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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. _____

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

PETITION FOR REVIEW

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

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

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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?

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?

PETITION FOR REVIEW

Appellant, the People of the State of California, respectfully petitions this Court for review of the published decision of Division Seven of the Second District Court of Appeal in *People of the State of California v. Miami Nation Enterprises, et al.* (B242644) (*People v. MNE*), filed on January 21, 2014.[1] A copy of the slip opinion is attached. (Cal. Rules of Court, rule 8.504(b).)

WHY REVIEW IS NECESSARY

This Court's review is necessary to secure uniformity of decision and to settle an important question of law concerning the test for

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[1] The People have also submitted a letter request for depublication of the Court of Appeal's decision, reported at (2014) 223 Cal.App.4th 21.

determining under what circumstances a business entity is an "arm of the tribe" and, therefore, entitled to invoke the tribe's sovereign immunity from suit.

Immunity is an important and inherent part of tribal sovereignty that protects tribal governmental and commercial activities both on and off tribal lands. Legitimate arm-of-the-tribe businesses, controlled by a tribal government and operated for the benefit of the tribe, are immune from state law enforcement. The practical effects of extending sovereign immunity to businesses that are affiliated with a tribe on paper, but in fact operate with little or no tribal control or oversight, can be seen in the abuses in the payday lending industry. Under the test applied by the Second Appellate District, the State is unable to protect or assist vulnerable consumers harmed by payday lenders claiming immunity as arms of tribes. Further, California-licensed payday lenders are at a competitive disadvantage as compared to lenders claiming immunity from state consumer protection laws as arms of tribes. A core function of California's sovereignty is thus at stake in this case—the State's legitimate exercise of authority to protect the interests of all of its businesses and residents through enforcement of its laws.

Review is necessary in this case for two closely related reasons. First, review is warranted to resolve a conflict between two appellate districts regarding when a tribally affiliated entity qualifies as an arm of a

tribe such that it enjoys the tribe's sovereign immunity. The test adopted by the Second Appellate District in this case is based solely on organizational formalities and is essentially limited to a facial examination of the formal indicia of the business entity's affiliation with the tribe. The test previously developed by the Court of Appeal for the Fourth Appellate District, in contrast, is fact-based, and properly considers, among other factors, the tribe's actual control over the business entity. Without review by this Court, application of the competing arm-of-the-tribe tests in California may result in dramatically different outcomes, depending on which test a court applies.

Second, review is warranted to settle the important question of whether the arm-of-the-tribe test should provide reasonable limits on the extension of sovereign immunity to businesses. Without this Court's intervention, the rule announced by the Court of Appeal in this case could encourage the creation of shell companies selling a variety of regulated financial products—including mortgages, insurance and loans—over the Internet without important consumer protections provided by California law. With the proper paperwork, these companies would be shielded from state enforcement by tribal sovereign immunity, even where the tribe does not exercise actual control and oversight. Review will allow this Court to articulate an appropriate arm-of-the-tribe test that ensures that only

businesses operating under meaningful tribal control and oversight benefit from sovereign immunity.

SUMMARY OF THE FACTS AND OF THE COURT OF APPEAL'S DECISION

In 2006, the California Department of Corporations ordered several Internet payday advance lenders (Payday Lenders) to stop their unlicensed and unlawful activities in California.[2] (Opn., at p. 2.) The Payday Lenders engaged in egregious, deceptive, and exploitive practices in violation of California law. They charged annual interest rates and fees in excess of 1,000 percent,[3] illegally renewed loans multiple times, and used threats and other unlawful techniques to collect loan payments. (Opening Brief (OB), p. 4; Reply Brief, pp. 2-4.) In 2007, when the Payday Lenders failed to obey the Department's desist and refrain order, the Commissioner, on

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[2] The California Corporations Commissioner was formerly the Chief Officer and head of the Department. (Corp. Code, § 25600.) The Department licenses and regulates a variety of financial services including, but not limited to, payday lenders. (See Fin. Code, §§ 23005, subd. (a) [licensing], 23015 [rules and regulations].) The Department of Corporations merged with the Department of Financial Institutions on July 1, 2013, and became the Department of Business Oversight. (Fin. Code, § 321, subds. (b) & (c).)

