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_____(____)

Plaintiff,

v.

MATT MARTORELLO and EVENTIDE CREDIT ACQUISITION, LLC,

Defendants.

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

MOTION TO QUASH SUBPOENA TO DONNA KENNEY
SUPPORTING MEMORANDUM OF LAW
AND CERTIFICATE OF SERVICE

MOTION TO QUASH SUBPOENA

Pursuant to Rule 45(d)(3) of the Federal Rules of Civil Procedure, and for the reasons described below, non-party Donna Kenney ("Ms. Kenney") respectfully moves this Court for an Order quashing the Subpoena to Testify at a Deposition in a Civil Action (the "Subpoena")[2] issued

[2] Ms. Kenney moves this Court for an Order quashing the Subpoena without any waiver of the sovereign immunity afforded to her by virtue of her former employment with Big Picture Loans, LLC – a recognized arm of the Lac Vieux Desert Band of Lake Superior Chippewa Tribe. *See Williams v. Big Picture Loans*, LLC, 929 F.3d 170, 175 (4th Cir. 2019) (holding affirmatively that Big Picture Loans, LLC is an economic arm of the Tribe and, therefore, immune from suit under the doctrine of sovereign immunity).

by Defendants Matt Martorello ("Martorello") and Eventide Credit Acquisitions, LLC ("Eventide") (together, the "Defendants") in the matter of *Duggan et al. v. Martorello, et al.*, No. 1:18-cv-12277-JGD (D. Mass.) (the "Massachusetts Action"). Defendants' concurrence in the relief requested was sought and denied. See **Exhibit B**, ¶ 17.

SUPPORTING MEMORANDUM OF LAW[4]

FACTUAL BACKGROUND

The letter accompanying the Subpoena issued to Ms. Kenney states that the Defendants are noticing her deposition because "we learned that you may have information relevant to these cases." (**Exhibit A**, Decl. of Donna Kenney ("Kenney Decl.") Ex. 1, Cover Ltr. and Subpoena.) But any knowledge of any theoretical relevance to the underlying "cases" that Ms. Kenney may possess would have arisen exclusively from the position she resigned more than six years ago as Office Manager for tribal entity Big Picture Loans, LLC, (and its predecessor entity, Duck Creek Tribal Financial, LLC) (herein referred to collectively as "Big Picture Loans"). (Ex. A, Kenney Decl. ¶¶ 3-6.) Furthermore, Ms. Kenney retained no corporate records or documents in her possession when she resigned from her tribal employment. *Id.* ¶ 5.

---

that Big Picture Loans, LLC is an economic arm of the Tribe and, therefore, immune from suit under the doctrine of sovereign immunity).

[4] A decision granting this Motion "would dispose of the entire matter at issue in this [miscellaneous] case," and, therefore, this Brief is subject to the dispositive brief page limit of W.D. Mich. Local Rule 7.2(a). *See, e.g.*, *Luppino v. Mercedes-Benz Fin. Servs. USA, LLC*, No. 13-50212, 2013 WL 1844075, at *3 (E.D. Mich. Apr. 11, 2013), *adopted in*, 2013 WL 1884073 (E.D. Mich. Apr. 30, 2013) (observing that motions to quash are often non-dispositive, unless "where, as here, the decision would dispose of the entire matter at issue"); *In re: Administrative Subpoena Blue Cross Blue Shield of Mass.*, 400 F. Supp. 2d 386, 388-89 (D. Mass. 2005) ("Many courts have treated similar motions to enforce or quash administrative subpoenas, or the like, as dispositive motions for purposes of review where the matter involving the subpoena constitutes the entire case before the court") (citing cases).

