IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SEVEN

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, **v.** **MNE d/b/a AMERILOAN, US FAST CASH and UNITED CASH LOANS, et al.** Defendants and Respondents.	Case No. B242644

Los Angeles County Superior Court, Case No. BC373536
Hon. Yvette Palazuelos, Assigned Judge

APPELLANT'S REPLY BRIEF

MARY ANN SMITH
Deputy Commissioner
UCHE L. ENENWALI
Senior Corporations Counsel
State Bar No. 235832
320 West 4th Street, Suite 750
Los Angeles, CA 90013-2344
Telephone: (213) 576-7586
Fax: (213) 576-7181
E-mail: uenenwal@corp.ca.gov
Attorneys for Plaintiff/Appellant

Service on Attorney General required by California Rules of Court, rule 8.29

TABLE OF CONTENTS

Page

Introduction 1

Summary of Undisputed Facts and Arguments 2

Legal Discussion 6

I. Because the facts are undisputed, the determination of sovereign immunity is a question of law for which de novo review is appropriate. 6

II. Law of the case does not apply to this appeal 7

A. Because the law of the case doctrine does not apply, this Court's arm-of-the-tribe determination may include the *American Property* factors. 7

B. Even if law of the case applied, this Court should exercise its discretion to use the *American Property* factors. 10

III. The Payday Lenders and the Corporations are not arms of the Tribes under either the *American Property* or the *Trudgeon* factors. 12

A. Respondents fail to dispute that they are not arms of the Tribes under the *American Property* factors 12

B. Respondents concede that the *American Property* factors are not different from those applied in *Trudgeon*. 14

Conclusion 17

TABLE OF AUTHORITIES

Page

CASES

American Property Management Corp. v. Superior Court
(2012) 206 Cal.App.4th 491 ..... passim

Ameriloan v. Superior Court
(2009) 169 Cal.App.4th 81 ..... passim

Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort
(10th Cir. 2010) 629 F.3d 1173 ..... 6, 13, 14

In re Spencer W.
(1996) 48 Cal.App.4th 1647 8

Lawrence v. Barona Valley Ranch Resort and Casino
(2007) 153 Cal.App.4th 1364 7

Morohoshi v. Pacific Home
(2004) 34 Cal.4th 482 ..... 8, 10, 11

Redding Rancheria v. Superior Court
(2001) 88 Cal.App.4th 384 ..... 8, 9, 10, 14

Searle v. Allstate Life Ins. Co.
(1985) 38 Cal.3d 425 8

The Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services
(S.D.N.Y. Sept. 30, 2013, No. 13 Civ. 5930 (RJS)) ___ F.Supp.2d ___ [2013 WL 5460185] 11

Trudgeon v. Fantasy Springs Casino
(1999) 71 Cal.App.4th 632 ..... passim

Warburton/Buttner v. Superior Court
(2002) 103 Cal.App.4th 1170 6

Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel
(2011) 201 Cal.App.4th 190 6

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* (2012) 69 Wash. & Lee L. Rev. 751 11

INTRODUCTION

This Court previously directed the trial court to "conduct a new evidentiary hearing to determine whether petitioners Ameriloan, United Cash Loans, U.S. Fast Cash, Preferred Cash and One Click Cash are sufficiently related to federally recognized Indian tribes to be entitled to the benefit of the doctrine of tribal sovereign immunity." (*Ameriloan v. Superior Court* (*Ameriloan*) (2009) 169 Cal.App.4th 81, 100.) As shown in the opening brief and this reply, the trial court made an erroneous determination that Ameriloan, United Cash Loans, U.S. Fast Cash, Preferred Cash, and One Click Cash (collectively Payday Lenders) are entitled to the benefit of tribal sovereign immunity. The People of the State of California, by and through the California Corporations Commissioner[1] (People), respectfully request that the Court reverse that determination and conclude that sovereign immunity does not apply under the facts here.

To avoid any confusion, the People desire to make clear that this appeal does not concern whether a federally recognized Indian tribe is accorded sovereign immunity. Rather, the issue here is whether tribally chartered corporations that exist and operate wholly separate and distinct from tribes to conduct off-reservation Internet payday lending activities in violation of California law can take advantage of the tribes' sovereign immunity to avoid the People's consumer protection efforts.

