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

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

ISSUES PRESENTED

1. Can a business—here, an Internet-based payday loan company exacting triple-digit interest rates from its customers—establish tribal sovereign immunity, and thus avoid enforcement of California's consumer protection laws, simply by making a showing that it is formally affiliated with a federally recognized Indian tribe?

2. May a court look behind the evidence of formal tribal affiliation to determine whether the tribe exercises actual control, management, and oversight of the business and, if not, reject the business's assertion of tribal sovereign immunity on that basis?

INTRODUCTION

As a sovereign, a federally recognized Indian tribe is immune from suit in both state and federal courts, unless the tribe has waived its immunity or consented to suit or Congress has authorized the action. Both the United States Supreme Court and this Court have observed that an instrumentality or "arm" of a tribe shares in that tribe's immunity. (See *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* (2003) 538 U.S. 701, 705, fn. 1; *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247-248 (*Agua Caliente*).) To date, however, neither court has set out a test to determine arm-of-the-tribe status, and the lower federal and state courts have developed a variety of conflicting approaches. This case offers an opportunity to clarify the law for California and to establish persuasive authority for other jurisdictions confronting this difficult issue.

The present matter involves a consumer enforcement action brought by the People of the State of California against five Internet cash-advance or "payday" lenders. In ruling on the payday lenders' renewed motion to quash, the Court of Appeal surveyed the case law and devised yet another

arm-of-the-tribe test. That test gave effectively dispositive weight to paper connections between the Tribe and the payday lenders and to tribal statements of intent to confer immunity. Further, the Court of Appeal required the People to prove a negative—that the payday lenders were *not* arms of tribes. Applying its test, the court affirmed dismissal of the People's action, preventing California from ensuring that these particular payday lenders, in their dealings with the State's consumers, comply with the State's consumer finance laws.

The Court of Appeal's approach to determining arm-of-the-tribe status does not comport with the purposes of sovereign immunity. Immunity is not a benefit that a sovereign may confer on a third party simply by stating its intent to do so. Rather, immunity is a legal protection the law recognizes for the sovereign itself, serving to protect the sovereign's fisc and its right to direct its governmental affairs. A valid arm-of-the-tribe test must ensure that a tribe's immunity extends to an entity only where that entity is, in certain essential respects, so closely connected to and aligned with the tribal sovereign that a suit against the entity is in practical effect a suit against the tribe itself.

Because state and tribal sovereignty share fundamental similarities, in clarifying the arm-of-the-tribe doctrine, this Court should look to the comparatively cohesive body of law concerning the immunity of entities claiming to be arms of states. In general, whatever their precise factors, tests for arm-of-the-state status focus on the actual connection, identity of interest, and control between the sovereign and the entity. Applying the logic of arm-of-the-state cases to tribal circumstances produces a sensible, practical, and fair test for arm-of-the-tribe status. That test takes into account three considerations grounded in the purposes of sovereign immunity: (1) the financial relationship between the entity and the tribe; (2) whether the entity serves central governmental functions; and (3) whether

the tribal government exercises actual, practical control over the entity's operations. Further, the overwhelming weight of the law treats arm-of-the-state status as an affirmative defense, thus placing the burden of proof on the entity seeking immunity. An entity claiming arm-of-the-tribe status should bear the same burden.

As set out in greater detail below, while much is unknown or unclear on the present record, it is undisputed that the entities standing behind the payday-lending trade names at issue here—MNE Services, Inc. and SFS, Inc.—are corporations. The resulting limited liability of the corporations' shareholders— Miami Nation Enterprises, a parent corporation owned by the Miami Tribe of Oklahoma (Miami Tribe), and the Santee Sioux Nation of Nebraska (Santee Sioux Nation)—weighs against immunity.[1] Further, it appears that recognizing arm-of-the-tribe status for these corporations would protect primarily the revenue streams of third parties who have no relationship with or responsibility to the Tribes and their members. Protecting private economic interests is not the purpose of sovereign immunity. Finally, evidence resulting from a Federal Trade Commission (FTC) investigation into payday lending suggests that, in practice, the entities' purse strings and key financial decisions are left in the hands of private third parties and are not meaningfully controlled or overseen by the Tribes. Applying the considerations articulated above, and on the existing record, the entities have not established that they should be accorded sovereign immunity as arms of the Tribes.

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[1] The Court of Appeal's Opinion refers to Miami Nation Enterprises as "MNE." The People will spell out Miami Nation Enterprises when referring to that entity to avoid confusion with MNE Services, Inc. In addition, the People refer to both Tribes using their current official names. (79 Fed. Reg. 4748, 4750, 4751 (Jan. 20, 2014).)

STATEMENT OF APPEALABILITY

On March 3, 2014, the People timely sought review of the Court of Appeal's final decision of January 21, 2014 (Opinion), which affirmed the superior court's May 10, 2012 order granting the renewed motion to quash service of the summons and complaint and dismissing the complaint. (25 CT 6074 [notice of appeal]; 24 CT 5754-5769 [order].)[2] An order granting a motion to quash service of summons is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(3).

FACTUAL AND PROCEDURAL BACKGROUND

I. STATE AND FEDERAL GOVERNMENTS TAKE ACTION TO PROTECT CONSUMERS OF PAYDAY LENDING SERVICES

As the Court of Appeal noted, citing a study from the Pew Charitable Trusts,

> 12 million Americans take out payday loans each year, spending approximately $7.4 billion annually. The average loan is $375. The average borrower is in debt for five months during the year, spending $520 in interest to repeatedly renew the loan.

(Opinion, at pp. 2-3, fn. 2.)[3] Further, while payday loans are marketed as a way to bridge a gap until the borrower's next paycheck, in practice they often lead to longer-term debt. "Sixty-nine percent of first-time borrowers

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[2] This brief uses the following references to the record, preceded by the volume number and followed by the page number:
CT = Clerk's Transcript;
SCT = Supplemental Clerk's Transcript;
SSCT = Second Supplemental Clerk's Transcript.

[3] The Pew Charitable Trusts' *Payday Lending in America* series is available at <http://www.pewtrusts.org/en/research-and-analysis/collections/payday-lending-in-america> [as of July 23, 2014].

use the loan for recurring bills, including rent or utilities; only 16 percent use them to deal with an unexpected expense such as a car repair." (*Id.*)

The volume and circumstances of payday lending highlight the need to protect consumers through effective government oversight and enforcement. California is among the many states that have enacted statutes regulating consumer finance practices, including payday lending.[4] The People brought this action to enforce the State's payday lending statutes. (See Fin. Code, § 23000 et seq.)[5]

While there are no federal laws that specifically target payday lending, the FTC has investigated and filed enforcement actions against payday lenders using the Federal Trade Commission Act (15 U.S.C. §§ 41-58) (prohibiting deceptive trade practices) and the Truth in Lending Act (15 U.S.C. §§ 1601-1667f) (requiring specific disclosures in lending documents). On April 2, 2012, the FTC filed a lawsuit in the United States District Court for the District of Nevada against 19 defendants, including MNE Services, Inc. and SFS, Inc. (See *FTC v. AMG Services, Inc.* (D.Nev. May 28, 2014, No. 2:12cv536) __ F.Supp.2d __ [2014 WL 2927148].) To date, the FTC has prevailed against MNE Services, Inc., SFS, Inc., and other related defendants on certain claims related to misleading website

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[4] See Papke, *Perpetuating Poverty: Exploitative Businesses, the Urban Poor, and the Failure of Reform* (2014) 16 Scholar: St. Mary's L. Rev. & Soc. Just. 223, 248; see also <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates> [as of July 24, 2014].

[5] Payday lenders doing business in California must be licensed by the State. (Fin. Code, § 23005, subd. (a).) Further, the State requires written loan contracts disclosing the fee as an Annual Percentage Rate (APR); limits payday loan amounts to $300; limits loan fees to 15 percent of the loan amount; and prohibits multiple, simultaneous loans to the same consumer. (Fin. Code, §§ 23001, subd. (a); 23035, subds. (a), (e)(1); 23036, subds. (a), (c).)

statements and inaccurate disclosures. Additional claims remain pending. (*Id.* at *4-5, 14-15.)[6]

In the face of increased enforcement, some online payday lenders have sought tribal affiliation in an effort to take advantage of tribal immunity, promising some share of revenues in return. (See Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk*? (hereinafter, Martin) (2012) 69 Wash. & Lee L. Rev. 751, 754-755, 763, 766-777; see also Harte and Zuckerman Bernstein (June 17, 2014) *Payday Nation, Part I.*)[7] The amount a given tribe actually receives in any specific affiliation deal will vary, but at least one commentary has noted that a tribe's share of revenues often amounts to "crumbs." (Martin, *supra,* at p. 767.)

II. CONSUMER COMPLAINTS SPUR DEPARTMENT ENFORCEMENT AGAINST THE PAYDAY LENDERS

Roughly a decade ago, in 2004, the California Department of Corporations, predecessor agency to the California Department of Business Oversight, began receiving complaints from California consumers who had taken out payday loans over the Internet. One early complaint about Ameriloan is typical. The consumer applied for a loan online. Money quickly appeared in his bank account, but without any information about the lender or how to repay the loan. (17 CT 3908.) He "tried to look them up online, but could not find the same company . . . ." (*Ibid.*) The

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[6] The district court did not have occasion to determine whether MNE Services, Inc. and SFS, Inc. would be immune as arms of tribes. The court held that under the FTC Act, Congress granted FTC the authority to regulate tribes. (*FTC v. AMG Services, Inc., et al.* (D. Nev. 2012) No. 2:12cv536, Doc. No. 559 (filed 03/07/14).)

[7] *Payday Nation Part I* is available at <http://projects.aljazeera.com/2014/payday-nation/index.html> [as of July 24, 2014].

consumer concluded that "this company intentionally keeps you from knowing who has funded the loan and what the terms are . . . so that they can collect as many fees by 'automatically renewing the loan' as they can before you are even aware that they are doing it." (*Ibid.*; see also 3 SSCT 638 [discussing extended history of complaints].) Any delay in repaying a payday loan may have serious consequences, as effective annual interest rates in the range of 300 to 400 percent are not unusual. (See Opinion at pp. 2-3, fn. 2.)

The Department investigated and determined that a number of Internet payday lending operations were violating California law. On August 22, 2006, the Department's Commissioner issued a Desist and Refrain Order to certain payday lenders requiring the businesses to come into compliance. (16 CT 3864-3868.)[8] Having no additional information about these businesses' legal status or structure, the Department issued the order using the names listed on their websites—Ameriloan, United Cash Loans, USFastCash, and Preferred Cash Loans. (16 CT 3864.)

III. THE PAYDAY LENDERS IGNORE THE DEPARTMENT'S DESIST AND REFRAIN ORDER; THE PEOPLE FILE SUIT

Faced with the Payday Lenders' continued non-compliance, and spurred by mounting complaints, in June 2007 the People brought an enforcement action against five Internet payday lenders, identifying each by its website name: Ameriloan, UnitedCashLoans, USFastCash, OneClickCash, and PreferredCashLoans (collectively, the Payday Lenders).[9] The People alleged that the Payday Lenders charged fees

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[8] See Fin. Code, § 23050.

[9] See Gov. Code, § 11180; Fin. Code, § 23051, subd. (a). A screenshot of the representative Ameriloan website taken May 18, 2007, is attached. (See Attachment at p. 1, 4 SSCT 729.)

exceeding the amounts permitted under California law, failed to provide required loan notices, were operating without a license, and were violating the Desist and Refrain Order. The complaint sought injunctive relief, restitution, and civil penalties. (1 CT 38-39.)

As of June 2007, the Payday Lenders' websites—the sole method by which consumers applied for loans—reflected only these businesses' trade names. (4 SSCT 729-733, 735-738, 739-740, 742-745, 753-754.) Therefore, the complaint designated each Payday Lender as "a business organization, form unknown" and, alternatively a corporation, a limited liability company, or a partnership. (1 CT 27; see also 4 SSCT at 28-29.)

IV. THE PAYDAY LENDERS ASSERT ARM-OF-THE-TRIBE STATUS AND CLAIM IMMUNITY

On July 30, 2007, the superior court issued a temporary restraining order against the Payday Lenders. (See 1 CT 48.) Shortly thereafter, the businesses appeared specially, one group asserting that they were instrumentalities or "arms" of the Miami Tribe (Ameriloan, UnitedCashLoans, and USFastCash) (1 CT 47-53) and the other claiming the same relationship with the Santee Sioux Nation (OneClickCash and PreferredCashLoans) (1 CT 67-68). The businesses contended that they were therefore entitled to invoke these Tribes' sovereign immunity. This was the State's first notice that these businesses claimed any tribal connection.

V. EVIDENCE CONCERNING THE PAYDAY LENDERS' STATUS AS ARMS OF TRIBES

The following factual summary is based on what the People know or understand from the evidence presently available.

