SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 20340

GREAT PLAINS LENDING LLC, CLEAR CREEK LENDING AND JOHN R. SHOTTON

PLAINTIFF/APPELLANTS/CROSS-APPELLEES

v.

STATE OF CONNECTICUT, DEPARTMENT OF BANKING, JORGE PEREZ, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF BANKING

DEFENDANT/APPELLEE/CROSS-APPELLANT

BRIEF OF PLAINTIFFS/APPELLANTS/CROSS-APPELLEES

TO BE ARGUED BY:

LINDA L. MORKAN OR
JEFFREY J. WHITE
PH.: (860) 275-8219
FAX: (860) 275-8299

LINDA L. MORKAN
JEFFREY J. WHITE
ROBINSON & COLE LLP
280 TRUMBULL ST.
HARTFORD, CT 06103
lmorkan@rc.com
jwhite@rc.com

ROBERT A. ROSETTE
SABA BAZZAZIEH
ROSETTE, LLP
1100 H ST., NW
WASHINGTON, DC 20005
rosette@rosettelaw.com
sbazzazieh@rosettelaw.com
PRO HAC VICE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The federally recognized Otoe-Missouria Tribe ("Tribe") has spent the last five years defending its sovereignty against the unlawful assertions of authority taken by the Connecticut Department of Banking ("DOB"). Throughout this time, the DOB has issued three separate orders proclaiming that it has jurisdiction over the Tribe's wholly owned and operated entities, Great Plains Lending, LLC ("Great Plains") and Clear Creek Lending ("Clear Creek") as well as over the Tribe's elected Chairman, John R. Shotton (collectively the "Tribal Parties"). These orders – which have been either remanded and/or vacated by the trial court– ignore and infringe upon the Tribe's sovereign rights by wrongfully concluding that the Tribal Parties somehow lack the same immunity from suit that Connecticut's own political and economic subdivisions (and state officials) enjoy. Notwithstanding this, the DOB's unfounded efforts persist, at great cost to the Tribe. The Tribal government has been forced to defend against these assertions of jurisdiction, resulting in an unnecessary expenditure of resources that would otherwise have been utilized for the benefit of the tribal community.

The DOB first attempted to assert jurisdiction over the Tribal Parties in 2014, issuing administrative "cease and desist" orders directing them to discontinue services to Connecticut residents, and purporting to impose $1.5 million in combined penalties against them. The DOB took these actions against the Tribal Parties despite their clear assertion of tribal sovereign immunity and a plethora of clear and definitive legal authority in support of this position. The Tribal Parties appealed the agency's order to the Superior Court which sustained their appeal and held that the DOB had wrongly refused to acknowledge that tribal sovereign immunity extends to administrative enforcement proceedings. The trial

court (Schuman, J.) remanded the matter for consideration of three delineated issues, *e.g.*, 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. In response to the DOB's attempt on remand to introduce new evidence into the administrative record, the trial court (Schuman, J.) further ordered that the DOB was restricted to consideration of only the administrative record as it existed at that time and returned the matter to the agency a second time.

In June 2017, the DOB issued its "re-stated order" again holding that (1) Great Plains and Clear Creek were not arms of the Tribe (and therefore not entitled to tribal sovereign immunity) and (2) Chairman Shotton was subject to the administrative monetary and injunctive penalties for the same reason. The Tribal Parties once again appealed to the Superior Court, arguing that the DOB had applied the incorrect legal standard for determining "arm of the tribe" status, and erred in failing to acknowledge Chairman Shotton's immunity as an officer of the Tribe. The trial court (Shortall J.) agreed with the Tribal Parties that the DOB had failed to apply the correct legal standard and further held that the DOB's errors of law had impaired the Tribal Parties' substantial rights. *See* Gen. Stat. § 4-163(j). The Court further determined that the Commissioner sought to impose liability upon Chairman Shotton "solely for actions he took in his capacity as an officer of the tribe." Memorandum of Decision, Appendix ("App.") at A289. Despite this holding, however, the trial court did not enter judgment for the Tribal Parties, instead returning the action to the DOB for a third time, this time directing the agency to conduct an evidentiary hearing.

The trial court erred in three respects:

(1) It adopted the arm-of-the-tribe standard outlined in a California Supreme Court decision, *Owen v. Miami Nation Enterprises*, which is inconsistent with state and federal case law across the country, including precedent from Connecticut courts.

(2) While correctly holding that the DOB had committed legal errors impairing the Tribal Parties' rights, the trial court should have ended these protracted proceedings, instead of remanding the action to the DOB yet *again*, and this time permitting the agency to conduct an evidentiary hearing it had declined to conduct initially;

(3) Although holding that the DOB's claims against Chairman Shotton were without basis, as he was acting at all times in his official capacity as a tribal officer and was not the real party in interest, the trial court did not order Chairman Shotton to be dismissed as a party from any further agency proceedings.

This Court should reject the trial court's conclusion that this matter had to be remanded to the DOB for further proceedings; the DOB has already had three bites at this apple and has failed each time to establish that it is entitled to exercise any authority over the Tribal Parties. It is an insult to the very idea of tribal sovereign immunity to allow a state regulatory authority to pursue a sovereign in such a manner. This five-year litigation must be ended.

