

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 10-23507-CV-GOLD

MICCOSUKEE TRIBE OF INDIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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**UNITED STATES' MOTION TO DENY PETITIONS TO QUASH**

**Introduction**

The Internal Revenue Service ("IRS") is examining whether the Miccosukee Tribe of Indians (the "Tribe") met its withholding and reporting obligations for the 2006 through 2009 tax periods. As part of its examination, the IRS issued four administrative summons to Morgan Stanley Smith Barney ("Morgan Stanley"), Citibank (South Dakota), N.A., American Express Company, and Wachovia Bank, third party recordkeepers of the Tribe (collectively "the banks"). The summonses seek information to help the IRS determine whether the Tribe properly withheld from and reported payments to tribal members, vendors, and employees. Before the banks could comply with the summonses, the Tribe filed four petitions to quash. *Miccosukee Tribe of Indians v. United States*, Nos. 10-cv-23507, 10-cv-23508, 10-cv-23509, and 10-cv-23511 (S.D. Fla.). The petitions have been consolidated under the case number 10-23507-CV-Gold. The United States asks this Court to deny the petitions to quash because the summonses satisfy the factors set

forth in *United States v. Powell*, 379 U.S. 48 (1964), and because the Tribe's arguments for quashing the summonses, including its sovereign immunity argument, fail as a matter of law.

### **Statement of Facts**

#### **A. The Examination**

The IRS's examination of the Tribe arose from allegations that the Tribe was making unreported distributions to tribal members. *See* Furnas Decl. at ¶ 4. The IRS first examined whether the Tribe was meeting reporting and withholding obligations for the 2000 through 2005 tax years. *See* Furnas Decl. at ¶ 4. The IRS discovered through investigations that the Tribe failed to make required withholding on certain taxable payments of American Indian casino profits under 26 U.S.C. § 3402(r) and backup withholding under 26 U.S.C. § 3406, and failed to file Forms 945, Annual Return of Withheld Federal Income Tax, for that withholding. In addition, the IRS determined that several Forms 1099 MISC, Miscellaneous Income, were not filed as required to report payments to members as well as payments of non-employee compensation to service providers. *See* Furnas Decl. at ¶ 5. Believing that the Tribe continued to make similar payments without properly withholding from or reporting them, the IRS began investigating the Tribe for the 2006, 2007, 2008, and 2009 tax periods. *See* Furnas Decl. at ¶ 6.

#### **B. The IRS Summonses**

In order to corroborate its suspicions regarding the Tribe and gather information about the Tribe's potential tax liabilities for 2006 through 2009, Revenue Agent James Furnas issued four summonses "in the matter of" Miccosukee Tribe of Indians of Florida on September 10, 2010, true and correct copies of which are attached as Exhibit A to the four petitions to quash filed by the Tribe. *See* Furnas Decl. at ¶¶ 9, 13, 19, 23, 29, 33, 39, 43. One of the summonses requires

Morgan Stanley to give testimony and to produce documents related to the Tribe's use of its accounts at Morgan Stanley. Specifically, the summons seeks:

- i. Records of security transactions including all types of accounts, agreements, contracts, application for account, and signature cards. Records relating to treasury notes or certificates of deposit purchased, cash accounts, ready asset accounts, mutual fund accounts, commodity accounts, margin accounts, or other accounts. Such records include cash receipts, confirmation slips, securities delivered receipts, statements of account, notifications of purchase or sale, representative's stock record, account executive worksheets, correspondence, ledger sheets, cash in slips, buy and sell slips, or other records of these transactions.
- ii. Records showing the dates, amounts, and purpose of all payments, including records showing a description of the securities transacted, quantity bought or sold, date of transactions, purchase or sales price, and commissions paid.
- iii. Records of the disposition of the proceeds from each sale of a security, including checks (front and back) issued to the above named individual(s) as a result of these sales.
- iv. Records of any and all dividends and/or interest paid to the Miccosukee Tribe, including checks (front and back) and Forms 1099 issued to the Miccosukee Tribe.
- v. Records of any other payments to the Miccosukee Tribe that show the date, amount, and purpose of the payment, including the checks (front and back) for such payments.
- vi. Records maintained of transactions for or communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence, financial statements, background or credit investigations, and records identifying the stock transfer agent and dividend disbursing agent.
- vii. Records of all checking accounts of the Miccosukee Tribe, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.
- viii. Records of all credit and/or debit cards of the Miccosukee Tribe, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash

advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).

*See Furnas Decl.* at ¶12. The three additional summonses require Citibank (South Dakota), N.A., American Express Company, and Wachovia Bank to give testimony and to produce documents related to the Tribe's use of accounts at those banks. Specifically, the summonses directed Citibank, American Express, and Wachovia to:

- i. Provide all savings account documents, including but not limited to signature cards, ledger cards, records reflecting dates and amounts of deposits, withdrawals, interest, debit and credit memos, deposit slips, checks deposited, withdrawal slips, transit items, checks issued for withdrawals and Forms 1099 issued.
- ii. Provide all checking account documents, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.
- iii. Provide all loan documents, including but not limited to applications, financial statements, loan collateral agreements, credit and/or background investigations, loan agreements, notes, mortgages, settlement sheets, contracts, checks issued for loans, repayment records (including records revealing the date, amount and method of repayment, whether by cash or check), checks used to repay loans, documents reflecting the total amount of discount or interest paid annually, records of liens, loan correspondence files and internal bank memoranda.
- iv. Provide all safe deposit box documents, including but not limited to contracts, access records, and records of rental fees paid (including those reflecting the date, amount, and method of payment, whether by cash or check).
- v. Provide all Certificate of Deposit documents, including but not limited to applications, actual Certificate of Deposit instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.

