

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

CASE NO. 10-CV-23507-GOLD

MICCOSUKEE TRIBE OF INDIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**UNITED STATES' REPLY TO THE MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA'S RESPONSE TO THE
MOTION TO DENY PETITIONS TO QUASH**

The United States hereby replies to the Tribe's response to the United States' motion to deny its petitions to quash the IRS summonses to the Tribe's third party recordkeepers in furtherance of the IRS's examination into whether the Tribe met its reporting and withholding requirements for the 2006 through 2009 tax years.

The Tribe's response betrays a wishful, willful misunderstanding of the law applicable to IRS summonses. The Tribe's response primarily rehashes its sovereign immunity arguments from its petitions to quash. (Doc. 33.) Additionally, the Tribe argues that the summonses were issued for an improper purpose—to malign the Tribe and coerce it to settle a collateral dispute—and that the summonses are overbroad. Repeatedly, the Tribe suggests that the summonses are improper because the Tribe will not ultimately be subject to reporting and withholding requirements. This proceeding is not an appropriate forum for the Tribe to argue about its ultimate tax liabilities, nor does this forum provide an opportunity for the Tribe to

instruct the IRS how to conduct its investigation. Contrary to the Tribe's allegations, there is no evidence that the summonses seek anything other than documents necessary for the IRS to investigate the Tribe's possible withholding and reporting requirements.

The Tribe does not dispute that it made unreported distributions of funds to tribal members. The IRS does not know the nature of these distributions or whether the Tribe made unreported distributions to non-tribal members. The IRS has a responsibility to investigate tribal payments to determine the applicability of the internal revenue laws through the third party summonses at issue in this case. The Tribe has failed to articulate a comprehensible, much less plausible, explanation of its allegations of improper purpose, even after the Tribe was granted discovery in this case. The summonses in this case must be upheld to ensure the Tribe complied with the Internal Revenue laws of the United States.

A. Tribal sovereign immunity does not apply.

The Eleventh Circuit has held, unequivocally, that “[t]ribal sovereign immunity does not bar suits by the United States.” *Florida Paraplegic Ass’n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1135 (11th Cir. 1999) (citing *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir. 1994)); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987) (“[I]t is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States.”). The Tribe persists in talking past this basic point, arguing that tribal sovereign immunity has not been waived or abrogated in this case. (Doc. 33, pp. 2-4.) However, where no sovereign immunity exists, no waiver or abrogation is required. (Doc. 16, p. 14.) The Tribe cannot quash the

summonses to its third party recordkeepers by asserting sovereign immunity, even if these summonses could be considered a suit against the Tribe.

The cases that the Tribe cites do not suggest that sovereign immunity applies to summonses by the IRS and do not overcome the binding Eleventh Circuit precedent. The Tribe cites *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 554 (9th Cir. 2002), *vacated and remanded on other grounds sub nom. Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop County*, 538 U.S. 701 (2003), *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), and *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002) for the proposition that sovereign immunity can be used to quash a subpoena by a federal court, including subpoenas to tribal third party recordkeepers. (Doc. 33, p. 6-7.) The court in *Catskill* addressed the Ninth Circuit's decisions in *James* and *Bishop Paiute Tribe*. 206 F.R.D. at 86-87. The *Catskill* court explained that there is a distinction between the *James* line of cases, where a tribe seeks to quash a subpoena by a private litigant (or a state), and cases where "the federal government itself subpoenaed the tribe." *Id.* at 88. The *Catskill* court concluded that "[a] tribe cannot assert sovereign immunity against the United States." *Id.* The *Catskill* court cited the Ninth Circuit's decision, two years after *James* and *Bishop Paiute Tribe*, in *Quileute*, which arrived at the same conclusion. 18 F.3d at 1459. Regardless whether a tribe may assert sovereign immunity to quash a subpoena by a private litigant or a warrant by a state, the Tribe may not assert sovereign immunity to quash the IRS summonses at issue here.¹

¹The United States argues, alternatively, that sovereign immunity does not apply because the summonses are issued to third party banks, are not a suit against the Tribe, and do not compel the Tribe or restrain it from doing anything. (Doc. 16, p. 15.) The Tribe responds by arguing that the IRS investigation "would expend itself on the public treasury" and restrain the Tribe from making financial decisions. (Doc. 33, p. 5 n.3.) The summonses, however, do neither of

B. The summonses were issued for a proper purpose.

To comply with the requirements of *United States v. Powell*, the United States need only establish a proper purpose for the summonses. 379 U.S. 48 (1964). Here, the IRS issued the summonses to investigate the Tribe's compliance with its withholding and reporting requirements as detailed in our motion to deny the petitions to quash.

The Tribe's primary argument that the summonses were issued for an improper purpose appears to be that the Tribe *may* ultimately not be liable for failure to properly withhold from and report its distributions because of its status as an Indian tribe. (Doc. 33, p. 8-11.) The ultimate applicability of the Internal Revenue Code is not at issue in this proceeding. *Powell*, 379 U.S. at 57; *see also United States v. White*, 853 F.2d 107, 116 (2d Cir. 1988). And in any case, the IRS has the authority to 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." *Powell*, 379 U.S. at 57 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)). As detailed in our motion to deny the petitions to quash, the law is clear that the withholding and reporting requirements not only may but in fact do apply to the Tribe. (Doc. 16, pp. 8-11.) Indeed, 26 U.S.C. § 3402(r) explicitly applies to Indian tribes. The Tribe may not quash the summonses by arguing it will ultimately not be liable for failure to report or withhold from its distributions.

Although the Tribe accuses the United States of improperly conducting an investigation where it allegedly knows the Tribe cannot be taxed, it is the Tribe that has improperly misled this Court to believe that the Tribe is not a taxable entity, subject to withholding and reporting

these things. The IRS is simply seeking to examine records in the possession of third parties, not tax the Tribe or restrain its financial decisions. The Tribe's ultimate liabilities and the effects thereof are not at issue in this case.

requirements, where it know it is. The Tribe suggests that IRS case law is limited to taxation of the Indian tribes as employers and further mocks one of the IRS's stated purposes—*i.e.*, ascertaining whether the Tribe failed to issue Form 1099-MISC's. (Doc. 33, pp. 10-11.) First, the Tribe fails to explain how the areas of taxation investigated by the United States are any different than taxing the Tribe as an employer: in *neither* case is there an express mention of Indian taxation in the Code, which the Tribe insists is necessary for taxation of an Indian tribe. Thus, to the extent the Tribe acknowledges that employment taxation is proper, so are the other focuses of the IRS investigation. Moreover, the Tribe knows this to be so. The Tribe admits that it files Form 1099's with vendors. (Doc. 33, p. 14.) Thus, it well knows that it is legally required to file such 1099's and that there are relevant instances where it must do so.

The Tribe also relies on a series of *non sequiturs* to support its argument that the information sought is not relevant to a legitimate purpose. For example, the Tribe argues that because the summonses do not request bank records of the Tribe's casino enterprises, the IRS cannot be investigating disbursements of casino profits. (Doc. 33, p. 13.) The IRS is investigating, among other things, distributions of funds that the Tribe obtained from its casino enterprises and *later* transferred to its members. Naturally, this investigation involves the bank records of the Tribe, not just its casino enterprises. Also, the Tribe argues that the information sought is not relevant because it may not show whether the Tribe did, in fact, obtain taxpayer identification numbers from payment recipients and may not show for which payments the Tribe

did, in fact, issue potentially required Form 1099's. (Doc. 13, pp. 13-14.)² But the summonses should not be quashed because they may not shed light on *all* relevant issues.

Finally, notwithstanding the Tribe having received permission to conduct discovery—highly unusual in a summons proceeding—the Tribe's allegations of improper purpose continue to more closely resemble wild conspiracy theories than substantiated fact. The Tribe suggests, for example, that the IRS issued the summonses to coerce it to settle a dispute regarding the 2000 through 2005 tax years. As Agent Furnas explained, however, his current investigation is not dependent on the outcome of the 2000 through 2005 investigation. (Ex. 1, p. 95 ln. 15 - p. 97 ln. 3.) Even if the Tribe prevailed in the collateral dispute regarding the 2000 through 2005 years, the IRS would *still* need to investigate the 2006 through 2009 tax years and would still need the summonsed information. *Id.*

The Tribe's insinuation that the summonses are part of an attempt to try the Tribe in "the court of public opinion" is equally baseless. (Doc. 33, p. 12; Ex. 1, p. 39 ln. 21 - p. 41 ln. 19.) The summonses themselves were private, not public. Any publicizing of the information is a direct result of the Tribe's voluntary decision to petition to quash these summonses as well as the

²The Tribe overstates the significance of the taxpayer identification numbers and misstates the United States' position. (Doc. 33, p. 13 ("This goes directly to the Government's allegations on the issue of withholding, which they admit would not apply as long as the Tribe has obtained taxpayer identification numbers from the payees prior to payment.")) Taxpayer identification numbers are only relevant to one of the potentially applicable withholding statutes: 26 U.S.C. § 3406. Furthermore, without knowing what distributions were made and at what times, it is impossible to know whether these withholding requirements apply. The first step in the examination is to see what payments the Tribe made. The second step is to determine whether the Tribe properly obtained taxpayer identification numbers. Thus, even if the Tribe were forthcoming with information regarding its collection of taxpayer identification numbers, which it has not been, the IRS would still require the summonsed information. (Ex. 1, p. 30 ln. 1 - p. 31 ln. 20 (detailing Agent Furnas's efforts to obtain information regarding the Tribe's collection of taxpayer identification numbers).)

earlier summons involving Billy Cypress. The United States has merely defended itself and, in doing so, under *Powell* has had to specify its proper purpose in issuing the summonses.

In support of this reply, we have attached a true and correct copy of the transcript for the deposition of Revenue Agent James Furnas to provide the proper context for the Tribe's arguments. For example, the Tribe suggests that Agent Furnas testified falsely regarding allegations of Tribal payments from armored cars in his declaration in the Billy Cypress case. (Doc. 33, p. 11.) The Tribe hypothesizes that Agent Furnas did so to mislead the press and malign the Tribe. (Doc. 33, p. 12.) First, Agent Furnas's testimony was not false; he described allegations that led to the summons at issue in the Billy Cypress matter without stating whether he ultimately could confirm all the details of the allegations. (*See* Doc. 33, p. 11 (quoting Doc. 15-5, *Miccosukee Tribe of Indians v. United States*, No. 10-21332-cv-Gold (S.D. Fla.); Ex. 1, p. 50 ln. 12 - p. 51 ln. 5.) Second, as Agent Furnas testified, he ultimately confirmed that the Tribe transferred large amounts of cash in highly secured vehicles, albeit SUV's with police escorts instead of armored cars:

So did the armored car actually go out to the reservation as alleged? From what I subsequently learned, I don't think so. Although I don't know how that's material. They brought it out there in SUVs with the police. Whether they did that or brought it out there in an armored car does not seem material to me.

(Ex. 1, p. 101 ln. 9 - 15.) When read as a whole, the deposition transcript reveals the baselessness of the Tribe's improper purpose arguments. Even after extensive discovery, the Tribe can make no case of an improper purpose. The summonses are relevant to the IRS's legitimate investigation into the Tribe's withholding and reporting requirements.

C. The summonses are not overly broad, and the information sought may lead to relevant evidence to determine the Tribe's liability.

The Tribe asserts that the summonses are overly broad because the IRS has not explained the relevance of particular items. (Doc. 13, pp. 15-16.) The Tribe appears to confuse the relevance of individual items with the breadth of the summonses. *Cf. Barquero v. United States*, 18 F.3d 1311, 1318 (5th Cir. 1994.) Relevance and overbreadth are separate inquiries. *Id.* The latter refers to the specificity of a summons and the ability of the recipient to identify responsive documents. *United States v. Medlin*, 986 F.2d 463, 467 (11th Cir. 1993) (“An 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.’”) The Tribe does not appear to dispute that the summonses are sufficiently specific.

If correctly identified as a potential relevance objections, the Tribe's arguments nonetheless fail. As stated in our motion to deny the petitions to quash, the IRS does not need to prove the relevance of the items sought. Instead, the IRS is entitled “to obtain items of even *potential* relevance” to its investigation. *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984). Regarding the Tribe's objections to records of “credit and/or background investigations,” (Doc. 13, p. 17) taxpayers are often more candid with the information they provided for credit or background investigations than they are with the IRS. *E.g., United States v. Clarke*, 562 F.3d 1158, 1162-64 (11th Cir. 2009) (taxpayer disclosed unreported income on credit application). In this case, credit or background investigation records may reveal whether the Tribe used financial institutions other than those summonsed. It may also reveal other sources of funds and distributions. Communications between the Tribe and its banks obviously may demonstrate the

nature of payments and source of funds. Similarly, safe deposit boxes may have been involved in Tribal distributions, which the IRS suspects involved significant amounts of cash. *Cf. United States v. Friedman*, 532 F.2d 928, 934 (3d Cir. 1976) (overruling district court's denial of summons with regard to safe deposit box records) (“[T]he entry records would be highly significant in determining whether withdrawals from a bank account had been placed in a safe deposit box or whether expenditures or bank deposits were being made from a cash source accumulated in a safe deposit box.”). Without seeing the summonsed documents it is impossible to say that they are “in no way relevant” to the IRS’s examination as the Tribe alleges. (Doc. 33, p. 17.)

