

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	)	

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

Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc. (“RUL”) (collectively “Defendants”), respectfully submit this final memorandum in support of their proposed stay and protective order.

Memorandum

The parties now agree that: (1) this action should be stayed and (2) Defendants should produce to Plaintiffs those documents Defendants have already produced to the Government. Plaintiffs’ Response at 1, Doc. No. 190. The parties disagree only about whether Plaintiffs may use the discovery they receive for purposes other than this action. Defendants write to briefly respond to a series of new arguments raised for the first time in Plaintiffs’ most recent submission, each of which is inconsistent with Supreme Court or Second Circuit precedent.

Plaintiffs advance two primary arguments:(1) that a stay of this action moots any risk of prejudice to Mr. Zodhiates in the pending criminal case and (2) that pretrial discovery is

presumptively public. Neither can be reconciled with existing Supreme Court and Second Circuit Precedent.

First, there is no question that Mr. Zodhiates could be prejudiced in the pending criminal case by the use of discovery obtained in this action outside of this action. The Sixth Amendment guarantees the right to a fair trial, which means a trial untainted by prejudicial pretrial publicity. *See United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993). The Supreme Court has long recognized that in cases that arouse public interest, as does this case, “adverse publicity can endanger the ability of the defendant to receive a fair trial.” *Gannet Co. v. DePasquale*, 443 U.S. 368, 378 (1979). Trial judges in criminal cases have “an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.” *Id.*

Second, the Second Circuit has expressly rejected Plaintiffs’ suggestion that pretrial discovery is presumptively public. Plaintiffs assert that “[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” and that “[m]ost cases endorse a presumption of public access to discovery materials” citing cases from the First and Seventh Circuits. Response at 3 (citing *Public Citizen v. Liggett Group Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) and *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999).

Public Citizen relied on a long since superseded version of Federal Rule 5(d), which it cited along with a 1980s Second Circuit case, *In re Agent Orange*, to conclude that a party receiving discovery materials may ordinarily make them public. 858 F.2d at 789. The Second Circuit has flatly rejected an identical interpretation of *Agent Orange*, stating “[a]t least one District Court in our Circuit has incorrectly concluded that *Agent Orange* established a new rule that created a presumption that discovery materials should be publicly accessible whenever possible, i.e., absent a showing of good cause for shielding them from view.” *SEC v.*

TheStreet.com, 273 F.3d 222, 231 n.9 (2d Cir. 2001). The Second Circuit has also dismissed any suggestion that there is a presumption of public access to discovery materials, stating “documents that play no role in the performance of Article III functions, *such as those passed between the parties in discovery*, lie entirely beyond the presumption’s reach.” *Id.* at 232 (emphasis in original) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)).

To the contrary, according to the Second Circuit, “[u]nlimited access to every item turned up in the course of litigation would be unthinkable. Reputations would be impaired, personal relationships ruined, and businesses destroyed on the basis of misleading or downright false information.” *Amodeo*, 71 F.3d at 1048-1049. A presumption of public access attaches only to documents used “in the performance of Article III functions” and not to documents produced in discovery, which “lie entirely beyond the presumption’s reach.” *Id.* at 1050.

Finally, contrary to Plaintiffs’ suggestion, the protective order proposed by Defendants is not unreasonable because it would not terminate at the conclusion of this action. Indeed, the Second Circuit has questioned whether parties may reasonably rely for discovery purposes on “protective orders that are on their face temporary or limited.” *TheStreet.com*, 273 F.3d at 231. Against this backdrop, any litigant who intends to rely on a protective order should state clearly that it will survive the termination of the underlying action.

Dated: Burlington, Vermont
March 27, 2015

/s/ David A. Boyd

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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 March 27, 2015, I served Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.'s Second Supplemental Memorandum through the CM/ECF system on the following individuals:

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