UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ALLTEL COMMUNICATIONS, L.L.C.,	)	
	)	Misc. Case No. 10-24
Plaintiff,	)	
	)	
v.	)	
	)	
EUGENE DEJORDY,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF NON-PARTY GONZALEZ LAW FIRM'S RENEWED MOTION TO QUASH SUBPOENA TO TESTIFY AT A DEPOSITION AND MOTION TO VACATE ORDER FOR *IN CAMERA* REVIEW, AND IN RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

The Gonzalez Law Firm, which is not a party in the above-captioned case, by and through Mario Gonzalez, attorney of record, hereby respectfully submits its Brief (1) in Support of the Firm's Renewed Motion to Quash the Subpoena to Testify at a Deposition ("Subpoena") issued to the Firm in this proceeding, (2) in Support of the Firm's Motion to Vacate the Court's Order of February 17, 2011 insofar as it directs the Gonzalez Law Firm to produce certain privileged documents for *in camera* review, and (3) in response to the Order to Show Cause issued by the Court on April 8, 2011, as to why Mario Gonzalez, individually and on behalf of the Gonzalez Law Firm, should not be held in contempt for failing to comply with the Court's Order of February 17, 2011.

I. Background.

On January 27, 2011, Alltel Communications, LLC, ("Alltel") issued a Subpoena to the Gonzalez Law Firm ("Firm") in the above-captioned case. However, the Firm is protected from being compelled to testify and to produce the documents sought by the Subpoena by the

attorney-client privilege as it represents the Oglala Sioux Tribe ("Tribe") and also by the sovereign immunity of the Oglala Sioux Tribe.

On February 16, 2011, the Firm filed a Motion to Quash the Subpoena [Dkt. 34] and Brief in Support of the Motion to Quash [Dkt. 35], which raised the defenses of attorney-client privilege and tribal sovereign immunity. On February 17, 2011, the Court requested the Firm to withdraw its Motion to Quash based upon a pending ruling, as set forth in the affidavit of Mario Gonzalez in Exhibit "A". On February 17, 2011, the Firm withdrew the Motion to Quash as requested by the Court [Dkt. 37].

On February 17, 2011, this Court entered an Order holding that the Oglala Sioux Tribe did not enjoy sovereign immunity from having to comply with the Subpoena [Dkt. 36], which ruling has been appealed to the Eighth Circuit. [Dkt. 39]. The Court's Order further directed that Attorney Mario Gonzalez "shall deliver to the court's chambers for *in camera* review on or before **March 3, 2011**, copies of the documents, in their entirety, identified in entries 1, 4, 5, 6, 7 and 10 from the revised privilege log (Docket 31-1)." [Dkt. 36.]

Since November 2009, the Firm has been advising and representing the Tribe in matters relating to issues involving the Tate Woglaka Service Agreement, Eugene DeJordy, Native American Telecom, LLC, and Alltel Communications, LLC. During the course of that representation, documents were created that reflected or contained legal opinions and/or legal advice to the Oglala Sioux Tribe.

Alltel seeks the disclosure of communications from the Firm that were created during its representation of the Tribe to secure redress relating to the Tate Woglaka Service Agreement from Alltel Communications, LLC or any of its affiliates. Specifically, the Subpoena demands the Firm to testify at a deposition to be taken in this civil action regarding the following:

> "Communications between Gonzalez Law Firm and Eugene DeJordy, Thomas Reiman, Native American Telecom, or Dakelyn Consulting relating to the Oglala Sioux Tribe's efforts to secure redress relating to Tate Woglaka Service Agreement."

The Firm has determined that the requested communications are privileged under the attorney-client privilege and that the Oglala Sioux Tribe is also protected from disclosing the requested communications by tribal sovereign immunity. Therefore, disclosure is precluded on ethical grounds and by the extension of absolute executive privilege to the Tribe's attorney.

Alltel subsequently filed a motion for contempt, for sanctions, and for an order enforcing the February 17, 2011, Order. [Dkt. 45.] The Court, on April 8, 2011, issued an Order to Show Cause requiring Attorney Mario Gonzalez, both individually and on behalf of the Gonzalez Law Firm, to appear and show cause why he individually and on behalf of the Gonzalez Law Firm, should not be held in contempt of court for failing to comply with the February 17, 2011, Order. [Dkt. 47.]

II. The Communications are Attorney-Client Privileged

Given the nature of the communications, there is at least one privilege that is likely to preclude their disclosure. The attorney-client privilege extends to all communications between a client and his or her attorney when legal advice or counsel is sought. South Dakota cases interpreting these statutes have held that four elements must be present to invoke the attorney-client privilege: (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of the five relationships enumerated in SDCL §19-13-3.[1]

---

1 SDCL §19-13-3 provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

Lamar Advertising of S.D., Inc. v. Kay, 267 F.R.D. 568, 574-75 (D.S.D. 2010), citing *State v. Rickabaugh*, 361 N.W.2d 623, 624-25 (S.D. 1985) (quoting *State v. Catch The Bear*, 352 N.W.2d 640, 645 (S.D.1984)). The communications at issue here were created during the course of the Firm's representation of the Oglala Sioux Tribe, were confidential, were made for the purpose of facilitating the rendition of professional legal services to the Tribe, and fell within the five relationships enumerated in the state statute.