---

[1] The California Corporations Commissioner previously headed up the Department of Corporations, which merged with the Department of Financial Institutions on July 1, 2013, and became the Department of Business Oversight.

SUMMARY OF UNDISPUTED FACTS AND ARGUMENTS

The facts listed below are uncontroverted and clearly demonstrate that sovereign immunity should not apply in this case. As is clear from the record, the evidence overwhelmingly shows the following: [2]

- The Payday Lenders – Ameriloan, United Cash Loans, U.S. Fast Cash, Preferred Cash, and One Click Cash – are business names used by tribally chartered corporations – i.e., SFS, Inc. and MNE Services, Inc. (Corporations).
- The Payday Lenders are engaged in the business of Internet payday lending.
- Even though they are tribally owned, the Corporations are separate and distinct from the two federally recognized Indian tribes – the Santee Sioux Nation and the Miami Tribe of Oklahoma (the Tribes) – that own them.
- Even though the Corporations exist under tribal law, the Tribes themselves are shielded from any of the Corporations' liabilities or debts by tribal ordinances – i.e., the Tribes' corporate laws.
- The Corporations' organizational documents also shield the Tribes from any of the Corporations' liabilities or debts.
- The Corporations along with third parties operate the Payday Lenders in derogation of the Tribes' laws and the Corporations' own organizational documents with respect to interest rates, control of bank accounts, and commingling of funds.

---

[2] The People's opening brief details these facts and provides citations to the record. (Appellant's Opening Brief (Open. Br.), pp. 3-4, 6-13.)

- Third parties, who are not tribal members or corporate officers, control the revenues of, and receive all net income from, the Payday Lenders' operations.
- The Corporations do not participate or share at all in the net income from the Payday Lenders' operations. Rather, in a fashion similar to a royalty, they receive a small percentage of the gross revenues from the third parties.
- The Payday Lenders' activities violate California payday lending laws, in many ways, including charging unconscionable interest rates of up to 1095 percent APR.

Respondents do not challenge or offer anything to contradict these facts. Instead, they dismiss the facts as "business minutiae." (See, e.g., Defendants-Respondents' Brief, pp. 14, 15 (Resp. Br.).) Respondents limit their factual discussions to revenue distribution and the Tribes' power and right to make poor business decisions.[3] (See, e.g., *id.* at pp. 15, 17.) Respondents do not address the impact of the Tribes' corporate laws, the

---

[3] Even though the People have never asserted that the Tribes themselves do not have sovereign immunity, Respondents apparently seek to elevate the Payday Lenders and the Corporations to be on equal footing with the Tribes and the United States:

> Part of the right of being a sovereign is the right to pursue activities that may not generate revenues at all. Indeed, if sufficient revenues were the test, then every tribal entity that failed to produce revenues, for whatever reason, would be denied sovereign immunity. By that standard, the federal government would also be stripped of its sovereign immunity, because it has failed to produce sufficient revenues to even pay is debt.

(Resp. Br., at p. 17.)

Corporations' organizational documents, operations in violation of tribal laws and organizational documents, or third parties' control over the Corporations and the Payday Lenders. Those factors, which are not contested, manifestly show that the Payday Lenders and the Corporations are not arms of the Tribes.

Instead, Respondents essentially ask the Court to disregard such facts by arguing that they "have no place in the analysis." (Resp. Br., at p. 9.) Respondents assert that the trial court was correct in finding the Payday Lenders and the Corporations were entitled to sovereign immunity based on tribal ownership of tribally chartered entities that receive a small fixed percentage of the entities' revenues. (*Id.* at pp. 12-17.) However, if those facts alone established sovereign immunity for these Payday Lenders and Corporations, the previous remand by this Court for a new evidentiary hearing was completely unnecessary.

Contrary to Respondents' argument, a sovereign immunity analysis cannot occur in the truncated and superficial factual background that they advocate. As is clear from this Court's earlier decision, tribal ownership and receiving a small percentage of the revenues, standing alone, do not make a tribally chartered corporation an arm of the tribe. (See *Ameriloan, supra*, 169 Cal.App.4 at p. 97, citing *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247-248.) Recognizing this, the Court directed an evidentiary hearing to determine whether the Payday Lenders were sufficiently related to the Tribes to be entitled to the benefit of sovereign immunity. The uncontroverted facts show that the Payday Lenders are not so entitled.

