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' REPLY TO
DEFENDANT TIMOTHY MILLER'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO COMPEL DEFENDANT TIMOTHY MILLER

This discovery dispute is straightforward, which makes the Court's needed intervention unfortunate: Defendant refuses to serve written responses and objections to each of Plaintiffs' requests for production, as required by Rule 34(b)(2) of the Federal Rules of Civil Procedure, so that the parties may in good faith meet and confer to resolve any disputes.

Plaintiffs seek from Defendant Timothy Miller documents that are relevant to Plaintiffs' claims against any of the nine defendants in this case. *See* Pls.' First Set of Reqs. for Produc., Ex. 1 to Mot. to Pls.' Mot. to Compel Def. Timothy Miller ("Mot."), ECF 473-1. Plaintiffs and Defendant agreed that Plaintiffs would seek from the government the discovery he exchanged with the government in his related criminal case, which should contain many responsive documents. *See* Emails 1–14, Ex. 2 to Mot., ECF 473-2; Letter 3–4, Ex. 3 to Mot., ECF 473-3. After 84 days of Plaintiffs repeatedly requesting that Defendant sign an authorization for the government to release that criminal discovery to Plaintiffs, Defendant finally objected to the broad scope of the government's standard form. *Compare* Emails 13 (Plaintiffs first requested Defendant's signed authorization on December 2, 2019), *with* Emails 3 (Defendant objected for

the first time to the scope of the form on February 24, 2020).[1] Only then were Plaintiffs able to negotiate a narrower authorization, *see id.* at 1–3, which Defendant signed and delivered to Plaintiffs on March 2, 2020.[2] Plaintiffs immediately submitted a Freedom of Information Act request for the criminal discovery and are awaiting the government's response due March 30, 2020. *See* 5 U.S.C. § 552(a)(6)(A) (requiring a response "within 20 days (excepting Saturdays, Sundays, and legal public holidays)"). This motion has nothing to do with the criminal discovery.

Defendant objects to searching for and producing the remainder of the responsive documents within his possession, custody, or control—that is, responsive documents that he did *not* produce to or receive from the government in his criminal case. He complains that he would object to producing those documents on the basis of his Fifth Amendment privilege against compulsory self-incrimination. *See* Letter 2; Def. Timothy Miller's Resp. in Opp'n to Pls.' Mot. to Compel ("Resp.") 6–7, ECF 475. He complains that Plaintiffs' requests are voluminous, overbroad, unduly burdensome, premature, vague, and even "attempts to overwhelm and

[1] It took 100 days for Defendant to serve initial disclosures, after Plaintiffs' repeated requests. *Compare* Emails 16 (Plaintiffs first requested Defendant's initial disclosures on October 30, 2019), *with* Emails 5–6 (Defendant served initial disclosures on February 7, 2020). *See also* Letter 2–3 (explaining why Defendant was required to, among other things, serve initial disclosures).

[2] Defendant emphasizes that he did not have to authorize the government to release the criminal discovery. *See* Resp. 8–9. If he means Plaintiffs did not need his authorization, then that is not true. Plaintiffs could not obtain the criminal discovery from the government without his written authorization. *See* Soto Decl. ¶ 7, ECF 473-4. If he means Plaintiffs could not have forced him to sign that authorization, then even if that were true, he was unwavering in his insistence that Plaintiffs obtain the criminal discovery from the government and in his refusal to search for and produce the criminal discovery himself. *See* Emails 3, 6, 14. To this day, he refuses even to say whether his criminal defense firm possesses a copy of the criminal discovery that he could request and produce. *See, e.g.*, *id.* at 3–4 (saying only that *Defendant* does not possess the criminal discovery when asked whether his criminal defense firm possesses a copy).

intim[id]ate" him. *Id.* at 5. And he complains that Plaintiffs are unwilling to resolve in good faith their disputes with him. *See id.* at 8–9.[3]

Even so, despite the vigor with which he condemns Plaintiffs' discovery of him, Defendant refuses to comply with Rule 34(b)(2) of the Federal Rules of Civil Procedure, which requires him to respond in writing to each of Plaintiffs' requests and make in writing any appropriate objection. That requirement is not merely "technical," as Defendant describes it. Resp. 9. It provides Plaintiffs with Defendant's specific reasons for objecting to each request, *see* Fed. R. Civ. P. 34(b)(2)(B), and informs Plaintiffs whether Defendant is withholding any responsive materials on the basis of those objections, *see* Fed. R. Civ. P. 34(b)(2)(C), so that Plaintiffs can productively address those objections in good-faith negotiations. After all, Defendant "bears the burden of demonstrating 'specifically how, despite the broad and liberal construction afforded the federal discovery rules, each request is'" objectionable. *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 298 F.R.D. 184, 186 (S.D.N.Y. 2014) (quoting *McKissick v. Three Deer Ass'n Ltd. P'ship*, 265 F.R.D. 55, 56–57 (D. Conn. 2010)). Written objections also must be signed, which helps ensure they are consistent with the Federal Rules of Civil Procedure, warranted by law, and not made for any improper purpose. *See* Fed. R. Civ. P. 26(g)(1).

