

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**PLAINTIFFS' CONSOLIDATED
REPLY IN SUPPORT OF THEIR SECOND MOTION TO COMPEL DEFENDANTS
LIBERTY COUNSEL, INC. AND RENA LINDEVALDSEN TO COMPLY WITH
PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS AND
RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR AN AWARD
OF \$10,650 AS AND FOR SANCTIONS AGAINST PLAINTIFF AND HER COUNSEL**

Scott D. McCoy
Southern Poverty Law Center
P.O. Box 10788
Tallahassee, Florida 32302
Phone: (850) 521-3042
Fax: (850) 521-3001
Email: scott.mccoy@splcenter.org

J. Tyler Clemons
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Phone: (504) 526-1530
Fax: (504) 486-8947
Email: tyler.clemons@splcenter.org

Diego A. Soto
Maya G. Rajaratnam
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: (334) 956-8200
Fax: (334) 956-8481
Email: diego.soto@splcenter.org
Email: maya.rajaratnam@splcenter.org

Frank H. Langrock
Langrock Sperry & Wool, LLP
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, Vermont 05753-0351
Phone: (802) 388-6356
Fax: (802) 388-6149
Email: flangrock@langrock.com

Sarah Star
Sarah Star, PL
P.O. Box 106
Middlebury, Vermont 05753
Phone: (802) 385-1023
Email: srs@sarahstarlaw.com

Counsel for Plaintiffs

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INTRODUCTION

Defendants Liberty Counsel, Inc. and Rena Lindevaldsen’s (“Defendants”) response and the documents they finally produced underscore Plaintiffs’ need for relief. For nearly two years, and continuing to this day, Plaintiffs have painstakingly sought, waited for, and negotiated with Defendants to produce documents to which they are entitled under the federal discovery rules. Beneath Defendants’ hyperbole, hand-waving, and quibbling, the essential fact of Plaintiffs’ second motion to compel (“Mot.”), ECF 472, remains unchallenged: Until March 9, 2020, fully 621 days after receiving Plaintiffs’ First Requests for Production of Documents (“Requests”) and fourteen days after Plaintiffs filed their second motion to compel, ECF 472, Defendants produced only five pages of documents that are not webpages, communications with Plaintiffs’ own counsel, or copies of public documents. But Defendants’ March 9 production—which is overwhelmingly filler, perpetuates Defendants’ inadequate privilege assertions, and contains random unsupported redactions—compounds rather than cures Defendants’ pattern of bad faith and abuse of the discovery process. Most tellingly, Defendants’ March 9 production still does not contain all documents responsive to Plaintiffs’ Requests.

Two years of delay, obstruction, and obfuscation is enough. The Court should grant Plaintiffs’ second motion to compel and deny Defendants’ cross-motion for sanctions.

ARGUMENT

Plaintiffs have sought discovery from Defendants since June 27, 2018. *See* Pls.’ First Mot. to Compel 1, ECF 361. From the beginning of the discovery process, Defendants have engaged in various dilatory tactics with a single goal: to run out the discovery clock while producing as little as possible to Plaintiffs. Defendants’ refusal to fulfill even the most basic discovery functions necessitated Plaintiffs’ first motion to compel, which the Court granted in substantial part. *See* Op. & Order 18, ECF 395. Now, nearly six months after that order,

Defendants' discovery abuses continue. Indeed, Defendants' response to this motion, which insists upon a meet-and-confer that Defendants know would have been futile, and their cross-motion for sanctions against Plaintiffs, are the latest examples of Defendants' tactics of delay and distraction. *See* Defs.' Resp. to Pls.' Second Mot. to Compel ("Resp.") 24–25, 30, ECF 484.

I. Privilege Waiver Is Warranted By Defendants' Pattern of Delay And Obstruction, Which Their March 9 Production Compounds

Defendants' ongoing misconduct warrants the sanctions of waiver of their privilege claims and an award of costs and fees to Plaintiffs, both of which courts routinely impose on parties who commit similar discovery abuses.

A. Defendants' Overall Pattern of Delay Is Inexcusable

As detailed in Plaintiffs' first and second motions to compel, Defendants have engaged in a nearly two-year-long pattern of delay, obstruction, and obfuscation in this case. That pattern began with Defendants' initial responses to Plaintiffs' Requests: Although Rule 34(b)(2)(A) of the Federal Rules of Civil Procedure unambiguously requires "[t]he party to whom the request [for production of documents] is directed must respond in writing within 30 days after being served," Defendants did not respond until four months after Plaintiffs served the Requests. *See* Pls.' First Mot. to Compel Defs. 1–2, ECF 361; *Applied Sys. Inc. v. N. Ins. Co. of N.Y.*, No. 97-C-1565, 1997 WL 639235, at *2 (N.D. Ill. Oct. 7, 1997) (noting that failure to respond to discovery requests for two months was "no minor procedural violation" nor "indicative of a good faith attempt" to comply with discovery obligations). And that pattern continues up to and even past Plaintiffs' filing of this motion: Defendants initially told Plaintiffs they would endeavor to produce electronic documents on December 23, 2019, and subsequently promised them by February 14, 2020, and then by February 28, 2020, before finally producing them on March 9,

2020.¹ See Email from Horatio Mihet to Tyler Clemons (Feb. 28, 2020) 1, ECF 472-12; Clemons Decl. ¶ 6; *Underdog Trucking, LLC v. Verizon Servs. Corp.*, 273 F.R.D. 372, 377–78 (S.D.N.Y. 2011) (granting fees and costs where producing party caused delay by repeatedly assuring requesting party that documents “would be produced ‘shortly’”).

Defendants have employed various tactics to cause delay. Defendants have refused to participate in discovery while motions were pending before this Court or while they sought a mandamus petition in the Second Circuit, despite Local Rule 26(a)(3)’s clear statement that such actions do not stay discovery. See Pls.’ Mot. for Hr’g 1, ECF 298; Email from Daniel Schmid to Sarah Star 1, ECF 298-3. Defendants have consistently prioritized their work in other cases over satisfying their discovery obligations in this one, *see, e.g.*, Defs.’ Mot. for Extension of Time 2 n.1, ECF 476; Defs.’ Mot. for Extension of Time ¶ 3, ECF 371; Defs.’ Mot. for Extension of Time ¶¶ 3–6, ECF 366; Email from Horatio Mihet to Tyler Clemons 1 (Nov. 10, 2019), ECF 472-2; Email from Horatio Mihet to Tyler Clemons (Mar. 22, 2019) at 2–3, Ex. 1, even though attorneys’ caseloads cannot excuse their failure to abide by discovery deadlines, *see, e.g.*, *Urban Elec. Supply & Equip. v. N.Y. Convention Ctr. Dev. Corp.*, 105 F.R.D. 92, 98 (E.D.N.Y. 1985) (citing *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 667 (2d Cir. 1980)). Defendants have refused to make co-counsel available to discuss discovery issues. Email from Horatio Mihet to Tyler Clemons (Apr. 3, 2019), Ex. 1, at 1. As with their latest production, Defendants have often strung Plaintiffs along bit by bit, promising responses or documents within the next week

¹ Defendants’ objection that they could not have produced electronic documents until January 16, 2020, when the negotiated search terms were finalized, *see* Resp. 9, ECF 484, is due to their failure to inform Plaintiffs until January 6, 2020, of the inability of their system to process some of the search terms that Plaintiffs proposed on December 3, 2019. See Email from Tyler Clemons to Horatio Mihet 1–2, ECF 472-5. Moreover, the negotiated search terms encompassed only four of the twenty Requests for which Defendants were ordered to produce documents. *See id.* (providing updated search terms for Requests 64, 65, 66, and 67).

or two weeks “if possible.” *See, e.g.*, Email from Horatio Mihet to Tyler Clemons (Jan. 6, 2020) 2–3, ECF 472-12; *id.* at 2 (Feb. 14, 2020 email); *id.* at 1 (Feb. 21, 2020 email). Defendants have attempted to exploit minor ambiguities in the Court’s orders to limit Plaintiffs’ access to sources of information. *See, e.g.*, Pls.’ Mot. to Amend Disc. Schedule/Order (“Deposition Mot.”) 2–3, ECF 432. Perhaps most egregiously, Defendants flatly refused to conduct even the most cursory of searches for documents responsive to several of Plaintiffs’ clearly relevant Requests until explicitly ordered to do so by the Court. *See Op. & Order 4*, ECF 395; *see also Underdog Trucking, LLC*, 273 F.R.D. at 377–78 (sanctioning party that “embarked on an in-depth document search only in response to a motion to compel”).

Defendants’ attempts to justify individual instances of these tactics cannot negate their overall purpose and effect: to run out the discovery clock while producing as little as possible to Plaintiffs. Taken together, Defendants’ “series of episodes of nonfeasance ... amount[s], in sum, to a near total dereliction of professional responsibility.” *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067 (2d Cir. 1979) (quoting *Affanato v. Merrill Bros.*, 547 F.2d 138, 141 (1st Cir. 1977)). The freedom granted to parties and lawyers by the federal discovery rules require that all sides operate in good faith without “dilation, posturing, and harassment.” *Id.* at 1068. Defendants have persistently and deliberately abused that freedom. By requiring Plaintiffs to hound Defendants, and to enlist the Court’s help in hounding them, each step of the way, Defendants’ behavior is “directly contrary to the overall scheme of the federal discovery rules.” *Id.* (quoting *Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977)).

B. Defendants’ March 9, 2020 Production Compounds Instead of Cures Their Pattern of Bad Faith and Discovery Abuse

1. Defendants’ Belated Production Does Not Excuse Their Discovery Abuses

Defendants’ claim that their March 9, 2020 production moots Plaintiffs’ second motion to compel, *see* Resp. 16, ECF 484, completely misses the point of that motion. Aside from the obvious deficiencies in Defendants’ March 9 production, *see infra* Section I.B.2, belated compliance with discovery obligations is insufficient to avoid sanctions for discovery abuse, even when the producing party can show that the delay did not prejudice the requesting party. *See S. New England Tel. Co. v. Global NAPS, Inc.*, 624 F.3d 123, 147–49 (2d Cir. 2010) (reasoning that “hopelessly belated compliance should not be accorded great weight” in determining outcome of Rule 37 motion (quoting *Cine Forty-Second St. Theatre Corp.*, 602 F.2d at 1068)). To hold otherwise “would encourage dilatory tactics, and compliance with discovery orders would come only when the backs of counsel and the litigants were against the wall.” *Id.*

Defendants’ focus on the four-and-a-half months it took them to make the March 9 production is also misplaced. Tellingly, Defendants once again do not mention the 30-day response deadline set by Rule 34(b)(2)(A), instead referencing—without citation or even case names—two unrelated cases in which parties took a long time to produce documents. *See* Resp. 15–16, ECF 484. Although the Court did not set an explicit compliance deadline in its order on Plaintiffs’ first motion to compel, Plaintiffs’ selection of an initial compliance deadline of 30 days after the Court’s order was reasonable based on Rule 34(b)(2)(A) and Defendants’ already severely delayed compliance.² *See, e.g., Nippon Fire & Marine Ins. Co. v. M/V EGASCO STAR*,

² Defendants make much of the fact that Plaintiffs communicated this initial deadline via U.S. mail instead of email. *See* Resp. 22, ECF 484. Plaintiffs did so because this communication also contained Plaintiffs’ responses to Defendants’ discovery requests, and Defendants refused to

No. 94 CIV. 6813, 1996 WL 74745, at *1 (S.D.N.Y. Feb. 21, 1996) (setting 30-day deadline to comply with order on motion to compel).

