UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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

DEFENDANT RESPONSE UNLIMITED, INC.'S RESPONSE TO STATEMENT OF INTEREST

Preliminary Statement

The Constitution limits the ability of the Government to use civil discovery to obtain evidence for criminal prosecutions. This limit is not altered by 18 U.S.C. § 3771, which is "silent and unconcerned" with respect to civil claims. *See United States v. Moussaoui*, 483 F.3d 220, 234-35 (4th Cir. 2007). Indeed, because the limit is constitutional in nature it could not be abrogated by statute. The Second Circuit has stated that Courts must explore the feasibility and fairness of accommodations like the entry of a protective order in cases involving directly overlapping civil and criminal proceedings. Both Plaintiff and the Government have confirmed that discovery taken in this action is being used in parallel criminal proceedings, and has furthered those proceedings, highlighting the existence of good cause for entry of a protective order here.

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Discussion

The Government's Statement of Interest confirms that the Government has used, and intends to continue using, the proceeds of civil discovery in parallel criminal proceedings. By doing so, the Statement of Interest further establishes the need for a protective order under *Martindell*.

RUL, Plaintiff, and the Government all agree that the Government may not institute civil proceedings simply to gain evidence for a criminal case. Stmt. at 2. This "rule exists to prevent the government from 'availing itself of [the more liberal] civil discovery devices to obtain evidence for subsequent criminal prosecution.'" *Doctor's Assocs. v. Weible*, 92 F.3d 108, 116 (2d Cir. 1996) (quoting *United States v. Parrott*, 248 F. Supp. 196, 202 (D.D.C. 1965) (alteration in original)). Plaintiff and the Government have confirmed that Plaintiff is actively sharing information she obtains in discovery in this action with the Government and that discovery taken in this case has advanced parallel criminal proceedings the Government is pursuing. Information provided by Plaintiff has been used "in applying for and carrying out search warrants." Plaintiff's Reply at 4. Further, the Government issued "a grand jury subpoena" to RUL "[w]hen it became apparent during the course of this litigation" that RUL may have documents "which might pertain to the government's continuing investigation." Stmt. at 3. In sum, it is undisputed that "[the more liberal] civil discovery devices" are currently being used "to obtain evidence for subsequent criminal prosecution." *Weible*, 92 F.3d at 116.

The Second Circuit has identified two ways in which the Government can seek to obtain discovery from a civil action to which it is not a party: (1) move to intervene in the civil action or (2) subpoena the discovery. *See In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221, 12226 (2d Cir. 1991); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d. Cir.

1979). The *Martindell* Court began its analysis by questioning whether the Government had the right at all to seek review of a protective order as a nonparty without formally seeking leave to intervene. *Id.* at 293-94. To the extent that the Government has standing as a nonparty to participate in the present discovery dispute by submitting a Statement of Interest, its rights as a nonparty are no greater than its rights could be as a party—it cannot "avail[] itself of [the more liberal] civil discovery devices to obtain evidence for subsequent criminal prosecution." *Weible*, 92 F.3d at 116.

In support of its opposition to the entry of a protective order, the Government cites the Crime Victims' Rights Act 18 USC § 3771. Section 3771 does not alter the dividing line between civil and criminal discovery procedures and would be unconstitutional if it did. The rights Section 3771 codifies "are limited to the criminal justice process" and do not speak at all to the pursuit of parallel civil claims. *United States v. Moussaoui*, 483 F.3d 220, 234-35 (4th Cir. 2007) (refusing to allow civil plaintiffs access to criminal discovery and stating "The rights codified by the [Crime Victims' Rights Act] . . . are limited to the criminal justice process; the Act is . . . silent and unconcerned with victims' rights to file civil claims against their assailants."). Further, the limitation on the use of civil discovery for criminal prosecution is constitutional in nature and could not simply be abrogated by statute as a result. *See United States v. Kordel*, 397 U.S. 1, 11-12 (1969) (identifying as a circumstance "that might suggest the unconstitutionality" of a criminal proceeding a case "where the Government has brought a civil action solely to obtain evidence for its criminal prosecution"); *Marbury v. Madison*, 5 U.S. 137, 176-77, 1 Cranch 137, 176-77 (1803) (establishing that laws that violate the Constitution are void).

The Government's Statement of Interest highlights the existence of good cause for the entry of a protective order here. Both Plaintiff and the Government have confirmed that discovery in this action is being used in parallel criminal proceedings and the Government recently issued a grand jury subpoena to RUL. The current existence of directly overlapping civil and criminal discovery places this case squarely in the category of cases where the Second Circuit has indicated that Courts "must explore the feasibility and fairness of accommodations" such as entry of a protective order. *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83, n.4 (2d Cir. 1995). The serious Fifth Amendment concerns raised by the currently ongoing use of civil discovery from this case to further parallel criminal proceedings weighs heavily in favor of entry of a protective order restricting discovery in this case to this case.

## Conclusion

The limitation on the use of civil discovery devices for criminal prosecutions serves an important constitutional function. That function—protecting the exercise of Fifth Amendment rights—is in no way altered by 18 U.S.C. § 3771, which does not speak to the differences between civil and criminal discovery and could not trump the Constitution if it did. This case falls well within existing Second Circuit precedent establishing the existence of good cause for the entry of a protective order limiting the use of discovery taken in this action to this action. The Court should deny Plaintiff's motion to compel and direct the parties to meet and confer regarding the entry of an appropriate protective order.

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Dated: Burlington, Vermont
May 23, 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 23, 2014, I served Defendant Response Unlimited, Inc.'s Response to Statement of Interest 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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