IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JEREMY MEYERS, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 15-cv-445
ONEIDA TRIBE OF INDIANS OF WISCONSIN,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

NOW COMES Plaintiff JEREMY MEYERS (hereinafter "Meyers"), by and through counsel, and for his *Response in Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction*, states as follows:

Congress enacted the Fair and Accurate Credit Transactions Act ("FACTA") in 1992 as an amendment to the Fair Credit Reporting Act ("FCRA"). *See* 15 U.S.C. § 1681c; *Armes v. Sogro, Inc.*, 832 F.Supp.2d 931, 936-37 (E.D. Wis. 2013). FACTA contains a truncation requirement that states that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1).

Between February 6-17, 2015, Meyers patronized the Oneida Travel Center and two Oneida One Stop retail locations. Those commercial stores are open to the public, and they are owned and operated by Defendant ONEIDA TRIBE OF INDIANS OF WISCONSIN ("the Oneida Tribe"). Meyers received electronically-printed receipts at those stores that displayed more than the last five digits of his credit card number as well as the card's expiration date.

Meyers now brings the current claim against the Oneida Tribe for violation of FACTA's truncation requirement.

I. STANDARD OF REVIEW.

A motion relating to subject matter jurisdiction is brought pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The party asserting jurisdiction bears the burden of proving the court has jurisdiction over the matter. *Alexander v. Northeastern Illinois University*, 586 F.Supp.2d 905, 909 (N.D. Ill. 2008). As such, the court must accept as true the allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *Forest County Potawatomi Cmty. v. Doyle*, 828 F.Supp. 1401, 1405 (W.D. Wis. 1993).

II. ARGUMENT.

This Court has subject-matter jurisdiction over Meyer's claim against the Oneida Tribe for violating FACTA's truncation requirement. The Oneida Tribe ignores well-settled law that Indian Tribes are *not* immune from federal laws of general applicability. Further, the Oneida Tribe fails to acknowledge that numerous courts, including courts from this jurisdiction, have previously found that a plaintiff has standing to bring a FACTA claim by receiving an electronically-printed receipt that did not comply with the truncation requirement.

The Oneida Tribe skips over the inquiry of whether FACTA is a statute of general applicability, and simply argues that it is immune from the lawsuit. However, unless narrow exceptions apply (none of which apply here), Indian Tribes must still comply with statutes of general applicability. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-33 (7th Cir. 1989). The Oneida Tribe fails to address this preliminary question. This Court must follow Seventh Circuit precedent and first determine that FACTA is a law of general applicability. After that determination is made, the Court must then determine whether any of the exceptions apply to

FACTA to prevent application of the law to the Oneida Tribe. None of the exceptions apply here. At that point, the Court can determine whether Congress intended to waive Tribal immunity. In this case, the Oneida Tribe is not immune from a private suit under FACTA and Meyers has standing to bring such a lawsuit.

A. The Oneida Tribe is Not Immune Because the FCRA Is a Statute of General Applicability.

The FCRA and FACTA's truncation requirements are laws of general applicability and none of the exceptions to the general rule apply here. Further, Congress intended to abrogate sovereign immunity under FACTA to allow for lawsuits from private individuals against governments for violations of FACTA's truncation requirement.

It has long been acknowledged that federally-recognized Indian Tribes are "distinct, independent political communities" that maintain the power to regulate their own internal affairs. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citing *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). However, Indian Tribes do not possess "full attributes of sovereignty," as Congress has the power to limit and modify Tribal sovereignty. *Smart*, 868 F.2d at 932 (citations omitted). In fact, Tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 2015 WL 3556005, at *5 (6th Cir. 2015) (hereinafter "*Little River Band*"). In 1960, the United States Supreme Court recognized that Indian Tribes are not immune from general federal laws. *See Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("a general statute in terms of applying to all persons includes Indians and their property interests.")

Ordinarily, federal statutes of general applicability apply to Indian Tribes. *Smart*, 868 F.2d at 932 ("[W]hen Congress enacts a statute of general applicability, the statutes reaches

everyone within federal jurisdiction not specifically excluded, including Indians and Tribes."). This rule applies even when the statute is silent on the issue of applicability to Indian Tribes. *Id.*

However, there are three limited circumstances when the rule of general applicability does not apply to a law. *Id.* Those three exceptions occur when: (1) the statute affects the exclusive rights of self-governance in purely intramural matters; (2) applying the statute would abrogate rights guaranteed to the Tribe by Indian treaties; or (3) there is proof in the legislative history of the statute that Congress intended that the law not apply to Indians. *Id.* (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)). In those instances, the statute must expressly include Indians to overcome Indian immunity. *Id.* In this case, however, FACTA applies to the Oneida Tribe because it is a statute of general applicability and none of the exceptions apply to it.

