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
STATE OF CONNECTICUT, DEPARTMENT OF BANKING, JORGE PEREZ, in his official capacity as Commissioner of the Department of Banking	:	AT NEW BRITAIN
	:	SEPTEMBER 28, 2017

OBJECTION TO MOTION TO DISMISS

Plaintiffs, Great Plains Lending, LLC, and Clear Creek Lending, wholly owned and operated entities of the Otoe-Missouria Tribe of Indians, a federally-recognized Indian tribe ("Tribe") and John R. Shotton, the Tribe's Chairman, at all times acting in his official capacity, hereby object to the Motion to Dismiss filed by Defendants, the Connecticut Department of Banking and its Commissioner, Jorge Perez. Defendants claim this Court does not have subject matter jurisdiction over this action because Plaintiffs did not "exhaust" their administrative remedies, a determination they allege that Judge Schuman made in the previous action between these parties. As set forth more fully below, Defendants' claims are factually and legally incorrect.

First, contrary to Defendants' assertions, there has never been a judicial finding that Plaintiffs failed to exhaust their administrative remedies; indeed, Defendants never

even made this argument in the prior appeal. If anything, the Court actually found the opposite, as the opinion plainly recognized that Plaintiffs made a special appearance for the limited purpose of contesting jurisdiction and not the merits of the charges against them. *See Great Plains Lending, LLC v. Connecticut Dep't of Banking*, 2015 WL 9310700, at *5 (Conn. Super. Ct. Nov. 23, 2015).

Second, the administrative record itself belies Defendants' claim that Plaintiffs failed to exhaust administrative remedies. There is no evidence that Plaintiffs "bypassed" the administrative agency; to the contrary, the parties actively litigated the question of whether the Commissioner could exercise jurisdiction over Plaintiffs (a question which is still being actively litigated by virtue of this administrative appeal). To the extent Defendants argue that Plaintiffs were required to request and participate in an evidentiary hearing in order to "exhaust," the Defendants cite to no authority for such a requirement.

Third, an evidentiary hearing would have made no difference to the Commissioner's ultimate ruling, as is borne out by the three separate rulings he issued all rejecting Plaintiffs' immunity defense. The law does not require an administrative party to engage in futile administrative proceedings in order to satisfy the exhaustion doctrine. *See Fish Unlimited v. Northeast Utils. Serv. Co.*, 254 Conn. 1, 13 (2000).

Finally, assuming arguendo that Plaintiffs failed to exhaust their administrative remedies as asserted by Defendants, the exhaustion doctrine does not apply under the circumstances of this case. This is because Plaintiffs have raised a claim of tribal sovereign immunity, asserting their right to be free from the Commissioner's exercise of regulatory jurisdiction. A claim of tribal sovereign immunity presents a question of subject matter jurisdiction, *State v. Velky*, 263 Conn. 602, 611 (2003), and challenges to

subject matter jurisdiction can be raised at any time. *City of Waterbury v. Town of Washington*, 260 Conn. 506, 528 (2002). Therefore, even if Plaintiffs had not presented their immunity defense at the agency level (which they clearly did), they could still raise it in a subsequent administrative appeal.

For all of these reasons, Defendants' Motion to Dismiss should be denied.

HISTORY OF 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 State. *See id.* 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 Engineering*, 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.*, 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 endures the same struggles faced throughout Indian Country, all stemming from a dearth of meaningful economic development opportunity. Located in rural Oklahoma with minimal land-based business opportunities, the Tribe turned to the Internet, specifically, the online consumer finance business.

