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.
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MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S RESPONSE TO DEFENDANTS LEWIS, TEIN AND LEWIS TEIN'S MOTION TO DISMISS AND IN SUPPORT OF THE SECOND AMENDED COMPLAINT AND JOINDER IN ALL RESPOSNES TO MOTIONS TO DISMISS OF ALL DEFENDANTS

COMES NOW Plaintiff, the Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe"), by and through the undersigned, and files this Response to Defendants, Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein P.L.'s Motion to Dismiss Plaintiff's Second Amended Complaint and Incorporated Memorandum of Law. In Support of its Response the Miccosukee Tribe states:

1. The Miccosukee Tribe filed its Complaint on July 1, 2012. D.E. No. 1.
2. On July 30, 2012, the Miccosukee Tribe amended its Complaint as of right. D.E. No. 13.
3. On August 6, 2012, Defendants Lewis, Tein and Lewis Tein (hereinafter, collectively referred to as "Defendants Lewis Tein"), filed a Motion to Compel Plaintiff to File a RICO Case Statement by Guy A. Lewis, Lewis Tein PL, Michael R. Tein. D.E. No. 14.

4. After full briefing, the Court issued an order granting the Motion to Compel in part and denying it in part on October 10, 2012. D.E. No. 55. In the Order, the Court required the Miccosukee Tribe to provide additional details regarding the RICO and Fraud claims against Defendants Lewis Tein, and to a lesser extent, those against Defendant Martinez. Pursuant to this Order, the Miccosukee Tribe filed the Second Amended Complaint. D.E. No. 75.

FACTUAL BACKGROUND

Defendant Cypress was the Chairman of the Miccosukee Tribe for over two decades. In his position as Chairman of the Miccosukee Tribe and one of the members of the Business Council, he was entrusted with the overall well being of the Miccosukee Tribe and Tribal Members. In order to fulfill this intended role, Defendant Cypress oversaw, controlled, supervised and had access to all the financial funds and records of the Miccosukee Tribe, which are the subject of this lawsuit. *See* Second Am. Compl, D.E. No. 75 at ¶ 6. The authority vested upon Defendant Cypress was by virtue of his position as Chairman as well as being one of the members of the Business Council, and his actions were to inure to the benefit of the Miccosukee Tribe. In his role as Chairman, Defendant Cypress had a legal and fiduciary duty to maintain, protect, and preserve the property of the Miccosukee Tribe. Second Am. Compl. D.E. No. 75 at ¶ 444. Unfortunately, Defendant Cypress converted this trust responsibility into "unrestricted access" to steal the hard earned money of the Miccosukee Tribe. Contrary to Defendant Cypress' contention that all the acts alleged against him in the present lawsuit were authorized and taken in his "official capacity" as the duly elected Tribal leader, in pursuing this unlawful course of action by lying, cheating, stealing and embezzling from the Miccosukee Tribe, he went beyond the scope of his authority as Chairman. *See* Cypress Mtn. to Dismiss, D.E. No. 104 at 3.

In 2005, Defendant Cypress arbitrarily hired Defendants Lewis Tein to provide legal representation to the Miccosukee Tribe. D.E. No. 75 at ¶ 27, 106. At the same time, Defendants Lewis Tein represented Defendant Cypress in a myriad of personal legal matters. *Id.* at ¶¶28(a), 39. These personal legal matters, like the Internal Revenue Service (hereinafter, "I.R.S.") audit of Defendant Cypress, many times were in direct conflict with their representation of the Miccosukee Tribe. As the attorneys for the Miccosukee Tribe, Defendants Lewis Tein had legal and fiduciary duty to maintain, protect and preserve the legal and property interests of the Miccosukee Tribe which was at the core of their representation. *Id.* at 209, 247, 262, 277, 452,

457, 460. The commencement of this dual and conflict ridden legal representation of Defendant Cypress individually and the Miccosukee Tribe was also the beginning of a complex scheme to defraud the Miccosukee Tribe that would span over five years and involve attorneys, tribal officers and employees and a financial institution.

MEMORANDUM OF LAW

I. STANDARD FOR MOTION TO DISMISS

Defendants Lewis Tein have facially attacked the Second Amended Complaint in their 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] 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. "At the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *Bryant v. Avado Brands, Inc*., 187 F.3d 1271, 1273 (11th Cir.1999).

II. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE MICCOSUKEE TRIBE'S SECOND AMENDED COMPLAINT

This Court has subject matter jurisdiction over this case as alleged in the Second Amended Complaint. 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. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362.[1] There are no issues presented by the Second Amended Complaint that are outside of this Court's jurisdiction.

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[1] The Miccosukee Tribe alleged federal question jurisdiction. *See* Second Amended Complaint ¶2(a). Although the Miccosukee Tribe did not include § 1362 in its Second Amended Complaint, the Supreme Court has stated that § 1362 only allows Indian tribes to bring suits for less than the minimum jurisdictional bar.

> Considering the text of § 1362 in the context of its enactment, one might well conclude that its *sole* purpose was to eliminate any jurisdictional minimum for "arising under" claims brought by Indian tribes. Tribes already had access to federal courts for "arising under" claims under **§ 1331**, where the amount in controversy was greater than $10,000; for all that appears from its text, **§ 1362** merely extends that jurisdiction to claims below that minimum.

