DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL FOR THE STATE OF COLORADO, and LAURA E. UDIS, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Applicants, v. CASH ADVANCE, Respondent.	▲COURT USE ONLY▲
Attorneys: Edward T. Lyons, Jr. (#3996) Jones & Keller, P.C. 1625 Broadway, Suite 1600 Denver, Colorado 80202 Phone No.: (303) 573-1600 Facsimile: (303) 573-8133 E-mail: elyons@joneskeller.com and Conly J. Schulte, NE Bar 20158 (*Pro Hac Vice* Pending) Shilee T. Mullin, NE Bar 22281 (*Pro Hac Vice* Pending) Monteau & Peebles, L.L.P. 12100 W. Center Road, Suite 202 Omaha, Nebraska 68144 Phone No.: (402) 333-4053 Facsimile: (402) 333-4761 E-mail: cschulte@ndnlaw.com E-mail: smullin@ndnlaw.com	Case No.: 05CV1143 Courtroom: 3

RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE, SPECIAL APPEARANCE TO CHALLENGE JURISDICTION, AND MOTION TO DISMISS FOR LACK OF IN PERSONAM AND SUBJECT MATTER JURISDICTION AND INSUFFICIENCY OF SERVICE OF PROCESS

INTRODUCTION

Respondent Cash Advance (hereinafter "Cash Advance"), appearing specially to challenge jurisdiction, files this response to the Court's June 21, 2005 Contempt Citation, ordering Cash Advance to show cause why it should not be held in contempt for failure to comply with this Court's Order Enforcing Administrative Subpoena dated February 14, 2005.

Cash Advance further moves the Court to enter an order dismissing this proceeding pursuant to C.R.C.P. 12(b)(1), (2) and (4). due to lack of jurisdiction over the subject matter, lack of jurisdiction over the person, and insufficiency of service of process.

As set forth below, Cash Advance should not be held in contempt because: (1) the Applicant State of Colorado *ex rel.* John W. Suthers, and Laura E. Udis (collectively referred to as "the State") did not properly serve Cash Advance, as required by C.R.C.P. 4(e); (2) this Court lacks personal jurisdiction over Cash Advance; and/or (3) there is no subject matter jurisdiction over Cash Advance. As such, the State cannot satisfy its burden of proving that jurisdiction exists, and this action must be dismissed pursuant to the C.R.C.P. 12(b)(1), 12(b)(2) and 12(b)(4). McNutt v. General Motors, 298 U.S. 178, 189 (1936). An Affidavit of Don Brady in support of this Response and Motion is attached hereto as Exhibit A.

STATEMENT OF FACTS

Cash Advance is a d/b/a of Miami Nation Enterprises ("MNE") and is an entity that provides cash advance loan services to eligible borrowers pursuant to express loan agreements. (Brady Aff. ¶ 6) As part of its business, Cash Advance accepts on-line applications for short-term loans from qualified individuals who desire to enter into the loan transactions with the entity. (Brady Aff. ¶ 11) Cash Advance is organized under the laws of the Miami Tribe of

Oklahoma, a federally-recognized Indian tribe. (Brady Aff. ¶ 7) As a tribally-formed and licensed entity, Cash Advance is strictly regulated by, and adheres to, all applicable tribal and federal usury laws. Id. At no time has Cash Advance operated any part of its business within the State of Colorado. (Brady Aff. ¶ 11) Nor has Cash Advance actively solicited business specifically from Colorado residents, or performed any activities in the State of Colorado to subject it to the jurisdiction of this Court. Id.; see Colo. Rev. Stat. § 13-1-124.

The State asserts that this case arises out of the Consumer Credit Code ("CCC") and Colorado Consumer Protection Act ("CPA"). Apparently pursuant to this authority, on January 7, 2005, the State issued an Administrative Subpoena to Cash Advance directing the business to produce various documents for its examination by January 25, 2005. The State, however, failed under Colorado law to properly serve Cash Advance with the Administrative Subpoena. The Proof of Service indicates that the subpoena was served upon Laughlin Associates USA ("Laughlin Associates"), a Nevada business, which merely serves as a mail distribution service, and not as an agent qualified to accept service of process on behalf of Cash Advance. (Brady Aff. ¶¶ 13, 14) Thereafter, on February 14, 2005, this Court issued an Order Enforcing Administrative Subpoena. This Order was also improperly served upon Laughlin Associates, not on Cash Advance.