[3] On January 28, 2014, in a case brought by the Federal Trade Commission against multiple Internet payday lenders, including the Payday Lenders in this case, in the United States District Court for the District of Nevada, the magistrate judge calculated that the typical borrower ultimately paid back $675 dollars in "fees" on a $300 loan. (*Federal Trade Com. v. AMG Services, Inc.* (D.Nev., Jan. 28, 2014, No. 2:12-cv-00536-GMN-VCF) 2014 WL 584781, *4.) California's payday lending law limits loan fees to 15 percent of the loan amount. (Fin. Code, § 23036, subd. (a).)

behalf of the People of the State of California, filed her complaint in this matter. (Opn., at p. 2.)

Two businesses, Miami Nation Enterprises (MNE) and SFS, Inc. (SFS), specially appeared and jointly moved to quash the service of summons and to dismiss the complaint. (Opn., at p. 3.) MNE was formed under the laws of the Miami Tribe of Oklahoma (also known as the Miami Nation) and is wholly owned by the Miami Nation. (*Id.* at p. 8.) SFS was incorporated under the laws of the Santee Sioux Nation (also formerly known as the Santee Sioux Tribe of Nebraska) and is wholly owned by the Santee Sioux Nation. (*Id.* at p. 7.)

MNE and SFS stated that they did business under the Payday Lenders' trademarked names, that MNE and SFS were owned and operated by two federally recognized tribes, and that they were entitled to the tribes' sovereign immunity.[4] (Opn., at pp. 3, 4.) The superior court denied MNE and SFS's motion and granted the People's request for a preliminary injunction. (Opn., at p. 4.) MNE and SFS jointly filed a petition for review, which the Court of Appeal summarily denied. (*Ibid.*) This Court granted MNE and SFS's petition and transferred the matter to the Court of Appeal with directions to vacate its order denying review and issue an

[4] This case does not concern, nor do the People question, the sovereign immunity of the tribes themselves.

alternative writ. (*Ibid*; see also *Ameriloan v. Superior Court* (*Ameriloan*) (2008) 169 Cal.App.4th 81, 86-88 [detailing case's procedural history].)

In a published opinion, the Court of Appeal remanded the matter to the superior court with directions to conduct an evidentiary hearing. (*Ameriloan*, *supra*, 169 Cal.App.4th at p. 101.) The superior court was directed to determine whether the Payday Lenders were sufficiently related to the tribes to be entitled to the benefit of their sovereign immunity under the criteria articulated in *Trudgeon v. Fantasy Springs Casino* (*Trudgeon*) (1999) 71 Cal.App.4th 632, and *Redding Rancheria v. Superior Court of Shasta County* (*Redding Rancheria*) (2001) 88 Cal.App.4th 384. (*Id.* at p. 98.) The Court of Appeal also authorized the parties to conduct limited discovery pertinent to subject matter jurisdiction. (*Id.* at pp. 98-99.)

Outside of the discovery process, the People obtained extensive evidence from the Federal Trade Commission (FTC) and other sources regarding the financial relationships among the Payday Lenders, MNE, SFS, and the affiliated tribes.[5] This evidence revealed that third parties had operated the Internet payday lending businesses for years before seeking to shield their activities through affiliation with the tribes; that the third parties sought tribal affiliation only after attracting the regulatory attention of

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[5] The FTC investigated multiple payday lending operations as part of an enforcement action for violations of federal law. (See *Federal Trade Com. v. AMG Services, Inc.*, *supra,* 2014 WL 584781, at pp. *1,*5.)

several concerned states; and that, once affiliated, the tribes did not control the day-to-day operations of the Internet payday lending activities and received only a small percentage of the income from their operations. (Opn., at pp. 9-10.) Further, the evidence showed that the Payday Lenders' activities violated the tribes' own laws. (OB, at pp. 11-12.)