A. Use and Registration of the Payday Lenders' Marks

The best available evidence concerning what entities actually own and are legally responsible for the Payday Lender businesses is the history of the ownership and use of the relevant marks.

Between May and July of 2004, a Kansas limited liability company named CLK Management, LLC (CLK) applied to register a number of marks with the U.S. Patent and Trademark Office for businesses providing payday loans. (23 CT 5529-5533; 24 CT 5704-5708, 5720-5721, 5620-5621.)[10] These businesses included four of the five Payday Lenders: Ameriloan, UnitedCashLoans, USFastCash, and OneClickCash. (23 CT 5529-5533; 24 CT 5704-5708, 5720-5724, 5620-5624.) According to the registration documents, some of the trademarks had been in use since 2002. (23 CT 5539-5541; 24 CT 5704-5705, 5720-5724, 5620-5624.) An individual named Scott Tucker was listed as CLK's President and signed the registration documents. (23 CT 5530; 24 CT 5621, 5705, 5721.)[11] The record contains no evidence that CLK had or has any tribal affiliation.

The name PreferredCashLoans has never been registered with the U.S. Patent and Trademark Office. (People's Request for Judicial Notice (RJN), Ex. J.)

Websites using the Payday Lenders' marks are all currently active. (RJN, Exs. A-E.)

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[10] The citations are to exhibits to the declaration of FTC investigator Victoria M. L. Budich. (See 18 CT 4149-4191 [text of declaration]; 18 CT 4193 through 24 CT 5748 [exhibits].)

[11] Scott Tucker is a defendant in the FTC's enforcement action. His role in the Payday Lenders' operations is discussed further below.

B. SFS, Inc.

1. Public information regarding SFS, Inc.'s ownership and use of marks OneClickCash and PreferredCashLoans

In September 2006—one month after the issuance of the Desist and Refrain Order, and approximately nine months before this case was filed—CLK conveyed the OneClickCash trademark to an entity named SFS, Inc. (24 CT 5630-5632.) SFS, Inc. retained ownership of the mark in May 2012, when the superior court ruled on the renewed motion to quash. (24 CT 5754; 18 CT 4189-4190 [Budich Decl., ¶ 95].) The U.S. Patent and Trademark Office website reflects that SFS, Inc. is still the owner of the OneClickCash mark. (RJN, Ex. I.) In 2007, OneClickCash's Web site did not state any tribal affiliation. (4 SSCT 739-740 [screenshot].)[12] The website now claims affiliation with the Santee Sioux Nation through SFS, Inc. (RJN, Ex. D.)

As noted, the U.S. Patent and Trademark Office has no records relating to PreferredCashLoans. (RJN, Ex. J.) The current website for PreferredCashLoans does not assert a connection to SFS, Inc. or the Santee Sioux Nation. (RJN, Ex. E.)

2. SFS Inc.'s creation, formation documents, and governing laws

SFS, Inc. is a corporation created under the procedures and laws of the Santee Sioux Nation. In February 2005, the Santee Sioux Tribal Council, the Tribe's governing body, passed a resolution incorporating SFS, Inc. "pursuant to the laws of the Santee Sioux Nation." (4 SSCT 771

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[12] This citation is to an exhibit to the declaration of Department examiner Peter Mock. (See 3 SSCT 634-638 [text of declaration]; 3 SSCT 639 through 4 SSCT 754 [exhibits].)

[Constitution], 800-801.)[13] The resolution authorized SFS, Inc. to engage in "short-term loans and cash advance services ('payday loans')," stating that "it is in the best interest of the Tribe to establish a tribally-owned corporation to facilitate the achievement of goals relating to the Tribal economy, self-government, and sovereign status of the Santee Sioux Nation." (4 SSCT 800.) SFS, Inc.'s original Articles of Incorporation (Articles) were attached to the resolution. (4 SSCT 800, 802-806.) Amended Articles were issued in June 2008. (4 SSCT 808-812.)

As set out in the Articles, the Tribe owns all shares of SFS, Inc. (4 SSCT 802, 808.) The Articles state that SFS's Inc.'s Board of Directors consists of the Tribal Council and that the Board "shall manage" the corporation. (4 SSCT 803, 809.) The Articles do not define what such management entails.

Pursuant to its Articles and the Tribe's Business Corporation Code, SFS, Inc. has the usual attributes of a corporation. The Tribe as shareholder, the Tribal Council, and SFS, Inc.'s officers or directors cannot be held liable to SFS, Inc.'s creditors. (5 SSCT 913 [Santee Sioux Tribe of Nebraska Business Corporation Code (BCC), § 11-1022], 915 [BCC § 11-1092].) Any recovery against SFS, Inc. is limited to its assets. (5 SSCT 912 [BCC § 11-1003, subd. (3)(b)].) The Articles require SFS, Inc. to maintain bank accounts in its own name and to hold its funds separate from those of any other person or entity. (4 SSCT 804, 810.)

Additionally, pursuant to its Articles and tribal law, SFS, Inc. also possesses typical corporate powers and privileges. (See 4 SSCT 802-806, 808-812; 5 SSCT 912 [BCC § 11-1003, subd. (3)].) The corporation has its

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[13] The citations to documents in this subsection are to exhibits of the declaration of Robert Campbell. (See 4 SSCT 761-767 [text of declaration]; 4 SSCT 769 through 5 SSCT 970 [exhibits].)

own assets, funds, and property interests, as well as "the authority to acquire, manage, own, use, pledge, encumber, or otherwise dispose of" such property, "subject to the contractual and sovereign rights of others, including the Tribe." (5 SSCT 914 [BBC § 11-1030, subd. (1)].) It appears that, under tribal law, SFS, Inc. as a corporation has the power to sue in its own name. (See 5 SSCT 907 [BBC § 11-783, transferring right to sue in corporation's name to officers, etc., on dissolution].) The corporation has authority to consent to be sued, provided that the consent is explicit, is contained in a written contract or commercial document that names the corporation as a party, and is specifically approved by the Board of Directors, and that any recovery is limited to the corporation's assets. (5 SSCT 912 [BCC § 11-1003, subd. (3)].) The Articles express an intention that SFS, Inc. share in the Tribe's immunity (see 4 SSCT 805, 811), but the corporation may not waive that immunity to allow recourse beyond the corporation's separate assets (4 SSCT 800).

Because SFS, Inc. is tribally owned, under tribal law any "net income" that the corporation receives from its operations is required to be "distributed to the Tribe at such time as the Tribal Council may determine." (5 SSCT 914-915 [BCC § 11-1030, subd. (2)].) Tribal law does not further define "net income," and nothing in SFS, Inc.'s formation documents or tribal law specifies how any net income must be used once distributed.

3. The Payday Lenders' declaration concerning SFS Inc.'s operations

To support their renewed motion to quash service, OneClickCash and PreferredCashLoans relied primarily on information provided in Robert Campbell's April 2012 declaration. Campbell is a member of the Santee

Sioux Nation and the Santee Sioux Tribal Council, and Treasurer of SFS, Inc. (4 SSCT 762-763 [¶¶ 2, 7].)[14]

Campbell's declaration contained limited information about the day-to-day operations of SFS, Inc. Among other things, Campbell stated that during a four-year period between 2007 and 2011, the Tribal Council—the corporation's Board—did not attain a quorum on a regular basis for routine meetings. (4 SSCT 765 [¶ 14].) Campbell also declared that, from its inception, SFS, Inc. has contracted with third parties—most recently AMG Services, Inc. (AMG)—to provide employees to perform the corporation's core function of "loan servicing." (4 SSCT 763-764 [¶¶ 9-10].)[15] What precisely this entails, or how much it affects net revenues flowing to the Tribe, is not discussed.[16] Campbell stated that "SFS[, Inc.]'s loan transactions . . . are approved daily by an SFS[, Inc.] officer or employee at which time the loans are 'consummated.'" (4 SSCT 764 [¶ 10].) He did not explain what constitutes approval or consummation, and whether it involves any substantive review of individual loans or of SFS, Inc.'s loan practices.

Campbell did not provide information on any required distributions from SFS, Inc. to the Tribe. He declared summarily that the payday lending revenues from SFS, Inc. "assist" in funding the Tribe's "operations, expenditures and social welfare programs." (4 SSCT 765 [¶ 13].)

Campbell stated that "SFS[, Inc.] does not currently actively issue loans under the trade name 'Preferred Cash Loans,' although it has the

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[14] Campbell is also a defendant in the FTC action.

[15] AMG is a defendant in the FTC action.

[16] AMG's fees are likely substantial. In 2011 alone, AMG reported to the State of Kansas that well over $20.5 million in employee wages were paid to 14 people, six of whom have the last name of "Tucker." (20 CT 4670.)

ability to utilize the trade name in the future, should it determine to reinstitute its use." (4 SSCT 764-765 [¶ 12].)

4. Evidence concerning the Payday Lenders' actual operations

In opposition to the renewed motion to quash, the People submitted evidence that SFS, Inc. was, in fact, neither closely connected with nor actually controlled by the Tribe. The People relied in part on documents obtained by the FTC, and FTC investigator Victoria M. L. Budich's explanation of those documents. (18 CT 4149-4191 [text]; 18 CT 4193 through 24 CT 5758 [exhibits].)[17] Budich's investigation revealed a network of payday lending and other businesses that had associations with third-party individuals Scott Tucker and his brother Blaine Tucker, among others. (18 CT 4149-4150, 4160-4161 [¶¶ 4, 34, 36].)[18] Both Scott and Blaine Tucker are or were associated with AMG and a number of other companies. (*Id.*)

Budich reviewed bank records and some 10,000 check images for payments made among the persons and entities in the payday lending network. (18 CT 4168-4170 [¶¶ 61-64].) Either Scott or Blaine Tucker was an authorized signatory for every account in the network, and one of the Tuckers signed every check that Budich reviewed. (18 CT 4168 [¶ 61]; 21 CT 5124 through 22 CT 5127; 18 CT 4170 [¶ 64].) Both Tuckers were authorized to sign checks in SFS, Inc.'s name. (22 CT 5220-5221 [corporate certificate of authority]; see also 3 SSCT 635 [Mock Decl., ¶ 6

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[17] The trial court overruled the Payday Lenders' objection to submission of the Budich declaration and attached exhibits. (24 CT 5755.) The information from the FTC investigation was part of the record before the Court of Appeal.

[18] Blaine Tucker, now deceased, was also a defendant in the FTC action.

(A)(B)].) The FTC's investigation showed that the SFS, Inc. dba OneClickCash made payments not only to AMG, but to a substantial number of other companies. (18 CT 4169 [¶ 62]; 22 CT 5129 [Ex. CC].) These included companies with no apparent relation to loan servicing, and companies associated with the Tuckers, including, for example, Level 5 Motor Sports. (*Ibid.*) The complicated flow of revenues from payday loan customers, including those of OneClickCash, through the payday loan network identified by the FTC, and Scott Tucker's relationship to various entities in that network, are summarized graphically in Budich's Exhibits CC and AS. (18 CT 4161, 4169 [¶¶ 35, 62]; 20 CT 4644 [Ex. AS]; 22 CT 5129 [Ex. CC]; see Attachment at pp. 2-10.)

C. MNE Services, Inc.

1. Public information regarding MNE Services, Inc.'s ownership and use of marks Ameriloan, UnitedCashLoans, and USFastCash

In September 2006, Scott Tucker's company, CLK, conveyed the trademarks for Ameriloan, UnitedCashLoans, and USFastCash to a business named "TFS Corp." (23 CT 5547-5549, 24 CT 5714-5716, 5744-5746.) In early March 2012, approximately two months before the superior court's ruling on the renewed motion to quash, TFS Corp. assigned the three trademarks to MNE Services, Inc., which remains the current owner. (RJN, Exs. F, G, H.)[19]

When the complaint was filed, the websites for these three businesses reflected only their trade names. (4 SSCT 729-733 [Mock Decl.], 735-738,

[19] Budich's investigation, described in her March 15, 2012 declaration, apparently was completed before TFS Corp.'s transfer of the marks to MNE Services, Inc. (See 18 CT 4189-4191.)

742-751.) Currently, the websites claim an affiliation with the Miami Tribe through MNE Services, Inc. (RJN, Exs. A-C.)[20]

2. MNE Services, Inc.'s creation, formation documents, and governing laws

In May 2005, the Miami Tribe created Miami Nation Enterprises, a corporation wholly owned by the Tribe. (6 SSCT 1256-1257.)[21] Its stated purpose, among other things, is to "provid[e] for the economic development of the Tribe through tribal business activities and governmental powers, to provide opportunities for tribal members and other persons residing within the tribal jurisdiction." (6 SSCT at 1259.)[22] The Tribe as shareholder is not liable for the obligations of Miami Nation Enterprises. (7 SSCT 1452 [Ordinance, § 15.3.3, subd. (b)].)

