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

JOHN M. WYATT, III, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	**Civil No. 1:11CV58 GBL/IDD**
v.	)	
	)	
MARK McDERMOTT, ESQ., *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS JENKINS AND WOOD JENKINS' RENEWED RULE 12(b)(2) MOTION TO DISMISS

Defendants Larry S. Jenkins ("Jenkins") and Wood Jenkins, LLC ("Wood Jenkins") (collectively "Jenkins") have renewed their motion, pursuant to Fed. R. Civ. P. 12(b)(2), asking this Court to dismiss the Complaint filed by John M. Wyatt, III, on his behalf as well on behalf of his daughter, Baby Emma. That motion should be denied because it is premised upon the erroneous argument that this Court lacks personal jurisdiction over him because his "only contacts" with Virginia in connection with the events set forth in the Complaint were "negligible, attenuated and incidental" to his role as legal counsel to Defendants Act of Love ("AOL") and Thomas and Chandra Zarembinski (the "Zarembinskis"). See Defendant Larry S. Jenkins' and Wood Jenkins, LLC's Renewed Rule 12(b)(2) Motion to Dismiss the Plaintiffs' Complaint at 1.

Jenkins' argument glosses over the fact that, as alleged in the Complaint and confirmed by the jurisdictional discovery authorized by this Court, he played a key role in the conspiracy that took place in Virginia to engage in fraud and deceit to deprive Mr. Wyatt of his constitutional right to develop a relationship with his daughter, Baby Emma, and for Baby Emma to develop a relationship with her father. Jenkins personally directed the activities of co-

conspirators in Virginia, knowing full well that his actions would cause injury within the Commonwealth. Throughout his moving papers, Jenkins seeks to portray his tortious acts as nothing more than the provision of legal services to his clients, but there is no legal services exemption in the law of personal jurisdiction or of torts.

Moreover, as set forth in the Complaint, and as confirmed by discovery in this case, Jenkins' actions were done in furtherance of a business transaction in Virginia – the procurement of a baby for money in which thousands of dollars changed hands. The fact that the monetary transaction involved an adoption instead of the sale of a car, for example, is not a basis to exempt Jenkins from personal jurisdiction.

Finally, Jenkins' motion ignores the fact that he also has engaged in a persistent course of conduct in Virginia related not only to the procurement of Baby Emma, but also to his adoption practice more generally. Discovery has revealed that Jenkins has regular communications and obtains referrals from attorneys in Virginia, and additionally, over the last three years from 2008-2010, he had handled 26 adoption matters involving Virginia and he has regular contacts with Virginia agencies in arranging for the placement of babies into Virginia. These are not mere isolated or incidental contacts with the Commonwealth. Rather, they go to the heart of the business of procuring babies for money in which Jenkins is engaged.

I. JENKINS' NUMEROUS CONTACTS WITH VIRGINIA AND HIS PARTICIPATION IN THE CONSPIRACY TO CAUSE TORTIOUS INJURY IN THE COMMONWEALTH.

A. Jenkins Key Role in the Conspiracy to Cause Harm in Virginia

1. The Conspiracy Is Formed to Deprive Mr. Wyatt of His Rights.

Far from being a mere bystander removed from the events in Virginia described in the Complaint, discovery in this case confirms that early on, Jenkins became a key member of the

conspiracy to deceive Mr. Wyatt and to deprive him of his rights.[1] Indeed, Jenkins was brought into the conspiracy soon after the initial meeting on January 15, 2009 between Defendant Mark McDermott, Esq., who is licensed to practice law in Virginia, and Baby Emma's birthmother, Colleen Fahland, and her father, Brad Fahland. See MTM 303. At that meeting, it was confirmed to McDermott that Mr. Wyatt opposed the adoption of his child and that he had an attorney. *Id*. Indeed, the documents produced by the Defendants are replete with references to the fact that Mr. Wyatt would fight any adoption and that he had an attorney. As Jenkins described the situation, "because [John] Wyatt was jumping up and down and waving his arms," McDermott decided that "it was too risky [to proceed] under VA law." MTM 7.[2]

Accordingly, McDermott contacted Jenkins, a Utah attorney, to find out "if any of the agencies [Jenkins] work[ed] with may be willing to take on the matter." *Id.* (emphasis added). See also MTM 301. McDermott brought Jenkins, as a Utah adoption attorney, into the conspiracy because Utah adoption law allows for severing an unmarried biological father's rights without any effective due process protections, and Utah allows its adoption laws to apply to biological fathers, like Mr. Wyatt, who have no connection to the state. Complaint, ¶ 36.[3]

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[1] Due to page limitations, Mr. Wyatt has referred only to selected documents showing Jenkins' deep involvement in the conspiracy and his contacts with Virginia. (These documents collectively comprise Exhibit 1.) The documents cited are but a small percentage of the myriad documents demonstrating Jenkins' concerted activities directed to the Commonwealth.

Some of the documents included in Exhibit 1 are stamped "Confidential – Subject to Non-Disclosure Agreement." Per the Court's September 2, 2011 Order, those documents no longer are confidential.

[2] The Commonwealth's adoption laws contain specific procedures requiring notification of birth fathers to allow them to contest an adoption. See Va. Code Ann. § 63-1200, *et seq*.

[3] Indeed, Jenkins is the prime author of the Utah statutes that facilitate the termination of an unmarried biological father's rights. Complaint, ¶¶ 38-39. Notably, McDermott turned to Jenkins only after McDermott had spoken with an attorney for a California adoption agency and

Following his conversation with McDermott, Jenkins contacted AOL, a Utah adoption agency. MTM 300. AOL informed Jenkins that it should not be a problem to have Colleen Fahland matched with a prospective adoptive family. *Id.* See also WJ 2392.

The subsequent email correspondence and other contacts (including many dozens of telephone calls) among Jenkins, McDermott, Act of Love, the Zarembinskis, and the Fahlands (in Virginia) confirms their concerted plan to prevent Mr. Wyatt from receiving notice and contesting the adoption of his daughter.[4] Jenkins was the person who would provide direction as to how Mr. Wyatt's parental rights would be terminated despite his "jumping up and down" to prevent the adoption of his child. As AOL wrote in an email to other co-conspirators approximately one week before Baby Emma was born, all questions "about birth father termination and rights" were to be directed to Jenkins, and indeed, they were. See AOL 1974.

2. Jenkins Devises Strategy to Terminate Mr. Wyatt's Rights.

The close coordination between Jenkins and McDermott in devising a strategy to ensure that Mr. Wyatt would remain in the dark so that his paternal rights could be denied is exemplified by an email Jenkins sent to McDermott approximately one week before Baby Emma's birth. In that email, Jenkins states as follows:

> Remind me how the Virginia registry works. Do you think it would be good to give birth father notice now that Colleen is planning to place into Utah to kick [Utah's] 20-day provision into effect, or do you think it would be best to wait to see if [Mr. Wyatt] gets on the Virginia

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they had agreed that California's notice requirements to biological fathers did not "give very many viable options from a legal point of view" to terminate Mr. Wyatt's rights. See MTM 301- 302.

