**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MICHIGAN**
**NORTHERN DIVISION**

In re Subpoena directed to Donna Kenney in the matter of:

DANA DUGGAN, Individually,
*and on behalf of persons similarly situated,*

Misc. No. 22-MC-00014-MV

Plaintiff,

v.

MATT MARTORELLO and EVENTIDE CREDIT ACQUISITION, LLC,

Defendants.

Case No. Civ. A. No. 18-cv-12277-JGD
(District of Massachusetts)
__________________________________________/

**PLAINTIFF'S BRIEF IN REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO QUASH SUBPOENA**

Defendants' arguments in response to Plaintiff's Motion to Quash actually confirm that the subpoena is unduly burdensome and should be quashed. Defendants have effectively confirmed that their third-party subpoena should be quashed under the doctrine of tribal sovereign immunity because it improperly seeks to command testimony from Ms. Kenney regarding matters squarely within the scope of her prior employment with Big Picture Loans, LLC – an admitted economic "arm of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ('LVD' or 'Tribe')." (*See* Def.'s Opp. Br. 1, ECF No. 13.) By arguing that Ms. Kenney may have knowledge regarding the operations, procedures, oversight by Tribal Council members, and other "on-reservation conduct" of Big Picture Loans, the Defendants have

effectively conceded that their subpoena is intended as a practical "end around" the protections of tribal sovereign immunity that prohibit Defendants from issuing a subpoena directly to the Tribe or its economic arms, including Big Picture Loans. (*Id.* at 5.) This attempt to subvert the Tribe's immunity is improper.

Second, Defendants' contention that the needs of their case justify a subpoena for Ms. Kenney's testimony about Big Picture Loans is irreconcilable with Defendants' primary argument that the "Tribal Entities waived their sovereign immunity with respect to the information sought by Defendants by agreeing to provide [such] information to Plaintiffs." (*Compare* Opp. Br. 5 *with id.* 8-9 (claiming that "the Tribal Entities agreed to provide extensive information to Plaintiff to support her efforts to obtain class certification".) Indeed, Defendants' waiver argument actually proves too much: If Big Picture Loans had waived its tribal sovereign immunity over the subject matter of the subpoena (and, to be clear, it did not), such a waiver would actually confirm that the subpoena imposes an undue burden *upon Ms. Kenney*. Ms. Kenney is a *non-party* who has not worked with LVD or any of its tribal entities *for five years*. Defendants have no need for her testimony if, as they contend, a Tribal waiver of immunity occurred, because such a waiver would entitle Defendants to obtain the information they seek directly from the Plaintiffs through party-discovery, or from the Tribe and Big Picture Loans themselves. *See, e.g.*, *Torre v. Charter Communications, Inc.*, No. 19-cv-5708, 2020 WL 7705940, at *1 (S.D.N.Y. Dec. 28, 2020) (citing cases applying the settled rule that a subpoena imposes an undue burden when it seeks information "from . . . a non-party that could and should be obtained from . . . a party to [the] action"); *see also* Fed. R. Civ. P. 26(b) (requiring courts to "limit discovery if it determines that the discovery sought is unreasonably cumulative or duplicative, *or can be obtained from some other source that is more convenient, less*

*burdensome, or less expensive*") (emphasis added); Fed. R. Civ. P. 45(c)(1) (requiring parties, and their counsel, to "take reasonable steps to avoid imposing undue burden or expense" upon non-parties when issuing a subpoena). In either event, the subpoena to Ms. Kenney should be quashed.

The Defendants' other arguments fare no better, because each relies on irrelevant or inaccurate statements of fact, law, or both, often while ignoring the points and authorities discussed in Ms. Kenney's opening Memorandum of Law entirely. Accordingly, Ms. Kenney respectfully asks that this Court grant her motion to quash Defendants' subpoena.

