IN THE MATTER OF:	BEFORE THE COMMISSIONER OF
AMERICAN WEB LOAN, INC., et al.,	FINANCIAL REGULATION
RESPONDENTS	OAH NO. LABOR-CFR-76-20-21265
	CFR: FY 2018-0042

FINAL ORDER

Background

On September 10, 2020, the Maryland Office of the Commissioner of Financial Regulation issued a charge letter (the "Charge Letter") against Respondents, American Web Loan, Inc. ("AWL"), James Hopper ("Mr. Hopper") and John R. Shotton ("Chairman Shotton")[1] charging the Respondents with various violations of the Maryland Commercial Law Article ("CL") and the Maryland Financial Institutions Article ("FI") relating to AWL's lending activities within the state of Maryland. Pursuant to Maryland State Government Article ("SG") §10-205, the OCFR delegated authority to conduct the contested hearing on the Charge Letter to the Office of Administrative Hearing. ("OAH").

On December 15, 2020, the Respondents filed a Motion to Dismiss Charge Letter and Motion to Quash Subpoena for Lack of Subject Matter Jurisdiction ("Motion to Dismiss"). In the Motion to Dismiss, Respondents argued that AWL represented an arm of the Oteo-Missouria Tribe of Indians ("Tribe") and that, under applicable law, the Respondents were entitled to protection of

[1] John R. Shotton also serves as Chairman of the Tribe and is referred to as Chairman Shotton in this order in deference to his office.

the Tribe's sovereign immunity ("Tribal Sovereign Immunity"). If entitled to Tribal Sovereign Immunity, Respondents argued that the OCFR lacked the necessary jurisdiction over the Respondents to bring the actions outlined in the Charge Letter. The OCFR opposed the Motion to Dismiss with each side submitting pleadings supportive of their positions.

The Administrative Law Judge assigned this matter by the OAH ("ALJ") held a video hearing on the Motion to Dismiss on February 1, 2021. Counsel for both parties appeared for this hearing. The ALJ's Proposed Decision issued on July 26, 2021 ("Proposed Decision") notes the ALJ offered to conduct this hearing as a full evidentiary hearing, but that Respondents' Counsel declined this offer.

On March 23, 2021, following additional briefing on the issue of collateral estoppel, the ALJ issued a ruling denying the Motion to Dismiss ("Ruling"). Thereafter, the ALJ scheduled a video hearing on the merits for May 3, 2021 ("Merits Hearing").

On March 26, 2021, Counsel for Respondents advised the ALJ of their intention to file exceptions to the Ruling and requesting a stay of the Merits Hearing. The ALJ advised Counsel for the Respondents that such a request should be submitted in the form of a motion with supporting authority. Respondents' Counsel then filed a Motion to Stay the Merits Hearing ("Motion to Stay"), which the OCFR opposed. The ALJ advised the parties the ALJ would hear arguments on the Motion to Stay at the commencement of the Merits Hearing.

The ALJ held the Merits Hearing on May 3, 2021, at which counsel for both parties appeared. Following arguments, the ALJ denied the Motion to Stay and proceeded with the Merits Hearing. The ALJ notes in the Proposed Decision that Respondents and their Counsel declined to participate in the Merits Hearing following the ALJ's denial of the Motion to Stay. The OCFR presented witness testimony and introduced documents into evidence in support of its position at the Merits Hearing.

The ALJ issued the Proposed Decision on July 26, 2021. Under COMAR 09.01.03.08, the Commissioner considered the Proposed Decision and issued a Proposed Final Order on September 24, 2021 ("Proposed Order"). The Proposed Order made certain findings of fact and conclusions of law, and concluded the Respondents failed to meet their burden to prove entitlement to the Tribal Sovereign Immunity. The Proposed Order also found the Respondents violated various provisions of Maryland law, imposed financial penalties, and ordered Respondents to cease and desist any activities violating Maryland law, including returning funds Respondents wrongfully collected from Maryland consumers.

On October 18, 2021, Respondents filed exceptions to the Proposed Order (the "Exceptions"). The Exceptions essentially challenged the Proposed Order on two grounds. First, Respondents argue that they presented sufficient evidence to prove entitlement to Tribal Sovereign Immunity but the Commissioner interpreted such evidence erroneously. Second, Respondents argue that due process rights recognized in relevant case law require affording Respondents with an opportunity to seek a final determination on Respondents' Tribal Sovereign Immunity claim before the Commissioner can make any substantive findings beyond such issue.

The OCFR opposed Respondents Exceptions and the Commissioner scheduled a hearing on the exceptions on January 25, 2022 ("Exceptions Hearing"). Prior to the Exceptions Hearing, Respondents filed a request to submit additional evidence. The additional evidence consisted of: (1) a Settlement Agreement and Final Approval Order in Solomon v. AWL, et. al., (case no.: 4:17-cv-0145-HCM-RJK) (collectively, the "Settlement Agreement") and (2) Oteo-Missouria Tribe of Indians, OMTC #0519039-FY 2020 Resolution; Oteo-Missouria Tribe AWL II Act and AWL II Corporate Charter and Restated Articles of Incorporation; and AWL II, Inc. certification issued by the Tribe on September 7, 2021 (collectively, the "Updated AWL Documents").

The Commissioner held the Exceptions Hearing as scheduled. As a preliminary matter, the Commissioner granted the Respondents request to submit the Settlement Agreement and the Updated AWL Documents as additional evidence in this matter. Each party then presented their arguments. Having considered all arguments advanced by each party throughout these proceeding, including arguments made at the Exceptions Hearing and all testimony and evidence presented in support of such arguments, the Commissioner now enters this Final Order ("Order").

Discussion

The outcome of this case depends on two questions. First, did Respondents produce sufficient evidence to satisfy the legal criteria needed to support a finding that AWL constitutes an arm of the Tribe and therefore entitles each of the Respondents to Tribal Sovereign Immunity? Second, did the procedure employed by the OCFR in this matter provide Respondents with sufficient due process to assert entitlement to Tribal Sovereign Immunity and challenge the OCFR's jurisdiction over them? This Order will address the second question first.

Due Process Concerns

This case involves important and compelling interests of two sovereigns. Although the Tribe is not a party in this case, the Respondents argue that AWL is an arm of the Tribe and an important part of the Tribe's economic development[2]. If AWL constitutes an arm of the Tribe, Respondents argue that the Tribe's sovereign immunity would extend to each of the Respondents and require the dismissal of this action. Analyzing a similar case involving the Tribe, the United States Second Circuit Court of Appeals noted:

> This case arises from a conflict between two sovereigns' attempts to combat poverty within their borders. Native American tribes have long suffered from a dearth of economic opportunities. Plaintiffs in this case, the Otoe–Missouria Tribe

[2] Shotton Declaration 23

> of Indians, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and wholly owned corporations of those tribes (collectively, "the lenders"), established internet-based lending companies in the hopes of reaching consumers who had difficulty obtaining credit at favorable rates but who would never venture to a remote reservation. The loans were made at high interest rates, and the loans permitted the lenders to make automatic deductions from the borrowers' bank accounts to recover interest and principle. New York has long outlawed usurious loans. DFS aggressively enforced those laws in order to "protect desperately poor people from the consequences of their own desperation." *Schneider v. Phelps,* 41 N.Y.2d 238, 243, 391 N.Y.S.2d 568, 359 N.E.2d 1361 (1977). Thus, the tribes' and New York's interests collided.

Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services, 769 F.3d 105, 107-108 (2014).

Like the Tribe's interests in promoting its economic opportunities and providing a better life for its members, Maryland has an interest in protecting its citizens from usurious loans. As stated by the Maryland Court of Appeals almost 100 years ago in *Carozza v. Federal Finance & Credit Co.*, 149 Md. 223, 342 (1925): "There is a general recognition that laws against usury sprang from the notion that the needy and driven borrower was, by reason of his unfortunate circumstances, subject to the dominion of the lender, with disastrous pecuniary loss and personal hardship...and the state conceived it a duty to redress, so far as possible, the wrongs resulting from the inequality of the contracting parties by relieving the necessitous borrower of usurious impositions."

