UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEWEENAW BAY INDIAN COMMUNITY, Plaintiff, v. KHOURI, et al., Defendants.	File No. 2:16-cv-00121 Hon. Paul L. Maloney

THE KEWEENAW BAY INDIAN COMMUNITY'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

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INTRODUCTION

The Keweenaw Bay Indian Community ("the Community") challenges the enforcement of Michigan's Tobacco Products Tax Act ("TPTA") by Defendants Khouri, Fratzke, Croley, Grano, and Sproull (together, "Defendants") against the Community and its members. (Counts IX-XIV, XVII (PageID.837-846, 848)). Defendants' unlawful surveillance and investigations carried out on the Community's Reservation and trust lands (together, "the Reservation") is an offense to the Community's sovereign immunity, and an element of Defendants' other efforts to unlawfully impose state law on the Community's activities on its own Reservation. Defendants' actions violate the Community's sovereign rights, including its sovereign immunity as well as its rights of self-governance and self-determination. The Community seeks discovery regarding the scope of investigations and other law enforcement activity in the Community's Indian country. Defendants refuse, and instead ask this Court to foreclose any discovery about their activities on the Community's Reservation and trust lands and the criminal prosecutions. Defendants have no legitimate basis for their position. They claim, against all reason, that information about the very conduct at issue in the Community's claims is somehow not relevant to the Community's claims. Defendants also claim that the information is privileged and would reveal secret law enforcement techniques. But Defendants have selectively revealed some of information, including testimony in open court, to support the prosecution of Community members. Defendants are eager to use facts about criminal investigations to injure the Community's sovereignty, but object vigorously to any attempt by the Community to use related facts to defend its sovereign rights. Moreover, the primary law enforcement techniques at issue—hiding in a car and using a pretextual traffic stop, for example—are not secret. Defendants have made no showing that the information they are withholding implicates any law enforcement technique more sensitive than that.

The Community's discovery requests have been pending for many months, but

Defendants waited until practically the eleventh hour—while the parties are endeavoring to schedule multiple fact and expert witnesses in various locations and the deadline for completion of all discovery less than three months away —to bring the issue before the Court.[1] To make matters worse, Defendants do not clearly articulate the exact discovery requests they think are objectionable, or the objections that should be upheld. For all of these reasons, and as explained in detail below, the Court should deny Defendants' motions, and order Defendants to provide all withheld documents and written discovery responses within fourteen days of the Court's order, and to make witnesses available for deposition in compliance with the Scheduling Order.

BACKGROUND

The Community is a federally-recognized Indian tribe and has the right under federal law to sell tobacco free of state tax on its Reservation and trust lands. (PageID.837-846, 848.) States have no jurisdiction to conduct law enforcement activity of any kind on the Community's Reservation and trust lands. *State v. Cummings*, 2004 SD 56, ¶¶ 12-18, 679 N.W.2d 484). Nevertheless, the Michigan Department of Treasury ("Treasury"), the Michigan State Police ("MSP") and Michigan Attorney General's Office ("AG's Office") have interfered with and obstructed the Community's right to buy, sell, and transport tobacco for sale on its Reservation. Third Am. Compl. ("TAC") ¶¶ 67-106 (PageID.811-21). No later than September 2015, the MSP began conducting surveillance and other investigative activity on the Community's Reservation and trust lands. (PageID.1437-38; 1459-63.) On December 11, 2015, Defendant Croley and MSP Trooper Ryan were conducting illegal surveillance on the Community's Reservation and spotted a truck and trailer they believed—based on unlawful surveillance—were

[1] The Parties previously stayed briefing and discovery on the issues raised in Defendants' motion—but that ended March 31, 2018 (ECF No. 111) and Defendants waited until June 4, 2018 to file their motion for protective order.

owned by the Community and used to transport tobacco products. (PageID.1437-38.) Defendant Croley and Trooper Ryan surveilled the truck and trailer before instructing other MSP Troopers to stop the truck and trailer as soon as they could after the truck left the Community's Indian country. (PageID.1439-40.) These other Troopers did so, using a pretextual traffic stop, and detained the driver and passenger—Community members and employees John Davis and Gerald Magnant. (PageID.1430, 1460-61.) At the same time, the Troopers were in contact with the AG's Office, likely Defendant Grano, who directed the Troopers, without a warrant or consent, to search and seize the boxes in the trailer. (PageID.1443.) Defendants Grano and Sproull later commenced criminal prosecutions of Community members (*People v. Davis*, No. 16-05237, and *Magnant*, No. 16-05238, "the State Criminal Prosecutions"). The MSP and AG's Office continued their surveillance on the Reservation following the December 11, 2015 seizure. They even recruited a confidential informant to spy on the Community and its activities, leading to seizure of more of the Community's tobacco on February 9, 2016. (PageID.2953-54).

