CASE NO. A156573

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

KATHRINE ROSAS,

Plaintiff and Appellant,

vs.

AMG SERVICES, INC.,

Defendant and Respondent.

Appeal from the Superior Court of Alameda County
The Honorable Judge Winifred Y. Smith
Alameda County Superior Court Case No. JCCP004688

Service on the Attorney General and the District Attorney of Alameda County as Required by Business and Professions Code Section 17209

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

The following entities or persons have either: (1) an ownership of ten percent (10%) or more in the party or parties filing this certificate; or (2) a financial or other interest in the outcome of the proceedings that the justices should consider in determining whether to disqualify themselves: AMG Services, Inc. is wholly owned by the Miami Tribe of Oklahoma.

Dated: September 30, 2019.

FOX ROTHSCHILD LLP

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INTRODUCTION

As it exists today—and as it has existed for nearly seven years—AMG Services, Inc. ("AMG") is unquestionably a tribal entity, under the full control of the Miami Tribe of Oklahoma (the "Tribe" or the "Miami Tribe"). Scott Tucker ("Tucker"), his attorneys and cronies have no role in AMG and have had no role in AMG for many years. Under tribal control, AMG severed its relationships with Tucker, Timothy Muir, Don Brady, the Frederick Peebles & Morgan law firm and Conly Schulte. On January 1, 2015, the Miami Tribe shuttered AMG's loan servicing operations. In 2015 and 2016, under tribal control, AMG and other Miami Tribe entities settled enforcement actions brought against them by the United States Department of Justice ("DOJ") and Federal Trade Commission ("FTC"). Pursuant to those settlements, AMG and other tribal entities agreed to pay $69 million in fines relating to their payday lending operations and to the entry of injunctive relief that effectively barred any further lending activities. In 2018, under tribal control, AMG and two other Miami Tribe entities settled the enforcement action brought by the State of California, which earlier had resulted in the Supreme Court's adoption of a new "arm-of-the-tribe" test in *People ex rel. Owen v. Miami Nation Enterprises*, 2 Cal. 5th 222 (2016). Today, as a result of the Miami Tribe's actions, AMG is insolvent with no ongoing operations, no employees, and no source of revenue.

Despite the obvious pointlessness of this putative class action, Appellant Kathrine Rosas ("Appellant") remains intent on pursuing claims against AMG for actions taken by Tucker, his lawyers and cronies years before AMG even existed. To maintain her action, Appellant contends that AMG's claim of sovereign immunity is not jurisdictional—an argument that is contrary to established and controlling federal and state jurisprudence.

Appellant further contends that, even if sovereign immunity is jurisdictional, the Court is precluded from reassessing whether it retains jurisdiction based on present-day facts. Instead, Appellant suggests that the Court's power to exercise jurisdiction over AMG is fixed at the time she filed her amended complaint in July 2012, if not earlier. But Appellant's argument ignores the Court's on-going obligation to evaluate its jurisdiction. Indeed, Appellant does not cite a single case that supports the proposition that the facts underlying a court's analysis of sovereign immunity are fixed at the time of filing.

Here, the trial court correctly concluded that the determination of whether AMG is an arm of the Miami Tribe properly considers and weighs current facts and circumstances. Applying current facts to the arm-of-the-tribe test established by *Owen*, the trial court then correctly found that AMG, as it exists today—and as it has existed for many years—is an arm of the Miami Tribe, protected from Appellant's claims by sovereign immunity.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Brief History of the Miami Tribe

The Miami Tribe is the contemporary body politic of the Miami and Eel River Tribes, and has continuously existed and exercised governmental authority over its membership for centuries. (Declaration of Chief Douglas Lankford in Support of AMG's Motion to Quash/Dismiss, ["Lankford Decl."] [AA 42, ¶ 5].) The Miami Tribe is organized under a Constitution and Bylaws adopted by its members and approved by the United States Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §§ 501-510 (the "OIWA"), and it exercises sovereign authority over its people and lands. (*Id.*) The supreme governing body of the Miami Tribe is the Miami General Council, which is comprised of all

voting members eighteen years of age and older. (AA 43–44, ¶ 9.) The highest elected governing body in the Tribe is the Business Committee, consisting of Tribal Officers elected by the General Council. (*Id.*)

The Miami Tribe did not originate in rural Oklahoma. Rather, in the 19th century, the Tribe was forcibly removed from its homelands in the upper Midwest and relocated to a small tract of land in remote northeastern Oklahoma. (AA 42, ¶ 4.) The Tribe's trust lands are distant from metropolitan areas, as the nearest city (Tulsa) is about ninety miles away. (AA 43, ¶ 6.) The area where the Tribe is located has been designated by the Small Business Administration as a "Historically Underutilized Business Zone" and includes a forty square-mile environmental Superfund site. (*Id.*) Because of its geographic isolation, lack of economic opportunities, and small tax base, the Tribe—like countless other similarly-situated tribes—has been forced to cast a much wider net than a more advantaged government would in developing economic ventures to maintain its financial independence and self-governance. (AA 43, ¶ 7.) These ventures often involve industries that many people find distasteful, such as casino gambling, tobacco, and payday lending.

Revenues generated by business ventures owned by the Miami Tribe are used to fund essential programs and services for members. (AA 43, ¶ 8.) For example, the Tribe has an Elder Benefit Program that reimburses elders for out-of-pocket medical expenses and a Disability Reimbursement Program for members who are totally disabled. (*Id.*) The Tribe also funds a Child Development Program for Native American families and offers substance abuse, job-training, and other programs and services that contribute to the well-being of members and that further the social and economic development of the Tribe. (*Id.*)

Scott Tucker, who had prior experience in internet payday lending, offered the Miami Tribe, through its business entities, what appeared to be a promising economic opportunity—an opportunity for which the Tribe's remote reservation location would be unimportant. Theoretically, tribal lending could be an important tool for economic development. As it turned out, however, Tucker and his attorneys Timothy Muir and Conly Schulte, conducted and controlled a criminal enterprise that took internet payday lending down a very different legal path from casino gaming and other tribal enterprises.

II. AMG's Formation and Early Operations

In June 2008, the Tribe, through its Business Committee, adopted Resolution 08-14, in which it found "that it is in the best interests of the Tribe to establish a wholly-owned Tribal corporation to be known as AMG Services, Inc., to stimulate the economic development of the Tribe and increase the economic well-being of the Tribe's membership." (AA 65.) The Articles of Incorporation for AMG provide that AMG is authorized by the Business Committee "to issue five (5) shares, which shall be held by the Tribe and voted by the Business Committee." (AA 70.) The Articles of Incorporation further provide that "[n]o individual or legal entity other than the Tribe shall acquire any ownership interest in the Corporation." (*Id.*)

In 2011, the Business Committee adopted a Resolution amending AMG's Articles of Incorporation. (AA 74.) Article VII of the Restated Articles of Incorporation provides that AMG Services "shall be managed" by a three-member Board of Directors that is vested with "all powers necessary to carry out the purposes of the Corporation and shall have control and management of the business and activities of the Corporation." (AA 78–79.) AMG's Board of Directors is appointed by the Business Committee,

and, pursuant to the Restated Articles of Incorporation, includes exclusively members of the Tribe's elected Business Committee. (*Id.*)

Pursuant to both the original and restated Articles of Incorporation for AMG, the Tribe conferred upon AMG "sovereign immunity from suit as an entity of the Tribe established to carry out purposes integral to the governance and operations of the Tribe." (AA 68, 77.) The Articles authorize AMG to waive its sovereign immunity only through an "explicit" writing "unanimous[ly]" approved by its Board. (AA 68–69, 77–78.)

