UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:11-mc-23107-ASG

MICCOSUKEE TRIBE OF INDIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

UNITED STATES' MOTION TO DENY PETITIONS TO QUASH

The Miccosukee Tribe of Indians of Florida (the "Tribe") has filed four petitions to quash summonses that the Internal Revenue Service issued in its examination into whether the Tribe met its withholding and reporting obligations for the 2010 tax period. *Miccosukee Tribe of Indians v. United States*, Nos. 11-mc-23107, 11-mc-23111, 11-mc-23112, 11-mc-23129 (S.D. Fla.) The IRS issued the summonses to four of the Tribe's third-party recordkeepers—Morgan Stanley Smith Barney ("Morgan Stanley"), Citibank (South Dakota), N.A., American Express Company, and Wachovia Bank (collectively "the banks"). The summonses are identical to those this Court previously considered in *Miccosukee Tribe of Indians v. United States (Miccosukee II)*, No. 10-cv-23507 (S.D. Fla.) except they seek records for a different tax year (2010).[1] The

[1]The Court consolidated case numbers 10-cv-23507, 10-cv-23508, 10-cv-23509, and 10-cv-23511 under case number 10-cv-23507 at the Tribe's request. The summonses at issue in those cases sought identical documents for the 2006 through 2009 tax years.

summonses seek information to help the IRS determine whether the Tribe properly withheld from and reported payments to tribal members, vendors, and employees.

In seeking to quash the summons at issue in this case, the Tribe has raised nearly identical issues that the Court previously rejected in *Miccosukee Tribe of Indians v. United States (Miccosukee I)*, No. 10-21332, 730 F. Supp. 2d 1344 (S.D. Fla. 2010), a case involving an investigation of the Tribe's former chairperson, Billy Cypress, and *Miccosukee II*, No. 10-cv-23507, 2011 WL 3300164 (S.D. Fla. Aug. 2, 2011). As it did in the previous cases, the Court should deny the petitions to quash because the summonses satisfy the factors set forth in *United States v. Powell*, 379 U.S. 48 (1964), and because the Tribe's arguments for quashing the summonses, including its sovereign immunity argument, fail as a matter of law.

Statement of Facts

A. The Examination

Revenue Agent James Furnas has previously testified before this Court regarding the background of his investigation of the Tribe. The IRS's examination of the Tribe arose from allegations that the Tribe was making unreported distributions to tribal members. *See* 2010 Furnas Decl. at ¶ 4, Doc. 16-1, *Miccosukee II*, No. 10-cv-23507 (S.D. Fla. Dec. 15, 2010). The IRS first examined whether the Tribe was meeting reporting and withholding obligations for the 2000 through 2005 tax years. *See* 2010 Furnas Decl. at ¶ 4. The IRS discovered through investigations that the Tribe failed to make required withholding on certain taxable payments of American Indian casino profits under 26 U.S.C. § 3402(r) and backup withholding under 26 U.S.C. § 3406, and failed to file Forms 945, Annual Return of Withheld Federal Income Tax, for that withholding. In addition, the IRS determined that several Forms 1099 MISC, Miscellaneous

Income, were not filed as required to report payments to members as well as payments of non-employee compensation to service providers. *See* 2010 Furnas Decl. at ¶ 5. Believing that the Tribe continued to make similar payments without properly withholding from or reporting them, the IRS began investigating the Tribe for the 2006, 2007, 2008, and 2009 tax periods. *See* 2010 Furnas Decl. at ¶ 6. In order to corroborate its suspicions regarding the Tribe and gather information about the Tribe's potential tax liabilities for 2006 through 2009, Agent James Furnas issued four summonses "in the matter of" Miccosukee Tribe of Indians of Florida on September 10, 2010. *See* 2010 Furnas Decl. at ¶¶ 9, 13, 19, 23, 29, 33, 39, 43; 2011 Furnas Decl. at ¶ 8.[2] Agent Furnas subsequently expanded his investigation to include the 2010 tax year. 2011 Furnas Decl. at ¶ 9. As part of his examination, Agent Furnas issued four summonses identical to those issued on September 10, 2010 seeking records for 2010 in addition to the records for 2006 through 2009.

