

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

\*\*\*\*\*

JANET JENKINS, for herself and as  
next friend of ISABELLA MILLER-  
JENKINS, A/K/A ISABELLA  
MILLER,

Plaintiffs

v.

Civil No. 2:12-cv-184-wks

KENNETH L. MILLER, LISA ANN  
MILLER, F/K/A LISA MILLER-  
JENKINS, TIMOTHY D. MILLER,  
RESPONSE UNLIMITED, INC., for itself  
and as an agent of LIBERTY COUNSEL,  
LLC, PHILIP ZODHIATES, individually  
and as agent for RESPONSE UNLIMITED,  
INC., VICTORIA HYDEN, f/k/a  
VICTORIA ZODHIATES, individually  
and as agent for both RESPONSE  
UNLIMITED, INC., LINDA M. WALL,  
MATHEW D. STAVER, individually and  
as agent for LIBERTY COUNSEL, LLC,  
RENA M. LINDEVALDSEN, individually  
and as agent for LIBERTY COUNSEL,  
LLC, and LIBERTY COUNSEL, LLC,

Defendants

\*\*\*\*\*

**DEFENDANT TIMOTHY MILLER’S OPPOSITION TO PLAINTIFFS’  
MOTION TO COMPEL DEFENDANT TIMOTHY MILLER**

NOW COMES Defendant, Timothy Miller (“Timo”), by and through undersigned  
counsel, and hereby objects to Plaintiffs’ Motion to Compel [Doc. 473]. In support of his  
Opposition, Defendant states as follows:

## FACTS

The Plaintiffs allege that Timo Miller aided and abetted Defendant Lisa Miller to leave the United States in September 2009 and come live in the Beachy Amish Mennonite Community in Nicaragua where Timo served as the pastor of the Church. *See* Second Amended Complaint, Doc. 238, ¶¶ 38, 65. Until he was arrested in 2016, Timo had lived with his family in Nicaragua for years. Doc. 341.4, p. 8-10. As soon as he hired counsel in 2018, Timo filed a motion to dismiss for lack of personal jurisdiction and failure to perfect service. *See* October 1, 2018 Motion to Dismiss at Doc. 337. This Court denied the Motion on October 30, 2019. Doc. 396. A motion for reconsideration of whether this Court has jurisdiction was filed on November 8, 2019 and still remains pending. *See* Doc. 403. The Court has, in this case, dismissed other parties on reconsideration. Doc. 328.

On the same day that the Motion for Reconsideration was filed (November 8, 2019), undersigned counsel spoke with Plaintiffs' counsel regarding the discovery requests which had been emailed nine days earlier on October 30, 2019. *See* Doc. 473-4, ¶ 5. Counsel discussed that, given the overbroad and burdensome nature of the extensive requests, the irrelevance of many of the requests and the fact that the information that the Plaintiffs really wanted was in the hands of the federal prosecutor, a request directly to the government would be more efficient. *See* Doc. 473-2, p. 14. It was acknowledged that even if Timo was dismissed, there may be some limited and focused discovery requests that Timo would have to answer but that given the likely Fifth Amendment privilege, all of the relevant documents sought by Plaintiffs would be able to be obtained from the Government. Counsel agreed that Plaintiffs' counsel would reach out to the prosecutor or file a Freedom of Information Act ("FOIA") action for the requested documents. Doc. 473.2, p. 14.

On December 2, 2019, Plaintiffs' counsel emailed asking that Timo request that the office of his former criminal defense attorney, Judge Conrad, see what documents they had in their office prior to Plaintiffs filing a FOIA request. *See* Doc. 473.2, p. 13. Eleven days later, on December 13, 2019, Plaintiffs filed a motion for summary judgment, alleging that "there can be no genuine dispute as to any material fact regarding Zodhates's and Timothy Miller's liability on Count 1, and Jenkins is entitled to judgment as a matter of law on Count 1 against them." Doc. 439.27, p. 10. Timo objected to this motion for summary judgment and the motion remains pending.

