SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

COORDINATED PROCEEDINGS SPECIAL TITLE (RULE 3.550)	JUDICIAL COUNCIL COORDINATION PROCEEDING No. 4688
INTERNET LENDING CASES	ORDER GRANTING MOTION TO QUASH AND DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
AND COORDINATED ACTIONS	

On May 3, 2013, the Motion to Quash and Dismiss For Lack of Subject Matter Jurisdiction ("Motion") filed by specially appearing defendants (a) Miami Tribe of Oklahoma, (b) MNE d/b/a Ameriloan, United Cash Loans and US Fast Cash, (c) Santee Sioux Nation; (d) SFS, Inc. d/b/a Preferred Cash Loans and One Click Cash and (e) AMG Services, Inc. (collectively, the "Tribal Entities") came on for hearing. Appearances are recorded in the minutes. Based on the

submissions to date and the arguments presented at the hearing, the court rules as follows:

I. BACKGROUND

1. The instant Motion is directed to the included case in these coordinated proceedings of *Kathrine Rosas v. US Fastcash, et al.,* ("*Rosas*"), first filed in the Superior Court of California, County of San Francisco on July 1, 2009. AMG Services, Inc. ("AMG") was added as a defendant by amendment on March 15, 2010. The operative complaint in Rosas is the First Amended Class Action Complaint, filed herein on July 31, 2012 ("Complaint"). The Complaint includes causes of action by plaintiff Kathrine Rosas, on behalf of herself and all others similarly situated, and as Private Attorney General ("Plaintiff") against the Tribal Entities and others for (1) Usury and/or Unconscionable Lending; (2) Injunctive and Restitutionary Relief Pursuant to B&P Code sections 17200, et seq.;[1] (3) Money Had and Received; and (4) Imposition of Constructive Trust, based on allegations regarding consumer lending activity carried out over the internet. The gravamen of Plaintiff's claims is that the subject consumer loans carry effective interest rates that can exceed 750%.

2. The Tribal Entities first moved to quash service of process prior to

[1] The 17200 cause of action is currently framed exclusively under the "unlawful" prong of the statute; however, as will become apparent in the discussion below, that claim as to the non-Tribal Entities may best be seen as arising under the "unfair" prong in that what Plaintiff is challenging as to those defendants is whether it is an unfair business practice to enter an arrangement with a tribe so as to allow non-Indians to invest in usurious lending transactions that they could not do directly. In Plaintiff's parlance, the issue is whether it is an unfair business practice to "rent-a-tribe" for purposes of shielding unlawful conduct.

the coordination of *Rosas* with the other included case in these coordinated proceedings, *Baillie, et al. v. Account Receivable Management of Florida, Inc., et al.*, first filed in Alameda County ("*Baillie*"). Before that motion was heard, however, the trial court in San Francisco granted Plaintiff's request for discovery on the jurisdiction issue. Meanwhile, the *Baillie* case was on a similar track, jurisdictional discovery having been permitted against the one defendant in *Baillie* that was also claiming the protection of tribal sovereign immunity – MTE Financial Services, Inc. ("MTE"), an entity claiming to be a subdivision of the Modoc Tribe of Oklahoma. However, after the cases were coordinated in October 2011, and before the jurisdictional discovery was complete in either case, counsel for MTE announced on the record that MTE had been "dissolved." Counsel for MTE subsequently withdrew, effective March 5, 2012. Although the *Baillie* plaintiffs have apparently not directed any further litigation activity towards MTE, neither has MTE's default been entered.

3. Jurisdictional discovery continued in *Rosas*, in fits and starts, generating a significant amount of motion practice in the process. Perhaps understandably, the parties were at complete loggerheads over what the parameters of the discovery should be. Unfortunately, the court in *Ameriloan* v. *Sup. Ct.* (2009) 169 Cal.App.4th 81 ("*Ameriloan*") stated only "we see no reason why limited discovery, directed solely to matters affecting the trial court's subject matter jurisdiction, should impact the payday loan companies' special appearance ..." (*Id.*, at p. 98.) Because the parameters of such discovery were not properly

before the *Ameriloan* court, those issues were not addressed by it. (*Ibid.*) Finally, with several discovery motions pending, the court issued a Case Management Order on April 20, 2012, which stayed any further discovery until after the Tribal Entities filed their revised/updated motion to quash for lack of subject matter jurisdiction and directed Plaintiff to file an opposition to the motion to quash that set forth the additional fact discovery she felt was necessary to respond to the specific points in the motion. The resulting Joint Statement regarding discovery filed July 6, 2012, however, did little to narrow the gulf.

4. At that point the court decided to permit Plaintiffs to depose the three persons whose declarations had been submitted by the Tribal Entities in support of the instant Motion – Robert Campbell, Don Brady and Chief Thomas Gamble – and issued an order to that effect on July 17, 2012. Disputes as to the parameters of those depositions and documents to be produced in connection therewith caused further delay, necessitating further court intervention (see September 18, 2012 "Order Re Disputes..."), after which *Rosas* was removed to federal court by newly named defendant Charles M. Hallinan. After remand, further disputes arose as to whether Plaintiff should still be allowed to depose Campbell, Brady and Gamble, and the court issued a further Case Management Order on January 11, 2013, deferring the issues regarding those depositions until after at least an initial hearing on the instant Motion was conducted. This matter has suffered further distraction and delay by a flurry of activity resulting from the service of the *Rosas* Complaint on multiple new parties defendant.

