

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA  
CIVIL DIVISION

ARK TAMPA, LLC,

Plaintiff,

**12 017222**

vs.

CASE NO.: \_\_\_\_\_

STATE OF FLORIDA,  
DEPARTMENT OF REVENUE,

Defendant.

**DIVISION A**

SUMMONS

THE STATE OF FLORIDA:  
TO ALL AND SINGULAR THE SHERIFFS OF SAID STATE:

Rcvd 11/21/12 at 1250 p.m. &  
Srvd 11/21/12 at 1227 p.m. by  
[Signature] Chris J. Colson #142  
Certified Process Server, 2nd Judicial Cret, FL

GREETINGS:

YOU ARE HEREBY COMMANDED to serve this Summons and Complaint, in the above-styled cause upon the Defendant:

STATE OF FLORIDA, DEPARTMENT OF REVENUE  
c/o Susan Wachman, Agency Clerk  
Office of the General Counsel  
2450 Shumard Oak Blvd., Building #1, Suite 2400  
Tallahassee, FL 32399

The Defendant is hereby required to serve written defenses to said Complaint on Plaintiff's attorney, whose name and address are:

**Glen A. Stankee, Esquire**  
**Florida Bar Number: 331848**  
**AKERMAN SENTERFITT**  
**305 East Las Olas Boulevard, Suite 1600**  
**Fort Lauderdale, FL 33301**

within 20 days after service of this Summons upon Defendant, exclusive of the day of service, and to file the original of said written defenses with the Clerk of said Court either before service on Plaintiff's attorney or immediately thereafter. If the Defendant fails to do so, a default will be entered against Defendant for the relief demanded in the Complaint.

WITNESS my hand and the seal of said Court on November 1, 2012.

PAT FRANK  
AS CLERK OF THE COURT

By: JACQUELINE WIGGS  
Deputy Clerk

(SEAL)

**GLEN A. STANKEE**  
Florida Bar No.: 331848  
**JASON L. MARGOLIN**  
Florida Bar No.: 69881  
**AKERMAN SENTERFITT**  
**305 East Las Olas Boulevard, Suite 1600**  
**Fort Lauderdale, FL 33301**  
Email: [glen.stankee@akerman.com](mailto:glen.stankee@akerman.com)  
Email: [jason.margolin@akerman.com](mailto:jason.margolin@akerman.com)

**If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact ADA Coordinator, 601 E. Kennedy Blvd., Tampa, FL 33602, (813) 276-8100, ext. 4205, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**IMPORTANT**

A lawsuit has been filed against you. You have 20 calendar days after this summons is served on you to file a written response to the attached Complaint in this Court. A phone call will not protect you; your written response, including the above number and named parties, must be filed if you want the Court to hear your case. If you do not file your response on time, you may lose the case, and your wages, money, and property may thereafter be taken without further warning from the Court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

If you choose to file a written response yourself, at the same time you file your written response to the Court you must also mail or take a carbon copy or a photocopy of your written response to the "Plaintiff/Plaintiff's Attorney" named below:

Glen A. Stankee  
Jason L. Margolin  
Akerman Senterfitt  
401 East Jackson Street, Suite 1700  
Tampa, Florida 33602  
(813) 223-7333

IMPORTANT: SPANISH AND FRENCH VERSIONS  
ON THE FOURTH PAGE OF THIS SUMMONS

IMPORTANTE

Usted ha sido demandado legalmente. Tiene veinte (20) dias, contados a partir del recibo de esta notificacion, para contestar la demanda adjunta, por escrito, y presentarla ante este tribunal. Una llamada telefonica no lo protegera; si usted desea que el tribunal considere su defensa, debe presentar su respuesta por escrito, incluyendo el numero del caso y los nombres de las partes interesadas en dicho caso. Si usted no contesta la demanda a tiempo, podriase perder el caso y podria ser despojado de sus ingresos y propiedades, o privado de sus derechos, sin previo aviso del tribunal. Existen otros requisitos legales. Si lo desea, puede usted consultar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a una de las oficinas de asistencia legal que aparecen en la guia telefonica.

Si desea responder a la demanda por su cuenta, al mismo tiempo en que presenta su respuesta ante el tribunal, debera usted enviar por correo o entregar una copia de su respuesta a la persona denominada abajo como "Plaintiff/Plaintiff's Attorney." (Demandante o Abogado del Demanadante).