On January 9, 2020, Timo's counsel called Plaintiffs' counsel but did not receive a call back. Doc. 473.2, p. 10. On January 24, 2020, Plaintiffs' counsel requested a telephone call to meet and confer, which Timo's counsel promptly agreed to within minutes of the request. Doc. 473.2, p. 10-11. During this meet and confer, Timo's counsel explained that, due to both the pending motion to dismiss as well as the pending motion for summary judgment, the overly burdensome discovery requests were disproportional to the needs of the case. Doc. 473.3. In particular, the Second Circuit has held that the district court was correct to deny a party's motion to compel discovery responses while that same party has a pending motion for summary judgment asserting that there are no facts in dispute. *Hendricks v. Boltja*, 20 Fed. Appx. 34, 36 (2d Cir. 2001). Nevertheless, Timo's counsel indicated on the call that he would assist in obtaining a narrower set of documents—*i.e.* non-privileged discovery documents—directly from the government. In a February 7, 2020 communication, Timo's counsel once again reiterated that the desired documents could be obtained from the government and, where both parties agreed that the requests "are overly burdensome and could be substantially narrowed," that

Plaintiffs should submit narrowed requests after obtaining the criminal discovery and obtaining a ruling on the pending motion to dismiss and motion for summary judgment. Doc. 473.2, p. 6.

On February 24, 2020, plaintiffs counsel once again demanded that Timo sign an authorization to provide the plaintiffs with any and all records that the government might have on Timo, including irrelevant tax records, social security records etc., instead of requesting the narrower subset of non-privileged criminal discovery relevant to this case. Doc. 473.2, p. 3-4. Timo's counsel offered a compromise that Plaintiffs could submit new more narrow discovery requests or, in the alternative, Timo could provide the necessary but narrow authorization to obtain the documents directly from the government. Doc. 473.2, p. 3. The Plaintiffs chose the second alternative of just obtaining the documents from the government. Doc. 473.2, p. 1-3. The Plaintiffs sent the requested authorization on February 26, 2020 at 9:23 AM and Timo signed the authorization later that morning. Doc. 473.2, p. 1. Nevertheless, despite the significant progress made in resolving this discovery dispute, the Plaintiffs still filed a Motion to Compel fewer than 6 hours later, at 2:58 PM. *See* Doc. 473.

The discovery requests at issue are a voluminous list of sixty-nine (69) Requests for Production, which are exceedingly broad and irrelevant. These include demands for Timo (who served as an Amish pastor in Nicaragua for years and years) to produce: "37. All documents and communications concerning Nicaragua" as well as "38. All documents and communications concerning the Beachy Amish Mennonite" and even all communications with Timo's mother-in-law concerning "the Beachy Amish Mennonites; or Nicaragua." Doc. 473.1. Despite the clear irrelevance and unduly burdensome nature of these requests, Plaintiffs have refused to narrow the requests.

The parties are currently negotiating a revised discovery plan, which will set new deadlines for discovery consistent with the current status of this action.<sup>1</sup>

### ARGUMENT

**I. Timo has, in good faith, engaged in discovery and thus, Plaintiffs’ Motion should be denied. Plaintiffs’ unwillingness to resolve disputes in good faith—and their proclivity for involving this Court in disputes which can be resolved amongst the parties—do not change that conclusion.**

*First*, Plaintiffs have, from the outset of their discovery efforts, sought to overwhelm and intimidate Timo with their voluminous, overbroad, unduly burdensome, premature, and often vague Requests for Production and, despite his sound legal bases for objecting to many of the Requests, Timo has, in good faith, sought to resolve the disputes. This Court has already ruled that identical Requests propounded to other defendants are unduly burdensome. *See, e.g.*, ECF 395, at 7-8. In that Order, this Court discussed how Requests such as “All documents . . . concerning Plaintiff Janet Jenkins” would likely create “an undue burden on Defendants.” *Id.* This Court so decided because such requests “would inevitably manifest a hefty sum of materials, many of which would likely be irrelevant . . .” *Id.* Nevertheless, the Plaintiffs have made the same requests upon Timo that this Court has already rejected as unduly burdensome against another defendant. *See, e.g.* Doc. 473.1, request 4-6 and Doc 395, p. 7-8.<sup>2</sup>

The majority of Plaintiffs’ Requests appear to be attempts to overwhelm and intimate Timo in this way. Perhaps most shocking are Requests 37 and 38. They ask for Timo, a pastor who lived in Nicaragua for decades, to produce “All documents and communications concerning Nicaragua” and “All documents and communications concerning the Beachy Amish Mennonite

---

<sup>1</sup> Because of this, the discovery delays thus far have not impacted any discovery deadlines, hearing, or trial.