A. The Second Amended Complaint Does Not Present A Intertribal Dispute

This case is not about "whether Defendant Cypress improperly abused his tribal authority by using tribal funds in a manner within his discretion." Defendants, Guy Lewis, Esquire, Michael Tein, Esquire, Lewis Tein P.L.'s Motion to Dismiss and Incorporated Memorandum of Law (hereinafter, "Motion to Dismiss") at 3, D.E. No. 94. On July 1st, 2010, the Miccosukee General Council, acting in its official capacity, passed General Council Resolution No. MGC-03-10 (hereinafter, referred to as "the General Council Resolution"), attached herein as Exhibit 1, 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 Council. 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 Defendants Lewis Tein's assertion, this case does not present an 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* D.E. No. 75 at ¶¶ 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).

Defendants Lewis Tein cite two cases in support of their proposition claiming that because this case presents an intra tribal dispute, this Court lacks subject matter jurisdiction. Furthermore, although Defendants Lewis Tein assert this case revolves around an intra tribal dispute, they fail to provide a case that defines what an intra 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–

Blatchford v. Native Village Of Noatak, 501 U.S. 775, 784 (1991).

36 (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); and 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).

Defendants Lewis Tein quote *Smith v. Babbit* as stating that "an Indian tribe, 'like other sovereigns, is immune from suit for alleged RICO violations'". 100 F.3d 556, 559 (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 to the former chairman. 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 Defendants Lewis Tein's arguments. 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 sovereignty retained by Indian tribes. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978)). Indeed, as the *Smith* court expresses, "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 "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 that 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 since the court dismissed the RICO claim only once it determined that 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, was an intra tribal dispute centered around an internal dispute regarding the tribe's governance and its constitution including an 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, and the Court has subject matter jurisdiction, 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. Defendant Cypress Cannot Assert Immunity Against The Miccosukee Tribe

Defendants Lewis Tein's poorly articulated argument that Defendant Cypress is immune from suit is devoid of common sense, or legal support, in light of the Miccosukee Tribe's General Council Resolution. Additionally, Defendants Lewis Tein seek for this Court to find that the Miccosukee Tribe, an Indian tribe, cannot sue a former tribal officer, for acts it has already

determined were illegal, not authorized and beyond the scope of that officer's authority because said former tribal officer can assert the tribe's own sovereign immunity against the Miccosukee Tribe. Defendants Lewis Tein's argument would require 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.

In addition, Defendant Cypress is subject to suit because 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 the sovereign was capable of bestowing on him. *Ex Parte Young*, 209 U.S. 123, (1908); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1210 (11th Cir. 2012)(citing *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1225 (11th Cir.1999) as holding "[T]ribal officers are protected by tribal sovereign immunity when they act in their official capacity and within the scope of their authority; however, **they are subject to suit under the doctrine of *Ex Parte Young* when they act beyond their authority.**")(Emphasis added). It would be absurd for Defendant Cypress to argue that the Miccosukee Tribe was capable or willing to bestow on him the authority to steal and plunder tribal funds for his and his co-conspirators' personal benefit. Thus, under the *Ex Parte Young* doctrine Defendant Cypress is subject to suit.

III. THE MICCOSUKEE TRIBE PLED THE RICO CLAIM WITH THE REQUISITE SPECIFICITY AS REQUIRED BY THIS COURT

The Miccosukee Tribe has complied with the plausibility criteria set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), as well as the heightened pleading standard of FED. R. CIV. P. 9(b). However, "courts have recognize that if the alleged fraud occurred over an extended period of time and the acts were numerous, the specificity requirements are less stringently applied." *Bill Buck Chevrolet, Inc V. Gte Florida, Inc.*, 54 F.Supp.2d 1127, 1137 (M.D. Fla. 1999). The Eleventh Circuit explained in *Ziemba v. Cascade International, Inc.* that: "Rule 9(b) is satisfied if the Complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir.2001). The Miccosukee Tribe's allegations in the Second Amended Complaint accepted as true "state a claim to relief that is plausible on its face." *Id.*

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. 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." *Tombly*, 550 U.S. at 557. *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. Moreover, the Miccosukee Tribe has complied with these pleading standards and "nudged its claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The facts in the Miccosukee Tribe's Complaint are well-pled, and the Court should assume these facts as true, and infer that there has been misconduct by the Defendants, for which the Miccosukee Tribe is entitled to relief for this egregious behavior.

A. RICO ELEMENTS

The Miccosukee Tribe has sufficiently established the essential requirements of a RICO claim: a RICO enterprise and a pattern of racketeering activity. *Jackson v. Bellsouth Telecommunications*, 372 F.3d 1250, 1264 (11th Cir. 2004). Additionally, the Miccosukee Tribe's Second Amended Complaint has provided the information required by this Court in its Order dated October 10, 2012, where it stated that the Miccosukee Tribe had failed to sufficiently plead in its First Amended Complaint, **with the required specificity**, the following: 1) the misconduct of the Lewis Tein Defendants; 2) the pattern of racketeering/criminal activity by the Lewis Tein Defendants; 3) the description of the enterprise insofar as whether the Lewis Tein Defendants are separate from the enterprise, members of the enterprise, or form the enterprise itself; 4) the description of the activities and the pattern of racketeering by the Lewis Tein Defendants; and 5) and a statement as to whether the same entity is both the liable "person" and the "enterprise". D.E. No. 55 at 4-5. Additionally, this Court stated that no specific format

was required when pleading the pattern of racketeering activity. D.E. No. 55 at 4, 6. As explained below, the Miccosukee Tribe has complied with this Court's requirements.

