tribes in Governing Structure or Other Critical Characteristics.

The third *American Property* factor is the entity's structure, ownership, and management, including the amount of control that the tribe has over it. (*American Property, supra*, 206 Cal.App.4th at p. 510.) This third factor overlaps with the second *Trudgeon* factor, for which the relevant question "is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa*, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." (*Ameriloan, supra*, 169 Cal.App.4th at p. 98.)

Whether a tribal entity and a tribe are closely related in governing structure and other characteristics requires an examination of "the extent to which the tribe controls the composition and operations of the business entity." (*Trudgeon, supra*, 71 Cal.App.4th at p. 641.) Other considerations in examining the link between the tribal entity and the tribe include:

(i) who owns, manages, controls, or operates the business; and

(ii) the financial relationship between the entity and the tribe, such as, whether the business generates its own income; whether it has power to bind the funds of the tribes or whether immunity is necessary to protect the tribe's treasury.

(*American Property, supra*, 206 Cal.App.4th at pp. 505-506; see also *Allen v. Gold Country Casino, supra*, 464 F.3d at pp. 1046-1047.)

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[13] The Court of Appeal in *American Property* refers to the factors as the "Tenth Circuit's list." (*American Property, supra,* 206 Cal.App.4th at p. 501, citing *Breakthrough, supra*, 629 F.3d at p. 1187.) In this brief, the factors will be referred to as the "*American Property* factors."

Based on *Trudgeon* and *American Property*, this element of management and control is an important factor in determining the question of tribal sovereign immunity. For example, in *Dixon v. Picopa Construction Co.* (Ariz. 1989) 772 P.2d 1104 (*Dixon*), the court found that a tribally chartered corporation was not protected by sovereign immunity, in part, because "the tribal government does not manage the corporation." (*Id.* at p. 1109.) In *Allen v. Gold Country Casino, supra,* the Ninth Circuit determined immunity existed because the tribe "owned and operated" the tribal casino enterprise. (464 F.3d at p. 1046.) The Ninth Circuit observed that "the Casino is not a mere revenue-producing tribal business (although it is certainly that)" and, that pursuant to federal policies reflected in the federal Indian Gaming Regulatory Act (IGRA) (25 U.S.C. § 2701 et. seq.), the tribe was the primary beneficiary of the gaming operation. (464 F.3d at p. 1046.) The court concluded that "[w]ith the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe." (*Id.* at p. 1047.)

Similarly, in *Cook v. AVI Casino, supra*, 548 F.3d at pages 721, 726, the Ninth Circuit Court found that a tribe's casino was entitled to immunity on the basis, along with other factors, that the casino was wholly owned, controlled, and managed by the tribe. A tribal corporation was held to be immune where uncontested evidence showed the corporation was "wholly owned and operated" by the tribe. (*Larimer v. Konocti Vista Casino* (2011) 814 F.Supp.2d 952, 955.)

While ownership and control have been noted as relevant factors in resolving jurisdiction, neither factor alone is sufficient for sovereign immunity to attach. There must be sufficient tribal involvement in the "management and control" of the entity in which the tribe has an ownership interest. (*American Property, supra,* 206 Cal.App.4th at p. 505, citing *Dixon, supra*, 772 P.2d at p. 1109 [immunity not granted, in part, because

tribal government did not manage the entity].) If control alone were sufficient, "immunity would attach whenever a tribe purchased a controlling interest in an ongoing non-tribal for-profit corporation." (*McNally CPA's & Consultants v. DJ Hosts, Inc.* (Wis. Ct. App. 2004) 692 N.W.2d 247, 252-253 (*McNally*).) As the *McNally* court noted, "[p]urchasing stock, even all of the stock, in an ongoing for-profit business seems to be just the sort of situation that the *Trudgeon* court envisioned would *not* confer immunity on the corporate entity." (*Id.* at p. 253, italics in original.) In other words, the test is not merely does the tribe have an ownership interest in an entity, but does the tribe also manage and control the entity in fact.