- vi. Provide all Money Market Certificate documents, including but not limited to applications, actual Money Market Certificate instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.
- vii. Provide all U.S. Treasury Notes and Bills, including but not limited to all documents reflecting the purchase of U.S. Treasury Bills and Notes and/or subsequent sale of such bills or notes, including interest paid, checks used for the purchase or sale of the notes and bills, Forms 1099 issued, checks issued for interest payments and all records of interest paid or accumulated (including those revealing the dates and amount of interest paid or accumulated).
- viii. Provide all credit card records, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).
- ix. Provide all documents reflecting the purchase of bank checks, cashier, teller, travelers' checks, certified checks and money order records. This request also includes the check register, file copies of the checks or money orders and records revealing the date and source of payment for said checks or money orders.
- x. Provide all documents reflecting certified checks, wire transfers, collections, letters of credit, bonds and securities purchased, sold or otherwise transacted through each bank. This request also includes savings bond transactions and investment accounts and should include documents that disclose the date and amount of the transaction, method of transaction (i.e., whether by cash, check or electronic), source of payment, instruments used for payment and statements of transactions.
- xi. Provide all documents reflecting correspondence or other communications regarding the Miccosukee Tribe.

Furnas Decl. ¶¶ 22, 32, 42. The IRS served properly attested copies of each summons on the relevant bank and the Tribe. Furnas Decl. at ¶¶ 9-10, 19-20, 29-30, 39-40. The IRS also took all administrative steps required by the Internal Revenue Code, and there is no referral to the Justice

Department as defined in Section §7602(d) of the Internal Revenue Code with respect to the Tribe for the years 2006 to 2009. Furnas Decl. at ¶¶ 8, 18, 28, 38, 48. Because the banks have failed to comply with the summonses, the IRS is not in possession of the summoned information, and the United States now requests the Court deny the petitions to quash. Furnas Decl. at ¶¶ 16-17, 26-27, 36-37, 46-47.

### **Argument**

#### **I. The Summonses Meet All Standards of Applicable Law**

Section 7602(a) of the Internal Revenue Code authorizes the IRS to issue an administrative summons for “determining the liability of any person for any internal revenue tax . . .” Specifically, Section 7602(a), in relevant part, authorizes the IRS:

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- (2) To summon . . .  
any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary [of the Treasury] may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.

The United States may seek to compel compliance with a summons in the context of an action brought to quash the summons. *See* 26 U.S.C. §7609(b)(2)(A). Although the United States does not do so here, in such a case, the United States would have the initial burden of making a *prima facie* showing that the following requirements have been met:

- (1) the investigation has a legitimate purpose;
- (2) the summoned materials may be relevant to that purpose;

(3) the information sought is not already within the IRS' possession; and,

(4) the IRS followed the administrative steps required by the Internal Revenue Code.

*Powell*, 379 U.S. at 57-58; *see also United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 318

(1978). This showing can be, and typically is, made through the affidavit or sworn declaration of

the IRS officer who issued the summons. *See e.g., In re Newton*, 718 F.2d 1015, 1019 (11th Cir.

1983); *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993); *United States v.*

*Abrahams*, 905 F.2d 1276, 1280 (9th Cir. 1990), *overruled on other grounds by United States v.*

*Jose*, 131 F.3d 1325 (9th Cir. 1997); *Alphin v. United States*, 809 F.2d 236, 238 (4th Cir.

1987); *United States v. Will*, 671 F.2d 963, 966 (6th Cir. 1982). Here, the showing is made

through the Furnas Declaration.<sup>1</sup>

#### **A. The IRS Issued the Summonses for a Legitimate Purpose.<sup>2</sup>**

An administrative summons must be issued "in good-faith pursuit of the congressionally authorized purposes of §7602." *LaSalle Nat'l Bank*, 437 U.S. at 318. Section 7602 authorizes the IRS to issue a summons to any person who has information that may be relevant to an IRS inquiry. This power may be invoked to require a person to produce books and records or to give testimony so that the IRS may:

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<sup>1</sup>Although the United States does not now formally counter petition for enforcement of the summons, we nevertheless wish to demonstrate that the instant summons meets all relevant legal standards for enforceability.

<sup>2</sup>The Tribe has requested discovery and a hearing regarding its improper purpose argument. (*E.g.*, doc. 1 p.18, *Miccosukee Tribe of Indians v. United States*, No. 1:10-cv-23507 (S.D. Fla.)) The United States opposes the Tribe's requests for discovery and a hearing. The United States understands that the Tribe will file a motion requesting a hearing and discovery and that the United States will have an opportunity to enumerate its reasons for opposing the Tribe's request in response to the Tribe's motion. (Doc. 13.)

- (1) assess the correctness of a return;
- (2) make a return where none has been made;
- (3) determine or collect the liability of any person for any internal revenue tax; or
- (4) inquire into an offense connected with the administration or enforcement of the tax laws.

26 U.S.C. § 7602(a) & (b); 26 C.F.R. § 301.7602-1(a). In the present case, the IRS is examining whether the Tribe properly met its withholding and reporting requirements. *See Chickasaw Nation v. United States*, 208 F.3d 871, 884 (10th Cir. 2000) (noting that American Indian Tribes remain subject to tax laws imposed by Congress despite their unique status).

In order to satisfy the “legitimate purpose” prong, the IRS need not at this stage present sufficient evidence to prove the Tribe has a tax liability or has otherwise violated a provision of the Internal Revenue Code. The Supreme Court rejected the notion that the IRS must demonstrate any “probable cause” before a summons is enforced. In *Powell*, the Supreme Court noted that the IRS can issue a summons to investigate “merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” 379 U.S. at 57 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)). “The function of the district court . . . in an enforcement proceeding is not to test the final merits of the claimed tax deduction, but to assess within the limits of *Powell* whether the IRS issued its summons for a legitimate tax determination purpose.” *United States v. White*, 853 F.2d 107, 116 (2d Cir. 1988).