B. The August 9, 2011 IRS Summonses

On August 9, 2011, Agent Furnas issued a summons to Morgan Stanley to give testimony and to produce documents related to the Tribe's use of its accounts at Morgan Stanley. Specifically, the summons seeks:

> i. Records of security transactions including all types of accounts, agreements, contracts, application for account, and signature cards. Records relating to treasury notes or certificates of deposit purchased, cash accounts, ready asset accounts, mutual fund accounts, commodity accounts, margin accounts, or other accounts. Such records include cash receipts, confirmation slips, securities delivered receipts, statements of account, notifications of purchase or sale, representative's stock record, account executive worksheets, correspondence,

[2]"2011 Furnas Declaration" shall refer to the declaration attached to this motion dated October 31, 2011.

ledger sheets, cash in slips, buy and sell slips, or other records of these transactions.

ii. Records showing the dates, amounts, and purpose of all payments, including records showing a description of the securities transacted, quantity bought or sold, date of transactions, purchase or sales price, and commissions paid.

iii. Records of the disposition of the proceeds from each sale of a security, including checks (front and back) issued to the above named individual(s) as a result of these sales.

iv. Records of any and all dividends and/or interest paid to the Miccosukee Tribe, including checks (front and back) and Forms 1099 issued to the Miccosukee Tribe.

v. Records of any other payments to the Miccosukee Tribe that show the date, amount, and purpose of the payment, including the checks (front and back) for such payments.

vi. Records maintained of transactions for or communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence, financial statements, background or credit investigations, and records identifying the stock transfer agent and dividend disbursing agent.

vii. Records of all checking accounts of the Miccosukee Tribe, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.

viii. Records of all credit and/or debit cards of the Miccosukee Tribe, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).

See 2011 Furnas Decl. at ¶ 14. This summons is worded the same as the summons issued to Morgan Stanley on September 10, 2010. *Compare* Doc. 1-3, No. 1:11-mc-23107 (S.D. Fla.) *with* Doc. 1-3, No. 1:10-cv-23507 (S.D. Fla.). The three additional summonses issued on August 9, 2011, require Citibank (South Dakota), N.A., American Express Company, and Wachovia Bank

to give testimony and to produce documents related to the Tribe's use of accounts at those banks.

Specifically, the summonses directed Citibank, American Express, and Wachovia to:

i. Provide all savings account documents, including but not limited to signature cards, ledger cards, records reflecting dates and amounts of deposits, withdrawals, interest, debit and credit memos, deposit slips, checks deposited, withdrawal slips, transit items, checks issued for withdrawals and Forms 1099 issued.

ii. Provide all checking account documents, including but not limited to signature cards, bank statements, deposit slips, checks deposited, checks drawn on the account, records pertaining to all debit and credit memos, transit items and Forms 1099 issued.

iii. Provide all loan documents, including but not limited to applications, financial statements, loan collateral agreements, credit and/or background investigations, loan agreements, notes, mortgages, settlement sheets, contracts, checks issued for loans, repayment records (including records revealing the date, amount and method of repayment, whether by cash or check), checks used to repay loans, documents reflecting the total amount of discount or interest paid annually, records of liens, loan correspondence files and internal bank memoranda.

iv. Provide all safe deposit box documents, including but not limited to contracts, access records, and records of rental fees paid (including those reflecting the date, amount, and method of payment, whether by cash or check).

v. Provide all Certificate of Deposit documents, including but not limited to applications, actual Certificate of Deposit instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.

vi. Provide all Money Market Certificate documents, including but not limited to applications, actual Money Market Certificate instruments(s), records of purchases, redemption's, checks issued on redemption, checks used to purchase Certificate, all correspondence regarding the Certificate(s), Forms 1099 issued, documents reflecting the annual interest paid and/or accumulated, the dates of payment and/or dates interest is earned, copies of checks issued for interest payments or deposits into account reflecting interest paid.

vii. Provide all U.S. Treasury Notes and Bills, including but not limited to all documents reflecting the purchase of U.S. Treasury Bills and Notes and/or subsequent sale of such bills or notes, including interest paid, checks used for the purchase or sale of the notes and bills, Forms 1099 issued, checks issued for interest payments and all records of interest paid or accumulated (including those revealing the dates and amount of interest paid or accumulated).

viii. Provide all credit card records, including but not limited to application forms completed, signature cards, credit or background investigations conducted, correspondence, monthly billing statements, cash advances, transaction records, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment and checks tendered to make repayments (front and back).

ix. Provide all documents reflecting the purchase of bank checks, cashier, teller, travelers' checks, certified checks and money order records. This request also includes the check register, file copies of the checks or money orders and records revealing the date and source of payment for said checks or money orders.

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

xi. Provide all documents reflecting correspondence or other communications regarding the Miccosukee Tribe.

