IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTIRCT OF WEST VIRGINIA
BECKLEY DIVISION

MICHAEL D. ROSE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 5:22-cv-405**
	)	
JEFF S. SANDY, et al.,	)	
	)	
Defendants.	)	
	)	

MOTION TO QUASH BY JAMES C. JUSTICE, II, GOVERNOR, AND BRIAN ABRAHAM, CHIEF OF STAFF TO THE GOVERNOR

Plaintiffs seek to force the Governor of West Virginia and his Chief of Staff into the deposition chair in a lawsuit, in which they are not parties, concerning conditions at the Southern Regional Jail (the "SRJ"). What is more, Plaintiffs intend to depose the Governor and his Chief of Staff regarding funding decisions irrelevant to the issues in this litigation — whether the named defendants acted negligently or improperly. Plaintiffs likewise seek a document production from the Governor and his Chief of Staff of a voluminous set of documents with little relevance — and no litigation value — to the claims contained within the Second Amended Complaint.

The court should quash Plaintiffs' subpoenas because (1) they are not entitled to depose the nonparties Governor and his Chief of Staff, plainly high-ranking state government officials, absent exceptional circumstances not present here; *see, e.g.*, *Blankenship v. Fox News Network, LLC*, No. 2:19-cv-236, 2020 WL 7234270 at *1 (S.D.W. Va. Dec. 8, 2020) (Aboulhosn, M.J.) (granting protective order to prevent

deposition of two United States Senators); and (2) the Governor and his Chief of Staff, as nonparties, have no information that would provide value in this litigation beyond what Plaintiffs possess — and can request — from parties, *see Virginia Dept. of Corr. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019).

BACKGROUND

In September 2022, Plaintiffs initiated this lawsuit against SRJ staff, executives in the West Virginia Division of Corrections and Rehabilitation (the "WVDCR"), the Cabinet Secretary of the West Virginia Department of Homeland Security (the "WVDHS"), employees of various county commissions, and employees of medical providers to the SRJ. Plaintiffs press fourteen causes of action alleging generally that (a) Defendants violated, conspired to violate, and failed to intervene in violation of, Plaintiffs' Eighth and Fourteenth Amendment rights; (b) that Defendants were, and conspired to be, negligent, grossly negligent, and negligent per se; (c) that Defendants did, and conspired to, intentionally inflict emotional distress upon Plaintiffs; and (d) that Defendants violated Plaintiffs' rights under the Americans with Disabilities Act. Based upon those allegations, Plaintiffs seek a declaratory judgment and injunction to compel Defendants to remedy the conditions at the SRJ.

In September 2023, Plaintiffs served nonparty subpoenas duces tecum on the Governor and his Chief of Staff, Brian Abraham. *See* ECF No. 632-1; 632-2. Those subpoenas command the Governor and his Chief of Staff to produce, and submit to deposition regarding, the documents sought in the "Attached Amended Notices of

Deposition," which had been previously filed with the Court. *See* ECF No. 629 & ECF No. 630. Specifically, Plaintiffs seek to force the nonparties Governor and his Chief of Staff to produce the following:

1. [A]ny and all emails in possession, custody, and/or control of this witness in accordance with the ESI search protocol attached hereto.
2. [A]ny and all text messages sent or received on your state issued cell phone in accordance with the ESI search protocol.
3. [A]ll documents having in any way to do with request (sic) for use of or expenditure concerning CARES Act funding as it relates to corrections in West Virginia, and specifically, Southern Regional Jail.
4. [A]ny and all documentary evidence which causes you, as Governor, to question the validity of Plaintiffs' claims.
5. [T]he reports of Cabinet Secretary Sandy which were required to be sent to you pursuant to Article VII section 18 of the *West Virginia Constitution*, including but not limited to, any information in writing under oath that you ever requested from officers of WVDMAPS/WVDHS; WVDCR/West Virginia Regional Jail Authority, relating to the condition, management, and/or expenses of, or having any way to do with (sic) Southern Regional Jail, as it relates to the allegations in Plaintiffs' Complaint.

ECF No. 629 at 3.[1]

In a good-faith attempt to respond, counsel for the Governor and his Chief of Staff had two meet-and-confer calls with the Plaintiffs' counsel. During the second call, on Monday, October 9, 2023, counsel was able to ascertain from Plaintiffs' counsel how they interpreted the ESI Protocol that they had drafted and attached to each subpoena. In particular, the ESI Protocol as drafted included a long list of custodians but did *not* include the Governor or his Chief of Staff as custodians that should be searched. After learning that Plaintiffs' counsel intended otherwise, the

[1] Requests to Chief of Staff Brian Abraham are substantially identical to the requests to the Governor, only replacing references to the Governor with references to the Chief of Staff. ECF No. 630 at 3.