In August 2008, the Board of Directors of Miami Nation Enterprises created a new corporation, MNE Services, Inc. (6 SSCT 1315.) MNE Services, Inc.'s stated purposes include "stimulat[ing] the Tribe's economy" (6 SSCT 1316 [art. II]) and, more specifically, "further[ing] the

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[20] The People argued before the Court of Appeal that MNE Services, Inc. was not an arm of the Miami Tribe. (See, e.g., Appellant's Opening Brief (Court of Appeal) at pp. 9-10.) The Payday Lenders' presentation to the court effectively conflated MNE Services, Inc. with a separate corporation, Miami Nation Enterprises. (See, e.g., Respondents' Brief (Court of Appeal) at pp. 25-26.) This confusion is reflected in the Court of Appeal's Opinion, which at one point refers to the business operating the Payday Lenders as "MNE/MNE Services Inc." (Opinion at p. 8.) The People continue to focus on the relevant entity—MNE Services, Inc.

[21] The citations to documents in this subsection are largely to the exhibits of the declaration of Don Brady. (See 6 SSCT 1213-1220 [text of declaration]; 6 SSCT 1222 through 7 SSCT 1559 [exhibits].)

[22] Miami Nation Enterprises' current website states that it operates eight companies, including two casinos. The website does not mention MNE Services, Inc. or payday lending operations. See <http://mn-e.com/companies.php> [as of July 24, 2014].

financial lending business of Miami Nation Enterprises." (6 SSCT 1322.) According to the declaration of Don Brady, the CEO of the Business Management Division of Miami Nation Enterprises, MNE Services, Inc. took over the payday lending business previously operated by TFS Corp. (6 SSCT 1216 [¶¶ 9-10].)[23]

Miami Nation Enterprises is the sole shareholder of MNE Services, Inc. (6 SSCT 1318 [art. VIII].) MNE Services, Inc.'s Board of Directors consists of three people appointed by the CEO of Miami Nation Enterprises. (6 SSCT 1318 [art. VII].) MNE Services, Inc.'s bylaws contain additional details regarding meeting requirements and duties for the corporation's Board of Directors, but do not address the relationship, if any, between the Board of MNE Services, Inc. and the Tribe. (17 CT 4074-4079.)

Pursuant to its Articles and the Tribe's Business Corporation Ordinance, MNE Services, Inc. has the usual attributes of a corporation, including limited liability and separateness from its shareholder, Miami Nation Enterprises. (See, e.g., 6 SSCT 1317-1318 [art. V, subd. (D)]; 7 SSCT 1456 [§ 15.10], 1452-1453 [§ 15.3.3, subd. (b)].) MNE Services, Inc. also possesses typical corporate powers. It can sue and be sued in its own name, acquire and sell property, exercise all powers necessary or convenient to do business, conduct business under an assumed name, enter into contracts, and borrow money. (7 SSCT 1375-1377 [Business Corporation Ordinance, § 4.1]; 6 SCCT 1317 [art. III, subd. (C)].)

In forming MNE Services, Inc., Miami Nation Enterprises expressed its intent that the Tribe's sovereign immunity be further extended to the new subsidiary corporation. (6 SSCT 1317-1318 [art. IV].) To the extent

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[23] Brady is a defendant in the FTC action.

that immunity is effectively extended, MNE Services, Inc. is not authorized to waive it. (6 SSCT 1318 [art. V, subd. (D)].)

Under tribal law, on the request of the Tribe's Business Committee, the Miami Nation Enterprises' Board is required to cause its subsidiary, MNE Services, Inc., to distribute to Miami Nation Enterprises "all or such portion of the net income of the subsidiary as may be requested by the Business Committee." (7 SSCT 1455 [§ 15.8.2].)[24] Miami Nation Enterprises, Inc.'s "net income" in turn must be distributed to the Tribe. (*Ibid.*) While the Miami Nation Enterprises Act states that revenues accruing to the Tribe from the operations of Miami Nation Enterprises allow the Tribe to address "pressing matters," the People's review reveals no specified use for such revenues set out in the Act. (6 SSCT 1301 [§ 102, subd. (c)].)

3. The Payday Lenders' declarations concerning MNE Services, Inc.'s operations

Miami Nation Enterprises submitted two declarations in support of the renewed motion to quash service and dismiss the People's complaint, one by Brady and the other by Thomas Gamble, Chief of the Miami Tribe. (6 SCCT 1213-1220 [text of Brady Decl.], 1208-1211 [text of Gamble Decl.].)

Like SFS, Inc., MNE Services, Inc. also contracted with AMG for the "purpose of providing employees to service the loans . . . ." (6 SSCT 1216-1217 [¶ 12].) Brady declared that the Miami Tribe formed AMG for this purpose. (*Ibid.*) Brady's declaration contains, however, virtually no information about AMG's operations. Evidence from the FTC's investigation strongly suggests that the Tuckers controlled AMG's financial operations. (See, e.g., 18 CT 4170-4174 [¶¶ 65-72]).) Brady stated

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[24] The Business Committee is comprised of the Tribe's five officers. (6 SSCT 1224 [Const., art. VI].)

summarily that he or "another MNE [Miami Nation Enterprises] executive" "processes and approves" the loans "pursuant to criteria that MNE has approved," but provided no additional details concerning the financial or managerial arrangement between Miami Nation Enterprises, MNE, Services, Inc. and AMG. (6 SSCT 1217 [¶ 14].)

Brady declared that "[a]ll profits that MNE [Miami Nation Enterprises] and MNE Services, Inc. receive from their loan business are utilized for the benefit of the Miami Tribe, and are distributed to many different programs and for many different services." (6 SSCT 1218 [¶ 18].) He provided, however, no specific details concerning the flow of revenues from MNE Services, Inc. to the Tribe. What any revenue stream from MNE Services, Inc. to the Tribe represents as a portion of the Tribe's total income is not clear from the record. Nor does the record provide any information concerning the dollar or percentage contribution that funds generated by MNE Services, Inc. provide to any identified tribal operation or expenditure.

Chief Gamble declared that he is "intimately familiar" with the Tribe's "budget, finances, programs, and attendant financial requirements." (6 SSCT 1209 [¶ 5].) He stated summarily that "[p]rofits from the Tribe's online short-term loan company support many Tribal programs and services and have contributed significantly to Tribal development" and to the Tribe's general fund. (6 SSCT 1209 [¶ 7], 1210 [¶ 9].) He does not further describe the amounts the Tribe received from payday lending or any specific programs that are actually supported by payday lending revenues.

4. Evidence concerning the Payday Lenders' actual operations

Evidence uncovered by the FTC's and the Department's investigations raised serious questions concerning who was in actual control of the Payday Lenders and MNE Services, Inc.

Bank documents indicate that third parties Scott and Blaine Tucker were authorized to sign checks in the name of various entities doing business as UnitedCashLoans and USFastCash. (See 18 CT 4169-4170 [¶ 63-64]; 22 CT 5228-5229, 5185-5186.)[25] On the creation of MNE Services, Inc. in 2008, its Board passed a resolution providing that the CEO and CFO were the only authorized signatories on the corporation's bank accounts. (17 CT 4080.) Nonetheless, either Scott or Blaine Tucker signed all checks drawn on MNE Services, Inc.'s account during the sample two-month period analyzed by the Department's examiner. (3 SSCT 636 [Mock Decl. ¶ 6H].)

The FTC's investigation further showed that businesses behind the relevant payday lending marks (Ameriloan, UnitedCashLoans, and USFastCash) made payments not only to AMG, but to a substantial number of other companies, including companies with no apparent relation to loan servicing, and companies associated with the Tuckers. (17 CT 4169 [¶ 62]; 22 CT 5129 [Ex. CC]; 20 CT 4644 [Ex. AS]; see Attachment at pp. 2-10.) Further, the FTC investigator noted payments from Scott Tucker's businesses to MNE Services, Inc. (18 CT 4179 [¶ 81].) Bank records revealed that between January 2008 and March 2011, Black Creek Capital Corp., owned by Scott Tucker, made payments to MNE Services, Inc., MNE Services, Inc. dba Ace Cash Services, and MNE Services, Inc. dba Star Cash Processing, which totaled over $3.3 million dollars. (*Ibid.*) The reason for these payments is unexplained in the current record.

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[25] It is not clear why the account authorizations remained in the names of "MTE Financial Services Inc." and "TFS Corp." after Miami Nation Enterprises created MNE Services, Inc. to take over the payday lending business. (See CT 6 SSCT 1216 [¶ 10].)

VI. THE COURT OF APPEAL AFFIRMS DISMISSAL OF THE CASE AGAINST THE PAYDAY LENDERS ON THEIR RENEWED MOTION TO QUASH

On January 21, 2014, the Court of Appeal issued its opinion affirming the superior court's dismissal. The procedural background of the case predating the renewed motion to quash is detailed in the Opinion at pages 2 through 7. While the superior court had applied a two-factor arm-of-the-tribe test adopted from *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 638 (*Trudgeon*), the Court of Appeal surveyed the case law and articulated its own multi-factor test for determining the Payday Lenders' status as arms of the Miami Tribe and the Santee Sioux Nation.[26] The Court of Appeal gave predominant, if not dispositive, weight to the purely formal factors that the tribal entities were created by tribal resolution and according to tribal law. It concluded that the Payday Lenders were arms of the Tribes and entitled to invoke the Tribes' sovereign immunity.

The People petitioned for review, which this Court granted on May 21, 2014.

LEGAL DISCUSSION

I. STANDARD OF REVIEW

Whether the Court of Appeal applied the correct legal standard in determining the Payday Lenders' status as arms of tribes, and whether it properly placed the burden of proof on the People rather than on the entities asserting arm-of-the-tribe status, are questions of law subject to this Court's independent review. (See *Estate of Joseph* (1998) 17 Cal.4th 203, 216; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 250 fn. 11.) Whether the

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[26] The court's reasoning is discussed in greater detail in Legal Discussion III.B., below.

evidence as it exists in the current record weighs in favor of or against arm-of-the-tribe immunity is, similarly, subject to this Court's independent review. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 [mixed question of fact and law reviewed independently when questions of law predominate].)

II. SUMMARY OF ARGUMENT

The flaw in the Court of Appeal's decision is a common one in the arm-of-the-tribe case law: The court did not consider the fundamental purposes of sovereign immunity in articulating and applying an arm-of-the-tribe test. Sovereign immunity serves to protect the sovereign's fisc and its "dignity"—that is, the sovereign's right to direct its governmental affairs. Whether immunity should be extended to an entity that is not itself the tribe should turn on whether and to what extent such extension would serve these sovereign interests. To fashion a test that will function in this manner, this Court should look to the law governing the analogous question of when state sovereign immunity extends to an entity that is not itself the state.

To begin with, the arm-of-the-state doctrine suggests that the burden of proof must rest with the entity claiming immunity. Virtually every court that has examined the matter, including the Ninth Circuit Court of Appeals, has placed the burden of proving arm-of-the-state status squarely on the entity seeking to invoke the state's immunity. They hold that arm-of-the-state immunity is best viewed as an affirmative defense, and note the unfairness of requiring a plaintiff to prove a negative—especially when the defendant is the party with ready access to the relevant information. There is no reason for reaching a different result in the directly analogous context of an entity asserting arm-of-the-tribe status.

Turning to substance, three fundamental considerations, bearing on protection of the sovereign's fisc and respect for its governmental

autonomy, are relevant to the arm-of-the-state analysis and, similarly, should be relevant to arm-of-the-tribe analysis. These are:

(1) The financial relationship between the entity and the sovereign, including whether the sovereign fisc would be put at risk if the entity were unable to invoke the sovereign's immunity;

(2) The function and purpose of the entity, including whether the entity serves central governmental functions; and

(3) Whether the entity is under the sovereign's legal and actual governmental control or instead operates independently.

Applying these considerations, and the factors relevant under each, to the facts of this case, the evidence as it stands tips heavily against immunity for both SFS, Inc. and MNE Services, Inc., operating in the names of the Payday Lenders. The entities' corporate form already shields the tribal treasuries from liability. Payday lending, marketed over the Internet to the general public, is not a central governmental function, and the present record does not establish that the entities here serve such a function simply by providing unspecified revenues. And the existing evidence falls far short of demonstrating actual control of these entities by the tribal governments.

To be clear, the People agree that the fact that entities are commercial in nature does not end the inquiry into whether their activities serve central governmental functions. It should, however, trigger additional scrutiny to ensure that extending immunity to an essentially commercial entity would in fact serve tribal governmental interests, rather than primarily benefit private third parties. Here, beyond summary declarations asserting that payday lending revenues assist in funding tribal services, the defendant entities have submitted no evidence to establish that payday lending revenues provide more than de minimis support for tribal governmental functions. There is no evidence in the current record that a substantial

portion of the Payday Lenders' gross revenues flows to the Tribes, or that payday lending generates stable and substantial revenues funding central tribal governmental operations or services.

