UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 07-C-316

MENOMINEE TRIBAL ENTERPRISES, the principal business arm of the Menominee Indian Tribe of Wisconsin, MARSHALL PECORE, and CONRAD WANIGER,

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF THE MENOMINEE INDIAN TRIBE'S MOTION FOR PROTECTIVE ORDER

I. Introduction

The United States submits this memorandum in support of the Menominee Indian Tribe's motion for a protective order, which seeks to quash a notice of deposition and subpoena served on the Chairperson of the Tribe, Lisa Waukau, by Menominee Tribal Enterprises ("MTE").[1] In its motion, the Tribe asserts that Ms. Waukau has tribal sovereign immunity from the subpoena, because she "has no knowledge of, and has taken no action regarding the activities described in the Complaint except in her official capacity as a member of the Menominee Tribal Legislature or as the Chairperson of the Menominee Tribal Legislature." Menominee Indian Tribe's Brief in Support of Motion for a Protective Order, at p. 2 (citing Waukau Affidavit, Exhibit A).

[1]In its pleadings, MTE refers to itself as "Menominee." This shorthand for Menominee Tribal Enterprises should not be confused with Menominee Indian Tribe of Wisconsin, which is represented by the Tribal Legislature and its own counsel. Counsel for MTE, the business arm of the Tribe, does not represent the Menominee Indian Tribe of Wisconsin.

The United States does not, by this memorandum, intend to take a formal position with respect to the issue of Ms. Waukau's tribal immunity. However, because Ms. Waukau appears to lack first-hand knowledge of facts relevant to the legitimate issues in this case, the United States questions the basis for MTE's stated desire to take her deposition. As set forth in the United States' motion for a protective order, a pattern has developed in discovery – one in which MTE has wasted significant time and resources on peripheral matters. Unfortunately, this has become *de rigueur* in MTE's deposition practice as well.

As the discussion below will demonstrate, MTE has failed to articulate a reasonable basis for the deposition subpoena directed to Lisa Waukau. Therefore, to prevent further abuse of the discovery process by MTE, and as authorized by Fed. R. Civ. P. 26 (b)(2)(C), this Court should enter the protective order requested by the Menominee Indian Tribe of Wisconsin.

II. Lisa Waukau's potential knowledge of facts relevant to this lawsuit.

A. Ms. Waukau's Interview with a Federal Investigator.

MTE's responsive memorandum alleges that it needs to question Ms. Waukau about statements she made to Special Agent Joseph Schwartz ("SA Schwartz") during his investigation. SA Schwartz conducted this interview on March 12, 2003, shortly after Ms. Waukau stepped down as a member of the Tribal Legislature. *See* MTE Memorandum, at pp. 5, 14.

In a brief, two-paragraph report, SA Schwartz wrote that Ms. Waukau provided some general background information about the contracts at issue in this case. The entirety of the report is as follows:

> On 3/12/03 Lisa Waukau, past Chairperson for the Menominee Tribe, was interviewed. Waukau said that sometime between 1993 and 1994, the Menominee Tribe allowed Menominee Tribal Enterprises (MTE) to be the contractor for the 93-

> 638 Road Maintenance and Forest Development contracts. Waukau said that because MTE had mismanaged the above contracts, the Menominee Tribal Legislature passed a resolution in March of 2001 to take the above contracts away from MTE.
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> Lisa Waukau said that between 1999, and 2001, tribal officials held numerous meetings regarding the taking back of the above contracts. Waukau added that MTE had a history of not cooperating with the tribe. Waukau said that at the time of the above meetings Apesanahkwat was the Chairperson for the Menominee Tribe, and that he wanted to take the contracts from MTE due to mismanagement of money and services by MTE.

MTE Memorandum, at p. 5 (Kanassatega Dec. Ex.1).

