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

APPELLANT'S REPLY BRIEF

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> by virtue of Plaintiff's need to obtain discovery from the Tribal Entities, which are shielded from any such discovery efforts. Thus in this and other cases, non-tribal parties now have a roadmap by which they may concoct schemes to defraud and exploit California residents through the use (and abuse) of tribal entities as the vehicle for perpetrating their schemes and thereby avoid exposure to liability by maintaining the evidence of their misconduct in the records of the immune tribal entities for this "service."
>
> A139147, AA vol. III, pp. 966-967

REPLY TO STATEMENT OF FACTS/PROCEDURAL HISTORY

I. AMG's Formation.

In the RB, AMG attempts to gloss over the undisputed fact that AMG was formed by Tucker, not by the Tribe by arguing that Tucker's offer through his business entities appeared to be a promising economic opportunity to help the tribe. (RB, p. 11, *et seq*.). What is ignored by AMG is what Tucker offered was to use AMG for the purposes of carrying on his illegal payday lending and merge CLK Management, LLC ("CLK") into AMG with AMG being the surviving entity so AMG could assert tribal sovereign immunity as to any claims made by the class members in this case or state regulatory authorities. For AMG to claim that the Miami Tribe had anything to do with the creation of AMG is pure fantasy.[1] As will be discussed *infra*, AMG cannot credibly argue that at the time of the creation of AMG in 2008/2010 that it had sovereign immunity. Nor can AMG deny that as a result of the merger with CLK, with AMG as the surviving entity, that AMG assumed CLK's obligations not only to appellant, but to all others similarly situated. There is no evidence to support the inference that AMG did not know what Tucker was doing, and in fact, AMG through its counsel, Conly Schulte and John Nyhan of Fredericks, Peebles & Morgan, LLP, continued to represent AMG in A139147 until June 8, 2015, where AMG continued to

[1] In fact, Tucker, a race car afficionado, even chose the name for AMG Services, Inc. AMG is a Mercedes model.

assert the same bogus arguments in this Court to support the claim of sovereign immunity that it had asserted in the trial court at the May 3, 2013 hearing, only to repudiate them eight months later in the Non-Prosecution Agreement with the U.S. government, dated February 9, 2016 (AA vol. I, pp. 267-272).

II. The Miami Tribe's Alleged Control Over AMG.

As AMG admitted in the Non-Prosecution Agreement with the U.S. Government (AA vol. I, p. 272, ¶¶ 2-4), Tucker and entities controlled by Tucker provided the capital to make loans, the tribe and its entities were not responsible for any losses, the tribe, nor any entity it controlled established or paid to acquire any part of Tucker's payday lending business, Tucker ran the business from Overland Park, Kansas, and Tucker -- not the tribe, managed operations and created the loan approval criteria, with all essential steps necessary for the approval of loans being performed in Overland Park under the direction of Tucker and individuals reporting to Tucker.

Tucker controlled AMG, was signator on bank accounts of AMG, and it was only after the government through the FTC initiated an enforcement action against AMG on April 2, 2012 (*FTC v. AMG Services, Inc., et al.*, United States District Court of Nevada, Case No. 2:12-cv-536) ("*FTC v. AMG*"), did AMG do anything to attempt to distance itself from Tucker and individuals and entities affiliated with Tucker, a fact which AMG concedes (RB, p. 13). AMG now tries to make a virtue out of that necessity by saying somehow by terminating its relationship with Tucker, AMG has now been absolved of the illegal conduct in AMG's day to day operations when AMG was controlled by Tucker. AMG does not and cannot dispute, that all revenues it obtained were as a result of AMG's illegal conduct.

In fact, in the Non-Prosecution Agreement, AMG stipulated that:

> "The Office and the Entities agree that the Forfeiture Amount

represents proceeds of the payday lending business described above. The Office further contends that the proceeds represented by the Forfeiture Amount were derived from unlawful conduct relating to the operation of that payday lending business and will file a Civil Forfeiture Complaint against the Forfeiture Amount. The Entities do not contest that the Forfeiture Amount is subject to civil forfeiture to the United States."

(AA vol. I, p. 268)

ARGUMENT

I. Sovereign Immunity is Not Jurisdictional and is Therefore Not Subject to Ongoing Inquiry by the Court Based on Present Facts and Circumstances.

Affirming the trial court's order (AA vol. III, pp. 757-763) is like "raising a red flag to a bull" and would do much to encourage successors to Tucker to continue to rent Indian tribes to shield their illegal activities, and when law enforcement or regulators "raise their ugly heads" to jettison themselves from those supervising the illegal conduct and claim sovereign immunity - in many cases years later, immunizing themselves from attempts at recompense by those injured by the illegal and wrongful conduct, and actions by state regulators.