The Tribe's lending businesses are wholly owned by the Tribe and were created pursuant to Tribal law. The Tribe's Constitution vests the Tribal Council, the Tribe's governing body over which Plaintiff John R. Shotton presides as the Chairman, with lawmaking authority, which includes the authority to pursue economic development ventures for the benefit of the Tribal community. *See* AR 34.[1] Among other mechanisms, the Tribal Council has established these economic instrumentalities

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[1] The abbreviation "AR" refers to the Administrative Record which was prepared and submitted in the first administrative appeal. *Great Plains Lending LLC v. Connecticut Dep't of Banking*, HHB-CV-15-156028096-S. No record has yet been filed in this appeal, but the two records should mirror each other, at least up until the conclusion of the first appeal. Of course, if necessary, this Court can take judicial notice of those proceedings. *Nichols v. Nichols*, 126 Conn. 614, 622 (1940).

pursuant to the Otoe-Missouria Tribe of Indians Limited Liability Company Act ("Tribal LLC Act") and the Otoe-Missouria Tribe of Indians Corporation Act ("Tribal Corporation Act"). AR 34, 47–48. Pursuant to those laws, businesses created thereunder are considered instrumentalities and arms of the Tribe and their officers are to be considered officers of the Tribe. *Id.*

Clear Creek Lending is a d/b/a of American Web Loan, Inc., a corporation owned and operated by, and formed and regulated under the laws of, the Tribe.[2] AR 34, 48. Great Plains Lending, LLC was established pursuant to Tribal law in 2011. AR 48. Both entities were created with the express purpose of growing the Tribe's economy and to aid in addressing issues of public health, safety, and welfare. AR 34, 48–49. The Tribe retains the sole ownership interest in Great Plains and Clear Creek, and all profits inure directly to the tribal government; they are used to support a wide array of government programs for the benefit of the tribal membership. AR 49, 90, 122. The Tribe also has full control over the business operations of both entities. AR 34, 49.

Great Plains and Clear Creek are both comprehensively regulated under tribal law. They operate pursuant to licenses granted by the Otoe-Missouria Consumer Finance Services Regulatory Commission ("Commission"). AR 115, 117. The Commission is an independent tribal regulatory agency charged with enforcing the Tribe's consumer lending law, called the Otoe-Missouria Consumer Finance Services Regulatory Commission Ordinance ("Ordinance"). AR 105–12. In carrying out this responsibility, the Commission oversees the lending activities of both Great Plains and Clear Creek and monitors their businesses for compliance with the Ordinance and adherence to applicable federal consumer protection laws. AR 105, 112; Complaint ¶ 16.

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[2] Clear Creek is no longer in operation. *See* Administrative Appeal, ¶ 9.

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

The Department's Prosecution of the Tribe's Businesses

In late 2013, the Department of Banking attempted to assert regulatory jurisdiction over the Tribe and the Plaintiffs. Administrative Appeal, ¶ 31. Counsel for Great Plains responded in writing to the Department, advising that Great Plains is owned and operated by the Tribe, and is thus not subject to the State's regulatory jurisdiction. *Id.* at ¶ 33. Nonetheless, the Tribe offered to meet with officials from the Department to further a respectful government-to-government relationship with the State of Connecticut; neither the Department nor any other subdivision of the State responded to this offer at that time. *Id.*, ¶¶ 33-34. Instead, on October 27, 2014, Plaintiffs received a document from the Department titled "Temporary Order to Cease and Desist, Order to Make Restitution, Notice of Intent to Issue Order to Cease and Desist, Notice of Intent to Impose Civil Penalty and Notice of Right to Hearing." Administrative Appeal, ¶ 35; AR 1–17. The Temporary Cease and Desist Order acknowledged the tribal status of Great Plains and Clear Creek, as well as Chairman Shotton's status as an elected official of the Tribe and Secretary/Treasurer of Great Plains. *See* AR 4. The Temporary Cease & Desist Order did not, however, allege any

waiver of Tribal sovereign immunity, implied or explicit; nor did it allege any congressional abrogation of said immunity. *Id.*

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

Plaintiffs' Motion to Dismiss explained that sovereign immunity is a proper basis for dismissal of an administrative proceeding for lack of subject matter jurisdiction, as immunity extends to both tribally owned businesses and tribal officials. AR 35–40. The Department objected to the Motion to Dismiss, arguing that sovereign immunity applied only to "suits," and that the administrative proceedings were merely a "demand for compliance," thus not triggering the defense of immunity. AR 128.

