UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re Subpoena directed to DONNA KENNEY In the matter of: DANA DUGGAN, individually, and on behalf of persons similarly situated, Plaintiff, v. MATT MARTORELLO and EVENTIDE CREDIT ACQUISITION, LLC, Defendants, In Civil Action No. 18-12277-JGD	)	Civil Action No. 23-mc-91208-AK

MEMORANDUM OF DECISION AND ORDER ON MOTION TO QUASH SUBPOENA TO DONNA KENNEY[1]

August 31, 2023

DEIN, U.S.M.J.

I. INTRODUCTION

This matter is before the Court on the amended "Motion to Quash Subpoena to Donna Kenney" (Docket Nos. 1, 3) (the "Motion"). The subpoena seeks Donna Kenney's deposition in Michigan, where she resides, in connection with litigation pending in this court (the "Underlying Litigation")[2] challenging the lending practices of the defendants, Matt Martorello

[1] The court has on this date issued a companion opinion in connection with a challenge to an identical deposition subpoena issued to Monique Martinez in Civil Action No. 23-mc-91305-NMG.

[2] The Underlying Litigation in which this deposition is being sought is Duggan v. Martorello, Civil Action No. 18-12277-JGD.

("Martorello") and his company, Eventide Credit Acquisitions LLC ("Eventide") (collectively the "Defendants"). For the reasons detailed herein, the motion to quash is ALLOWED.

II. STATEMENT OF FACTS

Background

The Underlying Litigation is a putative class action in which the plaintiff, Dana Duggan ("Duggan"), claims that the Defendants engaged in an internet-based predatory lending scheme in which they charged Duggan and other consumers unconscionably high interest rates, often exceeding 500%, for short-term loans. According to Duggan, Martorello and Eventide sought to evade state and federal laws prohibiting usurious lending practices by partnering with the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD" or the "Tribe") to set up a lending entity. Under this so-called "rent-a-tribe" scheme, LVD, through a company known as Big Picture Loans, LLC ("Big Picture Loans") and its affiliate Ascension Technologies, LLC f/k/a Bellicose Capital, LLC ("Ascension"),[3] allegedly acted as the nominal lender while Martorello and Eventide operated and exercised actual control over the lending business under the cloak of the Tribe's sovereign immunity. Duggan claims that this arrangement enabled the defendants to take advantage of the privileges and immunities available to Native American tribes to carry out their fraudulent enterprise and enrich themselves at the expense of borrowers. This is one of many cases pending in courts around the country which challenge

[3] The Tribe, Big Picture Loans, Ascension and their predecessors and successors are collectively referred to as the "Tribal Entities."

these lending arrangements, including cases in Oregon and the Eastern District of Virginia.[4] See Smith v. Martorello, No. 3:18-cv-1651-AC, 2021 WL 1257941, at *1 (D. Or. Jan. 5, 2021) (describing cases), adopted as modified, 2021 WL 981491 (D. Or. Mar. 16, 2021).

Officers of Big Picture Loans and Ascension, as well as members of LVD's Tribal Council, were initially named as defendants in the Underlying Litigation. After this case was filed, the Fourth Circuit Court of Appeals issued a decision in Williams v. Big Picture Loans, LLC, 929 F.3d 170 (4th Cir. 2019) ("Williams") finding that LVD was entitled to tribal immunity for its commercial lending venture, and that Big Picture and Ascension were entitled to immunity as arms of the Tribe. Id. at 176, 185. This decision reversed the decision reached by the District Court in the Eastern District of Virginia that the Tribal Entities were not entitled to tribal sovereign immunity. Id. at 174.

