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CASE NO. A156573

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

Kathrine Rosas, *Plaintiff and Appellant,*

v.

AMG Services, Inc., *Defendant and Respondent*.

Appeal From an Order Granting AMG Services, Inc.'s Motion to Dismiss
Alameda County Superior Court Case No. JCCP004688
Honorable Winifred Y. Smith, Judge Presiding

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

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

COURT OF APPEAL **FIRST** APPELLATE DISTRICT, DIVISION **THREE**	COURT OF APPEAL CASE NUMBER: **A156573**
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APPELLANT/ PETITIONER: **INTERNET LENDING CASES, COORDINATED ACTIONS:** RESPONDENT/ REAL PARTY IN INTEREST: **Rosas v. AMG Services, Inc.**	
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INTRODUCTION

The issue in this appeal is whether an alleged arm of the Tribe, AMG Services, Inc. ("AMG" or "Respondent") can violate the rights of California consumers in conjunction with and at the direction of convicted felons, Scott Tucker ("Tucker") and his attorney, Timothy Muir ("Muir"), accept the benefits of that collaboration and then when legal proceedings are brought against AMG, distance itself from Tucker and Muir, claim restoration of sovereign immunity, and therefore, claim it is not liable for its past conduct victimizing consumers in the State of California.

AMG, a payday loan company, in conjunction with Tucker and Muir, induced California consumers into signing up over the internet for short-term loans with interest rates as high as 782%, and then when the legal writing "came on the wall," AMG severed its association with Tucker and Muir, and now claims immunity from any claims of California consumers who were victimized by AMG's conduct. Kathrine Rosas ("Rosas" or "Appellant") now respectfully requests that this Court reverse the decision granting AMG's motion to dismiss and denying Rosas' motion to strike. The trial court's decision means that "nontribal parties" can still do what has been condemned previously in this case, i.e., attach themselves to a company like AMG, or in this case AMG attaches itself to non-tribal members, defraud and exploit California residents and then divorce itself from the non-tribal entities [Tucker and Muir] and claim sovereign immunity. The law does not permit this result. As stated in her Opening Brief ("AOB") in A139147 (Record Incorporated by Reference in Appeal No. A139147, defined as "A139147"), "Courts can—and must—distinguish between legitimate tribal businesses that truly 'act[] as an arm of the tribe [such] that [their] activities are properly deemed to be those of the tribe,' *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046 ("*Allen*"), and those businesses—like AMG—that associate themselves

with tribes in name only for the purpose of escaping the reach of consumer protection lawsuits." (A139147, AOB, pp. 1-2).

The trial court's order granting AMG's motion to dismiss should be reversed.

STATEMENT OF FACTS AND PROCEDURE

I. THE LENDING ENTERPRISE/TRIBAL AFFILIATION SCHEME

This lawsuit arises out of the lending activities of an internet payday lending enterprise that charges unwitting consumers usurious interest rates for their loans. Between September 2, 2005, and October 24, 2006, Appellant Kathrine Rosas obtained five payday loans over the internet from various entities that she would come to learn are part of an enterprise owned, operated, and controlled by Scott Tucker and Blaine Tucker (collectively, "the Tuckers"). (A139147, Appellant's Appendix ("AA") vol. III, pp. 864-65, 871.) The interest rate on each of these loans was an astronomical 782.14% (*id*. at p. 871), which far exceeds California's usury limit of 10% for unlicensed lenders (*id*. at pp. 880-81).

The Tuckers started their payday lending business on February 23, 2001, when they organized CLK Management, LLC ("CLK") in the State of Kansas. (A139147, *Id*. at pp. 875-87.) From an office complex located in Overland Park, Kansas, the Tuckers—through CLK—offered short-term, high-interest-rate loans to consumers over the internet using a variety of domain names, such as USFastCash, Ameriloan, and One Click Cash. (*Ibid*.)

A number of years later, after the State of California issued a Desist and Refrain order against USFastCash, Ameriloan, and others (A139147 *id*. at pp. 875, 887-90), the Tuckers devised a plan to continue their lending activities and avoid having to comply with state consumer protection laws. (A139147 *Id*. at pp. 870-71, 876.) To this end, the Tuckers: (a) caused a

business—AMG—to be incorporated pursuant to the laws of the Miami Tribe of Oklahoma ("Tribe"); (b) merged CLK into AMG; and (c) claimed that their lending enterprise was immune from consumer protection lawsuits on the ground that AMG was an "arm" of the Tribe, and thus entitled to share in the Tribe's immunity from lawsuits. (A139147, AA vol. I, pp. 039, 048-49.)

The Tuckers' plan did not go unnoticed by the federal government. The Federal Trade Commission ("FTC") launched an investigation into the lending enterprise, which culminated in a federal lawsuit against the Tuckers and AMG (among others) alleging violations of federal law arising from the Tuckers' lending activities. (See Complaint, *Federal Trade Commission v. AMG Services, Inc., et al.* (D. Nev. filed Apr. 2, 2012) No. 2:12-cv-00536 (hereinafter "FTC Compl.").) The FTC investigation examined, among other things, deposits, transfers, and withdrawals from AMG's bank accounts between 2008 and 2011 and the Tuckers' central role in directing the movement of funds to and from those accounts. (A139147, AA vol. III, pp. 787-95.) For example, the investigation showed that: (a) the Tuckers are the only two signatories on AMG's bank accounts through which many millions of dollars passed (*id*. at pp. 787, 953; see also *id*. at pp. 758, 789-90 [between September 2008 and March 2011, over $142,835,447 was deposited, and then subsequently withdrawn, from AMG's bank accounts at the Tuckers' direction]); (b) substantial disbursements were made from AMG's bank accounts to entities that have no connection with any tribe—including an auto racing company and a luxury home construction company (*id*. at p. 953); (c) the Tuckers signed checks from AMG's bank accounts to buy luxury automobiles and fund private jet travel (*id*. at p. 743); and (d) two non-Indian companies received substantial payments authorized by the Tuckers from AMG's bank accounts—Hallinan Capital, which received over $22,000,000, and Scott Tucker's auto racing team (Level 5 Motorsports), which received

$10,603,000 (*id*. at p. 747; see also *id*. at pp. 787-95).

In 2012, based on this and other evidence, the FTC filed suit against AMG, the Tuckers, and other individuals and entities associated with the Tuckers in federal court in Nevada. (See FTC Compl., *supra*.) The lawsuit alleged that AMG and the Tuckers misrepresented the cost of their loans and engaged in unlawful debt collection practices. (*Id*. at ¶ 44.) For these and other reasons, the FTC Complaint alleged that AMG, the Tuckers, and others violated the Federal Trade Commission Act, 15 U.S.C. § 53(b); the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1666j; and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693 *et seq*. (FTC Compl., *supra*, ¶ 1.) Subsequently, there was a settlement between the FTC and AMG which resulted in AMG paying the Government $21M. In January 2016, Tucker and Muir were indicted and AMG executed a Non-Prosecution Agreement, attached to which as Exhibit A is a Statement of Facts, with the United States Department of Justice (AA, vol. I, pp. 048, 266-272). In the Statement of Facts (AA, vol. I, p. 272), AMG admitted, acknowledged and affirmed that neither the Tribe or any entity it controlled paid to acquire any part of Tucker's payday lending business, and that Tucker and others based in Overland Park - not the Tribe - managed operations, created the loan approval criteria, and that all essential steps necessary for the approval of loans were performed in Overland Park under the direction of Tucker or individuals reporting to Tucker:

- That Tucker using powers of attorney, opened or caused to be opened bank accounts in the names of entities controlled by the Miami Tribe. Neither the Miami Tribe or any entity that it controlled exercised control over these bank accounts.
- In certain state court litigations, a then representative of the Miami Tribe who was also an officer of entities controlled by

the Miami Tribe, were involved in the loan business, submitted factual declarations that were false because they overstated the involvement of such former representatives and that of the Miami and/or entities controlled by the Miami in the operation of the loan business. (AA, vol. I, p. 272).

II. THE PROCEEDINGS BELOW

A. The Amended Complaint

On July 31, 2012, Rosas filed a First Amended Class Action Complaint ("Complaint"), which is the operative Complaint in this case, against AMG, the Tuckers, and a number of other individuals and entities involved in the lending enterprise for violating California's consumer protection laws. (A139147, AA vol. III, pp. 856-85.) In particular, the Complaint includes causes of action on behalf of Rosas and a class of California consumers for: (1) usury and unconscionable lending; (2) injunctive and restitutionary relief pursuant to Business and Professions Code §§ 17200, et seq.; (3) money had and received; and (4) imposition of constructive trust. (A139147, AA vol. III, pp. 880-84.)

The Complaint contains several allegations regarding AMG's specific role in the enterprise. According to the Complaint, AMG serves "as a lender, processor of loans, marketer of usurious loans, advertiser[] of loans, and as a collection agent . . . ." (A139147, AA vol. III, pp. 860, 876.) [All of these activities are conducted out of AMG's office complex in Overland Park, Kansas (*id*. at 876), where AMG develops and uses internet websites to extend usurious and unconscionable loans to California consumers (*id*. at 871).]

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. (A139147, AA, vol. III, p. 876.) The Complaint further alleges that AMG is "not closely linked in governing structure to the [T]ribe" because the "governance of the payday loan business has and does reside at all times relevant herein exclusively with [Scott Tucker]." (*Id*. at p. 870.)

