

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

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

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 OF INDIANS OF FLORIDA’S RESPONSE IN OPPOSITION TO
DEFENDANT BILLY CYPRESS’ MOTION TO STRIKE AND SUPPORTING
MEMORANDUM OF LAW TO THE MICCOSUKEE TRIBE’S RESPONSE IN
OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT**

COMES NOW Plaintiff, the Miccosukee Tribe of Indians of Florida (hereinafter, “the Miccosukee Tribe”), by and through the undersigned, and files this Response to Defendant Billy Cypress’ (hereinafter, “Defendant Cypress”) Motion to Strike the Miccosukee Tribe’s Response in Opposition to Motion to Dismiss Second Amended Complaint. In Support of its Response the Miccosukee Tribe states:

INTRODUCTION

Defendant Cypress is improperly requesting for this Court to strike the Miccosukee Tribe’s Response in Opposition to Motion to Dismiss Second Amended Complaint (hereinafter, referred to as “Response to Defendant Cypress’ Motion to Dismiss”) and the exhibits thereto, by

making blanket legal statements with little to no factual application. The Miccosukee Tribe requests that this Court consider the exhibits to the Response to the Defendant Cypress' Motion to Dismiss because all of the attached exhibits refer to matters that are inherent in the allegations of the Second Amended Complaint. In the alternative, even if this Court decides to strike the exhibits to the Response, it would be inappropriate to strike the Miccosukee Tribe's Response to Defendant Cypress' Motion to Dismiss in its entirety as it would preclude the Miccosukee Tribe from responding to any of the arguments made by Defendant Cypress in his Motion to Dismiss, and would result in prejudice to the Miccosukee Tribe. Finally, it would be inappropriate to treat Defendant Cypress' Motion to Dismiss as a Motion for Summary Judgment because the matter is not ripe for judgment on the pleadings.

MEMORANDUM OF LAW

A. THIS COURT MAY CONSIDER THE MICCOSUKEE TRIBE'S RESPONSE AND EXHIBITS IN THEIR ENTIRETY

This Court, in its discretion, may consider any material outside of the pleadings on a Motion to Dismiss. The discretion of this Court extends to its consideration of any materials which would facilitate the disposition of the action. *Thompson v. Chrysler Motors Corp.*, 755 F. 2d 1162, 1165 (5th Cir. 1985). The Miccosukee Tribe attached four exhibits to its Response to Defendant Cypress' Motion to Dismiss. The exhibits consisted of the following: (1) General Council Resolution; (2) Declaration of Mr. Jerry Cypress; (3) United States' Motion to Deny Petitions to Quash, *Miccosukee Tribe v. United States*, No. 10-cv-21332 (S. D. Fla. June 1, 2010); and (4) Morgan Stanley Smith Barney FMA Account Year End Summaries for 2006 through 2009. Exhibits 1 through 3 were included to facilitate this Court's determination of subject matter jurisdiction over this lawsuit. Defendant Cypress argues throughout his Motion to Dismiss that this Court lacks subject matter jurisdiction over this lawsuit because the claims

presented are of a purely intra-tribal nature. The first three exhibits demonstrate that there is no intra-tribal dispute. It is clear that the Miccosukee Tribe and the Internal Revenue Service have agreed that Defendant Cypress committed numerous wrongful acts against the Miccosukee Tribe. The purpose of attaching those exhibits was to contest and rebut Defendant Cypress' claim of lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), and not 12(b)(6) or 12(c). *See* FED.R.CIV.P. 12(d) ("If, **on a motion under Rule 12(b)(6) or 12(c)**, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."(emphasis added)). As such, those exhibits may properly be considered by this Court.

The fourth exhibit to the Miccosukee Tribe's Response to Defendant Cypress' Motion to Dismiss consists of the Morgan Stanley Account Year End Summaries for 2006 through 2009. These Year End Summaries are inherent to the allegations made in Second Amended Complaint. Specifically, in pages 18 through 53 of the Second Amended Complaint, the Miccosukee Tribe provides a chart that derived from the Year End Summaries. Second Am. Compl., D.E. No.75 at ¶ 45. Because the Morgan Stanley Year End Summaries, where these figures appeared, were incorporated by reference in the Second Amended Complaint, this Court may properly consider them in determining Defendant Cypress' Motion to Dismiss. *See In re Sprint Corp. Sec. Lit.*, 232 F. Supp. 2d 1193, 1210 (D. Kan. 2002).