Only a client can waive the attorney-client privilege, and the client does so only if he voluntarily or through his attorney discloses a significant portion of the communication's contents or advice to someone outside the relationship. *State v. Rickabaugh*, 361 N.W.2d at 625; *State v. Catch The Bear*, 352 N.W.2d 640, 647 (S.D. 1984). The Firm has inquired of its client, the Oglala Sioux Tribe, as to whether it wishes to waive all claims of privilege at this time, and the Tribe has informed counsel for the Firm that it does not wish to waive any of its claims of privilege. Nor have the contents of these communications been previously disclosed to third parties. The burden of establishing a waiver of the attorney-client privilege is on the party asserting the claim of waiver, in this case Alltel. *State v. Rickabaugh*, 361 N.W.2d at 625; *State v. Catch The Bear*, 352 N.W.2d at 647. Alltel has not shown any such waiver. Therefore, the documents requested remain privileged, and their disclosure is precluded.

---

(1) between himself or his representative and his lawyer or his lawyer's representative;

(2) between his lawyer and the lawyer's representative;

(3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) between representatives of the client or between the client and a representative of the client; or

(5) among lawyers and their representatives representing the same client.

III. The Communications are Protected by Sovereign Immunity

As the Court is aware, the Oglala Sioux Tribe's sovereign immunity protects it from suit. *Catskill Development, LLC v. Park Place Entertainment Corp.,* 206 F.R.D. 78, 86 (S.D.N.Y. 2002)("[T]he doctrine of tribal immunity from suit is well established"); *United States v. James,* 980 F.2d 1314, 1319 (9th Cir. 1992), *cert. denied,* 510 U.S. 838 (1993) ("It is clear that Indian tribes' immunity from suit remains intact 'absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress.'"), quoting *Burlington N. R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation,* 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied,* 505 U.S. 1212 (1992), *overruled in part on other grounds by Big Horn County Electric Coop. v. Adams,* 219 F.3d 944, 953 (9th Cir. 2000).

This immunity extends to protect the Tribe from complying with subpoenas, including non-party subpoenas. *U.S. v. James,* 980 F.2d at 1319-1320 (where tribe did not expressly waive its immunity in social and health service documents, district court acted correctly in quashing subpoena duces tecum issued at the request of the defendant in a criminal prosecution); *Catskill Development*, 206 F.R.D. at 87-88 (holding tribal sovereign immunity applies to non-party subpoenas in a civil case). Tribal immunity also extends to tribal officials when acting in their official capacity and within their scope of authority. *Davis v. Littell,* 398 F.2d 83, 84-85 (9th Cir. 1968), *cert. denied,* 393 U.S. 1018 (1969); *Catskill Development*, 206 F.R.D. at 86. This sovereign immunity further extends to the position of tribal attorney as tribal attorneys fall within the executive class of officers to which absolute immunity applies. *Diver v. Peterson,* 524 N.W. 2d 288, 291 (Minn. App. 1994).

In *Catskill Development*, the plaintiffs' subpoenas commanded the appearance of the tribe's non-member attorneys for testimony and the production of documents. In upholding the magistrate judge's action in quashing the subpoenas, 206 F.R.D. at 92, the district court held that, "[a]s a general proposition, a tribe's attorney, when acting as a representative of the tribe and within the scope of his authority, is cloaked in the immunity of the tribe just as a tribal official is cloaked in that immunity." *Id.* at 91 (citations omitted).

In this case, the Firm at all times relevant to this case was acting as a representative of the Oglala Sioux Tribe and within the scope of the Firm's delegated authority. And while it is true that "to the extent that sovereign immunity has been waived by the Tribe, the waiver extends to the attorneys," *Catskill Development*, 206 F.R.D. at 92, no waiver of immunity by the Tribe in the requested testimony and documents has been shown in this case. Alternatively, Alltel's broad request for disclosure of all communications between the Firm and Eugene DeJordy, Thomas Reiman, Native American Telecom, or Dakelyn Consulting, "relating to the Oglala Sioux Tribe's efforts to secure redress relating to Tate Woglaka Service Agreement," goes far beyond any limited waiver of immunity that the Tribe might have made. *See id.*

