

**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' MOTION TO CLARIFY FINAL DISCOVERY
SCHEDULE/ORDER REGARDING THE NUMBER OF
DEPOSITIONS PLAINTIFFS ARE PERMITTED**

Plaintiffs Janet Jenkins and Isabella Miller-Jenkins, through undersigned counsel, move for the Court to clarify the Final Discovery Schedule/Order, ECF 425, to specify that Plaintiffs are allowed to take the deposition of each Defendant as well as ten nonparty depositions. In the alternative, pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiffs move for leave to take the deposition of each Defendant as well as ten nonparty depositions.

PROCEDURAL BACKGROUND

On May 3, 2018, the parties in this case held a conference pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. Clemons Decl. ¶ 2. At that conference, Plaintiffs understood Defendants to agree that each party should be allowed to take the deposition of every other party. *Id.* ¶ 3. Plaintiffs and Defendants disagreed about the number of nonparty depositions that Plaintiffs should be allowed to take. Plaintiffs believed that they should be allowed to take twenty nonparty depositions, while Defendants wanted to limit Plaintiffs to ten nonparty depositions. *Id.* ¶ 4.

Following the Rule 26(f) conference, Plaintiffs circulated a proposed Discovery Schedule/Order to Defendants via email that reflected this understanding of the agreement regarding party depositions and the disagreement regarding the number of nonparty depositions. *Id.* ¶ 5; *see also* Pls’ Proposed Disc. Schedule/Order ¶ 8, ECF 320, (“Plaintiffs collectively may notice depositions of up to [10 (defendants’ proposal) 20 (plaintiffs’ proposal)] non-party witnesses . . . Each party may take the deposition of any other party” (brackets in original)). Defendants reviewed and made edits to the proposed Discovery Schedule/Order, but none of them objected to or corrected this language. Clemons Decl., ¶ 6.

Plaintiffs filed the proposed Discovery Schedule/Order on August 16, 2018. Pls’ Proposed Disc. Schedule/Order, ECF 320. As filed, the proposed Discovery Schedule/Order reflected Defendants’ edits and included the language memorializing the agreement regarding party depositions and the disagreement regarding the number of nonparty depositions. *See id.* ¶ 8. Once again, no Defendant objected to or attempted to correct this language.

On August 29, 2018, the Court approved and ordered Plaintiffs’ proposed Discovery Schedule/Order. Order, ECF 329. The Court’s order did not explicitly resolve the disagreement regarding the limit of Plaintiffs’ nonparty depositions. Plaintiffs—relying on Defendants’ stated positions at the Rule 26(f) conference and the statement in the adopted Discovery Schedule/Order that “[t]he parties agree to cooperate and consider in good faith any request for additional depositions of fact witnesses”—interpreted the Court’s order as permitting them to take each Defendant’s deposition as well as those of *at least* ten nonparty witnesses. Pls’ Proposed Disc. Schedule/Order ¶ 8, ECF 320.

During a phone conference to discuss ongoing discovery issues on November 25, 2019, counsel for Defendant Liberty Counsel, Inc., informed Plaintiffs’ counsel for the first time of

Liberty Counsel’s position that Plaintiffs were limited to ten depositions *total*—that is, including both Defendants and nonparty witnesses—pursuant to Rule 30(a)(2)(i) of the Federal Rules of Civil Procedure. Clemons Decl. ¶ 7. After this call, Plaintiffs’ counsel reached out to other defense counsel, who confirmed that they shared Liberty Counsel’s position despite their earlier positions at the Rule 26(f) conference. *Id.* ¶ 8.

Later on November 25, 2019, before Plaintiffs had the opportunity to draw the Court’s attention to this matter, the Court issued a Final Discovery Schedule/Order. Final Disc. Schedule/Order, ECF 425. The final order does not address the number of depositions that Plaintiffs are allowed to take but states that “[a]ll other provisions of the discovery schedule/order remain unchanged.” Final Discovery Schedule/Order, at 2, ECF 425.

ARGUMENT

I. Defendants Stipulated to Allow Plaintiffs to Take the Deposition of Each Defendant Plus Ten Non-Party Depositions.

At the Rule 26(f) conference on May 3, 2018, Plaintiffs understood Defendants as agreeing to allow Plaintiffs to take the deposition of each Defendant plus *at least* ten nonparty depositions. The only dispute between Plaintiffs and Defendants was whether Plaintiffs should be allowed to take ten or twenty nonparty depositions. That understanding was confirmed by Defendants’ subsequent silence regarding the language in paragraph 8 of Plaintiffs’ proposed Discovery Schedule/Order, which dealt with the number of nonparty depositions in a separate sentence from the one addressing party depositions. Pls’ Proposed Disc. Schedule/Order ¶ 8, ECF 320.

