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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV PLAINTIFFS' REPLY BRIEF RE: PAINTIFFS' MOTION TO COMPEL

INTRODUCTION

Plaintiffs are pursuing their Motion to Compel for two reasons. First, Plaintiffs seek to compel the production of information and documents that Defendant Hon. Jeff Davis is withholding based on an asserted ground of privilege, which Plaintiffs believe are not privileged. The second reason raises a significant and delicate matter that is being addressed in a separate

pleading filed under seal. Plaintiffs possess a document that strongly suggests that Judge Davis is concealing information prejudicial to his case. If Plaintiffs are correct, then the Court will need to determine whether that document and the brief that Plaintiffs are filing under seal should be unsealed,[1] whether any sanctions against Judge Davis are warranted, and whether Judge Davis should be ordered to disclose any other incriminating evidence that he may be concealing. For now, Plaintiffs will respond to Judge Davis's brief as if the injurious evidence that Plaintiffs have in their possession does not exist and will await the Court's ruling on that matter.

ARGUMENT

Plaintiffs' Motion to Compel contains four challenges. Plaintiffs seek to compel Defendant Davis to respond to Interrogatory No. 11 and Requests for Production Nos. 2, 3, and 4. Plaintiffs have decided to voluntarily withdraw their motion to compel with respect to Requests for Production Nos. 3 and 4. Shortly, Plaintiffs will be filing motions for partial summary judgment, seeking Rule 56 adjudication of most (but not all) of the claims in Plaintiffs' lawsuit. The documents sought in Requests for Production Nos. 3 and 4 are unnecessary to resolve the Rule 56 motions. Plaintiffs nonetheless continue to believe that Judge Davis should have responded to Nos. 3 and 4; however, in the interest of judicial economy, Plaintiffs hereby withdraw those two challenges.

The remaining two discovery challenges are relevant to the upcoming Rule 56 motions, but it is important to distinguish what this evidence does (and does not) relate to. The information sought in Interrogatory No. 11 and in Request for Production No. 2 is *not* necessary to establish Judge Davis's liability on Plaintiffs' claims. However, this information is relevant *to the scope of the remedy* being sought by Plaintiffs. Stated differently, the Court can adjudicate

[1] As explained in Plaintiffs' Motion for Sanctions (filed under seal), Plaintiffs believe that all pleadings involving this issue should be unsealed. However, Plaintiffs wish to protect any privilege that Judge Davis could assert, although Plaintiffs fail to see any privilege that could exist here.

Plaintiffs' upcoming motions for summary judgment even while the parties litigate the motion to compel because the evidence that the Court needs to decide the Rule 56 issues has already been discovered and will be presented to the Court. However, the scope of the remedy to which Plaintiffs believe they are entitled may be affected by Judge Davis's answers to Interrogatory No. 11 and Request for Production No. 2.

To be more precise, Plaintiffs believe that Judge Davis is a "policy maker" in two respects: (1) Judge Davis sets the policy for all of the 48-hour hearings that he conducts, and (2) Judge Davis also sets (or helps set) the policy for the 48-hour hearings that the other judges on the Seventh Judicial Circuit conduct.[2] In order to obtain a remedy against Judge Davis, Plaintiffs do not need to prove the second "policy maker" claim. On the contrary, Plaintiffs will be entitled to obtain a remedy against Judge Davis–with respect to *his* hearings–merely by showing that the policies challenged in this lawsuit are policies that Judge Davis has followed in his 48-hour hearings. *See Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

As the Court explained in its Order Denying Motions to Dismiss, a "policy maker" for purposes of liability under 42 U.S.C. § 1983 "is one who 'speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue,' that is one with 'the power to make official policy on a particular issue.'" *Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-5020 (D.S.D. Order Denying Motions to Dismiss Jan. 28, 2014) ("MTD Order") (Docket No. 69) at 19 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). A plaintiff who seeks a remedy under § 1983 against a policy maker must show that the action being challenged is an "official policy" made by that

[2] Six judges have presided over 48-hour hearings in the Seventh Judicial Circuit since January 2010: Judges Davis, Ecklund, Thorstenson, Trimble, Pfeifle and Mandel. The hearing transcripts show that all six judges follow the *identical* policies with respect to the issues being presented in Plaintiffs' Rule 56 motions. Plaintiffs believe that Judge Davis is responsible for those policies.

policy maker. *See Monell*, 436 U.S. at 694. "An 'official policy' involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy." MTD Order at 20 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)).

Thus, once Plaintiffs prove that Judge Davis is the "policy maker" who established the "official policies" applied in his own 48-hour hearings being challenged in this lawsuit, and that these policies are unconstitutional, Plaintiffs will be entitled to a remedy against Judge Davis individually. However, unless Plaintiffs can also prove that Judge Davis established (or helped establish) the policies used by the other judges in their 48-hour hearings, the Court will be unable to fashion remedies directed to the entire Seventh Judicial Circuit.

This is where Interrogatory No. 11 and Request for Production No. 2 fit in. They seek to gather evidence as to whether Judge Davis established (or helped establish) the policies used by all judges on the Seventh Judicial Circuit that are challenged in this lawsuit, not just the policies that he uses in his hearings.

A. <u>Interrogatory No. 11</u>

Interrogatory No. 11 states as follows: "With respect to *each* judge on the Seventh Judicial Circuit, describe in detail what conversation(s) you had with him or her regarding 48-hour hearings and the procedures that should or should not be included in them and approximately when you had each of those conversations." (emphasis in original). This interrogatory seeks information only as to "procedures" in 48-hour hearings. Nothing requires Judge Davis to disclose his deliberations or mental processes associated with any case, or the facts of any case (past or present).

As explained in Plaintiffs' opening brief, all of the cases cited by Nathan Oviatt in his written correspondence with Stephen Pevar show why the privileges invoked by Judge Davis are inapplicable in this circumstance. No further discussion of those cases is necessary (and, tellingly, Judge Davis selected not to cite some of those cases in his brief). Judge Davis cites only two new authorities in his brief. One is the dissenting opinion of Judge MacKinnon in *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973). The other is a decision from the West Virginia Supreme Court, *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727 (W. Va. 2000). Neither case supports Judge Davis's refusal to respond to Plaintiffs' discovery requests.

Nixon was an *en banc* decision that assists Plaintiffs, which explains why Judge Davis must cite to a dissenting opinion. In *Nixon*, the court rejected the claim of President Nixon to an absolute privilege in his oral and written communications with members of his staff and held that countervailing interests required the disclosure of those communications. 487 F.2d at 717 ("[N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task.") (citing *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 794 (D.C. Cir. 1971) (per curiam); *Gravel v. U.S.*, 408 U.S. 606, 627 (1972)). As discussed in Plaintiffs' Opening Brief, those same considerations warrant a similar disclosure here.

Kaufman is particularly harmful to Judge Davis. As with all of the other cases cited by Judge Davis, the West Virginia Supreme Court took pains to explain at the outset that "judges are subject to the rule of law as much as anyone else," and normally must respond to discovery requests the same as any other litigant. *Kaufman*, 535 S.E.2d at 733. However, the plaintiff in *Kaufman* sought to depose the judge who presided over a case in which he lost a verdict, and the state supreme court protected the judge's mental impressions from such disclosure. *Id.* at 736

("[Plaintiff] wishes to depose Judge Kaufman and ask him questions about the way he conducted [the case]. This Court cannot allow such an inquiry.") Thus, Judge Davis has been unable to find a single case that support his claim to a broad immunity from disclosing conversations he had with other judges about *procedures* that should be employed in handling a category of litigation.

As noted in Plaintiffs' Opening Brief, Judge Davis carries the burden of proof to show a need for secrecy. *See Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1189 (11th Cir. 2013); *Williams v. Mercer*, 783 F.2d 1488, 1520 (11th Cir. 1986). As is also as noted in the Opening Brief, Judge Davis has already selectively disclosed portions of his conversations with judges on the Seventh Judicial Circuit. Judge Davis has failed to carry his burden of proving that other portions of those conversations may legitimately be kept secret. Thus, Plaintiffs are entitled to an order compelling Judge Davis to respond to Interrogatory No. 11.

B. Request for Production No. 2

Plaintiffs' Request for Production No. 2 states: "Produce all documents of which you are aware issued by anyone other than you since you became the Presiding Judge of the Seventh Judicial Circuit that in any manner discusses, recommends, or prescribes procedures with respect to 48-hour hearings involving Indian children." As noted in Plaintiffs' Opening Brief, this Request is a corollary to Interrogatory No. 11 in that it seeks documents, whereas Interrogatory No. 11 seeks conversations, about the same subjects. Thus, both are governed by the same principles.

Citing *Kaufman*, Judge Davis states that "a court speaks through its orders," and then claims that Plaintiffs do not need to discover any outside communications. *See* Judge Davis's Response to Plaintiffs Second Motion to Compel at 7, citing *Kaufman*, 535 S.E.2d at 735.

(Docket No. 99). While it is true that every court speaks through its orders, that does not answer the question at issue here because courts and judges also speak through other means as well. Here, Plaintiffs are seeking to discover whether Judge Davis established or helped establish the *procedures* that other judges are using in their 48-hour hearings. The orders issued by these other judges show only that all of the judges use the identical procedures. Those orders are silent as to whether Judge Davis is a policy maker with respect to those procedures. That information is a legitimate concern in this civil rights case because Plaintiffs will be unable to obtain an omnibus remedy that includes the entire Seventh Judicial Circuit (rather than a remedy limited to Judge Davis) unless that evidence can be found and introduced.

CONCLUSION

Judge Davis has not carried his burden of proof with respect to his claim of privilege regarding either Interrogatory No. 11 or Request for Production No. 2. Accordingly, he should be ordered to produce all information and documents responsive to those discovery requests.

Respectfully submitted this 7th day of July, 2014.

By: /s/ Stephen L. Pevar

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2014, I electronically filed the foregoing Reply Brief with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants:

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