AMG does not dispute that its day-to-day operations were controlled by Tucker and his cronies from its creation in 2008 through late 2012. While Appellant correctly notes that the vast majority of money that flowed through AMG during this time period was taken by Tucker and Tucker-related entities and individuals, AMG transferred substantial revenues to the Tribe during at least two fiscal years. In 2012 and 2013, $6,993,407 and $824,764, respectively, was transferred from AMG to the Miami Tribe. (Lankford Decl., (AA 45, ¶ 17).) These distributions were used for the benefit of the Miami Tribe and its members. Among other things, these distributions were used to fund the Tribal government and enabled the Tribe to purchase businesses, including the Miami Cineplex, which provides employment and furthers the Tribe's economic self-sufficiency. (AA 45–46, ¶ 18) These revenues also helped construct offices for AMG on federal trust lands held for the benefit of the Tribe, which are now being used by Miami Nation Enterprises, a corporation owned by the Tribe that has businesses in the construction, health, information technology, entertainment, consumer, and government contracting sectors. (*Id.*)

III. The Miami Tribe Asserts Control Over AMG's Operations and Resolves Federal and State Enforcement Actions Against AMG and Other Tribal Entities

On April 2, 2012, the FTC filed an enforcement action against AMG and more than a dozen other parties (including Tucker and other Tucker-related entities) in the United States District Court for the District of Nevada. *See FTC v. AMG Servs., Inc.*, No. 2:12-cv-536 (D. Nev.). At the same time they were facing legal action from the FTC, Tucker and individuals and entities affiliated with him, including AMG, were being investigated by DOJ. Contemporaneously with these federal actions, Tucker, Tucker-related entities and AMG (among others) also were defending an enforcement action brought by the State of California based on loans made to California consumers. *See Owen.*

In 2012, with the FTC and the DOJ investigations proceeding, AMG and MNE Services, Inc. ("MNES")—another tribal entity involved in payday lending—began taking steps to sever ties with Tucker and his various enterprises and cease their payday lending operations. Over a four-day period in late 2012, managerial control of AMG and MNES was fundamentally altered. (Lankford Decl. (AA 46, ¶¶ 19–22).) On November 16, 2012, MNES' Board of Directors directed Joe Frazier, then CFO of Miami Nation Enterprises, to remove Scott Tucker, Blaine Tucker, and Don Brady as signatories on all bank accounts. (AA 46, ¶ 19 and Lankford Decl., Ex. 7 (AA 226).) Three days later, on November 19, 2012, the AMG Board suspended AMG President and CEO Don Brady. (AA 46, ¶ 20 and Lankford Decl., Ex. 8 (AA 228).) The next day, the AMG Board named Joe Frazier interim President and CEO of AMG, voted to remove Don Brady as a signatory for all AMG bank accounts, and authorized Mr. Frazier to have

signatory authority over all AMG accounts. (AA 46, ¶ 21 and Lankford Decl., Exs. 9-11 (AA 230–35).)

In March 2014, the AMG Board formally directed AMG to cease operations. (AA 47, ¶ 26.) By letters dated March 28, 2014, AMG terminated its contracts with BA Services, LLC and Impact BC, LLC, the last Tucker-related entities still under service contracts with AMG. (AA 47, ¶ 25 and Lankford Decl., Exs. 15-16 (AA 245–48).) On April 25, 2014, the Board formally terminated AMG's individual service relationship with Tucker. (AA 47, ¶ 24.) And on January 1, 2015, AMG's Board voted to cease its payday lending operations. (AA 47, ¶ 28.)

After shuttering its operations, AMG worked to resolve the federal and state enforcement actions pending against it. To resolve the FTC's claims, AMG and MNES agreed to forfeit $21 million to the United States and to the entry of injunctive relief against their payday lending operations. (AA 47, ¶ 29 and Lankford Decl., Ex. 17 (AA 251–265).) On January 23, 2015, the federal court entered the Stipulated Order for Permanent Injunction with the FTC (the "Consent Decree"). (Lankford Decl., Ex. 17 (AA 251–265).) The Consent Decree memorialized the monetary forfeiture and enjoined AMG and MNES from continuing the conduct underlying Appellant's claims here. (*See id.*) The broad equitable remedies imposed against AMG, included (among others):

- Permanently enjoining AMG from making misrepresentations in connection with the advertising, marketing, promotion, offering, or extension of a loan;

- Permanently enjoining AMG from making misrepresentations in connection with the collection of debts; and

- Requiring AMG to provide sufficient customer information to the FTC to efficiently administer consumer redress, while enjoining AMG from misusing or mishandling such customer information.

(*Id.*) Additionally, the Consent Decree extinguished all consumer debt for AMG-serviced loans issued prior to December 27, 2012. (*Id.*)

DOJ's investigation culminated in further penalties and injunctions against AMG. On February 9, 2016, AMG and MNES entered into a Non-Prosecution Agreement (the "NPA") with the United States Attorney for the Southern District of New York. (AA 48, ¶ 30 and Lankford Decl., Ex. 18 (AA 267–270).) Pursuant to the NPA, DOJ agreed that AMG and MNES (1) were "corporations established by the Miami Tribe of Oklahoma" who (2) were agreeing to forfeit the "proceeds of the payday lending business" in the amount of $48 million to the United States. (Lankford Decl., Ex. 18 (AA 267–270).) The amounts forfeited to DOJ were in addition to the $21 million previously forfeited to the FTC. In addition to the forfeiture, the NPA bars AMG from committing any crimes in the future. (*Id.*)

More recently, on August 8, 2018, AMG and two other Miami Tribe-related entities settled the enforcement action brought by the State of California. (Declaration of John C. Ekman in Support of AMG Motion to Quash/Dismiss ["Ekman Decl."], Ex. 1, § M (AA 706).) The final judgment, entered by the court on September 19, 2018, permanently enjoins AMG, MNES and Miami Nation Enterprises, Inc., from "offering, originating, or making a deferred deposit transaction" or "engaging in the business of a finance lender or broker" without "obtaining a license from the Commissioner." (Ekman Decl., Ex. 2, ¶ 1 (AA 715).) It also permanently enjoins these entities from violating any provision of the California Deferred Deposit Transaction Law and the California Financing Law. (*Id.*)

As part of the settlement with California, a monetary judgment of $41,717,800 was entered against AMG and MNES. (*Id.*, ¶ 2.) However, that judgment was considered "satisfied in full" based on credits given for California's estimated share of loans that were outstanding when AMG ceased operations that will never be collected and paid federal settlements ($31,100,000 and $7,600,000, respectively), along with the conveyance of MNES' right to seek repayment of retainage held by three of its former ACH processors (totaling $3,017,800). (*Id.*, ¶ 2; Ekman Decl., Ex. 1, ¶ 5 and § S (AA 707–709).)