Duggan and other plaintiffs in all pending cases subsequently settled with the Tribal Entities in a Class Action Settlement and Release (the "Settlement Agreement") in the case of Galloway v. Williams, Civil Action No. 3:19-cv-470, 2020 WL 4573822, at *1 (E.D. Va. Aug. 7, 2020) (Galloway III). This settlement also resolved claims pending against those defendants in other courts. Id. at *2 n.3. While Martorello and Eventide participated in the settlement negotiations, they did not enter into the Settlement Agreement. See Duggan v. Martorello, Civil Action No. 18-12277-JGD, 2021 WL 4295828, at **2-3 (D. Mass. Sept. 21, 2021) ("Duggan I") (denying the Defendants' motion to dismiss the Underlying Litigation on grounds that Duggan's participation in the Settlement precludes her from pursuing her claims in this case

[4] The facts are hotly contested, and the Defendants' business relationships with the Tribal Entities are quite complex. Since the details are not necessary to understand for this motion, they will not be described herein.

under the doctrine of judicial estoppel). Following the Settlement, the Tribal Entities were dismissed from the Underlying Litigation, leaving only Martorello and Eventide as Defendants. In her Second Amended Class Action Complaint, filed after the Settlement, Duggan has asserted claims against Martorello and Eventide for violations of Massachusetts lending, licensing and consumer protection laws, violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. ("RICO"), unjust enrichment and declaratory judgment. See generally Duggan v. Martorello, 596 F. Supp. 3d 195, 197 (D. Mass. 2022) ("Duggan II") (denying motion to dismiss the Underlying Litigation based on contention that LVD, Big Picture Loans and Ascension were necessary or indispensable parties under Fed. R. Civ. P. 19).

The Settlement Agreement

According to the Defendants, and not disputed by Duggan, during the pendency of the Williams case the Tribal Entities "produced thousands of pages of jurisdictional discovery and provided numerous depositions to the plaintiffs." (Defendants' Opposition ("Opp.") (Docket No. 13) at 4). While the Defendants have access to such discovery, "they were not permitted to participate in many aspects of the discovery from the Tribal Entities while they were parties to the Cases[.]" (Id.).

The Defendants contend that due to this production of materials, and based on the terms of the Settlement Agreement, the Tribe has waived its sovereign immunity. Pursuant to the Settlement Agreement, if a class action is certified, the Tribal Entities agree to

> provide (or provide authorization for third parties to provide) data sufficient to identify class members, to determine the terms of class members' loans, to determine payments made by class members on their loans, to determine which loans have been charged off, to determine all outstanding amounts owed under the terms of class members' loan agreements, and any other data or information about class members and their loans which is reasonably requested by Class Counsel[.] . . .

(Settlement Agreement § 6.3).[5] The Settlement Agreement provides further:

> Plaintiffs have represented that they may need additional data, documents, and information to establish liability or for other important purposes in the Actions other than class certification, including by example only and without limitation, information from: TransDotCom, LLC, Data X, LLC, and Microbilt (as it relates to the Actions); emails and communications by Non-Settling Defendants to which the Tribe or Tribal Officials were not a party; and loan-level information regarding each Settlement Class Member's loan sufficient to demonstrate the original principal balance of the loan, the interest rate, and the amount and timing of any payments the Settlement Class Member made on the loan. The Settling Defendants have neither agreed nor refused to provide this information and documents to the Plaintiffs as a term of the Settlement. If such request is made to the Big Picture Defendants by the Plaintiffs, . . . both sides agree to negotiate and attempt to resolve any disagreement in good faith. Any remaining disputes will [be resolved through binding mediation].

(Settlement Agreement § 6.4). To this court's knowledge, Duggan has not requested any documents from the Tribal Entities under the terms of the Settlement Agreement.

The Settlement Agreement expressly provides that it is not intended to constitute a waiver of tribal sovereign immunity for any of the Settling Defendants other than in connection with enforcing the Settlement Agreement. For example, the Settlement Agreement provides:

> The Parties agree that nothing in this Settlement Agreement shall constitute a waiver by the Tribe, the Big Picture Defendants, the Tribal Officials, the Individual Tribal Defendants, Dowd, McFadden, and/or Liang of sovereign immunity, except as specifically and expressly provided herein, namely and only to the extent, of enforcement of this Settlement Agreement.

