UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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

DEFENDANT RESPONSE UNLIMITED, INC.'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MOTION FOR LEAVE TO SUBMIT A SURREPLY IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND MOTION FOR SANCTIONS

Defendant, Response Unlimited, Inc. ("RUL"), by its attorneys, Gravel & Shea PC, hereby moves for leave to submit a combined reply in support of its motion for a protective order, and surreply in opposition to Plaintiff's motion to compel and for sanctions, in the form set forth below.

Preliminary Statement

It is undisputed that Plaintiff did not confer with Response Unlimited, Inc. ("RUL") before filing her most recent motion and responded "that is fine" when asked whether RUL could provide discovery responses by April 11, 2014. In addition to these procedural flaws, Plaintiff has failed to reconcile her stated intention to impermissibly use this case to generate discovery for use in parallel criminal proceedings with the well-established *Martindell* line of cases approving the use of protective orders that would bar her from doing so. Plaintiff's motion

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should be denied and the parties should be directed to confer regarding the entry of an appropriate protective order restricting the use of discovery generated in this case to this case.

Discussion

I. PLAINTIFF CONCEDES THAT SHE DID NOT CONFER WITH COUNSEL FOR RUL BEFORE FILING HER MOST RECENT MOTION AS REQUIRED BY LOCAL RULE 7.

Plaintiff does not really contest that she did not comply with Local Rule 7 and does not reference the requirement in Rule 26(d)(2) that an affidavit of compliance accompany any discovery motion. Technicalities aside, during the telephone conferences of December 18 and 19, 2013 before the first motion to compel was filed on December 20, 2013, RUL's counsel has no present recollection of advice that negotiations had come to an unsuccessful conclusion. That there were no discussions at all in advance of the more recent second motion to compel filed April 17, 2014, does not appear to be controversial. Had there been, the need for the second motion might have been obviated entirely, and certainly the motion could have been narrowed. That Ms. Jenkins "deemed it futile" to have a conversation is beside the point. A simple telephone conversation would have demonstrated that such a conclusion was not warranted.

II. RUL APPROPRIATELY RELIED ON THE EXTENSION OF TIME GRANTED TO RUL BY PLAINTIFF'S COUNSEL.

The suggestion that RUL's response to discovery was untimely is at best misleading, in that counsel relied on the extension that was negotiated, as documented in RUL's response filed May 5, 2014. The e-mail exchange between counsel attached to that opposition as Exhibit A needs no further amplification. When Ms. Star responded "Yes, that is fine" to a requested

extension of one week, it was assumed that Plaintiff would not then use the agreed extension to obtain a tactical advantage.

III. ENTRY OF A PROTECTIVE ORDER IS APPROPRIATE UNDER THE MARTINDELL LINE OF CASES, WHICH IS DIRECTLY ON POINT.

Plaintiff may not sidestep the long line of Second Circuit cases approving the use of protective orders to protect Fifth Amendment rights in the specific context of parallel civil and criminal cases by citing general civil cases addressing different concerns. The primary cases cited by Plaintiff are not relevant because they did not involve parallel civil and criminal proceedings and did not ask or answer the same questions as the *Martindell* line of cases. *See Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 16-17, 19-20 (2d Cir. 1992) (considering parallel civil litigation in the US and the UK and rejecting an attempt by the Plaintiff who chose to file the US action to resist discovery on the basis that it would not be allowed in the UK); *Cippoline v. Liggett Grp., Inc.*, 113 F.R.D. 86, 86-93 (D.N.J. 1986) (considering the extent to which discovery provided by tobacco companies in one civil case could be used in other similar civil tobacco cases).

In her brief, Plaintiff states that she has previously provided information used by the Government in applying for and carrying out search warrants and intends to continue providing information to advance ongoing criminal proceedings by the Government. The Second Circuit has repeatedly considered the specific constitutional concern posed by Plaintiff's motion—the use of civil discovery to advance parallel criminal proceedings. The rule against the Government instituting a civil action to generate discovery for a criminal case "exists to prevent the government from availing itself of [the more liberal] civil discovery devices to obtain evidence

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for subsequent criminal prosecution." *Doctor's Assocs. v. Weible*, 92 F.3d 108, 116 (2d Cir. 1996) (quotations omitted)

Where a party "validly invokes the Fifth Amendment and expeditiously seeks the court's help . . . the court must explore the feasibility and fairness" of accommodations such as a stay or the entry of a protective order. *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83, n. 4, 84, n.6 (2d Cir. 1995). The entry of a protective order is particularly appropriate where the party asked to produce materials has indicated that they will not do so absent the entry of a protective order. *See In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221, 1222 (2d Cir. 1991) (applying *Martindell* to a grand jury subpoena after observing that counsel for defendants in the civil action had expressly indicated "that they would not voluntarily produce documents or witnesses unless the information obtained would be . . . used only in the bankruptcy proceeding").