The Maryland Constitution, Article III, Section 57, establishes the legal rate of interest in Maryland as 6% per annum unless the Maryland General Assembly establishes another rate. While the Maryland General Assembly has enacted other legal rates of interest, such as in CL, Title 12, Subtitles 1, 3, 4, 9, and 10, it has also strictly limited the rates of interest a lender may charge on consumer loans and enacted substantial penalties for those who charge in excess of

allowed amounts. As examples, CL §12-314 renders certain loans contracting for interest in an amount greater then authorized by law as void and unenforceable while CL §12-114 subjects a person who collects interest and charges exceeding the amounts authorized for certain loans governed by that subtitle to damages equal to three times the excess amounts collected. Maryland also treats usurious lending as a criminal act (see e.g., CL §§ 12-122; 12-316; 12-414; 12-917 and 12-1110).

The Maryland General Assembly provided the OCFR with licensing, investigative and enforcement authority over most aspects of consumer lending. Lenders extending credit under CL, Title 12, subtitles 3, 4, 9 and 10 are subject to the OCFR's licensure authority (unless exempt), as are lenders extending credit under certain provisions of CL, Title 12, subtitle 1. FI §§ 2-113; 2-114; 2-115; 2-116; 11-214; and 11-215; give the OCFR broad investigative and enforcement authority over lending. These provisions regarding both consumer lending and the OCFR's authority evidence the intent of the Maryland General Assembly to protect Maryland consumers from usurious lending and to empower the OCFR to safeguard and enforce those protections.

The Maryland General Assembly provided the OCFR with 2 separate and distinct enforcement options in FI §2-115. These enforcement options are also provided in FI §§ 11-215 and 11-217. Although the language used in these provisions differ, the enforcement options and rights of any respondent are virtually identical. FI §2-115 (a) provides:

> (a) When the Commissioner determines that a person has engaged in an act or practice constituting a violation of a law, regulation, rule or order over which the Commissioner has jurisdiction, and that immediate action against the person is in the public interest, the Commissioner may in the Commissioner's discretion issue, without a prior hearing, a summary order directing the person to cease and desist from engaging in the activity, provided that the summary cease and desist order gives the person:
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> > (1) Notice of the opportunity for a hearing before the Commissioner to determine whether the summary cease and desist order should be vacated, modified, or entered as final; and

(2) Notice that the summary cease and desist order will be entered as final if the person does not request a hearing within 15 days of receipt of the summary cease and desist order.

Alternatively, the Commissioner may proceed under FI §2-115 (b) which states:

(b) When the Commissioner determines after notice and a hearing, unless the right to notice and a hearing is waived, that a person has engaged in an act or practice constituting a violation of a law, regulation, rule or order over which the Commissioner has jurisdiction, the Commissioner may in the Commissioner's discretion and in addition to taking any other action authorized by law:

(1) Issue a final cease and desist order against the person;
(2) Suspend or revoke the license of the person;
(3) Issue a penalty order against the person imposing a civil penalty not exceeding:
(i) $10,000 for a first violation; and
(ii) $25,000 for each subsequent violation; or
(4) Take any combination of the actions specified in this subsection.

By use of the permissive "may" in each section, the OCFR has discretion to choose which enforcement option it will pursue in a particular situation. Regardless of which provision of FI §2-115 the OCFR pursues, subsection (d) of FI §2-115 provides that the notice of any hearing, and the hearing itself, must be conducted in accordance with the Maryland Administrative Procedures Act ("Act"). The sections of the Act addressing contested hearings are codified in the SG §10-201 et. seq ("Subtitle 2").

The General Assembly declared the purpose of Subtitle 2 as ensuring the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed by that subtitle[3]. Subtitle 2 accomplishes this objective by including due process safeguards throughout administrative enforcement actions. The due process

[3] SG §10-201(1)

safeguards embedded in Subtitle 2 exist regardless of whether the OCFR proceeds under FI §2-115 (a) or (b).

If the OCFR proceeds under FI §2-115 (a), the OCFR may issue a summary cease and desist order against a petitioner without a prior hearing. However, such summary cease and desist order does not become final until the OCFR has given the petitioner notice and the opportunity for a hearing before the Commissioner. Following any requested hearing or the expiration of the timeframe for requesting such a hearing with no request being made, the OCFR may enter the summary cease and desist order as final.

Once the OCFR enters the summary cease and desist order as final, SG §10-222 gives the respondent the right to judicial review. This right of judicial review under SG §10-222 goes beyond traditional appellate rights by including the potential for the admission of additional evidence as well as testimony on alleged irregularities in procedure before the presiding officer that do not appear on the record. SG §10-222 expressly authorizes the Circuit Court to reverse, or modify the administrative order if any substantial right of the respondent may have been prejudiced because a finding, conclusion or decision is unconstitutional, exceeds the statutory authority or jurisdiction of the final decision maker, resulted from an unlawful procedure, is affected by any other error of law, is unsupported by competent, material and substantial evidence in light of the entire record as submitted, or is arbitrary or capricious. The Circuit Court may also remand the matter back to the agency for further proceedings.

SG §10-222 (b) allows judicial review of interlocutory orders in certain circumstances, but only when the presiding officer has final decision making authority.

The record for judicial review under SC §10-222 includes all transcripts, documents, information and materials that were before the final decision maker at the time of his or her decision including any written exceptions and evidence offered in connection with such

exceptions. Once the Circuit Court completes its judicial review, SG §10-223 grants an aggrieved party the right of appeal to the Court of Special Appeals in the same manner provided for appeal of civil cases.

The Act also requires the OCFR, if it seeks civil enforcement of an order it has entered, to do so through the Circuit Courts following the procedures outlined in §10-222.1 of the Act.

If the OCFR proceeds under Financial Institutions §2-115(b), as it did in this case, the respondent receives notice and the opportunity for a hearing before the issuance of even a proposed order. As the OCFR delegates contested matters to the OAH, the hearing takes place before the OAH. Under SG §10-220, the OAH only has authority to issue a proposed decision and is therefore not the final decision maker. Once the OAH issues its proposed decision, the OCFR must consider the proposed decision and issue a proposed final order. Once again, no order is entered at that time. SG 10-220 requires the OCFR to forward a copy of the proposed final order to all parties and to inform the parties of their right to file exceptions to the proposed final order. The Maryland Department of Labor, of which the OCFR is a part, has adopted regulations at Code of Maryland Regulations ("COMAR") 09.01.03.09 governing exceptions to a proposed final order. COMAR 09.01.03.09 affords various rights to a person filing exceptions, including a limited ability to request that additional evidence be presented at the exceptions hearing.

Following the exceptions hearing, or the passage of time to file such exceptions with none being filed, the OCFR may issue a final order. A final order issued under FI §2-115(b) may include financial penalties under FI §2-115(b)(3) and (c). Once the final order is issued, the same procedures governing the issuance of a final cease and desist order under FI §2-115(a) must be followed, with all procedural due process safeguards afforded to the petitioner. This includes the requirement that the OCFR must bring an action in Circuit Court to enforce the final order.

As outlined in the background section of this Order, this case has followed the procedures set forth under FI §2-115(b), which provided Respondents with an opportunity for hearings before both the OAH and the Commissioner. From the outset, Respondents have asserted that the Commissioner lacks jurisdiction over the Respondents because AWL constitutes an arm of the Tribe and entitles the Respondents to the Tribal Sovereign Immunity. Citing case law allowing a party to enter a limited appearance solely for the purpose of disputing jurisdiction, Respondents indicated they would only participate in these proceedings for the purposes of disputing the Commissioner's jurisdiction over the Respondents. Respondents assert that until the threshold issue of jurisdiction over Respondents is established, principles of sovereign immunity require that Respondents not be subjected to the attendant burdens of litigation. Such attended burdens would include being required to offer evidence or arguments in their defense beyond their claims of Tribal Sovereign Immunity.

