UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al., Plaintiffs, v. County of Mille Lacs, et al., Defendants.	Case No. 17-cv-05155-SRN-LIB **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE**

INTRODUCTION

In support of their Motion for Summary Judgment on Standing, Ripeness and Mootness, Plaintiffs submitted with their Memorandum of Law declarations and exhibits thereto of Ashley (Stavish) Burton, Bradley Gadbois, and Scott Heidt, none of whom were disclosed as required by the Federal Rules of Civil Procedure 26(a)(1)(A)(i), 26(e)(1)(A) and 33(b). Defendants are prejudiced by Plaintiffs' sudden and untimely use of these individuals, and request this Court pursuant to Federal Rule of Civil Procedure 37(c)(1) strike their testimony, declarations and supporting exhibits from the Memorandum of Law and any future use at trial.

FACTUAL BACKGROUND

A. Plaintiffs' Initial Disclosures.

On November 17, 2017, Plaintiffs filed their Complaint against Defendants alleging, in part, that Band police officers were threatened "with arrest and prosecution." (Compl. ¶¶ 5.O., 5.R., ECF 1.) On January 15, 2019, Plaintiffs served their Initial Rule 26(a)(1) Disclosures. Ashley Burton, Bradley Gadbois and Scott Heidt appeared nowhere in the 40-page document. (Declaration of Brett D. Kelley Ex. 1, July 29, 2020.)

B. Defendants' Written Discovery Requests.

Among other written discovery requests, Defendants requested Plaintiffs identify instances of alleged interference with Plaintiffs' exercise of Inherent Tribal Authority committed by Defendants or persons acting under their control:

> **INTERROGATORY NO. 18:** Describe and identify each and every instance and manner in which you allege any of the Defendants or persons acting under their control interfered with the exercise of Inherent Tribal Authority on trust lands, including every fact on which this response is based, every person with knowledge or expected to have knowledge of the facts on which each answer is based, every document relating to the facts on which your answer is based and/or on which you relied in preparing your answer.

(Kelley Decl. Ex. 2.)

C. Plaintiffs' Signed Discovery Responses.

Plaintiffs signed under oath their Responses to Defendants' Interrogatories, including Interrogatory No. 18, on October 9, 2019 and October 10, 2019. (*Id*.) Nowhere in these responses did Plaintiffs identify any alleged threat of arrest made directly to Band officers by Defendants or any person acting under their control. (*Id.*) Plaintiffs produced numerous "incident summaries" that Band officers had prepared detailing issues Plaintiffs were allegedly experiencing with Sheriff's deputies and were used in the litigation dated as early as August 9, 2016. (*See, e.g.*, *id*. ¶ 11) ("Officer Stavish's account of 8/9/16 domestic call where County Deputy refused to make arrest based on Stavish's investigation"). None of the Tribal officer summaries—including those made by Ashley Burton—alleged that any band officer had been threatened with arrest by a Sheriff's deputy.

D. Defendants Notice and Take Depositions of 26(A) Disclosed Tribal Officers.

On January 29, 2020, Defendants noticed the depositions for 10 fact witnesses, all to take place in February 2020, to adhere to this Court's fact-discovery deadline of February 28, 2020. (Kelley Decl. Ex. 3.) Defendants' deposition notices included all of the tribal officers listed in Plaintiffs' 26(a)(1)

disclosures, except Tim Kintop.[1] On February 13 and February 14, Defendants deposed Tribal officers Derrick Naumann, Michael Dieter and James West. Each witness was asked if they were aware of direct threats to Tribal police officers. Each said they were not aware of any direct threats to any Tribal police officers. (Kelley Decl. Ex. 4 (Naumann Tr. 92:23-25, 93:1); (Dieter Tr. 83:11-13); (West Tr. 41:12-17).)

E. Plaintiffs Supplemental Response to Defendants' Interrogatory No. 18.

Yet, 28 months into this litigation, on February 28, 2020, at 6:12 p.m. CST—on the date discovery closed and after close of business—after all but two of the parties' depositions were complete, Plaintiffs produced a "Supplemental Response to Defendants' Interrogatory No. 18." In that document, Plaintiffs state they "were informed" that Sheriff's Deputy Patrick Broberg threatened to arrest Band police officer Ashley (Stavish) Burton sometime "between July 2016, the end

[1] Though properly noticed, Police Chief Sara Rice's deposition was rescheduled twice because she failed to appear for the first two. Ultimately, the parties agreed to reschedule Sara Rice's for March 9 and Craig Nguyen's was rescheduled for March 13, in the interest of conserving attorney time and to accommodate Plaintiffs' counsel's travel schedule.

of and July 2017 . . . ." (Kelley Decl. Ex. 5a-5b.) Plaintiffs produced no other documentation or evidence relating to this allegation.

