SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20340

GREAT PLAINS LENDING LLC, CLEAR CREEK LENDING AND JOHN R. SHOTTON,
PLAINTIFFS-APPELLANTS/CROSS-APPELLEES,

v.

STATE OF CONNECTICUT, DEPARTMENT OF BANKING, JORGE PEREZ, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF BANKING,
DEFENDANTS-APPELLEES/CROSS-APPELLANTS.

BRIEF OF THE DEFENDANTS-APPELLEES ON THE APPEAL AND OF THE DEFENDANTS-CROSS APPELLANTS ON THE CROSS APPEAL WITH SEPARATE APPENDIX

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TABLE OF CONTENTS

COUNTERSTATEMENT OF ISSUES

TABLE OF AUTHORITIES

CASES PAGE

STATUTES AND REGULATIONS:

AGENCY PROCEEDINGS:

OTHER AUTHORITIES:

INTRODUCTION

Abusive short-term lending schemes targeting the financially desperate with usurious loans are a serious problem in Connecticut, and nationwide. To combat the problem, Connecticut has enacted laws that restrict such schemes and authorize the Banking Commissioner ("Commissioner") to issue cease and desist orders, impose civil penalties, and order other remedies on unlicensed lenders that offer or make certain types of loans with annual percentage rates ("APR") higher than 12% to Connecticut residents. Through an investigation conducted by the Department of Banking ("Department"), the Commissioner discovered that Great Plains Lending, LLC ("Great Plains") and Clear Creek Lending ("Clear Creek") were unlicensed lenders that had offered or made loans to Connecticut residents at usurious rates ranging from 199.44% to 398.20%, and that John R. Shotton participated in the scheme as corporate officer of Great Plains (collectively the "Lenders"). In an attempt to evade liability for their egregious violations of Connecticut law, Lenders have asserted that they are entitled to share the tribal sovereign immunity of the Otoe-Missouria Tribe of Indians ("Tribe").

Although federally-recognized tribes enjoy common-law immunity from suit that extends even to suits arising from a tribe's commercial activities off Indian lands that violate state laws, "a tribe has no legitimate interest in selling an opportunity to evade state law." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Serv.*, 769 F.3d 105, 114 (2d Cir. 2014) (affirming denial of tribe's and tribal lenders' motion for preliminary injunction against state regulator's enforcement of usury laws). Accordingly, persons or entities seeking to shield the consequences of their illegal actions under the cloak of tribal sovereign immunity bear the burden of establishing that they are entitled to share such immunity by proving that they are so closely linked to the tribe that they are an extension or "arm" of it. Moreover,

such persons and entities (and even tribes themselves) may not disregard applicable procedural rules of the foreign tribunals in which they appear because "tribal immunity does not extend to protection from the normal processes of the state court in which [even an undisputedly sovereign tribe] has filed suit." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986).

The Lenders essentially seek a rule where they merely have to assert that they are associated with a tribe and the inquiry stops there. No court has so held. As the trial court properly held below, the Lenders bear the burden of establishing tribal sovereign immunity applies to their usury activities in Connecticut.

The exact parameters of determining "arm-of-the-tribe" status is an issue of first impression for this Court. The Department asks this Court to affirm the Department's functional, follow-the-money, legal standard to such inquiries. The Department contends that choosing the appropriate legal standard was a policy matter for the agency, and that the Department applied the appropriate legal standard. Although the Department proffers that different aspects of the legal standard should be emphasized, the trial court properly applied a functional test in its determination as to whether the Lenders were acting as an arm-of-the-tribe. However, the Department's legal standard, and its application of that standard to the facts in this case, should have been affirmed by the trial court.

The Lenders had insisted that their briefing and affidavit were sufficient to establish tribal sovereign immunity in their first administrative appeal in this matter, *Great Plains Lending, LLC v. Conn. Dep't of Banking*, HHB-cv15-6028096-S ("*Great Plains I*"). On remand, the *Great Plains I* court required the Department to make a determination based solely on the original record, without the benefit of an evidentiary hearing. Thus, on appeal

after the remand, the trial court erred by ordering the Department to now hold an evidentiary hearing, even though the Lenders failed to establish tribal sovereign immunity in the first round.

Finally, the trial court held that the claims against Mr. Shotton rest entirely upon whether the Lenders are determined to be arms-of-the-tribe. A289. The Department, however, brought action against Mr. Shotton in his personal capacity as a corporate officer of Great Plains. Moreover, claims for prospective injunctive relief against individuals, including tribal officials, are not barred by tribal sovereign immunity.

COUNTERSTATEMENT OF FACTS

In October 2014, the Department sent Lenders notice that Lenders were violating Connecticut law and ordered them to stop. Plaintiff's Appendix ("Pl.") A60-80. Consistent with its regulations and Ch. 54, Conn. Gen. Stat. § 4-166, et seq., the Uniform Administrative Procedures Act ("UAPA"), the Department also provided Lenders a routine warning that unless each timely requested and appeared for a hearing on any issue of fact or law relevant to the Department's allegations, such allegations would be deemed admitted and a final order would issue, *inter alia*, permanently enjoining Lenders from violating Connecticut law and imposing civil penalties. Pl. A78, Pl. A79, Pl. A80.

In their Motion to Dismiss, Lenders asserted that the Tribe's sovereign immunity barred the Department from taking any action in response to Lenders' unlawful activity because the Lender entities claimed to be "wholly owned and operated entities" of the Tribe and Mr. Shotton was immune as a tribal official acting in his official tribal capacity. Pl. A81-82. Lenders solely relied upon an accompanying memorandum of law (Pl. A86-104) and an affidavit (Pl. A105-08) with exhibits (Pl. A109-84) to provide all relevant argument and evidence they believed was necessary to summarily determine that Lenders were shielded

by the Tribe's sovereign immunity from suit.[1] An Objection from the Department's prosecuting attorney and a Reply from Lenders followed. Pl. A185-94; Pl. A195-207.

On January 6, 2015, the Commissioner ruled on Lenders' Motion to Dismiss. The Commissioner held that (1) Connecticut law applied to Lenders' conduct, Pl. A211-14; (2) the Commissioner's actions against Lenders were "purely administrative and outside of any judicial process" and therefore did not implicate any claimed tribal sovereign immunity because such immunity was "immunity from suit," Pl. A214-15; and (3) because the Commissioner's actions were purely administrative and therefore would not implicate tribal sovereign immunity even if Lenders were entitled to such immunity, the Commissioner "need not address" whether Lenders were arms of the Tribe. Pl. A209 n.2. In light of that ruling, the Commissioner also issued an order against Lenders due to their failure to appear and request a hearing as required under the Department's regulations and the UAPA. Pl. A217-23.

Lenders then brought an administrative appeal. *Great Plains Lending, LLC v. Conn. Dep't of Banking*, HHB-CV15-6028096-S, Dkt. 136.00 (Conn. Super. Ct. Nov. 23, 2015) (as amended by Dkt. Entry 139.00, Aug 31, 2016) ("*Great Plains I*"). Defendant's Appendix ("D.") A369-86; D. A430.[2] Notably, Lenders did not appeal the Commissioner's holding "that

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[1] In both their memorandum of law (Pl. A94-95) and again in their brief to this Court, Lenders have presented legal background on "Tribal Sovereignty and Sovereign Immunity" (Pl. Br. 4-5). The Department has never asserted jurisdiction over the Tribe, and this matter does not implicate the Tribe's sovereignty unless and until Lenders actually are found to be arms of the Tribe. Moreover, the Department has never claimed the Tribe's sovereign immunity was waived by the Tribe or abrogated by Congress. In addition, Lenders' purported "facts" regarding "The Tribe's Wholly-Owned and Operated Lending Entities" (Pl. Br. 5-7) merely cite to Lenders' memorandum of law and affidavit in support of their motion to dismiss. Pl. A105-84.

[2] The trial court properly took judicial notice of the *Great Plains I* record. Pl. A269 n.1. See *Shirley P. v. Norman P.*, 329 Conn. 648, 660 (2018).

Connecticut substantive law applied to" Lenders' activities. D. A13 ¶33.[3] Rather, Lenders focused only on their claimed tribal sovereign immunity—an issue "separate and apart"—from whether Lenders' actions violated Connecticut substantive law. D. A13 ¶33.[4]

On November 23, 2015, the *Great Plains I* court issued its ruling on the merits. D. A369-86. The court (Schuman, J.) concluded that the Commissioner's holding that the Department's purely administrative actions did not implicate tribal sovereign immunity *per se*—an issue on which "there is no appellate case precisely on point"—was reasonable but erroneous. D. A374-79; D. A384.

The court also declined the Department's request that the court affirm the Commissioner's decision on the "alternative ground" that "based on the existing record" the entity Lenders "are not 'arms of the tribe' and should not receive the benefit of immunity." D. A380. The court reasoned that it was "certainly tempting to apply" the established rule that an "appellate court may affirm when the trial court reaches the correct result, albeit for wrong reasons" where, as in *Great Plains I*, "the situation involve[ed] appellate review of an administrative decision." D. A382-84.