In *American Property,* the court examined the "structure, ownership, and management of the entity," and found that ownership of the entity was not closely tied to the tribe and that this factor weighed against according the entity sovereign immunity. (*American Property, supra*, 206 Cal.App.4th at p. 505.) The entity was owned by several layers of other California limited liability companies, and "the indirect nature of [the tribal development corporation's] ownership *weakens* [the limited liability company operating the hotel's] relationship with the Sycuan tribe for the purpose of sovereign immunity analysis." (*Ibid.*, italics in original.) The court also stressed that the designation of a non-tribal entity to manage a tribal business—instead of a tribal entity—is an indication that the entity is not an arm of the tribe protected by sovereign immunity. (*Id.*)

In applying the management and control factor from *Trudgeon* and *American Property* to this case, it becomes clear that SFS and MNE are separate corporate entities distinct from the Tribes. SFS and MNE are not controlled by the Tribes as evidenced by the fact they operate in contravention of the laws of their respective Tribes. Tribes cannot be said to manage and control the entities when the entities do not operate pursuant

to the Tribal law regarding interest rates and corporate operations. Moreover, SFS and MNE ceded nearly absolute authority over the payday lending activities and the monies that were generated to Tucker and NMS. Because SFS and MNE operate independently of the Tribes and are not closely linked to the Tribes' governing structure, this factor weighs heavily against a determination that the corporations are entitled corporations to share in the Tribes' sovereign immunity.

B. SFS's and MNE's Purpose was to Affiliate the Payday Lenders with the Tribes.

In analyzing the second *American Property* factor—the purpose served by the tribal entity—it is important to examine the chronology of the tribal entities' formation and operation. An examination of the record and chronology of events shows that the purpose of SFS and MNE was to affiliate the Tribes with Tucker's companies to provide cover to Tucker's payday lending operations.

In analyzing *Trudgeon*'s first factor, *American Property* contrasted the purpose for which the subject tribal entity was created and the type of for-profit business it operated—a hotel—with tribal entities created to perform traditional governmental functions such as housing, education, and social services or casinos. (*American Property, supra*, 206 Cal.App.4th 491, 504.) The court found that the subject tribal entity existed "purely for the purpose of participating in an ordinary for-profit business enterprise," in contrast to tribal entities created "to provide housing or social services to tribal members." (*Id.* at p. 509.)

American Property also distinguished tribal entities formed to operate tribal gaming as "a unique situation" because of IGRA's endorsement of gaming as essential to tribal self-determination along with the special provisions in IGRA enacted for Indian welfare. (*American Property, supra*, 206 Cal.App.4th at p. 504.) One of the "principal purposes of IGRA

is to insure that the Indian tribe is the primary beneficiary of the gaming operation. [Citations.]" (*Id.*)

American Property cited to *Dixon* for another situation where the court weighed the tribal entity corporation's purpose. The court noted that its purpose did not weigh in favor of finding sovereign immunity because it was "'not formed to aid the [tribe] in carrying out tribal governmental functions' and appeared to be 'simply a for-profit corporation involved in construction projects.'" (*American Property, supra*, 206 Cal.App.4th at p. 504, citing *Dixon, supra*, 772 P.2d at p. 1110.)

Based on *American Property's* purpose factor, SFS and MNE are tribal entities formed solely for commercial purposes—to receive a percentage of the revenues from the Payday Lenders in return for affiliating with them. As the Tribes' officers admitted, the Tribes "recognized and took advantage of a business opportunity to engage in making short-term loans via the Internet." (CT 19, pp. 4496 ¶ 7, 4575 ¶ 6.) The Payday Lenders were part of a non-tribal, for-profit payday loan business operation before SFS and MNE began doing business under the Payday Lenders' names. (See *McNally, supra*, 692 N.W.2d at p. 253.)

The Tribes' involvement in the payday loan businesses evolved from Tucker's offer of an opportunity for a "fast cash operation." (2 SCT 3, p. 594 ¶ 7 E.) The Tribes formed SFS and MNE purely for commercial, for-profit purposes in response to Tucker's offer, and not to perform governmental functions on the Tribes' behalf.