<sup>2</sup> It is worth noting that Timo has fewer resources than the defendant against whom the identical request was deemed unduly burdensome.

Church in Nicaragua.” *Id.* Asking for all documents and communications concerning an entire country and an entire religious organization is not only outrageous, it is a clear attempt to overwhelm and intimate a party with few resources.<sup>3</sup> At the very least, these Requests, and the legal bases for objecting to them, highlight the validity of Timo’s opposition to them, even in light of his efforts to resolve the disputes in good faith, without court action.

The overbroad, vague, premature, and unduly burdensome nature of Plaintiffs’ Requests are not the only sound legal bases Timo has for objecting to them. Many of the Requests also invoke Timo’s Fifth Amendment right against self-incrimination. Plaintiffs themselves have alleged that documents related to criminal proceedings and this civil proceeding are identical. Doc. 439. Thus, disclosing any potentially incriminating evidence could potentially expose Timo to future criminal charges. Of course, the privilege against self-incrimination may be asserted in civil proceedings in cases where a party fears that “complying with discovery would expose him to a risk of self-incrimination.” *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1086 (5th Cir. 1979); *see also United States v. Of 47 Bottles*, 26 F.R.D. 4 (D.C. N.J. 1960), *aff’d*, 264 F.2d 666 (3d Cir. 1959); *Hope v. Burns*, 6 F.R.D. 556 (D.C. Ky. 1947); *Bowles v. Trowbridge*, 60 F.Supp. 48 (D.C. Cal. 1945); *Zonver v. Superior Court*, 270 Cal. App. 2d 613, 76 Cal. Rptr. 10 (1969); *United States v. Fishman*, 15 F.R.D. 151 (D.C. N.Y. 1953). The privilege can be invoked even if the information sought may merely furnish “a link in the chain” of evidence needed to prosecute for a crime and even if the possibility of future criminal prosecution is improbable or even a “fanciful possibility.” *See Malloy v. Hogan*, 378 U.S. 1, 11–12 (1964); *De Vita v. Sills*, 422 F.2d 1172, 1178 (3d Cir. 1970); *In re Folding Carton Antitrust*

---

<sup>3</sup> As is evident from the examples above, and a cursory glance at the totality of the Requests, many of them are vague as well. Plaintiffs attempt to seek an unspecified scope of information for unspecified (or exceedingly long) periods of time.

*Litigation*, 609 F.2d 867, 871 (7th Cir. 1979); *In re Master Key Litigation*, 507 F.2d 292 (9th Cir. 1974). Timo invoked this right in discussions with Plaintiffs and yet still attempted, in good faith, to work around the privilege and seek a route toward providing Plaintiffs with non-privileged discovery, without necessitating court involvement.

Finally, as the Second Circuit has recognized, a Court need not grant a party's motion to compel discovery of facts when that very party has filed a motion for summary judgment asserting that there are no facts in dispute and no facts need to be discovered in order to obtain liability. Plaintiffs' attempt to circumvent the Second Circuit's ruling in *Hendricks* ignores the court's clear logic as to why a motion for summary judgment filed by Plaintiffs themselves would stall discovery. The court stated:

Nor did the district court err when it granted summary judgment without compelling defendants to furnish the discovery Hendricks requested. Hendricks himself moved for summary judgment while his motion to compel was pending, thus indicating that there were no issues of fact to be resolved. And, he has not suggested what facts obtainable through the discovery process might have altered the judgment.

*Hendricks v. Boltja*, 20 Fed. Appx. 34, 36 (2d Cir. 2001). Because “[p]arties may obtain discovery” only of nonprivileged matters relevant to the claims and proportional to the needs of the case, *see* Fed. R. Civ. P. 26(b)(1), Plaintiffs have effectively asserted that they need no further discovery<sup>4</sup> or, at the very least, have indicated that the nature and proportionality of discovery needed will change dramatically should their motion for summary judgment be granted.

