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20 **UNITED STATES DISTRICT COURT**
21 **DISTRICT OF NEVADA**

22 FEDERAL TRADE COMMISSION,

23 Plaintiff,

24 v.

25 AMG Services, Inc., et al.,

26 Defendants, and

27 Park 269 LLC, et al.,

28 Relief Defendants.

Case No.: 2:12-cv-536-GMN-(VCF)

**OBJECTIONS TO THE MAGISTRATE
JUDGE'S JULY 16, 2013 REPORT AND
RECOMMENDATION**

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Services, Inc.; SFS, Inc.; MNE Services, Inc.*

1 COME NOW the Defendants AMG Services, Inc., SFS, Inc., Red Cedar Services, Inc. and
2 MNE Services, Inc. (collectively, "Tribal Entities") and, pursuant to Fed R. Civ. P. 72(a), file the
3 following objections to the Magistrate's Report and Recommendation (ECF No. 444) to the extent
4 that it denies the Tribal Entities' Motion for Legal Determination Pursuant to Phase 1(B) of the
5 Court's December 27, 2012 Bifurcation of Proceedings Order (ECF. No. 373) and to the extent that
6 it grants the FTC's Motion for Partial Summary Judgment (ECF No. 338) on the grounds that the
7 Magistrate's ruling is contrary to applicable law.

8 These Objections are made and based upon the pleadings and papers on file in this action, as
9 well as the following Memorandum of Points and Authorities.
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MEMORANDUM OF POINTS AND AUTHORITIES

Factual Background

It is beyond dispute that AMG Services, Inc. and Miami Nation Enterprises are wholly-owned economic and political subdivisions of the Miami Tribe of Oklahoma, a federally-recognized Indian tribe; that Red Cedar Services, Inc. is a wholly-owned economic and political subdivision of the Modoc Tribe of Oklahoma, a federally-recognized Indian tribe; and that SFS, Inc. is a wholly-owned economic and political subdivision of the Santee Sioux Nation, a federally-recognized Indian tribe. It is uncontroverted, moreover, that these entities (hereinafter the “Tribal Entities”) were created and chartered under the laws of their respective tribes and have been created for the benefit of those tribes. (E.g., ECF No. 1, ¶¶ 6-9; ECF No. 149, 7-8.)

This action represents the first time since the United States Congress created the Federal Trade Commission (hereinafter “FTC”) nearly 100 years ago, empowering it to assert authority over particular matters and entities, that the FTC has claimed its authority extends to both federally-recognized Indian tribes and their political and economic subdivisions. The question of whether the FTC in fact has the authority to enforce the FTC Act against the Tribal Entities, therefore, constitutes a critical threshold issue in this action. The Bifurcation Order issued by this Court on December 27, 2012 recognizes this threshold issue as it provides specifically that “whether, and to what extent, the FTC has authority over Indian tribes whose sovereignty is asserted in this case ... for alleged violations of the FTC Act” is a legal question that the Court shall adjudicate through motion practice. (ECF No. 296 at 10.)

The Tribal Entities raised this legal question by and through their motion for a legal determination and in their opposition to the FTC’s Motion for Partial Summary Judgment, because the FTC Act facially does not empower the FTC with authority over either Indian tribes or their instrumentalities. (ECF Nos. 355, 373,¹ 374, and 401.) The Tribal Entities consistently maintained

¹ The Tribal Entities filed a separate motion in addition to filing an Opposition to the FTC’s Motion for Partial Summary Judgment in order to ensure technical compliance with both the Federal Rules

1 throughout this case that the FTC bears the burden of proving this threshold jurisdictional issue.
 2 Because the FTC failed to meet this burden, the Tribal Entities are entitled to a determination as a
 3 matter of law that the FTC Act does not apply to Indian tribes or their political and economic
 4 subdivisions.

5 These motions were fully briefed on May 22, 2013.² The Magistrate Judge issued his
 6 Report and Recommendation on July 16, 2013. The Report and Recommendation was premised
 7 upon the following legal conclusions that are contrary to applicable law:

- 8 • the burden of proving the FTC Act applies to the Tribal Entities rests on the
- 9 Defendants. (ECF No. 444 at 26-27);
- 10 • the Tribal Entities must prove an exemption exists to the FTC Act. (*Id.*);
- 11 • the FTC Act “has a ‘broad reach’ and is one of general applicability.” (*Id.* at
- 12 31);
- 13 • “[T]he FTC Act is not ambiguous. . . .” (*Id.* at 35);
- 14
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16 of Civil Procedure and the local rules for the District of Nevada. (ECF No. 374 at 2-3.) The Tribal
 17 Entities’ Motion closely tracks, but does not precisely duplicate, their Opposition.

