

**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

**PLAINTIFF JANET JENKINS'S MOTION FOR AN ORDER TO SHOW CAUSE AND
NOTICE OF DEFENDANTS PHILIP ZODHIATES'S, VICTORIA HYDEN'S, AND
RESPONSE UNLIMITED, INC.'S NONCOMPLIANCE WITH [474] THE COURT'S
ORDER TO OBTAIN NEW COUNSEL BY APRIL 15, 2020**

Plaintiff Janet Jenkins notifies the Court that Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc. ("RUL") (collectively, "RUL Defendants") have failed to comply with the Court's March 3, 2020 order that they obtain new counsel by April 15, 2020, and that new counsel enter an appearance by April 15, 2020. *See* Order, ECF 474. Plaintiff therefore moves for an order requiring the RUL Defendants to show cause for these failures. Plaintiff proposes the RUL Defendants should have no more than two weeks to file a response to the Court's order to show cause, so that the Court can decide whether, when, and how discovery may proceed before the parties' proposed discovery schedule is due on May 15, 2020.

PROCEDURAL BACKGROUND

On December 10, 2019, Gravel & Shea PC moved to withdraw as counsel for the RUL Defendants. *See* Mot. of Gravel & Shea PC for Leave to Withdraw as Counsel, ECF 435.

On December 20, 2019, Plaintiffs noticed depositions of six nonparties, *see* Disc. Certificate, ECF 442, in Virginia for January 14, 2020, through January 17, 2020.

On January 6, 2020, the Court granted Gravel & Shea PC's motion and ordered the RUL Defendants to obtain new counsel, and for new counsel to enter an appearance, on or before February 5, 2020. *See* Order, ECF 449.

Because of the Court's order allowing the RUL Defendants time to obtain new counsel, on January 8, 2020, Plaintiffs canceled the noticed depositions. *See* Emails Between Counsel 2, Ex. 1 to Pls.' Mot. for Clarification of [450] the Court's January 7, 2020 Order that the Parties Submit One Proposed Modified Disc. Schedule, ECF 454-1. Plaintiffs agreed with opposing counsel that the RUL Defendants would be prejudiced if the depositions continued while they were unrepresented and were allowed time to obtain new counsel. *See id.* at 4–5.

On January 9, 2020, Plaintiffs moved for the Court to require Zodiates and Hyden, if they did not obtain new counsel, to file notices of *pro se* appearances, per Local Rule 11(a), and to require RUL, if it did not obtain new counsel, to show cause why it did not obtain new counsel, given that it cannot proceed *pro se* per Local Rule 11(b). *See* Pls.' Mot. for Modification of [449] the Court's January 6, 2020 Order Granting [435] Mot. to Withdraw as Attorney for RUL Defs., ECF 455.¹

On January 15, 2020, the clerk of the Court docketed the RUL Defendants' motion to extend the time to obtain new counsel to March 31, 2020. *See* Mot. to Stay Proceedings and Extension of Time to Secure Successor Counsel, ECF 458 (mailed on January 9, 2020). On January 16, 2020, Plaintiffs filed a response in which they deferred to the Court's judgment on whether to grant the extension. *See* Pls.' Resp. to RUL Defs.' Mot. to Stay Proceedings and

¹ That same day, Plaintiffs also filed a motion for leave to serve discovery documents on Zodiates through service on Hyden and RUL until Zodiates obtains new counsel. *See* Pls.' Mot. for Leave to Serve Disc. Docs on Zodiates Through Service on Hyden and RUL Until Zodiates Obtains New Counsel, ECF 453. That motion remains pending.

Extension of Time to Secure Successor Counsel, ECF 459. Plaintiffs acknowledged that, “[o]n the one hand, the important questions of whether Zodhiates can continue to assert a Fifth Amendment right against compulsory self-incrimination and whether summary judgment should be granted on Jenkins’s state-law claim against Zodhiates would be better resolved if Zodhiates were represented by counsel,” but “[o]n the other hand, the Court should hold the RUL Defendants to the deadline it sets for them to obtain new counsel and demand a showing of good cause from each of them before granting any extensions.” *Id.* at 2.

On February 7, 2020, Plaintiffs notified the Court that the RUL Defendants had failed to obtain new counsel by February 5, 2020. *See* Notice of RUL Defs.’ Noncompliance with [449] the Court’s Order that They Obtain New Counsel by February 5, 2020, ECF 466. Plaintiffs expressed their “wish to proceed with discovery, including depositions and nonparty subpoenas, which in many ways cannot proceed until the RUL Defendants obtain new counsel or the Court intervenes.” *Id.*

On March 3, 2020, the Court granted the RUL Defendants’ motion for an extension, ordered them to obtain new counsel by April 15, 2020, and ordered new counsel to enter an appearance by April 15, 2020. *See* Order, ECF 474. The Court denied Plaintiffs’ motion to require Zodhiates and Hyden to file notices of *pro se* appearances and for RUL to show cause why it did not obtain new counsel. *See id.* The Court also ordered the parties to file a proposed modified discovery schedule by May 15, 2020. *See id.*

No new counsel for the RUL Defendants has entered an appearance. Zodhiates and Hyden have not entered *pro se* appearances. *See* L.R. 11(a). RUL cannot proceed *pro se*. *See* L.R. 11(b). None of the RUL Defendants has filed a motion for a further extension of time to

obtain new counsel.² The parties therefore remain unable to negotiate a proposed modified discovery schedule and to proceed with much of discovery.