*Second*, despite the above, and despite Plaintiffs' obstinate tactics, Timo has consistently sought to narrow and resolve discovery disputes in good faith and in an attempt to avoid

---

<sup>4</sup> Count 1 and 2 allege the same damages arising from the same common nucleus of facts. If the Court were to find Timo liable on Count 1, the Vermont claim, there would be no need to analyze the constitutional claim in Count 2 and Count 2 would be moot as it pertains to Timo.

unnecessary litigation. The Federal Rules of Civil Procedure clearly state a desire for parties to settle discovery disputes without court action. *See, e.g.*, Fed. R. Civ. P. 37(a)(1). Given Plaintiffs' proclivity for opposing motions to stay—*see, e.g.*, ECF 459; Pls.' Motion to Compel, at 5, n. 3—and their argument against a hypothetical motion to stay within the instant Motion, filing a motion to stay would only further prolong this litigation, increase expenses for all involved parties, and undermine the interests of the Rules of Civil Procedure, this Court, and the parties to settle discovery disputes without court action. Timo has produced initial disclosures. He has remained in regular contact with Plaintiffs' counsel. He has negotiated in good faith. In the days leading up to the instant Motion, he agreed to sign an authorization—which he was not required to do—that would allow Plaintiffs access to a plethora of relevant information, most, if not all, of which would have addressed Plaintiffs' discovery requests.<sup>5</sup> Timo has attempted in good faith to settle these disputes without court intervention.

*Third*, Plaintiffs have demonstrated a bad faith eagerness to engage in unnecessary litigation, of which the instant Motion is a prime example, whereas Timo has sought to avoid burdening this Court and the parties with unnecessary and costly litigation, including what would have surely been a disputed motion to stay discovery. Despite the obvious progress in resolving the parties' discovery disputes without court action—indeed, within twenty-four hours of the parties having reached substantial agreement toward the production of discovery—Plaintiffs filed the instant Motion. It is Plaintiffs' attempts to increase litigation costs, not any lack of good faith on Timo's part, that has brought about this Motion and prolonged these discovery disputes. For

---

<sup>5</sup> This Court has already looked favorably, in this case, upon the affirmative action of a party to assist another party with independent discovery. In another defendant's motion to compel discovery from Plaintiffs, this Court approvingly stated: "Plaintiff has already agreed to produce responsive, non-privileged documents that have not been previously filed or produced in this or other proceedings, and which are not publicly or equally available to the RUL Defendants." ECF 394, at 16 (quotations omitted). Within 24 hours of Timo agreeing to do just that, however, Plaintiffs filed the instant unnecessary Motion.

this reason, and those above, this Court should deny Plaintiffs' Motion to Compel and, after Plaintiffs have received the criminal discovery and the Court has issued orders on the pending Motions to Dismiss and Motion for Summary Judgment, Plaintiffs can decide if they indeed need any more discovery from Timo, and if so propound substantially narrower requests. In the alternative, this Court should defer ruling on this Motion until after issuing orders on the pending Motion to Dismiss and Motion for Summary Judgment and after Plaintiffs have received the trove of discovery that Timo—in a good-faith effort to assist Plaintiffs in acquiring information from a third-party source by agreeing to sign an authorization that he was under no duty to sign—has agreed to facilitate.

**II. Even if this Court grants Plaintiffs' Motion, Plaintiffs are not entitled to their expenses incurred in bringing this Motion.**

Even if this Court grants Plaintiffs' Motion on the technical arguments they make, Plaintiffs are not entitled to the expenses incurred in bringing the unnecessary Motion, as—in addition to the unwarranted tactics noted above, some of which conducted in bad faith—Timo did not object to the discovery requests or this Motion in bad faith or in frivolity. Rather, Timo's attempts at narrowing and resolving the parties' discovery disputes without involving this Court reflect not only a good faith effort to avoid unnecessary litigation and expenses, but also the nature of the adversarial process in which the parties are engaged. Further, as detailed above, Timo's objections are grounded in law, further emphasizing the justified nature of Timo's position and highlighting the unjust nature of any award of expenses. Accordingly, Plaintiffs' request for expenses and attorney's fees should be denied.