18 ² A complete list of the pleadings that the parties filed related to this threshold issue is as follows:
 19 (1) The FTC’s Amended Motion for Partial Summary Judgment (ECF No. 338); (2) The Tribal
 20 Entities’ Opposition to Plaintiff’s Amended Motion for Partial Summary Judgment (ECF No. 355);
 21 (3) Robert D. Campbell’s Joinder in Tribal Defendants’ Opposition to Plaintiff’s Amended Motion
 22 for Partial Summary Judgment (ECF No. 356); (4) Troy L. Little Axe’s Opposition to Plaintiff
 23 Federal Trade Commission’s Amended Motion for Partial Summary Judgment (ECF No. 357); (5)
 24 Joint Opposition of the Tucker Defendants (ECF No. 358); (6) Don E. Brady’s Response in
 25 Opposition to Plaintiff’s Amended Motion for Partial Summary Judgment (ECF No. 359); (7)
 26 FTC’s Reply in Support of Amended Motion for Partial Summary Judgment (ECF No. 391); (8)
 27 Tribal Defendants’ Motion for Legal Determination as to Phase 1(B) of the Court’s December 27,
 28 2012 Bifurcation of Proceedings Order (ECF No. 374); (9) Troy L. Little Axe’s Cross Motion for
 Legal Determination of Phase 1(B) Issues of the Court’s December 27, 2012 Bifurcation of
 Proceedings Order (ECF No. 380); (10) Robert Campbell’s Joinder in Tribal Defendants’ Motion
 for Legal Determination (ECF No. 387); (11) FTC’s Opposition to the Tribal Defendants’ Motion
 for Legal Determination (ECF No. 373); (12) FTC’s Opposition to Troy Little Axe’s Cross Motion
 (ECF No. 392); (13) Tribal Defendants’ Reply in Support of Motion for Legal Determination (ECF
 No. 401); (14) Troy Little Axe’s Reply in Support of Cross-Motion (ECF 434); (15) FTC’s Motion
 to Strike Improper Sur-Replies (ECF No. 407); (16) Tribal Defendants’ Opposition to Motion to
 Strike (ECF No. 416); (17) Troy Little Axe’s Opposition to Motion to Strike (ECF No. 420); and
 (18) FTCs Reply in Support of Motion to Strike (ECF No. 434).

- *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) created positive law that governs this proceeding (*Id.* at 31-33);
- *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and other seminal Indian law opinions have no application to this issue as they are “distinguishable” on their facts. (*Id.* at 34-35; 35 at n. 34).

Defendants’ Objections

Defendants object to the Magistrate Judge’s Report and Recommendation as follows:

1. The Magistrate Judge’s conclusion that the Defendants bear the burden of proving the threshold jurisdictional issue of whether the FTC Act applies to the Tribal Entities (ECF No. 444 at 26-27) is contrary to applicable law; and
2. The Magistrate Judge’s conclusion that the FTC has presumptive authority over the Tribal Entities under the FTC Act to regulate Indian tribes, arms of Indian tribes, employees of arms of Indian tribes, and contractors of arms of Indian tribes (*Id.* at 3) is contrary to applicable law.

Standard of Review

Pursuant to Federal Rule of Civil Procedure 72(a), a party may serve and file any objections to a magistrate’s pretrial order and “[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.” *Id.* “[A] finding is ‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Waterfall Homeowners Ass’n v. Viega, Inc.*, 283 F.R.D. 571, 575 (D. Nev. 2012) (internal quotation marks and citations omitted). While the “clearly erroneous” standard applies to a magistrate’s findings of fact, his legal conclusions may be reviewed de novo to determine whether they are contrary to law. *See United States v. McConney*, 728 F.2d 1195, 1200-01 (9th Cir. 1984) (*overruled on other grounds, Estate of Merchant v. C.I.R.*, 947 F.2d 1390 (9th Cir. 1991)); *accord Lovell v. United Airlines, Inc.*, 728 F. Supp. 2d 1096, 1100 (D. Haw. 2010); *Columbia Pictures, Inc.*

1 v. *Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007); *Wolpin v. Phillip Morris, Inc.*, 189 F.R.D. 418,
 2 422 (C.D. Cal. 1999). “An order is contrary to law when it fails to apply or misapplies relevant
 3 statutes, case law or rules of procedure.” *Id.*

4 This Court explicitly defined the jurisdictional inquiry regarding whether the FTC Act
 5 applies to Indian tribes as a purely “legal question.” (ECF No. 296 at 9.) No factual dispute exists
 6 between the parties as to this discrete question, and these objections all challenge the Magistrate
 7 Judge’s legal conclusions. (*See e.g.* ECF Nos. 355, 374, 391, 392, and 401.) This Court, therefore,
 8 may review these objections de novo. *See e.g. McConney*, 728 F.2d at 1200-01.