IMPORTANT

Des poursuites judiciaires ont ete entreprises contre vous. Vous avez 20 jours consecutifs a partir de la date de l'assignation de cette citation pour deposer une reponse ecrite a la plainte ci-jointe aupres de ce Tribunal. Un simple coup de telephone est insuffisant pour vous proteger; vous etes oblige de deposer votre reponse ecrite, avec mention du numero de dossier ci-dessus et du nom des parties nommees ici, si vous souhaitez que le Tribunal entende votre cause. Si vous ne deposez pas votre reponse ecrite dans le relai requis, vous risquez de perdre la cause ainsi que votre salaire, votre argent, et vos biens peuvent etre saisis par la suite, sans aucun preavis ulterieur de Tribunal. Il y a d'autres obligations juridiques et vous pouvez requerir les services immediats d'un avocat. Si vous ne connaissez pas d'avocat, vous pourriez telephoner a un service de reference d'avocats ou a un bureau d'assistance juridique (figurant a l'annuaire de telephones).

Si vous choisissez de deposer vous-meme une reponse ecrite, il vous faudra egalement, en meme temps que cette formalite, faire parvenir ou expedier une copie au carbone ou une photocopie de votre reponse ecrite au "Plaintiff/Plaintiff's Attorney " (Plaignant ou a son avocat) nomme ci-dessous.

Glen A. Stankee  
Jason L. Margolin  
AKERMAN SENTERFITT  
305 East Las Olas Boulevard, Suite 1600  
Fort Lauderdale, FL 33301

IN THE CIRCUIT COURT OF THE  
THIRTEENTH JUDICIAL CIRCUIT, IN  
AND FOR HILLSBOROUGH COUNTY,  
FLORIDA

CASE NO. \_\_\_\_\_

12 017222

ARK TAMPA, LLC,

Plaintiff,

vs.

STATE OF FLORIDA,  
DEPARTMENT OF REVENUE,

Defendant.

**COPY**

**DIVISION A**

COMPLAINT

Plaintiff, ARK TAMPA, LLC ("Ark Tampa"), hereby sues Defendant, STATE OF FLORIDA, DEPARTMENT OF REVENUE (the "Department") for (1) a refund of wrongfully collected sales/use taxes under Section 72,011, Florida Statutes, and (2) a declaratory judgment declaring (a) the "rentals" at issue paid by Ark Tampa to the Seminole Tribe of Florida (the "Tribe") are actually non-taxable distributions of the Tribe's share of profits from its on-reservation restaurant activities; (b) the legal incidence of the tax on rentals paid to the Tribe is borne by the Tribe and that the tax is therefore prohibited by Federal law; or (c) the tax on the rentals paid to the Tribe is preempted and prohibited by Federal law. In support, Ark Tampa states as follows:

PARTIES

1. Plaintiff, Ark Tampa, is a Delaware limited liability company qualified to do business in Florida that is wholly owned by Ark Hollywood/Tampa Investment, LLC, a Delaware limited liability company that is wholly owned by Ark Hollywood/Tampa Corp., a  
{25336416;1}

Delaware corporation that is a wholly owned subsidiary of Ark Restaurants Corp., a New York, NASDAQ traded company ("ARKR").

2. Defendant, the Department, is an agency established under the laws of the State of Florida (the "State").

### JURISDICTION AND VENUE

3. This is an original action brought pursuant to Section 72.011(1)(a), Florida Statutes, to contest the Department's denial of Ark Tampa's claim for declaratory judgment and refund of a tax assessment paid pursuant to Section 212.031, Florida Statutes, for the period July 1, 2005 through June 30, 2008.

4. The amount in controversy exceeds \$15,000. This Court has jurisdiction under Section 72.011(1)(a), Florida Statutes.

5. Venue is proper in this Court pursuant to Section 72.011(4)(a), Florida Statutes, because Ark Tampa, in the ordinary course of business, regularly maintains its books and records in Hillsborough County, Florida.

### FACTUAL ALLEGATIONS

6. On May 2, 2005, Ark Tampa, as lessee, entered into a 25 year lease agreement (the "Contract") with the Seminole Tribe of Florida, a recognized Indian Tribe under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, as amended (the "Tribe"), as lessor, for space in the Tribe's Seminole Hard Rock Hotel and Casino ("Seminole Casino") that is located on the Tribe's Tampa, Florida, Indian reservation.

7. Title to the Tribe's reservation land is held by the United States of America in trust for the benefit of the Tribe.

8. Under the Contract, Ark Tampa is permitted to operate a food court style restaurant in the Seminole Casino, provided that a percentage of the gross receipts from the restaurant operations is paid to the Tribe. A true and correct copy of the Contract is attached.

