DOCKET NO.: HHB-CV-15-6028096-S

GREAT PLAINS LENDING LLC, ET AL., Plaintiffs	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF NEW BRITAIN
	:	AT NEW BRITAIN
v.	:	
STATE OF CONNECTICUT, DEPARTMENT OF BANKING, ET AL.,	:	
Defendants.	:	AUGUST 10, 2015

PLAINTIFFS' BRIEF

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I. INTRODUCTION

The Connecticut Department of Banking ("Department") and its Commissioner (collectively, "Defendants") have ventured to establish a new body of law that would carve out an exception to the well-settled doctrine of tribal sovereign immunity—specifically, for administrative proceedings initiated by the State of Connecticut and its administrative agencies. The Department, however, cannot pursue its policy objectives, no matter how well-intentioned, in contravention of well-established and binding legal precedent. Indeed, the issues presented in the instant action are not new or novel to the state or federal courts of Connecticut, or to the United States Supreme Court.

To the contrary, the legal doctrine of tribal sovereign immunity has been reaffirmed time and time again—in the context of state and federal actions and administrative proceedings—and involving tribal governments, their businesses and officials engaged in activities conducted both on- and off-reservation. As set forth herein, this legal authority makes clear that absent abrogation of sovereign immunity through an Act of Congress or consent to suit from the tribe itself, adversarial actions initiated by third parties against Indian nations, their instrumentalities and elected officials, simply cannot stand.

Plaintiffs respectfully submit this administrative appeal pursuant to General Statutes ("C.G.S.A.") § 4-183 to challenge a decision issued by Defendants on January 6, 2015 ("Final Decision"), which, in every respect, violates the legal principles of sovereign immunity so deeply engrained in the fabric of federal Indian law and policy.

For the reasons set forth below, the Defendants' administrative actions must be vacated pursuant to General Statutes § 4-183(j), as they are clearly erroneous as a matter of law.

II. LEGAL AND FACTUAL BACKGROUND

As the leading treatise on federal Indian law explains, "Indian law draws on disciplines as varied as anthropology, sociology, psychology, political science, economics, philosophy, and religion, [but the] most significant of these sources is history." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1.01, at 5 (2012). Indeed, "[h]istorical perspective is of central importance in the field of Indian law." *Id.*; *see also* WILLIAM C. CANBY, AMERICAN INDIAN LAW, at 1 (2009) ("[H]istorical context is perhaps more important to the understanding of Indian Law than of any other legal subject."). To that end, prior to summarizing the administrative action now on review, it is important to discuss the historical backdrop against which this case presents itself.

A. Tribal Sovereignty and Sovereign Immunity

Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). They have inherent sovereignty, meaning that their ability to self-govern is derived not from the U.S. Constitution, but from their existence on this continent as "distinct political societ[ies]" since time immemorial. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

Today, tribes no longer possess the "full attributes" of sovereignty, as they are subject to Congress's "plenary power" over Indian affairs. *See United States v. Kagama*, 118 U.S. 376,

381-82 (1886). This power is derived in part from the Constitution's Indian Commerce Clause—but more importantly, it is derived from the federal government's responsibility to protect tribal sovereignty, including by protecting tribes against overreaching state governments. *See id.* at 384 ("[Indian tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.").

Yet, even with the federal government having plenary power over Indian affairs, until Congress affirmatively exercises that power, tribal sovereignty remains fully intact. *Nat'l Farmers Union*, 471 U.S. at 852-53 n.14. State governments have no authority to unilaterally infringe on the sovereignty of tribes unless that authority has been expressly granted to them by Congress. Such authority has in fact been granted to states before, namely in the province of criminal jurisdiction. *See* Pub. L. No. 83-280, 67 Stat. 588, 588-90 (1950) (granting certain states authority to exercise criminal jurisdiction in Indian Country). However, in the absence of such legislation, states cannot take actions that diminish tribal sovereignty.

Tribal sovereign immunity, as the United States Supreme Court recently affirmed, is one of the "core aspects" of tribal sovereignty. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). Thus, like all other aspects of tribal sovereignty, in the absence of federal legislation commanding otherwise, such immunity maintains its full breadth—encompassing tribal businesses and tribal commercial activities, regardless of whether those activities take place on- or off-reservation and extending to tribal officials acting in their official capacity and

within the scope of their authority under tribal law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758–59 (1998); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *aff'd*, 114 F.3d 15 (2d Cir. 1997).

B. The Tribe's Wholly-Owned and Operated Lending Entities

The Otoe-Missouria Tribe of Indians ("Tribe") is a federally recognized Indian tribe that has endured the same struggles faced throughout Indian Country, all stemming from a dearth of meaningful economic development opportunity. Located in rural Oklahoma with minimal land-based business opportunities, the Tribe turned to the Internet, specifically, the online consumer finance business.

The Tribe's lending businesses are wholly owned by the Tribe and were created pursuant to Tribal law. AR 34, 47-48. The Tribe's Constitution vests its governing body, the Tribal Council, with lawmaking authority, which includes the authority to create new business enterprises for the Tribe. *See* AR 34. Among other mechanisms, the Tribal Council incorporates these new businesses pursuant to the Otoe-Missouria Tribe of Indians Limited Liability Company Act ("Tribal LLC Act") and the Otoe-Missouria Tribe of Indians Corporation Act ("Tribal Corporation Act"). AR 34, 47–48. Both the LLC Act and the Corporation Act provide the Tribal Council with the authority to establish wholly owned tribal enterprises for the purposes of developing the Tribe's economy and advancing the interests of Tribal members. AR 48. Pursuant to those laws, businesses created thereunder are considered instrumentalities and arms of the Tribe and their officers are to be considered officers of the Tribe. *Id.*

Plaintiff Clear Creek Lending is a d/b/a of American Web Loan, Inc., (hereinafter referred to as Clear Creek), which was established pursuant to Tribal law (Resolution OMTC #210561 and the Tribal Corporation Act), on February 10, 2010. AR 34, 48. Similarly, Plaintiff Great Plains Lending, LLC ("Great Plains") was established pursuant to Tribal law (Resolution OMTC #54293, pursuant to the Tribal LLC Act), on May 4, 2011. AR 48. Both Great Plains and Clear Creek were created with the express purpose of growing the Tribe's economy and to aid in addressing issues of public health, safety, and welfare. AR 34, 48–49. The Tribe retains the sole ownership interest in Great Plains and Clear Creek, and all profits inure directly to the Tribal government to fund a wide array of government programs for the benefit of the Tribal membership. AR 49, 90, 122. The Tribe also has full control over the business operations of both entities. AR 34, 49. For instance, each entity's officers are appointed by the Tribal Council, and may be removed by the Tribal Council at any time, with or without cause. AR 49–50.

Plaintiffs Great Plains and Clear Creek are both comprehensively regulated under Tribal law; they operate pursuant to licenses granted by the Otoe-Missouria Consumer Finance Services Regulatory Commission ("Commission"). AR 115, 117. The Commission is an independent tribal regulatory agency charged with enforcing the Tribe's financial services laws, including the Otoe-Missouria Consumer Finance Services Regulatory Commission Ordinance ("Ordinance"). AR 105–12. In carrying out this responsibility, the Commission oversees the lending activities of both Great Plains and Clear Creek and monitors their businesses for compliance with the

Ordinance and adherence to applicable federal consumer protection laws. AR 105, 112; Complaint ¶ 16.

Finally, as most relevant for the purposes of this litigation, in the establishment of all the Tribe's wholly owned business, including Great Plains and Clear Creek, the Tribe conferred on both entities all privileges and immunities enjoyed by the Tribe, including, but not limited to, immunities from suit as well as federal, state, and local taxation or regulation. AR 49. It is undisputed that this immunity has never been waived, implicitly or explicitly, by the Tribe, Great Plains, Clear Creek, the Commission, or any tribal official. AR 50.

C. The Department's Prosecution of the Tribe's Businesses

Prior to the initiation of its administrative action, in late 2013, the Department sent its one and only written communication to Plaintiff Great Plains, which pertained to a single customer loan. Complaint at ¶ 24. Counsel for Plaintiff Great Plains responded in writing to the Department, advising that Great Plains is owned and operated by the Tribe, and is thus not subject to the State's regulatory jurisdiction. Complaint at ¶ 26. Nonetheless, the Tribe offered to meet with the Department to further a respectful government-to-government relationship with the State of Connecticut; neither the Department nor any other subdivision of the State responded to the Tribe's offer. Complaint at ¶ 27. Instead, on October 27, 2014, Plaintiffs received a document from the Department titled, "Temporary Order to Cease and Desist, Order to Make Restitution, Notice of Intent to Issue Order to Cease and Desist, Notice of Intent to Impose Civil Penalty and Notice of Right to Hearing" (hereinafter "Temporary Order"). AR 1–17. The

Temporary Order acknowledged the tribal status of Great Plains and Clear Creek, as well as Chairman Shotton's position as an elected official of the Tribe and his position as Great Plains' Secretary/Treasurer. *See* AR 4. The Temporary Order did not, however, allege any waiver of Tribal sovereign immunity, implied or explicit, on the part of any of the Plaintiffs. Nor did it allege any congressional abrogation of said immunity.

Plaintiffs contested the Department's jurisdiction through the filing of a Motion to Dismiss pursuant to § 36a-1-29 of the Regulations of Connecticut State Agencies, which sets forth the relevant administrative procedures for "contested cases." Conn. Agencies Regs. § 36a-1-29. These procedures allow for both parties to brief the issue of dismissal before the Commissioner, who serves as an Administrative Law Judge for the purposes of these dispositive motions. Conn. Agencies Regs. § 36a-1-27(5) (providing that "only the commissioner shall have the power to grant any motion to dismiss").

Plaintiffs argued that the Department lacked jurisdiction due to their respective sovereign immunity from suit, which had neither been waived nor abrogated by Congress. Plaintiffs' dispositive motion explained that, pursuant to well-settled and binding federal and state authority, sovereign immunity is a proper basis for dismissal of an administrative proceeding for lack of subject matter jurisdiction, as immunity extends to both tribally-owned businesses and tribal officials. AR 35–40. Plaintiffs noted that virtually identical administrative proceedings have been dismissed on immunity grounds in the States of California, Colorado, and Minnesota. AR 40–43. As Plaintiffs pointed out, the Department itself had previously taken the position that

tribally-owned lending entities are entitled to sovereign immunity against administrative proceedings. See, infra, IV(B)(4)(d) AR 42 (citing *In re CashCall, Inc.*, Findings of Fact, Conclusions of Law and Order at *17 (Conn. Dept. of Banking Feb. 4, 2014). The Department objected to the Motion to Dismiss, arguing that sovereign immunity applied only to "suits," and that the administrative proceedings were merely a "demand for compliance," thus not triggering the defense of immunity. AR 128.

In its Final Decision dated January 6, 2015, the Commissioner denied the Plaintiffs' Motion to Dismiss. AR 150–58. The Commissioner maintained that it was not necessary for him to determine whether Great Plains, Clear Creek, and Chairman Shotton were entitled to the same immunities of the Tribe, because in his view, tribal sovereign immunity did not apply at all. AR 151. Essentially, the Commissioner reasoned that tribal immunity from suit did not bar the administrative proceeding because the administrative proceeding was not a "suit" in the first instance. AR 151.

On the same day that the Final Decision was issued, the Commissioner also issued an "Order to Cease and Desist and Order Imposing Civil Penalty" ("Order"). AR 159–65. The Order directs Plaintiffs to "cease and desist from violating [Connecticut lending laws]" or "participating in the violation" thereof. AR 164. It further imposes a $700,000 fine upon Plaintiff Great Plains; a $700,000 fine upon Plaintiff Chairman Shotton; and a $100,000 fine upon Clear Creek.

Plaintiffs timely appealed pursuant to General Statutes § 4-183(a).

III. STANDARD OF REVIEW

Appeals from decisions of Connecticut administrative agencies are governed by the Uniform Administrative Procedure Act. When an appeal is taken, the reviewing court "shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." C.G.S.A. § 4-183(j).

The Connecticut Supreme Court has described this standard as "requir[ing] a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . ." *Okeke v. Comm'r of Pub. Health*, 304 Conn. 317, 324 (2012). "[The court's] ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." *Id.*

This Court is presented with a pure question of law in the instant action: whether Plaintiffs—as tribally-owned and operated entities and a tribal official acting in his official capacity and within the scope of his authority—are protected by tribal sovereign immunity against the contested case initiated by the Department. This Court reviews questions of law,

such as this one, under a *de novo* standard. *Id.* at 324–25. That is, the Final Decision is not entitled to special deference. *Id.*

IV. ARGUMENT

As explained below, the Final Decision is legally incorrect at almost every level. It conflates the distinct concepts of sovereignty and sovereign immunity and fails to adhere to binding precedent definitively holding that sovereign immunity extends to tribal entities engaged in commercial activity and to tribal officials acting in their representative capacity in all adversarial actions, including administrative proceedings. Because sovereign immunity operates as a complete jurisdictional bar, whether the Department's actions are based on ideals of "reason" and "fairness" can have no part in this analysis. *Beecher v. Mohegan Tribe of Indians of Conn.*, 282 Conn. 130, 140 (2007). The Final Decision thus invents an exception to sovereign immunity out of whole cloth and, for the reasons set forth below, cannot stand.

A. In its Review, the Court is Limited to the Department's Reasoning on the Record and May Not Consider *Post Hoc* Rationalizations

Though the Court reviews issues of law *de novo*, the *scope* of review is quite narrow, as it is "limited to a review of the evidence and reasoning the agency has placed on the record." *Fanotto v. Inland Wetlands Comm'n of Town of Seymour*, 108 Conn. App. 235, 239 (2008). That is, the Court may uphold an agency decision only if the record supports "the express reasons given" in the decision itself. *Id.* at 240; *Vine v. Zoning Bd. of Appeals of Town of N. Branford*, 281 Conn. 553, 560 (2007); *cf. Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80,

95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

Based on their Answer filed on July 2, 2015, it appears the Department is now attempting to adopt a new reasoning on appeal. Changing course, the Department now contends that Plaintiffs Great Plains and Clear Creek are not arms of the Tribe. Answer at 4, ¶¶ 13–14. This rationale was not part of the Final Decision. In fact, in the Final Decision, the Commissioner clearly stated: "I need not address [whether Great Plains and Clear Creek are arms of the Tribe, or whether Chairman Shotton is entitled to immunity as an official acting in his official capacity] because I find that the Department has jurisdiction over each Respondent irrespective of tribal status." AR 151.

Indeed, at the agency level, the Department effectively conceded that Great Plains and Clear Creek are arms of the Tribe.[1] Therefore, in this administrative appeal, it would be improper for the Court to entertain the Department's new legal theory that Plaintiffs are not arms of the Tribe, as this is simply a *post hoc* rationalization for the Final Decision. *Fanotto*, 108 Conn. App. at 239; *cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (explaining that courts should not accept "*post hoc* rationalizations."). The only issue before this Court is whether a "contested case" before the Department of Banking constitutes a "suit" for the purposes of tribal sovereign immunity.

[1] For example, in its Objection to Motion to Dismiss, the Department characterized the lending activity as being conducted *by the Tribe itself.* AR 128 (arguing that "*the Tribe's* offering and lending activities in Connecticut subject it to the jurisdiction of the Commissioner . . . .") (emphasis added). If the Department's legal theory was that Plaintiffs are not arms of the Tribe, it would be senseless to argue that *the Tribe* was engaged in the lending activity.

B. The Final Decision's Conclusion that Sovereign Immunity Does Not Apply in the Context of State Administrative Actions is Erroneous As a Matter of Law

The Final Decision compounds error upon error. It begins with a faulty premise—that certain geographical limitations on tribes' lawmaking authority have any bearing on the scope of their sovereign immunity. From there, the Final Decision ultimately comes to the conclusion that Plaintiffs' tribal status is of no consequence, because the administrative proceeding initiated by the Department is not a "suit" for the purposes of sovereign immunity. This reasoning disregards well-settled principles of federal Indian law (and administrative law, for that matter), and should be corrected by this Court.

1. The Final Decision's Conflation of the Doctrines of Tribal Sovereignty and Tribal Sovereign Immunity is Defective As a Matter of Law

The first foundational error in the Final Decision is its misguided analysis of tribal sovereignty. This initial error reflects a fundamental misunderstanding of federal Indian law, and establishes the flawed foundation from which the Final Decision's findings and conclusions stem.

Tribal sovereignty, in essence, is the right of tribes to self-govern—the fundamental legal right of Indian Nations to enact their own laws and be governed by them. *See Williams v. Lee*, 358 U.S. 217, 220 (1959). As explained above, by virtue of their existence as self-governing political societies on this continent since time immemorial, tribes retain this inherent right unless it is explicitly abrogated by an Act of Congress. The Final Decision acknowledges the existence of tribal sovereignty, but then goes on to discuss its alleged "geographical component." AR 153.

Specifically, the Final Decision posits that Indians engaged in off-reservation activities are subject to certain state laws. *Id.*

The notion of a geographical component to tribal sovereignty is misplaced. Sovereignty and sovereign *immunity* are distinct concepts, and have always been regarded as such. *See* The Federalist No. 81, at 318 (Alexander Hamilton) (J. & A. McLean ed., 1788) (explaining that immunity from unconsented suit is "one of the attributes of sovereignty"). Thus, whatever "geographical component" exists regarding a tribe's sovereignty is irrelevant for the purposes of analyzing sovereign *immunity*. Sovereign immunity, as explained below, has no geographical restriction.[2]

Similarly, contrary to the legally flawed rationale in the Final Decision, the issue of whether Connecticut usury laws apply to Plaintiffs is completely distinct and has no bearing on whether Plaintiffs are immune to administrative proceedings initiated by the Department. The Final Decision fails to grasp this distinction, and mistakenly finds relevance in the case of *Otoe-Missouria Tribe of Indians v. New York Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014). That case involved entirely different issues, separate and apart from that of sovereign immunity. Indeed, in that action, it was the Tribe, not the state, that initiated proceedings, making the doctrine of sovereign immunity irrelevant. Distinct from the State of Connecticut in this action,

[2] Plaintiffs maintain that Connecticut substantive lending laws do not apply to their business, as under the Supreme Court's decisions in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1987) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), federally recognized tribes are generally not subject to state regulatory law. However, that is not the issue that presents itself in this case, because even if Connecticut law *did* apply to Plaintiffs, that would not decide the immunity question. *See Kiowa*, 523 U.S. at 755 ("To say substantive state laws apply to off-reservation conduct is not to say that a tribe no longer enjoys immunity from suit.").

the State of New York did not take any direct administrative action against the Tribe, its businesses, or its officials, through the issuance of an order, fine or otherwise.

Accordingly, Defendants' position as to applicability of Connecticut state law to the Plaintiffs reflects a fundamental misconception of tribal sovereignty, juxtaposed to tribal sovereign immunity, which simply cannot stand. Immunity from suit is but a single attribute of sovereignty, by virtue of which tribes, their subdivisions, and their officials are not subject to suit without their explicit consent. Defendants' attempt to unilaterally enforce state law upon Plaintiffs, notwithstanding their sovereign immunity, cannot be permitted under binding legal authority.

2. The Tribe Possesses Common-Law Immunity From Unconsented Suit, Which Extends to Plaintiffs by Virtue of their Tribal Status

As sovereign governments, federally recognized tribes possess common-law immunity from suit. The doctrine is well-settled and was first addressed by the United States Supreme Court in the 1850 case of *Parks v. Ross*, where the Court dismissed claims against the Principal Chief of the Cherokee Nation on the grounds that the tribe had not consented to the suit. 52 U.S. (11 How.) 362, 374 (1850). In the 165 years since then, the United States Supreme Court has reaffirmed tribal sovereign immunity on numerous occasions. *See, e.g.*, *Bay Mills*, 134 S. Ct. 2024; *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Kiowa*, 523 U.S. 751; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup*

Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165 (1977); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354 (1919).

Indeed, immunity has long been considered one of the "core aspects" of tribal sovereignty, as it is a necessary corollary to the exercise of self-governance. *Bay Mills*, 134 S. Ct. at 2030; *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). Without sovereign immunity, similar to the state of Connecticut, it would be impossible for tribes to safeguard their assets or preserve their political independence, and it would seriously threaten their ability to advance the "federal policies of tribal self-determination, economic development, and cultural autonomy that underlie the federal doctrine of tribal immunity." *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1104 (8th Cir. 2012); *see State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 437 (2012) (explaining that one of the primary rationales behind the doctrine of sovereign immunity is "the fiscal well-being of the state") (internal citation omitted).

Tribal sovereignty is not subject to diminution by the states and thus, neither is sovereign immunity. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). As the Supreme Court recently reaffirmed, "tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals." *Bay Mills*, 134 S. Ct. at 2031. Hence, any action initiated by a state against a tribe cannot stand unless it is either authorized by the tribe itself or by an Act of Congress. *Potawatomi*, 498 U.S. at 510. Such a waiver can never be implied, but must be "unequivocally expressed." *Santa Clara*, 436 U.S. at 59 (finding that the Indian Civil

Rights Act does not authorize suits against tribes, with the exception of habeas corpus actions). In other words, absent an unequivocally clear waiver of immunity by the Tribe, only Congress can modify the doctrine of tribal sovereign immunity. *Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.").

Both Congress and the judiciary have consistently reaffirmed the import of the doctrine of tribal sovereign immunity, demonstrating that this fundamental legal doctrine cannot simply be disregarded in any fora. Over the years, various bills have been introduced that would have effectively nullified tribal sovereign immunity altogether, but none have been enacted. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law,* 37 Tulsa L. Rev. 661, 722-30 (2002) (explaining proposed legislation that would have stripped tribes of most aspects of their sovereign immunity). Rather, Congress, in its considered judgment, has opted to keep sovereign immunity intact. *Bay Mills*, 134 S. Ct. at 2038 n.11; *see also Potawatomi*, 498 U.S. at 510 ("Congress has consistently reiterated its approval of the immunity doctrine."). Consequently, both federal and state courts have consistently and similarly treated sovereign immunity as a mandatory and respected doctrine that is "firmly ensconced" in the law. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *see also Cayuga Indian Nation v. Seneca Cnty.*, 761 F.3d 218, 220 (2d Cir. 2014) (holding that the county's attempt to foreclose on tribally owned land was barred by sovereign immunity, and recognizing that it would be "improper to start carving out exceptions to that immunity").

Notwithstanding this unrefuted precedent, the Commissioner in this action has reduced this fundamental legal principle to a "'You Can't Catch Me' defense."[3] *See* AR 150.