To reconcile the tension between the Fifth Amendment and furthering civil discovery, a protective order can be entered for the specific purpose of precluding the government from accessing information provided in a civil case. *See Palmieri v. New York*, 779 F.2d 861, 866 (2d Cir. 1985) ("Nor does the fact that the magistrate granted the sealing orders, and the earlier protective order, specifically to preclude the Attorney General from learning the details about the subject proceedings, necessarily show that he acted improvidently."). Indeed, as Judge Medina noted in his concurrence in *Martindell*, the protective order upheld by the Second Circuit in its leading case on the use of protective orders in parallel actions "expressly anticipated the arrival of Government investigators . . . and sought to prevent their access to the products of discovery." *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 298 (2d. Cir. 1979) (Medina, J. concurring).

Where Plaintiff does cite relevant Second Circuit precedent, it contradicts her position. Plaintiff first cites *Martindell* to suggest that the fact that "the Government could simply request the same information that Plaintiffs have requested" weighs against the entry of a protective order. Plaintiff's Reply at 5. The *Martindell* Court considered and rejected this exact argument. *Martindell*, 594 F.2d at 296, n. 6 (rejecting an attempt by the Government to distinguish cases where "the denial of the Government's efforts to obtain the private discovery" did not necessarily preclude it from obtaining the same material "through other statutory discovery powers").

Plaintiff goes on to misquote *Martindell* to suggest that 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." Plaintiff's Reply at 5-6. The *Martindell* Court reached the opposition conclusion in the very next sentence, which Plaintiff omits. 594 F.2d at 296. The full quotation is illustrative: "On the other side of the ledger, there is, of course, the public interest in obtaining all relevant evidence required for law enforcement purposes. However, as was noted by Judge Frankel when presented with substantially the same question . . . the Government as investigator has awesome powers *which render unnecessary its exploitation of the fruits of private litigation.*" *Id.* (emphasis added and quotations omitted). Accordingly, "after balancing the interests at stake," the Second Circuit held that a witness "should be entitled to rely on the enforceability of a protective order against any third parties, including the Government" absent a showing of improvidence in the grant of the order, an extraordinary circumstance, or compelling need. *Id.* In sum, the need to protect important constitutional rights requires the consideration of accommodations such as a protective order and is good cause for the entry of a protective order.

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Conclusion

Plaintiff's motion is both procedurally and substantively flawed and should be denied in its entirety. The parties should be directed to meet and confer regarding the entry of an appropriate protective order limiting the use of discovery generated in this case to this case.

Dated: Burlington, Vermont
May 16, 2014

/s/ Matthew B. Byrne

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CERTIFICATE OF SERVICE

I, Matthew B. Byrne, Esq., attorney for Defendant, Response Unlimited, Inc., certify that, on May 16, 2014, I served Response Unlimited, Inc.'s Reply in Support of Motion for Protective Order and Motion for Leave to Submit a Surreply in Opposition to Plaintiff's Motion to Compel and Motion for Sanctions through the CM/ECF system on Robert G. Cain, Esq., rcain@pfclaw.com; Thomas E. McCormick, Esq., tem@mc-fitz.com; Frank H. Langrock, Esq., flangrock@langrock.com; Katherine B. Kramer, Esq., kkramer@langrock.com; Brooks G. McArthur, Esq., bmcarthur@jarvismcarthur.com; Joshua M. Autry, Esq., jmautry@dennisboylelaw.com; Ritchie E. Berger, Esq., rberger@dinse.com; Lisa B. Shelkrot, Esq., lshelkrot@langrock.com; Sarah Star, Esq., srs@sarahstarlaw.com; Sophie E. Zdatny, Esq., szdatny@dinse.com; Peggy J. Schmitz, Esq., schmitz@ccj.com; Steven J. Shrock, Esq., shrock@ccj.com; Norman C. Smith, Esq., nc.smith@myfairpoint.net; and Michael J. DePrimo, Esq., michaeldeprimo@gmail.com.

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