**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MICHIGAN**
**Northern Division**

LULA WILLIAMS, GLORIA TURNAGE, GEORGE HENGLE, DOWIN COFFY, and FELIX GILLISON, JR., *on behalf of themselves and all individuals similarly situated*,

Plaintiffs,

v.

BIG PICTURE LOANS, LLC; MATT MARTORELLO; ASCENSION TECHNOLOGIES, INC.; DANIEL GRAVEL; JAMES WILLIAMS, JR.; GERTRUDE MCGESHICK; SUSAN MCGESHICK; and GIIWEGIIZHIGOOKWAY MARTIN,

Defendants.
_____ /

Civil Case No.

**MEMORANDUM IN SUPPORT OF**
**MOTION TO QUASH SUBPOENA TO KARRIE WICHTMAN**

Pursuant to Rule 45(d)(3)(iv) of the Federal Rules of Civil Procedure, non-party Karrie S. Wichtman moves this Court for an Order quashing Defendant Matt Martorello's December 13, 2018, (i) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action *and* (ii) Subpoena to Testify at a Deposition in an Civil Action (collectively "Subpoenas") in the matter of *Williams et al, v. Big Picture Loans, LLC*, *et al*, No. 3:17-cv-00461 (E.D. Va. filed June 22, 2017) (the "Virginia Court").[1]

[1] A motion to quash is a dispositive motion, thus allowing briefing page limits under Local Rule 7.2(a) as a dispositive motion "as defined by law." *See e.g., Luppino v. Mercedes-Benz Fin. Servs. USA, LLC*, No. 13-50212, 2013 WL 1844075, at *3 (E.D. Mich. Apr. 11, 2013), report and recommendation adopted, No. 13-50212, 2013 WL 1844073 (E.D. Mich. Apr. 30, 2013) ("'A motion to quash a subpoena is usually a nondispositive matter; but where, as here, the decision would dispose of the entire matter at issue in this case, the order is more properly treated as subject to de novo review.'"); *In re: Administrative Subpoena Blue Cross Blue Shield of Mass*., 400 F.Supp.2d 386, 388–89 (D.Mass.2005) ("Many courts have treated similar motions to enforce or quash administrative subpoenas, or the like, as dispositive motions for purposes of review where the matter involving the subpoena constitutes the entire case before the court." (collecting cases)).

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## INTRODUCTION

Wichtman presently serves as general counsel for the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribe"), a federally recognized sovereign Indian tribe with reservation lands near Watersmeet, Michigan. (Attach. 1, Declaration of Karrie S. Wichtman ¶ 2.) Before that, as a partner in the law firm Rosette, LLP ("Rosette"), Wichtman served as general counsel to several of the Tribe's economic arms, including Big Picture Loans, LLC ("Big Picture"), and Ascension Technologies, LLC ("Ascension"), collectively the Tribal Defendants in the captioned matter. (Attach. 1, ¶¶ 3, 6, 9.) Until August 21, 2018, Wichtman served as trial counsel to the Tribal Defendants in the captioned matter. (Attach. 1, ¶ 13; *Williams* ECF No. 163.) Additionally, and at all times relevant, the Tribe has retained Rosette for general counsel legal services, so over the years, Rosette has served directly as general counsel and, at times when the Tribe employed in-house counsel, provided general counsel services in a support position. (Attach. 1, ¶ 6-8.)

As general counsel for the Tribe, Wichtman shares the Tribe's sovereign immunity from unconsented suit, and a subpoena to a non-party constitutes a suit. The Subpoenas specifically seek the Tribe's records, which, as described below, is an inappropriate end-run around the Tribe's sovereign immunity. (Attach. 2, Subpoenas.)

Moreover, as described below, because of their appeal to the Fourth Circuit Court of Appeals, the Virginia Court is divested of jurisdiction over the Tribal Defendants, clearly prohibiting Martorello from directly subpoenaing the Tribal Defendants' records. Martorello should not be able to circumvent the want of jurisdiction by subpoenaing the Tribe's general counsel and the former general counsel to the Tribal Defendants. Also, the Tribal Defendants have filed a motion to stay the *Williams* matter, and until that is decided, Wichtman should not

be forced to comply prematurely. Finally, the subpoena improperly seeks documents protected by attorney-client and work product privileges and is overbroad, redundant, and unduly burdensome.

