IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DOLLAR LOAN CENTER OF SOUTH DAKOTA, LLC,

Appellant

-vs-

STATE OF SOUTH DAKOTA, DEPARTMENT OF
LABOR AND REGULATION, DIVISION OF BANKING,

Appellee

Appeal No. 28538

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICIA J. DeVANEY
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

In this brief, the Appellant, Dollar Loan Center of South Dakota, LLC, will be referred to as "DLC." The Appellee, State of South Dakota, Department of Labor and Regulation, Division of Banking, will be referred to as the "Division." The Hughes County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. The transcript of the January 8, 2018 hearing will be referred to as "T" followed by the corresponding page numbers. The Appendix to this brief will be referred to as "Appx." followed by the corresponding page number.

JURISDICTIONAL STATEMENT

This is an appeal from the trial court's Order Granting Motion to Dismiss, which was filed on January 24, 2018. (Appx. 1; CR 355.) Notice of Entry was served that same date. (CR 356.) DLC filed a Notice of Appeal on February 20, 2018. (CR 359.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(2), because DLC is appealing from "[a]n order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken."

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED BY CONCLUDING THAT THE CEASE AND DESIST AND LICENSE REVOCATION ORDER COULD NOT BE IMMEDIATELY APPEALED AS A FINAL DECISION UNDER SDCL 1-26-30.

Although the director of the Division is vested with the authority to revoke lending licenses under SDCL 54-4-49, and he entered his findings of fact and conclusions of law and ordered the immediate revocation of DLC's lending licenses, the circuit court concluded that the Cease and Desist and License Revocation Order is not a final decision and DLC must exhaust further administrative remedies, including seeking review by the Secretary of the Department of Labor, before it can appeal under SDCL 1-26-30.

In re Petition for Declaratory Ruling, 2016 S.D. 21, 877 N.W.2d 340.

Bruggeman v. South Dakota Chem. Dependency Counselor Certification Bd., 1997 S.D. 132, 571 N.W.2d 851.

SDCL 1-26-30.

SDCL 1-26-1(2) and (5).

SDCL 54-4-49.

SDCL 51A-2-2.

II. WHETHER THE TRIAL COURT ERRED BY CONCLUDING THAT THE DIVISION'S REVOCATION OF DLC'S LENDING LICENSES WITHOUT A HEARING DID NOT CONSTITUTE AN EXCEPTIONAL OR EXTRAORDINARY CIRCUMSTANCE WHICH WARRANTED AN EXCEPTION TO THE EXHAUSTION REQUIREMENT.

Although the Division ordered an immediate revocation without first furnishing DLC a contested case hearing, the circuit court concluded that DLC was required to exhaust administrative remedies by participating in a post-deprivation administrative hearing when its license was already revoked.

S.D. Bd. of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988).

Mordhorst v. Egert, 88 S.D. 527, 223 N.W.2d 501.

Read v. McKennan Hosp., 2000 S.D. 66, 610 N.W.2d 782.

SDCL 1-26-1(2).

III. WHETHER THE TRIAL COURT ERRED BY CONCLUDING THAT INTERMEDIATE REVIEW WAS NOT AVAILABLE.

The circuit court concluded that review of the final agency decision will provide an adequate remedy.

SDCL 1-26-30.

STATEMENT OF THE CASE

On September 13, 2017, the Division entered a Cease and Desist and License Revocation Order ("Revocation Order"), which immediately revoked DLC's lending licenses. (CR 62-68; Appx. 25-31.) On October 13, 2017, DLC filed a Notice of Appeal pursuant to SDCL 1-26-30. (CR 1.) The Division moved to dismiss DLC's appeal, arguing that DLC's appeal was premature and DLC failed to exhaust administrative remedies. (CR 13-98.) DLC resisted that motion. (CR 103-122; 123-154.)

The Division's Motion came on for hearing on January 8, 2018, before the Circuit Court, the Honorable Patricia J. DeVaney, presiding. Judge DeVaney issued a Memorandum Opinion on January 18, 2018, concluding that the Division's Motion should be granted. (CR 347-354; Appx. 2-9.) The Order Granting Motion to Dismiss was filed on January 24, 2018. (CR 355; Appx. 1.) DLC timely appealed that decision to this Court. (CR 359.)

STATEMENT OF FACTS

On September 13, 2017, the Division revoked DLC's lending licenses without notice or an opportunity to be heard. (CR 62-68; Appx. 25-31.) The Division's decision to render a final decision revoking DLC's lending licenses, while ignoring the proper administrative process under SDCL Chapter 1-26, is what led DLC to appeal to the Circuit Court under SDCL 1-26-30.

The Division's revocation came on the heels of significant legislative changes in South Dakota, which affected money lenders such as DLC. A discussion of those changes is needed to understand how this case came about.

A. INITIATED MEASURE 21.

This controversy finds its genesis in Initiated Measure 21 ("IM 21"), which was approved by South Dakota voters on November 8, 2016. IM 21 modified SDCL 54-4-44 by restricting the type and amount of interest that a licensee may charge. 2017 S.D. Laws 221 (Appx. 23-24). It prohibits all State-licensed money lenders licensed under SDCL Chapter 54-4 from making a loan that imposes total interest, fees, and charges at an annual percentage rate greater than 36%.

Id. In particular, SDCL 54-4-44 was amended by IM 21 by adding the bold language below:

> After procuring such license from the Division of Banking, the licensee may engage in the business of making loans and may contract for and receive interest charges and other fees at rates, amounts, and terms as agreed to by the parties which may be included in the principal balance of the loan and specified in the contract. **However, no licensee may contract for or receive finance charges pursuant to a loan in excess of annual rate of 36%, including all charges for any ancillary product or service in any other charge or fee incident to the extension of credit. A violation of this section is a Class 1 misdemeanor. Any loan made in violation of this section is void and uncollectible as to any principal, fee, interest, or charge.**

An additional statute, SDCL 54-4-44.1, was enacted as part of IM 21, and provides:

> No person may engage in any device, subterfuge, or pretense to evade the requirements of § 54-4-44, including, but not limited to, making loans disguised as a personal property sale and leaseback transaction; disguising loan proceeds as a cash rebate for the pretextual installment sale of goods or services; or making, offering, assisting, or arranging a debtor to obtain a loan with a greater rate of interest, consideration, or charge than is permitted by this chapter through any method including mail, telephone, internet, or any electronic means regardless of whether the person has a physical location in the state. Notwithstand-

> ing any other provision of this chapter, a violation of this section is subject to the penalties in § 54-4-44.

South Dakota money lenders were required to be in full compliance with the provisions of IM 21 when it went into effect on November 16, 2016. (Appx. 24.)

B. HOUSE BILL 1090.

IM 21 left money lenders with concerns about what exactly constituted "fees incident to the extension of credit." During the 2017 South Dakota legislative session, amendments to SDCL 54-4-44 were proposed in the form of House Bill 1090 ("HB 1090"). Of particular relevance to this dispute, Section 4 of HB 1090 provides:

> For the purposes of § 54-4-44 for all loans, late fees, return check fees, and attorney's fees incurred upon consumer default are not fees "incident to the extension of credit."[1]

Late fees, returned check fees, and attorney's fees are not "incident to the extension of credit," because when credit is extended, they are not certain to occur. They are not calculable when credit is extended, because they are all contingent on the borrower's behavior. The intent of the amendments to SDCL 54-4-44 was, in part, to define "fees incident to the extension of credit" in a manner consistent with federal

[1] This language now appears in SDCL 54-4-44.3.

law. Under federal law, the Truth in Lending Act ("TILA") and Regulation Z define proper disclosures, including what charges are included in the definition of "finance charge." Regulation Z identifies fees that are and are not "finance charges" for purposes of an annual percentage rate ("APR") calculation under the TILA. 12 C.F.R. 226.4. Regulation Z specifically exempts bona fide "late fees" from the calculation of the APR. 12 C.F.R. 226.4(c)(2). Neither South Dakota law, TILA nor Regulation Z impose any upper limit on the late fee that may be charged before a late fee is considered a disguised "finance charge."

HB 1090 passed, was signed by Governor Dennis Daugaard, and went into effect on July 1, 2017.

C. DIVISION'S INVESTIGATION OF DLC's 2017 LENDING AND REVOCATION OF DLC'S LENDING LICENSES.

In June 2017, DLC provided the Division advance notice of DLC's intent to begin making loans using a new loan contract sometime after July 1, 2017, when the South Dakota Legislature's amendments to SDCL Chapter 54-4 went into effect. (CR 123.) DLC's attorney provided the Division with a blank copy of its intended "Signature Loan Product" loan contract on or about June 21, 2017. (CR 123-124; 129-133.) The new Signature Loan Product, which DLC began offering July 3, 2017, had an APR that was capped at 36%. (CR 131.) The Signature Loan Product also imposed late fees upon customer defaults. (CR 130.)

On July 7, 2017, the Division wrote to DLC's attorney and notified him that the Division intended to conduct an examination to evaluate DLC's new loan product for compliance with applicable laws and regulations. (CR 124; 134-135.) The Division conducted a "target" examination on July 13, 2017, and reviewed Sioux Falls and Rapid City loans while on-site at the DLC's Sioux Falls location. (CR 124.) Following the target examination, the Division sent DLC's attorney a series of follow-up questions concerning the Signature Loan Product. (CR 125, 136.) DLC's attorney responded to the follow-up questions in letters dated July 26, 2017, and August 15, 2017. (CR 125, 137-151.) The Division conducted a full scope examination of DLC at DLC's Sioux Falls location on August 17 and 18, 2017. (CR 125.) At no point during either examination was DLC advised that the Division believed its Signature Loan Product was illegal or improper. (CR 124-125.)

DLC heard nothing from the Division in the weeks after the August 17-18 site visit. The Division did not advise DLC that it had taken the position that DLC's Signature Loan Product did not comply with SDCL Chapter 54-4, such that DLC should attempt to come into compliance.[2] The Division did not send

[2] See SDCL 1-26-29 ("No revocation . . . of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all

a cease and desist letter or any other kind of warning to DLC. The Division did not issue an advisory opinion of any kind. The Division did not give notice that it intended to commence a contested case or schedule a hearing.

Instead, on September 13, 2017, Bret Afdahl ("Afdahl"), the Division's director, signed the Revocation Order, and caused it to be mailed to DLC's attorney and registered agent. (CR 62-68; Appx. 25-31.) The Revocation Order required DLC to surrender all of its South Dakota money lender licenses and states, in part: "This Order is effective immediately upon signing and shall remain in effect unless set aside, limited, or suspended by the Division or upon court order after review under South Dakota law." (CR 66; Appx. 29.) The Revocation Order includes the Division's findings of fact and conclusions of law. (CR 62-68; Appx. 25-31.) Afdahl and the Division revoked DLC's licenses without any notice or warning, and provided no hearing prior to the revocation.

To ensure that DLC fully understood that the Revocation Order was the final word on the matter, the Division's attorney sent follow-up correspondence to DLC's attorney on September 15, 2017, and September 18, 2017, insisting that DLC cease all lending activity, including servicing its existing loans. (CR 126-127; 152-153.) If the Revocation Order left

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lawful requirements for the retention of the license.").

any doubt about the finality of the Division's action, it was made crystal clear in the September 15, 2017 email:

> It is my understanding that your client continues to service loans. The Cease and Desist and License Revocation Order requires that Dollar Loan immediately cease all lending activity, which includes servicing existing loans. **Dollar Loan is no longer licensed.**

(CR 152 (Emphasis added.))

A representative from the Division named "John" visited DLC's Sioux Falls office on September 18, 2017, and questioned DCL's employees about why the doors were still open and whether they were still originating loans and taking payments. (CR 127.)

The Revocation Order proved to be DLC's proverbial "death sentence." The Division made sure that media outlets knew of the revocation as soon as possible. (CR 125.) News that DLC's loans were unenforceable spread like wildfire on the very day the licenses were revoked. DLC took action immediately to cease all lending activities. (CR 125-126.) In accordance with the Division's Revocation Order, DLC wrote to its customers and advised them that its loans are void and uncollectible, and it can no longer accept payments. (CR 127-128.) DLC laid off its employees. (CR 128.) Put

succinctly, DLC's reputation as a lawful business in South Dakota was shattered in a matter of days.

On October 3, 2017, the Division served DLC's attorneys with a Notice of Hearing with the Office of Hearing Examiners. (CR 78.) Remarkably, the Division's Notice of Hearing states: "The purpose of this hearing is to determine whether Dollar Loan Center has violated the provisions of SDCL Chapter 54-4, and whether or not its money lending license should be revoked and the terms and conditions as contained in the Cease and Desist and License Revocation Order (Order No. 2017-2) should be enforced." (Id.) As shown above, by that time, the Division had already made those determinations. The Revocation Order was already being actively enforced. On the same date as the Division's Notice of Hearing, DLC surrendered its lending licenses, as it was ordered to do. (CR 66, 128, 154; Appx. 29.)

ARGUMENT

The Circuit Court dismissed DLC's appeal, finding a lack of subject matter jurisdiction. This Court reviews a dismissal for lack of jurisdiction as a "'question[] of law under the de novo standard of review.'" Upell v. Dewey Cnty. Comm'n, 2016 S.D. 42, ¶ 9, 880 N.W.2d 69, 72 (quoting AEG Processing Center. No. 58, Inc. v. S.D. Department of Revenue

and Regulation, 2013 S.D. 75, ¶ 7, n.2, 838 N.W.2d 843, 847 n.2). "This is in keeping with the principle that '[w]e review issues of jurisdiction de novo because they are questions of law.'" Id. (quoting Tornow v. Sioux Falls Civil Serv. Bd., 2013 S.D. 20, ¶ 10, 827 N.W.2d 852, 855).

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES WAS NOT REQUIRED, BECAUSE THE DIVISION'S DIRECTOR MADE HIS FINAL DECISION CONCERNING THE REVOCATION OF DLC'S LENDING LICENSES.

The matter before the Court comes down to a question of what should have happened at the agency level versus what actually happened. DLC should have been entitled to a hearing and accompanying procedures consistent with SDCL Chapters 1-26 and 1-26D *before* its legal rights, duties, or privileges vis-a-vis its lending licenses were determined by the Division. That is not how the Division chose to proceed. Instead, the Division elected to immediately revoke DLC's lending licenses without providing a hearing.

DLC sought to appeal to the Circuit Court under SDCL 1-26-30, which states, in pertinent part: "A person who has exhausted all administrative remedies available within any agency ***or*** a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. . . ." (Emphasis added.) "Notably, the Legislature's 1977 amendment of [SDCL 1-26-30] replaced the word 'and' with the emphasized word 'or.'" In re Petition for Declaratory

Ruling, 2016 S.D. 21, ¶ 13, 877 N.W.2d 340, 347 (citing 1977 S.D. Sess. Laws ch. 13, § 12). "Thus, under the disjunctive 1977 amendment, the Legislature authorized parties in agency proceedings to appeal to circuit court if they had either exhausted their remedies within the agency *or if they were aggrieved by the agency's decision in a contested case*." Id. at ¶ 14, 877 N.W.2d at 347 (emphasis added).