II. THE MOTION

5. As a preliminary matter, the court notes for the record that shortly after the Motion was filed in June 2012 the court raised the question of whether the instant Motion is the appropriate procedural vehicle for a challenge to subject matter jurisdiction. (See, e.g., *Greener* v. *Workers' Comp. Appeals Board* (1993) 6 Cal.4th 1028, 1036-1037 [a challenge to subject matter jurisdiction is properly brought by demurrer, motion to strike, motion for judgment on the pleadings, or motion for summary judgment].) In response, the Tribal Entities pointed the court to authority supportive of their chosen procedure (*Boisclair* v. *Sup. Ct.* (1990) 51 Cal.3d 1140, 1144 fn.1; *Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1416-1417), and Plaintiff waived any procedural irregularity and confirmed her desire to have the tribal sovereign immunity issue decided by way of the instant Motion. (See July 30, 2012 Order Re (1) Various Motions and (2) The July 27, 2012 Case Management Conference.)

A. Summary of Defendants' Arguments[2]

6. The Tribal Entities assert that Santee Sioux Nation ("Sioux Tribe") and Miami Tribe of Oklahoma (also known as "Miami Nation") ("Miami Tribe") are federally-recognized Indian tribes (75 Fed. Reg. 60,810 [Oct. 1, 2010]) and are entitled to tribal sovereign immunity on that basis alone. The Tribal Entities have

[2] Tribal Entities Request for Judicial Notice of Exhibits 1-9 and 15-20 to the Gamble Declaration, Exhibits 1-6, 9 and 10 to the Declaration of Robert Gamble, and Exhibits 1, 2, 4, 7, 8 and 9 to the Declaration of Shilee Mullin is GRANTED. As to the orders from courts in other jurisdictions, notice is taken of the existence of the orders only, and not as to the truth of any matter asserted therein.

provided a copy of the currently operative Constitution of the Miami Tribe (Declaration of Chief Thomas E. Gamble ["Gamble Declaration"], Exh. 1), which was approved by an Acting Deputy Commissioner of Indian Affairs on February 22, 1996. That document also reflects that an amendment to the Constitution was apparently approved on March 3, 2008, after having been ratified by qualified voters of the Miami Tribe on February 1, 2008; however, a copy of the amendment itself is missing from the exhibits. The Tribal Entities have also provided a copy of the currently operative Constitution of the Sioux Tribe, including Amendment IV thereto, which was approved by an Acting Regional Director of Indian Affairs on August 30, 2002, after having been adopted by qualified voters of the Sioux Tribe on August 23, 2002. (Declaration of Robert Campbell (Second) ["Campbell Declaration"] Exh. 1.) Plaintiff apparently concedes that the Sioux Tribe and the Miami Tribe are immune from suit, having failed to argue otherwise in their opposition.

7. As to MNE d/b/a Ameriloan, United Cash Loans and US Fast Cash ("MNE") and SFS, Inc. d/b/a Preferred Cash Loans and One Click Cash ("SFS"), the Tribal Entities point out that MNE and SFS have been found by two other courts to be entitled to tribal sovereign immunity. (See *State of Colorado* v. *Cash Advance*, Case No. 05CV1143, District Court, City and County of Denver, State of Colorado; *People* v. *Ameriloan*, Case No. BC373536, Superior Court of the State of California, County of Los Angeles.) They argue that the same determination should be made here. Although AMG was not a party in those

cases, it was also created and is wholly owned by the Miami Tribe, and the Tribal Entities assert that extending tribal sovereign immunity to AMG also promotes the Miami Tribe's autonomy.

8. The Tribal Entities submit a reasonably complete history of MNE, including the transfer of the internet lending operation from the original MNE to a new entity entitled "MNE Services, Inc." in January, 2009. (Gamble Declaration, ¶ 11 and Exh. 6.) For purposes of this Motion, the definition of "MNE" shall also include MNE Services, Inc. Also presented are copies of the Miami Tribe's statutes governing Interest Rates and Loans and Cash Advance Services and the Miami Business Regulatory Act. (Gamble Declaration, Exh. 17-21.) According to the Gamble Declaration, MNE transacts its internet lending business under the trade names "Ameriloan," "US Fast Cash," and "United Cash Loans" and all loan applications are approved by MNE on federal trust land under the sovereign jurisdiction of the Miami Tribe.

9. The Tribal Entities also submit a reasonably complete history of SFS, supported by the Campbell Declaration and exhibits thereto. Campbell is self-described as "an enrolled member of the [Sioux Tribe]", a member of the Tribal Council and the Treasurer of SFS since its creation in 2005. According to the Campbell Declaration, SFS' loan transactions, currently done under the trade name "One Click Cash" and formerly done under the trade name "Preferred Cash Loans" are all consummated at offices on the Sioux Tribe's Indian Reservation. Like the Miami Tribe, the Sioux Tribe has adopted a Business Corporations Code,

as well as a Code on Interest Loans and Debt.