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[3] *See also Defendants' Merits Brief in Great Plains I*, D. A233-34 (noting that Lenders acknowledged that the only issue before the court was tribal sovereign immunity and that they had waived any ability to challenge the Department's conclusion that Connecticut substantive law applied to Lenders' activities and that Lenders violated it); *Plaintiff's Reply in Great Plains I*, D. A303 (reiterating the distinction between the applicability of Connecticut law and Lenders' claimed immunity, not disputing the Department's argument that Lenders waived any challenge to the applicability of Connecticut law and not making any argument that Connecticut law was inapplicable).

[4] As the Department noted at the time, Lenders' decision not to challenge the applicability of Connecticut substantive law "was presumably a tactical decision based on Plaintiffs' inability to establish that Connecticut law does not apply to Plaintiffs' loans." D. A233 n.4. The Second Circuit had recently affirmed a decision denying Lenders a preliminary injunction against New York's attempts to combat Plaintiffs' unlawful loans to New York residents based on an argument that New York lacked regulatory authority. *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 359-61 (S.D.N.Y. 2013), *aff'd*, 769 F.3d 105 (2d Cir. 2014).

However, the court—finding "no Connecticut appellate authority precisely on point in a UAPA case"—found "more persuasive[ ]" Lenders' reliance on "the federal rule, stemming from the United States Supreme Court's decision in *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80 . . . (1943)" ("*Chenery*"). D. A380; D. A381. Under *Chenery*, the ordinary rule that an appellate court may affirm on any ground that appears in the record does not apply to an administrative decision when the administrative "order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made." D. A383. Under those circumstances, "a judicial judgment cannot be made to do service for an administrative judgment" because the agency—here, the Department—must be permitted to be allowed to exercise its judgment. D. A383.

The trial court held "[t]his rationale fully applies here." D. A383. "The legislature and the department have entrusted the commissioner with the responsibility to decide whether he has jurisdiction to take enforcement action against an Indian tribe and entities purporting to be arms of the tribe and allegedly violating state banking law." *Id.* Under the *Chenery* argument advanced by Lenders and adopted by the court, the decision of how to respond to Lenders' claims to be arms of the Tribe "requires the commissioner to make a 'determination of policy or judgment'" that is the Commissioner's alone to make; "[t]he court cannot make that administrative determination for him." D. A384. Accordingly, the court did not order the Commissioner to apply any particular procedure, factors or test on remand, but referenced *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010) ("*Cash Advance*") and *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 25 N.E.3d 928, 2 N.Y. Supp.3d 15 (NY 2014) ("*Sue/Perior*") as

examples of cases in which courts have applied multi-factor balancing tests when determining whether an entity is an arm of a tribe. D. A384.

On remand, the Commissioner sent Lenders a notice on May 9, 2016 that detailed the Department's allegations, alerted Lenders to the Department's preliminary reliance upon the *Sue/Perior* legal standard, and provided an analysis of the evidence in the record and a preliminary rejection of Lenders' jurisdictional fact claims raised by their motion to dismiss. D. A387-416 ("May 2016 Notice"). The May 2016 Notice also notified Lenders that they had a right to a hearing (D. A406-07) and alerted Lenders that unless they appeared for hearing on any issue of fact or law they wished to contest relevant to the Department's allegations and proposed findings of fact and law, the Commissioner would deem them to have admitted all such allegations and findings and would issue a final order against them, *inter alia*, permanently enjoining violations of Connecticut law and imposing civil penalties.[5] D. A409; D A.411-16.

Rather than avail themselves of an opportunity to participate in a hearing and to try to convince the Commissioner that he should not rely on *Sue/Perior* and instead should adopt a different test, Lenders moved the *Great Plains I* court to order the Commissioner to make a determination based on the existing administrative record. D. A417-29. The Department objected, arguing that Lenders' claims required an opportunity for a hearing under UAPA and Departmental regulations. D. A431-40. Notwithstanding the Department's

[5] Lenders have mischaracterized what happened following the initial *Great Plains I* decision of November 2015. Pl. Br. 9. The May 2016 Notice was not "a second administrative order" (*id.*), but rather a Notice of Proposed Findings of Facts, Proposed Conclusions of Law and Notice of Hearing. D. A387-416. It offered Lenders the opportunity, pursuant to the Department's regulations and the UAPA, to participate in a hearing where they could have attempted to meet their burden of establishing that they are entitled to tribal sovereign immunity.

arguments, the Court revised its earlier decision in accord with Lenders' motion, and remanded the case for the Commissioner "to determine, *based on the record that existed at the time*, 1) whether Great Plains and Clear Creek are arms of the Tribe, 2) whether Shotton has tribal sovereign immunity from financial penalties that the commissioner seeks to impose, and 3) whether Shotton has tribal immunity from the commissioner's request for prospective injunctive relief against future violations of the state's usury and banking laws." (emphasis added.) D. A430.

On June 14, 2017, the Commissioner issued a Restated Order and Ruling on Motion to Dismiss ("Restated Order"). Pl. A224-44. In accord with the *Great Plains I* remand, the Restated Order reiterated that the issue of whether Lenders are arms of a tribe is a matter of policy and judgment subject to administrative determination. The Commissioner further explained that under the UAPA and Departmental regulations, to contest any allegation, Lenders were required to appear for a hearing before the Department. Pl. A231. Specifically, the Commissioner noted the critical role a hearing provides in resolving disputes over the Department's allegations; both the respondents in a contested case *and* the agency have an opportunity for argument and to offer and challenge evidence. *Id.* Allegations may be deemed admitted if a respondent fails to appear for a hearing. *Id.* The Commissioner concluded that Lenders' "submission of a Motion to Dismiss does not, and cannot, waive the requirement to appear at a UAPA hearing to raise any issues of fact or law, including tribal sovereign immunity." *Id.*

Assuming *arguendo* that a jurisdictional challenge could be made without participation in a hearing, the Commissioner also analyzed "whether, based on the administrative record as it existed . . . [Lenders] are 'arms of the [T]ribe' entitled to tribal

sovereign immunity and whether such immunity also protects . . . Shotton." Pl. A231-32. The Commissioner made factual findings and found that on "the limited and inadequate record before the Department fails to show that either Great Plains or Clear Creek is an arm of the Tribe." Pl. A232. The Commissioner further found that "Shotton's involvement is not based on actions within the scope of his authority [as a tribal official]." *Id.* Thus, the Commissioner held that "as a matter of policy and judgment," neither Great Plains nor Clear Creek are arms of the Tribe and tribal sovereign immunity does not protect Shotton from the Department's action. Pl. A232-40, Pl. A243.

Even considering "the unsubstantiated documents [Lenders] unilaterally submitted," the Commissioner concluded that Great Plains and Clear Creek had failed to meet their burden to prove that they are arms of the Tribe. Pl. A243. "Clear Creek simply did not submit any relevant evidence and Great Plains failed to demonstrate that its relationship with the Tribe is meaningful enough to be considered an arm of the tribe." Pl. A237, A243.

As for Shotton, the Commissioner found "as a matter of policy and judgment, that Shotton does not have tribal sovereign immunity from either the [civil] penalties or injunctive relief." *Id.* The Commissioner determined that Shotton, a corporate officer of Great Plains, was not entitled to such immunity because (i) Great Plains was not an arm of the Tribe, (ii) Shotton is the real party in interest as the Department took action against him in his personal capacity as a corporate officer and sought to impose individual liability on him, and (iii) tribal sovereign immunity does not bar injunctive relief against individuals, including tribal officers, responsible for unlawful conduct. Pl. A240-43.

Lenders again brought an administrative appeal. Pl. A6-54. Prior to briefing and argument on the merits, the Department moved to dismiss the appeal, arguing that the trial

court lacked jurisdiction over the appeal because Lenders had failed to exhaust their administrative remedies by appearing for a statutorily required hearing on their claims. Pl. A55-56. The trial court (Shortall, J.), held that Lenders' filing of a motion to dismiss with the Department provided the Commissioner with "a full opportunity to consider the question" of whether Lenders were arms of the Tribe and thus Lenders' failure to appear for a hearing was not a failure to exhaust their administrative remedy. Pl. A57.

In its final Memorandum of Decision, the trial court correctly held that Lenders bore the burden of proof on their claim to be arms of the Tribe. *Great Plains Lending, LLC v. Conn. Dep't of Banking*, HHB-CV17-6038913-S, 2018 WL 6622189, (Conn. Super. Ct. Nov. 19, 2018) ("*Great Plains II*"). Pl. A280. And, the trial court appropriately took judicial notice of *Great Plains I*. Pl. A269. However, the trial court, puzzlingly, faulted the Commissioner for failing to conduct a hearing on Lenders' Motion to Dismiss (A275) even though the *Great Plains I* court—at Lenders' behest—had held that the determination of whether Lenders were immune must be based on the record that existed in 2015. D. A430. Lenders have made clear, both below and on appeal, that they have no wish for a hearing to bolster their claimed entitlement to be protected by the Tribe's sovereign immunity.