DLC was aggrieved by an agency's decision in a contested case. There is no question that the Division and/or its director qualify as an "agency." "Agency" is defined as "each association, authority, board, commission, committee, council, department, division, office, officer, task force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty . . . ." SDCL 1-26-1(1). The Division is an agency within the Department of Labor and Regulation, and "is charged with supervision and control over the activities set forth in [Title 51A], and it shall exercise such other jurisdiction over such other activities as shall be conferred upon it by the Legislature." SDCL 51A-2-1. The director of the Division is very clearly given the authority to exercise a portion of the state's sovereignty. He is vested with the statutory authority over state-issued lending licenses, including the right to revoke such licenses under SDCL 54-4-49. Indeed, Afdahl's Revocation Order

specifically notes that "[t]he Division has jurisdiction over the licensing and regulation of persons and entities engaged in the business of lending money in South Dakota" and states that he was acting pursuant to SDCL 54-4-49. (CR 62, 65-66; Appx. 25, 65-66.)

There is also no question that the revocation of DLC's lending licenses falls within the contested case provisions of SDCL Chapter 1-26. "The import of being 'governed by the provisions of chapter 1-26' is obvious; the revocation of a license is a 'contested case.'" Bruggeman v. South Dakota Chem. Dependency Counselor Certification Bd., 1997 S.D. 132, ¶ 10, 571 N.W.2d 851, 853. "Contested case" is defined as "a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency *after* an opportunity for hearing . . . ." SDCL 1-26-1(2) (emphasis added). "Licensing" is also a defined term, and includes the revocation of a license. SDCL 1-26-1(5). "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." SDCL 1-26-16.

Insofar as DLC's lending licenses are concerned, the law is clear that DLC's rights were to be determined *after* an opportunity for a hearing. Nonetheless, DLC was not provided a hearing prior to the issuance of the Revocation Order. The

fact that the Division chose to ignore SDCL Chapters 1-26 and 1-26D does not change the fact that its director, Afdahl, acted pursuant to his statutory authority and rendered a final decision on the revocation. Afdahl revoked DLC's licenses in a written decision which included separately stated findings of fact and conclusions of law, and he notified DLC by mail. (CR 62-68; Appx. 25-31.) The Division followed up to ensure DLC was not engaging in any lending activity. (CR 152-153.)

As evidenced by the language of the Revocation Order and follow-up correspondence and enforcement, there was nothing tentative or interlocutory about the Division's Order; rather, the Order was an unequivocal statement from Afdahl which determined DLC's rights, from which real legal consequences flowed. See Bennett v. Spear, 520 U.S. 154, 177-178 (1997) (to be final, the action must mark the consummation of the agency's decisionmaking process--it must not be of a merely tentative or interlocutory nature; and the action must be one by which rights or obligations have been determined or from which legal consequences will flow).

The Division argued below that DLC was required to exhaust further remedies because a final decision had not yet been issued. This argument was based, in part, on the Division's unsupported assertion that "[t]he 'reviewing agency'

is the Secretary of the Department of Labor. The Director of the Division of Banking is not the reviewing agency." (CR 159.) Counsel for the Division repeated this in a colloquy at the January 8, 2018 hearing, again without citation to authority. (T7-8; Appx. 11-12.) The Circuit Court incorporated this conclusion in the Memorandum Opinion, relying exclusively upon the unsupported representations of the Division's counsel:

> As pointed out by Appellee, the reviewing agency, i.e., the ultimate decision-maker at the agency level, is not the Director of the Division of Banking, but rather the Secretary of the Department of Labor. The reviewing agency is required to consider the whole record and then enter a final decision disposing of the proceeding. SDCL 1-26D-8 and 1-26D-9. The reviewing agency may also remand the matter for further proceedings and may order such temporary relief as is authorized and appropriate. SDCL 1-26D-9.

(CR 349; Appx. 4.)

The conclusion that the Director of the Division is not the final decision-maker at the agency level is simply wrong. It is contrary to two South Dakota statutes, which make clear that the Director of the Division holds the exclusive statutory authority to revoke lending licenses.

SDCL 54-4-49 provides that "[t]he director may condition, deny, decline to renew, suspend for a period not to exceed six months, or **revoke** a license for good cause **pursuant to chapters 1-26 and 1-26D.**" (Emphasis added.) SDCL 54-4-49 very clearly vests the director of the Division with the authority to revoke lending licenses, not the Secretary of the Department of Labor. In fact, SDCL 54-4-49 makes no mention of the Department of Labor whatsoever.

Giving the Division's director the authority to revoke lending licenses is consistent with SDCL 51A-2-2, which states that the Division retains its independence from the Secretary of the Department of Labor:

> The Division of Banking shall be administered under the direction and supervision of the Department of Labor and Regulation and the secretary thereof. **The division shall retain the quasi-judicial, quasi-legislative, advisory, and other nonadministrative functions (as defined in § 1-32-1) otherwise vested in it and shall exercise those functions independently of the secretary.**

(Emphasis added.)

The determination of whether or not to revoke a lending license under SDCL 54-4-49 falls within the ambit of SDCL 51A-2-2.[3] This makes perfect sense. While SDCL

[3] While acknowledging that the revocation of lending licenses would typically fall within the definition of a "quasi-judicial function" under SDCL 1-32-1(10), DLC makes absolutely no concession that Afdahl is entitled to immunity. The fact that he was charged with performing a quasi-judicial

1-37-21 gives the Secretary of the Department of Labor administrative control over the Division for things like coordinating programs, managing personnel, budgeting and other things defined as "administrative functions" under SDCL 1-32-1(1), the Secretary would seemingly lack the requisite context to consider complex issues relating to money lending practices and licensing. In other areas, the South Dakota Legislature has specifically provided a mechanism for matters to be heard by the Department of Labor. Workers compensation claims, public officer or employee grievances, or unemployment compensation claims are examples. See e.g. SDCL 62-7-13; 3-18-15.2; SDCL 61-7-12. Conversely, there is no statutory basis for the Division and Circuit Court's conclusion that the Secretary of the Department of Labor has reviewing authority over lending license revocations. SDCL 54-4-49 gives Afdahl the final word.

In an earlier case before this Court involving the Division's handling of a contested case, the Division handled its own contested case hearing and rendered a decision, which was appealed to the Circuit Court. See First Nat'l Bank v. S.D. State Banking Comm'n, 2009 S.D. 58, ¶ 4, 769 N.W.2d 847, 849. ("The [Division] conducted a contested hearing in

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function does not absolve him of the responsibility to do so in a manner which comports with standards of due process. See Freeman v. Blair, 793 F.2d 166, 171-72 (8th Cir. 1986).

accordance with SDCL ch 1-26, heard lay and expert testimony, and received other evidence from both Dakota Prairie and First National."). This appeal took place before the Division of Banking was transferred from the Department of Revenue and Regulation to the Department of Labor and Regulation, see SDCL 1-37-14 and 1-47-6, but the decision makes no mention of review by the department with administrative oversight over the Division.

In a properly handled contested case proceeding, the Division would have started with the notice required by SDCL 1-26-29: "[n]o revocation . . . of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license." Then, assuming DLC made no attempt to comply, the next step would have been the Division noticing a hearing *before* taking any action to revoke DLC's lending licenses. See SDCL 1-26-1(2); 1-26-16. Here, the Division requested that the Office of Hearing Examiners conduct the hearing. (CR 75.) Accordingly, after the hearing, the hearing examiner's findings of fact and conclusions of law would follow, see SDCL 1-26D-6, and Afdahl would need to review the whole record and enter his final decision. See SDCL 1-26D-8 and

1-26D-9. Operating this way would be entirely consistent with SDCL Chapter 1-26, SDCL 54-4-49 and SDCL 51A-2-2.

The Division operated in reverse. Afdahl made no attempt to comply with SDCL 1-26-29. Instead, On September 13, 2017, Afdahl issued findings of fact and conclusions of law, immediately revoked DLC's lending licenses before a hearing was conducted, and offered DLC a hearing with "the South Dakota Banking Commission," but only if DLC made a written request.[4] (CR 62-68.) Fifteen days later, the Division requested a "prompt hearing under the provisions of SDCL 1-26 and 1-26D." (CR 75.) Not prompt enough. By the time the hearing was requested, Afdahl's final revocation decision *had already been rendered*.

DLC had no control over how Afdahl arrived at his decision, but the fact remains that he arrived at it. Under these circumstances, DLC is aggrieved by an agency's final decision in a contested case, and is entitled to appeal under SDCL 1-26-30. The Circuit Court erred by dismissing DLC's appeal.

[4] The Division's counsel conceded that the offer of a hearing before the banking commission was an error, and he asserted the hearing would be before a hearing examiner. (T7.)

B. ALTERNATIVELY, EXHAUSTION OF ADMINISTRATIVE REMEDIES WAS EXCUSED BECAUSE THE DIVISION RENDERED A DECISION PRIOR TO A HEARING.

DLC maintains that a decision from Afdahl pursuant to SDCL 54-4-49 was a final decision appealable under SDCL 1-26-30. However, this Court has also previously recognized an exception to the exhaustion requirement which clearly applies in this case.

In S.D. Bd. of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988), this Court acknowledged that "[i]n certain circumstances, there are exceptions to the requirement of exhaustion of administrative remedies." Id. at 539. The Court listed five different examples, one of which reads: "Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair and impartial hearing cannot be had." Id. (Emphasis added.)

The exception in Heege comes from this Court's earlier decision in Mordhorst v. Egert, 88 S.D. 527, 223 N.W.2d 501. In Mordhorst, the State Board of Examiners in Optometry ("Board") received written complaints alleging that certain optometrists were guilty of unprofessional conduct in aiding and abetting an optical company in the unlawful practice of optometry. The trial court determined that the optometrists were denied due process in the proceedings before the Board.

Specifically, the evidence before the trial court demonstrated that, before the complaints against the optometrists were even signed, members of the Board had agreed upon their guilt. This Court noted: "On these facts it can be concluded that the agency given authority by statute to decide the matter had done its job before the formal charges were signed or presented to it for action." Id. at 534, 223 N.W.2d at 505. The Court went on to conclude:

> The absence of fundamental fairness in proceedings followed by the South Dakota State Board of Examiners in Optometry spawned this litigation. The trial court was asked to examine the situation and concluded that due process requirements had been violated. We affirm and decide no more. However, this and other similarly constituted boards should re-examine their structures and procedures, remembering that the final refuge people have in all governmental procedures is that of due process, the eternal friend of justice and unrelenting foe of undue passion.

Id. at 535, 223 N.W.2d at 506.

While Mordhorst involves a different factual setting, the Court's rationale applies perfectly to this case. The Division and its director, Afdahl, have the statutory authority over DLC's lending licenses. But neither the Division nor

Afdahl permitted a hearing to take place before they handed down the decision to revoke DLC's lending licenses. Their premature actions obviate DLC's requirement to exhaust administrative remedies, because exhausting remedies at this point would be an exercise in futility. See e.g. Read v. McKennan Hosp., 2000 S.D. 66, ¶ 16, 610 N.W.2d 782, 785 (where board with authority to make final decision regarding staff member privileges rendered its final decision, requiring plaintiff to exhaust his administrative remedies "would have been an exercise in futility").

The Circuit Court erroneously concluded that, following a post-deprivation hearing before the hearing examiner, the Secretary of the Department of Labor would determine whether DLC's licenses should be revoked. This error not only led to the incorrect conclusion about the ultimate decision maker vis-a-vis the lending license revocation, it also led to her misplaced reliance on Kolda v. City of Yankton, 2014 S.D. 60, 852 N.W.2d 425. (CR 350-352.) In Kolda, the applicable statutes made it clear that further exhaustion was required. Kolda appealed his employment termination to the city manager, but went no further. SDCL 3-18-15.2 specifically requires an appeal to the Department of Labor and Regulation. "After a final decision of the Department, an employee could appeal to the circuit court." Id. at ¶ 25, 852 N.W.2d at 432.

Kolda skipped the appeal to the Department. Therefore, he did not

obtain a final decision prior to filing his appeal under SDCL 1-26-30.

Kolda is easily distinguishable. In this case, DLC has a decision from the final decision maker, i.e., Afdahl. The fact that Afdahl made his decision before allowing things to proceed through the proper channels under SDCL Chapter 1-26 and 1-26D does not change the fact that he made a final decision that he immediately enforced. DLC has been without its lending licenses since the fall of 2017. (CR 128, 154.)

Under the guise of requiring the exhaustion of administrative remedies, the Division asked the Circuit Court to send this matter back for a "do-over," so that it can attempt to fix its missteps and create a record to support the final decision it already entered. The Circuit Court obliged. The implications of upholding the Circuit Court's dismissal of this case are profound and frightening. Doing so subverts the due process protections built into the law. Indeed, if the Court authorizes the Division's approach, why would any governmental agency with licensing authority ever bother to comply with SDCL 1-26-29 or conduct a hearing before summarily revoking a license? Rather, the standard approach would become: revoke

first; then, if the licensee challenges it, offer a pretextual hearing, insist that the licensee exhaust meaningless remedies, and then present the case for revocation after-the-fact. The Division and Afdahl's abusive exercise of executive power put DLC out of business in South Dakota, and goes right to the heart of the concerns expressed by this Court in Mordhorst.

DLC maintains it is aggrieved by Afdahl's final decision, which gives it the right to appeal under SDCL 1-26-30. However, even if the Court disagrees on the final decision issue, exhaustion is excused in this case because, as in Mordhorst, the agency given authority by statute to decide the matter improperly made its decision prior to a hearing. The Circuit Court erroneously dismissed DLC's case based upon the premise that further exhaustion is required.

C. ALTERNATIVELY, THE REVOCATION ORDER IS IMMEDIATELY REVIEWABLE BECAUSE A FINAL AGENCY DECISION WILL NOT PROVIDE AN ADEQUATE REMEDY.

For all the reasons already discussed, DLC maintains that it either falls within the first sentence of SDCL 1-26-30 as "a party who is aggrieved by a final decision in a contested case," or is excused from exhausting administrative remedies because Afdahl improperly made the decision to revoke without a hearing. SDCL 1-26-30 also provides the Circuit Court with authority to review agency actions even if they are not final.

"A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Id.

The type of *post hoc* proceeding that the Division and Circuit Court insist upon serves no purpose at this point, and cannot provide an adequate remedy. The Circuit Court's decision was based upon the incorrect observation that the Secretary of the Department of Labor has the final word on the revocation. For all the reasons previously discussed in this brief, that is not so. Instead, if DLC is required to go through an administrative hearing, the hearing examiner's decision will be subject to final review by Afdahl, who has already revoked DLC's lending licenses. A post hoc administrative hearing is not authorized by the law and is a pretext that serves only to afford the Division an opportunity to create a record to support Afdahl's predetermined decision. Even if DLC has not achieved a final agency decision, a final agency decision from the same person who has already revoked DLC's lending licenses hardly serves as an adequate remedy. See Read at ¶ 16, 610 N.W.2d at 785. The Circuit Court erred by concluding that a review of the final agency decision will provide an adequate remedy.

CONCLUSION

For all of these reasons, DLC respectfully urges the Court to reverse the Circuit Court's Order Granting Motion to Dismiss and remand this matter for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument.

Respectfully submitted this 3rd day of May, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 27 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 5,598 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 3rd day of May, 2018.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellant, hereby certifies that on the 3rd day of May, 2018, a true and correct copy of **APPELLANT'S BRIEF** was electronically transmitted to:

(pbachand@pirlaw.com)
(ehruska@pirlaw.com)
Mr. Paul E. Bachand
Edward S. Hruska III
Special Assistant Attorney General
Pierre, SD

and the original and two copies of **APPELLANT'S BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 3rd day of May, 2018.

