UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, ET AL., Plaintiffs, v. KENNETH MILLER, ET AL., Defendants.	Docket No. 2:12-cv-00184-wks

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO THE MOTION TO COMPEL AND MOTION FOR SANCTIONS

NOW COME Plaintiffs Janet Jenkins, et al., by and through undersigned counsel, and hereby reply to Defendant Response Unlimited's Opposition to the Motion to Compel and for Sanctions, and oppose Defendant's request for a protective order.

I. PLAINTIFFS' COUNSEL COMPLIED WITH LOCAL RULE 7

In its Opposition to the Motion to Compel and for Sanctions, Defendant Response Unlimited ("RUL") asserts that Plaintiffs' counsel failed to confer and attempt to reach an agreement before filing the December 20, 2013 Motion to Compel. This is false. Attorney Sarah Star conferred with Attorney Robert Hemley on December 18 and 19, 2013, on the phone and in email. Moreover, counsel certified in the December 20, 2013 filing that this conference did, in fact, occur, but that the parties were unable to fully resolve the issues without Court action. Opposing counsel should review the pleadings before making unfounded allegations. *See* Dkt. # 130 at 1.

Despite delaying nearly a month on the ordered responses, RUL continued to voice objections based on the same issues raised in the December 18 and 19, 2013 discussions. Specifically, RUL is claiming that it does not have knowledge of activities that it deems

outside the scope of its business. Attorney Hemley and Attorney Star had consulted on this issue extensively and did not reach a resolution, and so counsel deemed it futile, and not required by the rule to discuss identical objections to interrogatories that were already discussed, and which the Defendant was already *compelled by Court order* to answer. That being said, counsel did confer with Attorney Matt Byrne regarding a resolution on May 6, 2014, and Attorney Byrne indicated that no resolution was possible without a global agreement on the issue of a protective order (which is addressed below). Further, RUL has not subsequently provided the discovery requested under the second Motion to Compel, so pre-filing conferral would have done nothing to narrow the issues of the Motion to Compel. Hence, Defendant's claim that consultation could have somehow limited the scope of the Motion to Compel is completely without basis.

II. RUL'S RESPONSES WERE NOT TIMELY UNDER THE COURT'S DEADLINE

After this Court granted the first Motion to Compel with regard to certain interrogatories, the Defendant failed to produce the responses by the deadline. Because the Court has set a limited window for jurisdictional discovery, deadlines for complying with jurisdictional discovery orders are particularly important. After the deadline for RUL's response had passed, Attorney Sarah Star (with civility) contacted Attorney Hemley to request the already overdue responses. Attorney Hemley informed Attorney Star when she could expect to receive the overdue responses. (This telephone conference also satisfies the Local Rule 7 requirement of conferral before filing, as Plaintiffs agreed to additional time for RUL before filing a motion to compel.) Plaintiffs' agreement to extra time did not change the fact that the first deadline was missed, and the responses were untimely under the Court's order to provide said responses within 14 days.

III. PLAINTIFFS OPPOSE THE IMPOSITION OF A PROTECTIVE ORDER

As for the issue of a protective order, Plaintiff cannot agree to an order that would prevent her from sharing information about her daughter's disappearance with law enforcement agencies that are actively searching for Isabella and trying to help bring her home, and a protective order is not justified here. Plaintiff has no direct knowledge of any grand jury proceedings regarding RUL, other than what Defendant disclosed in its own Motion.

Defendant has failed to demonstrate "good cause" for a protective order. *See Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) (party seeking a protective order has burden of showing good cause). RUL's groundless alternative request for a stay of this action reveals that its true intention is delay. A civil protective order is usually intended to protect sensitive personal and corporate financial information. RUL does not contend that the information sought by Plaintiffs is confidential in that way, or that RUL would be harmed from a business perspective by public disclosure of the documents. Instead, Defendant's whole argument for a protective order is that parallel civil and criminal proceedings by the Government may be unconstitutional. But this case is brought by Isabella's mother, not by the Government, and the Government has no role whatsoever in its proceedings. The mere fact that Plaintiffs may provide unsolicited information to the Government does not justify a protective order here. "[W]here the discovery sought is relevant to a good faith [issue] in the federal case, the mere fact that it may be used in other litigation does not mandate a protective order." *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992). Plaintiffs have always acted in good faith in this litigation, and there is no shred of evidence to the contrary.

