

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, for herself and as :
next friend of ISABELLA MILLER- :
JENKINS, a/k/a ISABELLA MILLER, :

Plaintiffs, :

v. :

Case No. 2:12-cv-184

KENNETH L. MILLER, LISA ANN MILLER :
f/k/a LISA MILLER-JENKINS, TIMOTHY :
D. MILLER, RESPONSE UNLIMITED, :
INC., PHILIP ZODHIATES, :
individually and as an :
agent for RESPONSE UNLIMITED, INC., :
VICTORIA HYDEN, f/k/a VICTORIA :
ZODHIATES, individually and as an :
agent for RESPONSE UNLIMITED, :
INC., LINDA M. WALL, :

Defendants. :

Memorandum and Order Re: Motion to Compel

Plaintiffs have moved to compel Defendant Response Unlimited, Inc. ("RUL") to produce additional discovery responses. This is Plaintiffs' second motion to compel with respect to its interrogatories and document requests propounded in the course of jurisdictional discovery. In response, RUL requests a protective order or, in the alternative, a stay of this case while a related criminal proceeding is pending. For the reasons set forth below, RUL's requests are **denied** and Plaintiffs' motion to compel is **granted in part and denied in part.**

I. RUL's Requests for Protective Order or Stay

RUL objects to producing additional information, citing in part a related grand jury subpoena and its concern that the government will use civil discovery to obtain information for use in a criminal matter. RUL also seeks a protective order barring the use of civil discovery in the criminal inquiry. After the parties submitted their briefing, the government cancelled the grand jury subpoena request pending in this Court. It is unclear whether RUL is still seeking a protective order in the present case.

If RUL is maintaining its request for a protective order, that request is **denied**. A party seeking a protective order must show good cause. See *Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992); Fed. R. Civ. P. 26(c)(1)(B). RUL asserts that without a protective order, further discovery responses will allow the government to avail itself of "[the more liberal] civil discovery devices to obtain evidence for use in a subsequent criminal prosecution." *Doctor's Assocs., Inc. v. Weible*, 92 F.3d 108, 116 (2d Cir. 1996) (quoting *United States v. Parrott*, 248 F. Supp. 196, 202 (D.D.C. 1965)). Again, it is not clear whether RUL is adhering to this objection in light of recent developments.

It would be inappropriate for the government to initiate a civil case in order to obtain information in a criminal case.

See *United States v. Kordel*, 397 U.S. 1, 11-12 (1970). However, RUL has cited no authority for the proposition that a party in a civil case may not voluntarily share information with the government. The government is not a party in this case, but has been in communication with Plaintiff Janet Jenkins as Jenkins tries to locate her daughter. There is nothing unlawful about such communications.

RUL is nonetheless sensitive about its employees being asked questions that might implicate them in criminal conduct. To date, however, RUL has appointed Sales Manager Matthew LaPorta to provide discovery responses, and LaPorta has not indicated any need or desire to assert a Fifth Amendment privilege. RUL itself, as a corporation, is unable to assert a Fifth Amendment right. See *Curcio v. United States*, 354 U.S. 118, 122 (1957); *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46 (2d Cir. 1985); *United States v. Barth*, 745 F.2d 184, 189 (2d Cir. 1984). Accordingly, RUL appears to have an avenue for responding to discovery that does not give rise to Fifth Amendment concerns.

As an alternative to a protective order, RUL requests a stay of this civil proceeding. See, e.g., *SEC v. Boock*, 2010 WL 2398918, at *2 (S.D.N.Y. June 15, 2010) ("A stay may be entered to address the interests of a defendant who faces the choice of being prejudiced in the civil litigation if he asserts his Fifth

Amendment rights or prejudiced in the criminal litigation if those rights are waived.”). Courts generally analyze such a request under a multi-factor test. See *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d, 99 (2d Cir. 2012). Those factors may include: the extent to which the issues in the criminal case overlap with those presented in the civil case; whether defendants have been indicted; plaintiff’s interest in an expedited disposition weighed against the prejudice of a delay; the private interests of and burden on a defendant; the court’s interest in controlling its docket; and the public interest in a fair disposition. *Id.* (referring to these factors as a “rough guide” and “something of a check list . . . we ought to consider”) (citation omitted). These considerations have not been briefed by the parties. The Court will note, however, that a stay is an extraordinary remedy. See *In re Par Pharmaceutical, Inc.*, 133 F.R.D. 12, 13 (S.D.N.Y. 1990).

“Nothing in the Constitution forbids contemporaneous civil and criminal proceedings concerning the same subject matter.” *Nosik v. Singe*, 40 F.3d 592, 596 (2d Cir. 1994); see also *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986) (“[T]he Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings”) (internal citation omitted). Here, it appears that RUL has a means of providing information on behalf of the corporation

without the threat of self-incrimination. Accordingly, the Court **denies** RUL's request for a stay of the civil proceedings, and will instead proceed to the merits of Jenkins's motion to compel additional discovery.

