IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

MIAMI NATION ENTERPRISES, et al.,

Defendants and Respondents.

CASE NO. S216878

SUPREME COURT
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rules 8.208, 8.488)

Supreme Court Case Number: S216878

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

Please check the applicable box:

X There are no interested entities or persons to list in this certificate (Cal. Rules of Court, Rule 8.208).

Respondent Miami Nation Enterprises d/b/a Ameriloan, US Fast Cash, and United Cash Loans and Respondent SFS, Inc. d/b/a Preferred Cash Loans and One Click Cash are wholly owned by the Miami Tribe of Oklahoma and Santee Sioux Nation, respectively, which are federally-recognized Indian tribes and, as such, are governmental entities and, thus, are not included within the definition of "Entity" set forth in Rule 8.208.

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest (Explain)

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INTRODUCTION

Pursuant to Cal. Rule of Court 8.204, the Specially Appearing Defendants/Respondents Miami Nation Enterprises ("MNE") d/b/a Ameriloan, US Fast Cash and United Cash Loans; and SFS, Inc. ("SFS") d/b/a One Click Cash and Preferred Cash Loans (collectively "Tribal Entities") file this Respondents' Answer Brief on The Merits.

This is a case about tribal sovereign immunity. In its Opening Brief, however, the California Department of Business Oversight Commissioner (the "State") flouts binding and persuasive tribal sovereign immunity jurisprudence that guided the decisions of the courts below, as well as the long-settled rule that new issues cannot be asserted for the first time in an opening brief before this Court. In its latest attempt to deprive federally-recognized Indian tribes of their federally-protected sovereign rights, the State boldly disregards the Court of Appeal's analysis and its decision and only raises entirely new issues on appeal.

Since June 29, 2007, when the State filed this action (1 CT 000027-41[1]), all parties and the lower courts looked to and applied controlling California and federal Indian law authorities in seeking a determination of whether the Tribal Entities are sufficiently related to their respective Tribes so that each may exercise its respective Tribe's sovereign immunity from suit. Having now lost under these long-standing principles in both the trial court and in the Court of Appeal, the State, for the first time here, rejects that established authority, ostensibly as not "nationally coherent" (Appellant's Opening Brief ("AOB") at p. 24) and desperately urges this Court to adopt "a new rule to govern determination of arm-of-the-tribe

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[1] This brief uses the following references to the record, preceded by the volume number and followed by the page number:

"CT" = Clerk's Transcript;

"SSCT" = Second Supplemental Clerk's Transcript.

status" (*id.*) using factors considered in non-tribal Eleventh Amendment immunity cases—including factors that have been expressly rejected by the United States Supreme Court in tribal immunity cases.

Surprisingly, the State does not offer a single argument that the Tribal Entities are not arms of their respective Indian Tribes under existing and controlling precedent, which perhaps explains why it does not once argue that the lower courts improperly applied existing arm-of-the-tribe jurisprudence. Instead, for the first time in the seven years of this litigation, the State now urges this Court to ignore long established tribal sovereign immunity jurisprudence—including United States Supreme Court precedent —and simply create a new hybrid "test." The State's proposed "test" would even flip the burden of proof to enable the State to evade one of the fundamental jurisprudential principles: that a plaintiff has the burden of establishing a court's subject matter jurisdiction.

The State's dubious justification for urging this Court to ignore and depart from long-standing arm-of-the-tribe jurisprudence is that there is "no nationwide consensus of how to assess arm-of-the-tribe status." (AOB at p. 24). That position, however, is undermined by the State's fatal concession that "the United States Supreme Court has [similarly] not articulated a specific test for assessing *arm-of-the-state* status" in Eleventh Amendment immunity cases. (*Id.* at p. 29) (emphasis added). Indeed, while decrying the lack of a standardized arm-of-the-tribe test, the State myopically cobbles together an *arm-of-the-state* test from selective and inapplicable Eleventh Amendment principles and then asks this Court to pronounce it a "Properly Realigned Arm-of-the-Tribe Test" (*id.* at p. 39) that would be incongruous from every jurisdiction that has ever applied the arm-of-the-tribe doctrine in tribal sovereign immunity cases. So improper (and untimely) is the State's ploy that this Court must reject it out of hand.