10. AMG has a shorter history, having been created in 2008. It is described as a provider of "employee services necessary to service the loan portfolios owned by [MNE] and ... [SFS]." (Gamble Declaration, ¶ 15.) The Tribal Entities' third declarant, Don Brady, is self-described as "employed full-time by the Miami Tribe." According to the Brady Declaration, Brady serves as the Chief Executive Officer ("CEO") of MNE, although he does not state whether he serves as the CEO of MNE Services, Inc. Brady also serves as the CEO of AMG. According to both the Gamble Declaration and the Brady Declaration, in 2008 AMG acquired a company called CLK Management, LLC ("CLK") that had formerly provided the necessary "employee services and equipment" to service MNE and SFS loan portfolios. Brady further declares that CLK worked together with an entity called United Management Services, Inc. ("UMS"), which provided "capital and administrative support." UMS is not named as a defendant in the *Rosas* Complaint. After AMG acquired CLK, both MNE and SFS terminated their agreements with UMS. Between terminating UMS and contracting with AMG, SFS apparently entered into a contract with another entity called N.M. Service Corp. ("NMS") but claims to have terminated that agreement before any services were provided thereunder. (Campbell Declaration, ¶ 9 and Exh. 8.) NMS is named as a defendant in the *Rosas* Complaint.

11. The Tribal Entities set forth the history of the development of the law regarding the doctrine of tribal immunity, culminating with the *Ameriloan*

case, cited above. They argue that under *Ameriloan* there are two factors to consider in resolving whether entities such as MNE, SFS and AMG are "sufficiently related to the tribe to benefit from the application of sovereign immunity" – namely, (1) "whether the tribe and the entities are closely linked in governing structure and characteristics" and (2) "whether federal policies intended to promote tribal autonomy are furthered by extension of immunity to the business entity." (*Ameriloan*, at p. 98.)

12. The Tribal Entities assert that, in all, the evidence they have submitted clearly demonstrates that both MNE and AMG were created by the Miami Tribe as a wholly-owned and operated tribal entities pursuant to Miami tribal law and that they are both controlled by the Miami Tribe. The record likewise demonstrates that SFS was created by the Sioux Tribe as a wholly-owned and operated tribal entity pursuant to Sioux tribal law, and that it is controlled by the Sioux Tribe. In the Tribal Entities' view, this showing satisfies the "closely linked in governing structure and characteristics" factor.

13. The Tribal Entities also argue that the second factor is satisfied. Both Congress and the U.S. Supreme Court have recognized the importance of furthering economic development and self-sufficiency of Indian nations and have acted consistently to encourage such development and to extend the protection of tribal immunity to include commercial endeavors. Here, both MNE and AMG generate revenue for the economic development of the Miami Tribe, and SFS promotes and funds the Sioux Tribe's economic development. Any reduction in

those revenues would directly impact the tribes' ability to provide programs and services for their members, thereby stifling their ability to be autonomous. (*Ibid.*)

B. Summary of Plaintiff's Arguments

14. In her initial opposition filed on June 22, 2012 ("Opp") Plaintiff articulates the "key issue of this motion" as "whether [] MNE, SFS and AMG are sufficiently related to their respective tribes to benefit from the application of sovereign immunity" (Opp at p.1:8-9) and argues that all available evidence indicates that these Tribal Entities are a "sham" and part of a "rent-a-tribe" scheme designed to immunize their flagrant violations of California law. Plaintiff attributes the terms "sham" and "'rent-a-tribe' scheme" to *Ameriloan*, without noting that those terms appear in the *Ameriloan* decision only in the court's discussion of the *Ameriloan* plaintiff's request that evidence obtained after the petition for writ of mandate was filed be considered. (*Ameriloan,* at p. 97.) No factual determinations were made or reviewed in *Ameriloan.* (*Id.*, at p. 98 & fn.9.)

15. Plaintiff also relies on *Breakthrough Management Group, Inc.* v. *Chuk Chansi Gold Casino & Resort* (10th Cir. 2010) 629 F.3d 1173 ("*Breakthrough*"), in which the court listed a variety of factors to consider when examining the relationship between economic entities and the tribe, including "(1) the method of the [entities'] creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the Tribe has over the entities; (4) whether the Tribe intended for them to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the [entities]; and

(6) whether the purposes of tribal sovereign immunity are served by granting them immunity." (*Id.*, at p. 1191.)

16. Plaintiff further argues that when AMG merged with CLK it assumed responsibility for all the debts and liabilities of CLK and that by doing so it waived tribal immunity. At the May 3, 2013 oral argument Plaintiff emphasized this argument as a factor distinguishing this case from all of the others where immunity was found to apply and urged the court to at least keep AMG in the case on that basis.

