

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

JANET JENKINS, <i>et al.</i> ,	)	
Plaintiffs	)	
	)	
v.	)	Docket No. 2:12-cv-184
	)	
KENNETH L. MILLER, <i>et al.</i> ,	)	
Defendants	)	

RESPONSE UNLIMITED, INC., PHILIP ZODHIATES  
AND VICTORIA HYDEN’S OPPOSITION TO  
PLAINTIFFS’ MOTION TO CLARIFY DISCOVERY  
SCHEDULE/ORDER AND ALTERNATIVE  
MOTION TO MODIFY DISCOVERY SCHEDULE/ORDER

Defendants Response Unlimited, Inc. (“Response Unlimited”), Philip Zodhiates, and Victoria Hyden, by their attorneys, Gravel & Shea PC, hereby oppose Plaintiff’s Motion (ECF 401). The Court’s text order granting Plaintiffs’ motion for a six-week extension needs no clarification and Plaintiffs cannot establish good cause for a further extension of the discovery schedule. The Court should hold the parties to the October 10, 2019 discovery deadline.

Procedural History

This case has burdened the Court’s docket since Plaintiff filed her initial complaint in this case on August 14, 2012. ECF 1. The operative complaint, styled “Revised Second Amended Complaint,” was filed on May 4, 2017. ECF 223. Since Ms. Jenkins filed this case, two alleged co-conspirators were convicted in criminal proceedings and sentenced for the conduct that underlies her allegations. Defendant Kenneth Miller’s trial took place in Vermont from August 8 to 14, 2012 and Mr. Miller was sentenced on April 17, 2013. *U.S.A. v. Kenneth Miller*, No. 11-cr-00161-wks (D. Vt), ECF Nos. 115, 116, 117, 120, 118. Philip Zodhiates was tried and

convicted in the Western District of New York in 2016. *U.S.A. v. Zodhiates*, No. 14-cr-175-rja (W.D.N.Y.), ECF No. 151. Mr. Zodhiates was sentenced on May 27, 2017. *Id.* at ECF No. 187. Ms. Jenkins has had access to the trial transcripts and exhibits for both criminal trials, as well as to discovery produced by Response Unlimited, Mr. Zodhiates and Victoria Hyden in the criminal and civil proceedings. Declaration of Matthew D. Freedom, dated November 11, 2019 (“Freedom Decl.”), ¶ 2. There have been no new facts in this case since the spring of 2010.

Since the Court lifted the stay of these civil proceedings two and one-half years ago in March 2017, Plaintiffs have engaged in only the most limited discovery. Ms. Jenkins has not issued a single interrogatory or request to admit and has not noticed a single deposition. She issued one set of requests to produce to Response Unlimited, Mr. Zodhiates and Ms. Hyden, who responded with the production of documents on July 27, 2018, ECF 315. Response Unlimited supplemented that production on August 6, 2018. ECF 318. Well over a year passed before Ms. Jenkins even acknowledged, let alone complained, about the production. Freedom Decl., ¶ 3. The first and only inquiry came on October 28, 2019. Freedom Decl. ¶ 3.

The discovery schedule entered after the stay was lifted provided that “All discovery shall be completed by **one year from the date of service of the final answer or one year from the date set by the Court.**” ECF 320 (emphasis in original); ECF 329 (Order Approving Proposed Discovery Schedule). The Court ordered that “Commencement of discovery is effective on August 29, 2018, and discovery shall be completed within one year of that date . . . The case shall be trial ready on December 2, 2019.” ECF 329. Thus, under the originally approved discovery schedule the relevant deadlines were as follows:

Affirmative Expert Reports Due: April 29, 2019

Close of Discovery: August 29, 2019

Summary Judgment Motions Filed: October 10, 2019

Trial Ready: December 2, 2020

ECF 320, ¶¶ 9, 13, 15; ECF 329.

On April 29, 2019, Ms. Jenkins expressed that “[u]nfortunately, discovery has not progressed as expeditiously as anticipated by the discovery schedule.” ECF 348 at 1. Ms. Jenkins moved the Court to extend all deadlines on the discovery schedule by six weeks. *Id.* Defendants Zodiates, Hyden and Response Unlimited responded that a six-month extension, such that discovery would close on February 29, 2020, would be more appropriate.<sup>1</sup> ECF 349. On June 26, the Court issued a text order “granting 348 MOTION to [Modify] the Discovery Schedule/Order.” ECF 355. The Court clearly decided that the six-week extension Plaintiffs initially requested was more appropriate. Based on the Court’s order, the relevant deadlines are:

Affirmative Expert Reports Due: June 10, 2019

Close of Discovery: October 10, 2019

Summary Judgment Motions Filed: November 21, 2019

Trial Ready: January 13, 2019

ECF 320, ¶¶ 9, 13, 15; ECF 329, 320, 355.