This Court should affirm the Court of Appeal's decision below, which properly relied upon the body of controlling arm-of-the-tribe and tribal sovereign immunity jurisprudence, including California authority, lower federal court authority, and United States Supreme Court authority. (Opinion at pp. 12-17, 19-24.) Far from fashioning a new test, the Court of Appeal prudently distilled and thoroughly analyzed all of the criteria contained in the controlling arm-of-the-tribe authority. And relying upon precisely the objective evidence contemplated by the controlling case law, the Court of Appeal properly concluded that, under California law and federal Indian law, the Tribal Entities are sufficiently related to their respective Indian tribes to benefit from tribal sovereign immunity.

The State's factual allegations and arguments outside of unequivocal appellate rules and principles are irrelevant, legally unsupportable, and inflammatory. They constitute new issues and arguments, improperly raised for the first time on appeal, in an attempt by the State to avoid the binding federal Indian law principles that govern this issue. For these reasons, both the Court of Appeal's analysis and its decision upholding the trial court's order dismissing the Tribal Entities should be affirmed.

ISSUE PRESENTED ON APPEAL

Whether the Tribal Entities are sufficiently related to their respective Indian Tribes pursuant to California and federal Indian law to benefit from the application of sovereign immunity.[2]

FACTUAL AND PROCEDURAL HISTORY

I. The Tribal Entities are Wholly-Owned Political and Economic Subdivisions of Their Respective Tribes

A. The Miami Tribe of Oklahoma, MNE and MNE Services, Inc. ("MNES")

The Miami Tribe of Oklahoma ("Miami Tribe") is a federally-recognized Indian tribe. (79 Fed Reg. 4750 (Jan. 29, 2014).) Its ancestral homelands are located in present-day Indiana, Illinois, Ohio, lower Michigan, and lower Wisconsin. Like many Indian tribes, the Miami Tribe was forcibly removed from its homelands by the United States in 1846, and many times thereafter. (5 SSCT 000981.) In 1936, the Miami Tribe organized its government pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501. The Miami Tribe is governed by a Constitution and By-laws that have been approved by the Secretary of the Interior. (*Ibid.*; 6 SSCT 001209, 001222-34.)

[2] The State fails to describe actual legal issues for consideration by this Court in its "ISSUES PRESENTED" section on page 1 of its brief. Instead, it summarizes a truncated version of some of the State's policy arguments. The actual issues the State raises in this appeal are articulated in its "SUMMARY OF THE ARGUMENT" and "CONCLUSION" sections: (1) whether this Court should impose a new burden of proof in this matter, contrary to the weight of federal Indian law authority; and (2) whether this Court should adopt a completely new test of arm-of-the-tribe immunity derived from a handful of Eleventh Amendment immunity cases in violation of binding federal and California precedent.

The Miami Tribe's Headquarters are located on land held in trust by the United States for the Tribe's benefit in rural northeastern Oklahoma, an area far from any major metropolitan area (the nearest major city is Tulsa, Oklahoma, which is approximately ninety miles from the Miami Tribe's Headquarters). (5 SSCT 000981, 001026; 6 SSCT 001209.) This area includes a forty square mile environmental superfund site, and has been designated by the United States Small Business Administration as a "Historically Underutilized Business Zone" or "HUBZone." (5 SSCT 000981-982, 00100, 001005.)

Due to the Miami Tribe's relative geographic isolation and lack of economic opportunities, coupled with dramatic decreases in federal funds over the past decade, the Tribe has been compelled to develop tribally-owned economic ventures to build a tribal economy and sustain itself, thereby fulfilling the tribal and federal policies of promoting tribal economic development and self-sufficiency. (5 SSCT 000982, 001026, 001033; 6 SSCT 001209-10.)

Recognizing a "critical need for the development of economic activities . . . to provide for the well being of the citizens of the Miami Tribe," the Miami Tribe organized "Miami Nation Enterprises" or "MNE," a wholly-owned and controlled Tribal entity. (6 SSCT 001258.) MNE is governed by a five-member Board of Directors, pursuant to Section 201(b) of the MNE Act. (6 SSCT 001209, 001281.) Further, under Section 202(c) of the MNE Act, all of the MNE Board Members are appointed by the Chief of the Miami Tribe with the advice and consent of the Tribe's legislative body, the Tribal Business Committee. (6 SSCT 001210, 001281.) All five Board Members are enrolled members of the Miami Tribe of Oklahoma. (6 SSCT 001210.)

MNE "serves an essential government function of the Miami Tribe of Oklahoma by allowing the Miami Tribe to provide directly for the

development of tribal revenue generating activities and to acquire property." (6 SSCT 001259.) MNE is wholly owned by the Miami Tribe and enjoys the Miami Nation's sovereign immunity. (6 SSCT 001258, 001276.)

