STATE OF CONNECTICUT

DEPARTMENT OF BANKING

260 CONSTITUTION PLAZA • HARTFORD, CT 06103-1800

Howard F. Pitkin
Commissioner

IN THE MATTER OF:	
GREAT PLAINS LENDING, LLC ("Great Plains")	
JOHN R. SHOTTON ("Shotton")	**COMMISSIONER'S RULING ON MOTION TO DISMISS**
CLEAR CREEK LENDING ("Clear Creek")	
(collectively, "Respondents")	

On October 24, 2014, I issued a Temporary Order to Cease and Desist, Order to Make Restitution, Notice of Intent to Issue Order to Cease and Desist, Notice of Intent to Impose Civil Penalty and Notice of Right to Hearing (collectively, "Notice") in the Matter of: Great Plains Lending, LLC, John R. Shotton and Clear Creek Lending. On November 12, 2014, Respondents filed a Notice of Motion and Motion to Dismiss 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 together with a Memorandum of Points and Authorities in Support of Specially Appearing Respondents' Motion to Dismiss 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 or Right to Hearing, for Lack of Personal and Subject Matter Jurisdiction ("Motion to Dismiss"). On November 19, 2014, the Department of Banking ("Department") filed an Objection to Motion to Dismiss ("Objection") and, on November 26, 2014, Respondents requested leave and filed a Reply in Support of Motion to Dismiss Administrative Proceedings ("Reply"). I have considered the Reply in deciding this Motion to Dismiss,

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although I am not required to do so under the Connecticut Uniform Administrative Procedure Act or applicable regulations. As discussed below, the Motion to Dismiss is **denied**.

This administrative action stems from the Department's allegations that Respondents violated Connecticut's small lending laws by engaging or participating in the following conduct in the state of Connecticut: (1) making, offering or assisting Connecticut residents to obtain loans in amounts less than $15,000 with annual interest rates ranging from 199.44% to 448.76% that far exceed what is allowed under Sections 36a-555 and 36a-573 of the Connecticut General Statutes,[1] and (2) issuing such loans to at least three Connecticut residents. (Notice at 4-5.) Respondents seek dismissal claiming that the Department lacks jurisdiction over Respondents because tribal sovereign immunity "extends to all aspects of the judicial process, including administrative proceedings" and shields Respondents from this administrative action (Mot. Dismiss at 6.)[2] The Department counters that tribal sovereign immunity "applies to 'suits' instituted against tribes, and does not apply to orders issued by a regulatory body, such as this Department, that demand compliance by . . . [a tribe] with generally applicable state laws." (Obj. at 2.) Respondents reply that "this case very clearly is an adversarial action brought in a judicial forum" and, notably, further assert that the Department's action is both an "attempt to circumvent the protections of tribal sovereign immunity" and an "affront to tribal sovereignty." (Reply at 1.)

I have the authority to decide a motion to dismiss pursuant to Section 36a-1-27(5) of the Regulations of Connecticut State Agencies. In the absence of any regulatory or statutory standard of review for such motions in a contested case in this forum, the Department has traditionally adopted the standard utilized for such motions when they are made in Connecticut courts. The standard for a motion to dismiss has been articulated by the Connecticut Supreme Court as follows: "A motion to dismiss . . .

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[1]"No person shall (1) engage in the business of making loans of money or credit; [or] (2) make, offer, broker or assist a borrower in Connecticut to obtain such a loan . . . through any method . . . in the amount . . . of fifteen thousand dollars or less . . . and charge . . . a greater rate of interest . . . than twelve per cent per annum . . . ." Conn. Gen. Stat. Sec. 36a-555. "No person . . . shall . . . charge . . . any interest . . . greater than twelve per cent per annum upon the loan . . . of . . . fifteen thousand dollars or less . . . ." Conn. Gen. Stat. Sec. 36a-573(a).

