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 RECONSIDERATION

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. (Third Amended Complaint ("TAC") 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"), and targeted at the Community and its members, infringes on the Community's sovereignty, and is an element of Defendants' other efforts to unlawfully impose state law on the Community's activities on its own Reservation. Defendants attempted to obtain a protective order foreclosing discovery on these subjects, but in a July 9, 2018 Order (ECF No. 219, hereafter, "the Order"), the Court correctly determined that Defendants had to provide the discovery. Nevertheless, Defendants cling to their discredited position that information about law enforcement investigations of the Community and its members on the Reservation may be disclosed only as they choose. Defendant Croley was deposed on July 17, 2018—more than a week after the Court issued its Order—and Defendants' counsel instructed him not to answer certain questions relating to investigations of the Community on the Reservation. Nichols Decl. Ex. D at 14 (24:2-7), 15 (26:16-19). Defendants also refused to produce responsive documents required by the Order.[1] Defendants do not like the Order, but they have no legitimate grounds to seek reconsideration, much less for refusing to comply.

Defendants bear "a heavy burden" in moving for reconsideration, and utterly fail to meet it here. *Krygoski Constr. Co. v. City of Menominee*, No. 2:04-cv-076, 2006 U.S. Dist. LEXIS

[1] The Community offered Defendants the opportunity to reschedule Defendant Croley's deposition in order to avoid the cost and inefficiency of deposing him again after these disputes were resolved. Nichols Decl. ¶ 2, Ex. C. Defendants refused. *Id.*

51248, at *5-6 (W.D. Mich. July 26, 2006). They claim that the Order "was based on palpable defects by which the Court and the parties have been misled," but this is nothing but a recitation of Local Rule 7.4. Defendants' motion presents the exact same arguments and issues already ruled upon by the Court; specifically, Defendants:

- Repeat the bald, nonsensical, assertion that the Community has no need for discovery regarding the conduct that it alleges is unlawful (compare PageID.3026-3027 and PageID.2950; 2955-2956); and,
- Once again attempt to construct a privilege claim, even after making selective disclosures, and failing to establish that the subject matter is entitled to protection in the first instance (compare PageID.3031; 3011 and PageID.2952; 2956).[2]

Defendants' Motion for Reconsideration is "simply a regurgitation of [their] prior filings," and that is sufficient reason to deny it. *Lucre, Inc. v. Mich. Bell Tel. Co.*, No. 1:04-CV-497, 2005 U.S. Dist. LEXIS 35978, at *2 (W.D. Mich. Dec. 2, 2005).

The Court made the correct decision in its July 9 Order. It is a matter of common sense and fairness that the Community is entitled to seek discovery regarding the conduct that it alleges is unlawful, and Defendants' Motion should be denied.

ARGUMENT

I. Defendants Cannot Assert a Law Enforcement Privilege to Hide Government Wrongdoing.

Defendants cannot engage in illegal law enforcement operations on the Community's Reservation, and then assert a privilege to prevent the Community from learning details of the illegal conduct. The law enforcement privilege that Defendants are attempting to invoke doesn't apply if the party seeking the information "produce[s] some evidence of government wrongdoing." *United States v. Pirosko*, 787 F.3d 358, 365-67 (6th Cir. 2015). The Community

[2] Defendants attempt to improperly introduce new facts regarding the scope of their prior disclosures on law enforcement investigations on the Reservation. As explained in Part II.B, below, the belatedly-disclosed information actually undermines Defendants' argument.

has done so – state law enforcement agents are not permitted to conduct investigations in Indian country without permission of the Tribe, and Defendants admit to conducting surveillance and investigations against the Community and its members on the Reservation. It is a well-established principle of federal Indian law that states like Michigan have no jurisdiction to conduct law enforcement activity of any kind against the Community and its members on Reservation and trust lands—the State cannot conduct surveillance or other investigative activities, and it cannot make arrests. *U.S. v. Peltier*, 344 F. Supp. 2d 539, 546 (E.D. Mich. 2004); *State v. Cummings*, 2004 SD 56, ¶¶ 12-18, 679 N.W.2d 484 (both holding that state police officers cannot conduct an on-Reservation search even with a warrant or in connection with alleged off-Reservation crimes); *see also Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296, 2011 U.S. Dist. LEXIS 53765, at *9 (E.D. Mich. May 18, 2011) (indicating that *Cummings* properly articulated the scope of state police authority in Indian country); *Moses*, 274 Mich. App. at 491 (Michigan police do not have jurisdiction to conduct investigations or make arrests in Indian country); *Rodewald v. Kan. Dep't Revenue*, 297 P.3d 281, 289–291 (Kan. 2013) (holding that State lacked jurisdiction to investigate drunk driving offenses on the Reservation because "a state has no civil or criminal jurisdiction over tribal members unless Congress has expressly said so"). The Court's Order recognized that the Community stated a legitimate claim and is entitled to discovery. Defendants take pains to avoid acknowledging the fundamental fairness advanced by the Court's Order. Instead, Defendants try, and fail, as explained below, to identify technical flaws in the details of the Court's Order.

