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 RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO MAKE AN OFFER OF PROOF**

INTRODUCTION

Defendant Michael Howe, in his official capacity as Secretary of State of North Dakota, submits this response in opposition to *Plaintiffs' Motion for Leave to Make an Offer of Proof* (Doc. No. 109). Plaintiffs' Motion should be denied because Plaintiffs' offer of proof is not premised upon any actual proof, but rather Plaintiffs' unfounded speculations about what some unidentified documents and undescribed witness testimony might tend to prove.

LAW AND ARGUMENT

Rule 103 of the Federal Rules of Evidence provides in relevant part: "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: [] if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2). An offer of proof must be specific and "provid[e] the substance of the excluded evidence." *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285, 1287 (8th Cir. 1995); *Armour & Co. v. Nard*, 463 F.2d 8, 12 (8th Cir. 1972) (citation omitted); *see also In re Chateaugay Corp.*, 165 B.R. 130, 134 (S.D.N.Y. 1994) ("In the instant case, the Claimants did make an offer of proof, but it was

inadequate. It did not contain a single explicit reference to the testimony that [the witness] was to give. Rather the attorney for Claimants presented a rambling narration of their allegations at the end of which he professed that 'if there were complete discovery there would be many more facts that would go to these questions.'") (citation omitted); *State v. Lemons*, 2004 ND 44, ¶ 14, 675 N.W.2d 148 ("The substance of the evidence is not demonstrated when [claimant's] counsel stated only that [the witness] would provide 'credible exculpatory evidence.'"); *Okken v. Okken Estate*, 348 N.W.2d 447, 452 (N.D. 1984) ("An offer of proof must be definite enough so that the court can know what facts are sought to be introduced in order to see whether these facts would have any bearing upon the case. The court is not required . . . to guess at what the offerer has in mind."). "Specificity and detail are the hallmarks of a good offer of proof of testimony, [] and conclusory terms, especially when presented in a confused manner, mark poor ones." *U.S. v. Adams*, 271 F.3d 1236, 1242 (10th Cir. 2001) (quoting 21 Wright & Graham, *Federal Practice and Procedure* § 5040, at 213 (1977)).

In addition to informing the Court of the content of the offered proof, a party "must explain what [the party] expects [the evidence] to show and the grounds for which the party believes the evidence to be admissible." *U.S. v. Crockett*, 435 F.3d 1305, 1311 (10th Cir. 2006) (quotation omitted). "Where both proper and improper purposes for proffered evidence exist, the offer of proof must rule out the improper purposes because the trial judge is not required to 'imagine some admissible purpose.'" *Perkins v. Silver Mountain Sports Club and Spa, LLC*, 557 F.3d 1141, 1147 (10th Cir. 2009) (quotation omitted). "An offer of proof is inadequate if '[t]here is nothing in the offer that would apprise the district court that the proffered testimony was anything but

cumulative.'" *Porter-Cooper*, 49 F.3d at 1287 (quoting *Strong v. Mercantile Trust Co.*, 816 F.2d 429, 431 (8th Cir. 1987)).[1]

In this case, Plaintiffs assert their offer of proof is "the documents withheld by the subpoena recipients subject to legislative privilege would support a conclusion that the North Dakota Legislature has been unresponsive to the particular concerns of Native Americans, and that the Legislature's asserted justification for the configuration of District 9 is tenuous." Doc. No. 109 at p. 3. This proposed offer of proof fails to meet any of the criteria for a proper offer of proof under Rule 103.

First, Plaintiffs have not offered the evidence itself. Plaintiffs have not identified the alleged "documents withheld by the subpoena recipients" with any objective criteria, such as by date or author. Rather, the only description Plaintiffs provide of the proffered documents is that they "would support a conclusion that the North Dakota Legislature has been unresponsive to the particular concerns of Native Americans, and that the Legislature's asserted justification for configuration of District 9 is tenuous." In other words, Plaintiffs provide no description of the actual content contained in the alleged documents, other than what the Plaintiffs hope these alleged documents might show. At the first day of trial, Plaintiff's counsel attempted to provide some explanation for what kind of documentary evidence Plaintiffs would plan to proffer:

> And what we'd like to suggest to the Court is that we make a proffer of what we think we might find from the documents if we were to get them and proceed over the course of the week as normal and a rule based on that proffer.

