IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 11-14825-BB

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner-Appellant,

v.

UNITED STATES,

Respondent-Appellee,

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 10-cv-23507-ASG

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S APPELLANT BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

As Appellant, the Miccosukee Tribe of Indians of Florida certifies that the following persons and entities have an interest in the outcome of this litigation:

Gold, Honorable Alan S., District Court Senior Judge

Alexander, Craig, Chief, Indian Resources Section, Environment and Natural Resources Division, U.S. Department of Justice

American Express Company, Summonee

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Blaha, Amber, Assistant Section Chief, Law & Policy Section, Environment and natural Resources Division, United States Department of Justice

Citibank (South Dakota) N.A., Summonee

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Turner, John, Assistant Chief, Indian Resources Section, Environment and Natural

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United States of America, Appellee

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There are no publicly traded companies with an interest in the outcome of this matter.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, the Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe") respectfully requests oral arguments because it may assist the Court in the adjudication of the highly important issues presented in this case.

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STATEMENT OF JURISDICTION

The Court has jurisdiction of the appeal of the District Court's August 2, 2011 Order pursuant to 28 U.S.C. § 1291 and 26 U.S.C. § 7609(h)(1).

STATEMENT OF THE ISSUES

1. Whether the Internal Revenue Service has the Congressional authority to issue a summons seeking to obtain the governmental financial records of a federally recognized Indian tribe when
    a. Congress has not expressly and unequivocally abrogated the Tribe's sovereign immunity; and
    b. The Miccosukee Tribe has not waived tribal sovereign immunity.
2. Whether the IRS had a proper purpose when it issued the summonses to obtain financial governmental records of the Miccosukee Tribe.
3. Whether the IRS summonses are overbroad and as result must be quashed.

STATEMENT OF THE CASE

Federal Recognition of the Miccosukee Tribe and Interaction with the United States Government

The Miccosukee Tribe was originally part of the Creek Nation, and then migrated to Florida before it became part of the United States. See Miccosukee Tribe of Indians of Florida at http://www.miccosukee.com/tribe, (last visited on January 13, 2012). The Miccosukee Tribe was officially recognized as the Miccosukee Tribe of Indians of Florida by the United States Secretary of the Interior when it approved the Miccosukee Constitution and the Tribe on January 11, 1962. *Id.* This legally established the Miccosukee Tribe's status as a sovereign, domestic nation with the United States Government. *Id.* A government to government relationship developed as a result of the official recognition.

IRS Investigation of the Miccosukee Tribe

In 2005 the Internal Revenue Service (hereinafter, "IRS") commenced its investigation of the Miccosukee Tribe, after it "learned that the Tribe regularly distributed payments to tribal members without reporting these distributions to the IRS." Furnas Dec., D.E. No. 16-1 ¶ 4. Based on this information, the IRS conducted an investigation to determine whether the Tribe met its reporting and withholding requirements for the years 2000 through 2005. *Id.* ¶ 5; *see also* D.E, 38 (Transcript of February 17, 2011 Evidentiary Hearing (hereinafter, "Tr.")) at 8:18-9:4. This examination was extended to years 2006 through 2009 because

"[t]he IRS believes that similar payments were made by the Tribe for 2006, 2007, 2008, and 2009 and that the Tribe did not withhold from or report the payments as required." D.E. No. 16-1 ¶6; *see also* Furnas Depo. at 16:15-17:6; 103:9-14.

Procedural History

Consequently, On September 10, 2010, the IRS issued summonses to Morgan Stanley Smith Barney (hereinafter, "Morgan Stanley"), Wachovia Bank, (hereinafter, "Wachovia"), Citibank (South Dakota) N.A. (hereinafter, "Citibank"), and American Express Company (hereinafter, "Amex") requesting tribal financial records. The summonses sought detailed financial information for the years 2006 through 2009. The summonses purported to relate to an investigation of the Miccosukee Tribe.

On September 29, 2010, pursuant to 26 U.S.C. § 7609(b)(2), the Miccosukee Tribe filed Petitions to Quash IRS Summonses to Morgan Stanley (District Court Case No. 10-CV-23507,D.E No. 1), Wachovia Bank (District Court Case No. 10-CV-23511, D.E No. 1), Amex (District Court Case No. 10-CV-23509, D.E No. 1), and Citibank (District Court Case No. 10-CV-23508, D.E No. 1). The District Court later consolidated these cases into 10-CV-23507. *See* Case No. 10-CV-23507, D.E. No. 8.

The Miccosukee Tribe challenged the IRS summonses on several grounds, including sovereign immunity, bad faith, improper purpose, overbreadth, and

irrelevance. On December 15, 2010, the Government filed its Motion to Deny Petition to Quash. *See* 10-CV-23507, D.E. No. 16, 10-CV-23508, D.E. No. 11, 10-CV-23509, D.E. No. 11, and 10-CV-23511, D.E. No. 15. The Miccosukee Tribe responded by disputing the IRS' authority to issue the summonses on the same grounds it had stated in the Petition to Quash IRS Summons. *See* Petitioner Miccosukee Tribe of Indians of Florida's Response in Opposition to the United States' Motion to Deny Petition to Quash, 10-CV-23507, D.E. No. 33. Additionally, the Miccosukee Tribe argued that the IRS was already in possession of the requested documents. *Id.*

The Miccosukee Tribe filed a Motion to Request Discovery on December 15, 2010, seeking a deposition of IRS Agent James A. Furnas, interrogatories, a request for production and an adversary evidentiary hearing. *See* D.E. No. 17.[1] After the Government's Response and the Tribe's Reply, the District Court granted the Miccosukee Tribe's request for a deposition of IRS Agent Furnas and for an adversary evidentiary hearing, which took place as set by the Court. *See* D.E. Nos. 20, 30.