B. IT IS IMPROPER TO STRIKE THE MICCOSUKEE TRIBE'S RESPONSE IN ITS ENTIRETY

If this Court determines that the exhibits to the Miccosukee Tribe's Response to Defendant Cypress' Motion to Dismiss may not be considered, it would not be appropriate to strike the Miccosukee Tribe's Response in its entirety. In Defendant Cypress' Motion to Strike, he requests for the entire Response to be stricken including the exhibits, but cites to no legal

precedent explaining the need to strike the Response. The Miccosukee Tribe's Response to Defendant Cypress' Motion to Dismiss includes many legal arguments, which are not solely dependent on the exhibits attached thereto. Striking the Miccosukee Tribe's Response would result in prejudice and would prevent the Miccosukee Tribe from disputing Defendant Cypress' Motion to Dismiss, providing Defendant Cypress with an unjustifiable and unfair advantage.

C. IT IS IMPROPER TO TREAT DEFENDANT CYPRESS' MOTION TO DISMISS AS A RULE 56 SUMMARY JUDGMENT MOTION BASED ON THE MICCOSUKEE TRIBE'S EXHIBITS

Defendant Cypress argues in his Motion to Strike, that if this Court considers the Miccosukee Tribe's Response, and the exhibits attached thereto, then it "must determine to treat the motion as seeking summary judgment." Cypress Mtn. to Strike, D. E. No. 145 at 3. As mentioned before, Federal Rule of Civil Procedure 12(d) requires that if matters outside of the pleadings are considered on a 12(b)(6) or 12(c) motion to dismiss, then it must be treated as a Rule 56 summary judgment motion. Federal Rule of Civil Procedure 12(d) does not apply because Defendant Cypress' Motion to Dismiss was partially based on lack of subject matter jurisdiction, and the exhibits attached by the Miccosukee Tribe were meant to establish this Court's subject matter jurisdiction.. Similarly, the Morgan Stanley Year End Summaries for 2006 through 2009 should not be considered as being a document outside the pleadings because they were incorporated by reference into the Second Amended Complaint..

The Eleventh Circuit has recognized an important qualification to Federal Rule of Civil Procedure 12(d) where certain documents and their contents are undisputed: "In ruling upon a motion to dismiss, the district court may consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged." *Speaker v. U.S. Dep't of Health & Human Services*, 623 F. 3d 1371, 1379 (11th Cir. 2010) (quoting *SFM Holdings, Ltd. v. Bank of*

Am. Secs., LLC, 600 F. 3d 1334, 1337 (11th Cir. 2010)). All of the documents attached to the Miccosukee Tribe's Response to Defendant Cypress' Motion to Dismiss are central to the Miccosukee Tribe's claims and their authenticity has not been challenged by Defendant Cypress. Consequently, any challenge thereto has been waived. Therefore, the Miccosukee Tribe's Response to Defendant Cypress' Motion to Dismiss and the exhibits thereto: (1) should not be stricken; (2) should be considered in their entirety; and (3) the Motion to Dismiss should not be treated as a Rule 56 Motion for Summary Judgment.

In addition, this case is not ripe for summary judgment because there are several reasonable inferences which may be drawn from disputed facts. *Lawrence v. Dunbar*, 919 F. 2d 1525, 1530 (11th Cir. 1990). An example of one of these disputed facts is the extent of Defendant Cypress' authority to use tribal funds for gambling. Accordingly, summary judgment is not appropriate at this stage.

FAILURE TO CONFER

Prior to filing the Motion to Strike, Counsel for Defendant Cypress did not confer with the undersigned as required by Southern District of Florida Local Rule 7.1(a)(3). This failure is sufficient cause for this Court to deny the motion and impose "on counsel an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." *Id.* For this reason, Defendant Cypress' Motion to Strike the Miccosukee Tribe's Response in Opposition to Motion to Dismiss Second Amended Complaint should be denied and proper sanctions imposed.

PRAYER FOR RELIEF

WHEREFORE, the Miccosukee Tribe respectfully requests for this Honorable Court to DENY Defendant Cypress' Motion to Strike the Miccosukee Tribe's Response in Opposition to Motion to Dismiss Second Amended Complaint. In the alternative, the Miccosukee Tribe requests this Honorable Court to strike only the exhibits to the Miccosukee Tribe's Response.

Respectfully submitted on this 13th day of February 2013.

/s/Bernardo Roman III

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2013 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully Submitted,

s/Bernardo Roman III
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SERVICE LIST

Miccosukee Tribe of Indians of Florida v. Cypress
Case No. 12-22439-COOKE/McAliley
United States District Court for the Southern District of Florida

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