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

CASE NO. 10-23507-CV-GOLD [LEAD CASE]
Additionally this Document is to be docketed in 10-23508-CV-GOLD, 10-23509-CV-GOLD, 10-23511-CV-GOLD

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

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.

Respondent.

_____/

PETITIONER MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S MOTION TO STAY PENDING APPEAL

COMES NOW Petitioner, the Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe") through undersigned counsel, and files this Motion to Stay Pending Appeal, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, respectfully requesting this Court to stay pending appeal to the 11th Circuit Court of Appeals for the United States its August 2, 2011 Order Granting United States' Motion To Deny Petitions To Quash; Findings Of Fact And Conclusions Of Law. [D.E. No. 52] attached as Exhibit A. In support thereof the Miccosukee Tribe states:

1. On August 2, 2011, this Court entered its Order Granting United States' Motion To Deny Petitions To Quash; Findings Of Fact And Conclusions Of Law. [D.E. No. 52].
2. On August 30, 2011, the Miccosukee Tribe filed a Motion for Reconsideration and Motion to Stay under Rule 59(e) or alternatively 60(b) of the Federal Rules of Civil Procedure. [D.E. No. 53].
3. On September 12, 2011, this Court denied the Miccosukee Tribe's Motion for Reconsideration and Motion to Stay. [D.E. No. 55].
4. On October 10th, 2011, the Miccosukee Tribe filed a Notice of Appeal in this Court. [D.E. No. 58]. [1]
5. The Court should grant the Miccosukee Tribe's Motion to Stay because: 1) The Miccosukee Tribe will suffer irreparable harm if its governmental records are released in complete disregard for the Miccosukee Tribe's sovereign immunity before the court of appeals decides the issue of tribal sovereign immunity; 2) it will likely succeed on the merits of its appeal; 3) no substantial harm will result to the IRS or the Third Party Records Keepers from granting the stay; and 4) the public interest will not be harmed by the temporary delay.

MEMORANDUM OF LAW

Standard for Grant of Stay Pending Appeal

[1] The Miccosukee Tribe's Notice of Appeal is timely filed pursuant to Rule 4(a)(4)(A)(vi) of the Federal Rules of Appellate Procedure. *See* D.E. No. 55 construing the Miccosukee Tribe's Motion as a rule 60(b) motion, which tolls the time to file a notice to appeal.

When a taxpayer is not entitled to a stay pending appeal as a matter of right, the taxpayer must show 1) a likelihood that the taxpayer will prevail on the merits of the appeal; 2) irreparable harm or injury to the taxpayer unless a stay is granted; 3) no substantial harm to the other interested parties; and 4) no harm to the public interest. *Venus Lines Agency v. CVG Venezolana de Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000); *United States v. Blackburn*, 538 F.Supp. 1385, 1386-87 (M.D. Fla. 1982). A stay as a matter of right lies when the judgment is a monetary one. *United States v. U.S. Fishing Vessel Maylin*, 130 F.R.D. 684, 686 (S.D. Fla. 1990). "Although the first factor is generally the most important, the movant need not always show that he probably will succeed on the merits of this appeal." *Gonzalez v. Reno*, No. 00 Civ. 11424, 2000 WL 381901 *1 (11th Cir. April 19, 2000) (citing *Garcia-Mir. v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)). "Instead, where the 'balance of the equities weighs heavily in favor of granting the [injunction],' the movant need only show a substantial case on the merits." *Id.* [2]

The movant must address each factor, regardless of its relative strength. *In re Akron Thermal, Ltd. P'ship v. Akron Thermal, Ltd. P'ship*, 414 B.R. 193, 201 (N.D. Oh. 2009). "To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits." *Id.* The probability that must be shown is "inversely proportional to the amount of irreparable injury plaintiffs will suffer absent a stay. Simply stated, more of one excuses less of the

[2] The same standards that govern issuance of a stay pending appeal also govern the issuance of an injunction. See *In Re: Terazosin Hydrochloride Antitrust Litigation*, 352 F.Supp.2d 1279 (S.D. Fla. 2005); *Harris Corp. v. Federal Express Corp.*, No 07 Civ. 1819, 2011 WL 3627379 slip op. at 5 (M.D. Fla. Aug. 17, 2011).

other." *Id.* A movant is required to show at a minimum that there are serious questions as to the merits. *Id.* Serious questions have been defined as "substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Gila River Indian Cmty. v. United States*, No. 10 Civ. 1993/2017/2138, 2011 WL 1656486 * 2 (D. Ariz. May 3, 2011).

