In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

MIAMI NATION ENTERPRISES, ET AL.,

Defendants and Respondents.

Case No. S216878

Court of Appeal, Second Appellate District, Case No. B242644
Superior Court of California, County of Los Angeles,
Case No. BC373536
Yvette M. Palazuelos, Judge

APPELLANT'S REPLY TO ANSWER TO PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
SARA J. DRAKE
Senior Assistant Attorney General
JANILL L. RICHARDS
Deputy Solicitor General

MARY ANN SMITH
Deputy Commissioner
Department of Business Oversight
UCHE L. ENENWALI
Senior Corporations Counsel

*JENNIFER T. HENDERSON
State Bar No. 206231
TIMOTHY M. MUSCAT
State Bar No. 148944
WILLIAM P. TORNGREN
State Bar No. 58493
Deputy Attorneys General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5366
Fax: (916) 327-2319
Email: Jennifer.Henderson@doj.ca.gov

Attorneys for Appellant and Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION

The People do not question that Indian tribes enjoy sovereign immunity from suits based on their governmental and commercial activities. (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751.) But a business entity with tribal affiliations is not itself a tribe and does not automatically share the tribe's immunity. Accordingly, the law must determine the point at which the business

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

(*Trudgeon v. Fantasy Springs Casino* (*Trudgeon*) (1999) 71 Cal.App.4th 632, 639; see also *American Property Mgmt. Corp. v. Superior Court* (*American Property*) (2012) 206 Cal.App.4th 491, 503-504, quoting *Trudgeon*.) The People seek this Court's guidance on the proper analysis to determine when a business entity shares in a tribe's sovereign immunity from suit and whether, under that analysis, immunity is extended to a business that is affiliated with a tribe on paper, but in fact operates with little or no tribal oversight or control.

Miami Nation Enterprises (MNE) and SFS, Inc. (SFS) (collectively, Respondents)—two tribally chartered businesses that were the subject of state enforcement action because of their payday lending practices—claim in their answer to the petition that there is no need for this Court's review.

(Defendants' and Respondents' Answer to Petition for Review (Ans.) at pp. 5, 16.) They claim that no conflict exists between the appellate districts as to the proper test to determine whether an arguably privately run business is an arm of a tribe, and that the law in California is uniform and settled. (*Ibid.*)

Respondents are incorrect. Before the Second District Court of Appeal's decision in this matter, *People of the State of California v. Miami Nation Enterprises* (B242644) (Jan. 21, 2014) 223 Cal.App.4th 21 (*People v. MNE* or Opn.), the Fourth District Court of Appeal recognized that arm-of-the-tribe immunity had limits and that formal tribal affiliation, standing alone and without actual control and oversight by the tribe, may not be dispositive. (*Trudgeon, supra,* 71 Cal.App.4th at p. 641; *American Property, supra,* Cal.App.4th at p. 500.) The Second District's decision in *People v. MNE* would effectively eliminate a regulatory agency's ability to prove that a business is "far removed" and not an arm of the tribe, where the business satisfies certain organizational formalities. Simply by filling out the proper paperwork and observing a few other formalities, these businesses would be shielded from state enforcement by tribal sovereign immunity, even where the tribe does not exercise actual control and oversight. Review will allow this Court to articulate an appropriate arm-of-the-tribe test ensuring that only businesses operating under meaningful tribal control and oversight benefit from sovereign immunity.

ARGUMENT

I. REVIEW IS WARRANTED TO ESTABLISH A UNIFORM TEST TO DETERMINE WHEN A BUSINESS ENJOYS TRIBAL SOVEREIGN IMMUNITY AS AN ARM OF A TRIBE

This Court has never articulated the standard to be used in arm-of-the-tribe analyses. Currently, no uniform test exists in California to determine when an arguably privately run business qualifies as an arm of a tribe and shares in the tribe's sovereign immunity. (See Petition at pp. 7-12.) This case presents an opportune time for the Court to settle the law.[1]

In Respondents' view, the Second District merely synthesized the various arm-of-the-tribe tests. (Ans. at pp. 5, 16.) They argue that *People v. MNE* did not "reject" or "disregard" any "underlying factor" from the *Trudgeon* or *American Property* tests, and the Second District's opinion in fact added to the "stability and clarity of California's tribal sovereign immunity jurisprudence." (*Id.* at pp. 5-6.) Respondents acknowledge that the *People v. MNE* opinion "distills" the arm-of-the-tribe principles to their "most elemental form," resulting in only four enumerated factors. (*Id.* at p.