## ARGUMENT

### I. Big Picture Loans Did Not Waive its Tribal Sovereign Immunity From Suit

The Court should first reject the Defendants' primary argument in their Opposition Brief that tribal sovereign immunity cannot apply as a basis to quash the subpoena to Ms. Kenney. According to Defendants, the "[t]he Tribal Entities waived their sovereign immunity with respect to the information sought by Defendants by agreeing to provide information to Plaintiff" pursuant to the class action settlement agreement approved by Judge Payne of the Eastern District of Virginia in *Galloway et al. v. Williams et al.*, No. 3:19-cv-00470-REP, ECF No. 55-1 (herein, "*Galloway III*") (copy attached as **<u>Exhibit 1,</u>** for the Court's convenience). (*See* Defs.' Opp. Br. 8.) Defendants' waiver argument fails because it is inconsistent with well-established rules of law governing the interpretation and enforcement of waivers of tribal sovereign immunity.

Because the protections afforded under principles of sovereign immunity are essential to tribal self-governance, any waiver of such protections must be "unequivocally expressed" and, even then, will be "strictly construed and applied." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S.

782, 790 (2014); *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, (1978); *see Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.*, 517 F.2d 508, 509 (8th Cir.1975). By extension of these principles, a tribe can, in its discretion, condition or limit the scope of any waiver of its sovereign immunity. *Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852–53 (8th Cir. 2001) ("Because a waiver of immunity 'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted'") (quoting *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir.1985)). Thus, any waiver expressly limited in scope as to a particular person or cause of action may not be construed broadly to apply to other unspecified persons or causes of action. *See Tamiami Partners, Ltd. ex rel. Tamiami Development Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1224-25 (11th Cir. 1999); *Big Valley Band of Pomo Indians v. Superior Court*, 35 Cal. Rptr. 3d 357, 365 (Cal. Ct. App. 2005).

When applied to the *Galloway III* settlement agreement, these standards are fatal to the Defendants' waiver argument here. Defendants are correct that the Tribal Entities, including Big Picture Loans, agreed conditionally to provide certain data[1] and other information to the Plaintiffs,

[1] Under the Settlement Agreement, the Tribal Entities agreed only to provide "class data" *if a class action is certified* (§ 6.3) and did not consent to discovery propounded to non-parties in third-party discovery *to which the Tribe or its Tribal Officials were not a party* (§§ 6.4-6.5).

Defendants do not seek "class data," and their subpoena to Ms. Kenney is thus plainly beyond the scope of the Tribe's conditional, limited waiver under the Settlement Agreement. Moreover, should such information be disclosed pursuant to the waiver in the future, when the condition of class certification is satisfied, Defendants can obtain it from Plaintiffs, and have neither any need or right at this time to third-party discovery from Ms. Kenney.

The settlement agreement provisions Defendants cite are not an agreement "to provide extensive information;" on the contrary, they call for disclosure only of the information necessary to determine the identity of class members if a class is certified and determine the amount of relief to which they may be entitled.

as described in the *Galloway III* opinion approving the settlement agreement.[2] Inexplicably, however, Defendants did not disclose to this Court the clear limitations contained in the settlement agreement, which (1) expressly and repeatedly renounce any waiver of sovereign immunity beyond the limited waiver obligating the Tribe to provide "class data" if a class were certified and (2) permit Plaintiffs to enforce that conditional, limited waiver and the settlement agreement itself, in the Eastern District of Virginia. More specifically, the parties to the settlement agreement (which do not include either Defendant here), agreed expressly that "nothing in this Settlement Agreement shall constitute a waiver by the Tribe [or the Tribal Entities, among others] of sovereign immunity, except as specifically and expressly provided herein, namely ***and only to the extent of enforcement of this Settlement Agreement.***" (Ex. 1 § 1.8 (emphasis added); *see also id.* §§ 3.2 (same), 15.1 (same), 15.2 (same).)

The Settlement Agreement's terms governing when the conditional, limited waiver of sovereign immunity operates are clear: *i.e.*, "only to the extent of enforcement of this Settlement Agreement." They are equally clear as to whom the waiver applies: *i.e.*, those who have actual standing to enforce the Settlement Agreement. Accordingly, the Tribal Entities' limited waiver of immunity reflected in the settlement agreement interpreted and approved in *Galloway III* does not operate as a waiver of immunity *with respect to the Defendants' subpoena to Donna Kenney*. In

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Finally, though Defendants complain that the settlement includes a "one-sided waiver," such limited waivers are not only allowed, but entirely proper, because the sovereign is entitled to control the scope and terms of any voluntary or negotiated waiver of its immunity. See *Missouri River Servs., Inc., supra*, and accompanying authorities.