(Settlement Agreement § 1.8). Section 3.2 is entitled "No Waiver of Tribal Sovereign Immunity" and provides that the Settling Defendants "expressly assert that they are all entitled to tribal sovereign immunity" and that their willingness to enter into the Settlement Agreement does

[5] A copy of the Settlement Agreement is found in the Underlying Litigation at Docket No. 196-1. The Settling Defendants are the Tribe, the Big Picture Defendants including Big Picture Loans and Ascension, Tribal Officials, and individual Tribal Defendants.

not constitute a waiver of sovereign immunity. (Settlement Agreement § 3.2). In § 15.1, the Settling Defendants make it clear that they are consenting to a waiver of sovereign immunity only "for the limited purposes of the enforcement of this Settlement Agreement" – a provision which is reinforced in § 15.2 (by agreeing that Virginia law controls "all matters of construction, validity, performance, and enforcement" of the Settlement agreement, "none of the Defendants is agreeing to the application of Virginia law in any other context" and they do not waive sovereign immunity).

Donna Kenney's Role

The Defendants have noticed the deposition of Ms. Kenney in order "to learn more about what [she] know[s] regarding the subject matter" of the Underlying Litigation and similar cases pending elsewhere. (Docket No. 1-1: Defendants' counsel's letter to Ms. Kenney enclosing subpoena). According to Ms. Kenney, she "was employed as an Office Manager from approximately June 2012 through July 2017 by Duck Creek Tribal Financial, LLC ("Duck Creek"), and its successor entity, Big Picture Loans, LLC ("Big Picture"), which became Big Picture Loans, LLC, in approximately January 2016." (Declaration of Donna Kenney ("Kenney Decl.") (Docket No. 1-1) at ¶ 3). While Big Picture Loans is "a tribal entity formed under the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians, a federally recognized sovereign Indian tribe with reservation lands near Watersmeet, Michigan" it is undisputed that Ms. Kenney is not a tribal member or officer. (See id.). Ms. Kenney resigned from her employment with Big Picture Loans in the summer of 2017, and went to work with the Marinesco Township, where she is still employed. (Id. ¶ 4). She retained no books or records of Big Picture Loans. (Id. ¶ 5).

The Defendants contend that they are seeking to depose Ms. Kenney in her "individual

capacity" about things that she knows about the lending business. Ms. Kenney contends that despite the nomenclature, she is being asked to testify about the Tribal Entities' business and thus is entitled to assert tribal immunity due to her employment with an arm of the Tribe.

Additional facts will be provided below as necessary.

III. ANALYSIS

A. Motion to Quash

Ms. Kenney has moved to quash the deposition subpoena pursuant to Fed. R. Civ. P. 45(d)(3)(A)(iv), which authorizes the court to quash a subpoena that "subjects a person to undue burden." Ms. Kenney contends that since her deposition testimony is being sought to obtain information she acquired "in her official capacity as a (former) management employee of an economic arm of the Tribe" the subpoena is barred by the doctrine of sovereign immunity. (Motion at 7). A motion to quash is the appropriate method to challenge a subpoena on the grounds of tribal immunity. See United States v. Menominee Tribal Enterprises, Case No. 07-C-316, 2008 WL 2273285, at *10 (E.D. Wis. June 2, 2008).[6] Ms. Kenney further contends that compliance with the subpoena would be personally burdensome as she has not had any involvement in the business for many years. See Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998) ("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs" for discovery).

[6] The Menominee court considered both Fed. R. Civ. P. 45(d)(3)(A)(iii), which authorizes quashing a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies," and Rule 45(d)(3)(A)(iv) (undue burden) in analyzing a motion to quash based on a claim of tribal immunity.

For the reasons described herein, this court concludes that the subpoena should be quashed on the grounds of tribal immunity.