More fundamentally, however, the relevant period is not the four-and-a-half months between the Court’s order and Defendants’ production but rather the *twenty* months between the service of Plaintiffs’ Requests and that production. Even assuming Defendants worked “around the clock,” Resp. 9, 14, ECF 484, from the moment they received the Court’s October 29, 2019 order—a highly dubious proposition given Defendants’ active involvement in other cases, *see, e.g.*, Defs.’ Mot. for Extension of Time 2 n.1, ECF 476; Appellee’s Mot. for Extension of Time to File Br. ¶ 3–4, *Vazzo v. City of Tampa*, No. 19-14387 (11th Cir. Dec. 31, 2019)—that time crunch was entirely of Defendants’ own making, the result of their previous sixteen months of delay. Indeed, the very fact that Defendants had to spend “hundreds of hours of reviewing tens of thousands of pages” following the Court’s order proves their complete lack of diligence for the proceeding sixteen months. *See Underdog Trucking, LLC*, 273 F.R.D. at 378 (“Indeed, Plaintiffs acknowledge spending ‘close to 20 hours working with’ counsel to locate the documents that comprised the December 23 production, thus illustrating the lack of diligence undertaken the prior eight months.”).

2. Defendants’ March 9, 2020 Production Further Evidences and Compounds Their Discovery Abuses

Defendants’ reliance on their March 9, 2020 production as proof of their discovery compliance is further undercut by its multiple obvious flaws. Indeed, Defendants’ slipshod March 9 production compounds rather cures Defendants’ discovery abuses.

consent to service by email until November 21, 2019. *See* Email from Horatio Mihet to Tyler Clemons (Nov. 21, 2019) 1, Ex. 2.

a. Defendants' Production Is Overwhelmingly Filler

More than 35,500 pages—84 percent—of the roughly 42,000 pages Defendants have produced to Plaintiffs in this litigation consist of publicly available court filings, duplicative documents, or non-Defendant publications. Clemons Decl. ¶ 10. For a mere snapshot of Defendants' production, they produced:

- Twelve copies of Plaintiffs' Complaint in this case;
- A 363-page report regarding Mexican–American heritage and contemporary issues;
- Two copies of a 205-page document outlining Virginia's curriculum standards for World History & Geography;
- A 325-page document on emergency school planning published by the State of Rhode Island;
- A 544-page copy of Human Rights Watch's 2006 report;
- Two copies of a 497-page brief filed in support of the petition for certiorari in *Hollingsworth v. Perry*, 570 U.S. 693 (2013);
- Five copies of a 140-page pre-trial exhibit list in *Perry v. Schwarzenegger*, 264 F.R.D. 576 (N.D. Cal. 2009), including four consecutive copies; and
- Photocopies of several full books, including but not limited to:
 - *The Complete Infidel's Guide to the First Amendment* (276 pages);
 - *The Complete Infidel's Guide to Iran* (364 pages);
 - *Intimate Wars: The Life and Times of the Women Who Took Abortion from the Back Alley to the Board Room* (76 pages);
 - Six copies of *Redeeming the Rainbow: A Christian Response to the Gay Agenda* (237 pages each);
 - *Sex and Culture* (703 pages);
 - *Sexual Sabotage: How One Mad Scientist Unleashed A Plague of Corruption & Contagion on America* (416 pages); and

- *The New England Primer* (442 pages).³ Clemons Decl. ¶ 8.

Although these documents might contain at least one of the agreed-upon search terms, the vast majority of them clearly are not responsive to Plaintiffs' Requests.⁴ The ultimate determination of whether a document should be produced is not whether it contains a particular search term, but whether it is responsive to a discovery request. *See, e.g., Synventive Molding Sol., Inc. v. Husky Injection Molding Sys., Inc.*, 262 F.R.D. 365, 370 (D. Vt. 2009) (Conroy, J.) (quoting 8A Charles Allan Wright et al., *Federal Practice & Procedure* § 2213 (2002)) (internal quotation marks and alteration omitted)) ("The producing party has a burden to select and produce the items requested rather than simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought."); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259–60 (D. Md. 2008) (noting the necessity of analyzing "the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation"). Most modern dictionaries contain the term "civil disobedience," for instance, and all credible world atlases include Nicaragua, but the discovery rules obviously did not require Defendants to scan a copy of every dictionary and world atlas in their offices to produce to Plaintiffs. *See* Pls.' Reqs. for Produc. of Docs. 10, ECF 361-2 (requesting "All documents and communications concerning Nicaragua"; Email from Tyler Clemons to Horatio Mihet (Dec. 3, 2019) 5, ECF 472-5 (proposing "civil disobedience" as a search term for Requests

³ Eighty percent of the remaining filler pages—more than 22,000 pages, over half of the total production—consists of court filings and orders from this case, the custody disputes in Vermont and Virginia state courts, and various unrelated cases that Liberty Counsel has litigated in other federal courts.

⁴ Plaintiffs originally proposed much more limited search terms that likely would have excluded most if not all of the irrelevant documents from Defendants' production. Plaintiffs were forced to provide much simpler, and therefore much broader, search terms because Defendants' search software lacks Boolean functionality. *See* Email from Tyler Clemons to Horatio Mihet (Dec. 3, 2019) 5, ECF 472-5.

66 and 67). That they did not do so shows that Defendants are aware that search terms are the beginning, not the end, of the discovery review process. Moreover, Defendants know that the production of “multiple identical copies of the same document” is unreasonable. *See* Resp. 16, ECF 484.

If Defendants indeed spent “hundreds of hours” reviewing the March 9 production, why did they produce *The New England Primer* and five copies of the 140-page exhibit list from a completely unrelated case? There are only two possible answers: Either Defendants did not adequately review the March 9 production, or they deliberately included thousands of pages of patently unresponsive documents. Either is yet one more discovery abuse by Defendants, yet another demonstration of their sanction-worthy, bad faith approach to discovery in this case.

b. Defendants Have Not Produced All Responsive Documents

Although Defendants claim they have now produced “all responsive, non-privileged documents and communications in their custody, possession or control, and have catalogued all responsive privileged communications in their privilege logs,” Resp. 5–6, ECF 484, Plaintiffs have reason to believe there continue to be responsive documents that Defendants have neither produced nor catalogued as privileged. For instance, Defendant Lindevaldsen told this Court at least three times under penalty of perjury that, after the kidnapping in late September 2009, she “continued to try to communicate with [Lisa Miller] by email and voicemail,” but Lisa “never responded to any of these emails or voicemails.” Aff. of Rena M. Lindevaldsen in Supp. of Def.’s Mot. to Dismiss ¶ 9, ECF 66-5; *accord* Aff. of Rena M. Lindevaldsen in Resp. to Pls.’ Mot. to Join Additional Defs. ¶ 4, ECF 213-2; Aff. of Rena M. Lindevaldsen in Supp. of Defs. Mathew Staver, Rena Lindevaldsen, and Liberty Counsel’s Mot. to Dismiss Pls.’ Revised Second Am. Compl. ¶¶ 4–5, ECF 238-3. Yet the most recent email from Lindevaldsen to Lisa Miller produced by Defendants is dated September 7, 2009, two weeks before Lisa’s

disappearance. Clemons Decl. ¶ 11. And Defendants' privilege logs catalogue only two emails—both on September 22, 2009—from Lindevaldsen to Lisa Miller after she disappeared. *See* Def. Liberty Counsel's Privilege Log (March 9) 10, 14, ECF 484-3 (Entries 112 and 155). Moreover, these two emails did not inquire about Lisa Miller's whereabouts but only attempted to “remind client of outstanding need for information and instruction regarding visitation” that the Rutland Family Court had ordered Lindevaldsen to provide to Janet Jenkins.⁵ *Id.*

These facts permit only two possible explanations: Either Lindevaldsen never attempted to communicate with Lisa Miller via email to ascertain her post-September 21, 2009 whereabouts, in which case her statement “that she continued to try to communicate with [Lisa Miller] by email” was patently false, or there continue to be responsive communications between Lindevaldsen and Lisa Miller that Defendants have neither produced nor catalogued as privileged.

This single example is provided only to demonstrate the high probability that Defendants continue to withhold documents. Obviously, Plaintiffs cannot draw the Court's attention to documents about which they remain unaware due to Defendants' recalcitrance. *See* Op. & Order 11, 13, ECF 395 (noting that the information sought by Plaintiffs from Defendants is available only through discovery). But Plaintiffs should not be limited to the discovery that they can prove Defendants are withholding. *See, e.g., Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1322 (10th Cir. 2011) (Gorsuch, J.) (“Discovery is not supposed to be a shell game, where the hidden ball is moved round and round and only revealed after so many false guesses are made and so much money is squandered.”).

⁵ Two post-disappearance privilege log entries purport to cover email chains between Lindevaldsen and other attorneys “discussing attempts to reach client,” presumably Lisa Miller. *See* Liberty Counsel Privilege Log 13, ECF 484-3 (Entries 143 and 150). Lisa Miller herself is not listed as a recipient of these emails.

c. Defendants' Privilege Assertions Are Inadequately Supported

The privilege logs accompanying the March 9 production, ECF 484-3 and ECF 484-4, suffer from precisely the same deficiencies as the privilege log Defendants produced on January 10, 2020. *See* Mot. 6, ECF 372. Indeed, although Defendants claim that the March 9 logs demonstrate a “clear, good faith attempt” to address the issues with the January 10 log, Resp. 18, ECF 484, Plaintiffs are unable to spot any significant differences between the January 10 log and the March 9 logs. Just like the January 10 log, the March 9 logs provide names with no other identifying information.⁶ Similarly, the “subject” description Plaintiffs identified as vague in the January 10 log—“Facsimile letter between counsel discussing strategy, research, and impression for legal briefing in Miller/Jenkins Vermont litigation”—is repeated five times in Liberty Counsel’s March 9 log. *Compare* Mot. 7, ECF 372, *with* Def. Liberty Counsel’s Privilege Log (March 9) 1, ECF 484-3. And because the March 9 logs, just like the January 10 log, do not contain any information about the number of pages each entry covers, Plaintiffs have no way of knowing how many pages of documents Defendants are withholding under each claim of privilege.

Once again, Defendants’ insistence that Plaintiffs could have obtained supplemental information from them (such as the identities behind unfamiliar names), Resp. 34–35, ECF 384, misses the point. The Second Circuit’s requirement that a privilege log “provid[e] sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure” was clear when Defendants prepared the January 10 log, and was certainly known to Defendants before their preparation of the March 9 logs. Mot. 6, ECF 372 (quoting *United States*

⁶ Defendants know this additional identifying information is necessary; their own discovery requests to Plaintiffs instructs Plaintiffs to include in any privilege log “where not apparent, the relationships of the author(s), addressee(s), custodian(s), and any other recipient to each other.” Def. Liberty Counsel’s First Reqs. for Produc. 3–4, Ex. 3.

v. Constr. Prods. Research, 73 F.3d 464, 473 (2d Cir. 1996)). Failing to abide by that requirement and instead requiring Plaintiffs to inquire about obviously necessary information is not just a negligent oversight but rather the latest example of Defendants’ pattern of “foot-dragging” and “cavalier attitude towards following court orders and the discovery rules.” *Ritacca v. Abbot Labs.*, 203 F.R.D. 332, 335 (N.D. Ill. 2001); *see also Constr. Prods. Research*, 73 F.3d at 474 (noting that the “glaring absence of any supporting affidavits or other documentation” with privilege log contributed to insufficiency).⁷

d. Defendants’ Redactions Are Even Less Adequately Supported

The March 9 production also includes a number of documents with redactions that are not included in Defendants’ privilege log and unexplained beyond cursory assertions of, for example, “Attorney-Client Privilege” or “Work-Product Privilege” on the documents

⁷ To further distract from the insufficiency of Defendants’ own privilege logs, they also point to three of Plaintiffs’ purported acts or omissions. These arguments may be briefly dispatched.

