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 RESPONSE TO DEFENDANT MENOMINEE TRIBAL ENTERPRISES' MOTION TO COMPEL

The plaintiff, United States of America, submits this response to defendant Menominee Tribal Enterprises' ("MTE") motion to compel, filed on April 3, 2008.[1] For the reasons that follow, the United States respectfully requests that the Court deny the motion.

INTRODUCTION

In hundreds of formal document requests, MTE has demanded extremely broad categories

[1]MTE moves to compel the production of: (1) David Congos' personnel file; (2) original invoices and attachments; (3) BIA invoicing policies and procedures with respect to thirty-six other Indian Tribes; (4) additional electronic discovery in connection with Mr. Congos' laptop computer and "other electronically-stored BIA documents." See MTE's Memorandum in Support of Motion to Compel, at pp. 1-2. MTE also requests that the Court grant MTE an additional seven hours to depose David Congos, despite the fact that counsel for MTE has already questioned him for seven hours, and despite the government's agreement to permit an additional seven hours of deposition time by counsel for defendants Marshall Pecore and Conrad Waniger.

of irrelevant discovery, both as to time frame and subject matter. Despite the overly broad nature of MTE's discovery requests and MTE's lack of cooperation in the discovery process, the United States, and its client agency, the Bureau of Indian Affairs ("BIA"), has expended enormous resources in an effort to provide reasonable access to hundreds of thousands of potentially responsive documents.[2] The United States has searched for and retrieved documents from numerous sources of information, both in paper and electronic format. MTE has had almost unrestricted access to BIA files for eight months, and counsel has spent weeks at government offices reviewing them.

Now, despite this extensive review, the exchange of several expert reports, and MTE's lengthy questioning of deposition witnesses (including a seven-hour deposition of David Congos), MTE has moved to compel the production of even more extraneous information. MTE, however, has yet to articulate a viable defense to the relatively narrow False Claims Act charges – to wit, that MTE actually performed the work reflected in those invoices. Rather than attempting to develop a legitimate defense to the charges, MTE has focused much its discovery efforts on a campaign to discredit David Congos, the BIA's on-site Forester assigned to the Menominee Indian Reservation.[3] As MTE has admitted, its goal is "to support [MTE's] defense that Congos, with the aid of others

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[2]For example, in response to MTE's demands, the United States has: (1) sent three computers to the Office of Inspector General's forensic lab for analysis and recovery of documents and emails; (2) conducted electronic manual searches of archived emails pertaining to BIA employees David Congos and Thomas Magnuson; (3) assigned staff to supervise counsel's inspections of BIA files for sixteen working days; (4) scanned or copied tens of thousands of documents; and (5) created a searchable database of electronic documents as a means of locating potentially responsive documents.

[3]Mr. Congos reported the allegations of fraud that form the basis for the government's False Claims Act allegations, and he assisted in the investigation of those matters. Mr. Congos played no role in the investigation of the common law claims against MTE for making eight improper expenditure of federal funds.

and in violation of BIA's policies of non-interference, and with full knowledge of Pecore and Waniger's good-faith efforts, sought to contrive a case of fraud against Pecore and [MTE]." MTE Memorandum, at p. 23.

MTE, however, has failed to provide a shred of evidence to support this far-fetched conspiracy theory, despite the extensive discovery provided to date. MTE has provided no proof, for example, that Mr. Congos misrepresented any significant fact, or "contrived" any evidence. Instead, MTE has merely cited documents showing that Mr. Congos felt strongly about the issue of stumpage payments, and that MTE should be investigated, and (if appropriate) prosecuted. But this was entirely appropriate. As the on-site BIA Forester, Mr. Congos had a duty to ensure that MTE was appropriately managing the tribal forest, and that it expended federal funds in an appropriate fashion. This Court need not countenance the continued waste of time and resources resulting from MTE's efforts to discredit a single BIA employee (which to date have proven completely unfounded), rather than focusing on the facts of the case. Therefore, the United States respectfully opposes motion to compel further irrelevant discovery.

