

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

Plaintiffs

v.

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

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

Defendants

**DEFENDANT TIMOTHY D. MILLER’S MOTION TO RECONSIDER COURT’S
ORDER OF AUGUST 31, 2020 (Doc. 554)**

The Defendant, Timothy Miller (“Timo”)¹, requests that this Court reconsider its August 31, 2020 Order, Doc. 554, (the “Order”) stating as follows:

¹ Given the number of unrelated individuals with the last name “Miller” this Motion will refer to Defendant Mr. Timothy Miller as “Timo” in order to reduce confusion.

STANDARD OF REVIEW

A motion to reconsider may be granted if “the moving party points to controlling decisions or data that the court overlooked: ‘matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.’” L&B Truck Srvs., Inc. v. Daimler Trucks North America, LLC, No. 1:09-CV-74, 2009 WL 10678877 (D. Vt. Dec. 23, 2009) (quoting Schrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)).

FACTUAL ISSUES

First, in advance of filing this Motion, and in light of this Court’s Orders on Timo’s Motion for Reconsideration (Doc. 500) and Plaintiffs’ Motion for Partial Summary Judgment (Doc. 555), decided August 31, 2020, Timo has served upon Plaintiffs individual responses to each of Plaintiffs’ discovery requests.

Second, subsequent to this Court’s Order, Timo’s counsel has confirmed with counsel for the Plaintiffs what appeared to be a factual misunderstanding as to the scope of discovery relating to Timo’s past criminal proceeding. This Court appears to have assumed that Plaintiffs were seeking only the discovery that was generated in that past criminal proceeding, at the conclusion of which Timo pleaded guilty. *See* Order, at 9-10 (“Defendant has not successfully shown that the discovery which Plaintiffs seek from a past criminal proceeding would pose any risk of future self-incrimination . . .” (emphasis added)). The day after the Order was issued, Timo’s counsel contacted counsel for the Plaintiffs to clarify whether they seek discovery beyond that exchanged in the past criminal proceeding, which may implicate Timo’s Fifth Amendment privilege. In a written response, Plaintiffs confirmed that they do, in fact, “seek[] more than just the criminal discovery.” *See* Exhibit A, Letter from Plaintiffs.

Third, to be clear: Timo does not contest, and has never contested, the production of the discovery associated with his past criminal proceeding. It is for that reason, in part, that Timo

agreed, although he was not obliged, to participate in Plaintiffs' Freedom of Information Act ("FOIA") request, in an attempt to facilitate Plaintiffs' acquisition of that discovery.

Finally, the Court's Order of August 31, 2020 is based on a mistake of the facts of November and December 2019 and January 2020. In particular, the Court erroneously understood that "Defense counsel did not respond to Plaintiffs' counsel's email [of December 2, 2019] until January 24, 2020." Doc. 554, p. 3. In fact, defense counsel called Plaintiffs' counsel in response to his email, but Plaintiffs' counsel had technical issues at his firm and did not receive the voicemail from defense counsel. Doc. 473.2, p. 10. Furthermore, the Court's Order implies that nothing was being done to produce discovery, which is not true. On December 2, 2019, Timo's Pennsylvania counsel confirmed that Timo's files, which had previously been provided to his criminal defense attorney (who had subsequently become a judge) several years earlier, were available. *See* Exhibit B, Affidavit of Attorney James Smith, at 2. Between December 3, 2019 and December 16, 2019, several emails were exchanged between defense counsel and Plaintiffs' counsel to confirm that the complete file, going back to 2011, was to be produced. *Id.* As this Court recognized, however, there was some difficulty in accessing that criminal file, which the parties discussed. *See* Order, at 3. On December 17, 2019, Timo personally picked up the file from now-Judge Conrad's former law firm and delivered them to his Pennsylvania counsel for transmission to undersigned counsel. Exhibit B, Affidavit of Smith. On December 19, 2019, Pennsylvania counsel mailed, via the United States Postal Service, the entire file to undersigned counsel. *Id.* Although the file was supposed to have arrived on December 24, 2019, it did not. *Id.* Over the coming weeks, Pennsylvania counsel made numerous attempts to locate the whereabouts of the file, before it was determined that the file was permanently lost in transit by the United States Postal Service. *See id.* Timo informed

