DOCKET NO.: HHB-CV-17-6038913-S

GREAT PLAINS LENDING LLC, CLEAR CREEK LENDING and JOHN R. SHOTTON	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN
STATE OF CONNECTICUT, DEPARTMENT OF BANKING, JORGE PEREZ, in his official capacity as Commissioner of the Department of Banking	:	MARCH 23, 2018

PLAINTIFFS' BRIEF ON THE MERITS

This administrative appeal arises from the most recent effort by the Defendant, the Commissioner of the Department of Banking ("Department") to exercise authority over the Plaintiffs Great Plains Lending, LLC and Clear Creek Lending, two economic arms and instrumentalities of the federally recognized Otoe–Missouria Tribe, and John R. Shotton, the Tribe's elected Chairman. The Commissioner first attempted to assert regulatory jurisdiction over Plaintiffs in 2014, issuing permanent "cease and desist" orders directing them to stop offering consumer loans to Connecticut residents, and imposing $1.5 million in combined penalties against them. The Commissioner took these actions against the Plaintiffs despite their clear claim to tribal sovereign immunity. *Great Plains Lending, LLC v. Connecticut Dep't of Banking*, No. HHB-CV-15-6028096-S, 2015 Conn. Super. LEXIS 2923, at *5-6 (Conn. Super. Ct. Nov. 23, 2015) (Schuman, J.) (*Great Plains I*) (Ex. A hereto).

The Plaintiffs appealed the Commissioner's action to this Court, which sustained their appeal and held that the Commissioner had wrongly refused to acknowledge that tribal sovereign immunity extends to administrative enforcement proceedings. *Id*. at *5. The Court remanded the matter to the Defendant to determine whether: (1) Great Plains and Clear Creek are arms of the tribe, and therefore entitled to claim its immunity; (2) Chairman Shotton has immunity from the order imposing financial penalties; and (3) Chairman Shotton has immunity from the cease-

and-desist order. *Great Plains*, No. HHBCV-15-6028096-S, Dkt. Entry 139.20 (Aug. 31, 2016) (Ex. B hereto). The Court order further specified that these three determinations had to be made on the administrative record as it existed at that time. *Id*.

In June 2017, the Commissioner issued his ruling on the questions presented (the "Restated Order"), again holding that Great Plains and Clear Creek were not arms of the tribe and Chairman Shotton was subject to the Defendant's monetary and injunctive orders. Administrative Record ("AR") at 170-90. The Plaintiffs appealed, *see* Gen. Stat. § 4-183, and now submit this brief on the merits of their claims.

As set forth in greater detail *infra*, the Commissioner wrongly concluded that Great Plains and Clear Creek do not have "arm of the tribe" status because he applied the incorrect legal standard. Although the overwhelming number of federal and state courts apply a multi-factor test to determine which tribal entities can claim status as an "arm" of a tribe, the Commissioner instead based his ruling on an outlier New York decision that gives near-dispositive weight to one factor, *i.e.*, whether the entity seeking to invoke tribal immunity has a corporate structure that protects the tribe from the direct effects of an adverse money judgment. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 928 (N.Y. 2014). This is not the appropriate standard and is inconsistent with prior Connecticut case law as well as the leading Federal Circuit Court cases on the subject. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010); *Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co*., No. 4004218, 2005 Conn. Super LEXIS 3295 (Conn. Super. Ct. Nov. 30, 2005) (Hendel, J.). The failure to apply the correct test warrants reversal in and of itself. Moreover, had the Commissioner applied the correct test, it is clear that Great Plains and Clear Creek should have been deemed arms of the Tribe. *Klewin's* approval of the multi-factor

test is not even acknowledged by the Commissioner in his ruling. The Commissioner's refusal to consider binding Connecticut law and his adoption of the *single-factor* test threatens to penalize tribes (including the duly organized tribes in Connecticut) for using the same corporate structure relied on by other national businesses that routinely create subsidiaries in order to protect the assets of the parent company. Adoption of this approach in Connecticut could have potentially devastating results for the commercial enterprises created by Connecticut's own tribes.

Furthermore, the Commissioner's insistence that Chairman Shotton is susceptible to the Department's injunctive and financial orders is also erroneous. Contrary to the Commissioner's assertions, the administrative claims against Chairman Shotton do not stem from any acts taken in his personal capacity; the real party in interest in these proceedings is the Tribe, not its Chairman. Moreover, assuming *arguendo* Chairman Shotton was being sued in his personal capacity, he has official immunity as a tribal government officer, which immunity bars the Commissioner from issuing orders against him.

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*. Because the only evidence before the Commissioner was the undisputed evidence submitted by the Plaintiffs (the Department having failed to introduce any evidence of its own), this Court can apply the multi-factor test based on the limited record before it. When viewed through the appropriate legal lens for determining who can claim "arm of the tribe" status, this record supports only one conclusion: the Plaintiffs are not subject to the Commissioner's attempts to regulate their conduct, and their appeal must be sustained. *See* General Statutes § 4-183(j).

HISTORY OF THE CASE

Tribal Sovereignty and Sovereign Immunity

Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). They have inherent sovereignty, meaning that their ability to self-govern is derived not from the U.S. Constitution, but from their existence on this continent as "distinct political societ[ies]" since time immemorial. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-18 (1831).

Tribes today are subject to Congress's plenary power over Indian affairs. *See United States v. Kagama*, 118 U.S. 376, 381–82 (1886). Congress derives this power from the Constitution's Indian Commerce Clause as well as the well-established trust relationship between tribes and the United States. *See id* at 379-80. State governments, however, have no authority to unilaterally infringe on the sovereignty of tribes unless that authority has been expressly granted to them by federal statute. For example, certain states, *e.g.*, California, have been granted authority to exercise criminal jurisdiction over reservations within their boundaries. *See* 18 U.S.C. § 1162. But absent such legislation, tribal sovereignty is not subject to diminution by the states. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 891 (1986).

Immunity from state interference with their governance is one of the "core aspects" of tribal sovereignty. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). And like all other aspects of tribal sovereignty, in the absence of federal legislation commanding otherwise, such immunity maintains its full breadth—encompassing tribal businesses and tribal commercial activities and extending to tribal officials acting in their official capacity and within

the scope of their authority under tribal law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758–60 (1998); *see also Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996).

The Tribe's Wholly-Owned and Operated Lending Entities

The Otoe-Missouria Tribe of Indians, as a federally recognized tribe, enjoys the same attributes of sovereignty described above, and is subject to the same congressional oversight. It also faces the same struggles found throughout Indian Country, all stemming from a dearth of meaningful economic development opportunity. By way of historical background, the Otoe and Missouria originally hail from the Great Lakes Region. AR 37. They later migrated to the area along the Missouri River near Missouri and Nebraska. *Id.* The two groups of indigenous people combined into one tribe, and over the course of the 1900s, entered into a series of treaties with the federal government. *Id*. Eventually, by 1881, the federal government sold much of the Tribe's land, forcing the Tribe to relocate to its current land in Oklahoma. *Id*.

Faced with this long history of lost reservation lands at the hands of the federal government, the Tribe suffered from a lack of revenue to sustain its tribal government and citizens. Being located in a rural and remote geographical region, the Tribe's opportunities for economic development have always been limited. In an effort to create opportunities to provide for the well-being of the tribal community, the Tribe diligently explored different options. In 2010, acting through its Tribal Council, the Tribe entered into the area of e-commerce, specifically, consumer financial services via the Internet. AR at 38, 52-53.

Following the enactment of the proper legislative framework, the Tribe established two businesses under Tribal law:[1] American Web Loan, Inc., d/b/a Clear Creek Lending, and Great

[1] The Tribe derives its authority to create tribally owned businesses from its 1984 Constitution, which designates the Tribal Council as the supreme governing body and provides it lawmaking authority. AR 37-38. As an exercise of this power, the Tribal Council ratified the

Plains Lending, LLC. AR 52 ¶¶ 7-9. The Tribe created both businesses for the purpose of economic development for the Tribe and to aid in addressing issues of public health, safety, and welfare. AR 53 ¶ 12.

The Tribe maintains operation and control of each business; the Tribal Council may appoint and remove officers for both entities with or without cause. *Id*. ¶ 15. Both Great Plains and Clear Creek fall under the regulation of the Otoe-Missouria Consumer Finance Services Regulatory Commission ("Commission"), which issues each a license. *See id.* ¶ 14. The Commission is an independent regulatory agency serving to implement the Tribe's consumer financial services laws, including the Otoe-Missouria Consumer Finance Services Regulatory Commission Ordinance ("Ordinance"). *Id*.

Through the formation pursuant to Tribal law, the Tribe granted both businesses all the privileges and immunities enjoyed by the Tribe, including, but not limited to, immunity from suit. *Id*. ¶ 13. This immunity has never been waived by the Tribe, Great Plains, Clear Creek, or any tribal official with regard to any administrative enforcement proceeding in the State of Connecticut. AR 54 ¶¶ 16, 18.

The Department's Prosecution of the Tribe's Businesses

In late 2014, the Department of Banking attempted to assert regulatory jurisdiction over the Tribe vis-a-vis the Plaintiffs, issuing 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." *Great Plains Lending, LLC v. Connecticut Dep't of*

Otoe-Missouria Tribe of Indians Limited Liability Company Act and the Otoe-Missouria Tribe of Indians Corporation Act. AR 52 ¶ 5. Businesses created under these laws are considered instrumentalities and arms of the Tribe and their officers are to be considered officers of the Tribe. AR 52 ¶ 6. Plaintiff American Web Loan, Inc., d/b/a Clear Creek, was formed in February 2010 pursuant to Resolution OMTC #210561, and Great Plains Lending, LLC was formed in May 2011 pursuant to Resolution OMTC #54293. *Id*. ¶¶ 7-8.

Banking, No. HHB-CV17-6038913-S, Dkt. Entry 100.31 ¶ 35 (Conn. Super Ct. July 26, 2017); *Great Plains I* at *1. The Department alleged that Great Plains and Clear Creek violated Connecticut banking law by making unlicensed loans and charging a usurious rate of interest. *Great Plains I* at *2. The Department further claimed that Chairman Shotton violated Connecticut law by participating in these transactions. *Id*. at *5.[2]

The Plaintiffs contested the Department's assertion of regulatory jurisdiction, filing a Motion to Dismiss on the ground that tribal sovereign immunity barred all state enforcement actions against them as they were tribally-owned businesses and a tribal official. AR 27-29. *See* Regs. Conn. State Ag. § 36a-1-29. The Department objected to the Motion to Dismiss, arguing that sovereign immunity applied only to "suits," and that the administrative proceedings were merely a "demand for compliance," thus not triggering the defense of immunity. AR 131-40. The Department introduced no evidence of its own to refute the Plaintiffs' immunity defense.

In a written ruling issued in January 2015, the Commissioner denied the Plaintiffs' Motion to Dismiss, holding that it was not necessary for him to determine whether Great Plains and Clear Creek were "arms of the tribe" and therefore entitled to tribal sovereign immunity against unconsented suit because, in his view, administrative proceedings were not "suits" in the first instance. AR 154-62. At the same time, the Commissioner also issued his final "Order to Cease and Desist and Order Imposing Civil Penalty." AR 163-69. The Final Order directed Plaintiffs to "cease and desist from violating [Connecticut lending laws]" or "participating in the violation" thereof. AR 168-69. It further imposed a $700,000 fine upon Plaintiff Great Plains; a $700,000 fine upon Plaintiff Chairman Shotton; and a $100,000 fine upon Clear Creek. *Id.*

[2] Even while making these allegations, the Department acknowledged the tribal status of Great Plains and Clear Creek, as well as Chairman Shotton's status an elected official of the Tribe. AR 4.

The Plaintiffs timely appealed to the Superior Court. Gen. Stat. § 4-183(a). After briefing and argument, the court (Schuman, J.) issued its decision in favor of Plaintiffs, holding that contested cases are in fact "suits" for the purposes of tribal sovereign immunity. *Great Plains I* at *17. Judge Schuman then observed that the Commissioner never reached the question of whether the Plaintiffs enjoyed immunity due to their tribal status, *Great Plains I* at *18, and therefore returned the action to the Commissioner for the purpose of answering three specific questions:

(1) are Great Plains and Clear Creek arms of the Tribe?

