UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE**

I. INTRODUCTION

The Court should deny defendants' motion to strike the declarations and exhibits of Officers Ashley Burton, Bradley Gadbois and Scott Heidt because plaintiffs affirmatively and in good faith made the three individuals known to defendants as persons with potentially material information. Specifically, in accordance with Rule 26, plaintiffs repeatedly disclosed the identity of these individuals and described the subject matter of their declarations in interrogatory responses, eliminating any risk of prejudicial surprise. Likewise, plaintiffs produced *all* of the exhibits attached to their declarations in discovery,

as evidenced by the Band's Bates-stamp numbers on each exhibit. And, plaintiffs promptly supplemented their discovery responses to disclose Officer Burton's experience of having been threatened with arrest by a Sheriff's deputy as soon as plaintiffs gained knowledge of that information, which could not be constructively imputed to plaintiffs earlier under governing case law. Altogether, defendants had sufficient notice of these three individuals as prospective declarants and of the subject matter of their testimony, as well as ample opportunity to request to depose them, yet chose not to do so. Accordingly, defendants' motion should be denied.

II. FACTUAL BACKGROUND

In contrast to defendants' characterization of plaintiffs' disclosures, plaintiffs made the three declarants known to defendants in writing during the course of discovery and immediately supplemented their discovery responses when plaintiffs obtained knowledge of Officer Burton's experience of having been threatened with arrest by a Sheriff's deputy, which defendants then inquired about during depositions of other Band police officers.

First, on March 28, 2019, plaintiffs sent defendants a letter which enclosed a list of all police officers employed by the Band since January 1, 2016. Declaration of Beth Baldwin in Opposition to Motion to Strike (Baldwin Strike Opp. Decl.), Ex. 1. at 8. Officers Ashley Burton (formerly Stavish), Bradley Gadbois, and Scott Heidt were all included on that list. Plaintiffs' March 28 letter noted that plaintiffs understood that the County Attorney's Office and the Sheriff's Office already possessed such a list. *Id*. at 5 n.3.

Second, on June 6, 2019, plaintiffs attached an identical list as Exhibit A to their Responses to the County's First Set of Interrogatories. Baldwin Strike Opp. Decl., Ex. 2 (Plaintiffs' Responses to Mille Lacs County's First Set of Interrogatories) at 22. Interrogatory Nos. 4, 5, 6, 7, 8, 9, and 10 requested that plaintiffs "identify all persons with knowledge of and all documents and information that support or concern the allegations" in several paragraphs of plaintiffs' Complaint and in written testimony presented by Plaintiff Rice before a Minnesota House of Representatives committee informational hearing. *Id*. at 8-14. In response, plaintiffs identified each of the officers at issue here as having knowledge of the specific matters identified in each interrogatory. *Id.* For example, plaintiffs' Response to Interrogatory No. 4, which asked plaintiffs to identify all persons with knowledge of the allegations in Paragraph 5.T of the Complaint, stated:

> See the Plaintiffs' and Defendants' Initial Disclosures and Defendants' Responses to Plaintiffs' Discovery Requests, all of which identify persons with knowledge of and documents and information that support or concern the allegations in Paragraph 5.T of the Complaint. **Persons with knowledge of the allegations in Paragraph 5.T of the Complaint include all Band Police Officers employed by the Band since June 21, 2016, only some of which were identified in Plaintiffs' Initial Disclosures. Plaintiffs have since provided a complete list of those officers to Defendants and attach that list as Exhibit A to this response**.

Id. at 8-9 (Response to Interrogatory No. 4) (boldface added; underscore in original). Again, Officers Burton (formerly Stavish), Gadbois and Heidt were included on the attached list. Thus, these responses expressly supplemented plaintiffs' initial disclosures, identified the officers at issue, and stated the matters with respect to which they had knowledge.

