

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

JOHN M. WYATT, III, <i>et al.</i>,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 1:11CV58 GBL/IDD
)	
MARK McDERMOTT, <i>et al.</i>,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS' OPPOSITION TO DEFENDANT McDERMOTT'S
STATUS REPORT RELATING TO CONFIDENTIAL DOCUMENTS
SUBMITTED TO MAGISTRATE DAVIS ON JULY 18, 2011**

Plaintiffs take issue with McDermott's misleading title to his pleading, that the documents submitted to the Magistrate were confidential. As will be set out herein, while McDermott inappropriately designated them confidential, the agreement between counsel clearly allows for their filing as part of the record in the federal court. Plaintiffs will address herein that defense counsel Maloney misrepresented the agreement to the Court on July 18, 2011 and further misrepresented the agreement to the Court in the "Status Report" filed July 20, 2011. The agreement was negotiated among all counsel and specifically allowed for this type of filing. Further, McDermott has acknowledged this by his actions in filing information, as part of his Motion to Compel Plaintiff for further discovery, that was taken from a deposition of John Wyatt which had been designated as confidential under the Non-Disclosure Agreement.

A. The Non-Disclosure Agreement

The Non-Disclosure Agreement was negotiated among all counsel with exchange of various drafts of both a suggested protective order and a suggested non-disclosure

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agreement. It was initially agreed among all counsel to utilize a non-disclosure agreement rather than a protective order which had been suggested by one of defense counsel. The Non-Disclosure Agreement (*see* Exhibit 1 to McDermott's Status Report) was originally presented to plaintiffs' counsel so that Paragraphs 3(a)-(i) all would be treated as confidential material. Plaintiffs' lawyer objected to parts (f)-(i) as being included in that, which includes part (g) "the court and its personnel." Defendants then agreed and parts (f) through (i) were exempted as is the case in the present Non-Disclosure Agreement. Plaintiffs' counsel pointed out to defense counsel that federal courts disfavor agreements which require sealing parts of court filings or court records. This was a negotiation over a two week period between all counsel and the agreement is clear and unambiguous.

At the hearing on July 18, 2011, Mr. Maloney, counsel for defendant McDermott, misrepresented the agreement to the Court, indicating that plaintiffs' could not file the documents that were filed with the Court without taking certain steps under the Non-Disclosure Agreement. Plaintiffs' counsel pointed out that was not correct, and the Court very patiently gave a short recess so plaintiffs' counsel could demonstrate that to Mr. Maloney. After the recess, Mr. Maloney acknowledged that he was in error.

The brief Status Report filed by defendant McDermott's counsel also misstates these matters. To begin with, the agreement is not "silent with respect to use of confidential material . . . submitted to the Court and its personnel." As pointed out above, the Agreement specifically exempts "(g) The Court and its personnel" from people who cannot receive the material. Further, in paragraph 2 of the Status Report, it indicates that the 15 documents submitted by plaintiff contain confidential client

information. That is not correct. There is nothing confidential in those documents. The birth mother was deposed and gave a lot of this information and none of that is under seal. Certainly, her religious affiliation is all over the record because she and plaintiff John Wyatt went to Catholic school together for six years, and there are all sorts of references to co-conspirator Sr. Lisa Lorenz (a nun), etc. Indeed, as will be described below, these documents are all communications with third parties and it is unlikely any of them were properly designated as confidential. Nonetheless, all privilege as to the Colleen Fahland has been waived. Further, in paragraph 3 of the Status Report, it says that "the hearing on July 18th was the first time that confidentially designated documents were presented to the Court." That may be technically correct, but it is clearly misleading. As set forth above, McDermott's counsel had no problem relating information from Mr. Wyatt's deposition, which had been designated confidential, in his motion to compel, filed long before July 18th. It is plaintiffs' position that McDermott's counsel is able to do this under the agreement. However, it is duplicitous for McDermott's counsel to use material designated confidential in Court but then say that plaintiffs' counsel cannot do the same under the same Agreement.

