

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Mille Lacs Band of Ojibwe, a
federally recognized Indian Tribe;
Sara Rice, in her official capacity as
the Mille Lacs Band Chief of Police;
and Derrick Naumann, in his official
capacity as Sergeant of the Mille Lacs
Police Department,

Plaintiffs,

v.

County of Mille Lacs, Minnesota;
Joseph Walsh, individually and in his
official capacity as County Attorney
for Mille Lacs County; and Don
Lorge, individually and in his official
capacity as Sheriff of Mille Lacs
County,

Defendants.

Case No. 17-cv-05155 (SRN/LIB)

**MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS'
MOTION TO COMPEL AND TO
ENFORCE THIRD-PARTY
SUBPOENA**

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Plaintiffs submit this memorandum in opposition to Defendants' motion to compel and to enforce Defendant Walsh's subpoena to Ballard Spahr LLP (the Ballard Spahr subpoena). For the reasons given below and in Plaintiffs' memorandum in support of their motion for a protective order and to quash the Ballard Spahr subpoena (ECF No. 98; hereafter, "Plaintiffs' Memorandum"), the Court should deny Defendants' motion.

I. RFP NO. 8 DOES NOT ENCOMPASS THE DOCUMENTS SOUGHT IN THE BALLARD SPAHR SUBPOENA, AND THE SUBPOENA IS UNTIMELY.

The Ballard Spahr subpoena seeks four categories of documents: (1) a 2014 Report prepared by attorneys retained by the Band, every page of which designates the Report as an attorney-client communication; (2) documents memorializing the attorneys' confidential interviews with Band members in preparing the report; (3) documents reviewed by the attorneys in preparing the report; and (4) invoices for services provided by the attorneys in preparing the report. Defs.' Ex. A (ECF No. 92-1); Declaration of Beth Baldwin in Support of Plaintiffs' Mot. for Protective Order ¶¶ 28-33 (ECF No. 99; hereafter, "Baldwin Declaration."). Plaintiffs' memorandum first showed that the Ballard Spahr subpoena violated the parties' agreed November 1, 2019, deadline for service of written fact discovery; that the four categories of documents sought in the subpoena had not been requested in Defendants' Request for Production (RFP) No. 8; and that the subpoena was an attempt to evade the limits on discovery imposed by the Court because it sought documents in Plaintiffs' possession or control after exhausting the allowable number of requests for production. *See* Plaintiffs' Memorandum at 24-30.

Defendants argue that they sought the 2014 Report in RFP No. 8. Defendants' Memorandum in Support of Motion to Compel at 10-11 (ECF No. 89; hereafter "Defendants' Memorandum"). RFP No. 8 was one of a series of essentially boilerplate requests seeking "[a]ll documents relating to the allegations set forth" in 13 different paragraphs of Plaintiffs' complaint. *See* Defs.' Ex. D at 7-12, 14-20 (ECF No. 92-4) (RFP Nos. 4 through 8, 12 through 15, 17 through 20). As Plaintiffs have explained, the request did not encompass the 2014 Report because the Report did not relate to the lawful establishment or maintenance of the Band's Police Department, which was the subject of the relevant paragraph in Plaintiffs' complaint, and did not "demonstrate" the Band's policies, rules or regulations relating to its police department. Notably, Defendants themselves did not contend that RFP No. 8 encompassed the 2014 Report until *after* Plaintiffs objected to the Ballard Spahr subpoena. Plaintiffs' Memorandum at 16, 29-30.

Contrary to Defendants' supposition, the Report does not appear in Plaintiffs' June 6, 2019, privilege log because it was responsive to RFP No. 8. Rather, out of an abundance of caution, Plaintiffs included the Report in their privilege log because it was referenced in Joint Resolution 16-01-72-14, which was produced in response to Defendants' RFP No. 26. *See* Plaintiffs' Memorandum at 17 and Baldwin Decl. ¶ 10 (ECF No. 99); Ex. W (ECF No. 99-1 at 150). As explained in Plaintiffs' Memorandum, RFP No. 26 did not request the Report itself, and Defendants do not argue otherwise.

Apart from the 2014 Report itself, Defendants do not argue that the other three categories of documents sought in the Ballard Spahr subpoena were within the scope of RFP No. 8. Thus, Defendants provide no argument that they requested those three categories of documents before issuing the Ballard Spahr subpoena.

Because Defendants had not previously requested the documents sought in the Ballard Spahr subpoena, their attempt to obtain them through the subpoena was improper. First, as explained in Plaintiffs' Memorandum, the subpoena violated the parties' agreed-upon deadline for written fact discovery. Defendants' cursory argument that the deadline did not apply to the issuance of third-party subpoenas for documents that could have been, but were not, requested from the parties, Defendants' Memorandum at 20, disregards the language, intent and purpose of the parties' agreement. *See* Plaintiffs' Memorandum at 28-30.

Second, allowing Defendants to obtain the documents through the Ballard Spahr subpoena would allow Defendants to seek documents from Plaintiffs in excess of the 50-request limit on requests for production set by this Court. *See* Second Amended Pretrial Sched. Order ¶ V (ECF No. 84); Plaintiffs' Memorandum. at 28. As Plaintiffs have explained, all the documents sought in the Ballard Spahr subpoena are in Plaintiffs' possession or control. Plaintiffs' Memorandum at 27 n.8. Because Defendants did not make a request for these documents before exhausting their allotted 50 requests for

production, they should not be allowed to obtain them through a third-party subpoena, effectively evading the 50-request limit.

Third, allowing Defendants to obtain the documents through the Ballard Spahr subpoena would also allow Defendants to effectively evade the 50-interrogatory limit established by the Court. For example, Defendants aver that they only want the attorneys' invoices because they believe "the raw amount of money the Band spent on identifying its own law-enforcement problems" is relevant to their case. *See* Defendants' Memorandum at 27. However, if Defendants only wanted to know the "raw amount of money" spent on the Report, they could have used one of their interrogatories to ask Plaintiffs for that information. Defendants received Joint Resolution 16-01-72-14 referencing the Report in June 2019 and propounded two additional sets of interrogatories after that. *See* Plaintiffs' Memorandum at 27; Baldwin Decl. ¶¶ 6, 10, 11. However, Defendants failed to ask Plaintiffs for that information via an interrogatory and have now reached their 50-interrogatory limit. They should not be permitted to circumvent that limit through a third-party subpoena.

In sum, the documents sought in the Ballard Spahr subpoena were not previously sought in discovery and Defendants' attempt to obtain them via an untimely third-party subpoena was improper for several reasons. For these reasons alone, Defendants' motion to compel and to enforce the subpoena should be denied.

II. THE DOCUMENTS SOUGHT IN THE BALLARD SPAHR SUBPOENA ARE NOT RELEVANT TO THE PARTIES' CLAIMS OR DEFENSES AND ARE NOT PROPORTIONAL TO THE NEEDS OF THIS CASE.

To be discoverable, the documents sought in the Ballard Spahr subpoena must be relevant to some party's claim or defense and proportional to the needs of the case, taking into consideration the importance of the discovery in resolving the issues before the court. *See* Fed. R. Civ. P. 26(b)(1). Rule 26(b)(1)'s language confirms that the Court "has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." *Id.* Advisory Committee Note (2000 Amendment). Where the "probative value of the [information] in resolving the issues in this litigation" is "speculative," this factor weighs against allowing its discovery. *Pentel v. Shepard*, No. 18-cv-1447 (NEB/TNL), 2019 U.S. Dist. LEXIS 133167, at *17 (D. Minn. Aug. 7, 2019).