In the alternative, if this Court concludes that yet another remand is absolutely necessary, the trial court's adoption of the *Miami Nation* standard should be reversed, and the DOB should be directed to apply instead the widely-accepted multi-factor test set out in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010). *See also Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co.*, Inc.,

2005 WL 3510348 (Hendel, J.) (adopting a standard similar to *Breakthrough*) (App. at A356).

STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

Tribal Sovereignty and Sovereign Immunity

Indian tribes hold a unique status in the law and retain self-governing powers inherent to their communities since time immemorial. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). These powers pre-date the U.S. Constitution, as tribes are "distinct political societ[ies]" better known as "domestic dependent nations." *Cherokee Nation v. Georgia,* 30 U.S. 1, 16-17 (1831). Though the relationship between Indian tribes and the U.S. has shifted over time, tribes maintain their inherent powers, subject only to Congress's "plenary power" over Indian affairs. *See United States v. Kagama,* 118 U.S. 376, 381–82 (1886). Essentially, without adverse action by Congress, tribes retain their sovereign authority. *Michigan v. Bay Mills Indian Cmty*. 572 U.S. 782, 782 (2014).

The nature of the relationship between tribes and the federal government is derived from the U.S. Constitution, specifically, the Indian Commerce Clause. *See Kagama*, 118 U.S. at 381–82. While the federal government has authority over Indian affairs, the nature of the relationship between Indian tribes and states is vastly different. States "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996). Thus, unless Congress expressly grants power over Indian tribes to a state, tribal sovereignty, including immunity, is "privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986).

Tribes, like other sovereign nations, enjoy immunity from suit as a "core aspect" of their sovereignty. *Bay Mills*, 134 S. Ct. at 2027. Unless Congress explicitly authorizes a suit by a state against an Indian tribe, "it must be dismissed." *Id.* Tribal sovereign immunity is so vitally important to preserving tribal self-governance and resources, that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citation omitted). This same immunity extends to tribal businesses and tribal commercial activities and further extends to tribal officials acting in their official capacity and within the scope of their authority under tribal law. *Kiowa Tribe of Oklahoma 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 federal 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. App. at A91. 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. App. at A92, A106-07.

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 Plains Lending, LLC. App. at A106 ¶¶ 8, 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. App. at A107 ¶ 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. *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

---

[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. App. at A91-92. As an exercise of this power, the Tribal Council ratified the Otoe-Missouria Tribe of Indians Limited Liability Company Act and the Otoe-Missouria Tribe of Indians Corporation Act. App. at A106 ¶ 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. *Id.* ¶ 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.

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. App. at A108 ¶¶ 16, 18.

The DOB's Prosecution of the Tribe's Businesses

In late 2014, the DOB attempted to assert regulatory jurisdiction over the Tribe vis-a-vis the Tribal Parties, 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." Amended Admin. Appeal ¶ 35, App. at A14. *See also Great Plains Lending, LLC v. Conn. Dept. of Banking,* 2015 WL 9310700 at *1 (*Great Plains I*), App. at A313.[2] The DOB alleged that Great Plains and Clear Creek violated Connecticut banking law by making unlicensed loans and charging a usurious rate of interest. *Id.* The DOB further claimed that Chairman Shotton violated Connecticut law by participating in these transactions by virtue of his official role with the Tribe. App. at A67.[3]

The Tribal Parties contested the DOB'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—known as "arms of the Tribe"—and a tribal official acting in his official capacity and within the scope of tribal law. App. at A81-83. *See* Regs. Conn. State Ag. § 36a-1-29. Along with that Motion, the Tribal Parties submitted factual evidence and legal authorities supporting their assertion that they were protected by their arm-of-the-tribe status. App. at A86-184. The DOB objected to the

---

2 The trial court in this action took judicial notice of the court file in the first administrative appeal. *See* App. at A269 n.1.

3 Even while making these allegations, the DOB acknowledged the tribal status of Great Plains and Clear Creek, as well as Chairman Shotton's status an elected official of the Tribe. App. at A63 ¶ 3.

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. App. at A185-94. The DOB introduced no evidence of its own to refute or otherwise challenge the Tribal Parties' immunity defense.

In a written ruling issued in January 2015, the Commissioner denied the Tribal Parties' 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. App. at A208. At the same time, the Commissioner also issued his final "Order to Cease and Desist and Order Imposing Civil Penalty." App. at A217-23. The Final Order directed the Tribal Parties to "cease and desist from violating [Connecticut lending laws]" or "participating in the violation" thereof. App. at A222-23. 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. App. at A223.

The Tribal Parties' Prior Administrative Appeals

The Tribal Parties timely appealed the Commissioner's June 2015 order to the Superior Court. Gen. Stat. § 4-183(a). On November 23, 2015, after briefing and argument, the court (Schuman, J.) reversed the Commissioner's order and issued its decision in favor of the Tribal Parties, holding that contested cases are in fact "suits" for the purposes of tribal sovereign immunity. *Great Plains I*, 2015 WL 9310700, App. at A313-20. Judge Schuman observed that the DOB never reached the question whether the Tribal Parties enjoyed immunity due to their tribal status, *id.* at *6, App. at A316, 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?

Id. at *8, App. at A318.

Following Judge Schuman's initial remand order, in May 2016, the DOB issued a second administrative order finding that Great Plains and Clear Creek were not arms of the tribe and were unable to claim tribal immunity. App. at A321. The Tribal Parties challenged this new ruling on the ground that it did not comply with Judge Schuman's order, as it was based on "evidence" outside the administrative record. *Great Plains,* CV-15-6028096, Dkt. Entry 139.00 (May 23, 2016).

