

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

Turtle Mountain Band of Chippewa Indians,
Spirit Lake Tribe, Wesley Davis, Zachery S.
King, and Collette Brown,

Plaintiffs,

vs.

Michael Howe, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION IN LIMINE**

INTRODUCTION

Defendant Michael Howe, in his official capacity as Secretary of State of North Dakota (“Defendant” or “Defendant Howe”) submits this memorandum in support of *Defendant’s Motion in Limine*, filed herewith. Defendant Howe requests the Court exclude as inadmissible all expert reports, except when offered for non-hearsay purposes. Defendant Howe also requests the Court exclude as inadmissible the portions of the testimony and expert report of Dr. Loren Collingwood relating to compactness and voting age population, which were formed by analyzing unreliable data using the unreliable software Dave’s Redistricting App. Further, Defendant Howe requests the Court exclude as inadmissible the portions of the testimony and expert report of Dr. Weston McCool relating to his opinion that systemic disparities hinder the ability of Native American tribal members to participate effectively in the North Dakota political process, as the opinion is a mere assumption, unsupported by any facts or data at all. Additionally, Defendant Howe requests the Court exclude as inadmissible the portions of the testimony and expert report of Dr. Weston McCool relating to his opinion that Native Americans have less access to healthcare due to the cost, which was formed based on unreliable Kaiser

Family Foundation data. Finally, Defendant Howe requests the Court exclude the recently disclosed and entirely new categories of subject matter of Lonna Jackson Street's anticipated testimony, which goes well beyond the formerly disclosed subject matter of anticipated testimony related to the alleged injury the Spirit Lake Tribe and its members have allegedly suffered by the State's use of a redistricting plan that allegedly dilutes their vote, consistent with initial disclosures.

ARGUMENT

I. The Court Should Exclude All Expert Reports, Except When Offered For Non-Hearsay Purposes

Counsel for the parties have recently met and conferred regarding various issues relating to the upcoming trial in this case. Based on those discussions, it is Defendant Howe's understanding that all parties plan to call all of their disclosed expert witnesses who prepared expert reports, and all of those experts are expected to provide live testimony at the trial in this case. All of those expert witnesses (Dr. Loren Collingwood, Dr. Weston McCool, and Dr. Daniel McCool for Plaintiffs; and Dr. M.V. (Trey) Hood III for Defendant) have also been deposed during discovery.

It is Defendant Howe's counsel's understanding Plaintiffs intend at trial to introduce their complete expert reports as evidence, in addition to the live testimony of their experts. Plaintiffs are not able to supplement their experts' in-court testimony with expert reports. The expert reports are inadmissible hearsay, being out of court statements offered to prove the truth of the matters asserted in the reports, and not falling under any recognized exceptions to the hearsay rule. *See* Fed. R. Civ. P. 801, 802, 803; *see also McMahan v. Emerson Elec. Co.*, No. 2:15-CV-00022, 2021 WL 9593624, at *2 (D.N.D. Apr. 12, 2021); *Sutfin v. City of Bono, Ark.*, No. 3:07-CV-00124-WRW, 2009 WL 1955438, at *1-2 (E.D. Ark. July 6, 2009). The reports also do not

fall under the residual exception to the hearsay rule, as the reports are not more probative on the points for which they are offered than other evidence that the proponent can obtain through reasonable efforts, namely the live testimony the experts are planning to give at trial anyway. Federal Rule of Evidence 807(a)(2).

The expert reports could still potentially be introduced for non-hearsay purposes, however, such as impeaching a witness under Rule 801(d)(1)(A) or rehabilitating a witness under Rule 801(d)(1)(B) of the Federal Rules of Evidence.

Defendant Howe and his legal counsel are mindful of this Court's encouragement for parties to stipulate to the admissibility of *curriculum vitae* in *McMahan v. Emerson Elec. Co.*, wherein this Court stated:

While technically inadmissible hearsay, parties generally stipulate to the admissibility of *curriculum vitae*, which this Court would strongly encourage. Otherwise, qualification of an expert will have to be done on direct examination. 5 Handbook of Fed. Evid. § 702:2 (7th ed. 2015). This may unnecessarily prolong the trial.

No. 2:15-CV-00022, 2021 WL 9593624, at *3 (D.N.D. Apr. 12, 2021). Defendant Howe is willing to stipulate to the admissibility of the disclosed *curriculum vitae* of the experts, but not to the admissibility of the hearsay expert reports.

