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

Second Appellate District, Div. 7, Case No. B242644
Los Angeles County Superior Court, Case No. BC373536
Yvette M. Palazuelos, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Payday Lenders contend that they should be able to operate without regard to state consumer lending laws because, on paper, they are affiliated with federally recognized Indian tribes.[1] According to the Payday Lenders, any evidence showing that their profits actually flow primarily to private third parties rather than tribes, or that they actually operate independently and without substantial tribal control or oversight, is irrelevant to their status as arms of tribes. They suggest that requiring more than a paper showing for arm-of-the-tribe status is an affront to tribal sovereignty.

The People propose only that business entities claiming to be arms of tribes be put to a similar showing and bear the same burden as entities claiming to be arms of states. That approach is reasonable, because tribal and state sovereign immunity share a common legal grounding and serve similar purposes. Thus, to determine whether an entity should share in a tribe's sovereign immunity, courts should consider the financial relationship between the entity and the tribe, the entity's function and purpose, and the tribe's actual control over the entity. Formation-related documents should not control where other evidence suggests that, in practice, the entity is financially separate and independent from the tribe, primarily benefits private interests, and is under third-party rather than tribal control.

There is room to debate precisely how this Court can best articulate and explain the standard to be used by California courts in determining arm-of-the-tribe status. Under any reasonable approach, however,

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[1] The Payday Lenders are MNE Services, Inc. doing business as Ameriloan, UnitedCashLoans, and USFastCash; and SFS, Inc. doing business as OneClickCash and PreferredCashLoans.

sovereign immunity should not extend to entities that are not themselves tribes unless the extension serves the purpose of that immunity, which is to protect sovereign interests and prerogatives. Sovereign immunity, whether of states or tribes, should not protect essentially private, non-governmental businesses. Unless an entity can show that it is in fact an arm of government, it should remain subject to generally applicable state laws.

SUMMARY OF ARGUMENT

The United States Supreme Court has acknowledged the existence of immunity for arms of tribes but has had no occasion to define its boundaries. While the federal and state appellate case law is replete with differing multi-factor tests for determining arm-of-the-tribe status, there is little discussion of why any particular approach is appropriate, leaving parties to advocate, case-by-case, for whatever test achieves their desired result. A return to basic principles is in order.

The People have proposed that, in formulating arm-of-the-tribe doctrine for this State, this Court should be guided by the fundamental purposes of sovereign immunity: protecting the sovereign's fisc and its right to direct its governmental affairs. The law governing arm-of-the-state status, developed to serve these same sovereign purposes, provides a ready source of longstanding and comparatively coherent approaches. Factors relevant to arm-of-the-state status may be grouped in the following categories, which, by analogy, are also relevant to determining arm-of-the-tribe status:

(1) The financial relationship between the entity and the sovereign, including whether the sovereign fisc would be put at risk if the entity were not immune;

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

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

No single consideration or factor is dispositive. Further, just as an entity claiming immunity as an arm of a state must establish its status, so too should an entity seeking to share in tribal sovereign immunity bear the burden of establishing that it is in fact an arm of a tribe.

In this case, the record as it currently stands establishes only the Tribes' expressed intention to extend their sovereign immunity to the Payday Lenders; that some undisclosed amount of the entities' revenues at undefined intervals may flow to the Tribes; and the bare possibility of some tribal control and oversight. While the contents of the relevant tribal documents are undisputed, there has to date been no meaningful testing of assertions that the Tribes' affiliation with the entities in fact involves any financial relationship beyond a passive investment, any substantial tribal benefit, or any actual control or oversight by the tribal governments. Other record evidence establishes that the Payday Lenders are incorporated, insulating the interested Tribes from fiscal risk, and suggests substantial control by, and substantial revenue flowing to, non-tribal third parties. Under the People's proposed test—indeed, under any test that looks beyond bare intent and paper affiliation—and on the existing record, the Payday Lenders would not be immune from state consumer lending laws.

The Payday Lenders make a number of procedural and substantive arguments to avoid this result, described and countered below. Contrary to their contentions, nothing bars this Court from establishing a test for arm-of-the-tribe status or requires the Court simply to adopt a rule articulated by another court. Even on questions of federal law, where the U.S. Supreme Court has not spoken, it is this Court's function to say what the law is.

On the merits, the Payday Lenders' criticisms of the People's proposed framework for determining arm-of-the-tribe status must fail. The

proposed approach is not, as they assert, a challenge to tribal sovereign immunity or an attempt to thwart tribes' efforts to engage in commercial enterprises. Rather, it is a reasonable attempt to ensure that there is a sufficient *actual* connection between an entity claiming arm-of-the-tribe status and the tribal sovereign to warrant treating a suit against the entity as, in effect, a suit against the sovereign itself. To be sure, tribal immunity must continue to protect the legitimate interests of tribes as sovereigns, including their need to generate revenue to fund governmental operations. At the same time, the law must draw a meaningful distinction between separate entities that are genuinely arms of tribes and those that are not. Failure to do so would improperly impair the ability of the State of California, in its own sovereign capacity, to enforce its laws against entities that are for all practical purposes private commercial ventures, operating without meaningful tribal oversight or control and generating primarily private profit.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THE LAW GOVERNING DETERMINATION OF AN ENTITY'S ARM-OF-THE-TRIBE STATUS

A. No Procedural Bar Prevents This Court From Establishing an Arm-of-the-Tribe Test

According to the Payday Lenders, this Court should limit its review to determining whether the Court of Appeal's decision should be affirmed or reversed. Further, they argue, this Court should refrain from deciding any larger questions about the arm-of-the-tribe doctrine because the People did

not argue for alignment with the arm-of-the-state doctrine below. (See Answer Brief at pp. 3, 15-16.)[2]

It is, however, this Court's singular prerogative to resolve confusion and conflict in the legal rulings of the courts of appeal. (*People v. Davis* (1905) 147 Cal. 346, 348.) Accordingly, this Court is not constrained simply to pick a test already developed by another appellate court. Rather, on this question of law, the Court has a "need *not* to defer, in order to be free to further the uniform articulation and application of the law within" California. (See *Smiley v. Citibank* (1995) 11 Cal.4th 138, 146, italics in original.)

