NO. HHB CV15-6028096S	:	STATE OF CONNECTICUT
GREAT PLAINS LENDING, LLC, ET AL.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
CONNECTICUT DEPARTMENT OF BANKING	:	NOVEMBER 23, 2015

Memorandum of Decision

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

11/23/15
Mailed to Attys. Jannetta, Rozette, Bezzazich, White & Deichert and Reporter of Judicial Decisions.

I

On October 24, 2014, the commissioner of banking (commissioner) filed an initial order (Initial Order) against plaintiffs Great Plains Lending, LLC (Great Plains) and Clear Creek Lending (Clear Creek), which allege to be businesses created by the federally-recognized Otoe-Missouria Tribe of Indians (the Tribe), located in Oklahoma, and plaintiff James Shotton, who is Tribal Chairman. (Return of Record (ROR), pp. 1-17 (Initial Order.)) The commissioner alleged that Great Plains, by way of U.S. mail, email, and its website, had offered unsecured consumer loans in amounts ranging from $100 to $2,000 with annual interest rates of 199.44% to 448.76% to consumers in Connecticut and other states. Similarly, Clear Creek had allegedly offered unsecured small loans in amounts of $1,500 to $2,000 with annual interest rates of 390%

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to 420%. According to the commissioner, three Connecticut residents had entered into loan agreements with these companies, which agreements called for repayment at annual interest rates of 199.44%, 349.05%, and 398.20%. The commissioner alleged that at no point were the companies licensed as small loan lenders in Connecticut, nor were they exempt from licensure. (ROR, pp. 1-5.)

Based on these allegations, the commissioner found that the companies had violated Connecticut law by making loans without obtaining the required license and by contracting for and receiving interest at a rate greater than 12% on loans of less than $15,000. See General Statutes §§ 36a-555[1] and 36a-573 (a).[2] The commissioner found that Shotton had violated

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

[2]Section 36a-573 (a) provides: "(a) No person, except as authorized by the provisions of sections 36a-555 to 36a-573, inclusive, shall, directly or indirectly, charge, contract for or receive any interest, charge or consideration greater than twelve per cent per annum upon the loan, use or forbearance of money or credit of the amount or value of (1) five thousand dollars or less for any such transaction entered into before October 1, 1997, and (2) fifteen thousand dollars or less for any such transaction entered into on and after October 1, 1997. The provisions of this section

Connecticut law by participating in these transactions. (ROR, pp. 6-10.)

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

Instead of requesting a hearing, the plaintiffs filed a motion to dismiss, alleging that tribal sovereign immunity barred all state enforcement action against them. (ROR, pp. 23, 161.) In a nine page decision issued on January 6, 2015, the commissioner denied the motion. (Ruling on Motion). The commissioner concluded that at least some of the activity in question occurred off-reservation and that the state retained authority to regulate such off-reservation tribal activity in a

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shall apply to any person who, as security for any such loan, use or forbearance of money or credit, makes a pretended purchase of property from any person and permits the owner or pledgor to retain the possession thereof, or who, by any device or pretense of charging for the person's services or otherwise, seeks to obtain a greater compensation than twelve per cent per annum. No loan for which a greater rate of interest or charge than is allowed by the provisions of sections 36a-555 to 36a-573, inclusive, has been contracted for or received, wherever made, shall be enforced in this state, and any person in any way participating therein in this state shall be subject to the provisions of said sections, provided, a loan lawfully made after June 5, 1986, in compliance with a validly enacted licensed loan law of another state to a borrower who was not, at the time of the making of such loan, a resident of Connecticut but who has become a resident of Connecticut, may be acquired by a licensee and its interest provision shall be enforced in accordance with its terms."

nondiscriminatory way, at least as long it does not bring suit in court. (ROR, pp. 150-58.)

