

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

MOTION TO MODIFY THE EARLY NEUTRAL EVALUATION DEADLINE

Defendants Philip Zodhates, Victoria Hyden and Response Unlimited, Inc. (“RUL”), by their attorneys, Gravel & Shea PC, move this Court to reschedule the Early Neutral Evaluation (“ENE”) compliance deadline to September 16, 2019, or another suitable date after completion of discovery. All Defendants, excluding Lisa Ann Miller who has not yet made an appearance in this case and Timothy Miller who has a pending Motion to Dismiss, consent to extension of the ENE compliance deadline.

Background

While this case has been pending for a long time, due to the pendency of motions to dismiss and a stay pending completion of criminal proceedings brought against Mr. Zodhates in the Western District of New York, until recently no discovery had been taken other than jurisdictional discovery relating to RUL.¹ On June 27, 2018, Plaintiffs served identical interrogatories and requests to produce to each of the Defendants whose cases have not been

¹ The criminal proceedings are still ongoing, and Defendants Zodhates and Hyden have asserted their Fifth Amendment privilege in response to interrogatories which were issued.

dismissed.² Several Defendants have not yet answered Plaintiffs' requests for written discovery, none of the Defendants have yet issued written discovery, no depositions have been noticed, and the Court has yet to rule on Defendant Timothy Miller's Motion to Dismiss.

On August 30, 2018, as part of a scheduling order, this Court ordered that the parties engage in an ENE session on or before October 31, 2018. ECF 330. While some parties in this case have taken the position that ENE would be a pointless exercise, Mr. Zodhiates, Ms. Hyden and RUL believe that an ENE could be a helpful tool if pursued after sufficient discovery. They agree that to hold an ENE now, before discovery is taken, would be pointless. As such, these parties make the current Motion to Modify the Early Neutral Evaluation Deadline.

Memorandum

All parties agree that it is not feasible to complete the ENE session on or before the current deadline of October 31, 2018. However, despite several attempts to negotiate a proposed ENE compliance deadline, Plaintiffs and Defendants are unable to find a mutually agreeable deadline. Local Rule 16.1(f)(1) suggests that ENE sessions should take place near the mid-point of discovery. Even following that guidance, an ENE session in November or December would be premature as discovery has just begun. Moreover, because of the entrenched viewpoints and apparent ideological differences between the parties, a later ENE deadline is particularly appropriate in this case. After all, under Federal Rule of Civil Procedure 16(a)(3), this Court has the discretion to take actions that would discourage "wasteful pretrial activity."

² Originally, the Plaintiffs brought claims against fifteen (15) Defendants. Ten (10) remain in the case following a number of successful motions to dismiss on jurisdictional and other grounds.

Plaintiffs insist that the ENE session should be held in November or December of 2018. Mr. Zodhiates, Ms. Hyden and RUL maintain that such an immediate deadline effectively guarantees that the ENE session will fail to resolve any of the current disputes. If there is any possibility that ENE will resolve or limit this dispute, the session must be held after the parties have had an adequate opportunity to evaluate their cases through discovery. On April 26, 2018, Plaintiffs circuited a draft Stipulated Discovery Schedule to counsel. Affidavit of Robert B. Hemley, ¶ 6 (stating “[t]he parties agree that an Early Neutral Evaluation session would not be productive in this case.”). At the request of Mr. Zodhiates’ counsel, this language was removed. Plaintiffs now want to move forward with ENE, but insist on doing it immediately. This approach would not only doom the ENE to fail, but result in a waste of time and resources for the sake of checking off the ENE box.³ ENE in this case will only be effective if each of the parties has an opportunity to assess the strengths and weaknesses of their cases and make an informed decision regarding resolution.

Given the cost of an ENE session in this case and the virtual certainty that an early ENE session will not have any constructive impact on the course of this litigation, Defendants request that this Court reschedule the ENE deadline to September 16, 2019, or some other suitable date, just after the close of discovery.