Linked with their advocating for the disregard of nearly all undisputed facts, Respondents also assert that the law of the case doctrine narrowly circumscribes this Court's review of the trial court's mistaken decision. That doctrine, however, does not apply because the Court did not

state a principle of law necessary to its decision to remand. Moreover, the Court expressly stated that it was not deciding whether sovereign immunity applied.

In this appeal, the principal issue is whether under the uncontroverted facts, the Corporations and the Payday Lenders act as arms of the Tribes and, therefore, are entitled to benefit from the Tribes' sovereign immunity to avoid the People's enforcement of California's payday lending law. Respondents' assertions notwithstanding, this appeal is not concerned with whether the People seek to deprive the Tribes of sovereign immunity. (See, e.g., Resp. Br., at pp. 1, 15.) As shown by the undisputed facts, the Payday Lenders and the Corporations are sealed off from the Tribes themselves. The Tribes here have two shields protecting them from liability for the Payday Lenders' and Corporations' acts and omissions. First, the Tribes have sovereign immunity, which contrary to anything in Respondents' Brief is not at issue here. Second, pursuant to their corporate laws and the Corporations' organizational documents, the Tribes are not responsible for any of the Corporations' debts or liabilities.

Furthermore and Respondents' assertions notwithstanding, this appeal is not concerned with whether the latest California arm-of-the-tribe decision – *American Property Management Corporation v. Superior Court* (*American Property*) (2012) 206 Cal.App.4th 491 – was decided correctly. (Resp. Br., at pp. 8-9, 23-31). Rather, that decision identifies the factors to be applied. (*American Property*, *supra*, 206 Cal.App.4th at p. 501.) But if the Court applies the factors set forth in *Trudgeon v. Fantasy Springs Casino* (*Trudgeon*) (1999) 71 Cal.App.4th 632, 638 and advocated by

Respondents, the result is the same: the Payday Lenders and the Corporations are not arms of the Tribes.[4]

Consequently, the focus here is on the predatory Payday Lenders and Corporations that are separate and distinct from the Tribes and operate in derogation of the Tribes' laws, and what factors are to be applied to the uncontroverted facts to make an arm-of-the-tribe determination. When the Court is so focused, the proper result is that the Payday Lenders and the Corporations are not arms of the Tribes.

LEGAL DISCUSSION

I. BECAUSE THE FACTS ARE UNDISPUTED, THE DETERMINATION OF SOVEREIGN IMMUNITY IS A QUESTION OF LAW FOR WHICH DE NOVO REVIEW IS APPROPRIATE

Respondents assert that this appeal is not entitled to de novo review of factual findings. (Resp. Br., at p. 8.) That assertion is incorrect. As is clear from the record and Respondents' brief, the pertinent facts are undisputed. "If an appellate court is presented with a case in which the facts most relevant to the appeal are undisputed, it may resolve the question of law without regard to the findings of the trial court." (*Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 207, citing *Ghirardo v. Antonioli* (1994) 22 Cal.4th 791, 799; *Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1181.) In the absence of conflicting extrinsic evidence, subject matter jurisdiction

---

[4] Respondents assert that the factors enumerated in *American Property* result in "a ***wholly different*** test for an arm of the tribe." (Resp. Br., at p. 8, emphasis in original.) Despite that assertion, they concede that the *American Property* factors adopted from *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (*Breakthrough*) (10th Cir. 2010) 629 F.3d 1173, 1181, are not different from the tests that they advocate. Respondents state that "the *Breakthrough* test is substantially indistinguishable" from the criteria from *Trudgeon* that this Court suggested in *Ameriloan*. (*Id.* at p. 9, fn. 5.)

is a question of law. (*American Property, supra*, 206 Cal.App.4th at p. 498; *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369.) Accordingly, contrary to Respondents' assertion, de novo review by this Court is appropriate.

II. LAW OF THE CASE DOES NOT APPLY TO THIS APPEAL

A. Because the Law of the Case Doctrine does not Apply, this Court's Arm-of-the-Tribe Determination May Include the *American Property* Factors

In *Ameriloan*, this Court determined that the trial court failed to make findings as to whether the Payday Lenders and the Corporations were arms of the Tribes for sovereign immunity purposes. (*Ameriloan, supra*, 169 Cal.App.4th at pp. 97-99.) The Court remanded the case for those findings and suggested certain criteria to be considered.