First, Plaintiffs did not object to Defendants’ privilege log regarding the Liberty University production because Plaintiffs objected to the assertion of privilege over *any* document in the possession of Liberty University, a third party. *See* Pls.’ Mot. to Compel 9–10, ECF 361. It was therefore unnecessary for Plaintiffs to request more specific information to evaluate each individual privilege assertion on the log.

Second, the redaction log and privilege log from *Ferguson v. JONAH*, 136 A.3d 447 (N.J. Super. 2014), are from a wholly unrelated fraud case litigated by some of Plaintiffs’ attorneys in New Jersey state court. Moreover, as Plaintiffs informed Defendants, the logs’ format was the result of negotiations between counsel in that case. *See* Resp. 19–20, ECF 484. Defendants have a duty to abide by the clearly established privilege log standards of the Second Circuit and could have asked to negotiate different requirements before producing their logs.

Finally, Plaintiffs have not produced a privilege log to Defendants because Plaintiffs are not withholding any documents responsive to Defendants’ discovery requests on the basis of privilege. *See* Email from Tyler Clemons to Horatio Mihet (Mar. 18) 1, Ex. 3. Plaintiffs have objected as unduly burdensome the production of a privilege log cataloguing the years of communications between Jenkins and her attorneys in the Vermont and Virginia custody disputes. *See* Pls.’ First Suppl. Resp. to Defs.’ First Reqs. for Produc. 4, ECF 484-11; *see also Edmonson v. RCI Hosp. Holdings, Inc.*, No. 16-cv-2242, 2018 WL 4112816, at *2 & n.2 (S.D.N.Y. Aug. 29, 2018). Defendants cannot use this concern as an excuse for their own discovery failures.

themselves. One email from Lisa Miller to Rena Lindevaldsen on June 19, 2009—just three months before Lisa Miller kidnapped Isabella and fled to Nicaragua—contains a single redacted sentence in the middle of a multi-paragraph email asking for spiritual advice with only “REDACTED: ATTORNEY-CLIENT PRIVILEGE” offered as an explanation. Email from Lisa Miller to Rena Lindevaldsen (June 19, 2009), Ex. 5. Moreover, some redactions are explained with the notation “FIRST AMENDMENT PRIVILEGE,” *see, e.g.*, Emails (Jan. 23, 2007), Ex. 6, even though the Court explicitly rejected Defendants’ First Amendment privilege claims in its order on Plaintiffs’ first motion to compel. *See* Op. & Order 16–17, ECF 395.

C. Defendants’ Misconduct Warrants Waiver of Defendants’ Privilege Claims and Award of Plaintiffs’ Costs and Fees

Plaintiffs’ proposed solution to Defendants’ pattern of discovery abuse is straightforward: The Court should deem that Defendants have waived all privilege assertions. Plaintiffs also request costs, including attorney’s fees, for the preparation of this motion and Plaintiffs’ first motion to compel. *See* Mot. 10, ECF 372 (citing Fed. R. Civ. P. 37(b)(2)(C)).⁸

⁸ Because any attempt to meet and confer would have been futile, *see infra* Section II, Defendants’ arguments that the Court should not decide the merits of Plaintiffs’ second motion to compel and that Plaintiffs’ request for costs and fees should be denied for failure to meet and confer, *see* Resp. 30–32, ECF 484, are without merit. Where the meet and confer requirement is excused because of futility, courts are free to entertain the merits of a motion to compel and to grant costs and fees (and other sanctions) for bringing such a motion. *See, e.g., Moats v. City Hosp., Inc.*, No. 3:06-cv-120, 2007 WL 2220282, at *3 (N.D.W. Va. Aug. 2, 2007) (granting reasonable expenses for bringing motion to compel without a meet and confer where compliance with meet and confer rule would have been “a pointless formalit[y]”); *Owens v. Resource Life Ins. Co.*, No. 06-CV-0346, 2007 WL 1206726, at *2 (N.D. Okla. Apr. 24, 2007) (affirming magistrate judge’s imposition of discovery sanctions where movant did not meet and confer because of futility); *Reidy v. Runyan*, 169 F.R.D. 486, 490 (E.D.N.Y. 1997) (“[P]remotion conference requirement does not always constitute a condition precedent to consideration of the merits of a discovery motion.”); *Matsushita Elec. Corp of Am. v. 212 Copiers Corp.*, No. 93 Civ. 3243, 1996 WL 87245, at *1 (S.D.N.Y. Feb. 29, 1996) (reaching the merits of motion to compel after determining meet-and-confer would have been futile). None of the cases Defendants cite hold the contrary; rather, they support Plaintiffs’ position that failure to meet and confer does not mandate denial of the motion “where efforts at compromise would have been clearly futile.” *See,*

Privilege waiver is among the equitable sanctions granted to the Court's discretion by Rule 37 of the Federal Rules of Civil Procedure. *See Ritacca*, 203 F.R.D. at 335 (quoting Fed. R. Civ. P. 26(b)(5) advisory committee's note (1993)); *see also McNamee v. Clemens*, No. 09-cv-1647, 2014 WL 12775660, at *15–16 & n.37 (E.D.N.Y Jan. 30, 2014). Although waiver is a harsh sanction, it is not the harshest that district courts may employ to punish discovery abuse. *See Fed. R. Civ. P. 37(b)(2)* (listing “striking pleadings in whole or part” and “rendering a default judgment against the disobedient party” as permissible sanctions); *Cine Forty-Second St. Theatre Corp.*, 602 F.2d at 1066. The appropriate harshness of a sanction is determined by whether discovery failures are, on the one hand, “due to a mere oversight of counsel amounting to no more than simple negligence,” *Cine Forty-Second St. Theatre Corp.*, 602 F.2d at 1068, “minor procedural violations,” or “good faith attempts at compliance,” *Ritacca*, 203 F.R.D. at 335; or, on the other hand, evidence of “foot-dragging or a cavalier attitude towards following court orders and the discovery rules,” *id.*, or “unjustified delay, inexcusable conduct, or bad faith,” *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 902 F. Supp. 1356, 1361 (D. Kan. 1995).

Defendants' two-year pattern of discovery abuse clearly falls near the harshest side of this spectrum. Defendants have repeatedly engaged in the kinds of discovery abuses that courts routinely sanction. *See supra* Section I.B. More specifically, courts have deemed privilege waiver an appropriate sanction for similar misconduct. As Plaintiffs discussed in their second motion to compel, the court in *Ritacca* imposed privilege waiver as sanction on a party that delayed production for nine months, unreasonably delayed its privilege assertions, failed to produce or catalogue documents specifically identified by the requesting party, and made no

e.g., Veleron Holding, B.V. v. BNP Paribas SA, No. 12-CV-5966, 2014 WL 4184806, *2 (S.D.N.Y. Aug. 22, 2014) (citing *Prescient Partners*, 1998 WL 67672, at *3.).

more than a “slipshod attempt” at a privilege log. Mot. 9–10, ECF 472 (quoting 203 F.R.D. at 305–06).

Other courts have imposed privilege waiver as a sanction in similar cases.⁹ Specifically, courts have imposed waiver as a sanction on parties that, like Defendants, have delayed their responses to initial discovery requests, *id.*; *Applied Sys. Inc.*, 1997 WL 639235, at *2 (party failed to respond to discovery requests for two months); on parties that, like Defendants did by refusing to participate in discovery in the absence of a stay, have blatantly ignored a local rule, *Allstate Life Ins. Co. v. First Trust Nat’l Ass’n*, No. 92-civ-4865, 1993 WL 138844, at *2–3 (S.D.N.Y. Apr. 27, 1993); and on parties that, like Defendants, unreasonably delayed providing a privilege log, provided an inadequate privilege log, or withheld documents not included on the privilege log, *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 07-C-1707, 2011 WL 13262362, at *3 (N.D. Ill. Jan. 10, 2011) (party refused to provide privilege log for three months after giving responses); *Ritacca*, 203 F.R.D. at 305; *John Labatt Ltd. v. Molson Breweries*, No. 93-cv-75004, 1995 WL 23603, at *1 (S.D.N.Y. Jan. 20, 1995) (party withheld documents and did not include them on original privilege log). If waiver was an appropriate sanction for parties engaging in one or a handful of these abuses, it is certainly appropriate for Defendants, who have strung them together into two years of unjustifiable delay. *See Bess v. Cate*, No. 2:07-cv-1989, 2008 WL 5100203, at *5 (E.D. Cal. Nov. 26, 2008) (imposing waiver on party that did

⁹ Defendants’ misconduct also warrants forfeiture of the attorney–client privilege assertions of their former client, Lisa Miller. *See Cine Forty-Second St. Theatre Corp.*, 602 F.2d at 1068 (“A litigant chooses counsel at his peril ... and here, as in countless other contexts, counsel’s disregard for his professional responsibilities can lead to extinction of his client’s claim.”).

not serve responses until ten weeks after discovery requests were propounded, failed to produce a privilege log at that time, and made “blanket and dilatory objections”).¹⁰

Indeed, privilege waiver is a particularly apt sanction for this case. Defendants are themselves lawyers who are accused of conspiring with their client to violate Plaintiffs’ parental and civil rights. There is therefore a serious risk that Defendants will misuse the attorney–client privilege and work-product doctrine to conceal inculpatory communications with their co-conspirator client, who remains a fugitive. Indeed, this case raises numerous privilege issues that have yet to be litigated due to Defendants’ ongoing failure to provide adequate privilege logs. *See, e.g.*, Pls.’ First Mot. to Compel 9–10, ECF 361 (discussing the likely applicability of the crime–fraud exception to some of Defendants’ privilege assertions). The resolution of each of these issues will inevitably provide Defendants with yet more opportunities for delay and obfuscation. Sanctioning Defendants for their pattern of discovery abuse obviates the need to resolve these issues and ensures that Defendants cannot drag this litigation out longer than they already have.

¹⁰ Defendants’ assertion that they should be allowed to cure any defects in the January 10, 2020, privilege log, *see* Resp. 36–37, ECF 484, yet again misconstrues the point of Plaintiffs’ motion. Plaintiffs seek waiver of the privilege as a sanction for Defendants’ two-year-long pattern of discovery abuse, of which the repeated failure to provide adequate privilege logs is but one example. *See* Mot. 8–9, ECF 472. The standard for imposing waiver of the privilege as a sanction differs from that for determining that the privilege has been waived solely due to the failure to provide adequate information to justify assertion of the privilege. *In re Application of Aenergy, S.A. Pursuant to 28 U.S.C. § 1782*, No. 19-MC-542, 2020 WL 1659834, at *5 (S.D.N.Y. Apr. 3, 2020). Granting Defendants an opportunity to cure after finding that they had engaged in “foot-dragging” and a “cavalier attitude toward following court orders and the discovery rules” would give them yet another opportunity to delay. *Ritacca*, 203 F.R.D. at 335. “Limiting the remedy to the belated preparation of a privilege log effectively tells practitioners they can flout the Court’s Rules and incur no sanction other than an Order directing compliance with the rules.” *FG Hemisphere Assoc. v. Republique du Congo*, No. 01-civ-8700, 2005 WL 545218, at *6 n.1 (S.D.N.Y. Mar. 8, 2005) (quoting *PKFinans Int’l Corp. v. IBJ Schroeder Leasing Corp.*, No. 93-civ-5375, 1996 WL 525862, at *4 (S.D.N.Y. Sept. 17, 1996)).

II. Defendants' Repeated Abuse of the Meet and Confer Requirements to Obstruct and Delay Discovery Shows the Futility of Yet Another Conference

Against the backdrop of Defendants' two-year pattern of discovery abuse and delay, their insistence that Plaintiffs should have met and conferred with them before filing the second motion to compel is absurd, just one more attempt to string Plaintiffs along and distract the Court from Defendants' misconduct. The fundamental point of Plaintiffs' motion is that Defendants have demonstrated, through their persistent abuse of the discovery process, that they cannot be trusted to engage in that process in good faith. *See* Mot. 9, ECF 472. For their part, Defendants believe that the purpose of this litigation is literally to destroy them. *See* Defs.' Resp. to Pls.' Mot. to Compel 2, ECF 374. In this context, requiring Plaintiffs to confer with Defendants prior to filing the second motion to compel would have been futile.

