

**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' REVISED SECOND MOTION TO COMPEL
DEFENDANTS LIBERTY COUNSEL, INC. AND RENA LINDEVALDSEN
TO COMPLY WITH PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION**

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

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

Counsel for Plaintiffs Janet Jenkins and Isabella Miller-Jenkins

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Pursuant to the Court's September 14, 2020 order, ECF 563, and Rule 37 of the Federal Rules of Civil Procedure, Plaintiffs Janet Jenkins and Isabella Miller-Jenkins again move to compel Defendants Liberty Counsel, Inc. and Rena Lindevaldsen to comply with Plaintiffs' June 27, 2018 requests for production, as first compelled by the Court on October 29, 2019, ECF 395. Defendants' declaration proves they conducted clearly unreasonable, bad-faith searches for documents. The Court should compel Defendants to conduct reasonable, good-faith searches and produce all responsive documents, and it should impose all just sanctions.

STATEMENT OF THE CASE

A. The Court Grants Plaintiffs' Motion to Compel

On June 27, 2018, Plaintiffs served Defendants their first requests for production. *See* ECF 361-1; ECF 361-2. Defendants served responses and objections three-and-a-half months later, on October 15. *See* ECF 361-3; ECF 361-4. Lindevaldsen took another three months to serve her first production on January 15, 2019, which totaled 346 pages and included a 308-page PDF of the *Only One Mommy: The Story of Lisa and Isabella Miller* Facebook group. It took Liberty Counsel yet another five months to serve its first production on June 10, which totaled 225 pages and comprised Liberty Counsel's contact information for Lisa, Lisa's publicly viewable Facebook page (showing nothing but her name and profile photo), and Liberty Counsel's various publicly viewable social-media pages. Eight days later, Defendants produced a privilege log only for documents Plaintiffs had subpoenaed from nonparty Liberty University. *See* ECF 380-1.

On July 23, Plaintiffs moved to compel Defendants to comply with Requests for Production 4–8, 11–12, 17–19, 35–36, 47–48, and 64–69. *See generally* ECF 361. In summary, these requests seek Defendants' communications concerning Janet, Isabella, and Lisa Miller; their communications with Lisa and Isabella; their documents and communications concerning

the Dispute and the Court Orders; their communications on September 20–22, 2009, November 8–13, 2009, and November 20, 2009; their documents and communications concerning events that happened, were planned to happen, or were expected to happen on September 20–22, 2009, and November 8–13, 2009; and their documents concerning their opinions, beliefs, policies, or positions concerning, in summary, homosexuality, the relationship between secular law and religion, and the court orders giving Janet visitation and custody rights.

Defendants complained that they had “17 bankers’ boxes” and 15 gigabytes of documents about Lisa and Isabella, Mihet Decl. ¶¶ 5, 8 (Aug. 27, 2019), ECF 375, and that it would take them “over 10 work-weeks” to review and log the paper file, *id.* ¶ 7, and “over 5 work-weeks” to review and log the electronic file, *id.* ¶ 9.

On October 29, the Court ordered Defendants to comply with those requests. *See Op. & Order 4–18*, ECF 395.¹ With one modification, it held that the requests are relevant and proportional to needs of the case. *See generally id.* On November 6, Plaintiffs requested Defendants’ compliance by November 30. *See Ex. 1: Clemons–Mihet Emails *14*. Four days later, on November 10, Defendants requested a meet-and-confer for fifteen days later, on November 25, to give themselves time “to fully digest the Court’s order on the motion to compel and have a good indication of how long it will take to review the extensive file and catalogue the various privileges.” *See id.* at *13.

B. Plaintiffs Move Again to Compel

On November 25, the parties conferred by telephone. *See Clemons Decl. ¶ 6* (Feb. 24, 2020), ECF 472-13. Defendants agreed to search for and produce paper documents and a

¹ Defendants mischaracterize the Court’s order as absolving them from complying with the other requests, *see Mihet Decl. ¶ 7* (Oct. 26, 2020), ECF 580, but Plaintiffs moved to compel Defendants’ compliance with only those twenty requests; the Court said nothing about the others.

privilege log by December 23 and to search for and produce electronic documents and a privilege log. *See id.* Plaintiffs agreed to provide search terms for Requests 64–67, *see id.*, and provided them a week later, on December 3, *see Clemons–Mihet Emails* *9–10.

On December 23, the promised production date for paper documents, Defendants told Plaintiffs they had not completed their review and would aim to produce them by January 10, 2020, three business-weeks later. *See id.* at *12. On January 10, Liberty Counsel produced documents Bates stamped LC00226–LC13261 and a privilege log with seventy-one entries. *See id.* at *4; *see also* Defs.’ Privilege Log (Jan. 10, 2020), ECF 472-7. The production entirely comprised publicly filed documents from the state-court custody dispute between Janet and Lisa, even though Plaintiffs repeatedly told Defendants that it is not necessary to produce documents in the public record. *See Clemons Decl.* ¶ 10 (Feb. 24, 2020), ECF 472-13.