[4] The degree to which Jenkins was deeply involved in the conspiracy is confirmed by his March 5, 2009 invoice to the Zarembinskis, which references conversations not only with the Zarembinskis, but also with AOL and McDermott regarding "Virginia Birth Mother." See WJ 2250.

> registry? Can you check the Virginia registry at any time, or is it cumbersome? Just thinking out loud.

See WJ 2391; MTM 290.[5]

In a follow-up telephone call Jenkins placed to McDermott, they decided that Mr. Wyatt would not be given notice of the Virginia Putative Father Registry, where he could register to protect his rights as the father of Baby Emma. Instead, Mr. Wyatt would be told merely "that adoption in Utah is planned." See MTM 290; WJ 2553. As Jenkins informed McDermott, "Utah law provides that Utah [putative father] registry provisions kick in once birth father knows birth mother is placing in Utah." *Id*. Neither Jenkins nor McDermott decided to inform Mr. Wyatt of these registry requirements, however. The reason for this is clear. The purpose of Jenkins' and McDermott's discussions about Utah law were not in the context of providing effective notice to Mr. Wyatt so that he could protect his rights. Rather, the opposite was the case. The strategy was to deny Mr. Wyatt his constitutionally-protected parental rights and, thereby, prevent any opposition to the planned adoption.

On February 9, 2009, a mere day before Baby Emma was born, Jenkins participated in a conference call with McDermott and Colleen and Brad Fahland. Notes of that call confirm the strategy to keep Mr. Wyatt in the dark, to utilize Utah law to deny him his rights, and to prevent him from challenging the planned adoption. In this regard, the role of Jenkins was clear, and he specifically was placed on the speaker phone so he could "answer questions relating to: Utah law." See MTM 288; BKF 357-358.[6]

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[5] The 20-day provision referenced in Jenkins' email pertains to the Utah requirements of notice to a birth father. The Virginia Registry is the Virginia Putative Father Registry.

[6] Excerpts from the notes of Brad Fahland indicate that the following points were discussed concerning Jenkins and Utah law:

- John [Wyatt] obligation to register in Utah

3. Jenkins' Directions to Defendant Moon in Virginia.

On February 3 or 4, 2009, Jenkins spoke with Defendant Laraine Moon, an employee of AOL, and specifically directed her to "have Colleen [Fahland] [who was in Virginia] mention to BF [birth father, John Wyatt] that she is working with the Utah agency, have her do so both verbally and in some written memo so it can be tracked." See AOL 414. (emphasis added). Colleen Fahland allegedly made the call as directed, and Ms. Fahland told Moon that she had contacted John Wyatt "by phone [and] [s]he let him know she was working with a Utah. agency." *Id.*[7] Ms. Fahland also sent a text message from Virginia to Mr. Wyatt in Virginia, which said "Do you understand that im receiving information from a Utah agency for proceeding with an adoption." AOL 412. That was the sole so-called "notice" that Mr. Jenkins directed be provided to Mr. Wyatt.

Significantly, Jenkins did not direct Moon to have Ms. Fahland tell Mr. Wyatt that she was planning to proceed with an adoption in Utah under Utah law or that Mr. Wyatt should register with the Utah Putative Father Registry if he wanted to protect his rights under Utah law. This critical information was intentionally kept from Mr. Wyatt.

4. Jenkins' Monitoring of Developments at Hospital and Sending False Draft Affidavit to Virginia for Colleen Fahland to Sign.

Jenkins was kept apprised of the progress of the conspiracy by McDermott even as Colleen Fahland went into labor (see MTM 287; WJ 1464), and Jenkins had telephone conversations with and gave directions to McDermott about arrangements for the planned termination of Mr. Wyatt's rights. See AOL 410.

- Utah does not require notification to the father
- Questions to Larry [Jenkins].

BKF 357-358.

[7] Colleen also reported to Moon that John Wyatt's "response was not positive" about adoption. *Id.*

Baby Emma was born on February 10, 2009. Mr. Wyatt would have been at the hospital for his daughter's birth. However, when Jenkins learned that Ms. Fahland intended for Mr. Wyatt to come to the hospital, Jenkins sent an email to McDermott with the statement, "Doesn't seem like a great idea . . . ." MTM 288. Accordingly, Mr. Wyatt was kept in the dark, and he did not learn that Baby Emma had been born until a day later when his mother, Jeri Wyatt, after a number of telephone calls, was told that a "Baby Girl Fahland" had been born at Potomac Hospital. Complaint, ¶ 54.

Within hours of Baby Emma's birth, Jenkins spoke with McDermott and told him that Moon, who was on her way to Virginia, would "carry papers" to him. Jenkins also directed McDermott to check the Virginia Putative Father Registry to determine if John Wyatt had registered. See MTM 287.

Less than an hour after Jenkins' telephone conversation with McDermott, Jenkins sent McDermott an email attaching a draft affidavit for Colleen Fahland to sign.[8] That affidavit, which Colleen Fahland signed without any substantial change on February 11, 2009, falsely stated that "[o]n February 4, 2009, I spoke by telephone with Mr. Wyatt and told him I was working with the Utah adoption agency and planning to place my child for adoption under Utah law through that agency." Ex. H to Jenkins and Wood Jenkins' Renewed Motion to Dismiss. At that time, Jenkins knew full well that he had not instructed Moon to have Colleen Fahland tell Mr. Wyatt that Ms. Fahland was planning to place their child for adoption under Utah law. All Ms. Fahland was told to do was to mention that she was "working with" a Utah agency.

On February 11, 2009, Moon, who had arrived in Virginia, had telephone conversations with Jenkins. See AOL 90; AOL 2915. AOL sent an email to Jenkins to let him know that

[8] Jenkins wrote in his email "you may need to change a few details, but this is essentially how I would like it to read." See MTM 285-286.

Chandra Zarembinski, who was in Virginia at the time, would be calling him "re: Colleen regarding birth father's rights in Virginia" and that John Wyatt had "showed up at the hospital this morning." AOL 1980. Chandra Zarembinski had arrived in Virginia on February 10, 2009, the day of Baby Emma's birth, and Mrs. Zarembinski's telephone records confirm that a call was made to Jenkins on January 11, 2009. See Z 268.

Also, on February 11, 2009, McDermott had Colleen Fahland sign an Affidavit of Paternity, witnessed by her mother, in which Mr. Wyatt was identified as the birth father. Both Colleen Fahland and her mother, as well as others present at the signing, knew or could readily ascertain Mr. Wyatt's address (and Ms. Fahland and her father both testified that Ms. Fahland told McDermott that she could obtain the address). McDermott, however, placed a question mark next to Mr. Wyatt's address on the affidavit. See Complaint, ¶ 64.[9] Without an address, the Virginia Interstate Compact Office, where the documents were submitted, had no means of notifying Mr. Wyatt as to what was occurring with respect to his child. This lack of notice was in accord with the conspirators' plan to intentionally keep Mr. Wyatt in the dark.