Governor's Office immediately implemented a search pursuant to the Plaintiff's ESI protocol. That search yielded 134 results from both the Chief of Staff's email and the Governor's email. Those emails are being reviewed for privilege and will be produced to Plaintiffs by October 19, 2023. Neither the Governor nor the Chief of Staff possesses a state-issued cell phone.

The parties met and conferred regarding the remaining requests on October 9 and failed to resolve remaining objections. The Governor and his Chief of Staff accordingly file this Motion to Quash to protect their rights and interests as nonparties to this case, and to protect the Office of the Governor of West Virginia and Chief of Staff from unnecessary and burdensome discovery.

ARGUMENT

The Governor and his Chief of Staff request that the Court limit the enforcement of Plaintiffs' subpoena to require the production of only those documents that are necessary for Plaintiffs' claims and that cannot be obtained elsewhere. The requests for depositions should be quashed in their entirety. Absent truly extraordinary circumstances, the Governor and his Chief of Staff, as nonparties and high-ranking state government officials, should not be subject to a deposition seeking information that is — at best — tangential to the claims involved in this litigation, and is readily available from other sources. Because of the low litigation value of the information sought and its general availability, a deposition of the Governor or his Chief of Staff would pose an undue burden to each, as nonparties, and implicate serious federalism concerns.

With respect to the subpoena's request for the production of documents, the Governor and his Chief of Staff seek further limitation of the enforcement of the subpoena. Here, in a proactive and good faith effort to work toward a fair accommodation of this dispute, a search was performed on both email accounts using the ESI protocol attached to the subpoena. Subject to a privilege review, the undersigned anticipates those will be produced. Because the remaining requests for production seek documents beyond what Plaintiffs reasonably need to prove their case, they pose an undue burden to the nonparties. Accordingly, the Governor and his Chief of Staff request the court to narrow the subpoenas served upon them to only require the production of emails in accordance with the ESI protocol. The remaining requests in each subpoena should be quashed.

I. The extraordinary circumstances necessary to justify forcing the deposition of a high-ranking government official, including the Governor of a sovereign state, are not present here.

Long ago, the Supreme Court made clear that, to protect the integrity of the administrative process, it is "not the function of the court to probe the mental processes of" high-ranking government officials. *United States v. Morgan*, 313 U.S. 409, 422 (1941). It is now well-established that "absent 'extraordinary circumstances,' a government decision-maker will not be compelled to testify about his mental process in reaching a decision 'including the manner and extent of his study of the record and his consultations with subordinates.'" *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) (quoting *Morgan*, 313 U.S. at 421-22 and collecting cases).

When a party seeks to depose a state official, the specter of a federal court compelling the deposition of an executive decisionmaker threatens the "healthy balance of power" between the Federal government and the States inherent in our system of government. *In re Office of the Utah Attorney General*, 56 F.4th 1254, 1262 (10th Cir. 2022) (issuing writ of mandamus to stop deposition of Utah Attorney General). Our Founders saw that balance of power as necessary to "reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Only the most compelling and extraordinary circumstances can justify a federal court ordering the deposition of a State's governor.

Courts developed the "extraordinary circumstances" test not only to address structural concerns, but also to alleviate functional problems. *Lederman v. New York City Dept. of Parks and Rec.*, 731 F.3d 199, 203 (2d Cir. 2013) (affirming protective order preventing deposition of Mayor of New York City). It is well recognized that high-ranking government officials, who are generally more likely to be named in litigation, "have greater duties and time constraints than other witnesses." *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993) (issuing writ of mandamus to stop deposition of FDA Administrator). If high-ranking government officials were required to testify in every lawsuit naming or relating to them, those officials would "spend an inordinate amount of time tending to pending litigation." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (issuing writ of mandamus to bar deposition of Mayor of Boston). In short, the function of government would be "crippled" if courts could "unnecessarily burden" high-ranking

government decisionmakers with compelled depositions. *In re Dept. of Educ.* 25 F.4th 692, 702 (9th Cir. 2022) (issuing writ of mandamus to halt deposition of Secretary of Education).