B. The Documents Are Not At All Confidential.

With respect to these documents, they are basically all third party involved communications. Thus, MTM 304 and 301 are McDermott communications with third parties in California. Document MTM 303 relates to communications involving Brad Fahland (Colleen's father). Documents MTM 290, 285, 286, 173, 163, 149, 148, 82, 58 and 07 are or relate to communications with Jenkins and some include communications with Brad Fahland. Document MTM 186 is notes of a communication with Mr. Binder

(Mr. Wyatt's attorney at that time in the Virginia custody proceeding), and Document MTM 173 is apparently related to a communication with defendant Thomas Zarembinski.

The Non-Disclosure Agreement in defining confidential material says it "may include, without limitation, proprietary or commercially sensitive information, financial information, trade secrets, information that if disclosed would violate privacy laws, [clearly these documents are none of these], and other information concerning this dispute which, if disclosed, would impair or compromise the legitimate and/or protected privacy or confidentiality expectations of the producing party." These documents are not entitled to that protection, as there is no protected right of privacy for criminal or tortious activity in furtherance of a fraudulent scheme. These documents are clearly those things.

Document MTM 304 dated January 12-13, 2009 makes plain that there were concerns about the birth father not being cooperative, but nonetheless having to be given notice if they proceeded with an adoption in California.

Document MTM 303 are McDermott's notes of a meeting with Brad Fahland and the birth mother on January 15, 2009, that: "birth father opposes adoption – wants to parent." It further points out that Jeri Wyatt, the paternal grandmother of Baby Emma, opposed adoption and that John Wyatt had a family attorney.

Document MTM 301, January 28, 2009, is a communication with California adoption people and where McDermott says, "I learned the facts with respect to the birth father. We agreed that the situation does not give us very many viable options from a legal point of view." The notes further show that same day that McDermott would call a Utah attorney and did, in fact, call Jenkins.

Document MTM 290 shows conversations on February 3 and 4, 2009 between McDermott and Jenkins where they explore having to give notice to the birth father and, they discussed "planning to place into Utah to kick our 20 day provision into effect, or do you think it would be best to wait to see if he gets on the VA registry?" McDermott further notes a conversation with Jenkins which shows that they decided not to give John Wyatt notice of the Virginia registry and to give minimal notice about Utah.

Document MTM 288 of February 9, 2009 (the day before Baby Emma was born), are again McDermott's notes of a meeting with the Brad Fahland and

the birth mother, again exploring that John Wyatt was going to contest any adoption. Larry Jenkins was on a speaker phone. Later that day, there is an email from Jenkins to McDermott that the Act of Love representative, Ms. Moon, "is concerned because Colleen has told her she plans to let BF [birth father] come to the hospital after delivery to see the baby.... Doesn't seem like a great idea." After that, based on advice of Moon, Colleen lied to John Wyatt just three hours before she went into labor by telling him he would be at the birth of his child, and there were then numerous efforts to conceal the birth and the location of both Colleen Fahland and his daughter from John Wyatt.

Documents MTM 285 and 286 contain a draft affidavit from Jenkins to McDermott for Colleen Fahland that fraudulently states, "I sent a text message to Mr. Wyatt reaffirming to him that I was working with a Utah adoption agency for the placement of my baby." It had further misstatements in paragraph 5 of that affidavit. Ms. Fahland has testified that information was totally untrue. Indeed, in an affidavit which was attached to Plaintiff's Motion to Compel McDermott Discovery that was heard on July 18, 2011 (Exhibit 8), Ms. Fahland states, "Within 12 hours of [prior to] the baby's birth I informed John that I had not made a decision as to what to do with the baby." She further states that she was told by her attorney (McDermott) not to disclose to John Wyatt the arrangements, was told to conceal his address, and not to add his name to the birth certificate.

Document MTM 186 is notes of McDermott of a conversation he had with John Wyatt's attorney Mr. Binder on February 13, 2009, that makes it plain that John Wyatt opposed any adoption and would be filing an action in Stafford County court to block the adoption.

Document MTM 173 shows there was a course of communications between the Zarembinskis, Brad Fahland, Jenkins and McDermott about how to respond to John Wyatt's Petition for Custody in Virginia, and there were one or more conference calls with respect to that. This document covers the period February 27, 2009 through March 2, 2009. It makes plain that they discussed strategy in a conference call between McDermott, Jenkins, Brad Fahland and Thomas Zarembinski on March 2, 2009 and that the Zarembinskis needed time to "make a decision as to (a) nature of the defense, (b) financing the defense in Virginia."

