

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

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UNITED STATES OF AMERICA, : CIVIL ACTION No. 07-C-316
Plaintiff, :
v. :
: :
MENOMINEE TRIBAL ENTERPRISES, :
the principal business arm :
of the Menominee Indian Tribe of Wisconsin, :
MARSHALL PECORE, and :
CONRAD WANIGER, :
Defendants.:
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**DEFENDANT MENOMINEE TRIBAL ENTERPRISES’
MEMORANDUM OF LAW IN OPPOSITION TO UNITED STATES OF AMERICA’S
MOTION TO SEAL**

INTRODUCTION

Defendant Menominee Tribal Enterprises (“Menominee”) by its attorneys, Joshua Jay Kanassatega and Bryant D. Tchida of the law firm of Leonard, Street and Deinard, submit this memorandum of law in opposition to Plaintiff United States of America’s (“Government”) Motion to Seal the deposition transcript of Douglas G. Cox, filed with the Court in the above-entitled matter. (Docket No. 64.) While the Government has not filed or served any memorandum of law to outline the factual and legal basis supporting its Motion and entitlement to relief, Menominee believes it is important for the Court to possess a complete factual background on which to consider the issue. In particular, the Government has failed to provide the Court with relevant information, namely: (1) Mr. Cox’s involvement in Menominee’s decision to make litigation materials, including Mr. Cox’s deposition transcript (and audio/visual recording) publicly available; and (2) Mr. Cox’s active involvement as a quasi-

federal government agent in investigating whether Menominee had installed culverts. Based upon the facts and the full record, this Court should deny the Government's motion.

ARGUMENT

A civil fraud action by the United States in which, as here, monetary penalties are sought, is akin to a criminal proceeding in which the Government "acts as 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *SEC v. Heartland Advisors, Inc.*, No. 03-C-1427, 2006 WL 2547090, at *5 and n. 4 (E.D. Wis. Aug. 31, 2006) (Clevert, J.) (citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)).

The public, especially the members of the Menominee Indian Tribe of Wisconsin, has a right to know about what is going on in this litigation, and about the events underlying it. The Government utterly fails to carry its burden to demonstrate why Mr. Cox's transcript should be filed under seal. The Seventh Circuit adheres to a strong presumption of public access to judicial proceedings, as well as public access to discovery materials relating thereto. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) ("The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding. . .the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding."). Indeed, as recently recognized by Judge Stadtmueller, "pretrial discovery must take place in the public eye unless compelling reasons exist for denying the public access." *Forst v. Smithkline Beecham Corp.*, No. 07-CV-612, 2008 WL 473856, at *1 (E.D. Wis. Feb. 20, 2008); *accord Gross v. PPG Indus., Inc.*, No. 07-CV-982, 2008 WL 515002, at *1 (E.D. Wis. Feb. 25, 2008).

Motions to seal are viewed with a particularly jaundiced eye:

Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

Forst, 2008 WL 473856, at *1 (quoting *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346 (7th Cir. 2006)).

Here, the Government makes no showing as to why the strong presumption in favor of public filings has been overcome. Instead, the Government says that this motion to seal should be granted based solely upon unspecified reasons set forth in Assistant United States Attorney Christian R. Larsen's Affidavit in Support of the United States' Motion for a Protective Order. While Menominee will fully address the impropriety of that motion separately, there can be no justification for sealing Mr. Cox's transcript.

Absent a memorandum of law, it is difficult to know the bases for the Government's Motion to Seal. Menominee, however, will do its best to address the points in Mr. Larsen's affidavit that the Government appears to be relying upon. Mr. Larsen makes the allegation that he has concerns about "privacy," as well as "potential harassment of witnesses." (Docket No. 63-2, at ¶ 29.) Mr. Larsen also states that certain witnesses have expressed a "fear of retribution should they cooperate, or continue to cooperate, in the government's investigation." (*Id.* at ¶ 30.) Mr. Larsen also offers his "experience," based upon which the Court supposedly should accept the premise that "dissemination of discovery materials involving cooperating government witnesses can serve to increase the possibility of retaliatory action, and to dissuade witnesses from testifying in a complete and truthful manner." (*Id.*) Nothing could be further from the truth.