1. RICO Enterprise

A RICO enterprise "exists 'where a group of persons associates, formally or informally, with the purpose of conducting illegal activity. *Jackson v. Bellsouth Telecommunications*, 372 F.3d 1250, 1264 (11th Cir. 2004). The Miccosukee Tribe alleged the description of the enterprise regarding Defendants Lewis Tein in Paragraphs 18-22, which includes the allegations that Defendant Lewis, Tein and Lewis Tein P.L. are each members of the enterprise, not the enterprise itself and each Defendant a liable person.

2. Pattern of Racketeering Activity

The Miccosukee Tribe alleged a pattern of racketeering activity, by alleging that: (1) the Defendants committed two more 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*, 372 F.3d at 1264. The pattern of racketeering/criminal activity by Defendants Lewis Tein is alleged in paragraphs 106 through and including 151. Additionally, the Miccosukee Tribe alleged that Defendants Lewis Tein failed to report income unlawfully obtained from the Miccosukee Tribe in their income tax return. D.E. No. 75 at ¶¶110-113. The Miccosukee Tribe alleged three different types of predicate acts: 18 U.S.C. § 1956; 18 U.S.C. 1957; and 18 U.S.C. § 1341; which were repeatedly violated and form the pattern of racketeering activity committed by Defendants Lewis Tein.

As part of the overall scheme to defraud, which is explained further below, Paragraph 28(a) alleges three (3) different types of misconduct committed by Defendants Lewis Tein, including that Defendants Lewis Tein: designed a dual representation of the Miccosukee Tribe and Defendant Cypress in order to: 1) protect Defendant Cypress in his legal personal matters, 2) charge the legal fees and expenses owed by Defendant Cypress to the Miccosukee Tribe and fraudulently disguise those charges are "loans"; and 3) to kick back money to Defendant Cypress so he could continue enjoying his extravagant life style and make payments on his personal debts. Paragraph 29 alleges that Defendants Lewis Tein aided Defendant Cypress in concealing from the Miccosukee Tribe the theft of millions of dollars. Paragraph 30 alleges that Defendants Lewis Tein incorporated Lewis Tein P.L. in order to legitimize and further their fraudulent scheme of stealing and helping Defendant Cypress steal from the Miccosukee Tribe since a law

firm, with additional attorneys, would increase the hours that could be billed to the Miccosukee Tribe for work that was arbitrarily assigned, exaggerated and many times not necessary or fictitiously created by Defendant Cypress for the sole purpose of generating funds to support his illegal scheme. Therefore, the Miccosukee Tribe has provided details and notice of the conduct by Defendants Lewis Tein that is criminal and unlawful.

a) Description of Facts Showing Violation of § 1956 Is Sufficiently Alleged

The Miccosukee Tribe sufficiently pled Defendants Lewis Tein's repeated violation of two distinct subsections of § 1956. Specifically, paragraphs 106 through 113, 122 through 128, and 137 through 143 detail Defendants Lewis Tein's violation of § 1956. "When a plaintiff alleges money laundering under 18 U.S.C. §1956(a)(1) as a predicate act for a civil RICO claim," the plaintiff must make factual allegations that show "(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) (citing 18 U.S.C. § 1956(a)(1); and *United States v. Majors*, 196 F.3d 1206, 1212 (11th Cir. 1999) (outlining elements of 18 U.S.C. §1956(a)(1)(B) (i) in a criminal case)). "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 is defined to include violations of mail fraud and 18 U.S.C. § 1957 among others. *Id.* at fn. 5 (citing 18 U.S.C. § 1956(c)(7). Importantly, unlike mail fraud allegations, money laundering allegations underlying a civil RICO claim need not satisfy the heightened particularity standard in Rule 9(b), FED. R. CIV. P. *Id.* (citing *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1355-56 (11th Cir. 2008).

The statute defines the term "transaction" as including "a purchase, sale, loan, pledge, gift, **transfer**, **delivery**, or **other disposition**, and with respect to a financial institution…." § 1956(c)(3) (Emphasis added). "Financial transaction" is defined as

> (A) a transaction which in any way or degree affects interstate or foreign commerce (i) **involving the movement of funds by wire or other means** or (ii) **involving one or more monetary instruments**, or …, or (B) a transaction

> involving the **use of a financial institution** which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

§ 1956(c)(4)(Emphasis added). Finally, "monetary instruments" are defined as (i) coin[s] or currency of the United States or of any other country, travelers' checks, personal checks, **bank checks**, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery; §1956(c)(5) (Emphasis added).

These paragraphs describe, through factual allegations accepted as true, and reasonable inferences therefrom taken in the light most favorable to the plaintiff, a scheme to defraud the Miccosukee Tribe by Defendants Lewis Tein that commenced in April of 2005 (¶106). As to the violation of § 1956 (a)(1)(B)(i), the scheme includes charging the Miccosukee Tribe exorbitant (D.E. No. 75 ¶107:"three times higher than the rate of attorneys with more experience, prestige, and expertise in the field") legal fees for work that was fictitious and unnecessary. It is reasonably inferred from these paragraphs that there was an agreement between Defendant Cypress and Defendants Lewis Tein, in which Defendant Cypress would arbitrarily and without the knowledge or consent of the Miccosukee Tribe assign legal work, with the understanding that the Miccosukee Tribe would pay the extremely high and arbitrarily determined legal fees that Defendants Lewis Tein would charge. This agreement included disguising unnecessary and fictitious work as tribal legal issues as well as legal services for the personal legal matters arbitrarily assigned by Defendant Cypress. An example of personal legal representation is the legal services provided to Defendant Cypress regarding a tax investigation by the United State Internal Revenue Service for making unauthorized charges of millions of dollars on tribal credit cards. D.E. No. 75 ¶ 106. *See* United States' Motion to Deny Petitions to Quash, No. 10-Civ.-21332, D.E. No. 15 at 2, attached as Exhibit 2.

Moreover, this scheme to defraud consisted of an additional component and agreement, which can be inferred from the facts alleged in the paragraphs mentioned above, pursuant to Defendants Lewis Tein's performance of legal services for matters and issues arbitrarily assigned by Defendant CYPRESS, without the knowledge or consent of the Miccosukee Tribe, of a few tribal members who were not generally aware of the nature of the representation or the fees charged. Defendant Cypress, in concert with the other named Defendants, but without the knowledge or approval of the Miccosukee Tribe, paid Defendants Lewis Tein more than $10,000,000.00 from the funds of the Miccosukee Tribe. *Id.* ¶ 108(d) and (e). Although these

services would be reflected in Defendants Lewis Tein legal invoices as work for the individuals, the payments made for those services by the Miccosukee Tribe would be reflected in internal tribal accounting as loans to the tribal member to be paid at a future date. *Id.* Both Defendant Cypress and Defendants Lewis Tein knew that the loans were never going to be paid back to the Miccosukee Tribe and were not authorized by the Business and General Council or known by the Tribal members, with the exception of Defendant Cypress and the other named Defendants. *Id.* at ¶ 108 (e) and (f). This agreement and component of the scheme to defraud the Miccosukee Tribe served the purpose of allowing Defendants Lewis Tein to continue charging outrageous legal fees to the Miccosukee Tribe *Id.* at ¶ 108 (g). In order to maintain the appearance that these charges were legitimate, they were arbitrarily disguised by Defendant Cypress as loans and a few small and sporadic payments were made . *Id.* at 108(h).

The third and last component of the scheme to defraud was the funneling of a part of the excessive legal fees charged by Defendants Lewis Tein to Defendant Cypress as payment for the assignment of extravagantly overpriced legal work, and the cover up of same by making some payments to loans on Defendant Cypress' name. *Id.* at ¶ (i) and (j). Part of the money kicked back to Defendant Cypress was reinvested into the scheme to defraud by making some payments to the loans since it served to maintain the appearance that the loans were legitimate and were being paid to some extent. *Id.* These acts by Defendants Lewis Tein and Defendant Cypress were intentional and proved to be a successful scheme to defraud the Miccosukee Tribe out of millions of dollars. The Miccosukee Tribe alleged that the fraudulent and exorbitantly overpriced legal fees were reflected in monthly invoices submitted to Defendant Cypress by Defendants Lewis Tein from May 19, 2005 to August 3, 2010 on a monthly basis. *Id.* at ¶ 117-120. These allegations also show that payment was sent on or about the date of payment reflected in the checks, which the Miccosukee Tribe listed in the Second Amended Complaint. *Id.* at 120.

The allegations in the paragraphs mentioned above, accepted as true, and the inferences, taken in the light most favorable to the Plaintiff, provide the specificity required by Rule 9(b) and give Defendants Lewis Tein notice of their fraudulent conduct, namely knowing that their legal fees for the representation of the Miccosukee Tribe and Defendant Cypress were the result of this scheme to defraud, as detailed above, and that this scheme to excessively and repeatedly overcharge the Miccosukee Tribe was designed to conceal the fact that the funds belonged to the

Miccosukee Tribe and not to Defendant Cypress, nor any of the chosen tribal members, in violation of section 1956 (a)(1)(B)(i).

In addition to the above referenced scheme, Defendants Lewis Tein violated § 1956(a)(1)(A)(ii) by failing to report the proceeds of their unlawful criminal activity to the Internal Revenue Service as required by 25 U.S.C. § 7201. As alleged by the Miccosukee Tribe, Defendants Lewis Tein, after receiving the 1099s issued, failed to report the unlawful proceeds of their scheme to defraud. A review of the Miccosukee Tribe's Second Amended Complaint shows that the Miccosukee Tribe alleged sufficient details of the overall scheme to defraud and the conduct by Defendants Lewis Tein specifically that meet the elements of a violation § 1956(a)(1)(A)(ii). Although the Miccosukee Tribe alleged in paragraph 113 that Defendants Lewis and Tein were in violation of 26 U.S.C. § 7206, the correct statute is 26 U.S.C. § 7201 as is clear from the factual allegations in the preceding paragraphs and in the statement in paragraph 113 that "he filed a false federal tax return." Therefore, it is clear that the Miccosukee Tribe meant to make this allegation against Defendants Lewis Tein under § 7201 and not 7206. This was a scrivener's error. However, accepting the factual allegations and the 1099s as true, and reasonable inferences therefrom, in the light most favorable to the Plaintiff, the Miccosukee Tribe has also sufficiently alleged a violation of § 1956(a)(1)(A)(ii) against Defendant Tein and Lewis Tein P.L. The Forms 1099 were issued to the corporation's name and sent to the corporate address. This is clear from the face of the Forms 1099. It is also clear and undisputed that Lewis Tein P.L. is owned by both Defendant Lewis and Defendant Tein. It is reasonably inferred from the facts in paragraphs 110 through 113, the time, as income tax returns are filed once a year with the I.R.S.; the who, as income tax returns must be filed by the individual and or corporation; and the what, as the Miccosukee Tribe has reason to believe, based on its allegations in paragraph 111, that Defendants Lewis Tein failed to report some or all of the income reflected in the Forms 1099, as Defendants Lewis Tein has argued in pending state proceedings that these Forms 1099 were "fabricated" by the Miccosukee Tribe and created "after the fact." Tr. of Hr'g, 7:16-22, *Miccosukee Tribe v. Lewis Tein*, Case No. 12-12816, Sept. 11, 2012, attached as Exhibit 3.

