HHB-CV17-6038913-S		
GREAT PLAINS LENDING, LLC, *et al.*,	:	SUPERIOR COURT
PLAINTIFFS,	:	
	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
	:	
STATE OF CONNECTICUT DEPARTMENT OF BANKING, *et al.*,	:	
DEFENDANTS.	:	MAY 23, 2018

DEFENDANTS' BRIEF

Agency procedural regulations and the Uniform Administrative Procedures Act, Chapter 54 of the Connecticut General Statutes ("UAPA") govern administrative procedure for Connecticut state agencies, such as Defendants, and administrative respondents, such as Plaintiffs. Agencies must provide proper notice of allegations of violations, and respondents must timely appear, engage in discovery, and request and attend a hearing for testimony, cross-examination, presentation of evidence and argument on any issue of fact or law. Plaintiffs simply failed to do so, and were defaulted in due course. Therefore, Plaintiffs' administrative appeal should be dismissed because they were lawfully defaulted.

After the deadline to appear and request a hearing had passed, Plaintiffs muddied the waters by submitting a motion to dismiss claiming Defendants lacked subject matter jurisdiction over Plaintiffs. Corporate Plaintiffs Great Plains Lending LLC ("Great Plains") and Clear Creek Lending ("Clear Creek") claimed that as an agency, instrumentality, or enterprise of a tribe they enjoyed the tribe's sovereign immunity from suit. Corporate Officer Plaintiff Shotton claimed he was immune as a tribal employee acting within the scope of his official authority. To buttress their claims, Plaintiffs supplied an affidavit and exhibits which, in their view, conclusively established their

immunity. The Commissioner dismissed Plaintiffs' motion, noting Plaintiffs' default and concluding that tribal sovereign immunity related to suits, not administrative actions.

Upon the Plaintiffs' first administrative appeal, the Parties litigated before Judge Schuman the question of the applicability of tribal sovereign immunity to a state agency's subject matter jurisdiction. Judge Schuman concluded it did, and after remand the Commissioner ultimately decided that on the record before him, Plaintiffs failed to demonstrate entitlement to share a tribe's sovereign immunity as claimed. It is this decision ("Restated Order") that is under appeal in the present matter.

The Restated Order notes that Plaintiffs failed to timely appear and request a hearing. Filing a motion does not void the requirement of appearance, discovery and a hearing. Because Plaintiffs failed to exercise their duly noticed right to a hearing, Plaintiffs were lawfully defaulted on all issues, including jurisdictional ones. Second, the Commissioner reviewed the motion, affidavit and exhibits the Plaintiffs did submit, found facts relevant to a suitable (and Judge Schuman-endorsed) multi-factor balancing test for making the determination of policy or judgment on whether a party was entitled to "arm" of the tribe status, analyzed those facts under the multi-factor test, and concluded corporate Plaintiffs were not entitled to "arm" of the tribe status. The Commissioner went on to consider Plaintiff Shotton's claims and rejected those as well.

On appeal, Plaintiffs continue to simply ignore the fact they were lawfully and properly defaulted. But the law is plain; administrative respondents must appear, are subject to discovery, and must request and attend a hearing before the agency (absent an express statutory exception not present here) before contesting the agency decision

on appeal. This is true even if they only wish to file a special appearance to contest jurisdiction. Procedural history is fatal to Plaintiffs' appeal.

Instead, Plaintiffs claim that the Commissioner relied upon the wrong case in formulating the balancing test to weigh their jurisdictional claims. Since the law does not mandate that courts (or agencies) use any particular test, and the case the Commissioner relied upon to identify appropriate and relevant factors was judicially endorsed in a prior stage of litigation between the Parties, and the case suggested by Plaintiffs was not raised below, Plaintiffs' claim is not tenable. No more tenable are Plaintiffs' mischaracterizations of the case itself; a nine-factor test is not a single-factor test. Substantive distinctions between the factors in the balancing test the Commissioner applied and that Plaintiffs prefer are at most minor. Plaintiffs' speculation on what the Commissioner would have determined under their preferred test is meritless. Whatever Plaintiffs' claim, the Restated Order reveals that the Commissioner properly exercised his discretion to methodically review the facts available to him in the closed record as to all the factors in a reasonable and fair test. The Commissioner exercised the judgment that in earlier litigation Plaintiffs insisted he must exercise. Plaintiffs simply don't like the result.

Plaintiffs further claim that all the evidence in the record supports their claim and the Defendants offered no facts. But the law places the burden of proof for their claim on Plaintiffs, not Defendants. Not only was the evidence in Plaintiffs' submission incomplete in light of the factors the Commissioner properly weighed, but the Commissioner's analysis explained how many facts gleaned from Plaintiffs' submission were inconsistent with Plaintiffs' claim. The Commissioner's analysis was, if anything,

excessively deferential to Plaintiffs' characterizations of their evidence, given that Plaintiffs' failure to appear and request a hearing denied the Department both jurisdictional discovery and cross-examination at a hearing–both of which the Department is statutorily entitled to.

In an ironic twist, Plaintiffs ask this Court to usurp the Commissioner's role and now engage in jurisdictional fact-finding itself. Of course, in prior litigation Plaintiffs insisted–and Judge Schuman agreed–that the Commissioner must determine the scope of his own jurisdiction in an administrative action. Even if Plaintiffs weren't properly defaulted (they were), even if the Commissioner's method of jurisdictional determination was not well within his discretion (it was), this Court sitting in an appellate function under the UAPA may review the Defendant's order for error but it may not substitute its judgment for the Commissioner's as to the weight of the evidence on questions of fact. This administrative appeals court may not hold a hearing on jurisdictional facts now, just because the Plaintiffs find it convenient to appear for argument now rather than before the Department in the noticed administrative hearing.

In any event, Plaintiffs' preferred formulation of the appropriate balancing test differs little from that test previously recommended to the Commissioner by Judge Schuman. And there's no reason the Commissioner must accept Plaintiffs' blinkered application of its view of the evidence to that or any other balancing test.

Defendants have conformed, at all stages in this administrative proceeding, to UAPA procedural rules. Plaintiffs simply have not, and as a consequence can not show that their substantial rights have been prejudiced by the Commissioner's order. The Court should affirm the decision of the Commissioner.

COUNTER-STATEMENT OF THE LEGAL AND FACTUAL BACKGROUND

1. The Department's Statement of the Legal and Factual Background

Companies that target desperate borrowers with high interest loans are a serious problem in Connecticut, and nationwide. To combat predatory lending, Connecticut has laws that impose civil as well as criminal penalties on unlicensed lenders that issue certain types of loans with annual percentage rates ("APR") higher than 12%. There is no dispute that at all times relevant to this litigation, Plaintiffs were unlicensed lenders that issued loans to Connecticut residents at APRs ranging from 199.44% to 398.20%.

Defendants (collectively "the Department") are charged with protecting Connecticut residents from loans like those issued by Plaintiffs. To that end, the Department sent Plaintiffs notice that Plaintiffs were violating Connecticut law and ordered them to stop. Administrative Record ("AR") 1-21. Consistent with the its regulations and the UAPA, the Department also provided each Plaintiff warning that unless each timely appeared and requested a hearing on any issue of fact or law, the Department's allegations would be deemed admitted by each and a final order would issue, *inter alia*, permanently enjoining each from violating Connecticut law and imposing civil penalties. AR19-21.

No Plaintiff timely appeared and no Plaintiff ever requested a hearing, but instead Plaintiffs eventually delivered a responsive pleading that argued that the sovereign immunity of the Otoe-Missouria Tribe of Indians ("the Tribe") barred the Department from taking any action in response to Plaintiffs' lending activity, because the corporate Plaintiffs are tribal corporations and Plaintiff Shotton was a tribal employee. AR27-28. Attached was a memorandum of law (AR32-49) and an affidavit (AR51-54) with exhibits

(AR55-130) that purported to provide all relevant evidence necessary to summarily determine Plaintiffs were immune.

Notwithstanding the fact Plaintiffs had already missed their deadline to appear and did not request the hearing that is mandated for any contested case, the Commissioner notified Plaintiffs that he disagreed that tribal sovereign immunity was relevant to a state agency's authority to take administrative action. AR154-162. The Commissioner also issued a formal default order against Plaintiffs due to their failure to timely appear and request a hearing as required under the Department's regulations and the UAPA. AR163-169.

Plaintiffs brought an administrative appeal. *Great Plains Lending, LLC v. Conn. Dep't of Banking*, 2015 WL 9310700, (Nov. 23, 2015, Schuman, J) (as amended by Dkt. Entry 139.20, Aug 31, 2016 attached to Pl's Br. at Exhibit B) ("Great Plains 1"). Judge Schuman held that tribal sovereign immunity implicates the subject matter jurisdiction of administrative agencies. *Id*. at *5. He further held that an administrative respondent's jurisdictional objections require an agency to determine the scope of its jurisdiction in light of the facts and the law. *Id*. at *8. Finally, Judge Schuman recognized a non-tribal party's claim to be an "arm" of the tribe "involves use of a balancing test that essentially requires the commissioner to make a 'determination of policy or judgment.'" *Id*. For the appropriate balancing test itself, Judge Schuman referenced two cases; *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010) ("Cash Advance") and *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., Inc.*, 24 N.Y.3d 538, 25 N.E.3d 928, 2 N.Y. Supp.3d 15 (NY 2014) ("Sue/Perior"). *Id*. Judge Schuman

referred to the tests under these cases as, respectively, a "three-prong arm of the tribe test" (*Cash Advance*) and a "nine factor test" (*Sue/Perior*). *Id.*

As for whether Plaintiffs actually had demonstrated they were beyond the Department's jurisdiction, the Court recognized that presiding over an appeal, it "cannot make that administrative determination for [the Commissioner]." *Id*. In a subsequent order on August 31, 2016, the Court ultimately remanded the case "to determine, *based on the record that existed at the time*, 1) whether Great Plains and Clear Creek are arms of the Tribe, 2) whether Shotton has tribal sovereign immunity from financial penalties that the commissioner seeks to impose, and 3) whether Shotton has tribal immunity from the commissioner's request for prospective injunctive relief against future violations of the state's usury and banking laws." *Pl's Br. Ex. B.* (emphasis added.)

On remand, the Commissioner determined that even if (as Plaintiffs argued and Judge Schuman agreed) tribal sovereign immunity is a matter of fact and law implicating agency jurisdiction, that to avoid default on all issues, *including jurisdiction*, Plaintiffs were required to appear and attend a hearing before the Department just as with any contested case. AR176-177. The Department's regulations and the UAPA provide both the respondents in a contested case *and* the agency with a right to both discovery and appearance at a hearing on all issues involved, *including* jurisdiction. *Id*. Since the closed record revealed Plaintiffs were warned of the consequences of failing to appear, failing to timely request a hearing, and failing to appear for the hearing, but nevertheless did not do so, the Plaintiffs defaulted on all claims, *including* jurisdiction. *Id*.

Further, the Commissioner determined that even if Plaintiffs' submission was fully credited and the Plaintiffs excused for their failure to request and participate in

discovery and a hearing, corporate Plaintiffs had failed to meet their evidentiary burden to demonstrate that they are an "arm" of the Tribe. AR177-189. Corporate officer Plaintiff Shotton's claim failed, first, because it depended upon corporate Plaintiffs' status, and second, because the allegations concerned actions he took in his personal, rather than tribal official capacity and Plaintiff Shotton, not the Tribe, was the real party in interest. AR186-189. This appeal followed.

2. Clarifications of Plaintiffs' Statement of Procedural and Factual Background

Plaintiff's Brief reveals confusion about the factual and procedural history of the case. *Pl's Br. at 4–9*. A clarification of key elements of Plaintiffs' "History" follows.

The legal background of "Tribal Sovereignty and Sovereign Immunity" at pages 4-5 of Plaintiffs' Brief is irrelevant to the extent it discusses tribal sovereignty because that is an issue independent from the extension of tribal sovereign immunity to an "arm" of the tribe. The Department has never asserted jurisdiction over the Tribe, and this matter does not implicate the Tribe's sovereignty.

The supposed facts regarding "The Tribe's Wholly-Owned and Operated Lending Entities" at pages 5-6 of Plaintiffs' Brief cite to the memorandum of law and affidavit with exhibits that Plaintiffs filed with the Department. AR32-130. These are *not* the facts as found by the Commissioner under UAPA procedure. The only facts found by the Commissioner are (a) those facts which were alleged by the Department and later found by default when Plaintiffs failed to appear and request a hearing (AR178, Fact 1), and (b) those facts found in the Restated Order based upon evidence Plaintiffs put in the record (AR178-180, Facts 2-14). Plaintiffs' appeal does not challenge the facts found by Defendants under the substantial evidence test, nor do Plaintiffs explain how any evidence in the record compels additional facts relevant to, let alone determinative of,

the Commissioner's analysis of their claim. Accordingly, what Plaintiffs claim to be facts are of no moment.

The purported facts pertaining to "The Department's Prosecution of the Tribe's Businesses" (*Pls' Br. at 6-9*) are incomplete and misleading. First, the Department has consistently disputed that Plaintiffs "contested the Department's assertion of regulatory jurisdiction" (*Pls' Br. at 7*) in the manner required by law. The Plaintiffs were notified that under the Department's regulations and the UAPA, they could contest any issue of fact or law. AR13-15; AR19-21. They simply failed to do so, and as Judge Schuman has already determined, they were warned of the consequences for failing to do so and so were not deprived of due process. *Great Plains 1*, 2015 WL 9310700 at *8-9.

Judge Schuman vacated the Commissioner's initial order on August 31, 2016 (*Pl's Br Ex. B*), but that his decision was "in favor of Plaintiffs" (*Pl's Br. at 8*) is an incomplete characterization at best. The decision in *Great Plains 1* speaks for itself, and this Court should read it extremely carefully. In light of (a) Plaintiffs' failure to appear, engage in discovery, and request and attend a hearing as required under the Department's regulations and the UAPA, (b), the limited arguments Plaintiffs actually raised in their pleading, and (c) the unconvincing nature (whether by design or by necessity) of the evidence Plaintiffs' submitted, Judge Schuman's decision in *Great Plains 1* was at most a pyrrhic victory for Plaintiffs.