As reflected in its bylaws, SFS was created to "provide and/or administer short-term loans and cash advance services ('payday loans') and associated services on lands of the Santee Sioux Nation." (2 SCT 3, p. 4011 ¶ 4.1.) Likewise, recitals in MNE's formation resolution provide that it was "created to further the financial lending business of Miami Nation

Enterprises" and to "primarily engage in the business of financial lending." (CT 17, pp. 4142, 4144.)

Finally, SFS's and MNE's formation documents further show that both were formed as tribal entities with a purely commercial purpose. The management agreements and bank records demonstrate that SFS and MNE, doing business as the Payday Lenders, are simply revenue-producing businesses created to facilitate Tucker's ordinary for-profit payday lending business for a set fee. SFS and MNE, doing business as the Payday Lenders, are not carrying out functions "traditionally shouldered by tribal government" such as "housing, educational and health care services." (See *American Property, supra*, 206 Cal.App.4th 491 at p. 504, citing *Weeks Const., Inc. v. Oglala Sioux Housing Auth.* (8th Cir. 1986) 797 F.2d 668, 671.) Accordingly, they are not entitled to tribal sovereign immunity.

C. Pursuant to the Financial Relationships Between the Tribes and MNE and SFS, the Tribes' Assets are not Exposed to Any Liability from Payday Lending.

In analyzing the fifth *American Property* factor—the financial relationship between a tribe and an entity—"relevant considerations include 'whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the subentity has the 'power to bind or obligate the funds of the [tribe]' [citation]. The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." (*American Property, supra*, 206 Cal.App.4th at p. 506, quoting *Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc.* (N.Y. 1995) 658 N.E.2d 989, 992-993.)

Further evaluating the closeness of a tribe and its entity for purposes of immunity, the Tenth Circuit in *Breakthrough* considered the financial relationship between the tribe and its entity as a relevant measure of the

closeness of that relationship. (*Breakthrough, supra*, 629 F.3d at pp. 1185, 1187 [the financial relationship factor was a part of the immunity analysis, not the threshold, dispositive issue].) In applying this factor, the court held the tribal casino was entitled to the tribe's immunity after recognizing that "one hundred percent of the Casino's revenue goes to the Authority and then to the Tribe," and that an adverse judgment against a casino could reduce the tribe's income. (*Id.* at p. 1195.) Conversely, in *American Property*, the court found that immunity was not necessary to protect the tribe's treasury because the tribal entity was organized as a California limited liability company and the tribe's assets would not be exposed by any judgment against the tribal entity because the tribe's financial risk was limited to the capital it had contributed to the limited liability corporation. (*American Property, supra,* 206 Cal.App.4th at p. 506.) In *Allen v. Gold Country Casino, supra*, the Ninth Circuit found sovereign immunity applied to the tribal sub-entity because it "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." (464 F.3d at p. 1047.)

The most significant factor that weighed against granting immunity in *American Property* was the fact that the tribal entity was incorporated under state law as a California limited liability company. (*American Property, supra*, 206 Cal.App.4th at p. 507.) The court reasoned that by incorporating under state law, a limited liability company has a legal existence separate from its members and that its form provides members with limited liability to the same extent enjoyed by corporate shareholders, while permitting the members to actively participate in the company's management. (*Id.* at p. 503.) "A member of a California limited liability company—like a corporate shareholder—is not personally liable for the debts, legal liability or obligations of the company unless liability attaches under an alter ego theory." (*Id.* at p. 506.) Citing to an Alaska Supreme

Court decision, the court held that incorporation under state law militates against finding immunity because:

> the tribes' use of the corporate form protects their assets from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest. . . . By severing their treasuries from the corporation, they have also cut off their sovereign immunity before it reaches the [corporation].'

(*Ibid.*, quoting *Runyon v. Ass'n of Village Council Presidents* (Alaska 2004) 84 P.3d 437, 441, alterations by court.)

In *American Property* the hotel-operator limited liability company's operating agreement provided that "[t]he Member [shareholder] will not be liable to any creditor of the Company for Company liabilities or losses or for any amount in excess of the amount the Member originally agreed to contribute to the Company . . . . " (*American Property, supra*, 206 Cal.App.4th at p. 506.) The Court concluded that the hotel-operator limited liability company was not entitled to immunity because neither the tribe nor its tribal development corporation were exposed to the liability of the hotel-operator limited liability company. "As with any person or entity making an investment in a limited liability company or a corporation, [the tribal development corporation's] risk is completely cut off at the level of its voluntary investment in the entity." (*Ibid.*) If a tribe's fiscal resources are not at risk beyond their initial investment, it weighs against granting the entity immunity.

