

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 REPLY TO PLAINTIFFS’ OPPOSITION TO
DEFENDANT’S MOTION TO RECONSIDER COURT’S
ORDER OF AUGUST 31, 2020 (Doc. 554)**

The Defendant, Timothy Miller (“Timo”)¹, hereby replies to Plaintiffs’ Opposition to his request 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.

FACTUAL INACCURACIES IN PLAINTIFFS' OPPOSITION

In their Opposition, Plaintiffs make a number of factual misstatements that require correction. These factual misstatements bear directly upon Plaintiffs' inaccurate suggestions that Timo engaged in bad faith efforts to delay discovery. The corrections of these misstatements, as outlined below, demonstrate that Plaintiffs are primarily at fault for their own "costly, time-consuming, and ultimately fruitless hunt." And Plaintiffs' desire to punish Timo because Plaintiffs ignored his suggestions from nearly a year ago is revealed for what it is: an attempt to cast blame on Timo for Plaintiffs' frustration at themselves and third parties over which Timo has no control. Finally, these corrections to Plaintiffs' misstatements of fact clarify that Plaintiffs' absurd claim of "negligent[] spoliat[ion]," Opp. at 22, is just that: absurd. Not only is it legally inappropriate, but it is a factually incorrect claim. And even taking Plaintiffs' incorrect factual claims as true, the idea that using the United States Postal Service to mail a package—a practice, by the way, that all courts used for generations, prior to e-filing—amounts to negligent spoliation if that package is lost is simply ridiculous.

Plaintiffs misstate numerous facts, the most egregious and relevant of which follow:

- Plaintiffs create the misimpression that undersigned counsel knew that Timo's former criminal defense attorney's former law firm had the criminal discovery at issue. This is inaccurate. Undersigned counsel never knew whether the firm had the discovery or the scope of any retained discovery, as undersigned never received same. In fact, undersigned counsel made clear to Plaintiffs, in February 2020, that Timo "does not currently possess the information you seek (i.e. the criminal discovery produced in his criminal trial)." Doc. 473-2, at 3.
- Plaintiffs omit that, in undersigned counsel's *very first telephone call* with Plaintiffs' counsel, undersigned counsel asserted, on behalf of Timo, Timo's Fifth Amendment privilege. In that same phone call, undersigned counsel suggested that Plaintiffs either contact

the prosecutors or file a Freedom of Information Act (“FOIA”) request to obtain the criminal discovery from the government. Doc. 473-2, at 14. Initially, Plaintiffs agreed, but then changed their minds and emailed undersigned counsel that Plaintiffs wanted to file both a FOIA request and have Timo obtain whatever his former criminal defense attorney’s former law firm still had. Doc. 473-2, at 13. Timo promptly attempted the latter.

- After repeatedly reiterating that the best way to obtain the criminal discovery file—as Plaintiffs were well aware of the difficulties surrounding obtaining the file from Timo’s former criminal defense attorney’s former law firm—undersigned counsel again stated, clearly, that a FOIA request, or otherwise requesting the file from the government, was going to be the easiest and most successful way of obtaining the discovery. As undersigned counsel noted, any delay was of the Plaintiffs’ doing. Doc. 473-2, at 3.

- Plaintiffs now attempt to argue that they were prejudiced because Timo did not clearly state that his former criminal defense attorney’s former law firm had the discovery or state (somehow, before he even knew) that the discovery was permanently lost. To be clear, he *did not know* whether the former law firm had the discovery or what discovery it had and, as noted below, he *did not know* that the discovery had been permanently lost until September 2020. Prior to that, undersigned counsel clearly informed Plaintiffs that Timo did not possess the criminal discovery. Doc. 473-2, at 3. As to this alleged prejudice, Plaintiffs argue: “Had he immediately disclosed the file had been lost in the mail, Plaintiffs would have demanded, as they did after learning of the spoliation, that Defendant request another copy from the prosecutor.” Opp. at 18. This perfectly illustrates the guileful nature of Plaintiffs’ argument and, indeed, their tactic of ignoring Timo’s suggestions and then crafting their arguments as if Timo never made those suggestions. Unfortunately for Plaintiffs, their own evidence unveils their misstatement.