The Miccosukee Tribe has pled the predicate acts under § 1956 against Defendants Lewis Tein with sufficient specificity to meet the Rule 9(b) standard despite not having to do so. *See Liquidation Comm'n of Banco Intercontinental, S.A.,* 530 F.3d at 1355-56.

b) Description of Facts Showing Violation of § 1957 Is Sufficiently Alleged

The Miccosukee Tribe sufficiently plead a violation of § 1957 by Defendants Lewis Tein. A plaintiff must allege the following elements to state a clause of action for a violation of § 1957: (1) the defendant must knowingly engage or attempt to engage in a monetary transaction; (2) the defendant 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); *United States v. Ferguson*, 142 F. Supp. 2d 1350, (S.D.Fla. 2000); *United States v. Cerafatti*, 221 F.3d 502, 506 (3d Cir. 2000). Section 1957(f) defines "monetary transaction" as:

> "the **deposit**, withdrawal, **transfer**, or **exchange**, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, **through**, or **to a financial institution** (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

§1957(f)(1). Relevant to the overall scheme to defraud and the several acts of misconduct alleged in the Second Amended Complaint, is 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." *Silvestri*, 409 F.3d at 1335 (citing *United States v. Williamson*, 339 F. 3d 1295, 1302 (11th Cir. 2003). Thus, the allegations in the Second Amended Comaplint specifically paragraphs 114 through 116, 129 through 131, and 144 through 146, accepted as true, and reasonable inferences therefrom taken in light most favorable to the Miccosukee Tribe, detail and specify the misconduct of Defendants Lewis Tein's in violation of § 1957.

c) Violation of 18 U.S.C. § 1341 Is Sufficiently Alleged

The Miccosukee Tribe sufficiently alleged Defendants Lewis Tein's violation of §1341, mail fraud. "Mail or wire 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). "The mail or

wire transmission does not have to be an essential element of the scheme, but it must be incident to an essential part of the scheme. *Levitan v. Patti*, No. 09 Civ. 321-MCR-MD, 2011 WL 1299947 * 11 (N.D. Fla. Feb. 8, 2011) (citing *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989)). A jury may infer an intent to defraud from the defendant's conduct." *United States v. Bradley*, 644 F.3d 1213, 1239 (11th Cir. 2011). "Evidence that a defendant personally profited from a fraud may provide circumstantial evidence of an intent to participate in that fraud." *United States v. Naranjo*, 634 F. 3d 1198, 1207 (11th Cir. 2011) (citing *United States v. Navarro–Ordas*, 770 F. 2d 959, 966–67 (11th Cir.1985)). Significantly, the mail and wire fraud statutes "punish unexecuted as well as executed schemes." *Bradley*, 644 F.3d at 1240 (citing *Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir.1991)). Mail fraud is completed upon the sending of the fraudulent invoices. *See Silvestri*, 409 F. 3d at 1334-35. "It is therefore unnecessary that the victim actually relies on the misrepresentation or omission; proof of intent to defraud is sufficient." *Id.* 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)); *see Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1212 (11th Cir. 1981) (where the 11th Circuit adopted Fifth Circuit precedent before 1981 as binding.)

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. Pursuant to the judicial definition, a "scheme to defraud" is broader than the common law conception of fraud. *Bradley*, 644 F. 3d at 1240 (citing *Hammerschmidt v. United States*, 265 U.S. 182, 188, (1924)). "Our definition 'is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Id.* (citing *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958). The term "still signifies 'the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *Id.* "To gauge a defendant's intent to commit a fraudulent scheme, then, we must determine whether the defendant attempted to obtain, by deceptive means, something to which he was not entitled." *Id.*; *see also 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."); *United States v. Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla. 1962) (stating "a scheme to obtain money unfairly by obtaining and then betraying the confidence of another is a scheme to defraud although no lies are told.").

The Miccosukee Tribe met both the plausibility standard and the heightened pleading standard regarding the allegations of mail fraud against Defendants Lewis Tein. Paragraphs 117 through 121, 132 through 136, and 147 through 151 detail Defendants Lewis Tein's violation of § 1341. There can be no question that the Miccosukee Tribe has provided the who, the what, the where, and the when in regards to its allegations that Defendants Lewis Tein's monthly invoices sent through the mail to Defendants Cypress reflecting fraudulent legal services as described above constitute repeated violations of § 1341. It is sufficient as this stage that the Miccosukee Tribe alleged that the invoices were submitted to Defendant Cypress once a month (Defendants Lewis Tein are in the best position to know the date they submitted the legal invoices to the Miccosukee Tribe). *But See Simpson v. Sanderson Farms, Inc.*, No. 12 Civ. 28, 2012 WL 4049435 * 11 (M.D. Ga. Sept. 13, 2012) (finding that "plaintiff s have alleged violations of § 1546 sufficient under Rule 9(b) to withstand a Rule (b)(6) motion to dismiss. While Plaintiffs do not allege specific names of the alleged illegal workers, the Court does not believe such specificity is required at this juncture. And while no specific dates are given, the Court tends to agree with Plaintiffs that there is no way they could know that information at this time since the I-9 Forms at issue are in Defendants' possession.").

d) Reves Test

Defendants Lewis Tein seem to be arguing that the Miccosukee Tribe is only alleging that they provided "common legal services to the Miccosukee Tribe" and as such they cannot be held liable for a RICO violation. This argument is unsupported by the law or facts. The Miccosukee Tribe has clearly alleged facts, throughout its Second Amended Complaint, that show that Defendants Lewis Tein's participation in the scheme to defraud went above and beyond the provision of common legal services.