II. The Court Correctly Found that the Community Needs Information on Defendants' Law Enforcement Operations Against the Community and its Members.

Defendants claim that "the Court's decision was based on an erroneous balancing of the interests at issue" because "the Court did not find that the Community had any need for further

information about law enforcement investigative techniques." (PageID.3005.) Yet, Defendants also admit, as they must, that the Court found that "Defendants concerns for producing the alleged information does not outweigh the Community's *needs* in obtaining it." (PageID.3006 (emphasis added).) Thus, contrary to Defendants' assertion, the Court unequivocally found that the Community "needs" the information. *Id*. The Court devoted more space in its Order to explaining its rejection of Defendants' arguments than it did to explaining its agreement with the Community's arguments, but that is a matter squarely in the Court's discretion. Disagreement with the Court's drafting choices is not a ground for seeking reconsideration.

It makes sense that the Court presented its Order in this manner. The Community's need for the information is straightforward and not seriously contested. In Count X, 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 and sovereign right to make its own laws and be ruled by them. (TAC Count X, ¶ 151, PageID.839.) In support of Count X, 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. The Community also alleges 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 ("The charges [in the State Criminal Prosecutions] are based on the State's unlawful surveillance and investigative operations on the Reservation and trust lands."). 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").

Nevertheless, Defendants repeat the arguments from their original motion about why the Community does not "need" the information at issue. Those arguments were already considered and properly rejected—Defendants' did nothing more than assert, contrary to the pleadings, that information about investigations and surveillance is irrelevant. (PageID.2955.) Now, Defendants even go so far as to assert that the Community's "Count X does not mention law enforcement investigations." (PageID.3027.) In fact, as noted above, Count X relies on allegations that specifically mention law enforcement investigations and surveillance. Defendants' argument is entirely off the mark and fails to address the claims and issues that are actually being litigated or what the Court actually decided. They provide no legitimate basis for the Court to reconsider its Order.

III. The Court Correctly Found that the Defendants' Asserted Interests are not Sufficient to Preclude Disclosure of Law Enforcement Investigation Information.

The Court correctly found that Defendants' asserted interests are not sufficient to preclude disclosure of law enforcement investigation information. Defendants' repetition of arguments from their original motion does not change that.

A. Defendants Waived Any Law Enforcement Privilege that Might Otherwise Apply.

To the extent that Defendants might otherwise have any legitimate privilege claim, the Court correctly found that Defendants waived it through selective disclosure of information about their surveillance activities on the Reservation. Defendants now claim that this finding is "not supported by case law." (PageID.3029.) But Defendants agree that, under Sixth Circuit precedent, "waiver occurs when the party that holds the privilege attempts to use the privilege as both sword and shield." (PageID.3031.) Defendants are doing precisely that. (PageID.3033.)

Defendant Croley used the surveillance to initiate seizures of the Community's tobacco, and then Defendant Croley, along with Defendants Grano and Sproull, used the surveillance to support criminal prosecutions of Community members. TAC ¶¶ 104, 107. The Community is suing to stop these actions, and Defendants claim that information the Community needs to show the unlawfulness is privileged. [3]

In a failed attempt to show that their disclosures are minimal, and purportedly do constitute waiver of any privilege, Defendants belatedly[4] provide additional—but still incomplete—detail on the extent of their prior disclosures. Defendants' carefully curated the materials submitted with their motion to create the false impression that they took a principled

