No. _____

In the Supreme Court of the United States

LEWIS TEIN, P.L., GUY LEWIS AND MICHAEL TEIN,
Petitioners,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Third District Court of Appeal, State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the judicial doctrine of tribal sovereign immunity bars civil claims against an Indian tribe based on its intentional torts and criminal conduct that occurred off-reservation against non-members of the tribe.

PARTIES TO THE PROCEEDING

Petitioners are Lewis Tein, P.L., Guy Lewis and Michael Tein, plaintiffs and appellees below.

Respondent is the Miccosukee Tribe of Indians of Florida, defendant and appellant below.

CORPORATE DISCLOSURE STATEMENT

Lewis Tein, P.L. has no parent company and has no publicly held company owning any interest in it.

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JURISDICTION

The opinion of the Third District Court of Appeal was entered on August 9, 2017. The Petitioners moved to have the court certify the question decided as one of great importance to the Florida Supreme Court, which would allow the Florida Supreme Court to exercise its discretionary review authority. The court denied the request for certification on September 26, 2017. (App. 35.) This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1257(a).

INTRODUCTION

This case provides the Supreme Court with the opportunity to address the off-reservation reach of tribal sovereign immunity in an area that it has expressly left open, in which lower courts have reached conflicting decisions, and in which this Court has repeatedly recognized the potential for unfairness (of which this case is a prime example).

As "domestic dependent nations," Indian tribes enjoy some of the attributes of sovereignty, including sovereign immunity—the right not to be subject to suit without their consent. *Michigan v. Bay Mills Indian Community*, __U.S.__, 134 S. Ct. 2024, 2039 (2014). The core concerns of tribal sovereign immunity have traditionally been tribal self-governance and the

management of tribal lands. *See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). The Supreme Court has extended the doctrine of tribal sovereign immunity to the context of commercial relationships between Indian tribes and non-Indians. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998), the Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off reservation." *Kiowa*, however, was decided over a three-Justice dissent, which subsequently became a four-Justice dissent. *See Bay Mills*, 134 S. Ct. at 2045 ("I am now convinced that *Kiowa* was wrongly decided; that in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention.") (Scalia, J., dissenting).

As will be discussed below, (1) the Court's ruling in *Kiowa* acknowledged that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," 523 U.S. at 758; (2) the dissenting Justices in *Kiowa* and subsequent cases have sharply questioned the applicability of tribal sovereign immunity to <u>any</u> off-reservation conduct, let alone off-reservation torts; and (3) the Court has expressly left open the issue of whether tribal sovereign immunity applies to tortious conduct committed against non-Indians that occurs <u>off</u>-reservation. There is, in effect, a jurisprudential gap that has been left to lower courts to fill. That gap has been filled with decisions that conflict with each other.

This case presents the question whether the sovereign immunity of an Indian tribe can be stretched so far as to protect it from intentional torts, and even criminal conduct, that it inflicts on non-Indians, off-reservation. The Alabama Supreme Court has recently and correctly held that the answer is no. But in the decision below, the Florida appellate court (following a decision of the Connecticut Supreme Court) has reached the opposite conclusion. As long as this conflict exists, there will be uncertainty about whether the 567 federally-recognized Indian tribes in the United States are free to commit torts (not to mention intentional torts or even criminal acts) outside of their reservations against non-Indians without facing the civil law consequences of such acts in the state and federal judicial systems. This case is an ideal vehicle for filling in that jurisprudential gap and resolving this important legal question.

STATEMENT OF THE CASE

Statement of Facts. From 2005 to January 2010, Guy Lewis and Michael Tein, through their law firm Lewis Tein, P.L. (collectively "Lewis Tein"), professionally, honestly and effectively represented the Miccosukee Tribe of Indians of Florida (the "Miccosukee Tribe" or the "Tribe") and individual members of the Tribe in a variety of civil, criminal and administrative matters. Lewis and Tein are former federal prosecutors and former partners in a prestigious national law firm. In December 2009, their relationship with the Miccosukee Tribe changed dramatically when a new Chairman of the Tribe was narrowly elected and took power. (App. 39, 45.)

After assuming his position, the new Chairman and his newly appointed Tribal Attorney executed a "purge" in which they fired a large number of people in a wide variety of positions employed by the former Chairman's administration. In addition to firing Lewis Tein, the Miccosukee Tribe also fired its in-house general counsel and its entire in-house legal department, the Tribe's long-serving outside general counsel (a former U.S. Attorney for the Southern District of Florida), the supervisor of its Accounting Department, its Financial Director, its outside tax advisors, its Chief of Police, the manager of the Miccosukee Resort hotel, and even the head of the Miccosukee School. The Miccosukee Tribe's purpose was malicious and corrupt: to consolidate the new administration's financial and political power, punish those who served under the former Chairman, silence the new Chairman's critics, and to eliminate any potential threats to his re-election. (App. 39-40.)

In furtherance of the scheme, the Tribe maliciously injected itself—inexplicably and in contravention of its own interests—into pending litigation in the Florida state court system known as the Bermudez wrongful death action. Lewis Tein had zealously and effectively represented two Tribe members who were the defendants in the wrongful death action through trial. The Miccosukee Tribe injected itself into the proceedings by assisting its adversary, the wrongful death plaintiffs' counsel, in an effort to have Lewis Tein sanctioned on the ground that, contrary to their representations to the state court presiding over the case, the Tribe (and not the individual clients) had been paying their fees. The Tribe proceeded to hide evidence, present false testimony and obstruct justice in an effort to hide the truth—namely, that the

individual clients had been responsible for the attorney's fees throughout by taking loans from the Tribe off of the quarterly distributions they received as Tribe members. (App. 40-41, 49-61.)

The Tribe furthered this effort by filing a series of false lawsuits against Lewis Tein and other fired professionals in Florida state and federal courts perpetuating the false claim that Lewis Tein had been paid for its representation of individual Tribe members through a system of "fraudulent loans" from the Tribe to its members. These lawsuits also made numerous other false allegations, including that Lewis Tein:

- had fraudulently billed the Tribe for legal work that was "fictitious" or "unnecessary";
- had paid cash "kick-backs" to the former Chairman;
- had "knowing[ly] failed to report all or some of the income" received from the Tribe and filed "false tax returns"; and
- had engaged in a "money-laundering scheme."

(App. 40-41.)

The allegations were completely false. The false allegations were designed to damage and discredit Lewis Tein. Although completely false, the allegations had the malicious effect that the Tribe sought: they caused severe economic damage to the Lewis Tein law firm and severe economic and reputational damage to Guy Lewis and Michael Tein personally. (App. 41.)

Also in furtherance of its criminal scheme, the Miccosukee Tribe committed numerous criminal acts that harmed Lewis Tein, including:

- repeated instances of witness tampering, witness retaliation and suborning perjury from witnesses;
- repeated instances of perjury;
- repeated acts of obstructing justice by hiding, destroying and altering evidence; and
- making a false 911 emergency police report.

(App. 41-42.)

These are more than mere allegations about the Miccosukee Tribe's conduct in a civil complaint brought by the Petitioners. The United States District Court for the Southern District of Florida and the Florida state court have made extensive factual findings supporting these allegations against the Tribe, after more than a dozen days of evidentiary hearings and argument.[1] The U.S. Court of Appeals for the Eleventh Circuit and Florida's Third District Court of Appeals have both affirmed these findings.[2] Every claim brought by the Tribe against Lewis Tein has now been fully and finally dismissed on the merits by the state and federal courts

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[1] *Miccosukee Tribe v. Lewis, et al.,* 21 Fla. L. Weekly Supp. 323(a) (Dec. 15, 2013); *Miccosukee Tribe of Indians v. Cypress*, 2015 WL 235433 (S.D. Fla. Jan. 16, 2015).

[2] *Miccosukee Tribe of Indians of Florida v. Cypress*, 2017 WL 1521735 (11th Cir. Apr. 28, 2017); *Miccosukee Tribe of Indians of Florida v. Lewis*, 165 So.3d 9 (Fla. 3d DCA 2015).

after years of extensive discovery. Beyond dismissing the lawsuits, both the federal court and the state court have sanctioned the Tribe and its Tribal Attorney for the bringing of the claims. (App. 42.)

In unsparing terms, the United States District Court for the Southern District of Florida excoriated the Tribe for its conduct: "[T]here was no evidence, or patently frivolous evidence, to support the factual contentions set forth [in the Second Amended Complaint], which form the basis of [the Tribe's] claims against Defendants Lewis Tein . . . ." *Miccosukee Tribe of Indians v. Cypress*, 2015 WL 235433, at *4 (S.D. Fla. Jan. 16, 2015). The federal court found that the "tribe is not relenting with its legal crusade" against Lewis Tein and that its allegations were "inexcusable." The federal court then sanctioned the Tribe and its Tribal Attorney over $1 million. The court concluded the Tribal Attorney's behavior had been "egregious and abhorrent" and referred him to the Florida and federal bars "for investigation and appropriate disciplinary action." *Id.*

In equally unsparing terms, the Florida state court similarly excoriated the Tribe for its bad faith: "[The Tribal Attorney] and the Tribe together pursued this litigation in bad faith. Motivated by personal animosity for Lewis Tein and the firm's close and financially lucrative relationship with the Tribe's former Chair, the Tribe and [the Tribal Attorney] acted without regard for the truth." (App. 42-43.) As the state court summed up: "The Tribe and [the Tribal Attorney] filed this lawsuit in bad faith." (App. 43.)

The Petitioner's lawsuit seeks relief for the intentional torts and criminal acts committed against Lewis Tein. These acts caused severe economic damage to the Lewis Tein law firm and severe economic and reputational damage to Guy Lewis and Michael Tein personally. Their complaint includes a claim seeking relief under Florida's Civil Remedies for Criminal Practices Act (Florida's analogue to the federal RICO statute), pleading numerous felonies and intentional torts as predicate acts, and claims sounding in intentional tort for common-law malicious prosecution. (App. 87-94.)

Procedural Statement. The Miccosukee Tribe moved to dismiss all claims brought by the Petitioners based on the doctrine of tribal sovereign immunity. The trial court denied the motion. (App. 26.) The Tribe filed an interlocutory appeal. The intermediate court of appeal, Florida's Third District Court of Appeal, reversed and held that the Tribe was protected by sovereign immunity and that the Tribe's conduct did not amount to a waiver of sovereign immunity. The court acknowledged that "Lewis and Tein had a right not to have their reputations ruined and their business destroyed by the Tribe." (App. 24.) The court found, however, that the "immunity juice . . . is worth the squeeze" even though Lewis and Tein would "suffer from the squeezing." (App. 24-25.) The Petitioners moved to have the appellate court certify the question decided as one of great importance to the Florida Supreme Court, which would allow the Florida Supreme Court to exercise its discretionary review authority. The court denied the request for certification on September 26, 2017. (App. 35.)

REASONS FOR GRANTING THE PETITION

I. THE FLORIDA COURT'S DECISION FALLS INTO A GAP IN THE COURT'S TRIBAL SOVEREIGN IMMUNITY JURISPRUDENCE, AND THAT GAP HAS BEEN FILLED WITH CONFLICTING LOWER COURT DECISIONS.

A. The Supreme Court's More Recent Cases Indicate the Extension of Tribal Sovereign Immunity to Off-Reservation Commercial Conduct Rests on Shaky Ground.

The Supreme Court has recognized that the doctrine of tribal sovereign immunity is a common-law doctrine that "developed almost by accident"; that the Supreme Court opinion on which the doctrine is said to rest "simply does not stand for that proposition"; and that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-58 (1998). There is no federal statute or treaty defining the doctrine and what, if any, limits the doctrine may have. This Court has made clear that tribes certainly have the power "to make their own substantive law in internal matters . . . and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). The application of the doctrine, however, becomes murkier when tribes interact with those who are not members of the tribe.

In the absence of any foundational statute or treaty, it has been left to the Supreme Court to define the limits of tribal sovereign immunity in situations where tribal and non-tribal members interact. *See, e.g., Kiowa*, 523 U.S. at 759 ("Although the Court has taken

the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation."). The Court, however, has repeatedly expressed its reservations about extending the doctrine beyond the core concerns of tribal governance and tribal control of tribal lands.

Beginning with *Kiowa*, the first case in which the Court expressly extended tribal sovereign immunity to off-reservation conduct, the Court stated:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians.

523 U.S. at 758. The Court extended the doctrine with apparent reluctance, addressing only off-reservation commercial activity, while flagging the potential unfairness of the application of the doctrine to off-reservation tortious conduct. The Court noted that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* (emphasis added). A three-Justice (Justices Stevens, Thomas and Ginsburg) dissent argued that the doctrine should not be

extended beyond its present contours to include off-reservation commercial conduct. *See id.* at 764. The dissenters echoed the majority's theme and further cautioned against the unfairness of applying the doctrine to off-reservation torts:

> [T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; . . . . Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.

Id. at 766.

Next, in *Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S. Ct. 2024 (2014), in a 5-4 decision, the Court held that tribal sovereign immunity barred the State of Michigan's lawsuit against an Indian tribe under the Indian Gaming Regulatory Act dealing with a casino outside of Indian territory. The majority again acknowledged that its decision dealt only with off-reservation commercial activity. *See id.* at 2036 n.8 ("We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim . . . has no alternative way to obtain relief for off-reservation commercial conduct." (emphasis added)). A now-four-Justice dissent (Justices Thomas, Scalia, Ginsburg and Alito) argued that *Kiowa,* "wrong to begin with, has only worsened with the passage of time. In the 16 years since *Kiowa*, tribal commerce has proliferated and the inequities engendered by

unwarranted tribal immunity have multiplied."[3] *Id.* at 2046 (Thomas, J., dissenting). Notably, the four-Justice dissent also flagged the unanswered question as to the applicability of tribal sovereign immunity to off-reservation torts and invited the opportunity to resolve that question:

> The majority appears to agree that the Court can revise the judicial doctrine of tribal immunity, because it reserves the right to make an "off-reservation" tort exception to *Kiowa's* blanket rule . . . I welcome the majority's interest in fulfilling its independent responsibility to correct *Kiowa's* mistaken extension of immunity "without any exceptions for commercial or off-reservation conduct."

Id. at 2053 n. 5 (Thomas, J., dissenting).

And most recently, last Term, in *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285 (2017), the Court broached the issue of off-reservation torts by tribal employees. The Court unanimously rejected the application of tribal sovereign immunity to negligence claims against tribal employees in their personal capacity for off-reservation torts, even though the torts had been committed within the scope of their employment by the tribe and even though the tribe was legally required to indemnify the employees. *See id.* at 1288. The Court did not need to reach the issue of whether the tribe itself would have

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[3] Justice Scalia, who had joined the majority in *Kiowa*, dissented in *Bay Mills*, stating: "I am now convinced that *Kiowa* was wrongly decided; that in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention." 134 S. Ct. at 2045.

been immune from liability for the off-reservation tort. Significantly, two Justices concurred in the result, but specifically wrote to add that "tribes, interacting with nontribal members outside reservation boundaries, should be subject to non-discriminatory state laws of general application," *id.* at 1294-95 (Ginsburg, J., concurring), and that "tribal immunity does not extend to suits arising out of a tribe's commercial activities beyond its territory," *id.* at 1294 (Thomas, J., concurring). A third Justice observed at the oral argument that the tribe's position would "push[] the notion of tribal sovereign immunity off the reservation into a place where there are just no remedies for victims at all."[4]

B. The "Gap" in this Court's Tribal Sovereign Immunity Jurisprudence Has Been Filled with Conflicting Decisions.

While the Supreme Court has addressed the applicability of the doctrine of tribal sovereign immunity to off-reservation commercial conduct in close decisions, it has not resolved the doctrine's applicability to off-reservation torts. *See, e.g., Bay Mills,* 134 S. Ct. at 2036 n.8 ("We have never, for example, specifically addressed . . . whether immunity should apply in the ordinary way if a tort victim . . . has no alternative way to obtain relief for off-reservation commercial conduct." (emphasis added)).

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[4] *Lewis v. Clarke*, No. 15-1500, Transcript of Oral Argument before the United States Supreme Court, at 41-42 (Jan. 9, 2017) (comments of Breyer, J.), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1500_5g68.pdf (last visited Aug. 22, 2017).

Lower courts have recognized the presence of this gap. As one federal court has put it: "[W]e are left in a quandary as to what the Supreme Court majority intended in its *Kiowa* ruling. Certainly, the Court has created an across-the-board rule of tribal immunity for all contractual activity regardless of where the contract is signed. But the questions of immunity for non-contractual activity is, in this Court's opinion, left open." *Hollynn D'Ill v. Cher-Ae Heights Indian Community of the Trinidad Ranchera*, 2002 WL 33942761, at *7 (N.D. Cal. March 11, 2002) (emphasis in original) (holding that tribal sovereign immunity did not bar claims against a tribe under the Americans with Disabilities Act, the Rehabilitation Act and related state common law claims for conduct occurring at an off-reservation property owned by the tribe).

The Alabama Supreme Court recently stepped into this gap, addressed the same "quandary", and reached the correct result—holding that tribal sovereign immunity does not apply to a tribe's off-reservation torts. In *Wilkes v. PCI Gaming Authority*, 2017 WL 4385738, at *4 (Ala. Oct. 3, 2017), the Alabama Supreme Court held that "the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-members." That case involved an off-reservation car accident between an agent of the Porch Band of Creek Indians and non-members of the tribe. The non-members brought tort claims for negligence and wantonness (an Alabama common law cause of action) for the injuries they sustained in the accident. The tribe defendants moved for summary judgment in their favor, arguing that the Porch Band of Creek Indians was a federally recognized Indian tribe and that they

were accordingly protected by the doctrine of tribal sovereign immunity. The trial court ruled in favor of the tribe, but on appeal to the Alabama Supreme Court the decision was reversed.

The Alabama Supreme Court observed that this Court had "expressed its reservations about perpetuating the doctrine" in *Kiowa* and took "particular notice of the Court's comment that tribal sovereign immunity hurts those who 'have no choice in the matter' and the Court's limitation of its holding in *Kiowa* to 'suits on contract.'" 2017 WL 4385738, at *3 (quoting *Kiowa*, 523 U.S. at 760). The Alabama Supreme Court zeroed in on the open area in this Court's tribal sovereign immunity jurisprudence: "the Supreme Court of the United States has not ruled on the issue whether the doctrine of tribal sovereign immunity has a field of operation with regard to tort claims." 2017 WL 4385738, at *4. Stepping into that open field, the Alabama Supreme Court held that "in the interest of justice we respectfully decline to extend the doctrine of tribal sovereign immunity beyond the circumstances in which the Supreme Court of the United States has applied it," *id.*, and held that tribal sovereign immunity did not apply to a tribe's off-reservation torts.[5] *Accord Hollynn D'Ill*, 2002 WL 33942761, at *6 ("Tort victims . . . have no notice that they are on Indian property, nor any opportunity to negotiate the terms of their interaction with the tribe.

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[5] In the event the Indian tribe in *Wilkes* petitions this Court for certiorari review, the Petitioners respectfully suggest that the *Wilkes* case would also be an appropriate vehicle to address this important and open issue, and that the instant case be held pending resolution of the issue.

This makes the distinction between contractual and non-contractual relationships a reasonable place to draw the line for off-reservation tribal immunity.").

The decision of the Florida court below conflicts with *Wilkes*. The Florida court applied the doctrine of sovereign immunity to the torts and criminal conduct committed by the Miccosukee Tribe off-reservation. The Florida court's decision contains an additional element of analysis not present in *Wilkes*—whether the Tribe's litigation conduct constituted a waiver of its sovereign immunity—but the foundation of the Florida court's decision is an application of tribal sovereign immunity to off-reservation torts committed against non-Tribe members (otherwise no waiver analysis would be required).