[3] Defendant asserts that he gave Plaintiffs the option to serve narrower requests but that Plaintiffs chose not to. *See* Resp. 4 (citing Emails 3). Not so. As Defendant's email shows, Defendant offered to "discuss the proper parameters" of Plaintiffs' requests only if the Court were to deny his motion for reconsideration of his motion to dismiss and Plaintiffs' motion for partial summary judgment. Emails 3. For all the reasons set forth in Plaintiffs' motion, Defendant cannot unilaterally stay discovery against him while those motions are pending. *See* Mot. 5–6. Moreover, Plaintiffs did not understand Defendant's offer to include the discovery he exchanged with the government, but rather just to documents Defendant did *not* exchange with the government.

Instead, Defendant raised blanket objections by phone and email and some specific objections for the first time in his response to Plaintiffs' motion to compel. He characterizes this approach as a good-faith effort to resolve his disputes with Plaintiff without the Court's intervention. *See* Resp. 6–9. But the requirement to confer in good faith to resolve disputes, *see* Fed. R. Civ. P. 37(a)(1); L.R. 26(c)(1), does not excuse Defendant's failure to comply with Rule 34. Plaintiffs have no duty to act on Defendant's unsigned objections raised in these inappropriate manners. *See* Fed. R. Civ. P. 26(g)(2) ("Other parties have no duty to act on an unsigned … objection until it is signed, and the court must strike it ….").

Plaintiffs have always been willing to confer in good faith with Defendant to address his objections to their requests. But Defendant has yet to allow for good-faith negotiations to commence because he still refuses to serve written objections consistent with Rule 34. Because of his failure to comply with the Federal Rules of Civil Procedure and the Court's local rules, Defendant's complaints about the substance of Plaintiffs' discovery requests are not ripe for the Court's review.

Defendant even refuses to file a motion requesting the stay of discovery to which he believes he is entitled while his motion for reconsideration and Plaintiffs' motion for partial summary judgment remain pending. Why? Apparently because briefing *that* motion "would only further prolong this litigation" and "increase expenses for all involved parties." Resp. 8. The parties have already conferred in good faith about whether discovery against Defendant automatically is stayed pending the Court's disposition of those motions, and if not, whether it should be. *See, e.g.*, Letter (summarizing meet and confer and setting forth Plaintiffs' positions). Plaintiffs believe discovery against Defendant is not stayed and oppose a stay. Defendant

disagrees. Therefore, he should have filed a motion to stay. But he refused to do so, effectively granting himself a stay and leaving Plaintiffs with no option but to seek the Court's intervention.

In summary, Defendant appears to believe even the most basic of civil litigation rules do not apply to him: He does not have to serve objections to document requests to preserve those objections; he can just complain broadly about the requests. Nor does he have to file a motion to stay discovery to actually stay discovery; he can just say and act like discovery is stayed. When the other side complains that he is not following the rules, *they* are acting in bad faith.

Defendant's approach to discovery in this case plainly is wrong and has unjustifiably frustrated Plaintiffs' ability to acquire from him the discovery to which they are entitled. That is by design. Defendant hopes to avoid the costs of discovery and of briefing a motion to stay discovery on the off chance that the Court reconsiders his motion to dismiss and dismisses him from the case. But playing fast and loose with the Federal Rules of Civil Procedure, which are designed "to secure the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1, is an inappropriate way to avoid those costs.

Plaintiffs' motion to compel should be granted, and Defendant should be ordered to engage in discovery in good faith, including by promptly serving written responses and objections to Plaintiffs' requests for production, producing documents responsive to requests to which he does not object, producing a privilege log for withheld responsive documents over which he claims a privilege, and conferring in good faith with Plaintiffs to resolve any objections. Given Defendant's failure to provide any justification—much less substantial justification—for his refusal to serve written responses and objections consistent with the Federal Rules of Civil Procedure, he should also be ordered to pay Plaintiffs' reasonable expenses incurred in making this motion.

Respectfully submitted.

March 20, 2020

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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 and unrepresented parties through the Court's CM/ECF system:

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