IV. The Court Should Vacate Its February 17, 2011 Order.

This Court has inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment. *Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995), citing *Lovett v. General Motors Corp.*, 975 F.2d 518, 522 (8th Cir. 1992); *see also Association for Retarded Citizens of North Dakota v. Sinner*, 942 F.2d 1235, 1239 n. 4 (8th Cir. 1991). The Court's Order entered on February 17, 2011, directing the Tribe's attorney, Mario Gonzalez, to produce certain documents for *in camera* review, is interlocutory in nature and thus is subject to being modified pursuant to the Court's inherent power where the

Court becomes convinced that the order is flawed. *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. De C.V.*, 319 F. Supp. 2d 939, 941 (S.D. Iowa 2004). As shown above, the February 17, 2011 Order enforcing the Subpoena is flawed because it fails to recognize that (a) the communications whose disclosure is sought by the Subpoena are shielded from disclosure by the attorney-client privilege and (2) the Firm, while acting as a representative of the Tribe and within the scope of its authority, shares in the sovereign immunity of the Tribe, and is therefore immune from having to comply with the Subpoena.

For these reasons, the Court should exercise its inherent power to amend an interlocutory order and vacate its Order of February 17, 2011.

V. The Tribe's Attorney Should Not Be Held In Contempt.

The contempt power is a most potent weapon, and therefore it must be carefully and precisely employed. *Independent Federation of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998). The party seeking civil contempt bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order. *Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing*, 207 F.3d 500, 505 (8th Cir. 2000) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947)). Where it is undisputed that the defendant has violated a court order, the burden shifts back to the defendant to show that compliance is presently impossible. *Chicago Truck Drivers*, 207 F.3d at 505 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)). "To show that compliance is presently impossible, the defendant must demonstrate: '(1) that they are unable to comply, explaining why categorically and in detail, (2) that their inability to comply was not self-induced, and (3) that they made in good faith all reasonable efforts to comply.'" *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 736 (8th Cir. 2001) (quoting *Chicago Truck Drivers*, 207 F.3d at 506.)

In this case, the defendant has demonstrated that compliance is presently impossible. As tribal attorney, defendant is unable to comply with the Court's order to disclose the documents in question for *in camera* review without (a) violating its ethical obligations not to disclose communications protected by the attorney-client privilege, and (b) exceeding his authority as the Tribe's attorney, which authority does not include the power to waive the sovereign immunity of the Tribe. The defendant's inability to comply is not self-induced: the Tribe, not the tribal attorney, has the sole and exclusive prerogative to determine whether and to what extent the attorney-client privilege and/or the Tribe's sovereign immunity should be waived. Finally, the defendant made in good faith all reasonable efforts to comply by (a) first carefully reviewing and determining that the requested communications are privileged under the attorney-client privilege and that the Oglala Sioux Tribe is also protected from disclosing the requested communications by tribal sovereign immunity, and (b) inquiring whether the Tribe was willing to waive the protections of the attorney-client privilege and tribal sovereign immunity (which the Tribe refused to do). Absent an appropriate waiver by the Tribe of the attorney-client privilege and tribal sovereign immunity, the attorney's hands are tied, as he himself can neither waive the protection of the attorney-client privilege nor waive tribal sovereign immunity. Only the Tribe itself, acting through its governing body, the Tribal Council, can waive the protections of the attorney-client privilege and tribal sovereign immunity.

Furthermore, judicial sanctions in civil contempt proceedings may only be employed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United Mine Workers*, 330 U.S. at 303-304 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 448-449 (1911)). Sanctions for civil contempt are not imposed to punish the contemnor but must be based on

evidence of actual loss. *Jones v. Clinton*, 57 F. Supp. 2d 719, 724 (E.D. Ark. 1999) (citations omitted), *appeal dism'd*, 206 F.3d 811 (8th Cir. 2000). In this case, if the Court determines that its Order of February 17, 2011 should be vacated, coercion of the defendant to comply with that order becomes a moot issue. Furthermore, Alltel has not alleged or shown any actual losses sustained as a result of defendant's alleged violation of the Order of February 17, 2011. Consequently, judicial sanctions cannot be awarded for Mr. Gonzalez' violation, if any, of that order.

IV. Prayer for Relief

The Gonzalez Law Firm respectfully requests that this Court recognize that the communications at issue are privileged and protected by sovereign immunity, and that the Gonzalez Law Firm is obligated to forego production. Accordingly, this Court should grant the Firm's Renewed Motion to Quash the Subpoena and its Motion to Vacate the Court's Order of February 17, 2011. The Court should further deem the Order to Show Cause fully discharged and, accordingly, should dismiss the civil contempt proceedings against defendant, Attorney Mario Gonzalez, with prejudice.

Dated this 13th day of April, 2011.

Respectfully submitted,

/s/ Terry Pechota

Terry Pechota, Esq. (SDSB # 2002)
1617 Sheridan Lake Road
Rapid City, South Dakota 57701-2756
Tel: 1-605-341-4400
Fax: 1-605-341-0716
Email: tpechota@1868treaty.com

Attorney for Non-Party Gonzalez Law Firm