RICHARDSON, WYLY, WISE, SAUCK
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By /s/ Zachary W. Peterson
Attorneys for Appellant

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DOLLAR LOAN CENTER OF SOUTH DAKOTA, LLC,

Appellant

-vs-

STATE OF SOUTH DAKOTA, DEPARTMENT OF LABOR AND REGULATION, DIVISION OF BANKING,

Appellee

Appeal No. 28538

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICIA J. DeVANEY
CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED
FEBRUARY 20, 2018

INDEX TO APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

DOLLAR LOAN CENTER OF SOUTH DAKOTA, LLC, Appellant, v. STATE OF SOUTH DAKOTA, DEPARTMENT OF LABOR AND REGULATION, DIVISION OF BANKING, Appellee.	32 CIV 17-217 ORDER GRANTING MOTION TO DISMISS

A hearing was held before the Court on January 8, 2018 regarding Appellee, State of South Dakota Department of Labor and Regulation, Division of Banking's Motion to Dismiss. The Division was represented by and through their Special Assistant Attorneys General, Paul E. Bachand and Edward S. Hruska III. Appellant, Dollar Loan Center of South Dakota, LLC was represented by and through Jack H. Hieb. Based upon the arguments of counsel and the evidence presented, it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss is Granted; it is further

ORDERED, ADJUDGED AND DECREED that the Memorandum Opinion of the Court dated January 18, 2018 is incorporated herein by reference as if fully set out in this Order.

Dated January 24, 2018.

BY THE COURT:

Patricia DeVaney

Patricia J. DeVaney
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

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Re: Hughes Co. Civ. 17-217, *Dollar Loan Center of South Dakota, LLC v. South Dakota Department of Labor and Regulation, Division of Banking*

Dear Counsel,

Pending in this appeal by Dollar Loan Center (hereinafter "DLC") against the South Dakota Department of Labor and Regulation, Division of Banking (hereinafter "Division") is a Motion to Dismiss filed on behalf of the Division. The Court heard argument on the motion on January 8, 2018. After further review of the parties' briefs and supporting material, oral arguments, and legal authorities, the Court issues the following:

MEMORANDUM OPINION

In this matter, Appellant DLC filed a Notice of Appeal on October 12, 2017, asserting that the Cease and Desist and License Revocation Order (hereinafter "Order") entered by the Division of Banking is a final agency action giving this Court jurisdiction under SDCL 1-26-30. In the alternative, DLC asserts that the Order is a preliminary, procedural or intermediate agency action or ruling immediately reviewable pursuant to the same statute.

In this appeal, DLC raises issues pertaining to whether the Division's Order violates constitutional or statutory provisions, including but not limited to procedural due process rights. DLC further alleges errors of law pertaining to the Division's findings and conclusions that DLC

has engaged in practices violating SDCL Chapter 54-4, and also challenges the Division's finding that good cause existed to immediately revoke DLC's money lender licenses prior to a hearing.

The State has filed a motion requesting a dismissal of the appeal asserting that this Court lacks jurisdiction because DLC has failed to exhaust mandatory administrative remedies. In response, DLC contends that the Order constitutes a final decision and that exhaustion is not required because the Division made an improper decision prior to a hearing.

The relevant chain of events leading up to this appeal is not in dispute and is set forth in the parties' briefs and attachments. Following an approximately two-month investigation involving on-site examinations and lengthy written exchanges between legal counsel for both the Division and DLC, the Division issued the Cease and Desist and License Revocation Order on September 13, 2017. This Order included a Notice of Hearing directing that any person aggrieved by the Order could make a written request for a hearing. [1] (Exhibit F).

Approximately two weeks later on September 28, 2017, the Division issued a Limited Stay of the previous Order, allowing DLC to service loans originated prior to November 16, 2016 (the date the law went into effect that is the subject of the alleged unlawful conduct by DLC). (Exhibit G). The initial Order and the Limited Stay were filed with the Notice of Hearing Examiners on the same day (September 28) and the Division requested a prompt hearing. Following an exchange between counsel for the parties to agree upon a date, on October 3, the Division noticed a hearing with the Office of Hearing Examiners. (Exhibit H). This hearing was initially set for October 17, 2017. Counsel for DLC then requested a continuance, first by email on October 3, then by letter on October 5. (Exhibits J and K).

In the continuance letter to the Hearing Examiner, counsel for DLC raised a jurisdiction argument based on their assertion that the State had already taken final action, but explained that DLC thought it necessary to actively participate in the hearing to avoid the risk of a preclusive effect on the evidence DLC wants to submit in a corresponding federal lawsuit DLC had already filed against the State on September 21, 2017. (Exhibit K; DLC Brief at p. 9, n. 4 (referencing the federal lawsuit)). DLC counsel indicated that the amount of time needed to prepare for hearing was substantial and required further discovery. DLC counsel requested a hearing in 2018. (Exhibit K.) The hearing was ultimately continued by the hearing officer and is currently set for April 12, 2018.

A. Jurisdiction provided by Statute

The issue of whether this Court has jurisdiction to hear this appeal is governed primarily by SDCL 1-26-30. Under the statutory directives this Court must follow, DLC is entitled to judicial review if either of the following prerequisites have been met:

[1] While the Notice of Hearing refers to a hearing before the South Dakota Banking Commission, a subsequently issued Notice of Hearing sets the matter before the Office of Hearing Examiners.

1. DLC has exhausted all administrative remedies available within any agency; or
2. DLC has been aggrieved by a final decision in a contested case.

Given the facts set forth above, neither of these prerequisites have been met in this case. As set forth in the Order at issue, DLC clearly has further remedies to exhaust at the administrative level, therefore the first alternative is not applicable. DLC has conceded this point, but asserts that the Order issued by the Division is a "final decision" by which they have been aggrieved.

The Court finds this argument to be untenable given the type of proceeding at issue here.[2] It begs the question: How can a decision be "final" when there are still administrative remedies to exhaust? A hearing is currently set before the Office of Hearing Examiners in April. Following that hearing and pursuant to the procedures set forth in SDCL Ch. 1-26D, the hearing examiner will issue a proposed decision, and the reviewing agency may accept, reject or modify those findings, conclusions and decision. As pointed out by Appellee, the reviewing agency, i.e., the ultimate decision-maker at the agency level, is not the Director of the Division of Banking, but rather the Secretary of the Department of Labor. The reviewing agency is required to consider *the whole record* and then enter a *final decision* disposing of the proceeding. SDCL 1-26D-8 and 1-26D-9. The reviewing agency may also remand the matter for further proceedings and *may order such temporary relief* as is authorized and appropriate. SDCL 1-26D-9.

DLC has not provided any case law authority to this Court which held or even suggests that a case currently postured as the case at hand could be construed as a *final decision.* The United States Supreme Court case cited by DLC as to what constitutes finality of an agency action requires *two* conditions. *See Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). While DLC focuses primarily on the second condition, "whether rights or obligations have been determined or from which legal consequences will flow," the additional requirement is that "the action must mark the *consummation of the agency's decisionmaking process*." *Id.* (emphasis added). The second requirement has clearly not been fulfilled here.

Likewise, DLC's attempt to distinguish other cases where the South Dakota Supreme Court has dismissed for a failure to exhaust also fails. DLC tries to distinguish the case of *Reynolds v Douglas School Dist. No. 51-1*, by arguing that DLC's injury is not "supposed or threatened." 2004 S.D. 129, ¶10, 690 N.W.2d 655, 657. A "supposed" injury is, by definition,

[2] When dealing with licensing proceedings which fall within the definition of a contested case per SDCL 1-26-1(2), there is inescapably a corresponding requirement of exhausting the administrative remedies prior to a decision becoming final. Therefore, the two alternatives for seeking judicial review as set forth in SDCL 1-26-30 are inevitably intertwined when dealing with contested cases, because a contested case cannot be *final* until after administrative remedies are exhausted. The first alternative, at least as a stand-alone alternative, is more applicable to other types of agency actions that do not pertain to contested cases, such as the declaratory relief requested in the case cited by Appellant, *In re Petition for Declaratory Ruling*, 2016 S.D. 21.

one that is assumed as true. In other words, even where a party has been truly injured, our Court has still required parties to exhaust administrative remedies.

In one such case, a trial court found violations and awarded actual damages for a failure to provide predeprivation due process, as DLC is alleging here. *See Kolda v. City of Yankton*, 2014 S.D. 60, ¶30, 852 N.W.2d 425, 433. The South Dakota Supreme Court nonetheless dismissed for lack of jurisdiction because the aggrieved party failed to exhaust all administrative remedies. *Id.* While the *Kolda* case was postured differently than the case at hand, this Court cannot distinguish the material underlying facts in *Kolda* from the similar facts DLC is alleging, i.e., a termination from employment versus a revocation of a license, both carrying immediate consequences and alleged damages to the aggrieved parties. If exhaustion was required before seeking relief from the employment termination scenario in *Kolda*, this Court concludes that exhaustion is likewise required in the licensing case at hand.

B. Exceptions to Exhaustion Requirement

Next, DLC points to cases in which the South Dakota Supreme Court has recognized that "[i]n certain circumstances, there are exceptions to the requirement of exhaustion of administrative remedies." *South Dakota Bd. of Regents v. Heege*, 428 N.W.2d 535, 539 (S.D. 1988). In *Heege*, the Court set forth five scenarios that must be present before a case can be heard in circuit court despite a failure to exhaust. DLC is contending that the fourth scenario set forth in the *Heege* opinion is applicable here:

> Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair and impartial hearing cannot be had.

Id. (citing *Mordhorst v. Egert*, 88 S.D. 527, 223 N.W.2d 501 (S.D. 1974).

DLC contends that because the Division improperly issued the revocation Order without complying with the provisions of SDCL 1-26-29, exhaustion should not be required. The Division denies any due process violations, directing this Court to the legal and factual arguments raised on the State's behalf in the pending federal litigation, in which this very argument as to predeprivation due process is currently being litigated. (Division's Brief at p. 2.)

The only case cited in *Heege* which could shed light on what our Court meant by the phrase "improperly [making] a decision prior to a hearing," had a peculiar set of facts which are not present in this case. *See Mordhorst*, 88 S.D. 527, 223 N.W.2d 501. *Mordhorst* did not address a predeprivation due process violation as alleged here. Instead, it involved a lawsuit initiated by a citizen alleging charges against three optometrists that were identical to charges pending against these same individuals before the Optometry Board. The citizen further alleged that the Optometry Board had *failed* to commence and properly process these charges, and he was thus requesting injunctive relief to enjoin further proceedings by the Board on the alleged complaints. *Id.* at 529-530, 223 N.W.2d at 502-503.

It is not clear from the *Mordhorst* opinion exactly what had transpired before the Optometry Board. There is a reference to an "informal hearing" followed by an Order and Notice of Hearing advising of the charges, with formal hearings being set but not occurring on the noticed dates and not being rescheduled. *Id.* The trial court granted the injunctive relief, thereby prohibiting further Board action. In addressing the issue of whether the exhaustion doctrine precluded the trial court from granting such relief, the Court first found that the circuit court had primary jurisdiction pursuant to a specific statute governing optometrists. *Id.* at 532, 223 N.W.2d at 504. Unlike the *Mordhorst* scenario, this Court does not have primary jurisdiction over the licensing matter in this case.

Against that backdrop of a finding of primary jurisdiction, the Court in *Mordhorst* further addressed the trial court's finding that the optometrists were denied due process in the Board proceedings such that they were entitled to injunctive relief prohibiting further proceedings before the Board. Of note is the fact that *Mordhorst* did not involve a Board decision to suspend or revoke licenses, as that had not yet occurred, but rather the process in which the formal complaints pending before the Board were initiated. In affirming the injunction, the Court relied upon the fact that the person signing the complaint before the Board had no personal knowledge with respect to the specific charges, that there was no effort to verify the allegations, and that the complaint was executed at the request of those, including Board members and others, who had attended a meeting of the directors of the South Dakota Optometric Association. *Id.* at 533-534, 223 N.W.2d at 505. The Court further noted that there was no solid evidence of the alleged violations produced during the informal proceedings by the Board, nor at the court trial. *Id.* Finally, the Court referred to the necessity of a fair and impartial tribunal by a disinterested trier of fact, and given the manner in which the formal complaints arose, the Court concluded that the facts of the case required disqualification of the members of the Optometry Board. *Id.* at 534-535, 223 N.W.2d at 505.

In comparison, there has been no allegation or showing in the case at hand that the Office of Hearing Examiners, and subsequently the Secretary of the Department of Labor, "is so biased that a fair and impartial hearing cannot be had." *Heege*, 428 N.W.2d at 539. Likewise, the submissions attached to the parties' briefs do not raise the type of concerns at issue in *Mordhorst*. Unlike *Mordhorst*, there was a two-month investigation in this case, involving legal counsel for DLC. The facts supporting the alleged law violations were clearly laid out by Division counsel in correspondence with DLC, and DLC counsel was given the opportunity to respond to the alleged violations. (Exhibits 2-5). Moreover, there is no claim before the Court that the Director of the Division of Banking was inherently biased or improperly influenced by parties who did not have enforcement authority. Finally, the specific factual findings in the Order illustrate that, unlike the allegations against the optometrists in *Mordhorst*, the alleged violations here are not without factual support.

Moreover, subsequent opinions by the South Dakota Supreme Court do not support a finding that exceptional or extraordinary circumstances exist in the case at hand to warrant an exception to the exhaustion requirement. As set forth above, the Court in *Kolda* clearly did not

consider a pretermination procedural due process violation, similar to the allegations raised by DLC in this case, [3] to constitute a scenario that excuses a failure to exhaust administrative remedies. *Kolda*, 2014 S.D. 60 at ¶30, 852 N.W.2d at 433; *see also Jansen v. Lemmon Federal Credit Union*, 1997 S.D. 44, 562 N.W.2d 122 (rejecting the argument that exhaustion should be excused because administrative channels were inadequate to provide a damages remedy).

The *Heege* case also presented a unique set of procedural facts not present in the case at hand. In *Heege*, the Court was addressing the fifth scenario for excusing exhaustion, i.e., "extraordinary circumstances where a party faces impending irreparable harm of a protected right and the agency cannot grant adequate or timely relief," ultimately finding the exception to exhaustion did not apply. *Heege*, 428 N.W.2d at 541-542. In so holding, the Court acknowledged that faculty members could be aggrieved by being subjected to liquidated damages because the Department of Labor could not, within the 20-day timeframe in which such damages could be assessed under the disputed contract, hold a hearing and decide the issue of whether the Board committed an unfair labor practice. *Id.* at 540. While the South Dakota Supreme Court did find as a matter of law in *Heege*, that the Regents did not commit an unfair labor practice, this Court cannot decide the underlying merits of the dispute over whether DLC was violating state law without a more fully developed factual record.

C. Intermediate Relief

Finally, while not specifically raised in DLC's brief in response to the Division's Motion to Dismiss, DLC did allege alternatively in its Notice of Appeal that this Court has jurisdiction under SDCL 1-26-30 to review the Order as a "preliminary, procedural, or intermediate agency or ruling." However, similar to the fifth exception to requiring exhaustion addressed in *Heege*, this statutory provision also requires that such intermediate review is only afforded "if review of the final agency decision would not provide an adequate remedy." SDCL 1-26-30.

In their Statement of Issues, DLC seeks review of not only their alleged pre-revocation procedural due process violations, but also whether the Division erroneously concluded that they were engaging in unlawful practices. In their brief, DLC appears to concede that there are no procedural due process concerns with the Cease and Desist portion of the Order, only with the Revocation portion. At hearing, DLC, when pressed by the Court for a clarification as to what remedy they are currently seeking from this Court, advised that DLC is now only seeking review of whether the Revocation portion of the Order was issued contrary to statute, but not yet a ruling from this Court as to the merits of the Cease and Desist Order.

