IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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

RECEIVER'S REPLY SUGGESTIONS TO WYANDOTTE NATION'S SUGGESTIONS IN OPPOSITION TO RECEIVER'S MOTION FOR TURNOVER

Receiver Larry E. Cook ("**Receiver**"), by and through undersigned counsel, submits this reply brief in support of Receiver's Motion for Turnover of Property of the Receivership Estate Transferred to Wyandotte Nation/Edata Solutions Inc. ("**Wyandotte Nation**") (Doc. 231) (the "**Motion for Turnover**") and in reply to Wyandotte Nation's Responses in Opposition to Receiver's Motion for Turnover and Wyandotte Nation's Suggestions in Opposition to Receiver's Motion for Turnover (Doc. Nos. 256, 257, 258, and 259) (the "**Oppositions**") and respectfully states as follows:

Introduction

The Federal Trade Commission ("**FTC**") initiated this enforcement action on September 5, 2014 by filing its Complaint (Doc. 3) under the Federal Trade Commission Act ("**FTC Act**"), 15 U.S.C. § 41 *et seq.*; the Truth in Lending Act ("**TILA**"), 15 U.S.C. §§ 1601-1666j; and the Electronic Fund Transfer Act ("**EFTA**"), 15 U.S.C. §§ 1693-1693r. On September 9, 2014, the Court entered its *Ex Parte* Temporary Restraining Order With an Asset Freeze, Appointment of a Receiver, and Other Equitable Relief, and

Order to Show Cause Why a Preliminary Injunction Should Not Issue (the "**Order Appointing Receiver**") (Doc. 7). On September 23, 2014, the Court entered its Order Entering Stipulated Preliminary Injunction with an Asset Freeze, Appointment of a Receiver, and other Equitable Relief (the "**PI Order**") (Doc. 34). The PI Order provides the Receiver is directed and authorized to take exclusive custody, control, and possession of all assets of the Receivership Defendants, wherever situated. *See* PI Order, ¶ XII.B, Page 15. The PI Order also provides that the Receiver is directed and authorized to institute proceedings the Receiver deems necessary and advisable to recover assets of the Receivership Defendants. *Id.* at ¶ XII.L, Page 18. The PI Order further provides that any person or entity with knowledge of the PI Order shall transfer to the Receiver all assets of the Receivership Defendants. *Id.* at ¶ XIV.A.1, Page 23.

On August 26, 2015, the Court entered a Stipulated Order for Permanent Injunction and other relief against Defendant Timothy A. Coppinger and related entities "**Coppinger Final Order**") (Doc. 188). On October 14, 2015, the Court entered a Stipulated Order for Permanent Injunction and other relief against Defendants Frampton T. Rowland, III and related entities (the "**Rowland Final Order**") (Doc. 205). The Coppinger Final Order and the Rowland Final Order (collectively, the "**Final Orders**") each provide that Sections XI through XV of the PI Order (provisions regarding the duties and authority of the Receiver) continue notwithstanding entry of the Final Order.

On February 25, 2016, the Receiver filed the Motion for Turnover, seeking a turnover order directing the Wyandotte Nation to return $11,825,819.31 (the "**Wyandotte Nation Transfers**") transferred by Receivership Defendants FRH LLC, Incrementum Group LLC, Anasazi Group LLC, Namakan Capital LLC, Sandpoint

Capital LLC, and Basseterre Capital LLC (collectively, the "Receivership Defendants") to Wyandotte Nation between July 2012 and August 2014. On March 29, 2016, Wyandotte Nation filed the Oppositions and the Non-Party Respondent Wyandotte Nation'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. 256, 257, 258, and 259).

The Oppositions raised several arguments against the Motion for Turnover, including: (1) whether FTC Act is a law of general applicability, and, even if it is, that does not affect the Nation's tribal sovereign immunity; (2) tribal sovereign immunity serves as a complete bar to the Motion for Turnover; and (3) the Motion for Turnover is barred by the Nation's existing sovereign immunity because the Receiver is not an extension of the FTC and may not borrow the FTC's Authority under the FTC Act, if any, to breach the Nation's Tribal immunity. This Reply will address each argument.

