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

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

SECOND MOTION FOR ORDER TO SHOW CAUSE WHY RESPONDENT SHOULD NOT BE HELD IN CONTEMPT, FOR A CONTEMPT HEARING, AND FOR SANCTIONS

This case involves an IRS investigative summons issued to Colley Billie as Chairman of the Miccosukee Tribe of Indians of Florida. The United States requests that the Court issue an order to show cause as to why Billie should not be held in contempt, that the Court hold a contempt hearing, and that the Court sanction Billie for his failure to comply with a lawful Court Order.

BACKGROUND

For several years, the Miccosukee Tribe has refused to cooperate with the IRS's legitimate investigation of its failure to report and withhold federal income tax on distributions it makes to Tribal members. *E.g.*, *Miccosukee Tribe of Indians of Fla. v. United States*, 698 F.3d 1326, 1329 (11th Cir. 2012). When the Chairman of its General Council, Colley Billie, ignored an IRS summons requesting 19 categories of records of the Miccosukee Tribe and testimony from Billie related to that investigation, the United States commenced this action to enforce that summons. Docket No. 1; Docket No. 1-2, at 3-6.

On March 14, 2014, the Court issued an Order to Show Cause why the summons should not be enforced. Docket No. 3. After seeking several extensions of time, Billie responded by attaching a resolution from the Miccosukee Tribal Council purportedly revoking Billie's authority to release documents responsive to the summons. Docket Nos. 19, 19-1. Subsequently, the Court held a hearing and, after considering respondent's objections, issued an Order on August 13, 2014 enforcing the summons. Docket No. 26.

Billie filed a notice of appeal, Docket No. 27, and sought to stay enforcement of the summons in this Court. Docket No. 31. After this Court issued an Order on September 24, 2014 denying Billie's motion to stay, Docket No. 34, counsel for the United States wrote counsel for Billie to remind him of Billie's ongoing responsibility to comply with the Court's Order and to direct him to do so by delivering documents responsive to the summons to the IRS by October 28, 2014. Farrior Decl. Ex. 1. Billie responded through counsel by stating that that he was seeking a stay from the Eleventh Circuit, and would not comply with the summons while his request for a stay pending appeal was outstanding. Farrior Decl. Ex. 2.

The Eleventh Circuit summarily denied Billie's motion to stay on October 28, 2014. *United States v. Billie*, No. 14-13843 (11th Cir. Oct. 28, 2014). Nonetheless, Billie failed to deliver documents responsive to the summons on that day as demanded by the United States' October 21, 2014, letter, and he continues to ignore this Court's directive to comply with the summons. Furnas Decl. ¶¶ 4-5.

The United States filed this motion previously on November 6, 2014. Docket No. 35. The Court denied the motion without prejudice because it was unclear whether Billie would comply with the summons following the Eleventh Circuit's denial of his motion to stay. Docket No. 36. The United States contacted Billie's counsel on November 7 and 10 to ascertain Billie's

position on our motion for contempt and to determine when, if ever, Billie intends to comply with the Court's Order. Counsel for the United States additionally requested setting up a conference call to discuss this matter, and counsel for Billie declined. After requesting additional time for the Tribe to consider the matter, Billie refused to provide a date in which Billie intends to comply with the Court Order stating instead that the Tribe's position remains the same. Counsel also stated that Billie opposes the relief requested in this motion. This case and a prior case against Billie involving records of the Tribe demonstrate that Billie will only abide by valid IRS summonses when it is clear to him that sanctions are imminent. *See United States v. Billie*, No. 13-mc-21096-KMW (S.D. Fla. Nov. 4, 2013).[1] The IRS and the Department of Justice have tried diligently to obtain the Tribe's and Billie's voluntary compliance with the summons and Court Order, and it appears now that Billie will only comply when the Court imposes sanctions in the form of daily fines and incarceration.

ARGUMENT

By failing to provide documents responsive to the IRS summons and appear for testimony as directed, Billie has violated this Court's Order dated August 13, 2014. Docket No. 26. We therefore ask that the Court issue an order to show cause similar to the attached proposed order requiring Billie to appear and explain why he should not be held in contempt for failing to comply with the summons. Assuming Billie has no excuse for his failure to abide by

[1] The prior case involved a summons to Billie for records of the Tribe in an investigation of Billie Cypress, the Tribe's former chairman. Following a contempt hearing, the Court issued an Order requiring Billie to begin producing documents immediately, and Billie produced a substantial number of documents the following day. Some of those documents were responsive to this summons as outlined in the declaration of Revenue Agent James Furnas. Docket No. 1-1, ¶ 14.

the Court's Order, we ask that the Court find Billie in contempt and subject Billie to coercive fines and incarceration to secure his compliance.

This Court has jurisdiction to enforce an IRS administrative summons issued under the Internal Revenue laws by 26 U.S.C. § 7604 and may issue contempt orders pursuant to 26 U.S.C. § 7602 and the Court's inherent authority to enforce its own orders.

Because the evidence attached to this motion constitutes a *prima facie* showing of Billie's contempt, Billie has the burden to demonstrate current inability to comply with the Court's Order. When the government files a motion for contempt to enforce a court order, it must establish a *prima facie* case of contempt by clear and convincing evidence. *United States v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984); *Northside Realty Associates v. United States*, 605 F.2d 1348, 1352 (5th Cir.1979). To do so, the United States must show that certain conduct was required and that the alleged contemnor failed to comply with the same. *Hayes*, 722 F.2d at 725; *Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1315 (10th Cir. 1998) (noting that to be held in contempt, it must be shown by clear and convincing evidence that (1) a valid order existed, (2) the party had knowledge of the order, and (3) the party disobeyed the order). A *prima facie* case for contempt may be made by affidavits attached to the motion or sworn testimony. *See Miesel v. United States*, 412 U.S. 954 (1973); *Brussel v. United States*, 396 U.S. 1229 (1969); *United States v. United Mine Workers*, 330 U.S. 258, 301 n. 73 (1947).

Once a *prima facie* showing of violation has been made, the burden of proof shifts to the alleged contemnor to prove that he was unable to comply. *See Maggio v. Zeitz*, 333 U.S. 56, 75-76 (1948); *United States v. Rylander*, 460 U.S. 752, 757 (1983). The proper focus of the Court's inquiry is whether a Court order was violated, not the contemnor's state of mind. *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990) (citations omitted). Civil

contempt, which the United States is seeking in the instant matter, is designed to force a contemnor to comply with a court's order. *UMWA v. Bagwell*, 512 U.S. 821, 827 (1994); *United States v. McCorkle*, 321 F.3d 1292, 1298 (11th Cir. 2003). If a court finds that contempt has occurred, it has certain remedies and sanctions it can impose to compel compliance. *Bagwell*, 512 U.S. at 828-29. Available means include coercive fines (*e.g.*, *United States v. Darwin Constr. Co.*, 873 F.2d 750, 754 (4th Cir. 1989) (upholding fines of $5,000 a day for failure to turn over documents pursuant to summons enforcement order)); coercive imprisonment (*e.g.*, *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002) (upholding continued civil contempt incarceration after period of more than two years)); and compensatory fines (*e.g.*, *United States v. City of Jackson*, 359 F.3d 727, 733 (5th Cir. 2004)).

The Court's Order in no uncertain terms required Billie to appear and produce documents responsive to the IRS summons by August 28, 2014, and appear to give testimony by September 9, 2014. Docket No. 26. Billie did not produce the documents as required or appear for testimony. Instead, he filed a notice of appeal, which he knew did not relieve him of the requirement to comply with the Order since he twice moved to stay this Court's mandate. Although Billie's motions to stay were denied, he remains non-compliant. Therefore, the *prima facie* case is clear that Billie is in contempt of Court.

Billie may not avoid a finding of contempt by arguing that he does not have the authority to release the records. The United States sued Billie in his official capacity as chairman of the Tribe. Absent some allegation that Billie is an inadequate representative, the United States may bind the Tribe to produce its records by naming Billie. *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); *see Braswell v. United States*, 487 U.S. 99, 109-10 (1988)

(noting that collective entities may only act through their agents and describing the duty of a records custodian to respond to proper Government demands). It is no surprise that the Tribe objects to Billie releasing its records; however, the Tribe's attempt to revoke Billie's authority to release the records has no effect on this Court's authority to require such production. *See Miccosukee Tribe of Indians of Fla. v. United States*, 698 F.3d 1326, 1331 (11th Cir. 2012). Despite Billie's claimed lack of authority, Billie has the ability to produce the documents at issue; thus, he should be held in contempt for failing to do so.[2]

CONCLUSION

This Court ordered Billie to fully comply with the IRS summons by producing the requested documents and providing testimony. Billie has failed to comply with this Order. Therefore, the Court should hold a hearing requiring Billie to show cause why he should not be held in contempt. Assuming Billie is unable to do so, this Court should impose sanctions including coercive fines and incarceration to secure Billie's compliance.

Pursuant to Local Rule 7.1(a)(3), counsel for the United States certifies that he conferred with counsel for Billie, Bernardo Roman, in a good faith effort to resolve by agreement the issues raised in this motion and has been unable to do so.

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[2] If Billie intends to argue that he lacks custody or control of the records at the show cause hearing, Billie has the burden of producing credible evidence showing he lacks the present ability to comply with the summons. *United States v. Rylander*, 460 U.S. 752, 757-58 (1983). Billie may not rely on "*ex parte* affidavit[s] or uncross-examined testimony" to meet his burden. *Id*. Similarly, Billie may not rely on statements from counsel, as he attempted to do at the previous show cause hearing in this matter. *E.g.*, *United States v. Kendrick*, 682 F.3d 974, 987 (11th Cir. 2012) ("[S]tatements and arguments of counsel are not evidence.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2014, the foregoing document was served by the Court's CM/ECF system on:

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