SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
On Certiorari to the Colorado Court of Appeals Hon. RUSSELL E. CARPARELLI, STEVEN L. BERNARD, and KAREN S. METZGER, Judges, Case No. 07CA0582 District Court, City and County of Denver Hon. ROBERT S. HYATT, Judge Case Nos. 05CV1143 and 05CV1144	▲ COURT USE ONLY ▲
CASH ADVANCE and PREFERRED CASH LOANS, Petitioners, v. STATE OF COLORADO ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL FOR THE STATE OF COLORADO, and LAURA E. UDIS, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Respondents.	Case No.: 08SC639
THOMAS J. MILLER, Iowa Attorney General JESSICA J. WHITNEY, Assistant Attorney General and Deputy Administrator of the Iowa Consumer Credit Code* 1305 E. Walnut St. Des Moines, Iowa 50319 (515) 281-6386 *Counsel of Record For *Amici Curiae*	
BRIEF OF THE *AMICI CURIAE* STATES IN SUPPORT OF RESPONDENTS	

Dustin McDaniel
Attorney General of Arkansas
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201

Richard Blumenthal
Attorney General of Connecticut
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06106

Bill McCollum
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050

Lawrence G. Wasden
Attorney General of Idaho
P.O. Box 83270
Boise, ID 83720-0010

Thomas J. Miller
Attorney General of Iowa
Hoover Bldg.
1305 E. Walnut, 2nd Floor
Des Moines, IA 50319

Jim Hood
Attorney General of Mississippi
P.O. Box 220
Jackson, MS 37205-0220

Gary K. King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Jon Bruning
Attorney General of Nebraska
State Capitol
P.O. Box 98920
Lincoln, NE 68509-8920

Richard Corday
Attorney General of Ohio
30 East Broad Street, Floor 17
Columbus, OH 43215

Susan E. Hancock
President
National Association of Consumer
Credit Administrators
P.O. Box 20871
Columbus, OH 43220-0781

Lawrence E. Long
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Mark L. Shurtleff
Attorney General of Utah
Utah State Capitol, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320

Darrell V. McGraw, Jr.
Attorney General of West Virginia
1900 Kanawha Blvd.
E. Charleston, WV 25305

Bruce A. Salzburg
Attorney General of Wyoming
Office of the Attorney General
State Capitol Bldg.
Cheyenne, WY 82002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Other Authorities

INTERESTS OF THE *AMICI CURIAE* STATES[1]

Courts have long recognized that States have broad police powers to protect consumers in their states, particularly from usurious lending. Chief among the States' power is the attorney general's administrative subpoena to gather information on companies that may be attempting to thwart state laws. If the mere assertion of tribal immunity is allowed to trump the attorney general's investigative power, the States will be severely hamstrung in their ability to protect the public. The States have a vital interest in preserving their capacity to enforce consumer protection laws, here laws that prohibit or restrict "payday" loans.

The States' attorneys general hold broad subpoena powers to investigate suspected fraud and other potential violations of state consumer protection law. This broad investigative power helps better ensure that legislative mandates are carried out and the public is protected. The case at hand implicates that subpoena power, potentially undermining enforcement of consumer protections when tribal sovereign immunity is implicated, making the outcome of this case pertinent to attorneys general nationwide since, as reflected in the facts here, such immunity can be used without reference to where the underlying commercial activity occurs.

---

[1] *Amici Curaie* States consist of 13 State Attorneys General and the National Association of Consumer Credit Administrators a group whose members consist of credit regulators from all 50 states in addition to the District of Columbia and Puerto Rico.

Given the implications of tribal immunity, the ramifications of the present appeal goes much further than usurious lending. The outcome and reasoning of the decision have the potential to affect other States in their efforts to regulate consumer-related or, for that matter, most other types of commercial conduct.

ARGUMENT

The Court of Appeals dealt well with a challenging set of Indian law issues arising during the course of an investigation by the Colorado Attorney General under the Uniform Commercial Credit Code ("UCCC"), §§ 5-1-101 to - 9-103, C.R.S., and the Colorado Consumer Protection Act ("CCPA"), §§ 6-1-101 to -115, C.R.S. The *amici* States have concluded, however, that the court's opinion misses the mark in two significant ways that warrant a revised remand order.

First, as to the substantive Indian law question of whether Cash Advance[2] is an "arm"—or subordinate business enterprise—of an Indian tribe, the Court of Appeals erred in placing the initial burden of going forward and the ultimate burden of persuasion on the Attorney General to negate arm-of-the-tribe status. The court's holding essentially demands that the Attorney General prove a

[2] The *amici* States refer to the Respondents collectively as Cash Advance except where specific reference is made to Preferred Cash. Other than the claim by Miami Nations Enterprises, Inc. ("MNE") of control over Cash Advance and the claim by SFS, Inc. ("SFS") of control over Preferred Cash, the two loan companies appear identically situated for present purposes.

negative. Cash Advance should bear both burdens. The *amici* States further believe that, while the Court of Appeals' analysis with respect to the factors relevant to the arm-of-the-tribe status is fine insofar as it reviewed extant precedent on that issue arising in other States, it did not consider an arguably more persuasive precedent from the federal circuit courts of appeals addressing arm-of-the-state issues arising in the Eleventh Amendment context.

Second, the procedural context in which the tribal sovereign immunity claim is presented raises an issue of first impression concerning how the resolution of the claim should be integrated with the Attorney General's administrative investigation under the UCCC and CCPA. In the *amici* States' view, the processes attendant to such investigations should be allowed to proceed because of the inevitable overlap between the facts relevant to statutory coverage and possible violation and those relevant to the asserted sovereign immunity. This is not to say that Cash Advance, including its officers and employees, will be precluded from raising sovereign immunity as a defense in any attempt to enforce the two statutes' civil or criminal remedies; it is to say that a determination as to whether such immunity exists should await completion of the investigatory process and the Attorney General's decision to seek prospective compliance with the UCCC and CCPA or remedies for their past violation.