On August 2, 2011, the District Court entered its Order Granting United States' Motion to Deny Petitions to Quash; Findings of Fact and Conclusions of Law. *See* D.E. No. 52. In the Order, the court first addressed the issue of tribal

[1] References to D.E. will refer to Lead/Consolidated Case No. 10-CV-23507.

sovereign immunity and rejected its application as a defense to the issuance or enforcement of the summonses seeking tribal financial records. *See id.* at 18-22. Next, the Court determined that the United States had met its prima facie burden under the analytical framework set out in *United States v. Powell*, 379 U.S. 48 (1964) and found that "the Government has met its burden to demonstrate that it has met all four prongs required under a *Powell* analysis through, *inter alia*, the declaration of Agent Furnas." D.E. No. 52 at 17.

On August 30, 2011, the Miccosukee Tribe filed its Motion to Reconsider the District Court's Order of August 2, 2011 and sought a stay while the Court decided the Motion to Reconsider. D.E. No. 53. The Miccosukee Tribe asked the court to reconsider the analytical framework within which it had analyzed the issues and to consider that the case was different from the cases used to support the court's decision. *See generally id.* The court, however, found that none of the arguments presented by the Miccosukee Tribe served as a basis to grant the motion and denied the Motion to Reconsider as well as the Motion to Stay as moot. D.E. No. 55 at 4.

Subsequently, on October 10, 2011, the Miccosukee Tribe filed its Notice of Appeal to this Court from the District Court's final Order of August 2, 2011, which denied the assertion of sovereign immunity among other things. *See* D.E. No. 58. On the same day the Miccosukee Tribe filed a Motion to Stay the court's Order of

August 2, 2011 pending the resolution of the appeal to this Court in order to protect the status quo and maintain the records of the Miccosukee Tribe confidential. *See* D.E. No. 59. After oral arguments were heard on November 7, 2011, the Court issued an Order Denying the Miccosukee Tribe's Motion to Stay Pending Appeal; Ordering a partial Stay. *See* D.E. No. 69. The court concluded that the Miccosukee Tribe had failed to meet its burden to show that "(1) it has a substantial likelihood of success on the merits; (2) it will suffer irreparable injury unless the stay issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the stay would not be adverse to the public interest." *Id.* at 2. The court granted a partial stay until November 22, 2011 to allow the Miccosukee Tribe to seek relief pursuant to FED. R. APP. P. 8 with this Court. *Id.* at 5. The Miccosukee Tribe's Motion to Stay Pending Appeal is currently pending before this Court.

SUMMARY OF THE ARGUMENT

The IRS issued summonses that seek financial documents and information of the Miccosukee Tribe allegedly under the authority of the Internal Revenue Code. The district court's conclusion that the Miccosukee Tribe was barred from using sovereign immunity as a defense against the Summonses issued by the IRS is incorrect and is reviewed by this Court *de novo*. Additionally, the district court erroneously concluded that Indian tribes can never assert sovereign immunity against the United States, including federal agencies and agents because unless Congress expressly authorizes the abrogation of such immunity, Indian tribes enjoy sovereignty and sovereign immunity.

Courts have long recognized that Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. . *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1700, (1978). A tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1285 (11th Cir. 2001). 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. *State of Fla. v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999) (citing *Fla. Paraplegic Ass'n*, 166 F.3d at 1131).

In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002), the court stated that rules of statutory construction generally "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when the Indian rights are to be abrogated or limited." *Id.* (citing F. Cohen, *Handbook of Federal Indian Law* at 225). Doubtful or ambiguous expressions in statutes are to be construed as leaving tribal sovereignty undisturbed. *Id.* at 1194. In other words, "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). A waiver or abrogation of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *See, e.g. Santa Clara Pueblo*, 436 U.S. at 58-59.

This immunity extends to legal process such as warrant, subpoenas and summons. See e.g. *NGV Gaming, LTD.* v. *Upstream Point Malate, 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).

In *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), the 9th Circuit held that the Indian tribe was immune from the subpoena processes of the federal

district court because it possessed tribal immunity at the time the subpoena was served.

The Miccosukee Tribe has not clearly and unequivocally waived its protection from summons proceedings in this case. Nor has Congress abrogated the Miccosukee Tribe's immunity because the provisions that authorize the IRS to issue summons do not meet the strict abrogation test as explained by this Court and as such the Miccosukee Tribe is not subject to the summons authority of the IRS. The provisions that authorize the IRS to issue summonses to obtain records do not indicate an unequivocal and clear intent from Congress to subject Indian tribes to the summons process.

The IRS summonses have no proper purpose because the Miccosukee Tribe is exempt from income taxes. Additionally, the IRS has an improper purpose, which is to harass and force the Miccosukee Tribe and its members to settle a collateral matter.

Finally, even assuming that the Summons was issued for a proper purpose, which it was not, the manner in which the Summonses are written is so blatantly overbroad and improperly invasive as to render them otherwise unenforceable.

Standard of Review

The Court reviews *de novo* a ruling by a district court regarding the issue of a sovereign's immunity from suit. *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1128 (11th Cir. 1999); *see also Trimble v. United States Social Security*, 369 F.App'x 27, 30 (11th Cir. 2001) (stating that the Court reviews *de novo* a district court's determination as to whether sovereign immunity applies.) (citing *United States v. 1461 W. 42nd St., Hialeah, Fla.* 251 F.3d 1329, 1334 (11th Cir. 2001)) (district court's dismissal finding immunity absent express waiver reviewed *de novo*); *Tamiami Partners, Ltd. Ex rel. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1224 (11th Cir. 1999) (citing *Tinney v. Shores*, 77 F.3d 378, 383 (11th Cir. 1996)) (issue of Tribe's immunity from suit was a question of law reviewed *de novo*).