No Defendant objected to this characterization during their edits of the proposed Discovery Schedule/Order or between its filing and adoption by the Court. And although the Court’s order did not choose between the ten or twenty figure for nonparty depositions, the

Court's omission does not change the fact that Defendants agreed to permit Plaintiffs to take the deposition of each Defendant *plus* ten nonparty depositions.

Defendants' current position—that Plaintiffs are limited to the ten total depositions permitted by default in Rule 30(a)(2)(i) of the Federal Rules of Civil Procedure—is inconsistent with that agreement. Indeed, before November 25, 2019, no Defendant suggested that Plaintiffs should be allowed to take fewer than the deposition of each Defendant plus ten nonparty depositions. Moreover, Defendants have offered no substantive reason why they suddenly believe ten total depositions to be sufficient for Plaintiffs despite Defendants' earlier position to the contrary.

This dispute smacks strongly of Defendants' recent and equally sudden insistence that discovery closed on October 10, 2019, despite proposing themselves that discovery be extended to March 2, 2020. In both situations, Defendants attempted to exploit technical ambiguities in the Court's orders to limit unfairly Plaintiffs' ability to try this case. Such procedural chicanery ultimately accomplishes little more than wasting Plaintiffs' and the Court's time. The Court should reject Defendants' latest creative endeavor and clarify that Plaintiffs are entitled to take the deposition of each Defendant plus ten nonparty depositions.

II. Plaintiffs Should Be Allowed to Take the Deposition of Each Defendant Plus Ten Non-Party Depositions.

Even if Defendants had not already stipulated to permit Plaintiffs to take the depositions of each Defendant plus those of ten nonparties, Plaintiffs should be permitted to do so.

Rule 30(a)(2)(A)(i) of the Federal Rules of Civil Procedure specifies that courts should permit parties to take more than ten depositions when doing so would be consistent with the general standards governing discovery set forth in Rules 26(b)(1) and (2)—that is, that discovery of nonprivileged, relevant matters should be permitted “proportional to the needs of the case

considering the importance of the issues, the amount in controversy, relative access to information, the parties' resources, the importance of the discovery to resolving the issues, and the relative burden of the expense involved versus the likely benefit." *United States v. Town of Oyster Bay*, No. 14-cv-2317, 2016 WL 11265542, at *1 (E.D.N.Y. May 10, 2016) (quoting Fed. R. Civ. P. 26(b)(1)). "[C]ounsel's judgment about how many depositions it needs is entitled to a good deal of deference." *Id.* (internal alterations and quotation marks omitted).

A brief consideration of these factors is sufficient to demonstrate why ten total depositions would be woefully inadequate for Plaintiffs to prove their case. As the Court is aware, this case involves a broad conspiracy involving many different individuals across multiple states and countries. The complexity of the facts of this case is illustrated by the two multi-day criminal trials arising out of this conspiracy, during which the prosecution called more than thirty distinct witnesses. And each of those criminal trials involved only a single defendant. There are nine named Defendants in this civil case—meaning that, even if Lisa Miller remains a fugitive, ten total depositions would limit Plaintiffs to *two* nonparty depositions.

Moreover, Plaintiffs have identified at least nine nonparties that are highly likely to possess information vital to Plaintiffs' case. A brief description of each demonstrates why Plaintiff should be allowed to depose ten nonparties in addition to each Defendant:

- Jolene Booth was a friend, confidant, and colleague of Defendant Victoria Hyden during the time that Defendant Philip Zodiates sent correspondence from Defendant Lisa Miller to Defendant Rena Lindevaldsen through Hyden via her Liberty University email.