The first problem with this request is that the Cease and Desist and the Revocation prongs of the Order are unavoidably connected. This Court cannot rule on the merits of whether there was good cause to immediately revoke (or more accurately, suspend) DLC's licenses

[3] DLC's concerns are that the Division did not fully comply with the dictates of SDCL 1-26-29, particularly by labeling the Order as a "revocation," rather than a "summary suspension," and by not giving adequate notice and opportunity to comply.

without considering the underlying alleged law violations. That is precisely why exhaustion is necessary here.

Second, even if this Court were to conclude that the Order was improperly designated as a "revocation," rather than a "summary suspension" as the further noticed proceedings suggest, the jurisdiction afforded to this Court under SDCL 1-26-30 requires a finding that review of the final agency decision would not afford an adequate remedy. Here, DLC has very clearly elected its remedy for the alleged due process violation by filing a § 1983 action in federal court for damages.

Conceding that damages could not be awarded in the instant action before this Court, DLC has now indicated that it would like this Court to rescind the Revocation portion of the Order, reinstate its licenses, and require the Division to essentially start the process over. The Court first notes that this request appears to be disingenuous given DLC's simultaneous assertion that a reversal of the revocation Order cannot undo the damage that has been done. (DLC Brief at p. 11.) This request is also at odds with DLC's representations in the federal court proceeding, wherein DLC states in their Brief in Opposition to the State Defendant's Motion to Dismiss pending in federal court:

> The ongoing South Dakota administrative proceedings may resolve some state law issues relating to the propriety of Dollar Loan Center's lending practices and licensure. But they do not provide a forum for Dollar Loan Center to seek damages from Afdahl for violating Dollar Loan Center's constitutional right to due process. And they cannot undue [sic] the damage created by Afdahl's actions. *Indeed declaratory or injunctive relief at this stage is somewhat pointless.* By revoking Dollar Loan Center's lending license, . . . Afdahl *effectively destroyed Dollar Loan Center's ability to do business in the State of South Dakota.*

DLC's Brief filed in *Dollar Loan Center of South Dakota, LLC, d/b/a Dollar Loan Center v. Brett Adahl, individually and in his official capacity as Director of the South Dakota Division of Banking*, Case 3:17-cv-03024-RAL, Document 14 at p. 13 (emphasis added).

Furthermore, if DLC truly wanted their licenses restored while challenging the merits of the underlying action, there was a remedy afforded by statute that it could have pursued. SDCL 1-26-32 sets forth that "*any* agency decision[4] in a contested case is effective ten days after the date of receipt . . . of the decision." (emphasis added). It then lays out a procedure by which DLC could have applied to the circuit court for a stay of the Division's decision. Upon such application, this Court could then have considered a temporary stay pending hearing on the application, and could have also entered a further stay, pending a final decision, along with conditions such as furnishing a bond or other security, or supervision to protect the state or any person from loss, damages, or costs which may occur during the stay. That request, however,

[4] This statute does not appear on its face to be limited to *final* agency decisions.

needed to be made within ten days of DLC's receipt of the Order. Instead of pursuing the interim relief afforded by statute, DLC closed its doors and sued the State for damages in federal court. DLC's request for such interim relief is now time-barred.

CONCLUSION

For the above reasons and authorities, the Court grants the Division's Motion to Dismiss. The Order at issue is not a final decision in this contested case as DLC has failed to exhaust the administrative remedies afforded by statute. The preliminary action or ruling of the Division is no longer immediately reviewable because DLC failed to request a stay within the ten-day timeframe afforded by statute. Further, a review of the final agency decision will provide an adequate remedy, given DLC's decision to pursue damages for the alleged predeprivation due process violation in federal court.

Dated this 18th day of January, 2018.

BY THE COURT

Patricia DeVaney

Patricia J. DeVaney
Circuit Court Judge

STATE OF SOUTH DAKOTA	) IN CIRCUIT COURT
	:SS
COUNTY OF HUGHES	) SIXTH JUDICIAL CIRCUIT
**********	**********
	)
DOLLAR LOAN CENTER OF SOUTH DAKOTA,	) CIV 17-217
	)
Appellant,	) Motions Hearing
VS.	)
	)
SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION,	)
	)
Appellee.	)
**********	**********

Before: Honorable Judge Patricia DeVaney

Circuit Court Judge, Sixth Judicial Circuit

Pierre, South Dakota, January 8th, 2018

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what is scheduled with the notice of hearing for April 2018.

THE COURT: I have a question for you about the process, but I don't know if you wanted to keep going. But with regard to the contested hearing, my other question for you was that there is a language in the initial order that was presented to the appellant, and this is at the end -- the part that says notice of hearing -- that indicates that the person aggrieved may within 30 days file with the Division a written request for a hearing before the South Dakota Banking Commission.

And then there is reference in your brief to the Court on this issue that it is ultimately the secretary of the Department of Labor that would be the entity that would be reviewing the decision by the Office of Hearing.

So I just -- first, if you could clarify, does the South Dakota Banking Commission still have a part to play if this goes to the contested hearing?

MR. BACHAND: No, Your Honor. This would be in front of the Office of Hearing Examiners under 1-26D.

THE COURT: But then ultimately it is the secretary of Labor that would be the entity reviewing the decision of the Office of Hearing Examiners?

MR. BACHAND: That's correct. Under the procedure of 1-26 the hearing examiner -- and in 1-26D, the hearing examiner would essentially serve the secretary, provide the

secretary with the decision for the secretary to say yay or nay or correct.

THE COURT: Okay. And does that hierarchy of who the ultimate decision maker at the agency level is affect this Court's analysis of whether or not this is a final decision in a contested case?

MR. BACHAND: Oh, I think it does because then there has not been a final decision.

And if you look at the appeal statue which I think is 1-26-31, it actually discusses -- under 1-26-31, the notice of appeal, the time for serving discusses the fact that that is within 30 days of the agency served notice of the final decision.

So they have 30 days after the notice of entry of that final decision. Well, that, likewise, is the final decision that the Court referenced by the secretary of the department. So that has not occurred, likewise, at this time.

So jurisdiction in front of this Court for that reason is, likewise, not appropriate at this point in time.

THE COURT: All right. Well, did you have anything that you wanted to further argue at this time before I hear from the appellant?

MR. BACHAND: Briefly.

Appellant cited this concept of there are exceptions

1-26-1. Definition of terms. Terms used in this chapter mean:

(1) "Agency," each association, authority, board, commission, committee, council, department, division, office, officer, task force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term includes a home-rule municipality that has adopted its own administrative appeals process, whose final decisions, rulings, or actions rendered by that process are subject to judicial review pursuant to this chapter. The term does not include the Legislature, the Unified Judicial System, any unit of local government, or any agency under the jurisdiction of such exempt departments and units unless the department, unit, or agency is specifically made subject to this chapter by statute;

(2) "Contested case," a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in § 1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents;

(3) "Emergency rule," a temporary rule that is adopted without a hearing or which becomes effective less than twenty days after filing with the secretary of state, or both;

(4) "License," the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law;

(5) "Licensing," the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(6) "Party," each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;

(7) "Person," all political subdivisions and agencies of the state;

(8) "Rule," each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) Statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public;

(b) Declaratory rules issued pursuant to § 1-26-15;

(c) Official opinions issued by the attorney general pursuant to § 1-11-1;

(d) Executive orders issued by the Governor;

(e) Student matters under the jurisdiction of the Board of Regents;

(f) Actions of the railroad board pursuant to § 1-44-28;

(g) Inmate disciplinary matters as defined in § 1-15-20;

(h) Internal control procedures adopted by the Gaming Commission pursuant to § 42-7B-25.1;

(i) Policies governing specific state fair premiums, awards, entry, and exhibit requirements adopted by the State Fair Commission pursuant to § 1-21-10;

(j) Lending procedures and programs of the South Dakota Housing Development Authority; and

(8A) "Small business," a business entity that employs twenty- five or fewer full-time employees.

(9) "Substantial evidence," such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion.

Source: SDC 1939, § 65.0106; SL 1966, ch 159, § 1; SL 1968, ch 210; SL 1972, ch 8, § 3; SL 1973, ch 264, § 1; SL 1974, ch 16, §§ 1, 2; SL 1975, ch 16, §§ 7, 8; SL 1976, ch 14, §§ 1, 2; SL 1977, ch 13, § 1; SL 1977, ch 14; SL 1980, ch 17; SL 1982, ch 20, § 2; SL 1983, ch 199, § 1; SL 1989, ch 20, § 42;

SL 1990, ch 343, § 9A; SL 1992, ch 8, § 3; SL 1995, ch 3, § 2; SL 1996, ch 10, § 1; SL 1996, ch 130, § 15A; SL 1999, ch 6, § 1; SL 2004, ch 20, § 1; SL 2012, ch 7, § 1; SL 2014, ch 73, § 1.

1-26-29. Notice and hearing required for revocation or suspension of license--Emergency suspension. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Source: SL 1966, ch 159, § 14 (3).

1-26-30. Right to judicial review of contested cases--Preliminary agency actions. A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Source: SL 1966, ch 159, § 15 (1); SL 1972, ch 8, § 26; SL 1977, ch 13, § 12; SL 1978, ch 13, § 9; SL 1978, ch 15.

1-26D-6. Proposed findings, conclusions, and decision--Agency action--Appeal. The hearing examiner, after hearing the evidence in the matter, shall make proposed findings of fact and conclusions of law, and a proposed decision. The agency may accept, reject, or modify those findings, conclusions, and decisions, and an appeal may be taken therefrom pursuant to chapter 1-26.

Source: SL 1995, ch 8, § 7

1-26D-8. Review of proposed findings or decision--Written reasons for rejecting or modifying findings or decision. The reviewing agency shall personally consider the whole record or such portions of it as may be cited by the parties. If the reviewing agency rejects or modifies proposed findings or a proposed decision, it shall give reasons for doing so in writing. In reviewing proposed findings of fact entered by the presiding hearing examiner, the reviewing agency shall give due regard to the hearing examiner's opportunity to observe the witnesses.

Source: SL 1995, ch 8, § 9B

1-26D-9. Final decision--Remand. The reviewing agency shall enter a final decision disposing of the proceeding or shall remand the matter for further proceedings with instructions to the hearing examiner who entered the initial decision. Upon remanding a matter, the reviewing agency may order such temporary relief as is authorized and appropriate. A final decision shall include, or incorporate by reference to the initial decision, all matters required by § 1-26-25.

Source: SL 1995, ch 8, § 10

51A-2-1. Establishment of Division of Banking. The Division of Banking is established and shall be administered under the direction and supervision of the Department of Labor and Regulation. The division is charged with supervision and control over the activities set forth in this title, and it shall exercise such other jurisdiction over such other activities as shall be conferred upon it by the Legislature.

Source: SL 1909, ch 222, art 1, § 1; SL 1915, ch 102, art 1, § 1; SL 1917, ch 256, § 1; RC 1919, § 8917; SL 1933, ch 47, § 5; SDC 1939, § 6.0205 (1); SDCL § 51-2-18; SL 1969, ch 11, § 2.1; SL 1988, ch 377, § 13; SDCL § 51-16-1; SL 2004, ch 17, § 299; SL 2011, ch 1 (Ex. Ord. 11-1), § 162, eff. Apr. 12, 2011.

51A-2-2. Department and commission as division within Department of Labor and Regulation--Direction and supervision by department--Independent functions retained by division. The Division of Banking shall be administered under the direction and supervision of the Department of Labor and Regulation and the secretary thereof. The division shall retain the quasi-judicial, quasi-legislative, advisory, and other nonadministrative functions (as defined in § 1-32-1) otherwise vested in it and shall exercise those functions independently of the secretary.

Source: SL 1973, ch 2 (Ex. Ord. 73-1), § 43; SL 1973, ch 290, § 2; SL 1988, ch 377, § 14; SDCL § 51-16-1.1; SL 2003, ch 272 (Ex. Ord. 03-1), § 118, eff. Apr. 17, 2003; SL 2011, ch 1 (Ex. Ord. 11-1), § 162, eff. Apr. 12, 2011.

54-4-49. Conditions, denial, nonrenewal, suspension, or revocation of license. The director may condition, deny, decline to renew, suspend for a period not to exceed six months, or revoke a license for good cause pursuant to chapters 1-26 and 1-26D. If the licensee is the holder of more than one license, the director may condition, deny, decline to renew, suspend for a period not to exceed six months, or revoke any or all of the licenses. For purposes of this section, good cause includes any of the following:

(1) Violation of any statute, rule, order, or written condition of the commission or any federal statute, rule, or regulation pertaining to consumer credit;

(2) Engaging in harassment or abuse, the making of false or misleading representations, or engaging in unfair practices involving lending activity;

(3) Performing an act of commission or omission or practice that is a breach of trust or a breach of fiduciary duty;

(4) Refusing to permit the director to make any examination authorized by this chapter or rule promulgated pursuant to this chapter, or any federal statute, rule, or regulation pertaining to money lending;

(5) The licensee or any partner, officer, director, manager, or employee of the licensee has been convicted of a felony or a misdemeanor involving fraud, dishonesty, or breach of trust;

(6) The licensee or any partner, officer, director, manager, or employee of the licensee has had a license substantially equivalent to a license under this chapter, and issued by another state or jurisdiction, denied, revoked, or suspended under the laws of that state or jurisdiction; or

(7) The licensee has filed an application for a license which, as of the date the license was issued, or as of the date of an order denying, suspending, or revoking a license, was incomplete in any material respect or contained any statement that was, in light of the circumstances under which it was made, false or misleading with respect to any material fact.

Source: SL 1998, ch 280, § 14; SL 2005, ch 258, § 6; SL 2015, ch 242, § 4.

CHAPTER 221

Initiated Measure 21

Set a maximum finance charge for certain licensed money lenders.

Section 1. That § 54-3-14 be amended to read as follows:

54-3-14. The term "regulated lenders" as used in § 54-3-13 means:

(1) A bank organized pursuant to chapter 51A-1, et seq.;

(2) A bank organized pursuant to 12 U.S.C. § 21;

(3) A trust company organized pursuant to chapter 51A-6;

(4) A savings and loan association organized pursuant to chapter 52-1, et seq.;

(5) A savings and loan association organized pursuant to 12 U.S.C. § 1464;

(6) Any wholly owned subsidiary of a state or federal bank or savings and loan association which subsidiary is subject to examination by the comptroller of the currency, or the federal reserve system, or the South Dakota Division of Banking, or the federal home loan bank board and which subsidiary has been approved by the United States secretary of housing and urban development for participation in any mortgage insurance program under the National Housing Act;

(7) A federal land bank organized pursuant to 12 U.S.C. § 2011;

(8) A federal land bank association organized pursuant to 12 U.S.C. § 2031;

(9) A production credit association organized pursuant to 12 U.S.C. § 2091;

(10) A federal intermediate credit bank organized pursuant to 12 U.S.C. § 2071;

(11) An agricultural credit corporation or livestock loan company or its affiliate, the principal business of which corporation is the extension of short and intermediate term credit to farmers and ranchers;

(12) A federal credit union organized pursuant to 12 U.S.C. § 1753;

(13) A federal financing bank organized pursuant to 12 U.S.C. § 2283;

(14) A federal home loan bank organized pursuant to 12 U.S.C. § 1423, et seq.;

(15) A national consumer cooperative bank organized pursuant to 12 U.S.C. § 3011;

(16) A bank for cooperatives organized pursuant to 12 U.S.C. § 2121;

(17) Bank holding companies organized pursuant to 12 U.S.C. § 1841, et seq.;

(18) National Homeownership Foundation organized pursuant to 12 U.S.C. § 1701y;

(19) Farmers Home Administration as provided by 7 U.S.C. § 1981;

(20) Small Business Administration as provided by 15 U.S.C. § 633;

(21) Government National Mortgage Association and Federal National Mortgage Association as provided by 12 U.S.C. § 1717;

(22) South Dakota Housing Development Authority as provided by chapter 11-11;

(23) Insurance companies, whether domestic or foreign, authorized to do business in this state, and which as a part of their business engage in mortgage lending in this state. However, § 54-3-13 does not exempt insurance companies from the provisions of § 58-15-15.8; or

(24) Any wholly owned service corporation subsidiary of a domestic or foreign insurance company, authorized to do business in this state, and which subsidiary is subject to examination by the same insurance examiners as the parent company~~; or~~

~~(25) An installment loan licensee under the provisions of chapter 54-4 and 54-6~~.

Section 2. That § 54-4-44 be amended to read as follows:

54-4-44. After procuring such license from the Division of Banking, the licensee may engage in the business of making loans and may contract for and receive interest charges and other fees at rates, amounts, and terms as agreed to by the parties which may be included in the principal balance of the loan and specified in the contract. However, no licensee may contract for or receive finance charges in excess of an annual rate of thirty-six percent, including all charges for any ancillary product or service and any other charge or fee incident to the extension of credit. A violation of this section is a Class 1 misdemeanor. Any loan made in violation of this section is void and uncollectible as to any principal, fee, interest, or charge.

Section 3. That chapter 54-4 be amended by adding a NEW SECTION to read as follows:

No person may engage in any device, subterfuge, or pretense to evade the requirements of § 54-4-44, including, but not limited to, making loans disguised as a personal property sale and leaseback transaction; disguising loan proceeds as a cash rebate for the pretextual installment sale of goods or services; or making, offering, assisting, or arranging a debtor to obtain a loan with a greater rate of interest, consideration, or charge than is permitted by this chapter through any method including mail, telephone, internet, or any electronic means regardless of whether the person has a physical location in the state. Notwithstanding any other provision of this chapter, a violation of this section is subject to the penalties in § 54-4-44.

Initiated Measure 21, eff. November 16, 2016

South Dakota Department of Labor and Regulation
Division of Banking

IN THE MATTER OF: Order No. 2017-2

Dollar Loan Center of South Dakota, LLC
DBA Dollar Loan Center
MYL No. 2840
8860 W Sunset Road Suite 100
Las Vegas, NV 89148

CEASE AND DESIST AND LICENSE REVOCATION ORDER

The Director of the South Dakota Division of Banking ("Division"), having determined that Dollar Loan Center of South Dakota, LLC has engaged in, is engaging in, or is about to engage in, acts or practices constituting violations of state and federal law and applicable regulations, hereby issues the following FINDINGS OF FACT, CONCLUSIONS OF LAW, CEASE AND DESIST ORDER, and LICENSE REVOCATION ORDER.

A. PARTIES AND JURISDICTION

1. Dollar Loan Center of South Dakota, LLC ("DLC") is a South Dakota limited liability company with headquarters in Las Vegas, Nevada. DLC does business in South Dakota as Dollar Loan Center.

2. DLC and four of its branches are licensed by the Director as money lenders under SDCL Chapter 54-4 as of the date of this order.

3. The Division has jurisdiction over the licensing and regulation of persons and entities engaged in the business of lending money in South Dakota pursuant to SDCL 51A-2-1, SDCL Chapter 54-4, and its implementing rules at ARSD 20:07:20 *et seq.*

B. FINDINGS OF FACT

4. On all of DLC's applications to the Division for licensure as a money lender, DLC indicated that it would not provide "short term consumer loans" as defined in SDCL 54-4-36(16).

5. On June 21, 2017, the Division received written notice from DLC's attorney, that DLC intended to begin making loans using a loan contract that differed from those DLC previously disclosed to the Division.

6. Prior to June 21, 2017, DLC only originated and serviced "signature loans" with maturities longer than 6 months.

7. Pursuant to SDCL 54-4-57, the Division is authorized to conduct an examination of business records and accounts of any licensee licensed under SDCL Chapter 54-4 that transacts business in South Dakota to determine compliance with the provisions of SDCL Chapter 54-4, and any rule, or regulation issued thereunder, and with any federal law, rule, or regulation pertaining to consumer credit.

8. On July 13, 2017, the Division performed a target examination of DLC to evaluate the new loan product being offered by DLC for compliance with applicable laws and regulations. The Division reviewed Sioux Falls and Rapid City loans while on-site at DLC's Sioux Falls location via DLC's Infinity Software system. After reviewing the July 13, 2017 target examination information, the Division determined that additional performance information on DLC's new loan product was necessary and that the target examination needed to be expanded to a full scope examination.

9. On August 17-18, 2017, the Division performed a full scope examination of DLC. Again, the Division reviewed Sioux Falls and Rapid City loans while on-site at DLC's Sioux Falls location

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via DLC's Infinity Software system. The Division reviewed 308 loans originated between July 3, 2017, and August 12, 2017.

10. During the examination, it was determined that the new loans offered by DLC are unsecured loans ranging in principal amounts from $250 to $1,000. All of the new loans mature in 7 days and require full payment of principal and interest upon maturity.

11. Of the 308 loans reviewed during the DLC examination, 276 had a maturity date prior to August 17, 2017. Late fees were charged on 146, or 52.90 percent, of the sampled loans.

12. DLC appears to be reliant on late fees to generate revenue from its new loan product. DLC's Payments Report for the time period between July 1, 2017, and August 17, 2017, provides that late fees paid by DLC's customers totaled $10,050.00, compared to interest paid of only $1,091.81. Late fees accounted for 90.22 percent of total DLC income from this product.

13. As a result of DLC's unsound loan underwriting and insufficient repayment analysis, the delinquency rate per DLC account is 57.75 percent and the delinquency rate per volume is 56.84 percent as of August 17, 2017.

14. For the loans reviewed, the stated APR for DLC's new loans ranged from 35.87% to 35.98%. The actual APR for DLC's new loans, when late fees are included in the APR as finance charges, ranged from 300.86% to 487.64%.

15. DLC has neither applied for nor received authorization from the Division to originate or service "short term consumer loans." DLC has previously been authorized by the Division to originate and service only signature loans with maturities longer than 6 months.

16. The loan product offered by DLC after June 21, 2017, is designed to incur late fees. The new loan product offered by DLC would not be profitable without the revenue earned from late fees.

C. CONCLUSIONS OF LAW

17. Based upon the information contained in Paragraphs 1 through 16, the Director has determined that:

a. DLC has engaged in, is engaging in, or is about to engage in, acts or practices which are in violation of the provisions of SDCL Chapter 54-4.

b. DLC is currently originating and servicing loans that meet the definition of "short term consumer loan" provided in SDCL 54-4-36(16).

c. The late fees charged by DLC, on loans originated after June 21, 2017, are anticipated fees that must be considered fees incident to the extension of credit, and be included in the finance charge calculation for DLC's new loan product.

d. DLC is in violation of the provisions of SDCL 54-4-44.1 in that the loan product offered by DLC after June 21, 2017, is a device, subterfuge, or pretense to evade the requirements of SDCL 54-4-44.

e. The loans originated by DLC after June 21, 2017, are void and uncollectible as to any principal, fee, interest, or charge pursuant to SDCL 54-4-44.

f. 12 CFR 1026.22 ("Regulation Z") provides in part, "the annual percentage rate shall be considered accurate if it is not more than 1/8 of 1 percentage point above or below the annual percentage rate..." DLC is in violation of Regulation Z in that the actual APR charged by DLC is far more that 1/8 of 1 percent above the APR calculated and stated by DLC.

g. Pursuant to SDCL 54-4-49, the Director may revoke a South Dakota money lender license for good cause. There is good cause to immediately revoke DLC's money lender licenses in that, among other things, DLC violated statutes related to consumer credit, engaged in unfair practices

involving lending activity, and the money lender license applications filed by DLC with the Division are materially incomplete and contain statements that are, in light of the circumstances under which they were made, false or misleading with respect to material facts.

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED that:

DLC shall immediately cease engaging in the business of lending money in South Dakota.

Identify any and all loans made by DLC to consumers after June 21, 2017, to the date of this order, and notify any such consumer that the loans are void and uncollectible as to any principal, fee, interest, or charge pursuant to SDCL 54-4-44.

This Order is effective immediately upon signing and shall remain in effect unless set aside, limited, or suspended by the Division or upon court order after review under South Dakota law.

This Order shall not be construed as approving any act, practice, or conduct not specifically set forth herein which was, is, or may be in violation of relevant state or federal laws and regulations.

LICENSE REVOCATION ORDER

IT IS HEREBY ORDERED that:

DLC shall immediately surrender all of it its South Dakota money lender licenses and return them to the Division.

This Order is effective immediately upon signing and shall remain in effect unless set aside, limited, or suspended by the Division or upon court order after review under South Dakota law.

This Order shall not be construed as approving any act, practice, or conduct not specifically set forth herein which was, is, or may be in violation of relevant state or federal laws and regulations.

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NOTICE OF HEARING

Any person aggrieved by this order, may, within thirty days after notice of this order has been mailed, file with the Division a written request for a hearing before the South Dakota Banking Commission ("Commission"). All proceedings before the Commission related to this order shall be held in conformance with SDCL Chapter 1-26.

DATED 9/13/2017

Bret Afdahl
Director
Division of Banking

CERTIFICATE OF SERVICE

Delaine Campbell, Secretary to the South Dakota Division of Banking, does hereby certify that she served by mail a true copy of the CEASE AND DESIST AND LICENSE REVOCATION ORDER on Sander J. Morehead, Attorney for Dollar Loan Center of South Dakota, LLC, P.O. Box 5027, Sioux Falls, SD 57117-5027, and Incorp Services, Inc., Registered Agent for Service of Process in South Dakota for Dollar Loan Center of South Dakota, LLC, 400 North Main Ave. Ste. 206, Sioux Falls, SD 57104-5979 properly addressed, postage prepaid, by mailing first class United States mail at the United States Post Office, Pierre, South Dakota.

Dated and mailed this 13th day of September, 2017.

Delaine Campbell
Secretary
South Dakota Division of Banking
1601 N. Harrison Avenue, Suite 1
Pierre, SD 57501
(605) 773-3421

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DOLLAR LOAN CENTER OF
SOUTH DAKOTA, LLC

Appellant,

vs. Appeal No. 28538

STATE OF SOUTH DAKOTA,
DEPARTMENT OF
LABOR AND REGULATION,
DIVISION OF BANKING,

Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA
THE HONORABLE PATRICIA J. DEVANEY
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

Notice of Appeal filed February 20, 2018

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PRELIMINARY STATEMENT

In this brief, Appellee, the State of South Dakota, Department of Labor and Regulation, Division of Banking, is referred to as the "Division." Appellant, Dollar Loan Center of South Dakota, LLC, is referred to as "DLC." References to DLC's brief is referred to by "DLC Br." and the page number. The Hughes County Clerk of Courts' record is referred to by the initials "CR" and the page number.

JURISDICTIONAL STATEMENT AND CHALLENGE

This appeal is taken from the circuit court's Order Granting Motion to Dismiss, filed January 24, 2018. Notice of Entry was served on that same date. DLC's Notice of Appeal was filed on February 20, 2018. The Division's Motion to Dismiss Appeal was filed on March 2, 2018. DLC responded to the Division's Motion to Dismiss on March 15, 2018. This Court denied the Division's motion on March 30, 2018. For reasons discussed *infra,* the Division renews its assertion that this appeal should be dismissed for a lack of jurisdiction by this Court.

STATEMENT OF LEGAL ISSUES AND AUTHORITY

The broad issues before this Court are:

A. Whether an appeal is permitted at this stage of the proceedings.

This Court lacks subject matter jurisdiction over this appeal.

Relevant Cases:

In the Matter of PUC Docket HP 14-0001, 2018 S.D. 44, ___ N.W.2d___.
Bettelyoun v. Sanders, 90 S.D. 559, 243 N.W.2d 790.
In re Murphy, 2013 S.D. 14, ¶ 10, 827 N.W. 2d. 369.
Action Carrier, Inc. v. United Nat. Ins. Co., 2005 S.D. 57, 697 N.W.2d 387.

Relevant Statutes:

SDCL 15-26A-3
SDCL 1-26-30.1

Relevant Secondary Sources:

2 Am. Jur. 2d Administrative Law § 251.

B. Whether the circuit court erred by holding that it did not have jurisdiction to consider the decision by the Division.

The circuit court did not err.

Relevant Cases

Kolda v. City of Yankton, 2014 S.D. 60, 852 N.W.2d 425.
Schloe v. Lead-Deadwood Indep. Sch. Dist., 282 N.W.2d 610 (S.D. 1979).
City of Brookings v. Ramsay; 2007 S.D. 130, 743 N.W.2d 433.
Reynolds v. Douglas Sch. Dist. No. 51-1, 2004 S.D. 129, 690 N.W.2d 655.

Relevant Statutes and Rules:

SDCL 1-26-30
SDCL 1-26D-6
SDCL 1-26-32
SDCL 15-26A-1
SDCL 15-26A-60
SDCL 51A-2-1
SDCL 51A-2-2
SDCL 54-4-48
SDCL 54-4-49

C. Whether the circuit court erred by holding that there was no exception to the exhaustion requirement.

The circuit court did not err.

Relevant Cases:

S.D. Bd. of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988).
Mordhorst v. Egert, 88 S.D. 527, 223 N.W.2d 501.
Northwestern Bell Telephone Co., Inc. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990).
U.S. v. Morgan, 313 U.S. 409 (1941).

Relevant Statutes:

SDCL 54-4-49

SDCL 54-4-48
SDCL 1-26-32

D. Whether the circuit court erred by holding that intermediate relief was not available as review by the final agency will provide an adequate remedy.

The circuit court did not err.

Relevant Cases:

Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15.

Relevant Statutes:

SDCL 15-26A-1
SDCL 15-26A-60
SDCL 51A-2-1
SDCL 51A-2-2
SDCL 54-4-48
SDCL 54-4-49
SDCL 1-26D-6

STATEMENT OF THE CASE AND FACTS

In 2010, DLC submitted a Money Lending License Application to the Division. CR 247. That application indicated that DLC would not provide short term consumer loans.[1] CR 246. After the initial license applications in 2010, DLC submitted annual Money Lender Renewal Applications. CR 248-260. With the 2012 renewal, DLC indicated that it was enlarging its amortization schedule. CR 225; CR 268. That said, DLC was never licensed to issue short term consumer loans. CR 248-260.

On June 1, 2017, the Division received separate Money Lending License Applications from DLC for licenses to operate at specific locations in Aberdeen, Sioux Falls, and Watertown, South Dakota. CR 279-290. These new applications also indicated that DLC would not provide short-term consumer loans. *Id.* In reliance thereon, the Division issued licenses to DLC.

On or about June 21, 2017, DLC advised the Division that DLC was going to begin making loans using a loan contract that differed from those previously disclosed to the Division. CR 291. On July 7, 2017, the Division responded and advised DLC that it appeared that DLC might intend to use the late fee provision in the new loan contracts as a "device, subterfuge, or pretense to evade the requirements of § 54-4-44." CR 303-304.

