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2 Also before the court is the Tribal Chartered Defendants' Motion for Legal Determination as to  
3 Phase 1(B) of the Court's December 27, 2012, Bifurcation Of Proceedings Order. (#373)<sup>2</sup>. Defendant  
4 LittleAxe filed a Cross-Motion for Legal Determination of Phase 1(B) Issues of the Court's December  
5 27, 2012, Bifurcation Proceedings Order. (#380). Defendant Campbell filed a Joinder to the Tribal  
6 Chartered Defendants' Motion (#373). (#387). The FTC filed an Opposition to the Motion (#373) and  
7 Cross-Motion (#380). (#392). The Tribal Chartered Defendants filed a Reply (#401), and defendant  
8 LittleAxe filed a Reply (#406).

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10 Also before the court is the FTC's Motion to Strike Improper Sur-Replies. (#407). The Tribal  
11 Chartered Defendants filed an Opposition (#416) and defendant LittleAxe filed an Opposition (#420).  
12 The FTC filed a Reply (#434).

### 13 INTRODUCTION

14 On December 27, 2012, the court signed the parties' stipulation for preliminary injunction and  
15 bifurcation. (#296). The stipulation provides for the bifurcation of the proceedings as follows: (1)  
16 Phase 1 - Liability, and (2) Phase 2 - Common Enterprise Claim, Individual Liability, and Monetary  
17 Relief. *Id.* During Phase 1, the court is to adjudicate the merits of several of the FTC claims and "also  
18 adjudicate through motion practice the legal question of whether, and to what extent, the FTC has  
19 authority over Indian tribes whose sovereignty is asserted in this case and/or AMG Services, Inc., MNE  
20 Services, Inc., Red Cedar Services, Inc., and SFS, Inc. for alleged violations of the FTC Act." *Id.*

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22 Defendants' initial responses to the FTC's complaint (#1) were motions to dismiss and a motion  
23 for protective order to stay discovery based on the assertion that the FTC does not have jurisdiction over  
24 any of the defendants. (#100, #101, #103, #104, #105, #107, #108, #109, and #134). Defendants'  
25 analysis underling this assertion rests on alternative arguments:

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<sup>2</sup> The Tribal Chartered Defendants filed a Memorandum of Points and Authorities in Support of the Motion (#373). (#374).  
When discussing any arguments contained in the memorandum (#374) or the motion (#373), the court will refer to (#373).

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2 1. Since the FTC does not have authority to regulate Indian Tribes, it may not regulate the  
3 lending activities of Arms of Indian Tribes and employees of Arms of Indian Tribes; or

4 2. Since the Tribal Chartered Defendants are not "Corporations" for purposes of the Federal  
5 Trade Commission Act (hereinafter "FTC Act") 15 U.S.C. § 53, the FTC does not have authority to  
6 regulate the lending activities of the Tribal Chartered Defendants or their employees.

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8 Defendants' affirmative defenses presently at issue (with the exception of defendant LittleAxe's  
9 53-55 affirmative defenses, discussed below) contain language similar to the following: Plaintiff lacks  
10 authority to bring action against defendant under Section 13(b) of the FTC Act, 15 U.S.C. §53(b), and,  
11 thus, Truth in Lending Act (hereinafter "TILA") and Electronic Fund Transfer Act (hereinafter  
12 "EFTA"), because either defendant is an arm of the Indian tribe, defendant was acting on behalf a Tribal  
13 Chartered Defendant, or defendant was acting as a tribal officer of an Indian Tribe. (#310-312 and  
14 #314-319). The court finds that these affirmative defenses encompass the two alternative arguments  
15 outlined above. The Tribal Chartered Defendants addressed both of these arguments in their opposition  
16 to the motion (#355), and the FTC did not argue to the court that the "corporation" argument was not  
17 within the affirmative defenses asserted (#391). The court will address both arguments herein.

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19 Having reviewed all the points and authorities submitted by the parties on these issues, the court  
20 concludes:

21 1. The FTC does have authority under the FTC Act to regulate Indian Tribes, Arms of  
22 Indian Tribes, employees of Arms of Indian Tribes and contractors<sup>3</sup> of Arms of Indian Tribes with  
23 regard to the subject matter of this litigation; and

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25 <sup>3</sup> The defendants admit that the FTC has authority to regulate entities which contract with Arms of the Indian Tribes, and stated in their objections to the Undersigned Magistrate Judge's August 28, 2012, order, that "[t]he Tribal Entities have not—and do not—assert that the FTC's lack of jurisdiction extends to any contractor working with the Tribal Entities or anyone who has a "business relationship" with the Tribal Entities." (#165).



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2 tribal business and have repeatedly argued that the FTC (and, by extension, the entire federal  
3 government) is powerless to regulate them,” “they have never offered any proof that Congress intended  
4 any tribal businesses to be entirely exempt from federal law enforcement.” *Id.*

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6 **A. Appropriate Standard**

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

14 **B. FTC’s Arguments**

15 The FTC asserts that “[i]t is beyond reasonable dispute that federal statutes of general  
16 applicability that are silent on tribal issues presumptively apply to tribes and tribal businesses.”<sup>5</sup> *Id.*  
17 The FTC argues that the defendants have reacted to the numerous binding precedent supporting that fact  
18 in two ways: (1) “advanc[ing] a series of contradictory arguments in an  
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2 The FTC discusses several inconsistencies (1) in the way the defendants categorize themselves,  
3 (2) in their arguments regarding the applicability of federal laws to them, (3) as to whether non-tribal  
4 partners are also allegedly exempt from FTC regulation, (4) regarding whether sovereign immunity  
5 applies, and (5) regarding whether they are purportedly immune from the FTC’s TILA and EFTA  
6 claims. *Id.* The court will address several of these issues, as well as the relevant case law, below.

