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 MOTION FOR PROTECTIVE ORDER

The United States, by its attorneys, submits this memorandum in support of its motion for a Protective Order to prevent further abuse of the discovery process by defendant, Menominee Tribal Enterprises ("MTE"), and to prevent the disclosure of materials which may be protected by the Privacy Act or are otherwise confidential, as authorized by Fed. R. Civ. P. 26(c).

A. Introduction.

This is a civil action alleging, in part, that the defendants violated the False Claims Act in connection with the submission of invoices and requests for payment to the U.S. Department of the Interior, Bureau of Indian Affairs ("BIA"). The Complaint, filed in April 2007, alleges that: (1) MTE and two of its employees, Marshall Pecore and Conrad Waniger, submitted twelve false invoices and documents to the BIA for road maintenance

and fire suppression work it did not complete; and (2) MTE breached its BIA contracts by making eight improper expenditures of federal money. The Complaint concerns two contracts between the United States and MTE – one requiring MTE to provide road maintenance on reservation roads, and the other to provide fire suppression work in the tribal forest. The Complaint seeks damages and penalties totaling approximately $1.3 million. Most of the acts alleged in the Complaint occurred during a discrete time frame from 1999 to 2002.

MTE's answer asserts, among other things, that: (1) the government intentionally under-funded the contracts at issue, causing MTE to be unable to perform the needed work with federal funds, (See e.g., MTE's Answer – Prefatory Statement, ¶ 42; and Second Affirmative Defense, ¶ 4); and (2) the Complaint was brought based on the improper goal of forcing "the Menominee Indian Tribe of Wisconsin to acquiesce in a change in the Forest Manager position, held by Defendant Marshall Pecore ("Pecore") since 1976." MTE's Answer, page 4, ¶ 2.

From the start, MTE's approach to discovery has followed a disturbing pattern. This pattern is set forth in more detail below and in the attached affidavit of Assistant United States Attorney Chris R. Larsen. In summary, MTE has to date served the United States with 166 individual requests for discovery, not including the numerous creative subparts within many of the requests. MTE's discovery requests have included twenty-seven interrogatories (with at least fifty and perhaps as many as 100 subparts, in violation of Civil L.R. 33.1) and 134 document requests. Copies of all MTE's discovery requests are attached as Exhibit 1 to the Larsen Affidavit. Many of the requests are overly broad (covering a fifteen-year time period), cumulative of prior requests, and not relevant to any cognizable

issue in the case. Depositions conducted by MTE have similarly strayed far afield from the central issues in the case. Larsen Affidavit, ¶¶ 31-32. MTE has, moreover, posted videotaped transcripts of certain depositions on its website, and appears to be in the process of downloading internal government documents obtained in discovery onto that same website. Larsen Affidavit, ¶¶ 28-29. This conduct raises concerns about the potential public disclosure of confidential and irrelevant information prior to trial, harassment of witnesses, and adverse impact on the jury venire. Larsen Affidavit, ¶¶ 28-32.

Due to the pattern of discovery abuse that has developed in this case, the United States seeks a Protective Order: (1) directing MTE not to serve further interrogatories on the United States, without prior authorization of the Court; (2) directing MTE not to serve further requests for production of documents or things, unless such request is accompanied by a written statement describing the relevance of the requested material and why the request does not duplicate previous requests; (3) permitting the United States, in response to MTE's pending discovery requests, to produce an electronic copy of all non-privileged, hard-copy BIA records, as well as potentially relevant electronic "Congos communications" and metadata related to the Congos "Statement of Facts" memorandum (see Larsen Affidavit, ¶¶ 13, 15, 27); (4) imposing restrictions on the disclosure and use of materials obtained in discovery, including confidential information protected from disclosure under the Privacy Act; and (5) directing MTE to immediately remove from its website all documents produced by the United States and the depositions taken in this case, including deposition videotapes and transcripts.

B. Appropriate Limitations on Discovery.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides in part that a party

may obtain discovery into "any matter, not privileged, that is relevant to the claim or defense of any party." The rule further provides that discovery is not limited to matters that will be admissible at trial so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." By this language, Rule 26 sets forth a liberal discovery standard, one which allows "extensive intrusion into the affairs of both litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984). Due to the liberality of the discovery standards, the potential for abuse of the rules is significant. *See Herbert v. Lando*, 441 U.S. 153, 176-77 (1979)("There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus.").