Of the four different times mentioned by Judge Smith (AA vol. III, p. 758) for evaluating AMG's immunity claim, even AMG implicitly if not explicitly admits that the only one that can successfully work for them is the fourth - at the time the court hears the motion, otherwise the motion would be denied, because at the time of AMG's formation, at the time of the wrongful acts, and at the time both the original complaint was filed (July 1, 2009) and the first amended complaint was filed (July 31, 2012), AMG was controlled by Tucker and his cohorts, and was engaged in the illegal conduct which led to the Non-Prosecution Agreement above (AA vol. I, 267-272).

From May 4, 2004 through July 6, 2004, CLK, a Tucker controlled entity, applied for and registered four trademarks (Request for Judicial Notice

filed December 4, 2019 ["RJN"], p. 12 and pp. 32-66), including the mark USFastCash. (RJN, p. 12 and pp. 50-57). At least two of appellant's loans were with the tradename USFastCash in 2005 (RJN, p. 14 and pp. 94-97). CLK undisputably was using the tradename USFastCash to conduct its illegal payday lending activities to appellant and others similarly situated. Then CLK merged into AMG, with AMG being the surviving entity and assuming all the liabilities of CLK, including those to appellants and those similarly situated. At least as to the named plaintiff and those similarly situated, the conduct by AMG to "cleanse themselves" from Tucker and his cohorts allegedly starting at the end of 2012, does not affect AMG's liability to plaintiff and those similarly situated whose liabilities were assumed by AMG in 2008, upon the merger with CLK.

On December 7, 2018, when the motion to dismiss was heard by the trial court, it is undisputed that Tucker was in jail, and the illegal payday lending had ceased as a result of government enforcement actions. Although the Foreign Sovereign Immunities Act ("FSIA") may not pertain to claims of sovereignty by Indian tribes and their alleged arms, it is analogous for the purposes of this case in determining when the claim of immunity is evaluated. Like in the FSIA, there is no dispute that the conduct at issue was a commercial activity, in this case, an illegal commercial activity.

As pointed out in the AOB, FSIA creates an exception for immunity for commercial acts. 28 U.S.C. § 1605(a)(2). Other commonly invoked exceptions under the FSIA are waiver and commercial activity. In this case it is undisputed that AMG merged with CLK. As a result of AMG's merger with CLK, AMG is responsible for the pre-merger liabilities of CLK. See K.S.A. § 17-7681(f); see also 15 Fletcher Cyclopedia of the Law of Corporations, § 7121.

In its sovereign immunity argument, AMG omits the fact that in *People*

ex rel. Owen v. Miami Nation Enterprises, (2016) 2 Cal.5th 222 ("*Owen"*), the Supreme Court discussed whether or not the tribal immunity was a matter of subject matter or personal jurisdiction. *Id.* at 243-244. After discussing both sides of the issue, subject matter jurisdiction or personal jurisdiction the Supreme Court did not come down on either side but said, "Regardless of how we characterize tribal immunity, it is undisputed that tribal immunity, like state sovereign immunity, can be affirmatively waived. In addition, trial courts do not have a *sua sponte* duty to raise the issue of tribal immunity. These features indicate that tribal immunity, like Eleventh Amendment immunity, 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.'" (citations omitted). *Owen, Id.* at 243-244.

II. The Tribal Immunity Claim in This Case is Not Analogous to Diplomatic Immunity.

At the bottom of Page 23 of the RB, AMG attempts to analogize itself to reconstituted entities where it states, "Courts have found sovereign immunity where an entity amenable to suit is dissolved during the pendency of the case and replaced by an entity that asserts immunity." In this case there is no dispute that the structure of AMG has not changed since its formation in 2008/2010. What AMG claims has changed is who controls AMG, i.e., it used to be Tucker and his cohorts, and it is now the Miami Tribe.

For the reasons set forth in the AOB, the trial court and AMG's reliance on *U.S. v. Khobragade* (S.D.N.Y. 2014) 15 F.Supp.3d 383, 387-388, is misplaced. Also, AMG ignores that diplomatic and consular immunities are based on treaty law as applied to individual representatives of foreign governments (e.g., embassadors, embassy officials, consuls) who have been

duly accredited to the Department of State. See *Eggomes v. ANGOP Angola Press Agency*, 2012 WL 3637453 at *8-10 (E.D.N.Y) (diplomatic immunity); *Politis v. Gavriil*, 2008 WL 4966914 at *5-6 (S.D. Tex.) (consular immunity).

AMG's reliance on *Maysonet-Robles v. Cabrero* (1st Cir. 2003) 323 F.3d 43 ("*Maysonet*"), and *Amerind Risk Management Corp. v. Malaterre*, (8th Cir. 2011) 633 F.3d 680, 682-683 ("*Amerind*") (RB, pp. 23-24) are misplaced.