9 Argument

10 **I. Assigning the Burden of Proving the Threshold Jurisdictional Issue to the Defendants** 11 **Is Contrary to Applicable Law**

12 The Magistrate Judge erroneously assigned the burden of proving jurisdiction in this matter
 13 to the Defendants. The Bifurcation Order defines the threshold issue in this case and the subject of
 14 the Magistrate’s Report and Recommendation: “whether, and to what extent, the FTC has authority
 15 over Indian tribes whose sovereignty is asserted in this case . . . for alleged violations of the FTC
 16 Act.” (ECF No. 296 at 9.) The Magistrate Judge erroneously presumed that such authority already
 17 has been established and that the Defendants, therefore, bear the burden of proving “justification or
 18 exemption under a special exception to the prohibitions of a statute . . .” (ECF No. 444 at 26-27).
 19 This presumption is contrary to applicable law.

20 Federal courts constitute courts of limited jurisdiction, possessing only that power
 21 authorized by the Constitution and by statute. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).
 22 Therefore, contrary to the Magistrate Judge’s analysis, courts must **start** with the presumption that
 23 they lack jurisdiction, and the burden of establishing the contrary **rests on the party asserting**
 24 **jurisdiction.** *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (citing
 25 *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936); *Turner v. Bank of*
 26 *North America*, 4 U.S. (4 Dall.) 8, 11 (1799)); *accord Multibank 2009-1- ADC Venture, LLC v.*
 27 *Yoshizawa*, No. 2:10-cv-00695, 2012 WL 3847159, *1 (D. Nev. Aug. 29, 2011) (citing *Kokkonen*,

1 511 U.S. at 377; *McNutt*, 298 U.S. at 189); *c.f. Cmty. Blood Bank of Kansas City Area v. FTC*, 405
2 F.2d 1011, 1015 (1969) (stating specifically that the Federal Trade Commission only has such
3 jurisdiction as Congress has conferred upon it by the FTC Act).

4 The threshold question here is whether this Court may properly exercise jurisdiction arising
5 from the FTC's claimed authority under the FTC Act.³ This Court may only hear the claims against
6 the Tribal Entities if and to the extent the FTC is authorized by the FTC Act to exercise authority
7 over the Indian tribes whose sovereignty is asserted in this case and their instrumentalities. *See*
8 *Willy*, 503 U.S. at 136-37. This is the clear starting point of the analysis. The Magistrate Judge,
9 however, jumped straight to an analysis of whether the Indian tribes had qualified for any
10 exemption from an already applicable statute. (ECF No. 444 at 28-33.) In doing so, the Magistrate
11 Judge shifted the focus, and the burden of proof, away from a determination of whether the FTC
12 Act gives the FTC authority to enforce its provisions against Indian tribes and their instrumentalities
13 to a determination of whether or not the Tribal Entities met their "burden of proving justification or
14 exemption under a special exception to the prohibitions of a statute . . . (ECF No. 444 at 27). By
15 skipping the initial crucial step of the analysis, the Magistrate Judge improperly reassigned the
16 burden of proof to the Defendants.

17 The authorities that the Magistrate Judge relies upon in his analysis do not support the
18 conclusions he draws. For example, in *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709-
19 11 (2001), it was undisputed that the National Labor Relations Act applied to certain members of a
20 union bargaining unit unless it could be proved that they were supervisors, and therefore exempt.
21 Likewise, in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), it was undisputed that the Clayton Act
22 (including amendments) applied to the respondent unless it could be proved that the exemption
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25 ³ The Magistrate Judge in fact acknowledges the burden in this case is as to proving "jurisdiction."
26 (ECF No. 444 at 26) ("The Tribal Chartered Defendants assert that the FTC bears the burden to
27 establish the legal issue of whether the FTC Act applies to the Tribal Chartered Defendants, and that
28 the FTC has not met its burden. The FTC argues that the burden is on the defendants to establish
that the FTC does not have jurisdiction over the Tribal-Chartered Defendants.") (Internal citations
omitted).

1 applied. *See Morton Salt Co.*, 334 U.S. at 37, 40-45 (1948). Unlike the central issue here, whether
 2 the statutes applied in the first place simply was not at issue.