1. The Corporate Structures of SFS and MNE Insulate the Tribes from Liability.

SFS and MNE are corporate entities with provisions in their articles and operating documents that legally insulate the Tribes from any liability from the payday loan businesses. Specifically, MNE's articles of incorporation provide that "[a]ny recovery against the Corporation shall be

limited to the assets of the Corporation. . . . The Tribe shall not be liable for the payment or performance of any of the obligations of the Corporation, and no recourse shall be had against any assets or revenues of the Tribe in order to satisfy the obligations of the Corporation." (2 CT 6, pp. 1317-1318.) Similarly, recovery against SFS is limited to its assets. (Santee Sioux Tribe of Nebraska Business Corporation Code, § 11-1003, subd. 3(b), 2 CT 5, p. 912.) Neither the Santee Sioux Tribe nor any member of its tribal council is obligated to or liable for the obligations of SFS. (*Id.* at § 11-1022, 2 CT 5, p. 913.)

Although SFS and MNE are not incorporated under state law, their status as corporate entities, along with pertinent provisions contained in their corporate documents, legally insulate the Tribes from liability for any judgment resulting from a lawsuit related to the companies. As with the hotel limited liability company in *American Property*, the operating documents, MNE's and SFS's governing documents, and the Tribes' laws contain provisions that limit liability for judgment or debts resulting from the payday loan businesses to the corporations' assets only.

Based on these provisions, the Tribes have used the corporate forms of SFS and MNE to ensure that their treasuries are adequately protected and are not exposed to any risk of loss. Therefore, under *American Property,* immunity is not necessary to protect the Tribes' assets in furtherance of federal policy aimed at advancing Indian autonomy.

2. Given the Tribes' Immunity From Liability, the Tribes' Financial Benefits from SFS's and MNE's Payday Lending Activities Fail to Justify the Extension of Tribal Sovereign Immunity.

Immunity is not justifiable on the basis that as an indirect owner or sole stockholder of a business, a tribe will "reap the benefits of any favorable financial performance and will suffer a loss in the value of its investment" if the business performs poorly. (*American Property, supra,*

206 Cal.App.4th at p. 507.) A tribe reaping favorable financial benefits and suffering a loss in the value of its investment is not dispositive of whether the tribal business and entity is an arm of the tribe.[14] (*Ibid.*)

> "We reject this concept" because "[i]ts inevitable consequence would be to confer tribal immunity on every entity established by an Indian tribe . . . ." (*Dixon, supra,* 772 P.2d at p. 1108, fn. 7 [rejecting significance of the fact that the tribe would "reap the benefits" from a tribal construction company's financial performance, and concluding that the construction corporation, in which the tribe was the sole stockholder, was not an arm of the tribe protected by sovereign immunity].)

(*Ibid.*, alterations by court.)

If a tribe passively receiving financial benefits from a business entity was a dispositive factor in granting that entity sovereign immunity, *any* for-profit operation would potentially be immune. As long it was providing some financial benefit to a tribe, an entity could defraud and exploit California residents, but by sharing the tribe's immunity, avoid regulation and liability.

There is the additional aspect that the financial benefits reaped from the payday loan businesses are not dependant on the grant of sovereign immunity. SFS and MNE could still operate the Internet payday lending dbas and offer loans to California consumers—the only difference would be the loans would have to comply with California law. No legitimate need exists to grant immunity to a tribe-owned business that operates in contravention of state consumer laws. Absent the threat of an enforcement action or lawsuit, SFS and MNE have no incentive to comply with

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[14] Here, due to the dispute regarding discovery pertinent to the companies' financial operations and remuneration to Tucker, the record is unclear as to the amount of investment, if any, the Tribes contributed to the payday loan businesses.

California's consumer protection laws. (See *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 260 [discussing the importance of California's ability to enforce the Political Reform Act as part of holding that the tribe lacked immunity from suit].)