In 2008, MNE acting under Section 305(n) of the MNE Act, created a wholly-owned subsidiary company, "MNE Services, Inc.," which shares MNE's Board of Directors. (6 SSCT 001315-19.) MNE Services, Inc. ("MNES") is a governmental instrumentality of the Miami Tribe of Oklahoma, established to carry out economic advancement functions of the Tribe and its members. (6 SSCT 001317-18.) MNES, like MNE, explicitly shares in the Miami Tribe's sovereign immunity. (6 SSCT 001317-18.) The profits from MNE/MNES flow back to the Miami Tribe and enable it to fund critical governmental services to its members, including tribal law enforcement, poverty assistance, housing, nutrition, preschool, elder care programs, school supplies, and scholarships. (6 SSCT 001210, 001218-19, 001278-79; *see also* 001279-80, 001316.)

The Miami Tribe, through MNE/MNES transacts its Internet lending business under the trade names "Ameriloan," "US Fast Cash," and "United Cash Loans." (6 SSCT 001216.) MNE d/b/a Ameriloan, US Fast Cash, and United Cash Loans is governed by and licensed under Miami Tribal law, including the Miami Tribe's statutes governing Interest Rates and Loans and Cash Advance Services and the Miami Business Regulatory Act. (5 SSCT 001097-98; 7 SSCT 001467-1518, 001524-36.) The Tribe strictly regulates the lending activities in accordance with Tribal law. (*Ibid.*; 5 SSCT 001026-27.) As part of its business, MNE accepts on-line applications for short-term loans from qualified individuals who desire to enter into loan transactions with MNE. Applications are approved by MNE on federal trust land under the sovereign jurisdiction of the Tribe. (6 SSCT 001217.) The loan agreements are governed by the laws of the Miami

Tribe of Oklahoma. (5 SSCT 001097-98; 7 SSCT 001467-1518, 001524-36.)

B. The Santee Sioux Nation and SFS, Inc.

The Santee Sioux Nation (formerly the Santee Sioux Tribe of Nebraska) ("Santee Sioux Nation") is a federal-recognized Indian tribe. (79 Fed. Reg. 4751 (Jan. 29, 2014).) The ancestral homeland of the Santee Sioux Nation is located in present-day Minnesota. Following the 1862 hanging in Mankato, Minnesota of 38 Santee Sioux—the largest mass-execution in U.S. history—the U.S. government abrogated its prior treaties with the Santee Sioux and forcibly relocated them first to present-day South Dakota and later to present-day northeastern Nebraska. (5 SSCT 000983.) The land where the Santee Sioux were relocated is ill-suited for farming, and what little arable land that existed on the reservation was flooded by the federal government to provide hydroelectric power to surrounding non-Indian communities. (*Ibid.*) Located in this isolated rural region, the Santee Sioux Reservation is severely economically depressed, and in a "HUBZone." (*Ibid.*; 5 SSCT 001000, 001006.)

The Santee Sioux Nation is governed by a Constitution that has been approved by the Secretary of the Interior. The Santee Sioux Nation is organized "for the common welfare of the Nation and its posterity and to insure domestic tranquility . . . and establish this constitution according to the Act of Congress, dated June 18, 1934 (48 Stat. 984)." (4 SSCT 000769.) The Santee Sioux Nation is governed by the "Tribal Council," which consists of eight elected members. (4 SSCT 000771-772.) The Santee Sioux Nation's Constitution vests the Tribal Council with the authority to "charter subordinate organizations for economic purposes," and to "safeguard, regulate and promote the peace, safety, morals and general

welfare of the nation by regulating the conduct of trade . . . ." (4 SSCT 000773.)

The Santee Sioux Nation, acting through its Tribal Council, created SFS, Inc., which is a wholly-owned and controlled tribal corporation. SFS's sole purpose is to generate revenue to fund the Santee Sioux Nation's governmental operations and social welfare programs. SFS's Articles of Incorporation specifically provide that SFS enjoys the Santee Sioux Nation's sovereign immunity from suit, which can be waived only by a resolution of the Santee Sioux Tribal Council. (4 SSCT 000802-06.) SFS is governed by a Board of Directors that consists of the members of the Santee Sioux Tribal Council. (4 SSCT 000803.) SFS is licensed pursuant to the laws of the Santee Sioux Nation to operate an online lending business utilizing the trade names "Preferred Cash Loans" and "One Click Cash," although it does not currently utilize the trade name "Preferred Cash Loans" for new customers. (4 SSCT 000764-765; 5 SSCT 000957-70.) The loans are governed by laws of the Santee Sioux Nation that were enacted to regulate short term lending. (6 SSCT 00918-30.) This business is the primary source of revenue for SFS. (4 SSCT 000765.) The profits garnered by SFS are used to fund the Tribe's operations, expenditures, and social welfare programs, including elderly programs, childcare, building maintenance, and members' medical and burial needs. (*Ibid.*)

