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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FEDERAL TRADE COMMISSION,

Plaintiff,
v.

AMG Services, Inc. et al.,

Defendants, and
Park 269 LLC, et al.,

Relief Defendants.

Case No. 2:12-cv-536

**PLAINTIFF'S POINTS
AND AUTHORITIES
OPPOSING
DEFENDANTS'
OBJECTIONS TO
MAGISTRATE
JUDGE'S JULY 18,
2013 REPORT AND
RECOMMENDATION**

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PRELIMINARY STATEMENT

In this federal law enforcement proceeding, the FTC seeks to stop Defendants' unlawful lending and collection practices, which include charging borrowers several times the stated costs of their loans, requiring consumers to preauthorize electronic fund transfers as a condition of obtaining credit, and falsely threatening consumers with arrest and litigation. (Docket No. 386 at ¶¶ 26-45.) The FTC's partial summary judgment motion (Docket No. 338) addresses Defendants' various affirmative defenses that their supposed tribal affiliations deprive the FTC (and, indeed, the entire federal government) of authority to bring claims under the FTC Act,¹ TILA,² and EFTA³ even though none of those statutes contain any exceptions for tribal businesses.

After the parties lodged nearly two dozen briefs on the issue,⁴ the Magistrate Judge in his report and recommendation (the "Recommendation," Docket No. 445), correctly followed Supreme Court and Ninth Circuit precedent and disposed of Defendants' contrived tribal exception to those three statutes. Defendants' main argument – that a federal statute silent on its applicability to tribes exempts tribes and corporations owned by tribes from its coverage – was rejected in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) and many Ninth Circuit cases following it. Applying *Donovan*, the Magistrate Judge held that "[a]s the FTC Act is one of general applicability, is silent on the issue of applicability to Indian tribes, and none of the defendants argue that a *Donovan* exception applies, *that is the end of the inquiry*, and the FTC Act applies to Indian Tribes, Arms of Indian Tribes, and the employees of the Arms of Indian Tribes." (Recommendation at 33 (emphasis added).)

¹ Federal Trade Commission Act, *see* 15 U.S.C. § 41, *et seq.*

² Truth in Lending Act, *see* 15 U.S.C. § 1601, *et seq.*

³ Electronic Fund Transfer Act, *see* 15 U.S.C. § 1693, *et seq.*

⁴ *See* Docket Nos. 5, 300, 285, 101, 103, 120, 123, 134, 141, 149, 165, 167, 185, 339, 354, 355, 358, 359, 374, 380, 391, 401, 406. The Magistrate Judge also heard nearly two hours of argument regarding whether any tribal exception to the FTC Act exists. (*See generally* FTC Ex. 1 (transcript of 8/23/12 hearing).)

PROCEDURAL HISTORY

The FTC filed its complaint on April 2, 2012 and amended it (in a manner immaterial to the present motion) on April 12, 2013. (Docket Nos. 1, 386.) Defendants moved to dismiss the complaint, in part claiming they are non-profit, tribal entities outside of the FTC's jurisdiction. (Docket Nos. 100, 103, 104, 105, 107, 108, and 109.) The FTC opposed the motion, in part relying on volumes of evidence demonstrating that Defendants had diverted millions of dollars to non-tribal actors and for lavish personal expenditures. (Docket No. 120 at 13-15; *see also* Docket No. 5 at 8-10.) After the Magistrate Judge ordered expedited discovery on the factual dispute regarding Defendants' supposed use of proceeds from the lending operation for tribal and charitable purposes (Docket No. 153 at 11), Defendants abruptly withdrew the tribal defenses from their motions to dismiss (Docket Nos. 214, 216-221). The Court then rejected what remained of Defendants' motions to dismiss. (Docket No. 297 (accepting and adopting Magistrate Judge's recommendation (Docket No. 226) denying motions to dismiss).)