The superior court held an evidentiary hearing; determined that MNE and SFS functioned as arms of the tribes for the purposes of tribal sovereign immunity; and on that basis granted the two entities' joint motion to quash service and dismiss the action for lack of subject matter jurisdiction. (Opn., at pp. 7, 10.) On January 21, 2014, the Court of Appeal issued a published opinion affirming the superior court's dismissal. (*Id.* at pp. 2, 10.) The Court of Appeal's decision relied primarily on formal indicia of MNE's and SFS's organizational structure and relationship with the tribes and discounted evidence that their activities were largely controlled by third parties and violated tribal law and their own organizational documents. (See Opn., at pp. 22-24.)

LEGAL DISCUSSION

REVIEW IS NEEDED TO RESOLVE A CONFLICT BETWEEN THE DISTRICT COURTS OF APPEAL AND TO ESTABLISH A UNIFORM TEST TO DETERMINE WHEN A BUSINESS ENJOYS TRIBAL SOVEREIGN IMMUNITY

Under federal law, Indian tribes enjoy sovereign immunity from suits based on their governmental and commercial activities. (*Trudgeon*, *supra*, 71 Cal.App.4th at pp. 636-637, citing *Kiowa Tribe of Okla. v.*

Manufacturing Technologies, Inc. (1998) 523 U.S. 751.) A tribally related business entity has no immunity of its own—it has immunity only if the tribe's immunity is extended to it. (*Trudgeon, supra*, 71 Cal.App.4th at pp. 636-637.) A tribe's immunity "does not cover tribally chartered corporations that are completely independent of the tribe"; it extends only to entities that are so closely linked to the tribe that they qualify to be treated as, in legal effect, the tribe itself. (*Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247-248.)

Whether a separately organized business is closely linked or sufficiently connected to a tribe to benefit from the tribe's immunity depends on whether the business acts as an "arm of the tribe," such that its activities are properly deemed those of the tribe itself. (*Cook v. AVI Casino* (9th Cir. 2008) 548 F.3d 718, 725.) Any immunity a business might receive depends solely on whether it operates and conducts business as an arm of the tribe. (*Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047.) Importantly, "not all tribal businesses and corporations will function as 'arms of the tribe.'" (*Allen v. Mayhew* (E.D.Cal. 2009) U.S. Dist. LEXIS 25319, *4-5.) Even a business organized and owned by a tribe "may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself." (*Trudgeon, supra*, 71 Cal.App.4th at p. 639.)

This Court has never addressed what criteria should be applied in California state courts to determine arm-of-the-tribe immunity. As set out below, with the Second District's decision in this case, state appellate cases are now in conflict on the proper formulation and application of the test for arm-of-the-tribe immunity.

In *American Property*, the Fourth District endorsed the federal Tenth Circuit Court of Appeals' six-factor test as "accurately reflect[ing] the general focus of the applicable federal and state case law" for determining if a business qualifies as an arm of the tribe.[6] (*American Property Management Corp. v. Superior Court* (*American Property*) (2012) 206 Cal.App.4th 491, 501 [discussing the test in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d 1173].) The *American Property* court set out the following non-exhaustive list of factors to be examined:

> (1) the entity's method of creation;
>
> (2) the entity's purpose;
>
> (3) the entity's structure, ownership, and management, including the amount of control the tribe has over the entity;
>
> (4) whether the tribe intended for the entity to have tribal sovereign immunity;

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[6] The Fourth District decided *American Property* just two weeks after the superior court dismissed this case. This Court denied the petition for review on August 22, 2012. (*American Property Management Corp. v. Superior Court* (2012) 2012 Cal. LEXIS 8069.)