The Complaint further alleges that federal policies intended to promote tribal autonomy would not be furthered by granting immunity to AMG because the Tribe "abdicated all authority [to the Tuckers]" and was "rented" for a mere "1% to 2% of the revenue" generated by AMG. (A139147, AA vol. III, pp. 870-71.)

Finally, the Complaint alleges that any claim to tribal immunity AMG might assert in this case has been waived by the documents that effectuated the merger between AMG and CLK, which state (among other things) that AMG may be served with process in the State of Kansas in any action, and that AMG agreed to assume CLK's liabilities. (A139147, AA vol. III, pp. 869-70.) For all of these reasons, the Complaint asserts that AMG is "not entitled to sovereign immunity for [its] actions concerning the payday loans at issue" here. (*Id*. at p. 870.)

B. The First Motion to Dismiss

On June 1, 2012, AMG, along with other entities that purported to have tribal affiliation, who are not parties to this appeal, filed a renewed motion to quash and dismiss for lack of subject matter jurisdiction. (A139147 AA, vol. I, pp. 028-64.) AMG argued that it is an "arm" of the Miami Tribe of Oklahoma and, as such, is entitled to share in the Tribe's immunity. (*Id*. at pp. 048-49.) In support of the June 1, 2012 “renewed” motion to quash, AMG submitted the declarations of Chief Thomas Gamble (“Gamble”) (A139147, AA vol. I, pp. 065-413) and Don Brady (“Brady”) (A139147, AA vol. II, pp.414-424).

In Paragraph 14 of Gamble's declaration, Gamble states that the Miami Tribe formed AMG (A139147, AA vol. I, p. 69). In Paragraph 15, Gamble states the Tribe formed AMG to provide employee services necessary to service the loan portfolios of *inter alia* MNE and MNE Services (*id.* at p. 70). In Paragraph 19, Gamble states that the profits of *inter alia* AMG are utilized for the benefit of the Miami Tribe (*id.* at pp. 71-72).

In Paragraph 11 of Brady's declaration, Brady states that the Tribe established AMG for the purpose of providing employees to service the loans issued by MNE (A139147, AA vol. II, p. 417). In Paragraph 13, Brady states that loan applications are processed and approved pursuant to underwriting criteria established by MNE at MNE Headquarters located on the Tribe's trust land; and upon such approval the loan is consummated; and Brady concluded stating that the loans are consummated on Indian lands and within the jurisdiction of the Miami Tribe (*id.* at p. 417).

Both the Gamble and Brady Declarations were later admitted in connection with the Non-Prosecution Agreement with the United States Government to be materially false (AA vol. I, p. 272, ¶4).

On June 22, 2012, Rosas filed an opposition to AMG's motion requesting a continuance so that she could seek discovery to prove that AMG is not an arm of the Tribe, and therefore not entitled to assert the Tribe's immunity from her suit. (A139147, AA vol. III, pp. 751-52.) Her opposition brief urged the lower court to follow the approach articulated by the U.S. Court of Appeals for the Tenth Circuit in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort* (10th Cir. 2010) 629 F.3d 1173 (*Breakthrough*), for determining whether an entity is an "arm of the tribe" for immunity purposes. (*Id.* at 744.) Rosas further explained that, if permitted discovery, she would be able to prove that AMG is not entitled to arm-of-the-tribe immunity in this case. (I*d.* at pp. 742, 751-52.)

Rosas articulated specific reasons why discovery would likely reveal the absence of any legitimate connection between AMG and the Tribe that would justify granting arm-of-the-tribe immunity to AMG. Among other things, Rosas pointed to the FTC's investigation to support her assertion that AMG is used by the Tuckers to fund their "personal living expenses, such as, a luxurious mansion in Aspen, private jet travel, fund Scott's Formula One racing team, Level 5 Motorsports, LLC, and apparently even pays for the private school education of the Tuckers' children." (A139147, AA, vol. III, p. 745.) Rosas also argued that the bank records she requested in discovery—but that AMG never produced—would show that the Tribe receives a mere "1% to 2% of the revenue or less" from AMG (id. at p. 748), and that the Tuckers—not any member of the Tribe—are the sole signatories on AMG's bank accounts. (*Ibid*.) Rosas further argued that discovery would enable her to prove that the purpose of AMG is to enable the Tuckers to engage in illegal lending practices in California under the cloak of tribal immunity. (*Id.* at p. 744.) Rosas also requested discovery to prove that the Tuckers—not the Tribe—control nearly every aspect of the lending enterprise from their office complex located in Overland Park, Kansas, which is 150 miles away from reservation land. (*Id*. at pp. 740, 745-46.) Finally, Rosas argued that AMG had waived its right to assert an immunity defense in this case by agreeing to assume the liabilities of its predecessor, CLK, when those two companies merged. (*Id*. at pp. 742-43.) Along with her memorandum, Rosas submitted a declaration ("Jaffe Declaration") specifying the particular information she sought to obtain through discovery. (*Id*. at pp. 755-62.) Among other things, the Jaffe Declaration highlighted the findings of the FTC investigation and requested discovery so that Rosas could prove the FTC's findings. (*Ibid*.) In particular, Rosas requested discovery to obtain: (a) AMG's bank records that were the subject of the FTC investigation; and (b) confirmatory discovery to

prove that the Tuckers, from AMG's bank accounts, made hundreds of payments to myriad entities that have nothing to do with any tribe, including a children's private school in Kansas City, automobile racing teams, and a number of companies associated with a luxury home in Colorado. (*Id*. at pp. 756, 758.)

The Jaffe Declaration also requested permission to depose the three individuals whose declarations AMG had submitted in support of its motion: Robert Campbell, Don Brady, and Chief Thomas Gamble. (A139147, AA vol. III, at p. 757.)

On July 17, 2012, the court issued an order permitting Rosas to depose Campbell, Brady, and Gamble. (A139147, AA vol. III, p. 855.) However, those depositions never occurred due to a series of delays and removal of the case to federal court by one of the defendants, Charles Hallinan. (*Id*. at p. 943.) On remand, the trial court issued an order deferring the depositions until after the court received additional briefing on the immunity issue so that it could either instruct the parties on the proper scope of the depositions, or alternatively rule that the discovery issue was moot on the ground of AMG's immunity. (*Id*. at pp. 894, 943.)

In response to the court's order requesting additional briefing, Rosas filed her supplemental memorandum on February 2, 2013, where she reiterated her need for discovery. (A139147, AA, III, pp. 898-904.) Among other things, Rosas requested discovery:

• into the "corporate documents and all management agreements" between AMG and other individuals and entities (*id*. at p. 899);

• into the formation and contractual relationship[s]" between AMG and third parties "to ascertain whether AMG is in fact actually acting on behalf of a federally recognized Indian tribe" (*id*. at p. 900);

• into the percentage of the $142,834,447.66 withdrawn from AMG's

bank accounts between September 2008 and March 2011 that went to the benefit of the Tribe, as opposed to non-Indian entities and individuals (*ibid*.);

• into the management of AMG "to ascertain what input, if any, third parties, other than the [Tuckers] and their direct subordinates had in the conduct of AMG's business" (*id*. at p. 901);

• into the evidence uncovered by the FTC investigation, which shows that AMG operates "out of an office in Overland Park, Kansas," and is "controlled by the [Tuckers] and their immediate subordinates" (*id*. at p. 902);

• into whether AMG was "formed for any other purpose than to conduct illegal payday lending using the [Tribe] as a Potemkin Village facade to shield the illegal nature of the transaction" (*ibid*.);

• into the identities and compensation of AMG's employees (*id*. at p. 903); and

• into "[w]hy [AMG was] formed, at whose behest [it was] formed, [and into] who controls the money" that passes through AMG (*ibid*.).

AMG filed its supplemental brief on February 22, 2013, where it again argued that the trial court should grant its motion to quash and dismiss on the ground that AMG is an arm of the Tribe. (A139147, AA vol. III, pp. 912-25.) AMG also filed evidentiary objections to the documents Rosas submitted as exhibits to the Jaffe Declaration, including a challenge to the admissibility of the FTC investigatory report on hearsay and other grounds. (A139147, AA vol. III, pp. 931-36.)

C. The Trial Court's Decision on the First Motion to Dismiss

After a May 3, 2013, hearing, where the court heard arguments from the parties about the legal standards applicable to AMG's immunity claim immunity, but did not hear evidence (A139147, Transcript, pp. 5:4-17:3), the trial court granted AMG's motion and dismissed AMG from Rosas' lawsuit.