In its Final Decision dated January 6, 2015, the Commissioner denied the Plaintiffs' Motion to Dismiss. AR 150–58. The Commissioner maintained that it was not necessary for him to determine whether Great Plains and Clear Creek were "arms of the tribe" and therefore entitled to tribal sovereign immunity because, in his view, tribal sovereign immunity did not bar the administrative proceeding as it was not a "suit" in the first instance. AR 151.

At the same time, the Commissioner also issued an "Order to Cease and Desist and Order Imposing Civil Penalty" ("Final Cease & Desist Order"). AR 159–65. The Final Cease & Desist Order directed Plaintiffs to "cease and desist from violating

[Connecticut lending laws]" or "participating in the violation" thereof. AR 164. 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.

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 Lending, LLC v. Connecticut Dep't of Banking*, 2015 WL 9310700 (11/23/15) (Ex. A to Plaintiffs' Administrative Appeal dated 7/26/17). Judge Schuman then remanded the action to the Commissioner for the purpose of answering three specific questions: (1) whether Great Plains and Clear Creek are arms of the Tribe; (2) whether Chairman Shotton has tribal sovereign immunity from the financial penalties the Commissioner ordered; and (3) whether Chairman Shotton has tribal sovereign immunity from the Commissioner's demand for injunctive relief.[3]

Roughly a year later, the Commissioner issued a "Restated Order and Ruling" (Ex. C to Plaintiff's Administrative Appeal dated 7/26/17). The 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 was liable for both the ordered injunctive relief and monetary penalties. Plaintiffs appealed again, filing this action in July 2017. *See* Gen. Stat. § 4-183. Defendants have now moved to dismiss

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3 In May 2016, the Commissioner issued a ruling purporting to hold that Plaintiffs were not arms of the tribe and were unable to claim tribal immunity. Plaintiffs challenged this ruling on the grounds that it did not comply with Judge Schuman's remand order, and was based on new "evidence" raised *sua sponte* by the Commissioner. Judge Schuman issued an order remanding the matter once again to the Commissioner, directing him to restrict his consideration of the issues to only the three questions presented by the Court and to only the evidence in the record of the first appeal. *See* Ex. B to Administrative Appeal.

Plaintiffs' appeal, on the ground that Plaintiffs failed to "exhaust their administrative remedies" by failing to request an administrative hearing.[4]

ARGUMENT

A. Judge Schuman Did Not Hold That Plaintiffs Failed To Exhaust Administrative Remedies.

On the first page of the memorandum of law in support of their motion to dismiss, Defendants assert that Plaintiffs' alleged failure to exhaust their administrative remedies "has already been determined in prior litigation." Defendants' 9/1/17 Memo of Law at 1 (citing *Great Plains Lending, LLC*, 2015 WL 9310700, at *6-7) (emphasis added). This statement is blatantly incorrect.

Judge Schuman's decision contains no mention of Defendants' claim that Plaintiffs failed to exhaust their remedies, not at the pages Defendants cite, nor anywhere else. The words "exhaust" or "exhaustion" do not appear therein, nor is there any generalized discussion of the doctrine. In fact, Defendants never argued to Judge Schuman that Plaintiffs failed to exhaust their administrative remedies. Further, the remand order would make no sense if Judge Schuman had held that Plaintiffs failed to exhaust their administrative remedies. If Plaintiffs had failed to exhaust, the Court would have dismissed the appeal for lack of subject matter jurisdiction. Instead, the Court exercised jurisdiction, held that contested cases *are* in fact "suits" for the purposes