The Oneida Tribe's brief fails to address whether FACTA, or even the FCRA as a whole, is a statute of general applicability. Instead, the Oneida Tribe skips to whether Congress waived Indian immunity in FACTA. However, before a court can even address whether an Indian Tribe is immune from a law, the court must first determine if the federal law is one of general applicability, and, if so, whether any of the exceptions to general applicability apply. *Smart*, 868 F.2d at 932. Only after it is clear that the statute "generally" applies to the Indian Tribe, does the analysis proceed to determine whether Congress explicitly intended the law to apply to Indian Tribes. In this case, as described *infra*, FACTA is a law of general applicability and none of the three exceptions apply. Further, the Seventh Circuit previously determined that, because FACTA applies to "any . . . government," Congress intended for the law to waive immunity for "*every* kind of government." *Bormes v. U.S.*, 759 F.3d 793, 795 (7th Cir. 2014). Because Indian

Tribes are domestic governments, Congress expressly waived Indian immunity for FACTA violations.

1. FACTA is a Statute of General Applicability.

Statutes of general applicability are *presumed* to apply to Indian Tribes. *EEOC v. Forest County Potawatomi Cmty.*, 2014 WL 1795137, at *1 (E.D. Wis. 2014). Even statutes "that do not mention Indians are nevertheless usually held to apply to them." *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (citing *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)). In this case, the FCRA, including FACTA's truncation requirement, is a statute of general applicability and applies to the Oneida Tribe.

A federal law is "generally applicable" if the statute creates "a comprehensive regulatory scheme." *See Little River Band*, 2015 WL 3556005, at *9. Congress created the FCRA as a comprehensive statutory scheme to regulate consumer reporting. *See Ross v. FDIC*, 625 F.3d 808, 812 (4th Cir. 2010) ("The FCRA is a comprehensive statutory scheme designed to regulate the consumer reporting industry."); *Kodrick v. Ferguson*, 54 F.Supp.2d 788, 796 (N.D. Ill. 1999) ("It appears that Congress was meticulous in its enactment of the FCRA . . . creating a comprehensive statutory scheme.") (quotation omitted). Specifically, the FCRA created a "comprehensive series of restrictions on the disclosure and use of credit information." *Ross*, 625 F.3d at 812. (quotation omitted). Numerous courts have determined that FCRA is a comprehensive regulatory scheme, thus, the FCRA is a statute of general applicability.

In *Forest County Potawatomi Cmty*, 2014 WL 1795137, the court noted several reasons why the Age Discrimination in Employment Act ("ADEA") was a statute of general applicability. In that case, Judge Adelman held that the ADEA was generally applicable because not only was the coverage language of the statute broadly worded and provided few exceptions,

but also the statute "easily encompasses Indian tribes in their capacities as operators of commercial enterprises." *Id.* (citing *Smart*, 868 F.2d at 933). In the same way, FACTA is also a statute of general applicability.

FACTA is "generally applicable" because it is a broad statute and easily encompasses operators of commercial enterprises. FACTA prohibits any "person" from printing more than the last five digits or the expiration date of a credit or debit card on a receipt. 15 U.S.C. § 1681c(g)(1). Under the FCRA, a "person" is defined as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* at § 1681a(b). This broad definition is nearly identical to the definition of a "person" that made the ADEA a statute of general applicability. *See Forest County Potawatomi Cmty.*, 2014 WL 1795137, at *2 (quoting 29 U.S.C. § 630(b), defining person as "one or more individuals, partnership, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons"). Further, FACTA (like the ADEA) provides few exceptions to the truncation requirement. *See Bormes v. U.S.*, 759 F.3d 793 (7th Cir. 2014) (holding that the United States government must comply with the truncation requirement).

