

UNITED STATES DISTRICT COURT  
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.

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**MICCOSUKEE TRIBE’S MOTION FOR RECONSIDERATION OF OMNIBUS ORDER  
GRANTING DEFENDANTS’ MOTIONS TO DISMISS PLAINTIFF’S SECOND  
AMENDED COMPLAINT (D.E. No. 282)**

COMES NOW, the Plaintiff, the Miccosukee Tribe of Indians of Florida (hereinafter, “the Miccosukee Tribe”), by and through undersigned counsel, hereby files this motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure respectfully requesting this Court to reconsider its September 30, 2013 *Order* Granting Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint (D.E. No. 282) (hereinafter, “the Order”) by altering or amending it because the District Court committed clear error. This Court has misinterpreted the Miccosukee Tribe’s Complaint. In support thereof the Miccosukee Tribe states:

**INTRODUCTION**

This is not a case about blood or family. This is a case about a pattern of corruption, greed and thievery by a group of individuals, including an elected official and a number of alleged professionals whose duty was to protect the interests of the Miccosukee Tribe and its People. Instead, they conspired to create a scheme which allowed them to misappropriate the

funds of the Miccosukee Tribe and its people. Now, these same individuals who not only failed to meet their professional duties, but also perpetrated a fraudulent scheme for millions of dollars, have used their former positions as a sword and a shield by cynically claiming intratribal dispute as a basis for this Court not to exercise jurisdiction. There is no intratribal dispute here. The Miccosukee Tribe's legislative body, the Miccosukee General Council has conclusively decided based upon the Miccosukee Tribe's Constitution that Defendant Cypress's use of tribal funds was improper and unauthorized. The jurisdictional defense of intratribal dispute does not apply to Defendant Cypress, and certainly cannot apply to the other named Defendants who were neither Tribal Members nor Tribal Officers, nor did they share Indian blood. The only thing these Defendants shared was their greed, corruption and insatiable appetite to steal millions of dollars from the funds of the Miccosukee Tribe. These Defendants, as shown in the evidence attached to the pleadings filed in this case, simply took the money that is used to pay for the assistance of the elders, the children, the infirm and those in need, under the cover of their professional licenses as attorneys, accountants, and financial advisors. Unfortunately, these Defendants, including the corrupt former Chairman, Billy Cypress, cynically argue that the federal courts should not be involved because the money stolen is Indian money. Even the Internal Revenue Service has been actively investigating Defendant Cypress for his misappropriation of Tribal funds, and the allegations of an intratribal dispute has not persuaded them to cease their investigation. Therefore, this Court may properly exercise jurisdiction over the Miccosukee Tribe's claims.

### **PROCEDURAL HISTORY**

The Miccosukee Tribe filed its original Complaint in this action on July 1, 2012. D.E. No. 1. On July 30, 2012, the Miccosukee Tribe filed its Amended Complaint, as of right, in order to request additional relief from this Court. D.E. No. 13. On August 6, 2012, Defendants Lewis Tein filed a Motion to Require Plaintiff to File a Civil RICO Case Statement. D.E. No. 14. In the Miccosukee Tribe's Response in Opposition to Defendants Lewis Tein's Motion for a Civil RICO Case Statement, the Miccosukee Tribe requested that if the Court found that the fraud in the RICO claim was not pled with sufficient specificity, it should be granted leave to file a Second Amended Complaint. D.E. No. 15 at 4. The Court granted the relief requested by the Miccosukee Tribe. D.E. No. 55 at 4. On November 9, 2012, the Miccosukee Tribe filed its Second Amended Complaint. D. E. No. 75.