As the Fourth Circuit held in the original case that later spawned several copycat class actions (including the Massachusetts Action), in which Martorello and Eventide remain as defendants, Big Picture Loans is an "economic arm" of the Lac Vieux Desert Band of Lake Superior Chippewa Indians (herein, the "Tribe"), and as such is shielded from suit by the Tribe's sovereign immunity. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) ("*Williams*"). By extension, as a former management-level employee of Big Picture Loans, Ms. Kenney is also protected by the Tribe's sovereign immunity from suit for matters arising from her official employment capacity. As the following argument details, the protections of tribal sovereign immunity extend to the non-party Subpoena directed to Ms. Kenney because it seeks knowledge and information gained solely in her capacity as a management employee of a recognized arm of the Tribe. Because the Subpoena seeks to compel a Tribal management employee to disclose information that cannot be sought from the Tribe itself, it constitutes an improper "end-run" around the Tribe's sovereign immunity, and, therefore, must be quashed.

Federal Rule of Civil Procedure 45(d)(3)(A)(iv) provides that courts "must quash or modify a subpoena that . . . subjects a person to undue burden." And "[w]hen a subpoena should not have been issued, literally everything done in response to it constitutes 'undue burden or expense' within the meaning of Civil Rule 45(c)(1). It is similarly 'undue' to have to contend with a motion to compel compliance with an illegitimate subpoena." *Builders Ass'n of Greater Chicago v. City of Chicago,* No. 96 C 1122, 2002 WL 1008455, at *4 (N.D. Ill. May 13, 2002) (quoting *In re Shubov*, 253 B.R. 540, 547 (B.A.P. 9th Cir. 2000)). The Subpoena at issue here should not have issued in the first instance for lack of jurisdiction because it purports to seek testimony from Ms. Kenney regarding matters for which she, as a former employee of the Tribe, is immune from suit absent the Tribe's consent. As a result, and as explained more fully herein, the Subpoena imposes

an undue burden on Ms. Kenney, and should therefore be quashed pursuant to Federal Rule of Civil Procedure 45(d)(3).

LITIGATION BACKGROUND

On June 22, 2017, a group of borrowers sued a number of defendants, including Big Picture Loans and a different arm of the Tribe, Ascension Technologies, Inc., (together, the "Tribal Entities") in the United States District Court for the Eastern District of Virginia, alleging a RICO conspiracy to violate state usury laws using a purported "rent-a-tribe scheme." *See Williams*, 929 F.3d at 175 (reversing Memorandum Opinion issued in Case No. 3:17-cv-00461 (E.D. Va.) ruling originally that tribal immunity did not apply to the Tribal Entities); *see also* **Exhibit B,** Declaration of Michael Stinson, Esq. ("Stinson Decl.") ¶¶ 3-6. Numerous copycat lawsuits followed, including the Massachusetts Action, *Duggan v. Martorello,* Civil Action No. 18-12277-JGD (D. Mass. Filed October 31, 2018). *Id.* ¶ 4.

After two years of litigation in the Eastern District of Virginia, in which the District Court had ruled originally that tribal immunity did not apply to the Tribal Entities, the United States Court of Appeals for the Fourth Circuit reversed by a decision published July 3, 2019. Its decision in *Williams*, which is now a pivotal decision in federal Indian law on the issue of tribal immunity,[5] held unequivocally that Big Picture (and Ascension) were economic arms of the Tribe, and therefore shared the Tribe's sovereign immunity. *See Williams*, 929 F.3d at 185. After the Fourth Circuit's remand, with a mandate that the Tribal Entities be dismissed as defendants, the Tribal Entities settled all remaining outstanding claims on a nationwide class basis, and were dismissed from not only the *Williams* case, but also from each of the "copycat" lawsuits that had been

[5] For the Court's convenience, a true and correct copy of the *Williams* opinion is attached as Exhibit 1 to the Stinson Declaration (**Exhibit B** hereto).

instituted nationwide, including the Massachusetts Action (*i.e.*, the *Duggan* case). *See Galloway v. Williams*, No. 3:19-CV-470, 2020 WL 7482191, at *1 (E.D. Va. Dec. 18, 2020) (approving settlement); *Duggan v. Martorello,* No. CV 18-12277-JGD, 2021 WL 4295828, at *2 (D. Mass. Sept. 21, 2021) (discussing settlement); **Exhibit B**, Stinson Declaration, ¶¶ 6-7.