---

[1] Respondents object to the People's footnote apprising this Court that the United States Supreme Court is considering *Michigan v. Bay Mills Indian Community* (*Bay Mills*) (6th Cir. 2012) 695 F.3d 406, cert. granted June 24, 2103, No. 12-515, ___ U.S. ___ [133 S.Ct. 2850, 186 L.Ed.2d 907] (argued Dec. 2, 2013) (see Ans. at pp. 15-16.). While the United States Supreme Court may choose to decide *Bay Mills* on narrow grounds, it is also possible that the decision could be more far-reaching and inform this Court's analysis of the issues presented in this case.

5.) Yet Respondents claim the *People v. MNE* four-factor test does not differ from the *American Property* six-factor test because the Second District *discussed* all of the facts that would be analyzed under the *American Property* test. (*Ibid.*) Mere discussion of the same category of underlying facts in both *People v. MNE* and *American Property* does not make the legal analysis—which factors and what weight to accord to a factor—the same for both tests.

In fact, the Second District's abbreviated test differs fundamentally from the Fourth District's tests in *Trudgeon* and *American Property*.[2] Unlike the Fourth District's approach, the test adopted by the Second Appellate District in this case, as a practical matter, is based primarily on organizational formalities and is essentially limited to a mere facial examination of the formal indicia of the business entity's affiliation with the tribe. The factors as enumerated in *People v. MNE* by their very nature limit the analysis to the information controlled and provided by the

---

[2] MNE and SFS's Court of Appeal brief conceded the existence of multiple and differing tests before the *People v. MNE* opinion was issued. (Defendants-Respondents' Brief, at pp. 8, 9 (Resp. Br.).) There, they argued that the *American Property* test was a "wholly different test" with "irrelevant legal factors." (*Ibid.*) Respondents also asserted that the proper test was a two-factor test established by the Second District in this case's prior opinion, *Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 86-88, and that this two-factor test was based on *Trudgeon's* three-factor test. (Resp. Br. at pp. 18-19.) The People agree with MNE and SFS's Court of Appeal brief insofar as it acknowledged the significant differences in the multiple arm-of-the-tribe tests under California law.

business seeking arm-of-the-tribe status. (Opn. at p. 24.) Under the *People v. MNE* opinion's test, a business is an arm of the tribe if it can produce the following two documents: (1) a tribal resolution showing that the business was formed under tribal law and (2) a tribal resolution or articles of incorporation containing statements that the business's purpose is tribal economic development, that the tribe intends that the business share the tribe's immunity, and that the business's governing structure was set up to be appointed and overseen by the tribe. (*Ibid.*) But under the Second District's view of the law, the tribe's actual control, management and oversight of the businesses was effectively irrelevant.[3]

As this case illustrates, without review by this Court, application of the competing arm-of-the-tribe tests in California may result in dramatically different outcomes, depending on which test a court applies. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [where appellate decisions are in conflict lower courts must make a choice between the conflicting decisions].)

---

[3] The Second District disregarded record evidence showing that, despite what relationship was formally provided for in the articles of incorporation, in reality the tribes did not exercise actual control, management and oversight of MNE and SFS. (Opening Brief, pp. 10-12 [citing declarations of California consumers who had taken out loans from MNE's and SFS's payday lending operations (Clerk's Transcript (CT), 2 pp. 410-488, 16 pp. 3857-3902A)], 18-20 [citing tribal lending ordinances and articles of incorporation (CT 17, pp. 4013, 4019, 4080, 4085)]; Reply Brief, pp. 2-3.)

