UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CASE NO: 1:22-CV-00031-CRH

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 State of the State of North Dakota,

Defendants,

and

The Mandan, Hidatsa and Arikara Nation, Cesar Alvarez, and Lisa Deville

Defendant-Intervenors.

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION REQUESTING STAY OF MAGISTRATE JUDGE'S ORDER DENYING STAY

Pursuant to D.N.D. Civ. L. R. 72(D)(2), Plaintiffs Charles Walen and Paul Henderson submit this Memorandum in Response to Defendants' Motion Requesting Stay of the Magistrate Judge's Order Denying Stay. Because the Magistrate Judge's Order was not clearly erroneous or contrary to law, the Defendants' Motion should be denied.

INTRODUCTION AND BACKGROUND

This dispute arises out of Plaintiffs' repeated attempts to obtain copies of transcripts from public legislative hearings in the possession of Governor Doug Burgum and Secretary of State Michael Howe. Defendants object to producing the transcripts from the public hearings claiming they are attorney work product. Simply put, transcripts of public hearings are not attorney work product materials and are not privileged.

On January 3, 2023, the Magistrate Judge issued an Order finding that transcripts of public hearings are not protected attorney work product, and ordered they be disclosed to Plaintiffs. Doc. 77 (Order Regarding Discovery Dispute). On January 12, 2023, Defendants moved for a stay of the Order pending appeal. Doc. 79 (Defendants' Motion to Stay). The Magistrate Judge denied Defendants' request for a stay, finding that Defendants had not demonstrated a likelihood of success on the merits, and again ordered that Defendants produce the at-issue transcripts. Doc. 89 (Order Denying Motion to Stay). Defendants refused to produce the transcripts as ordered by the Magistrate Judge and now move this Court for an order staying the Magistrate Judge's denial of their previous stay request.

For the reasons set forth herein, Defendants have not met the requirements for a stay, and have not shown the Magistrate Judge's Order Denying Stay was clearly erroneous or contrary to law. Defendants' Motion should once again be denied.

LAW AND ARGUMENT

Where a party appeals a Magistrate Judge's non-dispositive order on a discovery dispute, the Magistrate Judge's decision is entitled to substantial deference and will not be disturbed unless the decision is clearly erroneous or is contrary to law. Jacam Chem. Co. 2013, LLC v. Shepard, No. 1:19-cv-093, 2020 WL 6263747, at 2* (D.N.D. Aug. 18, 2020). An order is clearly erroneous

when factual findings are unsupported by substantial evidence, where an order is based on an erroneous conception of the applicable law, United States v. Motor Vessel Gopher State, 614 F.2d 1186, 1187 (8th Cir. 1990), or when the court is left with the definite and firm conviction that a mistake has been committed. McAllister v. United States, 348 U.S. 19, 20 (1954).

I. The Defendants have not shown the Magistrate's Order Denying Stay was clearly erroneous or contrary to law.

Defendants have failed to demonstrate the Magistrate Judge's Order Denying Stay was clearly erroneous of contrary to law. Instead, Defendants' Memorandum simply regurgitates the same legal arguments that have already been rejected. Because the Defendants have failed to meet the requirements for a stay, Defendants' Motion should be denied.

In deciding whether to grant a motion to stay an order pending appeal, a court must consider four factors: (1) the likelihood of the movant's success on the merits of the appeal; (2) whether the movant will be irreparably harmed absent a stay; (3) whether the issuance of the stay would substantially injure the non-moving party; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The Eighth Circuit has explained that, in considering the four factors, the likelihood of success on the merits is the most significant. S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992) (denying a stay pending appeal when the moving party has failed to demonstrate the likelihood that it will succeed on the merits).

a. The Magistrate Judge correctly concluded the Defendants failed to demonstrate a likelihood of success on the merits.

The most significant factor in deciding a motion for stay is whether the movant has demonstrated a likelihood of success on the merits. Id. In the Order Denying Stay, the Magistrate Judge set forth three separate reasons why Defendants have failed to demonstrate a likelihood of success on the merits: 1) the transcripts of public legislative hearings are not protected attorney

work product; 2) Plaintiffs have shown a "substantial need" for the transcripts under Rule 26(b)(3)(A)(ii); and 3) Defendants failed to establish good cause requiring Plaintiffs to share the costs of producing the transcripts. Doc. 89.