Courts routinely waive the meet-and-confer requirement of Rule 37(a)(1) of the Federal Rules of Civil Procedure when "an attempt to compromise would have been clearly futile." *Elhannon, LLC v. F.A. Bartlett Tree Expert Co.*, No. 2:14-cv-262, 2017 WL 1382024, at *9 (D. Vt. Apr. 18, 2017) (Sessions, J.) (quoting *Care Envtl. Corp. v. M2 Techs., Inc.*, No. CV-05-1600, 2006 WL 1517742, at *3 (E.D.N.Y. May 30, 2006)). Courts consider the history of negotiations between the parties, *id.* (citing *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, No. 96 CIV 7590, 1998 WL 67672, at *3 (S.D.N.Y. Feb. 18, 1998)), the level of animosity between the parties, *id.*, and the parties' history of compliance with previous court orders, *Prescient Partners, L.P.*, 1998 WL 67672, at *3 (citing *Reidy*, 169 F.R.D. at 490).

Over the past two years, Plaintiffs have engaged in multiple conferences with Defendants about a number of discovery issues. Each conference has taken weeks to schedule. *See, e.g.*, Letter from Tyler Clemons to Horatio Mihet 1, ECF 361-5 (conference to discuss January 10, 2019 production was begun on February 11, 2019, and not finished until April 12, 2019); Email

from Horatio Mihet to Tyler Clemons 1, ECF 472-2 (email sent on November 10, 2019, but conference not set until November 25, 2019). None has resolved discovery issues sufficient to avoid the Court's intervention. *See, e.g.*, Pls.' Mot. to Compel Defs. Liberty Counsel & Rena Lindevaldsen, ECF 361 (asking Court to resolve issues raised during multiple conferences); Deposition Mot. 2-3, ECF 432 (asking Court to resolve dispute about depositions discussed during the November 25, 2019 conference).

Defendants' refusal to meet and confer during the pendency of Plaintiffs' motion to compel unless Plaintiffs withdrew their motion demonstrates that Defendants seek only to use the meet-and-confer requirement for further delay. *See* Email from Tyler Clemons to Horatio Mihet (Mar. 13, 2020) 4, ECF 484-5. Specifically, Plaintiffs agreed to withdraw their motion if negotiations resulted in a suitable resolution of the issues before Defendants' deadline to respond. *Id.* This offer balanced Plaintiffs' ongoing willingness to work with Defendants against Plaintiffs' unwillingness to grant Defendants yet another open-ended opportunity to delay and obstruct discovery. Rather than accept Plaintiffs' willingness to negotiate, however, Defendants flatly refused to meet and confer unless and until Plaintiffs withdrew their motion. *See* Email from Horatio Mihet to Tyler Clemons (Mar. 13, 2020) 1, ECF 484-5.

Defendants' assertion that negotiations would have obviated the need for the Court's involvement is further undercut by the stridency of their insistence that their privilege log is indeed sufficient. *See* Resp. 33-35, ECF 484. "Indeed," Defendants insist, "it is difficult for Defendants to imagine what more they could say about the withheld documents, without disclosing their contents." *Id.* at 34. Given the history of negotiations between Plaintiffs and Defendants, it strains credulity to believe that Defendants would have abandoned this insistence on a phone call with Plaintiffs. And it is the definition of futility to require Plaintiffs to spend

weeks attempting to set up that phone call for Defendants merely to say out loud to Plaintiffs what Defendants made clear over email and in their brief in response to this motion. *See, e.g., Reidy*, 169 F.R.D. at 491 (holding that “forc[ing] the plaintiff to attempt to locate his adversary, who was out of town for two weeks, only to have defense counsel contest the plaintiff’s position, and then cause the parties to wind up back in court litigating the same issue ... would have added an unnecessary layer of time and expense only to arrive at the same destination”). The only purpose such a meeting would serve is delay, which, of course, is precisely what Defendants want.

III. Defendants’ Cross-Motion for Sanctions Should Be Denied

Finally, Defendants argue that it is Plaintiffs whom the Court should sanction. *See Resp.* 32–33, ECF 484. This argument is meritless.

Defendants’ first basis for this assertion, Plaintiffs’ supposed failure to confer with them about the January 10 privilege log, is negated by Plaintiffs’ reasonable and good faith belief that any such conference would have been futile and would only have contributed to Defendant’s strategies of gamesmanship and delay. *See supra* Section II. Courts have decided not to issue sanctions for failure to comply with the requirement to confer when a meet-and-confer would have been futile. *See Star-Brite Distrib., Inc. v. Kop-Coat, Inc.*, 664 F. Supp. 2d 1246, 1258 (S.D. Fla. 2009).¹¹

¹¹ The cases cited by Defendants are inapposite. First, none of them involved situations where a meet-and-confer would have been futile. Second, all of them involved misconduct well beyond a mere failure to meet and confer prior to filing a discovery motion. In *Local 30, Int’l Union of Operating Eng’rs, AFL-CIO v. Wood Grp. Power Operations, LLC*, No. CV 13-2499, 2017 WL 9939042, *3–4 (E.D.N.Y. Dec. 22, 2017), the court noted that the sanctioned party’s behavior “borders on the contumacious” and previously “had failed to comply with the [Court’s] decision and its earlier orders.” In *Window Headquarters, Inc. v. Mat Basic Four, Inc.*, No. 91 Civ. 1816(MBM), 1996 WL 63046, *1 (S.D.N.Y. Feb. 9, 1996), in a two-paragraph opinion, a \$200 sanction was imposed in part because the party’s motion for default judgment was “meritless” and “without basis.” In *Campbell v. U.S. Dep’t of Justice*, 231 F. Supp. 2d 1, 13–16 (D.D.C.

The second basis—for which Defendants notably cite no legal authority—is that Plaintiffs’ motion is “premised on demonstrable misrepresentation and half-truths designed to mislead the Court.” Resp. 22–24, ECF 484. Plaintiffs deny making any misrepresentations or stating any half-truths to the Court. For example, Defendants label as a “half-truth” Plaintiffs’ omission of the fact that the communication in which Plaintiffs proposed an initial deadline to comply with the Court’s order on Plaintiffs’ first motion to compel was sent by U.S mail instead of email. But Defendants’ narrative omits the fact that they did not consent to email service until three weeks after this communication was sent. *See supra* note 2.

Regardless, the Court should not impose sanctions on Plaintiffs because the evidence does not clearly and convincingly show that Plaintiffs “knowingly submitted a materially false or misleading pleading, or knowingly failed to correct false statements, as part of a deliberate and unconscionable scheme to interfere with the Court’s ability to adjudicate the case fairly.”

Almeciga v. Ctr. for Investigative Reporting, Inc., 185 F. Supp. 3d 401, 427 (S.D.N.Y. 2016) (quoting *Braun ex rel. Advanced Battery Techs., Inc. v. Zhiguo Fu*, No. 11-cv-4383, 2015 WL 4389893, at *17 (S.D.N.Y. July 10, 2015)). Even viewing the accusations of “half-truths” and “misrepresentations” in the light most favorable to Defendants, those accusations clearly do not rise to the standard of “a deliberate and unconscionable scheme to interfere with the Court’s ability to adjudicate the case fairly.”

More fundamentally, Defendants’ baseless sanctions motion is yet one more example of their abusive discovery practices. Defendants want to drag Plaintiffs into petty squabbles over

2002), fees and costs were awarded not because the movant’s failure to meet and confer, which the court excused to reach the merits of the motion, but because the motion was substantively decided against the movant. None of the courts in the nine cases Defendants cite imposed a monetary sanction on, or ordered the payment of costs and fees by, a party solely for having filed a motion without first having met and conferred. *See* Resp. 30–31, ECF 484.

who-said-precisely-what-and-when in the hopes of frustrating the Court and deflecting attention from their overall pattern of abuse and delay. Above all, Defendants want to distract the Court from the key facts that they cannot deny: Until March 9, 2020, fully 621 days after receiving the Plaintiffs' Requests and fourteen days after Plaintiffs filed their second motion to compel, Defendants produced only five pages of documents that are not webpages, communications with Plaintiffs' own counsel, or copies of documents in the public record. Far from bringing Defendants into compliance with their discovery obligations, the March 9 production is overwhelmingly filler, perpetuates Defendants' inadequate privilege assertions, contains random inadequately unsupported redactions, and still does not account for all documents responsive to Plaintiffs' Requests. It is Defendants' repeated misconduct that is worthy of the Court's sanctions, not Plaintiffs' attempts to end it.

CONCLUSION

For these reasons, the Court should compel Defendants (1) to produce the entirety of their paper and electronic litigation files regarding Lisa Miller, irrespective of their privilege claims, within 30 days of the Court's order on this motion; (2) to produce documents, irrespective of form or privilege claims, from all other locations that reasonably might contain documents responsive to Plaintiffs' Requests as compelled by the Court's order, ECF 395, within 30 days of the Court's order on this motion; (3) to file sworn affidavits that enumerate the locations, both electronic and digital, into which Defendants have conducted reasonable inquiries for responsive documents, and that certify that there are no other locations in which such documents reasonably might exist, within 30 days of the Court's order on this motion; and (4) to pay Plaintiffs' costs and fees in preparing both this motion and Plaintiffs' first motion to compel, ECF 361.

Respectfully submitted.

April 14, 2020

/s/ Fritz H. Langrock
Frank H. Langrock
Langrock Sperry & Wool, LLP
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, Vermont 05753-0351
Phone: (802) 388-6356
Fax: (802) 388-6149
Email: flangrock@langrock.com

Sarah Star
Sarah Star, PL
P.O. Box 106
Middlebury, Vermont 05753
Phone: (802) 385-1023
Email: srs@sarahstarlaw.com

Scott D. McCoy
Southern Poverty Law Center
P.O. Box 10788
Tallahassee, Florida 32302
Phone: (850) 521-3042
Fax: (850) 521-3001
Email: scott.mccoy@splcenter.org

J. Tyler Clemons
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Phone: (504) 526-1530
Fax: (504) 486-8947
Email: tyler.clemons@splcenter.org

Diego A. Soto
Maya G. Rajaratnam
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: (334) 956-8200
Fax: (334) 956-8481
Email: diego.soto@splcenter.org
Email: maya.rajaratnam@splcenter.org

Counsel for Plaintiffs

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:

Richard Boyer
Integrity Law Firm, PLLC
Counsel for Defendant Linda M. Wall

Anthony R. Duprey
Neuse, Duprey & Putnam, PC
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Roger K. Gannam
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Adam S. Hochschild
Hochschild Law Firm, LLC
Counsel for Defendant Linda M. Wall

Brooks G. McArthur
Jarvis, McArthur & Williams, LLC
Counsel for Defendant Kenneth L. Miller

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

Daniel Joseph Schmid
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Norman C. Smith
Norman C. Smith, PC
Counsel for Defendant Linda M. Wall

Michael J. Tierney
Wadleigh, Starr & Peters, PLLC
Counsel for Defendant Timothy D. Miller

Defendant Philip Zodiates

and on the following unrepresented parties by United States mail:

Defendant Victoria Hyden
1212 Saint Cloud Avenue
Lynchburg, Virginia 24502

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

April 14, 2020

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

Exhibit 1

Tyler Clemons

From: Horatio Mihet <hmihet@lc.org>
Sent: Wednesday, April 3, 2019 5:15 PM
To: Tyler Clemons
Cc: Beth Jacob
Subject: RE: Finishing Meet & Confer

Tyler – I'm on a deposition break and responding to you. I was involved in the discovery responses and document gathering, so it wouldn't make sense to switch to one of my colleagues now, especially since we've already done much of the meet and confer without them. I need to see it through. I note that you took an extended break from the process, at a time when I would have been able to participate on a timelier basis. I am sorry that my schedule and yours did not match up well on this.