Taken together, the Consent Decree, the NPA and the *Owen* settlement effectively bar AMG from ever again engaging in the payday lending business. Indeed, AMG has not engaged in any loan collection activities since January 1, 2015, and will not resume those operations. (Lankford Decl., AA 47, ¶ 26.) AMG currently has no employees or officers. (AA 47, ¶ 27.) The $69 million in fines paid to the FTC and DOJ, combined with the cessation of AMG's business, left AMG insolvent. (AA 48, ¶ 31 and Lankford Decl., Ex. 19 (AA 274).)

IV. The Downfall of Scott Tucker and His Cronies

Tucker's situation also has changed substantially since this case was filed. Following a 2017 trial in federal court, Tucker and his attorney, Timothy Muir, were convicted of multiple federal offenses in the Southern District of New York.[1] Tucker was sentenced to more than sixteen years in federal prison, while Muir was sentenced to more than seven years behind bars. Earlier this summer, Conly Schulte—AMG's former attorney, who

[1] In March 2014, Tucker's brother and co-conspirator, Blaine, committed suicide. (AA 641 [reflecting Blaine Tucker's death in settlement with estate].)

also served as counsel for various Tucker entities—pleaded guilty to one count of conspiracy to collect unlawful debts in connection with the "Tucker Payday Lending Organization." *USA v. Schulte*, No. 1:19-cr-00456 (S.D. N.Y. June 19, 2019).

Prior to Tucker's criminal conviction, the United States Court for the District of Nevada found that Tucker was individually responsible for unlawful conduct related to payday lending, and ordered him to pay $1.3 billion to the federal government. *FTC v. AMG Servs., Inc.*, No. 2:12-cv-536 (D. Nev.). Since then, other entities involved in Tucker's schemes have also made significant payments to the federal government to resolve federal enforcement actions. The government has used the money it collected to compensate the victims of Tucker's payday lending activities. (*See, e.g.*, Declaration of Dwight C. Donovan in Support of AMG's Motion to Quash/Dismiss ["Donovan Decl."], Ex. 1 (AA 37–39) [DOJ press release announcing remission of over $500 million to a FTC victim reimbursement fund]; *see also* (AA 687 [September 2018 article noting that the FTC "is mailing 1,179,803 refund checks totaling more than $505 million to people who were deceived by AMG Services, Inc. and Scott A. Tucker . . . ."].)

V. The Trial Court's Order on AMG's Motion to Dismiss

This case originally was filed on July 1, 2009, against more than 25 different individuals and entities, including Tucker. On July 31, 2012, the complaint was amended to add claims relating to Appellant's five payday loans. According to her complaint, Appellant's loans were originated and paid off in 2005 and 2006. (A139147, AA vol. III, p. 871, ¶¶ 56-57.) Though AMG did not exist as an entity until June 2008—long after Appellant's loans were repaid—Appellant asserted claims against AMG and several other Miami Tribe-related entities. Today, AMG is the only Miami Tribe-related

entity remaining in this case. Based on the Court's docket entries, AMG also appears to be the only defendant represented by counsel.

On December 17, 2018, the trial court entered an order dismissing Appellant's claims against AMG on the grounds that AMG is an arm of the Miami Tribe. (AA 757–763.) In its decision, the court identified the "central legal issue . . . [to be] whether the court evaluates sovereign immunity (1) at the time of AMG's formation, (2) at the time of the allegedly wrongful acts, (3) at the time the case was filed, or (4) at the time the court hears the motion." (AA 758.) The court concluded that it "may reexamine sovereign immunity if the facts change during the course of the litigation and that [the] court evaluates sovereign immunity and arm of the tribe immunity at the time the court hears the motion." (*Id.*) In support of its conclusion, the trial court found that the "weight of federal authority . . . is that the court may reexamine sovereign immunity if facts change during the course of litigation." (*Id.* [citations omitted].) In so holding, the court analogized to the law on other types of immunity, which similarly require reexamination of jurisdiction as a case proceeds. (*Id.*)

Having determined that tribal sovereign immunity is subject to ongoing evaluation, the court then applied *Owen's* five factor arm-of-the-tribe test to AMG as it exists today. First, the court recognized that AMG was created by the Miami Tribe, but concluded that Tucker's "significant role at the time of creation" weighs against arm of the tribe status under the "method of creation" factor. (AA 759.) Second, though it found tribal intent at inception "was clouded by Tucker's involvement," the trial court concluded that "tribal intent after December 2012, and the intent in entering into the FTC settlement, [was] to reassert tribal control over AMG and to compensate AMG's former customers." (*Id.*) As a result, tribal intent

weighed in favor of arm of the tribe status. (*Id.*) Third, the court determined that AMG satisfied the "purpose" factor based on its distribution of revenues to the Tribe in 2012 and 2013. (*Id.*) In so finding, the court noted that AMG currently is a detriment to self-governance because it has no assets and "appears to be a liability to the tribe." (*Id.*) Fourth, based on the Tribe's assertion of control over AMG beginning in late 2012, the court concluded that the "control" factor "weighs in favor of arm of the tribe status." (*Id.*) Finally, because AMG "has no assets and is not operational," the court found that the "financial relationship" factor was neutral. (*Id.*)

The court then "consider[ed] the evidence and weigh[ed] the factors and [found] that after November 2012, and as of the date of this motion that AMG was an arm of the tribe." (*Id.*) As a result, it granted the motion to dismiss "based on lack of jurisdiction based on sovereign immunity." (*Id.*) It is this Order from which the appeal arises here.

