

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

Turtle Mountain Band of Chippewa Indians,
Spirit Lake Tribe, Wesley Davis, Zachery S.
King, and Collette Brown

Plaintiffs,

vs.

Michael Howe, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022

**DEFENDANT’S MEMORANDUM IN
REPOSE TO PLAINTIFFS’ MOTION
IN LIMINE TO EXCLUDE MATTHEW
CAMPBELL AND ALAN HERBISON
FROM DEFENDANT’S WITNESS LIST**

INTRODUCTION

Defendant Michael Howe, in his official capacity as Secretary of State of North Dakota (“Defendant” or “Defendant Howe”) submits this memorandum in opposition to *Plaintiffs’ Motion In Limine To Exclude Matthew Campbell And Alan Herbison From Defendant’s Witness List* (“Plaintiffs’ Motion”) (Doc. 96). Defendant requests the Court deny Plaintiffs’ motion with respect to Matthew Campbell (“Campbell”). Defendant’s counsel does not intend to include Alan Herbison (“Herbison”) on Defendants witness list, and thus Plaintiff’s motion with respect to Herbison is unnecessary.

BACKGROUND

I. Matthew Campbell

Plaintiffs seek to exclude Campbell from Defendant Howe’s witness list. *Plaintiffs’ Memorandum In Support Of Motion In Limine To Exclude Matthew Campbell And Alan Herbison*

From Defendant's Witness List ("Plaintiffs' Memorandum"), Doc. 97 at pp. 5-8; Plaintiffs' Motion, Doc. 96. Campbell is one of the attorneys of record for Plaintiffs in this case.

A. Discovery Relating to Campbell

Defendant's intention to call Campbell as a witness at trial should come as no surprise to Plaintiffs. Defendants' initial Rule 26(a)(1) disclosures, dated June 23, 2022, listed Campbell as an individual likely to have discoverable information that Defendant may use to support his defenses. *Defendant Alvin Jaeger's¹ Initial Rule 26(A)(1) Disclosures* (Doc. 47-1) at p. 6. Defendant's initial disclosures indicated, "Campbell has information regarding the testimony he provided to the Redistricting Committee." *Id.*

Campbell is a staff attorney employed by the Native American Rights Fund ("NARF"), a non-profit 501c(3) organization headquartered in Boulder, Colorado, with branch offices in Washington, DC, and Anchorage, Alaska², which provided lobbying services for the Tribal Plaintiffs during the legislative process of redistricting at issue in this case. NARF is a sophisticated organization dealing with redistricting and the Voting Rights Act, even conducting a series of lectures to train experts on these topics, including Dr. Weston McCool, an expert Plaintiffs intend to call at trial in this case. Transcript of the Deposition of Weston McCool (Doc. 95-1) at pp. 29-33; *see also* Transcript of the Deposition of Daniel McCool, attached to the Affidavit of David R. Phillips ("Phillips Aff.") as *Exhibit A*, at pp. 15-17; *see also* Transcript of the Deposition of Loren Collingwood (Doc. 74-1) at p. 17.

¹ North Dakota Secretary of State Michael Howe has been substituted as the defendant in this case. Doc. 57. Former North Dakota Secretary of State Alvin Jaeger is no longer a defendant. *Id.*

² <https://narf.org/about-us/>

In written discovery to each of the Tribal Plaintiffs, Defendant requested copies of communications between Plaintiffs and representatives of NARF. In response, the Tribal Plaintiffs produced various emails between Campbell and the Tribal Plaintiffs, dated prior to and during the legislative redistricting process at issue in this case. *Plaintiff Turtle Mountain Band Of Chippewa Indians Answer To Defendant's Interrogatories And Requests For Production Of Documents To Plaintiffs (Set No. 1)*, attached to the Phillips Aff. as **Exhibit B**, at pp. 12-13 (Request No. 9); *Plaintiff Spirit Lake Tribe's Answer To Defendant's Interrogatories And Requests For Production Of Documents To Plaintiffs (Set No. 1)*, attached to the Phillips Aff. as **Exhibit C**, at pp. 12-13 (Request No. 9). The produced emails involving Campbell are attached to the Phillips Aff. as **Exhibit D**. Notably, these emails involving Campbell were produced by Plaintiff in discovery. They were not withheld under any claim of privilege.

In the produced emails, Campbell indicated NARF kicked off its first ever Indian Country redistricting project, and offered to provide services “educating Tribal leaders and the public, assisting through the redistricting process, and helping to ensure that Native people have equal representation.” **Exhibit D** at p.1. The emails also show that Campbell worked with Tribal leaders closely during the subject legislative redistricting process, even sending Tribal leaders drafts of written testimony for them to provide to the legislative Redistricting Committee, and providing talking points to Tribal leaders on which to base their live testimony. **Exhibit D** at pp. 27-29 & pp. 33-34.