ARGUMENT

The Court should order the RUL Defendants to show cause for their failure to obtain new counsel. Plaintiff is eager to proceed with discovery, which did not formally commence until August 29, 2018—six years after the case was filed.

Plaintiff acknowledges and appreciates the many ways the ongoing COVID-19 pandemic has upended normal life, especially for incarcerated persons, so she is prepared to negotiate in good faith with opposing counsel and nonparties to account for these exceptional circumstances. But the RUL Defendants' lack of counsel has effectively put much of discovery in this case on hold, even before the pandemic brought most of the country to a standstill. Plaintiff cannot proceed with depositions, which the RUL Defendants have a right to attend, or nonparty document subpoenas, which the RUL Defendants have a right to move to quash, while the RUL Defendants are unrepresented. But their time to obtain new counsel has now run out.

Plaintiff requests that the Court order the RUL Defendants to show cause for their failure to obtain new counsel. The Court has given them at least 100 days to obtain new counsel—60 or so days of which preceded the first reported COVID-19 cases in Kentucky (where Zodiatis is incarcerated) and Virginia (where Hyden and RUL reside). *See* Press Release, Governor of the State of Kentucky, Gov. Beshear, Health Officials Confirm State's First COVID-19 Case (Mar. 6, 2020), <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=77>; *COVID-19 in Virginia*, Va. Dep't of Health, <http://www.vdh.virginia.gov/coronavirus/> (noting

² Plaintiff waited three business days before filing this motion in case one or more of the RUL Defendants, who do not have CM/ECF credentials, might have timely mailed such a motion that the Court had not yet received or docketed.

that the first COVID-19 case in Virginia was reported on March 7, 2020, the governor declared a state of emergency on March 12, 2020, and the governor issued a statewide stay-at-home order on March 30, 2020). They should be ordered to set forth in detail the efforts they have made in the last 100 days to obtain new counsel, why those efforts have failed, and why they should be afforded any more time to do so.

Although Plaintiff acknowledges that Zodhiates likely could explain how his incarceration and the COVID-19 pandemic have in just the last few weeks impeded his personal ability to search for and obtain new counsel from prison,³ Zodhiates's children Hyden and William Zodhiates, who runs RUL, are not incarcerated. *See* RUL Entity Information 2, Ex. 1 to Pls.' Mot. for Leave to Serve Disc. Docs on Zodhiates Through Service on Hyden and RUL Until Zodhiates Obtains New Counsel, ECF 453-1. Yet the RUL Defendants' latest filing suggests it is Zodhiates who is spearheading from prison the effort to find the trio new counsel. *See* Mot. to Stay Proceedings and Extension of Time to Secure Successor Counsel, ECF 458 (motion filed by Zodhiates requesting relief for himself, Hyden, and RUL). The Court should demand from each of the RUL Defendants a detailed accounting of their own efforts to obtain new counsel and an explanation of why neither Hyden nor RUL has led the effort to obtain new counsel for the related parties.

³ *See, e.g.*, Press Release, Federal Bureau of Prisons, Bureau of Prisons COVID-19 Action Plan: Phase Five (Mar. 31, 2020) (announcing that, effective April 1, 2020, “[f]or a 14-day period, inmates in every institution will be secured in their assigned cells/quarters to decrease the spread of the virus”); Press Release, Federal Bureau of Prisons, Bureau of Prisons Update on COVID-19 (Mar. 24, 2020) (noting that, “[o]n March 13, 2020, the Bureau instituted significant measures to prevent the COVID-19 virus from spreading in its facilities,” including “temporary restrictions on visitation” and “restricting inmate movement to only required and mission-essential transfers”).

Plaintiff proposes that the Court provide the RUL Defendants no more than two weeks to file a response to the Court's order to show cause, so that the Court can decide whether, when, and how discovery may proceed before the parties' proposed discovery schedule is due on May 15, 2020. Plaintiff again defers to the Court on whether to grant any or all of the RUL Defendants more time to obtain new counsel, after reviewing their responses to the Court's order to show cause. *Cf.* Pls.' Resp. to RUL Defs.' Mot. to Stay Proceedings and Extension of Time to Secure Successor Counsel, ECF 459. If the Court does afford any or all of the RUL Defendants more time to obtain new counsel, Plaintiff requests that the Court also modify the May 15, 2020 deadline to submit a proposed discovery schedule, and provide guidance on how discovery may proceed in the meantime.

CONCLUSION

Plaintiff's motion for an order requiring the RUL Defendants to show cause should be granted, the Court should order the RUL Defendants to show cause for their failure to obtain new counsel, and the RUL Defendants should be ordered to respond within no more than two weeks. If the Court grants any or all of the RUL Defendants more time to obtain new counsel, the Court should also modify the May 15, 2020 deadline to submit a proposed discovery schedule and provide the parties guidance on how discovery may proceed in the meantime.

Plaintiff thanks the Court for its attention to this matter during these exceptional times.

Respectfully submitted.

April 21, 2020

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CERTIFICATE OF SERVICE

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

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