The trial court also erred in other respects, by: (1) ignoring Lenders' failure to object to the Commissioner's noticed intention to apply the multi-factor balancing test used in *Sue/Perior* for evaluating an entity's claim to be an arm of a tribe; (2) holding that the Commissioner's reliance on *Sue/Perior* was an error of law and, *sua sponte*, holding that a California Supreme Court decision, *People v. Miami Nation Enters.*, 386 P.3d 357 (2016) ("*Miami Nation*") provides the correct standard despite the *Great Plains I* court's holding that the *Chenery* doctrine applied and that the determination of the proper test is a policy

judgment committed to the Commissioner, Pl. A288-89; (3) holding that the real party in interest as to all the Department's claims against Shotton was Great Plains, and thus the viability of such claims depended upon the ultimate determination of whether it was an arm of the Tribe despite that alternative remedies are available to the Department. Pl. A288-89. The trial court correctly concluded that Lenders bore the burden of establishing that they are entitled to tribal sovereign immunity as arms of the Tribe and that they failed to meet that burden because the evidence in the record did not illuminate the functional relationship between the entity Lenders and the Tribe. Pl. A289.

The *Great Plains II* court remanded to the Commissioner for application of the *Miami Nation* multi-factor balancing test to Lenders' claims following submission of evidence by the parties and further administrative proceedings. Pl. A296. This appeal and cross-appeal followed.[6]

STANDARD OF REVIEW

The standard of review of an agency's final decision in a contested case is long settled.

> Judicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act, General Statutes § 4–166 et seq. (UAPA) and the scope of that review is very restricted. With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. Judicial review of the conclusions of law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct

[6] Pursuant to a proposed consolidated class action settlement, Great Plains has agreed to "wind up its business and dissolve." *Gibbs v. Plain Green, LLC*, No. 3:17-cv-00495-MHL, ECF No. 135 (Pl.'s Memo in Supp.) (E.D.Va. Nov. 20, 2019) (D. A467). This Court can take judicial notice of the filing. *Montanaro v. Gorelick*, 73 Conn. App. 319, 326 n.12 (2002) (taking judicial notice of federal Bankruptcy Court proceedings, citing *McCarthy v. Warden*, 213 Conn. 289, 293 (1989), cert. denied, 496 U.S. 939 (1990)).

> application of the law to the facts found and could reasonably and logically follow from such facts.

Goldstar Med. Servs., Inc. v. Dep't of Soc. Servs., 288 Conn. 790, 800 (2008) (citations omitted; internal quotation marks omitted). "This court also has held, however, that when a state agency's determination of a question of law has not previously been subject to judicial scrutiny the agency is not entitled to special deference." *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669, 678–79 (2014). This Court's review of questions of law is plenary.

ARGUMENT

Rather than take the opportunity to attempt to meet their burden by presenting evidence on the jurisdictional issue of whether they are entitled to sovereign immunity as arms of the tribe (and afford the Department the same opportunity), Lenders instead moved for and obtained a revised remand order from the *Great Plains I* court, which compelled the Commissioner to make a determination on the basis of a closed administrative record.

Lenders' actions to secure an order precluding a hearing following the May 2016 Notice left the administrative record without evidence of the *functional arrangements* between Lenders and the Tribe. As the trial court correctly concluded, Lenders, not the Department, bore the burden of proof on their claim to be an arm of the Tribe. The trial court also correctly concluded that proving arm-of-the-tribe status requires evidence of the functional relationship between Lenders and the Tribe. In addition, the trial court correctly found Lenders' had failed to meet their burden based on the existing administrative record. Accordingly, the trial court should have affirmed the Department's decision and should not have remanded for further administrative proceedings.

Moreover, the trial court erred in rejecting the Commissioner's application of the multi-factor balancing test articulated in *Sue/Perior*. Specifically, the trial court should not have considered Lenders' unpreserved arguments regarding which multi-factor balancing test should have been applied and failed to give weight to the factual and discretionary determinations underlying the Commissioner's application of the *Sue/Perior* factors. The trial court also erred in concluding that the Commissioner's application of the *Sue/Perior* factors was an error of law, because the Commissioner's overall analysis was substantially similar to that of the trial court's preferred approach as articulated in *Miami Nation*. In addition, *Sue/Perior's* focus on whether the tribe is the real party in interest as part of the analysis of the financial relationship factor is consistent with the United States Supreme Court's recent holding in *Lewis v. Clarke*, 137 S.Ct. 1285 (2017) and with how federal courts analyze whether an entity is an arm-of-the-state when determining 11th Amendment immunity.

As to Shotton, the trial court erred in concluding that the viability of the Orders against him depended solely on whether Great Plains is an arm of the Tribe. Tribal sovereign immunity does not bar alternative remedies in the form of civil penalties against Shotton individually as the real party in interest or prospective injunctive relief against him as a tribal official in order to prevent future violations of state law.

I. THE TRIAL COURT CORRECTLY HELD THAT THE LENDERS BEAR THE BURDEN OF PROVING THAT THEY ARE ENTITLED TO TRIBAL SOVEREIGN IMMUNITY AS AN ARM OF A TRIBE.

The trial court correctly held that "[t]he burden of proving by a preponderance of the evidence that they are entitled to tribal sovereign immunity, i.e., the risk of non-persuasion"

is on Lenders. Pl. A280. Tribal sovereign immunity is a matter of federal common law,[7] and the trial court's conclusion is consistent with the approach the majority of federal courts have taken on this issue. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176–77 (4th Cir. 2019) ("*Big Picture Loans*").[8] Those courts have recognized the common-sense principle that "[t]he issue of whether an entity is an arm of the tribe may rest on nuances in the entity's ownership and control structure, corporate purpose, and relationship with the tribal government. . . . Knowledge of these facts is much more likely to reside with the party asserting immunity. . . . Defendants have the burden of establishing that they are entitled to sovereign immunity." *Golden Feather* at *4 (D. A500-01).

The federal courts' allocation of the burden where entities claim to be protected by tribal sovereign immunity is consistent with the approach that federal courts take when determining whether an entity may validly claim the protection of a state's Eleventh Amendment immunity or sovereign immunity as an arm of the state. For example, the Second Circuit found that circuit courts having addressed the issue "unanimously concluded that the entity asserting Eleventh Amendment immunity has the burden to show

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[7] *See, e.g.*, *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998).

[8] *See also Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F.Supp.2d 442, 465 (E.D.N.Y. 2009) ("Poospatuck Smoke Shop must establish, by a preponderance of evidence, that it is an arm of the Unkechuage, and thus entitled to immunity. Once the defendants' burdens are met on these preliminary issues, the plaintiff bears the burden to establish jurisdiction by showing either waiver or abrogation of immunity"); *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966 (CBA), 2009 WL 705815, at *4 (E.D.N.Y., March 16, 2009) (D. A500-01) ("*Golden Feather*"); *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1188 (10th Cir. 2010) ("denial of Defendants' motion to dismiss consisted of documents introduced by the Authority and the Casino at the evidentiary hearing (with an admissibility stipulation from BMG), testimony by the tribal chairperson, Dustin Graham, and the stipulated agreed-upon facts filed by the parties"); *Dahlstrom v. Sauk-Suiattle Indian Tribe*, 2017 WL 1064399, at *3 (W.D. Wash. Mar. 21, 2017) (D. A511-12) (denying defendant's motion to dismiss because they "have not met their burden of establishing that CNM is an arm of the tribe").

that it is entitled to immunity", and joined its sister courts in that conclusion. *Woods v. Rondout Valley Cent. Sch. Dist. Bd of Educ.*, 466 F.3d 232, 237-39 (2d Cir. 2006) (quotation marks omitted) (citing cases). Therefore, the trial court's conclusion that Lenders bore the burden to establish their claimed arm of the Tribe status was correct.

Tellingly, Lenders' argument on this issue is notably light on federal authority even though tribal sovereign immunity is a federal issue. Pl. Br. 15-19. Lenders argue in a footnote that the California Supreme Court's decision in *Miami Nation* "mysteriously failed to acknowledge the Second Circuit's controlling decision on the topic: *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76 (2d Cir. 2001)" when the California Supreme Court relied on the Second Circuit's later decision in *Woods* in holding that an entity claiming arm of the tribe status bears the burden to establish it. Pl. Br. 17 n.7. But the California Supreme Court's reliance on *Woods* rather than *Garcia* or similar cases is far from "mysterious." The California Supreme Court simply recognized that in *Garcia* the plaintiff conceded that the tribal entity, as an "agency" of the tribe "enjoy[ed] the same presumption of immunity" as the tribe. *Garcia*, 268 F.3d at 85. As a result, *Garcia* did not involve an arm-of-the-tribe analysis at all.[9]

Lenders do not cite a single federal case with a holding that contradicts the trial court's holding that Lenders bore the burden to show that they were arms of the Tribe.[10]

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[9] The same is true of *Chayoon v. Chao*, 355 F.3d 141, 142 (2d Cir. 2004).

[10] *See Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200 (11th Cir. 2012) (case involved a claim directly against a tribe, there was no arm-of-the-tribe analysis); *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015) (holding that tribal police chief, tribal gaming office inspector, and general manager of casino were not entitled to invoke the tribe's sovereign immunity from liability in their individual capacities, with no arm of the tribe analysis); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that an on-reservation College "serves as an arm of the tribe and not as a mere business and is thus entitled to tribal sovereign immunity" based on materials

The trial court's holding was consistent with the holdings of federal appellate courts that have addressed the issue, as well as courts within the Second Circuit that have done so. Lenders have offered no valid basis for this Court to reach the opposite conclusion.

That is particularly true given that—as the trial court recognized—this Court (like the federal appellate courts to address the issue) has held that an entity claiming arm-of-the-state status has the burden to show that it warrants that entitlement. A280 (citing *Town of Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 265, 279 (2015) ("*SecureCare*")). This Court's analysis in *SecureCare* is consistent with that of the federal courts addressing the issue and highlights why those courts are correct to put the burden on the entity claiming immunity. Specifically, this Court found that "sovereign immunity is 'strong medicine' that should not be granted lightly to private actors" because it *inter alia* "could shield them from" suits brought by individuals "harmed by their negligent acts." *SecureCare,* 315 Conn. at 283. Given those consequences, this Court "emphasize[d] that the extension of a state's immunity to a private, for profit entity should be a rare occurrence." *Id.* at 292. In *SecureCare*, this Court reversed the trial court's grant of arm-of-the-state status to an entity even though "the parties submitted a significant amount of evidence" and that evidence showed both that the entity was "performing a public function" and that "the financial impact of an adverse judgment would fall partly, and significantly, on the state, which is a particularly weighty consideration" in the arm-of-the-state analysis. *Id.* at 278, 292.

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provided by the College with no discussion of who bore the burden where the plaintiff apparently did not challenge the College's arm-of-the-tribe status); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1306 (D.N.M. 2009) (holding that an analysis similar to arm of the tribe was "not relevant" because the entity claiming immunity was incorporated under a federal law that expressly allowed for tribal status, in contrast to entities merely incorporated under "tribal law"—like Lenders—which do not "automatically" have tribal status).

Lenders seek to distinguish this Court's clear holding that it "was the defendants' burden to show that they were entitled to sovereign immunity" as "an 'arm of the state,'" *SecureCare,* 315 Conn. at 279—on which the trial court correctly relied—as a "half-sentence of *dicta*." Pl. Br. 16. Lenders' argument lacks merit. This Court began its analysis of the arm-of-the-state issue by stating that:

> The plaintiff claims first that the trial court improperly concluded that the defendants were an "arm of the state" and, therefore, shielded from suit by the defense of sovereign immunity. It contends that the court, on the evidentiary record before it, improperly found that the multifactor test set forth by this court in *Gordon, ...*, for establishing if an entity is an "arm of the state" had been satisfied, as [it] was the defendants' burden to show that they were entitled to sovereign immunity.

Id., citing *Gordon v. H.N.S. Management Co.,* 272 Conn. 81, 98–100 (2004). This Court held that it "agree[d] with the plaintiff." *Id.* This Court's identification of who bore the burden on the issue of whether defendants were arms of the state was necessary to its holding that the plaintiff was correct that the defendants did not meet their burden.

The federal decisions above should be dispositive, and this Court's decisions on arm-of-the-state buttresses them. Lenders' cited cases do not support their arguments. In *Cash Advance*, 242 P.3d at 1114-15 (cited at Pl. Br. 17), the court "declined to address the burden of production" and instead held that the tribe that owned the lending businesses "explicitly and unequivocally waived their immunity" with respect to information relevant to any entitlement to immunity because "the tribal entities voluntarily provided the state with some information relevant to the immunity determination." The lending businesses were required to provide evidence on the functional relationship with the tribal owner.[11]

[11] As in *Cash Advance*, Lenders voluntarily provided the Department with some relevant information. Pl. A105-84. Lenders waived immunity on functional relationship evidence relevant to their claims, and could be required to produce evidence.

Any persuasive value *Sungold Gaming USA v. United Nation of Chippewa*, 2002 WL 522886 (Mich. App. 2002) (Pl. A362-64, cited at Pl. Br. 18) has for Lenders' argument on burden is weak and overwhelmed by all the other cases cited. First, the tribal immunity issue received only summary treatment by the court. *See Sungold* at *2 (Pl. A363). Second, the *Sungold* court cites the nonprofit tribal corporation's articles of incorporation. *Id.* Presumably, those articles of incorporation were provided by the defendant, not the plaintiff, indicating the defendant had the burden on the identity issue. Finally, there is no basis to presume that the defendant did not provide additional evidence on other elements of an arm of the tribe analysis. In fact, in *Sungold* the court cited *Gavle v. Little Six, Inc.*, 555 N.W.2d. 284, 294 (Minn. 1996), a case that the parties briefed below and which describes a classic multi-factor balancing test not substantively different from that in *Breakthrough*, *Miami Nation*, or *Sue/Perior. Id.* In *Gavle*, although the court did not expressly address burden, it cited to the defendant's articles of incorporation. *Gavle*, *supra*, 555 N.W.2d. at 287, 294. Thus, *Gavle* is further support for the conclusion that all courts reach; the defendant has the burden to demonstrate that it is an arm, whatever that demonstration demands.

II. THE TRIAL COURT CORRECTLY HELD THAT EVIDENCE OF FUNCTIONAL ARRANGEMENTS IS NECESSARY TO DETERMINE WHETHER AN ENTITY IS AN ARM OF A TRIBE.

The trial court correctly held that determining whether an entity is an arm of a tribe requires "a functional analysis of the relationship between a tribe and a commercial entity it has created as opposed to one focused solely on the formal arrangements. . . ." Pl. A295. The trial court's holding is in accord with *Miami Nation*, which held that "[t]he ultimate purpose of the inquiry [into whether an entity is an arm of a tribe] is to determine whether

the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe." 386 P.3d at 375 (citation and internal quotation marks omitted) (emphasis in original). In so holding, the California Supreme Court explained that:

> Business entities that claim arm-of-the-tribe immunity have no inherent immunity of their own. Instead, they enjoy immunity only to the extent the immunity of the tribe, which does have inherent immunity, is extended to them. In view of that fact, it is possible to imagine situations in which a tribal entity may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself. In such cases, extending immunity to the entity would not promote the federal policies of tribal self-determination, economic development, and cultural autonomy. Arm-of the-tribe immunity must not become a doctrine of form over substance. The ultimate purpose of the inquiry is to determine whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe.

Miami Nation, 386 P.3d at 375 (citations omitted, internal quotation marks omitted). Accordingly, a multi-factor balancing test to determine arm-of-the-tribe immunity must "take[] into account both formal and functional considerations—in other words, not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe." *Id.* at 365. "These functional considerations illuminate the degree to which imposition of liability on the entity would practically impair tribal self-governance." *Id.* at 371.

The Lenders should be well familiar with the necessity to demonstrate these functional considerations. In *Finn v. Great Plains Lending, LLC*, 689 Fed. Appx. 608 (10th Cir. 2017) ("*Finn v. Great Plains*")—which Lenders fail to cite in their brief—the 10th Circuit expressly rejected the district court's reliance on "formal arrangements as set forth in Great Plains' organizational paperwork to hold that tribal sovereign immunity applied." *Id.* at 611. Instead, the 10th Circuit "conclude[d] that a more satisfactory showing regarding the actual workings of Great Plains and its financial relationship with the Tribe is necessary for a

thorough consideration of the *Breakthrough* factors." *Id.* at 611-12 (reversing district court's dismissal based on tribal sovereign immunity and remanding for jurisdictional discovery). Accordingly, even under the Lenders' preferred multi-factor balancing test from the 10th Circuit's decision in *Breakthrough*, evidence of functional arrangements—as opposed to formal organizational documents—is necessary to determine whether an entity is actually an arm of a tribe.

Moreover, *Big Picture Loans,* the Fourth Circuit decision which Lenders cite as support for their argument that fact finders may rely solely on evidence of formal arrangements (Pl. Br. 20-23), is actually consistent with the functional approach of *Miami Nation* and *Finn v. Great Plains*. Although the Fourth Circuit came to different conclusion than the district court regarding whether the entity had met its burden of proving it was an arm of the tribe, it also analyzed evidence of functional arrangements and did not rely solely on evidence of formal arrangements. *Big Picture Loans, supra*, 929 F.3d at 175–76. Notably, the parties in *Big Picture Loans* had engaged in jurisdictional discovery, which created a record that included formal organizational documents and functional evidence of the *actual* arrangements between the tribe and the entity. *Id.* at 175 (referencing "jurisdictional discovery" preceding district court's determination). The Fourth Circuit relied extensively on such functional evidence in making its arm-of-the-tribe determination. Specifically, when analyzing *Breakthrough*'s "purpose" factor, the court referenced email communications indicating the factual circumstances surrounding the creation of the entities, evidence detailing the revenues received by the tribe, evidence describing how the tribe *actually* used those revenues, and other evidence in the record beyond mere formal organizational documents. *Id.* at 178-181. Similarly, when analyzing *Breakthrough*'s

"control" factor, the Fourth Circuit described functional evidence in the record detailing the *actual* arrangements which provided the tribe control over the day-to-day management of the entity's "operating budget and employee handbook and . . . a variety of policies and procedures." *Id.* at 183.

