UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER AND TO QUASH DEFENDANT'S THIRD-PARTY SUBPOENA**

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Plaintiffs submit this memorandum in support of their motion for a protective order and an order quashing a third-party subpoena issued by Defendant Joseph Walsh to the law firm Ballard Spahr LLP and attorney Wallace G. Hilke. The subpoena is untimely because it was served seven weeks after the parties' agreed deadline for serving written fact discovery. Moreover, it seeks documents prepared by retained counsel for the Mille Lacs Band in 2013 that are irrelevant to any party's claims or defenses in this case, are protected by the attorney-client privilege and work-product doctrine, and contain private information on non-parties to this case. The subpoena is part of a pattern of discovery requests that seek to harass Plaintiffs and divert the parties' time and attention from the real issues in the case. If the Court believes review of the subpoenaed documents would be helpful in resolving this matter, it should order their submission *in camera*.

Before filing their motion, Plaintiffs provided Defendants detailed notice of their concerns regarding the subpoena and their intent to file a motion for a protective order and to quash the subpoena on January 6, 2020. On a meet and confer call requested by Plaintiffs, Defendants proposed that Plaintiffs defer filing their motion until January 10, 2020, when Defendants would file a cross-motion to compel production and/or enforce the subpoena. Plaintiffs consented to Defendants' proposal as well as their subsequent request to further defer filing the motions until January 17, 2020.

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. Statement of the Case.

Because Plaintiffs' motion seeks to quash Defendant Walsh's subpoena in part on

relevance grounds, a summary of the principal claims and defenses in the case is necessary. Plaintiffs claim that Defendants interfered with the exercise of the Mille Lacs Band's inherent and federally-delegated law enforcement authority and seek declaratory and injunctive relief defining the scope of that authority and preventing future interference with it. *See* Compl. ¶¶ 5.M. through 5.V and at 7-8 (Demand for Relief) (ECF No. 1).

The law enforcement dispute giving rise to Plaintiffs' claims began in June 2016 when Defendant Mille Lacs County revoked a 2008 cooperative law enforcement agreement among the Band, the County and the County Sheriff.[1] The parties had entered into the agreement under Minn. Stat. § 626.90, subd. 2(b), to define and regulate the provision of law enforcement services under that statute.

Under Minnesota Statutes § 626.90, subd. 2(c), the Band has concurrent law enforcement jurisdiction with the Mille Lacs County Sheriff's Department under certain circumstances "within the boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County. . . ." Article 2 of that Treaty reserved a tract of land on the south shore of Mille Lacs Lake for the "permanent home" of the Band. That tract, which came to be known as the Mille Lacs Indian Reservation, is the area of concurrent law enforcement jurisdiction referenced in Minn. Stat. § 626.90.

[1] *See* Exs. A (2018-01-18 Letter from Chief Executive Benjamin to then-Deputy Secretary for the Interior David Bernhardt) and E (2016-06-21 Mille Lacs County Resolution No. 6-21-16-2). All exhibits cited in this memorandum are attached to the Declaration of Beth Baldwin in Support of Plaintiff' Motion for Protective Order, filed herewith.

Immediately after terminating the cooperative agreement in 2016, Defendants began systematically undermining the Band's Police Department on the theory that the Band no longer possessed the powers of a state law enforcement agency.[2] For example, the County terminated a series of law enforcement agreements with the Band, including agreements for the Band's use of the County's records management system and agreements by which the Band's Police Department had obtained access to federal and state criminal justice data, on the theory that the Band was no longer a state law enforcement agency.[3] *See* Ex. E at 7-9 (County Resolution, "Transitioning of Tribal Law Enforcement Agreements"). The County Attorney sent a letter to the Minnesota Peace Officer Standards and Training (POST) Board, the licensing entity for peace officers, notifying them of his opinion that

[2] After unsuccessfully attempting to persuade Pine County to terminate its own law enforcement agreement with the Band under Minn. Stat. § 626.93, *see* Ex. F (2016-06-21 Walsh to Frederickson), Defendants conceded that the Band retained the powers of a state law enforcement agency with jurisdiction in Pine County. However, while acknowledging that, as state-licensed peace officers, the Band's police officers could execute warrants throughout the State (including in Mille Lacs County) under Minn. Stat. § 629.40, subd. 3, they denied that the Band's Police officers could otherwise exercise out-of-jurisdiction authority when acting in the course and scope of their employment, as also provided in § 629.40, subd. 3. *See* Ex. J at 6-7 (2016-07-08 County Attorney Opinion).

[3] Defendants proceeded with the cancellation of these agreements notwithstanding their acknowledgement that the Band retained the powers of a state law enforcement agency with jurisdiction in Pine County (and elsewhere under Minn. Stat. § 629.40). The only agreement Defendants preserved was a communication system subscriber agreement under which the Band's Police Department had access to state police and emergency radio communications, but even that agreement was modified to limit the Band's access to certain channels (including car-to-car communications among the County Sheriff's deputies). *See* Ex. I (2016-07-07 Lindgren to Rosati). Defendants did not explain the legal basis for retaining a modified subscriber agreement while cancelling the other agreements.

"as of midnight on July 21, 2016, the Mille Lacs Band Tribal Police Department shall no longer be a law enforcement agency under Minnesota law." Ex. G (2016-06-23 Walsh to Gove). Similar letters were sent to every law enforcement agency in the State of Minnesota, federal law enforcement agencies including the FBI, the Bureau of Alcohol, Tobacco and Firearms and the U.S. Postal Inspector, as well as the state's Public Employees Retirement Association. Ex. H (2016-07-07 Walsh to State Law Enforcement Partners).[4]

Defendants also asserted that the Band lacked *inherent* law enforcement authority as an Indian tribe: (1) on non-trust lands within the Mille Lacs Indian Reservation (because, according to Defendants, the Reservation had been disestablished); or (2) over non-Indians on trust or non-trust lands (because, according to Defendants, the Band lacks criminal jurisdiction to prosecute non-Indians). For example, on July 18, 2016, the County Attorney issued a legal opinion asserting that Plaintiffs lacked *tribal* law enforcement authority outside of tribal trust lands or over non-Indians. Ex. J at 6, 14 (2016-07-18 Mille Lacs County Attorney's Office Opinion on the Mille Lacs Band's Law Enforcement Authority). The opinion stated that a Band Police officer exercising authority outside of tribal trust lands in Mille Lacs County could do so only as an out-of-jurisdiction state peace officer or as a private citizen and warned of the "risks inherent in the practice of conducting citizens'

[4] As noted above, the County Attorney later acknowledged that the Band was a state law enforcement agency with jurisdiction in Pine County. The County Attorney advised the POST Board of his revised opinion but there is no record that he so advised the other federal, state and local law enforcement agencies. *See* Ex. L (2018-07-18 Walsh to Gove).

arrests." *See id.* at 6-11. Those "risks" included possible civil sanctions for false imprisonment, felony-level criminal sanctions based on false imprisonment and assault, and lesser criminal sanctions for "pretending to be a peace officer," unauthorized practice of a law enforcement officer and obstructing or interfering with a peace officer. *See id.* at 11-12 ("When acting as a private citizen making a citizen's arrest within Mille Lacs County …. a Mille Lacs Band Police Officer's use of firearms to cause fear in another of immediate bodily harm or death would be a felony offense that would result in a presumptive mandatory three year prison sentence ….").

A protocol developed by the County Attorney and distributed with the July 18, 2016, opinion confirmed that "Mille Lacs County's position is that inherent tribal criminal authority doesn't extend (1) outside of trust lands or (2) to non-members of the Mille Lacs Band." Ex. K (2016-07-18 Northern Mille Lacs County Protocol). The protocol states that Band officers:

> **may not lawfully**: … [c]onduct investigations regarding violations of state law including statements, investigative stops, traffic stops, and gathering evidence … [or] impersonate a state peace officer, obstruct justice, or engage in the unlawful practice of a peace officer, primarily by interfering with investigations within Mille Lacs County.