Duggan, however, continues against non-settling defendants Matt Martorello, whose loan servicing company was at one time retained by Big Picture Loans to provide loan servicing, and a different company controlled by Martorello; Eventide Credit Acquisitions, LLC, which later acted as a seller-financer when Mr. Martorello sold his servicing company to the Tribe (which later became Ascension Technologies after the acquisition). See **Exhibit B**, Stinson Declaration ¶¶ 8-10, Exhibit 2. *Duggan v. Martorello*, No. CV 18-12277-JGD, 2022 WL 952187 (D. Mass. Mar. 30, 2022) ("*Duggan*") (providing a succinct history of the case). The *Duggan* case is now focused on whether Martorello exploited the Tribe to operate a predatory lending scheme. *Id.* at *1. As noted above, until approximately July 2017, Ms. Kenney previously worked as Office Manager for Big Picture Loans, one of the Tribal Entities accused of being a pass-through for Martorello's alleged scheme. **Exhibit A**, Kenney Decl. ¶ 3.

On or about November 9, 2022, Defendants Martorello and Eventide served Ms. Kenney with the Subpoena at issue now, along with a cover letter from Defendants' counsel, stating that the Subpoena had issued because "[i]n the discovery process, we learned that you may have information relevant" to the case. **Exhibit A**, Kenney Decl. Ex. 1 at p 2.

Before filing the instant Motion, on November 28, 2022, counsel for Ms. Kenney, including the undersigned, met and conferred by telephone with Bethany Simmons, counsel for Defendants. **Exhibit B**, Stinson Decl. ¶ 14. During that telephone conference, counsel for Defendants confirmed that (1) the "information relevant to [the *Duggan* case]" referenced in her

cover letter consists exclusively of information that Ms. Kenney may have learned while acting in her official capacity as an employee of Big Picture Loans before her resignation in 2017; and (2) that Defendants do not contend that Ms. Kenney has any relevant knowledge or information that she learned or gained in her personal capacity. *Id.* ¶¶ 14-18. Accordingly, the Subpoena seeks testimony from Ms. Kenney related exclusively to her knowledge and status as a tribal employee working for an economic arm of the LVD Tribe that is immune from suit. *Id.*

Counsel for Defendants also declined Ms. Kenney's request to concur in the relief sought in this motion. **Exhibit B**, Stinson Decl. ¶¶ 16-18

Ms. Kenney now timely moves to quash Defendants' Subpoena.[6]

ARGUMENT

I. Applicable Legal Standards

A court must quash a subpoena "that subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). Undue burden must be assessed in a case-specific manner considering "such factors as relevance, the need of the party for the [information], the breadth of the [information] request[ed], the time period covered by it, the particularity with which [any] documents are described, and the burden imposed." *In re: Modern Plastics Corp.*, 890 F.3d 244, 251 (6th Cir. 2018). Additionally, the reasonableness of the subpoena should be considered and assessed by balancing the "interests served by demanding compliance with the subpoena against the interests served further by quashing it." *Aslani v. Sparrow Health Sys.*, No. 1:08-CV-298, 2010 WL 623673, at *4 (W.D. Mich., Feb. 18, 2010. "[C]oncern for the unwanted burden thrust upon non-

[6] By agreement of counsel for the Parties, the compliance date for purposes of filing the instant Motion to Quash was extended up to and including December 2, 2022. *See* **Exhibit B**, Stinson Decl. ¶ 19, Ex. 4 (email confirming extension and waiver of any objection based on timeliness of motion if filed on December 2, 2022).

parties is a factor entitled to special weight in evaluating the balance of competing needs." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 2018).