This Court bifurcated the proceedings to first consider, among other things, the legal sufficiency of Defendants' tribal defenses. (Docket No. 296.) The FTC then filed a motion for partial summary judgment to address those defenses. (*See* Docket No. 338 (listing tribal defenses challenged in the motion).)

The parties' debate on this motion centers on a single question: does the FTC Act include an unstated exception for tribes and tribal corporations? The answer is no. In *Donovan* and more than a dozen other cases, the Ninth Circuit has consistently held that a statute of general applicability silent regarding tribes presumptively applies to tribes. Accordingly, the Magistrate Judge sided with the FTC, determining, *inter alia*, as follows:

- As the parties seeking to benefit from a supposed exception under the statutes at issue, Defendants bear the burden of proving the exception. (*Id.* at 27);
- Under *Donovan* and other Ninth Circuit precedent, a statute of general applicability silent on its application to tribes presumptively applies to tribes. (*Id.* at 31-32);
- The FTC Act is a statute of general applicability, notwithstanding the fact that it contains some exceptions. The Ninth Circuit has repeatedly found that other federal

statutes containing exceptions similar to those in the FTC Act are “generally applicable.” (*Id.* at 29-31);

- Defendants’ reliance on a few federal statutes that mention tribal application specifically is “without merit,” particularly because those statutes have very focused purposes explaining the existence of specific language regarding tribes. (*Id.* at 34);
- Defendants’ reliance on a series of unrelated Supreme Court and Ninth Circuit cases involving states and private litigants’ unsuccessful attempts to sue tribes is distinguishable, because this case is brought by a federal agency. (*Id.* at 34-35 and n.34);
- Defendants’ reliance on a series of Supreme Court cases discussing canons of construction favoring tribal interests is misplaced, because the Ninth Circuit in *Chapa De* already considered, and rejected, precisely that same argument. (*Id.* at 35); and
- A genuine dispute of material fact exists regarding whether any of the Defendant corporations are “for profit” corporations within the meaning of the FTC Act (*id.* at 39), but the FTC has authority to pursue its TILA and EFTA claims against all Defendants regardless of their supposed “non-profit” status.” (*Id.* at 40).

With their two objections (Docket Nos. 448, 449), a handful of defendants – AMG Services, Inc., MNES Services, Inc., Red Cedar Services, Inc., SFS, Inc., and Troy LittleAxe (the “Objecting Defendants”) – now seek to overturn the Recommendation, arguing that this Court should ignore the volumes of Ninth Circuit caselaw carefully considered by the Magistrate Judge.⁵

⁵ Before the Magistrate Judge issued his Recommendation, Defendants advanced a series of contradictory arguments to the Colorado state court and this Court regarding the application of federal law to their business practices. In particular, Defendants assured the Colorado state court that they were subject to “all” federal laws and “any sort” of federal action. Upon securing a dismissal of those state proceedings, Defendants later argued in this Court that they were not subject to *any* federal law enforcement. (*See* Docket No. 4-8 (detailing Defendants’ conflicting statements regarding application of federal law), and Docket No. 391 at 11-13 (same).) The Court should not countenance Defendants’ doubletalk, particularly in connection with their frivolous attempt to avoid *all* federal and state law enforcement scrutiny of their interstate lending and collections practices. The Recommendation does not rely on Defendants’ litany of contradictory statements in support of its conclusion that the FTC Act, TILA, and EFTA apply to Defendants (Recommendation at 25 n.29); rather, the Recommendation rests its analysis on the relevant caselaw. Thus, the FTC does not revisit those conflicting statements in further detail here.

ARGUMENT

Summary judgment is appropriate where, as here, the movant shows “that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Here, the issue debated is a purely legal one,⁶ perfectly suited for summary disposition under Rule 56. *See Ohio Cas. Ins. Co. v. Biotech Pharmacy, Inc.*, 547 F.Supp.2d 1158, 1159 (D. Nev. 2008) (granting motion for partial summary judgment on a purely legal issue of contract interpretation).