ARGUMENT

I. Sovereign Immunity Is Jurisdictional and Is Therefore Subject to Ongoing Inquiry by the Court Based on Present Facts and Circumstances

A. Sovereign Immunity Implicates the Court's Subject Matter Jurisdiction

Sovereign immunity is unquestionably jurisdictional in nature. As the Supreme Court held in *United States v. United States Fidelity & Guaranty Co.*, "[c]onsent alone gives jurisdiction to adjudge against the sovereign." 309 U.S. 506 (1940). "Absent that consent, the attempted exercise of judicial power is void." *Id.* at 514; *see also Tassone v. Foxwoods Resort Casino*, 519 F. App'x 27, 28 (2d Cir. 2013) ("[W]e conclude that the district court properly held that it lacked subject matter jurisdiction due to Defendants' sovereign immunity."); *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-

CV-0962-JR, 2018 WL 4171612, at *2 (D. Or. Apr. 26, 2018) ("If tribal immunity extends to a commercial entity acting as an 'arm of the tribe,' the court does not have jurisdiction over the suit."); *Tavares v. Harrah's Operating Co., Inc.*, No. 13-CV-325-H-KSC, 2013 WL 1809888, at *2 (S.D. Cal. Apr. 29, 2013) ("Because Plaintiff sued an entity functioning as an arm of a sovereign Indian tribe, this Court lacks subject matter jurisdiction over Plaintiff's claims."); *Douglas Indian Assn v. Central Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1175 (Alaska 2017) ("Immunity is a core aspect of tribal sovereignty that deprives our courts of jurisdiction when properly asserted."). Consistent with these cases, this Court's remittitur order characterized AMG's motion to dismiss as a "jurisdictional challenge." *See Rosas v. AMG Servs., Inc.*, No. A139147, 2017 WL 4296668, at *2 (Cal. Ct. App. Sept. 28, 2017).

Appellant's attempt to overturn the trial court's decision largely rests on her contention that tribal sovereign immunity is not jurisdictional. (*See, e.g.,* App. Br. at 37.) Yet she fails to identify any case that contradicts the trial court's finding that tribal sovereign immunity implicates the Court's subject matter jurisdiction. To the contrary, Appellant opens her argument by correctly noting that "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." (App. Br. at 22–23 [*citing American Property Mgmt. v. Superior Court*, 206 Cal. App. 4th 491, 498 (2012) (emphasis added)].) Appellant's new-found contention that the arm-of-the-tribe inquiry is not jurisdictional also is contradicted by other filings in this case. For years, both parties here have characterized the limited discovery ordered by the trial court into AMG's claim of tribal sovereign immunity as "jurisdictional." (*See, e.g.*, A139147, AA Vol. III, p. 843 [characterizing the scope of

permissible discovery under the trial court's April 20, 2012 Order as limited to "jurisdictional issues"].) In seeking to compel the production of AMG's bank records, Appellant's counsel argued that the "US Bank records . . . are relevant *to jurisdiction* as to defendant AMG" because "Plaintiffs seek to prove that Mr. Tucker *is* AMG." (A139147, AA vol. III, p. 849 [emphasis added]; *see also* A139147, AA vol. III, p. 745 ["[P]laintiffs needs to conduct *jurisdictional* discovery as to the control of the money obtained from the payday lending at issue in this case, and what portion of it, if any, actually benefits an Indian tribe"] [emphasis added].)

Lacking any legal support for the proposition that sovereign immunity is not jurisdictional, Appellant incorrectly insists that the *Owen* court "clarified" that "tribal immunity is not jurisdictional in nature[.]" (*See, e.g.*, App. Br. at 37.) While *Owen* stated that tribal immunity does not implicate a court's subject matter jurisdiction "in any ordinary sense" (2 Cal. 5th at 243-44), that finding was made to justify the decision to shift the burden of proof from the plaintiff to the party claiming to be an arm-of-the-tribe. *See id.* Burden-shifting aside, *Owen* made clear that courts do *not* retain jurisdiction once an entity establishes it is an arm of the tribe. *See id.* at 244 ("Once the entity has established that it is an arm of the tribe, we treat the lawsuit as if it were an action against the tribe itself."). The *Owen* court further recognized that a finding of tribal immunity would bar suit. *Id.* at 250 ("Whether tribal immunity bars suit is a question of law that we review de novo."). Thus, while AMG bears the burden of proving it is an arm of the Miami Tribe, the Court does not have jurisdiction over AMG if it successfully makes such a showing.

B. Sovereign Immunity is Subject to Ongoing Inquiry

In order to establish it is an arm of the Miami Tribe, AMG need not demonstrate it has qualified as such for the entire duration of its existence. Instead, AMG need only demonstrate that this Court presently lacks jurisdiction based on its present-day sovereign immunity. The *Owen* decision is instructive on this point. *Owen* was decided on December 22, 2016, at which time the case had been pending for nine-and-a-half years. *Id.* at 231. After defining California's new arm-of-the-tribe test and shifting the burden of proof to the defendants, the *Owen* court remanded the case for further proceedings under its new test. *Id.* at 256. Had the *Owen* court intended the defendants to prove they were arms-of-the-tribe at the time of filing (in June 2007) to satisfy the new test, it could have said so. It also could have limited the defendants on remand to the facts briefed years earlier in the trial court. But the court did neither of those things. Instead, the Court's description of its test clearly contemplates a contemporaneous, present-day inquiry. For example, the Court held:

> [T]he financial linkage and formal control that the tribe ***possesses*** in relation to the entity are factors that illuminate whether the dignity that immunity doctrine accords to the tribe by virtue of its sovereign status should extend to the entity . . . . The more closely linked the entity ***is*** to the tribe in these formal dimensions, the more likely it ***is*** to share in the tribe's inherent immunity.

Id. at 245 (emphasis added). The Court's application of its arm-of-the-tribe factors likewise was written in the present tense. *See id.* at 250 ("The record . . . contains scant evidence that either tribe actually ***controls, oversees, or significantly benefits*** from the underlying business operations of the online lenders." [Emphasis added].). *Owen* simply did not adopt a "time of filing" limitation to sovereign immunity, which Appellant advocates here.

The *Owen* court's approach is consistent with judicial resolution of questions implicating a court's jurisdiction. Indeed, because sovereign immunity prohibits the Court from acting, the arm-of-the-tribe inquiry is necessarily an inquiry into the present; that is, asking whether the court *currently* can exercise its jurisdiction. Courts recognize that the inquiry into the existence of sovereign immunity is ongoing and subject to reassessment. For example, in *Iowa Tribe of Kansas & Nebraska v. Salazar*, the Secretary of the Interior took land into trust on behalf of the Wyandotte Tribe while a lawsuit disputing the propriety of the taking was pending. 607 F.3d 1225, 1229 (10th Cir. 2010). The district court dismissed the lawsuit for lack of subject matter jurisdiction. *Id.* at 1229-30. The Tenth Circuit Court of Appeals affirmed the dismissal, explaining that "[o]nce the Secretary took the Shriner Tract into trust . . . the nature of the plaintiffs' claim changed." *Id.* at 1230; *see also Alden v. Maine*, 527 U.S. 706, 711-12 (1999) (affirming district court's dismissal for lack of subject matter jurisdiction following Supreme Court decision issued during the litigation, which made clear sovereign immunity applied); *cf. also United States v. Khobragade*, 15 F. Supp. 3d 383, 387-88 (S.D. N.Y. 2014) (recognizing that "diplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied"); *Zuza v. Office of the High Representative*, No. CV 14-01099 (RC), 2016 WL 447442, at *5-6 (D. D.C. Feb. 4, 2016) (recognizing that "if international officials acquire immunity during the pendency of a suit, the suit must be dismissed").