The discovery cutoff is in late August, almost five months away. Are you really not able to wait the extra 12 days between your April 5 and my April 17?

I don't like the sudden rush in the middle of my very hectic deposition schedule, but as a show of good faith, and if it will help avoid a needless dispute, I can make an extra effort and be available on Friday, April 12 at 4 Eastern. Does that work?

HGM

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs and
Chief Litigation Counsel*

Liberty Counsel

PO Box 540774
Orlando, FL 32854
(407) 875-1776 phone
(407) 875-0770 fax

LC.org

Offices in DC, FL, and VA

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From: Tyler Clemons <Tyler.Clemons@splcenter.org>
Sent: Wednesday, April 3, 2019 10:41 AM
To: Horatio Mihet <hmihet@lc.org>
Cc: Beth Jacob <beth.jacob@splcenter.org>
Subject: RE: Finishing Meet & Confer

Good morning Harry,

It is imperative that we finish this as soon as possible. While I understand that you are busy, we have been attempting to schedule and complete this meet and confer since October 25, 2018. Please indicate a time within the next week when you are willing to meet, or designate one of your colleagues who can meet within the next on your behalf, by close of business on Friday, April 5. Otherwise, we will seek relief from the court.

Best,

Tyler

J. Tyler Clemons (*he/him/his*)

Staff Attorney, LGBT Rights/Special Litigation

[Southern Poverty Law Center](#)

201 St. Charles Avenue Suite 2000

New Orleans, Louisiana 70170

t (504)526-1530 c (504)258-4290 f (504)486-8947

[LinkedIn](#) | [SSRN](#)

Admitted to practice in Louisiana and Maryland.

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From: Tyler Clemons

Sent: Friday, March 29, 2019 11:07 AM

To: 'Horatio Mihet'

Cc: Beth Jacob

Subject: RE: Finishing Meet & Confer

Hi Harry,

Thanks for your response. While I understand that you are busy with other matters, that delay is just too long—we have impending discovery deadlines and need to move this case forward. Should I speak to one of your co-counsel, Daniel Schmid or Roger Gannam, instead?

Best,

Tyler

J. Tyler Clemons (*he/him/his*)

Staff Attorney, LGBT Rights/Special Litigation

[Southern Poverty Law Center](#)

201 St. Charles Avenue Suite 2000

New Orleans, Louisiana 70170

t (504)526-1530 c (504)258-4290 f (504)486-8947

[LinkedIn](#) | [SSRN](#)

Admitted to practice in Louisiana and Maryland.

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From: Horatio Mihet [<mailto:hmihet@lc.org>]

Sent: Friday, March 22, 2019 9:45 AM

To: Tyler Clemons

Cc: Beth Jacob; Claudia Huerta
Subject: RE: Finishing Meet & Confer

Tyler – thanks for getting back to me. I am eager to finish our discussion, but unfortunately you have caught me this time on a marathon deposition schedule is a major case where discovery closes April 15, and where I am engaged in day-long depositions every business day, coast to coast, between now and then. The first availability I have at this point is April 17 in the afternoon your time (I will be on the West Coast). My apologies for the delay – I understand that this is about 12 days farther out than you requested. Thanks for understanding.

HGM

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs and
Chief Litigation Counsel*

Liberty Counsel
PO Box 540774
Orlando, FL 32854
(407) 875-1776 phone
(407) 875-0770 fax

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Offices in DC, FL, and VA
*Licensed in Florida and Ohio

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From: Tyler Clemons <Tyler.Clemons@splcenter.org>
Sent: Thursday, March 21, 2019 9:53 AM
To: Horatio Mihet <hmihet@lc.org>
Cc: Beth Jacob <beth.jacob@splcenter.org>; Claudia Huerta <claudia.huerta@splcenter.org>
Subject: Finishing Meet & Confer

Good morning Harry,

We need to finish our meet and confer regarding Ms. Lindevaldsen and Liberty Counsel's production in the *Jenkins* litigation in Vermont. Please pick a couple of hours over the next two weeks (Tuesday, March 26 through Friday, April 5) that we could do so and I will make myself available.

Thanks,

Tyler

J. Tyler Clemons (*he/him/his*)
Staff Attorney, LGBT Rights/Special Litigation
[Southern Poverty Law Center](http://SouthernPovertyLawCenter.org)
201 St. Charles Avenue Suite 2000
New Orleans, Louisiana 70170
t (504)526-1530 c (504)258-4290 f (504)486-8947
[LinkedIn](#) | [SSRN](#)

Admitted to practice in Louisiana and Maryland.

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Exhibit 2

Tyler Clemons

From: Horatio Mihet <hmihet@lc.org>
Sent: Thursday, November 21, 2019 9:27 AM
To: Adam Hochschild; Tyler Clemons
Cc: Robert B. Hemley; Brooks G. McArthur; norman@normansmithlaw.com; cs.fergie@myfairpoint.net; Hillary A. Borcharding; Matthew D. Preedom; Linda Bradford Barron; Claudia Huerta; David Dinielli; Diego Soto; Emily Joselson; flangrock; Jessica Stone; jswift; Julie Jackman; Roger Gannam; Sarah Star; Maya Rajaratnam; Beth Littrell; Scott McCoy; Roger Gannam; Daniel Schmid; Anthony Duprey; Michael J. Tierney
Subject: RE: Jenkins: Deposition Notices

Tyler:

First, my clients consent to electronic service.

Second, please refrain from any further unilateral scheduling or noticing of depositions, without coordinating dates and locations with opposing counsel, because that is improper and unprofessional. We have communicated via email on numerous occasions until now, and there was no reason why you could not email or call me to coordinate the depositions you unilaterally noticed.

Third, we are unavailable for depositions in Virginia on Dec. 4-5. We can do December 9-10 or 10-11. Please confirm immediately that you do not intend to proceed with depositions on Dec. 4-5, failing which we will need to seek protection from the Court.

Fourth, please provide dates and locations for the depositions of Janet Jenkins, Carolyn Ceccotti Jenkins, and each of Plaintiff's four purported experts, during the week of December 16. We believe a half day with each witness may be sufficient, so we can schedule two per day in the same location, but reserve the right to go a bit longer if it proves necessary. The request for dates to depose the purported experts is made without prejudice to our argument that they were not timely disclosed.

Fifth, responding to the separate email from your office of yesterday afternoon, many months ago Mr. Staver planned travel and out of office activities between December 12 and January 1. The only remaining date for which he can be available for a deposition in Orlando is January 2. Please secure a location in Orlando. I am willing to accept a deposition subpoena for him, for the above date and location only.

Horatio G. Mihet, Esq.*

*Vice President of Legal Affairs and
Chief Litigation Counsel*

Liberty Counsel

PO Box 540774

Orlando, FL 32854

(407) 875-1776 phone

(407) 875-0770 fax

LC.org

Offices in DC, FL, and VA

*Licensed in Florida and Ohio

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From: Adam Hochschild <adam@hochschildlaw.com>

Sent: Wednesday, November 20, 2019 5:51 PM

To: Tyler Clemons <Tyler.Clemons@splcenter.org>

Cc: Robert B. Hemley <rhemley@gravelshea.com>; Brooks G. McArthur <bmcArthur@jarvismcarthur.com>; norman@normansmithlaw.com; cs.fergie@myfairpoint.net; Hillary A. Borcharding <hborcharding@gravelshea.com>; Matthew D. Preedom <mpreedom@gravelshea.com>; Linda Bradford Barron <lbarron@gravelshea.com>; Claudia Huerta <claudia.huerta@splcenter.org>; David Dinielli <David.Dinielli@splcenter.org>; Diego Soto <Diego.Soto@splcenter.org>; Emily Joselson <ejoselson@langrock.com>; flangrock <flangrock@langrock.com>; Jessica Stone <jessica.stone@splcenter.org>; jsSwift <jswift@langrock.com>; Julie Jackman <jjackman@langrock.com>; Sarah Star <sarahstar.esq@gmail.com>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Beth Littrell <beth.littrell@splcenter.org>; Scott McCoy <Scott.McCoy@splcenter.org>; Horatio Mihet <hmihet@lc.org>; Roger Gannam <rgannam@lc.org>; Daniel Schmid <daniel@lc.org>; Anthony Duprey <anthony@ndp-law.com>; Michael J. Tierney <mtierney@wadleighlaw.com>

Subject: Re: Jenkins: Deposition Notices

Tyler: I was in the email chain from the beginning; no apologies warranted there. I figured when you said you hadn't yet heard from any other counsel, that you had intended to email everyone. I'm including other counsel here and attaching your deposition notices.

Adam S. Hochschild
Hochschild Law Firm, LLC
314.503.0326
adam@hochschildlaw.com
www.HochschildLaw.com

On Nov 20, 2019, at 5:15 PM, Tyler Clemons <Tyler.Clemons@splcenter.org> wrote:

Hi Adam,

Apologies for leaving you off this email chain. Some defendants have not consented to email service, however, and therefore must be served by mail.

These are not the only depositions that Plaintiffs intend to take.

Best,

[<image001.jpg>](#) **J. Tyler Clemons** they/them/mx
Staff Attorney | LGBTQ Rights & Special Litigation
Southern Poverty Law Center
T 504.526.1530 C 504.258.4290 F 504.486.8947
tyler.clemons@splcenter.org | www.splcenter.org
Admitted in Louisiana & Maryland

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From: Adam Hochschild [mailto:adam@hochschildlaw.com]

Sent: Wednesday, November 20, 2019 4:09 PM

To: Tyler Clemons

Cc: Robert B. Hemley; Brooks G. McArthur; norman@normansmithlaw.com; cs.fergie@myfairpoint.net; Hillary A. Borcharding; Matthew D. Preedom; Linda Bradford Barron; Claudia Huerta; David Dinielli; Diego Soto; Emily Joselson; flangrock; Jessica Stone; jswift; Julie Jackman; Sarah Star; Maya Rajaratnam; Beth Littrell; Scott McCoy

Subject: Re: Jenkins: Deposition Notices

Tyler: It appears the deposition notices were not emailed to — and accordingly this email chain does not include — counsel for all parties. I suggest you include everyone.

Are these four depositions the only ones plaintiffs intend to take?

Thanks,

Adam

Adam S. Hochschild

Hochschild Law Firm, LLC

314.503.0326

adam@hochschildlaw.com

www.HochschildLaw.com

On Nov 20, 2019, at 4:14 PM, Tyler Clemons <Tyler.Clemons@splcenter.org> wrote:

Hi Bob,

We are serving the witnesses this afternoon and have not yet heard from any other counsel. As you are aware, the court's most recent order gives us very little time to take these depositions. But we will of course keep you and all parties informed of any scheduling changes.

We have no objection to remote participation, either by video or phone. The deposition was scheduled through Legal Media Experts (919-682-7757 or schedule@legalmediaexperts.com); you should contact them to set that up.

Best,

Tyler

<image003.jpg> **J. Tyler Clemons** they/them/mx
Staff Attorney | LGBTQ Rights & Special Litigation
Southern Poverty Law Center
T 504.526.1530 C 504.258.4290 F 504.486.8947
tyler.clemons@splcenter.org | www.splcenter.org
Admitted in Louisiana & Maryland

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From: Robert B. Hemley [mailto:rhemley@gravelshea.com]
Sent: Wednesday, November 20, 2019 2:33 PM
To: Tyler Clemons; Brooks G. McArthur; norman@normansmithlaw.com;
adam@hochschildlaw.com
Cc: cs.fergie@myfairpoint.net; Hillary A. Borcharding; Matthew D. Preedom; Linda Bradford Barron; Claudia Huerta; David Dinielli; Diego Soto; Emily Joselson; flangrock; Jessica Stone; jswift; Julie Jackman; Sarah Star; Maya Rajaratnam; Beth Littrell; Scott McCoy
Subject: RE: Jenkins: Deposition Notices

Tyler: The dates you have selected, December 4 and 5, are unavailable for me, though we may be able to staff the depositions. Can you let me know if these dates have been agreed to by other counsel, or the witnesses, or if the witnesses have been served? Also, if the depositions do go forward, do you have any objection to participation by SKYPE, or other video hookup, and phone? I see the location you have chosen is a Fairfield Suites, so I assume you have made arrangements for a conference room. Please provide the details of that and a contact person. Please let me know as soon as possible so we can make necessary arrangements and/or approach the court if necessary. Thank you.

