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, *et al*.,	)	
	)	
Defendants.	)	
	)	

REPLY TO DEFENDANTS ZAREMBINSKIS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY

COMES NOW plaintiff in reply to defendants Zarembinskis' Opposition to plaintiff's Motion to Compel Discovery and requests that the Court strike the Opposition of defendants Zarembinskis, Doc. 190, as being untimely and made with total disregard and in violation of this Court's Order. In the alternative, should the Court not strike the Opposition, the Court should nonetheless order production of the legal bills between the Zarembinskis and Wood Jenkins, work product material as to communications between the two and others, and all communications and materials under the crime fraud exception.

Plaintiff filed a Motion to Compel discovery from the Zarembinskis on June 24, 2011 and noticed it for July 1, 2011. Unfortunately, the Court was not sitting on July 1, 2011, and the matter was put over to July 18, 2011. That gave Zarembinskis' counsel almost a full month to draft an opposition. That opposition would have been due no later than July 14, 2011. Zarembinskis' counsel filed nothing, in total violation of the Rules since he chose to oppose it.

At the hearing on July 18, 2011, Zarembinskis' counsel took the position that he thought

the issues with plaintiffs' counsel had been resolved. However, plaintiffs' counsel had been trying to resolve the issues with Zarembinskis' counsel, and while they had a tentative agreement as to many of the issues, there was never any agreement on the crime-fraud exception. Zarembinskis' counsel had an absolute duty to brief that no later than July 14, 2011. Notwithstanding that, Zarembinskis' counsel never even lived up to the tentative agreement on other issues. For instance, he was supposed to supply a privilege log, which was three months overdue and plaintiff's counsel still has not received one. Similarly, numerous other things to which counsel tentatively agreed were then altered after the Zarembinskis apparently changed their minds about things to which their counsel had agreed. Accordingly, there was no agreement and Zarembinskis' counsel should have filed an opposition timely with the original filing date of the motion.

At the hearing on July 18, 2011, given the confusion professed by Zarembinskis' counsel, the Court ordered specifically that "Mr. and Ms. Zarembinski file a pleading on the issue [crime fraud exception] no later than 5:00 PM on July 20, 2011…." That was not done by the Zarembinskis. The Court granted an exception to the rules and the Zarembinskis ignored it. In the late evening of July 25, 2011, the Zarembinskis finally filed their opposition, almost a week late. They did not seek leave of Court to file it out of turn. They did not seek to consult with plaintiffs' counsel about agreeing to a late filing; and, indeed, plaintiffs' counsel is prejudiced by the late filing because given the number of issues coming up at hearing on Friday, July 29, now does not have adequate time to deal with all the legal issues raised by the Zarembinskis. The Zarembinskis have twice directly violated filing orders on this pleading, even after the Court extended the deadline, and plaintiffs request the Court enforce its order and thus strike the

Zarembinskis' opposition as untimely and improperly filed.

This matter is exacerbated by the fact that the Zarembinskis have openly violated the rest of this Court's Order of July 18, 2011. The Court further ordered that the Zarembinskis produce various documents, including pictures, state court pleadings, house trust documents, a privilege log, income for two years, and telephone records, by 5:00 PM on July 25, 2011. That was not done by the Zarembinskis. Plaintiff has none of these materials, even though many of them were not objectionable. Plaintiff should have had those three months ago. Instead of complying with the Court's Order, Zarembinskis' counsel sent plaintiff an email late in the evening of July 26, 2011 (Exhibit 1). It had no attachments, nor has anything referenced in the email been produced to plaintiff. Plaintiff is now denied those documents to prepare for the hearing on July 29, 2011 and for use in oppositions to motions being heard on July 29, 2011. Plaintiff was denied those non-objectionable documents of the Zarembinskis at their depositions, where documents such as state court pleadings, the privilege log, and telephone records would have been useful. There is a long history of failure to produce and plaintiffs' counsel has repeatedly asked for documents that have been repeatedly promised, *e.g.*, the privilege log, and not produced. This violation of the Court's Order to produce material is consistent with the violation in not timely filing an opposition, and further merits that the Court should strike the pleading, both as it prejudices plaintiff and as a reasonable minimum sanction for open defiance of this Court's rules and Order.

Plaintiffs would point out to the Court that this pattern of refusing to minimal discovery is consistent with the depositions recently taken of the Zarembinskis. The Zarembinskis repeatedly refused to answers questions because they did not feel "comfortable" with answering certain questions. Plaintiff will make a separate motion when appropriate with regard to those

depositions.

The Zarembinskis' Opposition also totally misstates the discovery in this case. The Opposition states at page 1, "the Zarembinskis were on the periphery of this matter." It further states, "they did not get involved in the strategy…." Those statements, according to the very documents previously provided to the Court, are materially false as will be shown hereafter. Additionally, the Opposition, at page 2, states, "The focus of the plaintiffs' crime fraud exception is the documents that were signed by Colleen Fahland …." It further states, "the plaintiffs attach, as Exhibit 4 to their motion, an email which has Thomas Zarembinski discussing strategy to keep the baby's father 'in the dark.' This email was generated months after the birth of the baby and simply shows Mr. Zarembinski adding his two cents" [emphasis added]. These statements are also materially incorrect.

This entire conspiracy was not just to keep Mr. Wyatt from registering with the Virginia Putative Father Registry, or to keep him from receiving notice from the Virginia ICPC in order to block his daughter being taken out of Virginia. A material part of the conspiracy was to keep Mr. Wyatt in the dark so he would not file in the State of Utah within 20 days of allegedly being put on notice of a Utah adoption. That is plain from the notes and was openly discussed between several of the conspirators, including the Zarembinskis. Indeed, after Jenkins filed the Petition for Adoption on behalf of the Zarembinskis in Utah, defendant Moon's notes (from AOL) show that she was checking every day to see if John Wyatt had filed anything in Utah. The Judge in Utah denied Mr. Wyatt entry into the Utah adoption proceedings because he had not filed in Utah within 20 days. The Utah Supreme Court has now affirmed that decision. It was vital to this conspiracy that Mr. Wyatt be kept in the dark during that key period throughout February and

into March 2009.

Certainly Mr. Zarembinski was not on the periphery. As pointed out in plaintiff's Opposition to McDermott's Status Report (Doc. 176), the Zarembinskis were funding the conspiracy and were helping to map out the strategy. Plaintiff has previously provided to the Court an email from Thomas Zarembinski to Brad Fahland which was a suggested letter to the lawyers. Mr. Zarembinski states, "Brad and I would like to discuss the risks of a possible fourth option: for Mark to say at the summons that the fight needs to go to Utah and that all Virginia proceedings are moot. While this approach goes against Larry's [Jenkins] strategy to keep John Wyatt trying to figure out what truly needs to be done …." That email was sent on March 14, 2009, not "months" after Mr. Wyatt's daughter was born, but within the critical time frame to keep Mr. Wyatt from filing in Utah. That email was sent several days after Mr. Zarembinski left a voice message for Larry Jenkins that said the "strategy is to keep birth father chasing his tail in the dark as long as possible in Virginia." That email, sent March 10, 2009, was only four weeks from the birth of Mr. Wyatt's daughter. As pointed out in other emails, there was a course of communications between the Zarembinskis and Fahland, Jenkins and McDermott about how to proceed, including conference calls preceding the above emails. Document Bates numbered MTM 173, produced by defendant McDermott, shows that on March 2, 2009 the Zarembinskis needed time to, "make a decision as to (a) nature of the defense, (b) financing the defense in Virginia." Other documents, again in early March, show Zarembinski being concerned that if McDermott appeared at the hearing in the Virginia court, the judge would force McDermott "to divulge where the adoption was pending" (MTM 148). There is no question the Zarembinskis were deeply involved in the conspiracy to keep John Wyatt in the dark and during a critical phase

and that cost Mr. Wyatt the physical custody of his only child despite the fact he holds a full custody order from a court of the Commonwealth of Virginia.

Nor can the Zarembinskis pretend they knew nothing of this chicanery earlier than late February or early March, right after they had taken Mr. Wyatt's daughter to Utah. The evidence is compelling that the Zarembinskis knew from the beginning, and before the baby was born, that they were taking the child against the father's will and the father was to be lied to and kept in ignorance to affect their purchase of a baby. Indeed, in the documents, Mr. McDermott refers to the fact that the Zarembinskis were the only adoptive parents willing to "buy off"on a contested adoption. Indeed, in August, 2009, Mr. Jenkins emailed 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 …." That same email states, "Mark [McDermott] felt it was too risky under Virginia law or the laws of any of the states out there because Wyatt was jumping up and down and waving his arms …."

On February 2, 2009, one week before Emma was born, the Zarembinskis signed papers with Act of Love acknowledging the birth father is "named and not consenting." It stated, "We understand that if the birth father resides in a state that has laws differing from those in the State of Utah and if he is not consenting, steps may need to be taken in his state of residence to obtain a termination of his rights…." The notes from an defendant Moon, of Act of Love, show that she was specifically told prior to the birth of Mr. Wyatt's daughter that Mr. Wyatt would fight any adoption and that he had a family attorney. On February 10, 2009, the Zarembinskis signed "Act of Love At-Risk Adoption Placement Agreement." They acknowledged that the biological father's rights may not have been terminated, that if a biological parent refused to consent it

could disrupt the adoption, that the biological mother may not provide complete or accurate information, and that Act of Love could not guarantee a parent might not challenge the adoption. During the week from when they received Mr. Wyatt's daughter to when they secretly removed her from Virginia, the Zarembinskis had hours of conversations with Colleen Fahland over several days. Ms. Fahland testified unequivocally that she told them Mr. Wyatt would fight the adoption and that he had a family attorney. The Zarembinskis took Mr. Wyatt's daughter knowing that it was against his will, that the he had absolutely no knowledge of where his daughter was or who had her, and, thus, no ability to fight the adoption as long as he was kept "in the dark."

John Wyatt has testified that he was at the hospital when Mrs. Zarembinski called and insisted that he not be given information concerning the baby (his own child) during the first week after his daughter's birth. This was before she had any legal rights to Mr. Wyatt's daughter whatever. She, indeed, made a complaint to the hospital because information from the baby's records was divulged to Mr. Wyatt.

Indeed, contrary to law, and, again in an obvious effort to conceal this baby's true whereabouts, Mrs. Zarembinski changed the baby's name on medical records while she was in Virginia, again in the first week of the baby's life. The Zarembinskis also paid part of defendant McDermott's legal bills.

There is no question a prima facie case of fraud has been made out.

CONCLUSION

Based on the failure to obey a number of this Court's Orders and specifically the Order on

the filing on this Opposition, the Zarembinskis' Opposition should be stricken and plaintiff's motion be granted. The motion should also be granted because no opposition was timely filed prior to the original setting of argument on the motion. The motion should be granted because the Zarembinskis totally misstate the facts of their involvement in their Opposition. And, the motion should be granted because the documents clearly demonstrate not only a fraud on Mr. Wyatt, but the Zarembinskis' role in that fraud, and particularly with relation to the Zarembinskis' relationship with Jenkins in planning and effectuating the fraud. Nor have the Zarembinskis addressed plaintiff's right to legal bills as not being privileged, which is fully briefed in plaintiff's Motion. Nor have the Zarembinskis addressed the fact that the work product doctrine is not absolute and the Court can overrule it under special circumstances as exist here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

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