In the Order, the Magistrate Judge properly concluded the transcripts of public legislative hearings are not protected from disclosure. As an initial matter, Defendants do not dispute the transcripts from these public legislative hearings contain the facts, testimony, and evidence that are relevant to the claims and defenses in this case. Likewise, Defendants do not deny the transcripts from these public hearings will be dispositive in this case, as they contain **all** the facts and evidence the Court must weigh in determining whether the Legislative Assembly violated the Equal Protection Clause. See Wisconsin Legislature v. Wisconsin Elections Commission, 142 S.Ct. 1245, 1251 (2022) (holding that a legislature may not "adopt a racial gerrymander that the State does not, at the time of imposition, judge necessary under a proper interpretation of the [Voting Rights Act]."). Finally, Defendants do not deny the transcripts are void of any mental impressions, conclusions, opinions, or strategies of any attorney in this case. Rather, Defendants assert that simply because the transcripts of public hearings were transcribed after the commencement of litigation, they are privileged attorney work product. Defendants' argument is erroneous and should not be given any weight.

As the Magistrate Judge's Order notes, the work product doctrine was created to ensure that an attorney may properly prepare his client's case with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). The paramount concern serving as the foundation upon which the work product doctrine rests is the preservation of an attorney's mental impressions, conclusions, opinions, and litigation strategies. Id. As the United States Supreme Court has stated, "[a]t its core, the work-

product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238.

The Eighth Circuit has recognized two distinct types of work product: 1) ordinary work product; and 2) opinion work product. Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000). Ordinary work product typically includes tangible items prepared in anticipation of litigation, such as attorney's notes, photographs, and raw factual data. Id. In contrast, opinion work product protects counsel's mental impressions, conclusions, opinions, and legal theories. Id. The work product doctrine "is not an umbrella that shades all material prepared by a lawyer, or agent of the client . . . it focuses only on materials assembled and brought into being in anticipation of litigation." Piatowski v. Abdon Callais Offshore, L.L.C., 2000 WL 1145825 at *2 (E.D. LA 2000). Importantly, the Supreme Court has found the work product doctrine "does not extend to the underlying facts relevant to the litigation." Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981). The work product doctrine also does not extend to information compiled in the ordinary course of business. Solis v. Food Emps. Lab. Rels. Ass'n, 644 F.3d 221, 232 (4th Cir. 2011) (holding information compiled in the ordinary course of business is not protected by the work product doctrine). The determination of whether an item or document constitutes work product "is to be applied in a commonsense manner in light of reason and experience as determined on a case-by-case basis." Pittman v. Frazer, 129 F.3d 983 (8th Cir. 1997)

In this case, Defendants do not allege the transcripts of public legislative hearings contain the mental impressions, conclusions, opinions, or legal theories of counsel. Rather, Defendants assert the transcripts constitute "ordinary work product." Doc. 95 (Defendants' Motion Requesting Stay of Magistrate's Order Denying Stay). Defendants claim the transcripts contain "raw factual

information" and are therefore protected. Id. Defendants' argument is one of semantics and relies on a straw man legal theory that is unsupported by any authority.

The information being sought – the facts and evidence considered by the Legislative Assembly – exists in the public record. The creation of the transcripts is not attorney work product, it is simply the copying of the public record into another medium for ease of use by parties and the Court. Rather, Defendants have merely transcribed the existing public record from video to the written word. In the Order Denying Stay, the Magistrate Judge makes this point:

> In light of the work product doctrine's purpose, the January 3 order stated the recordings of the Legislative Assembly's proceedings - not the transcripts - were created to memorialize public proceedings. Defendants fail to recognize that sentence as referring to creation of the recordings rather than creation of the transcripts. The transcription of those public proceedings changed their form - from audio to text - but not their substance. The Transcripts contain only public information, and no attorney strategy would be implicitly or explicitly revealed through disclosure.

