IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

People of the State of California, by and through the California Corporations Commissioner

Plaintiff/Appellant,

v.

MNE d/b/a Ameriloan, US Fast Cash and United Cash Loans, et al.,

Defendants/Respondents.

CASE NUMBER B242644

Los Angeles County Superior Court
Case No. BC 373536

From the Los Angeles County Superior Court
Honorable Yvette Palazuelos, Assigned Judge
Honorable Dzintra Janavs (Ret.), Discovery Referee

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rules 8.208, 8.488)

Court of Appeal Case Number: B242644

Case Name: *People of the State of California v. MNE d/b/a Ameriloan, et al.*

Please check the applicable box:

X There are no interested entities or persons to list in this certificate (Cal. Rules of Court, Rule 8.208(d)(3).

Respondent MNE d/b/a Ameriloan, US Fast Cash, and United Cash Loans and Respondent SFS, Inc. d/b/a Preferred Cash Loans and One Click Cash are wholly owned by the Miami Tribe of Oklahoma and Santee Sioux Nation, respectively, which are federally-recognized Indian tribes and, as such, are governmental entities and, thus, are not included within the definition of "Entity" set forth in Rule 8.208.

□ Interested entities or parties are listed below:

Name of Interested Entity of Person	**Nature of Interest (Explain)**

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INTRODUCTION

Pursuant to Cal. Rule of Court 8.204, the Specially Appearing Defendants/Respondents Miami Nation Enterprises ("MNE") d/b/a Ameriloan, US Fast Cash and United Cash Loans; and SFS, Inc. ("SFS") d/b/a One Click Cash and Preferred Cash Loans (collectively "Tribal Entities") file this Respondents' Brief. The sole issue before this Court is whether the Los Angeles Superior Court (the "trial court") properly determined that the Tribal Entities are sufficiently related to their respective Indian tribes to be clothed with sovereign immunity pursuant to this Court's instructions in *Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 89 (hereinafter *Ameriloan*). *Ameriloan* is the law of this case.

This appeal represents the latest in a long line of maneuvers employed by the California Department of Business Oversight Commissioner[1] (the "State") designed to deprive federally-recognized Indian tribes of their sovereign and federally-protected right to self-governance and self-determination free from State oppression and judicial action. This appeal stems from the trial court's grant of the Tribal Entities' motion to quash for lack of subject matter jurisdiction based on tribal sovereign immunity from suit. That motion has a long and tortured history, which includes prior addresses by both this Court and the California Supreme Court.

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[1] This action was originally filed by the California Department of Corporations Commissioner, which merged with the California Department of Financial Institutions on July 1, 2013 and became the California Department of Business Oversight.

For six years, since filing this action on June 29, 2007 (C.T. vol. 1, 27-41[2]), the State has doggedly pursued legal positions that defy both California and federal precedent governing the application of sovereign immunity and has repeatedly interjected inflammatory and irrelevant allegations against the Tribal Entities and their respective tribes. The State goes so far as to brashly ignore the law of the case established by this Court in *Ameriloan* when it instructed the trial court to vacate its order denying the Tribal Entities' motion to quash, conduct narrow and tailored fact finding and determine, based upon those facts, whether the Tribal Entities are arms of their respective Indian tribes. This Court fashioned a precise two-part test the trial court was required to utilize in determining whether the Tribal Entities are protected by tribal sovereign immunity. That test, fashioned from *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 388-89 (hereinafter *Redding Rancheria*) and *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 638-40 (hereinafter *Trudgeon*) required the trial court to determine: (1) whether the Tribal Entities are closely linked to their respective tribes in governing structure and characteristics; and (2) whether federal policies intended to promote Indian tribal autonomy are furthered by extension of immunity to the business entity.

The trial court conscientiously followed this Court's instructions, permitted narrowly-tailored discovery, accepted supplemental briefing, held an evidentiary hearing, and applied the facts to the factors within this Court's mandate. Based upon the evidence, the trial court correctly found that the Tribal Entities are arms of their respective Indian tribes and are

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[2] "C.T." refers to the Clerk's Transcript, followed by the volume and page number; "1st Supp. C.T." refers to the First Supplemental Clerk's Transcript, and "2d Supp. C.T." refers to the Second Supplemental Clerk's Transcript.

therefore entitled to tribal sovereign immunity. These findings are clearly supported by the evidence and should be affirmed on appeal.

ISSUE PRESENTED ON APPEAL

Whether the trial court properly determined that the Tribal Entities are sufficiently related to their respective Indian tribes to benefit from the application of sovereign immunity as directed by this Court in *Ameriloan, supra*, 169 Cal.App.4th 81, 98.

FACTUAL AND PROCEDURAL HISTORY

On June 29, 2007, the State sued various trade names, including "Ameriloan," "US Fast Cash," "United Cash Loans," "One Click Cash," and "Preferred Cash Loans," for alleged violations of the California Deferred Deposit Transaction Law ("CDDTL"). (C.T. vol. 1, pp. 000027-41.) The Tribal Entities appeared specially and filed a motion to quash for lack of subject matter jurisdiction based on tribal sovereign immunity. Specifically, MNE is a political and economic subdivision of the Miami Tribe of Oklahoma, a federally-recognized Indian tribe that conducts business under the trade names "Ameriloan," "US Fast Cash," and "United Cash Loans." (*Ameriloan, supra*, 169 Cal.App.4th at pp. 86-87; 77 Fed. Reg. 47,868 (Aug. 10, 2012).) SFS is a tribal governmental subdivision wholly owned by the Santee Sioux Nation, a federally-recognized Indian tribe that conducts business under the trade names "One Click Cash" and "Preferred Cash Loans." (*Id.*)

The Tribal Entities asserted that, as a matter of law, Indian tribes enjoy sovereign immunity from suit, including state enforcement actions. (*Ameriloan*, 169 Cal.App.4th at 89, 90 (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.* (1998) 523 U.S. 755 (hereinafter *Kiowa*)); *Oklahoma Tax Comm'n v. Potawatomi Tribe* (1991) 498 U.S. 505, 509, 510.) The Tribal

Entities further asserted that, as wholly owned instrumentalities of their respective tribes operating on behalf of their tribes, they are entitled to sovereign immunity from suit, and the trial court lacked subject matter jurisdiction. (*Ameriloan, supra*, 169 Cal.App.4th at pp. 84-89; *Redding Rancheria, supra*, 88 Cal.App.4th at pp. 388-89.) The trial court denied the motion to quash, and the Tribal Entities filed a petition for writ of mandate asking the Court of Appeal to vacate the trial court's order. (*Ameriloan, supra*, at pp. 88-89.) Following summary denial of the petition for writ, the California Supreme Court granted review and transferred the case to this Court with instructions to issue an alternative writ. (*Id.* at p. 88.)