In response to the Tribal Parties' motion, Judge Schuman issued a second order directing the DOB to limit its 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. App. at A351. Again, because the DOB chose to provide no factual evidence of its own, the only evidence in the administrative record was the material submitted by the Tribal Parties in connection with their 2014 Motion to Dismiss. App. at A81-184.

The DOB's Third Order

Almost a year later, the Commissioner issued his third order, the subject of this current appeal. App. at A224. This "Restated Order" reached the same conclusion as the earlier version, finding that neither Great Plains nor Clear Creek were arms of the Tribe, and that Chairman Shotton was liable for both the ordered injunctive relief and the monetary penalties. App. at A237-44.

In issuing the Restated Order, the Commissioner relied primarily on *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538 (N.Y. 2014), an outlier case imposing an atypically restrictive test for determining whether an entity is an arm of a tribe. As explained *infra*, while the *Sue/Perior* test purports to involve a balancing of numerous factors, it places near-dispositive weight on whether the tribe is directly liable for a monetary judgment against the entity (as opposed to having the protections of a limited liability or corporate shield).

The Tribal Parties appealed pursuant to General Statutes § 4-183, arguing that the DOB applied the incorrect legal standard for determining whether they were arms of the tribe and therefore entitled to immunity, and that Chairman Shotton was immune as a tribal officer.[4] On the arm-of-the-tribe issue, the Tribal Parties argued that the Commissioner should have applied the multi-factor test set forth in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010). Applying *Breakthrough* to the evidence in the record, the Tribal Parties argued that Great Plains and Clear Creek met every one of the factors described therein.

The Tribal Parties argued that the first factor (method of creation) weighed in their favor because both Great Plains and Clear Creek were created under duly enacted tribal law, *i.e.,* resolutions passed by the Tribal Council, the Tribe's governing body. They likewise maintained that the second factor (the purpose of the entity) weighed in their favor, as both Great Plains and Clear Creek were created for the expressly stated purpose of

---

[4] The DOB moved to dismiss the appeal claiming that the Tribal Parties had not exhausted their administrative remedies because they had not requested a hearing before the DOB. The trial court (Shortall, J.) denied the motion holding that the Tribal Parties' filing of a motion to dismiss the DOB proceedings on the ground of tribal sovereign immunity was a proper pleading and that they had not failed to exhaust their remedies. App. at A57.

improving the Tribe's economic well-being. The third factor (ownership, operation, and control of the entity) weighed in their favor, the Tribal Parties asserted, because both Great Plains and Clear Creek are 100% owned by the Tribe and because they are controlled by the Tribe vis-à-vis oversight of the Board of Directors and regulation by an independent tribal regulatory commission. The fourth factor (the Tribe's intent) weighed in their favor because the undisputed evidence in the record showed that the Tribe clearly intended for the entities to have sovereign immunity. The fifth factor (financial relationship) was argued to be in their favor because revenue from the entities supported the Tribe's governmental budget. And finally, the Tribal Parties argued that the sixth factor (the policies underlying immunity doctrine in general) supported their claim to immunity because the purposes of the doctrine of sovereign immunity include protecting the tribal treasury and supporting tribal self-government—both goals that would be directly served by recognizing Great Plains and Clear Creek as immune from suit.

The trial court (Shortall, J.) heard argument in August 2018 and issued its memorandum of decision in November 2018. App. at A267. The trial court held that the DOB used an improper legal standard to determine whether Great Plains and Clear Creek are arms of the Tribe but did not adopt either of the two standards suggested by the parties (*Sue/Perior* or *Breakthrough*). The trial court ordered that the matter be remanded to the DOB for further proceedings, including the introduction of new evidence from both the Tribal Parties and the DOB, *id.* at A289, A296, and directed the DOB to apply the arm-of-the-tribe test articulated in *Miami Nation*, 386 P.3d 357, 369 (2016). Additionally, the trial court stated that the action brought against Chairman Shotton was in his official capacity and therefore his liability "rises and falls" with the determination as to whether Great Plains

and Clear Creek are arms of the Tribe. App. at A289. In issuing this decision, the trial court vacated the orders imposing financial penalties on the Tribal Parties but ordered that the cease and desist orders were to remain in effect pending the outcome of the new proceedings. *Id.* at A297. The Tribal Parties appealed to the Appellate Court, *id.* at A300, and the DOB cross-appealed. *Id.* at A306. This Court transferred the appeal to itself on September 3, 2019. *Id.* at A312.

STANDARD OF REVIEW

This 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). Both the Tribal Parties and the DOB agreed that review was plenary, and the trial court correctly applied that standard. App. at A276-77.

ARGUMENT

In their challenge to the DOB's "restated" order, App. at A224, the Tribal Parties argued that the agency's reliance on the outlier case of *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 358(2014) was improper and inconsistent with Connecticut law as well as the leading federal court cases on the arm of the tribe issue. The trial court agreed, rejecting "the primacy given by *Sue/Perior* and the commissioner to the financial relationship between the tribe and the commercial entities it has created." App. at A285. Consistent with this finding, the trial court held that the DOB's decision to follow *Sue/Perior* was an error of law that prejudiced the Tribal Parties' substantial rights. *Id.* at A288.

While this holding of the trial court is correct, the determinations that followed are inconsistent with this legal finding and should therefore be reversed. Specifically, the trial court erred in holding that: (1) the proper relief for the DOB's errors is the remanding of this action yet again to the agency for further proceedings rather than the entry of judgment for the Tribal Parties; (2) the correct legal standard to determine arm of the tribe status is found in *Miami Nation*; and (3) Chairman Shotton should remain a party to the new proceedings despite the trial court's acknowledgement that he was acting in his official capacity and is not the "real party in interest." These issues are each discussed in more detail below.

