

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

Case No. 12-CV-22439-COOKE/Bandstra

**MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA**, a sovereign nation and
Federally recognized Indian tribe,

Plaintiff,

vs.

**BILLY CYPRESS; DEXTER WAYNE
LEHTINEN, ESQUIRE; MORGAN
STANLEY SMITH BARNEY, JULIO
MARTINEZ; MIGUEL HERNANDEZ;
GUY LEWIS, ESQUIRE; MICHAEL
TEIN, ESQUIRE; AND LEWIS TEIN, PL,
A Professional Association,**

Defendants.

**MICCOSUKEE TRIBE'S RESPONSE AND MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT, MIGUEL HERNANDEZ' AMENDED MOTION
TO DISMISS SECOND AMENDED COMPLAINT AND JOINDER IN ALL
RESPONSES TO MOTIONS TO DISMISS TO ALL OTHER DEFENDANTS**

COMES NOW, Plaintiff, the Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe"), by and through undersigned counsel and hereby files its Response and Memorandum of Law in Opposition to Defendant Miguel Hernandez' (hereinafter, referred to as "Defendant Hernandez") Amended Motion to Dismiss Second Amended Complaint. In support thereof, the Miccosukee Tribe states as follows:

INTRODUCTION

Defendant Hernandez was the Director of the Miccosukee Finance Department¹ and had a legal and fiduciary duty to the Miccosukee Tribe. As Director of the Miccosukee Finance Department, Defendant Hernandez was a critical player in knowingly and purposely allowing Defendant Cypress to have "unrestricted" access and control over the Tribal Funds. Defendant Hernandez failed to uphold his fiduciary duty to the Miccosukee Tribe by not disclosing Defendant Cypress' transactions to the Miccosukee Business Council or Miccosukee General Council. Defendant Hernandez, knowingly and willfully presented financial reports, which did not reflect the monies being misappropriated by Defendant Cypress. In addition, Defendant Hernandez also failed to disclose unauthorized credit card charges by Defendant Cypress and Defendant Martinez. Defendant Hernandez' omissions prevented the members of the Miccosukee Business Council and the members of the Miccosukee General Council from ascertaining the knowledge necessary to discover the existence of the aforementioned unauthorized and unlawful transactions and transgressions .

MEMORANDUM OF LAW

I. STANDARD OF REVIEW FOR A MOTION TO DISMISS

Defendant Hernandez has facially attacked the Second Amended Complaint in his Motion to Dismiss. The Eleventh Circuit has explained that when a complaint is facially attacked on a Rule 12(b)(1) motion to dismiss the court is required "to look and see if [the]

¹ Throughout the Miccosukee Tribe's Second Amended Complaint, Defendant Hernandez is referred to as the Director of the Miccosukee Finance Department. In paragraphs 237, 240 and 241(D.E. No. 75) Defendant Hernandez is mistakenly referred to as the "Chief Financial Officer." The aforementioned reference is a harmless scrivener's error, because these two titles essentially encompass the same responsibilities, and Defendant Hernandez is correctly referred to as the "Finance Director" throughout the majority of the Second Complaint. *See* D.E. No. 75.

plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-1529 (11th Cir. 1990). With a facial attack, “a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion-the court must consider the allegations of the complaint to be true.” *Id.* at 1529.

II. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE CLAIMS RAISED IN THE MICCOSUKEE TRIBE’S SECOND AMENDED COMPLAINT

This Court has subject matter jurisdiction over this case as alleged in the Miccosukee Tribe’s Second Amended Complaint (D.E. No. 75). This case is about whether Defendant Cypress’ abuse of tribal authority and Defendants Martinez, Hernandez, Lewis, Tein, Lewis Tein P.L., Lehtinen, and Morgan Stanley’s actions in concert with Defendant Cypress and each other, constitute a violation of RICO, conspiracy to commit RICO, civil theft, fraud, aiding and abetting fraud, Florida RICO, Florida RICO Conspiracy, embezzlement, breach of fiduciary duty, and fraudulent misrepresentation. There are no issues presented by the Second Amended Complaint that are outside this Court’s jurisdiction.