For these reasons, as explained below, this Motion should be granted.

## BACKGROUND

It is not disputed that the Tribe is a sovereign and as such, tribal sovereign immunity bars unconsented suit unless immunity is abrogated by Congress or waived.[2] *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 253 (E.D. Va. 2018); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) ("Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" (*quoting Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).)

### The *Williams* Litigation

On June 22, 2017, the *Williams* Plaintiffs sued the Tribal Defendants; the Tribe's Chairman, Vice Chairwoman, Treasurer, and Secretary; Co-Defendant Martorello; and, Daniel Gravel. (*Williams* ECF No. 1.) The Plaintiffs allege a RICO conspiracy by all Defendants to violate state usury laws and collect unlawful debts. (*See generally, Williams* ECF No. 1.) Notably, the Tribal Defendants retained Rosette, with Wichtman as lead counsel, to defend against the suit. (Attach. 1, ¶ 13; *Williams* ECF No. 7.) On September 29, 2017, the Tribal Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) arguing that the Virginia Court lacked jurisdiction because Plaintiffs' claims were barred by tribal sovereign immunity. (*Williams* ECF Nos. 22-23.) Also on that day, the four Tribal Officers filed a motion

[2] See Federal Register Vol. 83, No.20, pp 4235-4241 (January 30, 2018); *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F. Supp. 2d 952, 955 (N.D. Cal. 2011) ("Inclusion of a tribe on the Federal Register list of recognized tribes is generally sufficient to establish entitlement to sovereign immunity.").

pursuant to Fed. R. 12(b)(1) as the Tribe's immunity also barred consented suit against them as well as Rule 12(b)(6) for failure to state a claim. (*Williams* ECF Nos. 28-29.)

On March 12, 2018, the Virginia Court granted the Tribal Officer's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (*Williams* ECF Nos. 117, 122.) On June 26, 2018, the Virginia Court issued an order denying the Tribal Defendants' motion to dismiss for lack of jurisdiction.[3] (Williams ECF No. 124.)

On July 27, 2018, the Virginia Court issued, unsealed, its Memorandum Opinion denying the Tribal Defendants dispositive motion. *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248 (E.D. Va. 2018). The *Williams* decision contemplated whether tribal sovereign immunity barred Plaintiffs suit. *Id.* at 269 ("The parties do not dispute that Big Picture and Ascension would be immune from suit if they qualify as arms of the Tribe, so the sole question here is whether they do so.") The Virginia court found that "neither entity qualifies as an arm of the Tribe" and the Tribal Defendants were not immune from suit here. *Id.* at 283. The Tribal Defendants appealed to the United States Court of Appeals for the Fourth Circuit, and that appeal remains ongoing. (*Williams* ECF No. 135).

[3] It is prudent to inform the Court of another suit underway and very likely to lead to a second effort to subpoena Wichtman should the Court quash the subpoena here.

On June 12, 2018, *Galloway v. Big Picture Loans, LLC*, Case No. 3:18-cv-406 (E.D. Va. June 12, 2018), was filed in the Virginia Court. For purposes here, the only significant distinction between *Galloway* and *Williams* is that *Galloway* is a purported multi-state class action, while *Williams* is confined to a proposed Virginia class. Procedurally, based on the perceived factual deficits in *Williams* that led to a finding against tribal sovereign immunity, Big Picture and Ascension filed separate 12(b)(1) motions to dismiss for lack of jurisdiction, each addressing particular areas of the *Williams* decision. (*Galloway* ECF Nos. 41-44.) These motions are fully briefed and pending before the Virginia Court. (*Galloway* ECF Nos. 80, 87.) On September 27, 2018, the Tribal Defendants filed a motion to stay for the same reasons argued and pending in *Williams*. (*Galloway* ECF Nos. 54-55.) This stay is fully briefed and pending. (*Galloway* ECF Nos. 67, 75.) By October 9, 2018, all of the attorneys in *Galloway* had filed appearances in *Williams* and on that day, the Virginia Court held that all discovery in the *Williams* matter was available to the *Galloway* litigants. (*Galloway* ECF No. 64.) The attorneys have been using non-party discovery in both cases to obtain Big Picture and Ascension's records.