Argument

A. *The FTC Act is a law of general applicability.*

The Wyandotte Nation asserted in its Oppositions that the FTC Act is not a law of general applicability, and that tribal sovereign immunity is an absolute bar to the Receiver's Motion for Turnover. Whether a particular law is one of general applicability, thus waiving tribal sovereign immunity, and the *existence* of sovereign immunity, in general, are distinct concepts. Wyandotte Nation may claim sovereign immunity in certain instances; however, if a *federal law* is one of general applicability, then long established jurisprudence holds that tribal sovereign immunity is not a bar to suit unless one of the specifically defined exceptions applies. The FTC Act is a law of general

applicability. *See FTC v. AMG Servs, Inc.*, 2014 WL 910302 (D. Nev. 2014); *N.R.L.B. v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858, 868-76 (D. Minn. 2010); *N.R.L.B. v. Chapa de Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003). And since none of the specifically defined exceptions apply, suit under the FTC Act is not barred by tribal sovereign immunity.

In *AMG Services*, the court held that the FTC Act is a federal statute of general applicability granting the FTC the authority to regulate arms of Indian tribes, their employees, and their contractors. 2014 WL 910302 at *6. FTC brought an enforcement action pursuant to the FTC Act involving high-fee, short-term payday loans. *Id.* at *1. In finding that the FTC Act is a statute of general applicability, the court applied the general rule of statutory construction that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Id.* at *3. The defendants failed to meet this burden. *Id.* The court ultimately cited controlling precedent to find that the FTC Act is an act of general applicability without an exception for Indian tribes, and, as such, "applies to arms of Indian tribes, their employees, and their contractors. *Id.* at *5 (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) ("the principle [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.'"); *see also Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980) ("federal laws generally applicable throughout the United States apply with equal force to Indians on reservations."); *United States v. Mitchell*, 502 F.3d 931, 947 (9th Cir. 2007) ("federal statutes of nationwide applicability, where silent on the issue,

presumptively do apply to Indian tribes").

As the above case law unambiguously holds, the FTC Act is a statute of general applicability. Whether the FTC brought a direct action against Wyandotte Nation is immaterial. The Wyandotte Nation does not offer any direct support that the FTC Act is not a statute of general applicability. Although the 8th Circuit has not yet issued an opinion holding the FTC Act is a federal statute of general applicability, there is ample precedent to treat it as such.

Courts have held that laws of general applicability apply to Native American Tribes with limited exception.[1] *Coeur d'Alene*, 751 F.2d at 1115-16. The court in *Coeur d' Alene* provided three limited exceptions:

> 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 ...." *Farris*, 624 F.2d at 893-94. In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

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[1] The court in *Coeur d'Alene* held that laws of general applicability apply to Indian tribes regardless of whether those laws expressly make the laws applicable to them. *Id.* at 1116. The court reasoned as follows:

> 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. *See, e.g., Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878 (9th Cir.1982), *cert. denied*, 460 U.S. 1040, 103 S.Ct. 1433, 75 L.Ed.2d 792 (1983) (holding that absent a "definitely expressed exemption" tribes and their members are subject to federal excise taxes); *United States v. Fryberg*, 622 F.2d 1010 (9th Cir.), *cert. denied*, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980) (holding that Eagle Protection Act abrogates treaty hunting rights); *Fry v. United States*, 557 F.2d 646 (9th Cir.1977), *cert. denied*, 434 U.S. 1011, 98 S.Ct. 722, 54 L.Ed.2d 754 (1978) (holding that Indian logging operations are subject to federal taxes); *United States v. Burns*, 529 F.2d 114 (9th Cir.1975) (holding that federal gun control law applies to Indians, citing Tuscarora). *See also Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C.Cir.), *cert. denied*, 366 U.S. 928, 81 S.Ct. 1649, 6 L.Ed.2d 387 (1961) (holding that National Labor Relations Act applies to employers located on reservation lands).

Id. at 1115-16.

Id. at 1116 (citing *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)). The court in *Couer d'Alene* held that the "self-governance exception" cannot be read so broadly that Indian tribes are allowed to conduct commercial enterprises free of federal regulation as an aspect of self-governance, reasoning that case law makes clear that federal taxes apply to reservation action without Congress clearly expressing its intent for federal taxes to so apply. *Id.* The court indicated that examples of purely intramural matters include "conditions of tribal membership, inheritance rules, and domestic relations." *Id.* Wyandotte Nation does not attempt to argue that operating a "one-stop-shop" business for payday loans is purely an intramural activity or that any of the following known activities of its business were purely intramural activities including, but not limited to: providing consumer/borrower leads, qualifying the leads, providing a loan management software system to off-reservation, online payday lenders, buying defaulted consumer loans to sell to third party collectors—all off-reservation, and receiving payment from the Receivership Defendants via off-reservation banks and financial institutions. None of these activities have any bearing on the Wyandotte Nation's ability to govern itself. Furthermore, Wyandotte Nation does not even argue to fall into either of the other two exceptions.