On December 14, 2012, Lewis Tein filed a Motion to Dismiss the Second Amended Complaint. D.E. No. 94. On December 14, 2012, Lehtinen filed a Motion to Dismiss the Second Amended Complaint. D.E. No. 92. On December 21, 2012, Cypress filed a Motion to Dismiss the Second Amended Complaint. D.E. No. 104. On December 21, 2012, Hernandez filed a Motion to Dismiss the Second Amended Complaint. D.E. No. 103. On December 21, 2012, Martinez filed a Motion to Dismiss the Second Amended Complaint. All of the Motions to Dismiss relied on the primary argument that this Court lacked subject matter jurisdiction over the claims asserted by the Miccosukee Tribe because the allegations made by the Tribe amounted to an intratribal dispute. On January 14, 2013, the Miccosukee Tribe filed its responses to Defendants' Motions to Dismiss. D.E. No. 118. Thereafter, Defendants filed replies in support of their Motions to Dismiss.

On April 4, 2013, Lewis Tein filed a Motion for Summary Judgment. D.E. No. 191. On April 29, 2013, the Miccosukee Tribe filed its Response in Opposition to Lewis Tein's Motion for Summary Judgment. D.E. No. 203. On May 27, 2013, Lewis Tein filed a Motion to Stay Discovery Pending Resolution of Dispositive Motions. D.E. No. 231. On July 24, 2013, this Court issued an order granting Lewis Tein's Motion for Stay. D.E. No. 264. On September 30, this Court issued an Order granting all Defendants' Motions to Dismiss. D.E. No. 282.

**STANDARD ON MOTION TO RECONSIDER UNDER RULE 59(e)**

A party filing a motion to reconsider under Rule 59(e) "must demonstrate why the court should reconsider its prior decision and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Wendy's Intern., Inc. v. Nu-Cape Const., Inc.*, 169 F.R.D. 680, 684-85 (M.D. Fla. 1996); *Center Capital Corp. v. Q.E.S.T., Inc.*, No. 09 Civ. 157, 2009 WL 2600518 \* 1 (S.D. Ala. August 20, 2009). Granting a motion for reconsideration is justified if: "(1) there is an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice." *Id.* Reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources. *Id.* Such a motion is appropriate, however, when the court has patently misunderstood a party and has made a decision outside the adversarial issues presented, or has made a mistake, not of reasoning, but of apprehension. *Wendy's Intern. Inc.*, 169 F.R.D. at 686 (citing *Gregg v. American Quasar Petroleum Co.*, 840 F.Supp. 1394 (D.Colo.1991)). The District Court is afforded substantial discretion in ruling on motions to

reconsider, but the discretion is not unbridled. *Sussman v. Salem*, 153 F.R.D. 689, 694 (M.D. Fla. 1994).

A district court abuses its discretion when a relevant factor deserving a significant weight is overlooked, or when an improper factor deserving of significant weight is overlooked, or when the court considers the appropriate mix of factors, but commits palpable error of judgment in calibrating the decisional scales.

*Id.*

### **1. This Court Committed an Error of Law in Dismissing The Miccosukee Tribe's Complaint With Prejudice**

In its Order Granting Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint, this Court dismissed the Tribe's Complaint with prejudice stating "I am not of the opinion that Plaintiff can draft a complaint that will confer jurisdiction upon this Court, even accepting them as true as averred by the Miccosukee Tribe." This statement demonstrates a patent misunderstanding of the Miccosukee Tribe's Second Amended Complaint and Responses to the Motions to Dismiss.

This Court committed a clear error of law in determining that the allegations presented by the Miccosukee Tribe's Second Amended Complaint constituted an intra-tribal dispute. An intra-tribal dispute is a matter "involving questions of [a] tribal constitution and tribal law." *Runs After v. United States*, 766 F. 2d 347, 352 (8th Cir.1985). Specifically, Indian tribes have the power "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members" and to punish tribal offenders. *Montana v. U.S.*, 450 U.S. 544, 564 (1981).

This Court misconstrues the case law and policy which shapes the concept of an intratribal dispute. The concept of an intratribal dispute as a jurisdictional defense is meant to protect the right of self-government by an Indian Tribe and the sanctity of tribal sovereign immunity. It is not meant to keep Indian Tribes from bringing lawsuits in federal court against a group of individuals who orchestrated a fraud, the majority of which are non-Indian and when most acts were committed on non-tribal lands.