With no documentary or other evidence and only a supplemental interrogatory response, and with all other factual depositions complete and no ability to depose Ashley Burton herself, Defendants were only able to question Sara Rice and Craig Nguyen about the alleged incident. By late March, after still receiving no additional information about the alleged incident, Defendants requested that Plaintiffs produce all emails related to the incident and relevant timeframe, including emails made or received by Burton. (Kelley Decl. Ex. 6 at 9.)

F. Plaintiffs Produced Only Three Documents Relating to Supplemental Response to Interrogatory No. 18 Because Everything Else Had Been Destroyed.

Forty-five days after the supplemental response to Interrogatory No. 18, Plaintiffs produced nothing but an email dated April 2, 2020 with no content, an undated two-paragraph summary presumably written by Ashley Burton describing the alleged incident, and in a letter to counsel identified a Band Incident Crime Report that contained no facts or details about the alleged threat. (Kelley Decl. Ex. 7 at 3; Burton Decl. Exs. 4-5b.)

Plaintiffs' explanation for their naught production was that they destroyed Burton's entire email account sometime around August 2017—just three months before filing this lawsuit—because Burton voluntarily terminated her employment with the Band in July 2017 and the Band's retention policy at the time was to purge email accounts 30-days after termination. (Kelley Decl. Ex. 7 at 4, n.1 ("[A]t that time, due to severe limitations of the Band's server, employee email accounts were deactivated after an employee left Band employment and the contents of the account were purged 30 days later to free up space on the Band's server.").) Plaintiffs confirmed that this destroyed electronically-store information (ESI) cannot be restored and is lost forever. (*Id.* ("Plaintiffs confirmed with the Band's Information Services Director that it is not possible to retrieve the contents of those accounts.").)

Plaintiffs' counsel dismissed Defendants concerns about the propriety of Plaintiffs' conduct, explaining that "Plaintiffs did not allege that Sheriff's deputies threatened to arrest Band officers … in their original response to Interrogatory 18 because they were unaware of such threats" because "Officer Burton … was not employed by the Band when plaintiffs filed their complaint or when plaintiffs prepared their response to Interrogatory 18." (Kelley Decl. Ex. 8 at 4.) They assured

Defense counsel that "Plaintiffs first learned of the threat involving Officer Burton … on February 27, 2020." (*Id.*)

G. Plaintiffs Moved for Summary Judgment and Included Supporting Declarations of Ashley Burton, Bradley Gadbois and Scott Heidt.

On July 8, 2020, Plaintiffs filed their Motion for Summary Judgment on Standing, Ripeness and Mootness. Plaintiffs' Memorandum of Law in Support of the Motion and included the declarations with attached exhibits of Ashley Burton, Bradley Gadbois and Scott Heidt.

ARGUMENT

A. Plaintiffs Failed to Follow the Black Letter Law of Federal Rule of Civil Procedure 26(A).

Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires that certain disclosures be made without a discovery request:

> (1) *Initial Disclosure.*
>
> (A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
>
> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

Fed. R. Civ. P. 26(a)(1)(A)(i).

As detailed above, Ashley Burton, Bradley Gadbois and Scott Heidt were not included in Plaintiffs' 26(a) disclosures, and they were never included in any supplemental Rule 26(a) disclosure. While their names do sporadically appear in Plaintiffs Responses to Defendants' Interrogatories Set I and II, it is difficult to discern, next to the countless other individuals named in the 107 pages of interrogatory responses which individuals (including, e.g., tribal officers not included in Plaintiffs' 26(a) disclosures, criminal suspects, sheriff's deputies, witnesses to crimes) are likely to have discoverable information. Their address and telephone numbers were not provided.

For example, in Plaintiffs' Response to Mille Lacs County's First Set of Interrogatories, Plaintiffs' produced Exhibit A, entitled "Police Officers Employed by the Mille Lacs Band Since January 1, 2016." Officers Burton (then Stavish), Gadbois and Heidt are listed among a total of 34 officers. There are two problems with this list: 1) it is not even correct because at the time the list was produced, Burton and Heidt were no longer employed by the Band;[2] and 2) how are

[2] At the time Exhibit A was produced, Defendants had no knowledge of the precise whereabouts of each officer listed, except for officers identified in Plaintiffs' 26(a) disclosures. This underscores the need for 26(a) disclosures and why the rule sets out what information must be disclosed, including address and

Defendants to glean from this list which officers are likely to have discoverable information. This is not a sufficient disclosure under the Federal Rules.

Further, in Plaintiffs' Response to Defendant's Second Set of Interrogatories, the number of times the three officers appear in the Response is as follows:

- Ashley (Stavish) Burton – 2 times
- Gadbois – 8 times
- Heidt – 2 times (both times parenthetically and only in relation to ICRs)

By contrast, the number of times the officers disclosed in Plaintiffs' 26(a) disclosures appear in the Response is as follows:

- Nguyen – 20 times
- Naumann – 15 times
- Rice – 7 times
- Dieter – 6 times
- West – 1 time

By the time Plaintiffs had filed their interrogatory response, they should have supplemented the disclosures as required Fed. R. Civ. P. 26(e)(1)(A) (party

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telephone number. How were Defendants to know when, why and how Heidt and Burton had left the Tribal Police Department? Heidt states in his declaration that "one of the reasons" he left the Tribal Police Department was he wanted to exercise the full authority as a Tribal Police Officer. (Heidt Decl. ¶ 13.) Had he been properly disclosed, Defendants would have been interested to learn the other reasons for leaving the Tribal Police Department in a deposition, seeing as how reduced morale is a central theme to Plaintiffs' case.

must supplement or correct its disclosure "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete . . . ."). Burton, Gadbois and Heidt are material witnesses by the very fact that they are included in Plaintiffs' moving papers for summary judgment. The burden of understanding which of the non-disclosed witnesses will have discoverable information does not rest on Defendants. In any event, "disclosure requirements would be rendered meaningless if a party could ignore them and then claim that the nondisclosure was harmless because the other party should have read between the lines." *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 704 (8th Cir. 2018).

Defendants relied on Plaintiffs' 26(a) disclosures to whittle down the list of people they would depose. Even if Defendants had chosen not to depose Burton, Gadbois or Heidt, they still would have had information rightly available to them to question deposition witnesses about the allegations, claims and assertions made by these three witnesses, and to otherwise gather rebuttal evidence to Plaintiffs' claims. But because of Plaintiffs' failure to disclose and last-minute supplemental response, Defendants were denied their rightful opportunity.

B. The Band Had Knowledge of Ashley Burton's Allegation in 2016 Yet Failed to Disclose Until the Final Moment of Fact Discovery.

Federal Rule of Civil Procedure 26(a)(1)(E) obligations do not arise simply when Plaintiffs casually get around to understanding the facts of their own case. To the contrary:

> A party "must make its initial disclosures based on the information then reasonably available to it" and "is not excused from making its disclosures because it has not fully investigated the case . . . ."

Fed. R. Civ. P. 26(a)(1)(E).

When Defendants raised their concerns with Plaintiffs about the February 28, 2020 evening disclosure of Ashley Burton's allegations, Plaintiffs assured that they did not learn of Ashley Burton's allegations of threatened arrest until February 27, 2020. Yet, Burton's own statements belie this assertion.

According to Plaintiffs, the Band did not become aware of Burton's allegations of threatened arrest until tribal officer Michael Dieter and Ashley Burton were chatting about how depositions were going and the questions being asked by Defendants. (*See supra* Kelley Decl. Ex. 8, at 4.) It was then that Burton volunteered that she had been threatened with arrest. But contrary to Plaintiffs' previous assurances to Defendants counsel, this was not the first time she had shared this information with another Band officer. In her declaration, she states

that she told Tribal officer Craig Nguyen "around the time of the interaction" but did not commit it to writing.

Case law recognizes that an entity knows what its employees know within the scope of their employment. When interrogatories are addressed to an organizational litigant, the officer or agent who answers the interrogatories must supply the material information which is available to the organization. *Acme Precision Products, Inc. v. American Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970). It is improper for an organization to assert in discovery that it did not know some fact that its employee knew. *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973) (explaining that an organizational defendant is "duty bound to secure all information available" to it). An association knows a fact as of the date the employee or agent acquired knowledge. *Id.*; *accord Campen v. Executive House Hotel, Inc.*, 434 N.E.2d 511, 586 (Ill. App. 1st Dist. 1982).

Here, the Band had knowledge of the incident when it allegedly occurred (December 30, 2016) and again when Burton shared the information with Nguyen. Further, that Ashley Burton ultimately left Tribal Police Department in July 2017 did not absolve Plaintiffs of their duty to investigate their own case and contact Ashley Burton to inquire if she had additional information relating to the lawsuit.

The eleventh-hour disclosure was untimely and not justified given Plaintiffs' obligation to fully investigate its own case. Since the beginning of this litigation, Plaintiffs have asserted that Tribal police officers were threatened with arrest for violations of the County Attorney's Protocol and Opinion. (*See* Compl. ¶¶ O, R.) Plaintiffs were obligated to fully investigate these allegations and make the required disclosures.

Particularly concerning is that throughout fact depositions, Plaintiffs' witnesses were asked repeatedly for specific instances in which an officer was directly threatened with arrest. Before the discovery deadline had passed, not a single witness could name a single incident of another Band officer being threatened, in person, with arrest by a Sheriff's deputy. (*See supra* Kelley Decl. Ex. 4.) And yet, just hours before the close of fact discovery, Plaintiffs suddenly disclosed a specific allegation of a threatened arrest. Plaintiffs had ample time to investigate the factual basis for their claims, especially when the record – as shown by declaration submitted by Plaintiffs – demonstrates two Band officers knew of the incident as early as December 2016. The disclosure was untimely as required by Fed. R. Civ. P. 26(e)(1)(A).

C. The Declarations of Burton, Gadbois and Heidt Must Be Excluded Under Federal Rule of Civil Procedure 37(C)(1).

Under Federal Rule of Civil Procedure 37(c)(1), Plaintiffs are prohibited from using the declarations of Burton, Gadbois and Heidt in support of their Motion for Summary Judgment or later at trial because they failed to properly and timely disclose them. Federal Rule of Civil Procedure 37(c)(1) provides the limits on use of undisclosed information and witnesses:

> (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

The purpose of Rule 37(c) is "[t]o guard against "'sandbagging' an adversary with new evidence." *US Bank Nat. Ass'n v. PHL Variable Ins. Co.*, 12 CIV. 6811 CM JCF, 2013 WL 5495542, at *2 (S.D.N.Y. Oct. 3, 2013) (quoting *Ritchie Risk–Linked Trading Strategies (Ireland), Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 156 (S.D.N.Y.2012)). Unless Plaintiffs' failure to disclose key witnesses pursuant to Rule 26(a) or (e) was "substantially justified" or "harmless," Plaintiff is "'not allowed to use [any undisclosed witness] statements and opinions to supply

evidence' on [their] summary judgment motion or at trial." *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 704 (8th Cir. 2018) (internal punctation marks omitted); *Olivarez v. GEO Group, Inc.*, 844 F.3d 200, 203 (5th Cir. 2016) ("[A] party is subject to sanctions under Rule 37(c)(1) if the 'party fails to provide information or identify a witness as required by Rule 26(a) or (e), . . . unless the failure was substantially justified or is harmless.'" (quoting Fed. R. Civ. P. 37(c)(1)).

There is no dispute that Burton, Gadbois and Heidt were not disclosed pursuant to Rule 26(a) or 26(e). And there is no evidence that the failure is substantially justified or is harmless. The opposite is true.

Here, despite Plaintiffs-counsel's assurances that Plaintiffs had no knowledge of the alleged incident involving Ashley Burton until the eve of the discovery deadline on February 27, 2020, Burton's own declaration shows the Band knew about the alleged incident since December 2016—well before Plaintiffs' made their initial disclosures in January 2019. *See supra General Dynamics Corp.*, 481 F.2d at 1210. Likewise, they knew the identities of Gadbois and Heidt but failed to disclose them as well. There is no justification—substantial or otherwise—that would permit the non-disclosure of these witnesses.

Additionally, the failure to disclose is not harmless. Defendants relied on Plaintiffs' 26(a) disclosures to determine which Band officers to depose. Defendants were unable to evaluate whether to depose Gadbois or Heidt, and they were certainly not able to depose Burton because her disclosure came after the fact-discovery deadline. Nor were they even able to question other deponents (save two) about Burton's allegations. Defendants are now operating in a dearth of information about Burton's allegations—they have been unable to test her credibility, and were prevented from fully obtaining information the Band knew, information to which Defendants have every right. For Gadbois and Heidt, the same holds true—Defendants have not been able to question them about their statements, experiences, motivations or gain other information that goes to the claims and defenses in this case.

CONCLUSION

For the foregoing reasons, the declarations of Ashley Burton, Bradley Gadbois and Scott Heidt should be stricken and Plaintiffs should be prohibited from using their witness testimony, statements and exhibits thereto in support of Plaintiffs' Summary Judgment Motion on Standing, Ripeness and Mootness, or at trial.

Respectfully submitted,

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Dated: July 29, 2020

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