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

CIVIL NO. 1:22-CV-00031

Charles Walen, an individual; and Paul Henderson, an individual, Plaintiffs vs. Doug Burgum, in his official capacity as Governor of the State of North Dakota; Michael Howe, in his official capacity as Secretary of the State of North Dakota, Defendants and The Mandan, Hidatsa and Arikara Nation; Lisa DeVille, an individual; and Cesareo Alvarez, Jr., an individual. Defendants-Intervenors	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION REQUESTING STAY OF MAGISTRATE JUDGE'S *ORDER DENYING STAY* (DOC. 89)**

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Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Civil Local Rule 72(D)(2) and other applicable rule, Defendants Doug Burgum, in his official capacity as Governor of the State of North Dakota and Michael Howe, in his official capacity as Secretary of the State of North Dakota[1] (collectively, "Defendants") hereby appeal from the Magistrate Judge's *Order Denying Stay*, issued January 24, 2023 (Doc. 89) ("the Order"), and renew their request for a stay pending this Appeal. The Magistrate Judge's Order requires Defendants to produce to Plaintiffs

[1] Via order of the Magistrate Judge (Doc. 90), Michael Howe has been substituted as a lawsuit Defendant for Alvin Jaeger who is no longer the North Dakota Secretary of State. The substitution is reflected in the caption.

by January 31, 2023 transcripts of ND legislative hearings and floor sessions, which they have properly claimed are their work product / trial preparation materials. Defendants formerly appealed (Doc. 85) the Magistrate Judge's *Order Regarding Discovery Dispute*, issued January 3, 2023 (Doc. 77), which appeal ("the Appeal") remains pending with the Court. Because the Appeal involves important protections afforded to litigants under the Federal Rules of Civil Procedure for work product / trial preparation material and because the Appeal has not yet been decided, Defendants request the Order be stayed until the Appeal has been decided.

I. APPEAL ISSUES

As set forth in their *Appeal of Discovery Order* (Doc. 85) and as discussed below, Defendants believe, respectfully, that the Magistrate Judge clearly erred and/or ruled contrary to law in the following respects:

1. "The recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings." Order at 7.

   Defendants Response: While the Magistrate Judge has clarified in the Order that she did not intend the foregoing finding to apply to the transcription process but only to the recordings, the implication remains in her findings that the transcription process was likewise conducted to memorialize public proceedings. Yet, there is no evidence or argument to suggest the transcripts were created to memorialize public proceedings; all of the evidence shows they were created solely in anticipation of litigation or for use at trial and not in the "ordinary course".

2. There is no real dispute that protection of an attorney's mental impressions and strategies is the primary purpose of the work product doctrine. And there is no conceivable argument that the transcripts at issue here reveal attorneys' mental impressions or strategies [. . .] In this court's opinion, the transcripts are not protected from disclosure under the work product doctrine." Order at 8.

   Defendants' Response: The Magistrate Judge determined the lack of attorney mental impressions in the transcripts was fatal to their protection under the Rule, a standard that contradicts the Rule itself and the Eighth Circuit's controlling case law that protects both kinds of work product: "ordinary" work product and "opinion" work product.

3. "Even if the transcripts were work product, plaintiffs have established they would be substantially burdened by bearing the cost of obtaining second transcriptions." Order at 8.

   Defendants' Response: While the Magistrate Judge somewhat addressed the "hardship" element, Plaintiffs did not meet their Rule 26(b)(3)(A) showing of all three essential elements to obtain work product: (1) substantial need, (2) undue hardship, and (3) inability to "obtain their substantial equivalent by other means".

4. "In this court's opinion, defendants have not shown sufficient reason to require that plaintiffs share in the costs of preparation of the transcripts. [. . .] Defendants have not provided information about the number of pages in the transcripts or the cost of reproducing them and so have not shown good cause to require plaintiffs to bear those costs." Order at 9.

   Defendants' Response: Defendants presented the Magistrate Judge with sufficient reason to require cost sharing under Rule 26(c)(1)(B) and provided detailed information about the costs of transcript preparation.

II. LEGAL STANDARD

Although not "on all fours" with the procedural posture of this case with respect to the instant discovery stay motion, the North Dakota Federal District Court identified the following standard to be applied to a requested stay of a discovery order pending a Rule 72 appeal to the District Court Judge:

> When considering a motion for a stay pending appeal, courts generally consider four factors: (1) likelihood of the moving party's success on the merits, (2) irreparable harm to the moving party absent a stay, (3) whether a stay would substantially injure the non-moving party, and (4) potential harm to the public interest. James River Flood Control Ass'n v. Watt, 680 F.2d 543, 544 (8th Cir. 1982); Walmart Inc. v. Synchrony Bank, No. 5:18-CV-05216-TLB, 2020 WL 475829, at *1 (W.D. Ark. Jan. 29, 2020). The party seeking a stay pending appeal bears the burden on each of the factors. Of the four factors, likelihood of success on the merits and irreparable harm are the "most critical." Pablovich v. Rooms to Go La. Corp., No. CV 20-617, 2021 WL 928030, at *2 (E.D. La. Mar. 11, 2021). Issuance of a stay is left to the court's discretion, with the court's judgment to be guided by sound legal principles. Nken v. Holder, 556 U.S. 418, 434 (2009).

Order Denying Motions To Stay Discovery Order (Doc. 218), issued November 15, 2022 in North Dakota Federal District Court Case 1:18-cv-00236 (Sophia Wilansky v. Morton County, North Dakota, et al.).

III. ANALYSIS

A. Defendants have a substantial likelihood of success on the merits due to clear errors of law and fact.

Defendants believe the Magistrate Judge clearly erred in its findings and conclusions. Below are abbreviated versions of the arguments and evidence suggesting clear error which are more fully set forth in Defendants' *Appeal of Discovery Order* (Doc. 85), incorporated herein by reference.

1. There was never any evidence or other showing to suggest the transcripts "were created to memorialize public proceedings."

The Magistrate Judge's following conclusion is clearly erroneous: "The recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings." Order at 7. As indicated above, the Magistrate Judge states Defendants are mistaken and that the above finding related only to the recordings and not the transcription process. While that may be technically true, the implication in the Magistrate Judge's Order and the main thrust of the order is that the transcripts themselves were likewise created to memorialize public proceedings and cannot be protected as trial preparation materials, which is a finding that has no evidentiary support.

The Magistrate Judge's conclusions in this regard were contradicted by the argument contained in both of Defendants' Position Statements, which stated:

> The transcripts at issue relate to committee hearings and legislative floor sessions during North Dakota's last legislative special session in late 2021. The transcripts were not prepared live, but rather were prepared after-the-fact by transcriptionists and court reporters reviewing video recordings of those hearings and floor sessions. The transcripts were prepared at substantial cost to the Defendants, paid for out of a special fund earmarked for litigation purposes, and were prepared expressly at the direction of Defendants' legal counsel of record *after* Plaintiffs had commenced this litigation.

Defendants' First Letter to Judge Senechal dated December 19, 2022 (Doc. 69-2).[2] Certainly, Plaintiffs presented no evidence whatsoever on this issue. The Magistrate Judge's implication about memorializing public proceedings is also contradicted by the Declaration of Matthew Sagsveen (Doc. 81) who was counsel of record for the Defendants. The Sagsveen Declaration demonstrates the timing of the decision to order transcripts (after litigation was commenced), who ordered the transcripts (Defendants' counsel of record), the purpose for such transcripts (in anticipation of litigation or for use at trial), and the payment for the transcripts (out of the AG's special litigation expense fund). The decision to order transcripts was made in late February of 2022 after commencement of the litigation and nearly six (6) months after the legislative committee meetings, and House and Senate Sessions took place (in August and September of 2021). Sagsveen Declaration (Doc. 81); Defendants' First Letter to Judge Senechal (Doc. 69-2).

Plaintiffs provided absolutely no argument or evidence to contradict the foregoing facts concerning the transcripts at issue. There is simply no basis for the Magistrate Judge to essentially hold that the transcripts were "created to memorialize public proceedings" when all of the evidence before the Magistrate Judge was and is otherwise.

2. The Magistrate Judge applied the incorrect legal standard from other circuits that allow work product protection only for materials containing attorney mental impressions, which is contrary to the Rule and contrary to the Eighth Circuit's legal standard.

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[2] The Second Letter stated similar facts as follows:

> The facts surrounding the creation of the transcripts at issue here further confirm they were not created in the ordinary course of business, the preparation was directed by Defendants' legal counsel (including which hearings and floor sessions to transcribe), the transcripts remain and have at all times remained in the possession of Defendants' legal counsel, they were paid for by a special litigation fund of the AG's office, and the transcripts were created only because of the prospect of litigation (which at that time had already been instituted).

