

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

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UNITED STATES OF AMERICA, : CIVIL ACTION No. 07-C-316
Plaintiff, :
v. :
: **DEFENDANT**
MENOMINEE TRIBAL ENTERPRISES, : **MENOMINEE TRIBAL ENTERPRISES'**
the principal business arm : **MOTION FOR LEAVE TO FILE**
of the Menominee Indian Tribe of Wisconsin, : **SUPPLEMENTAL AFFIDAVIT AND**
MARSHALL PECORE, and : **EXHIBITS IN CONNECTION WITH**
CONRAD WANIGER, : **ITS RULE 7.4 EXPEDITED NON-**
: **DISPOSITIVE MOTION FOR**
Defendants.: **DISCOVERY AS TO SPOILIATION OF**
: **EVIDENCE AND VIOLATION OF**
: **MENOMINEE'S ATTORNEY-CLIENT**
: **PRIVILEGE**
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Defendant Menominee Tribal Enterprises ("Menominee") moves for leave of Court to file the Proposed Supplemental Affidavit of Joshua Jay Kanassatega in Support of Menominee's L.R. 7.4 Motion ("Proposed Supplemental Kanassatega Affidavit"), including attached Exhibits 42, 43 and 44, in connection with its pending Rule 7.4 Motion for Discovery as to Spoliation of Evidence and Violation of Menominee's Attorney-Client Privilege ("L.R. 7.4 Motion"). The Proposed Supplemental Kanassatega Affidavit and Exhibits 42-44 thereto are attached to this Motion for Leave to File Supplemental Affidavit and Exhibits in connection with the L.R. 7.4 Motion ("Motion to Supplement") as **Exhibit A**. In support of Menominee's Motion to Supplement, it states as follows:

1. The three Exhibits (marked 42, 43 and 44) to the Proposed Supplemental Kanassatega Affidavit are comprised solely of correspondence from Assistant United States Attorneys Christian R. Larsen and Mel S. Johnson. Proposed Supplemental Kanassatega Affidavit Ex. 42, 43, 44. For the reasons that follow, Exhibits 42, 43 and 44 could not have been

Motion for Discovery as to Spoliation and Violation of Menominee’s Attorney-Client Privilege (“Motion”). The Court’s consideration of each document provides an opportunity for the Court to decide the Motion upon a full and complete record. None of the three documents could have been included in my First Affidavit of October 25, 2007 for the following reasons. The first document (Exhibit 42) was received at my Microsoft Outlook mailbox *via* electronic transmission on Friday, October 26, 2007 at 3:35 p.m. after my First Affidavit had been finalized and I had left the office, but while Menominee’s e-filing was in the final preparation stage. The second and third documents (Exhibits 43 and 44 respectively) arrived at my office *via* United States Mail on Saturday, October 27, 2007. I reviewed each document upon my return to the office on Monday, October 29, 2007.

3. I am attaching hereto photocopies of the two documents I received from Assistant United States Attorney Christian R. Larsen and one document I received from Assistant United States Attorney Mel S. Johnson.

Ex. 42	Letter from AUSA Larsen dated 10/26/2007	Ex. 44	Letter from AUSA Johnson dated 10/25/2007
Ex. 43	Letter from AUSA Larsen dated 10/29/2007 (true date unknown)		

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Joshua Jay Kanassataga
JOSHUA JAY KANASSATEGA

SWORN TO BEFORE ME this
29th day of October, 2007.

/s/ Janet L. Skjei
Janet L. Skjei
NOTARY PUBLIC

Kanassatega, Joshua

From: Fazer, Rebecca (USAWIE) [Rebecca.Fazer@usdoj.gov]
Sent: Friday, October 26, 2007 3:35 PM
To: Kanassatega, Joshua; reynlaw@earthlink.net
Cc: Larsen, Chris (USAWIE)
Subject: USA v. MTE, et al.
Attachments: Kanassatega, re Oct 25 discovery conference.pdf

Please contact me if you are unable to open the attached document. <<Kanassatega, re Oct 25 discovery conference.pdf>>

Thanks.

Becky

Rebecca L. Fazer

Legal Assistant

United States Attorneys Office

Eastern District of Wisconsin

Phone: 414-297-4520

Fax: 414-297-4394

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U.S. Department of Justice

*United States Attorney
Eastern District of Wisconsin*

517 East Wisconsin Avenue

414 / 297-1700

Milwaukee, WI 53202

October 26, 2007

Joshua Jay Kanassatega
Leonard, Street and Deinard, P.A.
150 South Fifth Street
Suite 2300
Minneapolis, Minnesota 55402

Re: **USA V. Menominee Tribal Enterprises, et al.**
Case No. 07-C-316

Dear Mr. Kanassatega:

I write in response to your letter dated October 25, 2007, in which you summarize the substance of our Local Rule 37.1 conference. Although the bulk of your summary is accurate,¹ for the sake of completeness I would like to raise the following additional matters for your consideration.

First, in support of your request for an extension of the usual discovery limits (including the 7 hour time limit on depositions), you have asserted that the government "invaded" MTE's attorney-client privilege. The basis for this claim appears to derive from reports of interview disclosed to you in discovery (see Bates Nos. USA0012863-12883), conducted by OIG agent Joseph Schwartz. These reports reflect that certain MTE Board members raised concerns that MTE representatives (including you) took actions or made statements which the witnesses believed were in reprisal for their cooperation in the government's investigation.

¹To correct one item, page 3 of your letter indicated that Special Agent Bucci is in possession of the "Laptop Computers," which implies a reference to more than one computer. SA Bucci has only taken possession of the single fire laptop assigned to both Thomas Magnuson and David Congos while they were assigned to the BIA's office in Keshena. Sean Hart's laptop, which is addressed in the reports sent to you earlier this week, has not been transferred to OIG's possession.

Joshua Jay Kanassatega

October 26, 2007

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As you can probably appreciate, the government takes allegations of reprisal seriously; indeed, we have an obligation to conduct at least a limited inquiry into such allegations, consistent of course with legal and ethical standards. Although no formal allegation has been made against you or other MTE personnel, the facts contained within the interview reports of these witnesses, if true, raise troubling issues as to the behavior of MTE representatives in response to our investigation, and provide a good-faith basis for the inquiries made by the government.

Moreover, to the extent you believe the United States has violated some legal rule or ethical standard of conduct in connection with these interviews, you have provided no authority for your allegation that the government's inquiries were improper in any way. *See e.g.* Wisconsin SCR 20:4.2, Comment ("This rule [relating to communication with persons represented by counsel] does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation"). If called to testify, we believe both Ms. Pubanz and Ms. Caldwell would disavow being represented by you on the matters discussed with them during government interviews. And, as the lawyer for the tribal organization, you cannot claim the protection of attorney-client privilege in connection with their allegations of reprisal at the hands of MTE representatives.

Finally, even assuming MTE could identify an ethical lapse on the government's part (which the government denies), you have cited no authority for the proposition that evidence should be suppressed or that the ethical problem has had any impact on MTE's ability to mount a proper defense. *See e.g., United States v. Olson*, 450 F.3d 655, 681-82 (7th Cir. 2006).

That said, as you summarize in your letter of October 25, 2007, the government does not object to MTE using the appropriately limited discovery procedures available under the Federal Rules of Civil Procedure to pursue this issue if it so chooses (I note that MTE has already served a Fourth Set of Interrogatories and a Sixth Set of Requests for Production of Documents on this matter). However, absent a legitimate factual and legal basis for your allegations regarding the government's alleged invasion of MTE's attorney-client privilege, we are not inclined to consent to a further increase in the already escalating costs of this litigation (both to the parties and to the persons you seek to depose for more than 7 hours). As I have stated on other occasions, this is a relatively straightforward case involving a limited number of false invoices, along with several breach of contract issues. In the government's view, the current breadth of discovery is quickly exceeding the permissible scope of discovery under Fed. R. Civ P. 26(b)(2)(C).

Joshua Jay Kanassatega

October 26, 2007

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Second, with respect to the issue of alleged spoliation of evidence, the government has confirmed (as you stated during our conference) that emails sent by David Congos from his fire laptop computer were not routinely printed and placed in his Keshena files. Those emails, however, should reside on the fire laptop's hard drive in electronic format. As you have been advised, both the laptop itself and its hard drive (which contains the email information) have been transferred to the custody of OIG Special Agent Todd Bucci. Several weeks ago the government proposed sending the hard drive to the OIG laboratory for expert analysis and recovery of the emails, since MRO staff may not have the expertise to properly open the emails. At MTE's request, however, the government has not taken this step. I would simply reiterate our position that any spoliation claim is premature until we know whether the email information residing on that computer is in fact "lost." In this regard, the government remains willing, at its own expense, to have DOI computer experts conduct this review. I continue to think that your alternative proposal – to transfer the hard drive to your possession or that of an independent expert – would be unnecessarily expensive and cumbersome for the reasons I stated during our conference.

Thank you for your consideration of these matters.

Sincerely,

STEVEN M. BISKUPIC
United States Attorney

By: /s/
CHRISTIAN R. LARSEN
Assistant United States Attorney

CRL:rlf

cc: Glenn Reynolds



U.S. Department of Justice

United States Attorney
Eastern District of Wisconsin

517 East Wisconsin Avenue
Milwaukee, WI 53202

414 / 297-1700

October 29, 2007

Joshua Jay Kanassatega
Leonard, Street and Deinard, P.A.
150 South Fifth Street
Suite 2300
Minneapolis, Minnesota 55402

Re: **USA V. Menominee Tribal Enterprises, et al.**
Case No. 07-C-316

Dear Mr. Kanassatega:

In the process of preparing the government's response to MTE's discovery requests, I discovered a group of documents provided by Linda Caldwell and Jacci Pubanz to David Congos, who in turn provided them to OIG Special Agent Joseph Schwartz. Some of the documents appeared on their face to be potentially subject to the attorney client privilege. Therefore, without reading the substance of the documents, I provided them to this office's Professional Responsibility Officer for review. Upon review, it was concluded that some, but not all, of the documents are privileged and the privilege has not been waived.

As a result of that review, I am returning to you a page numbered copy of the documents we believe are not privileged (page numbers 1 and 9-28). Our office's Professional Responsibility Officer will be returning pages 2-8 to you, and he will maintain a copy of all the documents for our office's file.

Please contact me if you have any questions regarding this matter.

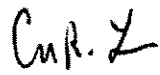
OCT 27 2007

Exhibit 43

Joshua Jay Kanassataga
October 23, 2007
Page 2

Sincerely,

STEVEN M. BISKUPIC
United States Attorney

By: 
CHRISTIAN R. LARSEN
Assistant United States Attorney

CRL:rlf



U.S. Department of Justice

*United States Attorney
Eastern District of Wisconsin*

*517 East Wisconsin Avenue
Milwaukee, WI 53202*

414 / 297-1700

October 25, 2007

Mr. Joshua Jay Kanassataga
Leonard, Street and Deinard, P.A.
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402

Re: United States v. Menominee Tribal Enterprises, et al
Case No. 07-C-316

Dear Mr. Kanassataga:

I am writing to follow up on Chris Larsen's recent letter to you regarding documents provided to government agents by Linda Caldwell and Jacci Pubanz. As he mentioned, at first glance, it appeared to him that some of the documents might be subject to the attorney-client privilege. So, he turned them over to me to review to determine whether I believed any were subject to that privilege. That responsibility fell to me because I am the Professional Responsibility Officer for this office and, from time to time, I perform such reviews.

As Mr. Larsen's recent letter explained, I concluded that pages 2 - 8 of the 28 pages I reviewed were arguably subject to the privilege. Accordingly, I did not return them to Mr. Larsen and, to my knowledge, he does not have copies. Enclosed please find copies of pages 2 - 8. I will also maintain copies of those pages in case they are necessary to refer to in the future regarding any issue about these documents. I have had and will have no role in the litigation of the above-captioned case. I do not intend to provide copies of the enclosed pages to Mr. Larsen.

OCT 27 2007

Exhibit 44

Mr. Joshua Jay Kanassatega

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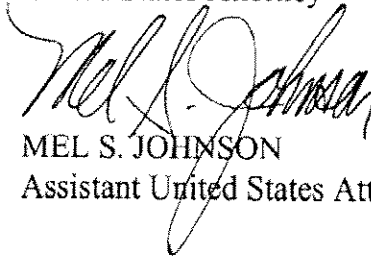
October 25, 2007

I hope that this clarifies the situation regarding these documents. Thank you for your attention to this letter.

Sincerely,

STEVEN M. BISKUPIC

United States Attorney

A handwritten signature in black ink, appearing to read "Mel S. Johnson". The signature is written in a cursive style with a large, looping initial "M".

MEL S. JOHNSON

Assistant United States Attorney

MSJ/nz

Enclosures

cc: AUSA Chris Larsen