One way in which the federal rules seek to limit this potential for abuse is through the issuance of protective orders under Fed. R.Civ.P 26(c). *Seattle Times*, 467 U.S. at 34. In addition, Rule 26(b)(2)(C) provides that:

> On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(Emphasis added). See also *Chavez v. Daimler Chrysler Corporation*, 206 F.R.D. 615, 619 (S.D. Ind. 2002).

When considering whether an abuse of the discovery process has occurred, a court must view Rule 26 in its entirety, keeping in mind the limited purposes of discovery. *Seattle*

Times, 467 U.S. at 34. "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times,* 467 U.S. at 34. Unfortunately, the need for Protective Orders in civil cases arises with some frequency. "It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse." *Id.*

Abuse of the discovery process, moreover, "is not limited to matters of delay and expense; discovery may also seriously implicate privacy interests of litigants and third parties." As the Supreme Court explained in *Seattle Times*:

> The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery. There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that is not only irrelevant but if publically released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.

Id. at 35. In this regard, the United States is also bound by the provisions of the Privacy Act, which protects from disclosure information such as addresses, social security numbers, medical information, financial information and employment history, some of which is contained in the discovery material. *See* 5 U.S.C. § 552a *et. seq*. "The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders." *Seattle Times*, 467 U.S. at 35-36.

C. MTE's abuse of the discovery process.

1. Volume, Breadth and Duplication of Requests.

The attached affidavit of Assistant United States Attorney Chris R. Larsen ("Larsen Affidavit") sets forth in some detail the pattern of abuse of the discovery process that has

developed in this case. To summarize, on July 20, 2007, the United States supplied defendants' counsel with approximately 11,500 pages of government files, in accordance with its obligation to provide "Initial Disclosures" of its evidence under Federal Rule of Civil Procedure 26(a)(1)(B). The government's Initial Disclosures included investigative reports, copies of invoices, maps and photographs relevant to the False Claims Act allegations, and thousands of pages of internal BIA documents. Larsen Affidavit, ¶ 4.

Within two weeks of the government's Initial Disclosures, MTE served the United States with seven sets of discovery, comprising fifty-two individual document requests and twenty-four interrogatories. Larsen affidavit, ¶ 5. As of March 12, 2008, MTE had served twenty-one sets of demands for discovery upon the United States, comprising 166 individual requests for discovery. Larsen Affidavit, ¶ 26. These requests include: (1) twenty-seven interrogatories, which the government asserts MTE improperly expanded through the creative use of subparts in violation of Civil L.R. 33.1(a)(limiting the number of interrogatories to 25 including subparts); and (2) 134 individual Document Requests (contained in fifteen separate Sets). Copies of the discovery requests served by MTE on the United States are attached as exhibit 1 to the Larsen affidavit. In addition to MTE's 166 formal requests for discovery, MTE has, throughout the course of discovery, made hundreds of informal demands (via letter, email, or verbal request) for internal investigations, additional information, explanations, and discovery of government files. Larsen Affidavit, ¶ 26.

Beyond the sheer volume of discovery requests, both formal and informal, MTE has demanded information spanning a fifteen-year time period from 1992 to the present, despite the Complaint's focus on a series of nineteen discrete acts covering a three-year time frame

from 1999-2002. Larsen Affidavit, ¶ 5. Many of the requests, moreover, duplicate or overlap prior requests, or seek the production of documents that either do not exist or are located in files to which MTE has been given access. Larsen Affidavit, ¶¶ 22-25. Therefore, the United States seeks a Protective Order to remedy this pattern of repetitive and overly broad requests, and to prevent further abuse of the discovery process.

2. Relevance.

In addition to concerns about the volume and breadth of MTE's discovery requests, it is difficult to divine the relevance of many of its requests. The Complaint alleges that the defendants caused the submission of twelve false invoice documents during a limited time period in 2001 and 2002, and that MTE made eight improper expenditures of federal funds in violation of its BIA contracts. Although the false invoice component of this case presents some factual complexities (due primarily to issues involving MTE's reporting of work accomplishments supporting the relevant invoices), this litigation is relatively narrow in scope, involving MTE's performance of two federal contracts under the BIA's Roads Maintenance and Forest Management Programs.

