

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 AND RENA M. LINDEVALDSEN’S
REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER
AND TO STAY PENDING EXHAUSTION OF DEFENDANTS’ APPEAL**

Pursuant to L.R. 7(a)(5), Fed. R. Civ. P. 26 and L.R. 26(c), Defendants, Liberty Counsel, Inc. (“Liberty Counsel”) and Rena M. Lindevaldsen (“Lindevaldsen”), by and through the undersigned counsel, hereby file this Reply in Support of their Motion for Protective Order and for a Stay Pending Resolution of Defendants’ Appeal. (Dkt. 317).

INTRODUCTION

In her opposition to Liberty Counsel and Lindevaldsen’s motion for protective order and stay, Jenkins contends (1) that no irreparable harm is imposed on Liberty Counsel and Lindevaldsen by submitting to litigation in a forum where jurisdiction is questionable because Liberty Counsel and Lindevaldsen would be subject to discovery as non-parties anyway; (2) that Liberty Counsel and Lindevaldsen have no right to have discovery claims adjudicated by a district court in a venue where they have constitutionally sufficient contacts; and (3) that this case should proceed because a stay does not aid in the just, speedy, or inexpensive determination of this action.

(Dkt. 319, Jenkins Opposition to Motion for Protective Order and Stay of Proceedings, “Opp.,” at 4-7).

Jenkins’ contentions ignore Liberty Counsel and Lindevaldsen’s actual objections to submitting to discovery, the federal procedure rules, and Liberty Counsel and Lindevaldsen’s due process rights. The requested protective order or stay is necessary here to prevent irreparable harm. The motion should therefore be granted.

ARGUMENT

A. A Protective Order And Stay Would Prevent Irreparable Injury Liberty Counsel and Lindevaldsen.

Subjecting Liberty Counsel and Lindevaldsen to litigation and discovery in this matter prior to final resolution of their threshold jurisdictional questions will impose irreparable injury on them by forcing them to litigate extensive and exhaustive discovery issues – potentially requiring multiple interlocutory appeals – in a forum where they lack constitutionally sufficient contacts.

Jenkins’ contends that Liberty Counsel and Lindevaldsen cannot suffer irreparable injury by being forced to have discovery disputes decided by this faraway court where they lack constitutionally sufficient contacts. (Opp. at 4). Indeed, she asserts that “[t]here is no reason to believe that this Court will not fairly and dispassionately consider and adjudge any discovery objections.” (*Id.*). True as that may be, it utterly ignores the relevant point and the federal procedure rules.

Liberty Counsel and Lindevaldsen have constitutional rights not to be subject to litigation in a forum in which they lack sufficient contacts. The point is not that Liberty Counsel and Lindevaldsen will receive unfavorable decisions by this Court on any discovery disputes, but that they will suffer irreparable injury by being subjected to any litigation, any discovery, and any discovery orders in a forum with which they lack the constitutionally requisite contacts. Forcing

Defendants to submit to discovery and further litigation in the absence of personal jurisdiction would work irreparable injury on them, regardless of where that litigation or discovery occurs, including here. *See, e.g., Fox v. Boucher*, 794 F.2d 34, 37 (2d Cir. 1986). Indeed, it is black letter law that “[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). The injury arises from the loss of their cherished due process rights absent a protective order and stay. *Connecticut Dep’t of Env’tl Protection v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (emphasis added) (“violations of constitutional rights are presumed irreparably injury”).

Additionally, Jenkins’ contention ignores the distinctions between party discovery and non-party discovery. The expense, burden, and obligations imposed on parties far exceeds those required of non-parties. Indeed, Rule 45 requires that the issuing party or attorney “**must** take steps to avoid imposing an undue burden or expense on a person subject to the subpoena.” Fed. R. Civ. P. 45(d)(1) (emphasis added). Rule 26, on the other hand, is only limited by a party seeking “nonprivileged matter that is relevant to any party’s claim.” Fed. R. Civ. P. 26(b)(1). The burdens imposed by those two sections are extraordinarily different. Indeed, submitting to third party discovery affords Liberty Counsel and Lindevaldsen greater protection in terms of required disclosure, imposes obligations on Plaintiffs that otherwise do not exist in party discovery, eliminates the need to travel and defend disputed matters in a distant jurisdiction with which Liberty Counsel and Lindevaldsen have no contacts, and otherwise entitles them not to be unduly burdened. Those statutory and constitutional protections are much more significant than Jenkins’ phantom claim that Liberty Counsel and Lindevaldsen have no right to pick a different court to adjudicate their discovery disputes. The point is that Liberty Counsel and Lindevaldsen have

constitutional and statutory rights not to be haled into far-flung fora and submit to unending fishing expeditions at Jenkins' whim, regardless of the fairness and impartiality of the court in that jurisdiction.

Lastly, it must be emphasized that the discovery Jenkins seeks to force upon Lindevaldsen and Liberty Counsel in Vermont is no mere picnic, and nothing of the sort typically visited upon non-parties (in their own fora). This is not the typical case where, if an unremarkable discovery dispute or two might arise, they will likely be resolved by the parties or the court in the first instance, without much effort. Quite the contrary, as the Court knows, Lindevaldsen and Liberty Counsel are a lawyer and law firm, respectively, with a solemn professional and ethical obligation to safeguard their clients' privileged communications. Jenkins has already made clear her unapologetic intention to compel disclosure of Lindevaldsen's and Liberty Counsel's privileged materials. (Opp. at 6) (admitting that Jenkins intends to seek – and has already sought – documents protected by the attorney-client privilege). Jenkins' foolhardy pursuit of privileged materials means that each privileged piece of paper she seeks will be the subject of extensive litigation, not just in this Court, but at the Second Circuit and potentially the Supreme Court as well, if necessary. *See e.g., S.E.C. v. Rajaratnam*, 622 F.3d 159, 170 (2d Cir. 2010) (“once the cat is out of the bag, the right against disclosure cannot later be vindicated.”); *In re Roman Catholic Diocese Of Albany, N.Y., Inc.*, 745 F.3d 30 (2d Cir. 2014) (same). As Lindevaldsen and Liberty Counsel intend to vigorously oppose disclosure of any privileged materials, and avail themselves of their right to immediate interlocutory appeal to preserve privilege, the discovery and litigation Jenkins proposes for them is a potentially endless and massive undertaking – all in a forum where they have no sufficient contacts. It is unjust to require these defendants to embark on this lengthy journey, prior

to the exhaustion of their appellate remedies on the threshold jurisdictional issues, as to which this Court agrees there are serious and close questions remaining to be resolved.

B. A Protective Order And Stay Would Secure The Just, Speedy, And Inexpensive Determination Of This Action.

Jenkins acknowledges that a stay and protective order is appropriate in circumstances where it is necessary to help “secure the just, speedy, and inexpensive determination of the action.” (Opp. at 4) (citing L.R. 26(a)(3)). However, she contends that a stay as to Liberty Counsel and Lindevaldsen would not advance that cause. (Opp. at 4). She is wrong.

First, ensuring that Liberty Counsel’s and Lindevaldsen’s cherished and fundamental right to due process is not infringed unquestionably aids in securing the **just** determination of this action. Indeed, as the Second Circuit has held numerous times, stays are appropriate and therefore just when “there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.” *Brenntag Int’l Chem., Inc. v. Bank of India*, 175 F.3d 245, 249-50 (2d Cir. 1999). There can be no doubt that protecting the constitutional rights of Liberty Counsel and Lindevaldsen serves the ends of justice, as that is the entire point of jurisdictional challenges—to ensure that “substantial justice” is done. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (noting that forcing a litigant to defend in a distant forum requires a showing that it comports with “substantial justice”). Failing to provide such protections is *ipso facto* **not** securing a just end to this litigation.

Second, ensuring that Liberty Counsel’s and Lindevaldsen’s cherished and fundamental rights to due process are protected is also necessary to secure the speedy and inexpensive resolution of this action. As noted above, forcing discovery of privileged materials upon a lawyer and her firm in Vermont will certainly not be speedy. Forcing Lindevaldsen and Liberty Counsel to litigate for several years in Vermont, and then requiring the process to start all over again in a new

jurisdiction – after an appellate determination that personal jurisdiction could not be constitutionally exercised in Vermont – would not be speedy at all. Allowing threshold jurisdictional matters to be exhausted at the outset would be speedy and just.

C. The Balance Of The Equities Favors A Stay And Protective Order.

Jenkins contends that a stay would only “further delay the discovery to which [she] would be entitled even if Liberty Counsel and Lindevaldsen were not parties.” (Opp. at 2). This is the only mention of any alleged harm that Jenkins contends she might suffer if this Court grants a stay. Such a contention, however, falls well short of the mark. To overcome Liberty Counsel and Lindevaldsen’s substantially grounded motion to stay discovery pending resolution and exhaustion of their dispositive appeals, 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 Liberty Counsel and Lindevaldsen pursue protection of their due process rights to final resolution.

Despite that fact, Jenkins contends that mere delay is sufficient to justify denying a stay. Fatal for Jenkins, however, is that she cannot rely on the mere assertion of prejudice. Instead, she must demonstrate **actual prejudice** with affirmative evidence. *Id.* at *7 (plaintiff’s mere assertion of prejudice, without showing actual prejudice, 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’s and Lindevaldsen’s appellate remedies. Indeed, mere delay is not

enough. *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).

D. Jenkins Does Not Challenge And Therefore Concedes That A Stay And Protective Order Would Serve The Public Interest.

Jenkins does not contest, and therefore concedes, that a stay and protective order aimed at vindicating constitutional rights is in public interest. Indeed, ensuring that Liberty Counsel and Lindevaldsen are not deprived of their constitutional defenses is of the highest order of public interest. *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). Thus, making sure that Liberty Counsel and Lindevaldsen receive the protections of “one of the most important personal rights guaranteed by the Constitution of the United States,” due process, is *per se* in the public interest. *United States v. Broncheau*, 759 F. Supp. 2d 694, 697 (E.D.N.C. 2010). A stay and protective order are warranted and should be granted.

CONCLUSION

For the foregoing reasons, this Court should issue a protective order as to Liberty Counsel and Lindevaldsen protecting them from submitting to discovery during the pendency of their merited appeals, and staying the proceedings as to Liberty Counsel and Lindevaldsen until their appellate remedies on threshold jurisdictional issues are exhausted.

Dated: August 24, 2018

Respectfully submitted,

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

/s/ Horatio G. Mihet
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: hmihet@lc.org

*Attorneys for Defendants Liberty Counsel
and Lindevaldsen*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2018, 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/ Horatio G. Mihet
Horatio G. Mihet