Id. (emphasis in original; footnote omitted). Defendants took a series of actions to enforce these restrictions. Mille Lacs County Sheriff's Deputies reported Band Police officers' "violations" of the County Attorney's opinion and protocol to the County Sheriff, who forwarded them to the County Attorney. Ex. M (2016-07-25 Sgt. Holada to then-Sheriff Lindgren) ("In conclusion we made a set of proper protocols for tribal police for when they

can act as police officers and when they should act as citizens. Below are a list of violations from this 3 day weekend. …. Tribal Police and Deputies need to know exactly where the line is and if it is crossed there will be consequences.").[5] The County Attorney chastised Band Police officers for not complying with his protocol and threatened that such actions "could also constitute obstruction of justice and the unauthorized practice of a law enforcement officer." *See* Ex. N at 2 (2016-08-25 Walsh to then-Band Police Chief Rosati). The County Attorney demanded adherence to his opinion and protocol and declined to prosecute cases where Band Police officers failed to adhere to them. *See*, *e.g.*, Ex. O (2016-09-20 Walsh to Band Police Officer Kintop) ("I expect all tribal police officers to follow the Mille Lacs County Attorney's Office Opinion on the Mille Lacs Band's Law Enforcement Authority and the Northern Mille Lacs County Protocol for as long as it is in place."). By December 2016, the County Attorney reported that Defendants' actions to curb the exercise of the Band's law enforcement authority had largely succeeded; in a letter to federal officials Defendant Walsh wrote that "[o]ver the past five months, a tenuous status quo has been followed by the Mille Lacs County Sheriff's Office and the Mille Lacs Band Police Department based upon my Opinion and Protocol dated July 18, 2016 …." Ex. P (2016-12 Walsh to Luger et al.).

In late 2016 and early 2017, the Band entered into a law enforcement deputation agreement with the Bureau of Indian Affairs' (BIA) Office of Justice Services, and BIA

[5] Sheriff Lindgren's message to Defendant Walsh upon forwarding Sgt. Holada's email was redacted by Defendants.

issued special law enforcement commissions (SLECs) to Band Police officers (including Plaintiff Naumann). Ex. Q (2016-12-20 Deputation Agreement Between BIA and Mille Lacs Band); Compl. ¶ 1. On December 22, 2016, the Band's attorneys wrote to the County Attorney explaining the legal bases for Band Police officers – acting pursuant to the Band's inherent law enforcement authority, the BIA deputation agreement and the SLECs – to investigate violations of state law by Indians or non-Indians within the Band's Indian country. Ex. R (2016-12-22 Slonim to Walsh). However, the County Attorney did not modify the positions set forth in his July 18, 2016, opinion and protocol regarding the scope of the Band's law enforcement authority in response to the deputation agreement, the SLECs or the Band's legal analysis, and he continues to maintain those positions today. *See, e.g.*, Ex. U at 11 (Def. Walsh's Answer to Plaintiffs' Interrogatory No. 11) ("The County Attorney's position during that time period [between the time the County revoked the cooperative law enforcement agreement in June 2016 and the date on which Plaintiffs filed this Case], and … his position still today, is that there is no lawful authority stating that the Band has inherent law enforcement authority on Non-Trust Lands or over persons who are not members of a federally-recognized Indian tribe, nor can the federal government delegate such authority.").

Plaintiffs claim that Defendants' positions and actions violated the Band's inherent tribal and federally-delegated law enforcement authority in two fundamental respects: (1) they limited such authority to trust lands, excluding all non-trust lands (including Band-owned fee lands) within the Band's Reservation; and (2) they failed to recognize the Band's

inherent authority to investigate violations of state law within its Reservation (on trust and non-trust lands). To remedy these violations, Plaintiffs seek a declaratory judgment defining the scope of the Band's inherent tribal and federally delegated authority. Compl. at 7-8, ¶ 1.A, 1.B.

Defendants deny interfering with the Band's inherent tribal or federally-delegated law enforcement authority; dispute Plaintiffs' position regarding the scope of the Band's inherent tribal and federally-delegated law enforcement authority; and assert a variety of jurisdictional, statute-of-limitations and estoppel defenses. *See* Answer and Counterclaim of Defendant County of Mille Lacs, Minn., ¶¶ 5.H, 5.K, 5.M-5.U and Affirm. Defs. 1 through 33 (ECF No. 17); Defendant Brent Lindgren's Answer, ¶¶ 5.H, 5.K, 5.M-5.U. and Affirm. Defs. 1 through 20 (ECF No. 19); Amended Answer of Joseph Walsh, ¶¶ 5.H, 5.K, 5.M-5.U and Affirm. Defs. 1 through 12 (ECF No. 21). Defendants deny "claims of unlawful interference asserted by the Band" and "state[] that certain matters complained of were the result of termination of the Cooperative State Law Enforcement Agreement, which has currently been reinstated and that the claims of Plaintiffs in those regards have been mooted." Defs.' Jt. Stmt. of the Case at 5-6 (ECF No. 50). Defendants also deny that their actions had an adverse effect on law enforcement or public safety within the Mille Lacs Reservation. *See id.* at 6 (denying that Defendants deterred Band Police officers "from responding to criminal activity within the trust lands, and further den[ying] that Mille Lacs County can be accurately described as having the highest crime rate in Minnesota. During the past two years, the number of tribal, federal and county law

enforcement officers in the three townships [of the Mille Lacs Reservation] was actually increased.")

Read together, Plaintiffs' Complaint and Defendants' Answers present legal issues regarding the scope of the Band's inherent and federally-delegated law enforcement authority and factual questions – necessary to establish Plaintiffs' standing to litigate the legal issues – regarding Defendants' actions beginning in June 2016 and the effects of those actions on Plaintiffs.

B. Summary of Relevant Discovery History.

The parties have been engaged in ongoing discovery in this case for over a year. Baldwin Decl. ¶ 4. After exchanging initial disclosures, Plaintiffs served two sets of Interrogatories, Requests for Admissions and Requests for Production of Documents on Defendants, the first on February 14, 2019, and the second on June 13, 2019. *Id.* ¶ 5. As the initial deadline for completing fact discovery by September 30, 2019, approached, Defendants informed Plaintiffs that they would be unable to complete their responses to Plaintiffs' requests for production of documents before the deadline (let alone in time to allow Plaintiffs to review the documents and prepare for fact depositions by the deadline) and proposed an extension of the deadline. *See* Defs.' Mem. of Law in Supp. of Mot. to Extend Pretrial Schedule Deadlines at 3 (ECF No. 79). Plaintiffs were reluctant to extend the deadline but agreed on two conditions that are relevant here. Baldwin Decl. ¶ 14. First, with discrete exceptions, Defendants agreed to complete their production of documents in response to Plaintiffs' first and second requests by October 10, 2019. *See id.* at 5. Second,

the parties agreed that "[n]o party will serve additional fact discovery requests" after November 1, 2019. ECF No. 79 at 5.

These agreements were incorporated in Defendants' motion to extend the deadline for completing fact discovery from September 30, 2019, to February 28, 2020 and, on that basis, Plaintiffs did not oppose the motion. Baldwin Decl. ¶ 14; *see also* Baldwin Decl. ¶ 10 (ECF No. 75). The Court granted the motion without a hearing on October 23, 2019, but cautioned the parties that any further extensions would necessitate a hearing. 2d Amended Pretrial Scheduling Order at 1 (ECF No. 84). Despite agreeing to complete their document productions by October 10, 2019, Defendants produced more than 10,000 pages of documents after the October 10 cutoff, and Defendants Walsh and Mille Lacs County have not indicated whether still more documents will be produced. Baldwin Decl. ¶¶ 36-40.

Defendants served three separate sets of Interrogatories, Requests for Admissions and Requests for Production of Documents on Plaintiffs. *See id*. ¶ 6. In the County's Set I Requests for Production of Documents, Request for Production (RFP) No. 8 sought:

> All documents relating to the allegations set forth in Paragraph 5.I of the Complaint. This request includes, but is not limited to, documents demonstrating the Band's policies, rules, and regulations regarding its Police Department.

