

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 MOTION FOR RECONSIDERATION IN PART

Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc. ("RUL") (collectively "Defendants"), respectfully request that the Court reconsider the portion of its April 6, 2015 ruling that denied entry of the protective order proposed by Defendants.

Memorandum

Defendants appreciate the Court's thoughtful consideration when staying this action to limit the danger of fundamental unfairness it poses to the parallel criminal case in which Mr. Zodhiates has been indicted. Defendants respectfully request that the Court reconsider only the portion of its ruling that denied entry of a protective order restricting the use of discovery. The risk of prejudicial pretrial publicity is very real and a protective order would in no way interfere with the ability of Ms. Jenkins to testify as a witness in the parallel criminal case, which is the only stated reason Plaintiff seeks to avoid a protective order.

First, there is a substantial risk of prejudicial pretrial publicity in the absence of a protective order. The Associated Press is actively covering both the civil and criminal cases. Within 24 hours of this Court's entry of a stay, counsel for Defendants received an inquiry from the Associated Press and articles regarding the stay were published. Declaration of David A. Boyd ("Boyd Declaration") ¶ 2, Exhibits A, B. The Associated Press has also continually covered the parallel criminal case, most recently attending and publishing an article about a suppression hearing held in March 2015. *Id.*, ¶ 3, Exhibit C.

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). Indeed, trial judges in criminal cases have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannet Co. v. DePasquale*, 443 U.S. 368, 378 (1979). The constitutional limitation of prejudicial pretrial publicity in criminal cases is wholly consistent with a protective order restricting discovery in this case to this case because discovery is not presumptively public. "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 of public access to judicial records. *SEC v. TheStreet.com*, 273 F.3d 222, 231 n.9 (2d Cir. 2001).

Second, entry of a protective order would have no impact on the ability of Ms. Jenkins to testify as a witness in the parallel criminal case. As a threshold matter, Ms. Jenkins will not need to review the documents that Response Unlimited, Inc. has previously produced to the Government, and will be producing to Ms. Jenkins, to testify as a witness in the criminal case. All of the documents in question have been produced to the Government, which will choose those they wish to discuss with Ms. Jenkins. Further, the documents generally are not about Ms.

Jenkins, and to the extent they are, discuss primarily judicial records from litigation between Ms. Jenkins and Lisa Miller that are both known by, and available to, Ms. Jenkins, or published newspaper articles.¹ Boyd Declaration ¶ 4. Further, because the Government is not a party to this action, a protective order could not have any impact on the Government's ability to show Ms. Jenkins any documents it possesses before calling her as a witness in the criminal case.

It should be stressed that the only reason advanced by Plaintiff for resisting a protective order is her stated need to review documents as a witness in the criminal trial. With the stay of the civil case, if there ever were any other reason to disseminate the documents, that reason no longer exists.

Dated: Burlington, Vermont
April 20, 2015

/s/ David A. Boyd

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

¹ Defendants suggest that they will provide the documents, under seal, to the Court for an *in camera* review should there be any doubt about their nature.

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DECLARATION OF DAVID A. BOYD

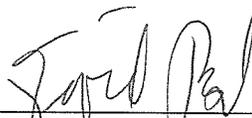
I, David A. Boyd, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. I am counsel for Defendants Philip Zodhates, Victoria Hyden and Response Unlimited, Inc.
2. Within 24 hours of this Court’s entry of a stay, counsel for Defendants received an inquiry from the Associated Press and articles regarding the stay were published. Copies of articles by the Associated Press regarding the stay are attached as Exhibits A and B.
3. The Associated Press has also continually covered the parallel criminal case, most recently attending and publishing an article about a suppression hearing held in March 2015. An article by the Associated Press regarding the suppression hearing is attached as Exhibit C.
4. The documents that Response Unlimited, Inc. has previously produced to the Government, and will be producing to Plaintiff, generally are not about Plaintiff, and to the

extent they are, discuss primarily judicial records from litigation between Ms. Jenkins and Lisa Miller that are known by, and available to, Ms. Jenkins, or published newspaper articles.

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

Executed this 20th day of April 2015 in Burlington, Vermont.



David A. Boyd, Esq.

Exhibit A

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Apr 7, 12:58 PM EDT

US judge delays civil suit in same-sex union custody case

MONTPELIER, Vt. (AP) -- A federal judge has delayed a Vermont woman's lawsuit against people she maintains helped her former same-sex partner and their daughter flee the country rather than comply with child custody orders.

In his ruling Monday, U.S. District Court Judge William Sessions said allowing the civil case filed by Janet Jenkins of Fair Haven to proceed while criminal charges are pending against one of the defendants, Philip Zodhiates, could prejudice the criminal case.