Third, in plaintiffs' October 10, 2019, responses to defendants' Set II Interrogatories (served more than four and a half months before the scheduled close of fact discovery on February 28, 2020), plaintiffs again identified these officers as having knowledge of various matters at issue in this litigation and provided specific information about the incidents and matters as to which they had knowledge. Interrogatory No. 18 asked plaintiffs to:

> 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.

Doc. 185-2 (Plaintiffs' Responses to Defendants' Set II Interrogatories) at 4-5. Throughout their Response to this interrogatory, plaintiffs stated that "[c]urrent and former Band police officers previously identified by Plaintiffs" had knowledge of such matters. *See id.* at 10 (¶¶ 4, 5), 16 (¶ 7), 17 (¶ 8), 19 (¶ 11), 23 (¶ 12), 31 (¶ 16).

Moreover, plaintiffs' Response to Interrogatory No. 18 described specific incidents involving the three officers at issue here, identifying them by name. *See id.* at 19 (¶ 11.a), 24 (¶ 13.a), 26 (¶ 13.c) (incidents involving Officer Burton and as to which she had knowledge); 23 (¶ 12.b), 28 (¶ 13.f) (incidents involving Officer Heidt and as to which he had knowledge); 23 (¶ 12.e), 29 (¶ 13.j) (incidents involving Officer Gadbois and as to which he had knowledge).

Notably, with the exception of the incident in which Officer Burton was threatened with arrest, plaintiffs' initial Response to Interrogatory No. 18 described *every* incident that

is described in the declarations that defendants now seek to strike. The officers involved in each incident were either named in the Response or in previously produced documents referenced in the Response. For example, in his declaration, Officer Gadbois describes a September 13, 2016, incident in which information on an overdose call on Ojibwe Drive was not relayed to him by the Sheriff's Office, delaying the response to that call, and attaches a summary of the incident that he had written shortly after it occurred (MLBO00029883-MLBO00029884). Gadbois Decl. (Doc. 158) at 2-3 (¶¶ 6-9) and Ex. 1 thereto. Plaintiffs' Response to Interrogatory No. 18 described the same incident, identified Officer Gadbois as having knowledge of it, and referred to the same summary of the incident, which had previously been produced in discovery. *See* Doc. 185-2 at 18 (citing "MLBO00029884-29885 (Officer Gadbois summary of 9/13/2016 incident where County dispatchers did not provide information to Band police regarding overdose call on Objibwe Drive)").

With the exception of the incident involving the threat to arrest Officer Burton, the following table identifies each additional incident described in the challenged declarations and the disclosure of each incident in plaintiffs' initial Response to Interrogatory No.18:

Declaration	**Interrogatory No. 18 Response**
Gadbois Decl. (Doc. 158) at 3-5 (¶¶ 10-19) (describing September 29, 2017, incident in which a County Deputy re-did an investigation conducted by Band officers in full view of criminal suspects, undermining the credibility, authority and morale of Band officers, and attaching as	P. 29 (¶ 13.i) (describing September 29, 2017, incident in which a County Deputy re-did an investigation conducted by Band officers, citing MLBO00078709-78715, and noting that plaintiffs were producing squad car camera and officer body camera footage of the incident with their response to Interrogatory 18).