In fact, there are two elements of the Florida court's decision that make it an even more glaring example of the unfairness of the doctrine when applied to tort victims which this Court has lamented beginning with *Kiowa*. First, the Florida court effectively extended the doctrine not just to ordinary torts such as negligence, but also to intentional torts (malicious prosecution) and to criminal conduct (perjury, obstruction of justice and the other criminal predicate acts under the Florida statutory equivalent of RICO).[6] Second, the Florida court applied the doctrine to the Tribe's purposeful use

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[6] While the Florida courts were required to accept the Petitioners' allegations of intentional torts and criminal conduct as true in the posture in which they addressed the sovereign immunity defense (on a motion to dismiss), it is worth reiterating that these were not mere allegations but the subject of state and federal court evidentiary findings after lengthy sanctions hearings. (App. 67-69, 72-75.)

(and abuse) of off-reservation, non-tribal institutions. The *Wilkes* case involved tribal conduct off-reservation on the state's roadways—a facility that tribes will invariably and necessarily need to use in order to function in the modern world given their territorial embedment within states. Here, by contrast, the Miccosukee Tribe took advantage of state and federal institutions—the court system—that it did not need to use (having a tribal court system of its own) and affirmatively abused that system.

Finally, the Florida court's decision also lines up with a decision of the Connecticut Supreme Court. In *Beecher v. Mohegan Tribe of Indians of Connecticut*, 918 A.2d 880 (Conn. 2007), the Connecticut Supreme Court also held that a federally recognized Indian tribe had sovereign immunity in connection with intentional tort claims (vexatious litigation) that occurred off-reservation. As a result, there are conflicting decisions, at a minimum, between the Alabama Supreme Court, on the one hand, and the Florida court below and the Connecticut Supreme Court.

C. The Question Presented is Important, and This Case Would Be a Good Vehicle for Resolving It.

One thing both the majority and dissenting opinions in this Court's recent tribal sovereign immunity jurisprudence share in common is a recognition of the unfairness inherent in the doctrine when applied to tort victims. In *Kiowa*, for example, both the majority and the dissent observed that tribal sovereign immunity resulted in a particular injustice for tort victims who had no choice in their interaction with Indian tribes. *See Kiowa*, 523 U.S. at 758, 766. The

Florida court below echoed that concern here. In fact, the Florida court opened its opinion with the following show of reluctance:

> "There are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.,* 523 U.S. 751, 758 (1998). It "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* No one knows this more than Guy Lewis and Michael Tein.

(App. 2). And the Florida court concluded its opinion with a similar lament that its hands were tied:

> Lewis and Tein had a right not to have their reputations ruined and their business destroyed by the Tribe. Like any injured party, if the allegations are true they should have proper redress for their injuries. But just as every right has its remedy, every rule has its exception. The exception here is sovereign immunity. . . . The immunity juice, our federal lawmakers have declared, is worth the squeeze. Still, some suffer from the squeezing, including car accident victims, beaten detainees, and Lewis and Tein.

(App. 24-25). This case provides the Court with the vehicle to address the open issue it has recognized exists in the field of tribal sovereign immunity in the context of a paradigm example of the unfairness the doctrine can cause.

Finally, this is an issue that will undoubtedly recur. There are 567 federally-recognized Indian tribes in the

United States. *See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,* 81 Fed. Reg. 26826 (May 4, 2016). They are dramatically expanding the volume and sophistication of their activities which now extend well beyond reservation boundaries and permeate most states and sectors of the national economy:

> In the 16 years since *Kiowa,* the commercial activities of tribes have increased dramatically. This is especially evident within the tribal gambling industry. . . . But tribal businesses extend well beyond gambling and far past reservation borders. In addition to ventures that take advantage of on-reservation resources (like tourism, recreation, mining, forestry, and agriculture), tribes engage in "domestic and international business ventures" including manufacturing, retail, banking, construction, energy, telecommunications, and more. . . . Tribal enterprises run the gamut: they sell cigarettes and prescription drugs online; engage in foreign financing; and operate greeting cards companies, national banks, cement plants, ski resorts, and hotels. . . . These manifold commercial enterprises look the same as any other—except immunity renders the tribes largely litigation-proof.

Bay Mills, 134 S. Ct. at 2050-51 (Thomas, J., dissenting) (citations omitted). With this commercial backdrop, the occurrence of off-reservation torts by Indian tribes will undoubtedly recur. The Petitioners submit that the application of tribal sovereign immunity to off-reservation torts will enable and

encourage irrational and unjust practical and legal consequences. Regardless, this is an area where clarity is required, where the conflicting decisions of the lower courts discussed above should be resolved, and where the gap in the Court's tribal sovereign immunity jurisprudence can be closed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 7, 2017

APPENDIX

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APPENDIX A

Third District Court of Appeal
State of Florida

No. 3D16-2826
Lower Tribunal No. 16-21856

[Filed August 9, 2017]

Miccosukee Tribe of Indians of Florida, Appellant,	)
vs.	)
Lewis Tein, P.L., et al., Appellees.	)

Opinion filed August 9, 2017.
Not final until disposition of timely filed motion for rehearing.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

Saunooke Law Firm, P.A., and Robert O. Saunooke (Miramar); Alston & Bird LLP, George B. Abney, Daniel F. Diffley, and Michael J. Barry (Atlanta, Georgia), for appellant.

Colson Hicks Eidson, P.A., Curtis B. Miner, Roberto Martinez, and Stephanie Casey, for appellees.

Rice Pugatch Robinson Storfer & Cohen PLLC, and Craig A. Pugatch, for United South and Eastern Tribes, Inc., as amicus curiae.

Before ROTHENBERG, C.J., and SCALES and LUCK, JJ.

LUCK, J.

"There are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998). It "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." Id. No one knows this more than Guy Lewis and Michael Tein. The Miccosukee Tribe of Indians of Florida, according to Lewis and Tein's complaint, spent five years filing false lawsuits, suborning perjury, and obstructing justice, in an effort to damage the attorneys' finances, reputations, and law firm. Whatever its wisdom, tribal immunity endures, and Indian tribes are not subject to the civil jurisdiction of our courts absent a clear, explicit, and unmistakable waiver of tribal sovereign immunity or a congressional abrogation of that immunity. Because neither exception to tribal immunity has been established in this case, we reverse the trial court's denial of the Miccosukee Tribe's motion to dismiss.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Bermudez Wrongful Death Case. In 2000, the Bermudez family filed a wrongful death action against Tammy Billie and Jimmie Bert, two members of the Miccosukee Tribe, based on their involvement in a 1998

car accident in which Gloria Bermudez was killed and her husband and son were injured. The Tribe was not a party to the action. In 2005, Lewis and Tein were hired to take over Billie and Bert's defense in the wrongful death action.[1] Damages were awarded in 2009 in the amount of $3.177 million to the Bermudez family. Following entry of the 2009 civil judgment, the Bermudez family began collections proceedings against Tammy Billie and Jimmy Bert; the family also sought to enforce the judgment against the Tribe itself, even though the Tribe was not a party to the suit.

In September 2011, Bernardo Roman, the Tribe's new attorney, provided the Bermudez family attorney with copies of sixty-one checks and check stubs from the Tribe's general account, payable to Lewis and Tein in the amount of $3,111,567. By doing so, the Tribe falsely represented to the trial court that the Tribe paid for the defense of Tammie Billie and Jimmie Bert in the wrongful death action. (In fact, the Tribe loaned the money to Billie and Bert to pay for their attorney's fees out of their quarterly dividends that all Tribe members receive.) Based on Roman's actions, the Bermudez attorney launched, what turned out to be, a false claim of perjury and fraud on the court against Lewis and Tein. During these proceedings, Roman filed a motion for protective order and to quash a subpoena for deposition.

In Miccosukee Tribe of Indians of Florida v. Bermudez, 92 So. 3d 232 (Fla. 3d DCA 2012), this court held that the Tribe and Roman's conduct in providing

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[1] From 2005 to 2010, Lewis and Tein represented the Tribe and individual Tribe members in various legal proceedings.

the Bermudez attorney with the checks constituted a waiver of the Tribe's sovereign immunity. This Court explained that:

> [T]here can be no mistake about what occurred in our case. Mr. Roman, in an act approved by the Tribe, admittedly, has purposefully sought to participate in or influence a state court proceeding. We can conceive of no motive for the Tribe or Mr. Roman to have done so. The only plausible legal conclusion that can be drawn from the actions of Mr. Roman and the Tribe in this case is the one made by the trial court – the Tribe's and Mr. Roman's conduct constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity.

Id. at 235. This Court further expressed bewilderment as to the purpose of the Tribe's actions. Id. at 233 ("[F]or reasons mystifying to us . . . [the Tribe] supplied plaintiff's counsel with copies of checks drawn on the Miccosukee Tribe General Account payable to Lewis Tein."). After numerous hearings and discovery in the Bermudez proceedings, the trial court found that Lewis and Tein did not commit perjury and did not engage in fraud on the court or misconduct.

State Court Action. On April 2, 2012, the Tribe filed an action against Lewis and Tein in Miami-Dade circuit court, alleging malpractice, breach of fiduciary duty, fraud, fraud in the concealment, conspiracy to defraud, civil RICO conspiracy, civil racketeering, theft, and conversion. The trial court granted Lewis and Tein's motion for summary judgment and, alternatively, dismissed the case for lack of subject matter jurisdiction because the complaint was

predicated on an intra-tribal dispute. In Miccosukee Tribe of Indians of Florida v. Lewis, 165 So. 3d 9 (Fla. 3d DCA 2015), this court affirmed the summary judgment because "the Tribe's expert was unable to identify a single invoice by the Lawyers that he believed was fraudulent, illegal, or excessive." Id. at 12. Subsequently, the trial court awarded Lewis and Tein reasonable attorney's fees as a sanction against the Tribe. In its order the trial court expressly found that the Tribe knew the claims were unfounded and frivolous and that "[t]he Tribe and Roman filed this lawsuit in bad faith."

Federal Court Action. On July 1, 2012, the Tribe filed an action against Lewis and Tein and other parties in federal court, alleging, in part, federal racketeering, conspiracy to engage in racketeering, fraud, aiding and abetting fraud, state racketeering, and breach of fiduciary duty. See Miccosukee Tribe of Indians of Fla. v. Cypress, 975 F. Supp. 2d 1298, 1301-02 (S.D. Fla. 2013). The federal court dismissed the lawsuit for lack of subject matter jurisdiction, id. at 1308, and the Eleventh Circuit Court of Appeals affirmed. See Miccosukee Tribe of Indians of Fla. v. Cypress, 814 F. 3d 1202 (11th Cir. 2015). After a hearing on sanctions, the federal district court issued a written order sanctioning the Tribe and Roman in the amount of $975,750, and remarked that Roman's "behavior [was] egregious and abhorrent." See Miccosukee Tribe of Indians of Florida v. Cypress, No. 12-22439-CIV, 2015 WL 235433, at *19 (S.D. Fla. Jan. 16, 2015) ("Here, the wrongful conduct is the filing of the complaints with no reasonable factual basis to support their allegations").

Second State Court Action. On November 16, 2013, the Tribe filed a second state court action, asserting essentially the same claims that were dismissed in federal court. On July 30, 2015, the trial court dismissed the second state court action based on res judicata grounds, stating that, "[a]t bottom, this case is simply another attempt to make the same claims that two prior judges have determined are factually baseless, or are outside the Court's jurisdiction as tribal governance." See Miccosukee Tribe of Indians of Fla. v. Cypress, No. 2013CA35936, 2015 WL 9438244, at *3 (Fla. 11th Cir. Ct. Jul. 30, 2015).

This Case. On August 22, 2016, Lewis and Tein filed a complaint against the Tribe, alleging one count of civil remedies for criminal practices pursuant to section 772.103(3), Florida Statutes, and four counts of malicious prosecution premised on the Bermudez wrongful death action (count two),[2] the 2012 state court action (count three), the federal court action (count four), and the second state court action (count five). The complaint sought both economic and non-economic damages.

The Tribe filed a motion to dismiss for lack of subject matter jurisdiction based on tribal sovereign immunity. Lewis and Tein responded that the Tribe's sovereign immunity waiver in the Bermudez case applied broadly to this case, too, and that, alternatively, the Tribe's litigation conduct in

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[2] Following the appeal in this case, the trial court granted a motion to dismiss for failure to state a cause of action as to the malicious prosecution claim pertaining to the Bermudez wrongful death action (Count II).

knowingly filing frivolous lawsuits against Lewis and Tein waived the Tribe's immunity.

The trial court denied the motion because, it concluded, the Bermudez decision found an explicit waiver of immunity, and the Tribe's litigation conduct in the four prior cases "demonstrated a clear, explicit and unmistakable waiver of sovereign immunity with regard to this matter." This appeal followed.

STANDARD OF REVIEW

We have jurisdiction to review appeals of non-final orders that determine, as a matter of law, a party is not entitled to sovereign immunity. Fla. R. App. P. 9.130(a)(3)(C)(xi) ("Appeals to the district courts of appeal of non-final orders are limited to those that . . . determine . . . that, as a matter of law, a party is not entitled to qualified immunity.").[3] "The issue of

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[3] Traditionally, the Florida courts had reviewed a trial court's denial of a tribe's motion to dismiss based on sovereign immunity under its certiorari jurisdiction. See Seminole Tribe of Fla. v. McCor, 903 So. 2d 353, 357 (Fla. 2d DCA 2005) (Canady, J.) ("We have previously exercised our common law certiorari jurisdiction to review a trial court order denying a motion to dismiss where the motion was based on the assertion that the trial court lacked subject matter jurisdiction because the suit was barred by tribal sovereign immunity. Certiorari jurisdiction exists in this context because the inappropriate exercise of jurisdiction by a trial court over a sovereignly-immune tribe is an injury for which there is no adequate remedy on appeal." (citations omitted)). In 2014, however, the Florida Supreme Court added determinations by the trial court that a party is not entitled to sovereign immunity as one of the few non-final orders that are appealable. In re Amends. to Fla. R. App. P. 9.130, 151 So. 3d 1217, 1217-18 (Fla. 2014) ("[W]e modify the Committee's proposal to authorize appeals from nonfinal orders which determine, as a matter of law, that a party

sovereign immunity . . . is a legal issue subject to a de novo standard of review." Plancher v. UCF Athletics Ass'n, Inc., 175 So. 3d 724, 725 n.3 (Fla. 2015); see also Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282, 1285 (11th Cir. 2001) ("We review de novo the district court's dismissal of a complaint for sovereign immunity.").[4]

DISCUSSION

The Tribe contends the trial court erred in concluding that it waived its immunity. First, the Tribe claims, its immunity waiver in Bermudez was limited to the issue in that case – the disclosure of the sixty-one checks and check stubs by the Tribe's attorney – and did not extend beyond that to a separate lawsuit involving conduct over a five year period. Second, the Tribe argues, its litigation conduct in the first and second state court actions and the federal court action was not an express waiver of its tribal immunity.

> "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Congressional waiver or abrogation of tribal sovereign immunity must be unequivocal and does not arise by implication.

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is not entitled to sovereign immunity."). Because of this amendment, we review this case as an appeal of a non-final order rather than a petition for writ of certiorari.

[4] Because "[t]ribal immunity is a matter of federal law," Kiowa Tribe, 523 U.S. at 756, we rely on a number of federal court decisions throughout this opinion.

> Likewise, a waiver of tribal immunity by a tribe must be clear.
>
> "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."

Seminole Tribe of Fla. v. McCor, 903 So. 2d 353, 358 (Fla. 2d DCA 2005) (Canady, J.) (citations omitted). This is a waiver case (there is no allegation that Congress abrogated the Tribe's sovereign immunity), and for us to find the Tribe waived its immunity, the party claiming the waiver must "show a clear, express and unmistakable waiver of sovereign immunity by the Tribe." Cupo v. Seminole Tribe of Fla., 860 So. 2d 1078, 1079 (Fla. 1st DCA 2003).

1. The Limited Waiver in Bermudez

One of the basic principles of appellate law is that the holding of a decision cannot extend beyond the facts of the case. See Adams v. Aetna Cas. & Sur. Co., 574 So. 2d 1142, 1153 (Fla. 1st DCA 1991) ("It is elementary that the holding in an appellate decision is limited to the actual facts recited in the opinion, so the supreme court's statements hypothesizing about the absence of a written rejection, being contrary to the actual facts in this case, are pure dictum."); see also UPS Supply Chain Sols., Inc. v. Megatrux Transp., Inc., 750 F.3d 1282, 1293 (11th Cir. 2014) ("The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision." (quotation omitted)); Twyman v. Roell, 166 So. 215, 217 (Fla. 1936) ("To be of value as a precedent, the questions raised by the pleadings and adjudicated in the case cited as a precedent must be in point with those

presented in the case at bar."); Rey v. Philip Morris, Inc., 75 So. 3d 378, 381 (Fla. 3d DCA 2011) ("No Florida appellate decision is authority on any question not raised and considered, although it may be involved in the facts of the case." (quotation omitted)). Our conclusion in Bermudez – that "the Tribe's and Mr. Roman's conduct constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity," Bermudez, 92 So. 3d at 235 – is, likewise, limited to the facts of that case.

These are the facts of the Bermudez case. The Bermudezes sought to have the trial court reconsider its sanctions order based on new information they received showing that the Tribe had paid Lewis and Tein's attorney's fees. To their motion, the Bermudezes attached copies of sixty-one checks and check stubs showing payments from the Tribe to Lewis and Tein that the Bermudezes claimed they received from Roman, the Tribe's attorney. In response, Lewis and Tein subpoenaed Roman for a deposition. Roman filed an emergency motion for protective order and to quash the subpoena based on tribal immunity.

a. Response to Emergency Motions for Protective Order and to Quash Subpoenas. Lewis and Tein responded to Roman's motion. In their response, Lewis and Tein said that if the Tribe authorized Roman to disclose the checks to the Bermudezes, then it "waived its sovereign immunity as to the subject matter of the act." Roman's "act" of giving the checks "waived sovereign immunity as to the subject matter of his action." Lewis and Tein described the nature and limitation of the sovereign immunity waiver. "If [] Roman was actually working in his tribal capacity,"

they wrote, "then he waived sovereign immunity as to the subject matter of his disclosure by injecting himself and the Tribe into this case." Lewis and Tein, then, defined "the subject matter of the disclosure – the checks and the check stubs, as well as the underlying documents pertaining to them."

Lewis and Tein relied, primarily, on a federal district court decision out of Idaho, Knox v. United States Department of the Interior, No. 4:09-CV-162-BLW, 2012 WL 465585, at *1 (D. Idaho Feb. 13, 2012). Lewis and Tein, describing Knox, wrote that the tribal members in that case "had injected themselves into the litigation by seeking to file an amicus brief and declaration of the tribal officers concerning the Tribes' gaming operation." Lewis and Tein acknowledged that "the filing of these documents did not waive the Tribes' sovereign immunity generally." However, quoting from the Knox case, Lewis and Tein wrote that by inserting itself in the litigation, the Idaho tribe gave a limited waiver of its immunity "to resist a deposition limited to the topics covered in their Declarations." (This last part was bolded.) The Idaho federal court, the pair explained, "granted the plaintiffs the right to take deposition of the tribal members limited to the matters contained in the tribal official's declarations." In the response's conclusion section, Lewis and Tein sought the same limited relief as in Knox: to take the deposition of Roman in connection with the disclosure of the sixty-one checks and check stubs.

b. Hearing on Emergency Motions for Protective Order and to Quash Subpoenas. At the hearing on Roman's motion to quash, Lewis and Tein made the

same points. Citing again to the Knox case, they told the trial court:

> The [Knox] Court granted the motion to compel attendance of these [tribal] lawyers at the depositions to quote, "Answer questions limited to the matters relevant to the contents of the declarations they filed in this case," unquote.
>
> That is all we are seeking.