On January 14, 2009, this Court issued an order granting in part and denying in part the petition for writ of mandate. The Court found the trial court erred in numerous respects, namely by concluding as a matter of law that sovereign immunity does not apply to off-reservation commercial activity. (*Ameriloan, supra*, 169 Cal.App.4th at pp. 89-90.) Accordingly, the Court directed the trial court to vacate its order denying the Tribal Entities' motion to quash and to "consider the criteria expressed by the Courts of Appeal in *Trudgeon, supra*, 71 Cal.App.4th at page 638 ... and *Redding Rancheria, supra*, 88 Cal.App.4th at page 389 ..., including whether the tribe and the entities are closely linked in governing structure and characteristics and whether federal policies intended to promote Indian tribal autonomy are furthered by extension of immunity to the business entity." To this end, the Court permitted the State to conduct "limited discovery, directed solely to matters affecting the trial court's subject matter jurisdiction" on remand.[3] (*Id.* at p. 98.)

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[3] The trial court stated that "the Court of Appeal noted, in dicta, that Plaintiff may be permitted to conduct limited discovery regarding this Court's subject matter jurisdiction in this case." (C.T. vol. 24, p. 005758.)

On remand, the trial court followed this Court's instructions and allowed discovery to proceed in accordance with the specific contours of the "arm of the tribe" factors set forth in *Trudgeon* and *Redding Rancheria.* The State, however, repeatedly sought documents far afield from the specific and narrow arm-of-the-tribe analysis prescribed by this Court. The trial court quashed the State's business records subpoena to U.S. Bank for broad categories of the Tribal Entities' financial records as it "sought documents unrelated to the limited issue of this Court's subject matter jurisdiction over Defendants." (C.T. vol. 7, p. 001598.) The trial court also quashed in part as overly broad a second document subpoena issued to the same bank that sought minute details of bank deposits and withdrawals from the Tribal Entities' bank accounts. (*Id.* at pp. 001594-1605.) Likewise, the trial court denied as irrelevant and overly broad the State's motion to compel responses to written discovery requests for information relating to the minute details of various relationships between the Tribal Entities and third parties, the disposition of all revenues generated by the tribes, and tribal members and tribal employees, because this information was not pertinent to the arm-of-the-tribe analysis required by this Court. (C.T. vol. 8, pp. 001868-80.)

In light of the discovery disputes caused by the State's repeated improper discovery requests, the trial court, on February 10, 2010, appointed a discovery referee, the Honorable Dzintra Janavs (Ret.). (C.T. vol. 10, pp. 002223-25.) The discovery referee took up three additional motions to compel filed by the State on a second set of written discovery requests. (C.T. vol. 14, pp. 003332-61, 003392-3414.) Those discovery requests largely duplicated the requests for financial information, operational information, and third party relationship information already denied by the trial court. (*See id.* at pp. 003339.) The discovery referee denied the State's motions to compel and imposed sanctions upon the State

for two significant reasons: (1) the State improperly renewed requests the trial court had previously denied in a binding ruling; and (2) the State continued to make requests for financial and operational minutiae that were wholly irrelevant to the discrete issue of whether the Tribal Entities constituted arms of their respective tribes. (*Id.* at pp. 0003332-3361.)

The trial court and the discovery referee expressly allowed discovery to proceed as to matters relevant to the arm-of-the-tribe factors set forth in *Trudgeon* and *Redding Rancheria.* As such, the Tribal Entities produced banking records probative of the degree of tribal control exercised over them, *e.g.*, signature cards, applications, and documents reflecting board resolutions. (C.T. vol. 7, pp. 000009-10.) The Tribal Entities also produced organizational documents, articles of incorporation, bylaws, tribal laws and resolutions, licenses, and entity meeting minutes relevant to tribal ownership and control of the Tribal Entities. (See C.T. vol. 8, pp. 001846-55; C.T. vol. 24, pp. 005765-67.)

Upon completion of discovery, the Tribal Entities renewed their motion to quash on April 16, 2012. The State did not file an opposition brief; instead, it filed a motion for preliminary injunction, which the trial court deemed to be the State's initial opposition to the motion to quash. (C.T. vol. 24, pp. 005759.) Three years after remand, the trial court conducted an evidentiary hearing and, based upon the pertinent evidence presented, found that the Tribal Entities are sufficiently related to their respective Indian tribes to benefit from tribal sovereign immunity. Accordingly, the trial court entered an order dismissing the case against the Tribal Entities for lack of subject matter jurisdiction. (C.T. vol. 24, pp. 005754-69; 2d Supp. C.T. vol. 5, pp. 000972-98.) The State appeals that order, as well as the trial court's order sanctioning the State for repeated and overreaching discovery abuses.

STANDARD OF REVIEW AND BURDEN OF PROOF

The federal government enjoys "plenary and exclusive power" to deal with Indian tribes, (*Bryan v. Itasca County, Minn.* (1976) 426 U.S. 373, 376 n. 2), and tribes "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58.) The United States Supreme Court has held repeatedly that, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (*Kiowa, supra,* 523 U.S. at p. 754.) Thus, Indian tribes possess "absolute immunity from suit in federal or state court, absent an express waiver of that immunity or congressional authorization to sue." (*Ameriloan, supra,* 169 Cal.App.4th at p. 89 [citing *Kiowa, supra,* at p. 754].) Tribal sovereign immunity also extends to "for-profit commercial entities that function as 'arms of the tribes.'" (*Ameriloan, supra,* at p. 97 [citing cases]; see, e.g., *Cash Advance and Preferred Cash Loans v. Colorado* (Colo. 2010) 242 P.3d 1099, 1107-08, 1109 (hereinafter "Cash Advance").)

The assertion of sovereign immunity from suit constitutes a challenge to a court's subject matter jurisdiction to hear the case. (See *Ameriloan, supra,* 169 Cal.App.4th at p. 85.) When sovereign immunity is raised, the plaintiff bears the burden of proving by a preponderance of the evidence that the court has jurisdiction. (*Yavapai-Apache Nation v. Lipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206 [citing *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369].) Furthermore, where "subject-matter jurisdiction turns on a question of fact, [courts must] review the [lower] court's factual findings for clear error and review its legal conclusions de novo." (*Breakthrough Mgmt. Group v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d

1173, 1182 [hereinafter *Breakthrough*] [citations omitted]). Hence, contrary to the State's assertion, this appeal is not entitled to de novo review on factual findings. (State's Br. at p. 13.)

ARGUMENT

The State failed to meet its burden to prove that the trial court has subject matter jurisdiction over either of the Tribal Entities. The State tries to characterize its appeal as a challenge to the trial court's purported failure to apply the factors of *Trudgeon* and *Redding Rancheria* pursuant to this Court's specific directions in *Ameriloan.* (State Br. at 2.) In reality, however, the State does not champion *Trudgeon* and *Redding Rancheria*, but asks this Court to modify its prior rulings and direction to the trial court and adopt a ***wholly different*** test for an arm of the tribe.[4] In fact, the State barely gives lip service to *Trudgeon* and *Redding Rancheria* even though these cases represent controlling authority and this Court established their factors as the law of the case the trial court must apply over four years ago.