The law in this area makes it abundantly clear that the Tribe, its wholly owned instrumentalities and its elected leader are immune from the Department's administrative action by virtue of the Tribe's sovereign status. Defendants erred in failing to recognize, pursuant to well-settled and binding legal precedent, that absent congressional abrogation of immunity or explicit consent (which does not exist in this case), sovereign tribal nations, their wholly owned entities and elected officials cannot be hauled into any fora—administrative or otherwise. Defendants' misplaced and misguided analysis of the law cannot and should not change this fundamental legal principle.

a. The Department Erred in Failing to Recognize that Tribal Sovereign Immunity Extends to Plaintiffs Great Plains and Clear Creek, Arms of a Tribal Nation

Tribal sovereign immunity is broad in scope. It applies to traditional "governmental" activities as well as those that might be deemed "commercial" in nature, and irrespective of whether the activity in question took place on- or off-reservation. *Kiowa*, 523 U.S. at 760; *Davidson v. Mohegan Tribal Gaming Auth.*, 97 Conn. App. 146, 150 (2006) (holding that a tribal

[3] Surely, the courts of Connecticut have not treated the doctrine of sovereign immunity in such a disparaging light through their consistent application and reaffirmation of the defense in relation to Connecticut state agencies. *See Chief Info. Officer v. Computers Plus Ctr., Inc.*, 310 Conn. 60, 79 (2013) (holding that the principle of sovereign immunity is well-established in Connecticut); *Fetterman v. Univ. of Conn.*, 192 Conn. 539, 550 (1984) (rejecting a former tenured college professor's claims against the University of Connecticut and certain university officials because they were "in effect, actions against the state as a sovereign and are, therefore, barred by the doctrine of sovereign immunity"); *Marasco v. Conn. Regional Vocational–Technical Sch. Sys.*, 153 Conn. App. 146 (2014) (finding that Connecticut school system was immune from teacher's Age Discrimination in Employment Act claim due to sovereign immunity).

gaming authority and tribal casino "are entitled to avail themselves of the tribe's sovereign immunity"). Immunity also extends to a tribe's political and economic subdivisions, including its wholly owned business entities, which are treated under the law as "arms of the Tribe." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725-26 (9th Cir. 2008) (dismissing dram shop claims against a tribal corporation and tribal employees because "tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself"); *see also Davidson*, 97 Conn. App. at 149-50 (dismissing an employment discrimination claim against the Mohegan Tribal Gaming Authority because the tribal gaming authority is "protected by the tribe's sovereign immunity").

Defendants erred in failing to recognize that, as arms of the Tribe, Plaintiffs Great Plains and Clear Creek are protected against adversarial, unconsented action through the doctrine of tribal sovereign immunity. Up until the filing of its Answer, the Department had not disputed Great Plains and Clear Creek's Tribal status. As explained above, in the Final Decision, the Commissioner instead reasoned that sovereign immunity was inapplicable because the contested case was not a "suit," *not* because of any allegation that Plaintiffs are not arms of the Tribe. AR 151. Moreover, at all relevant times, the Department has effectively conceded that the lending activity at issue, was for all intents and purposes, being conducted *by the Tribe*. *See* AR 128 (referring to "the Tribe's offering and lending activities"). Thus, Plaintiffs' arm-of-the-Tribe status cannot and should not be up for debate at this stage of the proceeding. *See Fanotto*, 108

Conn. App. at 239 (review of an agency decision is limited to "the evidence *and reasoning the agency has placed on the record*") (emphasis added).

Nevertheless, Plaintiffs Great Plains and Clear Creek reiterate what is undisputed in the record—that they are wholly Tribally-owned and operated entities, established pursuant to Tribal law, and, as such, are vested with sovereign immunity from suit. In determining whether a tribal entity is an arm of the tribe, courts consider several factors including: (1) whether the entity was created by tribal law; (2) whether the tribe owns and controls the entity; (3) the purpose of the tribal entity; (4) whether the entity's economic activity benefits the tribe; and (5) whether the tribe intended for the entity to have arm-of-the-tribe status. *Gold Country Casino*, 464 F.3d at 1046-47; *Cook*, 548 F.3d at 725-26; *see also Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

Both Great Plains and Clear Creek easily meet this standard. They were created pursuant to tribal law, specifically, "to aid in addressing issues of public health, safety, and welfare." AR 49. They are each wholly owned by the Tribal government, with all profits inuring to the benefit of the Tribe and its members. AR 49, 90, 122. Additionally, each entity is subject to the plenary control of the Tribe itself, with the Tribal Council having the authority to appoint and remove directors at will. AR 49–50.

Moreover, it is critical to note that every court that has addressed the issue thus far has held that tribal businesses engaged in online lending, similar to Great Plains and Clear Creek, enjoy arm-of-the-tribe status and are thus protected by tribal sovereign immunity, similar to other

types of tribal business. These cases, discussed in depth *infra*, have been issued in state and federal fora throughout the country—all reaching similar conclusions, and with facts directly on point with the facts of the instant case. By way of example, the California Court of Appeal, in *People v. Miami Nation Enterprises*, 166 Cal. Rptr. 3d 800, 816-17 (Cal. Ct. App. 2014), held that a tribal lending entity had sovereign immunity, precluding the enforcement of a state administrative subpoena, because it qualified as an arm of the tribe. Similar holdings have been issued by Colorado courts, in *Cash Advance v. State*, 242 P.3d 1099, 1111 (Colo. 2010), *remanded to Colorado v. Cash Advance*, No. 05CV1143, 2012 WL 3113527 (Colo. Dist. Ct. Feb. 13, 2012), and most recently, the United States District Court for the Eastern District of Pennsylvania, in *Bynon v. Mansfield*, No. 15-cv-00206, 2015 WL 2447159 (E.D. Pa. May 21, 2015).

In sum, as arms of a federally-recognized tribe, Plaintiffs Great Plains and Clear Creek are protected by the Tribe's sovereign immunity and the Defendants erred in disregarding this critical fact.

b. The Department Erred in Failing to Recognize that Tribal Sovereign Immunity Extends to Chairman Shotton, as a Tribal Official Acting in His Official Capacity and Within the Scope of His Authority

In addition to disregarding binding case authority related to immunity for tribal businesses, the Commissioner similarly erred in failing to even consider or address the application of tribal sovereign immunity to tribal officials acting in their official capacity. *See Romanella*, 933 F. Supp. at 167 ("The doctrine of tribal immunity extends to individual tribal

officials acting in their representative capacity and within the scope of their authority.") (citation and internal quotation marks omitted). Indeed, the law in this area is clear that so long as the tribal official is acting within his authority as conferred by tribal law, he or she is immune to suit. *Id.; see also Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (rejecting an attempt to sue individual tribal officials on grounds of tribal sovereign immunity because "the complaint d[id] not allege they acted outside the scope of their authority"); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) ("This tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority."). Determination of whether a tribal official is acting "within the scope of their authority" requires reference *only* to tribal law, as "actions allegedly violating state law are not necessarily outside the scope of a tribal official's lawful authority because that authority is defined by the sovereign tribe, not by state law." *Cash Advance*, 242 P.3d at 1112. These principles have been fully recognized in courts nationwide, including the courts of the State of Connecticut. *See Kizis v. Morse Diesel Int'l, Inc.*, 260 Conn. 46, 57–58 (2002).

Moreover, this cardinal principle of federal Indian law has been reaffirmed in the context of tribal online lending business as recently as May 2015 in *Mansfield*, 2015 WL 2447159. In *Mansfield*, the United States District Court for the Eastern District of Pennsylvania directly confronted the issue of tribal sovereign immunity as applied to a manager of a tribally owned online lending business. In that case, a customer of a tribal lending entity brought suit against a tribal lending business' manager, arguing that the manager lacked sovereign immunity because

he was sued as an individual. *Id.* at *1. The court rejected this argument and, in doing so, explained the breadth of tribal sovereign immunity—that it "extends to a tribe's subordinate economic entities and to tribal officials who are acting in their official capacity and within the scope of their authority." *Id.* at *2-3 (citation omitted). It did not matter that the customer pleaded the suit as one against the manager individually, because the tribe was the real party in interest. *See id.* at *3. Indeed, as the court explained, all of the plaintiff's factual allegations regarding the manager pertained to actions he took in his managerial role. *Id.* at *3–4. As such, the suit was barred by tribal sovereign immunity.[4]

Chairman Shotton's status as the elected leader of the Tribe acting in his official capacity mandates that the Final Decision be vacated on grounds of his sovereign immunity from the Department's administrative proceedings. The Department has consistently acknowledged Chairman Shotton's official role as the elected leader of the Tribe, *see* AR 4, as well as the Secretary/Treasurer of Great Plains and Clear Creek and has not (because it cannot) ever allege that Chairman Shotton acted outside of his official role. The Final Decision similarly makes no such finding or allegation.

To the contrary, it is undisputed that Chairman Shotton was appointed by the Tribe's governing body to serve as Secretary/Treasurer of Great Plains and Clear Creek, and in this capacity, he has at all times acted pursuant to the Tribal Council's directives. The Department has not even alleged—and it cannot show—that Chairman Shotton has acted outside of the

[4] Though *Mansfield* is at its core about tribal official immunity, the case also indicates why the proceedings against the tribal lending entities in this case—Great Plains and Clear Creek—must be dismissed under the doctrine of tribal sovereign immunity.

authority granted by the Tribal Council under Tribal law. Rather, all of the Department's factual allegations against Chairman Shotton pertain to his role as Secretary/Treasurer of the Plaintiff entities. *E.g.*, AR 5 ("As Chairman of the Tribe and Secretary/Treasurer of Great Plains, Shotton has direct knowledge of the Tribe's bank accounts . . . ."). As a result, the real party in interest is the Tribe. Thus, just as the manager of the tribal lending entity in the *Mansfield* case was held to be immune to suit, so too is Chairman Shotton protected by tribal sovereign immunity.

3. Tribal Sovereign Immunity From "Suit" Includes Immunity Against Administrative Proceedings, Such As "Contested Cases" Before the Department

The basic rationale of the Final Decision is that a "contested case" at the departmental level is not a "suit" for the purposes of sovereign immunity. AR 156–58. This reasoning has no support in law, logic, or policy, and in fact, it contradicts precedent from the United States Supreme Court, the lower federal courts, and Connecticut's state courts as well.

Tribal sovereign immunity protects against more than just civil litigation in a formally ordained court of law. It has always been acknowledged that immunity from suit is protection against all aspects of judicial process. *E.g.*, *Alltel*, 675 F.3d at 1104 (finding that compelled disclosure through third-party discovery was "the functional equivalent of a 'suit' against a tribal government"); *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (holding that the Quinault Nation was not subject to judicial processes relating to the prosecution of crimes

committed by individual tribal member). Whether sovereign immunity applies to a given proceeding does not depend on the forum, it depends only upon the identity of the parties.[5]

The case of *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), is instructive, as it holds that a sovereign may invoke its immunity in an administrative tribunal. The issue in the case was whether South Carolina's sovereign immunity barred a private claim for specific relief and damages that was filed with the Federal Maritime Commission. The Supreme Court held that such a proceeding was in fact barred by sovereign immunity. The Court reasoned that "the similarities between FMC proceedings and civil litigation are overwhelming." *Id.* at 759. Specifically, the Court noted that administrative proceedings before the commission "bear a remarkably strong resemblance to civil litigation in federal courts" in that the proceedings were overseen by an administrative law judge designated to hear the case and pleading practice and discovery were governed by "Rules of Practice and Procedure" quite similar to the Federal Rules of Civil Procedure. *Id.* In short, the agency adjudication was functionally equivalent to a suit in federal district court, so sovereign immunity applied. *See id.* at 760 ("Given . . . the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State.").

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[5] For instance, if a *federal* agency filed an administrative proceeding against a tribal entity, generally, the proceeding would not be barred by the Tribe's sovereign immunity. Of course, whether a substantive federal law actually *applies* to a tribal entity may be a closer question, as many federal laws do not apply to tribes. But the analysis of whether a federal law is applicable is entirely separate from the immunity analysis. *See, e.g., EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. 2001) (holding that a tribal housing authority was not immune to suit from the EEOC (a federal agency), but also holding that the substantive federal law (the Age Discrimination in Employment Act) did not apply against the tribe, so the EEOC still had no regulatory jurisdiction).

Furthermore, the reasoning of *Federal Maritime Commission* has been applied to a case involving tribal sovereign immunity. In 2007, the United States Department of Labor presided over an administrative action brought against the Viejas Band of Kumeyaay Indians. *In re: Jamal Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 07-074, ALJ No. 06-WPC-01 (Apr. 27, 2007). The administrative review board acknowledged that under *Federal Maritime Commission*, sovereign immunity may be invoked in administrative proceedings. It then proceeded to analyze the tribe's motion to dismiss on immunity grounds, because "[n]othing in existing sovereign immunity jurisprudence indicates that tribes cannot invoke sovereign immunity in agency adjudications such as this." *Id.* at *2.[6]

Existing Connecticut precedent is in accord with the reasoning of *Federal Maritime Commission*.[7] In *Figueroa v. C&S Ball Bearing*, the Connecticut Supreme Court observed that "[a]dministrative agencies . . . are tribunals of limited jurisdiction." 237 Conn. 1, 4 (1996). Looking to *Figueroa* (among other cases) as guidance, in *Department of Public Safety v. Freedom of Information Commission*, the Connecticut Court of Appeals held that the doctrine of mootness applies to administrative proceedings. 103 Conn. App. 571, 587-89 (2007). In doing so, the court discussed and relied upon the "similarity between administrative agencies and courts." *See id.* at 587. It particularly took note of the similarity between a "presiding officer" in

[6] The administrative review board ultimately denied the tribe's motion to dismiss, but only because it found that explicit language in the Clean Water Act abrogated tribal sovereign immunity. The Clean Water Act's abrogation of immunity, nor any other federal law, of course, is not relevant to the present administrative appeal.

[7] Other states have also applied principles of sovereign immunity in the context of state administrative proceedings. *See infra*, IV(B)(4)(a-d).

a contested case[8] and a civil trial court judge. *Id.* at 587–88 (observing that, under § 4-177b, "the presiding officer may administer oaths, take testimony under oath relative to the case, subpoena witnesses and require the production of records, physical evidence, papers and documents . . .").

With these precedents setting the appropriate framework, it is clear that a "contested case" before the Department is a suit for the purposes of sovereign immunity. The Connecticut Uniform Administrative Procedure Act describes a "contested case" as "a proceeding . . . in which the legal rights, duties or privileges of a party are . . . to be determined by an agency after an opportunity for [a] hearing . . . ." C.G.S.A. § 4-166(4). A contested case is remarkably similar to virtually all of the hallmarks of traditional civil litigation: the proceedings are overseen by a "presiding officer"—in effect, an administrative law judge. C.G.S.A. § 4-177b. The presiding officer has the authority to "administer oaths, take testimony under oath relevant to the case, subpoena witnesses and require the production of records, physical evidence, papers and documents to any hearing held in the case." *Id.* If the presiding officer's orders are not obeyed, he may apply to the Superior Court for an Order to Show Cause. *Id.* The proceedings are governed by "Rules of Practice" that are the practical equivalent of the rules of procedure governing civil litigation. These Rules of Practice set forth specific standards for issues such as notice, hearings, motion practice, discovery, ex parte communications, reconsideration, appeals, stays pending review, and more. *See* Conn. Agencies Regs. § 36a-1-1 to 36a-1-89. Indeed, the

[8] The "contested case" at issue in *Department of Public Safety v. Freedom of Information Commission* was an administrative proceeding before the Connecticut Freedom of Information Commission. Nonetheless, it was a proceeding governed by the Connecticut Uniform Administrative Procedure Act, similar to proceedings before the Department of Banking.

Department's own website states that "[p]rocedurally, a hearing is much like a court trial with evidence being submitted, testimony heard and witnesses examined and cross-examined." *See* Conn. Dep't of Banking, *Enforcement of Laws Administered by Department*.[9]

To be sure, the Final Decision does not deny that that a "contested case" and civil litigation are "strikingly similar," *see* AR 157, and it does nothing to explain why those striking similarities should be disregarded. The Commissioner merely opines in a footnote that he is "not persuaded that *Federal Maritime* is applicable here," and goes on to posit that the similarities between a contested case and civil litigation "do not make [a contested case] more than it is." *Id.* The Final Decision then cites *Black's Law Dictionary*, which apparently defines "suit" as "[a]ny proceeding by a party . . . against another in a court of law." *Id.* Emphasizing the words "court of law" in this definition, the Final Decision compares it with the definition of "administrative proceeding," which does not explicitly contemplate proceedings in a "court of law." *Id.* What the Final Decision fails to acknowledge is that this line of reasoning was flatly rejected by both the Connecticut courts and the U.S. Supreme Court. Indeed, Connecticut's Freedom of Information Commission is not technically a "court of law," but that did not prevent the Court of Appeals from holding that it was sufficiently analogous to a court for the purposes of the mootness doctrine. Likewise, the Federal Maritime Commission is surely not a "court of law" in the sense that it is not a federal district court. However, the Supreme Court found that this distinction was immaterial, because in every practical sense, the proceedings before the

[9] *See* http://www.ct.gov/dob/cwp/view.asp?a=2241&q=298158&dobNAV_GID=1661

commission were adjudicatory in nature. The same is true with regard to contested cases before the Department.

The Final Decision also appears to rely on the theory that the Department should be able to adjudicate a contested case against a tribal entity because this adjudication is separate from a proceeding in which the Department would actually attempt to enforce the resulting order. *See* AR 157. This distinction is inapposite, and again, *Federal Maritime Commission* is on point. In that case, the federal government raised essentially the same argument, pointing out that the Federal Maritime Commission's decisions were not "self-executing" because they could only be enforced through a federal district court order. The Supreme Court held that this was a "distinction without a meaningful difference" because, *inter alia*, if the sovereign chose to ignore the administrative adjudication proceedings, it would "substantially compromise its ability to defend itself at all." 535 U.S. at 762.

The same reasoning applies in this case. By not participating in the administrative adjudication, the respondent is subject to what is effectively a default judgment. *See* Conn. Agencies Regs. § 36a-1-31. When the respondent is a sovereign, regardless of whether the judgment will ultimately be enforceable, the potential for a default at the agency level necessarily subjects the sovereign to litigation in a formally ordained court of law. *See* AR 157 ("To the extent that I issue an order against a respondent and the respondent fails to comply with the order, I could refer the matter to the State Attorney General to enforce my order in the judicial forum.").

Of course, any final judgment of the Department would certainly be unenforceable due to the Tribe's immunity. *See Cayuga Indian Nation*, 761 F.3d at 220–21 (affirming district court enjoining foreclosure proceedings brought by Seneca County to collect certain *ad valorem* property taxes). However, the non-enforceability of an administrative order is immaterial, as tribal sovereign immunity is more than a "mere defense to liability," it is immunity against the *process* itself. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44 (1993)).

4. The Department's Prior Statements, and Precedent of at least Three Sister-States, Command the Recognition of Tribal Sovereign Immunity Under These Exact Circumstances

The Final Decision now on review does not present a novel issue; further demonstrating that vacatur of the Commissioner's Orders and reversal of the Final Decision is both necessary and appropriate. Indeed, cases have been decided by three other states—Colorado, California, and Minnesota—involving very similar facts and circumstances. Additionally, the position taken by the Department in a prior decision recognizes that tribal lending entities are immune from contested cases. Despite being made aware of this compelling authority the Final Decision fails to grapple with any of this precedent, and in the end, ignores it entirely.

a. Cash Advance & Preferred Cash Loans v. Colorado

The state courts of Colorado have already confronted the precise issue now before this Court. In *Cash Advance v. State of Colorado*, 242 P.3d 1099 (Colo. 2010), the Colorado Supreme Court was faced with an action brought by the State Attorney General to attempt to enforce administrative subpoenas issued to two tribally owned and operated lending entities. *Id.*

at 1103-04. The Court expressly held that "tribal sovereign immunity applies to state investigatory enforcement actions." *Id.* at 1102. Additionally, acknowledging that "sovereign tribes necessarily act through individuals," the Court further held that "tribal sovereign immunity protects tribal officers acting within the scope of their lawful authority, as defined by the tribe and limited only by federal law." *Id.*

The court remanded the action to allow for the trial court to apply the correct sovereign immunity principles. On remand, the lower court applied these principles and explained that "tribal immunity knows no territorial bounds. That is, in the absence of congressional limitations on tribal immunity, federally recognized Indian nations are immune from suit period, whether the subject of the suit is activity on or off Indian lands." *Colorado v. Cash Advance*, No. 05CV1143, 2012 WL 3113527, at *9 (Colo. Dist. Ct. Feb. 18, 2012). The court went on to find that administrative enforcement actions "are 'suits' to which federally-recognized Indian nations are immune," and that immunity applies to tribal business entities that are "arm[s] of the tribe." *Id.* at *9-10. The court easily found that the tribal lending entities at issue met the arm-of-the-tribe standard, as they were formed pursuant to tribal law, were owned and operated[10] by the tribe, and recognizing the immunity of the tribal lending entities would directly protect the *tribe*'s immunity, because, *inter alia*, the profits of the lending business were used to benefit the tribe. *Id.* at 13-17.

[10] The court noted that the tribal lending entities appeared to have contracted for the special expertise of non-Indian operators. However, the court explained that such contracting does not result in tribes losing their immunity. In fact, tribes are *encouraged* to engage outside contractors when the tribes themselves do not have the necessary expertise. *Colorado v. Cash Advance*, 2012 WL 3113527, at *16 (citing *Cabazon Band of Mission Indians v. Riverside Cty.*, 783 F.2d 900, 901 (9th Cir. 1986)).

b. California v. Miami Nation Enterprises

In another case involving the same tribes from the Colorado litigation—the Miami Tribe of Oklahoma and the Santee Sioux Nation—the California Court of Appeal likewise held that tribal online lending entities were immune to an administrative enforcement action taken by the California Department of Corporations. *People v. Miami Nation Enters.*, 166 Cal. Rptr. 3d 800 (Cal. Ct. App. 2014).

Generally tracking the analysis of the Colorado Supreme Court, the California Court of Appeal reasoned that the tribal online lending entities were entitled to sovereign immunity because they are arms of their respective tribe. Like here, their arm-of-the-tribe status was evident because each entity was created under tribal law, "as a subordinate unit of the tribe itself to provide for its economic development," and because the tribes clearly intended for the entities to be covered by tribal sovereign immunity. *Id.* at 814. The court summarized its findings, noting: "the Miami Tribe of Oklahoma and MNE are closely linked through method of creation, ownership, structure, control and other salient characteristics and, although the operations of MNE are commercial rather than governmental—itself an essentially neutral consideration after *Kiowa*—extension of immunity to it plainly furthers federal policies intended to promote tribal autonomy." *Id.* at 815.

c. In re Great Plains Lending

Plaintiff Great Plains has itself, on one occasion, had a state administrative enforcement action against it dismissed on the grounds of tribal sovereign immunity. In July 2012, the Minnesota Department of Commerce initiated action against Great Plains similar to the actions

recently taken by the Department, alleging violations of state usury laws. Following briefing at the administrative level, the agency and office of the Attorney General acknowledged the Tribe and Great Plains' sovereign immunity from the administrative proceedings, which was reaffirmed through the administrative law judge's dismissal of the action shortly thereafter. AR 50.

d. In re CashCall, Inc.