Even though no decision was made on the arm-of-the-tribe issue, Respondents assert that based on the law of the case doctrine, this Court irrevocably limited itself to what it can examine. They claim that this Court cannot consider any criteria for determining sovereign immunity other than "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." (Resp. Br., at pp. 9-10.) Those limited criteria were derived from *Trudgeon*.[5] In sum, Respondents assert that this Court cannot use the *American Property* factors in any manner. This assertion is incorrect.

---

[5] Respondents repeatedly complain that the People identify an additional factor of "whether the entity is organized for a purpose that is governmental in nature, rather than commercial." (See, e.g., Resp. Br., at p. 14.) Respondents' complaints lack substance because *Trudgeon* set forth three factors including "whether the entity is organized for a purpose that is governmental in nature, rather than commercial" – not two factors as asserted by Respondents. (*Trudgeon, supra*, 71 Cal.App.4th at 638.)

The law of the case doctrine generally precludes multiple review of the same issue in a single case. (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434.) The doctrine's primary purpose is one of judicial economy. (*Id.* at p. 435.) Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding. (*Ibid.*) Law of the case applies when an appellate court states a rule of law necessary to its decision. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) It does not apply, however, if the issue in the subsequent proceeding was not a ground for the first case's decision. (See *id.* at p. 492.) The doctrine also does not apply to issues a court expressly stated it was not deciding. (See *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650, fn. 1.)

The law of the case doctrine does not apply here because the Court never stated a rule of law necessary to its remand decision. Nor did the Court decide the issue now presented. Indeed, the Court expressly stated that it was not deciding the arm-of-the-tribe issue. (*Ameriloan, supra*, 169 Cal.App.4th at p. 97 ["on the record before us we are unable to direct the trial court to enter a new order granting the motion" to quash].)

Respondents also assert that this Court can consider only some, but not all, factors announced in *Trudgeon* and *Redding Rancheria v. Superior Court of Shasta County* (*Rancheria*) (2001) 88 Cal.App.4th 384. They assert that those factors are law of the case. They apparently base their assertion on the following passage from *Ameriloan*:

> We need not and do not consider the Department's "new" evidence in the first instance. In light of the trial court's failure to make findings in this area, we remand the matter to the trial court to consider, after a hearing in which both sides may present all available relevant evidence, whether the entities are sufficiently related to the tribe to benefit

> from the application of sovereign immunity. (See *Warburton/Buttner v. Superior Court, supra*, 103 Cal.App.4th at p. 1181, 127 Cal.Rptr.2d 706 [trial court faced with a claim of sovereign immunity may engage in limited but sufficient pretrial factual and legal determinations to satisfy itself on its authority to hear case].) To this end, the court should consider the criteria expressed by the Courts of Appeal in *Trudgeon, supra*, 71 Cal.App.4th at page 638, 84 Cal.Rptr.2d 65, and *Rancheria, supra*, 88 Cal.App.4th at page 389, 105 Cal.Rptr.2d 773, 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. (See also *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046 [the relevant question for purposes of applying tribal sovereign immunity "is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa*, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe"].)

(*Ameriloan, supra*, 169 Cal.App.4th at p. 98, footnotes omitted.)[6]

Nowhere in the above quoted passage or elsewhere in its opinion does this Court restrict an arm-of-the-tribe analysis to some of the factors enumerated in *Trudgeon* and *Rancheria*.[7] Nowhere in the above quoted

---

[6] Respondents quote only portions, rather than the entirety, of this passage to imply that this Court mandated a limited review based only on two factors identified by other courts. Specifically, Respondents state that the Court directed the trial court to consider the criteria from *Trudgeon* and *Rancheria*. (See Resp. Br., at p. 4.) Clearly, the above quoted passage is permissive by its use of "should" and "including." Additionally, this Court cited *Trudgeon* and *Rancheria* as examples for arm-of-the-tribe purposes. (See *Ameriloan, supra*, 169 Cal.App.4th at p. 85.)