Finally, when analyzing the "financial relationship" factor, the Fourth Circuit analyzed evidence of the *actual* revenues received by the tribe and the effect on the tribe's general fund, expanded commercial dealings, and support of tribal services. *Id.* at 184-85. Accordingly, *Big Picture Loans* undermines the Lenders' argument that a fact finder may rely solely on formal organizational documents. Rather, the decision supports the trial court's conclusion that evidence of functional arrangements is necessary to determine whether an entity is actually an arm of a tribe.

III. THE TRIAL COURT ERRED IN REJECTING *SUE/PERIOR'S* MULTI-FACTOR TEST.

A. The Arm-of-the-Tribe Legal Analysis Calls for Flexible, Fact-Driven Considerations where Deference Should Be Granted to the Factual and Discretionary Determinations of the Trier of Facts.

In *Great Plains I*, the trial court remanded so the Commissioner could make an "administrative determination" regarding whether Great Plains and Clear Creek are arms of the Tribe, which it explained "involves use of a balancing test that essentially requires the commissioner to make a determination of policy or judgment." D. A384. The *Great Plains I* court also reiterated that:

> Our Supreme Court has stated that an agency's factual and discretionary determinations are to be accorded considerable weight by the courts. Even for conclusions of law, the court's ultimate duty is only to decide whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally, or in abuse of discretion. Thus conclusions of law reached by the administrative agency must stand if the court determines that they resulted

> from a correct application of the law to the facts found and could reasonably and logically follow from such facts.

D. A373-74 (citations and internal quotation marks omitted). *See also*, *Longley v. State Employees Ret. Comm'n*, 284 Conn. 149, 163 (2007); *Chairperson, Conn. Med. Exam'g Bd. v. Freedom of Info. Comm'n*, 310 Conn. 276, 281-83 (2013).

The trial court's reminder that the agency's factual and discretionary determinations should be accorded considerable weight is particularly astute in this matter because there is no binding authority in Connecticut or elsewhere setting forth a single, definitive, and inflexible legal test to be applied and evaluated under all factual scenarios when determining whether a particular entity is an arm of a tribe. Nor is there binding authority suggesting that a Connecticut trial court or administrative agency does not have discretion to determine which factors to apply or how such factors should be evaluated in a particular factual scenario.

Rather, courts that have applied multi-factor balancing tests to determine arm-of-the-tribe status have routinely mixed-and-matched and reformulated the factors used by other courts in earlier decisions to fit the particular factual scenario of the case before them. *Matter of Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc.*, 86 N.Y.2d 553 (1995) ("*Ransom*") (relying upon a law review article and *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 809 (7th Cir. 1993)); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn 1996) (relying on *Ransom* and *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989) ("*Dixon*")); *Seneca Niagara Falls Gaming Corp. v. Klewin Building Co.*, No. 4004218, 2005 WL 3510348 (Conn. Super Ct. Nov. 30, 2005) Pl. A356-61 ("*Klewin*") (relying upon *Ransom* and *Gavle*); *Breakthrough*, *supra*, (citing *Gavle*, *Ransom,* and *Dixon*, among others); *Miami Nation*, *supra*, 386 P.3d at 371 (adopting a modified version of the *Breakthrough* test in

light of review of "prior California decisions as well as the various approaches in other jurisdictions").

Moreover, in applying and evaluating such factors, courts typically do not describe them as definitive, dispositive, or exhaustive, but rather as helpful aids to the overall determination in a particular case. *See, e.g., Breakthrough, supra*, 629 F.3d at 1187 (listing factors "helpful in informing our inquiry", but cautioning that "[a]t this time there is no need to define the *precise* boundaries of the appropriate test" to determine whether an entity is an arm of the tribe); *Ransom*, *supra*, 86 N.Y.2d at 553 (listing factors that "courts generally consider" while recognizing that "no set formula is dispositive"); *Miami Nation*, *supra*, 386 P.3d at 374 ("In setting forth the five factors of the arm-of-the-tribe test, we emphasize that no single factor is universally dispositive. (*See, e.g., Breakthrough*, *supra*, 629 F.3d at p. 1187 [financial relationship 'is not a dispositive inquiry']. Each case will call for fact-specific inquiry into all the factors followed by an overall assessment of whether the entity has carried its burden by a preponderance of the evidence."); *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *5 (D. Or. Apr. 26, 2018), findings and recommendation adopted, No. 6:17-CV-0962-JR, 2018 WL 4169019 (D. Or. Aug. 30, 2018) ("weighing all the factors together" in determining entity is not an arm of the tribe) (D. A518) ("*Hunter*").

According weight to the factual and discretionary determinations underlying application and evaluation of a multi-factor balancing test is particularly appropriate when such determinations are made as part of a proceeding governed by the UAPA. Although using expertise and knowledge derived outside the record in making such determinations may be inappropriate for a trial court, the UAPA expressly provides for an agency to apply

its expertise to its findings of fact. Specifically, Section 4-178(8) of the General Statutes provides that "[i]n contested cases the agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence." *See also* Conn. Gen. Stat. § 36a-1-46(g) ("The presiding officer and the commissioner shall have the authority to employ the agency's experience, technical competence and specialized knowledge in evaluating the evidence presented at the hearing for the purpose of making findings of fact and arriving at a decision in any contested case.").

Here, the trial court faulted the Commissioner for *not applying* one particular factor and for *applying* another. Specifically, the trial court found that the Commissioner erred by not evaluating the tribe's subjective intent with respect to sharing its immunity—a factor absent from *Sue/Perior*, but included in *Miami Nation*. The Commissioner considered weighing this factor, but declined because he found that the "financial factors that assess whether a judgment against the entity would actually impact the tribe . . . better address [the] *Bay Mills*' [dissenting Justices'] clear concern for the abuse of tribal sovereign immunity [in the online payday lending context] and the preservation of a state's ability to prevent violations of its laws outside of tribal lands." Pl. A236 n.10. Despite this policy determination, the trial court also expressly rejected the Commissioner's application and evaluation of the factors relating to the "financial relationship between the tribe and the commercial entities it has created" stating that it was "unconvinced that 'protection of a tribal treasury against liability in a corporate charter is strong evidence against the retention of sovereign immunity by the corporation.'" (citing *Sue/Perior*, *supra*, 24 N.Y. 3d at 551). Pl. A285-86.

The trial court's failure to accord weight to the Commissioner's factual and discretionary determinations was error and led it to improperly reject the Commissioner's application and evaluation of the *Sue/Perior* factors and supplant it with its own findings regarding the appropriate multi-factor balancing test to be applied.

B. The Commissioner Properly Used the *Sue/Perior* Factors for his Arm-of-the-Tribe Analysis.

The United States Supreme Court has never held that a corporation affiliated with an Indian tribe is entitled to tribal sovereign immunity as an arm-of-the tribe. Numerous lower courts have nonetheless held that "[o]fficial tribal enterprises that act as [an] . . . arm of the tribe are immune from suit as an extension of the tribe's sovereign immunity." *Gristede's Foods*, 660 F. Supp. 2d at 477. "In the absence of guidance from the high court, state and federal courts have articulated a variety of arm-of-the-tribe tests." *Miami Nation*, *supra*, *237. "Each case will call for fact-specific inquiry into all the factors followed by an overall assessment of whether the entity has carried its burden by a preponderance of the evidence." *Id.* at *248.

Here, the Commissioner made underlying factual and discretionary determinations and ultimately applied and evaluated the following nine-factor balancing test used by the New York Court of Appeals' in *Sue/Perior*:

> [1] the entity is organized under the tribe's laws or constitution rather than Federal law; [2] the organization's purposes are similar to or serve those of the tribal government; [3] the organization's governing body is comprised mainly of tribal officials; [4] the tribe has legal title or ownership of property used by the organization; [5] tribal officials exercise control over the administration or accounting activities of the organization; and [6] the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether [7] the corporate entity generates its own revenue, whether [8] a suit against the corporation will impact the tribe's fiscal resources, and whether [9] the subentity has the power to bind or obligate the funds of the tribe. The

> vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.

Sue/Perior, *supra*, 25 N.E.3d at 933 (citing *Ransom*, 658 N.E.2d at 992-93). The Commissioner noted that "[t]he nine *Sue/Perior* factors deal with two main concepts – (1) the financial relationship between an entity and a tribe . . . and (2) the organization, purpose and governance of the entity. . . ." *Id.* at PI. A237.