The Respondents first assert that the Commissioner failed to meet its burden of proof in asserting jurisdiction and cite *Howard v. Plain Green, LLC* (2017 WL 3669565, 2) and *Everette v. Mitchem* (146 F. Supp. 3d 720) for its proposition that the burden is on the OCFR to prove jurisdiction exists. In *Howard*, a pay-day-lender associated with a tribe of Indians asserted tribal sovereign immunity in its motion to dismiss a consumer suit. While the Court agreed that the plaintiff must bear the burden of proving jurisdiction, the Court clarified that a motion to dismiss should only be granted where "the material jurisdictional facts are not in dispute".[4]

"Subject matter jurisdiction is the court's ability to adjudicate a controversy of a particular kind…if by the law that defines the authority of the court, a judicial body is given the power to render a judgment over that class of cases within which a particular case falls, the court has subject matter jurisdiction". (*John A v. Board of Educ. for Howard County*, 400 Md. 363, 389). As stated

[4] Howard v. Plain Green (2017 WL 366565, 2)

previously the Maryland General Assembly has empowered the Commissioner to enforce Maryland consumer lending laws and to hear, and delegate to OAH to hear, questions regarding violation of Maryland lending laws. [5] The Respondents question is not whether the Commissioner has the power to enforce Maryland's consumer lending laws, but rather if the Commissioner can properly exercise personal jurisdiction over the Respondents. While an adjudicative body may have subject matter jurisdiction, based in statute, to hear a class of cases, it may lack the personal jurisdiction to pursue the party. As the Supreme Court has opined, "a court may have general jurisdiction over foreign (or sister-state or foreign county) corporations...when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State" or where there is an affiliation between the forum and the controversy".[6] This controversy involves loans made to Maryland consumers and possesses such an affiliation.

It is the Respondents contention that regardless of both the statutory authority of the Commissioner to hear and enforce violations of state lending laws (subject matter jurisdiction) and the significant number of loans made to Maryland consumers (personal jurisdiction), that the Commissioner is barred from pursuing these actions by Tribal Sovereign Immunity. Had the OCFR chosen to file charges against the Otoe-Missouria Tribe there would have been a presumption that, as a recognized tribe, the Tribe is entitled to Tribal Sovereign Immunity. However, the OCFR filed charges against AWL, a commercial entity so no such presumption exists[7]. As a result, the OCFR has established the elements necessary to demonstrate the Commissioner has both subject matter jurisdiction over loans made to Maryland consumers and personal jurisdiction over lenders extending loans to Maryland consumers.

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[5] FI 2-115(a) or FI 2-115(b)
[6] Goodyear Dunlop Tires Operations, S.A. v Brown, 564 US 915, 919 (2011)
[7] *Williams v Big Picture Loans*, LLC, 929 F.3d 170, 177 (2019)

The Commissioner's personal jurisdiction over AWL is subject to AWL's claims and defenses, including Tribal Sovereign Immunity. Case law clearly places the burden of proving a entitlement to tribal sovereign immunity on the person asserting such immunity in cases such as this. See *Williams v Big Picture Loans*, LLC, 929 F.3d 170, 176 (2019) (*"Williams"*).

Although the proceedings to date have been administrative and not judicial, Respondents argue that Tribal Sovereign Immunity applies equally to administrative actions and that the attendant burdens of an administrative action are indistinguishable from those of litigation. This argument relies heavily on the cases *Great Plains Lending, LLC v. Connecticut Dep't of Banking* (2015 WL 9310700) (*"Great Plains"*) and *Federal Maritime Com'n v South Carolina State Ports Authority* (535 US 743) (*"Federal Maritime"*).[8] However, Respondents fail to note that facts, law, and precedent distinguish these cases from the current situation and render them inapplicable.

Respondents correctly note that the Court in *Great Plains* found that the tribe "possesses sovereign immunity in a[n] administrative proceeding filed against them by a state commissioner".[9] However, language in the Court's decision limits this statement to a proceeding brought under Connecticut's version of the Uniform Administrative Procedures Act ("CT UAPA").[10] The Court made its determination regarding the CT UAPA after reviewing the Supreme Court's finding in *Federal Maritime*[11] and finding that, as in *Federal Maritime,* the procedures in a CT UAPA were substantially similar to those of a court.[12] However, there are key differences between the CT UAPA and Maryland's Act which render the Connecticut Superior Court's decision in *Great Plains* inapplicable to this situation.

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[8] American Web Loan, Motion to Dismiss at 10
[9] Id
[10] Great Plains Lending, LLC v. Connecticut Dep't of Banking, 2015 WL 9310700, 5 (2015)
[11] Id at 4
[12] Id at 5

In extending the concept of sovereign immunity from courts to administrative proceedings, the Court in *Federal Maritime* focused on the similarities between the Federal Maritime Commission ("FMC") and a civil proceeding and found them substantially similar.[13] Under 46 U.S.C. § 1711(a)(1), the FMC must conform its procedures to civil proceedings. Specifically, the Court noted that FMC procedures permit both parties to perform discovery through the service of interrogatories, requests for documents, and even entry onto the other party's property for purposes of inspection.[14] The administrative law judge, under the FMC, issues a decision that includes "a statement of findings and conclusions, as well as the reasonable basis therefore...and the appropriate rule, order, section, relief or denial".[15] The Court also took note of the fact that an administrative law judge may look to the Federal Rules of Civil Procedures where the FMC's own rules of practice provided no guidance.[16] The combination of these facts led the Court to determine that FMC proceedings are "overwhelming[ly]" similar to civil litigation and thus an affront to the notion of sovereign immunity.[17]

The Court in *Great Plains* also examined the process under the CT UAPA to determine if tribal sovereign immunity barred the actions of the Connecticut Banking Commissioner ("CBC"). Examining the CT UAPA, the Court found that the process was substantially similar enough to a civil suit to render it an affront to the sovereignty of a tribe.[18] The Court noted that CT UAPA hearings have a presiding officer, rules of practice, the right of cross-examination, subpoena witnesses, and present evidence and argument.[19] Further, the Commissioner has the power to "issue cease and desist orders, to order restitution and disgorgement, and to impose civil

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[13] Federal Maritime Com'n v South Carolina State Ports Authority, 535 US 743, 758
[14] Id
[15] Id at 759
[16] Id
[17] Id
[18] Great Plains Lending, LLC v Connecticut Dept. of Banking, 2015 WL 9310700, at 5
[19] Id

penalties". [20] While not expressly noted by the Court, Regulations governing action brought by the CBC permitted dispositive motions and allowed for discovery in the form of document requests. The Court concluded that CT UAPA proceedings to be "a serious event" likely to "offend the notion of tribal sovereign immunity".[21]

Certain similarities do exist between Maryland proceedings under the Act and proceedings under FMC and the CT UAPA. All three have triers of fact and empower the presiding officer to hear evidence, issue subpoenas, call witnesses, and issue a statement of findings and conclusions.[22] However, Maryland hearings under the Act are much more limited than the proceedings under either FMC or the CT UAPA. Hearings under the Act do not allow for discovery (*COMAR 09.01.02.11*) and the OAH may only grant a motion to dismiss or any other dispositive motion with the full concurrence of other parties. (COMAR *09.01.03.05(B)*)[23]. Eliminating the burdens of discovery and dispositive motions practice distinguishes a Maryland proceeding under the Act, but further differences also exist.

