

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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)
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Docket No. 2:12-cv-184

DEFENDANT PHILIP ZODHIATES, VICTORIA HYDEN AND
RESPONSE UNLIMITED, INC.'S SUPPLEMENTAL MEMORANDUM

Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc. (“RUL”) (collectively “Defendants”), respectfully submit this supplemental memorandum in support of their motion to stay.

Memorandum

On March 16, 2015, the Court held a hearing on the pending motion to stay, which seeks a stay of this action in favor of parallel criminal proceedings currently ongoing in the United States District Court for the Western District of New York. During the hearing, the Court proposed a potential resolution of the motion, which Defendants understand to be: (1) that RUL respond to Plaintiffs’ currently outstanding discovery requests by producing to Plaintiffs only those documents that it has already produced to the Government; and (2) that this action then be stayed pending the resolution of the parallel criminal proceedings. Defendants requested an opportunity to consider the Court’s proposal and respond by March 23, 2015.

Defendants write now to respectfully request that the Court implement its proposal by entering the attached proposed protective order. The proposed order would result in RUL promptly producing to Plaintiffs those documents it has previously produced to the Government in response to grand jury subpoenas. At the time of the hearing, the Government had served a third grand jury subpoena, dated December 4, 2014, which RUL and Mr. Zodiates had moved to quash. The motion to quash was subsequently denied and the proposed order would also result in RUL producing documents responsive to Plaintiffs' requests that it produces in response to the December 4, 2014 subpoena. The proposed order would then provide for a stay of this action pending the resolution of *United States v. Miller*, No. 14-cr-175-RJA-JJM (W.D.N.Y.), the parallel proceeding in which Mr. Zodiates has been indicted. Defendants have conferred with Plaintiffs, and after reaching agreement on several issues, arrived at an impasse regarding the proposed protective order. *See* Declaration of David A. Boyd, Exhibits A-D. More specifically, Plaintiffs are unwilling to agree to a protective order that would limit the use of discovery produced in this action to this action. *Id.*, Exhibits B-D.

"A party generally cannot use discovery for purposes unrelated to the lawsuit," in which it is taken. Moore's Federal Practice § 26.101[1][b]. Plaintiffs have stated that they oppose a protective order because Janet Jenkins will likely be a witness in the parallel criminal matter and "will have to communicate with the Government" accordingly. Boyd Declaration Exhibit B. This argument does not weigh against the proposed order because the Government is not a party to this case and a protective order would not impact what information it can, and cannot, share with Ms. Jenkins if it calls her as a witness in the criminal matter.

The use of discovery from this action outside of this action is one of the primary reasons Defendants moved for a stay. *See* Motion, Docket No. 172 at 3-4; Reply, Docket No. 176 at 2-3;

Supplemental Submission, Docket No. 185 at 2-4. A protective order limiting the use of discovery is appropriate here for the same constitutional and pragmatic reasons weighing in favor of a stay. *See, e.g. United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83, n. 4, 84, n.6 (2d Cir. 1995) (explaining that a court “must explore the feasibility and fairness” of accommodations such as a stay or the entry of a protective order where a party validly invokes the Fifth Amendment); *In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221, 1222-1226 (2d Cir. 1991) (applying *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979) to a grand jury subpoena seeking discovery from a civil action 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 civil action).

For the foregoing reasons, Defendants respectfully request that the Court implement its proposal and stay this action by entering the enclosed proposed order.

Dated: Burlington, Vermont
March 23, 2015

/s/ David A. Boyd

Robert B. Hemley, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
rhemley@gravelshea.com
For Response Unlimited, Philip Zodiates,
and Victoria Hyden

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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

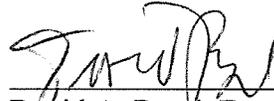
DECLARATION OF DAVID A. BOYD

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 Zodiates, Victoria Hyden and Response Unlimited, Inc.
2. On March 17, 2015, I sent a draft protective order to counsel for Plaintiffs by e-mail. A copy of my March 17, 2015 e-mail is attached as Exhibit A.
3. On March 17, 2015, I received a response from Emily Joselson by e-mail. Ms. Joselson's March 17, 2015 e-mail is attached as Exhibit B.
4. On March 18, 2015, I sent a revised proposed draft protective order to counsel for Plaintiffs by e-mail. A copy of my March 18, 2015 e-mail is attached as Exhibit C.
5. On March 19, 2015, I received two responses from Katherine Kramer by e-mail. In those responses, Ms. Kramer correctly noted that we had reached an impasse. Ms. Kramer's March 19, 2015 e-mails are attached as Exhibit D.

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

Executed this 23rd day of March, 2015 in Burlington, Vermont.



David A. Boyd, Esq.

Exhibit A

David A. Boyd

From: David A. Boyd
Sent: Tuesday, March 17, 2015 4:11 PM
To: 'Emily J. Joselson'
Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Katherine B. Kramer; Fritz Langrock; Robert B. Hemley
Subject: Jenkins v. Miller
Attachments: #994163-v1-Protective Order.DOCX

Categories: Saved to DM, #720005 : 00002
ProfileOnSend: 1

Counsel,

I write regarding the proposal advanced yesterday by the Court for the resolution of our motion to stay. We understand that proposal to be: (1) that Response Unlimited would respond to your outstanding discovery requests by producing only those documents that it has already produced to the Government and (2) that this action would then be stayed pending the resolution of the parallel criminal proceedings ongoing in the United States District Court for the Western District of New York. If we are able to agree on entry of a protective order, we are amenable to proceeding as proposed by the Court. Attached please find a draft protective order for your consideration.

Regards,

David A. Boyd | *Associate*
Gravel & Shea PC
76 St. Paul Street, 7th Floor | P. O. Box 369 | Burlington, VT 05402-0369
802-658-0220 (phone) | 802-658-1456 (fax)
dboyd@gravelshea.com | www.gravelshea.com
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Exhibit B

David A. Boyd

From: Emily J. Joselson <EJoselson@langrock.com>
Sent: Tuesday, March 17, 2015 5:49 PM
To: David A. Boyd
Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Katherine B. Kramer; Fritz Langrock; Robert B. Hemley
Subject: RE: Jenkins v. Miller
Attachments: Jenkins order redline_031715_0546PM.pdf

Dear David:

Thanks for this draft. Unfortunately, our recollection of the Court's comments and concerns compels us to request that you narrow the scope of the proposed order.

For instance, we are concerned that your proposed language regarding "parallel proceedings" is too vague, and have tried to limit it accordingly. The Court also rejected the idea of a protective order since Janet Jenkins will be a witness in the criminal matter, and will have to communicate with the Government, likely including communications about these documents. Also, if the pending motion to quash is denied, we understood we were also entitled to any such documents produced to the Government, and so we will need you to inform us of the status of that motion.

Take a look at what we propose. If we cannot agree, we may simply have to send the Court our divergent proposals.

From: David A. Boyd [<mailto:dboyd@gravelshea.com>]
Sent: Tuesday, March 17, 2015 4:11 PM
To: Emily J. Joselson
Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Katherine B. Kramer; Fritz Langrock; Robert B. Hemley
Subject: Jenkins v. Miller

Counsel,

I write regarding the proposal advanced yesterday by the Court for the resolution of our motion to stay. We understand that proposal to be: (1) that Response Unlimited would respond to your outstanding discovery requests by producing only those documents that it has already produced to the Government and (2) that this action would then be stayed pending the resolution of the parallel criminal proceedings ongoing in the United States District Court for the Western District of New York. If we are able to agree on entry of a protective order, we are amenable to proceeding as proposed by the Court. Attached please find a draft protective order for your consideration.

Regards,

David A. Boyd | Associate
Gravel & Shea PC
76 St. Paul Street, 7th Floor | P. O. Box 369 | Burlington, VT 05402-0369
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In accordance with IRS Circular 230, we inform you that any tax advice contained in this communication was not written or intended to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code, or promoting, marketing or recommending to another person any transaction or matter addressed in this communication.

Exhibit C

David A. Boyd

From: David A. Boyd
Sent: Wednesday, March 18, 2015 5:25 PM
To: 'Emily J. Joselson'
Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Katherine B. Kramer; Fritz Langrock; Robert B. Hemley
Subject: RE: Jenkins v. Miller
Attachments: #994163-v1-Protective Order.DOCX

Categories: Saved to DM, #720005 : 00002
ProfileOnSend: 1

Emily,

Thank you for your comments. We appear to be in agreement on several issues and I have attached a revised draft. We have no objection to more precisely defining the parallel proceedings at issue and I believe we have done so in the attached draft. If our pending motion to quash is denied, we also do not object to producing documents responsive to your requests that we produce to the Government.

We disagree regarding the importance of a protective order. The Government is not a party to this case and a protective order would not impact what information it can, and cannot, share with Ms. Jenkins if it calls her as a witness in the criminal matter. The use of discovery outside of this action is one of the primary reasons we filed our motion to stay. A protective order should not be controversial given that background and the fact that litigants "generally cannot use discovery for purposes unrelated to the lawsuit" in which they obtain that discovery even in the absence of a protective order. See, e.g. Moore's Federal Practice §26.101[1][b].

Regards,

David A. Boyd | Associate
Gravel & Shea PC
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From: Emily J. Joselson [mailto:EJoselson@langrock.com]
Sent: Tuesday, March 17, 2015 5:49 PM
To: David A. Boyd
Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Katherine B. Kramer; Fritz Langrock; Robert B. Hemley
Subject: RE: Jenkins v. Miller

Dear David:

Thanks for this draft. Unfortunately, our recollection of the Court's comments and concerns compels us to request that you narrow the scope of the proposed order.

For instance, we are concerned that your proposed language regarding "parallel proceedings" is too vague, and have tried to limit it accordingly. The Court also rejected the idea of a protective order since Janet Jenkins will be a witness in

the criminal matter, and will have to communicate with the Government, likely including communications about these documents. Also, if the pending motion to quash is denied, we understood we were also entitled to any such documents produced to the Government, and so we will need you to inform us of the status of that motion.

Take a look at what we propose. If we cannot agree, we may simply have to send the Court our divergent proposals.

From: David A. Boyd [<mailto:dboyd@gravelshea.com>]

Sent: Tuesday, March 17, 2015 4:11 PM

To: Emily J. Joselson

Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Katherine B. Kramer; Fritz Langrock; Robert B. Hemley

Subject: Jenkins v. Miller

Counsel,

I write regarding the proposal advanced yesterday by the Court for the resolution of our motion to stay. We understand that proposal to be: (1) that Response Unlimited would respond to your outstanding discovery requests by producing only those documents that it has already produced to the Government and (2) that this action would then be stayed pending the resolution of the parallel criminal proceedings ongoing in the United States District Court for the Western District of New York. If we are able to agree on entry of a protective order, we are amenable to proceeding as proposed by the Court. Attached please find a draft protective order for your consideration.

Regards,

David A. Boyd | *Associate*

Gravel & Shea PC

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Exhibit D

David A. Boyd

From: Katherine B. Kramer <KKramer@langrock.com>
Sent: Thursday, March 19, 2015 3:32 PM
To: David A. Boyd; Emily J. Joselson
Cc: Matthew B. Byrne; 'Sarah Star (srs@sarahstarlaw.com)'; Fritz Langrock; Robert B. Hemley
Subject: RE: Jenkins v. Miller
Attachments: 646077_2.pdf

Hi David,

Attached please find a slightly amended draft stipulation. The substance of the document is not changed from the one I sent earlier today. The two changes are: (1) no longer uses the phrase "protective order" in the heading because we do not believe that Judge Sessions viewed a protective order as warranted under these circumstances; and (2) deletes the proposed Nondisclosure Declaration as an attachment, since it is irrelevant to our proposed version.

Thanks,
Katie

From: Katherine B. Kramer
Sent: Thursday, March 19, 2015 10:32 AM
To: 'David A. Boyd'; Emily J. Joselson
Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Fritz Langrock; Robert B. Hemley
Subject: RE: Jenkins v. Miller

David,

It seems that we have reached an impasse regarding the proposed protective order. The attached document reflects the extent of what we would be willing to sign. I think the best course at this point is for us each to submit a proposed protective order to the court, and then Judge Sessions can make a ruling, unless you would reconsider signing our proposed draft. As Emily had stated previously, we are concerned that your proposal still goes well beyond what Judge Sessions expressed at the argument on Monday.

Thanks,
Katie

From: David A. Boyd [<mailto:dboyd@gravelshea.com>]
Sent: Wednesday, March 18, 2015 5:25 PM
To: Emily J. Joselson
Cc: Matthew B. Byrne; Sarah Star (srs@sarahstarlaw.com); Katherine B. Kramer; Fritz Langrock; Robert B. Hemley
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We disagree regarding the importance of a protective order. The Government is not a party to this case and a protective order would not impact what information it can, and cannot, share with Ms. Jenkins if it calls her as a witness in the criminal matter. The use of discovery outside of this action is one of the primary reasons we filed our motion to stay. A protective order should not be controversial given that background and the fact that litigants “generally cannot use discovery for purposes unrelated to the lawsuit” in which they obtain that discovery even in the absence of a protective order. *See, e.g.* Moore’s Federal Practice §26.101[1][b].

Regards,

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Take a look at what we propose. If we cannot agree, we may simply have to send the Court our divergent proposals.

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Sent: Tuesday, March 17, 2015 4:11 PM
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Subject: Jenkins v. Miller

Counsel,

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Regards,

David A. Boyd | *Associate*

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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

STIPULATED ORDER FOR LIMITED PRODUCTION AND STAY

WHEREAS criminal proceedings are ongoing in the United States District Court for the Western District of New York involving Philip Zodhiates; and

WHEREAS Defendants Response Unlimited, Inc. (“Response Unlimited”), Philip Zodhiates, and Victoria Hyden have moved to stay this action pending the completion of the criminal proceedings ongoing in the Western District of New York; and

WHEREAS certain discovery requests served by Plaintiffs on Response Unlimited are currently outstanding; and

WHEREAS the Court has proposed that these issues be resolved by: (1) Response Unlimited producing to Plaintiffs, at this time, only those documents it has produced to the Government in response to grand jury subpoenas and (2) thereafter this action being stayed pending the completion of the criminal proceedings against Philip Zodhiates ongoing in the Western District of New York, the following procedures shall apply:

1. Production of Documents. Response Unlimited shall promptly produce to Plaintiffs those documents it has previously produced to the Government in response to grand jury subpoenas. With regard to the pending grand jury subpoena Response Unlimited has moved to quash, if the motion to quash is denied, counsel for Response Unlimited shall promptly notify counsel for Plaintiffs and Response Unlimited shall produce to Plaintiffs documents it produces to the Government that are responsive to Plaintiffs' currently pending requests. All other documents and information responsive to Plaintiffs' outstanding discovery requests shall be stayed until further order of this Court.

2. Stay. The proceedings in this matter shall be stayed until further order of this Court.

Dated: Burlington, Vermont
March 19, 2015

Robert B. Hemley, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
rhemley@gravelshea.com
For Response Unlimited, Philip Zodhiates,
and Victoria Hyden

Dated: Middlebury, Vermont
_____, 2015

Katherine B. Kramer, Esq.
Langrock Sperry & Wool, LLP
111 S. Pleasant St., P. O. Drawer 351
Middlebury, VT 05753-0351
(802) 388-63556
kkramer@langrock.com
For Plaintiffs

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)	

PROPOSED PROTECTIVE ORDER FOR LIMITED PRODUCTION AND STAY

WHEREAS criminal proceedings are ongoing in the United States District Court for the Western District of New York involving Philip Zodhates; and

WHEREAS Defendants Response Unlimited, Inc. (“Response Unlimited”), Philip Zodhates, and Victoria Hyden have moved to stay this action pending the completion of the criminal proceedings ongoing in the Western District of New York; and

WHEREAS certain discovery requests served by Plaintiffs on Response Unlimited are currently outstanding; and

WHEREAS the Court has proposed that these issues be resolved by: (1) Response Unlimited producing to Plaintiffs, at this time, only those documents it has produced to the Government in response to grand jury subpoenas; and (2) thereafter this action being stayed pending the completion of the criminal proceedings against Philip Zodhates ongoing in the Western District of New York, the following procedures shall apply:

1. Production of Documents. Response Unlimited shall promptly produce to Plaintiffs those documents it has previously produced to the Government in response to grand jury subpoenas. At the time of the Court's proposal, the Government had served a third grand jury subpoena, dated December 4, 2014, which Response Unlimited and Mr. Zodiates had moved to quash. The motion to quash has now been denied and Response Unlimited shall also produce to Plaintiffs documents it produces to the Government in response to the December 4, 2014 subpoena that are responsive to Plaintiffs' currently pending requests. Documents produced by Response Unlimited shall be designated with a stamp including the phrase "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER." All other documents and information responsive to Plaintiffs' outstanding discovery requests shall be stayed until further order of this Court.

2. Use of Material Produced. Documents and information produced pursuant to this Order may be used only for the preparation and trial of this matter and shall not be used or disclosed for any other purpose. Plaintiff may disclose documents produced pursuant to this Order to their counsel and to employees of such counsel to the extent reasonably necessary to render professional services in this litigation. Any individual to whom disclosure is to be made other than Plaintiff's counsel shall first execute a Declaration in the form of Attachment A to this Order, indicating that he or she has been informed of, and has acknowledged that he or she understands, this Order. This Order shall not preclude the use of material or information that is in the public domain or has been developed independently by a person who has not had access to materials produced pursuant to this Order or otherwise learned of documents or information through this action.

3. Subpoena Or Request By Other Courts or Governmental Entities. If another court or governmental entity subpoenas or orders production of materials or information produced to

Plaintiff under this Order, Plaintiff shall promptly notify counsel for Response Unlimited of the pendency of such subpoena or order. Plaintiff shall also immediately inform the entity issuing compulsory process of this Order and shall deliver a copy of this Order to the entity issuing such process. The procedure set forth by the Second Circuit in *Martindell v. International Tel. & Tel. Corp*, 594 F.2d 291 (2d Cir. 1979) and its progeny shall apply as appropriate to the resolution of compulsory process received relating to this Confidentiality Order. Response Unlimited shall bear the burden and expense of seeking to protect any materials from disclosure in response to compulsory process.

4. Non-Termination. The provisions of this Order shall not terminate at the conclusion of this action.

5. Stay. The proceedings in this matter shall be stayed until further order of this Court.

Dated: Burlington, Vermont
March 23, 2015

/s/ David A. Boyd
Robert B. Hemley, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
rhemley@gravelshesha.com
For Response Unlimited, Philip Zodiates,
and Victoria Hyden

SO ORDERED,

Date

United States District Judge

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)	

NONDISCLOSURE DECLARATION

I hereby acknowledge that I have read the attached Protective Order and agree to be bound by the terms thereof. I will keep confidential all documents and information provided to me pursuant to the Order and shall make no use thereof other than in connection with the above-captioned litigation. I will not retain copies, electronic or otherwise, of any documents subject to the Order, and after I have completed my testimony, will return or destroy such documents.

_____)
Date

Subscribed and sworn to before me this ____ day of _____, 2015.

Notary Public
My Commission Expires:

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

CERTIFICATE OF SERVICE

I, David A. Boyd, Esq., attorney for Defendants Philip Zodiates, Victoria Hyden and Response Unlimited, Inc., certify that, on March 23, 2015, I served Defendants Philip Zodiates, Victoria Hyden and Response Unlimited, Inc.’s Supplemental Memorandum, together with Declaration of David A. Boyd, Proposed Protective Order for Limited Production and Stay, and Nondisclosure Declaration, 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.
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