Applying similar reasoning, courts have found sovereign immunity where an entity amenable to suit is dissolved during the pendency of case and replaced by an entity that asserts immunity. In *Maysonet-Robles v. Cabrero*, while litigation was pending against the Urban Renewal Housing

Corporation Accounts Liquidation Office of Puerto Rico ("Office"), the Puerto Rico Legislature passed an Act dissolving the Office and transferring its assets to the Department of Housing of the Commonwealth of Puerto Rico ("Department"). 323 F.3d 43, 46 (1st Cir. 2003). The *Maysonet-Robles* court then allowed the Department to raise the shield of immunity despite its mid-stream entrance into the case as a successor to the Office, reasoning that a time-of-filing rule did not sufficiently address the "unique nature" of sovereign immunity. *Id.* at 49-50. The court explained that "a State retains its sovereign immunity as a 'personal privilege' and, whether it is the original defendant or is added as a party later, it cannot be sued involuntarily." *Id.* at 50 (citation omitted). Consequently, the Department was entitled to invoke its immunity—regardless of its motivation for dissolving the Office and transferring its assets. *Id.* Indeed, the court recognized that "the Puerto Rico legislature acted to dissolve the Office and transfer the claims to Department with the precise goal of raising the shield of immunity." *Id.* at 51. But, "because the waiver of such immunity is entirely within the sovereign's prerogative, a State may alter the conditions of waiver and apply those changes to torpedo even pending litigation." *Id.* at 52.

Similarly, in *Amerind Risk Management Corp. v. Malaterre*, while a case was pending against Amerind in tribal court, the Department of the Interior issued a corporate charter incorporating Amerind pursuant to 25 U.S.C. Section 477. 633 F.3d 680, 682-83 (8th Cir. 2011). Amerind then filed a motion to dismiss, asserting that it was now entitled to sovereign immunity as a Section 477 corporation. *Id.* at 683. The Court of Appeals for the Eighth Circuit agreed, reversing the lower court's denial of Amerind's motion to dismiss. *Id.* at 685. The Eighth Circuit further determined that Amerind's tribal sovereign immunity was not waived by statutory language

stating that Amerind would "assume the obligations and liabilities" of its predecessor. *Id.* at 686; *see also ASEDAC v. Panama Canal Com'n*, 453 F.3d 1309, 1315 (11th Cir. 2006) (finding sovereign immunity required dismissal where defendant who was previously amenable to suit was dissolved mid-litigation and replaced by a state entity that had not waived its immunity); *Oracle Am., Inc. v. Oregon Health Ins. Exch. Corp.*, 145 F. Supp. 3d 1018, 1023 (D. Or. 2015) (recognizing sovereign immunity for substitute defendant entity where, during the litigation, the Oregon state legislature passed a bill dissolving the original defendant entity and moving its functions and duties to the substitute entity); *Surprenant v. Massachusetts Turnpike Auth.*, 768 F. Supp. 2d 312, 318 (D. Mass. 2011) (recognizing sovereign immunity for a state agency created by the Massachusetts legislature after the filing of a complaint against the agency's predecessor).

Appellant's attempts to distinguish a select few of the cases underlying AMG's motion to dismiss fail examination. For example, Appellant distinguishes *Maysonet-Robles* on the grounds "it involved activities centered in Puerto Rico" and not California. (App. Br. at 32.) But Appellant does not explain how a court's jurisdictional analysis is affected by the state or territory in which the alleged wrongdoing occurred. Likewise, the *Oracle* case cannot be distinguished on the grounds that "there has been no substitution of any entity by AMG." (*Id.*) In fact, the Miami Tribe's assertion of control over AMG is entirely analogous to the substitution of a state entity in *Oracle*. In both cases, the facts underlying a claim of immunity changed during the pendency of the case, thereby requiring the re-examination of jurisdiction by the court.

The attachment of sovereign immunity destroys jurisdiction. Because courts have an ongoing obligation to assess their jurisdiction, and a finding

of immunity bars courts from acting, the trial court correctly applied present-day facts to AMG's motion to dismiss in analyzing whether it is an arm of the Miami Tribe.

II. Tribal Sovereign Immunity Is Highly Analogous to Other Forms of Immunity

As recognized by the trial court, tribal sovereign immunity is closely analogous to other forms of immunity, including diplomatic immunity. *See, e.g., People of State of Cal. v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("The sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States"); *Tassone*, 519 F. App'x at 28 ("It is well-settled that Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers.") (quotation omitted); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1134 (N.D. Okla. 2001) ("It has been a part of this nation's long-standing tradition that Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns.").

Appellant's attempt to distinguish analogous types of immunity from tribal sovereign immunity only highlights the similarities. For example, Appellant invokes the storied history of diplomatic immunity—gleaned entirely from Wikipedia—to try to diminish AMG's claims of tribal sovereign immunity. (App. Br. at 28-29.) However, Appellant fails to explain how diplomatic immunity is a "bedrock of U.S. law," whereas tribal sovereign immunity is not. Of course, tribal sovereign immunity also has a storied history and is rooted in equally important—if not more important—public policy concerns. *E.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, PC*, 476 U.S. 877, 890 (1986) (explaining that tribal immunity is "a necessary corollary to Indian sovereignty and self-

governance."). While diplomatic immunity is rooted in the Diplomatic Relations Act of 1979, tribal sovereign immunity is rooted in the United States Constitution. *See* U.S. Const., Art. I, § 8.

Further attempting to marginalize the importance of sovereign immunity, Appellant discusses the Foreign Sovereign Immunities Act ("FSIA") and appears to argue that the FSIA's commercial activity exception should apply here. (*See* App. Br. at 30.) But Appellant identifies no similar act of Congress creating a "commercial activity exception" to tribal sovereign immunity. In fact, the United States Supreme Court has made clear that no such exception exists. *Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751, 759–60 (1998); *see also Michigan v. Bay Mills Indian Comty.*, 134 S. Ct. 2024, 2038–39 (2014) (emphasizing that Congress has declined multiple express invitations to overturn *Kiowa* and abrogate tribal immunity for "most torts"). As the Ninth Circuit noted in *Allen v. Gold Country Casino*, "the fact that Congress [via the FSIA] limited the immunity of foreign sovereigns simply underscores the breadth of sovereign immunity in the absence of congressional action; because Congress has not limited the immunity of Indian tribes, it retains its full force." 464 F.3d 1044, 1048 (9th Cir. 2006).

Finally, Appellant devotes multiple pages to attacking the trial court's passing analogy to the California Tort Claims Act ("CTCA"), which immunized California public entities from suit, including pending suits. (AA 759.) However, AMG never raised the CTCA in its briefing and the trial court clearly did not base its decision on the CTCA. Although correct and insightful, the trial court's CTCA analogy is merely *dicta*. *See id.*

Ultimately, Appellant fails to offer a coherent argument regarding why the trial court should not have considered other forms of immunity in

deciding whether it must assess jurisdictional facts as they exist today or as they existed at some point in the past. It was entirely proper for the Court to consider factually similar scenarios involving other claims of immunity, all of which plainly demonstrate that inquiries into the existence of immunity are not frozen in time. Instead, these cases firmly establish that, contrary to Appellant's argument, the Court may no longer exercise jurisdiction over a case once immunity attaches.