I. THE TRIAL COURT SHOULD HAVE ENTERED JUDGMENT IN THE TRIBAL PARTIES' FAVOR AND ENDED THIS INTERMINABLE LITIGATION

A. The Trial Court Should Not Have Ordered A New Evidentiary Hearing

The trial court properly held that the DOB had committed errors of law which impaired the substantial rights of the Tribal Parties. App. at A285, A288-89. This holding required the court to sustain the appeal. *See* Gen. Stat. § 4-183(j).[5] The Tribal Parties assert that the action should have ended at this juncture and judgment should have entered

---

[5] Section 4-183(j) provides:

> (j) 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. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment.

in their favor; the DOB had already issued three rulings on the question of the Tribal Parties' entitlement to tribal sovereign immunity and had failed each time to follow the law. To allow this charade to continue by offering the agency yet another chance to justify its improper attempt to exercise its regulatory jurisdiction over the Tribal Parties borders on the absurd.

Moreover, the trial court did not issue a restricted remand order (as had been issued after error was found in the first administrative appeal, *see supra* at 9), but instead orders the DOB to conduct an all-new evidentiary hearing upon remand. App. at A296. This is relief that the DOB is not entitled to, has never sought and, indeed, appears to think is either unnecessary or inappropriate. App. at A352 (DOB's Preliminary Statement of Issues on Cross-Appeal).

General Statutes § 4-183(h)[6] permits the trial court to remand an administrative appeal to an agency for the presentation of additional evidence under certain specific circumstances, which remand occurs before the trial court takes up the matter on its merits. *Wakefield v. Comm'r of Motor Vehicles*, 90 Conn. App. 441, *cert. denied*, 275 Conn. 931 (2005). One who wishes to expand the record must show not only that the material is relevant, but also that good reasons exist for the failure to introduce the evidence in the first

---

6 Section 4-183(h) provides:

> (h) If, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

instance. *Id.* at 444. In the absence of a showing of entitlement to this extraordinary relief, it is not available to the administrative appellant, who must instead prove its case on the existing record.

Here, the DOB never asked for permission to expand the record to include evidence regarding the Tribal Parties' claims of immunity, nor did it object after the first appeal where the order on remand was explicitly limited to the record. Where a party fails to ask for relief under § 4-183(h), it is not entitled to it. *Clark v. Comm'r of Motor Vehicles*, 183 Conn. App. 426, 441 (2018).

Finally, the trial court offered no rationale for allowing an all-new evidentiary hearing to be conducted on remand when the error at issue was the DOB's misapplication of the applicable standard of law. App. at A288-89. Even where new evidence is permitted on remand pursuant to § 4-183(h), both this and the Appellate Court have been careful to warn that such relief "does not offer the parties an opportunity to relitigate the case ab initio, but rather represents a continuation of the original agency proceeding." *Clark*, 183 Conn. App. at 442 (quoting *Salmon v. Dept. of Public Health and Addiction Servs.*, 259 Conn. 288, 319 (2002)). What the trial court ordered in this case is indeed a vitiation of the department's original decision," *Salmon*, 259 Conn. at 319, and is not within the general parameters of General Statutes § 4-183(j). The appropriate relief in this action is the entry of judgment in the Tribal Parties' favor. The Tribal Parties respectfully request this court to reverse the decision of the trial court in part and direct the entry of judgment in their favor.

B. The DOB Has The Burden Of Proof On The Question Of Its Own Jurisdiction

The trial court held, unequivocally, that the burden of proving entitlement to tribal sovereign immunity lay with the Tribal Parties "just as it is on corporate entities that claim

entitlement to the state's sovereign immunity from suit as 'arms of the state.'" App. at A280 (citing *Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 265, 279 (2015); *Owen v. Miami Nation Enters.*, 386 P.3d 357, 369 (2016)). This is an incorrect statement of the applicable law, both in Connecticut and nationally.

In finding that the Tribal Parties had the burden to prove the DOB's lack of jurisdiction, the trial court relied on a half-sentence of *dicta* from this Court's decision in *Rocky Hill v. SecureCare.* In that case, this Court found error in the trial court's holding that the defendants were entitled to sovereign immunity but did not base its ruling on the failure of the defendants to carry their burden of proof. Rather, this Court held that the lower court had mis-applied the multi-factor test used to determine who qualifies as an arm of the state. 315 Conn. at 292. The trial court here incorrectly relied on *SecureCare* as resolving the question of who bears the burden of proof in a case where an agency exerts its regulatory authority, treating an off-hand statement as a holding.

Moreover, even if *SecureCare* did stand for the proposition that a party seeking to be granted immunity as an arm of the state bears the burden of proving its status, that proposition has no easy corollary in the area of tribal sovereign immunity, as many courts have already held. "[T]ribal immunity implicates wholly different concerns than are raised by Eleventh Amendment immunity." *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1208 (11th Cir. 2012) (emphasis added) (citing *Lapides v. Board of Regents of Univ. Sys. Of Georgia*, 535 U.S. 613, 623 (2002)); *accord Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000).

Even the California Supreme Court in *Miami Nation* (the only other case the trial

court relied on), has acknowledged that there is a "lack of consensus across jurisdictions" regarding the use of state sovereignty principles to decide tribal sovereignty issues.

