IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23507-CV-GOLD [LEAD CASE]

MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA, a federally-recognized
Indian Tribe,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

PETITIONER MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION TO DENY PETITIONS TO QUASH

On September 10, 2010, the Government issued four summonses "In the matter of Miccosukee Tribe of Indians of Florida" (the "Summonses"). In contrast to the prior summons issued in the "Billy Cypress matter," which purported to seek only documents of an individual Tribal member, there is no question that the Summonses now at issue seek extensive Tribal records regarding the internal financial operations of the Tribe. Tribal sovereign immunity, which applies both on and off the reservation, applies to the Tribe's records at issue here. This is, in fact, the very kind of action to which the Tribe's immunity from suit is meant to apply: to protect the Tribe from unlawful and improper interference and coercion without having to litigate beyond the threshold issue of immunity.

Despite the Government's arguments to the contrary, the Summonses should be quashed because: (1) the Tribe has sovereign immunity with regard to the records and the Government did not show any waiver of that immunity; (2) the Government fails to present adequate admissible evidence sufficient to meet the four-part "*prima facie*" test under *United States v. Powell*, 379 U.S. 48 (1964) to enforce a third party summons; (3) the Declaration submitted by the Government on its face shows an improper purpose; and, (4) the Government's improper

purpose is confirmed by the testimony of the lead Revenue Agent conducting the examination of the Tribe.

I. The Government Fails To Show That Tribal Immunity Does Not Apply Or Has Been Waived

The Government fails to address the authority cited by the Tribe, which contradicts the Government's contention that tribal immunity does not apply against the IRS here. As it did in connection with the Cypress summons, the Government again argues that tribal immunity never applies against the United States, and cites the same general body of law for the proposition that the United States is a superior sovereign. DE 16 at 13-15. It argues that tribal immunity does not exist in this case. DE 16 at 14. However, as explained in the Tribe's Petition, tribal immunity exists unless waived by the United States or by the Tribe. DE 1 at 9-12. Furthermore, any such waiver by the United States must be effectuated by Congress. *Id*. at 9-16.

The Government's cases are inapplicable because no case cited by the Government supports the contention that a United States agency or agent may waive tribal immunity on behalf of the United States where Congress has not done so. *See* DE 1 at 16 n.5. The Government simply cites authority that echoes the general proposition that the United States is the "superior sovereign." *See* DE 16 at 13-14. As explained in the Petition, and again herein, the United States' sovereignty is not subordinated simply because it has chosen freely not to abrogate tribal immunity in a particular instance. Congress may exercise the United States' sovereign powers by abrogating tribal immunity, or it may remain silent.[1] Knowing full well how to expressly abrogate tribal immunity, Congress here elected to remain silent. DE 1 at 11 (citing *Florida Paragplegic Ass'n v Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1133 (11th Cir. 1999) (Congress knows how to express unequivocal intent to waive tribal immunity)).

The IRS is bound, not just with respect to its dealings with the Tribe, but with respect to all of its functions, by the limits of its statutory authority and by the federal Constitution. Here, the IRS lacks statutory authority to initiate this action against the Tribe by seeking the Tribe's financial records. The Government fails to address the fact that tribal immunity is not being

[1] Contrary to the Government's contention, the Petition cites authority that shows established precedent requires explicit waiver of tribal immunity, *compare* DE 1 at 9 (citing numerous cases which state that tribal immunity applies absent clear indication by Congress) *with* DE 16 at 14-15 (claiming the Petition cites no authority for that proposition).

applied over the sovereign interests of the United States where, as here, Congress permits it. DE 1 at 15 ("tribal immunity cannot act as a shield against the United States where the United States, exercising its sovereign powers through Congress, has elected not to waive tribal immunity"). It is Congress that speaks for the United States on this matter. DE 1 at 9-16. Congress has not waived tribal immunity here. *Id*. at 5-8, 12-15. It is inconsistent with constitutional separation of powers principles, with Supreme Court precedent, and with the tribal immunity doctrine to permit a United States agency or agent to unilaterally abrogate tribal immunity where Congress has not done so. The IRS has no place legislating tribal immunity and it may not do so here.

Moreover, as noted in the Petition, because the IRS lacks statutory authority to abrogate the Tribe's immunity, the Summonses are improper. DE 1 at 5-9 (provisions relied upon by the IRS apply only to "persons", not Indian tribes). The term "person" in statutes presumptively excludes the sovereign. *Id*. The Government supports the Tribe's position that the relevant provisions do not apply to tribes, by citing IRC provisions which actually do apply expressly to Indian tribes. *See* DE 16 at 9. Thus, in drafting this statute, Congress was clearly aware of how to include Indian tribes within the scope of desired provisions. It did not do so with respect to the provisions which give the IRS authority to summon "persons" – not tribes. If Congress intended these provisions to apply to tribes, it would have said so expressly, particularly in light of the tribal immunity doctrine, which requires express abrogation by Congress, and the presumption that "person" does not include the sovereign.

The Government cites *Chickasaw Nation v. United States*, 208 F.3d 871, 878 (10th Cir. 2000) in arguing for a blanket application of the term "person" in the IRC to Indian tribes. In *Chickasaw*, the Tenth Circuit held that the term "person" in IRC § 4401, which provides that each "'person who is engaged in the business of accepting wagers shall be liable for and shall pay' the federal wagering excise tax." *Id*. The court of appeals in *Chickasaw* relied upon the IRC § 7701(a)(1) definition of person to conclude that Indian tribes were subject to the § 4401 excise tax. *Id*. First, the Tenth Circuit in *Chickasaw* did not address the presumption that the term "person" excludes the sovereign. Second, even assuming that presumption was properly overcome in *Chickasaw* with respect to the excise tax, a similar analysis would have to apply here to overcome the presumption in the provisions cited by the IRS. Those provisions use the word "person" and do not reference Indian tribes, despite references to Indian tribes elsewhere in the statute. The IRS has not overcome that presumption here.