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4 The Motion to Dismiss asserts that Plaintiffs failed to exhaust their administrative remedies because they "failed to appear and request a hearing," but the Defendants do not separately analyze the claimed "failure to appear," only the lack of a hearing. As was explained in the first appeal, the Plaintiffs did not file a formal appearance with the Commissioner fearing the action could be considered as a waiver of their immunity claim. *See, e.g., Pitchell v. City of Hartford,* 247 Conn. 422, 432 n.14 (1999). Judge Schuman recognized Plaintiffs' filing of their Motion to Dismiss as participation in the proceedings. *See Great Plains Lending, LLC v. Connecticut Dep't of Banking*, 2015 WL 9310700, at *5 (Conn. Super. Ct. Nov. 23, 2015) ("[I]t is true that, in the present case, the plaintiffs *did* appear . . . .") (emphasis added).

of tribal sovereign immunity, and then remanded the proceedings back to the Department. *See Great Plains Lending*, 2015 WL 9310700, at *8-9.

In short, there is no merit to Defendants' assertion that their claim of exhaustion was already decided by Judge Schuman.

B. Plaintiffs Exhausted Their Administrative Remedies By Filing A Motion To Dismiss, Which The Commissioner Denied In A Final Order.

The exhaustion principle is clear and straightforward, in both its statement and in the policies underlying it: "When an adequate administrative remedy exists at law, a litigant must exhaust it before the Superior Court will obtain jurisdiction over an independent action on the matter." *Allen v. Commissioner of Revenue Servs.*, 324 Conn. 292, 302 (2016) (citation omitted). The doctrine is most frequently applied in those instances where a plaintiff has turned first to the Superior Court for relief, either negligently or even intentionally bypassing an available administrative forum. *See Financial Consulting, LLC v. Commissioner of Ins.*, 315 Conn. 196, 208 (2014)("[When] a statute has established a procedure to redress a particular wrong a person must follow the specified remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure."); *Owner-Operators Indep. Drivers Ass'n v. State*, 209 Conn. 679 (1989).

In this case, all that needed to happen in order for Plaintiffs to have "exhausted" their administrative remedies was for them to raise their immunity claim before the Commissioner and for the Commissioner to resolve that claim. The Department has certain procedures that allow the Commissioner to rule on a motion to dismiss. *See* Conn. Admin. Code § 36a-1-27(5). Plaintiffs utilized that process and filed a Motion to Dismiss, raising the defense of sovereign immunity. The Department filed a brief in

opposition, and the Commissioner assumed the role of an administrative law judge. The Commissioner then considered the immunity defense and rejected it in a final order. Once those events occurred, Plaintiffs were free to file their administrative appeal with this Court, pursuant to General Statutes § 4-183. Indeed, the Commissioner's decision on the question of immunity was the subject of the first administrative appeal. *Great Plains Lending*, 2015 WL 9310700 at *1.

Plaintiffs did not bypass the administrative forum at all; to the contrary, they directly engaged with the Commissioner, challenging his authority over them by filing a Motion to Dismiss. Not only did the Plaintiffs properly raise their immunity claim in the administrative proceeding, the Commissioner took up the issue and resolved it (albeit erroneously). It was only after that ruling—and a final decision imposing civil penalties—that Plaintiffs appealed to this Court under General Statutes § 4-183. Following Judge Schuman's reversal of the Commissioner's initial ruling, the Commissioner again considered and rejected Plaintiffs' claim of immunity, and Plaintiffs have again appealed to this Court. By now, it is somewhat ironic for Defendants to claim "failure to exhaust" when the tribal immunity claim has been presented to the Commissioner not just once, but twice.

Moreover, the cases cited by Defendants are factually distinguishable in that the complaining parties there were seeking relief from the courts without first completing available administrative proceedings, the *sine qua non* of an exhaustion claim. For example, in *Johnson v. Department of Public Health*, 48 Conn. App. 102 (1998), the plaintiff filed his administrative appeal before the Commissioner had issued a final decision on his nursing home license. *Id.* at 105-106. It was in this context that this Court ruled there was no jurisdiction over the court action; the decision points out that

it had to be the agency to first determine whether it had jurisdiction over the licensing matter. "[T]his question need not, and in fact cannot, be initially decided by a court." 48 Conn. App. at 110. *See also Cannata v. Department. of Envtl. Prot.*, 215 Conn. 616, 632 (1990) ("judicial intervention, before the commissioner has finally determined whether she has jurisdiction, . . . is unwarranted"); *Greater Bridgeport Transit Dist. v. Local Union 1336*, 211 Conn. 436, 440 (1989) ("challenges to an administrative agency's authority to act asserted initially in the Superior Court [are] premature").

