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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

GRAND CANYON SKYWALK DEVELOPMENT, LLC, a Nevada limited liability company; DAVID JIN, an individual; THEODORE (TED) R. QUASULA, an individual,

Plaintiffs,

vs.

RUBY STEELE, CANDIDA HUNTER, WAYLON HONGA, CHARLES VAUGHN, SHERRY COUNTS, WILFRED WHATONAME, SR., each individuals and members of the Hualapai Tribe Council; PATRICIA CESSPOOCH, an individual and member of the Hualapai Tribe; DAVID JOHN CIESLAK, an individual; NICHOLAS PETER "CHIP" SCUTARI, an individual; SCUTARI & CIESLAK PUBLIC RELATIONS. INC., an Arizona corporation,

Defendants.

DAVID JOHN CIESLAK, an individual; NICHOLAS PETER "CHIP" SCUTARI, an individual; SCUTARI & CIESLAK PUBLIC RELATIONS. INC., an Arizona corporation,

Third-Party Plaintiffs,

vs.

HUALAPAI TRIBE,

Third-Party Defendant.

Case No. 2:15-mc-00024-JJT

Case No. 2:13-cv-00596-JAD-GWF
(Case pending in United States District Court, District of Nevada)

REPLY IN SUPPORT OF MOTION TO QUASH DEFENDANTS/THIRD-PARTY PLAINTIFFS' SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS

I. INTRODUCTION.

S&C concedes that Gallagher & Kennedy, P.A. ("G&K"), as the Tribe's counsel, shares the Tribe's sovereign immunity. Because controlling Ninth Circuit law accepts sovereign immunity as grounds to quash a subpoena, and because the Tribe has not waived immunity regarding the subpoena issued by S&C to G&K ("Subpoena"), the Subpoena should be quashed.

II. AS TRIBAL COUNSEL, G&K HAS SOVEREIGN IMMUNITY.

A. G&K's Communications In Its Capacity As The Tribe's Legal Representative Are Cloaked With Tribal Immunity.

There is no dispute that G&K was acting as the Tribe's legal counsel in its dealings with S&C. For example, S&C alleges that the Tribe retained S&C at G&K's suggestion to handle public relations needs arising from the litigation with GCSD, that G&K was the "gatekeeper" for the Tribe, and that S&C's communications with G&K occurred in the context of the disputes with GCSD. Response at 3-4. In addition, S&C does not contest that G&K was the attorney for the Tribe in all litigation with GCSD, or that G&K was acting in its official capacity as counsel for the Tribe when communicating with S&C.

In fact, S&C does not even contest that G&K, as the Tribe's legal counsel, shares the Tribe's sovereign immunity. S&C even quotes *Catskill Dev., LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 92 (S.D.N.Y. 2002), that tribal attorney acting as representatives of the tribe and within the scope of their authority have sovereign immunity. Response at 7. S&C instead makes two arguments: (1) issuance of a subpoena is not a "suit" to which sovereign immunity applies; and (2) the Tribe waived its sovereign immunity to an indemnity claim by S&C, so G&K's sovereign immunity from service of the Subpoena has also been waived. Neither argument has merit.

B. Sovereign Immunity Applies To Issuance Of A Subpoena.

S&C maintains that issuance and service of a subpoena is not a "suit," so the Tribe cannot raise tribal immunity in response to it. This argument ignores not only *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), in which the Ninth Circuit affirmed an order quashing a subpoena on grounds of tribal immunity, but also Eighth and Tenth

Circuit cases to the contrary.

S&C points only to *United States v. Juvenile Male 1*, 431 F. Supp. 2d 1012 (D. Ariz. 2006), as support. In *Juvenile Male 1*, the juvenile defendant in a criminal prosecution issued subpoenas to custodians of records for Navajo Tribal entities. The Navajo Tribe moved to quash the subpoenas, asserting sovereign immunity. The Court framed the issue as: "whether the juvenile's right 'to have compulsory process for obtaining witnesses in his favor' under the Sixth Amendment to the United States Constitution extends to those witnesses who are custodians of records maintained by school and social service agencies under the control of the Navajo Tribe of Indians." 431 F. Supp. 2d at 1013. The court denied the motion to quash, stating that service of a federal subpoena on an employee of a tribal entity for official records is not a suit against the tribe, and that tribal immunity has no applications to claims made by the United States or when constitutional rights are at stake.[1] 431 F. Supp. 2d at 1016-1017.