Rule 45(d)(3)(iv)'s "undue burden" standard is necessarily met when a subpoena is issued from a court that lacks jurisdiction or authority to do so. "When a subpoena should not have been issued, literally everything done in response to it constitutes 'undue burden or expense' within the meaning of Civil Rule 45[]. It is similarly 'undue' to have to contend with a motion to compel compliance with an illegitimate subpoena." *Builders Ass'n of Greater Chicago v. City of Chicago,* No. 96 C 1122, 2002 WL 1008455, at *4 (N.D. Ill. May 13, 2002) (quoting *In re Shubov*, 253 B.R. 540, 547 (B.A.P. 9th Cir. 2000)). Thus, if the Subpoena to Ms. Kenney encroaches upon the Tribe's sovereign immunity through its former employee, Ms. Kenney, then it is unduly burdensome and "must" be quashed pursuant to Federal Rule of Civil Procedure 45(d)(3)(A)(iv).

II. Ms. Kenney and the Tribe Have Immunity from the Subpoena.

First, and foremost, the Subpoena should be quashed because it constitutes an impermissible "suit" against Ms. Kenney in her official capacity as a (former) management employee of an economic arm of the Tribe, in contravention of the sovereign immunity that Big Picture Loans enjoys as an economic arm of the Tribe under the Fourth Circuit's decision in *Williams*. Again, in the *Williams* case, the Fourth Circuit Court of Appeals held unequivocally that because, "a proper weighing of the [*Breakthrough*][7] factors demonstrates by a preponderance

---

[7] In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), the Tenth Circuit established a non-exhaustive set of factors to consider when evaluating whether an entity is a tribal arm entitled to share the tribe's sovereign immunity. Those factors include: (1) the method of the entities' creation; (2) their purpose; (3) their structure, ownership, and management; (4) the tribe's intent to share its sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) the policies underlying tribal sovereign immunity and the entities' "connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities." *Id.* at 1187.

of the evidence that the [Tribal] Entities, [including Big Picture Loans] are indeed arms of the [LVD] Tribe, Big Picture and Ascension are entitled to tribal sovereign immunity." 929 F.3d at 185.

Under the doctrine of tribal sovereign immunity, Big Picture Loans is protected by the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). The Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014) (quoting *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998)). "In doing so, we have held that tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014). "Equally important here, we declined in *Kiowa* to make any exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014).

The Tribe's sovereign immunity extends to those employees of Big Picture Loans who are sued or subpoenaed in their employment capacity because, in such instances, the Tribe (through its economic arm) is the real party in interest, *i.e.*, the suit is really seeking some form of redress against the Tribe. *See, e.g.*, *Lewis v.* Clarke, 137 S. Ct. 1285, 1291 (2017); *Cameron v. Bay Mills Indian Cmnty.*, 843 F. Supp. 334, 336 (W.D. Mich. 1994) (citing *Hardin v. White Mountain*

The Ninth Circuit and Fourth Circuit have adopted the first five *Breakthrough* factors to analyze arm-of-the-tribe immunity and also consider the central purposes underlying the doctrine of tribal sovereign immunity. See *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019).

Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985)). More to the point, federal courts have consistently held that tribal immunity from suit extends to third-party subpoenas targeting tribal employees, such as the Subpoena served on Ms. Kenney here.

For example, in *Alltel Communs., LLC v. DeJordy*, the court considered "whether tribal immunity bars enforcement of subpoenas" served upon a tribal administrator. 675 F.3d 1100, 1102 (8th Cir. 2012). After discussing the doctrine of tribal sovereign immunity, the *Alltel* panel reasoned that "third-party subpoena[s] ... command[ing] a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming" give rise to an "apparent" potential "for severe interference with government functions." *Id.* at 1103. In support of its holding that the subpoena at issue should be quashed, the Eighth Circuit considered by analogy a circumstance in which a subpoena is served upon an employee of the federal government: "Even though the government is not a party to the underlying action, the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the United States because such a proceeding 'interfere[s] with the public administration' and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function." *Id.* at 1103 (*quoting Boron Oil Co. v. Downie*, 873 F.2d 67, 70–71 (4th Cir.1989)). Ultimately, the Eighth Circuit quashed the subpoena at issue and concluded, "from the plain language of the Supreme Court's definition of a 'suit' in *Dugan*, and from the Court's well-established federal policy of further Indian self-government [citation omitted] a federal

court's third-party subpoena in private civil litigation is a 'suit that is subject to Indian tribal immunity.'"[8] 675 F.3d 1100, 1105 (8th Cir. 2012).