Meanwhile, on January 6, over a month after Plaintiffs had provided search terms for Defendants’ electronic documents, Defendants told Plaintiffs that they were unable to search by proximity and that Plaintiffs’ search terms yielded too many results, including documents “not even authored by Liberty Counsel.” *Clemons–Mihet Emails* *8–9. So, Plaintiffs provided simpler search terms that day, *see id.* at *8, and again two days later, *see id.* at *6; *see also* Mihet Decl. ¶ 22 (Oct. 26, 2020), ECF 580. Eight days later, on January 16, Defendants represented that they “retrieved a more manageable set of results” and promised to “review for responsiveness and privilege and produce/log as appropriate.” *Clemons–Mihet Emails* *6. They “believe[d]” they could produce documents and a privilege log by February 14, twenty-nine days later. *Id.* at *3. On February 14, however, Defendants told Plaintiffs that they had not completed their review of the electronic documents, they “th[ought] it w[ould] take ... another two weeks or so,” and that they “hope[d] to have this completed by February 28, or within a few days of that,

depending on how the rest of it [went].” *See id.* at *2. Given that three-and-a-half months had already elapsed since the Court’s order and that Defendants had twice missed promised production dates, Plaintiffs demanded a final production by February 21. *See id.* at *1–2. On February 21, Defendants told Plaintiffs that they would need until February 28 to produce documents. *See id.* at *1.

On February 24, Plaintiffs again moved to compel Defendants, asking the Court to order Defendants to produce all responsive documents irrespective of any privilege claim, to identify all locations they searched, and to certify that responsive documents would not reasonably exist in any other location. *See Pls.’ Second Mot. to Compel* 4, ECF 472. Plaintiffs argued that Defendants had conducted a bad-faith, unreasonable search for responsive documents because they had produced only publicly available documents but had not produced, for example, phone records, letters, calendars, pamphlets, mission statements, or any document about Lindevaldsen’s book *Only One Mommy* about Lisa’s life and refusal to allow Janet parental rights over Isabella. *See id.* at 5. Plaintiffs also argued that Defendants’ privilege logs were inadequately detailed because each entry did not identify to how many pages it applied; it did not include any communication with Lisa or any document from specific dates identified in Plaintiffs’ requests; it vaguely described many documents; and it failed either to identify an author or recipient by name or to explain the relationship between named individuals and the privilege asserted. *See id.* at 6–7. Plaintiffs requested that the Court sanction Defendants by holding they had waived their privilege claims over responsive documents because of their “foot-dragging” and “cavalier attitude toward adhering to” the Court’s order. *Id.* at 9 (quoting *Ritacca v. Abbott Labs.*, 203 F.R.D. 332, 335 (N.D. Ill. 2001)).

C. The Court Denies the Second Motion to Compel and Orders New Briefing

On March 9, nearly four-and-a-half months after the Court’s order and ten days past the extended production deadline Defendants awarded themselves, Defendants produced documents Bates stamped LC13262–LC36969 and RL00347–RL05164 and two privilege logs, one from Defendants with 261 entries, *see* ECF 484-3, and the other from Lindevaldsen with 19 entries, *see* ECF 484-4. This production included numerous irrelevant, hundred-plus-page, publicly available documents, many of which were neither authored nor published by Defendants. *See* Clemons Decl. ¶ 8 (Apr. 14, 2020); *cf.* Clemons–Mihet Emails *9 (raising concern with search term yielding results “not even authored by Liberty Counsel personnel”).

On September 14, the Court denied Plaintiffs’ second motion to compel without prejudice because Defendants had produced documents after the motion had been filed. *See* Op. & Order 3, ECF 563. The Court ordered Defendants to “submit an affidavit ... describing efforts to comply with discovery requests, including their use of terms for ESI production.” *Id.* The Court further ordered Plaintiffs to “submit a revised motion to compel ...[,] after review of the Defendants’ submission of the affidavit describing discovery procedures,” that “identif[ies] documents or areas of discovery not included in Defendants’ discovery responses” and that “identif[ies] sections of the privilege log which they claim to be inadequate.” *Id.* at 3–4.

D. Defendants File a Declaration

On September 17, Defendants asked Plaintiffs to “identify what, if any, substantive deficiencies alleged in [their] second motion to compel [they] believe are still unresolved.” Ex. 2: Soto–Mihet Emails 11. Plaintiffs agreed to provide “a nonexhaustive list of known deficiencies in [Defendants’] productions and privilege log, with the understanding that other deficiencies might be uncovered in ... negotiations, any supplemental productions, or the ordered affidavit.” *Id.* at 10.

On October 2, Plaintiffs provided that list. *See* Ex. 3: Soto Letter (Oct. 2, 2020). Plaintiffs identified “nonexhaustive examples” of “documents and communications that Defendants should have produced or logged,” *id.* at 2, primarily including numerous emails involving Defendants and other Liberty Counsel employees that the government had seized from Lisa’s and nonparty Beth Ehrhorn’s email accounts and produced to Kenneth Miller, who in turn produced them to the parties, *see id.* at 2–7.