Plaintiffs' memorandum showed that the documents sought in the Ballard Spahr subpoena are not relevant to the parties' claims or defenses and are not proportional to the needs of this case. To reiterate, Plaintiffs claim that the Mille Lacs Band's inherent and federally delegated law enforcement authority¹ extends throughout the Mille Lacs Indian Reservation, as established in 1855, and includes the authority to investigate violations of

¹ The Band's federally delegated law enforcement authority was first acquired in late December 2016, when it entered into a deputation agreement with the Bureau of Indian Affairs. *See* Plaintiffs' Ex. Q (ECF No. 99-1 at 80).

state law. Plaintiffs further claim that, beginning in mid-2016, Defendants interfered with the exercise of the Band's inherent and federally delegated law enforcement authority by taking actions: (1) to restrict the exercise of such authority to trust lands within the Reservation (excluding Reservation lands owned in fee by the Band and others); and (2) to prevent the Band's police officers from investigating violations of state law by non-Indians, even on trust lands. Plaintiffs claim that such interference injured Plaintiffs (the Band, Chief of Police Rice and Sergeant Naumann) and seek a declaratory judgment defining the scope of the Band's inherent and federally delegated authority and an injunction barring Defendants from interfering with that authority. Plaintiffs' Memorandum at 30-31.

Defendants, for their part, deny that the Band's inherent and federally delegated law enforcement authority extends beyond trust lands or includes the authority to investigate violations of state law. They further deny that they interfered with the exercise of the Band's inherent or federally delegated law enforcement authority or that their actions injured plaintiffs. *See* Plaintiffs' Memorandum at 13.

As discussed in Plaintiffs' Memorandum, the documents sought in the Ballard Spahr subpoena have no relevance to the ultimate dispute between the parties: whether the Band's inherent or federally delegated law enforcement authority extends throughout the Mille Lacs Indian Reservation and whether it includes the authority to investigate violations of state law. *See* Plaintiffs' Memorandum at 30-34. A report regarding the performance of the Band's Police Department in 2013 cannot shed light on the lawful extent of the Band's

inherent law enforcement authority or its federally delegated law enforcement authority (which, as noted, was first acquired in late December 2016, nearly four years later). These are matters governed by federal law regarding the status of the Reservation, the inherent authority of Indian tribes, and the BIA Deputation Agreement. Notably, Defendants' Memorandum makes no argument that the documents sought in the Ballard Spahr subpoena are relevant to the ultimate issues on the merits in this case.

With respect to the parties' claims and defenses relating to whether Defendants interfered with the exercise of the Band's inherent or federally delegated authority beginning in mid-2016 and whether such interference injured Plaintiffs, the documents sought in the Ballard Spahr subpoena also have no relevance and are not proportional to the needs of the case. These claims and defenses relate *solely* to the issue of standing – whether Plaintiffs can establish that there is an Article III case or controversy permitting them to seek a declaratory ruling on the scope of the Band's inherent and federally delegated law enforcement authority.

Despite the tens of thousands of pages of discovery already exchanged by the parties on this threshold issue, and Defendants' insistence that more is needed, it is not clear the Defendants even contest Plaintiffs' standing to seek a ruling on the scope of the Band's inherent and federally delegated law enforcement authority.² In the absence of an actual

² Although Defendants denied nearly all allegations on which Plaintiffs' standing rests, they admit the dispute is ripe for resolution by the Court. *Compare*, County's Answer ¶¶ 5.M-5.U (ECF No. 17); Sheriff's Answer ¶¶ 5.M-5.U. (ECF No. 19); and County

dispute over Plaintiffs’ standing, additional discovery relating to that issue is simply not proportional to the needs of this case.

Even if Plaintiffs’ standing remains at issue, the documents sought in the Ballard Spahr subpoena are not relevant or proportional to resolving the question. To establish standing, a plaintiff must “present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.” *Davis v. FEC*, 554 U.S. 724, 733, 128 S. Ct. 2759 (2008).³ “For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). An injury must be concrete—“that is, it must actually exist.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). “[I]t is *the existence—not the extent—of an injury that matters* for purposes of Article III standing,” *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1958 (2019) (Alito, J., dissenting) (emphasis added). A likelihood of “*some . . . injury*” is sufficient. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (emphasis in original).

Attorney’s Answer ¶¶ 5.M-5.U (ECF No. 21) (all denying allegations of Defendants’ interference with Band law enforcement authority) with ECF No. 17 ¶ 5.V, ECF No. 19 ¶ 5.V. and ECF No. 21 ¶ 5.V. (all admitting that scope of Band officers’ law enforcement authority is ripe for judicial resolution).

³ “Article III ‘requires no more than *de facto* causality.’” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (quoting *Block v. Meese*, 793 F. 2d 1303, 1309 (D.C. Cir. 1986)). “Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff’s injury be fairly traceable to the defendant’s conduct.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014).

For purposes of standing, it does not matter whether the defendant was the sole cause of the plaintiff's injury or even if the plaintiff himself contributed in some manner to the injury—it is sufficient if the injury can be traced, even in part, to the defendant's conduct. *See, e.g., City of Wyo. v. P&G*, 210 F. Supp. 3d 1137, 1151-52 (D. Minn. 2016) (“A plaintiff is not deprived of standing merely because he or she alleges a defendant's actions were a contributing cause instead of the lone cause of the plaintiff's injury.”); *see also Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 714 (6th Cir. 2015) (holding that plaintiffs had standing to sue federal agencies for a report describing plaintiffs as a gang even though plaintiffs had already been described as a gang by other independent state agencies); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (finding that plaintiff had standing to challenge a petition-collection ballot-access requirement, even though plaintiff's knee injury likely also contributed to his failure to collect a sufficient number of signatures); *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011) (finding that plaintiff had to challenge EPA's listing of plaintiff's property as an “impaired water body” because the listing was one contributing factor to the property's decrease in value); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011) (finding that plaintiffs met the causation element of standing doctrine even though defendant-polluters were only one of numerous polluters contributing to plaintiffs' injuries).

Given these legal standards, Defendants' Memorandum does not show that the documents sought in the Ballard Spahr subpoena are relevant to the standing issue or proportional to the needs of the case in resolving that issue. As a threshold matter, it should be noted that Defendants make no attempt to tie their relevance arguments to the standing issue (or any other issue) in this case. Instead, Defendants focus exclusively on statements made by the Band's Chief Executive in public speeches and news articles. *See* Defendants' Memorandum at 5-7 (quoting Defs.' Exs. G, H, I, J, K, N, L, and M). However, under Rule 26(b)(1), the proper focus is on the claims and defenses asserted in this case, not a media debate taking place outside the courtroom.

Despite Defendants' failure to tie their relevance arguments to the issues in the case, those arguments can be grouped into three categories: (1) an argument that the 2014 Report and its supporting documents contain information that will explain and justify Defendants' interference with the exercise of the Band's inherent and federally delegated law enforcement authority beginning in mid-2106; (2) an argument that the Report and supporting documents contain information that will show Defendants' interference did not injure Plaintiffs; and (3) other miscellaneous arguments. Each category is discussed in turn below.

- A. Defendants' Argument that the Documents Sought in the Ballard Spahr Subpoena Are Relevant to Explain and Justify Their Interference with the Band's Inherent and Federally Delegated Law Enforcement Authority Lacks Merit.

Plaintiffs' standing argument rests, first, on the claim that Defendants interfered with the exercise of the Band's inherent and federally delegated law enforcement authority beginning in mid-2016. Defendants do not argue that the documents they are seeking are relevant to the question of *whether* they interfered with the exercise of the Band's inherent and federally delegated law enforcement authority at that time. No such argument would be tenable because the 2014 Report can shed no light on what Defendants did beginning in mid-2016. Instead, Defendants argue the documents sought via the subpoena are relevant to "explain and justify" their interference with the Band's law enforcement authority. *See, e.g.,* Defendants' Memorandum at 18-19.

In making this argument, Defendants quote at length from Plaintiffs' response to Defendants' Interrogatory No. 18. *Id.* at 15-18. Interrogatory Nos. 18 and 19 asked Plaintiffs to identify instances in which Defendants interfered with the Band's inherent and federally delegated law enforcement authority, respectively. Defs.' Ex. F at 4, 32-33. Plaintiffs provided a combined response in their answer to Interrogatory No. 18, listing 17 different ways in which Defendants interfered with the Band's inherent and federally delegated law enforcement authority, including specific examples of each type of interference and citing supporting documents. *See id.* at 4-32.