ARGUMENT

I. David Congos' Personnel File

MTE seeks the production of the personnel file maintained by the BIA on David Congos. The Privacy Act of 1974, 5 U.S.C. § 552a, provides that the government may not disclose certain records, including the personnel files of its employees. However, the Privacy Act contains certain exceptions to this prohibition, including permitting the production of records pursuant to an order by a court of competent jurisdiction. *Id.* at 552(a)(b)(11). As a result, although the Privacy Act provides initial protection for records such as personnel files, it does not create a privilege for such records. Rather,

"in the absence of express standards in the Act, the usual discovery standards of Fed. R.Civ. Proc. 26(b) govern the court's discretion in ordering disclosure of government records." *United States v. Luwisch*, 1998 WL 720656, *1 (E.D. La. 1998). *See also, Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987).

The United States opposes MTE's request to produce Mr. Congos' personnel file because, as discussed above, those records lack relevance to the pending issues in this litigation and will not likely lead to the discovery of admissible evidence.[4] While the relevancy standard for discovery is broad, it is not limitless. For example, in *United States v. Lake County Board of Commissioners*, 2006 WL 1660598 (N.D. Ind. 2006), the United States filed suit against the defendant pursuant to the Fair Housing Act. During the course of discovery, the defendant sought the personnel files of six employees of the Department of Housing and Urban Development ("HUD") who were involved in the investigation of the original complaint made against the defendant. *Id.* at *1. Although the personnel files were protected by the Privacy Act, the defendant contended that the files would "likely lead to the discovery of admissible evidence related to possible misconduct by HUD in investigating this matter and the reason for the delay in HUD's final decision to pursue this action." *Id.* at *2. The district court roundly rejected the defendant's relevancy arguments, ruling that "[t]he sufficiency, methodology, and appropriateness of the HUD investigation are not relevant to the plaintiff's claims under the FHA. . ." *Id.*

The defendant in *Lake County* also argued, as MTE argues here, that the personnel files

[4] In the event that the Court has any question concerning the content of Mr. Congos' personnel file, the United States would not object to an *in camera* review by the Court of Mr. Congos' personnel file and confidential financial disclosure forms, OGE Form 450 and OGE Form 450-A, sought by the defendant.

might lead to "information relevant to the credibility of potential witnesses at trial." *Id.* *3. More specifically, the defendant argued that the personnel files might contain evidence regarding the employees' "competence to assess and evaluate [the complainants'] claims of retaliation" under the FHA. The court again rejected this theory because it simply led back to the purported issue that HUD mismanaged the investigation. "As noted above, the investigative process of HUD leading to the decision to file this action is not relevant to the court's decision of whether the defendants violated the FHA." *Id.*

Dave Congos' personnel file is neither relevant to the issues in this litigation nor will it lead to the discovery of admissible evidence on the issues in this litigation. It bears repeating that the United States alleges, among other things, that MTE violated the False Claims Act by submitting twelve false invoices and documents to the BIA for work it did not complete. MTE has not produced any evidence to date that it in fact performed the work that is the subject of the allegedly false invoices. Moreover, MTE has not produced any evidence that such allegations were fabricated by Mr. Congos or anyone else employed by the government.

Despite the fact that MTE does not possess any evidence of the alleged government conspiracy against it, it contends that the materials in Mr. Congos' personnel file "may contain information to support Menominee's defense that Congos. . . sought to contrive a case of fraud again Pecore and Menominee." MTE Memorandum, p. 23. MTE's brief lists several categories of potentially "relevant" information that it may find in Mr. Congos' personnel file. The information MTE seeks is primarily designed to bolster MTE's attempt to construct a defense based on an allegedly improper motive for the government's investigation. The issues in this case concern the submission of false invoices to the government. The government's investigation, how the

investigation was conducted, and the motive for instituting the investigation are not relevant to MTE's liability under the False Claims Act. Therefore, MTE's continued efforts to prolong discovery to prove up a theory based on the alleged fabrication of evidence during the investigation should be rejected.

MTE also seems to claim that Mr. Congos' personnel file may bear on his "purported experience giving him the ability to express expert opinions in this case. . ." MTE Memorandum, p. 23. While it is true that Mr. Congos' personnel file will contain information demonstrating his qualifications for the positions he has held in the United States' government, the information which MTE seeks can easily be obtained from other sources. Specifically, a summary of Mr. Congos' qualifications were produced with his report pursuant to Fed. R. Civ. Proc. 26(a)(2) on November 30, 2007. In addition, as will be discussed more fully below, MTE has already deposed Mr. Congos for seven hours and had ample opportunity to explore his qualifications to offer expert testimony in this matter.