On February 12, 2009, Colleen Fahland signed an Affidavit of Relinquishment and Consent to Adoption, transferring Baby Emma to AOL. Moon also signed the document on behalf of AOL. The document was witnessed by McDermott, as well as by co-conspirator Sr. Lisa Lorenz. During the course of the day, Jenkins traded telephone calls and emails with McDermott in Virginia. One of McDermott's emails to Jenkins pointedly said "I need a letter from you with plan for terminating the birth father's rights." See WJ 2389. After the signing of documents was completed, McDermott faxed to Jenkins copies of the documents Fahland had

[9] Also, one day later, McDermott obtained a letter from John Wyatt's attorney, and six days later, Mr. Wyatt's petition for custody, which contained his address, was filed. Thus, McDermott knew or could have obtained Mr. Wyatt's address if he wanted to. See, Sections I.A. 6 and 7, *infra.*

signed, including the false February 11, 2009 Affidavit of Emily Colleen Fahland and the Affidavit of Paternity. See WJ 2389; WJ 849-50; WJ 1746-1748; WJ 847; WJ 1771; MTM 278.

5. Jenkins Submits False Statements to Virginia ICPC Administrator

Having obtained the documents signed by Colleen Fahland, which contained false statements and false and incomplete information, the next stage of the conspiracy was to have the Virginia ICPC approve the transfer of Baby Emma from Virginia to Utah before Mr. Wyatt could initiate custody proceedings in Virginia or otherwise halt the planned transfer. Jenkins was instrumental in having this occur.

On February 12, 2009, the same day that Jenkins received the faxed documents from McDermott, Lance Rich, an attorney at Wood Jenkins, provided a letter to the Virginia ICPC administrator stating that he had reviewed "the relinquishment of the birth mother of the child referenced above," i.e., Baby Emma, and assuring the Virginia authorities that "[i]t complies with all particulars of Utah law." See WJ 1477-1478. The letter falsely stated that Mr. Wyatt had been informed that Baby Emma's mother intended to place Baby Emma for adoption through a Utah-licensed child placing agency. However, per Jenkins' instructions, Colleen Fahland had verbally mentioned to Mr. Wyatt only that she was "working with a Utah agency" and sent a text message that she was merely "receiving information from a Utah agency for proceeding with an adoption." AOL 412; AOL 414.

McDermott followed with the submission to the Virginia ICPC of the false affidavits and other documents, which Colleen Fahland had been induced to sign. MTM 180, WJ 2025-2026. The Virginia ICPC received the documents on Friday, February 13, 2009, approved the ICPC transfer of Baby Emma from Virginia to Utah, and that same day forwarded the paperwork to Utah for approval. See MTM 193; MTM 188.

6. Jenkins' Involvement in Extortionate Response to Mr. Wyatt's Virginia Counsel

Not knowing what had happened to his daughter, on February 12, 2009 Mr. Wyatt retained an attorney, James Binder, who had hand-delivered a letter addressed to Colleen Fahland asking that Mr. Wyatt be allowed to see Baby Emma. McDermott obtained a copy of the letter from Brad Fahland. Before responding, McDermott sought counsel from Jenkins. McDermott faxed Binder's letter to Jenkins, and later, Jenkins spoke to McDermott about a response. See WJ 1476; MTM 188. Jenkins directed McDermott to call Binder, which McDermott did, leaving a message. See MTM 188.

Later, when Binder responded, McDermott told Binder that unless he consented to the adoption, Mr. Wyatt would not see his child. McDermott also refused to reveal the location of Baby Emma or the names of the persons who had her. See MTM 381. Having given this extortionate response to Binder, McDermott and Jenkins exchanged telephone calls and emails. See MTM 186; WJ 2555, WJ 1474. Later in the evening, Jenkins placed a call to Chandra Zarembinski who was in Virginia. The call lasted approximately one-half hour and presumably included a discussion of Binder's request that Mr. Wyatt be allowed to see his daughter. See Z 274.

Late the following day, Friday, February 13, 2009, Binder called McDermott, followed by a fax message, informing McDermott that Mr. Wyatt opposed any adoption of Baby Emma and that Mr. Wyatt would be filing a petition for custody and seeking an emergency hearing. See MTM 186; MTM 381. McDermott called and emailed Jenkins about Binder's planned lawsuit and also faxed Binder's letter to him. See MTM 184; WJ 1474. On the following Monday, Jenkins emailed McDermott asking about any further communications with Binder and informing McDermott that the "chances were good" that the Utah ICPC would approve the

transfer of Baby Emma "early Tuesday." See MTM 182. In response, McDermott called Jenkins and told him that there had been no further contact with Binder and the courts in Virginia were closed on Monday due to a holiday. *Id.* Jenkins and McDermott obviously were concerned that Mr. Wyatt would file his custody suit in Virginia and serve Ms. Fahland before the Utah ICPC would approve the transfer of Baby Emma from Virginia to Utah.

Shortly after noon on Tuesday, February 17, 2009, Brad Fahland called McDermott and told him that Colleen had not been served with Mr. Wyatt's anticipated lawsuit. McDermott, who had been following the progress of the paperwork sent from Virginia to the Utah ICPC, said that the Virginia ICPC papers had been delivered to the Utah ICPC at 9:01 a.m. Utah time. See MTM 180. McDermott, then, called Jenkins to advise him that the Utah ICPC had received the paperwork, and Jenkins said he would call the Utah ICPC. See MTM 179. The Utah ICPC approved the placement of Baby Emma into Utah, and at 11:30 a.m. Utah time, Jenkins emailed to McDermott: "Approved!! They [Zarembinskis] can travel." See WJ 2385. Jenkins called AOL and said that the Zarembinskis were clear to take Baby Emma to Utah. See AOL 89. That afternoon, the Zarembinskis checked out of the Virginia motel where they had been staying and with Baby Emma boarded a flight to Salt Lake City. Jenkins' plan to keep John Wyatt in the dark while Baby Emma was spirited from Virginia to Utah had succeeded.

7. Jenkins' Strategic Role in Stafford County Proceedings

On February 18, 2009, Mr. Wyatt instituted legal proceedings in Stafford County to obtain custody of his daughter, not knowing where she was being kept. Indeed, Mr. Wyatt did not learn until mid-March that his daughter had been taken to Utah.

Jenkins was kept fully apprised and had regular communications with McDermott about Mr. Wyatt's custody case, and these communications continued through the Stafford County

Court order of December 9, 2009, granting Mr. Wyatt full custody of Baby Emma. See WJ 2383; MTM 176; WJ 2007-2009; WJ 854-858; WJ 1089-1094; WJ 2132-2136.

Jenkins placed telephone calls to McDermott to discuss the Virginia proceedings. See MTM 176; WJ 2558. McDermott supplied Jenkins with all the filings in the Stafford County proceeding, and Jenkins' files apparently contain all the Stafford County pleadings. See, e.g., WJ 1981-1998. Jenkins knew about the Fahlands' hiring of a private investigator to attempt to locate negative information about Mr. Wyatt (MTM 165), and Jenkins received a copy of the investigator's report. See WJ 2371-2372; MTM 161. See also Transcript of Telephone Deposition of Larry S. Jenkins ("Jenkins Depo."), p. 213, ln. 18-25 (Exhibit 2).

