

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-184-wks

RESPONSE TO DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN, AND  
RESPONSE UNLIMITED, INC.'S MOTION TO STAY

NOW COME Plaintiffs, Janet Jenkins et al., by and through undersigned counsel, and hereby oppose the Motion to Stay filed by Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc. ("RUL").

**MEMORANDUM**

This case is still in its early stages – despite the amount of time that has gone by since the initial filing and the voluminous subsequent pleadings – and Plaintiffs are seeking jurisdictional discovery from RUL. On October 30, 2014, the Court granted Plaintiffs' second motion to compel jurisdictional discovery and denied RUL's previous motion to stay. *See* Dkt. #169.

Since the second motion to compel was granted, no additional discovery has been produced by RUL, and RUL objects to the Rule 30(b)(6) deposition noticed for December 2 and 3, 2014. Plaintiffs' counsel has inquired about other possible dates within the 60-day window for jurisdictional discovery, but the moving Defendants' counsel refuses to suggest alternate dates until its second motion to stay is decided, and has stated that even if it is not

granted, Defendants would likely seek an appeal of the denial, which would further delay Plaintiffs' opportunity conduct a Rule 30(b)(6) deposition.

Defendants have not yet filed answers in this case and have recently filed a new round of motions to dismiss. Other than limited jurisdictional discovery of RUL, general discovery has not yet begun and is not likely to begin for at least several months. "The person seeking a stay bears the burden of establishing its need," *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 99 (2d Cir. 2012) (internal citation and quotation omitted), and Defendants have not met that burden.

Attorney Star has consulted with Attorney Hemley, who is also representing Zodhiates in the related criminal matter, and Attorney Hemley indicated that Zodhiates is likely to stand trial in the spring of 2015. Given the pace of this litigation to date, it is unlikely that general discovery will even have begun by that point.

I. THE COURT HAS ALREADY DENIED RUL'S MOTION TO STAY PENDING CRIMINAL CHARGES AGAINST ZODHIATES.

This Court denied RUL's prior request for a stay, which had been requested due to pending criminal matters against Zodhiates. *See* Dkt. #169, Memorandum and Order Re: Motion to Compel, p. 4-5 (dated Oct. 30, 2014). There is no reason to stay this entire action because of the indictment against Zodhiates. If anything, the criminal indictment against one of the civil defendants here highlights the urgency of moving this case forward. Because RUL has already requested a stay for the same reasons, and the Court has already denied it, under principles of res judicata the renewed request for a stay should be denied.

As the Court stated in its most recent Order:

"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 . . .”).

At this point, the only discovery pending is jurisdictional discovery, and this Court has already ruled that RUL is not entitled to a stay because it can designate someone other than Zodhiates to respond on behalf of the corporation. *Id.* (“Here, it appears that RUL has a means of providing information on behalf of the corporation without the threat of self-incrimination.”).

It is well-established that corporations do not have Fifth Amendment privileges and that a stay cannot be granted on that basis. *See, e.g., Gala Enterprises, Inc. v. Hewlett Packard Co.*, No. 96 CIV. 4864 DC, 1996 WL 732636, at \*2 (S.D.N.Y. Dec. 20, 1996) (granting partial stay for individual indicted party but not for corporate party) (“First, it is well-settled that corporations, such as [corporation defendant], do not have a Fifth Amendment privilege against self-incrimination. . . . Nor may a company generally assert Fifth Amendment protection on behalf of its agents, for if the agent who is ordered to produce corporate documents has a claim of privilege from the act of producing such documents, the corporation can simply designate another individual, who would not be incriminated by the act of production, to produce the documents. Thus, if [corporation defendant] is being asked to produce documents that would incriminate [individual defendant], [corporation defendant] can designate another agent to produce them.”) (internal citations omitted). Thus, RUL has no basis to request a stay and Plaintiffs should be permitted to proceed with jurisdictional discovery.

II. THE REMAINING DEFENDANTS CANNOT DEMONSTRATE THE REQUISITE PREJUDICE FROM THE CONTINUATION OF LITIGATION.

A stay of civil proceedings is only warranted if denying the stay will result in prejudice to a party. *See Ironbridge Corp. v. C.I.R.*, 528 F. App'x 43, 46 (2d Cir. 2013) (“The

law is generally disinclined to stay civil proceedings absent a party's showing that it will sustain undue prejudice or interference with the exercise of constitutional rights.”). It bears repeating that “a stay of a civil case is an extraordinary remedy.” *Hicks v. City of New York*, 268 F.Supp.2d 238, 241 (E.D.N.Y. 2003) (denying motion for stay).

This litigation is still in its early stages and general discovery is at least several months away. At this point, Plaintiffs are facing another round of motions to dismiss. The only arguable prejudice or interference with constitutional rights is the interplay between criminal proceedings and invoking Fifth Amendment privileges in a civil proceeding. This risk of prejudice only arises in discovery, not in pre-answer motion practice. Thus, the request to stay is groundless at this time.

Zodhiates is not currently facing any “difficult choices” between his criminal defense strategy and civil discovery, because there is no civil discovery pending against him. Indeed, well before the indictment, Defendants’ counsel indicated in its pleadings that Zodhiates would exercise his right to remain silent. *See* Dkt # 157. Even if he were facing more difficult choices now, this would not be sufficient to impose a stay. *See S.E.C. v. Constantin*, No. 11 CIV. 4642 MHD, 2012 WL 1195700, at \*4 (S.D.N.Y. Apr. 9, 2012) (“With respect to [defendant’s] Fifth Amendment argument, we have already observed that it is not unconstitutional for a defendant to be subjected to the difficult choices presented by parallel civil and criminal proceedings.”).