On October 26, Defendants filed a declaration. *See* Mihet Decl. (Oct. 26, 2020), ECF 580. In it, Defendants disclosed that, in response to requests for documents and communications about Lisa, Janet, Isabella, and the custody dispute, Defendants searched for emails only to or from Lisa and used the search terms 'Lisa Miller', 'Janet Jenkins', 'Isabella Miller', and 'Isabella Miller-Jenkins'. *Id.* ¶ 16. As for Requests for Production 64–69, for which the parties agreed to search terms, Defendants admitted that they reviewed the resulting documents only for privilege and not responsiveness or duplicates. *See id.* ¶ 24. Defendants, who on January 16 had said they would “review” the results “for responsiveness and privilege and produce/log as appropriate,” Clemons–Mihet Emails *6, now say Plaintiffs never asked them to review the results “for anything other than privilege.” Mihet Decl. ¶ 25 (Oct. 26, 2020), ECF 580.

In response to Plaintiffs’ examples of documents and communications missing from Defendants’ productions and logs, Defendants disclosed that, in 2008–2010, they had a practice of deleting emails to free up space in their inboxes without always saving those deleted emails elsewhere. *See id.* ¶¶ 29–30.

SUMMARY OF ARGUMENT

Last year, the Court ordered Defendants to comply with twenty of Plaintiffs’ requests for production. What Defendants produced—and did not produce—suggests they conducted an

unreasonable, bad-faith search and review. They produced documents (sometimes more than one copy) that are clearly unresponsive, irrelevant, publicly available, or clearly within Plaintiffs' possession. Meanwhile, they failed to produce or log numerous documents and communications that Plaintiffs know were in their possession, custody, or control—in particular, dozens of responsive emails other parties and nonparties have produced.

Defendants' own declaration proves their search and review were unreasonable, and it raises even more questions. They disclose that they used unreasonably narrow, self-selected search terms and that they unreasonably used agreed-upon search terms without reviewing the results for responsiveness, despite their earlier promise. Most importantly, they disclose a practice of deleting emails without preserving them, which raises many questions about the adequacy of their searches and the propriety of their privilege assertions.

Defendants' privilege logs also are inadequate. They do not identify the number of pages for each withheld document; they insufficiently identify individuals; they vaguely describe many documents; and they do not log redactions. Defendants agreed to amend their privilege logs to address some of Plaintiffs' concerns but failed to do so before this motion was due.

In sum, Defendants conducted an unreasonable, bad-faith search for documents responsive to the requests to which the Court ordered them to comply. The Court should compel Defendants to conduct reasonable, good-faith searches and produce all responsive documents by a date certain well before the March 15, 2021 discovery deadline. *See* Final Modified Disc. Schedule/Order 1–2, ECF 562. The Court should sanction Defendants' discovery misconduct and gamesmanship by finding Defendants waived privilege over responsive documents, instructing the jury that it may draw an adverse inference that Defendants are hiding incriminating evidence, and precluding Defendants from challenging the authenticity of evidence

Plaintiffs were able to obtain elsewhere and from arguing that inculpatory evidence does not exist within their documents.

ARGUMENT

Defendants’ two-plus-year foot-dragging and purposeful sluggishness to conduct reasonable searches, produce responsive documents, and adequately assert privileges over withheld documents warrants another order compelling them to comply and imposing sanctions. Under Rule 37, the Court may compel the production of documents by a party that fails to produce requested documents, Fed. R. Civ. P. 34(a)(3)(B), and then “issue ... just orders” for the party’s “fail[ure] to obey an order to provide or permit discovery,” Fed. R. Civ. P. 37(b)(2). Such just orders “may include ... (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; ... or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.” *Id.*

The Court may “consider various factors, including ‘(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of noncompliance.’” *Funk v. Belneftekhim*, 861 F.3d 354, 366 (2d Cir. 2017) (quoting *S. New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 144 (2d Cir. 2010)); *see also id.* at 368 (“[T]he length of defiance can inform the propriety of a particular sanction.”); *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir. 1991) (“Parties and counsel have no absolute entitlement to be ‘warned’ that they disobey court orders at their peril.”). “Because the text of the rule requires only that the district court’s orders be ‘just,’ however, and because the district court has ‘wide discretion in imposing sanctions under Rule

37,” *S. New England Tel. Co.*, 624 F.3d at 144 (quoting *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 135 (2d Cir. 2007)), “these factors are not exclusive, and they need not each be resolved against the party,” *id.* (citing *Daval Steel Prods.*, 951 F.2d at 1366). “Rule 37 sanctions must be applied diligently both ‘to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.’” *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (quoting *Nat’l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976)).

Defendants’ conduct merits sanctions. For two years and counting, they have dragged Plaintiffs along with delayed productions and inadequate privilege logs and still have not conducted reasonable, good-faith searches, even after being ordered to comply.

I. Defendants Have Unjustifiably Delayed Reasonable, Good-Faith Searches and Productions for over Two Years

Since Plaintiffs served their requests for production in June 2018, Defendants have repeatedly and unjustifiably delayed producing all responsive documents. Lindevaldsen took six-and-a-half months to serve her first production and Liberty Counsel eleven-and-a-half months to serve its. In total, Defendants—who had 17 bankers’ boxes and 15 gigabytes of documents about Lisa and Isabella—produced a mere 571 pages, primarily from publicly viewable social-media profiles. Defendants made blanket privilege assertions and refused to provide a privilege log.