The test the State attempts to forcibly wedge into this case arises from *American Property Mgmt. Corp. v. Superior Ct.* (2012) 206 Cal.App.4th 491 (hereinafter *American Property*), an inapposite case that has neither superseded the law of this case as announced by *Ameriloan,* nor is it binding on this Court. In fact, the State fails to explain why or how this Fourth District opinion bears upon the present case at all. Furthermore, *American Property* purports to adopt an arm-of-the-tribe test utilized by the Tenth Circuit Court of Appeals in *Breakthrough, supra*, 629 F.3d 1173, but

[4] Indeed, the State's insistence upon these improper and immaterial facts has already subjected it to sanctions, which is currently the subject of a related appeal. (*California v. MNE d/b/a Ameriloan, US Fast Cash and United Cash Loans, et al.*, Case No. B236547.)

misapplies that test in significant ways that undermine its analysis and eviscerates any guidance that might have been helpful to the Court here.[5]

The State cannot introduce a new test for sovereign immunity into this case ***more than six years*** after it filed this action as a vehicle to assert, yet again, myriad factual allegations repeatedly rejected by the trial court and the discovery referee as improper and irrelevant to the legal framework established by this Court in *Ameriloan.* Those collateral and irrelevant facts have no place in this analysis and should be disregarded. The trial court properly analyzed this case pursuant to the controlling authorities and the undisputed ***relevant*** facts. Because the State cannot overcome these facts, it urges this Court to turn a blind eye to the controlling law and apply irrelevant facts to irrelevant legal factors. As such, the State's appeal is without merit, and the trial court's ruling should be affirmed.

I. THE TRIAL COURT PROPERLY DETERMINED THAT THE TRIBAL ENTITIES CONSTITUTE ARMS OF THEIR RESPECTIVE TRIBES PURSUANT TO THIS COURT'S INSTRUCTIONS IN *AMERILOAN*

This Court unequivocally stated in *Ameriloan* that the test of whether the Tribal Entities are "sufficiently related to the tribe to benefit from the application of sovereign immunity" arises from the factors set forth in *Trudgeon* and *Redding Rancheria,* and are: (1) "whether the tribe and the entities are closely linked in governing structure and characteristics"; and (2) "whether federal polices intended to promote Indian tribal autonomy are furthered by extension of immunity to the business entity." (*Ameriloan, supra,* 169 CalApp.4th at p. 98.) Thus, this

[5] Importantly, as discussed below, even if this Court declined to adhere to the law of the case as established in *Ameriloan,* the *Breakthrough* test is substantively indistinguishable from the *Trudgeon* and *Redding Rancheria* factors such that the evidence would still support the trial court's finding that the Tribal Entities are protected by tribal sovereign immunity.

Court formulated a concise and accurate test and instructed the trial court to utilize that test in determining whether the Tribal Entities are entitled to tribal sovereign immunity. The *Ameriloan* test is the law of the case, and the trial court properly followed that test in its determination.

A. THE *TRUDGEON* AND *REDDING RANCHERIA* CRITERIA, AS SET FORTH IN *AMERILOAN*, CONSTITUTE THE LAW OF THIS CASE

This Court's holding and instructions to the trial court in *Ameriloan* constitute the law of the case and, absent special circumstances, control all subsequent proceedings. (See *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) Under the law of the case doctrine, any principle or rule of law stated in an appellate court opinion that is necessary[6] to the court's decision must be followed in all subsequent proceedings in the action, including a later appeal. (*Ibid.*) The doctrine applies equally to cases reversed with a general remand and those reversed with directions for particular proceedings on remand. (See *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 312.)

The law of the case doctrine applies to rules that arise from prior appeals of decisions that were short of full trial, such as a judgment on demurrer, an order of nonsuit, or an order denying an anti-SLAPP motion to strike a complaint. (*Bergman v. Drum* (2005) 129 Cal.App.4th 11, 15 n. 3 [citing 9, Cal. Procedure (4th ed. 1997) Appeal, § 909, p. 944].) While not inflexible, the doctrine applies "even if the court that issued the opinion becomes convinced in a subsequent consideration that the former opinion is erroneous." (*Clemente v. State of Cal.* (1985) 40 Cal.3d 202, 211; *Santa*

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[6] The requirement that the rule be "necessary" generally precludes rulings set forth in dicta, *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498, and generally limits application of the rule to issues expressly decided in the appellate court's opinion *Olson v. Cory* (1983) 35 Cal.3d 390, 399.

Clarita Organization for Planning the Environment v. County of Los Angeles (2007) 157 Cal.App.4th 149, 156.)

The law of the case doctrine is motivated by the policy of judicial economy. California courts have explained that "[f]inality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding." (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 435 [citing *People v. Shuey* (1975) 13 Cal.3d 835, 840-41; *People v. Durbin* (1966) 64 Cal.2d 474, 477; *Gore v. Bingaman* (1942) 20 Cal.2d 118, 123].) Put another way, "[t]he doctrine promotes finality by preventing relitigation of issues previously decided." (*Yu v. Signet Bank/Virginia, supra,* 103 Cal.App.4th at p. 309.) The doctrine therefore prevents litigants from "continually reinvent[ing] their position on legal issues that have been resolved against them by an appellate court." *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 304 [citing *Yu v. Signet Bank/Virginia, supra,* at p. 312].)

This Court established the law of this case in *Ameriloan,* when it confirmed that arms of federally-recognized Indian tribes are entitled to sovereign immunity from State enforcement actions and instructed the trial court to apply the *Trudgeon* and *Redding Rancheria* criteria to each of the Tribal Entities to determine whether they are the arms of their respective Indian tribes. (*Ameriloan, supra,* 169 Cal.App.4th at p. 98.) That arm-of-the-tribe test was not mere dicta—it was an express mandate that controls all subsequent proceedings, both in the trial court and now on appeal. (*Morohoshi v. Pacific Home, supra,* 34 Cal.4th at p. 491.) Indeed, for four years the parties, the trial court and the discovery referee all operated under the precise *Ameriloan* guidelines. The Court's specific instructions in *Ameriloan* constitute a necessary rule of law that was critical both to this Court's remand to the trial court for the arm-of-the-tribe analysis, as well as

to the trial court's ultimate determination. (*Ibid*; see also *Olson v. Cory*, *supra*, 35 Cal.3d 390, 399; *Gyerman v. United States Lines Co.*, *supra*, 7 Cal.3d 488, 498.)

B. THE TRIAL COURT CORRECTLY LIMITED ITS ANALYSIS TO THE *TRUDGEON* AND *REDDING RANCHERIA* FACTORS, AND ITS FINDINGS ARE SUPPORTED BY THE EVIDENCE

The trial court properly quashed the State's Summons and dismissed the Tribal Entities from suit because the uncontroverted facts presented at the evidentiary hearing established: (1) the Tribal Entities are closely linked to their respective tribes in governing structure and characteristics, as they are wholly-owned and controlled tribal entities pursuant to tribal law; and (2) the extension of immunity to the Tribal Entities furthers federal policies intended to promote tribal autonomy because the Tribes use revenues generated through the Tribal Entities to provide important services to their members. (2d Supp. C.T. vol. 5, pp. 000972-98.) Thus, each of the Tribal Entities satisfied the arm-of-the-tribe analysis prescribed by this Court to fall within the protections of sovereign immunity.