Document MTM 163 shows communications between Jenkins and McDermott on March 10, 2009 where Mr. Zarembinski is quoted as the "**strategy is to keep the birth father chasing his tail in the dark as long as possible in Virginia.**" Jenkins has a comment above that that he didn't recall "developing a strategy quite like what he [Tom Zarembinski] says." However, this document is very similar to a document produced by Brad Fahland (BKF 83-84), which is Exhibit 9 to Plaintiff's Motion to Compel McDermott Discovery, and was not and is not under any confidential designation. That document shows communication between Brad Fahland and Thomas Zarembinski on March 14, 2009 where Mr. Zarembinski described, "**Larry's [Jenkins'] strategy to keep John Wyatt**

trying to figure out what truly needs to be done” This is consistent with the voice message from Thomas Zarembinski quoted above about John Wyatt “chasing his tail in the dark.”

Document MTM 149 is communications on February 12 and 13, 2009 between Jenkins and McDermott where “Larry” Jenkins complains that the Zarembinskis felt they had spent enough already and it was “not a good sign.” The notes reflect that the Zarembinskis were originally told that the “case was initially presented as a potentially-contested adoption.” They further reflect that the Zarembinskis were the “only adoptive parents who were willing to **buy off** on a contested adoption.”

Document MTM 148 on March 13, 2009 is a Jenkins to McDermott communication referring to Thomas Zarembinski and his discussion concerning the Virginia litigation. Jenkins says, “[Thomas Zarembinski] had the impression we wanted to fight hard out there, but also not have you go to the hearing **for fear the judge would force you to divulge where the adoption was pending.**” Jenkins further states, “I told him you don’t know where the adoption is pending and that, and that [sic] the baby was placed with a Utah agency, is all you can tell the judge there.” They were clearly apparently planning to foist the same lie on the Virginia court that they had on Mr. Wyatt.

Document MTM 82, April 27, 2009, talks about when Mr. Wyatt finally had a Utah lawyer, giving the lawyer the case number (which no one knew) for the Zarembinski adoption case in Utah, with the hope that “if Les files simply an objection . . . he will not have taken any of the steps under Utah law that Mr. Wyatt was required to take.”

Document MTM 058 comprises notes on July 16, 2009 of a McDermott communication with Brad Fahland, where McDermott is told that Colleen, the birth mother, “regrets the adoption and would, if she could, take the baby back.”

Document MTM 007 is an August 18, 2009 email from Jenkins to Thomas Zarembinski and McDermott that, “we all knew going into things in February there was a possibility Wyatt would contest things and you agreed to take the baby knowing that. . . .” It further states, “**Mark [McDermott] felt it was too risky under VA law or the laws of any of the states out there because Wyatt was jumping up and down and waving his arms, so Mark called me and asked if any of the agencies I work with may be willing to take on the matter.**”

When the foregoing documents are all read together, and considering the false filing with the state agencies in Virginia that McDermott, Jenkins and the Fahlands did not know Mr. Wyatt’s address and could not reasonably ascertain it to give him notice,

there is no rational basis that can be formed that the foregoing documents have any reasonable expectation of privacy. Indeed, they alone show a clear conspiracy to commit fraud, and particularly when read with the filings with the state agencies in Virginia and Utah, and the affidavit and testimony of Colleen Fahland as to these inappropriate filings, and the notes of defendant Moon and her testimony how she received guidance from Jenkins and gave direction to Colleen Fahland, which helped conceal the Utah adoption.

Conclusion

The bottom line is that the documents submitted to the Court are all highly germane to this lawsuit and all substantiate the allegation of the Complaint. As a group they do not have any reasonable expectation of privacy. Nor should this Court be used to edit and/or conceal public filings because of McDermott's fear of bad publicity. That would clearly run afoul of the First Amendment to the United States Constitution. However, regardless of the foregoing, the parties all entered into a Non-Disclosure Agreement that specifically allows these documents to be filed with the Court.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

/s/

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