I. CASH ADVANCE BEARS THE BURDEN OF PROOF AS TO ITS CLAIMED ARM-OF-THE-TRIBE STATUS UNDER STANDARDS COMPARABLE TO THOSE DEVELOPED WITH RESPECT TO ENTITIES ASSERTING ARM-OF-THE-STATE STATUS

The *amici* States take no issue with the principle that federally-recognized Indian tribes generally possess immunity from suit where substantive prospective or retroactive *relief* is sought to be imposed upon them in federal or state court. This rule has its foundation in federal common law, not the United States Constitution, and "developed almost by accident" from *Turner v. United States*, 248 U.S. 354 (1919). *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998); *see also Agua Caliente Band of Cahuilla Indians v. Superior Ct.*, 148 P.3d 1126, 1139 (Cal. 2006) (Tenth Amendment and Guarantee Clause, U.S. Const. art. IV, § 4, trump judge-made sovereign immunity doctrine). The common exceptions to this immunity are settled: Tribes may not assert immunity in actions brought by the federal government (*e.g.*, *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001)); Congress has plenary authority to abrogate it through unequivocal legislation (*e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); tribes may waive it by "clear[ly]" consenting to suit in all or selected instances (*e.g.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)); and tribes remain liable for claims lying in equitable recoupment (*e.g.*,

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344-45 (10th Cir. 1982); *Oneida Tribe v. Village of Hobart*, 500 F. Supp. 2d 1143, 1149 (E.D. Wis. 2007)).

These settled exceptions do not exhaust the possibilities. Many courts, for example, have carved out an exception analogous to that established under *Ex parte Young*, 209 U.S. 123 (1908), when prospective relief is sought against tribal officers for violation of federal law (*e.g.*, *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133–34 (9th Cir. 1995)), and this exception has been extended to actions for violation of otherwise fully enforceable state law not only by the Court of Appeals in this case (205 P.3d at 406-07) but also by at least one other (*Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006) (*en banc*)). Courts additionally have exercised jurisdiction over *in rem* actions implicating tribal property interests. *E.g.*, *County of Yakama v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 385 (Wash. 1996); *cf. Cen. Va. Comm'y Coll. v. Katz*, 546 U.S. 356, 362 (2006) (since "[b]ankruptcy jurisdiction, at its core, is in *in rem*[,] . . . it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction"). There has been, as the Court of Appeals discussed, substantial litigation over the amenability of tribes to civil and criminal third-party subpoenas directed at acquiring

documents from tribes, but it correctly concluded that, under the circumstances here, immunity from responding to such process does not exist. *Cash Advance v. Colorado ex rel. Suthers,* 205 P.3d 389, 402-03 (Colo. Ct. App. 2008). Indeed, to the extent that individual tribal officers or employees may be subject to *Ex parte Young*-like relief, there typically will be no need to address a *tribe's* immunity from civil or criminal third-party process. See *United States v. Juvenile Male 1*, 431 F. Supp. 2d 1012, 1016 (D. Ariz. 2006) ("[t]he service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe"); *cf. Barnes v. Black* 544 F.3d 807, 812 (7th Cir. 2008) (Eleventh Amendment did not preclude habeas corpus *ad testificandum* subpoena to effect prisoner's court attendance in connection with a tort proceeding arising from a motor vehicle accident, since "[t]he writ sought in this case would if granted be like an order commanding a state official who is not a party to a case between private persons to produce documents in the state's possession during the discovery phase of the case" and does "not compromise state sovereignty to a significant degree").

The core Indian law issues in this appeal, however, involve not an exception to the federal-common-law sovereign immunity of tribes from suit but whether an entity is a tribe for such purposes—*i.e.*, whether Cash Advance is an arm of the Miami Nation—and whether the entity claiming to be an arm of a tribe has the

burden to sustain that claim. The Court of Appeals formulated an 11-factor test for determining "arm of the tribe" status (205 P.3d at 406) and imposed on the Attorney General the burden of establishing by a preponderance of the evidence that such status does *not* exist (*id.* at 408-09). Although the *amici* States concur that various factors should be considered in resolving assertions that an otherwise ordinary commercial enterprise doing business with the general public is actually the arm of an Indian tribe, they suggest as more appropriate a less diffuse set of criteria derived from comparable Eleventh Amendment litigation. They further believe that the Court of Appeals went seriously astray by directing the Attorney General to prove a negative. Instead, arm-of-the-tribe status constitutes a condition precedent for Cash Advance's right to raise sovereign immunity as an affirmative defense, and Cash Advance has the obligation to show its entitlement to assert the defense—as is also the rule in Eleventh Amendment-related controversies. The *amici* States address these issues in inverse order.