Defendants' memorandum (at pages 15-18) quotes Plaintiffs' Interrogatory 18 response at length and then concedes that Defendants engaged in the actions identified by Plaintiffs. According to Defendants, "*Defendants' actions identified in the Band's*

response are explained and justified by the egregious misconduct and lack of oversight identified in the [2014] Report.” Defendants’ Memorandum at 18-19 (emphasis added).⁴ Thus, Defendants argue the 2014 Report is relevant to a defense that their interference with the Band’s inherent and federally-delegated law enforcement authority was justified by the conduct of the Band’s Police Department at some time before 2014. *Id.* at 10, 15, 18.

There are three problems with that argument. First, the 2014 Report cannot “explain[] and justif[y]” Defendants’ interference with the Band’s inherent and federally delegated law enforcement authority because Defendants did not have the Report at the time they engaged in the acts of interference.⁵

Second, the “justification” defense is a new argument that is inconsistent with the Defendants’ pleadings and discovery responses. The County Attorney’s July 18, 2016, Opinion and Protocol are central to Plaintiffs’ interference claim. *See* Plaintiffs’ Exs. J and K (ECF No. 99-1 at 63). The Protocol asserted that the Band’s “*inherent tribal criminal authority doesn’t extend (1) outside of trust lands or (2) to non-members of the Mille Lacs*

⁴ Because defendants’ have not seen the 2014 Report, their assertion that it identified “egregious misconduct” is entirely speculative. *See V5 Techs. v. Switch, Ltd.*, No. 2:17-cv-02349-KJD-NJK, 2019 U.S. Dist. LEXIS 224482, at *10 (D. Nev. Dec. 20, 2019) (“arguments [that] are premised on unsubstantiated speculation [are] insufficient to bring an issue within the sphere of relevant discovery”).

⁵ Defendants argue that the amount the Band paid for the 2014 Report might “suggest[] an even strong [sic] justification for the Defendants’ responses to the Band’s law-enforcement misconduct,” Defendants’ Memorandum at 16, but again they do not explain how information of which they had no knowledge can explain or justify their actions.

Band,” Plaintiffs’ Ex. K (ECF No. 99-1 at 46-63) (emphasis in original), and that Band police officers “**May Not Lawfully**...Conduct investigations regarding violations of state law....” *Id.* (emphasis in original). As described in Plaintiffs’ response to Interrogatory No. 18, most of the Defendants’ acts of interference that Plaintiffs have identified, and the relief Plaintiffs seek in this case, derive from Defendants’ actions to enforce these express restrictions on the Band’s law enforcement authority. *See* Defs.’ Ex. F at 8-32.

Notably, the Opinion and Protocol do not claim that the restrictions imposed by the County Attorney on the Band Police Department were based on the conduct of Band officers. Instead, they assert that these restrictions were based on a *legal analysis* of the scope of the Band’s law enforcement authority. For example, the Opinion asserts that its purpose was to “authoritatively state the *legal relationships* that exist among [County and Band] law enforcement officers under Minnesota law effective July 22, 2016.” Plaintiffs’ Ex. J at 2 (emphasis added). The Opinion makes no suggestion that the scope of that authority was based on the past conduct of Band officers. *See id.* Likewise, in their discovery responses, Defendants asserted that “[t]he Opinion states the County Attorney’s *legal conclusions* on what law enforcement authority Band police officers would have following the revocation of the 2008 Cooperative Agreement,” and that the County Attorney’s position was and remains that “there is *no lawful authority* stating that the Band has inherent law enforcement authority on Non-Trust Lands or over persons who are not members of a federally-recognized Indian tribe, nor can the federal government delegate

such authority.” Def. Walsh’s Answers to Plaintiffs’ First Set of Interrogatories at 4-5, 11 (Plaintiffs’ Ex. U) (ECF No. 99-1 at 113-114, 120) (emphasis added).

Most importantly, in their Answers filed with the Court, Defendants did not seek to explain or justify their interference based on the conduct of the Band’s officers. Instead, apparently relying on their legal position regarding the limited scope of the Band’s authority, Defendants alleged that they *did not* interfere with the Band’s inherent and federally delegated law enforcement authority. County’s Answer ¶¶ 5.M-5.U (ECF No. 17); Sheriff’s Answer ¶¶ 5.M-5.U. (ECF No. 19); and County Attorney’s Answer ¶¶ 5.M-5.U (ECF No. 21).

As discussed above, Defendants make no attempt to show that the 2014 Report or other documents sought in the Ballard Spahr subpoena are relevant to the legal dispute over the extent of the Band’s inherent and federally delegated law enforcement authority – the issue raised in Defendants’ Answers and discovery responses. Instead, they shift ground and assert a new defense: that their interference with the Band’s inherent and federally delegated law enforcement authority was somehow “justified” by the conduct of the Band’s officers. This attempt to introduce a new, unpled and contradictory “justification” defense cannot establish the relevance of the documents sought in the Ballard Spahr subpoena. *See* Rule 26(b)(1), Advisory Committee Note (2000 Amendment) (parties “have no entitlement

to discovery to develop new claims or defenses that are not already identified in the pleadings”).⁶

Third, the “justification” defense is legally insufficient. The County, as a subdivision of the State of Minnesota, has no authority to restrict the exercise of an Indian tribe’s inherent or federally delegated law enforcement authority. *See, e.g., Rice v. Olson*, 324 U.S. 786, 789 (1945) (“The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”). This fundamental principle is reflected in Minn. Stat. § 626.90, which confers the powers of a state law enforcement agency on the Band under specified circumstances; subdivision (6) provides that “[n]othing in this section shall be construed to restrict the band’s authority under federal law.” *See also* Minn. Stat. § 16C.05, subd. 7 (prohibiting state agencies from requiring an Indian tribe “to deny its sovereignty as a requirement or condition of a contract with an agency.”) In their Answers, none of the Defendants alleges that they had authority to restrict the exercise of the Band’s inherent or federally delegated law enforcement authority based on the conduct

⁶ Because justification is an affirmative defense, it is relevant only to the question of liability. *See Reed v. Columbia St. Mary’s Hosp.*, 915 F.3d 473, 477 n.1 (7th Cir. 2019) (“An affirmative defense is one that admits the allegations in the complaint, but avoids liability, in whole or in part, by new allegations of excuse, justification or other negating matters.”). To be clear, Plaintiffs seek only declaratory and injunctive relief. Plaintiffs’ interference allegations were not pleaded to prove Defendants’ liability but to prove injury sufficient to convey Article III standing, and Defendants’ “justification” argument is insufficient to defeat standing.

of Band officers. Because Defendants’ new “justification” defense is unpled and legally insufficient, Defendants’ claim that the documents sought in the Ballard Spahr subpoena are relevant to that “justification” defense fail to demonstrate that they are relevant or proportional to the needs of the case.

B. Defendants’ Argument that the Documents Sought in the Ballard Spahr Subpoena Are Relevant to Show that Defendants’ Actions Did Not Injure Plaintiffs Lacks Merit.

Defendants also argue that the documents sought in the Ballard Spahr subpoena are relevant to the issue of whether Defendants’ actions injured Plaintiffs. As discussed above, injury and causation are necessary elements of Plaintiffs’ standing to litigate this case. Contrary to Defendants’ arguments, it is not necessary for Plaintiffs to prove (and Plaintiffs do not allege) that Defendants are solely responsible for every law enforcement problem on the Reservation.⁷ Rather, the standing issue is whether Plaintiffs can establish *some* injury arising at least in part from Defendants’ interference with the exercise of the Band’s inherent and federally delegated law enforcement authority. *See Food Mktg. Inst.*, 139 S. Ct. at 2362. This is a threshold inquiry with respect to which the parties have already

⁷ For example, Defendants assert that, “[d]espite the pre-existing problems plaguing the Band’s tribal police department—that are detailed in the [2014] Report—this lawsuit is based on the Band’s accusations that it was Defendants that caused *all* the Band’s law enforcement problems when Defendants allegedly interfered with the Band’s inherent law enforcement authority.” Defendants’ Memorandum at 2-3 (emphasis added). However, Plaintiffs have not alleged that Defendants caused “all” the Band’s law enforcement problems and need not do so to establish standing.

exchanged tens of thousands of pages of documents. The additional documents Defendants now seek through the Ballard Spahr subpoena are not relevant to this issue and are not proportional to the needs of the case, especially given the extensive discovery to date and the limited burden on Plaintiffs to establish some injury fairly traceable, at least in part, to Defendants' actions.