³ All of the Defendants in this case reside outside of the State of Vermont, therefore an ENE session will require a considerable amount of time and expense. Additionally, Ms. Hyden recently gave birth and is in no position to spend time away from her home in Virginia.

Conclusion

Mr. Zodhiates, Ms. Hyden and RUL request that this Court reschedule the ENE session for September 16, 2019, after all parties have had an opportunity to conduct adequate discovery and properly evaluate the strengths and weaknesses of their cases. All Defendants, excluding Lisa Miller and Timothy Miller, agree that September 16, 2019 is a more appropriate deadline.

Dated: Burlington, Vermont
October 24, 2018

/s/ Robert B. Hemley

Robert B. Hemley, Esq.
Hillary A. Borcharding, Esq.
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For Defendants Philip Zodhiates,
Victoria Hyden and Response
Unlimited, Inc.

UNITED STATES DISTRICT COURT
FOR THE
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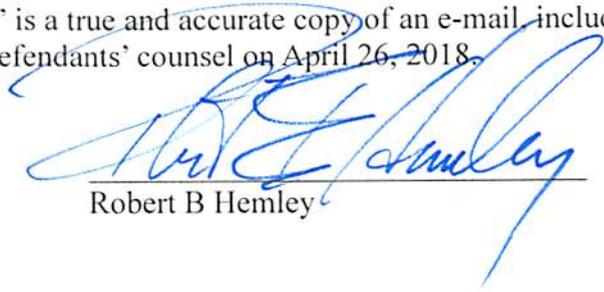
JANET JENKINS, <i>et al.</i> ,)	
Plaintiffs)	
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Defendants)	

AFFIDAVIT OF ROBERT B. HEMLEY, ESQ. IN SUPPORT OF
MOTION TO MODIFY THE EARLY NEUTRAL EVALUATION DEADLINE

Robert B. Hemley, being duly sworn, deposes and says:

1. I am counsel to Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc., and as such submit this affidavit pursuant to Local Rule 26(c) in support of their motion to modify the Early Neutral Evaluation deadline.
2. Over the last number of weeks, I have engaged in e-mail exchanges with Plaintiffs' local counsel, Sarah Star, Esq., concerning the scheduling of the Early Neutral Evaluation ("ENE") in this matter.
3. In addition, on October 23, 2018, I participated in a telephone call with Attorney Star that lasted approximately 30 minutes in order to continue our meet-and-confer on the scheduling of the ENE. I expressed my view that it would be fruitless to hold an ENE before there has been any substantive discovery. Ms. Star maintained the Plaintiffs' position that they do not agree to delay the ENE until later in the case. I agreed to note their position in our motion.
4. As expressed in the motion, we believe that it would be expensive, inconvenient, and of no value to go through an ENE simply to allow the parties to "check the box" and say they have had one. The process should be taken seriously and given its best chance to succeed. That necessarily means delaying it until there has been discovery taken of all parties, including Plaintiff Janet Jenkins.
5. I believe that we have negotiated in good faith, but are unable to arrive at an agreement as to when the ENE should proceed, requiring this motion.

6. Attached hereto as "Exhibit A" is a true and accurate copy of an e-mail, including attachment, sent from Plaintiffs' counsel to Defendants' counsel on April 26, 2018.



Robert B Hemley

Sworn to before me this
24th day of October, 2018.