Considering the newly-disclosed information, the Division conducted on-site examinations of DLC. CR 228-239. The Division reviewed 308 loans that originated between July 3, 2017, and August 12, 2017, and determined that DLC's new loans are unsecured loans ranging in principal amounts from $250 to $1,000 that mature in 7 days

[1] *See* SDCL 54-4-36(16), defining short-term consumer loans as loans with a duration of less than six months.

and require full payment of principal and interest upon maturity. *Id.* While DLC's stated Annual Percentage Rate (APR) for the new loans ranged from 35.87% to 35.98%, when late fees are included in the APR as finance charges, the actual APR ranged from 300.86% to 487.64%. *Id.* The Division found that since the loans have a duration of less than six months, the loans issued by DLC are short-term consumer loans as defined in SDCL 54-4-36(16). *Id.* DLC has neither applied for, nor been authorized by the Division, to originate short term consumer loans. *Id.*

During the July 13, 2017 target examination, Division representatives attempted to engage both the regional manager of DLC and its attorney to solicit answers to their additional questions. CR 228-239. DLC was not candid and would not discuss their unlicensed loan product with the Division's representatives. *Id.*; CR 315. The Division sent further follow-up questions to DLC regarding their unlicensed loan product. CR 312-313. DLC's responses were incomplete and unresponsive. CR 314-317; CR 319. The Division then conducted a full scope examination of DLC on August 17-18, 2017. CR 334-335. On September 13, 2017, the Division issued a Cease and Desist and License Revocation Order. CR 333-338.

On September 28, 2017, the Division issued a Limited Stay in order to clarify that DLC could continue to service loans that originated prior to November 16, 2016. CR 345-346. The Division sought to have the matter promptly reviewed by the Office of Hearing Examiners and on September 28, 2017, counsel for the Division filed with the Office of Hearing Examiners the Order and Limited Stay. The Division requested a prompt hearing under the provisions of SDCL 1-26 and 1-26D. Further, on September

28, 2017, the hearing officer indicated that the hearing could be held on October 16, 2017. CR 74.

After a number of emails between the parties attempting to schedule a hearing date, on October 3, 2017, the Office of Hearing Examiners scheduled a contested case hearing for October 17, 2017. CR 71. On October 3, 2017, the Division promptly filed the Notice of Hearing. CR 71- 83. Later that same day, October 3, 2017, after the Notice of Hearing was filed and provided to counsel for DLC, DLC emailed a request to continue the hearing. CR 94. DLC informed the hearing officer in part that "Now that I have had a chance to review the purpose of the hearing as set forth in Mr. Bachand's Notice, I believe it will be necessary for my clients to actively participate in the hearing or run the risk of there being a preclusive effect on evidence they will want to present in the Federal lawsuit they have filed against the State of South Dakota." CR 94. On October 5, 2017, DLC formally filed a letter requesting a continuance. CR 96-98. Based upon DLC's request for a continuance, the administrative hearing was continued to April 12, 2018. At no time did DLC request a stay of the Division's order pursuant to SDCL 1-26-32.

Notwithstanding the pending administrative hearing, DLC filed a Notice of Appeal on October 13, 2017, attempting to "appeal" the matter to circuit court prior to the scheduled administrative hearing. The Division moved to dismiss that appeal. CR 13. DLC resisted the motion. CR 103. On January 8, 2018, a hearing was held on the Division's motion to dismiss. CR 379.

On January 18, 2018, the circuit court issued an extensive memorandum opinion granting the Division's motion to dismiss. CR 347. The order granting the Division's

Motion to Dismiss was filed on January 24, 2018. CR 355. Instead of proceeding with the administrative hearing scheduled for April 12, 2018, DLC appealed the circuit court's decision to this Court. CR 359.

STANDARD OF REVIEW

A dismissal based upon a lack of subject matter jurisdiction is a question of law, and as such, the review is *de novo*. *Upell v. Dewey Cnty. Comm'n*, 2016 S.D. 42, ¶ 9, 880 N.W.2d 69, 72. In addition, the issue of jurisdiction may be raised at any time. *Id*., ¶ 8, nt. 3, 880 N.W.2d 72 (*citing Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, ¶ 9, 729 N.W.2d 335, 340; *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc*., 2003 S.D. 45, ¶ 12, 661 N.W.2d 719, 723).

ARGUMENT

This Court lacks subject matter jurisdiction over the current appeal. Without waiving any argument to the foregoing, the Division asserts, in the alternative, that the circuit court appropriately held 1) that it did not have jurisdiction, 2) that there was no exception to the exhaustion requirement, and 3) that intermediate relief is not available as review by the final agency will provide an adequate remedy. The Division incorporates the legal analysis and conclusions of the circuit court in addressing DLC's arguments.

A. An appeal is not permitted at this stage of the proceedings.

1. SDCL 15-26A-3(2)

This Court lacks jurisdiction over this appeal. This Court is required to take "notice of jurisdictional questions regardless of whether the parties present them." *In re Murphy*, 2013 S.D. 14, ¶ 10, 827 N.W. 2d. 369, 372, quoting *In re B.H., Jr.*, 2011 S.D. 26, ¶ 4, 799 N.W.2d 408, 409. Appellate jurisdiction cannot be presumed, "'but must affirmatively appear from the record.'" *Id. In re B.H., Jr.*, 2011 S.D. 26, ¶ 4, 799 N.W.2d

408, 409 (*quoting Johnson v. Lebert Const., Inc.*, 2007 S.D. 74, ¶ 4, 736 N.W.2d 878, 879). See also *Double Diamond Const. v. Farmers Co-op Elevator Ass'n of Beresford*, 2003 S.D. 9, ¶ 6, 656 N.W.2d 744, 746. It is well established that an "appeal may not be taken from an order unless it is authorized under SDCL 15-26A-3." *Action Carrier, Inc. v. United National Ins. Co.*, 2005 S.D. 57, ¶ 24, 697 N.W.2d 387, 393, quoting *Smith v. Tobin*, 311 N.W.2d 209, 210 (S.D. 1981). "An attempted appeal from an order from which no appeal lies confers no jurisdiction on this court, except to dismiss." *Id.*

DLC states in its Jurisdictional Statement that this appeal is taken pursuant to SDCL 15-26A-3(2). DLC Br. 1 ("Jurisdictional Statement" section). Appeals taken pursuant to SDCL 15-26A-3(2) occur when the appellate route is, in effect, extinguished. SDCL 15-26A-3(2). This Court has held that for subpart (2) to apply, "[f]irst, the order must affect a substantial right; second, the order must in effect determine the action; and third, the order must prevent a judgment from which an appeal might be taken." *Bettelyoun v. Sanders*, 90 S.D. 559, 243 N.W.2d 790, 792, emphasis added. DLC cannot satisfy *Bettelyoun's* three conjunctive elements. *Bettelyoun, supra.*

First, DLC's license is not a right; it is a privilege. *See generally, Discipline of Rokahr*, 2004 S.D. 66, ¶ 21, 691 N.W.2d 100, 108; *State v. Myers*, 411 N.W.2d 402, 406 (S.D. 1987) (noting that a license to drive is a privilege not a right); *State v. Halverson*, 277 N.W.2d 723, 725 (S.D. 1979) (noting that a hunting license is a privilege); *2 Am. Jur. 2d Administrative Law* § 251; *Application of Benton*, 2005 S.D. 2, ¶ 23, 691 N.W.2d 598; *Application of Widdison*, 539 N.W.2d 671, 678 (S.D. 1995); *Independent Trust Co., LLC v. S.D. State Banking Comm'n*, 2005 S.D. 22, ¶ 11-12, 696 N.W.2d 539, 543-44. As the circuit court's order only effects a privilege (*cf.* right), DLC fails the first element and

cannot satisfy the *Bettelyoun* test. *Bettelyoun, supra.* Accordingly, since DLC's appeal is procedurally defective, it must be dismissed.

Even if DLC satisfies the first *Bettelyoun* element, it fails the second. *Bettelyoun, supra.* The circuit court's order does not settle the matter definitively. Rather, it dismisses an inappropriate appeal and permits the case to proceed at the administrative level. DLC filed its "notice of appeal to circuit court" on October 12, 2017. DLC's appeal to circuit court was after the administrative hearing was set. In fact, a Notice of Hearing setting the administrative hearing for October 17, 2017 was provided to DLC on October 3, 2017. CR 77- 83. It was only after DLC reviewed the Notice of Hearing did counsel for DLC decide that they may have to participate in the hearing. Arguably, based upon statements from DLC's counsel, DLC never intended to participate in any administrative hearing. CR 94; 396. It is unknown what relief DLC may find at the administrative level and as such, the second *Bettelyoun* element is not met. The circuit court's order has not determined the action. *Bettelyoun, supra.* The determination of the matter will occur at the administrative hearing.

If DLC can satisfy the first two elements of the *Bettelyoun* test, it fails the third. The circuit court's order does not prevent a judgment from which an appeal might be taken. The circuit court's order permits the administrative hearing to proceed. In other words, DLC maintains a right to appeal if it is an aggrieved party post administrative hearing. SDCL 1-26-30.1 *et seq.* For these reasons, no right to appeal the circuit court's decision exists under SDCL 15-26A-3(2).

B. The circuit court did not have jurisdiction to entertain DLC's appeal.

1. A final decision in a contested case has not been rendered.

In the first portion of the circuit court's exacting memorandum opinion, it held that it did not have jurisdiction as the prerequisites of SDCL 1-26-30 had not been met. The circuit court noted that DLC failed to exhaust its administrative remedies, thereby depriving the circuit court of jurisdiction. CR 348-350. The circuit court correctly determined this question of law.

"No right to appeal *an administrative decision to circuit court* exists unless the South Dakota Legislature enacts a statute creating that right." *In the Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 12, ___ N.W.2d___. "[W]hen the [L]egislature provides for appeal to circuit court from an administrative agency, the circuit court's appellate jurisdiction depends on compliance with conditions precedent set by the [L]egislature." *Id*. SDCL 1-26-30 establishes two prerequisites for DLC's appeal to circuit court: 1) DLC must have exhausted all administrative remedies available within any agency; or 2) DLC must have been aggrieved by a final decision in a contested case. SDCL 1-26-30. Further, SDCL 1-26-30.2 provides that "[a]n appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency." SDCL 1-26-30.2.

DLC acknowledged, and the circuit court correctly pointed out, that DLC has further administrative remedies to exhaust at the administrative level. CR 401-402, CR 352. As to the second prerequisite, DLC mistakenly concludes that it is a, "party who is aggrieved by a final decision in a contested case. . . ." DLC Br. 12-13; SDCL 1-26-30. For the lion's share of DLC's arguments, it cites no legal authority and these arguments

should be deemed waived. *Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29; SDCL 15-26A-1; -60(6).

DLC's conclusion that it is a party aggrieved by a final decision in a contested case is incorrect. As the circuit court appropriately pondered: "How can a decision be 'final' when there are still administrative remedies to exhaust?" CR 349. The circuit court then pointed to the fact that a hearing was currently set before the Office of Hearing Examiners for April. *Id.* In addition, the circuit court held that to have a "final decision in a contested case," the procedure of SDCL Ch. 1-26; -26D applies. CR 349. DLC failed to follow the procedure outlined by SDCL 1-26 and 1-26D and instead filed an appeal to circuit court even though an administrative hearing date had been set. Additionally, DLC misrepresents the holding in the case of *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, the U.S. Supreme Court held that *two* conditions must be met for finality of an agency action:

> *"First, the action must* [178] *mark the consummation of the agency's decision-making process – it must not be of a merely tentative or interlocutory nature.* And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.,* 520 U.S. at 177-178, *emphasis added.* CR 349.

As adeptly pointed out by the circuit court, the "consummation of agency process" has not occurred. CR 349. Accordingly, DLC's posture – of only having to complete one element of the *Bennett* test – falls short of the mark. *Bennett, supra.*

Further, DLC's claim of "final agency action" should be examined in the context of its stated reasons for its appeal to circuit court. At the hearing before the circuit court,

counsel for DLC stated, “And if I don’t bring this appeal within 30 days, I am jurisdictionally barred from ever bringing this appeal at any point later. That was the reason this appeal was brought.” CR 396, ln. 5-8. Counsel reiterated that fact, stating “I filed it because of my concern over being jurisdictionally barred if I didn’t file it. My concern that they would come back 30 days after the date after Mr. Afdahl’s order and say, well, you didn’t appeal within 30 days. This was our final decision on this matter; you are barred. But forget that, I mean, that’s why I filed the appeal.” *Id.*, ln. 14-20.

Those concerns by DLC make little sense when, by that time and as evidenced by the record, hearing dates had been set for October 16, 2018, then October 17, 2018 and finally April 12, 2018. CR 74, 71, and 359. Additionally, counsel for DLC admitted to the circuit court judge that there had not been a hearing, yet counsel claims to this court that DLC has been aggrieved by a final decision in a contested case. The term “contested case” is defined at SDCL 1-26-1(2):

> "Contested case," a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in § 1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents.

SDCL 1-26-1(2).

A contested case under the provisions of Chapter 1-26 was finally set for April 12, 2018 after DLC requested to continue the October 17, 2017 hearing. That hearing, as

set forth in the Notice of Hearing filed by the Division on October 3, 2017, would determine the legal rights, duties or privileges of DLC. CR 359. Nonetheless, DLC appealed to circuit court prior to the contested case hearing.

Finally, DLC opines that in the as-yet-to-occur contested case, the Division would act without oversight. Of note, this is at odds with DLC's brief, when DLC admits that, "the Division is an agency within the Department of Labor and Regulation." DLC Br. 13. More to the point, this fundamentally misunderstands the inferior Division vis-à-vis the superior Department of Labor and Regulation. The Division is subordinate to, and operates under the direction and supervision of, the Department of Labor and Regulation. SDCL 51A-2-1; -2. As such, in the contested case, it would be the Department of Labor and Regulation (not the Division) who would review the proposed findings, conclusions, and decision, and ultimately render a final decision. SDCL 1-26D-6.

DLC's citation to this Court's opinion in *First Nat'l Bank v. S.D. State Banking Comm'n*, 2009 S.D. 58, 769 N.W.2d 847, for the proposition that the Division (Afdahl) has the "final word" is misplaced. DLC misstates the facts in that case. DLC's brief indicates "In an earlier case before this Court involving the Division's handling of a contested case, the Division handled its own contested case hearing and rendered a decision, which was appealed to the Circuit Court." DLC Br. 18. DLC furthers this misstatement by then substituting the actual word in that case "commission" for "[Division]". *Id.*

In *First Nat'l*, the Division did not handle the case hearing nor did the Division render the decision in that case. *First Nat'l., supra.* The Banking Commission did. *Id.* It is abundantly clear that the underlying hearing was administered by the Banking

Commission after First National intervened and objected to Dakota Prairie's Application to relocate its main office to Ft. Pierre, South Dakota. *Id.*, ¶ 3, 769 N.W.2d at 849-850. This bolsters the Division's position, and the circuit court's holding, that while the Division retains the authority to enter appropriate orders, it is the Office of Hearing Examiners and the Department of Labor and Regulation that will 1) provide the requisite oversight at the contested case and 2) ultimately render the final decision to determine the propriety of any contested order. SDCL 1-26D-6; SDCL 54-4-48; -49.