Plaintiffs' claims regarding the injury and causation components of standing are that Defendants' interference with the exercise of the Band's inherent and federally delegated law enforcement authority resulted in: (1) an injury to the Band's sovereignty by interfering with the exercise of the Band's lawful law enforcement authority under federal law, *see* Compl. ¶¶ 5.M, 5.O., 5.P.; Plaintiffs' Resp. to Defs.' Set II Interrogatories at 14-16 (Defs.' Ex. F, ECF No. 92-6); (2) an injury to Plaintiffs' Rice and Naumann, whose ability to exercise authority conferred upon them by the Band and practice their chosen profession as law enforcement officers was compromised *see* Compl. ¶¶ 5.N., 5.Q., 5.S., 5.T; and (3) a reduction in law enforcement and public safety on the Reservation, *see* Compl. ¶ 5.T.; Plaintiffs' Resp. to Defs.' Set II Interrogatories at 14-16 (Defs.' Ex. F, ECF No. 92-6).

As noted in Plaintiffs' Memorandum, the first injury – the injury to the Band's sovereignty – arises from the fact of Defendants' interference and requires no further proof. *See* Plaintiffs' Memorandum at 32 (citing *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153-54 (9th Cir. 2017)). The second injury requires proof that Plaintiffs Rice and Naumann were deterred from exercising the lawful authority conferred upon them by the

Band beginning in mid-2016 and has nothing to do with a performance review conducted two and a half years earlier. And the third injury turns on the law enforcement situation on the Reservation beginning in mid-2016 and the consequences of Defendants' actions thereafter, not the law enforcement situation on the Reservation in 2013.

Defendants' principal argument regarding injury and causation is addressed to Plaintiffs' third claim of injury (that Defendants' actions led to a decline in law enforcement and a worsening of public safety on the Reservation) and posits that the 2014 Report's description of misconduct by tribal officers is relevant because "the Band's problems with policing authority originate not in the Sherriff[sic] or the County Attorney's office but rather with the Band." Defendants' Memorandum at 14.⁸ However, for purposes of Plaintiffs' standing, the issue is not where the Band's law enforcement problems

⁸ Much of Defendants' argument is based on speculation about what is in the Report. Although Plaintiffs acknowledge that the 2014 Report addresses "misconduct by tribal officers," *see* Defendants' Memorandum at 14, Defendants' assertions that the "Report identifies a *pattern* of misconduct and lack of oversight *that impacted crime on the reservation*," that such misconduct was "egregious" and the origin of "the Band's problems with policing authority," and that "[t]he problems identified in the Report have continued into the relevant period of this lawsuit," *id.* at 19, 18, 14 (emphasis added), are entirely speculative. Similarly, Defendants' assertion that the Report contradicts Chief Executive Benjamin's recent statements that the Band experienced "a period of the highest rate of violence, drug related crime and death we have ever known in our modern history" *after* Defendants began interfering with the Band's Police Department in 2016, *id.* at 19-20, is also speculative. Defendants further speculate when they assert that the Band's alleged failure to implement all of the recommendations in Report is evidence of a continuation of the "problems" identified in the Report.

originated, but whether the actions taken by Defendants beginning in mid-2016 made those problems worse.

Plaintiffs do not dispute that there were significant law enforcement problems on the Reservation when the events giving rise to this case took place. Indeed, Plaintiffs' Complaint itself alleges:

According to statistics published by the Minnesota Bureau of Criminal Apprehension, Mille Lacs County had the highest crime rate of any county in Minnesota during 2015 and 2016. Within Mille Lacs County, a disproportionate amount of criminal activity occurs within the Reservation. Criminal activity within the Reservation is not limited to trust lands, but takes place on Band and non-Band member fee lands as well.

Compl. ¶ 5.L. Thus, Plaintiffs' third claim of injury is not that there were no law enforcement problems on the Reservation before Defendants began interfering in mid-2016 with the exercise of Plaintiffs' law enforcement authority, but that Defendants' actions made those pre-existing problems worse.

Plaintiffs provided a detailed explanation of this point in response to Defendants' Interrogatory No. 25, which asked Plaintiffs to identify every criminal activity or overdose that would have been prevented but for Defendants' actions "beginning January 1, 2016." *See* Plaintiffs' Resp. to Defendants' Set II Interrogatories at 38 (Defs.' Ex. F, ECF No. 92-6). As Plaintiffs explained:

Plaintiffs allege that Defendants interfered with the exercise of Plaintiffs' law enforcement authority *at a time when the Band faced serious law enforcement problems on its reservation, including high rates of gang and drug activity and resulting overdoses and deaths*. Plaintiffs contend that it can reasonably be inferred that *Defendants' substantial interference with the*

exercise of Plaintiffs' law enforcement authority under these circumstances harmed Plaintiffs, whether or not any particular overdose or criminal activity would have been prevented but for the actions or inactions of Defendants. Plaintiffs further contend that this inference is supported by Defendants' previous acknowledgement that: (1) the loss of the law enforcement services provided by Band police officers would compromise law enforcement, public safety and officer safety on the reservation; and (2) *additional* (not reduced) law enforcement activity was needed to address the increasing gang and drug problems on the reservation.

Id. at 39-40 (emphases added). Plaintiffs' response then quotes, at length, a detailed threat assessment prepared by the County Sheriff in 2014 that described the extent of drug-related criminal activity within the County and Reservation. *Id.* at 40-46. Notably, nowhere in that threat assessment did the County Sheriff suggest that the law enforcement problems on the Reservation could be attributed, in any way, to the conduct of the Band's Police Department. *See id.* Rather, the County Sheriff repeatedly pointed to partnerships with the Band's Police Department as important to addressing the threats. *See id.*

Plaintiffs' response to Interrogatory No. 25 goes on to note that "[t]he law enforcement threats reported in the Sheriff's Threat Assessment got worse, not better, from 2016 through 2018." *Id.* at 48. Plaintiffs supported this statement with specific facts relating to that time period – that is, the time period at issue in this case – including at least 134 tribal police reports responding to drug overdoses from September 20, 2016, to April 20, 2019. *Id.* at 48-51.

Plaintiffs' then explained that:

In this environment, it can reasonably be inferred that Defendants' actions to restrict the exercise of the Band's inherent tribal law enforcement authority

and the authority possessed by Band police officers under Special Law Enforcement Commissions issued by the Bureau of Indian Affairs contributed to a worsening law enforcement situation, a further deterioration in public safety on the reservation, and an increase in drug trafficking and drug overdoses. For example, the restrictions placed on the exercise of the Band's inherent tribal law enforcement authority prevented Band police officers from conducting drug interdiction traffic stops, one of the proactive law enforcement measures identified in Sheriff Lindgren's Threat Assessment as necessary to address drug and gang activity on the reservation.

Id. at 47; *see also id.* at 50-51 (discussing specific ways in which Defendants' actions led to a worsening law enforcement situation on the Reservation during this time); Plaintiffs' Memorandum at 33 (describing additional direct evidence Plaintiffs will present on the impacts of Defendants' actions during the time period at issue in this case). In short, Plaintiffs' alleged injury as stated throughout the pleadings and in detailed discovery responses is not that Defendants caused all the Band's law enforcement problems but rather that Defendants' actions beginning in mid-2016 contributed to worsening an already difficult law enforcement situation.