Additionally, FACTA easily encompasses the Oneida Tribe in its capacity as an operator of a commercial enterprise. The Oneida Tribe easily fits into the definition of a "person" in the FCRA as both an entity that operates businesses subject to FACTA and a governmental body. The Oneida Tribe operates the Oneida Travel Center and Oneida One Stop stores as commercial enterprises that are open to the general public. (Complaint, at ¶¶ 7, 17, 25). Even though the statute is silent on its application to Indian Tribes, FACTA is a statute of general applicability. As such, this Court should begin with the presumption that FACTA applies to the Oneida Tribe.

2. The Oneida Tribe Cannot Prove That Any of the Exceptions to the Presumption of General Applicability Are Present in This Case.

As set forth above, a statute of general applicability includes Indian Tribes, even when it is silent on Tribal inclusion. *Smart*, 868 F.2d at 932. However, a law is not presumed to include Indian Tribes when one of the three exceptions is present. *Id.* at 932-33. If one of the exceptions applies, then Congress must expressly include Indian Tribes in the statute to waive Tribal immunity under that law. *Id.* The Tribe has the burden of showing that applying the generally applicable statute to that Tribe falls within one of the exceptions. *Little River Band*, 2015 WL 3556005, at *9 (citation omitted). In this case, none of the three exceptions remove the Oneida Tribe from the reach of FACTA.

The Oneida Tribe's brief skips the analysis of whether FACTA is a statute of general applicability or whether any of the exceptions apply. Instead, the Oneida Tribe asks for this Court to immediately address whether Congress explicitly abrogated Tribal immunity. While Indian Tribes possess "inherent sovereign authority," Tribal sovereignty is "subject to plenary control by Congress." *Michigan v. Bay Mills Indian Cmty*, 134 S.Ct. 2024, 2027 (2014). Further, "aspects of inherent Tribal sovereignty can be implicitly divested by comprehensive federal regulatory schemes that are silent as to Indian tribes." *Little River Band*, 2015 WL 3556005, at *9 (citing *Menominee Tribal Enters. v. Solis*, 601 F.3d 699, 674 (7th Cir. 2010); *Smart*, 868 F.2d at 932-36). Thus, while Tribal immunity is a corollary to Tribal self-governance, *In re Greektown*, 2015 WL 3632202, at *7, Indian Tribes are *not* immune from federal regulations that do not impinge on a Tribe's right of self-governance. *See Smart*, 868 F.2d at 932.

The Seventh Circuit adopted this rule in *Smart v. State Farm Ins. Co.*, as follows:

> 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 apply to Indians on their reservations . . . ."

Smart, 868 F.2d at 932-33 (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116) (internal quotations omitted) (alterations in original). If none of the three exceptions apply, then the Tribe does not have sovereign immunity from the federal law.

None of the exceptions are applicable here. First, the FACTA truncation requirement does not involve the Oneida Tribe's right of "self-governance in purely intramural matters." Purely intramural self-governance matters are those such as "conditions of tribal membership, inheritance rules, and domestic relations." *Forest County Potawatomi Cmty.*, 2014 WL 1795137, at *3 (quoting *Coeur d'Alene*, 751 F.2d at 1116). The amount of information printed on a credit card or debit card receipt that the Tribe's commercial enterprises give to its customers has no relation to the Oneida Tribe's membership, inheritance rules, or domestic relations. Further, the allegations against the Oneida Tribe's One Stop and Travel Center stores cannot be considered purely intramural matters because the stores are open to the general public, including non-Indian consumers. (Complaint, at ¶¶ 7, 17, 25). Therefore, FACTA does not touch the Oneida Tribe's "exclusive rights of self-governance in purely intramural matters."

Second, the application of FACTA to the Oneida Tribe does not abrogate any rights guaranteed to the Tribe by Indian treaties. The Oneida Tribe has not even pointed the Court to any treaty that granted it rights applicable to FACTA, let alone proven that any treaty rights would be nullified by the application of the FACTA truncation requirement to its retail stores. Nor can it. FACTA merely prohibits retailers—all retailers—from printing more than the last five digits of a card number or the expiration date of a credit or debit card on the receipt that the retailer hands to its customers. 15 U.S.C. § 1681c(g)(1). Further, courts presume that "Congress

does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians." *Coeur*, 751 F.2d at 1117 (quotation omitted). As the Oneida Tribe noted in its brief, there is no reference to Indians in FACTA or FACTA's legislative history. Therefore, the application of FACTA to the Oneida Tribe would not abrogate any rights guaranteed to the Tribe by an Indian treaty.