Finally, the Department's current actions are at odds with its prior position interpreting immunity in the context of prior administrative actions. In March 2013, the Department initiated a contested case against CashCall, Inc. ("CashCall"), alleging that it had violated various Connecticut usury laws. *In re CashCall, Inc.*, Findings of Fact, Conclusions of Law and Order (Ct. Dept. of Banking Feb. 4, 2014). CashCall serviced loans originated by Western Sky Financial, LLC ("Western Sky"), an entity owned by an individual member of the Cheyenne River Sioux Tribe, Martin Webb, and organized under the laws of South Dakota.

In the course of the contested case, CashCall raised the defense of sovereign immunity, arguing that simply because Webb was a member of an Indian tribe, the privileges and immunities of the tribe extended to Western Sky, an individually-owned and state-organized entity. *Id.* at *16.

The Department appropriately rejected the sovereign immunity defense. In doing so, the Department expressly took into account that "[t]here is no evidence in the record that Western Sky Financial, LLC—let alone CashCall, Inc.—was an Indian tribe or that the Cheyenne River

Sioux Tribe sanctioned or was otherwise involved with the loans." *Id.* at *17. Thus, the Department found that "[n]either CashCall, Inc. nor Western Sky Financial, LLC could legally claim the immunity extended to an Indian tribe. *To conclude otherwise would do a disservice to legitimate Native American lending operations*." *Id.* (emphasis added).

Unlike Western Sky, it is undisputed that Plaintiffs Great Plains and Clear Creek are established pursuant to tribal law, wholly owned and controlled by a federally recognized Indian tribe, and regulated by a tribal regulatory agency. To use the words of the Department, they are *legitimate Native American lending operations*, and are, therefore, entitled to the protection of tribal sovereign immunity, as is Chairman Shotton, who, at all times acted in his official capacity and pursuant to Tribal law. To conclude otherwise would require this Court to depart not only from binding precedent but from the cogent reasoning set forth by every other tribunal that has addressed this issue.

C. In Issuing a Final Order Simultaneous to the Ruling On the Motion to Dismiss, the Commissioner Violated Plaintiffs' Right to Due Process

In challenging the Department's jurisdiction during the underlying administrative proceedings, Plaintiffs expressly reserved their right to contest the proceedings against them on the merits. *See, e.g.*, AR 146. Nevertheless, in denying the Plaintiffs' motion to dismiss and issuing the Final Decision, the Commissioner also issued an Order to Cease and Desist and Order Imposing Civil Penalty ("Order"). AR 159. The Order purported to resolve the merits of the case, as it found that Plaintiffs were subject to, and in violation of, Connecticut lending law. AR

164. In resolving the merits of the case, simultaneously, with the preliminary jurisdictional issue, the Department violated Plaintiffs' right to procedural due process.

The Fourteenth Amendment to the U.S. Constitution "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Constitution of the State of Connecticut mirrors this protection, providing that "[n]o person shall be . . . deprived of life, liberty or property without due process of law . . . ." Conn. Const. art. I, § 8. Of course, in the present case, Plaintiffs were fined a substantial sum of money, totaling $1.5 million. Moreover, the Order purports to restrain their ability to engage in certain business activities. Thus, it is clear that the Order is an attempt to deprive Plaintiffs of liberty and property interests that are protected by the both the state and federal constitutions.[11]

In order to meet the baseline constitutional standard, administrative adjudications "must be conducted in a fundamentally fair manner so as not to violate the rules of due process." *Bryan v. Sheraton–Hartford Hotel*, 62 Conn. App. 733, 740 (2001) (citation omitted). Indeed, the State must provide "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.*

Given the Plaintiffs' unique position and their challenge to the administrative proceedings on the basis of sovereign immunity, it was simply infeasible to participate in

[11] The analysis is essentially the same regardless of whether a procedural due process claim is raised under the U.S. Constitution or the Connecticut Constitution. *See Lee v. Bd. of Educ. of City of Bristol*, 181 Conn. 69, 71–72 (1980) ("Article one, section eight of our state constitution contains the same prohibition and is given the same effect as the fourteenth amendment to the federal constitution. . . . Our analysis of the plaintiff's claim, therefore, encompasses both provisions.").

proceedings on the merits while these jurisdictional issues were pending. Notwithstanding this, the Defendants' simply proceeded and issued a decision on the merits of the case without affording the Plaintiffs the opportunity to present their non-jurisdictional arguments. This was plainly in violation of Plaintiffs' procedural due process rights, and accordingly, is an appropriate basis for vacatur.

V. CONCLUSION

For the reasons set forth herein, the Defendants' erred as a matter of law in the issuance of the Final Decision and corresponding Order Imposing Civil Penalties, and, consequently, the Court should appropriately and necessarily vacate these actions.

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed and e-mailed, postage prepaid, to the following counsel of record this 10th day of August, 2015.

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Unreported Cases

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Breanda Taylor BYNON a/
k/a Breanda Bynon, Plaintiff
v.
Craig MANSFIELD, et al., Defendants.

Civil Action No. 15–00206.
| Signed May 21, 2015.

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MEMORANDUM

PAPPERT, District Judge.

***1** Plaintiff Breanda Taylor Bynon ("Bynon") filed this lawsuit against several parties in connection with an allegedly usurious loan she received by way of an internet web site. (*See* Sec. Am. Compl. ¶ 1 ("SAC"), Doc. No. 13.) Sovereign Lending Solutions, LLC ("Sovereign"), a title lending company established under the tribal law of the Lac Vieu Desert Band of Lake Superior Chippewa Indians ("LVD"), operated the web site. (*Id.* ¶¶ 14, 24.) Bynon has not sued LVD or Sovereign. Instead, she has sued Craig Mansfield ("Mansfield"), who allegedly was "a manager in charge of day-to-day operations" at Sovereign and authorized the loan to Bynon. (*Id.* ¶¶ 3, 4.) Before the Court is Mansfield's motion to dismiss Bynon's SAC pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure. The Court grants the motion because under the facts alleged in the SAC, Mansfield is immune from suit under the doctrine of tribal sovereign immunity. The Court therefore lacks subject matter jurisdiction over Bynon's claims against Mansfield. [1]

Courts address issues of tribal sovereign immunity pursuant to motions to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).*E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir.2001) ("Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed.R.Civ.P. 12(b)(1)") (citation omitted); *cf. United States v. Gov't of Virgin Islands*, 363 F.3d 276, 284 (3d Cir.2004) ("Eleventh Amendment immunity is relevant to jurisdiction...."). When a defendant challenges the court's subject matter jurisdiction, the plaintiff, as the party asserting jurisdiction, bears the burden of establishing jurisdiction. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977). Furthermore, as Mansfield presents a factual attack on the Court's subject matter jurisdiction, the Court may consider extrinsic materials and need not presume that Bynon's factual allegations are true. *Id.*

Indian tribes enjoy sovereign immunity unless that immunity has been clearly waived by the tribe or unequivocally abrogated by Congress. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *see also Michigan v. Bay Mills Indian Cmty.*, —— U.S. ——, ——, 134 S.Ct. 2024, 2030, 188 L.Ed.2d 1071 (2014). This immunity extends to a tribe's subordinate economic entities and to tribal officials who are acting in their official capacity and within the scope of their authority. *See, e.g., Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1195 (10th Cir.2010). It does not protect individual tribal members more generally. *See Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

Here, Bynon does not contend that LVD has waived or Congress has abrogated Sovereign's immunity. To the contrary, she acknowledges that she did not sue LVD and Sovereign because they are "protected from liability under the doctrine of tribal immunity."(SAC ¶ 14.) Nevertheless, Bynon insists that Mansfield is a proper defendant because "[t]ribal immunity does not apply to individuals."(Opp'n Br. at 9, Doc. No. 18.) [2] She asserts that Mansfield "is the real and substantial party in interest" and "a judgment under [the SAC] will operate only against Mr. Mansfield ."(*Id.* at 10.)

***2** A fair reading of the SAC, however, shows that Bynon's dispute is with Sovereign, not with Mansfield individually. All of Bynon's factual allegations regarding Mansfield pertain to his role as manager of Sovereign. There are no facts implicating Mansfield in any misconduct outside of his employment with Sovereign. Without factual allegations to state a plausible claim against Mansfield personally, Bynon's assertion that she has sued Mansfield only in his individual capacity is without weight. *See, e.g., Grace v. Thomas*, No.

92–cv–70253, 2000 WL 206336, at *3 n. 2 (E.D. Mich. Jan 3, 2000) ("The Court observes that Plaintiffs have named the individual Defendants in their individual capacities; however, upon careful review of the pleadings, it is clear as a matter of law, that the individuals were not acting in their personal capacities. Plaintiffs failed to show any evidence that the individual Defendants were not exercising the powers delegated to them by the sovereign or that the conduct in which they engaged was unrelated to their job duties."); *see also Murgia v. Reed,* 338 F. App'x 614, 616 (9th Cir.2009) ("If the Defendants were acting for the tribe within the scope of their authority, they are immune from Plaintiff's suit regardless of whether the words 'individual capacity' appear on the complaint.").

Bynon's arguments in opposition to Mansfield's motion to dismiss demonstrate that she has sued Mansfield in an attempt to circumvent LVD and Sovereign's tribal immunity. Bynon argues that Mansfield is individually liable because he "directed *Sovereign* to make loans in Pennsylvania," "authorized *Sovereign's* loan to [Bynon]," and "operated *Sovereign* through the collection of unlawful debt."(Opp'n Br. at 10–11 (emphasis added).) She further states that she became "obligated to *Sovereign*" in Pennsylvania and that *Sovereign's* loan was usurious under Pennsylvania law. (*Id.* at 15 (emphasis added).) Despite Bynon's protestations to the contrary, it is clear that Sovereign, not Mansfield, is the party with which Bynon has a dispute. *See, e.g., Chayoon v. Chao,* 355 F.3d 141, 143 (2d Cir.2004) ("[Plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority.").

Finally, Bynon argues that Mansfield does not enjoy tribal immunity because he allegedly acted beyond the scope of his lawful authority. Even assuming that Mansfield acted beyond the scope of his lawful authority, however, he would lose immunity only for purposes of prospective injunctive relief. *See Bay Mills,* 134 S.Ct. at 2035 ("[T]ribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct."); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.,* 177 F.3d 1212, 1225 (11th Cir.1999) ("[T]ribal officers are protected by tribal sovereign immunity when they act in their official capacity and within the scope of their authority; however, they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority."). Here, Bynon requests an award of monetary damages against Mansfield. Her argument that Mansfield does not enjoy immunity because he allegedly acted beyond the scope of his lawful authority is therefore unfitting.

***3** An appropriate order follows.

ORDER

AND NOW, this 21st day of May, 2015, upon consideration of Defendant Craig Mansfield's Second Motion to Dismiss (Doc. No. 16), Plaintiff Breanda Taylor Bynon's Opposition (Doc. No. 18), and Mansfield's Reply (Doc. No. 19), it is **ORDERED** that the Motion is **GRANTED.**Plaintiff's claims against Mansfield are **DISMISSED** for lack of subject matter jurisdiction.

All Citations

Slip Copy, 2015 WL 2447159

Footnotes

1 Because the Court lacks subject matter jurisdiction over Bynon's claims against Mansfield, it does not address Mansfield's arguments for dismissal pursuant to Rules 12(b)(2) and 12(b)(6).

2 Citations refer to the page numbers assigned by the Court's CM/ECF system.

End of Document

In the Matter of:

JAMAL KANJ,

COMPLAINANT,

v.

VIEJAS BAND OF KUMEYAAY INDIANS,

RESPONDENT.

ARB CASE NO. 06-074

ALJ CASE NO. 06-WPC-01

DATE: April 27, 2007

BEFORE THE ADMINISTRATIVE REVIEW BOARD:

Appearances:

For the Complainant:
Bryan Rho, Esq., *The McMillan Law Firm, APC,* LaMesa, California

For the Respondent:
George S. Howard, Esq., *Pillsbury Winthrop Shaw Pittman,* San Diego, California

ORDER OF REMAND

On August 5, 2005, the Complainant, Jamal Kanj, filed a complaint in which he alleged that the Respondents, Viejas Band of Kumeyaay Indians (Band or tribe), terminated his employment as Director of Public Works and Deputy Tribal Government Manager because he reported high levels of fecal coliform in Viejas Creek to the Respondent's Tribal Council. He averred that the termination from employment and other adverse employment actions violated the whistleblower protection provisions of the Federal Water Prevention Pollution Control Act (Clean Water Act, Act).[1]

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[1] 33 U.S.C.A. § 1367 (West 2001).

The Band moved for summary decision, arguing that tribal sovereign immunity barred the suit. On December 19, 2005, a Labor Department Administrative Law Judge (ALJ) denied the motion, and on March 9, 2006, the ALJ granted the Band's motion to certify the issue of its sovereign immunity to the Administrative Review Board for interlocutory review. The Band then petitioned the Board for interlocutory review of the ALJ's order denying summary decision.[2]

On August 24, 2006, we granted the petition for interlocutory review on the question whether Congress abrogated the Band's sovereign immunity from suit by a private citizen pursuant to 33 U.S.C.A. § 1367 (West 2001).

JURISDICTION AND STANDARD OF REVIEW

"[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 416 (2001). "Although the [Supreme] Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 759 (1998).

Sovereign immunity from suit may be invoked not only in Article III courts, but also before court-like "federal administrative tribunals." *Federal Mar. Comm'n v. South Carolina*, 535 U.S. 743, 761, 1875-76 (2002). Environmental whistleblower adjudications in the Labor Department's Office of Administrative Law Judges and the Administrative Review Board are sufficiently analogous to Article III trial proceedings that "a state is generally capable of invoking sovereign immunity in proceedings initiated by a private party under 29 C.F.R. part 24 [the environmental whistleblower regulations]." *Rhode Island v. United States,* 304 F.3d 31, 46 (1st Cir. 2002) (*Migliori*). Nothing in existing sovereign immunity jurisprudence indicates that tribes cannot invoke sovereign immunity in administrative adjudications such as this.[3]

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[2] The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the WPCA to the Administrative Review Board. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Secretary's delegation of authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." *Id.* at 64,273.

[3] In *Migliori*, the First Circuit directly decided the question whether state sovereign immunity may be used to bar administrative adjudications like ours. As far as our research shows, no court has squarely confronted the question whether Indian sovereign immunity may be raised in our proceedings. *See e.g., Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1180 (10th Cir. 1999)(court need not decide whether the Council could assert its immunity in the administrative proceeding, since court finds that "the SDWA has explicitly abrogated tribal immunity in any case"). And the Supreme Court has said that "the immunity

The standard of review on summary decision is de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003). The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e). Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision" as a matter of law. 29 C.F.R. §§ 18.40, 18.41 (2006); *Mehen v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-04, slip op. at 2 (ARB Feb. 24, 2005). If the non-moving party fails to show an element essential to his case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Rockefeller v. U.S. Dep't of Energy*, ARB No. 03-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

DISCUSSION

The Band seeks summary decision on grounds of tribal sovereign immunity. The ALJ denied the motion on the ground that Congress abrogated tribal sovereign immunity from suit based on the whistleblower provision of the Clean Water Act and on the ground that immunity from suit based on self-government in purely intramural matters did not arise. We affirm the ALJ on both counts.

1. Congress abrogated tribal immunity from Clean Water Act whistleblower complaints

In *Erickson v. EPA*, ARB Nos. 03-002, 03-003, 03-004, 03-064; ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18, slip op. at 10-12 (ARB May 31, 2006), we held that we were bound by the opinion of the Office of Legal Counsel (OLC) that Congress waived federal sovereign immunity from suit under the whistleblower provisions of the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003), and the Clean Air Act, 42 U.S.C.A. § 7622 (West 2003). OLC concluded that Congress expressly waived sovereign immunity from whistleblower suits by (1) permitting an aggrieved employee to file a complaint against "any person," and (2) defining the term "person" in the statutes' general definitions sections to include "each

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possessed by Indian tribes is not coextensive with that of the States," and "there are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. *Kiowa Tribe,* 523 U.S. at 755, 758. However, inasmuch as we conclude that Congress did abrogate tribal immunity from suit for violations of the Clean Water Act's whistleblower provision, we need not decide the effect of the *Migliore* decision on these proceedings.

department, agency, and instrumentality of the United States."[4] 42 U.S.C.A. §§ 6971(b), 6903(15); 42 U.S.C.A. §§ 7622(b)(1), 7602(e) (OLC letter attached).

The Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), argues in his amicus brief that OLC's reasoning compels the conclusion that Congress abrogated Indian tribal immunity from whistleblower suits under the Clean Water Act. Congress expressed that intention by (1) permitting an aggrieved employee to file a complaint against any "person," 33 U.S.C.A. § 1367(a), and (2) defining the term "person" in the statute's general definitions sections to include "municipalities," *id.* at § 1362(5), which in turn, includes "an Indian tribe or an authorized Indian tribal organization, *id.* at § 1362(4)." Amicus Br. at 6-10.

We agree that the framework OLC applied to whistleblower claims against the federal government under the SWDA and the CAA must be applied to whistleblower claims against sovereign tribes under the Clean Water Act. Under this analysis, we conclude that Congress abrogated tribal immunity from whistleblower suits under the Clean Water Act.

The Band argues that an abrogation analysis that focuses only on the text of the whistleblower provision and the general definitions provision is too narrow. It fails to account for the fact that Congress used much more explicit language elsewhere in the Clean Water Act to address tribal sovereignty, viz., the Administrator is "authorized to treat an Indian tribe as a State" for enumerated purposes, which do not include the whistleblower provision. 33 U.S.C.A. § 1377(e) (West 2001). From this, the Band argues that "[a]n elementary principle of statutory construction is that a section of a statute dealing with a specific topic (in this case, the sovereign immunity of tribes) governs or takes precedence over an interpretation based on a general provision of the statute (such as the definitional provisions in § 1362(4) and (5)[])]." Band Br. at 7.

The difficulty with this argument is that both the Clean Air Act and the Solid Waste Disposal Act include provisions that waive federal sovereign immunity with language much more explicit than the whistleblower text. 42 U.S.C.A. § 7418(a) (West 2003) (CAA) ("Each department, agency, and instrumentality of the executive, legislative, and judicial branches, of the Federal Government . . . shall be subject to, and comply with, all Federal . . . requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity"). 42 U.S.C.A. § 6961(a) (West 2003) (SWDA) (same). These provisions would support the same argument the Band makes under the Clean Water Act – that the contrast between text concerning federal

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[4] The OLC also considered the Clean Water Act and concluded that Congress did not waive federal sovereign immunity from suit under the whistleblower provision of that statute, 33 U.S.C.A. § 1323 (West 2001). Although the statute permits whistleblower claims against any "person," 33 U.S.C.A. § 1367(a), the statute's definition of "person" does not include the United States, *id.* § 1362(5).

compliance responsibilities and text concerning whistleblower liability shows that Congress drafted differently when it wanted to eliminate sovereign immunity than when it did not. In other words, the textual differences bespeak a difference in intent. But OLC's analysis did not treat the more explicit waivers in the CAA and SWDA as evidence of what Congress did not intend in the whistleblower provisions. Nowhere in its argument does the Band suggest any reason why the OLC analysis would look upon the explicit abrogations in the Clean Water Act differently.

The Band asserts that we should disregard the OLC opinion. "While opinions by the OLC may provide guidance for executive branch agencies, the Board here is performing an adjudicative function, and is not bound by an opinion." Band Reply Br. at 3. However, the Band offers no authority for its argument and makes no response to the authorities cited by amicus in support of the proposition that OLC opinions bind the Secretary of Labor and, in turn, the Board. Amicus Br. at 9 n.6. Thus, we have no basis for deviating from our conclusion in *Erickson* that we are bound by the OLC opinion. *Erickson,* slip op. at 10-12. Accordingly, we reject the Band's assertion of sovereign immunity from suit under § 1367 of the Clean Water Act.

2. Tribal immunity based on purely intramural governance does not apply

The Band also argued that it was immune from suit under subsection 1367 because Kanj's duties were inherently governmental, and the Ninth Circuit has held that federal statutes of general applicability that are silent about coverage of Indian tribes, will not apply to tribes if they concern "exclusive rights of self-governance in purely intramural matters." *See EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1078-80 (9th Cir. 2001) (following *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Band Opening Br. at 11.

The ALJ rejected this argument because the Clean Water Act is not silent about coverage of Indian tribes. Congress specifically referred to Indian tribes twice. The whistleblower provision applies to "any person in violation of paragraph (1)" – the prohibition on discriminating against employees because they raise environmental safety concerns. *Id.* § 300j-9(i)(2)(A). The general definitions section of the Act defines the term "person" to include municipalities, which in turn includes "Indian tribes." 42 U.S.C.A. § 300f(12) and (11). And § 1377(e) authorizes EPA "to treat an Indian Tribe as a state" under certain circumstances. *See Kanj v. Viejas Band*, ALJ No. 2006-WPC-01 (ALJ Dec. 19, 2005) (order denying Respondent's motion for summary decision).

Additionally, as the ALJ pointed out, the parties are in disagreement on whether Kanj's duties are purely intramural. Thus, he concluded, "even if the statute were construed as one of general applicability, based on this dispute of fact summary judgment is inappropriate." *Id.* We concur.

CONCLUSION

Accordingly, we hold that the ALJ did not err in denying the Tribe's motion for summary decision based on tribal sovereign immunity and we **REMAND** this case for further proceedings consistent with this opinion.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 520 W. Colfax Ave. Denver, Colorado 80204	
STATE OF COLORADO, et al., Applicants, v. CASH ADVANCE, et al., Respondents.	Case No. 05CV1143 COURTROOM 5B
AMENDED ORDER	

For the reasons articulated below, and based on the Colorado Supreme Court's remand in *Cash Advance v. State ex rel. Suthers*, 242 P.3d 1099 (Colo. 2010), and on the hearing I conducted on November 22, 2011 in accordance with that remand, the motions to dismiss filed on July 20, 2005 and November 16, 2006, by Respondents Miami Nations Enterprises, Inc., and SFS, Inc., are GRANTED, the administrative subpoenas issued by Applicants to those Respondents are HEREBY QUASHED, the contempt citations aimed at those Respondents are HEREBY DISCHARGED and the bench warrants for the arrest of those Respondents' tribal officers are HEREBY VACATED.[1]

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[1] This Amended Order corrects my inadvertent inversion of the 1% fee discussed in Part IV, contained in my original Order dated February 13, 2012. I apologize to counsel and their clients for that mistake. Although this correction makes the "sham" issue closer as a factual matter, I persist in my conclusions that the State has not proved that the tribal

I. INTRODUCTION

In 2003, the Colorado Attorney General's Office began getting complaints from Colorado residents about two different online businesses making so-called "payday loans." The complainants reported that the two websites through which they obtained these loans listed the businesses as "Cash Advance" and "Preferred Cash Loans," respectively, and listed very similar addresses for both businesses in Carson City, Nevada. Cash Advance's address was listed as "2533 North Carson Street, Suite 4976," while Preferred Cash Loans was listed as "2533 North Carson Street Suite 5024." No entities with these names or any individuals or entities doing business as these names were licensed to make payday loans in Colorado, as required by § 5-3.1-116 of the Colorado Deferred Deposit Loan Act, §§ 5-3.1-101 et seq. ("the DDLA"). It also appeared from the consumer complaints that these two online payday loan businesses had committed several substantive violations of the DDLA, including violating the prohibition against renewing loans, contained in § 5-3.1-108(1).