In its written order of May 6, 2013 (A139147, AA vol. III, pp. 940-67),

the trial court admitted that it "struggled to conceive of a way in which a principled line" could be drawn between entities entitled to arm-of-the-tribe immunity and those that are not (*id*. at p. 964). The trial court acknowledged that Rosas had urged the court to apply the Tenth Circuit's *Breakthrough* approach to the arm-of-the-tribe inquiry (*id*. at pp. 949-50), but rejected that approach—among others—on the ground that it was "inherently subjective." (*Id*. at p. 965.) The court concluded that the only way to avoid subjectivity in its arm-of-the-tribe analysis was to adopt a two-factor, bright-line test. (*Ibid*.) The first factor, the court held, is that "revenue in any amount directed to the benefit of the Tribe is enough" to confer immunity on the entity generating the revenue. (*Ibid*.) In other words, according to the trial court, an entity is exempt from state laws even if a tribe receives, for example, a mere $100 for every $100 million that a non-Indian receives from the entity. The second factor is that any entity claiming tribal immunity should be granted such immunity unless the opposing party can demonstrate that the tribe affiliated with the entity exerts "no control whatsoever over the management of [the entity's] business activities . . . ." (*Id*. at pp. 965-66.) In other words, the trial court held that, to defeat an entity's claim of tribal immunity under this two factor test, plaintiffs will need to prove both that the entity directs zero revenue to the tribe and that the tribe exerts no control over the management of the entity. (*Ibid*.) Although the court's order did not identify any other court to have utilized this two-factor test, the court held that its test was "inescapable" given that any other test would be an improper "dimunition [of tribal immunity] by the States." (*Id.* at p. 965, citation omitted.)

The court also denied Rosas' requests for discovery into the immunity issue on the ground that Rosas had failed to articulate how discovery would have proven that the Tribe exerts "no control whatsoever" over AMG. (A139147, *Ibid*.) The court did, however, acknowledge earlier in its decision

that Rosas had requested discovery into numerous aspects of the relationship between the Tuckers, AMG, and third parties to prove that AMG is not an arm of the Tribe. But the court later stated that Rosas had not articulated how discovery into AMG's method of creation, its structure and ownership, and whether the Tribe intended for AMG to share in its immunity would have enabled Rosas to prove that AMG is not an arm of the Tribe. (*Id*. at p. 960.) The court based this conclusion on its observation that the evidence submitted by AMG—which included declarations of witnesses whom Rosas was never permitted to depose—was "very clear on those fundamental issues." (*Ibid*.)

The court also denied Rosas' request for discovery into whether AMG waived its right to assert an immunity defense in this case. (A139147, *Id*. at p. 963.) On this point, the court reasoned that waivers of tribal immunity must be "unequivocally expressed" to be effective, and that Rosas' waiver arguments "could only be characterized as [demonstrating an] 'implied'" waiver of immunity, which was legally insufficient. (*Ibid*.) The basis for the court's holding was that the "operation of [AMG's] merger with CLK" was not an express waiver, although the court did not address whether specific statements in AMG's merger documents stating, for example, that AMG agreed to assume all the liabilities of CLK, constituted an express waiver. (*Ibid*.; see also A139147, AA vol. I, p. 292 [AMG's purchase agreement with CLK states that AMG "agrees to assume any and all liabilities of [CLK], whether arising or accruing prior to, on, or after the effective date [of the merger]"].)

For all of these reasons, the court dismissed AMG from this lawsuit on tribal immunity grounds without permitting Rosas to take discovery into the immunity issue to challenge AMG's claim that it is an arm of the Tribe. (A139147, AA vol. III, p. 967.)

Rosas filed an appeal of the trial court's order of May 6, 2013 (A139147, AA vol. III, 983-985). On December 22, 2016, after briefing had

been completed in A139147, the California Supreme Court decided *People ex rel. Owen v. Miami Nation Enterprises*, (2016) 2 Cal.5th 222 ("*People v. MNE*"), and in response to *People v. MNE*, this Court ordered supplemental briefing in A139147. On September 28, 2017, this Court issued its Opinion in the first appeal (2017 WL 4296668) ("*Rosas* Opin.") and stated in pertinent part: "We conclude the appropriate course of action is to remand to the trial court so that it - rather than this court - may apply the new standard (annunciated by the Supreme Court in *People v. MNE, supra*) to the facts at hand in the first instance." *2.

After the remittitur was issued in A139147 on July 31, 2018, AMG filed a motion to quash and dismiss for lack of personal jurisdiction; and in the alternative to dismiss action as moot (AA vol. I, pp. 1-275). The gravamen of AMG's motion to dismiss was that irrespective of its past conduct, "AMG's sovereign immunity must be assessed and reassessed based upon present facts and circumstances." (*Id.* at p. 8:5-6).

AMG admits receiving payments totaling approximately $7,818,171 (AA vol. I, pp. 45, 193-209, 210-223). On November 13, 2018, plaintiffs filed a motion to strike (AA vol. II, pp. 276-483, AA vol. III, pp. 484-568), to which AMG filed its opposition on November 26, 2018 (AA vol. III, pp. 569-606). On December 7, 2018, the trial court heard AMG's motion to dismiss and plaintiffs' motion to strike, and on December 17, 2018, an order was entered granting AMG's motion to dismiss and denying plaintiffs' motion to strike (AA vol. III, pp. 757-763), notice of entry of which was filed on January 7, 2019 (AA vol. IV, pp. 764-744).

On February 26, 2019, Rosas timely filed her Notice of Appeal of the trial court's final order of December 17, 2018 (AA vol. III, pp. 757-763), and on March 3, 2019, a Judgment of the Dismissal was filed (AA vol. IV, pp. 782-783).

SUMMARY OF ARGUMENT

In its motion, AMG asked the trial court to consider a new motion based on AMG's "present circumstances" which was a request to replace the record in front of this Court on which AMG lost with a new record. In effect absolving AMG from responsibility for the illegal payday lending which is the subject of this case.

The decision below should be reversed and remanded to the trial court with instructions to deny AMG's motion to dismiss, because the trial court erred in dismissing AMG from this lawsuit. According to the trial court, the central issue on AMG's motion is when the court should evaluate sovereign immunity and arm of the tribe immunity. The court concluded, after stating the parties have not identified any California law on the issue and the court has found none, that as a matter of law, the court may examine sovereign immunity based on circumstances existing at the time the court hears the motion (AA vol. III, pp. 757-763).

This Court should reverse the decision below, because sovereign immunity should not be evaluated at the time the court hears the motion, because as ROSAS stated to the court on December 7, 2018, "As long as it's able to delay the ultimate resolution of its motion to dismiss on arm-of-tribe grounds, until it can supposedly clean up its act and make itself - transform itself into an arm-of-the-tribe, then it does not matter that it broke the law." (Transcript, p. 7:20-25). Sovereign immunity should be evaluated as of the time of the filing of the complaint (July 1, 2009), but no later than the time of the filing of the first amended complaint (July 31, 2012).

ARGUMENT

I. STANDARD OF REVIEW

On appeal, "in the absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has subject matter jurisdiction over

an action against an Indian tribe is a question of law subject to our de novo review." (*American Property Management v. Superior Court*, (2012) 206 Cal.App.4th 491, at 498 (*"American Property*"), citation omitted [quoting *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal. App. 4th 175, 183 [39 Cal. Rptr.3d 875]].) Additionally, where the appellate court is required to "consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," those mixed questions of law and fact are classified as ones of law and are reviewed de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801 [35 Cal.Rptr.2d 418], cited in *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 207 [135 Cal.Rptr.3d 42] (*Yavapai-Apache*).) Stated differently, where—as here—"the parties contested each other's characterization of the facts and the legal conclusion to be drawn from those facts," the court treats the question as "a legal determination warranting [its] independent review." *(Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 585 [122 Cal.Rptr.2d 24].)

Further, in its' Order, the trial court stated "The court holds as a matter of law that the court may reexamine sovereign immunity if the facts change during the course of the litigation and that court evaluates sovereign immunity and arm of the tribe immunity at the time the court hears the motion." (AA vol. III, p. 758).

Therefore, this appeal is subject to de novo review.

II. STATEMENT OF APPEALABILITY

An Order granting a Motion to Dismiss is directly appealable, CCP § 904.1(a)(3).

III. TRIBAL SOVEREIGN IMMUNITY SHOULD BE EVALUATED AT THE TIME OF THE FILING OF THE COMPLAINT

In its decision, the trial court stated that neither the parties, nor the court

have identified any California law as to when a court should evaluate sovereign immunity and arm of the tribe immunity (AA vol. III, p. 758), and went on to rule incorrectly that if circumstances (facts) change during the litigation, the court evaluates sovereign immunity and arm of the tribe immunity at the time the court hears the motion (*Id.* at 758). In support of its' decision that tribal immunity should be evaluated by the circumstances existing at the time of hearing of the motion - December 7, 2018, the trial court used as analogies the law concerning diplomatic immunity, and the circumstances surrounding the creation by the California Legislature of the law on the immunity of California public entities (California Tort Claims Act [of 1963] ("CTCA")). For the reasons set forth *infra*, neither the law of diplomatic immunity or the circumstances surrounding the creation of the CTCA, are analogous to this case; and if this Court was to affirm the trial court's ruling on the central issue of the appeal as to the time at which sovereign immunity is evaluated, it would be as ROSAS argued to the trial court, tantamount to giving AMG a present circumstances "get out of jail free" card, which is contrary to the decision of the California Supreme Court in *People v. MNE*, *supra*, and as stated above, rewards AMG for submitting false declarations in support of the first motion to dismiss.

If the lower court's test gains traction, there will be nothing to stop other scam artists, like the Tuckers, from partnering with tribes, perpetuating their scams, and then disassociating themselves from the tribe with the ostensibly created tribal entity (here AMG) claiming sovereign immunity based on present circumstances, which is further exacerbated if sovereign immunity is determined at the time the court hears the motion.