Juvenile Male 1 is easy to reconcile with *James*, which controls here. The court in *Juvenile Male 1* distinguished *James* on the grounds that "defendants there did not raise constitutional challenges to the claim of immunity." 431 F. Supp. 2d at 1018. In other words, the *Juvenile Male 1* court relied on the Sixth Amendment rights asserted by the criminal defendant to justify its refusal to follow *James* and quash the subpoena on sovereign immunity grounds. The case, therefore, has no application in this civil action, where S&C has no corresponding Sixth Amendment rights. And S&C cites no non-criminal case in which a court has held that a tribe's sovereign immunity is impotent in the face of a federal subpoena. In fact, the Ninth Circuit in *James* ruled that, even for a subpoena in a criminal case, the tribe "was possessed of tribal immunity at the time the subpoena was served, unless the immunity had been waived." *James*, 980 F.2d at 1319.

[1] The Court in *Juvenile Male 1* relied upon *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 778 (9th Cir. 1994), in which the Ninth Circuit held that sovereign immunity and the Supremacy Clause preclude a state court from compelling a federal employee to testify, but that the same limitations do not apply when a federal court exercises its subpoena power against federal officials. This is not a case involving service of a federal subpoena on a federal official, but a federal subpoena served on counsel for a different sovereign.

Moreover, the court in *Juvenile Male 1* engaged in no meaningful analysis of whether issuance of a subpoena is a "suit" against the tribe, deferring instead to a supposedly "strange" result if a federal subpoena were operative against the "greater sovereign" (*i.e.* the United States), but not the "lesser" (*i.e.* Indian tribes).

Far more persuasive is *Alltel Comm'ns, LLC v. DeJordy*, 675 F.3d 1105 (8th Cir. 2012), in which the Eight Circuit examined the definition of "suit" in light of the Supreme Court's "well-established federal 'policy of furthering Indian self-government," and concluded that "a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." 675 F.3d at 1105, quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). The holding in *Alltel* is consistent with *James*.

The Subpoena has all the markings of a "suit." It is a formal legal process, issued from this Court, commanding G&K as the Tribe's counsel to produce documents related to G&K's representation of the Tribe. If not for sovereign immunity or other valid objections, S&C could obtain a judgment compelling compliance with the Subpoena should G&K fail to produce the requested documents. And but for sovereign immunity, S&C could seek to expand the scope of its discovery to include depositions of the Tribe's attorneys and Tribal Council members. Permitting this broad discovery would threaten the federal policy of tribal self-determination and cultural autonomy that underlie the doctrine of tribal immunity. *Alltel*, 675 F.3d at 1104.

It would be a strange result, indeed, if a tribe and its counsel have immunity from service of a lawsuit, but not from a "lesser" legal process of service of a subpoena. Accordingly, as the Eight Circuit held in *Alltel* and as the Ninth Circuit impliedly recognized in *James*, a subpoena is a legal process to which tribal immunity applies.

C. <u>The Tribe Did Not Waive Sovereign Immunity</u>.

The basis of G&K's motion to quash is that it is cloaked with the Tribe's sovereign immunity from legal process, *i.e.*, service of the Subpoena. S&C contends that G&K cannot assert immunity in response to the Subpoena for documents because the Tribe contractually waived sovereign immunity from an action by S&C for indemnification.

S&C is wrong for two reasons.

First, S&C's waiver argument is based on its claim that the Tribe waived immunity from *liability* to S&C by entering into the Communications and Public Relations Agreement ("Agreement"). As S&C interprets the Agreement (incorrectly), the Tribe waived its immunity by agreeing to indemnify S&C for liability from claims by third parties. However, S&C claims G&K must respond to the Subpoena because S&C has raised an "advice of counsel" *defense* to Plaintiffs' Complaint. Those are two different things, and the law treats them as such for purposes of tribal immunity.

An Indian tribe's immunity is broad to preserve tribal assets and autonomy. Tribal "[w]aivers of sovereign immunity are construed narrowly and in favor of the sovereign" and "not enlarged beyond what the express language requires." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe*, 966 F. Supp. 2d 876, 883 (D. Ariz. 2013). Furthermore, Article XVI, Section 1, of the Hualapai Tribe's Constitution protects the Tribe, Tribal Council members, and all tribal officials acting in their official capacities and within the scope of their authority from suit "except to the extent that the Tribal Council expressly waives sovereign immunity." *Grand Canyon Skywalk*, 966 F. Supp. 2d at 883.

Waiver, therefore, cannot be extended beyond its express terms. For example, although the filing of a lawsuit by a tribe may constitute consent for the court to decide the merits of that action, the waiver of tribal sovereign immunity does not extend to counterclaims, except in limited circumstances of setoff or recoupment. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 891 (1986) (tribes' access to sue in state court may not be conditioned on global waiver); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) ("[T]ribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts.").

In *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985), a tribe filed a complaint for declaratory and injunctive relief to enjoin the Board of Equalization from enforcing its cigarette tax against the tribe. The Board counterclaimed for taxes due. The district court had held that sovereign immunity barred the counterclaim. The district court recognized that the tribe's immunity from suit "might create practical difficulties for the Board in attempting to enforce its cigarette tax laws against the Tribe," but concluded, "these potential enforcement problems cannot override the Tribe's claim of sovereign immunity." *Chemehuevi Indian Tribe v. California State Board of Equalization*, 492 F. Supp. 55, 61 (1979). The Ninth Circuit affirmed, holding that the tribe's "initiation of a suit for declaratory and injunctive relief does not constitute consent to the Board's counterclaim." *Chemehuevi*, 757 F.2d at 1053.

The same principles apply here. Assuming, *arguendo*, that the Tribe waived immunity in the Agreement as to the duty to indemnify S&C, the Tribe and its attorneys still would remain immune from all other claims. But the Subpoena is not intended to garner information about S&C's indemnity claim against the Tribe. Rather, it seeks communications from G&K related to S&C's advice of counsel defense. Doc. 10 at 6, ll. 19-23 ("The subpoena *duces tecum* is seeking document production in order to aid S&C with its advice of counsel defense to a defamation claim . . . the information sought is only relevant to the extent it will show that S&C had a good faith, lawful belief in the advice it received from G&K"). Even under S&C's theory, the Tribe's purported waiver of liability from S&C's indemnity claim would not have waived G&K's or the Tribe's immunity with regard to S&C's defense against Plaintiffs' claims. Therefore, whether or not the Tribe waived tribal immunity as to S&C's third-party indemnity claim, G&K remains cloaked in the Tribe's sovereign immunity for purposes of S&C's "advice of counsel" defense. *See James*, 980 F.2d at 1320 (tribe did not waive its sovereign immunity to subpoena for documents from one agency when it voluntarily produced documents subpoenaed from another agency).

Second, the Tribe did not waive sovereign immunity in its Agreement with S&C in any event. G&K and the Tribe request this Court to take judicial notice of the Tribe's Motion to Dismiss in the Nevada District Court case, as well as S&C's response and the Tribe's reply. [Docs. 96, 108 (Filed Under Seal), and 114]. In those pleadings, the Tribe explains why it has sovereign immunity and why that immunity was not waived in the Agreement. However, it is not necessary to resolve the same issues pending before the Nevada District Court because, as discussed above, the Tribe has not waived sovereign immunity as to S&C's "advice of counsel" defense to Plaintiffs' Complaint.

III. S&C CANNOT WAIVE G&K'S ATTORNEY-CLIENT PRIVILEGE WITH THE TRIBE.

A. G&K Did Not Represent S&C, So S&C Has No Privilege To Waive.

In addition to moving to quash the Subpoena, G&K objected to producing communications between G&K and the Tribe or S&C based on attorney-client privilege. As explained below, S&C was a non-testifying consultant in the various disputes between the Tribe and GCSD.[2] S&C apparently has decided to anticipate a privilege objection in the event the motion to quash is denied.