2011 Furnas Decl. ¶¶ 24, 34, 44. The Citibank summons is worded the same as the summons issued to Citibank on September 10, 2010. *Compare* Doc. 1-1, No. 1:11-mc-23111 (S.D. Fla.) *with* Doc. 1-3, No. 1:10-cv-23508 (S.D. Fla.). The American Express summons is worded the same as the summons issued to American Express on September 10, 2010. *Compare* Doc. 1-2, No. 1:11-mc-23129 (S.D. Fla.) *with* Doc. 1-3, No. 1:10-cv-23509 (S.D. Fla.). The Wachovia summons is worded the same as the summons issued to Wachovia on September 10, 2010. *Compare* Doc. 1-2, No. 1:11-mc-23112 (S.D. Fla.) *with* Doc. 1-3, No. 1:10-cv-23511 (S.D. Fla.).

The IRS served properly attested copies of each summons on the relevant bank and the Tribe. 2011 Furnas Decl. at ¶¶ 11-12, 21-22, 31-32, 41-42. The IRS also took all administrative steps required by the Internal Revenue Code, and there is no referral to the Justice Department as defined in Section §7602(d) of the Internal Revenue Code with respect to the Tribe for the year 2010. 2011 Furnas Decl. at ¶¶ 10, 20, 30, 40, 50. Aside from a sequestered set of documents from American Express, which the IRS is not reviewing until the present petition is dismissed or denied, none of the banks have complied with the summonses. The IRS is not otherwise in possession of the summoned information, and the United States now requests the Court deny the petitions to quash. 2011 Furnas Decl. at ¶¶ 18-19, 28-29, 38-39, 48-49.

C. The Tribe's Petitions to Quash

On September 29, 2010, the Tribe filed four petitions to quash the summonses related to the 2006 through 2009 tax years. *Miccosukee Tribe of Indians v. United States (Miccosukee II)*, Nos. 10-cv-23507, 10-cv-23508, 10-cv-23509, and 10-cv-23511 (S.D. Fla.).[3] These cases were consolidated under case number 10-cv-23507-ASG. The Tribe attempted to quash the summonses by asserting tribal sovereign immunity. Additionally, the Tribe argued that the summonses were overbroad and that the summonses were improper because the IRS sought to enforce laws that are not applicable to the Tribe. Additionally, the Tribe complained that the summonses were generally issued for an improper purpose and in bad faith. After conducting an evidentiary hearing, this Court issued an Order denying the Tribe's petitions to quash on August

[3]As we have noted, the Tribe also filed a previous petition to quash on April 26, 2010. *Miccosukee Tribe of Indians v. United States*, No. 10-cv-21332-ASG (S.D. Fla.). In that case, the IRS issued a summons to a third-party bank in an investigation of the Tribe's former Chairperson Billy Crypress. In that case, the Tribe raised the same sovereign immunity argument, which the Court rejected. *Miccosukee I*, 730 F. Supp. 2d 1344, 1348 (S.D. Fla. 2010).

2, 2011. *Miccosukee II*, No. 10-cv-23507, 2011 WL 3300164 (S.D. Fla. Aug. 2, 2011). This Court determined that the summonses were issued for a proper purpose and were not overbroad. The Court additionally determined that the Tribe could not meet its burden to quash the summons and rejected the Tribe's attempted assertion of sovereign immunity. On October 10, 2011, the Tribe filed a notice of appeal. Docket entry no. 58, *Miccosukee II*, No. 10-cv-23507-ASG (S.D. Fla. Oct. 10, 2011).

On August 29, 2011, the Miccosukee Tribe of Indians filed four petitions to quash the August 9, 2011, summonses. *Miccosukee Tribe of Indians v. United States (Miccosukee III)*, Nos. 11-mc-23107-JAL,11-mc-23111-PAS, 11-mc-2112-UU, and 11-mc-23129-FAM (S.D. Fla.).[4] In each case, the United States filed a notice of related cases and an unopposed motion to consolidate. Doc. 7, No 11-mc-23107-JAL; Doc. 7, No. 11-mc-23111-PAS; Doc. 6, No. 11-mc-23112-UU; Doc. 6, No. 11-mc-23129-FAM. On October 24, 2011, case number 11-mc-23107 was transferred to Judge Alan S. Gold. Doc. 9, No. 11-mc-23107. On October 28, 2011, case number 11-mc-23111 was transferred to Judge Alan S. Gold. Doc. 11, No. 11-mc-23111. On October 31, 2011, case number 11-mc-23112 was transferred to Judge Gold. Doc. 8, No. 11-mc-23112.