Id. ¶ 8 and Ex. V at 11-12. Paragraph 5.I of Plaintiffs' complaint states that "[u]nder Band law, the Band established and maintained a police department authorized to promote public safety, protect members of the Band and Band property, preserve the peace, and work with other law enforcement agencies to promote the peace." *See* ECF No. 1. It further states

that "[t]he Band has authorized its law enforcement officers to make arrests and to carry handguns, other firearms, and other weaponry for their personal protection and the protection of others." *Id.*

Plaintiffs understood RFP No. 8 to seek documents relating to the legal establishment and maintenance of the Band's Police Department under Band law, the authority vested in Band officers by Band law, and Band policies, rules and regulations governing the Department. Baldwin Decl. ¶ 9. Accordingly, Plaintiffs' response referenced Band statutes relating to its Police Department (which are available online) and produced documents such as the Band's police manual (in various iterations). *Id*. Plaintiffs did not understand RFP No. 8 to seek performance reviews of the Band's Police Department such as the report now sought via subpoena, which does not relate to the establishment or maintenance of the Band's Police Department "under Band law" or "demonstrate the Band's policies, rules and regulations" concerning the Police Department. *Id.*

Notably, in the same set of requests for production, Defendants served a more specific request relating to "issues with the manner in which Tribal Police are carrying out their authorities." Specifically, RFP No. 26 sought "[c]opies of all Tribal Council minutes and/or resolutions *in any manner relating or pertaining to Tribal Police*, exercise of criminal authority thereof, *including any issues with the manner in which Tribal Police are carrying out their authorities*." *See* Ex. V at 23-24 (emphasis added). In response to that request, Plaintiffs produced Band Joint Resolution 16-01-72-14, which was adopted on

February 20, 2014 and titled "A Joint Resolution Approving the Executive Inquiry Hearing Officers' ***Report*** and Recommendations" (Joint Resolution). Baldwin Decl. ¶ 10 and Ex. W (Joint Resolution 16-01-72-14) (emphasis added). The Joint Resolution referred to concerns within the Band regarding the Band's Police Department, the appointment of hearing officers by the Band's Chief Executive to make findings and recommendations regarding the Department, the Band Assembly and Chief Executive's "review[of] the hearing officers' report and recommendations," and the Band Assembly's acceptance of the hearing officers' recommendation that the Band's then-Chief of Police be terminated. The Joint Resolution did not adopt the hearing officers' report as an official policy but instead asked the Chief Executive to provide "proposals to implement such other recommendations in the Hearing Officers' report as the Chief Executive determines to be in the best interest of the Band." Ex. W at 2.

Defendants' RFP No. 26 sought only "Tribal Council minutes and/or resolutions" and did not request underlying documents such as the report expressly referenced in the Joint Resolution. Nevertheless, Plaintiffs' response objected to RFP No. 26 to the extent that it sought attorney-client communications and listed the hearing officers' report in the accompanying privilege log. *See* Ex. V at 23-24 (2019-06-06 Plaintiffs' Response to Set I RFPs) and Ex. X, p. 5 row 57 (Production 1 Privilege Log) (listing "Confidential report prepared for Chief Executive by outside counsel under Exec. Order 166-13"). Plaintiffs served their responses to RFP Nos. 8 and 26 on June 6, 2019. Baldwin Decl. ¶ 10. As discussed below, Defendants did not challenge these responses until the January 3, 2020,

meet-and-confer call initiated by Plaintiffs, which was *seven months after* Plaintiffs served their responses to Defendants' Set I Requests for Production and after Plaintiffs notified Defendants of their objections to the Ballard Spahr subpoena. *Id.* ¶ 12.

Meanwhile, on November 1, 2019 (the agreed-upon deadline for service of fact discovery requests), Defendants served upon Plaintiffs a third set of discovery requests, including requests for production of documents. Baldwin Decl. ¶ 15. Like RFP No. 26, these requests included a request relating to "[i]ssues with the performance or non-performance of the Band Police." Specifically, RFP No. 44 sought "[a]ll minutes, resolutions, or other records of activities or meetings by the Band Assembly … that relate to … (a) *[i]ssues with the performance or non-performance, or concerns regarding the performance of the Band Police or any other issues with Tribal Law Enforcement ….*" *See* Ex. Y at 11-14 (emphasis added).[6] RFP No. 44's request for Band Assembly minutes, resolutions and records of activities or meetings, like RFP No. 26, did not seek the hearing officers' report referenced in the Joint Resolution or documents used to prepare that report. On December 2, 2019, Plaintiffs objected to RFP No. 44 on several grounds, including that it exceeded the 50-request limit established in the court's scheduling orders. *See id*. (citing ECF No. 84, Second Amended Scheduling Order). To date, Defendants have not challenged Plaintiffs' response to RFP No. 44. Baldwin Decl. ¶ 18.

[6] In Exhibit Y, the RFP is reproduced as Request for Production No. 43, which is incorrect. In Defendants' Set III Requests, it is numbered as RFP No. 44; the numbering in Plaintiffs' response is a typographic error. 2d Baldwin Decl. ¶ 16.

Instead, on December 18, 2019, Defendant Walsh notified Plaintiffs of his intent to serve a subpoena *duces tecum* on Ballard Spahr LLP and Wallace G. Hilke, one of the attorneys who prepared the report discussed in the Joint Resolution. *See* Baldwin Decl, ¶ 20. Mr. Hilke confirmed that he was served the subpoena on December 19, 2019. *Id.* ¶ 21. The subpoena demanded that Ballard Spahr and Mr. Hilke produce certain documents to Defendant's counsel on January 6, 2020. *See* Ex. Z at 3.

The subpoena seeks "[t]he report completed at the end of December 2013 described in Exhibit 1, attached hereto" and various related documents. *Id*. Exhibit 1 to the subpoena is a "Message from the Mille Lacs Band's Chief Executive" published in the March 2014 issue of the Band's *Inaajimowin* newsletter. *Id.* at 4. Chief Executive Benjamin's message describes an August 5, 2013, Executive Order No. 166-13, which appointed Mr. Hilke and another attorney, Mark Larsen, of Lindquist & Vennum LLP "to conduct hearings, interview witnesses, gather and review documents and provide recommendations to the Executive Branch to address concerns regarding the conduct and oversight of members of the Tribal Police Department (TPD)." *Id.* Chief Executive Benjamin's message indicates that the attorneys' report was completed in December 2013 and contained determinations and recommendations made "after numerous interviews with Band members and several document reviews …." *Id.* The subpoena seeks "[a]ny transcripts, written summaries, or memorialization of the 'interviews with Band members'" and "[t]he documents reviewed in the 'several document reviews'" thus described. Ex. Z at 3. The subpoena also seeks "[a]ll invoices for services provided by Lindquist & Vennum LLP in connection with

preparing the report ….” *Id.* The “report completed at the end of December 2013” described in the subpoena is the same document described as “the hearing officers’ report” in the Joint Resolution produced by Plaintiffs and as the “[c]onfidential report prepared for Chief Executive by outside counsel under Exec. Order 166-13” in Plaintiffs’ June 6, 2019 privilege log. Baldwin Decl. ¶ 24.

Plaintiffs wrote to Defendants on December 30, 2019, setting forth detailed objections to the subpoena and requesting to meet and confer via telephone to address plaintiffs’ objections before filing a motion for a protective order and to quash the subpoena on January 6. *See Meet-and-Confer Statement for Pltfs.’ Mot. for Protective Order*, filed herewith. On January 2, 2020, Ballard Spahr served its objections to the subpoena. Ex. CC. The parties’ meet-and-confer call took place on January 3, 2020. As described in the accompanying Meet-and-Confer Statement, Defendants stated they did not agree with Plaintiffs’ objections to the subpoena and proposed that the parties file joint motions on January 10 to resolve the dispute. Defendants asserted for the first time that the hearing officers’ report referenced in the Joint Resolution was responsive to Defendants’ RFP No. 8. Defendants’ also asserted that the report and other documents sought via subpoena are “hot documents” that they alleged are relevant to rebut Plaintiffs’ “narrative” that Defendants’ actions had created law enforcement problems on the Reservation – presumably by shifting the blame for those problems to the Band’s Police Department. Defendants also asserted that the November 1, 2019, deadline did not apply to third-party subpoenas. On January 8, 2020, Plaintiffs’ counsel accepted Defendants’ proposal for

filing of cross motions and their request to further defer filing the motions until January 17.