3 The core of this dispute is whether the FTC Act, which explicitly encompasses “persons,
 4 partnerships, or corporations,” pursuant to 15 U.S.C. § 45(a)(2), **applies at all** to Indian tribes and
 5 their tribal instrumentalities. Neither the Court, nor the Defendants, nor even the FTC has alleged
 6 that the FTC Act applies, but-for an exception. Because this issue is jurisdictional in nature (*See*
 7 No. ECF 296 at 9; ECF No. 444 at 26), the Magistrate Judge was required to **start** with the
 8 presumption that this Court lacks jurisdiction to hear this matter, and was required to impose the
 9 burden of establishing the contrary on the FTC who is the party in this case asserting jurisdiction.
 10 *See Kokkonen*, 511 U.S. at 377 (citing *McNutt*, 298 U.S. at 182-83; *Turner*, 4 U.S. (4 Dall.) at 11);
 11 *accord Multibank 2009-I- ADC Venture, LLC*, No. 2:10-cv-00695, 2012 WL 3847159, *1. The
 12 Magistrate Judge did not do so, and his Report and Recommendation is therefore flawed and should
 13 be rejected.

14 15 **II. The Magistrate Judge Erred in Concluding that the FTC Has Authority to Regulate 16 Indian Tribes and Their Instrumentalities Under the FTC Act**

17 **A. The Magistrate Judge Ignored Clear Indian Law Jurisprudence in Finding 18 That Laws of General Applicability Apply to Indian Tribes**

19 The Magistrate Judge’s conclusion that the FTC Act is presumed to apply to Indian tribes
 20 does not comport with the U.S. Supreme Court’s Indian law jurisprudence. The Magistrate Judge
 21 did not engage in an analysis of the substance of the general applicability presumption. He
 22 concludes, without examining the underlying authorities, that “[a]s the FTC Act is one of general
 23 applicability, is silent on the issue of applicability to Indian tribes, and none of the defendants
 24 argue that a[n] . . . exception applies, that is the end of the inquiry, and the FTC Act applies to
 25 Indian Tribes, Arms of Indian Tribes, and the employees of the Arms of Indian Tribes.” (ECF No.
 26 444 at 33 (internal citations omitted).) The Defendants have argued properly, however, that this
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1 “general applicability presumption” is flawed and cannot be grounded in the *dicta* discussions of
2 the Supreme Court in *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

3 In *Tuscarora*, the defendant tribe owned property that the Court held was subject to
4 condemnation under the Federal Power Act. *Id.* at 116. The Court held that the Federal Power
5 Act **explicitly applied** to the Tribe’s fee simple land, and, therefore, the condemnation was
6 appropriate. The *Tuscarora* court made the rather unremarkable statement that “it is now well
7 settled by many decisions of this Court that a general statute in terms of applying to all persons
8 includes Indians and their property interests.” *Id.* As the Defendants argued to the Magistrate
9 Judge, this passage has been widely acknowledged as *dicta*. See, e.g., *Nero v. Cherokee Nation of*
10 *Okla.*, 892 F.2d 1457, 1462 (10th Cir. 1989); *Equal Employment Opportunity Comm’n v.*
11 *Cherokee Nation*, 871 F.2d 937, 938 n. 3 (10th Cir. 1989); *Donovan v. Coeur d’Alene Tribal Farm*,
12 *751 F.2d 1113, 1115* (9th Cir. 1985). Furthermore, by its own terms, this statement only applies to
13 **individual Indians**, not sovereign Indian tribal governments or their instrumentalities.

14 The Magistrate Judge failed to acknowledge that in the fifty-three years since deciding
15 *Tuscarora*, the Supreme Court has never cited this passage at all. See Bryan H. Wildenthal, *How*
16 *the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence — And Has So Far*
17 *Gotten Away With It*, 2008 MICH. ST. L. REV. 547, 573 (2008). Rather than analyzing the
18 inapposite facts in *Tuscarora*, the Magistrate Judge blindly relies on further *dicta* from lower
19 appellate courts — most prominently, *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113,
20 1115 (9th Cir. 1985), which stretch the already paper-thin purported presumption of laws of
21 general applicability beyond application only to individual Indians to also encompass sovereign
22 Indian **tribes**. As the Defendants argued to the Magistrate Judge, the court in *Donovan* was aware
23 that this proposition rested on an illusory foundation, expressly acknowledging that the passage
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1 from *Tuscarora* upon which it relied is *dicta*. *Id.* Moreover, the *Donovan* court's reliance on the
2 *Tuscarora dicta* was unnecessary, because OSHA broadly defined entities covered by that statute
3 as "any organized group of persons," but then exempted certain governments — the United States,
4 States, and political subdivisions of States — indicating that governmental entities not enumerated
5 (such as Indian tribes) were intended to be covered by the statute. As discussed in detail below,
6 that is not true of the FTC Act.
7