A fundamental factual distinction between this case and *Chickasaw*, is that the Tribe in *Chickasaw* was apparently "engaged in the business of accepting wagers," as stated in the provision. Here, the Tribe is not engaged in any activity that gives rise to a duty or liability under the provisions cited by the Government. The Tribe is not responsible for withholding or reporting the funds which the IRS improperly seeks to tax as income to individual tribal members.[2] Thus, the IRS has no basis for investigating the Tribe on the withholding and reporting requirements cited, DE 16 at 9, because no withholding or reporting requirement attaches to the tribal distributions the IRS seeks to tax. The IRS is well aware that the taxability of tribal distributions to its members is currently being contested at the administrative level, and is simply using these Summonses to pressure the Tribe to settle that collateral issue. However, if the Tribe's distributions to individual dependent members are held not taxable, then the Tribe does not have a withholding or reporting requirement, there is nothing to investigate, and the Summonses are clearly improper.

Moreover, to the extent this Court concludes that the "general applicability" analysis applies (as explained in the Petition, the Tribe believes it does not), DE 1 at 12-15, the Government fails to show that Congress intended the IRC provisions relied on here to apply

[2] *See Squire v. Capoeman*, 351 U.S. 1 (1956) (affirming the principle that tribal distributions which come from the land are not taxable to dependent tribal members and extending the non-taxability of those distributions to an allotted tribal member because he was not yet emancipated and therefore the member's distributions from the land could not be taxed as an ordinary citizen's). The IRS's incorrect application of *Squire* (incorrectly restated in some subsequent case law), is currently in dispute in a collateral matter. However, Supreme Court precedent makes clear that tribal distributions to dependent members are not subject to federal income taxation. Thus, no federal withholding or reporting requirement attaches and the IRS has no proper basis for investigating the Tribe. *See Squire*, 351 U.S. 1 (holding that the tax exempt status of distributions to dependent tribal members [such as the Miccosukee tribal members] would extend to proceeds from the sale of timber derived from a dependent tribal member's allotted trust land); *see also Chouteau v. C.I.R.*, 38 F.2d 976 (10th Cir. 1930) (holding that restricted tribal member was not liable for income tax, whereas tribal member with certificate of competency was liable for income tax on share of tribal mineral lease); 35 Op. Atty. Gen. 107, 109 (1926) (income of unallotted tribal members derived from business conducted on the reservation is not subject to federal income tax); Dep. Interior Op., 1926 WL 2751 (1926) (income of dependent tribal members derived by tribe from its common reservation trust lands was not subject to federal income taxation); *State of New York v. United States*, 326 U.S. 572, 582 (1946) (a sovereign's own tax revenue is not subject to federal income taxation [tribal distributions to members come from the Tribe's own tax revenue, therefore taxing distributions as income improperly taxes the Tribe itself]); IRC § 61 (containing a non-exclusive list of items taxable as income, none of which resemble tribal distributions to its members).

generally to Indian tribes. *Id*. As noted in the Tribe's Petition, if the "general applicability" analysis applies, then the Government must show, at minimum, that: (1) the IRC provisions cited by the IRS apply generally to Indian tribes and (2) no exception applies. *Id*. at 14-15. The Government has not, and cannot, show this because these provisions do not apply generally to Tribes. DE 1 at 5-13 (IRC provisions relied upon do not apply generally to Indian tribes, which are exempt from major portions of the IRC, such as federal income taxation, and which are not "persons" based on the presumption that the term "person" in statutes does not include the sovereign). Moreover, the Tribe falls under two exceptions. Specifically, as shown in the Petition, applying the IRC provisions generally to the Tribe would interfere with matters touching the Tribe's exclusive rights of self-governance by affecting the Tribe's treasury, as well as sovereign decisions such as how, and with whom, the Tribe uses, maintains or invests its own revenue for the welfare of its members. *Id*. at 14. Additionally, it would contradict Congress's intent to promote tribal self-sufficiency and self-governance. *Id*.

The Government further argues that tribal immunity does not apply because this is not a suit "against the sovereign." DE 16 at 15.[3] However, tribal sovereign immunity is not so narrow as to apply only when a tribe is named as a defendant by a private party in a civil suit for damages. "Tribal sovereign immunity is rooted in federal common law and 'is a necessary corollary to Indian sovereignty and self-governance.'" *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (quoting *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986)). The immunity afforded Indian tribes has thus been recognized to encompass the immunity "'traditionally enjoyed by sovereign powers,' such as the United States." *NGV Gaming, Ltd. v. Upstream Pointe Molate, LLC*, 2009 WL 4258550, at *4 (N.D. Cal. Nov. 24, 2009) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,

[3] As it did in the Cypress matter, the Government again cites *Dugan v. Rank*, 372 U.S. 609, 620 (1963), but fails to address the Tribe's argument that this action falls squarely under *Dugan* because "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." *Id*.; *see also* DE 1 at 17. As noted in the Tribe's Petition, the summonses are clearly acts against the sovereign because they compel production of the Tribe's financial information in connection with a direct investigation of the Tribe itself, and force the Tribe to take measures to protect its privacy and sovereignty. They restrain the Tribe in making financial decisions, including how to distribute its own internal revenue. As noted herein, the Tribal distributions which the IRS seeks improperly to tax come from the Tribe's own revenue and are distributed for the welfare of its dependent members. This investigation clearly affects the Tribe's treasury and public administration, thus, tribal immunity applies.

58 (1978)). It endures absent explicit congressional abrogation or tribal waiver. *See Santa Clara Pueblo*, 436 U.S. at 58. Accordingly, the principles of immunity from suit traditionally enjoyed by Indian tribes in the context of civil actions for monetary damages also apply to suits seeking declaratory or injunctive relief, *see id.*, and protect Indian tribes from legal processes, such as the instant Summons, *see NGV Gaming, Ltd.*, 2009 WL 4258550, at *4 ("This immunity has also been found to protect tribes and their officers from legal processes such as a subpoena or a search warrant.").