Plaintiffs of this unfortunate fact in response to the aforementioned letter. To be clear: Timo did not retain copies of the materials he provided to his former criminal defense attorney and did not receive the materials back. Judge Conrad's former law firm kept backup, electronic copies of only a very small subset of documents, including publicly available pleadings and documents, which Plaintiffs likely have already, and two documents subject to privilege. Therefore, Timo does not have independent access to, possession of, or control over any of the non-privileged documents Plaintiffs seek relating to the prior criminal proceeding. This is another reason why Timo sought to assist Plaintiffs with their FOIA request. These facts were conveyed to Plaintiffs in response to the aforementioned letter.

ARGUMENT

A. Timothy Miller Timely Raised His Fifth Amendment Privilege

Timo asks that this Court reconsider its determination that Timo's assertion of his Fifth Amendment privilege against self-incrimination was not timely raised. He does so on two bases: (1) this Court overlooked pertinent law concerning waiver of objections to personal jurisdiction and service of process; and (2) this Court overlooked pertinent law and relevant facts concerning Timo's assertion of his Fifth Amendment privilege.

First, as this Court recognized, Timo cited the then-pending Motion for Reconsideration of this Court's Order on Timo's Motion to Dismiss as a basis for not individually addressing Plaintiffs' numerous discovery requests. *See* Order, at 5-6. In that Motion for Reconsideration, and the underlying Motion to Dismiss, Timo asserted a lack of personal jurisdiction and insufficient service of process. *See generally* Doc. 500. As this Court is well aware, "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); *see also United States v. Brow*, No. 01-CV-4797(NGG)(JMA), 2011 WL

7562706, at *5 (E.D.N.Y. Dec. 28, 2011) (citing *Burton v. N. Dutchess Hosp.*, 106 F.R.D. 477, 480–81 (S.D.N.Y.1985)) (“Service that is made but does not fully comply with the statutory requirements indicate[s] a lack of personal jurisdiction over a party, unless that party’s conduct waives the personal jurisdiction objection.”). “The requirement that a court have personal jurisdiction is a due process right that may be waived either explicitly or implicitly.”

Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion, 832 F.3d 92, 100-101 (2d Cir. 2016) (quotations omitted). “The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.” *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 704-05. “[A] party can be held to have waived a defense listed in Rule 12(h)(1) through conduct, such as extensive participation in the discovery process or other aspects of the litigation of the case.” *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419(GBD), 2015 WL 1499185, at *5 (S.D.N.Y. Mar. 31, 2015) (quoting 5C Fed. Prac. & Proc. Civ. § 1391). Indeed:

Courts have held that Defendants’ subsequent participation in the discovery process constitutes a waiver of the defense of deficiency of process. *See, e.g., Datskow v. Teledyne, Inc., Cont’l Prods. Div.*, 899 F.2d 1298, 1303 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990) (defendant’s participation in scheduling discovery, a conference with the magistrate, and motion practice barred it from complaining about defective service of process).

Brescia v. Leff, No. 3:04CV1680(PCD), 2006 WL 3231433, at *3 (D. Conn. Nov. 7, 2006).

Although the case law is not entirely consistent on this issue, there is enough authority in courts of this Circuit such that engaging in discovery presented a real threat of waiver of Timo’s jurisdictional objections. Accordingly, by engaging in the extensive efforts necessary to respond to Plaintiffs’ voluminous discovery requests—before this Court finally decided the jurisdictional issues, as it did on April 22, 2020, *after* Plaintiffs’ Motion to Compel was fully briefed—Timo would have faced the very real prospect of having waived his jurisdictional objections.

Therefore, it was proper for Timo to withhold his engagement with the individual discovery requests until April 22, 2020, when this Court issued its Order on his Motion for Reconsideration. By that time, however, Plaintiffs had already filed their Motion to Compel (Doc. 473) and Timo had reasserted his Fifth Amendment privilege (which he had previously done both informally and in his Initial Disclosures pursuant to FRCP 26(a)(1)) via his Opposition to Plaintiffs' Motion to Compel. *Cf. Brock v. Gerace*, 110 F.R.D. 58, 64 (D.N.J. 1986) (“[Where t]imely notice at least was informally given, but the privilege was not properly asserted, under oath and as to each question . . . the court holds that as of November 1, the date when responses were compelled by the court’s orders, defendant Smith did not lose his Fifth Amendment rights in this case.”). Upon this Court’s Order on Plaintiffs’ Motion to Compel, and pursuant to that Order, Timo has timely and properly responded to each of Plaintiffs’ individual requests. *See id.*²

Second, a party to a civil proceeding is not obligated to raise the privilege against self-incrimination to individual discovery requests within the specified timeframe. Rather, a party is entitled to raise that constitutional privilege at any time. This is due to the constitutional nature of that privilege, permitting “a civil litigant [to] legitimately use the Fifth Amendment to avoid having to answer inquiries *during any phase of the discovery process.*” *United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 82 (2d Cir. 1995) (emphasis added). Additionally, “litigants do not have a right to discovery of privileged matters” *in the first instance*. *See id.*; *see also* Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any *nonprivileged* matter . . .” (emphasis added)).

² As *Brock* suggests, Timo was entitled to wait for a determination as to Plaintiffs’ Motion to Compel before serving individual responses. Not only had he previously provided Plaintiffs with timely notice of his intention to raise his Fifth Amendment privilege, but, if he were to serve responses prior to this Courts Order, he would have waived the objections and arguments advanced in his Opposition to Plaintiffs’ Motion to Compel. *Cf. id.*

In short, Timo could not have waived his Fifth Amendment privilege, absent bad faith and extraordinary prejudice to the requesting party (issues not present here), especially with regard to responses to discovery requests that are, as here, rendered by his counsel and not, as with interrogatories, rendered himself, under oath. *See Brock*, 110 F.R.D. at 63-64 (where the Fifth Amendment privilege was asserted as a blanket objection to interrogatories and production requests, was not invoked pursuant to the Rules of Civil Procedure, was raised by the party's counsel in a letter to opposing counsel, where no material prejudice had befallen the opposing party, but where the responding party himself had not personally invoked the privilege, stating that "[t]he protection afforded by the Fifth Amendment is fundamental to our system of ordered liberties" and holding that the privilege was not waived despite its tardy invocation); *United States v. British American Tobacco Ltd.*, 387 F.3d 884, 890-91 (D.C. Cir. 2004) ("As the federal rules, case law and commentators suggest, waiver of privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." (quotations omitted)); *Bruner v. Midland Funding, LLC*, 2018 WL 2946401, at *3 (W.D. Okla. June 12, 2018) ("All objections [to interrogatories and production requests] are waived, *except a claim of privilege.*" (emphasis added)); *Johnson v. New Destiny Christian Center Church, Inc.*, 2016 WL 11586554, at *1 (M.D. Fla. Nov. 22, 2016) ("When a party fails to timely serve answers and responses to written discovery requests under Federal Rules of Civil Procedure 33 and 34, the party waives any objections they may have to the discovery *except objections based upon a recognized privilege from discovery.*" (emphasis added)); *Vesom v. Atchison Hosp. Ass'n*, 2005 WL 8160822, at *2 (D. Kan. May 12, 2005) (stating that the court "obviously" prefers not to find a waiver of privilege and finding no such waiver, even where the court "found massive, significant problems" with the responding party's discovery failures). Accordingly, the constitutional

nature of Timo's Fifth Amendment privilege against self-incrimination precludes some technical waiver-by-omission, particularly where Plaintiffs had no right to discovery of such matters in the first instance, where that privilege was invoked both informally (to Plaintiffs' counsel) and formally (in pleadings submitted to this Court), and where no material prejudice befalls Plaintiffs.³

In sum, Timo timely asserted his Fifth Amendment privilege, in light of both a likely waiver of his (at the time) pending jurisdictional objections, as well as his right to assert his constitutional privilege at any time during the discovery process.