A. The Court Of Appeals Erred When It Held That A Claim Of Arm-Of-The-Tribe Status As A Subject-Matter Jurisdiction Challenge Under C.R.C.P. 12(b)(1), Once Raised, Imposes On The Attorney General The Burden To Negate

The Court of Appeals relied on *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), for the otherwise unexceptional principle that the proponent of a court's subject matter jurisdiction has the burden

of establishing it in response to a motion to dismiss under C.R.C.P. 12(b)(1). *Cash Advance,* 205 P.3d at 408-09. This reliance is understandable because *Trinity Broadcasting* involved a sovereign immunity-based issue; whether the notice provisions of the Colorado Governmental Immunity Act ("CGIA"), §§ 24-10-101 to -120 C.R.S., had been complied with. This Court held that CGIA-notice compliance implicated a subject-matter jurisdiction question properly entertained under Rule 12(b)(1), not under C.R.C.P. 12(b)(5), and that, to the extent factual questions existed, the trial court and not a jury was the ultimate factfinder with the burden imposed on the plaintiff to show compliance.[3] The Court of Appeals,

---

[3] More specifically, the *Trinity Broadcasting* Court stated:

> A motion to dismiss for lack of subject matter jurisdiction is governed by C.R.C.P. 12(b)(1). Our version of Rule 12(b)(1) is identical to Fed.R.Civ.P. 12(b)(1), and C.R.C.P. 12(b)(5) is identical to Fed.R.Civ.P. 12(b)(6). Accordingly, we look to federal authorities for guidance in construing our rules. . . . If the motion is a factual attack on the jurisdictional allegations of the complaint, such as the timeliness of the notice involved in this case, the trial court may receive any competent evidence pertaining to the motion. . . . Fed.R.Civ.P. 12(b)(1) differs from Fed.R.Civ.P. 12(b)(6) (motion to dismiss for failure to state a claim) because a trial court may consider evidence pursuant to Fed.R.Civ.P. 12(b)(1) without converting the motion to a summary judgment motion as it would be required to do if it considered matters outside the pleadings under a Fed.R.Civ.P. 12(b)(6) motion. . . . The "clearly erroneous" standard of appellate review under Fed.R.Civ.P. 12(b)(1) differs greatly from the standard of appellate review used if a Fed.R.Civ.P. 12(b)(6) motion is converted to a summary judgment motion under Fed.R.Civ.P. 56. The test for summary judgment is very stringent and gives every benefit of the

however, failed to factor into its analysis two critical differences: the Colorado legislature's limitation of a state court's subject matter jurisdiction over tort claims in §§ 24-10-108 and -109 to those allowed under the CGIA (*Fogg v. Macaluso*, 892 P.2d 271, 276-77 (Colo. 1995)) and the statute's indisputable applicability to the municipality under § 24-10-103(5). The significance of these differences can be seen in relevant federal and Colorado precedent.

1. Tribal Sovereign Immunity Does Not Constitute A Limitation on Subject Matter Jurisdiction

The Eighth Circuit Court of Appeals in *In re Prairie Island Dakota Sioux*, 21 F.3d 302 (8th Cir. 1994) (*per curiam*), declined to issue a writ of mandate compelling the district court to resolve a defendant tribe's sovereign immunity defense. The writ was sought after the lower court had refused to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over an action removed pursuant

---

> inferences to the non-moving party (here, the plaintiff Trinity). By contrast, under Fed.R.Civ.P. 12(b)(1), the plaintiff has the burden to prove jurisdiction and the standard of appellate review is highly deferential.

848 P.2d at 924-25 (citations and footnote omitted). The Court remanded with the instruction that "the trial court should handle this issue under Rule 12(b)(1) and conduct such further proceedings as may be necessary to determine whether Trinity gave timely notice to Westminster under the Governmental Immunity Act." *Id.* at 927; *see also City of Longmont v. Henry-Hobbs*, 50 P.3d 906, 908 (Colo. 2002) (district court properly "held a *Trinity* hearing to resolve" questions of fact over whether the involved injury arose from "'[t]he operation and maintenance of . . . [a] sanitation facility'" subject to a CGIA exception to governmental immunity).

to 28 U.S.C. § 1441, once the only federal claim for relief had been eliminated from the case, and remanded the matter to the state court. *Id.* at 304. Rejecting the tribe's argument that the district court abused its discretion in not first addressing the sovereign immunity issue because it implicated subject matter jurisdiction, the Eight Circuit reasoned:

> Defendants, however, equate sovereign immunity and subject matter jurisdiction and argue that the district court abused its discretion in not first considering whether they were entitled to sovereign immunity. Indian tribes possess the common-law immunity traditionally enjoyed by sovereign powers. . . . In addition, sovereign immunity is jurisdictional in nature. . . . Sovereign immunity, however, is not of the same character as subject matter jurisdiction. . . . First of all, tribal sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress. . . . Lack of subject matter jurisdiction, on the other hand, may not be waived. . . . Second, sovereign immunity operates essentially as a party's possible defense to a cause of action. . . . In contrast, subject matter jurisdiction is primary and an absolute stricture on the court. . . . Finally, a waiver of sovereign immunity cannot extend a court's subject matter jurisdiction.

Id. at 304-05 (citations omitted). Tribal sovereign immunity, in other words, is a defense whose successful invocation, like other immunity defenses, deprives a court of its authority to adjudicate the controversy's merits against a particular party but stands apart from the issue of the court's constitutional authority to resolve the controversy itself. *See Oglala Sioux Tribe v. C & W Enters., Inc.*, 487 F.3d 1129, 1131 n.4 (8th Cir. 2007) ("sovereign immunity is jurisdictional in nature but is not of the same character as subject matter jurisdiction"). Other

federal circuits have agreed. *E.g.*, *Ninigret Devel. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000) ("although tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction"); *Florida v. Seminole Tribe*, 181 F.3d 1237, 1241 n.4 (11th Cir. 1999) (citing *Prairie Island* for the principle that "tribal 'sovereign immunity is a jurisdictional consideration separate from subject matter jurisdiction'"); *see also Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289, 292 (Minn. 1996) (defining "[j]udicial jurisdiction over matters involving Indians or Indian tribes [a]s a function both of territory—where the matters arise—and of subject matter—what the nature of the claim is[,]" and resolving challenge to such jurisdiction before commencing separate analysis of sovereign immunity).