A. The Second Amended Complaint does not present an intratribal dispute

This case is not about whether Defendant Cypress improperly abused his tribal authority by using tribal funds in a manner within his discretion, nor does this case “amount to a tribal dispute.” Defendant Hernandez’ Amended Motion to Dismiss Second Amended Complaint and to Join All Other Defendants’ Motions to Dismiss Second Amended Complaint to the Extent Applicable (hereinafter, “Motion to Dismiss”) at 8, D.E. No. 103. On July 1st, 2010, the Miccosukee General Council, acting in its official capacity, passed General Council Resolution No. MGC-03-10, attached herein as Exhibit A, where it

determined that Defendant Cypress' use of tribal funds was "improper and unauthorized."

The resolution states in relevant part:

Whereas, the Miccosukee Tribe conducted a review of its financial records and found improper and unauthorized use of Tribal funds by former Chairman Billy Cypress while a member of the Miccosukee Business Council. Whereas, the Miccosukee Tribe finds former Chairman Billy Cypress' conduct detrimental and harmful to the welfare of the Miccosukee Tribe and its members. Whereas, former Chairman Billy Cypress, shall reimburse the Miccosukee Tribe all unauthorized and improperly used funds. Whereas, former Chairman Billy Cypress, is forever barred of holding political office or a position in the Miccosukee Business Counsel. Whereas, the terms of this Resolution shall apply to any current or future member of the Miccosukee Tribe that engaged in unauthorized or improper use of Tribal funds.

Contrary to Defendant Hernandez' assertion, this case does not present a purely tribal or intra tribal dispute. In accordance with the General Council Resolution, the Miccosukee Tribe alleged repeatedly in its Second Amended Complaint that Defendant Cypress' actions were unauthorized by the Miccosukee Tribe and without its knowledge and consent. *See* Second Am. Compl. ¶¶ 29, 34, 35(c), 49, 106, 108(e), 108(i), 125, 127(e), 127(i), 140, 142(e), 142(i), 161, 196, 197, 441, 458(c).

Defendant Hernandez cites two cases in support of his proposition that because this case presents a tribal dispute, this Court lacks subject matter jurisdiction. Although Defendant Hernandez asserts this case revolves around a purely tribal dispute, he fails to provide a case that defines what a tribal dispute is.

An intra tribal dispute is that which involves a matter of tribal self governance and relates to the control of internal relations. *Montana v. United States*, 450 U.S. 544, 564 (1981). "Jurisdiction to resolve internal tribal disputes and to interpret tribal constitutions and laws lies with the Indian tribes and not the district courts." *United States v. Wheeler*, 435

U.S. 313, 323–36, 98 S. Ct. 1079, 55 L.Ed.2d 303 (1978). This case does not present a matter of tribal self governance and does not relate to the control of internal relations. Courts have found the following to be intra-tribal disputes: issues regarding tribal membership and membership requirements (*Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F. 2d 915 (10th Cir. 1957), *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F. 2d 364 (10th Cir. 1966), *Wopsock v. Natchees*, 279 Fed. Appx. 679, 2008 WL 2152435 (10th Cir. May 23, 2008); issues regarding an internal controversy among Indians over tribal government (*Motah v. United States*, 402 F. 2d 1 (10th Cir. 1968)); issues regarding the right to vote in tribal elections (*Harjo v. Kepple*, 420 F. Supp. 1110, 1117 (D.C. Dist. 1976); issues regarding which tribal council is rightly in place under the tribal constitution (*Sac and Fox Tribe of the Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Ia. 2003); election disputes between competing tribal councils over which council is authorized to govern tribe and casino (*Sac and Fox Tribe of Mississippi in Oiwa, Election Bd. v. Bureau of Indian Affairs*, 439 F. 3d 832 (8th Cir. 2006); issues regarding the appointment of a tribal official under tribal law (*Kaw Nation ex rel. McCauley v. Lujan*, 378 F. 3d 1139 (10th Cir. 2004); dispute between tribal members and members of the tribal council over who controls the financial assets of the tribe (*Wade v. Blue*, 369 F. 3d 407 (4th Cir. 2004); issues regarding the validity of a tribal resolution under tribal law (*Potts v. Bruce*, 533 F. 2d 527 (10th Cir. 1976); criteria to determine if someone is of Indian blood (*Groundhog v. Keeler*, 442 F. 2d 674 (10th Cir. 1971). Finally, a district court has already decided that the issue of alleged individual misconduct by the defendant tribal officials in the application of tribal funds presented in the Plaintiffs, Tribe's, Complaint is a not a political question. *Cheyenne–*

Arapaho Tribes Of Oklahoma v. Beard, 554 F. Supp. 1 (D.W. Okla. 1980), *overturned on other grounds*.