Subsequently, on June 20, 2005, this Court issued an Order for Contempt Citation and directed Cash Advance to show cause why it should not be held in contempt of Court for failing to comply with the Administrative Subpoena. Once again, the State failed to properly serve Cash Advance with its motion seeking the contempt citation as well as the Court's order for contempt citation, instead serving Laughlin Associates. (Brady Aff. ¶¶ 12-15)

ARGUMENT

I. This Action Must Be Dismissed For Insufficiency of Service Of Process.

In the Order For Contempt Citation, this Court relied upon the State's Verified Ex Parte Motion For Issuance of Contempt Citation, in which the State asserted that Cash Advance was duly served with this Court's Order Enforcing Administrative Subpoena, from which the Contempt Citation arises. Contrary to the State's assertion, Cash Advance was never served with: (1) the State's January 7, 2005 Administrative Subpoena; (2) the Court's February 14, 2005 Order Enforcing Administrative Subpoena; or (3) this Court's June 20, 2005 Contempt Citation. (Brady Aff. ¶ 12) The State's mistake arises out of the following erroneous assumption[1]:

> Cash Advance's address appears to be a 'mail drop.' The business located at this address is a company by the name of Laughlin Associates, Inc. (Laughlin). Laughlin apparently acts as a duly appointed resident agent for a number of businesses and also provides mail and telephone forwarding services . . . .

(Verified Ex Parte Motion, dated June 20, 2005, at ¶ 13.)

A review of the Administrative Subpoena at issue in this case and the Affidavit attached hereto, reveal that the State did not properly serve the Administrative Subpoena under the CCC, CPA or Colorado Rules of Civil Procedure ("C.R.C.P."), and thus the Administrative Subpoena must be quashed and this case dismissed.

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[1] The State has also erroneously assumed that Cash Advance is a d/b/a of "C.B. Service Corp." (Verified Ex Parte Motion, at 1, dated June 20, 2005) Cash Advance is not a d/b/a of C.B. Service Corp., nor is Cash Advance a subsidiary, agent, partner, associate or manager of C.B. Service Corp. (Brady Aff. ¶ 16)

A. The State Did Not Comply With the Consumer Protection Act.

The State contends that it derived its authority to issue the January 7, 2005 Administrative Subpoena against Cash Advance pursuant to Section 6-1-108 of the Colorado Consumer Protection Act. Section 6-1-108 of the CPA authorizes the attorney general or district attorney to "issue subpoenas to require the attendance of witnesses or the production of documents . . . ." Colo. Rev. Stat. § 6-1-108(1). In so doing, the district attorney or attorney general must effectuate service of the notice or subpoena "in the manner prescribed by law or the Colorado Rules of Civil Procedure." Id. § 6-1-108(2). It appears that the State attempted to comply with C.R.C.P. 4(e), but the State fell short, as Cash Advance was never served and the entities/individuals that were served were/are not agents of the Cash Advance, as demonstrated below. (Brady Aff. ¶ 12)

The Proof of Service of the Administrative Subpoena reveals that service was effectuated by a Carson City, Nevada Sheriff Department via personal service. (Proof of Service, dated Feb. 16, 2005) However, contrary to the Proof of Service, Cash Advance was not the party that was actually served, and the address listed on the Proof of Service is not that of Cash Advance. (Brady Aff. ¶¶ 12-16) Instead, the address denominated on the Proof of Service is that of Laughlin Associates, an entity that is separate and distinct from Cash Advance. Moreover, Cash Advance has never designated Laughlin Associates as its registered agent. (Brady Aff. ¶¶ 13-15) As such, the State has not complied with Colo. Rev. Stat. § 6-1-108(2), because Cash Advance was never served with the Administrative Subpoena in accordance with C.R.C.P. 4(e)(4), as Laughlin Associates is not now, nor has ever been, one of "the partners or associates, or a managing or general agent" or any kind of agent for Cash Advance. Therefore, the entire action

against Cash Advance must be dismissed due to insufficiency of service of process pursuant to C.R.C.P. 12(b)(4). Pioneer Astro Indus., Inc. v. District Court, 193 Colo. 409, 411, 566 P.2d 1067, 1069 (1977).

B. The State Did Not Comply With The Consumer Credit Code.

Section 5-6-106 of the Consumer Credit Code authorizes the "administrator," who is an assistant attorney general, to, *inter alia*, subpoena witnesses and require them to produce evidence relevant to an investigation. Id. In so doing, the administrator is required to comply with sections 24-4-102 through 24-4-106 (except for 24-4-104(3), which is not pertinent in this case) of the "State Administrative Procedure Act," found at Colo. Rev. Stat. § 24-4-101, *et seq.* Colo. Rev. Stat. § 5-6-107. Section 24-4-103(14) of the State Administrative Procedure Act mandates that the administrator serve the administrative subpoena "in the same manner as a subpoena issued by a district court." Colo. Rev. Stat. § 24-4-101(14). Rule 45(c) of the C.R.C.P. requires that "[s]ervice of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ." C.R.C.P. 45(c). Once again, the Administrative Subpoena in this case was not personally delivered to Cash Advance or one of its partners, associates, managers or general agents. C.R.C.P. 4(e)(4). (Brady Aff. ¶ 12) For this additional reason, the State's Administrative Subpoena must be quashed and this case dismissed.

Also, the State has not complied with Section 5-1-203 of the CCC, which requires that service of process over a nonresident that has not designated an agent in Colorado to be effectuated as follows:

> If no designation is made and filed or if process cannot be served in this state upon the designated agent, process may be served upon the secretary of state, but service upon the secretary of state is not effective unless the plaintiff or petitioner forthwith mails a copy of the process and pleading by registered or certified mail

> to the defendant or respondent at his or her last reasonably ascertainable address. An affidavit of compliance with this section shall be filed with the clerk of the court on or before the return of the process, if any, or within any further time the court allows.

Colo. Rev. Stat. § 5-1-203(3).

Here, the State has not filed an affidavit of compliance with Colo. Rev. Stat. § 5-1-203, nor is there any indication that the State has served the Secretary of State with process. For this alternative reason, the case must be dismissed.

II. This Action Must Be Dismissed For Lack Of Personal Jurisdiction.

It is clearly established that an assertion of personal jurisdiction over an out-of-state defendant must satisfy Colorado's long-arm statute and the requirements of due process of law. Classic Auto Sales, Inc. v. Schocket, 832 P.2d 233, 235 (Colo. 1992). First, the act or acts which a plaintiff relies upon to establish jurisdiction must fall within one of the subsections of the long-arm statute. Id. In its Verified Ex Parte Motion for Issuance of Contempt Citation, the State did not specifically assert which subsection, if any, of Colorado's long-arm statute extends Colorado personal jurisdiction over Cash Advance. Presumably, the State relies upon the "transaction of business any business within this state" subsection of the long-arm statute. Colo. Rev. Stat. § 13-1-124(1)(a).

A party invoking the Colorado long-arm statute "must allege sufficient facts to support a reasonable inference that the nonresident defendant has engaged in conduct under the statute which subjects the nonresident to the personal jurisdiction of the court." In re Parental Responsibilities, R.Z.G., 77 P.3d 848, 851 (Colo. Ct. App. 2003). Colorado's long-arm statute is intended to extend personal jurisdiction to the extent permissible under of the United States Constitution. New Frontier Media, Inc. v. Freeman, 85 P.3d 611, 613 (Colo. Ct. App. 2003).

Accordingly, a separate analysis of Colorado's long-arm statute and the Due Process Clause of the United States Constitution are unnecessary, as the inquiries are the same. Id.

The due process analysis requires that personal jurisdiction only be exercised over a defendant who has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. State of Wash. Office of Unemployment Comp. and Placement, 326 U.S. 310, 316 (1945). The Due Process Clause "does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." Id., 326 U.S. at 319. The Colorado Supreme Court has reiterated that in order for Colorado courts to have jurisdiction over a nonresident, the nonresident must have fair warning that his contacts with the State could reasonably subject him to that forum. Keefe v. Kirschenbaum & Kirschenbaum, P.C., 40 P.3d 1267, 1270 (Colo. 2002). This fair warning requirement is satisfied "if the litigation results from alleged injuries that arise out of or relate to activities that are significant and purposefully directed by the defendant at residents of the forum." Freeman, 85 P.3d at 613.

Here, the contact upon which the State relies is insufficient to establish jurisdiction. The only conduct upon which the State appears to rely to establish jurisdiction is issuing alleged "'payday' or unsupervised loans to Colorado Consumers . . . ." (Verified Ex Parte Motion at Introduction, dated June 20, 2005) No other contacts are alleged.[2] Thus, similar to the alleged basis for jurisdiction in Freeman, the only alleged basis for jurisdiction in this case are the

[2] No other contacts are alleged in the pleadings that Cash Advance has by happenstance received. However, as Respondent was not properly served with process, the Respondent cannot state with certainty whether the State has made additional allegations in other pleadings.

