

LEONARD
STREET
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150 SOUTH FIFTH STREET SUITE 2300
MINNEAPOLIS, MINNESOTA 55402
612-335-1500 MAIN
612-335-1657 FAX

February 13, 2008

JOSHUA JAY KANASSATEGA
BRYANT D. TCHIDA
FIRM'S DIRECT DIAL NUMBER
(612) 335-1500

VIA FACSIMILE

Christian R. Larsen, Esq.
Assistant United States Attorney
United States Department of Justice
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

***Re: United States of America v. Menominee Tribal Enterprises, et al.:
Case No. 07-cv-00316, United States District Court – Eastern
District of Wisconsin – Green Bay Div.
February 14, 2008 Discovery Conference***

Dear Mr. Larsen:

We write regarding the agenda for the discovery conference in the above matter scheduled to occur Thursday, February 14 at 1:30 p.m. Please note that some of these agenda items were previously discussed with you during our January 8, 2008 conference and remain unresolved. Menominee Tribal Enterprises (“Menominee”) reiterates that it hopes the parties will be able to work through these issues without need for the Court’s involvement.

The *first* and most pressing issue that looms larger by the day is amendment of the scheduling order. Although the government now concedes that a scheduling order amendment is in order due to the issue with David Congos’s (“Congos”) laptop, there are numerous other discovery items that need to be completed, and we do not believe that the current schedule will accommodate completion of those items. Menominee renews its proposal for a 30-45 day discovery extension, as previously proposed to you on January 8. Although this discovery adjustment may necessitate moving the dispositive motion dates (to the extent premised upon information gained in discovery), we believe the current trial schedule would not need to be moved.

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The *second* issue needing resolution is the Department of Interior (“DOI”), Bureau of Indian Affairs (“BIA”), Midwest Regional Office’s (“MRO”) handling of document review and production. While Menominee has been sensitive to purported space and personnel constraints at the MRO, the document review and selection process imposed on Menominee by your office and the MRO since October 2007 has been onerous. Equally significant, it has resulted in serious questions about the integrity and reliability of that production. As we discussed with you on January 8, the government has failed to bates label these documents. Instead of utilizing bates numbers, the government has required Menominee to fill out two forms for each document (or group of documents) requested (“Blue Sheets”). Menominee is then required to place one Blue Sheet in front of the document(s), and one Blue Sheet behind the document(s). A BIA employee, whom we understand to be is Sean Hart (a central fact witness in this case), then oversees a document production process that includes scanning each page of each document, placing bates numbers on the document, and making a photocopy. The government then produces (although, as discussed below, we have reason to believe several requested documents have not been produced) the document to Menominee several days or weeks later.

As we expressed to you on January 8, aside from the unduly burdensome nature of the process imposed upon Menominee, the primary problem with this procedure is that Menominee has no guaranty that the people doing the copying (including Sean Hart, who has every reason to withhold documents harmful to the government’s case) are copying and producing all of the selected documents, or documents in their entirety.

Menominee’s concerns have proven to be well founded. For example, gaps in the bates range of produced documents clearly indicate that a large number of documents selected for production have not in fact been produced. Ms. Pfister represented to us that documents would be produced with seriatim bates numbers. There should, therefore, be no bates number gaps in the production. Yet, there are numerous gaps, including, without limitation, the following: BIAC001018-BIAC001121, BIAC002501-BIAC002542, BIAC004462-BIAC004523, BIAC004974-BIAC004999, BIAC005105, BIAC005117, BIAC005144, BIAF000549-BIAF000565, BIAF000889-BIAF003441, BIAF003880-BIAF003882, BIAF004245-BIAF004349, BIAF005134, BIAF005565-BIAF005571, BIAF008584, and BIAK000266-BIAK000267.

A related issue casts further doubt on the completeness and accuracy of this production. Menominee has been numbering the Blue Sheets seriatim. Several requests, however, have not been produced. For example, Blue Sheet request Nos. 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 28, 39, 48, 56, 57, 62, 75, 85, 105, 135-154, 158-159, 164, 192, 194, 199, 205, 253, 276-277, 316-323, 339, 379, and 419 have not been produced.

In other instances, the complete group of documents requested by Menominee has not been produced. For example, Blue Sheet request No. 334 included attachments flagged for production, but which were not produced. Similarly, Blue Sheet request No. 354 included a

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cover letter with an attached CD. Although the CD was produced, the cover letter, which was selected for production, was not.

Moreover, with respect to some Blue Sheet requests – for example Blue Sheet Request No. 104 – the requested document has not been produced, and in its place is a piece of paper that says “Lost Tabs.” Mr. Hart (or whoever else was attempting to make the copy) obviously lost the Blue Sheets and did not make the requested copy.

There are also unidentified pink and blue pieces of paper standing up throughout the files. We asked Ms. Pfister whether these are place holders for documents that have been removed. She said that she has no idea, and we would need to take this issue up with you. Can you explain this?

On a related note, you and Ms. Pfister have both stated that documents have been and for all we know continue to be removed and added to these boxes, even as we review them. The MRO, however, has failed to segregate or specifically identify these documents. Although added to a general index, Menominee has no way of knowing which particular documents have been removed or added. To add to the confusion, we know that MRO has redacted portions of some documents without indicating the redaction on the copy.

A bigger problem is that by your own admission the invoices and attachments, if any, that were located in the BIAK files have been removed (by Congos, Joe Schwartz or others), disassembled and rearranged (by Congos, Schwartz or others). You did not seem to think that this was a problem when we raised the issue with you last year, but Menominee believes this is a serious spoliation issue. Your recalcitrant attitude regarding alteration of the MRO files is, to say the least, not well taken.

Another issue is that there are blank pages scattered throughout the production. Examples include, without limitation, documents bates numbered BIAF009444, BIAF009448, BIAC002307, and BIAC002309. There are literally dozens and dozens of these blank pages in the production. This raises a concern that some of the documentation requested by Menominee has either been pulled or not scanned properly, in addition to making the documents difficult to use as exhibits (an issue which arose during Ms. Pubanz’s deposition). Similarly, some pages in the production are blacked out, for example, pages bates numbered BIAC003180, BIAC003182, BIAC003184, BIAC003186, BIAC003188, BIAC003190, BIAC003192, and BIAC003194.

Furthermore, the MRO has failed to copy numerous post-it notes attached to the documents. In other instances, the MRO has copied the document with post-it notes as they appear, but failed to make a corresponding copy of the page without the post-it note, thus covering up information. A related problem is that the MRO has failed to make color copies of several documents which contain color highlighting. This is important information, especially in

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a case when hand-drawn, highlighted maps are among the documents at issue. The MRO's failure to produce exact duplicates of original documents is not acceptable.

With respect to the files themselves, although you have indicated that the BIAK documents are comprised in large part of Congos's files, we have no idea to whom the other files belong. The MRO has refused to identify for us which files belong to whom. This creates insurmountable barriers to Menominee's ability to adequately prepare for depositions because we have no way of knowing which documents came from which witness's file. This problem is compounded by the fact that these files do not appear to have been produced as they were kept in the ordinary course of business. It appears as though these files were pulled together from numerous sources and not arranged in an orderly fashion or in the ordinary course of business (out of chronological order) for Menominee's review. Important documents appear to have been shuffled in with non-responsive documents for no logical reason. Your contention that these files are organized as the were kept by program is belied by the disorganized nature of the files as well as the fact that certain emails and other hard copy documents relating to the contracts at issue are not located in these files. Under BIA's records retention policy, all contract-related documents should be filed in the program files.

Also, as you acknowledged during our January 8 conference, there are documents in the MRO files that reference attachments, but the attachments are missing. We need an answer as to where the missing attachments are and when they will be produced.