II. The Court Should Exclude Portions of the Testimony and Expert Report of Dr. Loren Collingwood Relating to Compactness and Voting Age Population, Which Were Formed by Analyzing Unreliable Data Using Dave's Redistricting App

The Court should exclude portions of the testimony and expert report of Dr. Loren Collingwood relating to compactness and voting age population, which were formed by analyzing unreliable data using the unreliable software Dave's Redistricting App.

A. Admissibility of Expert Testimony

“[W]here the court acts as a trier of facts it has broad discretion in the admission or exclusion of expert evidence.” *Waste Management, Inc. v. Deffenbaugh*, 534 F.2d 126, 129-30 (8th Cir. 1976) (citing *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 845 (8th Cir. 1965)).

Federal Rule of Evidence 702, governing the admissibility of expert testimony, states as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. This Court has previously explained:

Daubert requires the trial court to act as a “gatekeeper” of expert testimony, ensuring that the proposed testimony “both rests on a reliable foundation and is relevant to the task at hand.” 509 U.S. at 597. In applying Rule 702, the court balances “two guiding, and sometimes competing, principles.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). On one hand, “Rule 702 was intended to liberalize the introduction of relevant expert evidence.” *Id.* On the other hand “expert witnesses have the potential to ‘be both powerful and quite misleading.’ ... [and] proffered evidence that has a greater potential to mislead than to enlighten should be excluded.” *Id.* (internal citations omitted).

Hutchison v. Menard, Inc., No. 1:16-CV-362, 2018 WL 3567302, at *1 (D.N.D. June 22, 2018).

The party seeking to introduce the expert testimony has the burden of establishing admissibility, in this case Plaintiffs. *Id.* The Court must assess whether the proffered expert testimony is both reliable and relevant. *Id.* (citing *Newman v. Motorola, Inc.*, 218 F. Supp. 2d 769, 772 (D. Md. 2002); *United States v. Barnette*, 211 F.3d 803, 815 (4th Cir. 2000)).

In assessing whether the testimony is reliable, the court may consider a variety of factors, including (1) “whether the theory or technique in question can be (and has been) tested,” (2) “whether [the theory or technique] has been subjected to peer review and publication,” (3) “its known or potential error rate” and (4) “whether it has attracted

widespread acceptance within a relevant scientific community.” *Daubert*, 509 U.S. at 580. “The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate.” *Id.* Additionally, “although experiential expert testimony does not rely on anything like a scientific method, such testimony is admissible ... so long as an experiential witness explains how his experience leads to the conclusion reached, why his experience is a sufficient basis for the opinion, and how his experience is reliably applied to the facts.” *United States v. Bynum*, 604 F.3d 161, 167 (4th Cir. 2010) (internal alterations and citations omitted).

Hutchison, 2018 WL 3567302 at *1–2.

B. Dr. Collingwood’s Source of Data and Methods Were Unreliable to the Extent They Relied Upon Dave’s Redistricting App

Plaintiff’s expert Dr. Loren Collingwood relied on several data sources in forming his opinions in this case, which are listed in his expert report. Expert Report of Dr. Loren Collingwood (“Collingwood Report”) (Doc. 60-34, at pp. 2-3). One of those sources is known as “Dave’s Redistricting App”, which Dr. Collingwood testified he used as a software tool to calculate compactness scores for his expert report. Collingwood Report at pp. 2-3; Transcript of the Deposition of Loren Collingwood (“Collingwood Depo.”) (Doc. 74-1 at pp. 73-75; 178-79). Dr. Collingwood also used Dave’s Redistricting App as the source of his data for the census voting age population (Census VTD file). *Id.* at p. 178-80.

According to Dr. Collingwood’s deposition testimony, Dave’s Redistricting App is a free online app that is “pretty easy to use, you can upload some maps and it just pops out these two [compactness] numbers.” *Id.* at pp. 74-75. Dr. Collingwood does not know who created or owns Dave’s Redistricting App, but he assumes it is someone named “Dave.” *Id.* at pp. 180-81. At his deposition, Dr. Collingwood only “vaguely” remembered reviewing documentation about how Dave’s Redistricting App calculates compactness scores when he first started using the software, but did not recall at his deposition how the calculation is done within Dave’s Redistricting App. *Id.* at p. 181. Dr. Collingwood testified there was a difference in this case

between the compactness scores calculated by Defendant Howe's expert Trey Hood using Maptitude software and the scores calculated by Dr. Collingwood using Dave's Redistricting App. *Id.* at pp. 74, 181. Dr. Collingwood testified that Maptitude is very reliable when it is used correctly, but it is a difficult program to learn to use, so Dr Collingwood uses Dave's Redistricting App because it is easier to use. *Id.* at pp. 185-86.