The Commissioner found, *inter alia*, that Great Plains had failed to establish that it "was created for tribal purposes" in order to "further the economic goals and initiatives of the Tribe" in part because (a) organizational documents Lenders submitted "clearly protect the Tribe and its treasury from liability" and (b) "no evidence was submitted to show that Great Plains is actually transferring any money or resources to the Tribe or that the Tribe has in fact benefitted Great Plains." *Id.* at PI. A238-39. In making this finding the Commissioner stated that:

> Without any evidence, it is impossible to know whether the apparent relationship between Great Plains and the Tribe truly serves tribal interests or instead is merely a pretense in order to claim tribal sovereign immunity and evade state law. Uncorroborated statements in organizational documents without any evidence of contractual or financial arrangements, including any evidence showing the flow of profits to the Tribe, simply do not prove that the organization and purpose of the business predominately serves the tribal government.

Id. Accordingly, the Commissioner concluded that Great Plains had failed to meet its burden of establishing the requisite financial relationship with, and level of control by, the Tribe. PI. A238.

Although the trial court agreed that Lenders had failed to meet their burden of establishing arm-of-the tribe status due to the lack of evidence regarding functional arrangements (PI. A293), it rejected what it perceived as "the primacy given by *Sue/Perior*

and the commissioner to the financial relationship between the tribe and the commercial entities it has created." Pl. A285. The trial court further stated that it was "unconvinced that 'protection of a tribal treasury against liability in a corporate charter is strong evidence against the retention of sovereign immunity by the corporation.'" Pl. A285-86. The trial court then concluded that due to the Commissioner's "overemphasis on the vulnerability of the tribe's treasury to the effect of its entity's liability, as setting the appropriate standards for evaluating the claims of Great Plains and Clear Creek to tribal sovereign immunity . . . his choice constituted an 'error of law'; § 4-183(j); that prejudiced 'substantial rights'; of the plaintiffs, and that the appropriate legal standards for establishing arm of the tribe immunity are those stated in the *Miami Nation* case." Pl. A288-89.

The five-factor balancing test articulated in *Miami Nation* is substantially similar to *Sue/Perior*'s nine-factor test and is itself a "modified version of the Tenth Circuit's *Breakthrough* test." *Miami Nation*, *supra* 386 P.3d at 371. The five factors are (1) method of creation, (2) tribal intent, (3) purpose, (4) control, and (5) financial relationship. *Id.* Like *Sue/Perior*, *Miami Nation* includes the financial relationship factor, which "considers the degree to which the entity's liability could impact the tribe's revenue between the tribe and the entity."[12] *Id.* at 373. Moreover, *Miami Nation* recognizes that "[t]he starting point for analyzing the financial relationship between the entity and the tribe is whether a judgment against the entity would reach the tribe's assets." *Id.* at 373. Accordingly, even under *Miami Nation*, it is appropriate to consider direct tribal liability although it "is neither a threshold requirement for immunity nor a predominant factor." *Id.* In addition to direct tribal liability,

[12] In addition to the five *Miami Nation* factors, *Breakthrough* also considers a sixth: whether the purposes of tribal sovereign immunity are served by granting the entity immunity. *Breakthrough*, *supra*, 629 F.3d at 1187-88.

Miami Nation noted that courts also "consider the extent to which the tribe 'depends on the [entity] for revenue to fund its governmental functions . . . [and whether] a significant percentage of the entity's revenue flows to the tribe, or if a judgment against the entity would significantly affect the tribal treasury" and if so, the financial relationship factor "will weigh in favor of immunity even if the entity's liability is formally limited." *Id.* The *Miami Nation* court explained that the financial relationship factor "requires a consideration of degree rather than a binary decision . . . [and] because any imposition of liability on a tribally affiliated entity could theoretically impact tribal finances, the entity must do more than simply assert that it generates some revenue for the tribe in order to tilt this factor in favor of immunity."[13] *Id.* at 373-374.

Despite that the Commissioner's overall analysis essentially followed the considerations the court in *Miami Nation* articulated as relevant to the financial relationship factor, the trial court concluded that the Commissioner erred in relying upon *Sue/Perior,* and specifically, its focus on whether the tribe is protected against liability of the entity. This focus, however, is appropriate because the "vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." *Sue/Perior*, *supra,* 24 N.Y.3d at 547 (quoting *Matter of Ransom v. St. Regis Mohawk Educ. & Cmty. Fund,* 86 N.Y.2d 553, 559-560); *see also Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 441 (Alaska 2004) (holding that tribes' use of corporate form to protect assets "means that they are not the real party in interest . . . [and therefore] [b]y severing their treasuries from the corporation, [tribes] have also cut off their sovereign immunity before it reaches [the corporation]"). Analyzing whether the tribe is the real party

[13] *See also, Hunter*, supra, 2018 WL 4171612 at *5 (generation of revenue for the tribe is not dispositive because "such is the case with any for-profit tribal corporation"). D. A518.

in interest as part of the arm-of-the-tribe inquiry is consistent with the United States Supreme Court's recent decision in *Lewis v. Clarke*. There, the high court held that because a judgment against the defendant, a tribal employee, "will not operate against the tribe" that the tribe was not the real party in interest, and therefore, tribal sovereign immunity did not extend to the employee. *Lewis v. Clark,* 1291.

Moreover, placing significant weight on whether the tribe assumes the immediate obligations of an affiliated entity is consistent with federal precedent on the Eleventh Amendment immunity of the States. As the New York Court of Appeals has phrased it, "[i]n considering whether an entity is an 'arm' of an Indian tribe, the most significant factor is the effect on tribal treasuries, just as 'the vulnerability of the State's purse' is considered 'the most salient factor' in determinations of a State's Eleventh Amendment immunity.'" *Sue/Perior, supra,* 24 N.Y.3d at 550 (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)); *see also Woods v. Rondout Valley Central School Dist. Bd. of Educ.*, 466 F.3d 232, 243 (2d Cir. 2006) (in determining whether a governmental entity qualifies as an arm of the state for Eleventh Amendment immunity purposes, the "determining factor is the effect of any judgment against the governmental entity").

Accordingly, the trial court erred in rejecting the Commissioner's evaluation of the financial relationship factor using *Sue/Perior*'s framework which appropriately places significant weight on whether the tribe is protected from liability.

IV. THE TRIAL COURT ERRED IN SUSTAINING THE APPEAL AND REMANDING FOR FURTHER ADMINISTRATIVE PROCEEDINGS.

The trial court correctly concluded that Lenders had the burden of proving entitlement to tribal sovereign immunity as arms of the Tribe, correctly concluded that in order to meet their burden Lenders needed to submit evidence regarding the functional

arrangements between the entity Lenders and the Tribe, and correctly found that Lenders had failed to meet their burden under its preferred set of factors from *Miami Nation*. Given those conclusions and findings, the trial court should not have sustained Lenders' appeal and remanded for further administrative proceedings.

First, "[i]t is fundamental that [an administrative respondent] has the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion . . . . If the decision of the commissioner is reasonably supported by the evidence it must be sustained." *Murphy v. Comm'r of Motor Vehicles*, 254 Conn. 333, 343-44 (2000). Here, the trial court agreed with the Commissioner's determination; on the existing administrative record, Great Plains and Clear Creek failed to meet their burden of proving that they are arms of the Tribe—even under the trial court's preferred set of factors from *Miami Nation*. Specifically, even after rejecting the arguably stricter approach of *Sue/Perior* in favor of the multi-factor balancing test used in *Miami Nation*, the trial court nonetheless correctly found that Lenders submissions were insufficient to meet their burden because they focused solely on the formal arrangements as opposed to a functional analysis of the actual relationship between a tribe and a commercial entity it has created. Pl. A293.

Like the trial court, the Commissioner also found that evidence of the actual financial relationship between Lenders and the Tribe was devoid from the existing administrative record. Pl. A239. These findings are consistent with *Finn v. Great Plains*, 689 Fed. Appx 608 (10th Cir. 2017). Lenders' submissions in both cases—"organizational arrangements on paper [that] do not necessarily illuminate how businesses operate in practice"—were insufficient to meet their burden of establishing entitlement to tribal sovereign immunity.

Finn, 689 Fed. Appx. at 611 (quoting *Miami Nation, supra,* 386 P.3d at 375). Therefore, the trial court erred in sustaining the appeal because the Commissioner's determination—which he made on the existing factual record as required by *Great Plains I*—was reasonably supported by the evidence and, according to the trial court's own findings, would not have been any different under the factors used in *Miami Nation*.

Second, even if the Commissioner erred in placing too much weight on *Sue/Perior's* evaluation of the financial relationship factor, the Commissioner's overall conclusion that Lenders had failed to meet their burden was not based solely on that factor. Specifically, the Commissioner also found that the evidence did not "show that the Tribe exercises control over the business . . . [and that] the record reflects a lack of significant control." Pl. A239. The "control factor examines the degree to which the tribe *actually* not just nominally, directs the entity's activities." *Miami Nation*, *supra*, 386 P.3d at 371 (emphasis added). Again, the trial court agreed with the Commissioner that, although relevant, evidence of "the entity's formal governance structure"—without evidence addressing the functional arrangements and practical considerations—is insufficient to determine "whether the entity *acts* as an arm of the tribe so that its activities are properly deemed to be those of the tribe." (Pl. A294, Pl. A296) (quoting *Miami Nation*, *supra*, 386 P.3d at 375)). In other words, if error, the Commissioner's reliance on *Sue/Perior* was at most harmless. *Levy v. Comm'n on Human Rights and Opportunities,* 236 Conn. 96 (1996).