17. In her supplemental opposition filed on February 1, 2013 ("Supp.Opp"), Plaintiff argues that the *Ameriloan* court set forth five factors that should be considered in determining whether the Tribal Entities are entitled to the benefits of tribal immunity: (1) whether those entities, in fact, are acting on behalf of federally recognized Indian tribes, (2) whether the tribe and the entities are closely linked in governing structure and characteristics, (3) whether federal policies intended to promote tribal autonomy are furthered by extension of immunity to the business entity, (4) whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe, and (5) the fact that unlike the Federal Gaming Act, 25 U.S.C. section 2701, et seq., no similar congressional declaration exists in connection with the payday loan industry.

18. Plaintiff also relies in part on the Supreme Court of Arizona case of *Dixon* v. *Picopa Construction Company* (1989) 772 P.2d 1104 ("*Dixon*") as an example of where tribal sovereign immunity was found not to apply to a company

incorporated and wholly owned by a federally recognized Indian tribe, and points out that the *Breakthrough* court also observed that "'[c]ases which have not extended immunity to tribal enterprises typically have involved enterprises formed 'solely for business purposes and without any declared objective of promoting the [tribe's] general tribal or economic development.'" (*Breakthrough*, at p. 1195, citing *Trudgeon* v. *Fantasy Springs Casino, et al.* (1999) 71 Cal.App.4th 632, 640 ("*Trudgeon*"), quoting *Dixon*, at p. 1110.) Plaintiff asserts that these cases support their argument that further discovery is necessary "to know if AMG, MNE and SFS were formed for any other purpose than to conduct illegal payday lending using the tribal entity as a Potemkin Village façade to shield the illegal nature of the transaction, with the tribal interests receiving a token percentage of the revenue." (Supp.Opp at p. 5:18-21.)

19. Finally, Plaintiff posits the argument, without development or decisional authority, that Public Law 280, codified as 18 U.S.C. section 1162(a), which grants California (and certain other states) broad criminal jurisdiction over offenses by or against Indians on Indian reservations, should somehow operate to defeat immunity here because the underlying usury claims are a felony under Civil Code section 1916.12-3(b).

20. In response to the guidance of the court in its case management orders, Plaintiff focuses in both her Opp and Supp. Opp on the additional discovery she wishes to conduct in order to provide a broader scope of admissible evidence in support of her opposition arguments. Plaintiff does not deny, nor can

she, that she bears the burden of proving that this court has subject matter jurisdiction over MNE, SFS and AMG. (*Yavapai-Apache Nation* v. *Lipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206 ("*Yavapai-Apache Nation*"), citing *Lawrence* v. *Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369.)

21. Plaintiff current evidentiary presentation is comprised in significant part of evidence that was developed in connection with an investigation by the Federal Trade Commission ("FTC") into the activities of numerous individuals and business entities, including AMG, SFS and Tribal Financial Services ("TFS"). TFS is described in the Gamble Declaration as the former "portion of MNE (and/or MNE Services, Inc.) that is engaged in the online lending business," and "a present trade name of MNE Services, Inc." Plaintiff has submitted the March 15, 2012 Declaration of FTC investigator Victoria M. L. Budich ("Budich Declaration") and portions of the exhibits to that declaration that she considers pertinent to the instant Motion. Plaintiff understands that this evidence, in its current form, is not admissible in these coordinated proceedings but has presented it as an offer of proof to support her request that she be permitted to "take confirmatory discovery, so that [it] can be introduced as evidence in this case..." (Declaration of Harold M. Jaffe, p. 4, ¶6.[3]) Included among this "confirmatory

[3] Tribal Entities' Evidentiary Objections to the Declaration of Harold M. Jaffe and the Supplemental Declaration of Harold M. Jaffe and certain exhibits thereto are OVERRULED. As noted above, the Budich Declaration and exhibits thereto, one of the subjects of Tribal Entities' objections, was only submitted and considered as a proffer, with the recognition by Plaintiff that it would not be admissible in the form in which it was presented for any other purpose. If that proffer were sufficient to overcome the assertion of

discovery" are bank records of accounts that were identified in the Budich Declaration, including some for which Plaintiff has already served subpoenas. Motions to quash those subpoenas are still pending and currently stayed.

22. Plaintiff points out that the Budich Declaration, among other things, shows that individuals named Scott Tucker and Blaine Tucker, both of whom were recently named and served as defendants in the *Rosas* case, with personal jurisdiction challenges pending, are the only signatory on two AMG bank accounts through which many millions of dollars pass, and that substantial disbursements have been made to other entities that have no connection with the Miami Tribe or the Sioux Tribe. Among these questionable disbursements are substantial payments to an international auto racing company called Level 5 Motorsports and for the construction of a luxury home owned by the Tuckers.

23. Plaintiff also seeks to conduct discovery into the management of AMG, specifically to ascertain what input, if any, third parties other than the Tuckers and their direct subordinates had or have in the conduct of AMG's business. Plaintiff believes that such discovery will identify numerous individuals unassociated with any tribe who, like the Tuckers, use various tribal entities such as AMG to invest in payday loans.