> [T]ribal sovereignty "differs from state sovereignty in important respects." Unlike the states, which have consented to suit by other states, tribes have never agreed to so limit their sovereign immunity. The [U.S. Supreme Court] has "repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a [constitutional] convention to which they were not even parties."

386 P.3d at 368 (citations omitted) (emphasis added). Despite this acknowledgement, the court in *Miami Nation* held that California law supported treating a tribe's claim of sovereign immunity akin to an affirmative defense, which would then necessitate the tribe's shouldering of the burden of production on that issue. *Id.* at 369. In so holding, the Court expressly rejected the approach taken by other jurisdictions which have adopted different procedures.[7]

For example, the Colorado Supreme Court has held that "the state bears the burden of proving, by a preponderance of the evidence, that [tribal entities] are not entitled to tribal sovereign immunity." *Cash Advance and Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1113 (Colo. 2010) (emphasis added). *See also Bales v. Chicksaw Nation Indus.*, 606

---

[7] *Miami Nation* asserts that its holding is in accord with the law in the Second Circuit, 369 P.3d at 369-70, but the decision mysteriously fails to acknowledge the Second Circuit's controlling decision on the topic: *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76 (2d Cir. 2001).

Garcia held that "[o]n a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff [*i.e.*, the non-tribal entity] bears the burden of proving by a preponderance of the evidence that jurisdiction exists." *Garcia*, 268 F.2d at 84 (*quoted in Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (case involving claims against Mashantucket Pequot Tribal Council)).

The Second Circuit case *Miami Nation* cites to (*Woods v. Rondout Valley Central Sch. Dist. Bd. Of Ed.,* 466 F.3d 232, 237 (2d Cir. 2006)), although decided later in time than *Garcia*, did not involve an issue of tribal sovereign immunity and therefore is an inferior comparison to *Garcia* and *Chayoon*.

F. Supp. 2d 1299, 1301 (D.N.M. 2009) (in an action against a tribal corporation, the party "who seeks to invoke federal jurisdiction, in this case the Plaintiff, bears the burden of establishing that federal jurisdiction is proper"); *Sungold Gaming USA, Inc. v. United Nation of Chippewa*, 2002 WL 522886 at *2 (Mich. Ct. App.), *cert. denied*, 467 Mich. 910 (2002) (plaintiff failed to prove that a tribal nonprofit corporation was not entitled to sovereign immunity), App. at A362.

Given the split of authority on how best to handle the burden of proof issue, the trial court gave short shrift to these differing approaches, even when the importance of the issue was highlighted in the Tribal Parties' motion to reargue. This Court should follow well-established Connecticut law which holds that the party seeking to assert jurisdiction has the burden of proof. "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *May v. Coffey*, 291 Conn. 106, 113 (2009) (citation omitted). Thus, "[t]he party bringing the action bears the burden of proving that the court has subject matter jurisdiction." *Pentland v. Comm'r of Corr.*, 176 Conn. App. 779, 786 (2017); *see also Ferri v. Powell-Ferri*, 326 Conn. 438, 449 (2015) (where party did not "set the judicial machinery in motion," party did not bear the burden of proof as to jurisdiction). The burden of proving subject matter jurisdiction remains with the party asserting it, "wherever and however raised." *Fink v. Golenbock*, 238 Conn. 183, 199 n.13 (1996).

Here, it was the DOB which was attempting to exercise jurisdiction over the Tribal Parties; therefore, it bore the burden of proving facts that compel a finding that such jurisdiction exists. The agency failed to carry that burden, and the remedy for that failure is dismissal of the administrative proceedings. *See generally Conboy v. State*, 292 Conn.

642, 655-56 (2009) (where State failed to introduce its own evidence contradicting the Tribal Parties' evidence or request an evidentiary hearing, matter was not returned to trial court for further proceedings on State's motion to dismiss).

Indeed, even assuming *arguendo* that the burden of proof originally lay with the Tribal Parties, at a minimum, that burden *shifted* to the DOB once the Tribal Parties supplied affirmative evidence to support their assertion of tribal sovereign immunity. And as noted earlier, the only evidence in the record is that submitted by the Tribal Parties; the DOB did not offer anything to rebut the Tribal Parties' evidence or oppose it in any way. Accordingly, even if the Tribal Parties had the initial burden to provide proof of their immunity, the evidence in the record (comprised entirely of evidence *supporting* immunity) clearly satisfied that initial burden. The DOB then failed to provide *any* evidence in rebuttal. That is, the burden (once shifted) was not satisfied by the DOB. *Cf. A.R. Int'l Anti-Fraud Sys., Inc. v. Pretoria Nat'l Cent. Bureau of Interpol*, 634 F. Supp. 2d 1108, 1113-14 (E.D. Cal. 2009) (explaining, in Foreign Sovereign Immunities Act context, that once an entity shows sovereign status, the burden shifts to the opposing party to prove otherwise).

II. THE TRIAL COURT SHOULD HAVE APPLIED THE *BREAKTHROUGH* TEST

As stated earlier, the trial court's decision was based on an erroneous formulation of the arm-of-the-tribe test—a test drawn primarily from the California Supreme Court's decision in *Owen v. Miami Nation Enterprises*. The test used by the trial Court reflects a misguided and paternalistic approach to tribal sovereignty which entirely disregards the well-established policies underlying the tribal immunity doctrine, *i.e.*, the promotion of tribal self-governance and self-determination.