Declaration	Interrogatory No. 18 Response
Exhibit 2 the Band ICR for the incident (MLBO00078709-78715)).	
Gadbois Decl. (Doc. 158) at 6-7 (¶¶ 20-25) (describing November 3, 2017, incident in which County Deputies prevented Officer Gadbois from conducting a drug investigation, and attaching as Exhibits 3 and 4 Sergeant Naumann's summary of the incident (MLBO00114461-MLBO00114462) and the Band ICR regarding it (MLBO00077527-77260)).	P. 29 (¶ 13.j) (describing November 3, 2017, incident in which a County Sheriff's Deputy took over a drug investigation initiated by a Band police officer and stating that Officer Gadbois had knowledge of the incident and that plaintiffs had produced documents regarding it, including Officer Naumann's summary (MLBO00092023-92024)[1] and the Band ICR (MLBO00077257-77260)).
Gadbois Decl. (Doc. 158) at 7-8, ¶¶ 26-29 (describing March 21, 2018, incident in which a suspect told Band Officer Cook that he was "not a cop" as an example of community members and criminal suspects indicating they did not believe Band police officers were cops, and attaching as Exhibit 5 the Band ICR relating to the incident (MLBO00046755-MLBO00046766)).	P. 17 (¶ 9) (asserting that plaintiffs believe County Deputies informed community members that Band officers were no longer law enforcement officers and citing the incident in which a suspect told Officer Cook he was "not a cop," citing the Band ICR for the incident (MLBO00046755-46766), and noting that the Band was producing a squad car camera video recording of the incident with its responses).
Gadbois Decl. (Doc. 158) at 8-10 (¶¶ 30-36) (describing August 7, 2018, incidents in which: (1) Officer Gadbois observed evidence of illegal drug use in a black van in front of Grand Market but was unable to conduct a thorough investigation because of the Northern Protocol; (2) a County Deputy allowed the suspect to leave; and (3) a Band member suffered a fatal overdose less than four hours later after purchasing heroin from the suspects,	P. 21 (¶ 11.h) (describing August 2018 incident involving reported drug dealing from black van in front of Grand Market, County Deputy's decision to allow driver and van to leave, and subsequent fatal overdose of Band member, and citing Band ICRs for these incidents (MLBO00053871-53877 and MLBO00053877-53910)).

[1] MLBO000092023-92024 is a duplicate version of Plaintiff Naumann's summary of this incident. The version attached to Officer Gadbois' declaration as Exhibit 3 (MLBO00114461-MLBO00114462) is the same document.

Declaration	Interrogatory No. 18 Response
and attaching as Exhibits 6 and 7 the Band ICRs for these incidents (MLBO00053871-MLBO00053877 and MLBO00053877-MLBO00053910)).	
A. (Stavish) Burton Decl. (Doc. 154) at 2 (¶¶ 6-7) (stating that Officer (Stavish) Burton had several interactions with County Deputies that interfered with her ability to perform her duties as a peace officer and attaching as Exhibit 1 a summary of several of her interactions that she provided to her supervisor (MLBO00029873-29874)).	P. 19 (¶ 11.a) (referencing Officer Stavish's account of an incident in her written summary at MLBO00029874).
A. (Stavish) Burton Decl. (Doc. 154) at 2-3 (¶¶ 8-11) (describing August 9, 2016, incident in which a County Deputy told Officer Stavish that she was a civilian and allowed a suspect to leave when Officer Stavish refused to provide a statement, and attaching as Exhibit 2 the Band ICR for the incident (MLBO00034986-MLBO00034987)).	Pp. 19-20 (¶ 11.a) (citing Officer Stavish's summary of August 9, 2016, incident in which a County Deputy refused to make an arrest based on her investigation (MLBO00028974) and the Band ICR for the incident (MLBO00034986)); Pp. 24-25 (¶ 13.a) (describing August 9, 2016, incident in more detail and again citing Officer Stavish's account of it and the Band ICR for it).
A. (Stavish) Burton Decl. (Doc. 154) at 3-4 (¶¶ 12-16) (describing August 24, 2016, incident in which a County Deputy demanded that Officer Stavish turn over drugs she had seized for a tribal court prosecution, and attaching as Exhibit 3 the Band ICR for the incident (MLBO000355534-37)).	Pp. 26-27 (¶ 13.c) (describing August 24, 2016, incident in which a County Deputy demanded that Officer Stavish turn over drugs she had seized for a tribal court prosecution, and citing Officer Stavish's summary of the incident (MLBO00029874-29875) and the Band ICR for the incident (MLBO00035534-35540)).
A. (Stavish) Burton Decl. (Doc. 154) at 5-6 (¶¶ 24-25) (stating that Officer (Stavish) Burton left the Band Police Department because of the restrictions the County Attorney's Protocol placed on her as a	P. 24 (¶ 13) (stating that actions by County Deputies taking over, interfering with or re-doing investigations by Band officers undermined the credibility and morale of Band police officers and citing