Here, the IRS’s legitimate purpose is to determine whether the Tribe met its withholding and reporting requirements. These include:



- The requirement under 26 U.S.C. § 3402(r) that the Tribe withhold taxes from certain payments of American Indian casino profits. *See* 26 C.F.R. § 31.3402(r)-1.
- The requirement under 26 U.S.C. § 3406 that the Tribe collect, account for, and pay over backup withholding for certain payments including when a payee has failed to provide the Tribe with a taxpayer identification number and for non-employee compensation payments. *See* 26 C.F.R. § 31.3406(a).
- The requirement that the Tribe file a Form 945 Annual Return of Withheld Federal Income Tax, to report backup withholding and withholding on certain payments of American Indian casino profits. 26 U.S.C. § 6011(a); 26 C.F.R. § 31.6011(a)-4(b).
- The requirement that the Tribe properly file information returns, including Form 1099-MISC, for payments made in the course of its trades or businesses in excess of \$600. *See* 26 U.S.C. §§ 6011, 6041(a) (requiring information returns for certain payments of \$600 or more), 6041A(a) (requiring information returns for remuneration for certain services), 6042 (requiring information returns for payments of dividends, earnings, or profits). The Tribe could be subject to penalties for failure to file proper information returns under 26 U.S.C. § 6721.

While the United States need not prove that the Tribe actually failed to properly withhold taxes and report payments to justify the summons, the IRS already has strong reason to suspect that the Tribe has failed to do so. The IRS believes from its prior investigations for the 2000 through 2005 tax years that the Tribe has failed to properly withhold from and report payments. The Tribe has continued not to file any Form 945 or remit any withholding. Against this background, the IRS has a legitimate purpose in continuing its investigation with the summonses at issue.

In its petitions to quash, the Tribe rests its assertion of an improper purpose on its mistaken belief that because it is not subject to federal *income* tax, it is immune from all sections of the Internal Revenue Code. (*E.g.*, doc. 1 at 19-21, *Miccosukee Tribe of Indians v. United States*, No. 1:10-cv-23507 (S.D. Fla.).) Individual tribal members are subject to taxation. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (“Indians are citizens and . . . in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as

are other citizens.”). Similarly, nonmember contractors and other payees of the Tribe may be subject to taxation. To ensure collection of these taxes, the Internal Revenue Code imposes reporting and withholding requirements such as those listed above.

The Tribe has the responsibility to abide by these withholding and reporting requirements. *See Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir.1989) (citing Felix Cohen, Handbook on Federal Indian Law 399 (1982 ed.)) (“[T]here can be little doubt that tribes are subject to [the withholding statute’s] requirements as employers . . . . Tribes and Indians have in fact complied with this law, and there seems no controversy over it.”); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 845 F.2d 139, 143 (7th Cir. 1988) (“[T]ribes as employers basically have been subject to federal insurance contributions tax, 26 U.S.C. §§ 3101-26, unemployment compensation tax, *id.* at §§ 3301-11, and income tax withholding, *id.* at §§ 3401-06 . . . .”). Notably, § 3402(r) expressly applies to “every person, including an Indian tribe.” 26 U.S.C. § 3402(r). Section 3402(r) indisputably applies to the Tribe and suggests that similar references to “person” in the Code include Indian tribes. Statutes requiring an information return, such as 26 U.S.C. § 6041, apply to “all persons engaged in a trade or business.” Section 7701(a)(1) of the Internal Revenue Code supplies the definition of “person” and has been held to apply to Indian tribes. *See Chicksaw Nation*, 208 F.3d at 878, *aff’d, on other grounds* 534 U.S. 84 (2001) (“[W]e conclude that Congress unambiguously intended for the word ‘person,’ as used in § 7701(a)(1), to encompass all legal entities, including Indian tribes and tribal organizations . . . .”). That the withholding and reporting requirement statutes apply broadly argues against excluding Tribes, and this Court should not read an exception into these statutes where none exists solely because this case involves a Tribe.

*Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001) (“[T]he canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed.”). The Tribe must abide by its reporting and withholding responsibilities, and the IRS has the responsibility to issue summonses to ensure that it does. 26 U.S.C. § 7601, *et seq.*; *United States v. Euge*, 444 U.S. 707, 711 (1980) (“[I]f the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies.”). There is no improper purpose to the summonses.

#### **B. The Summoned Data May Be Relevant to the Investigation**

The second element of the *Powell* test requires that the summons seeks information that may be relevant to the purpose of the underlying investigation. In *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), the Supreme Court announced the controlling standard of “potential relevance” in summons enforcement cases:

As the language of § 7602 clearly indicates, an IRS summons is not to be judged by the relevance standards used in deciding whether to admit evidence in federal court. *Cf.* Fed. Rule Evid. 401. The language “may be” reflects Congress’ express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until it is procured and scrutinized. As a tool of discovery, the § 7602 summons is critical to the investigative and enforcement functions of the IRS, *see United States v. Powell*, 379 U.S. 48, 57 (1964); the Service therefore should not be required to establish that the documents it seeks are actually relevant in any technical, evidentiary sense.

465 U.S. at 814 (emphasis in original).

Determining the applicability of the Internal Revenue Code to possibly unreported Tribal payments by necessity entails examining a broad amount of information. To determine whether the Tribe properly filed Form 945's and Form 1099's, the IRS must examine what payments the Tribe made, the amount of the payments, the payees, when payments were made, and the purpose of the payment. To determine the applicability of withholding requirements imposed on distributions from the Tribe's casino profits, the IRS must examine the source of funds for payments that the Tribe made. The summonses here request various records related to the Tribe's accounts. These documents are related to the IRS's investigation in that they help identify payments, payees, the nature of payments, and the source of the funds. Furnas Decl. at ¶¶ 15, 25, 35, 45. Such information may also serve to justify or eliminate a justification proposed by the Tribe for unreported payments.