Defendants do not explain how the documents sought in the Ballard Spahr subpoena are relevant to Plaintiff's claim of injury or why additional discovery is needed after Plaintiffs have provided detailed interrogatory responses explaining their claim and the parties have exchanged tens of thousands of pages of documents regarding the law enforcement situation during the relevant time period. For example, Defendants' interest in knowing the reason "why crime rates were rising as of the date of the [2014] Report and whether *the Band* has done anything to stop it," Defendants' Memorandum at 15 (emphasis

added), does not make the Report relevant to the actual issue before the Court – whether Defendants’ conduct beginning in mid-2016 contributed in some way to a worsening of the law enforcement situation on the Reservation. Nothing in the documents sought in the Ballard Spahr subpoena will help to answer that question.

C. Defendants’ Miscellaneous Arguments Fail to Show that the Documents Sought in the Ballard Spahr Subpoena Are Relevant and Proportional to the Needs of This Case.

Defendants also argue that various recommendations in the 2014 Report are relevant because they “directly belie Plaintiffs’ claims.” Defendants’ Memorandum at 13. However, Defendants never make clear which claims *in this case* those recommendations allegedly “believe.” We address Defendants’ arguments regarding the recommendations in the Report here to show the lack of merit.

Defendants allege that the Report is relevant because the Band’s Chief Executive, Melanie Benjamin, stated that the Report “recommended that the Band make ‘better relations with county sheriffs,’” but “[i]nstead, the Band sued the prior Mille Lacs County Sheriff, and continued this action against the current Mille Lacs County Sheriff.” *Id.* at 14. There are two problems with Defendants’ argument. First, Defendants misquote and misrepresent what Chief Executive Benjamin said. She stated that “[t]he Band should develop a plan for comprehensive law enforcement *in Districts II and III* including better relations with county sheriffs.” Defendants’ Ex. A at 3 (emphasis added). Because District

II is in Aitkin County and District III is in Pine County,⁹ this statement had nothing to do with *Mille Lacs* County. Second, the Report's 2014 recommendation for improved relations with the Aitkin and Pine County Sheriffs sheds no light on whether actions taken by Mille Lacs County, the Mille Lacs County Attorney, and the Mille Lacs County Sheriff beginning in mid-2016 interfered with the Band's law enforcement authority or injured the Plaintiffs.

Defendants next claim that the Report is relevant because, according to Chief Executive Benjamin, it recommended retroceding Public Law 280 authority and expanding "the size and authority of [the Band's] tribal court to handle more non-violent crimes." Defendants' Memorandum at 14. However, Defendants fail to explain how either recommendation is relevant to Plaintiffs' standing claims in this case. Retroceding Public 280 authority would reduce state and county law enforcement authority within the Reservation and increase federal authority, leaving the Band's inherent and federally delegated authority unchanged. That the Report's authors thought the Band should consider such a proposal sheds no light on whether Defendants' interfered with *the Band's* law enforcement authority two-and-a-half years later or whether such interference injured Plaintiffs. The same is true of the 2014 Report recommendation to expand the size and authority of the tribal court – it has nothing to do with whether Defendants interfered with

⁹ See Mille Lacs Band of Ojibwe, *Reservation Map*, available at: <https://millelacsband.com/about/reservation-map> (last viewed Jan. 24, 2020).

the exercise of the Band *Police Department's* authority or injured the Band beginning in mid-2016.

Defendants further claim that the Report is relevant because, according to the Chief Executive, the Report recommended the formation of a citizen review board; according to Defendants, the Report's discussion of this recommendation is relevant because the Band "accuses Defendants of disrupting public trust." *Id.* However, Plaintiffs have made no such allegation in this case; as discussed above, Plaintiffs allege that Defendants engaged in specific actions that interfered with the exercise of the Band's law enforcement authority and that such interference resulted in specific injuries to Plaintiffs. Whether or not a citizen's review board was advisable in 2014 sheds no light on whether Defendants interfered with the Band's law enforcement authority beginning in mid-2016.

Defendants also assert that because, according to Chief Executive Benjamin, the Report recommended "a five-year longitudinal study on the cause of increased crime rates," it is relevant to allegations that "Defendants have limited the Band's ability to stop crime on the former reservation." *Id.* at 15. Defendants add that it is "relevant to the Band's policing authority to understand why crime rates were rising as of the date of the Report and whether the Band has done anything to stop it." *Id.* However, while the Report may have recommended that the Band undertake a study into the cause of increased crimes rates, there is nothing to suggest that the Report itself sheds any light on the cause of crime rates – indeed, recommending a study suggests a distinct lack of information existed at the

time. Nor could the Report contain any information on what steps the Band took to “stop” rising crime rates in response to the Report’s recommendation, because those steps would necessarily occur *after* the Report was completed.

In sum, Defendants have wholly failed to demonstrate that the documents sought in the Ballard Spahr subpoena are relevant to the issues in this case or are proportional to the needs of the case. For this reason as well, Defendants’ motion to compel and to enforce the subpoena should be denied.

III. THE DOCUMENTS SOUGHT IN THE BALLARAD SPAHR SUBPOENA ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE.

Even if the content of the 2014 Report were relevant and its discovery proportional to the needs of the case, the Report is not discoverable if it is protected by the attorney-client privilege. *See NCUA Bd. v. CUMIS Ins. Soc’y, Inc.*, No. 16-cv-139 (DWF/LIB), 2017 U.S. Dist. LEXIS 215417, at *10 (D. Minn. Sep. 29, 2017) (citing Fed. R. Civ. P. 26(b)(1)). Defendants make two alternative arguments to defeat Plaintiffs’ assertion of privilege over the 2014 Report. First, they claim the Report “is not privileged because it is a non-confidential policy document prepared by lawyers who were acting in a non-legal capacity for the purpose of giving governmental policy advice.” Defendants’ Memorandum at 21. Second, they claim that even if the Report was privileged, the privilege was waived by Chief Executive Benjamin’s 2014 newsletter column. *Id.* at 24-26. Defendants’ assertions are contradicted by sworn declarations provided to the Court

describing the circumstances surrounding the decision to appoint hearing officers to conduct the investigation that led to the report and are not supported by law.

A. The 2013 Report Is a Confidential Attorney-Client Communication Protected by the Attorney-Client Privilege.

Defendants argue that the 2013 report is not confidential because Chief Executive Benjamin “made public statements about the Report’s finding and recommendations, quoting directly from the Report itself,” and those “quoted statements are memorialized in a public news article that was widely distributed to Band members and the public generally, via the Internet.” *Id.* at 21. Defendants’ argument conflates the question of whether a communication was made in confidence with the issue of waiver. “It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.” *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355-56 (4th Cir. 1984) (quoting McCormick, *Evidence*, § 91, pp. 187-88 (Cleary ed. 1972)). There is no credible argument that the report itself is not confidential: as sworn by the Band’s counsel and Chief Executive Benjamin, the report was designated a privileged and confidential communication when it was provided to Band leadership, and has remained so since because only Band leaders and Band attorneys have seen the report itself. Baldwin Decl. ¶¶ 30-31; Benjamin Decl. ¶¶ 12-13 (ECF No. 100).

Defendants next argue that the report “is a policy document, not a communication as contemplated by the attorney-client privilege protections.” Defendants’ Memorandum

at 22. Defendants rely on language in the Band’s statutes to support their argument. *Id.* However, the Chief Executive’s general statutory authority to conduct an investigation and inquiry sheds no light on whether the report itself is a “communication.” It seems beyond debate that a report prepared by attorneys and given to a client constitutes a “communication.” *See Black’s Law Dictionary* at 273 (7th ed. 2001) (defining “communication” as “[t]he expression or exchange of information by speech, writing, or gestures”).

Defendants argue that the report is not a communication between an attorney and client because the attorneys “were acting in the capacity of providing systems analysis and change, not acting as legal counselors.” Defendants’ Memorandum at 22. Although hearing officers are not required to be attorneys under Band law, the Band specifically sought attorneys to act as hearing officers under Executive Order 166-13 because of the legal issues involved. Benjamin Decl. ¶¶ 5-7. The report communicates the attorneys’ legal advice regarding the personnel matters investigated – matters which are decidedly not discussed in Chief Executive Benjamin’s 2014 newsletter column. *See* Defendants’ Ex. A at 3.

