UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FEDERAL TRADE COMMISSION	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:14-cv-00783-DW
	)	
CWB Services, LLC, *et al.*	)	
	)	
Defendants.	)	

NON-PARTY RESPONDENT WYANDOTTE NATION'S SUGGESTIONS IN OPPOSITION TO RECEIVER'S MOTION FOR TURNOVER OF PROPERTY OF THE RECEIVERSHIP ESTATE TRANSFERRED TO WYANDOTTE NATION/EDATA SOLUTIONS INC.

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Non-party Respondent Wyandotte Nation ("Respondent," or the "Nation"), specially appears before this Court and offers the following Suggestions in Opposition to Receiver's Motion for Turnover of Property of the Receivership Estate Transferred to Wyandotte Nation/Edata Solutions Inc. (Doc. No. 231). The Nation hereby incorporates the facts, law and legal arguments as stated in the Nation's Special Appearance and Response in Opposition (Doc. No. 256)("Nation's Response in Opposition"), and would further show the Court as follows:

INTRODUCTION

This Court should deny Receiver Larry S. Cook's ("Receiver") eData Turnover Motion with regard to the Wyandotte Nation, as Receiver's Motion is barred by the Nation's existing sovereign immunity. As stated in the Nation's Response in Opposition, Receiver seeks an order of this Court compelling the Nation to return $11,825,819.31 paid by certain Receivership

Defendants to eData Solutions, Inc., a separate incorporated entity owned by the Nation.[1] In so moving, Receiver briefly acknowledges (in a footnote) that the Nation "may assert sovereign immunity as a federally recognized Indian tribe." eData Turnover Motion (Doc. 231), at 2, n.1. The Receiver further states that tribal sovereign immunity has been abrogated in this case through the statutory authority granted to the Plaintiff Federal Trade Commission ("FTC") under the Federal Trade Commission Act (FTCA), 15 U.S.C. §45, which Receiver claims is a statute of general applicability and thus allows the Receiver to bring his motion against the Nation. *Id.* However, as explained *infra*, Receiver has misstated the long-standing federal concept of tribal sovereign immunity with respect to the Receiver's authority in the present case, and fails to meet his burden in demonstrating congressional abrogation of tribal immunity without which Receiver's Motion is jurisdictionally ineffective against the Nation.

I. THE RECEIVER IS NOT AN EXTENSION OF THE FTC AND MAY NOT "BORROW" THE FTC'S AUTHORITY UNDER THE FTCA, IF ANY, TO BREACH THE NATION'S TRIBAL IMMUNITY.

As a preliminary matter, it is important to note the procedural status and nature of the parties related to Receiver's eData Turnover Motion. In his Motion, Receiver incorrectly states in a footnote that the doctrine of tribal sovereign immunity is unavailable to the Nation in this case because "this Motion is brought by the Receiver appointed by the Court in this Action brought by the Federal Trade Commission under the Federal trade Commission Act, a general Act of Congress and a federal statute of general applicability as to which tribal sovereignty does not apply." eData Turnover Motion, at 2, n.1. By this statement, Receiver incorrectly concludes

[1] Non-party eData Solutions, Inc., was formed by under the laws of the Wyandotte Nation in furtherance of the Nation's goals towards self-sufficiency and economic sustainability. On November 9, 2012, a Certificate of Merger recognizing eData Solutions, Inc. as the surviving entity in a merger with eData Solutions, LLC was issued by the District Court of Wyandotte County, Kansas. *See Exhibit A as attached to* Non-Party Respondent eData Solutions, Inc.'s Special Appearance and Response in Opposition to Receiver's Motion for Turnover of Property of the Receivership Estate Transferred to Wyandotte Nation/Edata Solutions, Inc. (Doc. No. 258) ("eData's Response in Opposition").

that any authority granted to the FTC by Congress under the Federal Trade Commission Act (FTCA) is thereby granted to Receiver through his judicial appointment in the originating case, merely because the originating case was brought by the FTC. This argument is misguided, at best.