24. To support her waiver argument, Plaintiff relies on records produced by a custodian of records of the Kansas Secretary of State regarding CLK and its

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tribal immunity, the court would continue the motion until such time as Plaintiff had completed such discovery.

merger into AMG. An earlier request for judicial notice of these records was granted on November 18, 2010, in the *Rosas* case before coordination.

25. For reasons unexplained, Plaintiff's evidentiary submission, as well as her request for additional discovery, includes evidence related to MTE, not one of the Tribal Entity moving parties in this Motion.

III. DISCUSSION

26. The early history and development of the law regarding tribal sovereign immunity is not disputed by the parties and is well chronicled in many of the cases cited. (E.g., *Breakthrough,* at pp. 1182-1183; *Cash Advance and Preferred Cash Loans* v. *State of Colorado* (2010) 242 P.3d 1099, 1106-1108 ("*Cash Advance*").) Widely recognized as an important turning point in this development is the U.S. Supreme Court case of *Kiowa Tribe of Oklahoma* v. *Mfg. Techs., Inc.* (1998) 118 S.Ct. 1700 ("*Kiowa*"). *Kiowa* includes its own discussion of the development of the doctrine if tribal immunity leading up to that decision (*id.*, at pp. 1703, 1704 ["we note that it developed almost by accident..."]), admitting that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." (*Ibid.*) The court submits that the instant case may well reflect another such reason. Nevertheless, *Kiowa* explicitly extended the doctrine, at least in the contractual setting, to contracts made involving either governmental or commercial activities, whether they are made on or off a reservation. (*Id.*, at p. 760.) In so doing, the Supreme Court reaffirmed the overarching principle that

only Congress can impose restrictions on the application of tribal immunity. (*Id.*, at pp. 1702-1703, 1759-1760.)

27. Unlike many of the cases that followed, *Kiowa* involved a suit directly against an Indian tribe, as opposed to a separate entity owned by a tribe. Indeed, to this day the U.S. Supreme Court has not directly opined on the question presented in the instant Motion, i.e., whether and/or under what circumstances a separate entity falls under the doctrine's protection. (See *Cash Advance*, dissent at p.1116 and fn.1.) A growing number of other courts, however, certainly have, and the analysis in this case must begin with the applicable binding California appellate authority, the most recent of which is *Ameriloan.*

28. In pointing out that *Ameriloan* is binding on this court, the Tribal Entities appear to suggest that the court is also bound to decision of the trial court after remand. This is, of course, not an accurate characterization of the doctrine of stare decisis, which only applies to courts exercising inferior jurisdiction. (*Auto Equity Sales, Inc. v. Sup. Ct.* (1962) 57 Cal.2d 450, 456.) *Ameriloan*, while binding, does not directly address the question now before this court, since the finding applicable to the facts of this case was only that the trial court had erroneously concluded that tribal sovereign immunity does not apply to off-reservation commercial activity. (*Id.*, at p. 84.) Its other findings, having to do with California's state sovereignty and the waiver arguments specific to that case (*ibid.*), are not implicated in the instant case.

29. Important to the court's analysis here is the *Ameriloan* court's

discussion of the test to be applied by the trial court upon remand. The parties disagree on exactly parameters of that test, and with good reason. The test set forth in *Ameriloan* is framed by reference to and quotations from other cases, including *Trudgeon,* supra, *Redding Rancheria* v. *Sup.Ct.* (2001) 88 Cal.App.4th 384 ("*Rancheria*") and *Allen* v. *Gold County Casino* (9th Cir. 2006) 464 F.3d 1044 ("*Allen*").

30. The test articulated in *Trudgeon* finds its roots in the Supreme Court of Minnesota case of *Gavle* v. *Little Six, Inc.* (1996) 555 N.W.2d 284 ("*Gavle*") which included consideration of "whether the business entity is organized for a purpose that is governmental in nature, rather than commercial." (*Trudgeon*, at p. 638, citing *Gavle*, at p. 294.) While *Gavle* was decided before *Kiowa*, *Trudgeon* was decided after and still applied the *Gavle* test. The *Trudgeon* court observed that "the purpose for which the entity is created may remain relevant even after *Kiowa* ... [because the *Kiowa* court] did not consider the possible relevance of the governmental/commercial distinction in determining the liability of tribal entities." (*Id.*, at p. 639.) In the court's view, the Tribal Entities' argument that *Rancheria*, which was decided two years after *Trudgeon*, completely closed the door on the "purpose" factor of the test is overstated.

31. Interestingly, the *Breakthrough* court also cites *Gavle* for the proposition that "we must determine whether the [tribal entities] are 'the kind[s] of tribal entit[ies], analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether [they] [are] more like ...

commercial business enterprise[s], instituted solely for the purpose of generating profits for [their] private owners." (*Breakthrough*, at p. 1184, citing *Gavle*, at p. 293.) It also cites both *Allen* and *Dixon* to illustrate the different terminology used to describe tribal entities. (*Breakthrough,* at p. 1185, fn. 9, citing *Allen*, at p. 1046 ["an arm of the tribe"] and *Dixon*, at pp. 1108-12 ["subordinate tribal organization"].) The *Trudgeon* court further cites *Dixon* for the proposition that "most courts have rejected, implicitly if not explicitly, the suggestion that courts should 'confer tribal immunity on every entity established by an Indian tribe, no matter what its purposes or activities might have been." (*Trudgeon*, at p. 638, citing *Dixon*, at p. 255, fn. 7.)