While DLC misapprehends the facts of *First Nat'l*, it also disregards the authority relied upon by the circuit court. The circuit court explicitly pointed to the procedures set forth in SDCL 1-26D, holding, "Following that hearing and pursuant to the procedures set forth in SDCL Ch. 1-26D, the hearing examiner will issue a proposed decision, and the reviewing agency may accept, reject or modify those findings, conclusions and decision." CR 349.

SDCL 1-26D-6 provides:

> The hearing examiner, after hearing the evidence in the matter, shall make proposed findings of fact and conclusions of law, and a proposed decision. The agency may accept, reject, or modify those findings, conclusions, and decisions, and an appeal may be taken therefrom pursuant to chapter 1-26.

SDCL 1-26D-6.

Here, the agency accepting, rejecting, or modifying the findings by the hearing examiner is the Secretary of the Department of Labor and Regulation. A point acknowledged by the Division and the circuit court. CR 349. DLC's statement that "there is no statutory basis for the Division and Circuit Court's conclusion that the Secretary of the Department of Labor has reviewing authority over lending license revocations[.]" ignores chapter 1-26D. DLC Br. 18.

The Director of the Division of Banking possesses quasi-judicial functions over licenses, including suspensions and revocation. SDCL 1-32-1(10); SDCL 51A-2-2, SDCL 54-4-48; -49. Here, under the provisions of 1-26 and 1-26D, his decision is reviewable by the hearing examiner and ultimately, the Secretary.

For these reasons, the circuit court's opinion should be affirmed.

2. DLC failed to exhaust its administrative remedies.

The circuit court correctly applied the law when it determined that DLC failed to exhaust its administrative remedies. CR 348-350. As noted, DLC failed to elect the simplest remedy available, that being an application for a stay. CR 353-354; SDCL 1-26-32. Noticeably absent from DLC's brief is any attempt to address the caselaw relied upon by the circuit court.

This Court's *stare decisis* clearly directs that a party's failure to exhaust its administrative remedies is a jurisdictional defect. *See Kolda v. City of Yankton*, 2014 S.D. 60, ¶ 30, 852 N.W.2d 425, 433 (holding "the jurisdictional base is lost if appellant's grievance is not timely filed in accordance with the grievance procedure…the trial court could have no better jurisdiction than that of the Department") (*quoting Schloe v. Lead-Deadwood Indep. Sch. Dist.*, 282 N.W.2d 610, 613 n. 1, 614 (S.D. 1979)); *City of Brookings v. Ramsay*; 2007 S.D. 130, ¶ 16, 743 N.W.2d 433, 438 (failure to exhaust as jurisdictional defect); *Zuke v. Presentation Sisters, Inc.*, 1999 S.D. 31, ¶ 18, 589 N.W.2d 925, 929 (exhaustion applies to disputes cognizable by an administrative agency); *Johnson v. Kolman*, 412 N.W.2d 109, 112 (S.D.1987); *Reynolds v. Douglas Sch. Dist. No. 51-1*, 2004 S.D. 129, ¶ 10, 690 N.W.2d 655, 657 (*quoting Small v. State*, 2003 S.D. 29, ¶ 16, 659 N.W.2d 15, 18-19 ("It is a settled rule of judicial administration that no one

is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Failure to exhaust is a jurisdictional defect")).

In application, DLC has failed to exhaust its administrative remedies. As noted by the Division before the circuit court, the Division timely requested that a contested case be held. It was DLC who requested the continuance and, after the continuance was granted, improperly appealed to the circuit court. As noted by the circuit court in the hearing, through DLC's avoidance of the contested case, there is no factual record for review, and without a factual record, the circuit court cannot apply the law to the facts; *ergo* jurisdiction is lost. CR 396 ln. 23; CR 397 ln. 10.

It is in keeping with this Court's precedent that these attempted end-runs around the administrative remedies will not be tolerated. *Kolda, supra., Zuke, supra., Johnson, supra., Reynolds, supra.* For these reasons, the circuit court's opinion should be affirmed.

C. The circuit court correctly determined that an exception to the exhaustion requirement did not exist.

In the second portion of the circuit court's memorandum opinion, it held that applicable exceptions to the exhaustion requirement did not exist. CR 350-352. The circuit court correctly applied the law in this regard. In its brief, DLC largely repackages the same arguments and cases addressed by the circuit court. *Id.,* DLC Br. 21-25.

This Court's holding in *Heege* first stands for the proposition that exhaustion of administrative remedies is necessary, as the dispute may be resolved at the administrative level. *S.D. Bd. of Regents v. Heege,* 428 N.W.2d 535, 539 (S.D. 1988). The corollary to this rule means that there will be less judicial involvement, a conservation of judicial resources, and a more harmonious relationship with executive branch. *Id.* DLC relies upon an exception to this rule, in that exhaustion is not required where, "the board having

appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair and impartial hearing cannot be had." *Id., citing Mordhorst v. Egert*, 88 S.D. 527, 223 N.W.2d 501. The court in *Mordhors*t first determined that the circuit court had primary jurisdiction pursuant to a specific statute governing optometrists. *Id*. ¶ 532, 223 N.W.2d at 504. Here, the circuit court held that (unlike the *Mordhorst* scenario) it does not have primary jurisdiction over the licensing matter in this case. CR 351. As pointed out by the circuit court (and admitted by DLC in its brief), there has been neither an allegation nor any showing that the Office of Hearing Examiners, and subsequently the Secretary of the Department of Labor and Regulation, is so biased that a fair and impartial hearing cannot be had. CR 351; DLC Br. 25; *Mordhorst, supra.* In fact, the evenhandedness of the Division was recognized by the circuit court, when it held:

> "Unlike *Mordhorst*, there was a two-month investigation in this case, involving legal counsel for DLC. The facts supporting the alleged law violations were clearly laid out by Division counsel in correspondence with DLC, and DLC's counsel was given the opportunity to respond to the alleged violations. (Exhibits 2-5). Moreover, there is no claim before the Court that the Director of the Division of Banking was inherently biased or improperly influenced by parties who did not have enforcement authority. Finally, the specific factual findings in the Order illustrate that, unlike the allegations against the optometrists in *Mordhorst*, the alleged violations here are not without factual support." CR 351.

Since administrative officials are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances, and no other showing has been made, that portion of the *Mordhorst* exception falls away. *Mordhorst, supra.*; *Northwestern Bell Telephone Co., Inc. v. Stofferahn*, 461 N.W.2d 129 (S.D. 1990); *U.S. v. Morgan*, 313 U.S. 409 (1941).

Accordingly, DLC's argument rests upon its allegation that the Division improperly made a decision prior to a hearing. *Mordhorst, supra.* DLC Br. 25. To the

propriety of the Division's decision, it is of note that the Legislature has vested the Division with the authority to make precisely this type of decision. SDCL 54-4-49. The Legislature also gave a route for those aggrieved by such a decision, yet DLC never requested a stay of the Division's order. SDCL 54-4-48; CR 353-354; SDCL 1-26-32. Factually, it was the Division (not DLC) which sought to timely bring this matter to a contested case hearing. DLC, however, seeks to avoid any contested case hearing and instead proceed with no factual record whatsoever. Now, as then, DLC's appeals attempt to avoid the very process the Legislature directed. Importantly, and as recognized by the circuit court, the factual background in this matter is dissimilar from *Mordhorst.* As such, no "improper decision" has been made prior to any hearing element. *Mordhorst, supra.* CR 350-351. For these reasons, DLC's argument fails and the circuit court should be affirmed.

D. The circuit court correctly determined that intermediate relief was not available, as review by the final agency will provide an adequate remedy.

The circuit court correctly held that intermediate relief was not available, since a review by the final agency will provide an adequate remedy. CR 352-354. Once again, DLC cites no legal authority in its brief and these arguments should be deemed waived. *Veith supra.*, SDCL 15-26A-1, -60(6).

In its brief, DLC misconstrues both the law and the reason for contested cases. DLC Br. 25-26. As noted earlier, even though the Director of the Division of Banking exercises quasi-judicial functions, the Secretary of the Department of Labor and Regulation (not the Division) reviews the proposed findings, conclusions, and decision from the contested case, and ultimately renders a final decision. SDCL 1-26D-6. It is the Secretary of the Department of Labor and Regulation (not the Division) who will

determine the propriety of the Division's actions. Should that decision ultimately be unfavorable to DLC, it has the appellate routes outlined in the Administrative Procedure and Rules. SDCL 1-26-30.1 *et seq.*; SDCL 1-26D-6. DLC's conclusions to the contrary are meritless.

Finally, DLC makes the bold assertion that a contested case "serves no purpose…and cannot provide an adequate remedy…is not authorized by law and is a pretext that serves only to afford the Division an opportunity to create a record to support Afdahl's predetermined decision." DLC Br. 26. Such a claim highlights DLC's fundamental misunderstandings. First, the Legislature has mandated that the contested case serves a purpose, and the Division's actions, and the corresponding contested case route for an aggrieved party, is authorized by law. SDCL 54-4-48; -49. Second, as addressed by the circuit court, it was DLC that failed to request a stay and (rather than pursuing the interim relief afforded by statute) closed its doors and began filing lawsuits. CR 353-354.

Third, the "adequate remedy" *could be* a return of DLC's lending licenses (if the necessary factual record is ever created). Fourth and final, the sought-after/long-avoided contested case is not a "pretext for a record." The Division has already set down its findings of fact, conclusions of law, and order. CR 62. Rather, the contested case gives DLC the ability to create the requisite factual record to show how the Division was incorrect in its assertions. By creating this shifting target of appeals, DLC has avoided a necessary step for judicial review. As such, DLC's argument fails and the circuit court's order should be affirmed.

CONCLUSION

The Division requests that this Court affirm the circuit court's Order granting the Motion to Dismiss.

Dated this 20th day of June, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of June 2018, a true and correct copy of the foregoing Brief in the above-referenced cases was served upon the following persons by electronic mail at the addresses listed below:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DOLLAR LOAN CENTER OF SOUTH DAKOTA, LLC,

Appellant

-vs-

STATE OF SOUTH DAKOTA, DEPARTMENT OF
LABOR AND REGULATION, DIVISION OF BANKING,

Appellee

Appeal No. 28538

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICIA J. DeVANEY
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The abbreviations used in Appellant's Brief will be used in this reply brief as well. Reference will be made to "Appellee's Brief" by the applicable page number.

REPLY ARGUMENT

A. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS APPEAL.

The Court has already considered, and rejected, the Division's argument that it lacks jurisdiction over this appeal. The Circuit Court's order dismissing DLC's appeal is a final appealable order, and DLC properly pursued an appeal as a matter of right under SDCL 15-26A-3(2).

DLC easily satisfies the final order requirement in SDCL 15-26A-3(2). "Appeals under this subsection are permitted as a matter of right if three requirements are met: 'First, the order must affect a substantial right; second, the order must in effect determine the action; and third, the order must prevent a judgment from which an appeal might be taken.'" Bettelyoun v. Sanders, 90 S.D. 559, 563, 243 N.W.2d 790, 792 (1976) (quoting Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879, 880-81 (1943)).

The Division argues that DLC's license is a privilege, rather than a right, and, since the Circuit Court's Order only affects a privilege, DLC cannot satisfy the first Bettelyoun requirement. An identical argument was recently heard and

summarily rejected in DLC's 42 U.S.C. § 1983 case in the United States District Court for the District of South Dakota:

> Afdahl appears to argue that because the director has discretion under South Dakota law to issue licenses, DLC has a privilege to conduct state regulated business rather than a constitutionally protected right. Doc. 20 at 14-15. Curiously, Afdahl then appears to concede that DLC is to be afforded due process as a licensee. Doc. 20 at 15. This question warrants little discussion; DLC had valid licenses which gave it a "legitimate claim to entitlement as opposed to a mere subjective expectancy," as reflected in the fact that South Dakota law mandates that licenses not be revoked without notice and opportunity to show compliance with the law in the absence of emergency circumstances. See SDCL § 1-26-29. Moreover, ample case law establishes that an issued license is a protected property interest. See, e.g., Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) ("Once licenses are issued... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees.

> In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."); Richardson v. Town of Eastover, 922 F.2d 1152, 1156 (4th Cir. 1991) ("A license issued by the state which can be suspended or revoked only upon a showing of cause creates a property interest protected by the Fourteenth Amendment."); C. Line, Inc. v. City of Davenport, 957 F. Supp. 2d 1012, 1036-37 (S.D. Iowa 2013) (finding a protected property interest where business had license to operate via a consent decree with municipality guaranteeing it would issue license to business despite its prior nonconforming use).

Dollar Loan Ctr. of S.D., LLC v. Afdahl, No. 3:17-CV-03024-RAL, 2018 U.S. Dist. LEXIS 88796, at *35-36 (D.S.D. May 29, 2018).

The authority cited in the federal district court decision applies with equal force to the Division's argument here. As a licensee, DLC had a legitimate claim of entitlement, or a *right*, to conduct business as a money lender unless and until the Division and its director, Bret Afdahl ("Afdahl"), provided the process to which DLC was due under South Dakota law. This appeal, brought under SDCL 1-26-30, involves the

deprivation of DLC's right to conduct business.[1] The Circuit Court's dismissal precludes DLC from challenging the Division's decision to revoke its lending licenses without the hearing it was due under SDCL Chapter 1-26. See SDCL 1-26-36(1), (2) and (3).

DLC was entitled to a hearing *before* its legal rights, duties, or privileges vis-a-vis its lending licenses were determined. That is not how the Division chose to proceed. Instead, the Division elected to immediately revoke DLC's licenses without providing a hearing. Even though DLC remains deprived of its lending licenses, the Circuit Court's order dismissed DLC's appeal and requires it to endure an unnecessary and meaningless post-deprivation hearing before bringing a challenge to the Division's unlawful action. DLC had a right to immediately challenge that dismissal.

The Division argues that the Circuit Court's Order did not determine the action or prevent a judgment. It did both of these things. The dismissal of DLC's appeal determined the action; the appeal was dismissed and DLC was precluded from going forward with its challenge to the Division's revocation of DLC's lending licenses. The Circuit Court's

[1] The Division has repeatedly attempted to conflate the cease and desist portion of its Revocation Order, which dealt with the use of a certain loan product, with the license revocation portion of its Revocation Order, which shuttered DLC's doors. The latter is the issue in this appeal.

Order prevents a judgment of affirmance, reversal, or modification under SDCL 1-26-36.

Although this Court has not squarely addressed whether an order of dismissal is a final appealable order, the Nebraska Supreme Court, applying virtually indistinguishable rules, very recently noted that "[g]enerally, an order of dismissal is a final, appealable order." Boyd v. Cook, 298 Neb. 819, 827-28 (2018).

In Boyd, the Nebraska Supreme Court noted, that under Nebraska's rules, three types of final orders may be reviewed on appeal: "(1) *an order which affects a substantial right and which determines the action and prevents a judgment*, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered." Id. at 825 (emphasis added). The issue in Boyd centered on a portion of the trial court's order that stayed part of the case pending arbitration. However, the Nebraska Supreme Court noted that "[h]ad the district court's order simply dismissed all claims, it would unquestionably be a final order." Id. at 827. Nonetheless, even with a portion of the order only *staying* the claims, the Nebraska Supreme Court determined the district court's order was a final order because "it put the parties out of court and effectively forced them to arbitrate

their claims." Id. at 829.