Similarly, Defendants argue that the report was not prepared for the purpose of securing legal advice. *Id.* at 22-24. However, it is the provision of legal *services*, not just “legal advice,” which defines the contours of the privilege. For a communication to be protected by attorney-client privilege, the communication must be either: “for the purpose

of facilitating the rendition of professional legal services to the client,” *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (quoting Supreme Court Standard 503(b)) (describing Supreme Court Standard 503(b) as an authoritative source that “courts have relied upon . . . as an accurate definition of the federal common law of attorney-client privilege”); or “for the purpose of securing either a legal opinion, legal services, or assistance in a legal proceeding.” *MasterMine Software, Inc. v. Microsoft Corp.*, No. 13-cv-971 (PJS/TNL), 2015 U.S. Dist. LEXIS 193050, at *24 (D. Minn. Aug. 5, 2015). “[W]hen a matter is committed to a professional legal advisor, it is ‘prima facie committed for the sake of legal advice and [is], therefore, within the privilege absent a clear showing to the contrary.’” *In re Bieter Co.*, 16 F.3d at 938 (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977) (en banc)).

The attorneys preparing the report marked every page of the report as a confidential attorney-client communication – clear evidence that the attorneys believed they were providing legal services. *See* Baldwin Decl. ¶ 30 (ECF No. 99); Benjamin Decl. ¶ 12 (ECF No. 100). And, the content of the report includes legal advice. Baldwin Decl. ¶¶ 28-29; Benjamin Decl. ¶¶ 5, 14. Additionally, the attorneys were hired to provide “assistance in a legal proceeding”; under Band statutes, they served as “hearing officers,” which unquestionably suggests a role providing “assistance in a legal proceeding.” *See In re Bieter Co.*, 16 F.3d 929 at 935. Defendants’ cramped interpretation of the scope of the privilege lacks merit.

Furthermore, although the Chief Executive may hold executive hearings to make rules or policies, it does not follow that all hearing officers' reports and recommendations are necessarily "policy advice." In this instance, Executive Order 166-13 specifically tasked Mr. Hilke and Mr. Larsen with investigating "potentially improper conduct by one or more officers of the Police Department" as well as "develop[ing] recommendations for policies, procedures and further steps for improving the operations and oversight of the Police Department." Plaintiffs' Ex. AA (ECF No. 99-1 at 183). As Plaintiffs' Memorandum shows (at 39-42), the report was prepared by attorneys retained for the purpose of providing legal services to the Band, and the predominate purpose of the report was to provide legal advice.

Defendants' interpretation of the Band's statutes in a manner inconsistent with that of the executive and legislative branches of the Band's government (both of which viewed the 2014 Report as a confidential attorney-client communication) lacks merit. For example, the fact that the Band's statutes make separate provision for appointing hearing officers and hiring external legal counsel does not mean, as Defendants contend, that "[a] hearing officer is not to act as a chief legal advisor." Defendants' Memorandum at 23. As relevant here, hearing officers appointed under Title 4 of the Mille Lacs Band Statutes Annotated (MLBSA) § 13 have subpoena powers – a power which is very relevant to conducting investigations, participating in legal proceedings, and securing legal advice, and which is not given to external legal counsel under 4 MLBSA § 16. *See* 4 MLBSA §

12(c) (“The powers of subpoena shall be available to any executive hearing of inquiry. The executive hearing officer may issue subpoenas and cause them to be served and enforced.”). That the Chief Executive chose to employ hearing officers to obtain confidential legal advice was entirely appropriate.

Numerous authorities provide that engaging attorneys to conduct internal investigations and inquiries involves the provision of legal services. *See, e.g., Sandra T.E. v. S. Berwyn School Dist. 100*, 600 F.3d 612, 620 (7th Cir. 2009); *Pritchard v. County of Erie*, 473 F.3d 413, 421 (2d Cir. 2007). That the result of such investigations includes “policy advice” is not dispositive because “[f]undamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct . . . and is not demarcated by a bright line.” *Pritchard*, 473 F.3d at 419-420. When attorneys advise government officials responsible for law enforcement policies on ways to improve those policies, they are rendering legal advice:

It is to be hoped that legal considerations will play a role in governmental policymaking. When a lawyer has been asked to assess compliance with a legal obligation, the lawyer’s recommendation of a policy that complies (or better complies) with the legal obligation – or that advocates and promotes compliance, or oversees implementation of compliance measures – is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be encouraged to seek out and receive fully informed legal advice in the course of formulating such policies. . . . To repeat: The availability of sound legal advice inures to the benefit not only of the client . . . but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law. This observation has added force when the legal advice is sought by officials responsible for law enforcement and corrections policies.

Pritchard, 473 F.3d at 422 (internal citations and quotation marks omitted).

Plaintiffs submitted clear evidence that the attorneys provided legal services in their capacity as hearing officers in the form of sworn declarations by counsel and Chief Executive Benjamin; that the report the attorneys prepared as hearing officers was confidential at the time it was prepared and has been kept confidential since that time; and that the report was a communication made in furtherance of the rendering of legal services. Thus, Plaintiffs have established that the report is protected by the attorney-client privilege and Defendants' Memorandum does not show otherwise.

B. The Band Has Not Waived Its Privilege to Keep the Report Confidential.

Defendants argue that "selective public disclosure of the report's contents" waived attorney-client privilege as to the report and that "the Band intends to use the Report as both a sword and a shield" because "the Band has already used selective portions of the Report (in a public newsletter) as a basis to argue that the Band has resolved any problems with its tribal police department before Defendants allegedly interfered with the Band's policing authority." Defendants' Memorandum at 24-25. Defendants thus present two issues: whether the newsletter article effectively waived the Band's privilege to keep the entire report confidential, and if so, whether the scope of that waiver encompasses the ancillary attorney interview notes, documents reviewed by the attorneys and attorney billing invoices sought by the subpoena.

Generally, disclosure of any significant portion of a confidential communication waives the privilege as to the whole. *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) (“[T]he disclosure of ‘any significant part’ of a communication waives the privilege.”) (quoting *United States v. Cote*, 456 F.2d 142, 145 (8th Cir. 1972)). Defendants cite Federal Rule of Evidence 502 for the proposition that “[i]f a party discloses a document that is subject to attorney-client privilege, a court may find that the party has waived privilege over all documents related to the subject matter.” Defendants’ Memorandum at 24. “Rule 502, however, only applies to disclosures made in a federal proceeding.” *Dukes v. Wal-Mart Stores, Inc.*, No. 01-cv-2252 CRB (JSC), 2013 U.S. Dist. LEXIS 42740, at *26 (N.D. Cal. Mar. 26, 2013). Still, where the disclosure is “extrajudicial . . . rather than as part of this litigation,” “fairness must be the touchstone in determining whether [a party’s] disclosure of certain findings [in a privileged document] compels disclosure of the entire [document].” *Id.* at *27 (citing *In re von Bulow*, 828 F.2d, 94 103 (2d Cir. 1987)).

As to Defendants’ first argument that the 2014 newsletter waived the Band’s privilege as to the 2014 Report, disclosure of some of the findings and recommendations contained within the 2014 Report – without disclosing the facts and legal analysis that the attorneys communicated to the Band to support those findings and recommendations – is insufficient to waive the Report’s privileged and confidential nature. “It is the substance of the request for legal advice and the advice given that is protected from disclosure.”

