UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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; ALVIN JAEGER 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.	CASE NO: 1:22-CV-00031-CRH

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' APPEAL

Pursuant to D.N.D. Civ. L. R. 72(D)(2), Plaintiffs Charles Walen and Paul Henderson submit this Memorandum in Response to Defendants' Appeal of the Magistrate Judge Order Regarding Discovery Dispute. Because the Magistrate Judge's order was not clearly erroneous or contrary to the applicable law, the Defendants' appeal should be denied.

INTRODUCTION AND FACTUAL BACKGROUND

This dispute arises out of Plaintiffs' repeated attempts to obtain copies of transcripts from public legislative hearings in the possession of Defendants Doug Burgum and Alvin Jaeger.

Defendants object to producing the transcripts from the public hearings claiming they are "materials prepared in anticipation of litigation and for use at trial." Simply put, transcripts of public hearings are not attorney work product materials, and they are not privileged.

The transcripts contain the legislative record of committee meetings and floor debate of the Legislative Redistricting Committee which are at issue in this case. There is no dispute the transcripts are relevant to the case, as they contain all the facts and evidence considered by the Legislative Assembly for implementing the at-issue subdistricts. The facts and evidence considered by the Assembly, are wholly reflected in the transcripts, and the transcripts from these public hearings are dispositive to the case because they contain all facts and evidence the Court must weigh to determine whether the Legislative Assembly violated the Equal Protection Clause.

It is important to set forth the factual background for context of the present appeal. Plaintiffs filed their Complaint against the Defendants on February 16, 2022. (Doc. #1). On March 7, 2022, Defendants' counsel, David Phillips, called Plaintiffs' counsel and requested an extension of time to answer the Complaint because the State was in the process of preparing transcripts of the underlying legislative hearings. See Ex. A (Affidavit of Attorney Paul Sanderson). Mr. Sanderson indicated to Mr. Phillips that Plaintiffs had been considering preparing transcripts as well and inquired if the State would provide copies of the transcripts when received. Id. Mr. Phillips stated he would provide copies of transcripts when received. Id. Subsequently, during the Parties' Rule 26(f) scheduling conference on June 9, 2022, Plaintiffs' counsel asked Mr. Phillips when he expected to produce the transcripts. Id. Mr. Phillips responded that he would produce the transcripts if a party made a request for them. Id. Plaintiffs' counsel stated during the telephone conference that Plaintiffs were requesting copies of the transcripts. Id.

On December 5, 2022, Plaintiffs' counsel wrote to Mr. Phillips in an attempt to resolve the

dispute without the need for a Rule 37 motion. Id. The letter referenced Mr. Phillips' agreement to produce the transcripts. Id. It also set forth the law explaining why transcripts of public hearings are not attorney work product. Id. On December 7, 2022, the Parties held a Rule 37 meet and confer conference. Id. During the conference, Mr. Phillips all but abandoned the work product argument and explained the Attorney General's office would turn over the transcripts if Plaintiffs agreed to pay for half of the costs. Id. Mr. Phillips sent an e-mail to counsel the following day stating:

> Counsel,
>
> In follow-up to our meet and confer yesterday, the total cost of the transcripts at issue in our discovery dispute with Plaintiffs was $24,181.45.
>
> I have a breakdown of the costs by individual invoice number, but I do not yet have a breakdown by cost per specific transcript/hearing. I have requested that the Attorney General's office provide that information and I will pass it along when I get it. Once we have that information, Plaintiffs could select which transcripts they wish to pay half of the cost of, if they choose to do so.

Id. On December 12, 2022, Plaintiffs' counsel sent a letter to Mr. Phillips explaining that the rules of civil procedure do not require a party to pay an opposing party to produce relevant documents. Id.