CONCLUSION

For the reasons identified in the United States motion to deny the Tribe’s petitions to quash, the Court should deny the petitions to quash and allow the IRS to continue its investigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, I electronically filed the foregoing Reply 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

James M. Furnas

January 12, 2011

<p style="text-align: center;">UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA</p> <p style="text-align: center;">-----x</p> <p>MICCOSUKEE TRIBE OF : INDIANS, :</p> <p style="padding-left: 40px;">Petitioner : Case No. : 10-23507-CV-GOLD</p> <p>v. : : PAGES 1 through 111</p> <p>UNITED STATES OF : AMERICA, :</p> <p style="padding-left: 40px;">Respondent :</p> <p style="text-align: center;">-----x</p> <p style="text-align: center;">Deposition of James M. Furnas Washington, DC Wednesday, January 12, 2011</p> <p>Reported by: Joanne Liverani, RMR ASSIGNMENT NO. 202096</p>	<p style="text-align: right;">1</p> <p>1 APPEARANCES: 2 For the Petitioner, MICCOSUKEE TRIBE OF INDIANS 3 Jorden Burt LLP 4 1025 Thomas Jefferson Street, Northwest 5 Suite 400 East 6 Washington, DC 20007-0805 7 (202)965-8100 8 JFJ@JORDENUSA.COM 9 SWK@JORDENUSA.COM 10 BY: James F. Jorden, Esq. 11 Stephen W. Kraus, Esq. 12 -and- 13 The following appearance was made via speakerphone: 14 777 Brickell Avenue 15 Suite 500 16 Miami, Florida 33131-2803 17 (305)371-2600 18 SEO@JORDENUSA.COM 19 BY: Sonia Escobio O'Donnell, Esq. 20 21 For the Respondent, UNITED STATES OF AMERICA 22 U.S. Department of Justice</p> <p style="text-align: right;">3</p>
<p style="text-align: right;">2</p> <p>1 2 3 4 January 12, 2011 5 10:13 a.m. 6 7 Deposition of James M. Furnas, held at the offices of: 8 9 United States Department of Justice 10 Tax Division 11 555 4th Street, Northwest 12 Washington, DC 20001 13 14 Pursuant to notice, before Joanne Liverani, RMR, a 15 Notary Public of District of Columbia. 16 17 18 19 20 21 22</p>	<p style="text-align: right;">4</p> <p>1 Tax Division 2 P.O. Box 14198 3 Washington, DC 20044 4 (202)514-6068/616-1908 5 robert.l.welsh@usdoj.gov 6 william.e.farrior@usdoj.gov 7 BY: Robert L. Welsh, Esq. 8 William E. Farrior, Jr. 9 10 Also Present: 11 Joe Bernardi, Paralegal (Short Appearance) 12 13 14 15 16 17 18 19 20 21 22</p>



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James M. Furnas

January 12, 2011

<p>1 C O N T E N T S</p> <p>2 EXAMINATION OF THE WITNESS: PAGE</p> <p>3 James M. Furnas</p> <p>4 Examination By Mr. Jorden 7</p> <p>5</p> <p>6 Furnas Deposition Exhibits PAGE</p> <p>7 1 Order Following Hearing 7</p> <p>8 2 Declaration of Revenue Agent James M. 9</p> <p>9 Furnas</p> <p>10</p> <p>11 3 United States' Motion to Deny 26</p> <p>12 Petitions to Quash</p> <p>13 4 Summons to Morgan Stanley Smith 78</p> <p>14 Barney</p> <p>15</p> <p>16 Transcript Marked by Mr. Jorden</p> <p>17 Page Line</p> <p>18 55 2</p> <p>19 75 6</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 MR. FARRIOR: I am Will Farrier.</p> <p>2 MR. JORDEN: Can you mark this</p> <p>3 for identification just so we have this.</p> <p>4 (Furnas Exhibit No. 1 - Order Following</p> <p>5 Hearing - was marked for identification.)</p> <p>6 MR. JORDEN: There was an order</p> <p>7 that has just been marked for identification as</p> <p>8 Exhibit 1 which sets the hearing -- sets the</p> <p>9 deposition of Agent Furnas consistent with</p> <p>10 Mr. Welsh's comments that it should last for three</p> <p>11 hours on Wednesday, January 12th, 2011.</p> <p>12 EXAMINATION BY COUNSEL FOR THE PETITIONER, MICCOSUKEE</p> <p>13 TRIBE OF INDIANS</p> <p>14 BY MR. JORDEN:</p> <p>15 Q Mr. Furnas, would you please state your</p> <p>16 full name.</p> <p>17 A James Martin Furnas.</p> <p>18 Q And who is your current employer?</p> <p>19 A The Internal Revenue Service.</p> <p>20 Q And where are you located?</p> <p>21 A Duluth, Minnesota.</p> <p>22 Q What is your title with the Internal</p>
<p>1 Thereupon,</p> <p>2 JAMES M. FURNAS,</p> <p>3 the Witness, called for examination by counsel for the</p> <p>4 Respondent, and, after having been sworn by the notary,</p> <p>5 was examined and testified as follows:</p> <p>6 MR. WELSH: Can I say something</p> <p>7 in advance. This deposition is taken pursuant to</p> <p>8 the Federal Rules of Civil Procedure and pursuant</p> <p>9 to the direction of the Court that it last for</p> <p>10 three hours. We are starting right now at 10:10.</p> <p>11 Thank you, sir.</p> <p>12 MR. JORDEN: Okay. James</p> <p>13 Jorden, Jorden Burt for the Miccosukee Tribe of</p> <p>14 Indians. With me today is Stephen Kraus, also</p> <p>15 Jorden Burt, and on the phone also my partner,</p> <p>16 Sonia O'Donnell, on behalf of the Miccosukee Tribe</p> <p>17 of Indians.</p> <p>18 You guys want to identify yourselves.</p> <p>19 MR. WELSH: I am Robert Welsh</p> <p>20 for the Department of Justice, representing the</p> <p>21 witness today and the Internal Revenue Service, and</p> <p>22 with me is --</p>	<p>1 Revenue Service?</p> <p>2 A I am an Internal Revenue Agent, Indian</p> <p>3 Tribal Government Specialist with the Tax Exempt</p> <p>4 and Government Entities Division of the Internal</p> <p>5 Revenue Service.</p> <p>6 Q How long have you been in that position?</p> <p>7 A In this position, since September 2000,</p> <p>8 so ten years.</p> <p>9 Q Mr. Furnas, are you well today? Are you</p> <p>10 okay? You have no medical conditions or are you</p> <p>11 taking any drugs?</p> <p>12 A No.</p> <p>13 Q Is there any reason why the answers you</p> <p>14 give to the questions would not be accurate and</p> <p>15 truthful?</p> <p>16 A No.</p> <p>17 Q Now, I will be asking you a series of</p> <p>18 questions. If there is a question you don't</p> <p>19 understand, please ask me to repeat it in a</p> <p>20 different fashion.</p> <p>21 You can -- you are required to answer</p> <p>22 every question. There will be objections from time</p>



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<p>1 to time, perhaps, from the Department of Justice 2 lawyers here. But you are still required to answer 3 the question unless you are instructed otherwise by 4 those lawyers. And then there will be some back 5 and forth, just to tell you what the procedure is 6 here.</p> <p>7 If you need to take a break at any time, 8 just let me know and we will take a break. And 9 again, if you don't understand a question, just ask 10 me to repeat it or clarify.</p> <p>11 Let me start by marking for 12 identification a document here. I'm going to hand 13 you a copy of this, and I will ask the court 14 reporter to mark that.</p> <p>15 This is the -- just to one side here 16 while I get my own.</p> <p>17 This is captioned the "Declaration of 18 Revenue Agent James M. Furnas." 19 (Furnas Exhibit No. 2 - Declaration of 20 Revenue Agent James M. Furnas - was marked 21 for identification.) 22 BY MR. JORDEN:</p>	<p>1 accurate? 2 A Well, I reviewed the documents that 3 are -- I reviewed the summons that I had previously 4 prepared that were included in the documents. I 5 reviewed some of the documents that were in the 6 case file, and I consulted with Will and Bob 7 concerning the preparation.</p> <p>8 Q Okay. Now directing your attention to 9 Paragraph 2 of this declaration. It says that you 10 are: Investigating whether the Miccosukee Tribe of 11 Indians complied with reporting and withholding 12 requirements and whether the Tribe satisfied its 13 tax liabilities for the taxable periods ending 14 December 31, 2006, December 31, 2007, December 31, 15 2008, and December 31, 2009.</p> <p>16 I assume that that's an accurate 17 statement.</p> <p>18 A Yes.</p> <p>19 Q Okay. And could you describe all of the 20 objectives of this examination and, first, just 21 describe the objectives and then I will ask you 22 some additional questions?</p>
<p>1 Q Are you familiar with this document, 2 Mr. Furnas? 3 A Yes. 4 Q Did you prepare this document? 5 A No. 6 Q Okay. Who prepared the document? 7 A Will and -- and I did participate in the 8 preparation of this document and made several 9 changes to what Will had originally started with, 10 and to my -- well, I know that we had considerable 11 discussions as he was drafting the document.</p> <p>12 Q And why was this document prepared? 13 A This document was prepared as a 14 declaration in the case that's cited on the top of 15 it, and as I understand, it's to provide evidence 16 that I've gone through the steps that I should have 17 went through in issuing the summons to the 18 Miccosukee Tribe -- or to the third-party 19 record-keepers of the Miccosukee Tribe.</p> <p>20 Q Okay. And what steps did you take 21 during the preparation of this document to satisfy 22 yourself that the statements herein were true and</p>	<p>1 A The objectives are to determine whether 2 the Tribe complied with the reporting and 3 withholding requirements of the Internal Revenue 4 Code to include information return reporting, 5 whether the Tribe met its withholding requirements 6 for the periods, and whether those withholding 7 requirements would require the filing of Form 945, 8 Annual Reported Withholding.</p> <p>9 Q Did you, prior to pursuing these 10 objectives, satisfy yourself that indeed these 11 requirements were imposed on the Tribe? 12 A Yes. 13 Q And how did you do that? 14 A Well, I -- I mean I've been working on 15 tax matters with Tribes for approximately 20 years, 16 and for the last ten years exclusively working with 17 the Tribe, so I have developed knowledge of 18 reporting and withholding requirements. I -- once 19 I was assigned the examination, I researched IRS 20 records to determine whether 945 returns had been 21 filed and what 1099s were filed by the Tribe. And 22 based on my review of those records, it appeared</p>



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<p>13</p> <p>1 that there was a significant possibility that all</p> <p>2 the 1099s that were required were not filed and</p> <p>3 that the Tribe may have a 945 filing requirement</p> <p>4 that had not been met.</p> <p>5 Q Okay. I am more interested in the</p> <p>6 question of what you did to decide that in fact</p> <p>7 there was some obligation to file either the 945s</p> <p>8 or the 1099s?</p> <p>9 A You mean what specifically --</p> <p>10 Q Let me rephrase the question.</p> <p>11 What was it about the Internal Revenue</p> <p>12 Code or its regulations, as applied to the</p> <p>13 operations of the Tribe, that caused you to reach</p> <p>14 the conclusion that 945s were required to be filed</p> <p>15 and 1099s were required to be filed?</p> <p>16 MR. WELSH: I'll object and make</p> <p>17 a statement for the record and then you will be</p> <p>18 allowed to answer.</p> <p>19 If it's agreeable with you, Mr. Jorden,</p> <p>20 I would like an agreement that for these legal</p> <p>21 matters, as we are all well aware, they are</p> <p>22 questions for the Court, what the agent thinks</p>	<p>15</p> <p>1 the Tribe is subject to information reporting</p> <p>2 requirements under Internal Revenue Code 6041,</p> <p>3 which is information return reporting. It's</p> <p>4 potentially subject to backup withholding under</p> <p>5 Internal Revenue Code 3406. And it is also</p> <p>6 potentially subject to withholding on certain</p> <p>7 payments of net gaming revenues to Tribal members</p> <p>8 under Code Section 3402(r).</p> <p>9 You know, my understanding of those code</p> <p>10 sections and the Tribe's requirements comes from</p> <p>11 dealing with Tribes for many years who are meeting</p> <p>12 those reporting and withholding requirements, and</p> <p>13 various previous audits I've conducted that dealt</p> <p>14 with those issues.</p> <p>15 So I am not sure -- I mean are you</p> <p>16 asking me in general -- I also want to say I have</p> <p>17 not concluded for the years in question that --</p> <p>18 that they did not meet their 1099 requirements or</p> <p>19 that they are required to file 945, because I have</p> <p>20 not seen any of the information necessary to make</p> <p>21 those conclusions. Okay.</p> <p>22 I believe in starting the investigation</p>
<p>14</p> <p>1 about such a subject is irrelevant. So for</p> <p>2 purposes of this record I would like a standing</p> <p>3 objection that two questions to the effect of what</p> <p>4 the agent's understanding of the law is, insofar as</p> <p>5 it would bear on the legitimacy of the issuance of</p> <p>6 the summons.</p> <p>7 MR. JORDEN: I have no problem</p> <p>8 with the standing objection. I would note for the</p> <p>9 record that I think we would all agree that if the</p> <p>10 agent had little or no basis for concluding that</p> <p>11 there was a requirement, that that would certainly</p> <p>12 weigh into the question of whether he is exercising</p> <p>13 the subpoena power with good faith.</p> <p>14 MR. WELSH: Well, to the extent</p> <p>15 that that is certainly a debatable proposition, I</p> <p>16 certainly wouldn't agree with that as a blanket</p> <p>17 assertion.</p> <p>18 MR. JORDEN: So we have had our</p> <p>19 tete-a-tete.</p> <p>20 Mr. Furnas, you may answer the question.</p> <p>21 THE WITNESS: You know, as we've</p> <p>22 discussed many times between me and you previously,</p>	<p>16</p> <p>1 that the Tribe may have reporting and withholding</p> <p>2 requirements that haven't been met. But of course</p> <p>3 before I conclude that, I have to review, you know,</p> <p>4 evidence and documents before I can conclude that</p> <p>5 they are required.</p> <p>6 BY MR. JORDEN:</p> <p>7 Q What I really am interested in is what</p> <p>8 steps you took with respect to the operation of</p> <p>9 this particular Tribe in the manner in which they</p> <p>10 made distributions to their members, as to the</p> <p>11 application of the 945 and the 1099 requirements to</p> <p>12 this particular Tribe? What steps did you take</p> <p>13 prior to initiating your investigation and your</p> <p>14 issuing of the subpoena?</p> <p>15 A Well, as you know, this was the</p> <p>16 expansion to these years of the examination. There</p> <p>17 were -- examination was conducted for the years</p> <p>18 2000 through 2005. And as a result of those</p> <p>19 examination -- of the examination of those years,</p> <p>20 we determined various reporting and withholding</p> <p>21 requirements that weren't being met, which were,</p> <p>22 you know, extensively detailed in the reports that</p>