The Court reviews for clear error the district court's ruling that the IRS has met the requirements for enforcement of its summons. *United States v Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995) (citing *United States v. Abrahams, 905 F.2d 1276, 1280 (9th Cir.1990)).* "Review under the clearly erroneous standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" *Blackman*, 72 F.3d at 1422 (citing *Concrete Pipe & Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623, 113 S.Ct. 2264, 2280, (1993)). "If the district court's account of the evidence is plausible in light of the

record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Blackman*, 72 F.3d at 1422 (citing *Service Employees Int'l Union v. Fair Political Practices,* 955 F.2d 1312, 1317 n. 7 (9th Cir.), *cert. denied*, 505 U.S. 1230, 112 S.Ct. 3056, (1992)).

ARGUMENT

I. THE IRS LACKS THE CONGRESSIONAL AUTHORITY TO ISSUE A SUMMONS SEEKING TO OBTAIN THE GOVERNMENTAL FINANCIAL RECORDS OF THE MICCOSUKEE TRIBE BECAUSE CONGRESS HAS NOT EXPRESSLY AND UNEQUIVOCALLY ABROGATED THE TRIBE'S SOVEREIGN IMMUNITY AND THE MICCOSUKEE TRIBE HAS NOT WAIVED IT

The IRS issued summonses that seek financial documents and information of the Miccosukee Tribe allegedly under the authority of the Internal Revenue Code (hereinafter, "IRC"). *See* Summonses (citing IRC §§ 7602-7605, 7610, 7210). The District Court's conclusion that the Miccosukee Tribe was barred from using sovereign immunity as a defense against the summonses issued by the IRS is incorrect and is reviewed by this Court *de novo*. Additionally, the District Court erroneously concluded that Indian tribes can never assert sovereign immunity against the United States, including federal agencies and agents because unless Congress expressly authorizes the abrogation of such immunity, Indian tribes enjoy sovereignty and sovereign immunity.

A. The Miccosukee Tribe As An Indian Tribe Enjoys Sovereignty And Sovereign Immunity From Suit

Courts have long recognized that Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1700, (1978). The sovereign nature of Indian tribes has been recognized since *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832), and subsequently reaffirmed by the United States Supreme Court. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894 (1982) ("Indian tribes within 'Indian country' are… 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'"). Indian tribes enjoy immunity because they are sovereigns predating the United States Constitution, and tribal sovereign immunity is necessary to preserve autonomous tribal existence. *See generally United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 60 S.Ct. 553 (1940).

The Court has explained that "in a line of cases decided over a period of 150 years, the Supreme Court has recognized that Indian tribes "retain[ ] their original natural rights" which vested in them, as sovereign entities, long before the genesis of the United States. *Fla. Paraplegic*, 166 F.3d at 1130 (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)) (footnote omitted); *Peña v. Miccosukee Service Plaza*, 2000 WL 1721806, at *2 (S.D. Fla. July 25, 2000). Tribal sovereign immunity is a matter of federal law and as such is not subject to diminution by the

States. *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700 (1998). The protection for Indian tribes extends to commercial activities on and off the reservation. *Id.* at 754-55.

A tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1285 (11th Cir. 2001) (citing *Kiowa Tribe of Okla*., 523 U.S. at 754); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905 (1991) ("Suits against Indian tribes are [thus] barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); *State of Fla. v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999) ("A suit against an Indian tribe is barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit."); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1038 (11th Cir. 1995).

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. *Seminole Tribe*, 181 F.3d at 1241 (citing *Fla. Paraplegic Ass'n*, 166 F.3d at 1131). "Congress abrogates tribal immunity

only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act." *Fla. Paraplegic*, 166 F.3d at 1131. Additionally, courts should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation. *Fla. Paraplegic*, 166 F.3d at 1130. In *Seminole Tribe* the Court stated:

> 'Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.' *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). A suit against an Indian tribe is therefore barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999).

Seminole Tribe, 181 F.3d at 1241-42.

In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002), the court stated that rules of statutory construction generally "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when the Indian rights are to be abrogated or limited." *Id.* (citing F. Cohen, *Handbook of Federal Indian Law* at 225). Doubtful or ambiguous expressions in statutes are to be construed as leaving tribal sovereignty undisturbed. *Id.* at 1194. . In other words, "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).

In *Freemanville Water Systems*, the Court explained the level of clarity that must be evident from the statutory language:

> Indian tribes have sovereign immunity from lawsuits unless Congress has abrogated it in the statute creating the right of action that is asserted against the tribe. To be effective the expression of congressional intent must be a clarion call of clarity. Ambiguity is the enemy of abrogation…

Freemanville Water System, Inc. v. Poarch Bank of Creek Indians, 563 F.3d 1205, 1205 (11th Cir. 2009) ("When Congress intends to abrogate tribal sovereign immunity, it must do so expressly, with clear and unequivocal language.").

A waiver or abrogation of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *See, e.g. Santa Clara Pueblo*, 436 U.S. at 58-59 (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948 (1976); *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501 (1969)). The court in *Seminole Tribe of Fla.*, confirmed that a waiver of immunity by a tribe would not and could not be implied on the basis of a tribe's actions but must be unequivocally expressed. *181 F.3d* at 1242 (stating that the tribe's election to engage in gaming subject to regulation under the Indian Gaming Regulatory Act did not waive the tribe's immunity).

B. Tribal Sovereign Immunity Protects The Miccosukee Tribe From A Summons Issued By The IRS To Obtain Confidential Financial Records Of The Miccosukee Tribe's Government

Tribal sovereign immunity extends to legal process such as warrant, subpoenas and summons. *See e.g. NGV Gaming, LTD. v. Upstream Point Malate, 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)).