The Court may address "any issues that are raised or fairly included in the petition or answer" without regard to their presentation in the lower courts. (Cal. Rules of Court, rule 8.516(b)(1); see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 250, fn. 11.) Indeed, the Court "may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (Cal. Rules of Court, rule 8.516(b)(2); see also *People v. Braxton* (2004) 34 Cal.4th 798, 809.) The legal question of what test should apply where an entity asserts arm-of-the-tribe status was squarely included in the petition, and the subsidiary question of the appropriate burden of proof for that test is fairly embraced by the issues in the petition. The parties have had a full opportunity to brief both issues before this Court. There is accordingly no barrier to this Court reaching all issues presented by the People in their Opening Brief.

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[2] The Payday Lenders complain that the "Issues Presented" in the People's Opening Brief are grounded in policy rather than law. (Answer Brief at p. 4, fn. 2.) The People have, as required by rule, simply repeated the Issues Presented in their Petition for Review. (Cal. Rules of Court, rule 8.520(b)(2)(B).)

B. The Absence of Controlling Precedent Leaves This Court Free To Establish a Test That Best Serves the Purposes of Sovereign Immunity

The U.S. Supreme Court has noted that immunity extends to arms of tribes, *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* (2003) 538 U.S. 701, 705, fn. 1, but has not had occasion to discuss the contours and limits of the arm-of-the-tribe doctrine. And while a body of consistent and numerous federal appellate court decisions can be persuasive on questions of federal law, on the issues now before the Court, that case law is "divided or lacking," requiring this Court to make an independent determination. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58.)

The Payday Lenders appear to suggest that a federal court of appeals decision post-dating the Opening Brief, *White v. University of California* (9th Cir. 2014) 765 F.3d 1010, effectively has settled the law. (Answer Brief at pp. 30-31.) In *White*, the Ninth Circuit held that a tribal repatriation committee was an arm of the tribe, summarily employing the Tenth Circuit's multi-factor, non-exclusive test from *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d 1173, 1187. (*White, supra*, 765 F.3d at p. 1025.)[3]

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[3] The factors considered by the Tenth Circuit in *Breakthrough* are "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." (629 F.3d at p. 1187.) In addition, the Tenth Circuit also considered "a sixth factor: the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities." (*Ibid.*) In cases pre-dating *White*, the Ninth Circuit has conducted its arm-of-the-tribe analysis without the assistance of a formal

(continued...)

The *White* case is helpful, in that it suggests that federal courts may be trending toward a more searching inquiry that takes into account not only a tribe's bare intent to share immunity and the entity's method of creation, but also the actual financial relationship between the tribe and the entity, including whether money flows from the tribe to the entity; whether the entity's purpose is "core to the notion of sovereignty"; and whether tribal representatives control the entity's key functions. (*White, supra*, 765 F.3d at p. 1025, internal quotations omitted.) These considerations are consistent with the People's proposed standard. However, just as *Breakthrough* did not control the Court of Appeal's approach in this case, *White* cannot provide definitive guidance for trial and appellate courts in California faced with arm-of-the-tribe questions.[4] This Court should independently articulate a governing standard and explain its underlying rationale. (See *Barrett, supra,* 40 Cal.4th at p. 58.)

II. THE COURT SHOULD BRING ARM-OF-THE-TRIBE DOCTRINE INTO ALIGNMENT WITH ARM-OF-THE-STATE DOCTRINE

The Payday Lenders' various arguments against aligning the arm-of-the-tribe and arm-of-the-state doctrines rely on mischaracterizations of the People's proposed approach and a strained reading of the case law, including the U.S. Supreme Court's decision in *Michigan v. Bay Mills Indian Community* (2014) __ U.S. __, 134 S.Ct. 2024. As set out below, an arm-of-the-tribe test that goes beyond mere paper affiliation is consistent

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(...continued)
framework for analysis or articulated factors. (See, e.g., *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047.)

[4] Indeed, the Payday Lenders repeatedly criticize the Fourth District's approach in *American Property Management Corporation v. Superior Court* (2012) 206 Cal.App.4th 491, 501, which relies heavily on *Breakthrough*. (See, e.g., Answer Brief at pp. 21, 23, 25, 26, 27, 37.)

with the case law, respects tribal sovereignty and, at the same time, ensures that immunity from state laws is not extended to entities that are not in fact closely connected to and controlled by tribes.

A. 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

As the People have observed, and the Payday Lenders reiterate, tribal and state sovereignty differ in certain important respects. (Opening Brief at p. 32; Answer Brief at pp. 32-33.) Still, the ultimate source of state and tribal immunity is the same. (See discussion in Opening Brief at pp. 31-33.) Accordingly, the body of law that has developed over the years to determine arm-of-the-state status provides a useful resource for this Court to draw upon in formulating a coherent framework for determining arm-of-the-tribe status.