B. Scope of Tribal Immunity

"Indian tribes are '"domestic dependent nations"' that exercise 'inherent sovereign authority.'" Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788, 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014) quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991) (additional citations omitted). "Among the core aspects of sovereignty that tribes possess – subject, again, to congressional action – is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" Id. quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978). Tribal immunity applies to suits brought by individuals as well as by the State, and extends to "suits arising from a tribe's commercial activities, even when they take place off Indian lands." Id. at 789-90, 134 S. Ct. at 2031. It is now established "that a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." Alltel Commc'ns, LLC v. DeJordy, 675 F.3d 1100, 1105 (8th Cir. 2012). Thus, for purposes of the present motion, this court assumes that LVD could assert tribal immunity and challenge the subpoena if it were still a party to the Underlying Litigation.[7]

"The Supreme Court has recognized that tribal immunity may remain intact when a tribe elects to engage in commerce using tribally created entities, *i.e.*, arms of the tribe[.]" Williams,

[7] In their Opposition, Defendants assert that "while the Motion assumes that the Tribal Entities are entitled to sovereign immunity, this is a primary question at issue in the Underlying Case that must be determined in the first instance by the Issuing Court." (Opp. at 4). The Defendants base this argument on their contention that the Plaintiff is asserting that the loans at issue were subject to, and not immune from, State usury laws which, according to the Defendants, means that the Plaintiff is disputing the

929 F.3d at 176 citing Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 705 n.1, 123 S. Ct. 1887, 1890, 155 L. Ed. 2d 933 (2003). See also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth., 207 F.3d 21, 29 (1st Cir. 2000) ("The Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"). As detailed above, the Fourth Circuit in Williams held that Big Picture and Ascension were "entitled to immunity as arms of the Tribe." Williams, 929 F.3d at 185.[8] That finding is not disputed in connection with the Motion.

"Tribal members in their individual capacity have no sovereign immunity" based solely on their status as members of a tribe. Knox v. United States Dep't of the Interior, No. 4:09-CV-162-BLW, 2012 WL 465585, at *1 (D. Idaho Feb. 13, 2012) citing Santa Clara Pueblo, 436 U.S. at 59, 98 S. Ct. at 1677. See also Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 171-72, 97 S. Ct. 2616, 2620-21, 53 L. Ed. 2d 667 (1977). Nevertheless, it is well-established that "[t]ribal immunity extends to individual tribal officials acting in their representative capacity within the scope of their authority." Cameron v. Bay Mills Indian Cmty., 843 F. Supp.

Tribal Entities' rights to claim sovereign immunity. (Id. at 3-4). However, regardless of what Duggan argued initially, she is presently not arguing in the Underlying Action that the Tribal Entities were making loans that were subject to State law. Rather, she is arguing that Martorello and Eventide were, in fact, pursuing a predatory lending scheme. In any event, since the Defendants do not base their opposition to the motion to quash on the grounds that the Tribal Entities cannot claim sovereign immunity for reasons apart from waiver, this court will assume for purposes of the Motion that the Tribal Entities are entitled to sovereign immunity unless it has been waived.

[8] The Williams court applied the "non-exhaustive factors" detailed in Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010), including "(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; [and] (5) the financial relationship between the tribe and the entities" with "the extent to which a grant of arm-of-the-tribe immunity promotes the purposes of tribal sovereign immunity . . . inform[ing] the entire analysis." Williams, 929 F.3d at 177.

334, 336 (W.D. Mich. 1994) citing Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985). There is no question that Ms. Kenney was not an officer of the Tribe, although whether she was an officer of Big Picture Loans is less clear. That status, however, is not controlling. The issue here is whether a non-tribal managerial employee of tribally created entities can claim immunity. For reasons detailed herein, this court concludes that the subpoena in the instant case should be quashed as it is, in reality, only an effort to obtain information from the Tribal Entities which are immune from suit.