Lewis and Tein defined the scope of the inquiry to "questions about when [Roman] gave those records, what [he] said to the person [he] gave the records to, how [he] got the records, where [he] gave it to [the Bermudezes], [and his] communications with the [Bermudezes' attorney]."

At the end of the hearing, the trial court explained that it was "inclined to say that there is a waiver by the production of those documents." However, the trial court continued, "I think there is a limited issue here and I am limiting the scope of the discovery to those questions that [Lewis and Tein] just proffer[ed] that he wanted to ask." "I'm going to find that there is sovereign immunity," the trial court ruled, but "I believe the actions of turning those checks over have at least resulted in a limited waiver of that immunity. So to that extent, I'm going to overrule [Roman's] immunity objection." After the trial court gave its oral ruling, Lewis and Tein clarified the scope of any appeal, "So the only thing that Your Honor is ruling on today . . . is so it's a narrow issue for the – the narrow issue for the Third DCA is [] Roman's emergency motion." The trial court's written order denied Roman's emergency motion to quash the subpoena, and confirmed its "find[ing] that Mr. Roman gave a limited

waiver of sovereign immunity by disclosing checks and check stubs to plaintiffs' counsel."

c. Response to Miccosukee Tribe of Indians of Florida's Petition for Writ of Certiorari. As promised, the Tribe filed a petition for writ of certiorari with our court to quash the trial court's order. In their response to the petition, Lewis and Tein summarized their position that "[e]ven if sovereign immunity applies, Mr. Roman gave a limited waiver, as the trial court found here, by voluntarily disclosing the checks and check stubs to [the Bermudezes]." Lewis and Tein described the trial court's order under review as finding "a limited waiver, thus permitting [Roman's] deposition." Lewis and Tein argued the trial court's "decision to allow the deposition should be affirmed because . . . Mr. Roman's actions constituted a limited waiver of sovereign immunity." Relying again on the Knox case, Lewis and Tein wrote that Roman "waived sovereign immunity as to the subject matter of his disclosure" and they "are permitted to take discovery from [] Roman regarding the subject matter of the disclosure – the checks and check stubs, as well as the underlying documentation pertaining to them." Lewis and Tein concluded that the trial court was correct in "finding that [] Roman gave a limited waiver of sovereign immunity by injecting himself into the trial court litigation."

d. The Bermudez Decision. In Bermudez, we described the Tribe's petition as seeking "certiorari relief from an order denying the Tribe's Motion for Protective Order and to Quash Subpoena for Deposition issued to" Roman, the Tribe's attorney. Bermudez, 92 So. 3d at 232. We, likewise, explained that "the inquiry

desired to be made of [Roman] [was] solely whether Lewis Tein, PL's legal bills were made by the Tribe or the individual defendants." Id. at 234. It was in this context that we found "the Tribe's and Mr. Roman's conduct constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity," id. at 235, and denied the petition for writ of certiorari.

* * *

From this record, the extent of the Tribe's immunity waiver in the Bermudez case is clear. The Tribe was immune from the Bermudez lawsuit but waived its immunity to a limited extent to allow Roman's deposition about the disclosure of the sixty-one checks and check stubs. Lewis and Tein asked for a limited waiver, and described the waiver as allowing them to depose the Tribe's attorney about the disclosure. The trial court granted a limited waiver on those terms. Lewis and Tein, in the Bermudez appeal, described the trial court's order as a limited waiver in arguing to deny the Tribe's certiorari petition.

We rely on the same Knox case that Lewis and Tein relied on, and that we cited in Bermudez. In Knox, "the Tribes asked, and were granted, the right to file an amicus brief accompanied by Declarations [of three tribe members] that discussed the Tribes' gaming operations." Knox, 2012 WL 465585, at *1. The federal district court concluded that although the filing of these declarations "did not waive the Tribes' sovereign immunity generally, it did waive the right" of the three tribal executives "to resist a deposition limited to topics covered in their Declarations." Id. If the Tribe dips its toe in the litigation waters, the reasoning goes, it can be asked about its toe but not the whole body.

Here, too, Roman, on the Tribe's behalf, dipped his toe in the ongoing Bermudez litigation by giving to the Bermudezes the checks and check stubs. As in Knox, the Tribe maintained its immunity generally, but waived it to the limited extent that its tribal attorney was subject to a deposition about the checks. That was the limited waiver advocated by Lewis and Tein, adopted by the trial court, and the subject of the petition for writ of certiorari that was before the court in Bermudez.

Importantly, filing the declarations in Knox, while a limited immunity waiver, did not open up the Idaho tribes to being hauled into court as defendants in that case. The federal district court had "already denied plaintiffs' attempt to add the Tribes as defendants, holding that the Tribes were protected by sovereign immunity." Id. The amicus brief and attached declarations didn't open the sovereign immunity door any more than allowing the deposition of the tribal executives on the subject of the declarations.

Likewise in this case, the Bermudez limited immunity waiver did not open the door to the Miccosukee Tribe being hauled into court in the underlying Bermudez case, or any subsequent cases. The limited waiver in Bermudez opened the door a crack for the Roman deposition about the checks, but it didn't bust the door open to allow in everything that happened after the deposition, including the allegations of the Tribe's perjury, obstruction of justice, and vexatious litigation in the five years that followed.

While participating in litigation is not a one-way street, as we explained in Bermudez, the length of the street extends only so far as the Tribe's participation.

In Knox, the Idaho tribes participated in the litigation to the extent they filed the amicus brief and attached the declarations of the three tribal executives. Tribal immunity was waived only to allow the plaintiffs in that case to depose the tribal executives about the substance of the declarations. In Bermudez, the Tribe participated by authorizing Roman to give the checks to the plaintiffs. Lewis and Tein argued for a limited immunity waiver to depose Roman about the checks and check stubs; the trial court granted the "limited waiver"; and we refused to quash the limited waiver by denying the petition for writ of certiorari.

Our holding in Bermudez could not have found a waiver of sovereign immunity beyond what the facts dictated, what Lewis and Tein requested, and what the trial court ordered. We did no more than deny the petition to review the trial court's order allowing the Tribe's attorney to be deposed about the checks and check stubs, and confirm the limited waiver of immunity. Reading Bermudez for a broader waiver of the Tribe's immunity, as the trial court did here, is not supported by the facts of the Bermudez case, Lewis and Tein's opposition to the motion to quash, the trial court's order, and the parties' arguments before this court.

2. The Tribe's Litigation Conduct

In addition to the Bermudez limited waiver, the trial court found a clear, explicit, and unmistakable waiver of the Tribe's sovereign immunity based on the Tribe's litigation conduct during the five years after Bermudez – frivolous lawsuits, false statements, and obstruction of justice. The Tribe contends that bad

litigation conduct in one case does not constitute an immunity waiver in a subsequent, related case.

We begin by noting that nothing in this opinion precludes a trial court from sanctioning a tribe for bad faith conduct or vexatious litigation in the case where the conduct occurred. Where the tribe chooses to litigate in our courts, it must follow the same rules that apply to all litigants: no lying; no destroying evidence; no filing claims without a basis in law or fact. Here, for example, the trial court sanctioned the Miccosukee Tribe in the first and second state court actions for claims that were "baseless" and brought in "bad faith." Assuming the allegations in the complaint are true, the sanctions were entirely proper in the case where the Tribe was actively litigating.

This case presents a much narrower issue: Was the Miccosukee Tribe's litigation in Bermudez, the first and second state court actions, and the federal court action a clear, explicit, and unmistakable waiver of its sovereign immunity, opening the door to the Tribe being sued by Lewis and Tein in a subsequent, related case for malicious prosecution and civil liability under section 772.103(3)? The general rule is that a tribe's immunity waiver in litigating one case does not waive immunity in subsequent cases. Two decisions of the federal appellate courts explain the point well.

In McClendon v. United States, 885 F.2d 627 (9th Cir. 1989), two couples sued the Colorado River Tribe for breach of a lease agreement. Id. at 628. The federal trial court dismissed the case for lack of subject matter jurisdiction based on tribal sovereign immunity. Id. at 629. On appeal, the couples argued that the Tribe waived its immunity regarding its rights to the leased

property because it had initiated and litigated an earlier case over the same property in 1972. Id. at 629-30. The Ninth Circuit affirmed, explaining that while "[i]nitiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy," the "tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." Id. at 630. "The initiation of the suit, in itself," the court continued, "does not manifest broad consent to suit over collateral issues." Id. at 631. In response to the argument "that allowing the Tribe to sue without exposing itself to suit for subsequent related matters is unfair," the Ninth Circuit, quoting from the United States Supreme Court, explained: "[t]he perceived inequities of permitting the Tribe to recover from a non-Indian for civil wrong in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances." Id. (quoting Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 893 (1986)).

Likewise, in Jicarilla Apache Tribe v. Hodel, 821 F.2d 537 (10th Cir. 1987), an oil company sued the tribe "seeking to pay adjusted bonuses to preserve its interests in certain oil and gas leases." Id. at 538. The federal trial court dismissed the lawsuit "for lack of jurisdiction over the Tribe." Id. The tribe's earlier litigation over the same oil and gas leases, the court explained, was not "a sufficiently unequivocal expression of waiver in subsequent actions related to the same leases." Id. at 539.

The United States Supreme Court has extended the general rule – that the tribe's immunity waiver in one lawsuit does not open the door to waiver in a related suit – to compulsory counterclaims.[5] That is, even if the tribe waives its immunity by suing a non-tribe party, the immunity waiver does not extend to the non-tribe's compulsory counterclaims in the same litigation.

In Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991), the tribe sued the state for injunctive relief prohibiting the state from collecting state cigarette taxes on tribe property. Id. at 507. The state counterclaimed for a declaratory judgment that its tax lien was enforceable and an injunction for the tribe to stop selling cigarettes without collecting state taxes. Id. at 507-08. The tribe moved to dismiss the counterclaims because it had not waived its sovereign immunity and could not be sued by the state. Id. at 508. The state responded that its counterclaims were "compulsory" under Federal Rule of Civil Procedure 13(a), which requires a party to bring a counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Id. at 509; Fed. R. Civ. P. 13(a). Even where the tribe is affirmatively litigating based on the same facts as the opposing party's claim, the Court held, "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in

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[5] There is an exception for recoupment counterclaims arising out of the same facts as the underlying lawsuit, but the exception does not apply to Lewis and Tein's claims (and they do not contend that it does).

a counterclaim to an action filed by the tribe." Citizen Band, 498 U.S. at 509.

The general rule still holds even if the tribe's sovereign immunity is deeply troubling to the courts, and results in unfairness and inequity to the non-tribe party. See Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005) ("We agree with the district court's conclusion that this case is deeply troubling on the level of fundamental substantive justice. Nevertheless, we are not in a position to modify well-settled doctrines of tribal sovereign immunity. This is a matter in the hands of a higher authority than our court."); Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 781 (D.C. Cir. 1986) ("Immunity doctrines inevitably carry within them the seeds of occasional inequities; in this case the Wichitas have used the courts as both a sword and shield. Nonetheless, the doctrine of tribal immunity reflects a societal decision that tribal autonomy predominates over other interests."). For example, even where a tribe engages in vexatious and bad faith litigation in a prior lawsuit, the unfairness and inequity to the non-tribe party still does not waive the tribe's immunity in a subsequent case arising out of the same facts.

In Beecher v. Mohegan Tribe of Connecticut, 918 A.2d 880 (Conn. 2007), the tribe sued one of its former employees to enjoin him "from communicating any confidential information pertaining" to the tribe. Id. at 883. In a subsequent lawsuit, the former employee, now the plaintiff, alleged the tribe's earlier lawsuit was "vexatious," in that it was "an attempt to extort money" and part of a larger "threat[] to disclose confidential information" about the former employee. Id. at 882-83.

The bad faith purpose of the tribe's earlier lawsuit, the former employee alleged, was to "restrain [him] from making adverse comments [about the tribe] to relevant state authorities" while the tribe was "in need of regulatory approval in order to purchase various gambling enterprises in Pennsylvania." Id. at 883. The tribe moved to dismiss the former employee's lawsuit "because, absent consent or congressional abrogation, it enjoy[ed] sovereign immunity from suit in state court as a federally recognized Indian tribe." Id. The former employee "argued that the [tribe] had waived that immunity by having commenced the prior action against the plaintiffs in state court." Id. The Connecticut Supreme Court agreed with the tribe "that, in bringing the prior action in state court, it consented only to the adjudication of the merits of that action, and not to the adjudication of any subsequent state court claims." Id. at 883-84.

"In its prior action," the court explained, the tribe "necessarily consented to the state court adjudication of its affirmative claims, including any special defenses and recoupment counterclaims related thereto." Id. at 886. However, "[t]hat consent to the adjudication of its affirmative claims did not . . . constitute a blanket waiver of its tribal sovereign immunity in the prior action, let alone in any subsequent action." Id. Applied to the former employee's allegations of vexatious litigation, threats, and extortion, the court held that his "present claim, which alleges that the defendant's prior action constituted vexatious litigation, neither falls within any valid exception to nor constitutes a waiver of the broad tribal sovereign immunity federal law affords to Indian tribes." Id. In response, the former employee, too, appealed to the court's "reason

and simple fairness." Id. at 887. "Neither reason nor fairness," the Connecticut Supreme Court concluded, "permits us to disregard the well established doctrine of tribal sovereign immunity." Id. at 887.

We are persuaded by Beecher. First, its reasoning is consistent with the United States Supreme Court and federal appellate court cases that have applied immunity and found no waiver even where the results are deeply troubling, unjust, unfair, and inequitable. Beecher, likewise, is consistent with the federal case law that the tribe's immunity waiver in one suit does not waive immunity in a second suit arising out of the same subject matter. If the unfairness and inequity of a tribal employee negligently killing or battering someone is not enough to waive immunity,[6] it follows that allegations of vexatious and bad faith litigation are also not enough to waive or abrogate it.

Second, we are persuaded by Beecher because we cannot find a single case, and none has been cited to us, holding that litigation conduct in one lawsuit is a clear, explicit, and unmistakable waiver of tribal immunity in a subsequent, related lawsuit. In all the cases that have been brought to our attention, the Indian tribe explicitly waived immunity in that case, or the tribe's active participation in litigation waived immunity in the case in which they participated, and not a

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[6] See, e.g., Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224 (11th Cir. 2012) (finding tribal immunity where tribal employees knowingly overserved alcohol to casino patron and watched her get into her car intoxicated, resulting in the patron's death in an automobile accident); Miller v. Coyhis, 877 F. Supp. 1262 (E.D. Wis. 1995) (finding tribal immunity where one tribal employee assaulted and battered another).

subsequent case.[7] The tribe's waiver in one case – whether by explicit waiver or active participation – does not represent a waiver in a subsequent case in the same litigation.

Applied here, the Miccosukee Tribe waived its sovereign immunity in Bermudez by participating in the litigation (giving the checks and check stubs to the Bermudezes), and in the first and second state court actions and the federal court action, by affirmatively litigating as the plaintiff. Because of the immunity

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[7] See Rupp v. Omaha Indian Tribe, 45 F. 3d 1241, 1244 (8th Cir. 1995) (the "Tribe's act of filing suit to quiet title in the disputed lands, combined with explicit language found in its complaint and its explicit waiver of immunity with respect to the counterclaims during the pendency of its suit, constitute[d] an express and unequivocal waiver of the Tribe's sovereign immunity"); Confederated Tribes of the Colville Reservation Tribal Credit v. White (In re White), 139 F.3d 1268, 1271 (9th Cir. 1998) (tribal agency filing collection action in the bankruptcy case waived immunity in that bankruptcy case); United States v. James, 980 F.2d 1314, 1320 (9th Cir. 1992) (tribe having affirmatively provided documents in case, it waived immunity with regard to those documents in that case); United States v. Oregon, 657 F.2d 1009, 1014 (9th Cir. 1981) (tribe waived sovereign immunity by intervening in the case and consenting to litigate all disputes in federal district court); Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria v. Ceiba Legal, LLP, 230 F. Supp. 3d 904 (N.D. Cal. 2017) (Indian tribe sued under federal Lanham Act and was therefore liable for attorney's fees resulting from the same litigation); United States v. Snowden, 879 F. Supp. 1054, 1056 (D. Or. 1995) (once tribe voluntarily appeared in court and complied with subpoena, it waive immunity with regard to those documents in the case in which the documents were subpoenaed); Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n, No. D068909, 2016 WL 3448362, at *2 (Cal. Ct. App. June 16, 2016) (tribe liable to pay costs in lawsuit that it brought against state agency).

waivers, the state and federal courts in those cases were entitled to sanction the Tribe for its litigation conduct – and they did. The immunity waivers in those four cases, however, do not extend to subsequent litigation, even if the subsequent case is related and arises out of the same facts. Where the prior litigation ends and the new case begins is the point that the waiver becomes unclear and not explicit. As in all the cases cited in footnote seven, the Tribe's conduct and active participation opened itself up to litigation in the same cases in which the conduct occurred and the participation happened – the Bermudez case, the first and second state court actions, and the federal court action – but it did not act as a clear, explicit, and unmistakable waiver in a subsequent case on the same subject matter, like this one.

CONCLUSION

It is a "settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." Marbury v. Madison, 5 U.S. 137, 147 (1803). Lewis and Tein had a right not to have their reputations ruined and their business destroyed by the Tribe. Like any injured party, if the allegations are true they should have proper redress for their injuries. But just as every right has its remedy, every rule has its exception. The exception here is sovereign immunity. Granting immunity to Indian tribes is a policy choice made by our elected representatives to further important federal and state interests. It is a choice to protect the tribes understanding that others may be injured and without a remedy. The immunity juice, our federal lawmakers have declared, is worth the squeeze. Still, some suffer from the squeezing,

including car accident victims, beaten detainees, and Lewis and Tein. We can only respond by repeating the words of Justice O'Connor in the Three Affiliated Tribes case:

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.

Three Affiliated Tribes, 476 U.S. at 893. Because the Tribe did not clearly, unequivocally, and unmistakably waive its immunity as to this case, we reverse the trial court's order and remand for the trial court to grant the Tribe's motion to dismiss on sovereign immunity grounds and dismiss the case as to the Tribe.

Reversed and remanded with instructions.

APPENDIX B

CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MIAMI-DADE COUNTY, FLORIDA

CASE NO. 16-21856 (CA 40)
COMPLEX BUSINESS LITIGATION SECTION

[Filed December 7, 2016]

LEWIS TEIN, P.L., GUY LEWIS and MICHAEL TEIN	)
	)
v.	)
	)
MICCOSUKEE TRIBE OF INDIANS OF FLORIDA.	)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This Cause comes before the Court on the Miccosukee Tribe of Indians of Florida's ("Tribe") motion to dismiss for lack of subject-matter jurisdiction. This Court reviewed extensive memoranda from the parties and held oral argument on November 28, 2016. Being otherwise fully advised in the premises, it is

ORDERED and **ADJUDGED** as follows:

Allegations of the Complaint[1]

Plaintiffs Lewis, Tein and Lewis Tein, PL (collectively, "Lewis Tein") filed a five-count complaint alleging violations of Florida's Civil Remedies for Criminal Practices Act and four counts of malicious prosecution. The complaint alleges that over four years, the Tribe committed a pattern of criminal acts designed to disregard the 2012 mandate of Florida's Third District Court of Appeal and publicly obstruct justice in several judicial proceedings in Florida and federal courts, all with the goal of harming Plaintiff Lewis Tein.