B. Campbell's Testimony Given to the Redistricting Committee

During the legislative redistricting process at issue in this case, Campbell registered as a lobbyist with the North Dakota Secretary of State under North Dakota Century Code Chapter 54-

05.1³ North Dakota law does not exempt attorneys from legislative lobbying laws, nor are attorneys acting in the capacity as lobbyists treated differently than other lobbyists under North Dakota law. *See* N.D.C.C. § 54-05.1-02(2) (listing persons the chapter does not apply to, without any reference to attorneys); *see also generally* N.D.C.C. ch. 54-05.1. Attorneys who testify at legislative committee meetings on behalf of the interests of others to do so in the capacity as lobbyists, not in their capacity as attorneys. N.D.C.C. §§ 54-05.1-02.

Campbell testified as a lobbyist at the September 15, 2021 meeting of the Redistricting Committee. Transcript of the North Dakota Legislative Assembly Redistricting Committee Meeting on September 15, 2021 (Doc. 74-2). At the September 15, 2021 meeting, Campbell introduced himself as follows:

Good morning, Mr. Chairman, members of the Committee members. My name is Matt Campbell. I'm a staff attorney at the Native American Rights Fund.

And I know Collette⁴ referred some questions over to me. I have represented the Spirit Lake Nation⁵ and the Standing Rock Sioux Tribe in litigation before. I'm consulting with them now, so I'm happy to answer any questions you may have.

Id. at pp. 46-47.

At the meeting, Campbell testified in favor of subdistricts, stating, “You know, I think what I've heard from the tribal leaders today is they are certainly very interested in sub-districting for their districts to improve their opportunities for representation.” *Id.* at p. 47. He also testified North Dakota law allows the legislature to draw subdistricts and:

As it stands right now, I think, essentially, the way the system is set up is there are three Senators for every district, and I think, you know, historically when you're looking at House of Representatives, it's a more local form of representation. And

³ <https://firststop.sos.nd.gov/lists/lobbyist?year=2021>

⁴ Collette Brown is a named plaintiff in this lawsuit.

⁵ Spirit Lake Tribe is a named plaintiff in this lawsuit.

you know, the lack of hearing from your representative is one aspect of that in terms of why having a sub-district would be more beneficial and have that more equitable representation.

* * *

Because you would have a representative that may be more responsive to your local needs because it's a more local view of things because you're not considering, you know, voters the entire district. You're considering voters within that sub-district as your -- you know, who you are representing.

Id. at pp. 49-50. He further testified:

Well, I think there are many considerations to look at when you're thinking about sub-districts and, you know, thinking about communities that are indicating that they have shared interests in terms of their identity, their cultural values, their economic values. That they believe that they are entitled to have a representative that's more responsive to their needs. It's certainly a reason to advocate for single-member districts. And of course, the North Dakota statutes allow for that.

Id. at pp. 50-51. He also testified:

I do think that it is beneficial to have sub-districts because when you're thinking about communities at a local level, having a greater opportunity to elect representatives of your choice from your area is much improved when you have sub-districts, whether it's -- you know, we're talking about reservations or other rural areas across the state. Having sub-districts can be beneficial to those local areas. And so I do think when you're looking at that and when communities come together and are advocating for their interest and asking for subdistricts, it's certainly something that is beneficial to them because you would have representatives that are more responsive to their needs when they're only worried about votes from their areas.

Id. at pp. 55-56.

C. Purposes of Calling Campbell as a Trial Witness

Plaintiffs have alleged in their Complaint that “[t]he North Dakota Legislature, including the Redistricting Committee, failed to actively and effectively engage tribal citizens in the 2021 Redistricting process.” Complaint, Doc. 1 at p. 18, ¶ 74. Plaintiffs also allege there was an “atmosphere of hostility toward the concerns of Tribal Nations during the 2021 redistricting process.” *Id.* at p. 19, ¶ 81. In their defense, Defendants intend to establish at trial that the Native

American and Tribal representatives who testified during the lengthy legislative process either specifically requested the creation of subdistricts, or did not request any specific district configuration. Defendants intend to establish that the redistricting law being challenged in this lawsuit created subdistricts around every reservation in North Dakota where it could be done to benefit Native American voters, in light of population equality requirements, and consistent with the requests made by Native American and Tribal representatives. North Dakota utilized the method requested of it by Native American and Tribal representatives to comply with the Voting Rights Act, namely the use of subdistricts where possible. Defendants intend to establish at trial that Plaintiffs waited until November 1, 2021 (the same day the Redistricting Committee submitted its final report (Doc. 60-30) and final proposed maps to Legislative Management, and only a week before Legislative Assembly would be voting on the final maps), to send a letter (Doc. 1-2) for the first time requesting a map similar to the requested map in this lawsuit, which does not include any subdistricts and joins the Turtle Mountain and Spirit Lake Reservations in a single district.