In *Federal Maritime,* the Court addressed the question of whether the lack of self-execution – a fact common to FMC, CT UAPA, and the Act – is dispositive in determining whether there is a difference between an administrative proceeding and a civil suit. The Court in *Federal Maritime*, noted that this lack of self-execution was an important distinction, it ultimately stated that it was one without a difference[24]. However, in disregarding that argument, the Court pointed to another procedural difference in that circumstance, one that also exists in Connecticut, but does not exist in Maryland. The Court noted that once the FMC issues a "nonreparation order" and the

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[20] Id
[21] Id
[22] 46 U.S.C. §502.223; CT ST §4-177c and §4-179; MD State Govt § 10-213
[23] Respondents dispute this prohibition and argue for following OAH procedures under 28.02.01.11. COMAR 09.01.03.05 specifically states OAH procedures should be followed "*except as provided for under this regulation*" followed by the exception that an ALJ not decide motions.
[24] Federal Maritime at 762-764

FMC seeks to enforce that order via the United States Attorney General, the sanctioned party cannot litigate the merits of that order in court[25]. Under 43 USC § 1713(c) a court can only review if an order was "properly and duly issued". Further, a party may not argue the merits of its position on appeal if it does not appear[26]. Ultimately, these facts, along with escalating fines for non-compliance, lead the Court to conclude that a party brought before the FMC is forced into appearance.[27]

The Court in *Great Plains* found a similar conundrum faces parties before the CBC.[28] Indeed, the CT UAPA specifically states that "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact" and that 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 order was unconstitutional, in excess of statutory authority, used unlawful procedure, clearly erroneous, or arbitrary and capricious".[29]

Unlike the CT UAPA, SG §10-222 gives the court in Maryland three options upon appeal: remand, affirm, or reverse or modify. While the Act and CT UAPA may contain similar factors a reviewing court may consider, an important distinction in the framing exists. Specifically, a Connecticut court must affirm the agency decision "unless" it makes certain findings; Maryland courts have broader discretion under the Act and may choose to reverse, remand or modify if it finds cause as stipulated. As a result, while the default in Connecticut is affirmation of the agency decision, in Maryland it is not. Further, Maryland law does not require the same level of deference Connecticut requires with respect to an agency's factual findings.

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[25] Id at 762
[26] *28 USC §2342(3)b*
[27] Federal Maritime at 763-4
[28] Great Plains at 5
[29] *CT ST §4-183(j)*

Along with the significant differences in procedure and law discussed above, there is also a factual difference between *Great Plains* and the current situation. The Court in *Great Plains* noted that the CBC, in issuing his final order denying Great Plains motion to dismiss, did not address the question of tribal sovereign immunity[30]. Here, the ALJ, not only heard the Motion to Dismiss but reviewed all evidence presented by Respondents in asserting AWL constitutes an arm of the Tribe. By allowing Respondents the opportunity to present all evidence they desired in support of their claim of entitlement to the Tribe's immunity, the ALJ, and the Commissioner by addressing those arguments in this Order, have preserved those arguments for judicial review and appeal.

For the reasons set forth herein, the Commissioner believes *Great Plains* is distinguishable from this case. Specifically, the Act and regulations adopted pursuant to the Act, operated in a manner which did not subject Respondents to discovery or dispositive motions practice. Although the OCFR issued subpoenas for attendance by Respondents at the Merits Hearing, the OCFR lacked any ability to enforce those subpoenas and, indeed, Respondents did not attend the Merits Hearing. The procedures employed in this case afforded Respondents the opportunity to present whatever evidence and arguments Respondents desired the OCFR to consider before the OCFR issues this Order. The judicial review afforded Respondents by the Act allows the Respondents to challenge this Order in a judicial setting and affords the Court significant discretion to address those challenges.

Notwithstanding claims of tribal sovereign immunity, an Indian tribe engaged in commercial activity off its sovereign territory may be subject to the laws of the jurisdiction in which it engages in such activity. In *Michigan v Bay Mills* (*523 US 782, 790*), the United States Supreme Court upheld its prior decision that tribal sovereign immunity applies to commercial

[30] Great Plains Lending, LLC v Connecticut Dept. of Banking, 2015 WL 9310700, at 6

operations of a tribe both on and off the reservation. However, the Court did not overturn the findings of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc* (523 U.S. 751, 755) and *Oklahoma Com'n v Citizen Band Potawatomi Indian Tribe of Oklahoma* (498 U.S. 505, 11) that tribes can be held subject to nondiscriminatory state laws (*Potawatomi* citing *Mescalero Apache Tribe v Jones*, 411 U.S. 145, 148-9). In *Mescalero*, the Court held that "absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State". (411 U.S. 145, 148-9). No federal law has been passed prohibiting the States from setting non-discriminatory interest rates on consumer loans[31].

Respondents decided to extend consumer loans to Maryland residents. While this does not mean Respondents waived any right to claim Tribal Sovereign Immunity or to challenge the OCFR's means to enforce Maryland law, Respondents understood that Tribal Sovereign Immunity does not override non-discriminatory state laws with respect to activities effecting such state. Consequently, Respondents understood their decision to extend loans to Maryland consumers at rates not allowed by Maryland law would predictably result in the OCFR bringing an action to terminate any activity which violated Maryland's consumer lending laws.

Respondents have questioned the OCFR's unwillingness to review the individual Tribal Sovereign Immunity claims of Chairman Shotton and Mr. Hutton. Both Chairman Shotton and Mr. Hutton have admitted they acted in their capacity as agents of AWL. As such, if AWL has not established its ability to assert Tribal Sovereign Immunity, neither has Chairman Shotton or Mr. Hutton.

[31] Federal law may pre-empt state interest rate laws with respect to certain banking institutions. Those laws are not at issue in this matter.

Respondents accurately assert that they have not conceded they do not possess a Maryland lender's license. Respondents also argue that, until the issue of Tribal Sovereign Immunity is finally resolved, there is no need for them to produce such a license or argue for an exemption to rebut the Commissioner's charge of unlicensed lending. This argument fails as Respondents have asserted throughout this matter that AWL constitutes an arm of the Tribe and is exempt from Maryland's licensing and lending laws meaning they assert AWL requires no such license. If AWL had acquired such a license not withstanding any claimed exemption of Tribal Sovereign Immunity, Respondents could have produced such license in connection with their Motion to Dismiss. Production of such a license could have resolved certain portions of the Charge Letter in their favor as a preliminary matter and therefore summarily relieved Respondents of some of the perceived burdens of litigation of which they now complain.

Maryland law prohibits making most consumer loans without either a license or an exemption from licensing. The OCFR issues such license and may bring actions against persons who extend consumer loans to Maryland residents without obtaining the required license. As such, an entity charged with engaging in unlicensed lending to consumers in Maryland must either produce a license or demonstrate that they are exempt from licensure.[32] Evidence produced in this matter is sufficient to support a finding the Respondents do not have a Maryland lending license.

Respondents also question the overall fairness of these proceedings. The OCFR commenced these proceeding based on information from Maryland consumers alleging those consumers received loans from AWL with interest rates which violate Maryland law. The OCFR chose to proceed in a manner which afforded Respondents an opportunity for a hearing before proceeding to an order. Respondents chose to participate only to the extent of asserting a right to

[32] Maryland law has no licensing exemption for federally recognized tribes of Indians. No need exists to examine whether Maryland law could require a Tribe to be licensed as AWL did not establish an entitlement to Tribal Sovereign Immunity.

Tribal Sovereign Immunity and received the opportunity to put forth all evidence and arguments in support of such claim. The ALJ and Commissioner considered all evidence and arguments advanced by Respondents in support of their claim of entitlement to Tribal Sovereign Immunity and each concluded Respondents had not met their burden of proof on the issue.

Respondents obviously dispute any conclusion that Respondents did not meet their burden of proving entitlement to the Tribe's sovereign immunity. Respondents also argue, however, that no administrative order issued in this matter should go beyond a determination of Tribal Sovereign Immunity until Respondents are afforded an opportunity to have that matter conclusively determined through the judicial process. To do otherwise, Respondents argue, subjects Respondents to the burdens of litigation prior to conclusively establishing jurisdiction. Even with the discussion distinguishing *Great Plains* from this case, Respondents assert that their compelling interest in promoting the interests of the Tribe and basic concepts of fairness mitigate against issuing an order that goes beyond addressing the issue of Tribal Sovereign Immunity.

