

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)	

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

Memorandum

Plaintiff opposes a protective order exclusively on the theory that an order would make it more difficult for her to testify as a witness in the parallel criminal case. This contention is impossible to reconcile with Plaintiff's testimony during the Kenneth Miller trial, which occupies only 10 transcript pages and, if at all, bears only the most tenuous connection to the documents produced by Defendants to the Government.¹ Defendants timely asked the Court to reconsider entering a protective order because a protective order would have no impact on Plaintiff's ability to testify and would protect well-recognized constitutional rights.

During the trial of Kenneth Miller, Plaintiff testified briefly about her job, the history of her relationship with Lisa Miller, the birth of Isabella, and visitation during Family Court proceedings between Plaintiff and Ms. Miller. Supplemental Boyd Declaration Exhibit D, at 83-93. In its entirety, including cross-examination, Plaintiff's testimony occupies 10 pages of the

¹ Defendants remain willing, as indicated in their motion, to provide the documents, under seal, to the Court for an *in camera* review should there be any doubt about their nature.

official court transcript. *Id.* There is no reason to believe that Ms. Jenkins will testify in a different capacity in the Western District of New York. The Miller trial raised similar issues and the same prosecutor who examined Ms. Jenkins, AUSA Paul Van de Graaf, is responsible for the prosecution of the Western District of New York case. A protective order would have no impact on either the ability of Ms. Jenkins to testify, or the ability of the Government, which already has all of the documents, to prepare its case.

Plaintiff concedes that this case has continued to attract media attention and that she, like Defendants, has been contracted recently by the Associated Press. Response at 2. She does not contest that prejudicial pretrial publicity could violate the constitutional rights of Mr. Zodiates in the parallel criminal action pending in the Western District of New York. *See United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993); *Gannet Co. v. DePasquale*, 443 U.S. 368, 378 (1979). Plaintiff's rhetoric should not distract the Court from the absence of factual support for her position. This case has already been stayed and Defendants could not possibly benefit from seeking to delay production in a stayed case. Entry of a protective order to prevent prejudicial pretrial publicity in the criminal case would be well within the Court's discretion on reconsideration and would have no impact on the ability of Ms. Jenkins to testify.

Dated: Burlington, Vermont
May 5, 2015

/s/ David A. Boyd
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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

SUPPLEMENTAL 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. A true and correct copy of the transcript of the testimony of Janet Jenkins from the case *United States v. Miller*, No. 2:11-cr-161-1 (D.Vt.) is attached as Exhibit D.

Executed this 5th day of May, 2015 in Burlington, Vermont.

/s/ David A. Boyd
David A. Boyd, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)

VS)

CASE NO: 2:11-cr-161-1

KENNETH L. MILLER)
_____)

TRIAL BY JURY

BEFORE: HONORABLE WILLIAM K. SESSIONS, III
DISTRICT JUDGE

APPEARANCES: PAUL J. VAN de GRAAF, ESQUIRE
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Boyle, Autry & Murphy
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Philadelphia, Pennsylvania 19102
Representing the Defendant

DATE: August 10, 2012

TRANSCRIBED BY: Anne Marie Henry, RPR
P.O. Box 1932
Brattleboro, Vermont 05302

1 J A N E T J E N K I N S, The Witness, after
2 being duly sworn, was examined and testified as follows:

3 THE COURT: Good morning, Miss Jenkins.

4 MS. JENKINS: Good morning, Judge.

5 DIRECT EXAMINATION BY MR. VAN de GRAFF:

6 Q. Good morning, Miss Jenkins.

7 A. Good morning.

8 Q. Could you pull that micke down so it's near your
9 mouth --

10 A. Yes.

11 Q. -- so everybody can hear you?

12 Miss Jenkins, where do you live?

13 A. I live in Fairhaven, Vermont.

14 Q. How long have you lived in Fairhaven?

15 A. Ten years.

16 Q. Do you have your own business in Fairhaven?

17 A. I do. I'm a licensed child care provider.

18 Q. How long have you had that business?

19 A. I've been doing that for about nine and a half years.

20 Q. And can you describe generally what kind of child care
21 you provide in your business?

22 A. Yes. I run a program of before and after school. A

23 lot of my children are age five to 12. And we have

24 different functions; homework help, snack time, play time.