Second Letter to Judge Senechal, dated December 23, 2022.

The Magistrate Judge's following conclusion is also clearly erroneous as it has no factual support at all: "There is no real dispute that protection of an attorney's mental impressions and strategies is the primary purpose of the work product doctrine. And there is no conceivable argument that the transcripts at issue here reveal attorneys' mental impressions or strategies [. . .] In this court's opinion, the transcripts are not protected from disclosure under the work product doctrine." Order at 8

Although the initial portion of the above conclusion is not incorrect based on applicable case law, the Magistrate Judge extrapolated from these initial conclusions to determine in a clearly erroneous fashion that the apparent lack of attorney mental impressions in the transcripts is fatal to their protection under the Rule. The Magistrate Judge thus clearly erred in this instance in applying a work product legal standard that contradicts the language contained in the Rule itself[3] and the Eighth Circuit's own legal standard. The Magistrate Judge's clear error is found in its refusal to protect both kinds of attorney work product, which includes "ordinary" work product. *E.g.*, Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000) (recognizing "ordinary work product," which is composed of "raw factual information" that may be protected provided it is prepared because of the "reasonable prospect of litigation" and not prepared in the ordinary course of business); *accord* Gulf Grp. Gen. Enterprises Co. W.L.L. v. United States, 96 Fed. Cl.

[3] The Rule provides:

> (3) Trial Preparation: Materials.
>
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
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> (. . . .)

Fed. R. Civ. P. 26(b)(3)(A).

64, 68 (2011) (the Rules accord protections for both "ordinary work product" and "opinion work product").

Rather than applying the plain language of the Rule, the Magistrate Judge applied the legal standard from other circuits and a sister district court that only protected materials as work product if they contained mental impressions of the attorney. *See* Order at 6-8 (citing and applying the standard in Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994); H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 108 F.R.D. 686, 687-88 (S.D.N.Y. 1985); and Biben v. Card, 119 F.R.D. 421, 424 (W.D. Mo. 1987). The Magistrate Judge should have applied the language of the Rule (that does indeed protect "ordinary" work product) and the controlling legal standard, which is provides:

> The work product doctrine will not protect these documents from discovery unless they were prepared in anticipation of litigation. Fed.R.Civ.P. 26(b)(3); [] Our determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination:
>
> > [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.
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> 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198–99 (1970) []. The advisory committee's notes to Rule 26(b)(3) affirm the validity of the Wright and Miller test: "Materials assembled in the ordinary course of business or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." Fed.R.Civ.P. 26(b)(3) advisory committee notes.

Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987) (cleaned up). Had the Magistrate Judge applied the above legal standard to the undisputed facts in this case, it would have determined the transcripts were not prepared "in the ordinary course" and they were "obtained because of the prospect of litigation."

3. Plaintiffs did not meet their burden of showing: (1) substantial need, (2) undue hardship, and (3) an inability to "obtain their substantial equivalent by other means".

The Magistrate Judge's following conclusion is clearly erroneous: "Even if the transcripts were work product, plaintiffs have established they would be substantially burdened by bearing the cost of obtaining second transcriptions." Order at 8. While the Plaintiffs initially argued[4] they did not need to make the required Rule 26(b)(3) showing of undue burden, substantial need, and an inability to obtain the transcripts by alternative means, they re-tooled and changed their arguments in their last position statement arguing undue burden, substantial need, etc. Plaintiffs' Letter to Judge Senechal, dated December 28, 2022 (Doc. 73).

The Magistrate Judge gave credence to Plaintiffs' arguments about substantial need and undue burden, which findings were devoid of any factual support, but the Magistrate Judge did not even consider Plaintiffs' ability to "obtain their substantial equivalent by other means". All of this was clear error. As pointed out in Defendants' letters to the Magistrate Judge and in the Sagsveen Declaration, the videos have been and remain publicly available, including to the Plaintiffs or to anyone else. Sagsveen Declaration (Doc. 81); Defendants' First & Second Letters to Judge Senechal (Docs. 69-2 & 74). Indeed, Defendants provided in written discovery responses the links to all of the relevant committee and Senate and House videos applicable to the redistricting issues in this case. Exhibit 1 (Doc. 69-3) at pdf pages 6-9. But regardless of Defendants pointing out the precise location of videos to the Plaintiffs, Plaintiffs and their legal counsel had the ability to check the public record themselves as soon as the legislative recordings became available in August and

[4] *See* Plaintiffs' First Letter to Judge Senechal, dated December 19, 2022 (Doc. 69-1) (no mention of undue burden, substantial need, et cetera). Attorney Sanderson on behalf of Plaintiffs argued during the Magistrate Judge's telephone conference on December 20, 2022 that Plaintiffs were not claiming and did not need to show undue burden, substantial need, and an inability to obtain the transcripts by alternative means.