II. STANDARD OF REVIEW.

Subpoenas under Federal Rule of Civil Procedure (Rule) 45 "are subject to the same constraints that apply to all of the other methods of formal discovery." *Shukh v. Seagate Tech*., *LLC*, 295 F.R.D. 228, 236 (D. Minn. 2013) (quotation omitted). "In other words, Federal Rule of Civil Procedure 26(b)(1) describes the permissible scope of discovery, regardless of whether that discovery is directed to parties or non-parties." *Deluxe Fin. Servs., LLC v. Shaw*, No. 16-cv-3065 (JRT/HB), 2017 U.S. Dist. LEXIS 221391, at *10 (D. Minn. Feb. 13, 2017). Thus, the Court has authority to handle an improper subpoena under either Rule 26(c) or Rule 45(d)(3). "[A] protective order and an order quashing a subpoena are discrete legal orders" and "have different standing requirements." *Mallak v. Aitkin Cnty.*, No. 13-cv-2119 (DWF/LIB), 2016 U.S. Dist. LEXIS 191858 at *16-*17 (D. Minn. Dec. 22, 2016). However, where a party has standing to prevent disclosure of information by a non-party in response to a third-party subpoena because the party possesses a personal right or privilege as to the information sought through the subpoena, the party may assert the privilege through either a motion to quash or a motion for protective order. *Id*. at *21-*22 (citing cases).

A. Motion for Protective Order.

District courts have broad discretion to decide discovery motions and to limit discovery. *Pavlik v. Cargill, Inc.*, 9 F.3d 710, 714 (8th Cir. 1993). A court may issue a

protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," upon a showing of good cause. Fed. R. Civ. P. 26(c)(1). Such protective orders may forbid the disclosure or discovery; specify terms for the disclosure or discovery; forbid inquiry into certain matters; or limit the scope of disclosure or discovery to certain matters. *Id*. A party to litigation has standing to move for a protective order under Rule 26(c) "to contest discovery sought from third-parties." *Shukh*, 295 F.R.D. at 236 (quotation omitted). This is because where a party "contends that subpoena requests are irrelevant, cumulative, and burdensome, they are not simply asserting the rights of the third party, but their own right to reasonable discovery and efficient disposition of the case." *Id*. Thus, under Rule 26, a party has standing to move for a protective order against a third-party subpoena and assert arguments based on relevance and proportionality, or other considerations of discovery management. *Mallak*, 2016 U.S. Dist. LEXIS 191858 at *20-*21.

Rule 26(b)(1), as amended on December 1, 2015, limits discovery to any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The court must limit the extent of discovery if it determines that "the party seeking discovery had had ample opportunity to obtain the information by discovery in the action" or if the proposed discovery is outside

the scope permitted by Rule 26(b)(1). Fed. R. Civ. P. 26(b)(2)(C)(ii), (iii). A district court has "discretion to limit the scope of discovery to what the court perceive[s are] the central issues." *Hill v. Southwestern Energy Co.*, 858 F.3d 481, 484 (8th Cir. 2017).

"[A] showing of irrelevancy of proposed discovery can satisfy the 'good cause' requirement of Rule 26(c)." *Shukh*, 295 F.R.D. at 237 (quotation omitted). "Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case." *Hofer v. Mack Trucks, Inc*., 981 F.2d 377, 380 (8th Cir. 1992). Furthermore, "[a] party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them." Fed. R. Civ. P. 26(b)(1), Adv. Comm. Note to 2015 Amend.

Even if the court determines that the discovery sought by a subpoena is relevant, "'discovery is not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information.'" *Deluxe Fin. Servs.,* 2017 U.S. Dist. LEXIS 221391, at *11 (quoting *Misc. Docket Matter No. 1 v. Misc. Docket Matter No. 2*, 197 F. 3d 922, 925 (8th Cir. 1999)). "[T]he Court can consider whether and to what extent the discovery sought can be more easily obtained from another source [such as] from the parties themselves." *Id.* at *17.

B. Motion to Quash a Third-Party Subpoena.

The court has broad discretion to determine when it is appropriate to quash a subpoena pursuant to Rule 45. *See Pamida, Inc. v. E.S. Originals, Inc*., 281 F.3d 726, 728 (8th Cir. 2002). Rule 45(d)(3)(iii) allows the court to quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies …." A party to litigation may raise or join in a motion to quash a third-party subpoena "in order to raise a claim of privilege." *Int'l Controls & Measurements v. Honeywell Int'l*, No. 18-mc-00059-DSD-KMM, 2018 U.S. Dist. LEXIS 194993, *5 (D. Minn. Nov. 15, 2018). The court may also quash a subpoena that seeks information not relevant to the underlying litigation. *See Roberts v. Shawnee Mission Ford, Inc.,* 352 F.3d 358, 361 (8th Cir. 2003).

III. ARGUMENT.

A. The Subpoena is Improper Because Defendant Walsh Served It After the Agreed-Upon Deadline for Serving Written Fact Discovery Requests.

Defendant Walsh's third-party subpoena violates the parties' agreement not to serve new fact discovery requests after November 1, 2019. As agreed by the parties and presented to the Court in support of Defendants' unopposed motion for an extension of pre-trial deadlines, that agreement was not limited to discovery served on the parties but included "fact discovery requests" without limitation. *See* ECF No. 77 at 4.

"Rule 45 Subpoenas, which are intended to secure the pretrial production of documents and things, are encompassed within the definition of 'discovery,' as enunciated in Rule 26(a)(5) and, therefore, are subject to the same time constraints that apply to all of

the other methods of formal discovery." *Marvin Lumber & Cedar Co. v. PPG Industries*, 177 F.R.D 443, 443 (D. Minn. 1997). Discovery deadlines embodied in scheduling orders issued under Rule 16 "should be read as being specific and comprehensive. When an Order details the scope of permissible discovery, a party should not read into the gaps permission to propound whatever discovery it so wishes." *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 286 F.R.D. 117, 129 (D.D.C. 2012). Indeed, where a scheduling order is "silent" on a particular discovery method or deadline, "[s]ilence is not a blank check …. When determining whether a position is substantially justified, the legal and factual context is everything." *Id.* at 130.

"Once the schedule proposed by the parties is accepted or modified by the Court and memorialized in a scheduling order, the scheduling order may not be modified except by the Court and then only upon a showing of good cause." *Olgyay v. Soc'y for Envtl. Graphic Design, Inc*., 169 F.R.D. 219, 220 (D.D.C. 1996); *see also* Fed. R. Civ. P. 16(b)(4). Disregard of deadlines embodied in a scheduling order "undermine[s] the court's ability to control its docket, disrupt[s] the agreed-upon course of litigation, and reward[s] the indolent and the cavalier." *Johnson v. Mammoth Recreations, Inc*., 975 F.2d 604, 610 (9th Cir. 1992); *accord Archer Daniels Midland Co. v. Aon Risk Servs., Inc*., 187 F.R.D. 578, 585 (D. Minn. 1999) ("[T]he failure of a litigant to honor the established pretrial deadlines gravely disturbs the entirety of the Court's calendar, as well as the capacity of the Court to promptly address the concerns of those litigants who do abide by Scheduling Orders and, in a real sense, the integrity of the system of Federal justice."). The court "may issue any

just orders . . . if a party or its attorney . . . fails to obey a scheduling or other pretrial order." Fed. R. Civ. P. 16(f)(1)(C).

Defendants' August 29, 2019, Motion to Extend Pretrial Schedule Deadlines informed the Court that the parties had agreed that Defendants would complete their document productions (with limited exceptions) by October 10, 2019, and that "[n]o party will serve additional fact discovery requests" after November 1, 2019. ECF No. 79 at 5. These agreements were an integral part of the Second Amended Scheduling Order's overall fact-discovery deadline, Baldwin Decl. ¶ 14; without compliance with these agreements, it is not possible to comply with the overall deadline without disrupting "the agreed-upon course of litigation." *Johnson*, 975 F.2d at 610. Defendant Walsh's attempt to obtain fact discovery from a third-party well after the original deadline for completing all fact discovery and seven weeks after the November 1, 2019, deadline for new requests, is a violation of the parties' agreement and disrupts the schedule contemplated by the Court's scheduling order.[7]

[7] This violation is compounded by Defendants' flouting of the October 10, 2019, deadline to complete their document productions; Defendant Walsh's late attempt to obtain additional documents via subpoena is now diverting Plaintiffs' counsel's time and attention away from reviewing the nearly-10,000 pages of documents that Defendants produced *after* the agreed-upon production deadline. *See U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 675 (M.D. Fla. 2008) (acknowledging that plaintiff's misconduct by "sporadic and incomplete" production of approximately 10,000 documents between 60 days before and 30 days after discovery deadline "may have benefitted [plaintiff] by limiting the time available to review the belatedly produced documents and to depose witnesses regarding these documents"); *accord Robson v. Hallenbeck*, 81 F.3d 1, 4 (1st Cir. 1996) ("Repeated disobedience of a scheduling order is inherently prejudicial, because disruption of the court's schedule and the preparation of other parties nearly always results.").