All the way back in November 2019, undersigned counsel suggested that Plaintiffs request a copy of the discovery from the prosecutor (something that Timo has now done *for Plaintiffs*, see Opp. at 11). Doc. 473-2, at 14 (undersigned counsel, writing to Plaintiffs on November 26, 2019: “You had said that you were going to reach out to the prosecutors and see if a FOIA action would be necessary to obtain the documents you seek or if the prosecutors would provide the documents without filing a FOIA request. I trust that you have done one or both of these options. Please let me know if you have success in your FOIA request or informally.”). If Plaintiffs did not do what Timo had suggested and what Plaintiffs said they would do, that is on Plaintiffs, not Timo.

- Plaintiffs’ Opposition gives the impression that undersigned counsel was unable to leave a voicemail with Plaintiffs’ counsel on January 9, 2020. Opp. at 5. Undersigned counsel *did* leave a voicemail, but Plaintiffs *never responded*. How was undersigned counsel to know that, because of Plaintiffs’ own negligence, his voicemail did not go through? It is not Timo’s responsibility to “text message[]” opposing counsel, just in case opposing counsel is not adequately maintaining its information technology.² It is this type of argument that undermines Plaintiffs’ attempts to shield itself from its own failures, particularly in light of the objective efforts Timo made to help Plaintiffs.

- Finally, Plaintiffs’ entire argument ultimately falls on the incorrect assumption that undersigned counsel and Timo knew that the criminal discovery had been permanently lost in the mail but did not tell Plaintiffs and that this amounts to bad faith and prejudice sufficient to justify waiver of Timo’s constitutional rights. This was not the case. Undersigned counsel

² Plaintiffs apologized, accepting their responsibility for the voicemail issue. When undersigned counsel was alerted to the phone issue, undersigned counsel promptly agreed to a phone conference with Plaintiffs’ counsel the very next business day. Doc. 473-2, at 10.

learned for the first time in *September* of this year that the USPS had given up its search for the missing discovery. By that time, not only was the Motion to Compel pending, but shortly after learning same, Plaintiffs were notified. And not only that, Timo did *for Plaintiffs* what he suggested Plaintiffs do *almost a year ago*, and contacted the prosecutor to request the criminal discovery. Plaintiffs attempts to misrepresent Timo's knowledge as to the existence and whereabouts of the criminal discovery in an effort to cast him in a poor light should be ignored. Timo notified Plaintiffs that, as of February 24, 2020, he did not possess the criminal discovery. Timo would have—and ultimately did—tell Plaintiffs when the discovery was located or when it was determined, to undersigned counsel's and Timo's knowledge, to be permanently lost. Furthermore, Plaintiffs made clear in its February 26, 2020 Motion to Compel that it was no longer looking for Timo to produce the criminal discovery. See Doc 473, p. 3, fn 2. (recognizing that due to the pending FOIA request the Plaintiffs no longer “seek to compel Defendant to produce that criminal discovery himself.”) Where the Plaintiffs represented both to undersigned counsel and to this Court that it was no longer requesting that Timo produce the criminal discovery himself, as it had chosen to obtain it directly from the prosecutors via a FOIA request, the Plaintiffs were no longer looking for any status updates on Judge Conrad's file after February 26, 2020. Accordingly, Plaintiffs flatly misrepresent that “Defendant Withheld for Months That the Criminal Discovery Went Missing.” Opp. at 5.

In sum, Plaintiffs' version of the facts is not what it seems, and Plaintiffs' own evidence proves as much. Plaintiffs suggest that Timo strategically led Plaintiffs on a fool's errand with regard to the criminal discovery. But that is false. Timo pursued *multiple avenues* to assist Plaintiffs in locating discovery from third parties. Undersigned counsel kept in regular contact with Plaintiffs' counsel and updated Plaintiffs' counsel *in a timely manner* when undersigned