(Exh. A.)

9. In compliance with federal law, 25 CFR Part 162, the Tribe submitted the Contract to the United States Department of Interior, Bureau of Indian Affairs (the "Bureau") for approval and the Contract was approved.

10. Federal regulation of the leasing of Indian land, including the Tribe's reservation property, is pervasive and preempts State law. The objective of the Federal regulation of the leasing of Indian land is to assure that the Indian Tribes derive the maximum benefit from the leasing of their land.

11. ~~State taxation of leases of Indian land interferes with the objectives of Federal~~ law. Federal law, including 25 U.S.C. § 465 and 25 CFR Part 162, specifically prohibits State taxation of the leasing of Indian land. Thus, the tax the Department is assessing is a violation of Federal law.

12. In addition—although titled a "lease" and the monies paid thereunder characterized as "rent"—the Contract and the facts under which it functions clearly establish that the monies paid by Ark Tampa to the Tribe are actually distributions of the Tribe's share of the profits of the business conducted on the Tribe's reservation pursuant to the Contract.

13. The Seminole Casino is a multi-faceted entertainment facility whose amenities include a 90,000 square foot gaming complex, more than 4,000 slot machines, a luxury hotel and several restaurants, bars, lounges and retail shops.

14. Substantially all of entertainment activities at the Seminole Casino, including the operation of such restaurants as the Tribe's signature Hard Rock Café and Council Oak Steak & Seafood restaurant, are conducted by the Tribe through its own employees.

15. The Tribe exercises complete control over every aspect of the food court restaurant operations at the Seminole Casino, and, accordingly (i) Ark Tampa functions as the Tribe's restaurant concessionaire rather than as its lessee; (ii) the food court restaurant constitutes a small, but integral, component of the Tribe's massive gaming and entertainment facility that is conducted jointly by Ark Tampa and the Tribe; and (iii) Ark Tampa's payments to the Tribe under the "Percentage Rent" provision of the Contract constitute distributions to the Tribe of its share of the profits from the jointly conducted business rather than lease payments:

a. All menu offerings and prices are subject to the Tribe's approval.

b. Ark Tampa is required to offer each of (and only) the following four food court units: (i) Italian and pizzeria under the name "Sirricos Pizza"; (ii) hamburgers and fries under the name "Shake n Burger"; (iii) Asian under the name "Asian Palace"; and (iv) Latin American under the name "ChaChaCha." Ark Tampa is also required to offer smoothies, shakes and ice cream under the name "Sweet Lucille's."

c. The Tribe sets the hours of the food court restaurant's operations.

d. Any advertisements relating to the food court restaurant must be pre-approved by the Tribe.

e. All disposable paper or plastic plates, cups and utensils that are used by the food court restaurant must be approved by the Tribe.

16. The food court restaurant is presented to the public as a restaurant that is owned and operated by the Tribe:



a. Ark Tampa's employees are required to wear shirts and hats bearing the "Hard Rock" name and logo.

b. Ark Tampa's employees are required to wear a "Seminole Tribe of Florida" ID badge at all times that they are working at the food court restaurant.

c. Ark Tampa is not allowed to display its name anywhere on or about the food court restaurant.

d. The food court appears on the Seminole Tribe's Hard Rock website as a restaurant that is operated by the Tribe in exactly the same manner as the Tribe's other restaurants, including the Hard Rock Café and the Council Oak Steaks & Seafood restaurant.

e. Any advertisements relating to the food court restaurant must include the Tribe's "Hard Rock" trade name and logo.

f. Ark Tampa must allow the Tribe's hotel guests to charge food court restaurant purchases to their rooms and honor any discount coupons that the Tribe provides to its customers.

17. Ark Tampa also functions as the Tribe's restaurant concessionaire, rather than its lessee, for the following reasons:

a. The Tribe provides 100% of Ark Tampa's customers.

b. Ark Tampa's employees are required to comply with the same dress, grooming, and conduct codes that apply to the Tribe's employees.

c. The Tribe provides services to Ark Tampa that are not typically provided by a lessor of real property, including the disposition of its trash and cooking oil, at no cost to Ark Tampa.

d. Telephone access to the food court restaurant is available only through the Tribe's PBX system by calling the Seminole Casino.

e. Any telephone call made from the food court restaurant appears on the recipient's caller ID as a call from the "Seminole Tribe."

f. The Tribe provides all utilities to the food court restaurant, including electricity and water, at no cost to Ark Tampa.