**C. The IRS Does Not Possess the Summoned Information, and the IRS Has Substantially Followed the Administrative Steps Required by the Internal Revenue Code**

As made clear by the Furnas Declaration, the IRS does not possess the summoned information. *See* Furnas Decl. at ¶¶ 16, 26, 36, 46. The IRS followed all procedures required by the Internal Revenue Code with respect to the summonses. *See* Furnas Decl. at ¶¶ 18, 27, 38, 48. In accordance with 26 U.S.C. § 7603, the IRS served properly attested copies of each summons on each relevant bank. Furnas Decl. at ¶¶ 9, 19, 29, 39. Additionally, in accordance with 26 U.S.C. §§ 7603 and 7609, Furnas served a copy of the summonses on the Tribe on September 10, 2010, by mailing copies, via certified mail. Furnas Decl. at ¶¶ 10, 20, 30, 40.

## II. Petitioner Cannot Meet Its “Heavy Burden” to Quash the Summonses.

In order to successfully quash the summons, the Petitioner bears the burden to rebut the United States’ *prima facie* case that the *Powell* requirements have been met or to prove that enforcement of the same would be an abuse of the Court’s process. *Powell*, 379 U.S. at 58; *see also United States v. Balanced Financial Mgt., Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985). Since summons enforcement actions are intended to be summary proceedings, the burden on the Petitioner to demonstrate abuse of process is a “heavy one.” *See e.g., Crystal v. United States*, 172 F.3d 1114, 1144 (9th Cir. 1999); *Dynavac*, 6 F.3d at 1414; *Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995); *United States v. Feminist Federal Credit Union*, 635 F.2d 529, 530 (6th Cir. 1980); *United States v. Kis*, 658 F.2d 526, 536 (7th Cir. 1981).

In addition to the argument discussed above—that the summons was issued for an improper purpose—the Tribe argues that its sovereign immunity protects it from the summonses issued to the banks and that the summonses are overbroad. As demonstrated below, these arguments do not meet the “heavy burden” required to quash the summons.

### A. Sovereign Immunity Does Not Bar Enforcement of the Summonses.

#### 1. *Indian Sovereign Immunity Does Not Bar Actions by the United States*

As the Tribe did in opposition to the IRS summons related to the former tribal chairperson, Billy Cypress, the Tribe argues that tribal sovereign immunity protects the records at issue. *See Miccosukee Tribe of Indians v. United States*, No. 10-cv-21332, 2010 WL 3195661 (S.D. Fla. Aug. 11, 2010). Tribes retain sovereign immunity in accordance with the principles of federal common law. *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 754, 759 (1998). This immunity is not absolute and may not be invoked to prevent actions taken by the United States, a

superior sovereign. *Miccosukee*, 2010 WL 3195661, at \*4 (citing *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1135 (11th Cir. 1999); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir.1987); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir.1994)). This Court previously rejected the Tribe's assertion of sovereign immunity on this basis and should do so again. *See Miccosukee*, 2010 WL 3195661, at \*3-4.

The Tribe previously argued that the summons in the Billy Cypress matter should be quashed because Congress did not *waive* its tribal sovereign immunity with regard to IRS summonses. The Court pointed out one of the flaws in this argument: that where no sovereign immunity exists to protect the Tribe, no waiver or abrogation is required. *Miccosukee*, 2010 WL 3195661, at \*4 (citing *Paraplegic*, 166 F.3d at 1134).<sup>3</sup> The Tribe's current petitions to quash again rely on its belief that Congress has not waived tribal sovereign immunity with respect to IRS summonses. (Doc. 1 at 5-14, *Miccosukee Tribe of Indians v. United States*, 1:10-cv-23507 (S.D. Fla.)) While it strongly disagrees with the Court's earlier conclusion that sovereign immunity is not a bar to actions by the United States, the Tribe cites no authority to the contrary. (Doc. 1 at 11, *Miccosukee Tribe of Indians v. United States*, No. 10-cv-23507 (S.D. Fla.) ("The Court's conclusion in *Miccosukee* is incorrect and conflicts with longstanding precedent requiring an explicit waiver of tribal immunity." (no citation)); at 16 n.5 ("[T]o the extent *Red Lake* suggests that tribal immunity can never bar a United States agency action for Tribal records, it is inconsistent with binding precedent requiring explicit waiver of tribal immunity by

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<sup>3</sup>In *Florida v. Seminole Tribe of Florida*, the Eleventh Circuit expressed a preference for the term "abrogation" to apply to Congressional divestiture of tribal sovereign immunity as opposed to a tribe's own waiver of its immunity. 181 F.3d 1237, 1241 n.5 (11th Cir. 1999)

Congress.” (no citation))). The rationale of the Court’s earlier ruling and the glaring lack of contradictory authority make clear that the Tribe’s renewed arguments towards this point are equally unavailing.

2. *Sovereign Immunity Does Not Extend to Third Party Recordkeepers*

Another reason the Tribe may not invoke sovereign immunity to protect it from the summonses is that a summons to the Tribe’s third party recordkeepers is not a suit against the Tribe. Sovereign immunity as an overall concept applies only to proceedings “against the sovereign;” the immunity does not extend to a tribe’s third party recordkeeper. *See United States Environmental Protection Agency v. General Elec. Co.*, 197 F.3d 592 (2d Cir. 1999). “The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.” *Dugan v. Rank*, 372 U.S. 609, 620 (1963), *cited in Miccosukee*, 2010 WL 3195661, at \*4 n.7 (internal citations and quotation marks omitted); *cf. Fisher v. United States*, 425 U.S. 391, 397 (1976) (for purposes of the Fifth Amendment, a summons to a taxpayer’s lawyer as a third party recordkeeper does not ‘compel’ the taxpayer to do anything, including, in that case, to incriminate himself); *Allen v. Woodford*, 543 F. Supp. 2d 1138, 1144 (E.D. Cal. 2008). The IRS issued the summonses to (and thus sought to compel the action of) third party recordkeepers for records within those recordkeepers’ custody and control. The banks are not a “tribe” or a “tribal officer.” Therefore, the Tribe in not being restrained from doing or compelled to do anything, and the summonses do not impinge upon the Tribe’s sovereign immunity.