As the report itself demonstrates, the information SA Schwartz gained from Lisa Waukau on March 12, 2003, was very general in nature, and could have been obtained from numerous sources. Although Ms. Waukau alludes in her interview to MTE's mismanagement of the federal contracts, it seems apparent that Ms. Waukau's knowledge of MTE's mismanagement is derived solely from her position as a member of the Tribal Legislature from February 1995 to February 2003. Ms. Waukau confirms this in her affidavit. The Schwartz report indicates that other Tribal Legislators had this same knowledge, including Apesanahkwat, who was the Chairman at the time the Tribe took back the federal contracts from MTE.

MTE, moreover, could have asked SA Schwartz himself about the interview during his seven-hour deposition on December 6, 2007, but MTE chose not to. If the matters addressed in the Waukau interview were truly important to MTE, it could have covered the subject during its questioning of SA Schwartz, rather than serving a subpoena on the Tribal Chairperson.

In addition, this is not a case about MTE mismanagement in general, but about twelve specific false invoices and eight improper expenditures of federal contract dollars. There is little indication that Ms. Waukau has information related to the specific allegations in the Complaint,

which Ms. Waukau herself confirms in her affidavit. It is therefore odd that MTE has sought to use one of its twelve depositions[2] to question someone who happens to be the current Tribal Chairperson. To the extent Ms. Waukau's current position as Tribal Chairperson drives MTE's desire to question her, this is not an appropriate reason to conduct her deposition in this case.[3]

B. Ms. Waukau's Conversations with Douglas Cox.

MTE next states that it needs to question Ms. Waukau about a conversation she allegedly had with Douglas Cox, a Tribal employee who inspected, at the government's request, approximately sixteen culverts allegedly installed by MTE and billed to the federal government. MTE cites Mr. Cox's deposition testimony that: "I believe I told Lisa Waukau that I provided information to OIG, yes." (Kanassatega Dec. Ex. 2, at 241:13-14). *See* MTE Memorandum, at p.6. According to MTE, it needs to question Ms. Waukau to determine what Mr. Cox may have said to her about the culvert inspections, and in particular whether it was SA Schwartz or David Congos that asked him to conduct the inspections. *See* MTE Memorandum, at pp. 15-16.

It is difficult to see the relevance of this line of questioning. It is undisputed that Mr. Cox

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[2]Fed. R. Civ. P. 30(a)(2)(A) limits the parties to ten depositions per side unless the parties have stipulated in writing to a different number or the court has given leave for a greater number. The United States has agreed to permit MTE to take twelve depositions in this case.

[3]One of MTE's discovery requests, for example, asked the United States to "identify any communication between Assistant United States Attorney Christian R. Larsen and any official of the Menominee Tribal Legislature or any officer, employee, or agent of the Menominee Indian Tribe of Wisconsin related to the investigation conducted by DOI, settlement of any of your claims arising from that investigation, any allegation in your Complaint or settlement of claims or causes of action described in your Complaint ." *See* Larsen Affidavit, Exhibit 1 (MTE Interrogatory Set 3, No. 5). The United States objected to the relevance of this interrogatory, but one has to question whether MTE seeks to examine Ms. Waukau about these kinds of peripheral matters, rather than seeking relevant, admissible information related to the allegations of the Complaint.

conducted his inspections at the government's request, regardless of whether that request came from Mr. Congos, SA Schwartz, or a combination of the two. The relevant question is whether MTE actually performed the culvert work billed to the government, not who directed Mr. Cox to inspect the culverts. To the extent MTE seeks to use Ms. Waukau to impeach one or both of the government witnesses, the alleged impeachment appears directed toward a peripheral matter, rather than a legitimate issue in the case.