The *amici* States believe it relevant to observe at this point that it remains an open question whether even their constitutionally rooted immunity from suit in federal court, as confirmed in the Eleventh Amendment (*Alden v. Maine*, 527 U.S. 706, 713-14 (1999)), embodies a subject-matter jurisdiction constraint on the exercise of Article III powers. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 391 (1998). The uncertainty derives from the significant differences attendant to adjudicating traditional Article III subject-matter jurisdiction issues

and the States' entitlement to immunity. *Woods v. Rondout Valley Cent. Dist. Bd.*, 466 F.3d 232, 238 (2d Cir. 2006); *see generally* 13 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3524.1, at 260 (3d ed. 2008) ("13 Wright") (identifying "two important ways" in which the Supreme Court has treated Eleventh Amendment immunity claims from Article III-based challenges—the availability of waiver and the discretion possessed by federal courts to raise immunity claims *sua sponte*); Katherine Florey, Comment, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 Cal. L. Rev. 1375, 1439 (2004) ("[p]ast cases make clear that the Supreme Court has described sovereign immunity in nonjurisdictional terms far more frequently than jurisdictional, and has understood and applied sovereign immunity in ways inconsistent with viewing it as a limit on subject matter jurisdiction"). That the States' immunity from federal court suit is not adjudicated consonantly with ordinary Article III standards—and hence should not be viewed as a subject-matter jurisdiction limitation—leaves no room to treat tribal sovereign immunity as affecting such jurisdiction over the underlying dispute given its wholly judge-made origin. *See Mfg. Techs.*, 523 U.S. at 757 ("first explicit holding" of tribal sovereign immunity traced to *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940), with "[l]ater cases, albeit with little analysis, reiterat[ing]

the doctrine"). Tribal immunity from suit, in short, remains a prudential doctrine that, as indicated in *Manufacturing Technologies*, may be modified or entirely abrogated by the federal judicial branch in the absence of congressional action. *Id.* at 758.

Cash Advance's claim to immunity from suit as an arm of a tribe thus stands on ground quite distinct doctrinally from that upon which governmental immunity from tort suit rests under the CGIA. The Court of Appeals' failure to recognize this distinction has more than academic significance because it led directly to the assumption that the same burden-of-proof regime applies here as it would in a suit against a public entity susceptible to being entertained only pursuant to a CGIA-specified exception. Its undifferentiated approach runs counter to the need for carefully assessing the nature of the asserted immunity—here, one arising under federal and not state law—and framing the applicable Rule 12 procedures accordingly. The Court of Appeals ignored the fact that the Colorado legislature possesses the power to limit the state judiciary's subject matter jurisdiction and that the CGIA, as stated in *Trinity Broadcasting* and other decisions, contains just such a limitation. *See In re A.W.*, 637 P.2d 366, 374 (Colo. 1981); *SR Condominiums, LLC v. K.C. Constr., Inc.*, 176 P.3d 866, 869 (Colo. Ct. App. 2007). The effect of the legislature's action was to transform the doctrine of state governmental

immunity, which had its creation and eventual abrogation in the common law (*Evans v. Bd. of County Comm'rs*, 482 P.2d 968, 972 (Colo. 1971)), into a direct constraint on the authority of Colorado courts to address tort suits against public entities. The implicit analogy drawn by the Court of Appeals between these very different types of sovereign immunity for purposes of applying Rule 12 does not hold.

2. The Court of Appeals Improperly Allocated To The Attorney General The Burden Of Persuasion On The Arm-Of-The-Tribe Issue

The second error in the Court of Appeals' reliance on *Trinity Broadcasting* stems from its failure to recognize the City of Westminster's uncontested status as a "public entity" under the CGIA. The municipality was situated identically to a federally-acknowledged Indian tribe whose entitlement to assert immunity from "suit" by a State presumptively exists because, absent applicability of a specified exception under the CGIA from the legislature's restoration of governmental immunity, no one disputed Westminster's immunity from tort claims. Cash Advance does not enjoy like status insofar as it attempts to bring itself within the ambit of tribal sovereign immunity; instead, its right to use that doctrine as shield to the "enforcement actions" constitutes the immediately relevant question on remand.

The Second Circuit in *Woods* recently reviewed decisions from other circuits answering the question whether an entity asserting arm-of-the-state status for Eleventh Amendment purposes bears the burden of showing that status. It found unanimity and then joined its sister circuits:

> This court has not previously addressed the issue of which party bears the burden when a governmental entity claims that it is an arm of the state entitled to Eleventh Amendment immunity. To the extent the Eleventh Amendment is construed as a specific limitation on the Article III powers of the federal courts that deprives them of subject matter jurisdiction to hear claims against the states, the burden might appear to fall on Woods because it is generally a plaintiff's burden to demonstrate subject matter jurisdiction. . . . To the extent, however, that Eleventh Amendment immunity is viewed as akin to an affirmative defense that a state may assert or waive at its discretion, the burden would appear to fall on the defendant Board of Education. [¶] Although the Supreme Court has not specifically ruled on this burden question, circuit courts that have done so have unanimously concluded that "the entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity." . . . We now join these sister courts in holding that the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity.