After the Court ordered Defendants to comply with Plaintiffs’ requests, it took nearly a month to get Defendants on the phone to agree to a production schedule and nearly seven weeks for Defendants to produce their first supplemental productions and an eight-page privilege log. The log was clearly inadequate, and Defendants still had not completed their review of the electronic file. It took them over a month even to tell Plaintiffs that they were unable to search by proximity and that Plaintiffs’ search terms yielded too many results. Then, three-and-a-half

months after the Court’s order, and the day Defendants had promised their production of the electronic file, Defendants attempted to grant themselves another extension. Defendants produced documents from their electronic files twenty-four days later—nearly four-and-a-half months after the Court’s order and over twenty months after Plaintiffs served the requests.

Today, the parties have begun depositions, yet Defendants still have not produced all responsive documents, to inform Plaintiffs’ search for evidence to support their claims, or adequate privilege logs, to enable Plaintiffs to assess Defendants’ privilege claims. Defendants prejudice Plaintiffs with each passing day.

II. Defendants Conducted Clearly Unreasonable, Bad-Faith Searches

Defendants’ delay is just the start: their productions suggested, and their declaration proves, they conducted clearly unreasonable, bad-faith searches.

A. Requests for Production 4–8, 11–12, 17–18

The Court ordered Defendants to comply with Plaintiffs’ requests for:

- “All ... communications concerning Plaintiff Janet Jenkins” (Request 4);
- “All ... communications concerning Plaintiff Isabella Miller-Jenkins” (Request 5);
- “All ... communications concerning Defendant Lisa Miller” (Request 6);
- “All communications with Plaintiff Isabella Miller-Jenkins” (Request 7);
- “All communications with Defendant Lisa Miller” (Request 8);
- “All communications with zeusdesfor@aol.com concerning the Dispute; Defendant Lisa Miller’s whereabouts from September 20, 2009, to date; Plaintiff Isabella Miller-Jenkins’s whereabouts from September 20, 2009, to date; the Beachy Amish Mennonites; or Nicaragua” (Request 11);
- “All communications with god1ofchild@live.com concerning the Dispute; Defendant Lisa Miller’s whereabouts from September 20, 2009, to date; Plaintiff Isabella Miller-Jenkins’s whereabouts from September 20, 2009, to date; the Beachy Amish Mennonites; or Nicaragua” (Request 12);
- “All documents and communications concerning the Dispute” (Request 17); and

- “All documents and communications concerning the Court Orders” (Request 18). *See* Op. & Order 4–13, ECF 395; *see also* Pls.’ First Set of Reqs. for Produc. to Def. Rena Lindevaldsen *3, ECF 361-1 (defining Dispute and Court Orders). Defendants searched “their email and electronic document databases” only for emails sent to or received from Lisa’s email addresses zeusdesfor@aol.com or god1ofchild@live.com and for emails and documents containing the terms 'Lisa Miller', 'Janet Jenkins', 'Isabella Miller', or 'Isabella Miller-Jenkins'. *See* Mihet Decl. ¶ 16 (Oct. 26, 2020), ECF 580.

Defendants’ search was woefully inadequate. *First*, Defendants do not specify what email accounts they searched. What @lc.org, @liberty.edu, and personal email accounts did they search? What email accounts created for Lisa’s case, such as onlyonemommy@yahoo.com, did they search? *See, e.g.*, Ex. 4: Thurman Produc. at JENKINS26474 (listing Lindevaldsen’s email address as onlyonemommy@yahoo.com); *id.* at JENKINS27106 (stating that Lindevaldsen checks the onlyonemommy@yahoo.com email account). Defendants merely say they searched “their email ... database[]” for “emails sent by anyone ... or received by anyone.” Mihet Decl. ¶¶ 16, 19, 23, 31 (Oct. 26, 2020), ECF 580; *see also id.* ¶ 31 (referring to “Liberty Counsel’s email ... database”), and Lindevaldsen’s “separate email accounts,” *id.* ¶ 31.

Second, Defendants unreasonably limited their search for zeusdesfor@aol.com and god1ofchild@live.com to the To, From, and (Plaintiffs assume) CC fields. Although emails to or from zeusdesfor@aol.com or god1ofchild@live.com would capture emails sent directly to or from Lisa, they would not necessarily capture all email chains that included Lisa or all emails about her. Thus, it was unreasonable not to search for the email addresses in the message body. Defendants also did not search for emails to, from, or mentioning Lisa’s email address lamiller6@liberty.edu. *See, e.g.*, Thurman Produc. at JENKINS27615.

Third, Defendants unreasonably limited their search terms to Janet's, Lisa's, and Isabella's full names. Defendants do not need Plaintiffs or the Court to tell them that a person's full name is an inadequate search term to find all communications about that person. Obviously, individuals often are referred to by first name or a nickname if referred to directly at all. *See, e.g.*, Ex. 5: Lindevaldsen Produc. at RL03676–RL03677 (email referring to Lisa Miller as Lisa, Janet Jenkins as Janet, and Isabella Miller-Jenkins as Izzy).² Defendants' narrow search terms are inadequate to gather what the Court ordered them to produce. A reasonable searcher would have used terms including, for example, first names only ('Lisa', 'Janet', 'Isabella'), nicknames ('Izzy'), and last name only ('Miller', 'Jenkins', 'Miller-Jenkins'). If such individual terms returned too many results, Defendants could create various combinations of terms with the AND connector. Defendants also should have searched for Lisa's and Isabella's alleged aliases 'Sarah' and 'Lydia'. *See* Revised Second Am. Compl. ¶ 40, ECF 223 (“Lisa Miller went by the name ‘Sarah’ and Isabella was called ‘Lydia’ while in Nicaragua.”); Ex. 6: RUL Produc. at RUL1103–RUL1104 (referring to “Sister Sarah” with attached list from Lisa referring to Sarah and Lydia).