Despite Wyandotte Nation's argument to the contrary, whether Wyandotte Nation is a federally-recognized tribe or a party to the above-captioned litigation have no bearing on the court's analysis or holding in *Couer d'Alene*. If a federal statute of general applicability is silent on whether it applies to Indian tribes, the general rule is that it will unless it touches an exclusive right of self-governance in a purely intramural matter, or meets one of the other two exceptions. Since it does not meet any of the exceptions, the

FTC Act is a statute of general applicability, and the Wyandotte Nation is not afforded sovereign immunity from the FTC Act.

B. *Tribal sovereign immunity should not apply to the FTC Act*

Laws of general applicability inherently waive a tribe's sovereign immunity when certain conditions are met pursuant to the *Tuscarora* Rule and the factors from *Couer d'Alene* and *Farris*. For example, in *Coeur d'Alene*, the court held that OSHA was applicable to the Coeur d'Alene entity because its operation of a tribal farm selling goods on the open market and in interstate commerce did not meet the exception of the law touching "exclusive rights of self-governance in purely intramural matters." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

Furthermore, tribal sovereign immunity is at its weakest when a tribe engages in commercial conduct off-reservation. *San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Board*, 475 F.3d 1306, 1312-13 (D.C. Cir. 2007) (citing *Mescarlero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). The Wyandotte Nation did just that in operating a "one-stop-shop" business providing off-reservation customer/borrower leads, qualifying the leads, buying defaulted, off-reservation consumer loans to sell to third party collectors, and receiving payments from the Receivership Defendant. Therefore, any claim Wyandotte Nation has for tribal sovereign immunity from the FTC Act is, at best, at its weakest.

Wyandotte Nation does not argue that it is excepted from the FTC Act because the FTC Act is a law that touches "exclusive rights of self-governance in purely intramural matters," nor does it argue that the application of the FTC Act would abrogate rights guaranteed by Indian treaties; rather, it simply argues that the FTC Act is not

generally applicable, and, even if it were, it does not apply to them because of its tribal immunity as a "special Indian right," citing *Fond du Lac Heavy Equip. & Const. Co., Inc.* as support.

The court in *Fond du Lac* outlines the rule for special Indian rights. The court cited the Supreme Court's general rule that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." *E.E.O.C. v. Fond du Lac Heavy Equip. and Const. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960)). The court then cited *Winnebago Tribe of Nebraska* for the proposition that "the general rule in *Tuscarora* . . . does not apply when the interest sought to be affected is *a specific right reserved to the Indians*." *Id.* (citing *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005 (8th Cir. 1976)). The court then stated:

> Specific Indian rights will not be deemed to have been abrogated or limited absent a "clear and plain" congressional intent. *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 2219, 90 L.Ed.2d 767 (1986) (citations omitted); *Winnebago Tribe*, 542 F.2d at 1005 (citations omitted). A clear and plain intent may be demonstrated by an "express declaration" in the statute, by the "legislative history," and by "surrounding circumstances." *Dion*, 476 U.S. at 739, 106 S.Ct. at 2220.

Id.

In *Fond du Lac*, the court held that the federal statute at issue, the Age Discrimination in Employment Act ("**ADEA**") as enforced by the U.S. Equal Employment Opportunity Commission ("**EEOC**"), does not apply to the "narrow facts of this case" because the dispute is strictly an internal matter and "the tribe's specific right of self-government would be affected." *Id.* at 249, 251. The dispute in *Fond du Lac*, arising from a tribal employer refusing to hire a tribal member based on his age, involved

a strictly internal matter as it was between a member of the Fond du Lac Bank of Lake Superior Chippewa Tribe and an employer of the same tribe that only occasionally did work off the reservation land. *Id.* at 249. Therefore, the court determined that the ADEA, though generally applicable, did not apply to the tribe because it met the exception of the law touching "exclusive rights of self-governance in purely intramural matters." *Id.*

The Oppositions attempt to leverage the holding in *Fond du Lac* to support its special Indian right, which is presumably the right to tribal sovereign immunity. However, *Fond du Lac* involves the special Indian right of self-governance over a purely internal matter. The Motion for Turnover, in contrast, involves a business operating in service of consumers predominantly, if not completely, off-reservation. Furthermore, the holding in *Fond du Lac* regards a tribe's dealings with a tribe member; not a tribe's commercial dealings with non-Indians. *In re Nat'l Cattle Cong.*, 247 B.R. 259, 266 (Bankr. N.D. Iowa 2000). A tribe's dealings with non-Indians are not "matters dealing with the tribe's right to self-governance." *Id.* (citing *Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe*, 166 F.3d 1126, 1129 (11th Cir. 1999). Therefore, the holding in *Fond du Lac* does not provide a basis for the court to hold that the Wyandotte Nation has tribal sovereign immunity from the FTC Act.