Further, with respect to the census voting age population data that Dr. Collingwood obtained from Dave's Redistricting App, in the past in another state Dr. Collingwood compared the data in Dave's Redistricting App with the regular redistricting file available from the census to make sure it was the same. *Id.* at p. 182. However, Dr. Collingwood admitted at his deposition he did not do such a comparison in the present case. *Id.* He relied entirely on Dave's Redistricting App to ensure the data was accurate. *Id.*

The one federal court that has addressed the admissibility of the output and data from Dave's Redistricting App has found them inadmissible. In Ohio Org. Collaborative v. Husted, the court excluded maps generated using Dave's Redistricting App in part on the basis that the expert who used the software failed to demonstrate how he determined the application contained accurate data and also failed to provide any information about the parameters he used to produce the maps in that case. 2016 WL 8201848, *8 (S.D. Ohio May 24, 2016).

III. The Court Should Exclude Portions of the Testimony and Expert Report of Dr. Weston McCool Relating to His Opinion That Systemic Disparities Hinder the Ability of Native American Tribal Members to Participate Effectively in the North Dakota Political Process

Plaintiff's expert Dr. Weston McCool's opinions in this case are limited to the application of the fifth Senate Factor in three specific counties in North Dakota: Rolette, Benson, and Ramsey Counties. Expert Witness Report of Weston C. McCool, Ph.D. ("Weston McCool Report") (Doc. 65-21); Transcript of the Deposition of Weston McCool ("Weston McCool

Depo.”), attached to the Affidavit of David R. Phillips as Exhibit 1 at pp. 27, 35, 40-41. The fifth Senate Factor, one of the factors courts may consider when determining if, within the totality of the circumstances, the operation of the electoral device being challenged results in a violation of Section 2 of the Voting Rights Act, is the “the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.” S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pp. 28-29. In relation to the fifth Senate Factor, Dr. Weston McCool analyzed seven areas in each county: income, poverty, education, health insurance coverage, computer ownership and internet access, housing, and employment. Weston McCool Report; Weston McCool Depo. at pp. 40-41. Specifically, he compared American Indian and Alaskan Native (“AIAN”) residents with white residents in each of the three counties, finding:

AIAN residents earn substantially less household income compared to Whites, AIAN residents are significantly more likely to earn an income under the poverty line compared to Whites, they are overrepresented in lower levels of educational attainment, and underrepresented in higher levels of educational attainment, AIAN households are significantly less likely to own a computer or have access to broadband internet compared to Whites, they are less likely to own their home, less likely to have health insurance coverage, and more likely to be unemployed.

Weston McCool Report at p. 2.

Based on his analysis of data derived from two sources (1: the 2015-2019 five-year American Community Survey for North Dakota, and 2: the Kaiser Family Foundation’s State Health Facts Report), Dr. Weston McCool concludes “there is race-based bias that disadvantages the AIAN population when compared to Whites.” Weston McCool Report at pp. 3, 13; Weston McCool Depo. at pp. 40-41, 84. However, without any analysis or data sources, Dr. Weston McCool also concludes, “[t]hese systemic disparities hinder the ability of AIAN tribal members to participate effectively in the North Dakota political process.” Weston McCool Report at pp. 2,

13. Other than citing to the Senate Factors themselves, Dr. Weston McCool has no basis to conclude that the “systemic disparities” he found relating to the seven areas listed above have had the actual effect of hindering the ability of Native American tribal members from participating effectively in the North Dakota political process. Weston McCool Report at pp. 2, 13; Weston McCool Depo. at pp. 79-84.

In his deposition, Dr. Weston McCool testified he is not familiar with and was not retained to analyze North Dakota’s election laws. Weston McCool Depo. at pp. 79-80. He also testified he is not familiar with and was not retained to address how elections are carried out in North Dakota in general, nor specifically with respect to the elections held in the three analyzed counties after the redistricting at issue in this case. *Id.* at pp. 80-81. As part of his analysis, he did not review any data on election results, voter turnout, or any other election data whatsoever. *Id.* at p. 82. He did not consider as part of his analysis the location of polling places relative to Native American populations. *Id.* at p. 83. Most importantly, he acknowledged at his deposition he did not conduct any analysis of whether Native Americans were actually prevented from voting in North Dakota based on the seven areas he analyzed, or whether those areas actually created obstacles to Native Americans voting in North Dakota. *Id.* at pp. 83-84.