Fourth, Defendants made a bad-faith attempt to search for documents and communications about the Dispute and Court Orders. Their search terms unreasonably assume all communications about the Dispute or the Court Orders would refer to Janet, Isabella, or Lisa by her full name. *See, e.g.*, Lindevaldsen Produc. at RL03676–RL03677 (email chain about the custody dispute and orders without using Janet's, Lisa's, or Isabella's full names); Ex. 7: Liberty Counsel Produc. at LC28969–LC28972 (same). Some reasonable search terms obviously could include, for example, 'Vermont', 'VT', 'Sessions', 'Sharp', 'Cohen', and 'visitation'.

² Defendants produced these examples because they were to or from zeusdesfor@aol.com.

Fifth, Defendants did not search for communications with individuals involved in the custody dispute or the kidnapping, such as:

- Response Unlimited, Inc., with whom Defendants contracted for Lisa’s case, *see* Revised Second Am. Compl. ¶ 29, ECF 223;
- Philip Zodhiates, who was president of RUL, emailed Liberty Counsel asking to be put in touch with Lisa to offer her “personal options,” drove Lisa and Isabella to the United States–Canada border, called Liberty Counsel on his way back to Virginia, recruited Kenneth Miller to assist with the kidnapping, facilitated Lisa’s communications with Lindevaldsen after the kidnapping, helped arrange for Lisa’s belongings to be removed from her home and transported to Nicaragua, and surreptitiously transferred \$500 to Lisa in Nicaragua, *see id.* ¶¶ 28–29, 36, 38, 40, 44–45, 56, 59–60;
- Victoria Hyden, Zodhiates’s daughter who received emails from her father for Lindevaldsen with messages from Lisa in Nicaragua, *see id.* ¶¶ 44, 46;
- Kenneth Miller, whom Zodhiates recruited to help with the kidnapping and who recruited Timothy Miller in Nicaragua, assisted with the removal of Lisa’s belongings from her home, and surreptitiously transferred \$500 to Lisa in Nicaragua, *see id.* ¶¶ 38–40, 48, 56, 59;
- Timothy Miller, whom Kenneth Miller recruited to help with the kidnapping and who hid Lisa and Isabella in Nicaragua, retrieved their belongings, and surreptitiously transferred \$500 to Lisa in Nicaragua, *see id.* ¶¶ 38, 45, 56–58;
- Linda Wall, whom Defendants asked to vet Lisa for representation, who acted as Lisa’s spokesperson, and who helped remove Lisa’s belongings from her home for transport to Nicaragua, *see id.* ¶¶ 21, 45;³
- Deborah Thurman, who also acted as Lisa’s spokesperson and with Lindevaldsen co-administered a Facebook group about Lisa’s case, *see id.* ¶¶ 26, 33, 47, 51;

Some reasonable search terms obviously could include, for example, the individuals’ names (for example, 'Zodhiates', 'Hyden', 'Thurman'), nicknames (for example, 'Timo', 'Ken', 'Debbie'), email addresses, and phone numbers. Most results from these searches likely would concern Janet, Isabella, Lisa, the Dispute, or the Court Orders, even if they did not explicitly mention

³ Lindevaldsen produced an email chain with an email from Wall to Lisa. *See* Lindevaldsen Produc. at RL03683.

those names or topics. Thurman, for example, produced dozens of emails with Defendants about Lisa, Isabella, the Dispute, and the Court Orders that Defendants neither produced nor logged.

See Soto Decl. ¶ 2 (Nov. 11, 2020).

B. Requests for Production 19, 35–36, and 47–48

The Court ordered Defendants to comply with Plaintiffs’ requests for:

- “All communications on November 20, 2009” (Request 19);
- “All communications on September 20, 2009, September 21, 2009, and September 22, 2009” (Request 35);
- “All documents and communications concerning events that happened, or were planned or expected to happen, on September 20, 2009, September 21, 2009, and September 22, 2009” (Request 36);
- “All communications on November 8, 2009, November 9, 2009, November 10, 2009, November 11, 2009, November 12, 2009, and November 13, 2009” (Request 47);
- “All documents and communications concerning events that happened, or were planned or expected to happen, on November 8, 2009, November 9, 2009, November 10, 2009, November 11, 2009, November 12, 2009, and November 13, 2009” (Request 48).

See Op. & Order 12–14, ECF 395. These requests are relevant because Plaintiffs allege Isabella was kidnapped between September 20 and September 22, 2009, *see Revised Second Am. Compl.* ¶¶ 36, 38, 44, 60, ECF 223, and Lisa’s and Isabella’s belongings were removed from their Virginia home for transportation to Nicaragua sometime between November 8 and November 13, 2009, *id.* ¶¶ 45–46. *See also Op. & Order 14*, ECF 395. Evidence of Defendants’ acts, communications, plans, and whereabouts on or about those dates are important to Plaintiffs’ case. *See id.*

Defendants searched their email and electronic document databases only for emails and correspondence on those dates; documents authored, dated, or published on those dates; and calendared appointments on those dates. *See Mihet Decl.* ¶ 19 (Oct. 26, 2020), ECF 580.