In *Maysonet*, the Puerto Rico Department of Housing was substituted as a defendant for Antonio J. Cabrero, as Trustee for Urban Renewal and Housing Corporation ("URHC"), Accounts Liquidation Office of Puerto Rico, an entity created to liquidate the proceeds of extinct URHC. Subsequently, the Puerto Rico legislature passed Act 106 which dissolved the office and transferred the assets of URHC to the Department of Housing of the Commonwealth of Puerto Rico ("Department"). *Maysonet Id.* at 46. The office then said the Department was now the real party in interest, the Department was immune from suit under the Eleventh Amendment, and that the true successor was the Commonwealth of Puerto Rico itself who asserted Eleventh Amendment immunity.

In *Maysonet*, the court was concerned with the particular issue of suit against a state (commonwealth in this case) in federal court and the legal issue as to whether the Eleventh Amendment barred such a suit against the Commonwealth of Puerto Rico, and stated that unlike a private individual or corporation, a state retains its sovereign immunity as a 'personal privilege' whether it is the original defendant or is added as a party later, it cannot be sued involuntarily. *Maysonet Id.* at 49. *Maysonet* has nothing to do with the facts of this case, nor is it authority for the proposition that, irrespective of any bad and illegal acts that AMG had committed and which AMG acknowledged it had committed at the hearing of the motion to dismiss on December 7, 2018,

only AMG's conduct at the time of the hearing (December 7, 2018) should be considered in evaluating AMG's claim of immunity.

In *Amerind*, the issue was whether Amerind was immune to plaintiff's suit in Tribal Court, and the 8th Circuit stated:

> "We must first determine whether Amerind is entitled to sovereign immunity. While Amerind is not itself a tribe, '[i]t is . . . undisputed that a tribe's sovereign immunity may extend to tribal agencies.' (Citation omitted) . . . Several courts have recently recognized that § 477 corporations are entitled to tribal sovereign immunity."

In *Amerind*, the United States Government issued a corporate charter incorporating Amerind under 25 U.S.C. § 477, pursuant to a petition of a tribe. No such act by the federal government has occurred in this case. Instead in the case at bench, we have a Certificate of Merger of CLK and AMG pursuant to the Kansas Revised Limited Liability Act which was filed in the Office of the Clerk of the District Court of Wyandotte County Kansas, on July 29, 2010, which provides in pertinent part, "To the extent authorized by law, AMG may be served with process in the State of Kansas in any action, suit, or proceeding for the enforcement of any obligation of CLK and hereby irrevocably appoints the Kansas Secretary of State as its agent to accept service of process in any such action . . ." (A139147, AA vol. III, p. 837), AOB, p. 44 and fn. 2 therein, citing K.S.A. § 17-7681(f).

Nowhere in the RB does AMG address these specific statutes under Kansas Law, or address the specific language of the AMG/CLK Certificate of Merger filed in the District Court of Wyandotte County, Kansas, but instead cites inapposite authority in an attempt to avoid the fact that with the merger of CLK and AMG, AMG succeeded to any existing liabilities of CLK, including those to the appellant/plaintiff and those similarly situated. Further, unlike for example, *Amerind*, even AMG concedes that at the time of the merger with CLK, it did not itself enjoy sovereign immunity. Therefore, in

merging with CLK, AMG knowingly agreed to be governed by Kansas law as to the debts and liabilities of CLK that it was assuming. As stated above, as to those preexisting liabilities of CLK, AMG assumed them as a result of the merger, and therefore, as to those liabilities the argument of when the claim of immunity is evaluated is moot.

Unlike in *Amerind*, where the court was concerned with a general assumption of "obligations and liabilities," here, we are concerned with a specific agreement filed in court to be subject to the laws of the State of Kansas regarding successor liability. Also, *Amerind* is distinguishable, because as the 8th Circuit pointed out, "Amerind's federal charter does not state that Amerind, in assuming ARMC's obligations and liabilities consents to submit to a particular forum or consents to be bound by its judgment." (citations omitted) *Amerind Id.* at 687.

Similarly, AMG's citation to *ASEDAC v. Panama Canal Com'n*, (11th Cir. 2006) 453 F.3d 1309, 1315 (RB, p. 25), for the proposition that sovereign immunity required dismissal where a defendant who was previously amenable to suit was dissolved mid-litigation and replaced by a state entity that had not waived its immunity, is misplaced. AMG is conflating change in the identity of the defendant with the alleged change in circumstances. Therefore, the statement by AMG (RB, p. 25) that the Miami Tribe's assertion of control over AMG is . . analogous to the substitution of a state entity like in *Oracle Am., Inc. v. Oregon Health Ins. Exchange Corp.*, 145 F.Supp.3d 1018 (D. Or. 2015) ("*Oracle*") is wrong. However, we are not talking about the Miami Tribe itself, but with an entity, AMG, which was created for the sole purpose to shield illegal payday lending from claims by appellant, those similarly situated, and state regulatory authorities.