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8 **1. The FTC Act’s Applicability to Defendants**

9 The FTC asserts that its argument in the motion for partial summary judgment is “a purely legal  
10 one,” and that “[t]his question of statutory interpretation may be decided entirely on the law –  
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2 categories of persons).” *Id.* The FTC relies on several cases for the position “that statutes of general  
3 applicability that are silent on tribal issues presumptively apply to tribes and tribal businesses,”  
4 including *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) and *Donovan v.*  
5 *Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).<sup>7</sup> *Id.*

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7 The court in *Donovan* held that “[a] federal statute of general applicability that is silent on the  
8 issue of applicability to Indian tribes will not apply to them if: (1) the law touches ‘exclusive rights of  
9 self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate  
10 rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means  
11 that Congress intended [the law] not to apply to Indians on their reservations ....’” 751 F.2d at 1116.  
12 The FTC asserts that despite having exceptions, the FTC Act is one of general applicability, as (a) the  
13 Ninth Circuit held in *Chapa De* that a law of general applicability for purposes of the *Donovan* rule may  
14 contain some exemptions without compromising its status as “generally applicable,” 316 F.3d at 998,  
15 and (b) the presence of some explicit exemptions for certain types of businesses but no corresponding  
16 exemption for tribal businesses defeats, rather than supports, Defendants’ argument to now create a  
17 judicial exemption for tribal businesses, *See Del Webb Communities, Inc.*, 2009 WL 3053709, at \*9  
18 (applying *expressio unius est exclusio alterius canon*).” *Id.*

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22 <sup>7</sup> The FTC also cites to *N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998-99(9th Cir. 2003) (“[W]e have  
23 explicitly adhered to the *Tuscarora* rule”); *Solis v. Matheson*, 563 F.3d 425, 434 (9th Cir. 2009) (applying *Fed. Power*  
24 *Comm’n* and *Donovan* and holding that the Fair Labor Standards Act applies to retail store on tribal trust land); *Lumber*  
25 *Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991) (applying *Donovan* and  
holding that the Employee Retirement Income Security Act applies to tribally operated sawmill); *U.S. Dep’t of Labor v.*  
*Occupational Safety & Health Review Comm’n*, 935 F.2d 182, 184 (9th Cir. 1991) (applying *Donovan* and holding that the  
Occupational Safety and Health Act applies to tribally operated sawmill); *Chao v. Spokane Tribe of Indians*, No.  
CV-07-0354-CI, 2008 WL 4443821, at \*1-2 (E.D. Wash. Sept. 24, 2008) (applying *Donovan* and holding that Fair Labor  
Standards Act applies to tribally owned and operated casino); *Hollynn D’Lil v. Cher-Ae Heights Indian Cmty. of the Trinidad*  
*Rancheria*, No. C 01-1638 THE, 2002 WL 33942761, at \*3 (N.D. Cal. Mar. 11, 2002) (applying *Donovan* and holding that  
Americans with Disabilities Act applies to inn owned and operated by tribe).

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2 The FTC argues that the defendants have failed to demonstrate that they meet any of the  
3 exceptions, and that “[b]ecause the FTC Act is a law of general applicability making no exception for  
4 tribes, it must apply to [d]efendants’ businesses.” *Id.*

5 The FTC asserts that the defendants’ alleged “arm of the tribe” status, even if proven, “applies  
6 exclusively to states’ and private litigants’ attempts to override tribal sovereign immunity.” *Id.* The  
7 FTC distinguished several cases relied upon by defendants, including *Kiowa Tribe of Oklahoma v. Mfg.*  
8 *Technologies, Inc.*, 523 U.S. 751 (1998), which involved a private plaintiff and issues of sovereign  
9 immunity (the Ninth Circuit in *Chapa De*, 316 F.3d at 1000, found *Kiowa* not applicable in a federal  
10 government case for that reason), and *Inyo County, Cal. v. Paiute- Shoshone Indians of the Bishop*  
11 *Cnty. of the Bishop Colony*, 538 U.S. 701 (2003), which involved a tribe’s attempt to sue a state. *Id.*

12 The FTC’s final argument is that the defendants cannot claim any immunity under TILA or  
13 EFTA, “because each of those statutes has language conferring authority to the FTC to enforce those  
14 statutes under the FTC Act, *irrespective of any jurisdiction limitations in the FTC Act.*” *Id.* (emphasis  
15 provided by FTC). The FTC states that “Section 108(c) of TILA sets forth the FTC’s power to enforce  
16 TILA: “All of the functions and powers of the [FTC] under the [FTC] Act are available to the  
17 [Commission] to enforce compliance by any person . . . irrespective of whether that person is engaged in  
18 commerce or meets any other jurisdictional tests under the [FTC] Act.” 15 U.S.C. § 1607(c) (emphasis  
19 added).” *Id.* The FTC also states that “[t]he Commission’s power to enforce EFTA is similarly  
20 unfettered by any FTC Act limitations, even if such limitations were present here. *See* 15 U.S.C. §  
21 1693o(c).” *Id.*

22 The FTC asks this court to grant summary judgment to dismiss the defendants’ Tribal Defenses  
23 that the FTC lacks authority under the FTC Act to bring this action against the defendants. *Id.*



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**C. Tribal Chartered Defendants’ Opposition<sup>8</sup>**

The Tribal Chartered Defendants assert that the FTC bears the burden to establish the legal issue of whether the FTC Act applies to the Tribal Chartered Defendants, and that the FTC has not met its burden. (#355).

**1. Indian Tribes/Arms of the Tribes: “Persons, Partnerships, or Corporations”**

The Tribal Chartered Defendants argue that the FTC mistakenly asserts that they are “corporations” that Congress intended to regulate when it enacted the FTC Act in 1914, and that this presumption is false for the following reasons: (1) “the alleged presumption is derived from the FTC’s misinterpretation of dicta from the Supreme Court decision in *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)— a misinterpretation that is inconsistent with Supreme Court decisions both before and after *Tuscarora*,” (2) “even if the Court’s dicta in *Tuscarora* should be given the force of

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2 law, reveals that the FTC’s conclusory assertions are legally false (Doc. 39 at 12)— the tribal businesses  
3 do not fall within the Act’s rubric.” *Id.*

4 Pursuant to 15 U.S.C. § 44, a “corporation” is defined as including “any company, trust,  
5 so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to  
6 carry on business for its own profit or that of its members, and has shares of capital or capital stock or  
7 certificates of interest, and any company, trust, so-called Massachusetts trust, or association,  
8 incorporated or unincorporated, without shares of capital or capital stock or certificates of interest,  
9 except partnerships, which is organized to carry on business for its own profit or that of its members.”  
10 The Tribal Chartered Defendants argue that, “on its face,” this definition does *not* include tribal  
11 governmental subdivisions or sovereign entities, and that it “bears stark contrast to other statutes that  
12 differentiate between corporations and Indian tribes and their subdivisions.” *Id.*<sup>9</sup>