Accordingly, in November 2004, the Attorney General's Office, on behalf of Laura Udis, the administrator of the Colorado Uniform Commercial Code (collectively, "the State"), sent cease and desist letters to the two businesses at their Nevada addresses. Cash Advance never responded. Preferred Cash Loans did respond, indicating that it "adjusted the consumer's account and therefore considered the matter closed." Verified Ex Parte Application, filed February 14, 2005, ¶ 8, ff. 000015.[2]

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entities are currently sham owners of these payday loan businesses, and that even if they were that characterization would not displace their tribal immunity.

[2] "ff. ____" refers to the Bates-stamped pages of the official appellate record.

The State then determined that there was probable cause to believe both Cash Advance and Preferred Cash Loans had engaged and/or were still engaging in violations of the DDLA and the Colorado Consumer Protection Act, §§ 6-1-101 et seq., and therefore directed that administrative subpoenas be issued and served on both businesses pursuant to §§ 5-6-106(1) and 6-1-108. Those administrative subpoenas were issued on January 7, 2005, each listing the targets, respectively, as Cash Advance and Preferred Cash Loans.

The administrative subpoenas directed these two businesses to produce, among other things, their "articles of incorporation, bylaws, corporate or other minutes, corporate reports, trade name registrations or other organizational documents," all documents relating to their "officers, directors, owners, members or other principals." and all documents relating to their "licenses, permits, notifications, bonds, authorities or other filings [they] received from or submitted to any governmental or regulatory authority." Administrative Subpoenas, Exhibits A, ¶¶ 1, 2 and 4, at ff. 000009 and 000022. The administrative subpoenas also asked for many other categories of documents related directly to the payday loan businesses, including any pleadings from any legal proceedings, any consent decrees, training and operating manuals, advertising and marketing materials, Internet materials, and, perhaps most broadly, "all documents constituting, concerning, reflecting, referring, or relating to all loans you offered or made to any Colorado consumer." *Id.* at ¶ 9, ff. 000010 and 000023. The administrative subpoenas directed Cash Advance and Preferred Cash Loans to provide these documents to the State by January 25, 2005.

At these early stages of the investigation the State did not know who or what these target businesses were, that is, whether they were entities or individuals or other entities doing business as these names. All the State knew was that Colorado consumers had obtained payday loans from websites that used the names "Cash Advance" and "Preferred Cash Loans," and the subpoenas

were therefore directed to these two target names. The subpoenas were served in Nevada, by the Carson City Sheriff, at the Carson City addresses that had appeared on the websites, and to which the cease and desists letters had been sent. They were served on a person named Jamie Webster, described in the returns of service as the businesses' "Manager." ff. 000012 and 000025.

Neither of the targets responded to the subpoenas, and the State brought an action seeking orders enforcing the subpoenas pursuant to §§ 5-6-104 and 6-1-109(1).[3] On February 4, 2005, my predecessor in Courtroom 280 entered Orders under §§ 5-6-106(3) and 6-1-109(1) enforcing the subpoenas.[4] Those enforcement Orders directed Cash Advance and Preferred Cash Loans to respond to the administrative subpoenas within seven days after service of the Order, on pain of contempt. Although the enforcement Orders by their terms purported to allow service of them by certified mail, the State also served them personally, again at the Carson City addresses and again on Jamie Webster as "Manager." ff. 000034 and 000042.

Neither Cash Advance nor Preferred Cash Loans responded to the enforcement Orders, and on June 20, 2005, the State filed verified motions for the issuance of contempt citations. By this time, however, the State had discovered that the Nevada addresses for these two businesses corresponded to the registered addresses of two Nevada corporations. The Cash Advance address was the registered address of a Nevada corporation called C.B. Services Corp. ("CBSC"). The Preferred Cash Advance address was the registered address of a Nevada corporation called Executive Global Management, Inc. ("Executive"). The State therefore sought contempt citations

[3] Actually, the State brought separate actions against the entities—05CV1143 against Cash Advance and 05CV1144 against Preferred Cash Loans. The two actions were consolidated into 05CV1143 by Order dated July 22, 2005, ff. 000076.

[4] This case is a Courtroom 280 case. This Order is captioned in Courtroom 5B because I moved to that criminal courtroom in January 2012. Because I presided over the tribal immunity hearing in November 2011, Judge Elliff, who now presides in Courtroom 280, and I agreed that I should retain this case for the limited purpose of ruling on tribal immunity and related issues.

not just against Cash Advance and Preferred Cash Loans but also against CBSC, Executive, and Executive's president, James Fontano.[5] ff. 000030 and 000038.

My predecessor issued both citations on June 20, 2005, returnable to July 22, 2005. ff. 000046-51. The State served the citations in Nevada on CBSC, Executive and Fontano, all by serving Laughlin & Associates, which the returns describe as these targets' "Resident Agent." ff. 188, 189, 204 and 205.

On July 20, 2005, two days before the return date, two tribal corporations—Miami Nations Enterprises, Inc. ("MNE") and SFS, Inc. ("SFS") (together, "the tribal entities")—responded to the contempt citations with the subject motions to dismiss, claiming that they do business as Cash Advance and Preferred Cash Loans, respectively, that they own the payday businesses targeted by the administrative subpoenas, that they are wholly-owned subdivisions of federally-recognized Indian tribes, and that they are therefore immune from the subpoenas and enforcement orders under the doctrine of tribal sovereign immunity.[6] In particular, MNE claims it is an arm of the Miami Tribe of Oklahoma, a federally-recognized Indian nation of the Miami people. SFS claims it is an arm of the Santee Sioux Nation, a federally-recognized Indian nation of the Santee Sioux people.

For almost two years the parties then wrangled over the question of whether the tribal entities could be forced to produce some preliminary information bearing on the tribal immunity issue. The tribal entities took the position that they were immune even from these preliminary requests, but nonetheless voluntarily produced certain documents which they claimed demonstrated their immunity, including tribal constitutions, ordinances, resolutions and licenses.

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[5] The State originally also sought a citation against Mr. Fontano as president of CBSC, but later admitted he was only president of Executive.

After a hearing on March 5, 2007, my predecessor concluded, in a ruling from the bench, that tribal immunity did not apply at all to administrative subpoenas to investigate tribal activities conducted outside tribal lands. He therefore found that the tribal entities were not immune from the subject administrative subpoenas, denied the motions to dismiss, and issued bench warrants for the arrest of the chief executive officer of MNE and the treasurer of SFS (on whom alias citations had since been served). The tribal entities filed an interlocutory appeal, and my predecessor stayed the bench warrants pending the appeal.

The court of appeals reversed, concluding that tribal immunity does in fact cover administrative subpoenas directed to activities off tribal lands. *State ex. rel. Suthers v. Cash Advance*, 205 P.3d 389 (Colo. App. 2008). It remanded the matter for a determination of whether these two tribal entities are "arms" of their respective Indian nations, setting forth an eleven-part test to make that determination, a test it borrowed from a dissent in a Washington state case. 205 P.3d at 405-406, *citing Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1288 (Wash. 2006) (Johnson, J., dissenting). The court of appeals also addressed four other issues to guide the trial court on remand. It held: 1) the trial court had broad authority to compel the tribal entities to produce information relevant to the tribal immunity issue; 2) the individual officers of the tribal entities are not immune even if the tribal entities themselves are immune; 3) the trial court must consider whether the tribes waived tribal immunity for their entities in any fashion, whether by tribal resolution, contracts with consumers or representations made to any third-party; and 4) the State has the burden on remand to prove, by a preponderance of the evidence, that the tribal entities are not immune.

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[6] Actually, this initial motion to dismiss was filed only by MNE. SFS first entered its appearance in the case in a joint "Response to Applicants' Motion to Compel," filed February 27, 2006. Both tribal entities joined in the second motion to dismiss filed November 20, 2006.

The parties cross-petitioned for certiorari. The State sought review of the court of appeals' conclusions that tribal immunity applies to these administrative subpoenas and that the State has the burden of disproving immunity. The tribal entities sought review of the balance of the court of appeals' conclusions (broad discovery, use of the 11-part test for being a tribal "arm," officer immunity, and waiver). The Colorado Supreme Court granted certiorari on each of these six issues.[7]

It concluded: 1) tribal immunity does apply to administrative subpoenas directed at activities off tribal lands; 2) whether the tribal entities are immune depends on whether they are "arms" of the tribes, which in turn is to be determined by a three-part test; 3) officers of immune tribal entities are immune for acts they take within the scope of their tribal authority; 4) the State has the burden of proving, by a preponderance, that the tribal entities are not immune; 5) waivers of tribal immunity must be explicit and unequivocal, and here any agreements the tribal entities had with consumers did not waive tribal immunity as to this investigative action; and 6) the tribal entities have waived immunity for the limited purpose of determining whether they are arms of the tribe, and the State may therefore conduct additional threshold discovery but only to the extent that that discovery is tailored to fall within this limited waiver. The Court remanded the case for a determination of whether the State is entitled to additional discovery under the limited waiver holding, and then whether the tribal entities are arms of the tribes under the announced three-part test.

[7] The Court actually granted certiorari on seven issues, breaking up the burden of proof issue into two parts: whether the court of appeals erred in assigning the burden to the State and whether the court of appeals erred in setting that burden at a preponderance. 242 P.3d at 1105-06, nn. 6 & 7.

On remand, the State sought, and the tribal entities resisted, additional discovery. I granted those requests in part and denied them in part, based on findings I made about whether the additional discovery was tailored to the limited waiver. Order dated August 5, 2011.

At the hearing held on November 22, 2011, neither side called any witnesses, but both sides offered additional exhibits, including those the State obtained in the new round of discovery. I ruled on objections to those additional exhibits, admitting some and excluding others. Counsel for the parties then proceeded to make arguments on whether, given all the admitted exhibits, new and old, the State had met its burden of proving that either of the tribal entities was not an "arm" of its respective tribe, under the three-part test. For the reasons set forth below, I agree with the tribal entities that the State has not met its burden of proving that the tribal entities are not arms of their tribes. I also find that the tribal entities have not waived their immunity. I therefore conclude that the tribal entities are immune, and thus quash the administrative subpoenas and discharge the contempt citations.

II. TRIBAL IMMUNITY GENERALLY

The Court discussed at length the origins of tribal immunity, and the general contours of its application. I summarize that discussion here only to put my findings and conclusions into context.

Indian tribes were of course governing themselves in the New World long before the territorial claims of European colonial powers. Their sovereignty was recognized, if inconsistently and seldom with any fidelity, not just by those European powers but also by the nascent United States. Indeed, the United States Constitution expressly recognizes the existence of Indian tribes.[8]

[8] There are three references to Indians in the Constitution. The first is in the apportionment section of Article I, which provides that "Indians not taxed" are not to be counted for apportionment purposes. U.S. CONST., art. I, § 2, cl. 3. The second reference is in the Commerce Clause, which empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST., art. I, § 8, cl. 3. The third reference is in the

The United States Supreme Court held as early as 1831 that congressionally-recognized Indian nations retained their sovereignty even as those nations' ancestral lands became absorbed into the United States. *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 (1831).

Like all sovereignty vis-à-vis the United States, Indian sovereignty depends entirely on whether Congress has recognized a tribe as a sovereign nation, and whether it continues to do so. Any Indian nation's tribal immunity could be limited or even completely abrogated tomorrow if Congress chose to do so, though such limitations or abrogation must be express and cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Like any sovereign, congressionally-recognized Indian nations are immune from suit, meaning that they can be sued in the courts of the United States or in any state courts only if Congress expressly permits such a suit or the Indian nation waives immunity and consents to the suit. *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998).

Six corollaries flow from these principles of tribal immunity. First, tribal immunity knows no territorial bounds. That is, in the absence of congressional limitations on tribal immunity, federally-recognized Indian nations are immune from suit period, whether the subject of the suit is activity on or off Indian lands. 242 P.3d at 1107, *citing Kiowa, supra*, 523 U.S. at 745-55.

Second, enforcement actions, unlike criminal prosecutions, are "suits" to which federally-recognized Indian nations are immune. Indian nations and their members are subject to non-discriminatory application of state and federal criminal laws for their conduct off Indian lands, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), but they cannot be forced in American courts to respond to civil suits, and enforcement actions are civil suits. 242 P.3d at 1108,

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Fourteenth Amendment, but this reference simply revises the apportionment language to take out the three-fifths provision but retain the "Indians not taxed" provision. U.S. CONST., amend. XIV, § 2.

citing Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 510-11 (1991).

Third, the Colorado Supreme Court recognized, as has the handful of federal courts addressing the matter, that tribal immunity from enforcement actions includes tribal immunity from enforcement of the sort of administrative subpoenas at issue here. 242 P.3d at 1108, *citing United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), and *Catskill Dev., LLC v. Park Place Entm't Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002).

Fourth, tribal immunity applies to a tribe's governmental and commercial activities alike. That is, a federally-recognized Indian nation cannot be sued in state or federal courts for any of its activities, whether or not those activities relate to tribal governance or to a commercial enterprise. Not only has every federal court of appeals addressing this issue so concluded, but the United States itself has also conceded that a tribe does not lose its immunity simply by engaging in a business through a corporate entity. On the contrary, there is a rich history of federal Indian law whose central premise is that, until and unless Congress decides otherwise, Indian tribes must be free to engage in economic activities in order to generate revenues to support tribal government and services. 242 P.3d at 1107, *citing* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

Because of the regulatory confluence between business and law in and among the United States, these critical tribal economic activities must often be conducted through business entities recognized by state law—corporations, limited liability companies, partnerships, etc. Tribes must therefore be permitted to engage in businesses through these kinds of legal entities without risking their immunity. This is why this threshold question—whether tribes necessarily lose their

immunity when they act through business entities—has been so resoundly answered in the negative.

Instead of depending on the nature of the business a tribe is conducting through a business entity, the question of whether tribal immunity is to be extended to the entity depends on whether, in the language of the federal courts, the entity is an "arm of the tribe." 242 P.3d at 1109, *citing Memphis Biofides, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 920-21 (6th Cir. 2009); *Native Am. Distr. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000).

Fifth, a tribal entity engaged in business does not lose its immunity simply by contracting with non-Indian operators of the business. *Native Am. Dist. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) (tribal tobacco company immune despite fact that non-Indians operated company through a management agreement). Here again, the idea is that Indian nations must be encouraged to generate revenues to fund their governments and activities, and must therefore be free to enter into commercial areas where they have no expertise, but can acquire the necessary expertise through non-Indian operators. *See also Cabazon Band of Mission Indians v. Riverside Cnty.*, 783 F.2d 900, 901 (9th Cir. 1986), *aff'd sub. nom., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (noting with approval that the tribal business was "operated by non-Indian professional operators, who receive a percentage of the profits").

Finally, although a tribe may waive its immunity, in whole or in part, such waiver, just like any congressional limitation or abrogation, must be "explicit and unequivocal." 242 P.3d at 1114, *quoting Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 58.

III. THE ARM-OF-THE-TRIBE TEST

The Court rejected the court of appeals' stricter 11-part test for whether a tribal entity is an arm of the tribe, and instead adopted a more lenient three-part test. The three parts are:

> 1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty.

242 P.3d at 1111. The Court further instructed that application of these three factors must be "tailored to the nature of the relationship between the tribal entities and the tribes." *Id.* Before I address each of these factors let me make two observations about both the temporal and substantive nature of this test.

First, as the State conceded at the hearing, the tribal immunity issue in this particular case is trapped in the present, meaning that the question is whether I can at this moment hold these tribal entities in contempt for failing to produce the subpoenaed documents. This is because tribal immunity is in the nature of subject matter jurisdiction, 242 P.3d at 1102, and a court must always be concerned about its subject matter jurisdiction. *J.P. Meyer Trucking & Const., Inc. v. Colorado Sch. Dist. Self Ins. Pool*, 18 P.3d 198, 201 (Colo. 2001). I cannot enforce these subpoenas via contempt citations or otherwise if the tribal entities are immune, quite apart from whether they were or were not immune when the subpoenas, enforcement orders or contempt citations were first issued and served. This is why the last two arm-of-the-tribe factors are phrased in the present test.[9] What matters is whether the tribes *now* own and operate the entities, not whether they owned and operated them at any other time. Likewise, what matters is whether a grant of immunity to the

[9] The first factor is by its very nature historical—were the subject entities created by the tribes pursuant to tribal law?

tribal entities will *now* protect the tribes' immunity, not whether it would have protected that immunity at some earlier time. What has happened in the past can of course be probative of the current state of affairs, but it is the current state of affairs that matters, at least as to the last two arm-of-the-tribe factors.

Second, and somewhat relatedly, the Court's emphasis on the relationship between the tribes and the entities is critical. This is, after all, a test of whether the entity is an arm of the tribe, and the Court reminds us that that inquiry must therefore focus on the relationship between the entity and the tribe. That is to say, the particular businesses in which the entities happen to be engaged is wholly irrelevant. 242 P.3d at 1111, citing *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., supra*, 523 U.S. at 756.

Let me now address the three arm-of-the-tribe factors.

A. Factor 1: The Tribes Created the Entities Pursuant to Tribal Law

The State expressly conceded, both in its briefs and at the hearing, that both tribal entities were in fact formed by their respective tribes and that such formation was accomplished pursuant to tribal law.

The Miami Tribe of Oklahoma became a federally-recognized Indian nation with the passage of the Oklahoma Indian Welfare Act of 1936, codified at 25 U.S.C. § 501 (2006). The Miami people's ancestral home was spread across Ohio, Indiana, Illinois, lower Michigan and lower Wisconsin. They ceded much of this territory to the United States in a 1795 treaty. They were forcibly removed from their remaining homelands in 1846, and relocated first to present-day Kansas then to present-day Oklahoma. 242 P.3d at 1103.

The constitution of the Miami Tribe of Oklahoma creates a Business Committee, which is expressly authorized to enact resolutions and ordinances "to transact business and otherwise speak

or act on behalf of the tribe in all matters on which the Tribe is empowered to act . . . ." MIAMI CONST., art. VI § 1, Exhibit A. Pursuant to that constitutional authority, on April 15, 2002, the Business Committee adopted a resolution and ordinance creating a tribal corporation called Miami Tribe Business Enterprises ("MTBE"). Exhibits M and N. These organic documents in turn authorized MTBE to engage in, among other things, "[p]roviding sources of revenue, through direct tribal business activities . . . ." Miami Tribe of Oklahoma Business Enterprises Act § 102(a). Exhibit N, at ff. 03821. The Business Committee changed MTBE's name to MNE by a resolution adopted on May 10, 2005. Exhibit D.

The Santee Sioux Nation became a federally-recognized tribe by way of the Indian Reorganization Act of 1934, codified at 25 U.S.C. §§ 461-79 (2006). The Santee Sioux's ancestral home was in present-day Minnesota. They were forcibly relocated first to present-day South Dakota and then to present-day northeastern Nebraska. 242 P.3d at 1104. The Santee Sioux, also known as the Eastern or Dakota Sioux, are one of three main subdivisions among the Sioux, the other two being the Yankton (or Middle or Nakota) Sioux and the Teton (or Western or Lakota) Sioux. WILLIAM K. POWERS, OGLALA RELIGION 11 (Univ. of Nebraska Press, 1977).

The constitution of the Santee Sioux Nation specifically authorizes the tribe to charter subordinate organizations for economic purposes. SANTEE SIOUX CONST., art. IV § 1(k), Exhibit B. The Santee Sioux Nation chartered SFS by way of tribal Resolution No. 2005-27, adopted March 2, 2005. Exhibit C.

I find and conclude based on this uncontradicted evidence that the two tribal entities at issue in this case—MNE and SFS—were indeed duly created by their respective tribes pursuant to tribal law.

B. Factor 2: MNE and SFS are Owned and Operated by their Tribes

Here again, the evidence is undisputed. The State concedes that MNE is a wholly-owned tribal entity of the Miami Tribe of Oklahoma, and that SFS is a wholly-owned tribal entity of the Santee Sioux Nation. The evidence is equally undisputed that the tribes operate the entities.

MNE's board of directors is appointed by the Chief of the Miami Tribe, with the advice and consent of the Business Committee. Resolution No. 05-14, Exhibit D; Amended Miami Nations Enterprise Act § 202(a), Exhibit N. Two of the three directors must be members of the tribe. *Id.* The Business Committee hired MTBE's initial chief operating officer, Don Brady, and Mr. Brady has remained as the CEO of MNE. Mr. Brady's office is located in MNE's headquarters, which in turn is located on tribal lands. Second Supplemental Affidavit of Don Brady ¶¶ 1-5, Exhibit I. MNE currently has numerous other employees, all of whom also work at the MNE headquarters on tribal lands. *Id.* at ¶ 5. Like any CEO, Mr. Brady is in charge of MNE's day-to-day operations, but is answerable to, and is directed in policy matters by, the MNE board of directors, which in turn reports to the tribal council. *Id.* at 7. Similarly, SFS is governed and regulated entirely by a director appointed by the Santee Sioux Nation. Exhibit W.

The State argues that none of the tribal entities' organic resolutions and ordinances expressly authorizes them to engage in payday lending. That contention is not only irrelevant—the tribes have, as set forth above, broadly authorized their entities to engage in any business activities—but it is also plainly incorrect. The Miami Tribe specifically enacted an ordinance to permit MNE to engage in the payday loan business. Resolution No. 04-62, Exhibit O. That ordinance specifically authorized the tribe to issue payday loan licenses to MNE, and the tribe in fact issued those licenses. Exhibit Q. One of those licenses was to operate a payday loan business known as Cash Advance. *Id.* The ordinance also imposed substantive and regulatory requirements on MNE's payday loan business, and charged the tribe's Business Committee with insuring MNE's

compliance with those requirements. Likewise, the Santee Sioux Nation expressly permitted SFS to obtain a tribal license to engage in payday lending, Exhibit W, and issued several different such licenses to SFS, one of which was under the name Preferred Cash Loans. Exhibit U.

