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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al,

Plaintiffs,

vs.

LUANN VAN HUNNIK, et al,

Defendants.

Case No. 5:13-cv-05020-JLV

PLAINTIFFS' MOTION

FOR SANCTIONS

1. Attached to Plaintiffs' Complaint as Exhibit 6 (and attached here as Exhibit 6) is a Memorandum Decision issued to Dana Hanna on July 3, 2012 by Judge Thorstenson of the Seventh Judicial Circuit. Plaintiffs attached the Memorandum Decision to their Complaint to illustrate the procedures being used in temporary custody ("48-hour") hearings that, Plaintiffs allege, violate the Indian Child

Welfare Act, 25 U.S.C. §§ 1901 *et seq.*, and the Due Process Clause of the Fourteenth Amendment. Plaintiffs discuss Exhibit 6 in the Complaint. *See* Compl. ¶ 96.

2. Attached hereto as Exhibit 6A is a memorandum written by Nathan Oviatt entitled “Indian Child Welfare Act and Temporary Custody Proceedings” (“ICWA Memorandum” or “Oviatt Memorandum”). It is dated April 27, 2012 and is addressed to “Seventh Circuit Judges.” The two documents are nearly identical. It is obvious that Judge Thorstenson based her July 2012 decision on Mr. Oviatt’s April 2012 Memorandum.
3. At the time that Mr. Oviatt wrote the ICWA Memorandum, he was a law clerk employed by the Seventh Judicial Circuit. He was *not* representing Judge Davis, as he is now. The timelines set forth in his website make this clear. *See* <http://www.goodsellquinn.com/attorneys/nathan-oviatt-rapid-city-south-dakota-lawyer.html>.
4. As discussed in the attached Affidavit of Dana Hanna, Mr. Hanna was handed the ICWA Memorandum at a meeting of the Board of Directors of Dakota Plains Legal Services (DPLS). Mr. Hanna is a member of the Board of DPLS. The person who handed him a copy of the ICWA Memorandum was another member of the Board, Marcia Whiting. Ms. Whiting distributed copies of the Memorandum to approximately 20 members of the DPLS Board at the same time she gave one to Mr. Hanna. Ms. Whiting recently confirmed to Mr. Hanna that she obtained the Memorandum from Judge Davis and that he authorized her to

distribute it to members of the DPLS Board. *See* Affidavit of Dana Hanna ¶¶ 4-6.

5. On March 25, 2014, Plaintiffs served Requests for Production (RFPs) on Defendant Hon. Jeff Davis. RFP No. 2 provides: “Produce all documents of which you are aware issued by anyone other than you since you became the Presiding Judge of the Seventh Judicial Circuit that in any manner discusses, recommends, or prescribes procedures with respect to 48-hour hearings involving Indian children.”
6. Both the ICWA Memorandum of April 27, 2012, and Judge Thorstenson’s Memorandum Decision of July 3, 2012 should have been produced by Judge Davis in response to RFP No. 2, given that those documents discuss *and* prescribe procedures with respect to 48-hour hearings involving Indian children. However, neither document was produced by Defendant Davis in response to RFP No. 2.
7. Last week, Mr. Oviatt, in his current capacity as counsel for Defendant Davis, filed Judge Davis’s Response to Plaintiffs’ Second Motion to Compel (“Davis Resp. MTC”) (Docket No. 99). That brief explains what happened after Plaintiffs saw that neither the Oviatt Memorandum nor the Thorstenson decision was produced in response to RFP No. 2: Mr. Pevar corresponded with Mr. Oviatt and *specifically requested* that Judge Davis produce all drafts that Judge Davis had received of Exhibit 6. *See* Davis Brief at 9 (noting that Mr. Pevar informed Mr. Oviatt that “Plaintiffs are specifically seeking all drafts, edits, or notes,

related to Exhibit 6 of the Complaint, i.e., the Memorandum Decision of Judge Thorstenson.”).