<image005.jpg>

Robert B. Hemley | *Shareholder*
Gravel & Shea PC

76 St. Paul Street, 7th Floor | P.O. Box 369 | Burlington, VT 05401
T: 802-658-0220 | F: 802-658-1456
rhemley@gravelshea.com | www.gravelshea.com
Biography | Download vCard

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From: Tyler Clemons <Tyler.Clemons@splcenter.org>
Sent: Wednesday, November 20, 2019 3:21 PM
To: Brooks G. McArthur <bmcarthur@jarvismcarthur.com>;
norman@normansmithlaw.com; adam@hochschildlaw.com; Robert B. Hemley
<rhemley@gravelshea.com>
Cc: cs.fergie@myfairpoint.net; Hillary A. Borcharding <hborcharding@gravelshea.com>;
Matthew D. Preedom <mpreedom@gravelshea.com>; Linda Bradford Barron
<lbarron@gravelshea.com>; Claudia Huerta <claudia.huerta@splcenter.org>; David
Dinielli <David.Dinielli@splcenter.org>; Diego Soto <Diego.Soto@splcenter.org>; Emily
Joselson <ejoselson@langrock.com>; flangrock <flangrock@langrock.com>; Jessica
Stone <jessica.stone@splcenter.org>; jswift <jswift@langrock.com>; Julie Jackman
<jjackman@langrock.com>; Sarah Star <sarahstar.esq@gmail.com>; Maya Rajaratnam
<maya.rajaratnam@splcenter.org>; Beth Littrell <beth.littrell@splcenter.org>; Scott
McCoy <Scott.McCoy@splcenter.org>
Subject: Jenkins: Deposition Notices

Counsel:

Please find attached deposition notices for Joleen Booth, William Sidebottom, Debbie Thurman, and Sandy Sturgill in *Jenkins v. Miller*, No. 2:12-cv-184 (D. Vt.).

Best,

<image006.jpg> **J. Tyler Clemons** they/them/mx
Staff Attorney | LGBTQ Rights & Special Litigation
Southern Poverty Law Center
T 504.526.1530 C 504.258.4290 F 504.486.8947
tyler.clemons@splcenter.org | www.splcenter.org
Admitted in Louisiana & Maryland

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Exhibit 3

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

<hr/>)	
JANET JENKINS, ET AL.,))	
))	
Plaintiffs,))	
))	Docket No. 2:12-cv-00184
v.))	
))	
KENNETH L. MILLER, ET AL.,))	
))	
Defendants.))	
<hr/>)	

**DEFENDANT LIBERTY COUNSEL, INC.’S FIRST SET OF REQUESTS
FOR PRODUCTION TO PLAINTIFF JANET JENKINS**

Pursuant to Fed. R. Civ. P. 26 and 34, Defendant Liberty Counsel, Inc. (“Liberty Counsel”), by and through the undersigned counsel, hereby propounds the following First Set of Requests for Production to Plaintiff Janet Jenkins (“Jenkins” or “Plaintiff”). Plaintiff is directed to serve her written response and document production in conformance with the above-cited rules within thirty (30) days via electronic means, or at the offices of the undersigned counsel, or as otherwise mutually agreed by the parties.

Plaintiff is further instructed to respond pursuant to the following definitions and instructions:

DEFINITIONS

For purposes of these Requests for Production, the following definitions shall apply:

1. “Jenkins,” “Plaintiff,” “you” and “your” mean Plaintiff Janet Jenkins, together with her agents, servants, employees, partners, attorneys, successors or assigns, and any other person or entity acting on Jenkins’s behalf, or on whose behalf Jenkins purports to bring this action. These

terms specifically include, without limitation, all, each and every attorney and law firm representing Jenkins in this action, and these Requests encompass, without limitation, all responsive documents in the custody, possession or control of such attorneys and law firms.

2. “All” shall be construed as all, each, any, and every.

3. “And” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Requests all information that might otherwise be construed to be outside of their scope.

4. “Communication” means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

5. “Complaint” and “RSAC” mean the Revised Second Amended Complaint filed on May 4, 2017 (dkt. 223), in the above-captioned case.

6. “Concerning” means relating to, referring to, reflecting, describing, evidencing, or constituting, in whole or in part, directly or indirectly, the stated subject matter.

7. “Document(s)” has the broadest possible meaning permissible under the Federal Rules of Civil Procedure and/or applicable precedent, including, without limitation, any handwritten, typewritten, printed, recorded, electronic or electronically stored information, or graphic matter however produced or reproduced, whether or not in the possession, custody, or control of the defendant(s) or the plaintiff(s), and whether or not claimed to be privileged against discovery on any ground, including but not limited to, all contracts, reports, records, lists, memoranda, Communications, correspondence, telegrams, telexes, telefaxes, emails, appointment calendars, diaries, schedules, films, videos, photographs, sound recordings, signed or unsigned documents, as well as sent or unsent drafts of documents. A draft or non-identical copy is a separate Document within the meaning of this term.

8. “Including” is used to illustrate only and should not be construed as limiting in any way.

9. “Liberty Counsel” means Defendant Liberty Counsel, Inc., including any of its employees, agents, attorneys, affiliates or representatives.

10. “Lindevaldsen” means Defendant Rena Lindevaldsen.
11. “Staver” means non-party Mathew Staver, Founder and Chairman of Liberty Counsel.
12. The singular form of any noun or pronoun includes the plural, and vice versa.
13. Terms in the present tense include terms in the past tense, and terms in the past tense include terms in the present tense.

INSTRUCTIONS

1. Unless otherwise stated, these requests cover the time period from January 1, 2000 through the present.
2. These requests shall be deemed continuing in nature so as to require timely supplemental responses when necessary to reflect events occurring and information becoming available subsequent to the serving of your initial response.
3. Jenkins is to search all documents in her possession, custody, or control, wherever located, including those documents in the possession, custody, or control of the Jenkins’ agents, attorneys, and others acting on her behalf.
4. Documents are to be produced as they are kept in the usual course of business.
5. Documents are to be sequentially Bates stamped. Each written response to each Request shall identify, by Bates range, the documents being produced in response to that Request.
6. If any part of a document is responsive to any request herein, produce the entire document.
7. Where a claim of privilege is asserted in objecting to any Request or part thereof and Documents or information are not provided on the basis of such assertion, the following information should be provided in a privilege log served with the objection, if known or reasonably

available, unless divulging such information would cause disclosure of the allegedly privileged information, in which case the assertion of any such privilege should be noted: (a) the type of document for which the privilege is claimed; (b) the date of the document; (c) the author(s), addressee(s), custodian(s), and any other recipient of the document, and, where not apparent, the relationships of the author(s), addressee(s), custodian(s), and any other recipient to each other; (d) the subject matter of the information requested or the document withheld; and (e) the nature of the privilege asserted and the basis upon which it is claimed.

8. For brevity, clarity or convenience, the following Requests may omit the “alleged” qualifier when inquiring about Documents concerning various acts, omissions or events. Do not take this as an indication that Liberty Counsel concedes that any of the acts, omissions or events inquired about actually took place, or that they took place in the manner described in the inquiry, or that any such Documents actually exist.

DOCUMENTS

1. All Documents identified or referred to in Category 1 of “DOCUMENTS” on page 15 or your Initial Disclosures dated July 9, 2018.

2. All Documents identified or referred to in Category 2 of “DOCUMENTS” on page 16 or your Initial Disclosures dated July 9, 2018.

3. All Documents identified or referred to in Category 3 of “DOCUMENTS” on page 16 or your Initial Disclosures dated July 9, 2018.

4. All Documents identified or referred to in Category 4 of “DOCUMENTS” on page 16 or your Initial Disclosures dated July 9, 2018.

5. All Documents sent by you or on your behalf to, or received by you or on your behalf from, each of the 66 Persons you identify on pages 2-15 of your Initial Disclosures dated July 9, 2018 as likely to have discoverable information that you might use to support your claim.

6. All Documents you have received from any party to this lawsuit, in connection with a request you made while prosecuting this lawsuit, whether via subpoena, document request or otherwise. This request also includes the request you made and the Communications between you and the party regarding your request and the documents produced.

7. All Documents you have received from any non-party or third party in connection with a request you made while prosecuting this lawsuit, whether via subpoena or otherwise. This request also includes the request you made and the Communications between you and the non-party or third-party regarding your request and the documents produced.

8. All Documents you have received from any government entity, law enforcement entity, or prosecutor in connection with a request you made while prosecuting this lawsuit, whether via subpoena or otherwise. This request also includes the request you made and the Communications between you and the non-party or third-party regarding your request and the documents they produced.

9. All Documents sent to or received from, including all Communications you have had with, any investigator, government entity, law enforcement entity, or prosecutor regarding (a) the disappearance of Lisa Miller or Isabella Miller, (b) the search for Lisa Miller or Isabella Miller, (c) the whereabouts of Lisa Miller or Isabella Miller; and (d) the Persons allegedly involved in assisting Lisa Miller or Isabella Miller to disappear from the United States or to remain undetected.

10. All Documents concerning any requests for investigation or complaints you have made, or that were made on your behalf, to any government entity, law enforcement entity, or

prosecutor, concerning any alleged involvement by Liberty Counsel (including without limitation Bill Sidebottom, Lindevaldsen or Staver) in the disappearance of Lisa Miller or Isabella Miller.

11. Documents sent to or received from, including all Communications you have had with, the National Center for Missing and Exploited Children, regarding Isabella Miller.

12. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen did or made any act, omission, representation or misrepresentation to assist Lisa Miller or Isabella Miller to disappear or remain undetected.

13. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen agreed to participate in any conspiracy to assist Lisa Miller or Isabella Miller to disappear or remain undetected.

14. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen knew of, participated in, or assisted in any way the conspiracy you allege in this lawsuit.

15. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen had any advance knowledge of Lisa Miller's plan to leave the United States with Isabella Miller.

16. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen have had any communications, directly or indirectly, with Lisa Miller or Isabella Miller since September 12, 2009.

17. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen assisted or encouraged Lisa Miller to ignore or violate court orders regarding Jenkins' custody of, or visitation with, Isabella Miller, as you allege in RSAC ¶20.

18. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen supported or encouraged Lisa Miller to move with Isabella Miller from Winchester to Lynchburg, as you allege in RSAC ¶24.

19. All Documents which you contend show, reflect, demonstrate or prove that Defendant Wall and Lisa Miller decided and agreed as early as June of 2008 that Lisa Miller should flee with Isabella, as you allege in RSAC ¶25.

20. All Documents which you contend show, reflect, demonstrate or prove that Response Unlimited, Inc. was working in conjunction with the lawyers at Liberty Counsel to raise funds in support of the effort to terminate contact between Jenkins and Isabella Miller, as you allege in RSAC ¶29.

21. All Documents which you contend show, reflect, demonstrate or prove that in early 2009, Philip Zodhiates offered Liberty Counsel a ‘personal option’ for Lisa Miller in the event that her legal fight failed, as you allege in RSAC ¶29.

22. The emails between Lisa Miller and Debbie Thurman, the Facebook post and the Lifesitenews.com article referenced in RSAC ¶33.