In *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), for example, the Ninth Circuit upheld a claim of sovereign immunity by a non-party tribe[4] to quash a subpoena seeking documents from a tribal agency. The party seeking the tribal documents argued on appeal that "the tribe's immunity does not protect it from complying with a valid subpoena from a federal district court." *Id.* at 1319. The Ninth Circuit rejected this contention and stated: "It is clear that Indian tribes' ***immunity from suit*** remains intact 'absent express and unequivocal wavier of immunity by the tribe or abrogation of tribal immunity by Congress.'" *Id.* (quoting *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991)) (emphasis added). Finding neither an abrogation by Congress nor waiver by the tribe with respect to the tribal agency documents, the Ninth Circuit concluded that the tribe "was possessed of tribal immunity at the time the subpoena was served" and affirmed the district court's decision to quash the subpoena based upon sovereign immunity. *Id.* at 1319-20. Thus, in the context presented here – tribal immunity asserted in reference to a tribe's petition to quash a summons or subpoena – the assertion of immunity has been recognized as immunity from suit.

Similarly, in *Bishop Paiute Tribe v. County of Inyo*, the Ninth Circuit found that Inyo County and its agents violated a non-party tribe's sovereign immunity when, as part of a welfare fraud investigation against three tribal member Casino employees, they obtained and executed a search warrant against the tribe and tribal property. 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 Cnty. of the Bishop Colony*, 538 U.S. 701 (2003). In rejecting the characterization of the execution of the warrant against the tribe as merely a "'customary inconvenience' that would accompany the service on any business," the court relied on its earlier decision in *James*:

[4] Note that here, the case for immunity is even stronger than in the cited authority because the summonses are issued pursuant to a direct investigation of the Tribe itself.

> The ruling in *James* is directly relevant to our review of this case. The *James* Court ***correctly focused on the status of Indian tribes as sovereigns and denied the federal government the authority to compel disclosure of tribal documents***. That the federal government may not pierce the sovereignty of Indian tribes, not withstanding its constitutionally preemptive authority over Indian affairs, *see* U.S. Const. art. I, § 8, carries considerable weight in our review of this case.

Id. at 558 (emphasis added). *James* and *Bishop Paiute Tribe* thus make clear that the assertion of tribal sovereign immunity by a tribe in defense to the enforcement of an investigatory summons or subpoena, such as the Tribe's assertion of sovereign immunity as a defense to the IRS summons issued for the Tribe's bank records in a direct investigation against the Tribe, is in fact an assertion of immunity from suit. *See also Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099 (Colo. 2010); *Colorado v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 398 (Colo. App. 2008) (affirming principle that tribal sovereign immunity carries with it immunity from enforcement actions absent clear waiver or abrogation, but holding that the State could obtain documents under the statutes at issue where the Attorney General was investigating off-reservation conduct).

Finally, the fact that the present case involves documents held by a third party does not change the fact that the Tribe's assertion of sovereign immunity as a defense to the enforcement of the Summonses is an assertion of immunity from suit, the denial of which is immediately appealable. In *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002), the plaintiffs served a subpoena on Key Bank, N.A., a third-party record keeper, seeking financial records of a non-party tribe. While the district court judge did not reach the issue,[5] the magistrate judge, upon the tribe's objection, quashed the summons to the bank on sovereign immunity grounds. The magistrate judge stated:

> Clearly, . . . had plaintiffs subpoenaed *the Tribe* demanding that it produce these bank records, the Tribe's sovereign immunity would prevent enforcement of the subpoena. The outcome does not change simply because the subpoenaed documents are held by a third party and not by the Tribe itself.

[5] The district court judge found the magistrate judge correctly quashed the subpoena because the request for documents amounted to no more than a fishing expedition, which the district court would not tolerate. *Id.* at 93.

Id. at 92 (emphasis in original). As in *Catskill*, the fact that the Tribe's records were held by a third party does not change the fact that the financial records sought belong to the Tribe, and, accordingly, principles of tribal sovereign immunity apply. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (holding that a tribe's immunity from suit applies both on and off the reservation and without distinction between governmental or commercial activities).[6] The IRS could not obtain these records from the Tribe itself. Therefore, it should not be able to obtain them from the Tribe's banks or other third parties.

II. The Government Fails To Make The Requisite Showing That The Summonses Comply With Applicable Law

The Government asserts that it has satisfied its initial burden of making a *prima facie* showing that the *Powell* requirements were met.[7] DE 16 at 7. As demonstrated below, the Government failed to meet its burden and therefore the Summonses cannot be enforced.

1. The Government fails to establish that its investigation has a legitimate purpose

To sustain the Summonses, the Government bears the burden of establishing a *prima facie* case that the Summonses were issued for a legitimate purpose. For purposes of an IRS summons, a legitimate purpose is limited to: (1) ascertaining the correctness of any return; or (2) determining the liability of any person for any internal revenue tax. *United States v. Richards*, 631 F.2d 341, 345 (4th Cir. 1980) (citing 26 U.S.C. § 7602). If a summons is issued for any other purpose, it exceeds the authority of the Government, *id.*, and lacks a proper

[6] The Tribe brought its Petition to Quash pursuant to 25 U.S.C. 7609(b)(2)(A), which provides the only means by which the Tribe was guaranteed an opportunity to object to the summons. The Government may contend, as it has previously, that the Tribe's claim of sovereign immunity is not "immunity from suit" because the Tribe is not seeking the dismissal of a suit brought by the Government, but rather the Tribe is the party that filed an action pursuant to I.R.C. § 7609 to quash a summons. Such argument ignores the fact that it was the Government that brought an action by serving a summons for tribal records in the possession of a third party. The Petition to Quash under § 7609 merely provides the Tribe a means by which to assert its sovereign immunity as a defense to the Government's action against it. Moreover, the case law discussed above clearly indicates that tribal sovereign immunity cannot be construed so narrowly and applies equally in the context of administrative subpoenas.