B. Timothy Miller's Assertion of His Fifth Amendment Privilege is Meritorious and Must Be Honored, Particularly in Light of Plaintiffs' Continued Requests for Information and Documents that Fall Outside of His Prior Criminal File

As noted above, Plaintiffs have confirmed that they seek information and documents *above and beyond* the discovery generated in Timo's past criminal proceeding. As Timo noted in his Opposition to Plaintiffs' Motion to Compel, the discovery Plaintiffs' seek could expose Timo to *future* criminal charges. Doc. 475, at 6. As Plaintiffs and this Court know, the crime for which Timo pleaded guilty relates to an offense that ended in September 2009. *See* Doc. 439.18 (Attachment to Plaintiffs' Motion for Partial Summary Judgment, stating an "Offense Ended" date of September 2009). Both Plaintiffs' Revised Second Amended Complaint and Plaintiffs' discovery requests clearly seek to implicate Timo in, and concern documents relating to, conduct after that "Offense Ended" date. *See, e.g.*, Doc. 223, at ¶¶ 64-65 (Complaint, alleging that Lisa Miller intentionally held Isabella Miller-Jenkins in Nicaragua from January 1, 2010 to the present and that, in part, Timothy Miller assisted her in doing so); Doc. 473.1 (Plaintiffs'

³ Plaintiffs do not appear to have asserted any material prejudice, but considering that the parties are still in discovery and there exists no impending deadline or event for which Plaintiffs would have needed individual responses well in advance, there is no such prejudice. The fact that Timo has consistently raised the Fifth Amendment privilege in informal communications with Plaintiffs reinforces this conclusion.

discovery requests, which seek to acquire information beyond September 2009, both implicitly (“8. All communications with Defendant Lisa Miller”) and explicitly (“19. All communications on November 20, 2009”).

Again, Timo does not dispute producing the discovery associated with his past criminal proceeding, to the extent his former defense attorney’s file can be located or Plaintiffs’ FOIA request can be satisfied. Timo has, and will, take reasonable action to continue to assist in these efforts. He objects, on Fifth Amendment grounds, only to those documents that may fall outside of that discovery and which may expose him to future criminal charges beyond the “Offense Ended” date of September 2009. Accordingly, this Court should order that such documents are subject to Timo’s Fifth Amendment right against self-incrimination.

WHEREFORE, Defendant, Timothy D. Miller, respectfully requests that this Honorable Court:

- A. RECONSIDER its Order of August 31, 2020 (Doc. 554);
- B. ORDER that Timothy Miller timely raised his Fifth Amendment privilege and that his right against self-incrimination applies to documents outside of the prior criminal discovery and which may expose him to future criminal charges; and
- C. GRANT such other relief as may be just and necessary.

Respectfully submitted,
Timothy D. Miller
By his attorneys,

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

Dated: September 10, 2019

By /S/ Michael J. Tierney
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September 2, 2020

Michael J. Tierney
Wadleigh, Starr & Peters, PLLC
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**Re: *Jenkins et al. v. Miller et al.*, No. 2:12-cv-184 (D. Vt.)
Plaintiffs' First Set of Requests for Production to Defendant Timothy Miller**

Dear Michael:

As you know, the Court ordered on Monday that Mr. Miller “is obligated to comply with” Plaintiffs’ first set requests for production, Op. & Order 8, ECF 554, that he forfeited objections to them by “fail[ing] to timely raise any ... objections” in writing, *id.*, and that he “has not successfully shown that the discovery which Plaintiffs seek from a past criminal proceeding would pose any risk of future self-incrimination in light of the case’s procedural posture,” *id.* at 9–10.

Therefore, Plaintiffs request that Mr. Miller produce **within 30 days—on or before Friday, October 2, 2020**—the discovery from his criminal cases and any additional responsive documents within his possession, custody, or control. Please also confirm in writing whether Mr. Miller has possession, custody, or control over the criminal discovery, such as through his criminal defense attorneys.¹

I. The Criminal Discovery

A. Plaintiffs’ Attempt to Obtain the Criminal Discovery Under FOIA Was Unsuccessful

On March 2, 2020, the day you provided me Mr. Miller’s signed authorization, I submitted a FOIA request for “[a]ll records, within the meaning of FOIA, that were produced in

¹ You have previously represented that Mr. Miller does not possess the criminal discovery, *see, e.g.*, Ex. 2 to Pls.’ Mot. to Compel Def. Timothy Miller 3, ECF 473-2, but you have not yet answered my specific question of whether that discovery is within Mr. Miller’s control, such as through his criminal defense attorneys.