Oracle discussed the U.S. Supreme Court case of *Port Auth. Trans-Hudson Corp v. Feeney*, 495 U.S. 299 (1990) ("*Feeney*"). In *Oracle*,

at *Id.* 1028-1029, the court discussed *Feeney* as a framework for analysis of waiver of the Eleventh Amendment and stated that in creating the Port Authority, 'New York and New Jersey ... expressly consented to suit in expansive terms' in the 1951 Acts. *Feeney Id.* at 306. The *Oracle* Court continued, "The 1951 Acts provided in pertinent part that 'the States' consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise ... against the Port of New York Authority.'" *Oracle Id.* at 1028.

Similarly, in the case at bench, the Certificate of Merger between CLK and AMG (A139147, AA vol. III, p. 837) provided, as set forth above, that "AMG may be served with process in the State of Kansas in any action, suit, or proceeding for the enforcement of any obligation of CLK." With Section 17-7681(f) providing that as the surviving corporation CLK's "liabilities and duties may be enforced against it (AMG) to the same extent as if the debts, liabilities and duties had been incurred or contracted by it (AMG)." Therefore, even if AMG had sovereign immunity to waive in 2010, which for the reasons set forth herein, it did not, by its actions - AMG waived any sovereign immunity it had at the time of its merger with CLK.

For the same reasons set forth above as to *Oracle*, *Surprenant v. Massachusetts Turnpike Auth.*, 768 F.Supp.2d 312, 318 (D. Mass. 2011) (RB, p. 25), is inapposite.

AMG attempts to confuse the issue in front of this Court on this appeal as to when its claim of immunity should be evaluated by arguing that appellant is trying to marginalize the importance of sovereign immunity (RB, p. 27). That is not true. What appellant is alleging is that the analogy to the FSIA is important to, in the context of cases like those in the case at bench, where commercial activity (in this case - illegal commercial activity) has been conducted, to determine the time at which the claim of immunity is evaluated. Since there is, at least as best the parties and the trial court could determine,

no California law on point (AA vol. III, p. 758), it is up to this Court from both a legal and policy standpoint to make that law.

AMG's citation to *Kiowa Tribe v. Manufacturing Techs, Inc.*, 523 U.S. 751 (1998) ("*Kiowa"*); *Michigan v. Bay Mills Indian Comty.*, 134 S.Ct. 2024 (2014) ("*Bay Mills"*); and *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006) ("*Allen"*) are misplaced, and are not relevant to the issue in this case as to the time when the court evaluates the claim of immunity, and is a misguided attempt by AMG to equate the time when the claim of immunity is evaluated with the principle of sovereign immunity itself. What this case is not about is the underlying principle of tribal sovereign immunity.

Kiowa involved a federally recognized Indian tribe, not an alleged arm of the tribe, which owned land in Oklahoma. The Chairman of the business committee signed a promissory note in the tribe's name. The note stated it was signed at Carnegie, Oklahoma, where the tribe had a complex on trust land. The respondent argued that the note was executed and delivered in Oklahoma City, beyond tribal lands and therefore obligated the tribe to make its payments in Oklahoma City. The note did not specify governing law. The tribe defaulted on the note, Manufacturing Technology sued in state court and the tribe moved to dismiss for lack of jurisdiction relying on its sovereign immunity from suit. In *Kiowa* there was no issue as to when jurisdiction should be determined, the issue was - was there jurisdiction.

Similarly, *Bay Mills*, *supra*, was a case where the issue was whether a federal court had jurisdiction over activity that violates the Indian Gaming Regulatory Act that took place off Indian lands, and if so, whether tribal immunity prevents a state court from suing in federal court. In a 5 to 4 decision, the USSC held that the state of Michigan's suit against Bay Mills was barred by tribal immunity. The Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) established a jurisdictional framework to govern Indian

gaming.[2] The question of whether tribal sovereign immunity barred Michigan's suit against Bay Mills for opening a casino outside Indian lands, like in *Kiowa*, had nothing to do with the time when tribal sovereign immunity is evaluated. In *Bay Mills* just as in *Kiowa*, there was no issue as to when the immunity was to be evaluated.

In this case, unlike in *Bay Mills* and *Kiowa*, AMG is not arguing that sovereign immunity should be based on the fact that AMG's off reservation commercial activity entitled it to sovereign immunity as the arm of a tribe. In fact, it is the exact opposite. AMG concedes that when the activity which is the subject of this case took place, when this case was filed (July 1, 2009), and when the first amended complaint was filed (July 31, 2012), its activity did not entitle it to sovereign immunity. It was only because of government enforcement actions starting with the *FTC v. AMG* suit in April 2012, did AMG cease in engaging in illegal payday lending. Therefore, when AMG's motion was heard in the trial court on December 7, 2018, AMG could only argue that it was no longer engaging in illegal payday lending - not the activity itself was exempt from state court jurisdiction.