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<p>17</p> <p>1 were issued for those prior years.</p> <p>2 We believe that similar payments and</p> <p>3 similar reporting and withholding requirements</p> <p>4 apply or are likely to apply for these periods.</p> <p>5 But again I can't conclude it until I see the</p> <p>6 specific information.</p> <p>7 Q During the course of your previous</p> <p>8 examination, did you become aware of the manner in</p> <p>9 which distributions are made by the Miccosukee</p> <p>10 Tribe of Indians? When I say "distributions," you</p> <p>11 understand what I mean by that, distributions to</p> <p>12 members?</p> <p>13 A Yes, we became aware that there were</p> <p>14 substantial payments to members.</p> <p>15 Q And did you become aware of the manner</p> <p>16 in which those payments were made?</p> <p>17 A Yes.</p> <p>18 Q And did you become aware of the -- of</p> <p>19 the sources of revenue for those payments during</p> <p>20 those years?</p> <p>21 A Yes.</p> <p>22 Q Okay. And what were the sources of</p>	<p>19</p> <p>1 A Yes.</p> <p>2 Q Okay. So it wasn't just the bingo hall;</p> <p>3 correct?</p> <p>4 A That's correct.</p> <p>5 Q Okay. And we will get back to the</p> <p>6 1099s.</p> <p>7 Can you cite me to any precedent for</p> <p>8 requiring a Tribe or any other sovereign for</p> <p>9 imposing withholding -- well, let's back up for a</p> <p>10 moment.</p> <p>11 The source of the revenue, whether it's</p> <p>12 from the NTDR account or the general account, that</p> <p>13 revenue in the hands of the Tribe is not subject to</p> <p>14 federal income tax as such by the Tribe; is that</p> <p>15 correct?</p> <p>16 A The Tribe is not subject to federal</p> <p>17 income tax.</p> <p>18 Q Okay. So can you cite me, is there any</p> <p>19 precedent or did you find any precedent for the</p> <p>20 proposition that if the Tribe imposes a tax that --</p> <p>21 that that tax, that the revenues from that tax when</p> <p>22 distributed are subject to withholding?</p>
<p>18</p> <p>1 revenue?</p> <p>2 A Some of the payments were made from the</p> <p>3 Tribe's general account, which based on the</p> <p>4 evidence developed in that examination was</p> <p>5 primarily funded with net gaming revenue from the</p> <p>6 casino.</p> <p>7 These included annual payments in equal</p> <p>8 amounts to members, mostly occurring in December.</p> <p>9 In addition, there were payments from an account</p> <p>10 that the Tribe identified as its NTDR account. The</p> <p>11 source of the money in that account came from a --</p> <p>12 what the Tribe recorded as a gross receipts tax on</p> <p>13 its bingo hall. In addition, there were payments</p> <p>14 to service providers that required 1099 reporting,</p> <p>15 of which the source was both the general account as</p> <p>16 well as the NTDR account, as well as a couple of</p> <p>17 other accounts of the Tribe that I was not able to</p> <p>18 fully determine the source of the revenue.</p> <p>19 Q Okay. Just a clarification. Did you</p> <p>20 become aware that the NTDR account was actually</p> <p>21 funded from a gross receipts tax imposed on all</p> <p>22 business enterprises of the Tribe?</p>	<p>20</p> <p>1 MR. WELSH: And again, and I</p> <p>2 won't do this every time, but I want to restate my</p> <p>3 standing objection, just reiterate it to any</p> <p>4 discussion of a legal argument with the agent.</p> <p>5 MR. JORDEN: I understand. And</p> <p>6 again, it's the question of what he did to prepare</p> <p>7 himself and what basis he has for his investigation</p> <p>8 is relevant to this.</p> <p>9 THE WITNESS: As of course I've</p> <p>10 explained to you many times the -- the way it works</p> <p>11 is if the Tribe is distributing taxable income in</p> <p>12 excess of \$600 per year, then the Tribe is required</p> <p>13 to file a 1099.</p> <p>14 BY MR. JORDEN:</p> <p>15 Q And what is the basis for that?</p> <p>16 A Well, Internal Revenue Code Section 6041</p> <p>17 which requires filing of 1049s -- of 1099s, excuse</p> <p>18 me.</p> <p>19 Q We will get to that in a moment. I am</p> <p>20 really talking about the withholding.</p> <p>21 What is the basis for saying that it is</p> <p>22 taxable income? And again, I am just asking for</p>



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<p>21</p> <p>1 what you -- I don't want to get into an argument 2 here. I just want to know what your basis is, what 3 authority you have -- you had for concluding that 4 the revenue, the sources of revenue here which are 5 not taxable to the Tribe become taxable when 6 distributed to members?</p> <p>7 A Well, there we are basically looking at 8 the individual question, and when an individual 9 receives taxable income under Internal Revenue Code 10 Section 61, that is gross income to them, unless 11 there is a specific exception. So we start with 12 that to determine was the distribution to an 13 individual taxable.</p> <p>14 So I mean that's the basic thing you are 15 looking at to determine the taxable income. And 16 then the next question is does the Tribe have to 17 file a 1099. 6041 requires the filing of 1099s. 18 And again, I mean -- you know, with all these 19 lawyers in the room I hate to argue the law, but 20 the courts have ruled that Tribes are subject to 21 employment taxes, withholding. 22 In my years of experience I have found</p>	<p>23</p> <p>1 So the two potential types of 2 withholding are Internal Revenue Code Section 3406, 3 backup withholding, and 3402(r). 4 Q My original question was: Did you have 5 any precedent or did you refer to any precedent 6 including practical -- other Tribes, where 7 withholding was imposed on other than profits from 8 gaming? 9 A Yes. 10 Q Okay. What Tribe is that and what 11 precedent is that? 12 MR. WELSH: Wait. We have 13 just -- 14 MR. JORDEN: Sure. 15 THE WITNESS: As far as personal 16 experience, I can't disclose any information 17 regarding examinations of other Tribes or anyone 18 that's not a plaintiff in this particular case. 19 I can tell you in general that, you 20 know, the withholding issues are a common issue in 21 almost every examination of a Tribe, with regard to 22 its information return reporting requirements or</p>
<p>22</p> <p>1 that without exception every Tribe that I've dealt 2 with was -- was filing 1099s. The Tribe in fact 3 filed some 1099s, okay. 4 Q So -- 5 A And you know, between the law and 6 experience, all of that leads me to believe that 7 Tribes do have a requirement to file 1099s. 8 Withholding is the next question. When 9 you make a payment that requires a 1099, you are 10 required to obtain the tax identification number of 11 the person to whom you made the payment. 12 If you don't -- if you don't acquire the 13 tax identification number of the payee prior to 14 making a payment, then you are required to backup 15 withhold on that payment under Internal Revenue 16 Code Section 3406. That backup withholding applies 17 if there is not other withholding provisions that 18 apply. 19 In this case, the other withholding 20 provision that may apply is 3402(r), which is, as I 21 said before, on net revenues from gaming when it's 22 distributed to Tribal members.</p>	<p>24</p> <p>1 Form 945 examinations. 2 You know, I mean going through the legal 3 scheme, I mean 6041 applies to persons, 7701 4 defines a person. There's been Supreme Court cases 5 that have indicated that Tribes are a person under 6 7701. 7 BY MR. JORDEN: 8 Q Let me -- 9 A I am not sure -- 10 Q Well, what I am looking for -- 11 A I am doing my best to explain my 12 understanding. 13 Q I understand. I understand. 14 Let's be a little more specific. 15 Have you audited -- are you saying you 16 have audited Tribes and you are familiar with 17 Tribes that make distributions, not from net gaming 18 revenues, but from other sources, such as a tax, 19 that withhold on them, and that you have audited 20 and required them to do so? I'm not asking who it 21 is. 22 MR. WELSH: Well, objection. I</p>



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<p>1 don't believe that Revenue Agent can require 2 someone to do something. 3 MR. JORDEN: Okay. Fine. 4 THE WITNESS: Without 5 mentioning -- you know, without telling any 6 specific case or Tribe, yes. I am aware and we 7 have done withholding on distributions to members 8 of sources other than gaming revenue. Our manual 9 and audit procedures particularly tell us that 10 these are the type of things that we should look 11 for in examination. 12 BY MR. JORDEN: 13 Q So where -- so if there -- just to be 14 clear here now, have you ever audited a Tribe that 15 imposes a tax on enterprises, and has that Tribe 16 withheld on distributions from the revenue from 17 those taxes? 18 A No. 19 Q Okay. Let me turn -- I am going to 20 introduce here -- we are not at trial anyway -- 21 MR. JORDEN: I'm going to mark 22 for identification United States' Motion to Deny</p>	<p>25 27 1 Q Okay. Page -- turn to Page 8 if you 2 would. 3 You know, Mr. Furnas, that our position 4 is that your summons is not for a legitimate 5 purpose and that's the purpose of this deposition, 6 is to ascertain some information related to that. 7 At the bottom of this page there is a 8 sentence that says: Here, the IRS's legitimate 9 purpose is to determine whether the Tribe met its 10 withholding and reporting requirements. 11 Do you see that? 12 A Yes. 13 Q And then the next page there are one, 14 two, three, four bullets. Would you take a look at 15 those. I just want to ask you -- won't take long 16 on this, just want to ask you a few questions about 17 the bullets. 18 A Okay. 19 Q Do you see those? 20 A Yes. 21 Q The first bullet relates to American 22 Indian casino profits. Right? That's -- you are</p>
<p>26 1 Petitions to Quash. 2 (Furnas Exhibit No. 3 - United States' Motion 3 to Deny Petitions to Quash - was marked for 4 identification.) 5 BY MR. JORDEN: 6 Q I assume you have seen this and just 7 want to ask you a couple of questions about a 8 couple pages of this. 9 MR. JORDEN: I actually have an 10 extra copy of this. 11 BY MR. JORDEN: 12 Q First of all, have you ever seen this 13 before, Mr. Furnas? 14 A Yes. 15 Q And were you involved in the preparation 16 of this document? 17 A I think that I did not prepare it but I 18 consulted with Will and Bob concerning, you know, 19 some of the facts that are in here. 20 I mean obviously I provided him with 21 copies of my summons, some of the other 22 information.</p>	<p>28 1 citing there 3402(r) with holding requirements for 2 taxes on payments of profits. Is that correct? 3 A That's right. 4 Q So that's one of the purposes? Right? 5 A Yes. 6 Q Okay. 7 A Although the -- the code specifically 8 describes net revenues from gaming. 9 Q Net revenues from gaming; correct? 10 A Correct. 11 Q Profits I guess is a -- I would accept 12 Mr. Farrior's description of that as profits. 13 A Okay. I was just trying to be precise. 14 Q That's fine. 15 The second item, this is the item you 16 referred to a few moments ago about whether or not 17 the Tribe has a taxpayer identification number. 18 That's 3406; correct? That's the other purpose to 19 see, the purpose of your summons is to determine 20 whether the Tribe has taxpayer identification 21 numbers. Is that right? 22 A Well, no.</p>



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<p style="text-align: right;">29</p> <p>1 Q That's what this is --</p> <p>2 A I mean to determine whether 3406</p> <p>3 applies, the first question is whether they made</p> <p>4 payments that required 1099 reporting.</p> <p>5 Q Yes.</p> <p>6 A And then the next question is, okay,</p> <p>7 we've determined the 1099 requirement. Did they</p> <p>8 obtain the payee identification numbers.</p> <p>9 The third-party record-keepers aren't</p> <p>10 going to be able to tell me whether the Tribe</p> <p>11 obtained taxpayer identification numbers.</p> <p>12 Q But if they did, if the Tribe did, then</p> <p>13 3406, the withholding requirement would not apply;</p> <p>14 correct?</p> <p>15 A The backup withholding requirement would</p> <p>16 normally not apply as long as the Tribe obtained</p> <p>17 taxpayer identification numbers from the payee's</p> <p>18 prior payment. Although there are other situations</p> <p>19 where 3406 may apply.</p> <p>20 Q Do you know whether the Tribe has</p> <p>21 taxpayer identification numbers for its members?</p> <p>22 A No.</p>	<p style="text-align: right;">31</p> <p>1 Q I'm sorry, I wasn't --</p> <p>2 A I do know that the Tribe as of the date</p> <p>3 of my examination report for the 2000 through 2005</p> <p>4 years, they should have Social Security numbers for</p> <p>5 most of the members because that report included a</p> <p>6 listing of the members that included them.</p> <p>7 Q That's really what I was asking for.</p> <p>8 What --</p> <p>9 A Yes, as of the date of that report, but</p> <p>10 that was after the period that is currently under</p> <p>11 audit.</p> <p>12 Q But those people are still members of</p> <p>13 the Tribe, I take it?</p> <p>14 MR. WELSH: Objection.</p> <p>15 BY MR. JORDEN:</p> <p>16 Q All those people that you already have</p> <p>17 the Social Security numbers are members of the</p> <p>18 Tribe; correct?</p> <p>19 MR. WELSH: Objection. How</p> <p>20 would he know that?</p> <p>21 THE WITNESS: I don't know. The</p> <p>22 Tribe hasn't provided membership rolls.</p>
<p style="text-align: right;">30</p> <p>1 Q Have you attempted to get that</p> <p>2 information?</p> <p>3 A Yes. Repeatedly.</p> <p>4 Q You have attempted to find out whether</p> <p>5 they have it or you've attempted to get the</p> <p>6 taxpayer identification numbers?</p> <p>7 A I've attempted to find out whether the</p> <p>8 Tribe obtained because the question is not whether</p> <p>9 they have it now. The question is, did they obtain</p> <p>10 it prior to making the payments.</p> <p>11 Q And how did they gather -- I got that.</p> <p>12 What information do you have today about</p> <p>13 Social Security numbers on Tribal members?</p> <p>14 A I have conflicting statements from</p> <p>15 representatives of the Tribe --</p> <p>16 Q No, no, I'm asking --</p> <p>17 A -- who had no personal knowledge. At</p> <p>18 one point I was told the Tribe did not obtain them.</p> <p>19 At another point I was told that it did.</p> <p>20 Q Okay.</p> <p>21 A When I asked for specific evidence I was</p> <p>22 not provided with any from the Tribe.</p>	<p style="text-align: right;">32</p> <p>1 BY MR. JORDEN:</p> <p>2 Q You asserted it in your audit. You</p> <p>3 asserted they're members of the Tribe. You made an</p> <p>4 adjustments --</p> <p>5 A I have for the periods that I've made</p> <p>6 adjustments for Tribal membership changes, people</p> <p>7 get disenrolled --</p> <p>8 Q If they were members of the Tribe --</p> <p>9 this is a hypothetical. I understand this -- if</p> <p>10 they did have these Social Security numbers at the</p> <p>11 time the distributions were made, then at least</p> <p>12 potentially, and I understand there may be</p> <p>13 exceptions to this, they did not have an obligation</p> <p>14 to withhold as to those amounts; correct?</p> <p>15 A Not if -- not for the payments that may</p> <p>16 have been made from net gaming revenue because</p> <p>17 that's a separate withholding requirement. But</p> <p>18 under 3406 unless they have been notified by the</p> <p>19 service center or some of those other things that</p> <p>20 make backup withholding apply, then that's true.</p> <p>21 Q Okay.</p> <p>22 A If they had the tax ID numbers, the 3406</p>



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<p style="text-align: right;">33</p> <p>1 would not apply.</p> <p>2 Q Okay. The 945 is the annual return of</p> <p>3 withheld federal income tax. That's the third</p> <p>4 bullet there?</p> <p>5 A Right.</p> <p>6 Q Am I correct? That is a penalty -- I</p> <p>7 assume that's a -- no, that's a --</p> <p>8 A No, that's tax.</p> <p>9 Q -- a form?</p> <p>10 A It's a form where they report</p> <p>11 withholding other than wage withholding.</p> <p>12 Q But that's not where the withholding</p> <p>13 occurs, that's just a report to the IRS of what</p> <p>14 withholding was done, correct, as I read that?</p> <p>15 A Yes, and you pay the tax with the 945.</p> <p>16 Q Correct. Okay.</p> <p>17 Again, assuming the description we've</p> <p>18 just -- the reference we've just discussed, that</p> <p>19 would apply only, assuming, again, that the</p> <p>20 taxpayer identification numbers were available,</p> <p>21 that would only apply to net gaming revenue amounts</p> <p>22 that had been withheld; correct?</p>	<p style="text-align: right;">35</p> <p>1 hypotheticals.</p> <p>2 Q I understand.</p> <p>3 A And I don't know --</p> <p>4 Q Yes, I got it.</p> <p>5 A -- whether they were required. You</p> <p>6 know, I mean as he said, I mean it's you pile</p> <p>7 assumption on assumption, but I can't make those</p> <p>8 assumptions until I've seen the evidence.</p> <p>9 Q I understand.</p> <p>10 MR. WELSH: Again, I would like</p> <p>11 to reiterate and enter it as a continuing objection</p> <p>12 to Mr. Furnas's pontificating on the law, what is</p> <p>13 or isn't the law is to be determined by the Court.</p> <p>14 MR. JORDEN: I understand.</p> <p>15 BY MR. JORDEN:</p> <p>16 Q Turn to Page 10, the first full</p> <p>17 paragraph there. There is just a few cases that</p> <p>18 are cited. These are the authorities and I'm</p> <p>19 confident the Department of Justice has other</p> <p>20 authorities, but at least for the moment these are</p> <p>21 the authorities being cited. So can we just take a</p> <p>22 quick look at these and just confirm for me what I</p>
<p style="text-align: right;">34</p> <p>1 MR. WELSH: I would like to</p> <p>2 interpose the objection. This question is piling</p> <p>3 supposition upon supposition.</p> <p>4 If you could break it into pieces and</p> <p>5 ask him a question.</p> <p>6 MR. JORDEN: All right.</p> <p>7 BY MR. JORDEN:</p> <p>8 Q If the Tribe was required to withhold</p> <p>9 with respect to the distributions made under bullet</p> <p>10 number one, the first bullet, okay, then it</p> <p>11 would -- it was also required to file a 945 and pay</p> <p>12 the tax?</p> <p>13 A Yes.</p> <p>14 Q Okay. If the Tribe was not required</p> <p>15 with respect to payments that are back up under</p> <p>16 bullet number two, then it would not have an</p> <p>17 obligation to file 4945; correct?</p> <p>18 A If the Tribe was not required to</p> <p>19 withhold on non-wage payments, then there would be</p> <p>20 no requirement to file Form 945.</p> <p>21 Q Okay.</p> <p>22 A Although, you know, I mean these are</p>	<p style="text-align: right;">36</p> <p>1 understand is being attributed to these cases.</p> <p>2 The first one is Smart versus State Farm</p> <p>3 Insurance Company. And the second one as well.</p> <p>4 Those decisions relate to the Tribe acting as an</p> <p>5 employer, according to this description. Is that</p> <p>6 correct?</p> <p>7 A According to this description?</p> <p>8 Q Yes.</p> <p>9 A Yes.</p> <p>10 Q And there is a reference down here that</p> <p>11 I would like your take on. It is down below and it</p> <p>12 is talking about the Chicksaw Nation case. It</p> <p>13 says -- begins with the word: Statutes requiring</p> <p>14 an information return. Applied to all persons</p> <p>15 engaged in a trade or business.</p> <p>16 What is the trade or business you think</p> <p>17 the Tribe was engaged in when it distributed</p> <p>18 revenues from its tax sources?</p> <p>19 MR. WELSH: Objection. He</p> <p>20 hasn't stated that. He's opined that they were</p> <p>21 engaged in a trade and business.</p> <p>22 BY MR. JORDEN:</p>



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<p style="text-align: right;">37</p> <p>1 Q Do you have an opinion on that?</p> <p>2 A Well, you know, again with all these</p> <p>3 lawyers in the room, I'm being asked to pontificate</p> <p>4 on the law.</p> <p>5 I do know that the trade or business</p> <p>6 requirement has been interpreted very broadly with</p> <p>7 regard to information return reporting. It has</p> <p>8 applied to non-profits, governments, state,</p> <p>9 municipal governments, federal government. They</p> <p>10 are conducting their operations on a regular basis,</p> <p>11 and, you know, again, my understanding is that the</p> <p>12 trade or business requirement is very broad when it</p> <p>13 comes to information return reporting and that</p> <p>14 these -- and that the type of payments that we</p> <p>15 believe the Tribe may have met -- made fit under</p> <p>16 that definition in 6041.</p> <p>17 Q How does the subpoena help you determine</p> <p>18 whether the Tribe met its 1099 requirements that</p> <p>19 you --</p> <p>20 A To determine if the Tribe met its 1099</p> <p>21 requirements I have to determine what disbursements</p> <p>22 the Tribe made, to whom, the nature of the</p>	<p style="text-align: right;">39</p> <p>1 MR. JORDEN: It's one of my</p> <p>2 habits; one of my bad habits. So I'll back up.</p> <p>3 BY MR. JORDEN:</p> <p>4 Q What -- are you aware of any published</p> <p>5 precedent that would support the position of the</p> <p>6 service and your position in seeking this</p> <p>7 information that's been published where tax</p> <p>8 revenues of a Tribe are being distributed to</p> <p>9 members?</p> <p>10 MR. WELSH: Objection, I would</p> <p>11 like Counsel to define --</p> <p>12 MR. JORDEN: I just want to know</p> <p>13 if he's aware of it.</p> <p>14 MR. WELSH: -- what he means by</p> <p>15 "published precedent."</p> <p>16 MR. JORDEN: Cases, IRS</p> <p>17 information, material, IRS publications, revenue</p> <p>18 rulings. Whatever. Whatever you might know of.</p> <p>19 THE WITNESS: I'm not.</p> <p>20 BY MR. JORDEN:</p> <p>21 Q Okay. Thank you.</p> <p>22 What communications have you had with</p>
<p style="text-align: right;">38</p> <p>1 disbursements, and the summons I have issued;</p> <p>2 that's what I'm looking for. You know, the</p> <p>3 disbursements probably came from checks from a</p> <p>4 bank, so I have issued the summons to the bank.</p> <p>5 The Tribe may have made disbursements by</p> <p>6 credit card, so I've issued summons to the credit</p> <p>7 card companies. And that's how the summons, again,</p> <p>8 you know, I need to determine the amount,</p> <p>9 recipient, and nature of the disbursement in order</p> <p>10 to determine whether the Tribe met its 1099</p> <p>11 reporting requirements.</p> <p>12 Q Are you aware of any published</p> <p>13 precedent? We were talking about precedents</p> <p>14 before. And you suggested that there were</p> <p>15 circumstances in which you were aware of tribes</p> <p>16 withholding on other than net gaming profits. Of</p> <p>17 course, they would withhold on employment matters;</p> <p>18 correct? If there was an employee and they were</p> <p>19 paying a salary, they certainly withhold on that.</p> <p>20 We understand that.</p> <p>21 MR. WELSH: Objection.</p> <p>22 Plaintiff's counsel is testifying as to --</p>	<p style="text-align: right;">40</p> <p>1 any third party or any member of the press or media</p> <p>2 relating to the Tribe or the examination of the</p> <p>3 Tribe?</p> <p>4 A I have had no contact whatsoever with</p> <p>5 the press or media. At the -- with regard to 2006</p> <p>6 through 2009, I have not made any third-party</p> <p>7 contacts with regard to the examination of the</p> <p>8 Tribe.</p> <p>9 Q Prior to 2006 --</p> <p>10 MR. WELSH: I believe you are</p> <p>11 misquoting what he said. He said that for the</p> <p>12 audit of 2006 to 2009.</p> <p>13 THE WITNESS: Right, with regard</p> <p>14 to the audit for 2006 through 2009, I have not made</p> <p>15 any third-party contacts.</p> <p>16 BY MR. JORDEN:</p> <p>17 Q Okay. With respect to the prior audit,</p> <p>18 and the information you gathered in the prior</p> <p>19 audit, which you, of course, as you've indicated</p> <p>20 are relying upon in pursuing this audit to some</p> <p>21 extent, what communications did you have with any</p> <p>22 third party?</p>



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<p style="text-align: right;">41</p> <p>1 A With regard to the at the very beginning 2 of the examination, which actually started with the 3 2002 year, I requested and obtained casino 4 financial statements from the National Indian 5 Gaming Commission. That is not under the -- our 6 procedural definition of third-party contacts and 7 as such another government agency, it doesn't fall 8 specifically under that and create the requirements 9 that we have with regard to third-party contacts. 10 The other contacts I have had, I issued 11 summonses to third-party record-keepers with regard 12 to 2000 through 2005. And in fact, these are the 13 same third-party record-keepers that are currently 14 being summonsed, and of course the Tribe received 15 notification of those third-party record-keeper 16 summonses. 17 Q Any discussions with press or media with 18 respect to the previous -- 19 A No. 20 Q -- audit? 21 A No, I have had no discussions with press 22 or media with regard to the previous or the current</p>	<p style="text-align: right;">43</p> <p>1 MR. JORDEN: Mr. Welsh is going 2 to make sure of that. 3 Do you want to find it and take a look 4 at it? 5 THE WITNESS: No, read it. 6 You've got it right in front of you. 7 BY MR. JORDEN: 8 Q The IRS commenced the Tribe examination 9 in 2005 upon learning of allegations that the Tribe 10 regularly hired armored cars to carry cash 11 (somewhere between 6- and \$10 million per quarter) 12 from its gambling operation for direct contribution 13 to Tribal members without reporting these 14 distributions to the IRS. 15 Now, from whom did you obtain that 16 information? 17 MR. WELSH: Objection. I would 18 like to remind Counsel that the Court has precluded 19 the petitioner from getting into the issue of 20 confidential informants, and so I would caution the 21 witness not to -- 22 MR. JORDEN: I don't think</p>
<p style="text-align: right;">42</p> <p>1 examinations. 2 Q Okay. Now in your previous declaration, 3 you recall you gave a declaration in connection 4 with your summons regarding the individual tax 5 matters of a member of the Tribe. Do you recall 6 that? 7 A Yes. 8 Q Okay. You made the following statement: 9 The IRS commenced -- 10 MR. WELSH: Can he see this? 11 What are you referring to? Do you have an exhibit? 12 MR. JORDEN: I don't have an 13 exhibit. But I am sure he knows his statements. 14 THE WITNESS: I have it. I know 15 it's coming. I am okay if he just reads it. Would 16 it be all right? 17 MR. WELSH: That's fine. 18 MR. JORDEN: I will help you. 19 You can help me. How is that? 20 THE WITNESS: As long as I can 21 catch my flight this afternoon, I'll be willing to 22 move things along.</p>	<p style="text-align: right;">44</p> <p>1 that's correct. I believe the only thing the Court 2 said is he doesn't have to give us the name of the 3 confidential informant. 4 MS. O'DONNELL: Or he may not 5 have to. We may take it up to the Court. 6 MR. JORDEN: We'll take it up 7 with the Court. 8 THE WITNESS: I think I can 9 answer this in a way that it's going to be okay. 10 MS. O'DONNELL: There was no 11 preclusion of that at all by the Court, and if we 12 have to go to the Court, we're going to need to, 13 'cause that's just not an accurate representation. 14 MR. WELSH: I refer to 15 Mr. Farrior who was present for the discussion. 16 MR. FARRIOR: It is certainly 17 not limited just to the name. The judge said you 18 can ask the questions and that Agent Furnas can 19 refuse to answer questions that would lead to the 20 identity of any confidential informant. 21 MS. O'DONNELL: He did not find 22 that. He said we could ask the questions and you</p>



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<p style="text-align: right;">45</p> <p>1 could make your objections, and we will go from 2 there.</p> <p>3 MR. FARRIOR: Okay. Regardless 4 of what your interpretation of that hearing was, we 5 will not -- Agent Furnas, without saying what he's 6 going to testify to -- my impression of the hearing 7 is that he should not and the Court did not order 8 him to reveal the identity of any confidential 9 informant. And you may file whatever you need to 10 file to try to force him to.</p> <p>11 MS. O'DONNELL: That he reveal 12 the identity but there was no order precluding the 13 question.</p> <p>14 MR. FARRIOR: Absolutely. I 15 agree. The order was not precluding the question 16 but the order did not require Mr. Furnas to answer 17 in any certain way.</p> <p>18 MS. O'DONNELL: That's right.</p> <p>19 BY MR. JORDEN: 20 Q Let's back up. Let me do some 21 foundational questions, if I may. 22 This confidential informant, who -- who</p>	<p style="text-align: right;">47</p> <p>1 I'll make my objection that he's debating the law 2 reference to --</p> <p>3 MR. JORDEN: It doesn't matter 4 whether he is aware of it or not; I am asking if he 5 is aware of it.</p> <p>6 MR. WELSH: And as we well know, 7 the Internal Revenue manual is not law.</p> <p>8 THE WITNESS: This case was 9 assigned to me with a memorandum of interview of a 10 confidential informant.</p> <p>11 BY MR. JORDEN: 12 Q Do you know if approval was obtained? 13 A No. 14 Q Okay. Do you know, because the manual 15 requires, and I am sure -- let me back up.</p> <p>16 MR. WELSH: Objection.</p> <p>17 BY MR. JORDEN: 18 Q Do you know and did you do anything 19 personally, individually, to determine the 20 reliability of the information that was given to 21 you? 22 A Yes. I conducted an examination and I</p>
<p style="text-align: right;">46</p> <p>1 determined -- with whom did that confidential 2 informant speak?</p> <p>3 A With a Special Agent in the Miami office 4 of the IRS, who has since retired. And I have to 5 confess, I -- I don't know the individual's name. 6 I have talked neither to the informant nor to the 7 Special Agent who initially interviewed that 8 informant. My knowledge of the information that 9 that informant gave is based on a review of the 10 memorandum of interview that was prepared by the 11 agent who interviewed that informant.</p> <p>12 Q Okay. Now, the manual, the Internal 13 Revenue Manual, Part 9, Chapter 4, requires that 14 approval be obtained to use a confidential 15 informant. Are you familiar with that?</p> <p>16 A I am not familiar with the particular 17 section that you are referring to.</p> <p>18 Q Are you familiar that approval must be 19 obtained?</p> <p>20 MR. WELSH: I know I have my 21 standing objection to legal arguments, but in 22 reference to the Internal Revenue Manual, again,</p>	<p style="text-align: right;">48</p> <p>1 reviewed thousands of records. I issued summons to 2 obtain third-party record-keeper information to 3 verify it. I attempted to question Tribal 4 employees and officials. I questioned Tribes' 5 attorneys regarding the allegations that were made. 6 I took extensive steps to verify the reliability of 7 the information.</p> <p>8 Q Well, you -- you provided this statement 9 in a declaration --</p> <p>10 A Mm-hmm.</p> <p>11 Q -- for a subpoena.</p> <p>12 A Mm-hmm.</p> <p>13 Q What steps did you take to verify this 14 statement?</p> <p>15 MR. WELSH: Which statement?</p> <p>16 MR. JORDEN: The statement that 17 we're talking about right here.</p> <p>18 MR. WELSH: It would be good if 19 you could refer to it again.</p> <p>20 MR. JORDEN: The IRS commenced 21 the Tribe examination in 2005 upon learning of 22 allegations that the Tribe regularly hired armored</p>



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<p style="text-align: right;">49</p> <p>1 cars to carry cash, et cetera, et cetera. 2 THE WITNESS: I reviewed the 3 memorandum of interview in which that was alleged 4 and that's how I learned of those allegations. 5 BY MR. JORDEN: 6 Q Did you do anything beyond that? 7 A Yes. I conducted an extensive -- 8 Q No, no. With respect to this statement, 9 what did you do specifically to determine that? 10 A The statement was this was alleged, 11 okay. I read in the interview where it said the 12 confidential informant alleges so and so and so and 13 so. 14 That seems to me pretty clear that it 15 was alleged. 16 Q Did the interview -- 17 A Are you asking me, Jim, did I 18 subsequently find that the armored cars, that that 19 allegation was correct in all respects? Is that 20 what you're asking me? 21 Q You published this statement. This 22 statement is published.</p>	<p style="text-align: right;">51</p> <p>1 slightly but not materially different than that 2 allegation. 3 But the allegation was made, and that's 4 what I put in my declaration, that this allegation 5 was made. 6 BY MR. JORDEN: 7 Q How did you determine that information 8 you just described? 9 A That it was -- how did I determine the 10 allegation? 11 Q No, no. How did you adjust -- 12 A When I examined, I started with an 13 examination of the bingo hall. And I found that 14 there was millions of dollars of cash that was 15 being delivered from the bank to the casino and 16 kept in the vault at the casino. Okay. Based on 17 the -- what the employees of the casino told me, 18 that money was then picked up by the Miccosukee 19 Tribal Police and delivered to the reservation. 20 Q Was there any other information in that 21 confidential informant's review of -- that you -- 22 was there any other information about the Tribe in</p>
<p style="text-align: right;">50</p> <p>1 A That it was alleged. 2 MR. WELSH: Objection. 3 BY MR. JORDEN: 4 Q It doesn't matter it was alleged. It 5 was alleged by the IRS. 6 MR. WELSH: Do you want to ask a 7 question, Counsel, or do you want to harass the 8 witness? Have it one way or the other. 9 MR. JORDEN: All right. Excuse 10 me. 11 BY MR. JORDEN: 12 Q You published this statement -- 13 A May I clarify that? That statement does 14 not say that I have personal knowledge that armored 15 cars were going out to the reservation. That 16 statement says that I have knowledge that it was 17 alleged. Reading that memorandum of interview was 18 enough for me to conclude that it was alleged. 19 Did I subsequently find that that 20 statement was -- that that allegation was true in 21 all respects? No. I found that the method for 22 them delivering the cash to the reservation was</p>	<p style="text-align: right;">52</p> <p>1 that document that you reviewed, in addition to 2 this? 3 A Yes. 4 Q Okay. And was the information about the 5 operations of the Tribe? 6 A Well, I mean to the extent that the 7 information was -- I mean the operations of the 8 Tribe included delivering large amounts of cash and 9 distributing it to Tribal members. So, yeah, I 10 mean the -- the allegations did involve the 11 operations of the Tribe. 12 Q Was the informant a member of the Tribe? 13 MR. WELSH: Objection. I would 14 counsel the witness to consider whether his 15 statements would reveal or certainly lead to a 16 chain of events which would reveal the name of the 17 confidential informant. 18 MR. JORDEN: I am just asking 19 whether it was a member of the Tribe to determine 20 the veracity of the comments being made. 21 MR. WELSH: And I am just 22 warning the witness again that revealing whether or</p>



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<p style="text-align: right;">53</p> <p>1 not the informant is a member of the Tribe could 2 very well lead to his name being revealed. 3 THE WITNESS: And I am not 4 authorized to reveal any information that would 5 lead to the identity of the confidential informant. 6 BY MR. JORDEN: 7 Q Was there financial information in this 8 report about the financial -- aside from the cash 9 carrying mechanism that you just described, aside 10 from that was there other financial information 11 about the Tribe in the report, in the confidential 12 informant's report? 13 A Yes. 14 Q Can you give me a description of what 15 that information was? 16 MR. WELSH: And again, I would 17 like to counsel the witness that he set out in his 18 declaration what's material to this matter in terms 19 of why he commenced his investigation, and to get 20 into any further discussion of what's in a 21 confidential informant's report may very well 22 reveal the name of the confidential informant and</p>	<p style="text-align: right;">55</p> <p>1 take this up with Judge Gold. 2 (Marked for the record.) 3 BY MR. JORDEN: 4 Q There is also in the Paragraph 14 of 5 your current declaration. 6 Let me back up for a moment. When you 7 read this report you became aware of who the 8 informant was? 9 A No. 10 Q No? The informant was not disclosed in 11 the report? 12 A No. 13 Q Did you subsequently become aware of it? 14 A Yes. 15 Q Okay. And did you satisfy yourself that 16 you believed that that informant was reliable? 17 MR. WELSH: Objection. I don't 18 think he opined on whether the informant was or 19 wasn't reliable or said anything else about the 20 informant since he didn't even know who he was. 21 BY MR. JORDEN: 22 Q All I'm asking is whether you -- you did</p>
<p style="text-align: right;">54</p> <p>1 not enlighten this Court or this matter in any way. 2 MR. JORDEN: Well, I would 3 object to that objection. You can't pick and 4 choose from the confidential informant's report. 5 Choosing to publish something it's clearly adverse 6 but then saying I can't tell you anything else. 7 All I want to know is what type of financial-- I am 8 not asking for what it was specifically. 9 BY MR. JORDEN: 10 Q What type of financial information are 11 we referring to? 12 A I -- I think I'm going to have to rely 13 on the advice of my counsel, that further details 14 regarding that information may lead to disclosure 15 of the identity of the confidential informant. 16 The relevant part is that that 17 allegation that was made is in part as I described 18 it in the declaration, the allegation was, and that 19 it was enough to lead us to commence the 20 examination. 21 MR. JORDEN: Mark the record, if 22 you would, please, Madam Court Reporter, we will</p>	<p style="text-align: right;">56</p> <p>1 that? 2 MR. WELSH: Did what? 3 BY MR. JORDEN: 4 Q Whether you determined, based on the 5 knowledge of who this informant was, in your mind, 6 did you conclude that the informant was reliable? 7 MR. WELSH: At what point? 8 MR. JORDEN: After he read it. 9 THE WITNESS: Well, based on the 10 results of my examination, I verified some of the 11 statements the informant made. I found that some 12 of the statements were not entirely correct. And 13 it -- you know, again, we -- the information from 14 the informant was enough to commence the 15 examination. 16 After that, it was a matter of what I 17 could determine based on documentary evidence, 18 et cetera, is what I based my examination and the 19 results on. So you know, I guess, a determination 20 of overall reliable of the informant wasn't really 21 necessary to my examination, because once I 22 commenced it, I had to develop, you know, specific</p>



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<p>57</p> <p>1 documentary evidence to support any adjustments 2 that I had made as a result of my examination. 3 BY MR. JORDEN: 4 Q Were payments made to the informant? 5 MR. WELSH: Objection. 6 THE WITNESS: You mean from the 7 government? 8 BY MR. JORDEN: 9 Q Yes. 10 A And the answer is no. 11 MR. JORDEN: Any reason I 12 shouldn't -- I just did. 13 MR. WELSH: You've answered. 14 THE WITNESS: As far as I know, 15 no. 16 BY MR. JORDEN: 17 Q And did you know whether the 18 informant -- and all I am asking is whether you 19 know the answer to this question -- whether the 20 informant was promised that this information would 21 remain confidential? 22 A No. I don't know.</p>	<p>59</p> <p>1 Although the report is mostly a summary 2 of the evidence, while the actual evidence is, you 3 know, was not -- I mean copies of all of the 4 canceled checks, et cetera, was not included with 5 that report, but it detailed, as you know, in very 6 large detail exactly which payments and what 7 evidence we had amassed, that there were unreported 8 payments. 9 Q Okay. So just to be clear, whatever -- 10 what that declaration is referring to is your 11 report essentially from the prior period -- 12 A Yes -- 13 Q -- and the information -- 14 A -- the evidence that was used to prepare 15 that report. 16 Q Do you remember a declaration issued by 17 Mr. Johnson in the prior proceeding? 18 A I read the declaration of Mr. Johnson in 19 the prior proceeding. 20 Q You worked with Mr. Johnson in 21 developing the audit for the Tribe? 22 A Yes.</p>
<p>58</p> <p>1 Q You don't know. 2 In your most recent declaration, you -- 3 you referred to: Significant evidence suggesting 4 that the Tribe was making large unreported payments 5 to Tribal members. 6 MR. WELSH: Where is that? 7 MR. JORDEN: In Paragraph 14. I 8 think I have given you that declaration. Do you 9 see that? 10 THE WITNESS: Right. 11 MR. WELSH: Exhibit 2. 12 MR. JORDEN: Yes, that's 13 Exhibit 2. 14 THE WITNESS: Could you repeat 15 the question or did you -- what is the question? 16 BY MR. JORDEN: 17 Q What is the significant evidence that 18 you are referring to there? 19 A The significant evidence is detailed in 20 the examination report of the 2000 through 2005 21 years, which you have been provided under your 22 power of attorney for those periods.</p>	<p>60</p> <p>1 Q Okay. Mr. Johnson referred to various 2 and possibly lavish personal expenses by members of 3 the Tribe. 4 Do you recall that reference in his 5 declaration? 6 A Yes. 7 Q Okay. Do you know what that's referring 8 to? 9 MR. WELSH: Objection. He's 10 asking for speculation on what somebody else 11 thought about something. 12 BY MR. JORDEN: 13 Q Well, if Mr. Johnson told you or if you 14 discussed it with Mr. Johnson then you know what 15 he's referring to. 16 A I do actually have personal knowledge. 17 Because the case he is referring to, I worked it up 18 to a certain point, at which time Mr. Johnson 19 completed it. 20 However, I'm not authorized to disclose 21 specific details regarding tax information of a 22 taxpayer who's not a plaintiff in this current</p>



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<p style="text-align: right;">61</p> <p>1 case.</p> <p>2 Q So is it fair to say the description is</p> <p>3 of a particular Tribal member, and your audit of</p> <p>4 that Tribal member?</p> <p>5 MR. WELSH: Well, I would like</p> <p>6 to caution the witness, and as I discussed with and</p> <p>7 I believe -- Ms. O'Donnell, are you on the phone?</p> <p>8 MS. O'DONNELL: Yes.</p> <p>9 MR. WELSH: As we discussed</p> <p>10 yesterday, if you wanted discussion of a particular</p> <p>11 Tribal member's tax information, we would not be</p> <p>12 allowed to reveal any of that pursuant to</p> <p>13 Section 6103 of the Internal Revenue Code, as you</p> <p>14 are well aware. And as I instructed you, if you</p> <p>15 wanted any questions asked and answered concerning</p> <p>16 that matter, we are perfectly happy to receive a</p> <p>17 waiver, and I would ask counsel for the petitioner</p> <p>18 now whether we have such a waiver.</p> <p>19 MS. O'DONNELL: No, I don't</p> <p>20 think we are asking any particulars.</p> <p>21 MR. JORDEN: We are not asking</p> <p>22 about any specific member. We are just asking --</p>	<p style="text-align: right;">63</p> <p>1 hearsay.</p> <p>2 THE WITNESS: Yes, I can't</p> <p>3 testify --</p> <p>4 MR. JORDEN: He can testify --</p> <p>5 THE WITNESS: -- to why</p> <p>6 Mr. Johnson made a statement.</p> <p>7 BY MR. JORDEN:</p> <p>8 Q Did Mr. Johnson discuss with you the</p> <p>9 fact that he was making a statement about various</p> <p>10 and possibly lavish personal expenses --</p> <p>11 A I don't recall a specific discussion</p> <p>12 regarding that particular statement.</p> <p>13 MR. JORDEN: Why don't we take a</p> <p>14 five-minute break or so.</p> <p>15 (Thereupon, a recess was taken.)</p> <p>16 MR. WELSH: Back on the record.</p> <p>17 Are you there, Ms. O'Donnell?</p> <p>18 MS. O'DONNELL: Yes. Yes.</p> <p>19 BY MR. JORDEN:</p> <p>20 Q Mr. Furnas, could you describe</p> <p>21 communications you have had with the Bureau of</p> <p>22 Indian Affairs and the National Indian Gaming</p>
<p style="text-align: right;">62</p> <p>1 I'm just asking --</p> <p>2 BY MR. JORDEN:</p> <p>3 Q What are you referring to -- what gave</p> <p>4 rise to your ability to make a public statement, a</p> <p>5 public statement about various and possibly lavish</p> <p>6 personal expenses?</p> <p>7 A Well, Mr. Johnson made that statement.</p> <p>8 Q All right.</p> <p>9 A I have some knowledge of the things</p> <p>10 that -- I mean I looked, for 2000 through 2005, I</p> <p>11 reviewed the disbursements of the Tribe and I saw</p> <p>12 very significant expenditures that, you know, it</p> <p>13 would not be unreasonable to describe as personal</p> <p>14 and lavish.</p> <p>15 I am trying to answer your question.</p> <p>16 Q What was the purpose of your making that</p> <p>17 statement in the declaration?</p> <p>18 A I didn't make that statement.</p> <p>19 Q Do you know did Mr. Johnson advise you</p> <p>20 as to why he made that statement in his</p> <p>21 declaration?</p> <p>22 MR. WELSH: Objection to</p>	<p style="text-align: right;">64</p> <p>1 Commission relating to the Tribe or the examination</p> <p>2 of the Tribe?</p> <p>3 A I have had no contact with the Bureau of</p> <p>4 Indian Affairs.</p> <p>5 As I previously mentioned at the very</p> <p>6 commencement, we obtained gaming financial --</p> <p>7 gaming facility financial statements from the</p> <p>8 National Indian Gaming Commission.</p> <p>9 This fall I was invited to give a class</p> <p>10 to the NIGC enforcement division. Among other</p> <p>11 things, they wanted me to talk about audit</p> <p>12 procedures. And this is not with regard to any</p> <p>13 specific Tribe, but with regard to audit</p> <p>14 procedures, particularly in the area of credit</p> <p>15 cards in the Tribal environment.</p> <p>16 I did in that discuss an article that</p> <p>17 was in the Miami Herald, which described some of</p> <p>18 the credit card expenses that were involved, and I</p> <p>19 neither confirmed nor denied information in that</p> <p>20 article, except to the extent that it's become</p> <p>21 public record, which as far as I could tell the</p> <p>22 whole article was based on public record. But that</p>



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<p>65</p> <p>1 was more of a general discussion of audit 2 procedures, and issues. 3 Other than that, I have had no specific 4 communications with the BIA or the NIGC. 5 Q Did you speak to a particular person at 6 the NIGC to get this information or how did you -- 7 how did you obtain the information from the NIGC? 8 A My manager requested the information in 9 a letter to the NIGC at the commencement of the 10 examination. 11 So I guess my manager at that time 12 obtained the information and forwarded it to me. 13 So I guess I didn't really have the contact with 14 the NIGC, my manager did. Indirectly I did. 15 Q Is that Ms. Gentry? 16 A No, it was Ken Vogt (ph) who was the 17 manager prior to Anita Gentry. 18 Q Okay. Are you -- you mentioned that in 19 connection with either the past or the present 20 audit of the Tribe, you had no conversations with 21 the media. 22 Are you aware of anyone that did have</p>	<p>67</p> <p>1 aware of anyone who has had communication with the 2 press regarding any of the individual Tribal 3 audits -- Tribal member audits? 4 A No. 5 Q Are you familiar with a document that's 6 been referred to as a position paper, regarding the 7 concept of income derived from the land? 8 A Not until I read your interrogatory that 9 told me that it's referred to in the manual. I 10 have read that section of the manual which refers 11 to that position paper. Of course, you know, 12 that's the Indian Tribal government section of the 13 Internal Revenue manual, which I've read and in 14 fact participated in writing portions of it. 15 I don't recall that position paper and I 16 don't recall ever having reviewed that position 17 paper. Although it's likely that I have, but, you 18 know, I can't specifically recall. 19 Q Do you know what position is taken in 20 the position paper? 21 A Well, no, since I can't recall the 22 details of the paper. I mean usually we have</p>
<p>66</p> <p>1 conversations with the media about the Tribe and 2 the tax issues of the Tribe? 3 A I was notified by my manager that 4 someone from the media had contacted Christie 5 Jacobs, who is the director of Indian Tribal 6 Governments in the Internal Revenue Service, that 7 someone had correct -- had contacted her requesting 8 information, which she refused to provide, and, you 9 know, the manager -- the nature of the manager's 10 contact with me was just that there's somebody from 11 the press that's snooping around and just be aware 12 of that. But I was never contacted by anybody from 13 the press or the media. 14 Q Now, that's with respect to the Tribal 15 issues. 16 Have you had any communications with the 17 press about the individual Tribal member's audits? 18 A I have not had any communications with 19 the media or the press concerning the examination 20 of the Tribe or any related examinations or any of 21 these matters. 22 Q And how about with respect to -- are you</p>	<p>68</p> <p>1 position papers relating to the manual that 2 describe, you know, applicable law and court cases, 3 and, you know, different types of situations 4 regarding it. But again, I guess I can't testify 5 to that position paper specifically because I don't 6 recall it. 7 Q Okay. Are you aware of any referrals to 8 the Department of Justice for Criminal 9 Investigation, including any referrals that are now 10 pending, contemplated or otherwise expected to 11 occur, relating to or as a result of the 12 examination of the Tribe? 13 MR. WELSH: I object. He's got 14 several questions there, that is whether or not -- 15 which the only one I can conceive of as being 16 proper is whether or not a referral has been made. 17 He included in that question several other 18 questions that is contemplated or, I can't even 19 remember the vague term he used to refer to other 20 possible considerations of referral, so it's a 21 compound question, which is improper. 22 MR. JORDEN: Let me break it up.</p>



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<p>1 I understand.</p> <p>2 BY MR. JORDEN:</p> <p>3 Q Has a referral been made to the</p> <p>4 Department of Justice for criminal investigation?</p> <p>5 A With regard to the examination of the</p> <p>6 Miccosukee Tribe, the -- there is not -- there has</p> <p>7 not been a referral either to the Department of</p> <p>8 Justice or to criminal investigation of the</p> <p>9 Miccosukee Tribe and of the examination of the</p> <p>10 Miccosukee Tribe.</p> <p>11 Q Are you aware of any referral to the</p> <p>12 Department of Justice for criminal investigation on</p> <p>13 any of the individual Tribal members?</p> <p>14 MR. WELSH: I would interpose an</p> <p>15 objection here. That is beyond the scope of this</p> <p>16 case entirely. And it could very well involve an</p> <p>17 improper disclosure pursuant to Section 6103 in the</p> <p>18 Internal Revenue Code, and there is no waiver</p> <p>19 obtained concerning any individual.</p> <p>20 MR. JORDEN: Let me try a few</p> <p>21 foundation questions and you can decide whether we</p> <p>22 have to take this up further.</p>	69	<p>1 we represent about 50 Tribal members.</p> <p>2 MR. WELSH: Do you? Have I</p> <p>3 received any waivers concerning any Tribal members</p> <p>4 in this litigation, Ms. O'Donnell?</p> <p>5 MR. JORDEN: Let's hold on here.</p> <p>6 Let's back up. We are not looking for any</p> <p>7 individual descriptions. Let me ask the question a</p> <p>8 different way.</p> <p>9 BY MR. JORDEN:</p> <p>10 Q To the extent you gained information in</p> <p>11 your prior audit, including your summons of third</p> <p>12 parties, isn't it true that you used that</p> <p>13 information to develop audits of individual Tribal</p> <p>14 members?</p> <p>15 MR. WELSH: Again, I am going to</p> <p>16 have to instruct the agent that audits of</p> <p>17 individual Tribal members, whether they exist or</p> <p>18 not, could be certainly Section 6103 information,</p> <p>19 and they are not involved in this matter. This is,</p> <p>20 as you pointed out, an investigation of the Tribe.</p> <p>21 MR. JORDEN: What's involved in</p> <p>22 this matter --</p>	71
<p>1 BY MR. JORDEN:</p> <p>2 Q It's true, is it not, Mr. Furnas, that</p> <p>3 the information you derive -- let's go back, let me</p> <p>4 back up.</p> <p>5 You have been involved in the audits of</p> <p>6 the individual Tribal members; have you not?</p> <p>7 MR. WELSH: Again I am going to</p> <p>8 have to warn the agent. I cannot instruct him not</p> <p>9 to answer.</p> <p>10 MR. JORDEN: I am not asking for</p> <p>11 any names. I am just asking if he's been</p> <p>12 involved --</p> <p>13 MR. WELSH: As you well know,</p> <p>14 under Section 6103 of the code whether someone's</p> <p>15 even under investigation is Internal Revenue -- is</p> <p>16 return information. And for an agent without a</p> <p>17 waiver and if it's not involved, if the case is not</p> <p>18 involved in litigation, for him to reveal that</p> <p>19 information would be for him to violate</p> <p>20 Section 6103, which includes both civil and</p> <p>21 criminal liability potentially for that agent.</p> <p>22 MS. O'DONNELL: Excuse me, but</p>	70	<p>1 MR. WELSH: Thank you, let me</p> <p>2 finish.</p> <p>3 I said this is a matter involving the</p> <p>4 Miccosukee Tribe, not any individual member of the</p> <p>5 Miccosukee Tribe.</p> <p>6 MR. JORDEN: What's involved is</p> <p>7 the purpose of this examination, including the</p> <p>8 purpose of the prior examination. All I am asking</p> <p>9 him is whether the information he develops and has</p> <p>10 developed in the past examination will be used in</p> <p>11 connection with audits of individual Tribal</p> <p>12 members.</p> <p>13 Now, that is not even a current audit.</p> <p>14 I am asking whether he will use it for audits of</p> <p>15 individual Tribal members.</p> <p>16 MR. WELSH: How exactly does</p> <p>17 that bear on the issues before this Court whether</p> <p>18 or not a summons relating to the Tribe itself is</p> <p>19 proper, not the individual Tribal members. You are</p> <p>20 getting into matters related to individuals who are</p> <p>21 not taxpayers in this case. Or potential taxpayers</p> <p>22 in this case.</p>	72



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<p style="text-align: right;">73</p> <p>1 BY MR. JORDEN:</p> <p>2 Q Can you answer the question?</p> <p>3 A Ms. O'Donnell says that she has 50 power</p> <p>4 of attorneys for individual taxpayers under audit.</p> <p>5 You have this information, if you choose to</p> <p>6 disclose it. But I'm not authorized, as the</p> <p>7 attorney said, I am not authorized to disclose any</p> <p>8 tax information regarding any -- anybody who's not</p> <p>9 a plaintiff in this case.</p> <p>10 Q I am not asking --</p> <p>11 A I will say -- and this may answer your</p> <p>12 question -- that in the course of an examination,</p> <p>13 any examination, if we determine that there are</p> <p>14 taxpayers who have not satisfied their liabilities,</p> <p>15 based on the results of our examination we do</p> <p>16 determine that there are other taxpayers who have</p> <p>17 not satisfied their liabilities, it's our duty to</p> <p>18 extend and to see that those other taxpayers do</p> <p>19 satisfy their responsibilities.</p> <p>20 Q So if, in the course of your gaining</p> <p>21 information through the summons or through the</p> <p>22 prior summons, you conclude that there may be</p>	<p style="text-align: right;">75</p> <p>1 Department. I am not authorized to disclose</p> <p>2 anything regarding any taxpayer who's not a</p> <p>3 plaintiff in this case.</p> <p>4 MR. JORDEN: Okay. We will mark</p> <p>5 that.</p> <p>6 (Marked for the record.)</p> <p>7 BY MR. JORDEN:</p> <p>8 Q Have you ever been accused, Mr. Furnas,</p> <p>9 of misrepresentation to induce cooperation with an</p> <p>10 examination? Or pretending to be conducting a</p> <p>11 civil examination when you are actually conducting</p> <p>12 a criminal examination?</p> <p>13 A Yes.</p> <p>14 Q You have been accused of that?</p> <p>15 A Yes.</p> <p>16 Q Can you describe the instances in which</p> <p>17 you have been accused of it?</p> <p>18 A Well, the -- the most significant -- of</p> <p>19 course, you know, I am a Revenue Agent and I have</p> <p>20 been for 23 years, and asking a Revenue Agent if</p> <p>21 they've ever been accused of misconduct, you know,</p> <p>22 after 23 years of being a Revenue Agent is -- I</p>
<p style="text-align: right;">74</p> <p>1 criminal activity --</p> <p>2 MR. WELSH: Are you asking him a</p> <p>3 hypothetical not related to a particular</p> <p>4 hypothetical in any case?</p> <p>5 MR. JORDEN: It's a</p> <p>6 hypothetical. That's all I am asking.</p> <p>7 MR. WELSH: In any case?</p> <p>8 MR. JORDEN: Sure. We will</p> <p>9 start with any case.</p> <p>10 THE WITNESS: Yes, in any case</p> <p>11 my job is to conduct a civil examination regarding</p> <p>12 the tax liability.</p> <p>13 If I develop firm indications of fraud</p> <p>14 on the case that I'm examining or other matters,</p> <p>15 then it's my duty to refer that to our criminal</p> <p>16 investigation division.</p> <p>17 BY MR. JORDEN:</p> <p>18 Q Have you done that in connection with</p> <p>19 your prior examination during your prior audit?</p> <p>20 A I have not referred the case of the</p> <p>21 Miccosukee Tribe of Indians of Florida either to</p> <p>22 the criminal investigation division or the Justice</p>	<p style="text-align: right;">76</p> <p>1 mean the answer is, yes, I have.</p> <p>2 Particular, I mean the most serious</p> <p>3 allegations were in a case that was, you know,</p> <p>4 Kontny versus the U.S. I was the -- I conducted a</p> <p>5 civil examination of a corporation and determined</p> <p>6 that there was substantial non-compliance with</p> <p>7 employment tax requirements, and I referred that to</p> <p>8 the criminal investigation division. They were</p> <p>9 charged, there was a hearing, an extensive hearing</p> <p>10 where the taxpayer alleged that I was conducting a</p> <p>11 criminal examination under the guise of a civil</p> <p>12 audit.</p> <p>13 As a result of that hearing the</p> <p>14 magistrate ruled, in fact, that I was not guilty of</p> <p>15 any misconduct, any misrepresentation. And the</p> <p>16 evidence that I collected was allowed in the</p> <p>17 criminal trial where I testified, and the taxpayers</p> <p>18 were convicted.</p> <p>19 Q That examination, was it originally</p> <p>20 brought to you by a Special Agent, criminal agent</p> <p>21 in Kontny?</p> <p>22 A It was referred to the examination</p>



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<p>77</p> <p>1 division from the criminal investigation, who there 2 were informants in the case who were -- who were 3 interviewed by Special Agents. The criminal 4 investigation division referred that to the civil 5 examination, and it was assigned to me. 6 Q In that case did you disclose to the 7 parties that it had been referred by criminal 8 investigation to you? 9 A I don't recall. 10 Q Okay. 11 A It could be that the transcript of that 12 hearing, which is public evidence, would answer 13 that question. I mean this was back in the '90s. 14 And that specific question of whether I told them 15 that this -- that it was referred from criminal, I 16 don't remember. 17 Q Okay. 18 A I do know that the magistrate in that 19 was pretty specific that I had been more than 20 upfront with the taxpayers, had told them more than 21 I was required to, and that, you know, the 22 allegations had no substance whatsoever.</p>	<p>79</p> <p>1 that I just handed to you? 2 A Well, this would appear to be a copy of 3 the summons that I issued -- 4 Q Okay. 5 A -- to Morgan Stanley Smith Barney. 6 Q Okay. 7 A And I would say it is one of the reasons 8 we are all here today. 9 Q Did you prepare this? 10 A I'm not the -- the first two pages, I 11 guess, the cover sheets, of course I didn't. The 12 summons, yes, I did. 13 MR. WELSH: If I could stop for 14 one second and ask Counsel why you have the civil 15 cover sheet on top of the summons. I mean the IRS 16 summons; I'm not talking about summons in a civil 17 action. Why do you have the civil cover sheet, the 18 summons in the case, and then the summons which the 19 Revenue Agent issued to Morgan Stanley together? 20 Seems curious to me. 21 MR. JORDEN: It's good question. 22 It's a fair question. It is curious because that's</p>
<p>78</p> <p>1 Q Okay. 2 A But that's all public record. I mean -- 3 MR. JORDEN: Mark four for 4 identification. 5 (Furnas Exhibit No. 4 - Summons to Morgan 6 Stanley Smith Barney - was marked for 7 identification.) 8 BY MR. JORDEN: 9 Q See if you can identify this and 10 describe it as to what this is, Mr. Furnas. 11 MR. JORDEN: I want to make sure 12 I have my copy. 13 BY MR. JORDEN: 14 Q Before we turn to that document I did 15 have another question similar to the question I 16 asked you, and this is just whether you are aware 17 of Revenue Agent John R. Johnson being accused of 18 pretending to conduct a civil investigation when 19 actually conducting a criminal investigation or 20 otherwise misrepresenting his status? 21 A I'm not. 22 Q Okay. So can you identify what this is</p>	<p>80</p> <p>1 how I pulled it out of the file. 2 MR. WELSH: Do you want to 3 rearrange your exhibit? 4 MR. JORDEN: Let's just take a 5 look at the summons, rip off the first two pages. 6 THE WITNESS: First two pages, 7 good. Because I don't really -- I am not familiar 8 with the first two pages. 9 MR. JORDEN: It is a two-page 10 document -- excuse me, it's three-page document. 11 THE WITNESS: Front and back. 12 MR. WELSH: Double-sided. 13 BY MR. JORDEN: 14 Q Let's start again. Mr. Furnas, you are 15 familiar with this. And did you prepare it? 16 A Yes. 17 Q Is this a form of summons that you've 18 used regularly or did you write this specifically 19 for the Miccosukee Tribe summons? 20 A The form itself, Form 2039, is a 21 published form, and I used the form that we issue 22 summonses on.</p>



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<p style="text-align: right;">81</p> <p>1 The attachments starting on the second</p> <p>2 page where it says "Instructions and Definitions,"</p> <p>3 most of that, I mean I have a file on my computer</p> <p>4 with attachments for different types of summons. I</p> <p>5 pulled it off of there and then revised it and then</p> <p>6 put in the stuff that was relevant to the</p> <p>7 particular information in the case that I am</p> <p>8 working.</p> <p>9 Q Now in addition to this summons, and if</p> <p>10 you turn back to exhibit, what is this, Exhibit 3,</p> <p>11 which is the United States' Motion to Deny</p> <p>12 Petitions to Quash? I think it's Exhibit 2.</p> <p>13 A One of Page 19.</p> <p>14 Q In this exhibit there are references to</p> <p>15 the other subpoenas that you issued beginning on</p> <p>16 Page 3 of that exhibit?</p> <p>17 A Right.</p> <p>18 Q There's Morgan Stanley?</p> <p>19 A Right.</p> <p>20 Q And then there is Citibank, American</p> <p>21 Express, and Wachovia?</p> <p>22 A Yes.</p>	<p style="text-align: right;">83</p> <p>1 American Express, and Wachovia Bank summons?</p> <p>2 A Well, Morgan Stanley is a brokerage that</p> <p>3 holds investment-type accounts. To my -- or at</p> <p>4 least for the years in question, we believe that it</p> <p>5 may, and the type of records that you would request</p> <p>6 from a brokerage that has investment type accounts</p> <p>7 are different than the type of records that you</p> <p>8 would ask from a bank or a credit card company or</p> <p>9 just a financial institution.</p> <p>10 Q Okay. Well, let's just go through the</p> <p>11 Morgan Stanley first so I understand what the</p> <p>12 relevance is of some of the documents you are</p> <p>13 seeking. Okay?</p> <p>14 A Okay.</p> <p>15 Q The first item is: Records of security</p> <p>16 transactions by the Tribe, and by that I assume</p> <p>17 that's referring to sales of securities or purchase</p> <p>18 of securities by the Tribe?</p> <p>19 A Could.</p> <p>20 Q What else would it refer to?</p> <p>21 A Any types of security transactions that</p> <p>22 they made through the brokerage. I mean most</p>
<p style="text-align: right;">82</p> <p>1 MR. WELSH: Excuse me, what are</p> <p>2 you referring to, Exhibit 2, Page --</p> <p>3 MR. JORDEN: Exhibit 2,</p> <p>4 beginning at Page 3. There is a reference to what</p> <p>5 the summons seeks in the Morgan Stanley summons,</p> <p>6 then there is a reference to the three additional</p> <p>7 summonses. And there is a description on that</p> <p>8 page -- I didn't bring the summonses for Citibank,</p> <p>9 American Express, and Wachovia because they are not</p> <p>10 part of the petition. But it is referred to in</p> <p>11 here.</p> <p>12 THE WITNESS: He's basically</p> <p>13 saying this is -- the attachment was attached to</p> <p>14 Morgan Stanley. This attachment was attached to</p> <p>15 Citibank -- and Wachovia.</p> <p>16 MR. WELSH: You are running over</p> <p>17 from Page 3 to subsequent pages.</p> <p>18 MR. JORDEN: Pages 3 and 4 and</p> <p>19 5. Okay.</p> <p>20 BY MR. JORDEN:</p> <p>21 Q Why is it that the Morgan Stanley</p> <p>22 summons description is different from the Citibank,</p>	<p style="text-align: right;">84</p> <p>1 commonly that's what I would expect.</p> <p>2 Q Is there another type of security</p> <p>3 transaction that I am not familiar with?</p> <p>4 MR. WELSH: I don't think he</p> <p>5 knows what you are familiar with.</p> <p>6 MR. JORDEN: Good point.</p> <p>7 THE WITNESS: And I don't --</p> <p>8 BY MR. JORDEN:</p> <p>9 Q Is there other type of security</p> <p>10 transaction other than purchase and sale of</p> <p>11 securities?</p> <p>12 A I -- I think there is. Although, you</p> <p>13 know, not having seen the records, I'm not sure</p> <p>14 what all types of transactions they may have made.</p> <p>15 Q If the Tribe --</p> <p>16 A It could be.</p> <p>17 Q -- I'm sorry. Go ahead.</p> <p>18 A I mean based on the prior years, the</p> <p>19 Tribe was maintaining several accounts at Smith</p> <p>20 Barney that were owned by the Tribe but were under</p> <p>21 the names of individual taxpayers. Okay. There</p> <p>22 could have been transfers between those accounts.</p>



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<p style="text-align: right;">85</p> <p>1 There could have been security transactions, where 2 securities were transferred between those accounts. 3 You know, I guess there could be instructions from 4 the Tribe with regard to the purchases and sale of 5 securities. 6 Q So describe to me how any of that would 7 be relevant to your determination of whether the 8 Tribe should have withheld payments? 9 A If the Tribe set aside money for 10 taxpayers, and again, based on the previous years, 11 we found that some of the money that was 12 distributed to the Tribal members, the Tribal 13 members had the choice of the Tribe investing it in 14 these security accounts at Smith Barney, so the 15 information in those accounts would then lead us to 16 potential 1099 requirements, because the 17 distribution to the member could have been in the 18 manner of setting the money aside in an account for 19 that member. 20 Q Okay. Item four refers to: Records of 21 any and all dividends and interest paid to the 22 Tribe, and Forms 1099 issued to the Tribe.</p>	<p style="text-align: right;">87</p> <p>1 disbursement to a Tribal member, and the source of 2 that disbursement was gaming revenue, then the 3 3402(r) withholding would apply. 4 If there was a disbursement to the 5 Tribal member and the source of that disbursement 6 was interest income or dividend income, then 7 3402(r) withholding would not apply. 8 Q I guess where I am confused is from -- 9 are you telling me that the Morgan Stanley records 10 would indicate to you which of those two accounts 11 were used to make the distribution? 12 A They may be part of that puzzle. You 13 know. I mean putting together that puzzle from 14 third-party records is no easy task. But, yes, the 15 records may -- and may be one of the only ways, 16 because if I see in the Morgan Stanley records a 17 disbursement from a particular account, okay, then 18 I would have to go and look and say, okay, how did 19 the money get into the account? Did it come from 20 the NTDR account? Did it come from interest or 21 dividends? Did it come from the general account? 22 Did it come from some other source? And each of</p>
<p style="text-align: right;">86</p> <p>1 What's the relevance of that? 2 A As part of my examination, I have to 3 determine the source of any distributions that were 4 made. The source of distributions could have come 5 from dividends or interest paid to the Tribe. And 6 therefore, knowledge of what dividends or interest 7 were paid to the Miccosukee Tribe would be relevant 8 to determining the source of amounts distributed. 9 Q How about Forms 1099? 10 A That would tell me what the dividends or 11 interest earned in those accounts, you know, it 12 would -- it would tell me the source, if it was 13 interest or dividend income. And then, you know, 14 if the amounts in those accounts were subsequently 15 disbursed, then that would be relevant to 16 determining the source of revenue for those 17 disbursements. 18 Q How does that relate to the two accounts 19 that you mentioned earlier that the Tribe uses to 20 make distributions, the general account and the 21 NTDR? 22 A If the -- if the -- if we found a</p>	<p style="text-align: right;">88</p> <p>1 those questions is relevant to the inquiry of 2 whether 3402(r) would apply. 3 Q Item six: Records maintained of 4 transactions for or communications with the 5 Miccosukee Tribe, including all notes, memoranda 6 (informal or formal), correspondence, financial 7 statements, background or credit investigations, 8 and records identifying the stock transfer agent 9 and dividend disbursing agent. 10 How is that relevant to your 11 determination of whether an amount should have been 12 withheld? 13 A Again, I need to determine the nature, 14 recipient, and source of any disbursements made by 15 the Tribe. Not knowing what's in those records, I 16 can't say if there is anything there that's 17 relevant or not, but they could include information 18 regarding other financial institutions, other 19 accounts of the Tribe that may have made 20 disbursements. There may be memoranda directing 21 Smith Barney to pay certain items and that 22 memoranda may indicate whether it was on behalf of</p>



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<p style="text-align: right;">89</p> <p>1 Tribal members or whether it was a payment for 2 services. 3 You know, in this instance, the Tribe 4 has -- I'm starting from zero. The Tribe has 5 refused to provide any information. And since to 6 conduct my examination I need to determine any 7 disbursements the Tribe may have made that would 8 require reporting or withholding, then, you know, 9 any of the financial information may lead me to 10 those disbursements and to those reporting and 11 withholding requirements. 12 Q Just so I understand, virtually all of 13 these questions -- is this true, I will just ask 14 the question. 15 Is it true virtually all these questions 16 or these requests are intended to help you 17 determine whether -- what the source of the payment 18 was, whether it was the NTDR account or the general 19 account; right? That's the source issue? 20 A Or -- or from whatever source. 21 Q Well, based on your prior audit, those 22 are the two accounts you referred to for purposes</p>	<p style="text-align: right;">91</p> <p>1 MR. WELSH: Got it. 2 MR. JORDEN: Okay. 3 BY MR. JORDEN: 4 Q Item three: Loan documents. 5 Can you tell me why you need -- you 6 would need to see loan documents? 7 A Again, my -- you know, I need to 8 determine the nature and the source of the 9 distributions. If the distributions were made from 10 loan proceeds, then that may be reflected in loan 11 documents. 12 Q How about item four: Safe deposit box 13 documents? 14 A The -- the Tribe may be holding assets 15 that they have distributed to members. And you 16 know, again, not knowing what records, I can't say 17 the specific relevance until I know what records 18 there are, but they could be -- could again lead me 19 to the nature, source, recipient, and amount of 20 disbursements. 21 Q When you say "holding assets that 22 they've distributed to members," I am not sure I</p>
<p style="text-align: right;">90</p> <p>1 of withholding. Am I correct? 2 A You know, based on prior years, those 3 were the main accounts. 4 Q Okay. And in addition to that, you're 5 attempting to obtain the records for the purpose of 6 determining amounts and to whom they were paid 7 amongst the members? 8 A Or others. 9 Q Or others. Okay. 10 Now, let's talk about the summonses 11 directed to Citibank, American Express, and 12 Wachovia. 13 Item three of that on Page 4 refers to 14 loan documents -- 15 MR. WELSH: Item three, Page 4 16 of what? 17 MR. JORDEN: Exhibit 3, Page 4. 18 This is a description of the Wachovia summons, 19 American Express summons, and the Citibank summons. 20 I think the witness has it in front of him, but I 21 will wait until you guys find it. 22 Got it?</p>	<p style="text-align: right;">92</p> <p>1 know what you mean by that. 2 A Well, again, in the prior years I found 3 where the Tribe would say, okay, your distribution 4 is X, the member could say, okay, I want you to 5 purchase merchandise with that; I want you to 6 distribute it to me in cash; I want you to put it 7 away in a brokerage account; potentially I want you 8 to buy me some gold coins and keep it in a safe 9 deposit box for me. 10 I mean I don't know that that happened, 11 but again, any of the financial information can be 12 relevant to the nature, source, amount of 13 distributions that may have been made. 14 Q Is it fair to say that if there were no 15 members of the Tribe that had personal access to 16 these accounts, and all transactions were on behalf 17 of the Tribe, aside from the payment of amounts to 18 Tribal members, that the information about 19 certificate of deposit documents, for example, and 20 records of purchases, redemptions, if that was 21 solely for Tribal activity, for the Tribe's 22 activity, that that would not be relevant to your</p>



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<p style="text-align: right;">93</p> <p>1 determination?</p> <p>2 A I don't think so, because I think it may</p> <p>3 be relevant to the source of revenue that I</p> <p>4 subsequently found was distributed.</p> <p>5 Q Explain to me what you mean by "source</p> <p>6 of revenue." Because I'm -- there are -- let me</p> <p>7 just back up for a minute here.</p> <p>8 When I think of "source of revenue," I</p> <p>9 think of how did the Tribe get the money in the</p> <p>10 first place to put into the accounts. That could</p> <p>11 be government advances; it could be taxes on</p> <p>12 enterprise; it could be revenues, net revenues from</p> <p>13 gambling; and there may be other sources.</p> <p>14 Are you talking about something other</p> <p>15 than that when you refer to "source of revenue"?</p> <p>16 A Well, there's other sources. I mean,</p> <p>17 you know, tribes have money that comes from</p> <p>18 government grants. They have money -- they may</p> <p>19 have taken gaming revenue and put it in an interest</p> <p>20 bearing account that earned investment income,</p> <p>21 okay. They may have non-taxable sources of</p> <p>22 revenue. I don't know of any. But they could.</p>	<p style="text-align: right;">95</p> <p>1 financial institution, okay. I see that there was</p> <p>2 disbursements made, and therefore the source of the</p> <p>3 revenue is relevant. Then I see what were the</p> <p>4 deposits to the account. And that may lead me to</p> <p>5 the source of the revenue.</p> <p>6 If the deposits were from an account</p> <p>7 that was the bingo hall's bank account, then I</p> <p>8 think I'd have a pretty good indication that that</p> <p>9 came from the bingo hall.</p> <p>10 If the deposit to the account was from</p> <p>11 the Bureau of Indian Affairs, then that would give</p> <p>12 me a pretty good indication that the source was</p> <p>13 some type of government grant. Is that -- is</p> <p>14 that --</p> <p>15 Q It is. I guess what I am trying to</p> <p>16 determine is what's the relevance of that to your</p> <p>17 ultimate determination on withholding?</p> <p>18 A The relevance is whether it came from</p> <p>19 net gaming revenue and is subject to 3402(r)</p> <p>20 withholding.</p> <p>21 And I have to add that, as we discussed</p> <p>22 many times, and as you know, the Tribe has</p>
<p style="text-align: right;">94</p> <p>1 Tribe sometimes do. If they then took that money</p> <p>2 and put it in an account and it earned income --</p> <p>3 and by -- let -- they may have sources of revenue</p> <p>4 that would not be taxable once distributed to the</p> <p>5 members. Okay.</p> <p>6 If they put that in an account that</p> <p>7 bears interest, okay, the -- typically the</p> <p>8 investment income, even though the, you know, the</p> <p>9 revenue itself is not subject to the tax when they</p> <p>10 distribute it, the investment income is, okay. So</p> <p>11 the nature of where the revenue came from is</p> <p>12 relevant to the determinations that I need to make</p> <p>13 in the examination.</p> <p>14 Q But with respect to the first category,</p> <p>15 namely where did the -- aside from investment</p> <p>16 earnings, where did the money come from, you</p> <p>17 wouldn't be able to determine that from any of</p> <p>18 these records; would you?</p> <p>19 A I may have.</p> <p>20 Q How would you know that, from these</p> <p>21 records?</p> <p>22 A Well, I get an account from the</p>	<p style="text-align: right;">96</p> <p>1 contended that the money that they distribute, that</p> <p>2 the source is the gross receipts tax that they</p> <p>3 impose on the casino, the Tribe has contended that</p> <p>4 that's all nontaxable to Tribal members. Okay.</p> <p>5 While I don't think that there's much</p> <p>6 chance of the Tribe prevailing with that argument,</p> <p>7 nonetheless it makes sense in my examination to</p> <p>8 clearly determine which disbursements fall under</p> <p>9 that category. So that if there is an ultimate</p> <p>10 determination, you know, that even though I don't</p> <p>11 think it's going to happen, but if it did, we could</p> <p>12 then say, well, okay, that was these disbursements</p> <p>13 because the source of these disbursements was that</p> <p>14 specific item.</p> <p>15 The other disbursements that were from</p> <p>16 the general account, and as far as we are</p> <p>17 concerned, were clearly from net gaming revenue,</p> <p>18 would then already be separately identified and</p> <p>19 there would still be, you know, the -- our</p> <p>20 conclusions would still apply.</p> <p>21 So, you know, I guess I'm saying that</p> <p>22 it's -- it is important for my examination to</p>



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<p style="text-align: right;">97</p> <p>1 determine whether it came from the NTDR account, 2 from the general account, from investment income, 3 or other sources. 4 Q Well, I guess in terms of these 5 financial institutions, if you looked at the 6 deposits, you could make that determination; 7 correct? 8 A Maybe. It would be a start. 9 Q Okay. One other thing, of course, the 10 reason for determining if it came from the NTDR 11 account is, in addition to our position that it is 12 not taxable when distributed, is that if, in fact, 13 the Tribe had the Social Security numbers of each 14 individual member at the time, then it wouldn't be 15 subject to withholding either? 16 MR. WELSH: Is there a question 17 there? 18 MR. JORDEN: I am asking a 19 question. He confirmed it before. 20 MR. WELSH: Let's ask him a 21 question. 22 THE WITNESS: Could you</p>	<p style="text-align: right;">99</p> <p>1 cards for personal expenses, and if the Tribe paid 2 it, you know, was allowing them the use of those 3 credit cards, then that would be a disbursement to 4 them that may certainly require 1099 reporting and 5 may require withholding. The application forms, 6 the signature cards, if I found credit card 7 expenses would tell me -- potentially tell me who 8 had access and who was authorized to use those 9 credit cards. You know, certainly cash advances on 10 credit cards. 11 I mean it's just another potential way 12 that disbursements would have been made by the 13 Tribe. 14 MR. JORDEN: Why don't we take 15 another five-minute break here, and we will find 16 out what else we have to cover in the time we have 17 left. 18 (Thereupon, a recess was taken.) 19 MR. JORDEN: Back on the record. 20 BY MR. JORDEN: 21 Q Mr. Furnas, we asked you previously 22 about communications with members of the Tribe</p>
<p style="text-align: right;">98</p> <p>1 repeat -- I mean you are asking me, I want to make 2 sure, because more than once I have had to go back 3 and say, no -- as I understand it the withholding 4 requirements work this way. 5 So you kind of went through -- do you 6 want me to confirm that again or -- 7 BY MR. JORDEN: 8 Q We will stand on your prior testimony. 9 I am fine with that. I think you did confirm it so 10 I am fine with that. 11 Let's go on with this further discussion 12 of what you need to determine source here. 13 The item eight here: Provide all credit 14 card records, including but not limited to 15 application forms, completed signature cards. 16 What's the relevance of that to your 17 withholding? 18 MR. WELSH: What number are you 19 on? 20 MR. JORDEN: Page 5, item eight. 21 THE WITNESS: Members or 22 officials of the Tribe may have -- made credit</p>	<p style="text-align: right;">100</p> <p>1 during your prior examination and preparing for 2 this one. And not asking you again about any 3 discussions you may have had with the confidential 4 informant, but rather whether you had discussions 5 and communications with any other Tribal counsel 6 members, any Tribal members relating to the 7 examination of the Tribe? 8 A I have not had any discussions with 9 Tribal officials, employees, or members, other than 10 those where the attorney, the Tribe's 11 representatives were present. So that would -- our 12 meeting in Albuquerque where all the Tribal members 13 were there. Some meetings with the prior 14 representatives, although most of them all I got 15 was attorneys. There was a few of them that may 16 have been attended by employees. Or members. 17 Q You mentioned in your prior testimony 18 that at some point you concluded that at least some 19 of the information that was given to the service by 20 the confidential informant was inaccurate. Can you 21 recall when you came to that realization? 22 A When I -- and you know, well, we at one</p>



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<p style="text-align: right;">101</p> <p>1 point summonsed armored car records, because we had 2 the information that there was large amounts of 3 cash being transported into the vault. From those 4 records I could see that the armored cars were only 5 used to go from the bank to the casino, and then 6 based on the testimony of the casino personnel, the 7 Tribal police picked it up there and took it out to 8 the reservation. 9 So did the armored car actually go out 10 to the reservation as alleged? From what I 11 subsequently learned, I don't think so. Although I 12 don't know how that's material. They brought it 13 out there in SUVs with the police. Whether they 14 did that or brought it out there in an armored car 15 does not seem material to me. 16 Q So when did you obtain these armored car 17 records, can you remember? 18 A Well, the -- no. The -- this was issued 19 at the same time that the summons for the 2000 20 through 2005 years on the third-party 21 record-keepers, and I would have obtained them 22 within a couple of months after that.</p>	<p style="text-align: right;">103</p> <p>1 referred us to, were there other instances of that 2 that you can recall? 3 A No. 4 Q Do you recall that there were other 5 instances, however? 6 A Of this -- 7 Q Of being accused of that? 8 A No. 9 Q What criteria did you use in deciding 10 what institutions -- which of the institutions 11 should be issued a summons? 12 A For 2006 through 2009 it was based on 13 information I had developed during the 2000 through 14 2005 examination. 15 Q I mean for specific example, American 16 Express, why did you choose American Express? 17 A Because in the prior -- in the 18 examination of '00 through '05, we found 19 significant credit card charges by individual 20 Tribal employees or officials. 21 Q American Express credit card charges? 22 A Yes.</p>
<p style="text-align: right;">102</p> <p>1 Q That would have been in -- 2 A I believe it would have been. 3 Q -- 2007? 2006? No, wait -- 4 A I believe February of -- I have to look 5 at the exact date. 6 It would have been '06. 7 Q February '06? 8 A The summons may have been issued at the 9 end of '06 and the information obtained February of 10 '07, would be my best guess. 11 Q When I asked you if you had ever been 12 accused of misrepresentation and for pretending to 13 be conducting a civil investigation when actually 14 conducting a criminal investigation, and I think -- 15 I don't want to misquote you on this, obviously, 16 you said: No Revenue Agent can go through a career 17 without being accused of that? 18 A I don't know if I said "no Revenue 19 Agent." But I said it's not -- what I should say 20 it is not uncommon for Revenue Agents doing their 21 job to be accused of various things. 22 Q Aside from the Kontny case that you</p>	<p style="text-align: right;">104</p> <p>1 Q And were those on Miccosukee Tribal 2 credit cards or personal -- 3 A Yes. 4 Q -- credit cards? 5 With respect to the information that is 6 sought in these summons to the various financial 7 institutions, what information do you think will be 8 relevant to your determination of whether 1099s 9 were issued on distribution payments to travel 10 members? 11 MR. WELSH: I object. He can 12 give his speculation, but it would obviously be 13 pure speculation since he doesn't have the records. 14 BY MR. JORDEN: 15 Q Let me ask it a different way. 16 Is it your experience that these 17 institutions would issue 1099s? 18 A These institutions issue 1099s, yes, 19 Wachovia Bank or -- 20 Q Would they be responsible for issuing 21 1099s regarding distributions made by the Tribe to 22 its members?</p>



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<p>105</p> <p>1 A Generally, no. And I don't anticipate 2 that I'm -- I mean I'm not auditing Smith Barney to 3 determine if they filed 1099s that they should have 4 filed. 5 I guess I need you to repeat the 6 question. I am not sure what you are saying. 7 Q There are two primary issues in your 8 audit. 9 A Right. 10 Q Withholding and 1099. 11 A Right. 12 Q What I am asking you is, you have this 13 extensive summons. 14 A Uh-huh. 15 Q What's the relevance of these summons to 16 your determinations regarding whether the Tribe 17 complied with its 1099 obligations? 18 A The relevance is that I need to 19 determine the amount, recipient, date, and nature 20 of any disbursements by the Tribe that may have 21 required 1099s. 22 These third-party record-keepers may</p>	<p>107</p> <p>1 MR. JORDEN: I have no further 2 questions. 3 THE WITNESS: Okay. 4 MR. WELSH: We have no 5 questions. 6 (Thereupon, at 12:53 p.m. the deposition was 7 concluded.) 8 (The witness reserved signature.) 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p>
<p>106</p> <p>1 have records that would tell me the nature, amount, 2 and recipient of disbursements. I mean a bank is 3 going to have canceled checks. You know, Smith 4 Barney, from the prior audit, there was checking 5 accounts there. 6 So again, I mean we detailed the records 7 that they may have and how that may relate to those 8 determinations. 9 Q I think you've answered previously the 10 question of whether these institutions were 11 responsible for issuing 1099s for the Tribe. 12 A Under certain circumstances they may 13 have been, okay. 14 Q Did you find any that were in the prior 15 audit? 16 A No. But I may also say, let's say that 17 one of these accounts that was owned by the 18 Miccosukee Tribe, you know, there is question in 19 who owns the account, and Smith Barney may have 20 issued 1099s with regard to some of these accounts 21 to individuals. And I would certainly need to know 22 that, you know.</p>	<p>108</p> <p>1 CERTIFICATE OF NOTARY PUBLIC 2 I, Joanne Liverani, the officer before whom the 3 foregoing deposition was taken, do hereby certify that 4 the witness whose testimony appears in the foregoing 5 deposition was duly sworn by me; that the testimony of 6 said witness was taken by me in stenotype and thereafter 7 reduced to typewriting under my direction; that said 8 deposition is a true record of the testimony given by 9 said witness; that I am neither counsel for, related to, 10 nor employed by any of the parties to the action in 11 which this deposition was taken; and, further, that I am 12 not a relative or employee of any attorney or counsel 13 employed by the parties hereto, nor financially or 14 otherwise interested in the outcome of this action. 15 16 17 Joanne Liverani, 18 Registered Merit Reporter 19 and Notary Public for the 20 District of Columbia 21 My Commission expires: 22 July 31, 2015</p>



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<p style="text-align: right;">109</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2</p> <p>3 OUR ASSIGNMENT NO. 202096</p> <p>4 CASE CAPTION: MICCOSUKEE TRIBE OF INDIANS vs. UNITED</p> <p>5 STATES OF AMERICA</p> <p>6</p> <p>7</p> <p>8 DECLARATION UNDER PENALTY OF PERJURY</p> <p>9 I declare under penalty of perjury that I have</p> <p>10 read the entire transcript of my Deposition taken in the</p> <p>11 captioned matter or the same has been read to me, and</p> <p>12 the same if true and accurate, save and except for</p> <p>13 changes and/or corrections, if any,</p> <p>14 as indicated by me on the Deposition Errata Sheet</p> <p>15 hereof, with the understanding that I offer these</p> <p>16 changes as if still under oath.</p> <p>17 Signed on the _____ day of</p> <p>18 _____, 20__.</p> <p>19</p> <p>20 _____</p> <p>21 James M. Furnas</p> <p>22</p>	<p style="text-align: right;">111</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. _____ Line No. _____ Change to: _____</p> <p>3 _____</p> <p>4 Reason for change: _____</p> <p>5 Page No. _____ Line No. _____ Change to: _____</p> <p>6 _____</p> <p>7 Reason for change: _____</p> <p>8 Page No. _____ Line No. _____ Change to: _____</p> <p>9 _____</p> <p>10 Reason for change: _____</p> <p>11 Page No. _____ Line No. _____ Change to: _____</p> <p>12 _____</p> <p>13 Reason for change: _____</p> <p>14 Page No. _____ Line No. _____ Change to: _____</p> <p>15 _____</p> <p>16 Reason for change: _____</p> <p>17 Page No. _____ Line No. _____ Change to: _____</p> <p>18 _____</p> <p>19 Reason for change: _____</p> <p>20 Page No. _____ Line No. _____ Change to: _____</p> <p>21 _____</p> <p>22 Reason for change: _____</p>
<p style="text-align: right;">110</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. _____ Line No. _____ Change to: _____</p> <p>3 _____</p> <p>4 Reason for change: _____</p> <p>5 Page No. _____ Line No. _____ Change to: _____</p> <p>6 _____</p> <p>7 Reason for change: _____</p> <p>8 Page No. _____ Line No. _____ Change to: _____</p> <p>9 _____</p> <p>10 Reason for change: _____</p> <p>11 Page No. _____ Line No. _____ Change to: _____</p> <p>12 _____</p> <p>13 Reason for change: _____</p> <p>14 Page No. _____ Line No. _____ Change to: _____</p> <p>15 _____</p> <p>16 Reason for change: _____</p> <p>17 Page No. _____ Line No. _____ Change to: _____</p> <p>18 _____</p> <p>19 Reason for change: _____</p> <p>20 Page No. _____ Line No. _____ Change to: _____</p> <p>21 _____</p> <p>22 Reason for change: _____</p>	



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