As the parties seeking an exemption under a statutory scheme, the Defendants bear the burden. *See NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-711 (2001) (“the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits”) (internal quotation and citation omitted). The Objecting Defendants continue to complain about the burden issue (*see* Docket No. 449 at 4-6), despite the clear holding in *Kentucky River*, and despite the fact that the Magistrate Judge has now *twice* found that the burden of demonstrating a statutory exception rests with them. (Recommendation at 26-27; Docket No. 153 at 4.) The “jurisdictional” issue raised here concerns the FTC’s jurisdiction under the FTC Act (and whether any exception to the FTC Act applies), not, as the Objecting Defendants erroneously assume, the jurisdiction *of the Court*. (Docket No. 153 at 8-9.) Thus, the Objecting Defendants’ reliance on cases involving challenges to subject matter jurisdiction rather than agency jurisdiction (Docket No. 449 at 4-6 (citing *Kokkonen* and *Multibank, etc.*); Docket No. 448 at 19-20) is clearly inapposite.

The Magistrate Judge’s Recommendation was issued pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. This Court’s review of the Recommendation is *de novo*. 28 U.S.C. § 636(b)(1)(B); LR IB 3-2(b). For sake of efficiency, the FTC incorporates by reference its

⁶ The Court previously assigned this legal question to phase 1 of the bifurcated proceedings. (Docket No. 296.) Thus, the Magistrate Judge found that the bifurcation order permitted resolution of Defendants’ tribal defenses in phase 1 (Recommendation at 2), a conclusion the Objecting Defendants do not dispute.

summary judgment memoranda (Docket Nos. 338, 391) and simply highlights below how the conclusions in the Recommendation remain unaffected by Defendants' objections.

The Magistrate Judge's legal determination that the FTC Act, TILA, and EFTA apply to tribes, tribal businesses, and tribal employees correctly followed decades of binding Ninth Circuit precedent, including the seminal *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), holding that a federal statute of general applicability that is silent regarding tribes presumptively applies to them. "The court finds that the Ninth Circuit law *is established* on the issue of statutes' applicability to Indian and Indian Tribes and any exemptions thereto." (Recommendation at 31-32 & n.33 (citing *eight* Ninth Circuit cases) (emphasis added).)

Despite the clarity of the *Donovan* rule and its consistent application by the Ninth Circuit, the Objecting Defendants persist in their quest to overturn precedent and create a nonexistent tribal exception to the FTC Act. They advance two principal arguments to overturn the Magistrate Judge's application of *Donovan*. First, all the Objecting Defendants argue that *Donovan* is bad law and that this Court should not follow binding precedent. Second, the Objecting Defendants (except Troy LittleAxe) argue that the FTC Act is not a statute of general applicability, and, therefore, that *Donovan* does not apply. Both arguments are defective, and the Court should accept and adopt in full the Magistrate Judge's Recommendation rejecting them.

I. THE MAGISTRATE JUDGE CORRECTLY FOUND THAT THIS COURT CANNOT IGNORE OR OVERRULE DECADES OF NINTH CIRCUIT PRECEDENT TO CREATE THE TRIBAL EXCEPTIONS DEFENDANTS SEEK

The Court may easily dispense with the Objecting Defendants' argument that *Donovan*, and the decades of Ninth Circuit law following *Donovan*, are wrongly decided. Not only is this Court is bound to apply Ninth Circuit precedent, but, as the Magistrate Judge correctly found, other Ninth Circuit courts have already dispensed with the specific arguments made by the Objecting Defendants here. (Recommendation at 34-36.)

Ninth Circuit law is clear that a statute of general applicability silent as to tribal interests presumptively applies to tribes. This rule originates from the Supreme Court's *Tuscarora* opinion, wherein the Court stated, "it is now well settled by many decisions of this Court that a

1 general statute in terms applying to all persons includes Indians and their property interests.”
 2 *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). The Objecting
 3 Defendants decry this language from *Tuscarora* as dicta, but, as demonstrated below, the Ninth
 4 Circuit has articulated, and repeatedly followed, the rule that a statute of general applicability
 5 presumptively applies to tribes.