32. Worse than the lack of uniformity in the way that question of immunity of tribal entities has been approached, and the door left open by the *Ameriloan* court's direction to "consider the criteria expressed by the Courts of Appeal in *Trudgeon* ... and *Rancheria*...," is the fact that the *Ameriloan* court quoted these lines from *Trudgeon*: "[i]t 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." (*Ameriloan*, at p. 97.) That court then went on in a much quoted footnote, to observe that "[i]t may be that entities engaged in Indian gaming may benefit from tribal sovereign immunity, which payday loan companies marginally affiliated with tribes should not. Although federal law, for

example, recognizes the Indian gaming industry is closely connected to the welfare of Indian tribes (see, e.g., 25 U.S.C. § 2701), no similar congressional declaration exists in connection with the payday loan industry." (*Ameriloan*, at p. 98, fn. 10.) Unanswered, of course, are the questions of "how far removed" is "so far removed" and what weight, if any, do the differences between Indian gaming and Indian internet lending carry in the immunity analysis?

33. The court disagrees with Plaintiff that *Ameriloan* footnote 10 should be treated as a "factor" in the immunity analysis on par with whether the tribe and the entities are closely linked in governing structure and characteristics, and whether federal policies intended to promote tribal autonomy are furthered by extension of immunity to the business entity; however, this court is troubled by the fact that the vast majority of the case law addressing the extension of tribal immunity to tribal entities has arisen in the context of gaming, and gaming is one of the few endeavors that Congress has seen fit to both regulate and encourage. (25 U.S.C. §§ 2710, et seq.) This encouragement has been given significant weight in most of the cases in which immunity has been extended to tribal entities that run gaming operations. (See, e.g., *Rancheria*, at p. 389, *Trudgeon*, at p. 640, *Breakthrough*, at pp. 1192-1193.) Tribal Entities cannot deny that such an articulation of federal policy specific to internet lending is decidedly absent.

34. The essence of Plaintiff's argument is that all of the Tribal Entities, but particularly AMG, were created and are operated for the primary purpose of making money for non-Indians, specifically the Tuckers and their associates.

Admittedly, Plaintiff's use of the words "primary" comes from a question posed to the parties by the court in its April 20, 2012 order – i.e. "[i]f it can be proven that a primary function of a business entity that is wholly owned by a federally recognized tribe ... is to provide cover to illegal activities of non-tribal persons, would the Tribal Entity still be protected by sovereign immunity?" Naturally, Plaintiff answered this question "no," and Tribal Entities answered it "yes." The court framed a similar question in terms of whether "the nature of the business ... including whether some or all of the business activities violate consumer protection or other statutes" should even be considered in the immunity analysis, with predictably similar answers. Notwithstanding that the court's questions were not drawn directly from case law, Plaintiff's position rises or falls on whether her answers to those questions are correct.

35. Having carefully reviewed the evidence submitted by Tribal Entities, the court does note certain inconsistencies. While the evidence shows that AMG acquired the stock, or membership interests, of CLK and merged CLK into AMG, the timeline of these events is less than clear. According to Exhibit 7 to the Gamble Declaration, the Resolution Approving The Formation of AMG (Resolution 08-14) was passed in June, 2008, although the exact day of the meeting of the Business Committee at which this occurred was left blank on the Certification. AMG's Articles of Incorporation were signed on June 24, 2008, and the effective date of the merger of CLK into AMG was also June 24, 2008. (Declaration of Harold M. Jaffe, Exh. 5 [Order Directing Execution and

Recordation of Certificate of Merger, *Tucker v. AMG Services, Inc.*, Case No. 10-CV-1084, District Court of Wyandotte County, Kansas].) The Purchase Agreement between AMG and CLK (Gamble Declaration, Exh. 13), however, has an effective date of January 1, 2008. Furthermore, AMG is purported to have been established as "a wholly owned corporation of the [Miami] Tribe pursuant to the [Miami] Tribe's Tribal Business Corporations Ordinance" (Gamble Declaration, ¶ 14), but the copy of said ordinance attached to the Gamble Declaration as Exhibit 9 includes only the year (2008) of its "effective date" at section 16.2 and is not accompanied by copies of resolution(s) of adoption.

36. The foregoing inconsistencies, however, are relatively minor, and even applying the broadest list of factors as set forth in *Breakthrough*, Plaintiff has not articulated any way in which further discovery would allow her to make any headway against the Tribal Entities' showing regarding the method of the Tribal Entities' creation, their structure and ownership, and whether the tribes intended for them to have tribal sovereign immunity. The documents are very clear on those fundamental issues.