C. *Cases preventing enforcement of statutes of general applicability are distinguishable*

Wyandotte Nation also cites *In re Nat'l Cattle Congress* for the proposition that a federal statute can be generally applicable to a tribe but unenforceable as to the tribe based on sovereign immunity. The bankruptcy court in *In re Nat'l Cattle Congress* held that, despite the general applicability of the Bankruptcy Code to Indian tribes, Indian tribes enjoy immunity from suit under the Bankruptcy Code. *In re Nat'l Cattle Cong.*,

247 B.R. at 267. However, the court's holding is specific to the Bankruptcy Code and should therefore be read narrowly as such. The court reasoned that the Bankruptcy Code specifically addresses entities whose sovereign immunity under the Bankruptcy Code is abrogated in 11 U.S.C. § 106, which abrogates the sovereign immunity of certain "governmental units." *Id*. at 266.

The Bankruptcy Code specifically defines "governmental units" to include States and other entities; however, it does not specifically include Indian tribes. *Id.* As such, the court held that Congress "has not unequivocally abrogated Wyandotte Nation's sovereign immunity to suit under the Bankruptcy Code." *Id.* at 267; *cf. Current Application of the Tribal Immunity Doctrine—Congressional Abrogation*, American Indian Law Deskbook, § 7.2 (May 2015) (*citing Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1058 (9th Cir. 2004) (holding that Indian tribes are "domestic governments" and are "therefore subject to the express abrogation of sovereign immunity in 11 U.S.C.A. § 106(a). The FTC Act does not specifically address abrogation of sovereign immunity but is instead a statute of general applicability; thus, the holding in *In re Nat'l Cattle Congress* is inapplicable here.

The Wyandotte Nation repeatedly asserts tribal sovereign immunity on the basis that the FTC Act does not expressly abrogate tribal sovereign immunity. However, the FTC Act is a statute of general applicability, and therefore the Act does not have to expressly abrogate tribal sovereign immunity. Tribal sovereign immunity is not absolute as to the federal government. *N.R.L.B. v. Fortune Bay Resort Casino*, 688 F. Supp.2d 858, 874 (D. Minn. 2010) (citing *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987); *see also Quileute Indian Tribe v. Babbit*, 18 F.3d

1456, 1459 (9th Cir. 1994) ("[T]ribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers.")).

The Wyandotte Nation cites *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.* for the proposition that tribal sovereign immunity is an absolute bar to suit. However, (1) *Kiowa* creates a standard for the applicability of substantive state laws to Indian tribes, and (2) the holding in *Kiowa* is narrow, as the Court simply held:

> Tribes enjoy immunity from suits *on contracts*, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa Tribe of Oklahoma v. Mfg. Tech, Inc., 523 U.S. 751, 760 (1998) (emphasis added). The court in *Hollynn D'Lil* distinguished *Kiowa*, holding that it will not extend the doctrine of tribal sovereign immunity to all non-contractual off-reservation conduct. *Hollynn D'Lil v. Cher-Ae Heights Indian Cmty. of the Trinidad Rancheria*, 2002 WL 33942761, *7-8 (N.D. Cal. Mar. 11, 2002).

In his dissent in *Shinnecock Indian Nation*, Judge Peter W. Hall succinctly encapsulates the narrowness of the Court's holding in *Kiowa*, stating:

> In sum, prior to *Kiowa*, it could be fairly said that, unless Congress dictated otherwise, a state could enforce its non-discriminatory laws against tribal activities occurring beyond the bounds of the reservation, so long as such activities were not intimately related to tribal self-governance. If, on the other hand, the state or a private party sought to enforce its laws or contractual rights on tribal lands, it needed to have congressional or tribal waiver of sovereign immunity. *Kiowa*, limited to the facts on which its holding rests, is not to the contrary: the party that sought to enforce a contract—that arguably involved on-reservation conduct because it was executed on the reservation—was barred from suing the tribe for breach of contract because the tribe had not waived its tribal sovereign immunity. *Id.* at 760, 118 S.Ct. 1700. *Kiowa's* broader sweeping pronouncements beyond those necessary to resolve the issue in dispute in that case—i.e., that a tribe's sovereign immunity from suit is a