Defendant Hernandez quotes *Smith v. Babbit* as stating that “Indian tribes retain elements of sovereign status, including the power to protect tribal self government and to control internal relations”. 100 F. 3d 556, 558 (8th Cir. 1996). The Miccosukee Tribe’s immunity, which is immunity from trial regardless of what statute is being violated, is not at issue in this case. The immunity belongs to the Miccosukee Tribe, not the former chairman nor former employees, such as Defendant Hernandez. The Miccosukee Tribe filed this action after it determined, through its legislative body, that Defendant Cypress had misappropriated tribal funds without the authorization of the Miccosukee Tribe.

The court’s holding in *Smith* does not provide any support to Defendant Hernandez’ argument. The *Smith* court held that “because this dispute involves a question of tribal membership, an inter-tribal matter, this court is without subject matter jurisdiction.” Unlike this case, the dispute in *Smith* was a dispute “on the issue of tribal membership.” *Smith*, 100 F. 3d at 558. The Eighth Circuit’s reasoning indicates why *Smith* is not dispositive of this case. The *Smith* court explained that the power to determine tribal membership was an aspect of the sovereignty retained by Indian tribes. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978)). Indeed, as the *Smith* court expressed, “the Supreme Court has stated in *Santa Clara Pueblo* that “a tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Smith* 100 F. 3d at 558. The court concluded that “therefore a membership dispute is an issue for a tribe and its courts.” *Id.* The *Smith* court did not hold that Indian tribes could not pursue RICO claims against a former tribal officer. Instead, the *Smith* court held that the

plaintiffs, tribal members, were attempting to appeal the tribe's determination of tribal membership, an issue which was purely intra tribal. *Id.* at 559.

Similarly, *In re Sac and Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*, 340 F. 3d 749 (8th Cir. 2003) is inapposite because the court dismissed the RICO claim because the underlying acts revolved around which council was properly authorized to act on behalf of the tribe, the elected council or the appointed council pursuant to and under the tribal constitution, which the court found to be an intra tribal dispute centered around an internal dispute regarding the tribe's governance and its constitution including interpretation thereof. *Id.* at 753. Consequently, this Court has subject matter jurisdiction over this action for it does not present an intra tribal dispute. In the alternative, if the Court finds that there is some intra tribal issue involved in this case, it is not purely an intra tribal dispute because the majority of the unauthorized and illegal conduct of the Defendants took place in non Indian country and the majority of the Defendants are non Indian. *See Goodface v. Grassrope*, 708 F. 2d 335 (8th Cir. 1983) (not an intra-tribal dispute because there were non Indian defendants and it involved the review of agency action by the federal government).

B. Neither Defendant Hernandez Nor Defendant Cypress Can Assert Immunity Against The Miccosukee Tribe

Defendant Hernandez' poorly articulated argument that both he and Defendant Cypress are immune from suit is devoid of common sense or legal support in light of the Miccosukee Tribe's resolution quoted above. Additionally, Defendant Hernandez seeks that this Court find that the Miccosukee Tribe, an Indian tribe, cannot sue a former tribal officer, former Chairman Cypress, or a former employee such as Defendant Hernandez, for acts it has determined were unauthorized and beyond the scope of Defendant Cypress' authority

because that former tribal officer can assert the tribe's own sovereign immunity against it. This requires this Court to erroneously read and interpret Indian law and turn decades of well established law on its head. There are two reasons why Defendants Lewis Tein's proposition fails.

First, Tribal sovereign immunity cannot be used against the superior sovereign. *See Miccosukee Tribe of Indians of Florida v. United States*, 698 F. 3d 1326, 1331 (11th Cir. 2012) (citing *Fla. Paraplegic Ass'n*, 166 F. 3d at 1135; *Reich v. Mashantucket Sand & Gravel*, 95 F. 3d 174, 182 (2d Cir. 1996); *Quileute Indian Tribe v. Babbitt*, 18 F. 3d 1456, 1459–60 (9th Cir. 1994); *United States v. Red Lake Band of Chippewa Indians*, 827 F. 2d 380, 382 (8th Cir.1987) and holding that “Indian tribes may not rely on tribal sovereign immunity to bar a suit by a superior sovereign.”). Thus, it is the next and only logical conclusion that an employee or tribal officer cannot use tribal sovereign immunity to bar a suit by the sovereign whom is the holder of the immunity.