With respect to Campbell specifically, he was the only lobbyist to testify during the legislative process on behalf of a named plaintiff in this case (Spirit Lake Tribe). At the September 15, 2021 meeting of the Redistricting Committee, live testimony was also provided by named Plaintiff Collette Brown, however, she expressly redirected questions from the Committee to Campbell. In that regard, the following testimony was given:

CHAIRMAN DEVLIN: ... So my question is, I guess: if you have 3700 people roughly out of 16,000, even if you sub-districted, you're not going to have half of the sub-district. Does that matter?

MS. COLLETTE BROWN: I am going to refer your question to Native American Rights Fund Representative Matt Campbell.

Transcript, Doc. 74-2 at p. 44. Further, as discussed above, Campbell guided the testimony of Tribal leaders in any event. Campbell sent Tribal leaders drafts of written testimony for them to

provide to the legislative Redistricting Committee, and provided talking points to Tribal leaders on which to base their live testimony. *Exhibit D* at pp. 27-29 & pp. 33-34.

At trial, Defendant intends to establish Campbell never supplemented his September 15, 2021 testimony to the Redistricting Committee to indicate the client he was lobbying on behalf of was no longer requesting a subdistrict (as he had requested in his testimony) and was instead requesting to be joined in a single district with another Reservation.⁶ Plaintiffs waited until the very end of the legislative process to, for the first time, request a drastic change to the final proposed maps prepared by the Redistricting Committee. Campbell was a sophisticated lobbyist testifying in front of a legislative committee, and Defendant should be permitted to call him as a witness at trial, to question him about his lobbying, about his testimony before the legislature, and about his failure to timely supplement or correct his testimony to inform the Redistricting Committee that his lobbying client was no longer requesting subdistricts.

D. Discussions Among Counsel Regarding Campbell

In a meet and confer call to discuss trial issues, counsel for Defendant informed counsel for Plaintiffs that he intended to call Campbell as a witness at trial, and inquired whether Campbell would be present at the trial in Fargo, North Dakota. Plaintiffs' counsel indicated Campbell was not intending to be present at the trial in this case. Defendant's counsel suggested they schedule a video trial deposition of Campbell, which could be taken remotely without requiring him to travel or be present at the trial. Plaintiff's counsel then indicated he would be filing the present motion.

II. Alan Herbison

⁶ At the September 15, 2021 meeting, Campbell testified he would follow up with data to support his position. Transcript, Doc. 74-2 pp. 51-52.

Plaintiffs also seek to exclude Herbison from Defendant Howe's witness list. Plaintiffs' Memorandum, Doc. 97 at pp. 8-11; Plaintiffs' Motion, Doc. 96. As Defendant's counsel has already informed Plaintiffs' counsel, Defendant's counsel does not intend to include Herbison on Defendants witness list.

ARGUMENT

I. Matthew Campbell

Plaintiffs argue Campbell's testimony given at the Redistricting Committee meeting "mirrored those of the tribal leaders and other testifiers...." However, Campbell was the only professional and sophisticated lobbyist to testify on behalf of a named Plaintiff in this case. As indicated above, Collette Brown redirected questions to Campbell at the September 15, 2021 meeting. Further, Campbell was instrumental in educating the Tribal leaders who testified, and he even provided the prepared written testimony and provided talking points to the Tribal leaders, whose testimony unsurprisingly mirrored his own. Campbell was knowledgeable and in a position to be able to analyze census data to drive specific requests of the Redistricting Committee. *See* email from Campbell to Collette Brown, dated September 13, 2021, *Exhibit D* at p. 30 (stating, "Hi Collette, it feels pretty disrespectful to tell the tribes of a hearing in less than two days. Are you available to attend? I would like to meet with you and the Chairman to discuss what we have learned from the census numbers."). He could have timely corrected his own testimony to the Redistricting Committee to instead request a single district encompassing the Turtle Mountain and Spirit Lake Reservations, but failed to do so. Plaintiffs acknowledge in Plaintiffs' Memorandum that the census data previously released by the U.S. Census Bureau on August 12, 2021, was re-released in an easier to use format on September 16, 2021, only a day after Campbell's testimony. Doc. 97 at p. 4. During his testimony, Campbell had promised to provide follow up data to the

Redistricting Committee. Transcript, Doc. 74-2 pp. 51-52. He should testify at trial about whether he provided any follow-up information or correction to the Redistricting Committee to change his request from subdistricts to a single district for two Reservations. In fact, the request to create a single district encompassing two Reservations was not made by anyone until a month and a half later on November 1, 2021 (Doc. 1-2), the same day the Redistricting Committee submitted its final report (Doc. 60-30).