> separate concept from general sovereign immunity over a tribe's lands and issues of self-governance and that the only way to overcome this distinct type of sovereign immunity from suit is to obtain congressional or tribal waiver—were unnecessary to the Court's holding. In a word, they are dicta.
>
> In the case before us, the state and the town are seeking to enforce their laws against the tribe's off-reservation commercial activities. For the plaintiffs to be able to do so, there is no need for a congressional or tribal waiver of sovereign immunity. As the tribe has not shown and cannot show that Congress has expressly forbidden the exercise of state and local authority at issue here, in my view tribal sovereign immunity does not bar the instant actions against the tribe.

New York v. Shinnecock Indian Nation, 686 F3d 133, 155-56 (2nd Cir. 2012).

As noted in Judge Hall's dissent, prior to *Kiowa*, the Court's holding in *Mescalero*, which is still good law, determined the "attendant need for congressional or tribal waiver in order to overcome [tribal sovereign immunity] depended on the answers to the following questions:"

> (1) whether the tribal conduct at issue involved self-governmental or commercial activities; and (2) if the conduct involved commercial activities, whether those activities were occurring on or off the tribe's reservation. *Mescalero Apache Tribe v. Jones ("Mescalero")*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). If the tribe's activities involved either (a) matters of self-government, whether occurring on- or off-reservation or (b) on-reservation commercial conduct, then congressional or tribal waiver of tribal sovereign immunity was necessary to be able to assert regulatory control over and to pursue an action against the tribe with respect to that activity. *Id.* at 148, 93 S.Ct. 1267. If, however, the tribe engaged in off-reservation commercial activities, then a state had the authority to enforce its laws against a tribe operating outside the boundaries of its reservations for all purposes unless Congress "expressly forbade it." *Id*. at 148–51, 93 S.Ct. 1267.

Id. at 148 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). Judge Hall then noted that *Kiowa* not only involved a contract, but that the contract in *Kiowa* included a clause indicating to the lender that the Tribe/borrower preserved its right to later claim tribal sovereign immunity; thus, the lender was on notice of the

tribe/borrower's potential claim and could have negotiated said clause out of the contract. *Id.*

Lastly, Judge Hall identifies that the three cases from which *Kiowa* derives support for its holding that "an Indian tribe is subject to suit only if it has waived its immunity or Congress has authorized suit" were cases in which "congressional or tribal waiver was necessary because the conduct at issue in each case involved matters of tribal self-governance conduct at issue in each case involved matters of tribal self-governance over either its tribal members or its tribal land." *Id.* at 149. He then stated, "[i]n other words, by their very nature the cases cited do not support the proposition that such waiver or congressional authorization was necessary in every case involving an Indian tribe because those three cases involved only issues of self-governance and did not involve circumstances where the tribe's commercial activities were occurring off-reservation." *Id.* at 149-50. Ultimately, *Kiowa* should be read as narrowly as it is written, and the Court should apply the holding in *Mescalero* to the Motion for Turnover. Therefore, since the Wyandotte Nation engaged in off-reservation commercial activities (including, but not limited to, providing consumer/borrower leads, qualifying the leads, providing a loan management software system to off-reservation, online payday lenders, buying defaulted consumer loans to sell to third party collectors—all off-reservation, and receiving payment from the Receivership Defendants via off-reservation banks and financial institutions), Wyandotte Nation's claim for sovereign immunity is without merit and the FTC Act should apply, as Congress did not expressly forbid its application against Indian tribes.

Similarly, the Wyandotte Nation cites *American Indian Agricultural Credit*

Consortium, Inc. for the proposition that tribal sovereign immunity exists as a jurisdictional bar to bringing suit against an Indian tribe "irrespective of the nature of the lawsuit." The court's quote that tribal sovereign immunity is a bar to bringing suit against an Indian tribe "irrespective of the nature of the lawsuit" is mere dicta. *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). *American Indian Agricultural Credit Consortium, Inc.* is yet another case in which the court rejects the district court's "conclusion that the sovereign immunity of an Indian nation need not be expressly waived, but can be waived by implication, *in contract actions*." *Id.* (emphasis added). Therefore, the holding in *American Indian Agricultural Credit Consortium, Inc.* has no bearing on a case involving a non-contractual off-reservation dispute; therefore, it does not support Wyandotte Nation's claim for sovereign immunity.