Ms. Jenkins disclosed four expert witness reports on November 1, 2019, nearly five months after the Court-ordered deadline. ECF 399.

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<sup>1</sup> Plaintiffs contend that Defendants have repudiated their original belief that a six-month extension was more appropriate. ECF 401 at 5. This contention is not correct. More accurately, Defendants have complied with the Court-ordered deadlines and believe it would now be unfair to change the rules under which they have been operating since the Court extended the deadlines by six weeks.

Argument

Ms. Jenkins comes before the Court to ask for more time, now having been in litigation with these Defendants for seven years and after having failed to act during 13 months of Court-ordered discovery. She offers no reason for her failure to comply with the Court's order. She suggests, without justification, that the Court's order is ambiguous and, in the alternative, she has good cause for extending the discovery period after it closed. Both arguments fail.

I. THE COURT'S ORDER IS UNAMBIGUOUS AND NEEDS NO CLARIFICATION.

When the Court issued its June 26 entry order, the Court had under consideration Plaintiffs' Motion to Modify Discovery Schedule/Order, which requested a six-week extension, and a response from some, but not all Defendants, proposing a six-month extension. *See* ECF 348 (filed 4/29/19); ECF 349 (filed 5/13/19). The Court's order clearly and unambiguously states that it "GRANTED 348 Motion to [Modify] the Discovery Schedule/Order." ECF 355. The Court's order leaves no room for interpretation; faced with the option of extending discovery by six weeks or six months, the Court chose the former.

Plaintiffs point out that in the Court's October 29, 2019 order on Response Unlimited's Motion to Compel, ECF 394, the Court held that Defendants' contention interrogatories were premature and responses were not due "until the completion of discovery." ECF 401 at 5 (quoting ECF 394 at 10). Plaintiffs claim that this apparent inconsistency shows that the Court intended to grant the six-month extension, but this is not the case.

As that same page of the Court's Opinion and Order points out, "The proposed interrogatories sought here concern Plaintiffs' understanding of specific interactions between various Defendants, Lisa Miller and Isabella. *These issues will be addressed in a number of Plaintiffs' outstanding discovery requests. See ECF 361.*" ECF 394 at 10 (emphasis added).

The Court's citation to ECF 361 references Plaintiffs' Motion to Compel Liberty Counsel and Rena Lindevaldsen to Comply with First Requests for Production of Documents, which Plaintiffs filed on July 23, 2019. The "completion of discovery" contemplated by the order was the pending motion to compel against Liberty Counsel and any other timely filed discovery requests. The Court's order did not contemplate that Plaintiffs would issue further discovery, *but complete the discovery that had already been issued.*

The Court's orders make plain that it granted a six-week extension and that Plaintiffs need not respond to the contention interrogatories until they are in possession of all responses to timely discovery requests.

## II. PLAINTIFFS DO NOT HAVE GOOD CAUSE TO EXTEND THE DISCOVERY PERIOD.

The discovery period closed on December 10, 2019 and Plaintiffs did not file their motion until November 7. Doc 401. "A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). A finding of good cause depends on the moving party's diligence. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000). "[T]he discovery period should not be extended when a party has had ample opportunity to pursue the evidence during discovery" but fails to act diligently during the discovery period. *Carlson v. Geneva City Sch. Dist.*, 277 F.R.D. 90, 95-96 (W.D.N.Y. Sept. 19, 2011), *citing Trebor Sportswear Co., Inc. v. The Limited Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989); *see also* L.R. 26(a)(7) ("**Extensions.** If additional discovery time is required due to case complexity or other extraordinary circumstances, counsel may move for an extension of time for good cause. Absent exceptional circumstances, requests must be made before the discovery deadline expires") (emphasis in original).

Plaintiffs assert three justifications that purport to establish good cause for extending the deadline. ECF 401 at 6. The second justification appears to be simply that they have not accomplished much in the past 13 months. *Id.*

In the 13 months since discovery reopened in this seven-year-old case, Plaintiffs have conducted no depositions, issued no interrogatories or requests to admit, disclosed no experts, and issued only a single set of requests to produce to the Defendants.<sup>2</sup> Preedom Decl. ¶ 4. When Plaintiffs finally disclosed experts one month after the close of discovery and five months after the Court-ordered deadline, it was promptly revealed that Plaintiffs have no justification for the late filing.

