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 DEFENDANTS LIBERTY COUNSEL AND RENA LINDEVALDSEN'S MOTION FOR PROTECTIVE ORDER AND STAY OF PROCEEDINGS PENDING EXHAUSTION OF DEFENDANTS' APPEAL

Once again, Defendants Liberty Counsel and Rena Lindevaldsen move this Court for a protective order and a stay of proceedings against them. ECF 317. This motion should be denied.

BACKGROUND

The Revised Second Amended Complaint ("Complaint"), ECF 223, alleges a conspiracy among individual and institutional defendants, motivated by anti-lesbian animus, to kidnap 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. The Complaint claims that Defendants Liberty Counsel and Rena Lindevaldsen ("Moving Defendants") participated in this conspiracy, in part through their role as counsel to Lisa Miller in the custody dispute before the Vermont courts.[1]

This Court denied Moving Defendants' motion to dismiss the Complaint on numerous grounds, including lack of personal jurisdiction. ECF 277. The Court then denied Moving

[1] The Complaint and previous briefings directed to the pleadings set out Moving Defendants' participation in the conspiracy in more detail. *See, e.g.*, Order at 6–7, ECF 220; Revised Second Am. Compl. ¶¶ 45–50, 60–62, ECF 223; Pls.' Opp. to Defs.' Mots. to Dismiss at 4–6, ECF 261.

Defendants' motion for a stay and interlocutory appeal of this decision. ECF 302. Moving Defendants petitioned the Second Circuit for a writ of mandamus, which also was denied, on the basis that appeal in the regular course was an adequate remedy. Order, *In re Liberty Counsel, Inc.*, No. 18-876 (2d Cir. July 9, 2018) (ECF 33) (attached to Declaration of Diego A. Soto dated August 10, 2018, as Exhibit 1). Moving Defendants now seek a stay of proceedings pending their motion for reconsideration en banc of the denial of mandamus, and presumably also pending their threatened petition for writ of certiorari to the United States Supreme Court if the Second Circuit denies the pending motion. Mot. at 1, ECF 317. Meanwhile, this Court lifted the stay of proceedings pending criminal prosecution of two of the defendants as of March 23, 2017, more than one year ago. ECF 220. Nevertheless, Plaintiffs moved for entry of an order lifting the stay. ECF 222. That motion was denied as moot on March 26, 2018; this Court remarked that the stay "has been lifted since March 23, 2017" and that "[n]o additional order lifting the stay is necessary." Order at 2, ECF 301.

After some scheduling difficulty, the parties met and conferred pursuant to Rule 26(f) on May 3, 2018. The parties are still negotiating the terms of a proposed scheduling order.

Plaintiffs served requests for production on June 27, 2018, on all defendants who have appeared, including Moving Defendants ("Requests"). Soto Decl. ¶ 3. Several weeks later, Plaintiffs and Moving Defendants met and conferred by telephone. *Id.* ¶ 4. During that conversation, counsel for Moving Defendants stated that he did not want to discuss any substantive or specific objections to the Requests, but only their position that discovery as to them should be stayed pending resolution of the motion for reconsideration en banc of the denial of mandamus and a possible petition for a writ of certiorari. *Id.* ¶ 5. The reasons for the stay advanced by Moving Defendants were (1) they should not be required to engage in discovery

until they have exhausted their appellate remedies, and (2) if their jurisdictional challenge were accepted, any nonparty discovery issues would be heard by a district court sitting someplace other than Vermont. *Id.* Plaintiffs disagreed, noting that the Federal Rules and Local Rules were clear that discovery should proceed despite motions to dismiss and that Plaintiffs would take discovery of Defendants whether or not they were parties. *Id.* ¶ 6. Three days before their objections and responses were due, Moving Defendants filed this motion for a stay and protective order.

Moving Defendants have not served responses or objections to any of the Requests, *id.* ¶ 3, nor have they asserted any claims of privilege with respect to any of the Requests. There has been no meet-and-confer among the parties concerning any objections or assertions of privilege.

ARGUMENT

As this Court noted a few months ago in denying these same Defendants' motion for a stay and interlocutory appeal, "[g]ranting Defendants' motion . . . would simply delay things even further in this case which has already been going on for five years and is still not in discovery." Order at 6–7, ECF 302. Moving Defendants advance no cogent reasons for continuing this delay. Their main argument is that they are still challenging this Court's jurisdiction. But a jurisdictional challenge is not a basis for a stay. A stay of discovery would contradict the policy of the Court's Local Rules against discovery stays pending dispositive motions and would further delay the discovery to which Plaintiffs would be entitled even if Liberty Counsel and Rena Lindevaldsen were not parties.