Finally, there is nothing in the legislative history that establishes that Congress did not intend for FACTA to apply to Indian Tribes' commercial enterprises that are open to the general public. As noted above, the wording and coverage language of the statute are broad and encompass Indian Tribes in their capacity as operators of commercial enterprises. *See supra* Section II.A.1. Further, the Oneida Tribe admits in its own brief that the legislative history of FACTA does not mention Indian Tribes.

The foregoing demonstrates that none of the three exceptions prohibit the application of FACTA to the Oneida Tribe.

3. The Oneida Tribe Cannot Assert Sovereign Immunity in This Case.

Since the Oneida Tribe is subject to the FCRA and FACTA, the Court must determine whether the Oneida Tribe can assert sovereign immunity relative to a private lawsuit for its FACTA violations. First and foremost, the mere fact that the Oneida Tribe is required to comply with FACTA's truncation requirements indicates that the Oneida Tribe can be sued for its failure to do so. *See Bormes*, 759 F.3d at 795. Additionally, even if some freestanding notion of Tribal immunity existed, Congress clearly intended to abrogate that immunity relative to FACTA lawsuits. *See Bormes*, 759 F.3d at 795; *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1059 (9th Cir. 2004). Therefore, the Oneida Tribe does not have immunity for its violations of FACTA's truncation requirements.

a. Sovereign Immunity Does Not Apply to Private Lawsuits for Violations of FACTA's Truncation Requirements.

The application of FACTA to the Oneida Tribe, in and of itself, abrogates the Oneida Tribe's sovereign immunity. *Bormes*, 759 F.3d at 795. As detailed in Section II.A.1, *supra*, FACTA's truncation requirements apply to any "person," which is defined to include "any . . . government." 15 U.S.C. § 1681c(g); 15 U.S.C. § 1681a(b). FACTA authorizes private individuals to bring lawsuits against any "person," and does not modify or otherwise alter the term "person." 15 U.S.C. § 1681n; 15 U.S.C. § 1681o.

In *Bormes*, the plaintiff used viapay.gov to pay the filing fee for a lawsuit in federal court and received a receipt that included the expiration date of his credit card. *Id.* at 795. The *Bormes* plaintiff brought suit against the federal government for violating the truncation requirement in FACTA. *Id.* The Court found that Congress expressly waived sovereign immunity under the FCRA by including "any . . . government" in the definition of "person." *Id.* (citing 15 U.S.C. §1681a(b)).

In reaching its decision, the Seventh Circuit noted that "nothing in the FCRA allows the slightest basis for a distinction" between the FCRA's imposition of duties upon sovereign entities and the ability of private parties to bring suit against sovereign entities for violations of those duties. *Bormes*, 759 F.3d at 795. Section 1681a(b) "waive[s] sovereign immunity for all requirements and remedies that [Sections 1681n and 1681o] authorize[] against any 'person,'" which includes "any … government." *Id*. at 796; 15 U.S.C. § 1681a(b). The generic term "any . . . government" is so expansive that it even abrogates sovereign immunity for foreign governments. *Id.* at 797.

While the *Bormes* court considered private FACTA lawsuits against the federal government, it is equally applicable to Indian Tribes because the "common law immunity

afforded Indian Tribes is coextensive with that of the United States and is similarly subject to the plenary control of Congress." *Evans v. McKay*, 869 F.2d 1341, 1346 (9th Cir. 1989). Indeed, the *Bormes* court started its analysis by applying the same rules used to analyze Indian immunity to determine whether the federal government was immune from the truncation requirement in FACTA. *See Bormes*, 759 F.3d at 796 ("It takes unequivocal language to waive the national government's sovereign immunity . . . ."). Yet, despite that high standard, the Court held that the use of the generic term "any . . . government" was an unequivocal abrogation of sovereign immunity for "*every* kind of government." *See id* at 765 (emphasis in original). If both the federal government and foreign governments are liable for violating FACTA, then Tribal governments are, as well. Paraphrasing Judge Easterbrook, "[i]f the definition in § 1681a(b) exposes foreign nations [and the federal government] to damages for commercial activity, why not [the Oneida Tribe]?" *See Bormes*, 759 F.3d at 797.