Vacating the Commissioner's initial order may have been the *action* Plaintiffs sought from Judge Schuman, but the substance of Judge Schuman's decision is that administrative respondents, such as Plaintiffs, that want to raise a jurisdictional objection based upon their entitlement to share a tribe's sovereign immunity from suit

must raise and prove their jurisdictional defense before the agency, and they're stuck with the administrative record they created because the agency's process provides all the process they were due. The record shows Plaintiffs defaulted on their chance rather than engage in discovery and a hearing before the Department, and the record shows they relied exclusively on organizational documents and neglect any evidence of the actual workings of corporate Plaintiffs and their financial relationship with the Tribe.

Plaintiffs are also confused about what happened following Judge Schuman's initial remand order in November 2015. *Pls' Br. at 8*. The Department did not issue "a ruling" (*id*.) but rather a Notice of Proposed Findings of Facts, Proposed Conclusions of Law and Notice of Hearing ("May 2016 Notice"). *See Great Plains 1*, Docket #138.00[1]. This May 2016 Notice, attached as Exhibit 1, offered Plaintiffs a fresh opportunity, pursuant to the Department's regulations and the UAPA, to engage in discovery and attend a hearing. Rather than grasp this opportunity to supplement the record and cure their default, not to mention offer argument and introduce whatever evidence and testimony they thought relevant and persuasive to the fact-finder, Plaintiffs sought an order from Judge Schuman to require Defendants to rescind the May 2016 Notice and proceed strictly on the administrative record as it stood when the initial administrative order was issued. *See Great Plains 1*, Docket #139.00 (*Pl's Br. Ex. C*). That limited administrative record reveals (a) failure on the part of Plaintiffs to timely appear and request a hearing pursuant to the procedural requirements of the Department's

[1] Plaintiffs' brief at 8 cites to AR170-190 for this May 2016 Notice, but that portion of the record is the Restated Order under appeal in the present matter, not the May 2016 Notice. The May 2016 Notice is attached as Exhibit 1.

regulations and the UAPA, (b) far more limited claims than they raise now on appeal, and (c) limited and ultimately unpersuasive evidence.

Plaintiffs mischaracterize Judge Schuman's August 2016 order (*Pl's Br. Ex. B*) in that Plaintiffs apparently believe the Department was to answer only three jurisdictional questions, and not permitted to issue a new order consistent with those findings. *Pl's Br. at 8.* The Department did what any administrative agency must do after its administrative order is vacated pursuant to the UAPA. The Department issued a new order consistent with the Court's decision and the law. *See* AR170–90.

Last, Plaintiffs are simply wrong to claim that the "only evidence in the administrative record is the materials submitted by Plaintiffs." *Pls' Br.*, p. 8. Allegations noticed to administrative respondents and unchallenged at a hearing are sufficient evidence to find facts and draw conclusions of law. More to the point, the issue is *facts*, not evidence. The Commissioner's analysis of evidence in the record, not an administrative respondent's self-serving analysis, is how facts are found in a contested case.[2] As ordered by Judge Schuman, the Commissioner analyzed what evidence was in the record and found facts. The Commissioner then considered multiple factors and, after weighing them all, properly exercised his discretion to make a determination of policy or judgment.

ARGUMENT

At its essence, the Plaintiffs' view is that it is settled fact and law that the Tribe's sovereign immunity makes Plaintiffs above the law as far as Connecticut is concerned, simply because Plaintiffs say so. First, Plaintiffs may flout the procedural requirements

[2] On appeal Plaintiffs could have, *but have not,* claimed any of the Commissioner's findings of fact are unsupported by substantial evidence.

of the Department's regulations and the UAPA and, unilaterally offering limited evidence and refusing discovery and cross-examination at a hearing, simply assert they are shielded from administrative action by tribal sovereign immunity. Second, no matter the Commissioner's analysis of the facts in evidence relevant to a judicially endorsed balancing test, and no matter the evident similarity of all such balancing tests, Plaintiffs can designate their preferred balancing test and dictate the analysis through this court. Accordingly, Plaintiffs can engage in a predatory lending business in Connecticut, targeting desperate Connecticut residents with loans at rates that exceed the state law maximums by orders of magnitude, and the state can do nothing to respond.

Plaintiffs are wrong. The Tribe has sovereign immunity from suit. But Plaintiffs are not the Tribe. Before corporate Plaintiffs Great Plains and Clear Creek can use the Tribe's sovereign immunity to shield them—and Plaintiff Shotton as their corporate officer—from the Department's action in light of their unlawful activity, corporate Plaintiffs needed to meet their burden to create a record before the administrative agency establishing, pursuant to an appropriate balancing test, that they are "arms" of the Tribe. Plaintiffs simply failed to do so.

Plaintiffs fail to claim, let alone explain why, these Plaintiffs may unilaterally deprive the agency of discovery and a hearing in a contested case. That alone is fatal to Plaintiffs' appeal. It is undisputable that the UAPA provides each respondent *and the agency conducting the proceeding* the opportunity for discovery and a hearing to respond, to cross-examine other parties and witnesses, and to present evidence and argument on all issues involved. Even if it isn't self-evident that an administrative respondent's claim of being an "arm" of a Tribe and therefore sharing in the Tribe's

sovereign immunity from suit is one of "all" possible issues an agency resolves through ordinary hearing procedure, it is well-established that when faced with fact-dependent jurisdictional claims, a civil court must hold a *hearing*. There's simply no basis for claiming otherwise for a contested case under the UAPA. Under the UAPA a respondent disputing the subject matter jurisdiction of an agency on any ground (and tribal sovereign immunity is one such ground) must timely appear (even if only 'specially' to raise a jurisdictional claim) and participate in discovery (even if only on the jurisdictional question) and attend a hearing (even if only on the jurisdictional question). Plaintiffs simply refused to do so. In any event, the burden of proof for a party claiming to be an "arm" of a Tribe is on the party claiming it.

The Commissioner did not merely determine that Plaintiffs failed to participate in required procedure, even though that fact alone is fatal to *any* and *every* claim by Plaintiffs on appeal. The Commissioner also explained that even if the evidence submitted by Plaintiffs' was fully credited, Plaintiffs fell woefully short of meeting their burden of persuasion under a multi-factor balancing test cited for just this purpose by Judge Schuman in prior litigation between these Parties.

Plaintiffs now claim the Restated Order errantly relies upon a single-factor test every tribal corporation automatically fails, but even a cursory review of the Restated Order belies that claim. First, Plaintiffs fail to recognize that the Commissioner acted lawfully in rigorously applying a multi-factor test, specifically endorsed in *Great Plains 1*, to all available evidence in the record (i.e., what evidence Plaintiffs chose to submit and refused to supplement). Responsibility for the inadequacy of that evidence falls on Plaintiffs, who were provided all the process they were due and insisted the record be

closed. Second, Plaintiffs vastly overstate any substantive difference between the factors cited in their preferred case and the factors in the Commissioner's analysis. Third, Plaintiffs never even asked the Commissioner to consider their preferred case.

Plaintiffs valiantly try to make it appear that regardless of the record, settled law entitles them to the Tribe's sovereign immunity from suit and accuse the Department of disregarding binding precedent. In reality, Plaintiffs are asking this Court to excuse their noncompliance with the procedures to present their jurisdictional claim, to shift the burden of proof for their jurisdictional claim, and to vastly expand existing tribal sovereign immunity doctrine to insulate Plaintiffs' flagrantly illegal conduct in Connecticut. This Court has no reason to do so. The Commissioner correctly held that on this record, the Tribe's sovereign immunity did not bar the Department's action. This Court should enter Judgment affirming the Commissioner's Order.

1. The Standard of Review of the Department's Subject Matter Jurisdiction is Plenary

Plaintiffs ask this Court to find the Commissioner's exercise of jurisdiction over them constitutes reversible error. Such a request makes Plaintiffs' administrative appeal anything but "unique." *Pl's Br. at 9*. "When an issue . . . implicates the agency's subject matter jurisdiction [the courts'] review is plenary." *Conn. Coal. Against Millstone v. Conn. Siting Council*, 286 Conn. 57, 68 (2008) (discussing federal preemption); *see also Mehdi v. CHRO*, 144 Conn. App. 861, 865 (2013) (per curiam) ("[B]ecause [a] determination regarding [an agency's] subject matter jurisdiction is a question of law, our review is plenary."). Judge Schuman provided the scope and standard of review for a UAPA appeal in Section II of Great Plains 1. *Great Plains 1* at *2-3. Plaintiffs do not

credibly challenge the well-established scope and standard of review for a UAPA appeal, and thus there is no need to exhaustively repeat it here.

Plaintiffs argue that the Commissioner's determination with regards to their jurisdictional claim "does not concern the statutory framework over which the Commissioner has a special expertise, [so] his ruling . . . is not entitled to any deference." *Pl's Br. at 9*. To the contrary, Judge Schuman has ruled (at Plaintiffs' urging) that "the legislature . . . [has] entrusted the commissioner with the responsibility to decide whether he has jurisdiction to take enforcement action against an Indian tribe and entities purporting to be arms of the tribe and allegedly violating state banking law. The court cannot make that administrative determination for him. This point is particularly true because whether an entity is an arm of the tribe involves use of a balancing test that essentially requires the commissioner to make a determination of policy or judgment." *Great Plains 1* at *8.

Accordingly, Judge Schuman explained that "our Supreme Court has stated that an agency's factual and discretionary determinations are to be accorded considerable weight by the courts. Even for conclusions of law, the court's ultimate duty is only to decide whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally, or in abuse of discretion. Thus conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." *Great Plains 1* at *3 (citations omitted). In short, "[n]either this court [the Supreme Court] nor the trial [administrative appeals] court may retry the case." *Dolgner v. Alander*, 237 Conn. 272, 280 (1996). "The substantial evidence rule

governs judicial review of administrative fact-finding under the UAPA. Gen. Stat. § 4-183(j)(5) and (6). An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . ." *Id*. at 281. "It is fundamental that a plaintiff has the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion. . . if the decision of the commissioner is reasonably supported by the evidence it must be sustained." *Murphy v. Comm'r of Motor Vehicles*, 254 Conn. 33, 343-44 (2000).

The action complained of on appeal is the formal reference to a particular case for guidance on the factors relevant to an "arm" of the tribe test, an original sin from which Plaintiffs perceive a parade of horribles emerging. Accordingly, this Court's scope of review (if it gets past the preliminary issue of Plaintiffs' procedural failure to timely file an appearance, request a hearing, and appear for a hearing after discovery) is whether the Commissioner's "arm" of the tribe test was unreasonable, arbitrary, illegal, or in abuse of discretion. The standard of such review is, of course, plenary.

2. All Plaintiffs Were Properly Defaulted on All Issues and Received All the Process Due

The record shows that Plaintiffs were noticed of the Department's allegations and warned they would be defaulted if they failed to timely appear and request a hearing. Judge Schuman has already found Plaintiffs were properly noticed and warned, were defaulted, and therefore received all the process they were due. *Great Plains 1* at *8-9.

There is no question that its regulations provide that the Department may require a party to request a hearing within fourteen days of the service of the complaint, and when a party fails to request a hearing within the time period noticed, allegations

against the party may be deemed admitted, and the Commissioner may then render a decision by default. *See* Regulations §§ 36a–1–21, 31. There is no question the UAPA allows a contested case to be resolved by default. General Statutes § 4–177(c) ("Unless precluded by law, a contested case may be resolved by stipulation, agreed settlement, or consent order or by the default of a party."). Ordinarily, a default is fatal to an administrative appeal. *McAllister v. Insurance Department*, 2001 WL 492350 (April 26, 2001, Cohn, J.); *Arroyo v. State of Conn. Ins. Com'r*, 2011 WL 4583820 (September 14, 2011, Cohn, J.).

There can be no question that the UAPA provides that in a contested case the agency has a right to discovery and a hearing to cross-examine other parties and to present evidence and argument on all issues. General Statutes § 4-177c(a) ("In a contested case, each party *and the agency conducting the proceeding* shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.").

Tribal sovereign immunity would not deprive the Department of its discovery rights on that issue. If Plaintiffs had appeared and requested a hearing, the Department would have been entitled to jurisdictional discovery prior to that hearing. "§ 4–177c unambiguously requires parties and agencies in administrative proceedings to provide other parties to the proceedings access to relevant documents." *Office of Consumer Counsel v. Dep't of Pub. Util. Control*, 44 Conn. Supp. 21, 29 (Super. Ct. 1994).

The same rule applies to parties in civil courts. *See, e.g.*, *Finn v. Great Plains Lending, LLC*, 689 Fed. Appx. 608, (10th Cir. 2017). In *Finn*, the 10th Circuit Court of Appeals determined that Great Plains, having made a claim to be an "arm" of the Tribe in a motion to dismiss in that case, was required to provide "a more satisfactory showing regarding the actual workings of Great Plains and its financial relationship with the Tribe. . ." *Id*. at 610-11. Jurisdictional discovery is a necessary, unavoidable burden for Plaintiffs before they are entitled to share in the Tribe's sovereign immunity from suit.

Although the Department's regulations permit a respondent to submit a motion, doing so does not void the requirement, in both the regulations and the UAPA, for the appearance at a hearing. Regulations §36a-1-29. Filing a motion supplements, not substitutes for, discovery and the hearing. Notably, a case cited by Plaintiffs at page 9 of their brief, *Lewis v. Clarke*, 320 Conn. 706, 710 (2016), rev'd on other grounds, 137 S. Ct. 1285 (2017), makes this point explicitly. In that case, our Supreme Court held that "where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." *Lewis v. Clarke*, *supra*, 320 Conn. at 712 (*citing Conboy v. State*, 292 Conn. 642 (2009)). As applied to the record in this matter, *Lewis v. Clarke* shows that because a jurisdictional question, though legal, turns on *facts*, the Plaintiffs' failure to appear and request a hearing on their jurisdictional claim is a default on that issue despite their motion.