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

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

II

Under the UAPA, General Statutes § 4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 136-37, 778 A.2d 7 (2001). Section 4-183 (j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the

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

agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Stated differently, "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Okeke v. Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

Our Supreme Court has stated that "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . ." (Internal quotation marks omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163, 938 A.2d 890 (2007). "Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the

court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* 310 Conn. 276, 281-83, 77 A.3d 121 (2013).

III

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

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

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

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

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

As stated, the commissioner concluded that at least some of the activity in question occurred off-reservation and that the state retains authority to regulate such off-reservation tribal activity in a nondiscriminatory way, at least as long it does not bring suit in court. Based on the statement of law from *Bay Mills*, the commissioner can no longer rest his decision on the fact or possibility that the activity in question was off-reservation commercial conduct.[5]

The remaining ground of the commissioner's decision was that the department's administrative action was not a "suit" against the tribe in a court of law and that immunity only extends to such suits. On this issue, there is no appellate case precisely on point. Other cases have dealt with the simpler question of whether a suit exists when the state, in an effort to enforce an administrative order, files an actual lawsuit against the tribe in a court of law. See *Cash Advance and Preferred Cash Loans v. State,* 242 P.2d 1099, 1108 (Colo. 2010) (tribal sovereign immunity applies to judicial enforcement of state investigatory action with respect to alleged violations of state law).[6] The department does not seriously contest the proposition that

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[5]But, dissenting in *Bay Mills*, Justice Thomas foresaw the precise issue currently before the court: "In the wake of *Kiowa*, tribal immunity has also been exploited in new areas that are often heavily regulated by States. For instance, payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1,000 percent per annum) often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality. Martin & Schwartz, The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk? 69 Wash. & Lee L. Rev. 751, 758-759, 777 (2012)." *Michigan v. Bay Mills Indian Community,* supra, 134 S. Ct. 2052 (Thomas, J., dissenting.)

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

sovereign immunity would bar such an action against the tribe itself when filed in court.

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

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

Further, administrative actions under the UAPA are sufficiently similar to suits in court to interfere with the dignity of tribes as sovereigns. A UAPA case is not just an informal meeting.

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

Rather, a "contested case" under the UAPA is a "proceeding . . . in which the legal rights, duties or privileges of a party are . . . to be determined by an agency after an opportunity for [a] hearing . . . ." General Statutes § 4-166 (4). The hearing contains most of the traditional hallmarks of civil trial: a presiding officer; General Statutes § 4-177b; rules of practice; General Statutes § 4-167 (a) (1); the right to cross-examine witnesses; General Statutes §§ 4-177c (b), 4-178 (5); the right to subpoena witnesses; General Statutes § 4-177b; and the right to present evidence and argument. General Statutes § 4-177c (2). The procedural safeguards in the UAPA exceed the minimum imposed by the due process clause. See *Levinson v. Board of Chiropractic Examiners,* 211 Conn. 508, 531, 560 A.2d 403 (1989). See generally *Dept. of Public Safety v. Freedom of Information Commission,* 103 Conn. App. 571, 587-88, 930 A.2d 739, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). See also *R.T. Vanderbilt Co. v. Continental Casualty Co.,* 273 Conn. 448, 870 A.2d 1048 (2005) ("suit" for purposes of insurance policy included federal agency administrative action initiated by a potentially responsible party letter). In the case of the department of banking, the commissioner has administrative authority to issue cease and desist orders, to order restitution and disgorgement, and to impose civil penalties up to one hundred thousand dollars per violation. General Statutes §§ 36a-50 (a) (2), 36a-50 (c), 36a-52 (a). Thus, being haled into a UAPA administrative proceeding by the commissioner is a serious event that could offend the notion of a tribe as a sovereign entity.