In *United States v. James,* 980 F.2d 1314 (9th Cir. 1992), the 9th Circuit held that the Indian tribe was immune from the subpoena processes of the federal district court because it possessed tribal immunity at the time the subpoena was served. James, a defendant in a criminal case, pursuant to a federal statute that allows prosecution of criminal acts committed in Indian country, was seeking to obtain records of a tribal member that were in the possession of the Quinault Indian Nation. *Id.* at 1319. James argued that the tribe's sovereign immunity did not release the Tribe from the obligation of having to comply with a subpoena of the district court. *Id.* Under the doctrine of tribal sovereign immunity, the court engaged in the two prong analysis established by the United States Supreme Court in a long line of cases. *See e.g. United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079 (1978). After analyzing whether Congress had abrogated the tribe's immunity when it enacted the criminal statute, the court concluded that the criminal statute did not contain "an express and unequivocal waiver of immunity"

because "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced." *James*, 980 F.2d at 1319. Furthermore, the court stated that "the fact that Congress grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's sovereign immunity." *Id.*

Eleven years later, the 9th Circuit confirmed its holding in *James* when it decided *Bishop Paiute Tribe v. Cnty. of Inyo*, 291 F.3d 549 (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 referring to the relevance of the *James'* holding to the case, the court stated that "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." *Id.* at 558.

In *In Re Matter of Grand Jury Subpoenas* (FGJ 97-7), *unsealed and redacted Order* (S.D. Fla. July 11, 1998), the court held that Indian tribes, their agencies and employees working in their official capacity were immune from the processes of federal courts, including compulsory process, unless their immunity has been waived. *Id.* at 2 (citing *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992)). Indeed, the court stated that "the mere fact that a statute, ... , grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's

sovereign immunity." *Id.* at 3 (citing *James*, 980 F.2d at 1319). The court explained that "while the argument that issuing subpoenas is simply a procedural vehicle to effectuate Congress' clear intent to expose individual Indians to prosecution may have merit, § 1153(a) simply does not contemplate exposing the Tribe as a whole to the process of federal courts." *Id.* Likewise, the court found that 18 U.S.C. §1169 and 25 U.S.C. §§ 3201 et seq., although requiring the reporting of incidents, "do not require the Tribe to turn over internal records upon order of a grand jury subpoena," because they "do not expressly waive the Tribe's Immunity." *Id.* Consequently, the Miccosukee Tribe's sovereignty and sovereign immunity protects it from disclosure by a third party of its confidential financial records because it applies to summons proceedings.

1. The Miccosukee Tribe has not waived its immunity

The Miccosukee Tribe has not clearly and unequivocally waived its protection from summons proceedings in this case. The Miccosukee Tribe has contested the release of third party records for the years 2006 through 2009 from the moment it received the IRS summonses. As a matter of fact, the Miccosukee Tribe has clearly asserted tribal sovereign immunity from the day it filed its Petition to Quash IRS Summons to Morgan Stanley Smith Barney for Records of the Miccosukee Tribe in the Court below. *See* Case No. 10 Civ. 23507, D.E. No. 1, filed on September 29, 2010.

2. Congress did not abrogate the Miccosukee Tribe's Immunity when it enacted the IRC sections that authorize the IRS to issue summons to obtain tribal records

The provisions that authorize the IRS to issue summons do not meet the strict abrogation test as explained by this Court and as such the Miccosukee Tribe is not subject to the summons authority of the IRS. In *Bishop Paiute Tribe*, the 9th Circuit stated that "that the federal government may not pierce the sovereignty of Indian tribes, notwithstanding its constitutionally preemptive authority over Indian affairs, carries considerable weight in our review of this case." 291 F.3d at 558. This last statement is in direct conflict with the position of the United States and the district Court below. Both the United States and the district court relied on a statement made by this Court in *Fla. Paraplegic*: "tribal sovereign immunity does not bar suits by the United States." United States' Response in Opposition to Pet. Miccosukee Tribe of Indians of Florida's Mot. to Stay Pending Appeal at 3, [D.E. No. 64]; *see also* Order Granting United States' Motion To Deny Petitions To Quash [Ecf No. 16]; Findings Of Fact And Conclusions Of Law at 19 ¶ 13, [D.E. No. 52].

In *Florida Paraplegic*, the Eleventh Circuit held that Title III of the Americans with Disabilities Act (hereinafter, "ADA") applies to Indian tribes, but that tribal sovereign immunity does not allow a private right of action against Indian tribes who allegedly have failed to comply with the requirements of the act

in the absence of an express waiver from Congress. *Florida Paraplegic*, 166 F.3d at 1133-1134. The court reasoned: "The Supreme Court repeatedly has emphasized that Congress may abrogate this sovereign immunity only by unequivocal expression in the language of the relevant statute." *Id.* at 1134. The court further explained: "Although the omission of this remedy may seem inconsistent with the rights granted by Title III, and even patently unfair, '[i]mmunity doctrines inevitably carry within them the seeds of occasional inequities…. Nonetheless, **the doctrine of tribal immunity reflects a societal decision that tribal autonomy predominates over other interests.**'" [Emphasis added]. *Id.* at 1134 (quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 761 (D.C.Cir. 1986)).

The Court, while discussing the effect of tribal immunity on remedies for a violation of Title III of the ADA, stated that "Title III applies to Indian tribes; moreover, '[t]ribal sovereign immunity does not bar suits by the United States.'" *Fla. Paraplegic*, 166 F.3d at 1135 (citing *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir.1996) (citing *Quileute Indian Tribe v. Babbitt*,18 F.3d 1456, 1459–60 (9th Cir.1994)). However, an analysis of the case shows that the statement relied on by the United States and the district court is only dicta and not the binding law of this circuit.