[7] *Rancheria* actually has no application whatsoever to this case. First, *Rancheria* involved the issue of immunity of a tribe itself from suit. (continued...)

passage or elsewhere in its opinion does this Court provide that the applicable criteria are limited to "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." Rather, those were suggested criteria for the trial court to consider in determining whether entities are sufficiently related to a tribe and whether an entity acts as an arm of a tribe.

The passage quoted above from *Ameriloan* does not state any rule of law that was necessary to this Court's decision to remand. The passage begins with a recognition of the "trial court's failure to make findings" relating to whether the Payday Lenders were arms of the Tribes, and then the Court instructed the trial court to determine whether the Payday Lenders acted as arms of the Tribes, or were sufficiently related to the Tribes to benefit from the Tribes' sovereign immunity. (*Ameriloan*, *supra*, 169 Cal.App.4th at p. 98.) This Court expressly did not decide whether the Payday Lenders and the Corporations were arms of the Tribes. Instead, it remanded that issue for the trial court to determine. This Court thus did not limit the trial court or itself as Respondents assert. The law of the case doctrine simply does not apply.

B. Even if Law of the Case Applied, this Court Should Exercise its Discretion to Use the *American Property* Factors

Law of the case is not jurisdictional. Rather, it is procedural and discretionary. (*Morohoshi v. Pacific Home*, *supra*, 34 Cal.4th at pp. 491-

---

(...continued)
(*Rancheria*, *supra*, 88 Cal.App.4th at pp. 386, 389.) Second, *Rancheria* did not enumerate any arm-of-the-tribe criteria.

492.) Exceptions for substantial injustice and changes in the applicable law are recognized and exist. (*Id.* at p. 492.)

Here, assuming, for the sake of argument, that the law of the case doctrine applies – and it does not – the Court should exercise its discretion under both recognized exceptions. First, the limitations that Respondents ask the Court to impose will result in a substantial injustice. Predatory lenders operating in defiance of California's payday lending laws will continue to prey on California victims. Respondents' practices include imposing exorbitant interest rates of up to 1095 percent APR, illegally rolling over loans multiple times, and using threats and harassment to collect loan payments. (Open. Br., at p. 4.) In this case, the People seek to enforce the state's consumer protection laws against the Payday Lenders and the Corporations that are separate and distinct from the Tribes and operate in derogation of the Tribes' laws. The burden of complying with California law like every other lender doing business in this state is minor in comparison with the injustice to vulnerable consumers. In short, Respondents' ongoing and untethered predatory lending constitutes a substantial injustice.[8]

---

[8] Potentially, the structures used by the Payday Lenders and the Corporations here could become the blueprint for other predatory lenders who find tribes that for some small portion of lending operation revenues are willing to allow tribally chartered entities to operate in violation of tribal laws and corporate organizational documents. (See Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* (2012) 69 Wash. & Lee L. Rev. 751.) Recently, the United States District Court for the Southern District of New York rejected an argument from tribes that New York's efforts to enforce its anti-usury laws against payday lenders should be preliminarily enjoined as an affront to the tribes' inherent sovereignty. (*The Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services* (S.D.N.Y. Sept. 30, 2013, No. 13 Civ. 5930 (RJS)) ___ F.Supp.2d ___ [2013 WL 5460185].)

Second, the factors enumerated in *American Property* possibly change the applicable law. Respondents' positions on this issue are inconsistent. In one section of their brief, Respondents describe the *American Property* factors as "a wholly different test." (Resp. Br., at p. 8.) But in another section, Respondents argue that the *American Property* factors are no different than the *Trudgeon* factors suggested in *Ameriloan.* (*Id.* at p. 27.) Irrespective of whether the factors change the law or are substantially indistinguishable, they provide for a more focused and detailed analysis of whether an entity operates as an arm of a tribe. *American Property* is the latest California appellate opinion to conduct an arm-of-the-tribe analysis. Law of the case should not prevent this Court from applying the factors refined and applied in *American Property.*

III. THE PAYDAY LENDERS AND THE CORPORATIONS ARE NOT ARMS OF THE TRIBES UNDER EITHER THE *AMERICAN PROPERTY* OR THE *TRUDGEON* FACTORS