As the trial court recognized at the May 3, 2013 hearing, the Order of which led to the first appeal (A139147), "I think this tribe and most tribes missed a marvelous opportunity in not acquiring all the asbestos manufacturers

and washing all those liabilities, billions and billions of dollars in liabilities and continued to manufacture asbestos products through tribal entities and raising sovereign immunity as a defense to every personal injury claim . . ." (A139147 Transcript, 6:7-16). Allowing 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, then once legal trouble descends - sever its ties, leaving consumers with no redress.

Here, there is no dispute that AMG is and was at most, a "mere revenue-producing tribal business" (see *Allen, Id.* at 1046), and should not be entitled to tribal immunity, or be allowed to "whitewash" its prior conduct by severing ties with Tucker and his cronies.

In the trial court, AMG argued that irregardless of its lack of tribal status "when Tucker was prominently involved in its operations," the court lacks jurisdiction over plaintiff's claims against AMG now, because Tucker is in prison and the tribe has asserted complete control over AMG (AA vol. I, p. 8). Thus, AMG argued that irregardless of what happened in the past, it is entitled to immunity "in its current state." (AA vol. I, p. 8).

As Rosas pointed out to the trial court, in *People v. MNE*, *supra*, the California Supreme Court has clarified that tribal immunity is not jurisdictional. Accordingly AMG bears the burden of proving its arm of the tribe status at the relevant time, i.e., when the acts were committed - not at a time of AMG's choosing. In allowing AMG to have sovereign immunity issue decided at the time of the motion in the trial court, i.e., December 7, 2018, the trial court erred in adopting AMG's argument that tribal sovereign immunity is jurisdictional in nature and thus is subject to ongoing inquiry by the court based upon present facts and circumstances.

Under current California law, a claim of tribal sovereign immunity - particularly when it is asserted by an entity that is not itself a tribe, such as

AMG, "is 'not a true jurisdictional bar' that automatically divests the court of the ability to hear or decide the case." [citations omitted] Thus, 'whatever its' jurisdictional attributes,' tribal immunity "does not implicate a court's subject matter jurisdiction in any ordinary sense." *People v. MNE, Id.* at 243-244.

A. The Trial Court Erred in Not Considering Past Conduct of AMG

At the December 7, 2018 hearing, the position of the trial court was that tribal immunity would be considered only on the circumstances existing at the time of the hearing of the motion to dismiss, at which time Scott Tucker was a convicted felon resulting from his participation in the payday loan business, and was no longer controlling AMG. Following the trial court's order would as Rosas stated at oral argument (Transcript, pp. 6-8), just reopen the door to the kind of extreme abuses which existed in this case - allow people to align themselves with Indian tribes commit all sorts of acts that flaunt state law whether payday lending or otherwise, and then once regulatory authorities are aware of the issue, or lawsuits commence, jettison the activity, file a motion to dismiss and claim that it does not matter what they did before, it only matters what exists at the time of the motion.

As the trial court stated in its order (AA, vol. III, p. 758), "The central issue on this motion is whether the court evaluates sovereign immunity and the arm of the tribe immunity: 1) at the time of AMG's formation; 2) at the time of the alleged wrongful acts; 3) at the time the case was filed; or 4) at the time the court hears the motion." After acknowledging that "The parties have not identified any California law on this issue and the court has found none," the trial court found for Number 4 -- at the time the court hears the motion. AMG's argument from a policy standpoint, is wrong, and if this Court is going to decide the first known appellate decision on this point, it should not adopt the position of the trial court.

One only has to look briefly at the history of the payday lending which is the subject of this case as good reason to disregard the trial court's opinion. The trend of seeking to affiliate with tribes, at least in the payday lending industry is only the latest wrinkle in a long history of subterfuge used by payday lenders to evade regulation by cloaking themselves in other identities. For example, when states acted to limit the effective interest rates that could be charged, payday lenders sought to affiliate with out-of-state banks, allowing them under federal law to charge any interest rates allowed by the banks' "home" state. See e.g., *BankWest, Inc. v. Baker*, (11th Cir. 2005) 411 F.3d 1289, 1293, vacated as moot (11th Cir. 2006) 445 F.3d 1358.

After the FTC in 2005 prohibited payday lenders from partnering with out-of-state banks in order to skirt state usury laws, payday lenders "turned to *inter alia* the tribal affiliation model" at issue in this case. AMG does not dispute the conduct of Scott Tucker, and in fact, AMG's counsel acknowledged at oral argument that it is bound by its consent agreement with the Government (Transcript, p. 18:23-25).

In its order of December 17, 2018 (AA, vol. III, p. 758), the trial court stated in pertinent part, "The court holds as a matter of law . . . that [the] court evaluate sovereign immunity and arm of the tribe immunity at the time the court hears the motion." In support of this statement, the court improperly attempted to analogize the facts of the instant case with diplomatic immunity and CTCA (*id.* at p. 759).

As to the law of diplomatic immunity, the trial court cites cases which state that diplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied, citing *inter alia U.S. v. Khobragade* (S.D.N.Y. 2014) 15 F.Supp.3d 383, 387-388. In *Khobragade*, an Indian National was arrested in December 2013, and was released on bond, and on January 8, 2014, Khobragade was

appointed a counselor to the permanent mission of India to the United Nations, a position that cloaked her with diplomatic immunity. On January 9, 2014, a grand jury returned an indictment charging Khobragade with visa fraud and making false statements to the government. At or about the same time Khobragade's counsel appeared before the District Court and moved to dismiss the case on the grounds of diplomatic immunity. The *Khobragade* Court cited another case mentioned in the trial court's order *Abdulaziz v. Metropolitan Dade County*, (11th Cir. 1984) 741 F.2d 1328, 1322, for the proposition that "the action was properly dismissed when immunity was acquired even if the suit was validly commenced prior to the acquisition of immunity."

Equating the law of diplomatic immunity with the commercial activity at issue in this case, is like "mixing oil with water," as easily can be seen by briefly examining the origin of diplomatic immunity and its place in relations between nations today. As far back as the days of Genghis Kahn the Mongols were well known for strongly insisting on the rights of diplomats. According to Wikipedia, in the 19th Century, the Congress of Vienna asserted the rights of diplomats and they have been largely respected since then as the European model spread throughout the world (*Wikipedia*, Diplomatic Immunity, Ancient). Wikipedia points out in modern times, diplomatic immunity continues to provide a means, albeit, imperfect, to safeguard diplomatic personnel from any animosity that might arise between nations (*Wikipedia*, Diplomatic Immunity, Modern). In the United States, the Diplomatic Relations Act of 1979 (22 U.S.C. §§ 254a, *et seq.*) follows the principles introduced by the Vienna Conventions. Further, as *Wikipedia* points out, "The United States tends to be generous when granting diplomatic immunity to visiting diplomats, because a large number of U.S. diplomats work in host countries less protective of individual rights. If the United States were to

punish a visiting diplomat without sufficient grounds, U.S. representatives in other countries could receive harsher treatment." *Wikipedia*, Diplomatic Immunity, Modern).

Diplomatic immunity is respected in order to lubricate foreign relations between, in the case of the United States -- the United States and third countries, and is a bedrock of U.S. law. Further, although diplomats may engage in discussions concerning the commercial interests of their respective nations, that is not the same as engaging in commercial activity resulting in harm to U.S. residents, such as payday lending, which is at issue in this case.

In 1976, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), which established the limitations as to whether a foreign sovereign nation or its political subdivisions may be sued in U.S. courts. The exceptions to sovereign immunity is the commercial activity exception, see 28 U.S.C. § 1605(a)(2), which provides three bases on which a plaintiff can sue a foreign state:

- When the plaintiff's claim is based upon a commercial activity carried on in the United States by the foreign state;
- When the plaintiff's claim is based upon an act by the foreign state which is performed in the United States in connection with commercial activity outside the United States;
- When the plaintiff's claim is based upon an act by the foreign state which is performed outside the United States in connection with commercial activity outside the United States and which causes a direct effect in the United States.

See also *Republic of Argentina v. Weltover*, (1992) 504 U.S. 607, by unanimous decision the Supreme Court held that Argentina was not entitled to sovereign immunity in connection with bonds issued by the Argentinian government arising from Argentina's default on the bond payments, including

that Argentina's actions were commercial and that the effect need only "follow as an immediate consequence" of the defendant's activities.

The payday lending in this case constituted a commercial activity and for the purposes of FSIA is determined not when the motion is heard (as the trial court ruled in this case) but at the time of the filing of the complaint (*Dole Food Co. v. Patrickson*, (2003) 538 U.S. 468, 479; 123 S.Ct. 1655, 1663.

Under FSIA, the foreign state has "carried on" its activities in the United States if there is a "substantial contact between the commercial act and this Country." [28 U.S.C. § 1603(e); *OBB Personenverkehr AG v. Sachs*, (2015) ___ U.S. ___, 136 S.Ct. 390, 395, 397.] In determining whether the foreign sovereign's commercial activity is sufficiently substantial, courts look to the gravamen of the complaint. *OBB Id.* at 395-96. The gravamen of the Complaint is the injury suffered by Rosas and those similarly situated, from commercial activity, i.e., illegal payday lending, directed to California.