466 F.3d at 237 (citations omitted); *accord Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009) *(per curiam)*. This rule has been extended to assertions of tribal sovereign immunity. *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966 (CBA), 2009 WL 705815, at *3-*4 (E.D.N.Y. Mar. 16, 2009); *see also New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 297 n.72 (E.D.N.Y. 2007) ("[a]lthough the Second Circuit has not decided this issue in the

context of Indian tribes, the Eleventh Amendment jurisprudence on the burden of proof applies with equal force to assertions of tribal immunity and, thus, the defendants have the burden of proof on this issue"). Indeed, no other rule makes practical sense in light of "the traditional principle that a party in possession of facts tending to support its claim should be required to come forward with that information" and the associated likelihood that "the facts supporting the defense will often be 'peculiarly within the knowledge' of the governmental entity asserting it, so that placing the burden upon that party will encourage prompt disclosure of the facts relevant to resolving the immunity claim." *Woods*, 466 F.3d at 238-39; *see Dep't of Institutions v. Kinchen*, 886 P.2d 700, 708 (Colo. 1994) ("considerations of procedural efficiency . . . support placing the burden of proof on an appointing agency during disciplinary hearings before the Personnel Board" since, *inter alia*, "the agency knows the reasons for its actions and is in the best position to present this information to the hearing officer" and "to place the burden of proof on the employee would require the employee to prove that the events or actions in question did not happen"—*i.e.*, "to prove a negative").

So, too, here the Attorney General cannot be expected to know the history and nature of any purported relationship between Cash Advance and some tribal entity. It is, thus, unsurprising that the arm-of-the-tribe issue was introduced by

Cash Advance only after administrative process had issued and contempt proceedings initiated in wake of its non-response. *Cash Advance*, 205 P.3d at 395. The "unanimous[]" view of the federal circuits in connection with arm-of-the-state issues should be adopted by this Court, and the burden of proof placed squarely on the shoulders of the party asserting such status and in possession of the relevant facts.

B. This Court Should Direct The District Court On Remand To Look To The General Factors Used By Federal Courts When Determining Arm-Of-The-State Status To Resolve Cash Advance's Assertion Of Its Entitlement To Assert Tribal Immunity From Suit

The Court of Appeals undertook an exhaustive analysis of various States' approaches to determining arm-of-the-tribe status. *Cash Advance*, 205 P.2d at 403-06. It eventually concluded that "the use of a combination of eleven factors" coalesced by the dissenting opinion in *Wright v. Colville Tribal Enterprise Corp.*, 147 P.3d 1275 (Wash. 2006), was appropriate. *Id.* at 405.[4] Cash Advance and its

[4] See *Wright*, 147 P.3d at 1288 (C. Johnson, J., dissenting) ("[t]he corporations in this case recognize 11 factors as relevant: (1) whether the entity is organized under the tribe's laws or constitution, (2) whether the entity's purposes are similar to or serve those of the tribal government, (3) whether the entity's governing body is composed mainly of tribal officials, (4) whether the tribe has legal title to or owns property used by the entity, (5) whether tribal officials exercise control over the administration or accounting activities of the organization, (6) whether the tribe's governing body has the power to dismiss members of the organization's governing body, (7) whether the entity generates its own revenue, (8) whether a suit against

amici curiae criticize the lower court's compilation as considering "out-of-step state court precedent" (Pet'rs Open. Br. 28) and "clash[ing] irreconcilably with the purpose of tribal sovereign immunity and federal authority recognizing its nature as an essential attribute of sovereignty" (Br. *Amici Curiae* Colo. Indian Bar Ass'n *et al.* 19). In lieu of those criteria, Cash Advance urges this Court "simply [to] inquire whether the Tribal Entities are subdivisions of the respective governments" and whether waiver exists (Pet'rs Open. Br. 29); the *amici* suggest a somewhat different but no less categorical inquiry: Whether "the tribe intend[ed] for an entity to share in its immunity" (Br. *Amici Curiae* Colo. Indian Bar Ass'n *et al.* 19-20).

Cash Advance's and its *amici*'s proposed analytical paths, reduced to their essentials, give tribes free reign to designate any entity that they choose as a subordinate tribal entity shielded by sovereign immunity. No case—federal or state—has endorsed either test, and neither Cash Advance nor the *amici* make even a token effort to tie their theories to prior arm-of-the-tribe decisional authority. The dearth of supportive precedent underscores the palpable overreach of their preferred approaches. The *amici* States, in contrast, believe that the federal courts have devoted much attention over decades to the most significant factors and their

---

the entity will affect the tribe's finances and bind or obligate tribal funds, (9) the announced purpose of the business entity, (10) whether the entity manages or exploits tribal resources, and (11) whether protection of Indian assets and tribal autonomy will be furthered by extending immunity to the entity").

proper weighting for resolving Eleventh Amendment "instrumentality" or arm-of-the-state issues and that this analysis provides the most ready template for determining analogous sovereign immunity claims by entities claimed to possess subordinate tribal entity status. The District Court should be instructed to be guided on remand by this Eleventh Amendment jurisprudence.

In *McGinty v. New York*, 251 F.3d 84 (2d Cir. 2001), the status of the New York State and Local Employees' Retirement System as an arm of the State was disputed in age discrimination litigation. The court of appeals examined six factors in concluding that the Retirement System did partake of New York's Eleventh Amendment immunity:

> In determining whether an entity is an arm of a state, six factors are initially considered. . . . They are: (1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state. . . . If these factors point in one direction, the inquiry is complete. If not, a court must ask whether a suit against the entity in federal court would threaten the integrity of the state and expose its treasury to risk. . . . If the answer is still in doubt, a concern for the state fisc will control.

Id. at 95-96 (citations omitted); *accord Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009); *Gorton*, 554 F.3d at 62. Although the Second Circuit's factors ultimately place "concern for the state fisc" as the controlling consideration, the

Supreme Court has stressed that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 759-60 (2002).

