IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. Plaintiffs, v. Michael Howe, in his official capacity as Secretary of State of North Dakota. Defendant	**NORTH DAKOTA LEGISLATIVE ASSEMBLY; SENATORS RAY HOLMBERG, RICHARD WARDNER, AND NICOLE POOLMAN; REPRESENTATIVES MICHAEL NATHE, WILLIAM R. DEVLIN, AND TERRY JONES; AND SENIOR COUNSEL AT THE NORTH DAKOTA LEGISLATIVE COUNCIL – CLAIRE NESS' MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO RESPONDENTS' MOTION FOR STAY PENDING APPEAL**

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I. INTRODUCTION

The Plaintiffs' Response to the Motion to Stay mischaracterizes the amount of time and effort that will be required for production of the requested documents. As previously explained, the process implemented by Legislative Council's legal division was to generate a cursory estimate as to the burden Plaintiffs' subpoenas imposed. The only number in the "Privilege Logs" that has any level of certainty is the "Total Number of Hits for the Key Word Searched" column as it was derived from simply looking at the total number of "items" that appeared when each of the State Officials' Outlook accounts were searched for each term. The Plaintiffs' extrapolated numbers are simply wrong for the reasons explained below.

II. ARGUMENT

It has always been the Respondents' position that it has no duty to respond to the Plaintiffs' subpoenas in accordance with the precedent of our sister circuits. However, in a good faith effort

to substantiate the imposed burden and comply with Fed. R. Civ. P. 45 to the extent reasonably practical under the circumstances, the following steps were taken[1]:

A. Explanation of Steps Taken to Provide Numbers in Respondents' "Privilege Log."

1. A search was performed on each subpoenaed State Officials' Outlook for the following "key words:" "1504"; "Redistricting; Map"; "Subdistrict"; "District"; "Race"; "Tribal"; "Native American"; "Indian"; "Reservation"; "Voting Rights Act"; "VRA"; "Demographic"; "Criteria"; and "Training." These terms were used to provide a general estimate of the total amount of communications sought by the Plaintiffs' subpoenas. These "key words" were selected to identify at least some of the documents requested in the subpoenas. Doc. 52 at pp. 1-2.

2. The "key word" search was cooperatively performed by all eight attorneys in the Legislative Council's Legal Division. The results of the "key word" search revealed the following number of emails for each individual: (William Devlin – 6,021 emails; Ray Holmberg – 8,965 emails; Michael Nathe – 5,613 emails; Richard Wardner – 3,654 emails; Nicole Poolman – 4,976 emails; Terry Jones – 22,237 emails; Claire Ness – 13,383 emails.) This totaled 64,849 emails. Doc. 77 at p. 2.

3. The 64,849 emails underwent an extremely cursory review to identify and eliminate emails that clearly were not responsive to the subpoena (such as list serve items), and identify the sender and recipient of the emails that were not immediately eliminated. Doc. 52 at p. 2.

[1] At the time the cursory review occurred, Legislative Council's attorneys worked numerous evenings and weekends to keep pace with the heightened demands leading up to session. This initial review in addition to the workload required for the Organizational Session, which is mandated to occur the first week of December pursuant to Section 7 of Article IV of the Constitution of North Dakota, was burdensome, despite the Plaintiffs' assertions.

4. The results of this cursory review were provided to the Plaintiffs in an effort to substantiate the Respondents' undue burden objection in accordance with Fed. R. Civ. P. 45 and 26.

5. Legislative Council does not possess a software program to supplant the human effort required to scan the nearly 65,000 emails responsive to the search terms. Due to the quantity of emails, and the limited resources of the legal division, these emails were rapidly reviewed and tallied[2]. The emails were not harvested and segregated into folders as this would have taken substantially longer than the 64 hours incurred.

B. The Plaintiffs' position mischaracterizes the effort needed to comply with the document subpoenas.

As previously explained, production of the requested documents will take approximately 10 times as long as the original cursory search and tally. Doc. 52 at pp. 1-2. First, the "key word" search will need to be performed again. Second, the emails will need to be manually segregated into different folders. Third, after the emails are segregated into folders, they will need to be reviewed for responsiveness to the subpoenas. Fourth, they will need to be screened for privilege. Fifth, the privileged communications will need to be logged in accordance with the Magistrate Judge's Order. Sixth, the remaining emails will need to be provided to outside counsel for review and ultimate disclosure. This is not a 26-hour process as alleged in the Plaintiffs' response. Rather, the 640-hour estimate to sift through nearly 65,000 emails is reasonable. Doc. 52 at p. 2.

The substantial undertaking explained above is exactly "why the privilege extends to discovery requests, even when the lawmaker is not a named party in the suit: complying with such requests detracts from the performance of official duties." In re Hubbard, 803 F.3d 1298, 1310 (11th Cri. 2015). This is also why the "privilege also extends to legislative aides and assistants."

[2] The North Dakota Legislative Council's legal division is one of the smallest legislative legal divisions in the nation.

Lee v. City of Los Angeles, 908 F.3d 1175, 1187 n. 12 (9th Cir. 2018). Under Circuit Court precedent, the State Officials have no duty to respond to the Plaintiffs' discovery as it is barred by common-law legislative privilege. Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88; American Trucking, Inc. v. Alviti, 14 4th 76, 88-91 (1st Cir. 2021). This is precisely the issue now before the Eighth Circuit in the Respondents' appeal and petition for writ of mandamus.

Nonetheless, Legislative Council's legal division devoted approximately 64 hours of its time to conduct a cursory key word review in a good faith effort to identify the scope of the Plaintiffs' discovery request. Doc. 52 at p. 2. Plaintiffs' inaccurate and insulting allegation that Respondents chose "to sit on their hands" and or lacked "any effort to limit the search terms" completely ignores Legislative Council's important official duties. The Respondents are elected and hired to perform duties related to making laws, not respond to discovery requests in private civil actions. Plaintiff's glib attitude towards the Legislative Council's attorneys' role during, and leading up to, a legislative session is like claiming an accountant would not be burdened during the height of the tax season.

To reiterate, the results of the "cursory key word review" of the 64,849 emails were provided to Plaintiffs' counsel in an effort to simply further establish the burden their subpoenas impose. It did not include separating the actual emails into various folders for production. Had Respondents actually believed a comprehensive response – in addition to simply asserting legislative privilege -- was required, the documents would have been reviewed in detail and a privilege log would have been produced in accordance with Fed. R. Civ. P. 26 and 45. However, Circuit Court precedent indicates privilege logs are not required with respect because the burden of producing one is not consistent with the privilege. Hubbard, 803 F.3d at 1308-09 (holding "that the privileged documents be specifically designated and described, and that precise and

certain reasons for preserving the confidentiality be given—was also an error of law…Given the purpose of the legislative privilege…there was more than enough under Rule 45 to assess the claim of privilege and to compel the granting of the motions to quash."). Rather, the tallies in the chart were provided to substantiate the Respondents' alternative undue burden objection. To comply with the subpoenas, the initial search and review would need to be repeated and numerous additional steps would be required. This is why Thompson explained subpoena compliance "would require approximately ten 8-hour days for the 8 attorneys." Doc. No. 52 at p. 2.

Respondents went above and beyond what is required in light of a legislative privilege claim to provide a cursory estimate of the total number of documents that may be responsive to the subpoenas to substantiate an alternative objection. The Plaintiffs have taken these efforts and performed mathematical gymnastics to erroneously argue that compliance with their requests should only take 26 hours. Doc. 84 at p. 4. In essence, the Plaintiffs misconstrued and weaponized the Respondents' good-faith effort to substantiate its alternative undue burden objection. The 640-hour estimate to respond to the Plaintiffs' subpoenas does not change just because the Plaintiffs claim so. The 640-hour estimate is based on the first-hand knowledge of the substantial undertaking required to comply with the subpoena.