In each of the four new cases, the Tribe makes identical arguments in favor of their petitions to quash. The Tribe asserts that the summonses should be quashed because (1) the summonses violate the Tribe's sovereign immunity; (2) the IRS did not give notice to individual Tribal members likely to be affected by the summonses; (3) the IRS issued the summonses for an

[4]The Tribe filed a fifth petition, case number 11-mc-23126-JAL, which was duplicative of case number 11-mc-23107. The Court dismissed this case on October 20, 2011. Doc. 6, No. 11-mc-23126.

improper purpose; and (4) the summonses are overbroad. Except for the Tribe's argument regarding notice, this Court has already rejected each of the Tribe's arguments. Because Agent Furnas's declaration meets the Powell factors listed below and because the Tribe's arguments still fail as a matter of law, this Court should deny the Tribe's petition to quash. Indeed, the Court should deny the petitions to quash because the Tribe is collaterally estopped from asserting its arguments.

Argument

I. The Summonses Meet All Standards of Applicable Law

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

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

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

> (1) the investigation has a legitimate purpose;

(2) the summoned materials may be relevant to that purpose;

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

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

Powell, 379 U.S. at 57-58; *see also United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978). This showing can be, and typically is, made through the affidavit or sworn declaration of the IRS officer who issued the summons. *See e.g.*, *In re Newton*, 718 F.2d 1015, 1019 (11th Cir. 1983); *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993); *United States v. Abrahams*, 905 F.2d 1276, 1280 (9th Cir. 1990), *overruled on other grounds by United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997); *Alphin v. United States*, 809 F.2d 236, 238 (4th Cir. 1987); *United States v. Will*, 671 F.2d 963, 966 (6th Cir. 1982). Here, the showing is made through the Furnas Declaration.[5]

A. The IRS Issued the Summonses for a Legitimate Purpose.

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

(1) assess the correctness of a return;

(2) make a return where none has been made;

[5]Although the United States does not now formally counter petition for enforcement of the summons, we nevertheless wish to demonstrate that the instant summons meets all relevant legal standards for enforceability.

> (3) determine or collect the liability of any person for any internal revenue tax; or
>
> (4) inquire into an offense connected with the administration or enforcement of the tax laws.

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

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

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

- The requirement under 26 U.S.C. § 3402(r) that the Tribe withhold taxes from certain payments of American Indian casino profits. *See* 26 C.F.R. § 31.3402(r)-1.
- The requirement under 26 U.S.C. § 3406 that the Tribe collect, account for, and pay over backup withholding for certain payments including when a payee has failed to provide the

Tribe with a taxpayer identification number and for non-employee compensation payments. *See* 26 C.F.R. § 31.3406(a).

- The requirement that the Tribe file a Form 945, Annual Return of Withheld Federal Income Tax, to report backup withholding and withholding on certain payments of American Indian casino profits. 26 U.S.C. § 6011(a); 26 C.F.R. § 31.6011(a)-4(b).

- The requirement that the Tribe properly file information returns, including Form 1099-MISC, for payments made in the course of its trades or businesses in excess of $600. *See* 26 U.S.C. §§ 6011, 6041(a) (requiring information returns for certain payments of $600 or more), 6041A(a) (requiring information returns for remuneration for certain services), 6042 (requiring information returns for payments of dividends, earnings, or profits). The Tribe could be subject to penalties for failure to file proper information returns under 26 U.S.C. § 6721.

This Court has already determined that investigation of these withholding and reporting requirements is the proper purpose of the IRS's investigation of the Tribe. *Miccosukee II*, 2011 WL 3300164, at *13-19 ("Based on the above, I find that the IRS has established that it possesses a legitimate purpose in continuing its investigation with the summonses at issue . . . .").

This Court correctly found that "[t]he Supreme Court 'has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies.'" *Id.* at *12 (quoting *United States v. Euge*, 444 U.S. 707, 711 (1980)). The Court then explained the various authorities supporting the application of the above-listed requirements to the Tribe, including 26 U.S.C. § 3402(r), which explicitly applies to "every person, including an Indian tribe." *Id.* (quoting 26 U.S.C. § 3402(r)).

While the United States need not prove that the Tribe actually failed to properly withhold taxes and report payments to justify the summons, the IRS already has strong reason to suspect

that the Tribe has failed to do so. The IRS believes from its prior investigations for the 2000 through 2005 tax years that the Tribe has failed to properly withhold from and report payments. The Tribe has continued not to file any Form 945 or remit any withholding. Against this background, the IRS has a legitimate purpose in continuing its investigation with the summonses at issue. Because the summons power extends where necessary to enforce the Internal Revenue Code and because the withholding and reporting requirements may apply to the Tribe, there is no improper purpose to the summonses.