(2) does Chairman Shotton have tribal sovereign immunity from the financial penalties the Commissioner ordered? And

(3) does Chairman Shotton have tribal sovereign immunity from the Commissioner's demand for injunctive relief?

Great Plains I at *25.

Following Judge Schuman's initial remand order issued in November 2015, the Commissioner issued a ruling again asserting that Plaintiffs were not arms of the tribe and were unable to claim tribal immunity. AR 170-90. The Plaintiffs challenged this ruling on the ground that it did not comply with Judge Schuman's order, and was based on evidence outside the record, which had been newly introduced *sua sponte* by the Commissioner. *Great Plains*, No. HHB-CV-15-6028096-S, Dkt. Entry 139.00 (May 23, 2016) (Ex. C hereto).

In response, Judge Schuman issued a second remand order directing the Commissioner to restrict his consideration to only the three questions presented in the November 23rd order, and to answer those questions based only the evidence in the record of the first appeal. *See id*. Dkt. Entry 139.20 (Ex. B). Again, the only evidence in the administrative record is the materials submitted by Plaintiffs in connection with their 2014 Motion to Dismiss. AR 27-130.

Almost a year later, the Commissioner issued the order now under review. AR 170-90. This "Restated Order" confirms the Commissioner's previous 2015 and 2016 orders, holding that neither Great Plains nor Clear Creek are arms of the Tribe, and that Chairman Shotton is liable for both the ordered injunctive relief and monetary penalties. *Id*. Plaintiffs appealed, Gen. Stat. § 4-183, and now submit their arguments on the merits.

STANDARD OF REVIEW

This administrative appeal is unique in that the sole issue before this Court is whether immunity shields the Plaintiffs from the Commissioner's attempts to exercise his regulatory authority over them. Our Supreme Court has specifically acknowledged that the question of whether an entity is an "arm of the tribe," and therefore covered by tribal immunity, is a legal question which implicates subject matter jurisdiction. *See, e.g., Lewis v. Clarke*, 320 Conn. 706, 710 (2016), *rev'd on other grounds*, 137 S. Ct. 1285 (2017). Because the issue of sovereign immunity is a purely legal issue and does not concern the statutory framework over which the Commissioner has a special expertise, his ruling on the issue is not entitled to any deference by this Court. As set forth previously by Judge Schuman:

> Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion . . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny, . . . the agency is not entitled to special deference.

Great Plains I at *9 (quoting *Conn. Med. Exam. Bd. v. FOIC*, 310 Conn. 276, 281-83 (2013)). In such cases, where the question is purely legal, it has been said that the agency's opinion is "of little value" to the court's ultimate resolution of the matter. *Aaron v. Conservation Comm'n*, 178 Conn. 173, 178-79 (1979) (citing *Levitt & Sons, Inc. v. Division Against Discrimination*, 158 A.2d 157 (N.J. 1960), *appeal dismissed*, 363 U.S. 418 (1960)). *See also Okeke v. Comm'r of*

Pub. Health, 304 Conn. 317, 324 (2012) (court reviews questions of law under a *de novo* standard with no deference to the agency).

Furthermore, because the only evidence in the record is the undisputed evidence submitted by Plaintiffs, this Court is free to apply the correct legal standard to that undisputed evidence again without deference to the agency's ruling. *See, e.g., Morton Bldgs., Inc. v. Bannon*, 222 Conn. 49, 53-54 (1992) (where record consists solely of written materials and trier of fact did not evaluate the credibility of witnesses or consider additional evidence, the record before the reviewing court is identical with the record below: "In these circumstances, the legal inferences properly to be drawn from the parties' definitive stipulation of facts raises questions of law rather than of fact.")

ARGUMENT

I. THE COMMISSIONER APPLIED THE WRONG TEST TO DETERMINE THAT GREAT PLAINS AND CLEAR CREEK WERE NOT ARMS OF THE TRIBE

In deciding the arm of the tribe issue, the Commissioner ignored the multi-factor test accepted by the majority of other courts across the country, including direct, binding precedent from Connecticut. Instead the Commissioner applied an out-of-state decision, widely recognized as an outlier, which gives near dispositive weight to one financial factor. The Commissioner's limited attempt to distinguish case law universally accepted as stating the controlling test is not persuasive; as explained in more detail, *infra*, application of the prevailing test, utilized by the overwhelming number of federal and state courts, including Connecticut, necessarily leads to the conclusion that Great Plains and Clear Creek are arms of the Tribe.[3]

[3] The Commissioner is mistaken in comparing Great Plains and Clear Creek to the non-tribal lending company, CashCall, Inc. ("CashCall"). AR 181 n.8. As the Commissioner notes, CashCall was organized under the laws of the state of California, and the loans assigned to CashCall were originated by a limited liability company owned by an individual tribal member, not a tribe itself. In contrast, Plaintiffs' have provided ample evidence, discussed *infra*, showing

A. Most Federal And State Courts, Including Connecticut, Apply A Multi-Factor Test

Although other iterations have existed over the years, currently, the most widely-accepted statement of the arm-of-the-tribe standard is found in *Breakthrough Management Group v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). *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.

Id. at 1187 (citations omitted). In applying these factors, the Tenth Circuit overruled the district court, which had relied on an Alaska case, *Runyon v. Association of Village Council Presidents*, 84 P.3d 437, 441 (Alaska 2004), that an "entity's financial relationship with the tribe is of paramount importance." 629 F.3d at 1186. *Breakthrough* expressly rejected *Runyon's* approach, stating that consideration of the entity's financial relationship to the tribe "is *not* a dispositive inquiry," therefore, the district court's rationale was flawed. *Id.* at 1187 (emphasis in original).

Decisions from almost every other federal and state court that have addressed the arm-of-the-tribe doctrine agree generally with *Breakthrough's* statement of the multi-factor test as well as its rejection of an approach focusing on the direct impact of a judgment on the tribe to the exclusion of all other factors. *See, e.g., White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir.

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that Great Plains and Clear Creek are organized under tribal law (not the laws of California or any other state) and they are owned and operated by a tribe (not an individual). Thus, whereas CashCall merely asserted immunity with no factual support demonstrating its entitlement to such immunity, Plaintiffs have provided the Department with more than enough evidence to demonstrate their legitimate arm-of-the-tribe status. The analogy to CashCall is simply inapposite.

2014); *J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1175-76 (D.S.D. 2012) (rejecting Runyon in favor of "cases like *Breakthrough*"); *Subranni v. Navajo Times Publ'g Co.*, 568 B.R. 616, 630 (Bankr. D.N.J. 2016) (comparing *Runyon* and *Breakthrough*, and deciding the case based on multiple factors). This has included cases in which the entity claiming immunity was a tribal lending entity, such as in *Howard v. Plain Green, LLC*, No. 2:17-cv-302, 2017 U.S. Dist. LEXIS 137229, at *7-8 (E.D. Va. Aug. 7, 2017) and *Everette v. Mitchem*, 146 F. Supp. 3d 720, 723-25 (D. Md. 2015).

Even before *Breakthrough*, numerous courts had recognized that arm of the tribe questions could only be resolved by considering multiple factors. *See, e.g., Cash Advance & Preferred Cash Loans v. Colo.*, 242 P.3d 1099, 1110 (Colo. 2010) (citing three factors but rejecting others, including whether a suit will affect the tribe's finances); *Gayle v. Little Six, Inc.*, 555 N.W.2d 284, 294 (Minn. 1996) (citing three factors); *see also Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1279 (Wash. 2006); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000). All these cases agree that determining whether an entity is an arm of the tribe requires consideration of multiple factors.[4] There is no single consideration or factor that controls.

Even more importantly, Connecticut courts have applied a multi-factor standard similar

[4] Numerous courts in other jurisdictions follow this general approach even if they do not expressly adopt the particular test in *Breakthrough*. *See, e.g., Reuer v. Grand Casino Hinckley*, No. 09-1798 (MJD/RLE), 2010 U.S. Dist. LEXIS 87765 (D. Minn. July 12, 2010); *Bruguier v. Lac du Flambeau Band*, 237 F. Supp. 3d 867, 873 (W.D. Wis. 2017); *Eagleman v. Rocky Boys Chippewa-Cree Tribal Bus. Comm.*, No. 14-73-GF-BMM, 2015 U.S. Dist. LEXIS 161739, at *4-5 (D. Mont. Dec. 2, 2015); *In re IntraMTA Switched Access Charges Litig.*, 158 F. Supp. 3d 571, 576 (N.D. Tex. 2015); *Allman v. Creek Casino Wetumpka*, No. 2:11-cv-24-WKW, 2011 U.S. Dist. LEXIS 65158, at *8 (M.D. Ala. May 23, 2011); *Sungold Gaming USA, Inc. v. United Nation of Chippewa*, No. 226524, 2002 Mich. App. LEXIS 2376 at *4 (Mich. App. Apr. 5, 2002).

to that set forth in *Breakthrough*. Following the development of tribal enterprises by both the Mashantucket Pequot and Mohegan tribes, Connecticut courts were asked to resolve the issue of who could claim "arm of the tribe" status. In taking up the question in *Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co.*, 2005 Conn. Super LEXIS 3295, the court reviewed the state of the law at the time, reviewing a number of prior Connecticut decisions (*see id.*, at *15) (collecting cases), as well as decisions emanating from other states. The court held that the determination of whether an entity constituted an arm of a tribe depended on a number of considerations, including the organizational purpose of the entity, its links to the tribe's governing structure, and whether immunity would further federal policies. *Id.* at *8-9.

The *Klewin* court identified a number of specific factors that other courts had considered: (1) whether the entity is organized under tribal law; (2) whether its purposes serve those of the tribal government; (3) the composition of the entity's governing body; (4) whether the tribe has legal title to the entity's property; (5) whether tribal officials exercise authority over administration or accounting; and (6) whether the tribe has power to dismiss members of the entity's governing body. *Id*. *Klewin* noted there was a disagreement between courts as to an additional factor: whether a suit against the entity would impact tribal fiscal resources. *Id.* at *9. Addressing this question, the *Klewin* court stated:

> Because the plaintiff is a corporation, suit against it will not directly impact the Nation's fiscal revenues. However, if a large judgment is entered against the plaintiff as a result of a suit, payment of such judgment could result in the plaintiff being unable to make the $1,000,000 monthly rental payments to the Nation, thereby substantially impacting the Nation. Similarly, as a corporation, the plaintiff does not have the power to bind or obligate the funds of the Nation, but its failure to make monthly rental payments would have a significant effect on such funds. The funds which the plaintiff administers, in practical effect, are the funds of the Nation and the manner in which the plaintiff handles such funds redounds to the benefit or detriment of the Nation.

Id., at *13-14. In other words, the court found it immaterial whether the tribe organized the entity so as to insulate the tribe from *direct* financial liability. Applying a multi-factor test derived from prior case law, the *Klewin* court ultimately determined the entity was an arm of the tribe.

The *Klewin* decision follows a line of similar Connecticut decisions, holding that entities owned and/or operated by tribes are entitled to immunity as an arm of the tribe.[5] The Connecticut cases are not limited to casinos on the reservation. In *Burnham v. Pequot Pharmaceutical Network*, No. 95536264, 1998 Conn. Super. LEXIS 1734, at *2, *10-11 (Conn. Super. Ct. June 19, 1998), for example, the court dismissed claims against "a for-profit, commercial organization in Pawcatuck," operating off the reservation, because the entity was entitled to tribal sovereign immunity.

B. The Commissioner Applied The Single-Factor Test Laid Out In *Sue/Perior*

Rather than applying the widely-accepted multi-factor test represented by *Breakthrough* and *Klewin*,[6] the Commissioner instead chose to apply the standard laid out in *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 925 (N.Y. 2014), which gives near dispositive weight to a single factor. The Commissioner opined that "the New York Court of Appeals decision in *Sue/Perior* provides the most appropriate framework for determining whether a tribally-owned business is an arm of the tribe." AR 182 (Restated Order). Since the Commissioner never addresses prior Connecticut decisions, such as *Klewin*, he avoids the difficult question of why a New York decision is more appropriate to apply than relevant

[5] *See, e.g., Greenidge v. Volvo Car Fin., Inc.*, No. X04CV 960119475S, 2000 Conn. Super. LEXIS 2240 (Conn. Super. Ct. Aug. 25, 2000); *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328, 330 (D. Conn. 2001). *See also Chayoon v. Sherlock*, 89 Conn. App. 821, 822 n.1 (2005).