14 The Tribal Chartered Defendants also argue that “it is absolutely irrelevant that there is “no  
15 exception in the FTC Act for Indian tribes or tribal businesses,”” as the question is “whether the FTC  
16 Act purports to apply to tribal businesses *to begin with*,” and not whether an exception applies. *Id.*  
17 (emphasis in original). The Tribal Chartered Defendants contend that the Supreme Court “has reiterated  
18 that abrogation of Tribal rights by Congress “cannot be implied,” but must be “unequivocally  
19 expressed” (*Santa Clara Pueblo*, 436 U.S. at 58) in “explicit legislation” (*see Kiowa Tribe of Okla. v.*  
20 *Mfg. Techs.*, 523 U.S. 751, 756-59 (1998),” and argue that since the FTC Act does not explicitly include  
21 “Indian Tribes” within the definition of persons that can be sued under the Act, it was not Congress’  
22 intent to make the act applicable to Indian Tribes. *Id.*

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24 <sup>9</sup> The Tribal Chartered Defendants provide as an example 15 U.S.C. § 375 (10), which states that “[t]he term ‘person’ means  
25 an individual, corporation, company, association, firm, partnership, society, State government, local government, Indian tribal  
government, governmental organization of such a government, or joint stock company.” (#355). The Tribal Chartered  
Defendants also assert that Congress “has shown the ability to encompass tribal instrumentalities that take the form of  
corporations,” such as in 16 U.S.C. § 470bb(7), stating that “the term ‘person’ means an individual, corporation,...or any other  
private entity or any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of  
any State or political subdivision thereof.” *Id.*

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2 The Tribal Chartered Defendants take the position that “Congress clearly intends to enable  
3 Indian tribes to engage in business development in commercial markets,”<sup>10</sup> and that it would be  
4 “contrary to congressional policy...to abrogate the Tribe’s sovereignty because of the mere name that the  
5 tribe chose for its governmental business development entity.” *Id.* The Tribal Chartered Defendants  
6 also state that the tribes and the arms of the tribes are not “corporations” under the Act because they are  
7 “wholly unlike private corporations that Congress intended to be covered by the FTC Act.” Indian  
8 Tribes (1) are “distinct, independent *political* communities,”<sup>11</sup> (2) have the power to constitute and  
9 regulate its form of government,”<sup>12</sup> and (3) “have the power to tax and legislate — including the power  
10 to make criminal and civil laws, not otherwise preempted by federal law, and to administer justice.”<sup>13</sup>  
11 *Id.* Tribal Chartered Defendants argue that none of these characteristics are shared with private  
12 “corporations,” and were certainly not shared with corporations that existed in 1914 when Congress  
13 enacted the FTC Act. *Id.*<sup>14</sup>

15 The Tribal Chartered Defendants contend that history itself belies the FTC’s argument that  
16 Congress intended for the word “corporation” to include Tribes, as “the official federal policy toward  
17 Indians and Indian tribes was that of “civilization and assimilation”” when the Act was enacted, and the  
18 goal of the federal policy was to “was to end the tribe as a separate political and cultural unit . . . .” *Id.*  
19 (internal citations omitted). Twenty years *after* the enactment of the FTC Act, Congress enacted the  
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23 <sup>10</sup> See e.g., Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301, ET  
24 SEQ.; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)(describing Congressional intent in the Indian  
25 Reorganization Act, 25 U.S.C. §§ 461-479, to encourage and support tribal business development while freeing tribal  
business enterprises from bureaucratic control by the federal government of the details of those enterprises.). *Id.*

<sup>11</sup>*Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (emphasis added).

<sup>12</sup>*Santa Clara Pueblo*, 436 U.S. at 62-63.

<sup>13</sup>See, e.g., *Fisher v. Dist. Ct.*, 424 U.S. 382, 386 (1976); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198-200 (1985).

<sup>14</sup>The Tribal Chartered Defendants also assert that the “same argument applies with equal force to the FTC’s Truth in Lending Act (TILA) and Electronic Funds Transfer Act (EFTA) claims,” and argues that the FTC needs to decide whether it is bringing the TILA and EFTA claims under the FTC Act or not. *Id.*

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2 Indian Reorganization Act, “which, for the first time, encouraged tribes to reorganize their tribal  
3 governmental structures similar to those modern business corporations.” *Id* (citing *Cohen*, at 81).

4                   **2.       The Indian Law Canons of Construction**  
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### 3. Case Law: Statutes of General Applicability

The Tribal Chartered Defendants argue that the FTC’s motion relies on the “false presumption” that laws of general applicability apply to Indian tribes. (#355). They assert that the Supreme Court’s statement in *Tuscarora*, 362 U.S. at 116, that “it is now well settled by many decisions of this Court that a general statute in terms of applying to all persons includes Indians and their property interests,” is *dicta* and has been “widely acknowledged as *dicta*.”<sup>16</sup> *Id.* The Tribal Chartered Defendants argue that the statement also applied only to individual Indians, not sovereign Indian tribal governments or their instrumentalities. *Id.*

The Tribal Chartered Defendants also argue that the statement in *Donovan*, 751 F.2d at 1115, following *Tuscarora* and relied upon by the FTC that laws of general applicability are presumed to apply not just to individual Indians, but to sovereign Indian tribes, is *dicta*. *Id.* The Tribal Chartered Defendants contend that the court in *Donovan* did not even need to look to *Tuscarora* because the statute in that case, OSHA, “broadly defined entities covered by that statute as “any organized group of persons,” but then exempted certain governments, and not Indian tribes. *Id.*; *Donovan*, 751 F.2d at 1115. The FTC Act, however, does not contain this same broad language. *Id.*

The Tribal Chartered Defendants further argue that after *Donovan*, the Supreme Court applied the Indian canons of construction and concluded that “*statutes of general applicability at issue...do not apply to Indian tribes.*” *Id.* (emphasis provided by FTC)(citing *Wildenthal*, 2008 MICH. ST. L. REV. 547, 585; *see also Idaho v. United States*, 533 U.S. 262, 270, 272-79, 278-282 (2001) (determining that statehood act that failed to explicitly address Indian submerged lands did not function to transfer them to the state); *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176-77, 185, 202-08