Doc. 89. (Citations omitted). The facts and evidence contained in the transcripts are nothing more than information compiled in the ordinary course of the Legislative Assembly's business. There is no dispute the information in the transcripts is solely from public hearings which occurred prior to litigation. There is also no dispute this litigation was not being contemplated by the Legislative Assembly at the time those hearings were held. The mere fact testimony and evidence from those hearings was transcribed into a new medium after this litigation commenced does not change the analysis. The transcripts of public hearings are not attorney work product protected by the attorney work product doctrine.

Moreover, the Supreme Court has ruled that the work product privilege does not apply to the facts of an underlying case. Upjohn, 449 U.S. at 396-97. That is what the requested transcripts are – facts and evidence on which this litigation turns. At its heart, Defendants continued refusal to disclose transcripts containing the legislative record is not about attorney work product – it is

about the continued suppression of the truth. The Defendants know full well the transcripts will unequivocally show the Redistricting Committee and the Legislative Assembly failed to conduct a proper legal analysis prior to implementing the challenged subdistricts. The Magistrate Judge was correct in finding the Defendants have not shown a likelihood of success on the merits.

Additionally, as the Magistrate Judge ruled, even if the transcripts are work product, Plaintiffs have established they would be substantially burdened by bearing the costs of acquiring a second set of transcripts. Doc. 89. Plaintiffs cannot obtain equivalent paper transcripts without incurring significant and duplicative costs. Plaintiffs are two private individuals who brought this lawsuit claiming a violation of their constitutional rights. Plaintiffs should not be required to pay tens of thousands of dollars to obtain identical copies of transcripts when Defendants, the State of North Dakota, already possess the same. As the Magistrate Judge points out, Rule 1 of the Federal Rules directs parties and the court to work toward the inexpensive determination of every case. Doc. 89. It is undisputed Plaintiffs have a clear and substantial need for the requested transcripts.

Defendants assert Plaintiffs can access the legislative record through videos posted on the Legislative Assembly's website. This assertion directly contradicts Defendants' previous arguments. Throughout this litigation Defendants have made repeated attacks on Plaintiffs for using the legislative recordings instead of transcripts. In their Response to Plaintiffs Motion for Preliminary Injunction, Defendants argued: "Plaintiffs rely entirely on a few selected quotes from individual legislators, hyperlinks to a few selected hearings videos (**without transcripts**), and hyperlinks to some selected hearing minutes." Now, Defendants argue Plaintiffs do not have a substantial need for the requested transcripts, and can instead access the legislative recordings online. Defendants' argument is insincere. Undoubtedly, Plaintiffs cannot play videos containing over 40 hours of testimony at trial. The Magistrate Judge correctly found Plaintiffs established a

substantial need for the transcripts and cannot obtain the substantial equivalent without undue hardship.

There is no dispute Defendants have failed to demonstrate a likelihood of success on the merits. The Magistrate Judge was correct in denying Defendants' Motion to Stay, and Defendants' current Motion should be denied.

b. The Magistrate Judge correctly ruled that Defendants will not suffer irreparable harm if required to produce transcripts of public hearings.

In the Order Denying Stay, the Magistrate judge correctly found Defendants will not suffer irreparable harm if required to produce transcripts of public hearings. Contrary to the Magistrate Judge's Order, Defendants argue producing transcripts of public hearings will cause them to suffer irreparable harm. Defendants' argument borders on frivolous.

As discussed, the requested transcripts in this matter are merely copies of recorded public hearings transcribed into written documents. There is not a single piece of information in the transcripts that is privileged. Yet, Defendants erroneously assert production of the transcripts prior to their appeal on the issue "will effectively remove Defendants' Rule 72 appeal rights." Doc. 95. To justify their position, Defendants cite caselaw which plainly does not support their argument.

First, Defendants' reliance on Western Horizons Living Centers v. Feland, 2014 ND 175, 853 N.W.2d 36, is misplaced. Western Horizons involved discovery requests seeking disclosure of an insurer's entire claims file and all communications during settlement negotiations. Id. at ¶ 9. The North Dakota Supreme Court granted a supervisory writ because the discovery requests "indicate the information, on its face, may include confidential and privileged communications." Id. at ¶ 17. The North Dakota Supreme Court ordered the lower court to "examine" the requested discovery to determine whether it was "protected by the lawyer-client privilege or constitutes protected communications during settlement negotiations." Id. In this case, there is no concern that

privileged communications would be revealed in the transcripts. As Defendants themselves admit, "the videos have been and remain publicly available, including to Plaintiffs or anyone else." Doc. 95. Defendants' contention that disclosure of public information will result in irreparable harm defies logic.