Plaintiffs also argue, “Mr. Campbell did not testify regarding the issue in this case, which is whether the map approved by the Redistricting Committee, which places the Turtle Mountain Reservation into a House subdistrict and cracks the Spirit Lake Reservation apart from the Turtle Mountain, violates the VRA.” Plaintiffs’ Memorandum, Doc. 97 at p. 4. Similarly, Plaintiffs argue, “[t]he information provided by Mr. Campbell is not particularly relevant or probative to the issues in this case. The question in this case is whether the *enacted* redistricting plan has discriminatory results for Native American voters in Districts 9, 9A, 9B, and 15 such that they lack an equal opportunity to participate in the electoral process.” *Id.* at p. 7 (emphasis in original). Plaintiffs’ contention that this case only involves that one issue is contradicted by their own Complaint, which also includes allegations specifically relating to the Redistricting Committee meetings, including that “[t]he North Dakota Legislature, including the Redistricting Committee, failed to actively and effectively engage tribal citizens in the 2021 Redistricting process.” Complaint, Doc. 1 at p. 18, ¶ 74. Plaintiffs also alleged in their Complaint that there was an “atmosphere of hostility toward the concerns of Tribal Nations during the 2021 redistricting process.” *Id.* at p. 19, ¶ 81. Plaintiffs have not withdrawn these allegations and presumably intend to introduce evidence on those issues at trial. Defendant should be permitted to call witnesses, including Campbell, to defend against these allegations.

Plaintiffs also argue *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) applies to only allow Campbell's testimony if it can be established "that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." Plaintiffs' Memorandum, Doc. 97 at pp. 6-8. As an initial matter, *Shelton* does not apply. Defendant does not seek to depose Campbell relating in any way to his work as an attorney of record in this lawsuit. Defendant seeks to call Campbell as a fact witness at trial relating to his lobbying work and testimony during the legislative process at issue in this case. Campbell worked for one of the Plaintiffs as a lobbyist during the legislative process at issue, and prior to North Dakota's enactment of the redistricting law at issue. That NARF later chose to assign that same individual to work as an attorney of record on this lawsuit (although not one of the trial attorneys evidently) does not insulate him from being subpoenaed to testify as a fact witness regarding events occurring prior to the enactment of the law being challenged. Defendant's counsel has offered to conduct a remote video trial deposition, and will issue a subpoena in that regard in the event Plaintiff loses the present motion.

Defendant has explained the importance and relevance of testimony at trial from the only lobbyist (and a sophisticated witness) who testified in the redistricting process for one of the Plaintiffs. Not only did he provide his own legislative testimony, but he guided and provided the testimony that was submitted by Tribal leaders. None of these matters are attorney-client privileged, as acknowledged by Plaintiffs freely providing the above information and documents in discovery. Any privilege that may have applied was waived by Plaintiffs providing the information and documents in discovery.

Plaintiffs suggest Defendant cannot call Campbell as a witness because Defendant did not depose him during discovery in this case. Plaintiffs' Memorandum, Doc. 97 at pp. 6-8. Defendant did conduct written discovery on the issues relating to Campbell, as discuss above in this memorandum. Plaintiffs have cited no authority, and Defendant is unaware of any authority, that a party must conduct a discovery deposition of every witness he intends to call at trial. Plaintiffs conflate discovery with trial. Defendant is not seeking discovery from Campbell. Defendant seeks to call Campbell as a witness at trial to establish the Redistricting Committee did listen to Tribal representatives and lobbyists who presented testimony, creating subdistricts where possible, as requested. Campbell failed to timely change his request of the Redistricting Committee.

Defendant respectfully requests the Court deny Plaintiffs' motion with respect to Campbell.

II. Alan Herbison

Defendant's counsel does not intend to include Herbison on Defendants witness list. Plaintiff's motion with respect to Herbison is unnecessary.

Dated this 24th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT'S MEMORANDUM IN REPOSE TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE MATTHEW CAMPBELL AND ALAN HERBISON FROM DEFENDANT'S WITNESS LIST** was on the 24th day of May, 2023 filed electronically with the Clerk of Court through ECF:

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