25 Like summertime I take them out to the local lakes. And we

1 do all, all day activities and things like that.

2 Q. Where did you grow up?

3 A. Falls Church, Virginia.

4 Q. Do you recall what year it was you met Lisa Miller?

5 A. 1997.

6 Q. At that time where were you living?

7 A. Falls Church, Virginia.

8 Q. Where was she living?

9 A. Alexandria, Virginia.

10 Q. How long was it between the time you met and the two of
11 you began living together?

12 A. Two months.

13 Q. Did there come a time that you and Ms. Miller entered
14 into a civil union?

15 A. Yes.

16 Q. When was that?

17 A. December 19, 2000.

18 Q. At some point in time did you and Lisa begin working on
19 a plan to have a family?

20 A. Yes, we did.

21 Q. How, when was that in relationship to the civil union?

22 A. We started talking about having children in 1999. We
23 started actively trying to get pregnant right after, in
24 2000.

25 Q. Did you at some point talk about moving to Vermont?

1 A. Yes, we did.

2 Q. At some point did Lisa Miller succeed at getting
3 pregnant?

4 A. Yes, she did.

5 Q. And did she have a child?

6 A. Yes.

7 Q. What's the name of that child?

8 A. Isabella Ruth Miller Jenkins.

9 Q. At the time Lisa was pregnant did you have any plan
10 with respect to where you were going to live?

11 A. Yes.

12 Q. Can you describe what that plan was?

13 A. Fairhaven, Vermont.

14 Q. When, in relationship to the birth of Isabella, did you
15 hope to move to Vermont?

16 A. We hoped to be in Vermont before Isabella's birth, but
17 she became premature and she came a month early.

18 Q. Did you move to Vermont with Isabella and Lisa?

19 A. Yes, I did.

20 Q. I should back up a second. What's Isabella's birthday?

21 A. April 16, 2002.

22 Q. At some point after Isabella was born did you close on
23 a house in Fairhaven?

24 A. Yes, I did.

25 Q. About how long after Isabella's birth did you close on

1 the house?

2 A. About a month or two.

3 Q. When did you actually move to Vermont?

4 A. Summer of 2002.

5 Q. And who came with you?

6 A. Lisa, Isabella and myself.

7 Q. At some point in time after you moved to Vermont did
8 you talk with Lisa about having a second child together?

9 A. Yes, I did.

10 Q. Did you make any efforts to do that, you and Lisa?

11 A. We did.

12 Q. And about how long after Isabella was born did you make
13 that effort?

14 A. A year and a half.

15 Q. Was it successful?

16 A. Yes, it was.

17 Q. Was there a second child born?

18 A. No. Miscarriage.

19 Q. After the miscarriage did there come a time that you
20 and Lisa separated?

21 A. Yes.

22 Q. When was that?

23 A. September, 2003.

24 Q. Focusing just on the question of visits between you and
25 Isabella between the end of 2003 to September of 2009. I

1 would like to focus you just on that question.

2 A. Okay.

3 Q. It's a six year time period.

4 A. Right.

5 Q. Were there some visits that you had with Isabella
6 during that time period?

7 A. Yes.

8 Q. Were there some times where there were breaks or
9 relatively long periods where you didn't see Isabella?

10 A. Yes.

11 Q. Sitting here today do you remember all the exact dates
12 of all the visitations that you had between 2003 and 2009?

13 A. No.

14 Q. Let me draw your attention to an exhibit I have marked
15 as Government Exhibit 60A. and ask you if you recognize what
16 those are?

17 A. Pictures of myself and my daughter Isabella.

18 Q. As you sit here today do you recall when those pictures
19 were taken?

20 A. June of 2007.

21 MR. AUTRY: Your Honor, may we approach?

22 THE COURT: Yes. All right. I'm going to turn
23 the husher on so you're free to stretch.

24 (Bench Conference held:)

25 MR. AUTRY: I'm going to object based upon

1 prejudice. I think there's already been a photo admitted of
2 Isabella. These essentially are photos of Janet and
3 Isabella playing together and I think they are admitted
4 solely to give her sympathy.

5 THE COURT: On the other hand, they are actually
6 being introduced to confirm the fact that there was
7 continuing visitation into 2007.

8 MR. AUTRY: Your Honor, I think she, I think she's
9 going to testify that --

10 MR. VAN DE GRAAF: Your Honor, if there's an
11 objection to the actual pictures I'll just use them to
12 refresh her recollection about when that visit took place,
13 where it took place. I don't need to introduce the
14 pictures.

15 THE COURT: All right.

16 (The Bench Conference concluded)

17 Q. (By Mr. Van de Graaf:) Miss Jenkins, using the
18 pictures to refresh your recollection do you recall that
19 visitation?

20 A. I do.

21 Q. Where did it take place?

22 A. Berryville, Virginia.

23 Q. And about how long was that visitation?

24 A. A weekend.

25 Q. Was anybody else involved in the visitation other than

1 you and Isabella?

2 A. Yes.

3 Q. Who else?

4 A. Her grandparents, my parents.

5 Q. And what, what are your parent's name?

6 A. Claude Lee Jenkins and Ruth Inez Jenkins.

7 Q. Let me move ahead to January, 2009. If I could put
8 that in your head for a second.

9 A. Right.

10 Q. Did you have a visit with Isabella in January of 2009?

11 A. I did.

12 Q. Do you recall where that was?

13 A. Falls Church, Virginia.

14 Q. How long was the visit?

15 A. A weekend.

16 Q. Again, who was involved in the visit besides yourself
17 and Isabella?

18 A. My parents and my sister.

19 Q. Have you seen Isabella since January, 2009?

20 A. No.

21 Q. Drawing your attention to September 25th there's been,
22 of 2009, there's been evidence that there was a court
23 ordered visit planned or scheduled by the Court for
24 September 25, 2009. Do you recall that?

25 A. Yes.

1 Q. You need a glass of water or a tissue or anything like
2 that? What was your plan for that weekend?

3 A. My parents and I were going to go to Lynchburg and pick
4 my daughter up for a weekend.

5 Q. Did that visit take place?

6 A. No.

7 Q. Did there come a point in time after that visit or that
8 visit that didn't take place where you became concerned
9 about Isabella's safety?

10 A. Yes.

11 Q. What did you do about that?

12 A. I called to have a welfare check. The sheriffs went by
13 the house. And they told me that --

14 Q. Don't tell me what they said. Did you, did you hear
15 from Isabella after that?

16 A. No, I did not.

17 MR. VAN DE GRAAF: Your Honor, nothing further of
18 Miss Jenkins.

19 THE COURT: All right. Mr. Autry?

20 MR. AUTRY: Yes, Your Honor.

21 CROSS EXAMINATION BY MR. AUTRY:

22 Q. Good morning.

23 A. Good morning.

24 Q. The visits took place from, with some regularity
25 initially from 2003 into I believe it was October of 2004?

1 A. Yes.

2 Q. And then visits stopped in October of 2004 for a while?

3 A. Yes.

4 Q. And then there was a court hearing in Vermont in April
5 of 2007. Do you remember that?

6 A. April, 2007?

7 Q. Your deposition was taken. Do you remember having your
8 deposition taken?

9 A. Yes, I do.

10 Q. And then Lisa Miller testified in court I believe the
11 following day?

12 A. I vaguely remember it.

13 Q. And then after that hearing visits resumed for a period
14 of time anyway?

15 A. Yes.

16 Q. Okay. And that would have been in 2007 through I
17 believe Christmas, around Christmas time 2007?

18 A. Yes.

19 Q. Okay. So from that hearing in 2007 until around
20 Christmas there was some regularity to visits?

21 A. Yes.

22 Q. And then there was two visits in January and February
23 of 2008 that were cancelled because of snow storms. Do you
24 remember that?

