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

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, et al., Plaintiffs, v. MICHAEL HOWE, in his official capacity as Secretary of State of North Dakota, Defendant.	Civil No. 3:22-cv-00022-PDW-ARS

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO SET DEADLINES TO COMPLY WITH THIRD-PARTY DISCOVERY AND OPPOSITION TO RESPONDENTS' MOTION FOR A STAY PENDING APPEAL

Plaintiffs respectfully submit this reply in support of their motion to set deadlines to comply with third-party discovery in this case and response in opposition to Respondents' motion for a stay pending appeal. Respondents have indicated they intend to seek appellate relief with respect to this Court's orders requiring them to comply with third-party discovery in this matter. *See* ECF 79 (Notice of Appeal). To ensure any appellate proceedings are completed prior to the trial scheduled for June of this year, this Court should deny Respondents request for a stay and require legislative respondents to produce, within seven (7) days of its order, the approximately 500 communications Respondents admit involved third-party non legislators and non-legislative staff, as well as the approximately 200 communications between Representative Jones and other legislators and legislative counsel staff, over which he has waived privilege. Furthermore, the Court should require Respondents to confer with Plaintiffs regarding a reasonable timeline for producing a privilege log with respect to the approximately 1,800 remaining communications that Respondents have identified as responsive. By Respondents' own math, this process should require

no more than 26.5 hours of staff time to complete. Finally, the Court should order Respondents to make Representative Devlin available within fourteen days of the entry of this order. Denying Respondents' request for a stay and entering a date certain by which they must comply will ensure that an extended appellate process will not threaten the trial schedule in this case by expediting any motion for a stay pending appeal in the Eighth Circuit.

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 566 U.S. 418, 433-34 (2009). In evaluating whether the party seeking the stay has met its burden, Courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. at 434. While courts must consider balance the relative strength of all four factors, "[t]he most important factor is the [applicant's] likelihood of success on the merits." *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011); *see also Nken*, 556 U.S. at 434.

I. Respondents Are Not Likely To Succeed on the Merits

For all of the reasons previously discussed in this Court's orders denying Respondents' motion to quash and granting Plaintiffs' motion to enforce, Respondents are not likely to succeed on the merits of their appeal. *See* ECF 48, 63, 71, 72. Indeed, Plaintiffs will not repeat their prior arguments on the merits here, other than to note that far from presenting a "substantial case" for appellate review, this Court's finding that sharing privileged communications with third parties breaks privilege is so unremarkable as to be axiomatic. Instead, Plaintiffs rely on the Court's previous orders and incorporate by reference their briefing the merits from the motions. *See id*.;

see also Mot. to Enforce, ECF 47; Reply in Support of Mot. to Enforce, ECF 53; Opp. to Mot. to Quash, ECF 56.

Nonetheless, one issue newly raised by Respondents merits a response. During the pendency of those motions, both Plaintiffs and this Court repeatedly and unsuccessfully sought to understand the basis of Respondents' claim that producing a privilege log in this case would impose an undue burden based on the time needed by Respondents to conduct the requisite review of the communications at issue. *See* Mot. to Enforce at 4, ECF 47 (attempting to calculate the number of documents at issue); Order Granting Mot. to Enforce at 19, ECF 63 (finding "the assertion that compliance with Turtle Mountain's subpoenas would require 640 hours of Legislative Council staff attorney time is not adequately explained"); Order Affirming Grant of Mot. to Enforce at 4, ECF 72 ("what is also missing from the record is a simple estimate from the Assembly as to the number of documents at issue."). For the first time, Respondents now explain that complying with the Court's orders to produce responsive documents that are not privileged or over which privilege has been waived and to produce a privilege log, imposes an undue burden because it would require them to review more than 64,000 communications. *See* Opp. to Mot. to Set Deadlines and Mot. for Stay at 3 ("Opp."), ECF 78. Taken at face value, this is certainly an eye-popping number.[1] But even if it is an accurate accounting, that number is also deeply misleading given that Respondents have determined that approximately 62,000 of them are "clearly non-responsive."[2] *Id*. But by adding together the total number of *responsive*

[1] That Respondents were apparently able to conduct even a "cursory" review of all 64,849 documents in just 64 hours—a rate of over 1000 documents reviewed per hour—casts at least some doubt as to their newly-made assertion that "total number of hits for the keyword searched" in fact means "number of documents containing a keyword hit." *See* Opp. at 3, ECF 78.

[2] That Respondents' search results numbered in the tens of thousands, an overwhelming majority of which could be deemed "clearly non-responsive" at a rate of 1000 per hour, appears facially incredible, but is perhaps explained by the extreme breadth of the search terms chosen by

communications listed across three categories—communications between the subpoenaed individual and (1) a legislator, (2) legislative council staff, or (3) a non-legislator, non-legislative council staff third party—for all Respondents, Plaintiffs arrive at a total of just over 2,600 communications. Of these, approximately 580 are not privileged because they involved third-parties, Rep. Jones has waived privilege over another 200, and approximately 1,860 must be logged for privilege.[3] *See* ECF 47-4; ECF 50-1. Simple arithmetic demonstrates that if it would take Respondents 640 hours to review 64,000 documents it will take them just 26 hours to review the universe of 2,600 communications that is actually responsive to Plaintiffs' requests.

To the extent it was not clear before, Plaintiffs hereby assure Respondents and this Court that they have no interest in obtaining or reviewing a privilege log covering tens of thousands of "clearly non-responsive" communications.[4] Nor do Plaintiffs think this Court's orders could be reasonably construed to impose such an obligation. As such, Respondents are unlikely to succeed on the merits of their assertion that compliance is unduly burdensome based on the number of documents at issue.

Respondents, e.g. "district," "map," and "training" and the apparent lack of any effort to limit the search terms using connectors or other traditional search methods. *See, e.g.*, ECF 47-4.

[3] These numbers are in line with the estimates originally provided by Plaintiffs in their motion to enforce, *see* Mot. to Enforce at 4, ECF 47, with the addition of the totals subsequently provided for Ms. Ness, *see* ECF 50-1. Again, however, this estimate is likely inflated because it does not account for any duplication or communications that contain more than keyword. Mot. to Enforce at 4 n. 1, ECF 47; *see also* Order Granting Mot. to Enforce at 19, ECF 63.

[4] To the extent Respondents cannot, in good faith, represent to Plaintiffs and this Court that all 62,000 documents are in fact non-responsive without further review, that does not preclude the Court from entering the relief Plaintiffs have requested—that Respondents immediately complete their review, production, and logging of the approximately 2,600 documents they have already determined *are responsive*.

II. Respondents Have Not Shown Irreparable Harm

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, a stay is "'an exercise of judicial discretion' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Id*.

Here, Respondents' assertion of irreparable harm is based solely on their claim that compliance will require them to "divert a substantial amount of time from their official duties to address the third-party subpoenas," that such efforts will detract from the legislative session, and that such time "once spent . . . cannot be recovered." Opp. at 8, ECF 78. As explained above, however, complying with the subpoenas will require approximately 26 hours, or just over three hours of work for each of the eight individuals identified by Respondents as sharing this task. That is hardly a "substantial amount of time," nor can it plausibly be claimed that a three-hour commitment will severely detract from these individuals' ability to comply with their other obligations—even during the legislative session. Finally, Respondents cannot claim as irreparable a harm that is of their own making. Respondents conducted their initial review and determined that the 2,600 documents at issue were responsive months ago—before the legislative session even started. *See* Opp. to Mot to Enforce at 3, ECF 50 (noting that the initial universe of approximately 1,400 responsive documents had been identified as of December 1, 2022, and that the additional 1,200 documents in the possession of Ms. Ness had been identified by December 30, 2022). Instead of completing their review at that time, or at any time during the intervening months, Respondents chose to sit on their hands—all the while opposing Plaintiffs attempts to enforce the subpoenas by presenting a severely inflated estimate of the burdens imposed. *See*, *e.g.* Appeal of Order Granting Mot. to Enforce at 17, ECF 64 (failing to explain that despite having already "excluded" documents

identified as "clearly non-responsive" during the initial review, those documents were nonetheless affirmatively *included* in Respondents calculation of the time required to comply with Plaintiffs' requests). The Court should exercise its discretion to reject Respondents' claim to an irreparable harm that is nothing more than the predictable result of their own procrastination.

III. The Balance of the Equities and the Public Interest Support Denying a Stay and Ordering Immediate Compliance.

Plaintiffs, this Court, and the public have a strong interest in ensuring that Plaintiffs' claim is adjudicated on a full record and in time to ensure relief is available for the 2024 election. This Court has consistently recognized those interests—both in ruling in favor of Plaintiffs and against Respondents in their attempts to preclude Plaintiffs from obtaining relevant evidence in this case, and in setting a trial schedule that provides sufficient time to resolve any appeals in advance of 2024. Respondents do not seriously dispute this, and instead simply suggest that Plaintiffs will not be prejudiced if they are forced to choose between going to trial on an incomplete record and obtaining timely relief. To state this proposition is to demonstrate its speciousness.

Moreover, it is important that Respondents be ordered to comply with this Court's orders and Plaintiffs' subpoenas by a date certain. Not only will that ensure the discovery is obtained in time for trial, but it will also ensure that Respondents pursue their forthcoming appeal in an expedited manner and not as a tool of delay to run out the clock before trial. Both the Fifth Circuit and the Supreme Court recently denied stays of discovery orders against legislators in which a date certain was set, and that approach ensured an expedited resolution (and denial) of the legislators' privilege objections on appeal. *See Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.).

Finally, the public's interest in ensuring that North Dakota's electoral systems do not perpetuate historical discrimination against Native American voters is substantial and, as this Court has already found, outweighs Respondents interest in preserving privilege in the redistricting

context. This is particularly so given that the bulk of the communications and testimony at issue Respondents are withholding are not privileged.

March 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

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