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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMG Services, Inc. et al.,

Defendants, and

Park 269 LLC, et al.,

Relief Defendants.

Case No. 2:12-cv-536

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

The purpose of this motion is to confirm the unremarkable legal proposition that the Federal Trade Commission ("FTC") has the authority to enforce the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and the Electronic Fund Transfer Act ("EFTA") against online lenders and debt collectors, including businesses associated with Indian tribes. Any determination to the contrary would, as the Court itself has observed, enable tribes, and those who partner with tribes, to "victimize" consumers without any federal government protection.[1]

In this action, the FTC challenges the lending and debt collection operations of four corporations – AMG Services, Inc. ("AMG"), MNE Services, Inc. ("MNES"),[2] Red Cedar Services, Inc. ("Red Cedar"), and SFS, Inc. ("SFS," and collectively, "Defendants") – that, along with other participating persons, deceived consumers across the country with false loan disclosures and collection threats, and unlawfully required consumers to preauthorize electronic fund transfers as a condition to obtaining credit.[3] For example, Defendants represented to consumers that a $300 loan would cost $390 to repay, but then charged those consumers $975 to repay their loans.[4] Defendants accomplished this deception through confusing and contradictory loan disclosures,[5] and compounded the problem by requiring consumers to repay their loans via electronic fund transfers initiated and controlled by Defendants and by falsely threatening consumers with litigation and arrest in collections calls.[6]

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1 Exhibit 1 (8/23/12 Hr'g Tr.) at 91-92.

2 The FTC named "Tribal Financial Services" ("TFS") as a defendant in this matter, but TFS has since stated that TFS is a trade name, whose business is wholly owned by MNES. *See* Docket No. 318, TFS Answer at n.1; *see also* Part IV, *infra*, SMF ¶¶ 5-6.

3 *See generally* Docket No. 1.

4 *Id.* at ¶ 40.

5 *Id.* at ¶¶ 34-36.

6 *Id.* at ¶¶ 42-45.

Defendants characterize themselves as a tribal business and have repeatedly argued that the FTC (and, by extension, the entire federal government) is powerless to regulate them. Although Defendants have trotted out many different variations of this defense in the eleven months since the case was filed, they have never offered any proof that Congress intended any tribal businesses to be entirely exempt from federal law enforcement. Their arguments conflict with binding Supreme Court and Ninth Circuit precedent, contradict their previous statements to courts, and defy common sense.

The Court should grant partial summary judgment to dismiss the tribal defense, and it is appropriate and necessary to do so now. In its bifurcation Order, the Court stated that it would adjudicate, in the first phase of the case, Defendants' tribal defense as a *legal matter*:

> The Court shall also adjudicate through motion practice the ***legal question*** of whether, and to what extent, the FTC has authority over Indian tribes whose sovereignty is asserted in this case and/or AMG Services, Inc., MNE Services, Inc., Red Cedar Services, Inc., and SFS, Inc. for alleged violations of the FTC Act.[7]

The resolution of this legal question is a matter of ordinary statutory interpretation: because the FTC Act generally applies to corporations, and contains no exemption for tribal corporations, Defendants' defense fails as a matter of law. This is so irrespective of the particular arrangements between the tribes and defendants Scott Tucker and Blaine Tucker (the "Tuckers"). Dismissal of the defense at this juncture would conserve judicial resources by disposing of Defendants' disingenuous and shape-shifting tribal arguments and focusing the Court's and the parties' inquiry to the core issues in dispute: the lawfulness of Defendants' operations, the entities and individuals participating in Defendants' common enterprise, and the appropriate relief.

II. SUMMARY OF ARGUMENT

It is beyond reasonable dispute that federal statutes of general applicability that are silent on tribal issues presumptively apply to tribes and tribal businesses. *Fed. Power Comm'n v. Tuscarora*

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[7] Docket No. 296 at 9 (emphasis added).

Indian Nation, 362 U.S. 99, 116 (1960) ("it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests"); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) ("Many of our decisions have upheld the application of general federal laws to Indian tribes; not one has held that an otherwise applicable statute should be interpreted to exclude Indians."). Numerous Ninth Circuit cases confirm the proposition that federal statutes govern the interstate operations of tribal businesses, including fully tribally-owned tribal businesses operating on tribal land. *See* Part V.A, *infra*. Under that unmistakable precedent, Defendants' attempt to avoid application of the FTC Act, TILA, and EFTA to their businesses based on purported tribal connections is defective on its face.

