

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, *et al.*,
Plaintiffs

v.

KENNETH L. MILLER, *et al.*,
Defendants

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Docket No. 2:12-cv-184

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

Preliminary Statement

Every factor typically considered by courts when determining whether to stay a civil case in favor of a parallel criminal case weighs in favor of staying this action, with the exception of Plaintiff’s legitimate interest in promptly pursuing her case. As Plaintiff’s opposition indicates, this case and the criminal case pending in the Western District of New York “certainly overlap” and it is undisputed that Mr. Zodhiates has been indicted, establishing that the two factors courts have found most significant are satisfied. Opposition at 5; *Harris v. Nassau County*, 2014 U.S. Dist. LEXIS 94554 *8, 10 (E.D.N.Y. July 11, 2014) (observing that “[t]he most important factor . . . is the degree to which the civil issues overlap with the criminal issues” and that a stay “is most appropriate where a party to the civil case has been indicted for the same conduct”). The primary cases cited by Plaintiff in opposing a stay are distinguishable, involving a stay sought by a plaintiff who initiated the case, and an indefinite stay sought by a *pro se* defendant who had defaulted on his discovery obligations months before he was indicted. Many district courts

considering situations substantially similar to this case have entered stays and this Court should do the same.

Discussion

Plaintiff concedes that “[t]he criminal case and the civil case certainly overlap.” Opposition at 5. When determining whether to stay a civil case, “[t]he most important factor . . . is the degree to which the civil issues overlap with the criminal issues.” *See, e.g. Harris v. Nassau County*, 2014 U.S. Dist. LEXIS 94554 *8, 10 (E.D.N.Y. July 11, 2014) (quoting *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (S.D.N.Y. 1989)). It is also undisputed that Mr. Zodhiates has been indicted. “A stay of a civil case is most appropriate where a party to the civil case has been indicted for the same conduct.” *See, e.g. id.* (quoting *Trustees of Plumbers & Pipefitters, Nat’l Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)). A stay is particularly appropriate because there is no dispute that the parallel cases overlap, and Mr. Zodhiates has been indicted, satisfying the two factors courts have found most important.

Plaintiff’s argument that the “risk of prejudice only arises in discovery, not in pre-answer motion practice” mischaracterizes what Plaintiff is seeking. There is no question that Plaintiff is actively pursuing discovery on topics directly overlapping the pending criminal case. Plaintiff is currently seeking to have Response Unlimited describe, and testify about, “any communications between Philip Zodhiates and RUL employees regarding Lisa Miller, Isabella Miller Jenkins, and/or Janet Jenkins.” Memorandum and Order Re: Motion to Compel (“Motion Ruling”), Doc. 169, at 5; Declaration of David A. Boyd, Ex. A at 3 (30(b)(6) Notice, topic 3). Nor is there any question that Plaintiff is sharing information she obtains in this action with the Government and that the Government is using this information in parallel criminal proceedings. Doc. 154

(Plaintiff's Reply in Support of Motion to Compel) at 4; Doc. 155 (Government's Statement of Interest) at 3. The Court's denial of Response Unlimited's motion for a protective order makes it highly likely that any further discovery taken in this action will be provided to the Government and used in the Western District of New York criminal case, which is being prosecuted by Assistant U.S. Attorneys from the District of Vermont. *See United States v. Miller*, No. 1:14-cv-175-RJA-JJM, Doc. 11 (Notice of Appearance of Paul J. Van de Graaf).

Plaintiff's primary argument in opposition to a stay is that Response Unlimited, Inc. is a corporation and does not have a personal Fifth Amendment privilege. Opposition at 3 (citing *Gala Enterprises, Inc. v. Hewlett-Packard Co.*, 1996 WL 732636 (S.D.N.Y. Dec. 20, 1996)).¹ *Gala* involved a plaintiff seeking to stay an action it brought after one of its agents was indicted. 1996 U.S. Dist. LEXIS 18867 *2-3. While Plaintiff accurately cites *Gala*, many courts have considered Plaintiff's argument in the directly analogous specific context of a corporate defendant whose managers or owners had been indicted and have entered a general stay of discovery as to all corporate and individual defendants. *See, e.g. Plumbers*, 886 F. Supp. at 1141 (granting a stay "as to all defendants rather than only a partial stay as to the individual ones" where the individual defendants were the controlling officers of the corporate defendants); *Volmar Distribs. v. New York Post Co.*, 152 F.R.D. 36, 40-42 (S.D.N.Y. Dec. 14, 1993) (granting "a complete stay as to all defendants," including corporate defendants, until criminal proceedings against individuals who controlled, or were former officers of, the corporate defendants were

¹ Plaintiff also argues that the Court has already considered and denied a stay request "for the same reasons" posed by the current motion. The Court did not have the opportunity to consider Mr. Zodiates' indictment in ruling on Plaintiff's motion to compel. Rather, the Court considered the pending criminal proceedings as though they had been resolved, observing that the "government canceled" an initial grand jury subpoena request and questioning whether Response Unlimited was still seeking a protective order accordingly. Motion Ruling at 2. Mr. Zodiates' indictment touches on one of the most important factors Courts consider when determining whether to stay parallel actions and no res judicata concerns are present here.

resolved); *accord SEC v. Downe*, 1993 U.S. Dist. LEXIS 753 *49-51 (S.D.N.Y. Jan. 26, 1993) (granting a stay of “discovery of the entire action” where an individual who was a central figure had been indicted).