Instead of the *Miami Nation* test, the trial court should have applied the more widely used test illustrated by the Tenth Circuit's decision in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010), and more recently applied by the Fourth Circuit in *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248 (E.D. Va. 2018), *rev'd*, 929 F.3d 170 (4th Cir. 2019). Application of the *Breakthrough* test, with appropriate deference to tribal sovereignty and tribal decision making, compels a finding that Great Plains and Clear Creek are, in fact, arms of the Tribe.

Relying on *Miami Nation*, the trial court erroneously applied an arm-of-the-tribe standard that fails to conform with prevailing doctrines of federal Indian law and contradicts the policies underlying tribal sovereign immunity, including the policies of encouraging tribal self-governance and economic development.[8]

While the trial court properly rejected the *Sue/Perior* standard, it nonetheless applied the wrong standard by adopting the arm-of-the-tribe test set forth by the California Supreme Court in *Miami Nation*. At first blush, *Miami Nation* appears similar enough to *Breakthrough*, as it employs the following five factors, all of which are used in *Breakthrough* itself: (1) the entity's method of creation; (2) whether the tribe intended the entity to share in its immunity; (3) the entity's purpose; (4) the tribe's control over the entity; and (5) the financial

---

[8] In previous stages of this litigation, the DOB argued that its choice of the proper arm-of-the-tribe test is entitled to deference. However, agency deference plays a narrowly defined role in Connecticut administrative law. In some cases, "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." *Longley v. State Emps. Ret. Comm'n*, 284 Conn. 149, 163 (2007) (citation omitted). But although legal conclusions are sometimes accorded deference, such deference is traditionally limited to instances when the agency adopts a reasonable construction of a statute which it is charged to enforce. *Celentano v. Rocque*, 282 Conn. 645, 652 (2007). On any other question of law, an agency's determination is generally not eligible to receive any special deference. *See Longley*, 284 Conn. at 163. In this case, determination of the proper arm-of-the-tribe test is a pure issue of law, and one that has nothing to do with banking at that.

relationship between the tribe and the entity. 386 P.3d at 365. Indeed, the California Supreme Court characterized its approach as a "modified version" of the *Breakthrough* test.

What makes *Miami Nation* problematic, however, is that the analysis places predominant weight on so-called "functional considerations." *See id.* This means that every court applying *Miami Nation* takes it upon itself to evaluate how successful, in practice, the entity has been in achieving its stated goals. Likewise, the court assumes the role of scrutinizing whether the tribe is sufficiently "hands-on" in business operations (as opposed to the tribe taking a less micro-managerial role). The court also takes on the task of determining whether the business arrangement was a financially savvy move. The analysis even allows the court to question the authenticity of the tribe's intentions in creating the entities in the first place. Basically, *Miami Nation* authorizes courts to dissect tribal decision-making at a granular level and grant or withhold immunity based solely on subjective determinations of whether the entity reflects an exercise in prudent business judgment.

The Fourth Circuit's recent decision in *Williams* highlighted the problems associated with *Miami Nation's* "functional" approach. 329 F.3d at 174. *Williams* arose from a consumer class action brought against two online lending entities owned and operated by the Lac Vieux Desert Band of Lake Superior Chippewa Indians. The entities moved to dismiss the complaint on the basis of tribal sovereign immunity, and the district court denied the motion. 329 F. Supp. 3d at 275. Relying heavily on the "modified version" of *Breakthrough* set forth in *Miami Nation*, the district court reasoned that the entities did not provide sufficient evidence that they had fulfilled their stated purpose because the evidence, in the district court's view, was "far too general" as to how revenue from the entities supported the tribal government. *Id.* Similarly, the district court found that the

revenues received by the tribe were (in its view) "a very small part of [the total] revenue." *Id.* at 281. The district court also found that the tribe did not exercise sufficient "control" over the entities, mainly on the basis that the tribe outsourced expertise to non-tribal persons. *See id.* at 278–79. Even the factor relating to the tribe's intent was held to weigh against the entities based entirely on unfounded skepticism of the tribe's motivations in creating the entities. *Id.* at 280

A unanimous panel of the Fourth Circuit reversed. With regard to the factor relating to the purpose of the entity, the panel reasoned that the district court improperly questioned the true motivations of tribal leadership in creating the entities, as the district court based its conclusion on circumstantial evidence that in no way contradicted the tribe's explicitly-stated intention that the purpose of the entities was to improve the tribe's economy and support self-governance. *Williams*, 929 F.3d at 178–79. As to the factor relating to control, the court of appeals explained that the district court erred in finding that the tribe's "outsourcing of certain day-to-day management" should weigh against arm-of-the-tribe status. *Id.* at 183. As to the factor relating the tribe's intent, the *Williams* Court held that the tribe's unequivocal statement of its intention to share its immunity with the entity was all that was necessary to satisfy this factor, as it is improper to question the tribe's motives in this regard. *Id.* at 184. And as to the final factor relating to financial relationship, the panel reasoned that "[w]here, as here, a judgment against the Entities could significantly impact the Tribe's treasury" via a reduction of revenue, the factor weighed in favor of finding the entity immune. *Id.* at 184–85. The policies underlying tribal sovereign immunity likewise weighed in favor of finding immunity, as the court of appeals explained that "policy considerations of tribal self-governance and self-determination counsel against second-

guessing a financial decision of the Tribe where, as here, the evidence indicates that the Tribe's general fund has in fact benefited significantly from the revenue generated by an entity." *Id.* at 181.

