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March 3, 2014

**SUPREME COURT  
FILED**

MAR - 4 2014

**Frank A. McGuire Clerk**

**Deputy**

Honorable Tani Gorre Cantil-Sakauye  
Chief Justice  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102-4797

Re: *The People of the State of California v. Miami Nation Enterprises, et al.*  
Second Appellate District, Division Seven, Case No. B242644  
Request for Depublication (Cal. Rules of Court, rule 8.1125(a))

To the Chief Justice and the Associate Justices of the Supreme Court of California:

On behalf of the Commissioner of Business Oversight, formerly the Commissioner of Corporations,<sup>1</sup> we respectfully request that this Court depublish the decision of the Second Appellate District, Division Seven, in *The People of the State of California v. Miami Nation Enterprises, et al.* (2014) 223 Cal.App.4th 21 (*People v. MNE*). The Court of Appeal certified the opinion for publication when it was filed on January 21, 2014.

As set out below, if the decision stands, it will create unnecessary confusion about the proper test for determining whether a business is sufficiently related to and controlled by a tribe to share in the tribe's sovereign immunity. Further, if the Second District's test is widely accepted, third-party businesses will be able to avoid the requirements of important state

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<sup>1</sup> Effective July 1, 2013, the Department of Corporations and the Department of Financial Institutions combined and became the Department of Business Oversight. The Commissioner of Corporations is now the Commissioner of Business Oversight. (Fin. Code, § 321, subs. (b) & (c).)

consumer and public protection laws—including laws prohibiting the predatory payday lending practices at issue in this case—by showing only the barest of formal affiliations with a tribe. By depublishing this case, the Court will ensure that the more comprehensive and substantive balancing test developed in the Fourth Appellate District, which considers whether the tribe actually oversees and controls the business, will continue to govern the determination of “arm-of-the-tribe” immunity, and that any further developments in the law will begin from this sound foundation.<sup>2</sup>

### **1. The Commissioner’s Interest**

The Commissioner regulates a variety of financial services, products, and professionals, including, among others, state-licensed financial institutions, securities broker-dealers, and certain other lenders. Pursuant to the California Deferred Deposit Transaction Law (Fin. Code, § 2300 et seq.), the Commissioner’s responsibilities include regulating deferred deposit transactions, commonly known as payday loans, and licensing payday lenders. *People v. MNE* arose from the Commissioner’s efforts to regulate certain unlicensed payday lenders doing business with Californians through the Internet.

As evidenced by this case, the Commissioner’s consumer protection and regulation responsibilities are increasingly challenged by innovative methods that seek to avoid enforcement of, and compliance with, California law. California consumers will lose important protections if the test for arm-of-the-tribe immunity becomes a mere formal exercise and third-party businesses are provided an easily satisfied formula for avoiding the Commissioner’s enforcement efforts.

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<sup>2</sup> The Commissioner has filed a petition for review together with this request for depublishation.

## 2. Why *People v. MNE* Should Be Depublished

In *People v. MNE*, the Court of Appeal affirmed dismissal of the Commissioner's enforcement action against certain Internet payday lenders charging triple-digit interest rates, on the ground that the businesses were arms of federally recognized Indian tribes and thus entitled to invoke the tribes' sovereign immunity from suit. Rather than relying on existing tests for arm-of-the-tribe immunity, the Court of Appeal created a new, more limited test. The court's decision relied primarily on the formal indicia of the businesses' organizational structure and relationship with the tribes, and discounted evidence that their activities were largely controlled by third parties and violated tribal law and their own organizational documents. (See *People v. MNE*, *supra*, 223 Cal.App.4th at pp. 40-42.)

By adding a new and different arm-of-the-tribe test to California's published decisions, *People v. MNE* creates unnecessary confusion regarding the determination of whether a tribally owned business is sufficiently related to and controlled by the tribe to share in the tribe's sovereign immunity. The Fourth District Court of Appeal already has developed well-considered arm-of-the-tribe tests, based on precedent from other state and federal courts. (*Trudgeon v. Fantasy Springs Casino (Trudgeon)* (1999) 71 Cal.App.4th 632, 638; *American Property Management Corp. v. Superior Court (American Property)* (2012) 206 Cal.App.4th 491, 501.) In *American Property*, the Fourth District expanded and clarified the earlier *Trudgeon* arm-of-the-tribe analysis. The six-factor *American Property* test accurately reflects the general focus of the applicable federal and state case law for determining if a business qualifies as an arm of the tribe.