Burris v. Versa Prods., No. 07-3938 (JRT/JJK), 2013 U.S. Dist. LEXIS 21851, at *13 (D. Minn. Feb. 19, 2013). The Band Chief Executive’s 2014 newsletter column does not disclose the substance of the Band’s request for legal advice except in the most general terms as “concerns regarding the conduct and oversight of members of the Tribal Police Department.” Defendants’ Ex. A at 3 (ECF No. 92-1). Nor does the newsletter disclose “the advice given” by the attorneys pertaining to the specific misconduct investigated or the attorneys’ analysis and reasoning as to why they made the policy recommendations described. *Burris*, 2013 U.S. Dist. LEXIS 21851, at *13; *see id.*

It is well established by other federal district courts that press releases and public statements summarizing findings and conclusions of investigative reports do not waive the privilege as to the reports themselves when the underlying facts and analysis communicated by attorneys within the reports are not disclosed. *See EEOC v. Tex. Hydraulics, Inc.*, 246 F.R.D. 548, 557 (E.D. Tenn. 2007) (statement revealing EEOC’s “ultimate conclusion – its findings” without revealing “the conclusions, legal advice or privileged communication of the EEOC’s attorneys during the investigation . . . or the legal reasoning upon which the ultimate conclusion was based” did not waive privilege); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 619 (S.D. Ohio 1983). This is because the partial disclosure of just conclusions and findings fails to disclose a significant portion of the privileged communication. *In re Dayco Corp.*, 99 F.R.D. at 619.

Despite Defendants' assumptions, Chief Executive Benjamin's March 2014 newsletter column did not disclose any facts regarding the specific misconduct investigated or the Band Police officers involved. Indeed, that Defendants are forced to speculate as to the content of the Report and the nature of the "misconduct" investigated confirms that a significant portion of the Report remains confidential. Similarly, while the newsletter describes the attorneys' general findings and recommendations, the newsletter does not describe how or why the attorneys reached those findings or the evidence supporting the recommendations, nor what advice the attorneys provided for dealing with the specific misconduct and personnel issues investigated. Notably, Defendants do not allege that the Report itself has ever been released outside of the limited audience of Band leaders and attorneys.

As to Defendants' second argument, that the scope of the waiver extends to the entire report "and all documents related to it," Defendants' Memorandum at 25-26, there is little support for a broad subject-matter waiver in this instance. Subject-matter waiver is generally limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. Fed. R. Evid. 502, 2011 committee note on subd. (a) (emphasis added). It is "reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." *Id.* It is "the strategic use *in litigation* of otherwise privileged information

[that] obliges [a] party to waive the privilege regarding other information concerning the same subject matter.” *Id.*, 2009 addendum to comm. note on subd.(a). (emphasis added).

Broad subject-matter waivers are thus disfavored where an intentional disclosure was ‘extrajudicial.’ See *XYZ Corp. v. United States (In re Keeper of the Records)*, 348 F.3d 16, 25 (1st Cir. 2003). In *Dukes v. Wal-Mart Stores*, Wal-Mart made public comments to *The New York Times* that disclosed information contained in a confidential memo prepared by its attorneys by describing the attorneys’ methodology for examining wage disparities and the attorneys’ ultimate finding as to that issue. 2013 U.S. Dist. LEXIS 42740 at *24. However, that “intentionally disclosed privileged information” did not waive Wal-Mart’s privilege as to the entire memo itself, which Wal-Mart had kept confidential and never voluntarily disclosed. *Id.* at *24. In circumstances somewhat analogous to the present dispute, the *Dukes* plaintiffs “argue[d] that it would be manifestly unfair to allow Wal-Mart to selectively disclose portions of the Memo it believed were beneficial to its position –and in one of the largest publications in the country – while refusing to disclose the full scope of these facts to Plaintiffs.” *Id.* at *27-28 (internal quotation marks omitted). But the *Dukes* court found “no unfairness” because “Wal-Mart has not attempted to use any portions of the Memo *in this litigation*. As long as the initial disclosures of privileged communications ‘are and remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver.’” *Id.* (quoting *In re von Bulow*, 828 F.2d at 103) (emphasis added). This is because “[d]isclosures made in

public rather than in court – even if selective – create no risk of legal prejudice until put at issue in the litigation by the privilege holder.” *Id.*

The same is true here. The Band has not attempted to use the 2014 Report ‘as both a sword and a shield’ *in this litigation*. As set forth in *In re EchoStar Communs. Corp.*, 448 F.3d 1294, 1301 (Fed. Cir. 2006), a party “uses the attorney-client privilege as both a sword and a shield” when “it uses the [privileged] advice *to establish a defense*” and “the selective waiver of the privilege may lead to the inequitable result that the waiving party could waive its privilege for favorable advice while asserting its privilege on unfavorable advice.” (Emphasis added). Similarly, in *Shukh v. Seagate Tech. LLC*, 848 F. Supp. 2d 987, 991 (D. Minn. 2011), the defendant selectively waived its privilege by disclosing only the privileged communications that the defendant received while claiming that the defendant’s communications in response were still privileged, and the defendant had indicated its intent to rely upon the disclosed communications *in that litigation*. Thus, the “sword and shield” argument depends upon Plaintiffs disclosing a selected part of the privileged report to establish a claim or defense *in this litigation*.

Contrary to Defendants’ argument, the Band has not used the 2014 Report *in this litigation* “to argue that the Band has resolved any problems with its tribal police department before Defendants allegedly interfered with the Band’s policing authority.” Defendants’ Memorandum at 25. A 2014 newsletter column describing the Report’s ultimate recommendations could not possibly respond to Defendants’ alleged interference

that began in 2016, and Defendants have consistently asserted attorney-client privilege over the Report in this litigation. Plaintiffs have no intent to rely upon the Report to support any of their claims because the Report is simply not relevant to the claims and defenses in this case. Because Plaintiffs' disclosure was extrajudicial and Plaintiffs have no intent of relying on the Report in this litigation, any waiver accomplished by publication of certain report recommendations in a newsletter does not waive privilege as to the entire report. Thus, Defendants have failed to show that the newsletter article waived attorney-client privilege as to the entire confidential report.

C. Disclosure of the Report Itself Does Not Require Disclosure of the Attorneys' Interview Notes, Documents Reviewed by the Attorneys or the Attorneys' Invoices.

Defendants present no argument that the newsletter column that they alleged waived the Band's privilege as to the 2014 Report also waives privilege or work-product protection as to the attorneys' interview notes, documents reviewed by the attorneys or the attorneys' invoices. The newsletter column does not disclose the substance of the interviews with Band members or the documents reviewed. As shown in Plaintiffs' Memorandum at 42-45, the notes of Band member interviews and the documents reviewed in preparing the report are protected by both the attorney-client privilege and work-product doctrine. The column relied upon by Defendants to support their waiver argument makes only opaque references that such interviews and document reviews occurred. Such references are insufficient to waive the privilege as to the attorney-client communications and attorney

work-product as to those documents. *See, e.g., In re Nat'l Prescription Opiate Litig.*, No. 17-MD-2804, 2018 U.S. Dist. LEXIS 142270, at *59, *69 (N.D. Ohio Aug. 1, 2018) (disclosure of entire report produced by attorneys investigating company's potential misconduct and lack of "adequate oversight" did not waive work-product protections as to underlying interview notes or documents reviewed in preparing report where report "did not disclose the *specific* contents of any of the attorney interview notes or the search terms used in the investigation" to identify documents to review); *Libbey Glass, Inc. v. Oneida Ltd.*, 197 F.R.D. 342, 346 (N.D. Ohio 1999) ("passing allusions" that did not "disclose the substance of communications" with counsel provided no basis for finding waiver of attorney-client privilege).

Furthermore, "[t]he attorney-client privilege and the work-product doctrine, though related, are two distinct concepts and waiver of one does not necessarily waive the other." *In re EchoStar Communs. Corp.*, 448 F.3d at 1300. Work-product waiver is not a broad waiver of all work product related to the same subject matter as is the attorney-client privilege. *Id.* The three cases cited by Defendants in favor of "a broad subject-matter waiver" that includes all of the underlying documents in fact support Plaintiffs' position. *See* Defendants' Memorandum at 25.