The Oneida Tribe is subject to the requirements of the FCRA and subsequent liability for its violations of FACTA's truncation requirement. *See* Section II.A, *supra*. On the basis of Section 1681a(b)'s language alone, the Oneida Tribe may be sued for its violations of FACTA. *Id.* at 795. The Court's inquiry should end here, and the Court should deny the Oneida Tribe's motion without engaging in the analysis proffered by the Oneida Tribe.

b. Congress Clearly Intended to Abrogate Indian Immunity by Abrogating Immunity for All Sovereign Entities.

Although Seventh Circuit precedent maintains that the application of FACTA and the waiver of sovereign immunity constitute a single inquiry, this Court has previously noted that "whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions." *Louis v. Stockbridge-Munsee Community*, 2008 WL 4282589, at *3 (E.D. Wis. 2008) (quoting *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of*

Indians of Florida, 166 F.3d 1126, 1130 (11th Cir. 1999) (internal quotations removed). Assuming, *argruendo*, that this inquiry is applicable to this case, Plaintiff must demonstrate that Congress clearly intended to abrogate Indian sovereign immunity. *Florida Paraplegic*, 116 F.3d at 1130-31. Relying on precedent from the Circuit Courts, including the Seventh Circuit, it is clear that Congress waived Indian immunity under FACTA.

Contrary to Defendant's assertion, Congress "need not use magic words," nor is there any "requirement that talismanic phrases be employed" to abrogate Tribal immunity. *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006); *see also Bormes*, 759 F.3d at 796 ("Congress need not add 'we really mean it!' to make statutes effectual."). While explicit language regarding sovereign immunity is one way to establish Congress's intent, it is not the only way to determine whether Tribal immunity has been abrogated. *Narragansett*, 449 F.3d at 25 (citing *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)); *see also Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008). Indian sovereign immunity can also be waived by abrogating immunity for all sovereign entities. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1058 (9th Cir. 2004).

In *Krystal*, the Ninth Circuit held that Congress expressly abrogated Indian sovereign immunity under 11 U.S.C. § 106(a) without using any language specific to Indian Tribes. *Id.* at 1057. In that case, the relevant statute applied to "governmental units" which was defined to include "other foreign or domestic governments.'" *Id.* The *Krystal* Court held that the phrase "other foreign or domestic governments," applies to "*all* 'foreign or domestic governments,'" including Indian Tribes, because Congress understood that Indian Tribes are subsumed within the category of "foreign or domestic governments." *Id.* at 1057-58 (emphasis in original). Indeed, "prior Supreme Court decisions *do* define Indian tribes as domestic nations, *i.e.*,

governments." *Id.* at 1059 (emphasis in original). Since Congress understands that the category of "Indian Tribes" is a subset of a larger category (*i.e.*, "governments"), Congress's intent to abrogate sovereign immunity for all "foreign or domestic governments" or "any…government" necessarily includes Indian sovereign immunity. *Id.* at 1057-58; 15 U.S.C. §1681a(b).

Clearly, Congress only needs to mention the largest category for which it wishes to abrogate sovereign immunity, and does not need to specifically mention every entity within that larger category. *Id.* at 1058; *see also Narragansett*, 449 F.3d at 25. To demonstrate that point, the *Krystal* Court compared Congressional abrogation of Indian immunity to statutes abrogating State immunity. *Id.* at 1059. When choosing to abrogate the States' sovereign immunity, Congress "does not have to list all of the specific states, beginning with Alabama and ending with Wyoming, for a court to conclude in one specific instance that Wisconsin's sovereign immunity has been abrogated by a statute that abrogates the sovereign immunity of all states." *Id*.

In that light, the *Krystal* court held that "Congress has abrogated the sovereign immunity for all foreign and domestic governments in § 106(a) of the Bankruptcy Code. The Navajo Nation is a specific example of a domestic government. Therefore, the Navajo Nation's sovereign immunity, like that of all individual domestic governments, has been abrogated." *Id.* The same can be said under FACTA because the Oneida Tribe is a domestic government and Congress authorized suits against "any . . . government." 15 U.S.C. § 1681a(b); 15 U.S.C. § 1681n; 15 U.S.C. § 1681o.

In contrast, the cases in which courts held that different federal statutes did not abrogate the sovereign immunity of Indian tribes are distinguishable because those statutes did not include language such as "other foreign or domestic government or some similarly generic term."