September of 2021. In fact, in their Spring 2022 briefing in support of their motion for temporary restraining order, Plaintiffs cited numerous times to the legislative materials linked at the ND Legislature's website, including citing to the video links of the committee hearings, and Senate and House sessions. *Memorandum of Law In Support of Plaintiff's Motion for a Preliminary Injunction []*, dated March 4, 2022 (Doc. 12); *Plaintiffs' Reply In Support of Motion for Preliminary Injunction*, dated April 18, 2022 (Doc. 30) at FN. 1 & 2.

This case is also factually different than the foreign and sister district court cases the Magistrate Judge relied on in ordering production of the transcripts. Those cases concerned materials that were not publicly available to the moving party seeking same and thus those parties had no ability to obtain their substantial equivalent. Riddell, 158 F.R.D. at 558 (disputed tape recordings and unredacted transcripts in the possession of non-moving plaintiff's counsel); H.L. Hayden, 108 F.R.D. at 688 (disputed tape recordings in possession of non-moving plaintiff's counsel); Biben v. Card, 119 F.R.D. 421, 425 (W.D. Mo. 1987) (non-public SEC deposition transcripts in the possession of non-moving objecting defendants). Since August/September of 2021, almost a year and a half ago, Plaintiffs have continually had full opportunity to access the videos in order to prepare transcripts of the materials they believed they would need to support their claims. Other than the cost Defendants paid to undertake that task themselves, Plaintiffs have not offered any evidence to show an inability to obtain transcripts.

Relating to costs, the Magistrate Judge's statement essentially that the two individual Plaintiffs ("two private citizens claiming a violation of their constitutional rights") cannot afford the cost of transcripts and thus they are "substantially burdened" is not a finding or conclusion based on any real evidence concerning Plaintiffs' respective financial situations. None of that type of showing was made or even attempted. The Magistrate Judge moreover assumes that the State

of North Dakota can afford to incur the entire cost of the transcripts itself simply because it is the State of North Dakota. The status of the Plaintiffs as just "private citizens" is not be dispositive of the substantial burden issue. Indeed, to the extent Plaintiffs are successful in their claims, which Defendants completely dispute, the rules allow them to obtain their costs and expenses of litigation, which ostensibly would include transcription costs. Thompson v. Wal-Mart Stores, Inc., 472 F.3d 515, 517 (8th Cir. 2006) (stating: "Rule 54(d)(1) provides 'costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs.' A prevailing party is presumptively entitled to recover all of its costs." (internal citations and quotations omitted)). There should be no presumption about costs until there really is a prevailing party. And because Plaintiffs essentially "sat on their hands" since August/September of 2021 when they could have prepared transcripts themselves, any undue burden was of their own making.

Plaintiffs have failed to make the required showing under Rule 26(b)(3) and the Magistrate Judge clearly erred in determining otherwise.

4. Defendants presented the Magistrate Judge with sufficient evidence and reason to require cost sharing under Rule 26(c)(1)(B) and provided detailed information about the costs of transcript preparation.

The Magistrate Judge further clearly erred in its following conclusion: "In this court's opinion, defendants have not shown sufficient reason to require that plaintiffs share in the costs of preparation of the transcripts. [. . .] Defendants have not provided information about the number of pages in the transcripts or the cost of reproducing them and so have not shown good cause to require plaintiffs to bear those costs." Order at 9.

The Rules of Civil Procedure allowed the Magistrate Judge to order Plaintiffs to share in the costs of the transcripts they are seeking.[5] For the same reasons as set forth above, it would not

[5] Rule 26 provides in relevant part as follows:

be inequitable for the Magistrate Judge to order Plaintiffs to share in the costs of only those transcripts they really need for summary judgment or trial purposes. They have made no showing they cannot afford to do so, and again, if they prevail, those costs can be recouped.