Despite the relatively narrow reach of the Complaint, MTE's discovery has strayed far afield of the central issues in this case. As just one of many possible examples, one of MTE's interrogatories ask the United States to identify "all current and former Office personnel [referring to the BIA's Midwest Regional Office] who have advocated a position that Menominee Tribal Enterprises should pay stumpage or a stumpage fee to the Menominee Indian Tribe of Wisconsin." Larsen Affidavit, ¶ 8. The issue of whether MTE should pay "stumpage" to the tribe for its use of standing timber in the tribal forest (stumpage is essentially a payment for the value of the standing timber) has been an ongoing

issue on the Menominee Indian Reservation for several years. Larsen Affidavit, ¶ 9. Accordingly, it is likely that documents and materials exist in BIA's extensive files (both electronic and paper copy) which address this issue. However, the government has in no way raised this issue in its Complaint, nor has MTE plead it as a relevant issue in this litigation. Despite the lack of apparent relevance to this litigation, the government provided both a narrative response to MTE's interrogatory and granted MTE access to voluminous BIA records from which the answer to this interrogatory could be derived. Larsen Affidavit, ¶ 9. Many similar examples abound.

The United States has made extensive efforts to comply in good faith with MTE's hundreds of formal and informal discovery requests, and to provide reasonable access to voluminous BIA records. MTE, however, continues to make numerous and unreasonable requests for extraneous information, the latest being a Fifteenth Set of Documents served on March 12, 2008 (containing seventeen individual document requests).[1] It is evident that limits need to be placed on MTE's continuing demands for information that have no apparent relevance to the issues in the case.

3. Public Dissemination of Discovery Materials.

In addition to the general pattern of abuse of the discovery process outlined above,

[1] One of these requests, for example, demands the production of "David Congos' OGE Form 450 Confidential Financial Disclosure Report," which would appear to lack any arguable relevance to the case and which raises Privacy Act concerns. *See* Larsen Affidavit,¶ 25. Another requests the production of "[a]ll final versions of the BIA's Internal Control Review Forms (OMB Circular A-123 Management's Responsibility for Internal Controls) for the trust programs and procedures for any forestry program at the Menominee Indian Reservation for the period October 1, 1996 through the present." *Id*. As with many of MTE's requests, it is difficult to decipher the relevance to this case of BIA internal controls forms covering a twelve-year time period.

MTE has loaded onto its public website a series of discovery materials related to this case. Larsen Affidavit, ¶ 28. As of March 7, 2008, MTE's website included a "Litigation Library Outline," with links to the videotaped depositions of Douglas Cox, an employee of the Menominee Indian Tribe, OIG Special Agents Joseph Schwartz and Todd Bucci, and BIA Forester David Congos. Larsen Affidavit, ¶ 28. The Outline also contains a heading for the videotaped deposition of Jacqueline Pubanz, a current MTE employee, but a link to that videotape did not appear on the website on March 7. Larsen Affidavit, ¶ 28. A printed copy of MTE's Litigation Library Outline is attached as Exhibit 2.

In addition to the deposition transcripts and videotapes, pages three and four of the Litigation Library Outline contains headings for a "Chronology of Documents," and "David L. Congos Communications to BIA and MTL [Menominee Tribal Legislature]." Larsen Affidavit, ¶ 29. Although no link to these documents existed as of March 7, 2008, counsel for MTE has indicated that MTE intends to make all of the discovery public. Larsen Affidavit, ¶¶ 29, 33. Due to MTE's approach to discovery thus far, they have obtained a substantial volume of materials which are of little or no relevance to the issues in the case, and would not be admissible at trial. Based on the discovery abuse that has occurred in this case, and the potential adverse impact on the integrity of the judicial process, the United States seeks a Protective Order directing MTE to remove all non-public material obtained in discovery, including deposition transcripts and video, from its website, and prohibiting MTE from disseminating to third parties or the public all material obtained in discovery.