The penultimate issue in the underlying action is the primary issue on appeal: whether tribal sovereign immunity bars Plaintiffs' claims against the Tribal Defendants. If so, the Virginia Court lacks jurisdiction to allow the matter to proceed against the Tribal Defendants. As the Tribal Defendants' immunity may bar the entire suit, on July 20, 2018, Tribal Defendants moved the Virginia Court to stay *all* proceedings before the pending the outcome of the appeal on the bases that: the pending appeal divested the Virginia Court of jurisdiction over the Tribal Defendants, including jurisdiction to compel participation in discovery; and, a stay was otherwise warranted as a matter of discretion. (*Williams* ECF No. 138.) On July 24, 2018, for similar reasons, Martorello filed a motion to stay. (*Williams* ECF No. 140.) By August 16, 2018, both motions to stay were fully briefed. (*Williams* ECF Nos. 150, 151, 152, 156.)

By October 17, 2018, the Virginia Court had not ruled on the motions to stay. Due to a barrage of discovery, including Plaintiffs' efforts to use non-party subpoenas to elicit testimony from Ascension's President and upper management about Big Picture's loans, Tribal Defendants filed a supplemental motion to stay. (*Williams* ECF No. 214); See, e.g., *Williams et al v. Big Picture Loans LLC et al*., Case No. 1:18-mc-83 (W.D. Mi. filed Aug. 31, 2018); *Williams et al v. Big Picture Loans LLC et al*., Case No. 6:18-mc-303 (D.S.C filed Aug. 31, 2018); *Williams et al v. Big Picture Loans LLC et al*., Case No. 3:18-mc-557 (D.P.R. filed Aug. 31, 2018). This motion was fully briefed on October 29, 2018. (*Williams* ECF Nos. 198, 199, 207, 228.)

Also, by October 17, 2018, upon her selection to serve as the Tribe's general counsel, Wichtman had separated from Rosette and filed to withdraw from the *Williams* matter. (Attach. 1, ¶ 2; *Williams* ECF Nos. 159, 163.)

By December 5, 2018—over 130 days later— the Virginia Court still had not ruled on the motions to stay and Plaintiffs, along with Martorello, had continued to use non-party subpoenas

to obtain Big Picture's Loan information at an alarming pace. (Attach. 3.) Without other options, on December 5, 2018, Tribal Defendants filed for expedited ruling on the motions to stay, which was fully briefed by December 10, 2018. (*Williams* ECF Nos. 252, 257, 259.)

**Wichtman's Subpoena**

On December 13, 2018, Martorello served his notice of intent to subpoena Wichtman for both records and testimony related to Big Picture, Ascension, and entities that the Tribe had acquired. (Attach. 2.) On December 19, 2018, Wichtman was served the Subpoenas.[4] (Attach 1, ¶ 19.) Counsel for parties telephonically met and conferred on December 27, 2018, and discussed whether Martorello would consider withdrawing the Subpoenas considering Wichtman's role with Tribe, but the parties were unable to reach an agreement.

More specifically, the Subpoenas seek production of non-privileged documents[5] pertaining to Martorello; Bellicose Capital, LLC; Bellicose VI, LLC; SourcePoint VI, LLC; Ascension Technologies, LLC, Big Picture Loans, LLC; Castle PayDay, Pepper Cash; Red Rock Tribal Lending, LLC; Duck Creek Tribal Financial, LLC. (Attach 1, ¶ 20; Attach. 2.) The Subpoenas also seek all documents related to the Tribe's economic development; and all communications with *any* third parties related to the Tribe's online consumer lending. *Id*.

For the reasons stated below, the Court should grant Wichtman's Motion to Quash.

[4] Wichtman was only served the subpoena to produce records, however as both were noticed on December 13, 2018, and as Wichtman will present the same bases to quash the subpoena seeking her testimony, both Subpoenas are discussed here. (Attach. 2.)