[1] As cited in a dissenting opinion by the Eighth Circuit Court of Appeals and dicta in the United States Bankruptcy Appellate Panel of the Ninth Circuit, Black's Law Dictionary has provided an offer of proof consists of "(1) the evidence itself, (2) an explanation of the purpose for which it is offered (its relevance), and (3) an argument supporting admissibility." *Smith v. Hy-Vee, Inc.*, 622 F.3d 904, 911 (8th Cir. 2010) (Bye, J., dissenting) (quoting *Black's Law Dictionary* 1190 (9th ed. 2009)); *in re Zulueta*, No. 10-42479, 2011 WL 4485621, at *2 n.5 (Aug. 23, 2011) (quoting *Black's Law Dictionary* (9th ed. 2009)).

Trial Day One Transcript at page 9, lines 5-9. Plaintiffs' offer of proof consists entirely of conclusory allegations and provides exactly none of the precise descriptors required for an adequate offer of proof. *See Strong v. Mercantile Trust Co., N.A.*, 816 F.2d 429, 432 (8th Cir. 1987) (noting the importance of "expressing precisely the substance of the excluded evidence."). For this reason alone, the Court should reject Plaintiffs' Motion.

Plaintiffs' proffer fails on the separate basis that Plaintiffs have not even attempted to provide an argument supporting the admissibility of the alleged evidence, which is required for an adequate offer of proof. *Smith v. Hy-Vee, Inc.*, 622 F.3d at 911. Plaintiffs' assertion that they believe "they satisfy the totality-of-circumstances test without the material subject to discovery dispute" constitutes an admission that their offer of proof, even if adequately described and relevant to their lawsuit claims, is merely cumulative of other evidence and thus inadmissible. Plaintiffs have agreed through legal counsel on the record at trial that they are only seeking the offer of proof so as not to allow their potential further *en banc* appeal to the Eighth Circuit to become mooted. Preventing a later mootness argument as part of a not-yet-realized appeal is not an adequate basis for an offer of proof either.

CONCLUSION

Defendant respectfully requests the Court deny *Plaintiffs' Motion for Leave to Make an Offer of Proof*.

Dated this 13th day of June, 2023.

By: */s/ David R. Phillips*

David R. Phillips
Special Assistant Attorney General
ND Bar # 06116
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247

(701) 751-8188
dphillips@bgwattorneys.com

Attorney for Defendant Alvin Jaeger, in his official capacity as Secretary of State of North Dakota

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO MAKE AN OFFER OF PROOF** was on the 13th day of June, 2023, filed electronically with the Clerk of Court through ECF:

Michael S. Carter
OK No. 31961
Matthew Campbell
NM No. 138207, CO No. 40808
Native American Rights Fund
1506 Broadway
Boulder, CO 80301
carter@narf.org
mcampbell@narf.org

Molly E. Danahy
DC Bar No. 1643411
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
mdanahy@campaignlegal.org

Mark P. Gaber
DC Bar No. 98807
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegal.org

Bryan L. Sells
GA No. 635562
The Law Office of Bryan L. Sells, LLC
PO BOX 5493
Atlanta, GA 31107-0493
bryan@bryansellslaw.com

Nicole Hanson
N.Y. Bar No. 5992326
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
nhansen@campaignlegalcenter.org

Samantha Blencke Kelty
AZ No. 024110
TX No. 24085074
Native American Rights Fund
1514 P Street NW, Suite D
Washington, DC 20005
kelty@narf.org

Timothy Q. Purdon
ND No. 05392
ROBINS KAPLAN LLP
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501
TPurdon@RobinsKaplan.com

By: */s/ David R. Phillips*
DAVID R. PHILLIPS