The case law provides firm support for such a request. In *Seattle Times*, the Supreme Court explained that "pretrial depositions and interrogatories are not public components of a civil trial." *Id.* at 33 (footnote omitted). The Court recognized that "such proceedings

were not open to the public at common law. ..." *Id*. Chief Justice Burger, writing separately in another case, has likewise stated that "it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants." *Gannett Company v. DePasquale*, 443 U.S. 368, 396 (1979). Hence, the discovery materials at issue here are not by any means presumptively open for public display, particularly prior to trial. *See also Baxter International Inc. v. Abbott Laboratories*, 297 F.3d 544 (7th Cir 2002)(citing *Seattle Times* for the proposition that "[s]ecrecy is fine at the discovery stage, before the material enters the judicial record").[2]

The question presented in *Seattle Times* was whether a Seattle newspaper could publish information it had gathered through the pretrial discovery process in the course of that civil litigation. The Supreme Court viewed the crucial issue as being whether a protective order precluding the newspaper from disseminating that information was an infringement on that party's First Amendment rights. The Court held that it was not, stating that "[a]s in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes." Id. at 32. As such, a "litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Id.*

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[2] The government acknowledges that some of the discovery material, especially the material consisting of federal records, would eventually be available to the public under the Freedom of Information Act, 5 U.S.C. § 552. However, discovery materials related to ongoing civil litigation are typically exempt from disclosure under FOIA. 5 U.S.C. § 552(b)(Exemption 5). In addition, exemptions may apply for personal and medical information (Exemption 6), law enforcement information (Exemption 7) and confidential or financial information submitted to the United States by third parties (Exemption 4), all of which are included among the BIA records produced for inspection and discovery in this action.

Given these legal touchstones, the Court concluded that restraints placed on discovered, but not yet admitted, information do not amount to a restriction on traditionally public sources of information. *Id*. at 33, n.19. Therefore, "where ... a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id*. at 37. *See also In Re Reporters Comm. For Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985)(holding that there is no right to public access to discovery materials until such materials are actually admitted at trial). *Cf. Hobley v. Burge*, 225 F.R.D. 221, 226 (N.D. Ill. 2004)(noting, in issuing a Protective Order, that the "dissemination of the videotaped depositions for broadcasting is particularly troubling" where the deponents repeatedly invoked the Fifth Amendment); *Stern v. Cosby*, 2007 WL 4328783 (S.D.N.Y. 2007)(granting a Protective Order, and noting that "[v]ideotaped depositions are permitted to facilitate the presentation of evidence to juries; they are not intended to provide a vehicle for generating content for broadcast and other media")(internal citation and quotation marks omitted).

In this case, this Court should exercise its broad discretion in this area to protect the integrity of the discovery process. As established above, MTE has no compelling First Amendment right, or practical need, to display this kind of material on its website. On the other hand, the unrestricted display and possible further dissemination (by printing and copying) of the discovery materials has the potential to negatively impact the integrity of the trial. Both the deposition transcripts and the written discovery contains vast amounts of irrelevant and inadmissible material, which could be used to harass or annoy witnesses, and which would certainly disqualify, as a potential juror, any person who accesses such

information. See Larsen Affidavit, ¶¶ 29-30. Accordingly, the United States asks that this Court enter a Protective Order prohibiting MTE from disseminating all material obtained in discovery to third parties or the public, including transcripts and videotapes of depositions.

D. A Protective Order should be entered to protect against possible inadvertent releases of confidential information protected by the Privacy Act.

The United States is bound by the terms of the Privacy Act of 1974, 5 U.S.C. §552a(b), and is prohibited, absent an appropriate court order, from disclosing protected information under the Privacy Act, as it relates to, among other records, an individual's personal identifying information (such as addresses and social security numbers), medical information, financial information, and employment history. 5 U.S.C. §552a(b)(11). Some of the files produced in discovery contain confidential information which has not been redacted, but which is protected from disclosure under the Privacy Act. MTE, moreover, has specifically requested the production of material contained within Mr. Congos' personnel file, as well as forms containing his personal financial information. The United States has objected, or will object, to these requests, but if produced much of the information in these files is subject to protection under the Privacy Act as well.

It is also anticipated that copies of tens of thousands of additional documents will be provided to counsel for the defendans in the near future (including a scan of approximately 80,000 paper files, and the results of a search, at MTE's request, of a government laptop computer). Larsen Affidavit, ¶¶ 13, 15, 27. It is likely that many of these documents will contain information otherwise protected from disclosure under the Privacy Act. However, due to the scope and breadth of pending discovery requests, it would be impractical to manually review each document for the existence of potential Privacy Act information, and

then redact that information from the document. Therefore, the United States seeks a Protective Order on this basis. A proposed Order is attached.

Respectfully submitted,

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