To establish the "extraordinary circumstances" required to depose a high-ranking government official, the requesting party must (1) make a showing of bad faith; (2) demonstrate that the information sought is essential to the case; *and* (3) establish that the information sought cannot be obtained in any other way. *In re Dept. of Educ.* 25 F.4th at 702. Unless the requesting party can clearly establish all three elements, a court may not compel such a deposition. *In re United States (Reno)*, 197 F.3d 310, 312-13 (8th Cir. 1999) (issuing writ of mandamus to prohibit deposition of U.S. Attorney General and Deputy Attorney General) (collecting cases).

As to the first element, cursory allegations of bad faith are not sufficient to warrant the deposition of a high-ranking government official. *In re F.D.I.C.*, 58 F.3d 1055, 1062 (5th Cir. 1995) (issuing writ of mandamus to bar deposition of members of Board of Directors of FDIC). Rather, a "clear showing" is required. *Franklin*, 922 F.2d at 211 (vacating order of civil contempt against Director of Office of Thrift Savings for refusing to answer certain interrogatories). At bottom, the court may not compel the deposition of a high-ranking government official unless "the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result." *In re United States (Reno)*, 197 F.3d at 314.

Turning to the second factor — necessity — the party seeking to depose a high-ranking government official must show that he has information that is "absolutely needed for a case" before the court can "allow a deposition to disrupt the normal governmental balance of powers." *In re Dept. of Educ.*, 25 F.4th at 703. Indeed, the "potentially disruptive nature" of mandating high-ranking government officials to testify about "relevant, but unnecessary information," is obvious when considering the sheer number of lawsuits filed against them and their agencies. *Id.* As this Court put it, when the high-ranking government official does not have information "essential to the case," the deposition will not be compelled. *Blankenship v. Fox News Network, LLC*, No. 2:19-cv-236, 2020 WL 7234270 at *1 (S.D.W. Va. Dec. 8, 2020) (Aboulhosn, M.J.) (granting protective order to prevent deposition of two United States Senators because "Plaintiff has not shown that these proposed depositions are essential to his case").

Finally, to establish the third factor, the requesting party must show "what efforts have been made to determine whether the information is otherwise available and the extent to which their efforts failed to uncover such information." *Coleman v. Schwarzenegger*, No. CIV-S-90-0520, 2008 WL 4300437, at *4 (E.D. Cal. Sept. 15, 2008) (granting motion to reconsider magistrate judge order requiring deposition of Governor Arnold Schwarzenegger and his Chief of Staff). If the requesting party has not attempted to discover the information from other parties, then it cannot show the necessity of deposing a high-ranking government official. *In re Dept. of Educ.*, 25 F.4th at 704 (collecting cases). In only the "rarest of cases" can the deposition of a

high ranking official be ordered where the same information is available from an alternate source. *In re F.D.I.C.*, 58 F.3d at 1062. In fact, this Court has denied the deposition of two United States Senators where the requesting party had "scheduled the depositions of several others who would also have personal knowledge of the alleged conspiracy." *Blankenship*, 202 WL 7234270 at *7.

Although the Fourth Circuit has not explicitly adopted this standard in a published opinion, we are not left to guess how that Court would approach this dispute. As an initial matter, in *Franklin*, the Fourth Circuit indicated that, at the very least, a showing of misconduct was *necessary* to warrant inquiry into a high-ranking government official's decision making process. 922 F.2d at 211. Later, in *In re McCarthy*, the Fourth Circuit issued the extraordinary writ of mandamus to halt the deposition of the EPA Administrator, as a high-ranking government official, because the plaintiffs in that case had not "demonstrated a need for [the Administrator's] testimony beyond what is already in the public record," or made a showing of "clear misconduct." 636 F. App'x 142, 144 (4th Cir. 2015).

In this case, Plaintiffs have, through counsel, indicated a desire to question the Governor and his Chief of Staff primarily regarding their budget decisions, especially with respect to the CARES Act funds. Yet subjecting the Governor and his Chief of Staff to a deposition simply because three paragraphs in the Second Amended Complaint mention a funding decision *wholly unnecessary* to proving the causes of action alleged therein would be patently unreasonable.

The Governor, and through his Chief of Staff, oversee 14 cabinet secretaries, who in turn each oversees a department containing multiple divisions and officials, any of which can be sued. Funding decisions made by the Governor's office could be tangentially related to a lawsuit against any one department, or division of a department, of the State of West Virginia. Subjecting the Governor and his Chief of Staff to depositions in every such case would cause an indefensible burden upon the operations of the State.

In light of those concerns and the record presented, Plaintiffs have failed to clearly demonstrate the extraordinary circumstances necessary to justify deposing the Governor and his Chief of Staff. As an initial matter, Plaintiffs have not demonstrated that the information sought is essential to the litigation. Funding decisions made by the Office of the Governor with respect to "corrections in West Virginia, and specifically, [the] Southern Regional Jail," ECF No. 629 at 3, have no bearing on whether the named defendants acted negligently or improperly in executing their duties. And as amply demonstrated herein, information regarding the decisions in the Governor's Office about the CARES Act money is available, in depth, publicly. And any "request for use of or expenditure concerning CARES Act funding," can be obtained from the person who made the request. ECF No. 629 at 3. Indeed, Plaintiffs have provided the Governor and his Chief of Staff with deposition testimony from Secretary Sandy, Commissioner Jividen, and Commissioner Douglas about their actions surrounding the CARES Act money.

And although the inquiry should stop there, it is important to highlight that Plaintiffs make no clear showing of wrongdoing. The Amended Complaint alleges:

> 1. On September 30, 2022, roughly twenty-eight million dollars ($28,000,000.00) in federal COVID relief funds designated for state correctional expenditures were transferred to a discretionary account controlled by Governor Justice.[2]
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> 2. On October 5, 2022, Governor Justice approved a ten million dollar ($10,000,000.00) contribution from his discretionary account to Marshall University (his alma mater) to build a baseball stadium. *See id.*
>
> 3. This ten million dollar contribution came five (5) days after Governor Justice transferred roughly $28,000,000.00 in COVID relief funds designated for state correctional expenses to the discretionary account he controls. *See id.*

2d. Am. Compl., ECF No. 433 ¶¶ 288-90.

Plaintiffs' allegations of fact do not amount to a clear showing of bad faith or misconduct, especially when measured against the publicly available testimony of Berkeley Bentley, General Counsel to the Governor, explaining that decision to the West Virginia Senate Finance Committee.[3] As reflected by that testimony, WVDHS

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[2] https://www.wvgazettemail.com/news/legislative_session/governors-office-28-3m-claim-of-state-corrections-expenses-to-fund-own-account-comes-amid/article_dd6f850b-fc44-5a90-ac08-e60c5fce73b7.html

[3] On February 2, 2023, a hearing was held before the West Virginia Senate Finance Committee regarding the use of the CARES Act money. Berkeley Bentley, General Counsel to the Governor, testified as to how the Governor's Office decided to spend the CARES Act money and the measures taken to ensure compliance with the CARES Act requirements. An audio/video recording of that testimony is archived available through the West Virginia Senate website at: https://sg001-

and WVDCR incurred $28.3 million in COVID-related expenses, which were paid for out of the State's general revenue fund. When the State received the CARES Act money, it properly reimbursed itself for those payments by sending $28.3 million to the discretionary Gifts and Grants Fund. At that point, the Governor's Office was free to spend that money without restriction. Bentley Senate Testimony 11:36:27 – 11:47:05. Prior to transferring or spending CARES Act money, the Governor's Office received multiple opinions from outside counsel and an opinion from an outside accounting firm that the transfers complied with the terms of the CARES Act. Indeed, as Mr. Bentley testified, the CARES Act transfers were reviewed during the annual audit of the use of federal funds by the Governor's Office, and no finding of wrongdoing was made. *Id.* at 11:46:41. Plaintiffs make no allegations, much less a clear showing, to the contrary.

The Governor's Office then used $10 million from the Governor's Gifts and Grants Fund to free up money for infrastructure and economic development projects throughout the State. Bentley Senate Testimony 11:42:00 – 11:43:07. As Mr. Bentley explained to the Senate, the Water Development Authority had previously approved a $13.5 million expenditure from the Economic Enhancement Grant Fund (the "EEGF") for long-sought improvements to the Marshall baseball stadium. The Governor, concerned about the financial burden on the EEGF — which is used to fund infrastructure, water/sewer, and economic development projects — decided to

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alleviate some of the financial burden on the EEGF resulting from the approved Marshall project. As a result, more EEGF money became available for statewide infrastructure improvements and economic development. *Id.* Considering the evidence in the public record, Plaintiffs' cursory allegations in the Second Amended Complaint establish no wrongdoing, and thus no "extraordinary circumstances" exist to justify the deposition of the Governor and his Chief of Staff.