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<sup>16</sup> The Tribal Chartered Defendants assert that “in the fifty-three years since deciding *Tuscarora*, the Supreme Court has never cited this passage at all,” and that “[b]y contrast, during those fifty-three years, the Supreme Court has on dozens of occasions reaffirmed the Indian law canons of construction noted above.” (#355)



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2                   **5. Tribal Charter Defendants' Alleged Admissions**

3                   The Tribal Chartered Defendants argue that the FTC's reliance on statements made by Tribal  
4 Chartered Defendants as "admissions" of the applicability of the FTC Act to Tribes and tribal entities is  
5 erroneous, as (1) "the issue of whether a particular federal statute applies to an Indian tribe may be a  
6 complicated legal issue," not one that a party can admit or deny, (2) the "admissions" were "isolated  
7 statements of Defendants or their counsel made in other proceedings in other jurisdictions involving  
8 different legal issues," (3) "Judicial admissions are limited in scope to factual matters otherwise  
9 requiring evidentiary proof, and are exclusive of legal theories and conclusions of law. *Glick v. White*  
10 *Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972); 6 Handbook of Fed. Evid. § 801:26 (7th ed.)," (4) the  
11 statements did not admit anything but that Congress has the *e t c* ~~to-4.6 relgued and trat CMNE~~ ~~and~~ ~~tribe~~ ~~FTC~~  
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2 does not extend to other persons not expressly exempt,” and (4) “[t]he remainder of footnote 40 contains  
3 only vague statements about tribal business partners, contractors or anyone who has a “business  
4 relationship” with the tribal defendants,” and the “FTC makes no comprehensible argument about how  
5 its comments made only in a footnote show grounds for summary judgment against LittleAxe.” *Id.*

6 Defendant LittleAxe asks this court to deny the FTC’s motion “for failure to show any grounds  
7 for summary judgment as to LittleAxe.” *Id.*

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9 **E. Joint Opposition**

10 Defendants AMG Capital Management, LLC, Level 5 Motorsports, LLC, Black Creek Capital  
11 Corporation, Broadmoor Capital Partners, LLC, LeadFlash Consulting, LLC, Scott Tucker, and Blaine  
12 Tucker (hereinafter “Tucker Defendants”) filed a joint opposition to the FTC’s amended motion for  
13 partial summary judgment. (#358). The Tucker Defendants assert that they incorporate by reference the  
14 Tribal Chartered Defendants’ opposition (#355) to the FTC’s motion (#338), and re-argue the Tribal  
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2 simply sue the tribal entity employees” or any number of the tribes’ officials and employees (citing  
3 *Cook*, 548 F.3d at 727), (4) the FTC’s argument “rests upon a fundamental misunderstanding about the  
4 nature of the Tribal Defendants’ argument,” as the defendants are not claiming that the Tribes are  
5 explicitly *exempt* from the FTC Act, rather the Act does not cover Tribes in the first place, (5) the  
6 Eighth Circuit in *Cnty v. Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1021 (8th Cir.  
7 1969) held that “the distinction made in the Act between corporations acting for profit and nonprofit  
8 corporations would be erased if all the Commission had to do, in order to obtain jurisdiction, was to  
9 name the officers, directors and other personnel of a nonprofit corporation as the respondents,” (6) the  
10 two cases relied upon by the FTC do not deal with Indian Tribes or their employees and concerned  
11 “arm-length agents,” rather than actual officers and employees of the Tribal Chartered Defendants, and  
12 (7) the FTC can point to no Congressional intent to preclude a tribal entities’ officials and employees  
13 from claiming the tribal entities’ own exemptions. *Id.*

15 The Tucker Defendants also argue that the FTC is trying to “short circuit the judicial process” by  
16 depriving the defendants of their “rightful opportunity to present valid affirmative defenses.” *Id.* The  
17 Tucker Defendants contend that the “question of agency, being factual in nature, is inappropriate for  
18 resolution on summary judgment,” and that the FTC’s “attempt to deprive the Tucker Defendants of yet  
19 another viable defense at the pleading stage should be denied.” *Id.* (citing *American Cas. Co. v. Krieger*,  
20 181 F.3d 113, 1121 (9th Cir. 1999)(unless only one conclusion may be drawn, existence of an ostensible  
21 agency is a question of fact that should not be decided on summary judgment). The Tucker Defendants  
22 argue that they should be able to prove their agency relationship with the Tribal Chartered Defendants  
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2 **F. Don E. Brady's Opposition**

3 Defendant Brady's opposition "formally adopts the arguments and authorities set forth by the  
4 Tribal [Chartered] Defendants," and addresses the FTC's argument contained in the footnote regarding  
5 the non-Tribal Chartered Defendants being subject to the FTC's authority even if the Tribal Chartered  
6 Defendants are not. (#359). Defendant Brady contends that it is undisputed between all parties that he  
7 was an officer of the Miami Tribe of Oklahoma and its related lending entities during the relevant time  
8 period. *Id.*<sup>21</sup> Defendant Brady asserts that the FTC has not met its burden of establishing both that no  
9 genuine issue of material fact exists and that the FTC has jurisdiction. *Id.*<sup>22</sup>  
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11 Defendant Brady asserts that the FTC cites to one case to support its position, and that this case  
12 is not relevant to the issue of law presented in Brady's affirmative defense. *Id.* The FTC relied on *FTC*  
13 *v. CompuCredit Corporation*, 2008 WL 8762850 (N.D. Ga. Oct. 8, 2008), where the defendant moved  
14 to dismiss the FTC's complaint based on the FTC's lack of authority over the defendant because it  
15 performed bank services as if it were the bank itself. The court held that "'non-bank entities performing  
16 contractual services for banks are not within the enumerated exemptions in the FTC Act," and that an  
17 entity's "exemption from FTC jurisdiction is based on that entity's status, not its activity."  
18 *CompuCredit Corp.*, 2008 WL 8762850 \* 4. Defendant Brady argues that since the court *did not*  
19 address whether an entity's exempt status extend to its officers, and the case dealt with an outside entity  
20 working with the exempt entity trying to gain the exempt status, the case is inapplicable here. (#359).  
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22 Brady also asserts that the FTC cannot rely on a prior briefing from the Tribal Chartered  
23 Defendants where they stated that the FTC's lack of jurisdiction does not "extend to any contractor  
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25 <sup>21</sup>Brady Answer, Doc. No. 317 ¶ 13 (admits that Brady was the CEO of AMG Services, Inc); FTC Exhibit 3 ¶ 2 (attached to its Amended Motion for Partial Summary Judgment, Doc. No. 338) (Brady employed as the CEO of Miami Nation Enterprises).