C. Standing to Assert Tribal Immunity

As an initial matter, the Defendants argue that Ms. Kenney does not have standing to invoke the Tribe's sovereign immunity. (See Opp. at 10). In so arguing, the Defendants urge the court to apply the standard used to determine whether a litigant has standing to bring a lawsuit on another's behalf. See, e.g., Powers v. Ohio, 499 U.S. 400, 410, 111 S. Ct. 1364, 1370, 113 L. Ed. 2d 411 (1991) (Court addresses "whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service" and concludes that he does); Singleton v. Wulff, 428 U.S. 106, 113-14, 96 S. Ct. 2868, 2874, 49 L. Ed. 2d 826 (1976) (Court addresses whether doctors have standing to bring suit challenging laws limiting access to abortions, and concludes that they do); Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 215 (4th Cir. 2002) (doctor lacks standing to bring constitutional challenge to ADA on patients' behalf). [9] This argument has no application here. Not only is Ms. Kenney defending herself in

[9] The defendants have also cited Wichtman v. Martorello, Case No. 2:19-mc-1, 2019 WL 244688 (W.D. Mich. Jan. 17, 2019). In Wichtman, the court refused to quash a subpoena directed to the general counsel of the Tribe, Big Picture and Ascension. The court, relying on the District Court's decision in Williams, found that it had already been determined that sovereign immunity was not applicable to Big Picture and Ascension, and refused to "interfere with" or "revisit that issue." Id. at *1. As detailed

response to a subpoena issued by the Defendants, and not initiating litigation, but her defense of tribal immunity also raises issues regarding the jurisdiction of the court to enforce the subpoena, and, therefore, must be resolved.[10]

The court cannot exercise jurisdiction over an entity protected by sovereign immunity. See Harper v. Rettig, 46 F.4th 1, 5-6 (1st Cir. 2022). While "[p]arties other than a foreign sovereign ordinarily lack standing to raise the defense of sovereign immunity" "the court may address the issue independently" when it must be decided to determine if the court has jurisdiction. See Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1290 (11th Cir. 1999). See also Larson v. United States, 274 F.3d 643, 648 (1st Cir. 2001) (sovereign immunity may be raised by the court *sua sponte* – even at the appellate stage). The court is obligated to "address the issue of sovereign immunity, even if, as in the instant case, the foreign state has not even entered an appearance to assert the immunity defense." Coleman v. Alcolac, Inc., 888 F. Supp. 1388, 1400 (S.D. Tex. 1995) citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 n.20, 103 S. Ct. 1962, 1971 n.20, 76 L. Ed. 2d 81 (1983) ("even if the

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above, however, the District Court's decision in Williams was reversed by the Fourth Circuit Court of Appeals. Furthermore, the Wichtman court expressly made "no ruling regarding whether Wichtman may assert tribal sovereign immunity or attorney client privilege as to any Tribal matter concerning the Lac Viex Desert Band of Lake Superior Chippewa Indians[.]" Id. at *2. Thus, nothing in Wichtman stands for the proposition that a deponent could not assert tribal immunity arising out of their employment with LVD.

[10] Even if this court were to assume, *arguendo*, that the standard for third party standing applies here, it would still conclude that Ms. Kenney has standing. As explained in Freilich, "[t]o overcome the prudential limitation on third-party standing, a plaintiff must demonstrate: (1) an injury-in-fact; (2) a close relationship between herself and the person whose right she seeks to assert; and (3) a hindrance to the third party's ability to protect his or her own interests." Freilich, 313 F.3d at 215, citing Powers, 499 U.S. at 410-11, 111 S. Ct. 1364. In the instant case, there is no question that the deposition subpoena causes Ms. Kenney's injury and that a close relationship existed between Ms. Kenney and the Tribe during the relevant time. The third factor is met due to the fact that the Tribe is not before the court. Ms. Kenney is the only one before the court who can raise the issue of tribal immunity.

foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the [Foreign Sovereign Immunities] Act."). Here, the jurisdiction of the court is dependent on whether the subpoena is barred by sovereign immunity. Therefore, the issue is properly before the court.