During the January 3, 2020, meet-and-confer call, Defendants asserted that the November 1, 2019, deadline applied only to discovery served on the parties and did not apply to third-party subpoenas. *See Meet-and-Confer Statement for Pltfs.' Mot. for Protective Order*, filed herewith. However, Defendants' counsel acknowledged that, on its face, the deadline is not limited to discovery served on the parties. *Id.* It would be inappropriate to read such a limitation into the deadline upon which the parties agreed and which Defendants themselves incorporated into their unopposed motion to amend the schedule. *See Marvin Lumber*, 177 F.R.D at 443; *Act Now*, 286 F.R.D. at 129-30.

Notably, all documents sought in the subpoena are in the possession or control of Plaintiff Mille Lacs Band; they were prepared by attorneys for the Band and are held for the benefit of the Band.[8] Moreover, Plaintiffs disclosed the existence of the report in the Joint Resolution produced with their June 6, 2019, response to RFP No. 26 and their privilege log – almost five months before the November 1, 2019, deadline and more than six months before Defendant Walsh served the Ballard Spahr subpoena. Thus, having failed to specifically request the report and associated documents in a follow-up discovery request – despite having served two subsequent sets of requests on Plaintiffs – Defendants

[8] Federal Rule of Civil Procedure 34 requires a party to produce requested documents if they are within its "possession, custody or control." Fed. R. Civ. P. 34(a)(1). "The question, therefore, is not only whether the documents are within the physical possession of the party, but also whether the party has a legal right to the documents or practical ability to obtain the information." *Triple Five of Minn. v. Simon*, 212 F.R.D. 523, 527 (D. Minn. 2002) (citing *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000)). Parties "clearly have a legal right to the documents and the ability to obtain the documents from their . . . attorneys." *Id.*

should not be permitted to turn to a third-party subpoena to evade the deadline for filing such a request and disrupt the agreed course of the litigation to Plaintiffs' prejudice. *See Mallak*, 2016 U.S. Dist. LEXIS 191858 at *31 (noting that "the Court cannot overlook the eleventh-hour nature of [the] current subpoena" where party "failed to offer any explanation why, in the exercise of due diligence, she was therefore unable to serve the broader subpoena now at issue . . . until a mere 10 days prior to the . . . close of fact discovery").

Moreover, even if the deadline did not by its terms apply to third-party subpoenas, it is improper to use a third-party subpoena to evade the limitations on discovery among the parties. *See* 7 Moore's Federal Practice - Civil § 34.02 (2019) (Rule 45 subpoena "should not be used to obtain pretrial production of documents or things, or inspection of premises, from a party in circumvention of discovery rules or orders …. and may not be used to obtain production of documents from a party after the discovery deadline."); *see also Hale v. Bunce*, No. 16-cv-02967, 2017 U.S. Dist. LEXIS 223734, at *2-*3 (N.D. Ohio Dec. 15, 2017) ("Plaintiffs should not attempt to obtain information from a nonparty where the requested information can reasonably be obtained from a party to the lawsuit."). As of November 1, 2019, Defendants had already served more than 50 requests for production upon Plaintiffs, *see* Ex. Y at 4-6; additional requests served after November 1 are not only be untimely as discussed above, but also in violation of the 50-request limit set in the Court's scheduling order. *See* ECF No. 84 at 3, ¶ V.

During the January 3, 2020, conference, Defendants sought to avoid this result by claiming the subpoenaed documents should have been produced in response to RFP No. 8. However, that claim – which was not made until *after* Defendants sought the report via third-party subpoena and Plaintiffs objected to that subpoena – lacks merit. Plaintiffs reasonably and genuinely interpreted RFP No. 8 to seek documents relating to the establishment and maintenance of the Band's Police Department under Band law and the Band's actual policies, rules and regulations governing its operations, *not* a performance review conducted by outside counsel. This interpretation is reinforced by RFP No. 26 and later, RFP No. 44, which specifically sought Band Assembly resolutions and minutes involving "issues" with and the "performance" of Band Police. Defendants clearly knew how to formulate requests for production seeking documents relating to the performance of Band Police, but did not do so in RFP No. 8.

Moreover, the subpoenaed report does not relate to the establishment or maintenance of the Band Police Department, nor "demonstrate the Band's [own] policies, rules, or regulations" regarding the Department. Rather, the report simply presented outside counsel's findings and recommendations regarding individual officers and other matters for Band leadership to consider. Instead, the Band's policies, rules and regulations for the Police Department are housed in the Band statutes and police manual, as stated in the Band's response to Defendants' RFP No. 8.

The other documents sought by the subpoena – the attorneys' interview notes, background documents reviewed by the attorneys and the attorneys' billing invoices

relating to the report – also are not within the scope of RFP No. 8. Those documents do not relate to the establishment or maintenance of the Band's Police Department or "demonstrate the Band's policies, rules, or regulations" regarding the Department.

Because the subpoenaed documents were not requested before the November 1, 2019, deadline to serve written fact discovery requests despite ample opportunity to do so, Defendants should not be allowed to obtain them now through an untimely third-party subpoena.

B. The Subpoena is Improper Because It Seeks Materials That Are Not Relevant to Any Party's Claims or Defenses, and the Request Is Not Proportional to the Needs of the Case.

The documents sought by the subpoena are not relevant to any party's claims or defenses and their belated discovery is not proportional to the needs of the case. The fundamental claims and defenses in this case concern the extent of the Band's inherent and federally-delegated law enforcement authority. As discussed above, the two principal questions are: (1) whether those authorities extend throughout the 1855 Mille Lacs Reservation or are limited to trust lands; and (2) whether those authorities include the authority to investigate violations of State law by non-Indians. *See* Part I.A, *supra.* These are legal questions that turn on federal law governing the status of the Mille Lacs Reservation, the inherent sovereign authority of Indian tribes, and the authorities delegated to Band officers through the BIA deputation agreement and SLECs. The documents sought in the subpoena, involving an internal performance review of the Band's Police Department in 2013, do not address and shed no light on these legal questions.

Neither Plaintiffs' factual allegations nor Defendants' denials of them warrants discovery of the subpoenaed documents. To establish their standing to litigate this case, Plaintiffs alleged that Defendants interfered with the exercise of the Band's law enforcement authority and that Defendants' interference injured Plaintiffs. Part I.A., *supra*; *see, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (stating that to establish an Article III case or controversy exists, a plaintiff must demonstrate that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision"). Although Defendants dispute some of the facts surrounding Defendants' alleged interference, nothing in the subpoenaed documents would tend to prove or disprove any relevant or material disputed facts needed to establish Plaintiffs' standing.

First, Plaintiffs allege Defendants interfered with the exercise of Plaintiffs' inherent and federally-delegated law enforcement authority beginning in mid-2016, which in turn injured Plaintiffs. *See* Part I.A, *supra*. Thus, both the alleged "injury in fact" and the "challenged conduct of the defendant" began in mid-2016. Nothing in the documents sought via the subpoena – all of which relate to events that occurred before 2014 – is relevant to Defendants' actions beginning in mid-2016 or the effects of those actions on Plaintiffs. Instead, they relate to personnel and administrative issues within the Band Police Department that existed more than two years prior, at a time when the cooperative agreement between the Band and the County was in full force and effect and the disputes

giving rise to this case had not yet arisen.[9] Thus, the documents address neither the issues nor time frame presented in this case. *See United States ex rel. Dicken v. NW Eye Clinic*, No. 13-cv-2691 (JNE/KMM), 2018 U.S. Dist. LEXIS 100778 at *3-*4 (D. Minn. June 14, 2018) ("Because of the clear time-frame at issue in the complaint, the Court finds that requiring discovery outside of the seven years at issue would not be proportional to the needs of the case.").

