

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 RESPONSE  
TO PLAINTIFFS’ MOTION TO  
EXPEDITE DISCOVERY APPEALS**

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**I. INTRODUCTION**

The Plaintiffs’ Motion to Expedite Discovery Appeals is disingenuous with respect to its statement that “Plaintiffs have conferred with counsel for the...Respondents...Respondents take no position on this motion.” Doc. 67 at p. 2. The Respondents were not provided a copy of the Plaintiffs’ actual motion prior to its filing and certainly object to numerous of the statements in the Plaintiffs’ motion.

**II. BACKGROUND**

On March 2, 2023, Plaintiffs sent an email to the Defendants and Respondents which provided the following:

Hello,  
Plaintiffs intend to file a motion to expedite consideration of the two discovery matters pending before the court—Representative Devlin’s appeal of the magistrate judge’s order denying his motion to quash and the legislative respondents’ appeal of the order granting the motion to enforce Plaintiffs’ documents subpoenas.

Scott, David – can you please let me know you [sic] clients’ respective positions on this motion? We intend to file concurrently with Plaintiffs’ response to the appeal on the document subpoenas.

Declaration of Scott K. Porsborg (hereinafter “Porsborg Dec.”) at Exhibit # 1.

On the same date, Respondents replied as follows: “Molly, we take no position on whether the panel should expedite its ruling(s).” *Id.* A copy of the Plaintiffs’ motion to expedite was not provided to the Respondents prior to filing. Porsborg Dec. at ¶5.

The Plaintiffs’ Motion to Expedite requests the Court “impose a prompt date-certain for compliance with the Magistrate Judge’s Orders. This will ensure that (1) discovery is promptly completed and (2) should Respondents attempt to seek a stay of this Court’s Order from the Eighth Circuit,<sup>2</sup> that request is promptly resolved.” Doc. 67 at pp. 1-2. The Plaintiffs’ footnote 2 provides that “[s]uch a request would not be well taken.” *Id.* at p. 2.

### III. ARGUMENT

The Plaintiffs’ assertion they “conferred with...counsel for Respondents...Respondents take no position on this motion” is disingenuous. As shown above, the Respondents only informed Plaintiffs they take no position on whether the rulings should be expedited. Porsborg Dec. at Exhibit # 1. Clearly, the Respondents object to the argumentative and self-serving statements in the Plaintiffs’ motion. Specifically, Respondents object to Plaintiffs’ assertion that a future request for a stay would not be well taken. Obviously, Respondents believe the Magistrate Judge’s Order should be reversed - for all of the reasons it previously explained - and no request for a stay would be necessary. However, the Plaintiffs’ assertion that Respondents “take no position” on their argument a stay would not be necessary in the event of an appeal is misleading.

The Eleventh and First Circuit have both determined immediate review of a district court’s decision denying discovery relief on the grounds of legislative privilege was appropriate. In *In re Hubbard*, 803 F.3d 1298 (11<sup>th</sup> Cir. 2015), the Court held four non-party lawmakers could

“immediately appeal the district court’s discovery order” which denied their motion to quash subpoenas seeking the production of documents. *Id.* at 1303-1305. The Eleventh Circuit held it had jurisdiction to hear the appeal under the collateral order doctrine and reversed the district court’s discovery order. *Id.* at 1306, 1315. In *American Trucking Assoc., Inc. v. Alviti*, 14 F.4<sup>th</sup> 76 (1<sup>st</sup> Cir. 2021), the Court reversed the district court’s decision to deny former state office holder’s motions to quash discovery requests on the grounds of legislative privilege by exercising its “advisory mandamus jurisdiction.” *Id.* at 81, 85-91.

While Respondents do not believe a stay should be necessary because its appeals should be granted, the entire purpose of these proceedings is to protect its properly invoked legislative privilege and prevent undue burden. Clearly, a stay would be necessary to preserve these interests in light of the fact the Eleventh and First Circuits reversed decisions very similar to the Magistrate Judge’s Orders on immediate appeals.

In short, Plaintiffs’ statement implying the Respondents take no position with respect to their motion is disingenuous in light of its content.

#### **IV. CONCLUSION**

While it is true the Respondents take no position with respect to whether the Court wishes to issue an expedited order on these appeals, the Respondents object to the argumentative statements in the Plaintiffs’ motion as explained above.

Dated this 10th day of March, 2023.

SMITH PORSBORG SCHWEIGERT  
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th 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 LEGISLATIVE COUNCIL – CLAIRE NESS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION TO EXPEDITE DISCOVERY APPEALS** 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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By /s/ Scott K. Porsborg

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