A. Respondents Fail to Dispute that they Are Not Arms of the Tribes Under the *American Property* Factors

In the opening brief, the People used both the *American Property* and the *Trudgeon* factors to show that the Payday Lenders and the Corporations are not arms of the Tribes and therefore, are not entitled to benefit from the Tribes' sovereign immunity. (Open. Br., at pp. 14-35.) The People's analysis related the undisputed facts to the six *American Property* factors and established that four of the six factors weighed heavily against finding sovereign immunity for the Payday Lenders and the Corporations. (*Ibid.*)

Tellingly, Respondents do not challenge, or address at all, how the *American Property* factors apply to the undisputed facts. Respondents offer nothing to contradict the People's analysis. In view of their failure to dispute the facts and their efforts to limit this Court's review, Respondents

apparently agree that under the *American Property* factors, the Payday Lenders and the Corporations are not arms of the Tribes.

Instead of addressing what the undisputed facts show, Respondents attack the People's use of the *American Property* factors by asserting the case was decided incorrectly and is factually distinguishable from the present case. (Resp. Br., at pp. 23-27.) Whether *American Property* was decided incorrectly does not affect the applicability of the factors that it identified as "helpful in analyzing whether an entity related to an Indian tribe should be considered an arm of the tribe for sovereign immunity purposes." (*American Property, supra,* 206 Cal.App.4th at p. 501.) Similarly, whether the facts in *American Property* are distinguishable from the undisputed facts here does not affect using those factors to analyze whether the Payday Lenders and the Corporations should be considered arms of the Tribes for sovereign immunity purposes.

In *American Property*, the court identified six factors from *Breakthrough, supra*, 629 F.3d at p. 1181, that "accurately reflect the general focus of the applicable federal and state case law." (*American Property, supra*, 206 Cal.App.4th at p. 501.) Importantly, Respondents do not assert anywhere in their brief that those six factors are not appropriate for analyzing whether an entity other than a tribe is entitled to sovereign immunity. Instead, Respondents argue – as set forth above, incorrectly – that under the law of the case doctrine, this Court cannot consider the six factors. They also assert that the six factors are "unnecessarily detailed." (Resp. Br., at p. 27.)

Even though Respondents devote several pages of their brief to why *American Property* was incorrectly decided and factually distinguishable, they do not address specifically how the six factors apply to the undisputed facts here. The Court can infer that is because four of the six factors lead to the conclusion that the Payday Lenders and the Corporations are not

entitled to share in the Tribes' sovereign immunity, as demonstrated in the People's opening brief. (Open. Br., at pp. 17, 35.) Consequently, when the *American Property* factors are applied to the undisputed facts, the trial court's determination should be reversed.

B. Respondents Concede that the *American Property* Factors are not Different from Those Applied in *Trudgeon*

Respondents in effect assert that the Payday Lenders and the Corporations are arms of the Tribes because they are wholly-owned tribal entities organized pursuant to tribal law and provide some revenue to the Tribes. (Resp. Br., at p. 12.) Respondents argue that these facts meet the test under *Trudgeon*. (*Id.* at pp. 10-17.) As is clear from this Court's earlier decision, that is not what is contemplated in *Trudgeon* or under applicable law. (See *Ameriloan, supra*, 169 Cal.App.4th at p. 97, citing *Agua Caliente Band of Cahuilla Indians v. Superior Court, supra*, 40 Cal.4th at pp. 247-248.)

A more in-depth analysis is required for sovereign immunity, and that is what the *American Property* factors provide. Despite asserting that *American Property* is a "very different arm-of-the-tribe test" (Resp. Br., at p. 23), Respondents describe the *American Property* factors as "an unnecessarily detailed recitation" of "the *Ameriloan* test"[9] and "needlessly cumbersome" (*id.* at p. 27). Respondents thus do not disagree with the factors taken from *Breakthrough*, which the *American Property* court

---

[9] As set forth below, this Court did not establish an extensive list of criteria to be considered in determining whether the Payday Lenders and the Corporations are arms of the tribes. Instead, what Respondents characterize as the "*Ameriloan* factors" were among the criteria that the trial court "should consider" in determining whether the entities are sufficiently related to the Tribes to benefit from the application of sovereign immunity, and were taken from *Trudgeon* and *Rancheria*. (*Ameriloan, supra*, 169 Cal.App.4th at p. 98.)

examined. Instead, Respondents' disagreement merely is with the conclusion reached in *American Property* after the court analyzed the six factors that Respondents concede are "substantially indistinguishable" from the *Trudgeon* factors. (*Id.* at p. 9, fn. 5.)