In conclusion, allowing SFS and MNE to operate in violation of California law, but under the protection of the Tribes' immunity, does not balance the competing sovereign interests of the State and the Tribes. The fact that a tribe receives income from a for-profit commercial entity is not dispositive in favor of granting the entity sovereign immunity. (*American Property, supra*, 206 Cal.App.4th at p. 507.) The corporate forms of SFS and MNE, along with their bylaws and contractual agreements, contain numerous provisions protecting the Tribes from liability and the Tribes' treasury and assets from court judgment. This weighs heavily against a finding that SFS and MNE are arms of the Tribes protected by sovereign immunity.

D. The Purposes of Tribal Sovereign Immunity are not Served by Granting Immunity to MNE and SFS for Their Payday Lending Businesses.

The final factor in the analysis is "whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." (*American Property, supra*, 206 Cal.App.4th at p. 507, quoting *Breakthrough, supra*, 629 F.3d at p. 1181.) As the court in *American Property* noted, the discussion in the case law of this factor "overlaps significantly" with other factors. (*Ibid.*)

1. Circumventing Consumer Protections Against Predatory Payday Lenders Does Not Promote the Purpose of Tribal Sovereign Immunity.

The policies underlying sovereign immunity include "preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians."

(*American Property*, *supra*, 206 Cal.App.4th at p. 507, quoting *Dixon*, *supra*, 772 P.2d at p. 1111.) The Payday Lenders are not "'the kind[s] of tribal entit[ies], analogous to a governmental agency, which should benefit from the defense of sovereign immunity. . . .'" (*Breakthrough*, *supra*, 629 F.3d at p. 1184, quoting *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 293, alterations by court.) Instead, the Payday Lenders are the type of business the courts in *Trudgeon, Dixon,* and *American Property* have held should not be entitled to immunity—companies established purely for commercial, for-profit purposes. In this case, the Payday Lenders have the added element of having been established solely to take advantage of the Tribes' sovereign immunity—to allow the Payday Lenders to escape state regulation.

Here, the payday loan commercial activity is rigged to circumvent California's payday loan law. The Tribes' affiliation with Tucker's preexisting payday loan business is nothing more than an attempt to market the Tribes' sovereign immunity to a non-Indian for an economic advantage.

The People have a legitimate interest in enforcing California's payday loan law, which primarily serves to protect borrowers from unfair practices by lenders. The payday loan law is a non-discriminatory law that applies to every individual or entity wishing to offer payday loans to Californians. California's payday loan law does not in any way seek to regulate affairs of Indian self-government, tribal lands, or commercial activities of Indians on Indian land, and the lending activities the statute regulates are neither intramural nor essential to Indian self-government.

The People's interest in protecting Californian citizens from unlawful lending practices trumps the Tribes' interest in obtaining a nominal economic advantage culminating from an illegal scheme designed to circumvent California's payday loan law.

California is not alone in recognizing the importance of protecting consumers from predatory payday lenders. The federal government has filed its own enforcement action against such abusive payday lending practices. On April 2, 2012, the Federal Trade Commission (FTC) filed a lawsuit in the United States District Court, District of Nevada, against 19 defendants, including the five Payday Lenders in this case, SFS and MNE, their corporate officers, Don Brady and Robert Campbell, the Tuckers, and several entities related to the Tuckers. (*Federal Trade Commission v. AMG Services, Inc., et al.* (U.S. Dist. Nev. 2012) Case No. 2:12cv536.)[15] The FTC's complaint seeks a preliminary and permanent injunction enjoining the defendants from engaging in deceptive and unlawful business practices in the conduct of payday loan businesses and collection of payday loans in violation of federal statutes, including misrepresentations, false advertising, and deceptive collection practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the Truth in Lending Act, 15 U.S.C. §§ 1601-1666j, and other federal statutes.