On December 12, 2022, the Court held a discovery conference with the Parties and allowed them to make their arguments. Subsequent to the discovery conference, the Court allowed the Parties to submit position papers setting forth the law and argument in support of their position. On December 23, 2022, Defendants submitted a position paper setting forth their argument that the 2021 Legislative Redistricting Committee's transcripts constitute attorney work product. On December 29, 2022, Plaintiffs submitted their position paper explaining that the transcripts are not attorney work product and Plaintiffs have a substantial need and could not obtain the transcripts without undue hardship. On January 3, 2023, the Magistrate Judge issued an Order concluding

the transcripts are not protected under the attorney work product doctrine. (Doc. 77).

LAW AND ARGUMENT

Where a party appeals a Magistrate Judge's non-dispositive order on a discovery dispute, the district court is to apply the clearly erroneous standard of review under D.N.D. Civ. L. R. 72(D)(2). Auto Club Grp. v. Wimbush, No. 3:05-CV-105, 2007 WL 9724048, at *1 (D.N.D. May 8, 2007). 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 Magistrate Judge's conclusion that transcripts of public legislative proceedings are not attorney work product was not clearly erroneous.

The transcripts do not reveal Defendants' attorneys' mental impressions and strategies. Additionally, the transcripts merely document public proceedings and do not contain any information that is privileged or protected. The Magistrate Judge's conclusion that transcripts of public legislative hearings are not protected under the work product doctrine is not erroneous.

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, 510–511 (1947). It is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure and protects (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that other party's representative, protecting the mental impressions, conclusions, or legal theories of a party's attorney concerning the litigation. Fed.R.Civ.P. 26(b)(3). 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. Hickman, 329 U.S. at 510–11.

The work product doctrine does not extend to documents in an attorney's possession that were prepared by a third party in the ordinary course of business and that would have been created in essentially similar form irrespective of any litigation anticipated by counsel. In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002, 318 F.3d 379, 384–85 (2d Cir. 2003). The Advisory Committee Note to Rule 26(b)(3) said in part: "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." See also 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024 at p. 343–46 (2d ed.1994) (noting there is no work–product immunity for documents prepared in the regular course of business rather than for purposes of the litigation); Solis v. Food Emps. Lab. Rels. Ass'n, 644 F.3d 221, 232 (4th Cir. 2011) (stating materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes do not constitute documents prepared in anticipation of litigation protected by work product privilege).

The Magistrate Judge properly concluded the transcripts of public legislative hearings were not protected from disclosure under the work product doctrine. As an initial matter, there is no dispute that the underlying video recordings of the legislative hearings were not prepared in anticipation of litigation and, as such, the recordings of the legislative hearings themselves are not protected by the work product doctrine. See 8 Federal Practice and Procedure § 2024 at p. 343–46; see also Solis, 644 F.3d at 232. The Magistrate Judge also correctly noted that the legislative hearing transcripts at issue do not reveal Defendants' attorneys' mental impressions, conclusions,

or legal strategies. See Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994) (explaining the transcription process is entirely devoid of analysis or synthesis, thus it is beyond the work product immunity). Absent any intrusion into Defendant attorneys' mental impressions, conclusions, opinions, and litigation strategies, there is no basis for invoking the attorney work product protection. See Hickman, 329 U.S. at 510–11; see also Simon v. G.D. Searle & Co., 816 F.2d 397, 402 (8th Cir. 1987) (holding the purpose of the work product doctrine—that of preventing discovery of a lawyer's mental impressions—is not violated by allowing discovery of documents that do not incorporate a lawyer's thoughts); Kushner v. Buhta, 322 F.R.D. 494, 498 (D. Minn. 2017) (explaining the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions).

The Defendants' chief argument is that the Magistrate Judge erred in concluding "[t]he recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings." Contrary to Defendants' argument, the Judge's conclusion is factually correct. The Judge was analyzing the underlying recordings of the legislative hearing, which is the appropriate analysis in considering work product protection. See 8 Federal Practice and Procedure § 2024 at p. 343–46; see also Solis, 644 F.3d at 232. The video recordings of the legislative hearings were created to memorialize public proceedings and, therefore, do not constitute attorney work product. See Simon, 816 F.2d at 401 (holding materials assembled in the ordinary course of business or for other nonlitigation purposes are not protected from disclosure under the work product doctrine). Defendants' argument that the transcripts constitute work product because they prepared them in anticipation of litigation is an erroneous view of the law. See In re Grand Jury Subpoenas, 318 F.3d at 384–85 (explaining documents do not become work product simply because they are in an attorney's possession).