Second, interference with the sovereign authority of an Indian tribe is an injury *per se*. *See Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153-54 (9th Cir. 2017). Thus, if Plaintiffs can establish that Defendants interfered with the exercise of the Band's inherent law enforcement authority beginning in mid-2016, Plaintiffs will have established standing. Nothing in the subpoenaed documents is relevant to that inquiry.

Third, even if Plaintiffs must establish that Defendants' interference resulted in a decline in law enforcement or public safety on the Reservation to demonstrate injury in fact, the inquiry must focus on events that took place beginning in mid-2016, not those that took place before 2014. Defendants' hypothesis that the subpoenaed documents are "hot" documents that will somehow counter Plaintiffs' evidence regarding the consequences of

[9] In March 2013, the former County Attorney wrote that "[t]he Mille Lacs Tribal Police Department, the Mille Lacs County Sheriff's Office, and the Mille Lacs County Attorney's Office have very good working relationships with one another, both independently and within the North Central Drug Task Force." Ex. C at 2 (2013-03-06 County Att'y Jude to Minn. Att'y Gen. Swanson). As recently as April 2016, the County Board adopted a resolution stating it "value[d] the cooperative contributions made by tribal law enforcement in providing law enforcement services" under Minn. Stat. § 626.90 and the cooperative agreement, which had resulted in a "positive and productive working relationship." Ex. D at 1 (2016-04-05 County Resolution 4-5-16-4).

Defendants' actions beginning in mid-2016 is unfounded. Whatever the Band's retained attorneys reported about the Band's Police Department in 2013 can shed no light on whether Defendants interfered with the Department's authority beginning in mid-2016 or whether such interference injured the Band.

For example, Plaintiffs will present evidence from a qualified, independent observer (a State Department of Corrections officer), who, in April and October 2017, wrote:

- The responsiveness and professionalism of the Band's Police Department was and continued to be one of the best he has ever encountered; it was one of the best departments he had worked with on many levels;
- Given the issues that were occurring, he was amazed at how proactive and community oriented the Band Police Department remained;
- Since the County's revocation of the law enforcement agreement with the Band, things had gotten significantly worse – whereas formerly drug deals had been driven behind closed doors in the past several months he had witnessed numerous drug deals and use right out in the open;
- In the past it would have been a very rare occasion that he would not see Tribal officers out monitoring obscure areas on the Reservation, but now he does not see the same type of law enforcement taking place and it has resulted in a much less safe area;
- He sincerely hoped the Band's officers would be able to get back to doing what is desperately needed;
- There was simply not the level of law enforcement on the Reservation that there had been; although he observed County officers patrolling, it was not even remotely close to what had been done by Tribal officers.

See Ex. B (2017-04-04 Lennox to Rice) and Ex. S (2017-10-10 Lennox to Walsh). If Defendants wish to rebut this or other evidence regarding the law enforcement situation on the Reservation beginning in mid-2016, they will need evidence relating to that time period; nothing in a 2013 report will be of assistance to them.

Finally, because the documents sought in the subpoena fail to address the relevant issues and time period, they would open up an entirely new area of litigation regarding the

claims and recommendations made in the documents, the Band's response to those claims and recommendations (which, as noted in the Joint Resolution, included termination of the Band's then-Police Chief), and the efficacy of that response. The Court should issue a protective order to prevent the diversion of the parties' time and resources to such extraneous matters. Because the documents are neither relevant nor proportional to the actual claims and needs of this case, the subpoena should be quashed. *See United States ex rel. Dicken*, 2018 U.S. Dist. LEXIS 100778 at *3-*4.

C. The Subpoena is Improper Because It Seeks Materials Protected from Discovery by the Attorney-Client Privilege and Work-Product Doctrine.

All documents sought by the subpoena are privileged attorney-client communications and/or attorney work-product. The attorney-client privilege protects confidential communications between a client and his attorney made for the purpose of facilitating the rendering of legal services to the client. *United States v. Spencer*, 700 F.3d 317, 320 (8th Cir. 2012). The privilege belongs to and exists solely for the benefit of the client. *United States v. Yielding*, 657 F.3d 688, 707 (8th Cir. 2011).

The privilege applies when the parties in question have a lawyer and client relationship, and the lawyer was "engaged or consulted by the client for the purpose of obtaining legal services or advice services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity." *Triple Five of Minn. v. Simon*, 212 F.R.D. 523, 527 (D. Minn. 2002) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 601, 602 (8th Cir. 1977) (*en banc*)). Additionally, where a communication intertwines non-legal advice with legal advice, the "legal advice must predominate over the [non-legal]

advice, and not be merely incidental." *Krueger v. Ameriprise Fin., Inc., LLC*, No. 11-2781 (SRN/JSM), 2014 U.S. Dist. LEXIS 197161, at *37 (D. Minn. May 7, 2014) (citing *In re Universal Serv. Fund Tel. Billing Practices Litig*., 232 F.R.D. 669, 675 (D. Kan. 2005)). "The predominant purpose of a particular document – legal advice, or not – may also be informed by the overall needs and objectives that animate the client's request for advice." *Pritchard v. Cnty. of Erie*, 473 F.3d 413, 421 (2d Cir. 2007).

"The objectives of the attorney-client privilege apply to governmental clients …. [and] [u]nless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169-70 (2011) (citing 1 Restatement (Third) of the Law Governing Lawyers § 74, Comment b, pp. 573-574 (1998)). In the government-client context, "[w]hen a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation – or that advocates and promotes compliance, or oversees implementation of compliance measures – is legal advice." *Pritchard*, 473 F.3d at 422. "This observation has added force when the legal advice is sought by officials responsible for law enforcement and corrections policies." *Id*.

Communications from government employees to outside counsel made at the direction of their superiors can be protected by attorney-client privilege. *Compare Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) ("[T]he privilege exists to protect not only

the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.") *with* Restatement 3d of the Law Governing Lawyers, § 74, cmt. b (2000) ("The objectives of the attorney-client privilege including the special objectives relevant to organizational clients apply in general to governmental clients. The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture. Communications from such persons should be correspondingly privileged." (internal citations omitted)). "The fact that the privilege is invoked to protect communications made by employees of a governmental entity rather than a private party does not change the analysis." *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 620 (7th Cir. 2009).

The *Upjohn* Court considered several factors relevant to determining whether communications from employees to an organization's attorneys fell within the attorney-client privilege, including: whether such communications were made at the direction of the employees' superiors in order to secure legal advice from counsel; whether counsel consulted with the organization's leadership and conducted an investigation "to determine the nature and extent" of questionable conduct "and to be in a position to give legal advice to the [organization] with respect to" that conduct; whether such information was "not available from upper-echelon management" and "was needed to supply a basis for legal advice . . . and potential litigation;" whether "[t]he communications concerned matters within the scope of the employees' official duties, and the employees themselves were

sufficiently aware that they were being questioned in order that the [organization] could obtain legal advice;" and whether "the communications were considered highly confidential when made, and have been kept confidential by the [organization]." 449 U.S. at 394-395 (emphasis omitted) (quotation omitted) (internal citation omitted).

Additionally, where privileged communications result from an entity's "efforts to investigate allegations of prior misconduct," courts should be mindful that "allowing disclosure of [the communications] could deter such inquiries, which should not be chilled as a matter of policy." *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 284 (8th Cir. 1984) (citing *Diversified Indus.*, 572 F.2d at 610 (*en banc*) (corporations should be encouraged to "seek out and correct wrongdoing in their own house and to do so with attorneys")). "The public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their past and present activities and how to conform their future operations to the requirements of the law." *Sandra T.E.*, 600 F.3d at 621.