Again, Defendants’ search was unreasonable. Defendants again do not specify what email accounts they searched, *see supra* at 11, and they only searched “a master calendar,” *see* Mihet Decl. ¶ 19(b), rather than each Liberty Counsel employee’s @lc.org, @liberty.edu, and other relevant calendars. They did not search for additional documents and communications “concerning events that happened, or were planned or expected to happen on” the dates Plaintiffs listed. Reqs. for Produc. 36, 47. Defendants obviously should have used search terms, such as 'September 20', 'Sept. 20', '9/20', and '9-20', to target documents and communications about, but not on, those dates. Defendants also should have reviewed documents and communications from before and after those dates using relative phrases (for example, 'tomorrow', 'yesterday', 'next week', 'last weekend') or days of the week (for example, 'Sunday') to refer to the dates Plaintiffs listed. *See, e.g.*, RUL Produc. at RUL1103–RUL1104 (October 23, 2009 email from Zodiates to Hyden referring to “today,” “this month,” and “next couple of weeks”); RUL Produc. at RUL1127 (November 9, 2009 email from Zodiates to Hyden referring to “this weekend”).

C. Requests for Production 64–69

The Court ordered Defendants to comply with Plaintiffs’ requests for “[a]ll documents and communications concerning” Liberty Counsel’s “policies or positions concerning,” and Lindevaldsen’s “opinions or beliefs concerning,”:

- “same-sex marriage, same-sex civil unions, or same-sex relationships,” (Request 64);
- “whether homosexual persons should have custody of or visitation with children,” (Request 65);
- “the relative supremacy of secular law (including but not limited to court orders and court opinions) over religion, morality, ethics, or conscience,” (Request 66);
- “the relative supremacy of religion, morality, ethics, or conscience over secular law (including but not limited to court orders and court opinions),” (Request 67);
- “compliance or noncompliance with the Court Orders,” (Request 68); and

- “whether Plaintiff Janet Jenkins should have custody of or visitation with Plaintiff Isabella Miller-Jenkins,” (Request 69).

Op. & Order 14–18, ECF 395. The parties agreed on search terms. *See* Mihet Decl. ¶ 22 (Oct. 26, 2020), ECF 580. Defendants “ran the agreed-upon search terms on both their email and electronic document databases” and produced “[a]ll documents retrieved by the search terms,” except for “a limited number of privileged documents.” *Id.* ¶ 23. They again do not specify what email accounts they searched. *See supra* at 11.

Defendants ignore Plaintiffs’ examples of unproduced documents and communications responsive to these requests. *See* Soto Letter 7–9 (Oct. 2, 2020). For example, despite the agreed-upon search term ‘civil disobedience’, *see* Mihet Decl. ¶ 22(c) (Oct. 26, 2020), ECF 580, Defendants produced nothing more about a Liberty Counsel conference with a session entitled “The History of Civil Disobedience,” *see* Liberty Counsel Produc. at LC15361; the Liberty Live radio program’s discussion of civil disobedience, *see id.* at LC17190, or Lisa’s appearance on it, *see id.* at LC28282–LC28284, LC28391; a so-called marriage pledge calling for civil disobedience, which Staver co-drafted, *see id.* at LC14342–LC14345; or the November 20, 2009 Manhattan Declaration, which called for civil disobedience, *see* Ex. 8: Manhattan Declaration. Defendants’ declaration does not even attempt to explain why no documents associated with items identified in these examples were not found and produced.

III. Defendants’ Practice of Deleting Emails Raises Questions About Their Searches and Privilege Assertions

Defendants attempt to explain away dozens of missing emails from their productions and logs by disclosing a practice of deleting emails to make room in their inboxes. This revelation raises serious questions about the adequacy of their search for responsive documents and the propriety of their privilege assertions. Defendants’ declaration raises many questions:

- To what email accounts did this practice apply? (Plaintiffs' examples included emails involving Liberty University's @liberty.edu domain and others involving Liberty Counsel's @lc.org domain.)
- How did Defendants decide which emails to delete?
- Did Defendants decide based on the email's date, perhaps deleting older emails before newer ones? (Perhaps not: Plaintiffs cited emails spanning a wide date range from October 2008 through February 2010, *see* Soto Letter 3, 6 (Oct. 2, 2020), and Defendants produced emails from as early as December 2007 through as late as this year, *see, e.g.*, Liberty Counsel Produc. at LC36354, LC28208)
- Did Defendants delete based on size, perhaps deleting larger emails before smaller ones? (Unlikely: Plaintiffs' examples ranged from 4 KB to 4,733 KB, *see* Soto Decl. ¶ 3 (Nov. 11, 2020), and 1 GB is 1,000,000 KB.)
- Did Defendants delete based on sender, perhaps deleting emails from distribution lists before emails from individuals? (Probably not: none of Plaintiffs' examples included distribution lists.)
- Did Defendants delete based on subject matter, perhaps reviewing their emails for those that should be kept and those that could be deleted?
- How did Defendants decide which deleted emails to preserve on the server?
- Why did Defendants delete the emails Plaintiffs cited over other emails?
- When did Defendants delete the emails Plaintiffs cited?
- Why would all Liberty Counsel employees on an email have deleted it and not preserved it? *See, e.g.*, Soto Letter 3 (Oct. 2, 2020) (citing October 3, 2008 email chain including two @liberty.edu email addresses and two @lc.org email addresses).