Jenkins also had and placed telephone calls with Brad Fahland and McDermott to discuss litigation strategy in Virginia. See MTM 162; MTM 173. As Jenkins testified at his deposition, "[w]e definitely strategized and talked." Jenkins Depo., p. 214, ln. 12 (Exhibit 2). The strategy devised by Jenkins was described by Tom Zarembinski as being "to keep [John] chasing his tail in the dark as long as possible in Virginia" so that he would not take legal action in Utah to block the Zarembinskis' adoption petition, which had been filed by Jenkins. See MTM 163.

On March 14, 2009, approximately ten days prior to a hearing in Stafford County, Jenkins sent an email to McDermott setting forth his strategy. To avoid alerting Mr. Wyatt as to where the Zarembinski adoption proceeding was pending, Jenkins suggested that McDermott could tell the court that "you [McDermott] don't know where the adoption is pending and that the baby was placed with a Utah agency, is all you could [tell] the judge there [in Stafford County]." See MTM 148. However, McDermott knew where the adoption was pending, as he so testified at his deposition.

That Jenkins was pulling the strings in Stafford County is confirmed in a draft email prepared by Tom Zarembinski on March 14, 2009, which he and Brad Fahland sent on March 16, 2009 to Jenkins and McDermott. In that email, Tom Zarembinski described Jenkins "strategy" as one "to keep John Wyatt trying to figure out what truly needs to be done [i.e., file proceedings in Utah; it could potentially squelch any Virginia proceedings.]." See BKF 81-82. See also WJ 2364-2366. Following this email, on March 17, 2009, Jenkins placed a telephone call to Brad Fahland in Virginia and McDermott to prepare for potential questions from the Stafford County judge at the upcoming hearing. See MTM 146; WJ 2568.

After the March 25, 2009 Stafford County hearing, Jenkins spoke with McDermott about the hearing, and later that day, McDermott sent an email to Jenkins (to be forwarded to the Zarembinskis) about the pre-trial conference. See MTM 124. Thereafter, Jenkins reviewed draft pleadings, including McDermott's pretrial memorandum and responses to interrogatories, before McDermott filed them. See WJ 2348 (email stating that McDermott plans to send draft interrogatories, requests for admission and requests for production for suggestions). Jenkins also reviewed McDermott's draft discovery to Mr. Wyatt (WJ 2346) and consulted with McDermott before McDermott responded to discovery promulgated by Mr. Wyatt. See MTM 107.

8. Jenkins' False Statements to Virginia Putative Father Registry and Failure to Give Notice to Mr. Wyatt.

The strategy to keep Mr. Wyatt "chasing his tail in Virginia" continued in March and April, 2009, when Jenkins made false statements to the Virginia Putative Father Registry to prevent Mr. Wyatt from learning about the Zarembinskis' efforts to institute adoption proceedings in Utah and the whereabouts of his daughter.

On March 30, 2009, the Virginia Putative Father Registry ("Virginia Registry") received Jenkins' search request (WJ 864), and Jenkins' office informed the Virginia Registry that Jenkins would be supplying confidential information that was not to be disclosed to the birth father. If there were a "hit" as to the father of the baby, Jenkins said he would be responsible for giving notice to the father. See WJ 1782. At his deposition, Jenkins could not cite to any authority to keep this information confidential; Jenkins' statements to the Virginia Registry simply were made to continue the strategy of keeping Mr. Wyatt in the dark.

On April 6, 2009, Jenkins sent a 10-page fax to the Virginia Registry reiterating that the information supplied by Jenkins be kept confidential and, again, fraudulently claiming his office would give notice to the father if there were a "hit." WJ 1782. Two days later on April 8, 2009, Mr. Wyatt filed with the Virginia Putative Father Registry. Despite receiving notice on April 13, 2009 of a "hit," Jenkins never gave the required notice to Mr. Wyatt, notwithstanding Jenkins' assurances to the Virginia Putative Father Registry that he would do so.

That created "a problem" for Jenkins (and McDermott), as confirmed by an email Plaintiffs' counsel recently discovered in McDermott's original files at the time of his deposition, but which had not previously been produced by either McDermott or Jenkins in response to document requests. In that email, dated May 12, 2009, Jenkins writes to McDermott in response to a prior telephone conversation about the results of a search Jenkins directed to the Virginia Putative Father Registry. Although Jenkins intended to tell his assistant not to initiate a search, a search apparently was made, and as a result, Jenkins received from the Virginia Registry "a second letter telling us about the filing [i.e., Mr. Wyatt's April 8, 2009 filing]." Exhibit 3.[10] Jenkins' email discusses the "problem" that this may create under both Utah and Virginia law

[10] The "initial search certificate" said "no one had registered." Exhibit 3.

because of the failure to give notice to Mr. Wyatt. Nonetheless, neither Jenkins nor McDermott took any steps to provide Mr. Wyatt with notice; they simply ignored and covered up any "problem."

9. Jenkins' Continued Communications About Strategy for Stafford County Proceedings

Prior to both the May 13 and June 17, 2009 Stafford County custody proceedings, Jenkins placed calls and sent emails to McDermott to discuss preparation and "strategy" for the hearings. See MTM 76; MTM 65. Following the May 13, 2009 hearing, McDermott briefed Jenkins about what had occurred (see MTM 75), and subsequent to the June hearing, Jenkins reviewed a draft letter that McDermott planned to send to the court. See MTM 62-63.

After the June 17, 2009 hearing, Colleen Fahland decided that the adoption was a mistake and that she now did not oppose Mr. Wyatt having custody of Baby Emma. Jenkins discussed this turn of events with McDermott in telephone calls and email correspondence. See MTM 17, 58; WJ 1824; AOL 1998. As a consequence, McDermott withdrew as Colleen Fahland's counsel, but Jenkins' communications with McDermott continued. After entry of the Stafford County order on August 24, 2009, granting Mr. Wyatt *pendente lite* custody of Baby Emma, Jenkins emailed to McDermott a portion of Jenkins' brief in the Utah adoption proceedings making the argument that the Virginia court did not have jurisdiction over Baby Emma. See MTM 2. Jenkins also continued to initiate telephone conversations with McDermott. See, e.g., WJ 2664 (Oct. 9, 2009); WJ 2689 (Dec. 14, 2009).

Jenkins had additional conversations and e-mail communications with Fahland's new counsel, Sharon Gustafson, Esq., whose office is located in Virginia, about Mr. Wyatt's custody case (see BKF 316, 249, 321, 253-54, 325), and after the Stafford County court issued its

December 11, 2009 order granting full custody of Baby Emma to John Wyatt, Gustafson forwarded a copy of the order to Jenkins. BKF 325.

B. Jenkins' Persistent Course of Conduct in Virginia Involving Adoption Matters.

In addition to the numerous contacts that Jenkins had in Virginia pertaining to the scheme to deprive Mr. Wyatt of his parental rights and to remove Baby Emma from her home in the Commonwealth, Jenkins also has engaged in a persistent course of action in Virginia relating to adoption matters.

Larry Jenkins is on the Board of the American Academy of Adoption Attorneys (the "Quad A"), and he and his partner, Lance Rich, are identified in the American Academy of Adoption Attorneys' online directory. Defendant Wood Jenkins, LLC's Answers to Plaintiffs' First Set of Interrogatories Regarding Personal Jurisdiction ("Wood Jenkins Int. Ans."), No. 15 (Exhibit 4). As a prominent adoption attorney, Jenkins obtains referrals from Virginia attorneys (or those licensed to practice in the Commonwealth). McDermott's involvement of Jenkins in the Baby Emma matter is just one such instance, and Jenkins has had additional cases with McDermott. See Jenkins Depo. at p. 57, ln. 25-p. 58, ln. 1; p. 71, ln. 6 – ln. 20 (cases with McDermott in Virginia) (Exhibit 2). Over the last several years, Jenkins also has worked with other Virginia counsel about Virginia adoption matters. Jenkins' Depo., p. 49, ln. 11 - p. 61, ln. 5; p. 61, ln. 21 - p. 64, ln. 6 (cases involving Virginia attorneys Rodney Poole, Barbara Jones and Stan Phillips), p. 61, ln. 21 - p. 63, ln. 19 (cases with Virginia attorney Barbara Jones); p. 63, ln. 20 - p. 64, ln. 6 (case with Virginia attorney Stan Phillips in 2006/2007) (Exhibit 2).

In addition, Wood Jenkins has engaged in the following course of conduct in Virginia during the year period 2008-2010 relating to adoption matters:

- In 2008, Wood Jenkins engaged in representations involving eight cases related to Virginia.[11] In seven matters, Wood Jenkins represented adoptive parents who resided in Virginia, and in one additional case, the birth mother resided in Virginia and the child was believed to have been conceived in Virginia.

- In 2009, Wood Jenkins commenced the representation of four adoptive parents, who resided in Virginia. In two other cases, the birth mother or the adoptive mother resided in Virginia.

- In 2010, Wood Jenkins commenced representations in 14 cases related to Virginia. In five cases, the adoptive (or prospective adoptive) parents resided in Virginia. In six cases, the child was either born or conceived in Virginia. In five cases, the birth mother resided in Virginia.

See Defendant Wood Jenkins, LLC's Supplemental Answers to Plaintiffs' first Set of Interrogatories Regarding Personal Jurisdiction ("Wood Jenkins' Supp. Int. An."), No. 1 (Exhibit 5).[12]

In those cases where Wood Jenkins represents the Virginia adoptive parents, Wood Jenkins has stated that its files show written and/or electronic communications with the adoptive parents in Virginia regarding the adoption proceedings and the status of these proceedings. Id. In 16 out of the 28 adoption matters involving Virginia between 2008-2010, Wood Jenkins also had communications with the Virginia Putative Father Registry, the Virginia ICPC or the Virginia Department of Social Services ("DSS"). *Id*.

Documents obtained from the Virginia DSS further show that during the period 2009-2011, Wood Jenkins initiated written communications with the Virginia ICPC or the Putative Father Registry for 13 adoption matters the firm was handling. See DSS 429-430, 512-513, 526-27, 539, 544, 570-71, 574-75, 589, 597, 607, 617, 622, 659. In other correspondence, the

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[11] Two of the cases, commenced in 2007, but continued into 2008.

[12] Additionally, Larry Jenkins traveled to Virginia to attend a conference in 2007, and in 2010, a member of Wood Jenkins attended a deposition in Virginia. See Jenkins Depo., p. 49, ln. 4-10 (Ex. 2); Exhibit 5. Two other attorneys also have performed legal services in matters where the client or the client contact was located in Virginia. See Ex. 5.

Virginia ICPC on five separate occasions, received communications from Jenkins to the Utah ICPC which communications were forwarded to the Virginia ICPC because the matter concerned a placement of a child into Virginia. See DSS 353, 394-95, 404-05, 437-38, 478-79.[13]

ARGUMENT

I. Standards for Asserting Personal Jurisdiction Over Jenkins.

As Jenkins acknowledges, the exercise of personal jurisdiction over an out-of-state defendant under Virginia's long arm statute "is intended to extend personal jurisdiction to the extent permissible under the due process clause, [and thus] the statutory inquiry [under the long arm statute] merges with the constitutional inquiry." Brief in Support of Larry S. Jenkins' and Wood Jenkins, LLC's Renewed 12(b)(2) Motion to Dismiss the Plaintiff's Complaint ("Jenkins' Brief") at 7, quoting *Consulting Eng'rs Corp. v. Geometric, Ltd.*, 561 F.3d 273, 277 (4th Cir. 2009).[14]

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[13] In one of Jenkins' letters forwarded to the Virginia ICPC, for example, Jenkins requests the Utah ICPC to "direct the Virginia ICPC office's attention" to an enclosed decision of the Utah Court of Appeals, which Jenkins says confirms his view of adoption law as to the placement of a child into Virginia. DSS 353-354. After the Utah ICPC forwarded Jenkins' letter to the Virginia ICPC, as requested, Virginia gave approval for the child's placement into Virginia. DSS-366. In another letter, Jenkins addresses a number of questions raised by the Virginia ICPC with respect to the placement of a different child into Virginia. DSS 404-425. All of these communications were directed to actions Jenkins wanted the Virginia authorities to approve.

[14] The Virginia long-arm statute, in pertinent part, provides:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or things in this Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth;
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other

The touchstone of due process is whether the nonresident defendant has sufficient minimum contacts with the forum state such that the "'maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Mitrano v. Hawes*, 377 F.3d 402, 406 (4th Cir. 2004) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Importantly, the defendant need not be physically present in the forum. *Elliot Machine Corp. v. John Holland Party, Ltd.*, 995 F.2d 474, 476 (4th Cir. 1993), quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985). "Minimum contacts exist where the defendant 'purposefully direct[s]' its activities toward the residents of the forum." *Id.* at 476. Moreover, "[t]he relevant question is not where the contacts predominate, but only whether enough minimum contacts exist that the district court's assumption of specific jurisdiction satisfie[s] due process." *English & Smith v. Metzger*, 901 F.2d 36, 39 (4th Cir. 1990). Thus, a single contact can be sufficient to support personal jurisdiction where the action arises out of that contact. *Chesapeake Bank v. Cullen*, 2010 U.S. Dist. LEXIS 100827, *10 (E.D. Va. Sept. 21, 2010).

The Fourth Circuit further has observed that where the presence of personal jurisdiction is being challenged as it is in Jenkins' renewed motion to dismiss:

> the plaintiff is simply to make a prima facie showing of a sufficient jurisdictional basis in order to survive the jurisdictional challenge. In considering a challenge on such a record, the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction.

Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989). See also *Convergence Technologies (USA), LLC v. Microloops Corp.*, 711 F. Supp. 2d 626, 634 (E.D. Va. 2010) ("a plaintiff is

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> persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth; . . .

Va. Code Ann. § 8.01-328.1(A)(1)-(4).

required to make only a *prima facie* showing that defendants are subject to personal jurisdiction. In determining whether a plaintiff has established a *prima facie* case, a court 'must accept the uncontroverted allegations in the plaintiff's complaint as true and resolve any factual conflicts in the affidavits in the plaintiff's favor.'").

In this case, Mr. Wyatt's Complaint clearly makes such a *prima facie* showing, as confirmed by the evidence adduced during jurisdictional discovery demonstrating Jenkins' deep involvement in the tortious conduct that occurred in Virginia pertaining to the procurement for money of Baby Emma and his additional, persistent contacts with Virginia in pursuing other adoption matters.

II. JENKINS' PURPOSEFUL ACTIVITIES TO DENY PLAINTIFFS THEIR RIGHTS SATISFY DUE PROCESS CONCERNS.

Jenkins recognizes that to satisfy the due process clause of the Constitution, sufficient minimum contacts will be found "if [the defendant] has purposely directed his activities at the residents of the state and the causes of action alleged by the plaintiff arise out of those activities." Jenkins' Brief at 8, citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985). Here, Jenkins' activities easily satisfy the "minimum contacts" test. The record is replete with the numerous actions that Jenkins directed toward Mr. Wyatt, a resident of Virginia, to deny him his constitutional right to develop a relationship with his daughter and toward Baby Emma, also a Virginia resident, to deny her right to a relationship with her father.

As set forth in more detail in Section I, *supra,* Mr. Jenkins directed the activities of co-conspirators in Virginia to keep Mr. Wyatt in the dark, facilitated the signing of false affidavits in Virginia, and facilitated the submission of false information and documents to the Virginia authorities and a Virginia court. Colleen Fahland, the birth mother, and her parents are Virginia residents, and their actions at the direction of Jenkins were all taken in Virginia. Baby Emma

was born in Virginia, and after Baby Emma was removed from Virginia (unbeknownst to Mr. Wyatt), Jenkins oversaw a strategy of keeping Mr. Wyatt "chasing his tail" in Virginia to prevent him from opposing the Utah adoption proceedings that Jenkins had instituted. For Jenkins to contend that his concerted actions directed at Mr. Wyatt in Virginia and taken with the intent to deny him his constitutionally protected rights are not sufficient to allow him to obtain redress in the Virginia courts turns due process on its head.

III. JENKINS' CONSPIRATORIAL ACTIONS DIRECTED TO VIRGINIA FALL WITHIN VIRGINIA'S LONG-ARM STATUTE

In this case, Jenkins' wrongful activities directed to Virginia (both on his own and in league with his co-conspirators) and the injuries that were purposely inflicted upon Mr. Wyatt and Baby Emma within the Commonwealth also are more than sufficient to make the requisite *prima facie* showing for this Court to exercise personal jurisdiction over him under the Virginia long-arm statute on three alternative bases: (1) conspiring with defendants who committed tortious injury by acts or omissions in the Commonwealth, (2) transacting any business in the Commonwealth, and (3) causing tortious injury in the Commonwealth by an act or omission outside the Commonwealth.

A. This Court Has Personal Jurisdiction Over Jenkins Due to His Active Participation In the Conspiracy to Commit Tortious Injury in Virginia.

This Court has recognized that personal jurisdiction may be founded upon the acts or contacts in Virginia of a co-conspirator. See *Verizon Online Services v. Ralsky*, 203 F. Supp. 2d 601, 622 (E.D. Va. 2002) ("[w]hen co-conspirators have sufficient contacts with the forum, so that due process would not be violated, it is imputed against the 'foreign' co-conspirators who allege there is not sufficient contacts; co-conspirators are agents for each other."); *American Online, Inc. v. Ambro Enterprises*, 2005 U.S. Dist. LEXIS, 46261 (E.D. Va. Sept. 5, 2005).

Thus, where parties, like Jenkins and the other Defendants, conspire to take actions that they reasonably could expect would have consequences in Virginia, all the conspirators are subject to personal jurisdiction in Virginia as long as one co-conspirator who is subject to personal jurisdiction (1) commits overt acts in furtherance of the conspiracy in Virginia and (2) those acts are attributable to the other co-conspirators. This is the case regardless of whether the out-of-state co-conspirators have any other contacts with the forum. See *In re: Outsidewall Tire Litigation*, 2010 U.S. Dist. LEXIS 110507, *36 n.20 (E.D. Va. Oct. 18, 2010); *Noble Sec, Inc. v. MIZ Eng'g, Ltd.*, 611 F. Supp. 2d 513, 539 (E.D. Va. 2009) ("a defendant who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction … because the defendant has purposefully availed himself of the privileges of that state"); *Cline v. Hanby*, 2006 U.S. Dist. LEXIS 90469, *21-22 (S.D. W. Va. 2006); *St. Paul Fire & Marine Ins. Co. v. Hoskins*, 2011 U.S. Dist. LEXIS 53321 (W.D. Va. May 18, 2011) (denying defendant's motion to dismiss for lack of personal jurisdiction where a complaint sufficiently showed that out-of-state defendants participated in a tortious conspiracy intentionally and purposefully directed at Virginia); *Chesapeake Bank v. Cullen*, 2010 U.S. Dist. LEXIS 100827, *13 (E.D. Va. Sept. 21, 2010) (plaintiff pled sufficient facts for exercise of personal jurisdiction over out-of-state defendants within the meaning of Va. Code § 328.1(A)(1) where the out-of-state defendants knowingly participated in a conspiracy involving a conspirator who carried on business in Virginia).[15]

[15] See also *Hong v. Tong*, 61 Va. Cir. 439 (Richmond 2003) (where out-of-state lawyer prepared legal documents that were used by other defendants in Virginia, the lawyer was subject to personal jurisdiction in the Commonwealth because the lawyer "should have reasonably expected to be haled into court where his documents were being used."); *Massey Energy Co. v. UMW*, 69 Va. Cir. 118, 127-128 (Fairfax County 2005); *Nathan v. Takeda Pharms. Am., Inc.*, 2011 Va. Cir. LEXIS 99 (Fairfax County, Va. Aug. 2, 2011) (Thatcher, J.) (where plaintiff alleged that out-of-state defendants knew or should have known that tortious actions would be

For example, in *Outsidewall Tire Litigation, supra*, Judge Ellis affirmed a jury verdict on a conspiracy claim against defendants located in China where the evidence established that the Chinese defendants knew that actions in furtherance of the conspiracy would occur in Virginia. The court held that personal jurisdiction over the Chinese defendants was properly exercised even though their participation in the conspiracy was limited to emails and telephone calls. 2010 U.S. Dist. LEXIS 110507, *35-37.

The same analysis easily applies to the activities of Jenkins in this case. It defies credulity that Jenkins did not know that his actions taken in league with the other defendant co-conspirators would not cause injury to Mr. Wyatt and Baby Emma in Virginia. In his motion to dismiss, Jenkins does not challenge the principle that conspiracy jurisdiction is a recognized basis for the assertion of personal jurisdiction over a non-forum defendant. Instead, Jenkins contends that Mr. Wyatt cannot make a threshold showing that "a conspiracy existed and Jenkins and Wood Jenkins participated therein." Jenkins Brief at 23 and n. 5. Jenkins simply is wrong.

Contrary to Jenkins' assertions, the discovery in this case confirms the allegations in Mr. Wyatt's Complaint that in January, 2009, McDermott involved Jenkins in the conspiracy to engage in fraud and deceit to prevent Mr. Wyatt from exercising his parental rights and to spirit Baby Emma from her home in Virginia to Utah, where Jenkins could institute adoption proceedings. See Section. I, *infra.* Indeed, Jenkins himself portrayed the reason for his involvement in the conspiracy as being McDermott's concern that "it was too risky [to proceed] under VA law" because John "Wyatt was jumping up and down and waving his arms." MTM 7.

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committed in Virginia by Virginia co-conspirator, "the Court is satisfied that alleged conduct by the co-conspirators in Virginia is sufficient to establish personal jurisdiction over [out-of-state defendants].")

Moreover, for Jenkins to contend there is "no evidence that a conspiracy existed, and no evidence that Jenkins and Wood Jenkins participated in the conspiracy" (Jenkins Brief at 23-24), flies in the face of the myriad emails and telephone calls among McDermott, Act of Love, Moon, the Zarembinskis, and the Fahlands (who are Virginia residents). The documentary evidence referenced in Section I, *supra*, could not be more clear that a conspiracy was formed, that it existed, and that Jenkins was a key participant.

Jenkins also asserts that no false representations were made by Colleen Fahland, citing a February 10, 2011 statement signed by Ms. Fahland and procured by McDermott's counsel after Mr. Wyatt's lawsuit was filed. See Exhibit B to Jenkins Brief. However, Jenkins fails to note that before Ms. Fahland signed the statement procured by McDermott, she signed a sworn statement which quite specifically said as follows:

> I, Colleen Fahland, was told by my attorney not to disclose to John Wyatt the arrangements [for the relinquishment of Baby Emma], was told to conceal his address and not to add his name to the birth certificate.

Exhibit 22-B to Deposition of Collen Fahland (Exhibit 6).[16]

To the extent that Jenkins asserts that Ms. Fahland's subsequent affidavit procured by McDermott is to the contrary, any factual divergence is not one that can be resolved on a motion to dismiss (or summary judgment, for that matter); it is a matter for trial. Moreover, Jenkins'

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[16] Additionally, Fahland's sworn statement stated:

> Within three days prior to the child's birth I agreed to allow John Wyatt to participate in the actual birth of our child and stated to John that after the birth we would make a decision together on how to best handle the child's future. We discussed raising the child together.
>
> In my last telephone conversation with John Wyatt prior to the baby being born, within twelve hours of the baby's birth, I informed John that I had not made a decision as to what to do with the baby.

Id.

attempt to put an innocent gloss on documents Mr. Wyatt previously submitted to this Court demonstrating Jenkins' critical role in the conspiracy is one for a jury to assess. See Jenkins Brief at 24-27. The documents, on their face, certainly confirm concerted activity among Jenkins, McDermott and other co-conspirators. Also, Jenkins erroneously asserts that the affidavit he drafted for Colleen Fahland to sign and which he sent to McDermott within hours of Baby Emma's birth is "accurate." See Jenkins Brief at 26. To the contrary and as noted above, that affidavit falsely states that Collen Fahland told Mr. Wyatt that she was planning to place Baby Emma "for adoption under Utah law." She did not.

In sum, Mr. Wyatt has made more than a sufficient threshold showing that a conspiracy involving Jenkins existed and that members of that conspiracy engaged in tortious conduct in Virginia which caused injury to the Plaintiffs in this case. Accordingly, Jenkins, as a co-conspirator, is subject to the personal jurisdiction of this Court.

B. Jenkins Transacted Business in Virginia Sufficient to Subject Him to Personal Jurisdiction.

Transacting *any* business in Virginia is sufficient to subject an out-of-state defendant to personal jurisdiction in this forum (Va. Code § 8.01-328.1(A)(1)), and Mr. Wyatt clearly has presented sufficient facts to make a *prima facie* showing that Jenkins participated in the transaction of business in Virginia within the meaning of the long-arm statute.

As alleged in the Complaint, Jenkins specializes in representing both adoption agencies and biological mothers in adoption transactions (Complaint, ¶ 97), and he earns substantial sums of money in using the unconstitutional adoption procedures of the State of Utah to separate biological fathers, like Mr. Wyatt, from their children. *Id.*, ¶ 31.

In the business transaction at issue in this case, the Zarembinskis contracted with Act of Love for the purchase of a baby (Complaint, ¶ 12), and Jenkins was retained by both Act of Love

and Zarembinskis to facilitate the transaction, as he has done in the past. *Id*., ¶ 31. One of Jenkins' roles in the business transaction was to induce the Virginia authorities to allow Baby Emma to be taken from her home in Virginia to Utah unbeknownst to Mr. Wyatt and, then, to initiate an attempted adoption proceeding in Utah to separate Baby Emma from her biological father and legal custodian. Complaint, ¶¶ 29, 68, 73-75, 78. Jenkins' actions directed to the Commonwealth of Virginia were instrumental in this business transaction, that is, procuring a baby for money in Virginia.

Any argument by Jenkins that the procurement of Baby Emma was not a "business transaction" is belied by the fact that the Zarembinskis paid Act of Love over $25,000 for Baby Emma. Indeed, evidence adduced during discovery confirms that the Zarembinskis decided to procure Baby Emma knowing that Mr. Wyatt would not consent to the adoption because it was cheaper than procuring a baby in Texas, whose parents would both consent, because the "price" of obtaining that baby was $48,000. See Z 525-526. The procurement of Baby Emma was a business transaction pure and simple.

The key role that Jenkins played in this business transaction also is a far cry from the limited involvement of the law firm in *Village Lane Rentals, LLC v. Capital Fin. Group,* 159 F. Supp. 2d 910 (W.D. Va. 2001), upon which Jenkins heavily relies. Jenkins' Brief at 13-14. In *Village Lane Rentals*, the defendant out-of-state law firm merely had responded "to a limited number of phone calls and inquiries on its client's behalf," and the court held that this limited involvement did not rise to the level of "transacting business in the forum." *Id*. at 915.

The discovery in this case has confirmed that Jenkins did more than merely answer a few inquiries from his clients; he actively participated in the procurement for money of Baby Emma in Virginia and directed the actions of conspirators in Virginia. Without Jenkins' active

involvement, Baby Emma never would have left Virginia and the business transaction would not have been completed.

