

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, et al.,  
Plaintiffs

v.

KENNETH L. MILLER, et al.,  
Defendants

)  
)  
)  
)  
)  
)  
)

Docket No. 2:12-cv-184

CERTIFICATION OF MATTHEW B. BYRNE

Matthew B. Byrne certifies as follows pursuant to Local Rules 7(a)(7) and 26(d)(1):

1. I am counsel to Defendant, Response Unlimited, Inc. (“RUL”) in this matter.

2. Late in the week of April 25, 2014, my colleague, Robert B. Hemley, spoke with counsel for Plaintiff and asked counsel for Plaintiff to consider entering into a confidentiality/protective order. Mr. Hemley followed up on this telephone conference by email on April 29, 2014, attaching a proposed confidentiality agreement, and citing the *Martindell* line of cases addressing the use of confidentiality agreements in parallel civil and criminal cases. I was copied on Mr. Hemley’s email and am submitting this certification at the request of Mr. Hemley, who is currently engaged in a week-long jury trial in federal court in Brattleboro. A copy of Mr. Hemley’s email to counsel for Plaintiff is attached hereto as Exhibit 1.

3. On April 30, 2014, counsel for Plaintiff responded to Mr. Hemley’s email by declining to stipulate to the proposed protective order. A copy of the email sent by counsel for Plaintiff to Mr. Hemley and me is attached hereto as Exhibit 2.

4. On May 6, 2014, I spoke with Sarah Star. Ms. Star confirmed that counsel for Plaintiff is providing information gathered in discovery in this action to the United States Attorney's Office. Ms. Star also confirmed that Plaintiff remains unwilling to enter into a protective order restricting the use of discovery obtained in this action to this action.

Dated: Burlington, Vermont  
May 6, 2014

/s/ Matthew B. Byrne

Matthew B. Byrne, Esq.  
Gravel & Shea PC  
76 St. Paul Street, 7<sup>th</sup> Floor, P. O. Box 369  
Burlington, VT 05402-0369  
(802) 658-0220  
mbyrne@gravel-shea.com  
For Defendant Response Unlimited, Inc.

# Exhibit 1

---

**From:** Robert B. Hemley  
**Sent:** Tuesday, April 29, 2014 5:53 PM  
**To:** 'kkramer@langrock.com'  
**Cc:** Matthew B. Byrne; David A. Boyd  
**Subject:** Jenkins v Miller, et. al.  
**Attachments:** DOCS-#894960-v2-Confidentiality Agreement.DOCX  
  
**Categories:** Saved to DM

Katie,

I am following up on our telephone conference of late last week in which I asked you to consider a confidentiality/protective order in connection with the discovery you are seeking.

Attached is a draft confidentiality agreement along the lines we discussed. The Second Circuit has previously explained that similar orders entered into by agreement under Rule 26 serve a vital function in encouraging full disclosure of all evidence in civil cases where parallel criminal proceedings may also be possible. *See Martindell v. International Tel. & Tel. Co.*, 594 F.2d 291, 295-96 (1979). Indeed, in *Martindell*, the Second Circuit held that protective orders entered in civil cases are enforceable against government agencies absent "a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need." *Id.* at 296. The Second Circuit has since interpreted *Martindell* broadly, applying its procedure and standards in the context of both state and federal grand jury proceedings. *See In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221, 1223-26 (2d Cir. 1991).

Please let me know at your earliest convenience if the Plaintiff is agreeable to such an agreement/order. I will be happy to discuss this with you further, but will be on trial next week and unavailable. You can discuss the matter with Matt Byrne or David Boyd in my absence. In the meantime, I appreciate your keeping confidential any materials that have previously been produced.

Regards,

**Robert B. Hemley** | *Shareholder*  
**Gravel & Shea PC**  
76 St. Paul Street, 7th Floor | P. O. Box 369 | Burlington, VT 05402-0369  
802-658-0220 (phone) | 802-658-1456 (fax) | 802-233-1437 (cell)  
[rhemley@gravelshesha.com](mailto:rhemley@gravelshesha.com) | [www.gravelshesha.com](http://www.gravelshesha.com)  
[Biography](#) | [Download vCard](#)

The information contained in this transmission may be confidential and/or otherwise subject to the attorney-client privilege. If you have received this information in error, you are notified that any review, dissemination, distribution or publication of the information is strictly prohibited. If you are not the intended recipient, you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake. Confidentiality cannot be guaranteed by e-mail.

IRS NOTICE: This e-mail communication requires you to provide your IRS identification number. If you do not provide your IRS identification number, your information will not be used for the purpose of providing services from the Internal Revenue Service. If you are unable to provide your IRS identification number, you should contact the Internal Revenue Service at 1-800-829-1040 for more information.