Second, an Indian tribe's immunity only extends to a tribal officer if that tribal officer's actions are within his or her official capacity. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F. 3d 1212, 1225 (11th Cir. 1999); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, No. 10 Civ. 60483, 2011 WL 1303163 *10 (S.D. Fla. March 31, 2011); *Lobo v. Miccosukee Tribe of Indians of Fla.*, 279 Fed. Appx. 926, 927, 2008 WL 2222074 * 1 (11th Cir. May 30, 2008); *Fletcher v. United States*, 116 F. 3d 1315, 1324 (10th Cir. 1997); *Teneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F. 2d 572, 576 (10th Cir. 1984); *Snow v. Quinault Indian Nation*, 709 F. 2d 1319, 1321 (9th Cir. 1983), cert. den. 467 U.S. 1214 (1984); *Terry v. Smith*, No. 09 Civ. 00722, 2011 WL 4915167 * 7 (S.D. Ala. July 20, 2011); *United States v. Menominee Tribal Enterprises*, No. 07 Civ. 316, 2008

WL 2273285 *10 (E.D. Wis. June 2, 2008); *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 86 (S.D. N.Y. 2002); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1048 (E.D. Wis. 1999). Because the Miccosukee Tribe determined that Defendant Cypress was not acting in his official capacity when he pillaged the coffers of the Miccosukee Tribe, tribal sovereign immunity does not extend to Defendant Cypress to protect him from suit by the Miccosukee Tribe for his unauthorized actions. Similarly, tribal sovereign immunity does not extend to Defendant Hernandez as a former employee. As such, Defendant Hernandez' weak argument seeking to hide behind Defendant Cypress' direction as his superior fails.

However, under the doctrine of *Ex Parte Young*, a plaintiff seeking declaratory or injunctive relief can sue a tribal officer who has acted outside the scope of the lawful authority which the sovereign was capable of bestowing on him. *Ex Parte Young*, 209 U.S. 123 (1908).

II. THE MICCOSUKEE TRIBE'S SECOND AMENDED COMPLAINT SATISFIES ALL REQUISITE PLEADING AND SPECIFICITY REQUIREMENTS AS REQUIRED BY THIS COURT

As detailed below, the Miccosukee Tribe's Second Amended Complaint satisfies the heightened pleading requirement of FED. R. CIV. P. 9(b), as well as the "flexible plausibility" standard as set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) and subsequently expanded in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). However, as referenced by this Honorable Court, "Rule 9(b) does not...abrogate the concept of notice pleading." D.E. No. 55 at 3, citing *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F. 3d 1364, 1371 (11th Cir. 1997); see *DeGirmenci v. Sapphire-Fort Lauderdale, LLP*, 693 F. Supp. 2d 1325,

1344 (S.D. Fl. 2010) (“Rule 9(b) must be read in conjunction with Rule 8(a) so as to not ‘abrogate the concept of the notice pleading.’”).

In order to survive a motion to dismiss a RICO claim, the plausibility standard “does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Twombly*, 550 U.S. 554, 569 (2007). *Twombly* does “not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” 550 U.S. at 557. As will be explained below, the Miccosukee Tribe’s Second Amended Complaint is “well pleaded” because it includes “[i]dentifying facts that are suggestive enough to render a [] conspiracy plausible.” *Twombly*, 550 U.S. at 556.

A. RICO CLAIM

The Miccosukee Tribe has sufficiently pled the requirements needed to establish a RICO claim. Pursuant to the RICO Act, it is unlawful for “any person employed by or associated with any enterprise engaged in, or the activities which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). In order to establish a RICO claim, a plaintiff must plead “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Koch v. Royal Wine Merchants, LTD.*, 847 F. Supp. 2d 1370, 1376 (S.D. Fla. 2012). As detailed below, the Miccosukee Tribe’s Second Amended Complaint has established a RICO enterprise and a pattern of racketeering activity with the requisite specificity as required by this Court.