In particular, the complaint alleges that the Tribe injected itself into the post-judgment phase of a Florida wrongful-death lawsuit (the "Bermudez Case") to which it was not a party, by authorizing delivery of a set of checks to the plaintiff's lawyer. Compl. ¶ 40. The alleged purpose was to deceive the presiding judge into believing that Lewis and Tein were part of a "fraudulent loan scheme" and had committed perjury about it. ¶ 41. The Florida Third District Court of Appeals found that the Tribe had waived sovereign immunity by authorizing the delivery, and required its Tribal counsel to respond to Lewis Tein's subpoena *duces tecum*. *Miccosukee Tribe v. Bermudez*, 92 So.3d 232 (Fla. 3d DCA 2012). Instead of responding truthfully, the Tribe allegedly embarked on a course of criminal conduct to obstruct the final hearing. ¶ 45-54.

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[1] For purposes of ruling on a motion to dismiss, this Court is required to accept all of the well-pleaded allegations in the Complaint as true. *See Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731, 734 (Fla. 3d DCA 2014).

Concurrently, the Tribe prosecuted a series of ultimately determined frivolous lawsuits against Lewis Tein in Florida and federal court based on the same "fraudulent loan scheme" allegations. ¶¶ 57-58, 62, 74, 88-89. The Tribe allegedly sought "widespread and frequent" media coverage for its allegations. ¶ 61.

After thousands of court filings, thousands of pages of discovery, over a hundred judicial hearings, and multiple interlocutory appeals in state and federal court, all of the presiding judges found the Tribe's claims to be unsupported by any evidence. ¶¶ 65-67, 72-73, 83-85, 91 & Exs. A, B, E. The U.S. District Court for the Southern District of Florida and this Court both sanctioned the Tribe, awarding attorneys' fees. ¶¶ 12, 13, 70, 83.

According to the complaint, the Tribe's conduct severely damaged Lewis Tein because: the firm's resources were diverted; its associates resigned; most of its clientele left; its revenue plummeted; Mr. Lewis's house was burglarized (after the Tribe published his home address and described its contents); and the Plaintiffs' personal and professional reputations were virtually destroyed. ¶¶ 60, 100-106.

Sovereign Immunity

As a general matter, Indian Tribes have common-law immunity from suit traditionally enjoyed by sovereign powers. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). It is also well-settled that a Tribe can waive its immunity from suit through its conduct, so long as such waiver is clear. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("Suits against

Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") In this case, the Tribe argues that this Court lacks subject-matter jurisdiction because the Tribe enjoys tribal sovereign immunity. This Court finds that there has been a "clear waiver" of sovereign immunity here.

In *Miccosukee Tribe v. Bermudez*, 92 So.3d 232 (3d DCA 2012), *rev. denied*, 114 So.3d 935 (Fla. 2013), the Third District Court of Appeal found that the Tribe had waived sovereign immunity. The case involved the same parties and the core allegations of the instant Complaint. *See supra* at 2 (discussion of the Bermudez Case); ¶¶ 38-55, 62-63, 92(b)-(c), 93, 113-118 (Count 2). On certiorari review, the Third DCA held that the Tribe had waived its immunity by the "duly authorized act of providing the checks to plaintiff's counsel" which was "intended to influence ongoing litigation in our state courts." *Id.* at 234. The court made clear that sovereign immunity cannot be used as a litigation sword:

> ***An election to participate in litigation is not a one-way street.*** Mr. Roman cannot seek to participate in or influence litigation in another sovereign entity, the State of Florida, then ***retreat into his own sovereign when it suits him.***

Id. (emphasis added). Acknowledging the rule that waiver must be "clear, explicit and unmistakable," the Third DCA found that the Tribe's conduct waived tribal immunity:

> [T]here can be no mistake about what occurred in our case. ***Mr. Roman, in an act approved by the Tribe, admittedly, has purposefully sought to participate in or influence a state court proceeding***. We can conceive of no motive for the Tribe or Mr. Roman to have done so. The only plausible legal conclusion that can be drawn from the actions of Mr. Roman and the Tribe in this case is the one made by the trial court—***the Tribe's and Mr. Roman's conduct constituted a clear, explicit, and unmistakable waiver of the Tribe's claim to sovereign immunity.***

Id. at 235 (emphasis added).

The Tribe unsuccessfully sought rehearing of the Third DCA's ruling, including rehearing *en banc*, and appealed to the Florida Supreme Court, which denied review. Accordingly, the holding in *Bermudez* binds this Court.

Against the weight of this binding authority, the Tribe argued that sovereign immunity cannot be waived without a formal written declaration by the Tribe's government. This argument directly contradicts the holding in *Bermudez*. *Id.* ("[T]he Tribe's . . . ***conduct*** constituted a . . . waiver of . . . sovereign immunity.") (emphasis added). It also contradicts the clear command of decisions by the U.S. Supreme Court and other federal appellate courts.[2]

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[2] *See C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 420-21 (2001) (finding "clear" waiver because tribe agreed to arbitrate and quoting the "cogent observation" of the Seventh Circuit in *Sokaogon v. Tushie* that the words "sovereign

The Tribe conceded at oral argument that Lewis Tein could have filed counterclaims to the suits brought by the Tribe. The Tribe argued, however, that it did not waive its immunity "simply" by the "filing of a lawsuit." That is a correct statement of the law. It is not, however, what the Complaint alleges. The Complaint alleges that the Tribe did more than "file" a single lawsuit. Rather, it alleges that the Tribe injected itself into the Bermudez Case to which it was not a party, and then, for several years, committed a fraud upon that court. ¶¶ 1-16. Concurrently, it filed lawsuits against Lewis Tein in Florida and federal courts which those courts found were "frivolous," based on "no evidence," and brought in "bad faith," ¶¶ 11, 72, 73, 76, 85. After the Bermudez Case ended, the Tribe filed a third frivolous lawsuit (in Florida state court) and pursued it – this after the trial Court found the identical allegations to have been frivolous, and after the Third DCA affirmed that decision. ¶¶ 65, 89-90 & Ex. E; *Miccosukee Tribe v. Lewis*, 165 So.3d 9 (Fla. 3d DCA 2015).

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immunity" need not even be used for a waiver to be clear); *Sokaogon Gaming Enter. Corp. v. Tushi-Montgomery Associates, Inc.*, 86 F.3d 656, 660 (7th Cir. 1996) (Posner, J.) (reasoning that "[n]o case has ever held" that for a waiver "to be deemed explicit" it "must use the words 'sovereign immunity'"); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (finding waiver and allowing a state search warrant to be executed on tribal land, observing that: "An Indian tribe's sovereign immunity may be limited by either tribal conduct (i.e., waiver or consent) or congressional enactment . . . . [T]here is no requirement that talismanic phrases be employed. Thus, an effective limitation on tribal sovereign immunity need not use magic words.").

Further, "filing" multiple lawsuits is not all the Complaint alleges. It alleges that the Tribe directed its overwhelming resources to "relentlessly"[3] prosecute objectively frivolous lawsuits – involving thousands of pleadings and requiring over a hundred judicial hearings – solely to harm Lewis Tein. ¶¶ 1, 11. After the Third DCA found that the Tribe had waived sovereign immunity and ordered compliance with a subpoena, the Tribe allegedly disregarded the mandate by falsely claiming that no responsive documents existed. ¶¶ 43-44. Finally, in pursuit of its "crusade"[4] against Lewis Tein, the Tribe allegedly committed a series of criminal acts to justify its false sworn statements and to attempt to obstruct justice in four separate lawsuits. ¶¶ 3, 11, 43-51, 57, 88, 92. Thus, the Tribe's argument that it merely "filed a lawsuit" is belied by the record.

Finally, the Tribe argued that it had been "punished enough" because, in two of the proceedings it prosecuted, it was sanctioned with attorneys' fees. The logical consequence of this argument is that the Tribe, having received an appellate mandate to respond to discovery based on a waiver of immunity, could commit a series of alleged crimes to obstruct compliance with the mandate, and in concert, prosecute multiple bad-faith lawsuits, resulting in harm to its adversaries – and suffer no consequences beyond attorneys' fees. In this regard, the observations of the United States

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[3] *See Miccosukee Tribe v. Cypress*, 2015 WL 235433, at *2 (S.D. Fla. Jan. 16, 2015)(Cooke, J.) (observing that the Tribe was "not relenting with its legal crusade" against Lewis Tein).

[4] *See supra*, note 3.

Court of Appeals for the Eighth Circuit reviewing a similar case are apt:

> We confront here special circumstances striking at the core of the effective administration of justice. ***The history of abuses by the Tribe and its attorney leading to the dismissal of the Tribe's complaint is especially egregious.*** To hold, as the Tribe argues, that its consent to the counterclaims was conditioned upon the continuing vitality of its quiet title action ***effectively encourages the Tribe's flagrant disrespect of the court's authority and orders.***

Rupp v. Omaha Indian Tribe, 45 F.3d 1241, 1246 (8th Cir. 1995) (emphasis added).

When a sovereign Tribe brings claims in state or federal court (thus subjecting itself to that court's jurisdiction), which claims ultimately are determined by that court to have been brought in bad faith, the Tribe's conduct in bringing such claims constitutes a clear waiver of tribal sovereign immunity for redress sought against the Tribe, so long as that redress is a direct result of, and arises directly out of, the Tribe's initial claims which have already been judicially determined to have been brought in bad faith.

This complaint alleges that tribal conduct, already judicially determined to be bad faith tribal conduct, which constitutes a clear waiver of sovereign immunity. The Court determines that the Tribe's alleged conduct has demonstrated a clear, explicit and unmistakable waiver of sovereign immunity with

regard to this matter thus providing subject matter jurisdiction to this Court.

For the foregoing reasons, the Tribe's motion to dismiss for lack of subject matter jurisdiction is hereby **DENIED.**

The Court will separately address the motion to dismiss for failure to state a cause of action.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 12/07/16.

/s/ John W. Thornton
JOHN W. THORNTON
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

Copy to counsel of Record

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D16-2826
L.T. NO.: 16-21856

[Filed September 26, 2017]

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA Appellant(s)/Petitioner(s),	)
vs.	)
LEWIS TEIN P.L., et al., Appellee(s)/Respondent(s),	)

SEPTEMBER 26, 2017

United South and Eastern Tribes, Inc. and National Congress of American Indians' motion for leave of Court to file amici curiae brief is hereby granted.

Upon consideration, appellees' motion for certification is denied.

ROTHENBERG, C.J., and SCALES and LUCK, JJ., concur.

cc:

Roberto Martinez	Robert O. Saunooke	Curtis B. Miner
Stephanie A. Casey	George B. Abney	Daniel F. Diffley
Michael J. Barry	Craig A. Pugatch	

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APPENDIX D

CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT
MIAMI-DADE COUNTY, FLORIDA

No. 16-21856

[Filed August 23, 2016]

LEWIS TEIN, P.L., GUY LEWIS and MICHAEL TEIN,	)
Plaintiffs,	)
v.	)
MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,	)
Defendant.	)

COMPLAINT

Plaintiffs LEWIS TEIN, P.L., GUY LEWIS and MICHAEL TEIN bring this Complaint for violation of Florida's Civil Remedies for Criminal Practices Act and for malicious prosecution against defendant MICCOSUKEE TRIBE OF INDIANS OF FLORIDA and allege as follows:

INTRODUCTION

1. From 2011 to at least 2015, the Miccosukee Tribe of Indians of Florida (the "Miccosukee Tribe" or

"Tribe"), through and in concert with its newly elected Chairman Colley Billie, its newly appointed "Tribal Attorney" Bernardo Roman III, and others in and out of the Tribe acting at their direction or in their employ, used their massive financial resources to engage in a criminal scheme to severely damage the finances and reputation of Guy Lewis and Michael Tein and their law firm. The Tribe was largely successful.

2. The purpose of the Tribe's scheme was to consolidate the newly elected chairman's political and financial power and to discredit and disable former employees and outside professionals who had been associated with the Tribe's prior elected management. Those outside professionals included the Tribe's former outside counsel, Guy Lewis, Michael Tein and their law firm.

3. As described in detail in this Complaint, the manner and means of the Tribe's scheme included the commission of numerous criminal acts including perjury, obstruction of justice, witness tampering, witness intimidation, destruction of evidence, manufacturing false evidence, secreting evidence, filing false lawsuits, lying to state and federal judges and making false statements to law enforcement officials.

4. The Tribe's criminal scheme had its intended effect in causing extraordinary damage to the livelihoods and reputations of Mr. Lewis and Mr. Tein and to their law firm. For decades before, these lawyers had earned excellent reputations in this community and beyond as ethical and hardworking litigators, who cared deeply about their clients and conducted their practices at the highest level of integrity. As a result of the Tribe's numerous illegal and malicious acts,

however, Lewis's and Tein's reputations suffered grave harm and their practices declined precipitously.

5. This lawsuit seeks to bring the Tribe to justice and to compensate Mr. Lewis, Mr. Tein and their law firm for the Tribe's illegal acts.

SUMMARY

6. From 2005 to January 2010, Guy Lewis and Michael Tein, through their law firm Lewis Tein, P.L. (collectively "Lewis Tein"), professionally, honestly and effectively represented the Tribe and individual members of the Tribe in a variety of civil, criminal and administrative matters. In December 2009, their relationship with the Tribe changed dramatically when a new Chairman of the Tribe, Colley Billie, was narrowly elected and took power. Colley Billie had no previous executive experience in managing the Tribe's affairs. He had been a part-time manager of the simulated-poker table in the Tribe's casino and one of several part-time Indian-law judges on the Miccosukee Reservation.

7. After assuming his new position as Chairman, Colley Billie and his newly appointed "Tribal Attorney" Bernardo Roman, III, Esq., with the assistance of others, executed a "purge" in which they fired a large number of people in a wide variety of positions employed by the former Chairman's administration. In addition to firing Lewis Tein, the Tribe, acting at Colley Billie's instructions, also fired the Tribe's in-house general counsel (Jeanine Bennett, Esq.) and its entire in-house legal department including its long-standing secretary, the Tribe's long-serving outside general counsel (Dexter Lehtinen, Esq.), the supervisor

of its Accounting Department (Julio Martinez), its Financial Director (Miguel Hernandez), its outside tax advisors (Gerson Preston & Robinson, CPAs), its Chief of Police, the manager of the Miccosukee Resort hotel, and even the head of the Miccosukee School. The Tribe's purpose was malicious and corrupt: to consolidate the new administration's financial and political power, punish those who served under the former Chairman, silence the new Chairman's critics, and to eliminate any potential threats to his re-election.

8. In order to maintain a veil of secrecy over the Tribe's unlawful and corrupt scheme and to plan illegal and malicious acts against Lewis Tein, Colley Billie and Tribe "Business Council" member Roy Cypress Jr. conspired to exclude and did in fact regularly exclude the Tribe's Lawmaker, William Osceola, and its Treasurer, Jerry Cypress, from certain meetings of the Tribe's Business Council in which they were otherwise entitled to participate.

9. In furtherance of the criminal scheme, the Tribe maliciously filed a series of false lawsuits against Lewis Tein and other fired professionals in state and federal court. These lawsuits, and the Tribe's supporting filings, made numerous false allegations, including that Lewis Tein:

had fraudulently billed the Tribe for legal work that was "fictitious" or "unnecessary":

- had paid cash "kick-backs" to the former Chairman;
- had paid cash "kick-backs" to the former Chairman;

- had "knowing[ly] failed to report all or some of the income" received from the Tribe and filed "false tax returns";
- had engaged in a "money-laundering scheme"; and
- had been paid for its representation of individual Tribe members through a system of "fraudulent loans" from the Tribe to its members.

The allegations were completely false.

10. The false allegations were designed to damage and discredit Lewis Tein. A lawyer's reputation is his or her most valuable asset. Damaging a lawyer's reputation is the surest way to damage his ability to retain clients and attract new clients. Although completely false, the allegations had the malicious effect that the Tribe sought: they caused severe economic damage to the Lewis Tein law firm and severe economic and reputational damage to Guy Lewis and Michael Tein personally.

11. Also in furtherance of its criminal scheme and as detailed in this Complaint, independent of its malicious lawsuits, the Tribe committed numerous criminal acts that harmed Lewis Tein, including:

- repeated instances of witness tampering, witness retaliation and suborning perjury from witnesses;
- repeated instances of perjury;
- repeated acts of obstructing justice, by hiding, destroying and altering evidence; and

- making a false 911 emergency police report.

12. Every single claim brought by the Tribe against Lewis Tein has now been fully and finally dismissed on the merits by the state and federal courts after years of extensive discovery. Beyond dismissing the lawsuits, both the federal court and this Court have sanctioned the Tribe and its Tribal Attorney Bernardo Roman III for the bringing of the claims.

13. In unsparing terms, Judge Marcia G. Cooke of the United States District Court for the Southern District of Florida excoriated the Tribe for its conduct:

> [T]here was no evidence, or patently frivolous evidence, to support the factual contentions set forth [in the Second Amended Complaint], which form the basis of [the Tribe's] claims against Defendants Lewis Tein . . . .

Miccosukee Tribe of Indians v. Cypress, 2015 WL 235433, at *4 (S.D. Fla. Jan. 16, 2015) (also attached as Exhibit A). The federal court found that the "tribe is not relenting with its legal crusade" against Lewis Tein and that its allegations were "inexcusable." Judge Cooke then sanctioned the Tribe and its Tribal Attorney over $1 million. The court concluded that Tribal Attorney Roman's behavior had been "egregious and abhorrent" and referred him to the Florida and federal bars "for investigation and appropriate disciplinary action." *Id.*

14. In equally unsparing terms, the Miami-Dade Circuit Court similarly excoriated the Tribe for its bad faith:

> [The Tribal Attorney] and the Tribe together pursued this litigation ***in bad faith.*** Motivated by personal animosity for Lewis Tein and the firm's close and financially lucrative relationship with the Tribe's former Chair, the Tribe and [the Tribal Attorney] ***acted without regard for the truth.***

Order on Lewis Tein's Entitlement to Attorneys Fees and Costs, dated December 12, 2015, at 12 (emphasis added) (attached as Exhibit B). As the Circuit Court summed up: "The Tribe and [the Tribal Attorney] filed this lawsuit ***in bad faith."*** *Id.* at 14 (emphasis added).

15. These Subsequently, The Florida Bar filed formal charges against Roman and his co-counsel Jose Maria "Pepe" Herrera for their acts of dishonesty and obstruction of justice against Lewis Tein. (Copies of The Florida Bar Complaints against Roman and Herrera are attached as Exhibit C and Exhibit D.)

16. These harsh sanctions orders rightly required the Tribe to pay for a portion of the millions of dollars in attorney's fees and costs incurred, primarily by Lewis Tein's insurer, in the defense of the malicious and baseless actions filed in federal and state court. However, attorney's fees were not intended to – and do not – compensate Lewis Tein for the severe economic damage that the Tribe's numerous illegal acts and multiple malicious prosecutions caused to the law firm. They likewise do not compensate Guy Lewis or Michael Tein for the severe economic and reputational damage they personally suffered. The purpose of this action is to recover such damages from the Tribe.

THE PARTIES

17. Lewis Tein, P.L. is a Florida limited liability company with its principal place of business located in Coconut Grove, Florida. Lewis Tein, P.L. is a law firm, and its principals are Guy Lewis and Michael Tein.

18. Guy Lewis is a citizen and resident of Miami-Dade County, Florida. Mr. Lewis is a practicing lawyer and member in good standing of the Florida Bar.

19. Michael Tein is a citizen and resident of Miami-Dade County, Florida. Mr. Tein is a practicing lawyer and member in good standing of the Florida Bar.

20. Lewis Tein, P.L., Guy Lewis and Michael Tein will be collectively referred to as "Lewis Tein" in this Complaint except where it is necessary to distinguish among them.

21. The Miccosukee Tribe of Indians of Florida is a federally-recognized Indian Tribe residing in the Florida Everglades. The Tribe owns and operates a number of businesses marketed to Miami-Dade County, including a gambling casino. The Tribe also owns and operates a golf course in Miami-Dade County at 6401 Kendale Lakes Dr., Miami Lakes, Florida. The Tribe owns numerous parcels of improved and unimproved real property throughout Miami-Dade County.