It is correct that "courts following *Reves v. Ernst and Young*, 507 U.S. 170 (1993) have generally held that the provision of traditional legal services does not constitute the operation and management of an enterprise for purposes of RICO liability. *Kelly v. Palmer, Reifler and Associates, P.A.*, 681 F. Supp. 2d 1356, 1380-31 (S.D. Fla. 2010). It is also clear that while the provision of common legal services will not give rise to RICO liability under the statute, there is no *"per se* rule that one cannot operate or manage an enterprise via the provision of legal services." *Al-Rayes v. Willingham*, No. 06 Civ. 362, 2007 WL 788401 * 2 (M.D. Fla. 2007) (citing *Thomas v. Ross & Hardies,* 9 F.Supp.2d 547, 554 (D. Md. 1998). "For that reason, when

'the professional services provided strike at the very core of the enterprise,' it can be said that the lawyer is managing or operating the enterprise." *Id.* Although Defendants Lewis Tein cite to *Kelly* to support its argument that "attorneys cannot be held liable under the Civil RICO for the performance of legal services even if those services involve fraud, because the performance of legal services does not constitute "operation and management of an Enterprise," (D.E. No. 94 at 12), a review of the *Kelly* shows that the case fails to provide such a statement. Similarly, neither does *Design Pallets, Inc. v. Gray Robinson, P.A.*, 07 Civ. 655, 2008 WL 3200275 (M.D. Fla. Aug. 5, 2008); *Baumer v. Pachl*, 8 F.3d 1341 (9th Cir. 1993); nor *Handeem v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997). All of these cases have found that "an attorney or other professional does not conduct an enterprise's affair through run of the mill provision of professional services." *Design Pallets*, 2008 WL 3200275 *5; 112 F. 3d 1339; 681 F. Supp. 2d 1356. Finally, although courts have held that "due to the similarity of the Florida and federal RICO Acts, under Florida law a court can look to federal courts' interpretations of the federal RICO Act for guidance and persuasive authority in construing the Florida RICO Act," *Horace-Manasse v. Wells Fargo Bank, N.A*, No. 10 Civ. 81623, 2012 WL 1232016 at * 2 (S.D. Fla. April 12, 2012) (citing *Lugo v. State*, 845 So. 2d 74, 96 n. 39 (Fla. 2003); *Gross v. State*, 765 So. 2d 39, 42 (Fla. 2000); *Palmas y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc.*, 881 So. 2d 565, 570 n. 1 (Fla. 3d DCA 2004), the language of the Florida Rico statute "may render the analysis in Reves inapplicable to the Florida RICO Act." *Horace-Manasse*, 2012 WL 1232016 at * 5.

It is mystifying that Defendants Lewis Tein argue that this Court must find that the allegations, accepted as true, and inferences therefrom, taken in the light most favorable to the plaintiff, clearly show that they merely provided run of the mill legal services. The Miccosukee Tribe has pled sufficient facts to show that Defendants Lewis Tein's provision of legal services "strike at the very core of the enterprise" and as a result, it can be said and inferred that Defendants Lewis Tein were managing or operating the enterprise.

3. Closed Ended Continuity

The allegations made by the Miccosukee Tribe meet the closed ended continuity element. A plaintiff establishes closed ended continuity "by 'proving a series of related predicates extending over a substantial period of time.'" *Magnifico*, 783 F. Supp. 2d at 1227. The Eleventh Circuit has found that "closed-ended continuity cannot be met with allegations of schemes lasting less than a year." *Id.* (citing *Jackson*, 372 F.3d at 1266. "Open ended continuity may be

established by either showing that the predicate acts were a part of a 'regular way of doing business' or threaten repetition in the future. *Id.* In *Magnifico*, the Court found that 18 months was enough to establish a closed ended continuity when the scheme involved several victims, several predicates acts of mail fraud, wire fraud, among others and spanned throughout two states and two countries. *Id.* at 1229.

Defendants Lewis Tein cite to *Jackson, Efron v. Embassy Suites (Puerto Rico) Inc.*, 223 F.3d 12 (1st Cir. 2000) and *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545 (10th Cir. 1992) for the proposition that "when a single scheme with a discrete goal" is involved, "courts refuse to find closed-ended pattern of racketeering even when the scheme took place over longer periods of time." D.E. No. 94 at 18. However, Defendants Lewis Tein fail to provide the Court's entire statement. The Court in *Jackson* stated: "indeed, in cases like this one, where the Rico allegations concern a single scheme …" *Jackson*, 372 F. 3d at 1267. The phrase "in cases like this one" is important because the time period involved in *Jackson* was nine months, less than the two year period of time the Eleventh Circuit has found to be the minimum. *Jackson*, 372 F. 3d at 1267. In *Effron*, the time period was twenty one months; less than two years. Finally, in *Boone* the time period involved was one year and three months. However, the time period involved in this case well surpasses the time periods of time found insufficient in the cases cited by Defendants Lewis Tein. The facts of this case, regarding continuity and mail fraud are more akin to those in the case of *Fleet Credit Corp. v. Sion*, 893 F. 2d 441, 445 (1st Cir. 1990). The First Circuit found in *Fleet* that ninety-five fraudulent mailings over four and one-half years "is the type of long term criminal conduct defined by the Supreme Court as continued criminal activity." *Id.*

