UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KEWEENAW BAY INDIAN COMMUNITY, a federally-recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

Plaintiff,

v.

NICK A. KHOURI, Treasurer of the State of Michigan; WALTER FRATZKE, Native American Affairs Specialist of the Michigan Department of Treasury; RUTH JOHNSON, Secretary of State of Michigan; and CHRISTOPHER CROLEY, Detective/Sergeant of the Michigan State Police; DANIEL C. GRANO, Assistant Attorney General for the State of Michigan; and, TIMOTHY SPROULL, Detective of the Michigan State Police,

Defendants.

No. 2:16-cv-00121

HON. PAUL L. MALONEY

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER

ORAL ARGUMENT REQUESTED BY TELEPHONE
EXPEDITED CONSIDERATION REQUESTED

Bill Schuette
Attorney General

Jaclyn Shoshana Levine (P58938)
Kelly M. Drake (P59071)
Laura R. Gnyp (P79943)
Assistant Attorneys General
Attorneys for Defendants
Environment, Natural Resources and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
LevineJ2@michigan.gov

DrakeK2@michigan.gov
GnypL@michigan.gov

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Are Defendants entitled to a protective order barring pending and future discovery concerning the state prosecutions?

2. Are Defendants entitled to a protective order barring pending and future discovery that could directly or indirectly reveal the identity of a confidential informant or the individuals at the trucking facility who identified the trucks?

3. Are Defendants entitled to a protective order barring pending and future discovery of police investigative techniques, including surveillance?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Fed. R. Civ. P. 26(b)(2)

Fed. R. Civ. P. 26(c)(1)

INTRODUCTION

Defendants file this motion pursuant to Fed. R. Civ. P. 26(b)(2) and 26(c)(1) seeking to prevent the Keweenaw Bay Indian Community (the Community) from conducting discovery related to: (a) ongoing state prosecutions under the Tobacco Products Tax Act (TPTA), Mich. Comp. Laws § 205.421 *et seq*., of two Community members for transporting cigarettes seized on December 11, 2015; (b) the confidential informant who provided information related to the February 9, 2016 cigarette seizures, and the personnel at the trucking facility who provided truck identification information; and (c) the methods or techniques the MSP used to investigate TPTA violations. A protective order should be granted for lack of relevance, unreasonable annoyance, privilege, and undue burden disproportionate to the needs of the case. The issues raised in this motion are also directly connected to a motion for partial summary judgment and abstention concerning state prosecutions Defendants filed in September 2017. (ECF No. 98.) Granting this motion is necessary to preserve the status quo until the court decides that motion. With only three months left before the end of discovery and because these topics will be addressed in upcoming depositions, Defendants respectfully request oral argument by telephone and an expedited decision.

LEGAL STANDARD

"Under Federal Rule of Civil Procedure 26(c)(1), a court may grant a protective order preventing the production of discovery to protect a party or entity from 'annoyance, embarrassment, oppression, or undue burden or expense.'" *In re Ohio Execution Protocol Litigation*, 845 F.3d 231, 235 (6th Cir. 2016) (quoting Fed. R. Civ. P. 26(c)(1)). A party seeking a protective order must show "good cause" for protection from one or more of the harms listed in Rule 26(c)(1). *Id.*

ARGUMENT

I. The Community is not entitled to discovery related to the state prosecutions.

Michigan is prosecuting Community members John Davis and Gerald Magnant for transporting fifty-six cases of untaxed, unstamped cigarettes that were seized after a traffic stop that occurred on December 11, 2015. (PageID.1262-66; PageID.1302, ¶ 12.) The state trial judge presiding for the prosecutions held that the stop and search was "valid all the way through." (PageID.1573, p. 134.) Yet, Counts IX, X, XI, XII, XVI, and XVII in this case ask the court to stop the prosecutions and prevent Defendants from enforcing the TPTA. (ECF No. 58.)

The Community's discovery requests seek: (1) ***all*** documents relating to the three seizures; and (2) information concerning ***all*** activities undertaken by the Michigan Department of Treasury (Treasury), its agents, and the Michigan State Police (MSP) within the Community's Indian country related to TPTA violations or enforcement since 2010, regardless of whether the activities relate to the Community or its members. (PageID.1345, ROG 8; PageID.1350, RFP 4; PageID.1354, ROG 1.) The "all documents" requests appear to encompass the prosecutions. Further, the Community now seeks to depose Defendants Grano and Sproull concerning the prosecutions even though both men have filed declarations stating their involvement in this federal case. (PageID.1300-1312.) The Community may also question other defense witnesses, such as Defendant Croley, concerning the prosecutions.