1. The Tribal Entities Are Closely Linked In Governing Structure And Characteristics

Using *Trudgeon* as a guide, which itself is guided in part by *Gavle v. Little Six, Inc.* (Minn. 1996) 555 N.W.2d 284 (hereinafter *Gavle*), the trial court properly determined that the Tribes and their respective business entities were closely linked in governing structure and characteristics. Like *Gavle*, *Trudgeon* considered whether the entity had been organized under tribal law; whether it was wholly owned by the tribe; the composition of the entity's governing board; and the process by which the board was elected and removed. (*Trudgeon*, *supra*, 71 Cal.App.4th at p. 641 [citing *Gavle*, *supra*, at p. 295].) In *Trudgeon*, the entity was determined to be closely linked to the tribe, as the entity had been organized under tribal law; the

entity was wholly owned by the tribe; the entity's board was selected by the tribal members from members of the tribal council; and the board members could be removed by a majority vote of the tribal members. (*Trudgeon, supra*, at p. 641.) *Trudgeon* concluded that "[i]t is thus apparent that the Tribe, through its members and their elected officials, directly oversees the operations of [the tribal entity]." (*Ibid.*)

Here the trial court properly found, based on uncontroverted facts, that the Tribal Entities are positioned precisely like the tribal entities in *Trudgeon* and *Gavle*. As to MNE, the trial court found:

> The same analysis is directly on point in this case and warrants granting the motion to quash. As to Defendant MNE, the evidence shows that MNE's initial Board of Directors consisted of the Miami Tribe's Business Committee; that the Chief of the Miami Tribe has appointed all successor members of the MNE Board, with the advice and consent of the Business Committee; that the MNE Act provide [sic] that the MNE Board will be comprised only of persons appointed by the Chief of the Miami Tribe; that all five members of the MNE Board are members of the Miami Tribe; and that the initial officers of MNE were all hired by the Tribe's Business Committee.[7]

(C.T. Vol. 24, p. 005764.)

As to SFS, the trial court found:

> As to Defendant SFS, Inc., the evidence shows that SFS was created by the Santee Sioux Nation and is 100% owned by the Nation; that SFS's Article [sic] of Incorporation mandate that the Board of Directors of SFS, which consists of the elected tribal council of the Santee Sioux Nation, manage SFS; and

[7] MNE relies upon MNE Services, Inc., a wholly-owned subsidiary created in 2008 pursuant to Section 305(n) of the MNE Act, to process and approve loan applications pursuant to underwriting criteria that MNE has approved. MNE Services, Inc. also approves loan applications daily at MNE's headquarters, which are located on land that the United States holds in trust for the Miami Tribe's benefit. (2d Supp. C.T. Vol. 6, pp. 1209-10, 1215, 1217).

> that the Santee Sioux Nation Trial [sic] Council appointed the Santee Sioux Nation's business manager as SFS's CEO.

(*Id.* at p. 005765.) Thus, each "Tribe, through its members and their elected officials, directly oversees the operations" of its respective business entity, just as in *Trudgeon*. (See *Trudgeon*, *supra*, 71 Cal.App.4th at p. 641.)

Accordingly, the trial court correctly concluded that the Tribes are clearly enmeshed in the direction and control of the Tribal Entities such that they are closely linked in governing structure and characteristics. (CT. Vol. 24, p. 005766.) These findings are clearly supported by the record evidence and should be affirmed on appeal.

In both its briefing on the issues and at the hearing, the State once again ignored this Court's mandate to examine the relationship between the Tribal Entities and their respective tribes. The State stubbornly substituted its own test for the one commanded by *Ameriloan*, choosing to focus on irrelevant factors such as the relationship between the Tribal Entities and third parties, the business minutiae of the day-to-day operations of the lending businesses, and the Tribes' share of the revenues from the business. (*Id.* at pp. 005759.) Specifically, the State unilaterally expanded the two-part test fashioned by this Court in *Ameriloan* and improperly injected a third factor—"whether the entity is organized for a purpose that is governmental in nature, rather than commercial" (State's Br. at p. 16)—which is not part of the analysis and is contrary to Supreme Court precedent. (See *Kiowa*, *supra*, 523 U.S. at p. 754.)

The trial court properly rejected this misdirection, holding that the State's assertions continued to fall outside the proper analysis ordered by this Court in *Ameriloan* under the dictates of *Trudgeon* and *Redding Rancheria*, because "control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of

the business without being involved in the actual management." (C.T. vol. 24, pp. 005764, 66 [citing *Trudgeon, supra*, 71 Cal.App.4th at 641 [citing *Gavle, supra*, 555 N.W.2d at p. 295]].) The trial court stated:

> Plaintiff's arguments go beyond governing structure and characteristics and seek a determination that sovereign immunity does not apply because the Tribes have not exercised sufficient control of the Defendants or have allowed third parties to extract too much money (benefit) from the tribal entities. However, these concerns are the Tribe's concerns ....

(C.T. vol. 24, pp. 005766.) Thus, the trial court held that the State's "evidence" and arguments regarding third-party relationships and day-to-day management were simply inapposite to the analysis. (*Ibid.*)

The State's reliance on business minutiae and day-to-day operations on appeal should also be rejected on appeal as irrelevant to the relationship between the Tribal Entities and their respective tribes. As the trial court astutely noted, it is not the province of the trial court, or of this Court to second guess business arrangements freely entered into by Indian tribes or to decide how much control, or how much benefit, is enough to strip a tribe of its sovereign immunity. Such power is akin to abrogation of sovereign immunity, which is within the sole authority of Congress. (*Kiowa, supra*, 523 U.S. at p.754.) This Court should similarly decline the State's request to usurp Congressional powers.

2. *Federal Policies Intended to Promote Indian Tribal Autonomy Are Furthered By Extension of Immunity to the Tribal Entities*

The trial court likewise properly determined that *Trudgeon* and *Redding Rancheria* did not require an inquiry into **how much** financial benefit the Tribal Entities received in proportion to the total amount of existing revenue. Such a proposition finds no support in the case law, and

the State's complaints as to the division of revenues are irrelevant. *Trudgeon*, following *Gavle*, merely inquired into whether the entity's activity promoted tribal economic development and self-sufficiency. (*Trudgeon, supra*, 71 Cal.App.4th at p. 642.) The uncontroverted evidence on this point is indisputable: the revenues generated by MNE's lending activities are used to provide vital governmental services to members of the Miami Tribe of Oklahoma (2d Supp. C.T. vol. 6, pp. 001279-80, 001210); and the revenues generated by SFS's lending activities are used to provide vital governmental services to members of the Santee Sioux Nation. (2d Supp. C.T. vol. 4, pp.000765, 000802-807.)