III. Based on the Facts as They Exist Today, and as They Have Existed for Nearly Seven Years, AMG Is Immune under California's Arm-of-the-Tribe Test

As explained above, the arm-of-the-tribe test is a jurisdictional test that assesses AMG's immunity ***today***. *Owen* identifies five factors courts must consider in determining whether an entity is entitled to tribal sovereign immunity: (1) method of creation, (2) tribal intent, (3) purpose, (4) control, and (5) financial relationship. 2 Cal. 5th at 245. No single factor is dispositive. *Id.* at 248. Rather, courts must make an "overall assessment" based upon a case-specific inquiry. *Id.* When applied to the facts as they currently exist, all five factors of the *Owen* test support a determination that AMG is immune from suit.

A. Method of Creation

In its decision, the trial court conflated this factor with the control factor in observing that "Tucker had a significant role at the time of creation." (AA 759.) However, *Owen* made clear that the method of creation factor focuses on the law under which the entity was formed. 2 Cal. 5th at 245–46. Here, AMG was created under tribal law, by the Miami Tribe acting in its governmental capacity. AMG was organized and chartered under the laws of the Miami Tribe of Oklahoma and operated pursuant to tribal law.

Notably, DOJ agreed that AMG was a corporation established by the Miami Tribe of Oklahoma in the parties' NPA. Under *Owen*, these operative facts weigh in favor of immunity. 2 Cal. 5th at 245.

B. Tribal Intent

The Miami Tribe has always intended for AMG to be immune. In finding that this factor weighed in favor of immunity, the trial court recognized the Tribe's current intent "to reassert tribal control over AMG and to compensate AMG's former customers." (AA 759.) Further, as the *Owen* court noted, "[i]n some cases, the tribal ordinance or articles of incorporation creating the entity will express whether the tribe intended the entity to share in its immunity." *Owen*, 2 Cal. 5th at 246. That is plainly the case here. Specifically, Articles IV and V of AMG's Articles of Incorporation make explicit the Tribe's intent that AMG share in the Tribe's sovereign immunity.

There is no question the Tribe has always intended for AMG to be immune and intends it to be immune today. Indeed, while Appellant clearly challenges AMG's immunity here, she repeatedly acknowledges the Tribe's intention that AMG share its immunity. (*See, e.g.*, App. Br. at 13-14.)

C. Purpose

The *Owen* court held that "inquiry into this factor begins with the entity's stated purpose." 2 Cal. 5th at 246. "If the entity was created to develop the tribe's economy, fund its governmental services, or promote cultural autonomy, its purpose pertains to tribal self-governance notwithstanding the entity's commercial activities." *Id.* Here, under its Articles of Incorporation, the stated purposes of AMG are:

> To create and stimulate the Tribe's economy and to create employment opportunities for tribal members; To generate

> profits to promote the growth and continuity of the Corporation and for distribution to the tribal government; To in-crease the economic well-being of the members of the Tribe in accordance with the economic development and tribal self-determination policies and plans of the Tribe as adopted by the Business Committee; [and] To generate tax and other revenue for use by the tribal government in providing services to the Miami Tribe's reservation community.

(Lankford Decl., Ex. 2, Art. II (AA 67), Ex. 3, Art. II (AA 76).) Under *Owen*, "[i]f the entity's stated purpose is sufficiently related to tribal self-governance, the inquiry then examines the extent to which the entity actually serves that purpose." 2 Cal. 5th at 247 (framing element in the present tense).

It is true that, for much of AMG's operation, its revenues largely were taken by Tucker and his related entities. However, AMG distributed revenues to the Tribe in 2012 and 2013, which were utilized for the benefit of the Miami Tribe in support of Tribal programs and services. The trial court correctly held that these distributions to the Tribe satisfied the purpose requirement. Moreover, since those distributions were made, AMG has ceased operations, removing any concern that it "actually *operates* to enrich primarily persons outside of the tribe or only a handful of tribal leaders." *Owen*, 2 Cal. 5th at 247 (emphasis added). As noted above, AMG's only present-day purpose is to defend its sovereign immunity from diminution by nonconsensual lawsuits, which plainly benefits the Tribe.

D. Control

As correctly emphasized by the trial court, AMG is controlled by the Miami Tribe and has been controlled by the Miami Tribe dating back almost to the time of Appellant's involvement in this suit. *Owen* instructs that "[r]elevant considerations include the entity's formal governance structure, the extent to which it is owned by the tribe, and the entity's day-to-day management." 2 Cal. 5th at 247 (framing element in present tense). AMG

acknowledges that, for a substantial period of time, the Miami Tribe did not exert control over AMG's operations. However, as demonstrated by its actions beginning in November 2012 to remove Tucker and his cronies from AMG, the Tribe always held power over AMG—even if it did not exert managerial control over its day-to-day business.

Today, there is no aspect of AMG's structure, ownership, or management that weighs against its status as a tribal entity. AMG is fully controlled by the Miami Tribe. AMG severed ties with Tucker and all of his entities years ago. And AMG has not engaged in loan collection or other loan-related activities for nearly five years. Under tribal control, AMG settled the federal and state enforcement actions against it, paying $69 million in penalties, abandoning the collection of millions in outstanding loans, and agreeing to the entry of injunctive relief against its lending operations. Today, AMG consists solely of its Board of Directors, all of whom are members of the Tribe. As a result, all decisions concerning AMG are controlled by the Miami Tribe. The trial court correctly found that this factor weighs in favor of arm-of-the-tribe status.

Appellant does not dispute that AMG currently is controlled by the Miami Tribe. Instead, in arguing against tribal control, Appellant deviates from her legally-unsupported "time of filing" argument to contend instead that the "control at issue is when the illegal lending which led to the subject of this case took place." (App. Br. at 38.) But the illegal lending activity that underlies Appellant's claims against AMG—her loans in 2005 and 2006—happened years before AMG even existed. Of course, no one controls a non-existent company. Appellant's contention that this Court should apply a "time of harm" analysis to determine control shows an ignorance of the facts and highlights the weakness of her "time of filing" argument.

E. Financial Relationship

Although it does not generate any revenue, AMG's financial relationship is exclusively with the Miami Tribe. The *Owen* court explained that "[i]f a significant percentage of the entity's revenue flows directly to the tribe, or if a judgment against the entity would significantly affect the tribal treasury, this factor will weigh in favor of immunity even if the entity's liability is formally limited." 2 Cal. 5th at 248. Here, after the Tribe began reasserting control over AMG, AMG made payments to the Tribe totaling approximately $7,818,171. As explained above, AMG has not been operational for many years, and will never resume operations. Today, the only financial relationship between the Tribe and AMG is the flow of funds from the Tribe to defend—and only to defend—AMG's claim to sovereign immunity. These facts weigh in favor of immunity for AMG.