The Government has never given Plaintiff any information about its criminal proceedings other than what is in the public record from the Kenneth Miller trial, what was

necessary to prepare Janet Jenkins' testimony at the trial of Kenneth Miller, and information to keep her generally informed of her daughter's last known whereabouts and appellate issues regarding venue. The Government has had absolutely no input on the discovery requests made in this case, and has not requested any information about the discovery sought. Plaintiff has been providing *unsolicited* information to the appropriate law enforcement officials since the time of her daughter's kidnapping and plans to continue to do so until such time as Isabella is located and returned safely home. In fact, it was Plaintiff who first alerted the Government to the role of RUL employees in the abduction of Isabella Miller-Jenkins after Defendant Hyden divulged incriminating information to her colleague Joleen Thaxton in the Spring of 2010, and Plaintiff provided other valuable information that was used in applying for and carrying out search warrants. This activity has been entirely lawful and above reproach. Plaintiff has every intention of continuing to provide *unsolicited* information about Isabella's kidnapping, although it may be duplicative of information that Government may have already obtained through search warrants or subpoenas. "So long as the initial litigation has not itself been instituted in bad faith for the purpose of obtaining documents for other actions, and so long as the interests of those represented in the initial litigation are being fully and ethically prosecuted, the Federal Rules do not foreclose the collaborative use of discovery." *Cipollone v. Liggett Grp., Inc.*, 113 F.R.D. 86, 91 (D.N.J. 1986). To be clear, the only collaboration is Plaintiffs' intent to provide unsolicited information to the Government, and the Government has provided no information or legal assistance to Plaintiffs. This one-way sharing of unsolicited information does not justify imposing a restrictive protective order, and does not justify further delay by RUL in providing Court-ordered information.

In addition, it should be noted that the information that Defendant is seeking to make subject to a protective order was not generated during the course of civil litigation, but includes emails and other communications that date back to at least 2009. This information would be readily discoverable by the Government if they sought it. RUL fails to address the point that the Government could simply request the same information that Plaintiffs have requested through their own subpoenas, and a protective order in this case would be ineffective against such a request. *See Martindell v. International Tel & Tel Corp.*, 594 F.2d 291 (2d Cir. 1979) ("the Government as investigator has awesome powers . . . the Government may institute or continue a grand jury proceeding and, in connection therewith, subpoena witnesses to testify, regardless of whether they have already testified or furnished documentary evidence in civil litigation."). In *Martindell*, 594 F.2d 291, the government sought to obtain depositions that were generated through civil litigation to explore new charges for perjury based on those depositions. The depositions at issue were taken with the understanding that a protective order was already in place. *Martindell* only addressed whether a protective order should limit governmental access after the protective order had been found justified and imposed. *Id.* at 296 ("the deponents testified in reliance upon the Rule 26(c) protective order[.]"). *Martindell* is therefore not applicable to the threshold question of whether a protective order is warranted in the first place, which is the issue presented by RUL here. No documents sought now were created in reliance upon a protective order. Even if eventual depositions in this case were to be turned over, the government has not solicited this information, and as Defendant itself states, "providing unsolicited information obtained in a civil case is not an abuse of process." Defendant's Opposition, Dkt. #150 at p. 3. The "public's interest in obtaining all relevant evidence required for law

enforcement purposes," *Martindell*, 594 F.2d at 296, requires the denial of a protective order here.

As a final point, RUL has waived its right to a protective order due to its disclosure of documents and information before raising the issue of a protective order. Nearly six months has passed since the initial service of jurisdictional discovery before RUL raised the issue of a protective order. During that time, RUL has provided some – albeit limited and inadequate – discovery. *See Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 58, 970 A.2d 656, 689 (2009) ("It is well established that a party that fails to object timely to the introduction of evidence or fails to assert a privilege in connection with disclosed material is deemed to have waived such objection or privilege and may not subsequently resurrect it to protect that material from subsequent disclosure."). This waiver extends to all materials that are similar to those already disclosed, including internal RUL emails regarding Janet Jenkins, Lisa Miller, and Isabella Miller-Jenkins, which are subject to the present motion to compel.

IV. RUL MUST COMPLY WITH THE COURT'S EARLIER ORDER COMPELLING DISCOVERY RESPONSES.

Plaintiffs incorporate by reference their prior arguments on the merits of the motion to compel. These issues have been fully briefed in Plaintiff's first motion to compel and the second motion to compel, and RUL's arguments already been rejected by the Court's order granting the first motion to compel. Plaintiffs now ask that RUL be held accountable for its extensive delays and obstruction in jurisdictional discovery.

V. CONCLUSION.

For the foregoing reasons, the Motion for a Protective Order should be denied, the Motion to Compel should again be granted and appropriate sanctions imposed.

DATED at Middlebury, Vermont this 12th day of May, 2014.

SARAH R. STAR, ESQ., P.C.

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CERTIFICATE OF SERVICE

I, Katherine B. Kramer, Esq., counsel for Plaintiff Janet Jenkins, for herself and as next friend of Isabella Miller-Jenkins, a/k/a Isabella Miller, hereby certify that I caused the foregoing *Plaintiffs' Reply to Defendant's Opposition to the Motion to Compel and Motion for Sanctions* to be filed with the Court using the CM/ECF electronic filing system, which will provide electronic notification of such filing(s) to Counsel of Record for the Defendants, and to all other registered users.

Dated at Middlebury, Vermont, this 12th day of May, 2014.

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