Taken together, the independent state and federal consumer protection actions highlight the competing sovereign interests at stake. Tribes' interest in achieving economic self-sufficiency through a commercial strategy to use their immunity to circumvent state law does not outweigh the People's legitimate interest in protecting California citizens. (See *Barona Band of Mission Indians v. Betty T. Yee, et al.* (9th Cir. 2008) 528 F.3d 1184, 1186-1187, 1192 [in context of tax immunity, the federal government's interest in assisting tribes to achieve economic self-sufficiency "continues to fade when the commercial activity is rigged to

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[15] By separate motion, the People have requested judicial notice of the FTC's complaint. (See Motion for Judicial Notice, Exh. 2 attached to Declaration of Uche L. Enenwali filed in support thereof and in conjunction with this brief.)

trigger a tax exemption" as part of a calculated business strategy to circumvent state sales tax].)

2. Extending Tribal Sovereign Immunity to Payday Lending Corporations Fails to Promote Tribal Autonomy.

Another aspect of the sixth *American Property* factor (also the third *Trudgeon* factor) is a consideration of whether extending immunity to the payday loan companies furthers federal policies aimed at promoting tribal autonomy. (*Ameriloan, supra,* 169 Cal.App.4th at p. 98.) One of the tenets of federal policy as proscribed in IGRA is that a tribe be the primary beneficiary of a tribally owned business. (*Allen v. Gold Country Casino, supra,* 464 F.3d at p. 1046 [one of the principal purposes of IGRA is "to insure that the Indian tribe is the primary beneficiary of the gaming operation".])

Trudgeon determined that a casino was entitled to immunity in part because of "the importance of gaming in promoting the self-determination of the Tribe" and the existence of federal law promoting Indian gaming. (*Trudgeon, supra,* 71 Cal.App.4th at p. 640.) *Trudgeon* also acknowledged that the parties stipulated that the business was being conducted in accordance with IGRA provisions. (*Ibid.*) This Court in *Ameriloan* noted that there is no similar expression of federal policy regarding the payday loan business:

> It may be that entities engaged in Indian gaming may benefit from tribal sovereign immunity, while payday loan companies marginally affiliated with tribes should not. Although federal law, for example, recognizes the Indian gaming industry is closely connected to the welfare of Indian tribes (see, e.g., 25 U.S.C. § 2701), no similar congressional declaration exists in connection with the payday loan industry.

(*Ameriloan*, 169 Cal.App.4th at p. 98, fn. 10.)

Extending immunity to the corporations here does not reflect—much less advance—federal policy aimed at promoting tribal autonomy. If anything, recent federal developments show a different trend with regard to payday lending. Congress has enacted legislation which appears to curtail the application of sovereign immunity under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 by authorizing a state attorney general or state regulator to bring a civil action against "any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law" (12 U.S.C. § 5552(a)(1)), engaged in "unfair, deceptive, or abusive acts or practices" relating to consumer financial products and services (12 U.S.C. § 5536 et seq.). The term "State" is defined as including "any federally recognized Indian tribe." (12 U.S.C. § 5481(27).)

In addition, as part of the requirement that tribes be the primary beneficiary of their gaming operations, IGRA prohibits a non-tribal manager from receiving compensation exceeding 30 percent of net profit or a maximum 40 percent under special circumstances. (25 CFR § 531.1(i)(1) & (2).) Here, Tucker receives all of the net income from the Payday Lenders, while SFS and MNE—corporations separate and distinct from the Tribes—receive only one percent of the revenues. (2 SCT 3, pp. 517, 526.) Such an arrangement falls far short of supporting federal policy aimed at promoting Indian self-determination and autonomy. In addition to determining whether a particular business is analogous to a "governmental agency" to be accorded immunity, the courts in *Ameriloan*, *Dixon* and *American Property* looked to whether pursuant to federal policy, a business confers adequate benefit to a tribe such that immunity should be extended to the business entity.

Here, the primary beneficiary of the payday loan businesses is a non-tribal individual. Any income the Tribes receive from SFS's and MNE's 1

percent share in the revenue benefits them at the expense of other, vulnerable California citizens.[16] Federal policy is not advanced by allowing tribes to affiliate with non-tribal individuals to exploit the tribes' sovereign immunity, especially when the purpose is to evade state and federal regulation and consumer protections. The final factor—consideration of the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entity—weighs heavily against sovereign immunity for MNE and SFS.