Mr. Larsen fails to inform the Court of numerous relevant facts. Among the most important is the fact that Mr. Cox is an elected tribal public official, as he is an elected member of the Menominee Board of Directors (“Board”). (Declaration of Melinda Cook dated March 20, 2008, ¶ 3.) Indeed, Mr. Cox previously served as the Board’s Chairperson (and held that position from approximately September 2005 through December 2006). Mr. Larsen also fails to inform the Court about Mr. Cox’s recent actions as a sitting Board member with respect to the publication of, among other materials, his deposition transcript and the video record thereof. Mr. Cox voted in favor of making those materials public and made numerous inquiries about the process in which those materials would be made public and the accessibility of those materials. (*Id.* ¶¶ 3, 5-6.)¹

In fact, on January 31, 2008, in connection with Mr. Cox’s public vote in favor of making these materials publicly available, he stated as follows:

I think that in order to get this type of material out there for access, it’s going to take more than people calling Melinda saying I want from the document management system, document number 11, 345, she’s going to holy crap, but I think it’s going to take more than that. But whatever works for you to get that information out there.

Secondly, I would hope that this board, in moving forward regarding this motion, does not decide to change the intent of this motion in regard to what an attorney could protectively, could potentially, protective order. Because if you just leave available bits and pieces of this case, you’re going to give people as much wrong information out there as they have now. So if you’re going to make this available, make it wholly available and don’t put protective orders on information that is readily available to the public. That’s my concern, thank you.

¹ It is significant that Mr. Larsen fails to inform the Court as to what reasonable inquiry he made to the individuals he seeks to protect with respect to public Menominee records regarding the publication of litigation materials, including Mr. Cox’s deposition transcript. It is reasonable to assume that any reasonable inquiry could have revealed Mr. Cox’s support for publication of the litigation materials, including his deposition transcript and the video record thereof.

(*Id.*, ¶ 4 and Ex. 1 thereto, at 4-5.) In the six Board meetings since, Mr. Cox has not changed his position, nor has he suggested that his deposition transcript and the video record thereof should be removed from public view. (*Id.* ¶¶ 7-8.) Similarly, Mr. Cox has neither provided an affidavit in support of the Government’s Motion to Seal (or Motion for Protective Order for that matter) nor himself moved for a protective order.

Hence, it does not appear that Mr. Cox could possibly be one of the alleged witnesses who Mr. Larsen claims fears retaliation.² Indeed, while Mr. Larsen expresses concern that publication of deposition transcripts may “dissuade witnesses from testifying in a complete and truthful manner,” he fails to inform the Court about the Government’s contention that Mr. Cox agreed in a September 11, 2007 telephone conversation with Mr. Larsen to “go over the facts as you see them,” with the assistance of Mr. Cox’s personal counsel. (Declaration of Joshua Jay Kanassatega (“Kanassatega Dec.”) Exhs. A, B.) The Government makes no representation that Mr. Cox has changed his mind since then based on the publication of his deposition transcript. It is disturbing that the Government’s motion is based upon unsupported fiat by Mr. Larsen instead of facts necessary to lend credibility to such serious and inflammatory allegations.

With respect to the Cox transcript, Mr. Larsen also makes allegations of irrelevance. (Docket No. 63-2 at ¶ 31.) Mr. Larsen contends that Mr. Cox is only a “potential witness” and that his “first-hand knowledge of the facts relevant to this case is limited to his inspection of sixteen culverts billed to BIA.” (*Id.*) He alleges that in connection with Mr. Cox’s deposition, Menominee’s counsel has “strayed far afield from any cognizable issue in this case,” (*Id.*) He states that these irrelevant inadmissible matters include: (1) Mr. Cox’s activities as a

² To the extent that Mr. Larsen has a duty to contact individuals whom the Government has purportedly acted to protect, it is reasonable to assume that he could have obtained information in the form of affidavits to bring to the Court’s attention any specific facts of retaliation, instead of relying upon his own naked *ipse dixit*.

Menominee Board member in connection with the federal investigation (which included a “statement” from Menominee’s counsel cautioning Mr. Cox about answering certain types of questions); (2) Mr. Cox’s authority to issue Water Quality Permits; and (3) Mr. Cox’s authority to enforce the National Environmental Protection Act (“NEPA”). (*Id.*)

Contrary to Mr. Larsen’s assertions, these matters are relevant. With respect to Mr. Cox’s activities as a Menominee Board member, the Court will recall that it granted latitude to Menominee to make a record about alleged invasion of Menominee’s attorney-client relationship and privileged communications. Mr. Cox is one of the individuals whom Menominee believes may have communicated privileged information to government agents that he learned in his capacity as former Board Chairperson. Indeed, the Government produced in discovery memos regarding Mr. Cox’s communications with Mr. Larsen, outside the presence of Menominee’s counsel, while Mr. Cox was a sitting Board member. (Kanassatega Dec., Exhs. A, B, and C at 243:2-248:23.) Menominee is certainly entitled to explore those matters to develop a record in support of its allegation of an invasion of the attorney-client relationship (discovery continues, and Menominee reserves the right to ask the Court for appropriate sanctions at a future date, depending on the complete discovery record).

Mr. Larsen implies that Menominee’s counsel made an inappropriate “statement” cautioning Mr. Cox about answering certain types of questions. Mr. Larsen fails to provide appropriate context for this allegation, namely, that Menominee’s counsel instructed Mr. Cox that the Board had not waived attorney-client privilege, and that Mr. Cox needed to be careful not to reveal privileged information that he learned during Board executive sessions, rather than knowledge he gained as a fact witness. (Kanassatega Dec., Ex. C at 12:8-14:6.) There was

nothing improper about an instruction given to prevent the inadvertent disclosure of attorney-client privileged communications.

Menominee asked Mr. Cox about Water Quality Permits and his authority to enforce NEPA because Mr. Cox used his purported job responsibilities to issue those permits and to enforce NEPA as pretext for conducting a culvert inspection and for making allegations that Menominee had mismanaged the contracts at issue by spending federal funds for a non-federal purpose. (Kanassataga Dec. Exhs. D, E, F.) One of the Government's theories in this case is that Menominee's work was inadequate because it was using federal fire funds for non-federal purposes (*i.e.*, Congos deemed some of the work to be inadequate not because the road was never graded, brushed or chipped – rather, he deemed the work to be inadequate because it was allegedly performed in the wrong part of the Menominee forest). Mr. Cox's allegations go to one of the central issues in this case.

With respect to Mr. Cox's culvert inspections, it is important to understand the scope of his job duties as an Environmental Specialist, under which Mr. Cox claimed to have NEPA and Water Quality Permit enforcement authority. The scope of Mr. Cox's job responsibilities in this respect is relevant because Menominee needs to know Mr. Cox's status at the time he conducted the inspections. The jury is entitled to hear why Mr. Cox was doing what he was doing (motive), and what biases (or lack thereof) he may have accordingly had when he conducted these inspections and made his report. It is relevant whether he did so as a neutral and independent party acting within the scope of his job duties, as opposed to being an agent sent by federal investigators and employees to do their bidding. It is also relevant as to whether Mr. Cox was competent to conduct this inspection. We now know that Mr. Cox testified that Congos told him to conduct the culvert inspections at issue, including what to inspect, how to inspect it, and how

to document the inspection (at the behest of the Office of Inspector General). (Kanassatega Dec. Ex. C at 128:23-145:5.) There is nothing improper about Menominee fully exploring this issue.

In short, Mr. Cox's extensive involvement in this investigation, along with his memos alleging improper use of federal funds for non-federal purposes by Menominee, does not make him a "potential witness." He is a fact witness who has made serious allegations against Menominee in connection with the matters at issue, and there is nothing improper about Menominee deposing him as such.

The Government appears to have brought this motion based solely on unsubstantiated allegations of counsel, and not for the purpose of protecting Mr. Cox, but for the purpose of preventing public access to the facts in this case after the Government itself took numerous steps to involve the Menominee Tribal Legislature ("Legislature") in the investigation and the lawsuit, knowing full well or, in the alternative, being able to predict that the result of its actions would be to politicize this case within the Menominee Indian Reservation community. The Government's public actions include statements to the press by United States Attorney Steven Biskupic and Assistant United States Attorney Matthew Richardson. (Kanassatega Dec. Exhs. G, H.) They also include a Power Point presentation by Assistant United States Attorney Christian R. Larsen to the Legislature about the Government's case (a non-party that had no authority over Menominee and no authority to engage in settlement negotiations with the Government). (Kanassatega Dec. Ex. I, at 110:12-119:22.)

The public record amply demonstrates that this issue has been so divisive that some Menominee tribal members have called for the Legislature to take over Menominee. (Kanassatega Dec. Ex. J.) There should be no doubt as to the Menominee peoples' right to know the full story. They have a right to know what is going on in this case. They have a right to see

discovery materials from this case. Mr. Cox publicly supports their right to know. What the Government is doing here is not about justice. It is just the opposite. It is about hiding the truth from the Menominee people and protecting its own.

CONCLUSION

The Menominee people have a right to know the facts of this case. Mr. Cox agrees. The Motion to Seal should be denied.

DATED: MARCH 20, 2008

/s/ Joshua Jay Kanassatega
Joshua Jay Kanassatega (MN #211254)
Bryant D. Tchida (MN #314298)

LEONARD, STREET AND DEINARD
Professional Association
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

**ATTORNEYS FOR DEFENDANT
MENOMINEE**