Moreover, to the extent this matter is deemed relevant, MTE could have asked Mr. Cox what he said to Ms. Waukau about the culvert inspections. MTE deposed Mr. Cox for almost seven hours on a variety of extraneous matters, but MTE chose not to question Mr. Cox about the substance of what he said to Ms. Waukau, beyond the fact that he informed her he had provided information to the Office of Inspector General for the Interior Department. (Kanassatega Dec. Ex. 2, at 241-243). Instead, MTE counsel questioned Mr. Cox about a list of several individuals he may have spoken to about his inspections, without asking Mr. Cox to describe the substance of any of those conversations. *Id*. at 241-243. Hence, there is no reason to believe, particularly in light of Ms. Waukau's affidavit, that she is any more likely than the numerous other individuals named by Mr. Cox to know whether it was Mr. Congos or SA Schwartz that asked him to perform the culvert inspections.

C. Ms. Waukau's Conversations with David Congos and Larry Morrin.

MTE also asserts that it needs to question Ms. Waukau about conversations she may have had with two government officials, Larry Morrin, the former Director of the BIA's Midwest Regional Office, and David Congos, BIA Forester. MTE maintains that the BIA's communications with Ms. Waukau, while she sat as a Tribal Legislator, are important to the issue of "whether the

Government's claims regarding these matters [the breach of contract issues] are barred by the ISDEA," the Indian Self-Determination and Education Assistance Act, 25 U.S.C § 450 *et seq*. MTE Memorandum, at p. 17. Although MTE's argument is somewhat unclear, MTE apparently asserts that Ms. Waukau might have information which would show when the government became aware of the false invoices or improper expenditures alleged in the Complaint. As with MTE's other contentions, this attenuated reasoning provides no support for questioning Ms Waukau.

MTE maintains that date on which the government became aware of MTE's wrongdoing is relevant to whether this action is barred by ISDEA's 365-day statute of limitations, found at 25 U.S.C. § 450j-1(f). This administrative statute of limitations, however, is not relevant to this lawsuit. The government brings this case not under the administrative provisions of the ISDEA, but under the False Claims Act and the federal common law, each of which contains its own statute of limitations. *See e.g.*, 31 U.S.C. § 3731(b)(providing for a six year statute of limitations for actions under the False Claims Act; however, the statute can be extended to ten years, if suit is filed within three years of when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances.").

MTE further asserts that Ms. Waukau's communications with Congos and Morrin are relevant to the False Claims Act aspect of the case, because they may shed light on when they became aware of the fraudulent invoices submitted by MTE to the BIA. Admittedly, the government's alleged knowledge of the falsity of MTE's claims could be relevant to its False Claims Act allegations. *See U.S. ex rel. Durcholz v. FKW Inc.,* 189 F.3d 542, 544-45 (7th Cir. 1999)(holding that the government's prior knowledge of an allegedly false claim can vitiate a FCA action)(emphasis added). In this regard, MTE alleges that there is a long history between MTE and

the BIA with respect to the invoices at issue, and that Lisa Waukau began coordinating with Congos in April 2002 to review MTE's contract performance. MTE Memorandum at pp. 6, 19. As a result of those coordination efforts, MTE asserts that Ms. Waukau may have information about what Mr. Congos knew at the time the invoices were submitted. MTE Memorandum, at p.19.

However, by late April 2002, when Congos and Waukau began this coordination effort, the false invoices had already been submitted, and MTE had long since made all of the allegedly improper expenditures of federal funds. Therefore, MTE's assertion – that Ms. Waukau may have gained information from those coordination meetings about the government's prior knowledge of the false claims – is entirely speculative. While it is possible that Ms. Waukau communicated at some level with Congos and Morrin about the contracts involved in this case, there is very little basis to believe Ms. Waukau has any first, or even second-hand, knowledge of when the government became aware of the falsity of MTE's claims.

III. Conclusion.

The government agrees with the general proposition, cited by MTE at the onset of its brief, that the Court has the right to "every man's evidence." Yet the mere incantation of this precept cannot shield MTE from its own pattern of discovery abuse in this case. MTE has proffered an extremely tenuous basis to support its subpoena to take the deposition of the current Chairperson of the Menominee Indian Tribe. Therefore, the United States joins the Tribe in its motion for a Protective Order.

Dated this 2nd day of April, 2008.

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