In this case, Defendants Lewis Tein created an elaborate and intricate scheme to defraud the Miccosukee Tribe, which included multiple components, multiple defendants, a variety of racketeering acts, and multiple goals over a five year period of time, as well as more than ninety-five fraudulent mailings in a five year span. It is disingenuous to state that the scheme had a discrete goal when the goal of the scheme was to defraud the Miccosukee Tribe of millions of dollars through repeated and varied criminal acts, which included unfairly obtaining and betraying the confidence of a tribal government. Although the scheme alleged by the Miccosukee Tribe might be described as a single scheme, it was a highly complex scheme with different and

multiple acts designed to advance such scheme and the goals and financial benefits to each of the different named Defendants.

4. Scienter

The Miccosukee Tribe has alleged that Defendants Lewis Tein knew the stolen funds belonged to the Miccosukee Tribe and that Defendants Lewis Tein had an intent to defraud the Miccosukee Tribe throughout its Second Amended Complaint in paragraphs 41(c), (h), (j); 67; 108(c), (e), (g); 127 (c), (e), (g); 142 (c), (e), (g); 180; 248; 263; 278; 428.

As previously stated, "a RICO plaintiff 'need not produce direct proof of scienter.'" *Bill Buck Chevrolet, Inc.*, 54 F.Supp.2d at 1132. In *Beck v. Manufacturers Hanover Trust*, the court stated that "a common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so." 820 F. 2d 46 (2d Cir. 1987)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. Pursuant to the judicial definition, a "scheme to defraud" is broader than the common law conception of fraud. *Bradley*, 644 F.3d at 1240 (citing *Hammerschmidt v. United States*, 265 U.S. 182, 188, (1924)). "Our definition 'is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Id.* (citing *Gregory v. United States*, 253 F. 2d 104, 109 (5th Cir. 1958). The term "still signifies 'the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *Id.* "To gauge a defendant's intent to commit a fraudulent scheme, then, we must determine whether the defendant attempted to obtain, by deceptive means, something to which he was not entitled." *Id.*; *see also 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."); *United States v. Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla. 1962) (stating "a scheme to obtain money unfairly by obtaining and then betraying the confidence of another is a scheme to defraud although no lies are told.").

Defendants Lewis Tein rely on *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935 (11th Cir. 1997), and *Bill Buck Chevrolet, Inc.* and *United States v. Baker*, 19 F.3d 605 (11th Cir. 1994) to support their argument that the Miccosukee Tribe has failed to allege the element of scienter for § 1956, § 1957 and § 1341. However, these cases however, do not provide the support Defendants Lewis Tein so desperately seek. In *Bill Buck Chevrolet, Inc.* the plaintiff made no allegation that the defendants knew "the source of the funds or the ultimate

beneficiary, or that the funds were derived from unlawful activity." 54 F. Supp. 2d at 1133. In this case, the Miccosukee Tribe has made repeated allegations as set forth in the paragraphs referenced above and others throughout the Second Amended Complaint that Defendants Lewis Tein knew that the funds belonged to the Miccosukee Tribe and certainly knew that they, among the other Defendants in this case were the beneficiaries. There are several allegations that state that Defendants Lewis Tein knew that the funds were derived from unlawful activity. In *Baker*, the court held that the act of depositing the funds in the defendants account derived from their own criminal activity showed the requisite knowledge. 19 F.3d at 614. It is reasonably inferred from the Miccosukee Tribe's factual allegations, that Defendants Lewis Tein deposited into their accounts the payments for their legal services that included the profits of their own criminal fraud activities. Finally, in *Republic of Panama*, the court found that "the fourth amended complaint does not allege that the []defendants knew the money transferred … was unlawfully diverted from the Panamanian government …" 119 F. 3d at 949. As stated above, the Miccosukee Tribe has sufficiently alleged the required knowledge by Defendants Lewis Tein that the money belonged to the Miccosukee Tribe.

IV. THE MICCOSUKEE TRIBE'S CONSPIRACY CLAIMS SURVIVES

The Miccosukee Tribe has sufficiently alleged Defendants Lewis Tein conspiracy to defraud the Miccosukee Tribe and to participate in the commission of in a multitude of predicate acts. A plaintiff can establish a RICO conspiracy claim "by showing that the defendant agreed to the overall objective of the conspiracy or by showing that the defendant agreed to commit two predicate acts." *American Dental Association v. Cigna Corp.*, 605 F. 3d 1283, 1293 (11th Cir. 2010). Due to the nature of agreements to commit criminal acts, such as those alleged by the Miccosukee Tribe, the showing does not have to be through the proffer of direct evidence, but can inferred from the conduct of the participants. Defendants Lewis Tein's agreement to the overall objective of the conspiracy, and/or to commit two predicate acts can be inferred from the allegations throughout the Second Amended Complaint and specifically from paragraphs 165 through 188.

