

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, ET AL.,
Plaintiffs,

v.

KENNETH L. MILLER, ET AL.,
Defendants.

Docket No. 2:12-cv-184

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

NOW COME Plaintiffs Janet Jenkins, et al., by and through undersigned counsel, and respectfully submit this memorandum in response to the supplemental memorandum filed on March 23, 2015, by Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc.

Defendants acknowledge that, at the hearing on March 16, 2015, this Court proposed a resolution to the current pending discovery obligations and motion to stay. Plaintiffs agree with the wisdom of the Court's proposal, which they understand is as follows: (1) RUL shall produce to Plaintiffs all discovery already produced to the Government pursuant to the three grand jury subpoenas in the criminal case against Philip Zodhiates; and then (2) this action is stayed until the criminal proceedings against Philip Zodhiates are complete, or further order of this Court. Although Plaintiffs would prefer that this action move forward without further delay, Plaintiffs recognize the Court's concerns regarding the justifications for a stay.

A stay and a protective order are alternative paths to the same objective: protecting Defendants from undue prejudice in the pending criminal case against Mr. Zodhiates. Even Defendants acknowledge that a stay and a protective order are alternative accommodations to

protect Fifth Amendment rights. *See* Defendants' Memorandum, p. 3 ("*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)") (emphasis added). Therefore, since the Court intends to grant a stay of this action, a protective order is not warranted, as the stay will adequately protect Defendants from disclosure of any additional discovery, over and above that which they have already produced to the Government.

As expressed during oral argument, Defendants seek to limit the flow of information from Plaintiffs to the prosecutors in the case against Mr. Zoghiates. Because the Government has already received (or will receive) all of the documents Defendants shall produce to Plaintiffs, the permitted discovery will not prejudice Defendants in the ongoing criminal case. The Court's proposal further ensures this protection for Defendants by staying the instant case. So long as the only information disclosed to Plaintiffs during the pendency of the criminal case has already been produced to the Government, there can be no prejudice to Defendants.

Defendants have not identified any additional reasons for imposing the protective order they seek, and such a protective order is unwarranted. The Court rightfully expressed concern that a protective order would hinder Plaintiff Janet Jenkins in her role as a victim and key witness in the ongoing criminal case. As the Court noted during oral argument, Plaintiff Jenkins will need to communicate with the Government in preparation for the criminal trial against Mr. Zoghiates, and a protective order would interfere with that communication.

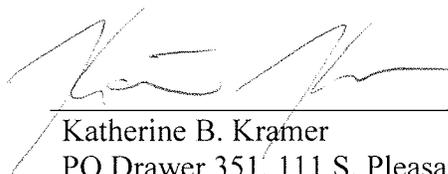
Protective orders are generally disfavored as a matter of public policy, and court proceedings are presumed to be open and public. The party seeking a protective order bears the heavy burden of showing that good cause merits the order. *See, e.g., Penthouse Int'l, Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371, 391 (2d Cir. 1981) (“Where, as here, the documents are relevant, the burden is upon the party seeking non-disclosure or a protective order to show good cause.”). Open and unrestricted access by the public of court proceedings is a cornerstone of our system of justice. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (“[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings”); *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999) (“Most cases endorse a presumption of public access to discovery materials.”). Indeed, “[e]ven disputes about claims of national security are litigated in the open.” *Union Oil Company v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000).

Nor would Defendants’ proposed protective order terminate upon completion of the criminal action against Mr. Zodiates, nor even at the conclusion of this civil action. Such a restraint is not only against public policy. It would be unduly burdensome on Plaintiffs, as the only prejudice raised by Defendants relates to the criminal charges against Mr. Zodiates (and, perhaps, the related criminal investigation of Response Unlimited). It would unduly burden and prejudice Plaintiffs if the use of all documents produced under the proposed protective order were restricted throughout and beyond this litigation, even after any possible prejudice had been eliminated. Further, a protective order of any duration would unduly hinder Plaintiff Jenkins’ ability to use information obtained during discovery in her efforts to locate her daughter.

For the reasons set forth by this Court during oral argument on March 16, 2015, and as more fully set forth above, Plaintiffs respectfully request that the Court deny Defendants' motion for the proposed protective order. Instead, Plaintiffs respectfully refer this Court to Plaintiffs' proposed Order, attached hereto as Exhibit A (as well as to Defendants' supplemental memorandum, Exhibit D).

DATED at Middlebury, Vermont this 24th day of March, 2015.

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Exhibit A

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)	

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 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. 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

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Dated: Middlebury, Vermont
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UNITED STATES DISTRICT COURT
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JANET JENKINS, ET AL.,
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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 *Plaintiffs' Response to Defendant Philip Zodhates, Victoria Hyden and Response Unlimited, Inc.'s Supplemental Memorandum* 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 24th day of March, 2015.

/s/ Katherine B. Kramer
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