With the exception of Plaintiff’s “legitimate interest in the expeditious resolution” of her case, *see Plumbers*, 886 F. Supp. at 1140, every factor typically considered by Courts weighs in favor of a stay. As described above, the first two factors are effectively undisputed. The third factor, Plaintiff’s interest in promptly pursuing her case, weighs against entry of a stay.

Defendants’ interests and judicial economy support a stay. *See Plumbers*, 886 F. Supp. at 1140 (emphasizing a defendant’s “interest[] in avoiding the quandary of choosing between waiving their Fifth Amendment rights or effectively forfeiting the civil case” and observing that “judicial efficiency also weighs in favor of granting a stay”); *Harris*, 2014 U.S. Dist. LEXIS 94554,*12 (recognizing that completing criminal proceedings first may narrow issues and avoid duplicative work).² Finally, the public interest is protected because the two proceedings are overlapping. *Plumbers*, 886 F. Supp. at 1140-41 (granting a stay where it would not “inordinately prolong the civil case” and where “the criminal prosecution could provide some benefit to the civil case and advance public interests”); *Harris* 2014 U.S. Dist. LEXIS 94554,*13 (“the public’s interest is best served by preserving the integrity of the criminal case”) (quotations omitted).

Parlin Funds LLC v. Gilliams is not to the contrary. The defendant seeking a stay in *Parlin* was proceeding *pro se*, had “been in extended default on his discovery obligations” for “many months before criminal charges were filed,” and sought a stay for an “unknown period of time.” 2012 U.S. Dist. LEXIS 3240 *4-5, 7 (S.D.N.Y. Jan. 6, 2012). Through its counsel,

² A brief stay could also favor judicial economy by allowing the Second Circuit to decide the fully briefed appeal of Kenneth Miller’s criminal conviction. The decision in that case could help narrow issues and avoid duplicative work by clarifying some of the jurisdictional questions posed by this case.

Response Unlimited has complied with its discovery obligations, responding to a series of discovery requests issued by Plaintiff, and attempting to meet and confer with Plaintiff to address the requests about which the parties disagreed. The Court granted in part, and denied in part, Plaintiff's recent motion to compel, finding that no further response was due to some of the disputed requests and denying Plaintiff's request that the Court order Response Unlimited to designate Mr. Zodhiates as its corporate representative for a 30(b)(6) deposition. Motion Ruling at 6-9. The *Parlin* Court noted that the defendant's Fifth Amendment concerns "would be entitled to significant weight" if he had not "been in extended default on his discovery obligations" for several months before criminal charges were filed. 2012 U.S. Dist. LEXIS 3240 *4-5. Nor is the stay sought by Defendants unduly lengthy. A scheduling order has been entered in the New York criminal proceedings and it contemplates discovery being completed, and any pretrial motions being filed and heard, by March 2015. *United States v. Miller*, No. 1:14-cv-175-RJA-JJM, Doc. 4.

Conclusion

Five of the six factors Courts typically consider weigh in favor of a stay of this action. It is undisputed that this case overlaps with a pending Western District of New York criminal case and that Mr. Zodhiates has been indicted. While Plaintiff's interest in promptly pursuing this case weighs against a stay, the remaining public and private interest factors support a stay. Defendants' interests, judicial economy, and the public interest in maintaining the integrity of criminal proceedings, all favor a stay of this action until the Western District of New York criminal case has been completed.

Dated: Burlington, Vermont
December 2, 2014

/s/ David A. Boyd

Matthew B. Byrne, Esq.

David A. Boyd, Esq.

Gravel & Shea PC

76 St. Paul Street, 7th Floor, P. O. Box 369

Burlington, VT 05402-0369

(802) 658-0220

mbyrne@gravelshea.com

dboyd@gravelshea.com

For Defendants Philip Zodhiates, Victoria
Hyden and Response Unlimited, Inc.

UNITED STATES DISTRICT COURT
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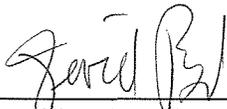
DECLARATION OF DAVID A. BOYD

I, David A. Boyd, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. I am counsel for Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.
2. On November 24, 2014, my colleague Robert Hemley received a revised 30(b)(6) deposition notice of Response Unlimited, Inc. by e-mail. A copy of the Notice of Deposition is attached hereto as Exhibit A.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 2nd day of December, 2014 in Burlington, Vermont.



David A. Boyd, Esq.

UNITED STATES DISTRICT COURT
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Docket No. 2:12-cv-184-wks

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(2) and Rule 30(b)(6) of the Federal Rules of Civil Procedure, Plaintiff Janet Jenkins shall take the deposition upon oral examination of defendant Response Unlimited, Inc., (“RUL”), as an organization, upon the topics detailed below. The deposition may be stenographically and/or video recorded and will take place on [[DATE]], commencing at [[TIME]], at the offices of [[LOCATION, ADDRESS]]. The taking of this deposition may be adjourned from day to day until completed, and may occur as well on [[DATE]], and further dates if more than one person is necessary to provide the information requested.

Defendant RUL is requested to designate one or more officers, directors, managing agents, representatives, or other persons who consent to testify on the matters designated below. If more than one person is so designated, RUL shall set forth for each person so designated the matter or matters on which that person will testify. This deposition is limited to jurisdictional discovery and does not restrict Plaintiffs’ ability to notice a subsequent Rule 30(b)(6) deposition of RUL on other topics.

Plaintiff shall examine RUL on the following subject matters:

1. All interrogatories ordered to be supplemented by the Court's Order Re: Motion to Compel, dated 10/30/14;
2. RUL's efforts to date to comply with Plaintiffs' discovery requests, including but not limited to identification of electronic and paper files searched, search terms used, and dates those searches were conducted;
3. Any communications between Philip Zodhiates and RUL employees regarding Lisa Miller, Isabella Miller-Jenkins, and/or Janet Jenkins, including the speaker, the recipients, and the contents of the communications;
4. Lisa Miller's first contacts and any and all interactions with RUL, its agents and/or employees within the scope of their employment;
5. RUL's communications with third parties regarding Lisa Miller through its employees and/or agents within the scope of their employment;
6. RUL's involvement with Lisa Miller, Isabella Miller-Jenkins, and/or Janet Jenkins through its employees and/or agents within the scope of their employment;
7. Job description and responsibilities of Philip Zodhiates, Victoria (Zodhiates) Hyden, and Kathie Zodhiates, from January 2009 to December 2010, or during the time that RUL was working for Liberty Counsel, whichever period is longer;
8. [DELETED – RETAINED FOR REDLINING];
9. The full range of services RUL provides to its clients;
10. RUL's policies and expectations regarding RUL employees' use of company phones, email, and vehicles during work hours and after hours;
11. RUL's policies and expectations regarding its monitoring of RUL employees' email, phone use, and vehicle use.

Pursuant to Rule 30(b)(2) of the Vermont Rules of Civil Procedure, the deponent shall bring to the deposition the following documents:

12. Any and all documents which the deponent has reviewed in preparation for this deposition;
13. All documents ordered to be produced pursuant to the Court's Order Re: Motion to Compel, dated 10/30/14;

14. All documents within RUL's possession regarding Lisa Miller, Isabella Miller-Jenkins, Janet Jenkins, and/or this lawsuit, including but not limited to emails, other written communication, memoranda, phone records, and letters.

DATED at Middlebury, Vermont this ____ day of November, 2014.

LANGROCK SPERRY & WOOL, LLP

Fritz Langrock
Emily J. Joselson
Katherine B. Kramer
PO Drawer 351, 111 S. Pleasant Street
Middlebury, VT 05753
kkramer@langrock.com
Phone: 802-388-6356

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CERTIFICATE OF SERVICE

I, David A. Boyd, Esq., attorney for Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc., certify that, on December 2, 2014, I served Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.'s Reply in Support of Motion to Stay through the CM/ECF system on the following individuals:

Ritchie E. Berger, Esq.
rberger@dinse.com

Robert G. Cain, Esq.
rcain@pfclaw.com

Eugenia A. Cowles, AUSA
eugenia.cowles@usdoj.gov

Michael J. DePrimo, Esq.
michaeldeprimo@gmail.com

Emily J. Joselson, Esq.
ejoselson@langrock.com

Katherine B. Kramer, Esq.
kkramer@langrock.com

Frank H. Langrock, Esq.
flangrock@langrock.com

Brooks G. McArthur, Esq.
bmcarthur@jarvismcarthur.com

Thomas E. McCormick, Esq.
tem@mc-fitz.com

Peggy J. Schmitz, Esq.
schmitz@ccj.com

Lisa B. Shelkrot, Esq.
lshelkrot@langrock.com

Steven J. Shrock, Esq.
shrock@ccj.com

Norman C. Smith, Esq.
nc.smith@myfairpoint.net

Sarah Star, Esq.
srs@sarahstarlaw.com

Sophie E. Zdatny, Esq.
szdatny@dinse.com

Dated: Burlington, Vermont
December 2, 2014

/s/ David A. Boyd

David A. Boyd, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
dboyd@gravelshea.com
For Defendants Philip Zodhiates, Victoria
Hyden, and Response Unlimited, Inc.