Plaintiffs cite to no statute permitting them to appeal from a default order after failing to appear for a hearing. In *Connecticare Benefits v. Wade*, 2016 WL 6120585 (September 9, 2016, Huddleston, J.), the court permitted an administrative appeal to proceed only after finding a specific statute permitted the administrative appeal "notwithstanding the usual requirement of a statutorily required hearing." *Connecticare* at *1 (*citing Nizzardo v. State Traffic Commission*, 259 Conn. 131, 140 n.10. Such a hearing was noticed, and Plaintiffs did not request a hearing.

Departmental regulations and the UAPA therefore provide that the agency must offer a hearing, but the respondent must accept that offer or be defaulted on all issues. Plaintiffs, not the Department, are responsible for the fact that no hearing occurred and the record does not establish the jurisdictional facts necessary for corporate Plaintiffs to prevail on their claim.

Judge Schuman has already rejected the argument that in the Commissioner's resolving the case against the Plaintiffs by default, the Plaintiffs were denied due process. *Great Plains 1* at *8-9. The Plaintiffs received notice of the Department's charges, notice of the obligation to appear within fourteen days, and notice of the potential of default judgment if they fail to comply. As such, due process was met. *See also Pet v. Dept. of Health Services*, 228 Conn. 651, 661 (1994) (when an agency follows the procedures required by the UAPA, it exceeds the minimal procedural safeguards mandated by the due process clause); *R.A. Lalli v. Commission on Human Rights & Opportunities*, 1998 WL 61899 (February 9, 1998, DiPentima, J.) (prior notice by agency before default enters satisfies due process).

The Department did not act unreasonably, arbitrarily, illegally or in abuse of discretion in resolving the administrative complaint by default on all issues including jurisdictional claims after the Plaintiffs did not request a hearing, so the Plaintiffs' appeal should be dismissed.

3. The Commissioner's Balancing Test Was Not Prejudicial Error

Even if we reach Plaintiffs' jurisdictional claims, the record reveals the Commissioner's determinations as to those claims were reasonable. The very *existence* of balancing tests shows that tribal sovereign immunity extends to some, but not all, tribal corporations. The Commissioner, like a trial court, had discretion to determine what factors to consider and whether Plaintiffs proved that they are "arms" of the Tribe by reference to such relevant facts as could be gleaned from the record. The Commissioner's reliance upon the articulation of the test in the judicial decision he did was reasonable, within his discretion, and in light of the record, anything but outcome-determinative.

A. The Commissioner Properly Relied Upon Judge Schuman's Instruction in Prior Litigation Between the Parties

The Plaintiffs' claim of error is most easily dismissed by noting that the Commissioner actually relied upon a case specifically cited for this purpose by Judge Schuman in prior litigation between the Parties. *Great Plains 1* at *8 ("See *Cash Advance and Preferred Cash Loans v. State, supra, 242 P.3d at 1102, 1111* (three-prong arm of the tribe test); *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 546-47, 2 N.Y.S.3d 15, 25 N.E.3d 928 (2014) 2015 Conn. Super. LEXIS 2923, *20 (nine factor test).").

B. Connecticut Courts Have Not Ruled that Any Particular Test Articulates All the Factors to Weigh in All Such Claims

There is no Connecticut case specifically directing Connecticut trial courts (or Connecticut state agencies, for that matter) to use any particular multi-factor test. Instead, courts have exercised discretion to select an appropriate test. *See, e.g.*, *Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co., Inc.*, 2005 WL 3510348 (Nov. 30, 2005, Hendel, J.T.R.) ("Klewin") (applying the record to two multi-factor tests, including the prevailing one in New York state and one from Minnesota). Plaintiffs have not, and can not, cite to any authority suggesting a Connecticut trial court, or a Connecticut agency in an administrative hearing, does not have discretion to determine what cases to rely upon to determine what factors to weigh in considering whether a party claiming to be an "arm" of a tribe is any such thing.

C. Regardless of the Factors Considered, the Burden of Proof Was On Plaintiffs

Plaintiffs are wrong to suggest that in considering Plaintiffs' claim of entitlement to the Tribes' sovereign immunity from suit, the Department had the burden of proving otherwise. *Pl's Br. at 15* ("the limited record that is a product of the Department's failure to produce evidence rebutting Plaintiffs' sovereign status means [the Commissioner] cannot justify his conclusion…"). The burden, as a matter of law, is Plaintiffs'. "[T]he burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe." *Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442, 466 (E.D.N.Y. 2009). This is no different from the burden on a putative arm of the state. *Woods v. Rondout Valley Cent. Sch. Dist. Bd of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006) ("holding that the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it

qualifies as an arm of the state entitled to share in its immunity"). The absence of relevant supportive evidence in the record means Plaintiffs failed to meet their burden.

In any event, the record reveals that Plaintiffs refused to appear for a duly noticed hearing, thereby denying the Department the procedural opportunity to engage in jurisdictional discovery of facts relevant to their jurisdictional claims. So, on the law and the procedural history, Plaintiffs must live with the consequences of absence of relevant facts to be found from the sparse evidence in the record.

D. Case Law is Replete With Substantially Similar Arm of the Tribe Tests

The application and scope of tribal sovereign immunity is a somewhat unsettled matter of federal law. The United States Supreme Court has never provided a definitive test for when tribal corporations are "arms" of the tribe and thereby entitled to share in the tribe's sovereign immunity from suit. To the contrary, the Supreme Court has said that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). In the absence of binding authority as to the factors an entity must establish to be entitled to "arm" of the tribe status, courts have reached a variety of conclusions.

i. New York

In New York the Court of Appeals has addressed the "arm" of the tribe test. *Sue/Perior*, 25 N.E.3d at 934. That court affirmed the multi-factor test laid out in a prior decision, *Matter of Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553, 635 N.Y.S.2d 116, 658 N.E.2d 989 (1995) ("Ransom").

> Although no set formula is dispositive, in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: [1] the entity is organized under the tribe's laws or constitution rather than Federal law; [2] the organization's purposes are similar to or serve those of the tribal government; [3] the organization's governing body is comprised mainly of tribal officials; [4] the tribe has legal title or ownership of property used by the organization; [5] tribal officials exercise control over the administration or accounting activities of the organization; and [6] the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether [7] the corporate entity generates its own revenue, whether [8] a suit against the corporation will impact the tribe's fiscal resources, and whether [9] the subentity has the power to bind or obligate the funds of the tribe. The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.

Sue/Perior, 25 N.E.3d at 933 (citing *Ransom*, 658 N.E.2d at 992-93). As the above indicates, the *Ransom* (or *Sue/Perior*) test recognizes "no set formula is dispositive" and "courts generally consider" nine factors. So, even New York doesn't preclude trial courts (and presumably, NY state agencies) from considering additional factors or disregarding some *Ransom* factors.

ii. Minnesota

The Minnesota Supreme Court has also laid out an "arm" of the tribe test. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn 1996). The *Gavle* court relied principally on *Ransom* and *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989), and distilled those cases to set forth three principal factors for the test. *Id*. at 294. The *Gavle* factors are "(1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; (2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity." *Id*. A cursory comparison shows that

Gavle factors #1 and #3 are two takes on *Ransom* (or *Sue/Perior*) #2, and *Gavle* factor #2 distills down the factors in *Ransom* #1, #3, #4, #5 and #6.

iii. Connecticut

In Connecticut, there is no similar appellate caselaw recommending any specific factors. Plaintiffs cite *Klewin*, but as discussed above that is a trial court decision that was not appealed, and therefore lacks preclusive authority. Judge Hendel elected to consider factors from two cases; the *Ransom* factors relied upon by the *Sue/Perior* court, described above, and the *Gavle* factors described above (which itself derived from *Ransom* and *Dixon*). *Klewin* at *3-4.

Plainly Judge Hendel felt he was not bound to adopt any particular test or set of factors, and had the discretion to choose. Judge Hendel's analysis came to the same result on both tests he formally applied to the facts in the record before him. There's no reason to believe a judge today would feel bound to follow Judge Hendel's formal analytical approach in *Klewin*. And there's no reason to think the recent *Sue/Perior* decision would be an inappropriate source for guidance, particularly when that court relied upon one of the same underlying cases (*Ransom*) as *Klewin*, and the practical similarity of all the underlying cases.

iv. 10th Circuit

Plaintiffs claim, on appeal, the Commissioner should have applied the test enunciated by the Tenth Circuit in *Breakthrough Management Group v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010) ("Breakthrough"). According to Plaintiffs, *Breakthrough* is "universally accepted as stating the controlling test. . ." *Pl's Br. at 10*. *Breakthrough* is "utilized by the overwhelming number of federal and state

courts, including Connecticut. . ." *Id*. According the Plaintiffs, the law on this question is so well settled that the Commissioner lacked the discretion to accept Judge Schuman's citation and to accept the guidance of the Court of Appeals of the State of New York in *Sue/Perior*. As Plaintiffs' claim, at page 11 of their brief, *Breakthrough* identified the following six factors:

> (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; . . . (5) the financial relationship between the tribe and the entities . . . [and (6)] the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.

In their effort to convince this Court that the Commissioner's failure to strictly and formally employ the *Breakthrough* test constitutes reversible error, Plaintiffs make a number of false and misleading claims about *Breakthrough* and its relationship to other cases. Most unfairly, Plaintiffs mischaracterize *Sue/Perior* as a single-factor test even though, as explained above, it is most plainly not. *Sue/Perior* simply does not treat the direct impact of a judgment on the tribe as a dispositive inquiry, as accused by Plaintiff at page 15 of their brief, and neither does the Restated Order. As explained below, a more careful comparison of *Sue/Perior* with *Breakthrough* reveals extremely little difference in substance. Second, Plaintiffs mischaracterize *Klewin* as a *Breakthrough* clone even though, as explained above, it relies upon *Ransom* and *Gavle*. Third, Plaintiffs claim *Breakthrough* provides an exclusive list of factors even though it expressly says it does not.

First, the *Breakthrough* court didn't even claim to set forth a precise test. What it actually said is that "[a]t this time there is no need to define the *precise* boundaries of

the appropriate test to determine if a tribe's economic entity qualifies as a subordinate economic entity entitled to share in a tribe's immunity. In this case, we conclude that the following factors are helpful in informing our inquiry. . ." *Breakthrough*, 629 F.3d at 1187. Accordingly, not even the *Breakthrough* court itself claimed to define a precise test, but rather found that six factors were helpful in that particular case. Another court in the 10th Circuit, in a different case, may find additional factors useful in testing a party's claim to "arm" of the tribe status, without running afoul of *Breakthrough*.

After laying out the six factors they found helpful in that case, the *Breakthrough* court cited their sources, including *Gavle*, *Ransom* and *Dixon* (all discussed above).[3] *Id*. As explained above, *Sue/Perior* relied upon *Ransom*. *Klewin* relied upon *Ransom* and *Gavle* (which itself relied upon *Ransom* and *Dixon*). Accordingly, it seems plain that all these cases articulate inter-related and substantially similar tests. Comparing *Breakthrough* with *Ransom*, it appears that all the *Ransom* (and hence, *Sue/Perior*) factors are taken into account in *Breakthrough*; *Ransom* #1 arises under *Breakthrough* #1, *Ransom* #2 under *Breakthrough* #2, #5 and #6, *Ransom* #3, #4, #5, and #6 under *Breakthrough* #3, *Ransom* #7, #8, and #9 under *Breakthrough* #5.

That leaves *Breakthrough* #4, the tribe's subjective intent with respect to sharing its sovereign immunity, unaccounted for. The Commissioner expressly declined to weigh this factor (AR13 at n.10) but, there's no reason to believe that was error or

[3] The *Breakthrough* court also cited *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006), *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65 (Cal. Ct. App. 1999) abrogated by *People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357 (Cal. 2016), *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581 (8th Cir. 1998), and William V. Vetter, *Doing Business with Indians and the Three "S" es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L.Rev. 169 (1994). *Breakthrough*, 629 F.3d at 1187.

changed the result. Certainly *Breakthrough* does not claim this factor is dispositive. *Breakthrough* does not hold that failure to weigh this (or any other) factor is reversible error.

E. The *Breakthrough* Test Was Never Raised Below

The administrative record reveals that Plaintiffs failed to so much as cite *Breakthrough* in pleading their jurisdictional claim. AR32-49; AR142-152. Plaintiffs failed to even concede that there exists *any* balancing test for their claim that corporate Plaintiffs are "arms" of the tribe. *Id*. So, Plaintiffs' claim that the Commissioner's failure to rely on *Breakthrough* amounts to reversible error is unpreserved. Instead, the record shows that Plaintiffs asserted that "as entities created pursuant to the authority of the Tribal government, with the consent of the Tribal Council, and under the ultimate control of the Tribal government, Great Plains and Clear Creek are undoubtedly instrumentalities of the Tribe." AR43. That isn't the *Breakthrough* test, the *Klewin* test, or any other test now appearing in Plaintiffs' brief on appeal.

F. The *Breakthrough* Test Hasn't Helped These Plaintiffs

There is no need to take Plaintiffs' word for it that if only the Commissioner had formally applied the *Breakthrough* test to the record before him, the Commissioner would have determined that corporate Plaintiffs were "arms" of the Tribe and therefore beyond his jurisdiction. The 10th Circuit, home of the *Breakthrough* test and Plaintiffs, recently made clear to Great Plains that whatever the Tribe's subjective intent, to establish that Great Plains is an "arm" of the Tribe under the *Breakthrough* test, Great Plains must make "a more satisfactory showing regarding the actual workings of Great Plains and its financial relationship with the Tribe. . ." *Finn v. Great Plains Lending, LLC*, *supra*, 689 Fed. Appx. at 610-11.

The *Finn* Court expressly determined that an "actual workings" showing is relevant to four of the six *Breakthrough* factors: *Breakthrough* #2, the entity's purpose, *Breakthrough* #3 the entity's "structure, ownership, and management, including the amount of control the Tribe has over the entit[y]," *Breakthrough* #5, the financial relationship between the Tribe and the entity, and *Breakthrough* #6, "whether the purposes of tribal sovereign immunity are served by granting [the entity] immunity" (#6). *Id*. (citing *Breakthrough*, 629 F.3d at 1191.).