B. The Summoned Data May Be Relevant to the Investigation

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

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

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

Determining the applicability of the Internal Revenue Code to possibly unreported Tribal payments by necessity entails examining a broad amount of information. To determine whether the Tribe properly filed Form 945's and Form 1099's, the IRS must examine what payments the

Tribe made, the amount of the payments, the payees, when payments were made, and the purpose of the payment. To determine the applicability of withholding requirements imposed on distributions from the Tribe's casino profits, the IRS must examine the source of funds for payments that the Tribe made. The summonses here request various records related to the Tribe's accounts. These documents are related to the IRS's investigation in that they help identify payments, payees, the nature of payments, and the source of the funds. 2011 Furnas Decl. at ¶¶ 17, 27, 37, 47. Such information may also serve to justify or eliminate a justification proposed by the Tribe for unreported payments.

In *Miccosukee II*, this Court examined identically worded summonses related to the same withholding and reporting requirements. *Miccosukee II*, 2011 WL 3300164, at *19-21. The Court correctly determined "that the requested materials and documents in the summonses are relevant to the purpose of the IRS's inquiry in determining whether the Tribe made necessary and proper withholding and reporting requirements." *Id.* at *21.

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

As made clear by the Furnas Declaration, the IRS does not possess the summoned information. *See* 2011 Furnas Decl. at ¶¶ 18, 28, 38, 48. The IRS also followed all procedures required by the Internal Revenue Code with respect to the summonses. *See* 2011 Furnas Decl. at ¶¶ 20, 29, 40, 50. In accordance with 26 U.S.C. § 7603, the IRS served properly attested copies of each summons on each relevant bank. 2011 Furnas Decl. at ¶¶ 11, 21, 31, 41. Additionally, in accordance with 26 U.S.C. §§ 7603 and 7609, Furnas served a copy of the summonses on the Tribe on August 9, 2011, by mailing copies, via certified mail. Furnas Decl. at ¶¶ 12, 22, 32, 42.

II. Petitioner Cannot Meet Its "Heavy Burden" to Quash the Summonses.

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

As in *Miccosukee I* and *Miccosukee II*, the Tribe attempts to quash the summonses at issue by asserting tribal sovereign immunity and that the summonses are overly broad. As this Court found in *Miccosukee II*, these arguments do not meet the "heavy burden" required to quash the summons. Nor does the Tribe's new argument that the United States did not provide it proper notice carry the Tribe's heavy burden.

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

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

Tribes retain sovereign immunity in accordance with the principles of federal common law. *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 754, 759 (1998). This immunity is not absolute and may not be invoked to prevent actions taken by the United States. *Miccosukee II*, 2011 WL 3300164, at *9-10; *Miccosukee I*, 730 F. Supp. 2d at 1348 (citing *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1135 (11th Cir. 1999); *United States v. Red*

Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir.1987); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir.1994)). This Court previously rejected the Tribe's assertion of sovereign immunity on this basis and should do so again. *See Miccosukee II*, 2011 WL 3300164, at *9-10; *Miccosukee I*, 730 F. Supp. 2d at 1348.

The Tribe continues to argue that Congress did not *waive* its tribal sovereign immunity with regard to IRS summonses. The Court has pointed out one major flaw in this argument: that where no sovereign immunity exists to protect the Tribe, no waiver or abrogation is required. *Miccosukee I*, 730 F. Supp. 2d at 1348 (citing *Paraplegic*, 166 F.3d at 1134).[6] Because the concept of tribal sovereign immunity is inapplicable to this case, the Court need not find a waiver of tribal sovereign immunity to apply summons laws to the Tribe, and as established above, there is sufficient intent discernable in the statute to apply the summons laws in this case.

2. Sovereign Immunity Does Not Extend to Third Party Recordkeepers

Another reason the Tribe may not invoke sovereign immunity to protect it from the summonses is that a summons to the Tribe's third party recordkeepers is not a suit against the Tribe. Sovereign immunity as an overall concept applies only to proceedings "against the sovereign;" the immunity does not extend to a tribe's third party recordkeeper. *See United States Environmental Protection Agency v. General Elec. Co.*, 197 F.3d 592 (2d Cir. 1999). "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v.*

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

Rank, 372 U.S. 609, 620 (1963), *cited in Miccosukee I*, 730 F. Supp. 2d at 1349 n.7 (internal citations and quotation marks omitted); *cf. Fisher v. United States*, 425 U.S. 391, 397 (1976) (for purposes of the Fifth Amendment, a summons to a taxpayer's lawyer as a third party recordkeeper does not 'compel' the taxpayer to do anything, including, in that case, to incriminate himself); *Allen v. Woodford*, 543 F. Supp. 2d 1138, 1144 (E.D. Cal. 2008). The IRS issued the summonses to (and thus sought to compel the action of) third party recordkeepers for records within those recordkeepers' custody and control. The banks are not a "tribe" or a "tribal officer." Therefore, the Tribe in not being restrained from doing or compelled to do anything, and the summonses do not impinge upon the Tribe's sovereign immunity.