[6] While the phrasing may differ, the basic considerations recognized in *Klewin* are reflected in the *Breakthrough* factors.

Connecticut case law, particularly where the Connecticut cases follow the majority rule. Although not expressly acknowledged by the Commissioner in his Restated Order, his reliance on *Sue/Perior* was one of necessity. Indeed, as explained below, the limited record that is a product of the Department's failure to produce evidence rebutting Plaintiffs' sovereign status means that he cannot justify his conclusion if he had applied the *Breakthrough* test.

Sue/Perior purports to rely on the factors previously identified in an earlier decision of the New York Court of Appeals, *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, 658 N.E.2d 989 (N.Y. 1995). In practice, however, *Sue/Perior* separates the list of factors in *Ransom* into two categories and then focuses on "those that consider the financial relationship between the subsidiary or agency and the Indian nation." *Id.* at 934. Diverging from the *Breakthrough* multi-factor approach, the court in *Sue/Perior* determines that financial relationship issues "are the most important" factors. *Id.* at 935. *Sue/Perior* found that the "tribe's use of the corporate form protects their assets from being called upon to answer the corporation's debt." *Id.* at 936 (quoting *Runyon*, 84 P.3d at 441). The court reasoned that "[i]f a judgment against a corporation created by an Indian tribe will not reach the tribe's assets, because a corporation lacks the power to bind or obligate the funds of the tribe, then the corporation is <u>not an 'arm' of the tribe</u>." *Id.* at 935 (emphasis added).

Sue/Perior, thus, reduces the *Breakthrough/Klewin* multi-factor approach to a single controlling question: whether the tribe is directly responsible for any judgment against the entity. As the *Sue/Perior* dissent points out, this analysis makes the financial considerations "outcome determinative." *Id*. at 938; *see also id*. at 942 ("the majority's argument [is] . . . that the corporate form, and the protections therein, categorically bars the extension of sovereign immunity").

Notably *Sue/Perior* specifically rejects *Klewin's* approach of recognizing the importance of indirect financial effects on a tribe. In *Sue/Perior*, the tribal entity argued that a lawsuit against it "would have an economic impact on the Seneca Nation because revenues that would otherwise be distributed to the Nation will not be available." *Id.* at 935. The court rejected this argument, saying "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*. *Sue/Perior*, thus, effectively makes the financial relationship the "dispositive inquiry," which *Breakthrough* (and almost every other court to address the issue) found improper.

Since the issuance of *Sue/Perior* other courts have refused to follow it and adhered to the *Breakthrough* multi-factor approach. For example, in a recent Florida case, the non-tribal party (in an action against one of the present Plaintiffs, Great Plains) urged the court to apply the *Sue/Perior* test. *Monahan v. Great Plains Lending LLC*, No. CA15-449, 2016 WL 6127568 (Fla. Cir. Ct. Sept. 30, 2016). The court refused, labeling *Sue/Perior* "an outlier." *Id.* at *4. Instead, the *Monahan* court applied the *Breakthrough* test to determine that Great Plains was an arm of the Otoe–Missouria Tribe and entitled to sovereign immunity. *Id.*; *see also People v. Miami Nation Enters.*, 386 P.3d 357, 366-67 (Cal. 2016) (rejecting *Sue/Perior* test in favor of *Breakthrough*).

The attraction of *Sue/Perior* for the Commissioner is obvious. Rather than confront and address the full range of factors—which would be difficult for the Commissioner given the Department's failure to produce evidence rebutting Plaintiffs' arm-of-the-tribe argument—it is easier for the Commissioner to focus is on a single outcome-determinative issue: whether the

Tribe established the entity with some type of separate corporate structure. This reliance on *Sue/Perior* is irreconcilable with the case law in Connecticut and the rest of the country.

The Commissioner's justification for choosing the *Sue/Perior* standard has no basis in law, logic, or policy. His sole argument as to why *Sue/Perior* should govern the analysis is that *Sue/Perior* is one of the more recent decisions, and particularly that it post-dates the U.S. Supreme Court's decision in *Bay Mills*, which upheld the doctrine of tribal sovereign immunity. *See* AR 182 (Restated Order n.10). Specifically, the Commissioner claims that *Sue/Perior's* financial factors, "better address *Bay Mills* clear concern for the abuse of tribal sovereign immunity." *Id.*

There are two problems with the Commissioner's argument. First, the court in *Sue/Perior* expressly rejected the notion that *Bay Mills* affected its analysis, stating:

> *Kiowa* and *Bay Mills* do not apply in the present appeal, because they concerned lawsuits against Indian tribes themselves, not against corporate affiliates of tribes. They do not illuminate questions concerning whether such an entity is an 'arm' of the tribe.

25 N.E.3d at 934 (emphasis added). As the court in *Sue/Perior* rejected the idea that *Bay Mills* had any role in its determination, the Commissioner can hardly argue that the case addresses *Bay Mills'* concerns.[7] Second, *Sue/Perior* bases its analysis on the language from *Ransom*, a case decided two decades before *Bay Mills*. The Commissioner's effort to explain reliance on a single outlier decision, which directly conflicts with the accepted rule nationwide, cannot succeed.

Indeed, *Sue/Perior*'s failure to garner any kind of judicial following is understandable when viewed against the backdrop of the core tenets of federal Indian law. Sovereign immunity, the U.S. Supreme Court has explained, occupies an important role in federal Indian law, as it is a

[7] Moreover, the Commissioner mischaracterizes *Bay Mills* since it was only the dissent there that criticized the modern application of tribal sovereign immunity. *See* 134 S. Ct. at 2045-55 (Scalia, J. dissenting).

"necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986).

Among the primary justifications for retaining the doctrine of tribal sovereign immunity is that the defense is vitally important in safeguarding tribes' economic well-being. *See id.* A tribe's sovereignty, and its attendant immunity, is no less robust when the tribe engages in a commercial activity than when it engages in what might be considered more traditional "governmental" activities. *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684 (1999).

Tribes all over the country have formed hundreds, if not thousands, of corporate business instrumentalities pursuant to tribal laws. These entities operate independently from their respective tribal governments insofar as they are generally formed so as to both protect the tribe from *direct* liability and also protect the business from undue political influence within the tribe. Such businesses include telecommunications and utility companies, agricultural entities, and gas/oil businesses. The corporate structure serves to ensure separation between business decision-making and the politics of the tribal government, as well as ensuring that the business is operated effectively with full attention from a separate operating board, given the heavy day-to-day duties and responsibilities of the elected tribal leadership. *See* S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 693 (2010) ("Indeed, clear separation of business and politics appears to be a primary factor in the success of tribal businesses.").

In Connecticut, courts have already accorded "arm of the tribe" status to tribal entities such as the Foxwoods Gaming Enterprise, *Worrall*, 131 F. Supp. 2d at 330, and the Pequot Pharmaceutical Network, *Burnham*, 1998 Conn. Super. LEXIS 1734. There are many more

established tribal businesses within our state boundaries, and adopting the Commissioner's approach might possibly threaten all of them with a loss of sovereign immunity—a significant consideration in their creation and profitability.[8]

C. On This Record, Application Of The Multi-Factor Test Establishes That Great Plains And Clear Creek Qualify As Arms Of The Tribe

Consideration of the Plaintiffs' evidence supporting their claim of arm of the tribe status, when viewed with the appropriate multi-factor standard, confirms that Great Plains and Clear Creek are arms of the Tribe.[9]

1. Great Plains and Clear Creek were created pursuant to tribal law.

The first factor—method of creation—weighs in favor of Great Plains and Clear Creek. Both entities were created pursuant to duly enacted tribal law. As to Clear Creek, as attested to by the Tribe's Vice-Chairman, on February 10, 2010, the Tribal Council enacted Resolution #210561, creating American Web Loan, Inc. as a wholly owned arm of the Tribe pursuant to the Tribe's Corporation Act. *See* AR 52, 101–03. Later, in September 2013, Clear Creek was created as a d/b/a under which American Web Loan conducted business. *Id.*; *see also* AR 105-06. Great Plains was created in a similar manner. As the Vice-Chairman explained on May 4, 2011, the Tribal Council enacted Resolution #54293, creating Great Plains as a wholly owned arm of the Tribe pursuant to the Tribe's Limited Liability Company Act. AR 52, 98-99. There is no evidence in the record that contradicts the fact that Great Plains and Clear Creek were

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[8] As a further example in the non-tribal context, the National Railroad Passenger Corporation, (commonly known as Amtrak) was established as a "corporation" under federal law. The U.S. Supreme Court has pointed out that Amtrak possesses "inherent powers and immunities" that Congress can choose to either retain or waive, including "sovereign immunity from suit," regardless of its plainly commercial nature or its corporate status. *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995).

[9] Given *Breakthrough's* general acceptance in the years since *Klewin* was decided, it is the most appropriate restatement of the multi-factor standard.

created pursuant to tribal law, and thus, no support for a contrary conclusion.[10]

2. Great Plains and Clear Creek were created to advance the Tribe's economy.

The second factor — purpose of the entity — also weighs in favor of Great Plains and Clear Creek, as both entities were created with the express purpose of advancing the Tribe's economy. As attested to by the Tribe's Vice-Chairman, Clear Creek was created "to advance the Tribe's economic development and to aid in addressing issues of public health, safety, and welfare." AR 53 ¶ 12. Likewise, Great Plains, as stated above, was created by Tribal Council Resolution #54293. As that resolution explicitly states, Great Plains was created because doing so was "in the best interests of the Otoe–Missouria people." AR 98. More specifically, Great Plains was designed to "advance tribal economic development to aid addressing issues of public safety, health and welfare." *Id.* The Restated Order itself acknowledges that Great Plains was established "with the stated desire to further the economic goals and initiatives of the Tribe." AR 185.

Again, there is no evidence in the record to the contrary. Although the Commissioner alleges that the Tribe has merely created a "pretense in order to claim tribal sovereign immunity and evade state law," AR 185, there is no evidence in the record to support that assertion.

3. Great Plains and Clear Creek are wholly owned and controlled by the Tribe.

The third factor — ownership and control — also weighs in favor of Great Plains and Clear Creek, as both entities are wholly owned by the Tribe and subject to tribal control and

[10] Nor has the Commissioner alleged anything calling into question the authenticity of the resolutions establishing each entity. As discussed *supra*, at the outset of this administrative proceeding, the Commissioner apparently made a strategic decision not to conduct an arm of the tribe analysis. He had the opportunity in the context of the Motion to Dismiss to introduce additional evidence on this issue, but chose not to. As a result, the evidence in the record was presented exclusively by the Plaintiffs.

regulation. Both Great Plains and Clear Creek are 100% owned by the Tribe. *See* AR 52, 98, 101, 105. As such, each entity is subject to the plenary control of the Tribe. Indeed, the Tribe has the power to control all business decisions, including through participation in the Board of Directors. *See* AR 53-54, 125–28. Officers of both Great Plains and Clear Creek, the Tribe's Vice-Chairman attested, "may be removed by the Tribal Council with or without cause." AR 53.

The Tribe additionally exercises regulatory control over both entities vis-à-vis the Otoe-Missouria Consumer Financial Services Regulatory Commission. *See* AR 53. Both entities are required to maintain a license granted by the Commission. AR 119, 121. To maintain that license, both entities must abide by the robust standards set forth by the Commission. *See* AR 108–17. It should be noted that this regulatory model closely mirrors the tribal gaming systems in Connecticut and elsewhere, pursuant to which tribal casinos are overseen by independent tribal regulatory agencies. *See Kizis v. Morse Diesel Int'l, Inc.*, 260 Conn. 46, 48 n.1 (2002) (discussing the tribal gaming regulation conducted by the Mohegan Tribe).