The Payday Lenders counter that "tribal sovereign immunity is a pure jurisdictional bar" (citing *Puyallup Tribe, Inc. v. Department of Game of State of Washington* (1977) 433 U.S. 165, 172), implying that sovereign immunity in the tribal context is fundamentally different from sovereign immunity in the state context, and the bodies of law should be considered discrete. (Answer Brief at p. 34.) *Puyallup* does not stand for that proposition. In *Puyallup*, the Court merely stated the longstanding rule that "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." (*Puyallup, supra*, 433 U.S. at p. 172.) The People note that both states and tribes can waive immunity or consent to suit, and that in either case the waiver or consent must be express and cannot be implied. (*Santa Clara Pueblo v. Martinez*

(1978) 436 U.S. 49, 58, cited in Answer Brief at p. 34; *Sossamon v. Texas* (2011) __ U.S. __, 131 S.Ct. 1651, 1658.)[5]

In any event, the question before this Court does not involve mechanisms of waiver, but rather whether and when entities that are not tribes are entitled to share in a tribe's sovereign immunity.

The Payday Lenders also assert that state and tribal immunity have different sources—the Eleventh Amendment for states and the common law for tribes. That is incorrect. As the People noted in their Opening Brief, 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 . . . ." (*Alden v. Maine* (1999) 527 U.S. 706, 713; see Opening Brief at p. 33, fn. 30.) Tribal immunity, while more limited in its remaining extent, stems from the same pre-constitutional sovereign status. "Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity." (*Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075, 1088-1089; see also *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047, citing *Alden, supra*, 527 U.S. at p. 750.)[6] For both

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[5] State sovereign immunity has been referred to as a "defense" to signal that it can be waived by a state if not asserted at some point in the litigation. (See *Wisconsin Dept. of Corrections v. Schacht* (1998) 524 U.S. 381, 389.) Nonetheless, as the Supreme Court noted in *Federal Maritime Commission v. South Carolina State Ports Authority* (2002) 535 U.S. 743, 766, state "[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."

[6] *Alden* addresses state sovereign immunity and its purposes. The Payday Lenders' assertion that the Ninth Circuit in *White* "did not include any Eleventh Amendment immunity considerations in its analysis" is thus, at best, an overstatement. (Answer Brief at p. 30.)

state and tribal sovereigns, "[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; see also *Sossamon v. Texas*, *supra*, 131 S.Ct. at p. 1657, quoting The Federalist No. 81.)

Arm-of-the-state case law is guided by fundamental purposes of sovereign immunity: shielding the sovereign treasury and respecting the dignity and governmental autonomy inherent in sovereign status. (Opening Brief at pp. 29-31; see also *Federal Maritime Com. v. South Carolina State Ports Auth.* (2002) 535 U.S. 743, 760, 765.) Any test for arm-of-the-tribe status should be judged by whether it serves these same purposes for tribes. (See *Breakthrough*, *supra*, 629 F.3d at p. 1188; *Allen, supra,* 464 F.3d at p. 1047.)

B. The Burden to Prove Arm-of-the-Tribe Status Should Rest on the Entity Claiming to Share in a Tribe's Immunity

Most arm-of-the-tribe cases do not address the issue of which party bears the burden of proof concerning arm status. (Opening Brief at pp. 24-25.) By "burden of proof," the People mean both "the 'burden of persuasion' (specifying which party loses if the evidence is balanced), as well as the 'burden of production' (specifying which party must come forward with evidence at various stages in the litigation)." (*Microsoft Corp. v. i4i Ltd. Partnership* (2011) __ U.S. __, 131 S.Ct. 2238, 2245, fn. 4.) The placement of this burden is important, because it will facilitate the efficient submission of evidence a court needs to decide whether immunity applies, and may control whether a case may proceed or must be dismissed where such evidence is ambiguous or lacking.

As set out in the People's Opening Brief, this Court should adopt the reasoning in arm-of-the-state cases to hold that in arm-of-the-tribe cases, an entity seeking to share in the tribe's immunity must establish its arm status.

The reasons for this placement are well stated in *ITSI T.V. Productions, Inc. v. Agricultural Associations* (9th Cir. 1993) 3 F.3d 1289. (See Opening Brief at pp. 33-34.) In that case, 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. As the court noted, knowledge of the true facts relevant to arm status will lie within the knowledge of the entity. (*ITSI, supra*, 3 F.3d at p. 1292.) Further, "whatever its jurisdictional attributes," an assertion by an entity that it is an arm of the state "should be treated as an affirmative defense" that, like other defenses, "must be proved by the party that asserts it and would benefit from its acceptance." (*Id.* at p. 1291.)

The Payday Lenders contend that a "settled rule of Indian law" requires that plaintiffs, including state enforcers, must prove a negative—that an entity asserting arm status is not in fact closely connected with a tribe. (Answer Brief at p. 35.)[7] The cases they cite, however, stand for a different proposition—that on a motion to dismiss for lack of subject matter jurisdiction based on a tribe's sovereign immunity, the plaintiff bears the burden of proving that jurisdiction exists by establishing waiver or abrogation. (See, e.g., *Garcia v. Akwasasne Housing Auth.* (2d Cir. 2001) 268 F.3d 76, 84 [where plaintiff conceded that tribal housing authority was agency of tribe and shared in its immunity, plaintiff bore burden of establishing waiver or abrogation]; *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 205-206; and cases cited at Answer Brief p. 34.) These cases involving asserted waivers of an otherwise clear or acknowledged tribal immunity do not suggest that the burden of proving a different issue—whether an entity is so closely

[7] The People addressed the dearth of case law on this point in their Opening Brief at pages 24 through 25.

connected to a tribe that it should be considered a tribal instrumentality in the first place—should rest on the plaintiff.

Placing the burden of production and persuasion on entities claiming arm status is not unfair or unreasonable. Evidence establishing the entity's formation, structure, and governing laws; how revenues flow from the entity to the tribe; and the tribe's involvement in key financial and operational decisions should be readily available to the entity itself, but generally will not be readily available to a plaintiff. Much of the relevant evidence about the entity's formation and operation, such as articles of incorporation, bylaws, organization charts, and board meeting minutes, will be in the entity's possession, and in some instances not publicly available. Further, where the entity is formed under tribal law, the plaintiff may not have ready access to relevant ordinances and resolutions. (See Shucha, "*Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law* (2014) 106:2 Law Library J. 199.) If the entity has a close connection with the tribe (as it will if it is truly an arm of the tribe), obtaining this type of evidence, and declarations of authorized tribal representatives authenticating and explaining the evidence, should not be difficult. Thus, the initial burden of production should be on the entity claiming arm status.[8]

In many instances, this initial showing by the entity will constitute prima facie evidence establishing the entity's arm status. Where, however,

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[8] Placing the burden on the entity will also reduce the need for broad—and arguably burdensome—discovery directed to the tribe, which can occur where the plaintiff has little information about the entity's structure, operation, and relationship to the tribe. The entity is in the best position to know what relevant evidence and documents exist. Where such evidence and documents are not already in the entity's possession, an entity that is truly an arm should be able to identify them with specificity and secure them with minimum inconvenience to the tribe.

other evidence of the entity's actual operations suggests that the entity may in fact serve primarily private interests and is actually controlled by third parties, the entity should be put to further proof to establish that the circumstances described in the documents match practice. If, in the end, the entity cannot persuade a court that it is more likely than not a true instrumentality of the tribal government, then there is no sound basis for shielding the entity from suit.

C. In Determining Arm-of-the-Tribe Status, Courts Should Not Be Limited to Evidence of Paper Affiliation, but Should Consider Evidence of Actual Financial Relationship, Function and Purpose, and Tribal Control

The People have proposed that, in determining arm-of-the-tribe status, courts should consider and weigh:

(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 government control or instead operates independently.

(Opening Brief at pp. 22-23, 34-39.) A variety of facts and circumstances may be relevant to each consideration, and none is dispositive. Further, the test should not be a mere formal exercise. Evidence of actual operations is relevant and should put the entity claiming immunity to further proof where it contradicts conclusions that might otherwise be drawn from purely formal evidence of affiliation, such as tribal resolutions and laws and the entity's articles of incorporation. (Opening Brief at pp. 43-44, 45, 46.)

The Payday Lenders now advocate for a test that, while it purports to be modeled on *Breakthrough* and might on its surface appear similar to the

People's proposed approach, in fact requires little more than paper affiliation to insulate a business from state laws.[9] As shown by the Payday Lenders' proposed application of their test, under their approach a court would consider only:

(1) Whether the entity was created under tribal law rather than state law, without regard to the corporate form of the entity;

(2) Whether the entity's formation documents:

  (a) Declare that the entity was created to benefit the tribe;[10]

  (b) Provide that the entity's board is to be comprised of tribal representatives, without regard to whether the Tribe actually controls the entity in practice;[11] and

  (c) Announce the Tribe's intent to share immunity with the entity; and

(3) Whether some of the entity's revenues, regardless of comparative amount or regularity of payment, eventually flow back to the tribe.

(See Answer Brief at pp. 40-45.) If some revenues do reach the tribe, then a final factor—whether the purposes of sovereign immunity are served by insulating the entity from state law—would be satisfied automatically. (*Id.* at p. 45.)

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[9] (See, e.g., Answer Brief at p. 25 [on control, whether the tribe is "enmeshed in the direction and control of the business"]; *id.* at p. 27 [on relationship, whether the entities "are sufficiently related to their respective Indian tribes to enjoy sovereign immunity from suit"]; see also *id.* at p. 22.)

[10] The Payday Lenders appear to argue that "the mere fact that the resolution creating the entity referenced the goal of promoting self-determination" should be sufficient to demonstrate the financial relationship between the entity and tribe. (Answer Brief at p. 44.)

[11] The Payday Lenders are clear that, in their view, a tribe's "actual control" over the entity is irrelevant. (Answer Brief at pp. 15-16; see also *id.* at p. 26.)

As the People discussed in their Opening Brief, a test grounded only in formalities would in many instances serve to protect what are, at bottom, no more than passive tribal investments, and to insulate essentially private businesses and private revenue streams from generally applicable state laws, including laws designed to protect California consumers. (Opening Brief at pp. 34-39.) These outcomes do not serve the purposes of sovereign immunity—protecting public resources and a sovereign's ability to control its governmental operations. (See *Washington v. Confederated Tribes of the Colville Indian Reservation* (1979) 447 U.S. 134, 155, 156; see also *Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services* (2d Cir. 2014) __ F.3d. __, 2014 WL 4900363, at *7 ["a tribe has no legitimate interest in selling an opportunity to evade state law"].) This Court should reject the Payday Lenders' attempt to reduce the determination of arm-of-the-tribe status to a mere formal exercise.

D. The Court Should Reject the Payday Lenders' Attempt To Exclude Consideration of Facts That Are Relevant to Financial Relationship, Function and Purpose, and Tribal Control

The People in their Opening Brief explain why it is relevant and reasonable to consider, among other things, whether the entity's structure insulates the tribe's treasury from liability, whether the revenues flowing from a commercial enterprise to the tribe are substantial as compared to the benefits flowing to third parties, and whether third parties rather than the tribe are making key financial and operational decisions. (Opening Brief at pp. 23-24, 29-39.) The Payday Lenders respond by recasting the People's arguments and then arguing that the revised proposals, if accepted, would tread on tribal sovereign interests and invite court interference in governmental affairs. (Answer Brief at pp. 35-39.) As set out below, the considerations actually advanced by the People do nothing more than

assure that sovereign immunity is extended to entities that are not themselves tribes only where this result actually serves the tribe's sovereign interests—rather than the interests of private parties that are not in fact, to use the Payday Lenders' preferred phrase, "sufficiently related" to a tribe. (See, e.g., Answer Brief at pp. 1, 3, 4, 11, 18, 22, 27, 46.) The resulting arm-of-the-tribe doctrine is as respectful of tribes as the arm-of-the-state doctrine is of states.

1. Incorporation under state or tribal law, while not dispositive, weighs against arm status, and lack of incorporation weighs in favor of arm status

In determining arm-of-the-tribe status, it is appropriate to consider whether the entity claiming such status is structured under state or tribal law in any way that causes the entity to rely on the sovereign's treasury for its operational funds or puts the sovereign's treasury at risk if immunity is not extended. Accordingly, incorporation generally should weigh against an entity being an arm of the tribe, while lack of incorporation (or some similar fiscal insulation from the general tribal treasury) would normally weigh strongly in favor of arm status. This consideration appears in both arm-of-the-tribe and arm-of-the-state cases. (See, e.g., *Allen, supra,* 464 F.3d at p. 1047 [immunity for non-incorporated casino "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general"]; *White, supra*, 765 F.3d at p. 1025 [native remains repatriation committee was arm in part because it "is funded exclusively by the Tribes"]; *Breakthrough, supra*, 629 F.3d at p. 1192 [fact that resolution described casino as "unincorporated enterprise of the Tribe" rather than "corporate" body weighed in favor of arm status];[12] see also

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[12] In *Breakthrough*, the Tenth Circuit held that whether or not the tribe would be liable for a monetary judgment against the entity is not (continued...)

Alaska Cargo Transport, Inc. v. Alaska Railroad Corp. (9th Cir. 1993) 5 F.3d 378, 380; but see Court of Appeal's Opinion (Jan. 21, 2014) at p. 20.) This Court should therefore reject the Payday Lenders' argument that only the flow of revenues from the entity *to the tribe* is relevant. (See Answer Brief at pp. 23-24.)[13]

Contrary to the Payday Lenders' assertions, the People do not contend that incorporation under state or tribal law automatically precludes a finding of arm-of-the-tribe status. (See Answer Brief at pp. 22-23, 35-36.)[14] Incorporation, with its limits on tribal shareholder liability, is just one factor among many to be considered in determining whether, on balance, extending immunity to the entity would serve the purposes of

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(...continued)
dispositive of arm-of-the-tribe status. The court did not hold that this factor is irrelevant. (See *Breakthrough*, *supra*, 629 F.3d at p. 1187.)

[13] The People discuss the tribe's receipt and use of revenues in the next section, under function and purpose.

[14] The Payday Lenders cite *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.* (6th Cir. 2009) 585 F.3d 917, for the proposition that "incorporating does not divest a tribal entity of sovereign immunity from suit." (Answer Brief at p. 23.) The People agree, but note that a special type of corporation—federally chartered under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477—was at issue in that case. To form a Section 17 corporation, "[t]he tribe must pass a resolution, draft a corporate charter, obtain tribal approval of that charter, submit the resolution and charter to the Bureau of Indian Affairs for approval, and finally ratify the BIA-approved corporate charter before the corporation can begin to conduct operations." (Cohen's Handbook of Federal Indian Law (2012 ed.) § 21.02[1][b].) Some courts, like the Sixth Circuit in *Memphis Biofuels*, rely on the language of Section 17 to hold that a federally chartered corporation is an arm of the tribe. (585 F.3d at p. 921.) Other courts appear to look beyond the language of Section 17 to determine arm-of-the-tribe status. (See, e.g., *Amerind Risk Management Corp. v. Malaterre* (8th Cir. 2011) 633 F.3d 680, 685.) Cases concerning Section 17 corporations are in any event of limited utility in determining what test should apply more generally to businesses claiming arm-of-the-tribe status.

tribal sovereign immunity. Two Ninth Circuit cases involving casinos are illustrative. In *Cook v. AVI Casino Enterprises, Inc.* (9th Cir. 2008) 548 F.3d 718, cited by the Payday Lenders, the Ninth Circuit held that a corporation created to operate a tribal casino was immune as an arm of the tribe. (*Id.* at p. 726.) The court relied primarily on *Allen*, an earlier Ninth Circuit casino immunity case. In *Allen*, the court held that an unincorporated casino was an arm of the tribe because the tribe owned and operated the casino and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2700-2721, ensured that the business would be operated for the benefit of the tribe. (464 F.3d at pp. 1046-1047.) *Cook* does not establish that incorporation is irrelevant, only that incorporation, standing alone, does not preclude immunity where other factors establish that the entity is an arm of the tribe. (*Cook, supra*, 548 F. 3d at p. 726, fn. 5; see also *Breakthrough, supra*, 629 F.3d at p. 1192 [discussing importance of IGRA to determination of casino's arm status]; Cohen's Handbook of Federal Indian Law (2012 ed.) §§ 12.01–12.02, 21.01.)

The Payday Lenders further argue that, given tribes' limited ability to raise taxes, it makes no sense to consider the potential of tribal liability for the entity's debts or the entity's financial dependence or independence. (Answer Brief at p. 36.) They assert categorically that "[t]ribal entities are not financially dependent upon the sovereign; ***the tribal sovereign is financially dependent upon the entity***." (Answer Brief at p. 36-37, italics and bolding in original.) The Court should reject this argument for a number of reasons. First, the factual premise is not uniformly correct. Many tribes have been able to establish sizable treasuries and revenue streams from gaming, natural resources, and other enterprises that could be put at risk if the tribe were held liable for the debts and obligation of a

tribally-affiliated entity.[15] Further, some tribally-created entities are financially dependent on tribes. The repatriation committee at issue in *White* is an example. (See *White*, *supra*, 765 F.3d at p. 1025.) Lastly, contrary to the Payday Lenders' assertions, the People do not contend that the presence or absence of financial separation between the tribe and the entity is dispositive. As the People noted in their Opening Brief, even an incorporated entity may be deemed an arm of the tribe, and this result is more likely where the incorporated entity provides a stable, substantial revenue stream to fund governmental functions. (See next section.)

In this case, as the People noted in their Opening Brief, the corporate status of MNE Services, Inc. and SFS, Inc., which insulates the tribes from liability, weighs against, but is not dispositive of, their arm status.

2. A commercial entity may qualify as an arm of a tribe, but tribal immunity should not operate to protect interests or activities that bear little real relationship to a tribe

Whether an entity serves a governmental function is relevant to the entity's status as an instrumentality of the tribal or state sovereign. (See *White*, *supra*, 765 F.3d at p. 1025, citing *Breakthrough*, *supra*, 629 F.3d at p. 1187; *American Property Management Corp. v. Superior Court* (2012) 206 Cal.App.4th 491, 504; *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 639-640; see also *Alaska Cargo*, *supra*, 5 F.3d at p. 381.) Where the entity engages in activities that directly advance government purposes, such as providing housing or health care to tribe members, developing or safeguarding natural resources owned by the tribe, repatriating remains, or educating the public about a tribe, a governmental

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[15] Miami Nation Enterprises' current website states that it operates eight companies, including two casinos. (Opening Brief at p. 16, fn. 22.)

function is of course evident. (See, e.g., *E.E.O.C. v. Karuk Tribe Hous. Auth.* (9th Cir. 2001) 260 F.3d 1071, 1074; *White*, *supra*, 765 F.3d at p. 1025.) But the People agree that even purely or primarily commercial entities can also serve governmental functions. As the People discussed in their Opening Brief, creating a substantial, reliable, income stream to support tribal programs and services is an important governmental function that would normally weigh heavily in favor of arm-of-the-tribe status. (Opening Brief at pp. 37-38, citing *Bay Mills*, *supra*, 134 S.Ct. at p. 2043 [Sotomayor, J., concurring].)

The Payday Lenders imply that the *Bay Mills* decision precludes consideration of "governmental purpose" in determining arm-of-the-tribe status. (Answer Brief at p. 29; see also *id.* at p. 12.) The case does not support such a limitation. In *Bay Mills*, the State of Michigan sued the Bay Mills Indian Community to enjoin the tribe from opening a casino outside Indian lands. (134 S.Ct. at p. 2028.) The U.S. Supreme Court held that the tribe was immune from suit and declined to limit the tribe's sovereign immunity to protect only the tribe's on-reservation, non-commercial activities. (*Id.* at pp. 2028, 2031.) *Bay Mills* thus instructs that where tribal sovereign immunity exists, the fact that the tribe's action is commercial is irrelevant. But the decision does not suggest that in determining whether a business entity that is not itself a tribe should nonetheless share in the tribe's sovereign immunity, the connection between the business and the tribe's sovereign interests is irrelevant.[16]

[16] The Payday Lenders state that the People advocate consideration of the "equities" as between tribes and states in determining arm-of-the-tribe status. (See Answer Brief at p. 29.) That is incorrect. The People do not argue that California's interests in law enforcement should override tribal immunity. The question here is instead whether particular entities are entitled to invoke tribal governmental immunity in the first place.

There are at least two ready examples of purely commercial enterprises that can serve governmental functions by creating stable revenue streams to fund important programs and services: public lotteries and tribal gaming operations. (See *Wojcik v. Massachusetts State Lottery Com.* (1st Cir. 2002) 300 F.3d 92, 99-100; *Breakthrough, supra*, 629 F.3d at pp. 1192-1193.) Casinos operated under IGRA have routinely been recognized as serving tribal governmental functions. (See *Allen, supra*, 464 F.3d at pp. 1046-1047; *Breakthrough, supra*, 629 F.3d at 1192, fn. 14, 1192-1193.) As the *Allen* court observed, by operation of IGRA, a casino is "no ordinary" or "mere revenue-producing tribal business . . . ." (464 F.3d at p. 1046.) By its terms, IGRA ensures that "'the Indian tribe is the primary beneficiary of the gaming operation.'" (*Id.* at p. 1046, quoting 25 U.S.C. § 2702(2).) IGRA ensures tribal benefit by, for example, requiring National Indian Gaming Commission approval of any management contract to limit management fees and contract length. (Cohen's Handbook § 12.08[1], citing 25 U.S.C. §§ 2711(c)(1)-(2), 2711(b)(5).) With limited exceptions, IGRA limits ownership to the tribe, and authorized uses of gaming revenues to governmental purposes. (Cohen's Handbook § 12.09[1]-[2], citing 25 U.S.C. § 2710(b)(2)(A), (B).) Because of IGRA, funding of tribal functions and services from casino operations in most cases can be clearly demonstrated. (See *Breakthrough, supra*, 629 F.3d at pp. 1192-1193 [setting out allocation of casino revenue by percentage].)