V. THE MICCOSUKEE TRIBE HAS SUFFICIENTLY PLED THE ELEMENTS OF FRAUD

The Miccosukee Tribe has sufficiently alleged the elements of fraud against Defendants Lewis Tein for failure to disclose to the Miccosukee Tribe what they knew as a result of their

representation of Defendant Cypress: Cypress was withdrawing millions of dollars from the ATM machines. D.E. No. 75 at ¶27. The essential elements for a claim sounding in fraud are: (1) a material misrepresentation or **omission**, (2) reasonable reliance thereon, and (3) damages. *DeGirmenci V. Sapphire–Fort Lauderdale, LLLP*, 693 F.Supp.2d 1325, 1353 (S.D. Fla. 2010) (citing *AutoNation, Inc. v. GAINSystems, Inc.,* Case No. 08–61632–CIV, 2009 WL 1941279, at *9 (S.D.Fla. July 7, 2009) (Emphasis added).

The Miccosukee Tribe alleged the who, the what, the where, and the when with regards to its Fraud claim. For example, in alleging the who in paragraphs 247, 262, and 277 the Miccosukee Tribe alleged that Defendants Lewis Tein as professional attorneys for the Miccosukee Tribe had a legal and fiduciary duty to protect the legal and proprietary interests of the Miccosukee Tribe. In paragraphs 248, 263 and 278 the Miccosukee Tribe alleged the element of scienter. Further evidence of the scienter element is the fact that Defendant Cypress by and through Defendants Lewis Tein's representation espoused the outrageous explanation to the Internal Revenue Service that the $11,508,304.71 withdrawn from ATM machines at various casinos across the United States were withdrawn to provide Defendant Cypress with funds to test the operation of the Class II machines. Tr. of Lucky Jerry Cypress Decl., 45-46, Sept. 26, 2012, attached as Exhibit 4. In alleging what was omitted in paragraphs 249 264, and 279, the Miccosukee Tribe alleged the failure to disclose the wrongful and unlawful acts all of the Defendants in this case. Moreover, in paragraphs 250, 265 and 280 the Miccosukee Tribe alleged that the concealment of the wrongful and unlawful conduct by Defendants Lewis Tein was done for the purpose of reaping financial benefits.

In alleging scienter regarding the "when" in paragraphs 251, 252, 266, 267, 281 and 282, the Miccosukee Tribe alleged that Defendants Lewis Tein knew that the General Council meetings took place quarterly, always on February, May, August and November, and that Business Council meetings took place monthly. In providing further details, the Miccosukee Tribe alleged that financial and legal reports were presented in every one of those meetings. D.E. No. 75 at ¶¶ 253, 268, 283. In paragraphs 254, 257, 269, 270, 284, and 287, the Miccosukee Tribe listed the dates of the meetings, the individual in attendance and the role played by those individuals that attended. It can be reasonably inferred from the facts in the Second Amended Complaint that both the Business and General Council meeting take place at the Miccosukee Tribe reservation. The Miccosukee Tribe alleged reliance in the repeated instances of omissions

by Defendants Lewis Tein and the detriment resulting from that reliance, namely that the Miccosukee Tribe was unable to put a stop to the fraudulent scheme to steal and conceal the theft and fraud being committed upon the Miccosukee Tribe's legal and proprietary interests. D.E. No. 75 at ¶¶ 258, 259, 273, 274, 288, 289. Finally, the Miccosukee Tribe alleged the damage it suffered as a direct result of Defendants Lewis Tein' repeated omissions. D.E. No. 75 at 260, 261, 275, 276, 290, 291. All of these well pled factual allegations, accepted as true, and taking inferences therefrom, in the light most favorable to the plaintiff, meet the plausibility standard as well as the Rule 9(b) heightened pleading standard.

VI. THE COURT HAS SUPPLEMENTAL JURISDICTION

This Court has supplemental jurisdiction over the state causes of action in the Second Amended Complaint. The Miccosukee Tribe's RICO claim was pled with the requisite level of specificity required by this Court. Section 1367(a) states:

> (a)Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a). As a result, this Court has original jurisdiction over the Miccosukee Tribe Second Amended Complaint and the state causes of action found therein because the Miccosukee Tribe has sufficiently pled a federal RICO Claim.

Additionally, the Miccosukee Tribe hereby incorporates by reference, adopts, and re-alleges, as if set forth fully herein, the arguments made in the Miccosukee Tribe's Responses in Opposition as to all Defendants' Motions to Dismiss.

VII. LEAVE TO AMEND COMPLAINT IS PROPER SHOULD THIS COURT FIND THE COMPLAINT DEFECTIVE

Alternatively, if this Court finds that the Miccosukee Tribe's Second Amended Complaint is defective, the appropriate remedy is to allow the Miccosukee Tribe to file a Third Amended Complaint. "When a plaintiff has imperfectly stated what may be an arguable claim, leave to amend is ordinarily in order." *Alley v. Resolution Trust Corp.*, 984 F.2d 1201, 1207 (D.C. Cir. 1993). "Where a more carefully drafted complaint for failure to state a cause of action might state a claim, the plaintiff must be given **at least** one chance to amend the complaint…"

Bank v. Pitt, 928 F. 2d 1108, 1112 (11th Cir. 1991) (emphasis added). Should this Court find that the Miccosukee Tribe's Second Amended Complaint is insufficient, in the interest of justice, as well as according to relevant and binding authority, the Court should grant the Miccosukee Tribe leave to amend its Second Amended Complaint.

CONCLUSION

For the reasons described above, the Miccosukee Tribe respectfully requests that Defendants Lewis Tein's Motion to Dismiss be denied 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 14th day of January, 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
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: yinet@bromanlaw.com
E-mail: yesenia@bromanlaw.com