As to the work-produce doctrine, a party ordinarily may not discover "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)" absent a showing of substantial need and inability to obtain their substantial equivalent without undue hardship. Fed. R. Civ. P. 26(b)(3)(A). "The work product privilege operates to ensure that an opponent cannot secure materials that an adversary has prepared in anticipation of litigation." *Gundacker v. Unisys Corp*., 151 F.3d

842, 848 (8th Cir. 1998). "The doctrine allows for discovery of ordinary work product when there is a demonstrated substantial need and an inability to otherwise procure the relevant material without undue hardship." *Id.* However, opinion work product, which includes attorneys' conclusions, mental impressions, opinions, and legal theories concerning litigation, enjoys a near-absolute immunity from discovery. *Id*. at 848 & n.5; *see also In re Murphy*, 560 F.2d 326, 335-36 (8th Cir. 1977).

The party asserting the attorney-client privilege or the work product doctrine bears the burden to provide a factual basis for its assertions by producing "a detailed privilege log stating the basis of the claimed privilege for each document in question, together with an accompanying explanatory affidavit from counsel." *Triple Five of Minn.*, 212 F.R.D. at 527-28 (quoting *Rabushka ex rel. United States v. Crane Co*., 122 F.3d 559, 565 (8th Cir. 1997)). For the work-product privilege, that includes stating "a factual basis for concluding materials with respect to which it is claimed are (1) 'documents and tangible things' (2) 'prepared in anticipation of litigation or for trial' (3) 'by or for another party or its representative (including the other party's attorney . . . or agent).'" *United States v. Dico, Inc.*, No. 4:10-cv-00503, 2017 U.S. Dist. LEXIS 52787, at *20-21 (S.D. Iowa Mar. 27, 2017) (quoting Fed. R. Civ. P. 26(b)(3)(A)). "A document-by-document privilege log is not always necessary when a party has, in good faith, asserted other non-privilege objections to the discoverability of a whole range of materials." *Joy Global, Inc. v. Wisconsin Dep't of Workforce Dev.*, Civ. No. 01-039-LPS, 2008 U.S. Dist. LEXIS 46495 at *13-14 (D. Del. 2008); *see also* Fed. R. Civ. P. 26(b)(5), Adv. Comm. Note to 1993

Amend. ("The obligation to provide pertinent information concerning withheld privileged materials applies only to items 'otherwise discoverable.'").

1. *The Attorneys' Report is Privileged.*

As noted in Plaintiffs' June 6, 2019 privilege log, the hearing officers' report is a privileged attorney-client communication. The Band's Chief Executive issued an Executive Order (No. 166-13, Ex. AA) authorizing the Band to contract with legal counsel to investigate the Band's Police Department and prepare written recommendations for a course of action. The Band specifically retained counsel for that purpose, in part, to assure potential interviewees that the information they provided would be confidential and not made public – a critical component of the investigation and of potential future investigations. *See* Declaration of Melanie Benjamin ¶ 6, filed herewith. The attorneys who conducted the interviews and prepared the report understood that it was a privileged attorney-client communication and tendered it to the Band on that basis: every page of the report was marked as a confidential attorney-client communication and only the Band's Chief Executive, elected members of the Band Assembly (the Band's legislative branch), Solicitor General and in-house and outside counsel have seen the report. Baldwin Decl. ¶¶ 30-31; Benjamin Decl. ¶¶ 12-13.

Executive Order 166-13 provided that Lindquist & Vennum and its attorneys Mr. Hilke and Mr. Larsen were appointed to "investigat[e] potentially improper conduct by one or more officers of the Mille Lacs Band Police Department (the 'Police Department') and to develop recommendations for policies, procedures and further steps for improving the

operations and oversight of the Police Department." Ex. AA at 2. The Band and Lindquist & Vennum entered into a contract for legal services to effectuate that Order. Thus, the report was prepared by attorneys retained for the purpose of providing legal services to the Band, and the predominate purpose of the report was to provide legal advice. *See Sandra T.E.*, 600 F.3d at 620 (holding that when "lawyers were hired in their capacity as lawyers to provide legal services–including a factual investigation–the attorney-client privilege applies to the communications made and documents generated during that investigation").

In *Sandra T.E.*, the Seventh Circuit based its holding that a document was protected by the attorney-client privilege on an engagement letter showing that a school district retained attorneys to provide legal services in connection with developing the school's response to an employee's misconduct. *Id*. The attorneys' "investigation of the factual circumstances surrounding the [misconduct] was an integral part of the package of legal services for which it was hired and a necessary prerequisite to the provision of legal advice about how the District should respond." *Id*. Furthermore, the court found relevant that when the attorneys conducted confidential interviews with employees,

> [n]o third parties attended the interviews[;] the School Board received [the attorney's] report of the firm's findings during an executive session not open to the public[;] and the written executive summary that [the attorneys] turned over to the Board was marked "Privileged and Confidential," "Attorney-Client Communication," and "Attorney Work Product."

Id. The same analysis applies to the Band's engagement of Lindquist & Vennum under Executive Order 166-13 and the attorneys' subsequent investigation. Baldwin Decl. ¶¶ 28-31, Benjamin Decl. ¶¶ 6, 11-14. That the report includes counsel's recommendations for

policies that would improve police operations and oversight only reinforces the conclusion that the report is a privileged communication of legal advice. *See Pritchard*, 473 F.3d at 422.

Chief Executive Benjamin's March 2014 newsletter column attached to the subpoena is insufficient to waive the privilege because it discloses only general findings and conclusions of the report, rather than the facts relied upon by the attorneys to make those findings or conclusions. *See In re Dayco Corp. Derivative Sec. Litig.,* 99 F.R.D. 616, 619 (S.D. Ohio 1983) (press release that disclosed findings and conclusions of investigative report but not "the facts which led to those conclusions, nor the Report itself," did not waive privilege as to entire report). Although the attorneys generated the report to communicate legal advice to Band leadership about administration of the Band Police Department as discussed in Exhibit 1 to the subpoena, the report's primary purpose was to provide legal advice about specific personnel matters not discussed in Exhibit 1 to the subpoena. Chief Executive Benjamin's March 2014 column discloses some of the determinations and recommendations contained in the report relating to creating a Commissioner of Public Safety position and updating the Police Department's administrative structure; however, the column does not disclose other determinations and recommendations in the report that constitute legal advice regarding employment and discipline of former Band Police Department employees. The report itself has not been disclosed and its confidentiality has been preserved by the Band's leadership – the client

to whom the privilege belongs. *See* Baldwin Decl. ¶ 31; Benjamin Decl. ¶¶ 13, 18; *Yielding*, 657 F.3d at 707. Thus, the privilege has not been waived.

During the January 3, 2020, meet-and-confer call, Defendants suggested that, under the Band's statutes, the report was a policy document and did not constitute legal advice. In Executive Order 166-13, Chief Executive Benjamin invoked a Band statute authorizing the appointment of "hearing officers" to conduct inquiries. The statute vests discretion in the Chief Executive to select "hearing officers" but requires they be "knowledgeable in law." *See* Ex. BB at 2 (4 MLBSA § 13(a)). In this case, the Chief Executive made a deliberate decision to retain attorneys as hearing officers because of the personnel issues as well as the legal issues involved. Benjamin Decl. ¶ 6. Moreover, the Chief Executive did not call for public hearings and no such hearings were held. *Id*. ¶ 20. Instead, given the sensitive nature of the issues, persons interviewed by the "hearing officers" were interviewed in private and were assured that their comments would remain confidential; the Band's leadership did not request copies of the attorneys' interview notes and carefully protected the confidentiality of the report. *Id.* ¶¶ 10, 16-20. Thus, the Band interpreted its own statutes to provide for the retention of attorneys to conduct a confidential inquiry and produce a privileged attorney-client communication setting forth their findings and recommendations. Defendants' reading of the Band's statutes does not change this.

2. The Notes and Summaries of Band Member Interviews Are Protected by Work-Product Doctrine and Attorney-Client Privilege.

The interview notes and summaries created by the attorneys memorializing "interviews with Band members" are all attorney work-product. *In re Green Grand Jury*

Proceedings, 492 F.3d 976, 981-82 (8th Cir. 2007) ("Notes and memoranda of an attorney, or an attorney's agent, from a witness interview are opinion work product entitled to almost absolute immunity.") At the time of the interviews, Mr. Hilke and Mr. Larsen were investigating potential employee misconduct in anticipation of potential litigation. Benjamin Decl. ¶ 7. The work product doctrine applies to documents prepared in anticipation of litigation other than the instant case. *See In re Murphy*, 560 F.2d at 334.

