UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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

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,

Defendants.

Civil File No. 15-cv-02639 (JRT/SER)

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Defendants are sensitive to and want to accommodate Plaintiffs' desire to not have their identities made public. To that end, Defendants proposed a protective order that would protect the confidentiality of Plaintiffs' identities. Plaintiffs cite no authority to support the excessive restrictions they propose. Accordingly, the Court should deny Plaintiffs' Motion for a Protective Order and enter the proposed protective order that Defendants submit with this Response.

BACKGROUND

I. FACTUAL BACKGROUND.

Plaintiffs Jane Doe and John Doe, individually and on behalf of their biological child, Baby Doe, (collectively, "Plaintiffs") challenge the constitutionality of the

Minnesota Indian Family Preservation Act's ("MIFPA") tribal notice and intervention provisions for voluntary adoptive placements contained at Minnesota Statutes section 260.761, subdivisions 3 and 6. *See generally* Doc. 1.

The Does allege they are each members of federally-recognized Indian tribes and kept their pregnancy and Baby Doe's birth a secret from their families and their respective tribes. Doc. 1, p. 2. After the child's birth, Plaintiffs state that they instituted a direct placement adoption proceeding in Hennepin County District Court. *See* Minn. Stat. § 259.47. (providing for direct placement adoption). *Id*. at 7-8, 10. Plaintiffs did not object to any MIFPA requirement in state court, and subsequent filings in this case indicate that Plaintiffs finalized Baby Doe's adoption to the adoptive parents Plaintiffs chose, without compromising their identities. Doc. 44.

II. PROCEDURAL POSTURE OF PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER.

After filing their Complaint anonymously, Plaintiffs moved for a protective order to proceed under pseudonyms. *See* Doc. 6. Defendants did not oppose this motion. *See* Doc. 23. The Court therefore ordered that, for purposes of this litigation, Plaintiffs shall be referred to as "John and Jane Doe," their child shall be referred to as "Baby Doe," and the adoptive parents shall be referred to as "the Adoptive Parents." Doc. 42, p. 1 n.1.

Defendants answered Plaintiffs' Complaint on March 10, 2016, following the Court's rulings on Defendants' Motion to Dismiss. *See* Doc. 54. A pretrial scheduling conference was held before Magistrate Judge Rau on April 14, 2016. *See* Doc. 58.

Following the scheduling conference, the Court issued a scheduling Order setting a discovery deadline of July 12, 2016. Doc. 60.[1]

Defendants served written discovery on April 26, 2016, and Plaintiffs responded on May 31, 2016. *See* Affidavit of Aaron Winter, Aug. 5, 2016 ("Winter Aff."), Exs. A, B. In their responses, Plaintiffs objected to all of Defendants' document requests on the grounds that they "see[k] to obtain private and confidential information, and information that is not relevant to the claims made in this case or the issues to be decided." *See* Winter Aff. Ex. B, pp. 12–13. Plaintiffs also stated that, subject to these objections, "once a protective order is in place they will produce documents they have in their possession that they believe are responsive to this Request." *See id.* Plaintiffs also objected to various Interrogatories, stating that they are "willing to provide certain information under the provisions of a Protective Order." *See id.* at 4–5.

Before even serving discovery, Defendants' counsel circulated a proposed protective order to Plaintiffs on April 13, 2016. *See* Winter Aff. Ex. C, pp. 21-29. In an email on April 14, 2016, Plaintiffs' counsel expressed a desire to "discuss the specifics of the information [Defendants are] requesting before we can reach a stipulation on the protective order," and stated that "[i]t may make sense to revisit the protective order more fully once [Plaintiffs] receive [Defendants'] discovery requests." *See* Winter Aff. Ex. D, p. 1. Plaintiffs did not respond to Defendants' proposed protective order after receiving

[1] On July 19, 2016, the Court moved the discovery deadline to November 12, 2016, upon joint stipulation of the parties. *See* Docs. 61, 63.

Defendants' discovery requests on April 26, 2016, but did respond with their proposed protective order on July 12, 2016, after Defendants sent Plaintiffs a deficiency letter. *See* Winter Aff. at ¶ 5.

On June 14, 2016, after receiving Plaintiffs' responses to their discovery requests, Defendants sent Plaintiffs a letter outlining deficiencies in Plaintiffs' responses. *See* Winter Aff. Ex. E. Counsel engaged in multiple written and telephonic meet-and-confer efforts regarding the deficiencies in Plaintiffs' responses to Defendants' discovery requests as well as the terms of a protective order governing discovery. *See* Winter Aff. at ¶ 7, Ex. F. The parties were unable to reach an agreement about the terms of a protective order. *See* Winter Aff. at ¶ 8.

In addition to the disputes arising from written discovery, there have also been disputes regarding depositions in this case. On June 24, 2016, Defendants noticed the depositions of Jane Doe and John Doe for July 11 and 12, respectively. *See* Winter Aff. Ex. G. On June 29, Plaintiffs' counsel informed Defendants that they planned to move for a protective order to prevent the depositions and therefore refused to produce Jane Doe and John Doe for the noticed depositions. *See* Doc. 61. On July 6, 2016, however, Plaintiffs' counsel informed Defendants' counsel that — sometime after telling the Does about the scheduled depositions — counsel lost all contact with the Does and was therefore unable to engage in further discussion regarding the terms of a protective order. Winter Aff. at ¶ 9. On July 8, Plaintiffs' counsel informed Defendants counsel that they believed their communication issues were resolved. Doc. 61. On July 11, Plaintiffs'

counsel told Defendants' counsel that Plaintiffs would be made available for depositions. *Id*.

III. THE COMPETING PROPOSED PROTECTIVE ORDERS.

Defendants do not challenge Plaintiffs' desire to keep their identities from public disclosure. Defendants' protective order would allow Plaintiffs to designate information and documents produced in discovery "Attorney's Eyes Only ("AEO")," which under Defendants' proposed protective order would limit access, as relevant here, to "Attorneys and their office associates, legal assistants, and stenographic and clerical employees." Winter Aff. Ex. C, p. 22-23. AEO-designated information therefore may not be publicly disclosed under Defendants' proposed order.

Plaintiffs' proposed protective order, however, contains an AEO designation that is overly restrictive. First, under Plaintiffs' proposed protective order, AEO documents are restricted to, among others, Defendants' counsel of record. Doc, 66-1, pp. 37-38. Plaintiffs' proposed protective order adds several other restrictions relating to Defendants' ability to obtain documents containing John and Jane Does' identifying information. These proposed restrictions are contained in the following paragraphs of Plaintiff's proposed 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.
>
> 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.[2]
>
> 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.

See id.

Accordingly, Defendants propose entry of the proposed protective order they previously circulated (found in Winter Aff. Ex. C, pp. 21-29).

ARGUMENT

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). For good cause, the Court may issue a protective order to prevent or limit discovery where required "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The party moving for a protective order, however, has "the burden to demonstrate good cause for issuance of the order," and the movant's "claim of harm must be based on more than stereotypical and conclusory statements." *Miscellaneous Docket Matter*, 197 F.3d 922, 926 (8th Cir. 1999)

[2] Defendants do not plan (and do not want) to take discovery from either Does' Indian Tribes. The only reason Defendants have not been able to categorically commit to such a prohibition is because of Plaintiffs' failure to provide meaningful responses to written discovery or appear for depositions. Defendants would strongly prefer to obtain the necessary information from Plaintiffs.

(citing *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir.1973), *cert. denied*, 414 U.S. 1162 (1974)).

In order to show good cause, "[t]he party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one." *Frideres v. Schiltz*, 150 F.R.D. 153, 156 (S.D. Iowa 1993) (citing *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C.1991); *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n.16 (1981)). This requirement "furthers the goal that the Court only grant as narrow a protective order as is necessary under the facts." *Brittain*, 136 F.R.D. at 412.

I. PLAINTIFFS SET FORTH NO FACTS SHOWING THAT DEFENDANTS' PROPOSED PROTECTIVE ORDER WOULD LEAD TO PUBLIC DISCLOSURE OF THEIR IDENTITIES, AND HAVE NO AUTHORITY FOR WHAT THEY REQUEST.

Plaintiffs fail to show good cause for their motion to be granted, because their overly restrictive protective order is unnecessary to protect their identities from public disclosure.

As noted, Plaintiffs argue that their proposed protective order is necessary solely to protect their identities from becoming publicly known. Doc. 65, pp. 7-8 (expressing Plaintiffs' "extreme concern . . . about the embarrassment they believe would ensue if their identities are revealed" and Plaintiffs' concern that they will become "pariahs in their community if their identities are revealed."). The harm Plaintiffs wish to avert, then, is not disclosure of their identities to the people allowed to access AEO information

under Defendants' proposed protective order,[3] but disclosure to the public and their community. Plaintiffs have failed to show that entry of Defendants' proposed protective order would lead to public disclosure.

Defendants are sensitive to Plaintiffs' privacy concerns, and accordingly did not object to Plaintiffs proceeding pseudonymously. *See* Doc. 23. As discussed, Defendants have also always proposed entry of a protective order that would allow Plaintiffs to prevent public disclosure of any sensitive information through an AEO designation.