Accordingly, the *Finn* court found that Great Plains was not an "arm" of the tribe simply because it presents organizational documents that establish a tribal desire to bestow immunity from suit upon it. When claiming "arm" of the tribe status, under *Breakthrough*, Great Plains must at a minimum engage in jurisdictional discovery regarding the financial relationship between Great Plains and the Tribe if it wants to be treated as an "arm" of the Tribe.

G. The Commissioner's Restated Order Found the Same Problem with Great Plains that the *Finn* Court did.

As in *Finn*, the Commissioner found that evidence of the actual working and financial relationship was absent from the administrative record before him. In the Restated Order, the Commissioner found that:

> "[N]o evidence was submitted to show that Great Plains is actually transferring any money or resources to the Tribe or that the Tribe has in fact benefitted from Great Plains. Without any evidence, it is impossible to know whether the apparent relationship between Great Plains and the Tribe truly serves tribal interests or instead is merely a pretense in order to claim tribal sovereign immunity and evade state law. Uncorroborated statements in organizational documents without any evidence of contractual or financial arrangements, including any evidence showing the flow of profits to the Tribe, simply do not prove that the organization and purpose of the business predominantly serves the tribal government."

AR185. Plaintiffs didn't present such evidence to the Department, and Plaintiffs avoided jurisdictional discovery by refusing to appear for a hearing. Accordingly, that Plaintiffs' evidence is insufficient even under their preferred balancing test has been established by the court responsible for the *Breakthrough* test.

H. California Agrees with *Finn* and the Commissioner's "Actual Workings" Concerns

A recent California Supreme Court decision illustrates the importance of the financial relationship between the Tribe and tribe-created payday loan companies in sovereign immunity cases. In *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357 (2016), the California Supreme Court adopted the first five *Breakthrough* factors, and applying that test, denied immunity to two tribe-created payday loan companies. *Id*. at 371-73, 375. The court "[took] into account both formal and functional considerations—in other words, not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe." *Id*. at 365.

In other words, the California Supreme Court found that *Breakthrough's* "purpose factor considers the extent to which the entity actually promotes tribal self-governance; the control factor examines the degree to which the tribe actually, not just nominally, directs the entity's activities; and the financial relationship factor considers the degree to which the entity's liability could impact the tribe's revenue." *Id*. at 371. As the court recognized, "organizational arrangements on paper do not necessarily illuminate how businesses operate in practice." *Id*. at 375.

I. All Roads Lead to the Commissioner's Determination

As was the case in *Finn*, the Commissioner found that Plaintiffs' claims (*Pl's Br.* at 19-24) are buttressed only by evidence as to "organizational arrangements on paper." The record is devoid of evidence regarding the degree to which the Tribe is the beneficiary of Plaintiff entities' business. The Operating Agreement for Great Plains indicates that profits are allocated to the Tribe (AR126, § 5.1) but also indicates that Great Plains "operate[s] separately from the Tribe and will not require continuing financial support from the Tribe" and may need "to obtain funding for working capital." AR126. In fact, the Second Circuit noted "the necessary involvement of non-tribal institutions" in Plaintiffs' business operations in affirming the district court's denial of Plaintiffs' demand for a preliminary injunction against New York's attempts to combat Plaintiffs' unlawful loans. *Otoe-Missouria Tribe of Indians v. New York State Dep't of Financial Services*, 769 F.3d 105, 115 (2d Cir. 2014).

"[I]t is rare" for a tribe to be the primary beneficiary of a lending operation; "[t]ypically, a non-tribal payday lender makes an arrangement with a tribe under which the tribe receives a percentage of the profits, or simply a monthly fee, so that otherwise forbidden practices of the lender are presumably shielded by tribal immunity." Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?,* 69 Wash. & Lee L. Rev. 751, 758-59, 777 (2012). There are records of an arrangement where "between one and two percent of the payday profits of one 'tribal' lender actually went to the tribes." *Id*. Indeed, it has been reported that "[t]he tribe keeps about 1 percent" of the profits from Plaintiffs' business—with the bulk going to an outside backer—and a former tribal official has been quoted as saying that "'[a]ll we wanted was money coming into the tribe'" but that

"'[a]s time went on, I realized that we didn't have any control at all.'" Zeke Faux, *Behind 700% Loans, Profits Flow Through Red Rock to Wall Street*, BLOOMBERG, Nov. 11, 2014, (http://www.bloomberg.com/news/2014-11-24/payday-loan-fortune-backed-by-medley-found-behind-indian-casino) (Exhibit 2).

Accordingly, it's not mere idle speculation that corporate Plaintiffs' purpose isn't primarily or substantially aligned with that of the Tribe. In *Finn*, the court noted that in *Commonwealth of Pennsylvania v. Think Fin., Inc.*, 2016 WL 183289, Pennsylvania's Attorney General credibly alleged that Think Finance contracted with tribe-created payday lending companies, including Great Plains, to evade Pennsylvania's cap on interest rates and that the Tribe received less than 5% of the profits thereby generated. *Finn, supra*, 689 Fed. Appx. at 611.

Back in Connecticut, when served notice of the Department's allegations Great Plains and Clear Creek failed to appear and were defaulted in due course on all claims. In merely submitting an affidavit that failed to introduce critical financial relationship evidence (or, in the case of Clear Creek, even organizational evidence), Plaintiffs failed to meet their burden, no matter what case the Commissioner expressly relied upon in testing their claim. As a result, Plaintiffs cannot use the Tribe's sovereign immunity to avoid the consequences of their actions, and Plaintiff Shotton likewise cannot avoid liability for his actions on behalf of Great Plains (which are the basis for the Department's Orders). *See, e.g.*, *Gristede's Foods*, *supra*, 660 F. Supp. 2d at 478 (holding that tribal Chief was not immune from suit "to the extent that he [wa]s sued for acts in his capacity as the owner of" entity held not to be an arm of the tribe).

J. Plaintiffs' Knock on *Sue/Perior* is Both Misleading and Irrelevant to the Court's Review of the Restated Order.

Despite Plaintiffs' characterization of the *Sue/Perior* test as "single-factor" test (*Pl's Br. at 14-19*), the cases reveal that *Sue/Perior* is a nine-factor test. Judge Schuman called it a nine-factor test. *Great Plains 1* at *8. *Sue/Perior* cites *Ransom*'s nine factors, with approval. *Sue/Perior*, 25 N.E.3d at 933. *Sue/Perior* actually weighs all nine factors. *Sue/Perior*, 25 N.E.3d at 933-35. The Restated Order demonstrates that the Commissioner considered each and every one of the nine factors in light of the administrative record, and treated none of them as dispositive. AR183-86.

Sue/Perior was issued more recently than *Breakthrough*. And again, *Sue/Perior* expressly relies upon *Ransom*, the New York case relied upon by the Connecticut trial court in *Klewin*, which Plaintiffs conflate with their preferred test, *Breakthrough*. *Pl's Br. at 2-3* ("this Court should reject the Commissioner's use of *Sue/Perior* and, if necessary, apply the widely-accepted multi-factor test set out in *Breakthrough/Klewin*."). Plaintiff's citation of *Klewin* is all the more remarkable for the *Klewin* court's consideration of *Gavle* factor #1 – "whether the business entity is organized for a purpose that is governmental in nature, *rather than commercial*." What could be more plainly commercial in nature than a business organized to issue high-interest loans over the internet to people with no connection to the Tribe?

Plaintiff's extreme characterization of *Sue/Perior* by a Florida circuit court, *Monahan v. Great Plains Lending LLC*, 2016 WL 6127568 (Fla. Cir. Ct. Sept. 30, 2016) similarly does not bear up to scrutiny. *Pl's Br. at 16*. In *Monahan*, the court declined to use the *Sue/Perior* test, stating the *Sue/Perior* court "held a tribal economic organization that limits its liability is automatically precluded from exercising trial sovereign

immunity." *Monahan* at *4. The *Sue/Perior* court did no such thing. Rather, it cited the *Ransom* factors and weighed them all. The *Monahan* court and Plaintiffs take one of the *Sue/Perior* court's findings, on one of the nine factors, out of context. The entirety of *Sue/Perior* reveals context the Plaintiffs hope this Court will ignore. In any case, Commissioner's Restated Order reveals that the Commissioner did not rely upon a single *Sue/Perior* factor to reach a preordained result, as the *Monahan* court feared.

4. Administrative Appeals Courts Do Not Substitute Their Judgment for that of the Agency

Without explaining why this Court should engage in the "administrative . . . determination of policy or judgment" (*Great Plains 1* at *8) rather than review the Commissioner's Restated Order for prejudicial error in light of the record, including their claims below, Plaintiffs walk the Court through their own fact-finding, their own *Breakthrough* test, reach their own conclusions and ask the Court to do the same now.

As explained above, the Court in *Great Plains 1* made clear *at the request of Plaintiffs* that the Commissioner and *not* this Court must make the administrative determination of policy or judgment that a tribal economic entity is or is not an "arm" of the tribe. *Great Plains 1* at *8-9. It is ironic, to say the least, that Plaintiffs now ask this court to select a particular arm of the tribe test, to find particular facts based only upon the evidence they have deigned to submit to the Department, and to reach conclusions of law contrary to the Commissioner's determination of policy or judgment. This is not a trial court. Thus, Plaintiffs' request for this Court to usurp the role expressly granted to the Commissioner in *Great Plains 1* is procedurally improper.

5. The Commissioner Properly Reached His Determinations as to Plaintiff Shotton's Tribal Sovereign Immunity

Contrary to Plaintiffs' claims (*Pl's Br. at 24-31*) the Restated Order (at AR186-189) coherently articulates why, on the record, Plaintiff Shotton failed to demonstrate that he is not subject to the Department's jurisdiction. First, Plaintiff Shotton's claims presumed that Great Plains was an "arm" of the Tribe. Just as in *Grestede's Foods*, *supra*, 660 F.Supp.2d at 478, tribal office does not insulate from personal liability when acting in a personal capacity even where a tribe owns the business. Second, the allegations against Plaintiff Shotton were for conduct in his personal capacity as a responsible corporate officer, and sought to impose individual liability. The U.S. Supreme Court recently held, in *Lewis v. Clarke*, *supra*, 581 S.Ct. at 1291-92, that the real party in interest controls. Third, many of Plaintiffs' current arguments were never raised in the contested case and thus waived.

As explained in the Restated Order, there is no reason to believe Shotton isn't the real party in interest or that the Department is seeking to control the Tribe. AR186-189. Plaintiffs' speculation aside, there simply is nothing in the record to suggest that the Tribe would pay Connecticut the fine levied against Plaintiff Shotton. If Plaintiff Shotton doesn't pay the fine, the Department would have no recourse against the Tribe.

It is ironic that Plaintiffs rely on *Lewis v. Clarke*, *supra*, 581 S.Ct. at 1291-92, for the real party in interest test. In that tort case against an employee acting in the scope of his employment with a tribal corporation that was indisputably an "arm" of the tribe, the Supreme Court dismissed the employee's suggestion that the tribal corporation, and therefore the tribe itself, was the real party in interest. As with *Lewis v. Clarke*, the Department's action against Plaintiff Shotton is simply an enforcement against an individual to recover for his personal actions, which "will not require action by the

sovereign or disturb the sovereign's property." *Id*. (citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457 (1949).

Enforcement action against responsible corporate officers in their personal capacity is not unusual. *See* AR188 (Restated Order, n.16). The applicable statute, Gen. Stat. § 36a-50(a)(1) and (2), allows for enforcement on "any person" who "has violated any provision of the general statutes within the jurisdiction of the commissioner." The record reflects allegations Plaintiff Shotton violated Connecticut law by virtue of his culpable participation in Great Plains' clear and flagrant violations of the state's usury and banking laws. AR4, 7-8. The record reflects Plaintiff Shotton did not timely appear and request a hearing and therefore was defaulted on those allegations. He pled that as a tribal employee, he was immune. The Commissioner, on remand, did not find the facts in the record to establish Plaintiff Shotton's immunity.

The Plaintiffs, on appeal, do not even claim that the Commissioner's factual findings lacked substantial evidence. Instead, Plaintiffs claim that as a matter of law, their tribal chairman must be immune from a personal capacity suit because Plaintiffs believe the Tribe must ultimately pay. In light of *Lewis v. Clarke* and *Gristede's Foods*, that contention is simply not sustainable. In any case, Plaintiffs' arguments on this issue weren't raised below, and thus are waived. Plaintiffs just argued that tribal employees are categorically immune from acts within the scope of their employment. AR 43-44, AR149-151. This claim was flatly rejected by the U.S. Supreme Court. *Lewis v. Clarke*, 137 S. Ct. at 1291 ("sovereign immunity does not erect a barrier against suits to impose individual and personal liability").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter judgment affirming the Department's Restated Order.

DEFENDANTS,

State of Connecticut Dep't of Banking
Commissioner Jorge L. Perez

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CERTIFICATION OF SERVICE

I hereby certify, pursuant to Practice Book §§ 10-12 through 10-17 and the parties' agreement, that a copy of the above was electronically mailed on May 23, 2018 to all counsel and *pro se* parties of record:

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IN THE MATTER OF: **GREAT PLAINS LENDING, LLC ("Great Plains")** **JOHN R. SHOTTON ("Shotton")** **CLEAR CREEK LENDING ("Clear Creek")** **(collectively "Respondents")**	**PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW AND NOTICE OF RIGHT TO HEARING**

I. INTRODUCTION

The Banking Commissioner ("Commissioner") is charged with the administration of Connecticut laws regulating small loan lenders.[1] Pursuant to Section 36a-17 of the Connecticut General Statutes, the Commissioner, through the Consumer Credit Division of the Department of Banking ("Department"), investigated Respondents' lending activity in Connecticut and 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 ("First Order") against Respondents on October 24, 2014. In the First Order, Respondents were given the opportunity to request a hearing in order to

[1] *See* Chapter 668, Part III of the Connecticut General Statutes and the regulations adopted thereunder, Sections 36a-570-1 to 36a-570-17, inclusive, of the Regulations of State Agencies.

present evidence, rebuttal evidence and argument on all issues of fact and law to be considered by the Commissioner. Respondents did not request a hearing but sent the Commissioner a pleading, styled a "Motion to Dismiss," in which they asserted tribal sovereign immunity from the Department's actions based on Respondents' purported affiliation with the Otoe-Missouria Tribe of Indians ("Tribe"), a federally recognized Indian tribe with a reservation located in Oklahoma. The Commissioner issued a Ruling on the Motion to Dismiss on January 6, 2015, concluding that the Department has jurisdiction over Respondents despite Respondents' assertion of tribal sovereign immunity.[2] After Respondents failed to request a hearing to dispute the Department's matters asserted and proposed conclusions of law in the First Order, the Commissioner issued a final Order to Cease and Desist and Order Imposing Civil Penalty on January 6, 2015.