As will be discussed in further detail below, the Commissioner does not believe the additional evidence and arguments advanced by Respondents through the Exceptions support a finding that Respondents may claim protection of Tribal Sovereign Immunity. The question then becomes whether this Order should simply include this finding or include both this finding and the other provisions contained in the Proposed Order. Determining which course to pursue involves a balancing of the important rights and interests of each of the parties as previously noted herein.

Considering these interests, the Commissioner will modify this Order from the Proposed Order is several respects but will include modified cease and desist provisions.

This Order will continue, without modification, the cease and desist provision prohibiting Respondents from making loans to Maryland residents in violation of Maryland law and without

being properly licensed under Maryland law. Notably, this provision does not prohibit Respondents from making loans in Maryland, it only prohibits the making of such loans in a manner which violates Maryland law. This cease and desist provision in no way precludes Respondents from approaching OCFR independent of these proceedings to discuss changes made to AWL following the events at issue in this case to determine whether, and under what circumstances, AWL could resume lending operations in Maryland in a manner which the OCFR will not assert violates Maryland law.

In the Exceptions, Respondents assert that the Settlement Agreement in *Solomon* will result in AWL both discharging most loans made to Maryland consumers and making restitution payments to such consumers. The Proposed Order addressed these loans with similar requirements; however, the record does not contain sufficient information to determine whether the settlement class included in the Settlement Agreement ("*Solomon* Settlement Class") covers all loans extended by AWL to Maryland consumers. Notwithstanding, the description of the *Solomon* Settlement Class contained in the Settlement Agreement appears to cover much of AWL's lending activities within the State of Maryland. In order to recognize the effects of the Settlement Agreement and remove any duplicative relief, this Order will exclude from its scope any members of the *Solomon* Settlement Class who have received the relief provided for in the Settlement Agreement.

This Order also eliminates financial penalties imposed on Respondents in the Proposed Order. FI §2-115(b) requires the Commissioner to consider certain factors in arriving at the amount of any financial penalty. Although Respondents received multiple hearings in this matter, Respondents chose not to offer evidence in their defense beyond evidence relating to Tribal Sovereign Immunity. The evidence Respondents have refrained from presenting prior to a final determination of their claim of Tribal Sovereign Immunity could potentially impact the

Commissioner's determination of the appropriate amount of a fine. While Respondents had opportunities to present such evidence, in an effort to balance the respective rights of the parties, this Order eliminates those penalties.

Tribal Sovereign Immunity

Beginning with the Motion to Dismiss, the Respondents have asserted throughout these proceedings that AWL constitutes an arm of the Tribe and is entitled to the protection of Tribal Sovereign Immunity. If AWL may assert protection of Tribal Sovereign Immunity, Respondents assert the individual Respondents may also assert such protection with respect to actions taken on behalf of AWL[33]. The ALJ considered the Motion to Dismiss, all evidence offered by Respondents in support thereof, and the OCFR opposition before issuing the Ruling concluding the Respondents had not met their burden of proof on this issue. The Proposed Order considered the same evidence and reviewed all arguments advanced by the Respondents before also concluding Respondents failed to establish sufficient grounds to entitle them to Tribal Sovereign Immunity.

The Exceptions filed by Respondents and the arguments made at the Exceptions Hearing challenge this conclusion in two ways. First, Respondents sought to introduce new evidence pursuant to COMAR 09.01.03.09 (K) which Respondents claim further support their claim to Tribal Sovereign Immunity and otherwise have relevance to these proceedings. Second, Respondents argue the Proposed Order incorrectly concluded the Respondents failed to meet their burden of proof on the issue of Tribal Sovereign Immunity.

[33] While it does not follow that Respondents' entitlement to Tribal Sovereign Immunity would allow AWL to make loans to Maryland consumers which violate Maryland consumer protection laws, Respondents ability to assert such immunity may prevent these proceedings from addressing any such violations.

With respect to the new evidence, COMAR 09.01.03.09 (K) allows a party to introduce new evidence at an exceptions hearing if the presiding officer is satisfied such evidence is: (i) relevant and material; (ii) was not discovered before the ALJ hearing; and (iii) could not have been discovered before the ALJ hearing with the exercise of due diligence. Respondents sent correspondence to the Commissioner and the OCFR on January 10, 2022, seeking permission to add additional evidence at the Exceptions Hearing and outlining their arguments in support of such evidence ("New Evidence Request"). The new evidence Respondents sought to introduce consisted of: (1) the Settlement Agreement (defined to include the Order) and (2) the Updated AWL Documents.

At the Exceptions Hearing, the Commissioner allowed the entry of the Settlement Agreement and the Updated AWL Documents. In making this ruling, the Commissioner noted only that the criteria required by COMAR 09.01.03.09 (K) were met and the documents would speak for themselves once admitted.

In the New Evidence Request, Respondents assert that:

> The Commissioner has relied almost exclusively on *Solomon* as the basis of his jurisdiction in this action, citing to *Solomon* from the inception of this matter in the Charge Letter and every brief filed subsequent thereto. Moreover, allegations that the Commissioner levels in these proceedings are the very allegations that the Tribal Respondents have explicitly addressed within the Settlement Agreement, through final approval of the Court. Namely, that the Tribe (1) did not violate any provision of federal, state, or tribal law; (2) that its lending activity is not subject to the laws and/or regulations of any state; (3) that AWL's loans are valid and enforceable; and (4) that AWL is immune from suit as an arm of the Tribe. *See* Revised Settlement Agreement at 7, attached hereto as **Exhibit B**.

The New Evidence Request further noted that "the relief afforded pursuant to the Settlement is directly material to these proceedings as it overlaps with the relief that the Commissioner now seeks to impose through the Proposed Final Order." Arguments made by Respondents at the Exceptions Hearing largely tracked these statements.

The Settlement Agreement satisfied the criteria of COMAR 09.01.03.09 (K) because it received Court approval only after the date of the Merits Hearing and has potential materiality to this Order. However, the Settlement Agreement does not advance Respondents' arguments concerning Tribal Sovereign Immunity.

Despite Respondents' assertions, the Proposed Order did not in any way rely on the *Solomon* decision, rather, the Proposed Order found its basis in the evidence the Respondents chose to both present and withhold in this matter. Specifically, changes made to AWL as a result of transactions occurring in 2016 (the "2016 Transactions") are relevant and material to the determination of whether AWL constituted an arm of the Tribe at the time it extended loans to Maryland consumers as alleged in the Charge Letter. The Proposed Order referenced *Solomon* to point out the evidence made available to the Court in *Solomon* as opposed to the limited evidence Respondents chose to present in this case. The Court in *Solomon*, having access to such information, determined AWL did not constitute an arm of the Tribe at the time of that decision. Neither the Proposed Order nor this Order adopt this decision from the *Solomon* Court. Rather, *Solomon* has relevance because it notes the existence of these relevant documents. By not presenting such documents, a genuine dispute of material fact continues to exist over the impact of changes made to AWL in the 2016 Transaction. Leaving this question open precludes any finding in favor of Respondents on this question of Tribal Sovereign Immunity.

Court approval of the Settlement Agreement also does not validate the Respondents claims of Tribal Sovereign Immunity or any claim they did not violate Maryland law. Both Plaintiffs and AWL included language in the Settlement Agreement stating that their decision to settle neither validates nor invalidates any positions taken in the matter. The reference made in the New Evidence Request to the Settlement Agreement points to AWL's statements regarding its decision to settle not constituting an admission of liability nor a waiver of any of its defenses or claims of

immunity. The Court's approval of the Settlement Agreement in no way constitutes a judicial finding that AWL had no liability to the class members, violated no laws, or is entitled to sovereign immunity as an arm of the Tribe.

