

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

Case No. 14-MC-20938/ALTONAGA

UNITED STATES OF AMERICA,

Petitioner,

v.

**COLLEY BILLIE, as Chairman of the
MICCOSUKEE GENERAL COUNSEL,
And MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA,**

Respondent.

**MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S
EMERGENCY MOTION TO STAY PENDING APPEAL**

The Miccosukee Tribe of Indians of Florida (hereinafter, “the Miccosukee Tribe”) through undersigned counsel files this Emergency Motion to Stay Pending Appeal, pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure, respectfully requests this Court to stay pending appeal of this Honorable Court’s Order of August 13th, 2014 entitled Order Enforcing Summons [ECF No. 26] attached as Exhibit A. In support thereof the Miccosukee Tribe states:

1. On August 11, 2014, the Court heard oral arguments on the Internal Revenue Service’s Petition to Enforce Summons.

2. At the conclusion of the hearing, the Court ruled that the Petition to Enforce Summons would be granted and that a proposed order should be submitted to the Court for signing.

3. On August 13, 2014, this Court entered the Order Enforcing Summons. [ECF No. 26].

4. The Order Enforcing Summons requires that Chairman Colley Billie turn over the documents requested by the Internal Revenue Service on or before August 28, 2014.

5. On August 25, 2014, the Miccosukee Tribe filed its Notice of Appeal of Order Enforcing Summons.

6. The Court should grant the Miccosukee Tribe's Motion to Stay because: 1) The Miccosukee Tribe and Chairman Colley Billie will suffer irreparable harm if its governmental records are forced to be released by the Chairman in complete disregard for the General Council's mandate and in contravention to the Miccosukee Tribe's Constitution; 2) it will likely succeed on the merits of its appeal; 3) no substantial harm will result to the IRS; and 4) the public interest will not be harmed by the temporary delay.

MEMORANDUM OF LAW

Standard for Grant of Stay Pending Appeal

When a taxpayer is not entitled to a stay pending appeal as a matter of right, the taxpayer must show 1) a likelihood that the taxpayer will prevail on the merits of the appeal¹; 2) irreparable harm or injury to the taxpayer unless a stay is granted; 3) no substantial harm to the other interested parties; and 4) no harm to the public interest. *Venus Lines Agency v. CVG Venezolana de Aluminio, C.A.*, 210 F. 3d 1309, 1313 (11th Cir. 2000). A stay as a matter of right lies when the judgment is a monetary one. *United States v. U.S. Fishing Vessel Maylin*, 130 F.R.D. 684, 686 (S.D. Fla. 1990). “Although the first factor is generally the most important, the movant need not always show that he probably will succeed on the merits of this appeal.” *Gonzalez v. Reno*, No. 00 Civ. 11424, 2000 WL 381901 *1 (11th Cir. April 19, 2000) (citing *Garcia-Mir. v. Meese*, 781 F. 2d 1450, 1453 (11th Cir. 1986)). “Instead, where the ‘balance of the equities weighs heavily in favor of granting the [injunction],’ the movant need only show a substantial case on the merits.” *Id.*²

The movant must address each factor, regardless of its relative strength. *In re Akron Thermal, Ltd. P’ship v. Akron Thermal, Ltd. P’ship*, 414 B.R. 193, 201

² The same standards that govern issuance of a stay pending appeal also govern the issuance of an injunction. See *In Re: Terazosin Hydrochloride Antitrust Litigation*, 352 F.Supp.2d 1279 (S.D. Fla. 2005); *Harris Corp. v. Federal Express Corp.*, No 07 Civ. 1819, 2011 WL 3627379 slip op. at 5 (M.D. Fla. Aug. 17, 2011).

(N.D. Oh. 2009). “To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits.” *Id.* The probability that must be shown is “inversely proportional to the amount of irreparable injury plaintiffs will suffer absent a stay. Simply stated, more of one excuses less of the other.” *Id.* A movant is required to show at a minimum that there are serious questions as to the merits. *Id.* Serious questions have been defined as “substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Gila River Indian Cmty. v. United States*, No. 10 Civ. 1993/2017/2138, 2011 WL 1656486 * 2 (D. Ariz. May 3, 2011).

I. THE MICCOSUKEE TRIBE MAY PREVAIL ON THE MERITS

While existing law does not support the position of the Miccosukee Tribe, the facts in this case are unique and of first impression. The Chairman of the Miccosukee Tribe, Colley Billie, is an elected official. He was elected by the governing and legislative body of the Miccosukee Tribe, the General Council. The Miccosukee Tribe’s General Council consists of all Tribal Members eighteen years of age and older. Chairman Colley Billie along with the Miccosukee Tribe’s Business Council presented a request to the General Council in order to compile and submit the documents requested in the summons. The General Council voted against turning over the documents and passed a resolution denying the document request. The Order Enforcing Summons is forcing the Chairman of the Miccosukee

Tribe to disobey the orders of the Miccosukee Tribe, the people who elected him and the people who he is meant to serve. This is the equivalent of the President of the United States directly disobeying a congressional mandate.

The Miccosukee Tribe's Constitution, attached as Exhibit B, delineates the duties of each of its officers. The Chairman's powers are limited by the constraints of the Constitution. The Constitution provides that the Chairman "shall not act on matters binding the tribe until either the General Council or the Business Council has deliberated and enacted appropriate resolution." Constitution of the Miccosukee Tribe of Indians of Florida, Article II § 1(b). Additionally, the Chairman "shall see that all resolutions and ordinances of both the General Council and the Business Council are carried into effect." *Id.* at § 1(c). The Chairman does not cast a vote at General Council or Business Council except in the case of a tie. *Id.* at § 1(g).

It is clear from the language of the Miccosukee Tribe's Constitution that Chairman Colley Billie does not have the power to compile the summoned documents or to produce them to the Internal Revenue Service. He is charged with the duties enumerated in the Constitution and as an elected official he may act only for those individuals he represents. He may not exceed the authority granted to him and therefore what this Court has ordered him to do is beyond his ability as Chairman of the Miccosukee Tribe. The documents being summoned are property

of the Miccosukee Tribe. The Miccosukee Tribe has not granted permission for the documents to be produced. The documents are not Chairman Colley Billie's to produce without approval. This Court's Order is commanding the Chairman to engage in actions that go directly against the Tribal Constitution and a General Council resolution. The equities in this case, as presented above, highly favor the granting of the Miccosukee Tribe's Motion to Stay pending this appeal.

II. THE MICCOSUKEE TRIBE WILL BE IRREPARABLY HARMED IF A STAY IS NOT GRANTED

The Miccosukee Tribe will suffer irreparable harm if a stay pending its appeal is not granted. A stay pending appeal will serve to protect the Miccosukee Tribe from a harm of epic proportions. A stay will serve to preserve the status quo and in turn preserve the meaning of tribal self-government while negotiations with the IRS are ongoing. The Supreme Court of the United States has recognized the federal policy of promoting tribal self-government and self-determination. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). If this Court's Order is not stayed pending appeal, the Miccosukee Tribe's governmental structure will be undermined and its Constitution stripped of any meaning. The Chairman of the Miccosukee Tribe is being forced to go against the dictates of the Constitution. The Order, if not stayed pending appeal, allows the federal government to demean the tribal government, its structure and its Constitution in direct contradiction to the federal policy to respect and encourage tribal self governance.

In the context of injunctions, an adequate showing of irreparable harm is one that shows that the injury is likely to occur and that it is the kind of injury for which an award of money cannot compensate. *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 293 F. Supp. 2d 183, 195 (N.D. N.Y. 2003). Irreparable harm is also shown “when the moving party alleges a constitutional deprivation for which monetary compensation is not an adequate remedy.” *Id.* Abrogation of the Tribal Constitution and right to self governance would result in irreparable harm which cannot be compensated by a monetary award.

Honoring tribal sovereignty, its corollary tribal sovereign immunity and tribal self-determination has been the policy of the federal government and its agencies for decades. The Honorable Eric H. Holder, Attorney General of the United States, has referred to the principles of tribal sovereign immunity and tribal self-determination as “sacrosanct” and unequivocally articulated that it is the policy of the Department of Justice to preserve and protect these principles. *See* Office of the Attorney General, *Letter to Tribal Leaders*, November 13, 2009, Attorney General Eric H. Holder, also available at <http://www.justice.gov/otj/pdf/tribal-leader-email.pdf>, attached herein as Exhibit C. The Miccosukee Tribe respectfully asks this Court to grant the requested stay and provide the protection that these important values deserve.

The Miccosukee Tribe will likely suffer substantial and irreparable harm if this Court does not grant a stay pending appeal because once the records are released the Miccosukee Tribe's appeal becomes moot. This will function to deprive the Miccosukee Tribe of their right to appeal. *See* 28 U.S.C. § 1291; *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (“[T]he Constitution and laws entitled litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable.”).

Release of the governmental records of the sovereign Miccosukee Tribe will result in two permanent damaging consequences: 1) the Tribal Constitution will be violated; and 2) it will set precedent that the governmental records of sovereign Indian tribes can be obtained by abrogating tribal self-government and forcing tribal officials to go against the laws of the Tribe. Failure to grant a stay will result in an intangible injury to the Miccosukee Tribe. Such an injury to tribal self-government is not quantifiable and cannot be reversed.

Moreover, if this the Eleventh Circuit reverses this Honorable Court's decision on the merits, the Miccosukee Tribe will be left with no remedy for its damages. Once tribal self-government has been trampled upon, the tribal Constitution and General Council Resolutions rendered meaningless, the remedy of returning the records or limiting its use provide no remedy at all.

III. THERE WILL NOT BE SUBSTANTIAL HARM TO THE OTHER INTERESTED PARTIES

The IRS will not suffer substantial harm because any harm will only be temporary. Although the IRS issued the summons challenged in this case in 2012, the Miccosukee Tribe has been conducting its gaming operations since the late 1980s. Therefore, the collection efforts of the IRS will not be substantially impeded by a stay pending appellate review. Similarly, in *Gonzalez*, the 11th Circuit found that a stay pending appeal would not harm the INS because the plaintiff had been in the country for 5 months and it had been 3 months since the INS had refused to consider plaintiff's INS application. *Gonzalez*, 2000 WL 381901 * 2. Because the INS had not moved to remove the Plaintiff in those 3 months, the Court found that the argument by the INS that it would be harmed if a stay pending appeal was granted was not compelling. *Id.* Just as in *Gonzalez*, the argument that the IRS would be harmed if a stay pending appeal was granted in this case is not compelling. The Miccosukee Tribe was authorized by Congress to conduct gaming operations in the late 1980s. It was not until 2005 that the IRS issued summons seeking to obtain tribal confidential governmental and financial records. According to Agent Furnas the IRS did not commence the examination of the Miccosukee Tribe until 2005. Furnas Dec. ¶ 4; *see also Order Granting United States' Motion to deny Petitions to Quash; Findings of Fact and Conclusions of*

Law [D.E. No. 52]. The temporary stay will not, therefore, substantially harm the IRS.

IV. THERE WILL NOT BE HARM TO THE PUBLIC INTEREST

There are several competing public interests in this case. The Miccosukee Tribe does not dispute that the United States as a sovereign has a general interest in the collection of taxes. However, there is also a unique public interests in the protection of Tribal sovereignty and tribal self-determination and self governance, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (“Congress is committed to a policy of supporting tribal self-government and self-determination”) and the protection of the Miccosukee Tribe’s right to appellate review. *In re SK Foods, LP.*, No. 09 Civ. 02942, 2009 WL 5206639 * 4 (E.D. Cal. Dec. 24, 2009) (stating that there is a public interest in “preserving the integrity of the right to appellate review”); *see also Population Inst.*, 797 F.2d at 1082 (“[T]he public interest will be furthered by an injunction pending appeal, which will preserve” the ability to provide complete relief “if an appellant is successful on appeal.”). As the 11th Circuit stated in *Gonzalez*, it is doubtful that to protect a party’s day in court, when the party’s appeal has arguable merit, would be contrary to the public interest. *Gonzalez*, 2000 WL 381901 * 2. Finally, any harm to the public interest in the collection of taxes will only be temporary until the court of

appeals decides the greatly important issues presented in the Miccosukee Tribe's appeal.

CONCLUSION

WHEREFORE, the Miccosukee Tribe respectfully requests this Honorable Court to grant the Miccosukee Tribe's Motion for Stay Pending Appeal in order to preserve the status quo and to honor and protect tribal self-government. Additionally, the Miccosukee Tribe respectfully requests that this Court grant a temporary stay while this motion is being considered in order to maintain the status quo and to maintain the records sealed.

Respectfully submitted on the 26th day of August 2014.

s/ Bernardo Roman III
Bernardo Roman III (Fl Bar No.:2739)
Tribal Attorney
Miccosukee Tribe of Indians of Florida
Legal Department
P.O. Box 440021, Tamiami Station
Miami, FL 33144
Telephone: (305) 894-5214
Facsimile: (305) 894-5212

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 26th, 2014, 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 in the manner specified, either via

transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Bernardo Roman III

Bernardo Roman III, Tribal Attorney

ROBERT L. WELSH
S.D. Fla. Bar No. A5500117
WILLIAM E. FARRIOR
S.D. Fla. Bar No. A5501479
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 14198
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6068
Facsimile: (202) 514-9868
Robert.L.Welsh@usdoj.gov
William.E.Farrior@usdoj.gov