There is also convincing evidence in this record that the tribal entities actively engaged in these payday loan businesses, by applying their tribes' articulated lending criteria to requested loans, and in fact by actually approving each payday loan. Second Supplemental Brady Affidavit ¶ 14; Exhibit I. The State argues that tribal officials could not possibly have approved all the loans that were approved by these tribal entities, but I do not find that impossibility argument persuasive. If, as is the State's theory, it was actually the prior non-Indian operators who continued to approve these loans, then somehow they were able to approve them despite their volume. If they could approve them then Indian officials could also have approved them. I see no reason to disbelieve the sworn testimony of tribal officials, particularly when the State has not produced any direct evidence disputing that testimony. Finally, it is worth reiterating that the cases make it clear that tribes do not lose their immunity just by contracting for the special expertise of non-Indian operators; indeed, they are encouraged to do so. *Cabazon Band of Mission Indians v. Riverside Cty., supra,* 783 F.2d at 901; *Native Am. Dist. v. Seneca-Cayuga Tobacco Co., supra,* 546 F.3d at 1294. Thus, even if every pertinent payday loan was approved by the non-Indian operators with no control or even input from the tribes, that would not be dispositive of Factor 2.

It is clear to me from my review of the evidence, and I find, that the Miami Tribe of Oklahoma owns and operates MNE and that the Santee Sioux Nation owns and operates SFS. Stated another way, given the burden of proof, I find that that the State has failed to prove that the tribes do not own and operate these tribal entities.

C. Factor 3: Giving MNE and SFS Immunity Will Protect their Tribes' Immunity

The State has not disproved this third factor. In its briefs, the State relies on the proposition, announced in *Allen v. Gold Country Casino*, *supra*, 464 F.3d at 1046-47 and other cases, that the function of this third factor is to protect the treasury of the tribe. It then argues, without citation, that because the former non-Indian operators of the payday loan businesses have fully indemnified the tribal entities, forcing the tribal entities to incur fees and expenses responding to these administrative subpoenas will not endanger the treasury of the tribes. This proposition is not only not recognized in any reported case I know, it is patently incorrect. Every hour spent by tribal officials producing entity or tribal documents is an hour they cannot spend engaged in tribal business. It is in fact in recognition of this reality that the courts deciding this question, including the Colorado Supreme Court in this very case, have concluded that tribal immunity protects tribes from administrative subpoenas. 242 P.3d at 1108. Whether the tribes could ever recoup these costs from the former non-Indian operators is sheer speculation, for which the State has provided no credible evidence.

Moreover, such a rule would have the perverse effect of discouraging Indian business from insisting that their non-Indian operators indemnify them. Yet federal law is designed to encourage Indians to use the expertise of non-Indian operators, and all reasonable business owners, Indian and non-Indian alike, would insist on indemnification in such circumstances.

There is a plethora of evidence that makes it clear to me that extending the tribes' immunity to MNE and SFS will benefit the tribes, for no other reason than that the tribes have been economically benefitted by the payday loan activities of MNE and SFS. All profits these tribal entities have generated through their payday loan businesses have been used to benefit their respective tribes. Second Supplemental Brady Affidavit ¶ 17, Exhibit I; Second Supplemental Affidavit of Robert Campbell ¶ 12, Exhibit H. In the case of the Miami Tribe, these revenues have

been used, among other things, to build a new headquarters for MNE, to enable MNE to employ tribal members, and to fund various tribal programs, including scholarship program for secondary education. Exhibit I ¶ 17. MNE also distributes some of its profits to the tribe's general fund. *Id.* In the case of the Santee Sioux, payday loan profits have been used, among other things, to buy additional tribal lands, fund head start programs, and create daycare and educational incentive programs. Exhibit H, ¶ 12. Robert Campbell, a member of the Santee Sioux Nation and a member of its tribal council for the last seven years, testified that loss of SFS's payday loan revenues "would be devastating to the Santee Sioux Nation's economy, not to mention the loss of jobs for those employed by SFS." *Id.*

I recognize that the tribal immunity issue before me is a narrow one, limited to the question of whether these tribal entities are immune from the subject administrative subpoenas and their enforcement and contempt consequences. By considering the broader economic relationship between the tribal entities and their tribes in the payday loan context I do not mean to be straying from the narrow immunity issue that confronts me. But neither do I think that I can ignore those economic relationships when I am considering this broadest of the three arm-of-the-tribe factors.

Based on my review of all the evidence, it is clear to me, and I find, that providing MNE and SFS with tribal immunity will protect their respective tribes' immunity.

IV. THE STATE'S "SHAM" ARGUMENT

The State went to great lengths, in all of its briefs and at the hearing, to argue that I should deny immunity to the tribal entities because they are shams. The State claims that these two payday loan businesses are really being operated, as they have always been operated, by a Mr. Scott Tucker and his associates. And indeed, as early as 1998, Tucker and another non-Indian man

named Charles Hallinan formed a Nevada corporation called National Money Services and began making payday loans. In February 2001, Tucker and James Fontano acquired several Nevada shell corporations, among them CBSC and Executive, whom we saw earlier had Carson City addresses identical to the addresses listed on the Cash Advance and Preferred Cash Loan websites, and in fact whom the State decided to include as named contemnors on the contempt citations.

The State has also shown that Tucker was conducting other payday loan businesses in other states, using various corporations doing business under various names, including "Cash Advance" and "Preferred Cash Loans. In early 2003, the Kansas bank commissioner brought an enforcement action against "Cash Advance" for engaging in illegal payday lending in the state of Kansas. In September 2003, the New York Attorney General brought an enforcement action against Hallinan for engaging in illegal payday lending in New York.

In October 2003, just one month after New York commenced its action against Hallinan, and some 10 months after the Kansas enforcement action began, Tucker first approached the Miami Tribe to discuss a proposal involving the payday loan business. He made that approach to MTBE, the predecessor of MNE. MTBE's board eventually agreed to the proposal, Merits Exhibit 6, and on November 14, 2003, MTBE and Tucker (through one of his entities) entered into a Service Agreement, a copy of which was admitted as Merits Exhibit 10.[10]

Under the Service Agreement, whose term was five years, MTBE agreed to retain Tucker's entity, which in turn agreed to provide MTBE with $5 million in working capital, staff, equipment, and advertising services so that MTBE could operate an online payday loan business. MTBE agreed, at its option, to furnish an office on tribal lands staffed by at least one employee to

[10] The State's Exhibits are divided into "Request Exhibits," which consist of the material the tribal entities voluntarily provided in response to the administrative subpoenas and to the State's supplemental requests, and "Merits Exhibits," which were attached to the State's briefs in response to the motions to dismiss.

administer the loan program. Tucker's entity agreed to pay MTBE a monthly fee of 1% of the gross revenues, with a minimum payment of $20,000 per month.

In April 2005, almost a year and a half after executing the Service Agreement and also long after the payday loan activities that triggered the first Colorado consumer complaint, the Miami Tribe adopted its first resolution authorizing its Business Committee to issue licenses and regulations governing its payday lending business. Request Exhibits 6 and 7.

Tucker did not approach the Santee Sioux Nation until early 2005, long after his own companies were already engaged in payday loan businesses using the name Preferred Cash Advance, and of course long after the Kansas and New York investigations began. Merits Exhibit 19. SFS and a Tucker entity entered into a Service Agreement on February 28, 2005. Merits Exhibit 21. That Service Agreement was virtually identical to the Service Agreement Tucker entered into with the Miami Tribe—a five year term, a capital commitment ($3 million for SFS, compared to the $5 million for MNE), and a monthly fee of 1% of gross with a monthly $20,000 minimum).

From all of this evidence, it is clear to me that the State is correct that these two payday loan businesses existed before the tribal entities took them over, that Tucker and his associates owned and operated those businesses, that they did business as "Cash Advance" and "Preferred Cash Loans," among many other names, and that Tucker likely recruited the tribal entities in the mistaken belief that he could shield the businesses with tribal immunity. It is also clear to me that the State has proved, by a preponderance of the evidence, that Tucker and his entities, and not the tribal entities, were the true owners of these payday loan businesses during the terms of the Service Agreements. Nothing is more telling as far as assessing true owners than to follow the money, and the fact that Tucker put up 100% of the capital and enjoyed 99% of the payday revenues makes it

evident that Tucker, and not the tribal entities, continued to own these businesses during the terms of the Service Agreements. But it does not follow from these facts and conclusions that by participating in this scheme the tribal entities have lost their immunity.

First, as discussed in Part II above, the question of tribal immunity is always a question about the present. MNE and SFS terminated their Service Agreements with Tucker's entities in September 2008, and replaced Tucker's entities with operating corporations that are themselves wholly-owned tribal entities. Exhibits H and I. That is, these businesses have evolved in precisely the manner that Congress has intended for Indian businesses to evolve. In the beginning, they were dependent on Tucker and his associates for their capital and expertise, paying a steep price for that capital and expertise; but over time the tribes were able to take over operations completely.

Moreover, even if Tucker still functionally owns and operates these two payday loan businesses—something the State has not proved—I am not at all certain the tribal entities would thereby lose their immunity. The State's syllogism—the real lenders are Tucker and his associates, and therefore protecting them does not protect the tribes—would make perfect sense except that the State eventually directed these subpoenas to these two tribal entities, wants documents from these two tribal entities and seeks contempt citations against these two tribal entities through their tribal officers. What the State has fundamentally misunderstood in this case is that tribal entities are immune, not their particular businesses, and therefore that tribal immunity does not depend in any fashion on the type of business a tribal entity engages in, with whom, or for what ulterior purpose.

That mistake seems to have had its origins in the very inception of this case, when the State elected to subpoena phrases—"Cash Advance" and "Preferred Cash Loans"—instead of legal entities. The State wrongly believes that if it shows that these two phrases are businesses that are really being operated by Tucker rather than by the tribal entities, then the tribal entities are

somehow not immune. But it has long been the law, as the state Supreme Court emphasized in this very case, that immunity depends on the relationship between the tribal entities and their tribes, not on the activities the tribal entities undertake. 242 P.3d at 1111, citing *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., supra*, 523 U.S. at 756. Had MNE or SFS been tribal shams—that is, had the State proved they are not really tribal entities because they were not created by tribal law and/or are not owned and being operated by the tribes—that would be quite a different matter. But once they are arms of the tribes, they are clothed with the tribes' immunity regardless of the particular businesses they operate or the manner of that operation.

Of course, this broad immunity is not unlimited. It does not cover any other legal persons other than the two tribal entities and their officers while acting within the scope of tribal business. If Tucker's grand scheme was to insulate himself from state scrutiny by associating with these tribes, it was not a very good scheme because he and all his non-tribal officer associates remain subject to investigation. The State can subpoena Messrs. Tucker, Fontano, Hallinan and any other non-tribal officer or non-tribal entity to its heart's content, and thus can freely investigate whether Tucker and his associates were and still are the true lenders in this case. But it cannot subpoena these two tribal entities just because it claims the payday loan businesses are really being operated by Tucker, any more than it could subpoena France if it thought Tucker was the real owner and operator of Air France.

Each of the three arm-of-the-tribe factors focuses on the relationship between the tribe and the tribal entity, and none of them, and none of the reported cases I have been able to find addressing them, suggests that immunity is lost if the sole motive of a non-Indian operator is to try to take advantage of a tribe's immunity. On the contrary, the broader purpose of that immunity is to make tribes attractive targets for economic development.

Cries that such an interpretation makes tribes the targets of unscrupulous non-Indians whose only purpose is to rent immunity has three answers. First, and most significantly, my job is to apply the law, not to write it. If Congress does not want Indian nations hiring non-Indian operators to engage in payday loan businesses, or does not want Indian nations in the payday loan business at all, it could limit or eliminate tribal immunity for such businesses tomorrow. *See Cabazon Band of Mission Indians, supra,* 480 U.S. at 202. Second, "renting immunity" will be fundamentally ineffective, as we have seen here, because the allegedly unscrupulous non-Indian operators are never immune. Third, and maybe deepest, the paternalistic days when the law fretted about Indian nations being incapable of distinguishing between good and bad business opportunities are happily behind us. The Miami and Santee people are the ones we must trust, as long as Congress lets us trust them, to know what kinds of business relationships are in their best interests. They do not need the guidance of the State of Colorado, through either its law enforcement officials or its courts.

V. WAIVER

Finally, the State once again raises the question of waiver, this time focusing on its argument that certain so-called "sue-and-be-sued" clauses contained in the tribes' charters expressly waived their tribal immunity. I disagree.

As a threshold matter, it is not at all clear to me that this waiver issue is properly before me on remand. The Court expressly directed me to decide just two issues: whether the State is entitled to additional discovery under the limited waiver and whether the State has proved that the tribal entities are not arms of the tribes. 242 P.3d at 1115.

On the other hand, the State correctly notes that although the Court rejected the court of appeals' broad command that I consider all manner of things to decide the waiver issue, it specifically rejected only one of the waiver arguments—that arbitration provisions in consumer loan agreements amounted to a waiver. *Id.* at 1114. It did not, and neither did the court of appeals, expressly reject the argument that the tribes' own founding documents, by way of their sue-and-be-sued clauses, effected a waiver of tribal immunity. So with no small amount of procedural trepidation, I address that narrow issue here.

It is clear to me that these sue-and-be-sued clauses are not sufficiently explicit or unequivocal to amount to a wholesale waiver of tribal immunity. The Miami charter, adopted in 1940, in a section labeled "Corporate Powers," lists among its powers:

> To sue and be sued; to complain and defend in in [sic] any court; *Provided, however*, That the grant or exercise of such power shall not be deemed a consent by the Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

Corporate Charter of the Miami Tribe of Oklahoma ¶ 2(b), Exhibit 20 to Udis Affidavit, at ff. 1093 (emphasis in original). The Santee charter, adopted in 1936, has virtually identical language, also in a section labeled "Corporate Powers":

> To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power shall not be deemed a consent by the said Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

Corporate Charter of the Santee Sioux Tribe of Nebraska ¶ 5(i), Exhibit 17 to the Udis Affidavit, ff. 1080.

I realize that in *Martinez v. Southern Ute Tribe*, 374 P.2d 691, 693-94 (Colo. 1962), our state Supreme Court held that language identical to the above-quoted language in the Santee

charter amounted to a broad waiver of tribal immunity. But *Southern Ute* was decided before the United States Supreme Court held in *Santa Clara Pueblo, supra,* 436 U.S. at 58, that waivers of tribal immunity, just like congressional limitations or abrogations of it, must be "explicit and unequivocal." Indeed, our state Supreme Court, in this very case, "caution[s] that any waiver of tribal sovereign immunity must be explicit and unequivocal," and expressly cites *Santa Clara.* 242 P.3d at 1114. Tellingly, the Court never cites its own opinion in *Southern Ute.*

I read these express directions to be an implicit overruling of *Southern Ute*, requiring me to examine the waiver issue anew under the standard that any waiver of tribal immunity must be explicit and unequivocal. Under that standard, neither of these sue-and-be-sued clauses are waivers of tribal immunity. They are not explicit because they do not mention tribal immunity. They are not unequivocal because to reach the waiver conclusion one must engage in the following line of reasoning: the tribes have consented to have money judgments entered against them, but just not to have any such judgments enforceable against their property; therefore, such consent is in effect a partial waiver of tribal immunity. Even if this language unequivocally waived immunity for damage actions, it did not unequivocally waive immunity for non-damage actions such as the one at issue here. Again, some reasoning beyond the mere words is necessary: the tribes waived immunity for damage actions as long as any money judgment could not be collected; therefore they impliedly waived immunity for all action not involving claims for money damages. These lines of reasoning may be perfectly sensible, but the very fact they are necessary shows that the language itself does not unequivocally waive tribal immunity.

My conclusions in this regard are bolstered by two other considerations. First, and most important, most of the tribal immunity waiver cases decided after *Santa Clara* have held that the subject language, or substantially similar language, does not waive tribal immunity. Although one

commentator has described the issue as "arguable," even he admits that "most courts have reasoned that tribal adoption of a charter with such a clause simply creates the power in the corporation to waive immunity, and that adoption of the charter alone does not independently waive tribal immunity." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 7.05(1)(c) (2005 ed.). Among the many post-*Santa Clara* cases that have concluded that this very language, or its equivalent, does not effect a general waiver of tribal immunity are cases decided by several federal circuits. *E.g., Ninigret Dev. Corp. v. Narragansett Indian Wetoumuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 78 (2nd Cir. 2001); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043-44 (8th Cir. 2000). *Cf. Native Am. Distrib. Co. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008) (not reaching sue-and-be sued issue because tribe conceded waiver). In fact, the State does not cite, and I am unaware of, any circuit case decided after *Santa Clara* that holds that any kind of sue-and-be-sued clause is ipso facto a general waiver of tribal immunity.

Second, though admittedly less important, the tribes here have consistently acted long after adoption of these charters as if they still had tribal immunity. MNE's authorizing ordinance contains its own sue-and-be-sued clause, which specifically provides that its tribal immunity can be waived by contract "only to the extent of the specific terms of the applicable contract or obligation." Miami Resolution No. 05-14 § 302(c), Exhibit D. Even more strictly, when the Santee Sioux Nation formed SFS, it specifically provided in the SFS articles of incorporation that SFS may not take any action to waive the tribe's immunity. Santee Sioux Resolution No. 2005-27, Articles of Incorporation § 13.2, Exhibit C. Neither of these provisions would have been necessary or appropriate had the tribes waived their immunity in their charters more than 70 years ago.

VI. CONCLUSION

The tribal entities' motions to dismiss are GRANTED, the orders enforcing the administrative subpoenas are VACATED, the contempt citations aimed at the tribal entities and their officers are DISCHARGED and the bench warrants associated with the tribal officers' failure to appear at the show cause hearing are VACATED.

DONE THIS 18TH DAY OF FEBRUARY, 2012.

BY THE COURT:

Morris B. Hoffman
District Court Judge

cc: All counsel

State of Connecticut Department of Banking

IN THE MATTER OF:	
CASHCALL, INC.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**
(NMLS Number 38512)	

FINDINGS OF FACT

Procedural History

1. On March 12, 2013, the Banking Commissioner (the "Commissioner") issued a Temporary Order to Cease and Desist, Order to Make Restitution, Notice of Intent to Issue Order to Cease and Desist, Notice of Intent to Impose Civil Penalty and Notice of Right to Hearing (the "Original Order") against CashCall, Inc. (also referred to herein as "Respondent") (Dept. Ex. 17).
2. The Original Order alleged that 1) CashCall, Inc. offered, via various media in Connecticut, including the Internet, unsecured consumer loans in amounts less than $15,000 with annual interest rates greater than 12%; 2) on or about March 1, 2012 and January 29, 2013 an unnamed Connecticut resident initiated contact with CashCall, Inc. via its website and received an e-mailed response; 3) on or about August 3, 2012, a second Connecticut resident, also unnamed, initiated contact with CashCall, Inc. via telephone and received a telephonic and e-mailed response; 4) from April 2011 to October 2012, CashCall, Inc. acquired consumer loans via assignment from an unnamed third party within three days of the making of such loans and charged to and received from Connecticut residents interest payments exceeding 12% on those loans; 5) CashCall, Inc. violated the antifraud provisions in Section 36a-53b of the Connecticut General Statutes in that its website failed to identify the third party and the website stated that all loans were made pursuant to CashCall, Inc.'s California lender license; 6) CashCall, Inc. violated Section 36a-555 of the Connecticut General Statutes by offering consumer loans, assisting Connecticut borrowers to obtain such loans, arranging those loans through a third party or acting as an agent for the third party while unlicensed; 7) CashCall, Inc. violated Section 36a-573(a) of the Connecticut General Statutes by charging and receiving interest at a rate greater than 12% on at least five Connecticut consumer loans in amounts of less than $15,000; and 8) CashCall, Inc. had been the subject of a September 10, 2012 civil action by the State of West Virginia (No. 08-C-1964) and a January 30, 2013 administrative action by the State of Washington Department of Financial Institutions.
3. The Original Order directed CashCall, Inc. to cease and desist from violating Sections 36a-53b, 36a-55 and 36a-573(a) of the Connecticut General Statutes; to provide specified information to the Consumer Credit Division of the State of Connecticut Department of Banking within 14 days; and

to make restitution of any sums obtained as a result of CashCall, Inc.'s violation of Section 36a-573(a) of the Connecticut General Statutes. The Original Order also provided that if CashCall, Inc. did not request a hearing or appear, the Order to Make Restitution and the Order to Cease and Desist would become permanent and the Commissioner could order that a civil penalty be imposed.

4. On March 13, 2013, the Original Order was sent by registered mail, return receipt requested, to CashCall, Inc. at 1600 South Douglass Road, Anaheim, California 92806 and at P.O. Box 66007, Anaheim, California 92816. (Dept. Ex. 17)

5. On March 29, 2013, Attorney Julian Dayal of Katten Muchin Rosenman LLP filed a special appearance on behalf of CashCall, Inc. and requested a hearing on behalf of Respondent.

6. On April 4, 2013, the Commissioner issued a Notification of Hearing setting the hearing date for May 8, 2013 and appointing Cynthia Antanaitis as the Hearing Officer.

7. On May 3, 2013, at the mutual request of counsel to the Department and counsel to the Respondent, the hearing was continued to June 19, 2013 to enable the parties to exchange witness lists and to enable Respondent to retain Connecticut counsel.

8. On May 3, 2013, Dena L. Wood, Banking Department Manager at the State of Connecticut Department of Banking, wrote a letter to John Paul Reddam, President and CEO of CashCall, Inc. asking CashCall, Inc. to show compliance with the retention of CashCall, Inc.'s mortgage lender license (Dept. Ex. 24). The letter alleged that CashCall, Inc., in violation of Section 36a-490(c)(3) of the Connecticut General Statutes, had failed to promptly file with the Nationwide Mortgage Licensing System and Registry notification that the department had initiated administrative action on March 12, 2013. The letter also stated that CashCall, Inc. had violated Section 36a-17 of the Connecticut General Statutes by not producing the records required by the Original Order. Specifically, the letter alleged that, although CashCall, Inc. provided partial production of information on Connecticut loan activity on April 19, 2013, it did not provide copies of loan agreements and a list of all Connecticut residents who had been offered consumer loans by CashCall, Inc. The letter maintained that CashCall, Inc. was continuing to offer consumer loans in Connecticut in violation of the Original Order; that this fact, combined with violations of Sections 36a-490(c)(3), 36a-53b, 36a-555, 36a-573(a) and 36a-17 of the Connecticut General Statutes, failed to demonstrate the character and general fitness required of mortgage lender licensees under Section 36a-489(a)(1) of the Connecticut General Statutes; and that, on April 26, 2013, a Connecticut resident had received an e-mail from CashCall, Inc. encouraging the resident to call right now since, based on the information provided by the resident, the resident had a strong chance of being preapproved for a loan program.