Declaration	Interrogatory No. 18 Response
licensed police officer and that the incidents she described in her declaration undermined her credibility as a peace officer in the community and negatively affected her morale).	incidents involving Officer (Stavish) Burton (at p. 24-25 (¶ 13.a) and p. 26 (¶13.c)) as examples).
Heidt Decl. (Doc. 159) at 2 (¶¶ 6-7) (stating that Officer Heidt had several interactions with County Deputies that interfered with his ability to perform her duties as a peace officer and attaching as Exhibit 1 a summary of several of his interactions that he provided to his supervisor (MLBO00029864-MLBO29865)).	P. 28 (¶ 13.f) (citing Officer Heidt's summary of his interactions with County Deputies (MLBO00029864-29865) in the connection with a September 8, 2016, incident).
Heidt Decl. (Doc. 159) at 2-3 (¶¶ 8-12) (describing September 8, 2016, incident in which: (1) a County Deputy advised Band officers not to take a statement from a witness and then took his own statement; and (2) Band officers were not informed that a possible suspect vehicle had been located on the Reservation, creating an officer safety issue, and attaching as Exhibit 2 the Band ICR relating to the incident (MLBO00042348-MLBO00042362)).	P. 22 (¶ 12.b) (citing Officer Heidt's report regarding the September 8, 2016, incident (MLBO00029864-29865) and the Band ICR for the incident (MLBO00042348-42362), and stating that Band officers were not informed the County deputies had located a possible suspect vehicle, creating an officer safety concern); P. 28 (¶ 13.f) (describing the September 8, 2016, incident in which a County Deputy advised Band officers not to take a statement from a witness and then took his own statement, and citing Officer Heidt's report of the incident at MBLO00029684-29685 and the Band ICR for the incident).
Heidt Decl. (Doc. 159) at 3-4 (¶ 13) (stating that one of the reasons Officer Heidt left the Band Police Department was because of the restrictions the County Attorney's Protocol placed on him as a licensed police officer and that the incidents he described in his declaration undermined his credibility as a police	P. 24 (¶ 13) (stating that actions by County Deputies taking over, interfering with or re-doing investigations by Band officers undermined the credibility and morale of Band police officers and citing the incident involving Officer Heidt (at p. 28 (¶ 13.f)) as an example).

Declaration	Interrogatory No. 18 Response
officer and negatively affected his morale and job satisfaction, contributing to his decision to seek employment elsewhere).	

Thus, with the exception of the incident involving the threat to arrest Officer Burton, all of the incidents described in the three challenged declarations were previously described in plaintiffs' Response to Interrogatory No. 18, and all of the exhibits attached to the three challenged declarations were previously produced in discovery.

As to Officer Burton's experience of having been threatened with arrest by a Sheriff's deputy, plaintiffs described that incident in a supplemental response to Interrogatory No. 18 as soon as they learned of it. Plaintiffs' May 29, 2020, letter to defendants explained the context for that disclosure:

> Plaintiffs did not allege that Sheriff's deputies threatened to arrest Band officers in their complaint or in their original response to Interrogatory 18 because they were unaware of such threats. Officer Burton (formerly Stavish) was not employed by the Band when plaintiffs filed their complaint or when plaintiffs prepared their response to Interrogatory 18. Plaintiffs first learned of the threat involving Officer Burton after she was re-hired by the Band as a conservation officer on January 27, 2020, and Sergeant Dieter discussed with her the questions being asked by defendants during fact depositions. Specifically, on February 27, 2020, Officer Burton mentioned that she had been threatened with arrest by a Sheriff's deputy during her previous employment with the Band, and plaintiffs served their supplemental response disclosing that information one day later, on February 28, 2020.