Simply put, no "extraordinary circumstances" exist to warrant a federal court to compel the deposition of the Governor of West Virginia and his Chief of Staff. There has been no wrongdoing, the requested information is not essential to the litigation, and it can be obtained elsewhere. The court should therefore quash Plaintiffs' subpoena with respect to the requested depositions.

II. The discovery requested from the Governor and his Chief of Staff do not survive the heightened proportionality considerations required for non-party discovery.

In general, the scope of discovery is governed by Federal Rule of Civil Procedure 26(b)(1), which allows discovery of any information "relevant to any party's claim or defense," that is "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). The proportionality inquiry asks whether the "burden or expense of the proposed discovery outweighs its likely benefit." *Id.*

Discovery sought against a nonparty, however, is subject to "a more demanding variant of the proportionality analysis." *Virginia Dept. of Corr. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019). Under Rule 45, a subpoena may not subject a nonparty to an undue burden. Fed. R. Civ. P. 45(d)(3)(A)(iv). After all, "[b]ystanders should not be drawn into the parties' dispute without some good

reason, even if they have information that falls within the scope of party discovery." *Jordan*, 921 F.3d at 189. When deciding whether to allow nonparty discovery, the court must balance the potential benefit of the requested discovery against the burden imposed, giving the nonparty's status "special weight." *Id.* Indeed, a party cannot be permitted to obtain information from a nonparty "beyond what the requesting party reasonably requires." *Id.* at 190.

When considering the potential benefit of discovery sought from a nonparty, the court must determine that the discovery will "likely (not just theoretically) have . . . benefit in litigating important issues . . . over and above what the requesting party already has." *Jordan*, 921 F.3d at 189. Indeed, to survive a motion to quash a nonparty subpoena, the requesting party must establish that it cannot obtain the same or comparable information "from one of the parties to the litigation — or, in appropriate cases, from other third parties that would be more logical targets for the subpoena." *Id.*

When considering the burden imposed on the nonparty, the court must consider — along with the monetary cost — "other cognizable burdens as well." *Jordan*, 921 F.3d at 189. Special considerations exist when seeking discovery from an executive or member of his staff—for the Governor of a State no less than the Vice President of the United States. *See Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 367 (2004). Members of an executive branch, including constitutional officers, are highly visible officials whose actions affect countless people and who, as a result, are "easily identifiable target[s]" for lawsuits. *Id.* at 386. Moreover, just as

compelled discovery of a federal executive raises separation of powers concerns, the compelled discovery of a state executive raises significant federalism concerns. The court should therefore carefully weigh the need for discovery before burdening a nonparty executive with the "unnecessary intrusion" into the operation of his office. *Id.* at 387.

What is more, the burden imposed by unnecessary discovery on a decisionmaker's deliberative process is another cognizable burden to be considered by the court. *See N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 150-51 (1975). Congress itself has recognized that when decisionmakers know that their deliberative process will be subject to public review, they are much less likely to have a robust, free-ranging discussions, and that the "policies formulated would be poorer as a result." *Id.* at 150 (quoting Senate and House Reports explaining the deliberative process exemption in the Freedom of Information Act). In short, such a needless burden imposes a chilling effect.

The burden imposed by these subpoenas on the Governor and his Chief of Staff, who are nonparties, outweighs any potential benefit that the information sought could possibly have in this case. Because the subpoena "seeks information beyond what the requesting party reasonably requires," the Court can grant this Motion to Quash without any further consideration of the other cognizable burdens imposed upon the Governor and his Chief of Staff. *Jordan*, 921 F.3d at 190. As discussed, the information sought with respect to the CARES Act funding is both irrelevant to the resolution of Plaintiffs' claims and obtainable from other sources.

Plaintiffs further seek "any and all documentary evidence which causes you, as the Governor," and "you, as the Governor's Chief of Staff," "to question the validity of Plaintiffs' claims." ECF No. 629 at 3; ECF No. 630 at 3. The opinions of the Governor and his Chief of Staff (who are not named or involved in this litigation) regarding the validity of Plaintiffs' claims is, again, unnecessary to the resolution of those claims. Finally, Plaintiffs seek reports generated by Secretary Sandy, including "any information in writing under oath that the Governor ever requested." ECF No. 630 at 3.[4] Plaintiffs have failed to explain why that information cannot be obtained from Secretary Sandy or other parties.