Any discovery concerning the prosecutions should be barred for multiple reasons. First, the evidence is not relevant and any discovery is simply a fishing expedition. *See* Rule 26(b)(1) (defining relevance); *see also Coleman v. Am. Red Cross*, 23 F.3d 1091, 1097 (6th Cir. 1994) (relevant discovery likely to lead to admissible evidence). The Community's theory in the tobacco claims is that federal law preempts the TPTA, which consists of several legal theories. The Community's claims depend on the *fact* that the prosecutions are occurring, not the *details*

of or evidence from the prosecutions. (PageID.795, ¶¶ 11-12; 820, ¶¶ 104-05.) Indeed, when the Community added Defendants Grano and Sproull and allegations concerning the prosecution in the third amended complaint, it did not change any of its tobacco claims, demonstrating that the evidence regarding the prosecutions is not necessary to resolve these legal claims.

Second, allowing the Community discovery concerning the prosecutions will cause unreasonable annoyance, i.e., interference, in the state judicial proceedings. *See* Rule 26(c)(1) (permitting protective order to "protect a party or person from annoyance"). The court has already abstained from granting equitable relief related to the prosecutions because of the potential for interference. (PageID.1184-85.) Defendants' motion concerning the state prosecutions seeks both summary judgment and abstention on the remaining claim for legal relief due to the same potential for interference. (PageID.1249-1250.) The work required for Defendant Grano (the prosecutor) to testify at a deposition and answer written discovery, as well as the scrutiny of those ongoing proceedings in this litigation, will be just as disruptive as this Court granting equitable relief before the state proceedings are concluded. (PageID.1305, ¶ 22.)

Third, allowing this discovery would be an unreasonable annoyance for Defendants Grano and Sproull. Requiring them to provide discovery, including sitting for depositions, denies them the benefits of absolute immunity, which they asserted months ago in the motion concerning the state prosecutions. (PageID.1269-1275.) *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (absolute immunity provides "complete protection from suit"). Absolute immunity "presents a threshold question that may be raised prior to discovery," which then requires a plaintiff to "demonstrate why such discovery [is] necessary." *Rogers v. O'Donnell*, 737 F.3d 1026, 1033 (6th Cir. 2013). The Community's alleged "need" for this discovery is nothing more than its attorney's rank speculation. (PageID.1527-1529.)

Fourth, seeking any form of discovery from Defendant Grano concerning the prosecutions, directly or indirectly, implicates his mental impressions, litigation strategy, and preparations for a trial of Mr. Davis and Mr. Magnant that has not yet occurred. (Ex. A.) His work product is squarely protected from disclosure under Rule 26(b)(3). *See also Upjohn Co. v. United States*, 449 U.S. 383, 398-402 (1981) (stressing importance of protecting an attorney's thoughts); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 304 (6th Cir. 2002) (doctrine applies "to any document prepared in anticipation of litigation by or for the attorney"). Like all other attorneys, he "should be free to conduct research and prepare litigation strategies without fear that these preparations will be subject to review by outside parties." *In re Grand Jury Subpoenas*, 454 F.3d 511, 520 (6th Cir. 2006).

Fifth, if the Community seeks to obtain evidence for Mr. Davis and Mr. Magnant to use for their defense, that purpose is outside the scope of discovery. Rule 26(b)(1) defines the scope of discovery in relation to "the case" and "the action," meaning the lawsuit in which the party seeks discovery. The Michigan rules of criminal procedure govern discovery in the state prosecutions. *See, e.g.*, Mich. Ct. R. 6.201 and 6.202. Rule 26 does not grant discovery in a federal civil action to skirt state discovery procedures and limits.

Finally, this discovery connected to the prosecutions should be barred because it imposes burdens disproportionate to the needs of the case when the Community already has the substantive information it needs concerning the three seizures. Fed. R. Civ. P. (Rule) 26(b)(1) (discovery must be "proportional to the needs of the case"). On December 19, 2016, Defendants produced the videos and photographs of all three seizures at issue in this case, invoices and other documents related to the seized cigarette shipments, as well as other evidence. (PageID.1359, Response to RFP 4.c.) On October 30, 2017, a date agreed to with the Community, Defendants

served supplemental discovery responses concerning the seizures, including additional documents and affidavits. (ECF No. 112.) The Community also obtained evidence from the state prosecutions, including transcripts from the March 16, 2017 preliminary examination and the November 2, 2017 evidentiary hearing in state court, at which time the attorneys for Mr. Davis and Mr. Magnant were able to question members of the MSP concerning the December 11, 2015 traffic stop and seizure. (PageID.1120-1133, 1538-1575.) The Community has all the substantive information it needs to proceed with the tobacco claims in this case, making further discovery an unwarranted burden. Accordingly, the court should bar this discovery.