This case does not involve a monetary judgment. Consequently, the Miccosukee Tribe seeks a stay pending an appeal pursuant to the discretionary powers of the district court.

I. THE MICCOSUKEE TRIBE WILL LIKELY PREVAIL ON THE MERITS

The Miccosukee Tribe will likely succeed on the merits because the 11th Circuit will likely follow the 9th Circuit view that unless Congress expresses a clear and unequivocal intent to abrogate an Indian tribe's immunity or the Indian tribe waives it, an agent or agency of the federal government cannot initiate a suit or any legal process against an Indian Tribe. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1979); *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751 (1998); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282 (11th Cir. 2001); *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1038 (11th Cir. 1995); *Furry v. Miccosukee Tribe of Indians of Fla.*, No. 10 Civ. 24524, 2011 WL 2747666 (S.D. Fla. July 13, 2011).

Indeed, this Court in its Order denying the Miccosukee Tribe's Motion for Reconsideration and Motion to Stay stated that "the Tribe correctly notes in the instant Motion that there is an issue of whether the Tribe waived its sovereign

immunity or whether Congress abrogated such sovereign immunity by authorizing a suit." [D.E. No. 55]. There is no binding precedent from this Circuit that has decided this issue.

There are two well-established principles of statutory construction with regard to Indian tribes: that Congress may abrogate an Indian tribe's sovereign immunity only by expressly using statutory language that makes its intention unmistakably clear; and that ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor. *Florida v. Seminole Tribe of Indians*, 181 F.3d 1237, 1241 (11th Cir. 1999) (citing *Fla. Paraplegic Ass'n*, 166 F.3d at 1131). The doctrine of sovereign immunity provides that Indian tribes possess inherent tribal sovereignty derived from their own inherent powers. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002). Indian tribes and the federal government have a unique relationship, one that can be best classified as a relationship between dual sovereigns:

> Tribes are not the equivalent of states or territories, and are nothing akin to municipal governments which derive all of their authority from the states. As this Court stated elsewhere, Indian tribes and the federal government are dual sovereigns. Tribes have a unique relationship with the federal government and occupy a unique status under the law. As Chief Justice Marshall observed in the historical case of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1931)[1831]: 'the condition of the Indians in relation to the United States is perhaps unlike any other two people in existence … The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.' *Id.* at 16.

N.L.R.B. v. Pueblo of San Juan, 30 F.Supp.2d 1348, 1354 (D.N.M. 1998).

Sovereign immunity from suit protects Indian tribes from legal process such as subpoenas, search warrants and summonses. See *NGV Gaming, LTD. v.*

Upstream Point Molate, LLC, Nos. 04 Civ. 3955, 05 Civ. 1605, 2009 WL 4258550 slip op. at 4 (N.D. Cal. Nov. 24, 2009) (citing *United States v. James*, 980 F.2d 1314 (9th Cir. 1992). Congress did not authorize the IRS to initiate a legal process against an Indian tribe in 26 U.S.C. §§ 7602-7605, 7610, 7210. None of the provisions of the Internal revenue Code (hereinafter, "IRC") that authorize the IRS to issue summons to aid it in investigations of taxpayers express a clear and unequivocal intent by Congress to abrogate Indian tribes' immunity from suit.