Doc. 185-9 at 4; *see also* Doc. 185-5, Doc. 185-6 (plaintiffs' Feb. 28, 2020, transmission to defendants of plaintiffs' supplemental response to Interrogatory No. 18).

During the subsequent depositions of Plaintiff Rice and Band Sergeant Nguyen, defendants asked about Officer Burton's experience being threatened with arrest by a

Sheriff's deputy. On March 11, 2020, Sergeant Nguyen testified Officer Burton (Stavish) had been threatened with arrest for impersonating a peace officer and that she had "started talking to [him] about it over the course of the last couple of weeks," that is, in late February and early March 2020. Baldwin Strike Opp. Decl., Ex. 3 at 53. Plaintiff Rice also confirmed that she had recently acquired knowledge of Officer Burton's experience being threatened with arrest. Baldwin Strike Opp. Decl., Ex. 4 at 161-65. Although defendants requested and plaintiffs agreed to a supplemental deposition of the Band's Chief Executive, which took place in July 2020, they made no request to depose Officer Burton.

III. ARGUMENT

A. Plaintiffs affirmatively and repeatedly made the three officer declarants and the substance of their testimony known to defendants in writing during the discovery process.

Defendants' arguments seeking to strike the declarations and exhibits of Officers Burton, Gadbois and Heidt are unavailing because plaintiffs in good faith disclosed the three officers to defendants on multiple occasions, including in plaintiffs' Responses to Interrogatories, thereby fulfilling the Rule 26 disclosure requirement and eliminating any risk of surprise.

Rule 26(e)(1)(A) requires a party to supplement or correct a prior initial disclosure under Rule 26(a)(1)(A) or discovery response "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and <u>if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing</u>." Rule 26(e)(1)(A) (emphasis added). The Advisory Committee Notes to the 1993 Amendments of Rule 26 clarify that "[t]here is, however, no

obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition … .” *See also Hysitron Inc. v. MTS Sys. Corp.*, 2010 U.S. Dist. LEXIS 171, at *24 (D. Minn. Jan. 4, 2010) (“Supplementation is not required where supplemental or corrective information has been otherwise made known to the parties in writing or during the discovery process.”) (citing Fed. R. Civ. P. 26, Advisory Comm. Notes, 1993 Amends.).

Even where disclosure of a witness or declarant falls short, “‘use of an undisclosed witness should seldom be barred unless bad faith is involved.’” *Mawby v. United States*, 999 F.2d 1252, 1254 (8th Cir. 1993) (quoting *Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 826 (8th Cir. 1989)); *see also Ward v. The Nat’l Geographic Soc’y*, 2002 U.S. Dist. LEXIS 310, *8 (S.D.N.Y. Jan. 11 2002) (“[B]ecause refusing to admit evidence that was not disclosed during discovery is a drastic remedy, courts will resort to preclusion only in those rare cases where a party’s conduct represents *flagrant bad faith* and *callous disregard* of the Federal Rules of Civil Procedure.”) (internal quotations omitted) (emphasis in original). “‘[T]he purpose of our modern discovery procedure is to narrow the issues, *to eliminate surprise*, and to achieve substantial justice.’” *Mawby*, 999 F.2d at 1254 (quoting *Greyhound Lines, Inc. v. Miller*., 402 F.2d 134, 143 (8th Cir. 1968)) (emphasis in original). The Eighth Circuit repeatedly has upheld district court rulings allowing previously undisclosed testimony that did not cause prejudicial surprise. *Kahle v. Leonard*, 563 F.3d 736, 741 (8th Cir. 2009); *Davis v. U.S. Bancorp*, 383 F.3d 761, 765 (8th Cir. 2004) (no abuse of discretion to allow testimony of defendant corporation’s vice

president when "district court reasonably found that there was no unfair surprise" about the topic of testimony); *Farmland Indus. v. Morrison-Quirk Gran Corp.*, 54 F.3d 478, 482 (8th Cir. 1995) (no abuse of discretion to allow testimony when opposing party "was neither surprised nor confused at the substance of [the] testimony").

Courts have held that witness-declarants were adequately disclosed – and their testimony therefore not excluded – when their identities were known to the opposing party in advance of litigation or made known during a deposition. In *Wells v. Berger, Newmark & Fenchel, P.C.*, 2008 U.S Dist. LEXIS 21608, *5 (N.D. Ill. March 18, 2008), the court rejected the defendant's motion to exclude testimony of four witnesses where the defendants argued the plaintiff failed to timely identify them in her Rule 26(a)(1) initial disclosures "and interrogatory answers." As to three of the witnesses, the defendant "cannot claim prejudicial surprise because [the defendant] was aware of their identities even before the litigation began." *Id*. at *7. As to the fourth witness, "[h]er identity and relevance to this litigation was 'made known' … during … deposition[,]" therefore "an amendment of [the plaintiff's] Rule 26(a) disclosures to include [the witness] was not required, and is not subject to exclusion." *Id*. at *6. *See also Arista Records, LLC v. Lime Grp. LLC*, 715 F. Supp. 2d 481, 500 (S.D.N.Y. 2010) (rejecting defendants' motion to strike declarations of three declarants for alleged failure to identify them as potential witnesses because the information provided by one declarant was equivalent to that of a witness who had been timely disclosed, and no prejudice resulted as to the other two).

Furthermore, both the *Wells* and *Arista* courts concluded that the defendants could have cured any alleged prejudice attributed to inadequate disclosure by moving to depose

the declarants after plaintiffs submitted their declarations. "[I]f [defendant] was prejudiced by the late disclosure, it could have sought a limited extension of discovery to depose these former employees." *Wells*, 2008 U.S Dist. LEXIS 21608 at *8. "After Plaintiffs submitted the declarations, however, Defendants could have moved to depose the two witnesses, which would have remedied any prejudice Defendants claim to have suffered. Defendants' failure to request depositions undercuts their argument of prejudice." *Arista*, 715 F. Supp. 2d at 501.[2]

Here, plaintiffs affirmatively and repeatedly disclosed Officers Burton, Gadbois and Heidt as police officers employed by the Band during the relevant time period and possessing knowledge about specific allegations in the Band's Complaint, and, in addition, described each of the incidents addressed in their declarations. First, in their March 28, 2019, letter, plaintiffs alerted defendants that these three individuals were among police officers employed by the Band during the relevant time period. Baldwin Strike Opp. Decl., Ex. 1. at 8. Plaintiffs did so even though the County Attorney's Office and Sheriff's Office already possessed an equivalent list of police officers employed by the Band during the relevant time period and, therefore, as in *Wells*, defendants were "aware of their identities

[2] To the extent defendants complain about an alleged failure to provide addresses for the three challenged declarants, defendants could simply have requested their addresses from plaintiffs, as they did with respect to three other witnesses, or attempted to contact them through the Band's Police Department, where Officer Gadbois was employed throughout this litigation. *See* Baldwin Strike Opp. Decl., Exs. 5 and 6 (email correspondence regarding addresses of other former Band police officers and employees).

even before the litigation began." 2008 U.S Dist. LEXIS 21608 at *7; *see* Decl. of Baldwin, Ex. 1 at 5 n.3.

Second, in their June 6, 2019, Responses to the County's Set I Interrogatories, plaintiffs expressly supplemented their initial disclosures and identified the three officers as persons with knowledge of specific allegations in plaintiffs' Complaint. Third, in their initial, October 10, 2019, Response to Interrogatory No. 18, plaintiffs repeatedly stated that current and former Band police officers previously identified by plaintiffs had knowledge of matters described in that Response. Because plaintiffs had identified the three challenged declarants on March 28 and again June 6 as current or former Band police officers, their Response to Interrogatory No. 18 served to underscore that the challenged declarants had knowledge of matters at issue in this case. Moreover, plaintiffs' initial Response to Interrogatory No. 18 went further, and specifically named the three challenged declarants as having knowledge of specific incidents identified in the Response. These interrogatory responses were adequate under Rule 26 because they "made known to the other parties during the discovery process [and] in writing" that these three individuals were sources of potentially material information. Fed. R. Civ. P. 26(e)(1)(A); *see also Wells*, 2008 U.S Dist. LEXIS 21608 at *5 (including "interrogatory answers" as a proper vehicle to timely disclose persons likely to possess material information). Thus, no additional supplementation was required.

What's more, with the exception of the incident involving the threat to arrest Officer Burton, *every* incident described by Officers Burton, Gadbois and Heidt in their respective declarations was previously described by plaintiffs in their initial Response to defendants'

Interrogatory No. 18, and *every* exhibit attached to the three officers' declarations was previously produced by plaintiffs in discovery. *See supra*, at 4-9. As such, even if plaintiffs had not made the three officers known in advance of filing their declarations and exhibits, their testimony should still be allowed, as in *Davis* and *Farmland*, because defendants could claim neither "unfair surprise," *Davis*, 383 F.3d at 765, nor "confus[ion] at the substance of [the] testimony." *Farmland*, 54 F.3d at 482.

Defendants' reliance on *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 704 (8th Cir. 2018), is inapposite. *Vanderberg* dealt with disclosure requirements for *expert* witnesses under Rule 26(a)(2). The court held it was not an abuse of discretion to exclude expert witness testimony because the proponent failed to identify the expert witness. *Id.* at 703-04. Neither the proponent's production of hundreds of pages of medical records, including notes by the expert witness, nor the proponent's letter to opposing counsel three months after the deadline for disclosing expert witnesses, stating generally that the proponent expected non-retained physicians and surgeons to testify on various issues, was adequate to compensate for the failure to identify the witness as an expert. *Id*. According to the court, that approach would require the opposing party to "read between the lines" to discern who the proponent intended to call as an expert. *Id*. at 704.

This case is different. It involves the disclosure of fact witnesses, not expert witnesses, and plaintiffs *did* disclose the challenged declarants as fact witnesses, specifically identifying the facts of which they had knowledge. Thus, in this case, there was no failure to disclose the identity of a fact witness and no need for defendants to "read

between the lines" to discern whether the challenged declarants had been identified as fact witnesses; they had only to read plaintiffs' actual disclosures.

Finally, it is important to note that defendants could have requested or moved to depose one or more of the three officers after plaintiffs submitted their declarations. Indeed, defendants requested and plaintiffs agreed to a supplemental deposition of the Band's Chief Executive, which was taken via video chat on July 16, 2020, demonstrating that defendants clearly know how to seek a supplemental deposition when desired. There is no prejudicial surprise in plaintiffs' use of declarations by Officers Burton, Gadbois or Heidt because all three individuals and the subject matter of their declarations were amply disclosed to defendants. Nonetheless, defendants were free to seek "to depose the [declarants], which would have remedied any prejudice Defendants claim to have suffered. Defendants' failure to request depositions undercuts their argument." *Arista*, 715 F. Supp. 2d at 501.

B. Defendants improperly impute to the Band prior constructive knowledge of Officer Burton's experience being threatened with arrest.

Defendants' argument pertaining specifically to the portion of Officer Burton's declaration regarding her experience having been threatened with arrest by a Sheriff's deputy also lacks merit. Defendants cannot claim prejudicial surprise as to that information because plaintiffs disclosed the information the day after the Band obtained knowledge of it, which occurred before the close of discovery. *See* Doc. 185-9 at 4. Additionally, that information was further made known and explored during two subsequent depositions. *See*

Wells, 2008 U.S Dist. LEXIS 21608 at *6; Fed. R. Civ. P. 26, Advisory Comm. Notes, 1993 Amends.

