

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

UNITED STATES OF AMERICA,	)	
	)	Case No. 1:14-MC-20938-CMA
Petitioner,	)	
	)	
v.	)	
	)	
COLLEY BILLIE, AS CHAIRMAN OF THE	)	
MICCOSUKEE GENERAL COUNCIL,	)	
MICCOSUKEE TRIBE OF INDIANS	)	
OF FLORIDA,	)	
	)	
Respondent.	)	

**RESPONSE IN OPPOSITION TO MOTION TO STAY**

The United States filed a petition to enforce an IRS summons issued to Colley Billie in his official capacity as Chairman of the Miccosukee Tribe of Indians of Florida for documents and testimony relevant to an IRS investigation of the Tribe. The Court issued an Order enforcing the summons and requiring Billie to comply with the IRS’s request. Docket No. 26. Instead of complying, Billie filed a notice of appeal and filed a motion to stay the Court’s Order enforcing the summons. Docket No. 31.

Billie’s motion fails to identify any valid reason to stay the Court’s Order and appears to be interjected solely for the purposes of delay. The Court should therefore deny Billie’s motion and order Billie, once again, to comply promptly with the IRS summons at a time and date designated by the IRS.

**BACKGROUND**

For several years, the IRS has been investigating the Miccosukee Tribe for its failure to report and withhold from distributions to tribal members. Throughout the IRS’s investigation, the Tribe has sought to delay and impede the IRS, resulting in several disputes submitted to this

Court. *Miccosukee Tribe of Indians of Fla. v. United States*, No. 12-cv-22638-UU, 2013 WL 7728831 (S.D. Fla. Feb. 11, 2013); *Miccosukee Tribe of Indians of Fla. v. Jewell*, --- F. Supp. 2d ---, 2013 WL 7158023 (S.D. Fla. Dec. 4, 2013); *Miccosukee Tribe of Indians of Fla. v. United States*, 877 F. Supp. 2d 1331 (S.D. Fla. 2012); *Miccosukee Tribe of Indians of Fla. v. United States*, No. 10-cv-23507-ASG; 2011 WL 3300164 (S.D. Fla. Aug. 2, 2011). The Tribe has been thus far been unsuccessful in its many attempts to prevent the IRS from obtaining the documents needed for its investigation. *E.g.*, *Miccosukee Tribe of Indians of Fla. v. United States*, 698 F.3d 1326, 1329 (11<sup>th</sup> Cir. 2012).

The dispute in this case involves a summons issued to Colley Billie as Chairman of the Tribe for records of the Tribe in an investigation of the Tribe for the 2006 through 2010 tax periods. Docket No. 1-2, IRS Summons. The summons was originally served on June 27, 2012. *Id.* at 2. The Tribe previously sought to quash the summons at issue in this case. Docket No. 1, *Miccosukee Tribe of Indians of Florida v. United States*, No. 1:12-mc-22638-UU (S.D. Fla. Jul. 18, 2012). In its petition to quash, the Tribe did not allege that Billie lacked the ability or authority to comply with the summons. This Court denied the Tribe's petition to quash on the grounds that the summons constituted a "first party" summons for which the Court had no jurisdiction to consider a petition to quash. *Miccosukee Tribe of Indians of Florida v. United States*, No. 1:12-mc-22638-UU (S.D. Fla. Feb. 11, 2013).

The United States subsequently petitioned to enforce the summons on March 12, 2014. Docket No. 1. Billie sought several delays in responding to the United States' petition to enforce. 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 his request to comply with the summons. Docket No. 19. The Tribe's resolution is dated after Billie had been served, after Billie's response to the summons was due, and after the United States filed its petition to enforce the summons. Billie also filed a copy of the Tribe's Constitution. Docket No. 24-1. Billie has not provided any evidence or testimony suggesting that he lacked possession, custody, or control of the summoned documents at the time the summons was served. Billie has not provided any evidence or testimony that he lacks the present ability to comply with the summons, apart from his claim that such compliance would violate instructions from the Miccosukee General Council. Billie has not provided any evidence contesting that he is the chairman and records custodian for the Tribe. And Billie has not provided any evidence that he cannot adequately represent the interests of the Tribe in this case.

#### ARGUMENT

“A stay is an intrusion into the ordinary processes of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable harm might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 1757 (2009) (quotations omitted). To support his motion to stay, Billie has the burden of making a strong showing that he is likely to succeed on the merits of his appeal and that the following factors weigh in favor of granting a stay: “whether, absent a stay, the movant will suffer irreparable damage; whether the adverse party will suffer no substantial harm from issuance of a stay; and whether the public interest will be served by issuing a stay.” *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1293 & n.12 (11th Cir. 2010); *Venus Lines Agency v. CVG Venezolana de Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000) (citing Fed. R. Civ. P. 62(d)). Because Billie failed meet any of these requirements, his motion should be denied.

**1. Billie is unlikely to succeed on the merits**

Billie has not set forth any valid defense to the Court's Order enforcing the summons at issue, let alone supported that defense with admissible evidence; therefore, he is unlikely to succeed on the merits of his appeal. "[T]he validity of the summons is to be tested as of the date of issuance of the summons." *United States v. Gimbel*, 782 F.2d 89, 93 (7<sup>th</sup> Cir. 1986). 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 (4<sup>th</sup> 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 (9<sup>th</sup> 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.*

Here, Billie only argues that the Miccosukee General Council denied his request to release the records. In support of this allegation, Billie attached a resolution dated almost two years after the summons in this case was served. Docket No. 19-1. This evidence is irrelevant to whether Billie maintained possession, custody, or control of the requested records at the time the summons was served. Billie candidly admits in his motion that "existing law does not support the position of the Miccosukee Tribe." Motion to Stay, Docket No. 31, at 4. He argues instead that "the facts in this case are unique and of first impression." *Id.* Regardless, Billie has offered no evidence of any fact relevant to the issues on appeal. Billie has offered no evidence that he lacked possession, custody, or control over the documents or the present ability to comply with

the summons, absent the Council's resolution. Thus, Billie's motion to stay fails to set forth any valid reason for overturning the Order enforcing the summons.

Furthermore, there is no authority 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). In the context of an American Indian tribe, suing the tribal chairman in his official capacity is the same as suing the tribe, absent some allegation that the chairman is an ineffective tribal representative. *Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012) (holding that the Tribe was not a necessary party in an official capacity suit against the chairman). 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. The Tribe cannot avoid the summons at issue by "revoking" its chairman's authority to submit records pursuant to a valid Court Order.

Because neither the evidence nor the law supports Billie's claims, Billie has no prospect of succeeding on the merits in his appeal. Given Billie's failure to demonstrate a likelihood of success on the merits, his motion for stay should be denied. Nonetheless, we will address his further arguments.

**2. Billie has not demonstrated irreparable harm if the stay is not granted**

The Supreme Court has held that handing over summoned records does not cause irreparable injury because a court may still order the Government to destroy or return any records it may have in its possession. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992). Handing over records will not moot any appeal, as he alleges. *Id.* Here, denying a stay will force Billie and the Tribe to comply with a valid IRS summons. This will allow the IRS to continue its investigation to determine the proper tax liability for the Tribe, but it will not harm Billie or the Tribe. This Court should follow the Supreme Court's holding that compliance with an IRS summons does not constitute irreparable harm.

Nor is Billie's argument that the Tribe will suffer irreparable harm because "it will set precedent that the governmental records of sovereign Indian tribes can be obtained by abrogating tribal self-government" legally cognizable. Motion to Stay, at 8. The Eleventh Circuit has already held that the IRS is entitled to tribal records, specifically of the Miccosukee Tribe, in response to a valid summons. *Miccosukee Tribe of Indians of Fla. v. United States*, 698 F.3d 1326, 1331 (11<sup>th</sup> Cir. 2012). Such entitlement is not affected by any internal procedures of the Tribe. Billie has failed to articulate any irreparable harm to himself or the Tribe.

**3. A stay will harm the United States' and the public's interest**

The third and fourth requirements for stay pending appeal (no substantial harm to other parties or to the public interest) merge into one here since the United States is a party. An IRS investigation would be seriously impeded if it were stayed while an appeal remained pending. *United States v. Kis*, 658 F.2d 526, 535-36 (7th Cir. 1981); *United States v. Manchel, Lundy & Lessin*, 477 F. Supp. 326, 334-35 (E.D. Pa. 1979). Such delay would harm the public interest in effective enforcement of the tax laws. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (Government should be allowed to "assess and collect taxes as expeditiously as possible with a

minimum of preenforcement judicial interference”); *Bull v. United States*, 295 U.S. 247, 259 (1935) (“taxes are the life-blood of government, and their prompt and certain availability an imperious need”); *United States v. Barrett*, 837 F.2d 1341, 1349 (5th Cir. 1992) (“The enforcement proceeding should be concluded expeditiously so that the actual investigation can be continued with the goal of reaching the final determination of whether there will be any civil or criminal liability for the taxpayer.”).

As this Court has already found, there is acute harm in granting a stay in this case because it would allow the Tribe to shield tribal members from paying tax found to be owing in ancillary investigations that may result from the IRS’s investigation. In another case involving a summons issued for tribal records, this Court noted “[t]hrough it is not the purpose of the instant summons, whether tribal members reported the income could lead to future information which would be important to the IRS regarding individual tribal members.” *Miccosukee Tribe*, 2011 WL 3300164, at \*14. “Postponing the investigation would affect taxability of the distributions to tribal members, potentially allowing the statute of limitations on collection or assessment to run as to the tribal members themselves.” *Id.* at \*16. In that case, the Tribe filed a similar motion to stay pending appeal raising many of the same arguments. Docket No. 59, *Miccosukee Tribe of Indians of Florida*, No. 10-cv-23507-ASG (S.D. Fla. Oct. 10, 2011). This Court applied the four-factor test and determined that the Tribe was not entitled to a stay, finding that the harm to the United States was “compelling.” *Miccosukee Tribe of Indians of Florida v. United States*, No. 10-23507, 2011 WL 5508802, at \*2 (S.D. Fla. Nov. 8, 2011).<sup>1</sup> As this Court has already

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<sup>1</sup> This Court granted a partial stay to allow the Tribe to move for a stay in the Eleventh Circuit. The partial stay required the IRS to seal records received pursuant to the summons for two weeks but did not relieve any party from the requirement to respond to the summons. *Id.* at (continued...)

found, the United States will be injured should the Court grant Billie a stay and prevent the IRS from obtaining records necessary to conduct its investigation.

In sum, there are no legal or equitable grounds on which a stay could be granted here.

#### CONCLUSION

For the foregoing reasons, the Court should deny Billie's request to stay this case pending appeal.

Respectfully submitted,

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(... continued)

\*2. The Eleventh Circuit summarily denied the Tribe's request for a stay in a single page order. *Miccosukee Tribe of Indians of Florida v. United States*, No. 11-14825 (11<sup>th</sup> Cir. Feb. 17, 2012).

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2014, the foregoing document was served by the Court's CM/ECF system on:

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