AMG is unquestionably an arm of the Miami Tribe. While there may have been a period of time during which Tucker's operational and financial control over AMG *could have* weighed against arm-of-the-tribe status under *Owen*, that time has long since passed. AMG was created by the Tribe and the Tribe intended for AMG to share in its sovereign immunity. Everything the Miami Tribe has done since reasserting control over AMG in late 2012 reaffirms that intent and unequivocally establishes that AMG is presently an arm of the Miami Tribe.

IV. Recognizing and Enforcing AMG's Immunity Works No Injustice on Appellant or Anyone Else

AMG is presently an arm of the Miami Tribe and, thus, not subject to the jurisdiction of this or any other court. Appellant nevertheless urges the Court to disregard the constitutional limits on its powers over a tribal entity in order to avoid "reopen[ing] the door to . . . extreme abuses." (App. Br. at

26). Appellant even argues that this Court should overturn the trial court's denial of her motion to strike and refuse to recognize AMG's sovereign immunity as a sanction.[2] (*See* App. Br. at 44-48 (collecting cases that involve discovery abuses, not jurisdictional questions of sovereign immunity).) Appellant's proposition is both factually unwarranted and normatively misguided.

As a factual matter, no one in this case has "gotten out of jail free." (*See* App. Br. at 22 (suggesting that AMG would be "absolve[d]" if the trial court's decision is affirmed).) All of the people who engaged in the illegal payday lending operations were removed from AMG by the Miami Tribe years ago. As a result of the federal government's enforcement actions against it and the subsequent actions taken by the Miami Tribe, AMG paid tens of millions of dollars to the federal government and is now defunct and insolvent. AMG's permanent insolvency is highlighted by the *Owen* settlement in which AMG agreed to substantial additional injunctive relief against it, but paid no money to the State of California.

Consumers harmed by the illegal payday lending activities also are not without redress if AMG is determined to be an arm of the Miami Tribe. (*See* App. Br. at 25.) As recognized by a September 2018 article attached to Appellant's pleadings below, the FTC (working jointly with DOJ) "is mailing 1,179,803 refund checks totaling more than $505 million to people who were deceived by AMG Services, Inc. and Scott A. Tucker . . . ." (AA 687.) Regardless, Appellant fails to explain how prosecuting the

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[2] The trial court's decision not to strike AMG's motion to dismiss is reviewed under an abuse of discretion standard. *Brandwein v. Butler*, 218 Cal. App. 4th 1485, 1497 (2013). Appellant simply has not sufficiently explained how the court abused that discretion by denying her motion to strike.

operationally defunct and financially insolvent AMG to judgment will further punish AMG or result in additional compensation to her or any other member of her putative class.

Appellant's related argument that "[a]llowing immunity to be determined at the time of the hearing could enable anyone to gain immunity for its actions by giving a tribe some nominal role in the business" falsely conflates individual wrongdoers such as Tucker—who are never immune—with tribal entities. Tucker's attempt to cloak his revenue stream in the Tribe's immunity *failed*, a fact Appellant completely ignores. His payday lending operation and the substantial revenues it generated for him were crushed under the substantial weight of multiple federal investigations. Tucker has been sentenced to more than 16 years in federal prison and has a $1.3 billion federal judgment entered against him. The attorneys who misled this court and courts in other actions either have pleaded guilty to federal offenses (Conly Schulte) or have been convicted and are sitting in federal prison today (Timothy Muir). Appellant's claims against a host of non-immune defendants, including Tucker and CLK, presumably will continue, though none of those individuals or entities are currently defending the action (presumably because there is nothing left to defend).

As a normative matter, the Court should not weaken the protection sovereign immunity provides to tribes by turning the determination of whether sovereign immunity applies to a tribal entity into a backward-looking inquiry. Tribes are entitled to the same judicial deference as other sovereigns. Moreover, remedies against tribal entities that engage in misconduct are not lacking, even where, as here, they have immunity from private lawsuits. Government enforcement actions against tribes and their entities and private suits against individual perpetrators of illegal conduct

such as Tucker, remain available avenues to seek redress. As this case demonstrates, those remedies can be extremely effective. Appellant's unbridled determination to notch a "victory" against a defunct entity is not a valid reason for this Court to disregard AMG's sovereign immunity or alter its longstanding obligation to re-examine jurisdiction if facts and circumstances change. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2028 ("Michigan must . . . resort to other mechanisms, including legal actions against the responsible individuals, to resolve this dispute."); *California Parking Servs., Inc. v. Soboba Band of Luiseno Indians*, 197 Cal. App. 4th 814, 819 (2011) ("Although we are sympathetic to the position of [Plaintiff], we are constrained in this case by the heavy presumption against waivers of immunity."); *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1195–96 (2005) ("Regardless of the equities, a court is not empowered to deprive an Indian tribe of its sovereign immunity."); *People of State of Cal. v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("[T]he desirability for complete settlement of all issues . . . must . . . yield to the principle of immunity.") (internal citation and quotation marks omitted).

V. AMG Never Waived Its Sovereign Immunity

Appellant's argument that AMG waived its sovereign immunity when it merged with CLK is frivolous. As Appellant acknowledges:

> The Complaint alleges that the purpose of AMG was to enable the Tuckers to continue the same payday lending business they had created in 2001 when they incorporated CLK, but with the goal of aligning AMG with the Tribe so that the Tuckers could claim that their enterprise was entitled to the Tribe's immunity from consumer lawsuits.

(App. Br. at 13-14.) Appellant's contention that the agreement intended to cloak Tucker's revenue stream in the Tribe's immunity actually *waived* that immunity is inconsistent with the theory underlying her complaint.

Regardless, as a matter of law, neither the language from the merger agreement, nor AMG's obligatory appointment of an agent for service of process constitutes a waiver of its sovereign immunity. "Waiving sovereign immunity does not arise through silence, implication, or innuendo. . . . courts have consistently held that that waiver of immunity must be beyond doubt[.]" *Multimedia Games*, 214 F. Supp. 2d at 1140; *see also Allen*, 464 F.3d at 1047 (holding that even contractual language that "might imply a willingness to submit to federal lawsuits" is not a waiver because such waivers "may not be implied.").

Courts have flatly rejected Appellant's argument that vague language in a merger agreement or a tribal entity's incorporation under state law effect a valid waiver of sovereign immunity. *Multimedia Games* is directly on point. The *Multimedia Games* court reasoned that a "generalized merger agreement [that] does not contain [an] unequivocal expression of tribal consent to suit" does not waive the tribal entity's immunity. 214 F. Supp. 2d at 1140. "The merger contract is devoid of any language that clearly expresses the Tribe's intent to authorize causes of action in federal court." *Id.* at 1141; *see also Amerind*, 633 F.3d at 686 (holding that a "general assumption of [company's] obligations and liabilities" did not constitute an express waiver of sovereign immunity because it did not state that the sovereign "consents to submit to a particular forum, or consents to be bound by its judgment").