The Magistrate Judge properly analyzed the law cited by the Parties regarding whether transcripts are discoverable. See Riddell, 158 F.R.D. at 559–60; see also Biben v. Card, 119 F.R.D. 421, 428-29 (W.D. Mo. 1987) (holding that transcripts obtained specifically for litigation are not subject to protection or privilege). The Judge cited the Riddell Court for the proposition:

> [T]he collection of evidence, without any creative or analytic input by an attorney or his agent, does not qualify as work product. . . . "At its core, the work-product doctrine exists to shelter the attorney's preparation and analysis of the case. . . ." [T]he transcription process . . . is entirely devoid of analysis or synthesis and so is beyond the work product doctrine.

Riddell, 158 F.R.D. at 559. In Biben, the defendants obtained transcripts of testimony given before the Securities Exchange Commission. 119 F.R.D. at 423. During the discovery process, the plaintiffs sought to obtain copies of the transcripts through requests for production. Id. The defendants objected to disclosure on the grounds that the transcripts were prepared as litigation materials or otherwise were attorney work product. Id. at 428. The Biben Court rejected the defendants' assertion of privilege and required disclosure of the transcripts, stating the work product rule exists to protect written statements, private memoranda, and personal recollections prepared by an adverse party's counsel in the course of their legal duties and the transcripts simply do not fit this description and are, therefore, not shielded from discovery under the attorney work product rule. Id. at 428-29.

The Magistrate Judge's conclusion that the public legislative hearing transcripts were not protected under the work product doctrine was not clearly erroneous or contrary to law. Accordingly, Defendants' appeal should be denied.

II. The Magistrate Judge's conclusion that Plaintiffs would be substantially burdened by bearing the cost of obtaining second transcripts was not clearly erroneous.

The Magistrate Judge held that, even if the transcripts were considered work product, plaintiffs established they would be substantially burdened by bearing the cost of obtaining second

transcriptions." (Doc. 77, p. 8). Defendants argue this holding is clearly erroneous because it lacked evidentiary support.

The Magistrate Judge found the Plaintiffs are private citizens who reside in the subdistricts and have alleged a violation of their constitutional rights because the redistricting resulted in illegal gerrymandering. The Judge also cited Federal Rule of Civil Procedure 1, which directs the parties and the court to work toward the inexpensive determination of every case. The Judge concluded these two private citizens should not be required to incur the substantial cost of obtaining transcripts when such transcripts are already in the possession of the Defendants.

Defendants continue to argue they should not be required to produce the transcripts because the recordings of the proceedings are public and available to Plaintiffs. However, federal courts have routinely rejected arguments against disclosure which claim that such transcripts are publicly obtainable. See Riddell, 158 F.R.D. at 557 (stating the fact that information is publicly available does not place it beyond the bounds of discovery).

There is also no dispute as to Plaintiffs' substantial need for the transcripts. Plaintiffs have requested the transcripts from the Defendants since the outset of this litigation. The transcripts will be the critical piece of evidence for the Plaintiffs' summary judgment motion, which is due February 28, 2023. In the May 26, 2022, Order denying Plaintiffs' Motion for a Preliminary Injunction, this Court highlighted the importance of the legislative record:

> What the record contains today are isolated comments from legislators during the reapportionment process that suggest race motivated the decision to subdivide two house districts. We do not know whether those sentiments outweighed the other race-neutral criteria that lawmakers considered over more than 40 hours of committee hearings and floor debates . . . The limited record before us cannot satisfy the difficult burden to prove that race predominantly motivated the subdivision of Districts 4 and 9.

Doc. #37 at 7-8. Production of the transcripts in Defendants' possession would put all the relevant

facts, evidence, and testimony directly before the Court. 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 substantial to Plaintiffs' claims, they are substantial to the outcome of this case.

The Magistrate Judge's holding that plaintiffs would be substantially burdened by bearing the cost of obtaining second transcripts was not clearly erroneous.

III. The Magistrate Judge's rejection of Defendants' request to require Plaintiffs' to share the costs of the transcripts was not clearly erroneous.

Lastly, Defendants argue the Magistrate Judge's order denying their request for cost sharing was clearly erroneous. The Judge correctly rejected the Defendants' proposal when they failed to provide any good cause to require Plaintiffs to bear the cost of document production.

The Magistrate Judge correctly found federal courts routinely hold 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) (explaining under the Federal Rules of Civil Procedure, the presumption is that the responding party must bear the expense of complying with discovery requests); Superior Indus., LLC v. Masaba, Inc., 2011 WL 13138106 (D. Minn. 2011) (finding that a party, which advised it would only produce documents if the requesting party paid the costs of production, was required to pay the requesting party's costs and fees for bringing a motion to compel); Kirschenman v. Auto-Owners Ins., 280 F.R.D. 474, 487 (D.S.D. 2012) (noting the Rules require parties to bear their own costs to produce discoverable documents); Minter v. Wells Fargo Bank, N.A., 286 F.R.D. 273, 277 (D. Md. 2012) (explaining the general presumption is that the producing party should bear the cost of responding to properly initiated discovery requests); Barnes v. Alves, 10 F. Supp. 3d 391 (W.D.N.Y. 2014) (noting the federal rules do not require the requesting party to share the costs of production with the producing

party).

The Judge noted that it may for good cause order an allocation of expenses between the Parties, but Defendants made no showing of good cause. The Defendants provided no justification why the Judge should depart from the general rule that a producing party bears the cost of production. Absent justification establishing good cause, the Judge's conclusion rejecting Defendants' proposed cost sharing was not clearly erroneous.

CONCLUSION

For the foregoing reasons, Defendants' appeal should be denied.

Respectfully submitted this 24th day of January, 2023.

EVENSON SANDERSON PC
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By: */s/ Paul Sanderson*
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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; ALVIN JAEGER 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.	CASE NO: 1:22-CV-00031-CRH **AFFIDAVIT OF PAUL SANDERSON**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Now comes Paul R. Sanderson, being first duly sworn, deposes and says as follows:

1. I am the attorney for Plaintiffs and I have personal knowledge of all the facts contained in this Affidavit and I am competent to testify to the matters stated herein.

2. On March 7, 2022, Defendants' counsel, David Phillips, called me and requested an extension of time for Defendants to answer the Complaint because the State was in the process of preparing transcripts of the underlying legislative hearings. I told Mr. Phillips that Plaintiffs had also been considering preparing transcripts as well. I asked Mr. Phillips if he would provide copies of the transcripts when received. Mr. Phillips agreed he would provide copies of transcripts when received.

3. During the Parties' Rule 26(f) scheduling conference on June 9, 2022, I specifically asked Mr. Phillips when he expected to produce the legislative transcripts. Mr.

Phillips responded that he would produce the transcripts if a party made a request for them. I then stated that Plaintiffs are requesting copies of the transcripts.

3. Attached as Exhibit A to this Affidavit is a true and correct copy of the December 5, 2022, letter I sent to Mr. Phillips.

4. On December 7, 2022, the Parties held a Rule 37 meet and confer conference. During the conference, Mr. Phillips all but abandoned the work product argument and explained the Attorney General's office wanted to be paid for the transcripts. He said they would turn over the transcripts if Plaintiffs agreed to pay for half of the costs.

5. Attached as Exhibit B to this Affidavit is a true and correct copy of the December 8, 2022, email Mr. Phillips sent to counsel.