Put simply, compliance with the subpoenas will require a substantially more detailed review of the 64,849 emails that were potentially responsive from the initial cursory "key word" search as explained above. Each of those emails would have to be reviewed again to harvest the emails that were simply tallied to provide a cursory estimate. Then these would have to be reviewed to determine whether the emails are actually responsive to the request and/or subject to the privilege – whether it be attorney-client or legislative - as outlined in the Magistrate Judge's

Orders. Further, this substantial undertaking may ultimately be deemed unnecessary by the Eighth Circuit as this exact issue is currently pending before it.

C. Enforcement of Representative Devlin's deposition subpoena is in direct conflict with Circuit Court precedent.

Respondents will not rehash all arguments with respect to Representative Devlin's deposition subpoena, but reiterate "plaintiffs are generally barred from deposing local legislator, even in 'extraordinary circumstances." Lee, 908 F.3d at 1187-88. This applies even when the claim implicates the government's intent in a racial gerrymandering case. Id. at 1188. This is because "[a]ny questioning about legislative acts, even [in the situation of someone no longer a member of Congress], would 'interfere' by having a chilling effect on Congressional freedom of speech." MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 860 (D.C. Cir. 1988) (internal alterations in original, quotation omitted). This issue is now squarely before the Eighth Circuit. If the Eighth Circuit rules in accordance with the Circuit Courts, Representative Devlin's privilege will be unjustly lost.

D. A stay is justified under these circumstances.

The Supreme Court acknowledged "it has always been held…that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." Nken v. Holder, 556 U.S. 418, 421 (2009) (quotation omitted). In other words, a "stay simply suspend[s] judicial alteration of the status quo…." Id. at 429 (quotation omitted, alteration in original). This is certainly appropriate when there is an unsettled question of law that may protect the rights of a party. See Calvillo v. Siouxland Urology Associates, P.C., 2011 WL 5196542 at *4 (D.S.D. October 31, 2011) (holding it was appropriate to issue a stay where the "law is unsettled" and the stay will "fully protect" a party's rights.) The Magistrate Judge acknowledged "the Assembly and the Tribes marshal extensive case in law

support of their respective positions." Doc. 48 at p. 10. Notably, the state officials in American Trucking and Hubbard were in the same position as the Respondents before the First and Eleventh Circuits reversed the district court's decisions and held legislative privilege barred the requested discovery. As previously explained, American Trucking, Lee, and Hubbard all held legislative privilege barred subpoenas not issued in the prosecution of federal criminal statutes or by the United States.

The Respondents should not be required to divert their attention from their official duties until the unsettled questions involving the scope of privilege as applied to state lawmakers is answered. "The legislative privilege is important. It has deep roots in federal common law." Hubbard, 803 F.3d at 1307. This important legal doctrine will essentially be nullified if a stay is not granted until appellate review is complete. If Respondents are required to divert their time from their official duties to the monumental task of responding to a subpoena in a civil action, the entire stated purpose of legislative privilege will be lost. The time lost by what is one of the smallest legislative legal divisions in the nation during the height of the limited 80-day legislative session cannot be recovered and the Respondents would have no remedy in the event the Eighth Circuit reverses this court's discovery orders just like in American Trucking and Hubbard.

III. CONCLUSION

This case involves an unsettled question of law and a stay will ensure the correct law is applied before the legislative branch of the North Dakota government is forced to divert its attentions from its official duties. Principles of comity and federalism require the judiciary to allow this issue to be fully vetted before the important legislative privilege is disturbed. For the aforementioned reasons, the Respondents' motion for a stay should be granted.

Dated this 30th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2023, a true and correct copy of the foregoing **NORTH DAKOTA LEGISLATIVE ASSEMBLY; SENATORS RAY HOLMBERG, RICHARD WARDNER, AND NICOLE POOLMAN; REPRESENTATIVES MICHAEL NATHE, WILLIAM R. DEVLIN, AND TERRY JONES; AND SENIOR COUNSEL AT THE NORTH DAKOTA LEGILSATIVE COUNCIL – CLAIRE NESS' MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO RESPONDENTS' MOTION FOR STAY PENDING APPEAL** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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