Receiver's position and powers were created by an order of this Court. *See generally* Order Entering Stipulated Preliminary Injunction with an Asset Freeze, Appointment of a Receiver, and Other Equitable Remedies ("Receiver Appointment Order")(Doc. No. 34), at 1 ("Larry E. Cook is appointed Receiver for the business activities of the Receivership Defendants with the full power of an equity receiver."). The Receiver Appointment Order establishes both the scope of Receiver's power, and the limitations thereof. *See* Receiver Appointment Order (Doc. No. 34), at 15-30. The Receivership Appointment Order gives Receiver the authority to control the defendant-companies (called the "Receivership Defendants" in the Order), manage the business of the defendant-companies, and hold, conserve, manage, and liquidate the assets of the defendant-companies, as deemed necessary by the Receiver in order "to preserve the value of those assets, . . . [or to] prevent any irreparable loss, damage or injury to consumers or to the creditors of the Receivership Defendants . . . ." Receiver Appointment Order (Doc. No. 34), at 17-18. The Receiver Appointment Order also grants Receiver the authority to initiate, defend, or otherwise participate in litigation related to the defendant-companies or in order "to preserve the assets of the Receivership Defendants . . . ." Receiver Appointment Order (Doc. No. 34), at 18; *compare with N. Fin. Corp. v. Byrnes*, 5 F.2d 11, 12 (8th Cir. 1925):

> "Receivers appointed by the federal courts ***are officers thereof***, ***and in the absence of any special authority given by the court, their powers are very limited.*** As a rule they can do nothing ***without express authority***. They are at liberty, and are in fact encouraged to apply at all times to the court for instructions

> and advice, and such is their duty in any doubtful or important matter arising in the course of their duties." (Emphasis added.)

Contrary to his unsupported assertions, Receiver did not succeed to, nor is he cloaked with, any authority the FTC may have under the FTCA, even assuming *arguendo* that the FTCA is a statute of "general applicability," which Respondent Nation does not concede. Although originating from the FTC's action against the Receivership Defendants before this Court, it is *Receiver*, not the FTC, who seeks to compel action from the Nation as a non-party Respondent. ***Receiver's authority is afforded to him as an extension of the Court's authority over parties and issues.*** *Compare* Receiver Appointment Order (Doc. No. 34), at 1 ("The Receiver shall be the agent of this Court and ***solely the agent of this Court in acting as Receiver under this Order***. The Receiver shall be accountable directly to this Court. The Receiver shall comply with any laws and Local Rules of this Court governing receivers.")(emphasis added), *with Bowersock Mills & Power Co. v. Joyce*, 101 F.2d 1000, 1002 (8th Cir. 1939)("The receiver [is] an officer of the court, . . . act[s]for the court, and [is] ***not an agent or employee of either party to the litigation***.")(emphasis added), *and McPherson v. U.S. Physicians Mut. Risk Retention Grp.*, 99 S.W.3d 462, 482 (Mo. Ct. App. 2003)("The receiver functions as an arm of the court by making decisions about the operation of a business that the judge otherwise would have to make.")(citation omitted)(internal quotation omitted).

At bottom, the Receiver is *not* the Plaintiff Federal Trade Commission, but rather a court-appointed custodian of the Receivership Defendants' property and assets, whose powers and authority, while broadly defined in equity, do not mirror those of the FTC by virtue of his receivership. *Walker Mgmt., Inc. v. Affordable Communities of Missouri*, 912 F. Supp. 455, 457 (E.D. Mo. 1996)(acknowledging that a receiver "is operating as an arm of the court and must enjoy the same protections; if that were not the case, courts would be forced to perform the tasks

of receivers thus diminishing the amount of time allowed for the administration of justice.").

The Receiver is an "officer of the court," not an officer of the FTC. *United States v. Smallwood*, 443 F.2d 535, 539 (8th Cir. 1971); *Bowersock Mills & Power Co.*, 101 F.2d at 1002. The receivership in this case is made pursuant to the Court's inherent authority, not because of the FTC's ability to *move* for a receiver under the FTCA. The Receiver, then, is without authority to bring this Motion against the Nation ***because this Court lacks jurisdiction over the Nation.***

II. SHOULD THE COURT DETERMINE RECEIVER IS AUTHORIZED UNDER THE FTCA TO MOVE AGAINST THE NATION, RECEIVER'S MOTION SHOULD STILL FAIL.

A. This Court Should Deny Receiver's eData Turnover Motion with Respect to the Wyandotte Nation as Tribal Sovereign Immunity Serves as a Complete Bar to Receiver's Motion.