Defendants also cite Sporck v. Peil, No. 85-3023, 1985 WL 1279239 (3d Cir. Apr. 18, 1985) to support their position. Again, Defendants' reliance is misplaced. The documents at issue in Peil involved opinion work product, including the mental impressions and conclusions of an attorney. Id. at 315. The Third Circuit ruled the documents were protected as opinion work product in accordance with "the adversary system's interest in maintaining the privacy of an attorney's thought processes." Id. at 316. In this case, Defendants do not argue the transcripts contain any attorney thought process or other opinion work product. By Defendants' own admission, the transcripts contain only publicly accessible information. In short, Defendants have not cited a single case that supports their position.

The Magistrate Judge's finding that disclosure of the transcripts will not result in irreparable harm is not clearly erroneous or contrary to law. Rather, such a finding is common sense. Defendants' Motion should be denied.

c. Issuance of the stay would substantially injure Plaintiffs in this matter.

A stay and further delay of the production of the transcripts would substantially injure the Plaintiffs. Plaintiffs have requested the transcripts since the outset of this litigation. The transcripts will be a critical piece of evidence for Plaintiffs' summary judgment motion. The summary judgment deadline is February 28th, 2023. Any stay would prevent Plaintiffs from having access to the transcripts for use in support of their summary judgment motion. This is the real reason Defendants seek to avoid their production.

To be clear, this dispute is not about work product, it's about Defendants' continued suppression of the truth. Defendants continue to stall disclosure of the transcripts because they know the transcripts are dispositive in this case. Production of the transcripts will place the entire legislative record – the facts and evidence used to implement the subdistricts – before this Court. Defendants want to prevent this at all costs. The transcripts will unequivocally prove the Legislative Assembly racially gerrymandered Districts 4 and 9 without a proper legal analysis. The suppression of this truth would amount to the continued violation of the constitutional rights of over 30,000 North Dakota voters, including Plaintiffs.

Moreover, Plaintiffs cannot obtain the transcripts by other means without incurring significant and duplicative costs. Two private individuals who have arguably had their constitutional rights violated should not be required to expend thousands of dollars to reproduce transcripts of public hearings already in the State's possession. Courts have routinely found that the Federal Rules of Civil Procedure require a producing party to bear its own costs to produce discoverable materials. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) ("Under the Federal Rules of Civil Procedure, the presumption is that the responding party must bear the expense of complying with discovery requests."). The Magistrate Judge correctly followed this precedent and denied Defendants request that Plaintiffs share the costs to produce the transcripts. The Magistrate Judge following Supreme Court precedent is not erroneous or a clear error. Defendants' Motion should be denied.

d. The Magistrate Judge correctly ruled that production of the transcripts is in the public interest.

Defendants argue a stay would not conceivably harm the public interest because the video recordings are publicly available. Contrary to Defendants' assertions, the transcripts of the Legislative proceedings are the best evidence that will assist the Court in deciding this case.

Production of the transcripts would eliminate any doubt as to what exactly the Legislative Assembly considered when it enacted the challenged subdistricts. The transcripts are not just important to Plaintiffs' claims, they are substantial to the Court's consideration of the outcome of this case, which is in the public interest.

Public policy weighs in favor placing all the facts and evidence in its most useful form directly in front of the Court. The Magistrate judge was correct in finding that disclosure of the transcripts is in the public interest.

CONCLUSION

The Magistrate Judge correctly weighed the required four factors in deciding the Order Denying Stay. The Defendants failed to establish any of the four factors weigh in their favor. Most significantly, Defendants have failed to show that transcripts of public hearings are protected attorney work product. The Magistrate Judge did not clearly err in denying Defendants' requested stay. For the foregoing reasons, Defendants' Motion should be denied.

Respectfully submitted this 3rd day of February, 2023.

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