1. RICO Enterprise

The Miccosukee Tribe properly established the existence of a RICO Enterprise (hereinafter, referred to as “Enterprise”). An “Enterprise” for purposes of a RICO claim includes “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). The Miccosukee Tribe specifically identifies, defines and describes the Enterprise in its Second Amended Complaint. The Miccosukee Tribe specifically alleged the definition and description of the Enterprise with regards to Defendant Hernandez in Paragraphs 18 through 35, including the allegations that: Defendant Hernandez is a member of the Enterprise; Defendant Hernandez is not the Enterprise itself, Defendant is a liable person, Defendant Hernandez’ actions, in concert with the other named Defendants, comprises the Enterprise; and describes the common purpose of the Enterprise.

2. Pattern of Racketeering Activity

The Miccosukee Tribe sufficiently alleged and established a pattern of racketeering activity. A “pattern of racketeering activity” requires “at least two acts of racketeering activity.” 18 U.S.C. § 1961(5). “Racketeering Activity” includes any act which is indictable under 18 U.S.C.: § 1341 (relating to mail fraud); § 1956 (relating to the laundering of monetary instruments); and § 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity). In order to qualify as a “pattern,” there must be at least two distinct but related racketeering activities (or ‘predicate acts’). *Koch*, 847 F. Supp. 2d at 1377.

The Miccosukee Tribe sufficiently established a pattern of racketeering activity by alleging that: (1) Defendants committed two or more predicate acts within a ten year time span; (2) the predicate acts were related to one another; and (3) the predicate acts

demonstrated criminal conduct of a continuing nature. *Jackson v. Bellsouth Telecommunications*, 372 F. 3d 1250, 1264 (11th Cir. 2004). The Miccosukee Tribe specifically alleged the pattern of racketeering and criminal activity by Defendant Hernandez in Paragraphs 79 through and including 102. The Miccosukee Tribe alleged three (3) distinct, yet related, types of predicate acts, which were repeatedly violated and which constitute Defendant Hernandez' pattern of racketeering activity. The predicate acts committed by Defendant Hernandez are 18 U.S.C. § 1956 (money laundering), 18 U.S.C. § 1957 (monetary transactions in criminally derived property), and 18 U.S.C. § 1341 (mail fraud).

The Miccosukee Tribe's allegations describe the Defendants scheme to defraud the Miccosukee Tribe in Paragraphs 23 through and including 35, and specifically allege: (1) Defendant Hernandez was recruited by Defendant Cypress as the Director of the Miccosukee Finance Department to conceal of Defendant Cypress' misappropriation of tribal funds (D.E. No. 75 ¶ 25); (2) Defendant Hernandez, as the Finance Director, knowingly approved Defendants Lewis, Tein, and Lewis Tein, PL's fraudulent invoices (D.E. No. 75 ¶ 33) in furtherance of this scheme to defraud; and (3) Defendant Hernandez received account statements containing unauthorized withdrawals by Defendant Cypress and knowingly failed to notify the Miccosukee Business Council or the Miccosukee General Council about these unlawful transactions.

i. The Description Of Facts Alleging Violation Of 18 U.S.C. § 1956 Are Sufficiently Pled

The Miccosukee Tribe sufficiently pled Defendant Hernandez' violation of 18 U.S.C. § 1956. In order to properly establish a violation of § 1956, a plaintiff must allege facts showing "(1) that the defendant(s) conducted or attempted to conduct a financial transaction;

(2) that the transaction involved the proceeds of ‘specified unlawful activity’; and (3) that the defendant(s) knew the proceeds were from some form of unlawful activity.” *Bryan v. Countrywide Home Loans*, case no. 08 CIV 794-T-23EAJ, 2008 WL 4790660 * 4 (M.D. Fla. Oct. 27, 2008) (citations omitted). “The allegations must then satisfy either § 1956(a)(1)(A) or (a)(1)(B).” *Id.* Section 1956 (a)(1)(B) “may be satisfied by showing that the defendant(s) knew a purpose of the transaction was to conceal or disguise the nature, location, source, ownership, or control of the proceeds.” *Id.* (citing 18 U.S.C. § 1956(a)(1)(B)(i)). Specified unlawful activity includes 18 U.S.C. § 1957 among others. *Id.* at fn. 5 (citing 18 U.S.C. § 1956(c)(7)).