MTE also seeks the confidential financial disclosure forms - Office of Government Ethics ("OGE") Form 450 and OGE Form 450-A - completed by Mr. Congos. MTE Memorandum, p.25. OGE Form 450 requires some government employees to disclose certain financial relationships to avoid a real or apparent conflicts of interest between private financial interests and official job responsibilities. MTE has proffered absolutely no factual basis to support its demand for disclosure of these internal government forms. If the OGE Forms 450 or 450-A had shown any real or apparent conflict of interest between Mr. Congos' private financial interests and his official responsibilities, he would have been precluded from those official responsibilities. Therefore, there can be no showing by MTE that this evidence would be relevant or likely to lead to the discovery of admissible

evidence.

II. Additional Congos Deposition Time

MTE next asserts that it requires an additional seven hours of deposition time to question David Congos. The United States, however, has agreed to permit up to seven additional hours of deposition time for Mr. Congos, to be conducted initially by counsel for defendants Marshall Pecore and Conrad Waniger (counsel has indicated that will endeavor to complete his additional questioning in four to five hours). The United States has further agreed to allow MTE to question Mr. Congos for the balance of the unused deposition time.

Fourteen total hours of deposition time for Mr. Congos is enough. As with most of the MTE-conducted depositions, MTE wasted significant time during Mr. Congos' deposition on a variety irrelevant and peripheral matters (for instance, MTE used extensive deposition time focusing on whether Mr. Congos properly used the title "Trust Forester" while working at the reservation), while spending relatively little time on the matters MTE states it now needs to address. MTE, moreover, chose the timing of Mr. Congos' deposition, knowing that the government had not yet produced all the voluminous electronic information MTE had requested. MTE therefore should not be heard to assert that it needs more time to focus on these documents. Finally, counsel for the defendants are free to coordinate their additional questioning of Mr. Congos during his second deposition, in an effort to cover the matters MTE has raised in its brief.[5] Under the circumstances of this case,

[5]The Federal Rules of Civil Procedure encourage this approach, to avoid repetitive and overlapping deposition questioning by counsel for multiple parties. See Fed. R. Civ. P. 30, Advisory Committee Notes, 2000 Amendment, Subdivision (d)(noting that in "multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest.").

fourteen hours is more than sufficient time to permit a "fair examination" of Mr. Congos under Fed. R. Civ. P. 30

III. The Invoices

MTE maintains "that the Government has to date failed to produce or identify the original invoices at issue and original supporting documentation, if any, as such documents were *originally submitted* in 2001, and as they were *resubmitted* in March and April of 2002." MTE Memorandum, at p.27 (emphasis in original). This is not accurate. The United States has produced, or offered to produce, for inspection and copying on multiple occasions the invoices and supporting documents which form the basis for the False Claims Act charges.

For example, the United States identified and made the invoices available for production in its Rule 26(a) Initial Disclosures. The United States produced copies of the invoices in response to MTE's Second Request for the Production of Documents (Requests Nos. 2-4). MTE also made three separate requests related to the invoices in its Tenth Set of Requests to Produce Documents (dated January 25, 2008). A copy of the United States' response to those requests is attached as Exhibit 1. Specifically, MTE's requests and the United States responses are as follows:

> **REQUEST NO. 1:** *The original of every document, including invoices, requests for reimbursements, accomplishment reports, maps, and time cards, submitted by Menominee or any of its representatives to any BIA official in connection with the following Hazardous Fuel Reduction (HFR) Program Invoice numbers 200, 202, 212, 214, 217, 219, 224, and 248 submitted under Word Order No. 867, in the form in which the documents were submitted to the BIA.*
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> Please see the Government's Response to Defendant Pecore and Waniger's First Request for Production of Documents, Request No. 1, and the government's response to Requests 3 and 4 below. All originals are in the possession of the United State and are available for inspection.