8 Not only has the Supreme Court never cited *Tuscarora* for the proposition asserted by the
9 FTC, but, instead, in decisions that post-date *Donovan*, the Supreme Court has applied the Indian
10 canons of construction to conclude that statutes of general applicability at issue in those cases do
11 not apply to Indian tribes. *See Wildenthal*, 2008 MICH. ST. L. REV. 547, 585; *see also Idaho v.*
12 *United States*, 533 U.S. 262, 270, 272-79, 278-282 (2001) (determining that statehood act that
13 failed to explicitly address Indian submerged lands did not function to transfer them to the state);
14 *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176-77, 185, 202-08 (1999)
15 (determining that statehood act that was silent on the issue failed to extinguish Indian usufructuary
16 rights).
17

18 The Supreme Court has never adopted the proposition that federal laws of general
19 applicability are presumed to apply to Indian tribes, and, in fact, such a proposition is flatly
20 contradicted by a long line of Supreme Court precedent. When faced with choosing to apply
21 authority from the Supreme Court or *dicta* from a lower court of appeals, the Magistrate Judge
22 was required to choose the former. Accordingly, the Magistrate Judge's determination that the
23 FTC Act applies generally to Indian tribes pursuant to *Donovan* is contrary to applicable law and
24 cannot stand.
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B. The Magistrate Judge Erroneously Concluded that the FTC Act Is a Law of General Applicability

Even if the compounded *dicta* described above constituted valid authority, the Magistrate Judge erred by failing to require the FTC to bear the burden to demonstrate that the FTC Act is in fact a law of general applicability. The FTC did not even attempt to explain how or why the FTC Act is a law of general applicability in its briefing, and without his own explanation, definition, legal criteria or analysis, the Magistrate Judge simply concluded that the FTC Act constitutes a “law of general applicability.” (*See* ECF No. 444 at 28-31.) The Magistrate and the FTC merely noted occasions where courts have found **other** statutes (with much broader definitions of entities covered by such statutes) to be generally applicable; but neither applied any substantive analysis to the FTC Act. (ECF No. 339 at 14 and ECF No. 444 at 30-31.) The FTC did not meet its burden on this important jurisdictional issue, and the Magistrate Judge’s analysis was incomplete.

Not only did the Magistrate Judge defer to the FTC’s conclusory statements about the FTC Act, but he failed to consider the Defendants’ arguments to the contrary. Unlike the statutes cited in the post-*Donovan* cases upon which the FTC relied, the FTC Act does not apply broadly. *See Solis v. Matheson*, 563 F.3d 425, 430 (9th Cir. 2009) (*citing Snyder v. Navajo Nation*, 382 F.3d 892, 894 (9th Cir. 2004), 563 F.3d at 430 (interpreting the Fair Labor Standards Act)); *Lumber Indus. Pension Fund. v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991) (interpreting the Employee Retirement Income Security Act). To the contrary, the FTC Act contains numerous exemptions, including nonprofits, “banks, savings and loan institutions . . . , Federal credit unions. . . , common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers . . . , and persons, partnerships, or corporations insofar as they are subject to

1 the Packers and Stockyards Act.” 15 U.S.C. § 45 (a).⁴ Congress’s intent that the FTC Act **not**
 2 broadly apply is evident from the fact that Congress did not even intend for it to apply to all
 3 corporations. *See Cmty. Blood Bank of Kansas City Area Inc.*, 405 F.2d at 1017 (citing H.R. REP.
 4 NO. 533, 63d CONG., 2D SESS. (1914); S. REP. NO. 597, 63d CONG., 2D SESS. (1914); H.R. REP.
 5 NO. 1142, 63d CONG., 2D SESS. (1914).

7 Furthermore, the Magistrate Judge ignored the fact that the FTC Act was enacted in 1914,
 8 more than 20 years before the enactment of the Indian Reorganization Act, 25 U.S.C. §§ 461-479
 9 (“IRA”), which provided the very foundation for tribes to engage in mainstream commerce by
 10 “reviving tribal governments and chartering tribal business entities that would engage in economic
 11 development.” F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, § 2101, p. 1320 (2012 ed).
 12 Importantly, before the IRA, federal Indian policy generally inhibited tribal economic
 13 development. *Id.* As such, tribal commercial enterprises of the sort contemplated by the FTC Act
 14 were virtually unknown when the FTC Act became law. *See, e.g.,* Angelique Eaglewoman, *Tribal*
 15 *Nation Economics: Rebuilding Commercial prosperity in Spite of U.S. Trade Restraint —*
 16 *Recommendations for Economic Revitalization in Indian Country*, 44 Tulsa L. Rev. 383, 393-94,
 17 398-400, and 407 (2008). This chronology dispels any notion that Congress intended the FTC Act
 18 to apply to Indian tribes.
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24 ⁴ While the Ninth Circuit in *National Labor Relations Board v. Chapa De Indian Health Program,*
 25 *Inc.*, 316 F.3d 995, 998 (9th Cir. 2002) noted that the issue is “whether the statute is generally
 26 applicable, not whether it is universally applicable,” the court emphasized in *Chapa De* that only
 27 *two* major exemptions applied to the NLRA: public sector employers and church-controlled and
 28 operated schools. By contrast, Congress provided for numerous exemptions to the FTC Act across
 a variety of industries and entity types. 15 U.S.C. § 45(a); *see also Cmty. Blood Bank of Kansas*
City Area, Inc. v. FTC, 405 F.2d 1011 at 1017 (1969).