IRC § 7602 does not mention Indian tribes nor does it express any intention to abrogate Indian tribes' immunity, neither do IRC §§ 7610 and 7210. Because an abrogation of tribal sovereign immunity cannot be implied, *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1241 (11th Cir. 1999), and "mere silence regarding Indian tribes is insufficient to establish an abrogation of traditional sovereign authority," *NLRB v. Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. 2000), there is no abrogation of the Miccosukee Tribe's sovereign immunity in the above mentioned IRC provisions.

Similarly, IRC § 7701 does not show an intent by Congress to abrogate Indian tribe's sovereign immunity by making any of the sections mentioned above applicable to Indian tribes. The general definition in § 7701(a)(1) of the word persons does not include Indian tribes, Indian governmental entities nor governmental entities in general. Indeed, "Indian tribal government" is defined separately in 26 U.S.C. § 7701(a)(40) and so is the "United States" in § 7701(a)(9) and "States" in § 7701(a)(10). "Partner and partnership" and "corporation" are also

defined separately in § 7701(a)(2) and § 7701(a)(3) respectively. However, unlike Indian tribes, "partner and partnership" and "corporations" are included in the definition of "person." This evidences a clear intent of Congress to not abrogate Indian tribes' sovereignty and sovereign immunity in the general definition of person.

Moreover, while the language of the definition uses the word "includes" and § 7701(c) states that the words "include" and "including" do not exclude "other things otherwise within the meaning of the term defined," Indian tribes cannot be included in the definition of "person" because they are not otherwise within the meaning of "persons" and because it is not language that is unmistakably clear as to Congress' intent to abrogate Indian sovereignty. Although subsection (c) makes the list not necessarily exclusive, it is unreasonable to include entities completely dissimilar to those listed. *See Poulakis v. Rogers*, 341 Fed. App'x. 523, 530 (11th Cir. 2009) (stating that the principle of *expressio unius* says that when a legislature has enumerated a list or series of related items, the drafter intended the list to be exclusive); *see also Gouch v Cal. Franchise Tax Bd.*, No. 08 Civ. 3299, 2009 WL 2957284 at * 3 (N.D. Ga. Sept. 15, 2009) (stating that the California Tax Board was clearly not a person under the IRC § 7701, but instead was part of the state of California).

Indian tribes are not otherwise within the meaning of "person" because if they were it would be hard to imagine what legal entities would not be included as well. Importantly, by defining "person" and providing a list of entities considered

persons, Congress must have intended to exclude some legal entities or the list would be superfluous.

There is hardly a legal entity more dissimilar to those listed than sovereign Indian tribes. Although, this Court in its August 2, 2011 Order interpreted the word "person" to be broad enough to include government entities such as a tribal government, citing *Ohio v. Helvering,* 292 U.S. 360 (1934) as support, this interpretation is incorrect as a matter of law. The Supreme Court has "a longstanding interpretative presumption that 'person' does not include the sovereign." *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003). This presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Id.* Such showing of statutory intent to the contrary is lacking here.

The IRS lacks authority to issue a summons seeking confidential governmental records of the Miccosukee Tribe because neither of the IRC provisions include statutory language by Congress that shows a clear and unambiguous intent to allow the IRS to issue summons to investigate an Indian tribe that is exempt from federal income taxes. Therefore, this Court incorrectly found that Congress had waived the Miccosukee Tribe's immunity because it cannot be said that it is a clear showing of intent to abrogate Indian tribes immunity for Congress to authorize third party suits seeking to quash IRS Summons.

This Court found that even if sovereign immunity applied to this case, Indian tribes cannot ever assert it against a federal agency or employee. This cannot be the

result Congress intended when it established the contours of the doctrine of tribal sovereign immunity. If any federal agency, by its federal nature, could sue or start a legal process against an Indian tribe without any clear and unambiguous statutory authorization showing an intent to specifically abrogate Indian tribes immunity, the test would be that sovereign immunity protects an Indian tribe from suit unless it is the federal government bringing the suit, Congress abrogates it or the Indian tribe waives it. This, however is not the test.