The table below compares the *Trudgeon* factors with the *American Property* factors. Contrary to Respondents' repeated assertions, *Trudgeon* identified three – not just two – factors. (*Trudgeon, supra*, 71 Cal.App.4th at p. 638.) Those factors are set forth in the table. The *Trudgeon* court found the three-factor analysis "to be an accurate summation of relevant case law." (*Id.* at p. 639.) With respect to the purpose factor, the court wrote:

> In the wake of *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., supra*, [1998] 523 U.S. 751, it might be questioned whether the first criterion . . . is still relevant. . . . If a tribe enjoys immunity for its commercial as well as its governmental activities, then arguably the fact it creates a business entity for a purely commercial purpose should not mater in determining the immunity of the entity.
>
> In another sense, however, the purpose for which the entity is created may remain relevant even after *Kiowa*. Because *Kiowa* involved liability of a tribe and not a tribal business entity, the court did not consider the possible relevance of the governmental/commercial distinction in determining the liability of tribal entities. It is clear from the cases involving tribal entities that such entities have no inherent immunity on their own. Instead, they enjoy immunity only to the extent the immunity of the tribe, which does have inherent immunity, is extended to them. In view of that fact, it is possible to imagine situations in which a tribal entity 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. Such an entity arguably

should not be immune, notwithstanding the fact it is organized and owned by the tribe.

(*Ibid.*)

Trudgeon – American Property Table

Trudgeon Factor	*American Property* Factor
Whether the business entity is organized for a purpose that is governmental in nature, rather than commercial.	1. The purpose of the entity.
Whether the tribe and the entity are closely linked in governing structure and other characteristics.	1. Method of creation of the entity; 2. The structure, ownership, management, and control of the entity; and 3. The financial relationship between the tribe and the entity.
Whether federal policies intended to promote tribal autonomy are furthered by extension of the tribe's sovereign immunity to the entity.	1. Whether the tribe intended the entity to have tribal sovereign immunity; and 2. Whether the purposes of sovereign immunity are served by granting sovereign immunity

In the opening brief, the People related the undisputed facts to both the *Trudgeon* and *American Property* factors. The People plainly addressed the factors under both tests, which Respondents concede are substantially indistinguishable. The undisputed facts were analyzed for the "purpose" factor under both *Trudgeon* and *American Property*; it weighed against extending sovereign immunity. (Open. Br., at pp. 21-23.) The analysis of the *Trudgeon* factor of whether the tribe and the entity are closely linked in governing structure and other characteristics included the *American Property* factors set forth in the above table; that analysis weighed against extending sovereign immunity. (See *id.* at pp. 18-21, 23-28, 33-34.) The *Trudgeon* factor of whether federal policies intended to

promote tribal autonomy are furthered by extension of the tribe's sovereign immunity to the tribal entity, along with the *American Property* components, was analyzed in the context of this case's undisputed facts. (See *id.* at pp. 28-35.) The *Trudgeon* factor too weighed against extending sovereign immunity to the Payday Lenders and the Corporations. (See *ibid.*)

Respondents do not address any of this analysis in their brief. Instead, they repeat that the trial court was correct and this Court cannot look beyond two factors. Respondents' argument distills down to this: the Payday Lenders and the Corporations are arms of the Tribes because they are wholly-owned tribal entities organized pursuant to tribal law and provide some revenue to the Tribes. (Resp. Br., at p. 12.) Respectfully, Respondents' narrow and self-serving test is not sufficient under any arm-of-the-tribe analysis. Respondents offer no other argument and fail to address the undisputed facts set forth in the People's opening brief.

Thus, when the *American Property* factors are analyzed as parts of the *Trudgeon* factors, the conclusion is that the Payday Lenders and the Corporations, which are separate and distinct from the Tribes and operate in violation of tribal laws, are not arms of the Tribes. The Payday Lenders and the Corporations are not entitled to benefit from the sovereign immunity doctrine. That conclusion does not impinge the Tribes' sovereign immunity in any way. Importantly, Respondents do not challenge the People's analysis of the undisputed facts under either the *American Property* or the *Trudgeon* factors.

