

NAFSA: Federal Appeals Court Ruling Affirms Tribal Sovereignty, Acknowledges Strong Case for Ultimate Victory

WASHINGTON, DC (October 1, 2014) – After the U.S. Court of Appeals for the Second Circuit ruled that Native American sovereignty is a critically relevant issue to the State of New York’s attempt to shut down Indian-owned businesses, Barry Brandon, Executive Director of the Native American Financial Services Association (NAFSA), provided the following comment:

“The decision is an important recognition of the need to ‘weigh the interests of each sovereign—the tribes, the federal government, and the state—in the conduct targeted by the state’s regulation,’ and acknowledges our strong case for ultimate victory.

“We are very heartened by the Court’s recognition of the deep Supreme Court legal precedent and federal law regarding Native Americans’ sovereign rights and the fact that its own ruling was limited by the facts available to it at this early stage of the case, the procedural hurdles the Tribes had to clear in order to reverse the District Court’s ruling, and the novelty of the issues arising from e-commerce business.

“Importantly, the Court recognized that, ‘[t]he tribes are independent nations, and New York’s regulatory efforts may hinder the tribes’ ability to provide for their members and manage their own internal affairs.’ Therefore, while noting that further fact development in this matter was required, the Court profoundly recognized that ‘once a state reaches across a reservation’s borders its power diminishes and courts must weigh the interests of each sovereign – the tribes, the federal government, and the state – in the conduct targeted by the state’s regulation.’

“We are also pleased the Court acknowledged multiple times throughout its opinion that a court could find the Tribes’ arguments persuasive upon further illumination to the crucial rights at issue in the case, noting in conclusion that the Tribes ‘may amass and present evidence that paints a clear picture’ and ‘may ultimately prevail in this litigation.’ Additionally, they noted their sensitivity towards the importance of these businesses to improving the economic prosperity of Native American tribes, and made the key finding that the state of New York’s legal theories ‘rest on uncertain factual premises.’

“This important decision is further recognition of the significant interests of Indian Country in the area of e-commerce and economic development and will bolster the Tribes’ position as they continue in their efforts to preserve and protect their sovereign rights – through all available channels, including the courts.”

The lawsuit was first filed on August 21, 2013 on behalf of the Otoe-Missouria Tribe, a federally-recognized Indian Tribe; Great Plains Lending, LLC, a wholly-owned tribal limited liability company; American Web Loan, Inc., a wholly-owned tribal corporation; Otoe-Missouria Consumer Finance Services Regulatory Commission, a tribal regulatory agency; Lac Vieux Desert Band of Lake Superior Chippewa Indians, a federally-recognized Indian Tribe; Red Rock



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Tribal Lending, LLC, a wholly-owned tribal limited liability company; and the Lac Vieux Desert Tribal Financial Services Regulatory Authority, a tribal regulatory agency. Both tribes involved are members of NAFSA. Following an initial ruling by the U.S. District Court for the Southern District of New York, the appeal was filed with the U.S. Court of Appeals for the Second Circuit on October 4, 2013.

Benjamin M. Lawsky, in his individual capacity and in his official capacity as Superintendent of the New York State Department of Financial Services, has been named as the Defendant.

David Bernick of Dechert, LLP, is serving as Counsel of Record for the action with Robert Rosette serving as co-counsel and attorney representing the two tribes.

About NAFSA

The Native American Financial Services Association (NAFSA) formed in 2012 to advocate for Native American sovereign rights and enable tribes to offer responsible online lending products. Through the protection of consumer rights and sovereign immunity, NAFSA provides vital services to tribally operated lenders serving the under-banked with better short term financial services, furthering economic development opportunities in Indian Country.