The commissioner argues that *Federal Maritime Commission* is distinguishable because there the State was somewhat coerced into appearing in the administrative proceedings by the fact that, if it did not appear, it would not have the benefit of asserting sovereign immunity in a subsequent court enforcement action filed by the United States. Although the circumstances are

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

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

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

IV

A

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

The court has found no Connecticut appellate authority precisely on point in a UAPA case. The plaintiffs cite *McDonald v. Rowe,* 43 Conn. App. 39, 45-46, 682 A.2d 542 (1996). While that case arose under the UAPA, it did not squarely address the issue presented. Rather, it dealt with a rather unique situation in which the trial court went outside the administrative record to find a basis for an award of attorney's fees to the plaintiff. See also *Neri v. Powers,* 3 Conn. App. 531, 537, 490 A.2d 528, cert. denied, 196 Conn. 808, 494 A.2d 905 (1985) ("Except in the

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immunity. See *Otoe-Missouria Tribe of Indians v. Financial Services,* supra, 769 F.3d 113. Indeed, the court did not discuss tribal sovereign immunity.

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

very limited situation in which there is an allegation of procedural irregularities not shown in the record; General Statutes § 4-183 (f); [judicial] review is limited to the record and the court cannot hear evidence.").[10]

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

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

marks omitted.].

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

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

The department also cites the doctrine, applicable in UAPA and other cases, that an appellate court may affirm a superior court decision on any alternate grounds supported by the

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

This rationale fully applies here. 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. The court cannot make that administrative determination for him. This point is particularly true because whether an entity is an arm of the tribe involves use of a balancing test that essentially requires the commissioner to make a "determination of policy or judgment." Id. See *Cash Advance and Preferred Cash Loans v. State,* supra, 242 P.3d 1102, 1111 (three-prong arm of the tribe test); *Sue/Period Concrete & Paving, Inc. v. Lewiston Golf Course Corp., Inc.,* 24 N.Y.3d 538, 546-47, 25 N.E.3d 928, 2 N.Y. Supp.3d 15 (2014) (nine factor test).[11] Further, the record that the court has to review on these issue is simply incomplete. Accordingly, the court cannot uphold the commissioner's decision on the alternative ground, not reached by the commissioner, that the plaintiffs are not arms of the Tribe.

B

The court does, however, have the authority to remand the case to the department when the fact-finder "never [made] complete factual findings . . . ." *Lages v. Lennard,* 148 Conn. App. 234, 257, 85 A.3d 13 (2014).[12] It is fully appropriate to exercise that authority in the present case. The commissioner had a valid reason for not reaching the arm of the tribe issue because, at the time, he reasonably, though erroneously, believed that it was unnecessary to do so in order to resolve the case. See, e.g., *Gould v. Freedom of Information Commission,* 314 Conn. 802, 805,

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

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

104 A.3d 727 (2014). Further, it is entirely possible that the same issue will arise in the future with the same Tribe and thus it will promote judicial economy to have it resolved now. Therefore, the court remands the case to the department for determination of the arm of the tribe issue. The court retains jurisdiction. For the sake of clarity, the court asks the commissioner to decide: 1) whether Great Plains and Clear Creek are arms of the Tribe, 2) whether Shotton has tribal sovereign immunity from financial penalties that the commissioner seeks to impose, and 3) whether Shotton has tribal immunity from the commissioner's request for prospective injunctive relief against future violations of the state's usury and banking laws.

V

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

cease and desist order and civil penalties. (ROR, pp. 150-65.)

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

The plaintiffs note that, in a footnote in their November 26, 2014 reply brief in support of their motion to dismiss the administrative proceedings, they expressly reserved their right to contest the proceedings on the merits. (ROR, p. 146, n.1.) Ordinarily, the passing mention of a matter in a reply brief is an inadequate way of raising a claim on the merits. See *Bovat v. Waterbury*, 258 Conn. 574, 585-86 n.11, 738 A.2d 1001 (2001). In any event, the request was late. Therefore, the plaintiffs' final claim has no merit.

VI

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

It is so ordered.

Schuman, J.
Carl J. Schuman
Judge, Superior Court