In *Allen*, *supra*, the court was concerned with a suit by a former employee after he was fired. The issue before the 9th Circuit in *Allen* was whether the casino sufficiently functioned as an arm of the tribe. Even AMG does not contend that at the time of the CLK/AMG merger, that AMG was

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[2] As the Court of Appeal pointed out in *Ameriloan v. Superior Court (People),* (2008) 169 Cal.App.4th 81, 98 fn. 10 "It may be that entities engaged in Indian gaming may benefit from tribal sovereign immunity, while payday loan companies marginally affiliated with tribes should not. Although federal law, for example, recognizes the Indian gaming industry is deeply connected to the welfare of Indian tribes (see e.g., 25 U.S.C. § 2701), no similar congressional declaration exists in connection with the payday loan industry."

acting as an arm of the tribe.

III. AMG is Not Immune Under California's Arm of the Tribe Test.

As set forth by AMG (RB, p. 28), *Owen* sets forth five factors that courts must consider in determining whether an entity is entitled to tribal immunity. *Owen, Id.* at 245. Further, no single factor is universally dispositive. "Each case will call for fact-specific inquiry into all the factors followed by an overall assessment of whether the entity (AMG) has carried its burden by a preponderance of the evidence." (*Owen, Id.* at 248). For the reasons set forth above, concerning the result of the merger between AMG and CLK, it is unnecessary to do an arm of the tribe analysis to determine immunity in this case as to at least the plaintiff and those similarly situated. However, for the reasons set forth below, even if such a test is done, it points to the inescapable conclusion that AMG is not immune under California's arm of the tribe test.

A. Method of Creation.

AMG argues that the trial court conflated the creation factor with the control factor and that "Tucker had a significant role at the time of creation" (RB, p. 28). AMG claims that *Owen* made clear that the method of creation should focus on the law under which the entity was formed, which of course elevates form over substance, just what the Supreme Court in *Owen* said that the Court of Appeal in *Owen* had done. "The Court of Appeal thus assigned dispositive weight to formal considerations." *Owen Id.* at 249.

There can be no dispute that AMG claims it was organized/chartered under tribal law to create the shield of sovereign immunity for Tucker's illegal activities. How form over substance leads to tribal immunity, is a springboard to the illegal activities that went on in this case. This case is "poster child" for a form over substance argument, because it is fantasy for AMG to argue that

the Miami Tribe had anything to do with the creation of AMG, other than to acquiesce to Tucker's attempt to cloak AMG with the immunity of the Miami Tribe itself. Therefore, AMG's argument (RB, p. 28) that "AMG was organized and chartered under the laws of the Miami Tribe of Oklahoma and operated pursuant to tribal law," may be true as to form, but as to substance, it has no basis in fact, as nothing could be further from the truth, because as AMG admitted in the Non-Prosecution Agreement with the government that in reality AMG was created to attempt to shield Tucker and his cohorts from claims of victims like the plaintiff, and regulators like the Department of Business Oversight, formerly the Department of Corporations ("DBO") (AA vol. I, pp. 267-272).

It is absurd and a flight of fantasy for AMG to argue under *Owen* that the method of creation weighs in favor of immunity when the undisputed facts are that AMG was organized/created in an attempt to shield Tucker and his cohorts from potential liability to individuals like the appellant and those similarly situated, and from regulators, like the DBO.

Therefore, whatever the organization papers may state, the reality is that AMG was created to act as a "Potempkin Village" facade behind which the illegal payday lending which is the subject of this case, could take place.

B. Tribal Intent.

Again, AMG elevates form over substance. As to tribal intent, when you strip away the hyperbole, what AMG is really arguing is someone like Tucker can come in, create papers that on their face reflect tribal intent, and then hide behind those papers to commit the same illegal conduct he was committing with CLK prior to the CLK/AMG merger. Self-serving papers were created by Tucker, and attorneys at Fredericks, Peebles & Morgan, LLP, including a partner, Conly Schulte, an admitted felon according to AMG (RB, p. 17). Therefore, when looking at the substance of the formation of AMG,

one can come to only one conclusion, that the primary intent was to benefit Tucker and his cohorts, and not the Miami Tribe.

C. Purpose.

Again, any argument that the purpose of the creation of AMG was primarily to benefit the tribe is pure fantasy. Even AMG concedes "for much of AMG's operation its revenues were largely taken by Tucker and his related entities." (RB, p. 30).

It cannot be disputed that the purpose of the creation of AMG was to shield the illegal payday lending which is the subject of this case. The fact that AMG distributed revenues to the tribe in 2012 and 2013 (RB, p. 30), which were the fruits of illegal payday lending, does not mitigate or overcome the fact that the purpose of AMG's creation was to facilitate illegal payday lending, allowing Tucker and his cohorts to continue to engage in this illegal lending behind the facade of tribal immunity, afer its conduct was challenged by state regulators, and to attempt to immunize itself from the claims of appellant/plaintiff and those similarly situated.

D. Control.

AMG states that it is [now] 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." The record does not support this claim. It is undisputed that this suit was initiated on July 1, 2009, and four and one-half years later AMG was still paying to BA Services, LLC, a Tucker entity, $39,048,102.00 (AA vol. I, pp. 211-223). Therefore, the statement about control during the time period apposite in this suit is incorrect. Even by AMG's own admission (RB, pp. 30-31), AMG did not start to attempt to assert control until November 2012, almost three and one-half years after this case was filed, and AMG continued to use Tucker's licensing until 2014 (AA vol. I, p. 47, ¶¶ 24-26).