As stated in the Nation's Response in Opposition, non-party Respondent Wyandotte Nation is a federally-recognized Indian tribe, empowered with the rights and protections afforded to it as a "domestic dependent nation." *Am. Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377-78 (8th Cir. 1985)("Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy.")(internal citations omitted). Federal courts, including those in the Eighth Circuit, have long upheld the principle that this sovereign immunity allows a tribe to effectively withstand the jurisdiction of non-tribal courts, both federally and at the state level. *Id.*, *citing United States v. Kagama*, 118 U.S. 375, 382 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832); *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508 (8th Cir. 1975). Tribal immunity extends beyond the boundaries of the tribal

reservation, and applies to a tribe's commercial, governmental, and regulatory activities, wherever occurring. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55 (1998)(acknowledging that there is "no distinction between governmental and commercial activities of tribe" with respect to tribal immunity); *see also Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1102 (8th Cir. 2012)("The doctrine [of tribal immunity] applies broadly to a tribe's commercial activities and to activities outside its reservation."). Tribal immunity exists even in cases where the tribe is not a direct party to the action. *Id.* In circumstances where a tribe is commanded to act (or refrain from acting) by judicial order, the Eighth Circuit has expressly held that sovereign immunity extends to the non-party tribe in repelling the court's exercise of authority. *See generally id.* (quashing third-party subpoenas duces tecum issued to Indian tribe based on the doctrine of tribal immunity, noting the Supreme Court has upheld the doctrine as a "well-established federal policy of furthering Indian self-government," even where the immunity "works some inconvenience or some injustice . . . .").

A tribe loses its sovereign immunity only under two (2) circumstances: through explicit congressional abrogation or by unequivocal waiver by the tribe itself. *Am. Indian Agr. Credit Consortium, Inc.*, 780 F.2d at 1378; *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684-85 (8th Cir. 2011), *quoting Kiowa Tribe of Oklahoma*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *accord with Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1151-53 (10th Cir. 2011)("As a dependent sovereign entity, an Indian tribe is not subject to suit in a federal or state court unless the tribe's sovereign immunity has been either abrogated by Congress or waived by the tribe."). Tribal sovereign immunity exists as a jurisdictional bar to bringing suit against an Indian tribe "irrespective of the nature of the lawsuit." *Am. Indian Agr.*

Credit Consortium, Inc., 780 F.2d at 1378, *citing Fontenelle v. Omaha Tribe*, 430 F.2d 143 (8th Cir.1970). Eighth Circuit precedent places the burden on Receiver to demonstrate Congress' "clear and plain intent" in abrogating "specific Indian rights," through "express declaration in the statute, by the legislative history, and by surrounding circumstances." *E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 248 (8th Cir. 1993).

Moreover, the nature of the jurisdictional action Receiver seeks to enforce against the Nation "threatens to contravene 'federal policies of tribal self-determination, economic development, and cultural autonomy' that underlie the federal doctrine of tribal immunity." *See DeJordy*, 675 F.3d at 1104. In *DeJordy*, the plaintiff Alltel Communications brought suit for breach of contract against its former vice-president, DeJordy, alleging that DeJordy was collaborating with the Oglala Sioux Tribe in an unrelated lawsuit against Alltel in tribal court. *Id.* at 1101. Alltel issued third-party subpoenas duces tecum to the Tribe, seeking evidence of the connection between DeJordy and the tribal lawsuit. *Id.* The non-party Tribe specially appeared before the district court and moved to quash the subpoenas based on tribal sovereign immunity. *Id.* In quashing the subpoenas, the court noted that "[t]he broad issue is how a tribe's sovereign immunity, an immunity created and controlled by federal law, will be enforced in the courts of another sovereign, the United States." *Id.* at 1105. Additionally, the court found that the issuance of the subpoenas by the federal district court qualified the Tribe's sovereign immunity from a "suit," even though the Tribe was a non-party. *Id.*

Similarly, this Court should deny the Receiver's eData Turnover Motion regarding the Nation. Like the subpoena issuance in *DeJordy*, Receiver's authority to seek an order of this Court divesting the Nation of its assets is an extension of the authority of this Court, and qualifies as a "suit," for the purposes of triggering the Nation's sovereign immunity. *Compare*

id., at 1104 ("The point is . . . whether the end result is the functional equivalent of a 'suit' against a tribal government within the meaning of its common law sovereign immunity."). Because the Nation may raise tribal immunity in withstanding the jurisdiction of this Court, the Receiver must first demonstrate that the immunity has been congressionally abrogated. Receiver has failed to do so.