6. Attached as Exhibit C to this Affidavit is a true and correct copy of the December 12, 2022, letter I sent to Mr. Phillips.

Further, this affiant sayeth naught.

Dated this 24th day of January, 2023.

EVENSON SANDERSON PC
Attorneys for Plaintiffs
1100 College Drive, Suite 5
Bismarck, ND 58501
Telephone: 701-751-1243

By: _____
Paul R. Sanderson (ID# 05830)

STATE OF NORTH DAKOTA)
) SS
COUNTY BURLEIGH)

Before me, a notary public in and for said County and State, personally appeared Paul R. Sanderson and acknowledged that he did sign the foregoing instrument and that the same is his free and voluntary act and deed.

In testimony whereof, I have set my hand at Bismarck, North Dakota, on this 24th day of January, 2023.

BRENDA K VITEK
Notary Public
State of North Dakota
My Commission Expires 10/19/2026

_____
Notary Public

Paul R. Sanderson*
William J. Behrmann
Nils J.D. Eberhardt
John E. Ward
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December 5, 2022

VIA EMAIL ONLY

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Matthew A. Sagsveen
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RE: Walen et al. v. Burgum et. al.

Counsel,

I am writing this letter to follow up on Defendants Burgum and Jaeger's ("Defendants") Responses to Plaintiffs' written discovery, which were served on December 1st, 2022. Please note this letter is an attempt to confer on these issues in good faith so as to avoid court action, as required by Rule 37 of the Federal Rules of Civil Procedure. Specifically, this letter is being sent to address several discovery violations committed by the Governor and Secretary of State in their Responses. First, Defendants have refused to turn over legislative transcripts despite an agreement between counsel and case law requiring disclosure. Second, many of Defendants' responses to my clients' discovery requests are incomplete or outright non-responsive. Finally, your clients use of boilerplate objections on nearly every discovery request is improper and sanctionable conduct in accordance with applicable Eighth Circuit case law.

EXHIBIT
A

I would prefer to address these issues without the need for court involvement, but will bring forward a Motion to Compel with the Court if that is what is necessary for my clients to receive appropriate discovery responses in this matter.

To begin, your clients have refused to disclose transcripts of legislative hearings and testimony on the basis that such transcripts are "protected trial-preparation materials." Such a claim is unsupported by the Federal Rules and applicable case law. Federal Courts have routinely held that transcripts, even when compiled for litigation, are plainly discoverable. See Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 559–60 (S.D.N.Y. 1994) (holding that acquiring transcripts in the course of litigation does not exempt such transcripts from discovery disclosure.); see also Jobin v. Resolution Tr. Corp., 156 B.R. 834 (D. Colo. 1993) (holding that absent the "transcripts containing the mental impressions or thought processes of any attorney," disclosure is required.); Biben v. Card, 119 F.R.D. 421, 428-29 (W.D. Mo. 1987) (holding that transcripts obtained specifically for litigation are not subject to protection or privilege.).

For example, in Biben, the defendants obtained transcripts of testimony given before the Securities Exchange Commission. 119 F.R.D. at 423. During the discovery process, the plaintiffs sought to obtain copies of the transcripts through requests for production. Id. The defendants objected to disclosure on the grounds that the transcripts were prepared as litigation materials or otherwise were attorney work product. Id. at 428. The Court rejected the defendants' assertion of privilege and required disclosure of the transcripts, stating:

> "While it may be true that counsel have obtained from the SEC copies of the transcripts specifically because of the existence of this case and the prospect of additional litigation, such transcripts contain statements concerning the action or its subject matter previously made by a party to the action. Such statements are obtainable by another party without a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Id. In addition, federal courts have routinely rejected arguments against disclosure which claim that such transcripts are publicly obtainable. See Riddell Sports, Inc., 158 F.R.D. at 557 ("[T]he fact that information is publicly available does not place it beyond the bounds" of discovery).