[2] Defendants unsuccessfully attempted to intervene in *Galloway III* to oppose approval of the settlement agreement. *Galloway III*, Dkt. 93. By Order for Final Approval issued December 18, 2020, the Court in *Galloway III* approved the settlement. *Galloway III*, Dkt. 115. Defendants may not collaterally attack in this miscellaneous proceeding the meaning and scope of the settlement agreement as it was interpreted and approved in *Galloway III*.

short, the discovery Defendants seek from Ms. Kenney clearly falls outside the scope of the terms of the conditional, limited waiver on which Defendants purport to rely.

The cases Defendants cite in their Opposition Brief do not alter, and in fact support, this conclusion. For example, in *Ninigret Development Corp v. Narragansett Indian Wetuomuch Housing Authority*, the First Circuit found that "explicit language broadly relegating dispute resolution to arbitration constitutes a waiver of tribal sovereign immunity, whereas language that is ambiguous rather than definite, cryptic rather than explicit, or precatory rather than mandatory, will not achieve that end." 207 F.3d 21, 31 (2000). Notably, the plaintiff in *Ninigret Development* was a counter-party to the written contract with the tribal-defendant that included the arbitration clause in question. Unlike Defendants here, the plaintiff there did not contend that a limited waiver in favor of a third-party could somehow operate as a general waiver applicable to all.[3] *Id.* Properly understood, the decision in *Ninigret Development* actually confirms that waivers of sovereign immunity are to be strictly construed and enforced only to the extent that the waiver is unequivocally expressed.

Similarly, Defendants' reliance on *Narragansett Indian Tribe v. Rhode Island* for the proposition that, "there is no requirement that talismanic phrases be employed" when waiving sovereign immunity is misplaced. (Defs.' Opp. Br. 8.) The decision in *Narragansett Indian Tribe is* irrelevant to the limited waiver in the *Galloway III* at issue here, because it involved a waiver of drastically broader scope. There, Rhode Island and the Tribe executed a written agreement to settle the tribe's land claims under which the "Tribe gained effective control of the settlement lands in

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[3] This was also the circumstance in another case Defendants cite, *C&L Enters. v. Citizen Band Potawatomi Indian Tribe,* 532 U.S. 411 (2001). There, the parties' "standard form construction contract" included an express arbitration clause, under which the tribe had "expressly agreed to arbitrate disputes with [plaintiff] relating to the contract," and to permit "the enforcement of arbitral awards 'in any court having jurisdiction thereof.'" *Id.* at 414.

exchange for the relinquishment of its claims, the voluntary dismissal of its lawsuits, and its agreement that, with the exception of state hunting and fishing regulations, '*all laws of the State of Rhode Island shall be in full force and effect on the settlement lands*.'" *Narragansett Indian Tribe*, 449 F.3d 16, 19, 25 (1st Cir. 2006) (emphasis added). The Court merely held that the clear intent expressed in the land settlement agreement constituted a waiver of tribal sovereign immunity in favor of the State regarding jurisdiction over criminal prosecutions for conduct occurring on the settlement land, which entitled the State to prosecute criminal offenses it otherwise would lack jurisdiction to do. *Id.* at 25. This explicit waiver in favor of the enforcing party has no application to here, where Defendants, who are not parties to the Settlement Agreement, seek to interpret and enforce a limited waiver executed in favor of other persons more broadly than the terms of the limited waiver permit. (*See* Ex. 1 § 1.8.) Once again, Defendants rely on authority that, properly interpreted, actually negates their argument.

Perhaps the most inapposite case Defendants rely upon is the Ninth Circuit's decision in *United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992). Defendants claim that *James* held that a tribe waived its sovereign immunity with respect to a subpoena for "all relevant documents" when it "voluntarily provided documents from one of its agencies to one party," but not to the other party. (*See* Defs.' Opp. Br. 9.) This description of the holding in *James* is, to put it as civilly as possible, inaccurate.