- Suzanne Cline alerted Plaintiffs' counsel to Lisa Miller and Isabella Miller-Jenkins's whereabouts in June 2010. She is related to Jolene Booth and learned about the conspiracy via Booth.
- William Sidebottom was the recipient of the email from Zodiates offering Lisa Miller a "personal option" if she lost custody of Isabella. He was employed by Liberty Counsel at the time but has also been employed by Defendant Response Unlimited, Inc. Sidebottom testified at the criminal trials of Zodiates and Defendant Kenneth Miller.
- Andrew Yoder was told by Lisa Miller that Liberty Counsel told her that it was "in her best interest to disappear." Yoder testified at the criminal trials of Zodiates and Kenneth Miller.
- Debbie Thurman was a friend and confidant of Lisa Miller, Lindevaldsen, and Defendant Linda Wall during Lisa Miller's time in Lynchburg, Virginia. Thurman ran the "Protect Isabella Coalition" with Wall and managed the *Only One Mommy* Facebook page with Lindevaldsen. Thurman testified by stipulation at the criminal trial of Kenneth Miller.
- Mathew Staver is the president of Liberty Counsel. Together with Lindevaldsen, he represented Lisa Miller during the custody battles in Vermont and Virginia. He also co-taught a class with Lindevaldsen at Liberty University School of Law during which Lisa Miller's case was used as an example of civil disobedience.
- Jessica Fehr lived with Lisa Miller at the home of Defendant Timothy Miller during Lisa's and Isabella's early days in Managua, Nicaragua. Lisa used Fehr's

email address to communicate with individuals in the United States. Fehr testified at the criminal trial of Zodiates.

- Janet Stasulli was a friend and confidant of Lisa Miller, Lindevaldsen, and Wall during Lisa Miller's time in Lynchburg, Virginia. Stasulli shared a cell phone plan with Lisa Miller and Wall. She held a cookout at her home that Wall, Lisa Miller, and Isabella attended on September 20, 2009, the day Zodiates picked up Lisa and Isabella from a Walmart and the day before he drove them to Canada. Stasulli testified at the criminal trials of both Zodiates and Kenneth Miller.
- Sandy Sturgill was a friend and confidant of Lisa Miller, Lindevaldsen, and Wall during Lisa Miller's time in Lynchburg, Virginia. Sturgill overheard Wall and Lisa Miller discussing the kidnapping of Isabella in June 2008.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion to clarify the Final Discovery Schedule/Order, ECF 425, or Plaintiffs' alternative motion for leave to take the deposition of each Defendant as well as ten nonparty depositions, and enter Plaintiffs' proposed order specifying that Plaintiffs are permitted to take the deposition of each Defendant plus ten nonparty depositions.

December 10, 2019

Respectfully submitted.

/s/ Frank H. Langrock

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record through the Court's CM/ECF system:

Brooks G. McArthur
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December 10, 2019

/s/ J. Tyler Clemons _____
J. Tyler Clemons
Counsel for Plaintiffs

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v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**DECLARATION OF J. TYLER CLEMONS
IN SUPPORT OF PLAINTIFFS' MOTION TO CLARIFY FINAL
DISCOVERY SCHEDULE/ORDER REGARDING NUMBER
OF DEPOSITIONS PLAINTIFFS ARE PERMITTED**

I, J. Tyler Clemons, declare under penalty of perjury that the following is true and correct:

1. My name is J. Tyler Clemons and I am counsel for Plaintiffs in the above-captioned action.
2. The parties held a conference pursuant to Rule 26(f) of the Federal Rules for Civil Procedure on May 3, 2018, in Burlington, Vermont.
3. At that conference, Plaintiffs understood Defendants to agree that each party should be allowed to take the deposition of every other party.
4. Plaintiffs and Defendants disagreed about the number of nonparty depositions that Plaintiffs should be allowed to take. Plaintiffs believed that they should be allowed to take twenty nonparty depositions, while Defendants wanted to limit Plaintiffs to ten nonparty depositions.

5. Following the Rule 26(f) conference, Plaintiffs circulated a proposed Discovery Schedule/Order to Defendants via email that reflected this understanding of the agreement regarding party depositions and the disagreement regarding the number of nonparty depositions.

6. Defendants reviewed and made edits to the proposed Discovery Schedule/Order, but none of them objected to or corrected the language regarding party depositions or nonparty depositions.

7. On November 25, 2019, I had a phone conference with Horatio Mihet, counsel for Defendants Liberty Counsel, Inc., and Rena Lindevaldsen (Liberty Counsel Defendants). During this conference, Mr. Mihet informed me for the first time of his clients' position that Plaintiffs were limited to ten depositions *total*—that is, including both Defendants and nonparty witnesses—pursuant to Rule 30(a)(2)(i) of the Federal Rules of Civil Procedure.

8. Following this phone conference, I reached out to counsel for the other Defendants in this case. They confirmed that they share the Liberty Counsel Defendants' position that Plaintiffs are limited to ten total depositions in this case.

9. I make this Declaration on my own knowledge, information, and belief.

DATED at New Orleans in the Parish of Orleans and State of Louisiana this 10th day of December, 2019.

A handwritten signature in black ink, reading "Tyler Clemons", written over a horizontal line.

J. Tyler Clemons