Defendants' reaction to that precedent has been two-fold. First, as outlined in Part III, *infra*, they have advanced a series of contradictory arguments in an attempt to expand tribal immunity to block federal oversight of their interstate commerce, only to retract and revise most of their arguments upon the multiple queries and signs of disbelief from the Court. Second, as demonstrated in Part V, *infra*, Defendants have chosen to mostly ignore *Tuscarora, Donovan* and the rest of the Ninth Circuit cases confirming federal oversight into tribal interstate commerce by relying only on precedent involving *state* and *private* litigants.

III. PROCEDURAL HISTORY

In April 2012, the FTC filed a complaint to stop Defendants' unlawful lending and collection practices, which include charging borrowers several multiples of the stated costs of their loans, requiring consumers to preauthorize electronic fund transfers as a condition of obtaining credit, and falsely threatening consumers with arrest and litigation.[8]

In their answers, Defendants claim via various affirmative defenses that the FTC lacks authority under the FTC Act (and, therefore, under TILA and EFTA) to bring actions against them

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[8] Docket No. 1 at ¶¶ 26-45.

because they are "arms of tribes."[9] Defendants are therefore taking the position that, even if they violated federal law, the FTC (and, they further claim, the entire federal government) is powerless to do anything about it.

To emphasize the importance of resolving Defendants' tribal defense now, it is instructive to revisit the mischief Defendants have created with the defense to date.

A. Defendants First Admitted That Federal Laws Applied To Them, Then Claimed That Only Tribal Authorities Could Regulate Them, And Then Refused To Answer What, If Anything, The Supposed Tribal Authorities Do

Before the instant lawsuit, several state authorities sued or investigated Defendants, mostly for offering unlicensed and/or usurious loans in their states.[10] In one such matter, MNE and SFS, represented by the same attorney here, reassured the Colorado state court their operations were ***unequivocally*** subject to "all" Federal laws and "any" federal actions:

> Tribes are subject to ***all*** Federal laws, of course, and so that would not immunize the tribes from ***any*** sort of federal action.[11]

This statement was not offered in the abstract. To the contrary, it was made precisely with the prospect of this FTC action in mind.[12] AMG's CEO, defendant Don Brady, similarly testified to the

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9 Docket No. 316, AMG Answer, Affirmative Defense No. 2; Docket No. 318 (same, TFS); Docket No. 310, Red Cedar Answer, Affirmative Defense No. 1; Docket No. 311 (same, SFS). Nearly all defendants have advanced similar defenses. Citations to all affirmative defenses challenged in this summary judgment motion are listed in the motion and proposed order.

10 *See, e.g.* State of Nebraska: Department of Banking and Finance http://www.ndbf.ne.gov/searches/Orders/20070824_SFS_Inc_dba_One_Click_Cash.pdf (last visited January 30, 2013); Enforcement Orders: New Hampshire Banking Departmenthttp://www.nh.gov/banking/orders/enforcement/documents/order10-081Sfs-cd-otsc.pdf (last visited January 30, 2013); Settlements – The West Virginia Attorney General, http://www.wvago.gov/press.cfm?fx=more&ID=447 (last visited January 28, 2013).

11 Exhibit 2 (Colorado Trial Tr.) at 100 (emphasis added).

12 *See generally id.* at 1-33 (numerous references to FTC investigation).

California state court that Ameriloan, US Fast Cash and United Cash Loans are "strictly regulated by and adhere[] to … ***all*** federal laws."[13]

Notwithstanding those sweeping reassurances to other courts that "all" federal laws apply to them, and that Defendants are not immunized from "any" sort of federal action, Defendants radically changed their tune when faced with this federal action under federal law. When this Court asked Defendants to reconcile their previous state court statements with their current federal court arguments, Defendants advanced a new position that they are immune from *all* federal law enforcement, subject to regulation only by their own tribes:

> THE COURT: Okay. So just to explore that a little bit further then. So if your clients are subject to these laws, but the FTC is constrained not to enforce them, are we talking about, you know, a tree falling in the forest where no one can hear, or is there some consequence to the laws applying to your client? I mean, in some other way that --
>
> MR. SCHULTE: Well, your Honor, these -- the Tribes -- again, as I mentioned earlier -- the Tribes do have their own regulatory institutions and their own -- their own lending codes. And the Tribes regulate the lending activity. They have separate Governmental regulatory authorities that govern the business end of the Tribes. And the Tribes are sovereigns and have full power to do that.[14]

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[13] Exhibit 3 (Don Brady Decl.) at ¶ 9 (emphasis added). Under scrutiny from the media, the chief of the Miami Tribe likewise stated that the lending activities of MNE and AMG "are strictly regulated by the laws [of] the United States" and "[w]e are fully compliant with ***all*** federal laws." Exhibit 4 (Chief Gamble Letter) at 2 (emphasis added).

