UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

PHILIP C. BELLFY

Plaintiff,

v

MICHAEL T. EDWARDS and HON. JOCELYN K. FABRY

Defendants.

CASE NO.: 2:23-CV-51

HON. PAUL L. MALONEY

Mag. Judge Maarten Vermaat

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SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS NON-PARTY MOTION TO QUASH NON-PARTY SUBPOENA AND THE HONORABLE JOCELYN K. FABRY'S MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY PENDING RULING ON MOTIONS TO DISMISS

ORAL ARGUMENT REQUESTED

NOW COMES Defendant, the Honorable Jocelyn K. Fabry ("Judge Fabry"), and non-party Sault Ste. Marie Tribe of Chippewa Indians ("the Tribe"), by and through their attorneys, GREWAL LAW PLLC, relies on their brief in support, which is incorporated herein by reference, and requests this Court to grant: 1) the Tribe's motion to quash third-party subpoena pursuant to Rule 45(d)(3) based on the fact that the Tribe, and its court, is entitled to sovereign immunity from suit; and/or 2) Judge Fabry's motion for a protective order pursuant to Rule 26(c) to stay discovery pending a ruling on Defendants' Motions to Dismiss Plaintiff's Complaint in its entirety on the basis that Plaintiff's third-party subpoena is premature, this matter is likely to be dismissed, discovery at this stage in litigation creates an undue and unnecessary burden on the Tribal Court.

Judge Fabry and the Tribe only request oral argument on this Motion if Plaintiff requests and receives the opportunity to have oral argument.

WHEREFORE, Defendant, Hon. Jocelyn Fabry, and non-party, Sault Ste. Marie Tribe of Chippewa Indians, respectfully requests this Honorable Court to:

A. Enter an Order quashing the subpoena;

B. Enter a Protective Order and/or an Order Staying Discovery until the Motions to Dismiss are ruled on; and

C. Grant any further relief this Honorable Court deems equitable and just.

Respectfully submitted,

GREWAL LAW PLLC

Dated: June 13, 2023

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BRIEF IN SUPPORT OF SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS NON-PARTY MOTION TO QUASH NON-PARTY SUBPOENA AND THE HONORABLE JOCELYN K. FABRY'S MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY PENDING RULING ON MOTIONS TO DISMISS

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I. INTRODUCTION

The Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") is immune from suit as a sovereign entity. The Tribe's Tribal Court, as an extension of the Tribe, is also immune from suit. As such, Plaintiff's subpoena is improper, as it would subject the Tribe to a civil suit to which it has not waived its sovereign immunity, and the subpoena should be quashed.

As to Judge Fabry, she is also immune from suit, and in any event is not in control of the requested documents. Prior to filing an Answer to Plaintiff's Complaint, both Defendants in this matter filed Motions to Dismiss. Plaintiff did not timely respond to either Motion, and instead opted to serve a third-party discovery subpoena on the Tribal Court's Administrator and Magistrate requesting the production of several documents and electronically stored information. Judge Fabry and the Tribe now requests this Honorable Court to enter a protective order as to Plaintiff's third-party subpoena because discovery is premature, uncontested Motions to Dismiss have been filed, and the Tribal Court need not bear the undue burden of responding to discovery.

II. BRIEF FACTUAL AND PROCEDURAL HISTORY

Plaintiff is a former lay advocate that filed an "election challenge" in December of 2021 in the Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") Tribal Court (the "Tribal Court").[1] Mr. Michael T. Edwards was the attorney representing the Tribe's Election Commission and the Honorable Jocelyn Fabry, the Chief Tribal Court Judge, was the presiding judge in Plaintiff's "election challenge."[2] On an unidentified date and for an unidentified hearing, Plaintiff alleges that the Tribal Court failed to provide him with a notice of hearing and Zoom information to access the hearing.

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1 **ECF 1:** Plaintiff's Complaint, PageID.1.

2 *Id*.

Plaintiff subsequently filed his Complaint in this matter alleging that Mr. Edwards and Judge Fabry "conspired to deprive [Plaintiff of his] Fourteenth Amendment Constitutional rights to due process and equal protection by failing to 'notice' [Plaintiff] of an alleged 'hearing.'"[3] Judge Fabry was sued presumably in her individual capacity only.[4] On April 26, 2023, Judge Fabry filed her Motion to Dismiss Pursuant to Rule 12(b), arguing that she has immunity from suit, that the Court lacks subject matter jurisdiction, and that Plaintiff failed to state a claim upon which relief can be granted.[5] One day later, on April 27, 2023, Mr. Edwards filed his Motion to Dismiss Pursuant to Rule 12(b)(6).[6]

Pursuant to Local Rule 7.2(c), Plaintiff had 28 days to respond to Defendants' dispositive Motions to Dismiss, meaning no later than May 24, 2023, and May 25, 2023, respectively. Plaintiff did not file a response to either Motion to Dismiss. Instead, on May 30, 2023, Plaintiff requested the Court Clerk to sign a third-party subpoena directed to Ms. Traci Swan, the Tribe's Tribal Court Administrator and Magistrate to produce several emails "from the [Tribal] Court's Electronically Stored Information system."[7] The Court Clerk signed the requested subpoena on May 31, 2023.[8]

Plaintiff served the subpoena on Ms. Swan via certified mail, which was received on June 6, 2023, requesting that Ms. Swan produce the requested documents within 14 days of receipt, meaning no later than June 20, 2023. On June 7, 2023, Counsel for Judge Fabry requested concurrence to stay discovery until the Motions to Dismiss were heard. Defendant Edwards

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3 *Id*. at PageID.2.
4 *Id.* at PageID.1.
5 **ECF 8:** Defendant Fabry's Motion to Dismiss, PageID.15-19.
6 **ECF 10:** Defendant Edwards' Motion to Dismiss, PageID.45-46.
7 **ECF 13:** Proposed Subpoena, PageID.232-235.
8 **ECF 13:** Signed Subpoena, PageID.236-239.

concurred, but no answer was received from Plaintiff. This Motion to Quash and/or for Protective Order to stay discovery timely follows.

III. APPLICABLE LAW AND ARGUMENT

Federal Rule of Civil Procedure 45(d)(3)(a) allows this Honorable Court to quash a subpoena that requires disclosure of protected matters. The Tribe is a non-party immune from civil suit. As such, this Honorable Court should quash Plaintiff's subpoena, as forcing the Tribe to comply with the subpoena would improperly subject it to suit.

Federal Rule of Civil Procedure 26(c) allows this Honorable Court to issue a protective order for good cause to protect a person from annoyance, undue burden, or undue expense. The provision of the protective order may forbid discovery or specify the terms for the discovery.[9]

In the alternative, a protective order should be issued staying the time to conduct discovery until the Motions to Dismiss are heard because Plaintiff's discovery request is premature, the Motions to Dismiss have a high probability of being granted, including on the issue of immunity, and the parties need not endure the additional cost, time, and undue burden of conducting discovery prior to a ruling on the uncontested Motions to Dismiss.

A. The Subpoena Should Be Quashed Because The Tribe Is Entitled To Sovereign Immunity From Suit.

The issue before this Court is whether a subpoena "served on a non-party Tribe [] seeking documents relevant to a civil suit in federal court" amounts to a suit against the Tribe, thereby triggering tribal sovereign immunity.[10] The United States Court of Appeals for the Tenth Circuit has answered this question in the affirmative.[11] In *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741

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9 Fed. R. Civ. P. 26(c).

10 *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1156 (10th Cir. 2014).

11 *Id.*

F.3d 1155, the plaintiffs brought suit against various other companies after the Ute Indian Tribe terminated the plaintiffs' contract.[12] Importantly, the plaintiffs did not sue the Ute Tribe; thus, the Ute Tribe was a non-party, just as the Tribe is in this matter.[13] In holding that the district court's denial of the Ute Tribe's motion to quash the plaintiffs' subpoena was an immediately appealable collateral order, the Tenth Circuit found that the plaintiffs' subpoena was in fact a "'suit'" against the Ute Tribe, which triggered its sovereign immunity.[14] The Tenth Circuit further went on to hold that the Ute Tribe was immune from suit, reversed the district court's decision, and ordered that the subpoena be quashed.[15]

The Tenth Circuit's holding is also consistent with the Eighth Circuit's decision in *Alltel Commc'ns, LLC v. DeJordy,* 675 F.3d 1100 (8th Cir. 2012). In *Alltel*, the district court also declined to quash a subpoena sent to a non-party Indian tribe.[16] The Eighth Circuit held that "a federal court's third-party subpoena in a private civil litigation is a 'suit' that is subject to Indian tribal immunity."[17] The *Alltel* court then reversed the district court's decision, and ordered the subpoena be quashed.[18] The subpoena at issue here should also be quashed.

In this case, Plaintiff seeks several emails regarding factual allegations from his Complaint. Plaintiff seeks not only a copy of these emails, but also the emails from the Tribal Court's secure Electronically Stored Information System.[19] Plaintiff wishes to examine not only the emails, but instead all metadata embedded in those emails.[20] As discussed, above, complying with this

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12 *Id.*
13 *Id.*
14 *Id.* at 1157, 1159.
15 *Id.* at 1159, 1162.
16 *Alltel Commc'ns, LLC v. DeJordy,* 675 F.3d 1100, 1106 (8th Cir. 2012).
17 *Id*. at 1105.
18 *Id.* at 1106.
19 **ECF 13:** Signed Subpoena, PageID.239.
20 *Id*.

subpoena would amount to subjecting the Tribe to a suit. The Tribe is immune from such a suit and Plaintiff's subpoena should be quashed.

B. Discovery Should Be Stayed Because It Is Premature.

Plaintiff has violated the Federal Rules of Civil Procedure by seeking discovery prior to the parties' Rule 26(f) Conference. Rule 26(d), *Timing and Sequence of Discovery*, provides that "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." This matter has just begun, and the parties have not yet had a Rule 26(f) conference. Plaintiff has not requested a Rule 26(f) conference be held, which would nonetheless be premature and unnecessary given both Defendants' Motions to Dismiss requesting that Plaintiff's Complaint be dismissed in its entirety.

In *Whorton v. Cognitians, LLC,* the *in pro per* plaintiff sought discovery after the defendants had separately filed motions to dismiss.[21] The defendants moved to strike the plaintiff's request for discovery, citing to Rule 26(d)(1) and arguing that the plaintiff could not seek discovery prior to the parties holding a Rule 26(f) conference. "In light of the pending motions to dismiss and for good cause appearing on the face of the record," the district court appropriately stayed discovery until a Rule 16 scheduling order was issued after the final disposition of the defendants' motions to dismiss.

Here, the Court has not yet issued a Rule 16(b) scheduling order. Rule 16(b) mandates this Honorable Court to issue a scheduling order pertaining to the discovery timeline and scope of discovery after receiving the parties' report on the parties' Rule 26(f) conference or after consulting with the parties. Plaintiff seeks discovery prematurely, prior to a Rule 26(f) conference or a Rule 16(b) scheduling order.

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21 *Whorton v. Cognitians, LLC,* 358 F.Supp.3d 712, (S.D. Ohio 2019).

Plaintiff has not requested to hold a Rule 26(f) conference, has inappropriately sought discovery prematurely and in violation of Rule 26(d), and this Honorable Court should order Plaintiff's third-party discovery subpoena stricken and void for failure to abide by the Federal Rules of Civil Procedure.

C. Discovery Should Be Stayed Because Motions To Dismiss Have Been Filed.

"Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."[22] "Limitations on pretrial discovery are appropriate where claims may be dismissed 'based on legal determinations that could not have been altered by any further discovery.'"[23] This is especially true in cases where a motion to dismiss on the basis of immunity applies, as immunity would be "substantially vitiated absent a stay."[24] "A stay of discovery is properly granted until the issue of immunity is decided."[25]

Both Judge Fabry and Mr. Edwards have filed separate Motions to Dismiss Plaintiff's Complaint, which remains uncontested by Plaintiff. Plaintiff did not file a response or otherwise contest either Motion to Dismiss, nor did he request oral argument to rebut the legal arguments raised in these Motions. In fact, Plaintiff's time to respond to these Motions has now expired. Plaintiff cannot seek factual discovery when his Complaint fails as a matter of law, and when he has not taken the steps to rebut the legal issues raised in the Motions to Dismiss.

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22 *Gettings v. Bldg. Laborers Loc. 310 Fringe Benefits Fund,* 349 F.3d 300, 304 (6th Cir. 2003).

23 *Id*. (*quoting Muzquiz v. W.A. Foote Memorial Hosp., Inc.*, 70 F.3d 422, 430 (6th Cir.1995)).

24 *Ohio Bell Tel. Co. v. Glob. NAPs Ohio, Inc.,* No. 2:06-CV-0549, 2008 WL 641252, at *1 (S.D. Ohio Mar. 4, 2008).

25 *Chow v. State*, 165 F.3d 26 (6th Cir. 1998)

In her Motion to Dismiss, Judge Fabry argues that Plaintiff's Complaint must be dismissed in its entirety because:

1) Judge Fabry has absolute immunity for all judicial actions within her jurisdiction;[26]
2) This Honorable Court lacks subject matter jurisdiction;[27]
3) Plaintiff failed to state a valid cause of action premised on the 14th Amendment because it does not apply to the Tribe, Tribal Court, or Judge Fabry;[28] and
4) Plaintiff cannot seek civil liability under the criminal statute he bases his relief under, 18 USC § 242.[29]

Thus, immunity is at issue in this case not only for the Tribe, but also for Judge Fabry.

A stay of discovery is appropriate here because Judge Fabry has argued that she is immune from Plaintiff's causes of action. This, of course, only adds to the Tribe's absolute immunity from having to comply with Plaintiff's discovery request. Moreover, none of the issues raised by Judge Fabry to support her Motion to Dismiss requires the discovery of factual issues. Each issue raised by Judge Fabry in her Motion to dismiss is a legal issue, not a disputed factual issue. Plaintiff does not need this requested discovery to contest why his Complaint should not be dismissed, and by failing to timely respond and request oral argument he has waived his ability to rebut the requested dismissal of this action.

The information in the requested emails and electronically stored information does not affect the legal issues raised in the Motions to Dismiss. Immunity prevents this case from

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26 **ECF 9:** Brief in Support of Defendant Fabry's Motion to Dismiss, PageID.24-25.
27 *Id*. at PageID.25-27.
28 *Id*. at PageID.27-30.
29 *Id*. at PageID.30-31.

proceeding, and discovery should be stayed until the uncontested Motions to Dismiss have been decided.

D. The Tribal Court Will Be Unduly Burdened In Responding To Plaintiff's Discovery.

"Pretrial discovery is time-consuming and expensive; it protracts and complicates litigation; and judges are to be condemned rather than criticized for keeping tight reins on it."[30] Plaintiff does not need expedited discovery while the Motions to Dismiss are pending and the Tribal Court need not waste its time, resources, and funds producing documents in response to Plaintiff's discovery requests prior to a ruling on the pending Motions.

Plaintiff seeks several emails regarding factual allegations from his Complaint. However, Plaintiff does not just seek a copy of these emails; but rather emails from the Tribal Court's secure Electronically Stored Information System.[31] Plaintiff wishes to examine not only the emails, but instead all metadata embedded in those emails.[32] Accessing and producing all metadata associated with the Tribal Court's emails is no small feat, but instead takes the time and assistance of the Tribe's technical support.

There is no immediate need for Plaintiff to have these emails or the included metadata at this time. For purposes of Judge Fabry's Motion to Dismiss, the bare factual allegations of Plaintiff's Complaint can be accepted as true and the Court can still grant the requested dismissal she seeks. The Tribal Court and the Tribe need not spend its time and resources responding to Plaintiff's third-party subpoena and producing the electronically stored information Plaintiff now

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30 *Olivieri v. Rodrieguz*, 122 F.3d 406, 409 (7th Cir. 1997); *citing Herbert v. Lando,* 441 U.S. 153, 177 (1979).

31 **ECF 13:** Signed Subpoena, PageID.239.

32 *Id*.

seeks. This Honorable Court should stay discovery at this time to limit the costs, time, and undue burden in responding to premature and unnecessary discovery.

Finally, Judge Fabry could not produce this information even if ordered to do so. Every were Plaintiff to seek the subpoenaed information from Judge Fabry, she does not have access to, nor does she own, this information. Plaintiff's requested discovery is property of the Tribe, not Judge Fabry. As such, the only way Judge Fabry could access and produce this information would be if the Tribe were to do so. As explained above, the Tribe is immune from this suit. For these reasons, the subpoena should be quashed, or, at the minimum, a protective order put in place.

IV. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, Defendant, Hon. Jocelyn Fabry, and non-party, the Tribe, respectfully requests this Honorable Court to:

A. Quash Plaintiff's subpoena because it is a non-party subpoena to the Tribe, which is immune from suit;

B. In the alternative, enter a Protective Order or an Order Staying Discovery until the Motions to Dismiss are ruled on; and

C. Grant her any further relief this Honorable Court deems equitable and just.

Respectfully submitted,

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Dated: June 13, 2023

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Certificate of Compliance

I hereby certify that this Motion and Brief contains 2,947 words, including headings and footnotes, as computed by Microsoft Word.

Respectfully submitted,

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