Additionally and contrary to the above conclusion by the Magistrate Judge, Defendants provided detailed information to the Plaintiffs and the Magistrate Judge about those transcription costs. In their first letter to the Magistrate Judge, Defendants provided a chart showing each of the transcripts by invoice number, hearing date(s), amount of each transcript, the court reporting service for each transcript, and the total cost of all transcripts. Defendants' First Letter to Judge Senechal (Doc. 69-2). As part of the Sagsveen Declaration (Doc. 81), Defendants have provided essentially the same chart as well as the invoices themselves, which provides all 13 of the invoices paid by the AG's Office. Sagsveen Decl. Exhibit 1 (Doc. 81-1). Those transcripts reference the legislatives video(s) that have been transcribed.

The Magistrate Judge's determination there was no evidence to support cost sharing is clearly erroneous.

B. Defendants will be irreparably harmed if the stay is not granted as the appeal relates to important questions of protections accorded to attorney "work product" materials.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending [.] The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(. . . .)

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery[.]

Fed. R. Civ. P. 26(c)(1)(B).

Forcing production of the transcripts by January 31, 2023 prior to Defendants having recourse to their Appeal will further result in irreparable harm to Defendants. Indeed to force production now prior to this Court's Appeal decision will effectively remove Defendants' Rule 72 appeal rights concerning an important protection afforded to work product materials as set forth in the Federal Rules and in applicable case law. *See* Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund, 425 F.3d 1087, 1093 (8th Cir. 2005) (citing rule that allows appeals of discovery orders only in "exceedingly narrow circumstances, such as when the discovery order would compel the production of allegedly privileged information." (citation omitted)). While the appellate standard discussed in Borntrager has been overruled by the holding of the United States Supreme Court in Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009), it nevertheless illustrates the importance of the protections to be accorded to work product materials.

Other courts have determined work product protections are important enough to avail the parties to extraordinary writs when courts order those materials produced. *See* W. Horizons Living Centers v. Feland, 2014 ND 175, ¶ 8, 853 N.W.2d 36, 39–40 (in supervisory writ action, held: "This is an appropriate case to exercise our supervisory jurisdiction because the court's order compelling disclosure of the claimed privileged or protected information cannot be 'unmade' and Western Horizons' remedy by later appeal from a judgment is not adequate."); Sporck v. Peil, 759 F.2d 312, 314 (3d Cir. 1985) (granting mandamus where discovery order was not appealable, and overruling district court's ruling forcing defendant to provide the discovery materials he had reviewed with counsel in preparing for deposition, which defendant's attorney had properly claimed were protected as attorney work product under Rule 26(b)(3)).

Defendants' situation here is analogous to the plaintiffs in the above lawsuits where writs were properly brought to enforce work product protections that were imperiled by a discovery

order. To the extent Defendants are required to produce the transcripts prior to this Court's Appeal determination, they will have essentially lost their appeal rights, and once that should happen, the issue will likely evade review, causing irreparable harm. This factor weighs in favor of the stay.

C. A stay to accommodate the appeal will not substantially injure Plaintiffs, who are fully able to obtain the substantial equivalent of the transcripts from the North Dakota Legislature's website.

Defendants are not requesting a lengthy stay, only enough time for this Court to issue a ruling on Defendants' Appeal. The Legislature's videos from which Defendants' made the transcripts remain fully available to Plaintiffs to use for summary judgment or other purposes, just as they already used them in briefing in support of injunctive relief. While the Magistrate Judge insists Plaintiffs should be able to use the transcripts for summary judgment motion, to the extent the Court denies the Appeal and orders the transcripts be produced, Plaintiffs will be able to use the transcripts. To the extent the Court grants the Appeal and protects the transcripts, their potential use as summary judgment materials would be irrelevant. Either way, Plaintiffs are not and will not be substantially injured by a stay. This factor weighs in favor of the stay.

D. There is no potential harm to the public interest in this stay.

There could be no conceivable harm to the public interest in staying enforcement of the Magistrate Judge's Order to provide transcripts either. All of the legislative hearings and sessions recordings and videos continue to be publicly available and will remain so during the pendency of the Appeal to the District Court. This factor weighs in favor of the stay.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court stay the Magistrate Judge's Order until the Appeal has been decided.

Dated this 31st day of January, 2023.

By: */s/ Bradley N. Wiederholt*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION REQUESTING STAY OF MAGISTRATE JUDGE'S ORDER DENYING STAY (DOC. 89)** was on the 31st day of January, 2023 filed electronically with the Clerk of Court through ECF:

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