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), Moving Defendants do not explain how further delay in this case is warranted or would expedite the "just, speedy, and inexpensive determination of the action," especially since numerous other defendants would remain as parties. As this Court already found, "[t]he fact of the matter is that even if Liberty Counsel and Lindevaldsen were completely dismissed, the case would continue on and Liberty Counsel and Lindevaldsen would likely be actively involved as third parties." Order at 6, ECF 302. The fact that Moving Defendants would be involved in discovery even as nonparties makes a discovery stay even more unwarranted. *See Hachette Distribution, Inc. v. Hudson City 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).

Moving Defendants' position, Mot. at 6–8, ECF 317, that they would be injured by having this Court rule on discovery disputes, instead of a district court in another state as nonparties, is meritless. There is no reason to believe that this Court will not fairly and dispassionately consider and adjudge any discovery objections that come before it, and of course, in addition this argument would apply to every defendant who moves to dismiss for lack of personal jurisdiction in a case that would continue against other defendants.

Moving Defendants offer no justification for a stay pending their motion for reconsideration en banc and possible petition for a writ of certiorari that would not apply equally 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; that policy applies even more to a stay pending a request for permission to appeal from a denial of a dispositive motion, and even more to a stay pending a motion for reconsideration en banc of a denial of mandamus. A request for a stay pending a motion for reconsideration is even less favored; "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). Even an interlocutory appeal does not stay discovery; instead, the litigation continues contemporaneously with the appeal (unless a stay is ordered by the district or appellate court). 28 U.S.C. § 1292(b); *ACLU v. U.S. Dep't of Homeland Sec.*, No. 11 Civ. 3786 (RMB), 2013 WL 6912685, at *2 (S.D.N.Y. Dec. 19. 2013) (noting "'heavy burden' to support a stay pending appeal").

In an effort to show that the motion for reconsideration en banc of the denial of their mandamus petition is meritorious, Moving Defendants quote this Court's statement that some of their issues "may be subject to reasonable debate." Mot. at 2, 4, 6, 11, ECF 317. They ignore the rest of the sentence, where this Court continued that it "does not believe that any of them justify departing from the standard course of litigation—i.e., reserving appellate review of these arguments until the Court enters final judgment." Order at 6, ECF 302. This Court noted that its ruling included questions of first impression (which, by the way, is not unusual for a district court), but continued that these did not rise to the extraordinary circumstances that would justify interlocutory appeal. *Id.* Indeed, both this Court and the Second Circuit already have rejected Moving Defendants' argument that their jurisdictional challenges should be heard by an appellate court now rather than after final judgment in the district court.

It is premature for this Court to consider any issues raised by Moving Defendants concerning the Requests other than whether it should stay proceedings. *See* L.R. 26(c). Moving Defendants have not served responses or objections to any of the Requests, Soto Decl. ¶ 3, and the parties have not met and conferred concerning any objections or assertions of privilege. Therefore, any arguments raised by Moving Defendants in the instant motion concerning the scope of the Requests, such as whether they are unduly invasive or implicate the attorney–client privilege, should be disregarded. In the absence of specific (or any) objections from Moving Defendants to the Requests, Plaintiffs cannot know the basis of their objections or even which requests Moving Defendants find objectionable, and therefore cannot respond other than in the broadest of terms. Discovery of lawyers is not *per se* prohibited, and in appropriate circumstances discovery even of information otherwise covered by the attorney–client privilege is permitted. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984) ("It is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.").

Moving Defendants also argue that discovery should be stayed because they will be irreparably injured if they are forced to produce documents protected by the attorney–client privilege or be subjected to invasive discovery. Mot. at 6–8, ECF 317. But there is no need for a stay to protect Moving Defendants from improper discovery. Their proper course is to serve responses and objections, and if necessary, to litigate their objections and the scope of their asserted privileges. The instant motion for a protective order against production of information is

premature because Moving Defendants have yet to serve objections to any request for production. Soto Decl. ¶ 3.

Having lost their motions to dismiss, for interlocutory appeal, and for mandamus, Moving Defendants are asking this Court to delay discovery while they continue to file motions—including a petition for writ of certiorari. Moving Defendants of course are entitled to pursue their remedies, and it seems likely that they similarly will challenge future adverse rulings on discovery or substance, as is their right. But Moving Defendants should not be permitted to continue to stall this litigation because they engage in extensive motion practice.