Defendants' argument rests on the proposition that the Band should be charged with imputed constructive knowledge of an event that occurred more than ten months before litigation commenced and that involved a former employee who left employment with the Band several months before litigation began. Defendants selectively cite *General Dynamics v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973), for the alleged principle that "[a]n association knows a fact as of the date the employee or agent acquired it." Defs.' Mem. at 12. However, defendants leave out the critical temporal limit on imputed constructive knowledge recognized by *General Dynamics*: "[t]his would include information within the personal knowledge of former [association] employees, employed by [the association] at the time this action commenced." 481 F.2d at 1210 (emphasis added) (citing 74 Harv. L. Rev. 940, 1026027 (1961); 4A Moore's Federal Practice ¶ 33.26 at 33-143 and n.12; *Riley v. United Air Lines*, 32 F.R.D. 230, 233 (S.D.N.Y. 1962)).

Moreover, another case on which defendants rely, *Acme Precision Prods. v. Am. Alloys Corp*., 422 F.2d 1395, 1398 (8th Cir. 1970), specifies that only the "knowledge of [association] officers and key employees" is imputed to an association. In *Petersen v. Tig Ins. Co.*, 2002 U.S. Dist. LEXIS 20801, *19 (D. Neb. Oct. 28, 2002), the court emphasized *Acme Precision*'s limitation in concluding that a professional staff member of law firm "is not held to the same standard of knowledge as an attorney in the firm. Thus, her knowledge, if any … could not be imputed to the firm."

Here, Officer Burton was not employed by the Band at the time this lawsuit commenced; therefore, under *General Dynamics*, her knowledge was not imputed to the Band at the time that plaintiffs drafted their Complaint or initially responded to defendants' discovery requests. Furthermore, Officer Burton was not a key employee of the Band or the equivalent of a corporate officer. Rather, as a patrol officer she was more like a professional staff member. Thus, her experience being threatened with arrest could not be imputed to the Band even as constructive knowledge.

As soon as plaintiffs gained actual knowledge of Officer Burton's experience, they promptly supplemented their discovery responses and disclosed the information to defendants. *See* Doc. 185-5, Doc. 185-6. Thereafter, defendants deposed Sergeant Nguyen and Plaintiff Rice regarding Officer Burton's experience. *See* Baldwin Strike Opp. Decl., Ex. 3 at 53, Ex. 4 at 161-65. And, defendants were free to request or move to depose Officer Burton to cure any perceived prejudice, but did not do so. *See Arista*, 715 F. Supp. 2d at 501.

Defendants also argue that knowledge of the threat should be imputed to plaintiffs because Officer Burton mentioned it to Sergeant Nguyen at the time it occurred. However, Sergeant Nguyen's knowledge of the incident was extremely limited. At his deposition, defendants asked Sergeant Nguyen about his recollection of Officer Burton mentioning her experience to him, and he stated that his "memory of this particular incident is very vague. … I remember hearing something, but the details of it were very vague, and I couldn't remember the details of it." Baldwin Strike Opp. Decl., Ex. 3 at 128. This is an insufficient foundation on which to impute knowledge of the incident to plaintiffs.

In sum, plaintiffs did not have actual or constructive knowledge of Officer Burton's experience being threatened with arrest by a Sheriff's deputy until they learned of it in February 2020. Any degree of surprise accompanying this information was shared by plaintiffs, who, in good faith, immediately supplemented their discovery responses to relay the new information to defendants.

IV. CONCLUSION

The Court should deny defendants' motion to strike the declarations and exhibits of Officers Burton, Gadbois and Heidt because plaintiffs affirmatively, adequately, timely and in good faith disclosed each of these officers and their relevant knowledge in accordance with Rule 26.

DATED: August 5, 2020

Respectfully submitted,

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