37. Plaintiff's attack is really on the "purpose" for which the entities were formed, not because Plaintiff believes that a distinction between "governmental" and "commercial" endeavors is important, but because Plaintiff believes that the "real," "true," "fundamental" or "primary" (the court's words, not Plaintiff's) purpose of these entities is to enrich others and bears on the "degree of control" the Tribes have over the Tribal Entities. These factors, of course,

necessarily overlap with perhaps the most important factor, i.e., whether the purposes of tribal sovereign immunity are served by granting immunity to the Tribal Entities in this case. (*Breakthrough*, at p. 1191.)

38. The Tribal Entities, of course, argue strenuously that the best test is the one articulated by the Supreme Court of Colorado in *Cash Advance* and applied thereafter by the Denver District Court in Case No. 05CV1143. That test looks only to whether the tribes created the entities pursuant to tribal law, whether the tribes own and operate the entities, and whether the entities' immunity protects the tribe's sovereignty. (*Cash Advance*, at p. 1102.) In the Tribal Entities' view, this test is fully consistent with the test articulated in *Ameriloan*, which the Tribal Entities see as having only two parts, whether the tribe and 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. While the court agrees that these tests, as articulated, may fairly be characterized as two different ways of saying the same thing, the Tribal Entities' takeaway from *Ameriloan* is more than a little bit constrained for the reasons discussed above.

39. Although the court recognizes that some courts have left open the possibility that the "purpose" of a tribal entity may be considered in the immunity analysis (e.g., *Trudgeon* and *Breakthrough*), there is dearth of authority on how such a factor can and should be applied to the effect Plaintiff seeks. Certainly neither the *Trudgeon/Gavle* test nor the *Breakthrough* test, as applied in those

cases, resulted in rulings adverse to the immunity of the tribal entities. So, what we have here are cases that, on the one hand, *suggest* the possibility that a plaintiff could make an evidentiary showing that would be sufficient to demonstrate that (a) so small a portion of the proceeds of a business enterprise actually redound to the benefit of the tribe and/or (b) the level of control the tribe has over the business enterprise is so small, that the entity formed for the purpose of conducting the business enterprise cannot be considered an "arm of the tribe," but, on the other hand, no case having actually applied these theories in practice so as to defeat a claim of tribal sovereign immunity. Indeed, the case that is most supportive of the broad analytical approach advocated by Plaintiff here includes the disclaimer that "[a]t this time there is no need to define the precise boundaries of the appropriate test..." (*Breakthrough*, at p. 1187.) Further, the language in *Ameriloan* most helpful to Plaintiff, as discussed above, is relegated to footnote. All of this suggests that the courts facing the issue to date have not wanted to concede the stark logic of the controlling authority and what it may mean in terms of the ability of tribes to become vehicles for otherwise patently unlawful activities.

40. Nor is *Dixon*, the one case cited by Plaintiff in which a tribal entity was found *not* to be immune, at all helpful to Plaintiff's cause. In *Dixon*, a personal injury case, it was not the entity but rather the entities' insurer, who was asserting immunity in the first instance, and the purchase of general liability insurance was one factor found by the *Dixon* court to weigh against immunity. (*Dixon*, at p. 1109.) Moreover, the entity in *Dixon* had a board of directors that

was completely separate from the tribal government, and the ordinance that created the entity stated that it was created solely for business purposes and was silent on any objective of promoting general tribal or economic development. (*Id.*, at p. 1110.) If anything, *Dixon* further demonstrates the strength of the doctrine of tribal sovereign immunity, even in the face of injustice to tort victims. (*Kiowa*, at p. 766 (dis. opn. of Stevens, J., joined by Thomas, J. and Ginsburg, J.) ["the rule is unjust ... especially with respect to tort victims ..."].)

41. While Plaintiff's waiver argument in this case is different than the waiver arguments raised in *Ameriloan*, the same general principles apply. In order to be binding, a waiver of immunity must be "'clear'... 'cannot be implied but must be unequivocally expressed'." (*Ameriloan* at p. 94, citing, inter alia, *Santa Clara Pueblo* v. *Martinez* (1978) 436 U.S. 49, 58.) Having reviewed each of the cases regarding waiver cited in *Ameriloan*, and the cases upon which those cases relied, the court concludes that there is no authority to support Plaintiff's theory that AMG waived its right to assert tribal sovereign immunity by operation of its merger with CLK. Any such waiver could only be characterized as "implied" and therefore does not constitute an effective relinquishment of immunity.

42. As noted above, Plaintiff's argument regarding Public Law 280 and Civil Code section 1916.12-3(b) was decidedly undeveloped, so much so that Tribal Entities apparently did not consider it worthy of response. In any event, any notion that Public Law 280 has any place in the context of civil litigation was clearly laid to rest in *California v. Cabazon Band of Mission Indians* (1987) 480

U.S. 202 ("*Cabazon*"). *Cabazon* also stands as a further example the strength of the tribal sovereign immunity doctrine , which in that case resulted in a finding that the State of California could not enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders. The court notes that some of the concerns it has with the state of the law as it applies to the matter before it are artfully articulated in Justice Stevens' dissent in *Cabazon* (joined by O'Connor, J. and Scalia, J.):

> While gambling provides needed employment and income for Indian tribes, these benefits do not, in my opinion, justify tribal operation of currently unlawful commercial activities. Accepting the majority's reasoning would require exemptions for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises. [*Id.*, at p. 222.]