B. The Summonses Are Not Overly Broad

While the IRS's summons authority has been described as a license to fish, *United States v. Luther*, 481 F.2d 429, 432-33 (9th Cir. 1973) ("Sec. 7602 authorizes the Secretary or his delegate 'to fish'"); *United States v. Giordano*, 419 F.2d 564, 568 (8th Cir. 1969) ("Secretary or his delegate has been specifically licensed to fish by § 7602"), this license is not without limit. The IRS may not conduct an unfettered "fishing expedition" through a person's records, but "must identify with some precision the documents it wishes to inspect." *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967). Thus, in testing for overbreadth, the question is not whether the summons calls for the production of a large volume of records. Instead, under Eleventh Circuit case law, "[a]n IRS summons is overbroad if it does not advise the summoned party what is required of him with sufficient specificity to permit him to respond adequately to the summons." *United States v. Medlin*, 986 F.2d 463, 467 (11th Cir. 1993) (citation and internal quotation marks omitted). Summonses that are definite in nature and finite

in scope, and that request only information that may be relevant to the IRS's inquiry, consistently have been enforced against challenges for overbreadth. *See, e.g.*, *United States v. Reis,* 765 F.2d 1094, 1096 n.2 (11th Cir. 1985); *United States v. Linsteadt*, 724 F.2d 480, 483 n.1 (5th Cir. 1984); *United States v. Cmty. Fed. Sav. & Loan Ass'n*, 661 F.2d 694 (8th Cir. 1981); *United States v. Nat'l Bank of South Dakota*, 622 F.2d 365 (8th Cir. 1980).

By these standards, the summonses at issue are not overly broad. The summonses describe the documents sought, specifically documents in possession of the banks reflecting the nature of debits and credits to the Tribe's account. The summonses clearly state the applicable time period, the 2010 tax year. Furthermore, the United States has already demonstrated how the summoned materials may be relevant to its investigation and that the IRS has a legitimate purpose for seeking these documents. Given the nature of the IRS's suspicions, there is simply no other way for the IRS to investigate Tribal payments other than through an inspection of these particular tribal account records. There is no way to narrow the summonses while still achieving these necessary ends. This Court previously found that identically worded summonses were not overbroad, *Miccosukee II*, 2011 WL 3300164, at *21, and should do so again.

C. The IRS Provided Proper Notice

The only new argument in the Tribe's petitions to quash is its assertion that the IRS should have provided notice to unknown individual Tribal members who may be affected by the summonses. Treas. Reg. §301.7609-2 provides, in relevant part, that the Service "shall give notice of a third-party summons to any person, other than the person summonsed, who is identified in the summons." Such identification would be in the "description of summonsed records or testimony." *Id.* As an example of this identification, the Regulation provides that if

the Service "issues a summons to a bank with respect to the liability of C that requires the production of account records of A and B, both of whom are named in the summons, the (Service) must notify A, B and C of the summons." *Id.*

None of the August 9, 2011, summonses name anyone other than the Tribe. It is not the records of individual tribal members that are being sought; rather, it is the records of the Tribe that are sought. Moreover, the examination for which the summonses were issued is of the Tribe's reporting and withholding requirements for the year 2010. Since no individual tribal member is named anywhere on any of the summonses and the Tribe was provided with the notice required under section 301.7609-2, the Service has fully complied with the notice requirements under this Regulation.

III. The Tribe Is Collaterally Estopped from Bringing its Petitions

Additionally, the Court should find that the Tribe is collaterally estopped from bringing its petitions to quash which are based on the same allegations previously rejected. "Collateral estoppel or issue preclusion forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit." *I.A. Durbin, Inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). The prerequisites for applying collateral estoppel are:

> (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id. (citing *Hart v. Yamaha-Parts Distributors, Inc*., 787 F.2d 1468, 1470 (11th Cir.1986); *Ray v. Tennessee Valley Authority*, 677 F.2d 818, 821 (11th Cir.1982)). These rules precluding parties

from contesting matters that they have had a full and fair opportunity to litigate protects adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Here, the Court should apply collateral estoppel to preserve judicial resources relitigating an issue that has already been decided and to prevent the Tribe from improperly delaying and impeding the IRS's investigation.