9. The May 3, 2013 letter authored by Dena L. Wood was received by Attorney Dayal, and CashCall, Inc. stipulated at the hearing that it received the May 3, 2013 compliance letter (tr. 75).

10. Dan Baren, General Counsel of CashCall, Inc. testified that CashCall, Inc. did not respond to the May 3, 2013 compliance letter because "we had already complied with everything in there except with respect to the NMLS posting." (tr. 176)

11. On June 5, 2013, the Commissioner issued an Amended and Restated Temporary Order to Cease and Desist, Amended and Restated Order to Make Restitution, Amended and Restated Notice of Intent to Issue Order to Cease and Desist, Amended and Restated Notice of Intent to Impose Civil Penalty, Notice of Intent to Revoke Mortgage Lender Licenses [sic] and Notice of Right to Hearing (the "Amended Order") against CashCall, Inc.

12. The Amended Order mirrored the Original Order but added the following: 1) an allegation that Respondent violated the Original Order by soliciting Connecticut residents in e-mailed communications dated April 26, 2013 and May 16, 2013; 2) the date range relating to the timing of

the assignment was expanded to February 2010 to March 2013 with 3,800 occasions referenced; 3) as of May 3, 2013, Respondent had failed to file notification of the Original Order with the Nationwide Mortgage Licensing System and Registry and had thus violated Section 36a-490(c) of the Connecticut General Statutes; 4) the alleged violation of Section 36a-573(a) was expanded to cover 3,800 consumer loans in amounts of less than $15,000 to Connecticut residents; and 5) the alleged violation of the Original Order, together with the alleged violations of Sections 36a-53b, 36a-555 and 36a-573(a) of the Connecticut General Statutes, would support the revocation of Respondent's mortgage lender license in Connecticut.

13. The Amended Order contained a Certification stating that, on June 6, 2013, the Amended Order was sent via certified mail, return receipt requested, to CashCall, Inc. at 1600 South Douglass Road, Anaheim, California and at P.O. Box 66007, Anaheim, California as well as to Julian Dayal, Esq., Dan Baren, General Counsel of CashCall, Inc., and Albert Peter Choi, Branch Manager of CashCall, Inc., 7125 Pollock Drive, Las Vegas, Nevada.
14. Respondent received the Amended Order on or about June 10, 2013 (Dept. Ex. 1).
15. The Cheyenne River Sioux Tribe was not named as a respondent in either the Amended Order or the Original Order.
16. On June 19, 2013 an administrative hearing was held in the matter of CashCall, Inc. The Respondent was represented by Attorney Donn A. Randall, a member of the Connecticut bar, with *pro hac vice status* being granted to Attorneys Julian Dayal, Claudia Callaway and John Black of Katten Muchin Rosenman LLP.
17. On June 19, 2013, after the hearing, the Hearing Officer e-mailed counsel to the Respondent and counsel to the department confirming that, in accordance with Section 36a-1-48 of the Regulations of Connecticut State Agencies, the Hearing Officer would give each side until July 19, 2013 to file the following supplemental evidence: 1) financial statement (to be provided by the Respondent) reflecting the Respondent's current financial position; 2) technological document relevant to the accessing of Respondent's website by witness Anne Cappelli (to be provided by Respondent); and 3) the contract between Respondent and Western Sky, together with any writing reflecting the termination of the relationship between the two (to be provided by Respondent).
18. On June 21, 2013, counsel to the department e-mailed the Hearing Officer and Respondent's counsel, noting that the Respondent would also provide any objection to the interest amounts summarized on the Department's exhibit 20, or alternatively supplement the record with a revised interest calculation.
19. On July 17, 2013, counsel to the department electronically filed redacted versions of Department's Exhibits 2 and 3 with the Hearing Officer. Counsel for the department noted that the department retained the original documents, with opposing counsel having copies of the originals.
20. On July 19, 2013, counsel to the Department electronically filed the following additional evidence pursuant to Section 36a-1-48 of the Regulations of Connecticut Agencies: 1) Affidavit of Carmine Costa, including Exhibits A and B; and 2) Affidavit of Anne Cappelli, including Exhibits A through M.
21. On July 19, 2013, Respondent's counsel electronically filed supplemental documents with the Hearing Officer and opposing counsel. Respondent requested that the documents be given confidential treatment.
22. On July 22, 2013, the Hearing Officer gave both sides until August 2, 2013 to review, rebut or object to evidence provided by the other.
23. By letter dated August 2, 2013, the Hearing Officer accepted as Respondent's post-hearing exhibits 1) the declaration of Ethan Post, including Exhibits A and B; 2) the October 28, 2010 Agreement for the Assignment and Purchase of Promissory Notes; and 3) the March 19, 2013 e-mail from

CashCall General Counsel Dan Baren to Cheryl Bogue. In that letter, the Hearing Officer declined Respondent's request to have the above documents, as well as department Exhibits 18, 19 and 20 be treated as confidential, noting that the Respondent had not isolated what particular elements in each document should be afforded confidential treatment, why they were confidential or the legal basis for confidentiality. The Hearing Officer added that respondent had raised no objection to the introduction of Exhibits 18, 19 and 20 during the hearing.

24. On August 2, 2013, the department relayed via e-mail its rebuttal argument to Respondent's July 19, 2013 post-hearing submission.

25. By letter dated August 7, 2013, the Hearing Officer noted that, during the June 19, 2013 hearing, Attorney Randall, who is a member of the Connecticut bar, requested that non-Connecticut counsel also be permitted to represent the Respondent because of its "intimate knowledge of the business operations of CashCall." (tr. 4) Attorney Serrano noted for the record that, under Section 36a-1-32(b) of the Regulations, Connecticut-admitted counsel would be required to sign all pleadings and papers filed in the proceeding and take full responsibility for supervising the conduct of the attorney. Attorney Randall replied, "I understand that obligation and I will undertake it." (tr. 5). The Hearing Officer's August 7, 2013 letter also stated that post-hearing written submissions were made electronically by both counsel to the Respondent and counsel to the department; that although Attorney Randall was copied in on the transmittal e-mailed communications, he did not initiate them nor did his signature appear on any of the filings; and that, instead, Attorney Dayal, who is not a member of the Connecticut bar, served as the Respondent's point person with respect to the post-hearing submissions, with Attorney Randall not being cc'd on Attorney Dayal's July 19, 2013 or August 2, 2013 letters to the Hearing Officer. The hearing Officer's August 7, 2013 correspondence afforded Respondents' counsel an opportunity to show cause why the grant of *pro hac vice* status should not be rescinded in light of their noncompliance with Section 36a-1-32(b) of the Regulations, and an opportunity to submit such curative filings as may be appropriate under the circumstances. The Hearing Officer called for a written response on or before 5:00 p.m. on Friday, August 16, 2013.

26. On August 16, 2013, Attorney Randall responded to the Hearing Officer's August 7, 2013 correspondence, indicating that he had communicated with Katten Muchin Rosenman LLP counsel regularly on the case and was requesting permission to submit curative filings *nunc pro tunc*. By e-mail dated August 27, 2013, the Hearing Officer acquiesced to Attorney Randall's request, asked that curative filings be made within the next two weeks and emphasized that, going forward, compliance with Section 36a-1-32(b) of the Regulations was expected.

27. On September 10, 2013 Attorney Randall filed a signed submission which was virtually identical to Respondent's July 19, 2013 post-hearing submission, with the exception that the Declaration of Ethan Post was now styled as an Affidavit.

28. By letter dated September 18, 2013, the Hearing Officer advised both sides that the record was closed on September 18, 2013. The Hearing Officer requested that briefs be filed by November 14, 2013.

29. By e-mailed communications dated October 1, 2013 and October 17, 2013, Attorney Randall advised the Hearing Officer and opposing counsel that Attorneys Dayal, Black and Callaway had withdrawn from the case, and that Attorney Randall would continue to represent the Respondent. Executed Notices of Withdrawal were included in the electronic communications.

30. On October 18, 2013, the Hearing Officer granted the October 1, 2013 motion of Attorney Donn A. Randall, counsel for the Respondent, to allow attorneys Katya Jestin and Neil M. Barofsky of Jenner & Block to appear *pro hac vice*.

31. On November 14, 2013, counsel for the Respondent and counsel for the state filed briefs.

32. On December 6, 2013, the Hearing Office granted the November 26, 2013 motion of Attorney Donn A. Randall, counsel for the Respondent, to permit Anthony S. Barkow of Jenner & Block to appear *pro hac vice* in connection with any additional matters relating to CashCall, Inc. at the administrative level.

Respondent

33. CashCall, Inc. is a California corporation formed on January 28, 2000 and having its principal office at 1600 South Douglass Road, Anaheim, California 92806 (Dept. Ex. 12).
34. CashCall, Inc. has been licensed as a mortgage lender in Connecticut since November 5, 2010 (tr. 51-52; Dept. Ex. 11).
35. The Nationwide Mortgage Licensing System or "NMLS" is a nationwide system for mortgage licensing and renewals (tr. 53).
36. The NMLS identification number associated with CashCall, Inc.'s main office is 38512 (tr. 51-52).
37. CashCall, Inc. has a Nevada branch office bearing NMLS number 27346 which is also licensed in Connecticut to perform mortgage loan activity (tr. 52).
38. CashCall, Inc. has never been licensed as a small loan lender in Connecticut (tr. 38-39).
39. According to NMLS information (Dept. Ex. 11), CashCall, Inc.'s consumer loan lending record referenced California and Iowa (tr. 170-171).
40. CashCall, Inc.'s NMLS record listed Dan Baren ("Baren"), General Counsel, as its primary contact person (Dept. Ex. 11).
41. Baren testified that "CashCall has about 13 consumer loan licenses" in various states and that, in some states, the same license covered both mortgage loans and consumer loans. (tr. 170)
42. Baren testified that, while CashCall held an Iowa consumer loan license "it could make loans pursuant to that license. It just hasn't. And the same with several other states. Missouri, for instance, New Mexico, Idaho. 13 total." (tr. 171)
43. On September 10, 2012, CashCall, Inc. was permanently enjoined from violating the West Virginia Consumer Credit and Protection Act, making loans in West Virginia without a license, making or collecting on usurious loans and collecting or attempting to collect excess charges (*State of West Virginia ex rel. McGrow v CashCall, Inc. and J. Paul Reddam*, Kanawi Cir. Ct., Civil Action No. 08-C-1964, Dept. Ex. 15).
44. On January 30, 2013, the State of Washington Office of Administrative Hearings entered an Order Granting Department's Motion for Partial Summary Judgment in the matter of CashCall, Inc. (Dept. Ex. 16). The Washington order revoked the Respondent's Consumer Loan License based, in part, on violations of Washington's usury laws (Dept. Ex. 16).

Relationship Between Western Sky and CashCall

45. The third party to which the Original Order and the Amended Order allude was Western Sky Financial, LLC (*see, e.g.* comment of Attorney Dayal, tr. at 12)
46. The Hearing Officer takes administrative notice that, according to South Dakota Secretary of State online records, 1) Western Sky Financial, LLC. was formed as a domestic limited liability company under SDCL Chap. 47-34A on May 15, 2009; 2) its initial member was PayDay Financial, LLC whose member was Martin A. Webb; and 3) its 2013 address of record was 612 E Street, PO Box 370, Timber Lake, South Dakota 57656-0370.

47. Post-hearing, Respondent filed as a supplemental exhibit a copy of an October 28, 2010 Agreement for the Assignment and Purchase of Promissory Notes (the "Assignment"). Exhibit A was missing from the filed exhibit.

48. The Assignment predated CashCall, Inc.'s November 5, 2010 Connecticut licensure as a mortgage broker.

49. The parties to the Assignment were Western Sky Financial, LLC as assignor and WS Funding, LLC, a subsidiary of CashCall, Inc., as assignee. J. Paul Reddam signed the Assignment on behalf of WS Funding, LLC, and Butch Webb executed the Assignment as Manager of Western Sky Financial, LLC.

50. According to Chiara Gaussa of CashCall, Inc., "WS Funding is a California entity owned by CashCall." (Dept. Ex. 4).

51. J. Paul Reddam is also the president of CashCall, Inc. (Dept. Ex. 12)

52. The record contains no evidence of common ownership or control between Western Sky Financial, LLC and either CashCall, Inc. or WS Funding, LLC.

53. Michael Lentini is an Examiner in the Government Relations and Consumer Affairs Office of the Department of Banking.

54. In a July 10, 2012 letter to Examiner Lentini, Elissa Chavez, Director of Fraud Prevention/Dispute Resolution at CashCall, Inc., represented to Examiner Lentini that "Western Sky is a wholly Cheyenne River Sioux Tribal Member owned business and is located and operates within the exterior boundaries of the Cheyenne River Indian Reservation. Western Sky loans are initiated, approved, issued and disbursed within the confines of the Cheyenne River Indian Reservation. *Western Sky is licensed with the Cheyenne River Sioux Tribe*." (emphasis supplied) (Cappelli Post-hearing Affidavit, Ex. C)

55. Elissa Chavez's statement suggests that Western Sky Financial, LLC was owned by a member of the Cheyenne River Sioux Tribe rather than by the tribe itself.

56. The Department included as Exhibit M to Anne Cappelli's post-hearing Affidavit an archived web page, retrieved on July 15, 2013, from the site westernsky dot com. Exhibit M stated: "Western Sky Financial is owned wholly by an individual Tribal Member of the Cheyenne River Sioux Tribe and is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions."

57. In a September 4, 2012 communication to Examiner Lentini, CashCall, Inc. represented that: "Western Sky is a wholly Cheyenne River Sioux Tribal Member owned business and is located and operates within the exterior boundaries of the Cheyenne River Indian Reservation. Western Sky loans are initiated, approved, issued and disbursed within the confines of the Cheyenne River Indian Reservation. Western Sky is licensed with the Cheyenne River Sioux Tribe." (Dept. Ex. 3)

58. In an April 15, 2013 letter from CashCall, Inc. to Examiner Lentini, CashCall, Inc. represented that: "Western Sky is licensed with the Cheyenne River Sioux Tribe." (Ex. E to Cappelli post-hearing Affidavit).

59. The record contains no independent evidence from the Cheyenne River Sioux Tribe showing that Western Sky Financial, LLC was licensed with the Cheyenne River Sioux Tribe or in what capacity.

60. Pursuant to the Assignment (Respondent's Post-hearing Ex. 2), Western Sky Financial, LLC assigned and sold some of its loans to WS Funding, LLC. Western Sky Financial, LLC warranted that no payments had been received on any of the assigned notes and that the balance due on each note was the same as the face amount of the note.

61. In a post-hearing supplemental exhibit filed by Respondent (Respondent's Post-hearing Ex. 3), Dan Baren, General Counsel of Respondent, represented in a March 19, 2013 e-mail to Cheryl Bogue that "we are going to stop purchasing Western Sky loans made to CT residents on Friday, March 22."

62. In addition to the Assignment, the record contains some testimony that CashCall, Inc. may have performed administrative support services for Western Sky Financial, LLC. Baren testified that, in handling incoming telephone calls, Western Sky would transfer the excess calls it was understaffed to handle "to a CashCall person for the express and only purpose of collecting the application and submitting it back to Western Sky, so that Western Sky can make the underwriting decision." (tr. 187)

The Assignment and Its Relationship to Connecticut Borrowers

63. The Original Order required that CashCall, Inc. provide the Consumer Credit Division of the State of Connecticut Department of Banking with "a list of all Connecticut residents who, on or after October 1, 2009, have been: (1) offered Consumer Loans by CashCall, Inc.; or (2) charged interest in excess of 12% by CashCall, Inc., on a Consumer Loan. For each Consumer Loan consummated by a Connecticut resident, such submission shall include: (a) A copy of each loan agreement specifying the amount and annual interest rate of the loan, and (b) a list of each Connecticut resident's name and address and full itemization of payments made pursuant to the loan agreement, specifying the dates and amounts of such payments." (Dept. Ex. 17)

64. Anne Cappelli is a Principal Financial Examiner with the State of Connecticut Department of Banking (tr. 17)

65. Examiner Cappelli testified that CashCall, Inc. provided a spreadsheet in response to the Original Order (tr. 63)

66. The department created a spreadsheet, introduced as Exhibit 19, from data provided by CashCall, Inc. (tr. 66).

67. Dan Baren, General Counsel for CashCall, Inc., testified that it appeared that the department-prepared spreadsheet introduced as Exhibit 19 "does accurately summarize the total amount of interest that was received" (tr. 69).

68. Baren testified that all of the loans listed on Exhibit 19 were currently owned by CashCall, Inc. and purchased from Western Sky (tr. 172).

69. Approximately 3,800 loans were listed on Exhibit 19 (tr. 186). With few exceptions, the borrowers listed on Exhibit 19 had a Connecticut address.

70. The Annual Percentage Yield for the loans listed on Exhibit 19 ranged from approximately 89% to 335.32% (Dept. Ex. 19).

71. The record contains no evidence that any of the borrowers listed on Exhibit 19 were members of the Cheyenne River Sioux Tribe.

72. There is no evidence in the record that any of the borrowers listed on Exhibit 19 or any of the borrowers whose complaints were introduced into evidence went to the Cheyenne reservation to apply for, negotiate or enter into the loan agreement.

73. Baren testified, and additional documentary evidence in the record bear this out, that CashCall, Inc. purchased the loans on Exhibit 19 from Western Sky "anywhere from three to seven" days following Western Sky's origination of the loan (tr. 172)

74. Baren testified that the majority of consumer loans originated by Western Sky in Connecticut were purchased by CashCall (tr. 173).

75. Baren testified that the majority of unsecured loans originated by Western Sky and serviced by CashCall, Inc. "came from Western Sky's television and radio advertising." (Tr. 141)

76. Would-be borrowers contacted Western Sky by telephone (see, e.g. Dept. Ex. 2)

77. Examiner Cappelli testified that she was unaware of any Connecticut consumers who obtained a non-mortgage loan from CashCall, Inc. (tr. 99)

78. Examiner Cappelli testified that all of the consumer complaints that were the subject of her testimony involved CashCall, Inc. as a servicer (tr. 104) and that none concerned unsecured loans made by CashCall, Inc. (tr. 104)

Common Characteristics of the Western Sky Loan Agreements Executed With Connecticut Borrowers

79. The Western Sky Loan Agreements introduced into evidence had common characteristics:

a) The Cheyenne River Sioux Tribe was not a party to the agreement.

b) The lender was Western Sky Financial, LLC.

c) Each was electronically signed and had language stating that: "this Notice is in original format an electronic document fully compliant with the Electronic Signatures in Global and National Commerce Act (E-SIGN) and other applicable laws and regulations, and the one, true original Note is retained electronically by us." Baren also testified that each of the documents was electronically signed and that the only true original was the version held on the lender's server (tr. 30).

d) As a precondition to obtaining a loan, borrowers were required to consent to be "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation"; and that "no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation."

e) As a precondition to obtaining a loan, borrowers were required to "agree that you have executed this Loan Agreement as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation . . . ."

f) The Agreements described Western Sky Financial, LLC as "a lender authorized by the laws of the Cheyenne River Sioux Tribal Nation"

g) The Agreements stated that: "We [Western Sky Financial, LLC] do not have a presence in South Dakota or any other states of the United States."

h) The loan document extended to "any subsequent holder of this Note"

i) The note included a set prepaid finance charge.

j) Any dispute arising under the agreement would be resolved by arbitration "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." Even if the borrower opted out of arbitration, any dispute would remain "governed under the laws of the Cheyenne River Sioux

Tribal Nation."

k) The agreements acknowledged that the borrower had previously authorized and requested that payments be made from the borrower's bank account via ACH or electronic funds transfer. If the borrower was delinquent in making payments on the loan "you also authorize us to withdraw funds from your account on additional days throughout the month . . . ."

l) The amount financed on each loan was less than $15,000.

m) The interest rate on each loan was well in excess of 12%.

Interest Rates Charged to Connecticut Borrowers on the Western Sky Loans Assigned to CashCall, Inc.

80. The following chart provides a snapshot of certain Western Sky loan agreements that were the subject of a complaint referenced during the hearing as well as those included post-hearing as an exhibit to Examiner Cappelli's Affidavit. Where the data was not evident from the loan agreement, it was compiled from CashCall, Inc.'s response to the complaint. [*Web editorial note: Items not completed were described as "Not Provided" in original.*]

Borrower Residence	Date of Loan	Amount Financed	APR	Interest Rate	Total Payments Due or Total Finance Charge	Prepaid Finance Charge/Origination Fee
Torrington, CT	4/4/11	$2,525		139%		
Stamford, CT	1/8/12	$1,000	233.05%	149%	$4,899.35 / $3,899.35	$500
Meriden, CT	4/3/12	$1,000	232.72%		$3,936.60	$500
East Hartford, CT 1	4/12/12	$2,525		135%		$75
Norwalk, CT	4/20/12	$9,925	89.68%		$62,650.94	
Waterford, CT	6/12/12	$1,000	233.28%	149%	$4,874.52 / $3,874.52	$500
Amston, CT		$2,525	139.12%		$14,073.62 / $11,548.62	
New Haven, CT	7/7/12	$2,500	139.12%		$11,538.87	
East	8/15/12	$5,000	116.73%		$36,059.13	$75

Hartford, CT 2					
East Hampton, CT	12/20/12	$2,525	139.13%	$13,956.62 / $11,431.62	$75
Danbury, CT	1/7/13	$2,525	139.12%	$14,083.37 / $11,558.37	$75

81. During his testimony, Baren alluded to "a third of the people" defaulting on the loans (tr. 173).
82. Baren explained the unsecured loan interest rates in his testimony: "These are mostly payday customers who otherwise might be in a 600 or 700 or 800 percent APR. But I would agree to the naked eye someone outside of the sub prime lending industry, 139 does look high, yes." (tr. 173)
83. By contrast, Baren also testified that CashCall, Inc.'s mortgage rates are, on average, "in the three and half percent" range (tr. 134; also see CashCall Ex. 2).
84. During his testimony, Baren added that CashCall, Inc. had received millions of dollars in interest since October 1, 2009 (tr. 173).
85. The total amount of interest on Department Ex. 19 was approximately $5.5 million (tr. 65).

Complaints Against CashCall, Inc.