## **B. The Summons Is Not Overly Broad**

While the IRS's summons authority has been described as a license to fish, *United States v. Luther*, 481 F.2d 429, 432-33 (9th Cir. 1973) ("Sec. 7602 authorizes the Secretary or his delegate 'to fish'"); *United States v. Giordano*, 419 F.2d 564, 568 (8th Cir. 1969) ("Secretary or his delegate has been specifically licensed to fish by § 7602"), this license is not without limit. The IRS may not conduct an unfettered "fishing expedition" through a person's records, but "must identify with some precision the documents it wishes to inspect." *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967). Thus, in testing for overbreadth, the question is not whether the summons calls for the production of a large volume of records. Instead, under Eleventh Circuit case law, "[a]n IRS summons is overbroad if it does not advise the summoned party what is required of him with sufficient specificity to permit him to respond adequately to the summons." *United States v. Medlin*, 986 F.2d 463, 467 (11th Cir. 1993) (citation and internal quotation marks omitted). Summonses that are definite in nature and finite in scope, and that request only information that may be relevant to the IRS's inquiry, consistently have been enforced against challenges for overbreadth. *See, e.g., United States v. Reis*, 765 F.2d 1094, 1096 n.2 (11th Cir. 1985); *United States v. Linsteadt*, 724 F.2d 480, 483 n.1 (5th Cir. 1984); *United States v. Cmty. Fed. Sav. & Loan Ass'n*, 661 F.2d 694 (8th Cir. 1981); *United States v. Nat'l Bank of South Dakota*, 622 F.2d 365 (8th Cir. 1980).

By these standards, the summonses at issue are not overly broad. The summonses describe the documents sought, specifically documents in possession of the banks reflecting the nature of debits and credits to the Tribe's account. The summonses clearly state the applicable time period, the years 2006 through 2009. Furthermore, the United States has already



demonstrated how the summoned materials may be relevant to its investigation and that the IRS has a legitimate purpose for seeking these documents. Given the nature of the IRS's suspicions, there is simply no other way for the IRS to investigate Tribal payments other than through an inspection of these particular tribal account records. There is no way to narrow the summons while still achieving these necessary ends.

The Tribe fails to point to any portion of any of the summonses that is overbroad. In its petitions to quash, the Tribe argues that “several of the requested records are far outside the scope of any possible legitimate inquiry.” (*E.g.*, doc. 1 at 23-24, *Miccosukee tribe of Indians v. United States*, 1:10-cv-23507 (S.D. Fla.).) The Tribe then cites portions of the summons “broadly requesting ‘all documents pertaining to the Miccosukee Tribe in any capacity, whether held jointly or severally, as trustee, fiduciary, custodian, executor, guardian and/or beneficiary’, including ‘[r]ecords maintained of . . . communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence, financial statements, background or credit investigations. . . .’” *Id.* at 23-24 (alterations in original). The Tribe's citations quote paragraphs 3 and 5 of the summonses which appear in the “Instructions and Definitions” section. (*E.g.*, doc. 1 Ex. A at 1, *Miccosukee tribe of Indians v. United States*, 1:10-cv-23507 (S.D. Fla.).) These instructions reflect the extent of the IRS's summons authority and supplement the actual requests, which follow. *See* 26 U.S.C. § 7602. These instructions do not render the summonses overbroad, and the Tribe has failed to identify any portion of the actual requests that is overbroad.

**Conclusion**

The Tribe has not met its heavy burden of refuting the United States' showing or demonstrating that enforcement would be an abuse of the Court's process. The Court, therefore, should deny the petitions to quash.

Respectfully submitted,

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Of Counsel:

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United States Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2010, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, via transmission of Notices of Electronic Filing generated by CM/ECF or other approved means.

/s/ William E. Farrior  
WILLIAM E. FARRIOR

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-CV-23507-CIV-GOLD

MICCOSUKEE TRIBE OF INDIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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DECLARATION OF REVENUE AGENT JAMES M. FURNAS

I, James M. Furnas, hereby declare pursuant to Title 28 United States Code § 1746 as follows:

1. I am a duly commissioned Revenue Agent employed by the Internal Revenue Service ("IRS") in Duluth, Minnesota. As a Revenue Agent, I am authorized to issue administrative summonses for documents and testimony in furtherance of civil tax examinations.

2. In my capacity as a Revenue Agent, I am investigating whether the Miccosukee Tribe of Indians (the "Tribe"), complied with reporting and withholding requirements and whether the Tribe satisfied its tax liabilities for the taxable periods ending December 31, 2006, December 31, 2007, December 31, 2008, and December 31, 2009.

3. Everything contained in this declaration is based upon my personal knowledge.

**The Examination of the Tribe**

4. In 2005, the IRS learned of allegations that the Tribe regularly distributed payments to tribal members without reporting these distributions to the IRS.

5. Based in part on the allegations in paragraph 4, an examination to determine whether the Tribe was meeting its reporting and withholding requirements was conducted for 2000 through 2005. The IRS determined that the Tribe should have been withholding from the payments described in ¶ 4 and paying the withheld portions over to the United States as required under Internal Revenue Code (26 U.S.C.) § 3406 (Backup Withholding) or § 3402(r) (Withholding on Certain Taxable Payments of Indian Casino Profits), and that the Tribe should have been reporting these payments and withholding on Form 945's (Annual Return of Withheld Federal Income Tax). In addition, the IRS determined that several Forms 1099 MISC (Miscellaneous Income) were not filed as required to report payments to members as well as payments of non-employee compensation to service providers.