(5) the financial relationship between the tribe and the entity; and

(6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entity.

(*American Property*, *supra*, 206 Cal.App.4th at p. 501, citing *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, *supra*, 629 F.3d at pp. 1187-1188.)

In contrast, the Second District Court of Appeal in this case limited its analysis to four factors in determining whether MNE and SFS functioned as arms of the respective tribes:

(1) whether the tribal entity was formed by tribal resolution and according to tribal law;

(2) whether the stated purpose of the tribal entity's formation was for tribal economic development;

(3) whether there was a clearly expressed intent by the tribe to provide the tribal entity with immunity; and

(4) whether the tribal entity has a governing structure that is appointed by and ultimately overseen by the tribe.

(Opn., at p. 24.)

Moreover, in discussing the scope of this narrower, more formalistic test, the Court of Appeal made clear that the first factor—whether the entity was formed under tribal law—"should be given predominant, if not necessarily dispositive, consideration." (Opn., at p. 20 [citing to *American Property's* quotation of court decisions that considered creation under tribal law a factor weighing significantly in favor of finding an entity enjoyed

sovereign immunity].) The Court of Appeal did not, however, cite any rationale for giving this factor effectively dispositive weight.

In contrast to the Second Circuit in this case, the Fourth District in *American Property* declined to accord dispositive weight to any single factor, and, in addition, recognized that some factors called for a substantive, not superficial, inquiry into the relationship between a business entity and the tribe. For instance, even while giving significant weight to the "method of creation" of the tribal business, the Fourth District nonetheless went on to evaluate all of the remaining five factors. (*American Property*, *supra*, 206 Cal.App.4th at pp. 501-503.) Indeed, the concurring opinion disagreed with the weight the majority accorded to the "method of creation" factor, yet still concluded that "on balance, the factors weigh[ed] against a determination" that the business was an arm of the tribe. (*Id.* at pp. 513-514.)

The method of creation of a business is a relevant threshold issue in the arm-of-a-tribe jurisdictional analysis, in part because the choice of law under which a tribe incorporates a business entity is one indication of whether the tribe intends to extend its sovereign immunity to the business. But in the Fourth District's view, the method of creation is only one of six factors to be evaluated. In *Trudgeon*, the Fourth District included as a factor for evaluation "the extent to which the tribe controls the composition and operations of the business entity." (*Trudgeon, supra*, 71 Cal.App.4th at

p. 641.) As one of the six factors for evaluation, the Fourth District in *American Property* examined the critical element of tribal management and control over the subject business, holding that the tribe's designation of a non-tribal entity to manage the business was another indication that the business was not an arm of the tribe. (*American Property, supra,* 206 Cal.App.4th at p. 505, quoting *Dixon v. Picopa Construction Co.* (Ariz. 1989) 772 P.2d 1104 ["tribally chartered corporation was not protected by sovereign immunity, in part, because 'the tribal government does not manage the corporation'"].)

The Second and Fourth Districts' tests are in material conflict regarding what factors courts should consider in evaluating the relationship between a business and a tribe, and deciding what weight to give to the factors. The resulting lack of uniformity creates uncertainty for both tribes and the State in establishing the jurisdictional boundaries between the two sovereigns. That uncertainty on this important and recurring issue warrants review by this Court.[7]

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[7] This may be a particularly appropriate time for the Court to consider issues relating to arm-of-the-tribe immunity. The United States Supreme Court is currently considering *Michigan v. Bay Mills Indian Community* (*Bay Mills*) (6th Cir. 2012) 695 F.3d 406, cert. granted June 24, 2103, No. 12-515, ___ U.S. ___ [133 S.Ct. 2850, 186 L.Ed.2d 907] (argued Dec. 2, 2013), in which the State of Michigan has argued that tribal sovereign immunity should not prevent a state from suing a tribe to enjoin an allegedly unlawful off-reservation gaming operation. The Court's

(continued...)