D. *The Receiver is an officer of the Court tasked with preventing irreparable loss, damage, or injury to consumers or to the creditors of the Receivership Defendants. As such, Receiver must bring the Motion for Turnover to adequately serve the purpose of his appointment.*

The Receiver is an officer of the Court. The Receiver's authority is provided to him as an extension of the Court's authority over the issues and the parties. The Court has the authority to compel a non-party to turn over all proceeds of a fraud to the receiver to preserve the status quo for the benefit of defrauded consumers. *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 103, 1022 (N.D. Ind. 2000). Furthermore, the court may order non-parties to turn over receivership assets to the Receiver. *FTC v. Neiswonger*, 2009 WL 2998356, *3 (E.D. Mo. Sept. 2009). Moving against the Wyandotte Nation for a turnover of proceeds, the Receiver is acting as an officer of the court, in the interest of the defrauded creditors and consumers.

Wyandotte Nation does not cite any cases holding that the Receiver does not have the authority to do so or that the court does not have the authority to grant the Receiver's Motion for Turnover. Because the Receiver is an officer of the Court, the Receiver has the authority over the *issue* of pursuing proceeds from the fraudulent scheme to "prevent any irreparable loss, damage or injury to consumers or to the creditors of the Receivership Defendants. . . ." (Doc. 34). Having authority over the issue, which arises under the FTC Act, the Receiver must be permitted—under the FTC Act, the Court's prior orders, and the Court's inherent powers—to effectuate the tasks that the Court appointed him. If the Court determines the Receiver does not currently have this authority, the Court should extend the law to allow him such authority in circumstances in which a fraudulent actor utilizes an Indian tribe to perpetuate a fraud in a rent-a-tribe scenario such that beneficiaries of the fraud may be compelled to turnover proceeds attained from the fraud to a Receiver on behalf of the innocent victims.

Conclusion

Tribal sovereign immunity is a judge-made, prophylactic rule designed to prevent encroachment upon the rights of tribal nations. It has been developed and altered through decades of opinions promoting the public policy of preserving the autonomy of tribal self-governance, commercial activities on reservation land, the bargained-for rights of Indian treaties, and the intent of legislators. Throughout the history of jurisprudence regarding tribal sovereign immunity, no court has permitted a fraudulent actor to utilize an Indian Tribe for the purpose of invoking tribal sovereign immunity as a shield from accountability for its participation in, and perpetuation of, a fraudulent scheme.

The purpose of the FTC Act is to prevent "unfair or deceptive acts or practices in

commerce." 15 U.S.C. § 45. Pursuant to *AMG Services* and *Coeur d'Alene*, the FTC Act is a statute of general applicability that is applicable to Indian Tribes, as none of the *Coeur d'Alene* exceptions are met. Tribal sovereign immunity does not apply because *Kiowa* and similar cases are inapplicable. As such, the FTC Act waives the Wyandotte Nation's claim to sovereign immunity, if any, pursuant to the *Tuscarora Rule* that a generally applicable statute includes Indians and their property interests unless expressly stated otherwise—the FTC Act does not expressly state otherwise—and pursuant to *Mescalero*.

While the FTC serves the purpose of enforcing provisions of the FTC Act, the Receiver acts as an officer of the Court to preserve the assets of the Receivership Defendants for the benefit of the defrauded creditors and consumers. The Wyandotte Nation cites no authority disallowing the Receiver from pursuing the Motion for Turnover. The Receiver has authority over the *issue* of pursuing proceeds from the fraudulent scheme, which arises under the FTC Act. Therefore, the Receiver must have authority to utilize the FTC Act to adequately prevent any irreparable loss, damage, or injury to consumers or to the creditors of the Receivership Defendants by pursuing a Motion for Turnover against Wyandotte Nation, a recipient of the proceeds of the fraudulent scheme.

Dated: April 29, 2016 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April 2016, I electronically filed the foregoing document, with the Clerk of the Court for the Western District of Missouri by using the CM/ECF system which will send a notice of electronic filing to all parties participating in the Court's CM/ECF system.

I further certify that on this 29th day of April 2016, I transmitted a copy of the above and foregoing via electronic mail to the following counsel not presently participating in the Court's CM/ECF system in this case:

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