The Court should apply collateral estoppel to issues actually litigated in the prior suit. As noted above, this Court previously determined (1) that tribal sovereign immunity is inapplicable to summonses issued to the Miccosukee Tribe, *Miccosukee II*, 2011 WL 3300164, at *9-10, (2) that issuing summonses to determine whether the Tribe met its withholding and reporting requirements is a proper purpose, *id.* at *19, (3) that identically worded summonses sought evidence relevant to the Tribe's withholding and reporting requirements, *id.* at *19-20, and (4) that identically worded summonses were not overbroad, *id.* at *21. The Court's determinations were actually litigated[7] and were a necessary and critical part of the Court's judgment that the Tribe could not quash the earlier summonses. Given that the Court held a hearing and took the rare step of granting the Tribe discovery in *Miccosukee II*, there are no factors suggesting that the Tribe did not have a full and fair opportunity to previously litigate these issues. Because the Tribe previously litigated the above-listed issues, it is precluded from raising them now.

[7]Under federal law, the existence of a pending appeal does not affect a judgment's preclusive effect. *E.g.*, *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (D.C. Cir. 1983).

IV. The Tribe Is Not Entitled to Discovery or a Hearing

As with the previous cases, the Tribe requests a hearing and discovery. The Tribe claims it is entitled to a hearing based on its "mere allegation of abuse without alleging a factual background or providing a supporting affidavit." *E.g.*, Doc. 1, at 24, 11-mc-23107. The Court should exercise its discretion to deny a hearing and find that the Tribe has failed to meet the standard entitling it to discovery.

A. The Tribe Is Not Entitled to a Hearing

The Tribe is not entitled to an evidentiary hearing in this case. Indeed, the Tribe essentially admits this when it argues that the propriety of the summons may be determined "on its face." *Id.* The Tribe may be entitled to a "limited adversarial hearing" and an explanation of the Service's reasons for issuing the summons, but "the scope of any adversarial hearing in this area is left to the discretion of the district court." *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009). The limited adversarial hearing must provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an *adversarial* hearing does not require an *evidentiary* hearing. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324 n.7 (1985) (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary").[8] Significantly, the

[8]In other contexts, courts have distinguished adversary hearings and evidentiary hearings. *See Gonzales v. Galvin*, 151 F.3d 526, 534 35 (6th Cir. 1998) (holding that hearing required for approval of consent decree need not be evidentiary); *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 106 n.22 (D.C. Cir. 1977) (recognizing that an evidentiary hearing is only one of several forms that the adversary proceeding for enforcement of FTC administrative subpoenas can take); *FTC*

Eleventh Circuit faulted the district court in *Nero* for inadequately *explaining* its decision not to hold an evidentiary hearing, not for failing to hold one. *Id.* at 1250.[9] This Court should exercise its discretion to deny the Tribe an evidentiary hearing.

This case presents an ideal set of facts for the Court to exercise its discretion not to hold an evidentiary hearing. In *Miccosukee II*, the Tribe made identical allegations regarding the general impropriety and bad faith of the IRS's investigation. The Court granted the Tribe both discovery and a hearing. Ultimately, the Court determined that the summonses were proper. The Court was able to see, first hand, the professionalism and seriousness with which Agent Furnas approaches his responsibilities. The allegations regarding the present summonses involve the same nucleus of operative facts. Granting a hearing under these circumstances would be a waste of the Court's and the IRS's limited resources. Indeed, those very purposes support the principle

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v. MacArthur, 532 F.2d 1135, 1141 (7th Cir. 1976) (distinguishing adversary hearing from evidentiary hearing in context of FTC subpoenas).

[9]*Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. To do so would put the opinion at odds with the Supreme Court. In *Tiffany Fine Arts, Inc. v. United States*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the taxpayer." 469 U.S. 310, 324 n.7 (1985) ("We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary.").

of collateral estoppel, which applies here.[10] Forcing the United States to present evidence at an evidentiary hearing will serve no purpose but to delay the IRS's examination of the Tribe.[11]

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[10]This Court would be well within its discretion to hold that the Tribe has already had its adversary hearing—in *Miccosukee II*—and is not entitled to another merely to advance the same rejected arguments, especially in what should be a summary proceeding. *See United States v. Stuart*, 489 U.S. 353, 369 (1989)