g. The Tribe's employees have unfettered access to the non-public areas of the food court restaurant.

h. The Tribe's employees receive the same 30% discount on food court restaurant purchases that Ark Tampa's employees receive.

i. Ark Tampa's employees receive the same 30% discount on purchases from the Tribe's other businesses in the Seminole Casino that the Tribe's employees receive.

j. Customer seating for the food court restaurant is not included in the Contract and is provided and maintained by the Tribe at no cost to Ark Tampa.

k. The Tribe has the right to move the food court restaurant to any other location in the Seminole Casino at any time in its sole discretion.

l. Ark Tampa is required to display such of the Tribe's merchandise in the display cases in the food court restaurant as the Tribe directs.

m. Ark Tampa's employees' access to the food court restaurant is strictly controlled by the Tribe.

n. The monies paid under the Contract are directly determined and derived from the annual "gross sales" of the food court restaurant resulting from the prices of all

food, drink, goods, wares and merchandise—said prices being specifically approved by the Tribe.

18. Ark Tampa does not own property or conduct any business operations in Florida or otherwise have any presence in Florida other than at the Seminole Casino on the Tribe's Tampa, Florida, reservation.

19. The State provides no services that directly or indirectly benefit the Tribe, its members or lessees, on or off of the reservation.

20. The State is prohibited from regulating and does not regulate, the leasing of reservation property or any on-reservation restaurant activities conducted by the Tribe, its members or lessees.

21. The Tribe uses the income it derives from the leasing of its reservation property and the operation of its on-reservation gaming and entertainment activities, including its restaurant activities, to provide essential governmental services to or for the benefit of its members, including police and fire protection, emergency medical services, public schools, public transportation, garbage pick-up, and road construction and maintenance.

22. Despite this overwhelming evidence, the Department conducted a sales and use tax audit of Ark Tampa's on-reservation restaurant activities, determined that its payments to the Tribe during the period July 1, 2005, through June 30, 2008, constituted rentals subject to tax under Section 212.031, Florida Statutes, and assessed Florida sales tax and interest the amount of \$100,735.45, which Ark Tampa paid.

23. Ark Tampa filed a Form DR-26S, Application for Refund – Sales and Use Tax, with the Department for refund of the \$100,735.45 sales tax and interest it paid. A true and correct copy of the Application for Refund – Sales and Use Tax is attached. (Exh. B.).

24. The Department issued its Notice of Proposed Refund Denial proposing to deny Ark Tampa's refund claim. A true and correct copy of the Notice is attached. (Exh. C.).

25. Ark Tampa submitted a Protest to the Department in which it contested the Department's right to tax such payments. A true and correct copy of the Protest is attached. (Exh. D.).

26. The Department issued its Notice of Decision of Refund Denial in which it sustained the refund denial. A true and correct copy of the Notice of Decision of Refund Denial is attached. (Exh. E.).

27. Ark Tampa submitted a Petition for Reconsideration of the refund denial in which it requested that the Department reconsider its Notice of Decision of Refund Denial. A true and correct copy of the Petition for Reconsideration is attached. (Exh. F.).

28. The Department issued its Notice of Reconsideration of Refund Denial on September 5, 2012, in which it sustained its refund denial. A true and correct copy of the Notice of Reconsideration of Refund Denial is attached. (Exh. G.).

29. Pursuant to Section 72.011, Florida Statutes, on September 5, 2012, the denial of the refund became final and this dispute became ripe for adjudication by this Court.

30. All statutory prerequisites to the prosecution of this action have occurred and have been satisfied so as to entitle Ark Tampa to the relief sought herein.

**COUNT I**  
**CLAIM FOR SALES/USE TAX REFUND UNDER SECTION 72.011,**  
**FLORIDA STATUTES**

31. Ark Tampa restates and realleges the allegations contained in paragraphs 1 through 30 as though fully set forth herein.

32. Although titled a "lease" and the monies paid thereunder characterized as "rent," it is the substance of the transactions, rather than the form in which they are cast, that governs their tax consequences. Because Ark Tampa actually acts as the Tribe's restaurant concessionaire rather than a lessee, the payments to the Tribe do not constitute lease payments, and the tax imposed by Section 212.031, Florida Statutes, does not apply.

33. Instead, the payments to the Tribe constitute income derived by the Tribe from its on-reservation activities, and the tax imposed by the Department is invalid because the State is prohibited by the Indian Commerce Clause of the United States Constitution from taxing such income in the absence of clear Congressional authorization—which has not been given.

34. In addition, even if Ark Tampa is characterized as the Tribe's lessee rather than a restaurant concessionaire, the State tax on the rentals paid to the Tribe is invalid because the legal incidence of the tax is borne by the Tribe. The State is prohibited by the Indian Commerce Clause of the United States Constitution from imposing any tax relating to any on-reservation activity, including the leasing of Indian land, the legal incidence of which is borne by an Indian or Indian tribe in the absence of clear Congressional authorization which has not been given.

35. Moreover, even if Ark Tampa is characterized as the Tribe's lessee rather than a restaurant concessionaire, and even if the legal incidence of the tax is not borne by the Tribe, the State is still prohibited by the Indian Commerce Clause of the United States Constitution from imposing any tax that burdens any on-reservation activity of an Indian tribe, including the leasing of Indian land, that is preempted by Federal law, unless such State tax compensates the State for services it specifically provides in connection with the particular on-reservation activity involved.

36. Because the taxes at issue are invalid, the Department must refund Ark Tampa the sales tax and interest in the amount of \$100,735.45 that it assessed and collected in respect to the assessed monies it paid to the Tribe between July 1, 2005 and June 30, 2008.

37. Ark Tampa has demanded the return of its \$100,735.45 payment, but the Department refused to refund it.

WHEREFORE, Plaintiff, Ark Tampa, requests that the Court enter judgment in its favor and against Defendant, the Department, as follows:

a. Determining that the payments that Ark Tampa paid to the Tribe are not rentals subject to the tax imposed by Section 212.031, Florida Statutes, but are distributions to the Tribe of its share of profits from its on-reservation restaurant activities which the State is prohibited from taxing; or

b. Determining that the legal incidence of the State tax on the rentals that Ark Tampa paid to the Tribe is borne by the Tribe and that such tax is therefore invalid; or

c. Determining that the the State tax on the rentals that Ark Tampa paid to the Tribe is invalid because State taxation of leases of Indian land is preempted, and therefore prohibited, by Federal law, since such tax does not compensate the State for services that it specifically provides in connection with such on-reservation leasing activities; and

d. Finding that the Department erroneously denied Ark Tampa's refund in the amount of \$100,375.45, and that Ark Tampa is entitled to a refund of that amount; and

e. Ordering the Department to pay the refund, plus interest and costs, to Ark Tampa; and

f. Ordering such other relief as the Court deems appropriate.

**COUNT II**  
**DECLARATORY JUDGMENT**

38. Ark Tampa restates and realleges the allegations contained in paragraphs 1 through 37 as though fully set forth herein.

39. State taxation of leasing of Indian land is prohibited by the Indian Commerce Clause of the United States Constitution and other provisions of Federal law absent clear Congressional authorization which has not been given.

40. Ark Tampa requests that this Court enter a declaratory judgment pursuant to Section 86.021, Florida Statutes, declaring that payments made by Ark Tampa to the Tribe for space in the Seminole Casino on its Tampa, Florida, Indian reservation are exempt from the Florida tax imposed by Section 212.031, Florida Statutes.

WHEREFORE, Plaintiff, Ark Tampa, demands judgment against Defendant, the Department, as follows:

a. Declaring that the monies Ark Tampa paid to the Tribe are not rentals subject to the tax imposed by Section 212.031, Florida Statutes, but are distributions to the Tribe of its share of profits from its on-reservation restaurant activities which the State is prohibited from taxing; or

b. Declaring that the legal incidence of the State tax on the rentals that Ark Tampa paid to the Tribe is borne by the Tribe and that such tax is therefore invalid; or

c. Declaring that the the State tax on the rentals that Ark Tampa paid to the Tribe is invalid because State taxation of leases of Indian land is preempted and prohibited, by Federal law, since such tax does not compensate the State for services that it specifically provides in connection with such on-reservation leasing activities; and

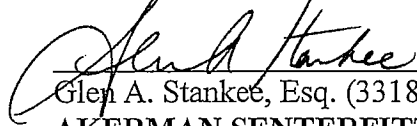
d. Ordering such other relief as the Court deems appropriate.

**Demand for Jury Trial**

Plaintiff, Ark Tampa, demands a jury trial as to all issues so triable.

DATED this 1<sup>st</sup> day of ~~October~~ <sup>November</sup>, 2012.

Respectfully Submitted,



Glen A. Stankee, Esq. (331848)

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*Counsel for Plaintiff, Ark Tampa, LLC*