Defendants themselves inform consumers that their loans are governed by federal law. For example, Defendants' loan disclosure states, "this note and your account shall be governed by all applicable federal laws and the laws of the jurisdiction in which the Lender is located . . . ." and also contains an arbitration clause that claims to be "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16." *See* Exhibit 5 (Defendants' loan disclosure) at PX10 344. And Defendants' websites cite, among other statutes, the Gramm-Leach-Bliley Act, Telemarketing Sales Rule, the CAN-SPAM Act of 2003, the Electronic Signatures in Global and National Commerce Act, and "the copyright laws of the United States." *See* Exhibit 6 (excerpts of Defendants' websites) PX02 at 27, 28, 29, 38, and 44.

[14] Exhibit 1 (8/23/12 Hr'g Tr.) at 86.

After representing to the Colorado and California courts that they were subject to federal law and federal regulation, and then withdrawing that representation by claiming that only the tribes could regulate Defendants' lending activity, Defendants pivoted *again*. Defendants' counsel next instructed their client *not to answer* questions regarding the supposed existence and function of such tribal authorities.[15]

When the FTC moved to compel an answer to question regarding supposed tribal self-regulation, the Court asked (again) who, if not the FTC, would enforce lending laws for Defendants' operations. Defendants simply reiterated their previous unsatisfactory answer:

> MR. SCHULTE: Well, my response was that -- and – was that -- and it is again -- that the Tribes have enacted, you know, the Tribal Lending Codes, and the Tribes have the capacity and do regulate this activity --
>
> THE COURT: Enforce it.
>
> MR. SCHULTE: -- under Tribal law.
>
> THE COURT: Well, then, I kind of think that --
>
> MR. SCHULTE: Not only do they enforce the Federal law, but they have Tribal law.
>
> THE COURT: Oh, oh, okay. So then who's enforcing ***the Federal law***?
>
> MR. SCHULTE: Well, I think that is really a moot point at this point because we are compliant with Federal law. And the Tribes do have the authority to do it ***if*** they would incorporate Federal law into the Tribal -- into the Tribal -- Tribally Chartered laws, they have the authority to do that.
>
> THE COURT: Well, yeah, ***if*** they do.[16]

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[15] Exhibit 7 (SFS Dep.) at 56.

[16] Exhibit 8 (10/12/12 Hr'g Tr.) at 41-42 (emphasis added).

B. Defendants First Claimed To Be Nonprofit Companies, But Now Claim They Are Merely Analogizing To Nonprofits

In a distinct but related reversal of positions, Defendants initially advanced a separate argument that they were nonprofit entities, exempt from the FTC Act.[17]

Later, when it became clear that only a tiny fraction of gross revenues are directed to the tribes for provision of tribal government services, the Court inquired whether Defendants truly intended to cast themselves as nonprofits. Defendants then withdrew their nonprofit theory as an independent argument, recasting it as providing support only by analogy:

> THE COURT: Right. I have a question about that because I thought I read something somewhere -- and I'm afraid I can't remember where now -- that there's now another defense being raised about non-profit status? Is that part of the confusion here now?
>
> MR. SCHULTE: Well, Your Honor, I -- at the hearing on August 23rd, and I think perhaps in some of our papers, the point was made that, you know, the FTC doesn't even have jurisdiction over all corporations.
>
> For example, there is some precedent saying that certain non-profit corporations are outside the jurisdiction of the FTC Act. And I think we analogized our position to that of a non-profit corporation and pointed out that, yes, like non-profit corporations, the Tribally Chartered Entities, all their revenues, or distributed revenues, are paid over to the Tribe and, essentially, are ***akin to a non-profit corporation, but we're not saying that we're exactly the same thing***.[18]

C. Defendants First Claimed That All Non-Tribal Partners Are Also Exempt From FTC Regulation, Then Disclaimed That Argument

At one point, AMG, MNES, Red Cedar, and SFS even attempted to argue that all of the defendants, even the non-tribal ones, should be exempt from FTC Act prosecution:

> THE COURT: Okay. So taking that logic of that – and I'm glad you brought up the historical context again – so the -- is this your way of thinking? The Tribes can enter into a really -- you know, and I'm not casting any aspersion against anybody's clients, I'm just assuming for the

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[17] Docket No. 101 at 8 (Defendants arguing that "the Tribal Defendants are not 'organized to carry on business for [their] own profit or that of [their] members'") (alterations in original).

[18] Exhibit 8 (10/12/12 Hr'g Tr.) at 10 (emphasis added).