Again, the record contains only evidence in support of the Plaintiffs' claims. The Commissioner argues that control is not demonstrated because he does not know the identity of every single officer and director of the entities. AR 185-86. However, what the Commissioner fails to recognize - or acknowledge - is that the Tribal Council's ability to control the entities is already sufficiently demonstrated by their power to remove officers and directors. *See Howard*, 2017 U.S. Dist. LEXIS 137229, at *10-11 (finding the third *Breakthrough* factor satisfied in part because the tribe's governing body "retains the right to remove Managing Members"). No further evidence is necessary to establish regulatory control.

4. All profits of Great Plains and Clear Creek inure to the Tribe's benefit.

The fourth factor — the financial relationship between the entities and the Tribe — similarly weighs in favor of Great Plains and Clear Creek, as the revenues generated by both entities inures to the benefit of the Tribe. Because the Tribe is the sole shareholder of both entities, it is entitled to the profits that both entities generate. *See* AR 52; *see also* AR 126 § 5.1. Those revenues, as the authorizing resolutions make clear, are used "to advance tribal economic development to aid addressing issues of public safety, health and welfare." *See* AR 98.

The Commissioner's reliance on *Sue/Perior*, *see supra* at 14-19, improperly seeks to reduce this factor to the question of liability for judgments rather than the broad financial relationship to the Tribe. As the Restated Order acknowledges, however, "the profits and cash flow will be distributed to the Tribe." AR 184. While the Commissioner complains that the record does not show how much money is being transferred (AR 185), the specific amount is not relevant since the Commissioner can point to nothing in the record showing distribution has not occurred as the structure created by the Tribe prescribes.

5. The Tribe intended for Great Plains and Clear Creek to have sovereign immunity.

The fifth factor—the Tribe's intent—clearly weighs in favor of Great Plains and Clear Creek. As the elected Vice-Chairman of the Tribe attested, "[t]he Tribe granted Great Plains and American Web Loan (and, in turn, Clear Creek Lending) all privileges and immunities enjoyed by the Tribe, including, but not limited to, immunities from suit . . . ." AR 53 ¶ 13. There is nothing in the record which challenges the Tribe's intent to vest the entities with immunity.

6. Recognition of Great Plains' and Clear Creek's immunity serves the purposes of immunity doctrine.

The sixth and final factor — the purposes of immunity doctrine generally — also weighs in favor of Great Plains and Clear Creek. The doctrine of sovereign immunity is meant to preserve the sovereign's dignity, protect the treasury, and ensure political autonomy. Recognition of Great Plains' and Clear Creek's immunity would serve these goals. As Judge Schuman explained in *Great Plains I*, the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities," and that "tribes are entitled to no less dignity than states with regard to their immunity from administrative action." *Great Plains I*, at *14. Subjecting Great Plains and Clear Creek to unconsented administrative action offends the dignity of the Tribe just as it would offend the dignity of a state to be subjected to any other lawsuit.

Further, the purpose of the doctrine of tribal sovereign immunity is primarily to protect the tribal treasury. As the Ninth Circuit has explained, protection of the Tribe's treasury "is one of the historic purposes of sovereign immunity in general." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). In this case, recognition of Great Plains' and Clear Creek's sovereign immunity will directly protect the Tribe's treasury, because any judgment levied against Great Plains or Clear Creek would attach to funds that would otherwise be deposited into the Tribe's treasury, as the Tribe is the sole shareholder of Great Plains and Clear Creek.

Finally, recognition of Great Plains and Clear Creek is consonant with protection of the Tribe's political autonomy and its ability to self-govern. As the Supreme Court has noted, immunity and self-governance are interrelated. *Three Affiliated Tribes*, 476 U.S. at 890 (stating that immunity is a "necessary corollary" to sovereignty and self-governance). In this case, if Great Plains and Clear Creek were subject to the underlying administrative action, it would

impede the Tribe's ability to develop its economy in accordance with the will of the Tribe's government and its constituent tribal members, thus severely undermining the Tribe's ability to self-govern.

Accordingly, in sum, all of the *Breakthrough* factors weigh in favor of holding that Plaintiffs are arms of the Otoe-Missouria Tribe. Had the Commissioner applied the proper legal test, rather than *Sue/Perior*, and performed the proper analysis of the documentation submitted by Plaintiffs, he would have reached the correct result. Because he did neither, this Court must sustain the Plaintiffs' appeal.

II. THE COMMISSIONER ERRED IN FINDING THAT CHAIRMAN SHOTTON LACKS IMMUNITY

With regard to Chairman Shotton's immunity, the Commissioner has failed to articulate a coherent theory as to how he can exercise jurisdiction over Chairman Shotton regarding either the claims for monetary penalties or injunctive relief. The original Notice and Temporary Order did not specify whether the action was against Chairman Shotton in his individual capacity or his official capacity. Under the Matters Asserted (which the Commissioner subsequently converted into findings) No. 3 states that "Shotton served as Chairman of both the Otoe–Missouria Tribe of Indians ('Tribe') and its Tribal Council, the Tribe's supreme governing body." AR 4. While No. 3 mentions Shotton serves as Great Plains Secretary/Treasurer, the record is clear that that position derives directly and automatically from his role as Chairman. AR 53 ¶ 11.

The Restated Order shifts back and forth between two apparent (and contradictory) theories of jurisdiction over Chairman Shotton: (1) that the Chairman does not have immunity because the Department allegedly seeks to "impose individual liability upon him," *see* AR 187 and (2) that the doctrine of *Ex parte Young* negates the Chairman's immunity against claims alleging a violation of Connecticut law, *see* AR 188. What is missing under either theory is any

evidence that Shotton acted in anything but his capacity as Chairman of the Tribe. Conflation of various legal arguments notwithstanding, under either theory, and regardless of the remedy that the Department seeks, the Chairman is immune.

A. The Chairman Has Immunity Against Financial Penalties

As to financial penalties, the Restated Order appears to take the position that such penalties are enforceable against Chairman Shotton because "the Department took action against Shotton in his personal capacity and sought to impose individual liability on him." AR 187. This argument is flawed both because it rests on a false legal premise (that this is a true personal-capacity action) and because it ignores the doctrine of *official* immunity against suit.

1. The Tribe is the real party in interest.

Though the doctrine of sovereign immunity does not bar a true personal-capacity action against a tribal employee, in order for a suit to be deemed a personal-capacity action, the employee — not the tribe — must be the real party in interest. *See Lewis v. Clarke*, 137 S. Ct. 1285 (2017). In this case, taking into account both the nature of the allegations and the practical consequences of any adverse judgment, it is clear that the Tribe, not Chairman Shotton, is the real party in interest. Hence, this is not a true personal-capacity case, and sovereign immunity bars the claims for financial penalties against Chairman Shotton.

In suits where the named defendant is an employee or officer of a sovereign government, to determine whether sovereign immunity applies, courts must determine whether the sovereign is the "real, substantial party in interest." *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). The caption of the complaint itself is of little significance in this analysis. Indeed, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 137 S. Ct. at 1291. Thus, instead of relying on technicalities in pleading, courts will look

to "the essential nature and effect of the proceeding" and thereby determine whether "the action . . . in essence" is one that should be considered as against the sovereign. *Regents*, 519 U.S. at 429. "The general rule is that a suit is against the sovereign if the judgment would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Greene v. IRS*, 348 F. App'x 625, 626 (2d Cir. 2009) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). If the suit will "require action by the sovereign or disturb the sovereign's property," the sovereign would plainly be considered the real party in interest, not the officer. *Lewis*, 137 S. Ct. at 1292. Put another way, if the officer's allegedly unlawful conduct is the byproduct of government policy, the suit is considered to be against the sovereign. *See id.*

Here, without describing any specific conduct, the Department alleged that Chairman Shotton "participat[ed]" in violations of Connecticut banking laws. *See* AR 4-15. It thus issued the Temporary Order and Notice of Intent. Later, in the Restated Order, the Commissioner found that Chairman Shotton "engaged in acts or conduct which, . . . pursuant to Sections 36a-573(c) and 36a-50(a) of the Connecticut General Statutes, forms the basis to impose a civil penalty upon Shotton." AR 175. However, the Commissioner again fails to identify any conduct other than Shotton's role as Chairman. Nonetheless, the Commissioner imposed a civil penalty against Shotton in the amount of $700,000. AR 168-69.

Despite nominally levying the financial penalty against Chairman Shotton personally, it is clear that the Tribe is the real party in interest, for three reasons. First, the financial penalty would fall on the Tribe's treasury or domain. Though the financial penalties are technically directed to Chairman Shotton personally, it is obvious that they would be paid with funds that would otherwise go to the tribal treasury. While nothing on the face of the Restated Order

explicitly requires the financial penalties to be paid from any particular source, in a case such as this — where the alleged wrong precipitating the penalty was merely the Chairman carrying out his mandate under tribal law — it is clear that the penalty would be paid by Great Plains and Clear Creek. *Cf. Edelman v. Jordan*, 415 U.S. 651, 664 (1974) ("These funds will obviously not be paid out of the pocket of [the official]"). In turn, as explained *supra*, the Tribe is the sole owner of both Great Plains and Clear Creek. Hence, as a practical matter, the financial penalty would effectively deplete the Tribe's treasury, making the Tribe the real party in interest.

Second, the financial penalty would "interfere with the public administration" of the Tribe. Interference with the public administration, for immunity purposes, can come about in a variety of ways. In *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1103 (8th Cir. 2012), the Court of Appeals held that a third-party subpoena to an Indian Tribe was barred by sovereign immunity, recognizing the "potential for severe interference with government functions."[11] In this case, a sovereign Tribe operates a revenue-generating program designed to increase its governmental budget, and a lawsuit threatens to put that program at risk. Thus, this proceeding necessarily implicates the Tribe's legal rights and interferes with the continued viability of the Tribe's lending business. The Tribe is the real party in interest in this case, despite the fact that the Department nominally sought financial penalties against the Tribe's Chairman as opposed to the Tribe itself.

Third, the financial penalty would restrain the Tribe from acting, or compel it to act. Regardless of whether the Department would seek to levy the financial penalties against

[11] Other courts have addressed sovereign immunity based on the interference with public administration rationale. *See, e.g., Board of Supervisors v. U.S.*, 408 F. Supp. 556, 560 (E.D. Va. 1976) (any declaration that D.C. prison unit constitutes a public nuisance could have "a major impact on the public administration of the unit"); *In re Kish*, 212 B.R. 808, 814 (D.N.J. 1997) (declaration that costs imposed by state's DMV were dischargeable in bankruptcy "would seriously interfere with the public administration of the surcharge program").

Shotton's personal bank account (as opposed to the Tribe's treasury), the gravamen of the remedy is that it is punitive; it is designed to stop the Tribe from engaging in lending activities in the future. (Indeed, if the penalties were merely compensatory, they would be far less than $700,000.) As a practical matter, the Tribe would clearly be unable to effectively operate a lending enterprise if every tribal official overseeing the enterprise would become personally liable for hundreds of thousands of dollars. The U.S. Supreme Court has acknowledged that sovereign immunity cannot be circumvented through personal-capacity suits against governmental officers when "the relief sought from [the officer] is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem*, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer." *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). That is what has happened in this case. The financial penalties sought against Chairman Shotton are essentially "compulsion against the sovereign," that is merely "nominally directed against an officer." The Tribe, therefore, is clearly the real party in interest, barring any suit against Shotton seeking financial penalties.