[2]Respondents argue that Great Plains and Clear Creek, as instrumentalities of the Otoe-Missouria Tribe of Indians, and Mr. Shotton, as the Tribal Chairman, are entitled to the same immunities as the Tribe. I need not address this argument for purposes of deciding this motion because I find that the Department has jurisdiction over each Respondent irrespective of tribal status.

properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." *State v. Haight,* 279 Conn. 546, 550, 903 A.2d 217 (2006).[3] "Moreover, [t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . ." *McIntosh v. Sullivan*, 274 Conn. 262, 267 (2005) (quoting *Filippi v. Sullivan,* 273 Conn. 1, 8 (2005)). When a court "decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light" and "must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *Id.*

DISCUSSION

As the Second Circuit recently noted in a case remarkably similar in almost every factual respect to this one, this case "arises from a conflict between two sovereigns' attempts to combat poverty within their borders." *Otoe-Missouria Tribe of Indians v. New York State Department of Financial Services,* 769 F.3d 105, 107 (2014) ("*Otoe II*"). In this case, Respondents include Shotton, the Tribal Chairman of the Otoe-Missouria Tribe of Indians ("Tribe"), and two online lending companies that appear to be established by the Tribe "for the purpose of Tribal economic development and to aid in addressing issues of public health, safety, and welfare." (Mot. Dismiss at 3.) On the other hand, Connecticut's consumer transaction and small loans interest rate statutes embody a "general policy . . . 'to prevent overbearing lenders and commercial entrepreneurs from exploiting impecunious borrowers and consumers who lack bargaining power.'" *Gilmore v. Pawn King, Inc.*, 313 Conn. 535, 546 (2014), quoting *Rhodes v. City of Hartford,* 201 Conn. 89, 98-99 (1986).

[3]Respondents also cite authority for the proposition that the party asserting jurisdiction must allege all facts necessary to establish it. (Mot. Dismiss at 4, citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). I find that the Department's factual allegations are sufficient to establish jurisdiction.

The Respondents argue very broadly that "tribal sovereign immunity" destroys the Department's jurisdiction to maintain this administrative action. Immunity from suit, as a necessary corollary of tribal sovereignty, obligates me to discuss the more general protections afforded Respondents by tribal sovereignty before discussing any particular impact that immunity from suit may have on this action. As discussed below, neither tribal sovereignty nor immunity from suit supports the Motion to Dismiss.

Tribal Sovereignty

In this case, the protections afforded by tribal sovereignty rest upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). "The traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (internal citation omitted) ("*New Mexico*"). Tribal sovereignty, however, "contains a 'significant geographical component.'" *Id.* at 336 n. 18 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980).

> [T]he State's power to regulate activity will differ depending on where a statute applies and whom the statute targets. For example, absent specific permission from Congress, states have no power to regulate the affairs of Indians on a reservation. On the other hand, absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. Between these two poles, if a state seeks to regulate non-Indians doing business with a tribe on the tribe's reservation, state law will apply unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.

Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Services, 974 F. Supp. 2d 353, 359-60 (S.D.N.Y. 2013) *aff'd,* 769 F.3d 105 (2d Cir. 2014) *("Otoe I")* (internal citations, quotes, and punctuation omitted).

"Thus, the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary.'" *New Mexico*, 462 U.S. at 336 n. 18 quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973) ("*Mescalero*"). The Second Circuit has stated this rule most recently:

> The breadth of a state's regulatory power depends on two criteria—the location of the targeted conduct and the citizenship of the participants in that activity. Native Americans "going beyond the reservation boundaries" must comply with state laws as long as those laws are "non-discriminatory . . . [and] otherwise applicable to all citizens of [that] State."

Otoe II, 769 F.3d 105 at 113 (emphasis added).

Location and Effects of Alleged Conduct

The "first step in assessing the State's regulatory power is to determine whether the activity that the State is seeking to regulate is taking place on Tribal land or off it." *Otoe I*, 974 F. Supp. 2d at 360. Respondents have elected to remain silent as to the location and effects of their Connecticut lending activity, choosing instead to rely on the more diffuse argument that their "sovereign immunity" destroys the Department's jurisdiction. (Reply at 8 n. 1 and 9-10.) Their failure to argue—even in the alternative—that their activity does not take place in Connecticut leaves the Department's allegations to stand alone unchallenged.