II. The Community should be barred from discovering the identity of the confidential informant or individuals at the trucking facility.

The Community has asked Defendants to identify any witnesses who have or may have knowledge relevant to the claims and defenses in the case and to provide a description of that knowledge. (PageID.1346, ROG 20; PageID.1355, ROG 3.) Defendants have provided a list of thirty-eight individuals who may have relevant knowledge and have also served documents in discovery that identifies additional individuals. (PageID.1346-1370; PageID.1375-1376, 1380-1381, Responses to ROGs 19 and 20.) They have not identified the informant who provided information to the MSP that led to the two cigarette seizures that occurred on February 9, 2016. Nor have they identified the name of any individuals at the Con-Way facility who identified the trucks that were stopped on February 9, 2016. The identity of the informant and individuals who provided information concerning the trucks are protected by a law enforcement (or informer's) privilege, are not relevant. and should be protected against discovery by any means.

The law enforcement privilege preserves the government's ability to "withhold from disclosure the identity of persons who furnish to law enforcement personnel information concerning violations of the law." *Holman v. Cayce*, 873 F.2d 944, 946 (6th Cir. 1989);

Bergman v. U.S., 565 F. Supp. 1353, 1360 (6th Cir. 1983) (privilege applies in civil and criminal cases). The privilege furthers and protects the public interest in effective law enforcement. *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957). In applying this privilege, a court must balance the right of the party seeking the information to prepare his case against the public interest in protecting the free flow of information. *See Bergman*, 565 F. Supp. at 1359.

The confidential informant's identity is irrelevant to the Community's claims that federal law preempts the TPTA. Those claims raise questions of law that do not hinge on the informant's identity. The Community has not brought any Fourth Amendment claims in this case because each search leading to a seizure was conducted with consent and other warrant exceptions. (PageID. 1570, pp. 119-21; PageID.1573-1574, pp. 132-37.) The Community does not need to inquire into whether, or to what extent, probable cause depended on information the confidential informant or the person identifying the trucks. Nor was there any potential for the informant to contradict the MSP's version of the seizures because only members of the MSP (not any informant) were present during the seizures. The Community's interest could only be to identify informants to prevent them from providing information to the MSP in the future so that its contraband shipments can avoid detection, which is precisely why the privilege exists.

The public has a strong interest in ensuring that citizens feel free to provide information concerning the Community's trade in contraband cigarettes to the MSP. States have the right to enforce their tax laws against tribes and tribal members outside of Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (unless barred by Congress, nondiscriminatory state laws apply to "Indians going beyond reservation boundaries"). The three shipments at issue in this case had a total of 144,000 untaxed, unstamped individual packs of cigarettes, which would constitute a direct loss of $288,000 in tax revenue if sold by the

Community to consumers liable for, but seeking to avoid paying, the tobacco tax. The public has a strong interest in ensuring that the state collects that revenue and enforces its laws concerning the tobacco tax. But locating contraband shipments as they move through Michigan before they reach Indian country is difficult given the size of the state, shipments enclosed in vehicles are not visible, and the Community attempts to prevent MSP from discovering the shipments. The MSP has a substantial need for assistance from citizens to identify those shipments.

The balance of these interests weighs heavily toward the public interest of protecting the safety of informers and continuing the unimpeded flow of information by protecting this confidential informant's identity. Accordingly, Defendants seek an order forbidding the discovery of any information that would directly or indirectly reveal the identity of any confidential informant or anyone working at the Con-Way facility.

III. The Community should be barred from discovering police investigative techniques.

The Community alleges that the MSP was "conducting illegal surveillance and investigative operations on the Reservation and trust land," thus violating the Community's sovereign immunity. (PageID.812, ¶ 71.) The Community's discovery requests seek to identify ***all*** Treasury and MSP activities within the Community's reservation and trust lands related to the tobacco tax since 2010 and ***all*** documents relating to the seizures of the Community's tobacco products. (PageID.1345, ROG 8; PageID.1350, RFP 4; PageID.1354, ROG 1.) This discovery, including deposition questioning, should be barred.

First, the information concerning activities inside Indian country is not relevant and the request is overly broad and burdensome. There are only three seizures at issue in this case, all occurred outside Indian country, and all involved cigarettes the Community (and no one else) owned. The 2016 seizures stem from information provided by an informant, not on-reservation surveillance. The 2015 seizure occurred after MSP officers were driving on US-41 and saw a

pickup truck suspected of transporting contraband cigarettes for the Community. (PageID.1127-31.) When the MSP stopped the pickup truck off the reservation, Mr. Davis consented to the search that revealed the cigarettes he and Mr. Magnant were transporting. (PageID.1288, ¶ 18; PageID.1565-1566, pp. 102-03.) The Community already has the relevant information.