C. The Magistrate Judge Erroneously Concluded that the FTC Act Applies on Its Face to Indian Tribes

The Magistrate Judge, without substantive analysis or explanation, determined that (1) the “plain text of the FTC Act” supports a conclusion that the FTC Act applies to Indian tribes (ECF 444 at 28-30), and (2) “the FTC Act is not ambiguous” (*Id.* at 35). These conclusions are unsupported by the text of the FTC Act itself, misapply the burden of proof, and are in error.

A prima facie reading of the FTC Act reveals that the FTC only has authority to enforce the Act upon “persons, partnerships or corporations,” as defined in the Act. 15 U.S.C. § 45(a)(2). This list clearly does not encompass Indian tribes or arms of Indian tribes. First, Indian tribes are not “persons.” *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 (2003); *United States v. Shoshone-Paiute Tribes, Duck Valley Indian Reservation*, No. 2:10-CV-01890-GMN, Dec. 26, 2012, 2012 WL 6725682, * 2 (D. Nev. 2012). Second, there is no claim that Indian tribes are partnerships. Finally, a thorough analysis of the definition of “Corporation” in 15 U.S.C. § 44, in conjunction with principles of statutory construction and federal Indian law, shows that Indian tribes are not contemplated by the FTC Act.

The FTC Act provides that a “corporation” is “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members.” 15 U.S.C. § 44. Not only does this definition fail to include tribal governmental subdivisions or sovereign entities on its face,⁵ but it also bears a stark contrast to other federal statutes that differentiate between corporations and Indian tribes and their subdivisions. *See* 15 U.S.C. § 375(10) (“The term ‘person’ means an individual, **corporation**, company, association, firm, partnership, society, State government, local

⁵ Even if this Court believed that Indian tribes can be considered corporations in the typical case, “[w]hen a statute includes an explicit definition . . . we must follow that definition, even if it varies from that term’s ordinary meaning.” *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

1 government, **Indian tribal government, governmental organization of such a government**, or
2 joint stock company.” (Emphasis added)). In light of the fact that 15 U.S.C. § 375(10)
3 “address[es] the same subject matter generally” as the FTC Act, namely, entities covered by the
4 statute and involved in certain commercial transactions, the two statutes should be read *in pari*
5 *materia*. See *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-316 (2006) (citation and internal
6 quotation marks omitted).
7

8 Furthermore, the paramount distinction that sets Indian tribes apart in this analysis is their
9 inherent tribal sovereignty. The Magistrate Judge erred in discounting, distinguishing, and
10 refusing to apply seminal tribal sovereignty cases, including *Santa Clara Pueblo v. Martinez*, 436
11 U.S. 49, 59-60 (1978). (ECF No. 444 at 34-35, 35 n. 34.) The Magistrate Judge failed to take into
12 account the important stature of these cases in Indian law and their broad application to general
13 sovereignty principles, which must inform any discussion of jurisdiction over an Indian tribe and
14 its instrumentalities, as “common law sovereign immunity possessed by the Tribe is a necessary
15 corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes of Fort Berthold*
16 *Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). The two concepts are so intertwined
17 that courts discussing abrogation routinely interpret them together. See, e.g. *Wold Engineering*,
18 476 U.S. 877, 890 (1986); *Santa Clara*, 436 U.S. at 56-60; *United States v. United States Fidelity*
19 *& Guaranty Co.*, 309 U.S. 506, 512 (1940); *In re Whitaker*, 474 B.R. 687, 696 (B.A.R. 8th Cir.
20 2012) (citing cases). The Magistrate Judge’s Report and Recommendation fails to recognize and
21 apply these long-standing sovereignty principles, including that sovereignty is subject only to the
22 plenary control of Congress, and while Congress may abrogate Indian tribes’ sovereignty (which
23 is often mistakenly referred to as abrogation of sovereign immunity), the law of abrogation of
24 sovereignty is the same. *C.f. Wold*, 476 U.S. at 890-891 (discussing Congress’ plenary control);
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1 *Santa Clara*, 436 U.S. at 56-57 (discussing Congress' plenary control). Whether a federal statute
 2 applies to Indian tribes and its businesses cannot be considered in a vacuum, but must be informed
 3 by the milieu of decades of case law and considerations of tribal sovereignty. *Santa Clara Pueblo*,
 4 436 U.S. at 61 (stating that considerations of "Indian sovereignty" are the backdrop against which
 5 the statute must be read). The United States Supreme Court has reiterated that abrogation of
 6 Tribal rights by Congress "cannot be implied," but must be "unequivocally expressed" (*Santa*
 7 *Clara Pueblo*, 436 U.S. at 58) in "explicit legislation" (see *Kiowa Tribe of Okla. v. Mfg. Techs.*,
 8 523 U.S. 751, 756-59 (1998)). Courts have found abrogation where Congress has included "Indian
 9 tribes" in definitions of those who may be sued under specific statutes. *In re Whitaker*, 474 B.R.
 10 687, 691 (B.A.R. 8th Cir. 2012) (citing cases). The FTC Act does not define Indian tribes as
 11 falling within the FTC's enforcement authority.