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discovery by the United States to Timothy David Miller (including his attorneys and agents) or by Timothy David Miller (including his attorneys and agents) to the United States in United States v. Timothy David Miller, No. 2:11-mj-28 (D. Vt.), United States v. Timothy David Miller, No. 5:11-cr-44 (D. Vt.), and/or United States v. Timothy Miller, No. 1:14-cr-175 (W.D.N.Y.).”

After DOJ failed to respond within 20 business days, I filed a lawsuit on April 16, 2020, to compel DOJ’s response and production of responsive records. *See generally Jenkins v. DOJ*, No. 2:20-cv-59 (D. Vt.). On May 21, 2020, I began negotiations with the Assistant United States Attorney assigned to the case.

DOJ represented that Mr. Miller provided the government no discovery in his criminal cases. *See* JENKINS23311. DOJ also represented that its discovery to Mr. Miller comprised 25 CDs (labeled 1–16 and 18–26) and hard-copy pages Bates stamped 000001–016912. *See id.* Of all that discovery, DOJ released in full only two CDs labeled 4 and 16, comprising emails from timjomiller@gmail.com, and in part some information from the CD labeled 22, comprising Mr. Miller’s Vivophone records, from which DOJ redacted all names and phone numbers. *See* JENKINS22453–JENKINS22516; JENKINS23221–JENKINS23222; JENKINS23256. DOJ withheld in full the remainder of the discovery. *See* JENKINS23256.

DOJ withheld the redacted information and the remainder of the discovery because they contain third-party information, “disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” 5 U.S.C. § 552(b)(6), and I had not provided written authorization from those unidentified third parties. *See* JENKINS23256. DOJ also withheld certain records as grand-jury materials specifically exempted from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure. *See* 5 U.S.C. § 552(b)(3); JENKINS23311.

Today, DOJ filed a motion to file under seal a list of the third parties whose consent is needed to obtain the discovery from the government under FOIA, *see* Unopposed Mot. to Seal and for Protective Order, *Jenkins*, No. 2:20-cv-59, ECF 13, and a motion to stay the FOIA case for 90 days, *see* Unopposed Mot. to Stay, *Jenkins*, No. 2:20-cv-59, ECF 13, so that I may attempt to obtain releases. I can confirm that the list comprises the names of 72 individuals. According to DOJ, those individuals comprise “the witnesses, prosecutors, paralegals, government agents, defense attorneys, interpreters, and other individuals referenced in the interview reports, attachments, and attorney proffer.” Ex. 1 to Unopposed Mot. to Stay ¶ 15, *Jenkins*, No. 2:20-cv-59, ECF 12-1. The withheld records contain personal identifying information, including credit card information, home addresses, personal email addresses, *see id.* ¶ 4, social security numbers, home and cell phone numbers, statements, interviews, and other investigatory materials, *see id.* ¶ 19.

B. Mr. Miller Must Produce the Criminal Discovery

Mr. Miller must produce the remainder of the criminal discovery himself. It would be unduly burdensome for Plaintiffs to attempt to obtain releases from dozens of individuals, especially

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because Plaintiffs cannot necessarily compel all of those individuals to sign authorizations for the release of personal identifying information.

It would be less burdensome for Mr. Miller to produce the entirety of the unredacted discovery himself. The criminal discovery should be easy to collect and produce. It comprises 25 labeled CDs and Bates-stamped, hard-copy pages. Mr. Miller would not need to review the criminal discovery because he indicated he would not invoke the Fifth Amendment with respect to the criminal discovery, *see* Ex. 3 to Pls.’ Mot. to Compel Def. Timothy Miller 2, ECF 473-3, the Court held that he has not shown a risk of self-incrimination, *see* Op. & Order 9–10, ECF 554, and the Court held that Mr. Miller forfeited objections to Plaintiffs’ first set of requests for production by failing to serve written responses and objections, *see id.* at 8.

Plaintiffs request that Mr. Miller produce the remainder of the criminal discovery—that is, the 23 CDs labeled 1–3, 5–15, and 18–26, and the documents Bates stamped 000001–016912—within 30 days. I would prefer that the hard-copy pages be digitized as PDF documents and served by email using a link to a cloud folder,² and that the CDs be copied and served by mail to my mailing address above.

II. Additional Responsive Documents

Plaintiffs request that Mr. Miller also produce within 30 days all additional documents within his possession, custody, or control that are responsive to Plaintiffs’ first set of requests for production. The Court ordered Mr. Miller to comply with Plaintiffs’ requests, except that Plaintiffs were ordered to narrow Requests for Production 37 and 38. *See* Op. & Order 9, ECF 554. In compliance with that order, Plaintiffs narrow those requests as follows:

Request for Production 37. All documents and communications concerning Nicaragua and any of the following:

- a. Any investigations, prosecutions, charges, convictions, or sentences related to the removal or retention of Plaintiff Isabella Miller-Jenkins outside the United States
- b. Any of the Defendants in this Case;³
- c. Defendant Lisa Miller

² I would be happy to create a cloud folder for this purpose. If this method is impracticable, then I would prefer that the PDF documents be saved on a CD to accompany the other CDs.

³ Plaintiffs define “this Case” to mean, of course, the federal civil case *Jenkins et al. v. Miller et al.*, with case number 2:12-cv-184, in the United States District Court for the District of Vermont.

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- d. Defendant Lisa Miller's attorneys, including but not limited to Defendant Liberty Counsel, Inc., Defendant Rena Lindevaldsen, and Mathew Staver
- e. Defendant Lisa Miller's Nicaraguan residency status from September 20, 2009, to the present
- f. Defendant Lisa Miller's whereabouts from September 20, 2009, to present
- g. Extradition to the United States
- h. Nicaraguan residency requirements
- i. Plaintiff Isabella Miller-Jenkins
- j. Plaintiff Isabella Miller-Jenkins's Nicaraguan residency status from September 20, 2009, to the present
- k. Plaintiff Isabella Miller-Jenkins's whereabouts from September 20, 2009, to the present
- l. Plaintiff Janet Jenkins
- m. The Court Orders
- n. The removal or retention of Plaintiff Isabella Miller-Jenkins outside the United States
- o. The Vermont Proceedings
- p. The Virginia Proceedings
- q. This Case

Request for Production 38. All documents and communications concerning the Beachy Amish Mennonite Church in Nicaragua and any of the following:

- a. Any investigations, prosecutions, charges, convictions, or sentences related to the removal or retention of Plaintiff Isabella Miller-Jenkins outside the United States
- b. Any of the Defendants in this Case;⁴
- c. Defendant Lisa Miller
- d. Defendant Lisa Miller's attorneys, including but not limited to Defendant Liberty Counsel, Inc., Defendant Rena Lindevaldsen, and Mathew Staver
- e. Defendant Lisa Miller's Nicaraguan residency status from September 20, 2009, to the present
- f. Defendant Lisa Miller's whereabouts from September 20, 2009, to present
- g. Extradition to the United States
- h. Nicaraguan residency requirements

⁴ Plaintiffs define "this Case" to mean, of course, the federal civil case *Jenkins et al. v. Miller et al.*, with case number 2:12-cv-184, in the United States District Court for the District of Vermont.

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- i. Plaintiff Isabella Miller-Jenkins
- j. Plaintiff Isabella Miller-Jenkins's Nicaraguan residency status from September 20, 2009, to the present
- k. Plaintiff Isabella Miller-Jenkins's whereabouts from September 20, 2009, to the present
- l. Plaintiff Janet Jenkins
- m. The Court Orders
- n. The removal or retention of Plaintiff Isabella Miller-Jenkins outside the United States
- o. The Vermont Proceedings
- p. The Virginia Proceedings
- q. This Case

Plaintiffs also are willing to narrow Request for Production 39 as follows:

Request for Production 39. All communications with the Beachy Amish Mennonite Church in Nicaragua concerning any of the following:

- a. Any investigations, prosecutions, charges, convictions, or sentences related to the removal or retention of Plaintiff Isabella Miller-Jenkins outside the United States
- b. Any of the Defendants in this Case;⁵
- c. Defendant Lisa Miller
- d. Defendant Lisa Miller's attorneys, including but not limited to Defendant Liberty Counsel, Inc., Defendant Rena Lindevaldsen, and Mathew Staver
- e. Defendant Lisa Miller's Nicaraguan residency status from September 20, 2009, to the present
- f. Defendant Lisa Miller's whereabouts from September 20, 2009, to present
- g. Extradition to the United States
- h. Nicaraguan residency requirements
- i. Plaintiff Isabella Miller-Jenkins
- j. Plaintiff Isabella Miller-Jenkins's Nicaraguan residency status from September 20, 2009, to the present
- k. Plaintiff Isabella Miller-Jenkins's whereabouts from September 20, 2009, to the present
- l. Plaintiff Janet Jenkins
- m. The Court Orders

⁵ Plaintiffs define "this Case" to mean, of course, the federal civil case *Jenkins et al. v. Miller et al.*, with case number 2:12-cv-184, in the United States District Court for the District of Vermont.