Whether the Updated AWL Documents satisfy the criteria required by COMAR 09.01.03.09 (K) presented a closer case. Specifically, certain of the Updated AWL Documents came into existence prior to the Merits Hearing and were therefore discoverable at the time of the Merits Hearing. However, the New Evidence Request represented that the changes reflected in the Updated AWL Documents related to negotiation of the Settlement Agreement and did not become fully effective until the Court approved the Settlement Agreement following the date of the Merits Hearing. Based on this representation, the Updated AWL Documents were admitted with the understanding they would speak for themselves.

It is unclear from the Updated AWL Documents whether any of the changes reflected therein became effective prior to Court approval of the Settlement Agreement. The New Evidence Request does not resolve this issue but implies certain changes may have become effective prior to such Court approval but others did not become effective until such Court approval. The Updated AWL Documents consist of the 3 documents. First, the Oteo-Missouria Tribe of Indians, OMTC #0519039-FY 2020 Resolution which is dated May 19, 2020, less than 4 months prior to issuance of the OCFR Charge Letter. Second, The Oteo-Missouria Tribe AWL II Act and AWL II Corporate Charter and Restated Articles of Incorporation which is undated and unsigned. Third, the Tribe issued AWL II, Inc. a certification on September 7, 2021. Given the lack of clarity on this issue, the proximity of the earliest document to the Charge Letter and Respondents assertion that these documents could not have been produced until approval of the Settlement Agreement, they will be treated as becoming effective after the activity which is the subject of the Charge Letter.

Respondents do not assert AWL became an arm of the Tribe because of changes reflected in the Updated AWL Documents (the "2021 Transaction") [34]. Rather, they assert the Updated AWL Documents represent the continuing evolution of AWL as an arm of the Tribe and therefore support Respondents claim of Tribal Sovereign Immunity. Indeed, the Updated Tribal Documents demonstrate the Tribe exercising greater control over AWL beginning in 2021 and, had the matters at issue in these proceedings occurred after the effective date of the Updated AWL Documents, the Updated AWL Documents would be relevant to a claim of Tribal Sovereign Immunity. However, the events at issue in this matter did not occur after the Updated AWL Documents and the updated Tribal Documents do not provide transparency on AWL as it existed prior to that date. Information in the Charge Letter indicates AWL commenced lending activity to Maryland consumers as early as 2015 and continued though the date of the Charge Letter. Where AWL stood in its continuing evolution in this 2015-2020 timeframe is therefore relevant to whether Respondents may claim the protection of Tribal Sovereign Immunity. Unfortunately, that is the information the ALJ noted as missing in the Ruling and which remains missing at this time.

The relevance of information concerning AWL between 2015 and 2020 is underscored by the following statement which appears in the Respondents' New Evidence Request:

> As a result of the *Solomon* settlement, the Tribe took steps to extricate itself from AWL's prior Chief Executive Officer and senior lender Mark Curry. (*See* Settlement Agreement, Sec. III(a)(1)). To do so, the Tribe also took steps to restructure its debt with Mr. Curry. Given this structural change, significant changes were also necessary to AWL's corporate charter – including the removal of Mr. Curry and his three-appointed Directors from the AWL Board.

Few if any details appear in the documents provided by Respondents in this matter concerning the identity of Mr. Curry, his interests in AWL, any ability or inability of Mr. Curry to exert control

[34] Research did not locate any case law which would support an argument that, if AWL became an arm of the Tribe as of the effective date of the Updated AWL Documents, such status would allow AWL to assert Tribal Sovereign Immunity in a proceeding relating to events occurring prior to that date.

over AWL either through his role as CEO or through his 3 appointed directors, the indebtedness owed to Mr. Curry by AWL, and any control Mr. Curry could exert over AWL as a creditor. Respondents offered assertions in connection with the Motion to Dismiss that the Tribe controlled AWL at all times but withheld any documents which would have provided transparency into both the 2016 Transaction and the roles of individuals outside of the Tribe in the management and operation of AWL. The Updated AWL Documents do not clarify these matters but rather continue concerns regarding AWL during the time frame relevant to these proceedings.

Because the Respondents provided limited information concerning the changes made to AWL beginning in 2020, the Proposed Order only noted a "2020 Transaction" and that Respondents had not produced documents relating to the 2020 Transaction. The Updated AWL Documents and the New Evidence Request clarify that the portions of the "2020 Transaction" did not become effective until 2021 and the Updated AWL Documents relate to this transaction. As a result, this Order will make modifications to the Proposed Order to eliminate references to the 2020 Transaction, define the transaction described in the Updated AWL Documents as the "2021 Transaction,", note that Respondents have produced documents relevant to the 2021 Transaction, and provide any clarifying comments needed with respect to the 2021 Transaction.

Beyond introducing the Settlement Agreement and Updated AWL Documents, Respondents argue that the Proposed Order reached the wrong conclusion on the issue of Tribal Sovereign Immunity by failing to properly analyze the factors identified in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, et al.* 629 F.3d 1173 (10th Cir. 2010 ("*Breakthrough*"). The Ruling and Proposed Order both cite a lack of information concerning the 2016 Transaction contributed to the ALJ's denial of the Motion to Dismiss and the Proposed Order. Respondents argue that they have no duty to produce information concerning the 2016 Transaction and that the OCFR chose an enforcement process which limited the OCFR's

ability to compel production of this information. While these statements may be true, they ignore the fact that Respondents have the burden of proof on the issue of Tribal Sovereign Immunity and satisfaction of the *Breakthrough* factors.[35]

At the hearing on the Motion to Dismiss, Respondents' counsel stated that the ALJ had all information needed to rule on the Motion to Dismiss[36]. Respondents Counsel expressly rejected the ALJ's offer to conduct the hearing as an evidentiary hearing which would have permitted Respondents to offer additional evidence or testimony.[37] The ALJ treated the Motion to Dismiss as a motion for summary judgment. Under Maryland Rule 2-501(a), the threshold for granting a motion for summary judgment is that there can be no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law.[38] Respondents do not dispute the 2016 Transaction occurred. Documentation regarding the 2016 Transaction would have allowed an analysis of its effects on the question of AWL's status as an arm of the Tribe. AWL's failure to produce documents relevant to the 2016 Transaction has created a genuine dispute of material fact regarding AWL's status as an arm of the Tribe in the timeframe relevant to these proceedings.

The Proposed Order properly analyzed the *Breakthrough* factors based on the limited information the Respondents provided. The Respondents have constructed their argument for AWL's status as an arm of the Tribe based on information for two separate and distinct time periods. First, Respondents produced corporate and tribal documents concerning AWL at is inception and prior to the 2016 Transaction. Second, Respondents produced the Updated AWL Documents relevant to AWL's existence when the Court approved the Settlement Agreement in 2021. In failing to provide documentation from the period between the 2016 Transaction and the

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[35] Williams v Big Picture Loans, LLC, 929 F.3d 170, 176 (2019)
[36] Hearing transcript page 57 lines 2-4; page 58 lines 9-11
[37] hearing transcript page 58 lines 4-8
[38] Explained by Matthews v. Cassidy Turley Maryland, Inc., 435 Md. 584, 598 (2013) stating that "the court is to consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party".

2021 Transaction there are multiple inferences that could be drawn regarding the status of AWL during this time period. Where multiple inferences can be made, a summary judgment motion is improper and the inferences should be submitted to the trier of fact, in this case the Commissioner.[39]

The Proposed Order noted the 2021 Transaction (defined therein as the 2020 Transaction) may have addressed elements of the 2016 Transaction. The Proposed Order also noted Respondents' failure to produce documents relating to the 2021 Transaction. Respondents have now produced the Updated AWL Documents, but those documents do not provide any clarity on the 2016 Transaction or AWL prior to the 2021 Transaction.