The trial court correctly held that the State failed to demonstrate that federal policies intended to promote Indian tribal autonomy are not furthered by extension of immunity to the Tribal Entities. The trial court again rejected the State's argument that the division of revenues between the Tribes and third-party consultants is relevant to this factor:

> However, this argument fails to show that extending immunity would not further tribal autonomy. It is undisputed that the Tribes receive some amount of the gross revenues, which allow the Tribes to fund important services and projects for their members. It is not the province of this court to determine that, because the Tribes did not make a better deal with Defendants in which they secured a greater percentage of gross revenues, Indian tribal autonomy is no longer furthered. Such an interpretation would substitute this court's analysis of the Tribes' interests for the Tribes' own analysis of what is in their best interests. That is not the test.

(C.T. vol. 24, p. 005764.)

Again, this Court should likewise reject and disregard the State's repeated reference to factual assertions regarding the minute details of the Tribal Entities' revenues. The undisputed fact that each of these Tribes uses the revenues generated by the Tribal Entities to provide important

social and governmental services to their members clearly satisfies the test of *Trudgeon*. It is not within the province of the courts to determine how much revenue a tribe must receive before the federal goals and purposes of tribal autonomy are furthered. As noted above, such an interpretation would invade Congress' sole authority to abrogate tribal sovereign immunity. (*Kiowa, supra*, 523 U.S. at p. 756.)

Sufficient revenues, or any revenue at all, is not the test, and cannot be the test for whether any entity enjoys sovereign immunity. Part of the right of being a sovereign is the right to pursue activities that may not generate revenues at all. Indeed, if sufficient revenues were the test, then every tribal entity that failed to produce revenues, for whatever reason, would be denied sovereign immunity. By that standard, the federal government would also be stripped of its sovereign immunity, because it has failed to produce sufficient revenues to even pay its debts. Notably, the State has not even attempted to offer any valid argument or legal authority to the contrary.

Accordingly, the trial court properly determined, based on the uncontroverted facts, that federal policies intended to promote Indian tribal autonomy are furthered by extension of immunity to the Tribal Entities. (C.T. vol. 24, pp. 005761-68.) These findings are also supported by the uncontroverted evidence and should be affirmed on appeal.

C. THE STATE IGNORES CONTROLLING LAW AND ESPOUSES POSITIONS CONTRARY TO THIS COURT'S OPINIONS, THE LAW OF CALIFORNIA AND THE SUPREME COURT

Significantly, the State only feebly attempts to apply *Ameriloan*, *Trudgeon*, and *Redding Rancheria* to the present case, even though this Court directed on remand that these authorities governed the trial court's determination. Indeed, the main body of the State's substantive analysis (State Br. pp. 17 – 31) is totally devoid of any direct citation to this Court's

opinion in *Ameriloan.* When the State finally refers to the controlling authority, it misstates this Court's opinion to state (without offering any specific citation) that this Court "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." (State Br. p. 32 [emphasis added].) This proposition does not appear in this Court's opinion in *Ameriloan.*

The State's silence as to the controlling authority speaks volumes—the controlling authority simply does not support the State's position. Instead, the State relies almost completely on *American Property* and the cases cited therein. As set forth below, those cases are factually inapposite and employ the now-defunct governmental versus commercial purpose factor in contravention of the Supreme Court's holding in *Kiowa* that sovereign immunity applies even to tribal businesses engaged in commercial activities. Therefore, these cases should be disregarded.

This Court should also reject the State's efforts to engage in some balancing of the "competing sovereign interests at stake." (State Br. at pp. 29-30.) The State cites absolutely no authority for this absurd proposition. Indeed, it cannot, because such a balancing test is explicitly prohibited. (See *Warburton/Buttner v. Superior Ct.* (2003) 103 Cal.App.4th 1170, 1182 ["It must be recognized that sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation."] [citing *Chemehuevi Indian Tribe v. Cal. St. Bd. Of Equal.* (9th Cir. 1985) 757 F.2d 1047, 1052, n. 6]]; see also *Bishop Paiute Tribe v. County of Inyo* (9th Cir. 2002) 291 F.3d 549, 559, overruled on other grounds by *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* (2003) 538 U.S. 701).) It is also prohibited by the United States Supreme Court's oft-repeated admonition that, "tribal immunity is a matter of federal law and is not subject to

diminution by the States." (*Kiowa, supra*, 523 U.S. at p. 756 [citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering* (1986) 476 U.S. 877, 891; *Washington v. Confederated Tribes of Colville Reservation* (1980) 447 U.S. 134, 154].) Any such balancing test unilaterally imposed by a state tribunal would necessarily amount to unlawful state diminution of tribal sovereign immunity.

II. THIS COURT SHOULD REJECT THE STATE'S ATTEMPT TO INJECT A NEW ARM-OF-THE-TRIBE TEST BASED ON AN INAPPOSITE, MISGUIDED AND NONBINDING DECISION FROM ANOTHER APPELLATE DISTRICT

As set forth above, the two part test articulated by this Court in *Ameriloan* is the law of the case, and the trial court correctly followed that rule of law in its analysis of the relationship between the Tribal Entities and their respective tribes. Because the evidence showed the Tribal Entities are arms of their respective tribes under *Trudgeon* and *Redding Rancheria*, the trial court properly dismissed the complaint against the Tribal Entities for lack of subject matter jurisdiction based on sovereign immunity. (C.T. vol. 24, p. 005768.)

A. NO EXCEPTIONS TO THE LAW OF THE CASE DOCTRINE APPLY

California recognizes limited exceptions to the law of the case doctrine. (See *Yu v. Signet Bank/Virginia, supra*, 103 Cal.App.4th at p. 309 ["The doctrine is one of procedure rather than jurisdiction, and can be disregarded in ***exceptional*** circumstances."] [Emphasis added].) California courts may elect not to follow the law of the case in order to avoid an unjust decision; but courts will not apply the "unjust decision" except ***unless*** a party demonstrates "a manifest misapplication of existing principles resulting in substantial injustice." (*Ibid.*) California courts also may elect not to follow the doctrine if the controlling rule of law has been changed by

an intervening decision. (See *Morohoshi v. Pacific Home, supra*, 34 Cal.4th at p. 492.)

Importantly, however, there is no horizontal *stare decisis* in the California Courts of Appeal. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1489 n. 10; *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.) The decision of one court of appeal is not binding upon another court of appeal. Courts and California commentators long have recognized that "[o]ne district or division may refuse to follow a prior decision of a different district or division for the same reasons that influence the federal Courts of Appeals of the various circuits to make independent decisions ...." (*McCallum v. McCallum* (1997) 190 Cal.App.3d 308, 315 n. 4 [citing *McGlothlen v. Dept. of Motor Vehicles* (1977) 71 Cal.App.3d 1005, 1017; *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 101; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal § 772, pp. 740-41].)

The law of the case set forth in *Ameriloan* must be followed unless the State can establish one of these recognized exceptions. The State has not and cannot show any exception exists here to avoid the two part arm-of-the-tribe test formulated by this Court.

First, the State offers no argument that application of the *Trudgeon* and *Redding Rancheria* criteria constitutes "a manifest misapplication of existing principles resulting in substantial injustice." (See, *Yu v. Signet Bank/Virginia, supra*, 103 Cal.App.4th at p. 309.) Nor can it make that argument here. Courts apply this exception in very limited and extreme circumstances. (See, e.g. *Moore v. Kaufman* (2010) 189 Cal.App.4th 604, 617 [exception applied where law of the case doctrine would have upheld a

"patently void judgment" and put a party unjustly at risk of incarceration.[8]]) Such an extreme circumstance is not present here. Rather, the only "injustice" the State can espouse is that this Court's rule in *Ameriloan* has proven adverse to the State's position. But courts have specifically refused to apply the unjust decision exception where the law of the case is simply adverse to a party's position. (See *People v. Stanley* (1995) 10 Cal.4th 764, 787 [refusing to apply the unjust decision doctrine in a death penalty appeal where the defendant had repeatedly raised the same suppression issues before the trial court, the Court of Appeal on a writ of mandate, and the Supreme Court, stating: "The unjust decision exception does not apply when there is a mere disagreement with the prior appellate determination."].)

Second, the State cannot show that *Ameriloan*, the controlling rule of law in this case, has been changed by an intervening decision. (See *Morohoshi v. Pacific Home*, *supra*, 34 Cal.4th at p. 492.) The State seeks to end-run the *Ameriloan* mandate by relying primarily on the *American Property* decision, which is not binding on this Court and which, as discussed in detail below, actually misapplies the *Trudgeon* and *Redding Rancheria* criteria and improperly inserts a factor into the analysis that the United States Supreme Court has unequivocally held cannot be considered.

This Court set forth two factors drawn from *Trudgeon* and *Redding Rancheria* to be analyzed in the arm-of-the-tribe test: (1) whether the tribe

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[8] In *Moore* the Court declined to follow the law of the case doctrine noting that "Kaufman is seeking to collect over $170,000 from Diaz on the basis of a patently void judgment, and Diaz currently faces the prospect of incarceration for resisting Kaufman's collection efforts. Were we to deny Diaz's writ petition on the basis of the law of the case, we would be deliberately shutting our eyes to a manifest misapplication of existing principles that results in substantial injustice." (*Moore v. Kaufman*, *supra*, 189 Cal.App.4th at p. 617.)

and the entity are closely linked in governing structure and other characteristics; and (2) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the entity. (*Ameriloan, supra*, 169 Cal.App.4th at p. 98.) The State unilaterally injects a third factor not discussed or approved by this Court—"whether the entity is organized for a purpose that is governmental in nature, rather than commercial." (State's Br. at p. 16.) The State's third factor is wholly improper in light of the Supreme Court's holding in *Kiowa, supra*, 523 U.S. at p. 760 [decided in 1998, before *Trudgeon* was decided in 1999], that immunity applies regardless of the nature of the activity. (See also *Cash Advance, supra*, 242 P.3d at p. 1010 n12 [noting tribal sovereign immunity cases that rely on a "government versus commercial activity distinction" do so in contravention of *Kiowa*].)

The State simply suggests, without any further analysis, that the Fourth District's decision in *American Property* should control here as it "expanded and clarified *Trudgeon's* 'arm of the tribe' analysis ...." (State Br. at 16.) But the State does not explain how *American Property* could or did change the controlling law of the case. Any "clarification" of *Trudgeon* by the Fourth District has no bearing on this Court's interpretation and application of *Trudgeon* in this case. The law of the case was established by this Court's decision in *Ameriloan.* The Fourth Circuit cannot impose its own views of *Trudgeon*, based on different facts and circumstances, on this Court. And any suggestion by the State that the Fourth District's analysis is superior to that of this Court should be summarily rejected. (*Jessen v. Mentor Corp., supra*, 158 Cal.App.4th at 1489 n. 10; *In re Marriage of Shaban, supra*, 88 Cal.App.4th at p. 409; *McCallum v. McCallum, supra*, 190 Cal.App.3d at p. 315 n. 4 [citing *McGlothlen v. Dept. of Motor Vehicles, supra*, 71 Cal.App.3d at p. 1017; *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center, supra*, 40

Cal.App.3d at p. 101; 9 Witkin, Cal. Procedure, Appeal § 772, pp. 740-41].)

While one district has discretion to give deference to another district's opinion based upon the policies of "stability of the law and predictability of decision," *Mega Life and Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522 1529, such deference must be based upon one district agreeing with the reasoning of the other district, or upon one district's compliance with binding rules of law established by the California Supreme Court. (*Ibid.; Apple Valley Unified School Dist. v. Vavrinek, Tribe, Day & Co.* (2002) 98 Cal.App.4th 934, 947.) Neither scenario requires this Court to give any deference to the *American Property* decision. The California Supreme Court has not adopted an arm-of-the-tribe test that would bind both the Second District and the Fourth District, and *American Property* is both factually dissimilar from the facts here, and the Fourth District's application of the law is so seriously flawed, that no policy encouraging stability of the law would be served by deference to that opinion. (See *Mega Life and Health Ins. Co. v. Superior Court*, *supra*, at p. 1529.)

B. THE AMERICAN PROPERTY DECISION IS FACTUALLY AND LEGALLY INAPPOSITE

The State's reliance on *American Property* is wholly misplaced, and this Court should reject the State's invitation to adopt its analysis and reasoning. *American Property* utilized a very different arm-of-the-tribe test to analyze a very different set of facts. The significant distinctions between the law and the facts presented here and those at issue in *American Property* make any attempted cross-over in analysis and reasoning difficult at best.

Rather than the two part test articulated by this Court in *Ameriloan*, the court in *American Property* adopted a six-part arm-of-the-tribe test

arising out of the Tenth Circuit Court of Appeals' opinion in *Breakthrough, supra*, 629 F.3d at p. 1187. Those factors consist of: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the tribes." (*American Property, supra*, 206 Cal.App.4th at p. 501.) The court in *American Property* then applied those factors to wholly inapposite facts from those presented here.

First, in *American Property,* the subject entity was not created pursuant to tribal law; rather it was created pursuant to state law. (*American Property, supra*, 206 Cal.App.4th at p. 495.) Importantly, the court considered the creation of the entity under state law to be "the dispositive fact" and "the most significant fact" in its analysis and conclusion that the entity was not an arm of the tribe. (*Id.* at pp. 501-02, 508.) Here it is uncontroverted that both Tribal Entities were created pursuant to tribal law, and neither was organized under the laws of any state. (*Ameriloan, supra*, 169 Cal.App.4th at p. 86.)

Second, none of the facts recited in *American Property* demonstrated that the entity's revenues served the purpose of promoting tribal autonomy. There is no evidence that the entity's revenues flowed to the tribe, or otherwise aided the tribe in providing essential services to tribal members, which weighed against a finding the entity had a purpose that would promote Indian tribal autonomy. (*American Property, supra*, 206 Cal.App.4th at pp. 504, 508.) Here it is uncontroverted that the Miami Tribe of Oklahoma uses the revenues generated by MNE to provide vital tribal services to its members, including tribal law enforcement, poverty assistance, housing, nutrition, eldercare programs, school supplies,

preschool, and scholarships (2d Supp. C.T. vol. 6, pp. 001279-80, 001210). It is also undisputed that the Santee Sioux Nation likewise uses the revenues generated by SFS, Inc. to provide vital tribal services to its members. (2d Supp. C.T. vol. 4, pp. 000765, 000802-807.)