First, in *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 639 (N.D. Iowa 2000), the court held that as to work-product production, the scope of waiver is narrow, extending "as to items actually disclosed" and requiring "an intention that an

opposing party see the work product. . . . [D]isclosure of some documents does not destroy work product protection for other documents of the same character.”¹⁰ Here, Plaintiffs have not disclosed any of the content of the interviews with Band members or the documents reviewed by the hearing officers. Thus, there has been no work-product waiver as to those documents.

Second, *Mills v. Iowa*, 285 F.R.D. 411, 415 (S.D. Iowa 2012), involved defendants’ voluntary and intentional release of its entire investigative report of an alleged sexual assault of a student and associated investigation notes to the public following defendants’ public “commitment to the people of Iowa” that the “investigation would be as transparent as humanly possible.” Plaintiffs then sought all communications between the defendants and the report’s authors on the theory that release of the entire report and notes constituted a broad subject-matter waiver as to the entire investigation. *Id.* at 416-417. The court agreed that “fairness dictate[d]” a limited subject-matter waiver for two reasons: defendants announced an intent to be “completely open and transparent about the conduct of the investigation,” and an employee who was fired as a result of the report questioned the report’s integrity. *Id.* at 416-17. Neither of those “fairness” factors apply here, where

¹⁰ Although Defendants conflate attorney-client privilege and work-product protections in their scope-of-waiver argument, *St. Paul Reinsurance Co.* clearly distinguishes the two. *See id.* at 639 (“broad concepts of subject matter waiver analogous to those applicable to claims of attorney-client privilege are inappropriate when applied to Rule 26(b)(3)”) (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222 (4th Cir. 1976)).

the Band assiduously ensured that the investigation remained confidential and the report's integrity is not debated.

Third, *Luminara Worldwide v. Liown Electronics Co.*, No. 14-3103 (SRN/FLN), 2015 U.S. Dist. LEXIS 175271 (D. Minn. Oct. 2, 2015), involved intentional disclosure of two confidential documents to an adverse party in discovery that the disclosing party intended to use to support its claims. Thus, it was a 'sword and shield' case and is inapplicable here, where Plaintiffs have not disclosed any of the protected documents in discovery or indicated an intent to rely upon them to support their claims.¹¹

In sum, the documents sought in the Ballard Spahr subpoena are protected by the attorney-client privilege and the work-product doctrine. For these reasons as well, Defendants' motion to compel and to enforce the subpoena should be denied.

IV. THE ABILITY TO REDACT CERTAIN INFORMATION DOES NOT PROTECT THE PRIVACY INTERESTS OF NON-PARTIES IN THIS CASE OR PROTECT AGAINST EMBARRASSMENT OR HARASSMENT.

Defendants assert that because the existing confidentiality order entered in this case, ECF No. 66, allows parties to mark produced documents as "attorneys' eyes only" and to redact "[t]ruly sensitive, nonresponsive information" or "any arguably privileged

¹¹ *Luminara* is also a patent-law case. Other courts have recognized that "in this specific area of patent law, there is a broad subject-matter waiver that is not subject to fairness balancing" and thus, disclosure of attorney opinions in those cases can work "a broad subject-matter waiver of work product protection and attorney-client privilege." *Johns Hopkins Univ. v. Alcon Labs., Inc.*, No. 15-525-SLR/SRF, 2017 U.S. Dist. LEXIS 109191, at *9 (D. Del. July 14, 2017).

information,” Plaintiffs’ concerns about the privacy of non-parties “do not justify withholding the Report.” Defendants’ Memorandum at 26-27. This both mischaracterizes Plaintiffs’ concerns and the Court’s confidentiality order.

The Court’s confidentiality order defines “confidential information” to

include[] “comprehensive law enforcement data” that is classified as “private,” “confidential” or “nonpublic” under applicable provisions of the Minnesota Government Data Practices Act (“MGDPA”), other information classified as “private,” “confidential” or “nonpublic” under the MGDPA, or information deemed “confidential” under the Mille Lacs Band’s statutes or personnel policy.

ECF No. 66 ¶ 1(b). Under that order, “[a] party or non-party disclosing a document may redact nonresponsive information within the document on grounds that nonresponsive information is confidential as defined in paragraph 1(b).” *Id.* ¶ 3(a). However, parties may not redact confidential information that is also responsive. *Id.* ¶ 3(b). There is no provision in the confidentiality order for redacting privileged information, as Defendants suggest. Only information that is both confidential under the MGDPA or Band law *and* nonresponsive may be redacted from produced documents. Defendants have confirmed the limited reach of the confidentiality order by stating that it “does not address *federally* protected data” because paragraph 1(b) does not expressly say so. *See* Decl. of Brett Kelley ¶ 26 (ECF No. 80) (emphasis added). Thus, privileged information is also not redactable by the express terms of the confidentiality order.

Furthermore, it is not clear that the “truly sensitive” information in the report *could* be redacted because it may be responsive. The entire Report is responsive to the subpoena

because Defendants requested the entire Report. Defendants have asserted that the “pattern of misconduct” and “the problems identified in the Report” are relevant to their case, and the portions of the Report that describe that misconduct are the same portions that contain non-parties’ private information. Defendants’ Memorandum at 19. In this situation, redacting would not work, and would likely only generate further disputes requiring the Court’s intervention. *Accord Burris*, 2013 U.S. Dist. LEXIS 21851, at *9 (“redacting allegedly nonresponsive or irrelevant portions of discoverable documents breeds suspicions” because “[p]arties making such redactions unilaterally decide that information within a discoverable document need not be disclosed to their opponents, thereby depriving their opponents of the opportunity to see information in its full context and fueling mistrust about the redactions’ propriety”) (internal quotations omitted).

Defendants assert that it is “vanishingly unlikely” that the report contains information “more sensitive than, for example, a child abuse report or a murder investigation report,” which Defendants have already produced in this case. Defendants’ Memorandum at 27.¹² However, “the very act of disclosing an employee’s sensitive and personal data is a highly, and frequently, an unnecessarily intrusive act – whether or not that disclosure is governed by the terms of a Confidentiality Order.” *Raddatz v. Standard*

¹² Such police reports are clearly “comprehensive law enforcement data” protected by the MGDPA and thus fall squarely within paragraph 1(b) of the confidentiality order; details regarding victims’ identities could be redacted under the Order if they are nonresponsive.

Register Co., 177 F.R.D. 446, 447-48 (D. Minn. 1997). Whether such personal information is “more sensitive” than a completely different type of information already disclosed doesn’t matter; the issue is “whether the proposed discovery would subject a person to annoyance or embarrassment.” *Ivey v. MSOP*, No. 12-cv-30 (DWF/TNL), 2019 U.S. Dist. LEXIS 126727, at *10 (D. Minn. July 30, 2019) (citing Fed. R. Civ. P. 26(c)).

Some of the sensitive information in this report pertains to persons who are law enforcement officers and who may continue to interact with Defendants in their professional capacities, even if they no longer work for the Band. Disclosure of such information to Defendants would subject those persons to annoyance or embarrassment due to the intrusiveness of the disclosure, regardless of the confidentiality order.

V. CONCLUSION.

For the reasons stated here and in Plaintiffs’ Memorandum, Defendants’ motion to compel and to enforce the Ballard Spahr subpoena should be denied and Plaintiffs’ motion for a protective order and to quash the subpoena should be granted.

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Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

/s Charles N Nauen

Charles N. Nauen (#121216)

David J. Zoll (#0330681)

Arielle S. Wagner (#0398332)

100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401

Tel: (612) 339-6900

Fax: (612) 339-0981

cnnaugen@locklaw.com

djzoll@locklaw.com

aswagner@locklaw.com

ZIONTZ CHESTNUT

s/Marc Slonim

Marc Slonim, WA Bar #11181

Beth Baldwin, WA Bar #46018

Wyatt Golding, WA Bar #44412

2101 – 4th Ave., Suite 1230

Seattle, WA 98121

Phone: 206-448-1230

mslonim@ziontzchestnut.com

bbaldwin@ziontzchestnut.com

wgolding@ziontzchestnut.com

Attorneys for Plaintiffs