JURISDICTION AND VENUE

22. This is a civil action for damages in excess of $15,000, exclusive of costs, interest and attorney's fees.

23. Venue is appropriate in this Court because both Lewis Tein and the Tribe are located in Miami-Dade County and because the wrongful conduct carried out by the Tribe included the commission of numerous illegal and malicious acts in Miami-Dade County.

FACTUAL ALLEGATIONS

A. Lewis Tein's Representation of the Tribe.

24. Guy Lewis and Michael Tein formed the law firm of Lewis Tein, P.L. in April 2005, after years of civil and criminal litigation experience as federal prosecutors and then as partners at a prestigious national law firm.

25. From 2005 to the present, Lewis Tein has professionally, honestly and effectively represented a wide variety of businesses and individuals in complex civil and criminal litigation and other legal matters.

26. Billy Cypress was the longtime Chairman of the Tribe, having first held the position of Interim Chairman from 1987 to 1989, and then Chairman from 1989 to December 2009, winning re-election multiple times.

27. Chairman Cypress, and several other members of the Tribal leadership, interviewed and vetted Lewis Tein, hiring the firm to perform legal work for the Tribe, beginning in 2005.

28. In the years that followed, Lewis Tein represented the Tribe in a number of significant and complex matters, including commercial, tax, environmental, administrative and regulatory cases.

Lewis Tein also represented individual Tribe members on a variety of matters.

B. The *Bermudez* Wrongful Death Case.

29. One of the cases that Lewis Tein handled for individual Tribe members was a civil wrongful death lawsuit, and related criminal proceedings, arising out of a car accident. Tribe member Tammy Billie had been involved in an automobile accident in 1998 on Tamiami Trial in which Gloria Bermudez was killed and her husband Carlos Bermudez and their minor son were both injured.

30. Tammy Billie was subsequently sued by the Bermudez family in 2000 for wrongful death (along with her father, Jimmie Bert, who was the owner of the car she was driving). The Tribe was not a party to the wrongful death lawsuit.

31. In 2005, after five years of litigation in the case, Lewis Tein was hired by Tammy Billie, Jimmie Bert and Louise Bert (Jimmie Bert's wife) to take over their defense in the wrongful death lawsuit.

32. ***Tribe lent money to clients for legal fees:*** The Tribe had revenues in the hundreds of millions of dollars per year from its business operations, especially its casino. Members of the Tribe received large quarterly dividends from the Tribe, which they received in full without paying any income taxes. Tammy Billie, and Jimmie and Louise Bert obtained permission from the Tribe to have their attorney's fees paid in the form of loans to be repaid with deductions from their quarterly dividends – a routine practice that had been used for many years by the Tribe for other

members and other attorneys as well, long before Lewis Tein ever represented the Tribe or any of its members.

33. ***Defense of $ 27 million demand:*** The defense of the wrongful death case was extremely challenging. Tammie Billie had pled guilty to and served eight years in prison for negligent homicide, and the Bermudez family – which was represented simultaneously by four separate law firms from Florida and Washington, D.C. – demanded over $27 million in compensatory damages. Several attempts were made to settle the case, including two mediations. The plaintiffs rejected all of these settlement offers. Consequently, Ms. Billie and Mr. and Mrs. Bert instructed Lewis Tein to defend the lawsuit through trial.

34. ***Lewis Tein successfully limit damages:*** At trial in 2009, Lewis Tein proved that plaintiff Carlos Bermudez had recently been arrested and confessed to laundering money for Medellin drug traffickers and had stashed a duffel bag containing $200,000 in cash drug proceeds in the home where their minor son (also a plaintiff) was living. The jury rejected the plaintiffs' demand for $27 million, awarding only $3.177 million, roughly 1/9th of the demand. A judgment was entered against Tammy Billie and Jimmie Bert. The Tribe was not a party to the lawsuit and no judgment was entered against it.

C. <u>The Change of Power at the Tribe.</u>

35. The governing body of the Tribe is the Miccosukee General Council, which is composed of all adult members of the Tribe. The elected officers of the General Council are the Chairman, Assistant Chairman, Treasurer, Secretary and Lawmaker, and

together are referred to as the Business Council. The Business Council runs the day-to-day operations of the Tribe's numerous administrative functions and its valuable business interests. The officers are elected by the General Council and hold office for a term of four years.

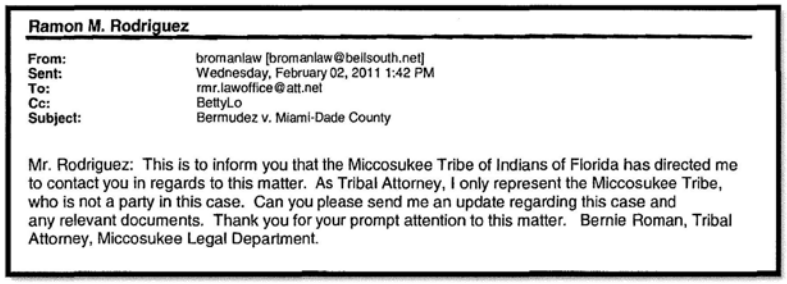
36. ***Roman elevated from clerk to "Tribal Attorney":*** The narrow election in 2009 of Colley Billie to Chairman resulted in a dramatic elevation of attorney Bernardo Roman III. Under the prior administration, Roman worked for Colley Billie as a part-time clerk to the Tribe's Indian-law court, earning $300 per day. When he was not working as a clerk, Roman had a small law practice, typically handling "slip and fall" cases. Under the new administration, Roman assumed the position of the Tribe's sole "Tribal Attorney," controlling the Tribe's legal department and reporting directly to the new Chairman.

37. ***Roman was Tribe's agent:*** In conducting the Tribe's illegal scheme to damage Lewis Tein, Roman was at all times the Tribe's authorized and/or apparent agent. Roman signed pleadings and identified himself as the "Tribal Attorney." Roman used a Tribe address as his place of business in pleadings and correspondence. Roman had an office at and worked from the Tribe's headquarters. Roman communicated regularly and conspired with the new Chairman and enjoyed unfettered access to him. Roman acted in furtherance of the Tribe's interests and regularly reported on his actions against Lewis Tein to the Business Council and the General Council. Under Florida agency principles, the Tribe is legally responsible for all of Roman's actions.

D. Collection Proceedings in the *Bermudez* Wrongful Death Action.

38. After the entry of the 2009 civil judgment, the Bermudez family began collection proceedings against Tammy Billie and Jimmy Bert. The Bermudez family also sought to enforce the judgment against the Tribe itself, even though the Tribe had not been a party to the case. Lewis Tein continued its vigorous defense of Tammie Billie and Jimmie Bert in these collection proceedings.

39. ***Tribe directed Roman to inject the Tribe into the Bermudez collection proceedings.*** In February 2011, Tribal Attorney Roman wrote an email to counsel for the Bermudez family, stating that the "Tribe . . . has directed me to contact you in regards to this matter. As Tribal Attorney, I only represent the Miccosukee Tribe, who [sic] is not a party in this case."



Ramon M. Rodriguez

From: bromanlaw [bromanlaw@bellsouth.net]
Sent: Wednesday, February 02, 2011 1:42 PM
To: rmr.lawoffice@att.net
Cc: BettyLo
Subject: Bermudez v. Miami-Dade County

Mr. Rodriguez: This is to inform you that the Miccosukee Tribe of Indians of Florida has directed me to contact you in regards to this matter. As Tribal Attorney, I only represent the Miccosukee Tribe, who is not a party in this case. Can you please send me an update regarding this case and any relevant documents. Thank you for your prompt attention to this matter. Bernie Roman, Tribal Attorney, Miccosukee Legal Department.

(Email from Tribal Attorney Bernardo Roman, dated Feb. 2, 2011)

40. ***Tribe injected itself into in Bermudez collection proceedings by falsely representing that 61 checks were not loans***: In or around September 2011, the Tribal Attorney (Roman) supplied the

Bermudez family's counsel with copies of 61 checks (and check stubs) drawn on the Tribe's general account, payable to Lewis Tein, totaling $3,111,567. The Tribal Attorney falsely represented that they were evidence of payments by the Tribe itself – not loans to the clients – for the defense of Tammie Billie and Jimmie Bert in the wrongful death action. (One third of this amount was actually payment for legal work performed for other Tribe members whom Roman had not consulted before unilaterally disclosing details about their cases. The balance was proceeds of the loans from the Tribe to Billie and Bert.)

41. ***Tribe made false accusations against Lewis Tein as part of the Bermudez collection proceedings:*** The Tribe's purpose in providing the checks and making the false representations was to assist the Bermudez family's lawyer in launching a false claim of "perjury" and "fraud on the court" against Lewis Tein for truthfully stating during the Bermudez collection proceedings that Tammy Billie and Jimmie Bert had been responsible for the firm's fees. As a result of those false perjury allegations, the Bermudez court conducted an inquiry (the "Bermudez Sanctions Proceeding") into whether Tammy Billie and Jimmie Bert had paid Lewis Tein's fees through loans from the Tribe, as Lewis Tein had represented.

42. ***Tribe's false statements were malicious*:** The Tribe was not a party to the Bermudez case. It had no legitimate basis for cooperating with an adversary counsel seeking to execute against the Tribe on a large civil judgment. Both the trial court and the appellate court recognized that the Tribe's efforts were malicious, aimed at damaging Lewis Tein:

(a) The Third District Court of Appeal commented that the reasons the Tribe injected itself into the Bermudez case were "mystifying to us" – since the Bermudez family was seeking to hold the Tribe itself liable to satisfy the civil judgment. *Miccosukee Tribe of Indians of Florida v. Bermudez,* 92 So.3d 232, 233 (Fla. 3d DCA 2012).

(b) The Miami-Dade Circuit Court then expressly explained why the Tribe injected itself into the Bermudez case, namely, "to hurt Lewis and Tein":

> Because of bad blood ***the Tribe did whatever it could to hurt Lewis and Tein.*** And part of what they did was they dropped this gift on your doorstep of cancelled checks, which you never would have known about but for the bad blood between Lewis Tein and the Tribe. So they gave you that gift because they wanted to use you to hurt Lewis Tein. Which you did.

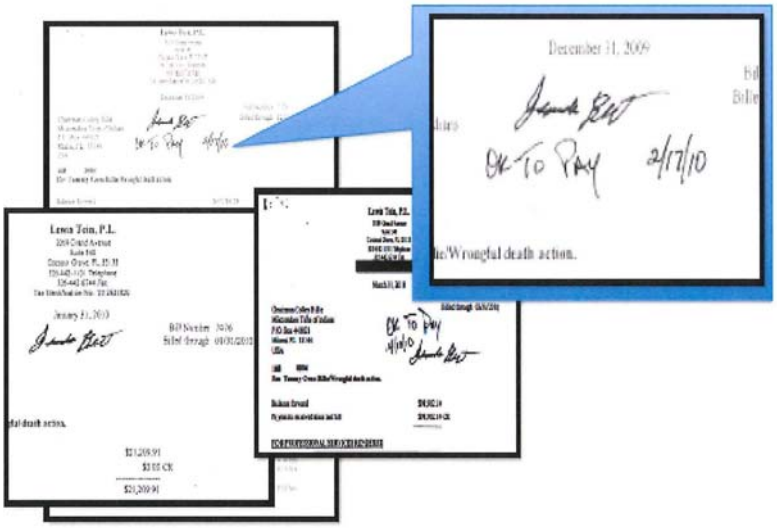
6/21/2013 Hearing Transcript (Case No. 00-25711) at 34. Indeed, this Court further recognized that the Tribe's conduct in the Bermudez Sanctions Proceeding was "obviously planning" for its other lawsuits against Lewis Tein. *Id*

43. ***Tribe filed false statement to hide the loans*:** To further its criminal scheme, the Tribe thereafter committed perjury in the Bermudez Sanctions Proceeding in an attempt to lead the Miami-Dade Circuit Court to believe that Lewis Tein had not

been truthful in describing the Tribe's loans for legal fees. After this Court issued an order compelling the Tribe to produce any documents regarding loans from the Tribe to Tammie Billie and Jimmie Bert, Tribal Attorney Roman, expressly acting in his official capacity as "records custodian" for the Tribe, filed a false affidavit flatly denying that the Tribe had any documentation supporting any such loans, swearing that: (a) "There are no books of accounts or general ledgers reflecting loans or advances made by the Miccosukee Tribe to Jimmie Bert and/or Tammy Gwen Billie for payment of their legal fees and related expenses" to Lewis Tein, P.L.; and (b) "There are no writings, other information, memoranda, documents, notes, or other things with respect to accounts receivable for loans in general or loans to Jimmie Bert or Tammy Gwen Billie by the Miccosukee General Council for payment of legal fees by the Miccosukee Tribe for legal representation by Guy Lewis, Esquire, Michael Tein, Esquire, or Lewis Tein, P.L."

44. ***Tribal Attorney Roman's statements constituted perjury*:** The Tribe's affidavit was false and perjurious. The Tribe and its Tribal Attorney well knew that there were many such books of accounts, general ledgers, writings, other information, documents, notes and other things with respect to loans to Jimmie Bert and Tammy Billie by the Tribe for payment of Lewis Tein's fees. As testimony by the Tribe's senior in-house accountant, its file clerk and its former in-house counsel later exposed, the Tribal Attorney was then in possession of documents <u>in his own office</u> that conclusively demonstrated that the loans existed and Lewis Tein had told the truth about them.

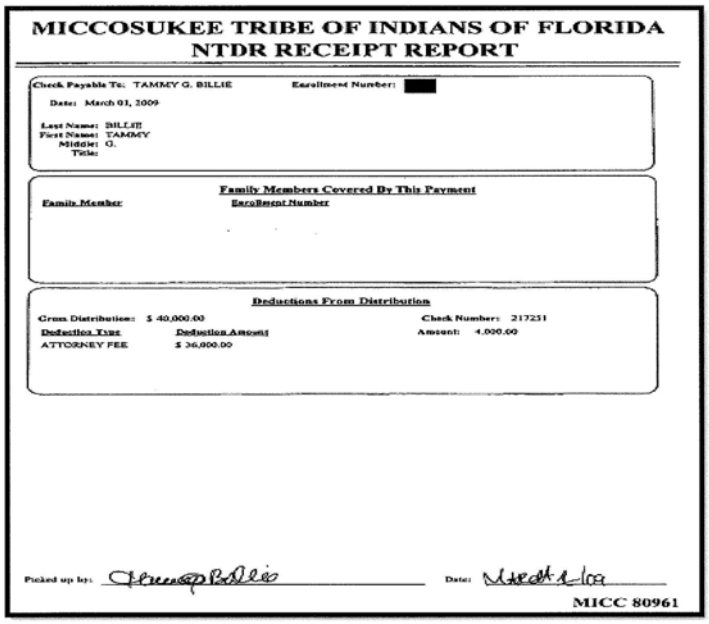
45. ***Tribe hid key documents proving loans were genuine*:** The documents that the Tribal Attorney possessed, at the time of his false affidavit, in his office at the Tribe's headquarters, included Lewis Tein invoices that Jimmie Bert had endorsed *"OK to Pay,"* indicating that he approved disbursement of a loan to him from the Tribe to pay the invoice. Pertinent portions of three such invoices follow:



(Lewis Tein invoices signed "OK to pay"
by Jimmie Bert)

46. ***Tribe hid loan documents proving the loans were genuine:*** Beyond the documents Roman kept in his office at the Tribe, the Tribe possessed a variety of loan documents, including audited financial statements reflecting the loans, loan requisition forms, and documents reflecting the Tribe deducting sums from the quarterly distributions to Tammie Billie and Jimmie Bert for their legal fees.

47. By way of just one example, the Tribe had "NTDR Receipt Reports"[1] for both Tammy Billie and Jimmie Bert showing the amount of their quarterly distributions from the Tribe, the deduction amounts, and the deduction type ("Attorney Fee"). These forms demonstrate that the Tribe, as well as Billie and Bert, knew the Tribe was deducting installments from their quarterly distributions to pay legal fees. Samples of these hidden documents are reproduced below:



MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
NTDR RECEIPT REPORT

Check Payable To: TAMMY G. BILLIE Enrollment Number: [redacted]
Date: March 01, 2009

Last Name: BILLIE
First Name: TAMMY
Middle: G.
Title:

Family Members Covered By This Payment

Family Member	Enrollment Number

Deductions From Distribution

Gross Distribution: $ 40,000.00 Check Number: 217251

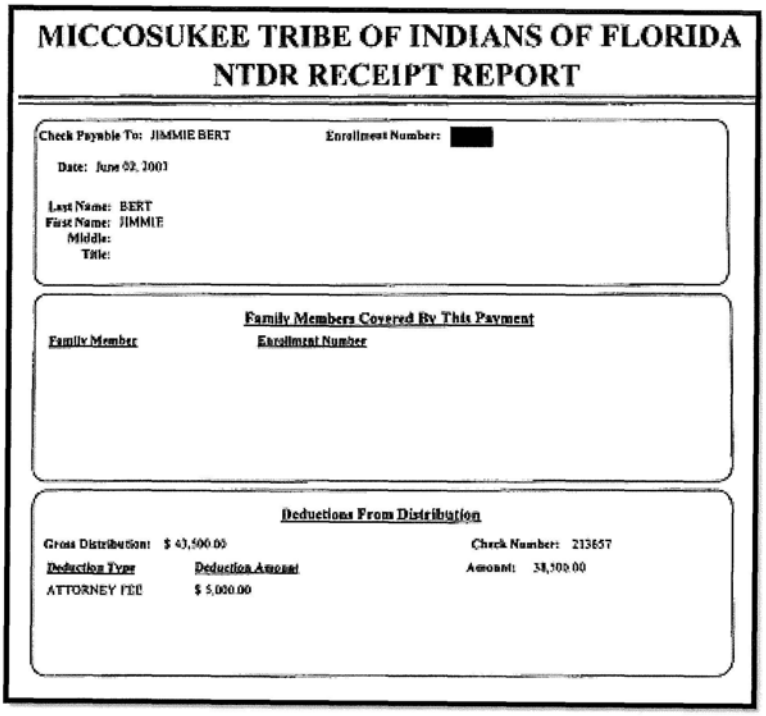
Deduction Type	Deduction Amount	Amount: 4,000.00
ATTORNEY FEE	$ 36,000.00	

Picked up by: Tammy Billie Date: March 1 09

MICC 80961

(Receipt showing a $40,000 distribution to Tammy G. Billie, with a $36,000 deduction for "ATTORNEY FEE" – signed and dated by Tammy Billie)

[1] "NTDR" stands for "Non-Taxable Distribution Revenue." During all material times, the Tribe took the position that Tribe members were not required to pay any federal income tax on these distributions. The federal government rejected the Tribe's position.



MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
NTDR RECEIPT REPORT

Check Payable To: JIMMIE BERT Enrollment Number: [redacted]

Date: June 02, 2007

Last Name: BERT
First Name: JIMMIE
Middle:
Title:

Family Members Covered By This Payment

Family Member	Enrollment Number

Deductions From Distribution

Gross Distribution: $ 43,500.00 Check Number: 213657

Deduction Type	Deduction Amount
ATTORNEY FEE	$ 5,000.00

Amount: 38,500.00

(Receipt showing a $43,500 distribution in June 2007 to Jimmie Bert, with a $5,000 deduction for "ATTORNEY FEE")

47. ***Tribe's former General Counsel authenticated these loan documents*:** The Tribe's former General Counsel, Jeanine Bennett, Esq., a ten-year member of the Tribe's legal department whom Colley Billie and Bernardo Roman fired as part of the Tribe's illegal scheme, specifically corroborated these invoices. Ms. Bennett truthfully confirmed in deposition testimony that "Jimmie [Bert] and Tammy [Billie] came to the office and informed me that [it] was the case" that "the invoices pertaining to legal fees incurred by Jimmie Bert and Tammy Gwen Billie in

the Bermudez case were paid by loan proceeds." Bennett 1/15/2013 Depo. Tr. at 151.