Notary Public
My commission expires: 2/10/19

Hillary A. Borcharding

From: Julie M. Jackman <JJackman@langrock.com>
Sent: Thursday, April 26, 2018 9:42 AM
To: Norman Smith (nc.smith@myfairpoint.net); Robert B. Hemley;
'bmcArthur@jarvismcarthur.com'; 'daniel@lc.org'; 'anthony@ndp-law.cm';
'rgannan@lc.org'; 'timjomiller@gmail.com'; Hillary A. Borcharding;
'cparah@jarvismcarthur.com'; 'dwilliams@dinse.com'; 'hmihet@lc.org';
'rberger@dinse.com'
Cc: Fritz Langrock; 'srs@sarahstarlaw.com'; James W. Swift
Subject: Proposed Jenkins
Attachments: PROPOSED Jenkins Discovery Schedule Order.pdf

Follow Up Flag: Follow up
Flag Status: Completed

Categories: Saved to DM, #1340860

Dear Counselors,

Attached is a proposed discovery schedule that we hope to discuss next week at the 26(f) conference. Feel free to reply with any immediate comments, and I look forward to meeting with you all on May 3rd.

Regards,

Fritz

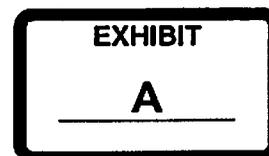
Fritz Langrock, Sperry, & Wool LLP
By Julie M. Jackman, Legal Assistant

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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.

No. 2:12-cv-184-WKS

STIPULATED DISCOVERY SCHEDULE/ORDER

The parties submit the following Discovery Schedule pursuant to Local Rule 26(a)(2):

INTRODUCTION

1. In this case, discovery may be needed on the following subjects:
 - a. Defendant Lisa Ann Miller's noncompliance with court orders, including but not limited to Vermont court orders, concerning custody of Isabella Miller-Jenkins.
 - b. Aid to Defendant Lisa Ann Miller from any source, which assisted her noncompliance with court orders concerning custody of Isabella Miller-Jenkins.

Unless noted herein to the contrary and in more detail, discovery in this matter shall not be conducted in phases or limited to particular, enumerated issues.

2. The parties have conferred about disclosure, discovery, and preservation of electronically stored information ("ESI"). Unless noted otherwise, ESI shall be produced in the following format(s):

- a. ESI shall be produced in Tagged Image Format (TIF) with a Concordance delimited load file using Concordance standard delimiters. Document breaks and parent/child relationships shall be maintained.

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b. Paper documents shall be digitized and produced in Portable Document Format (PDF), OCR'd and unitized logically on the document level. Other documents (including Excel documents) shall be produced in native, searchable format.

c. Structured data shall be produced in Comma Separated Values (CSV) file format.

d. Metadata shall be included.

The parties agree to meet and confer regarding the production of any form of ESI not specified in this Protocol to determine the most reasonable form of production based on the specific circumstances.

The party requesting ESI discovery shall propose search terms. The party producing discovery shall accept those search terms or counter-propose terms within 7 days of receipt; if a counter-proposal is made, the parties shall meet and confer concerning terms within 7 days of receipt of the counter-proposal. If the parties cannot agree on search terms, the party requesting discovery may seek Court assistance.

3. The parties have conferred about claims of privilege and claims of protection as trial-preparation materials. For every document or part of document withheld from production because of a claim of privilege or a claim of protection as trial-preparation material, the withholding party will provide the following information with respect to each such document, in a single privilege log in a Microsoft Excel Worksheet (.xlsx) file with clearly marked rows for each document and ESI withheld and clearly marked columns for each descriptor used:

- a. First Bates number;
- b. Last Bates number;
- c. Type of document (for example, memorandum, email, letter);

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- d. Subject matter;
- e. Date;
- f. Title;
- g. Authors;
- h. Recipients;
- i. Relationship of authors and recipients to each other;
- j. Person asserting the privilege; and
- k. Nature of the claimed privilege (including work product) and, if the privilege is governed by state law, the state's privilege rule being invoked.

If a party learns that it inadvertently disclosed a privileged document, it may assert the privilege within seven days of discovering the inadvertent disclosure by making a written request and updating the privilege log. All copies of that document shall be returned or destroyed by the non-producing parties, and such destruction shall be confirmed to the producing party in writing. Such return or destruction does not affect the receiving party's right to challenge the assertion of privilege.

Unless specifically requested in a filing with this Court, the parties' agreed procedure will not be the subject of a court order under Federal Rule of Evidence 502.