Subsequently, Respondents appealed to the Superior Court for the Judicial District of New Britain pursuant to Chapter 54 of the Connecticut General Statutes, contending that the Department lacked subject matter jurisdiction over Respondents. In its Memorandum of Decision issued on November 23, 2015 ("MOD"), the Court declined to either sustain the appeal or affirm the decision of the agency, but instead retained jurisdiction and remanded the case to the Commissioner to answer three questions. Specifically, the Court asked the Commissioner to decide whether: (1) Great Plains and Clear Creek are arms of the Tribe; (2) Shotton has tribal sovereign immunity from financial penalties that the Commissioner seeks to impose; and (3) Shotton has tribal immunity from the Commissioner's request for prospective injunctive relief against future violations of the state's usury and banking laws.

[2] Specifically, the Commissioner found that the Department's administrative action against Respondents was outside the scope of tribal sovereign immunity from suit. Because the Commissioner found that such immunity would not apply even if Respondents were entitled to it, the Commissioner expressly did not address the question of whether Great Plains and Clear Creek are arms of the Tribe.

II. BRIEF ANSWER

After careful consideration of the available facts and having balanced all relevant factors, the Commissioner concludes as a matter of policy and judgment that neither Great Plains nor Clear Creek are arms of the Tribe and that Shotton does not have tribal sovereign immunity from either the financial penalties or prospective injunctive relief.

III. PRIOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Connecticut law applies to Respondents' Connecticut activities (AR 1-3, 6-10).
2. The matters asserted, as set forth in paragraphs 1 through 14, inclusive, of Section II of the First Order (AR 4-5), are facts within the meaning of Section 4-180(c) of the Connecticut General Statutes as they were deemed admitted pursuant to Section 36a-1-31(a) of the Regulations of Connecticut State Agencies, which provides in pertinent part that "[w]hen a party fails to request a hearing within the time specified in the notice, the allegations against the party may be deemed admitted" (AR 163-164). The First Order asserted, among other things, that:
    a. At all times relevant to the investigation, Shotton has served as Secretary/Treasurer of Great Plains and American Web Loan (AR 4; *see also* AR 49).
    b. From at least September 2013 to the present, Great Plains offered, via US mail, e-mail and its website at www.greatplainslending.com, unsecured consumer loans in amounts of $100 to $2,000 with annual interest rates of 199.44% to 448.76% (AR 4).

c. From at least July 2014 to the present, Clear Creek offered, via its website at clearcreeklending.com, unsecured small loans in amounts of $1,500 to $2,500 with annual interest rates of 390% to 420% (AR 5).

3. The conclusions, as set forth in paragraphs 1 through 7, inclusive, of Section III of the First Order (AR 7- 9) are conclusions of law within the meaning of Section 4-180(c) of the Connecticut General Statutes and Section 36a-1-52 of the Regulations of Connecticut State Agencies (AR 163-164). In the First Order, the Commissioner found, among other things, that:

   a. The interests of Connecticut residents were being materially prejudiced by Shotton's participation in Great Plains' violations of Connecticut law (AR 9; *see also* AR 7-8).

IV. PROPOSED FINDINGS OF FACT

1. The Tribe adopted the Otoe-Missouria Tribe of Indians Corporation Act ("Corporation Act") and the Otoe-Missouria Tribe of Indians Limited Liability Company Act ("LLC Act") (AR 47-48).
2. The LLC Act provides for the organization of "entities to promote economic development and the general welfare of the Otoe-Missouria Tribe of Indians" (AR 63).
3. A limited liability company may be formed under the LLC Act for any lawful purpose (AR 66).
4. The LLC Act explicitly states that "[n]othing contained in [the] Act shall be construed as creating any liability . . . of the Tribe in any manner; provided that the assets of the LLC in which the Tribe holds an interest may be subject to liabilities and claims unless otherwise provided herein" (AR 66).

5. Under Part 6, Section 601 of the LLC Act, all property originally transferred to or acquired by a limited liability company is property of the company and not property of the Tribe's members individually (AR 80).
6. Under Part 9, Subpart 1, Section 913 of the LLC Act, an LLC may grant limited waivers of its immunity from suit and consent to be sued, but no such waiver or consent can extend to any action against the Tribe (AR 88).
7. Under Part 9, Subpart 1, Section 913 of the LLC Act, any recovery against the LLC is limited to the assets of the LLC and the Tribe is not liable for the payment or performance of any of the obligations of the LLC (AR 88).
8. The LLC Act explicitly provides that "no recourse shall be had against any assets or revenues of the Tribe in order to satisfy the obligations of the LLC; including assets of the Tribe leased, loaned, or assigned to the LLC for its use, without transfer of title" (AR 88).
9. Under Part 9, Subpart 1, Section 914 of the LLC Act, all LLC interests in a limited liability company wholly owned by the Tribe are held by and for the Tribe. No individual citizen of the Tribe has any personal ownership interest in any LLC organized under the LLC Act, whether by virtue of such person's status as a citizen of the Tribe, as an officer of the government of the Tribe, or otherwise (AR 88).
10. Under Part 9, Subpart 5, Section 952 of the LLC Act, management of an LLC wholly owned by the Tribe must submit various financial statements, business reports and budget information to the Chairman of the Tribal Council (AR 91).
11. Great Plains was created as a limited liability company wholly owned by the Tribe by resolution dated May 4, 2011 (AR 94-95).

12. The Tribe desired to form Great Plains as a limited liability company for the purpose of carrying on a for-profit business and to further the economic goals and initiatives of the Tribe (AR 119).

13. Great Plains' Operating Agreement indicates that its business is "[t]o accomplish any lawful purpose which shall at any time appear conducive or expedient for the protection or benefit of the Company and its assets" (AR 120).

14. Pursuant to Great Plains' Operating Agreement:

    a. Great Plains' management is vested in a board of directors that is appointed and can be removed by the Tribal Council (AR 122).

    b. Great Plains has five initial directors (AR 122).

    c. The Tribe has no liability to creditors of Great Plains (AR 122).

    d. "It is intended that the Company will operate separately from the Tribe and will not require continuing financial support from the Tribe" (AR 122).

    e. All profits and losses are allocated to the Tribe, all cash flow is distributed to the Tribe, and upon dissolution of the company, any assets remaining after payment of Great Plains' debts and obligations will be distributed to the Tribe (AR 122).

    f. "As an entity separate from the Tribe, the Company shall either contract with independent professionals for accounting, legal and other services which the Company may require; or may contract with the Tribe to obtain such services from the Tribe's internal operating departments on such terms as shall be agreed between the Directors on behalf of the Company and the Tribal Council on behalf of the Tribe" (AR 124).

15. The Secretary of the Tribal Council of the Tribe issued a Certificate of Incorporation to American Web Loan, Inc. on February 10, 2010 (AR 98).
16. The Tribal Council approved a resolution registering "Clear Creek Lending" as a fictitious name of American Web Loan, Inc. on September 4, 2013 (AR 102).
17. Section 150 of the Tribe's Criminal Offenses makes it unlawful for "any individual to intentionally provide financing or make loans without the expressed written consent from the Otoe-Missouria Tribal Council at a rate of interest higher than the following: (1) If the amount to which the interest applies is less than one hundred dollars ($100.00), or the period of the loan or financing is less than one (1) year, or both, the rate of interest shall not exceed twenty-four percent (24%) per annum simple interest rate. (2) If the amount to which the interest applies is greater than one hundred dollars ($100.00), or the period of the loan or financing is greater than one (1) year, or both, the rate of interest shall not exceed eighteen percent (18%) per annum simple interest rate" (*See* www.omtribe.org/assets/files/OTOE_CRIMINAL_OFFENSES_Revised_2012.pdf).
18. Section 150 of the Tribe's Criminal Offenses further provides that "criminal usury shall be punishable by a fine not exceeding two hundred fifty dollars ($250.00), or by imprisonment in the Tribal jail for a term not exceeding three (3) months, or both," and that the "victim shall be entitled to restitution for double the actual amount of interest which was actually paid and cancellation of all interest owing for the term of the financing" (*Id.*).
19. Shotton was featured prominently in the film *An Unlikely Solution*, released in June, 2015 (*An Unlikely Solution* [Motion Picture]. United States: Earthstream Media, n.d. Web. Retrieved from: www.anunlikelysolution.com).
    a. Discussing the benefits of online lending companies, Shotton stated:

i. "We provide a forum in which people can electronically come into our reservation via the internet. It is the electronic equivalent of walking into our reservation and taking out a loan at a tribal bank or a financial institution" (*Id.*, at 8:28).

ii. "We really see the internet as a great equalizer for small tribes in rural communities. . . " (*Id.*, at 9:25).

iii. "Well, I feel very strongly that people like myself, my tribal council, or the tribal council that I work with are very educated, we look very hard into what we are going to do, we assess the environment and we do what we feel is right for our community and for our people" (*Id.*, at 30:21).

b. The credits give "a very special thanks to" Shotton (*Id.*, at 45:27).

c. Shotton is seen on the member panel at the Native American Financial Services Association (NAFSA) meeting featured in the film (*Id.*, at 29:21 and 42:10).

20. The Tribe, Shotton, and American Web Loan have been identified in at least one reputable business news report suggesting that the Tribe established the Respondent entities after they were approached by non-tribal interests seeking the opportunity to evade state law. The article offers unrebutted persuasive evidence that the Tribe is not the predominant economic beneficiary of the Respondent entities and that the Tribe does not exercise control over the Respondent entities. *See* Faux, Z. (2014, November 24). *Behind 700% Loans, Profits Flow Through Red Rock to Wall Street, Bloomberg Technology.* Retrieved from: www.bloomberg.com/news/articles/2014-11-24/payday-loan-fortune-backed-by-medley-found-behind-indian-casino.

a. "Revenue from American Web Loan flows through the tribe to a firm owned by Mark Curry, according to a presentation his company gave to potential private-equity investors last year. Curry, whose payday-loan websites have been sanctioned by state regulators for the past seven years, is in turn backed by a New York hedge fund, Medley Opportunity Fund II LP.

"Chasing big returns, some Wall Street investors have been willing to overlook the legal uncertainty of a business that regulators say is exploiting a loophole to trap poor borrowers in a cycle of debt. Hedge funds, private-equity firms and Silicon Valley venture capitalists are investing in a new generation of Internet companies that lend money at high rates to working people.

"Curry's presentation, filed in federal court in Illinois by an investment banker suing him over fees, shows that Curry's MacFarlane Group Inc. generates more than $100 million a year in revenue from American Web Loan and another website owned by the Otoe-Missouria. The tribe keeps about 1 percent, according to Charles Moncooyea, who helped strike the deal with Curry in 2010 when he was the tribe's vice chairman.

"'All we wanted was money coming into the tribe,' Moncooyea said in a telephone interview. 'As time went on, I realized that we didn't have any control at all'" (*Id.*).

b. "Curry met the Otoe-Missouria's tribal council in Red Rock about five years ago, Moncooyea said. Few visitors come to the town, 95 miles south

of Wichita, Kansas, where the tribe migrated from Nebraska around 1880 after much of its reservation was sold to make way for railroads.

"'They put on a dog-and-pony show about how good they are, how much money they were bringing in,' said Bat Shunatona, then the tribe's treasurer.

"The 3,100-member tribe needed the money. In Red Rock, population 283, weeds grow through abandoned buildings. Some people live in government-surplus mobile homes that were raffled off by the tribe. A deserted grain-storage tower looms over the only business in town, a combination thrift store and diner run by the Baptist church.

"The tribe's quarterly payments to members, then about $800, were threatened by planned casinos closer to Wichita. The council asked few questions during Curry's presentation and granted a license to American Web Loan in February 2010, according to Moncooyea, who was put in charge of the company.

"'I didn't do much at all, just looked at the checks and passed them on,' said Moncooyea, who added that he'd hoped to learn the business and eventually cut Curry out. 'We were just a pawn'" (*Id.*).

V. DISCUSSION

A. Arms of the Tribe

The first question the Court asked the Commissioner to answer is whether Great Plains and Clear Creek are arms of the Otoe-Missouria Tribe of Indians ("Tribe").[3] The application and scope of tribal sovereign immunity is a matter of federal law. "The United States Supreme Court has never held that corporations affiliated with an Indian tribe have sovereign immunity," but federal cases provide some guidance as to when entities claiming affiliation with a sovereign can invoke the sovereign's immunity from suit." *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 548 (N.Y. 2014) ("*Sue/Perior*"). The legislature and the [D]epartment have entrusted the [C]ommissioner with the responsibility to decide whether he has jurisdiction to take enforcement action against . . . entities purporting to be arms of [an Indian] tribe and allegedly violating state banking law. . . [W]hether an entity is an arm of the tribe involves use of a balancing test that essentially requires the [C]ommissioner to make a 'determination of policy or judgment'" (MOD 15-16). The Commissioner concludes, as a matter of policy and judgment, that neither Great Plains nor Clear Creek are arms of the Tribe. [4]

Burden of Proof

The "burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe." *Gristede's Foods, Inc. v. Unkechuage*

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[3] In the film *An Unlikely Solution*, Shotton relies upon a tribal sovereignty theory to support the lawfulness of online lending companies like Great Plains and American Web Loan by contending that borrowers notionally travel via the internet to the reservation, where tribal laws govern. *See* Proposed Finding of Fact 19. Shotton does not rely upon arm of the tribe status and immunity from suit. With an opportunity to litigate its tribal sovereignty theory in federal court, the Tribe chose to withdraw instead. *Otoe-Missouria Tribe of Indians v. New York State Dep't of Financial Services*, 974 F. Supp. 2d 353, 359-61 (S.D.N.Y. 2013), aff'd, 769 F.3d 105 (2d Cir. 2014).