In this case, my clients are seeking to discover copies of transcripts of public hearings in Defendants' possession. Your clients' objection to disclosure because such transcripts were created as part of this litigation and are of publicly accessible hearings is plainly without merit. No legal authority exists which supports your clients position that transcripts of public hearings are privileged and may be withheld from disclosure.

Moreover, on two separate occasions, you, as counsel for the Governor and Secretary of State, agreed to disclose such transcripts if my clients requested them. On March 8, 2022, you contacted my office to request an extension of time for Defendants to respond to my clients' Motion for a Preliminary Injunction. During that phone conversation, we both agreed that obtaining transcripts would be to the benefit of all parties involved in this case. Additionally, on June 9, 2022, during a meet and confer regarding an upcoming scheduling conference, I inquired about whether the transcripts discussed had been obtained. During that conference with counsel, you informed me they had and that your clients would agree to disclose such transcripts upon request. Now, your clients are refusing to disclose the transcripts under the guise of attorney work product, an objection which has been repeatedly rejected by federal courts. In accordance with the Federal Rules of Civil Procedure, please supplement your clients' discovery responses to include the requested transcripts so that we can move this case forward without the need for a Motion to Compel the same.

Furthermore, many of your clients' responses to my clients' discovery requests are incomplete or outright non-responsive. For example, Interrogatory No. 7 asks your clients to "identify the facts the State is relying on to assert the at-issue Subdistricts are narrowly tailored." In response, your clients put forth inappropriate boiler plate objections followed by a non-responsive answer:

> "...Defendants will provide information and reports regarding expert witnesses and expert opinions in accordance with the Scheduling Order and the Federal Rules of Civil Procedure, which will address the issues raised in this interrogatory."

To be clear, Interrogatory No. 7 does not ask for any expert opinions, but rather asks for facts that your clients are relying on to defend this case. As another example, Interrogatory No. 8 asks: "Is it Defendants' position in this case that the at-issue Subdistricts were enacted in order to Comply with 28 U.S.C. § 10101, otherwise known as the Voting Rights Act of 1965?" In response, your clients again provide a boilerplate objection followed by a non-responsive answer:

> "...Defendants state that the North Dakota Legislative Assembly is comprised of numerous individuals who individually and collectively may have had various reasons for enacting the law that created the challenged Subdistricts."

Again, the contemplated Interrogatories, including No. 8, do no request the opinions or reasoning of individual legislators, they request your clients' factual position on the legal claims being asserted in this case. Your clients provided incomplete, non-responsive, or evasive answers to Interrogatory No. 7, 8, 9, 10, 12, 13, 14, 15, and 16. Please supplement these responses to provide the requested information pursuant to the Federal Rules of Civil Procedure.

Finally, your clients have asserted various boilerplate objections to, in essence, every single Interrogatory and Request for Production asked by my clients. The objections made by your clients, as stated, are improper. Rule 33 of the Federal Rules of Civil Procedure provides that "[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath" and "[t]he grounds for objecting to an interrogatory must be stated with specificity." Fed. R. Civ. P. 33(c). Additionally, Rule 34 likewise provides that where a party objects to producing documents, the "objection must state whether any responsive materials are being withheld on the basis of that request." Fed. R. Civ. P. 34(2)(C). Courts in this District have repeatedly and consistently held that general boilerplate objections, such as the ones asserted by your clients, are improper and sanctionable under Rules 33 and 34. See Chapman v. Hiland Operating, LLC, 2014 WL 1513977 (D.N.D. Apr. 16, 2014) (holding that "objections repeated to virtually every discovery request no matter how specific, targeted, or relevant" is improper under the Federal Rules.); see also Rychner v. Continental Res., Inc., 2021 WL 2211110 (D.N.D. June 1, 2021) (holding that because a party's general objections fail to comply with Rule 34, such objections were stricken.). Additionally, courts in the Eighth Circuit have found that such generalized objections not only waive the objection itself but open the objecting party up to sanctions from the court. See Liguria Foods, Inc. v. Griffith Labs., Inc., 320 F.R.D. 168, 186 (N.D. Iowa 2017) ("Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all."); St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 198 F.R.D. 508 (N.D. Iowa 2000); (holding the Federal Rules "allow the court to impose sanctions on the signer of a discovery response when the signing of the response is incomplete, evasive or objectively unreasonable under the circumstances.").