REQUEST NO. 2: *The original of every document, including invoices, requests for reimbursements, accomplishment reports, maps, and time cards, submitted by Menominee or any of its representatives to any BIA official in connection with the following Hazardous Fuel Reduction (HFR) Program Invoice numbers 220 and 222 (Prescribe Burns), submitted under Work Order No. 870, in the form in which the documents were submitted to the BIA.*

Copies of these documents have been produced previously. See USA0007287-7297(Invoice 220) and USA0007312-7323 (Invoice 222). The originals are available for inspection, and are currently marked as Plaintiff Deposition Exhibits 41 and 42.

REQUEST NO. 3: *Please provide copies (in color if applicable) of every document, including invoices, requests for reimbursements, accomplishment reports, maps, and time cards, submitted by MTE or any of its representatives to any BIA official in connection with the following Hazardous Fuel Reduction (HFR) Program Invoices, in the form in which the documents were submitted to the BIA:*

A. HFR invoice numbers 200, 202, 212, 214, 217, 219, 220, 222, 224, and 248 submitted under Word Order No. 867;

B. *HFR invoice numbers 220 and 222 (Prescribed Burns), submitted under Work Order No. 870.*

Color copies of the documents submitted by MTE to the BIA in support of MTE's requests for payment for these invoices are contained on the enclosed CD.

MTE's claim that the United States has not produced the allegedly false invoices and supporting material charged in the Complaint is incorrect.

MTE then appears to acknowledge that the invoices have been produced but questions the manner in which the government produced the invoices. MTE complains that "simply dumping... a bunch of files containing lose documents apparently selected by Schwartz, Canada and Westphal on Menominee. . . is not sufficient." MTE Memorandum, p. 27. MTE's complaint is confounding; the government has produced the documents it has in its possession and which it believes constitute the invoices at issue. Those documents were produced in files organized by invoice number. This is hardly a document dump.

In addition, MTE appears to question the manner in which the government organized the invoices in its files. *Id.* But this does not present a discovery issue. The fact that government investigators recovered the invoices from BIA files, and organized them in individual red folders, is of no moment. To the extent MTE believes there is a gap in the chain of custody of these documents, that issue goes to the weight to be given to the invoices, not their admissibility. *See United States v. Lee*, 502 F.3d 691, 697 (7th Cir. 2007)("The government is not required to prove a perfect chain of custody, as gaps in the chain go to the weight of the evidence rather than its admissibility"). The United States believes it will be able to properly authenticate these invoices at trial (and on a motion for summary judgment). Because the United States has produced for inspection and copying the invoices that are relevant to this lawsuit, MTE's motion to compel should be denied as unnecessary and moot.

IV. BIA Invoicing Policies

MTE next argues that the United States should be compelled to search for and produce "invoicing policies" pertaining to the thirty-six Indian Tribes within the BIA's Midwest Region. According to MTE, "discovery will show that no other Tribe in the region was forced to comply with the retroactive standards and arbitrary and capricious whim of a BIA employee to which [MTE] was held." MTE Memorandum, at p. 28.

As with many of MTE's discovery demands, the relevance of invoicing policies and procedures as they pertain to other Indian Tribes is highly questionable. Even if it is true, as MTE asserts, that the BIA created a unique policy for MTE, it fails to explain how this is inappropriate in any way. Nor has MTE explained how this is material to the charges against it. The relevant question is not whether the BIA required MTE to follow a unique invoicing procedure. Rather, the

relevant questions are, whatever the invoicing policy: (1) whether MTE present false invoices for payment; and (2) if so, whether it did so knowingly within the meaning of the False Claims Act. The United States has not brought this action because MTE failed to follow some new or allegedly retroactive procedure. The government's allegation is that MTE presented for payment knowingly false documents. Whether the BIA used different invoicing policies for other Indian Tribes are simply not relevant to this inquiry. Therefore, the United States should not be required to undertake the burden of searching the BIA's files pertaining to thirty-six other Indian Tribes for this type of information.

V. Electronic Discovery

MTE asks the court to compel the United States to produce a "mirror image of the Congos hard drive." MTE Memorandum, at p. 29. MTE makes this request despite the fact that as of April 3, 2008, the government has: (1) sent Mr. Congos' laptop computer to the OIG's forensic lab for recovery of thousands of emails and documents (this computer was out of service by the time of the government's lawsuit but was preserved pursuant to a government-issued "litigation hold" of potentially relevant electronic documents); (2) requested that the lab run a reasonable number of computer searches, using key word terms, to capture potentially relevant documents[6]; and (3) provided the search results, in their "native" format (i.e. a .pdf document was produced in .pdf format), with metadata included, to counsel. The United States has further informed counsel that

[6]In response to the government's request for cooperation in developing these key word search times, MTE initially refused, and then on the eve of the OIG lab's search demanded that the United States run searches using in excess of two-hundred search terms. See Declaration of Joshua Jay Kannassatega in Support of MTE's Motion to Compel, Exhibit T, at pp. 6-7. Not only would this search process have been unduly burdensome, it would have resulted in the production of thousands of duplicative and overlapping documents and emails.

a report pertaining to the OIG lab analysis would be available in the near future. Given the volume of emails, documents, attachments and other information contained on the is computer (which has a 27.9 gigabyte hard-drive containing over 150,000 individual computer files), the United States' production of information from the Congos hard drive was entirely reasonable.[7] Moreover, because the Congos laptop is a government-owned computer, it may contain a variety of information that is sensitive or irrelevant to this case. Particularly in light of MTE's stated intention to publically disclose the discovery material in this case, this Court should deny MTE's request to compel the production of a mirror image of the Congos hard drive.

MTE objects further to the manner in which the United States produced archived emails and attachments recovered via the "Zantaz" archiving system.[8] In particular, MTE complains that "the name of the BIA employee from whose system the email was printed" was not displayed. MTE Memorandum, at p. 29. The United States, however, has produced and printed the entirety of the information recovered from its search of the Zantaz system. MTE apparently questions the heading of these emails (which identifies Chuck Westphal as the person whose computer was used to print the emails). See e.g., Declaration of Joshua Jay Kannassatega in Support of MTE's Motion to

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[7]In response to the government's April 3, 2008, production of documents from the Congos hard drive, counsel for MTE responded with a letter dated April 7, 2008, raising five "issues" about the manner in which the United States produced these documents. A copy of MTE's April 7, 2008 correspondence is attached as Exhibit 2.

[8]The Zantaz archiving system was established in 1999 as a result of a court order in the ongoing litigation, *Cobell v. Babbitt*, No.1:96CV01285 (D.D.C.)(see Order dated August 12, 1999). The order, which remains in effect, required the Interior Department to establish procedures to ensure the preservation of information related to Indian trust assets. DOI, in turn retained a private contractor, called Zantaz, to preserve BIA email communications in a searchable database. At MTE's request, the United States searched this system for and retrieved emails pertaining to David Congos and Thomas Magnuson (another BIA employee assigned to the BIA's offices in Keshena, Wisconsin).

Compel, Exhibit H. As explained to MTE's counsel, this could not be avoided, because the Outlook program used to print the emails does not allow for the deletion of that information. The manner in which these emails were produced, moreover, should not detract in any way from MTE's ability to authenticate them. The emails all identify the sender and recipient information. Regardless of the header information, MTE would still be required to authenticate the emails in the same manner as any other document or business record. MTE's objections as to the manner of production of the Zantaz emails are without merit.

MTE finally makes the vague assertion that the government has not cooperated in the production of other "potentially relevant BIA electronic data." MTE Memorandum, at p. 30. Yet the BIA has undertaken, at great burden and expense, to compile a searchable computer hard-drive containing voluminous sources of information relating to the Menominee Indian reservation. Indexes of that data have been provided and updated throughout the course of discovery. See e.g., Declaration of Joshua Jay Kannassatega in Support of MTE's Motion to Compel, Exhibit U. The United States has, on repeated occasions, encouraged MTE to cooperate in formulating key word search terms which might disclose relevant data. MTE has consistently refused, instead demanding that the United States produce "all relevant documents." Despite this lack of cooperation, the BIA has used this database to help locate documents sought by MTE and the individual defendants. At this late stage of discovery, MTE should not heard to demand additional searches of large volumes of electronic information based on vague and unsupported assertions that additional "potential relevant BIA electronic data may exist."

CONCLUSION

For the reasons set forth above, the Plaintiff, United States of America, respectfully requests that this Court deny MTE's motion to compel.

Dated this 9th day of April, 2008.

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