Similarly, the current record contains no evidence to substantiate the defendant entities' assertions that the Tribes actually exercise control over these business operations. On the contrary, the available evidence, including evidence obtained from the FTC's investigation, strongly indicates that private third parties actually continue to manage the Payday Lenders' operations and control their purse strings—just as they did before the paper connections were established—without any effective tribal governmental control or oversight, and overwhelmingly to their own financial advantage.

If, as the People request, this Court announces a new rule to govern determination of arm-of-the-tribe status, the Payday Lenders should be afforded a reasonable opportunity to meet their burden of proof under that rule. The People, similarly, should be afforded an opportunity to respond and conduct any appropriately focused discovery that might be necessary to test new factual assertions. Accordingly, the People request that the Court remand the matter for proceedings consistent with the Court's opinion.

III. ANALYSIS

A. There is No Nationally Coherent Arm-of-the-Tribe Doctrine

There is no nationwide consensus concerning how to assess arm-of-the-tribe status. In many cases, for example, courts have not addressed the threshold question of who bears the burden of proving whether or not an entity with tribal associations may invoke the tribe's immunity, despite the potential importance of that issue. (See *Engle v. Isaac* (1982) 456 U.S. 107, 149 [noting that placement of burden of proof may be decisive of outcome].) At least one court explicitly placed the burden of proof on the

entity claiming immunity as an arm of the tribe. (*Gristede's Foods, Inc. v. Unkechuage Nation* (E.D.N.Y. 2009) 660 F.Supp.2d 442, 466.) In contrast, in *Cash Advance and Preferred Cash Loans v. State* (Colo. 2010) 242 P.3d 1099 (*Cash Advance*), the Colorado Supreme Court expressly placed the burden on the plaintiff—there, the state enforcer. (*Id.* at p. 1102; see also *id.* at p. 1119 [Coats, J., concurring in part and dissenting in part].)

Similarly, state and federal courts have developed a variety of multi-factor tests to determine arm-of-the-tribe status. For example, in *Ransom v. St. Regis Mohawk Education & Community Fund* (N.Y. 1995) 86 N.Y.2d 553, 558-560, New York's highest court listed nine relevant factors, including whether the "organization's purposes are similar to or serve those of the tribal government," and placed special emphasis on factors relating to the financial relationship between the entity and the tribe. In *Runyon ex rel. B.R. v. Association of Village Council Presidents* (Alaska 2004) 84 P.3d 437, 441, the Alaska Supreme Court held that an entity cannot be an arm of the tribe where the tribe is not legally liable for the entity's debts, regardless of other factors. And in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d 1173 (*Breakthrough*), the Tenth Circuit set out six non-exclusive factors that it deemed "helpful," expressly rejecting Alaska's approach in *Runyon* and holding that lack of tribal liability was not dispositive. (*Id.* at p. 1187.)

Even where courts identify similar relevant factors, differences in how those factors are applied, the weight given to certain factors, and whether certain factors should be considered dispositive have resulted in "conflicting standards."[27] The lack of a uniform body of law has made

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[27] Mayle, *Usury on the Reservation: Regulation of Tribal-Affiliated Payday Lenders* (2011) 31 Rev. Banking & Fin. L. 1053, 1074, 1076.

litigation against entities with asserted tribal affiliations expensive, inefficient, and unpredictable.[28]

B. The California Courts of Appeal Have Developed Conflicting Arm-of-the-Tribe Tests

The arm-of-the-tribe doctrine in California state courts reflects a similar lack of cohesion. This Court, while it has acknowledged the doctrine's existence (see *Agua Caliente, supra,* 40 Cal.4th at pp. 247-248), has not previously addressed how to assess an assertion of arm-of-the-tribe immunity.

The California appellate courts that have addressed the burden of proof have required—without substantial discussion—that the plaintiff prove that an entity with ostensible tribal affiliation is not an arm of the tribe. (*American Property Management Corp. v. Superior Court* (2012) 206 Cal.App.4th 491, 498 (*American Property*); Opinion at p. 12; see also *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369 (*Barona Valley*).)[29]

As to the relevant factors and their relative importance, the Courts of Appeal have taken differing approaches. The Fourth Appellate District, Division Two, was the first to address the substance of the arm-of-the-tribe doctrine, in *Trudgeon, supra,* 71 Cal.App.4th 632, a personal injury suit against a casino. (See *id.* at p. 637 [noting lack of California authority].) The *Trudgeon* court looked to the Minnesota Supreme Court's then-recent decision in *Gavle v. Little Six, Inc.* (Minn. 1996) 555 N.W.2d 284, which attempted to synthesize the divergent arm-of-the-tribe case law into three

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[28] Martin, *supra*, 69 Wash. & Lee L. Rev. at 778.

[29] In *Barona Valley*, the issue was not whether the casino was an arm of the relevant tribe, but whether the tribe had waived its immunity in its compact with the State of California. (*Barona Valley, supra,* at pp. 1366-1367.)

factors: "'1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.'" (*Id.* at pp. 638-639, quoting *Gavle, supra*, 555 N.W.2d, at p. 294.) Noting the importance of gaming in promoting tribal self-determination, the court determined that all three factors weighed in favor of the casino corporation's immunity. (*Id.* at pp. 640, 639-642.)

Two years later, the Third Appellate District considered the immunity of a tribally owned and operated casino in *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384 (*Redding Rancheria*). In that case, a casino employee filed a personal injury suit against her employer. (*Id.* at p. 386.) Citing the facts and holding of *Trudgeon*, the court concluded that the casino was immune as an arm of the tribe. (*Id.* at p. 389.)

In 2008, the Second Appellate District, Division Seven addressed arm-of-the-tribe immunity in an earlier phase of this case. (*Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81.) The court did not articulate a test, but merely noted that, as an outer boundary, the arm-of-the-tribe "doctrine . . . does not 'cover tribally chartered corporations that are completely independent of the tribe.'" (*Id.* at p. 97, citing *Agua Caliente, supra*, 40 Cal.4th at pp. 247-248.) The court remanded the matter to the superior court to consider, after an evidentiary hearing, the criteria identified in *Trudgeon* and *Redding Rancheria.* (*Id.* at p. 98.)

Next, the Fourth Appellate District, Division One, considered whether a hotel corporation, connected to a tribe through an ownership chain that involved three layers of California limited liability companies, was entitled to invoke the tribe's immunity. (*American Property, supra*, 260 Cal.App.4th at p. 495.) Citing the Tenth Circuit's six-factor test in

Breakthrough, the *American Property* court examined a number of factors, but ultimately held that the fact that the corporation was formed under California law, rather than tribal law, was "dispositive." (*Id.* at p. 501; see also *id.* at p. 502, fn. 8; but cf. *id.* at pp. 509, 512-513 [Huffman, J., concurring, contending that, among other things, the "full extent and nature of the financial ties between the entities" and the tribe's interest in "self-determination through revenue generation" should be considered].)

In 2014, in this matter's second appearance before the Court of Appeal, Second District, Division Seven, the court surveyed the current state of the arm-of-the-tribe doctrine, discussing a number of cases including *Trudgeon*, *American Property*, and the Colorado Supreme Court's decision in *Cash Advance*. (Opinion at pp. 14-17.) While the court ostensibly considered a number of factors in holding that "MNE" and SFS, Inc. were immune from the People's enforcement action (*id.* at pp. 19-25), it stated that the Tribes' "method and purpose" in creating the entities were the "most significant" (*id.* at p. 20). It then analyzed "method and purpose" primarily by observing that, as a formal matter, the entities were created under tribal law, and summarily asserting that the entities supported tribal economic development. (See *id.* at pp. 19-21.) The court noted that the entities' incorporation would insulate the Tribes' treasuries from the entities' obligations, but stated that this fact did "not appear to be significant." (*Id.* at p. 20.)

C. The Court Should Bring Arm-of-the-Tribe Doctrine Into Alignment With Arm-of-the-State Doctrine

To resolve the conflicts in current arm-of-the-tribe case law, the People propose that this Court look to the analogous and better-developed doctrine governing arm-of-the-state immunity.

1. Summary of arm-of-the-state doctrine

"It has long been settled" that the sovereign immunity reserved by states under the federal Constitution "encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." (*Regents of the Univ. of Cal. v. Doe* (1997) 519 U.S. 425, 429 (*Regents*).) The United States Supreme Court has addressed on numerous occasions whether a state-created or state-related entity shares in the state's immunity. (See, e.g., *Auer v. Robbins* (1997) 519 U.S. 452, 456, fn. 1 (*Auer*) [board of police commissioners not immune]; *Regents, supra,* 519 U.S. at pp. 431-432 [state university as manager of laboratory immune]; *Hess v. Port Auth. Trans-Hudson Corp.* (1994) 513 U.S. 30, 32 (*Hess*) [bistate railway authority formed by compact with commissioners selected by each state not immune]; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979) 440 U.S. 391, 400-402 (*Lake Country*) [regional planning agency formed by compact not immune].) It is not sufficient simply that an entity "exercise a slice of state power." (*Lake Country,* at p. 401.) Rather, a court must examine "[i]ndicators of immunity" to determine whether the entity, on balance, is an arm of the state. (*Hess*, at p. 44.)

While the United States Supreme Court has not articulated a specific test for assessing arm-of-the-state status, the facts and circumstances it has considered relevant fall generally into categories that reflect the main purposes of sovereign immunity. These purposes are shielding the sovereign treasury and respecting the dignity and governmental autonomy inherent in sovereign status. (*Federal Maritime Com. v. South Carolina State Ports Auth.* (2002) 535 U.S. 743, 760, 765; see also *Sossamon v. Texas* (2011) __ U.S. __ [131 S.Ct. 1651, 1659].) The Court has considered, for example, whether the state is legally responsible for the entity's liabilities or debts (*Auer, supra*, 519 U.S. at p. 456, fn. 1; *Regents,*

supra, 519 U.S. at p. 430; *Hess, supra*, 513 U.S. at pp. 45-46), or whether, instead, the entity is "fiscally independent" (*Hess,* at p. 45). Whether a money judgment against the entity would be enforceable against the state is of "considerable importance" in the evaluation. (*Regents,* at p. 430.) Further, the Court has considered evidence of the state's control over the entity (*Auer,* at p. 456, fn. 1; *Hess,* at p. 44), and whether the entity serves a state function (*Hess,* at p. 45). And the Court also has taken into account the state's intent to create either an instrumentality that shares its immunity or a "separate legal entity." (*Lake Country, supra*, 440 U.S. at pp. 401-402.)

The lower federal courts have articulated a number of tests reflecting these same considerations. The Ninth Circuit, for example, has held courts should consider whether a money judgment against an entity would be satisfied out of state funds, whether the entity performs "central governmental functions," and various factors related to corporate structure and state control. (See *Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, 201 [setting out factors].) Of the various factors, whether the state is legally responsible for the entity's debts and obligations is generally considered to be the most important. (*Durning v. Citibank, N.A.* (9th Cir. 1991) 950 F.2d 1419, 1424.) Legal fiscal responsibility is not, however, dispositive. (Compare *ITSI T.V. Productions, Inc. v. Agricultural Assns.* (9th Cir. 1993) 3 F.3d 1289, 1293 (*ITSI*) [state fair was not an arm of the state where it did not serve "central governmental functions" and operated independently, and state was not legally liable for its obligations] with *Alaska Cargo Transport, Inc. v. Alaska Railroad Corp.* (9th Cir. 1993) 5 F.3d 378, 381 (*Alaska Cargo*) [railroad serving as a "lifeline" for state residents was an arm of the state, even though state was not legally liable for its obligations].)

The indicators of immunity considered in these cases can be organized into three general considerations reflecting the fundamental purposes of sovereign immunity:

(1) The financial relationship between the entity and the state, including whether a money judgment would be satisfied out of state funds;

(2) Whether the entity performs central governmental functions such that an action or judgment against the entity would effectively interfere with state governmental prerogatives; and

(3) Whether the entity is under the state's legal and actual control, or instead is independent.

The Ninth Circuit, like most other federal courts, has determined that the burden to prove arm-of-the-state status rests on the entity seeking to assert the state's immunity. (*Del Campo v. Kennedy* (9th Cir. 2008) 517 F.3d 1070, 1075; *ITSI, supra,* 3 F.3d at p. 1292; see also *Woods v. Rondout Valley Central School Dist. Bd. of Ed.* (2d Cir. 2006) 466 F.3d 232, 237 [citing consistent out-of-circuit cases]; but see *U.S. ex rel. Oberg v. Pennsylvania Higher Ed. Assistance Agency* (4th Cir. 2014) 745 F.3d 131, 142.)