2. Even if this were a true personal-capacity action, Chairman Shotton has official immunity against suit.

Assuming *arguendo* that this is a true personal-capacity action against Chairman Shotton, financial penalties would be unavailable because Shotton would be protected by the doctrine of official immunity. Separate from sovereign immunity, official immunity protects government employees from personal liability for claims arising from actions taken in the course of their official duties. It "springs from the same root considerations that generated the doctrine of sovereign immunity," i.e., the need to maintain an effective and functioning government. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). There are two forms of official immunity: absolute and

qualified. Absolute immunity is generally confined to actors such as judges and legislators acting within their judicial or legislative roles. Government employees outside of those limited categories are entitled to qualified immunity which "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

In this case, Chairman Shotton is a government employee. Even if he is sued in his personal capacity, he is nonetheless entitled to qualified immunity. He is protected by qualified immunity because he has not violated any "clearly established statutory or constitutional rights." *See Harlow*, 457 U.S. at 818. That is, no federal law prohibits the conduct of which the Department complained—the offering of consumer loans over the Internet pursuant to tribal law. The Department's complaints of state law violations are unavailing, as it is by no means "clearly established" that state law applies to the Tribe's e-commerce activities to begin with.[12]

B. <u>The Chairman Has Immunity Against Injunctive Remedies</u>

Finally, the Commissioner erred in finding that Chairman Shotton lacks immunity against injunctive remedies. The Commissioner's citation to a single line of *dicta* in the *Bay Mills* case is not sufficient to establish regulatory jurisdiction over the leader of a sovereign tribe. The Commissioner quotes the following line from *Bay Mills*: "[t]ribal immunity does not bar . . . a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct [under Michigan law]." *See* AR 188. This single line, the Department appears to argue,

[12] Indeed, it is Plaintiffs' position that state law <u>does not apply</u> to the loans in question, for two reasons. First, each loan is subject to a binding choice of law clause that designates tribal law over state law. Second, state law is preempted by operation of federal Indian law. *See Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Nonetheless, this Court need not decide the issue as the question of state law applicability is separate and distinct from that of state enforcement authority. *See Kiowa*, 523 U.S. at 755.

extends the doctrine of *Ex parte Young* so as to allow suits against tribal officials to enjoin ongoing violations of state law in state courts. *See id.*

The Commissioner's reliance on this *dicta* is misplaced. *Ex parte Young* is a "narrow exception" to sovereign immunity. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996). It allows suits against state officers for prospective injunctive relief in federal court to enjoin the ongoing violation of federal law. A federal court exercising jurisdiction over an *Ex parte Young* cause of action is essentially just "command[ing] a state official to do nothing more than refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). It is simply a judge-made rule designed to give "life to the Supremacy Clause." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1391 (2015). As the U.S. Supreme Court stated, the doctrine is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Because it is designed to vindicate federal law, therefore, *Ex parte Young* actions are disallowed as to state law claims. As the U.S. Supreme Court explained in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), "the entire basis for the doctrine of [*Ex parte Young*]" disappears when the claim is brought under a state law.

In making the passing statement regarding alternative remedies that the State of Michigan may have had in the *Bay Mills* case, the U.S. Supreme Court did not intend to overrule *Pennhurst* and undo the well-settled rule that *Ex parte Young* claims must be grounded in federal law. At issue before the Court in *Bay Mills* was the immunity of an Indian tribe itself for alleged violations of a federal law (the Indian Gaming Regulatory Act), not whether state-law claims could be brought against Bay Mills officials under an *Ex parte Young* theory. The statement relied on by the Commissioner was *dicta* and should not be given any weight by this Court.

The better reading is simply that tribal officers acting outside the scope of their official duties are subject to applicable state laws. For example, a tribal employee driving off-reservation must clearly obey posted speed limits. Or, as held by the Supreme Court, tribal members fishing off-reservation, absent any special treaty rights, would be subject to applicable state hunting and fishing laws and could thus face penalties for non-compliance with those laws. *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977). These scenarios are a far cry from a state agency exercising jurisdiction over a Tribe's Chairman in connection with the Chairman carrying out his mandate under tribal law to operate a tribal business entity.

In any event, even assuming that *Bay Mills* could be read as expanding the *Ex parte Young* doctrine so as to allow claims against tribal officials based on violations of state law, such actions would still have to be brought in federal court. *Ex parte Young* is a federal doctrine; it has expanded the jurisdiction of the federal courts over certain governmental officials, but cannot serve as a basis for expanding the jurisdiction of state courts. The Eleventh Circuit decision relied upon by the Department — although certainly erroneous insofar as it extended *Ex parte Young* to state-law claims — nonetheless still confined the doctrine to federal courts, stating 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." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015). Thus, regardless of the Commissioner's misreading of *Bay Mills*, state-law claims against tribal officials cannot be raised in a state administrative enforcement proceeding; they would belong in federal court.[13] For that reason as well, Chairman Shotton is immune from any injunctions issued by the Commissioner.

[13] Indeed, cases raising jurisdictional issues pertaining to Indian tribes are uniquely federal in nature. *E.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

CONCLUSION

For the reasons set forth herein, the Defendant erred as a matter of law in the issuance of both the 2014 Cease and Desist and Penalty Order as well as the Restated Order as it has no jurisdiction over the Plaintiffs. This appeal should be sustained and the Commissioner's Restated Order vacated. Gen. Stat. § 4-183.

PLAINTIFFS,
GREAT PLAINS LENDING LLC, CLEAR CREEK LENDING and JOHN R. SHOTTON

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent electronically to all parties, who have consented to electronic service, on March 23, 2018 to:

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EXHIBIT A

Great Plains Lending, LLC v. Conn. Dep't of Banking

Superior Court of Connecticut, Judicial District of New Britain At New Britain

November 23, 2015, Decided; November 23, 2015, Filed

HHBCV156028096S

Reporter
2015 Conn. Super. LEXIS 2923 *

Great Plains Lending, LLC et al. v. Connecticut Department of Banking

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Judges: **[*1]** Carl J., Schuman, J.

Opinion by: Carl J., Schuman

Opinion

Memorandum of Decision

The issue in this administrative appeal is whether two companies created by a federally-recognized Indian tribe, along with the tribe's chairman, have tribal sovereign immunity from an enforcement action by the defendant state department of banking (department) intended to prevent the companies from engaging in the business of online payday loans in violation of state usury law.

I

On October 24, 2014, the commissioner of banking (commissioner) filed an initial order (Initial Order) against plaintiffs Great Plains Lending, LLC (Great Plains) and Clear Creek Lending (Clear Creek), which allege to be businesses created by the federally-recognized Otoe-Missouria Tribe of Indians (the Tribe), located in Oklahoma, and plaintiff James Shotton, who is Tribal Chairman. (Return of Record (ROR), pp. 1-17 (Initial Order).) The commissioner alleged that Great Plains, by way of U.S. mail, email, and its website, had offered unsecured consumer loans in amounts ranging from $100 to $2,000 with annual interest rates of 199.44% to 448.76% to consumers in Connecticut and other states. Similarly, Clear Creek had allegedly offered unsecured small loans **[*2]** in amounts of $1,500 to $2,000 with annual interest rates of 390% to 420%. According to the commissioner, three Connecticut residents had entered into loan agreements with these companies, which agreements called for repayment at annual interest rates of 199.44%, 349.05%, and 398.20%. The commissioner alleged that at no point were the companies licensed as small loan lenders in Connecticut, nor were they exempt from licensure. (ROR, pp. 1-5.)

Based on these allegations, the commissioner found that the companies had violated Connecticut law by making loans without obtaining the required license and by contracting for and receiving interest at a rate greater than 12% on loans of less than $15,000. See *General Statutes §§36a-555*[1] and *36a-*

[1] *Section 36a-555* provides: "No person shall (1) engage in the business of making loans of money or credit; (2) make, offer, broker or assist a borrower in Connecticut to obtain such a loan; or (3) in whole or in part, arrange such loans through a third party or act as an agent for a third party, regardless of whether approval, acceptance or ratification by the third party is necessary **[*3]** to create a legal obligation for the third party, through any method, including, but not limited to, mail, telephone, Internet or any electronic means, in the amount or to the value of fifteen thousand dollars or less for loans made under *section 36a-563* or *section 36a-565*, and charge, contract for or receive a greater rate of interest, charge or consideration than twelve per cent per annum therefor, unless licensed to do so by the commissioner pursuant to *sections 36a-555 to 36a-573*, inclusive. The provisions of this section shall not apply to (A) a bank, (B) an out-of-state bank, (C) a Connecticut credit union, (D) a federal credit union, (E) an out-of-state credit union, (F) a savings and loan association wholly owned subsidiary service corporation, (G) a person to the extent that such person makes loans for agricultural, commercial, industrial or governmental use or extends credit through an open-end credit plan, as defined in *subdivision (8) of subsection (a) of section 36a-676*, for the retail purchase of consumer goods or services, (H) a mortgage lender or mortgage correspondent lender licensed pursuant to *section 36a-489* when making residential mortgage loans, as defined in *section 36a-485*, or (I) a licensed pawnbroker."

573(a).[2] The commissioner found that Shotton had violated Connecticut law by participating in these transactions. (ROR, pp. 6-10.)

Accordingly, the commissioner ordered the plaintiffs to cease and desist from further loan activity and to make restitution of any sums obtained from these loans. The order also required the plaintiffs to provide a list of all Connecticut residents who applied for consumer loans from the plaintiffs or contracted with the plaintiffs to pay interest at rates exceeding 12%. Finally, the commissioner gave notice that he intended to impose civil penalties. The notice informed the plaintiffs that they could request a hearing on these matters within fourteen days, and that the hearing would be held in accordance with the Uniform Administrative Procedure Act (UAPA) on December 18, 2014. (ROR, pp. 10-17.)

Instead of requesting a hearing, the plaintiffs filed a motion to dismiss, alleging that tribal sovereign immunity barred all state enforcement action against them. (ROR, pp. 23, 161.) In a nine page **[*6]** decision issued on January 6, 2015, the commissioner denied the motion. (Ruling on Motion.) The commissioner concluded that at least some of the activity in question occurred off-reservation and that the state retained authority to regulate such off-reservation tribal activity in a nondiscriminatory way, at least as long it does not bring suit in court. (ROR, pp. 150-58.)

[2] Section 36a-573 (a) provides: "(a) No person, except as authorized by the provisions of sections 36a-555 to 36a-573, inclusive, shall, **[*4]** directly or indirectly, charge, contract for or receive any interest, charge or consideration greater than twelve per cent per annum upon the loan, use or forbearance of money or credit of the amount or value of (1) five thousand dollars or less for any such transaction entered into before October 1, 1997, and (2) fifteen thousand dollars or less for any such transaction entered into on and after October 1, 1997. The provisions of this section shall apply to any person who, as security for any such loan, use or forbearance of money or credit, makes a pretended purchase of property from any person and permits the owner or pledger to retain the possession thereof, or who, by any device or pretense of charging for the person's services or otherwise, seeks to obtain a greater compensation than twelve per cent per annum. No loan for which a greater rate of interest or charge than is allowed by the provisions of sections 36a-555 to 36a-573, inclusive, has been contracted for or received, wherever made, shall be enforced in this state, and any person in any way participating therein in this state shall be subject to the provisions of said sections, provided, a loan lawfully made after June 5, 1986, in compliance with **[*5]** a validly enacted licensed loan law of another state to a borrower who was not, at the time of the making of such loan, a resident of Connecticut but who has become a resident of Connecticut, may be acquired by a licensee and its interest provision shall be enforced in accordance with its terms."

The commissioner then observed that, because the plaintiffs had not requested a hearing, he could issue a final decision based on the allegations in the October 24 Initial Order. Accordingly, the commissioner ordered the plaintiffs to cease and desist from violating Connecticut lending law, ordered Great Plains and Shotton to pay civil penalties of $700,000, and ordered Clear Creek to pay a civil penalty of $100,000. (ROR, pp. 159-65 (Final Order).)[3]

The plaintiffs appealed to this court. When the plaintiffs filed what the court construed as a motion to stay, the court denied the stay as to the cease and desist order, but granted **[*7]** the stay as to the financial penalties upon the posting of a $1.5 million bond or payment of that amount in escrow. After much litigation, the plaintiffs requested permission to withdraw their motion to stay, which the court granted. At the current time, there is no stay in effect.

II

Under the UAPA, General Statutes §4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) MacDermid, Inc. v. Dept. of Environmental Protection, 257 Conn. 128, 136-37, 778 A.2d 7 (2001). Section 4-183(j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Stated differently, "[r]eview of **[*8]** an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted

[3] Counsel for the commissioner represented at oral argument that the restitution and disclosure orders in the Initial Order remain in effect even though not specifically mentioned in the Final Order.

unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Okeke v. Commissioner of Public Health, 304 Conn. 317, 324, 39 A.3d 1095 (2012)*. "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles, 254 Conn. 333, 343, 757 A.2d 561 (2000)*.

Our Supreme Court has stated that "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts . . ." (Internal quotation marks omitted.) *Longley v. State Emples. Ret. Comm'n, 284 Conn. 149, 163, 931 A.2d 890 (2007)*. "Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, **[*9]** illegally, or in abuse if its discretion . . . [Thus] [c]onclusions 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 . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . [When the agency's] **[*10]** interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission, 310 Conn. 276, 281-83, 77 A.3d 121 (2013)*.