Second, information concerning law enforcement investigative techniques, including details concerning surveillance, is privileged. *See, e.g.*, *United States v. Pirosko*, 787 F.3d 358, 365-67 (6th Cir. 2015) (privilege protected disclosure of type/location of law enforcement surveillance equipment). Courts recognize this privilege to avoid hindering future law enforcement efforts. *See United States v. Gazie*, 786 F.2d 1166 (6th Cir. 1986), available at 1986 WL 16498, *8-9 (discussing *United States v. Harley*, 682 F.2d 1018, 1020-21 (D.C. Cir. 1982)); *see also In re City of N.Y.*, 607 F.3d 923, 944 (2d Cir. 2010) (ability "to conduct future investigations may be seriously impaired if certain information is revealed to the public").

The party seeking the law enforcement/surveillance information must "produce some evidence of government wrongdoing." *Pirosko*, 787 F.3d at 366. The Community attempts to argue in response to the motion concerning the state prosecutions that state police lack jurisdiction to investigate off-reservation crimes by Indians inside a reservation. But the trucks carrying the cigarettes seized in February 2016 never reached the Community's Indian country. Nor do Defendants know of authority holding that passing through a reservation and then enforcing state law *outside* of Indian country is wrongful, which happened in December 2015. As the Supreme Court said in *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001), "State sovereignty does not end at a reservation's border."

The Community has previously argued that, under *State v. Cummings*, 679 N.W.2d 484 (S.D. 2004), and *United States v. Peltier*, 344 F. Supp. 2d 539 (E.D. Mich. 2004), MSP officers

cannot enter its reservation. But *Cummings*, 679 N.W.2d at 485, involved an officer who pursued a tribal member *onto* a reservation to make a warrantless arrest without tribal permission. In *Peltier*, 344 F. Supp. 2d at 542-43, the MSP executed a state search warrant on reservation without tribal permission, and without federal involvement in seeking the warrant or executing it. Unlike *Cummings* and *Peltier*, the MSP waited until the Community's pickup truck *left* the reservation in December 2015 to conduct a traffic stop and then obtained consent for a search; they did not attempt to exercise jurisdiction over the Community's members on its reservation. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980) ("state power over Indian affairs is considerably more expansive [off-reservation] than it is within reservation boundaries"). Defendants also provided additional briefing on this issue in their reply brief in support of the motion concerning the state prosecutions. (PageID.1529-1531.)

The Community clearly regrets the fact that Mr. Davis and Mr. Magnant cooperated with the MSP and are displeased that a confidential informant provided information that led to the seizures on February 9, 2016. But that regret and displeasure is not wrongdoing by Defendants; there is no conduct by the state officials or employees in this case that justifies applying a balancing test to decide if this privilege applies. *See Pirosko*, 787 F.3d at 365. If the balancing test did apply, the interests favor protecting the information from disclosure. The Community does not need the information to argue questions of law, especially when the relevant facts surrounding the seizures are known from evidence already produced. *See Jabara v. Kelley*, 62 F.R.D. 424, 427 (E.D. Mich. 1974) (discussing *Black v. Sheraton Corporation of America*, 50 F.R.D. 130 (D.D.C. 1970)) (balance of interests favored "secrecy" when information obtained by surveillance had been supplied); *see also Harley*, 682 F.2d at 1020 (party seeking surveillance

information must demonstrate necessity and absence of "alternative means of getting at the same point"). The Community only seeks the information to protect future contraband tobacco shipments from being intercepted before they reach Indian country; the potential to hinder law enforcement is precisely why a privilege protects this type of information. *See Gazie,* 786 F.2d at 1166, available at 1986 WL 16498, *8. Thus, Defendants seek an order forbidding the discovery of police investigative techniques, including surveillance.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request that this Court enter an order prohibiting **pending *and* future** discovery of information addressed in this motion by any means, including written discovery and depositions. At minimum, the motion should be granted to preserve the status quo while the motion for state prosecutions is pending. The court's docket is understandably busy. But requiring defendants with absolute immunity to provide discovery – particularly a prosecutor's privileged work product – before the court decides that motion would cause irreparable harm and interfere with the state prosecutions. Also, requiring any witness to reveal informants or investigative techniques will impair the MSP's ability to perform its lawful work.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Jaclyn Shoshana Levine
Jaclyn Shoshana Levine (P58938)
Kelly M. Drake (P59071)
Laura R. Gnyp (P79943)
Assistant Attorneys General
Attorneys for Defendants
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

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