"possible" contacts between Colorado consumers and a nonresident Defendant. No other contacts exist in this case, and the contacts alleged are insufficient as a matter of law. Cash Advance does not operate any part of its business within the State of Colorado, and all business is conducted with the boundaries and jurisdiction of the Miami Tribe of Oklahoma's Reservation located in the State of Oklahoma. (Brady Aff. ¶ 8) Cash Advance is not licensed within the State of Colorado, as it does not have a business located within the State, nor has it physically executed any contracts for the alleged "payday" loans within the State. (Brady Aff. ¶ 11) Cash Advance has not committed a tortious act within the State of Colorado; contracted to insure any person, property or risk located in Colorado; maintained a matrimonial domicile; engaged in sexual intercourse as to an action brought under Title 19 of Colorado Revised Statutes; or entered into any agreement pursuant to part 2 or 5 of article 22 of Title 13 of Colorado Revised Statutes. (Brady Aff. ¶ 11)

The only alleged basis for jurisdiction is the supposed contact between residents of Colorado and a nonresident Cash Advance. This contact does not satisfy the necessary minimum contacts to confer jurisdiction over Cash Advance. Freeman, 85 P.3d at 614. The Colorado Court of Appeals has held that in order for a contract executed by a nonresident defendant and a resident plaintiff to form a basis for jurisdiction in Colorado, the contract must typically: (1) "require activity by the defendant in the forum state;" (2) "have been negotiated in-state pursuant to substantial and significant contacts;" (3) "have been executed by the defendant in-state;" or (4) "have been solicited by the out-of-state defendant." Id. None of these conditions is present in this case.

Here, the State has not demonstrated that the contracts contain any of these conditions, nor has the State demonstrated that Cash Advance has conducted any of the above activities. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Circle A. Drilling Co. v. Sheehan, 251 F. Supp. 242, 243 (D. Colo. 1966); See Hanson v. Denckla, 357 U.S. 235, 253 (1958). While it is the State of Colorado basing its jurisdiction on the resident's relationship with Cash Advance, and not the Colorado resident's, the analysis is the same. The State apparently attempts to assert jurisdiction over Cash Advance based on the unilateral acts of a Colorado consumer. The State has not demonstrated that Cash Advance has made any active attempts to solicit business, or to conduct business with Colorado residents. The mere existence of a contract executed by a Colorado resident is not sufficient to confer personal jurisdiction over an absent non-resident defendant. "To hold otherwise would offend traditional notions of fair play and substantial justice." Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co., 323 F. Supp. 996, 1001 (D. Colo. 1971) (applying Colorado law), *aff'd* 449 F.2d 775 (10th Cir. 1971).

In sum, Cash Advance has not conducted business within the State of Colorado to warrant jurisdiction. Specifically, Cash Advance has not maintained an office within Colorado, and it has not actively solicited business within Colorado, either by person or mail, nor does Cash Advance have any other contacts with Colorado. Also, the State has not asserted that Cash Advance was required to perform any acts within Colorado pursuant to these alleged "payday" loans. Cf. Freeman, 85 F.3d at 614. For this Court to exercise jurisdiction in this matter would offend traditional notions of fair play and justice.

III. This Action Must Be Dismissed For Lack of Subject Matter Jurisdiction

This action must also be dismissed for the reason that this Court lacks subject matter jurisdiction over this controversy because Cash Advance, as an entity owned and operated by the Miami Tribe of Oklahoma, a federally-recognized Indian tribe, possesses sovereign immunity from suit. (Brady Aff. ¶¶ 3-9) Tribal sovereign immunity is a matter of federal law and, where asserted, it raises the issue of subject matter jurisdiction. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998); E.F.W. & A.T.B. v. St. Stephen's Indian High School, 264 F.3d 1297, 1302 (10th Cir. 2001) (recognizing that "[t]ribal sovereign immunity is a matter of subject matter jurisdiction."). As a matter of federal law, tribal sovereign immunity "is not subject to diminution by the States." Kiowa Tribe, 523 U.S. at 756. The Colorado Court of Appeals has recognized, "[i]ssues of governmental immunity are determined under C.R.C.P. 12(b)(1) concerning motions to dismiss for lack of subject matter jurisdiction." Quintana v. City of Westminster, 56 P.3d 1193, 1196 (Colo. Ct. App. 2002).