In addition, although Menominee filled out Blue Sheet requests seriatim, the MRO has not produced the requested documents seriatim. Instead, the documents have been produced out of order, further highlighting MRO's pattern of making this document review as difficult and time consuming as possible.

Menominee objected to the government's decision to deny Menominee further access to the MRO documents at MRO's office after of February 12, 2008. In response, you proposed to "have the entirety of the BIAK boxes copied and produced to you within the next few weeks." This is not a viable solution. First, making a copy of the BIAK boxes does not resolve any of the problems associated with the BIAF, BIAR and BIAC boxes. More importantly, Menominee has invested substantial resources in complying with the onerous and complicated procedure imposed by the MRO. It is not about to invest additional resources to re-review documents that it has already reviewed and selected for production.

Please recall that Menominee contested the MRO procedure at the outset. Menominee complained that the process was difficult, and that because the source documents were not bates labeled there was no way to easily track what has and has not been produced. You and Ms. Pfister, however, refused to address Menominee's concerns and insisted on the Blue Sheet procedure. Having selected that procedure, the government is in no position to complain now about Menominee's review. Menominee fully expects that it will be permitted to complete its

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review. Moreover, Menominee fully expects that the documents it selected for production will all be copied properly, produced as requested, and that the MRO and your office will certify that all documents requested by Menominee have been completely and fully produced.

The *third* issue needing resolution relates to production of Congos's emails. At the top of the list of issues is your statement that "we have located what appears to be the Congos fire laptop and plan to send that to the lab as soon as possible." What do you mean by "located" and "what appears to be the Congos fire laptop?" Menominee requested before that Congos's fire laptop be quarantined and properly preserved for forensic analysis. You represented to the Court that this had been done. Why then, was there a need to "locate" this computer, and why are you uncertain whether this is Congos's fire laptop? This calls into serious question the chain of custody for this computer and the integrity of the data located on it. The competence of the Office of Inspector General ("OIG") lab's forensic analysis is also now called into serious question. How can it be that the OIG lab did not discover that it was looking at Tom Remus's laptop instead of Congos's laptop at the inception of or during its analysis?

With respect to Congos's emails purportedly recovered from the Zantaz system, Menominee objects to the manner in which those emails have been produced. First, there are numerous emails in this production that have nothing to do with this case (for example, an announcement for Jay West's retirement party). Second, there are emails in this production that are clearly not Congos's emails. More importantly, all emails have been printed in a manner such that Chuck Westphal's name appears in the top left column, rather than the name of the individual from whose computer the email was captured. Aside from questions about the integrity of the production by having a paralegal instead of an attorney conduct the review, production of these emails in this manner makes it impossible for Menominee to be able to identify which witness can authenticate and lay foundation for each of these emails. Moreover, Menominee requests that the government explain its decision to capture all emails regardless of source and its failure to make a targeted search in response to Menominee's discovery requests. Menominee also requests that the government explain why there are so few responsive emails produced resulting from a search encompassing a time period from 2001 to the present. Furthermore, Menominee requests that the government explain why a search was not conducted for years 1999 and 2000.

The *fourth* issue concerns the government's production of electronic information. Menominee requested that the government develop an electronic discovery plan at the outset of this case, as required by Rule 26(f)(3). You were not interested in addressing this issue then, and Menominee objects to the procedure foisted upon it by Sean Hart now.

Menominee objected first to your office's designation of Sean Hart as the person responsible for taking custody of Congos's fire laptop computer. Moreover, Menominee objects to the decision to have Sean Hart be responsible for the production of electronic information. Aside from the fact that Hart does not have appropriate credentials to be coordinating an

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electronic records search, he is a fact witness in this case who is clearly biased against Menominee and has much to hide. The government selected the search terms used, the sources searched, and the method of production. While the government sought Menominee's input regarding search terms, it is not Menominee's obligation to determine how to capture responsive and relevant information from a computer system about which it knows nothing. This issue will need to be resolved by involving appropriately credentialed individuals who can agree upon an acceptable electronic document production methodology and procedure. We will be prepared to discuss possible solutions during tomorrow's discovery conference, and we ask that you do the same.