As to the appointment of an agent for service of process, the *Multimedia Games* court explained:

> The consent to service of process is not analogous to the consent to waive tribal sovereign immunity. . . . At the most, the consent to service waives only personal jurisdictional defenses, but does not deprive the tribe of its inherent sovereign immunity. . . .
>
> [Plaintiff] argues that the purpose of finding that consent to service of process waives immunity is to ensure that at least one judicial forum is available. Such an argument is untenable, because access to tribal courts have in no way been eliminated and still offer a viable alternative to suing in federal district court for appropriate causes of action. Thus, ***the Court cannot equate the agreement to consent to service of process as a waiver of tribal sovereign immunity***. . . .
>
> [T]he only entities that can determine the extent to which the immunities and protection are afforded to tribes are Congress and the applicable tribes, themselves. The state legislatures have no such right. Thus, it would be inconsistent with previous Supreme Court law for this Court to find an implied waiver of tribal immunity based on the purposes of Oklahoma corporate law rather than an unequivocal and explicit expression of tribal intent to relinquish their rights.

214 F. Supp. 2d at 1140–41 (emphasis added); *see also Gavle v. Little Six, Inc.*, 534 N.W. 2d 280, 286 (Minn. Ct. App. 1995) ("[C]onsent to service does not amount to a waiver of sovereign immunity."); *Ransom v. St. Regis Mohawk Educ. & Comty. Fund, Inc.*, 658 N.E. 2d 989, 995 (N.Y. Ct. App. 1995) ("[T]he mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to 'sue and be sued' does not automatically subject that corporate entity to any court's jurisdiction where jurisdiction is otherwise lacking.").

Appellant's cited cases concerning arbitration provisions do not establish that a waiver of tribal immunity can be implied in the absence of an express consent to the jurisdiction of a non-tribal court. To the contrary, in *C & L Enterprises, Inc. v. Citizen Bank, Potawatomi Indian Tribe of*

Oklahoma, the Supreme Court emphasized that "the regime to which the Tribe subscribed includes entry of judgment upon an arbitration award" in an Oklahoma state court. 532 U.S. 411, 419 (2001). The holding of *C & L Enterprises* also has been limited, by this Court and others, in order to protect Tribes against prohibited waivers-by-implication. *See Big Valley Band of Pomo Indians*, 133 Cal. App. 4th at 1194 ("At most [the arbitration clauses] indicate an arbitration award may be entered in a court of competent jurisdiction . . . . The analysis in *C & L Enterprises* does not suggest that acceptance of an arbitration clause constitutes a broader immunity waiver."); *California Parking Servs.*, 197 Cal. App. 4th at 819 (distinguishing *C & L Enterprises* and finding no waiver of tribal immunity); *Allen*, 464 F.3d at 1047 (distinguishing *C & L Enterprises* and finding no waiver in contractual language that "did not mention court enforcement, suing or being sued, or any other phrase clearly contemplating suits").

Appellant's reliance on *Hunter v. Redhawk Network Security, LLC*, is similarly misplaced. In that case, the defendant was a separate entity formed under state law (the equivalent of CLK) that later merged with a tribally-chartered entity (the equivalent of AMG). *See* 2018 WL 4171612, at *3. The *Hunter* court merely held that the CLK-equivalent company was not entitled to immunity. *See id.* at *5. It did ***not*** hold that the tribally-chartered equivalent of AMG had waived or otherwise forfeited ***its*** immunity. *See id.* Here, even assuming AMG's vague agreement in 2008 to assume the "liabilities" of CLK encompassed Appellant's then-unasserted claims against CLK, there still must be an unequivocal consent to suit by AMG for that liability to be enforceable against it in state or federal court. No such consent has ever been given. Indeed, even CLK could not have sued AMG

in state or federal court for any breach of the merger agreement, as there is no express waiver of AMG's immunity in that agreement.

VI. The Trial Court's Decision Was Fully Within the Scope of Remittitur

Finally, the trial court properly denied Appellant's motion to strike AMG's motion to dismiss based on her argument that the motion was beyond the scope of the remittitur. Appellant's argument is based on a mischaracterization of this Court's remittitur, which instructed the trial court to apply the new arm-of-the-tribe standard to the "facts at hand in the first instance." (App. Br. at 48.) Appellant contends this statement directed the trial court to consider only the facts the parties briefed years ago. But the Court's statement was made in response to Appellant's argument that the Court of Appeals should apply the facts in the record before it to the new *Owen* test, thereby circumventing the trial court's consideration of the new test altogether. *See Rosas*, 2017 WL 4296668, at *2 ("Rosas argues we should apply *MNE*'s new standard ***in the first instance*** and reverse in favor of a new order denying AMG's jurisdictional challenge." [Emphasis added.]).

In rejecting Appellant's invitation to decide the case "in the first instance" on the then-existing record, this Court did not limit the factual record that could be considered on remand. To the contrary, this Court explicitly invited AMG to collect evidence and brief the application of the recently refined arm-of-the-tribe test. *Id.* at *5 ("We do agree AMG is entitled to an opportunity to further develop the evidentiary record in light of its newly-announced burden under *MNE* to prove by a preponderance of the evidence that it ***is*** an 'arm of the tribe' entitled to tribal immunity." [Emphasis added.]). That is exactly what AMG did. Appellant's motion to

strike was an improper attempt to block the trial court from complying with the remittitur by examining the issue of AMG's sovereign immunity under the new test established by *Owen*. It was properly denied by the trial court.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's decision finding that AMG Services, Inc., as it exists today and as it has existed for many years, is an arm-of-the-Miami Tribe of Oklahoma and, as a result, that Appellant's claims are barred based on sovereign immunity.

Dated: September 30, 2019

Respectfully Submitted,

FOX ROTHSCHILD LLP

By:_____
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, the text of Respondent's Brief, including footnotes, consists of 9,654 words as determined by the word counting tool of Microsoft Word, the computer program used to prepare the brief.

Dated: September 30, 2019.

FOX ROTHSCHILD LLP

By: _____
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PROOF OF SERVICE

I am over the age of eighteen years of age, not a party to this action, and employed in the City and County of San Francisco at the law offices of Fox Rothschild LLP, 345 California Street, Suite 2200, San Francisco, California 94104. My electronic service address is evanmatre@foxrothschild.com.

On September 30, 2019, I caused a copy of the attached Respondent's Brief to be served electronically on opposing counsel at the electronic service address as last given, as follows:

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and by placing a true and correct copy in a sealed Federal Express envelope and delivered to a Federal Express Agent in San Francisco, California, delivery prepaid by shipper for next day delivery, addressed to the following interested party:

///

///

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 30, 2019 at San Francisco, California.

Eileen Van Matre

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **Baillie et al. v. Processing Solutions, LLC et al.**
Case Number: **A156573**
Lower Court Case Number: **JCCP004688**

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Date

/s/Dwight Donovan

Signature

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