Another reason why the diplomatic immunity analogy is inapposite is explained in *Republic of Argentina v. Weltover*, *supra*, where the U.S. Supreme Court pointed out that a government's act is "commercial" if it is the type of transaction private actors could complete. But it is public in nature and thus not within the "commercial activities exception" if it is one that requires sovereign power, such as the government's regulation of the market or use of its police power. *Republic of Argentina v. Weltover*, *supra*, at 614.

The diplomatic arena, such as in diplomatic immunity by its nature arises from the exercise of sovereign power, for example, India's relationship with the United States or in the case of its counselor official, Khobragade, with the United Nations, which would by its nature require that individual's presence in New York. While in the United States, Khobragade, may have committed offenses punishable under U.S. law before she acquired sovereign immunity, but those offenses were not directly related to commercial activity,

i.e., if for example, Khobragade was an officer of an entity sponsored by the Indian government conducting commercial activity in the State of New York or in the United States. What everyone thinks, Khobragade's attachment to the United Nations on behalf of India, required the exercise of sovereign power by India.

As the *Republic of Argentina v. Weltover* Court explained, a foreign government's limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party. In contrast, a contract to buy army boots or even bullets is a commercial activity, because private companies an contract to acquire goods - issuance of bonds a "commercial activity" even if proceeds used for sovereign purposes. *Id.* at 614.

In its order, the court cites *inter alia Maysonet-Robles v. Cabrero* (1st Cir. 2003) 323 F.3d 4352, for the proposition "A state may alter the conditions of waiver and apply those changes to torpedo even pending litigation." The issue in *Maysonet,* was whether the Commonwealth of Puerto Rico had waived its immunity (under the 11th Amendment) so that it could be sued in federal court. In *Maysonet*, in order to avoid liability, the Commonwealth of Puerto Rico substituted itself as defendant in place of its Urban Renewal Housing Corporation. During the litigation, the Puerto Rico legislature passed legislation (Act 106) which dissolved the office of Urban Renewal Housing Corporation and transferred its assets to the Department of Housing of Puerto Rico, thereby giving rise to the argument that Puerto Rico was now the

defendant and was entitled to sovereign immunity under the 11th Amendment.[1]

Further, *Maysonet* is distinguishable, because it involved activities centered entirely in Puerto Rico. In contrast, the activities here -- the payday lending, occurred throughout the United States and have nothing to do with the 11th Amendment, but with commercial activity by an entity claiming sovereignty or an entity controlled by a sovereign Indian tribe directed to California and throughout the United States.

In another case cited by the trial court, *Oracle America, Inc. v. Oregon Health Insurance Exchange Corp.*, (D. Or. 2015) 145 F.Supp.3d 1018 ("*Oracle*"), *Oracle* makes clear (which cites *Maysonet*) that a state may substitute itself for one of its state agencies not otherwise entitled to immunity and then claim 11th Amendment immunity. In this case, there has been no substitution of any entity by AMG - instead they argue change of circumstances at the time the motion is heard based on claims stemming from AMG's commercial activity, which not even AMG argues was exempt on any basis by sovereign immunity - only that they have removed the individuals (Tucker and his cohorts) who were responsible for the illegal activities, and have ceased the activity.

The trial court also mistakenly analogized to the adoption of the CTCA to apply sovereign immunity in this case at the time the court heard the motion (AA, vol. III, p. 759). Unlike retroactivity when considered in relation to court rulings, see *inter alia* discussion in *Rosas* Opin., *supra*, where this Court

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[1] Unlike the decision of the New Mexico Court of the Second Judicial District in *Felts v. Paycheck Today*, (AA, vol. III, pp. 721-730). The *Felts* case is distinguishable from this case, because in *Felts*, the plaintiff had the burden of proof, and the *Felts* Court had determined that a claim of tribal immunity is a question of subject matter jurisdiction as a matter of New Mexico law.

pointed out, "As a general rule, judicial decisions are given retroactive effect, even if they represent a clear change in the law." (citation omitted) at *2. "In this case, considerations of fairness and public policy -- including the policy of deciding cases on their merits -- so clearly weigh in favor of retroactivity that we do not hesitate to remand this matter to the trial court to apply MNE in the first instance." *Rosas* Opin. at *2. If anything, the opposite is true in relation to the retroactivity of statutes. In the CTCA, the Legislation provided in Section 45 "(a) This act applies retroactively to the full extent that it constitutionally can be so applied." See discussion in *Flournoy v. State of California*, (1964) 230 Cal.App.2d 520, 530. The constitutionality of applying the CTCA retroactively has nothing to do with when sovereign immunity should be evaluated, i.e., in this case, (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) as the court did in this case, at the time the court heard the motion [December 7, 2018]. In the case of the CTCA, the court relied upon the fact that when the CTCA was adopted "the liabilities and immunities in the Act applied to all pending cases even if the wrong occurred and the case was filed before the Act was adopted." (AA, vol. III, p. 759).

The trial court did so without any analysis of why CTCA was able to be applied retroactively and "pass constitutional muster." Nor did the trial court discuss the general rule that statutes are not applied retroactively. The trial court ignored the fact that the retroactivity in the CTCA was the exception rather than the rule, and was only able to overcome the presumption against retroactivity because of language in the statute that clearly conveyed the legislative intent to overcome the presumption against retroactivity. See *Evangelatos v. Sup. Ct.*, (1988) 44 Cal.3d 1188, where the California Supreme Court stated that "It is well settled that statutory amendments operate only prospectively and not retroactively, absent express intent to the contrary." *Id.*

at 1208-1209. The trial court took the exception in the CTCA to the general rule as precedent for applying the alleged current status of AMG retroactively to events that had previously occurred and which led to the filing of this litigation. The retroactivity of the CTCA is a red herring and has nothing to do with the time at which sovereign immunity and arm of the tribe immunity is evaluated.

The seminal case in California on retroactivity is *Aetna Casualty Ins. Co. v. Industrial Accident Committee*, (1947) 30 Cal.2nd 388 ("*Aetna*"). In *Aetna*, the California Supreme Court stated, '[i]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.' (citations omitted) *Id*. at 393. Also see *Dubois v. Worker's Compensation Appeals Board*, (1993) 5 Cal.4th 382, where the court stated "[a] fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." *Id*. at 387.

The trial court's order states without any analysis, that "applying sovereign immunity as of the time the court hears the motion is consistent with how the California Legislature has created the law on the immunity of California public entities." (AA, vol. III, p. 759). No change in law has occurred in this case, the lending in question was illegal when done, and remains just as illegal today.

In *Muskopf v. Corning Hospital District*, (1961) 55 Cal.2d 211, the California Supreme Court stated, "After a revaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust." *Id.* at 213. Subsequently, in *Flournoy, supra*, 230 Cal.App.2d 523, the court was concerned with an accident which occurred in November 1955 and a complaint filed in February 1956. In *Flournoy*, the court concluded that the CTCA was constitutional, *Id.* at 524,

and that the plaintiff could amend to state a cause of action under the CTCA.

In *Hayes v. State of California*, (1964) 231 Cal.App.2d 48, a case relied upon by the trial court (AA, vol. III, p. 759) for the proposition that CTCA applied to all pending cases even if the wrong occurred and the case was filed before the act was adopted, i.e., the retroactivities. In *Hayes,* the question concerned the CTCA when applied to claims based upon casualties occurring subsequent to the California Moratorium Legislation of 1961, and in *Hayes*, the court of appeal affirmed a motion for judgment on the pleadings in favor of the state and held that claims arising after the 1961 Calif. Moratorium Legislation could only have validity to the extent the CTCA so declared. An exceptional set of circumstances set in motion by the Supreme Court's decision in *Muskopf v. Corning Hospital District*, *supra*, because of the unique circumstances during that time period is not precedent for applying sovereign immunity in this case at the time the court hears the motion, as the trial court did here, and as explained above, the "default" position concerning retroactivity as to statutes is that they are not retroactive (unlike case law) as to pending cases, unless the Legislature unequivocally so indicates as it did when it passed the CTCA. Payday lending at exorbitant interest rates was wrong when AMG was created in 2008 and is just as wrong today, and no Legislation or other law has come into effect which in any way can be deemed to affect plaintiff's claims, and neither the law of diplomatic immunity, nor the CTCA are in any way analogous authority as to when sovereign immunity in this case should be determined.

Therefore, just as in the case of FSIA, sovereign immunity should be determined when the case is filed (in this case July 1, 2009), but no later than the filing of the First Amended Complaint on July 31, 2012. The trial court erred when it disregarded all that had come before the motion and assessed AMG's tribal immunity based solely on the present facts and circumstances

existing at the time of the hearing of the motion to dismiss on December 7, 2018.

B. The Trial Court's Ruling Does Not Conform with *People v. MNE*

The trial court's ruling is a step backward from the Supreme Court's decision in *People v. MNE, supra*, and would allow rogue businesses to solicit and contract with tribal entities for declarations that the enterprises were covered by tribal immunity. In evaluating the tribal immunity at the time the court hears the motion sets forth a standard which does not allow courts to distinguish non-tribal businesses with purely nominal affiliation to tribes - including affiliations that do not go beyond paying tribes for stating their intention to share their sovereign immunity - from actual tribal businesses, and would allow just what was wrong with the court of appeal's decision in *People v.MNE*, is one that could be done by any rogue business that persuades or pays a tribe to create a corporate entity using the right words in its Articles of Incorporation and its contract with the rogue business. These prescribed words will, of course, be readily supplied by the law evading business. "Oversight" at least in name, will always exist as long as the tribe retains its stated power to terminate the agreement - then exactly what has occurred here -- once legal challenges are made to the arrangement (especially those emanating from governmental authority such as the FTC) -- allow the tribal entity created to jettison itself from those like the Tuckers conducting the rogue business and claim sovereign immunity by making a motion such as AMG has done here.