In this case, the general boilerplate objections asserted to every discovery request by your clients are improper and in violation of the Federal Rules. Additionally, such objections constitute plainly sanctionable conduct in accordance with case law in the Eighth Circuit and the District of North Dakota. The Rules require that your clients state with specificity the exact reason for each objection, including an explanation as to how the information being requested is privileged or otherwise not subject to disclosure. In accordance with the Federal Rules of Civil Procedure, please have your clients supplement their responses to the at-issue discovery requests so that my clients can clearly identify the basis for your clients' refusal to answer basic questions and refusal turn over relevant and discoverable documents.

Please let me know your earliest availability for a meet and confer conference to discuss these issues. I would recommend a meet and confer on December 7, 2022, following the deposition of Charles Walen, as all counsel will be present during that time. If we are unable to reach an agreement on these discovery issues, my clients intend to move forward with a motion to address the same. Any motion brought by my clients will seek to compel supplemental discovery responses and will request sanctions against Governor Burgum and Secretary of State Jaeger for their conduct cited herein.

Please contact me if you have any questions or want to discuss this matter further. I look forward to working with you to resolve these issues.

Sincerely,

Paul. R. Sanderson
Attorney for Plaintiffs

Cc: Clients

Paul Sanderson

From: David Phillips <dphillips@bgwattorneys.com>
Sent: Thursday, December 8, 2022 10:08 AM
To: Paul Sanderson; Ryan Joyce; robert@harmsgroup.net; Mark Gaber; Michael Carter; Samantha Kelty; Allison Neswood; Nicole Hansen; Bryan L. Sells
Subject: Walen v. Burgum transcripts

Counsel,

In follow-up to our meet and confer yesterday, the total cost of the transcripts at issue in our discovery dispute with Plaintiffs was $24,181.45.

I have a breakdown of the costs by individual invoice number, but I do not yet have a breakdown by cost per specific transcript/hearing. I have requested that the Attorney General's office provide that information and I will pass it along when I get it. Once we have that information, Plaintiffs could select which transcripts they wish to pay half of the cost of, if they choose to do so.

David R. Phillips

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EXHIBIT
B

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December 12, 2022

VIA EMAIL ONLY

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RE: Walen et al. v. Burgum et. al.

Dear Mr. Phillips,

I am writing to follow up on my December 5, 2022, letter and our and our December 7, 2022, Rule 37 meet and confer conference. Among the issues discussed at the conference was the State's refusal to disclose transcripts of public hearings in your clients' possession. Specifically, you indicated that the transcripts would only be disclosed to my clients if they agreed to pay their share of the cost to produce them. Further, during a meet and confer conference today, the Intervenors' counsel indicated they are not agreeable to paying for a portion of the transcripts.

I am writing this letter in a final attempt to confer on this issue in good faith. The Governor and Secretary of State's refusal to turn over relevant transcripts of public hearings is a violation of the rules governing discovery, and the reasoning for their refusal is without merit. I would prefer to resolve this issue without the need for court involvement. However, if your clients continue to withhold relevant and discoverable documents, my clients will move forward with a motion to compel and will seek costs and fees for doing so, if that is what is necessary to obtain the requested transcripts.

EXHIBIT
C

Rule 34 of the Federal Rules of Civil Procedure require your clients to produce the requested transcripts. "The purpose of Rule 34 is to make relevant and nonprivileged documents and objects in the possession of one party available to the other." 8A C. Wright & A. Miller, Federal Practice and Procedure § 2202, at 356 (2d ed.1994). Therefore, a party may inspect any document that is relevant to the pending subject matter. Id. § 2206, at 379.