The Community's litigation was already well underway when Defendant Grano decided to commence the State Criminal Prosecutions; on February 1, 2017, this Court granted the Community's motion for leave to amend its Complaint to add Grano and Sproull as Defendants and to add claims challenging the State Criminal Prosecutions and related enforcement actions. (ECF No. 57.) To prosecute its claims, the Community seeks discovery on the full extent of Defendants' unlawful activities on the Community's Reservation and trust lands, including with respect to the State Criminal Prosecutions—and Defendants improperly refused to provide it.

ARGUMENT

I. The Community is Entitled to Discovery on the Criminal Prosecutions.

A. Discovery on the Criminal Prosecutions is Relevant to the Community's Claim that the Prosecutions Violate the Community's Sovereignty.

Even though Defendants' seizures of the Community's tobacco products and the State Criminal Prosecutions of Community members are the subjects of this litigation, Defendants remarkably claim that information about those subjects is not relevant to the Community's claims. The arguments fail because Defendants' conduct of investigations on the Reservation is an offense to the Community's sovereignty and a fundamental part of the Community's claims.

1. The Community's Claims Encompass All Injuries that Defendants' Inflicted on the Community's Sovereignty.

Defendants argue that, to litigate its claims, all the Community needs to know is "the *fact* that the prosecutions are occurring" and the "*details*" are irrelevant. PageID.2950-51 (emphasis in original). This is an inaccurate characterization of the Community's claims and legal theories. While the Community does believe that Defendants' interpretation of the TPTA is unlawful on its face, that is just one aspect of the Community's claims—even Defendants acknowledge that the Community has "several legal theories" supporting its claims. (PageID.2950.) Some of the Community's theories do turn on the specific circumstances of Defendants' conduct, and the Community is entitled to conduct discovery in support of those theories. Fed. R. Civ. P. 26 (information relevant to a claim or defense is discoverable). In Count X of its Third Amended Complaint, the Community alleges that, "[u[nder the factual circumstances of this case . . the seizure and forfeiture of the Community's property . . . and the criminal prosecution of Community members involved in the Community's tobacco sales" infringes the Community's rights of self-government sovereign right to make its own laws and be ruled by them." (TAC Count X, ¶ 151, PageID.839.) Specifically, the Community alleges that "Defendants' unlawful law enforcement operations on the Community's Reservation and trusts lands and wrongful prosecution, and potential incarceration, of the Community's agents and employees represents an egregious and irreparable harm." TAC ¶ 107 (PageID.821); *see McClanahan v. Ariz. State Tax*

Comm'n, 411 U.S. 164, 168 (1973) ("'[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'"); *Rodewald v. Kan. Dep't Revenue*, 297 P.3d 281, 289–291 (Kan. 2013) ("a state has no civil or criminal jurisdiction over tribal members unless Congress has expressly said so"); *State v. Cummings*, 2004 S.D. 56, ¶ 18, 679 N.W.2d 484, 489 (state law enforcement officers have no authority to enter a "reservation and gather evidence without a warrant or tribal consent"). The Community believes that the seizures and arrests are the direct product of concerted state law enforcement activity on the Community's Reservation in violation of the Community's sovereignty. TAC ¶ 104 (PageId.820). The Community has obtained evidence that Defendants engaged in extensive surveillance and other unlawful investigation-related conduct on the Reservation. *See* Background, *supra* (citing materials submitted with Plaintiff's Opposition to Defendants' Motion Regarding State Prosecutions (ECF No. 109)). Each of these actions is an offense to the Community's sovereign rights, and the Community is entitled to discovery to prove its claims and obtain a remedy that addresses the full scope of its injuries. *See Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269, 272 (1959) ("the exercise of state jurisdiction [on the Reservation]. . . would infringe on the right of the Indians to govern themselves"). Defendants may disagree with the Community's contentions, but cannot unilaterally declare there will be no discovery on the subject matter.