By adopting the trial court's decision, ruling on the motion at the time the motion is heard, will undermine the decision in *People v. MNE*, that only businesses operating under meaningful tribal control and oversight should benefit from sovereign immunity.

Further, as pointed out to the trial court (AA, vol. III, pp. 624-625), at

least after *People v. MNE*, arm of the tribe immunity is not jurisdictional. Because tribal immunity is not jurisdictional in nature, there is no basis for subjecting AMG's status to an ongoing inquiry. Further, the Supreme Court made clear in *People v. MNE*, the focus of the inquiry is on "the practical operation of the entity in relation to the tribe." *Id.* at 236. Therefore, the court clearly based its decision in *People v. MNE*, on not what was occurring in December 2016 when it made its decision - but on the evidence as of the time the payday lending was operating. See *People v. MNE*, *Id.* at 251 (examining whether tribe "controls overseas or significantly benefits from the underlying business operations of the online lenders.").

C. AMG Has Failed to Meet Its Burden Under *People v. MNE*

The above notwithstanding, even if this Court gets to the modified *Breakthrough* test set forth by the Supreme Court in *People v. MNE* (*Id.* at 244), AMG cannot meet its burden under the modified version of the *Breakthrough* test adopted by the Supreme Court in *People v. MNE*.

1. <u>Method of Creation</u>.

Although the trial court stated that the method of creation weighs against arm of the tribe status, the trial court was incorrect in stating that AMG was created by the Miami Tribe. AMG was created by Tucker and it even bears the name of a Mercedes model, i.e., AMG. As set forth in Rosas' opposition to AMG's motion to dismiss (AA vol. III, p. 626), organizational documents were prepared by Tucker's lawyers as a result of Tucker approaching the tribe - not vice versa. Therefore, although the trial court reached the correct conclusion when it stated the method of creation weighs against immunity, its statement that AMG was created by the Miami Tribe is incorrect.

2. <u>Purpose</u>.

Irrespective of Lankford's declaration, it cannot be disputed that AMG

primarily benefitted the Tuckers both financially and to shield their payday lending from liability, and the purpose of AMG was to benefit the Tuckers, not the Miami Tribe. See *People v. MNE*, *Id.* at 255. Thus, as in *People v. MNE*, the purpose factor "weighs against finding that the entity is an arm of the tribe." *Id.* at 247. The fact distributions were made by AMG in 2012 and 2013 (AA vol. III, p. 759) [the source of which was the illegal payday lending which is the subject of this case] years after AMG was formed does not overcome the fact that AMG's primary purpose was to benefit the Tuckers.

3. <u>Control</u>.

The trial court misapplied the control standard. The control at issue is when the illegal lending which led to the subject of this case took place. AMG now concedes as plaintiffs maintained throughout this litigation, that AMG was actually controlled by Tucker and his cronies (AA vol. I, pp. 48, 272). Under *People v. MNE*, "evidence that the tribe . . . exercises little or no control or oversight weighs against immunity." *Id.* at 247. The fact that AMG now controls AMG - a factor that the trial court mentioned weighed in favor of immunity -- ignores AMG's admission that AMG did not control AMG when the payday lending, which is the subject of this case, took place. Therefore, control weighs against immunity.

4. <u>Financial Relationship</u>.

There is no evidence that a significant percentage of AMG's revenues flowed to the tribe. Therefore, AMG cannot show that there is "a close financial relationship between [the tribe and the lending business]." *People v. MNE, Id.* at 255. In fact, AMG's argument is disingenuous on the issue of financial relationship, as they tried to have it both ways.

In this case, there has been no evidence that a significant percentage of AMG's revenue flowed to the tribe, nor is there evidence that a judgment against AMG would significantly effect the tribal treasury. Therefore, any

liability imposed upon AMG would not affect the tribe's finances. *People v. MNE*, at 248.

As the Supreme Court stated in *People v. MNE*, "Determining whether this factor [financial relationship] weighs in favor of immunity requires a consideration of degree rather than a binary decision, but because any imposition of liability on a tribal related entity could theoretically impact tribal finances, the entity (AMG) must do more than simply assert that it generates some revenue for the tribe in order to tilt this factor in favor of immunity." *Id.* at 248.

5. <u>Tribal Intent</u>.

Irrespective of what was stated in AMG's Articles of Incorporation, in light of the undisputed evidence that AMG was created to shield the Tuckers, and because this factor must look back to AMG's creation -- substance prevails over form. Therefore, the trial court erred in finding that intent weights in favor of arm of the tribe status. Therefore, none of the factors adopted by the Supreme Court in its modified *Breakthrough* test weigh in favor of immunity.

Further, Paragraphs 19 -22 of the Lankford declaration do not state that AMG took back control in November 2012 (AA vol. I, p. 46) -- those paragraphs state that AMG fired Don Brady in November 2012 and replaced him with Joe Frazier. AMG's relationship with Tucker was not terminated until April 2014 (AA vol. I, p. 47). It was not until March 2014 that AMG gave notice to Tucker-related entities. (AA vol. I, p. 47). Therefore, at the time of the appeal of the May 6, 2013 order which led to the first appeal (A139147), Tucker's relationship with AMG was intact. In fact, according to the financial statement attached to Lankford's declaration as Exhibit 15 (AA vol. I, pp. 244-246), the software licensing fee with BA Services (Tucker) was still in effect at the end of 2014. Section 5 states that the company

recognized an expense of $102.9M for software licensing fees due to BA Services, LLC, as of December 31, 2012, and Aircraft rental fees of $451,000 owned by a member of management. Financial statements also state that during August 2013 (under subsequent events) AMG entered into a series of agreements with entities owned by members of the company's management, to wit: Impact BP, LLC and BA Services, LLC. In fact, the statement for December 31, 2013 shows payments received from customers of $215,802,074.00 for the year 2013, and recognized a $39,048,102.00 software licensing fee to BA Services, LLC as of December 31, 2013.

In Exhibit 15 of the Lankford declaration (AA vol. I, pp. 244-246), the agreement between AMG and BA Services, LLC whose authorized member was Scott Tucker, was not terminated until March 28, 2014, when AMG wrote to Tucker that they are ceasing business operations and would like to discuss transition services as described in the licensing agreement. Further, in its Non-Prosecution Agreement with the U.S. Government (AA vol. I, pp. 48, 266-272), AMG admitted that Tucker and entities controlled by Tucker provided the capital to make the loans, and all steps necessary for the approval of loans were performed outside the tribe in Overland Park, Kansas, under the direction of Tucker and individuals reporting to Tucker (AA vol. I, p. 272).

IV. IN MERGING WITH CLK, AMG WAIVED ITS RIGHT TO ASSERT AN IMMUNITY DEFENSE IN THIS CASE

Although it was briefed (AA vol. III, p. 629), in its order granting the motion to dismiss, the trial court did not address the argument that AMG waived any immunity it may have had when it acquired/merged with CLK, and assumed the liabilities of CLK.

AMG waived its sovereign immunity when it merged with CLK and agreed to assume "any and all liabilities" of CLK, the company Tucker used to extend loans to California consumers since 2001. (A139147, AA, vol. I,

p. 292). As the correspondence between Tucker's lawyers and Don Brady proves, the purchase was intended to protect Tucker's business from subpoenas (AA, vol. II, pp. 410-412), (by acquiring the membership interests [in CLK] the new co would also be assuming the liabilities of CLK . . . The assumption of liabilities of CLK is a serious matter [.]").

In addition, the merger documents Tucker's lawyer persuaded the Kansas State Court to back-date confirmed that AMG agreed to be served with process in the State of Kansas in any action, and that the company appointed the Kansas Secretary of State as its agent to accept service of process (A139147, AA, vol. III, pp. 755-837, Ex. 5).

By assuming CLK's liabilities, AMG "clearly contemplated suits" and thereby waived any immunity it otherwise would have had. *Allen, supra*, at 1047, where the *Allen* Court cites *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* (2001) 532 U.S. 411, 423 ("*C & L Enterprises*")**.** In *C & L Enterprises*, the U.S. Supreme Court held that the tribe waived its immunity by expressly agreeing to arbitration of disputes and to "enforcement of arbitral awards in any courts having jurisdiction." *Id.* at 414.

Here, at the time of the back-dated merger with CLK, AMG agreed service could be effectuated through the Kansas Secretary of State. To rule otherwise, would allow entities that are in no way related to an Indian Tribe or even an arm of a tribe, such as CLK, to escape liability for its actions by engineering a phoney merger with an alleged arm of the tribe, such as AMG, the surviving entity in the merger.

AMG was formed in 2008. Subsequently, pursuant to a purchase agreement, AMG purchased CLK, including all of Scott Tucker's membership interest in CLK. As part of the purchase agreement with CLK, AMG agreed to assume any and all liabilities of CLK, whether arising or accruing prior to

the date of the purchase agreement. In or about June 2008, CLK and AMG authorized, adopted, certified and executed an Agreement of Merger, wherein CLK and AMG would merge and AMG would be the surviving entity.