[7] In *United States v. Powell*, 379 U.S. 48 (1964), the Court held that in order to sustain an IRS civil summons, the Government must establish a *prima facie* case that: (1) the investigation has a legitimate purpose; (2) the summoned materials may be relevant to that purpose; (3) the information sought is not already within the IRS' possession; and (4) the IRS followed administrative steps required under the Internal Revenue Code. *Id.* at 57-58.

purpose. *See Nero Trading LLC v. United States Dep't of Treasury, IRS*, 570 F.3d 1244, 1250 n.4 (11th Cir. 2009). Enforcement of a summons issued for an improper purpose would result in an abuse of this Court's process. *See Powell*, 379 U.S. at 57-58. Such are the circumstances here. The Government argues that the Tribe's Petitions to Quash should be denied so that it can obtain all of the Tribe's confidential financial records even though the Tribe is a sovereign Indian nation that is not subject to federal income taxation, and the United States has attendant trust obligations which are owed to the Tribe.

In *Powell*, the Supreme Court recognized that "an abuse would take place if the [IRS] summons had been issued for an improper purpose such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.* at 58. Subsequent decisions have explained those parameters. *See, e.g.*, *United States v. Caltex Petroleum Corp.*, 12 F. Supp. 2d 545, 554 (N.D. Tex. 1998) (improper purpose includes circumstances in which the IRS planned to unlawfully disclose the summoned documents and includes circumstances in which the government engages in fraud, deceit or trickery); *United States v. Deak-Perera & Co.*, 566 F. Supp. 1398, 1402 (D.D.C. 1983) (IRS committed fraud in gathering information used to issue the summons). *See also SEC v. ESM Gov't Sec.*, 645 F.2d 310, 317 (5th Cir. 1988) (fraud, deceit and trickery constitute an abuse of process); *Richards*, 631 F.2d at 345-46 (which upheld the trial court's limitation of questioning of the taxpayer's president because failure to do so would: (1) allow the IRS to venture into testimony for which it had no legitimate purpose; and (2) would result in an abuse of the court's process). These grounds are not exhaustive:

> We find the notion that passage of I.R.C. § 7602(b) and (c) created a bright-line rule precluding a determination of improper motive in the absence of a Justice Department referral unpersuasive. First, we are aware of no Eleventh Circuit precedent recognizing such a rule. Second, such a rule implies that improper motive or purpose can only mean the issuance of a summons in order to conduct a criminal investigation. Our reading of improper motive or purpose is not so narrowly circumscribed.

See Nero Trading, 570 F.3d at 1250 n.4 (internal citation omitted).

Here, the IRS issued the Summonses in an effort to obtain confidential financial (and other sensitive records) of the Tribe, posited with the Tribe's third party recordkeepers, for a supposed administrative examination as to whether the Tribe: (a) failed to "withhold taxes from certain payments of American Indian casino profits" pursuant to 26 U.S.C. 3402(r); (b) failed to

backup withhold under 26 U.S.C. § 3406, to the extent the Tribe did not possess a payee's tax identification number prior to the Tribe making a payment and for non-employee compensation; (c) failed to report on Form 945 backup withholding or withholding on certain payments of American Indian casino profits; and, (d) failed to file information returns "including Form 1099-MISC for payments made in the course of its trades or businesses." DE 16 at 9. In so doing, the Government cites several cases as authority for the Summonses now before the Court. However, review of the Government's own argument reveals that none of these authorities provide support for the Summonses here.

For example, the Government cites *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989), for the proposition that: "[T]here can be little doubt that tribes are subject to [the withholding statute's] requirements **as employers** . . . . Tribes and Indians have in fact complied with this law, and there seems no controversy over it." DE 16 at 10 (alterations in original, bold emphasis added). Nonetheless, here the Government claims that the examination relates to payments made to Tribal members and non-employees. There is no allegation that the Tribe failed to abide by any requirements imposed upon the Tribe, as an employer, under the withholding statute. Similarly, the Government cites *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 845 F.2d 139, 143 (7th Cir. 1988) for the proposition that: "[T]ribes **as employers** basically have been subject to federal insurance contributions tax, 26 U.S.C. §§ 3101-26, unemployment compensation tax, *id.* at §§ 3301-11, and income tax withholding, *id.* at §§ 3401-06 . . . ." DE 16 at 10 (alterations in original, bold emphasis added). The discussion quoted by the Government refers to "Tribes as employers" and concerns "federal insurance contributions tax," "unemployment compensation tax," and "income tax withholding" as to employees, none of which is at issue here. None of the authorities cited by the Government suggests that the Government has the unbridled authority to demand production of every single piece of paper and every byte of information that relates to the Tribe in connection with a supposed administrative examination. The Government seeks shelter from its improper Summonses based on the Tenth Circuit's decision in *Chickasaw Nation v. United States*, 208 F.3d 871, 873 (10th Cir. 2000). However, that case concerned a "claim for a refund of federal wagering and occupational excise taxes," none of which are at issue here.[8]

[8] Indeed, Agent Furnas admitted during his deposition that he is not aware of any "[c]ases, IRS information, material, IRS publications, revenue rulings," or anything else "that

Moreover, to the extent the Government claims to be investigating the Tribe's alleged failure to file Forms 1099-MISC for payments made in the course of the Tribe's trade or business, the Government has failed to identify what that "trade or business" might be. Existing as a federally recognized Indian Tribe does not constitute a "trade or business" and the Government admits that this examination does not involve the separate enterprise that is the Tribe's casino enterprise. *See* DE 1-3 at 2 ("The term 'Miccosukee Tribe' . . . exclud[es] the Miccosukee Tribe of Indians of Florida Indian Bingo, also known as Miccosukee Indian Gaming, whose records we are not requesting.").[9] Nor has the Government shown that the Tribe falls within the statutory definition of "person." *See supra* at 3.