6. The IRS believes that similar payments were made by the Tribe for 2006, 2007, 2008, and 2009 and that the Tribe did not withhold from or report the payments as required.

7. From the period 2000 to the present, the Tribe has never filed a Form 945, Annual Return of Withheld Federal Income Tax.

8. No Justice Department referral, as defined by 26 U.S.C. § 7602(d)(2), is in effect with respect to the Tribe for the periods under investigation.

#### **Morgan Stanley Summons**

9. In order to learn about the Tribe's potential tax liabilities for the tax periods ending December 31, 2006, December 31, 2007, December 31, 2008, and December 31, 2009, I caused to be issued a summons to Morgan Stanley (the successor to Smith Barney) on September 10, 2010, "in the matter of" Miccosukee Tribe of Indians of Florida. The summons was served

on Morgan Stanley, by mailing, via certified mail, an attested copy of the summons to "Morgan Stanley Smith Barney, 485 Lexington Avenue, 14<sup>th</sup> Floor, New York, New York 10017."

10. I gave notice of the service of the summons to the Tribe on September 10, 2010, via certified mail.

11. The September 10, 2010, summons requested documents encompassing calendar years 2006, 2007, 2008, and 2009.

12. The summons sought the following records and testimony:

- i. Records of security transactions including all types of accounts, agreements, contracts, application for account, and signature cards. Records relating to treasury notes or certificates of deposit purchased, cash accounts, ready asset accounts, mutual fund accounts, commodity accounts, margin accounts, or other accounts. Such records include cash receipts, confirmation slips, securities delivered receipts, statements of account, notifications of purchase or sale, representative's stock record, account executive worksheets, correspondence, ledger sheets, cash in slips, buy and sell slips, or other records of these transactions.
- ii. Records showing the dates, amounts, and purpose of all payments, including records showing a description of the securities transacted, quantity bought or sold, date of transactions, purchase or sales price, and commissions paid.
- iii. Records of the disposition of the proceeds from each sale of a security, including checks (front and back) issued to the above named individual(s) as a result of these sales.
- iv. Records of any and all dividends and/or interest paid to the Miccosukee Tribe, including checks (front and back) and Forms 1099 issued to the Miccosukee Tribe.
- v. Records of any other payments to the Miccosukee Tribe that show the date, amount, and purpose of the payment, including the checks (front and back) for such payments.
- vi. Records maintained of transactions for or communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal),

correspondence, financial statements, background or credit investigations, and records identifying the stock transfer agent and dividend disbursing agent.

- vii. Records of all checking accounts of the Miccosukee Tribe, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.
- viii. Records of all credit and/or debit cards of the Miccosukee Tribe, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).

13. A true and correct copy of the summons appears as Exhibit A to the Tribe's Petition to Quash. (Doc. 1-3, *Miccosukee Tribe v. United States*, No. 1:10-cv-23507 (S.D. Fla.)).

14. I issued the summons for the proper purpose of continuing the IRS's investigation of the Tribe. From previous summonses and investigation of the Tribe, the IRS amassed significant evidence suggesting that the Tribe was making large unreported payments to Tribal members. The IRS also knew that the Tribe was not remitting any withholding amount from the payments. The IRS issued the summons to confirm that the Tribe was making unreported payments and to determine the applicability of the Internal Revenue Code to the payments.

15. The summoned information may be relevant to my investigation. The summons requests information that is necessary to determine whether the Tribe made unreported payments, the amount of payments, the recipients of the payments, the nature of the payments, and the source of income for the payments (including whether the payment was from gaming revenue or

non-gaming revenue). This information is relevant to the IRS's suspicion that the Tribe is not meeting its withholding and reporting responsibilities.

16. To date, Morgan Stanley has not complied with the summons and the IRS is not otherwise in possession of the summoned information.

17. It is necessary to obtain the testimony and to examine the books, records, papers or other data sought by the summons in order to properly determine the Tribe's unmet reporting requirements and unpaid liability.

18. I followed all administrative steps required by the Internal Revenue Code for issuance of the summons.

#### **Citibank Summons**

19. In order to learn about the Tribe's potential tax liabilities for the tax periods ending December 31, 2006, December 31, 2007, December 31, 2008, and December 31, 2009, I caused to be issued a summons to Citibank on September 10, 2010, "in the matter of" Miccosukee Tribe of Indians of Florida. The summons was served on Citibank by mailing, via certified mail, an attested copy of the summons to "Citibank (South Dakota), N.A., Attention: Legal Department, 701 East 60th Street North, P.O. Box 6034, Sioux Falls, South Dakota 57117."

20. I gave notice of the service of the summons to the Tribe on September 10, 2010, via certified mail.

21. The September 10, 2010, summons requested documents encompassing calendar years 2006, 2007, 2008, and 2009.

22. The summons directed Citibank to:



- i. Provide all savings account documents, including but not limited to signature cards, ledger cards, records reflecting dates and amounts of deposits, withdrawals, interest, debit and credit memos, deposit slips, checks deposited, withdrawal slips, transit items, checks issued for withdrawals and Forms 1099 issued.
- ii. Provide all checking account documents, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.
- iii. Provide all loan documents, including but not limited to applications, financial statements, loan collateral agreements, credit and/or background investigations, loan agreements, notes, mortgages, settlement sheets, contracts, checks issued for loans, repayment records (including records revealing the date, amount and method of repayment, whether by cash or check), checks used to repay loans, documents reflecting the total amount of discount or interest paid annually, records of liens, loan correspondence files and internal bank memoranda.
- iv. Provide all safe deposit box documents, including but not limited to contracts, access records, and records of rental fees paid (including those reflecting the date, amount, and method of payment, whether by cash or check).
- v. Provide all Certificate of Deposit documents, including but not limited to applications, actual Certificate of Deposit instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.
- vi. Provide all Money Market Certificate documents, including but not limited to applications, actual Money Market Certificate instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.