The titles of the four reports alone clearly indicate that *no* discovery from Defendants was necessary to support their opinions. Attorney Tara Devine’s report is titled “REPORT ON FAMILY COURT PROCEEDINGS INVOLVING ISABELLA MILLER-JENKINS[;]” those proceedings concluded in 2009. Preedom Decl. ¶ 5. Attorney Patricia Apy’s “Report Regarding the Status of Obstacles to Recovery of a Child Wrongfully Removed or Retained from Their Habitual Residence in Nicaragua With Particular Attention to the Application of the Hague Convention on the Civil Aspects of International Child Abduction” is an interpretation of law and hypothetical circumstance. *Id.* Professor John Maluccio’s “Report on Education, Health and Economic Conditions in Nicaragua” is founded on a socio-economic analysis of that country. *Id.* Finally, Dr. Sharon Lamb’s “Report on Potential Consequences of Abduction & Separation in

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<sup>2</sup> The 13-month discovery period was already five months longer than the period typically allowed by L.R. 26(a)(1), which provides that the parties must “jointly prepare and file a single schedule *providing for the completion of discovery no later than 8 months after the last answer was filed*” (emphasis added).

the case of Isabella Miller-Jenkins” is not founded on any discovery in this case since no one in the United States has seen Isabella Miller-Jenkins since 2009. *Id.*

Even more significantly, Plaintiffs have issued no discovery to Defendants since the expert disclosure deadline and, therefore, these reports could not possibly have been delayed by anything other than Plaintiffs’ lack of diligence. All of Plaintiffs’ expert reports could have been issued on June 10, 2019, or even June 10, 2010.

Indeed, there is little discovery Plaintiffs need. After seven years and two criminal trials, the record in this case is well-developed. Several witnesses’ testimonies are preserved in a trial record; some have given testimony twice. Thousands of pages have been produced in this case and Plaintiffs have access to the Defendants’ and Government’s exhibits from both trials. This record was sufficient to support two convictions and Plaintiffs’ burden of proof is a much lower bar.

Plaintiffs cannot credibly claim to have acted diligently to complete discovery where, in a seven-year-old case, they issued only two sets of discovery requests to each Defendant and missed the expert report deadline by nearly five months. *See, e.g.*, ECF 117 (First Set of Jurisdictional Interrogatories and Requests to Produce by Janet Jenkins (11/5/2013)); ECF 315 (Response to Request to Produce by Victoria Hyden, Response Unlimited, Inc., and Philip Zodhiates (7/27/2018)<sup>3</sup>; and ECF 399 (expert disclosures (11/1/2019)).

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<sup>3</sup> It does not appear that Plaintiffs filed a discovery certificate for their 2018 Requests to Produce.

## III. DEFENDANTS WOULD BE PREJUDICED IF AN EXTENSION WERE GRANTED.

Plaintiffs' other two arguments for good cause are that "all but three of the parties had agreed to a six-month extension of discovery" and "no party would be prejudiced by an extension of the deadline to complete discovery." ECF 401 at 6. Neither of these claims are evidence of good cause and the second is false. "[A]bsent good cause, defendant's consent [to a motion to extend a discovery period] is irrelevant." *Rupp v. City of Buffalo*, 328 F.R.D. 69, 71 (W.D.N.Y. Nov. 5, 2018). "The absence of prejudice to the non-moving party . . . does not satisfy the good cause requirement." *Id.* quoting *Shemendera v. First Niagara bank N.A.*, 288 F.R.D. 251, 253, n. 3 (W.D.N.Y. 2012) (ellipses in original); *see also* Matthew Bender, Moore's Fed. Practice, § 16.14[1][b], 16-82 (3d ed. 2018) ("The existence or degree of prejudice to the party opposing modification may supply an additional reason to deny a motion to modify a scheduling order, but it is irrelevant to the moving party's exercise of diligence and does not show good cause").