III

On appeal, the plaintiffs renew their claim that tribal sovereign immunity barred the administrative action. In *Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024, 188 L. Ed. 2d 1071 (2014)*, the United States Supreme Court recently summarized the law of tribal sovereign immunity. As pertinent here, the Court stated: "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority . . . As dependents, the tribes are subject to plenary control by Congress.

"Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers . . . Thus, we have time and again treated the doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver).

"In doing so, we have held that tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals . . . Or as we elsewhere explained: While each State at the Constitutional Convention **[*11]** surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'-at a conference 'to which they were not even parties'-similarly ceded their immunity against state-initiated suits . . .

"Equally important here, we declined in *Kiowa [Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)]* to make any exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands., . . . Rather, we opted to defer to Congress about whether to abrogate tribal immunity for off-reservation commercial conduct." (Citations omitted; internal quotation marks omitted.) *Michigan v. Bay Mills Indian Community, supra, 134 S.Ct. 2030-32*. Accord *Davidson v. Mohegan Tribal Gaming Authority, 97 Conn.App. 146, 150, 903 A.2d 228*, cert. denied, *280 Conn. 941, 912 A.2d 475 (2006)*.[4]

As stated, the commissioner concluded **[*12]** that at least some of the activity in question occurred off-reservation and that the state retains authority to regulate such off-reservation tribal activity in a nondiscriminatory way, at least as long it does not bring suit in court. Based on the statement of law from *Bay Mills*, the commissioner can no longer rest his decision on the fact or possibility that the activity in question

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[4] In *Kiowa*, the Court distinguished older cases, such as *Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973)*, which had observed that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." The *Kiowa* Court noted that "[t]o say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., supra, 523 U.S. 755*.

was off-reservation commercial conduct.[5]

The remaining ground of the commissioner's decision was that the department's administrative action was **[*13]** not a "suit" against the tribe in a court of law and that immunity only extends to such suits. On this issue, there is no appellate case precisely on point. Other cases have dealt with the simpler question of whether a suit exists when the state, in an effort to enforce an administrative order, files an actual lawsuit against the tribe in a court of law. See *Cash Advance and Preferred Cash Loans v. State, 242 P.3d 1099, 1108 (Colo. 2010)* (tribal sovereign immunity applies to judicial enforcement of state investigatory action with respect to alleged violations of state law).[6] The department does not seriously contest the proposition that sovereign immunity would bar such an action against the tribe itself when filed in court.

With regard to administrative actions initiated by the state at the agency level, the closest real precedent is *Federal Maritime Commission v. South Carolina Ports Authority, 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002)*. In that case, the Supreme Court held that a state's sovereign immunity bars the Federal Maritime Commission (FMC) from adjudicating complaints filed by a private party against a nonconsenting state. The basis for the decision was the "interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation . . ." *Id., 760*. Indeed, "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Id.* "The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court." *Id.*

Applying *Federal Maritime Commission*, the court first acknowledges that tribes are entitled to no less dignity than states with regard to their immunity from administrative action. Again, "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority . . . Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity **[*15]** from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Community, supra, 134 S.Ct. 2030*.

Further, administrative actions under the UAPA are sufficiently similar to suits in court to interfere with the dignity of tribes as sovereigns. A UAPA case is not just an informal meeting. Rather, a "contested case" under the UAPA is a "proceeding . . . in which the legal rights, duties or privileges of a party are . . . to be determined by an agency after an opportunity for [a] hearing . . ." *General Statutes §4-166(4)*. The hearing contains most of the traditional hallmarks of civil trial: a presiding officer, *General Statutes §4-177b*; rules of practice, *General Statutes §4-167(a)(1)*; the right to cross-examine witnesses, *General Statutes §§4-177c(b)*, *4-178(5)*; the right to subpoena witnesses, *General Statutes §4-177b*; and the right to present evidence and argument, *General Statutes §4-177c(b)*. The procedural safeguards in the UAPA exceed the minimum imposed by the *due process clause*. See *Levinson v. Board of Chiropractic Examiners, 211 Conn. 508, 531, 560 A.2d 403 (1989)*. See generally *Dept. of Public Safety v. Freedom of Information Commission, 103 Conn.App. 571, 587-88, 930 A.2d 739*, cert. denied, *284 Conn. 930, 934 A.2d 245 (2007)*. See also *R.T. Vanderbilt Co. v. Continental Casualty Co., 273 Conn. 448, 870 A.2d 1048 (2005)* ("suit" for purposes of insurance policy included federal agency administrative action initiated by a potentially responsible party letter). In the case of the department of banking, the commissioner has administrative authority to issue cease and desist orders, to order restitution and disgorgement, and to impose civil penalties up to one hundred thousand dollars per violation. **[*16]** *General Statutes §§36a-50(a)(2)*, *36a-50(c)*, *36a-52(a)*. Thus, being haled into a UAPA administrative proceeding by the commissioner is a serious event that could offend the notion of a tribe as a sovereign entity.

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[5] But, dissenting in *Bay Mills*, Justice Thomas foresaw the precise issue currently before the court: "In the wake of *Kiowa*, tribal immunity has also been exploited in new areas that are often heavily regulated by States. For instance, payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1,000 percent per annum) often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality. 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)*." *Michigan v. Bay Mills Indian Community, supra, 134 S.Ct. 2052* (Thomas, J., dissenting).

[6] The remaining appellate cases cited by the plaintiffs are inapplicable for other reasons. *Middletown Rancheria v. Workers' Comp. Appeals Bd., 60 Cal. App. 4th 1340, 71 Cal. Rptr. 2d 105*, cert. denied, ***525 U.S. 887, 119 S. Ct. 202, 142 L. Ed. 2d 165 (1998)***, dealt with the distinct issue of whether there was a Congressional waiver of immunity. *People v. Miami Nation Enterprises, 223 Cal. App. 4th 21, 166 Cal. Rptr. 3d 800 (2014)*, has been "depublished" because the California Supreme Court has granted a petition for review. ***171 Cal. Rptr. 3d 646, 324 P.3d 834 (2014)***.

The plaintiffs cite one district court case that held, with minimal analysis, that tribal sovereign immunity bars the state's nonjudicial unemployment insurance tax collection activities, such as imposing liens and levies. *Blue Lake Rancheria v. Morgenstern **[*14]** , No. 2:11-CV-01124 JAM-JFM, 2011 U.S. Dist. LEXIS 140062, 2011 WL 6100845, at *8-9 (E.D.Cal. Dec. 6, 2011)*.

The commissioner argues that *Federal Maritime Commission* is distinguishable because there the State was somewhat coerced into appearing in the administrative proceedings by the fact that, if it did not appear, it would not have the benefit of asserting sovereign immunity in a subsequent court enforcement action filed by the United States. Although the circumstances are not exactly alike in the present case, they are sufficiently similar. Here, as in *Federal Maritime Commission*, the administrative order is not self-executing but instead leads to an enforcement action filed in court. See *General Statutes §36a-50(b)*. If the plaintiffs failed to appear at the administrative hearing, there seems to be little doubt that the department would argue default or issue preclusion on the merits of the Final Order in a court enforcement action. While it is true that, in the present case, the plaintiffs did appear and still failed to contest the merits, thus seemingly negating the contention that they were coerced to appear and argue the merits, the plaintiffs dispute **[*17]** that contention by claiming that "any participation in the merits of the action could be deemed a waiver of Plaintiffs' sovereign immunity." (Plaintiffs' reply brief, p. 10.) Although it is difficult to predict exactly what would happen in an enforcement action, it is hard to deny that the plaintiffs would gain no benefit, and probably would suffer some detriment, if they did not appear in the administrative proceedings.[7] Thus, there is also a form of coercion acting on the plaintiffs to appear in the administrative proceedings, contrary to the notion of sovereign immunity. For all these reasons, the better conclusion is that the tribe possesses sovereign immunity in a UAPA administrative proceeding filed against them by a state commissioner.[8]

IV

A

The commissioner stated in his decision denying the plaintiffs' motion to dismiss that he need not address the argument raised by the plaintiffs of whether the plaintiff officer and companies are "arms of the tribe" because "I find [based on the reasoning that the administrative action was not a 'suit'] that the Department has jurisdiction over each Respondent irrespective of tribal status." (ROR, p. 151 n.2.) The commissioner now argues, as an alternative ground to support his decision, that the court should find based on the existing record that the plaintiffs are not "arms of the tribe" and should not receive the benefit of immunity. The plaintiffs contend, however, that the court is limited to the department's reasoning on the record and may not consider "post hoc rationalizations." (Plaintiffs' Brief, **[*19]** pp. 10-11.)[9]

The court has found no Connecticut appellate authority precisely on point in a UAPA case. The plaintiffs cite *McDonald v. Rowe, 43 Conn.App. 39, 45-46, 682 A.2d 542 (1996)*. While that case arose under the UAPA, it did not squarely address the issue presented. Rather, it dealt with a rather unique situation in which the trial court went outside the administrative record to find a basis for an award of attorneys fees to the plaintiff. See also *Neri v. Powers, 3 Conn.App. 531, 537, 490 A.2d 528*, cert. denied, *196 Conn. 808, 494 A.2d 905 (1985)* ("Except in the very limited situation in which there is an allegation of procedural irregularities not shown in the record; *General Statutes §4-183(f)*; [judicial] review is limited to the record and the court cannot hear evidence").[10]

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[7] The department did represent at oral argument that, in an enforcement action, it would not argue that the Tribe itself would waive sovereign immunity by failing to appear at an administrative hearing. The department maintains, however, that the plaintiffs are not arms of the Tribe. The court addresses that issue in the next section.

[8] The case of *Otoe-Missouria Tribe of Indians v. Financial Services, 769 F.3d 105 (2d Cir. 2014)*, cited by the commissioner in his decision, while dealing with similar efforts to regulate on-line lending **[*18]** by the same Tribe, involves a different legal issue. The Second Circuit case is a suit filed by, rather than against, the Tribe. There the Tribe sought an injunction against regulatory action by New York State. Thus, the issue was tribal sovereignty under cases stemming from *Mescalero Apache Tribe v. Jones, supra, 411 U.S. 145*, and not tribal sovereign immunity. See *Otoe-Missouria Tribe of Indians v. Financial Services, supra, 769 F.3d 113*. Indeed, the court did not discuss tribal sovereign immunity.

[9] The plaintiffs also contend that, in the administrative proceedings, the department "effectively conceded" that they are arms of the tribe. (Plaintiffs' Brief, p. 11.) Although the department used some loose language to that effect in their objection to the Tribe's motion to dismiss, the court does not find that the department clearly and unequivocally conceded the point. Accordingly, the issue is properly before the court.

[10] The plaintiffs also cite to zoning cases, claiming that the rule there is that a court may uphold an agency decision only if the record supports the "'express **[*20]** reasons given' in the decision itself." (Plaintiff's brief, p. 10, citing *Fanotto v. Inland Wetlands Commission, 108 Conn.App. 235, 240, 947 A.2d 422*, appeal dismissed, *293 Conn. 745, 980 A.2d 296 (2008)*.) Actually, the full rule in zoning cases is that "[w]hen a commission states its reasons in support of its decision on the record, the court goes no further, but if the commission has not articulated its reasons, the court must search the entire record to find a basis for the [commission's] decision." (Internal quotation marks omitted.) *Azzarito v. Planning & Zoning Comm'n, 79 Conn. App. 614, 618, 830 A.2d 827*, cert. denied, ***266 Conn. 924, 835 A.2d 471 (2003)***. Insofar as the rule allows the reviewing court, in some circumstances, to search the record to sustain agency action, the zoning rule may also support the department's position on this issue. The court, however, does not rely

The plaintiffs more persuasively point to the federal rule, stemming from the United States Supreme Court's decision in *Securities Commission v. Chenery Corp., 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943)*. There the Court stated that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Id., 95*. The Supreme Court has subsequently **[*21]** applied this rule; see *Motor Vehicle Manufacturer's Assn. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)* ("courts may not accept appellate counsel's post hoc rationalizations for agency action . . . It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself" [citations omitted]); as has the Second Circuit, see *Wala v. Mukasey, 511 F.3d 102, 106 (2d Cir. 2007)* ("Under the *Chenery* doctrine, our review is limited to [t]he grounds upon which . . . the record discloses that [the agency's] action was based" [internal quotation marks omitted]).