[4] The Department maintains that even if Great Plains and Clear Creek were arms of the Tribe, sovereign immunity, and more particularly immunity from suit, would not protect Respondents from the Department's administrative action. *See* Commissioner's Ruling on Motion to Dismiss (AR 150, *et seq.*).

Nation, 660 F. Supp. 2d 442, 466 (E.D.N.Y. 2009).[5] Accordingly, Respondents bear the burden of proving that Great Plains and Clear Creek are arms of the Tribe.

As a preliminary matter, Respondent Clear Creek failed, by any reasonable measure, to satisfy their burden of proof and to provide any meaningful or reliable evidence that Clear Creek is an arm of the Tribe, despite being offered the opportunity for a hearing. Specifically, Clear Creek did not provide the Tribe's Corporation Act or Clear Creek's Operating Agreement, evidence that is essential to the Commissioner's analysis of arm of the tribe status. Because Clear Creek did not provide any evidence that Clear Creek is an arm of the Tribe, the Commissioner concludes that Clear Creek is not an arm of the Tribe.

Arms of the Tribe

"Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024, 2030 (2014) (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 (1978) ("*Bay Mills*"). Immunity from suit, as a "necessary corollary" to sovereignty[6], "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Allen v. Gold Country Casino*, 464 F. 3d 1044, 1047 (9th Cir. 2006). Tribal businesses, however, "'have no inherent immunity of their own,' and enjoy immunity only

[5]If the mere assertion of immunity sufficed, it would be possible for any company to claim a tribal connection, regardless of the facts and how remote or legally irrelevant that connection is, to enjoy the protections of sovereign immunity and violate state law unless the Department expends investigatory resources or has access to the facts to show otherwise. For example, CashCall, Inc. ("CashCall"), a California company that was engaging in consumer lending in Connecticut, claimed tribal sovereign immunity from the Department's action. However, materials submitted to support its claim showed that a limited liability company owned by a member of a tribe assigned loans to CashCall. Had the Department been unable to track the relationship between the companies and the individual tribal member or been unaware of actions in other states that ruled against CashCall's similar claims of immunity, and if CashCall did not have the burden to prove its entitlement to immunity, the Department would have had to accept CashCall's unsupported claim, leaving Connecticut residents harmed by the company's improper lending without reasonable recourse. *See* Connecticut Department of Banking case: *In the Matter of CashCall, Inc. (NMLS Number 38512)*, February 4, 2014.

[6] *Bay Mills*, 134 S. Ct. at 2030 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering, P.C.,* 476 U.S. 877, 890 (1986)).

to the extent the tribe's immunity is extended to them." *Seaport Loan Products, LLC v. Lower Brule Community Development Enterprise LLC*, 981 N.Y.S.2d 638 (Sup. Ct. 2013) (quoting *Am. Prop. Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 500 (Cal. Ct. App. 2012). "Official tribal enterprises that act as [an] . . . arm of the tribe are immune from suit as an extension of the tribe's sovereign immunity." *Gristede's Foods*, 660 F. Supp. 2d at 477.

In the absence of United States Supreme Court guidance as to the factors an entity must establish to be entitled to arm of the tribe status, courts have reached a variety of conclusions.[7] After carefully analyzing the relevant decisions and the policy implications of each approach, the Department concludes that the New York Court of Appeals' decision in *Sue/Perior* provides the appropriate framework for determining whether an entity claiming tribal status is an arm of the tribe shielded by tribal sovereign immunity.[8] That court applied a nine-factor test, reasoning that:

> Although no set formula is dispositive, in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: [1] the entity is organized under the tribe's laws or constitution rather than Federal law; [2] the organization's purposes are similar to or serve those of the tribal government; [3] the organization's governing body is comprised mainly of tribal officials; [4] the tribe has legal title or ownership of property used by the organization; [5] tribal officials exercise control over the administration or accounting activities of the organization; and [6] the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether [7] the corporate entity generates its own revenue, whether [8] a suit against the corporation will impact the tribe's fiscal resources, and whether [9] the

[7] Respondents cited three cases in their brief to the Court: *Allen*; *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008); and *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F .3d 1173, 1187 (10th Cir. 2010). Plaintiffs' Brief 19 (August 10, 2015). However, these cases pre-date *Bay Mills* and emphasize factors that assess a tribe's subjective intent in bestowing arm of the tribe status on an entity, rather than financial factors that assess whether a judgment against the entity would actually impact the tribe. The financial factors, discussed below, better address *Bay Mills*' clear concern for the abuse of tribal sovereign immunity and the preservation of a state's ability to prevent violations of its laws outside of tribal lands.

[8] In *Bay Mills*, a sharply divided U.S. Supreme Court determined, 5-4, that a *tribe* defendant could assert tribal sovereign immunity. In reaching its decision as to the *tribe* defendant, the majority noted that the state had "many alternative remedies," *Bay Mills*, 134 S. Ct. at 2036 n.8—including actions against the "tribal officers, responsible for unlawful conduct," *Id.* at 2035—and noted that the Court "need not consider whether the situation would be different if no alternative remedies were available." *Id.* at 2036 n.8. Such a situation could "present a 'special justification' for abandoning" tribal sovereign immunity – even as to the *tribe* defendant. *Id.*

> subentity has the power to bind or obligate the funds of the tribe. The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.

Sue/Perior, 24 N.Y.3d at 546-47 (quotation marks omitted).

Whether a tribal business is an arm of the tribe entitled to the protections of immunity from suit depends significantly upon the financial relationship between the business and the tribe. Although courts look at a variety of factors when analyzing an arm of the tribe question, "protection of a tribal treasury against liability in a corporate charter is strong evidence against the retention of sovereign immunity by the corporation." *Id.* at 551(emphasis added). Accordingly, if a judgment against the business would reach the tribe's assets, if a business has the power to bind or obligate the funds of the tribe, or if the tribe is legally responsible for the business' obligations, this factor weighs heavily in favor of arm of the tribe status.[9] On the other hand, the passing of revenue from the tribal business to the tribe is not a relevant factor in evaluating the financial relationship between the business and the tribe. For instance, in *Sue/Perior,* the tribal business argued that a lawsuit against it "would have an economic impact on the [tribe] because revenues that would otherwise be distributed to the [tribe] will not be available." *Id.* At 550. The Court reasoned that whether the tribe's "revenues will become part of the [tribe's] resources . . . is beside the point. The test, with respect to the financial relationship factors . . ., is not the indirect effects of any liability on the tribe's income, but rather whether the immediate obligations are assumed by the tribe." *Id.*

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[9] "If a judgment against a corporation created by an Indian tribe will not reach the tribe's assets, because the corporation lacks 'the power to bind or obligate the funds of the tribe' (*Ransom*, 86 N.Y.2d at 559 . . .), then the corporation is not an 'arm' of the tribe. However, if a tribe is legally responsible for a corporation's obligations, the tribe is 'the real party in interest' (*id.* at 560. . .)." *Sue/Perior*, 24 N.Y.3d at 550 (parallel cites and parenthetical omitted).

In the present case, both the LLC Act and Great Plains' Operating Agreement clearly protect the Tribe and its treasury from liability. The LLC Act provides that (1) the Tribe has no liability for a limited liability company; (2) a limited liability company can opt to be sued, but cannot bind the Tribe; (3) the Tribe is not liable for the payment or performance of any LLC obligations; (4) there is no recourse against the Tribe; and (5) the company (not the Tribe) owns the property (AR 66, 80, 88). In addition, the Operating Agreement specifies that the Tribe has no liability to Great Plains' creditors (AR 122). In other words, a judgment against Great Plains would not reach the Tribe, Great Plains does not have the power to bind or obligate the funds of the Tribe, and the Tribe is not legally responsible for Great Plains' obligations. The Operating Agreement and the LLC Act respectively provide that profits and cash flow will be distributed to the Tribe and that the Tribe owns LLC interests (AR 88, 122). However, as *Sue/Perior* noted, that revenues pass to the Tribe is not evidence of whether the immediate obligations of Great Plains are assumed by the Tribe. Therefore, the Commissioner finds the financial relationship between Great Plains and the Tribe sufficiently independent such that Great Plains should not be afforded the protections of tribal immunity from suit. Accordingly, the Commissioner finds that the financial relationship between Great Plains and the Tribe weighs heavily against arm of the tribe status for Great Plains.

Although courts will also consider the organization, purpose and governance of the tribal business when analyzing an arm of the tribe question, these factors are not dispositive if there is no financial connection between the business and the tribe. *Sue/Perior*, quoting *Ransom*, emphasizes that the financial factors are more important because the "vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." *Sue/Perior* , 24 N.Y.3d. at 547 (quoting *Matter of Ransom v. St. Regis Mohawk Educ. &*

Community Fund, 86 N.Y.2d 553, 559, 560). Moreover, in the limited discussion in *Allen*, a case relied on by Respondents[10], the Court expressly noted that "[i]mmunity of the [tribal business] directly protects the sovereign tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Allen*, 464 F.3d at 1047. Even if these factors are afforded weight, Great Plains has not provided enough evidence to support a finding under these factors that it should be considered an arm of the Tribe.

Creation of a business under tribal law for purposes similar to or serving those of the tribal government weighs in favor of arm of the tribe status but "a tribe has no legitimate interest in selling an opportunity to evade state law." *Sue/Perior*, 24 N.Y.3d at 546, 547; *Otoe-Missouria Tribe of Indians v. New York State Dep't of Financial Services*, 769 F.3d 105, 114 (2d Cir. 2014). Here, Great Plains was created under tribal law with the stated desire to further the economic goals and initiatives of the Tribe and also expressly formed for the purpose of carrying on a for-profit business and to accomplish any lawful purpose that appears conducive or expedient for the protection of the company and its assets (AR 94-95, 119-120). However, a credible press report suggests that non-tribal interests are using the Tribe to avoid state law[11] (*See* Proposed Finding of Fact 20).

Furthermore, Great Plains' actual business involves making loans to individuals at rates that exceed the Tribe's own criminal usury cap (AR 4). The Tribe's Criminal Code sets a maximum interest rate of 24% and provides for certain punishments and restitution to victims for violations of the law (*See* Proposed Findings of Fact 17-18). Because the predominant purpose of Great

[10] *See* Plaintiffs' Brief 16, 19 (August 10, 2015).

[11] The United States Supreme Court has noted that tribal sovereign immunity is being abused to protect "payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1,000 percent per annum) [that] often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality." *Bay Mills*, 134 S. Ct. 2024 at 2052 (Thomas, J., dissenting, joined by Scalia, Ginsburg and Alito, Js. (citing Martin & Schwartz, The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?, 69 Wash. & Lee L. Rev. 751, 758-59, 777 (2012).

Plains is not clear and the company does not appear to be operating in accordance with Tribal law, the Commissioner is hard-pressed to find that the organization and purpose of the business predominantly serves the tribal government. As Respondents bear the burden of proof, the Commissioner finds that this factor further weighs against arm of the tribe status for Great Plains.[12]

Significant control over the governance of the business by a tribe weighs in favor of arm of the tribe status. Significant control would be evidenced by the composition of the business' board of directors, whether the tribe has control over the administration or accounting activities of the business, and the level of separation, if any, between the business and the tribe. *Sue/Perior*, 24 N.Y.3d at 547. Here, Great Plains is controlled by a five-member board of directors, but Respondents did not provide any evidence showing whether any of the directors are tribal officials[13] (AR 122). Without any such evidence, it is impossible to determine whether the Tribal Council's power to appoint or remove directors should be afforded any weight (AR 122). In fact, a credible press report quotes Tribal officials disavowing substantive control over the Respondent entities (*See* Proposed Finding of Fact 20). In addition, the documentation provided by Respondents shows that the Tribe does not have control over the administration or accounting activities of the business, as § 7.5 of Great Plains' Operating Agreement explicitly states that Great Plains must contract for accounting, legal and other services (AR 124). The

[12] Because Respondents bear the burden of proof in demonstrating entitlement to tribal sovereign immunity, the Commissioner's finding that this factor weighs against arm of the tribe status for Great Plains does not depend upon Proposed Findings of Fact 17-18.

[13] The Resolution creating Great Plains states that the "Board of Directors of Great Plains . . . shall consist of five (5) members including the President of the Development Authority and the Tribal Vice-Chairman" (AR 94). It appears that the tribal vice-chairman is Ted Grant (AR 47). However, the Operating Agreement is not as specific and it is not clear which document (Resolution or Operating Agreement) controls, leaving the Commissioner unable to find as a matter of fact that any tribal officials are also directors of Great Plains. Moreover, even if it was shown that all directors were also tribal officers, it would still not prove that the Tribe exercised a significant level of control over the business.

Tribe may provide personnel to assist in the performance of these services by way of a contract between Great Plains and the Tribe, but the Tribe does not and cannot independently control these functions. The LLC Act does require the management of an LLC wholly owned by the Tribe to submit financial statements, business reports and budget information to the Chairman of the Tribal Council, but the Act does not provide the Tribe with any corresponding power to control the company's actions (AR 91). Finally, the Operating Agreement very strongly affirms that Great Plains is a separate entity from the Tribe. § 4.3 states, "It is intended that the Company will operate separately from the Tribe. . ." (AR 122). § 7.5 also refers to Great Plains as "an entity separate from the Tribe" (AR 124). Together with the sections showing a financial separation between Great Plains and the Tribe discussed above, it is clear that there is a very distinct separation between the two. Accordingly, the Commissioner finds that the Tribe's lack of significant control over the governance of Great Plains weighs against arm of the tribe status.[14]

B. Individual Immunity

The final questions the Court asked the Commissioner to answer are whether Shotton has tribal sovereign immunity from (1) financial penalties that the Commissioner seeks to impose and (2) the Commissioner's request for prospective injunctive relief against future violations of the state's usury and banking laws. Shotton is Chairman of the Tribe (AR 49). He is also Secretary/Treasurer of Great Plains and responsible for their oversight (AR 4, 49). The Commissioner determines, as a matter of policy and judgment, that Shotton does not have tribal sovereign immunity from either the penalties or injunctive relief.