The Seventh Circuit, noting the twin objectives of protecting the fisc and sovereign dignity, has deemed the most important considerations in determining the arm-of-the-state status of a "hybrid entity"—*i.e.*, "a state's creation of a private entity, with the state using its leverage as the creator of the entity to insist that it serve the state's interests as well as its own"—"are the extent of state control and whether the entity was acting as the state's agent in conducting the activity that gave rise to the suit." *Takle v. Univ. of Wis. Hosp. and Clinics Auth.*, 402 F.3d 768, 771-72 (7th Cir. 2005). Nevertheless, even the *Takle* court noted the potential significance of a judgment's fiscal impact in some cases. *Id.* at 772 ("to say that the effect of a judgment on state finances is never important would be inconsistent with numerous decisions of the Supreme Court and the courts of appeals, including this court"). The several federal circuits have adopted their own sets of arm-of-the-state considerations, but these twin objectives serve to channel the eventual determination. *See generally* 13 Wright § 3524.2, at 288 n.25 (collecting cases); Analisa Dillingham, Casebrief, *Reaching for Immunity: The Third Circuit's*

Approach to the Extension of Eleventh Amendment Immunity to Instrumentalities as Arms of the State in Benn v. First Judicial District Court of Pennsylvania, 51 Vill. L. Rev. 999, 1011-24 (2006) (same).

Tribal immunity from suit similarly is concerned with protection of tribal assets and more generalized sovereignty interests of a tribe *qua* tribe. *E.g.*, *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (tribal casino constituted arm of the tribe entitled to immunity where "the sovereign Tribe's treasury" directly protected by the immunity); *see also Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n.1, 711 (2003) (tribal casino, which functioned as an arm of a tribe, did not constitute a "person" for purposes of 42 U.S.C. § 1983 when tribe sued to vindicate its sovereign interest against being subject to state court-issued process). Any arm-of-the-tribe analysis must keep these fundamental purposes in mind, and, given that need, the three factors upon which, *inter alia*, the Seventh Circuit focuses have special force. Translated from their arm-of-the-state context, they include (1) the extent of tribal control over the involved entity's governance and daily activities; (2) the extent to which the entity serves as a disclosed agent or agency of the tribe; and (3) the extent to which a monetary judgment or other relief against the entity will be paid out of the tribal treasury or will directly restrain the tribe in discharging sovereign governmental

functions related to its internal relations. These broadly phrased criteria encompass consideration of the eleven "factors" identified by the Court of Appeals (205 P.3d at 406) but may better assist the District Court in determining whether deeming Cash Advance as an arm of the tribe will serve to protect the tribal treasury from a monetary judgment and the tribe's self-governance.

The approach suggested by the *amici* States is fact-intensive, as has been the situation in arm-of-the-state litigation under the Eleventh Amendment. More generally, however, tribes should not be able to market their immunity from suit to an erstwhile private commercial enterprise that continues its operations without any apparent tribal status. *Cf. Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [do not] authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere"). By the same token, nothing should preclude them from carrying out commercial activities within and without their reservation when they do so through a disclosed subordinate tribal business organization whose legal undertakings bind the tribe *itself*. *See Mfg.*

Techs., 523 U.S. at 758.[5] Cash Advance's and its *amici*'s proffered approaches should be rejected because they turn arm-of-the-tribe status into little more than a blanket exception from the duty to answer through administrative or judicial proceedings for noncompliance with, under the circumstances here, otherwise applicable state law.

II. THE USE OF ADMINISTRATIVE SUBPOENAS TO DISCOVER VIOLATIONS OF THE LAW MUST NECESSARILY REMAIN HIGHLY UNRESTRICTED AT AN INVESTIGATORY STAGE.

Conducting administrative investigations of possible state law violations is a well established right of the involved State's attorney general. *See Cuomo v. Clearing House Ass'n,* 129 S. Ct. 2710 (2009). The importance of administrative investigations lead the federal courts, and eventually state courts, to determine that the court should not interfere with the investigations over questions of statutory coverage until the appropriate time, which is after a subpoena enforcement proceeding. *See Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508 (1934). Thus, the proper inquiry of the court during the administrative investigation is not

[5] Tribes are not foreclosed from insulating their treasuries from liability through use of the incorporation alternative provided under 25 U.S.C. § 477 or like statutes. Such corporate entities retain immunity from suit absent waiver. *See generally* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 966 (1972) (discussing § 477's purposes). Arm-of-the-tribe issues do not arise with regard to these entities. *See Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1306 (D.N.M. 2009) ("subordinate economic organization test" should not be applied to § 477-chartered corporations).

one of statutory coverage or violation, but instead whether the subpoena is relevant to the inquiry, not too indefinite or broad, and for a legally authorized purpose. *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946).

The Attorney General's subpoena here meets the *Walling* test and should thus be authorized without further inquiry from the court. He issued an administrative subpoena to gather information regarding a potential violation of Colorado usury laws by two state-chartered companies. After ignoring the first subpoena, Cash Advance was held in contempt. It now seeks to protect its refusal to respond through invocation of sovereign immunity derived from a tribe whose alleged involvement in Cash Advance's operations was brought to the Attorney General's attention for the first time substantially after the administrative investigation and the ensuing subpoena enforcement proceeding commenced.

The administrative subpoena should not be held captive to Cash Advance's sovereign immunity claim because the Attorney General is using it to gather information relevant to the propriety of seeking actual UCCC and CCPA enforcement. The Attorney General thus not only may, but also will, inquire into whether an actual relationship between Cash Advance and a tribe exists. "To do otherwise would be to not only place the cart before the horse, but to substitute a different driver for the one appointed by Congress." *EEOC v. Kloster Cruise Ltd.*,

939 F.2d 920, 924 (11th Cir. 1991) (administrative subpoena compliance required as to employer operating foreign flagged vessel owned by foreign corporation in order to allow investigation of relevant facts, including those pertaining to jurisdiction) (internal citations omitted).