In *James*, the Ninth Circuit *affirmed* an order *quashing* the defendant's subpoena because the tribe "did ***not*** explicitly waive its sovereign immunity to documents from different agencies when it volunteered [other] documents" to the prosecution. *James*, 980 F.2d at 1320. *James* actually holds that a limited waiver of sovereign immunity as to some relevant information does not constitute a general waiver for other or all relevant information. This was so because the

tribe, "has a different interest in the documents [being subpoenaed] than in documents [that it voluntarily provided]." *Id.* (emphasis added). Far from supporting Defendants' waiver argument, *James* actually confirms that the Tribe did not waive its immunity from subpoenas seeking information about "operations," "procedures," or other "on-reservation conduct" by agreeing in the *Galloway III* settlement to provide borrower "class data" to plaintiffs if a class is someday certified[4] – a condition that has not yet even occurred.

Finally, Defendants' reliance on *United States v. Menominee Tribal Enterprises,* No. 07-C-316, 2008 WL 2273285, at *1 (E.D. Wis. June 2, 2008) is also misplaced. In *Menominee*, a False Claims Act case against an economic arm of the tribe, the court found an "implied" waiver of sovereign immunity with respect to a subpoena for records that the tribe had provided voluntarily to the government. In so holding, however, the Court merely observed that, under traditional principles of discovery, it would be unfair to deprive the defense of information the tribe already had provided to the government. *Id.* at *12. *Menominee* is inapposite. Unlike this case, in which the settlement agreement interpreted and approved in *Galloway III* expressly limits and conditions the scope of the Tribe's waiver of sovereign immunity, in *Menominee* the waiver was inferred from the Tribe's conduct in providing to the government documents otherwise privileged from discovery under sovereign immunity. In addition, even if it were factually apposite, *Menominee* is unpersuasive because it reflects an unpublished, minority implied waiver doctrine based on principles of "fairness" that other courts have refused to follow. *See, e.g., Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1105-06 (8th Cir. 2012). *Alltel* rejected *Menominee's* reasoning because, "the Supreme Court has consistently

[4] To be clear, the Tribal Entities' agreement to provide class data to the Plaintiffs does not even come into effect until and unless a class of borrowers is first certified. (*See* Ex. 1 § 1.8.)

applied the common law doctrine [of tribal sovereign immunity]" and, thus, "even if denying Alltel the discovery it seeks 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.'" *Id.* (quoting *Am. Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985)). For these reasons, the unpublished *Menominee* decision is factually distinguishable and thus inapplicable, without precedential value, and doctrinally unsound.

In sum, the limited, conditional waiver in the *Galloway III* settlement does not constitute the unequivocal waiver of the Tribe's sovereign immunity that must occur before this Court may enforce a subpoena directed to a former Tribal employee to secure Tribal information.

## II. The Court Should Reject Defendants' Argument that Ms. Kenney Lacks Standing to Challenge the Subpoena on the Basis of Sovereign Immunity.

The Court should reject Defendants' argument that, because she is not Big Picture Loans or the Tribe, Ms. Kenney lacks standing to quash the subpoena on the basis of the Tribal sovereign immunity.

This argument must be rejected both for the reasons discussed in this argument and those discussed separately in Section III. In reply to Defendants' argument that Ms. Kenney cannot invoke the Tribe's immunity because the subpoena is "not a suit against Kenney in any official capacity as a tribal officer." (Defs.' Opp. Br. 11-13.)

First, Defendants' "standing" argument is squarely at odds with the expansive line of cases cited in Ms. Kenney's supporting Memorandum (which Defendants failed to address, much less distinguish), in which courts granted the motion to quash of tribal officers, employees, or former employees on the ground of tribal immunity. (Pl.'s Br. 9-14, ECF No. 3.). That discussion is incorporated by reference, to comply with W.D.L.R. 7.1(c)'s word limitation.

Second, Defendants' "standing" argument also fails because it suggests that Article III courts may ignore their lack of subject matter jurisdiction based merely on the identities of the parties, which cannot be because sovereign immunity is a jurisdictional limitation. If the subpoena violates a tribe's sovereign immunity, no court can enforce it, for lack of subject matter jurisdiction. *See, e.g., Harper v. Rettig,* 46 F.4th 1, 6 (C.A.1 2022) (""[T]he terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit"). Defects in subject matter jurisdiction "can be raised at any time" by any person, including by the court, without any motion by a party-in-interest. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *Larson v. United States,* 274 F.3d 643, 648 (1st Cir. 2001) (appellate court may raise the [immunity] issue *sua sponte*).