Defendants' email-deletion practice makes it imperative that they identify all email accounts they searched and all email accounts they could, but did not, search. *Cf. supra* at 11. Defendants' declaration leaves open the possibility that they did not search every @lc.org email account, all @liberty.edu email accounts used by Liberty Counsel employees, and all other relevant email accounts, regardless of domain name. If that possibility pans out as fact, then Defendants should be compelled to search all of those accounts, given the likelihood that deleted emails remain preserved on other accounts that sent or received them.

Defendants’ practice of deleting emails calls into question the propriety of their privilege assertions. For example, Thurman produced an email chain Mathew Staver sent her, which includes a February 17, 2010 email from Mary McAlister to Steve Crampton, Rena Lindevaldsen, Mathew Staver, Anita Staver, and Bonnie Gentry (all Liberty Counsel employees) about a hearing that day regarding Isabella’s whereabouts. *See* Thurman Produc. at JENKINS26058. Defendants logged that McAlister email as privileged work product, despite its disclosure to Thurman. *See* Defs.’ Privilege Log no. 142 (Mar. 9, 2020), ECF 484-3.

IV. Defendants’ Privilege Logs Are Inadequate

Aside from any missing entries, Defendants’ privilege logs do not provide Plaintiffs enough information to assess the claimed privileges. *See* Fed. R. Civ. P. 26(b)(5)(A). Defendants agreed to amend their privilege logs to address some of Plaintiffs’ concerns but failed to do so before this motion was due, *see* Soto–Mihet Emails 1–2, so Plaintiffs preserve the following arguments to comply with the Court’s order, *see* Op. & Order 4, ECF 563.

First, Defendants appear to number each document without indicating the document’s page count, which prevents Plaintiffs from assessing the sufficiency of the other information provided in light of the extent of Defendants’ withholdings. *See* Pls.’ First Set of Reqs. for Produc. to Def. Liberty Counsel 6 (requesting first and last Bates stamp numbers). Defendants have agreed “to provide ... the number of pages in each entry.” Soto–Mihet Emails 2.

Second, Defendants insufficiently identify individuals. Some names are omitted altogether. *See, e.g.*, Defs.’ Privilege Log no. 22 (Mar. 9, 2020) (identifying author only as “Law Clerk”). Defendants often do not disclose the relationship between individuals at the time, such as by firm and title. *Compare, e.g., id.* no. 25 (“Legal research memorandum with attorney highlights, comments, thoughts, and impressions concerning potential arguments concerning witness testimony in Miller/Jenkins custody litigation in Vermont”), *with, e.g., id.* no. 36 (“Email

correspondence from counsel to paralegal ...”). These deficiencies prevent Plaintiffs from assessing, for example, whether the asserted privileges failed to attach because of disclosure to a third party. *See, e.g.*, S.D.N.Y. Loc. Civ. R. 26.2(a)(2)(B)(i) (requiring, “where not apparent, the relationship of the persons present to the person making the communication”). Defendants have agreed to “provide ... an identification of any persons appearing on the privilege log, and their relationship to the privilege claimed.” Soto–Mihet Emails 2.

Third, Defendants’ subject-matter descriptions often are too vague for Plaintiffs to assess whether the documents are protectable or warrant *in camera* review. Defendants provide some helpful specificity—for example, “research on ... contempt issues,” Defs.’ Privilege Log no. 2—but Defendants otherwise unjustifiably leave Plaintiffs guessing to what “briefing,” “pleadings,” “hearing,” “witness testimony,” and “order,” for example, Defendants refer. *See, e.g., id.* nos. 1–2, 14, 25, 169. Many documents merely “concern[]” the “Miller/Jenkins custody litigation in Vermont.” *E.g., id.* no. 6. Defendants have agreed “to provide ... some expanded descriptions of the withheld documents.” Soto–Mihet Emails 2.

Fourth, Defendants’ privilege logs do not include their redactions, which themselves seem inappropriate and often do not assert a basis for the redaction. For example, Lindevaldsen redacted as privileged attorney–client communications much of a June 24–25, 2009 email chain between her, Steve Crampton, and Lisa. *See* Lindevaldsen Produc. at RL03681–RL03682. But the unredacted version of that email produced by Kenneth Miller reveals that much of those redacted communications are not privileged attorney–client communications. *See* Ex. 9: Kenneth Miller Production (filed under seal). Liberty Counsel and Lindevaldsen also redacted certain information as privileged by the First Amendment, *see, e.g.*, Liberty Counsel Produc. at LC28743, LC29328, LC36354–LC36356; Lindevaldsen Produc. at RL01023–RL01027, despite

the Court’s holding that they must at least explain how disclosure would encroach on First Amendment rights, *see* Op. & Order 15–18, ECF 395. These examples call into question the propriety Defendants’ redactions. Defendants have agreed to “include the redactions on the privilege log.” Soto–Mihet Emails 2.