Appellant does not dispute the statements concerning the settlement with the federal government or with the FTC. However, there is also no dispute that during the apposite time period in this suit when the illegal payday lending was being done that AMG was controlled by Tucker and his cohorts; and even after there were efforts to wrest back control, AMG continued to collect at least through the end of 2014, proceeds from the illegal payday lending which is the subject of this case.

At the bottom of Page 31 of its RB, AMG argues that the illegal lending activity that underlies appellant's claims against AMG - her loans in 2005 and 2006 - happened years before AMG even existed, and this fact "shows an ignorance of the facts and highlights the weakness of her 'time of filing' argument." AMG is wrong.

The aforementioned argument of AMG ignores the fact that when AMG merged with CLK, who owned the tradenames under which the illegal lending took place, including that to appellant, it assumed all the liabilities of CLK, see *inter alia* discussion in Section V *infra*. Any argument by AMG, starting at Page 35 of the RB, that AMG never waived its sovereign immunity is meritless, because *inter alia* when the merger took place even AMG now acknowledges that its conduct at the time of the merger did not entitle it to sovereign immunity. Simply put, by its own admission, AMG was engaged in criminal conduct at the time of the merger with CLK, and therefore, there was no sovereign immunity to waive. Even if it did, as a result of the CLK/AMG merger in 2008/2010, AMG assumed the liabilities of CLK to plaintiff and those similarly situated.

E. <u>Financial Relationship</u>.

Grudgingly, AMG concedes that during the period of which Tucker had control over AMG "could have weighed against arm of the tribe status" under *Owen*, but that time has "long since passed." (RB, p. 32). AMG then goes on

to state without any basis whatsoever, "AMG was created by the tribe and the tribe intended for AMG to share in its sovereign immunity." Again, this statement elevates form over substance. It is undisputed that AMG was created to shield Tucker and his cohorts from the illegal activity for which Tucker, his lawyers Timothy Muir and Conly Schulte, were either convicted or pled guilty. Further, as to the time period which is involved in this case, there is no doubt that the financial relationship's primary purpose was to benefit Tucker - not the Miami Tribe.

In *Owen*, the Court concluded, "Each case will call for fact-specific inquiry into all the factors followed by an overall assessment of whether the entity has carried its burden by a preponderance of the evidence." (*Owen, Id.* at 248, emphasis added). A fair reading of *Owen* indicates that the Supreme Court instructed lower courts in evaluating the arm of the tribe test, that of all things, substance counts more than form. One needs to go no further than the Non-Prosecution Agreement (AA vol. I, pp. 267-272) to conclude that the creation, intent, purpose, control and financial relationship tests all point to a finding of no immunity.

IV. Appellant's Claims are Not Moot and Have not Been Vindicated Through Governmental Enforcement Actions.

Having succeeded in delaying resolutions of Plaintiffs' claims for more than a decade with its false tribal immunity defense, AMG argues in Section IV of the RB that allowing this case to move forward would be a waste of resources (RB, pp. 32-33). AMG argues that it is insolvent; and that the federal government has obtained relief by its enforcement actions against AMG and that any compensation for the harm caused by Tucker's payday loan business would have to come from the federal government in the form of refund checks (RB, p. 33).

First, as appellant pointed in the trial court, starting at AA vol. I, p.

620, AMG's claimed insolvency is entirely unproven: the only evidence AMG has submitted is an unauthenticated one-page "balance sheet" prepared by an unknown person for an undisclosed purpose (AA vol. I, p. 274).

Second, Plaintiff's claims are not mooted by the federal actions, because there is no proof whatsoever that any members of the putative class have been—or ever will be—compensated by them (AA vol. III, p. 621). Further, as pointed out by plaintiff in the opposition to motion to dismiss, beginning at AA vol. III, p. 622, a settlement cannot moot claims that it does not resolve. The fact that Tucker may have ultimately failed, because of his prosecution by the federal government, also does not moot plaintiff's claim.

Last, the cases cited on Page 35 of the RB, are inapposite. Regarding the issue of the waiver of immunity, for the reasons set forth in the AOB, and *supra*, they are inapposite because they have nothing to do with the time the court evaluates a claim of immunity.

V. AMG Waived its Sovereign Immunity.

At the time of the CLK/AMG merger, AMG did not have any sovereign immunity to waive, and even if it did, as a result of the CLK/AMG merger in 2008/2010, AMG assumed the liabilities of CLK to plaintiff and those similarly situated.