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- n. The removal or retention of Plaintiff Isabella Miller-Jenkins outside the United States
- o. The Vermont Proceedings
- p. The Virginia Proceedings
- q. This Case

III. Mr. Miller Cannot Invoke the Fifth Amendment

The Court held that Mr. Miller failed to properly and timely invoke the Fifth Amendment in writing in response to specific requests. *See* Op. & Order 9, ECF 554. On the merits, the Court held that Mr. Miller failed to successfully show that producing documents responsive to Plaintiffs' requests would pose any risk of future self-incrimination because he already pleaded guilty to his involvement in the kidnapping of Plaintiff Isabella Miller-Jenkins. *Id.* at 9–10. Plaintiffs' claims arise from that kidnapping, including its preparation, execution, and cover-up.

In response to your September 1, 2020 email, Plaintiffs do not interpret the Court's order, which referenced "discovery which Plaintiffs seek from a past criminal proceeding," to limit Plaintiffs to the discovery Mr. Miller received from the government in his criminal case. Instead, Plaintiffs interpret the Court's reference to mean that Plaintiffs seek evidence concerning a kidnapping for which Mr. Miller has already been convicted. The Court's opinion makes clear that it was aware that Plaintiffs are seeking more than just the criminal discovery. *See id.* at 3 ("[Defendant] also represented that he would object, based on his Fifth Amendment privilege against compulsory self-incrimination, to producing anything beyond the criminal discovery." (citing ECF 473-4 at 2)); *id.* at 8 ("[T]he majority of Plaintiffs' discovery requests seek documents and communications related to Defendant's contact with Lisa Miller and Isabella Miller-Jenkins").

Plaintiffs agree with the Court that Mr. Miller has failed to show a "real and appreciable" risk of additional prosecution for his participation in that kidnapping. *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 190 (2004); *see also Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2d Cir. 1990) ("[T]he burden of establishing its existence rests on the person claiming the privilege." (citations omitted)); *Mitchell v. United States*, 526 U.S. 314, 326 (1999) ("[W]here there can be no further incrimination," such as when "the sentence has been fixed and the judgment of conviction has become final," "there is no basis for the assertion of the privilege." (citing *Reina v. United States*, 364 U.S. 507, 513 (1960))).

* * *

Therefore, Plaintiffs request that Mr. Miller produce **within 30 days—on or before Friday, October 2, 2020**—the discovery from his criminal cases and any additional responsive documents within his possession, custody, or control. Please also confirm in writing whether Mr. Miller has possession, custody, or control over the criminal discovery, such as through his criminal defense attorneys.

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Sincerely,



Diego A. Soto
Counsel for Plaintiffs
Janet Jenkins and Isabella Miller-Jenkins

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

v.

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

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

DECLARATION OF JAMES SMITH, ESQUIRE

I, James Smith, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am an attorney licensed by the Commonwealth of Pennsylvania and have served as counsel to Defendant, Timothy Miller, a resident of Pennsylvania, since 2018.

2. In November and December 2019, I received a request from Timothy Miller's Vermont Counsel, Michael Tierney, Esquire, wherein Attorney Tierney requested my assistance

in retrieving a copy of Timothy Miller's file believed to be in the possession of the law firm of Clymer, Musser and Sarno whose attorneys, and Hon. Jeffrey A. Conrad in particular, had represented Timothy Miller in defense of criminal charges prosecuted federally.

3. On December 2, 2019, I confirmed with the office staff at Clymer, Musser and Sarno that they had located the file and that it was quite voluminous, including large three-ring binders and several CDs.