Pursuant to Kansas Statutes Annotated ("K.S.A."), Sections 17-7681(c), the merger of CLK into AMG was effective upon the filing of a Certificate of Merger with the Kansas Secretary of State. Pursuant to K.S.A Section 17-7681(b), AMG as a surviving entity was the party responsible for and required to file a Certificate of Merger with the Kansas Secretary of State. K.S.A. Section 17-7681(f) provides that "All debts, liabilities and duties of each of the limited liability companies that have merged or consolidated shall thenceforth attach to the surviving or resulting limited liability company and may be enforced against it to the same extent as if the debts and liabilities and duties had been incurred or contracted by it."

As the court pointed out in *Hunter v. Redhawk Network Security, LLC*, 2018 WL 4171612 (D. Oregon), "Neither the [US] Supreme Court nor the Ninth Circuit has decided whether an existing company acquired by a tribe enjoys tribal sovereign immunity." at *2. Also, to the best of Rosas' knowledge, neither has the appellate court in California decided this precise legal issue, i.e., when an existing company (CLK) is acquired by an alleged tribal entity. However, as the *Hunter* Court pointed out in *McNally CPA's & Consultants S.C. v. DJ Hosts, Inc*., 692 N.W.2d 247, 250 (Wis. 2004) provides a persuasive argument that such organization does not. The *McNally* Court stated, 'When the sole facts are that an Indian tribe purchases all of the shares of an existing for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation.' *Hunter Id.* at *2. As the *Hunter* Court pointed out, citing *McNally*, there is good reason for this proposition, because 'while entities dealing with an organization initially chartered by a tribe can negotiate waivers of immunity

before conducting business, there is no such opportunity for preexisting relationships between an entity and an organization subsequently acquired by a tribe.' *Hunter Id.* at *2 citing *McNally Id*. at 277.

As in *Hunter*, *supra*, CLK was formed as a separate entity under state law (Kansas) before it merged with an alleged tribal entity (AMG). Therefore, irrespective of the court's ruling as to when tribal immunity is determined, i.e., when the acts occurred or when the motion is filed, in this case, at least as to Ms. Rosas and members of the putative class similarly situated, whose claims arose prior to the alleged merger, the timing of the motion as to when sovereign immunity is determined is irrelevant, as AMG assumed the liabilities of CLK at the time it merged with CLK. Also see *Solomon v. American Web Loan*, 2019 WL 1324490 (E.D. Virginia), citing *Hunter* with approval at *7.

An entity that may otherwise be entitled to assert arm-of-the-tribe immunity waives that immunity when it explicitly indicates a willingness to expose itself to suit. (See *Allen, supra*, 464 F.3d at p. 1047 [stating that a casino did not waive its arm-of-the-tribe immunity because it merely implied, rather than unequivocally expressed, a willingness to submit to lawsuits]; see also *C & L Enterprises, supra* at 423 [holding that a tribe waived its immunity where it entered into an arbitration clause consenting to arbitration and to the enforcement of the arbitral award in state court].) In defining what constitutes an explicit waiver of immunity, *Allen, supra*, 464 F.3d at p. 1047, distinguished between references in an employment application and an employee orientation booklet to "applicable federal law," which do not constitute waiver, and more direct references to "court enforcement" and "suing or being sued," which do. The latter examples, *Allen* explained, "clearly contemplat[e] suits" against the entity and thus waive arm-of-the-tribe immunity. (*Id*.; compare *Native American Distributing v. Seneca-Cayuga Tobacco Co.* (10th Cir. 2008) 546 F.3d 1288, 1293 [recognizing that a "sue or

be sued" clause in a corporate charter may function as a waiver of tribal immunity]; with *Nanomantube v. Kickapoo Tribe in Kansas* (10th Cir. 2011) 631 F.3d 1150, 1152 [noting that a "single sentence contained in [an] employee handbook," which provided that the tribe would comply with federal law, would not function as a waiver of immunity].) However, for waiver of immunity to be explicit, no "magic words" are required. (*Yavapai-Apache, supra*, 201 Cal.App.4th at p. 213.)

Here, statements by AMG plainly resemble those that the Ninth Circuit found to "clearly contemplate[e] suits." Notably, the purchase agreement that AMG's President executed to acquire CLK states that AMG "agrees to assume any and all liabilities of [CLK], whether arising or accruing prior to, on or after the effective date" of the merger. (A139147, AA vol. I, p. 292.) Moreover, the merger documents Rosas obtained from the Kansas Secretary of State reveal that AMG agreed to be served with process in the State of Kansas in any action, and that the company appointed the Kansas Secretary of State as its agent to accept service of process. (A139147, AA vol. III, p. 837.)[2] Therefore, as a matter of law, by merging with CLK, AMG assumed CLK's liabilities and cannot claim sovereign immunity as to those claims.

V. THE TRIAL COURT SHOULD HAVE EXERCISED ITS INHERENT AUTHORITY TO STRIKE AMG'S NEW MOTION AND ENTER JUDGMENT AGAINST AMG ON ITS TRIBAL IMMUNITY DEFENSE

Although AMG now admits that it was not an arm of the tribe when it

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[2] Moreover, Kansas state law requires that "all debts, liabilities, and duties of each of the limited liability companies that have merged or consolidated shall thenceforth attach to the surviving or resulting limited liability company and may be enforced against it to the same extent as if the debts, liabilities and duties had been incurred or contracted by it. (K.S.A. § 17-7681(f).) Thus, AMG is responsible for the pre-merger liabilities of CLK under Kansas law.

claimed to be, it argues that as of today, the tribe does own and control AMG, and therefore its conduct in the past must be excused, because the standard for assessing tribal immunity is based on facts as they currently exist. In respondents brief in A139147, dated February 21, 2014, AMG asserted, despite knowing it was not true, that it was a tribally chartered instrumentality of the Miami Tribe formed to further the tribe's economic interests. (A139147, Respondents' Brief ("RB"), p. 3). AMG made the following points in its brief:

a. the Miami Tribe seeks to develop new tribal economic opportunities to achieve economic self sufficiency;

b. the tribe formed AMG under tribal law as part of its integrated lending business and AMG's revenues directly benefit the tribe.

In reality, AMG and its attorneys, knew at the time respondents' brief was filed in A139147 (February 25, 2014), that their arguments had no basis in fact. After briefing was complete in A139147, several things happened. First, on February 9, 2016, Scott Tucker was criminally indicted for crimes related to his role in the payday lending enterprise of which AMG was a part. (AA vol. II, pp. 307-341). Second, on that same date, the U.S. Government entered into a Non-prosecution Agreement with AMG. (AA vol. I, pp. 266-272). Not only did AMG forfeit money four years after Tucker ceased to allegedly be a signator, AMG admitted in a statement signed by Douglas Lankford, that AMG had been lying all along about its relationship with Tucker and the Miami Tribe-and that it had submitted false tribal declarations to state courts, including the Alameda County Superior Court. *Id.*

Central to AMG;s brief to this Court in A139147, were the roles of Tucker and Conly Schulte in AMG's creation. Conly Schulte is a partner in the same firm Fredericks, Peebles & Morgan, LLP, who filed the briefs in A139147 on behalf of AMG. Tucker and his lawyers devised a scheme to

thwart state actions by claiming that the lending business was protected by sovereign immunity. AMG argued to this Court in A139147 that it was a tribally created instrumentality of the Miami Tribe formed to further the tribe's economic interests (A139147, RB p. 4).

At Tucker's trial, Conly Schulte of the same firm that was asserting the tribal immunity argument on AMG's behalf, testified that he represented Tucker until the tribe created AMG (AA vol. II, p. 448). Conly Schulte further testified that it was his firm who drafted the documents needed to create AMG as well as the declarations AMG submitted in litigation. Conly Schulte also testified that he recommended changes to the agreements between Tucker and Tribe to make the appearance of tribal control over the lending business "more defensible in litigation." (AA vol. II, p. 450.) Also at Tucker's trial, Lankford testified that Schulte and Muir drafted the AMG board resolution approving the purchase of CLK.

According to findings by the court at Tucker's criminal trial, not only Tucker and Muir, but outside counsel, Conly Schulte took a key step to deceive this Court into accepting AMG's tribal immunity defense by organizing a sham lawsuit for the purpose of invoking tribal immunity as to defendant's allegedly usurious practices (see *United States v. Tucker*, 254 F.Supp.3d 620, 622-24 (S.D.N.Y. 2017) which required that Tucker's company, CLK be merged into the newly created tribal company, AMG. After which, Conly Schulte congratulated Muir on his brilliant legal work (AA vol. II, pp. 416-418).

After a five-week trial, Tucker and his lawyer, Timothy Muir, were found guilty on all 14 counts against them, including racketeering and money laundering offenses. Tucker was sentenced to 16 years in federal prison. (AA vol. III, 486, 493-497).