23. All Documents which you contend show, reflect, demonstrate or prove that that by the late summer of 2009, Lisa Miller and her co-conspirators had devised a plan to kidnap Isabella and avoid detection, as you allege in RSAC ¶34.

24. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen participated in devising, knew of, agreed to, or in any way participated in the purported, plan to kidnap Isabella and avoid detection, as you allege in RSAC ¶34.

25. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen had advance knowledge, participated, assisted or were otherwise

involved in the transportation of Lisa Miller and Isabella Miller across the Canadian border, as you allege in RSAC ¶36.

26. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen had advance knowledge, participated, assisted or were otherwise involved in the purchasing of plane tickets for, or the transportation of Lisa Miller and Isabella Miller, from Canada to Nicaragua, as you allege in RSAC ¶38.

27. All Documents which you contend show, reflect, demonstrate or prove that Lisa Miller told Andrew Yoder that Liberty Counsel had advised her that it would be in her best interest to disappear, as you allege in RSAC ¶38.

28. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel in fact had advised Lisa Miller that it would be in her best interest to disappear.

29. All Communications with or about Andrew Yoder.

30. All Communications between you and the police in connection with the welfare check you arranged at Lisa Miller's last known address in Forest, Virginia in December 2009, as you allege in RSAC ¶42, and all Documents, including without limitation police reports, concerning that welfare check.

31. All Documents concerning your learning, allegedly in June 2010, of Lisa Miller and Isabella Miller-Jenkins' whereabouts, as you allege in in RSAC ¶43.

32. All Documents which you claim, in RSAC ¶44, were delivered by Victoria Zodiates from her father to Lindevaldsen at Liberty University School of Law, together with any Documents or evidence demonstrating that they were actually so delivered and when.

33. All Documents which you contend show, reflect, demonstrate or prove that Lindevaldsen is or was an elder of Thomas Road Baptist Church, as you allege in in RSAC ¶45.

34. All Documents which you contend show, reflect, demonstrate or prove that Lindevaldsen packed up the personal belongings of Lisa Miller to have them sent to Lisa Miller in Nicaragua, as you allege in in RSAC ¶45.

35. All Documents which you contend show, reflect, demonstrate or prove that Victoria Hyden used her employment at Liberty University to facilitate Lisa Miller's communication with her lawyer, Rena Lindevaldsen during the time that Lindevaldsen claimed she was unable to communicate with Lisa Miller in an attempt to help her duck service of contempt and enforcement pleadings filed by Janet Jenkins to help locate Isabella, as you allege in RSAC ¶45.

36. All Communications between Lindevaldsen and Lisa Miller facilitated by Hyden.

37. The transcript of the testimony of Andrew Yoder which you reference and quote from in RSAC ¶56.

38. Each false or misleading statement made by Liberty Counsel to “courts in two states” as you allege in RSAC ¶57, and all Documents which you contend show, reflect, demonstrate or prove that the statement in question was false or misleading, or that Liberty Counsel knew that the statement was false or misleading at the time the statement was made.

39. All Documents which you contend show, reflect, demonstrate or prove that Lindevaldsen or Liberty Counsel assisted Lisa Miller to leave the United States in advance of September 25, 2009 and to remain hidden, as you allege in RSAC ¶57.

40. The phone records introduced at the trial of Kenneth Miller, which you reference in RSAC ¶60.

41. All Documents which you contend show, reflect, demonstrate or prove that on September 22, 2009 Phillip Zodhiates called Staver, Lindevaldsen or anyone at Liberty Counsel.

42. All Documents which you contend show, reflect, demonstrate or prove that on September 22, 2009 Phillip Zodhiates actually reached by telephone and had a conversation of any length with Staver, Lindevaldsen or anyone at Liberty Counsel.

43. All Documents which you contend show, reflect, demonstrate or prove the substance, time, length and participants of each Communication you contend to have taken place between Phillip Zodhiates and Lindevaldsen, Staver or anyone at Liberty Counsel on September 22, 2009.

44. Each false or misleading statement made by Staver or Lindevaldsen to various courts in Vermont and Virginia and to the press, as you allege in RSAC ¶61, and all Documents which you contend show, reflect, demonstrate or prove that the statement in question was false or misleading, or that Liberty Counsel knew that the statement was false or misleading at the time the statement was made.

45. The entire statement issued by the Nicaragua Brethren, which you reference in RSAC ¶63.

46. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel or Lindevaldsen knew of, participated in, agreed to, or in any way assisted the alleged conspiracy because of alleged animus towards Jenkins' sexual orientation or towards same-sex couples, as you allege in RSAC ¶67.

47. All Documents which you have used, or upon which you have relied, to calculate any of the damages you seek in this lawsuit, including, without limitation, any of the damages referred to on page 16 of your Initial Disclosures dated July 9, 2018.

48. All Documents which you contend show, reflect, demonstrate or prove that you have suffered extreme emotional distress as a result of any act, omission, representation or misrepresentation of Liberty Counsel or Lindevaldsen.

49. All Documents concerning any therapy, counseling or medical intervention you have sought or received in connection with the extreme emotional distress you allege to have suffered, including but not limited to medical provider notes, diagnoses, prescriptions, invoices, or correspondence.

50. All Documents concerning the legal fees you allege to have incurred in RSAC ¶69.

51. All Documents concerning the lost business damages you allege in RSAC ¶69.

52. A profit and loss statement for your daycare business from January 1, 2000 to the present.

53. Your tax returns from January 1, 2000 to the present.

54. The tax returns for your daycare business from January 1, 2000 to the present.

55. Any journal or diary you have kept from January 1, 2000 to the present.

56. Any transcript from any trial related to the disappearance of Lisa Miller or Isabella Miller.

57. Any exhibits or other evidence presented at any trial related to the disappearance of Lisa Miller or Isabella Miller.

58. Any Communications you have had with any prosecutor prosecuting any trial related to the disappearance of Lisa Miller or Isabella Miller.

59. All Documents you have obtained from any trial related to the disappearance of Lisa Miller or Isabella Miller.

60. All Documents which you contend show, reflect, demonstrate or prove that Liberty Counsel has or has had sufficient contacts with Vermont to enable the United States District Court for the District of Vermont to exercise personal jurisdiction over it.

61. All Documents which you contend show, reflect, demonstrate or prove that Lindevaldsen has or has had sufficient contacts with Vermont to enable the United States District Court for the District of Vermont to exercise personal jurisdiction over her.

62. All Documents which you contend show, reflect, demonstrate or prove Staver has or has had sufficient contacts with Vermont to enable the United States District Court for the District of Vermont to exercise personal jurisdiction over him.

63. All Documents and Communications concerning the designation of Liberty Counsel as a “hate group” by the Southern Poverty Law Center.

64. All Documents or Communications regarding the goal, desire or intention of the Southern Poverty Law Center to “destroy” or “completely destroy” Liberty Counsel, or organizations like Liberty Counsel, or organizations whom the Southern Poverty Law Center has designated as “hate groups.”

65. All documents concerning any solicitation or request from you to Southern Poverty Law Center, or from Southern Poverty Law Center to you, to represent you in this litigation.

66. Any retainer agreement or engagement letter between you and the Southern Poverty Law Center.

67. All Communications you have had with Southern Poverty Law Center prior to the time they became your attorneys in this lawsuit.

68. All Communications you have had with any organization advocating for LGBT rights, including without limitation the Southern Poverty Law Center or the National Center for

Lesbian Rights, regarding Liberty Counsel, Lindevaldsen, Staver or the disappearance of Lisa Miller or Isabella Miller.

69. All statements you have provided to the media regarding this lawsuit or the disappearance of Lisa Miller or Isabella Miller.

70. All Documents you reviewed, consulted or relied upon in answering any interrogatories or document requests propounded upon you by Liberty Counsel or Lindevaldsen.

Anthony R. Dupree
NEUSE, DUPREY, & PUTNAM
1 Cross Street
Middlebury, VT 05743
Phone: (802) 388-7966
Fax: (802) 388-9713
Email: anthony@ndp-law.com

/s/ Horatio G. Mihet
Horatio G. Mihet*
Daniel J. Schmid*
Roger K. Gannam
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Fax: (407) 875-0770
Email: dschmid@lc.org

*Attorneys for Defendants Liberty Counsel
and Rena Lindevaldsen*

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2019, a true and correct copy of the foregoing, *Defendant Liberty Counsel's First Set of Requests for Production to Plaintiff Janet Jenkins* were served via electronic mail on all counsel of record for Plaintiff and Defendants, including:

David C. Dinielli, Esq. (david.dinielli@splcenter.org)
Diego A. Soto, Esq. (diego.soto@splcenter.org)
J. Tyler Clemons, Esq. (Tyler.Clemons@splcenter.org)
Frank H. Langrock, Esq. (flangrock@langrock.com)
Sarah Star, Esq. (srs@sarahstarlaw.com)

Counsel for Plaintiff Janet Jenkins

Brooks G. McArthur, Esq. (bmcarthur@jarvismcarthur.com)

Counsel for Defendant Kenneth L. Miller

Michael J. Tierney, Esq. (mtierney@wadleighlaw.com)

Counsel for Defendant Timothy D. Miller

Robert B. Hemley, Esq. (rhemley@gravelshea.com)
Hillary A. Borcharding (hborcharding@gravelshea.com)

Counsel for Defendants Response Unlimited, Inc., Philip Zodiates, and Victoria Hyden

Norman C. Smith, Esq. (nc.smith@myfairpoint.net)
Adam S. Hochschild, Esq. (adam@hochschildlaw.com)

Counsel for Defendant Linda Wall

/s/ Horatio G. Mihet
Horatio G. Mihet

*Attorney for Defendants Liberty Counsel
and Rena Lindevaldsen*

Exhibit 4

Tyler Clemons

From: Tyler Clemons
Sent: Wednesday, March 18, 2020 4:12 PM
To: 'Horatio Mihet'; Roger Gannam; Daniel Schmid
Cc: Beth Littrell; Claudia Huerta; Emily Joselson; flangrock; Jessica Stone; jswift; Julie Jackman; Maya Rajaratnam; Sarah Star; Scott McCoy; srs; Brooks G. McArthur; Anthony Duprey; Adam Hochschild; Norman C. Smith; Toddy Ferguson; Michael J. Tierney; Diego Soto
Subject: Jenkins: Plaintaiff's Supplemental Responses to Liberty Counsel's RFPs
Attachments: Jenkins Pls Supp Responses to Liberty Counsel's 1st RFPs.pdf

Hi Harry,

Please find attached Plaintiff Janet Jenkins's First Supplemental Responses to Liberty Counsel's First Requests for Production. As you will see, Plaintiff has withdrawn her objection to Request 9 and plans to make a supplemental document production by early next week at the latest.

At this time, and subject to General Objection 11, Plaintiffs are not withholding any document responsive to Liberty Counsel's requests on the basis of privilege.

