

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

_____)	
JANET JENKINS, ET AL.,)	
)	
Plaintiffs,)	
)	Docket No. 2:12-cv-00184
v.)	
)	
KENNETH L. MILLER, ET AL.,)	
)	
Defendants.)	
_____)	

DEFENDANTS LIBERTY COUNSEL, MATHEW D. STAVER, AND RENA M. LINDEVALDSEN’S REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY

Pursuant to L.R. 7(a), Defendants Liberty Counsel, Mathew D. Staver (“Staver”), and Rena M. Lindevaldsen (“Lindevaldsen”), by and through counsel, submit this Reply in Support of their Motion to Stay Discovery Pending Resolution of their Motions to Dismiss. (Dkt. 244, “Motion”).

INTRODUCTION

In Plaintiffs’ (“Jenkins”) Opposition to Motions to Stay Discovery (dkt. 250, “Opp.”), Jenkins labors in vain to lump every single defendant together to suggest previous proceedings in this litigation affect and bind newly added defendants. (Opp. at 2). Jenkins fails to grasp that Liberty Counsel, Staver, and Lindevaldsen were only joined as defendants in this action in the fourth iteration of a Complaint that was originally filed five (5) years ago. (Dkt. 1). Though she devotes much time to her futile effort to lump all defendants together, Jenkins cannot escape the **indisputable fact that she chose not to bring her claims against Liberty Counsel, Staver, and Lindevaldsen until now**. Due process entitles them to be heard prior to discovery.

Jenkins suggests that this Court has made binding jurisdictional findings against Liberty Counsel, Staver, and Lindevaldsen, that such findings constitute the law of the case, and that

because of those findings Liberty Counsel, Staver, and Lindevaldsen's motions to dismiss (dkt. 239, 240) do not constitute good cause for staying discovery. (Opp. at 3-7). Jenkins' arguments willfully ignore Liberty Counsel, Staver, and Lindevaldsen's due process right not be subject to litigation of any kind, including discovery, until their jurisdictional defenses have been heard by this Court. The law of the case doctrine is inapplicable to these Defendants.

Moreover, Jenkins fails to address any of the factors relevant to a stay of discovery, ignores the fact that Liberty Counsel, Staver, and Lindevaldsen made a substantial showing that her claims lack merit (Motion at 4-9), and instead presents a frivolous law of the case defense wholly irrelevant to Liberty Counsel, Staver, and Lindevaldsen. Jenkins ignores these Defendants' showing that they would be substantially burdened by any discovery prior to resolution of their motions to dismiss. (Motion at 10-12). Finally, Jenkins' treatment of her burden to show undue prejudice reveals that she cannot make any such showing. A stay of discovery is warranted.

ARGUMENT

I. LIBERTY COUNSEL, STAVER, AND LINDEVALDSEN HAVE SHOWN GOOD CAUSE FOR A STAY OF DISCOVERY.

Jenkins' hangs her entire opposition to a stay on the notion that the law of the case prohibits this Court from reconsidering virtually all of the issues raised in Liberty Counsel, Staver, and Lindevaldsen's motions to dismiss. (Opp. at 5-7). This argument runs roughshod over the constitutional rights of these Defendants. The law of the case doctrine has no application here. Also, even if the doctrine applied to jurisdictional findings, which it does not, application of that doctrine here would be a gross violation of due process. Liberty Counsel, Staver, and Lindevaldsen's motions to dismiss present "substantial grounds" for dismissal, are not foreclosed by the law of the case, and a stay of discovery pending resolution of those motions is compelled by settled law. *Johnson v. N.Y. Univ. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002).

A. The Law Of The Case Doctrine Does Not Bar Liberty Counsel, Staver, and Lindevaldsen's Arguments.

The law of the case doctrine is not a straightjacket deployed to bind a court's determinations on issues previously arising in litigation. *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009). Indeed, "interlocutory orders . . . remain open to trial court reconsideration and do not constitute the law of the case." *Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005). As abundant precedent demonstrates, this Court is not only permitted to revisit jurisdictional findings, but is required to reconsider them. *See, e.g., Christianson v. Holt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (holding that court may revisit jurisdictional issues despite law of the case doctrine, and is required to decline jurisdiction when presented with evidence that it is lacking); *Rogers v. Valentine*, 426 F.2d 1361, 1363 n.2 (2d Cir. 1970) (jurisdictional findings may be revisited despite law of the case doctrine); *Chen-Oster v. Goldman, Sachs, & Co.*, No. Civ. 6950(AT)(JCF), 2015 WL 4619663, *3 (S.D.N.Y. Aug. 3, 2015) (same).

It is true that the law of the case generally does not apply to a finding that the court has jurisdiction. The federal courts are under an independent obligation to examine their own jurisdiction and without jurisdiction the court cannot proceed at all in any cause. . . . **Thus, a court is obligated to reverse a prior finding that it has jurisdiction if it subsequently determines that it does not, notwithstanding the law of the case doctrine.**

Id. (emphasis added) (internal citations omitted).

Where, as here, substantial and meritorious arguments have been raised by newly added parties concerning the constitutional infirmities of the exercise of jurisdiction over them, this Court has a constitutional mandate to revisit previous findings of jurisdiction. Liberty Counsel, Staver, and Lindevaldsen have put forth substantial arguments grounded in well-settled law militating a finding that this Court lacks jurisdiction. (Dkt. 240, at 24-53). The law of the case does not and cannot preclude consideration and adjudication of these substantial and well-grounded arguments.

1. The Law of the Case Does Not Apply to Personal Jurisdiction Findings.

Jenkins erroneously contends that Liberty Counsel, Staver, and Lindevaldsen's arguments showing that this Court lacks jurisdiction are "foreclosed by the law of the case." (Opp. at 5-6). Jenkins' argument is devoid of merit. A court's findings concerning personal jurisdiction is not subject to the law of the case doctrine. *See, e.g., Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 111 (2d Cir. 2001) (law of the case doctrine does not foreclose arguments concerning personal jurisdiction); *Lane v. XYZ Venture Partners, LLC*, 322 F. App'x 675 (11th Cir. 2009) (same); *see also Weiss v. Nat'l Westminster Bank PLC*, 176 F. Supp. 3d 264, 275 (E.D.N.Y. 2016) (holding that the law of the case doctrine does not bar revisiting a finding of personal jurisdiction); *Little v. Twentieth Cent. Fox Films Corp.*, No. 89 Civ. 8526, 1995 WL 404939 (S.D.N.Y. July 7, 1995) (holding that prior determinations of personal jurisdiction do not constitute the law of the case); *Neelon v. Krueger*, No. 12-cv-11198-IT, 2015 WL 4576825 (D. Mass. July 30, 2015) (a court's preliminary findings of personal jurisdiction do not implicate the law of the case doctrine when personal jurisdiction is challenged). Jenkins' contention that this Court's jurisdictional findings bind Liberty Counsel, Staver, and Lindevaldsen has no basis in law.

Moreover, Jenkins willfully ignores the facts of this case. She contends that, despite this Court's discussion in its order permitting leave to amend (dkt. 220), Liberty Counsel, Staver, and Lindevaldsen "**again** argue that the Court lacks jurisdiction over them." (Opp. at 6) (emphasis added). Jenkins' assertion that newly added defendants Liberty Counsel, Staver, and Lindevaldsen (parties who were not added until **5 years** into the litigation) are in the same procedural posture as all other defendants who have been in the case since the beginning is demonstrably fallacious. Liberty Counsel, Staver, and Lindevaldsen are not "again" arguing that the Court lacks jurisdiction. They are not "again" arguing anything, as they have never presented **any arguments**

whatsoever to this Court. Indeed, until now, they were not parties and could not respond to anything. Liberty Counsel, Staver, and Lindevaldsen's motions to dismiss are therefore the first opportunity they have had to raise any defense in this action, including the substantial constitutional questions concerning the exercise of jurisdiction over them. Even if the law of the case applied to previous findings of personal jurisdiction, which it does not, the law of the case doctrine cannot bind parties that have never had any opportunity to challenge the Court's jurisdiction. *See Westerbeke Corp. v. Diahatsu Motor Co., Ltd.*, 304 F.3d 200, 219 (2d Cir. 2002); *Weiss*, 176 F. Supp. 3d at 275 (when defendant had no fair opportunity to raise jurisdictional defenses, law of the case is inapplicable to him); *In re Bulk (Extruded) Graphite Prod. Antitrust Litig.*, No. Civ. 02-6030(WHW), 2006 WL 1084093, *9-10 (D.N.J. Apr. 24, 2006) (when issues concerning personal jurisdiction were decided in a prior motion by **different** defendants, law of the case cannot be used by plaintiff to assert appropriateness of jurisdiction over **new** defendants). The law of the case has no application here, and Liberty Counsel, Staver, and Lindevaldsen have shown good cause for a stay.

2. The Law of the Case Does Not Apply to Subject Matter Jurisdiction.

This Court's previous findings concerning its subject matter jurisdiction also do not bind Liberty Counsel, Staver, and Lindevaldsen under the law of the case. *See, e.g., Marvella v. Capital Dist. Physicians Health Plan, Inc.*, 293 F.3d 42, 47 (2d Cir. 2002) ("**the law of the case doctrine is irrelevant to our review of subject matter jurisdiction**") (emphasis added); *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 77 (2d Cir. 1992) (law of the case doctrine cannot bar reconsideration of subject matter jurisdiction findings); *Amen v. City of Dearborn*, 718 F.2d 789, 793-94 (6th Cir. 1983) ("the law of the case doctrine does not foreclose reconsideration of subject matter jurisdiction"); *see also Walsh v. McGee*, 918 F. Supp. 107, 111 (S.D.N.Y. 1996) (same);

Allah v. Juchnewicz, No. 93WIV8813MMGWG, 2003 WL 1535623, *3 (S.D.N.Y. Mar. 24, 2003) (law of the case doctrine “does not apply where subject matter jurisdiction is implicated”).

Liberty Counsel, Staver, and Lindevaldsen have made numerous arguments concerning this Court’s subject matter jurisdiction and issues involving pure questions of law. (Dkt. 240, at 14-22, 61-113) (noting that Jenkins’ claims are time barred, that she lacks standing, and that she fails to state a claim under any legally sufficient theory). These bases for dismissing Jenkins’ claims are not based in factual disputes as Jenkins’ asserts (Opp. at 6), but are grounded in questions independent of the facts of this case and go to the heart of the Court’s subject matter jurisdiction. *See, e.g., Carter v. HealthPort Tech., LLC*, 822 F.3d 47, 55 (2d Cir. 2016) (if plaintiff lacks standing, federal court does not have subject matter jurisdiction to decide the issue); *Williams v. United States*, 947 F.2d 37 (2d Cir. 1991) (failure to comply with statute of limitations deprives federal court of subject matter jurisdiction); *Monje v. Shalala*, No. 93 Civ. 4707 (MBM), 1995 WL 540028 (S.D.N.Y. Sept. 11, 1995) (same) The law of the case doctrine is inapplicable, and Liberty Counsel, Staver, and Lindevaldsen have put forward substantial grounds for dismissal and such potentially dispositive arguments compel a stay of discovery pending their resolution.

B. Application Of The Law Of The Case Doctrine Would Violate Due Process.

Even if the law of the case doctrine were applicable to questions of jurisdiction, which it is not, and even if the law of the case could bar revisiting previous findings concerning jurisdiction, which it cannot, the application of the law of the case doctrine in this matter would violate Liberty Counsel, Staver, and Lindevaldsen’s right to due process. Despite Jenkins’ claims that these new Defendants are “again” raising previously addressed arguments (Opp. at 6), which is a frivolous claim, Liberty Counsel, Staver, and Lindevaldsen have not and, until now, could not raise any defense whatsoever. They were not parties until this Court permitted them to be added, and their

motions to dismiss are the first opportunity these defendants have had to address any of Jenkins' fanciful claims. Jenkins' assertion that Liberty Counsel, Staver, and Lindevaldsen's defenses are foreclosed before they were even able to appear and be heard would eviscerate due process. Indeed, due process would "have little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Regardless of the substance of any proceedings that occurred in this matter before Liberty Counsel, Staver, and Lindevaldsen were joined as defendants, these Defendants have a fundamental right to appear and be heard on their defenses before binding adjudications can be made against them. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, the law of the case does not and cannot foreclose Liberty Counsel, Staver, and Lindevaldsen's arguments concerning jurisdiction, timeliness, standing, and Jenkins' ability to state a claim against them.

Jenkins' assertion that this Court's previous discussion of personal jurisdiction somehow forever binds Liberty Counsel, Staver, and Lindevaldsen violates due process and seeks to impose an unconstitutional burden on them. This Court's previous findings concerning jurisdiction do not and cannot bind these new Defendants. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 227 (1946) (court does not have jurisdiction to enter findings against a defendant prior to defendant being given notice and an opportunity to be heard); *id.* ("to the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him . . . there was a want of judicial due process and hence a want of jurisdiction over the person"); *Mullane*, 339 U.S. at 314 (court cannot make binding jurisdictional findings unless defendant is given an "opportunity to present their

objections”); *United States v. Casciano*, 124 F.3d 106, 112 (2d Cir. 1997) (before a court can make any findings concerning a defendant, due process requires that defendant be given notice and an opportunity to be heard); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (due process requires that a defendant be given “the opportunity to be heard in his defense” concerning a court’s jurisdiction over him); *In re Verit Indus.*, 7 F. App’x 743 (9th Cir. 2001) (reversing a district court’s findings against a defendant that “did not have its day in court . . . to challenge the court’s exercise of personal jurisdiction”); *see also Nat’l Sch. Reporting Serv., Inc. v. Nat’l Sch. of Cal., Ltd.*, 924 F. Supp. 21, 23 (S.D.N.Y. 1996).

Jenkins claims that this Court’s findings in its Order lifting the previously imposed stay and permitting joinder of additional defendants binds Liberty Counsel, Staver, and Lindevaldsen. (Opp. at 6). But, this Court issued its order on **March 20, 2017**. (Dkt. 220). Jenkins did not file her Revised Second Amended Complaint naming these Defendants until **May 4, 2017**. (Dkt. 223). No counsel appeared on their behalf until **May 12, 2017** (dkt. 226), lead counsel did not appear until **May 26, 2017** (dkt. 231, 232, 233), and the first opportunity for Liberty Counsel, Staver, and Lindevaldsen to present any defenses occurred on **June 5, 2017**. (Dkt. 238, 239). Thus, this Court’s March 20th order discussing jurisdiction over these Defendants was made without affording Liberty Counsel, Staver, and Lindevaldsen the opportunity to have legally sufficient notice or any opportunity to be heard. Indeed, this Court explicitly noted that Liberty Counsel, Staver, and Lindevaldsen had no opportunity to be heard on the jurisdictional questions. (Dkt. 220, at 3 n.1) (noting that Liberty Counsel, Staver, and Lindevaldsen had no opportunity to present defenses and that they would “assert jurisdictional and other defenses only if the Court grants the Plaintiffs’ motion, and only once it has been properly served”). Thus, any findings concerning this Court’s jurisdiction over Liberty Counsel, Staver, and Lindevaldsen were issued in “want of judicial due

process and hence a want of jurisdiction over the person.” *Griffin*, 327 U.S. at 227. Applying the law of the case doctrine as Jenkins seeks would violate these Defendants’ constitutional rights.

II. JENKINS HAS NOT AND CANNOT SHOW PREJUDICE.

To overcome Liberty Counsel, Staver, and Lindevaldsen’s substantially grounded motion to stay discovery pending resolution of their motions to dismiss, Jenkins must demonstrate that she would suffer undue prejudice during the temporary stay of discovery. *Mortgage Resolutions Serv., LLC v. JPMorgan Chase Bank, N.A.*, No. 15 Civ. 0293(LTS)(JCF), 2016 WL 3906712, *7 (S.D.N.Y. July 14, 2016). Jenkins has not and cannot demonstrate substantial prejudice from a temporary stay while dispositive motions are considered. Jenkins does nothing more than merely assert prejudice without presenting any support to demonstrate prejudice. Her purported prejudice boils down to two things: (1) Jenkins would suffer delay in a case that has been going on since 2012, and (2) Defendants only seek to “prejudice” Jenkins by attempting to “drown the Plaintiff in pleadings.” (Opp. at 4). Neither ground has any merit, and both are the result of her own strategic decisions. No finding of prejudice is warranted or supported.

First, Jenkins’ mere assertion of prejudice without any discussion or demonstration of **actual** prejudice is insufficient to overcome a strong showing of meritorious defenses and substantial burden of having to submit to discovery.¹ Jenkins cannot rely on the mere assertion of prejudice, but must demonstrate actual prejudice with affirmative evidence. *Mortgage Resolution*, 2016 WL 3906712 at *7 (plaintiff’s mere assertion of prejudice, without showing actual prejudice,

¹ Jenkins does not even address the substantial burden Liberty Counsel, Staver, and Lindevaldsen would suffer by being forced to submit to discovery when their constitutionally required contacts and dispositive motions are the subject of well-grounded motions to dismiss. She has, therefore, conceded the point, and her “concession by omission is well-taken.” *Mortgage Resolution*, 2016 WL 3906712 at *6. Defendants would suffer tremendous burden absent a stay, and that burden overcomes any prejudice to Jenkins. (Dkt. 244, at 10-12).

is insufficient to overcome motion to stay discovery pending resolution of motion to dismiss); *Niv v. Hilton Hotels Corp.*, No. 06 Civ. 7839(PKL), 2007 WL 510113, *2 (S.D.N.Y. Feb. 15, 2007) (plaintiff must put forward affirmative demonstration of prejudice to overcome merited motion to stay discovery). Jenkins has failed to do so and cannot do so. She would suffer no undue prejudice by a temporary stay pending resolution of Liberty Counsel, Staver, and Lindevaldsen's motions to dismiss.

The volume of Defendants' motions to dismiss is irrelevant to the question of whether a stay is appropriate. But, even if it were, Jenkins' assertion of prejudice by being "drowned" in pleadings is meritless. Notably, Jenkins has **eight** (8) lawyers and three (3) separate law firms representing her, one of which is a nationwide firm with a \$302.8 million endowment. The notion that Defendants' motions to dismiss prejudices Jenkins and her squad of lawyers with seemingly endless resources has no merit.

Finally, Jenkins claims mere delay is unduly prejudicial. But any delay resulting from Liberty Counsel, Staver, and Lindevaldsen's motions to dismiss and a temporary stay is Jenkins' own fault as she did not name them until 2017, despite knowing of them since 2012. (Dkt. 240, at 15-16). Jenkins cannot now attempt to lay that "burden" at these Defendants' feet. Her claims of prejudice fall far short of the mark. Moreover, courts have rejected claims of prejudice merely because a case was several years old when a request for a stay was entered. *Spinelli v. Nat'l Football League*, No. 13 Civ. 7398 (RWS), 2015 WL 7302266, *2 (S.D.N.Y. Nov. 17, 2015) (fact that case was several years old does not warrant a finding that brief delay pending determination of the potentially dispositive motions would be prejudicial to the plaintiffs). Jenkins has not demonstrated prejudice.

CONCLUSION

For the foregoing reasons, and for all of those presented in Liberty University's Reply Brief (dkt. 254) which Liberty Counsel, Staver, and Lindevaldsen incorporate and adopt in full, this Court should grant the motion to stay discovery pending resolution of Defendants' motions to dismiss.

Respectfully submitted,

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Anthony R. Duprey
NEUSE, DUPREY, & PUTNAM
1 Cross Street
Middlebury, VT 05743
Phone: (802) 388-7966
Fax: (802) 388-9713
Email: anthony@ndp-law.com

/s/ Daniel J. Schmid
Horatio G. Mihet*
Daniel J. Schmid*
Roger K. Gannam*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Fax: (407) 875-0770
Email: dschmid@lc.org

*Attorneys for Defendants Liberty Counsel,
and Staver and Lindevaldsen (in their
individual capacities)*

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2017, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Daniel J. Schmid
Horatio G. Mihet*
Daniel J. Schmid*
Roger K. Gannam*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Fax: (407) 875-0770
Email: dschmid@lc.org

Attorneys for Defendants Liberty Counsel, and Staver and Lindevaldsen (in their individual capacities)

*Admitted pro hac vice