The Connecticut appellate courts have not expressly adopted the *Chenery* doctrine. Our Supreme Court has cited *SEC v. Chenery Corporation, 332 U.S. 194, 196-97, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)*, a successor to the first *Chenery* case, for the proposition that "[a] court reviewing an administrative determination cannot engage in surmise and conjecture to determine whether the decision was lawfully reached." See *Lee v. Bristol Board of Education, 181 Conn. 69, 82, 434 A.2d 333 (1980)*.

The department relies on two other lines of Connecticut appellate authority that, upon close analysis, do not support its argument. First, the department cites *Connecticut Coalition Against Millstone v. Connecticut Siting Council, 286 Conn. 57, 942 A.2d 345 (2008)*, for the proposition that "[w]hen an issue, such as [tribal sovereign immunity], implicates the agency's subject matter jurisdiction . . . our review is plenary." *Id., 68*. Although the issue of tribal sovereign immunity does implicate the subject matter **[*22]** jurisdiction of the agency; see *State v. Velky, 263 Conn. 602, 611, 821 A.2d 752 (2003)*; that fact does not mean that the court can find jurisdiction on a ground not relied upon by the agency itself. Rather, "plenary review" refers to the standard of review, not the scope of review. "Plenary review" has the same meaning as "de novo review" and means only that an agency "is not entitled to special deference . . ." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission, supra, 310 Conn. 281-83*. See *Ammirata v. Zoning Board of Appeals, 264 Conn. 737, 746 n.13, 826 A.2d 170 (2003)*.

The department also cites the doctrine, applicable in UAPA and other cases, that an appellate court may affirm a superior court decision on any alternate grounds supported by the record. Stated differently, an appellate court may affirm when the trial court reaches the correct result, albeit for the wrong reasons. See *Medhi v. CHRO, 144 Conn. App. 861, 865, 74 A.3d 493 (2013)*. It is certainly tempting to apply this rationale to the situation here involving appellate review of an administrative decision. However, Justice Frankfurter, speaking for the Court in *Chenery*, affirmatively dispelled the analogy: "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed **[*23]** if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason . . . The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (Citations and internal quotation marks omitted.) *Securities Commission v. Chenery Corp., supra, 318 U.S. at 88*.

This rationale fully applies here. The legislature **[*24]** and the department have 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." *Id.* 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)*

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on the zoning cases, as zoning commission decisions tend to be oral and more informal than decisions under the UAPA, and thus different considerations may apply on judicial review.

(nine factor test).[11] Further, the record that the court has to review on these issue is simply incomplete. Accordingly, the court cannot uphold the commissioner's decision on the alternative ground, not reached by the commissioner, that the plaintiffs are not arms of the Tribe.

B

The court does, however, have the authority to remand the case to the department when the fact-finder **[*25]** "never [made] complete factual findings . . ." *Lagueux v. Leonardi, 148 Conn. App. 234, 257, 85 A.3d 13 (2014)*.[12] It is fully appropriate to exercise that authority in the present case. The commissioner had a valid reason for not reaching the arm of the tribe issue because, at the time, he reasonably, though erroneously, believed that it was unnecessary to do so in order to resolve the case. See, e.g., *Gould v. Freedom of Information Commission, 314 Conn. 802, 805, 104 A.3d 727 (2014)*. Further, it is entirely possible that the same issue will arise in the future with the same Tribe and thus it will promote judicial economy to have it resolved now. Therefore, the court remands the case to the department for determination of the arm of the tribe issue. The court retains jurisdiction. For the sake of clarity, the court asks the commissioner to decide: 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.

V

In their final issue, the plaintiffs **[*26]** argue that the commissioner violated their procedural due process rights by issuing a final order on the merits without giving them a hearing. Because this issue may arise after the remand, and because the parties have fully briefed it, the court addresses it. The pertinent facts are as follows. On October 24, 2014, the department issued an order entitled "Temporary Order to Cease and Desist," which also included in its title a "Notice of Right to Hearing." (ROR, p. 1.) The body of the notice specifically stated that the department would grant a hearing to the plaintiffs "if a written request for a hearing is received by the Department of Banking . . . within fourteen (14) days following each Respondent's receipt of this Temporary Order . . ." (ROR, p. 13.) The notice then advised each plaintiff that, if it did not request a hearing within the time prescribed, the order would remain in effect. (ROR, pp. 14-15.) On November 12, 2014, the plaintiffs filed a motion to dismiss but, as found by the commissioner, never requested a hearing. (ROR, p. 161.) On January 6, 2015, the commissioner issued a decision denying the plaintiffs' motion to dismiss and a second decision imposing a cease **[*27]** and desist order and civil penalties. (ROR, pp. 150-65.)

Under these circumstances, the plaintiffs received the process that they were due. It is fatal to a litigant's claim of a procedural due process violation that it failed to utilize the remedies that were available to compel agency action. See *Pet v. Department of Health Servs., 228 Conn. 651, 674, 638 A.2d 6 (1994)*. Here the plaintiffs had clear notice of the deadline to request a hearing and the consequences of failing to do so. The plaintiffs simply failed to comply with these procedures. No one denied them any constitutional rights in that regard.

The plaintiffs note that, in a footnote in their November 26, 2014 reply brief in support of their motion to dismiss the administrative proceedings, they expressly reserved their right to contest the proceedings on the merits. (ROR, p. 146, n. 1.) Ordinarily, the passing mention of a matter in a reply brief is an inadequate way of raising a claim on the merits. See *Bovat v. City of Waterbury, 258 Conn. 574, 585-86 n.11, 783 A.2d 1001 (2001)*. In any event, the request was late. Therefore, the plaintiffs' final claim has no merit.

VI

The court remands the case to the commissioner for further proceedings consistent with this opinion. The court retains jurisdiction.

It is so ordered.

Carl J. Schuman

Judge, Superior Court

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[11] Thus the rationale of *Chenery* might not govern when the reviewing court can uphold an agency decision based on a pure question of law, such as the applicability of a statute, not reached by the agency. See ***Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1089 n.10 (9th Cir.)***, cert. denied, ***134 S. Ct. 2877, 189 L. Ed. 2d 836 (2014)***.

[12] Such a remand falls outside the scope of the remands authorized by either *General Statutes §4-183(h)* or *4-183(j)*. See *Commission on Human Rights and Opportunities v. Hartford, 138 Conn.App. 141, 153-54, 50 A.3d 917*, cert. denied, ***307 Conn. 929, 55 A.3d 570 (2012)***.

EXHIBIT B

DOCKET NO: HHBCV156028096S

SUPERIOR COURT

GREAT PLAINS LENDING LLC Et Al
V.
STATE OF CONNECTICUT
DEPARTMENT OF BANKING Et Al

JUDICIAL DISTRICT OF NEW BRITAIN
AT NEW BRITAIN

8/31/2016

ORDER

ORDER REGARDING:
05/23/2016 139.00 MOTION FOR ORDER

All Counsel Present.

The foregoing, having been heard by the Court, is hereby:

ORDER:

Construing the motion for an immediate order (Dkt. # 139) as a motion to reargue or reconsider, the court grants the motion and vacates sections IV.B and VI of its November 23, 2015 opinion. The court enters the following revised order: Pursuant to General Statutes § 4-183 (j) and (k), the court sustains the appeal in part, finds that substantial rights of the plaintiffs have been prejudiced by the commissioner's ruling on tribal immunity, and remands 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.

Judicial Notice (JDNO) was sent regarding this order.

414999

Judge: CARL J SCHUMAN

EXHIBIT C

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

GREAT PLAINS LENDING LLC, ET AL., Plaintiffs	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF NEW BRITAIN
	:	AT NEW BRITAIN
v.	:	
STATE OF CONNECTICUT, DEPARTMENT OF BANKING, ET AL., Defendants.	:	MAY 23, 2016

MOTION FOR IMMEDIATE ORDER

Plaintiffs Great Plains Lending, LLC ("Great Plains"), Clear Creek Lending ("Clear Creek") and John R. Shotton (collectively, "Plaintiffs") submit this motion seeking an order concerning the Proposed Findings of Fact, Proposed Conclusions of Law and Notice of Hearing ("Proposed Findings") recently issued by the Commissioner of the Department of Banking ("Commissioner").

From the beginning of this dispute, the Commissioner has attempted to regulate the Otoe -Missouria Tribe of Indians, a federally-recognized Indian tribe, its wholly-owned and chartered tribal businesses, and its elected Chairman in contravention of the law. The Commissioner's legal reasoning was soundly rejected by this Court in its November 2015 Memorandum of Decision ("the Decision"), which remanded the matter to the Commissioner in part for an articulation on an issue not decided the first time around (whether Great Plains and Clear Creek were "arms of the tribe" and therefore immune from the Commissioner's orders). Rather than articulate, the Commissioner has unilaterally opened the administrative record, and attempts to justify its 2015 orders with new evidence. This leaves the Plaintiffs in an untenable position: they do not believe new evidence should be considered by the Commissioner as a part of his

articulation but, if this Court disagrees, the Plaintiffs wish to preserve their right to introduce evidence of their own. The immediate intervention by this Court is necessary to resolve whether submission of new evidence is appropriate here.

I. ARGUMENT

A. The Commissioner's Proposed Findings Do Not Comply With This Court's Remand Order That Called For An Articulation

In the Decision (p. 16 n.12), this Court expressly stated that its remand was not pursuant to either General Statutes § 4-183(h) or § 4-183(j), which both contemplate the presentation of new evidence or further proceedings.[1]

Instead, this Court cited to *Commission on Human Rights and Opportunities v. City of Hartford*, 138 Conn. App. 141, 153-54 (2012), *cert. denied,* 307 Conn. 929 (2012). In *City of Hartford*, the Appellate Court held that the authority of the Superior Court to order a remand in an administrative appeal was not limited to § 4-183(h) or (j). Rather, the matter could be remanded "for an articulation." 138 Conn. App. at 154 (emphasis added). As the Appellate Court explained, "[r]eviewing courts typically have the ability to obtain articulations from the tribunals whose decisions they review. . . . By analogy a trial court hearing administrative appeals has the same power. . . ." *Id.* n.9 (emphasis added). Indeed, in recent years Judge Cohn of this Court has issued several such remand orders asking for an articulation from agencies. *See e.g., Micari v. State Employees Retirement Comm'n*, No. HHB-CV-11-6012236-S, 2013 Conn. Super. LEXIS 964, at *19-20 (New Britain Sup. Ct. Apr. 24, 2013); *Planning & Zoning Comm'n v. F.O.I.C.*, 2012 Conn. Super. LEXIS 3167, at *10-12 (New Britain Super. Ct. Dec. 28, 2012), *rev'd on other grounds,* 316 Conn 1, 20 (2015).

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[1] Section 4-183(h) permits the court to send an administrative appeal back to the agency "before the date set for hearing" on the request of either side "to present additional evidence." Section 4-183(j) authorizes the court, after it has sustained an administrative appeal, "to remand the case for further proceedings."

Under Connecticut law, an articulation has a settled purpose and procedure. A request for articulation provides a mechanism for the lower tribunal to clarify some ambiguity or deficiency in its ruling. *Walshon v. Walshon*, 42 Conn. App. 651, 655 (1996) (citing *State v. Wilson*, 199 Conn. 417, 435 (1986)); *see also* P.B. § 66-5. "An articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision." *Koper v. Koper*, 17 Conn. App. 480, 484 (1989). It is a means by which a reviewing court can "determine the basis for the [lower tribunal's] decision." *Stone-Krete Constr. Inc. v. Eder*, 280 Conn. 672, 686 (2006). A proceeding on remand for articulation thus has a limited scope; it is not a proper basis for the lower tribunal to "alter its initial findings." *Sosin v. Sosin*, 300 Conn. 205, 240 (2011). Rather, an articulation is intended to permit the lower tribunal to review the record and clarify the items on which the reviewing court has questions. The remand does not provide a basis or opportunity for taking new evidence. Indeed, when a lower tribunal makes new factual findings, it is deemed to have gone "beyond the permissible scope" of the remand. *Id.* at 240 (citing and summarizing *In re Christian P.*, 98 Conn. App. 264, 266 n.4 (2006)).