[5] As the Subpoenas seek "non-privileged documents," Wichtman will forego any arguments here to quash based on attorney-client privilege, but ultimately, if ordered to comply, on behalf her clients, Wichtman reserves all rights to raise the attorney-client privilege when appropriate. *See, e.g., Compulit v. Banctec, Inc.*, 177 F.R.D. 410, 412 (W.D. Mi. 1997) ("Since the privilege rests with the clients of these law firms, this Court holds that these law firm customers of Compulit have standing to raise the privilege in this case if they choose to do so—just like they could if one of their employees or partners was about to disclose privileged communications."); *Avago Techs. Gen. IP Pte. Ltd. v. Elan Microelectronics Corp.*, No. C04-05385RMWHRL, 2007 WL 841785, at *2 (N.D. Cal. Mar. 20, 2007) ("An attorney or other representative of a client can claim the attorney-client privilege on the client's behalf . . . .").

## ARGUMENT

### I. Legal standard for motions challenging jurisdiction and motions to quash.

"Tribal sovereign immunity deprives a court of subject matter jurisdiction." *Sault Ste. Marie Tribe of Chippewa Indians v. Hamilton,* No. 2:09-CV-95, 2010 WL 299483, at *1 (W.D. Mi. Jan. 20, 2010); *relying on Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir.2007). When a court lacks subject matter jurisdiction, the case must be dismissed. *See* Fed. R. Civ. P. 12(b)(1). Plaintiff has the burden of proving that subject matter jurisdiction exists. *Jude v. Comm'r of Soc. Sec.,* 908 F.3d 152, 157 (6th Cir. 2018) ("Federal courts are courts of limited jurisdiction; the plaintiff carries the burden of demonstrating that either the Constitution or a statute has granted the court jurisdiction over a given suit, and that it may therefore hear it." (*quoting Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377, (1994).) "Since 'federal courts, being of limited jurisdiction, must examine their subject-matter jurisdiction throughout the pendency of every matter before them,'" subject matter jurisdiction should be addressed first, whether there is a pending Fed. R. Civ. P. 12(b)(1) motion or not. *Noble Sec., Inc. v. MIZ Eng'g, Ltd.*, 611 F. Supp. 2d 513, 549 n. 21, (E.D. Va. 2009) (quoting *Holloway v. Brush,* 220 F.3d 767, 781 (6th Cir. 2000) (internal quotations omitted)).

A court must quash a subpoena "that subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). Undue burden must be assessed in a case-specific manner considering "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described, and the burden imposed." *In re: Modern Plastics Corp*., 890 F.3d 244, 251 (6th Cir.), reh'g denied (May 17, 2018), cert. denied sub nom. *New Prod. Corp. v. Dickinson Wright, PLLC*, 139 S. Ct. 289 (2018). Courts must "balance the need for discovery against the burden imposed on

the person ordered to produce documents," and factor in the non-party status of the person being subpoenaed. *Id*. Additionally, the reasonableness of the subpoena should be considered and assessed by balancing "the interests served by demanding compliance with the subpoena against the interests served further by quashing it." *Aslani v. Sparrow Health Sys.*, No. 1:08-CV-298, 2010 WL 623673, at *4 (W.D. Mich. Feb. 18, 2010) (*quoting* Wright and Miller Federal Practice and Procedure § 2463.1).

**II. The Subpoenas should be quashed because Wichtman is immune from suit.**

The United States Supreme Court, in line with its long-standing policy of upholding tribal sovereign immunity as an integral feature of tribal sovereignty, dictates that a federally recognized tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (recognizing tribal sovereign immunity as a "core aspect" of tribal sovereignty); *Santa Clara,* 436 U.S. at 58 (holding that suit against a tribe to enforce federal statutory rights was barred by tribal sovereign immunity).

The Tribe's sovereign immunity extends to Tribal officials acting in an official capacity, *i.e*., acting within the scope of their authority, and where the Tribe is the real party in interest. *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017); *Cameron v. Bay Mills Indian Cmty.*, 843 F. Supp. 334, 336 (W.D. Mich. 1994) *citing Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir.1985). "As a general proposition, a tribe's attorney, when acting as a representative of the tribe and within the scope of his authority, is cloaked in the immunity of the tribe just as a tribal official is cloaked in that immunity." *Catskill Dev., L.L.C. v. Park Place Entm't Corp*., 206 F.R.D. 78, 91 (S.D.N.Y. 2002); *relying on Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir.1996) ("As any government with aspects of sovereignty, a tribe must be

able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney, or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised."); *Stock West Corp. v. Taylor,* 942 F.2d 655, 664–65 (9th Cir.1991), modified on rehearing, 964 F.2d 912 (9th Cir.1992) (en banc) (tribal attorneys may qualify as a "tribal official" if their actions are "clearly tied to their roles in the internal governance of the tribe").