> sake of, you know, analysis -- they could make a deal with, you know, Al Capone and his successors to have loan sharks victimize customers all over the country. ***And because the Tribes got one-tenth of 1 percent under this very bad deal, the Government and the FTC's hands would be tied, and they could not try to enforce the laws against the parties contracting with the Tribes because they contracted with the Tribes.***
>
> MR. SCHULTE: ***Your Honor, yes***. And the FTC has a remedy for that, they can go to Congress and ask for the authority --

But after Magistrate Judge V. Cam Ferenbach rejected this wildly overbroad argument – "The court, in its preliminary evaluation of these issues, does not accept the proposition that any person or entity who points to a business relationship with a Native American tribe to claim the status of a Tribal-Chartered Entity is beyond the enforcement jurisdiction of the FTC" – Defendants incredulously complained to District Judge Gloria M. Navarro that they had never made the argument.[19]

* * *

In addition to their reversals on the applicability of federal law, their supposed nonprofit status, and immunity for non-tribal contractors, Defendants have also taken contradictory positions on whether sovereign immunity applies[20] and whether they are also purportedly immune from the FTC's TILA and EFTA claims.[21]

As shown above, Defendants' tribal defense has taken more than its share of twists and turns, and the Court has continually expressed confusion and skepticism regarding it. But because

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[19] Docket No. 153 at 4 (Court's order); Docket No. 165 at 16 (Defendants' objection).

[20] Defendants represented to the Court that they are not asserting sovereign immunity vis-à-vis the federal government (Exhibit 1 (8/23/12 Hr'g Tr.) at 83 ("This is not a true sovereign immunity case")), but on the other hand continually rely on sovereign immunity cases to avoid federal government prosecution. Docket No. 134 at 6, 7; *see also* Docket No. 149 at 8, 9, 10 & n.20, 12, 13.

[21] Defendants first admitted that their tribal defense did not apply to the TILA and EFTA claims. *See* Docket No. 134 at 9 ("if the Court rules that the FTC lacks authority to bring claims under the FTC Act…. the FTC would be left with, at most, its TILA and EFTA claims"). Now, Defendants' answers state that they are supposedly exempt from all three federal statutes.

Defendants preemptively withdrew their tribal defense from their motion to dismiss,[22] and stipulated to entry of the preliminary injunction,[23] the Court has not, until now, been required to resolve the defense.

For those reasons and the reasons stated in Part V, *infra*, the Court should now take the opportunity to rule definitively on the legal, statutory question regarding whether AMG's, MNES's, Red Cedar's, and SFS's supposed status as "arms of tribes" may exclude them from the definition of "corporations" in the FTC Act, and, answering that question in the negative, promptly and finally dispose of this defense.

IV. STATEMENT OF MATERIAL FACTS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and Local Rule 56-1, the FTC submits the following statement of material facts not genuinely in dispute ("SMF"), citing to the appropriate pleading, affidavit, declaration, deposition, and other evidence upon which the FTC relies:

1. Defendants provide loans to and engage in collections activities involving consumers across the country.[24]

2. AMG is a shared services provider that runs customer service and collections operations, among other things, for the online payday lending businesses of MNES, Red Cedar, and SFS under the trade names (d/b/as): UnitedCashLoans, OneClickCash, USFastCash, Ameriloan, and

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[22] Docket No. 214.

[23] Docket No. 296.

[24] Defendants' answers admit that they do business across the country, with the exception of a handful of states. *See, e.g.*, Docket No. 316, AMG Answer, at ¶¶ 6-9 (admitting that AMG does business throughout the United States and that Red Cedar, SFS, and TFS do business in all but five states); *see also* Docket Nos. 5-1, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-10, 5-11, 5-12, 5-13, 5-14, 5-15, 5-16, 5-17, 5-18, 5-19, 5-20, 5-21 (declarations from consumers in Wisconsin, California, South Carolina, Oregon, Missouri, Oklahoma, Tennessee, Michigan, Washington, North Carolina, Florida, Kentucky, Utah, New York, Arkansas).

500FastCash.[25] The websites for those businesses, operated by AMG, share "commonality" and "utilize the same language and lending forms."[26]

3. AMG is a corporation.[27]

4. AMG is a for profit entity.[28]

5. MNES is a corporation.[29]

6. MNES is a for profit entity.[30]

7. Red Cedar is a corporation.[31]

8. Red Cedar is a for profit entity.[32]

9. SFS is a corporation.[33]

10. SFS is a for profit entity.[34]

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[25] Exhibit 9 (Decl. of Natalie Dempsey) at ¶¶ 7, 9-10.

[26] *Id.* ¶ 13.

[27] Exhibit 13 (Restated Articles of Incorporation for AMG Services, Inc.).

[28] *Id.* at II.(B) (stating that one of AMG's general purposes is to "generate profits"); Exhibit 14 (AMG's bank account opening form indicating that AMG is a "For Profit" entity).