Here, rather than simply reviewing the existing Administrative Record and formulating a response to this Court's questions, the Commissioner unilaterally sought out, and then incorporated into his Proposed Findings, new evidence. The Proposed Findings rely upon a movie that was not even released until June 2015, six months after the January 6, 2015 Cease and Desist Order now on appeal. *See* Proposed Finding No. 19 (pp. 7-8). Plainly, the Commissioner could not have relied on this movie as the basis for his decision when the movie had not even been released yet. Similarly, the Commissioner based other findings on an on-line news article from Bloomberg.com. *See* Proposed Finding No. 20 (pp. 8-10). Although the

article was posted in November 2014, it was never referenced at any point previously in these proceedings and is not part of the Administrative Record in this case. *See* Doc. #127.[2] In short, this is yet another example of the Commissioner's inclination to make *post hoc* rationalizations for his decision.

The Commissioner intends to go further. His Proposed Findings (p. 23) foresee an additional hearing at which the Plaintiffs "will have the right to appear and present evidence, [and] rebuttal evidence." It is unclear from the Proposed Findings whether the hearing officer will also accept additional evidence and rebuttal evidence from the Department of Banking.

When this Court remanded the matter to the Commissioner, it was not with an order to conduct a new hearing; the order asked the Commissioner to answer three discrete questions. The Commissioner has acted unlawfully in unilaterally opening the record, considering new evidence and proposing an additional hearing. This is not the procedure this Court set forth when it ordered the remand.[3]

B. <u>There Is No Other Valid Basis For The Commissioner's Course Of Action</u>

In discussing a possible hearing, the Proposed Findings, Section VII (p. 23), cite to General Statutes § 4-177 and Regulation of Connecticut State Agencies § 36a-1-21. Both of these deal with the procedures for a "contested case." However, the Court's remand did not create a new contested case. This Court specifically stated its remand order was <u>not</u> under

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[2] Moreover, both the movie (which is unauthenticated) and the on-line posting would be otherwise inadmissible as hearsay in an administrative proceeding. *See Town of Windsor v. Loureiro Eng'g Assocs.*, No. HHD-CV-11-6023672-S, 2015 Conn. Super. LEXIS 2545, at *7 (Hartford Super. Ct. Oct. 7, 2015) ("As a general rule, newspaper articles are textbook examples of inadmissible hearsay.") Nevertheless, on a remand for articulation, they could not be considered regardless of their admissibility or reliability.

[3] There are other substantive errors in the Commissioner's Proposed Findings, (for example his chosen standard for determining whether an entity is an arm of a tribe) but those need not be addressed until the matter is before this Court after the articulation.

§ 4-183(j), which would have permitted a new hearing and new contested case. *See e.g., Hogan v. Dep't of Children & Families*, 290 Conn. 545, 557-59 (2009).

Moreover, even the procedures under § 4-177 and § 36a-1-21 do not provide for proposed findings and a subsequent hearing. That process appears only in General Statutes § 4-179. Based on the procedure selected by the Commissioner, and indications during the intervening months, it appears the Commissioner has adopted the procedure described in the *Halpern* line of cases. *See Halpern v. Bd. of Educ. of Bristol*, 45 Conn. Supp. 171 (New Britain Super. Ct. 1996), *aff'd,* 243 Conn. 435 (1997). The *Halpern* cases, however, arose out of a very particular, and peculiar, set of facts. The case began with a teacher termination proceeding in 1974. The teacher's administrative appeal of that termination went up to the Supreme Court twice—in 1980 and again, after the Supreme Court's first remand, in 1994. *See Halpern v. Board of Ed.*, 231 Conn. 308 (1994). In the 1994 decision, the Supreme Court, "[t]o eliminate any ambiguity" on its second remand, set forth specific procedures for the agency to follow. *Id.* at 314. The Court expressly based these procedures on General Statutes § 4-179 by analogy. *Id.* Section 4-179 of the Connecticut APA deals with proceedings where the members of the agency have not heard the matter nor read the record. The procedure in *Halpern* of preparing proposed findings and providing an opportunity to respond was a particularly apt analogy for a Board of Education, whose members had all changed in the intervening twenty years. The subsequent 1996 Superior Court and 1997 Supreme Court *Halpern* decisions approved of the procedure in that context only. They did not create a new procedure to be followed in all cases where a court remands a final judgment—and have no relevance to orders seeking articulation.

Moreover, even the *Halpern* line of cases does not justify the Commissioner's consideration of new evidence in his Proposed Findings. To the contrary, on remand, the Board

of Education in *Halpern* was prohibited from considering any evidence outside the original administrative record—even when the new members expressed dissatisfaction with the information in that record. *See Halpern*, 45 Conn. Super. at 174. *See also id.* at 176 (the plaintiff teacher was told during the hearing, after the second remand, that the "board would not consider additional evidence."). As the trial court stated in a decision (adopted as a proper statement of the law by the Supreme Court, *see Halpern*, 243 Conn. at 438), the "remands in both the *Lee* and *Halpern* decisions clearly did not contemplate further evidentiary proceedings" *Id.* at 186 (emphasis added). Thus, even if the *Halpern* process of proposed findings and an opportunity to comment on them was to be followed, the Commissioner still should not have considered any evidence not in the Administrative Record prior to his January 6, 2015 Ruling.

C. The Commissioner's Course Of Action Prejudices Plaintiffs

Having failed to follow this Court's direction to simply prepare an articulation, the Commissioner's chosen procedure creates additional new risks for the Plaintiffs. The purported Notice of Hearing states that Plaintiffs have 14 days from actual receipt to request a hearing. The 14 day period comes from Conn. Gen. Stat. § 36a-50(a)(1)(F). Of course, the applicability of this statute is open to question, since it deals with cases where "the commissioner finds as the result of an investigation that any person has violated any provision of the general statutes within the jurisdiction of the commissioner." *Id.* Here the Commissioner is responding to this Court's order not an internal investigation. Nonetheless, without this Court's guidance, Plaintiffs cannot be sure the statute is inapplicable. Further, if the contested case regulations apply, and Plaintiffs fail to request a hearing, the Commissioner would no doubt argue that the allegations against them should "be deemed admitted." Reg. § 36a-1-31. Without waiving any rights, Plaintiffs are filing a Conditional Request for Hearing with the Commissioner pending the outcome of this Court's resolution of this Motion. Conditional Request attached hereto as Exhibit A.

Plaintiffs seek an immediate ruling from this Court so that the Court's wishes can be heard before any hearing is scheduled by the Commissioner. If the Department hearing were held first, Plaintiffs must either offer evidence (and perhaps concede that new evidence is appropriate) or refuse to offer evidence (and perhaps forfeit their rights to fill in gaps in the record). In short, the Commissioner's choices are fraught with danger to Plaintiffs—a danger that can be easily and speedily resolved by this Court's immediate intercession.

II. CONCLUSION

This Court's Decision remanding the matter to the Commissioner is the impetus for his Proposed Findings. It is appropriate, therefore, for this Court to decide if the Commissioner's actions—both those taken to date and those proposed in the future—actually comply with this Court's direction. Delay until a future review will only risk wasting additional time and money for all concerned, and needlessly further complicate this case.

Rather than send this matter back to the Commissioner for a third time, Plaintiffs request that the Court order that it will disregard any findings based upon new evidence that is outside the administrative record. Alternatively, if the Court decides to hold its decision on this new evidence in abeyance, the Court should order that Plaintiffs are permitted, if they so choose, to present evidence outside the administrative record without fear that they are waiving the arguments set forth herein. In either instance, the future proceedings of this case will be simplified for all concerned.

PLAINTIFFS

By 

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed and e-mailed, postage prepaid, to the following counsel of record this 23rd day of May, 2016.

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Jeffrey J. White

EXHIBIT A

IN THE MATTER OF:	:	STATE OF CONNECTICUT
	:	DEPARTMENT OF BANKING
GREAT PLAINS LENDING LLC	:	
("Great Plains")	:	
	:	
JOHN R. SHOTTON	:	
("Shotton")	:	
	:	
CLEAR CREEK LENDING	:	
("Clear Creek")	:	
(collectively "Respondents")	:	MAY 23, 2016

CONDITIONAL REQUEST FOR HEARING

The Respondents, Great Plains Lending LLC ("Great Plains"), John R. Shotton, and Clear Creek Lending ("Clear Creek"), hereby conditionally request a hearing before the Commissioner of the Department of Banking ("Commissioner") regarding the Proposed Findings of Fact, Proposed Conclusions of Law, and Notice of Right to Hearing ("Proposed Order") issued by the Commissioner to the Respondents in the above-captioned proceeding. Contemporaneously with this filing, the Respondents have filed a Motion for Immediate Order with the Superior Court objecting to the procedure followed by the Commissioner of holding a new hearing and using new evidence outside of the administrative record to respond to the Superior Court's remand. Without waiving any rights to object to the Commissioner's decision to hold a new hearing, the Respondents request a

hearing to preserve their rights to seek a hearing if the Superior Court holds that the Commissioner is permitted to reopen the administrative record for new evidence.

I. FACTS

On October 24, 2014, the Commissioner issued a Temporary Order to Cease and Desist, Order to Make Restitution, Notice of Intent to Issue Order to Cease and Desist, Notice of Intent to Impose Civil Penalty and Notice of Right to Hearing ("First Order") against the Respondents. The Respondents filed a Motion to Dismiss the First Order asserting tribal sovereign immunity from the Commissioner's actions. The Commissioner denied the Motion to Dismiss, and issued the Final Order to Cease and Desist and Order Imposing Civil Penalty on January 6, 2015 ("Final Order"). The Respondents subsequently appealed the Final Order to the Superior Court.

The Superior Court issued its Ruling on November 23, 2015 reversing portions of the Commissioner's Final Order and remanding the "arm of the tribe" analysis to the Commissioner to make "complete factual findings." Memorandum of Decision at 16-17. Specifically, the Commissioner was asked to determine:

1. whether Great Plains and Clear Creek are arms of the Tribe;
2. whether Chairman Shotton has tribal sovereign immunity from financial penalties that the Commissioner seeks to impose; and
3. whether Chairman Shotton has tribal immunity from the Commissioner's request for prospective injunctive relief against future violations of the state's usury and banking laws.

Id. at 17. The Superior Court retained jurisdiction over the appeal. *Id.*

The Commissioner issued its Proposed Order in response to the Superior Court's remand order on May 9, 2016. Rather than directly respond to the Superior Court's questions based on the administrative record as of the date of the appeal, the Commissioner unilaterally considered new evidence from outside the administrative record. The Respondents have objected to this process, and have requested that the Superior Court decide whether the Commissioner's response to its request for an articulation complies with the Court's direction.

II. ANALYSIS

General Statutes § 36a-50(a)(1)(F) requires a respondent to file a request for a hearing within 14 days of actual receipt of a decision by the Commissioner that the respondent has violated a provision of the general statutes. Without the Superior Court's guidance, the Respondents are unable to determine whether this statutory requirement applies to this stage of this case. Thus, to avoid waiving any rights to seek a hearing, the Respondents submit this Conditional Request for Hearing.

Any hearing, however, should be stayed until after the Superior Court issues its decision. Sections 36a-1-30 and 36a-1-11 of the Regulations of Connecticut State Agencies permit the continuance of an administrative hearing. There is also support in case law for staying an administrative hearing while other proceedings are being heard by an appellate court. *See Burke v. Fleet Nat'l Bank*, 252 Conn. 1, 7 (1999) (postponing a hearing before the Department of Banking pending a District Court decision on a preliminary injunction filed by a respondent). Staying the hearing would prevent both the Commissioner and the Respondents from wasting time and resources

if the Superior Court rejects the Commissioner's articulation procedure. Moreover, the stay would not prejudice the Commissioner.

WHEREFORE, for all of the foregoing reasons, the Respondents hereby conditionally request a hearing after the Superior Court's issuance of an order on the proper hearing procedure.

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed and e-mailed, postage prepaid, to the following counsel of record this 23rd day of May, 2016.

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