Taking the factual allegations in the Notice as true and viewing them in the light most favorable to the Department:

1) Connecticut consumers received offers from Great Plains offered via U.S. Mail, e-mail and its website at their Connecticut residences (Notice at 4, ¶ 7);

2) Connecticut consumers received solicitations at their Connecticut addresses from Clear Creek via its website (Notice at 5, ¶ 13);

3) Connecticut consumers received loan proceeds by electronic deposit into their bank accounts (Notice at 5, ¶¶ 9-11);

4) Great Plains electronically withdrew money from Connecticut consumers' bank accounts (Obj. at 4);

5) Connecticut consumers signed their loan agreements electronically while physically present in the state of Connecticut (Notice at 5, ¶ 12); and

6) "[A]t no time did Connecticut residents leave the physical boundaries of this state or enter the physical boundaries of the Reservation to receive a Consumer loan." (Notice at 5, ¶ 12.)

Therefore, for purposes of this Motion to Dismiss, this activity occurs off-reservation and in Connecticut. *McIntosh*, supra 274 Conn. 262.

Connecticut's regulatory interest will not be destroyed even if some related conduct occurs on-reservation. *New Mexico*, 462 U.S. at 336 (State's regulatory interest is particularly substantial if State can point to off-reservation effects that necessitate State intervention.) I make special mention of the Court's discussion on this point in *Otoe II*. There, the Court stated that "[e]ven if we concluded that the loan is made where it is approved, the transaction New York seeks to regulate involves the collection as well as the extension of credit, and that collection clearly takes place in New York." Here in Connecticut, as in New York, Respondents (at least with respect to Great Plains Lending) reach into borrowers' bank accounts to make withdrawals. See *Otoe II* 769 F.3d 105 at 115.

General Applicability of State Laws at Issue

In order for the Department's jurisdiction to remain intact, the state laws at issue must be laws of general applicability, cannot be discriminatory, and must apply to all citizens of the state. *New Mexico*, 462 U.S. at 336 n.18; *Mescalero*, 411 U.S. at 148-49; *Otoe II*, 769 F.3d at 113.

In this case, the Department alleges violations of Sections 36a-555(1), 36a-555(2) and 36a-573(a) of the Connecticut General Statutes. Subdivisions (1) and (2) of Section 36a-555 of the Connecticut General Statutes, plainly stated, prohibit anyone without the required license from making loans in the amount of $15,000 or less through any method (specifically including the Internet) at an interest rate greater than 12% per year to borrowers in Connecticut. (Notice at 7, ¶¶ 1-3, 7.) Section 36a-573 of the Connecticut General Statutes, plainly stated, prohibits any person from enforcing or participating in any way in the enforcement of a loan in the amount of $15,000 or less and charging an interest rate greater than 12% per year. These laws set limits on the type of loans unlicensed persons can make to Connecticut borrowers and the enforceability of such loans, but are generally applicable to all lenders and operate to protect all Connecticut borrowers.[4]

Accordingly, the Department has alleged sufficient facts and law to defeat Respondents' assertion of tribal sovereignty as an absolute jurisdictional defense. Perhaps most fundamentally, neither the

[4]In an ironic twist, Section 36a-555 would also prohibit a Connecticut company from making similar loans over the Internet to tribal borrowers on tribal land.

present action nor the application of these statutes to Respondents infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. The lending activities at issue here are online lending companies. At this point in this case, they appear indistinguishable from any other online lender but for the fact that a tribe created them by passing a law. To say that it is a valid exercise of sovereign power for a tribe to endow those companies with the competitive advantage of immunity from regulation inside the sovereign states where they operate is to say a tribe has sovereign right to legislate the reach of its own sovereign immunity. Tribal legislation of this sort appears far "beyond what is necessary to protect tribal self-government or to control internal relations . . . ." *See, e.g., Montana v. United States*, 450 U.S. 544, 546 (1981).

Immunity from Suit

The question remains as to the impact of tribal immunity from suit on the Department's jurisdiction. "Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Immunity from suit stands for the proposition that even if the conduct at issue violates a law, the immune actor cannot be sued in a court of law for the violation. It is not a justification for their conduct. It is, in playground-speak, the "You Can't Catch Me" defense. Immunity from suit, however, does not give a tribe permission to break the law; it still remains obligated to comply with the law whether or not the state has the power to enforce it. "[A] State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998). Accordingly, if the present administrative action is something other than a suit, the Department's jurisdiction to "catch" the Respondents remains intact. I have already found that tribal sovereignty does not protect the Respondents

from the administrative reach of the Department and I find no compelling reason to conclude that the present administrative action is a suit from which Respondents can claim immunity.