The Court in *Fla. Paraplegic* repeatedly and clearly stated that the issue before the Court was whether the Miccosukee Tribe could be sued by a private

entity alleging a violation of the ADA. *Fla. Paraplegic*, 166 F.3d at 1127, 1130, 1131. The Court answered this question in the negative. It held "that Congress has not abrogated tribal sovereign immunity with respect to this statute so as to allow a private suit against an Indian tribe." *Id.* at 1127. The Miccosukee Tribe argued that even though the ADA was a statute of general applicability, one of the exceptions to the rule applied to the Miccosukee Tribe and thus the Miccosukee Tribe could not be sued for an alleged violation of a statute that did not apply to it. *Id.* at 1128. The court disagreed and found that none of the exceptions applied to the facts before the Court and that the ADA applied to Indian Tribes. *Id.*

However, the Court clearly stated that "a statute can apply to an entity without authorizing private enforcement actions against that entity." *Id.* The Court reasoned that the analysis does not stop at determining if a statute is a generally applicable statute because "whether an Indian tribe is subject to a statute and whether the Tribe may be sued for violating the statute are two entirely different questions." *Id.* at 1130. The Court further explained that "this principle, which simply spells out the distinction between a right and a remedy, applies with equal force to federal laws." *Id.* An Indian tribe is only subject to suit when Congress abrogates tribal immunity with definitive language in the statute, which states an intent to "either abolish Indian tribe's common law immunity or to subject tribes to suit under the act." *Id.* at 1131. In conducting this analysis, the Court found that

"an examination of Title III of the ADA reveals that it does not meet the strict requirements of this [abrogation] text" because "no specific reference to Indians or Indian tribes exists anywhere in Title III." *Id.* Thus, "no support exists in the statute for a finding that Congress has waived tribal sovereign immunity under Title III of the ADA." *Id.* at 1132.

In explaining its conclusion that there was no evidence that Congress intended to abrogate Indian tribe's immunity, the Court compared the statutory language of the ADA with that of other statutes in which Congress expressly stated that the definition of persons included Indian tribes. In this regard, the Court stated

> when we compare Title III of the ADA to the HMTUSA and RCRA, the absence of any reference to Indian tribes in the former statute [Title III of the ADA] stands out as a stark omission of any attempt by Congress to declare tribes subject to private suit for violating the ADA's public accommodation requirements.

Id. at 1132. Additionally, the Court found support in the language of the ADA that shows Congress fully understands "the need to express unambiguously its intent to abrogate sovereign immunity where it wishes its legislation to have that effect." *Id.* The Court quoted section 1220, which states in relevant part that "A state shall not be immune under the eleventh amendment … from an action … for a violation of [any portion of the ADA]. … against a state …, remedies are available … to the same extent as … against any public or private entity other than a state." *Id.* at 1133. The Court concluded that such clarity from Congress was in response to,

and to meet the requirements of *Atascadero State Hospital v. Scanion*, 473 U.S. 234, 242, 105 S.Ct 3142, 3147 (1985), which required that "to abrogate state sovereign immunity Congress must make such intent 'unmistakably clear in the language of the statute.'" *Id.* Consequently, the Court stated that Congress has shown its ability to draft statutes in a way that satisfy the Supreme Court's strict requirements for abrogation.

Consistent with its strict analysis of what language is necessary to subject an Indian tribe to suit and legal processes, the Court found that Congress had explicitly expressed an intent to subject Indian tribes in §12188of the ADA, by providing that the "United States Attorney General may bring a civil action to compel Indian tribes' compliance with the statute." *Fla. Paraplegic* at 1134. Therefore, when in the same paragraph, the court stated that "tribal sovereign immunity does not bar suits by the United States," it was so concluding due to the express intent of Congress evidenced in the language of the statute in § 12188.

Even assuming *arguendo*, that the Court finds that the statement that sovereign immunity does not bar suits by the United States was not based on the language of § 12188, the statement is dicta because it was not related to any argument raised by the parties to advance their positions in the case, nor related to the issue on appeal. Dictum is not binding on this Court because "[w]hatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in

which those decisions are announced." *Watts v. Bellsouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir 2003); *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000). Whether tribal sovereign immunity can be raised against the United States was not decided by *Florida Paraplegic* because it was not the United States Attorney General or any other federal agency or official suing the Miccosukee Tribe. *See Gibson v. Walgreen Co.*, No. 07 Civ. 1053, 2008 WL 2607775 * 2 (M.D. Fla. July 1, 2008) (stating that "[a] court decision that does not address an argument that was not raised cannot be considered to have decided the question that was not presented.").

In the alternative, if the Court were inclined to find that the statement in *Fla. Paraplegic* is persuasive enough to be adopted by the Court as binding law, there are weighty reasons to find differently under the facts of this case. A finding that a federal agency can obtain the governmental financial records of Indian tribes without Congress clearly expressing its intent to abrogate Indian sovereignty and sovereign immunity, will undo years of a societal choice to afford Indian tribes the respect and protection they deserve, which was for many years unavailable to Indian tribes. Such a holding would work further injustice towards the first inhabitants of the United States and contradict the strict abrogation test established by decades of precedent and federal Indian law.

Under the strict abrogation test and holding of *Fla. Paraplegic*, the Miccosukee Tribe is not subject to legal processes such as summons because there is no specific reference to Indians or Indian tribes in section 26 U.S.C. § 7602, the statute authorizing the IRS to issue summons, or 26 U.S.C. § 7701, the statute defining the word person because they fail to meet the strict abrogation test.

Title 26 §§ 7602, 7610, and 7210 do not abrogate tribal sovereignty and sovereign immunity because they fail to clearly, expressly and unequivocally show intent by Congress to abrogate Indian tribes' sovereignty and immunity. A lack of Congressional intent to make these provisions applicable to Indian tribes is palpable from Congress' silence regarding Indian tribes in the language of these provisions. It is clear that Congress has chosen not to exercise the federal government's superior sovereignty to make these provisions applicable to Indian tribes.

Doubtful or ambiguous expressions in statutes are to be construed as leaving tribal sovereignty undisturbed. *NLRB*, 276 F.3d 1186, 1194. "Moreover, 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Sanderlin*, 243 F.3d 1282, 1285 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399 (1985); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245 (1985)); *See also Fla. Paraplegic*, 166 F.3d at 1130 ("Federal encroachment upon Indian tribe's

natural rights is a serious undertaking, and we should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation."); *Seminole Tribe*, 181 F.3d at 1242 ("Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor."). "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).