Best,

Tyler



J. Tyler Clemons they/them/mx
Staff Attorney | LGBTQ Rights & Special Litigation
Southern Poverty Law Center
T 504.526.1530 C 504.258.4290 F 504.486.8947
tyler.clemons@splcenter.org | www.splcenter.org
Admitted in Louisiana & Maryland

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Exhibit 5

**REDACTED: NON-RELEVANT
PERSONAL AND
CONFIDENTIAL INFORMATION
OF NON-PARTIES (FIRST
PARAGRAPH)**

From: zeusdesfor@aol.com <zeusdesfor@aol.com>
Sent: Friday, June 19, 2009 10:23 PM
To: Lindevaldsen, Rena M <rlindevaldsen@liberty.edu>
Subject: today

hey, thought you would want to know that the other lady who I am counseling, per say, tonight decided to give up her affair. She also is thinking of telling [REDACTED] about what is going on so she can step away completely out of his life and not feel guilty if he (the affair person) does decide to commit suicide. WOW! I invited her over tonight and we talked for hours while our kids played in the other room. God is so good. The neatest thing happened first thing. God had told me to go to Ollies and buy her Deserts in the SStream- I reasoned with that for a bit b/c this is my last paycheck. I obeyed and bought it and gave it to her today. She then told me the story about an email that she just got yesterday admonishing her about not having a quiet time and that perhaps that was the problem of why she went to the alter crying this past Sunday- and this came from an 11th grader. She then told me that she did not have any devotion books (she does own a Bible though) and that she had no idea where to start reading the Bible (she had tried what I had suggested a while ago but it wasn't working for her she said). She was amazed at how God works. Just think - if I had not obeyed God's still small voice of going and getting that devotion book (first, I didn't have the time to go get it and second, I thought of the money spent) then [REDACTED] would not have been touched by God as she was tonight. It just drove home how much God loves her b/c He worked through people to get her what she needed. I also gave her my devotion Bible and she actually read today's devotion (the reading through the Bible in a year) and was amazed that if she kept up with the 2 page readings per day then she could finish the Bible in a year. She also admitted that she had been thinking of what I had said about the foot in two places :) She actually got it! tonight and realized that God wasn't going to bless her marriage and or her life if she didn't "do her part" as she put it. Yeah! Keep her in your prayers b/c she is considering moving to [REDACTED] where [REDACTED]. She also told [REDACTED] she would not be return (another yeah- I encouraged her not to return b/c of the two feet in two places- long story but suffice it to say- it was the best decision she made).

Well, that is it- other than I did speak to the principal in WI tonight. Not sure what God wants. Still no jobs on this end. I even called several more places today. I know there is a door and I guess I have to explore the door in WI. This principal called me again last night and asked me to call him today. I don't think he knows who I am though! I sure hope that God doesn't want me to open eyes in WI. [REDACTED]

[REDACTED] Seriously though, I have been thinking- wouldn't this be just like the homosexual agenda- except for the opposite- we are spreading God's good news in the midst of a legal battle. I told a Pastor this last night and he got all excited. I told him to just calm down that once this principal found out who I was I wouldn't be offered the job. Some times I wonder if people think! I have leprosy.

oh- one more thing- Pastor Tipp didn't want to help me find a job. I figured as much but went anyway. He just wanted the low down. I shared with him the truth and he admitted it didn't make sense.

**REDACTED: ATTORNEY-
CLIENT PRIVILEGE (SECOND
PARAGRAPH)**

o.k. now I am really going. I am tired and tomorrow morning is yard sale day. I have no idea how Izzy talked me into this. I hate yard sales. Had to have them every sat in the summer as a child and all I can say is boring and all those people you have to talk to. I am going to put tracts in the books I am selling and hand them out with each sale so I have to be friendly :) :)

Try to relax at your parents. I will be praying for you guys. Lisa

Make your summer sizzle with [fast and easy recipes](#) for the grill.

Exhibit 6

From: [Mcalister, Mary E.](#)
To: [Corry, David M.](#); [Reichel, Hannah](#); [Staver, Mathew \(Liberty Counsel\)](#); [Staver, Anita L.](#); [Erik Stanley](#); [Belinda Wetherington](#)
Subject: Eml - Mary's comment RE: What do you say when God's law conflicts with man's law?...
Date: Tuesday, January 23, 2007 6:29:48 PM

All I can say is Amen Brother. I could not have said it nearly as articulately, particularly at the end of the day.

Mary E. McAlister
Senior Litigation Counsel
Licensed in California and Florida

Liberty Counsel

PO Box 11108

Lynchburg, VA 24506

(434) 592-7000 - Phone

(434) 582-7700 - Fax

www.LC.org

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From: Corry, David M.
Sent: Tuesday, January 23, 2007 6:23 PM
To: Reichel, Hannah; Staver, Mathew (Liberty Counsel); Staver, Anita L.; Erik Stanley; Mcalister, Mary E.; Belinda Wetherington
Subject: RE: What do you say when God's law conflicts with man's law?...

As Christian lawyers, we work within the law and the courts to advance religious liberties and use the law as a fulcrum for the advancement of the Kingdom of God. When the task before us does not provide an opportunity to do either, we are not shirking any responsibility to decline the representation. Sometimes the law is firmly set in a jurisdiction and taking the case will not afford an opportunity to change it (thus potentially wasting limited resources that could be used in a more fruitful endeavor). In those cases, litigating to an unsuccessful end (for the principle) can actually have the effect of adding to the unfavorable reported precedents, making it more difficult to get a positive result elsewhere. We would prefer to fight the battles in other jurisdictions where the law is not yet set, in hopes of getting reported opinions that conflict with the jurisdictions where the law is firmly set, setting up a battle for final interpretation by the Supreme Court.

Regarding [REDACTED]'s cause, we understand her position but, [REDACTED]

[REDACTED]

When God's law absolutely conflicts with man's law, follow God's law. When God's instructions to you absolutely conflict with man's law, follow God's instructions. Neither of those propositions requires the aid

of counsel. Neither of those propositions compels me to represent a woman who [REDACTED]

[REDACTED]

There are three God-ordained institutions: The Church, The Government and The Family. When government leaders establish laws that steer individuals away from obedience to God, they bear responsibility for the result. I'm not sure, theologically, whether the individual citizens are thereby exempt (its been well argued both ways), but certainly leadership in the family, the church and government has a heavy price when leading others astray. God requires us to be obedient to government and laws of government except where those can not be harmonized with with his law or his calling. According, I told [REDACTED]

So, she must do what she is called to do and suffer whatever the costs of obedience are. Paul, Peter and John did and they spoke to the tribunals without aid of counsel. I think I recall that Paul and Peter were executed (or at least died in prison) for their witnessing. While I do not believe that would happen in the United States, God may have a big test or trial of faith in front of [REDACTED]. That is a separate matter from whether Liberty Counsel must (or should) provide her legal representation through that test and trial.

We do advocate for Christians who take actions that are against the law **when the law provides a means for success** (i.e. the law is unconstitutional as an impermissible burden on the free exercise of religion). When the law will not provide any aid or cannot provide any aid, I cannot see the reason for undertaking the legal representation. They can lose without our help and without utilizing the finite resources of Liberty Counsel.

This response is more of a philosophical one with my extemporaneous thoughts at the close of a long day, not for distribution to Ms. [REDACTED] or outside Liberty Counsel. Others undoubtedly see it differently. Nevertheless, I thought the issue merited some thoughtful reply. Especially since I was the attorney who had the last conversation with Ms. [REDACTED].

David M. Corry, Esq.

Senior Litigation Counsel

Liberty Counsel

Offices in Florida, Virginia and the District of Columbia

(800) 671-1776

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From: Reichel, Hannah

Sent: Tuesday, January 23, 2007 5:35 PM

LC36355

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**DECLARATION OF J. TYLER CLEMONS
IN SUPPORT OF PLAINTIFFS' CONSOLIDATED
REPLY IN SUPPORT OF THEIR SECOND MOTION TO COMPEL DEFENDANTS
LIBERTY COUNSEL, INC. AND RENA LINDEVALDSEN TO COMPLY WITH
PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS AND
RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR AN AWARD
OF \$10,650 AS AND FOR SANCTIONS AGAINST PLAINTIFF AND HER COUNSEL**

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. On March 29, 2019, I sent an email to Defendants' counsel Horatio Mihet, asking him to make one of his co-counsel, Daniel Schmid or Roger Gannam, available to finish our meet-and-confer begun on February 11, 2019. This was due to Attorney Mihet's lack of availability to finish the meet-and-confer until nearly two weeks after my proposed dates. Attorney Mihet responded on April 3, 2019, declining to make one of his co-counsel available. A true and accurate copy of our email correspondence is attached to this reply as Exhibit 1.

3. On November 21, 2019, Defendants Liberty Counsel, Inc., and Rena Lindevaldsen sent Plaintiffs an email agreeing to accept email service for the first time. A true and accurate copy of this email is attached to this reply as Exhibit 2.

4. On August 29, 2019, Defendant Liberty Counsel served Plaintiffs with its first requests for production of documents. A true and accurate copy of these requests is attached to this reply as Exhibit 3.

5. On March 18, 2020, Plaintiff Janet Jenkins served Defendants with her first supplemental responses to Liberty Counsel's first requests for production of documents via email. This email also informed Defendants that "[a]t this time, and subject to General Objection 11, Plaintiffs are not withholding any document responsive to Liberty Counsel's requests on the basis of privilege." A true and accurate copy of this email is attached to this reply as Exhibit 4.

6. On March 9, 2020, Defendants served their supplemental production of approximately 40,000 pages on Plaintiffs.

7. Between March 9 and March 31, 2020, I spent approximately 19 hours reviewing Defendants' March 9 production.

8. Defendants' March 9 production includes, but is not limited to, the following:

- a. Twelve copies of Plaintiffs' Complaint in this case;
- b. A 363-page report regarding Mexican–American heritage and contemporary issues;
- c. Two copies of a 205-page document outlining Virginia's curriculum standards for World History & Geography;
- d. A 325-page document on emergency school planning published by the State of Rhode Island;
- e. A 544-page copy of Human Rights Watch's 2006 report;
- f. Two copies of a 497-page brief filed in support of the petition for certiorari in *Hollingsworth v. Perry*, 570 U.S. 693 (2013);

- g. Five copies of a 140-page pre-trial exhibit list in *Perry v. Schwarzenegger*, 264 F.R.D. 576 (N.D. Cal. 2009), including four consecutive copies; and
- h. Photocopies of several full books, including but not limited to:
 - i. *The Complete Infidel's Guide to the First Amendment* (276 pages);
 - ii. *The Complete Infidel's Guide to Iran* (364 pages);
 - iii. *Intimate Wars: The Life and Times of the Women Who Took Abortion from the Back Alley to the Board Room* (76 pages);
 - iv. Six copies of *Redeeming the Rainbow: A Christian Response to the Gay Agenda* (237 pages each);
 - v. *Sex and Culture* (703 pages);
 - vi. *Sexual Sabotage: How One Mad Scientist Unleashed A Plague of Corruption & Contagion on America* (416 pages); and
 - vii. *The New England Primer* (442 pages).

9. Defendants' March 9 production contained several redacted documents that were not included on Defendants' privilege logs. True and correct copies of two of these documents are attached to this reply as Exhibit 5 and Exhibit 6.

10. Of the roughly 42,000 pages of documents produced by Defendants Liberty Counsel and Rena Lindevaldsen in this case, 84 percent—more than 35,500 pages—consist of publicly available court filings, duplicative documents, or non-Defendant publications.

11. The most recent email from Lindevaldsen to Lisa Miller produced by Defendants is dated September 7, 2009.

12. 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 14th day of
April, 2020.

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

J. Tyler Clemons

**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

**INDEX OF EXHIBITS IN SUPPORT OF PLAINTIFFS' CONSOLIDATED
REPLY IN SUPPORT OF THEIR SECOND MOTION TO COMPEL DEFENDANTS
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RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR AN AWARD
OF \$10,650 AS AND FOR SANCTIONS AGAINST PLAINTIFF AND HER COUNSEL**

Exhibit

Description

- | | |
|---|--|
| 1 | Email Correspondence Between Horatio Mihet and Tyler Clemons (Apr. 3, 2019) |
| 2 | Email Correspondence Between Horatio Mihet and Tyler Clemons (Nov. 21, 2019) |
| 3 | Defendant Liberty Counsel's First Requests for Production of Documents to Plaintiffs |
| 4 | Email Correspondence Between Tyler Clemons and Horatio Mihet (Mar. 18, 2020) |
| 5 | Email From Lisa Miller to Rena Lindevaldsen with Redactions (June 19, 2009) |
| 6 | Email Among Various Individuals with Redactions (Jan. 23, 2007) |