C. Jenkins Is Subject to Jurisdiction Under § 328.1(A)(4).

There can be no dispute that Mr. Wyatt has set forth in the Complaint sufficient factual allegations that Jenkins caused tortious injury in Virginia by directing co-conspirators in Virginia to undertake various actions and make fraudulent representations and by submitting (directly or indirectly) false documents to Virginia agencies. In such a circumstance, § 328.1(A)(4) authorizes this Court to exercise personal jurisdiction over Jenkins, even if he physically remained in Utah, as long as he engages in a "persistent course of conduct" in the Commonwealth. Va. Code Ann. § 8.01-328.1(A)(4).[17] As this Court has explained, the exercise of personal jurisdiction under Section 328.1(A)(4) recognizes that "Virginia has legitimate interest in providing a forum for claims based on conduct causing harm within its borders" and that "an out-of-state defendant should reasonably expect to appear before a Virginia court when

[17] Additionally, personal jurisdiction will be found if the out-of-state defendant derives substantial revenue from goods used or consumed or services rendered in Virginia. *Id.*

In his brief, Jenkins contends that Mr. Wyatt may not assert personal jurisdiction under any provision of the Virginia long-arm statute other than Va. Code § 8.01-328.1(A)(1)-(3) because, according to Jenkins, Mr. Wyatt's Complaint alleges personal jurisdiction under only these three provisions. Jenkins Brief at 18-19. Jenkins' argument is based upon a false premise. The Complaint specifically alleges that both Larry Jenkins and Wood Jenkins have caused tortious injury in Virginia by virtue of their "acts or omissions within Virginia as well as elsewhere," and that they have "engaged in purposeful activity in Virginia." Complaint, ¶ 7, 8. These allegations are more than sufficient for this Court to find that Plaintiffs have alleged personal jurisdiction that may be founded under § 328.1(A)(4). The case relied upon by Jenkins for his argument, *New Wellington Financial Corp. v. Flagship Resource Development Corp.,* 416 F.3d 290, 294 n. 6 (4th Cir. 2005), is not to the contrary. In *New Wellington,* the Fourth Circuit merely said that a plaintiff could not raise at oral argument a new basis for the assertion of personal jurisdiction several months after full briefing on the issue. Here, the parties still are engaged in briefing, and oral argument is not scheduled until September 23, 2011.

his 'purposefully targeted conduct' has caused harm in Virginia." *Robinson v. Egnor*, 699 F. Supp. 1207, 1213-14 (E.D. Va. 1988).

Thus, the showing of a persistent course of conduct is not an onerous standard. The Fourth Circuit has stated that the level of "persistent conduct" required by § 328.1(A)(4) need not reach the level of the "continuous and systematic" contacts amounting to "doing business" in the state. See *First American First, Inc. v. National Association of Bank Women,* 802 F.2d 1511 (4th Cir. 1986). It may be demonstrated merely by a showing that the defendant "maintains some sort of ongoing interactions with the forum state." *Willis v. Semmes, Bowen & Semmes,* 441 F. Supp. 1235 (E.D. Va. 1977). Importantly, a defendant's "persistent course of conduct" does not need to be "related to the cause of action alleged." *Robinson,* 699 F. Supp. at 1212. See also *Colt. Def. LLC v. Hechler & Koch. Def., Inc*., 2004 U.S. Dist. LEXIS 28690, *43 (E.D. Va. Oct. 22, 2004).

In this case, discovery has shown that over a multi-month period in 2009, Jenkins on a regular and ongoing basis placed numerous telephone calls and sent emails to McDermott and other co-conspirators who were either in Virginia (or planning to act in Virginia) to carry out their tortious conduct. See Section I.A., *supra.* He also has had repeated communications on referrals and other adoptions with attorneys across Virginia with whom he is principally associated through the Quad A. See Section I.B., *supra.*

Additionally, over the three-year period from 2008-2010 for which information was supplied by Jenkins, he handled 27 adoption matters, in addition to Baby Emma, involving either adoptive parents in Virginia, birth mothers in Virginia, or babies born or conceived in Virginia. In those cases where he was representing the adoptive parents, Jenkins directed communications into Virginia, and in most of the matters, he also directed communications to Virginia

authorities. See Wood Jenkins' Supp. Int. Ans., No. 1 (Exhibit 5). Indeed, for the last three years (2009-2011), Jenkins has had communications with the Virginia DSS concerning 13 adoption matters (in addition to Baby Emma) to arrange for the placement of babies in Virginia, and he has had additional communications with other state agencies addressing questions raised by the Virginia authorities. See Section I.B., *supra*.

This activity Jenkins has directed to Virginia represents a far more concerted and persistent course of conduct than the mere sending of a few emails and a letter to Virginia, which the court in *Micro Picture Int'l v. Kickartz,* 2006 U.S. District LEXIS 3714, *8-10 (W.D. Va. Jan. 17, 2006), held was not sufficient to support the exercise of personal jurisdiction. Mr. Wyatt is not seeking to hale Mr. Jenkins into court based upon a few emails and a letter.

Rather, this is a situation akin to that present in *Robinson,* where the Eastern District held that personal jurisdiction was appropriately exercised. In *Robinson,* this Court found significant the fact that the out-of-state defendant had approximately 50 contacts with his employer over a 19-month period and had worked with his employer located in Virginia on various matters. In this case, the record shows that Jenkins has had even more significant contacts with Virginia based upon his (1) contacts and communications with the other co-conspirators and the Virginia ICPC/Putative Father Registry as to Baby Emma; (2) his contacts and referrals from Virginia attorneys in other adoption matters; and (3) his service as counsel in numerous other adoption matters involving adoptive parents, mothers or babies in Virginia. Further, like the defendant in *Robinson* who twice traveled to Virginia, Larry Jenkins traveled to Virginia in 2007, and a member of Defendant Wood Jenkins traveled to Virginia in 2010. Accordingly, there is no significant difference in the number and type of contacts between the situation here and that in

Robinson, where this Court found a "persistent course of conduct."[18] The exercise of personal jurisdiction over Jenkins, therefore, is appropriate under § 328.1(A)(4) of the Virginia long-arm statute.

CONCLUSION

For the reasons set forth above, and those set forth in Plaintiffs' prior submissions in this case, Plaintiffs respectfully submit that this Court should deny Larry S. Jenkins and Wood Jenkins, LLC's Renewed Rule 12(b)(2) Motion to Dismiss.

[18] Jenkins' representation of adoptive parents in Virginia is akin to that of out-of-state medical providers who provide medical services to patients who reside in Virginia. Even though the medical professional is not physically present in Virginia, personal jurisdiction may be exercised under § 328.1(A)(4). See, e.g., *Pierce v. First Healthcare Corp*., 43 Va. Cir. 479 (Va. Cir. Ct. 1997); *Nussbaum v. CVS Caremark Corp*., 2011 W.L. 201482 (E.D. Va. Jan. 21, 2011) (holding that a plaintiff had made a *prima facie* case that non-resident physician was subject to personal jurisdiction in the Eastern District where plaintiff alleged that a prescription called into a Virginia pharmacy under the physician's name caused the death of plaintiff's wife, who was a Virginia resident; plaintiff had sufficiently shown that non-resident physician had engaged in a persistent course of conduct in intentionally directing his activities at Virginia to establish not only constitutionally sufficient minimum contacts with Virginia but also to satisfy the "bolstering activities" requirement of § 328.1(A)(4). See also *Bullion v. Gillespie*, 895 F. 2d 213, 217 (5th Cir. 1990) (finding personal jurisdiction over California physician in Texas litigation, explaining "Texas has a strong interest in protecting its citizens from allegedly harmful experimental drugs, disbursed by those not licensed to practice within the state.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 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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