Rather than focusing on what did happen before the Commissioner, *i.e.*, the filing and resolution of the motion to dismiss, Defendants focus on what did not happen: Plaintiffs did not initially ask the Commissioner to conduct a hearing, instead immediately filing their Motion to Dismiss. Defendants' 9/1/17 Memo. of Law at 6-7. Essentially, Defendants argue that the failure to participate in a hearing at the agency level is the functional equivalent of a failure to exhaust administrative remedies.[5]

Defendants point to no judicial authority for this position, however, and there is nothing in General Statutes §§ 36a-50 or 36a-52 (addressing the Commissioner's enforcement powers) which mandates that a hearing be held. Again, the doctrine of exhaustion does not concern itself with exactly what procedural steps are taken at the administrative level, but rather that the party seeking relief from the Superior Court not bypass the administrative level. *See generally Connecticare Benefits, Inc. v. Wade*, 2016 Conn. Super. LEXIS 2393, *3 (Sept. 9, 2016) ("Nothing in § 38a-19(d) requires an aggrieved party to seek a hearing under § 38a-19(a) before exercising its statutory right

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5 Of course, a hearing is not itself an "administrative remedy." It is only an information-gathering tool intended to assist the agency in reaching a decision. Unless there is a statutory requirement mandating that a hearing is a prerequisite to the issuance of an agency's final decision, the existence or non-existence of a hearing is immaterial to the question of exhaustion.

to appeal.") (holding that defendants' exhaustion argument did not lie based on the plaintiffs' alleged failure to request an administrative hearing). While it is true that Judge Schuman rejected Plaintiffs' claim that they had been deprived of procedural due process because the Commissioner failed to hold a hearing, that ruling is irrelevant here. Plaintiffs have not renewed their due process claim in the appeal presently pending before this Court; this appeal challenges Defendants' resolution of the three issues remanded after the first appeal, *i.e.,* Defendants' ruling that Plaintiffs are not protected by tribal sovereign immunity.

Put simply, Plaintiffs asked the Commissioner to rule on their immunity defense and did not file an administrative appeal in the Superior Court until after the Commissioner rejected their position and made his final decision.[6] Accordingly, Defendants' assertion that the exhaustion doctrine bars the Plaintiffs' claims in this administrative appeal should be rejected

C. Where The Remedy Would Have Been Futile Or Inadequate, A Party Need Not Exhaust

Because a hearing before the Commissioner would be both futile and inadequate given his three written decisions holding that the Plaintiffs cannot rely on the doctrine of tribal immunity, it would be inequitable for this Court to hold that a hearing had to be held in order to perfect this administrative appeal. Our Supreme Court has held that the exhaustion doctrine should not apply under such circumstances.

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[6] Because Judge Schuman agreed with the Plaintiffs on the primary claim and reversed the Commissioner's ruling on that basis, the procedural due process claim was not necessary to the resolution of the appeal and Judge Schuman's discussion of the issue was dicta. *DeSena v. Waterbury*, 249 Conn. 63, 78 n.16 (1999)("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case . . . are obiter dicta, and lack the force of an adjudication." (Internal quotation marks omitted.))

> Notwithstanding the important public policy considerations underlying the exhaustion requirement, this court has carved out several exceptions from the exhaustion doctrine . . . . Such narrowly defined purposes include when recourse to the . . . remedy would be futile or inadequate. A remedy is futile or inadequate if the decision maker is without authority to grant the requested relief. It is futile to seek a remedy only when such action could not result in a favorable decision and invariably would result in further judicial proceedings.