counsel learned of new facts, such as the USPS giving up its search for the lost discovery, which undersigned counsel learned of in September. Plaintiffs' claims that they were prejudiced are wholly undermined by the fact that what Plaintiffs claim they would have done was suggested to them *by Timo* almost one year ago, before any of these issues arose. Plaintiffs' claims that they were prejudiced because Timo did not notify Plaintiffs earlier that the criminal discovery was permanently lost (even though undersigned counsel did not know same until September) are further undermined by the fact that Plaintiffs clearly stated, in their Motion to Compel (Doc. 473), that they did "not seek to compel Defendant to produce that criminal discovery himself." Doc. 473, at 3, n. 2. Accordingly, this Court should put to bed Plaintiffs' misrepresented scope of these issues, refuse to give them the benefit of the doubt on account of their own failures,³ and decline to impose the severe punishment of forfeiting Timo's constitutional right.

ANALYSIS

Plaintiffs' response to the law cited by Timo is predictable: even though Timo, through counsel, made clear in undersigned counsel's very first telephone call with Plaintiffs' counsel that he would assert his Fifth Amendment privilege and engaged in no bad faith relating to any delay,⁴ Plaintiffs ask this Court to take the extreme measure of waiving a constitutional right in favor of a technical rule. Even though Timo made every effort to secure the discovery that Plaintiffs seek,⁵ discovery that was not in the hands of Timo but rather *third parties*, Plaintiffs ask this Court to impose a severe and highly prejudicial punishment.

³ Particularly where they led Timo to believe that the parties had reached an informal agreement regarding discovery, whereby Timo would assist Plaintiffs in securing the criminal discovery they sought.

⁴ In correcting Plaintiffs' factual misstatements below, it will become clear that Plaintiffs' own actions (and Plaintiffs' tactic of ignoring Timo's suggestions and then arguing later that he should have made the very suggestions he already made) led to any prejudice they now claim to have sustained.

⁵ And has now been successful in getting that discovery, *on behalf of Plaintiffs*.

Ultimately, as Timo’s Motion (Doc. 560) outlines, Timo had a good faith basis for believing that *extensive* participation in discovery could waive his personal jurisdiction defenses, a position Timo made very clear to Plaintiffs long ago (*see* Opp. at 5). “[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). Responding individually to Plaintiffs’ voluminous and burdensome discovery requests—many of which did not pertain to Timo and all of which, to the extent responsive documents existed, would be covered by the criminal discovery Plaintiffs sought or would be, as Timo had told Plaintiffs, covered by privilege—surely qualifies as “extensive” participation in discovery.

Plaintiffs cite their own letter to argue that Timo acknowledged that participation in discovery does not forfeit Rule 12 defenses, *see* Opp. at 15, which is problematic for two reasons. First, Plaintiffs’ characterization of what Timo may have acknowledged as proof that Timo so acknowledged is inappropriate. Second, Plaintiffs’ strategically leave out the next sentence in their own letter: “Yet Mr. Miller does not believe that Local Rule 26(a)(3) is specific enough to protect him from forfeiting his jurisdictional arguments by serving initial disclosures.” Doc. 473-3, at 2. Moreover, Timo only served initial disclosures after Plaintiffs, apparently acknowledging the merit in Timo’s concern regarding waiver, stipulated that Timo would not waive or forfeit his personal jurisdiction defenses in doing so. *See* Opp. at 6; Doc. 473-2, at 6 (Plaintiffs, to Timo, stating: “Plaintiffs stipulate that Mr. Miller’s service of initial disclosures does not waive or forfeit the defenses he has raised, in his motion to dismiss and his motion for reconsideration, that the Court lacks personal jurisdiction and that service of process was

insufficient. If that suffices, please let me know when we can expect those initial disclosures.”). Timo has consistently stated this position numerous times to Plaintiffs. Plaintiffs, in stipulating to non-waiver, agreed with Timo. Plaintiffs cannot now allow their litigious desires to overcome the fact that *Plaintiffs* waited so long to file a motion to compel, *after* acknowledging Timo’s valid waiver concerns. Could Timo have filed a motion for a stay? Perhaps. But given Plaintiffs’ repeated acknowledgments of Timo’s informal concerns and Timo’s clear efforts to assist Plaintiffs in obtaining the discovery they sought from third parties, Plaintiffs led Timo astray in believing that this Court would not need to be involved in a senseless discovery dispute that appeared informally resolved.