The following factual allegations, accepted as true, and reasonable inferences therein, taken in the light most favorable to the plaintiff, describe and detail a scheme to defraud the Miccosukee Tribe by Defendant Hernandez that took place from 2005 through and including 2009 (D.E. No. 75 ¶ 84). With regards to § 1956 (a)(1)(B)(1), the scheme includes that as a result of Defendant Hernandez’ position and responsibilities within the Miccosukee Tribe (D.E. No. 75 ¶ 82), Defendant Hernandez was aware that Defendant Cypress was misappropriating tribal funds (D.E. No. 75 ¶ 83). In addition, the Miccosukee Tribe describes its premise for the aforementioned allegations by specifically alleging that Defendant Cypress would withdraw funds from the Morgan Stanley Investment account, deliver said money in cash to Defendant Hernandez, to be deposited to cover the tribal check Defendant Hernandez would subsequently issue to Defendant Cypress for the money requested (D.E. ¶ 85) and failed to report these unlawful transactions (D.E. No. 75 ¶ 90). *See* D.E. No. 75 ¶¶ 82 - 90.

The Miccosukee Tribe specifically alleged that from 2005 through and until 2009, Defendant Hernandez kept a monthly log of Defendant Cypress' gambling activities in order to assist Defendant Cypress with the preparation of his income tax return. The Miccosukee Tribe's allegation that Defendant Hernandez assisted in preparing false income tax returns for Defendant Cypress is proper because 26 U.S.C. § 7206 does not require a person to actually file, or sign off on a return on another's behalf, in order to be sufficient in establishing fraud and false statements. Contrary to Defendant Hernandez' unsubstantiated argument, §7206(2) specifically states that "any person who—[a]ids or assist[s] shall be guilty." *Id.* Furthermore, § 7206(2) further defines the terms "aid" and "assist" as anyone who:

“[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document[.]”

Id. Therefore, the Miccosukee Tribe properly, and sufficiently, alleged that Defendant Hernandez assisted in preparing false income tax returns for Defendant Cypress, and as a result is in violation of 18 U.S.C. § 1956(a)(1)(A)(ii).

As detailed above, the Miccosukee Tribe has plead the predicate acts under § 1956 against Defendant Hernandez with sufficient specificity to meet the heightened standard of Rule 9(b) despite not having to do so. *See Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F. 3d 1339, 1355-56 (11th Cir. 2008) (holding that money laundering

allegations underlying civil RICO claims need not satisfy the heightened particularity standard in Rule 9(b)).

ii. *The Description Of Facts Alleging Violation Of 18 U.S.C. § 1957 Are Sufficiently Pled*

The Miccosukee Tribe sufficiently pled Defendant Hernandez' violation of § 1957. In order to claim a violation of § 1957, a plaintiff must allege the following with regards to the defendant(s): (1) must knowingly engage or attempt to engage in a monetary transaction; (2) must know that the transaction involved criminally derived property; (3) the criminally derived property must be of a value greater than \$10,000; (4) the criminally derived property must also, in fact, have been derived from a specified unlawful activity; and (5), the monetary transaction must have taken place in the United States. *See United States v. Silvestri*, 409 F. 3d 1311, 1332-33 (11th Cir. 2005); *see also United States v. Ferguson*, 142 F.Supp. 2d 1350 (S.D.Fla. 2000).

As detailed below, the Eleventh Circuit statement in *Silvestri* that “[t]he subsequent deposits of the checks, as proceeds of the specified unlawful activity of mail fraud, satisfied the requirements of the money-laundering counts,” is important to note, and of relevance, to Defendant Hernandez' scheme to defraud the Miccosukee Tribe. *Silvestri*, 409 F. 3d at 1335 (citing *United States v. Williamson*, 339 F. 3d 1295, 1302 (11th Cir. 2003)).