In addition to the threshold consideration of prejudice, a request for a stay pending resolution of criminal proceedings is generally analyzed under a six-factor test:

- 1) the extent to which the issues in the criminal case overlap with those presented in the civil case; 2) the status of the case, including whether the defendants have been indicted; 3) the private interests of the plaintiffs in proceeding expeditiously weighed

against the prejudice to plaintiffs caused by the delay; 4) the private interests of and burden on the defendants; 5) the interests of the courts; and 6) the public interest.

*Louis Vuitton*, 676 F.3d at 99.

Contrary to Defendants' assertion, these factors weigh in favor of denying the stay. To the extent Defendants have identified any factors that favor a stay, that weight only goes toward Zodiates himself, not the remaining defendants. While these factors serve as a "rough guide" for the Court, they are "not mechanical devices" for assessing whether to grant a stay. *Id.*

The criminal case and the civil case certainly overlap. If anything, that overlap highlights the importance of this lawsuit. However, the only civil defendant charged is Philip Zodiates.<sup>1</sup> At this time, there are no pending criminal charges against the remaining defendants, and therefore no overlap. While the indictment may put Zodiates in a difficult spot, the procedural stance of the criminal case is not determinative of whether to stay a civil case, and would not support a stay as to the entire civil case.

The third factor – the private interest of the Plaintiffs – weighs heavily against a stay. Plaintiffs filed this lawsuit two years ago and have been fighting multiple rounds of motions, attempted interlocutory appeals, a writ of mandamus, and other tactics to stall the progress of this case. Plaintiff Janet Jenkins is fighting for her daughter, Isabella Miller-Jenkins. Every day that goes by is another day that Jenkins and her daughter are separated. A stay would impose further delays and would unfairly maintain the status quo. For Isabella and for Jenkins, justice delayed is justice denied.

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<sup>1</sup> Lisa Miller and Timothy Miller have also been indicted along with Philip Zodiates, but neither of those two defendants has been served in this lawsuit.

The fourth factor – the private interests of defendants – does not favor a stay. Other than Zodhiates, no other defendant is facing criminal charges at this time, and the other defendants would not face any constitutional risks if this case were to proceed. For the reasons discussed above, given the early pre-discovery procedural posture of this case, even Zodhiates is not facing constitutional risks at this time.

Finally, the interests of the public and the interests of the courts both favor expeditious case resolution. The recent indictment of Zodhiates highlights the public interest in a full resolution against those who kidnapped or conspired to kidnap Isabella Miller-Jenkins. It is inefficient to halt this case in a pre-discovery stage. The only possible prejudice would arise during discovery of Zodhiates, and the case is not yet at that point, and is unlikely to be at that point before Zodhiates stands trial in the spring of 2015. It would be more efficient to continue to move this case along through its current stage. *See Parlin Funds LLC v. Gilliams*, No. 11 CIV. 2534 ALC MHD, 2012 WL 76134, at \*3 (S.D.N.Y. Jan. 9, 2012) (“[T]he public plainly has an interest in the efficient functioning of the judicial system, a goal that, as we have noted, will be damaged if this case remains in suspended animation now for some unknown period of time[.]”).

To the extent the Court determines that a stay is necessary, Plaintiffs request that the stay be as narrowly tailored as possible. A global stay of the entire case is clearly not warranted. The only identifiable prejudice would be to Zodhiates, if he were asked questions under oath in the civil proceeding, and therefore, if a stay were granted, it should be limited to that scope. In *Gala Enterprises, Inc. v. Hewlett Packard Co.*, No. 96 CIV. 4864 DC, 1996 WL 732636, at \*3 (S.D.N.Y. Dec. 20, 1996), the court granted a partial stay only as to the single indicted individual defendant, ruling that “[b]ecause the only risk of prejudice in this

case is the possible infringement of [individual defendant's] Fifth Amendment rights, the remedy should be tailored to permit as much discovery as possible without infringing on those rights." Applying the same principle here, if the Court determines that a partial stay is necessary, the Court should only stay the deposition of Zodhiates (which is not yet scheduled or even schedulable) while the criminal case against him is pending. That stay would be quite premature, as the parties are many months away from general discovery. Nevertheless, such an order would be narrowly tailored to protect Zodhiates' constitutional rights while permitting this case to move forwards.

A partial stay would not prejudice Plaintiffs or the other parties because the case is very far from trial. Even if a stay were issued as to Zodhiates, the remainder of the litigation can move forward to resolve pre-discovery issues. If the case were to advance to general discovery while Zodhiates' criminal charges are still pending, there is plenty of discovery Plaintiffs can do that does not involve Zodhiates.

### CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendants' Motion to Stay in its entirety, or, in the alternative, grant a limited stay of deposing Philip Zodhiates while his criminal case is pending.

DATED at Middlebury, Vermont this 18th day of November, 2014.

LANGROCK SPERRY & WOOL, LLP

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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,

Plaintiff,

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KENNETH L. MILLER, ET AL,  
Defendant.

**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 *Response to Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc.'s Motion to Stay* 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 18th day of November, 2014.

/s/ Katherine B. Kramer  
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