[11]While the United States does not believe the Eleventh Circuit's decision in *Nero* requires an evidentiary hearing upon a bare allegation of improper purpose, to the extent that it suggests that one is required, the United States' position is that *Nero* was wrongly decided. *Nero* is based on pre-TEFRA case law that does not take into account the Congressional mandate to ensure that these are summary proceedings. *Nero Trading*, 570 F.3d at 1249 (citing *United States v. Southeast First Nat'l Bank*, 655 F.2d 661 (5th Cir. 1981)). The Fifth Circuit has cited the same case cited by the *Nero* Court—*Southeast First National Bank*—to arrive at the opposite conclusion, that 26 U.S.C. § 7602 does not require an evidentiary hearing. *Zugerese Trading LLC v. Internal Revenue Serv.*, 336 Fed.Appx. 416, 419 (5th Cir 2009) (citing *Southeast First Nat'l*, 655 F.2d at 667-68). More significantly, as shown, *supra*. at note 8, the Supreme Court in *Tiffany Fine Arts, Inc.*, expressly held that a district court has the discretion to deny an evidentiary hearing. Finally, no other circuit requires an evidentiary hearing on a mere allegation of improper purpose. *See United States v. Judicial Watch, Inc.*, 371 F.3d 824, 830 31 (D.C. Cir. 2004); *United States v. Gertner*, 65 F.3d 963, 967 (1st Cir. 1995); *Copp v. United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992); *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd*, 469 U.S. at 324 n.7; *United States v. Garden State Nat'l Bank,* 607 F.2d 61, 71 (3d Cir. 1979); *Hintze v. IRS*, 879 F.2d 121, 126 27 (4th Cir. 1989), *overruled on other grounds sub nom. Church of Scientology of California v. United States*, 506 U.S. 9 (1992); *United States v. Will*, 671 F.2d 963, 968 (6th Cir. 1982); *Kis*, 658 F.2d at 539-40; *United States v. Nat'l Bank of South Dakota*, 622 F.2d 365, 367 (8th Cir. 1980); *Fortney v. United States*, 59 F.3d 117, 121 (9th Cir. 1999); *United States v. Balanced Fin. Mgmt*., 769 F.2d 1440, 1444-45 (10th Cir. 1985). To the extent *Nero* requires an evidentiary hearing based on the Tribe's unexplained and unsubstantiated allegations and we do not believe it does, *Nero* was wrongly decided and does not represent the standard applicable in the rest of the country. *E.g., Sugarloaf Funding, LLC v. U.S. Dept. Of The Treasury*, 584 F.3d 340, 343 (1st Cir. 2009) ("In order to proceed to an evidentiary hearing, a taxpayer must make a sufficient threshold showing that there was an improper purpose behind an IRS summons. To make this showing, the taxpayer must do more than allege an improper purpose; he must introduce evidence to support his allegations." (internal citation omitted)).

B. The Tribe Is Not Entitled to Discovery

The Tribe has not even approached a showing that it is entitled to discovery in this case. Generally, in a civil action, discovery is allowed as to any matter relevant to a party's claim or defense. Fed. R. Civ. P. 26. The standard for discovery in the summons context is much more circumscribed. *Cf. United States v. McCoy*, 954 F.2d 1000, 1004 (5th Cir. 1992). Given the summary nature of these proceedings, taxpayers are not entitled to discovery as a matter of course. *See Nero Trading, LLC v. United States Dept. of Treas.*, 570 F.3d 1244, 1249 (11th Cir. 2009); *Judicial Watch*, 371 F.3d at 830 (requiring a showing of extraordinary circumstances). In order to obtain discovery, a taxpayer must make "a substantial preliminary showing that enforcement of the summons would result in an abuse of the court's process" and that "discovery would likely lead to useful, relevant evidence." *Robert v. United States*, 364 F.3d 988, 999-1000 (8th Cir. 2004). If traditional discovery is granted at all, it is only *after* the taxpayer's adversarial hearing in which the taxpayer must establish the need for discovery. *See United States v. Harris*, 628 F.2d 875, 882 (5th Cir. 1980); *United States v. Garrett*, 571 F.2d 1323, 1326-27 (5th Cir. 1978); *United States v. Wright Motor, Inc.*, 536 F.2d 1090, 1095 (5th Cir. 1976); *cf. Nero Trading*, 570 F.3d at 1250 ("[W]e simply refuse to create a rule that would require [a] taxpayer to allege a factual background before he is entitled to the initial, basic discovery *provided by an adversary hearing*."(emphasis added)). The Tribe must have at least a single particular basis for discovery before the Court grants its discovery request. Here, it does not.

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2011, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, via transmission of Notices of Electronic Filing generated by CM/ECF or other approved means.

/s/ William E. Farrior
WILLIAM E. FARRIOR