12
 13 Importantly, Congress has shown the ability to encompass within federal legislation tribal
 14 instrumentalities that take the form of corporations. See, e.g., 16 U.S.C. § 470bb(6) ("**The term**
 15 **'person' means an individual, corporation, partnership, trust, institution, association, or any**
 16 **other private entity** or any officer, employee, **agent, department, or instrumentality** of the
 17 United States, **of any Indian tribe**, or of any State or political subdivision thereof." (emphasis
 18 added)).⁶ In other statutes, Congress has even defined "Indian tribe." See 15 U.S.C. § 375(8).
 19 That Congress did not do so in the FTC Act ends the query.

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 21 Considering the Supreme Court's mandate to "tread lightly" over matters of tribal
 22 sovereignty "in the absence of clear indication of legislative intent" in this area (*Santa Clara*, 436
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 25 ⁶ See also, e.g., 42 U.S.C. § 8802(17) ("The term 'person' means any individual, company,
 26 cooperative, partnership, corporation, association, consortium, unincorporated organization, trust,
 27 estate, or any entity organized for a common business purpose, any State or local government
 28 (including any special purpose district or similar governmental unit) or any agency or
 instrumentality thereof, or any Indian tribe or tribal organization.").

1 U.S. at 60), the nomenclature that the Tribe chooses to use for its entities cannot be determinative of
 2 whether Congress intended to abrogate the Tribe's sovereignty. Congress clearly intends to enable
 3 Indian tribes to engage in business development in commercial markets. *See, e.g.*, Native American
 4 Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301, *et seq.*;
 5 *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (describing Congressional intent in the
 6 Indian Reorganization Act, 25 U.S.C. §§ 461-479, to encourage and support tribal business
 7 development while freeing tribal business enterprises from bureaucratic control by the federal
 8 government of the details of those enterprises). Thus, it would be contrary to congressional policy,
 9 "to grant to those Indians living under Federal tutelage and control the freedom to organize for the
 10 purposes of local self-government and economic enterprise"⁷ to abrogate a Tribe's sovereignty
 11 because of the mere name the Tribe chose for its governmental business development entity.
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13
 14 Indian tribes and tribal instrumentalities (arms of tribes) are not "corporations" under the
 15 FTC Act, because they are wholly unlike private corporations that Congress intended to be covered.
 16 Of course, Indian tribes are "distinct, independent **political** communities,"⁸ that have the power to
 17 constitute and regulate its form of government.⁹ Tribes have the power to tax and legislate —
 18 including the power to make criminal and civil laws, not otherwise preempted by federal law, and to
 19 administer justice. *See, e.g., Fisher v. Dist. Ct.*, 424 U.S. 382, 386 (1976); *Kerr-McGee Corp. v.*
 20 *Navajo Tribe*, 471 U.S. 195, 198-200 (1985). And, numerous Executive Orders acknowledge the
 21 "unique legal and political relationship" that the United States has with Indian tribal governments
 22 and require executive departments and agencies to engage in regular consultation and collaboration
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25 ⁷ H.R. Rep. No. 73-1804, at 1 (1934).

26 ⁸ *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (emphasis added).

27 ⁹ *Santa Clara Pueblo*, 436 U.S. at 62-63.