II. THE MICCOSUKEE TRIBE WILL BE IRREPARABLY HARMED IF A STAY IS NOT GRANTED

The Miccosukee Tribe will suffer irreparable harm if a stay pending its appeal is not granted. A stay pending appeal will serve to protect the Miccosukee Tribe from harm that has constitutional dimensions. A stay will serve to preserve the status quo and in turn preserve the meaning of the doctrine of tribal sovereign immunity. The Supreme Court of the United States has unequivocally stated that "tribal sovereign immunity provides an Indian tribe with immunity from suit," which "would be rendered meaningless if a suit against a tribe asserting immunity were allowed to proceed to trial." *Tamiami Partners, Ltd. v. Miccosukee Tribe,* 63 F. 3d 1030, 1050 (11th Cir. 1995). Sovereign immunity "is an entitlement not to stand trial or face the other burdens of litigation" which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Not preserving the status quo in this case would prove the protection the doctrine of tribal sovereign immunity affords Indian tribes meaningless. Because sovereign immunity is a right to be free from the burdens of litigation, it should be

decided at an early stage in the case. *See*, *P.R. Aqueduct and Sewer Auth. v. Metcalf and Eddy, Inc.*, 506 U.S. 139, 143-45 (1993); *see also Bell Atlantic-Delaware v. Global NAPS South*, 77 F. Supp. 2d 492, 497 (D. Del. 1999) (stating that the issue of sovereign immunity is a threshold matter that must be disposed of at the earliest possible stage in the litigation, in order to protect that immunity).

In *Rhode Island v. United States*, 115 F.Supp.2d 269 (D. R.I. 2000) the court explained that "[g]enerally, the violation of a constitutional right, by itself, is deemed to cause irreparable harm. (Citations omitted). Sovereign immunity and Eleventh Amendment immunity are rights of constitutional dimension." *Id.* In the context of injunctions, an adequate showing of irreparable harm is one that shows that the injury is likely to occur and that it is the kind of injury for which an award of money cannot compensate. *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 293 F.Supp.2d 183, 195 (N.D. N.Y. 2003). Irreparable harm is also shown "when the moving party alleges a constitutional deprivation for which monetary compensation is not an adequate remedy." *Id.*

Importantly, this district has already held that "the threatened violation of the Miccosukee Tribe's sovereignty as guaranteed by federal law and MRAA, would constitute a tangible, irreparable harm if an injunction were not granted." *Miccosukee Tribe of Indians of Fla. v. United States*, No. 00 Civ. 3453, 2000 WL 35623105 * 10 (S.D. Fla. December 15, 2000).

As explained supra, the Miccosukee Tribe has repeatedly asserted sovereign immunity from the repeated attempts by the IRS to use a summons to obtain tribal

confidential governmental records. This, the IRS seeks to do without any express, clear and unambiguous Congressional authorization or waiver from the Tribe. Therefore, the Miccosukee Tribe will likely suffer substantial and irreparable harm if this Court does not grant a stay pending appeal because once the records are released the Miccosukee Tribe's appeal based on tribal sovereign immunity becomes moot. This will function to deprive the Miccosukee Tribe of their right to appeal. *See* 28 U.S.C. § 1291; *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("[T]he Constitution and laws entitled litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable."). In *Gonzalez v. Reno*, the 11th Circuit found that to deprive the Plaintiff of his day in court would in and of itself represent a significant risk of irreparable harm to the Plaintiff. 2000 WL 381901 * 1 (stating that "our failure to issue an injunction pending appeal, therefore, could strip the Court of jurisdiction over this case and deprive Plaintiff forever of something of great value: his day in a court of law.") (citing *Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995)); *see also Population Inst. v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986) (finding that appellant "will suffer irreparable injury" if the government renders its appeal moot).