Further, concerning the waiver of sovereign immunity, AMG's reliance on *Multimedia Games, Inc. v. WLGC Acquisition Corp*., 214 F. Supp. 2d 1131 (N.D. Okla. 2001) ("*Multimedia*") as being "directly on point" is misplaced (RB, p. 36). First, at the time of the merger, there was no sovereign immunity to waive, and even if there was some sort of sovereign immunity for AMG for its criminal conduct, in the merger agreement, AMG assumed all the liabilities of CLK, and CLK ceased to exist.

In *Multimedia*, the court at *id*. 1140 states, "The generalized merger agreement simply does not contain that unequivocal expression of tribal

consent to suit necessary to effect a waiver of . . sovereign immunity." In this case, the purchase agreement between CLK and AMG effective January 1, 2008, provided *inter alia*, in Section 6 that "Purchaser [AMG] agrees to assume any and all liabilities of the company [CLK] whether arising or accruing prior to, on or after the effective date." Appellant's claims accrued prior to the effective date. AMG ignores K.S.A. § 17-7681(f) which provides that "all debts, liabilities and duties of each of the limited liability companies that have merged or consolidated shall henceforth attach to the surviving or resulting limited liability company and may be enforced against it to the same extent as its debts, liabilities and duties have been incurred or contracted by it."

AMG also ignores the Statement of Facts attached to the Non-Prosecution Agreement as Exhibit A (AA vol. 1, p. 272) in which AMG admitted that the lending which is the subject of this case, was controlled by Tucker and Tucker entities. In addition, in arguing that the merger agreement between AMG and CLK was like the one in *Multimedia*, and did not contain an unequivocal expression of tribal consent to suit, AMG ignores the fact that in addition to the provisions of Kansas Law mentioned above, that in 2008-2010, there was no tribal immunity to waive.

AMG's attempt to distinguish *Hunter v. Redhawk Network Sec., LLC*, 2018 WL 4171612 (D. Or. Apr. 26, 2018) (RB, p. 38), ignores the fact that in *Redhawk*, the merger had taken place in November 2013, but Redhawk continued to exist as a separate entity. *Multimedia* did not have K.S.A. § 17-7681(f) concerning the liability of the surviving entity, i.e., that the claim could be enforced against the surviving entity to the same extent as if "the debts, liabilities and duties have been incurred or contracted by it." Therefore, the argument regarding sovereign immunity notwithstanding, at least as to the debts of CLK, which included appellant's potential claim, because they were

an action of CLK, AMG had assumed liability for them. Any other result would be ridiculous. All any entity would have to do in order to avoid liability would be to merge with an entity alleged to be an arm of the tribe, such as AMG, and have the alleged tribal entity be the surviving entity.

VI. The Trial Court's Decision Was Not Within the Scope of the Remittitur.

As to the trial court's decision being within the scope of this Court's remittitur, AMG cites no authority that contradicts the argument and authority set forth in the AOB. There can be no doubt that AMG had the full opportunity to litigate and present whatever evidence it wanted in support of its claim that somehow the timing of the determination of sovereign immunity is a moving target. Although AMG claims it started to take back control in 2012 from Tucker and his cohorts (RB, p. 13), these actions were ignored in the trial court leading up to Judge Carvill's May 6, 2013 Order (A139147, AA vol. III, pp. 940-971). Further, they were not mentioned in the RB in A139147 (A139147, RB, filed February 25, 2014, pp. 1-49), instead AMG repeated the now repudiated arguments that AMG was created 'to stimulate the economic development of the tribe.' (A139147, RB filed 02/25/14, p. 5). AMG disingenuously argued that the CEO of AMG oversees AMG's day to day operations and reports directly to the AMG board. (A139147, RB filed 02/25/14, p. 6).

In its brief in A139147, AMG states "when CLK merged into AMG, CLK ceased to exist as a matter of law and AMG became the surviving entity of the merger." (A139147, RB filed 02/25/14, p. 6). AMG went on to state in footnote 6 of Page 6 (A139147, RB filed 02/25/14, p. 6) that the merger was effectuated under Kansas law and that CLK was subsequently dismissed on the motion of the tribal entities as CLK was rendered legally non-existent due to its merger with AMG. In footnote 7 on Page 7 of the RB (A139147, RB

filed 02/25/14 p. 7), AMG states the threshold issue of tribal immunity has remained constant since July 1, 2009, the date of the filing of the initial complaint in this case. Evidence produced in the trial court to support in A139147, included the Declaration of Chief Thomas Gamble (A139147, RB filed 02/25/14, p. 10) which AMG admitted in the Statement of Facts, Exhibit A to the Non-Prosecution Agreement, was misleading. (AA vol. I, p. 272).