SFS approves loan applications on reservation land under the sovereign jurisdiction of the Tribe. (4 SSCT 000764.) The loan agreements are governed by the laws of the Santee Sioux Nation. (6 SSCT 00918-30.) The transactions are therefore consummated on Tribal lands, and are subject to, and fully compliant with, the laws and regulations of the Tribe.

II. Procedural Background

On June 29, 2007, the State sued various trade names, including "Ameriloan," "US Fast Cash," "United Cash Loans," "One Click Cash," and "Preferred Cash Loans" for alleged violations of the California Deferred Deposit Transaction Law. (1 CT 000027-46.) The Tribal Entities appeared specially and moved to quash for lack of subject matter jurisdiction based on tribal sovereign immunity. The Tribal Entities asserted that, as a matter of law, Indian tribes enjoy sovereign immunity from suit, including state enforcement actions. (*Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 86, 90 (hereafter *Ameriloan*) [citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 755 (hereafter *Kiowa*); *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe* (1991) 498 U.S. 505, 510 (hereafter *Potawatomi*)].) The Tribal Entities further asserted that, as wholly-owned instrumentalities of their respective Tribes operating on behalf of their Tribes, they are entitled to sovereign immunity from suit, and therefore, the trial court lacked subject matter jurisdiction. (*Ameriloan, supra,* at pp. 84-89.)

The trial court denied the motion to quash, and the Tribal Entities petitioned for writ of mandate asking the Court of Appeal to vacate the trial court's order. (*Ameriloan, supra,* 169 Cal.App.4th at pp. 88-89.) Following summary denial of the petition, this Court granted review and transferred the case to the Court of Appeal with instructions to issue an alternative writ. (*Id.* at p. 88.)

On January 14, 2009, the Court of Appeal issued an order granting in part and denying in part the petition for writ of mandate. The Court of Appeal found the trial court erred in numerous respects, namely by concluding as a matter of law that sovereign immunity does not apply to

off-reservation commercial activity. (*Ameriloan, supra*, 169 Cal.App.4th at pp. 89-90.) Accordingly, the Court of Appeal directed the trial court to vacate its order denying the Tribal Entities' motion to quash and to "consider the criteria expressed by the Courts of Appeal in *Trudgeon* [*v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 638 (hereafter *Trudgeon*)] ... and *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 389 (hereafter *Redding Rancheria*))..., including whether the tribe and the entities are closely linked in governing structure and characteristics and whether federal policies intended to promote Indian tribal autonomy are furthered by extension of immunity to the business entity." (*Ameriloan, supra* at p. 98.) To this end, the Court of Appeal permitted the State to conduct "limited discovery, directed solely to matters affecting the trial court's subject matter jurisdiction" on remand. (*Ibid.*)

On remand, the trial court properly allowed discovery to proceed in accordance with the specific contours of the arm-of-the-tribe factors set forth in *Trudgeon* and *Redding Rancheria.* Although the State repeatedly sought documents far afield from those contours, resulting in imposition of monetary sanctions against the State,[3] it did not dispute that California and federal arm-of-the-tribe authorities govern these questions. Consistent with the trial court's tailored scope of jurisdictional discovery, the Tribal Entities produced organizational documents, articles of incorporation, bylaws, Tribal laws and resolutions, licenses, and entity meeting minutes. (See 24 CT 005764-67.)

Upon completion of jurisdictional discovery, the Tribal Entities renewed their motion to quash. (5 SSCT 000972-98.) The State filed a motion for preliminary injunction, which the trial court deemed to be the State's opposition to the motion to quash. (24 CT 005759.) The trial court

[3] The sanction award was confirmed by the Court of Appeal. (Opinion at p. 7, fn. 3.)

conducted an evidentiary hearing and, based upon the relevant evidence, found that the Tribal Entities are sufficiently related to their respective Indian Tribes to benefit from tribal sovereign immunity. Accordingly, the trial court dismissed the case for lack of subject matter jurisdiction. (24 CT 005754-69.) The State appealed.