With these principles in mind, the absence of any reference to Indians or Indian tribes in sections 7602, 7210, and 7610 cannot work to subject the Miccosukee Tribe to the legal process of an IRS summons. Section 7602 states:

> **(a) Authority to summon, etc.**
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> **(1)** To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> **(2)** To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or 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 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; and

> **(3)** To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. § 7602. There is no definition of the word "person" in this provision, nor is there any mention of Indian tribes. Section 7210 states:

> Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420 (e)(2), 6421 (g)(2), 6427 (j)(2), 7602, 7603, and 7604 (b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

26 U.S.C. § 7210. Similarly, there is no definition of "person" in this provision. Lastly, § 7610 provides for fees and costs to persons summoned under § 7602 for expenses incurred in connection with the summons. It states:

> **(a) In General**. The Secretary shall by regulations establish the rates and conditions under which payment may be made of
>
> **(1)** fees and mileage to persons who are summoned to appear before the secretary, and
>
> **(2)** reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for reproducing, or transporting books, papers, records, or other data required to be produced by summons.

26 U.S.C. § 7610. There is no definition of "persons" or mention of Indian tribes in this section either. Therefore, the IRC general definition of the word person found in 26 U.S.C. § 7701(a)(1) would apply. This section in turn states:

> **(a)** When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof
>
> **(1) Person**. The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

26 U.S.C § 7701(a)(1). 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 tribe's sovereignty.

Moreover, while the language of the definition uses the word "includes" and section 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, the District Court 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, 54 S.Ct. 725 (1934) and *Chickasaw Nation v. United States*, 208 F.3d 871 (2000), *affirmed on other grounds* 534 U.S. 84, 122 S.Ct. 528, (2001), 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 Community of the Bishop Colony*, 538 U.S. 701, 709, 123 S.Ct. 1887 (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.

In *Ohio v. Helvering*, the Supreme Court extended the word "person" to include a government entity such as a state when dealing with the issue of governmental tax immunity. *Id.* at 369. However, in *Ohio,* "person" was extended to include the state only where a state engages in private activities outside their normal police powers. *Id*. In *Ohio*, the state was engaged in the selling of intoxicating beverages, the proceeds of which it thought should be immune from taxation. *Id.* The Supreme Court said that "whether the word 'person' includes a state or the United States depends upon the connection in which the word is found." *Id.* at 370. This definition of "person" still did not include a governmental body when it is performing its normal governmental functions in regards to immunity from taxation or any other issue for that matter. There is nothing in *Ohio* that states that the word "person" will include a government body in every single circumstance or even just in relation to taxation, nor is there any mention of Tribal governments.

In *Chickasaw Nation*, the 10th Circuit admitted that § 7701(a)(1) does not specifically list "Indian tribes" or Indian tribal governments." 208 F.3d at 878. Nonetheless, and in complete and utter disregard of the strict requirements to find abrogation, the court concluded that Congress had shown an intent to include Indian tribes or Indian tribal governments within the reach of § 7701(a)(1). *Id.* at 879. The court first determined that the list in § 7701(a)(1) was not exhaustive but

also included "other things otherwise within the meaning of the term defined," citing to § 7701(c). *Id.* at 878. The court then turned to the ordinary common meaning of the word person and found that Congress must have meant the word person to be interpreted in its broadest sense, which would include "any human being, a body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties." *Id.* at 878-79. Therefore, the court concluded that "Congress unambiguously intended for the word person in § 7701(a)(1), to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties. *Id.* This finding contradicts the law of this circuit as discussed at length in *Fla. Paraplegic*. Simply stated *Chickasaw Nation* was wrongly decided. The Court should find that *Chickasaw Nation* is not persuasive or dispositive of this case for the following reasons.

First, *Chickasaw Nation* was deciding an issue different from the issue before this Court. The issue before the 10th Circuit in *Chickasaw Nation* was whether "the nation must pay wagering excise taxes and federal occupational taxes." *Id.* at 875. The Nation argued that

> pull tabs do not involve a taxable wager, as defined in 26 U.S.C. §4421,[the nation] was not a person subject to federal wagering excise taxes, the Indian Gaming Regulatory Act demonstrates Congress' intent not to subject Indian gaming activities to federal wagering excise taxes, and the self-government guarantee of the 1985 treaty between the United States and the Nation precludes imposition of the taxes in question.

Id. The issue before this Court is whether the Miccosukee Tribe is subject to the summons process of the IRS, when the statutory provisions authorizing the IRS to issue summons does not mention Indian tribes or specifically authorizes the IRS to issue summons to obtain records of Indian tribes. Thus, the holding of the 10th Circuit is not dispositive of the present case or persuasive to the Court because the question before the 10th Circuit is not the question before the Court in the present case. *See Watts v. Bellsouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) (stating that "[w]hatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."); *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000). Moreover, a court decision that does not address an argument that was not raised cannot be considered to have decided the question that was not presented. *Gibson v. Walgreen Co.*, No. 07 Civ. 1053, 2008 WL 2607775 * 2 (M.D. Fla. July 1, 2008).

Secondly, the court in *Chickasaw Nation* used the wrong abrogation test. Regarding the argument of whether the Nation was a person for purposes of having to pay federal wagering excise taxes, the court found that if Congress wanted to exempt Indian tribes or tribal governments from payment of excise taxes, "it should do so explicitly." *Chickasaw Nation,* 280 F.3d at 880. The court stated that otherwise it was a reasonable construction of § 7701(a)(1) to find that it applied to Indian Tribes. *Id.* The analysis conducted by the *Chickasaw Nation* court is fatally

defective. In contradiction to decades of Indian federal law and the doctrine of tribal sovereign immunity, the court states that unless Congress expressly exempts Indian tribes, laws of general applicability serve to subject Indian tribes to suit or legal processes. *Id.* The 10th Circuit in *Chickasaw Nation* turns the strict abrogation test on its head. The test for Congressional abrogation under the law of this Circuit and *Fla. Paraplegic* is that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act." *Fla. Paraplegic*, 166 F.3d at 1131. Therefore, the 10th Circuit's conclusion that the definition of person in §7701(a)(1) includes Indian tribes is clearly contrary to the law of this circuit and should not be given any weight by the Court in deciding the issue before it in the case at bar.