Endicott is the first in a line of cases unequivocally establishing that the question of statutory coverage is not properly addressed at the subpoena enforcement stage. There, a manufacturer challenged a subpoena issued by the Secretary of Labor on grounds that the relevant statute did not cover portions of its business. The United States Supreme Court reasoned that "Congress submitted the administration of the Act to the judgment of the Secretary, not to the judgment of the courts[.]" 317 U.S. at 507. Therefore, because "the subpoena was not plainly incompetent or irrelevant to any lawful purpose[,] . . . it was the duty of the District Court to order its production for the Secretary's consideration." *Id.* at 509. As in *Endicott*, the Attorney General seeks discovery though an administrative subpoena for a relevant and lawful purpose—*i.e.*, whether the UCCC and CCPA should be enforced against Cash Advance. Likewise, in the second seminal case on administrative subpoena enforcement, *Walling*, the Supreme Court rejected several constitutional challenges and enforced an investigatory subpoena issued by the administrator of the Fair Labor Standards Act. Rather, an administrative subpoena

for enforcement purposes need only be relevant to the inquiry, not too indefinite or broad, and for a lawfully authorized purpose. *Walling*, 327 U.S. at 209.

The inquiry for this Court, as the United States Supreme Court held in *Walling,* "is not in . . . the nature of the legal obligation violation of which the evidence is sought to show. It is rather whether evidence relevant to the violation, whatever the obligation's character, can be drawn forth by the exercise of the subpoena power." 327 U.S. at 211. Arriving at the question of statutory coverage at a premature stage rewrites Colorado's statutorily authorized investigatory powers. It also jeopardizes all States' ability to inquire into *possible* violations of their law through the mere incantation of tribal immunity from suit.

The Supreme Court, analogizing administrative agencies' powers of inquisition to that of a grand jury, reiterated the force of the *Walling* rule in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), "[w]hen investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." *Id.* at 643. The Attorney General, as well, has a duty to discover whether lenders are in violation of Colorado usury law. Raising questions of statutory coverage at the administrative subpoena stage frustrates this public necessity.

Lower federal and state courts have long declined to impose additional requirements on top of those established in *Walling*. "It can no longer be disputed that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular statute." *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985) (if *Walling* standards are satisfied, the respondent must demonstrate enforcement would be an abuse of the court's process) (citing *Donovan v. Shaw*, 668 F.2d 985 (8th Cir. 1982)). "So long as the agency makes a plausible argument in support of its assertion of jurisdiction, a district court must enforce the subpoena if the information sought there is not plainly incompetent or irrelevant to any lawful purpose of the agency." *Id.* at 922 (internal citations omitted).

Many state courts also looked to the *Walling* test in assessing their proper role in the administrative subpoena enforcement process. The commonly accepted standards are straightforward: State administrative subpoenas must seek information that is reasonably relevant to the inquiry, the demand must not be too indefinite, and the inquiry must fall within the authority of the agency. *E.g., Tesoro Petroleum Corp. v. State*, 42 P3d 531, 541 (Alaska 2002) (requiring general deference to the state in investigative subpoena hearings); *State ex rel. Miller v. Publisher's Clearing House, Inc.*, 633 N.W.2d 732, 736 (Iowa 2001) (broad extent

of the attorney general's investigative powers are "necessarily a limitation on a trial court's discretion to restrict those powers"). As at the federal level, these are the sole requirements; the applicability of statutes to the recipient of an investigative demand is not subject to judicial determination at the investigatory stage. *Vendall Mktg. Corp. v. State Dep't of Justice*, 863 P.2d 1263, 1266 (Or. 1993) (rejecting jurisdictional challenge to Attorney General's investigative demand).

Colorado is no exception. *See Charnes v. DiGiacomo*, 612 P.2d 1117, 1122 (Colo. 1980). In *DiGiacomo*, this Court explicitly adopted the *Walling* test in upholding a subpoena issued by the Department of Revenue to a third party bank. *Id.* The Attorney General's administrative subpoena need do no more than comply with the *Walling* standards adopted by this Court in *DiGiacomo*. Requiring the state to prove the outcome of investigation before an investigation even occurs would be circular in reasoning and without precedent. Further, if the Court legitimizes this proposed end-run of state investigatory power, the people of Colorado will be placed at a serious disadvantage to gather information on possible violations of law.

Questions of statutory authority, in sum, must be delayed until after the subpoena enforcement stage for the attorney general to investigate individuals who may be violating the law. *See, e.g., Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d

1364, 1366-67 (Mass. 1989) (enforcement of subpoena upheld in part because individual employees of investigated party may have violated the law); *Atlanta Auto Auction v. Ryles*, 251 S.E.2d 28, 30 (Ga. Ct. App. 1978) (stressing that the state need not show statutory coverage of respondent to trigger investigative authority). Questions of statutory authority applied at the subpoena enforcement stage unduly restrict the Attorney General's ability to investigate individuals he believes are in violation of the law. The CCPA supports this position as well, allowing for investigation of "*any* person in connection with the sale or advertisement of any property" as well as "*any* property or sample thereof, record, book, document, account, or paper he deems necessary[.]" § 6-1-107(b)-(c) (emphasis added). Holding otherwise would deter the Attorney General from pursuing individuals who may be preying on Colorado consumers and erecting false legal barriers to protect themselves and their violation of state usury laws. This Court, as the legislature intended, should allow him to use his administrative subpoena to gather all information to investigate whether a violation has taken place regardless of statutory coverage.

While the *amici* States do not believe that the question of statutory coverage is properly determined, they feel constrained to observe that the Court of Appeals erred insofar as it apparently set the burden for enforcement of the Attorney

General's administrative subpoena at a "preponderance of the evidence" standard. Both the UCCC and CCPA apply a "cause to believe" standard, which is considerably lower than the standard used by the appellate court. The court effectively conflated the burden attendant to resolving Cash Advance's sovereign immunity claim on the merits with the burden attendant to enforcement of the subpoena itself. Raising the standard from "cause to believe" to "preponderance of the evidence" not only thwarts the legislature's direction but also harms Colorado residents.