On a related note, the government has yet to produce the metadata relating to Congos's statement of facts. We provided you with authorities demonstrating that Menominee is entitled to this information. When will it be produced?

The *fifth* issue relates to continuation of the depositions of Congos, Todd Bucci and Joe Schwartz. You have not provided us with an answer as to whether the government will produce any of these witnesses for further examination by Menominee. As we explained to you on January 8, we need an additional day for Congos, and a half-day each for Bucci and Schwartz. In addition, Menominee requests that the government consent to continue the deposition of Ms. Pubanz for one day and the deposition of Douglas Cox for a half-day in light of the substance of numerous documents unavailable to Menominee at the time of those depositions as well as Ms. Pubanz's lack of cooperation and convenient loss of memory. We request that you provide us with your answer during tomorrow's discovery conference.

The *sixth* issue relates to extending the 10 deposition limit. Menominee has taken 5 depositions, and more than five key witnesses remain to be deposed. Key witnesses remaining to be deposed include: (1) Sean Hart; (2) Marty Casselius; (3) Bernita Lonetree; (4) Mike Berlin; (5) Neil Smith; (6) Rule 30(b)(6) deposition of DOI; (7) Jay West; (8) Stuart Mani; (9) Larry Morin; (10) Andy Bellcourt; (11) Terrance Virden; (12) Emma Canada; (13) Tom Magnuson; (14) Lisa Waukau; and (15) Linda Caldwell. Please be prepared to give us your answer tomorrow as to your position on this issue.

The *seventh* issue relates to Ms. Pubanz's production of documents that you provided to her counsel electronically. Ms. Pubanz did not testify truthfully when, among other things, she testified under oath at her deposition that she produced all of those materials to Menominee on a CD. Ms. Pubanz's counsel wrote to Menominee's counsel in a letter dated September 13, 2007 regarding Ms. Pubanz's document production in response to a subpoena *duces tecum*. That letter makes no reference to producing a CD. Moreover, we are prepared to produce an affidavit by the person who has had custody of the envelope and contents of Ms. Pubanz's production, stating that no CD was included in Ms. Pubanz's production. Accordingly, the transmittal letter from Pubanz's counsel and the document production itself confirms that those materials were produced by Ms. Pubanz in hard copy, not on CD. This is problematic because Ms. Pubanz also

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testified that she did not print all of the materials for production that you provided to her counsel. Menominee requests that you provide a complete set of the electronic documents you gave to Pubanz's counsel to be produced to Menominee in response to the subpoena *duces tecum*.

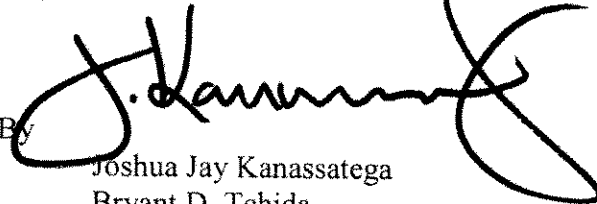
The *eighth* issue relates to Sean Hart's fire laptop. You contend that his fire laptop has been destroyed. If that is the case, then we need a report as to the chain of custody for that computer, as well as the records relating to its destruction.

The *ninth* issue relates to the photographs taken by Congos in the course of his "investigation." There are references in the documents produced by the government to many more photographs taken by Congos (or others working with him) than have been produced. We need to have all of these photographs produced or an explanation as to why they have not or cannot be produced.

While there may be other discovery issues that need to be resolved, these are the major issues as we see them as of today's date. We hope tomorrow's discovery conference is productive and that we are able to agree to a satisfactory resolution to all of these issues.

Very truly yours,

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By  Joshua Jay Kanassatega
Bryant D. Tchida

JJK/BDT/js

cc: Glenn Reynolds, Esq. (via Facsimile Transmission and United States Mail)