48. ***Tribe also hid loan documents from federal court*:** In April 2013, just two weeks after the conclusion of the Bermudez Sanctions Proceedings, the Tribe filed a brief in federal court (signed by its Tribal Attorney) representing to Judge Marcia Cooke that "a review of the loan records shows that there are neither loan request forms nor purchase orders for Jimmie Bert and Tammy Gwen Billie for payment of legal fees." Tribe's Opposition to Lewis Tein's Motion for Summary Judgment [DE 203:19] (filed April 29, 2013). Like the Tribe's false affidavit filed in the Bermudez case four months earlier, this statement to a United States District Judge constituted an unlawful attempt to obstruct justice.

49. ***Tribe violated federal and state court orders compelling production of the loan documents, for strategic advantage in the Bermudez Sanctions Proceeding*:** In addition to knowing that these loan documents existed and demonstrated the *bona fide* loans for legal fees to Tammy Billie and Jimmie Bert, the Tribe and its Tribal Attorney unlawfully hid these loan documents in order to obstruct justice in the Bermudez Sanctions Proceeding.

(a) ***Federal court order*:** The Tribe had federal "initial disclosure" obligations and was commanded by a federal court order to produce these documents in the Tribe's federal case against Lewis Tein (the "Federal Court Action," described below). *See* [DE 177:6] in Case No. 12-22439-MGC (court order compelling production,

over Tribe's objection, of "all documents concerning disbursements . . . made on behalf of individual Tribe members for any purpose" and "all documents concerning disbursements to, or made on behalf of, individual Tribe members for legal services or representation").

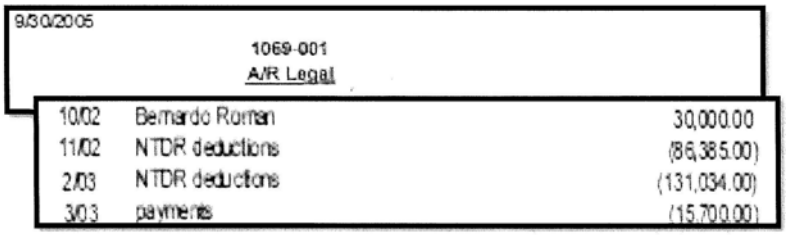
(b) ***State court order:*** The Tribe had also been commanded by a court order in the Bermudez Sanctions Proceeding to produce the documents. *See* Order Denying Tribe's Motion for Reconsideration of Order Denying Motion for Protective Order as to Subpoena Duces Tecum for Continuation of Deposition of Bernardo Roman III (Dec. 10, 2012).

(c) ***Tribe disobeyed orders until* after *Bermudez Sanctions Proceeding was over*:** Despite these federal and state court orders directing the Tribe to produce these loan documents, the Tribe and its Tribal Attorney unlawfully secreted these loan documents until ***after*** the conclusion of the Bermudez Sanctions Proceeding against Lewis Tein, in order to prevent the court from knowing the truth – namely, that the loans were genuine and documented.

50. ***Tribe hid and destroyed evidence of the loans*:** As the Tribe's file clerk testified, Roman kept these loan documents in his own office at the Tribe ***during*** the Bermudez Sanctions Proceeding. *See* Andre Dennis 6/12/2013 Depo. Tr. at 30-31 (testimony of Tribe's file clerk that Roman instructed him to copy certain documents for production and to "shred" others"), 63 (testimony that invoices evidencing Bert's

and Billie's approval of loans to them for legal fees were located "[i]n Mr. Roman's office" for "[m]ore than two years").

51. ***Tribal Attorney (Roman) himself had been paid by Tribal loans:*** The Tribe and the Tribal Attorney Bernardo Roman well knew that the Tribe routinely lent money to its members to pay legal fees, beginning well before Lewis Tein ever represented any Tribe member. Indeed, the Tribe's records reflected that, in 2002, *Roman himself had* been paid $30,000 in legal fees by precisely such a loan:



9/30/2005

1069-001
A/R Legal

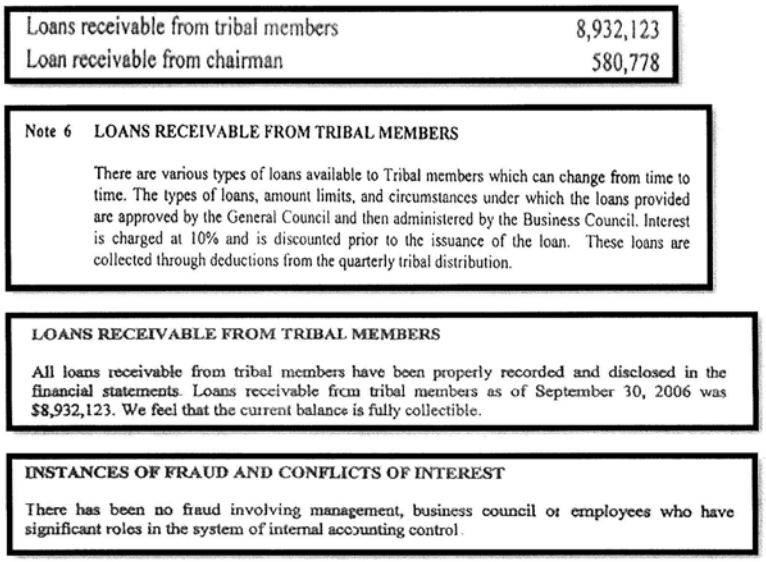
10/02	Bernardo Roman	30,000.00
11/02	NTDR deductions	(86,385.00)
2/03	NTDR deductions	(131,034.00)
3/03	payments	(15,700.00)

(Tribe's records for accounts receivable from Tribe members for legal fees, showing a $30,000 payment to Bernardo Roman in October 2002)

In deposition testimony, the Tribe's former General Counsel, Jeanine Bennett, Esq., truthfully confirmed that Roman "regularly" received checks from the Tribe that were "loans to his individual clients." Bennett 1/15/2013 Depo. Tr. at 139.

52. ***Tribe's public auditors confirmed the loans*:** Moreover, the Tribe's independent certified public auditors specifically audited the loans to the Tribe members, year after year. The auditors certified that the loans were "properly recorded and disclosed" and "fully collectible" in the Tribe's audited financial

statements. Following are representative excerpts from those audited financial statements:



Loans receivable from tribal members	8,932,123
Loan receivable from chairman	580,778

Note 6 LOANS RECEIVABLE FROM TRIBAL MEMBERS

There are various types of loans available to Tribal members which can change from time to time. The types of loans, amount limits, and circumstances under which the loans provided are approved by the General Council and then administered by the Business Council. Interest is charged at 10% and is discounted prior to the issuance of the loan. These loans are collected through deductions from the quarterly tribal distribution.

LOANS RECEIVABLE FROM TRIBAL MEMBERS

All loans receivable from tribal members have been properly recorded and disclosed in the financial statements. Loans receivable from tribal members as of September 30, 2006 was $8,932,123. We feel that the current balance is fully collectible.

INSTANCES OF FRAUD AND CONFLICTS OF INTEREST

There has been no fraud involving management, business council or employees who have significant roles in the system of internal accounting control.

(Excerpts from Tribe's audited financial statements)

53. ***Tribe conspired with Tribe's adversary to create false testimony about the loans*:** With the active assistance of the Tribal Attorney and Tribal Judge Petties Corey "Pete" Osceola, Jr., the Tribe attempted to manufacture a false sworn statement by Jimmie Bert, denying the existence of *bona fide* loans for Lewis Tein's legal fees, in order to use that false statement against Lewis Tein in the Bermudez Sanctions Proceeding. To accomplish this, the Tribe took four secret statements from Mr. Bert, in succession, using leading questions, until he had denied the existence of the loans.

(a) The first two secret statements were taken from Mr. Bert at the Miccosukee Indian Village on November 20, 2012, within minutes of

each other. As reflected on the transcripts, the statements were interpreted from Miccosukee to English by Tribal Judge Osceola. Months later in 2013, the conspirators took two more sworn statements from Mr. Bert, in preparation for offering his testimony against Lewis Tein in the Bermudez Sanctions Proceeding.

(b) In furtherance of the scheme, Tribal Judge Osceola attended a "confidential" meeting in a Miccosukee Resort hotel room between Bernardo Roman and Ramon Rodriguez (counsel for Jimmie Bert's adversary). Pete Osceola 6/3/2013 Depo. Tr. at 139-148.

(c) On cross-examination at the final hearing in the Bermudez Sanctions Proceeding, Tammy Billie admitted that the Tribe (by its lawyer Roman) had prepared her to be called by counsel for the Tribe's ***adversary*** (Rodriguez) to testify against Lewis Tein.

54. ***Lewis Tein exonerated:*** In April 2013, after 1½ years of discovery and multiple hearings in the Bermudez Sanctions Proceeding, and despite the Tribe's numerous attempts to obstruct justice, this Court found that Lewis and Tein "(1) did not commit perjury; (2) did not engage in fraud on the Court or misconduct; and (3) did not fail in their obligation of candor to the tribunal." Order Denying Plaintiffs' Motion for Relief Pursuant to [Rule] 1.540(b) (Case No. 00-25711), at 1-2 (entered May 9, 2013).

55. ***The Florida Bar investigated and found probable cause to prosecute Tribe's lawyers:*** In 2016, after a lengthy investigation, The Florida Bar

filed disciplinary charges against Tribal Attorney Roman and Tribe counsel Jose Maria "Pepe" Herrera for numerous acts of unethical conduct against Lewis Tein, including acts committed during the Bermudez Sanctions Proceeding. *See* Exhibit C and Exhibit D. The Florida Bar also found probable cause against Ramon Rodriguez for his unethical conduct during the Bermudez Sanctions Proceeding and indicated that, absent his entering a guilty plea, it will also file charges against him.

E. The Malicious and Baseless State Court Action.

56. Not content to damage Lewis Tein by inserting itself into the *Bermudez* case, the Tribe escalated its campaign of malicious criminal activity. The Tribe, through its Tribal Attorney (Roman), filed its first complaint in Miami-Dade Circuit Court (Case No. 12-12816-CA40) against Guy Lewis, Michael Tein and Lewis Tein, P.L. on April 2, 2012 (the "State Court Action"). The complaint asserted causes of action for legal malpractice, breach of fiduciary duty, fraud, fraud in the concealment, conspiracy to defraud, civil RICO conspiracy, civil RICO, civil theft and conversion.

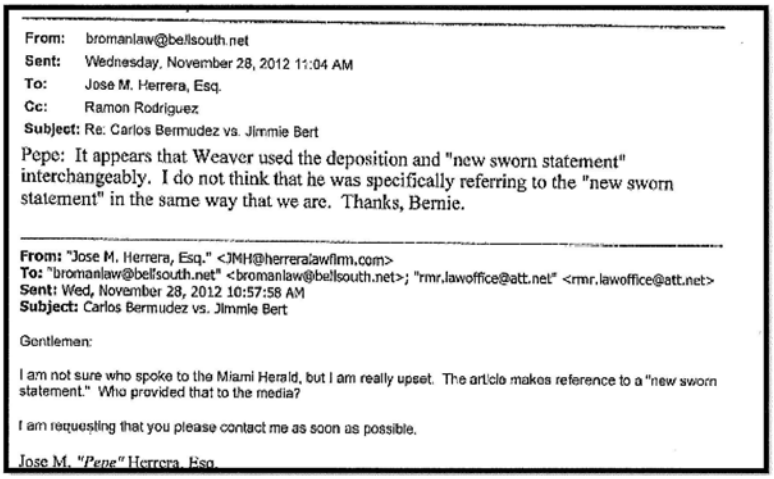
57. ***Tribe's false claims against Lewis Tein*:** Among other extraordinary allegations, the Tribe falsely claimed that Lewis Tein, soon after they began to represent the Tribe, "implemented a secret and sophisticated scheme to defraud the MICCOSUKEE TRIBE and individual members of the MICCOSUKEE TRIBE out of millions of dollars by creating fictitious, excessive, unreasonable and/or unsubstantiated legal work and other excessive, unreasonable and unsubstantiated expenses"; and that "the

MICCOSUKEE TRIBE was lured into unnecessarily paying millions of dollars in legal fees that were excessive and unreasonable, for work that was fictitious, improperly created, unsubstantiated and which did not achieve any reasonable benefits."

58. ***Tribe's false personal attacks on Lewis and Tein*:** In addition, the Tribe gratuitously and falsely claimed that Lewis Tein used legal fees from the Tribe to maintain a "lavish and extravagant lifestyle," listing a variety of personal possessions. This allegation was designed to publicly embarrass Mr. Lewis and Mr. Tein and ensure coverage in the media of such salacious details. Among other things, the complaint falsely asserted that Lewis' personal possessions purchased with money "stolen" from the Tribe included "an elaborate 'Prince's Chair'" (which, in fact, was a gift from a non-Tribe client) and "[f]urniture featured in the 1939 movie *Gone with the Wind*" (which, in fact, had been purchased by Mr. Lewis some 20 years before Lewis Tein was ever hired by the Tribe).

59. ***Tribe publicized their home addresses and contents and Lewis' home was burglarized*:** The complaint even gratuitously listed Mr. Lewis' and Mr. Tein's home addresses, their purchase prices and some of their contents – homes where they lived with their wives and young daughters. *Mr. Lewis' home was subsequently burglarized.* Lewis Tein filed an emergency motion to have their home addresses redacted, which this Court immediately granted. Later, the Tribe intentionally and maliciously violated this court order by re-listing the home addresses in publicly filed pleadings, several times.

60. ***Tribe used a* Miami Herald *reporter to ensure publicity for its false allegations*:** The Tribe, through its Tribal Attorney, ensured that its malicious allegations received widespread and frequent coverage in the media by transmitting their false allegations to a *Miami Herald* reporter, who repeatedly published them on the Internet and in print. As an example, the following is an email reflecting dissemination of false information about loans to Jimmie Bert even before the information was filed in Court:



From: bromanlaw@bellsouth.net
Sent: Wednesday, November 28, 2012 11:04 AM
To: Jose M. Herrera, Esq.
Cc: Ramon Rodriguez
Subject: Re: Carlos Bermudez vs. Jimmie Bert

Pepe: It appears that Weaver used the deposition and "new sworn statement" interchangeably. I do not think that he was specifically referring to the "new sworn statement" in the same way that we are. Thanks, Bernie.

From: "Jose M. Herrera, Esq." <JMH@herreralawfirm.com>
To: "bromanlaw@bellsouth.net" <bromanlaw@bellsouth.net>; "rmr.lawoffice@att.net" <rmr.lawoffice@att.net>
Sent: Wed, November 28, 2012 10:57:58 AM
Subject: Carlos Bermudez vs. Jimmie Bert

Gentlemen:

I am not sure who spoke to the Miami Herald, but I am really upset. The article makes reference to a "new sworn statement." Who provided that to the media?

I am requesting that you please contact me as soon as possible.

Jose M. "*Pepe*" Herrera, Esq.

(Email between Tribal Attorney and co-counsel regarding disclosing a confidential transcript to a *Miami Herald* reporter prior to its being filed in any court)

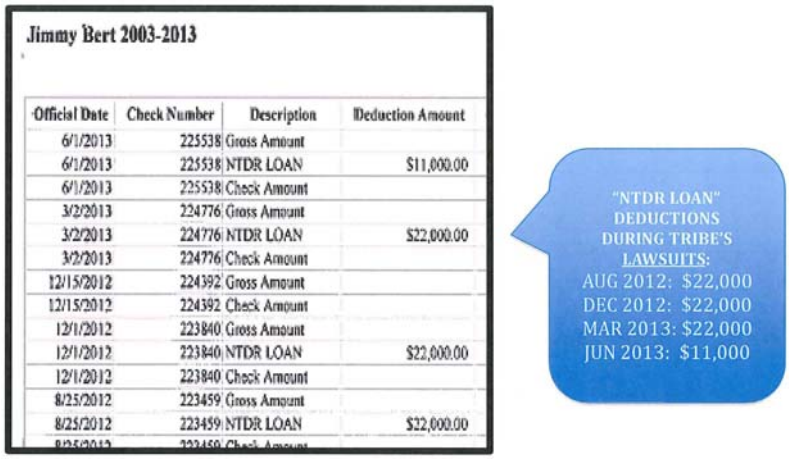
Indeed, this Court commented: "[C]ases are supposed to be tried in the courtroom and not in the press and . . . I often read about this case in the Miami Herald ***before I get any motion.***" 2/6/2012 Hearing Tr. (Case No. 00-25711) at 20 (emphasis added).

61. ***Tribe regularly deducted loan payments on these same loans while alleging, during its lawsuits, that they were fake*:** The Tribe well knew that its allegations of a fictitious loan scheme involving Tammy Billie, Jimmie Bert and Lewis Tein were false. During the Tribe's state and federal lawsuits prosecuting those allegations, the Tribe regularly deducted payments from the accounts of Tammy Billie and Jimmie Bert ***for those same loans***. Thus, ***at the very same time*** that the Tribe publicly declared that these loans were fraudulent, the Tribe secretly treated them as genuine. The Tribe unlawfully and maliciously secreted its internal records of these regular payments to obstruct justice against Lewis Tein. Examples of those suppressed documents are:

Tammy G, Billie 2003-2013

Official Date	Check Number	Description	Deduction Amount
6/1/2013	225603	Gross Amount	
6/1/2013	225603	ASSISTANCE LN	$1,100.00
6/1/2013	225603	ATTORNEY FEE	$36,000.00
6/1/2013	225603	Check Amount	
3/2/2013	224841	Gross Amount	
3/2/2013	224841	ATTORNEY FEE	$36,000.00
3/2/2013	224841	Check Amount	
12/15/2012	224457	Gross Amount	
12/15/2012	224457	Check Amount	
12/1/2012	223905	Gross Amount	
12/1/2012	223905	ATTORNEY FEE	$36,900.00
12/1/2012	223905	Check Amount	
8/25/2012	223524	Gross Amount	
8/25/2012	223524	ATTORNEY FEE	$36,900.00
8/25/2012	223524	Check Amount	
5/28/2012	223147	Gross Amount	
5/28/2012	223147	NTDR LOAN	$1,100.00
5/28/2012	223147	TRUST ACCOUNT	$36,900.00
5/28/2012	223147	Check Amount	
2/25/2012	222771	Gross Amount	
2/25/2012	222771	ATTORNEY FEE	$36,900.00

"ATTORNEY FEE" LOAN DEDUCTIONS DURING TRIBE'S LAWSUITS:
AUG 2012: $36,900
DEC 2012: $36,900
MAR 2013: $36,000
JUN 2013: $36,000



Jimmy Bert 2003-2013

Official Date	Check Number	Description	Deduction Amount
6/1/2013	225538	Gross Amount	
6/1/2013	225538	NTDR LOAN	$11,000.00
6/1/2013	225538	Check Amount	
3/2/2013	224776	Gross Amount	
3/2/2013	224776	NTDR LOAN	$22,000.00
3/2/2013	224776	Check Amount	
12/15/2012	224392	Gross Amount	
12/15/2012	224392	Check Amount	
12/1/2012	223840	Gross Amount	
12/1/2012	223840	NTDR LOAN	$22,000.00
12/1/2012	223840	Check Amount	
8/25/2012	223459	Gross Amount	
8/25/2012	223459	NTDR LOAN	$22,000.00

(Tribe accounting records reflecting deductions from distributions for loan payments, during Tribe's lawsuits alleging these same loans were "fake")

62. ***Tribe's own official representative testified that these payments were loans:*** In the State Court Action, the Tribe was required to designate an official representative to testify at a deposition. The Tribe designated its Lawmaker, William Osceola. Osceola truthfully testified that the payments were loans from the Tribe to Billie and Bert to pay their legal fees. *See* William Osceola 3/11/2013 Depo. Tr. at 77-78 ("Q. . . . [I]s it your understanding that the General Council approved the loan to pay the legal fees for Jimmie Bert and Tammy Billie without regard to who their lawyer would be? A. Yes."), 192 ("Q. Were you aware in 2009 that the Tribe was paying for the legal representation of some Tribal members? A. Yes, with the understanding that it would be paid back.").