Rather than produce documents concerning material changes to AWL between its formation and 2021, Respondents rely exclusively on declarations of Chairman Shotton and a 2018 Report prepared by an attorney asserting AWL's status as an arm of the Tribe ("Report")[40] to assert the Tribe continually maintained requisite levels of management and control over AWL to claim status as an arm of the Tribe. These assertions alone cannot satisfy Respondents burden of proof on the status of AWL during the 2015-2020 timeframe. Assertions do not substitute for a void in documentation, they only present an inference and, as noted previously, with a Motion for Summary Judgement, the facts and inferences are viewed in the most favorable light to non-movant.[41]

The Respondents have relied heavily on *Williams* throughout these proceedings. *Williams* similarly dealt with a federally recognized tribe of Indians claiming sovereign tribal immunity for a corporation formed by that tribe to engage in lending activities. However, the Fourth Circuit

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[39] Hill v Cross Country Settlements, LLC, 402 Md. 281, 294 (2007)
[40] Respondents submitted the Report in connection with the Motion to Dismiss. The Report is styled as an Expert's Report but has not been admitted in these proceedings as an Expert Report. It is, however, part of the record in this case.
[41] See note 24

decided *Williams* on a much more complete factual record. Among other things, the *Williams* District Court found:

1. Revenue received by the tribe from the lending operations constituted more than 10% of the tribe's general fund and could contribute more than 30% in the near future;
2. The tribe received a $1.3 million reinvestment at the time it obtained financing to acquire an outside vendor;
3. The tribe currently received approximately 5% of the lending operations monthly earnings; and
4. The tribe had received over $5 million from the lending operations.

In comparison, the Respondents in this case failed to provide any details concerning any amounts received by the Tribe from AWL. Rather, the Respondents relied on general statements by the Chairman Shotton such as "All of AWL's profits inure to the benefit of the Tribe, providing an invaluable source of economic growth for our government" (Shotton Declaration 31) and "Our Tribe relies heavily on the revenues generated by AWL in many ways," followed by a laundry list of general alleged uses of this non-quantified revenue (Shotton Declaration 32). Chairman Shotton's statements do not include any reference to what amounts, if any, the Tribe actually received from AWL. Without additional information, such as what amounts the Tribe receives or expects to receive from AWL or whether AWL even generates a profit, Chairman Shotton's statements are meaningless and subjective. Indeed, there is nothing in the record to establish that AWL generates any profits for the Tribe as opposed to diverting AWL's revenues in a manner that artificially minimizes AWL's profits and any payments to the Tribe.

Similarly, the *Williams* decision results from a more developed factual record concerning the corporate governance and control of the lending entity owned by that tribe and its relationship

with outside parties. Among other things, the District Court made findings based on the terms of loan documents and operating agreements, two of many potentially relevant items the Respondents chose not to offer into evidence. This, despite claims by Chairman Shotton or made in the Report, alleging such documents support the Respondents' position. As discussed by the ALJ in the Ruling, the 2016 Transaction represented a complex commercial transaction directly impacting the *Breakthrough* analysis, the details of which could support or refute the Respondents' efforts to seek the protection of Tribal Sovereign Immunity. However, those documents are not part of the record by Respondents' choice and cannot be considered as supporting the Respondents' position.

The Commissioner also notes, as did the ALJ, that AWL faced a similar challenge to its lending activities in Virginia in the case of *Solomon v. American Web Loan*, 375 F.Supp.3d 638 (2019) ("*Solomon I*"). As noted by the ALJ on page 15 of the Ruling: "It is significant that *Solomon I* was decided upon a record developed through three months of discovery and a two-day evidentiary hearing."[42] Based on the evidence produced by that discovery and evidentiary hearing, the *Solomon I* court found AWL did not represent an arm of the Tribe and therefore could not claim protection of the Tribe's tribal immunity. The Respondents have withheld information considered by the *Solomon I* court. While Respondents allege material facts have changed since the *Solomon I* decision and produced the Updated AWL Documents in connection with Exceptions, those changes all appear to have occurred after the activity at issue in this matter and cannot be considered as supporting Respondents' position.

Williams may have lowered the bar a tribally created entity must clear to receive protection under that tribe's tribal sovereign immunity. However, *Williams* did not remove that bar entirely nor did it suggest such an entity need only make general and unsupported statements designed to

[42] *Solomon I at 647*

superficially satisfy certain *Breakthrough* factors. The *Williams* court looked at real evidence offered by the tribally created entity to show how it satisfied each element of the *Breakthrough* analysis in both form and substance. That is not the case here. Respondents may have papered AWL in a way to satisfy the form required by certain *Breakthrough* factors, but they have offered no meaningful evidence or affidavits to prove AWL satisfies the substance of those factors. Stated alternatively, despite paper assertions that might generally support a finding favorable to Respondents on certain *Breakthrough* factors in certain timeframes, Respondents offered no meaningful evidence or statements to support a conclusion the Respondents actually operated in a manner consistent with those paper assertions in the timeframe relevant to these proceedings.

The lack of relevant information produced by Respondents precludes a finding for the Respondents on the *Breakthrough* factors because the analysis of each Breakthrough factor could change as AWL changed throughout its evolution. While few details of the 2016 Transaction exist, enough information is scattered through the file to suggest the 2016 Transaction resulted in significant changes to AWL and Mr. Curry's involvement. These changes could influence any of the *Breakthrough* factors and, by failing to produce sufficient evidence to demonstrate these changes the Respondents have left two equally possible inferences available: that the 2016 Transaction did not alter the Tribe's control, thus supporting AWL's claimed immunity or that the 2016 Transaction fundamentally shifted control of AWL and other *Breakthrough* factors away from the Tribe thus precluding it from claiming arm of the Tribe status. Because there are two inferences, the ALJ could not grant the Motion to Dismiss and the Commissioner must proceed with the information on the record. Based on the information on the record, even with the inclusion of the Settlement Agreement and the Updated AWL Documents, Respondents have failed to meet their burden of proof.

For the reasons cited above, this Order will be issued largely in the form of the Proposed Order, subject to the limited changes discussed herein. Further, to the extent terms have been defined in this Order and were also defined in the Proposed Order, the defined term has been inserted into the text of the Order rather than continuing the language originally contained in the Proposed Order.

Findings of Fact

After examining all evidence, including both the testimony and documentary evidence submitted at the hearing on the Motion to Dismiss, the Merits Hearing and the Exceptions Hearing, and having assessed the demeanor and credibility of those offering testimony, the Commissioner makes the following findings of fact:

1. The Tribe is federally recognized and is governed by its constitution, ratified on February 4, 1984.
2. AWL was created in 2010 pursuant to the Tribe's Corporation Act and is licensed by the Tribe's Consumer Finance Service Commission. It was wholly owned by the Tribe.
3. In 2016, the Tribe acquired an outside vendor to operate AWL (the "Purchase"). The acquired vendor was subsequently merged into AWL. The purchase was financed by a promissory note payable to the seller (the "Senior Lender").
4. At the time of the Purchase, and until at least May 2020, a representative of the Senior Lender served as AWL's Chief Executive Officer.
5. Beginning in May 2020 but not becoming fully effective until Court approval of the Settlement Agreement on July 9, 2021, AWL restructured its organization in such a way which removed the Senior Lender's representative as AWL's CEO and eliminated or significantly reduced the Senior Lender's representation on AWL's Board.
6. AWL advertises on the Internet and has made loans to Maryland consumers.

