

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

UNITED STATES OF AMERICA,)
)
Petitioner,)
)
v.) Civil Action No. 1:14:-mc-20938-CMA
)
COLLEY BILLIE,)
AS CHAIRMAN, MICCOSUKEE)
GENERAL COUNSEL, MICCOSUKEE)
TRIBE OF INDIANS OF FLORIDA)
)
Respondent.)

**REPLY IN SUPPORT OF PETITION TO ENFORCE INTERNAL REVENUE SERVICE
SUMMONS**

The United States files this reply in support of its petition to enforce an IRS summons to Colley Billie to address matters that Chairman Billie raised in his response. This matter is set for a hearing on August 11, 2014. After requesting several extensions from the Court and from the United States, Chairman Billie and the Tribe have continued their failure to comply with the IRS summons at issue in this case. Billie filed a response alleging that he lacks authority to release the records at issue based on a resolution that the General Council of the Tribe passed almost two years after the summons was served on Billie. The resolution and Billie's claimed inability to comply with the summons are not a proper basis to deny enforcement. At the hearing on August 11, 2014, the United States requests that the Court order Billie to promptly comply with the summons.

The IRS is investigating the Miccosukee Tribe of Indians for its failure to comply with provisions of the internal revenue code. Revenue Agent James Furnas served a summons on Colley Billie as Chairman and records custodian of the Tribe on June 27, 2012. Docket No. 1-2. On July 18, 2012, the Tribe filed a petition to quash the summons at issue. *Miccosukee Tribe of*

Indians of Florida v. United States, No. 1:12-mc-22638-UU (S.D. Fla. Jul. 18, 2012). The Tribe did not allege that Billie lacked the ability or authority to comply with the summons. On February 11, 2013, this Court denied the Tribe's petition to quash. *Id.* The United States subsequently petitioned to enforce the summons. Docket No. 1. After the Court issued an Order that it would grant no further extensions to the Tribe, Billie filed a response to the United States' petition to quash alleging that he lacks the authority to comply with the summons and attaching a resolution from the Tribe's General Council dated June 12, 2014, allegedly denying the request to comply with the summons.

Billie's recent purported lack of authority to comply with the IRS summons is not a defense to enforcement. When an IRS summons is served, the rights and obligations of the party on whom the summons was served become fixed. *United States v. Darwin Constr. Co.*, 873 F.2d 750, 755 (4th Cir. 1989). Receipt of a summons imposes on the recipient a duty to retain possession of the documents pending a judicial determination of the enforceability of the summons. *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980). A respondent who did not have possession or control of the documents at the time the summons was served must raise this as a defense to enforcement of the summons in the initial enforcement proceeding. *United States v. Rylander*, 460 U.S. 752, 757 (1983). Lack of possession or control of the requested records is a defense to the enforcement of a summons only if the respondent properly establishes non-possession. *Id.* Not possessing the records is not a defense to enforcement of the summons if the respondent caused the records not to be in his possession after receiving the summons. *Asay*, 614 F.2d at 660. "Not surprisingly, the law does not allow a custodian of records to send them away after receiving a summons and then claim he cannot produce them because they are

no longer in his possession.” *United States v. Three Crows Corp.*, 324 F. Supp. 2d 203, 206 (D. Me. 2004).

Here, Billie only argues that the Miccosukee General Council denied his request to release the records. He makes no allegations that he lacks possession, custody, or control over the documents or the present ability to comply with the summons absent the Council’s resolution. Further, this lack of authorization arose long after the IRS served the summons on Billie and fixed his obligation to retain the records and prepare them for disclosure. The resolution also indicates that Billie at least contributed to, if not caused, the present lack of authorization. Billie is head of the General Council, and the Council voted unanimously to deny the purported request to release the records. Thus, Billie’s response fails to establish a lack of possession, custody, or control at the time the summons was served and, therefore, fails to set forth any valid reason for denying enforcement of the summons.

Furthermore, Billie cites no authority, and there appears to be none, allowing an organization to avoid complying with a summons by purportedly revoking its leader and record custodian’s authority to release certain records. The Supreme Court “has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents and a custodian’s assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian’s act of production is not deemed a personal act, but rather an act of the corporation.” *Braswell v. United States*, 487 U.S. 99, 109-10 (1988); *cf. Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012) (holding

that a suit against a tribal chairman in his official capacity is generally the same as a suit against the tribe). It would be antithetical to rules requiring collective entities to submit records to the Government to allow entities to alter a custodian's responsibilities to avoid production. If Billie indeed lacked the authority to produce the records as he now claims, the Tribe should have raised this defense when it originally objected to the summons at issue more than two years ago.

The Court should order Billie promptly to comply with the summons at issue.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, the foregoing document was served by the Court's CM/ECF system on:

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