II. REVIEW IS WARRANTED TO SETTLE THE IMPORTANT QUESTION OF WHETHER THE ARM-OF-THE-TRIBE TEST SHOULD PROVIDE REASONABLE LIMITS ON THE EXTENSION OF SOVEREIGN IMMUNITY TO BUSINESSES NOT SUBJECT TO ACTUAL TRIBAL CONTROL AND OVERSIGHT

The Second District's test does not allow a court to look behind the documents indicating a business entity's tribal affiliation to determine whether a tribe actually controls and oversees the business. The test champions form over substance. Sovereign immunity analysis should not occur in this truncated and superficial factual manner.

A tribally chartered business that only on paper is owned by a tribe and that provides the tribe with a small percentage of the revenues should not qualify as an arm of the tribe. (*Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247-248.) Rather, when state authorities reasonably believe that a tribally chartered business is engaging in illegal activities that harm California citizens, the analysis of whether the business should be shielded from state enforcement by tribal sovereign immunity must be meaningful and rigorous. The business should either be under the actual management and oversight of the tribe as a sovereign, or subject to enforcement by the state as a sovereign.

Left unchallenged, the business model allowed by the Second Appellate District's published opinion could become a blueprint for consumer fraud, not by tribes that are operating their businesses in accordance with tribal law, but by private parties taking cover behind mere

tribal forms. Accordingly, this Court should accept review and establish a meaningful arm-of-the-tribe test that ensures that only businesses operating under actual tribal control and oversight enjoy sovereign immunity.

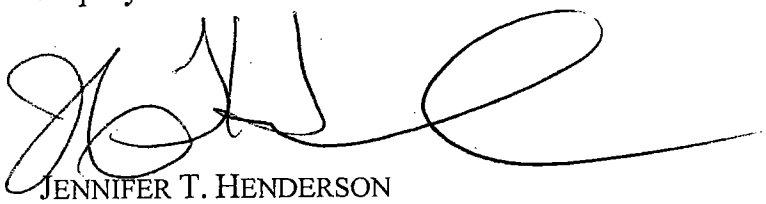
CONCLUSION

The People's petition for review should be granted.

Dated: April 4, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
SARA J. DRAKE
Senior Assistant Attorney General
JANILL L. RICHARDS
Deputy Solicitor General



JENNIFER T. HENDERSON
Deputy Attorney General
Attorneys for Appellant and Petitioner

SA2014312087
31947570.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **APPELLANT'S REPLY TO ANSWER TO PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 1,564 words.

Dated: April 4, 2014

KAMALA D. HARRIS
Attorney General of California

JENNIFER T. HENDERSON
Deputy Attorney General
Attorneys for Appellant and Petitioner

DECLARATION OF SERVICE

Case Name: **People of the State of California v. Miami Nation Enterprises, et al.**

Case No.: **S216878**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On April 4, 2014, I served the attached **APPELLANT'S REPLY TO ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed overnight envelope and causing such envelope to be personally delivered by courier service to the office of the addressee listed below:

California Supreme Court Earl Warren Building 350 McAllister Street, Room 1295 San Francisco, CA 94102	Original + 13 copies Sent via Golden State Overnight
John Nyhan Fredericks Peebles & Morgan LLP 2020 L Street, Suite 250 Sacramento, CA 95811	Attorney for Defendants and Respondents Sent via Golden State Overnight
Nicole E. Ducheneaux Fredericks Peebles & Morgan LLP 3610 North 163rd Plaza Omaha, NE 68116	Attorney for Defendants and Respondents Sent via Federal Express
Conly J. Schulte Fredericks Peebles & Morgan LLP 1900 Plaza Drive Louisville, CO 80027	Attorney for Defendants and Respondents Sent via Federal Express

Court of Appeal Second Appellate District 300 So. Spring Street, 2nd Floor Los Angeles, CA 90013	1 copy Sent via Golden State Overnight
Hon. Yvette M. Palazuelos Los Angeles Superior Court 111 North Hill Street, Dept. 28 Los Angeles, CA 90012	1 copy Sent via Golden State Overnight
Uche L. Enenwali Dept. of Business Oversight 320 West 4th Street, Suite 750 Los Angeles, CA 90013-2344	Courtesy Copy Sent via Golden State Overnight

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April \, 2014, at Sacramento, California.

Linda Thorpe
Declarant

Linda Thorpe
Signature