1 with tribal officials, which is also unlike private corporations. Exec. Order 13,175, 65 Fed. Reg.
2 67,249 (Nov. 6, 2000). None of the characteristics of Indian tribes are shared by private
3 “corporations.” These characteristics demonstrate that Indian tribes, and their instrumentalities, are
4 not “corporations” as defined in the FTC Act.
5

6 In fact, the FTC Act was enacted in 1914, at a time when the official federal policy toward
7 Indians and Indian tribes was that of “civilization and assimilation.” COHEN, *supra*, at 72. The goal
8 of this federal policy “was to end the tribe as a separate political and cultural unit” *Id.* at 75.
9 Indeed, when Congress enacted the FTC Act, Indians were not even considered United States
10 citizens. *Id.* at 78; *see* Indian Citizenship Act of 1924, 43 Stat. 253. It was not until 1934 — twenty
11 years *after* the enactment of the FTC Act — that Congress enacted the Indian Reorganization Act,
12 which, for the first time, encouraged tribes to reorganize their tribal government structures similar
13 to those of modern business corporations. COHEN, *supra*, at 81. Thus, the FTC’s claim that the
14 Tribal Entities are “corporations” within the meaning of the FTC Act is belied by these undeniable
15 historic facts.
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17 The Magistrate Judge failed to acknowledge these important sovereignty and statutory
18 interpretation issues, despite the fact that sovereignty is at the center of this legal question. The
19 Magistrate Judge presumed incorrectly that Defendants bore the burden of proving an exemption to
20 the FTC Act, and thus failed to require the FTC to prove the FTC Act applied facially to Indian
21 tribes and their instrumentalities. Because the FTC did not meet this burden, the Magistrate Judge’s
22 Report and Recommendation is in error and must be rejected.
23

24 **D. The Magistrate Judge Erroneously Concluded that the Canons of Construction**
25 **Do Not Require Resolution of this Issue in Favor of Indian Tribes**

26 While the Defendants maintain that the FTC Act facially does not apply to Indian tribes or
27 their instrumentalities, any ambiguity or confusion under the Act requires application of the Indian
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1 canons of construction. The Magistrate Judge erroneously refused to employ these canons of
2 construction. (ECF 444 at 35.) The Magistrate Judge's reliance on *NLRB v. Chapa De Indian*
3 *Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003), is misplaced, as the Ninth Circuit only
4 rejected the canons of construction argument after first determining that the National Labor
5 Relations Act constituted a law of general applicability. *Id.* at 999. Here, as set forth above, the
6 FTC failed to meet its burden to show the FTC Act constitutes a law of general applicability, and
7 the question of whether the FTC Act applies to Indian tribes remains unresolved.

9 It is a basic precept of federal Indian law that "the standard principles of statutory
10 interpretation do not have their usual force in cases involving Indian law." *Mont. v. Blackfeet*
11 *Tribe*, 471 U.S. 759, 766 (1985). Instead, courts are required to apply Indian canons of
12 construction to cases involving that application of federal statutes to Indian tribes. *See id.* The
13 Indian canons are rooted in the unique trust relationship between the United States and Indian
14 tribes. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The
15 canons include the following fundamental interpretive rules that govern statutory construction
16 where a question of Indian law is concerned: (1) that courts must resolve ambiguities in a federal
17 statute in favor of Indian tribes, *e.g., County of Yakima v. Confederated Tribes and Bands of the*
18 *Yakima Indian Nation*, 502 U.S. 251, 268-69 (1992); *Blackfeet Tribe of Indians*, 471 U.S. at 766;
19 *McClanahan v. Ariz. State Tax Com'n*, 411 U.S. 164, 176 (1979); and (2) that a clear expression
20 of Congressional intent is necessary before a court may construe a federal statute so as to impair
21 tribal sovereignty, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978). The Indian canons
22 of construction must be applied unless the statutory language at issue is clear and unambiguous.
23 *Blackfeet Tribes of Indians*, 471 U.S. at 766.

1 Any ambiguity that may exist in the FTC Act's definitions, including whether the authority
2 given to the FTC by the Act encompasses Indian tribes, tribally-owned corporations, companies,
3 entities, or subdivisions, must be resolved by application of the Indian canons of construction..
4

5 **Conclusion**

6 For the reasons set forth above, the Defendants respectfully request that the Court set aside
7 the Magistrate Judge's July 16, 2013 Order and find instead that the FTC does not have authority
8 over Indian tribes whose sovereignty is asserted in this case for alleged violations of the FTC Act.
9

10 Dated: August 2, 2013

11 /s/ Nicole Ducheneaux

12 *Attorneys for Defendants Red Cedar*
13 *Services, Inc. and SFS, Inc.*
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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on the 2nd day of August 2013, service of the foregoing **OBJECTIONS TO THE MAGISTRATE JUDGE'S JULY 16, 2013 REPORT AND RECOMMENDATION** was submitted electronically for filing and/or service with the United States District Court of Nevada. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

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