2. Because tribal and state sovereignty are fundamentally similar, it is reasonable to consider arm-of-the-state doctrine in applying arm-of-the-tribe doctrine

It is reasonable for this Court to look to arm-of-the-state authority to help give appropriate form and content to arm-of-the tribe doctrine. A number of courts have noted the similarities between the doctrines, although most arm-of-the-tribe cases make only passing reference to arm-of-the-state precedent. (See, e.g., *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047; *Gristede's Foods, Inc. v. Unkechuage Nation, supra*, 660 F.Supp.2d at p. 465; *Runyon ex rel. B.R. v. Assn. of Village Council Presidents, supra,* 84 P.3d at p. 440; see also Opinion at p. 13.) In

Cash Advance, the Colorado Supreme Court rejected the argument of fourteen amici states that the court should look to arm-of-the-state law for guidance in fashioning an arm-of-the-tribe test, but the court's only stated justification was that "the inherent nature of tribal sovereignty . . . requires us to distinguish tribal sovereign immunity from state sovereign immunity." (*Cash Advance*, *supra*, 242 P.3d at p. 1110, fn. 11.) A closer examination of the nature of both tribal and state sovereignty establishes the wisdom of bringing the doctrines into alignment.

Tribal sovereignty certainly differs from state sovereignty in important respects. The process of forming the United States had different effects on state and tribal sovereign powers. The tribes, "separate sovereigns pre-existing the Constitution," became "domestic dependent nations" (*Michigan v. Bay Mills Indian Community* (2014) __ U.S. __ [134 S.Ct. 2024, 2030] (*Bay Mills*)), whose immunity may be abrogated only by Congress (*id.* at p. 2039). In contrast, the states, on ratification of the Constitution, generally entered the Union with their sovereignty intact. (*Federal Maritime Com. v. South Carolina State Ports Authority, supra,* 535 U.S. at p. 751.) In ratifying the Constitution, however, each state surrendered a portion of its immunity by, for example, consenting to certain suits brought by sister states. (See *Alden v. Maine* (1999) 527 U.S. 706, 755; see also *Bay Mills*, at p. 2031.) This negotiated limit on state sovereignty does not apply to tribes, which were not parties to the Constitutional Convention and did not "cede[] their immunity against state-initiated suits." (*Bay Mills, supra*, at p. 2031.)

Despite these and other significant differences, the ultimate source of state and tribal immunity is the same. Simply, "[i]t is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." (*Bay Mills, supra*, 134 S.Ct. at p. 2030 [quoting The Federalist No. 81 regarding tribal immunity]; see also *Sossamon v. Texas*, *supra*, 131 S.Ct. at p. 1657

[quoting The Federalist No. 81 regarding state immunity].)[30] Such immunity shields the sovereign from suits in courts that are not under its jurisdiction, leaving parties with claims to present them, if the sovereign's laws permit, in the sovereign's own tribunals. (See *Hess, supra*, 513 U.S. at p. 39; see also *Redding Rancheria, supra*, 88 Cal.App.4th at p. 390 [noting existence of tribal mechanisms to resolve civil disputes].)[31]

The United States Supreme Court precedent that has developed around the immunity of tribes and states accordingly reflects a preference for like treatment "in like circumstances" and an aversion to "asymmetry." (See *Bay Mills, supra*, 134 S.Ct. at p. 2042 [Sotomayor, J., concurring].) Treating states and tribes similarly when extending immunity to their instrumentalities shows appropriate respect for both sovereigns. (*Id.* [noting that equal treatment serves comity].)

3. An entity claiming arm-of-the-tribe status should bear the burden of proof

In *ITSI*, the Ninth Circuit explained why it is both permissible and warranted to place the burden of proof for establishing arm-of-the-state status on the entity claiming immunity. The court observed that sovereign immunity is not a true jurisdictional bar; a court is not required to raise and resolve immunity on its own motion, and it may be expressly waived or forfeited by failure to assert. (*ITSI, supra*, 3 F.3d at p. 1291.) The court concluded that an assertion by an entity that it is an arm of the state,

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[30] As the Court noted in *Alden v. Maine, supra,* 527 U.S. at p. 713, the shorthand of "Eleventh Amendment immunity," while "convenient" is "something of a misnomer, for the sovereign immunity of the States . . . is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . . ."

[31] Alternatively, a plaintiff may often bring an action against a sovereign's officials or employees seeking injunctive relief. (*Bay Mills, supra*, 134 S.Ct. at p. 2035; *Ex parte Young* (1908) 209 U.S. 123.)

"whatever its jurisdictional attributes, should be treated as an affirmative defense." (*Ibid.*) "Like any other such defense," arm-of-the-state status "must be proved by the party that asserts it and would benefit from its acceptance." (*Ibid.*) Moreover, "fairness" requires placing the burden on the entity claiming immunity, especially where "a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state." (*Id.* at p. 1292.) In that instance, knowledge of the "true facts" will lie within the knowledge of the entity, which "ought to bear the burden of proving the facts that establish its immunity . . . ." (*Ibid.*)

The same reasoning applies where an entity asserts that a suit against it is in effect a suit against a tribe. That entity should bear the burden of proving its arm-of-the-tribe status.

4. The same three fundamental considerations should govern the determination of both arm-of-the-state and arm-of-the-tribe status

The three fundamental considerations that govern arm-of-the-state analysis—financial relationship, purpose and function, and sovereign control—should similarly govern arm-of-the-tribe analysis. Factors relevant to these considerations should remain in or be added to the arm-of-the-tribe analysis, adapted as appropriate to fit the tribal context. Factors that are not should be disregarded.

The test that emerges recognizes that sovereign immunity is an attribute of the sovereign and its own activities. Thus, a sovereign may not "market" this aspect of its sovereignty, even if substantial economic benefits might result. (See *Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134, 155 (*Colville*) [prohibiting tribe from "market[ing]" exemption from state taxation]; see also, e.g., *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.* (2005) 544 U.S. 197, 224

[immunity from state taxation is "a core incident of tribal sovereignty"].) Rather, for an entity distinct from the sovereign itself to be entitled to assert the sovereign's immunity from suit, there must be sufficient identity between the entity and the sovereign to make the sovereign the "real, substantial party in interest" in the suit. (See *Alaska Cargo*, *supra*, 5 F.3d at p. 380; see also *American Property*, *supra*, 206 Cal.App.4th at p. 506.) Necessarily, this identity must exist not only in form, but in substance.

a. Financial relationship

Courts should consider, for example, whether the entity generates its own revenue or instead receives funds from the sovereign treasury; whether the entity has the power to obligate the tribe's funds; and whether the tribe is legally or practically liable for the entity's debts and obligations. (*American Property, supra*, 206 Cal.App.4th at p. 506, citing *Breakthrough, supra*, 629 F.3d at p. 1181; *see also ITSI*, *supra*, 3 F.3d at pp. 1292-1293 [noting state's lack of legal liability for state fair's obligations]; *Alaska Cargo, supra*, 5 F.3d at p. 381 [noting state's practical fiscal responsibility for "lifeline" railroad should it face financial need].)

The Court of Appeal erred in summarily dismissing the relevance of the Tribes' lack of liability for the payday lending corporations' obligations. (See Opinion at p. 21.) As in arm-of-the-state cases, a tribe's legal liability, or lack of liability, for the entity's obligations, though not dispositive, is an important consideration. This follows from sovereign immunity's central fisc-protecting purpose. "'The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.'" (See *American Property, supra*, 206 Cal.App.4th at p. 506, quoting *Ransom v. St. Regis Mohawk Educ. & Community Fund, supra,* 86 N.Y.2d at pp. 559-560.) In contrast, if the entity is structured to shield the tribe from liability, this tips the balance away from immunity. (See *American Property,* at p. 506.)

Following the lead of other courts, the Court of Appeal in this case held that if an entity's "method of creation" was governed by tribal rather than state law, this fact, standing alone, weighed strongly in favor of immunity. (Opinion at pp. 19-20; see, also *American Property, supra*, 206 Cal.App.4th at p. 501, citing *Cash Advance, supra*, 242 P.3d at p. 1110; *Wright v. Colville Tribal Enterprise Corp.* (Wash. 2006) 147 P.3d 1275, 1279 (*Wright*).) The inquiry should not hinge, however, on the source of the applicable law. Instead, a court should look to the substance and operation of that law—whether tribal or state—to determine the nature of the relationship between the entity and the sovereign. (See *Alaska Cargo, supra*, 5 F.3d at p. 380 [analyzing Alaska statutes governing liability of Alaska Railroad Corporation]; see also *Wright, supra*, 147 P.3d at pp. 1277-1278 [analyzing Colville tribal code provisions governing operation of governmental tribal corporations]; *American Property, supra*, 206 Cal.App.4th at p. 503 [analyzing California statutes governing creation and liability of California limited liability companies].)[32]

b. Function and purpose

Whether an entity serves a central governmental function or purpose is also relevant to the entity's status as an instrumentality of the sovereign. (See *American Property, supra*, 206 Cal.App.4th at p. 504; *Trudgeon, supra*, 71 Cal.App.4th at pp. 639-640; *Alaska Cargo, supra*, 5 F.3d at p. 381; c.f. *ITSI, supra*, 3 F.3d at p. 1293.) Where an entity provides services of a type "traditionally shouldered by tribal government," such as providing

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[32] Tribes may also form corporations under federal law pursuant to section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477. (See, e.g., Atkinson and Nilles, *Tribal Business Structure Handbook 2008* (Office of Indian Energy and Economic Development) at p. I-5, available at <http://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf> [as of July 24, 2014].

tribal members with housing or social services, the entity's purpose will generally tip toward immunity. (See *American Property,* at p. 504.) Less traditional, more commercial endeavors can also serve a "vital government function," weighing in favor of the entity being entitled to assert the sovereign's immunity. (See *Alaska Cargo,* at p. 381 [railroad served as "lifeline" for state's residents]; cf. *ITSI, supra*, 3 F.3d at p. 1294 [state fairs did not serve "central governmental functions"].) If, for example, a tribe established a corporation to generate renewable energy for on-reservation use and to sell excess power into the larger, interconnected grid, or to operate a gravel mine on tribal land to provide raw materials for reservation roads, those functions would weigh in favor of immunity.

It is also possible that a largely or purely commercial endeavor might serve central governmental functions simply by generating needed funds for important government services or operations. As Justice Sotomayor observed in her concurrence in *Bay Mills*, raising revenues through taxation is harder for tribes than for states. Accordingly, a tribal commercial enterprise may be "critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues.'" (*Bay Mills, supra*, 134 S.Ct. at p. 2043 [Sotomayor, J., concurring, internal quotation omitted]; see also Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue* (2004) 80 N.D. L. Rev. 759, 803.) Entities engaged in gaming on Indian lands under the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. §§ 2701-2721), for example, serve a "'unique role . . . in the economic life of here-to-fore impoverished Indian communities across this country.'" (*Trudgeon, supra*, 71 Cal.App.4th at p. 640, quoting *Gavle, supra*, 555

N.W.2d at p. 295.)[33] There may be other commercial enterprises that serve this same tribal revenue-generating purpose. In such cases, however, courts should consider whether the enterprise operates under conditions similar to those imposed by IGRA, designed to ensure that more than de minimis revenues flow back to the tribe and will be used for governmental purposes. (*Id.*; see also *Colville, supra*, 447 U.S. at p. 156; 25 U.S.C. § 2702.) An entity's bare declaration that some undisclosed amount of revenue flows back to a tribe to be used in unspecified ways—just as it would flow to any investor in any ordinary commercial venture—should not be sufficient to meet the entity's burden of proof.

c. Governmental control versus independence

Finally, in both arm-of-the-tribe and arm-of-the-state cases, courts must examine whether in form and in practice the entity is under the sovereign's substantial, actual control (suggesting the entity is an arm of the sovereign), or whether instead it is essentially independent (suggesting it is not). (See *American Property, supra*, 206 Cal.App.4th at p. 505; *Trudgeon, supra*, 71 Cal.App.4th at p. 641; *Alaska Cargo, supra*, 5 F.3d at p. 381.)

Borrowing from both tribe and state cases, factors that are relevant to this inquiry may include the nature of the sovereign's ownership of the entity, including whether the entity is wholly owned by the sovereign, and whether the sovereign's ownership interest is direct or indirect (*American Property, supra*, 206 Cal.App.4th at p. 505; *Trudgeon, supra*, 71

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[33] IGRA, "which governs all Indian gaming, requires that revenues from gaming be used only '(i) to fund tribal government operations or programs; [¶] (ii) to provide for the general welfare of the Indian tribe and its members; [¶] (iii) to promote tribal economic development; [¶] (iv) to donate to charitable organizations; or [¶] (v) to help fund operations of local government agencies . . . .'" (*Trudgeon, supra*, 71 Cal.App.4th at p. 640, citing 25 U.S.C. § 2710(b)(2)(B).)