V. Sanctions Are Warranted

Defendants’ sluggish, bad-faith conduct warrants sanctions such as the following.⁴

A. The Court Should Hold Defendants Have Waived Privilege Claims over Withheld Documents

A privilege-waiver sanction is appropriate because Defendants “committed unjustified delay in responding to discovery,” evidenced by their “foot-dragging” and “cavalier attitude towards following court orders.” *Ritacca*, 203 F.R.D. at 335; *cf. Nat’l Hockey League*, 427 U.S. at 643 (holding district court did not abuse discretion in imposing extreme sanction of dismissal because of bad faith and callous disregard of responsibilities to court and opponents). In *Ritacca*, for example, the defendant for weeks failed to cooperate with the plaintiff over concerns about the adequacy of the defendant’s document production, 203 F.R.D. at 333–34, and the court held that a privilege-waiver sanction was appropriate because of the defendant’s “inexcusable and unjustified delay.” *Id.* at 335. Similarly, over two-plus years, Defendants made blanket privilege assertions, refused to search for documents responsive to all of Plaintiffs’ requests, refused to log privileged documents, forced Plaintiffs to move to compel, conducted clearly unreasonable searches, served productions stuffed with filler and clearly inadequate privilege logs, and forced Plaintiffs to move to compel again. Defendants’ conduct is at least as deserving of a privilege-

⁴ Rule 37(a)(5)(A) would require the Court to order Defendants to pay Plaintiffs’ reasonable expenses incurred in making this motion because Defendants’ conduct was not substantially justified and no other circumstances make an award of expenses unjust.

waiver sanction as the conduct of the sanctioned party in *Ritacca*. They should be ordered to search for and produce all responsive documents, regardless of a privilege claim.

B. The Court Should Give Adverse-Inference Instructions

Adverse-inference instructions also are appropriate. “[T]he party seeking the instruction must show (1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to timely produce the evidence had ‘a culpable state of mind’; and (3) that the missing evidence is ‘relevant’ to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). Mere negligence is enough. *Id.* at 108 (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001)). “Just as the intentional or grossly negligent *destruction* of evidence in bad faith can support an inference that the destroyed evidence was harmful to the destroying party, so, too, can intentional or grossly negligent acts that hinder discovery support such an inference, *even if* those acts are not ultimately responsible for the unavailability of the evidence.” *Id.* at 110 (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Reilly v. Natwest Mks. Grp. Inc.*, 181 F.3d 253, 267–68 (2d Cir. 1999)). “[A]cts evincing ‘purposeful sluggishness’” can be “supportive of [a] claim that the” withheld discovery “likely [was] harmful to” the withholding party. *Id.*

In *Residential Funding Corp.*, for example, the district court found that the plaintiff was “purposeful[ly] sluggish[.]” in producing emails from a back-up tape, dragging the defendants along for months with promises to produce the emails until thirty responsive emails finally were found. 306 F.3d at 102–05. The defendants asked the judge to instruct the jury that “it should presume the emails” that had not been produced “would have disproved [the plaintiff’s] theory of the case.” *Id.* at 105. The Second Circuit held that the district court abused its discretion by not considering the plaintiff’s “purposeful sluggishness” as supportive of the defendants’ argument

that the unproduced emails were harmful to the plaintiff. *Id.* at 110. Here, Defendants' purposeful sluggishness strongly supports an instruction allowing the jury to draw an adverse inference that Defendants are trying to hide inculpatory evidence.

C. The Court Should Preclude Defendants from Certain Arguments

The Court should preclude Defendants from making certain arguments. For example, Defendants should be precluded from challenging the authenticity of evidence Plaintiffs were able to obtain by other means, such as emails the government seized from Lisa's email accounts or emails produced by nonparties. *Cf. Twitty v. Salius*, 455 F. App'x 97, 98–99 (2d Cir. 2012) (holding district court did not abuse discretion by not imposing adverse inference instruction for destruction of original videotape because "quality copies of the tape existed"). Defendants also should be precluded from arguing that inculpatory evidence does not exist within their documents. *See Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 204 (E.D.N.Y. 2010) (precluding party from arguing that it lacked certain knowledge because it did not produce complete records and cannot "profit from evidentiary gaps that it chose to create"). Defendants have frequently argued that Plaintiffs have no direct evidence of their involvement in or knowledge of the kidnapping; Defendants cannot fairly make that argument while denying Plaintiffs reasonable discovery.

CONCLUSION

Plaintiffs' motion to compel should be granted, the Court should compel Defendants to conduct reasonable, good-faith searches and produce all responsive documents, and the Court should sanction Defendants.

Respectfully submitted.

November 11, 2020

/s/ Frank 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, PC
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

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
Janet Jenkins and Isabella Miller-Jenkins

CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record 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

Michael R. Hirsh
Hirsh & Heuser, LLC
Counsel for Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc.

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

November 11, 2020

/s/ Diego A. Soto

Diego A. Soto

Counsel for Plaintiffs

Janet Jenkins and Isabella Miller-Jenkins