The misconception that appears in Appellee's Brief is that, because the Division has attempted to keep some form of proceeding at the administrative level pending, the Circuit Court's Order did not determine this action. This is the wrong inquiry. The Circuit Court's Order put DLC out of court. Insofar as *this action* is concerned, the Circuit Court's Order settled it definitively. It outright dismissed DLC's appeal, precluding a judgment of affirmance, reversal, or modification. It was a final appealable order

under SDCL 15-26A-3(2), and this Court has already correctly concluded that it has subject matter jurisdiction.

B. THE DIVISION'S FAILURE TO FOLLOW THE LAW DOES NOT CHANGE THE FACT THAT A FINAL, APPEALABLE DECISION WAS RENDERED.

Amazingly, the Division asserts that "DLC failed to follow the procedure outlined by SDCL 1-26 and 1-26D and instead filed an appeal to circuit court even though an administrative hearing date had been set." (Appellee's Brief, pg. 11.) More amazingly, the Division made this assertion on June 20, 2018, just 22 days after United States District Court Judge Roberto Lange concluded that the Division's director failed to follow South Dakota law. Dollar Loan Ctr. of S.D., LLC, 2018 U.S. Dist. LEXIS 88796, at *29 (". . .Afdahl's choice to revoke the licenses rather than affording a hearing or giving

DLC an opportunity to bring its practices into compliance with the law was improper."). In reality, Afdahl completely ignored the procedure outlined by SDCL 1-26 by summarily revoking DLC's license:

- With no notice or opportunity to show compliance. See SDCL 1-26-29. ("No revocation . . . of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.").
- With no finding that "public health, safety, or welfare imperatively require emergency action[.]" SDCL 1-26-29.[2]
- With no hearing. See SDCL 1-26-1(2) ("Contested case" is defined as "a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency *after* an opportunity for hearing . . . ."); SDCL 1-26-16 ("In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.").

The Division's entire argument centers on the idea

[2] Although not material because Afdahl made no such emergency finding, SDCL 1-26-29 does not permit a *revocation* of a license based upon the finding of an emergency; it only permits suspension.

that DLC is not aggrieved by a final decision in a contested case, because DLC has further remedies to exhaust at the administrative level. But this argument makes no sense in the context of this case. DLC has no lending licenses. It has not been licensed since September 2017, pursuant to Afdahl's Revocation Order, which included his findings and conclusions and demanded that DLC immediately turn over its lending licenses. It would be one thing if DLC was attempting to bring a circuit court appeal to challenge a cease and desist or emergency suspension order under SDCL 1-26-30 *before* a contested case hearing could take place and its licenses were still in hand. Here, the Division revoked DLC's licenses *without* a contested case hearing. In fact, it didn't see fit to ask for a hearing until its director was sued in federal court.

The Division continues to advance the position that Afdahl's decision is not final, because Afdahl does not have the final say on DLC's license revocation and additional administrative steps must be completed to reach a final decision. The Division argues that the it "is subordinate to, and operates under the direction and supervision of, the Department of Labor and Regulation," citing SDCL 51A-2-1 and 51A-2-2. (Appellee's Brief, pg. 13.) It also argues that it is "the Department of Labor and Regulation (not the Division) who would review the proposed findings, conclusions, and

decision, and ultimately render a final decision," citing SDCL 1-26D-6. (Id.)

The Division makes absolutely no attempt to reconcile its position with the second sentence of SDCL 51A-2-2: "The division **shall** retain the **quasi-judicial**, quasi-legislative, advisory, and other nonadministrative functions (as defined in § 1-32-1) otherwise vested in it and **shall exercise those functions independently of the secretary**." (Emphasis added.) "Shall" is a mandatory directive. SDCL 2-14-2.1. The term "quasi-judicial function" is defined in SDCL 1-32-1(10) to include, *inter alia*, "issuing, suspending, or **revoking** licenses, permits and certificates." (Emphasis added.)[3] The Division is required by law to handle the revocation of licenses independently of the Secretary of the Department of Labor.

The Division also claims that SDCL 1-26D-6 supports its position, and claims that the agency accepting, rejecting, or modifying the hearing examiner's findings is the Secretary

[3] While acknowledging that the revocation of lending licenses would typically fall within the definition of a "quasi-judicial function" under SDCL 1-32-1(10), DLC makes absolutely no concession that Afdahl is entitled to immunity. Indeed, the U.S. District Court found that he is not entitled to such immunity. See Dollar Loan Ctr. of S.D., at *31. ("There is no reason to think Afdahl would be impeded from the vigorous exercise of his office if he is not entitled to absolute immunity for his conduct in this case, because that conduct went beyond the statutory authority vested in Afdahl by state law.").

of the Department of Labor and Regulation. This argument fails for two reasons.

First, the Division's position flatly contradicts SDCL 51A-2-2. As noted above, SDCL 51A-2-2 requires the Division to exercise quasi-judicial functions "independently of the secretary." The revocation of licenses is a quasi-judicial function. SDCL 1-32-1(10).

Second, SDCL 1-26D-6 merely refers to "the agency." There is no question that the Division and/or its director qualify as an "agency," as that term is defined. "Agency" is defined as "each association, authority, board, commission, committee, council, department, division, office, officer, task force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty . . . ." SDCL 1-26-1(1). The director of the Division is very clearly given the authority to exercise a portion of the state's sovereignty. He is vested with the statutory authority over state-issued lending licenses, including the right to revoke such licenses under SDCL 54-4-49. Indeed, Afdahl's Revocation Order specifically notes that "[t]he Division has jurisdiction over the licensing and regulation of persons and entities engaged in the business of lending money in South Dakota" and states that he was acting pursuant to SDCL 54-4-49. (CR 62, 65-66; Appx. 25, 65-66.)

The Secretary of the Department of Labor has absolutely nothing to do with this matter. The Division was required to see to it that DLC received an opportunity for a hearing before its director revoked the lending licenses. "A contested case is 'a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing[.]'" In re Keystone XL Pipeline, 2018 S.D. 44, ¶ 15 (quoting SDCL 1-26-1(2)). This Court recently noted that a hearing is "required by law" when required by a statute, an agency rule, or a due-process constitutional requirement. Id. SDCL 54-4-49 required Afdahl to act pursuant to SDCL Chapter 1-26 and 1-26D, which means giving DLC a hearing before revoking its lending licenses. Likewise, a hearing was required under the United States Constitution. "There is a clearly established right to a predeprivation hearing before the revocation of a business license absent exigent circumstances." Dollar Loan Ctr. of S.D., LLC v. Afdahl, 2018 U.S. Dist. LEXIS 88796, at *59. "Notwithstanding Afdahl's arguments, due process always requires 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" Id. (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

In a properly handled contested case proceeding, the steps would have included: the notice required by SDCL 1-26-29;

then, assuming DLC failed to comply, the Division's notice of the contested case hearing (*before* taking any action to revoke DLC's lending licenses); then, after the contested case hearing, the hearing examiner's findings of fact and conclusions of law would follow under SDCL 1-26D-6; and, finally, Afdahl would need to review the whole record and enter his final decision. This would be the proper way for Afdahl to perform his quasi-judicial function.

Operating this way would have been entirely consistent with SDCL 54-4-49, SDCL Chapters 1-26 and 1-26D, and SDCL 51A-2-2.

The Division operated in reverse, and provided no notice under SDCL 1-26-29, and did not notice or conduct a hearing. Instead, On September 13, 2017, Afdahl issued findings of fact and conclusions of law, and immediately revoked DLC's lending licenses. DLC had no control over how Afdahl arrived at his decision. But the fact remains that he arrived at it. Under these circumstances, DLC is aggrieved by an agency's final decision in a contested case, and it is entitled to appeal under SDCL 1-26-30. The Circuit Court erred by dismissing DLC's appeal.

C. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS EXCUSED BECAUSE AFDAHL IMPROPERLY MADE THE DECISION TO REVOKE THE LENDING LICENSES PRIOR TO A HEARING.

To resist DLC's argument concerning an exception to the exhaustion requirement, the Division sets up straw men and knocks them down. But it never addresses the real issue.

First, DLC did not argue that Mordhorst v. Egert, 88 S.D. 527, 223 N.W.2d 501, is factually analogous. In fact, DLC conceded that it is not, and argued, instead, that the Court's rationale concerning the importance of due process is equally applicable here. (Appellant's Brief, pg. 22.) Indeed, considering that Afdahl is intended to be a quasi-judicial decision maker vis-a-vis the revocation of DLC's lending licenses, see SDCL 51A-2-2 and SDCL 1-32-1(10), the Division would be hard-pressed to argue otherwise. See Armstrong v. Turner Cnty. Bd. of Adjustment, 2009 S.D. 81, ¶ 19, 772 N.W.2d 643, 651 (quasi-judicial decision making implicates due process constraints).

Second, DLC has never made an argument that the hearing examiner is biased. Rather, it argued that exhaustion is futile because the person with statutory authority to make the final decision, i.e., Afdahl, has already made his decision. See e.g. Read v. McKennan Hosp., 2000 S.D. 66, ¶ 16, 610 N.W.2d 782, 785. The exception that is involved in this case has two alternatives: "Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing ***or*** is so biased that a fair and impartial hearing cannot be had." S.D. Bd. of Regents v. Heege, 428 N.W.2d 535,

539 (S.D. 1988) (emphasis added). DLC's argument is and has always been about the former of these alternatives, namely, that Afdahl made the decision to revoke and took action before proceeding through the proper channels under SDCL Chapter 1-26 and 1-26D.

More telling than the Division's assault on issues that DLC did not raise is the Division's inability to deal with the issue that supports DLC's argument that exhaustion is excused: the Division's noncompliance with SDCL Chapter 1-26. Absent from the Division's brief is any explanation of why DLC is wrong in its assertion that the decision to revoke DLC's lending licenses was improperly made prior to a hearing. Simply stated, the immediate revocation of DLC's lending licenses cannot be reconciled with numerous provisions in SDCL Chapter 1-26. The Division does not argue otherwise anywhere in Subpart C. of its Argument.

DLC's position now has additional support. Having examined the situation, U.S. District Court Judge Lange recently concluded that Afdahl failed to follow South Dakota law: ". . .Afdahl's choice to revoke the licenses rather than affording a hearing or giving DLC an opportunity to bring its practices into compliance with the law was improper." Dollar Loan Ctr. of S.D., LLC, 2018 U.S. Dist. LEXIS 88796 at *29. "Under state law, DLC was entitled to a contested hearing before

the [hearing examiner] before the revocation of its licenses." Id. at *49.

Instead of arguing that it somehow complied with the requirements of SDCL Chapter 1-26, the Division argues that the Legislature vested it with the authority to make precisely this type of decision, citing SDCL 54-4-49. There is no question that Afdahl had the authority to revoke DLC's lending licenses. However, such authority is expressly conditioned on acting "pursuant to chapters 1-26 and 1-26D." Id. The fact that Afdahl chose to ignore those sections by revoking without a hearing is the very basis for DLC's argument that it should be permitted to appeal without further exhaustion.

The Division also touts its supposed desire to "timely bring this matter to a contested case hearing." (Appellee's Brief, pg. 18.) To be sure, once Afdahl was sued in federal court, and DLC's allegations of due process violations were raised, the Division grew much more interested in conducting some kind of hearing. Unfortunately, by that time, Afdahl had already revoked DLC's lending licenses and taken steps to ensure that his Revocation Order was enforced. (CR 126-127; 152; 153.) DLC's licenses were mailed to the Division, and it quit operating in South Dakota. (CR 128; 154.)

The Division also chastises DLC for wanting to avoid any contested case hearing and proceed with no factual record whatsoever. This is the bed that the Division made for itself.

DLC certainly didn't ask for Afdahl to take its lending licenses without a hearing. But the fact that Afdahl made the decision to do should not mean that DLC has to endure a meaningless ad hoc administrative hearing to adjudicate an issue that Afdahl has already decided.

Even if the Court determines that a final decision has not been rendered, exhaustion is excused in this case. The agency given authority by statute to decide the matter improperly made its decision prior to a hearing. The Circuit Court erroneously dismissed DLC's case based upon the premise that further exhaustion is required.

D. REVIEW BY AFDAHL WILL NOT PROVIDE AN ADEQUATE REMEDY.

DLC incorporates its prior argument. Suffice to say, the Division is fundamentally mistaken in its assertion that the Secretary of the Department of Labor has some additional layer of oversight in this matter. The Division's cited authority provides no support for this argument, and actually demonstrates the opposite. See SDCL 51A-2-2 (Division shall retain quasi-judicial functions and exercise them independently of the secretary).

Further, the hearing that the Division contends is a necessity is not even statutorily authorized. In a contested case setting such as a license revocation, the legal rights of a party are required by law to be determined by an agency *after* an opportunity for hearing. SDCL 1-26-1(2). In other

words, SDCL Chapter 1-26 clearly calls for a *pre-deprivation* hearing where a license revocation is involved. Afdahl is the person vested with the statutory authority to revoke DLC's lending licenses, and he acted before a hearing was set. The Division's Notice of Hearing, dated October 3, 2017, unwittingly reveals the entire problem with the proceedings that the Division urges are now required:

> The purpose of this hearing is to determine whether Dollar Loan Center has violated the provisions of SDCL Chapter 54-4, and **whether or not its money lending license should be revoked** and the and conditions contained in the Cease and Desist and License Revocation Order (Order No. 2017-2) should be enforced.

(CR 78.) (Emphasis added.)

The Notice of Hearing purports to describe a pre-deprivation hearing with the purpose of determining *whether* the license "*should be revoked*." In a proper hearing before the Office of Hearing Examiners where a license revocation is contemplated, that would be correct. But in this case, by October 3, 2017, license revocation had already happened. The Division now insists upon a post-deprivation hearing, supposedly aimed at determining the merits of the revocation, while DLC remains unlicensed. Such a proceeding is the Division's ad hoc creation and finds no support in the law.

Finally, under a proper application of SDCL 54-4-49, SDCL 51A-2-2, and SDCL Chapters 1-26 and 1-26D, Afdahl is the final arbiter who decides whether revocation of the lending licenses is warranted. Requiring DLC to now endure an ad hoc post-deprivation hearing only to have the hearing examiner's

findings be reviewed by Afdahl - the very person that has already taken DLC's lending licenses - makes absolutely no sense and certainly provides no remedy. See Read at ¶ 16, 610 N.W.2d at 785 (where board was final arbiter in disputes between hospital and staff, and board already made final decision regarding renewal of radiology privileges, requiring Read to exhaust administrative remedies would be an exercise in futility).

The Division's choice to ignore SDCL Chapters 1-26 and 1-26D created this problem, and led to DLC being wrongfully deprived of its lending licenses without a pre-deprivation hearing. DLC can attain no meaningful relief through further administrative proceedings, including the ad hoc post-deprivation hearing that the Division concocted after Afdahl was sued in federal court. This hearing finds no support in the law. The simple issue in this appeal is whether the Revocation Order issued by the Division is legal or valid. Clearly, it is not, and it should be reversed and DLC's lending licenses returned. Following reversal, if the Division wants to commence a proceeding to attempt to revoke DLC's lending licenses in a proper manner, it may certainly do so.

CONCLUSION

For all of these reasons, DLC respectfully urges the Court to reverse the Circuit Court's Order Granting Motion to Dismiss and remand this matter for further proceedings.

Respectfully submitted this 12th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 19 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 3,958 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 12th day of July, 2018.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellant, hereby certifies that on the 12th day of July, 2018, a true and correct copy of **APPELLANT'S REPLY BRIEF** was electronically transmitted to:

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and the original and two copies of **APPELLANT'S REPLY BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 12th day of July, 2018.

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