Nonetheless, the impropriety of this subpoena becomes even more clear when considering the burdens imposed upon the functioning and deliberative process of the Office of the Governor and his Chief of Staff. The chilling effect on the deliberative process of a decisionmaker is clear. If a Governor or his Chief of Staff know that they can be called to testify regarding any decision tangentially related to any civil lawsuit, they will be far less likely to engage in a robust consideration of the available options or render difficult decisions. As the Supreme Court recognized, "there are enough incentives as it is for playing it safe and listing with the wind." *Sears*, 421 U.S. at 150. In addition to the burden on their deliberative function, subjecting the Governor and his Chief of Staff to deposition and discovery in every case involving the State of West Virginia, would, as discussed *supra*, severely

[4] The subpoena to the Governor seeks "information in writing under oath that you ever requested." ECF No. 629 at 3.

disrupt the operations of the State and threaten the "healthy balance of power" between the States and the Federal Government that serves to "reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458. To mitigate such adverse impacts, Plaintiffs may only seek highly relevant and necessary information from the Governor and his Chief of Staff, as nonparties to this litigation. Plaintiffs have fallen far short of meeting that extraordinary burden here.

III. This Motion to Quash is timely, and therefore Plaintiffs' Motion to Compel should be denied.

A court may quash a subpoena upon the filing of a "timely motion." Fed. R. Civ. P. 45(d)(3). Plaintiffs contend that because written objections to the subpoena were not filed within 14 days of its service, no motion to quash can be timely. ECF. No. 717 at 3. But that contention is belied by the text of Rule 45 and by the caselaw.

Rule 45(d)(2) provides that a "person *commanded to produce documents*" … *may* serve on the [requesting] party . . . a written objection." Rule 45(d)(2)(B) (emphasis added). That objection "must be served before . . . 14 days after the subpoena is served." *Id.* Separately, Rule 45(d)(3) provides that "on timely motion, the court . . . must quash or modify a subpoena that . . . subjects a person to undue burden." Rule 45(d)(3). Notably, "unlike with objections, Rule 45 does not specify what 'timely' means for filing motions to quash subpoenas." *Carter v. Archdale Police Dept.* No. 1:13-cv-613, 2014 WL 1774471 at *2 (M.D.N.C. May 2, 2014). And Rule 45(d)(2) imposes no deadline on a person seeking to avoid a *deposition*, as opposed to producing documents.

Indeed, most courts — including courts within the Fourth Circuit — consider a motion to quash timely if it is filed before the return date of the subpoena. *Williams v. Big Picture Loans, LLC*, 303 F. Supp. 3d 434, 442 (E.D.V.A. 2018) (collecting cases). Looking at the text of the Rule, this interpretation is the most logical. Rule45(d)(2)(B) is a permissive rule that "does not require a person served with an objectionable subpoena to follow [the Rule's] directives in lieu of filing a motion to quash pursuant to Rule 45(c)(3)." *WM High Yield v. O'Hanlon*, 460 F. Supp. 2d 891, 894 (S.D. Ind. 2006). Indeed, the Federal Rules were amended in 1991 to use the word "timely" to replace the phrase "promptly and in any event at or before the time specified in the subpoena for compliance therewith" in providing for motions to quash. *Id.* That amendment, which was implemented to "enlarge the protections" afforded to persons subject to subpoena, cannot be read to tie the timeliness of a motion to quash to the written objections contemplated by Rule 45(d)(2). *Id.*

In this case, the Governor and his Chief of Staff were served with an overly burdensome subpoena. The subpoena seeks information unnecessary to the question of whether the named defendants acted improperly or negligently. And as evidenced by the deposition transcript attached to Plaintiffs' Motion to Compel, the information sought can be obtained from the parties. This Motion to Quash has been filed before the return date for the subpoena and is therefore timely. What is more, the Governor and his Chief of Staff have implemented the ESI Protocol authored by Plaintiffs – after a meet-and-confer necessary to determine how it

should be read – and intend to produce documents that comply with the portions of the subpoena not subject to this Motion to Quash.

CONCLUSION

Because Plaintiffs have not established the extraordinary circumstances warranting the deposition of the Governor and his Chief of Staff, and because the burdens imposed by the subpoenas severely outweigh any potential litigation benefit of the information requested, the court should grant this Motion to Quash.

James C. Justice, II, Governor, and **Brian Abraham, Chief of Staff**

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