Recognizing perhaps that its overbroad Summonses lack statutory authority under the IRC, the Government has embarked on a campaign to harass and malign the Tribe to force it to submit to the Government's improper demands. The Government filed declarations with the Court that contain statements known to be false or misleading. That is the case with regard to the prior declaration of Agent Furnas filed in the "Billy Cypress Matter," also recently before this Court, in which Agent Furnas states:

> The IRS commenced the Tribe Examination in 2005 upon learning of allegations that the Tribe regularly hired armored cars to carry cash (somewhere between six and ten million dollars per quarter) from its gambling operation for direct distribution to tribal members without reporting these distributions to the IRS

DE 15-5 at 6 ¶ 4, filed in Case No. 10-21332-CV-GOLD (S.D. Fla.). Apart from the fact that this statement had absolutely nothing to do with the matters at issue in the "Billy Cypress Case" in which it was filed, the Tribe has recently learned through discovery that Agent Furnas knew this statement to be false several years before the declaration was filed with this Court, although the agent attempted to minimize the falsity by saying it wasn't material whether the money was actually brought in an armored car. *See* Furnas Depo. at 100:17-102:10 ("So did the armored car actually go out to the reservation as alleged? From what I subsequently learned [in 2006 or

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would support the position of the [Internal Revenue] [S]ervice and [his] position in seeking th[e] information [sought by the Summonses] that's been published where tax revenues of a Tribe are being distributed to members." Deposition of Revenue Agent James M. Furnas, January 12, 2011 at 39 ("Furnas Depo.") (excerpts attached hereto as Exhibit "A").

[9] The Tribe imposes a gross receipts tax on its enterprises, including but not limited to its casino, and distributes from the tax revenue, which, of course would not constitute "payments of American Indian casino profits."

2007], I don't think so") (*Id.* at 101:9-11.). To this day, there has been nothing filed with this Court to correct the seriously misleading impression caused by Furnas' Declaration originating from a purported confidential informant whom he would not disclose. *See, e.g.,* Furnas Depo. at 53:3-5 ("I am not authorized to reveal any information that would lead to the identity of the confidential informant"). What is undisputedly material, and incorrectly reported by the press, was the false allegation that the armored cars were making direct distributions of cash. *See* Jay Weaver, *IRS Is Probing Casino Payouts*, MIAMI HERALD, June 29, 2010, at A1 ("The IRS is investigating allegations that the Miccosukee Tribe used armored vehicles to deliver up to $10 million in cash from its gambling operations to hundreds of Indians four times a year -- without anyone reporting the money as taxable income, *according to federal court records*.") (emphasis added).

The IRS campaign was to spread misinformation to try the Tribe in the court of public opinion to force the Tribe to settle a collateral issue. Agent Furnas testified that he taught a class to the Enforcement Division of the National Indian Gaming Commission during which he discussed the examination of the Tribe using materials that made their way to what he said was "the public record" and Miami Herald (but which he admitted in deposition, as discussed above, contained false or misleading information).

> I did in that [class Agent Furnas taught to the National Indian Gaming Commission Enforcement Division] discuss an article that was in the Miami Herald, which described some of the credit card expenses that were involved, and I neither confirmed nor denied information in that article, except to the extent that it's become public record, which as far as I could tell the whole article was based on public record.

Furnas Depo. 64:16-22. Such actions further maligned the Tribe and perpetuated false allegations, which obviously is not a proper purpose.

The impropriety of such disclosures is rendered more acute because: (1) as the Government is well-aware this matter is far from resolved and is currently being appealed internally within the IRS; and (2) even if such information were either relevant or admissible the Government should have clarified the situation to avoid misleading the reader and/or filed this material under seal. The Government's failure to do so, provides further support to the Tribe's argument that the issuance of the Summonses, and the Government's conduct related thereto,

was for an improper purpose, constitutes an abuse of authority and abuse of this Court's process. For these reasons alone, the Summonses should be quashed.

2. The Government fails to establish that the summoned material is relevant to a legitimate purpose

To satisfy its obligation to show that the Summonses seek information that is relevant to a legitimate purpose, the Government argues that "[d]etermining the applicability of the Internal Revenue Code to possibly unreported Tribal payments by necessity entails examining a broad amount of information." DE 16 at 12. According to the Government, "[t]o determine the applicability of withholding requirements imposed on distributions from the Tribe's casino profits, the IRS must examine the source of funds for payments that the Tribe made." *Id.* Assuming for purposes of argument only that the Tribe's sovereign immunity does not protect the Tribe from the Government's improper and invasive attempt to "determin[e] the applicability of the Internal Revenue Code," review of the Summonses reveals that they specifically do not seek information that would throw light on "distributions from the Tribe's casino profits." The Instructions and Definitions contained in the Summonses specifically state that the scope of the Summonses "exclud[es] the Miccosukee Tribe of Indians of Florida Indian Bingo, also known as Miccosukee Indian Gaming, whose records we are not requesting." DE 1-3 at 2 (Morgan Stanley Summons); DE 1-3 at 2, filed under Case No. 10-23508 and consolidated herein (Citibank Summons); DE 1-3 at 2, filed under Case No. 10-23509 and consolidated herein (American Express Summons); DE 1-3 at 2, filed under Case No. 10-23511 and consolidated herein (Wachovia Summons). The Government's allegation that the summoned records are necessary to investigate "the Tribe's casino profits" is meritless, when the Summonses expressly indicate that no information relating to the Tribe's casino enterprise is sought.

Moreover, the Government admitted that the third party recordkeepers could not provide information regarding whether the Tribe obtained taxpayer identification numbers. *See* Furnas Depo. at 29:9-11 ("The third-party record-keepers aren't going to be able to tell me whether the Tribe obtained taxpayer identification numbers."). 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. *See id.* at 29:15-18. *See also id.* at 34:18-20 ("If the Tribe was not required to withhold on non-wage payments, then there would be no requirement to file Form 945."). Nor has the Government adequately explained how the third party credit card recordkeepers could provide information regarding

whether 1099s were issued for distributions. The IRS can certainly determine from its own records whether 1099s were filed with regard to distributions. In addition, the IRS is aware from random samples given by the Tribe to the IRS with regard to the prior audits that 1099s were filed with regard to vendors. Thus, there is no basis to justify the invasive review of the Tribe's credit card records that the IRS seeks, and there is no support for the unbridled search of Tribal records simply to fulfill this Agent's vivid, but incorrect, imagination. It also has not explained how "credit and/or background investigations" that may have been performed if the Tribe obtained a loan, or any "records of rental fees paid" on any safe deposit boxes that the Tribe may have obtained are relevant to a legitimate examination of the Tribe's "reporting and withholding obligations."