<sup>22</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). *See, e.g., Cmty. Blood Bank of Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011, 1015 (8th Cir. 1969) (citations omitted).

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2 working with the Tribal entities or anyone who has a business relationship with the Tribal Entities,” as  
3 the Tribal Chartered Defendants’ statement “merely clarified that the defendant are not claiming that  
4 anyone with any connection whatsoever to a tribe is outside the jurisdiction of the FTC.” *Id.*

5 Defendant Brady argues that he has not admitted that the FTC has jurisdiction over him as the  
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2 an officer of the Tribe as a defendant, rather than the sovereign entity.”<sup>25</sup> *Id.* Defendant Brady also  
3 relies upon *Miller v. Wright*,  
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2 burden in “establishing its jurisdiction over the Miami Tribe of Oklahoma, its related lending enterprises  
3 and its officers and employees.” *Id.*

#### 4 **G. FTC’s Reply**

5 The FTC addresses the Tribal Chartered Defendants’ status as “corporations” that exist for  
6 profit, and asserts that although “the [Tribal Chartered] Defendants attempt to distance themselves from  
7 some of th[eir] self-authored facts (Lending Defs.’ Mem. at 2-3.),” “they make no effort to explain their  
8 previous admissions to financial institutions and to this Court that they exist “for profit.”” (#391). The  
9 FTC next addresses the burden with regard to jurisdiction, and argues that the defendants improperly  
10 place the burden on the FTC, and that “the Court has already, in accord with precedent, assigned this  
11 burden to the Lending Defendants.” *Id.* (citing #153 wherein the court stated “the burden must rest on  
12 the Tribal-Chartered Entity to prove that it is in fact sufficiently an arm of a Native American Tribe to  
13 fall outside the enforcement jurisdiction of the FTC,” and *NLRB v. Kentucky River Community Care,*  
14 *Inc.*, 532 U.S. 706, 710 (2001) (person claiming exemption bears burden)).

##### 16 **1. *Donovan* and Ninth Circuit Precedent**

17 The FTC argues that the defendants’ request that this court disregard *Donovan* and other Ninth  
18 Circuit precedent is improper. (#391). The FTC contends that the Ninth Circuit declared in *Donovan*  
19 that federal statutes “presumptively apply to tribal businesses,” when it stated that “[m]any of our  
20 decisions have upheld the application of general federal laws to Indian tribes; not one has held that an  
21 otherwise applicable statute should be interpreted to exclude Indians,” and that “we have not adopted  
22 the proposition that Indian tribes are subject only to those laws of the United States expressly made  
23 applicable to them.” *Id.* (*Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985)).

24 The FTC also cites to *United States v. Mitchell*, 502 F.3d 931, 947 (9th Cir. 2007), where the  
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2 defendants' attempt to use a "law professor's (incorrect) view that the case was wrongly decided" to  
3 overrule *Donovan*. *Id.*

4 The FTC asserts that this court should reject the defendants' arguments regarding *Donovan's*  
5 incompatibility with the canons, as the court in *N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316  
6 F.3d 995, 998 (9th Cir. 2003) did when it stated that:

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8 Chapa-De also relies on special canons of construction, which require that statutes be  
9 construed for the benefit of Indian interests, in support of its position that even a statute  
10 that is generally applicable does not apply to Indian tribes when the statute is silent on  
11 the subject. This reliance is misplaced for the same reason. To accept Chapa-De's  
12 position would be effectively to overrule [*Donovan v.*] *Coeur d'Alene*, which, of course,  
13 this panel cannot do.

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15 *Id.* The FTC also asserts that *Chapa De* "expressly rejected the [Tribal Chartered] Defendants'  
16 arguments that cases such as *Kiowa Tribe* (Lending Defs.' Mem. at 7, 7 n.5) supposedly conflict with  
17 *Donovan*. 316 F.3d at 1002 ("*Kiowa Tribe* involved the question of sovereign immunity, which is  
18 different from whether a statute applies.")" *Id.* The FTC's final argument is that the court should reject  
19 the defendants' argument that the presence of express language in other dissimilar statutes addressing  
20 tribes upsets *Donovan's* presumption that silent statutes presumptively apply to tribes, as many of the  
21 statutes cited to by the defendants "have particular application to or purpose regarding tribes and none  
22 are statutes broadly governing general commercia  
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2 the exemptions do not compromise the conclusion that the FTC Act is one of “general applicability.”  
3 *Id.* The FTC relies on the court in *Chapa De* to support its conclusion, where the court held that  
4 “exemptions alone are not dispositive, “[t]he issue is whether the statute is generally applicable, not  
5 whether it is universally applicable,” and “[w]e have previously held that other federal statutes that  
6 contain exemptions are nevertheless generally applicable.” *Id.* (quoting *Chapa De*, 316 F.3d at 998).

7  
8 The FTC also asserts that the case of *Chapa De* is instructive here with regard to the defendants’  
9 argument that the FTC Act does not apply to corporations that are wholly owned by, or constitute  
10 subdivisions of, tribes, as the court in *Chapa De* specifically found that “the NLRA applied to a tribal  
11 health-care business organized and operated by a federally-recognized tribe,” despite the fact that the  
12 NLRA expressly states that the definition of “employer” under the act does not include “any wholly  
13 owned Government corporation” or any “State or political subdivision thereof.” *Id.* (citing *Chapa De*,  
14 316 F.3d 997-98); 29 U.S.C. § 152(a)(2).