63. The State Court Action was vigorously contested by Lewis Tein. Throughout the litigation, Lewis Tein was repeatedly subject to adverse publicity because of the nature of the Tribe's false allegations. The Tribe and its Tribal Attorney fanned the flames of this adverse publicity, maliciously seeking to inflict maximum reputational damage on Lewis Tein.

64. ***State Court dismissed the allegations:*** On December 15, 2013, the Miami-Dade Circuit Court (Judge John Thornton) entered an Order Granting Lewis Tein's Motion for Summary Judgment on the Tribe's Claims and Alternatively Dismissing Complaint for Lack of Jurisdiction (attached as Exhibit E). *See Miccosukee Tribe v. Guy Lewis, et al.,* 21 Fla. L. Weekly Supp. 323(a) (Dec. 15, 2013). This Order dismissed all of the Tribe's claims against Lewis Tein.

65. ***State Court found Tribe's allegations frivolous*:** Among other things, the Miami-Dade Circuit Court found that "[t]he thousands of pages of record evidence adduced in this matter, ranging from affidavits to deposition transcripts, to Special Magistrate Report and Recommendations and Orders thereon, all disclose that no false statements or evidence of fictitious or improperly created or fraudulent legal fees or expenses have been perpetrated by Lewis Tein upon the Tribe." *Id.* at 324-25.

66. ***State Court found "no evidence" against Lewis Tein*:** Further, the Miami-Dade Circuit Court found that "[t]he Tribe has failed to identify one fictitious time entry, invoice or legal matter attributable to Lewis Tein." *Id.* The Court held that there was no evidence that "Lewis Tein acted with any

bad intent, made intentional misrepresentations to the Tribe, or otherwise intended to harm the Tribe." *Id.* In short, the Court ruled, "[t]here is no evidence in the record of any fraud or overbilling." *Id.*

67. ***Florida's Third DCA also found no evidence*:** Judge Thornton's Order was subsequently affirmed by the Third District Court of Appeal. *See Miccosukee Tribe of Indians of Florida v. Lewis,* 165 So.3d 9 (Fla. 3d DCA 2015). In finding that Judge Thornton "properly granted summary judgment" for Lewis Tein and against the Tribe, the Court of Appeal found that the Tribe failed to come forward with any evidence, or sworn statement, supporting its claims against Lewis Tein. The Court of Appeal specifically pointed out that, indeed, "the Tribe's expert [Steven Davis] was unable to identify a single invoice by [Lewis Tein] that he believed was fraudulent, illegal or excessive." *Id.* at 11.

F. The State Court Action Sanctions Order against the Tribe.

68. After Judge Thornton's summary-judgment order was affirmed by the Court of Appeal, he conducted a thorough two-day evidentiary hearing on Lewis Tein's motion to sanction the Tribe and its Tribal Attorney for bringing the frivolous State Court Action.

69. ***State Court sanctioned Tribe and Tribal Attorney*:** After that hearing, on December 12, 2015, Judge Thornton entered an Order on Lewis Tein's Entitlement to Attorney's Fees and Costs (the "State Court Sanctions Order") (attached as Exhibit B). In the State Court Sanctions Order, Judge Thornton

excoriated the Tribe for filing the lawsuit against Lewis Tein.

70. ***State Court found Roman's testimony "not credible:"*** Roman had testified at length during the evidentiary hearing regarding the Tribe's reasons and motives for bringing the State Court Action. During that testimony, Roman made false statements under oath, which constituted perjury. Indeed, the Court specifically found that "Mr. Roman's testimony at the hearing was not credible." Exhibit B at 10. This is a finding of extraordinary significance, especially when made about a lawyer's sworn testimony, and further demonstrates the Tribe's criminal intent.

71. ***State Court found Tribe knew the case against Lewis Tein was frivolous*:** Judge Thornton expressly found, among other things, the following: "[T]he Tribe and its counsel commenced and continued to litigate this matter in the face of overwhelming evidence demonstrating the claims against Lewis Tein were unfounded and frivolous." Exhibit B at 5. Further, the Court found that "Mr. Roman, his firm, and the Tribe necessarily had access at all times to the facts and evidence, which conclusively refuted their claims alleged against Lewis Tein, but they nevertheless pursued them in lengthy and costly litigation." *Id.* at 6-7.

72. ***State Court found Tribe in bad faith:*** The Court summed up the Tribe's "bad faith:"

> [The State Court Action] was completely lacking in merit and utterly frivolous. The Tribe and its lawyer, Bernardo Roman, III, knew that there was no basis in fact or law to

> file these allegations against Guy Lewis, Michael Tein and Lewis Tein, P.L. The Tribe and Roman filed this lawsuit in bad faith.

Id. at 14 (emphasis added).

G. <u>Tribe's Malicious and Baseless Federal Court Action.</u>

73. ***Tribe filed virtually the same case in Federal Court*:** A few months after the Tribe filed the State Court Action, the Tribe filed yet another false and malicious lawsuit against Lewis Tein, P.L., Guy Lewis and Michael Tein in the U.S. District Court for the Southern District of Florida (Case No. 12-cv-22439-MGC) on July 1, 2012 (the "Federal Court Action"). The Federal Court Action also asserted claims against the former Chairman of the Tribe (Billy Cypress), former senior employees (Julio Martinez and Miguel Hernandez), and the Tribe's former longtime outside General Counsel (attorney Dexter Lehtinen).

74. ***Tribe alleged "racketeering":*** The Federal Court Action frivolously and maliciously alleged violations of the federal Racketeering Influenced and Corrupt Organizations Act (RICO), conspiracy to violate RICO, fraud, aiding and abetting fraud, Florida RICO, conspiracy to violate Florida RICO and breach of fiduciary duty. The federal court dismissed this lawsuit without prejudice for failure to state a claim, ordering the Tribe to plead its allegations with more specificity.

75. ***Tribe then alleged kickbacks, fraudulent loans and fraudulent billing.*** The Tribe then filed a Second Amended Complaint on November 9, 2012, in which the Tribe repeated the frivolous and baseless

factual allegations and legal claims against Lewis Tein. The Second Amended Complaint stated that Lewis Tein had engaged in a "kickback scheme," in which Lewis Tein charged the Tribe exorbitant fees for legal representation, some of which was purportedly for "fictitious, unnecessary, inflated, substandard and exaggerated legal work," and then "kicked back" a portion of the legal fees to Chairman Billy Cypress. The Tribe also claimed that Lewis Tein engaged in a "loan scheme," in which it obtained work from Chairman Cypress by representing individual Tribe members in legal matters and having their fees paid by the Tribe through loans to the members, which loans were never intended to be repaid or be enforced. *Second Am. Compl.* [DE 75] at ¶¶ 41(d)-(j).

76. ***Tribe alleged criminal acts including tax evasion*:** In addition to these false allegations, the Tribe made other extraordinary false allegations that were extremely damaging to Lewis Tein, P.L. and to Mr. Lewis and Mr. Tein personally. The Second Amended Complaint alleged the following:

> (a) that the law firm of Lewis Tein, P.L. had been formed in 2005 by Mr. Lewis and Mr. Tein "for the main purpose of advancing and perfecting the plundering of the MICCOSUKEE TRIBE" (¶30);
>
> (b) that Mr. Lewis and Mr. Tein had "knowingly derived income through money laundering, mail fraud, and engaging in monetary transactions in criminally derived property" (¶¶103, 122);

(c) that Mr. Lewis and Mr. Tein "knowingly failed to report all or some of the income reflected in the 1099 forms [issued by the Tribe for payments of legal fees] in their tax return" (¶112); and

(d) that Mr. Lewis and Mr. Tein "used the money belonging to the MICCOSUKEE TRIBE to create, maintain and expand a lavish and extravagant lifestyle," and listing examples of their personal property purportedly so purchased (¶114).

77. ***Tribe had no supporting evidence and Chairman Colley Billie invoked the Fifth Amendment:*** The Tribe produced no evidence to support these false and damaging allegations against Lewis Tein. In fact, when the Tribe's Chairman Colley Billie was testifying as the Tribe's official representative, he admitted that the Tribe had no evidence to support these allegations and then invoked the Fifth Amendment right against self-incrimination in response to six questions, indicating that a truthful answer would incriminate him.

(a) As a typical example, Colley Billie admitted that the Tribe had no evidence to support its allegation that Guy Lewis billed at an hourly rate exceeding $2,000. Colley Billie 3/18/2013 Depo. Tr. at 39 ("Q. Was it true or false that Guy Lewis was billing at $2,000 an hour for his time. A. That I have no idea.").

(b) Similarly, Colley Billie admitted that he had no evidence of any kickback scheme. *Id.* at 66-68 ("Q. Which payments . . . support this

allegation [of] a kickback scheme . . . with Lewis Tein? . . . Time, date, and amount. A. That I don't have.").

78. ***Federal Court dismissed the case*:** On September 30, 2013, the federal court (Judge Marcia G. Cooke) dismissed the Federal Court Action. *See Miccosukee Tribe of Indians of Florida v. Cypress,* 975 F. Supp.2d 1298 (S.D. Fla. 2013).

79. ***Tribe appealed and lost:*** The dismissal of the Federal Court Action was affirmed on appeal by the U.S. Court of Appeals for the Eleventh Circuit. *See Miccosukee Tribe of Indians of Florida v. Cypress,* 2015 WL 9310571 (11th Cir. Dec. 23, 2015).

H. <u>The Federal Sanctions Order Against the Tribe.</u>

80. ***Federal Court held an evidentiary hearing and commented on Tribal Attorneys unethical conduct*:** Over nine days in May, June and July 2014, United States District Judge Cooke conducted an evidentiary hearing on whether the Tribe had a good-faith basis to file its lawsuits against Lewis Tein. The Tribal Attorney (Roman), represented by counsel, testified at that hearing. At one point, Judge Cooke commented that the Tribe was "dancing on the head of legal pins that don't exist and the time has come for it to stop . . . this is over." 5/12/2014 Hearing Tr. at 54. At another point, Judge Cooke stated, "it's clear to me, Mr. Roman, that you've just probably never read the rule of ethics. And if you had, you must have been absent from school that day . . . ." 6/16/2014 Hearing Tr. at 188.

81. ***Tribe hired a former state judge who had sat on this matter – and the Federal Court disqualified him*:** Even at those sanctions proceedings, the Tribe continued its malicious and unethical conduct:

> (a) The Tribe hired as its defense counsel a lawyer who had previously been a sitting judge on Florida's Court of Appeal. While he was a judge on that court, he had ***personally participated*** in three of the nine *Bermudez* wrongful death action appellate cases involving Lewis Tein that the Court of Appeal decided while he was on the bench. *See* [DE 331:2] in Case No. 12-cv-22439-MGC (filed June 1, 2014) (listing these decisions). This former judge filed one of these decisions as an exhibit in the federal sanctions proceedings. *See id.* at Ex. 19. Before he was a state appellate judge, he had been a law partner of Dexter Lehtinen, working on some of the same matters that the Tribe was suing Lehtinen about in this same federal lawsuit.
>
> (b) As a result of these clear conflicts of interest, Lewis Tein and Lehtinen moved to disqualify the former state judge from representing the Tribe and its Tribal Attorney in the Federal Court Action. In hearing the motions, Judge Cooke commented that "Ray Charles could have seen that [the former state judge] shouldn't have been in this case . . . it was really that apparent and I am beyond frustrated." 6/6/2014 Hearing Tr. at 6-7. Judge Cooke then granted the motion and disqualified

the former judge by written order. *See* Order Granting Motions for Order to Show Cause [DE 349].

82. ***Federal Court sanctioned Tribe*:** On January 16, 2015, Judge Cooke entered an Omnibus Order Granting Defendants' Motions for Sanctions. *See Miccosukee Tribe of Indians v. Cypress,* 2015 WL 235433 (S.D. Fla. Jan. 16, 2015) (Exhibit A). The Federal Court sanctioned the Tribe (and its former Tribal Counsel Bernardo Roman III and his law firm Bernardo Roman III, P.A.) in excess of $1 million.

83. ***Federal Court referred Tribal Attorney to the Bar*:** The federal court also referred Roman to The Florida Bar for "investigation and appropriate disciplinary action." In addition to Roman's ethics violations relating to his misconduct in the Bermudez Sanctions Proceeding, The Florida Bar later charged Roman for violating five separate Florida Bar rules in the Federal Action and the State Court Action.

84. ***Federal Court found Tribe's case was frivolous*:** In unsparing language, the Federal Court found that "there was no evidence, or patently frivolous evidence, to support the factual contentions set forth [in the Second Amended Complaint], which form the basis of [the Tribe's] claims against Defendants Lewis Tein . . . ." 2015 WL 235433 at *4 (Exhibit A). Specifically, the federal court found that "there is no doubt that the loan to Tammy Gwen Billie, Jimmie and Louise Bert for legal fees in the *Bermudez* matter were valid because over the course of several years and continuing until today, the Berts have been repaying on the loans." *Id.* Further, the federal court found that the Tribal Attorney (Roman) knew or should have

known this because relevant documents were found in his office and because Jodi Goldenberg, an accountant in the finance department for the Tribe for over 21 years, spoke to Roman about the loans and their validity. *Id.* Moreover, the Tribe's outside auditor reported the loans to tribal members and to the Tribe's former general counsel. *Id.*

85. ***Federal Court found no evidence against Lewis Tein:*** The Federal Court also found that the Tribal Attorney "had no evidence of a 'kickback scheme' involving Defendants Lewis Tein and former Chairman Cypress." *Id.* Indeed, the Tribal Attorney (Roman) admitted under oath during the evidentiary hearing that he could not point to a single transaction in which Lewis Tein gave money to the former Chairman or a single dollar from Lewis Tein going to the former Chairman. *See* 6/17/14 Hearing Tr. at 218 ("Q: And you [Roman] can't point to a single dollar from Lewis Tein going to the chairman, can you? A: No, I do not.").

86. ***Federal Court levied a million-dollar fine and found the case "abhorrent:"*** At the conclusion of the hearing, the federal court issued a written order sanctioning the Tribe and Roman in the amount of $975,750 owing to Lewis Tein (plus additional amounts to co-defendant Dexter Lehtinen), which represented certain of the attorney's fees and costs incurred in defending the Federal Court Action. The Federal Court remarked that the Tribal Attorney's "behavior is egregious and abhorrent." 2015 WL 235433 at *14 (Exhibit A).

H. <u>The Malicious and Baseless Re-Filed State Court Action.</u>

87. ***Tribe's "crusade" continued*:** On November 16, 2013, after Judge Cooke dismissed the Federal Court Action, the Tribe filed yet another lawsuit against Lewis Tein, P.L., Guy Lewis and Michael Tein in Miami-Dade Circuit Court (Case No. 13-35956-CA03) (the "Re-Filed State Court Action") – a step which later prompted Judge Cooke, when issuing sanctions against the Tribe, to observe that the Tribe "is not relenting with its legal crusade." 2015 WL 235433 at *2 (<u>Exhibit A</u>).

88. ***Re-filed case same as the dismissed federal case:*** In the Re-Filed State Court Action, the Tribe again repeated the same sensational allegations that were the subject of the Federal Court Action. The Tribe brought the same causes of action against Lewis Tein for legal malpractice, breach of fiduciary duty, fraud, "fraud in the concealment," conspiracy to defraud, civil RICO conspiracy, civil RICO, civil theft and conversion. The claims were again frivolous and baseless. Indeed, the Tribal Attorney admitted in open court that the Re-Filed State Court Action was the same case as the Federal Court Action that Judge Cooke had dismissed. *See* 1/28/2014 Hearing Tr. at 4-5 (Bernardo Roman: "This case . . . was originally filed in Federal court before Judge Cooke . . . . It was dismissed for lack of jurisdiction . . . . And then the Tribe has re-filed it in state court[.]").

89. Remarkably, even ***after*** the Tribe had been sanctioned over $1 million by the Federal Court (in a January 16, 2015 order), and ***after*** The Florida Bar had investigated and found probable cause to believe

that the Tribal Attorney's conduct in prosecuting the Federal Court Action and the State Court Action to have been unethical, the Tribe ***continued with*** the Re-Filed State Court Action. The Tribe thus persisted with the Re-Filed State Court Action, even though it was virtually identical to the Federal Court Action, and even though the federal court had excoriated and sanctioned the Tribe for filing the Federal Court Action.

90. On July 30, 2015, the State Court (Judge Jennifer Bailey) dismissed the Re-Filed State Court Action with prejudice, holding that "[a]t bottom, this case is simply another attempt to make the same claims that two prior judges have determined are factually baseless, or are outside the Court's jurisdiction as tribal governance." *Omnibus Order on Motions to Dismiss* (dated July 30, 2015) at 6.

I. Tribe's Independent Criminal Acts Against Lewis Tein

91. ***Tribe committed numerous criminal acts:*** Separate and apart from its false and malicious lawsuits, the Tribe committed independent criminal acts that harmed Lewis Tein. These included:

(a) ***False 911 emergency police report*:** During the lunch recess of the deposition of Mr. Lewis, the Tribal Attorney (Roman) called 911 seeking to have Lewis Tein's lawyer, Paul Calli, Esq., arrested mid-way through the deposition.

i. On a recorded and transcribed 911 emergency call, Roman told the 911 emergency dispatcher that Calli "came in to a deposition" and committed "a battery" on

his assistant, Sheena Perez. Roman reported that, "the minute [Calli] found out" that Ms. Perez was allergic, "he just grabbed a bunch" of pistachio nuts and "put them in front of her face so she will get ill" and "got her lunch and he put a bunch of pistachios in there so when she touched it, she . . . just had to go to the hospital."

ii. These allegations were false and Roman knew they were false. Calli did not "come into a deposition;" he was counsel to the deponent. The pistachio nuts were brought to the deposition by Special Master Ellen Leesfield. As the deposition transcript reflects, Calli did not put anything in front of Ms. Perez' face and the lunch order did not even arrive at the deposition until 28 pages of testimony ***after*** Ms. Perez left. *Compare* Lewis 6/7/2013 Depo. Tr. at 103 (ROMAN: "Judge, I just want the record to reflect that Sheena Perez has left the deposition.") *with id.* at 131 (SPECIAL MASTER LEESFIELD: "We can take a break, there's lunch here."), *and id.* at 135 (end of the deposition and break for lunch).

iii. Mr. Roman's false 911 call diverted three armed Coral Gables police officers, on an emergency basis, from their duties.

iv. The deposition was videotaped and transcribed. It was conducted at all times in the presence of former Circuit Court Judge Ellen Leesfield, acting as special master. All eye-witnesses contradicted Mr. Roman,

including Judge Leesfield, her law partner (former Circuit Court Judge Victoria Platzer), employees of their law office, the stenographer and the videographer.

v. Indeed, when the police interviewed her later that day, Ms. Perez herself told the police that "at no time did she feel there was any intentional attempt to cause her an allergic reaction by anyone at the deposition." Coral Gables Police Incident Rep. No. 13-004312 (6/7/2013).

vi. According to Ms. Perez, Mr. Roman subsequently became angry with her when she refused to change her story or press charges against Mr. Calli, and Roman fired her.