2. Defendants' Activities in Indian Country are Relevant to the Community's Claims.

Defendants also argue that "the information concerning activities inside Indian country is not relevant" because the seizures at issue "all occurred outside Indian country." (PageID.2954.) Defendants' argument is disingenuous, as it is based on a misrepresentation of the nature of their activities on the Community's Reservation and the critical role of those activities in carrying out the seizures and State Criminal Prosecutions. The seizures and State Criminal Prosecutions are

inextricably intertwined with Defendants' on-Reservation activity, and are part of an effort by Defendants to use fear of seizure and prosecution to regulate the Community's activity on its Reservation—the ultimate injury to tribal sovereignty, self-determination and self-governance.

Defendants claim that the 2015 seizure of the Community's property occurred after MSP Troopers were "driving on US-41 and saw a pickup truck suspected of transporting contraband cigarettes for the Community." (PageID.2955-56.) In fact, by the admission of Defendant Croley and an MSP Trooper that he supervised, the seizure of the Community's tobacco products on December 11, 2015 and resulting Criminal Prosecutions were the direct result of on-Reservation surveillance—not merely "driving on US-41." (PageID.1437-40; PageID.1460.). As Defendant Croley wrote in his police report, he was "conducting surveillance" of the Community's Reservation. *Id*. Defendants knew that they could not conduct law enforcement activity on the Reservation, so Trooper Ryan, under the supervision of Defendant Croley, ordered other MSP officers to stop the truck in transit between the Reservation and the Community's trust land. *Id*. Thus, the seizures may have occurred outside of the Community's Indian country, but the injury to the Community's sovereign rights occurred because of Defendants' unlawful conduct in Indian country. Defendants treat tribal sovereignty like a game, and using illegal on-Reservation law enforcement activity, and the threat of criminal prosecution, to unlawfully regulate the on-Reservation conduct of the Community and its members. *U.S. v. Peltier*, 344 F. Supp. 2d 539, 546 (E.D. Mich. 2004); *Cummings*, 2004 SD 56, ¶¶ 12-18; *see also Moses v. Dep't of Corr.*, 274 Mich. App. 491, 736 N.W. 2d 269 (2007) (Michigan police have no jurisdiction to conduct investigations or arrests in Indian country).

Nevertheless, Defendants claim that their conduct is not only lawful, but not even subject to discovery, because "[u]nlike *Cummings* and *Peltier*, the MSP waited until the Community's

pickup truck *left* the [R]eservation" before stopping the Community's truck and carrying out the seizures. (PageID.2957.) Defendants are wrong. Defendants' position here is more offensive to tribal sovereignty than the conduct at issue in *Cummings* and *Peltier*. In *Cummings*, a state officer was engaged in an off-Reservation investigation, aimed at regulating off-Reservation conduct, and followed the suspect onto a Reservation. The court still found the tribe's sovereignty was injured by the State's attempt "to extend its jurisdiction into the boundaries of the Tribe's Reservation without consent" and tribal sovereignty was properly invoked "as a shield to protect the Tribe's sovereignty from incursions by the State." *Cummings*, 679 N.W.2d at 487. The injury was serious, and the court imposed an appropriate consequence – suppressing all evidence obtained from the unlawful on-Reservation investigation. *Id*. Similarly, in *Peltier*, the court found that a warrant to search an on-Reservation home in connection with suspected controlled substance and fire-arms offenses was not valid. 344 F. Supp. 2d at 546. But there was nothing in either case to suggest that the state officers' conduct was part of a larger effort to regulate the activities of the Tribe or its members on the Reservation. *Id*. In this case, Defendants started an unlawful on-Reservation investigation to regulate the Community's tobacco commerce on its own Reservation. This injures the Community's sovereign rights, and the Community is entitled to discovery to support its claims.

B. Defendants Cannot Otherwise Show Cause for a Protective Order.

None of Defendants other arguments are sufficient to grant a protective order.

First, Defendants claim that "discovery concerning the prosecutions will cause unreasonable annoyance" because requiring Defendant Grano to respond will be too disruptive—even though Defendant Grano caused injury far greater than mere "annoyance" to the Community and members. (PageID.2951.) He makes no showing that the requests are anything but narrowly-tailored, does not make any showing that he could not comply, and has not

attempted to negotiate limitations on the discovery requests to avoid "annoyance." Nichols Decl. ¶ 2. Defendant Grano has no legitimate basis for precluding discovery.

Second, Defendants argue that requiring Defendants Grano and Sproull "to provide discovery . . . denies them the benefits of absolute immunity." (PageID.2951.) But as explained in its Community's opposition to Defendants' motion for judgment on the pleading, Grano and Sproull have not, and cannot, show that they are entitled to absolute immunity. (PageID.1403-14.) Moreover, the Court has informed that parties that Defendants' motion on this issue will not be decided until early 2019, and the parties are to proceed with discovery under the schedule set by the Court, which requires that all discovery be completed by September 7, 2018. Nichols Decl. ¶ 3. The Court did not excuse Defendants Grano and Sproull from discovery obligations, and as such, they should be ordered to respond to discovery and appear for deposition.