15 The FTC also distinguishes *Miller* relied upon by the defendants for their argument against  
16 “general applicability,” and states that the critical difference is that *Miller* was brought by private  
17 citizens, as (1) “when it comes to tribes’ amenability to suit, this Court itself has recognized the material  
18 difference in private versus federal government actions. *U.S. ex rel. Howard v. Shoshone Paiute Tribes,*  
19 *Duck Valley Indian Reservation*, No. 2:10–CV–01890–GMN, 2012 WL 6725682, at \*2 n.3 (D. Nev.  
20 Dec. 26, 2012) (Navarro, J.),” (2) “because *Miller* was brought by a private plaintiff, the court analyzed  
21 the applicability of federal antitrust laws under a sovereign immunity lens,” and the defendants admit  
22 that they cannot invoke sovereign immunity here, and (3) “*Miller* was not decided under the FTC Act,  
23 but rather under the Sherman and Clayton Acts,” and “whatever the “general applicability” of other  
24 federal antitrust laws may be, the FTC’s consumer protection authority under Section 5 of the FTC Act  
25 is undoubtedly broad.” *Id.* The FTC states that the exemptions in the FTC Act simply allow other



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2 agencies to regulate certain industries and do not compromise the fact that the FTC Act is one of  
3 “general applicability.” *Id.*

4 **3. TILA and EFTA Claims<sup>29</sup>**

5 The FTC argues that the Tribal Defenses do not apply to the TILA and EFTA claims. (#391).  
6 The FTC asserts that the “plain text of TILA and EFTA state that the FTC may enforce those statutes  
7 free of the jurisdictional limits that exist under the FTC Act.” *Id.* The FTC referred the court to its  
8 argument in the motion for partial summary judgment (#338). *Id.*

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10 **4. Tribal Defenses Application to Remaining Defendants**

11 The FTC asserts that if the Tribal Defenses fail as to the Tribal Chartered Defendants, they  
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2 “outside expertise.” *Id* (quoting #338 Exhibit 1). The FTC also contends that the defendants, including  
3 Scott Tucker, joined in a memorandum (#165) disclaiming any tribal defense for any “contractor”  
4 working with the Tribal Chartered Defendants. *Id.* The FTC asserts that the defendants try to  
5 characterize Tucker as a “contractor” when they want to distance the court from his personal  
6 expenditures, and now characterize him as an “employee” for “purposes of cloaking them with their  
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2 special exception to the prohibitions of a statute generally rests on one who claims its benefits.”  
3 *N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711, 121 S. Ct. 1861, 1866, 149 L. Ed. 2d  
4 939 (2001) (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45, 68 S.Ct. 822, 92 L.Ed. 1196 (1948)).  
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2 5. Scott Tucker, AMG Capital Management, LLC, Level 5 Motorsports, LLC, Black Creek  
3 Capital Corporation, and Broadmoor Capital Partners, LLC Answer (#315) Third Affirmative  
4 Defense;

5 6. AMG Services, Inc. Answer (# 316) Affirmative Defense 2;

6 7. Don Brady Answer (# 317) Affirmative Defense 1;

7 8. Tribal Financial Services Answer (# 318) Affirmative Defense 2; and

8 9. Troy LittleAxe Answer (# 319) Affirmative Defenses 2, and 53-55<sup>31</sup>.

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10 (#338). These defenses allege that the FTC lacks authority to bring this action against the defendants  
11 under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and TILA and EFTA, because the defendants  
12 are either arms of an Indian Tribe or employees acting on behalf of an Indian Tribe. (#310, #311, #312,  
13 #314, #315, #316, #317, #318, and #319). The defendants also contend that they are not “For Profit”  
14 “Corporations” as defined in §44 of the FTC Act. (#355). The court must, therefore, determine whether  
15 the FTC has authority to bring the instant action against the defendants and if the FTC is entitled to  
16 judgment on these defenses as a matter of law. *See* Fed. R. Civ. P. 56. In order to do this, the court  
17 must first examine the FTC Act, its applicability in general, and then address the Act’s applicability to  
18 the defendants, by determining if the Tribal Chartered Defendants are “For Profit Corporations” as  
19 defined in §44 of the FTC Act.

20  
21 **a. The FTC Act**

22 The FTC Act states that “[w]henver the Commission has reason to believe--(1) that any person,  
23 partnership, or corporation is violating, or is about to violate, any provision of law enforced by the  
24 Federal Trade Commission, and (2) that the enjoining thereof pending the issuance of a complaint by the

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<sup>31</sup> Defendant LittleAxe’s Affirmative Defenses #53-#55 differ from the other affirmative defenses and are as follows: 53. The Federal Trade Commission Act does not apply to the Defendants under the Indian law canons; 54. The Truth in Lending Act does not apply to the Defendants under the Indian law canons; and 55. The Electronic Funds Transfer Act does not apply to the Defendants under the Indian law canons.” (#319).

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Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public— the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice.” 15 U.S.C. § 53(b).

Section 45(a)(2) provides that “[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of A of””30(reird

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Here, just as in *Donovan, Lumber Indus, and Baker*, the FTC Act contains specific exemptions: “banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in sec

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2 statutes of nationwide applicability, where silent on the issue, presumptively *do* apply to Indian tribes.”

3 “Many of [the Ninth Circuit’s] decisions have upheld the application of general federal laws to  
4 Indian tribes; not one has held that an otherwise applicable statute should be interpreted to exclude  
5 Indians.” *Donovan*, 751 F.2d at 1115.<sup>33</sup> The Ninth Circuit clearly stated that it has “not adopted the  
6 proposition that Indian tribes are subject only to those laws of the United States expressly made  
7 applicable to them,” and refused to do so in *Donovan*. *Id* at 1116.

8  
9 The FTC Act does not expressly apply to or exclude Indian Tribes, rather, as stated above, it is a  
10 statute of general applicability that is silent on the issue. *See* 15 U.S.C. §45(a)(2). As the Ninth Circuit  
11 held in *Donovan*, a “federal statute of general applicability that is silent on the issue of applicability to  
12 Indian tribes will not apply to them if: (1) the law touches “exclusive rights of self-governance in purely  
13 intramural matters”; (2) the application of the law to the tribe would “abrogate rights guaranteed by  
14 Indian treaties”; or (3) there is proof “by legislative history or some other means that Congress intended  
15 [the law] not to apply to Indians on their reservations ...” *Donovan*, 751 F.2d at 1116 (*quoting Farris*,  
16 624 F.2d at 893-94). Neither the Tribal Chartered Defendants nor the non-Tribal Chartered Defendants  
17 make the argument that any of these exceptions apply, rather they argue that the language in *Donovan*  
18 and *Tuscarora* addressing the application of general statutes to Indian Tribes is *dictum*. *See* (#355,  
19 #356, #357, #358, and #359).

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21 The court in *Donovan* directly addressed this argument, when it stated that the defendant “may  
22 be correct when it argues that this language from *Tuscarora* is dictum, but it is dictum that has guided

23 <sup>33</sup> *Citing Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878 (9th Cir.1982), cert. denied,  
24 460 U.S. 1040, 103 S.Ct. 1433, 75 L.Ed.2d 792 (1983) (holding that absent a “definitely expressed exemption” tribes and  
25 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). *Donovan*, 751 F.2d at 1115-16.



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2 many of our decisions.” *Donovan*, 751F.2d at 115. This court finds that defendants’ argument lacks  
3 merit, as courts in this and other circuits have routinely relied on both *Donovan* and *Tuscarora* for their  
4 decisions regarding Indians and Indian Tribes. *See* Footnotes 23 and 24. As the FTC Act is one of  
5 general applicability, is silent on the issue of applicability to Indian tribes, and none of the defendants  
6 argue that a  
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2 States, of any Indian tribe, or of any State or political subdivision thereof,” and provides for specific  
3 definitions for “Indian lands” and Indian tribe.” (#355). The court notes that the purpose of this statute  
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2 Ninth Circuit precedent. Accordingly, summary judgment should be entered in favor of the FTC on  
3 defendant LittleAxe's 53<sup>rd</sup> affirmative defense that "[t]he Federal Trade Commission Act does not apply  
4 to the Defendants under the Indian law canons" (#319).

5 A recently decided case relied upon by the Tribal Chartered Defendants, *Miller v. Wright*, 705  
6 F.3d 919 (9th Cir. 2013) (#355), is distinguishable from the instant action for several reasons: (1) the  
7 action was brought by a cigarette dealer and his customers, as opposed to the federal government, (2)  
8 the court focused on the Indian Tribe's *sovereign immunity* and the waiver thereof, (3) the court held in  
9 that case that the issue *did not* involve a claimed *statutory exemption*  
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2 The FTC filed as Exhibit 13 to its motion for partial summary judgment (#338) Tribal Chartered  
3 Defendant AMG's "Restated Articles of Incorporation," wherein it states in Article II(B) that the  
4 purpose of the corporation is to "generate *profits* to promote the growth and community of the  
5 Corporation and for distribution to the tribal government." (#338-15)(emphasis added). The FTC also  
6 included under seal AMG's bank account opening form which indicates that AMG is a "For Profit"  
7 corporation. (#340-1). Exhibit 15 to the motion (#338) is Tribal Chartered Defendant MNE's "Articles  
8 of Incorporation," which states that one of the purposes of the corporation is to "generate *profits* to  
9 promote the growth and continuity of the Corporation and for distribution to the tribal government."  
10 (#338-17)(emphasis added). The FTC filed under seal MNE's bank account opening form stating that  
11 MNE is a "For Profit" corporation. (#340-2).  
12

13 The FTC included as Exhibit 18 to its motion for partial summary judgment (#338) Tribal  
14 Chartered Defendant Red Cedar's "Articles of Incorporation," which provides in Article III(B) that one  
15 purpose of the corporation is to "promote the growth and continuity of the Corporation and for  
16 distribution to the tribal government." (#338-20). Red Cedar's bank account opening form stating the  
17 Red Cedar is a corporation "For Profit" is filed under seal as Exhibit 20. (#340-3). The FTC also  
18 attached Tribal Chartered Defendant SFS's "Amended Articles of Incorporation" as Exhibit 21 (#338-  
19 23) and SFS's bank account opening form under seal stating that SFS is a "For Profit" corporation  
20 (#340-4).  
21

22 The FTC argues that this evidence demonstrates to the court that the Tribal Chartered  
23 Defendants are corporations that exist for profit and fall under the definition of "corporation" found in  
24 15 U.S.C. § 44. (#391). The Tribal Chartered Defendants dispute this, and assert in their "Statement of  
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Genuine Issues in Opposition to Partial Motion for Summary Judgment” that AMG, MNES, Red Cedar, and SFS are not corporations and are not “for profit” as required under the FTC Act. (#355). In support of this argument, the Tribal Chartered Defendants state that:

(1) AMG is a “wholly owned tribal corporation,” is “considered to be a governmental instrumentality,” was created “as an entity to generate revenue for the tribal government,” and whose dividends are distributable “to the Tribe as sole shareholder in accordance with a distribution plan approved by the Business Committee of the Tribe,” relying on the language in its Articles of Incorporation (#338-15);

(2) MNES is “considered to be a governmental instrumentality of the [Miami] Tribe . . . .” that was created “to generate revenue for distributi

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2           The Tribal Chartered Defendants also contend that “they are wholly unlike private corporations  
3 that Congress intended to be covered by the FTC Act,” and that “Indians tribes are “distinct,  
4 independent *political* communities,” that have the power to constitute and regulate its form of  
5 government.” *Id.*

6           The court finds that there is a “genuine dispute as to [the] material fact” of to whether the Tribal  
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2 **e. TILA and EFTA Claims**

3 The Tribal Chartered Defendants contend that “the same argument [regarding the FTC’s  
4 authority to bring action against the Tribal Chartered Defendants] applies with equal force to the FTC’s  
5 Truth In Lending Act (TILA) and Electronic Funds Transfer Act (EFTA) claims.” (#355). The FTC  
6 argues that the Tribal Defenses it seeks summary judgment for have no application to the TILA and  
7 EFTA claims. (#391). The court agrees with the FTC, and finds that the affirmative defenses which are  
8 the subject of this motion have no application to the claims under TILA and EFTA, as both TILA and  
9 EFTA provide the FTC the power to enforce the statutes *without regard* for any jurisdictional  
10 limitations contained in the FTC ACT. Section (c) of TILA states that:

11  
12 [T]he Federal Trade Commission shall be authorized to enforce such  
13 requirements. For the purpose of the exercise by the Federal Trade  
14 Commission of its functions and powers under the Federal Trade  
15 Commission Act, a violation of any requirement imposed under this  
16 subchapter shall be deemed a violation of a requirement imposed under  
17 that Act. All of the functions and powers of the Federal Trade  
18 Commission under the Federal Trade Commission Act are available to the  
19 Federal Trade Commission to enforce compliance by any person with the  
20 requirements under this subchapter, *irrespective of whether that person<sup>35</sup>*  
21 *is engaged in commerce or meets any other jurisdictional tests under the*  
22 *Federal Trade Commission Act.*

18 15 U.S.C. § 1607(c) (emphasis added). Section (c) of EFTA contains the same language and states that  
19 the FTC has authority to enforce the act “irrespective of whether that person<sup>36</sup> is engaged in commerce  
20 or meets any other jurisdictional tests under the Federal Trade Commission Act.” 15 U.S.C. § 1693o(c).  
21 To the extent the defendants’ affirmative defenses assert that the FTC does not have authority to bring  
22 the TILA and EFTA claims, summary judgment should be entered in favor of the FTC.  
23

24 <sup>35</sup> A “governmental unit” is included in the definition of “person” under TILA. 12 C.F.R. § 226.2(22).