7. Between September 2015 and May 2019, AWL made loans totaling $23,000 to sixteen Maryland consumers.
8. The loan agreements were signed in Maryland.
9. The borrowers responded to direct mail or Internet advertisements.
10. The total repayment amount provided for in the loan agreements for these loans signed by the borrowers was $106,102.17.
11. The effective interest rates provided for in those loan agreements ranged from 193.06% to 794.29%.
12. The actual amount repaid by the borrowers totaled $19,950.42.
13. Neither AWL nor either of the individual Respondents is licensed to engage in commercial lending in Maryland.
14. John Shotton, as Chairman of the Board of AWL, and James Hopper, as Vice President for Lending Operations, had knowledge of the lending operations of AWL and participated in directing and controlling the lending operations of AWL.
15. Respondents were aware of the proceedings in this matter and given opportunities to present evidence or affidavits in support of their claim of entitlement to the protection of Tribal Sovereign Immunity or any additional defenses they desired to raise.

Conclusions of Law

Based on the findings of fact, and using the Commissioner's specialized knowledge, training and experience, the Commissioner hereby issues the following conclusions of law consistent with the discussion set forth herein.

1. The Commissioner has subject matter jurisdiction over loans made to Maryland consumers as FI §§2-113, 2-114, 2-115, 2-116, 11-214, 11-215, 11-216, 11-217, 11-218, and 11-303, among other provisions of law, provide the

Commissioner with investigative and enforcement powers over potential violations of CL Title 12, Subtitles 1, 3 and 10.

2. The Commissioner may assert personal jurisdiction over any person extending consumer loans to Maryland residents, subject to such person's legal and factual defenses under FI §§2-113, 2-114, 2-115, 2-116, 11-201 et. seq, and 11-301 et. seq, as well as relevant provisions of CL Title 12, Subtitles 1, 3 and 10.

3. Respondents bear the burden of proof on the issue of entitlement to the protection of Tribal Sovereign Immunity.

4. The following 6 factors established in *Breakthrough* are applicable to a determination of whether the Respondents are entitled to Tribal Sovereign Immunity in this matter:

   I. Method of Creation of AWL;

   II. AWL's purpose;

   III. AWL's structure, ownership, and management, including the amount of control the Tribe has over AWL;

   IV. Whether the Tribe intended AWL to have Tribal Sovereign Immunity;

   V. The financial relationship between the Tribe and AWL; and

   VI. Whether the purposes of Tribal Sovereign Immunity are served by granting immunity to AWL.

5. The Respondents failed to meet their burden of proof with respect to *Breakthrough* factor I because they failed to provide relevant documentation

relating to the 2016 Transaction which, among other things, resulted in AWL incurring significant financial obligations to non-Tribal persons, installing certain non-Tribal persons in positions of power in AWL corporate governance and changing the composition of AWL's Board of Directors.

6. The Respondents failed to meet their burden of proof with respect to *Breakthrough* factor II because they failed to offer any financial or other information to demonstrate that AWL is providing revenues for the Tribe.

7. The Respondents failed to meet their burden of proof with respect to *Breakthrough* factor III because they failed to produce relevant documentation regarding the 2016 Transaction required to determine whether the Tribe controlled AWL between September 2015 and May 2019.

8. The Respondents failed to meet their burden of proof with respect to *Breakthrough* factor IV because they failed to provide relevant documentation concerning AWL's corporate governance in light of the 2016 Transaction.

9. The Respondents failed to meet their burden of proof with respect to *Breakthrough* factor V because they offered no documentation reflecting how AWL calculates its profits, the amount of AWL's operating expenses, the amount of payments to outside parties or the amount of money, if any, the Tribe has received from AWL since 2016.

10. The Respondents failed to meet their burden of proof with respect to *Breakthrough* factor VI because this factor derives from the previous 5 and the Respondents' failure to develop a meaningful factual record preclude a finding

in favor of the Respondents' claim that AWL is an arm of the Tribe entitling Respondents to the protection of Tribal Sovereign Immunity.

11. The Respondents failed to satisfy their burden of proof to support a conclusion there are no disputes of material jurisdictional facts and that the Respondents are entitled to judgment on the issue of Tribal Sovereign Immunity.
12. Respondents are subject to Maryland's usury, lending and licensing laws when extending loans to Maryland Residents.
13. The Respondents made loans without being licensed to do so in violation of sections 11-203.1, 11-204 and 11-302 of the Financial Institutions Article and which violate Sections 12-102, 12-302 or Section 12-1015 of the Commercial Law Article.
14. The Respondents violated CL §12-302 by receiving loan applications signed in Maryland without securing a Maryland lending license.
15. The Respondents contracted for, charged, and/or received interest rates in excess of rates permitted by Maryland law in violation of CL §§12-102, 12-306(a) through (d), 12-313(a) and 12-1003(a).
16. Prior to January 1, 2019, the Respondents made loans to Maryland residents for less than $6,000, Respondents were not licensed by the Commissioner to make such loans, Respondents contracted for, charged, and received interest on such loans in excess of amounts permitted by Maryland law, such loans are void and Respondents are not entitled to retain any payments made on such loans. CL §12-313(a) (2013) and §12-314(a) (2013).
17. Since January 1, 2019, the Respondents made loans for less than $25,000 to Maryland residents, the Respondents were not licensed by the Commissioner to make such loans, such loans are void and unenforceable, Respondents may

not sell, assign, or otherwise transfer such loan to another person and Respondents are not entitled to retain any payments made on such loans. CL§12-314(a), (d) (2020 Supp).

18. Respondents violated CL §12-308(a) by failing to include required statements and disclosures in written loan agreements.
19. The Respondents are liable for a civil penalty and subject to injunctive relief under FI § 2-115 (b).
20. The individual Respondents are liable for the wrongdoing of AWL. *Consumer Protection Division v. Morgan,* 387 Md. 125, 171-77 (2005); *T-UP, Inc. v. Consumer Prot. Div.*, 145 Md. App 27, 72-73 (2002).
21. The ALJ properly denied Respondents' Motion to Stay and proceeded with the Merits Hearing as applicable regulations did not permit appeal of the Ruling.

Order

In consideration of the Commissioner's findings of fact and conclusions of law in this matter it is this__25th_ day of April, 2022, **ORDERED**:

1. That Respondents shall immediately CEASE AND DESIST from making loans to Maryland residents in violation of Maryland law and without being properly licensed under Maryland law;
2. That any loan to any borrower who is a member of the *Solomon* Settlement Class in *Solomon* and who did not opt out of that settlement shall continue to be governed by the terms of the Settlement Agreement and shall not be subject to Sections 3 and 4 of this Order;

3. That Respondents shall immediately CEASE AND DESIST from servicing, enforcing, collecting, retaining or otherwise receiving payments on any loan made to a Maryland resident prior to January 1, 2019, in the amount of $6,000 or less if such loan contracted for a rate of interest, charge, discount, or other consideration greater than that authorized by Maryland law unless the excess rate contracted for was the result of a clerical error or mistake and AWL corrected such error or mistake before receiving any payment thereunder;
4. That Respondents shall immediately CEASE AND DESIST from servicing, enforcing, collecting, retaining, otherwise receiving payments on, or selling, transferring, or assigning any loan made to a Maryland resident after January 1, 2019, in the amount of $25,000 or less;
5. That Respondents shall send any correspondence, notices, and other required submissions to the Commissioner at the following address: Commissioner of Financial Regulation, 1100 N. Eutaw Street, Suite 611, Baltimore, Maryland 21201, Attention: Proceedings Administrator; and
6. That the records and publications of the Commissioner reflect this Order.

This Order constitutes the final administrative decision in this case. Pursuant to SG 10-222, all parties have the right to seek judicial review of this Order in the appropriate Circuit Court; however, the filing of a petition for judicial review does not automatically stay the enforcement of this Order. Rules governing this judicial review may be found at Maryland Rules 7-201 et. seq. Please note that Maryland Rule 7-203(a)(2) requires a party seeking judicial review to file a

petition with the appropriate circuit court within 30 days of the date this Order is sent to such party.

Date:

April 25, 2022

MARYLAND COMMISSIONER OF FINANCIAL REGULATION

By: _____

Antonio P. Salazar,
Commissioner of Financial Regulation