A tribe's general counsel is very much an official position of the tribe.[6] *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968) (holding that tribal sovereign immunity barred a defamation lawsuit against a non-Indian lawyer who served as general counsel for the Navajo Tribe). As the *Littell* Court noted, "[t]he general counsel's duties are not limited to representing the Tribe in its disputes with others. They include advice with respect to the administration of the public affairs of the Tribe." *Id*. at 85. The general counsel position is perhaps the closest fiduciary relationship a tribe can maintain with a professional. "Tribal attorneys possess sovereign immunity only to the extent that a tribal official possesses sovereign immunity, so to the extent sovereign immunity has been waived by the Tribe, the waiver extends to the attorneys. In addition, the attorney must be acting as a representative of the tribe and within the scope of his authority." *Catskill,* 206 F.R.D. at 92.

A subpoena is a "suit:"

> According to binding precedent then: tribes are immune from 'suit' under *Kiowa*, 'suit' includes 'judicial process' under Murdock, and a subpoena duces tecum is a form of judicial process under Becker. The logical conclusion, therefore, is that a subpoena duces tecum served directly on the Tribe, regardless of whether it is a party to

[6] In *Littell*, the attorney was outside counsel operating under contract, but that "fact should not control the disposition of the instant problem." *Davis v. Littell*, 398 F.2d at 85. "That a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege otherwise available to it." *Id*.

> the underlying legal action, is a 'suit' against the Tribe, triggering tribal sovereign immunity.

*Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014). Federal courts have consistently held that immunity from suit extends to third-party subpoenas:

> Even though the government is not a party to the underlying action, the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the United States because such a proceeding 'interfere[s] with the public administration' and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function.

*Boron Oil Co. v. Downie*, 873 F.2d 67, 70–71 (4th Cir.1989), *quoting Dugan v. Rank,* 372 U.S. 609, 620 (1963).

In *Alltel Communs., LLC v. DeJordy*, the Eight Circuit concluded that "from the plain language of the Supreme Court's definition of a 'suit' in *Dugan*, and from the Court's well-established federal policy of further Indian self-government . . . a federal court's third-party subpoena in private civil litigation is a 'suit that is subject to Indian tribal immunity." 675 F.3d 1100, 1105 (8th Cir. 2012); *quoting Dugan,* 372 U.S. at 620 (defining 'suit' for purposes of sovereign immunity). *Alltel* explained:

> [P]ermitting broad third-party discovery in civil litigation threatens to contravene 'federal policies of tribal self determination, economic development, and cultural autonomy' that underlie the federal doctrine of tribal immunity. Here, for example, the Tribe's gathering and production of the extensive documents [sought by the subpoena] would likely be followed by depositions of all tribal officials identified in those documents. Information gleaned from this discovery would likely reveal deliberations establishing [] policies for the Reservation, information [plaintiff] could then use [against defendant for other purposes]. The point is not whether such compelled disclosure is good or bad; it is whether the end result is the functional equivalent of a 'suit' against a tribal government within the meaning of its common law sovereign immunity.

675 F.3d at 1104 (8th Cir. 2012) (internal citations, quotation marks, and alterations omitted). Finding that the subpoena was a suit against the tribe, *Alltel* recognized that tribal sovereign immunity applies:

> It may be that federal courts applying normal discovery principles could adequately protect Indian tribes from abusive third party discovery without invoking tribal immunity. But the Supreme Court has consistently applied the common law doctrine even when modern economic realities might suggest a need to abrogate tribal immunity, at least as an overarching rule, concluding that it would leave that decision to Congress. Thus, even if denying the subpoena in this case works some inconvenience, or even injustice, it is too late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well-established.

675 F.3d at 1105-1106 (8th Cir. 2012) (internal citations, quotation marks, and alterations omitted); *see also Bonnet*, 741 F.3d at 1160 (holding that a subpoena *duces tecum* served on the Tribe is a "suit" against the Tribe triggering tribal sovereign immunity).