In light of this clear contrary authority, Defendants unsurprisingly cite many standing cases arising in irrelevant, non-immunity contexts. See, e.g., *Powers v. Ohio,* 499 U.S. 400, 410 (1991) (criminal defendant had no standing to raise a juror's equal protection rights); *Freilich v. Upper Chesapeake Health, Inc.,* 313 F.3d 205, 214-215 (4th Cir. 2002) (plaintiff-physician had standing to pursue ADA claims on behalf of her patients).

The only sovereign immunity case Defendants cite in their "standing" argument, *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.,* 179 F.3d 1279, 1290 (11th Cir. 1999), expressly rejects the proposition that a court may only consider questions of sovereign immunity when asserted by the actual sovereign. Defendants miscite *Aquamar* for the proposition that "[p]arties other than a foreign sovereign ordinarily lack standing to raise the defense of sovereign immunity," (Opp. Br. 10), omitting its actual holding that, "[w]hen the court's jurisdiction rests on the presence of the foreign sovereign, . . . the court may address the issue independently." *Id.* at 1290. Accord *Coleman v. Alcolac, Inc.*, 888 F.Supp. 1388, 1400 (S.D.Tex.1995) ("the district court must address

the issue of sovereign immunity, even if ... the foreign state has not even entered an appearance to assert the immunity defense.") Clearly, as the target unduly burdened by the subpoena, Ms. Kenney may challenge it based on tribal sovereign immunity. *See, e.g.*, *Pettus v. Servicing Co., LLC*, No. 3:15CV479(HEH), 2016 WL 7234106, at *2–3 (E.D. Va. Feb. 9, 2016) (a tribal employee had standing to "challenge the [subpoena] deposition request").

### III. The Subpoena Seeks the Knowledge and Information of Big Picture Loans through Ms. Kenney, and is, Therefore, Barred by Sovereign Immunity.

The Tribe's sovereign immunity from suit extends to its managers and employees in their official capacities. (Pl.'s Br. 9-11, citing authorities; previous argument.)[5] Defendants do not dispute this rule; rather, they attempt to sidestep it by arguing that their subpoena was issued to Ms. Kenney only in her "personal" capacity, (*See* Defs.' Opp. 11-12), citing *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). Because *Lewis* considered only whether and when a state law tort claim could be pursued against a tribal employee in his individual capacity for off-reservation conduct exceeding the scope of his employment, a claim not presented here, *Lewis* is simply inapposite. Defendants do not claim that Ms. Kenney committed a tort, nor do they contend that she acted outside the scope of her employment with Big Picture Loans. Rather, Defendants seek Ms. Kenney's knowledge about the operations, procedures, reporting structure, and other "on-

[5] *See also, e.g.*, *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (a party "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and does not allege they acted outside the scope of their authority."); *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir 1994) (if they acted in their official capacity "the tribal officers are clothed with the Tribe's sovereign immunity."); *Cook v. AVI Casino Enter., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (same); *Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997) ("[T]ribal immunity protects tribal officials against claims in their official capacity.); *Ala. v. PCI Gaming Auth.*, 801 F.3d 1278, 1288 (11th Cir 2015) (same); *Imperial Granite Co. v. Pala Band of Missouri Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (same). *See also Pettus v. Servicing Co., LLC, E.D. Va. No.* 3:15CV479(HEH), 2016 WL 7234106, at *3 (E.D. Va. Feb. 9, 2016) (tribal immunity applied to both a tribal online lending business and its CEO).

reservation conduct" of Big Picture Loans, *precisely because of her prior role with the Tribe.* (Defs.' Opp. 6 ("Kenney cannot claim that she – the admitted former Office Manager of Big Picture . . . has no relevant information concerning the management and operations of these companies").) It is irrelevant that Defendants subpoenaed Ms. Kenney in her personal *name.* Because they seek Ms. Kenney's "knowledge of the loan [business of the Tribe which] exists only because of [her] official position," Defendants' subpoena actually seeks the Tribe's knowledge and information through testimony from Ms. Kenney in her official capacity. *Dillon*, 2016 WL 447502, at *6 (quashing subpoena issued to treasurer of tribe's lending arm in treasurer's personal name). Defendants' subpoena must be quashed for violating the LVD Tribe's sovereign immunity.

