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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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-cv-00663-JAD-GWF

OBJECTIONS TO ORDER DENYING MOTION TO QUASH AND REQUEST FOR REVIEW

Pursuant to Local Rule 1B 3-1, Third-Party Defendant The Hualapai Indian Tribe of the Hualapai Indian Reservation, through its attorneys Gallagher & Kennedy, P.A., both of which make a special limited appearance, object to the Magistrate Judge's Order dated June 5, 2015 ("Order") denying the Motion to Quash Defendants/Third-Party Plaintiffs' Subpoena to Produce Documents, Information, or Objects ("Motion"), and request the District Court to review the Order for reasons discussed below.

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NON-WAIVER OF SOVEREIGN IMMUNITY

This special limited appearance is solely for purposes of moving to quash the subpoena issued to G&K on grounds of sovereign immunity and privilege.[1] Neither this motion nor any preceding or subsequent appearance, pleading, document, writing, objection or conduct, shall constitute a waiver of any rights, protections or immunities, including, without limitation, sovereign immunity, defenses, set-offs, recoupments, or other matters under the Hualapai Constitution, the United States Constitution or federal law. Based upon the foregoing, and in accordance with cases such as *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and its progeny, submission of this motion is not a waiver of sovereign immunity, which is expressly reserved. Furthermore, any alleged waiver of sovereign immunity arising out of this motion or any other participation in this proceeding, which is not conceded, may not be implied to extend beyond the express terms of the issues herein pursuant to cases such as *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and its progeny.

I. INTRODUCTION.

The issue presented in this motion is this: when does legal counsel, acting within the scope of representing a tribe in matters of tribal affairs, have sovereign immunity from service of a subpoena in a federal court action? The Magistrate Judge ruled that sovereign immunity applies only if (1) there is proof the law firm is "general counsel" or holds an "official" position with the tribe, and (2) if the subpoena is served on the tribe, rather than the law firm.

The Tribe objects to these conclusions. A lawyer need not have an "official" position with a tribe before sovereign immunity attaches, and immunity is not limited to subpoenas served on tribes. In addition, the Tribe objects to the Magistrate Judge's refusal to consider the privilege argument in its reply brief, an issue that was raised by S&C in its response. Therefore, the Court should reject the Magistrate Judge's ruling.

[1] Capitalized terms have the same meaning as in the Motion to Quash Defendants/Third-Party Plaintiffs' Subpoena to Produce Documents, Information, or Objects.

II. OBJECTIONS TO THE ORDER AND GROUNDS FOR REVIEW.

A. G&K Has Sovereign Immunity Even Without Proof It Was "General Counsel" For The Tribe.

Relying chiefly on *Stock West Corp. v. Taylor*, 942 F.2d 655 (9th Cir. 1991) and *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), the Magistrate Judge ruled that sovereign immunity does not apply because G&K did not represent in its moving papers that it was the Tribe's "general counsel" or held an "official" position with the Tribe. Order at 13, ll. 22-25. This conclusion, which the Tribe did not have the opportunity to address because S&C never advocated it, is not warranted by case law.

In *Stock West*, a lawyer representing a tribal corporation in a sawmill venture prepared an opinion letter for a lender, which concluded that the venture did not need BIA to approve an agreement. When that conclusion proved to be incorrect, the other party to the venture sued the lawyer for malpractice and misrepresentation. The lawyer then sought dismissal on grounds of sovereign immunity. The Ninth Circuit's analysis of the immunity issue turned not on whether the lawyer was "general counsel" (although the Court noted that he was), but rather on whether the lawyer's actions were within his representative capacity and the scope of his delegated authority. 924 F.2d at 664. Accordingly, the court determined that tribal officials are "amenable to suit if the subject of the suit is not related to the official's performance of official duties." *Id.* at 665. Because there were factual questions as to whether preparing the opinion letter was within the lawyer's official role for the tribe, the court held that discovery was needed before summary judgment on the issue of immunity was appropriate. *Id.*

Here, in contrast, S&C has never contested that G&K was acting in its official capacity as counsel for the Tribe in dealing with S&C; to the contrary, S&C alleges that "All statements made by Defendants were authorized and/or approved by members of HUALAPAI Tribe and/or HUALAPAI Tribe's counsel." Third-Party Complaint ¶ 17. S&C also claimed that G&K had to "vet" S&C on behalf of the Tribe, and that G&K served as the

"gatekeeper" to the Tribal Council.[2] In addition, G&K officially appeared in multiple lawsuits and jurisdictions as counsel for the Tribe in matters involving GCSD, including the eminent domain action. Thus, there is no dispute that G&K's interaction with S&C was within the scope of G&K's role as Tribal counsel.