Indeed, as recognized by the Fourth Circuit, an overly "functional" approach such as that taken in *Miami Nation* contravenes longstanding principles of tribal sovereignty. After all, inherent in the very nature of sovereignty is the ability of the sovereign to make its own decisions regarding how to best protect the interests and values of its people. *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978) (referring to Congress's policy of "protect[ing] tribal sovereignty from undue interference"). To that end, tribal governments must make their own decisions regarding how to develop their economies and exercise their self-governance powers. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216–17 (1987) (explaining how the operation of tribal gaming enterprises goes hand in hand with "notions of Indian sovereignty"). It would frustrate these goals of tribal self-government for a state or federal court to deny a tribal entity's immunity based on that court's subjective determinations regarding such minutiae as whether it was a good idea for the tribe to enter a particular industry or whether the tribe cut a good deal with its business partners. To that end, this Court has sensibly cautioned that "the inherent sovereignty of Indian tribes bars courts from intervening in many matters of tribal self-government." *Golden Hill Paugussett Tribe of Indians v. Town of Southbury*, 231 Conn. 563, 578 (1995).

For these reasons, instead of *Miami Nation*, the trial court should have applied the more traditional *Breakthrough*-style arm-of-the-tribe test, which would avoid any improper second-guessing regarding so-to-speak "functional" considerations. If this Court holds that

a remand for further proceedings is necessary, the DOB should be directed to apply the test articulated in *Breakthrough*.

III. AS A MATTER OF LAW, CHAIRMAN SHOTTON IS IMMUNE FROM THE DOB'S ACTIONS

The trial Court additionally erred in failing to order the dismissal of Chairman Shotton. While the trial court accurately found that the Tribe—not Chairman Shotton—is the real party in interest, it should have further reaffirmed the Chairman's immunity notwithstanding any arm-of-the-tribe inquiry.

A. The Tribe, Not Chairman Shotton, Is The Real Party In Interest

Based on its position with the trial court, it is likely that the DOB will press its argument that its claims against Chairman Shotton are in his personal capacity; therefore, he may not claim the protection of tribal sovereign immunity. For much the same reasons stated by the trial court, that argument should be rejected. App. at A289. The Tribe is the real party in interest in this litigation—both as to the claims against Great Plains and Clear Creek and as to the claims against Chairman Shotton.

In any action brought against a government official, the applicability of various immunity defenses will often hinge on whether the official or the government is the real party in interest. And in making this determination, "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." *See Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). Opportunities to provide guidance in that determination have not come to the U.S. Supreme Court often, but it has provided some instruction, explaining that "[t]he general rule is that relief sought nominally against an officer is in fact against the

sovereign if the decree would operate against the latter." *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (citation omitted). The analysis thus focuses on "the essential nature and effect of the proceeding," and whether "the action in essence" is one that should be considered as against the sovereign." *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945). Hence, "if the judgment sought 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," then the sovereign, not the official, is the real party in interest. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted; internal quotation marks omitted).

This Court has similarly instructed—in the context of suits against Connecticut employees—that the real-party-in-interest test can be boiled down to analysis of four criteria: "(1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." *Spring v. Constantino*, 168 Conn. 563, 568 (1975).

Additional guidance also comes from the Connecticut Appellate Court's recent decision in *Drabik v. Thomas*, 184 Conn. App. 238, *cert. denied*, 330 Conn. 929 (2018). In that case, a landowner filed a petition for a bill of discovery against two officers of the Mohegan Tribe's Historic Preservation Office as well as the Mohegan Tribal Council. The defendants argued that the case should be dismissed based on tribal sovereign immunity. The Appellate Court agreed, holding that sovereign immunity applied notwithstanding the fact that the petition was nominally against the defendants in their "individual" capacities. In

doing so, the court noted that a plaintiff "may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity." *Id.* at 247. Rather, in order to plead an individual-capacity claim, a plaintiff must allege that the tribal official "acted beyond the scope of his authority to act on behalf of the [t]ribe." *Id.*

Here, under any formulation of the analysis, the Tribe is the real party in interest. Every aspect of the DOB's allegations against Chairman Shotton in all three of its orders pertained to actions that were alleged were taken by Great Plains and Clear Creek in relation to lending services to Connecticut customers. At no time did any of DOB's claims pertain to any of Chairman Shotton's individual actions. Chairman Shotton, as an individual, had nothing to do with those activities. Nor does the bare allegation that the DOB sought a remedy from Chairman Shotton "individually" change the analysis. It is clear that any judgment against Chairman Shotton would operate to control the activities of the Tribe. Not only would any monetary judgment obviously come from the Tribe's treasury, but the judgment would effectively bind the lending activities of Great Plains and Clear Creek, and in turn, the Tribe—remedies that are entirely outside of and unrelated to Chairman Shotton's personal estate.

For these reasons, the trial court was clearly correct in stating that "the injunctive remedies sought by the [C]ommissioner make it clear that the [T]ribe, through its entities Great Plains and Clear Creek, is the real party in interest . . . ." App. at A289. The tribal parties claim error, however, in the trial court's failure to order Chairman Shotton dismissed from any further proceedings.[9] *See infra*.