86. Baren testified that CashCall, Inc. had received approximately 14 complaints from Connecticut customers regarding Western Sky Loans that CashCall had purchased (tr. 156-157).
87. The department also introduced several complaints involving CashCall, Inc. as assignee of Western Sky Financial, LLC (see Dept. Ex. 2, 3, 5, 6, 7, 8 and 14) and complaints attached to post-hearing Affidavit of Anne Cappelli). By and large, these complaints focused on the loans' interest rates.
88. None of the complainants appeared or testified at the hearing. Therefore, the hearing officer focused on the actual loan documentation (where provided) and CashCall, Inc.'s undisputed responses to the complaints.
89. In attempting to resolve a dispute, the complaints establish a pattern of CashCall, Inc. calling for accelerated repayment of the debt in full.
90. At least two Connecticut borrowers received mailers from CashCall, Inc. (Ex. E and F to Cappelli post-hearing Affidavit). The first, sent to an East Hampton, Connecticut borrower who took out a loan in 2012, announced: "Welcome to CashCall. Congratulations on your new loan with CashCall, Inc. Enclosed is some information about your loan as well as information on how to contact us and where to send in extra payments." The mailer did not reference Western Sky Financial, LLC. The second, sent to a Danbury, Connecticut borrower who took out a loan in January 2013, elaborated "Welcome to CashCall. CashCall was recently assigned your loan for servicing."
91. Post-assignment, Connecticut borrowers would receive a written communication from CashCall, Inc. advising them that their Western Sky Financial, LLC loans had been assigned to CashCall, Inc. That communication generally provided that: "We wish to assure you that the terms and conditions of your Promissory Note and Disclosure Statement will not change in any way, except

for the fact that you will now be making all of your payments, including your first payment, to CashCall." (see, e.g. Dept. Ex. 2)

92. In at least two instances, a representative of CashCall, Inc. offered to modify the interest rate on the Western Sky loan. See, e.g., Cappelli Affidavit, Ex. C (offering Meriden, Connecticut borrower an opportunity to reduce interest rate to 25%); Dept. Ex. 6 (offering Stratford, Connecticut borrower an opportunity to reduce the borrower's interest rate from 69% to 47% and extend the maturity date from August 1, 2015 to November 1, 2019, with no reference to Western Sky Financial, LLC).

93. The interest rate modifications proposed by CashCall, Inc. to the two Connecticut borrowers were well above 12 percent.

CashCall, Inc. Web Pages

94. The department introduced as Exhibit 10 several website pages for CashCall, Inc. Summarized below are the features of Exhibit 10. While the introduced pages describe CashCall, Inc.'s secured and unsecured lending activity, none refers to CashCall, Inc.'s servicing activities on behalf of Western Sky Financial, LLC.

Cashcallmortgage dot com/LandingPage.aspx

95. The first (cashcallmortgage dot com/LandingPage.aspx) was retrieved on November 27, 2012 and is headed "CashCall – Personal and Mortgage Loans that fit your lifestyle. Apply Online Now!" This combination page, dealing with both personal and mortgage loans, was not a secure site.

96. The page contained the following statement: "Consumer Loans Get Thousands in Your Bank Account in a Day!" (followed by a Learn More link). Juxtaposed against this statement was a reference to "Mortgage Loans No Closing Costs Incredibly Low 3.50% 30 Year Fixed Rate 3.50% APR" (followed by a Learn More link).

97. Although the bottom of this combination page stated that "All loans made pursuant to Dept. of Corporations Finance Lenders Law License #603-8780", neither California or any other state was identified on the page.

98. The page contained no disclaimer stating that the loans were limited to residents of specific, enumerated states.

99. The page contained no information on the interest rates for personal (versus mortgage) loans.

100. The page contained no reference to Western Sky Financial, LLC.

Cashcall dot com/Home.aspx

101. This page, retrieved on November 27, 2012, is headed "Loans that fit Your Lifestyle" and explains that: "[W]e offer a quick and convenient application process so you can get the money you need, when you need it, even if you don't have perfect credit. Apply Now."

102. The page provides a space for the user to type in his or her first name, last name, e-mail address and telephone number, adding that, if the form is completed, "We'll call you." The page contains a caveat indicating that "By clicking the Submit button, I expressly consent to receiving any live or prerecorded telephone call, including to my wireless phone, regarding loan options for CashCall."

103. Under the header "How Does CashCall work?", the page asks the user to "Just complete our short online application, and receive an answer in minutes. It doesn't get any easier than this!"

104. While the page indicates that "All loans made pursuant to California Department of Corporations Finance Lenders Law License #603-8780", this language only addresses California authority to make the loans. The page does not contain any disclaimer stating that the loans were limited to residents of specific, enumerated states – only that they were authorized in California.

105. In requesting that users complete an online application, the page does not mention the interest rates associated with personal loans.

106. The page contained no reference to Western Sky Financial, LLC.

Cashcall dot com/AboutUS.aspx

107. Retrieved on November 27, 2012 this page is headed "California locals, helping Californians."

108. The page indicates that CashCall, Inc. was founded in 2003 and that it is headquartered in Anaheim, California.

109. The page described CashCall, Inc.'s business as offering "high-interest-bearing, unsecured term loans to qualified borrowers who typically use the loans for one-time purchases and debt consolidation. These loans of up to $25,000 are processed entirely over the Internet, phone and fax, and funds are wired into the borrower's bank account typically within 24 hours. CashCall Personal Loans are a good alternative to Payday Loans for borrowers. While interest rates are high, they are typically much lower than those of payday lenders, and CashCall Personal Loans have the potential to help customers rebuild their credit score by making payments on time."

110. The page contained no specific interest rate disclosures or any comparative data supporting CashCall, Inc.'s claims that its interest rates were "typically much lower than those of payday lenders."

111. Although the page referenced CashCall, Inc.'s California Department of Corporations Finance Lenders license, there was no disclaimer indicating that the loans were limited to residents of specific, enumerated states.

Cashcall dot com/HowItWorks.aspx

112. Retrieved on November 27, 2012, this page provides information on how to start the loan application process:

a) *Step 1: Communication by Telephone*. The pages indicates that the first step is to either call 866-590-cash or, alternatively, fill out an online form and have CashCall, Inc. call you. The form does not require a physical address but only a telephone number. By submitting the form, the user consents to receiving any live or prerecorded telephone call for CashCall.

b) *Step 2: Qualify*. As an apparent alternative to initiating contact by telephone, the page permits the user to click on a separate "Apply Now" button. The page points out that "At CashCall, we do our best to make it easy for people just like you to obtain an unsecured personal loan. To get started you must meeting the following requirements to qualify for an Unsecured Personal Loan. You must be able to send us the following information: *Statement of an active bank account *Proof of Employment *Provide proof that you are at least 21 years of age with a valid form of ID such as a driver's license." The page says nothing about having to reside in California to qualify for a loan.

c) *Step 3: Funding*. The page emphasizes speed in funding, advising users that "CashCall

unsecured personal loans are fast! In fact, you could get your money as soon as the next business day, and the money will be deposited directly into your personal bank account so it is easy and convenient too. You do not need to go anywhere – just pick up the phone or log onto the website. It is that easy, 1-2-Money!"

113. The page contains no disclaimer indicating that the loans were limited to residents of specific, enumerated states.

Cashcall dot com/Rates/CurrentRates.aspx

114. Retrieved on November 27, 2012, this page states that CashCall, Inc.'s "lowest rates and higher loan products are reserved for customers with excellent credit." According to the site, loan proceeds range from a high of $25,000 (with an APR of 35.87%) to a low of $2,600 (with an APR of 139.22%), with each loan having a $75 loan fee.
115. The page does not disclose that customers with "excellent credit" would probably qualify for loans having a much lower rate than 35.87% from competing lenders or that the quoted rates present issues under state usury laws.
116. Although the page states that all loans are made pursuant to CashCall, Inc.'s California Department of Corporations Finance Lenders license, there is no disclaimer indicating that the loans were limited to residents of specific, enumerated states.

Cashcall dot com/ContactUs.aspx

117. This page indicates that 1) the user may apply for a loan by phone (866-590-2274 (24 hours 7 days a week); 2) there are separate numbers and times to speak to a customer service representative or a collections service representative or a recovery representative; 3) loan approval documents may be faxed to 949-225-4699; and 4) the address for general inquiries is CashCall, Inc. 1600 S. Douglass Rd. Anaheim CA 92806. The page provides no separate mailing address for complaints, but only instructs the user to click a link.
118. Although the page states that all loans are made pursuant to CashCall, Inc.'s California Department of Corporations Finance Lenders license, there is no disclaimer indicating that the loans were limited to residents of specific, enumerated states.

CashCall, Inc.'s Position on Advertising

119. CashCall, Inc. introduced as CashCall Ex. 3 a June 14, 2013 Declaration by John Fuller who stated that he was the partner and president of Kovel/Fuller, a marketing and brand management firm in California. John Fuller stated that Kovel/Fuller placed media advertising for CashCall, Inc. and had done so since 2003. The Declaration stated that: "Since 2008, no CashCall radio or TV ads related to non-mortgage consumer loans have aired on stations or outlets located outside of California. Since 2008, none of CashCall's advertising related to non-mortgage consumer loans (including TV, radio, internet and print advertising) has been directed to non-California consumers." "Since 2008, no CashCall e-mail advertising has been directed to consumers residing outside of California."
120. John Fuller's Declaration did not explain what specific role Kovel/Fuller played in website design and development or what measures, if any, Kovel/Fuller undertook to ensure that CashCall, Inc.'s web presence did not result in loan inquiries or transactions by nontargeted users.

121. Baren testified that, in the last 5 years, no Connecticut consumer ever obtained a non-mortgage loan from CashCall's website or through CashCall's 800 number (tr. 140-141).

122. Baren testified that "[t]he only borrowers that we have where CashCall was the lender that came through what I call the CashCall channel, be it the CashCall website and 800 number are California." (tr. 142)

Interaction With the CashCall, Inc. Website by Department Personnel

123. Both the Original Order and the Amended Order alleged, as a factual matter, that 1) on or about March 1, 2012 and January 29, 2013 a Connecticut resident inquired about consumer loans using CashCall, Inc.'s online form and, in response, Respondent e-mailed the Connecticut resident to discuss consumer loans and offered to complete the resident's application over the phone; and 2) on August 3, 2012, a second Connecticut resident asked about consumer loans via the telephone number on CashCall, Inc.'s website.

124. Based on the dates and the described conduct, the only evidence in the record relating to such interaction with the CashCall, Inc. website involved Examiner Cappelli and Carmine Costa.

125. Carmine Costa is an employee of the Department of Banking.

126. Carmine Costa did not testify at the hearing.

127. There is a factual dispute between CashCall, Inc. and the department concerning whether Costa and Cappelli focused on obtaining a loan by clicking the "Apply Now" button (as the Respondent contends) or whether communications with CashCall, Inc. were initiated by completing a separate online form.

Interaction With the CashCall, Inc. Website by Carmine Costa

128. In a post-hearing filed Affidavit, Carmine Costa stated that, the morning of August 3, 2012, he had filled out a form on CashCall's website to receive more information on its loan products, that he had inserted his first name, last name, e-mail address (carmine.costa at ct.gov) and the phone number 860-240-8207; that, in reply, he had received a voice mail message from "Patrick" at CashCall; that Patrick's message indicated that Costa's "application for a loan" had come across Patrick's desk; that Patrick wished to assist Costa in completing the application; and that Patrick had requested that Costa call him back at 714-221-3478. In his Affidavit, Costa also indicated that he had called Patrick back at approximately 11:24 a.m., and that Patrick then stated that, to obtain a loan, Costa would need to be 21 years old, possess a valid ID and have a bank account. Costa stated in his Affidavit that he told Patrick that he was from Manchester, Connecticut. Costa also stated that Patrick encouraged him to seek a higher loan amount, such as $2,600 because the origination fees as a percentage of the loan would be lower. When Patrick asked for Costa's Social Security number to pull a credit report, Costa stated that he would back Patrick back. Costa stated in his Affidavit that Patrick did not mention Western Sky or WS Funding.

129. In his Affidavit, Costa also indicated that he had received a telephone call from Brad Martinez of CashCall. The Affidavit did not provide any details on the substance of that phone call.

130. On August 3, 2012 at 11:40 a.m., Bradley E. Martinez, Senior Loan Representative at Cashcall, e-mailed Carmine Costa. The subject line of the message was "Personal Loan." In the e-mail, Martinez acknowledged that he had just spoken with Costa "in regards to your loan application. Please provide me with the following information and I will get you pre-approved for a personal loan ASAP . . . Date of birth - Home address - Social security number - Employer - Monthly gross income - Direct deposit?" (Dept. Ex. 13). Beneath Martinez's name were the words "License

CA-DOC #222810."

131. In reality, 222810 is the NMLS identification number for Bradley E. Martinez and is not a California license number for either Martinez or CashCall.

132. At the hearing, the Hearing Officer asked counsel to the department whether the department would be calling Costa as a witness. Counsel to the department replied, "I could." (tr. 111) Costa, however, ultimately did not testify at the hearing.

133. Neither Bradley E. Martinez nor Patrick of CashCall appeared or testified at the hearing.

134. Examiner Cappelli testified that she had no knowledge concerning any information provided after the August 3, 2012 e-mail (tr. 97).

135. Ethan Post identified himself in a post-hearing Affidavit as the principal architect and leader developer of CashCall, Inc.'s Information Technology Department.

136. Post did not appear or testify at the hearing.

137. In the post-hearing Affidavit filed by Ethan Post, Post stated that an Internet submission was made on August 3, 2012 at 8:07 a.m. PST; that the person making the submission identified himself as Carmine Costa and provided an e-mail address of carmine.costa at ct.gov and a telephone number of 860-240-8207. Post maintained that Costa had selected California as his state of residence on the drop down menu, and characterized the submission as "an application." Post also maintained that the loan agent who later communicated with Costa regarding Costa's application necessarily had knowledge that Costa entered California as his residence.

138. No individual who worked in the loan operations department or call center of CashCall, Inc. appeared or testified at the hearing.

Interaction With the CashCall, Inc. Website by Examiner Cappelli

139. Anne Cappelli is a Principal Examiner with the State of Connecticut Department of Banking. Cappelli has been employed by the department for 25 years (tr. 17).

140. On March 1, 2012 at 12:33 pm, David Ngo, Senior Loan Agent with CashCall, Inc., e-mailed Examiner Cappelli. The subject line of the message was "Western Sky/Cash Call Application Assistance. In the message, Ngo wrote, "I was following up with you regarding the loan application that you are currently working on online for Cash Call. It appears that your application timed-out over the internet, so I was just following up to see if you had any questions or to see if you would like me to complete your application over the phone. When you get a chance, please give me a call at 949-223-1992." (Dept. Ex. 13)

141. In a post-hearing Affidavit filed by Ethan Post, Post stated that an Internet submission was made on March 1, 2012 at 9:07 a.m. PST; that the person making the submission identified herself as Anne Cappelli and provided an e-mail address of anne.cappelli at ct.gov. and a telephone number of 860-240-8200. Post maintained that Cappelli had selected California as her state of residence on the drop down menu, and characterized the submission as "an application."

142. The telephone number for Cappelli provided in the Post Affidavit was different from the telephone number in the Cappelli affidavit for the March 1, 2012 activity. Both phone numbers, however, began with a Connecticut area code (860).

143. No evidence was provided concerning the ability of CashCall's system to flag area codes that were not associated with California.

144. The Cappelli affidavit stated that, on or about March 1, 2012, Cappelli had filled out "a form" on

CashCall's website to receive more information on its loan products, and had included her first and last names, e-mail address (anne.cappelli at ct.gov) and telephone number (860-240-8206).

145. In her affidavit, Cappelli claimed that clicking the "apply" button on the website did not work because she only received a pop up message that "your home state is not supported."

146. Baren testified that "[b]ack in 2008 when we set up the existing website we put up a firewall to ensure that nobody outside of California could possibly submit a loan application through CashCall. We initiated a drop-down menu . . . After you click the apply now, all 50 states are listed. The only one that works is California. If you hit California you're taken to the first page of an application where you start entering information. If you hit any other state . . . Connecticut, Massachusetts, Nevada, it says your state is not supported, and that's the end of the road for that application. You can't go farther." (tr. 128, 139)

147. The post-hearing Affidavit of Ethan Post stated that, since November 2008, the website cashcall dot com "only allowed users who select California as their state of residency to submit information in connection with a loan application. Users who select any state other than California are notified that their state is not supported. All non-California users are thus unable to submit any information or proceed with an application."

148. Baren testified that loans were not made to residents of the states that were not supported (tr. 128).

149. Baren testified that, had Cappelli been successful in submitting an online loan application, "the first thing we would have asked her to do is to send in her California driver's license" and that it was impossible for a Connecticut consumer to obtain a non-mortgage loan through CashCall's website without a California driver's license (tr. 154).

150. On March 5, 2012 at 6:02 a.m., Cappelli e-mailed Ngo, asking "What other information would you need from me to proceed with the loan process?" The e-mail was signed "Anne Cappelli State of Connecticut Phone: 860.240.8206 Fax: 860.240-8215."

151. On March 5, 2012 at 9:42 am, Ngo responded by e-mail to Cappelli, asking, "Did you ever complete and submit the online application? If not, go ahead and give me a call when you get a chance and I can complete the application for you over the phone. At that time, I would be able to see what you have completed so far and would be able to advise you of what additional information I would need."

152. The record contains no evidence concerning whether it would be possible to override an online application block by completing a loan application over the telephone.

153. The Cappelli affidavit did not cover the March 5, 2012 communications with David Ngo at CashCall.

154. Cappelli's next related interaction or attempted related interaction with CashCall occurred over 10 months later.

155. Dept. Exhibit 13 includes a January 29, 2013 at 4:44 a.m. e-mail, which appears to be a web form submission, from www_CCC-ANA-PWS-03 at cashcall.com to info at cashcall.com. The subject line read "Contact Us" and the body read: "Name: Anne Sponzo, Email Address: anne.cappelli at ct.gov, Phone: 860-240-8206, SSN: , Account Number: , Comment: I had just placed a request for a loan and believe someone tried to contact me. I was on another line. Are you able to provide a $500.00 [sic] to me? I live in CT and did no [sic] know if you offered loans in this state, since I could not pull it up on your website?"

156. In her post-hearing Affidavit, Cappelli confirmed the nature of this communication as involving a web submission.

157. In a post-hearing Affidavit filed by Ethan Post, Post stated that an Internet submission was made on January 29, 2013 at 4:31 a.m. PST; that the person making the submission identified herself as

Anne Cappelli and provided an e-mail address of anne.cappelli at ct.gov and a telephone number of 860-240-8206. Post maintained that Cappelli had selected California as her state of residence on the drop down menu and characterized the submission as "an application."

158. Dept. Exhibit 13 also consists of a January 29, 2013 at 4:59 p.m. e-mail from info at cashcall dot com to Cappelli. The subject line of the message was "Contact Us." The message read, "Dear Customer, Thank you for your correspondence. Please contact one of our loan agents at 866-590-2274 to get information on our loan products" and was signed by Nikki Carmody, Customer Concerns Representative.

159. In her affidavit and testimony, Cappelli indicated, on or about January 30, 2013, she called 866-590-2274 (tr. 45). Cappelli's affidavit did not describe the substance of any communications with CashCall as a result of that communication.

160. Examiner Cappelli testified that she could not recall whether she identified herself as a Connecticut resident when she telephoned CashCall, Inc. (tr. 98)

161. Dept. Exhibit 22 consists of an April 26, 2013 e-mail to Anne Cappelli from Robert Araya at cashcall.com. The subject line read "Please Read – IMPORTANT. "WELCOME!" The message stated, "My name is Robert Araya. I have been assigned to help you finish your loan application. Your loan application is still pending and may expire soon. Please give me a call right now. DON'T WAIT! Get your money today! Don't risk getting this loan application expired. Based on the information that you have already provided, it does seem that you have a STRONG CHANCE of being PREAPPROVED for a loan program, please give me a call (949-973-9596. I am Available right now! Please Reply ***STOP*** To be removed from from [sic] email list." Robert Araya identified himself as a CashCall Sr. Loan Agent.

162. Dept. Exhibit 21 consists of a May 16, 2013 e-mail from Robert Araya at Cashcall.com. The subject line of the message was "Call Me to Finish Your Loan – Important." In the message, Araya stated, "Welcome! My name is Robert Araya. I have been assigned to help you finish your loan application. Your loan application still pending and may expire soon. Please give me a call right now. DON'T WAIT! Get your money today! Don't risk getting this loan application expired. Based on the information that you have already provided, it does seem that you have a STRONG CHANCE of being PREAPPROVED for a loan program, please give me a call (949) 973-9596. Thank you for your interest in obtaining a personal loan. I am Available right now! Please Reply ***STOP*** To be removed from from [sic] email list." The message was signed Robert Araya, Sr. Loan Agent, Cashcall, 1600 South Douglass, Anaheim CA 92806.

163. Dept. Exhibits 21 and 22 appear to be automatically generated e-mail messages.

164. Examiner Cappelli testified that she did not ultimately obtain a loan from CashCall, Inc. (tr. 88, 91, 93, 99).

165. Neither Senior Loan Agent David Ngo nor Senior Loan Agent Robert Araya appeared or testified at the hearing.

Updating of NMLS Record by CashCall, Inc.

166. On May 6, 2013, CashCall, Inc. uploaded to the NMLS system information on the Commissioner's March 12, 2013 Original Order.

167. Baren admitted that he had "basically dropped the ball" in not uploading information on the March 12, 2013 Original Order sooner (tr. 156).

CONCLUSIONS OF LAW

Jurisdiction and Procedure

1. The Commissioner has jurisdiction over the licensing and regulation of mortgage lenders, brokers and loan originators pursuant to Part I of Chapter 668, Sections 36a-485 to 36a-534a, inclusive, of the Connecticut General Statutes, and jurisdiction over the licensing and regulation of small loan lenders pursuant to Part III of Chapter 668, Sections 36a-555 to 36a-573, inclusive, of the Connecticut General Statutes. The Commissioner also is charged with administering Sections 36a-570-1 to 36a-570-17, inclusive, of the Regulations of Connecticut State Agencies.
2. The notices provided by the Original Order and the Amended Order issued by the Commissioner against Respondent comported with the requirements of Section 4-177(b) of Chapter 54 of the Connecticut General Statutes.
3. The Commissioner complied with the requirements of Section 4-182(c) of Chapter 54 of the Connecticut General Statutes.
4. The Original Order and the Amended Order complied with the requirements of Section 36a-52(a) [cease and desist order] of the Connecticut General Statutes.
5. The Amended Order complied with the provisions of Section 36a-51(a) [revocation action] of the Connecticut General Statutes.
6. The Original Order and the Amended Order complied with the provisions of Section 36a-50(a) [civil penalty] of the Connecticut General Statutes.
7. The Original Order and the Amended Order complied with the requirements of Section 36a-50(c) [restitutionary remedy] of the Connecticut General Statutes.
8. The Respondent received notice of the hearing, and through its appearance through four attorneys at the June 19, 2013 hearing, had the opportunity to present evidence, rebuttal evidence and argument on all issues of fact and law to be considered by the Commissioner. In addition, Respondent had additional time post-hearing to provide supplemental evidence and argument and/or informally resolve the pending matter with the Consumer Credit Division of the Department of Banking.

Alleged Violation of Section 36a-555 of the Connecticut General Statutes

Section 36a-555 of the Connecticut General Statutes provides, in part, that:

> No person shall (1) engage in the business of making loans of money or credit; (2) make, offer, broker or assist a borrower in Connecticut to obtain such a loan; or (3) in whole or in part, arrange such loans through a third party or act as an agent for a third party, regardless of whether approval, acceptance or ratification by the third party is necessary to create a legal obligation for the third party, through any method, including, but not limited to, mail, telephone, Internet or any electronic means, in the amount or to the value of fifteen thousand dollars or less for loans made under section 36a-563 or section 36a-565, and charge, contract for or receive a greater rate of interest, charge or consideration than twelve per cent per annum therefor, unless licensed to do so by the commissioner pursuant to sections 36a-555 to 36a-573, inclusive. . . .

The Amended Order contains two factual allegations relating to the alleged violation of Section 36a-555: 1) From at least March 2012 forward, CashCall, Inc. offered, via various media in

Connecticut, including the Internet, unsecured consumer loans in amounts less than $15,000 with annual interest rates of greater than 12%; and 2) CashCall, Inc.'s website offered those loans to consumers, not excluding Connecticut residents, by soliciting such consumers.

CashCall, Inc.'s business was multi-faceted. It is and was a Connecticut licensed mortgage lender; it performed loan servicing activities on behalf of Western Sky Financial, LLC in conjunction with an assignment and servicing agreement involving its subsidiary, WS Funding; and it also hosted a website which provided information on its unsecured lending activities.

CashCall, Inc.'s performance of loan servicing activities for Western Sky Financial, LLC, would not, without more, rise to the level of brokering or assisting borrowers in Connecticut to obtain loans, arranging loans through a third party or acting as an agent for a third party since there is insufficient evidence in the record that CashCall, Inc. took proactive steps to perform these functions. Rather, the record indicates that the services that CashCall, Inc. performed pursuant to the agreement with Western Sky Financial, LLC occurred after Western Sky Financial, LLC had funded the loans in question.

Baren testified that, in handling incoming telephone calls, Western Sky would transfer the excess calls it was understaffed to handle "to a CashCall person for the express and only purpose of collecting the application and submitting it back to Western Sky, so that Western Sky can make the underwriting decision." This statement and additional details regarding CashCall, Inc.'s "back office" function, however, were not fleshed out during the hearing or corroborated by additional evidence. Footnote 4 to Respondent's brief attempts to "correct" Baren's testimony by providing a two page description of how CashCall, Inc.'s support functions worked. However, the purported facts set forth in Footnote 4 were not brought out at the hearing and, for that reason, cannot be considered. In addition, no evidence was presented at the hearing that CashCall, Inc. was an alter ego of Western Sky Financial, LLC.

The next question is whether CashCall, Inc. "offered" unsecured loans in Connecticut through its website or any other electronic means. On its face, the website indicates that the first step to obtaining a loan from CashCall, Inc. is to either call 866-590-cash or, alternatively, fill out an online form and have CashCall, Inc. call you. The form does not require a physical address but only a telephone number. By submitting the form, the user consents to receiving any live or prerecorded telephone call for CashCall. As an apparent alternative to initiating contact by telephone, the website also permits the user to click on a separate "Apply Now" button. Nowhere is the consumer advised that the only way he or she can obtain a loan is to click the "Apply Now" button. Indeed, the "Contact Us" page invites would-be borrowers to apply by phone.

CashCall, Inc. argues that it is not offering unsecured loans to Connecticut residents because clicking the "Apply Now" button results in a drop-down menu and a "Not Supported" computer system message when Connecticut is selected from the menu. CashCall, Inc. also maintains that since there is no evidence in the record that any Connecticut resident obtained an unsecured loan from CashCall, Inc. directly, no "offer" was made. The fact that an offer or business solicitation was unsuccessful, however, does not make a communication any less of an offer.

Although CashCall, Inc. claims to have installed a firewall to prevent Connecticut residents from using the Apply Now drop down menu, CashCall, Inc. was remiss in otherwise restricting what on its face is a generic website. None of the pages contains a disclaimer that unsecured loans may only be made to residents of specified states. Moreover, although Baren claimed in his testimony that only those individuals who provided a California driver's license would be loan candidates,

the website contains no such restriction. In fact, the website uses the driver's license requirement to prove that the applicant is at least 21 years old – not to establish where the applicant resides ("Provide proof that you are at least 21 years of age with a valid form of ID such as a driver's license.") Thus, aside from the nonfunctioning (for Connecticut) Apply Now button, CashCall, Inc. did not dissuade website visitors from applying for unsecured loans based on their residency but held itself out as being able to provide unsecured loans without restriction.

When department employees Cappelli and Costa filled out a separate online form, CashCall, Inc. representatives initiated contact with them by telephone and e-mail. CashCall, Inc.'s position appears to be that the representatives (both Senior Loan Agents) believed Cappelli and Costa were California residents. CashCall, Inc. maintains that this is the case even though both Costa and Cappelli provided a Connecticut area code and an e-mail address bearing the State of Connecticut domain name. In fact, Cappelli's March 5, 2012 e-mail was signed "Anne Cappelli State of Connecticut." It is hard to fathom why CashCall, Inc.'s senior loan officials would persist in believing that Costa and Cappelli were from California (as Respondent contends) when the communications were from the State of Connecticut's governmental domain, the telephone numbers bore a Connecticut area code and Cappelli added the words "State of Connecticut" to the body of her March 5, 2012 e-mail. In addition, a third Senior Loan Agent sent e-mail messages to Cappelli's State of Connecticut e-mail account following the entry of the Original Order exhorting her to "Get Your Money Today" since there was a "strong chance" she would be preapproved for a loan.

Therefore, since CashCall, Inc. extended loan offers through its unrestricted website and through e-mailed communications to State of Connecticut employees at their State of Connecticut e-mail accounts, CashCall, Inc. violated Section 36a-555(2) of the Connecticut General Statutes.

The applicability of Section 36a-555(2) to out-of-state lenders was confirmed in an opinion by the State of Connecticut Attorney General who concluded that because 36a-555 was amended in 2009 to "expressly" cover small loans offered to Connecticut consumers "through any method, including, but not limited to, mail, telephone, Internet or any electronic means," it applied to out-of-state small loan lenders using these methods to make small loans to in-state consumers."

Alleged Violation of Section 36a-573(a)

Section 36a-573(a) states that:

> (a) No person, except as authorized by the provisions of sections 36a-555 to 36a-573, inclusive, shall, directly or indirectly, charge, contract for or receive any interest, charge or consideration greater than twelve per cent per annum upon the loan, use or forbearance of money or credit of the amount or value of . . . fifteen thousand dollars or less for any such transaction entered into on and after October 1, 1997. The provisions of this section shall apply to any person who, as security for any such loan, use or forbearance of money or credit, makes a pretended purchase of property from any person and permits the owner or pledgor to retain the possession thereof, or who, by any device or pretense of charging for the person's services or otherwise, seeks to obtain a greater compensation than twelve per cent per annum. No loan for which a greater rate of interest or charge than is allowed by the provisions of sections 36a-555 to 36a-573, inclusive, has been contracted for or received, wherever made, shall be enforced in this state, and any person in any way participating therein in this state shall be subject to the provisions of said sections, provided, a loan lawfully made after June 5, 1986, in compliance with a validly enacted licensed

> loan law of another state to a borrower who was not, at the time of the making of such loan, a resident of Connecticut but who has become a resident of Connecticut, may be acquired by a licensee and its interest provision shall be enforced in accordance with its terms.

The Amended Order alleged that CashCall, Inc. charged and received interest at a rate greater than 12% on at least 3,800 consumer loans to Connecticut residents in amounts less than $15,000, and that, in so doing, CashCall, Inc. violated Section 36a-573(a) of the Connecticut General Statutes.

It is beyond dispute that the Western Sky loans which were the subject of complaints introduced into evidence and the Western Sky loans listed on Department Exhibits 19 and 20 bore interest rates well in excess of 12%. Equally clear, CashCall, Inc. received interest on those loans. Therefore, CashCall, Inc. violated Section 36a-573(a) of the Connecticut General Statutes. In addition, on at least two occasions, CashCall, Inc. attempted on its own to negotiate a loan modification in excess of the 12% interest cap with Western Sky borrowers located in Connecticut.

Significantly, as a licensed mortgage lender in Connecticut, CashCall, Inc. had a responsibility to comply with Connecticut law governing all aspects of its business operations – including the statutory interest rate cap. The fact that it did not do so reflects adversely on its character and fitness to operate in the lending industry.

Alleged Violation of Section 36a-53b

Section 36a-53b of the Connecticut General Statutes provides, in pertinent part, that:

> No person shall, in connection with any activity subject to the jurisdiction of the commissioner: (1) Employ any device, scheme or artifice to defraud; (2) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) engage in any act, practices, or course of business which operates or would operate as a fraud or deceit upon any person.

The Amended Order alleged that CashCall, Inc. violated Section 36a-53b by 1) failing to identify a third party (i.e. Western Sky) as the entity making consumer loans in Connecticut when offering such loans to Connecticut residents, and 2) stating on its website that all loans were made pursuant to its California lender license, when in fact such loans in Connecticut are not made pursuant to such license.

The record is not clear on the factual context in which CashCall, Inc. failed to identify a third party as the maker of the loans, and therefore the claim based on this factual predicate cannot stand. Indeed, each loan agreement identified Western Sky Financial, LLC as the lender.

Similarly, it is unclear from the record whether CashCall, Inc.'s website was a vehicle for would-be borrowers to obtain unsecured and/or mortgage loans exclusively from CashCall, Inc. or whether those borrowers would also be introduced to Western Sky via the website. From a reading of the website, it would appear that the former is true, particularly since Western Sky Financial, LLC maintained its own website. In addition, there is no evidence, testimonial or otherwise, that any prospective borrower sought or was directed to Western Sky as a result of the prospect's interaction with CashCall, Inc.'s website. Each of the loan agreements specifically referenced Western Sky Financial, LLC as the maker of the loan. If there was any consumer confusion it might have been because Western Sky Financial, LLC did not fully disclose the identity of

CashCall, Inc. However, that is not the department's claim. Consequently, there is insufficient evidence to establish a violation of Section 36a-53b based upon a failure to identify Western Sky Financial, LLC as the originator of the loans.

Next, the fact that the CashCall, Inc. website stated that loans were made pursuant to CashCall, Inc.'s California license does not imply that the California license authorized loans in all states. (It should also be noted that the Landing Page only references the "Dept. of Corporations Finance Lenders Law" – without any mention of California.) A reasonable would-be borrower, bent on obtaining a quick, short-term loan, would probably not give the statement a second thought. What would have been more meaningful to the would-be borrower is a disclaimer that CashCall, Inc. was not authorized or licensed to make loans in States X, Y and Z. Therefore, the reference to CashCall, Inc.'s California license does not in and of itself establish a violation of Section 36a-53b of the Connecticut General Statutes.

Section 36a-53b also proscribes material omissions. The web pages introduced into evidence may contain omissions that would have been material to would-be borrowers in deciding whether to pursue a loan through CashCall, Inc.: 1) if CashCall, Inc.'s unsecured lending was indeed limited to California residents, the pages contain no statement that the loans were limited to residents of specific, enumerated states; 2) the interest rates associated with personal loans were not consistently disclosed; 3) there was no comparative data supporting CashCall, Inc.'s claims that its interest rates were "typically much lower than those of payday lenders"; 4) CashCall, Inc. neglected to state that customers with "excellent credit" would probably qualify for loans having a much lower rate than 35.87% from competing lenders or that the quoted rates present issues under state usury laws; and 5) in representing that CashCall, Inc. unsecured loans would have the potential to help customers rebuild their credit score by making payments on time, CashCall, Inc. failed to disclose the default rate on the loans and the resulting adverse impact on a borrower's credit score.

The Amended Order, however, did not allege that Respondent made material omissions of the type described in the preceding paragraph, and therefore such omissions cannot support a finding that Respondent violated Section 36a-53b.

However, such lack of disclosure would be relevant to Respondent's business practices, and, by extension, it character and fitness to conduct lending activity.

Alleged Violation of Section 36a-490(c)

Section 36a-490(c) of the Connecticut General Statutes provides, in part, that:

> The mortgage lender . . . licensee shall promptly file with the system or, if the information cannot be filed on the system, directly notify the commissioner, in writing, of the occurrence of any of the following developments: . . .
>
> (3) Receiving notification of the institution of license denial, cease and desist, suspension or revocation procedures, or other formal or informal regulatory action by any governmental agency against the licensee and the reasons therefor . . . .

CashCall, Inc. clearly violated Section 36a-490(c) of the Connecticut General Statutes by waiting approximately two months after the Original Order was issued to amend its NMLS record to disclose the existence of the Original Order. It was only after the department issued its May 3,

2013 compliance letter that CashCall, Inc. undertook to comply with the provision.

Basis for Revocation

Section 36a-494 of the Connecticut General Statutes provides, in part, that:

(a) (1) The commissioner may . . . revoke . . . any mortgage lender . . . license or take any other action, in accordance with the provisions of section 36a-51, for any reason which would be sufficient grounds for the commissioner to deny an application for such license under sections 36a-485 to 36a-498f, inclusive, 36a-534a and 36a-534b, or if the commissioner finds that the licensee . . . (C) violated any of the provisions of this title or of any regulations adopted pursuant thereto . . . .

(b) Whenever it appears to the commissioner that (1) any person has violated, is violating or is about to violate any of the provisions of sections 36a-485 to 36a-498f, inclusive, 36a-534a and 36a-534b, . . . the commissioner may take action against such person or licensee in accordance with sections 36a-50 and 36a-52.

Section 36a-489(a)(1) of the Connecticut General Statutes explains that:

> (1) The commissioner shall not issue an initial license for a mortgage lender . . . unless the commissioner, at a minimum, finds that: . . . (C) the applicant demonstrates that the financial responsibility, character and general fitness of the applicant . . . are such as to command the confidence of the community and to warrant a determination that the applicant will operate honestly, fairly and efficiently within the purposes of sections 36a-485 to 36a-498f, inclusive, 36a-534a and 36a-534b . . . .

The record indicates that CashCall, Inc. violated Sections 36a-555 and 36a-490(c) of the Connecticut General Statutes. In addition, and of more significance, CashCall, Inc. violated Section 36a-573(a) of the Connecticut General Statutes thousands of times by receiving interest well in excess of 12% in conjunction with its business activities involving unsecured loans. This fact, combined with other state sanctions entered against CashCall, Inc. for alleged violations of state usury laws, does not inspire confidence that CashCall, Inc. will abide by Connecticut law for the benefit of Connecticut borrowers. CashCall, Inc. argues that, because the allegations concern unsecured lending and did not arise in conjunction with its mortgage business, the Commissioner would be overreaching in revoking CashCall, Inc.'s mortgage license. The Commissioner rejects this argument (see, *Crescent Investment Co. v. Commissioner of Banking and Insurance of the State of New Jersey*, 103 N.J. Super. 11 (1968).

CashCall, Inc.'s Special Defenses

CashCall, Inc. asserts that 1) Webb is a member of the Cheyenne River Sioux Tribe; 2) because Webb is a member of the tribe, Western Sky Financial, LLC enjoys the privileges of tribal membership; 3) as assignee, CashCall, Inc. steps into the shoes of Western Sky Financial, LLC; and 4) therefore, the department cannot enforce against CashCall, Inc. what it could not enforce against Western Sky Financial, LLC.

This argument is attenuated at best. In *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165,

171, 172, the United States Supreme Court held that the sovereign immunity doctrine does not immunize individual tribal members. *Puyallup* was cited with approval in *State of Colorado ex rel. Suthers v. Western Sky Financial LLC and Martin A. Webb* (D. Col., Case No. 11 CV 638, 4/15/12) wherein the court held that "Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon Western Sky." The court also concluded that Western Sky's conduct did not involve the regulation of Indian affairs on an Indian reservation.

Similarly, in *State ex rel. Suthers v. Western Sky LLC*, 845 F.Supp. 2d 1178, 1182 (D. Colo. 2011), the court held that Western Sky's conduct did not involve the regulation of Indian affairs on a reservation, observing that: "The borrowers do not go to the reservation in South Dakota to apply for, negotiate or entered into loans. They apply for loans in Colorado by accessing defendants' website. They repay the loans and pay the financing charges from Colorado; Western Sky is authorized to withdraw the funds electronically from their bank accounts; and the impact of the allegedly excessive charges was felt in Colorado."

There is no evidence in the record that any Connecticut resident went to the Cheyenne River Sioux Reservation to apply for or negotiate a loan. Insofar as the Western Sky loans were concerned, the record suggests that the application and repayment process was done electronically as was the case in Suthers. And certainly, the impact of the high interest charges was deeply felt in Connecticut by borrowers who could ill afford such charges.

In considering a motion to remand in *State of Missouri ex rel. Koster v. Webb et al.* (D. Mo., Case No. 4:11-cv-01237-AGF, 3/27/12), the court concluded that "Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon the Lending Companies [including Western Sky Financial LLC]" and that, as an enabling provision, the Indian Commerce Clause does not completely preempt state law.

Even if Western Sky Financial, LLC were an Indian tribe (which it is not), courts have held that Internet lending does not constitute on-reservation activity (see, e.g., *Otoe v. Missouria Tribe of Indians et al. v. New York State Department of Financial* Services (SDNY, 9/30/13, Case No. 13-CV-5930-RJS) [consumers not on a reservation when they apply for a loan, agree to the loan, spend loan proceeds or repay those proceeds with interest nor do they travel to tribal land].

There is no evidence in the record that Western Sky Financial, LLC – let alone CashCall, Inc. – was an Indian tribe or that the Cheyenne River Sioux Tribe sanctioned or was otherwise involved with these loans. In fact, no document was introduced evidencing any license that Western Sky Financial, LLC had with the tribe. The Cheyenne River Sioux Tribe did not intervene in these proceedings or ask to file an amicus brief. Although the tribe's perspective is not included in the record, on August 13, 2013, the Native American Financial Services Association ("NAFSA"), an organization dedicated to preserving the sovereignty of Native American tribes and whose membership consists of federally recognized tribes issued this release: "Western Sky Loans does not operate under tribal law or abide by tribal regulatory bodies and is not wholly-owned by a federally-recognized tribe." On December 16, 2013, NAFSA issued another release which stated: "CashCall does not abide by these consumer-friendly practices, is not an enterprise wholly owned by a federally-recognized tribe, is not regulated by a tribal regulatory lending authority, does not operate according to tribal law, and breaks the covenants meant to benefit tribal governments and their members." (see release at mynafsa dot org) . . . .

Neither CashCall, Inc. nor Western Sky Financial, LLC could legally claim the immunity extended

to an Indian tribe. To conclude otherwise would do a disservice to legitimate Native American lending operations. In its brief, CashCall, Inc. claims that the Commissioner, in issuing the Amended Order, is attempting to "regulate a reservation" (Respondent's brief at 20). This argument misconstrues the Commissioner's action. The Commissioner was attempting to regulate California-based CashCall, Inc.'s unsecured lending activity and the exorbitant interest rates charged and/or received by CashCall, Inc.

Therefore, CashCall, Inc.'s tribal immunity defense must fail.

Lest anyone erroneously believe that the extraordinary interest rates charged and/or received by CashCall, Inc. would have been permissible from a Native American perspective, the case of *Capital Loan Corporation v. Platero et al.* (2000 CP-cv-001) may provide some insight. There, the District Court of the Navajo Nation (New Mexico) was presented with three unsecured loans for $200, $100 and $500. The APR on the loans was 191.31%, 233.76% and 89.62% respectively. Finding the interest rates unconscionable, the court remarked, "these loans certainly appear to be an 'unconscionable bargain' which is 'one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other' [citation omitted]. Are these interest rate agreements ones are freely made? The court takes judicial notice of the very high poverty rates in the Navajo Nation and the smallness of these loans indicate need by the borrowers. The court also wonders what fair and honest lender would charge interest rates from 89.63% to 233.76%. This court cannot enforce that kind of agreement."

ORDER

Having read the record, I hereby **ORDER**, pursuant to Sections 36a-50, 36a-51, 36a-52 and 36a-494 of the Connecticut General Statutes that::

1. The temporary cease and desist order issued against CashCall, Inc. pursuant to Section 36a-52(b) of the Connecticut General Statutes shall be made **PERMANENT** upon the effective date of this Order.
2. Pursuant to Sections 36a-573(c) and Section 36a-50(c) of the Connecticut General Statutes, CashCall, Inc. shall **MAKE RESTITUTION** of those sums obtained as a result of CashCall, Inc.'s violation of Section 36a-573(a) of the Connecticut General Statutes. Specifically, the Commissioner **ORDERS** that: No later than thirty (30) days from the date this Order becomes effective, CashCall, Inc. shall 1) Repay any interest in excess of 12% received by CashCall, Inc. on or after October 1, 2009, from those Connecticut residents identified in Department Exhibit 19, such payments to be made by cashier's check, certified check or money order; and 2) provide proof of such payments to the Commissioner, through the Consumer Credit Division of the State of Connecticut Department of Banking.
3. The license of CashCall, Inc. to act as a mortgage lender is Connecticut is hereby **REVOKED** effective thirty days following the Commissioner's execution of this Order. During that thirty day time frame, Respondent shall wind up its mortgage lending business with persons located in Connecticut, such winding up to include any pending mortgage business activities, including extensions of credit, loan closings, servicing and the like. No later than five business days following the effective date of this Order, CashCall, Inc. shall file with the Commissioner a written report providing details on those Connecticut persons (the "Affected Persons") affected by the winding up of its Connecticut operations, to wit: 1) the names, address and telephone numbers of each Affected Person; 2) the amount of prepaid fees submitted by each Affected

Person; 3) rate lock status; 4) the amount of each loan; 5) loan status; 6) loan terms, if approved; 7) scheduled closing date: and 8) whether the purpose of the loan was a purchase or a refinance. CashCall, Inc. shall place any fees previously collected from an Affected Person in connection with a residential mortgage loan application in a separate escrow account maintained at a federally-insured bank located in Connecticut and shall file with the Commissioner during the thirty day time frame written reports satisfactorily documenting each escrowed amount.

4. A **CIVIL PENALTY** of Three Hundred Fifty Thousand Dollars ($350,000) shall be imposed upon CashCall, Inc., such penalty to be remitted to the Department of Banking by cashier's check, certified check or money order made payable to "Treasurer, State of Connecticut" no later than thirty (30) days from the date this Order is effective; and
5. This Order shall become effective when mailed.

So ordered at Hartford, Connecticut
this 4th day of February, 2014.

_____/s/_____
Howard F. Pitkin
Banking Commissioner

On February 4, 2014, this Order
was sent electronically and hand delivered
to Stacey Serrano, Esq., counsel to the
Department, and sent electronically
as well as by certified mail,
return receipt requested, to
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at the following addresses:

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Administrative Orders and Settlements