The rationale for extending sovereign immunity to tribal counsel is that a lawyer advising the Tribe would be hindered in performing his or her functions for the tribal government without immunity. *Stock West*, 942 F.2d at 664. In *Davis*, for example, the attorney was immune from claims of alleged defamation for statements he made to the tribal council about the competence of his subordinate. As the Ninth Circuit recognized in *Stock West*, that was because the attorney in *Davis*, "plainly was acting in his representative capacity and within the scope of his authority" in advising the tribal council. *Id.*; *see also Catskill Dev., LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 92 (S.D.N.Y. 2002) (attorney "acting as a representative of the tribe and within the scope of his authority" is cloaked with sovereign immunity).

This case is similar. G&K did not just issue a single legal opinion letter for a tribal corporation's joint venture, as in *Stock West*, but was involved in advising the Tribal Council with respect to Tribal matters, including the exercise of eminent domain and the related retention of a consultant such as S&C to provide advice about media relations and to coordinate communications with the media about the disputes with GCSD. *See generally* Exhibit B to S&C's Opposition to Motion to Quash Defendants/Third-Party Plaintiffs' Subpoena to Produce Documents, Information, or Objects [Filed Under Seal]. S&C contends that its role was broader, and that the Tribe hired S&C at G&K's suggestion to protect the name of the Tribe and make the Tribe look "more reasonable" in the eyes of the public. In either case, G&K's involvement with S&C was subsumed within its advice to the Tribal

[2] Although the Tribe and G&K disagree with the factual premise of these statements, the point is that S&C issued the Subpoena to G&K precisely <u>*because*</u> the firm was acting in the scope of its official duties as the Tribe's counsel.

Council regarding the disputes with GCSD, and its later communications with S&C occurred in the performance of those services for the Tribe.

There also is no question that G&K's communications with S&C involved Tribal affairs. S&C's retention by the Tribe was intertwined with the overall dispute with GCSD over management of the Skywalk and the Tribal Council's legislative decision to pursue eminent domain, a fundamental constitutional power and an essential attribute of the Tribe's sovereignty. *See* Hualapai Constitution, Art. IX(c); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977) ("[T]he police power and the power of eminent domain were among those [essential attributes of sovereignty] that could not be 'contracted away.'"). These matters, which were at the heart of S&C's retention and communications with G&K, involved the Tribe's public affairs and G&K's role in the Tribe's governance.

The confidential nature of the relationship among G&K, the Tribe, and S&C buttresses the need to recognize sovereign immunity for Tribal counsel. As we explained in the reply brief, communications with public relations consultants like S&C that are related to litigation are protected by the umbrella of the attorney-client privilege between the Tribe and G&K. *E.g. In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003). The reason for this is that "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.*, 265 F. Supp. 2d at 330-331. Revealing those discussions to third parties would compromise counsel's representation of its client, a consideration that applies equally to outside counsel and to "general counsel." As the Eighth Circuit explained in a case involving alleged improprieties by retained tribal counsel in a gaming licensing process:

> Tribes need to be able to hire agents, including counsel, to assist in the process of regulating gaming. As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney, or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised.

Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 550 (8th Cir. 1996).

G&K's communications with S&C arose in the larger context of the advice the firm was giving to the Tribe about the disputes with GCSD. To compel G&K to disclose those communications under threat of subpoena would chill Tribal counsel's ability to obtain information, to communicate with a Tribal consultant, and to provide reasoned advice to its Tribal client. Whether "general counsel" or not, sovereign immunity extends to tribal attorneys acting within the scope of their duties to the tribal government, as G&K indisputably was doing.

B. G&K Can Assert Sovereign Immunity Even Though The Subpoena Was Served On G&K Rather Than The Tribe.

The Magistrate Judge also found that G&K could not assert sovereign immunity because the Subpoena was served on the firm, rather than the Tribe. Order at 14, ll. 1-3. It is clearly the law that a tribe is immune from service of a federal subpoena. *U.S. v. James*, 980 F.2d 1314 (9th Cir. 1992). It would be a dramatic and unprecedented intrusion into tribal sovereign immunity to allow a party in civil litigation to evade that immunity by subpoenaing an individual or entity instead of the tribe. Indeed, the subpoena in *James* was issued to a tribal official, not the tribe as an entity. *Id.*, 980 F.2d at 1319. Nevertheless, the Ninth Circuit ordered it quashed.

The decision in *James* is not only binding on this Court, it was the right one. Analogously, a state subpoena against a federal employee concerning testimony about information obtained in his official capacity is a suit against the United States, and therefore barred by sovereign immunity. *See Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989) ("The subpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign"). Based on this reasoning, the Eighth Circuit quashed a federal court's third-party subpoena to a tribe and a tribal administrator. *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1104-1105 (8th Cir. 2012); *see also Catskill Dev.*, 206 F.R.D. at 91-92 (quashing subpoenas served on tribe's attorneys on sovereign immunity grounds). This case is no different.

Although the Magistrate Judge seems to try to find support in *Ex Parte Young*, 209 U.S. 123 (1908), that case does not apply. *Ex Parte Young* stands for the proposition that a federal official may be sued, despite sovereign immunity, when the plaintiff is seeking prospective injunctive relief to enjoin the official from violating federal law. This action involves neither prospective injunctive relief nor a violation of federal law. It involves, more fundamentally, an attempt to use the federal court subpoena power to compel a different sovereign (through service on its legal representative) to act. Sovereign immunity protects the Tribe from that intrusion.

C. The Magistrate Judge Should Have Considered Whether Communications Between G&K And S&C Are Privileged.

The Magistrate Judge refused to consider the Tribe's argument that the documents sought by S&C were privileged, ruling that the argument was made in the reply brief without any opportunity for S&C to respond. However, S&C was the one that raised the privilege issue in its responsive pleading. Opposition to Motion to Quash Defendants/Third-Party Plaintiffs' Subpoena to Produce Documents, Information, or Objects at 9-10 (a "party asserting the attorney-product doctrine bears the burden of establishing a privilege applies. G&K failed to make such a showing. G&K cannot assert attorney-client privilege or work-product doctrine with regards to communications requested within the subpoena *duces tecum*." (citations omitted)).

Having opened the door to the privilege issue, it was not unfair for G&K to explain in its reply why the attorney-client privilege and work-product doctrine applied. Therefore, the Magistrate Judge should have addressed the privilege arguments. *See U. S. v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) ("Although we ordinarily decline to consider arguments raised for the first time in a reply brief, we may consider them if, as here, the appellee raised the issue in its brief").

III. CONCLUSION.

For the foregoing reasons, the following rulings are objected to:

/ / /

1. That G&K does not share the Tribe's sovereign immunity because there was no showing that G&K was "general counsel" for the Tribe or was a Tribal "official," even though there is no dispute that G&K was acting within the scope of its representation in advising the Tribe in its dealings with GCSD including, as part of that advice, hiring S&C to provide public relations consultation.

2. That G&K was not protected by sovereign immunity because the Subpoena was served on the law firm, rather than the Tribe.

3. That the issue of privilege would not be considered because it was raised in the reply brief.

RESPECTFULLY submitted this 19th day of June, 2015.

GALLAGHER & KENNEDY, P.A.

By: */s/ Jeffrey D. Gross*

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CERTIFICATE OF SERVICE

I certify that I am an employee of GALLAGHER & KENNEDY, P.A., and that on this 19th day of June, 2015, I served a true and correct copy of the **OBJECTIONS TO ORDER DENYING MOTION TO QUASH AND REQUEST FOR REVIEW** via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk.

/s/ Candice J. Cromer
an employee of Gallagher & Kennedy, P.A.