II. THE TWO *AMERICAN PROPERTY* FACTORS SUPPORTING EXTENDING TRIBAL SOVEREIGN IMMUNITY TO MNE AND SFS ARE NOT DISPOSITIVE.

The last two *American Property* factors are the "'method of creation of the economic entit[y]'" and whether "the tribe intended that the entity at issue share in its sovereign immunity." (*American Property, supra,* 206 Cal.App.4th at pp. 501, 510-511.) Here, it is undisputed that both the Santee Sioux Nation and the Miami Tribe are federally recognized tribes. SFS and MNE were formed under the laws of the Santee Sioux Nation and the Miami Tribe, respectively. The formation documents for both SFS and MNE include language that the corporations share the Tribes' sovereign immunity and the intended goal of the payday loan businesses' affiliation

[16] The record does not indicate the actual dollar amount the Tribes receive from the entities. Unlike in *Breakthrough*, where an auditor's report was produced explaining the "minimum guaranteed monthly payment to the Tribe from the Casino," here, the entities did not provide any financial data–much less an auditor's report–shedding light on the flow of revenue to the Tribes. (*Breakthrough, supra*, 629 F.3d 1173 at p. 1194.) Although records were demanded pertaining to the entities' financial relationship with the Tuckers (CTSA p. 234:1-3); remuneration to Tucker (CTSA p. 238:10-13); and financial statements, books and records, discovery as to these matters was denied. (CTSA p. 233:8-13).

with the Tribes was to exploit the Tribes' sovereign immunity. In isolation, it appears both of these factors would weigh in favor of extending tribal sovereign immunity to SFS and MNE. However, these two factors are not dispositive, and they must be considered in combination with the other *American Property* factors.

An entity's charter under tribal law is not dispositive to the application of sovereign immunity, but is only one of the factors in the analysis. (*Somerlott v. Cherokee Nation Distributors, Inc.* (10th. Cir. 2012) 686 F.3d at p. 1144, quoting Felix S. Cohen, Handbook of Federal Indian Law § 7.05(1)(a) (2005 ed.) ["Although the immunity extends to entities that are *arms of tribes*, it apparently does not cover *tribally chartered corporations* that are completely independent of the tribe," italics added by court].) Tribal corporations are not "imbued automatically" with immunity and a multi-factor inquiry is used to decide whether the corporation constitutes an "arm of the tribe" and shares in the tribe's immunity from suit. (*Breakthrough, supra*, 629 F.3d at p. 1185, fn 8.)

In *Dixon*, the entity was incorporated under tribal law, but was not entitled to assert the tribe's immunity because there was no evidence the entity acted as an extension of the tribal government. (*Dixon, supra*, 160 Ariz. at p. 258.) In *Breakthrough*, the fact that the entities were created under tribal law weighed in favor of applying sovereign immunity, but the Tenth Circuit did not end the analysis with its conclusion on this factor. (*Breakthrough, supra*, 629 F.3d at p. 1181.) Even if tribally-chartered, the remaining factors must be examined to determine if the entity acts as an extension of the tribal government such that it qualifies as an "arm of the tribe." While SFS's and MNE's status as tribally-charted entities weighs in favor of immunity, it does not, by itself, outweigh the countervailing factors.

Similarly, the Tribes' intent regarding whether the entities' share in their sovereign immunity is one factor in the "arm of the tribe" analysis, but it is not dispositive. At most, it merely overlaps with the method of creation factor. (*American Property, supra*, 206 Cal.App.4th at p. 511 (conc. opn. of Aaron, J.) [expressing view that the intent to share immunity factor had "already been effectively considered and weighed" when considering the method of creation factor].) A tribe's intent to share its sovereign immunity is part of the overall test measuring the relationship between a tribe and its economic entities—but it is only part of the test. Any such intention must still serve a legitimate tribal purpose above and beyond breaking state law. As one commentator noted, "[t]ribal immunity does not make tribal lending in contravention of state law legal, but it does make tribes immune from prosecution." (*The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk? supra*, 69 Wash. & Lee L. Rev. at p. 802.)