Nothing in Dr. Weston McCool’s report or deposition testimony addresses elections or the political process in North Dakota, other than simple conclusory statements. As discussed in *Abelmann v. SmartLease USA, LLC*, an expert report “must explain the chain of reasoning that adequately connects the facts and data to the expert's conclusions.” No. 4:14-CV-040, 2020 WL 2475796, at *21 (D.N.D. May 13, 2020) (citing *United States ex rel. Tennessee Valley Auth. v. 1.72 Acres of Land in Tennessee*, 821 F.3d 742, 751 (6th Cir. 2016); *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010) (“[A]n expert opinion must ‘set forth facts’

and, in doing so, outline a line of reasoning arising from a logical foundation.”); *Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 741 n. 6 (7th Cir. 1998) (“Expert reports must include ‘how’ and ‘why’ the expert reached a particular result, not merely the expert's conclusory opinions.”). Dr. Weston McCool’s conclusion that “systemic disparities hinder the ability of AIAN tribal members to participate effectively in the North Dakota political process” is a mere assertion, unsupported by any facts or data at all. His attempt to opine about the alleged effect that income, poverty, education, health insurance coverage, computer ownership and internet access, housing, and employment have on the North Dakota political process should be excluded from trial as those opinions are entirely unsupported and thus unreliable.

IV. The Court Should Exclude Portions of the Testimony and Expert Report of Dr. Weston McCool Relating to his Opinion That Native Americans Have Less Access to Healthcare Due to the Cost, Which Was Formed Based on Unreliable Kaiser Family Foundation Data

As noted above, Plaintiff’s expert Dr. Weston McCool bases his opinions on his analysis of data derived from two sources: 1: the 2015-2019 five-year American Community Survey for North Dakota, and 2: the Kaiser Family Foundation’s State Health Facts Report. Weston McCool Report at p. 3; Weston McCool Depo. at pp. 40-41. Most of Dr. Weston McCool’s opinions are derived from his analysis of the first source, the American Community Survey for North Dakota, and the data from that source are summarized in a chart at the bottom of his report. Weston McCool Report at p. 14; Weston McCool Depo. at p. 84. However, Dr. Weston McCool relied on the Kaiser Family Foundation’s State Health Facts Report with respect to one opinion: that Native Americans avoid health care due to the cost at a higher rate than whites. Weston McCool Report at pp. 7-8, 10, 13; Weston McCool Depo. at p. 45. With respect to each of the counties analyzed, Dr. Weston McCool opinions as follows:

Despite access to IHS services, AIAN in North Dakota..., are also over three times more likely than whites to report that they avoided care due to cost, with 3.9% of Whites reporting not seeing a doctor because of cost, compared to 13.9% of AIAN according to the Kaiser Family Foundation's State Health Facts report. While these are state-wide data, they are the best available data on health care avoidance due to cost.

Weston McCool Report at pp. 7-8, 10, 13; Weston McCool Depo. at pp. 69-70. Dr. Weston McCool's opinion in that regard is based solely on the Kaiser Family Foundation's State Health Facts Report. *Id.*

As an initial matter, the Kaiser Family Foundation's State Health Facts Report is purportedly based on statewide data only, and is not specific to the counties analyzed by Dr. Weston McCool or to the reservations or areas at issue in this case. Weston McCool Report at pp. 7-8, 10, 13; Weston McCool Depo. at pp. 71-72. Further, based on his deposition testimony, it is clear Dr. Weston McCool has extremely limited knowledge regarding the Kaiser Family Foundation and the data it compiles. In that regard, he testified as follows:

Q. Let's talk about that Kaiser Family Foundation. What is that?

A. Kaiser Family Foundation, I believe, is a non-profit. I haven't looked under the hood to see if there's any private component to it. They compile health data from various states throughout the U.S.

Q. Do you know where the Kaiser Family Foundation obtains the data that it compiles?

A. They compile the data.

Q. Correct. And so where do they get that data from? How do they get their data?

A. I don't know.

Q. Do you know if they -- if the Kaiser Family Foundation does door-to-door surveys?

A. I do not.

Q. Or phone surveys?

A. I don't know where they get their data.

Q. Have you -- have you relied on the Kaiser Family Foundation in any prior research or work that you've ever done?

A. I have not.

Q. How did you come upon that dataset to incorporate it into your opinion in this case?

A. When meeting with the attorneys, they stated that it would be nice to get additional health data if possible. I then did some sleuthing.

* * *

Q. Is the Kaiser Family Foundation tied in any way to the U.S. census?

A. I don't know.

* * *

Q. Is the data contained in the Kaiser Family Foundation State Health Facts Report reliable?

A. I believe so, yes.

Q. What leads you to believe that?

A. My understanding is, while I don't know the source of the publicly available data, it is publicly available data that they compile.

Q. What do you mean when you say they compile the data?

A. Meaning that they aggregate it.

Q. And do you know -- and, again, I apologize if you've already said this. I just want to make sure I ask the question correctly and clearly. Do you know whether the Kaiser Family Foundation obtains the data that it uses to aggregate?

A. I'm not 100 percent sure. My understanding is that they aggregate the data from publicly available sources. I'd have to double-check.

Q. And do you know what those publicly-available sources are?

A. I do not.

Weston McCool Depo. at pp. 45-49 (Exhibit 1).

Based on the foregoing, Dr. Weston McCool's opinion that Native Americans avoid health care due to the cost at a higher rate than whites is unreliable and should be excluded from trial. The opinion is purportedly based solely on statewide data, not limited to the reservations or areas at issue in this case. Further, Dr. Weston McCool is entirely unaware of key facts about the Kaiser Family Foundation and the data it compiles. He believes the Kaiser Family Foundation compiles data from publicly available sources, but has no idea what those publicly available sources are. He has never relied on the Kaiser Family Foundation in any prior research or work he has ever done, and only sought out this additional data source after meeting with Plaintiffs' attorneys, who suggested finding additional health data if possible. The Court should exclude Dr. Weston McCool's opinion that Native Americans avoid health care due to the cost at a higher rate than whites, as it is based on one single source of data, whose reliability is entirely unknown.

V. **The Court Should Exclude Portions of the Testimony of Lonna Jackson Street Except Regarding the Injury the Spirit Lake Tribe and Its Members Have Allegedly Suffered by the State's Use of a Redistricting Plan That Allegedly Dilutes Their Vote**

Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires each party to provide to the other parties, "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." In accordance with that rule, Plaintiffs served *Plaintiffs' Rule 26(a) Initial Disclosures* on June 23, 2022, attached to the Affidavit of David R. Phillips as Exhibit 2,

disclosing among other individuals Chairman Douglas Yankton, Sr., the then-chair of the Spirit Lake Tribe. *Id.* at p. 4. Under the column “Subjects of Information” for Chairman Yankton, the disclosure states, “The injury the Spirit Lake Tribe and its members have suffered by the State’s use of a redistricting plan that dilutes their vote.”

Two days ago, on May 10, 2023, well after the end of fact discovery on December 1, 2022. Plaintiffs served *Plaintiffs’ Second Set Of Supplemental Disclosures*, attached to the Affidavit of David R. Phillips as Exhibit 3, disclosing Lonna Jackson Street. Under the column “Subjects of Information” for Ms. Jackson, the disclosure states, “Ms. Jackson Street is the newly elected chair of the Spirit Lake Nation and has information regarding the Tribe, its voters and local election conditions, and the needs and interests of the Tribe and Tribal residents with respect to the state legislature.” No individuals, including former Chairman Douglas Yankton, Sr., have previously been disclosed with those subjects of information.

Defendant Howe does not object to the late disclosure of Ms. Jackson as a potential witness to replace Douglas Yankton, as she is apparently newly elected as chair of Spirit Lake Tribe, replacing the previously disclosed Douglas Yankton, Sr. However, Defendant Howe does object to the newly disclosed subjects of information for the new chair, which neither Ms. Jackson’s predecessor nor any other witness has previously disclosed as having information about or expecting to testify about. Like her predecessor in office, Ms. Jackson’s testimony should be limited to “The injury the Spirit Lake Tribe and its members have suffered by the State’s use of a redistricting plan that dilutes their vote.”

CONCLUSION

For the foregoing reasons, Defendant Howe respectfully requests the Court exercise its discretion to exclude from trial as inadmissible: 1) all expert reports, except when offered for

non-hearsay purposes, 2) the portions of the testimony and expert report of Dr. Loren Collingwood relating to compactness and voting age population, which were formed by analyzing unreliable data using the unreliable software Dave's Redistricting App, 3) the portions of the testimony and expert report of Dr. Weston McCool relating to his opinion that systemic disparities hinder the ability of Native American tribal members to participate effectively in the North Dakota political process, as the opinion is a mere assumption, unsupported by any facts or data at all, 4) the portions of the testimony and expert report of Dr. Weston McCool relating to his opinion that Native Americans have less access to healthcare due to the cost, which was formed based on unreliable Kaiser Family Foundation data, and 5) the testimony of Lonna Jackson Street, except regarding the injury the Spirit Lake Tribe and its members have allegedly suffered by the State's use of a redistricting plan that allegedly dilutes their vote, consistent with initial disclosures.

Dated this 12th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE** was on the 12th day of May, 2023 filed electronically with the Clerk of Court through ECF:

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