As noted above, the Supreme Court, in defining immunity from suit, has clearly articulated that there is a "difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. Immunity from suit limits the enforcement options a state may have against a tribe by removing litigation in a court of law as an option. In the context of this administrative action as well as that of Connecticut state agencies in general, my authority to issue the Notice against Respondents is purely administrative and outside of any judicial process. To the extent that I issue an order against a respondent and the respondent fails to comply with the order, I could refer the matter to the State Attorney General to enforce my order in the judicial forum. Every step before referral to the Attorney General, however, remains entirely within the Department and does not use or expend any judicial resources.

Respondents assert a distinction between the Department's *regulatory* jurisdiction and its *adjudicatory* jurisdiction in order to argue, in essence, that there is no difference between an actual suit and any other attempt by an administrative agency to require compliance with state laws. (Reply at 10.)[5] This is a false distinction that grossly contorts the Supreme Court precedent expressly recognizing a state's authority to regulate off-reservation commercial activity occurring within its borders. To agree with Respondents is to pretend that the Supreme Court never recognized a state's authority to regulate tribal activities. In more visceral terms, Respondents' untenable position here would, with one hand, give Connecticut some illusory authority to "regulate" certain off-reservation tribal activity, but with the other

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[5]Respondents rely heavily on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), for the proposition that this administrative action is legally indistinguishable from a suit because "proceedings before the Department bear striking similarity to civil litigation." (Reply at 3.) I am not persuaded that *Federal Maritime* is applicable here. The fact that this administrative action is called a "contested case," has an "adversarial nature," uses a neutral fact finder called a "presiding officer" and employs Rules of Practice that lay out procedures bearing a "strong resemblance to civil litigation" do not make this action more than it is. *Id.* Black's Law Dictionary defines "suit" as "[a]ny proceeding by a party . . . against another *in a court of law*." *Black's Law Dictionary* 1448 (7th ed. 1999) (emphasis added). Black's defines "administrative proceeding" as a "hearing, inquiry, investigation, or trial before an administrative agency . . . [usually] adjudicatory in nature. . . ." *Black's* at 46. Just because two things look "strikingly similar" (such as the homoglyph rn next to the letter **m**) does not make them the same. Such is the case here; the key differences are easily revealed upon a closer look.

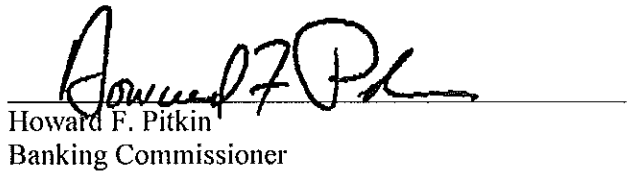
hand, rip from Connecticut's sovereign mouth any teeth sharp enough to hold a tribe, its officials or its commercial entities accountable for illegal activity in Connecticut.

CONCLUSION

Respondents accuse Connecticut of unlawfully ignoring the Tribe's independent status and hindering the Tribe's ability to provide for its members and manage its own internal affairs. (Motion to Dismiss at 1.) Such an accusation could just as easily have been levied at Respondents. Could it be they who are unlawfully ignoring *Connecticut's* independent status and its ability to provide for its citizens and manage its own affairs? The attempts by each sovereign to manage its own internal affairs by combating poverty within its borders have collided in this case. While Congress and the courts may in the future decide to permit tribes to be sued in a court for off-reservation commercial activity, Respondents remain obligated to comply with the state laws at issue here and the Department may proceed with this action.

On the face of the record and as a matter of law, the Department has alleged sufficient facts to state a claim for violations of Connecticut law under its jurisdiction. In my view of the law regarding tribal sovereignty and tribal immunity from suit, the Department has also made sufficient allegations to establish its jurisdiction over Respondents. For these reasons and pursuant to the authority granted to me by Section 36a-1-27(5) of the Regulations of Connecticut State Agencies, Respondents' Motion to Dismiss is **DENIED.**

So ordered at Hartford, Connecticut
this 6th day of January 2015.



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