Defendant Cypress hand-picked Defendant Hernandez in furtherance of his scheme to defraud the Miccosukee Tribe. D.E. No. 75 ¶ 25, 26, 167. Although Defendant Hernandez' income was paid for by the Miccosukee Tribe, it was derived indirectly from the racketeering activity because Defendant Cypress hired Defendant Hernandez as the Director of Finance, and kept Defendant Hernandez in such position, in order to successfully defraud, as well as

further his scheme to defraud, the Miccosukee Tribe. D.E. No. 75 ¶¶ 25, 26, 167. Defendant Hernandez was allowed to keep this position because he enabled Defendant Cypress' illegal activity to continue successfully. Contrary to Defendant Hernandez' claims, Defendant Cypress did not have "unrestricted access" to these tribal funds. Mr. Lucky Jerry Cypress (hereinafter, referred to as "Mr. Jerry Cypress") unequivocally refutes this argument through his recent declaration, under oath, which show that Defendant Cypress' expenses, like any other tribal employee, were specifically limited. A copy of the Sworn Interview of Lucky Jerry Cypress is attached herein as Exhibit B; *see* Ex. B 12:1-13:22, 14:1-25. These specific limitations also applied to credit card charges. Ex. B 14:1-22, 16: 23-17:2. Moreover, these specific restrictions were in effect during the relevant periods described in the Second Amended Complaint. Ex. B 16: 23-17:2.

Furthermore, it is important to note that pursuant to tribal policy, credit card statements would be received by the Miccosukee Finance Department. Ex. B 14:8-24. In his declaration, Mr. Jerry Cypress confirms that it was the Miccosukee Finance Department who would be aware of Defendant Cypress' expenses. Ex. B 42:14-24. Mr. Jerry Cypress also confirms that neither Defendant Cypress' charge cards expenses nor his business expenses were disclosed at the General Council Meetings. Ex. B 50:23-25; 52:5-22, 54:18-25. The aforementioned statements further reiterate and support the Miccosukee Tribe's allegations, throughout the Second Amended Complaint, that Defendant Hernandez purposefully committed acts or omissions with regards to his knowledge as to the Miccosukee Tribe's actual financial status, as well as Defendant Hernandez' participation in knowingly assisting Defendant Cypress in the operation and management of the Enterprise through the use of his

position as the Director of the Finance Department in order to conceal these unauthorized transactions.

Thus, accepted as true and reasonable inferences therein taken in light most favorable to the Miccosukee Tribe, paragraphs 79 through 81, and paragraphs 91 through 98, detail and describe with specificity the Defendant Hernandez' violation of § 1957.

iii. *The Description Of Facts Alleging Violation Of 18 U.S.C. § 1341 Are Sufficiently Pled*

The Miccosukee Tribe has sufficiently pled Defendant Hernandez' violation of § 1341. Mail fraud occurs “when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mail or wires in furtherance of that scheme.” *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1227 (S.D. Fla. 2011); *see also Levitan v. Patti*, No. 09 Civ. 321-MCR-MD, 2011 WL 1299947 (N.D. Fla. Feb. 8, 2011) (citations omitted) (holding that while the transmission does not have to be an essential element, it must be incident to an essential portion of the scheme). The court in *Sylvestri* held that the crime of mail fraud was completed once an instrument containing false material representations was mailed. *See* 409 F. 3d at 1334-35. The *Sylvestri* court further stated that all that is necessary is that the scheme be reasonably calculated to deceive; the intent element of the crime is shown by the existence of the scheme. *Id.* (citing *United States v. Bruce*, 488 F. 2d 1224, 1229 (5th Cir.1973)). The specific intent required by the mail fraud statute “is the intent to defraud, not the intent to violate a particular statute or regulation.” *Levitan*, 2011 WL 1299947 at * 10 (stating “a scheme to defraud may also exist without misrepresentation in fact, or lies, so long as the intent is to defraud.”).

The Miccosukee Tribe has met both the plausibility standard and the heightened standard regarding the allegations of mail fraud against Defendant Hernandez. Paragraphs 79 through 81, and 99 through 102 detail Defendant Hernandez' violation of § 1341 with specificity. The Miccosukee Tribe has provided the "who, the what, the where, and the when" with regards to its allegations that Defendant Hernandez received, processed and sent payments for Defendants Lewis, Tein, and Lewis Tein, PL's monthly invoices reflecting fraudulent legal services, constitute repeated violations of § 1341. D.E. No. 75 ¶¶ 99 through and including 102. It is sufficient as this stage that the Miccosukee Tribe alleged that the invoices were submitted to Defendants Lewis, Tein, and Lewis Tein, PL on a monthly basis, totaling **three hundred and fifty-seven (357)** separate violations of § 1341. *See Fleet Credit Corporation v. Sion*, 893 F. 2d 441, 447 (1st Cir. 1990) (holding that 95 fraudulent mailings sent over a four and one-half year period constituted "continued criminal activity").