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

JANET JENKINS, et al.,	)	
Plaintiffss	)	
	)	
v.	)	Docket No. 2:12-cv-184
	)	
KENNETH L. MILLER, et al.,	)	
Defendants	)	

CONFIDENTIALITY AGREEMENT AND ORDER

WHEREAS, Plaintiffs and Defendant Response Unlimited, Inc. (“RUL”), wish to expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect material entitled to protection, and ensure that protection is afforded to material so entitled, the following procedures shall govern.

1. Non-Disclosure of Confidential Documents and Information. Except with the prior written consent of RUL, or as hereinafter provided under this Order, no identified confidential documents or information may be disclosed to any person. An identified confidential document is any document designated with a stamp including the word “CONFIDENTIAL.” Confidential information is information designated as confidential by a party to this agreement. RUL may designate information in deposition testimony as confidential information by stating on the record at the deposition that the information is confidential or by advising the opposing party within 14 days after receipt of the transcript that the information is confidential.

2. Permissible Disclosures. Confidential information or documents may be disclosed, summarized, described, characterized, or otherwise communicated only to the persons described in this paragraph. Plaintiffs may disclose confidential documents or information only to their counsel, and to employees of such counsel to the extent reasonably necessary to render professional services in this litigation. Any individual to whom disclosure is to be made other than Plaintiffs's counsel shall first execute a Declaration in the form of Attachment A to this Order, indicating that he or she has been informed of, and has acknowledged that he or she understands, this Confidentiality Agreement.

3. Use of Material. Persons obtaining access to confidential information or documents under this Order shall use the information only for preparation and trial of this matter and shall not use or disclose such information for any other purpose. Nor shall any such person inform others that confidential information has been produced. This Order shall not preclude the use of material or information that is in the public domain or has been developed independently by a person has not had access to confidential information or otherwise learned of confidential material or information through this action.

4. Subpoena or Request by Other Courts or Governmental Entities. If another court or governmental entity subpoenas or orders production of materials or information that the Plaintiffs has obtained under the confidentiality provisions of this Order, the Plaintiffs shall promptly notify counsel for Defendant RUL of the of the pendency of such subpoena or order. Plaintiffs shall also immediately inform the entity issuing compulsory process that some or all of the materials covered by the process are the subject of this Confidentiality Order and shall deliver a copy of this Confidentiality Order to the entity issuing such process. The parties to this agreement intend that the procedure set forth by the Second Circuit in *Martindell v. International*

*Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979) and its progeny shall apply as appropriate to the resolution of compulsory process received relating to this Confidentiality Order. RUL shall bear the burden and expense of seeking to protect any such material from disclosure in response to compulsory process.

5. Challenge to Designation. Upon receipt of material designated as confidential, Plaintiffs may request in writing that RUL change the designation. RUL shall then have five business days to advise the Plaintiffs whether or not it will change the designation. If the parties are unable to reach agreement, the Plaintiffs may seek an order from the Court in this action to alter the confidential status of the designated material. Until any dispute over designation is ruled upon, the designation shall remain in force and effect and the information shall continue to be accorded the treatment required by this Confidentiality Order.

6. Filing. If filed in Court, confidential documents shall be filed under seal and shall remain sealed, so long as they retain their status as confidential documents.

7. Confidential Information at Hearings or Trial. Any party seeking to offer confidential documents or confidential information into evidence in any court hearing or trial shall give five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as confidential information, and if so, what protection may be afforded to such information at the hearing or trial.

8. Non-Termination. The provisions of this Order shall not terminate at the conclusion of this action. Within 30 days after final conclusion of all aspects of this action,

confidential documents and all copies of same (other than exhibits of record) shall be returned to counsel for the producing party, or destroyed.

9. No Waiver. The inadvertent failure to designate any information as confidential information will not be deemed to waive a later claim as to its appropriate confidential nature, or to stop RUL from designating such information as confidential at a later date. RUL shall have 10 days from the date that this agreement is signed to designate any previously produced materials as confidential.

Dated: Burlington, Vermont  
May 6, 2014

---

Robert B. Hemley, Esq.  
Gravel & Shea PC  
76 St. Paul Street, 7<sup>th</sup> Floor, P. O. Box 369  
Burlington, VT 05402-0369  
(802) 658-0220  
rhemley@gravelshea.com  
For Plaintiffss

Dated: Middlebury, Vermont  
\_\_\_\_\_, 2014

---

Katherine B. Kramer, Esq.  
Langrock Sperry & Wool, LLP  
111 S. Pleasant St., P. O. Drawer 351  
Middlebury, VT 05753-0351  
(802) 388-63556  
kkramer@langrock.com  
For Defendants

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, et al.,  
Plaintiffss

v.

KENNETH L. MILLER, et al.,  
Defendants

)  
)  
)  
)  
)  
)  
)

Docket No. 2:12-cv-184

NONDISCLOSURE DECLARATION

I hereby acknowledge that I have read the attached Confidentiality Agreement and Order and agree to be bound by the terms thereof. I will keep confidential all documents and information provided to me pursuant to the Agreement and shall make no use thereof other than in connection with the above-captioned litigation. I will not retain copies, electronic or otherwise, of any documents subject to the Agreement, and after I have completed my testimony, will return or destroy such documents.

\_\_\_\_\_  
Date

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public  
My Commission Expires: 2/10/15

# Exhibit 2

---

**From:** Katherine B. Kramer <KKramer@langrock.com>  
**Sent:** Wednesday, April 30, 2014 9:17 AM  
**To:** Robert B. Hemley  
**Cc:** Matthew B. Byrne; David A. Boyd  
**Subject:** RE: Jenkins v Miller, et. al.

Bob, Matt, and David,

Thanks for preparing the draft, but we won't stipulate to the protective order. *Martindell* is distinguishable from the circumstances here and a protective order is not warranted. If you choose to file a motion for a protective order, we will oppose it and the court can determine the right course of action. In the meantime, I expect that you will continue working with RUL to gather all responsive documents to be produced as soon as possible.

Thanks,  
Katie

Katherine B. Kramer, Esq.

**Langrock Sperry & Wool, LLP**

111 So. Pleasant Street  
PO Drawer 351  
Middlebury, VT 05753-0351  
Phone: 802.388.6356 x113  
Fax: 802.388.6149

[kkramer@langrock.com](mailto:kkramer@langrock.com)

[www.langrock.com](http://www.langrock.com)



---

**From:** Robert B. Hemley [<mailto:rhemley@gravelshea.com>]  
**Sent:** Tuesday, April 29, 2014 5:53 PM  
**To:** Katherine B. Kramer  
**Cc:** Matthew B. Byrne; David A. Boyd  
**Subject:** Jenkins v Miller, et. al.

Katie,

I am following up on our telephone conference of late last week in which I asked you to consider a confidentiality/protective order in connection with the discovery you are seeking.

Attached is a draft confidentiality agreement along the lines we discussed. The Second Circuit has previously explained that similar orders entered into by agreement under Rule 26 serve a vital function in encouraging full disclosure of all evidence in civil cases where parallel criminal proceedings may also be possible. *See Martindell v. International Tel. & Tel. Co.*, 594 F.2d 291, 295-96 (1979). Indeed, in *Martindell*, the Second Circuit held that protective orders entered in civil cases are enforceable against government agencies absent "a showing of improvidence in the grant of a Rule 26(c)

protective order or some extraordinary circumstance or compelling need." *Id.* at 296. The Second Circuit has since interpreted *Martindell* broadly, applying its procedure and standards in the context of both state and federal grand jury proceedings. See *In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221, 1223-26 (2d Cir. 1991).

Please let me know at your earliest convenience if the Plaintiff is agreeable to such an agreement/order. I will be happy to discuss this with you further, but will be on trial next week and unavailable. You can discuss the matter with Matt Byrne or David Boyd in my absence. In the meantime, I appreciate your keeping confidential any materials that have previously been produced.

Regards,

**Robert B. Hemley** | *Shareholder*

**Gravel & Shea PC**

76 St. Paul Street, 7th Floor | P. O. Box 369 | Burlington, VT 05402-0369

802-658-0220 (phone) | 802-658-1456 (fax) | 802-233-1437 (cell)

[rhemley@gravelshea.com](mailto:rhemley@gravelshea.com) | [www.gravelshea.com](http://www.gravelshea.com)

[Biography](#) | [Download vCard](#)

The information contained in this transmission may contain privileged and confidential information. It is intended only for the use of the person(s) named above. If you are not the intended recipient, you are hereby notified that any review, dissemination, distribution or duplication of this communication is strictly prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

This e-mail may contain privileged and confidential information, and is intended solely for the use of those to whom it is addressed. If you are not an intended recipient, please delete this message, destroy all copies, and notify us as soon as possible. If you are the intended recipient, please note that email is not a secure method of communication, and you may choose to communicate with us by other means.

In accordance with IRS Circular 230, we inform you that any tax advice contained in this communication was not written or intended to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code, or promoting, marketing or recommending to another person any transaction or matter addressed in this communication.