The cases cited in this Court's Order provide clear insight into the types of cases involving an intratribal dispute. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978), a tribal member sued a tribe for not granting membership to her daughter. The court found that it did not have jurisdiction to infringe upon the tribe's membership decisions. *See id.* at 55, 71. The

court's holding, however, rested on the fact that it was an Indian tribe being sued, which is not permitted absent a waiver of sovereign immunity. Similarly, in *Smith v. Babbitt*, 100 F. 3d 556, 557 (8th Cir. 1996), a group of tribal members sued a tribe and the tribe's Business Council under numerous statutes and the tribal constitution for alleged payments to non-members and denial of payments to members. The court determined that the case involved a membership determination which is within the exclusive jurisdiction and sovereign power of the tribe. In *Smith*, not only was the tribe a defendant, but some of the causes of action were brought under the tribal constitution necessitating its interpretation. *See id.* at 558-59. The court declined to infringe upon the tribe's sovereign immunity and membership decisions. *Id.*

In *Longie v. Spirit Lake Tribe*, 400 F. 3d 586, 586 (8th Cir. 2005), a tribal member brought suit against its tribe in a quiet title action. The court found that whether the tribe legally consented to and effectuated the transfer of the land was an intra-tribal matter contingent upon tribal law, not federal law and declined to exercise jurisdiction. *Longie*, 400 F. 3d at 590.

This Court refers to the case of *Kaw Nation v. Springer*, 341 F. 3d 1186 (10th Cir. 2003), to support dismissal of this case as an intratribal dispute. Notably, *Kaw Nation* deals with a specific federal statute which does not grant a private civil right of action. *Id.* at 1187. The statutes under which the Miccosukee Tribe pursued its Complaint do provide for a private civil right of action under federal law and therefore, *Kaw Nation* does not provide support for this Court's finding of lack of subject matter jurisdiction.

This Court's reliance upon *Sac & Fox Tribe of Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003), is similarly misplaced. In *Sac & Fox Tribe*, there were two rival Tribal Councils which were attempting to exert authority simultaneously. *Id.* at 939. The Appointed Council questioned the authority and the acts of the Elected Council. *Id.* Also, the Tribe's Constitution granted dispute resolution power to the Tribal Council. *Id.* Therefore, had the court exercised jurisdiction over the case, the court would have had to interpret the tribe's constitution to determine if the elected council had authority for the acts it was being accused of, because if in fact the acts were authorized, then there were no RICO predicate acts. *See id.* at 943. In the present case, there was no intratribal dispute. The Miccosukee Tribe as a whole sued its **former** Chairman Billy Cypress. There is no question that Cypress's actions were unauthorized. *See* Miccosukee General Council Resolutions attached as **Composite Exhibit 1**. Therefore, the facts

in *Sac & Fox* are inapposite and do not bar this Court from exercising jurisdiction over the Miccosukee Tribe's Second Amended Complaint.

Consistently when faced with suits against Indian tribes by tribal members and non-members for matters touching on the tribe's self-government, the federal courts have had a general policy of non-interference with tribal self-government. *See Tillet v. Lujan*, 931 F. 2d 636, 642 (10th Cir. 1991). The aggrieved parties have been directed to seek relief from tribal forums. The present case is different. *See id.* The Miccosukee Tribe itself brought suit against its former chairman and numerous professionals who worked for the Tribe. The Miccosukee Tribe's legislative body has already conclusively decided that the acts of Defendant Cypress and Defendants Lewis Tein were improper and unauthorized. *See* Composite Ex. 1.