8. Mr. Oviatt indicated in response to Mr. Pevar, however, that Judge Davis had already either produced all documents that were responsive to RFP No. 2 or had listed them on his Privilege Log. Yet, the ICWA Memorandum that Mr. Oviatt wrote for the Seventh Judicial Circuit was neither produced nor listed on the Privilege Log.
9. In Mr. Oviatt’s recent brief, he states that it was “an oversight” to not reference Judge Thorstenson’s Memorandum Decision in response to RFP No. 2. However, no mention is made in his brief of the ICWA Memorandum drafted by him.
10. Mr. Pevar and Mr. Oviatt swapped numerous emails regarding Judge Davis’s response to RFP No. 2. Mr. Pevar asked Mr. Oviatt to be sure that Judge Davis had not reviewed a draft of the Thorstenson Memorandum. For instance, in an email to Mr. Oviatt on June 25, 2014, Mr. Pevar wrote: “We have reason to believe that Judge Davis was sent a draft of the [Thorstenson] Memorandum. Before you take a firm stand to the contrary, would you mind verifying with your client that he was not sent a draft?” In another email, Mr. Pevar asked Mr. Oviatt to state “yes or no” whether Judge Davis reviewed a draft of the Thorstenson Memorandum Decision.¹

¹ Mr. Pevar is willing to provide the Court with a copy of Mr. Oviatt’s responses to these emails, and all the rest of the correspondence between counsel on this subject, if Mr. Oviatt consents.

11. Only Judge Davis and Mr. Oviatt know for certain whether each of them forgot about the Oviatt Memorandum and nothing in Mr. Pevar's emails triggered their recollection.
12. However, the failure to produce the ICWA Memorandum is suspicious because Judge Davis and Mr. Oviatt know from the Motion to Dismiss they filed that Plaintiffs are seeking to prove that Judge Davis established (or helped establish) the policies that all judges on the Seventh Judicial Circuit employ in their 48-hour hearings. It is also apparent that the ICWA Memorandum would assist Plaintiffs in proving that the policies challenged in this lawsuit originated from, or were fostered by, Judge Davis. Moreover, it is highly possible that Judge Davis responded to Mr. Oviatt's Memorandum in a manner that would significantly assist Plaintiffs in proving their allegation that all of the judges on the Seventh Judicial Circuit use the same policies, and that Judge Davis had a hand in establishing those policies.
13. The following two conclusions seem inescapable unless Judge Davis and Mr. Oviatt can overcome them: (a) both men were aware that the Oviatt Memorandum (entitled "Indian Child Welfare Act and Temporary Custody Proceedings") should have been produced or listed on a Privilege Log in response to RFP No. 2, which requested that Judge Davis produce all documents he received "that in any manner discusses, recommends, or prescribes procedures with respect to 48-hour hearings involving Indian children;" and (b) these men made a deliberate decision to conceal injurious evidence.

14. Plaintiffs have decided to file this motion and the ICWA Memorandum under seal, rather than on the public record, on the remote chance that Judge Davis and Mr. Oviatt actually did wholly forget about that document and it is covered by a valid privilege. In other words, Plaintiffs wish to be as accommodating as possible. However, it seems extremely unlikely that both men could have forgotten about the Oviatt Memorandum, and equally unlikely that the Oviatt Memorandum is a privileged document. (Indeed, any privilege that might have attached to the Oviatt Memorandum was waived when Judge Davis gave a copy to Ms. Whiting for distribution.) Accordingly, for the reasons set forth *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978) (holding that in a democracy such as ours, court proceedings and records are generally open to the public), Plaintiffs request that all documents related to this Motion be unsealed. In determining whether to keep a document sealed, courts must “start with a strong presumption in favor of access to court records.” *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). *See generally Kelly v. Wengler*, 979 F. Supp.2d 1243 (D. Idaho 2013) (agreeing that court documents filed under seal should be unsealed because defendants failed to carry their burden of showing a compelling need for secrecy that overcame the public’s right of access to court records).

CONCLUSION

Plaintiffs respectfully request that this Court (1) issue appropriate sanctions against Judge Davis (and, perhaps, against Mr. Oviatt, depending on whose decision it was to withhold the Oviatt Memorandum), (2) order that all documents associated with this motion be unsealed, and (3) order that Judge Davis disclose any other evidence

responsive to Plaintiffs' discovery that he may be concealing, including any responses he sent after receiving the ICWA Memorandum.

Respectfully submitted this 7th day of July, 2014.

By: /s/ Stephen L. Pevar

Stephen L. Pevar

Dana L. Hanna

Rachel E. Goodman

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on July 7, 2014, I electronically filed the foregoing Motion with the Clerk of Court **under seal** and that I only sent a copy of it to Nathan Oviatt, counsel for Defendant Judge Davis, at his address:

Nathan R. Oviatt noviatt@goodsellquinn.com

/s/ Stephen L. Pevar

Stephen L. Pevar