Cal.App.4th at p. 639); whether the entity can sue and be sued and take title to, convey, and encumber property in its own name (*Alaska Cargo, supra*, 5 F.3d at p. 380); the extent of the sovereign's actual control over the appointment of the entity's board and officers (*id.* at p. 381; *Trudgeon,* at p. 639) and over the entity's business activities (*Alaska Cargo,* at p. 382); whether the entity is in fact managed by a private, third-party entity (*American Property, supra*, 206 Cal.App.4th at p. 505); whether the entity has its "own separate identity" (*ITSI, supra*, 3 F.3d at p. 1293); and, finally, whether the entity was intended by the sovereign to share in its immunity (*American Property,* at p. 505; see also *Lake County, supra*, 440 U.S. at pp. 401-402 [considering California and Nevada's lack of intent to confer immunity on regional planning agency and intent to create "separate entity"].)

To tip toward immunity, the tribe's control should be established both as a legal and "as a practical matter." (See *Trudgeon, supra*, 71 Cal.App.4th at p. 641.) Requiring actual tribal control ensures that, where an entity is held immune as an arm of the tribe, the dignity and autonomy being respected is genuinely that of the sovereign. It will also help ensure that, as a functional matter, if the entity engages in unlawful activity, appropriate plaintiffs will be able to seek an effective injunction against responsible tribal officials. (See *Bay Mills, supra*, 134 S.Ct. at p. 2035 [noting availability of such relief].)

D. Applying a Properly Realigned Arm-of-the-Tribe Test, the Payday Lenders Have Not Established Entitlement to Immunity on the Present Record

Applying the test proposed by the People to the evidence in the current record, neither SFS, Inc. (purportedly doing business as PreferredCashLoans and OneClickCash) nor MNE Services, Inc. (purportedly doing business as Ameriloan, UnitedCashLoans, and

USFastCash) has satisfied its burden to show that it is an arm of the relevant Tribe.

1. SFS, Inc. has disavowed a relationship with PreferredCashLoans, and the People's suit against this entity should be allowed to proceed

The website for PreferredCashLoans appears to be currently active. (RJN, Ex. E.) SFS, Inc. does not hold the mark for PreferredCashLoans. SFS, Inc. asserted in April 2012 that it does not "currently actively issue loans under the trade name 'Preferred Cash Loans.'" (4 SSCT 764-765 [¶ 12].) Because SFS, Inc. has disavowed a relationship with PreferredCashLoans, that business cannot claim arm-of-the-tribe immunity, and the People's suit against PreferredCashLoans should be allowed to proceed.

2. The evidence presented fails to establish that SFS, Inc., dba as OneClickCash, is an arm of the Santee Sioux Nation

a. Financial relationship

SFS, Inc. is incorporated. Under the laws of the Santee Sioux Nation, as well as SFS, Inc.'s Articles, recovery on any judgment against SFS, Inc. is limited to its corporate assets. (Background V.B.II.) The Tribe is not legally liable for any judgment against SFS, Inc. And there is no suggestion that the Tribe would step in to ensure SFS, Inc.'s continued operation, should the corporation face financial difficulty. (Compare *Alaska Cargo, supra*, 5 F.3d at p. 381.)

Other factors related to the financial relationship between SFS, Inc. and the Tribe also suggest a lack of financial identity. SFS, Inc. generates its own revenues from payday lending, and there is no suggestion that the Tribe makes any ongoing contribution to SFS, Inc. (See *ITSI, supra*, 3 F.3d at p. 1292.) Granted, there is some financial connection between SFS, Inc.

and the Tribe. The Tribe receives some unknown amount of "net revenue," as attested to by Campbell. (See Background V.B.3.)[34] Evidence uncovered by the FTC's investigation, however, establishes that the financial relationship between SFS, Inc. and the Tribe is indirect at best, given the involvement of Scott and Blaine Tucker and AMG, and the flow of funds to and from persons and entities that have no apparent connection to SFS, Inc.

On balance, the evidence of financial relationship in the existing record weighs against a determination that SFS, Inc. is an arm of the Santee Sioux Nation.

b. Function and purpose

Similarly, SFS, Inc.'s function and purpose do not support the corporation's immunity. (See Background V.B.3.-4.) SFS, Inc. does not, for example, provide traditional government services for tribe members, such as housing, education, or healthcare, or even specialized financial services for tribe members or tribal businesses. Nor does it serve any other function traditionally shouldered by tribal governments that would favor a finding of immunity. Instead, SFS, Inc.'s stated purpose and function is a purely commercial one—to generate revenue by marketing payday loans to the general public over the Internet.

SFS, Inc. may argue that it supports tribal governmental functions by providing the Tribe with needed funds. The People agree that a commercial enterprise can serve sovereign purposes by providing the sovereign with a stable and substantial income stream, much as IGRA gaming often does. (See *Bay Mills, supra*, 134 S.Ct. at p. 2043 [Sotomayor, J., concurring]; see

[34] The use of the monies apparently received by the Tribe from SFS, Inc. is discussed in the next subsection on function and purpose. Control over SFS, Inc.'s funds is discussed in the section concerning tribal control versus independence.

also *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 758.) Beyond bare assertions, however, there is no evidence in the record that revenues from SFS, Inc. serve this purpose. Campbell declared that SFS, Inc. provides the Tribe with some revenues, but he did not disclose any specific facts about their amount or regularity. (Background V.B.3.) SFS, Inc. provided no information concerning, for example, what percentage of the total tribal revenue it generates for the Santee Sioux Nation. (*Ibid.*) This omission is significant in light of the evidence from the FTC's investigation suggesting that the revenue stream may be irregular or very small (both in absolute terms and relative to the entities' overall gross revenue). (See Opinion at p. 10.)

Campbell summarily stated that loss of SFS Inc.'s revenues would be "devastating" to the Tribe, provided no details about specific programs funded by revenue from SFS, Inc., or whether and to what extent the programs would exist without income from payday lending. (4 SSCT 765 [¶ 13].)[35] Campbell made assertions about the timing of certain tribal services, but did not state that these services were actually created by or dependent on revenues from state law-compliant payday lending. (See, e.g., *ibid.* [stating that "prior to the Tribe's creation of SFS, there was no Tribal daycare facility"].) Although Campbell noted that the corporation's sole income source is payday lending, he was silent as to whether SFS Inc.'s payday lending operation is a substantial income source for the Tribe. Without knowing more, there is a very real possibility that extending immunity to SFS, Inc. would primarily protect private revenue streams, rather than sovereign prerogatives.

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[35] The People note that its enforcement action is not designed to put the Payday Lenders out of business, but only to ensure compliance with California consumer protection laws.

On this record, what is know about SFS Inc.'s function and purpose tips against immunity.

c. Governmental control versus independence

The final arm-of-the tribe consideration is legal and actual tribal control versus functional independence and separate identity. SFS, Inc.'s corporate documents specify, for example, that its Board of Directors shall be comprised of the Tribal Council, and state the Tribe's intent that SFS, Inc. share in the Tribe's sovereign immunity. (Background V.B.2.) But formalities, standing alone, do not establish actual control.

Other facts in the record show that the Tribe in practice exercised little control over SFS, Inc., which operated independently of the Tribe. For a substantial period of time, the Board did not hold regular meetings and therefore could not manage the corporation. (Background V.B.3.) Further, Scott and Blaine Tucker, who are not members of the Tribal Council, in fact controlled the corporation's purse strings. They were signatories to SFS, Inc.'s and AMG's bank accounts. (Background V.B.4.) The Tuckers made payments from the corporation's revenues to other businesses with no apparent relationship to SFS, Inc. or the Tribe. (Background V.B.4.) These facts suggest that, whatever formal authority the Tribe might have to control the corporation's operations, it has not exercised any meaningful control or oversight. Campbell's summary assertions of unspecified tribal control of SFS, Inc. are entitled to little or no weight in light of this evidence. (See Background V.B.3.)

In addition, SFS, Inc. has the power to sue and be sued and to take property in its own name, and does not possess authority to waive the Tribe's sovereign immunity. (Background V.B.2.) And it has long had an independent presence on the Internet as a payday lender. (Background V.B.1.) These factors likewise point to SFS, Inc.'s functional independence from the Tribe.

The lack of actual tribal control over SFS, Inc., and evidence of the corporation's independent identity and operation, together with the other considerations discussed above, tip the balance of the existing evidence against recognizing arm-of-the-tribe status for SFS, Inc.

3. The evidence presented fails to establish that MNE Services, Inc., dba as Ameriloan, United Cash Loans, and USFastCash, is an arm of the Miami Tribe

The analysis for MNE Services, Inc., is substantially similar to that for SFS, Inc. Under the People's proposed test, and with MNE Services, Inc. bearing the burden of proof, the existing evidence fails to show that the corporation is an arm of the Miami Tribe.

a. Financial relationship

The Miami Tribe is more financially insulated from the operation of MNE Services, Inc., than the Santee Sioux Nation is from SFS, Inc. MNE Services, Inc. is incorporated, protecting its shareholder Miami Nation Enterprises from legal liability. (Background V.C.2.) And Miami Nation Enterprises is also incorporated, protecting its shareholder, the Miami Tribe. (*Ibid.*) There is nothing to suggest that the Tribe would ignore the corporate structure and step in to fund MNE Services, Inc. and its payday lending business, should the entity face financial difficulties. MNE Services, Inc. is expected to, and does, generate its own operating revenues.

The financial connection from MNE Services, Inc., to Miami Nation Enterprises, and ultimately the Tribe, is unclear due to the subsidiary nature of MNE Services, Inc. and the involvement of AMG and the third-party Tuckers in the Payday Lenders' finances. (See Background V.C.2., V.C.3.-4.)

On the current record, considerations of demonstrated financial relationship between MNE Services, Inc. and the Miami Nation weigh heavily against immunity.

b. Function and purpose

Similarly, considerations of function and purpose do not weigh in favor of arm-of-the-tribe status for MNE Services, Inc. The corporation does not, for example, directly provide traditional governmental services for tribe members, or serve other functions that would favor a finding of immunity. Like SFS, Inc., MNE Services, Inc.'s purpose and function is to provide short-term Internet-based payday loans to the public, a purely commercial endeavor. (Background V.C.2.)

Again, a commercial enterprise could serve sovereign purposes by providing a tribe with a stable and substantial income stream to support central governmental functions and services. (See *Bay Mills, supra*, 134 S.Ct. at p. 2043 [Sotomayor, J., concurring].) But as with SFS, Inc., the current record consists largely of generalized assertions that the Tribe receives some unspecified amount of funds from payday lending. There are virtually no details regarding how much or how often revenue flows to the Tribe (either in absolute terms or relative to the businesses' gross income), or what tribal programs or operations the funds support.

The record shows that MNE Services, Inc.'s central purpose and function are purely commercial, and that substantial funds flow to private third parties. On the current record, this consideration, too, therefore weighs against immunity.

c. Governmental control versus independence

As with SFS, Inc., the present record fails to show that the Miami Tribe's government ever effectively exercised the legal control it theoretically had over MNE Services, Inc., through the Tribe's ownership

of Miami Nation Enterprises, MNE Services' corporate parent. (Background V.C.2.; see also *American Property, supra*, 206 Cal.App.4th at p. 504 [noting indirect nature of corporate ownership].)

Moreover, the record strongly suggests that MNE Services, Inc., in practice, was not controlled by the Tribe. As with SFS, Inc., despite prohibitions in corporate documents regarding access to bank accounts and control of funds, it appears that MNE Services, Inc.'s accounts were controlled by the third-party Tuckers, who made payments that do not appear to be for management services. (See Background V.C.4.) The lack of evidence of the Miami Tribe's actual control over the operations of MNE Services, Inc. weighs strongly against immunity.

On balance, and on the current record, the Payday Lenders have not established that they are arms of the Santee Sioux Nation or of the Miami Tribe.

E. Under Any Reasonable Arm-of-the-Tribe Test, and on the Present Record, the Payday Lenders are Not Immune

The analysis proposed in this brief reflects the fundamental purposes of sovereign immunity and is reasonable and fair. Of course, this Court may conclude that the relevant considerations include additional factors or are better expressed in some different way. (See, e.g., Brief of Amici Curiae States in Support of Respondents in *Cash Advance v. State of Colorado* (Colo., Aug. 31, 2009, Case No. 08SC639), 2009 WL 3170028 at *21 [proposing test that would include consideration of "the extent to which the entity serves as a disclosed agent or agency of the tribe"].) But the People respectfully submit that, whatever the specific formulation, any acceptable arm-of-the-tribe test must result in recognizing arm-of-the-tribe immunity only where "the purposes of tribal sovereign immunity are served by granting immunity to the entit[y]." (See *American Property, supra*, 206

Cal.App.4th at p. 507, internal quotation, citation omitted.) In this case, the existing record establishes only that the Tribes have some economic interest in payday lending businesses, whose essentially private operations generate revenues that appear to flow mostly to parties other than the Tribes. On this record, the defendant entities have not established that the purposes of tribal sovereign immunity would be served by insulating them and their private revenue streams from the routine enforcement of California's consumer finance laws.