1. Whether the FTCA is a Law of General Applicability Does Not Affect the Nation's Tribal Sovereign Immunity.

The present Motion is controlled by the extant case law of the Eighth Circuit and in the Eighth Circuit's application of relevant Supreme Court jurisprudence, which has repeatedly upheld the broad protection afforded to Indian Nations by the doctrine of sovereign immunity, even in the context of congressional laws of general applicability. The cases cited by Receiver in his footnote (as fully explored *infra*) rely on the Supreme Court's ruling regarding the general applicability exception in the context of abrogating tribal sovereignty in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), as further narrowed by *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.3d 1113, 1115 (9th Cir. 1985). The *Tuscarora-Coeur d'Alene* rule states the general principle that congressional legislation that is silent as to its application to Indian tribes will in fact "generally" apply to the tribes, provided that the statute at issue does not encroach upon matters of tribal self-governance, treaty rights, or contradict other specialized treatment for tribes in existing legislations. *See, e.g., Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1302-03 (D.N.M. 2009), *citing Coeur d'Alene Tribal Farm*, 751 F.3d at 1116 ("The Ninth Circuit in *Coeur d'Alene* [held] that when a statute of general applicability is silent with respect to tribes, that statute will not apply to tribes 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.")(internal quotations omitted).

The *Tuscarora* rule has not been unilaterally embraced by all the Circuits, nor found to be applicable to every "silent" federal statute. *See, e.g., Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709, 711-12 (10th Cir. 1982)(holding applying OSHA to tribe "dilute the principles of tribal sovereignty and self-government recognized in the [tribe's] treaty," and further acknowledging "[t]he two primary sources of explicit limitations on tribal sovereignty or political independence are treaties and federal legislation dealing with Indians; the Indian tribes thus retain all aspects of tribal sovereignty not specifically withdrawn."); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356-57 (2d Cir. 2000), *quoting Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)(rejecting application of federal Copyright Act to Indian tribe as "[n]othing on the face of the Copyright Act 'purports to subject tribes to the jurisdiction of federal courts in civil actions' brought by private parties."); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1285 (11th Cir. 2001), *citing Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247(1985); *see also Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1130 (11th Cir. 1999)(holding that federal Rehabilitation Act did not apply to tribe, noting that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit . . . We should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation.")(internal quotations omitted). Even the Ninth Circuit has acknowledged the limitations of the *Tuscarora* rule. *See E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1079-80 (9th Cir. 2001)(acknowledging the Eighth Circuit's ruling in *Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d at 249, and the Tenth Circuit's ruling in *E.E.O.C.*

v. Cherokee Nation, 871 F.2d 937 (10th Cir.1989), and similarly finding that ADEA did not apply to tribal Housing Authority); *Carsten v. Inter-Tribal Council of Nevada*, 599 Fed. Appx. 659, (Mem)-660 (9th Cir. 2015)(upholding district court's determination that FMLA "does not abrogate tribal sovereign immunity.").

Additionally, the Eighth Circuit has expressly acknowledged that determination of whether a statute is one of "general applicability" requires a separate analysis that does not bear upon issues of tribal sovereignty. *See Fond du Lac Heavy Equip. & Const. Co., Inc*., 986 F.2d at 248:

> "The Supreme Court has stated [in *Tuscarora*] that 'general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary.' This general rule in *Tuscarora*, however, ***does not apply when the interest sought to be affected is a specific right reserved to the Indians.*** Specific Indian rights will not be deemed to have been abrogated or limited absent a 'clear and plain' congressional intent."(citations omitted)(emphasis added).

Tribal sovereign immunity is indeed a "specific right reserved" to Indian Nations by the federal government, developed in part by federal recognition of tribal self-governance. *See generally Fond du Lac Heavy Equip. & Const. Co., Inc*., 986 F.2d at 248 (noting that a "specific Indian right" may be created through treaties, but also "based upon statutes, executive agreements, and federal common law."); *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304-05 (8th Cir. 1994)("Indian tribes possess the common-law immunity traditionally enjoyed by sovereign powers."); *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir. 1995)(noting the Supreme Court's "protectiveness of tribal sovereign immunity" regarding waivers of tribal immunity); *DeJordy*, 675 F.3d at 1102, *citing Kiowa Tribe of Oklahoma*, 523 U.S. at 756-60 (recognizing that tribal immunity "developed almost by accident, initially grounded in the perception that Congress wished to protect dependent, quasi-sovereign

Indian tribes from costly claims and interference, and sustained by the failure of Congress to exercise its unquestioned power to abrogate the immunity, in whole or in part."); *accord with Karuk Tribe Hous. Auth.*, 260 F.3d at 1079-80, *quoting United States Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 186 (9th Cir.1991)(recognizing that "identical right[s] should not have a different effect" regardless of whether the right is created by treaty or "recognized, inherent sovereign rights.").