- vii. Provide all U.S. Treasury Notes and Bills, including but not limited to all documents reflecting the purchase of U.S. Treasury Bills and Notes and/or subsequent sale of such bills or notes, including interest paid, checks used for the purchase or sale of the notes and bills, Forms 1099 issued, checks issued for interest payments and all records of interest paid or accumulated (including those revealing the dates and amount of interest paid or accumulated).
- viii. Provide all credit card records, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).
- ix. Provide all documents reflecting the purchase of bank checks, cashier, teller, travelers' checks, certified checks and money order records. This request also includes the check register, file copies of the checks or money orders and records revealing the date and source of payment for said checks or money orders.
- x. Provide all documents reflecting certified checks, wire transfers, collections, letters of credit, bonds and securities purchased, sold or otherwise transacted through Citibank. This request also includes savings bond transactions and investment accounts and should include documents that disclose the date and amount of the transaction, method of transaction (i.e., whether by cash, check or electronic), source of payment, instruments used for payment and statements of transactions.
- xi. Provide all documents reflecting correspondence or other communications regarding the Miccosukee Tribe.

23. A true and correct copy of the summons appears as Exhibit A to the Tribe's Petition to Quash. (Doc. 1-3, *Miccosukee Tribe v. United States*, No. 1:10-cv-23508 (S.D. Fla.)).

24. I issued the summons for the proper purpose of continuing the IRS's investigation of the Tribe. From previous summonses and investigation of the Tribe, the IRS amassed significant evidence suggesting that the Tribe was making large unreported payments to Tribal members. The IRS also knew that the Tribe was not remitting any withholding amount from the

payments. The IRS issued the summons to confirm that the Tribe was making unreported payments and to determine the applicability of the Internal Revenue Code to the payments.

25. The summoned information may be relevant to my investigation. The summons requests information that is necessary to determine whether the Tribe made unreported payments, the amount of payments, the recipients of the payments, the nature of the payments, and the source of income for the payments (including whether the payment was from gaming revenue or non-gaming revenue). This information is relevant to the IRS's suspicion that the Tribe is not meeting its withholding and reporting responsibilities.

26. To date, Citibank has not complied with the summons and the IRS is not otherwise in possession of the summoned information.

27. It is necessary to obtain the testimony and to examine the books, records, papers or other data sought by the summons in order to properly determine the Tribe's unpaid liability.

28. I followed all administrative steps required by the Internal Revenue Code for issuance of the summons.

#### **American Express Summons**

29. In order to learn about the Tribe's potential tax liabilities for the tax periods ending December 31, 2006, December 31, 2007, December 31, 2008, and December 31, 2009, I caused to be issued a summons to American Express on September 10, 2010, "in the matter of" Miccosukee Tribe of Indians of Florida. The summons was served on American Express by mailing, via certified mail, an attested copy of the summons to "American Express Company/CT Corporation, Attn: Custodian of Record, 111 8th Avenue 13th Floor, New York, New York 10011."

30. I gave notice of the service of the summons to the Tribe on September 10, 2010, via certified mail.

31. The September 10, 2010, summons requested documents encompassing calendar years 2006, 2007, 2008, and 2009.

32. The summons directed American Express to:

- i. Provide all savings account documents, including but not limited to signature cards, ledger cards, records reflecting dates and amounts of deposits, withdrawals, interest, debit and credit memos, deposit slips, checks deposited, withdrawal slips, transit items, checks issued for withdrawals and Forms 1099 issued.
- ii. Provide all checking account documents, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.
- iii. Provide all loan documents, including but not limited to applications, financial statements, loan collateral agreements, credit and/or background investigations, loan agreements, notes, mortgages, settlement sheets, contracts, checks issued for loans, repayment records (including records revealing the date, amount and method of repayment, whether by cash or check), checks used to repay loans, documents reflecting the total amount of discount or interest paid annually, records of liens, loan correspondence files and internal bank memoranda.
- iv. Provide all safe deposit box documents, including but not limited to contracts, access records, and records of rental fees paid (including those reflecting the date, amount, and method of payment, whether by cash or check).
- v. Provide all Certificate of Deposit documents, including but not limited to applications, actual Certificate of Deposit instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.

- vi. Provide all Money Market Certificate documents, including but not limited to applications, actual Money Market Certificate instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.
- vii. Provide all U.S. Treasury Notes and Bills, including but not limited to all documents reflecting the purchase of U.S. Treasury Bills and Notes and/or subsequent sale of such bills or notes, including interest paid, checks used for the purchase or sale of the notes and bills, Forms 1099 issued, checks issued for interest payments and all records of interest paid or accumulated (including those revealing the dates and amount of interest paid or accumulated).
- viii. Provide all credit card records, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).
- ix. Provide all documents reflecting the purchase of bank checks, cashier, teller, travelers' checks, certified checks and money order records. This request also includes the check register, file copies of the checks or money orders and records revealing the date and source of payment for said checks or money orders.
- x. Provide all documents reflecting certified checks, wire transfers, collections, letters of credit, bonds and securities purchased, sold or otherwise transacted through American Express Company. This request also includes savings bond transactions and investment accounts and should include documents that disclose the date and amount of the transaction, method of transaction (i.e., whether by cash, check or electronic), source of payment, instruments used for payment and statements of transactions.
- xi. Provide all documents reflecting correspondence or other communications regarding the Miccosukee Tribe.