25 <sup>36</sup> The definition of “person” under EFTA also includes “government agency.” 12 C.F.R. § 205.2(j).



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2 **I. Conclusion**

3 **1. FTC's Amended Motion for Partial Summary Judgment (#338)**

4 The court finds that the FTC Act (1) is one of general applicability, (2) is silent as to Indian  
5 Tribes, (3) provides for specific exemptions, none of which exempt Indian Tribes, arms of Indian  
6 Tribes, or employees of arms of Indian Tribes, and (4) gives the FTC the *authority* to bring suit against  
7 Indian Tribes, arms of Indian Tribes, and employees and contractors of arms of Indian Tribes. The  
8 court also finds that the FTC is given the authority to enforce TILA and EFTA "irrespective of" any  
9 jurisdictional tests under the FTC Act. *Id.* The FTC's request for partial summary judgment on the  
10 defendants' affirmative defenses should be granted to the extent the affirmative defenses are based on  
11 the position that the FTC Act, TILA, and EFTA do not apply to Indian Tribes, arms of Indian Tribes, or  
12 employees of arms of Indian Tribes.  
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14 The court also finds that a genuine issues of material fact exist as to whether the Tribal Chartered  
15 Defendants are "for profit corporations" as defined in §44 of the FTC Act. The court recommends that  
16 the FTC's request for partial summary judgment be denied to the extent the defendants' affirmative  
17 defenses assert that the FTC Act does not apply to the defendants because the Tribal Chartered  
18 Defendants are not "for profit corporations," but be granted against all defendants on the TILA and  
19 EFTA claims, as discussed in Sections H(2)(d)(ii) and H(2)(e) above. The court also recommends that  
20 summary judgment be entered in favor of the FTC as to defendant LittleAxe's 53<sup>rd</sup> affirmative defense  
21 regarding the Indian law canons (#319).  
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**2. Tribal Chartered Defendants’ Motion and Defendant LittleAxe’s Cross-Motion for Legal Determination as to Phase 1(B) of the Court’s Bifurcation Of Proceedings Order (#373 and #380)**

In its December 27, 2012, order, the court bifurcated the proceedings, and held that in Phase 1(B) “[t]he Court shall...adjudicate through motion practice the legal question of whether, and to what

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2                   **3.       Motion to Strike Improper Sur-Replies (#407)**

3                   The FTC asserts in its motion to strike that the court should strike the Tribal Chartered  
4 Defendants' reply in support of their motion for legal determination (#401) and defendant LittleAxe's  
5 reply in support of his cross-motion (#406), as they "are masquerading as reply memoranda in support  
6 of superfluous cross-motions." (#407). The FTC argues that the defendants' motions (#373 and #380)  
7 do not seek "anything other than to defeat the FTC's motion for partial summary judgment" (#338), and  
8 that the replies in support thereof (#401 and #406) are "actually surreplies opposing the FTC's summary  
9 judgment motion" that "attempt to rebut arguments in the FTC's reply brief in support of summary  
10 judgment." *Id.* The FTC argues that the "cross-motions" are not true cross motions for summary  
11 judgment, and instead are named "motion for legal determination" because they are "nothing more than  
12 oppositions to the FTC's motion..." *Id.* The FTC asserts that the replies (#401 and #406) do not address  
13 new issues or aid the court in resolving th FTC's motion. *Id.*

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15                   The Tribal Chartered Defendants argue in their opposition that the "filings were designed both  
16 to ensure that the Tribal Defendants' request for a Phase 1 legal determination properly was before this  
17 Court and to ensure systematic and efficient resolution of this legal issue." (#416). The Tribal  
18 Chartered Defendants assert that they "offered a different analytical framework, a different legal  
19 standard, and raised different substantive issues" in their opposition (#355) and motion (#373). *Id.* The  
20 Tribal Chartered Defendants contend that the cases relied upon by the FTC fail to support its position,  
21 and ask this court to deny the motion. *Id.*

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23                   Defendant LittleAxe asserts in his opposition that he "properly filed for his own affirmative  
24 determination through his Cross Motion" wherein he addressed the application of Indian canons to the  
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2 FTC Act (#380), and that he “had no cause to provide analysis of the Indian law canons in his  
3 Opposition to the FTC’s Amended Motion because the FTC did not seek relief under the Indian law  
4 canons nor did the FTC apply any law to LittleAxe.” (#420). Defendant LittleAxe argues that the cases  
5 cited to by the FTC are inapposite, that in this case there is no “surreply,” and that “LittleAxe’s counsel  
6 went to unusual lengths to limit the scope of the motion to the agreed threshold issue after discussion  
7 with the FTC’s counsel.” *Id.* Defendant LittleAxe asks this court to deny the FTC’s motion to strike  
8 (#407). *Id.*

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10 The FTC asserts in its reply that the Tribal Chartered Defendants and defendant LittleAxe  
11 should have sought leave of the court to file the sur-replies, and that their attempts to distinguish the  
12 relevant case law is deficient. (#424). Because resolution of the affirmative defenses at issue here is  
13 critical to the outcome of this case, the court considered the motions for legal determination (#373 and  
14 #380) as well as the replies (#401 and #406), and the motion to strike (#407) will be denied.

15 Accordingly, and for good cause shown,

16 IT IS HEREBY ORDERED that the FTC’s Motion to Strike Improper Sur-Replies (#407) is  
17 DENIED.

18 **RECOMMENDATION**

19 IT IS THE RECOMMENDATION of the Undersigned Magistrate Judge that:

20 (1) the Federal Trade Commission’s Motion for Partial Summary Judgment (#338) be  
21 GRANTED in part, and DENIED in part, as set forth in Section I(1) above.

22 (2) the Tribal Chartered Defendants’ Motion for Legal Determination as to Phase 1(B) of the  
23 Court’s December 27, 2012, Bifurcation Of Proceedings Order (#373) and Defendant  
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