The statutory standard for enforcement of subpoenas issued under Colorado's UCCC is "reasonable cause to believe." § 5-6-106. The standard under the CCPA is "cause to believe that any person has engaged in or is engaging" in violations of the CCPA. § 6-1-107. Both statutes are "intended to be liberally construed to promote [their] underlying purposes and policies, which include protecting consumer borrowers against unfair practices by some suppliers of consumer credit." *State ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161, 166 (Colo. 2001) (UCCC enforcement); *see also People ex rel. Dunbar v. Gym of Am.*, 493 P.2d 660, 670 (Colo. 1972) (CCPA enforcement).

Recognizing the necessity and value of conducting meaningful investigations, many States set their statutory burdens below reasonable cause.

See, e.g., Scott v. Ass'n for Childbirth at Home, Int'l, 430 N.E.2d 1012, 1019 (Ill. 1982) (upholding belief standard for issuance of investigatory subpoenas); *State ex rel. Miller v. Smokers Warehouse Corp.*, 737 N.W.2d 107, 110 (Iowa 2007) (belief standard for issuance of CID's does not violate due process); *Little v. ex rel. Dep't of Justice*, 883 P.2d 272, 277 (Or. Ct. App. 1994) (Oregon's statutory standard a "far cry" from requiring a showing of probable cause to issue CID). Even those States that require more recognize that "[t]he 'reasonable cause' standard requires less than the probable cause standard[.]" *Paramount Builders, Inc. v. Commonwealth*, 530 S.E.2d 142, 144 (Va. 2000). Under any standard, be it "mere belief," "cause to believe" or "reasonable cause," the elevation of the burden of proof to that of a preponderance of the evidence rewrites the UCCC and CCPA and contravenes the legislature's consumer-protection objective.

The Court of Appeals justified its disregard of the statutory standard with the rationale that "the burden of proof in civil cases is a preponderance of the evidence." 205 P.3d at 409. However, this Court, similarly to other state courts applying comparable statutes, has explicitly stated that the legislature intended the enforcement procedure for the CCPA to be "rather summary in nature." *People ex rel. MacFarlane v. Am. Banco Corp.*, 570 P.2d 825, 831 (Colo. 1972); *cf. People ex rel. Babbitt v. Herndon*, 581 P.2d 688, 692 (Ariz. 1978) (enforcement hearing is

more in the nature of the preliminary hearing in criminal law, where the level of proof required of the state is considerably lower). In an earlier case concerning whether enforcement of an administrative subpoena by the commissioner of agriculture required strict compliance with the Colorado Rules of Civil Procedure, this Court held "[i]f the legislature intended that such proceeding was to be handled as just another civil proceeding, it could have said so. But it did not[.]" *People ex rel. Orcutt v. District Ct.*, 435 P.2d 374, 392 (Colo. 1967).

Consequently, while the burden of proof in traditional civil cases is a preponderance of the evidence, the legislature has carved out an exception for subpoena enforcement hearings. Elevation of the statutory standard to a "preponderance of the evidence" would thus be a misinterpretation of the nature of subpoena enforcement proceedings.

Conclusion

The Court of Appeals' opinion represents a thoughtful analysis of various issues involving the proper integration of administrative subpoena-related proceedings and the federal common law-established right of Indian tribes to be free from unconsented suit absent congressional waiver. This Court should correct the opinion's two principal shortcomings by (1) placing the burden of establishing arm-of-the-tribe status on Cash Advance and (2) making clear that the claim of

CERTIFICATE OF COMPLIANCE

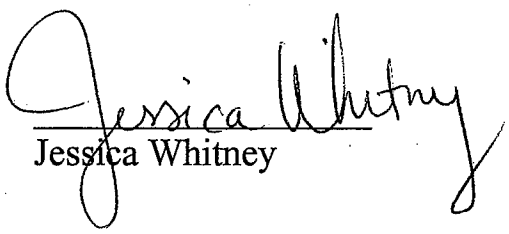
I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g):

Choose one:

[x] It contains 7890 words.

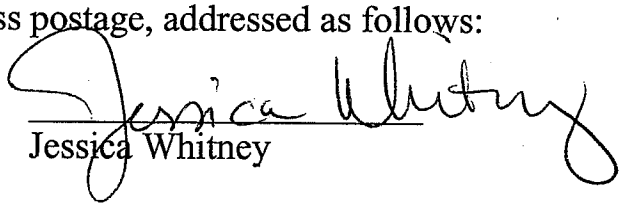
[ ] It does not exceed 30 pages.



Jessica Whitney

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2009, a true and complete copy of the foregoing document was served upon all parties via placing the same in the United States mail, with first class postage, addressed as follows:



Jessica Whitney

Paul Chessin
OFFICE OF THE ATTORNEY GENERAL
Assistant Attorney General
Consumer Credit Union
Consumer Protection Section
Attorneys for the State of Colorado
1525 Sherman Street, 5th Floor
Denver, CO 80203

Edward T. Lyons, Jr.
Thomas J. Burke, Jr.
JONES & KELLER PC
1625 Broadway, Suite 1600
Denver, CO 80202

Jennifer H. Weddle
Greenberg Traurig LLP
1200 17th Street, Suite 2400
Denver, CO 80202

Peter Ortego
UTE Mountain UTE Tribe
Post Office Box 128
Towaoc, CO 81334

Jill Tompkins
American Indian law Clinic
University of Colorado School of Law
404 UCB
Boulder, CO 80309-0404

Helen Padilla
American Indian Law Center, Inc.
P.O. Box 4456
Albuquerque, NM 87196