CONCLUSION

The People respectfully request that the Court hold that the burden of proving arm-of-the-tribe status rests on the defendant claiming immunity and that the following three fundamental considerations must guide the inquiry: (1) the financial relationship between the entity and the tribal sovereign, including whether the tribe is legally obligated for the entity's debts and obligations; (2) the function and purpose of the entity, including whether it serves central governmental functions; and (3) whether the entity is under the tribe's legal and actual control or rather operates independently and with a separate identity. The People suggest that the Court then remand the case for further proceedings consistent with the Court's opinion.

Dated: July 28, 2014

Respectfully submitted,

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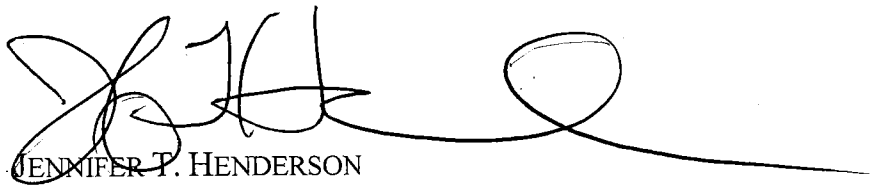

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13,516 words.

Dated: July 28, 2014

KAMALA D. HARRIS
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ATTACHMENT TO PEOPLE'S OPENING BRIEF

Page 1:	Screenshot of Ameriloan website dated 5/18/2007	4 SSCT 729
Pages 2-8:	Excerpts from declaration of Federal Trade Commission investigator Victoria M. L. Budich dated 3/15/2012	18 CT 4149-4150, 4169-4171, 4191
Page 9:	Exhibit AS to Budich declaration	20 CT 4644
Page 10:	Exhibit CC to Budich declaration	22 CT 5129

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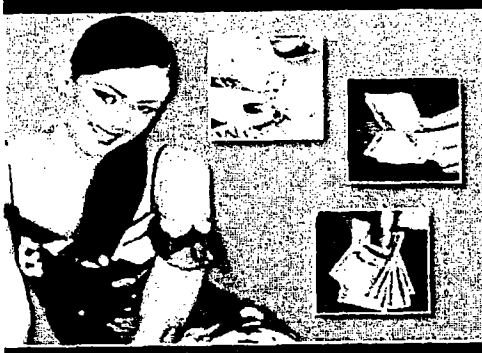

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Password:

LOG IN ➡

Forgot your password? Click Here

I couldn't believe just how easy it was

Before I knew it, the money was in my account and my cash problems were solved!

More Customer Testimonials

Apply Now!

We'll Contact You Within the Hour!

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NOTHING TO FAX!!!

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Last Name:
? Address:
Apt: City:
State: ZIP:
Email:
? Home Phone: ###-###-####
? Work Phone: ###-###-####
? Work Phone Ext: #####
Best Time To Call: Morning (9:00 to 12:00)
How do you receive your pay:
(Select Pay Type)

Yes	No	
◉	○	I am currently employed or I receive recurring income regularly.
◉	○	I make at least $1000 per month.
◉	○	I currently have an active checking account.
◉	○	I am a Citizen of the USA and at least 18 years of age.
◉	○	Send me details on other credit offers.

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QUESTIONS

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Can I qualify?
How much can I qualify for?
What does it cost?
When do I get my money?
When do I repay?

My Loan Application has been Submitted Online
I don't have a printer and I want to print a copy of my loan documents. Can I get my documents another way?
How do I reprint my loan documents?

I Have Received My Funds
I'm a little low on funds, can I get an extension?

SEARCH 000729

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RELATED OFFERS

DECLARATION OF VICTORIA M. L. BUDICH
PURSUANT TO 28 U.S.C. § 1746

1. I, Victoria Budich, hereby state that I have personal knowledge of the facts set forth below. If called as a witness, I could and would testify competently as follows:

2. I am a citizen of the United States and am over the age of eighteen (18) years old. I am employed as an investigator with the Federal Trade Commission ("FTC") in the Division of Financial Practices. My office address is 600 Pennsylvania Avenue, N.W., NJ-3158, Washington, D.C. 20580.

3. I began working at the FTC in February 2002. My responsibilities for the FTC include investigating suspected violations of consumer protection laws, including the Federal Trade Commission Act, the Truth In Lending Act, and the Electronic Fund Transfer Act. In the normal course of carrying out my investigative responsibilities, I regularly use Internet search engines, electronic databases, spreadsheet software, and a variety of other software-based investigative and organizational tools. I also am the custodian of documents and other materials that the FTC collects in the course of the investigations to which I am assigned. I maintain all such documents in my custody and control.

4. On or around October 18, 2010, I was assigned to the FTC's investigation of this matter, which came to include, as Defendants, AMG SERVICES, INC., an Oklahoma Tribal Entity; RED CEDAR SERVICES, INC., an Oklahoma Tribal Entity, also dba 500FastCash; SFS, INC., a Nebraska Tribal Entity, also dba OneClickCash; TRIBAL FINANCIAL SERVICES, an Oklahoma Tribal Entity, also dba Ameriloan, UnitedCashLoans, USFastCash, and Miami Nation Enterprises; AMG CAPITAL

MANAGEMENT, LLC, a Nevada Limited Liability Company; LEVEL 5 MOTORSPORTS, LLC, a Nevada Limited Liability Company; LEADFLASH CONSULTING, LLC, a Nevada Limited Liability Company; PARTNER WEEKLY, LLC, a Nevada limited liability company; BLACK CREEK CAPITAL CORPORATION, a Nevada Corporation; BROADMOOR CAPITAL PARTNERS, LLC, a Nevada Limited Liability Company; THE MUIR LAW FIRM, LLC, a Kansas Limited Liability Company; SCOTT A. TUCKER, in his individual and corporate capacity; BLAINE A. TUCKER, in his individual and corporate capacity; TIMOTHY J. MUIR, in his individual and corporate capacity; DON E. BRADY, in his individual and corporate capacity; ROBERT D. CAMPBELL, in his individual and corporate capacity; and TROY LITTLEAXE, in his individual and corporate capacity, Defendants, and PARK 269, LLC, a Kansas Limited Liability Company; and KIM C. TUCKER, in her individual and corporate capacity, Relief Defendants.

Corporate Registration

5. During the investigation, the FTC obtained corporate filings, including articles of incorporation, fictitious business name filings, and other documents, from various public sources.

6. From the Nevada Secretary of State, the FTC obtained copies of the Articles of Incorporation and Annual Lists relating to certain Defendants and associated entities. True and correct copies of the Articles of Incorporation and Statements of Information that the FTC obtained are appended as follows:

a. Black Creek Capital Corporation - Att. A;
b. Broadmoor Capital Partners, LLC - Att. B;
c. LeadFlash Consulting, LLC - Att. C;
d. Level 5 Motorsports, LLC - Att. D;

of the corporation. True and correct copies of the corporate filings that the FTC obtained are appended as Att. AD.

33. During the investigation the FTC obtained court filings, including Defendant affidavits from litigation in the State of California and the State of Colorado. True and correct copies of the materials that the FTC obtained are appended as follows:

a. Affidavit of OneClickCash Former Employee William James – Att. AD1
b. Affidavit of Don Brady - Att. AE
c. Affidavit of Don Brady - Att. AF
d. Affidavit of Don Brady - Att. AG
e. Affidavit of Don Brady - Att. AH
f. Affidavit of Robert Campbell - Att. AI
g. Affidavit of Robert Campbell - Att. AJ
h. Affidavit of Robert Campbell - Att. AK
i. Troy Little Axe Privilege Log - Att. AL
j. Affidavit of Troy Little Axe - Att. AM
k. Affidavit of Troy Little Axe - Att. AN
l. Affidavit of Troy Little Axe - Att. AO
m. Affidavit of Troy Little Axe - Att. AP
n. Affidavit of Troy Little Axe - Att. AQ
o. Affidavit of Thomas Assenzio - Att. AR

<u>Individual Defendants and Individual Relief Defendants</u>

34. Scott Tucker is connected to many of the Corporate Defendants and other related entities as a principal, organizer, or employee. Scott Tucker is associated with at least the following entities:

a. MTE Financial Services, Inc.
b. Red Cedar Services, Inc. dba 500FastCash
c. Tribal Financial Services
d. Broadmoor Capital Partners, LLC
e. WestFund, LLC
f. Level5 Motorsports, LLC
g. Black Creek Capital Corporation
h. AMG Services, Inc.
i. TCS Services, LLC
j. GEO Capital Services, LLC
k. Partner Weekly, LLC
l. Level 5 Worldwide, LLC

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m. Latin Global Entertainment Network, LLC

35. Throughout the investigation I compiled a chart detailing Scott Tucker's corporate connections. A true and correct copy of the chart is appended as Att. AS.

36. Blaine Tucker is connected to many of the Corporate Defendants and other related entities as a principal, organizer, or employee. Blaine Tucker is associated with at least the following entities:

a. MTE Financial Services, Inc.
b. Red Cedar Services, Inc. dba 500FastCash
c. Tribal Financial Services
d. Key Financial Systems Corp.
e. Broadmoor Capital Partners, LLC
f. WestFund, LLC
g. Level5 Motorsports, LLC
h. Black Creek Capital Corporation
i. AMG Services, Inc.
j. TCS Services, LLC
k. GEO Capital Services, LLC
l. Partner Weekly, LLC
m. Level 5 Worldwide, LLC
n. Latin Global Entertainment Network, LLC
o. B.A.T. Services, Inc.
p. LeadFlash Consulting, LLC

37. Throughout the investigation I compiled a chart detailing Blaine Tucker's corporate connections. A true and correct copy of the chart is appended as Att. AT.

38. Timothy Muir is connected to many of the Corporate Defendants and other related entities as a principal, organizer, resident agent, or employee. Timothy Muir is associated with at least the following entities:

a. The Muir Law Firm, LLC
b. Black Creek Capital Corp.
c. Partner Weekly, LLC
d. Level 5 Worldwide, LLC
e. Sangria South Ventures, LLC
f. ST Capital, LLC
g. WestFund, LLC

62. Throughout the investigation I reviewed numerous bank records and identified regular payments from the Defendants to service providers. Regular payments from several of the defendants' corporate bank accounts to associated entities and closely related service providers. A true and correct copy of a chart showing regular payments from Defendants to closely related service providers is appended as **Att. CC**.

63. Accompanying the US Bank records are documents that denote account signatories, account holders, state of incorporation, and Corporate Secretary. Scott Tucker and Blaine Tucker are signatories on the accounts listed below. Some accounts have additional signatories, but Scott and Blaine Tucker appear to be the only individuals actually signing the checks. True and correct copies of each known US Bank Corporate Certificate of Authority or Signatory Card that the FTC obtained are appended as follows:

a. AMG Capital Management, LLC - **Att. CC1**;
b. AMG Services, Inc.- **Att. CD**;
c. AMG Services, Inc. - **Att. CE**;
d. Black Creek Capital - **Att. CF**;
e. Black Creek Capital -**Att. CG**;
f. Black Creek Capital - **Att. CH**;
g. Black Creek Capital - **Att. CH1**;
h. Black Seas Investments, LLC - **Att. CI**;
i. Broadmoor Capital Partners, LLC - **Att CJ**;
j. Cash Disc.com, Inc. - **Att. CK**;
k. CVC Services, Inc. - **Att. CL**;
l. ECM Services, Inc. - **Att. CM**;
m. ESSFA AC, LLC - **Att. CN**;
n. GEO Capital Services, LLC - **Att. CO**;
o. Key Financial Services, Inc. - **Att. CP**;
p. Key Financial Systems, Inc. - **Att. CQ**;
q. LeadFlash Consulting, LLC - **Att. CR**;
r. Level 5 Motorsports, LLC - **Att. CS**;
s. MTE Financial Services dba PC Today - **Att. CT**;
t. MTE Financial Services dba Instant Cash USA - **Att. CU**;
u. MTE Financial Services dba United Cash Loans - **Att. CV**;
v. MTE Financial Services dba Cash Advance - **Att. CW**;

w. MTE Financial Services dba Cash Advance Network - **Att. CX;**
x. MTE Financial Services dba AxcessCash - **Att. CY;**
y. MTE Financial Services dba Xtra Cash - **Att. CZ;**
z. MTE Financial Services dba Web Cash Network - **Att. DA;**
aa. MTE Financial Services dba Preferred Cash Loans - **Att. DB;**
bb. MTE Financial Services dba Xtra Cash (*Second Account*) - **Att. DC;**
cc. MTE Financial Services dba Rio Resources - **Att. DD;**
dd. Pinion Management - **Att. DE;**
ee. PSB Services, LLC - **Att. DF;**
ff. Red Cedar Services, Inc. - **Att. DG;**
gg. SFS, Inc. dba OneClickCash - **Att. DH;**
hh. SMC Services, LLC - **Att. DI;**
ii. TCS Services, LLC - **Att. DJ;**
jj. TFS Corp dba USFastCash - **Att. DK;**
kk. Tribal Financial dba Preferred Cash Loans - **Att. DL;**
ll. Universal Management Services, Inc. - **Att. DM;**
mm. West Fund, LLC Collection Account - **Att. DN;** and
nn. WestFund, LLC - **Att. DO.**

64. In the course of my investigative duties, I reviewed the records produced by US Bank to examine account activity, including deposits, withdrawals, and transfers. Most records spanned three years, while some went back nine years or more. These records showed consistent patterns in deposits, transfers, payments, and account holders. Over the course of the investigation I reviewed approximately 10,000 check images and hundreds of bank statements. As such, Scott Tucker or Blaine Tucker signed every check discussed in this declaration. In addition to being voluminous, the records provided by US Bank contained several instances of blank, missing, or removed pages. Therefore, the analysis includes only identifiable data. True and correct copies of the complete corporate bank records are available upon request. In lieu of producing all of the documents, I have mapped out account data with tables and charts.