Generally, "tribal immunity extends to individual tribal officials and employees acting within the scope of their authority." *Lewis v. Clarke*, 320 Conn. 706, * 5 (2016) (citing *Kizis v. Morse*

[14] Because Respondents bear the burden of proof in demonstrating entitlement to tribal sovereign immunity, the Commissioner's finding that this factor weighs against arm of the tribe status for Great Plains does not depend upon Proposed Finding of Fact 19.

Diesel International, Inc., 260 Conn. 46, 54 (2002)). Respondents acknowledge that "all of the Department's factual allegations against Chairman Shotton pertain to his role as Secretary/Treasurer of the Plaintiff entities" (*See* Plaintiffs' Brief, 23 (August 10, 2015)). As discussed above, Great Plains and Clear Creek are not arms of the tribe. Accordingly, tribal sovereign immunity does not shield Shotton from the claims against him and the analysis need go no further. *See*, e.g., *Gristede's Foods*, 660 F. Supp. 2d at 478 (holding that tribal Chief was not immune from suit "to the extent that he [wa]s sued for acts in his capacity as the owner of" entity held not to be an arm of the tribe).

Even if Great Plains and Clear Creek were arms of the tribe, tribal sovereign immunity would not extend to Shotton to bar either the financial penalties or the injunctive relief. The United States Supreme Court has "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." *Oklahoma Tax Com'n v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). Rather, the Court has analogized to the principles applicable to suits against state officials and employees in federal court. *Bay Mills*, 134 S. Ct. at 2035. The Connecticut Supreme Court recently found that "[i]n addressing the claims against the employees in their individual capacities . . . [i]n the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe." *Lewis*, 320 Conn. 706 at * 6 (quoting *Bassett v. Mashan-tucket Pequot Museum & Research Center, Inc.*, 221 F.Supp.2d 271, 280 (D.Conn. 2002)) (emphasis removed). "Actions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." *Id.* At * 7.

Here, the applicable statutes allow for the imposition of civil penalties on "any person" who "has violated any provision of the general statutes within the jurisdiction of the commissioner."[15] *See* Subdivisions (1) and (2) of Subsection (a) of Section 36a-50 of the Connecticut General Statutes. Shotton did not contest the Department's allegations concerning his direct involvement in conduct that violated Connecticut law. Consequently, his involvement was properly deemed to be a fact at the administrative stage that has since been corroborated by additional substantial evidence. His involvement with and support of tribally owned online lending companies is no accident, as is corroborated by his statements in *An Unlikely Solution*, a film that essentially advertises the short-term installment loan products offered by Great Plains and American Web Loan (*See* Proposed Finding of Fact 19). While Shotton is a tribal official, the record does not reflect that the Department's action was based to any degree on actions that Shotton took in his capacity as Chairman of the Tribe. On the contrary, the record reflects that the Department alleged Shotton serves as Secretary/Treasurer of Great Plains and found that he violated Connecticut law by virtue of his culpable participation in Great Plains' clear and flagrant violations of the state's usury and banking laws (AR 4, 7-8). As discussed in greater detail above, the record also shows that Great Plains is an entity separate and distinct from the Tribe, and was violating tribal law. Shotton was not acting within the scope of his authority as Chairman of the Tribe because he was not acting in his official capacity at all. Accordingly, the Commissioner does not find that tribal sovereign immunity extends to Shotton for either the financial penalties

[15] The Department has named individuals in similar actions. *See* Connecticut Department of Banking cases: *In the Matter of Another Level Capital Venture, Inc (d/b/a Quick Legal Solutions), Michael Taylor, and Quick Mortgage Solutions Division of: Quick Legal Solutions*, October 10, 2015; *In the Matter of Home Loan Division, Serrano Financial LLC d/b/a Default Servicing, and Kelvin Pickering*, March 2, 2015; *In the Matter of UMC, Inc. d/b/a United Mortgage Consulting and Brandon P. Chodosh*, December 8, 2014; and *In the Matter of Western Sky Financial, L.L.C. and Martin A. Webb*, September 23, 2013.

or injunctive relief.[16]

Even if Great Plains and Clear Creek were arms of the tribe *and* Shotton's actions were within the scope of his employment, the Commissioner finds that tribal sovereign immunity should not extend to Shotton for injunctive relief. The Commissioner ordered all three Respondents to cease and desist their violations of Connecticut law and to provide information, in addition to imposing civil penalties and restitution (AR 11-13, 164-65). The cease and desist order and subpoena to provide information were equivalent to injunctive relief and "[t]ribal immunity does not bar . . . a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct" under state law. *Bay Mills*, 134 S. Ct. at 2035 (first and third emphases added; second in *Bay Mills*); *see also Alabama v. PCI Gaming Auth.*, 2015 WL 5157426, at *7 (11th Cir. Sept. 3, 2015) (noting based on *Bay Mills* that "tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands"); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (holding that tribal sovereign immunity barred suits against tribal officials for money damages, but indicating that prospective relief would be available). Accordingly, the Commissioner concludes that Shotton does not have tribal sovereign immunity from the Commissioner's request for prospective injunctive relief against future violations of the state's usury and banking laws. Shotton must provide information and stop violating Connecticut law regardless of any arm of the tribe determination.

VI. PROPOSED CONCLUSIONS OF LAW

1. Neither Clear Creek nor Great Plains are arms of the Tribe. By any measure, Clear Creek failed to meet its burden to prove that it is an arm of the Tribe. Great Plains failed to meet

[16] The Commissioner's finding in this regard does not depend upon Proposed Finding of Fact 19.

its burden to demonstrate that its relationship with the Tribe is meaningful enough to be considered an arm of the tribe and to warrant extension of the Tribe's sovereign immunity, in light of substantial evidence weighing against an arm of the tribe status.

2. Shotton does not have immunity from the financial penalties the Commissioner has imposed. Respondents failed to show that the Department's allegations against Shotton were based on his actions as Chairman of the Tribe rather than as Secretary/Treasurer of Great Plains.
3. Shotton does not have immunity from the Commissioner's order for prospective injunctive relief against future violations of the state's usury and banking laws. Respondents failed to show that the Department's allegations against Shotton were based on his actions as Chairman of the Tribe rather than as Secretary/Treasurer of Great Plains.

VII. NOTICE OF RIGHT TO HEARING

Notice is hereby given to Respondents that the Commissioner intends to issue Findings of Fact and Conclusions of Law, subject to Respondents' right to a hearing on the allegations set forth above.

A hearing will be granted to Respondents if a written request for a hearing is received by the Department of Banking, Consumer Credit Division, 260 Constitution Plaza, Hartford, Connecticut 06103-1800 within fourteen (14) days following Respondents' receipt of this Proposed Findings of Fact, Proposed Conclusions of Law and Notice of Right to Hearing ("Notice"). This Notice shall be deemed received on the earlier of the date of actual receipt, or seven days after mailing or sending. To request a hearing, complete and return the enclosed Appearance and Request for Hearing Form to the above address. If Respondents will not be

represented by an attorney at the hearing, please complete the Appearance and Request for Hearing Form as "pro se". Once a written request for a hearing is received, the Commissioner will issue a notification of hearing and designation of hearing officer that acknowledges receipt of a request for a hearing, designates a hearing officer and sets the date of the hearing in accordance with Section 4-177 of the Connecticut General Statutes and Section 36a-1-21 of the Regulations of Connecticut State Agencies. If a hearing is requested, it will be held at the Department of Banking, 260 Constitution Plaza in Hartford, Connecticut.

Unless Respondents fail to appear at the requested hearing, the hearing will be held in accordance with the provisions of Chapter 54 of the Connecticut General Statutes. At such hearing, Respondents will have the right to appear and present evidence, rebuttal evidence and argument on all issues of fact and law to be considered by the Commissioner.

If Respondents do not request a hearing within the time period prescribed or fail to appear at any such hearing, pursuant to Section 36a-1-31(a) of the Regulations of Connecticut State Agencies, the allegations herein will be deemed admitted and the Commissioner will issue a final Findings of Fact and Conclusions of Law.

Dated at Hartford, Connecticut,
this 6th day of May, 2016.

Jorge L. Perez

Jorge L. Perez
Banking Commissioner

CERTIFICATION

I hereby certify that on this 9th day of May, 2016, the foregoing Proposed Findings of Fact, Proposed Conclusions of Law and Notice of Right to Hearing was sent by certified mail, return receipt requested, to Respondents' attorneys:

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Laura M. DiMeola
Paralegal Specialist

STATE OF CONNECTICUT
DEPARTMENT OF BANKING
260 CONSTITUTION PLAZA • HARTFORD, CT 06103-1800

Jorge L. Perez
Commissioner

IN THE MATTER OF: **GREAT PLAINS LENDING, LLC ("Great Plains")** **JOHN R. SHOTTON ("Shotton")** **CLEAR CREEK LENDING ("Clear Creek")** **(collectively "Respondents")**	**PROPOSED FINDINGS OF FACT,** **PROPOSED CONCLUSIONS OF LAW** **AND** **NOTICE OF RIGHT TO HEARING**

APPEARANCE AND REQUEST FOR HEARING

Please enter the appearance of:

_____
(Attorney/Pro Se Respondent)

_____
(Mailing Address)

E-mail Address: _____

Telephone Number: _____ Facsimile Number: _____

The above-named individual is qualified as provided in Section 36a-1-32 of the Regulations of Connecticut State Agencies and authorized to represent and accept service in the above-entitled case for:
( ) The Respondent ( ) All Respondents ( ) The following Respondent(s) only

_____

Signed: _____ Date: _____
(Attorney/Pro Se Respondent)

By returning this form, you can expect to receive a telephone call with the hearing officer and the prosecuting attorney approximately two weeks prior to the scheduled hearing date to discuss issues related to the number of anticipated witnesses, possibility of settlement and anticipated length of the hearing, and other related issues.

TEL: (860) 240-8299
FAX: (860) 240-8178
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website: http://www.ct.gov/dob

INSTRUCTIONS

You, Great Plains Lending, LLC, are a Respondent in the enclosed Proposed Findings of Fact, Proposed Conclusions of Law and Notice of Right to Hearing ("Notice"). You have been afforded an opportunity for hearing after reasonable notice. Please read the following instructions carefully.

1. Proposed Findings of Fact and Proposed Conclusions of Law – If you wish to request a hearing on the Proposed Findings of Fact and Proposed Conclusions of Law, you or your attorney *must* complete and return the enclosed Appearance and Request for Hearing Form. You have the right to be represented by an attorney at such hearing. In order to preserve your right to a hearing, the Department of Banking must receive the Appearance and Request for Hearing Form no later than fourteen (14) days after the date you received the Notice. (The Notice is deemed received on the date you received it or seven days after mailing or sending, whichever date is earlier.) The Appearance and Request for Hearing Form should be mailed to the Department of Banking, Consumer Credit Division, 260 Constitution Plaza, Hartford, Connecticut 06103-1800. If you request a hearing within the time specified, the hearing will be held at the Department of Banking, 260 Constitution Plaza, Hartford, Connecticut. The prosecuting attorney assigned to this case is Attorney Stacey Serrano; her telephone number is (860) 240-8202. *If you fail to return the Appearance and Request for Hearing Form requesting a hearing, the Commissioner will issue a final Findings of Fact and Conclusions of Law.*

2. You have the right to resolve or settle this case. Please contact the prosecuting attorney to make arrangements.

3. If you have any additional questions or issues related to this case, or to the date, time or place of the hearing, please contact the prosecuting attorney.

STATE OF CONNECTICUT
DEPARTMENT OF BANKING
260 CONSTITUTION PLAZA • HARTFORD, CT 06103-1800

Jorge L. Perez
Commissioner

IN THE MATTER OF: **GREAT PLAINS LENDING, LLC** **("Great Plains")** **JOHN R. SHOTTON** **("Shotton")** **CLEAR CREEK LENDING** **("Clear Creek")** **(collectively "Respondents")**	**PROPOSED FINDINGS OF FACT,** **PROPOSED CONCLUSIONS OF LAW** **AND** **NOTICE OF RIGHT TO HEARING**

APPEARANCE AND REQUEST FOR HEARING

Please enter the appearance of:

_____
(Attorney/Pro Se Respondent)

_____
(Mailing Address)

E-mail Address: _____

Telephone Number: _____ Facsimile Number: _____

The above-named individual is qualified as provided in Section 36a-1-32 of the Regulations of Connecticut State Agencies and authorized to represent and accept service in the above-entitled case for:
( ) The Respondent ( ) All Respondents ( ) The following Respondent(s) only

_____

Signed: _____ Date: _____
(Attorney/Pro Se Respondent)

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Defendants' Merits Brief, Exhibit 1 - 027

INSTRUCTIONS

You, Clear Creek Lending, are a Respondent in the enclosed Proposed Findings of Fact, Proposed Conclusions of Law and Notice of Right to Hearing ("Notice"). You have been afforded an opportunity for hearing after reasonable notice. Please read the following instructions carefully.

1. Proposed Findings of Fact and Proposed Conclusions of Law – If you wish to request a hearing on the Proposed Findings of Fact and Proposed Conclusions of Law, you or your attorney *must* complete and return the enclosed Appearance and Request for Hearing Form. You have the right to be represented by an attorney at such hearing. In order to preserve your right to a hearing, the Department of Banking must receive the Appearance and Request for Hearing Form no later than fourteen (14) days after the date you received the Notice. (The Notice is deemed received on the date you received it or seven days after mailing or sending, whichever date is earlier.) The Appearance and Request for Hearing Form should be mailed to the Department of Banking, Consumer Credit Division, 260 Constitution Plaza, Hartford, Connecticut 06103-1800. If you request a hearing within the time specified, the hearing will be held at the Department of Banking, 260 Constitution Plaza, Hartford, Connecticut. The prosecuting attorney assigned to this case is Attorney Stacey Serrano; her telephone number is (860) 240-8202. *If you fail to return the Appearance and Request for Hearing Form requesting a hearing, the Commissioner will issue a final Findings of Fact and Conclusions of Law.*

2. You have the right to resolve or settle this case. Please contact the prosecuting attorney to make arrangements.

3. If you have any additional questions or issues related to this case, or to the date, time or place of the hearing, please contact the prosecuting attorney.