The *People v. MNE* test differs from *American Property* in what factors should be evaluated in an arm-of-the-tribe analysis, and in what weight the factors should be given. This leads to the potential for disparate outcomes. The *People v. MNE* decision also elevates form over substance in its test for determining whether a tribally owned business is an arm of the tribe, and thus interferes unduly with the proper enforcement of California's consumer protection (and most likely other) laws. Under the test in *People v. MNE*, a third-party business can insulate itself from important state laws simply by completing paperwork to affiliate with a tribe. The business is then immune from suit and free to ignore state laws—regardless of whether it is actually overseen and controlled by the tribe in any meaningful sense.

The Second District's test does not allow any substantive factual inquiry, of the sort recognized by other California courts, to show that a formally affiliated business is not in fact overseen or controlled by the tribe. As demonstrated by the facts in *People v. MNE*, a non-tribal business facing a state enforcement action can thus complete documents establishing only a formal affiliation with a tribe, with no actual oversight or control. Under the Second District's test, the business can then conduct its operations without concern for enforcement of the State's laws. The *MNE* decision thus creates a virtually insurmountable barrier for state enforcement authorities seeking to challenge a claim of arm-of-the-tribe immunity, no matter what abusive circumstances they might be able to demonstrate in a particular case.

The Second District's test, if widely applied, would leave the State of California largely powerless to protect its people from unlawful commercial activities conducted by third parties who affiliate with, or operate through, tribally chartered entities. If the business's paperwork meets the formalistic *People v. MNE* requirements, the business enjoys immunity from

enforcement of the State's laws, including, for example, those regulating payday lenders (as in *MNE*), contractors, car repair services, unemployment insurance and benefits, employees' wages and hours, workers compensation, and environmental protection.

The precedent set in *People v. MNE* creates confusion and may be used by third-party businesses to avoid important consumer and public protection laws that benefit all California residents and business. It should not be part of California's published body of law on tribal sovereign immunity.

### 3. Conclusion

We respectfully request that the Court depublish *People v. MNE*.

Sincerely,

KAMALA D. HARRIS  
Attorney General of California  
EDWARD C. DUMONT  
Solicitor General  
SARA J. DRAKE  
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State Bar No. 206231  
*Attorneys for Appellant and Petitioner*

**DECLARATION OF SERVICE**

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

Case No.: **Second Appellate District Case No. B242644**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

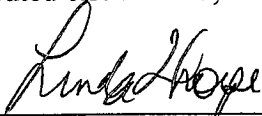
On March 3, 2014, I served the attached **DEPUBLICATION LETTER** by placing a true copy thereof enclosed in a sealed overnight envelope and causing such envelope to be personally delivered by courier service to the office of the addressee listed below:

California Supreme Court Earl Warren Building 350 McAllister Street, Room 1295 San Francisco, CA 94102	Original + 1 copy  Sent via Golden State Overnight
John Nyhan Fredericks Peebles & Morgan LLP 2020 L Street, Suite 250 Sacramento, CA 95811	Attorney for Defendants and Respondents  Sent via Golden State Overnight
Nicole E. Ducheneaux Fredericks Peebles & Morgan LLP 3610 North 163rd Plaza Omaha, NE 68116	Attorney for Defendants and Respondents  Sent via Federal Express
Conly J. Schulte Fredericks Peebles & Morgan LLP 1900 Plaza Drive Louisville, CO 80027	Attorney for Defendants and Respondents  Sent via Federal Express
Court of Appeal Second Appellate District 300 So. Spring Street, 2nd Floor Los Angeles, CA 90013	1 copy  Sent via Golden State Overnight
Hon. Yvette M. Palazuelos Los Angeles Superior Court 111 North Hill Street, Dept. 28 Los Angeles, CA 90012	1 copy  Sent via Golden State Overnight

Uche L. Enenwali Dept. of Business Oversight 320 West 4th Street, Suite 750 Los Angeles, CA 90013-2344	Courtesy Copy  Sent via Golden State Overnight
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 3, 2014, at Sacramento, California.

Linda Thorpe  
Declarant

  
Signature