[29] Exhibit 15 (Articles of Incorporation for MNES).

[30] *Id.* (stating that one of MNES's general purposes is to "generate profits"); Exhibit 16 (Decl. of Chief Thomas Gamble) at ¶ 9 ("*Profits* from the Tribe's online short-term loan company [TFS, later MNES] support many Tribal programs and services and have contributed significantly to Tribal development.") (emphasis added); Exhibit 17 (MNES's bank account opening form indicating that MNES is a "For Profit" entity).

[31] Exhibit 18 (Red Cedar Articles of Incorporation).

[32] *Id.* (stating that one of Red Cedar's general purposes is to "generate profits"); Exhibit 19 (Decl. of Second Chief Judy Cobb) at ¶ 12 ("*Profits* of Red Cedar Services, Inc. are used exclusively for the benefit of the Modoc Tribe, and are distributed to several different tribal programs and for a variety of tribal services….") (emphasis added); Exhibit 20 (Red Cedar's bank account opening form indicating that Red Cedar is a "For Profit" entity).

[33] Exhibit 21 (Articles of Incorporation for SFS).

V. ARGUMENT

Summary judgment is appropriate where, as here, the movant shows "that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' if it might affect the outcome of a suit, as determined by the governing substantive law." *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1211 (D. Nev. 2011) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "An issue is 'genuine' only if sufficient evidence exists such that a reasonable fact finder could find for the nonmoving party." *Id.* (*citing Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)).

Defendants have claimed that their enterprise is entirely above the law because of supposed tribal affiliations. As noted in Part III, as a result of this Court's scrutiny, these arguments have begun to collapse under the weight of their absurdity. Indeed, in the ten months since the complaint and motion for preliminary injunction were filed, Defendants claimed nonprofit status, disclaimed nonprofit status, claimed that only tribal authorities could enforce federal law against them, failed to identify or confirm the existence of those tribal authorities, moved to dismiss based on the FTC's purported lack of authority, and withdrew that portion of their motion to dismiss. Defendants even went so far as to claim immune status for their contractors and employees, only to later retract that overreach.

As demonstrated below, Defendants' dizzying attempts to exploit their purported tribal connections are deficient, because none of the federal statutes at issue have any exceptions for tribes and tribal businesses and because there is no basis for this Court to author such exceptions.

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[34] Exhibit 22 (Declaration of Chairman Roger Trudell) at ¶ 14 ("All *profits* that SFS earns are utilized by the Santee Sioux Nation to assist in the funding of the Tribe's operations, expenditures, and social welfare programs.") (emphasis added); Exhibit 23 (SFS's bank account opening form indicating that SFS is a "For Profit" entity).)

A. The Federal Trade Commission Act Presumptively Applies To AMG, MNES, Red Cedar, And SFS, No Matter How Their Relationships With The Tuckers Are Arranged

The FTC's argument in this motion for summary judgment is a purely legal one. The FTC contends that AMG, MNES, Red Cedar, and SFS enjoy no conceivable exemption from FTC authority under the FTC Act simply because they are chartered by Indian tribes. This question of statutory interpretation may be decided entirely on the law – irrespective of the Tuckers' particular arrangements with the tribes – and is perfectly suited for disposition via motion for partial summary judgment. *See Ohio Cas. Ins. Co. v. Biotech Pharmacy, Inc.*, 547 F.Supp.2d 1158, 1159 (D. Nev. 2008) (granting motion for partial summary judgment on a purely legal issue of contract interpretation); *see also Goldinger v. Datex-Ohmeda Cash Balance Plan*, 701 F. Supp.2d 1205, 1207 n.2, 1215 (W.D. Wash. 2010) (granting motion for partial summary judgment on a purely legal issue of statutory interpretation); *Klass v. Fidelity & Guar. Life Ins. Co.*, No. CIV 04–2337–PHX–RCB, 2009 WL 886874, at * 5 (D. Ariz. Mar. 31, 2009) (purely legal issues are proper for resolution under Rule 56). For purely legal issues, the Court in deciding a summary judgment motion owes neither side any deference. *See 3BA Int'l LLC v. Lubahn*, No. C10–829RAJ, 2012 WL 2317563, at * 3 (W.D. Wash. June 18, 2012) ("The court defers to neither party in resolving purely legal questions.") (*citing Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir.1999)).

1. Federal Laws Of General Applicability, Including The FTC Act, Presumptively Apply To Tribal Businesses

The FTC Act gives the FTC authority to prevent "persons, partnerships, or corporations" from using unfair and deceptive acts and practices in commerce. *See* 15 U.S.C. § 45(a)(2). Defendants are corporations that engage in interstate commerce. (SMF ¶¶ 1-10.) Still, Defendants claim that they are not "persons, partnerships, or corporations" within the meaning of the FTC Act because they are *tribal* corporations.