CONCLUSION

The Local Rules expressly state that discovery should continue while motions to dismiss are pending, and this principle applies equally to motions for interlocutory challenges to denials of motions to dismiss. Liberty Counsel and Rena Lindevaldsen's motion to stay discovery pending decision on their motion for reconsideration en banc of the denial of their petition for a writ of mandamus, and a possible petition for a writ of certiorari, should be denied. In addition, to the extent that the motion seeks a protective order blocking specific requested discovery, it is premature and should not be considered at this time.

August 10, 2018

Respectfully submitted.

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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:

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

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August 10, 2018

/s/ Beth D. Jacob
Beth D. Jacob

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

DECLARATION OF DIEGO A. SOTO IN OPPOSITION TO DEFENDANTS LIBERTY COUNSEL AND RENA LINDEVALDSEN'S MOTION FOR PROTECTIVE ORDER AND STAY OF PROCEEDINGS PENDING EXHAUSTION OF DEFENDANTS' APPEAL

I, Diego A. Soto, declare:

1. I am a Law Fellow with the Southern Poverty Law Center and represent Plaintiffs in this case.

2. Attached as Exhibit 1 is a true and correct copy of the July 9, 2018 order of the United States Court of Appeals for the Second Circuit denying Defendants Liberty Counsel and Rena Lindevaldsen's ("Moving Defendants") petition for a writ of mandamus.

3. On June 27, 2018, Plaintiffs served requests for production on Moving Defendants. Plaintiffs have not received objections or responses from Moving Defendants to these requests.

4. On July 25, 2018, I participated in a meet-and-confer with Horatio G. Mihet and Daniel J. Schmid, counsel for Moving Defendants, and Beth D. Jacob and Jessica Matthis of the Southern Poverty Law Center for Plaintiffs, to discuss Moving Defendants' stated intention to file a motion for protective order and to stay discovery in the district court pending the outcome

of the en banc petition Moving Defendants had filed in the Second Circuit on July 23, 2018, which Moving Defendants the next day refiled as a motion for reconsideration en banc.

5. During the meet-and-confer, Mr. Mihet stated that he would not discuss any substantive objections to the merits of Plaintiffs' discovery requests, but only Moving Defendants' position that discovery as to them should be stayed pending resolution of the motion for reconsideration en banc and a possible petition for a writ of certiorari. Mr. Mihet explained that Moving Defendants should not be required to engage in discovery in this Court or submit discovery disputes to this Court while exhausting their appellate remedies, and that, were Moving Defendants nonparties, Plaintiffs' discovery requests would be governed by Rule 45 and any nonparty discovery issues would be heard by a district court sitting someplace other than Vermont.

6. Ms. Jacob responded that Plaintiffs disagreed with Moving Defendants' position. Ms. Jacob explained that it is a clear policy in the Federal Rules of Civil Procedure and this Court's Local Rules that discovery is not stayed pending a dispositive motion. (Contrary to Moving Defendants' assertion in their moving papers, Ms. Jacob did not say at the meet-and-confer that the local rules barred a stay of discovery pending a motion to dismiss.) She further explained that, because Plaintiffs would take discovery of Moving Defendants whether or not they were parties, a stay of the proceedings against Moving Defendants would only delay an already very delayed case.

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

Executed on: August 10, 2018

Diego A. Soto

Exhibit 1

D. Vt.
12-cv-184
Sessions, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of July, two thousand eighteen.

Present:

Rosemary S. Pooler,
Reena Raggi,
Peter W. Hall,
Circuit Judges.

In re Liberty Counsel, Inc. and Rena M. Lindevaldsen,

Petitioners.

Liberty Counsel, Inc., Rena M. Lindevaldsen, Individually and as Alleged Agent of Liberty Counsel, Inc.,

Petitioners,

v. 18-876

Janet Jenkins, for herself and as next friend of Isabella Miller-Jenkins, a/k/a Isabella Miller,

Respondents.

Petitioners seek a writ of mandamus directing the district court to vacate its order denying their motion to dismiss and to dismiss the action against them. Upon due consideration, it is hereby ORDERED that the mandamus petition is DENIED. *See In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 122 (2d Cir. 2010) ("[M]andamus is not available unless . . . a direct appeal from a final judgment would not be an adequate remedy.").

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court