Third, if the existing administrative record is insufficient to support a determination that Lenders have met their burden of proving entitlement to tribal sovereign immunity under the required "functional analysis" of *Miami Nation*, that is the consequence of Lenders' actions. By successfully moving the *Great Plains I* court to order the

Commissioner to determine the issue on the existing administrative record, Lenders essentially waived the opportunity to submit additional evidence and participate in further evidentiary proceedings.[14] Indeed, on appeal to this Court, Lenders hold to their position that a determination may properly be made on the existing administrative record, arguing that the trial court erred in ordering a new evidentiary hearing. Pl. Br. 13-15. Under these circumstances, Lenders should not get another unwanted bite at the apple.

Fourth, the trial court's remand for submission of evidence and further evidentiary proceedings is in direct conflict with *Great Plains I*. At Lenders' urging, the court in *Great Plains I* revised its remand decision and ordered the Commissioner "to determine, *based on the record that existed at the time*" whether Great Plains and Clear Creek are arms of the Tribe. D. A430 (emphasis added.) Thus, *Great Plains I* precluded further evidentiary proceedings, closing the administrative record. As a final, unappealed decision, *Great Plains I* is *res judicata*. The *Great Plains II* court should not have disregarded *Great Plains I* and reopened the administrative record by remanding for submission of evidence and further evidentiary proceedings. Instead, it should have affirmed the Commissioner's determination that Lenders had failed to meet their burden on the existing administrative record and dismissed their administrative appeal.

Accordingly, the trial court erred in sustaining the Lenders' appeal and remanding for further evidentiary proceedings.

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[14] Ordinarily, a default for failure to comply with agency procedures for disputing allegations, such as appearing at a hearing, is fatal to an administrative appeal. *McAllister v. Ins. Department*, CV01-0506339-S, 2001 WL 492350 (Conn. Super. Ct. Apr. 26, 2001) (D. A492-94); *Arroyo v. State of Conn. Ins. Comm'r*, CV10-5015153-S, 2011 WL 4583820 (Conn. Super Ct. Sept. 14, 2011) (D. A495-97).

V. THE COMMISSIONER'S ORDERS AGAINST SHOTTON ARE NOT BARRED BY TRIBAL SOVEREIGN IMMUNITY.

A. The Orders Against Shotton, A Corporate Officer Of Great Plains, Are Not Barred By Tribal Sovereign Immunity Because Great Plains Is Not An Arm Of The Tribe.

As discussed above, Great Plains failed to meet its burden of establishing that it is an arm of the Tribe and therefore, is not entitled to tribal sovereign immunity from the Commissioner's Orders against it. Shotton, a corporate officer of Great Plains, is not entitled to tribal sovereign immunity because such immunity cannot be extended to an individual if the entity to which the individual is connected is not itself entitled to tribal sovereign immunity. *See Gristede's Foods*, 660 F. Supp. 2d at 478 (holding that tribal Chief was not immune from suit "to the extent that he [wa]s sued for acts in his capacity as the owner of" an entity held not to be an arm of the tribe). Accordingly, this Court's analysis of whether tribal sovereign immunity bars the Orders against Shotton need go no further.

B. The Order Imposing Civil Penalties On Shotton Is Not Barred By Tribal Sovereign Immunity Because Shotton Is The Real Party In Interest.

Even if Great Plains were an arm of the Tribe, Shotton would still not be entitled to tribal sovereign immunity because the Department took action against him in his individual capacity as Secretary and Treasurer of Great Plains for his participation in violations of Connecticut law and imposed civil penalties on him individually, making him the real party in interest. Although Shotton argues that tribal sovereign immunity bars the Orders against him because he was acting within the scope of his official capacity[15] as tribal chairman when engaging in the alleged violations of Connecticut law, the United States Supreme Court rejected a similar argument in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (reversing this

[15] It is inexplicable how Shotton could have been acting in such capacity, given that his actions violated the Tribe's own criminal usury law. D. A291; Pl. A327.

Court's decision in *Lewis v. Clarke*, 320 Conn. 706 (2016)), instead holding that tribal sovereign immunity does not bar suit against a tribal employee in his individual capacity where the employee, not the tribe, is the real party in interest.[16]

In *Lewis*, the defendant, a member of the Mohegan Tribe of Indians and an employee of the Gaming Authority, an arm of the tribe, asserted that the tribe's sovereign immunity protected him against a suit arising from a car accident he caused while acting in the scope of his employment. *Id.* at 1289. The Court, however, found no reason to depart from its prior cases establishing that "in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Id.* at 1290. The Court explained that the relevant analysis in determining whether tribal sovereign immunity bars a suit is not whether the defendant was acting within the scope of his employment for a tribe, but rather whether the real party in interest in the suit is the tribe or the defendant. *Id.* at 1290-92. "In making this [real-party-in-interest] assessment, 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." *Id.* at 1290. A case in which the real party in interest is the sovereign is one where "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id.* at 1291. By contrast, a suit against an officer in his individual capacity is one that

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[16] Indeed, the United States Supreme Court has "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). Rather, the Court has analogized to the principles applicable to suits against state officials and employees in federal court. Michigan v. *Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2035 (2014).

seeks 'to impose *individual* liability'" upon the officer for his actions. *Id.* (*quoting Hafer v. Melo*, 502 U.S. 21, 25 (1991)).

Because the suit against the defendant in *Lewis* was to recover for his personal actions and because a judgment "will not operate against the tribe . . . [nor] 'require action by the sovereign or disturb the sovereign's property,'" the Court held that as the real party in interest the suit was against the defendant in his individual capacity and therefore was not barred by tribal sovereign immunity. *Id.* (quoting *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 687 (1949)).[17]

[17] There are numerous cases—both before and after *Lewis*—that apply the real-party-in-interest assessment and similarly hold that suits against tribal officials sued in their individual capacities for monetary damages are not barred by tribal sovereign immunity. *See e.g., Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013) (because tribe was not the real party in interest, tribal sovereign immunity did not bar individual capacity suit against tribal paramedics); *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015) (reaffirming *Maxwell* and holding that tribal sovereign immunity did not bar individual capacity suits for money damages against tribal officers, including the tribe's Chief of Police, because the tribe was not the real party in interest); *Pennachietti v. Mansfield*, No. CV 17-02582, 2017 WL 6311646, at *2-4 (E.D. Pa. Dec. 11, 2017) (D. A523-26) (following *Lewis* and holding that manager of a tribal lender sued in his individual capacity was not entitled to sovereign immunity), *appeal dismissed*, No. 18-1070, 2018 WL 3475602 (3d Cir. Jan. 31, 2018) (D. A528); *JW Gaming Dev., LLC v. James*, No. 3:18-CV-02669-WHO, 2018 WL 4853222, at *4 (N.D. Cal. Oct. 5, 2018) (D. A531-32), *aff'd,* 778 F. App'x 545 (9th Cir. 2019) (applying *Lewis* and denying motion to dismiss based on tribal sovereign immunity because fraud suit was against tribal officials in their individual capacities); *Williams & Cochrane, LLP v. Quechan Tribe of Fort Yuma Indian Reservation*, No. 317CV01436GPCMDD, 2018 WL 2734946, at *15–16 (S.D. Cal. June 7, 2018) D. A548-49 (following *Lewis* and holding that because claim against tribal officials relating to a fraudulent payday lending scheme was a personal-capacity suit, tribal sovereign immunity was not a bar); *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 662 (E.D. Va. 2019) (holding that tribal sovereign immunity did not bar suit against Chief Executive Officer and director of online payday loan company created by the Otoe-Missouria Tribe in part because "the burden of relief would not be borne by the Tribe, as any relief granted . . . can be shaped so as to avoid taking from the Tribe").

Here, the Department took action against Shotton for his personal participation in violations of the state's usury and Banking Laws.[18] Pl. A66-67; Pl. A241-42. The Orders issued to Shotton are independent of the Orders issued to Great Plains, for which he served as Secretary and Treasurer. Pl. A222-23; P. A229-30. Specifically, the Department issued an order to cease and desist *against Shotton* and imposed a civil penalty *upon Shotton*, while also issuing separate Orders to Great Plains and Clear Creek. Pl. A229-30. As to the civil penalties imposed on him, Shotton—and not the Tribe or Great Plains—is the real party in interest because the Order addresses his individual wrongdoing and "will not bind the Tribe or its instrumentalities in any way." *Lewis*, 137 S.Ct. at 1293. Therefore, tribal sovereign immunity does not bar the Order imposing civil penalties on Shotton.[19]

Although Shotton asserts—without any citation to the administrative record—that "any monetary judgment obviously will come from the Tribe's treasury," (Pl. Br. 26) the Court in *Lewis* rejected a similar argument and instead held that indemnification provisions

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[18] The Department has named corporate officers in their personal capacity in numerous administrative actions. *See* Department cases: *In the Matter of Another Level Capital Ventures, Inc. (d/b/a Quick Legal Solutions), Michael Taylor*, March 24, 2016 (D. A610-18); *In the Matter of Home Loan Division, Serrano Financial LLC d/b/a Default Servicing, and Kelvin Pickering*, June 9, 2015 (D. A619-23); *In the Matter of UMC, Inc. d/b/a United Mortgage Consulting and Brandon P. Chodosh*, April 10, 2015 (D. A624-29); and *In the Matter of Western Sky Financial, LLC and Martin A. Webb*, September 23, 2013 (D. A102-18).