Garcia v. City of Hartford, 292 Conn. 334, 340 (2009) (citations omitted; internal quotation marks omitted); *see also Fish Unlimited,* 254 Conn. at 13 ("We have recognized such exceptions [to the exhaustion doctrine] . . . when recourse to the administrative remedy would be futile or inadequate"); *Local 1739, Int'l Ass'n of Fire Fighters v. Town of Ridgefield*, , 2001 Conn. Super. LEXIS 2927, at *3 (Oct. 11, 2001).

The futility exception was discussed at some length in *Johnson*, a case relied on heavily by the Defendants. Defendants 9/1/17 Memo. of Law at 7-8. There, the DPH had brought charges against the plaintiff, but had done nothing to remove his license. 48 Conn. App. at 113. In contrast, here, the Commissioner not only decided the issue of sovereign immunity against the Plaintiffs, but also issued a final Cease and Desist Order and imposed civil penalties. *See CHRO v. Human Rights Referee,* 66 Conn. App. 196, 199-202 (2001) (overruling a dismissal for failure to exhaust on the basis that the "administrative remedy would be useless").

Thus, even if the Court were to conclude that the Plaintiffs should have requested a hearing with the Commissioner, its failure to do so does not deprive this Court of jurisdiction because that hearing would have been futile.

D. The Principle Of Exhaustion Does Not Apply To Subject Matter Jurisdiction Challenges.

In the alternative, assuming *arguendo* that Plaintiffs' filing of a Motion to Dismiss in lieu of requesting an evidentiary hearing could be deemed a failure to

exhaust administrative remedies, the exhaustion doctrine should not be applied under the unique circumstances of this case. Specifically, tribal sovereign immunity is an issue that goes to the authority of one sovereign to assert jurisdiction over another sovereign. This is a purely legal issue, over which the Commissioner has no special expertise.

Everyone agrees that administrative agencies are creatures of statute, entrusted with supervision of a particular area of regulatory specialty, often highly technical in nature. Where such an agency is active in a given area, citizens and businesses are required to submit first to them so that decisions can be made in a consistent and orderly fashion. *Concerned Citizens of Sterling v. Sterling*, 204 Conn. 551, 557 (1987). The Superior Court has the power to review the final decisions made by these special boards and commissions, albeit a limited power. The principle of exhaustion of remedies is a rule in aid of this orderly process because it directs people to the technical experts first, so that their expertise can be plumbed. *Id.* ("The doctrine of exhaustion is grounded in a policy of fostering an orderly process of administrative adjudication and judicial review in which a reviewing court will have the benefit of the agency's findings and conclusions.").

However, not all questions that arise in the context of an administrative proceeding are necessarily directed at the expertise of the agency. Our Supreme Court has noted that while administrative appeals may be ideal to review the parameters of an administrative agency's decision in a particular case, the analysis of more traditional legal issues, especially challenges to the absolute authority of the agency to act in the first instance, belong in the Superior Court:

> [T]his court [has] commented on the difference between questions appropriate for resolution by declaratory judgment and those more appropriately dealt with by means of administrative appeal. We there

> observed that declaratory judgment proceedings are appropriate for determining jurisdictional issues or questions concerning the validity of the regulations of an administrative agency, while questions concerning the correctness of an agency's decision in a particular case or of the sufficiency of the evidence can properly be resolved only by appeal. *Hartford Electric Light Co. v. Water Resources Commission*, [162 Conn. 89],104-105.

Aaron, 178 Conn. at 177-178.

The issue raised by the Plaintiffs is a purely legal one: are they immune from the attempts by the Commissioner to exercise his regulatory authority over them? Questions of immunity, especially sovereign immunity, are not technical matters entrusted to administrative bodies; they are quintessentially legal issues which are best decided by the courts. *See, e.g., La Croix v. Board of Ed.*, 199 Conn. 70, 81 (1986) ("We conclude that, under the specific circumstances of this case, the plaintiff's failure to follow the administrative appeal route to challenge the June termination did not preclude him from bringing a collateral judicial action to test this basic constitutional infirmity in the board's termination process."); *Maresca v. Town of Ridgefield*, 35 Conn. App. 769, 772-73 (1994) (where applicability of UAPA to plaintiff's claim is challenged, the issue is one for the courts and the exhaustion doctrine does not apply).