"A fraud on the court" occurs where a party intentionally engages in a

scheme intended to "interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Aoude v. Mobile Oil Corp.*, (1989) 892 F.2d 1115 at 1118. A court "possesses the inherent power to deny the court's processes to one who defiles the judicial system by committing a fraud on the court." *Id*. As the California court of appeal has explained, "[c]ourts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system." *Stephen Slesinger, Inc. v. Walt Disney Co.*, (2007) 155 Cal.App.4th 736 at 762 (quoting *Aoude*, *supra*, at 1119). Accordingly, where, as here, a party fabricates evidence, relies on false factual statements, or offers perjured testimony, California courts have consistently held that the appropriate remedy is dismissal of the claim or defense. See *Slesinger, supra*, at 761 n. 18 (collecting cases); *Padilla v. Walgreen Co.* (Cal. Ct. App. Nov. 25, 2013) No. 244834, 2013 WL 6156528, at *6 (dismissal warranted where party has engaged in "deliberate and egregious conduct" such as falsifying evidence); *Davis v. City of Auburn* (Cal. Super. Ct. Oct. 3, 2002) No. SCV9736, 2002 WL 32912203 (directing a verdict on liability against Honda as sanction for its expert's deliberate spoliation of evidence).[3]

The First Circuit's decision in *Aoude* is particularly on point. The

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[3] Courts in other jurisdictions agree. See, e.g., *Aoude*, 892 F.2d at 1118-22 (plaintiff's falsification of evidence warranted dismissal of complaint even after plaintiff filed new claim based on authentic evidence); *Martin v. DaimlerChrysler Corp*. (8th Cir. 2001) 251 F.3d 691, 694-95 (perjury in discovery responses warranted dismissal); *Cox v. Burke* (Fla. Ct. App. 1998) 706 So.2d 43, 46-47 (perjurious discovery responses); *Rockdale Mgmt. Co. v. Shawmut Bank* (Mass. 1994) 638 N.E.2d 29, 31-32 (forged evidence); *Young v. Johnny Ribeiro Bldg., Inc.* (Nev. 1990) 787 P.2d 777, 778-782 (willful fabrication of evidence in discovery). *Schultz v. Sykes* (Wis. Ct. App. 2001) 638 N.W.2d 604, 610 (attempt to suborn perjury).

plaintiff tried to persuade Mobil to honor an agreement he claimed to have made to purchase a Mobil gas station franchise. But when Mobil refused to honor the purported sale, the plaintiff sued the oil company, attaching the purported agreement to his complaint. 892 F.2d at 1116-17. A few months later, discovery revealed that the agreement had been falsified: "[T]o gain bargaining leverage with Mobil," the plaintiff had "concocted, backdated, and persuaded [the seller] to sign[] a bogus purchase agreement" that "reflected a price nearly twice what had actually been paid[.]" *Id*. at 1116. Even after he was caught, the plaintiff did not immediately come clean. *Id*. at 1118. Finally, the plaintiff sought to amend his complaint to substitute the authentic agreement for the bogus one-and also filed a new action with a new complaint that adopted all the same factual allegations and sought the same relief, but did not rely on the false evidence. *Id*. at 1117. Therefore, based upon AMG's conduct, AMG's new motion to dismiss should have been stricken and judgment entered against AMG on its bogus tribal immunity defense.

The trial court never should have heard AMG's new motion, and new defense, because a fraud on the court had been committed.

VI. THE TRIAL COURT EXCEEDED THE SCOPE OF THIS COURT'S REMITTITUR, BECAUSE AMG ALREADY HAD THE OPPORTUNITY TO FULLY LITIGATE ITS CLAIM, THEREFORE, THE TRIAL COURT'S ORDER IS VOID

In the first motion to dismiss, Rosas appealed the trial court's May 6, 2013 Order dismissing AMG (A139147, AA vol. III, 940-971). In December 2016, the California Supreme Court decided *People v. MNE, supra*. Thereafter, this Court issued the *Rosas* Opin., and stated in pertinent part:

"We conclude the appropriate course of action is to remand to the trial court so that - rather than this Court, may apply the new standard (annunciated by the California Supreme Court in *People v. MNE*) to the facts at hand in the first instance." (2017 WL 4296668 at * 2)

Jurisdiction was restored to the trial court for the limited purpose of applying the new standard annunciated by the California Supreme Court in *People v. MNE* (2016) 2 Cal.5th 222 "…to the facts at hand in the first instance…" The trial court did not have the power, authority or jurisdiction to entertain new facts or allow AMG to introduce new facts into the record. The new standard annunciated in *People v. MNE*, *supra* was to be applied to the facts before the trial court prior to the final appeal in A139147, the same facts that were before this Court in case A139147.

The trial court did not have the power or authority to do anything other than what it was directed to do by this Court in its opinion in case A139147. A trial court judge on remand with directions cannot permit amended pleadings or retry the case, cannot add conditions to the judgment, it is to do as instructed. See *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655. ["Action which does not confirm to those directions is void."] Examples of the applications of this rule in regard to acting in compliance with this Court's directions are as follows: *Coffee-Rich v. Fielder* (1975) 48 Cal.App.3d 990, 998 [directions to modify findings of fact; new findings making material changes were unauthorized]; *Bell v. Farmers Insurance Exchange* (2006) 135 Cal.App.4th 1138, 1143 [on remand the trial court had no jurisdiction to change pre-judgment interest rate]; *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530 [where remittitur directed trial court to complete Statement of Decision, Judge exceeded jurisdiction by granting preemptory challenge].

Where a reversal with direction is issued, the trial court is "limited to following the directions precisely on remand." *Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 147.

A party is deemed to have had a full opportunity to litigate when it is placed on notice of the importance of the evidence by the opposing party or

otherwise by the Court. See *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050-1056. AMG had the opportunity to present evidence and the freedom to choose not to produce some evidence at the time of its first motion to dismiss before the trial court; however, the question for this Court is not whether AMG, in light of *People v. MNE, supra* would have presented additional evidence, the issue before this Court is whether AMG had an opportunity to present such evidence the first time. In this case, this Court indicated that the *People v. MNE, supra* standards should be applied to the record as it existed. This Court did not give any direction that additional evidence be considered by the trial court. The trial court was directed to apply the standards annunciated by the Supreme Court in *People v. MNE, supra* "...to the facts at hand in the first instance" (2017 WL 4296668 at *2).

At the hearing on the first motion to dismiss, AMG had the opportunity to present all relevant evidence to the trial court (see discussion in *People v. MNE, supra*, at 251-256) such as: (1) The extent to which the tribe was involved in AMG's lending; (2) the distribution of gross revenues from AMG's lending; (3) the amount of profits flowing from AMG's lending to the tribe; and (4) the tribe's use of its profits received from AMG. AMG may have decided not to offer some evidence, such as the entirety of its third party management contracts, but AMG certainly had the opportunity to do so. At most, the trial court should have limited AMG to evidence that supplemented the record that was before this Court in A139147. This Court's decision in A139147 and subsequent remittitur prohibits any request that the trial court allow the presentation of an entirely new record based on "present circumstances".

The request by AMG to the trial court to consider a new motion based on present circumstances, a request to replace the record that was in the front of this Court in A139147, was beyond the scope of this Court's opinion in

A139147 and subsequent remittitur. *Hampton v. Superior Court, supra* at 655-656 (any order varying from direction by a reviewing court would be rendered void).

VII. CONCLUSION

Based on the above, the order of the trial court granting AMG's motion to dismiss should be reversed, and the case should be remanded to the trial court with instructions to enter an order denying AMG's motion to dismiss.

Respectfully submitted,

DATED: July 3, 2019

/s/ Harold M. Jaffe
HAROLD M. JAFFE,
HAROLD M. JAFFE and BRIAN W. NEWCOMB, Attorneys for Plaintiff and Appellant KATHRINE ROSAS

CERTIFICATE OF WORD COUNT
Cal. Rules of Court, rule 8.204(c)(1)

The text of this brief consists of 13,596 words as counted by the Word Perfect word-processing program used to generate this document.

DATED: July 3, 2019

/s/ Harold M. Jaffe
HAROLD M. JAFFE,
HAROLD M. JAFFE and BRIAN W. NEWCOMB, Attorneys for Plaintiff and Appellant KATHRINE ROSAS

CERTIFICATE OF SERVICE

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action. My business address is 11700 Dublin Blvd., Ste. 250, Dublin, CA 94568.

On the date stated below, I served the within document(s):

APPELLANTS' OPENING BRIEF AND APPELLANTS' APPENDIX (VOLUMES I TO V)

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The Hon. Winifred Y. Smith
1221 Oak Street, Dept. 21
Oakland, CA 94612
(AOB Only)

District Attorney's Office of Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612
(**AOB Only)**

XX by electronic delivery through the website of the Appellate Coordinator Office of Attorney General, Consumer Law Section, set forth below.

Appellate Coordinator Office of the
Attorney General Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230 (**AOB Only**)
(https://oag.ca.gov/services-info)

XX by filing a copy of the aforementioned document(s) with any and all attachments, electronically True Filing, via ECF, which will serve all counsel of record and the Supreme Court of California.

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350 McAllister Street
San Francisco, CA 94102
(Pursuant to Misc. Order 13-1, Amended
03/29/13)

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I declare under penalty of perjury under the laws of the United States, that the foregoing is true and correct, and that this Declaration was executed on July 3, 2019, at Dublin, California.

/s/ Harold M. Jaffe
HAROLD M. JAFFE

Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically FILED on 7/3/2019 by X. Ramos, Deputy Clerk

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**
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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.

7/3/2019

Date

/s/Gail Smith

Signature

Jaffe, Harold (57397)

Last Name, First Name (PNum)

Law Offices of Harold M. Jaffe

Law Firm