In this case, however, no federal law analogous to IGRA regulates the structures or terms under which tribes may affiliate with payday lending businesses that are otherwise operated for private profit. Further, there is no evidence concerning the amount or percentage of revenues that flow back to the Tribes from the Payday Lenders, the regularity of payment, what programs the revenues actually fund, and whether any program funding is substantial as compared to other revenues sources. Evidence

from the Federal Trade Commission's investigation suggests that substantial revenues flow to third parties through management fees and other payments. (See Opening Brief at pp. 13, fn. 16; 20; see also Section III, below.) There is therefore a strong indication that non-tribal third parties—not the Miami Tribe or the Santee Sioux Nation—are the primary beneficiaries of the Payday Lenders' operations. Protecting those private parties and their revenue streams is not a purpose of sovereign immunity.

3. Where evidence suggests that non-tribal parties control an entity, the entity must present evidence showing actual management and oversight by the tribe

In both arm-of-the-tribe and arm-of-the-state cases, courts examine whether the entity is under the sovereign's substantial, actual control or whether instead its operation is essentially independent. (See *White*, *supra*, 765 F.3d at p. 1025, citing *Breakthrough*, *supra*, 629 F.3d at p. 1187; *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.) To tip toward immunity, the tribe's control should be established "as a practical matter." (See *Trudgeon*, *supra*, 71 Cal.App.4th at p. 641.)

Contrary to the Payday Lenders' contentions, the People do not argue that the mere fact that a tribally affiliated entity enlists the help of third parties for services, technical assistance, or day-to-day management precludes arm-of-the-tribe status. (See Answer Brief at pp. 24-26.) But the effect of bringing in outside management is relevant to whether a tribe controls a business, and, in turn, whether the entity is so closely tied to the tribe as to share in its immunity. Even in the context of IGRA gaming, the Tenth Circuit noted that third-party involvement in operations might affect the immunity calculus. (*Breakthrough*, *supra*, 629 F.3d at p. 1192, fn. 14.)

Nor do the People contend that to exert control over a business, tribal representatives must personally conduct every aspect of "business minutiae." (See Answer Brief at p. 25, citing *Trudgeon*, *supra*, 71 Cal.App.4th at p. 641; see also *id.* at pp. 38-39.) But "control" should require that tribal government officials are personally and substantially involved in making, or at least actively supervising, key decisions about the business's policies, practices, operations and finances. Without a requirement of some substantial, actual, tribal control, arm-of-the-tribe immunity would extend beyond respecting a tribe's sovereign prerogatives to shielding the activities of essentially private businesses in which tribes are not more than passive investors—at the expense of the State of California's sovereign prerogative to enforce its generally applicable laws and, if misconduct is in fact occurring, California's residents and consumers. The doctrine cannot properly be stretched that far.

Where, as in this case, there is evidence of substantial (and perhaps practically exclusive) third-party operational control (see Opening Brief at pp. 14-15, 19-20), an entity claiming arm status should not be allowed to rest solely on summary declarations and initial formation documents showing only the potential for tribal control.

III. ON THE PRESENT RECORD, THE PAYDAY LENDERS ARE NOT IMMUNE

A. The Current Record Establishes Only the Tribes' Bare Intent to Share Immunity and the Potential for Tribal Control

The Payday Lenders in their Answer Brief do not take issue with the People's statement of facts. (Opening Brief at pp. 8-20.) To a large extent they cite the very same documents and declarations described in the People's Opening Brief. (Answer Brief at pp. 4-8, 41-44.) As the People have explained, MNE Services, Inc., a business entity incorporated under

tribal law with attributes typical of a corporation, including limited shareholder liability, holds the marks for Ameriloan, UnitedCashLoans, and USFastCash; SFS, Inc., a tribal corporation with similar corporate attributes, holds the mark for OneClickCash, and has used the unregistered trade name PreferredCashLoans. (Opening Brief at pp. 10, 13-14, 15-16.) Websites for the Payday Lenders continue to operate. (*Id.* at pp. 9, 10.)

Moreover, the Payday Lenders do not address the many voids and uncertainties in the record that the People identified in their Opening Brief. Significantly, the People noted that nothing in the record described the amount or percentage of the Payday Lenders' revenues received by the Tribes or documented any specific tribal programs that actually rely on these revenues. (See Opening Brief at pp. 13, 19.) The Payday Lenders in their Answer Brief respond with general assertions that some undisclosed revenues flow from the Payday Lenders to the Tribes, and that certain receiving programs are important to the Tribes, citing the same tribal formation documents, tribal business licenses, tribal laws, and summary declarations that were described and cited with specificity by the People in their Opening Brief. (Answering Brief at pp. 6, 8.)

The Payday Lenders' discussion of the flow of revenues from MNE Services, Inc. is particularly confusing because it continues to conflate that entity with Miami Nation Enterprises. (Answer Brief at p. 6; see Opening Brief at pp. 3, fn. 1, 16, fn. 20.) MNE Services, Inc. is the holder of the payday lending marks and is the business standing behind these businesses. (Opening Brief at p. 15.) Miami Nation Enterprises is a separate tribal corporation that, while it is the sole shareholder of MNE Services, Inc., also operates a number of other companies, including two casinos, which presumably generate revenue. (*Id.* at pp. 16, fn. 22, 17.) It is thus not clear if payday lending or some other commercial venture is the source of the asserted revenues.