Instead, the Agent *hypothesized* that perhaps a tribal member may have "potentially [said to the Tribe:] I want you to buy me some gold coins and keep it in a safe deposit box for me." Furnas Depo. at 92:7-9. There is no evidence of any purchases of "gold coins" made by the Tribe on behalf of Tribal members or of such coins being stored in Tribal safe deposit boxes. The Agent's response shows at best, a fantasy that cannot justify the broad searches requested by the Government to obtain the confidential records of a sovereign Indian Tribe. Any records relating to any supposed safe deposit boxes and any mysterious "gold coins" contained therein would do nothing to further the examination of the Tribe's reporting and withholding. This request, and many others, are so far attenuated from any legitimate examination that the Summonses should simply be rejected.

3. The Government fails to establish that the IRS is not already in possession of the requested documents

The Government also fails to establish that the IRS is not already in possession of at least a portion of the requested documents. The Declaration of Agent Furnas states that the IRS is not in possession of the summoned information. DE 16-1, ¶¶ 16, 26, 36, 46. However, review of the Summonses reveals that they plainly seek information that should already be in the IRS's possession. The summons issued to Morgan Stanley, for example, requests copies of Forms 1099 issued to the Tribe. *See* DE 1-3 at p. 3, ¶¶ 4 & 7. So do the summonses issued to Citibank, American Express, and Wachovia. *See* DE 1-3 at pp. 1-3, ¶¶ 1-2, 5-7, filed under Case No. 10-23508 and consolidated herein (Citibank Summons); DE 1-3 at pp. 1-3, ¶¶ 1-2, 5-7, filed under Case No. 10-23509 and consolidated herein (American Express Summons); DE 1-3 at pp. 1-3, ¶¶ 1-2, 5-7, filed under Case No. 10-23511 and consolidated herein (Wachovia Summons). The

filing of these Form 1099s would be made as a general business practice by their issuer, and there is no allegation that Morgan Stanley, Citibank, American Express or Wachovia issued Form 1099s to the Tribe and then failed to transmit them to the IRS.[10] The Government's failure to admit that it already possesses these documents and its persistent refusal to attempt narrowing the overbroad Summonses to at least eliminate the information that it already has in its possession provides further support to the Tribe's allegations of harassment and overbreadth of the Summonses.[11]

III. The Summonses Are Clearly Overbroad

The Government argues that the Summonses are not overly broad because they "describe the documents sought" and "clearly state the applicable time period." DE 16 at 16. According to the Government, "[g]iven the nature of the IRS's suspicions, there is simply no other way for the IRS to investigate Tribal payments other than through an inspection of these particular tribal account records. . . . [and] [t]here is no way to narrow the summons (sic)." *Id.* at 17. Even assuming that the Summonses were issued for a proper purpose, which they were not, the Summonses "describe" practically every conceivable document that may exist and improperly demand production of massive amounts of sensitive Tribal records that lack any relevance to a supposed administrative investigation of a sovereign Indian tribe concerning the "administration or enforcement of the internal revenue laws." *See, e.g.*, DE 1-3 at 1. A summons which is overbroad or seeks irrelevant information is unenforceable. *See, e.g., United States v. Monumental Life Ins. Co.*, 440 F.3d 729 (6th Cir. 2006). Such are the circumstances here.

Review of the Summonses reveals that they are so broadly drawn that they can only be construed as seeking unfettered access to all of the financial account information of the Tribe, including the contents of all its sensitive and confidential communications concerning the finances of its sovereign government. *See, e.g.*, DE 16-1 at ¶ 12.vi. (summons to Morgan Stanley demands all: "[r]ecords maintained of transactions for or communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence,

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[10] *See, e.g*, Furnas Depo. at 104:16-18 ("Q . . . Is it your experience that these institutions [summoned by the Government] would issue 1099s? A These institutions issue 1099s, yes, ..."); *Id.* at 105:2-4 ("I'm not auditing Smith Barney to determine if they filed 1099s that they should have filed").

[11] *See, e.g.*, DE 16 at 17 (wherein the Government claims that "[t]here is no way to narrow the summons (sic)").

financial statements, background or credit investigations, and records identifying the stock transfer agent and dividend disbursing agent"), ¶ 22.xi. (summons to Citibank demands production of: "all documents reflecting correspondence or other communications regarding the Miccosukee Tribe"), ¶ 32.xi. (summons to American Express demands production of: "all documents reflecting correspondence or other communications regarding the Miccosukee Tribe"), ¶ 42.xi. (summons to Wachovia demands production of: "all documents reflecting correspondence or other communications regarding the Miccosukee Tribe").[12]

The Summonses issued to Citibank, American Express and Wachovia also seek "all loan documents, including but not limited to applications, financial statements, . . . credit and/or background investigations, . . . loan correspondence files and internal bank memoranda" and "all safe deposit box documents, including but not limited to contracts, access records, and records of rental fees paid." DE 1-3 at 3, ¶¶ 3 & 4, filed under Case No. 10-23508 and consolidated herein (Citibank Summons); DE 1-3 at 3, ¶¶ 3 & 4, filed under Case No. 10-23509 and consolidated herein (American Express Summons); DE 1-3 at 3, ¶¶ 3 & 4, filed under Case No. 10-23511 and consolidated herein (Wachovia Summons). Assuming, *arguendo*, that the IRS is examining

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[12] The Instructions contained in the summonses broadly define the term "Miccosukee Tribe" as follows:

> The term "Miccosukee Tribe" refers to the Miccosukee Tribe of Indians of Florida, whose address is Box 440021, Tamiami Station, Florida 33144, and includes any entity, corporate or otherwise, owned, operated or controlled, whether wholly or in part, by the Miccosukee Tribe or officials or representatives of the Miccosukee Tribe, as well as any other entity in which the Miccosukee Tribe may have a financial or proprietary interest, excluding the Miccosukee Tribe of Indians of Florida Indian Bingo, also known as Miccosukee Indian Gaming, whose records we are not requesting.