The Miccosukee Tribe did not file a lawsuit under the Tribal Constitution, did not request for this Court to interpret the Tribal Constitution, and any determination of tribal law which may have been necessary was conclusively decided by the Miccosukee General Council Resolutions. *See Kaw Nation ex rel. McCauley v. Lujan*, 378 F. 3d 1139, 1140 (10th Cir. 2004)(Lawsuit brought by individual members of tribe claiming that a tribal judge was not properly confirmed under the tribal constitution dismissed for lack of subject matter jurisdiction). Therefore, this lawsuit is ripe for adjudication by this Court and this Court committed a clear error of law in dismissing the Miccosukee Tribe's Second Amended Complaint with prejudice.

**2. This Court Erred in Striking the Exhibits to the Miccosukee Tribe's Response to Defendant Cypress' Motion to Dismiss Which Conclusively Established That There Is No Intratribal Dispute**

In Defendant Cypress's Motion to Dismiss, he alleged sovereign immunity as a defense. Sovereign immunity is grounds for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). In the Miccosukee Tribe's Response to Defendant Cypress's Motion to Dismiss, the Miccosukee Tribe included as an exhibit Miccosukee General Council Resolution No. MGC 03-10, dated July 1, 2010, which unequivocally states that 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." Thereafter, Defendant Cypress filed a Motion to Strike the Tribe's Response to the Motion to Dismiss along with exhibits. On September 30, 2013, this Court granted Defendant Cypress's Motion in part by striking the exhibits to the Miccosukee Tribe's response. The Court's action of

striking the Miccosukee General Council Resolution and all other exhibits was clear error by this Court.

First of all, “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)). Because the Miccosukee General Council Resolution is central to this Court’s subject matter jurisdiction and the authenticity of the resolution has not been challenged, this Court erred in striking it and in not considering its effect on the subject matter jurisdiction of this Court. Any alleged intratribal dispute which could have existed was resolved by the Miccosukee General Council’s Resolution. The Resolution in and of itself serves as the necessary interpretation of the tribal constitution and absolutely finds Defendant Cypress’s actions to have been unauthorized and harmful. This Resolution leaves no need for this Court to engage in any interpretation of the tribal constitution and destroys any possible intratribal dispute that may prevent this Court’s jurisdiction. Therefore, it was clear error to ignore this Resolution, a finding that resulted in prejudice to the Miccosukee Tribe.

Secondly, this Court erroneously decided that Defendant Cypress’s challenge was a facial challenge to the Court’s jurisdiction. In fact, Defendant Cypress’s challenge was factual because it contests the truth of the allegations that, by themselves, would be sufficient to invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Defendant Cypress specifically alleges that he is protected by tribal sovereign immunity. 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). Therefore, Defendant Cypress’s sovereign immunity defense turned on whether he actually committed the acts alleged against him and whether those acts were authorized. Factual attacks challenge “the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” *Lawrence v. Dunbar*, 919 F. 2d 1525, 1529 (11th Cir. 1990). Therefore, this Court should have rightfully considered the Miccosukee General Council Resolutions.



### **3. This Court Should Exercise Jurisdiction Over the State Law Claims**

Because this Court erred as a matter of law in dismissing the Miccosukee Tribe's Second Amended Complaint in its entirety, this Court should reconsider its Order Granting Defendants' Motions to Dismiss and should rightfully exercise its jurisdiction over the state law claims alleged in the Complaint. This Court should exercise its discretion in favor of preserving jurisdiction over these properly plead state law claims.

### **CONCLUSION**

As set forth above, the Miccosukee Tribe's Second Amended Complaint does not present an intratribal dispute which strips this Court of subject matter jurisdiction. The claims brought by the Miccosukee Tribe do not require interpretation of the Tribal constitution. This Court committed a clear error of law in granting the Defendants' Motions to Dismiss the Miccosukee Tribe's Second Amended Complaint.

For the foregoing reasons, the Miccosukee Tribe respectfully requests that this Honorable Court grant its Motion for Reconsideration of Omnibus Order Granting Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint (D.E. No. 282).

Respectfully submitted this 10th day of October, 2013.

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