Notably, the interview notes were not provided to the Band but kept by Mr. Hilke and Mr. Larsen in their files, underscoring the Band's intent to preserve their confidentiality. *See* Benjamin Decl. ¶ 17. The questions asked and topics discussed would reveal the attorneys' mental impressions. *See In re Green Grand Jury Proceedings*, 492 F.3d at 982 (attorney's notes of a witness interview and recollections of conversations with clients would reveal attorney's thought processes because "when taking notes, an attorney often focuses on those facts that she deems legally significant."). Thus, the interview notes are protected opinion work product.

Furthermore, the attorneys' notes of interviews with Band employees who were interviewed at the direction of Band leadership about issues within the scope of their employment, including professional relationships with Band police, *see* Benjamin Decl. ¶¶ 8-9, are also protected attorney-client communications. *See Upjohn*, 449 U.S. at 394-395; *Sandra T.E.*, 600 F.3d at 620 ("Following *Upjohn*, other circuits have concluded that when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client

communications in the course of the investigation are fully protected by the attorney-client privilege."). This is a separate and independent basis for protecting the interview notes from disclosure.

3. *The Documents Reviewed by the Attorneys in Preparing the Report Are Protected by the Work-Product Doctrine and Attorney-Client Privilege.*

The documents reviewed by the attorneys in preparing the report are protected by the work-product doctrine because the attorneys were investigating potential misconduct by Band Police officers that could result in personnel actions and litigation, and the selection of the documents would reveal the attorneys' mental processes (as well as the identities of employees being investigated). Benjamin Decl. ¶ 6-7; *Petersen v. Douglas Cnty. Bank & Tr. Co.*, 967 F.2d 1186, 1189 (8th Cir. 1992) ("Documents 'prepared in anticipation of litigation' may include business records that were specifically selected and compiled by the other party or its representative in preparation for litigation and that the mere acknowledgment of their selection would reveal mental impressions concerning the potential litigation.") (citing *Shelton v. American Motors Corp*., 805 F.2d 1323, 1329 (8th Cir. 1986)).

The documents reviewed are also protected by attorney-client privilege because their disclosure would reveal the identities of the persons investigated in the report and thus reveal the Band's confidential communications to its attorneys. *See In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982) ("[C]orrespondence between attorney and client which reveals the client's motivation for creation of the relationship or possible litigation

strategy ought to be protected."). Thus, the documents reviewed by the attorneys are protected from discovery.

4. *The Attorneys' Invoices are Protected by Attorney-Client Privilege.*

Disclosure of invoices for the attorneys' services would reveal confidential attorney-client communications by revealing identities of persons interviewed and the content of the report, including personnel matters not discussed in the March 2014 newsletter. Baldwin Decl. ¶¶ 32-33. Thus, the invoices are also privileged. *In re Grand Jury Witness*, 695 F.2d at 362 ("[B]ills, ledgers, statements, time records and the like which also reveal the nature of the services provided, such as researching particular areas of law, also should fall within the privilege."); *Cardenas v. Prudential Ins. Co. of Am.*, Nos. 99-1421 (JRT/FLN), 99-1422 (JRT/FLN), 2003 U.S. Dist. LEXIS 9512, at *7-8 (D. Minn. May 16, 2003) (upholding magistrate judge's decision that billing records were protected by attorney-client privilege and work-product doctrine where "billing records contain[ed] narrative descriptions of conversations between clients and attorneys, the subjects of legal research or internal legal memoranda, and activities undertaken on the client's behalf . . .[and] these materials were prepared for the purposes of this litigation.").

Because all documents sought by the subpoena are privileged or protected from disclosure, they are not subject to discovery and should remain protected from disclosure.

D. The Subpoena is Improper Because It Seeks Materials That, if Released, Would Implicate the Privacy Interests of Non-Parties.

Information contained in the report and the underlying documents implicates non-party privacy interests. The report discusses internal investigations into former Band

Police Department employees, who are not parties to this litigation, for the purpose of making recommendations regarding whether to discipline and/or terminate those employees. Baldwin Decl. ¶ 29; Benjamin Decl. ¶ 18. "In our considered view, the very act of disclosing an employee's sensitive and personal data is a highly, and frequently, an unnecessarily intrusive act – whether or not that disclosure is governed by the terms of a Confidentiality Order." *Raddatz v. Standard Register Co.*, 177 F.R.D. 446, 447-48 (D. Minn. 1997).

The persons interviewed for the report likewise provided information on the understanding that their identities would be kept confidential and this was a key factor in ensuring that persons interviewed responded candidly and truthfully. Benjamin Decl. ¶ 10. The report was written to avoid attributing information gleaned in "interviews with Band Members" to specific individuals. *Id*. ¶ 16. Some individuals disclosed their own experiences as crime suspects, crime victims or informants—highly personal information that they may not have disclosed but for the understanding that the interviews would remain confidential. *Id*. ¶ 19. Disclosing that information now would implicate the privacy interests of those Band members and potentially discourage Band members from willingly participating in future inquiries. *Id*. ¶ 18; *cf. Kluth v. City of Converse*, No. SA-04-CA-0798 XR, 2005 U.S. Dist. LEXIS 15222, at *9 (W.D. Tex. July 27, 2005) (defendants' argument that disclosure of interview notes would "thwart governmental processes in the future by discouraging its employees from giving government information truthfully and without fear of public disclosure of their testimony" not supported where interviewees'

identities and summary report of testimony were publicly disclosed). Thus, the Court should forbid discovery of the documents sought by Defendants' subpoena.

E. The Subpoena is Improper Because It Is Motivated by a Desire to Harass or Embarrass Plaintiffs.

Defendant Walsh's subpoena is yet another attempt by Defendants to harass Plaintiffs and divert the parties' time and attention from the actual claims and defenses in this case. The record is clear and largely undisputed that Defendants sought to restrict the Band's exercise of its inherent and federally-delegated law enforcement authorities to trust lands and to prevent the exercise of those authorities to investigate violations of state law. Whether those restrictions injured Plaintiffs and establish standing to litigate this case turns on events that took place beginning in mid-2016, not a performance review of the Band's Police Department conducted in 2013.

However, throughout the discovery process, Defendants have sought information to discredit the Band and its Police Department. For example, Defendants previously sought "[a]ll Documents Relating to criminal prosecutions against Melanie Benjamin [the Band's current Chief Executive] as a defendant in any court of law …," Defs.' RFP No. 42, and "[t]he Personnel Files of Sara Rice and Derrick Naumann [the Band's Chief of Police and a Sergeant in the Band's Police Department]," Defs.' RFP No. 43.[10] *See* Ex. Y at 8-9, 11

[10] In Exhibit Y, the RFP seeking Plaintiffs' personnel files is reproduced as Request for Production No. 42, which is incorrect. In Defendants' Set III Requests, it is properly numbered as RFP No. 43; the numbering in Plaintiffs' response is a typographic error. 2d Baldwin Decl. ¶ 16.

(Plaintiffs' Resp. to Defs.' Set III RFPs). Plaintiffs objected to these Requests as irrelevant. *See id.*

Plaintiffs seek the Court's protection to discourage Defendants from continuing to use discovery to attempt to obtain private, personal information that is irrelevant to this case. This is especially necessary because documents produced by Defendants suggest that the Sheriff's Office routinely collects private, personal information on Band officials for later use. *See id.* at 11 (citing documents). The issues in this case are limited to the extent of the Band's law enforcement authority, whether Defendants interfered with the exercise of that authority, and whether Plaintiffs were injured as a result of such interference. Defendants' attempt to create an issue as to *how* the Band discharged its law enforcement authority *more than two years before* the events giving rise to this case occurred is nothing more than a sideshow intended to harass and embarrass the Plaintiffs.

IV. CONCLUSION.

The Court should issue a protective order preventing production of documents pursuant to and quashing the Ballard Spahr subpoena. If the Court believes review of the documents would be helpful in resolving this matter, it should order their submission *in camera*.

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Respectfully submitted,

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