33. A true and correct copy of the summons appears as Exhibit A to the Tribe's Petition to Quash. (Doc. 1-3, *Miccosukee Tribe v. United States*, No. 1:10-cv-23509 (S.D. Fla.)).

34. I issued the summons for the proper purpose of continuing the IRS's investigation of the Tribe. From previous summonses and investigation of the Tribe, the IRS amassed significant evidence suggesting that the Tribe was making large unreported payments to Tribal members. The IRS also knew that the Tribe was not remitting any withholding amount from the payments. The IRS issued the summons to confirm that the Tribe was making unreported payments and to determine the applicability of the Internal Revenue Code to the payments.

35. The summoned information may be relevant to my investigation. The summons requests information that is necessary to determine whether the Tribe made unreported payments, the amount of payments, the recipients of the payments, the nature of the payments, and the source of income for the payments (including whether the payment was from gaming revenue or non-gaming revenue). This information is relevant to the IRS's suspicion that the Tribe is not meeting its withholding and reporting responsibilities.

36. To date, American Express has not complied with the summons and the IRS is not otherwise in possession of the summoned information.

37. It is necessary to obtain the testimony and to examine the books, records, papers or other data sought by the summons in order to properly determine the Tribe's unpaid liability.

38. I followed all administrative steps required by the Internal Revenue Code for issuance of the summons.



### Wachovia Summons

39. In order to learn about the Tribe's potential tax liabilities for the tax periods ending December 31, 2006, December 31, 2007, December 31, 2008, and December 31, 2009, I caused to be issued a summons to Wachovia on September 10, 2010, "in the matter of" Miccosukee Tribe of Indians of Florida. The summons was served on Wachovia by mailing, via certified mail, an attested copy of the summons to "Wachovia Bank Attn: Legal Orders Processing, Y1372-110, P.O. Box 7600, Philadelphia, PA 19106."

40. I gave notice of the service of the summons to the Tribe on September 10, 2010, via certified mail.

41. The September 10, 2010, summons requested documents encompassing calendar years 2006, 2007, 2008, and 2009.

42. The summons directed Wachovia to:

- i. Provide all savings account documents, including but not limited to signature cards, ledger cards, records reflecting dates and amounts of deposits, withdrawals, interest, debit and credit memos, deposit slips, checks deposited, withdrawal slips, transit items, checks issued for withdrawals and Forms 1099 issued.
- ii. Provide all checking account documents, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.
- iii. Provide all loan documents, including but not limited to applications, financial statements, loan collateral agreements, credit and/or background investigations, loan agreements, notes, mortgages, settlement sheets, contracts, checks issued for loans, repayment records (including records revealing the date, amount and method of repayment, whether by cash or check), checks used to repay loans, documents reflecting the total amount of discount or interest paid annually, records of liens, loan correspondence files and internal bank memoranda.

- iv. Provide all safe deposit box documents, including but not limited to contracts, access records, and records of rental fees paid (including those reflecting the date, amount, and method of payment, whether by cash or check).
- v. Provide all Certificate of Deposit documents, including but not limited to applications, actual Certificate of Deposit instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.
- vi. Provide all Money Market Certificate documents, including but not limited to applications, actual Money Market Certificate instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.
- vii. Provide all U.S. Treasury Notes and Bills, including but not limited to all documents reflecting the purchase of U.S. Treasury Bills and Notes and/or subsequent sale of such bills or notes, including interest paid, checks used for the purchase or sale of the notes and bills, Forms 1099 issued, checks issued for interest payments and all records of interest paid or accumulated (including those revealing the dates and amount of interest paid or accumulated).
- viii. Provide all credit card records, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).
- ix. Provide all documents reflecting the purchase of bank checks, cashier, teller, travelers' checks, certified checks and money order records. This request also includes the check register, file copies of the checks or money orders and records revealing the date and source of payment for said checks or money orders.



- x. Provide all documents reflecting certified checks, wire transfers, collections, letters of credit, bonds and securities purchased, sold or otherwise transacted through Wachovia Bank. This request also includes savings bond transactions and investment accounts and should include documents that disclose the date and amount of the transaction, method of transaction (i.e., whether by cash, check or electronic), source of payment, instruments used for payment and statements of transactions.
- xi. Provide all documents reflecting correspondence or other communications regarding the Miccosukee Tribe.

43. A true and correct copy of the summons appears as Exhibit A to the Tribe's Petition to Quash. (Doc. 1-3, *Miccosukee Tribe v. United States*, No. 1:10-cv-23511 (S.D. Fla.)).

44. I issued the summons for the proper purpose of continuing the IRS's investigation of the Tribe. From previous summonses and investigation of the Tribe, the IRS amassed significant evidence suggesting that the Tribe was making large unreported payments to Tribal members. The IRS also knew that the Tribe was not remitting any withholding amount from the payments. The IRS issued the summons to confirm that the Tribe was making unreported payments and to determine the applicability of the Internal Revenue Code to the payments.

45. The summoned information may be relevant to my investigation. The summons requests information that is necessary to determine whether the Tribe made unreported payments, the amount of payments, the recipients of the payments, the nature of the payments, and the source of income for the payments (including whether the payment was from gaming revenue or non-gaming revenue). This information is relevant to the IRS's suspicion that the Tribe is not meeting its withholding and reporting responsibilities.

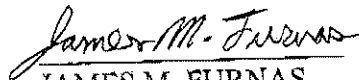
46. To date, Wachovia has not complied with the summons and the IRS is not otherwise in possession of the summoned information.

47. It is necessary to obtain the testimony and to examine the books, records, papers or other data sought by the summons in order to properly determine the Tribe's unpaid liability.

48. I followed all administrative steps required by the Internal Revenue Code for issuance of the summons.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on

December 14, 2010 in Duluth, MN.

  
JAMES M. FURNAS  
Revenue Agent