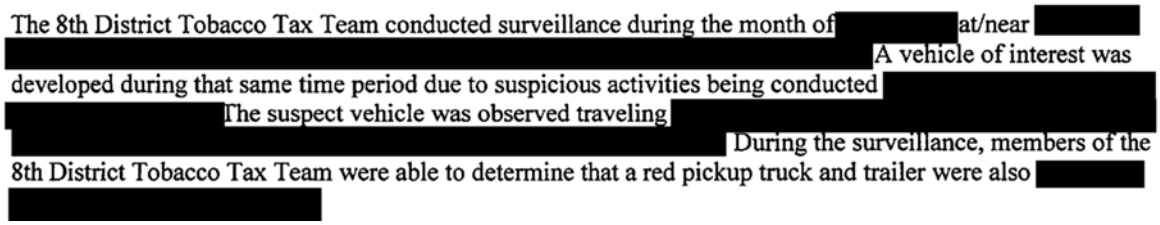
[3] In Defendant Croley's deposition, Defendants took an aggressive, and unsupported, position on privilege, claiming that information exchanged between Michigan State Troopers and the Michigan Attorney General Criminal Division, in connection with the investigation of the Community and its members, is subject to attorney-client or work product privilege. Nichols Decl. Ex. D at 11 (18:1-19:4), 18 (31:1-32:5), 62 (112:12-113:13). Courts have consistently held that the attorney client privilege and work product protections do not apply to communications between law enforcement agents and prosecutors. *Amili v. City of Tukwila*, No. C13-1299-JCC, 2014 U.S. Dist. LEXIS 94615, at *4 (W.D. Wash. July 10, 2014) ("There was no attorney-client relationship between these two individuals because a district attorney is a public officer who represents the people—not 'the police officers.'"); *Sampson v. Schenck*, No. 8:07CV155, 2009 U.S. Dist. LEXIS 18246, at *22 (D. Neb. Feb. 23, 2009) ("The Cass County Attorney's Office does not render legal services to the investigators in the context of pursuing criminal charges against a third-party."); *Klein v. Jefferson Par. Sch. Bd.*, No. 00-3401, 2003 U.S. Dist. LEXIS 6514, at *9 (E.D. La. Apr. 10, 2003) ("the [work product privilege] is unavailable when a prosecutor in a prior criminal investigation later objects to discovery of her work product by a litigant in a related civil lawsuit."); *Hernandez v. Longini*, 96 C 6203, 1997 U.S. Dist. LEXIS 18679, at *5 (N.D. Ill. Nov. 12, 1997) (same). There is no legal support for Defendants' position and if they maintain it, this matter will likely come before the Court yet again.

[4] Defendants admit that they failed to comply with the rule requiring them to provide their verbatim responses with their original motion, and now attempt to "remedy that oversight" in their Motion for Reconsideration. (PageID.3029.) It is not proper, however, to introduce new facts on a motion for reconsideration. *See United States v. Stone*, No. 1:06-CV-157, 2006 U.S. Dist. LEXIS 75732, at *3 (W.D. Mich. Oct. 18, 2006) (denying motion for reconsideration after Defendants submitted new affidavits because "Defendants were on notice of Plaintiff's evidence, knew of the impending possibility of an injunction, and did not make these submissions; rather, they waited in reliance on the Court finding in their favor").

approach to the disclosures and avoided releasing anything that they deem to be privileged. In fact, Defendants revealed information about surveillance in the criminal cases, but later claimed that the exact same information is privileged in the civil case. For example, in the criminal case, Defendants disclosed a report written by Defendant Croley that stated:

> The 8th District Tobacco Tax Team conducted surveillance during the month of September at/near the Pines convenience store along with the Ojibwa Casinos located in Baraga and Marquette. A vehicle of interest was developed during that same time period due to suspicious activities being conducted at the Pines convenience store in Baraga, MI. The suspect vehicle was observed traveling from the Pines convenience store to a storage facility located directly across from the Ojibwa Casino in Baraga, MI. During the surveillance, members of the 8th District Tobacco Tax Team were able to determine that a red pickup truck and trailer were also located inside the storage building.
>
> Nichols Decl. Ex. A.

Defendants disclosed the same document in this case, but it is heavily redacted to obscure the details of their surveillance activity on the Reservation:



Nichols Decl. Ex. B.

Defendants are happy to disclose surveillance details when it advances their prosecution of Community members. But when the Community challenges those prosecutions and related law enforcement operations, Defendants improperly withhold the information in order to prevent the Community from proving its case. Defendants are using the privilege as a sword and shield, and—by their own understanding of the law—have therefore waived the privilege.

B. The Court Correctly Applied Sixth Circuit Precedent Regarding Disclosure of Surveillance Techniques.

Defendants claim that the Court erred because it "appears to have been swayed in its ruling by the fact that the investigation at issue did not involve 'new sophisticated technology.'" (PageID.3032.) That was one factor considered by the Court in balancing the interests of the State with the needs of the Community—and it did not work in the State's favor because the surveillance techniques at issue are widely known (as confirmed, in part, by Defendants' prior disclosures) and would not compromise future investigations if revealed.[5] It was proper for the Court to consider this, and Defendants cannot show otherwise.

Defendants believe that the Court should accept at face value, and not question, their assertion that revealing details of the surveillance—even if the techniques are well known to the public—would compromise future investigations. Defendants cite two cases that purportedly support their argument. The first case, *United States v. Gazie*, 786 F.2d 1166 (6th Cir. 1986), was decided 32 years ago, and its view of technologically complex surveillance is significantly outdated. Defendants attempt to take advantage of that by arguing that the surveillance techniques at issue there—electronic microphones and audio recording equipment—are not sophisticated by today's standards, and contend incorrectly that *Gazie* therefore stands for the proposition that even unsophisticated techniques should not be subject to disclosure. In the second case, *United States vs. Harley*, 682 F.2d 1018, 1019-20 (D.C.D.C. 1982), information about the surveillance technique at issue was not protected—Defendants themselves describe it: "[o]fficers observed a drug deal from a nearby apartment using binoculars and recorded it with a video camera." (PageID.3032.) The court merely found that information related only to "the

[5] Some, and perhaps most, of the surveillance was conducted by entering the Reservation out of uniform in an unmarked car, and Defendant Croley admitted that this is not a secret surveillance technique—the public may know about it just by watching police shows on television. Nichols Decl. Ex. D at 14 (24:2-25:10), 39 (69:23-70:25).

safety of the cooperating apartment owner," such as the precise location and ownership of the apartment, should be protected. *Id*. Defendants conflate the issues to make it appear that the court was protecting information about an "unsophisticated" technique.

Based on the limited evidence that is available to the Community, Defendants carried out surveillance by entering the Reservation under false pretenses, out of uniform and in an unmarked vehicle. Nichols Decl. Ex. D at 14 (24:2-25:10), 39 (69:23-70:25). As Defendant Croley admitted in his deposition, this technique is publicly known. *Id*. at 15 (25:11-19). If Defendants utilized any technique that is not public knowledge, Defendants could have sought a protective order to maintain the confidentiality—rather than absolute secrecy—of that information.

C. Defendants' Desire to Continue Unlawful Surveillance and Seizures is no Justification for Withholding Information from the Community.

Defendants claim they "need to protect" the information at issue because they want to continue seizing the Community's tobacco products and "such seizures rely on law enforcement investigations into how cigarettes are being transported." (PageID.3033.) This is yet another example of Defendants' attempts to use privilege assertion as a sword and shield. The Community is challenging the legality of Defendants' surveillance and the seizures that resulted from it. Defendants' desire to continue those unlawful activities is no justification for precluding discovery of the very information that the Community needs to prove its claims.

CONCLUSION

For all of these reasons, Defendants Motion for Reconsideration should be denied, and the Court should order Defendants to immediately comply with the Order, and: 1) make Defendant Croley available for deposition on lines of questioning regarding investigations of the

Community and its members that were foreclosed by improper instructions not to answer; and, 2) reimburse the Community's travel costs for continuing the deposition of Defendant Croley.

Date: July 24, 2018

Respectfully submitted,

Danielle Webb (MI Bar No. P77671)
Tribal Attorney's Office
Keweenaw Bay Indian Community
16429 Beartown Road
Baraga, Michigan 49908
(906) 353-4107; FAX: (906) 353-7174

DORSEY & WHITNEY LLP

By s/James K. Nichols
Skip Durocher (MN Bar No. 208966)
Mary J. Streitz (MN Bar No. 016186X)
James K. Nichols (MN Bar No. 0388096)
50 South Sixth Street, Ste. 1600
Minneapolis, MN 55402
(612) 340-7855; FAX: (612) 340-2807

Attorneys for Plaintiff Keweenaw Bay Indian Community