This conclusion is supported by case law addressing the sovereign immunity of Native American tribes. For example, in Lewis v. Clarke, 581 U.S. 155, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017), suit was brought against a tribal employee in his individual capacity for a motor vehicle accident he caused while acting within the scope of his employment for the tribe. Even though the tribe was not a party to the litigation, the court entertained a motion to dismiss for lack of subject-matter jurisdiction on the basis of tribal sovereign immunity. Id. at 160, 137 S. Ct. at 1290. In Tamiami Partners, Ltd. Ex rel Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212 (11th Cir. 1999), the court addressed separately motions to dismiss due to tribal immunity brought by the tribe and individual tribal members, and concluded that the tribe had waived its sovereign immunity but the individual tribal members had not. Id. at 1224-25. Implicit in this ruling is that the individual defendants had standing to assert their own claims of immunity. See also Pettus v. Servicing Co., LLC, Civil No. 3:15-cv-479(HEH), 2016 WL 7234106, at *4 (E.D. Va. Feb. 9, 2016) (ruling that CEO of a company that was an arm of the tribe must move to quash deposition subpoena directed to her, and that an independent contractor hired by tribe lacked standing to act on her behalf). In sum, this court concludes

that Ms. Kenney has standing to assert that tribal immunity requires that the subpoena propounded to her be quashed.

D. The Subpoena is Barred by Tribal Immunity

The Defendants contend that Ms. Kenney is being subpoenaed in her individual capacity, and therefore cannot claim tribal immunity. It is not disputed that if, in fact, Ms. Kenney was being asked to testify about personal matters, she would not be immune from testifying. See Lewis, 581 U.S. at 163, 137 S. Ct. at 1291 ("Defendants in an official-capacity action may assert sovereign immunity" but sovereign immunity does not bar "suits to impose individual and personal liability") (citations omitted). However, both in their communications with Ms. Kenney (and her counsel) and in oral argument on the motion to quash, the Defendants made it clear that they are seeking to take Ms. Kenney's deposition about the workings of Big Picture Loans and its predecessors, which she learned in her capacity as a management-level employee of those entities. (See Stinson Decl. (Docket No. 1-2) at ¶ 15).[11] As such, the Tribal Entities are the real parties in interest, and Ms. Kenney cannot be deposed to disclose information gathered in her official capacity as an employee. Shapiro v. Think Finance, LLC, Civil Action Case No. 18-mc-169, 2018 WL 4635750, at *6 (E.D. Pa. Sept. 26, 2018) (motion to quash deposition of former CEO of business arm of a tribe allowed where

[11] Ms. Kenney's counsel submitted a Declaration, which the Defendants do not dispute, in which he attests that "Counsel for Defendants confirmed in the course of our 'meet and confer,' in response to my direct question, that (a) the 'information relevant to (the *Duggan* case)' referred to in the letter from her accompanying the subpoena to Ms. Kenney 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 (b) that Defendants do not contend that Ms. Kenney has any relevant knowledge or information that she learned or gained in her personal capacity." (Declaration of Michael Stinson ("Stinson Decl.") (Docket No. 1-2) ¶ 15).

information being sought about business operations "amounts to information gathered in his 'official capacity,' and therefore he is protected by tribal sovereign immunity"); Dillon v. BMO Harris Bank, N.A., Case No. 16-mc-5-CVE-TLW, 2016 WL 447502, *6 (N.D. Okla. Feb. 4, 2016) (deposition subpoena directed to tribal officer quashed: although he could be deposed in his individual capacity, his knowledge of relevant facts arose out of his work for the tribe and he was protected by sovereign immunity) (and cases cited).

The fact that the Defendants are seeking to depose Ms. Kenney as an employee/representative of the Tribal Entities is best illustrated by their Opposition to the motion to quash. There the Defendants contend that they are seeking the deposition "to obtain an equal amount of discoverable information" to balance the information produced by the Tribe before it was dismissed in the Virginia litigation. (Opp. at 4-5). According to the Defendants, Ms. Kenney will have information about "Big Picture, its management and operations from its creation as the successor entity to Red Rock through 2016 (and beyond)" as well as "all Big Picture loans made on or after October 31, 2014." (Id. at 6). Since Ms. Kenney obtained all such information as a managerial employee of an arm of the Tribe, the subpoena must be quashed to prevent what is, in effect, a suit against the Tribe. The Defendants "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe" where, as here, the Defendants are seeking to explore actions undertaken by the deponent as an employee of the Tribe. See Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004).

