

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jane Doe and John Doe, individually, and
on behalf of Baby Doe,

Case No. 15-cv-02639 (JRT/SER)

Plaintiffs,

vs.

Emily Johnson Piper, in her official capacity
as Commissioner of the Minnesota
Department of Human Services, and
Lori Swanson, in her official capacity
as Minnesota Attorney General,

**Memorandum in Support of
Plaintiffs' Motion for
Protective Order**

Defendants.

Introduction

The parties agree that a Protective Order is appropriate in this case, but disagree as to its scope. Defendants believe that virtually every employee at the Minnesota Attorney General's Office should have the ability to access Plaintiffs' identities under the terms of their proposed Protective Order. Plaintiffs maintain that the unique nature of this case warrants more stringent protections than a run-of-the-mill attorneys-eyes-only provision. Indeed, this litigation involves adoption, fundamental privacy rights, questions of tribal nationalism, and defense counsel who work for and with one of the Defendants. Plaintiffs are prepared to give Defendants more than sufficient information to explore their defenses and defend their case; they only ask that the Court issue a Protective Order that sufficiently protects and preserves their Court-ordered anonymity in doing so.

Background

1. The Procedural Posture of Plaintiffs' Fourteenth Amendment Challenge to MIFPA

Plaintiffs' filed their Verified Complaint for Declaratory and Injunctive Relief ("Complaint") on June 3, 2015, and shortly thereafter filed a Motion for Preliminary Injunction and a Motion to Proceed Under Pseudonyms.¹ Plaintiffs allege that the notice and intervention provisions of the Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. §§ 260.751 – 260.835, violate their Fourteenth Amendment Rights to Due Process and Equal Protection.² In short, these MIFPA provisions expand the scope of the federal Indian Child Welfare Act ("ICWA"), allowing Indian Tribes to intervene in **voluntary** adoptions whereas ICWA only permits intervention in **involuntary** adoptions. Shockingly, an Indian woman living in Minnesota could abort her own child, but a couple giving birth to a child eligible for Indian tribal membership cannot place that child for voluntary adoption without the intrusion of Indian tribes if the child is eligible for membership.

Plaintiffs pursued their claim for prospective relief, under the common law doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against Lucinda E. Jesson ("Jesson"), in her official capacity as Commissioner of the Minnesota Department of Human Services,³ Lori Swanson, in her official capacity as Minnesota Attorney General ("Swanson"), and Samuel Moose, in his official capacity as Commissioner of Health and

¹ ECF Doc. Nos. 1 (Complaint), 6 (Mot. re: Pseudonyms), and 8 (Mot. re: Prelim. Inj.).

² See *generally* Complaint.

³ Emily Johnson Piper ("Piper"), as the new Commissioner, was substituted as defendant for Jesson.

Human Services for the Mille Lacs Band of Ojibwe (“Moose”). Plaintiffs sought a preliminary injunction so that Baby Doe’s adoption could be finalized absent tribal intervention. In response to Plaintiffs’ pleadings, the Mille Lacs Band of Ojibwe filed a Covenant Not to Intervene in Baby Doe’s Adoption.⁴ In large part due to this covenant, Plaintiffs’ motion for preliminary relief was denied, and Baby Doe’s Adoption was finalized.⁵

The Court did grant Plaintiffs’ Motion to Proceed Under Pseudonyms, which went unopposed.⁶ For the purposes of this litigation, the Court held that Plaintiffs shall be referred to as “John and Jane Doe,” their son shall be referred to as “Baby Doe,” and the adoptive parents shall be referred to as “the Adoptive Parents.”⁷ Defendants did not and are not challenging this ruling.

Following the initial motion practice, Defendants filed a motion to dismiss Plaintiffs’ claims. Moose’s motion was granted.⁸ Plaintiffs did, however, overcome a laundry list of jurisdictional and prudential challenges (e.g., standing, abstention, mootness) thrown at them by Piper and Swanson, and the government-defendants’ motion to dismiss was denied.⁹ Piper and Swanson subsequently answered Plaintiffs’ Complaint and discovery commenced.¹⁰

⁴ ECF Doc. No. 26.

⁵ ECF Doc. No. 42, Memorandum Opinion and Order at *9-10, (D. Minn. July 2, 2015).

⁶ *Id.* at *1, n.1.

⁷ *Id.*

⁸ ECF Doc. No. 52, Memorandum Opinion and Order on Defendants’ Motion to Dismiss (2/25/16) at 22-25.

⁹ *See generally id.*

¹⁰ ECF Doc. No. 54, Answer.

2. The Parties Fail to Reach an Agreement on a Protective Order

Defendants served written discovery on Plaintiffs, which Plaintiffs timely responded to on May 31, 2016.¹¹ On June 14, 2016, Defendants sent correspondence alleging deficiencies in Plaintiffs' responses.¹² Counsel for the parties engaged in a number of written and oral meet-and-confer efforts regarding the alleged deficiencies and disagreement over the Protective Order that will govern discovery production in this case.¹³ It is expected that many, if not all, of Defendants' discovery concerns will be alleviated once a protective order is entered.

The Protective Order the parties have been negotiating over is overwhelmingly a standard protective order. It is Plaintiffs' understanding that the parties have reached agreement on major points, including:

- (1) The Plaintiffs shall continue to proceed anonymously;
- (2) Plaintiffs shall not be required to disclose the identities of Baby Doe or the Adoptive Parents; and
- (3) Plaintiffs will provide to Defendants counsel of record: (1) Plaintiffs' names and addresses; (2) the tribal information in their possession; (3) the name of the adoption agency; and (4) responsive documents in Plaintiffs' possession related to the adoption.¹⁴

¹¹ ECF Doc. No. 61 at *1, Stipulation to Extend Scheduling Order.

¹² *Id.*

¹³ *See* Declaration of Jeffrey S. Storms (7/29/16) ("Storms Dec.") ¶¶ 5 – 9.

¹⁴ *Id.* at Ex. E at *2, Storms Email to Winter (7/21/16); *see also* ¶ 9.

Because Plaintiffs believe this is a unique case, Plaintiffs seek more restrictive attorneys-eyes-only (“AEO”) provisions and additional provisions to preserve anonymity.

Plaintiffs propose that AEO documents be restricted to: (a) the Court and its officers; (b) Defendants’ counsel of record; (c) persons shown on the face of the document to have authored or received it; and (d) court reporters retained to transcribe testimony.¹⁵

Plaintiffs also propose that the following provisions be contained in the Protective Order:

7. Plaintiffs shall redact Jane, John, and Baby Does’ and the Adoptive Parents’ names, dates of birth, addresses, court file numbers, and any other personal identifiers from all documents produced to the Defendants in this case.
8. Plaintiffs shall disclose the names, dates of birth, and addresses of Jane and John Doe to Defendants’ attorneys of record in this matter. Defendants’ attorneys of record shall maintain this information but shall not share this information with any third party, except that Defendants’ may file such information under seal with the Court in this or other actions to the extent the disclosure of this information is material to a pending legal proceeding.
9. All documents produced by third parties in this litigation, including those disclosed by the Minnesota state court overseeing Baby Doe’s adoption, shall first be produced to Plaintiffs for redaction in accordance with Paragraph 7 of this Order.
10. Defendants shall not attempt to solicit information from Jane or John Does’ Indian Tribes. Plaintiffs shall provide Defendants with requested Tribal information.
11. Should Defendants come into possession of documents containing Jane and John Does’ names, such documents shall be immediately provided to Plaintiffs for redaction in accordance with Paragraph 7 of this Order.

¹⁵ *Id.* at Ex. F ¶ 5.

12. At depositions, Plaintiffs shall be referred to as Jane and John Doe.¹⁶

Plaintiffs offered to provide identifier-redacted information in advance of this hearing, to get the ball rolling, with an agreement that Defendants would **temporarily** maintain those documents as AEO amongst defense counsel of record.¹⁷ Defendants refused to do this even on a temporary basis.¹⁸

Defendants will not agree to Plaintiffs' proposed AEO provisions, seemingly suggesting that they are unworkable for the AG's Office: "As an example, if we want to maintain our documents electronically, it will necessarily require access to support staff—whether IT or other litigation support staff..."¹⁹ Defendants have also not agreed to the additional provisions designed to protect anonymity, as set forth above.

Defendants' last proposal provided that the following individuals would have access to AEO information: "Attorneys and their office associates, legal assistants, and stenographic and clerical employees."²⁰ Not only do Defendants refuse to limit the scope of individuals who will have access to AEO documents, Defendants also insist that Plaintiff's counsel not be permitted to redact the AEO information to remove Jane and John Does personal identifiers.²¹ Thus, under Defendants' proposed Protective Order,

¹⁶ This provision was not contained in the most recent proposal Plaintiffs made to Defendants (i.e. Storms Dec. Ex. F), but Plaintiffs now seek its inclusion after further consideration of the circumstances and legal opinions.

¹⁷ *Id.* at Ex. E, Emails between Storms and Winter (7/12/16 – 7/21/16).

¹⁸ *Id.*

¹⁹ *Id.*, Winter Email to Storms (7/20/16).

²⁰ *Id.* at Ex. F, Plaintiffs' Redline of Defendants' Proposed Protective Order (7/12/16).

²¹ *Id.* at Ex. E, Emails between Storms and Winter (7/12/16 – 7/22/16).

virtually everyone at the Minnesota AG's office will have access to AEO information and the identities of Jane and John Doe.

3. The Special Intrigue Surrounding this Litigation and the Likelihood of Embarrassment.

Litigation challenging and related to ICWA and related state legislation is receiving heightened attention across the country.²² Several Indian groups have banded together to form the "ICWA Defense Project," which releases regular updates on its joint defense efforts, including in this litigation.²³ The coverage of this and related litigation by Indian tribes reflects that this case has raised heightened concerns of Indian nationalism.²⁴

Plaintiffs have expressed their extreme concern from the outset about the embarrassment they believe would ensue if their identities are revealed:

Jane and John Doe are also adamant that they do not want their tribes put on notice regarding Baby Doe's adoption. This notice will result in word

²² See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); see also Lindsey Bever, "'Keep Lexi home': A foster family's wrenching fight for a 6-year-old Choctaw girl," *The Washington Post* (March 24, 2016), available at <https://www.washingtonpost.com/news/morning-mix/wp/2016/03/24/keep-lexi-home-a-foster-familys-wrenching-fight-for-a-6-year-old-choctaw-girl/>; Riham Feshir, "Native American couple suing tribe, state to allow adoption to white couple," *Minnesota Public Radio* (June 9, 2015), available at <http://www.mprnews.org/story/2015/06/09/native-american-adoption>.

²³ Storms Dec. Ex. G. ICWA Defense Project Memorandum (June 25, 2016).

²⁴ Suzette Brewer, "War of Words: ICWA Faces Multiple Assaults from Adoption Industry," *Indian Country Today Media Network* (7/8/15), available at <http://indiancountrytodaymedianetwork.com/2015/07/08/war-words-icwa-faces-multiple-assaults-adoption-industry-160993>; see also Bill John Baker, Principal Chief of the Cherokee Nation, "It Takes a Tribe: ICWA under assault," *Native Times* (12/18/15), available at <http://www.nativetimes.com/index.php/life/commentary/12568-it-takes-a-tribe-icwa-under-assault>.

spreading in the tribal offices of their adoption plan, and if the tribes seek out alternate placements then their families and others in the tribal community will learn of their private adoption plan. John and Jane Doe have intentionally kept Jane Doe's pregnancy and birth a secret, even from their own parents and family. This will result in embarrassment and immense pressure to deviate from what Jane and John Doe have determined to be the best decision for Baby Doe. This will also provide the tribes with the opportunity to intervene and interfere with what Jane and John Doe have determined to be the best decision for Baby Doe.²⁵

Ultimately, Plaintiffs are concerned that they will be pariahs in their community if their identities are revealed.

Argument

1. The Court has Wide Discretion to Fashion a Protective Order.

Federal Rule of Civil Procedure 26(c) states, in relevant part, that:

The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure of discovery;
- (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order

²⁵ Complaint ¶ 37.

(G) ...

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes to be opened as the court directs.

This rule “confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also* *Bison Advisors LLC v. Kessler*, Civ. No. 14-3121 (DSD/SER), 2015 WL 4509158, at *2 (D. Minn. July 24, 2015) (“District courts have broad discretion to decide discovery motions and to limit discovery... Likewise, the court has discretion to decide when a protective order is appropriate and what degree of protection is required.”) (citations and quotations omitted). This vast discretion afforded to the trial court on issuing protective orders is critical because each case has unique facts, concerns, and interests. *See Seattle Times*, 467 U.S. at 36 (“The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.”). A magistrate judge’s order on a nondispositive issue shall only be modified or set aside “if it is clearly erroneous or contrary to law.” *Id.* at *1 (citations omitted).

2. Good Cause Exists to Issue Plaintiffs’ Proposed Protective Order.

There is no dispute that good cause exists to issue a protective order in this case. However, there are several unique aspects to this matter, which warrant a heightened level of protection in this case. First, this litigation inherently requires extreme confidentiality because it involves adoption. *See, e.g.*, Minn. R. Adop. P. 7.01 (limiting access to adoption case records to the court, the Commissioner of Human Services,

placement agency, and by court order). Second, at the core of this litigation are extreme privacy concerns related to the fundamental right to parenting. *See, e.g., Troxille v. Gransville*, 530 U.S. 57, 66, 68-69 (2000) (“Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

Third, the above-cited media references support Plaintiffs’ legitimate concern that they will be embarrassed and viewed as pariahs by members of the Indian community. This case very acutely and uniquely weighs fundamental parenting rights against concepts of Indian nationalism. Fourth, defense counsel work for and in the same offices as one of the defendants to this suit (i.e., Swanson). Defendants’ proposed protective order assures that virtually every single person working for Swanson will have access to Plaintiffs’ identities. In fact, Defendants’ proposed protective order conflicts even as to whether Swanson herself would have access to this information.

Taking these unique facts and interests into consideration, Plaintiffs propose a protective order that allows Defendants to verify Plaintiffs’ identities and the legitimacy of their standing without broadly exposing Plaintiffs’ identities. Courts have limited disclosure to “counsel of record.” *See, e.g., Avery Dennison Corp. v. UCB SA*, Case No. 95-c-6351, 1996 WL 633986, at *2 (N.D. Ill. Oct. 29, 1996); *see also F.T.C. v. Lonning*, 539 F.2d 202, 210 (D.C. Cir. 1976). Courts have also required that pseudonym plaintiffs be referred to as “Does” at deposition. *See, e.g., Doe v. Provident Life and Acc. Ins. Co.*, 176 F.R.D. 464, 470 (E.D. Pa. 1997). Plaintiffs recognize that the *F.T.C.* and *Doe* cases

do permit dissemination of AEO information to counsel's staff. Those cases do not, however, present the unique circumstances that exist here (i.e., counsel's office is one and the same as defendant, constitutionally fundamental privacy rights versus nationalist interests, etc.).

Defendants fail to explain why they must be permitted to disseminate Plaintiffs' identities throughout the entirety of their office. Defendants' refusal to limit disclosure of Plaintiffs' identities to defense counsel of record makes it critically important that documents bearing Plaintiffs' identities be redacted. Thus far, Defendants have not identified who will have access to any documents they choose to maintain electronically, admitting that utilizing their technology at their office will likely give access to others at their office.

Defendants' supposed need for technology is, of course, a red herring. This is not a case with copious amounts of ESI. At most, this case involves a document production of a couple hundred pages of documents. If Defendants legitimately need unredacted documents, it is not clear why such documents cannot sit offline in a locked file cabinet, where only counsel of record can access them. If a document needs to be filed in this case, a placeholder can be filed electronically and the document can be filed under seal in paper form. Indeed, the greatest risk of disclosure in this case exists from Defendants maintaining Plaintiffs' identities electronically, where something as simple as an errant email (perhaps in response to a data practices request) could destroy anonymity.

Defendants also fail to explain why it is unworkable for Plaintiffs to first redact third-party documents, when defense counsel will be given the private identifier information and the context of documents will make it clear what has been redacted (i.e., Does' names, Adoptive Parents' names, and Baby Does' name). Plaintiffs' proposal to first redact third-party documents is consistent with Defendants' agreement that they do not seek the names of the Adoptive Parents and Baby Doe. How else would Plaintiffs protect that information if they were not first given the opportunity to redact third party documents?

Additionally, a prohibition on Defendants' seeking information from any Indian tribe, once they are in possession of the Does' identities, is obviously necessary. This litigation is one of a handful of high profile cases involving ICWA-related issues. If the Minnesota AG's office starts seeking information from a tribe regarding the Does' membership, the Does' anonymity will surely be destroyed.

Defendants' insistence on deposing the Does and engaging in probing discovery from them and third parties is an intimidation tactic. Defendants want the Does to be fearful about the potential of their identities being discovered. At most, there are two factual issues that warrant minimal discovery: (1) are Plaintiffs' real people; and (2) were they required to comply with MIFPA? Defendants already know these things to be true, particularly given that Moose filed his Tribe's Covenant Not to Intervene into Baby Doe's adoption proceedings. Plaintiffs have agreed to provide more than sufficient information for the Defendants to test the basis of the legitimacy of Plaintiffs' standing. Plaintiffs' proposed Protective Order provides them the necessary protection in doing so.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court enter their proposed Protective Order.

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Dated: July 29, 2016

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