But Sessions said there was no reason to delay the sharing of documents sought by Jenkins' attorneys in the civil suit because federal prosecutors have, or will soon have, the same records.

Zodhiates, a businessman from Waynesboro, Virginia, has pleaded not guilty to criminal charges in Buffalo, New York, that he helped Lisa Miller and her daughter Isabella flee the country in 2009 rather than share custody with Jenkins. They are believed to be living in Nicaragua.

Zodhiates was charged last fall with bringing Miller and Isabella to Buffalo so they could cross the border into Canada.

Sessions' ruling said Zodhiates is expected to go on trial this summer in the criminal case.

In 2012, Kenneth Miller, a Mennonite pastor from Stuarts Draft, Virginia, was convicted of aiding in international kidnapping for arranging the flight for Miller, who is not related, and Isabella. Kenneth Miller's conviction is being appealed.

Miller and Jenkins were joined in a Vermont civil union in 2000. Isabella was born to Miller in the spring of 2002. Miller and Jenkins later split up and fought lengthy legal battles over visitation and later custody until Miller and Isabella disappeared in 2009.

Jenkins filed a civil lawsuit against Kenneth Miller, Zodhiates and others in 2012.

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Exhibit B

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US judge delays civil suit in same-sex union custody case

April 7, 2015
Associated Press

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MONTPELIER, Vt. (AP) — A federal judge is delaying a civil lawsuit by a Vermont woman against people she maintains helped her former same-sex partner and their daughter flee the country rather than comply with child custody orders.

U.S. District Court Judge William Sessions issued a stay Monday in Janet Jenkins' civil suit against Philip Zodhiates (ZOH'-dee-ah-tays) and others until a criminal case against Zodhiates is finished.

Zodhiates, a Virginia businessman, has pleaded not guilty to criminal charges in Buffalo, New York, that he helped Lisa Miller and her daughter Isabella flee the country in 2009 rather than share custody with Jenkins.

Sessions says the civil case could prejudice the criminal case against Zodhiates.

While Sessions stayed the civil suit, he ruled Zodhiates should share documents with Jenkins, who is from Fair Haven.

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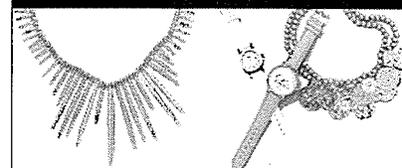
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Exhibit C

The Washington Post

National

Man charged in lesbian custody case slams cell bill evidence

By Carolyn Thompson | AP March 24

BUFFALO, N.Y. — A businessman’s cellphone bills showing where he was when he placed calls emerged Tuesday as central to charges he aided a woman who renounced being a lesbian and fled with her daughter during a custody dispute.

Attorneys for Philip Zodhiates of Virginia argued in federal court that the bills shouldn’t be allowed at trial because the government did not have a search warrant for them.

The conservative businessman is charged with conspiracy and international parental kidnapping for allegedly helping Lisa Miller take her daughter Isabella out of the country in 2009 to avoid losing custody to her former partner, Janet Jenkins.

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Miller and Jenkins broke off their civil union in Vermont in 2003 and Miller came to believe that her lesbian relationship was sinful, according to court documents. Miller was on the verge of losing custody of their daughter for refusing to let Jenkins visit when she fled in 2009.

Zodhiates, owner of Waynesboro, Virginia-based Response Unlimited, is accused of helping Miller travel from Virginia to Canada by way of western New York. From Canada, prosecutors said Miller flew with her daughter to Nicaragua, where they were sheltered by Mennonite missionaries and remain today. Isabella is now 12 years old.

The cellphone bills from provider nTelos were instrumental in the 2012 conviction of another defendant, Kenneth Miller, who is not related to Lisa Miller. Authorities obtained the bills in response to a grand jury subpoena demanding records of calls made around the time Lisa Miller allegedly fled.

Zodhiates' attorney said the subpoena covered things like numbers called and call lengths, but that location information would have required a warrant.

"They took the shortcut and now they can't use the evidence," attorney Robert Hemley told the judge.

Special Assistant U.S. Attorney Paul Van de Graaf said cellphone bills are not protected under Fourth Amendment prohibitions against unlawful searches and seizures. He said that while authorities didn't expect to receive the call location information included in the bills, they found it relevant to the case.

Zodhiates did not attend Tuesday's hearing. Judge Jeremiah McCarthy did not immediately rule on the suppression request.

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Defendants)

CERTIFICATE OF SERVICE

I, David A. Boyd, Esq., attorney for Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc., certify that, on April 20, 2015, I served Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.'s Motion for Reconsideration in Part through the CM/ECF system on the following individuals:

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Dated: Burlington, Vermont
April 20, 2015

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