6 *Donovan* crystalized the tenet in the Ninth Circuit: “Many of our decisions have upheld
 7 the application of general federal laws to Indian tribes; not one has held that an otherwise
 8 applicable statute should be interpreted to exclude Indians.” *Donovan v. Coeur d’Alene Tribal*
 9 *Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).⁷ Following *Donovan* (decided under the
 10 Occupational Safety and Health Act (“OSHA”)), the Ninth Circuit⁸ and its district courts have on
 11 many occasions affirmed that a myriad of federal statutes – e.g., OSHA, FLSA, NLRA, ERISA –
 12 presumptively apply to tribes and tribal businesses notwithstanding the lack of any specific
 13 language in those statutes saying so.⁹ The Objecting Defendants’ fundamental dispute with the
 14

15 ⁷ There are three exceptions to the *Donovan* rule, 751 F.2d at 1116, but, as the Magistrate
 16 Judge correctly found, Defendants have never attempted to invoke any of them.
 17 (Recommendation at 32.) The Objecting Defendants still make no argument that any of
 the *Donovan* exceptions apply.

18 ⁸ Underscoring its significance, *Donovan* has been followed in other Circuits as well. *See*,
 19 e.g., *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996) (“We adopt
 20 the Ninth Circuit’s method of analysis in [*Donovan v.*] *Coeur d’Alene* as the appropriate
 21 test to determine whether a statute, silent as to Indians, applies to tribes.”); *see also*
Florida Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126,
 1129 (11th Cir. 1999); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989).

22 ⁹ *See, e.g., Solis v. Matheson*, 563 F.3d 425, 434 (9th Cir. 2009) (Fair Labor Standards
 23 Act (“FLSA”)); *U.S. v. Fiander*, 547 F.3d 1036, 1039 (9th Cir. 2008) (Contraband
 24 Cigarette Trafficking Act (“CCTA”)); *United States v. Mitchell*, 502 F.3d 931, 947 (9th
 25 Cir. 2007) (Federal Death Penalty Act); *U.S. v. Smith*, 387 F.3d 826, 829 (9th Cir.
 26 2004) (federal witness retaliation, 18 U.S.C. § 1513(b)(2)); *N.L.R.B. v. Chapa De*
Indian Health Program, Inc., 316 F.3d 995, 998-99 (9th Cir. 2003) (National Labor
 27 Relations Act (“NLRA”)); *U.S. v. Baker*, 63 F.3d 1478, 1485 (9th Cir. 1995) (CCTA);
Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683, 685
 28 (9th Cir. 1991) (Employment Retirement Income Security Act (“ERISA”)); *U.S. Dep’t*
of Labor v. Occupational Safety & Health Review Comm’n, 935 F.2d 182, 184 (9th Cir.
 1991) (OSHA); *see also Dish Network Corp. v. Tewa*, No. CV 12–8077–PCT–JAT,
 2012 WL 5381437, at *8 (D. Ariz. Nov. 1, 2012) (Communications Act); *Chao v.*

1 existence of a “general applicability presumption” (Docket No. 449 at 6; *see also* Docket No.
 2 448 at 12-13) and reliance on law review articles amount to an inapt argument that each and
 3 every one of those Ninth Circuit cases is wrongly decided.