Equally significant, the People noted that evidence from the FTC investigation suggested that non-tribal third parties exercised substantial control over the Payday Lenders' operations and financial decisions. (Opening Brief at pp. 14-15, 19-20.) The relationship between the Payday Lenders (whose lending businesses pre-dated their relationship with the Tribes), the holders of the payday lending marks (MNE Services, Inc. and SFS, Inc.), the purported management company AMG Services Inc. and Scott and Blaine Tucker, and the Tribes, (the Miami Tribe as shareholder of Miami Nation Enterprises, the shareholder of MNE Services, Inc., and the Santee Sioux Nation, as shareholder of SFS, Inc.) is—to say the least—complicated. (Opening Brief at pp. 13-15, 18-20.) Nonetheless, while the precise relationships and connections are less than clear, the evidence from the FTC's investigation strongly suggests that the Payday Lenders' finances in practice have been controlled by the third-party Tuckers for their own benefit, with substantial revenues flowing from the payday lending businesses to companies associated with the Tuckers. (Opening Brief at pp. 14-15, 19-20.)

Rather than addressing this evidence, the Payday Lenders state summarily that the Miami Tribe "strictly controls the[ir] lending activities[,]" citing the same summary declarations and tribal documents described by the People. (Answer Brief at p. 6, citing 5 SSCT 1026-1027 [Brady Decl.]; 7 SSCT 1467-1518 [Miami Business Regulatory Code], 1524-1536 [amendments to Miami Tribal Codes].) Similarly, while the Payday Lenders assert that SFS, Inc. is "controlled" by the Santee Sioux Nation and payday lending is "governed" by the laws of the Santee Sioux Nation, their evidence of tribal control consists of Mr. Campbell's summary declaration and the tribal laws and formation and license documents already discussed by the People. (Answer Brief at p. 8, citing 4 SSCT 764-765 [Campbell Decl.]; 4 SSCT 802-806 [SFS, Inc. Articles of Incorporation]; 5

SSCT 918-930 [resolution adopting codes regulating lending], 957-970 [tribal business licenses].) Their response confirms that the record establishes only the Tribes' bare intent to share immunity and the potential for tribal control.

B. On Balance and on the Current Record, the Evidence Concerning Financial Relationship, Purpose and Function, and Tribal Control Weighs Against Arm-of-the-Tribe Status

According to the Payday Lenders, only the following evidence can be considered, all weighing in favor of immunity:

- MNE Services, Inc. and SFS, Inc. were created under tribal resolution as authorized by tribal law. (Answer Brief at pp. 40-41.)
- These entities' formation documents state that they were created for tribal purposes, such as to benefit the tribal economy. (Answer Brief at pp. 41-42.)
- According to their formation documents, the boards of these entities are comprised of members appointed by the Tribal Business Committee (MNE Services, Inc.) or are Tribal Council members (SFS, Inc.). (Answer Brief at pp. 42-43.)
- These entities' formation documents state that the relevant Tribes intended to share their immunity. (Answer Brief at p. 43.)
- Some undisclosed share of revenues from the Payday Lenders' operations flow to the Tribes and are "used for the benefit of the Tribe . . . ." (Answer Brief at p. 44.)

The Payday Lenders repeatedly assert that these facts are "undisputed." (Answer Brief at pp. 42, 43, 44, 45.)

The Payday Lenders are correct that the People do not dispute the text of the formation documents and tribal laws, or that the Payday Lenders' declarants made certain summary assertions about the benefit to the Tribes. The People's point is that, as a matter of law, this evidence should not be sufficient to establish that the Payday Lenders operate as arms of tribes. Examining the three overarching considerations—financial relationship, function and purpose, and sovereign control— that courts have found relevant in both arm-of-the-tribe and arm-of-the state cases, and taking into account evidence of actual practices, the Payday Lenders have not shown they are arms of the relevant Tribes. The entities standing behind the 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, and the Santee Sioux Nation—weighs against immunity. Further, based on evidence from the FTC's investigation, it appears that recognizing arm-of-the-tribe status for these corporations would protect primarily the revenue streams of private third parties. Finally, it appears 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.

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, citing *Breakthrough, supra*, 629 F.3d at p. 1181.) In this case, the existing record establishes only that the Tribes have some economic interest in the payday lending businesses, whose operations appear to be run by private, non-governmental parties and to generate revenues that flow mostly to parties other than the Tribes. On this record, the Payday Lenders 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 Payday Lenders and that the following three fundamental considerations guide the determination of arm-of-the-tribe status: (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 a central governmental function; and (3) whether the entity is under the tribe's legal and actual control or rather operates independently with a separate identity. Since the Payday Lenders have not yet had the opportunity to meet their burden under this clarified test, the People further request that the Court remand the case for further proceedings consistent with the Court's opinion.

Dated: November 6, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,359 words.

Dated: November 6, 2014

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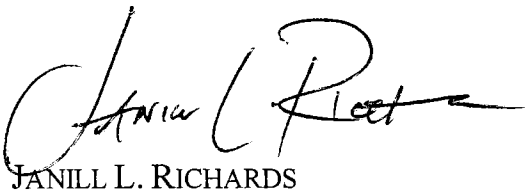
Attorney General of California



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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 November 6, 2014, I served the attached **REPLY 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:

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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 November 6, 2014, at Oakland, California.

Tanisha N. Marshall
Declarant

Tanisha N. Marshall
Signature