If an analysis of the prejudice imposed on non-movants demonstrates anything it is that an extension should not be granted. Response Unlimited and Victoria Hyden would be significantly prejudiced by the extension of the discovery deadline. Both parties have geared their strategy based on the existing schedule. They issued all of their discovery within the authorized timeline. *See* ECF 347 (discovery certificate for interrogatories and requests to produce by Ms. Hyden, Response Unlimited and Mr. Zodhiates (2/25/2019); ECF 391 (discovery certificate for Response Unlimited and Ms. Hyden's requests to admit (10/23/2019)).<sup>4</sup> Ms. Hyden and Response Unlimited are also preparing to file summary judgment motions on the

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<sup>4</sup> Request for admission were due four weeks after the close of the discovery period. ECF 320, ¶ 12.

November 21, 2019 deadline based on the record developed during the discovery period.

Freedom Decl. ¶ 6. Should the discovery period be extended, the summary judgment motions already drafted based on the record as it exists today will have been largely wasted work.

#### IV. PLAINTIFFS CANNOT ESTABLISH EXCUSABLE NEGLIGENCE.

As explained above, Plaintiffs' deadline to disclose expert witnesses was June 10, 2019. Plaintiffs now seek to extend that deadline five months after its expiration. When a party fails to perform an act within the allotted time and failed to make a motion before the deadline to extend that time, the Court may grant an extension of time only upon a showing of excusable neglect. Fed. R. Civ. P. 6(b)(1); *see also* L.R. 26(a)(7) ("Absent exceptional circumstances, requests must be made before the discovery deadline expires"). Plaintiffs have not even attempted to satisfy this lofty standard. *See generally*, ECF 401. For this reason alone, Plaintiffs' motion to extend the discovery period, including the expert disclosure deadline, should be denied.

#### V. THE COURT SHOULD STAY THE SUMMARY JUDGMENT DEADLINE PENDING THE RESOLUTION OF THIS ISSUE. DEFENDANTS ZODHIATES, RESPONSE UNLIMITED AND HYDEN WILL FILE A SEPARATE MOTION SEEKING THIS RELIEF.

As stated previously, Defendants Hyden and Response Unlimited are prepared to file summary judgment papers by the November 21, 2019 deadline. Freedom Decl. ¶ 6. However, were they to file their motions in compliance with this deadline and the Court then issue an order extending the discovery period, Ms. Hyden and Response Unlimited would be subject to the additional prejudice of being cornered into giving Plaintiffs a roadmap to the remainder of discovery. The Court should not allow this unfair advantage. Ms. Hyden and Response Unlimited request that the Court stay the summary judgment deadline until two weeks after the Court issues its decision on Plaintiffs' motion (ECF 401).

Dated: Burlington, Vermont  
November 11, 2019

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DECLARATION OF MATTHEW D. FREEDOM

I, Matthew D. Freedom, declare under penalty of perjury that the following is true and correct:

1. I am a paralegal at Gravel & Shea PC and I make this declaration based on my personal knowledge.

2. Plaintiffs have access to the trial transcripts and exhibits for both criminal trials as well as to discovery produced by Response Unlimited, Inc., Philip Zodhiates, and Victoria Hyden in the criminal and civil proceedings.

3. Plaintiffs’ first complaint regarding Response Unlimited, Inc., Philip Zodhiates, and Victoria Hyden’s production came in a letter to their counsel dated October 28, 2019.

4. In the 13 months since discovery reopened, Plaintiffs have conducted no depositions, issued no interrogatories or requests to admit, disclosed no experts and issued only a single set of requests to produce to the defendants.

5. Plaintiffs disclosed four expert reports on November 1, 2019. Attorney Tara Devine’s report is titled “REPORT ON FAMILY COURT PROCEEDINGS INVOLVING ISABELLA MILLER-JENKINS.” Attorney Patricia Apy’s “Report Regarding the Status of

Obstacles to Recovery of a Child Wrongfully Removed or Retained from Their Habitual Residence in Nicaragua With Particular Attention to the Application of the Hague Convention on the Civil Aspects of International Child Abduction.” Professor John Maluccio’s “Report on Education, Health and Economic Conditions in Nicaragua.” Dr. Sharon Lamb’s “Report on Potential Consequences of Abduction & Separation in the case of Isabella Miller-Jenkins.”

6. Since the discovery period closed, Gravel & Shea PC has been preparing summary judgment motions on behalf of Response Unlimited, Inc. and Victoria Hyden. These motions are based on the factual record as presently constituted and are nearly complete. Response Unlimited, Inc. and Victoria Hyden intend to file their summary judgment motions on November 21, 2019, unless the Court stays that deadline.

Executed this 11<sup>th</sup> day of November 2019 in Burlington, Vermont.



Matthew D. Freedom