Even assuming *arguendo* that the FTCA is a statute of general applicability, the question of whether a statute is generally applicable to Indian tribes and whether tribal immunity has been abrogated are completely separate issues, neither of which is dispositive of the other. *See Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1302-03 (D.N.M. 2009), *citing Kiowa Tribe of Oklahoma*, 523 U.S. at 755 ("The issue of whether a statute of general applicability should apply to a tribe or tribal entity is distinct from the issue [of] whether a tribal entity enjoys sovereign immunity from suit."); *accord with Sanderlin*, 243 F.3d at 1292 ("The bare proposition that broad general statutes have application to Native American tribes does not squarely resolve whether there was an abrogation of tribal immunity . . . case law since *Tuscarora* has made clear that any purported abrogation must be express and unequivocal."). Receiver cannot circumvent the Nation's sovereign immunity by merely stating that the FTCA is generally applicable to the Nation in order to maintain his Motion against the Nation.

2. The Cases Cited by Receiver are Neither Dispositive Nor Controlling of the Present Issues.

Even if the FTC's authority under the FTCA did extend to Receiver to allow him to bring this Motion against the Nation (which it does not), the footnoted cases cited by Receiver in support of his erroneous assertion that tribal sovereign immunity does not apply are easily

distinguished from the facts of the present case. In *FTC v. AMG Servs., Inc.*, 2014 WL 91032 (D. Nev. 2014), the FTC brought a *direct* suit against Indian-owned companies for violations under the FTC Act, the Truth in Lending Act, and the Electronic Funds Act. *Id.*, at *1. The Defendants moved for summary judgment premised in part on the extension of tribal sovereignty to the Indian-owned defendant-companies. *Id.* at *2. In adopting the magistrate's decision that the FTCA was a law of "general applicability," the district court cited the *Tuscarora-Coeur d'Alene* rule, holding that "controlling Ninth Circuit precedent grants the FTC authority to regulate arms of Indian tribes, their employees, and their contractors." *Id.* at *3-6.

Unlike the facts at hand, *AMG Servs., Inc.*(as well as the other two cases cited by Receiver) involves a direct suit by a federal agency against a tribally-owned corporation for violations of the FTCA. *See id.* In the present case, the originating action was brought by the FTC against the Receivership Defendants for violating the FTCA, not against the Nation or against eData Solutions, Inc. As previously discussed *supra*, whether or not the FTCA is a statute of general applicability giving the ***FTC*** the "authority to regulate arms of Indian tribes," does not permit ***Receiver*** to compel the non-party Wyandotte Nation to submit to this Court's jurisdiction, and thus *AMG Servs., Inc.* is inapplicable to this case.

Chapa De Indian Health Program, Inc., 316 F.3d 995, 998 (9th Cir. 2003), is equally distinguishable. *Chapa De* involved an action by the National Labor Relations Board (NLRB) against a tribally-owned health care organization for unfair labor practices. *Id.* at 997. In the developing litigation, the NLRB issued subpoenas to the health care organization's officers, managers and to the health organization itself. *Id.* The organization moved to quash all the subpoenas, claiming that the National Labor Relations Act was not a statute of general applicability. *Id.* In upholding the validity of the subpoenas, the Ninth Circuit applied the

Tuscarora rule, noting specifically that the "self-government exception" to the *Tuscarora* rule in *Coeur d'Alene* was inapplicable because "Chapa-De ***is not a tribe*** . . . Chapa-De is a non-profit California corporation that operates . . . on non-Indian land." *Id.* at 1000. The court further noted that the "nearly half" of the organization's patients were non-Indian, as well as "at least half" of the organization's employees. *Id.*, *citing Coeur d'Alene*, 751 F.2d at 1116 ("Th[ese factors] cut[] against Chapa–De's claim that its activities touch rights of self-governance on a purely intramural matter.").

In contrast, the Wyandotte Nation ***is*** a federally-recognized tribe and any analysis of the general applicability of the FTCA in the present case does not change the fact that the Receiver has no authority under the Act. Moreover, the Nation is not a party to this litigation, and thus the *Coeur d'Alene* distinction regarding "intramural" disputes is not a factor. *Compare with id.*, at 999-1000, *citing Karuk Tribe*, 260 F.3d at 1081.