Similarly, in *Pennsylvania by Shapiro v. Think Fin., LLC,* the United States District Court for the Eastern District of Pennsylvania quashed a subpoena directed to an economic arm of a tribe and its CEO. No. 14-CV-7139, 2018 WL 4635750 (E.D. Pa. Sept. 26, 2018). In that case, the court held that the subpoena must be quashed because, "[t]o enforce a subpoena, a court must have jurisdiction" in the first instance. *Id.* at *3, citing *U.S. Catholic Conference v. Abortion Rights Mobilization,* 487 U.S. 72, 76 (1998) (stating "the subpoena power of a court cannot be more extensive than its jurisdiction"). And because "[a] court does not have jurisdiction to enforce a subpoena where the subpoenaed 'entity enjoys immunity from suit,' and where immunity has not been effectively waived," the subpoena in question could not be enforced. *Id.* Core to this holding was the district court's recognition that "tribal immunity from suit encompasses third-party subpoenas." *Id.* The court also quashed the subpoena issued to the tribal entity's CEO because tribal sovereign immunity extends to claims against tribal officials in their capacity as such, and *the subpoena "seek[s] his knowledge from his role as former CEO for Plain Green," when he was acting in an "official capacity."* *Id.* at 6. The same is true of the Subpoena here, which, Defendants' counsel has confirmed, seeks only knowledge Ms. Kenney may have gained while acting in her official capacity as a former management level employee of Big Picture Loans.

Likewise, in *Dillon v. BMO Harris Bank, N.A.*, the District Court for the Northern District of Oklahoma considered a motion to quash a subpoena served upon a tribal chairman and

---

[8] See *Dugan v. Rank,* 372 U.S. 609, 620 (1963) (discussing the scope of a 'suit' subject to sovereign immunity); *see also In re Facebook Inc.*, 42 F. Supp. 3d 556 (S.D.N.Y. 2014) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996)) (observing that immunity doctrines are meant to give sovereigns, "a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery").

secretary/treasurer of an economic arm of their tribe. No. 16-MC-5-CVE-TLW, 2016 WL 447502, at *1 (N.D. Okla. Feb. 4, 2016). Recognizing that a tribe's immunity extends to its subdivisions, as well as to those individuals serving the Tribe's economic arms who are acting in an official capacity, the district court found that (a) the subpoena was a "suit" under the doctrine of tribal sovereign immunity, (b) there was no waiver, and (c) the subpoena should be quashed because it sought information from tribal officials that they acquired while acting in their official capacity. *Id.* at *2, *6 ("his knowledge of the loan agreements exits only because of his official position.")

No material difference exists between these cases and the facts now before the Court: Defendants have subpoenaed Ms. Kenney to secure from her testimony concerning knowledge she acquired only by virtue of her official position with Big Picture Loans – a recognized economic arm of the LVD Tribe who shares the Tribe's sovereign immunity from suit.[9]

That the Subpoena seeks testimony from Ms. Kenney concerning knowledge she acquired in her official capacity while acting as a management employee of Big Picture Loans is not genuinely disputed. The claims and defenses at issue in the underlying Action center around allegations that Martorello exploited the LVD Tribe to operate a predatory lending scheme.

---

[9] Importantly, the Fourth Circuit's decision in *Williams* reversed the district court's prior ruling that Big Picture Loans was not an economic arm of the LVD Tribe, and it was this erroneous ruling, that had previously informed a different decision within this District denying a motion to quash a subpoena directed at a different employee of the LVD Tribe that had issued from the *Williams* case in the Eastern District of Pennsylvania. *See* Opinion and Order at 2, *In re: Williams et al. v. Big Picture Loans, LLC, et al.*, Case No. 2:19-mc-1 (W.D. Mich., Jan. 1, 2019), ECF No. 3 (denying motion to quash of LVD Tribe's former general counsel based upon sovereign immunity because *"[t]he district court in Virginia has already determined that tribal sovereign immunity is not applicable to [Big Picture Loans and Ascension Technologies]. This Court will not interfere with that decision or revisit that issue*") (emphasis added).