STATE OF CONNECTICUT
DEPARTMENT OF BANKING
260 CONSTITUTION PLAZA • HARTFORD, CT 06103-1800

Jorge L. Perez
Commissioner

IN THE MATTER OF: **GREAT PLAINS LENDING, LLC ("Great Plains")** **JOHN R. SHOTTON ("Shotton")** **CLEAR CREEK LENDING ("Clear Creek")** **(collectively "Respondents")**	**PROPOSED FINDINGS OF FACT,** **PROPOSED CONCLUSIONS OF LAW** **AND** **NOTICE OF RIGHT TO HEARING**

APPEARANCE AND REQUEST FOR HEARING

Please enter the appearance of:

_____
(Attorney/Pro Se Respondent)

_____
(Mailing Address)

E-mail Address: _____

Telephone Number: _____ Facsimile Number: _____

The above-named individual is qualified as provided in Section 36a-1-32 of the Regulations of Connecticut State Agencies and authorized to represent and accept service in the above-entitled case for:
( ) The Respondent ( ) All Respondents ( ) The following Respondent(s) only

_____

Signed: _____ Date: _____
(Attorney/Pro Se Respondent)

By returning this form, you can expect to receive a telephone call with the hearing officer and the prosecuting attorney approximately two weeks prior to the scheduled hearing date to discuss issues related to the number of anticipated witnesses, possibility of settlement and anticipated length of the hearing, and other related issues.

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INSTRUCTIONS

You, John B. Shotton, are a Respondent in the enclosed Proposed Findings of Fact, Proposed Conclusions of Law and Notice of Right to Hearing ("Notice"). You have been afforded an opportunity for hearing after reasonable notice. Please read the following instructions carefully.

1. Proposed Findings of Fact and Proposed Conclusions of Law – If you wish to request a hearing on the Proposed Findings of Fact and Proposed Conclusions of Law, you or your attorney *must* complete and return the enclosed Appearance and Request for Hearing Form. You have the right to be represented by an attorney at such hearing. In order to preserve your right to a hearing, the Department of Banking must receive the Appearance and Request for Hearing Form no later than fourteen (14) days after the date you received the Notice. (The Notice is deemed received on the date you received it or seven days after mailing or sending, whichever date is earlier.) The Appearance and Request for Hearing Form should be mailed to the Department of Banking, Consumer Credit Division, 260 Constitution Plaza, Hartford, Connecticut 06103-1800. If you request a hearing within the time specified, the hearing will be held at the Department of Banking, 260 Constitution Plaza, Hartford, Connecticut. The prosecuting attorney assigned to this case is Attorney Stacey Serrano; her telephone number is (860) 240-8202. *If you fail to return the Appearance and Request for Hearing Form requesting a hearing, the Commissioner will issue a final Findings of Fact and Conclusions of Law.*

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Pursuits

Behind 700% Loans, Profits Flow Through Red Rock to Wall Street

Zeke Faux
November 24, 2014 12:00 AM

Joshua Wrenn needed money to make the January payment for his Jeep Cherokee.

The truck driver and aspiring country singer in Madison, North Carolina, got $800 within minutes from a website he found on his phone. When he called to check his balance a few weeks later, he was told he had electronically signed a contract to pay back $3,920 to a company owned by an American Indian tribe.

"I didn't ever see a contract, not one time," said Wrenn,

30. "If I was that stupid, to sign for $3,000 for an $800 loan, I might as well bury myself alive."

Payday loans like Wrenn's -- costly, short-term advances for those with poor credit -- are illegal in North Carolina and about a dozen other states. That's driving online lenders to Indian reservations, where tribes say they're not subject to interest-rate regulations.

American Web Loan, Wrenn's payday lender, is one of the biggest in the U.S. Its offices are in four double-wide trailers, behind the Otoe-Missouria tribe's 7 Clans Paradise Casino in Red Rock, Oklahoma, off a two-lane highway lined with wheat fields. John Shotton, chairman of the Otoe-Missouria, says his impoverished tribe needs the profits to fund affordable housing and after-school programs.

Chasing Returns

It turns out other people are profiting from the business inside the trailers.

Revenue from American Web Loan flows through the tribe to a firm owned by Mark Curry, according to a presentation his company gave to potential private-equity investors last year. Curry, whose payday-loan websites have been sanctioned by state regulators for the past seven years, is in turn backed by a New York hedge fund, Medley Opportunity Fund II LP.

Chasing big returns, some Wall Street investors have been willing to overlook the legal uncertainty of a business that regulators say is exploiting a loophole to trap poor borrowers in a cycle of debt. Hedge funds, private-equity firms and Silicon Valley venture capitalists are investing in a new generation of Internet companies that lend money at high rates to working people.

Curry's presentation, filed in federal court in Illinois by an investment banker suing him over fees, shows that Curry's MacFarlane Group Inc. generates more than $100 million a year in revenue from American Web Loan and another website owned by the Otoe-Missouria. The tribe keeps about 1 percent, according to Charles Moncooyea, who helped strike the deal with Curry in 2010 when he was the tribe's vice chairman.

"All we wanted was money coming into the tribe," Moncooyea said in a telephone interview. "As time went on, I realized that we didn't have any control at all."

Closing Loopholes

Shotton says that's not true. The tribe owns the websites, hires outside help when needed, as it does with its four casinos, and keeps all the profit, he said.

"Short-term lending on the Internet for us has been one of the most successful ventures we've been involved in since gaming," he said in an interview in his office across from the casino, where a drum decorated with the tribal seal hangs on a wall. "The profits were immediate and they were substantial."

Curry said in a telephone interview that he's only a consultant. He also said that the presentation was prepared by an outside firm and that many figures in it are inaccurate estimates. While he declined to say whether he does business with the Otoe-Missouria, Curry said he does work with some American Indians and that the arrangement is legal.

"They control these businesses very clearly," Curry said. "We provide, basically, call-center services for clients that do online financial services."

'Criminal Usury'

Curry, 46, isn't the only payday businessman who made an arrangement with a tribe in the past few years as regulators went after those incorporated offshore or in states that don't cap rates. Tribe-owned websites loaned about $4 billion last year, according to estimates from Jefferies Group LLC.

"What we're seeing is this cat-and-mouse game," said Bruce Adams, general counsel for the banking regulator in Connecticut, one of at least nine states that have taken actions against payday lenders linked to Curry since 2008. "What they're doing now is, frankly in my view, committing criminal usury and hiding behind this claim of sovereign immunity."

Curry's backer, Medley, was founded by the late Richard Medley, an adviser to billionaire George Soros. He intended to invest in socially responsible ventures that also would make money, according to a former employee of the firm. The twin brothers Brook and Seth Taube, who co-founded Medley, took the $3 billion money manager in a different direction.

Medley Loan

Medley invested in payday-store chain Allied Cash Holdings LLC. It loaned $22.9 million in 2011 to Curry's Mission, Kansas-based MacFarlane Group. A MacFarlane executive disclosed the deal in April during a deposition in the case brought by the investment banker, Thomas Ablum of Ablum Brown & Co. in Chicago.

The loan to MacFarlane carries the highest effective interest rate in Medley's second fund, 26 percent a year, according to a presentation Medley gave in 2012 to a pension plan that invested and another former Medley employee. Other pension funds that put up money represent city employees in San Jose, California, and San Antonio firefighters, according to data compiled by Bloomberg.

The Taubes didn't respond to e-mails and phone calls. Ablum, whose case is pending, declined to comment.

Modernist Mansion

Curry has made a fortune from payday lending. MacFarlane, which he owns through a trust, generated $47.3 million in profits from 2009 through mid-2013, according to the investor presentation and the deposition.

As his business expanded, Curry moved from the Kansas City area to a suburb of Las Vegas, where he paid $1.8 million for a modernist mansion, according to real estate records, then to Puerto Rico. He said in the interview that he's providing a service that customers want.

"They're making very educated decisions," Curry said. "Being an entrepreneur, what motivates me is to find solutions for things."

He co-founded the Online Lenders Alliance, a Washington-based lobbying group that fights restrictions on the industry. Two executives who attended the association's meetings and asked not to be identified to avoid retaliation said Curry arrived by private jet and picked up the tab at dinners that cost thousands of dollars. Curry said he usually travels on commercial airlines and that the bills for the dinners weren't extravagant.

Red Rock

Curry met the Otoe-Missouria's tribal council in Red Rock about five years ago, Moncooyea said. Few visitors come to the town, 95 miles south of Wichita, Kansas, where the tribe migrated from Nebraska around 1880 after much of its reservation was sold to make way for railroads.

"They put on a dog-and-pony show about how good they are, how much money they were bringing in," said Bat Shunatona, then the tribe's treasurer.

The 3,100-member tribe needed the money. In Red Rock, population 283, weeds grow through abandoned buildings. Some people live in government-surplus mobile homes that were raffled off by the tribe. A deserted grain-storage tower looms over the only business in town, a combination thrift store and diner run by the Baptist church.

The tribe's quarterly payments to members, then about $800, were threatened by planned casinos closer to Wichita. The council asked few questions during Curry's presentation and granted a license to American Web Loan in February 2010, according to Moncooyea, who was put in charge of the company.

"I didn't do much at all, just looked at the checks and passed them on," said Moncooyea, who added that he'd hoped to learn the business and eventually cut Curry out. "We were just a pawn."

Geneva-Roth

Curry's deal with the Otoe-Missouria came at a good time for him. Complaints from state regulators were piling up at his previous payday-loan firm, Geneva-Roth Ventures Inc., which shares a name with one of Gordon Gekko's shell companies in the 1987 movie "Wall Street." The regulators were disputing Geneva-Roth's claims that its license in Utah, which doesn't cap interest rates, allowed it to lend across the country.

Geneva-Roth settled with regulators in at least six states by agreeing to stop making loans through its now defunct website LoanPointUSA, according to records obtained by Bloomberg News. The settlements didn't affect American Web Loan, which kept lending in New York, North Carolina and other states where high rates are illegal.

American Web Loan typically charges $30 every two weeks per $100 borrowed, equivalent to about 700 percent a year, contracts obtained by Bloomberg News show. Payments are taken directly from borrowers' bank accounts on paydays. More than a quarter of them default on their first payment, according to the investor presentation. Federal Trade Commission records show more than 1,000 borrowers complained about the website.

Trucker's Complaint

Wrenn, the North Carolina truck driver, was one of them. After the company claimed he had signed a contract agreeing to pay 795 percent interest, he closed his bank account and complained to the state's attorney general, who wrote to the tribe on his behalf in May. Two weeks later, a reply came from the Otoe-Missouria Consumer Financial Services Regulatory Commission. Clayton B. Farrell, the commissioner, said he was the only one with jurisdiction.

"American Web Loan shares in the tribe's sovereign immunity and therefore is not subject to state regulation," Farrell wrote on May 19. "After reviewing Mr. Wrenn's complaint and a copy of the loan agreement contract we find no violation."

Debt Collector

Farrell's letter left something out. He has been a debt collector for American Web Loan and Curry's LoanPointUSA, according to consumer complaints to state regulators, lawsuits and bankruptcy filings dated between 2010 and August 2014. The address listed on his regulatory agency's letterhead is a UPS Store in Stillwater, Oklahoma, about 35 miles from Red Rock.

Farrell said in an e-mail that he doesn't collect debts for Curry's companies. He didn't respond to other questions.

Curry introduced other companies to the Otoe-Missouria, according to MacFarlane's investor presentation. Think Finance Inc., a Fort Worth, Texas-based technology and analytics firm was sued on Nov. 13 by Pennsylvania's attorney general for using tribes, including the Otoe-Missouria, as a cover for an "illegal payday-loan scheme."

Sequoia Capital, a venture-capital firm that backs Think Finance, declined to comment. Jennifer Burner, a spokeswoman for Think Finance, said the companies cited in the complaint are legal, licensed and follow tribal law.

"We're proud to be a service provider to Native American e-commerce lending businesses," she said in an e-mail.

Lawsky Letters

Courts in Colorado and California have blocked state regulators who have tried to impose their laws on tribal-owned payday lenders. The Consumer Financial Protection Bureau is still weighing national rules for the industry. Benjamin Lawsky, superintendent of New York's Department of Financial Services, is taking a more aggressive approach.

Each payday lender needs to find a bank that will act on its behalf to process the deposits and debits it makes in customers' bank accounts. Lawsky sent letters in

August 2013 to 117 banks warning they might be facilitating illegal activity by processing payments for American Web Loan and 34 other companies. His action came after the U.S. Department of Justice started a similar campaign called Operation Choke Point.

"If payday lenders are just using tribes and tribal land as puppets to perpetuate their attempts to lend into states where payday lending is illegal, that's deeply disturbing," Lawsky said in an interview.

Joint Defense

The Online Lenders Alliance, along with two other lobbying groups, called for a "joint defense strategy" in an internal presentation dated September 2013 obtained by Bloomberg News. The organizations asked members for $9 million for litigation, lobbying and public relations.

Curry and Think Finance, a member of Curry's lobbying group, offered $600,000 to hire David Bernick, a lawyer known for defending tobacco companies and fighting asbestos claims, according to a provisional budget for the plan obtained by Bloomberg News and two people with knowledge of the matter.

Bernick sued Lawsky in federal court in New York last year on behalf of the Otoe-Missouria and another tribe, saying the regulator was attacking their sovereignty. The tribes dropped the case this month after Lawsky won a preliminary ruling.

Curry said in an e-mail that MacFarlane didn't pledge any funds for the lawsuit. A spokesman for the Native American Financial Services Association, part of the defense alliance, said that group paid the legal fees. Curry founded that group too, according to the MacFarlane presentation.

Shotton, the Otoe-Missouria's chairman, said litigating became less important after new banks were found to process payments. He said the profits from online lending are funding free lunches for the elderly and a subsidized loan program for members of the tribe, whose quarterly checks have dwindled to about $400.

"We're confident that our model stands up, and we're in the right," he said. "We're not out here hiding from anybody."