Third, the relationship between the subject entity in *American Property* and the Indian tribe was remote and attenuated. The tribe owned an entity organized under tribal law that in turn owned a limited liability company organized under California law. The first California LLC owned a second California LLC. The second California LLC owned a third California LLC—the subject entity. In other words, the ownership structure was as follows:

INDIAN TRIBE
|
Tribal Entity organized under Tribal Law
|
1st Tier California LLC
|
2nd Tier California LLC
|
Subject California LLC

(*American Property*, *supra*, 206 Cal.App.4th at p. 495.)

In sharp contrast here, MNE was created and is wholly owned by the Miami Tribe of Oklahoma. MNE's initial Board of Directors consisted of the Miami Tribe's Business Committee, its elected Tribal Council. The Chief of the Miami Tribe has appointed all successor members of the MNE Board, with the advice and consent of the Business Committee. The MNE Act provides that the MNE Board will be comprised only of persons appointed by the Chief of the Miami Tribe. All five members of the MNE Board are members of the Miami Tribe. The initial officers of MNE were all hired by the Tribe's Business Committee. (C.T. vol. 24, pp. 005764.)

In other words, the relationship between MNE and the Miami Tribe is as follows:

MIAMI TRIBE OF OKLAHOMA

|

MNE

(Wholly-owned tribal entity created pursuant to tribal law)

Furthermore, as to SFS, Inc., SFS was created by the Santee Sioux Nation and is wholly owned by the Nation. SFS's Articles of Incorporation mandate that the Board of Directors of SFS, which consists of the elected Tribal Council of the Santee Sioux Nation, manages SFS. And the Santee Sioux Nation Tribal Council appointed the Santee Sioux Nation's business manager as SFS's CEO. (*Id.* at p. 005765.) In other words, the relationship between SFS and the Santee Sioux Nation is as follows:

SANTEE SIOUX NATION

|

SFS

(Wholly-owned tribal entity created pursuant to tribal law)

Thus, there is a direct relationship between the Tribal Entities and their respective tribes, and the Tribal Entities are fully creatures of tribal law, owned, operated, and managed by the tribes themselves.

Fourth, in *American Property*, the record failed to demonstrate that the tribe had intended the entity to have tribal sovereign immunity. (*American Property*, *supra*, 206 Cal.App.4th at p. 505.) Here it is uncontroverted that both Indian Tribes intended that the Tribal Entities would have tribal sovereign immunity. The Miami Tribe explicitly conferred upon MNE its tribal sovereign immunity. (2d Supp. C.T. vol. 6, p 001317.) Likewise, the Santee Sioux Nation explicitly conferred upon SFS its tribal sovereign immunity. (2d Supp. C.T. vol. 4, p. 000800.)

Hence, *American Property* is so factually different from the case at bar that both the rule and the analysis arising out of that Fourth District

decision have almost no applicability here. The state-chartered entity in *American Property* shares almost nothing in common with the Tribal Entities here. Therefore, for this Court to decline to follow the attenuated *American Property* decision would have no impact on the "stability of the law and predictability of decision." (Cf. *Mega Life and Health Ins. Co. v. Superior Court*, *supra*, 172 Cal.App.4th p. 1529) [in which the factual similarities between the subject case and the other district's case were very close].) Moreover, as demonstrated below, *American Property's* reasoning and analysis deviate from accepted tribal sovereignty jurisprudence in such egregious ways that it would be unreasonable for this Court to afford it any deference.

C. THE *AMERICAN PROPERTY* DECISION EMPLOYS UNSOUND REASONING AND MISAPPLIES CONTROLLING LAW

As set forth above, the court in *American Property* adopted a six-part arm-of-the-tribe test set forth in *Breakthrough*, *supra*, 629 F.3d at pp. 1187-88, which includes "(1) their method of creation; (2) their purpose; (3) their structure, ownership, and management; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." (*American Property*, *supra*, 206 Cal.App.4th at p. 501.) *American Property* applies and analyzes these factors in ways that simply are not supported by any authority, and in some ways outright defy binding authority.

As a preliminary matter, the *Breakthrough* test appears to be an unnecessarily detailed recitation of the more concise and accurate two-part *Ameriloan* test implemented by this Court. Indeed, every *Breakthrough* factor overlaps with an *Ameriloan* factor in such a way that renders the *Breakthrough* analysis needlessly cumbersome.

Specifically, *Breakthrough* factors (1) method of creation; (3) structure, ownership and management; and (4) whether the tribe intended for the entity to benefit from tribal sovereign immunity (*Breakthrough, supra*, 629 F.3d at p. 1187) overlap with *Ameriloan's* more general question of whether the entity is closely linked to the tribe in governing structure and characteristics. Indeed, in analyzing its factors the *Breakthrough* court considered the same facts that are relevant to the "closely linked" question here, *e.g.* creation and organization under tribal law (*id.* at pp. 1191-92) and composition of the board of directors (*id.* at p. 1193).

Similarly, *Breakthrough* factors (2) the entity's purpose; (5) the entity's financial relationship to the tribe; and (6) whether granting immunity to the entity serves the overall purpose of tribal autonomy (*Breakthrough, supra,* 629 F.3d at p. 1187) overlap with *Ameriloan's* more general question of whether the extension of sovereign immunity would serve federal policies intended to promote tribal autonomy. Again, the *Breakthrough* court considered similar facts as those considered by the trial court to analyze these factors, *e.g.* revenues flowed to the tribe (*id.* at pp. 1192-93); and those revenues funded important services for tribal members and economic development (*id.* at p.1194-95). The uncontroverted facts demonstrate that if the Court were to apply these factors to the analysis here, the trial court still would have correctly determined that the Tribal Entities are arms of their respective tribes.

The *American Property* court twisted the *Breakthrough* factors into requiring proof of elements the *Breakthrough* court did not establish and did not envision, and which violate Supreme Court precedent. For example, the *American Property* court misapplies *Breakthrough* factor (2)—the entity's purpose—by explicitly relying upon the improper governmental purpose factor rejected by the Supreme Court in *Kiowa*.

