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13 *Attorneys for Defendant Don E. Brady*

14  
15 **UNITED STATES DISTRICT COURT**

16 **DISTRICT OF NEVADA**

17 **FEDERAL TRADE COMMISSION**

18 Plaintiff,

19 v.

20 **AMG SERVICES, INC., et al.,**

21 Defendants, and

22 **Park 269, LLC, et al.,**

23 Relief Defendants.  
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Case No.: 2:12-cv-00536-GMN-VCF

**DEFENDANT DON E. BRADY'S  
RESPONSE IN OPPOSITION TO  
PLAINTIFF'S AMENDED  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

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## **INTRODUCTION**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, Defendant Don E. Brady (“Brady”) opposes the Amended Motion for Partial Summary Judgment filed by Plaintiff Federal Trade Commission (“Plaintiff” or “FTC”). Doc. No. 338. In its motion, Plaintiff seeks to strike Brady’s first affirmative defense, which asserts that the FTC lacks authority to bring an action against him under the FTC Act because he was acting as a tribal officer for arms of an Indian Tribe. Brady Answer, Doc. No. 317, p. 13.

The substance of Plaintiff’s argument focuses on its jurisdiction over Indian Tribes (and tribal entities). If that argument alone favored the FTC, then Brady concedes his first affirmative defense would not withstand the summary judgment test. But that is not the case. Here, the Tribal Defendants have established that Plaintiff has not met its burden and is not entitled to judgment as a matter of law regarding jurisdiction over Indian Tribes under the FTC Act. *See* Doc. No. 355, Defendants AMG Services, Inc., Red Cedar Services, Inc., SFS, Inc., and MNE Services, Inc. (collectively “Tribal Defendants”) Opposition to Plaintiff’s Amended Motion for Partial Summary Judgment (“Tribal Def. Opp.”). Mr. Brady formally adopts the arguments and authorities set forth by the Tribal Defendants.

Plaintiff is then left flat footed without any support to address Brady’s defense that the FTC also lacks jurisdiction over tribal officers. Indeed, Plaintiff’s argument as to Brady and the other nine defendants is relegated to a single footnote and relies on a mischaracterization of Defendants’ prior representations to the Court. Under these circumstances, partial summary judgment should be denied.

## **STATEMENT OF FACTS**

Rule 56(c) of the Federal Rules of Civil Procedure and Local Rule 56.1 require that motions for summary judgment and responses thereto include a concise statement setting forth each fact material to the disposition of the motion. Plaintiff includes ten (10) purported uncontroverted facts, which relate to the Tribal Defendants. Summary Judgment Memo., pp. 9-10. Brady incorporates the responses and evidentiary support to those statements as set forth by the Tribal Defendants. Tribal Def. Opp., pp. 1-3. Additionally, Brady submits that it is undisputed between the parties that Brady was an officer of the Miami Tribe of Oklahoma and its related lending entities during the relevant time period.<sup>1</sup>

## **ARGUMENT**

### **I. Burden of Proof**

A party may move for partial summary judgment to dispose of pure issues of law, which is what Plaintiff has done in the instant motion. *See generally Miller v. County of Santa Cruz*, 796 F. Supp. 1316, 1317 (N.D. Cal. 1992), *aff'd*, 39 F.3d 1030 (9th Cir. 1994). In evaluating a summary judgment motion, a court must view “all facts and draw[] all inferences in the light most favorable to the nonmoving party,” and shall grant the motion only when “the pleadings, the discovery and disclosure materials on file, and any affidavits ‘show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.’” *F.T.C. v. Johnson*, 2013 WL 800257, \*1 (D. Nev. Mar. 1, 2013) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986)); *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 772 (9th Cir. 1981) (“[s]ummary judgments are to be cautiously granted”).

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<sup>1</sup> Brady Answer, Doc. No. 317 ¶ 13 (admits that Brady was the CEO of AMG Services, Inc); FTC Exhibit 3 ¶ 2 (attached to its Amended Motion for Partial Summary Judgment, Doc. No. 338) (Brady employed as the CEO of Miami Nation Enterprises).

As the moving party, Plaintiff bears the burden of showing that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). Also, Plaintiff has only such jurisdiction as Congress has conferred upon it by the Federal Trade Commission Act, and where, as here, the jurisdiction of the Commission is challenged, the FTC bears the burden of establishing its jurisdiction. *See, e.g., Cmty. Blood Bank of Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011, 1015 (8th Cir. 1969) (citations omitted).

## II. The FTC Has Failed to Meet Its Burden for Partial Summary Judgment

### a. Brady's Affirmative Defense Should Not Be Rejected Based On a Footnote

Nearing the end of Plaintiff's memorandum, it claims that the Tribal Defendants must comply with the FTC Act "irrespective of their tribal connections and their arrangements with non-tribal partners." At the conclusion of this sentence, Plaintiff inserts a footnote stating "[o]f course the remaining defendants cannot, as a legal matter, claim any tribal exemption for themselves." Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Summary Judgment Memo."), Doc. No. 339, at p. 17 n.40. In support of this oddly definitive position, Plaintiff states – without any citation, discussion or attention to the differences between the remaining ten defendants – that a jurisdictional exemption does not extend to other persons not expressly exempt. *Id.* Plaintiff cites one case for this proposition, but, as discussed below, this case is not relevant to the issue of law presented by Brady's first affirmative defense.

Further, the Plaintiff concludes its footnote with a misleading citation to prior briefing by Tribal Defendants' counsel (and joined by all defendants) that "the FTC's lack of jurisdiction does not extend to *any contractor working with* the Tribal entities or anyone who has a 'business

1 relationship' with the Tribal Entities." As discussed in detail below, this prior statement merely  
 2 clarified that the defendants are not claiming that anyone with any connection whatsoever to a  
 3 tribe is outside the jurisdiction of the FTC. What the FTC chose to leave out are the two  
 4 paragraphs immediately preceding the Tribal Defendants' statement, in which Tribal Defendants  
 5 specifically confirmed that their position has always been that officers and employees of tribal  
 6 entities are protected by the tribes' sovereignty. *See* § II(c), *infra*.

8 Plaintiff's conclusory statements fall far short of its burden to negate an element of  
 9 Brady's affirmative defense and establish its jurisdiction over him. *See, e.g., Stetco v. Holder*,  
 10 2012 WL 5851144, \*1 (9th Cir. Nov. 16, 2012) (holding that the government waived an  
 11 argument by solely alluding to the argument in a footnote that contained no discussion of the  
 12 facts or reasoning of any of the cases). The Plaintiff's footnote is simply insufficient for this  
 13 Court to properly evaluate the issues and ascertain that "under the governing law, there can be  
 14 but one reasonable conclusion." *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511.

16 b. The Plaintiff Relies Solely on One Unpersuasive and Inapplicable Case

18 Plaintiff's motion fails to address Brady's position as an officer of a tribal entity and  
 19 relies on authority that is inapposite to Brady's relationship with the tribal entities. In *FTC v.*  
 20 *CompuCredit Corporation*, 2008 WL 8762850 (N.D. Ga. Oct. 8, 2008), the sole case upon which  
 21 Plaintiff relies, the FTC took action against CompuCredit, a corporation that provided various  
 22 consumer credit products and related financial services through its contractual arrangements with  
 23 various banks. *Id.* at \*1. CompuCredit moved to dismiss the FTC's complaint against it on the  
 24 basis that the FTC lacked authority to enforce the FTC Act "with regard to banking activities  
 25 delegated to a bank service provider like CompuCredit." *Id.* at \*3. Specifically, CompuCredit  
 26 argued that "because it performed banking activities on behalf of a bank, or in essence, was the  
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1 bank's agent, it is exempt from the FTC Act as if it were the bank itself." *Id.* In response, the  
 2 FTC argued "the exemption for banks does not include non-banks performing contractual  
 3 services for banks such as CompuCredit." *Id.* at \*4.

4 In deciding the motion, the court agreed that "non-bank entities performing contractual  
 5 services for banks are not within the enumerated exemptions in the FTC Act." *Id.* "Courts have  
 6 held that an *entity's exemption* from FTC jurisdiction is based on *that entity's status*, not its  
 7 activity." *Id.* (quoting *Nat'l Fed'n of the Blind v. FTC*, 303 F. Supp. 2d 707, 714-15 (D. Md.  
 8 2004)) (emphasis added). The court therefore denied CompuCredit's motion to dismiss the  
 9 FTC's complaint. The court did *not*, however, address whether an entity's exempt status extends  
 10 to its officers, and thus the FTC's reliance on *CompuCredit* is misplaced.

11 It is undisputed that Brady held several high level executive positions within the Miami  
 12 Tribe of Oklahoma and its lending arms of the tribe. *See infra*, p. 2 n.1. Brady was an executive  
 13 officer of tribal government entities, not merely an outside contractor performing services for the  
 14 tribe. The respective roles of CompuCredit and Brady vis-à-vis their entity relationships are not  
 15 comparable and Plaintiff's effort to draw such dispositive comparison is misguided.

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 19 c. Brady Has Not, Contrary to Plaintiff's Claim to the Contrary, Admitted the FTC's  
 20 Jurisdiction over Him

21 After relying on a single inapposite case, the Plaintiff then states that all defendants  
 22 acknowledged the notion that exemptions do not extend to other persons not expressly exempt  
 23 when defendants "disclaim[ed] any 'tribal exemption' for Defendants' business partners."  
 24 Summary Judgment Memo., p. 17 n.40 (quoting Objections to the Magistrate Judge's August 28,  
 25 2012 Order wherein defendants clarify that they are not asserting the FTC lacks jurisdiction over  
 26 "any contractor working with the Tribal Entities or anyone who has a 'business relationship'  
 27 with the Tribal Entities"). First, Plaintiff materially overstates what was actually acknowledged.  
 28

1 The Tribal Defendants, and Brady, recognized only that tribal immunity does not extend to  
 2 *everyone* with *any business connection* whatsoever to a tribe. Second, the FTC continues to  
 3 ignore the real issue – *i.e.* whether the FTC can assert jurisdiction over an officer when it lacks  
 4 jurisdiction over the entity. The FTC can discuss “non-tribal partners” (*id.*, p. 17), “Defendants’  
 5 business partners” (*id.*, p. 17 n.40), “any contractor working with the Tribal Entities” (*id.*) and  
 6 “anyone who has a ‘business relationship’ with the Tribal Entities,” but that does not address the  
 7 affirmative defense asserted by Brady. Brady was a tribal executive officer during the relevant  
 8 period of time and, as such, the FTC lacks jurisdiction over him.

9  
 10 Third, Plaintiff’s reference to the Tribal Defendant’s prior statement is misleading.  
 11 Plaintiff takes a single sentence out of context and distorts its meaning. In full, the passage  
 12 states:  
 13

14 The Tribal Entities’ position is, and has always been that *officers and employees*  
 15 *of the Tribal Entities* are protected by the Tribe’s sovereignty when acting in their  
 16 official capacity and within the scope of their authority. This position is  
 17 consistent with binding precedent. *E.g., Cook v. AVI Casino Enterp., Inc.*, 548 F.  
 18 3d 718, 726-27 (9th Cir. 2008). In *Cook*, the Ninth Circuit held that “the settled  
 19 law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the  
 20 same sovereign immunity granted to a tribe itself,” and that it extends to the tribal  
 21 corporation’s employees and officials acting in the court and scope of their  
 22 employment. *Id.* But the Tribal Entities have not asserted (and do not assert) that  
 23 any person or entity can “claim the status of a Tribal-Chartered Entity,” and the  
 Magistrate Judge’s determination to the contrary is erroneous. (Doc. 153, p. 4).  
 ... And, as set forth above, the legal conclusion that tribal officials and tribal  
 employees are treated as a tribe when acting in the course and scope of their  
 employment is apt. The Tribal Entities have not—and do not—assert that the  
 FTC’s lack of jurisdiction extends to any contractor working with the Tribal  
 Entities or anyone who has a “business relationship” with the Tribal Entities.

24 Objections to Order, Docket No. 165 at pp. 15-16 (emphasis in original). By quoting only the  
 25 last three lines of this passage, particularly where the issue is on point with Brady’s affirmative  
 26 defense, Plaintiff materially alters the argument’s representation. The single sentence quoted out  
 27 of context by Plaintiff merely acknowledged that *everyone* with any connection whatsoever to an  
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1 Indian Tribe is not outside of the FTC's jurisdiction. It in no way diminishes the defendants'  
2 position on tribal immunity or statutory exception as it applies to Brady in this case.