Now that the Fourth Circuit has reversed the district court's decision in *Williams* regarding the application of sovereign immunity to Big Picture Loans, the instant Motion should be granted under the same logic previously expressed as the basis for decision in Magistrate Judge Greeley's opinion. A true and correct copy of his Opinion and Order is attached to **Exhibit** B, the Stinson Declaration, as Exhibit 3, for the Court's convenience.

Exhibit B, Stinson Decl. ¶¶ 10-11, Ex. 2 (*Duggan*, 2022 WL 952187, at *1). Until 2017, Ms. Kenney worked as a management-level employee for one of the Tribal Entities accused of being a pass-through for Martorello's alleged scheme. Accordingly, *the only knowledge that Ms. Kenney might still remember of any theoretical relevance to the Action necessarily came to exist in the natural course and scope of her official capacity as an employee of Big Picture Loans and is, therefore, subject to the Tribe's sovereign immunity.*

This is confirmed by Defendants' counsel, who acknowledged during the November 28, 2022, meet-and-confer call preceding this Motion that the only "relevant information" being sought under the Subpoena is information that Ms. Kenney may have learned while acting in her official capacity as an employee of an arm of the Tribe. **Exhibit B**, Stinson Decl. ¶¶ 14-18. Thus, Ms. Kenney respectfully asks the Court to quash the Subpoena for precisely the same reasons that the Courts in the cases discussed above did so.

III. The Subpoena also Imposes an Undue Burden on Non-Party Ms. Kenney Given the Limited Importance of her Testimony to the Issues in the Underlying Action.

Even disregarding the application of Tribal immunity to Ms. Kenney under the authorities discussed above, the Court also should quash the Subpoena because Defendants have come nowhere near meeting their burden of establishing that the Subpoena falls within the scope of permissible discovery allowed by Federal Rule of Civil Procedure 26(b)(1). "A subpoena to a third party under Rule 45 is subject to the same discovery limitations as those set out in Rule 26." *State Farm Mut. Auto Ins. Co. v. Elite Health Centers, Inc.*, No. 2:16-CV-13040, 2018 WL 4927171, at *6 (E.D. Mich. Oct. 11, 2018) (citing *US v. Blue Cross Blue Shield of Mich.*, No. 10-14155, 2012 WL 4513600, at *5 (E.D. Mich. Oct. 1, 2012)). In turn, Rule 26(b) limits the scope of permissible discovery to those non-privileged matters that are "relevant to any party's claim or defense" and "proportional to the needs of the case." *Michigan State A. Philip Randolph Inst. V.*

Johnson, No. 16-CV-11844, 2018 WL 1465767, at *2 (.E.D. Mich. Jan. 4, 2018) (quoting Fed. R. Civ. P. 26(b) and discussing its application to subpoenas issued pursuant to Rule 45). The "proportionality" inquiry required under Rule 26(b) asks whether the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii). The Subpoena should be quashed under these standards, as well.

Most fundamentally, Defendants have not articulated what "information relevant to these cases" the "discovery process" has "suggested" Ms. Kenney may have,[10] much less why such information is "relevant," or why the Defendants need to depose Ms. Kenney to obtain this "information," rather than by seeking it through party discovery or even through non-party discovery directed at a third-party who has an actual stake in the outcome of the Action, or who has more resources than Ms. Kenney (the former Office Manager for Big Picture Loans, who now works for her local municipality), or from a different third-party more likely to actually recall whatever "relevant information" the Defendants are seeking. Ms. Kenney has had no connection to the Tribal Entities since her resignation from Big Picture Loans in 2017, over six years ago, and she has no access to, and did not retain in her possession, any documents or materials that could be used to refresh whatever recollection she may have. Absent a compelling explanation as to what "relevant information" Ms. Kenney is expected to have that would justify subjecting her