As to his Fifth Amendment privilege, Timo timely raised it at least informally (in his counsel’s very first phone call with Plaintiffs’ counsel), which is enough to overcome the extreme and irreversible waiver of that privilege, for the reasons stated in Timo’s Motion. *See also 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.”). Plaintiffs recognize the extreme nature of such a waiver (*see* Opp. at 16) and their argument that, simply because this Court has discretion to waive it means that it should be waived, falls flat. As Plaintiffs recognize, there must be some element of “bad-faith conduct” (Opp. at 17); for the reasons noted above—in clarifying Plaintiffs’ misstatements of fact—there can simply be no finding of bad faith.

Finally, Plaintiffs argue that because his plea agreement forbid the government from pursuing additional charges involving “international parental kidnapping,” Timo does not have a

Fifth Amendment right against self-incrimination pertaining to, as Plaintiffs frame it, “keeping Isabella in Nicaragua after September 2009.” Opp. at 18. Taking Plaintiffs’ allegation as true, “keeping Isabella in Nicaragua” could amount to the crime of false imprisonment. Keeping Lisa Miller in Nicaragua could amount to the crime of harboring a fugitive. These are not charges for “international parental kidnapping.” Therefore, Plaintiffs’ own characterization of Timo’s alleged conduct after September 2009 would undoubtedly put him in real danger of further prosecution for those, or related crimes. This is absolutely the type of protection that the Fifth Amendment provides. As Plaintiffs note, Opp. at 19, Timo has conceded that he enjoys no Fifth Amendment privilege as to conduct involving the charge of parental kidnapping through September 2009. He has graciously assisted Plaintiffs—though he had no obligation to do so—to secure, *for Plaintiffs*, criminal discovery from third parties. He will assert no Fifth Amendment privilege to that material. But information outside that scope undoubtedly invokes Timo’s Fifth Amendment privilege.

As a concluding point, it should be noted that this Court did not find that Timo waived his Fifth Amendment privilege. It merely found that Timo is “obligated to respond” to the requests. Doc. 554, at 7.⁶ Timo has done so. As Timo’s Motion and this Reply clarify, the Fifth Amendment privilege does, indeed, apply to portions of Plaintiffs’ discovery requests and now that Timo has asserted it, as to each discovery request to which it applies, he has complied with this Court’s Order and his discovery obligations. Accordingly, the privilege is not waived and it has been validly asserted.

CONCLUSION

⁶ The Court made this fact (*i.e.*, that Timo did not *wave* objections) as clear as day when it considered Timo’s unduly burdensome and overbroad objections and required Plaintiffs to narrow their requests. Doc. 554, at 7-8.

In short, Plaintiffs' Opposition is a collection of misrepresented facts and red herrings designed to make Timo look bad. This Court should ignore this creative but misleading approach. Ultimately, these issues come down to these essential facts: (1) Timo has replied to all discovery requests, pursuant to this Court's Order; (2) Timo engaged in significant efforts over the course of the past year to assist Plaintiffs in obtaining discovery from third parties, even though Plaintiffs did "not seek to compel Defendant to produce that criminal discovery"; (3) after Timo found out that his former defense attorney's former law firm's discovery file had been permanently lost, he promptly notified Plaintiffs and offered to assist them with independent attempts at uncovering that discovery; (4) Timo has now gone further and done what he had suggested Plaintiffs do one year ago (and which Plaintiffs misleadingly suggest they would have done), but which Plaintiffs refused to do—that is, ask the prosecutor for the discovery; and (5) throughout the course of the past year, Plaintiffs have led Timo to believe that his concerns with regard to waiving his personal jurisdiction defenses and his Fifth Amendment concerns were valid and that they could be informally resolved by his assisting Plaintiffs, which he did. For these reasons, the irreversibly severe punishment of forfeiting a constitutional right is, simply, inappropriate. Timo asks this Court to so find and to leave Plaintiffs to their proof, should they wish to challenge any of Timo's individual objections in the future.

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: October 5, 2020

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