4. Following an exchange of communication between myself and support staff at Clymer, Musser and Sarno in December 2019, I had confirmed that they had the file and that it would expedite delivery to have the entire file picked up by Timothy Miller and hand-delivered to this office, and that we would in turn, deliver it to Attorney Tierney.

5. On December 19, 2019, having received the file from Clymer, Musser and Sarno, my staff packed the materials securely in a box, labeled the box for delivery by the United States Postal Service ("USPS") to Attorney Tierney, deposited it with the USPS for delivery to Attorney Tierney, and obtained a receipt for the same.

6. By correspondence dated January 23, 2020, I received confirmation from Clymer, Musser and Sarno that it retained a digital copy of only a very small subset of the documents it delivered to my office earlier that month. Most of what was saved digitally consisted of publicly filed documents otherwise accessible through the PACER system. Clymer, Musser and Sarno provided this firm with a USB/flash drive of this subset of documents, which my staff immediately forwarded to Mr. Tierney's office.

7. Although I did not review the physical materials received from Clymer, Musser and Sarno in any detail, I am aware that many of the CDs deposited with USPS for delivery to

Attorney Tierney were labeled in a way that indicated they contained materials used by the United States Department of Justice in the prosecution of Timothy Miller.

8. I did not retain a copy of the materials delivered to Attorney Tierney on December 19, 2019.

9. On January 7, 2020, Attorney Tierney notified me that the material had not arrived, and I promptly caused the United States Postal Service to open an investigation into the location of the file.

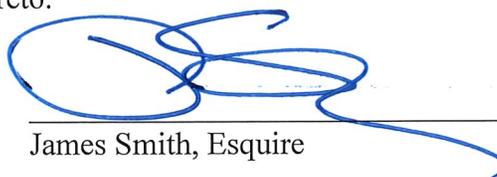
10. On or about January 7, 2020, staff with my office caused USPS to open an investigation into the missing package.

11. Disappointed with the progress USPS appeared to have been making in its search for the package, my office contacted the office of Congressman Dan Meuser on or about January 14, 2019, and requested the assistance of his office in locating the missing file.

12. My office consistently followed up with both the office of Congressman Dan Meuser and the USPS on the status of the investigation.

13. By email dated April 13, 2020, my office received confirmation that the USPS investigation had been closed, confirming that the package sustained visible damage on December 30, 2019, and was delivered without contents on January 11, 2020. A true and correct copy of this correspondence is attached hereto.

Dated: September 10, 2020


James Smith, Esquire

Sarah Bailey

From: uspscusersupport@usps.gov
Sent: Monday, April 13, 2020 4:08 PM
To: Sarah Bailey
Subject: Your USPS Service Request #08280632 Has Been Resolved! [ref:_00Dj0GyYH._500t0Ty3wa:ref]

Dear Sarah Bailey,

Thank you for contacting the United States Postal Service.

I am sorry but there has not been any new information on this uninsured Media Mail package 9549 0130 9356 9353 2102 61.

Package scanned Visible Damage on 12/30/2019 in our Springfield MA NDC
Package scanned Delivered without contents on 1/11/2020 in Manchester NH 03101.

Items found loose within our network are sent to the Mail Recovery Center and are held for up to 90 days. It is highly possible that the contents received too much damage to have been salvaged therefore could have been discarded, not sent to the Mail Recovery Center.

Because so much time has passed since its mailing, and the search initiated by your inquiry has been unsuccessful in locating the missing item, we must reluctantly conclude that it is irretrievably lost.

Please accept our sincere apology for the disappointment and frustration this matter has caused you.

Sincerely,

Donna Martin
Consumer Affairs Representative
Northern New England District



ref:_00Dj0GyYH._500t0Ty3wa:ref

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v.

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JENKINS, TIMOTHY D. MILLER,
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MATHEW D. STAVAR, individually and
as agent for LIBERTY COUNSEL, LLC,
RENA M. LINDEVALDSEN, individually
and as agent for LIBERTY COUNSEL,
LLC, and LIBERTY COUNSEL, LLC,

Defendants

CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date DEFENDANT TIMOTHY D. MILLER'S MOTION TO RECONSIDER COURT'S ORDER OF AUGUST 31, 2020 (Doc. 554) was filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record:

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/S/ Michael J. Tierney

Michael J. Tierney

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