

2. The Court held in its June 20, 2008 Order that “[u]nder all of the circumstances presented here, the Court concludes that an extension until July 11, 2008 should be sufficient to meet the Government’s needs. In the event there are specific areas the Government claims further discovery is required and cannot be completed within that time, it may renew its motion.” Docket No. 127, at 3 (emphasis added). Menominee understood the Court’s June 20 Order to have extended the time to “complete” discovery to July 11 (at least for the Government).

3. On June 18, Menominee hand-delivered to the Government its Amended Rule 26(a)(1) Disclosures (“Disclosures”). Kanassataga Dec. ¶ 2. In a June 19 response, the Government threatened to move to strike Menominee’s Disclosures if Menominee would not voluntarily withdraw them. *Id.* Ex. 6. Menominee replied on June 20 that the Government’s contentions were misplaced, and in any event Menominee would have no objection to the Government taking depositions of the four “new” witnesses on Menominee’s Disclosures. *Id.* Ex. 7. Hence, there is no possibility of harm to the Government. *Id.*¹

4. The parties met and conferred about this issue on June 27. Kanassataga Dec. ¶ 3. Menominee renewed its offer to work with the Government to schedule and complete any new

¹ The primary new witness and documents identified by Menominee that the Government objects to are Paul Crocker and certain documents relating to Mr. Crocker’s recent field inspections of David Congos’s photograph locations relied upon in this case by the Government. On June 16, Menominee’s counsel was out of the office defending a Government deposition in Ottawa, Canada. Kanassataga Dec. ¶ 2. On that day, Menominee’s counsel received a FedEx package that contained documents which were, upon information and belief, prepared by Crocker relating to Crocker’s recent field inspections. *Id.* After returning to the office late in the day on June 17, Menominee’s counsel immediately initiated a procedure to prepare Crocker’s documents for production – the production occurred on June 20 (only four days after receiving the documents). *Id.* Menominee also immediately added Crocker to its Disclosures (only two days after Menominee received Crocker’s materials). *Id.* The Government also objects to Menominee’s identification of recent photographs taken by Marshall Pecore in his independent field inspections of Congos’s photo locations. The Government further objects to Menominee’s identification of two Menominee employees whom Menominee has discovered have information about one of the culverts at issue in this case, which was installed but later removed because it was crushed by a truck. Moreover, the Government objects to Menominee’s identification of Mariana Shulstad – whom the Government knows about from the June 4 deposition of Larry Morrin, in which Menominee questioned Morrin about his June 16, 1998 meeting with Shulstad and others regarding the equipment purchases at issue in this case. Pecore has already testified that Morrin gave Menominee permission during that meeting to make the equipment purchases. Finally, the Government objects to Menominee identifying various Menominee road crew members, all but one of whom the *Government itself* identified as potential witnesses in a February 20, 2003 letter to Menominee. *Id.* Ex 8.

witness depositions the Government may wish to take before, or even after, July 11. *Id.* In addition, although the Government has taken 9 depositions, Menominee agreed to waive the 10-deposition limit. *Id.* Menominee also agreed to “double track” any depositions (2 at a time), so that any such depositions could be completed in a day or two. *Id.* Furthermore, Menominee offered to the Government its consent to the Government supplementing the summary judgment record, even after July 11, to the extent the Government needed to do so. *Id.* Thus, there is no reason these depositions could not be completed before July 11, but even if not, Menominee compromised with a position that would result in no harm to the Government.

5. The Government rejected Menominee’s proposal on the grounds that the discovery “deadline” was June 15. *Id.* ¶ 4. Menominee responded that all the parties had agreed that discovery would be completed by the end of June, and that it is unfair for the Government to take this new position now. *Id.* Menominee also explained its view that the Court already extended discovery to July 11 in its June 20 Order and, therefore, the Government could take depositions. *Id.* Menominee further offered a practical solution that the parties jointly move the Court to formally amend the Scheduling Order for discovery completion by July 11, to address the Government’s concerns. *Id.* The Government rejected Menominee’s proposal and instead stated that it would be moving to strike the Disclosures. *Id.* Ex. 9.

6. A prosecutor should champion all of the facts, including exculpatory facts, coming to light. The Government’s interest is to see that justice is done. The solution is for the parties to work together to complete discovery by July 11 (an existing date per the June 20 Order), not to strike exculpatory defense evidence in a civil fraud action akin to a criminal prosecution, especially when there is no harm to the Government. Menominee asks that the Court provide immediate direction and clarify that July 11 is the discovery “completion” date.

RESPECTFULLY SUBMITTED,

DATED: JUNE 29, 2008

/s/ Joshua Jay Kanassatega

Joshua J. Kanassatega (MN #211254)

joshua.kanassatega@leonard.com

Bryant D. Tchida (MN #314298)

LEONARD, STREET AND DEINARD

Professional Association

150 South Fifth Street, Suite 2300

Minneapolis, Minnesota 55402

Telephone: (612) 335-1500

Fax: (612) 335-1657

**ATTORNEYS FOR DEFENDANT
MENOMINEE TRIBAL ENTERPRISES**