II. Jenkins's Motion to Compel and for Sanctions

A. Interrogatory 15

Jenkins moves the Court to compel responses to three interrogatories and three document requests. The first dispute pertains to Interrogatory 15, which asks RUL to "[d]escribe any communications between Philip Zodhiates and RUL employees regarding Lisa Miller, Isabella Miller-Jenkins, and/or Janet Jenkins." The Court previously deemed this interrogatory relevant to the question of whether Zodhiates's actions might be attributable to RUL itself. RUL thereafter responded to the interrogatory as follows: "During 2009, several RUL employees exchanged thoughts with one another about the pending legal actions, largely, if not exclusively circulating comments made by others." Plaintiffs contend that this response is incomplete, as it does not identify either the speakers or the contents of their communications.

RUL argues that the interrogatory requires a description, rather than identifications, and that it has complied with this narrow request. RUL's response does not address the specific question asked, which focused upon communications between

Zodhiates and his employees. The response shall therefore be supplemented in that regard. The person answering the interrogatories shall identify the speaker, the recipient(s), and the content of the communications, if known.

B. Interrogatory 16

Plaintiffs next move to compel a response to Interrogatory 16: "Describe how and when RUL, its agents, or its employees first became aware of Lisa Miller, and identify the date of the first contacts between Lisa Miller and RUL, its agents, or its employees." The Court previously determined that this question pertains to the circumstances of Lisa Miller's first contact with RUL, and may be highly relevant to the matter of personal jurisdiction. RUL responded: "RUL has never conducted business with Lisa Miller, and is unaware of the timing or date of contacts, which would have occurred outside the course of its business, between any of its employees and Lisa Miller."

Plaintiffs argue that this interrogatory seeks information about not only RUL, but also agents or employees. RUL responds that its knowledge is limited to that of agents or employees acting within the scope of their authority, implying that any contacts with Lisa Miller would have been outside such authority. In general, a corporation is charged with constructive knowledge "of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of

employment within the scope of his or her authority.'" *In re Parmalat Sec. Litig.*, 684 F. Supp. 2d 453, 472 n.116 (S.D.N.Y. 2010) (quoting 3 William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 790 (perm. ed. 2002)). Therefore, if Lisa Miller never associated with RUL employees in the scope of their employment, RUL would not have any knowledge of her contacts with those persons, and no further response is warranted.

C. Interrogatory 22

This interrogatory asks RUL to identify the other person in the car with Philip Zodhiates when Zodhiates allegedly drove Lisa Miller and Isabella to the Canadian border. The Court previously found that this interrogatory was relevant to the question of personal jurisdiction. RUL has since responded that it does not keep track of its employees when they are not engaged in the ordinary course of RUL's business, and that it has no record of any such trip. As with Interrogatory 16, the Court cannot compel the corporation to disclose knowledge beyond the scope of its business.

D. Requests to Produce 24, 25, and 26

Plaintiffs' final contention is that RUL has not provided a complete response to Requests to Produce 24, 25, and 26. Those requests essentially seek all RUL documents relating to Lisa Miller, Isabella, Janet Jenkins, and/or this lawsuit. RUL has produced four emails sent between July 5, 2009 and August 27,

2009. Plaintiffs submit that there "must be more," and provide as an example an email from Bill Dolack to Philip Zodhiates that was introduced during Kenneth Miller's criminal trial.

Plaintiffs also posit that RUL has only searched Zodhiates's email inbox, though the request was not limited to Zodhiates. RUL has not responded to this portion of the motion to compel. As Plaintiffs have shown that RUL's response was incomplete, their motion is **granted** and RUL must provide all documents within its possession, and not just within Zodhiates's inbox, responsive to this request.

III. Remedies

Plaintiffs suggest that rather than compelling another round of written responses, the Court should compel a Rule 30(b)(6) deposition of an RUL representative. They also ask the Court to designate Zodhiates as that representative. RUL reports that there is no need for Court action, as Plaintiffs may notice a Rule 30(b)(6) deposition. RUL also argues that, under the Rule, it may designate a person of its choosing.

The Court may not designate a specific person to serve as RUL's Rule 30(b)(6) deponent. See *Wultz v. Bank of China, Ltd.*, 298 F.R.D. 91, 99 (S.D.N.Y. 2014). The Court can, however, require that RUL uphold its duty to "make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought . . . and to prepare those persons in order

that they can answer fully, completely, unequivocally, the questions posed. . . .” *SEC v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (citations omitted); see also *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (“[T]he corporate deponent has an affirmative duty to make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf.”). If Plaintiffs notice a Rule 30(b)(6) deposition, RUL will be held to this standard, keeping in mind that RUL can only testify to its corporate knowledge.

Plaintiffs also ask for their legal fees associated with filing the second motion to compel. With respect to one arguably incomplete response to Interrogatory 15 and unanswered questions about document production, there is little evidence of RUL’s non-compliance. The Rule 30(b)(6) deposition may uncover additional facts with respect to RUL’s efforts during discovery, but based upon the current record, monetary sanctions do not appear to be warranted.

IV. Conclusion

As set forth above, Plaintiffs’ motion to compel is **granted in part and denied in part**, and their motion for sanctions is **denied**. The Court also **grants** Jenkins’s request for an additional 60 days in which to complete jurisdictional discovery with respect to RUL.

Dated at Burlington, in the District of Vermont, this 30th
day of October, 2014.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge