

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT LIBERTY UNIVERSITY'S MOTION TO STAY DISCOVERY**

Defendant Liberty University's motion to stay discovery pending the Court's decision on the University's motion for reconsideration, ECF 313, should be denied. The Court's Local Rules set a clear policy against staying discovery pending a motion to dismiss, and Liberty University's connection with the pleaded conspiracy means it would be subject to discovery in this nearly six-year-old case whether or not it remains a party. Thus, "the just, speedy, and inexpensive determination" of this case is best secured by permitting, rather than staying, the commencement of discovery of Liberty University.

BACKGROUND

The Complaint, ECF 223, alleges a conspiracy among individual and institutional Defendants, motivated by anti-gay animus, to kidnap Plaintiff Isabella Miller-Jenkins—the then-eight-year-old daughter of Plaintiff Janet Jenkins and Defendant Lisa Miller—and hide her in Nicaragua to avoid compliance with court orders giving Jenkins visiting rights and then custody of Isabella. Liberty University's liability is based in part on the actions of its employees Defendants Rena Lindevaldsen and Victoria Hyden, who used their relationship with the University to help Miller flee the country undetected with Isabella. As the Complaint pleads,

their role within the University and use of its resources was essential to the success of the conspiracy to kidnap Isabella and hide her in Nicaragua.

Plaintiffs filed their original complaint nearly six years ago on August 14, 2012. Compl., ECF 1. The Court stayed the case on April 6, 2015, pending the federal criminal case against Defendant Philip Zodhiates. Order, ECF 192. A jury convicted Zodhiates in September the next year, Pls.' Mot. to Lift Stay at 1, ECF 204, and judgment was entered March 23, 2017, Pls.' Mot. for Order Lifting Stay at 2, ECF 222. The Court lifted the stay as of March 23, 2017, and granted Plaintiffs' motion to join Liberty University, Lindevaldsen, and Mathew Staver as defendants. Order at 60, ECF 220 (filed Mar. 20, 2017).

Plaintiffs moved for entry of an order lifting the stay, ECF 222, and filed their Revised Second Amended Complaint on May 4, 2017, ECF 223. Defendants moved to dismiss, ECF 228, 237, 238, 242, and to stay discovery pending their motions to dismiss, ECF 241, 244, 245, 249. Meanwhile, Plaintiffs attempted to schedule a Rule 26(f) conference and commence discovery. Pls.' Mot. for Status Conference at 2, ECF 298 (filed Mar. 15, 2018). On September 29, 2017, the Court denied Defendants' motions to dismiss, with a few exceptions not relevant to this motion. Order at 108, ECF 277. Liberty University moved for reconsideration. ECF 278 (filed Oct. 9, 2017).¹ Plaintiffs again attempted to schedule a Rule 26(f) conference and commence discovery. Pls.' Mot. for Status Conference at 1, ECF 298 (filed Mar. 15, 2018). Because Defendants refused to participate in discovery, participate in a Rule 26(f) conference, or in some cases even to respond to Plaintiffs, Plaintiffs moved for a status conference, ECF 298, which the

¹ Defendants Liberty Counsel and Lindevaldsen sought interlocutory appeal, ECF 280 (filed Oct. 13, 2017), which the Court denied, ECF 302 (filed Mar. 26, 2018), and petitioned for mandamus, *In re Liberty Counsel, Inc. et al.*, No. 18-876 (2d Cir. filed Apr. 2, 2018), ECF 5, which the Second Circuit denied, ECF 33 (filed July 9, 2018).

Court has now scheduled for August 20, 2018. Third Revised Notice of Hr'g, ECF 312 (filed July 5, 2018).

In response to Plaintiffs' motion for an order lifting the stay, the Court confirmed that the stay on the case "has been lifted since March 23, 2017," and that "[n]o additional order lifting the stay is necessary." Order at 2, ECF 301 (filed Mar. 26, 2018) (denying as moot Plaintiffs' motion for entry of order lifting stay, ECF 222, and Defendants' motions to stay discovery pending motions to dismiss and strike, ECF 241, 244, 245, 249). The parties then conferred pursuant to Rule 26(f) on May 3, 2018. Plaintiffs served discovery requests on all Defendants (except Defendant Lisa Miller, who has not appeared and whose location is unknown) on June 27, 2018. Liberty University's responses and objections are due by July 27, 2018. *See* Fed. R. Civ. P. 34(b)(2)(A).

Plaintiffs' first requests for production seek documents related to the participation of Liberty University employees Lindevaldsen and Hyden in the conspiracy and any other documents in the University's possession, custody, or control concerning the conspiracy. For example, Plaintiffs request documents and communications (such as emails) concerning the dispute between Miller and Jenkins over custody of Isabella; Miller's and Isabella's whereabouts since September 2009; assistance and advice given to Miller to leave the United States and live undetected with Isabella in Nicaragua; the removal of Miller's and Isabella's belongings from their Virginia home; and the transportation of those belongings to them in Nicaragua.

On July 9, 2018, counsel for Plaintiffs and Liberty University conferred concerning the University's request to stay discovery as to itself pending the Court's resolution of its motion for reconsideration. Although Plaintiffs refused to stay all discovery of Liberty University, Plaintiffs offered to permit the University to (1) respond first to those document requests that would be

appropriate were the University a nonparty; (2) produce documents and then serve formal responses at a later date; or (3) stagger or stage its responses and document production. Liberty University declined to discuss anything but a complete stay.

ARGUMENT

A stay of discovery of Liberty University would contradict the policy of the Court's Local Rules against discovery stays pending dispositive motions and would further delay the discovery Plaintiffs are entitled to even if Liberty University were not a party.

The Federal Rules of Civil Procedure and the Local Rules are clear: Discovery "shall not be stayed during the pendency of a Fed. R. Civ. P. 12(b) or (c) motion." L.R. 26(a)(3); *accord In re Chase Manhattan Corp. Sec. Litig.*, No. 90 Civ. 6092 (LMM), 1991 WL 79432, at *1 (S.D.N.Y. 1991) ("Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.P. 12(b)(6) would stay discovery, they would contain such a provision."). Although the Local Rules permit "a stay, or phased discovery, until the motion is decided, if a stay or phasing will help to secure the just, speedy, and inexpensive determination of the action," L.R. 26(a)(3), Liberty University does not explain how further delay in this case is warranted. Discovery has been stopped pending two rounds of motions to dismiss, a criminal trial, and Defendants' refusal to participate in discovery without a Court order.

Liberty University offers no justification for a stay pending its motion that would not equally apply to every civil defendant that files a dispositive motion. A discovery stay in these circumstances would squarely contradict the policy that the mere filing of a dispositive motion does not stay discovery. In fact, because "[c]ourts generally disfavor motions for reconsideration," "the arguments in favor of a stay on a motion to dismiss have less force when the pending motion is one for reconsideration." *United States ex rel. Brooks v. Stevens-Henager Coll., Inc.*, No. 2:15-CV-00119-JNP-EJF, 2017 WL 5241002, at *1 (D. Utah June 23, 2017).

In any event, awaiting decision on its motion for reconsideration of the denial of its motion to dismiss would not accomplish anything other than further delay. The requested discovery would be required of Liberty University whether or not it is a party, which makes a discovery stay unwarranted. *See Hachette Distribution, Inc. Hudson Cty. News Co.*, 136 F.R.D. 356, 359 (E.D.N.Y. 1991) (denying motion to stay discovery pending motion to dismiss in part because, even if granted, defendants would be subject to discovery as nonparties). The Court recognized in denying Liberty Counsel and Lindevaldsen's motion for interlocutory appeal that, "given their closeness to the other defendants, [they] would likely be actively involved in discovery even if they [were] dismissed from the case." Order at 5, ECF 302. So too with Liberty University. The University almost assuredly has information and documents relevant to Plaintiffs' claims. It employed Miller, Lindevaldsen, and Hyden, who used their relationship with the University to further their conspiracy. And, as the Court has noted, Defendant "Liberty Counsel and Liberty University operated as a unified entity with respect to Lindevaldsen and Staver's representation of Miller." Order at 46, ECF 220.

Therefore, even if the Court grants Liberty University's motion for reconsideration and dismisses the claims against it, Plaintiffs would still be entitled to discovery of Liberty University similar to the discovery demands already served. A stay of discovery now would not protect Liberty University from unnecessary discovery, but would instead further delay the progress and ultimate disposition of this case against all Defendants.

CONCLUSION

The Local Rules expressly state that discovery should continue while motions to dismiss are pending. In any event, discovery of Liberty University would take place whether or not it is a party. Therefore, Liberty University's motion to stay discovery pending decision on its motion for reconsideration of its motion to dismiss should be denied.

July 24, 2018

Respectfully submitted.

David C. Dinielli*

/s/ Frank Langrock

/s/ Beth D. Jacob

Frank Langrock

Beth D. Jacob*

LANGROCK SPERRY & WOOL, LLP

Diego A. Soto*

P.O. Drawer 351, 111 S. Pleasant Street

SOUTHERN POVERTY LAW CENTER

Middlebury, Vermont 05753

400 Washington Avenue

flangrock@langrock.com

Montgomery, Alabama 36104

(802) 388-6356

david.dinielli@splcenter.org

Sarah R. Star

beth.jacob@splcenter.org

SARAH STAR, ESQ., PC

diego.soto@splcenter.org

P.O. Box 106

CMECFLGBT@splcenter.org

Middlebury, Vermont 05753

(334) 956-8200

srs@sarahstarlaw.com

(802) 385-1023

J. Tyler Clemons*

SOUTHERN POVERTY LAW CENTER

201 St. Charles Avenue, Suite 2000

New Orleans, Louisiana 70170

tyler.clemons@splcenter.org

(504) 526-1530

*Admitted Pro Hac Vice

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing document was filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record, including the following:

Brooks G. McArthur
JARVIS, MCARTHUR & WILLIAMS, LLC
95 St. Paul Street, Suite 2E
P.O. Box 902
Burlington, Vermont 05402-0902
bmcArthur@jarvismcarthur.com
(802) 658-9411
Counsel for Defendant Kenneth L. Miller

Robert B. Hemley
Matthew B. Byrne
Norman C. Williams
GRAVEL & SHEA PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, Vermont 05402-0369
rhemley@gravelshea.com
mbyrne@gravelshea.com
nwilliams@gravelshea.com
(802) 658-0220
Counsel for Defendants Philip Zodhates, Victoria Hyden, and Response Unlimited, Inc.

Norman C. Smith
76 Lincoln Street
P.O. Box 24
Essex Junction, Vermont 05453
nc.smith@myfairpoint.net
(802) 288-9088
Counsel for Defendant Linda M. Wall

Anthony R. Duprey
NEUSE, DUPREY, & PUTNAM, PC
1 Cross Street
Middlebury, Vermont 05753-1445
anthony@ndp-law.com
(802) 388-7966
Counsel for Defendants Liberty Counsel and Rena M. Lindevaldsen

Horatio G. Mihet
Daniel J. Schmid
Roger K. Gannam
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
hmihet@lc.org
dschmid@lc.org
rgannam@lc.org
(407) 875-1776
Counsel for Defendants Liberty Counsel and Rena M. Lindevaldsen

Ritchie E. Berger
Justin B. Barnard
DINSE, KNAPP & MCANDREW, PC
209 Battery Street
P.O. Box 988
Burlington, Vermont 05402-0988
rberger@dinse.com
jbarnard@dinse.com
(802) 864-5751
Counsel for Defendant Liberty University

I further certify that the foregoing document was sent via U.S. mail to the last known address of the following:

Timothy D. Miller
1380 Girl Scout Road
Denver, Pennsylvania 17517

July 24, 2018

/s/ Beth D. Jacob

Beth D. Jacob

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**DECLARATION OF BETH D. JACOB
IN OPPOSITION TO DEFENDANT LIBERTY UNIVERSITY'S
MOTION TO STAY DISCOVERY**

I, Beth D. Jacob, declare as follows:

1. I am a Senior Supervising Attorney with the Southern Poverty Law Center and represent Plaintiffs in this action.

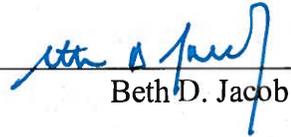
2. Ritchie E. Berger, counsel for Defendant Liberty University, and I exchanged emails on July 8, 2018, and July 9, 2018, and then spoke by telephone on July 9, 2018, concerning Liberty University's request that Plaintiffs agree to stay discovery as to it pending this Court's decision on its motion for reconsideration of its motion to dismiss the Revised Second Amended Complaint. Diego A. Soto, also an attorney with the Southern Poverty Law Center, participated in the July 9 telephone call. The call with Mr. Berger lasted about 15 minutes.

3. In the telephone call, Mr. Berger requested a complete stay of discovery as to Liberty University. In response, I offered to agree that the University could (1) respond first to those document requests that would be appropriate were the University a nonparty; or (2) produce documents and then serve formal responses at a later date; or (3) stagger or stage its

responses and document production. Mr. Berger said that Liberty University was interested only in a complete stay.

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

Dated: July 24, 2018


Beth D. Jacob