DE 1-3 at 2, ¶ 1 (Morgan Stanley Summons); DE 1-3 at 2, ¶ 1, filed under Case No. 10-23508 and consolidated herein (Citibank Summons); DE 1-3 at 2, ¶ 1, filed under Case No. 10-23509 and consolidated herein (American Express Summons); DE 1-3 at 2, ¶ 1, filed under Case No. 10-23511 and consolidated herein (Wachovia Summons).

In addition, the Instructions state: "this request is for all documents pertaining to the Miccosukee Tribe in any capacity, whether held jointly or severally, as trustee, fiduciary, custodian, executor, guardian and/or beneficiary. . . . [and] [t]his request encompasses all open and/or closed accounts." DE 1-3 at 2, ¶¶ 5-6 (Morgan Stanley Summons); DE 1-3 at 2, ¶¶ 5-6, filed under Case No. 10-23508 and consolidated herein (Citibank Summons); DE 1-3 at 2, ¶¶ 5-6, filed under Case No. 10-23509 and consolidated herein (American Express Summons); DE 1-3 at 2, ¶¶ 5-6, filed under Case No. 10-23511 and consolidated herein (Wachovia Summons).

whether the Tribe "met its withholding and reporting obligations for the 2006 through 2009 tax periods," (*see* DE 16 at 1), these materials are far outside the scope of a legitimate examination. Quite simply, the "credit and/or background investigations" that may have been performed if the Tribe obtained a loan, and any "records of rental fees paid" on any safe deposit boxes that the Tribe may have obtained are in no way relevant to an examination of whether the Tribe "met its withholding and reporting obligations for the 2006 through 2009 tax periods." *Cf.* DE 16 at 1.

In support of its argument that the Summonses are not overbroad, the Government claims that the Tribe cites to the Instructions and Definitions section of the Summonses, DE 16 at 17, as if this somehow narrows their scope. If the Government now contends that their Definitions sections should be ignored they should move to strike it. Moreover, the Government's assertions are not correct. Review of the Summons to Morgan Stanley reveals that the request for "[r]ecords maintained of . . . communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence, financial statements, background or credit investigations. . . ." does not appear in the "Instructions and Definitions" section of the Summons. *See* DE 1-3 at 3, ¶ 6. The Government's demand for all records of communications between the Tribe and Morgan Stanley appears in paragraph six of the Summons issued to Morgan Stanley. *See id.* (demanding "**Records maintained of** transactions for or **communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence, financial statements, background or credit investigations**, and records identifying the stock transfer agent and dividend disbursing agent.") (emphasis added). A similar demand for "all documents reflecting correspondence or other communications regarding the Miccosukee Tribe" appears in the Summonses issued to Citibank, American Express and Wachovia. See DE 1-3 at 3, ¶ 11, filed under Case No. 10-23508 and consolidated herein (Citibank Summons); DE 1-3 at 3, ¶ 11, filed under Case No. 10-23509 and consolidated herein (American Express Summons); DE 1-3 at 3, ¶ 11, filed under Case No. 10-23511 and consolidated herein (Wachovia Summons). Regardless, the Government fails to explain how every communication between the Miccosukee Tribe and Morgan Stanley is relevant to a legitimate examination. The "Instructions and Definitions" is quoted by the Tribe for the purpose of showing that the demand for all communications between the Tribe and Morgan Stanley seeks communications regardless of whether the Tribe is acting for itself or in the capacity of a trustee, fiduciary, custodian, executor, guardian or beneficiary. The Government

has presented nothing to counter the obvious overbroad and improper demand for production of confidential information regarding the Tribe's sovereign governmental operations that is obviously not relevant to any legitimate examination of "withholding and reporting." *Cf.* DE 16 at 1.

CONCLUSION

Based upon the foregoing, the Miccosukee Tribe of Indians of Florida moves this Court to enter an Order granting the Tribe's Petitions to Quash.

February 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2011, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List, either via transmission of Notices of Electronic Filing Generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Sonia Escobio O'Donnell

SERVICE LIST

Miccosukee Tribe of Indians of Florida v. United States of America
Case No. 10-23507-CV-GOLD [LEAD CASE] (S.D. Fla.)

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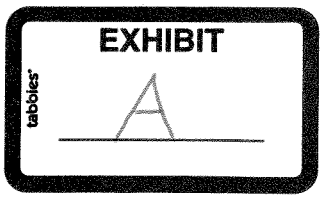
192549

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MICCOSUKEE TRIBE OF INDIANS, Petitioner	:	Case No. 10-23507-CV-GOLD
v.	:	
UNITED STATES OF AMERICA, Respondent	:	PAGES 1 through 111

Deposition of James M. Furnas
Washington, DC
Wednesday, January 12, 2011

Reported by: Joanne Liverani, RMR
ASSIGNMENT NO. 202096



Q That's what this is --
A I mean to determine whether 3406 applies, the first question is whether they made payments that required 1099 reporting.
Q Yes.
A And then the next question is, okay, we've determined the 1099 requirement. Did they obtain the payee identification numbers.
The third-party record-keepers aren't going to be able to tell me whether the Tribe obtained taxpayer identification numbers.
Q But if they did, if the Tribe did, then 3406, the withholding requirement would not apply; correct?
A The backup withholding requirement would normally not apply as long as the Tribe obtained taxpayer identification numbers from the payee's prior payment. Although there are other situations where 3406 may apply.
Q Do you know whether the Tribe has taxpayer identification numbers for its members?
A No.

MR. WELSH: I would like to interpose the objection. This question is piling supposition upon supposition.

If you could break it into pieces and ask him a question.

MR. JORDEN: All right.

BY MR. JORDEN:

Q If the Tribe was required to withhold with respect to the distributions made under bullet number one, the first bullet, okay, then it would -- it was also required to file a 945 and pay the tax?

A Yes.

Q Okay. If the Tribe was not required with respect to payments that are back up under bullet number two, then it would not have an obligation to file 4945; correct?

A If the Tribe was not required to withhold on non-wage payments, then there would be no requirement to file Form 945.