Furthermore, as already stated, ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor. *State of Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1241 (11th Cir. 1999) (citing *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999)). In *NLRB,* , the court stated that rules of statutory construction generally "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when the Indian Rights are to be abrogated or limited." 276 F.3d at 1194 (citing F. Cohen, *Handbook of Federal*

Indian Law at 225). Doubtful or ambiguous expressions in statutes are to be construed as leaving tribal sovereignty undisturbed. *Id.* at 1194. In other words, "mere silence regarding Indian tribes is insufficient to establish an abrogation of traditional sovereign authority." *NLRB,* 280 F.3d 1278.

Consequently, unless Congress abrogates the Miccosukee Tribe's sovereign immunity expressly in a clear and unequivocal manner, the IRS lacks statutory authority to obtain the Miccosukee Tribe's documents.

C. The IRC generally does not apply to the Miccosukee Tribe

The IRS cannot show that the IRC generally applies to the Miccosukee Tribe. While *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 80 S.Ct. 543 (1960), has been interpreted by some courts as espousing the principle that laws of 'general application' apply to Indian Tribes, a close analysis of that case shows that such an interpretation is without merit. The law at issue in *Tuscarora*, the Federal Power Act, was not a law of general applicability that did not mention Indian tribes. *Id.* at 111. Instead, it was a statute that expressly and specifically mentioned Indian reservations. *Id.* at 111-12. *Tuscarora* involved limitations on the power of the federal government to condemn tribal lands. *Id.* at 110. Moreover, the general applicability to Indian tribes language in *Tuscarora* has been recognized as dicta and not essential to *Tuscarora*'s holding. *See e.g. Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 984 (10th Cir. 2005) (Lucero, J.

concurring). Further, and in contradiction to this general applicability principle, case law since *Tuscarora* has clearly established that abrogation of tribal sovereign immunity must be express and unequivocal. *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1292 (11th Cir. 2001). Importantly, the Supreme Court's decision in *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130 (1982), has been interpreted as having overruled the 'general applicability' dictum of *Tuscarora*. In *Donovan v. Navajo Forest Prods. Indus.*,692 F.2d 709, 713 (10th Cir. 1982) the court stated:

> Thus *Merrion*, in our view, limits or, by implication, overrules *Tuscarora*, supra, at least to the extent of the broad language relied upon by the Secretary contained in *Tuscarora*, "that it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."

Id. (citing *Tuscarora Indian Nation*, 362 U.S. at 116); *see also Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp. 2d. 1131, 1135-36 (N.D. Okla. 2001) (stating that "although the Supreme Court established forty years ago that a statute of general and broad application applies to all persons, including Indian tribes, this dictum has since been abrogated and numerous federal courts of appeal have rejected it through subsequent action."); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007) (stating that "moreover, Tuscarora's statement is of uncertain significance, and possibly dictum, given the particulars of that case.").

Similarly, the IRS would have to show that the IRC is generally applicable to the Miccosukee Tribe, and the Miccosukee Tribe does not fall under any of the exceptions to the general applicability to Indian tribes' principle. *Fla. Paraplegic*, 166 F.3d at 1129 (stating that a law of general applicability presumptively governs Indian tribes "unless its application would 1) abrogate rights guaranteed under an Indian treaty, 2) interfere with purely intramural matters touching exclusive rights of self government, or 3) contradict Congress' intent"). The IRC, however, does not generally apply to the Miccosukee Tribe as previously discussed. But even if it did, the Miccosukee Tribe falls under at least two of the three exceptions. First, to apply the IRC to the Miccosukee Tribe would be to interfere with matters touching the Miccosukee Tribe's exclusive rights of self-government. Decisions regarding how, with whom, and when the Miccosukee Tribe maintains or invests its own revenue for the welfare of its people is a purely intramural matter. The IRS' circumvention of tribal sovereignty in order to obtain the Miccosukee Tribe's governmental financial records from third party financial institutions interferes with the Miccosukee Tribe's exclusive rights to collect its revenue and to use and distribute it for the welfare of its people.

Importantly, the Court in *Fla. Paraplegic* stated that a law of general applicability presumptively governs Indian tribes unless Congress indicates an intent that the general statute does not apply to Indian tribes. *Fla. Paraplegic*, 166

F.3d at 1129. However, the Court was clear that just because a statute applies to an Indian tribe, it does not mean that the Indian tribe will be subject to suit or legal processes, Congress must still unequivocally express that the Indian tribe will be subject to suit under the statute. *Id.* at 1130. Simply stated, the court pointed out that there is a difference between a right and a remedy. *Id.* In *Fla. Paraplegic*, the Court found that the ADA was a law of general applicability and as such applied to Indian tribes. *Id.* at 1129-30. Yet, it also found that the Miccosukee Tribe was not subject to suit under the ADA, because it had not expressly and unequivocally stated that Indian tribes would be subject to suit under the statute.

II. THE IRS HAS NO PROPER PURPOSE TO ISSUE A SUMMONS SEEKING RECORDS OF THE MICCOSUKEE TRIBE

The IRS summonses have no proper purpose. When the IRS issues a summons it must seek enforcement of that summons in the appropriate district court, in this case the Southern District of Florida because summons are not self executing. *Nero Trading LLC v. United States Dep't. of Treasury, IRS*, 570 F.3d 1244, 1248-49 (11th Cir. 2009). The Court explained,

> The Service must make a four-step prima facie showing to have a summons enforced. The [IRS] must show: (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to the purpose; (3) that the information sought is not already within the commissioner's possession, and (4) that the administrative steps required by the Code have been followed.

Id. at 1248 (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)).