In the RB in A139147, AMG argued "These factors along with the undisputed evidence that revenues generated by AMG flowed directly to and greatly benefited (sic.) the Miami Tribe." (A139147, RB filed 02/25/14, p. 21). On Page 33, AMG argued that "The evidence shows that AMG is owned, managed, and controlled by the Miami Tribe." (A139147, RB filed 02/25/14, p. 33). At Page 34 (A139147, RB filed 02/25/14, p. 34), AMG states, "In 2008, as its business acumen developed, the Miami Tribe created AMG to take over these functions and directly service the 34 loans issued by the Miami Tribe's lending entity, MNE. (*Ibid*.) Thus, the Miami Tribe fully integrated its lending business under Tribal ownership and control, and no longer delegates the day-to-day functions of that business to a non-tribal entity." Arguments that both AMG and its counsel, Fredericks, Peebles & Morgan, LLP, including Conly Schulte, knew were untrue.

AMG had full opportunity to create the record it needed prior to the appeal in A139147. In the Remittitur in A139147, this Court remanded this case to the trial court so that the trial court could apply the holding in *Owen* "in the first instance." *Rosas v. AMG Services*, A139147, 2017 WL 4296668 at *2-3. This Court did not remand in A139147 so that AMG could present new legal arguments (such as mootness) and introduce an entirely "present circumstances" theory of tribal immunity. This Court remanded the case to the trial court so the trial court could apply the new standard in *Owen* to the facts at hand in the first instance. 2017 WL 4296668 at *2. See also *Owen Id.* at

256. It is only if intervening events and new evidence shed new light on the question of whether AMG was an arm of the tribe when it was engaged in the unlawful conduct at issue here, should the trial court have considered any new events - - but anything else would not have conformed to this Court's instructions.

In the appeal that led to the decision in A139147, AMG continued to assert the same self-serving arguments that have now been shown to be meritless and untrue. AMG could have pointed out to Judge Carvill that it had taken steps to extricate itself from Tucker and his cohorts in 2012, but failed to do so (AA, vol. I, p. 6).

AMG never argued to the trial court that starting in 2012, it was taking steps to sever ties to Tucker so that Tucker would no longer have managerial control. (AA vol. I, p. 6). Until this Court's decision in A139147, AMG fought tooth and nail to prevent appellant and the court from obtaining information that would have shed light on the actual relationship between AMG, Tucker and the Tribe, including in the RB in A139147 (A139147, RB filed 02/25/14, pp. 1-49). Now AMG maintains that it does not matter that it was not an arm of the tribe during the time it was violating California law and victimizing the plaintiffs in this case, because it has "seen the light" and become tribal in the interim - and that plaintiffs' claims have been in effect mooted by intervening law enforcement actions against AMG.

VII. Not Only the Law, but Public Policy Supports the Argument that Immunity Should Not be Evaluated at the Time the Motion is Made.

As Judge Carvill recognized in his May 6, 2013 order (A139147, AA vol. III, pp. 966-967), any rogue business could affiliate itself with an Indian tribe and escape state jurisdiction. The problematical consequences of employing a standard of "sovereignty at the time the motion is heard" would

go far beyond payday lending. The sovereignty decision as to circumstances when the motion is heard, as the trial court did in this case, would set a precedent allowing any sort of unscrupulous business to attempt to evade state law by finding a tribe somewhere in the United States that is willing to agree to nominal affiliation at least until the lawsuits or the regulators make the relationship "too hot to handle." Before the motion could be heard the relationship would be terminated. The trial court's decision on timing would set a precedent allowing any sort of unscrupulous business to evade state law by finding a tribe somewhere in the United States who is willing to agree, if only for a period of time, to nominal affiliation. Sellers of travel and credit card organizations could claim they did not need to register with the state; polluters could maintain that stringent state regulations no longer apply to them. Presumably any business overseen by the California Department of Business Oversight, the California Consumer Affairs, could declare itself liberated from state regulations, and the consequences would extend even beyond consumer protection laws - employers could similarly evade rules, protecting worker's safety, as well as wage and hour rules; polluters could evade sanctions for illegal omissions.

As appellant pointed out to the trial court on December 7, 2018, under *Owen*, trial immunity is not a jurisdictional bar, therefore, the trial court had no obligation to assess tribal immunity under changed circumstances. Assessing tribal immunity under changed circumstances will not further the purpose of tribal sovereignty. (Transcript, 12/07/18, p. 11:15-24).

Appellant further pointed out to the trial court, what the Supreme Court's test in *Owen* is designed to do is to enable courts to distinguish between legitimate tribal arms and companies and entities that seek to take advantage of the tribal immunity doctrine. (Transcript, 12/07/18, p. 13:18-22).

CONCLUSION

For the foregoing reasons, this Court should overturn the trial court's order of December 17, 2018, finding that immunity should be evaluated at the time the motion is made, and should find that immunity should be evaluated at the time of the filing of plaintiff's complaint (July 1, 2009) or the first amended complaint (July 31, 2012).

Respectfully submitted,

DATED: December 17, 2019

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DATED: December 17, 2019

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The Hon. Winifred Y. Smith
1221 Oak Street, Dept. 21
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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 December 17, 2019, at Dublin, California.

/s/ Harold Jaffe
HAROLD JAFFE

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Case Number: **A156573**
Lower Court Case Number: **JCCP004688**

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