Q Okay.

A Although, you know, I mean these are

MR. JORDEN: It's one of my habits; one of my bad habits. So I'll back up.

BY MR. JORDEN:

Q What -- are you aware of any published precedent that would support the position of the service and your position in seeking this information that's been published where tax revenues of a Tribe are being distributed to members?

MR. WELSH: Objection, I would like Counsel to define --

MR. JORDEN: I just want to know if he's aware of it.

MR. WELSH: -- what he means by "publish precedent."

MR. JORDEN: Cases, IRS information, material, IRS publications, revenue rulings. Whatever. Whatever you might know of.

THE WITNESS: I'm not.

BY MR. JORDEN:

Q Okay. Thank you.

What communications have you had with

not the informant is a member of the Tribe could very well lead to his name being revealed.

THE WITNESS: And I am not authorized to reveal any information that would lead to the identity of the confidential informant.

BY MR. JORDEN:

Q Was there financial information in this report about the financial -- aside from the cash carrying mechanism that you just described, aside from that was there other financial information about the Tribe in the report, in the confidential informant's report?

A Yes.

Q Can you give me a description of what that information was?

MR. WELSH: And again, I would like to counsel the witness that he set out in his declaration what's material to this matter in terms of why he commenced his investigation, and to get into any further discussion of what's in a confidential informant's report may very well reveal the name of the confidential informant and

Commission relating to the Tribe or the examination of the Tribe?

A I have had no contact with the Bureau of Indian Affairs.

As I previously mentioned at the very commencement, we obtained gaming financial -- gaming facility financial statements from the National Indian Gaming Commission.

This fall I was invited to give a class to the NIGC enforcement division. Among other things, they wanted me to talk about audit procedures. And this is not with regard to any specific Tribe, but with regard to audit procedures, particularly in the area of credit cards in the Tribal environment.

I did in that discuss an article that was in the Miami Herald, which described some of the credit card expenses that were involved, and I neither confirmed nor denied information in that article, except to the extent that it's become public record, which as far as I could tell the whole article was based on public record. But that

know what you mean by that.

A Well, again, in the prior years I found where the Tribe would say, okay, your distribution is X, the member could say, okay, I want you to purchase merchandise with that; I want you to distribute it to me in cash; I want you to put it away in a brokerage account; potentially I want you to buy me some gold coins and keep it in a safe deposit box for me.

I mean I don't know that that happened, but again, any of the financial information can be relevant to the nature, source, amount of distributions that may have been made.

Q Is it fair to say that if there were no members of the Tribe that had personal access to these accounts, and all transactions were on behalf of the Tribe, aside from the payment of amounts to Tribal members, that the information about certificate of deposit documents, for example, and records of purchases, redemptions, if that was solely for Tribal activity, for the Tribe's activity, that that would not be relevant to your

during your prior examination and preparing for this one. And not asking you again about any discussions you may have had with the confidential informant, but rather whether you had discussions and communications with any other Tribal counsel members, any Tribal members relating to the examination of the Tribe?

A I have not had any discussions with Tribal officials, employees, or members, other than those where the attorney, the Tribe's representatives were present. So that would -- our meeting in Albuquerque where all the Tribal members were there. Some meetings with the prior representatives, although most of them all I got was attorneys. There was a few of them that may have been attended by employees. Or members.

Q You mentioned in your prior testimony that at some point you concluded that at least some of the information that was given to the service by the confidential informant was inaccurate. Can you recall when you came to that realization?

A When I -- and you know, well, we at one

point summonsed armored car records, because we had the information that there was large amounts of cash being transported into the vault. From those records I could see that the armored cars were only used to go from the bank to the casino, and then based on the testimony of the casino personnel, the Tribal police picked it up there and took it out to the reservation.

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.

Q So when did you obtain these armored car records, can you remember?

A Well, the -- no. The -- this was issued at the same time that the summons for the 2000 through 2005 years on the third-party record-keepers, and I would have obtained them within a couple of months after that.

Q That would have been in --
A I believe it would have been.
Q -- 2007? 2006? No, wait --
A I believe February of -- I have to look at the exact date.
It would have been '06.
Q February '06?
A The summons may have been issued at the end of '06 and the information obtained February of '07, would be my best guess.
Q When I asked you if you had ever been accused of misrepresentation and for pretending to be conducting a civil investigation when actually conducting a criminal investigation, and I think -- I don't want to misquote you on this, obviously, you said: No Revenue Agent can go through a career without being accused of that?
A I don't know if I said "no Revenue Agent." But I said it's not -- what I should say it is not uncommon for Revenue Agents doing their job to be accused of various things.
Q Aside from the Kontny case that you

Q And were those on Miccosukee Tribal credit cards or personal --

A Yes.

Q -- credit cards?

With respect to the information that is sought in these summons to the various financial institutions, what information do you think will be relevant to your determination of whether 1099s were issued on distribution payments to travel members?

MR. WELSH: I object. He can give his speculation, but it would obviously be pure speculation since he doesn't have the records.

BY MR. JORDEN:

Q Let me ask it a different way.

Is it your experience that these institutions would issue 1099s?

A These institutions issue 1099s, yes, Wachovia Bank or --

Q Would they be responsible for issuing 1099s regarding distributions made by the Tribe to its members?

A Generally, no. And I don't anticipate that I'm -- I mean I'm not auditing Smith Barney to determine if they filed 1099s that they should have filed.

I guess I need you to repeat the question. I am not sure what you are saying.

Q There are two primary issues in your audit.

A Right.

Q Withholding and 1099.

A Right.

Q What I am asking you is, you have this extensive summons.

A Uh-huh.

Q What's the relevance of these summons to your determinations regarding whether the Tribe complied with its 1099 obligations?

A The relevance is that I need to determine the amount, recipient, date, and nature of any disbursements by the Tribe that may have required 1099s.

These third-party record-keepers may

CERTIFICATE OF NOTARY PUBLIC

I, Joanne Liverani, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Joanne Liverani,
Registered Merit Reporter
and Notary Public for the
District of Columbia

My Commission expires:
July 31, 2015