The Court was correct to be reluctant to in establishing a bright line rule, which would limit the definition of "improper purpose" to circumstances in which a criminal investigation has already been initiated. *Id.* The Court's reluctance was clear when it stated that "our reading of improper motive or purpose is not so narrowly circumscribed." *Id.* This case is an example of why the Court was correct in being reluctant to restrict the definition or conduct that constitutes improper purpose. The IRS issued its summons in an effort to obtain governmental confidential financial information of the Miccosukee Tribe in the care of third party financial institutions with the purported purpose of conducting an administrative examination "relating to the tax liability or the collection of the tax liability or for purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the [Miccosukee Tribe]." *See* IRS Summonses issued to Morgan Stanley Smith Barney, Citibank, Wachovia Bank, and American Express. The Miccosukee Tribe, however, 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 Miccosukee Tribe.

An IRS summons has a legitimate purpose if that purpose is one of two things: (1) "[f]or the purpose of 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). A summons issued for any other purpose would be exceeding the agency's authority and it would indicate a lack of proper purpose. Enforcement of such a summons would result in an abuse of this Court's process. *See Powell*, 379 U.S. at 57-58. The summons issued in this case was not issued for any of the two proper purposes described above.

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. These grounds are not exhaustive. And, "[t]he parameters of abuse of process must remain flexible in order to prevent other forms of agency abuse of congressional authority and judicial process." *United States v. Caltex Petroleum Corp.*, 12 F. Supp. 2d 545, 554 (N.D. Tex. 1998). Among others, improper purpose has included circumstances in which the IRS planned to unlawfully disclose the summoned documents. *Id.* It has also included 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 Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1988).

Because on its face, the summonses show an improper purpose, the summonses should be quashed. Here, the improper purpose is even more glaring. No longer is there even a pretense that the United States is not seeking to harass the Tribe and its members. The Tribe is not subject to income taxes yet the IRS seeks all of its records based on sections of the IRC that do not even apply to the Tribe.

III. THE SUMMONSES ARE OVERBROAD AND MUST BE QUASHED AS A RESULT

Even assuming that the summonses were issued for a proper purpose, which they were not, the manner in which the summonses are written is so blatantly overbroad and improperly invasive as to render them otherwise unenforceable. The summonses improperly seek from a third party a voluminous amount of sensitive tribal records which plainly lack any relevance to an administrative investigation of a sovereign Indian tribe concerning the "administration or enforcement of the internal revenue laws." Summons issued to Stanley Smith Barney, Citibank, Wachovia Bank, and American Express. A summons which is overbroad or seeks irrelevant information is unenforceable. *See United States v. Monumental Life Ins. Co.*, 440 F.3d 729 (6th Cir. 2006).

In *Monumental Life*, the Sixth Circuit refused to enforce an IRS summons where: (1) the summons was directed to a third party, not the taxpayer being investigated; (2) the summons sought a voluminous amount of highly sensitive

proprietary information about the company's general administration of its products; (3) the IRS had opposed the imposition of a protective order; and (4) the summons sought apparently irrelevant information. *Id*. at 736-37. In so ruling, the Sixth Circuit noted that many of the documents sought by the IRS related not to the taxpayer being investigated, but to other unnamed taxpayers. *Id*. at 736. As a result, the IRS agent's affidavit that the documents were relevant was legally insufficient. *Id*. at 737. Furthermore, as the Sixth Circuit also indicated, the summons imposed an improper burden on a third party "to produce proprietary documents that the IRS refused to place under a protective order." *Id*. As a result, the Sixth Circuit denied enforcement of the summons in full, permitting the IRS to redraft a more narrowly tailored summons.

Here, the Summonses at issue similarly seek voluminous amounts of sensitive tribal records from a third party which pertain to unnamed tribal members. Such circumstances, if allowed, would sanction the use of an administrative summons to *any* institution, club, corporation or organization to justify unfettered access to all books and records of the institution, club, corporation or organization, without regard for the proper limitations imposed by Congress on the powers of the investigating agency. To interpret agency power this broadly would clearly contravene the Court's mandate regarding the IRS' required

establishment of a four-part prima facie case prior to its sanctioning of the enforcement of a summons. *See Nero Trading*, 570 F.3d at 1248.

Here, as with the abusive general warrants and writs of assistance overwhelmingly rejected by the founders of this Country and prohibited by the Constitution, the summonses fail to show why any of the requested records are relevant to a legitimate investigation. In fact, review of the Summons indicates that several of the requested records are far outside the scope of any possible legitimate inquiry. *See* Summons Stanley Smith Barney, Citibank, Wachovia Bank, and American Express (broadly requesting "all documents pertaining to the Miccosukee Tribe in any capacity, whether held jointly or severally, as trustee, fiduciary, custodian, executor, guardian and/or beneficiary", including "[r]ecords maintained of . . . communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence, financial statements, background or credit investigations..."). More importantly, the summonses broadly seek the records of a sovereign Indian tribe which, unlike other institutions or organizations, has specific protections under the law with regard to its sovereignty. *See Kiowa*, 523 U.S. at 754 (Indian tribes enjoy sovereign immunity unless Congress has abrogated such immunity or the Tribe has waived its immunity). The summonses are therefore overbroad, seek irrelevant information, and is improper with respect to their requests of Tribal records.

CONCLUSION

The Miccosukee Tribe respectfully requests this Honorable Court to quash the IRS Summonses seeking to obtain the financial governmental records of the Miccosukee Tribe because 1) the Tribe is not subject to legal process such as summonses unless Congress has unequivocally expressed an intent to so subject the Tribe to such process, which it has not done in this case; 2) the IRS has an improper purpose and 3) the summonses are overbroad.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitation set forth in FED.R.APP.P. 32(a)(7)(B). This Brief contains 10,268 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii). This Brief complies with the typeface requirements of FED.R.APP.P. 32(a)(5) and the type style requirements of FED.R.APP.P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman, size 14.

Dated: February 11th, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the following parties via electronic correspondence and via United States Postal Service, priority certified mail on February 11, 2012.

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