Thus, accepted as true and reasonable inferences therein taken in light most favorable to the Miccosukee Tribe, paragraphs 79 through 81, and paragraphs 99 through 102, detail and describe with specificity Defendant Hernandez' violation of § 1341.

B. CONSPIRACY CLAIM

The Miccosukee Tribe has sufficiently alleged Defendant Hernandez' conspiracy to commit RICO and defraud the Miccosukee Tribe, as well as his participation in the commission of several predicate acts. A plaintiff can establish a RICO conspiracy claim through circumstantial evidence, including "inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." *See Sylvestri*, 409 F. 3d 1311 at 1328. Due to the nature of the criminal acts and schemes alleged by the Miccosukee Tribe, the showing of an agreement can be inferred from the conduct of the Defendants. Defendant

Hernandez' agreement to the objective and purpose of the scheme, including the commission of two or more predicate acts, can be inferred not only from the allegations throughout the Second Amended Complaint, but specifically from paragraphs 165 through 188.

Thus, accepted as true and reasonable inferences therein taken in light most favorable to the Miccosukee Tribe, paragraphs 165 through and including 188, sufficiently detail and describe with specificity Defendant Hernandez' conspiracy to commit RICO.

III. THE MICCOSUKEE TRIBE'S FLORIDA RICO, AND CONSPIRACY TO COMMIT FLORIDA RICO CLAIMS ARE PROPERLY PLED AND THUS SURVIVE

Defendant Hernandez' naïve and misguided argument that the Miccosukee Tribe's Florida RICO allegations are "simply recitations" of statutes fails to mention and take into consideration paragraph 366 of the Second Amended Complaint, which re-states with specificity, all of the allegations describing the fraud committed by Defendant Hernandez. D.E. No. 75 at ¶¶ 235 – 246. Additionally, this Court has Supplemental Jurisdiction over the state claims because both the RICO claim and the state-law claims arose out of the same nucleus of operative facts. *See Koch*, 847 F. Supp. 2d 1370 at 1378. For the reasons argued above, throughout section II in this Response, the Miccosukee Tribe has sufficiently pled the Florida RICO claims and conspiracy to commit Florida RICO, and as such these claims survive.

Furthermore, the Miccosukee Tribe joins in all bases raised in each of its responses as to all responses to all Defendants' Motions to Dismiss Second Amended Complaint. The Miccosukee Tribe requests this Honorable Court permit the Miccosukee Tribe to join in the aforementioned Responses to all other Defendants' Motions to Dismiss the Miccosukee Tribe's Second Amended Complaint.

IV. CONCLUSION

For the reasons described above, the Miccosukee Tribe requests that this Court deny Defendant Hernandez' Motion to Dismiss Second Amended Complaint or in the alternative, the Miccosukee Tribe requests this Honorable Court grant the opportunity for leave to amend the Second Amended Complaint.

Respectfully submitted this January 14, 2013.

/s/Bernardo Roman III

Bernardo Roman III, Esquire

Fla. Bar No. 0002739

Tribal Attorney, Miccosukee Tribe of
Indians of Florida

P.O. Box 440021, Tamiami Station

Miami, Florida 33144

Tel: (305) 894-5214

Fax: (305) 894-5212

E-mail: bromanlaw@bellsouth.net

Yinet Pino, Esquire

Fla. Bar No. 085272

Attorney for the Miccosukee Tribe of
Indians of Florida

1250 SW 27th Avenue, Suite 506

Miami, Florida 33135

Telephone: (305) 643-7993

Facsimile: (305) 643-7995

E-mail: yinet@bromanlaw.com

Yesenia Rey, Esquire

Fla. Bar No. 89577

Attorney for the Miccosukee Tribe of
Indians of Florida

1250 SW 27th Avenue, Suite 506

Miami, Florida 33135

Telephone: (305) 643-7993

Facsimile: (305) 643-7995

E-mail: yesenia@bromanlaw.com