4 The Objecting Defendants point to a few Supreme Court cases and Indian law canons in
 5 support of their spurious argument that *Donovan* is bad law. The Magistrate Judge correctly
 6 found the Objecting Defendants’ reliance on those cases and canons to be misplaced. As the
 7 Magistrate Judge observed, the Ninth Circuit in *Chapa De* contemplated and rejected this exact
 8 argument:

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

13 *Chapa De*, 316 F.3d at 999 (cited in Recommendation at 35-36). This passage alone dispenses
 14 with the entirety of Troy LittleAxe’s objection and its *ad nauseum* invocation of those canons.
 15 (*See generally* Docket No. 448.) The AMG objection recycles the same cases and arguments
 16 from the papers below (*see, e.g.* Docket No. 449 at 16 (*citing Blackfeet Tribe; County of Oneida;*
 17 *County of Yakima; McClanahan, Santa Clara Pueblo*)), without any reason for this Court to
 18 reach any different conclusion than that reached by the Magistrate Judge (Recommendation at
 19 34-36) (distinguishing those cases); *see also* Docket No. 391 at 7 n.10 (same).)

20 In addition to their heavy reliance on canons already distinguished by the Ninth Circuit,
 21 the Objecting Defendants rely on a series of dissimilar cases limiting state and private litigants’
 22 ability to sue tribes based on sovereign immunity. (Docket No. 449 at 8, 11-14 (*citing Mille*
 23 *Lacs Band; Inyo County; Three Affiliated Tribes; Wold Engineering; United States Fidelity &*
 24

25 *Spokane Tribe of Indians*, No. CV-07-0354-CI, 2008 WL 4443821, at *1-2 (E.D. Wash.
 26 Sept. 24, 2008) (FLSA); *Cano v. Cocopah Casino*, No. CV-06-2120-PHX-JAT, 2007
 27 WL 2164555, at *2 (D. Ariz. 2007) (Age Discrimination in Employment Act); *Hollynn*
 28 *D’Lil v. Cher-Ae Heights Indian Cmty. of the Trinidad Rancheria*, No. C 01-1638 TEH,
 2002 WL 33942761, at *3 (N.D. Cal. Mar. 11, 2002) (Americans with Disabilities Act).

1 *Guaranty; Kiowa Tribe, Fisher; Kerr-McGee; et al.*.) Unlike the Objecting Defendants' cases,
 2 this matter is brought by the federal government in a law enforcement capacity. The Objecting
 3 Defendants' pervasive and continuing reliance on cases involving disputes between tribes and
 4 states and private actors conveniently ignores the fact that tribes cannot assert sovereign
 5 immunity against the United States. *See, e.g., United States v. Yakima Tribal Court*, 806 F.2d
 6 853, 861 (9th Cir. 1986) ("[T]he United States may sue Indian tribes and override tribal
 7 sovereign immunity."). On this basis, the Magistrate Judge readily dispensed with the remainder
 8 of the Objecting Defendants' citations. (Recommendation at 35 n.34 (A large number of
 9 Defendants' cases "are distinguishable, as they were not brought by the federal government
 10 acting in a law enforcement capacity"); *see also* Docket No. 391 at 7 n.10 (distinguishing
 11 Defendants' cases).) Indeed, this Court has recognized the material difference in private versus
 12 federal government actions. *U.S. ex rel. Howard v. Shoshone Paiute Tribes, Duck Valley Indian*
 13 *Reservation*, No. 2:10-CV-01890-GMN, 2012 WL 6725682, at *2 n.3 (D. Nev. Dec. 26, 2012)
 14 (Navarro, J.).

15
 16 In short, the Objecting Defendants' attempt to avoid the rule that a generally applicable
 17 federal statute presumptively applies to tribes amounts to an improper plea that the Court
 18 overrule or ignore binding Ninth Circuit precedent. *See CML-NV East Mountain, LLC v.*
 19 *Vandenberg 8 LLC*, No. 2:11-cv-00187-GMN-RJJ, 2012 WL 4339602, at *3-4 (D. Nev. Sept.
 20 20, 2012) (Navarro, J.) (declining party's request for court to disregard Supreme Court and Ninth
 21 Circuit precedent); *see also* Recommendation at 35-36 ("this court is not in a position to overrule
 22 *Donovan* or refuse to apply the binding Ninth Circuit precedent").

23 **II. APPLYING *DONOVAN* AND OTHER NINTH CIRCUIT PRECEDENT, THE**
 24 **MAGISTRATE JUDGE CORRECTLY FOUND THAT THE FTC ACT IS A**
 25 **GENERALLY APPLICABLE STATUTE THAT APPLIES TO TRIBES AND**
 26 **TRIBAL BUSINESSES**

27 *Donovan* and its progeny are binding in this Circuit, and there is no reason why *Donovan*
 28 should not be applied here.

A. The FTC Act Is A Statute of General Applicability, With No Language Exempting Tribes

The Objecting Defendants do not contend that the FTC Act has any language exempting tribes. Nor do the Objecting Defendants argue that any of the three *Donovan* exceptions apply here. Thus, the Objecting Defendants' only remaining argument is that the FTC Act is not a statute of general applicability.

The Objecting Defendants contend that the existence of certain exemptions in the FTC Act undermines the finding that the statute is one of general applicability, but the Ninth Circuit has already considered and disregarded this argument. The court held in *Chapa De* that a statute need not be *universally* applicable for the *Donovan* rule to apply, only *generally* applicable. Thus, Ninth Circuit law is clear that the presence of some exceptions in a statute will not disturb the conclusion that the statute is generally applicable:

Chapa-De contends that the National Labor Relations Act ... is not a statute of general applicability and does not apply to Indian tribes because the NLRA has exemptions. But exemptions alone are not dispositive. *The issue is whether the statute is generally applicable, not whether it is universally applicable.* We have previously held that other federal statutes that contain exemptions are nevertheless generally applicable. 316 F.3d at 998 (citation omitted) (emphasis added), cited in Recommendation at 29-30.

Accordingly, the Ninth Circuit has confirmed that several statutes containing exceptions (e.g., NLRA, OSHA, FLSA, ERISA, CCTA) are nevertheless "generally applicable" and therefore presumptively apply to tribal interests. *See Chapa De*, 316 F.3d at 998 (NLRA); *Donovan*, 751 F.2d at 1115 (OSHA); *Solis*, 563 F.3d at 429-30 (FLSA); *Lumber Indus.*, 939 F.2d at 685 (ERISA); and *Baker*, F.3d 1484-85 (CCTA), all cited in Recommendation at 29-31 and/or Docket No. 391 at 8-9.

The AMG objection contends meekly and without explanation that the FTC Act is somehow different from those statutes that also have exceptions. (Docket No. 449 at 9-10.) But under settled Ninth Circuit precedent, it is immaterial that, for example, OSHA contains certain exemptions for certain business activities whose enforcement is reserved for other federal agencies (just as the FTC Act does). The Magistrate Judge carefully compared the exemptions in

1 the FTC statute to those in the other statutes previously deemed applicable to tribes, concluding
 2 that the exemptions are similar. (Recommendation at 30-31 and n. 32 (discussing FTC Act
 3 exemptions and other federal enforcement mechanisms for exempted activities).) Thus, the
 4 limited exemptions in the FTC Act do not affect the conclusion that the FTC's consumer
 5 protection powers under the FTC Act are "broad." Indeed, the Ninth Circuit has already reached
 6 this conclusion. *See FTC v. Neovi*, 604 F.3d 1150, 1153 (9th Cir. 2010) ("The Federal Trade
 7 Commission ('FTC') has broad powers under the FTC Act to prevent businesses from engaging
 8 in unfair or deceptive practices."); *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1000 (N.D. Cal.
 9 2010) (same).

10 Indeed, under the doctrine *expressio unius est exclusio alterius*, the presence of certain
 11 specific and explicit exemptions in the FTC Act, without any corresponding exemption for tribal
 12 interests, compels the conclusion that the Court should not recognize any unstated exemptions.
 13 *See Del Webb Communities, Inc. v. Partington*, No. 2:08-cv-00571-RCJ-GWF, 2009 WL
 14 3053709, at *9 (D. Nev. Sept. 18, 2009) (statutory provision specifically articulating eight
 15 exceptions implied exclusion of exceptions for other categories of persons).