4. Any changes in the limitations on discovery imposed under the Federal Rules of Civil Procedure or the Local Rules for this District shall be specifically described below.

5. The parties agree that service of documents, including but not limited to discovery requests and responses, may be effected through email to lead counsel or counsel designated by that party to receive email service.

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DEADLINES

6. The parties shall serve initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) on or before **May 17, 2018**.

7. The parties shall serve all interrogatories and requests for production on or before **December 21, 2018**.

8. Depositions of all witnesses (fact and expert) shall be completed by **March 1, 2019**. Plaintiffs collectively may notice depositions of up to 40 non-party witnesses and Defendants collectively may notice depositions of up to 40 non-party witnesses, except for good cause shown or agreement of the parties. Each party may take the deposition of any other party, but these depositions shall be scheduled so that an individual party need appear only once for deposition. Where a party is an organization, depositions of up to five individuals associated with that organization plus a deposition pursuant to Federal Rule of Civil Procedure 30(b)(6) may be noticed, separately and in addition to the number of non-party depositions. The parties agree that the convenience of the witness will be considered but will not be dispositive when setting the location of the deposition, and that the depositions may be scheduled outside the District of Vermont.

9. Plaintiff shall submit expert witness reports on or before **December 10, 2018**.

10. Defendant shall submit expert witness reports on or before **January 21, 2019**.

11. If an expert report is served before December 10, 2018, any expert report in response shall be served no later than five weeks after the date of service.

12. The parties agree that an Early Neutral Evaluation session would not be productive in this case.

13. The parties shall serve all requests for admission on or before **July 31, 2019**. Requests for admission are not considered “discovery” with respect to any other deadlines

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provided in this or other orders for completion of fact or expert discovery. Requests for admission may be served at any time after May 17, 2018.

14. All discovery shall be completed by **March 1, 2019**.

15. Except for good cause shown, or upon agreement of the parties, motions for joinder of parties and amendments to the pleadings shall be filed on or before **August 3, 2018**.

16. Motions, including summary judgment motions but excluding motions relating to the conduct of the trial, shall be filed on or before **April 8, 2019**. Oppositions to dispositive motions shall be filed on or before **May 13, 2019**. Replies to oppositions to dispositive motions shall be filed on or before **June 3, 2019**. There shall be no further briefing on dispositive motions, except with permission of the Court.

17. This case shall be ready for trial by **June 24, 2019**.

/s/ _____
Frank Langrock
Counsel for Plaintiffs

Date: _____

/s/ _____
Brooks G. McArthur
Counsel for Defendant Kenneth L. Miller

Date: _____

/s/ _____
[NAME]
Counsel for Defendant Timothy D. Miller

Date: _____

/s/ _____
Robert B. Hemley
Counsel for Defendants Philip Zodiates, Victoria Hyden, and Response Unlimited, Inc.

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Date: _____

/s/ _____

Norman C. Smith
Counsel for Defendant Linda M. Wall

Date: _____

/s/ _____

Ritchie E. Berger
Counsel for Defendant Liberty University, Inc.

Date: _____

/s/ _____

Horatio G. Mihet
Counsel for Defendants Liberty Counsel, Inc., and Rena M. Lindevaldsen

Date: _____

APPROVED and SO ORDERED:

U.S. District Judge

Date: _____

UNITED STATES DISTRICT COURT
FOR THE
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Defendants)	

CERTIFICATE OF SERVICE

I, Robert B. Hemley, Esq., attorney for Defendants Philip Zodhates, Victoria Hyden and Response Unlimited, Inc., certify that, on October 24, 2018, I caused to be served Motion to Modify the Early Neutral Evaluator Deadline, through the CM/ECF system on the following individuals:

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Liberty Counsel
P.O. Box 540774
Orlando, FL 32854

Dated: Burlington, Vermont
October 24, 2018

/s/ Robert B. Hemley

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