Krystal, 357 F.3d at 1059 (discussing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2nd Cir. 2000) and *Florida Paraplegic*, 116 F.3d 1126). For example, as evaluated in *Bassett*, Congress did not abrogate Indian immunity under the Copyright Act because that statute only applied to "[a]ny State, any instrumentality of a State, and any officer employee of a State or instrumentality of a State acting in her or her official capacity . . . ." *Id.* Because the Copyright Act was specifically limited to *State* government, as opposed to every kind of government, the law did not include Indian Tribes. *Id.*

Likewise, the *Florida Paraplegic* court considered the immunity of Indian Tribes to private suits under the Americans with Disabilities Act ("ADA"). *Florida Paraplegic*, 116 F.3d at 1131-32. With respect to sovereign immunity, the ADA waives immunity for "public entities," which are defined as "any State or local government." 42 U.S.C. § 12131. As in *Bassett*, the inclusion of a smaller subset of sovereign entities—the States and their local governments—excluded the statute's application to other foreign or domestic sovereign entities, such as Indian Tribes. *Krystal*, 357 F.3d at 1059.

This Court's prior evaluation of Tribal Immunity relative to a suit brought pursuant to a federal statute is similarly distinguishable. In *Stockbridge-Munsee Community*, the plaintiff brought suit against an Indian Tribe for a violation of 42 U.S.C. § 1983. *Stockbridge-Munsee Community*, 2008 WL 4282589, at *1. In dismissing that case, this Court held, *inter alia*, that the Indian Tribe defendant was entitled to assert sovereign immunity.[1] However, the United States "is not a 'person' under 42 U.S.C. § 1983," and "may not be sued without its consent." *E.g., U.S. v. Vital Health Products, Ltd.*, 786 F.Supp. 761, 778 (E.D. Wis. 1992). Therefore, Section 1983 does not abrogate the federal government's sovereign immunity—and by

[1] This Court also held that a Section 1983 "action is unavailable for persons alleging deprivation of constitutional rights under color of tribal law," but that reasoning is inapplicable to this case. *Stockbridge-Munsee Community*, 2008 WL 4282589, at *3.

extension, Indian Tribes' sovereign immunity—in the same way as FACTA, and this Court's ruling in *Stockbridge-Munsee Community* is not applicable here.

Finally, the Oneida Tribe claims that it is immune from the FACTA truncation requirement because the legislative history of the FCRA does not reference Indian Tribes. However, that argument was expressly *rejected* by the Seventh Circuit when it was raised by the United States in *Bormes*. *Bormes*, 759 F.3d at 795-96. In that case, the United States made the identical argument that, because the FCRA only applied to "consumer reporting agencies" when first enacted in 1970, the absence of legislative history when Congress enacted FACTA in 1996 prohibits application of the law to the federal government. *Id*. Judge Easterbrook soundly rejected the argument in *Bormes*. *Id.* at 796. The Court should likewise reject the argument in this case.

In sum, the requirement that a statute specifically mention Indian Tribes in order to waive Indian sovereign immunity only applies when Congress abrogates immunity as to certain sovereigns but not as to others. *Krystal*, 357 F.3d at 1059. Where Congress includes a generic term abrogating sovereign immunity for all governments—which necessarily includes Indian governments—Indian Tribes need *not* be specifically identified. *Id*. As discussed in Section II.A.3.a, *supra*, FACTA waives sovereign immunity for any and all governments, domestic or foreign. *Bormes*, 759 F.3d at 796-97. Therefore, the Oneida Tribe is not immune from FACTA's truncation requirement in its retail locations, and this Court has subject matter jurisdiction over the Plaintiff's claim.

B. Plaintiff Has Standing to Bring This Claim.

This Court can easily disregard the Oneida Tribe's argument that Plaintiff lacks standing to allege that the Oneida Tribe violated the FACTA truncation requirement. The Oneida Tribe,

like many other defendants in FACTA cases, "confuses 'injury' with 'harm.'" *See Korman v. Walking Co.*, 503 F.Supp.2d 755, 759 (E.D. Penn. 2007). Well settled FACTA precedent shows that Meyers has standing to bring this claim against the Oneida Tribe.

Standing requires that a plaintiff prove, in part, that he suffered an "injury in fact." *Armes v. Sogro, Inc.*, 932 F.Supp.2d 931, 937 (E.D. Wis. 2013) (citation omitted). Moreover, "standing may exist 'solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Congress created a private right of action for plaintiffs to bring claims against any person who prints receipts in violation of the truncation requirement. 15 U.S.C. §§ 1681n, 1681o. Further, in numerous FACTA cases around the country, courts have routinely found that a plaintiff has standing to bring the claim merely by alleging the defendant printed more than the last five digits of the card number or the expiration date of the plaintiff's credit or debit card on the plaintiff's receipt. *See, e.g., Armes*, 932 F.Supp.2d 931; *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614 (7th Cir. 2007); *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 499 (8th Cir. 2014).

As the Oneida Tribe correctly notes, the Seventh Circuit did not mention any issues with plaintiffs' standing in prior FCRA cases. *See Killingsworth*, 507 F.3d at 622 ("actual damages are not a precondition for suit"); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006). Further, this District previously addressed this standing issue and found that receiving a printed receipt in violation of the truncation requirement gives the plaintiff standing to bring a FACTA claim. *See Armes*, 932 F.Supp.2d 931. In *Armes v. Sogro, Inc.*, the court held that "[t]hrough FACTA, Congress created a legal right to electronically printed receipts that truncate the consumer's credit card number. Receiving a receipt that fails to truncate the card number violates

this legally protected right, which results in an injury sufficient to confer standing under Article III." *Armes*, 932 F.Supp.2d at 938.

Further, it is well settled in FACTA cases that the printing of a receipt in violation of the truncation requirement is sufficient to give a plaintiff standing. *See e.g.*, *Armes*, 932 F.Supp.2d at 938 ("FACTA entitled [plaintiff] to a receipt truncating his credit card number and [defendant] printed the full number. As such, [plaintiff] has standing."); *Hammer*, 754 F.3d at 499 ("Because [plaintiffs] allege that they have suffered an actual, individualized invasion of a statutory right, we conclude that they have satisfied the injury-in-fact requirement of Article III standing."); *Korman*, 503 F.Supp.2d 755 ("Plaintiff has standing to bring this [FACTA] suit . . . ."); *Ramirez v. Midwest Airlines, Inc.*, 537 F.Supp.2d 1161, 1166-67 (D. Kan. 2008) ("Joining what appears to be the unanimous view on this issue, this court finds that plaintiff has standing to bring her FACTA claim against Midwest."); *Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117 (S.D.N.Y. 2011) ("the plaintiff has carried his burden of demonstrating that he has standing to bring a claim for a willful FACTA violation."); *Dreher v. Experian Info. Solutions, Inc.*, 2014 WL 6834867 (E.D. Va. 2014) ("[Plaintiff] and the class members have standing to pursue their claims."); *Hedlund v. Hooters of Houston*, 2008 WL 2065852, at *3 (N.D. Tex. 2008) ("Numerous district courts that have considered the issue have also found Plaintiffs to have standing in FACTA cases . . . .").

Finally, the Oneida Tribe argues that this Court should dismiss this case because the United States Supreme Court recently took certiorari review on a case with a similar issue. However, even in that case, *Robins v. Spokeo Inc.*, 742 F.3d 409 (9th Cir. 2014), the Ninth Circuit held that the plaintiff had standing to bring his claim under the FCRA. *Id.* at 413-14 (the "alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact

requirement of Article III."). In the same way, Meyers has carried his burden of showing that he has standing to bring this claim.

WHEREFORE, Plaintiff JEREMY MEYERS prays that the Court deny Defendant ONEIDA TRIBE OF INDIANS OF WISCONSIN's motion to dismiss, and for any other relief the Court deems appropriate, including amendment of the pleadings.

Plaintiff JEREMY MEYERS, individually,
and on behalf of all others similarly situated,

By: s/ Thomas A. Zimmerman, Jr.

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CERTIFICATE OF SERVICE

Thomas A. Zimmerman, Jr., an attorney, hereby certifies that he caused the *Plaintiff's Response in Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction* to be served upon counsel of record in this case via the U.S. district court CM/ECF system, on this day July 10, 2015.

s/ Thomas A. Zimmerman, Jr.

Plaintiff **JEREMY MEYERS**, individually, and on behalf of all others similarly situated,

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