Acknowledging the terms of Defendants' proposed protective order, Plaintiffs do not contend that the order would allow public disclosure of AEO documents, but instead simply suggest that the AGO may not comply with the order if it is entered. Doc. 65, p. 11 (discussing an alleged risk of "dissemination of AEO information to counsel's staff" and expressing concern that "an errant email . . . could destroy anonymity."). Plaintiffs set forth no facts substantiating their belief that the AGO employees would either negligently or intentionally violate a court order, much less the "specific demonstration of facts" required to show good cause for their requested restrictions. *Frideres*, 150 F.R.D. at 156. Instead, Plaintiffs' claim is "stereotypical and conclusory," which is insufficient to show good cause. *Miscellaneous*, 197 F.3d at 926.

Plaintiffs also do not cite a single case in which a court entered a protective order containing the extraordinary restrictions Plaintiffs propose. Plaintiffs cite only two cases

[3] Indeed, Plaintiffs have agreed to inform Defendants' counsel of Jane and John Does' identities. *See* Doc. 65, p. 4.

in attempted support of their position, but then acknowledge those two cases actually involved entry of a protective order like the one Defendants propose. Doc. 65, pp. 10–11 ("Plaintiffs recognize that the *F.T.C.* and *Doe* cases do permit dissemination of AEO information to counsel's staff.").

The AGO routinely deals with sensitive and confidential discovery information subject to court-issued protective orders in cases involving significant public interest. There is no reason to doubt the AGO's ability to keep Plaintiffs' information private in this case under the terms of the protective order Defendants propose. Plaintiffs have failed to show good cause for entry of their proposed protective order, and their motion should be denied.

II. PLAINTIFFS' PROPOSED PROTECTIVE ORDER GOES FAR BEYOND NORMAL ATTORNEY'S EYES ONLY PROTECTIONS AND IMPOSES RESTRICTIONS THAT ARE UNFAIR AND UNDULY BURDENSOME.

An "attorneys eyes only" designation, such as the one Defendants propose, is already a "drastic remedy" to be used "in very limited situations." *Ragland v. Blue Cross Blue Shield of N. Dakota*, No. 12-cv-080, 2013 WL 3776495, at *1 (D.N.D. Jun. 25, 2013) (denying request for separate AEO designation in protective order). In addition to being unsupported by the required showing of good cause, Plaintiffs' extraordinary proposed AEO designation would unfairly burden Defendants' ability to litigate in a number of ways.

First, under Plaintiffs' proposed protective order, Defendants' counsel of record only would be permitted to learn the identities and personal information of Jane and John

Doe, but any document produced to Defendants would have all such personal identifying information redacted. Specifically, Plaintiffs propose that they be permitted to "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." Doc. 65, p. 5. If a disclosed document lacks personal identifiers, Defendants will be unable to tell if the document concerns Jane Doe, John Doe, or someone else entirely. This level of redaction would render the produced document useless or possibly even incomprehensible to Defendants. Accordingly, Plaintiffs' desire to redact all personal identifying information from their documents would "deprive [Defendants] of the opportunity to see information in its full context." *Burri v. Versa Products, Inc.*, No. 07-cv-3938 (JRT/JJK), 2013 WL 608742, at *3 (D. Minn. Feb. 19, 2013) (granting request to remove redactions for responsiveness).

Second, Plaintiffs' proposed protective order would potentially deprive the AGO of the information necessary to assert a res judicata defense should Plaintiffs lose this case but sue again. In order to assert a res judicata defense, a defendant must in part show that a plaintiff the earlier claim involved "the same parties or their privies." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012). If Plaintiffs' names were known only to Defendants' counsel of record in this case, other attorneys in the AGO would have no way to discover whether a subsequent claim was brought by the same plaintiffs and therefore barred, especially if the AGO no longer employed current counsel of record.

Finally, Plaintiffs' proposed protective order also imposes inefficient and unfair administrative and management-related burdens on Defendants. Plaintiffs demand that the disclosure of all AEO documents be limited only to Defendants' counsel of record, excluding any assistants and clerical employees. *See* Doc. 65, p. 5. This would mean that, while Plaintiffs' counsel could have the advantage of using paralegals and support staff to assist with the case, Defendants' counsel would be entirely on their own, unable even to utilize clerical assistance in filing under seal. Defendants would also be unable to store any documents electronically, as the drive used by counsel of record can be accessed by members of their division and IT support staff. Winter Aff. ¶ 10. As noted above, Plaintiffs acknowledge that they have no authority to support restricting AEO documents from Defendants' support staff. *See* Doc. 65, pp. 10–11 ("Plaintiffs recognize that the *F.T.C.* and *Doe* cases do permit dissemination of AEO information to counsel's staff."). Indeed, Plaintiffs would prevent the undersigned from discussing potential issues related to identity of the Does with executives of the Office, apparently including the Attorney General herself.

Defendants' version of AEO provides Plaintiffs with sufficient protection while not imposing excessive administrative burdens on just Defendants. Accordingly, Plaintiffs' Motion for a Protective Order should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Protective Order should be denied. The Court should instead enter the proposed protective order submitted by Defendants.

Dated: August 5, 2016

Respectfully submitted,

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