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), *reversed on other grounds*, 137 S. Ct. 1285 (2017). It is firmly established in our law that issues of subject matter jurisdiction can be raised at any time, and take priority over other issues. *City of Waterbury*, 260 Conn. at 527. "It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court." *Gurliacci v. Mayer*, 218 Conn. 531, 545 (1991)

(citing *Statewide Grievance Comm. v. Rozbicki*, 211 Conn. 232, 245 (1989); *Cahill v. Board of Ed.*, 198 Conn. 229, 238, 502 A.2d 410 (1985)). The same rule applies for proceedings before administrative agencies. *Mankus v. Mankus*, 107 Conn. App. 585, 589-90, *cert. denied*, 288 Conn. 904 (2008); *Burton v. Commissioner of Envtl. Prot.*, 291 Conn. 789, (2009).

In other words, Defendants cannot rely on the doctrine of exhaustion of administrative remedies to overcome a challenge which goes to the very heart of the question of whether the Commissioner has the right to exert power and authority over Plaintiffs when they have asserted tribal sovereign immunity. Defendants disagree, asserting that even where a claimant has challenged the authority of an administrative agency over him, he may not sidestep the administrative process without running afoul of the exhaustion doctrine. Defendants' 9/1/17 Memo. of Law at 8-9 (citing *Johnson v. Dept. of Public Health*, 48 Conn. App. 102 (1998); *Cannata v. Department of Envtl. Prot.*, 215 Conn. 616, 632 (1990); *Greater Bridgeport Transit Dist. v. Local Union 1336*, 211 Conn. 436, 440 (1989)).

What Defendants fail to recognize, however, is that none of the cases on which they rely involve a defense of sovereign immunity. The Defendants' cases invariably present a routine statutory challenge to the agency's administrative authority, a challenge that our law dictates must be made first to the appropriate agency (who is best able to determine its own statutory charge).

Here, though, Plaintiffs do not claim that the Commissioner does not have the general authority to regulate lending practices in the state of Connecticut; what they claim is that he does not have the authority to regulate <u>their</u> activities, as they enjoy the immunity of a sovereign. *See Castro v. Viera*, 207 Conn. 420, 427-28 (1988). "A court

has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy. Such jurisdiction relates to the court's competency to exercise power, and not to the regularity of the court's exercise of that power." *Id.* at 427 (quoting *State v. Malkowski,* 189 Conn. 101, 105-106 (1983)). The Plaintiffs' objection to the Commissioner's actions went to the exercise of his powers, not his competency or his statutory authority. The asserted claim of sovereign immunity has nothing to do with the Commissioner's administrative reach; it has to do with the power of the State of Connecticut to attempt to exert its regulatory powers. The former issue may be subject to the exhaustion doctrine, but the latter issue is not.

CONCLUSION

The Defendants' Motion to Dismiss should be denied. The record plainly reveals that Plaintiffs exhausted the administrative remedies available in the proceedings conducted before the Commissioner by arguing that they enjoyed immunity from the purported exercise of his statutory powers. The Commissioner issued a final decision rejecting Plaintiffs' challenge and they have appealed that decision to this Court pursuant to General Statutes §4-183. There is nothing else that Plaintiffs needed to do in the administrative proceedings in order to perfect their right to appeal. Assuming *arguendo* that there was, this Court should hold that it would have been futile to require Plaintiffs to act further.

Finally, because the challenge raised by Plaintiffs concerns the issue of tribal sovereign immunity, they were not required to submit the issue to the Commissioner in the first place. This Court is not only free to analyze the basis of its own jurisdiction, our case law requires that this analysis be done by the Court, and be performed before any

other action is taken. This matter is properly before this Court and the parties should proceed to briefing the issues on the merits.

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 September 28, 2017 to:

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