CONCLUSION

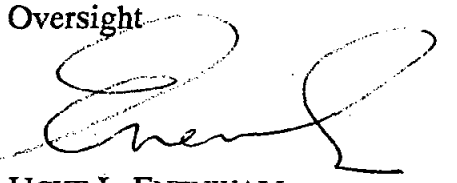
When the undisputed facts are analyzed under the criteria identified in *Trudgeon* or *American Property*, the inescapable conclusion is that the Payday Lenders and the Corporations are not entitled to share in the Tribes' sovereign immunity. The narrowly circumscribed test and analysis

advocated by Respondents are contrary to applicable law. Moreover, if adopted by the Court, Respondents' test for shielding tribal-affiliated predatory payday lenders from consumer protection laws will result in an expansion of unlawful activity directed at vulnerable Californians. The People of the State of California, therefore, respectfully request that the trial court's order be reversed and this matter be remanded for further proceedings on the merits.

Dated: November 12, 2013

Respectfully submitted,

JAN LYNN OWEN
California Commissioner of Business Oversight



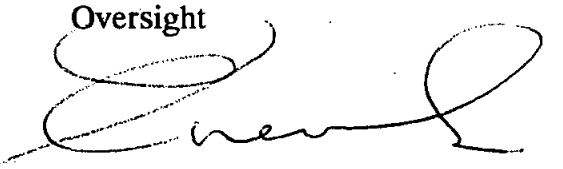
UCHE L. ENENWALI
Senior Corporations Counsel
Attorneys for Petitioner/Plaintiff r

CERTIFICATE OF COMPLIANCE

I certify that the attached **APPELLANT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains 5,054 words.

Dated: November 12, 2013

JAN LYNN OWEN
California Commissioner of Business Oversight



UCHE L. ENENWALI
Senior Corporations Counsel
Attorneys for Petitioner/Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
CASE NO. B242644

The undersigned declares: I am a citizen of the United States and I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Department of Corporations, 320 W. 4th Street, Suite 750, Los Angeles, California 90013-2344.

On **November 12, 2013** I served the following document(s): **APPELLANT'S REPLY BRIEF**

on:

See Attached Service List

☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed **on November 12, 2013** at Los Angeles, California.

Frida Mazard

FRIDA MAZARD

SERVICE LIST
The People of the State of California v. Ameriloan et al.
CASE NO. B242644

Fredericks Peebles & Morgan LLP John M. Peebles, Esq. John Nyhan. Esq. 2020 L Street, Suite 250 Sacramento, CA 95811	Attorneys for Respondents and Defendants Specially Appearing as MNE dba Ameriloan, US Fast Cash, United Cash Loans And SFS, Inc. dba One Click Cash, and Preferred Cash Loans
Conly J. Schulte, Esq. Fredericks Peebles & Morgan LLP 3610 N. 163rd Plaza Omaha, NE 68116	Attorneys for Respondents and Defendants Specially Appearing as MNE dba Ameriloan, US Fast Cash, United Cash Loans And SFS, Inc. dba One Click Cash, and Preferred Cash Loans
Rebecca E. Gutierrez The People of the State of California By and through the California Commissioner of Business Oversightc/o 320 W. 4th Street, Suite 750 Los Angeles, CA 90013	On behalf of Petitioner/Plaintiff
Hon. Yvette M. Palazuelos Los Angeles, Superior Court 111 North Hill Street, Dept.28 Los Angeles, CA 90012	Judge of the Superior Court
Office of the Attorney General 300 South Spring Street Los Angeles, CA 90013	

PROOF OF SERVICE

Case: B242644, People of the State of California vs. MNE d/b/a Ameriloan et al.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 811 Wilshire Boulevard, Suite 900, Los Angeles, California 90017. On November 12, 2013 I served **APPELLANT'S REPLY BRIEF** on the party below by serving one electronically a copy pursuant to CRC 8.2129(c)(2).

CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102
(*served electronically a copy pursuant to* CRC 8.212(c)(2))

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 12, 2013, at Los Angeles, California.

Fernando Mercado
PRINT NAME


SIGNATURE