Overview of AMG Services, Inc. Bank Accounts:

65. The FTC identified two AMG Services, Inc. accounts with US Bank. Scott Tucker and Blaine Tucker are the only signatories on the accounts.

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66. AMG Services, Inc. account xxx0600, receives regular deposits from the following Defendants: TFS Corp dba Ameriloan; TFS Corp dba United Cash Loans; TFS Corp dba USFastCash; MTE Financial Services dba 500FastCash; Red Cedar Services dba 500FastCash; and SFS, Inc. dba OneClickCash. Subsequently, systematic payments are wired to a company named Halinan Capital. Table 3, below, summarizes the deposits and wire transfers from January 2010 through March 2011 for account xxx0600.

TABLE 3: AMG Services, Inc. Account xxx0600

Transactions: January 2010 – March 2011	Amount
Deposits from TFS Corp., SFS, Inc., MTE, and Red Cedar Services:	$22,501,000.00
Withdrawals to Halinan Capital	$22,000,000.00

67. The AMG Services, Inc. account xxx0270 appears to be the corporate operations account. Checks are regularly deposited into the AMG Services, Inc. xxx0270 account from the entities listed below. The word "payroll" is within the note on each check. A true and correct copy of select "payroll" checks from these entities are appended as follows:

a. TFS Corp dba Ameriloan, **Att. DP**;
b. TFS Corp dba United Cash Loans, **Att. DQ**;
c. TFS Corp dba USFastCash, **Att. DR**;
d. MTE Financial Services dba 500FastCash, **Att. DS**;
e. Red Cedar Services dba 500FastCash, **Att. DT**;
f. SFS, Inc. dba OneClickCash, **Att. DU**;
g. Black Creek Capital Corp., **Att. DV**;
h. Eclipse Renewable Holdings, LLC, **Att. DW**;
i. Broadmoor Capital Partners, LLC, **Att. DX**;
j. Real Estate Capital Services, LLC, **Att. DY**;
k. MNE Services, Inc. dba Ace Cash Services, **Att. DZ**;
l. MNE Services, Inc. dba Star Cash Processing, **Att. EA**; and
m. WestFund, LLC, **Att. EB**.

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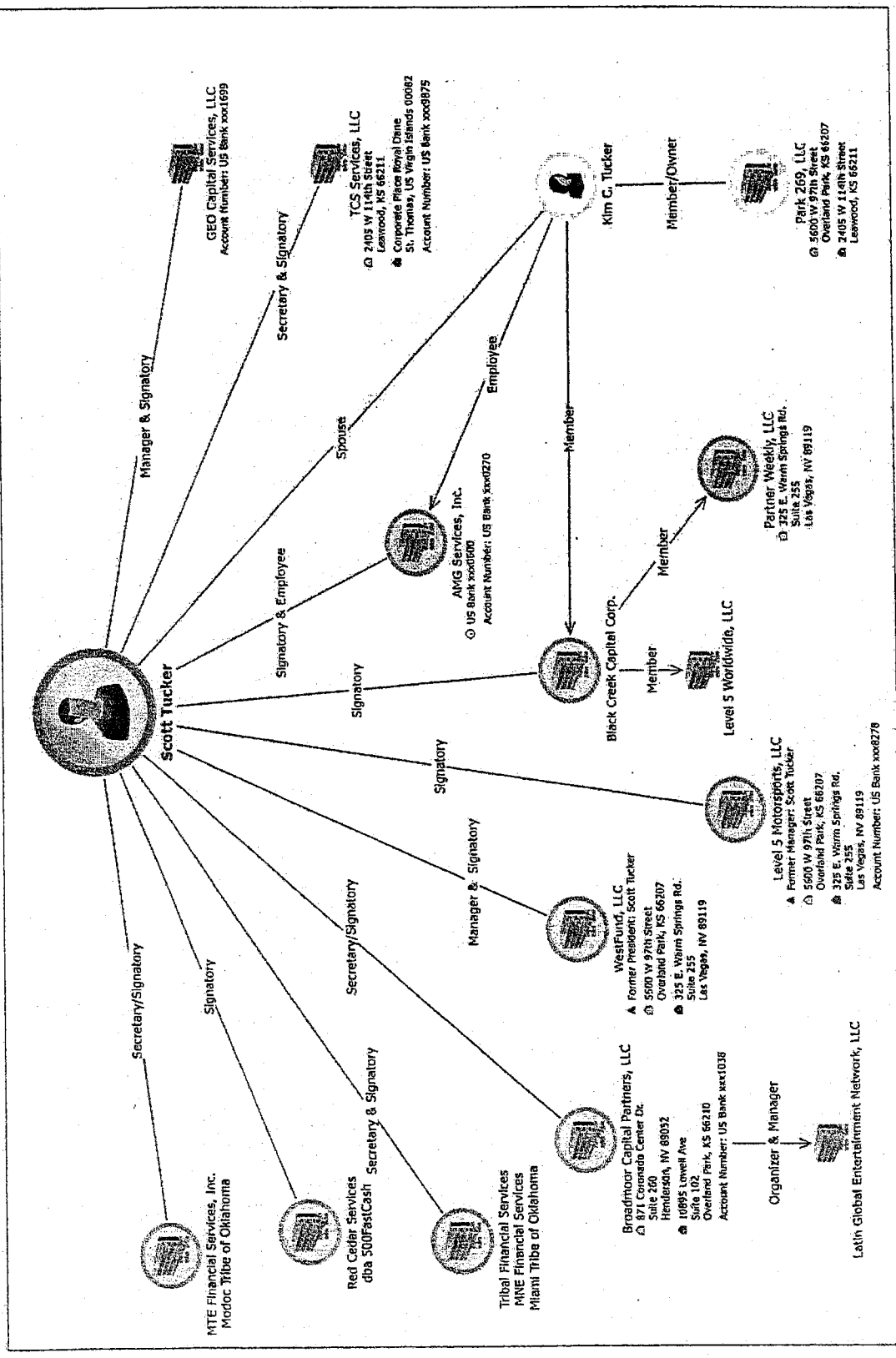

Page 1 of 1

Attachment to Opening Brief -- Page 9

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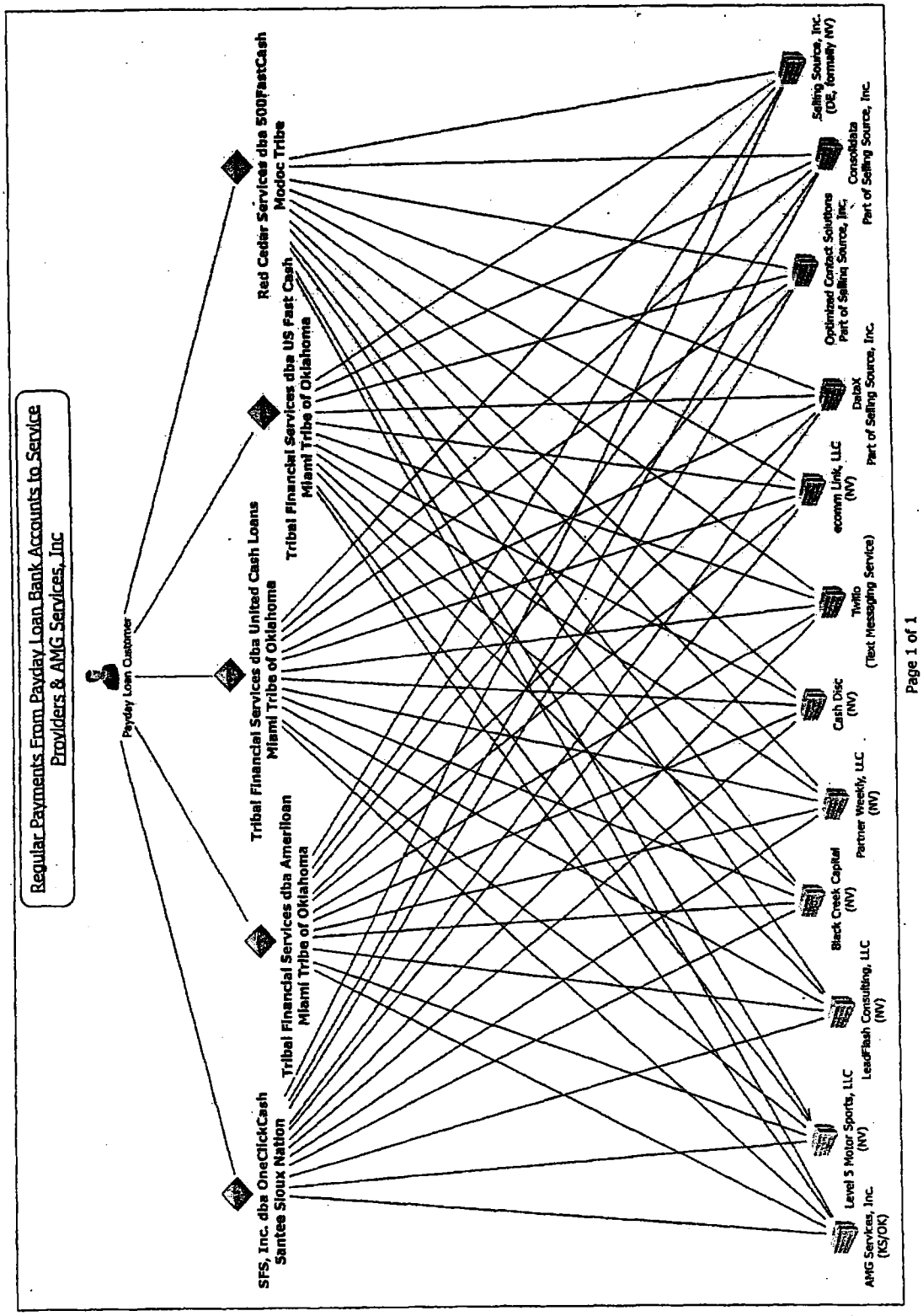

Page 1 of 1

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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 1515 Clay Street, 20th Floor, P.O. Box 70550, Oakland, CA 94612-0550.

On July 28, 2014, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General; or, where indicated, causing such envelope to be personally delivered by messenger 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 Messenger (Ace Attorney Service, Inc.)
John Nyhan Fredericks Peebles & Morgan LLP 2020 L Street, Suite 250 Sacramento, CA 95811	Attorney for Defendants and Respondents Sent via First-Class U.S. Mail
Nicole E. Ducheneaux Fredericks Peebles & Morgan LLP 3610 North 163rd Plaza Omaha, NE 68116	Attorney for Defendants and Respondents Sent via First-Class U.S. Mail
Conly J. Schulte Fredericks Peebles & Morgan LLP 1900 Plaza Drive Louisville, CO 80027	Attorney for Defendants and Respondents Sent via First-Class U.S. Mail

California Court of Appeal Second Appellate District Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	1 copy Sent via Golden State Overnight
Hon. Yvette M. Palazuelos Los Angeles County Superior Court Central District Stanley Mosk Courthouse 111 North Hill Street, Dept. 28 Los Angeles, CA 90012	1 copy Sent via First-Class U.S. Mail
Uche L. Enenwali Dept. of Business Oversight 320 West 4th Street, Suite 750 Los Angeles, CA 90013-2344	Courtesy Copy Sent via First-Class U.S. Mail

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 July 28, 2014, at Oakland, California.

Debra Baldwin
Declarant

Debra Baldwin
Signature