[19] The cases cited by Shotton do not compel a different result. For example, *Drabik v. Thomas*, 184 Conn. App. 238, *cert. denied*, 330 Conn. 929 (2018), is distinguishable because it involved a petition for a bill of discovery which—unlike a civil penalty imposed on an individual—would impose obligations on, and "constitute . . . interference" with, the tribe itself, and because it sought to uncover information to be used in a suit against the tribe. *Id.* at 244-45. Moreover, in concluding that the individual officers were entitled to tribal sovereign immunity, the Appellate Court's analysis focused solely on whether the officers were alleged to have "acted beyond the scope of their authority." (*Id.* at 24). That approach was expressly rejected by the United States Supreme Court in *Lewis*. *Lewis*, 137 S.Ct. at 1290-92 (relevant analysis in determining whether tribal sovereign immunity bars a suit is not whether the defendant was acting within the scope of employment for a tribe, but rather whether the real party in interest is the tribe or the defendant).

applicable to adverse judgments against individual tribal employees "cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak . . . [because] [t]he critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Id.* at 1292-93. Here, Shotton—and not the Tribe—will be legally bound to pay the civil penalties imposed on him by the Order.[20]

Accordingly, the trial court erred in not concluding that Shotton is the real party in interest with respect to the Order imposing civil penalties on him individually and in holding that the viability of the Order is solely dependent on whether Lenders are arms of the tribe.

C. The Orders Against Shotton For Prospective Injunctive Relief Are Not Barred By Tribal Sovereign Immunity Because Tribal Officials May Be Sued For Such Relief To Prevent Violations Of State Law Outside Of Indian Lands.

Even if Great Plains were an arm of the Tribe and regardless of who is the real party in interest with regard to civil penalties, Shotton is not immune from the Orders against him for prospective injunctive relief because tribal sovereign immunity does not bar such relief against tribal officials for violations of state law outside of Indian lands, under a theory analogous to *Ex parte Young*, 209 U.S. 123 (1908). In addition to imposing civil penalties

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[20] Shotton also argues—for the first time (and in a footnote)—that even if the Department's claims against him are personal-capacity claims, that he would nonetheless be immune under the doctrine of qualified immunity. (Pl. Br. 26-27 n.9). Because Shotton failed to raise the issue of whether he is entitled to personal immunity below, this Court should not address the qualified immunity defense on appeal. *See*, *Lewis,* 137 S. Ct. at n.2 (declining to address personal immunity defense that was absent from defendant's motion to dismiss and raised for first time on appeal). Even if his qualified immunity defense were properly before this Court, it would still fail because it is not objectively reasonable to believe that offering or making loans to Connecticut residents far in excess of statutory usury limits and without the statutorily required license did not violate clearly established law. This is especially true given that the interest rates imposed by Lenders also violated the Tribe's own criminal usury law. D. A291; Pl. A327.

on Shotton, the Commissioner ordered him to cease and desist from violating Connecticut law and to provide information regarding Connecticut residents who applied for or received loans from Great Plains. Pl. A222-23; Pl. A229-30. These Orders are equivalent to injunctive relief and "[t]ribal immunity does not bar . . . a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct" under state law. *Bay Mills*, 134 S. Ct. at 2035 (emphasis in original).

> In *Bay Mills*, the Supreme Court considered Michigan's lawsuit against the tribe for opening a casino outside Indian lands. The Court held that the federal Indian Gaming Regulatory Act . . . did not abrogate tribal sovereign immunity, and thus Michigan's suit was barred. The Court made clear, however, that Michigan could still "resort to other mechanisms, including legal actions against the responsible individuals" to vindicate violations of Michigan state law. In exploring the limits of tribal sovereign immunity for conduct beyond Indian land, the Supreme Court recognized that "Michigan could bring suit against *tribal officials* or employees (rather than the Tribe itself) seeking an injunction."

Gingras v. Think Finance, Inc., 922 F.3d 112, 120 (2d Cir. 2019) (quoting *Bay Mills* at 796, 134 S.Ct. 2024 (emphasis added) (internal citations omitted).[21]

[21] Although in *Bay Mills Indian Cmty.*, the United States Supreme Court held that tribal sovereign immunity barred a suit directly against a tribe relating to operation of an off-reservation casino, the four dissenting Justices raised concerns that tribal sovereign immunity was being abused to protect "payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1000 percent per annum) [that] often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality." *Id.* at 2052 (Thomas, J., dissenting, joined by Scalia, Ginsburg and Alito, Js.) (*citing* Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751, 758-59, 777 (2012) (D. A555-56, D.A574)). The majority apparently responded to those concerns (among others) by noting that the state had "many alternative remedies," *Bay Mills*, 134 S. Ct. at 2036 n.8—including suits against the "tribal officers, responsible for unlawful conduct," *id.* at 2035—and pointedly noted that the Court "need not consider whether the situation would be different if no alternative remedies were available" to obtain relief for off-reservation conduct, but that such a situation could "present a 'special justification' for abandoning" tribal sovereign immunity. *Id.* at 2036 n.8.

In addressing the question of whether tribal officials can be sued in their official capacities for prospective injunctive relief to vindicate violations of state law, the Second Circuit read *Bay Mills* to permit that form of action. *Gingras*, 922 F.3d at 121. The court explained that "[t]he first and most obvious justification for our affirmative answer to this question is that the Supreme Court has already blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law. . . . We think this plain statement that tribal officials can be sued to stop unlawful conduct by a tribe definitively resolves the issue here." *Id.* at 121. Therefore, the court held that the plaintiffs' suit against tribal officials in their official capacities for prospective injunctive relief from violations of state law stemming from a tribal payday lending operation were not barred by tribal sovereign immunity. *Id.* at 121-124.[22]

As the Second Circuit warned, "[a]bsent this mechanism for a state to enforce its laws against out-of-state tribal officials, the state and its citizens would seemingly be without recourse. Tribes and their officials would be free, in conducting affairs outside of reserved lands, to violate state laws with impunity." *Id.* at 124. Moreover, depriving plaintiffs the ability to sue tribal officials for such violations would be inconsistent with *Bay Mills* because the availability of that mechanism "was critical to the Court's analysis and necessary to its holding" that the suit against the tribe itself was barred by sovereign immunity. *Id.* at 122.

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[22] In affirming the availability of *Ex parte Young-by-analogy* actions for violations of state law, the Second Circuit joined the Eleventh Circuit. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015) ("[T]ribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands.").

Accordingly, the trial court erred in not affirming the Department's Orders against Shotton for prospective injunctive relief and in holding that the viability of those Orders is solely dependent on whether Lenders are arms of the Tribe.

In the alternative, if Great Plains and Clear Creek are shielded from liability for their violations of Connecticut law, and if there are no alternative remedies against Shotton available to the Department, then this case presents a "special justification" to abandon tribal sovereign immunity and deny Lenders' the protection it affords. As the United States Supreme Court contemplated in *Bay Mills*, if a state has no alternative remedies to obtain relief for off-reservation conduct that violates its laws, then abandoning tribal sovereign immunity is warranted. *See, Bay Mills*, 134 S. Ct. at 2036 n.8. Accordingly, if this Court decides against the Commissioner on all other issues, it nonetheless must deny Lenders the protection of tribal sovereign immunity.

CONCLUSION

For all the foregoing reasons, the Court should reverse the trial court's decision and remand with direction to affirm the Department's decision. In the alternative, if the Court concludes that remand for further administrative proceedings is necessary, the Court should affirm that the Commissioner may determine whether the Lenders have met their burden to prove that the entity Lenders are arms of the Tribe by evaluating evidence of the functional relationship under the multi-factor balancing test used in *Sue/Perior*.

Respectfully submitted,

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CERTIFICATION

Pursuant to Connecticut Practice Book § 67-2, the undersigned attorney hereby certifies that:

(1) the electronically submitted brief and appendix have been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided;

(2) the electronically submitted brief and appendix, and the paper filed brief and appendix, have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;

(3) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically;

(4) the brief complies with all applicable provisions of appellate procedure including the provisions of Conn. Practice Book § 67-2; and

(5) a copy of the brief and appendix has been mailed, first class postage prepaid, this 18th day of December, 2019, by Brescia's Printing Service, to each counsel of record, other than counsel for non-participating appellees, in compliance with Practice Book § 62-7 at the following addresses:

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