Along these lines, on September 26, 2018, the Eastern District of Pennsylvania granted a motion to quash subpoenas that were issued to tribal officials in a similar consumer-lending action. *See Pennsylvania by Shapiro v. Think Fin., LLC*, No. 14-CV-7139, 2018 WL 4635750, at *1 (E.D. Pa. Sept. 26, 2018) (quashing subpoenas issued to "a consumer lending business wholly owned and operated by the federally recognized Indian Tribe" and "its former CEO"). Notably, the court held that because sovereign immunity was not waived, the court did "not have jurisdiction to enforce" the subpoenas. *Id*. at *6; *see also Catskill*, 206 F.R.D. at 86–88; *United States v. James*, 980 F.2d 1314, 319 (9th Cir. 1992) (holding that tribal immunity bars a criminal defendant's trial subpoena "unless the immunity had been waived."); *see also Commonwealth of Pennsylvania v. ThinkFinance*, No. 1:18-mc-0024 (E.D. La. Aug. 8, 2018) ("The Tribe's immunity from suit also extends to third-party subpoenas, such as the deposition subpoena

served on MobiLoans . . . Therefore, this court lacks jurisdiction to enforce the deposition subpoena."); *Dillon v. BMO Harris Bank, N.A.*, No. 16-MC-5-CVE-TLW, 2016 WL 447502 (N.D. Okla. Feb. 4, 2016) ("Although [defendant] may have the right to depose Shotton in his individual capacity, his knowledge of the loan agreements exists only because of his official position within the Tribe as Secretary/Treasurer of Great Plains, and his sovereign immunity with respect to the loan documents has not been waived because he was acting within the scope of authority that the Tribe could lawfully provide him . . . Accordingly, Shotton cannot be required to give deposition testimony regarding the loan documents because he only has access to that information in his official capacity as Secretary/Treasurer of Great Plains.")

The facts above make it clear that the Subpoenas seek the Tribe's records[7] through Wichtman's production and testimony. (*See, e.g.,* Attach. 1, ¶¶ 20-22.) The Subpoenas seek documents and information that Wichtman possesses and knows only because of her (past and present) official capacity as general counsel for the Tribe, former general counsel for the Tribal

[7] While, admittedly, the issue of whether Big Picture and Ascension are immune is pending on appeal, *Williams* did find that the Tribe formed both by Tribal Council resolution under tribal law and wholly owns both entities. *Williams,* 329 F. Supp. 3d at 258. The records are designated as tribal records by the Tribe's Constitution, Art III § 3:

> (a) The Tribal Council shall provide access for review by any tribal member or his/her authorized representative of the records of the Band; Provided, That such review shall be conducted during normal office hours of the Tribal Council, in accordance with the rules and procedures established by the Tribal Council, and not inconsistent with any other provision of this Constitution, Federal law, or individual tribal members and tribal employees' rights to privacy.
> (b) All Band records are the exclusive property of the Lac Vieux Desert Band and shall be transferred by Tribal Council officers leaving office to their successors in office. [Attach. 4, Tribal Constitution.]

And also by the Lac Vieux Desert Band of Lake Superior Chippewa Indians Freedom of Information Ordinance § 3.02: "Tribal records subject to disclosure under this Ordinance include all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, including any electronic media, that were made, sent, received, or held in the course of government business of the Tribe, which includes the business of any committee, agency, enterprise, and other instrumentality of the Tribe. Tribal records listed under Section 3.03 are not subject to this disclosure." (Attach. 5, LVD FOIO Ordinance.)

Defendants, and formerly as trial counsel. *Id*. The Tribe and Wichtman are not party to any lawsuit. By requesting information from Wichtman and the Tribe, the Subpoenas seek to circumvent well established principles of tribal sovereign immunity.

The Tribe's sovereign immunity extends to Wichtman and to any officer called to produce documents from the Tribe or testify about the Tribe's information. Therefore, this Court lacks jurisdiction as Wichtman is immune. This Court should quash the Subpoenas.

**III. The Subpoena is Unduly Burdensome.**

As a threshold matter, a subpoena must be issued by a court having the jurisdiction to do so. And, "[w]hen a subpoena should not have been issued, literally everything done in response to it constitutes 'undue burden or expense.'" *Builders Ass'n of Greater Chicago v. City of Chicago,* No. 96 C 1122, 2002 WL 1008455, at *4 (N.D. Ill. May 13, 2002) (quoting now Fed. R. Civ. P. 45(d)(1)); *see also Thompson v. Carrier Corp.*, No. 3:06-cv-90, 2009 WL 3446391 (M.D. Ga. Oct. 21, 2009) (granting a motion to quash subpoenas issued after the filing of a notice of appeal, which divested the district court of jurisdiction).

As explained above, the Tribal Defendants appealed, which "divests a district court of jurisdiction to proceed with trial unless the district court certifies the appeal as frivolous." *In re Facebook, Inc.*, 42 F. Supp. 3d 556, 558 (S.D.N.Y. 2014); *relying on Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (recognizing an entitlement of immunity from suit provides for a defendant not to face the burdens of litigation, including pretrial matters such as discovery); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (finding that discovery should not proceed until the "threshold immunity question" is resolved); *Eckert Int'l v. Gov't of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 174 (E.D. Va. 1993) (holding that the defendant's

interlocutory appeal based on immunity "divests this Court of jurisdiction over the remaining matters.")..

The complete divesture of the district court's jurisdiction over the Tribal Defendants in the *Williams* litigation is intended to stop all pre-trial proceedings against them, including discovery, until the appellate court can answer the threshold immunity question. This limitation should not be easily avoided by seeking Tribal records circumspectly rather than directly. Thus, the Subpoenas must be quashed as the district court had no authority to issue it in the first instance and it seeks records outside the Virginia Court's jurisdiction. *See, e.g.*, *Thompson*; *Henkel v. Lickman*, 304 B.R. 897 (Bankr. M.D. Fla. 2004) (applying the "Divesture Rule" to quash subpoenas issued after the filing of a notice of appeal because thereafter district court no longer had jurisdiction over the matter); *Wade v. City of Fruitland*, 287 F.R.D. 638, 643 (D. Id. 2013) (granting motion to quash Rule 45 subpoena attempting to discover information from a non-party that the underlying district court had stayed with respect to the party-defendant: "Judge Ryan, although ordering Canyon County to turn over the records, issued a stay of that order pending appeal. If this Court ordered compliance with the Rule 45 subpoena with respect to the three binders, it would nullify Judge Ryan's order and allow Wade to circumvent the stay.")

Additionally, there are pending motions to stay in both *Williams* and *Galloway* that, once resolved, will either stay the matter or clarify any limits to Tribal records. Under these circumstances, courts have consistently held that the quashing of a subpoena until a pending motion to stay is resolved is appropriate. *See, e.g., Williams v. Sampson,* No. C17-0092-JCC, 2017 U.S. Dist. LEXIS 55461, *4 (W.D. Wa. Mar. 11, 2017) (quashing subpoenas in light of pending jurisdictional motions and related motion to stay); *Wedemeyer v. Pneudraulics, Inc.*, No.

CV411-135, 2011 U.S. Dist. LEXIS 116725, *4 (S.D. Ga. Sept. 15, 2011) (quashing subpoenas in light of pending dispositive motions and related motion to stay); *McFadyen v. Duke Univ.*, No. 1:07CV953, 2011 WL 13134315 at *3 (M.D.N.C. June 9, 2011) (finding that, absent a stay, the discovery that had been served on several non-appellant defendants "would indeed impose undue burdens on the City Defendants while their qualified immunity defense is still pending on appeal.")

Additionally, "[a] subpoena to a third party under Rule 45 is subject to the same discovery limitations as those set out in Rule 26." *State Farm Mut. Auto. Ins. Co. v. Elite Health Centers, Inc*., No. 2:16-CV-13040, 2018 WL 4927171, at *6 (E.D. Mich. Oct. 11, 2018); relying *on U.S. v. Blue Cross Blue Shield of Michigan, No*. 10-14155, 2012 WL 4513600, at *5 (E.D. Mich. Oct. 1, 2012). "Rule 26(b) defines the scope of discovery for a subpoena issued pursuant to Rule 45, and it allows a party to obtain discovery on any matter that is not privileged, is relevant to any party's claim or defense, and is proportional to the needs of the case." *Michigan State A. Philip Randolph Inst. v. Johnson,* No. 16-CV-11844, 2018 WL 1465767, at *2 (E.D. Mich. Jan. 4, 2018); *relying on Systems Prods. & Solutions, Inc. v. Scramlin*, No. 13-CV-14947, 2014 WL 3894385, at *9 (E.D. Mich. Aug. 8, 2014); Fed. R. Civ. P. 26(b)(1). But a district court must limit the scope of discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii).

The Sixth Circuit in *In re: Modern Plastics Corp*., outlined factors of when a subpoena is unduly burdensome including the broad scope of the requests in terms of the number of categories, the breadth of each category, and the temporal reach of the requests. 890 F.3d at 251.

In addition to the lack of jurisdiction because of immunity and the pending appeal, the Subpoenas are unduly burdensome because they are (1) overbroad and not proportional as they seek documents dated from 2011 to the present from nonparty entities which have been dissolved and (2) redundant to the extent they seek documents that have already been produced by other parties in the underlying litigation. Moreover, it is very likely that responsive documents are Tribal records that Wichtman cannot produce without authorization from the Tribe. See Attach. 5, § 4.01 ("Any Tribal Member may review Tribal records that are not exempted under Section 3.03 by submitting a written request to the FOIO Officer."); § 6.01(a) ("Non-Tribal Members may submit a written request for Tribal Records to the Tribal Chairman or the Chairman's designee. The written request must comply with Section 4.01, include specific reason(s) for the request, and specify whether the principal purpose for the request is personal or commercial.")

There is an undue burden here because "[t]he leading treatises agree that although Rule 45 may apply to both parties and nonparties, resort to Rule 45 should not be allowed when it circumvents the requirements and protections of Rule 34 for the production of documents belonging to a party." *Sherrill v. DIO Transp., Inc*., 317 F.R.D. 609, 615 (D.S.C. 2016); *quoting Stokes v. Xerox Corp*., 2006 WL 6686584, at *3 (E.D. Mich. Oct. 5, 2006). "If documents are available from a party, it has been thought preferable to have them obtained pursuant to Rule 34 rather than subpoenaing them from a nonparty witness." *Id.*; quoting 8A Charles Alan Wright, et al., Federal Practice and Procedure § 2204 at 365 (2nd ed. 1994).

"Under Fed. R. Civ. P. 34, which governs the production of documents during discovery, the clear rule is that documents in the possession of a party's current or former counsel are deemed to be within that party's "possession, custody and control." *MTB Bank v. Federal Armored Express, Inc.*, 1998 WL 43125 (S.D.N.Y.1998); *relying on Variable–Parameter Fix.*

*Dev. Corp. v. Morpheus Lights, Inc*., 1994 U.S. Dist. LEXIS 11185, No. 90 Civ. 5593, 1994 WL 419830, at *6 (S.D.N.Y. Aug.10, 1994) (finding that party had right of access to documents in possession of former counsel).

The Subpoenas are clearly attempting to bypass traditional discovery and the limitations in the Eastern District of Virginia. For these reasons, the Subpoenas should be quashed. Moreover, Wichtman should not be compelled to examine thousands of communications spanning nine years for potentially responsive documents, especially when they are more readily obtained from others. (Attach. 1, ¶¶ 23-24.) As a nonparty subpoena recipient, Wichtman should be spared the cost and burden of detailed privilege review pending the Tribal Defendant's appeal. The Subpoena served upon Wichtman is undisputedly broad in the number and breadth of categories requested and in the temporal reach of the requests, especially in light of the pending motions to stay and the pending appeal, and as such is unduly burdensome.

**CONCLUSION**

For all the reasons provided above, as jurisdiction is barred by tribal sovereign immunity, Wichtman respectfully requests that the Court quash the nonparty Subpoenas. Alternatively, Wichtman respectfully requests that the Court quash the Subpoenas as they impose an undue burden for want of jurisdiction because the issuing court is divested of jurisdiction, seek records best obtain from others in contravention of discovery rules, and are overbroad and not proportional.

Respectfully submitted by:

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