The FTC Act contains limited exceptions for certain kinds of businesses, but no exception for tribes or tribal businesses. *See* 15 U.S.C. § 45(a)(2) (FTC authority does not include certain banks, savings and loan institutions, federal credit unions, common carriers, air carriers, etc.). Under the

statutory canon *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of another"), this observation alone defeats Defendants' claim to any exception based on their supposed tribal status. *See Del Webb Communities, Inc. v. Partington*, No. 2:08–cv–00571–RCJ–GWF, 2009 WL 3053709, at *9 (D. Nev. Sept. 18, 2009) (statutory provision specifically articulating eight exceptions implied exclusion of exceptions for other categories of persons).

The Supreme Court and Ninth Circuit have determined that statutes of general applicability that are silent on tribal issues presumptively apply to tribes and tribal businesses. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests"); *N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998-99 (9th Cir. 2003) ("[W]e have explicitly adhered to the *Tuscarora* rule"); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) ("Many of our decisions have upheld the application of general federal laws to Indian tribes; not one has held that an otherwise applicable statute should be interpreted to exclude Indians.").

Under *Donovan*, "[a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ....'" 751 F.2d at 1116. In their multiple briefs on the tribal defense, Defendants have scarcely acknowledged this test, and have – for good reason – never attempted to argue that they meet any of the factors for exemption.[35]

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[35] *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. 2001) is particularly instructive. In that case, often cited by Defendants, the Ninth Circuit declined to apply the Age Discrimination in Employment Act to a tribal housing complex. The Court did so only after following *Donovan* and concluding that the dispute between a tribal government employer and a member of the tribe was wholly intramural. *Id.* at 1081. Where, as here, the business at issue is engaged in interstate commerce with consumers who are not members of a tribe, federal statutes unquestionably apply.

Under *Donovan*, courts in this Circuit and across the country have consistently applied federal statutes to tribal businesses. *See, e.g. Solis v. Matheson*, 563 F.3d 425, 434 (9th Cir. 2009) (applying *Fed. Power Comm'n* and *Donovan* and holding that the Fair Labor Standards Act applies to retail store on tribal trust land); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991) (applying *Donovan* and holding that the Employee Retirement Income Security Act applies to tribally operated sawmill); *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 184 (9th Cir. 1991) (applying *Donovan* and holding that the Occupational Safety and Health Act applies to tribally operated sawmill); *Chao v. Spokane Tribe of Indians*, No. CV-07-0354-CI, 2008 WL 4443821, at *1-2 (E.D. Wash. Sept. 24, 2008) (applying *Donovan* and holding that Fair Labor Standards Act applies to tribally owned and operated casino); *Hollynn D'Lil v. Cher-Ae Heights Indian Cmty. of the Trinidad Rancheria*, No. C 01-1638 TEH, 2002 WL 33942761, at *3 (N.D. Cal. Mar. 11, 2002) (applying *Donovan* and holding that Americans with Disabilities Act applies to inn owned and operated by tribe). Because the FTC Act is a law of general applicability[36] making no exception for tribes,[37] it must apply to Defendants' businesses.[38]

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[36] Defendants once argued that the FTC Act was not a law of general applicability because of the presence of certain exemptions for banks, savings and loans, common carriers, air carriers, etc. The argument has two critical flaws. First, the Ninth Circuit held in *Chapa De* that a law of general applicability for purposes of the *Donovan* rule may contain some exemptions without compromising its status as "generally applicable." 316 F.3d at 998. Second, as noted in the text above, the presence of some explicit exemptions for certain types of businesses but no corresponding exemption for tribal businesses defeats, rather than supports, Defendants' argument to now create a judicial exemption for tribal businesses. *See Del Webb Communities, Inc.*, 2009 WL 3053709, at *9 (applying *expressio unius est exclusio alterius* canon).

[37] No party contends that there is any language in the FTC Act creating an exemption for tribes.

[38] Defendants' authorities reversing the *Donovan* presumption – holding tribal entities presumptively immune from suit absent express abrogation of tribal immunity – involve non-federal law, and/or states or private parties as plaintiffs. See note 39, *infra*.