Under well-settled principles of federal law, Indian tribes are not subject to civil suits in any state or federal tribunal absent a clear and unequivocal express waiver of the tribe's sovereign immunity. C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 418; Kiowa Tribe, 523 U.S. at 754; St. Stephen's Indian High School, 264 F.3d at 1304; In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), the Supreme Court specifically recognized:

> Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian nations are exempt from suit. It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.

(emphasis added).

Tribal sovereign immunity applies to tribal commercial activities as well as traditional governmental functions. Kiowa Tribe, 523 U.S. at 754-755; See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991) (reaffirming tribal immunity from suit arising from state's attempt to impose taxation over cigarette sales). Therefore, a tribal entity must be treated as the tribe for purposes of sovereign immunity. See Sac & Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995) (applying Tribe's sovereign immunity to activities of its commercial enterprise). Furthermore, this sovereign immunity applies to commercial activities undertaken both on and off the reservation. Kiowa Tribe, 523 U.S. at 755 ("Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions."). The long-standing basis for this principle is the tribal power of self-determination. Id. at 1064; Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992) (noting that the "point of sovereign immunity . . . is the power of self-determination.").

Tribal sovereign immunity is a mandatory doctrine that a court must honor and invoke. As the Supreme Court conclusively held in Kiowa, absent a valid waiver of sovereign immunity, a Tribe, or an agency thereof, cannot be sued in any court. Kiowa Tribe, 523 U.S. at 754. (noting that even where a state has the power to regulate a Tribe's activities, it still does not have authority to enforce state laws through judicial proceedings). In sum, under the framework clearly articulated by the Supreme Court, the doctrine of sovereign immunity is mandatory and prevents all unauthorized suits against a tribe. Kiowa Tribe, 523 U.S. at 754-57.

In this case, Cash Advance is a wholly-owned tribal entity, duly constituted under the laws of the Miami Tribe of Oklahoma. (Brady Aff. ¶7) Cash Advance received its business license pursuant to an Ordinance of the Miami Tribe of Oklahoma that regulates lending activities. (Brady Aff. ¶ 7) As a tribally-formed and licensed entity, Cash Advance is strictly regulated by and adheres to all applicable laws and regulations of the Miami Tribe of Oklahoma governing lending activities, and federal usury laws. (Brady Aff. ¶ 7) Because it is a tribally-owned and operated entity, Cash Advance enjoys sovereign immunity to the full extent of that sovereign immunity possessed by the Miami Tribe of Oklahoma. (Brady Aff. ¶¶ 5-9); Kiowa Tribe, 523 U.S. at 754-57. As such, Cash Advance may only be subjected to state judicial and/or regulatory process where it consents to such actions. Kiowa Tribe, 523 U.S. at 754-57. Cash Advance has not unequivocally waived its immunity from suit. (Brady Aff. ¶ 10)

The State has not made, nor can it make, any showing of the requisite wavier of sovereign immunity as to Cash Advance. (Brady Aff. ¶ 10) This immunity, a sovereign right that must be invoked and honored by state courts, serves as a bar to this Court's jurisdiction over Cash Advance. St. Stephen's Indian High School, 264 F.3d at 1302. Therefore, Cash Advance respectfully requests that this Court find that it does not have jurisdiction over this matter, and enter an order vacating its previous Order Enforcing Administrative Subpoena and dismissing the entire action against it pursuant to C.R.C.P. 12(b)(1).

CONCLUSION

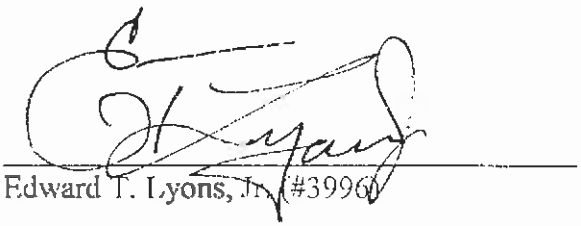
Cash Advance did not comply with this Court's Order Enforcing Administrative Subpoena because: (1) it was not properly served with process; (2) it is not subject to the jurisdiction of the courts of this State; and (3) this Court lacks subject matter jurisdiction over

this action. For these reasons, Cash Advance should not be held in contempt, the Administrative Subpoena quashed, the Order to Show Cause discharged, and this case dismissed.

Dated: July 20th, 2005.

Respectfully Submitted,

JONES & KELLER



Edward T. Lyons, Jr. #39960