(b) ***Witness intimidation and retaliation against Jodi Goldenberg*****:** After designating the Tribe's senior in-house accountant (Jodi Goldenberg) to testify as the Tribe's corporate representative on the loan issue, the Tribal Attorney (Roman) falsely claimed she was "unavailable" shortly before her deposition was to take place.

i. In fact, the Tribe fired her days before her deposition when it learned she intended to tell the truth – namely, that the Tribe ***had*** lent money to Tammie Gwen Bert and Jimmie Bert to pay Lewis Tein's legal fees.

ii. When Lewis Tein later deposed Ms. Goldenberg, she testified that she was available but that Tribal Attorney Roman

fired her on the eve of her deposition because she refused to lie for the Tribe about loans to Lewis Tein's former clients for legal fees:

Q. Why were you fired?
A. I wasn't given a reason.
Q. Why do you believe you were fired?
A. Well, I think there are several reasons. One being that *I **know the truth in some of these cases that are going on and I think that what I'm going to say is contrary to what the Tribe's attorney wants me to say*;** maybe he wanted me to appear to be a disgruntled employee. Also, I wouldn't hire one of his friends.

* * *

Q. You were previously set for deposition in this case; is that correct?
A. Yes.
Q. You were fired, was it a day or two days before that deposition?
A. I think it was three days before.
Q. Did you intend to appear at that deposition?
A. Yes.
Q. Did you intend on testifying at that deposition?
A. Yes.
Q. Did you intend to tell the truth at that deposition?
A. Yes.

> Q. Did you communicate those three things to the Tribe's lawyer, Bernie Roman?
> A. Yes.
> ***Q. Do you believe that Mr. Roman and the Tribe terminated you because you were going to appear and tell the truth?***
> ***A. Yes.***
>
> Jodi Goldenberg 2/1/2013 Depo. Tr. at 8-9 (emphasis added).

iii. Ms. Goldenberg further testified that Lewis Tein told the truth about the loan issue; that Lewis Tein's legal fees to Tammy Billie and Jimmie Bert were paid via loans from the Tribe; that the Tribe's governing Business Council knew about this; that the loans were booked and disclosed in the ordinary course of business; that only Roman took the position that they were not "approved;" and that Roman knowingly failed to produce in discovery the three sets of *"Louise Bert – Ok to pay"* loan documents (described above), clearly demonstrating the loans to Lewis Tein's former clients Tammy Billie and Jimmie Bert. Ms. Goldenberg specifically testified that Roman's December 2012 affidavit denying the existence of these documents (described above) was false.

(c) ***Witness retaliation against Jasper Nelson*:** The Tribe's former Assistant Chairman (Jasper Nelson) likewise testified at his deposition

that Lewis Tein's fees had been paid by loans to Tammie Billie and Jimmie Bert from the Tribe. *See* Jasper Nelson Depo. Tr. at 62 ("Q. Did you authorize the payment of – as a member of the Business Council did you authorize payment of legal fees to Lewis & Tein for representing Tammy Billie and Jimmie Bert? A. Yes."); at 71 ("Q. And therefore these payments were not loans, correct? A. Is a loan . . . . Q. The payments of the legal fees for Tammy Billie and Jimmie Bert you have stated that they were a loan? A. Yes."); and 73 ("Q. Now were you present at the General Council meeting when this loan was approved? A. Yes."). After this testimony, the Tribe, through the unlawful actions of individual defendant Roy Cypress, Jr., sought to have Mr. Nelson removed from his official position on the Tribe's General Council in an effort to retaliate against him and intimidate others from testifying truthfully. *See* William Osceola 3/11/2013 Depo. Tr. at 90 ("Q. Are you aware that after he gave that truthful testimony that members of the Tribe with Mr. Roman tried to sanction him in General Council? A. Yes, I've heard of it."); Pete Osceola Jr. 6/3/2013 Depo. Tr. at 80 ("Q. When Roy Cypress bought up . . . his statements about Jasper Nelson . . . it was because his deposition testimony was contrary to what the General Council had voted to pursue? . . . A. Yes.").

J. <u>The Tribe Acted with Malice.</u>

92. The Tribe acted with malice in the post-judgment proceedings in the *Bermudez* action, and in bringing the Federal Court Action, the State Court Action and the Re-Filed State Court Action.

93. As an initial matter, the requisite malice ("legal malice") can be inferred entirely from the lack of probable cause to bring the complaints in the first place. Additionally, two separate courts – one state and one federal – have already found that the Tribe brought complaints that were lacking in probable cause. Beyond those extraordinary findings, The Florida Bar has also found probable cause to prosecute the Tribal Attorney for numerous ethical violations arising from the Tribe's filing and litigating of the Federal Court Action and the State Court Action.

94. In any event, both the State Court and the Federal Court that sanctioned the Tribe have expressly remarked on the underlying motive. The Federal Court found that the Tribe's "internal feud blinded its counsel [Roman] from adhering to the ethical tenets of our profession while pursuing legal claims against the Miccosukee Tribe of Indians of Florida's former administration, and particularly against [Lewis Tein]." 2015 WL 235433 at *1 (Exhibit A).

95. The State Court similarly found that "Mr. Roman and the Tribe together pursued this litigation in bad faith. Motivated by personal animosity for Lewis Tein and the firm's close and financially lucrative relationship with the Tribe's former Chair, the Tribe and Mr. Roman acted without regard for the truth." State Court Sanctions Order at 12 (Exhibit B).

96. Further, the Tribe's officers, leaders, representatives and members were fully aware of and endorsed the Tribe's illegal actions against Lewis Tein. This includes, without limitation, former chairman Colley Billie, Vice-Chairman Roy Cypress Jr., Tribal

Judge Petties "Pete" Corey Osceola Jr. and Tribal Judge Teresa Willie.

97. Judge Thornton made specific written findings in this regard, observing that the Tribal officers and leaders attended hearings and participated in discovery, and that the Tribe's then-chairman (Colley Billie) even testified as the Tribe's official representative in the Federal Court Action (in which he repeatedly asserted the Fifth Amendment):

> The Tribe's representatives attended many hearings in this case, including the summary judgment hearing and case management conferences. Sometimes, multiple representatives were present. The Court notes that these representatives included current Tribe Vice Chairman Roy Cypress, Jr., Tribal Court Judge Teresa Willie and Tribal Court Judge Pete Osceola, Jr. Numerous Tribe elected officials, including members of its Business Council, were deposed during discovery in this case and related cases ... . The record from the federal court's sanctions hearings, which this Court admitted into evidence, reveals that former Chairman of the Tribe, Colley Billie, testifying as the Tribe's Rule 30(b)(6) witness (the federal analogue to Fla. R. Civ. P. 1.310(b)(6)), asserted the Fifth Amendment multiple times.

State Court Sanctions Order at 6 (Exhibit B).

98. This action is now ripe for adjudication. All of the claims brought by the Tribe against Lewis Tein

have been dismissed (and have either been affirmed on appeal or are otherwise final). Further, the Tribe has recently moved to dismiss its appeal from the federal court sanctions order, and paid its share of the sanctions orders for fees and costs in both federal and state court.

K. Damages.

99. The Tribe's wrongful actions resulted in damage to Lewis Tein, P.L. Specifically, the law firm of Lewis Tein P.L. suffered economic damages in the form of lost income in the past and a lost ability to earn income in the future. The law firm had an extremely successful – and growing – practice from its formation in 2005 through the year 2011, when the Tribe first publicly leveled highly-damaging – and completely false – allegations against the law firm.

100. Although completely false, the allegations caused existing clients to stop using the firm's services and caused prospective clients, general counsel and referral lawyers to cease to engage Lewis Tein for new matters.

101. While the Tribe itself had been a valued client for Lewis Tein, P.L., the majority of the law firm's revenues came from other clients (and in most years, the ***vast*** majority of its revenues were from other clients). These revenues from other clients dropped substantially in 2011 after the Tribe began launching false claims against Lewis Tein in the Bermudez Sanctions Proceeding, and dropped yet again in 2012 after the Tribe filed the State Court Action and the Federal Court Action.

102. Not only did the law firm lose its clientele and reputation, but after the Tribe made its malicious allegations which assailed Lewis and Tein's integrity and accused them of serious criminal acts, each and every one of Lewis Tein's numerous associates resigned from the law firm.

103. The Tribe's false allegations in the Bermudez Sanctions Proceeding and its malicious lawsuits also forced Lewis Tein to devote enormous amounts of its own time defending itself and assisting its defense counsel. This was time that could have been spent working on other matters or developing Lewis Tein's clientele. And while the sanctions orders rightly required the Tribe and its Tribal Attorney to pay for certain attorney's fees and costs incurred in the defense, these orders do not cover all of the time spent or fees incurred in defending against the Tribe's illegal conduct.

104. Not surprisingly, with the Tribe's lawsuits now dismissed on the merits – and the Tribe rightly and harshly sanctioned for its "egregious and abhorrent" conduct – Lewis Tein has begun the process of rebuilding its practice to the levels where it was prior to the Tribe's wrongful conduct – but, it is a long process to rebuild reputations. If it is even possible, it will take years before Lewis Tein is back on the same track it was previously on.

105. The Tribe's wrongful actions also resulted in damage to Guy Lewis and Michael Tein individually. Specifically, Mr. Lewis and Mr. Tein both suffered damage to their professional reputations (a lawyer's most precious asset), personal humiliation and embarrassment, and emotional distress. Mr. Tein and

Mr. Lewis were forced to spend years burdened publicly with these unfounded and false allegations. By way of just one example, the complaint in the Federal Court Action falsely alleged that Mr. Lewis and Mr. Tein failed to pay income taxes – an allegation that had a horrible effect on the reputations of these two former federal prosecutors. As another example, the Tribe repeatedly accused Lewis and Tein of money-laundering, racketeering, and purchasing their homes, cars and personal effects with criminal proceeds. Lewis and Tein suffered significant reputational damage in the community as a result – which is precisely what the Tribe intended.

CAUSES OF ACTION

COUNT I

FLORIDA CIVIL REMEDIES FOR CRIMINAL PRACTICES ACT (FLORIDA STATUTES § 772.103(3))

106. Plaintiffs re-allege the allegations in paragraphs 1 through 105.

107. The Tribe (a legal entity), Bernardo Roman III (an individual), Bernardo Roman III, P.A. (a corporation), together with individual Tribe members Colley Billie, Roy Cypress Jr., Petties "Pete" Corey Osceola Jr., Teresa Willie and others (the "Conspiring Individuals"), associated in fact and constituted an "enterprise" for the purposes of carrying out a pattern of criminal activity directed at Lewis Tein.

108. The Tribe (as well as individuals employed by or associated with the Tribe), Bernardo Roman III, and Bernardo Roman III, P.A., together with the Conspiring Individuals, conducted or participated,

directly or indirectly, in such enterprises through a "pattern of criminal activity" directed at Lewis Tein.

109. The "pattern of criminal activity" occurred between 2010 and 2015 and included incidents of criminal activity listed in Florida Statutes § 772.102(1)(a) & (b), as described above.

110. Bernardo Roman and the Conspiring Individuals were employed by or were associated with the enterprise, and did conduct or participate directly or indirectly, in the enterprise, through a pattern of criminal activity. Specifically, as described above, the Tribe, Roman and the Conspiring Individuals did commit, attempt to commit, conspire to commit and solicit another person to commit the following crimes enumerated in Chapter 772.102, Florida Statutes: "perjury"; "obstruction of justice"; "tampering with or harassing a witness"; "retaliating against a witness" and "tampering with . . . evidence." Fla. Stat. §§ 772.102(1)(a)(27), (29), (33) & (34).

111. The Tribe's wrongful conduct resulted in economic damages to Lewis Tein, P.L. and both economic and non-economic damages to Guy Lewis and Michael Tein individually.

WHEREFORE, plaintiffs Lewis Tein, P.L., Guy Lewis and Michael Tein seek judgment against the Miccosukee Tribe of Indians of Florida for compensatory damages, for treble (triple) damages under Florida Statutes § 772.104(1), for reasonable attorney's fees and court costs under Florida Statutes § 772.104(1), pre- and post-judgment interest, costs, and such other and further relief as this Court deems just and appropriate.

COUNT II

MALICIOUS PROSECUTION: THE BERMUDEZ WRONGFUL DEATH ACTION

112. Plaintiffs re-allege the allegations in paragraphs 1 through 105.

113. The Bermudez wrongful death action (*Carlos Bermudez vs. Jimmy Bert, et al.,* Case No. 00-25711-CA10) is an original, civil judicial proceeding.

114. During the post-judgment proceedings in that action, the Tribe took actions and induced the plaintiffs' counsel to take actions directed against Lewis Tein, P.L., Guy Lewis and Michael Tein, including making false statements, filing false affidavits and inducing the plaintiffs counsel to seek sanctions against Lewis Tein.

115. The judicial proceeding, as it relates to Lewis Tein, has fully and finally ended on the merits in favor of Lewis Tein. The judicial proceeding was commenced without probable cause.

116. The judicial proceeding was instigated with malice.

117. The Tribe's wrongful conduct resulted in economic damages to Lewis Tein, P.L. and both economic and non-economic damages to Guy Lewis and Michael Tein individually.

WHEREFORE, plaintiffs Lewis Tein, P.L., Guy Lewis and Michael Tein seek judgment against the Miccosukee Tribe of Indians of Florida for compensatory damages, pre- and post-judgment

interest, costs, and such other and further relief as this Court deems just and appropriate.

COUNT III

MALICIOUS PROSECUTION: THE STATE COURT ACTION

118. Plaintiffs re-allege the allegations in paragraphs 1 through 105.

119. The State Court Action (*Miccosukee Tribe of Indians of Florida vs. Guy Lewis, et al.,* Case No. 12-12816-CA40) is an original, civil judicial proceeding that was commenced against Lewis Tein, P.L., Guy Lewis and Michael Tein. The Tribe constituted the legal cause of the judicial proceeding. The Tribe was the plaintiff in the State Court Action, and the action was filed and prosecuted with the Tribe's authorization by its Tribal Attorney (Bernardo Roman), and with the knowledge and assistance of the Conspiring Individual Tribe Members.

120. The judicial proceeding has fully and finally ended on the merits in favor of Lewis Tein. The Miami-Dade Circuit Court entered an order granting summary judgment dismissing all of the Tribe's claims against Lewis Tein, and that order was subsequently affirmed on appeal by the Third District Court of Appeal. *See Miccosukee Tribe of Indians of Florida v. Lewis,* 165 So.3d 9 (Fla. 3d DCA 2015).

121. The judicial proceeding was commenced without probable cause. Specifically, in the State Court Sanctions Order, the state court found that "[the State Court Action] was completely lacking in merit and utterly frivolous. The Tribe and its lawyer, Bernardo

Roman, III, knew that there was no basis in fact or law to file these allegations against Guy Lewis, Michael Tein and Lewis Tein, P.L. The Tribe and Roman filed this lawsuit in bad faith." State Court Sanctions Order at 14 (Exhibit B).

122. The judicial proceeding was instigated with malice.

123. This wrongful conduct by the Tribe resulted in economic damages to Lewis Tein, P.L. and both economic and non-economic damages to Guy Lewis and Michael Tein individually.

WHEREFORE, plaintiffs Lewis Tein, P.L., Guy Lewis and Michael Tein seek judgment against the Miccosukee Tribe of Indians of Florida for compensatory damages, pre- and post-judgment interest, costs, and such other and further relief as this Court deems just and appropriate.

COUNT IV

MALICIOUS PROSECUTION: THE FEDERAL COURT ACTION

124. Plaintiffs re-allege the allegations in paragraphs 1 through 105.

125. The Federal Court Action *(Miccosukee Tribe of Indians of Florida vs. Billy Cypress, et al.,* Case No. 12-CIV-22439-MGC) is an original, civil judicial proceeding that was commenced against Lewis Tein, P.L., Guy Lewis and Michael Tein, among others. The Tribe constituted the legal cause of the judicial proceeding. The Tribe was the plaintiff in the State Court Action, and the action was filed and prosecuted

with the Tribe's authorization by its Tribal Attorney (Bernardo Roman) and with the knowledge and assistance of the Conspiring Individual Tribe Members.

126. The judicial proceeding has fully and finally ended on the merits in favor of Lewis Tein. The U.S. District Court entered an order dismissing all of the Tribe's claims against Lewis Tein, and that order was subsequently affirmed on appeal by the Eleventh Circuit. *Miccosukee Tribe of Indians of Florida v. Cypress,* 2015 WL 9310571 (11th Cir. Dec. 23, 2015).

127. The judicial proceeding was commenced without probable cause. Specifically, in the Omnibus Order Granting Defendants' Motion for Sanctions (Exhibit A), the federal court found that "there was no evidence, or patently frivolous evidence, to support the factual contentions set forth [in the Second Amended Complaint], which form the basis of [the Tribe's] claims against Defendants Lewis Tein . . . ." *Miccosukee Tribe of Indians v. Cypress,* 2015 WL 235433, at *4 (S.D. Fla. Jan. 16, 2015).

122. The judicial proceeding was instigated with malice.

123. This wrongful conduct of the Tribe resulted in economic damages to Lewis Tein, P.L. and both economic and non-economic damages to Guy Lewis and Michael Tein individually.

WHEREFORE, plaintiffs Lewis Tein, P.L., Guy Lewis and Michael Tein seek judgment against the Miccosukee Tribe of Indians of Florida for compensatory damages, pre- and post-judgment interest, costs, and such other and further relief as this Court deems just and appropriate.

COUNT V

MALICIOUS PROSECUTION: THE RE-FILED STATE COURT ACTION

124. Plaintiffs re-allege the allegations in paragraphs 1 through 105105.

125. The Re-Filed State Court Action (*Miccosukee Tribe of Indians of Florida vs. Billy Cypress, et al.,* Case No. 13-35956-CA03) is an original, civil judicial proceeding that was commenced against Lewis Tein, P.L., Guy Lewis and Michael Tein, among others. The Tribe constituted the legal cause of the judicial proceeding. The Tribe was the sole plaintiff in the State Court Action, and the action was filed and prosecuted with the Tribe's authorization by its Tribal Attorney (Bernardo Roman) with the knowledge and assistance of the Conspiring Individual Tribe Members.

126. The judicial proceeding has fully and finally ended on the merits in favor of Lewis Tein. The Miami-Dade Circuit Court entered an order dismissing with prejudice all of the Tribe's claims against Lewis Tein, an order which the Tribe did not appeal.

127. The judicial proceeding was commenced without probable cause. Specifically, in the Omnibus Order Granting Defendants' Motion for Sanctions (Exhibit A), the federal court found that "there was no evidence, or patently frivolous evidence, to support the factual contentions set forth [in the Second Amended Complaint], which form the basis of [the Tribe's] claims against Defendants Lewis Tein . . . . " *Miccosukee Tribe of Indians v. Cypress,* 2015 WL 235433, at *4 (S.D. Fla. Jan. 16, 2015). The Re-Filed State Court Action was

based on substantially identical allegations to those in the Federal Court Action.

128. In addition, the Tribe ***continued to prosecute*** the Re-Filed State Court Action even after the federal court had sanctioned the Tribe in the First Sanctions Order. The Tribe nonetheless persisted in prosecuting the Re-Filed State Court Action even though it was based on virtually identical allegations.

129. The judicial proceeding was instigated with malice.

130. This wrongful conduct of the Tribe resulted in economic damages to Lewis Tein, P.L. and both economic and non -economic damages to Guy Lewis and Michael Tein individually.

WHEREFORE, plaintiffs Lewis Tein, P.L., Guy Lewis and Michael Tein seek judgment against the Miccosukee Tribe of Indians of Florida for compensatory damages, pre- and post-judgment interest, costs, and such other and further relief as this Court deems just and appropriate.

DEMAND FOR JURY TRIAL

Lewis Tein, P.L., Guy Lewis and Michael Tein demand a jury trial as a matter of right on all matters so triable.

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[*Attachments: Exhibits A, B, C, D & E Omitted from the Printing of this Appendix*]