With respect to your refusal to disclose relevant documents in your possession unless my clients pay for the costs, federal courts, including the United States Supreme Court, 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) ("[u]nder [the Federal Rules of Civil Procedure], the presumption is that the responding party must bear the expense of complying with discovery requests."); Superior Indus., LLC v. Masaba, Inc., 2011 WL 13138106 (D. Minn. 2011) (finding that a party, which advised it would only produce documents if the requesting party paid the costs of production, was required to pay the requesting party's costs and fees for bringing a motion to compel); Kirschenman v. Auto-Owners Ins., 280 F.R.D. 474, 487 (D.S.D. 2012) (noting the Rules require parties to bear their own costs to produce discoverable documents); Minter v. Wells Fargo Bank, N.A., 286 F.R.D. 273, 277 (D. Md. 2012) (explaining the general presumption is that the producing party should bear the cost of responding to properly initiated discovery requests); Barnes v. Alves, 10 F. Supp. 3d 391 (W.D.N.Y. 2014) (noting the federal rules do not require the requesting party to share the costs of production with the producing party).

In Kirschenman, plaintiffs filed a lawsuit against their home insurer alleging the company acted in bad faith in failing to cover the costs of roof damage caused by a storm. Throughout the course of discovery, plaintiffs sought to obtain "company newsletters" distributed by the company. Id. at 487. Like your clients, the company refused to produce the requested documents unless the plaintiffs paid the costs of production. Id. The District Court of South Dakota squarely rejected that argument, noting that "the presumption under the federal rules of discovery is that the responding party must bear the expense of complying with discovery requests." Id. In so holding, the Court noted the costs for production may only be shifted when a request imposes an "undue burden" on the producing party. Id. In denying shifting the costs, the Court stated:

> "Here, Auto–Owners has simply not shown sufficient, specific facts to show that the burden or expense of producing copies of the newsletters is undue, and it is Auto–Owners' job to show such facts. Furthermore, Auto–Owners can be presumed to have vastly more resources than two elderly people living lives of modest means in rural South Dakota."

Id. at 488.

Interestingly, you as counsel of record in a currently pending case in the Western District of North Dakota, have taken the exact opposite legal position as the one you are currently asserting in this case. See FA ND, Chev., LLC. v. Kupper, Case No. 1:20-cv-00138

(D.N.D. 2022). In that case, Plaintiffs are seeking to have your client, Defendant Kupper, pay $186,500 to review and produce 46,688 documents requested by your client. See id. (DE# 132 Memorandum in Support of Motion for Protective Order). You opposed plaintiffs' motion seeking to require your client to pay for a share of the cost of discovery production arguing there is no legal justification for plaintiffs' request. See id. (DE# 136 Response to Motion for Protective Order).

In this case, your clients do not face an undue burden in producing documents already in their possession. Your clients, through the resources of the State of North Dakota, voluntarily had transcripts of public hearings produced to support their defense in this case. Further, your clients specifically state they obtained these transcripts to use as evidence at trial in this case. See Defendants' Response to Request for Production No. 2. Moreover, prior to refusing to produce these transcripts, you twice represented you would produce the transcripts. Now, after the discovery deadline has passed, you are requesting two individual Plaintiffs bear the costs to produce transcripts that were paid for with State funds. Your client's refusal to disclose the requested transcripts is without merit and is a violation of the Rules of Civil Procedure.

The Federal Rules and the case law interpreting them make clear that your clients must produce the requested transcripts. If we are unable to reach an agreement on this issue, my clients intend to move forward with a motion to address the same. Any motion brought by my clients will seek to compel disclosure of the transcripts and will request costs, fees, and sanctions against Governor Burgum and Secretary of State Jaeger for their improper conduct cited herein.

Please contact me if you have any questions or want to discuss this matter further. I look forward to hearing from you shortly on this issue.

Sincerely,

Paul Sanderson

Cc: Clients