The third and final case cited by Receiver regarding the Nation's immunity is *N.L.R.B. v. Fortune Bay Casino*, 688 F.Supp. 2d 858 (D. Minn. 2010), in which the NLRB brought suit against and issued subpoenas duces tecum to a tribally-owned casino. In that case, the District Court of Minnesota found that the Ninth Circuit precedent of *Tuscarora* and its progeny granted the NLRB jurisdiction over the tribal casino through the NLRA as a statute of general applicability, noting that the Eighth Circuit had not yet determined the general applicability of the NLRA. *Id. at* 867-68. The court further noted that although the Ninth Circuit had previously determined that the NLRA was a law of general applicability, other circuit courts did not. *Id.*, at 867-868, *citing N.L.R.B. v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000).

Receiver's citation of the *Fortune Bay Casino* case in support of his Motion ignores the fact that the Eighth Circuit (and the Supreme Court, for that matter) has not determined the general applicability of the FTC's authority under *Federal Trade Commission Act*, and also disregards the fact that whether the FTCA is found to be a statute of general applicability by the Eighth Circuit still has no bearing on the Receiver's authority to collaterally attack non-party tribes. *See In re Nat'l Cattle Cong.*, *infra*.

Moreover, all of the cases cited by Receiver are inapplicable to Receiver's Motion, and the Nation still retains its tribal immunity as a "special Indian right." *Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d at 248. Other courts in this Circuit have applied the "special Indian right" ruling in *Fond du Lac Heavy Equip. & Const. Co., Inc*. and upheld tribal sovereign immunity as a jurisdictional barrier, despite a statute's generally-applicable status. *See, e.g., In re Nat'l Cattle Cong.*, 247 B.R. 259, 265 (Bankr. N.D. Iowa 2000), *citing Kiowa Tribe of Oklahoma*, 523 U.S. at 754. In *In re Nat'l Cattle Cong.*, the Bankruptcy Court of the Northern District of Iowa found that even though federal statutes (including the Bankruptcy Code) were broad enough to apply to Indian tribes through the *Tuscarora* rule,

> "[t]he Supreme Court recently noted [in *Kiowa Tribe of Oklahoma*] that there is a difference between the right to demand compliance with general laws and the means available to enforce them. ***This principle spells out the distinction between a right and a remedy***. While Bankruptcy Code applies to the Tribe, ***the Tribe can, nevertheless, retain its sovereign immunity from suit*** under the Code. "*Id.* at 265, *citing Kiowa Tribe of Oklahoma*, 523 U.S. at 754; *Florida Paraplegic, Ass'n, Inc.*, 166 F.3d at 1130 (emphasis added)(internal quotations omitted).

This Court should likewise find that regardless of the *Tuscarora* rule in application to the FTCA, the Wyandotte Nation "enjoys sovereign immunity from suit" in the present case, and hold that Receiver's Motion cannot compel any action from the Nation as a matter of law. *Id.*, *citing Hagen v. Sisseton–Wahpeton Comm. College*, 205 F.3d 1040, 1043 (8th Cir. 2000).

III. CONCLUSION

To extend the FTC's authority to Receiver for the sole purpose of evading tribal sovereign immunity in this case would be not only improper (and inequitable), but contravene the well-established principles of tribal sovereignty and congressional purpose. Just as Receiver improperly conflates the independent forms of the Nation and eData Solutions, Inc. in his Motion, so too does the Receiver invalidly apportion the FTC's authority unto himself. Even if that Receiver was expressly granted the authority under the FTCA, there is no indication whatsoever that this statute satisfies the test for general applicability, or any evidence of congressional intent to abrogate tribal sovereignty with respect to the FTCA. *Accord with Kiowa Tribe of Oklahoma*, 523 U.S. at 759; *Michigan v. Bay Mills Indian Cnty.*, 134 S. Ct. 2024, 2037-39 (2014)("[I]t is fundamentally Congress's job, not [the Court's] to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain – both its nature and its extent – rests in the hands of Congress."); *see also Amerind Risk Mgmt. Corp.*, 633 F.3d at 685, *quoting Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995)("A waiver of sovereign immunity may not be implied, but ***must be unequivocally expressed by either the Tribe or Congress***.")(emphasis added). Here, the record is devoid of any such expressed intent and the Nation is entitled to assert its tribal immunity with regards to this litigation.

WHEREFORE, all premises considered, the Nation respectfully requests this Court deny Receiver's Motion.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on the 29th day of March, 2016, I electronically transmitted the foregoing document to the Clerk of the Court for the Western District of Missouri using the ECF System for filing and transmittal of a Notice of Electronic Filing to all parties participating and registered with the Court's ECF System.

/s/ Lloyd W. Raber