3 For these reasons, the Plaintiff has failed to meet its burden for partial summary judgment  
4 against Brady and its amended motion should be denied. Its lack of legal authority or analysis  
5 suggests that the Plaintiff is relying solely on its argument against the Tribal Defendants, and in  
6 doing so, overlooks the burden it must satisfy for *all* of the relief it has sought.  
7

8 **III. As the FTC Has No Jurisdiction Over the Tribal Entities, It Has No Jurisdiction**  
9 **over Tribal Officers Such as Brady**

10 Plaintiff's motion disregards the law governing the officers and employees of exempt  
11 entities, as well as tribal sovereign immunity and the relationship between an Indian Tribe and its  
12 officers and employees. This law contradicts Plaintiff's assertion of jurisdiction over Brady.

13 First, on a pragmatic level, a lack of jurisdiction to bring claims against an Indian Tribe  
14 operates as a lack of jurisdiction over its officers. Otherwise the limitation would have no  
15 practical effect. It would be legally unsound to hold that a tribal entity could not be sued by the  
16 FTC, but its chief executive officer could be sued for the same conduct. It is well-settled law  
17 that an entity, such as a corporation, can act only through its officers and agents. *See, e.g.,*  
18 *Alaska United Gold Min Co v. Muset*, 114 F. 66, 69 (9th Cir. 1902) ("Being a corporation, it  
19 could act only by means of officers and agents."); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*,  
20 556 F.2d 406, 419 (9th Cir. 1977) (same); *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491,  
21 1499 (10th Cir. 1994) ("Since a corporation is only a legal entity, it cannot act or have a mental  
22 state by itself. *See* Fletcher Cyclopedia of the Law of Private Corporations § 4877 (Perm.Ed.).  
23 It can only act through its officers and employees, and these acts are attributed to the corporation  
24 under basic principles of agency."). Subjecting tribal officers to federal law and regulations not  
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1 otherwise imposed on the tribe itself is wholly inconsistent with Congress's intent of not  
 2 providing the Federal Trade Commission authority over Indian tribes.

3 To allow the FTC to commit this type of end run around the recognized sovereignty of  
 4 Indian Tribes would go against the spirit of the law and ignore the clear intent of Congress. *See*  
 5 *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (“[A] plaintiff cannot  
 6 circumvent tribal immunity ‘by the simple expedient of naming an officer of the Tribe as a  
 7 defendant, rather than the sovereign entity.’”) (citations omitted); *Hardin v. White Mountain*  
 8 *Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (tribal immunity extends to individual tribal  
 9 officials acting in their representative capacity and within the scope of their authority) (citing  
 10 *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir.1981)); *Miller v. Coyhis*, 877 F. Supp.  
 11 1262, 1266 (E.D. Wis. 1995) (doctrine of tribal sovereign immunity barred action against tribal  
 12 council and tribal administrator where actions of officials and administrator had no independent  
 13 legal effect, rather it was action of tribe that caused plaintiff's alleged injury). Here, Plaintiff  
 14 seeks injunctive relief to prohibit certain acts related to the Tribal Defendants' lending  
 15 enterprises, as well as the rescission or reformation of contracts, restitution, the refund of monies  
 16 paid, and the disgorgement of alleged ill-gotten monies. FTC Complaint, Doc. 1 p. 20. It is  
 17 clear from the essential nature and effect of the relief sought by the Plaintiff the case would  
 18 operate against the Indian Tribes, impermissibly infringing upon their sovereign immunity.  
 19

20 The Ninth Circuit recently applied this rule to tribal employees in *Miller v. Wright*, 705  
 21 F.3d 919 (9th Cir. 2013), a case challenging the imposition of cigarette sales taxes. As the court  
 22 recognized:  
 23

24 “Tribal sovereign immunity protects Indian tribes from suit absent express  
 25 authorization by Congress or clear waiver by the tribe. This immunity applies to  
 26 the tribe's commercial as well as governmental activities....” *Cook v. AVI Casino*  
 27 *Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (citations omitted). “[T]he settled  
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1 law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the  
2 same sovereign immunity granted to a tribe itself....” *Id.*

3 *Id.* at 923-24. The court first held that federal antitrust laws did not preempt the tribe’s sovereign  
4 immunity. *See id.* at 927 (“As we have explained, federal antitrust laws are not intended to apply  
5 to Indian tribes. This conclusion forecloses the argument that federal antitrust law is of general  
6 applicability vis-a-vis the Tribe.”). The court extended this immunity to the individuals named  
7 in the suit, including the CEO of the tribal store. The court rejected the plaintiffs’ claim that the  
8 individuals could be sued even if the tribe could not, agreeing with the district court (and the  
9 defendants) that “the tribal officials are protected by the Tribe’s sovereign immunity because  
10 they were acting pursuant to the Tribe’s authority.” *Id.* at 927-28.