While the American Property factors, method of creation and intent to share immunity, weigh nominally in favor of sovereign immunity, they are only two of the six factors that must be analyzed and both should be considered in light of the overall plan to contravene state consumer protection law. In sum, the balance of the *American Property* factors weigh against according sovereign immunity to MNE and SFS.

CONCLUSION

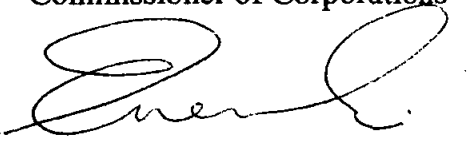
Considering all of the factors that courts have identified in determining whether an entity related to an Indian tribe is an arm of the tribe for the purpose of sovereign immunity, SFS and MNE are not entitled to share in the Tribes' sovereign immunity. Accordingly, the People of the State of California respectfully request that the trial court's order be

reversed and this matter be remanded for further proceedings consistent with this Court's rulings.

Dated: June 20, 2013

Respectfully submitted,

JAN LYNN OWEN
Commissioner of Corporations



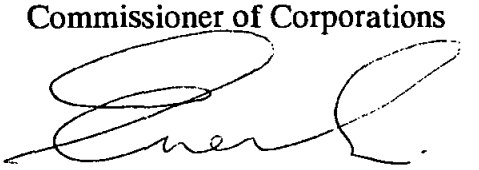
UCHE L. ENENWALI
Senior Corporations Counsel
Attorneys for Petitioner/Plaintiff

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLENT'S OPENING BRIEF uses a 13 point Times New Roman font and contains 10,407 words.

Dated: June 20, 2013

JAN LYNN OWEN
Commissioner of Corporations



UCHE L. ENENWALI
Senior Corporations Counsel
Attorneys for Petitioner/Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
CASE NO. BC373536

The undersigned declares: I am a citizen of the United States and I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Department of Corporations, 320 W. 4th Street, Suite 750, Los Angeles, California 90013-2344.

On **June 20, 2013** I served the following document(s): **APPELLANT'S OPENING BRIEF** on:

See Attached Service List

☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **June 20, 2013** at Los Angeles, California.

Frida Mazard

FRIDA MAZARD

SERVICE LIST
The People of the State of California v. Ameriloan et al.
Case No. BC373536

Fredericks Peebles & Morgan LLP **John M. Peebles, Esq.** **John Nyhan. Esq.** **2020 L Street, Suite 250** **Sacramento, CA 95811**	**Attorneys for Respondents and Defendants Specially Appearing as MNE dba Ameriloan, US Fast Cash, United Cash Loans And SFS, Inc. dba One Click Cash, and Preferred Cash Loans**
Conly J. Schulte, Esq. **Fredericks Peebles & Morgan LLP** **3610 N. 163rd Plaza** **Omaha, NE 68116**	**Attorneys for Respondents and Defendants Specially Appearing as MNE dba Ameriloan, US Fast Cash, United Cash Loans And SFS, Inc. dba One Click Cash, and Preferred Cash Loans**
Rebecca E. Gutierrez **The People of the State of California** **By and through the** **Commissioner of Corporations** **320 W. 4th Street, Suite 750** **Los Angeles, CA 90013**	**On behalf of Petitioner/Plaintiff**
Hon. Yvette M. Palazuelos **Los Angeles, Superior Court** **111 North Hill Street, Dept.28** **Los Angeles, CA 90012**	**Judge of the Superior Court**
Office of the Attorney General **300 South Spring Street** **Los Angeles, CA 90013-1230**	

PROOF OF SERVICE

Case: B242644, People of the State of California vs. MNE d/b/a Ameriloan et al.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 811 Wilshire Boulevard, Suite 900, Los Angeles, California 90017. On June 20, 2013 I served **APPELLANT'S OPENING BRIEF** on the party below by serving one electronically a copy pursuant to CRC 8.2129(c)(2).

CALIFORNIA SUPREME COURT
300 S SPRING ST
LOS ANGELES CA 90017
(served electronically a copy pursuant to CRC 8.212(c)(2))

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 20, 2013, at Los Angeles, California.

Fernando Mercado
PRINT NAME

Fernando Mercado
SIGNATURE