16 The Objecting Defendants' related reliance on a handful of other statutes that happen to
 17 contain specific references to tribes fails because, as the Magistrate Judge found, each of those
 18 statutes¹⁰ has particular (and not general) application. (Recommendation at 33-34.) AMG
 19 repeats this argument in its objection (Docket No. 449 at 13 & n.6), nearly verbatim (*see* Docket
 20 No. 355 at 7-8), without even acknowledging that the Magistrate Judge specifically considered
 21 and rejected it. (Recommendation at 33-34.) In any event, Defendants' underlying premise that
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23
 24 ¹⁰ The statutes cited by AMG have particular application to or purpose regarding tribes and
 25 none are statutes broadly governing general commercial enterprises as the NLRA, FLSA,
 26 OSHA, ERISA, and the FTC Act are. *See, e.g.*, 16 U.S.C. § 470bb(7) (definition
 27 includes specific mention of tribes in statutory scheme designed to protect archaeological
 28 resources on tribal lands); 15 U.S.C. § 375(8) (definition includes specific mention of
 tribes in tax statute designed specifically to apply to tribal lands); 42 U.S.C. § 8802(17)
 (definition includes specific mention of tribes in biofuel government program statute for
 Departments of Energy and Agriculture).

the specific mention of tribal interests in a handful of federal statutes somehow precludes tribal application for *all other federal statutes in the balance of the entire U.S. Code* is nonsensical and directly conflicts with the core rule in *Donovan*: “[W]e have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them.” *Donovan*, 751 F.2d at 1115. (Recommendation at 34 (citing *Donovan* to support conclusion that Defendants’ reliance on tribal language in three specific statutes is “without merit”).)¹¹

B. The FTC Also Has Authority To Sue Under TILA And EFTA Under The Clear Language Of Those Statutes

After initially attempting to avoid application of all three statutes before the Magistrate Judge, the Objecting Defendants offer little or no argument that the FTC lacks authority to sue them under TILA and EFTA. This is because, as the Magistrate Judge found, the statutory language in TILA and EFTA explicitly rejects any supposedly applicable jurisdictional limits in the FTC Act. (Recommendation at 40 (citing 15 U.S.C. § 1607(c) (TILA provision conferring enforcement authority to the FTC “irrespective” of FTC Act jurisdictional limits); 15 U.S.C. § 1693o(c) (same, EFTA).) For this reason, the Recommendation determined that Defendants’ “non-profit” defense under the FTC Act – for which the Magistrate Judge will entertain further factual development – is wholly inapplicable under TILA and EFTA. (Recommendation at 40.)

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¹¹

AMG also argues that the FTC Act cannot apply to tribes based on a historical chronology that supposedly belies any finding that Congress intended the FTC Act to apply to tribes. (Docket No. 449 at 10.) But by assuming as necessary a specific intent in the statute for it to apply to tribes, AMG is simply rearguing the Ninth Circuit’s *Donovan* presumption that generally applicable statutes apply to tribes even without specific language (or Congressional intent). *Donovan*, 751 F.2d at 1116.

CONCLUSION

For the foregoing reasons, and those stated in the FTC's original and reply memorandum in support of its amended motion for summary judgment (Docket Nos. 339, 391), this Court should overrule Defendants' objections (Docket Nos. 448, 449) and accept and adopt the Recommendation in full.

Dated: August 16, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nikhil Singhvi, certify that the following individuals were served with the **PLAINTIFF'S POINTS AND AUTHORITIES OPPOSING DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S JULY 18, 2013 REPORT AND RECOMMENDATION** by the method indicated below:

Dated this 16th day of August, 2013

/s/ Nikhil Singhvi

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