---

[9] Even assuming *arguendo* that the claims against the Chairman were properly considered personal-capacity claims, the Chairman would be immune under the doctrine of qualified immunity. Apart from the doctrine of *sovereign* immunity, the doctrine of

B. The Claims Against Chairman Shotton Should Be Dismissed Irrespective Of Great Plains's And Clear Creek's Arm-Of-The-Tribe Status

Although the trial court was correct to conclude that the Tribe, not Chairman Shotton, was the real party in interest, the court nonetheless wrongly concluded that Chairman Shotton's immunity hinged on whether Great Plains and Clear Creek are arms of the Tribe. App. at A289. To the contrary, because Chairman Shotton was effectively sued for being Chairman of the Tribe—not an officer of Great Plains and Clear Creek—he must be dismissed irrespective of the arm-of-the-tribe inquiry.

Under any practical and realistic interpretation of this action, Chairman Shotton was not sued for being the Secretary and Treasurer of Great Plains and Clear Creek. The DOB, in substance, brought this action against the Chairman for serving as the Tribe's elected leader. Consider for example the original administrative order giving rise to this case—styled "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

---

qualified immunity protects government employees and officials against personal liability stemming from actions taken in the course of their governmental duties. The doctrine of qualified immunity "springs from the same root considerations that generated the doctrine of sovereign immunity," such as the need to maintain effective government operations. *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974).

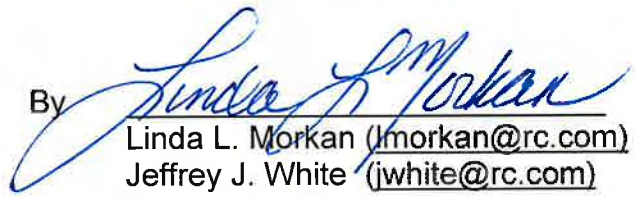
Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted; internal quotation marks omitted). In this case, Chairman Shotton did not commit, and is not alleged to have committed, any action that violates "clearly established statutory or constitutional rights." To be sure, even if the actions of Great Plains and Clear Creek could be attributed to Chairman Shotton personally, there is no federal statute or consensus in case law prohibiting the offering of consumer loans over the internet on terms pursuant to tribal law. Therefore, it cannot be considered "clearly established" that such conduct violates the law, and Chairman Shotton should therefore has qualified immunity against individual-capacity actions stemming from Great Plains and Clear Creek's business activity.

Right to Hearing." App. at A60-80. In that document, the DOB acknowledged that "[a]t all relevant times hereto, Shotton served as Chairman of both the Otoe-Missouria Tribe of Indians ("Tribe") and its Tribal Council, the Tribe's governing body." *Id.* at A63 ¶ 3. Yet, the DOB's allegations include essentially nothing about actions that Chairman Shotton might have taken in his capacity as Secretary and Treasurer of Great Plains and Clear Creek, only vaguely stating that he "participat[ed]" in violations of Connecticut banking laws without any detail whatsoever. App. at A63-74. Seeking to perhaps make an example out of the Tribe and its lending operations, the DOB nonetheless included Chairman Shotton as a defendant. In fact, even though it was aware that at least one other individual held a higher-ranking position with Great Plains and Clear Creek (the affiant, Ted Grant), the DOB still chose to repeatedly name Chairman Shotton as a respondent.

In sum, regardless of the outcome of this Court's application of the arm of the tribe inquiry, it will not change the fact that Chairman Shotton is undeniably Chairman of the Tribe. Because the DOB's claims, in substance, pertain directly to his status as Tribal Chairman, the claims against him are barred and the trial court erred in failing to reach this conclusion.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the reasons stated herein, it is respectfully submitted that this Court vacate that portion of the trial court's order which remands this matter to the DOB for further proceedings and direct the trial court to enter judgment in favor of the Tribal Parties. In the alternative, if a remand is necessary, the DOB should be ordered to consider the Tribal Parties' arm-of-the-tribe arguments applying the multi-factor *Breakthrough* test and should dismiss Chairman Shotton from further proceedings on remand.

By 

Linda L. Morkan (lmorkan@rc.com)
Jeffrey J. White (jwhite@rc.com)
ROBINSON & COLE LLP
280 Trumbull Street
Hartford, CT 06103-3597
T: 860.275.8200
F: 860.275.8299
Juris No.: 050604

Robert A. Rosette (rosette@rosettelaw.com)
Saba Bazzazieh (sbazzazieh@rosettelaw.com)
ROSETTE, LLP
1100 H Street, NW, Suite 400
Washington, DC 20005
Tel No.: (202) 652-0579
Fax No.: (202) 525-5261

CERTIFICATION

This is to certify that the foregoing Brief and separate Appendices comply with all provisions of Practice Book § 67-2, and that on this the 18th day of October 2019, they were mailed and electronically transmitted to the following:

Clare Kindall
(Clare.Kindall@ ct.gov)
John Langmaid
(John.Langmaid@ct.gov)
Joseph Chambers
(Joseph.Chambers@ct.gov)
Robert J. Deichert
(Robert.Deichert@ct.gov)
Office of the Attorney General
State of Connecticut
55 Elm Street
PO Box 120
Hartford, CT 06141-1020
T: 860.808.5270
F: 860.772.1709
Juris No. 434418

Hon. Joseph M. Shortall, Judge Trial Referee
Judicial District of New Britain
20 Franklin Square
New Britain, CT 06051
(mail only)

This is further to certify pursuant to § 67-2(i) that the Brief and Appendices are true copies of the materials submitted electronically to the Court on this day, and that they do not contain any information prohibited from disclosure by rule, statute, court order, or case law.

Linda L. Morkan