Those comments are proving to have been prophetic. The dissent goes on to observe with respect to gaming what may be said as well about internet lending:

> Appellants and the Secretary of the Interior may well be correct, in the abstract, that gambling facilities are a sensible way to generate revenues that are badly needed by reservation Indians. But the decision to adopt, to reject, or to define the precise contours of such a course of action, and thereby to set aside the substantial public policy concerns of a sovereign State, should be made by the Congress of the United States. It should not be made by this Court, by the temporary occupant of the Office of the Secretary of the Interior, or by non-Indian entrepreneurs who are experts in gambling management but not necessarily dedicated to serving the future well-being of Indian tribes. [*Id.*, at p. 227.]

43. The court has struggled to conceive of a way in which a principled line if not a bright one might be drawn, consistent with the controlling authorities, that would answer the questions "how much revenue directed to the Tribes is enough" and "how much outside control is too much?" It is fair to say that

Plaintiff has the short end of the proverbial stick in at least two respects. First, rightly or wrongly, the burden of proof is clearly on Plaintiff. (*Yavapai-Apache Nation*, at 206; but see, *Cash Advance*, dis. opn. of Coats, J. at p. 1116 ["I believe the majority's confused jurisdictional analysis leads it to an unjustifiable and in fact illogical allocation of burdens, making it virtually impossible for the state to protect its own citizens from even the most blatant acts of fraud"].) Second, even though the cases allow for some level of discovery by a party attempting to meet that burden, the parameters of such discovery run up against the very protections that the doctrine of tribal sovereign immunity has evolved to provide – i.e., the protection against having to direct economic resources that would otherwise be available to the Tribe to the defense of civil litigation.[4]

44. In the end, the inescapable conclusion is that the only test regarding revenue allocation that is not inherently subjective, thereby crossing the line into the area characterized by the *Kiowa* court as "diminution [of tribal immunity] by the States" (*Kiowa*, at p. 756) is that revenue in any amount directed to the benefit of the Tribe is enough. Similarly, since "... the [Tribes] can be enmeshed in the direction and control of the business without being involved in the actual management" (*Trudgeon*, at p. 641, quoting *Gavle*, at p. 295), Plaintiff would have

[4] Make no mistake: if Plaintiff were to be allowed to pursue discovery against the Tribal Entities regarding the purpose for which they were formed, the degree of actual control exerted by the Tribes over their operations and the extent to which the Tribes financially benefit from the arrangement, such discovery would be very extensive and intrusive. One can easily imagine extensive electronic discovery, depositions of various Tribal officers regarding their involvement in various decisions, and the tracing of the revenues and expenses to determine who was truly benefiting from the internet lending endeavor. Further, if at the end of the day there were no immunity, the subordinate tribal entities could be exposed to massive civil liability.

to show that the Tribal Entities have no control whatsoever over the management of their business activities, a goal that Plaintiff herself does not claim could be reached by further discovery.

IV. CONCLUSION

45. For the foregoing reasons, the court concludes that the Tribal Entities enjoy the protection of tribal sovereign immunity. Accordingly, this court has no subject matter jurisdiction over them. If the adage "for every wrong there is a remedy" is true, a remedy for the wrongs alleged in this case is simply not available in this court but must be found in the halls of Congress. The Supreme Court has completely foreclosed the States from addressing the wrongs alleged here. (*Kiowa*, at p. 759.) That is because "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." (*Ameriloan*, at p. 93, quoting *Warburton/Buttner* v. *Sup. Ct.* (2002) 103 Cal.App.4th 1170, 1182.) If properly invoked, the doctrine is a complete bar and even precludes subjecting the immune entities to third-party discovery demands.

46. One of the many untoward consequences of this court's decision to dismiss the Tribal Entities on immunity grounds is that, by respecting the sovereign immunity claims of those parties, non-immune parties in this case will probably be able to avoid liability by virtue of Plaintiff's need to obtain discovery from the Tribal Entities, which are shielded from any such discovery efforts. Thus

in this and other cases, non-tribal parties now have a roadmap by which they may concoct schemes to defraud and exploit California residents through the use (and abuse) of tribal entities as the vehicle for perpetrating their schemes and thereby avoid exposure to liability by maintaining the evidence of their misconduct in the records of the immune tribal entities established to front for them. All they need to do is pay the tribal entities for this "service." Such is the current state of the law. If Tribes increasingly elect to exercise their sovereign rights so as to facilitate such schemes, they may eventually see those rights re-defined.

47. Plaintiff's complaint is HEREBY DISMISSED as to specially appearing defendants Miami Tribe of Oklahoma; MNE d/b/a Ameriloan, United Cash Loans and US Fast Cash; Santee Sioux Nation; SFS, Inc. d/b/a Preferred Cash Loans and One Click Cash; and AMG Services, Inc.

May 6, 2013
Date

Wynne S. Carvill
Coordination Trial Judge