Third, Defendants claim that "seeking any form of discovery from Defendant Grano . . . implicates his mental impressions, litigation strategy, and preparations for a trial of Mr. Davis and Mr. Magnant that has not yet occurred." (PageID.2952.) Defendants are aware that legitimately privileged information is not discoverable and can be withheld and logged. Thus, this argument is no basis for precluding discovery relating to the State Criminal Prosecutions.

Fourth, Defendants descend into pure speculation, arguing that "if the Community seeks to obtain evidence for Mr. Davis and Mr. Magnant" that is outside the scope of discovery." (PageID.2953.) The Community assumes that the State has already fulfilled its obligation to turn over any exculpatory evidence to the defense in the State Criminal Prosecutions, and as it relates to this litigation, there are no facts supporting Defendants' speculation, and Defendants cite no law that would precluded discovery just because it might also be useful in some other action.

II. Defendants Cannot Establish that any Law Enforcement Investigation Privilege Protects any Information about their Conduct on the Reservation.

The Community's possession of some evidence—obtained from the State's voluntary disclosure in other proceedings—regarding Defendants' activities on the Reservation presents an obvious problem for the argument that "all" information regarding Treasury and MSP activities within the Reservation or relating to the seizures of the Community's property are privileged. (PageID.2955.)[2] By disclosing some information for their own purposes, Defendants confirmed that they do not consider information about who was on Reservation, when they were on the Reservation, and what they were doing there, to be privileged. Defendants cannot use the privilege as "shield and a sword." *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005); *see also Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 588 (6th Cir. 2014) (sword and shield rule applies to all forms of privilege). Defendants do not address the contradiction of their position at all.

Defendants cannot show that a privilege for "law enforcement investigative techniques" applies at all. Defendants rely on cases addressing computer and electronic surveillance, where law enforcement's ability "to conduct future investigations may be seriously impaired if certain information is revealed to the public." (PageID.2955) (discussing discovery on state computer systems and electronic surveillance devices). The primary surveillance technique Defendants used was hiding in a car. (PageID.1437-38, 1460-61.) Defendants also disclosed the use of a pretext stop as a way to perform the seizures (PageID.1430, 1460-61), and recruited confidential

[2] Under Local Rule 7.1(b), "[a]ll discovery motions shall set forth verbatim, or have attached, the relevant discovery request and answer or objection." Defendants seek relief from discovery and their motion is thus subject to LR 7.1(b), but they did not set forth verbatim, or attach, the discovery requests and responses. Defendants only provide page cites to the record for some requests, but not the responses. This is a critical deficiency because Defendants have disclosed some information on the subject matter at issue, yet seek to foreclose "all" such discovery. Even if the Court were inclined to grant some relief—and as the Community has shown, the Court should not—Defendants provide no basis for tailoring relief to specific requests and objections, and thus frustrate establishment of clear limitations on what will, or will not, be subject to discovery. Defendants' failure to appropriately articulate the specific details of the dispute, or the relief they seek, is sufficient reason to deny the motion.

informants to spy on the Community.[3] None of these are high-tech secrets that would endanger ongoing investigations if revealed. And even if Defendants (or their agents) did employ a surveillance technique not widely known, the Community would be entitled to discovery. As Defendants admit, the law enforcement privilege doesn't apply if the party seeking the information "produce[s] some evidence of government wrongdoing." *U.S. v. Pirosko*, 787 F.3d 358, 366 (6th Cir. 2015). Defendants struggle mightily to avoid the implications of *Cummings* and *Peltier*, but do not contest that state law enforcement agents cannot conduct investigations in Indian country without permission of the Tribe—or that Defendants did precisely that.

CONCLUSION

The Court should deny Defendants' motion for protective order, and because the deadline for completion of discovery is September 7, 2018, also order Defendants to produce all withheld documents and written discovery responses within 14 days of the Court's order and to make e relevant witnesses available in time for all depositions to be completed by September 7, 2018.

Date: June 19, 2018

Respectfully submitted,

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[3] The Community does not necessarily seek public disclosure of the informant's identity, but if Defendants or their agents entered the Reservation to recruit an informant, that would be critical evidence of yet additional infringement of the Community's sovereignty.