## IV. Defendants Have Neither Shown Nor Contended That Their Subpoena is Proportional and Not Unduly Burdensome

As the parties seeking to compel testimony from Ms. Kenney through their subpoena, Defendants have the initial burden to establish that their subpoena is proportional to the needs of the case and imposes no undue burden upon her. *See Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205, 211 (W.D. Va. 2016) (requirement to make a "prima facie showing of discoverability"); *see also G.D. & R.D. v. Utica Community Schools*, No. 20-12864 (W.D. Mich. July 27, 2022) (overruling objections to Magistrate's Order quashing subpoena that placed "burden of proving proportionality" on the "party seeking to compel discovery"). The Defendants' obligation to establish proportionality, relevance, and due burden is further reinforced by Fed. R. Civ. P. 45(c)(1), which provides that parties (and their counsel) who issue subpoenas must "take reasonable steps to avoid imposing undue burden or expense" on non-parties. Defendants' suggestion that they need not articulate for this Court why their subpoena is relevant and proportional, and imposes no undue burden or expense upon Ms. Kenney, is at odds with these Rules.

Defendants' Opposition Brief actually confirms that their subpoena is unduly burdensome on its face and should be quashed for multiple reasons.

First, Defendants do not dispute that Rule 45's "undue burden" standard is necessarily met when, as here, a subpoena is issued by a court that lacks jurisdiction or authority to do so, *i.e.*, when a subpoena is void under the doctrine of tribal sovereign immunity. *See* Movant's Br., 7, citing *Builders Assn. of Greater Chicago v. City of Chicago*, 2022 WL 1008455, at *4 (N.D. Ill. May 13, 2002)). The subpoena should be quashed as inherently unduly burdensome because it is barred by the Tribe's sovereign immunity from suit.

Second, Defendants' contention that they need Ms. Kenney's testimony because "the Tribal Entities agreed to provide extensive information to Plaintiff," but have not "afforded" Defendants the same access to such information, reflects Defendants' belief that the information they seek from Ms. Kenney is equally available from Plaintiffs in party-discovery or from Big Picture Loans directly.[6] *See, e.g.*, *Torre v. Charter Communications, Inc.*, No. 19-cv-5708, 2020 WL 7705940, at *1 (S.D.N.Y. Dec. 28, 2020) (a subpoena imposes an undue burden when it seeks information "from . . . a non-party that could and should be obtained from . . . a party to [the] action"); *see also* Fed. R. Civ. P. 26(b) (court should "limit discovery if ... the discovery sought ... can be obtained from some other source that is more convenient, less burdensome, or less expensive"); Fed. R. Civ. P. 45(c)(1) (parties and their counsel must "take reasonable steps to avoid imposing undue burden or expense" upon non-parties when issuing a subpoena). Despite Defendants' apparent belief that they could obtain much of the information they seek

[6] If Defendants actually believe (as they must, *see* Fed. R. Civ. P. 11) that the Tribe has waived its immunity, they are required to subpoena information regarding the "operations, procedures," oversight by the Tribal Council, or other "on-reservation conduct" relating to Big Picture Loans from the company directly before issuing a non-party subpoena to its former Office Manager, Ms. Kenney.

from Ms. Kenney through party discovery, they have not shown that they made any effort to do so before issuing a non-party subpoena to Ms. Kenney, who left Tribal employment in 2016. Defendants' subpoena is unduly burdensome for this reason too.

## IV. Conclusion

For the foregoing reasons, and in her Memorandum of Law, Ms. Kenney respectfully asks the Court to grant her Motion to Quash the Subpoena.

DATED: January 13, 2023

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The above-signed counsel of record certifies that on this 13th day of January, 2023, the foregoing was filed using the Western District's CM/ECF electronic filing system, and served upon all counsel of record for the Defendants in the underlying Action by electronic means in accordance with the prior agreement of the parties to accept e-service.