S&C argues that it "has waived its attorney-client privilege with G&K and G&K *must* produce the requested documents to support S&C's defense." Response at 10, ll. 14-15 (emphasis in original). This argument presumes, incorrectly, that G&K was S&C's attorney. In fact, G&K and S&C never had an attorney-client relationship, and S&C does not provide any evidence to support its claim. To the contrary, S&C says it "was never told" that "G&K considered S&C a trial consultant/expert and thus covered under [an] attorney-client privilege." *Id.* at 4-5.

As explained below, S&C was hired as a consultant to assist G&K and the Tribe regarding political and public media relations surrounding the legal disputes with GCSD, so communications with S&C were covered by G&K's attorney-client relationship *with the Tribe*. But no attorney-client relationship formed with S&C, which is demonstrated

[2] G&K did not raise attorney-client privilege as grounds to quash the subpoena, but reserves all objections in the event the motion to quash is denied.

by S&C's admission that it did not believe at the time that one existed. *See Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146, 149, 24 P.3d 593, 596 (2001) (a purported client's "belief that [the lawyer] was their attorney" is crucial to the existence of an attorney-client relationship, so long as that belief is "objectively reasonable").

The attorney-client relationship that did exist, and which gives G&K grounds to object to the Subpoena on the basis of privilege, was between G&K and the Tribe. S&C cannot waive the Tribe's attorney-client privilege.

B. <u>As A Non-Testifying Consultant, Communications With S&C Were Included Within G&K's Attorney-Client Privilege With The Tribe</u>.

The communications S&C seeks are privileged. Like any other consultant or party representative, federal courts have acknowledged the need for attorneys and their clients to retain political and public relations consultants in anticipation of litigation and for consultation and advice throughout litigation in high-profile cases. For example, in *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003), the U.S. Attorney's Office issued a subpoena to a public relations firm hired by Martha Stewart, the target of a grand jury investigation. The firm refused to produce the documents, contending that the information sought had been generated in the course of the firm's engagement by Stewart's lawyers as part of her defense. The court agreed with the public relations firm, finding that public relations consultants are necessary in high-profile cases. *Id.* at 330 ("Dealing with the media in a high profile case probably is not a matter for amateurs. Target and her lawyers cannot be faulted for concluding that professional public relations advice was needed."). The court thus held that the documents responsive to the subpoena were protected by both the attorney-client privilege and work-product doctrine:

> [T]he ability of lawyers to perform some of their most fundamental client functions...would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants... And there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions.

Id. at 330-331; *see also Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141, (D.C. Cir. 2002) (communications that drug manufacturer shared with its public relations and government affairs consultants were protected by its attorney-client privilege where corporate counsel worked with the consultants and the consultants were "needed to provide input to the legal department").

Because the communications between S&C and G&K are within the scope of the Tribe's attorney-client privilege, G&K may not produce them.[3] Even if the privilege does not apply, however, discovery of communications with non-testifying experts can only take place upon a showing of "exceptional circumstances" under which it is "impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." *See Mantolete v. Bolger*, 96 F.R.D. 179, 181 (D. Ariz. 1982), citing *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1142 (5th Cir.1980). S&C has not tried to make a showing that "exceptional circumstances" justify G&K having to disclose its communications with S&C to the parties in this action.

IV. CONCLUSION.

As Tribal counsel, G&K shares the Tribe's sovereign immunity for purposes of the objections to the Subpoena. The Tribe has not waived its immunity, and S&C cannot waive any privilege between G&K and the Tribe to compel G&K to produce privileged documents. Therefore, the Subpoena should be quashed.

RESPECTFULLY submitted this 6th day of April, 2015.

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[3] According to S&C, discovery has revealed over 1,000 e-mails showing that allegedly defamatory statements were approved by G&K. Response at 4, ll. 23-25. To the extent these e-mails have been disclosed by S&C to Plaintiffs, the Tribe reserves its rights to demand return of privileged communications.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2015, I electronically transmitted the foregoing to the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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