The Court of Appeal, relying on California and federal Indian law authorities, also concluded that the Tribal Entities are arms of their respective Tribes protected by tribal sovereign immunity from suit and affirmed the trial court's dismissal. (Opinion at p. 24-25.)

STANDARD OF REVIEW AND BURDEN OF PROOF

The United States Supreme Court recently emphatically reaffirmed the importance of tribal sovereign immunity and explicitly confirmed both that Indian tribes are shielded from judicial process arising from off-reservation commercial conduct and that courts may not diminish or abrogate that immunity. (*Michigan v. Bay Mills Indian Community* (2014) ___ U.S. ___, ___ [134 S.Ct. 2024, 2030-32] (hereafter *Bay Mills*).) Thus, as the Court of Appeal aptly recognized, Indian tribes possess "absolute immunity from suit in federal or state court, absent an express waiver of that immunity or congressional authorization to sue." (*Ameriloan, supra*, 169 Cal.App.4th at p. 89 [citing *Kiowa, supra*, 523 U.S. at p. 754].) Courts must strictly construe any alleged waivers or diminishments of tribal sovereign immunity. (E.g., *Ameriloan, supra*, at p. 94; *Rupp v. Omaha Indian Tribe* (8th Cir. 1995) 45 F.3d 1241, 1245.) Further, as a matter of federal law, to the extent that such a diminishment has been alleged, courts must interpret such allegations in favor of the tribes as a function of traditional notions of sovereignty. (See, e.g., *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143-44 ["Ambiguities in federal law have been construed generously in order to comport with these traditional

notions of sovereignty. . . ."].) Absent clear and unequivocal waiver by the tribe itself, any diminution or abrogation of tribal sovereign immunity is within the sole authority of Congress, and courts may not restrict, impair or limit tribal sovereign immunity based on the type of activity in which a tribe engages. (*Bay Mills*, *supra*, at pp. 2031, 2036.) Instead, "the doctrine of tribal immunity—***without any exceptions*** for commercial or off-reservation conduct—is settled law." (*Id.* at p. 2036 [emphasis added].) Tribal sovereign immunity also extends beyond the tribes to "for-profit commercial entities that function as 'arms of the tribes.'" (*Ameriloan*, *supra*, at p. 97 [citing cases]; see, e.g., *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d 1173, 1183 (hereafter *Breakthrough*); *Cash Advance and Preferred Cash Loans v. Colorado* (Colo. 2010) 242 P.3d 1099, 1107-08, 1109 (hereafter "*Cash Advance*").)

The assertion of sovereign immunity from suit challenges a court's subject matter jurisdiction. (E.g., *Ameriloan*, *supra*, 169 Cal.App.4th at p. 85; *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 182.) When sovereign immunity is raised, the plaintiff bears the burden of proving by a preponderance of the evidence that the court has jurisdiction. (*Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206 [citing *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369].)

Appellate courts must afford great deference to the factual conclusions reached by the trial court. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564). And where factual inferences are in conflict, the appellate courts must defer to the trier of fact. (E.g., *Ibid.*; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1312.) "[A] reviewing court's role is simply to determine whether substantial evidence supports the trial court's findings of fact. . . . [T]he reviewing court should

not substitute its judgment for [the trial court's] express or implied factual findings that are supported by substantial evidence." *In re Charlisse C.* (2008) 45 Cal.4th 145, 159 [internal citations and quotation marks omitted].)

ARGUMENT

The question of whether an entity constitutes an arm of a federally-recognized Indian tribe is governed by longstanding principles of federal Indian law, which the United States Supreme Court, lower federal courts and California courts have refined and elaborated based upon the unique nature of tribal sovereigns. As such, this Court should proceed rationally and according to those binding and persuasive authorities.

The State's arguments, which are a series of clumsy and misleading maneuvers, turn this rational and principled process on its head. After seven years of litigating these issues under accepted federal Indian law authorities and precedent in California, the State recognizes that it cannot prevail under the controlling sovereign immunity analysis. Instead, the State abruptly reverses course at the eleventh hour, and urges this Court to throw out both long-standing principles governing tribal sovereign immunity (including principles that the State itself advocated in the courts below) and the well-established burden of proof in these jurisdictional challenges and replace them with a new test that has never been applied in tribal sovereign immunity cases and contravenes binding Indian law. This Court should not do so.

The State ignores that existing federal Indian law principles and California law interpreting those principles have guided every motion, hearing, and order in this proceeding until now, and its effort to challenge these fundamental legal concepts for the first time on review to this Court is astounding. The State cannot justify its radical diversion that flouts the