As recounted in Part III.A, *supra*, Defendants previously acknowledged to state courts that they are subject to federal laws, and affirmatively invoke federal statutes when doing so suits them. But, disingenuously, Defendants have since attempted to distance themselves from those admissions. First, Defendants told the Colorado state court that they were subject to "all" Federal laws and not immune from "any" sort of federal action. Then, Defendants told this Court that, in the absence of FTC authority, tribal authorities (*not* other federal authorities) could enforce federal law against them. Whereas the FTC Act, TILA, and EFTA contain specific provisions assigning enforcement authority to the FTC and other agencies, there is no mention in those statutes of enforcement by tribal agencies. In any event, Defendants flatly refused to answer questions regarding the supposed existence of those tribal authorities that might enforce federal laws. This understandably left the FTC, and the Court, confused. When the Court attempted to clarify Defendants' position on whether any tribal authority really exists to enforce federal law with respect to Defendants' operations, Defendants reiterated, unsatisfactorily, that the tribes *might* enforce federal law.

Of course, even an existing and functioning tribal authority enforcing federal law would not put tribal businesses beyond the purview of federal law enforcement agencies. But Defendants' previous admissions that they were subject to federal law enforcement and subsequent evasive responses on the issue are instructive of the absurd lengths to which they will go to avoid any meaningful scrutiny of their unlawful activities.

2. Defendants' Supposed Status As Arms Of Their Respective Tribes Is Irrelevant In A Federal Law Enforcement Proceeding

In support of their tribal defense, Defendants have repeatedly invoked "arm of the tribe" language that is built on a straw-man argument. Defendants contend that if they establish that those four corporations are chartered by federally-recognized tribes and exist for official tribal purposes, then they will be deemed "arms of the tribe" and that characterization will, in and of itself, defeat the FTC's jurisdiction with respect to the FTC Act claims.

But the "arm of the tribe" analysis applies exclusively to *states'* and *private litigants'* attempts to override tribal sovereign immunity; Defendants therefore have not found, and cannot

find, a single case determining that a tribal business is an "arm of the tribe" and therefore immune from federal law enforcement.[39] In fact, businesses that are genuine "arms" of their respective tribes are routinely subject to federal law in federal proceedings. For example, unless the business is engaged in wholly intramural tribal activity (clearly not the case here), it is settled that a tribal farm must comply with the federal Occupational Safety and Health Act (*Donovan*), a tribal sawmill must comply with the federal Employee Retirement Income Security Act (*Warm Springs*), a tribal casino must comply with the federal Fair Labor Standards Act (*Chao*), and a tribal inn must comply with the federal Americans with Disabilities Act (*Hollynn D'Lil*). Whether those businesses constitute "arms" of their respective tribes or not, federal law applies. Indeed, the court in *Chao v. Spokane Tribe of Indians* found that the tribally-owned and operated casino was an "arm of the tribe," and

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[39] In previous briefing, Defendants have relied almost exclusively on cases involving states and private litigants. Defendants' two oft-cited Supreme Court cases illustrate the point. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998), involved a private plaintiff and issues of sovereign immunity; the Ninth Circuit in *Chapa De* found *Kiowa* not applicable in a federal government case for that reason. 316 F.3d at 1000. And *Inyo County, Cal. v. Paiute- Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003), involved a *tribe's attempt to sue a state*.

Defendants' other previously-cited authorities are likewise easily distinguishable. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (private plaintiff's attempt to sue tribe); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986) (tribe's attempt to sue private parties in state court); *United States v. Dion*, 476 U.S. 734 (1986) (Endangered Species Act *does* apply to tribal lands); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) (state's attempt to tax tribal business conflicted with specific federal statute protecting tribal mining businesses); *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (tribe's property dispute with state counties); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribe's tax dispute with private businesses); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (member of tribe's attempt to sue tribe); *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) (criminal defendant's subpoena dispute with tribe); *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012) (private plaintiff's attempt to sue tribe in tort); *In re Whitaker*, 474 B.R. 687, 690 (B.A.P. 8th Cir. 2012) (bankruptcy dispute involving tribal businesses); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) (dispute between tribal insurance administrator and tribal members); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006) (state's attempt to regulate tribal casino).

nevertheless found the Department of Labor had authority to investigate possible Fair Labor Standards Act violations. 2008 WL 4443821, at *4-5. Proof from Defendants that their online lending businesses constitute "arms" of three tribes, therefore, would not exempt those businesses from the FTC Act.

In sum, Defendants' argument that their purported tribal status puts them beyond the reach of the FTC, and, indeed, all federal law enforcement, is contrary to law (as demonstrated by Supreme Court and Ninth Circuit precedent) and common sense (as demonstrated by their constantly shifting arguments). These Defendants' interstate commerce (*i.e.*, online lending, payment processing, and collections) must comply with federal law (including the FTC Act), irrespective of their tribal connections and their arrangements with non-tribal partners.[40]

To create a judicial exemption under the FTC Act for tribal businesses that Congress did not provide would not only contradict decades of precedent, but would also permit tribal businesses engaging in interstate commerce in industries of all sorts to operate in complete disregard of federal consumer protection law. This is precisely the scenario that the Court contemplated upon questioning Defendants as to the logical consequence of their argument for FTC Act immunity, when

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[40] Of course, the remaining defendants cannot, as a legal matter, claim any tribal exemption for themselves. This is because to the extent any person is exempt under the FTC Act, that exemption does not extend to other persons not expressly exempt. For example, in *FTC v. CompuCredit*, the defendant argued that it was acting as a bank's agent, and therefore should share in the bank's exemption from the FTC Act. The magistrate judge noted that courts that have addressed factually similar situations declined to extend the FTC Act exemptions in 15 U.S.C. § 45(a)(2) to persons not enumerated therein, even when performing services for exempt persons. No. 1:08-cv-1976-BBM-RGV, 2008 U.S. Dist. LEXIS 123512, at *13 (N.D. Ga. Oct. 8, 2000) (citing *National Fed'n of the Blind v. FTC*, 420 F.3d 331, 334-35 (4th Cir. 2005) and other cases). All defendants acknowledged this rule when disclaiming any "tribal exemption" for Defendants' business partners. Docket No. 165 at 16 ("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.") (Defendants' emphasis) (memorandum signed or joined by all defendants; *see also* Docket Nos. 166, 167, 170, 172).

the Court observed that accepting Defendants' argument would invite tribal businesses to "victimize" consumers:

> MR. SCHULTE: -- that Congress has not given [the FTC authority] to regulate Indian Tribes.
>
> THE COURT: All right. So --
>
> MR. SCHULTE: That is correct, your Honor.
>
> THE COURT: -- so Congress has determined that, in order -- and ***this is your position -- Congress has determined that, in order to make amends and reparations to the Indian Tribes for what's happened in the past, that consumers in this country can be victimized by people who contract with Tribes.***
>
> MR. SCHULTE: I do not agree with the premise that consumers in this country are being victimized --
>
> THE COURT: No, but that's -- but that's the allegation.
>
> MR. SCHULTE: -- in the first place.
>
> THE COURT: I mean, you know, that's the allegation. I realize, you know, they'd have to prove that at trial. It's not a criminal case so we're not talking about beyond a reasonable doubt, but it still would have to happen. But, you know, I've just got to look at it to try and understand, you know, where to draw the line. I think that's it.
>
> MR. SCHULTE: Yes.
>
> THE COURT: And you're saying that the line has to be -- there is no line. As long as the Tribes declare that you're a Tribal entity, then it's hands off for the FTC.[41]

B. Defendants Cannot Claim Any Immunity Under TILA And EFTA

Defendants' defense that TILA and EFTA likewise do not apply to them is entirely derivative of their FTC Act argument, and should be dismissed for precisely the same reasons.

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[41] Exhibit 1 (8/23/12 Hr'g Tr.) at 91-92.

The TILA and EFTA defenses are even more deficient, however, because each of those statutes has language conferring authority to the FTC to enforce those statutes under the FTC Act, *irrespective of any jurisdiction limitations in the FTC Act*. Section 108(c) of TILA sets forth the FTC's power to enforce TILA: "All of the functions and powers of the [FTC] under the [FTC] Act are available to the [Commission] to enforce compliance by any person . . . *irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the [FTC] Act*." 15 U.S.C. § 1607(c) (emphasis added).[42] The Commission's power to enforce EFTA is similarly unfettered by any FTC Act limitations, even if such limitations were present here. *See* 15 U.S.C. § 1693o(c).[43] In fact, Defendants themselves have conceded that the FTC could bring TILA and EFTA claims against them even if the FTC Act claims fail.[44]

VI. CONCLUSION

Because there is no exemption in the FTC Act for corporations chartered by tribes, the Court should grant summary judgment to dismiss Defendants' defenses, as enumerated in the motion and proposed order, that the FTC lacks authority under the FTC Act to sue AMG Services, Inc., MNES Services, Inc., Red Cedar Services Inc., and SFS, Inc. or any other defendant.

Dated: March 7, 2013

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[42] The definition of "person" under TILA includes a "government unit." 12 C.F.R. § 226.2(22).

[43] *See also* 12 C.F.R. § 205.2(j) (defining "person" to include a "government agency").

[44] Docket No. 134 at 9 ("if the Court rules that the FTC lacks authority to bring claims under the FTC Act…. the FTC would be left with, at most, its TILA and EFTA claims").

CERTIFICATE OF SERVICE

I, Nikhil Singhvi, certify that, as indicated below, all parties were served with **PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** filed with the Court. Under seal filings will be supplied to counsel via email.

Dated this 7th day of March, 2013

/s/ Nikhil Singhvi
Nikhil Singhvi

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