Specifically, the *American Property* court found that the subject entity did not have a proper purpose because it did not "carry out any government functions" of the tribe and was not created specifically to provide direct housing or direct social services to tribal members—"functions 'traditionally shouldered by tribal government.'" (*American Property, supra*, 206 Cal.App.4th at p. 504 [citing *Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc.* (N.Y. 1995) 658 N.E.2d 989, 993 and *Dixon v. Picopa Construction Co.* (Ariz. 1989) 772 P.2d 1104, 1110].) *American Property* then postulates, without citing any positive authority, that the casinos at issue in *Trudgeon* and *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044[9] enjoy arm-of-the-tribe status despite their clear commercial purpose because Congress specifically intended gaming conducted pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2702(1), to promote "tribal economic development, self-sufficiency, and strong tribal government." (*American Property, supra*, 206 Cal.App.4th at p. 504.) Therefore, according to *American Property,* gaming "presents a unique situation ...." (*Ibid.*)

A review of relevant case law, however, reveals that it is the Fourth District's analysis in *American Property* that is in fact unique. No other court has taken this view of "purpose," nor should they because such a position directly contravenes *Kiowa.* Indeed, *Kiowa* clearly held that sovereign immunity attaches to tribal entities engaged in **any governmental or commercial activities, not governmental activities and only those commercial activities arising out of gaming under the Indian Gaming Regulatory Act.** (See *Kiowa, supra*, 523 U.S. at p. 760.) The

[9] This is a tribal sovereign immunity case that analyzes whether sovereign immunity attached to an Indian casino.

Fourth District's interpretation of the "purpose" factor in the arm-of-the-tribe test is invalid, violates Supreme Court mandate and must be rejected.

Similarly, *American Property's* analysis of the *Breakthrough* factor (5)—the "financial relationship between the tribe and the entities"—is equally flawed and should be disregarded. *American Property's* entire analysis hinges on the entity's status as a limited liability company and the fact that a judgment against the entities would not reach directly into tribal coffers. (*American Property*, *supra*, 206 Cal.App.4th at pp. 506-07.) The authority upon which *American Property* relies is inapposite and does not support this conclusion.

For example, *Runyon v. Ass'n of Village Council Presidents* (Alaska 2004) 84 P.3d 437, 441, involved a nonprofit entity owned by **56 separate Indian tribes.** The financial entity had a separate financial coffer that was not linked to any one tribe. Accordingly, the Alaska Supreme Court determined the nonprofit entity did not have a sufficient financial relationship to any single tribe to be sufficiently related to an Indian Tribe. These facts are highly unique, and *Runyon* cannot be used to support the general proposition espoused by the *American Property* court. *American Property's* reliance on *Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc.*, *supra*, 658 N.E.2d 989, and *Dixon v. Picopa Construction Co.*, *supra*, 772 P.2d 1104, is equally misplaced. Notably, both of these opinions utilized the governmental versus commercial purpose distinction that has been overruled by the Supreme Court in *Kiowa*, *supra*, 523 U.S. at 7p. 60. (See also *Cash Advance*, *supra*, 242 P.3d at p. 1010 n 12) [noting both *Ransom* and *Dixon* are disfavored as they relied "upon the governmental

status versus commercial activity distinction, in contravention of *Kiowa*."[10]].)

These authorities are not only non-binding decisions from other jurisdictions, but they are no longer good law. It is axiomatic that Indian tribes have the sovereign right to create commercial entities organized in such a way that limits liability, such as a limited liability company, a corporation, a tribal subdivision, or, as here, a combination thereof. To prohibit the extension of tribal sovereign immunity to such tribally-created instrumentalities would effectively eviscerate the Supreme Court's explicit holding in *Kiowa* that tribes enjoy sovereign immunity regardless of whether they are engaged in governmental or commercial activities. (*Kiowa, supra*, 523 U.S. at p. 760.)

Indeed, the *American Property* analysis constitutes an unauthorized state abrogation of tribal sovereign immunity by creating a Hobson's choice for an Indian tribe wishing to bestow its immunity on a tribal agency or subdivision. Under *American Property*, if a tribe wishes to bestow its sovereign immunity on a tribal agency or subdivision, the tribe must "open its coffers" to judgment against the subdivision—i.e., waive its sovereign immunity. Imposition of this factor effectively forces a tribe to waive its sovereign immunity as a prerequisite to bestowing its immunity on a tribal subdivision. As such, it is an attempted state court abrogation of tribal sovereign immunity in derogation of established law. (*Kiowa, supra*, 523 U.S. at p. 754.)

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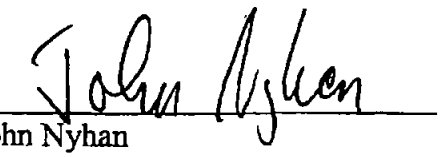
[10] *Cash Advance* also noted that *Runyon,* which post-dated *Kiowa*, improperly hinged on the governmental versus commercial distinction. (*Cash Advance, supra*, 242 P.3d at p. 1010 n. 12.)

CONCLUSION

The trial court correctly determined that the State failed to carry its burden of proving by a preponderance of the evidence that subject matter jurisdiction exists in this case. The trial court correctly followed this Court's mandate in *Ameriloan* and, based upon the evidence presented, applied uncontroverted facts to the arm-of-the-tribe test this Court established. The uncontroverted evidence established that the Tribal Entities are closely linked to their respective tribes in governing structure and characteristics and that federal policies intended to promote Indian tribal autonomy are furthered by extension of immunity to the Tribal Entities. Accordingly, the trial court correctly found that the Tribal Entities are arms of their respective tribes and are entitled to protection from this suit under tribal sovereign immunity. Therefore, the Tribal Entities respectfully request that the Court affirm the trial court's Order Quashing Summons and Complaint and Dismissing for Lack of Subject Matter Jurisdiction.

Dated: September 19, 2013

FREDERICKS PEEBLES & MORGAN LLP
John Nyhan

By: 
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CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. RULES OF COURT 8.04(c)(1)

I certify that:

Pursuant to Cal. Rule of Ct. 8.04(c)(1), the attached Defendants-Respondents' Brief is printed in Times New Roman typeface with 13 point font and contains 8,964 words (excluding cover, tables, and certificate of service and compliance), according to the count of the computer program Microsoft Word used to prepare the brief.

September 19, 2013

John Nyhan
Attorney

People of the State of California, et al. v. MNE d/b/a Ameriloan, et al.
Second Appellate District, Div. Seven – Case No. B242644

PROOF OF SERVICE

I declare I am employed in the County of Sacramento, State of California. My business address is: 2020 L Street, #250, Sacramento, California 95811. I am over the age of eighteen (18) years and not a party to the within action.

On **September 19, 2013**, I served the within:

DEFENDANTS-RESPONDENT'S BRIEF

on the parties listed below, addressed as follows:

Counsel for Plaintiff:
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X **By overnight delivery** service by placing a true copy thereof in an overnight delivery envelope and placing the envelope in a Federal Express drop box at Sacramento, California.

___ **By Email** to the addressee(s) listed herein.

___ **By Facsimile** to the addressee(s) listed herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **September 19, 2013**, at Sacramento, California.

Suzanne Balluff
Suzanne Balluff

PROOF OF SERVICE

I declare I am employed in the County of Sacramento, State of California. My business address is: 2020 L Street, #250, Sacramento, California 95811. I am over the age of eighteen (18) years and not a party to the within action.

On **October 3, 2013**, I served the within:

DEFENDANT-RESPONDENT'S BRIEF

on the parties listed below, addressed as follows:

CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102

X **Served electronically pursuant to CRC 8.212(C)(2)**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **October 3, 2013.** at Sacramento, California.

Suzanne Balluff

Suzanne Balluff