DATED this 9<sup>th</sup> day of March, 2020.

Respectfully submitted,  
Timothy D. Miller  
By his attorneys,

WADLEIGH, STARR & PETERS, P.L.L.C.

Dated: March 9, 2020

By /S/ Michael J. Tierney  
Michael J. Tierney – VT Bar No. 5275

95 Market Street  
Manchester, NH 03101  
(603) 669-4140  
[mtierney@wadleighlaw.com](mailto:mtierney@wadleighlaw.com)

CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date DEFENDANT TIMOTHY MILLER'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DEFENDANT TIMOTHY MILLER 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:

David C. Dinielli, Esq.  
Diego A. Soto, Esq.  
Southern Poverty Law Center  
400 Washington Avenue  
Montgomery, Alabama 36104  
[David.dinielli@splcenter.org](mailto:David.dinielli@splcenter.org)  
[Diego.soto@splcenter.org](mailto:Diego.soto@splcenter.org)  
[CMECFLGBT@splcenter.org](mailto:CMECFLGBT@splcenter.org)  
(334) 956-8200

Frank Langrock, Esq.  
Langrock, Sperry & Wool, LLP  
PO Drawer 351, 111 S. Pleasant Street  
Middlebury, Vermont 05753  
[flangrock@langrock.com](mailto:flangrock@langrock.com)  
(802) 388-6356

Sara R. Star, Esq.  
Sarah Star, Esq., P.C.  
PO Box 106  
Middlebury, Vermont 05753  
[srs@sarahstarlaw.com](mailto:srs@sarahstarlaw.com)  
(802) 385-1023

J. Tyler Clemons, Esq.  
SOUTHERN POVERTY LAW CENTER  
201 St. Charles Avenue, Suite 2000  
New Orleans, Louisiana 70170  
[Tyler.clemons@splcenter.org](mailto:Tyler.clemons@splcenter.org)  
(504) 526-1530

Brook G. McArthur, Esq.  
Jarvis, McArthur & Williams, LLC  
95 St. Paul Street, Suite 2E  
PO Box 902  
Burlington, Vermont 05402-0902  
[bmcArthur@jarvismcarthur.com](mailto:bmcArthur@jarvismcarthur.com)  
(802) 658-9411  
Counsel for Defendant, Kenneth L. Miller

Norman C. Smith, Esq.  
76 Lincoln Street  
PO Box 24  
Essex Junction, Vermont 05453  
[Nc.smith@myfairpoint.net](mailto:Nc.smith@myfairpoint.net)  
(802) 288-9088  
Counsel for Defendant, Linda M. Wall

Anthony R. Duprey, Esq.  
Neuse, Duprey & Putnam, PC  
1 Cross Street  
Middlebury, Vermont 05753-1455  
[anthony@ndp-law.com](mailto:anthony@ndp-law.com)  
(802) 388-7966  
Counsel for Defendants, Liberty Counsel and Rena M. Lindevaldsen

Horatio G. Mihet, Esq.  
Daniel J. Schmid, Esq.  
Roger K. Gannam, Esq.  
LIBERTY COUNSEL  
PO Box 540774  
Orlando, Florida 32854  
[hmihet@lc.org](mailto:hmihet@lc.org)  
[dschmid@lc.org](mailto:dschmid@lc.org)  
[rgannam@lc.org](mailto:rgannam@lc.org)  
(407) 875-1776  
Counsel for Defendants, Liberty Counsel and Rena M. Lindevaldsen

Adam S. Hochschild, Esq.  
Hochschild Law Firm, LLC  
[adam@hochschildlaw.com](mailto:adam@hochschildlaw.com)

And will be sent via first class mail to the following individuals:

Philip Zodhiates  
#18649-084  
ASHLAND  
Federal Correctional Institution  
Inmate Mail/Parcels  
P.O. Box 6001  
Ashland, KY 41105-6001

Victoria Hyden  
1212 Saint Cloud Avenue  
Lynchburg, Virginia 24502

Response Unlimited, Inc.  
c/o William Zodhiates  
274 Shalom Road  
Waynesboro, Virginia 22980

/S/ Michael J. Tierney  
Michael J. Tierney