---

[10] *See* **Exhibit A**, Kenney Decl. Ex. 1 at p. 2. During the November 28 meet-and-confer between counsel for the parties, Defendants' counsel could provide no further detail nor any specific examples of "relevant information" Defendants actually seek from Ms. Kenney, other than to say that such information would have necessarily come to be within Ms. Kenney's knowledge by virtue of her employment with Big Picture Loans, a Tribal Entity. **Exhibit B**, Stinson Decl. ¶ 18.

specifically to the rigors, expense, and inconvenience of a deposition, the Subpoena should be quashed and Defendants should be forced to exhaust other avenues for the unidentified "relevant information" that they purport to be seeking now. *See Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 193 (1st Cir. 2001) (affirming motion to quash deposition subpoenas issued on the mere "'hope" that the target's testimony might contradict prior deposition testimony of the target's employer, because such "cumulative or duplicative" discovery practices amount to a "fishing expedition" in violation of Rule 26)).

Such a conclusion is further bolstered by the procedural background of the Massachusetts Action (pending since 2018) and the other related actions, which were originally commenced in 2017. Again, *Duggan* is merely one of several copycat cases based on the same facts and circumstances as the *Williams* case in Virginia. Discovery obtained in any of these ongoing cases may be, and, as a practical matter, is used in all of the other cases under the applicable protective order. *See, e.g., Smith v. Martorello*, No. 3:18-CV-01651-AR, 2022 WL 1749887, at *4 (D. Or. May 2, 2022) ("Big Picture, Ascension, and the Tribe have already produced numerous documents (23,000 pages) for class certification in *Williams*. The parties have agreed that the documents and discovery produced in that case may be used in this lawsuit. . . . defendants have already deposed [the Tribe's Chairperson Ms.] Hazen (three times), [the Tribal Entities' CEO,] Mr. McFadden (twice), and [the Tribe's General Counsel, Ms.] Wichtman (once)."). To date, the Defendants have participated in numerous depositions and retrieved thousands of pages of documents from a variety of sources, further calling into question what additional "relevant information" the Defendants could possibly hope to obtain (a) that is within the unique purview of Ms. Kenney, who separated from her employment with Big Picture Loans in 2017, and (b) that they either cannot obtain or have not already retrieved from other witnesses who have already been deposed (likely more than

once). And it should be noted that Defendants have not even suggested that Ms. Kenney has documents in her possession, nor included any request for documents in the Subpoena.

Under these circumstances, and particularly in light of the Defendants' failure to explain why their Subpoena seeks information within the scope of Rule 26, Ms. Kenney asks for these additional reasons that the Court quash the Subpoena as unduly burdensome.

IV. Conclusion

For the foregoing reasons, Ms. Kenney respectfully asks that the Court grant her Motion to Quash the Subpoena in its entirety.

Dated: December 2, 2022

Respectfully submitted,

/s/ Frederick M. Baker, Jr.
Frederick M. Baker, Jr. (P25415)
Frederick M. Baker, Jr., PLLC
200 Washington Square North, #400
Lansing, MI 48933
(517) 220-2372, or 318-6190
fmbjrpllc@outlook.com

and

Michael Stinson (*pro hac vice forthcoming*)
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
(612) 340-2600 (*telephone*)
(612) 340-2868 (*facsimile*)
stinson.mike@dorsey.com

Counsel for Non-Party Donna Kenney

CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that on this 2nd day of December, 2022, 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.

By: /s/ Frederick M. Baker, Jr.
Frederick M. Baker, Jr. (P25415)
Frederick M. Baker, Jr., PLLC
200 Washington Square North, #400
Lansing, MI 48933
(517) 220-2372, or 318-6190
fmbjrpllc@outlook.com

Attorney for Donna Kenney