25 A. Yes.

1 Q. Okay. And then there were no more visits until it
2 would have been April or May of 2008. You recall that?

3 A. Yes.

4 Q. And that was the only 2008 visit?

5 A. I don't recall.

6 Q. And then the last visit you would have had would have
7 been I believe January, 2009, early 2009, if you recall?

8 A. Yes.

9 Q. Okay. Now, with the 2009 visits there were some issues
10 about whether or not those would be -- visitation orders
11 were being violated; correct?

12 A. Yes.

13 Q. And specifically starting in March of 2009 there was a
14 visit that wasn't honored and Lisa Miller claims that
15 Isabella was sick during that visit?

16 MR. VAN DE GRAAF: Your Honor, I'd object now to
17 the basis for why visits didn't take place.

18 THE COURT: Objection sustained. I should say
19 that the Court has asked the lawyers to focus in upon the
20 issues of this trial and not get into the whole issue of
21 custody and visitation in general and that's why it's so
22 limited.

23 MR. AUTRY: I have no further questions, Your
24 Honor. Thank you.

25 THE COURT: All right. Anything further?

1 MR. VAN DE GRAAF: No, Your Honor. Thank you.

2 THE COURT: All right. Thank you, Miss Jenkins.

3 MR. VAN DE GRAAF: Your Honor, the government
4 calls Doug Wright.

5 Miss Cowles says I can do a stipulation if we're
6 still waiting. So maybe I'll go forward with the
7 stipulation.

8 THE COURT: Mr. Cowles, you're going to let
9 Mr. Van de Graaf do a stipulation on the record?

10 MS. COWLES: Your Honor, I suggested earlier he
11 could do a few.

12 THE COURT: Okay.

13 MR. VAN DE GRAAF: Well, while we're waiting for
14 Mr. Wright why don't I read the stipulation. Your Honor,
15 this is Government Exhibit 58B., which is a stipulation
16 regarding the testimony of a witness named Debbie Thurman.
17 And, Your Honor, I guess I'd move the admission of 58B
18 before I read the whole stipulation.

19 MR. AUTRY: No objection, Your Honor.

20 THE COURT: So admitted.

21 MR. VAN DE GRAAF: Exhibit 58B. reads as follows:
22 It's a stipulation among the parties that if called as a
23 witness Debbie Thurman would testify as follows: I've lived
24 in Maddison Heights, Virginia for more than five years. I
25 was a member of the Thomas Road Baptist Church in 2008 and

1 have been since that time.

2 In the fall of 2008 I began communicating with
3 Lisa Miller who had moved to Lynchburg, Virginia. I met her
4 at some point around the end of the year. We became
5 friendly. I had followed the story of her custody dispute
6 before I met her and I became more involved in the matter
7 after we met. Lisa Miller attended Thomas Road Baptist
8 Church in 2009.

9 In approximately March, 2009 I helped with the
10 formation of a website called Protectisabella.com., which
11 provided information about Lisa Miller's case and some of
12 the legal issues associated with that litigation. I worked
13 with Lisa Miller's lawyer, Rena Lindevaldsen, of Liberty
14 Counsel, on the website's content.

15 The Protectisabella website was updated twice in
16 2009, in April and again in May. The first page of Exhibit
17 58A. is a true and correct copy of the content of the home
18 page of the website as of September, 2009. The second page
19 of Exhibit 58A. is a true and correct copy of the page on
20 the website called Fact Sheet. The website was taken off
21 the internet in January, 2010.

22 Your Honor, I move the admission of 58A. at this
23 time.

24 THE COURT: Any objection?

25 MR. AUTRY: No objection, Your Honor.

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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 May 5, 2015, I served Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.’s Reply in Support of Motion for Reconsideration and Supplemental Declaration of David A. Boyd through the CM/ECF system on the following individuals:

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Dated: Burlington, Vermont
May 5, 2015

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