Release of the governmental records of the sovereign Miccosukee Tribe will result in two permanent damaging consequences: 1) the inner governmental workings of the Miccosukee Tribe will be in possession and control of the IRS and 2) it will set precedent that the governmental records of sovereign Indian tribes can be

obtained without the consent of the sovereign and without Congressional approval through the use of any law of general applicability in complete disregard of decades of binding precedent requiring express statutory language that clearly and unequivocally expresses an intent to abrogate tribal sovereign immunity.

III. THERE WILL NOT BE SUBSTANTIAL HARM TO THE OTHER INTERESTED PARTIES

The IRS will not suffer substantial harm because any harm will only be temporary. Although the IRS issued the summons challenged in this case in 2010, the Miccosukee Tribe has been conducting its gaming operations since the late 1980s. Therefore, the collection efforts of the IRS will not be substantially impeded by a stay pending appellate review. Similarly, in *Gonzalez*, the 11th Circuit found that a stay pending appeal would not harm the INS because the plaintiff had been in the country for 5 months and it had been 3 months since the INS had refused to consider plaintiff's INS application. *Gonzalez*, 2000 WL 381901 * 2. Because the INS had not moved to remove the Plaintiff in those 3 months, the Court found that the argument by the INS that it would be harmed if a stay pending appeal was granted was not compelling. *Id.* Just as in *Gonzalez*, the argument that the IRS would be harmed if a stay pending appeal was granted in this case is not compelling. The Miccosukee Tribe was authorized by Congress to conduct gaming operations in the late 1980s. It was not until 2010 that the IRS issued summons seeking to obtain tribal confidential governmental records. According to Agent Furnas the IRS did not commence the examination of the Miccosukee Tribe until 2005. Furnas Dec. ¶ 4; *see also Order Granting United States' Motion to deny*

Petitions to Quash; Findings of Fact and Conclusions of Law [D.E. No. 52]. The IRS waited 5 years before issuing the first summons seeking tribal records in 2010. The temporary stay will not, therefore, substantially harm the IRS.

The third party record keepers will suffer even less harm as a result of a temporary stay pending appeal because they have no interest in enforcement of the summons or in the collection of taxes. On the contrary, it is likely the case that IRS summons forcing the release of client records hurts the business of these record keepers.

IV. THERE WILL NOT BE HARM TO THE PUBLIC INTEREST

There are several competing public interests in this case. First, there is interest of collecting taxes. Second, the protection of the Miccosukee Tribe's right to appellate review will further the public interest in "preserving the integrity of the right to appellate review." *In re SK Foods, LP.*, No. 09 Civ. 02942, 2009 WL 5206639 * 4 (E.D. Cal. Dec. 24, 2009); *see also Population Inst.*, 797 F.2d at 1082 ("[T]he public interest will be furthered by an injunction pending appeal, which will preserve" the ability to provide complete relief "if an appellant is successful on appeal."). Thirdly, there is a public interest in protecting tribal sovereignty and tribal sovereign immunity from impingement. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("Congress is committed to a policy of supporting tribal self-government and self-determination"). As the 11th Circuit stated in *Gonzalez*, it is doubtful that to protect a party's day in court, when the party's appeal has arguable merit, would be contrary to the public interest. *Gonzalez*, 2000 WL 381901 * 2. Finally, any harm to the public interest in the

collection of taxes is far detached from this case, as the Miccosukee Tribe is not liable for income taxes, and will only be temporary until the court of appeals decides this greatly important issue.

WHEREFORE, the Miccosukee Tribe respectfully requests this Honorable Court to grant the Miccosukee Tribe's Motion for Stay Pending Appeal.

CERTIFICATE OF GOOD FAITH CONFERENCE: CONFERRED BUT UNABLE TO RESOLVE ISSUES PRESENTED IN THE MOTION

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues but has been unable to resolve the issues.

Respectfully submitted on this 10th day of October of 2011.

s/Bernardo Roman III
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 10th, 2011, I electronically filed the foregoing document 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 or pro se parties identified on the attached Service List in the manner specified, 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.

Respectfully Submitted,

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SERVICE LIST

Miccosukee Tribe of Indians v. United States
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