12 Second, the FTC’s attempt to assert jurisdiction over Brady is inconsistent with case law  
13 involving officers and employees of other entities exempt from the FTC’s reach. This is not the  
14 first time the FTC has attempted to bypass an entity’s exempt status by suing its key employees.  
15 The Plaintiff tried to circumvent the FTC Act’s exemption for nonprofit corporations in  
16 *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). In that  
17 case, the petitioners sought to have an FTC order set aside. The petitioners to which the FTC’s  
18 order was directed were divided into three groups:

- 21 (1) Community Blood Bank of the Kansas City Area, Inc., a Missouri not-for-  
22 profit corporation and its officers, directors and agents;
- 23 (2) Kansas City Area Hospital Association, a Missouri nonprofit corporation, and  
24 its officers, directors and agents and certain member hospitals; . . . and
- 25 (3) Individual pathologists affiliated with various hospitals located in the Kansas  
26 City area.

26 *Id.* at 1013. After its other arguments failed, the FTC claimed that “the order may be enforced  
27 indirectly against any of the not-for-profit corporations . . . by enforcing it against those officers,  
28 directors, and employees found to be subject to the order in their individual capacities.” *Id.* at

1 1020-21. However, the court saw the FTC's "hypothesis" as just another improper "attempt to  
2 establish its jurisdiction" over a non-profit corporation. *Id.*

3 The court in *Community Blood Bank* recognized that while the FTC Act grants the FTC  
4 jurisdiction over all "persons," "the distinction made in the Act between corporations acting for  
5 profit and nonprofit corporations would be erased if all the Commission had to do, in order to  
6 obtain jurisdiction, was to name the officers, directors and other personnel of a nonprofit  
7 corporation as the respondents." *Id.* at 1021 (quoting dissenting opinion in the FTC order). The  
8 court held that the FTC was not entitled to acquire jurisdiction otherwise lacking by  
9 "indirection," that is, by enforcing its order against the key employees of the corporations. *Id.* at  
10 1022 ("In this situation we hold that the Commission is not entitled to acquire jurisdiction  
11 otherwise lacking over the nonprofit corporations by indirection, that is, by enforcing its order  
12 against the pathologists, administrators or key employees of the corporations."). Likewise, here,  
13 the FTC is not entitled to acquire jurisdiction over the exempt Tribal Defendants by attempting  
14 to enforce the FTC Act against Brady, who held several tribal executive positions.<sup>2</sup> This Court  
15 should not allow Plaintiff to evade the limits on its jurisdiction in this circuitous manner.  
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22 <sup>2</sup> Similarly, in the context of the FTC's subpoena power, which may be exercised even against  
23 those – such as banks and common carriers – who are exempt from the FTC Act, the courts  
24 appear to presume that if an entity is exempt from the Act, then so too are its officers. *See Casey*  
25 *v. F.T.C.*, 578 F.2d 793, 797-98 (9th Cir. 1978) (even if unions were exempt from FTC Act,  
26 union and its officials could nonetheless be subpoenaed by FTC); *FTC v. Cockrell*, 431 F. Supp.  
27 561, 563-64 (D.D.C. 1977) (non-profit county medical society and its executive director could be  
28 subpoenaed by FTC notwithstanding their argument that they could not be subpoenaed because  
they could not be the subject of an FTC investigation). Indeed, not surprisingly, research has  
disclosed no case in which the FTC sought to impose liability against, for example, the officers  
of a bank when the bank itself was not subject to the Act. This is exactly what the FTC seeks to  
do here – impose liability on a tribal officer, when it cannot do so against the tribe itself.

**CONCLUSION**

Plaintiff has failed to meet its burden in establishing its jurisdiction over the Miami Tribe of Oklahoma, its related lending enterprises and its officers and employees. For that reason, summary judgment is not appropriate. WHEREFORE, Defendant Don E. Brady requests that this Court deny Plaintiff's Amended Motion for Partial Summary Judgment.

DATED: March 25, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing pleading has this day been filed with the Clerk of the Court using the ECF system which sent notification of such filing to all the proper parties.

SO CERTIFIED this 25th day of March, 2013.

/s/ Nathan F. Garrett  
Attorney for Defendant Don E. Brady