E. There Was No Waiver of Tribal Immunity

The Defendants argue that the Tribe has waived its sovereign immunity by producing documents in connection with the jurisdictional dispute in Williams, and by agreeing to produce

information in connection with the terms of the Settlement Agreement. "An Indian tribe's sovereign immunity may be limited by either tribal conduct (*i.e.*, waiver or consent) or congressional enactment (*i.e.*, abrogation)." Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 25 (1st Cir. 2006) (citations omitted). "While such actions must be clear and unequivocal in their import, there is no requirement that talismanic phrases be employed. Thus, an effective limitation on tribal sovereign immunity need not use magic words." Id. (internal citations omitted). "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." Missouri River Servs., Inc. v. Omaha Tribe of Nebraska, 267 F.3d 848, 852 (8th Cir. 2001) (internal punctuation and citation omitted). "In addition, if a tribe does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied." Id. (citation omitted). See also United States v. James, 980 F.2d 1314, 1320 (9th Cir. 1992) (while the Tribe "expressly waived its immunity as to relevant documents in the possession of the Housing Authority by voluntarily providing the Government with documents relevant to the case" it did not, as a result, "explicitly waive its sovereign immunity to documents from different agencies").

With respect to the documents already produced by the Tribe, to which the Defendants apparently have access, the Defendants have not described the circumstances or scope of the production. Thus, there is no basis in the record to conclude that the Tribe has waived any privilege by the production or, if there was a waiver, the scope of any waiver.[12] Compare Knox,

[12] Nothing herein shall be deemed to pre-judge any objections at trial the Defendants may have to documents obtained from the Tribe for any reason, including that the production was incomplete and/or prejudicial.

2012 WL 465585, at *1 (while Tribal officers would generally be immune from testifying about Tribal practices and policies, they may be deposed for the limited purpose of addressing items raised in Declarations they filed with the court). Therefore, the Defendants have not established a waiver of tribal immunity due to the production of documents in other litigation.

With respect to the Settlement Agreement, by its terms, the Tribal Entities have expressly limited their waiver of immunity to the enforcement of the Agreement. (See Settlement Agreement §§ 1.8, 3.2, 15.1, 15.2). Such a limitation is enforceable, and does not constitute a general waiver of tribal immunity. See Shapiro, 2018 WL 4635750, at *7 (Tribal defendants "have not waived sovereign immunity in any legal proceeding beyond disputes . . . relating to contract interpretation, arbitration of contract disputes, or contract breach").

To the extent that the Tribe has agreed to produce documents if a class is certified identifying the class members, the Defendants may seek additional information at the appropriate time if the production occurs and is not complete. With respect to any other documents, the Tribal Entities have not agreed to produce anything, and there is no way to read the Settlement Agreement provision that Duggan may request documents as an express waiver of sovereign immunity. If documents are, in fact, produced by the Tribal Entities, the Defendants may renew their claim of waiver if appropriate. As of now, however, this court finds no waiver of sovereign immunity.

F. Undue Burden In Complying With The Subpoena

For the reasons detailed above, the court will quash the subpoena to Ms. Kenney on the basis of tribal immunity. Therefore, the court does not need to reach the issue of whether it would be unduly burdensome for Ms. Kenney to comply with the subpoena. Ms. Kenney bears

the burden of proving the deposition would cause her undue burden. See Green v. Cosby, 152 F. Supp. 3d 31, 36-37 (D. Mass. 2015) adopted as modified 160 F. Supp. 3d 431 (2016). She "cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance." In re New England Compounding Pharmacy, Inc. Prods. Liab. Litig., MDL No. 13-2419-FDS, 2013 WL 6058483, at *6 (D. Mass. Nov. 13, 2013) (quotation omitted). Here she has provided only generalized arguments that the Defendants have not established any specific need for her deposition, or identified the information that she could provide that could not be obtained from other sources. The present record is insufficient for this court to conclude that the deposition would be unduly burdensome.

IV. CONCLUSION

For the reasons detailed herein, the amended "Motion to Quash Subpoena to Donna Kenney" (Docket Nos. 1, 3) is ALLOWED.

/ s / Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge