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 POST HEARING MEMORANDUM REGARDING THE VALIDITY OF HIS FIFTH AMENDMENT RIGHT AND HIS MOTION TO RECONSIDER THIS COURT'S ORDER OF AUGUST 31, 2020 (Doc. 554)

At the hearing held on December 21, 2020, the Court held that any party could file a post hearing memorandum on issues discussed at the hearing. At the hearing, the Court questioned counsel for Timothy Miller and the plaintiff regarding whether Timothy Miller could validly assert a Fifth Amendment privilege in this case given the allegedly remote chance that new

criminal charges would actually be brought against Timothy Miller. Timothy Miller ("Timo")[1], hereby files this brief Memorandum to further explain why he has a valid Fifth Amendment Privilege.

I. Timo Miller Has Previously Had Immunity Only to Have it Taken Away

In October 2011, Timo Miller testified before the grand jury in the case against Kenneth Miller. In exchange for his testimony, he was provided with a non-prosecution agreement by the US Attorneys for the District of Vermont. Timo also gave a video deposition in December 2011. Timo then returned to his home in Nicaragua.

In April 2015, Timo was indicted for the same charges for which he received a non-prosecution agreement in 2011. Timo filed a motion to dismiss on the basis of the non-prosecution agreement. The government objected, first arguing that a non-prosecution agreement is the equivalent of a plea agreement. See page 11 ("A non-prosecution agreement, granted solely by a United States Attorney, is contractual, rather than statutory, in nature. These agreements are similar to those more commonly made in plea agreements"). Second, the government argued that the non-prosecution agreement only barred prosecution in the District of Vermont and not the new charges (on identical facts) that were brought in the Western District of New York. See page 12 ("As the USAO-WDNY was not a signatory to the agreement in question, and had no role in its negotiation, it cannot be bound by the contractual agreement. The Second Circuit has clearly stated that plea agreements only bind the office for the United States for the District in which the plea is entered.") Third, the government argued that the Vermont Non-Prosecution Agreement was no longer valid as the government deemed Timo's

[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.

grand jury and deposition testimony to be inconsistent and therefore a breach of the non-prosecution agreement. See page 14.[2] Timo's motion to dismiss on the basis of the Vermont Non-Prosecution Agreement was denied by the court for the Western District of New York.

The Plea Agreement in the Western District of New York has similar language to the Vermont Non-Prosecution Agreement repudiated by the government. In particular, the Plea Agreement's non-prosecution clause is limited to the Western District of New York. See Doc. 436.16, p. 9, ¶ 25. (a copy of the plea agreement is also attached to this Memorandum). Therefore, even if the Plea Agreement precluded prosecution in the Western District of New York, there is a reasonable fear of prosecution in a different district or state.[3]

Furthermore, although Timo fully intends to cooperate and answer all questions truthfully, there is a reasonable fear that this cooperation clause would be deemed violated if his answers to questions differed than how he answered questions 10 years earlier.[4] Similar to the Vermont Non-Prosecution Agreement, the Plea Agreement has a cooperation clause. If a violation of the cooperation clause is found, "the defendant shall thereafter be subject to prosecution for any federal criminal violations of which the government has knowledge." Plea Agreement, p. 11, ¶32(a). Although this Court suggested, at the December 21, 2020 hearing, that this possibility is "remote," the Court is reminded that the government previously argued that differences in his grand jury and deposition testimony in 2011 was a basis to deem the Vermont

[2] In addition, the government also deemed Timo to have violated the agreement by declining to leave his pregnant wife in Nicaragua and travel to Vermont on a few days notice as the baby was not born until "10 days" after the beginning of trial. See Exhibit A, p. 21.

[3] The Court is reminded that Janet Jenkins has brought nearly identical civil claims against Timothy Miller (as well as Lisa Miller and others) in the Western District of Virginia.

[4] The Court is further reminded that English is Timo's second language. Although his English proficiency has greatly improved in the past 10 years, Timo was born in Honduras and spent the first thirty years of his life with English as a second language.

Non-Prosecution Agreement voidable. Many possibilities that would have been deemed "remote" have already happened in this case.

II. The Standard for Validity of a Fifth Amendment Claim is Not the Likelihood of Criminal Prosecution But the Possibility of Criminal Prosecution

During the hearing on December 21, 2020, the Court seemed to suggest that likelihood of further criminal prosecution was the proper standard in determining the availability of a Fifth Amendment Privilege. This is not the correct standard. The Fifth Amendment Privilege may be asserted any time questions are asked that "the witness ***reasonably believes*** could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972)(emphasis added). It is the witness's reasonable belief, not the likelihood of future criminal actions. As the Second Circuit has recognized, one must only "show a reasonable possibility that his own testimony will incriminate him, not establish it by a preponderance of the evidence." *Estate of Fisher v. Comm'r*, 905 F.2d 645, 650 (2d Cir. 1990). It is only when it is absolutely certain that "there can be no further incrimination," that one cannot have a reasonable belief of future action and therefore has lost the right to assert the privilege. *Mitchell v. United States*, 526 U.S. 314, 326 (1999). If there is any potential for a future criminal action, then a Fifth Amendment privilege may be validly asserted.

In this case, there is more than just a "reasonable possibility" that the plaintiffs may potentially ask questions that would lead Timothy Miller to incriminate himself. Although Timo has been convicted of violating Title 18, United States Code, Section 371 with respect to his actions on or about September 22, 2009, he has not been convicted of violating any other statute by the federal prosecutors. Therefore, a different federal prosecutor could potentially bring a charge under a different federal statute. As long as "each offense contains an element not contained in the other," such successive prosecution would not be barred by the double

jeopardy clause. *United States v. Dixon*, 509 U.S. 688, 696 (1993). In addition, Timo has not been convicted of any crimes related to Timo's actions after Lisa and Isabella arrived in Nicaragua in September 2009. Nevertheless, in this civil case, the plaintiffs allege that Timo took actions subsequent to September 2009. See Second Amended Complaint, Doc. 223, ¶¶ 45-72. Timo has a reasonable belief that answering questions regarding this time frame could potentially expose him to further incrimination. His conviction is limited to the act of removal in September 2009 and not any subsequent actions.

Furthermore, the federal conviction does not bar the bringing of charges under state law. Timo's testimony in this civil case could potentially be used by the Rutland County prosecutors' office to bring charges in the future. As recently as last year, the United States Supreme Court held that prosecution for a certain crime under one sovereign's laws is not "the same offense" as a crime under another sovereign's laws and, therefore, different sovereigns can prosecute an individual for crimes involving the same conduct. *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019)("Under the 'dual sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute."; see also *State v. O'Brien*, 106 Vt. 97, 101 (1934) ("the prosecution of this respondent [under State law] is not barred by his former conviction [under federal law for the same conduct]."). Accordingly, Timo can be prosecuted under Vermont (or Virginia, or any state) law, by a Vermont (or Virginia, or any state) prosecutor, for precisely the same conduct—or any offense relating to, growing out of, or distinct from the conduct—by which he was convicted in federal court. This will not violate Timo's double jeopardy rights. Therefore, Timo has a potentially valid Fifth Amendment privilege against testifying on matters that may potentially incriminate him.

Finally, even if all of the potential prosecutors promised not to ever prosecute, that still would not preclude a Fifth Amendment privilege. "[A] trial judge may not constitutionally compel a witness to give incriminating testimony [in a civil case] solely upon a finding that the witness's answers could not properly be used against him in a later criminal proceeding." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 266 (1983). The standard is not whether a prosecutor in the future could bring charges but whether a witness, based on all of the facts particular to his case, has a reasonable belief that incrimination could occur.

III. All of the Issues Relevant to the Motion to Compel Have Been Resolved

At the hearing on December 21, 2020, counsel for the plaintiffs agreed that all document requests at issue in the Motion to Compel have been resolved. In particular, all document requests have been answered and Timo has produced the entirety of the criminal file totaling over 38,000 pages of deposition transcripts, emails and other documents. See Doc. 577. The Court in its Order of August 31, 2020, Doc. 554, appears to have misunderstood Timo's assertion of the Fifth Amendment privilege to apply to criminal discovery materials. Timo does not assert any privilege to those documents and has produced them in their entirety. The Court erred, however, in blanketly determining that Timo cannot ever assert a Fifth Amendment Privilege in any way related to this civil case. Because Timo's testimony on certain matters may potentially expose him to future incrimination, either federally or by a state, he may potentially assert a Fifth Amendment Privilege 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 he may properly assert a Fifth Amendment Privilege in the future for matters for which he reasonably believes could lead to future incrimination; 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: December 22, 2020

By /S/ Michael J. Tierney
Michael J. Tierney – VT Bar No. 5275
95 Market Street
Manchester, NH 03101
(603) 669-4140
mtierney@wadleighlaw.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

14-CR-00175-A

TIMOTHY MILLER,

Defendant.

GOVERNMENT'S RESPONSE TO
DEFENDANT'S NOTICE OF MOTION

The defendant, who failed to appear for arraignment on the indictment, has filed pretrial motions seeking dismissal of the indictment, specific performance of the cooperation agreement and an evidentiary hearing. The United States of America, by and through William J. Hochul, Jr., United States Attorney for the Western District of New York, and Kathleen A. Lynch, Assistant United States Attorney, of counsel, hereby files the government's response to the defendant's pretrial motions and opposes dismissal, specific performance and an evidentiary hearing as those requests are premature and baseless.

PRELIMINARY STATEMENT

On September 19, 2014, a grand jury impaneled in the Western District of New York returned an indictment against the defendant Timothy Miller ("Timo Miller") charging him with Conspiracy and International Parental Kidnapping. After hearing additional evidence, a superseding indictment was returned against the defendant on April 24, 2015. The defendant failed to appear for an arraignment on the indictment. Instead, through his counsel, defendant

Miller filed the instant motions in an effort to litigate the case without being brought under the jurisdiction of this court. The government's response will address the defendant's failure to appear as well as the other issues raised by the defendant.

BACKGROUND

The international parental kidnapping at the heart of this case grew out a contentious child custody battle in Vermont. In September 2009, Lisa Miller, no relation to the defendant, was ordered by a Vermont state court judge to allow a visit between her seven-year-old daughter, Isabella, and Janet Jenkins, Isabella's other parent. Isabella was born when Lisa and Janet were in a civil union under Vermont law. Lisa later filed a petition in Vermont state court to end the civil union. Between 2004 and 2009, the Vermont judge gave Lisa custody, but granted Janet visitation rights. After the two women separated, Lisa came to believe that her lesbian relationship was sinful and repeatedly sought to prevent Janet from seeing Isabella. The Vermont judge ordered that custody of Isabella was transferred to Janet as of January 1, 2010. The government began investigating the flight of Lisa and Isabella in 2010 and developed evidence that Lisa had left the United States into Canada shortly after midnight on September 22, 2009, crossing the Rainbow Bridge in Niagara Falls, New York within this district. Evidence shows that Lisa and Isabella flew out of Toronto on September 22, bound for Nicaragua. In April 2011, the government obtained a sealed arrest warrant for Timo Miller, a Mennonite pastor working in Nicaragua. Miller was arrested on the charge of aiding and abetting international parental kidnapping, in violation of 18 U.S.C. §§ 1204, 2, when he flew to the United States in 2011 on a visit. Section 1204 creates two separate offenses: 1) removing a child from the United States with intent to obstruct lawful parental rights, a crime completed in September 2009, and 2) retaining a child outside the United States with intent to obstruct

lawful parental rights, a crime that is potentially still being committed each day, since Lisa and Isabella have apparently never returned the United States.

Following arrest, the defendant admitted in an interview that he had purchased the airline tickets for Lisa and Isabella upon request by Tim Schrock, a Mennonite leader in Nicaragua. The defendant explained that he was aware of the ongoing custody battle between Lisa Miller and her former partner and described the help he provided to Lisa Miller once she arrived in Nicaragua. The United States Attorney's Office for the District of Vermont and Timo Miller entered into a non-prosecution agreement in October 2011, under which the defendant agreed to testify truthfully upon request by the United States in the trial of Kenneth Miller, no relation, a fellow coconspirator. On or about October 27, 2011, the defendant testified before a grand jury in Vermont, a proceeding in which the defendant testified to a number of matters, including the fact that Nicaragua was selected as the destination due in part to the lack of extradition with the United States and the collaboration between himself, Kenneth Miller, Phillip Zodhiates and Lisa Miller. Based in part on the on the availability of the defendant to cooperate, the government charged Kenneth Miller in Vermont with aiding and abetting the kidnapping.

On or about December 20, 2011, the defendant submitted to a trial deposition, which was conducted at the United States Attorney's Office in Philadelphia, Pennsylvania. The deposition was attended by Kenneth Miller and his attorneys. Despite the fact that the defendant provided a number of inconsistent answers, as compared to what he had previously testified and even as recently as during the preparation the morning of the deposition, the government did not immediately pull the cooperation agreement even though the government

believed that Timo Miller was influenced in his testimony by the presence of known associate Kenneth Miller. As the trial of Kenneth Miller moved forward, the Government requested Timo Miller's testimony during the trial. The defendant failed to appear as per the Government's request. Kenneth Miller was convicted and the case has been appealed to the Second Circuit Court of Appeals. Kenneth Miller raised venue as an issue in that appeal.

In 2014, the United States Attorney for the Western District of New York ("USAO-WDNY") made the decision to pursue this investigation based on the evidence and history of the case and in consultation with the United States Attorney's Office in Vermont. The USAO-WDNY appointed Paul Van de Graaf, the Criminal Chief in the District of Vermont, as a Special Assistant United States Attorney in the Western District to help in the investigation and any prosecutions. Mr. Van de Graaf was co-counsel in the Kenneth Miller trial and had developed significant familiarity with the evidence developed in the Vermont investigation.

On or about September 19, 2014, the grand jury in the Western District of New York returned an indictment against three defendants – Lisa Miller, Timo Miller, and Philip Zodhiates. A superseding indictment was filed on April 24, 2015. Only Mr. Zodhiates has been arraigned on the charges. The defendant is charged with aiding and abetting the removal of Isabella and with conspiring to remove and retain Isabella from September to November 2009. The goal of the government was and remains prosecution of co-conspirators who helped Lisa with removing Isabella and with retaining her outside the country.

ARGUMENT

I. THE DEFENDANT IS A FUGITIVE AND IS NOT ENTITLED TO HAVE THE COURT RULE ON A PRE-ARRAIGNMENT MOTION TO DISMISS

The defendant, Timo Miller, is currently at large, likely living in Nicaragua. Though he is clearly aware of the charges in the indictments against him, the defendant has not yet been arraigned in the Western District of New York on these charges and has not waived appearance pursuant to Fed. R. Crim. P. 10(b)(2). The defendant's motion is not only unfair, but also encourages flights from justice. The Government submits that the Court should refuse to rule on defendant's motion as he has not yet submitted himself to the jurisdiction of this court.

The Federal Rules of Criminal Procedure do not address whether a court may rule on a pre-arraignment motion to dismiss. The decision to rule on a pre-arraignment motion to dismiss has been found to be within the district court's discretion. *Hughes v. Thompson*, 415 U.S. 1301, 1302-03 (1974) (Douglas, J., in chambers). *See also United States v. Weinstein*, 511 F.2d 622, 627 (2d Cir. 1975); *United States v. Golden*, 239 F.2d 877, 880 (2d Cir. 1956). In exercising its discretion, the district court must consider the well-established fugitive entitlement doctrine and the underlying foundational principle of mutuality of litigation.

The Supreme Court held in *Molinaro v. New Jersey*, 396 U.S. 365 (1970), that "[an escape from custody] disentitles the defendant to call upon the resources of the Court for determination of his claims." The legal principles which underlie what is now referred to as the "fugitive disentitlement doctrine" are applicable in a situation in which the defendant has not yet been arraigned and remains outside of the United States. Courts within the Second

Circuit "have suggested that the primary concern underlying *Molinaro* is one of mutuality" and have held that "a court should decline to entertain the appeal of an escaped prisoner because it would allow him to benefit from a favorable result without risking the normal consequences of an adverse decision." *United States v. Veliotis*, 586 F. Supp. 1512, 1515 (S.D.N.Y. 1984).

The *Molinaro* court, in recognizing mutuality of litigation and establishing the fugitive disentitlement doctrine, was primarily concerned with a situation in which a litigant calls upon the judicial system to make a determination on a claim in which that litigant only stands to benefit. In such situations, the absent litigant would not be subject to the consequences of an adverse decision. This places the government in an untenable situation. *See generally Eisler v. United States*, 338 U.S. 189 (1949) (holding that "[w]hen [the defendant] withdraws himself from the power of the Court to enforce its judgment, he also withdraws the questions which he had submitted to the Court's adjudication."); *Johnson v. Laird*, 432 F.2d 77, 79 (9th Cir. 1970) (holding that "[w]e do not believe that any court is compelled to adjudicate the rights of a litigant on his own terms" and that "[w]e do not believe that this court is required to rule on the merits of his appeal so long as he remains absent.").

Defendant, in filing a motion with this court prior to surrendering to its jurisdiction and while remaining in Nicaragua, is subject to the discretionary limitations of the fugitive disentitlement doctrine. The Second Circuit has recognized four rationales for the fugitive disentitlement doctrine:

> 1) assuring the enforceability of any decision that may be rendered against the fugitive; 2) imposing a penalty for flouting the judicial process; 3) discouraging flights from justice and promoting the efficient operation of the courts; and 4) avoiding prejudice to the other side caused by the defendant's escape

Bano v. Union Carbide Corp., 273 F.3d 120, 125 (2d Cir. 2001) (citing *Shield v. Finkelstein,* 111 F.3d 278, 280 (2d Cir.1997)). While the fugitive disentitlement doctrine is generally used at the appellate level, it has been found that district courts have the discretion to apply the doctrine in civil or criminal proceedings. *United States v. Hernandez*, No. 09 CR 625 (HB), 2010 WL 2652495, at *5 (S.D.N.Y. June 30, 2010). *See also Bano v. Union Carbide Corp.*, 273 F.3d 120, 125 (2d Cir. 2001); *United States v. Veliotis,* 586 F.Supp. 1512, 1514 (S.D.N.Y.1984). In determining whether to apply the fugitive disentitlement doctrine, courts have distilled the issue down to two fact specific questions; whether the applicant is a fugitive and, if so, whether, in light of the factors underlying the doctrine, a court should abstain from addressing his application. *United States v. Hayes*, No. 12 MJ 3229, 2015 WL 1740830, at *4 (S.D.N.Y. Mar. 20, 2015) (citing *In re Grand Jury Subpoenas dated March 9, 2001,* 179 F.Supp.2d 270, 287 (S.D.N.Y.2001)).

The defendant is a fugitive by any measure of the word. A fugitive is defined as "1) [s]omeone who flees or escapes; a refugee. 2) A criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, esp. by fleeing the jurisdiction or by hiding." FUGITIVE, Black's Law Dictionary (10th ed. 2014). In addition, in determining whether one is considered a "fugitive," courts within the Second Circuit have held that "[a] person can be a fugitive even when he does not 'flee' but is simply found outside the jurisdiction." *United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F.Supp. 984, 998 (E.D.N.Y.1992) (citations omitted). In addition, "[a] person who learns of charges against him while he is outside the jurisdiction 'constructively flees' by deciding not to return. *In re Grand Jury Subpoenas dated Mar. 9, 2001*, 179 F. Supp. 2d 270, 287 (S.D.N.Y. 2001) (citing *United*

States v. 218 Panther Street, 745 F.Supp. 118, 121 (E.D.N.Y.1990) (citation omitted)); *See also Jhirad v. Ferrandina,* 536 F.2d 478, 483-84 (2d Cir.1976) (no "meaningful distinction exists between those who leave their native country and those who, already outside, decline to return").

The defendant was indicted on similar charges in the District of Vermont and arrested in 2011. Only after promising to testify against co-defendant Kenneth Miller, in a binding non-prosecution agreement, were those criminal proceedings terminated. The defendant understood that the agreement required him to testify including at a trial. Although he participated in a video recorded deposition, the defendant was not forthcoming and truthful as required by the agreement. Furthermore, he returned to Nicaragua and refused to return to testify in the trial of Kenneth Miller, as required by the non-prosecution agreement. The defendant is clearly aware of the charges pending against him, as he obtained counsel and filed this motion, yet he continues to refuse to return to the United States. Even if the court finds that the defendant is not a "fugitive" in the traditional sense that he did not escape custody and flee the jurisdiction, he clearly qualifies as one under both the legal definition and case law within the Second Circuit as he is evading jurisdiction of this court.

After establishing that the defendant is a fugitive for purposes of applying the fugitive disentitlement doctrine, the court must then find that the factors underlying the doctrine dictate that the defendant is not entitled to call upon the judicial system. The defendant here, in failing to surrender to an arraignment, places himself in position in which he would not be subject to the consequences of an adverse decision should the district court rule against him. A decision to rule on a pre-arraignment motion to dismiss in this situation, in which the fugitive

disentitlement doctrine applies, would be contrary to all notions of mutuality of litigation. In addition, by ruling on the fugitive defendant's motion, the court would not promote the efficient use of judicial resources and would prejudice the government.

In *United States v. Shapiro*, the district court, in exercising its discretion, decided to rule on a pre-arraignment motion to dismiss. 391 F. Supp. 689, 693 (S.D.N.Y. 1975). The court focused on, *inter alia*, mutuality of litigation and the potential concerns cases like the one at bar could pose. *Id*. Consistent with this principle, the court rested its decision to rule on the motion on a promise made by defense counsel to the court that the defendant, upon an adverse decision regarding his jurisdictional challenge, would surrender to the authorities and permit a determination on the merits. *Id*. *But see In re Hijazi*, 589 F.3d 401, 414 (7th Cir. 2009) (holding that while mutuality of litigation is a concern, the inability to reenter the United States without threat of arrest and prosecution was sufficient to satisfy any mutuality concern.). Unlike in *Shapiro*, the defendant here has made no guarantee that he will surrender himself to the jurisdiction of the court if an adverse decision on his motion to dismiss is entered. In addition, the defendant has not simply fled to Nicaragua, but rather has established a life there, including the presence of his parents, siblings and children. Here, unlike in *In re Hijazi*, the incentive to return to the United States is much lower, and therefore the threat of prosecution upon reentry is not sufficient to satisfy mutuality of litigation concerns

The defendant remains outside the United States and out of reach of law enforcement. He now calls upon the judicial system to dismiss a pending indictment against him even though he has not yet surrendered himself to being formally charged at arraignment. Ruling on

this pre-arraignment motion to dismiss in this situation would be contrary to all notions of mutuality of litigation.

II. THE COOPERATION AGREEMENT DOES NOT PROTECT DEFENDANT FROM PROSECUTION IN THE WESTERN DISTRICT OF NEW YORK

In the alternative, if the Court finds that it will rule on the defendant's pre-arraignment motions, the court should deny them. The cooperation agreement in question was entered into between the defendant and then United States Attorney for the District of Vermont Tristram J. Coffin, by and through Assistant United States Attorney Eugenia A.P. Cowles, on or about October 27, 2011. The defendant moves to dismiss the indictment currently pending in the Western District of New York and for specific performance of the agreement, arguing that the Government has breached the agreement by indicting the defendant in the Western District of New York. The defendant's argument is entirely without merit.

The defendant entered into a non-prosecution agreement with the United States Attorney in the District of Vermont on October 27, 2011. *See Dkt. # 48-4, Defendant's Exhibit 1.* The agreement provided that the criminal charges against the defendant would be terminated if he cooperated with the government's ongoing investigations. The terms of the agreement explicitly conditioned the termination of charges on specific terms of cooperation, including a requirement that the defendant cooperate completely, candidly and truthfully with the investigation. The defendant further agreed to testify under oath completely, candidly and truthfully before grand jury, in trials or other proceedings in the District of Vermont or elsewhere as requested by the United States and to "return to the United States as requested by

the United States if and when his cooperation is required under this agreement." *See Dkt. # 48-4, Defendant's Exhibit 1, para. 1.*

A non-prosecution agreement, granted solely by a United States Attorney, is contractual, rather than statutory, in nature. These agreements are similar to those more commonly made in plea agreements in which the United States Attorney agrees to move for downward departure during sentencing. "It is well settled that the government may in its discretion make agreements in which it exchanges various levels of immunity from prosecution for the defendant's cooperation." *United States v. Aleman*, 286 F.3d 86, 89-90 (2d Cir. 2002) (citing *United States v. Pelletier,* 898 F.2d 297, 301 (2d Cir.1990)).

The Second Circuit interprets non-prosecution agreements of this nature according to contract law principles. *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir.1990). "Cooperation agreements, like plea bargains, are interpreted according to principles of contract law." *United States v. Carbone*, 739 F.2d. 45, 46 (2d Cir. 1984). *See United States v. Alexander*, 869 F.2d. 91.95(2d Cir. 1989); *See also Santobello v. New York*, 404 U.S. 257, 262-63 (1971) (specific performance is an appropriate remedy for breach of a plea agreement.) Under contract law principles, a third party cannot be bound by an agreement absent contractual privity. *See Generally* 17B C.J.S. Contracts § 836 (stating that "contract obligations are imposed because of conduct of the parties manifesting consent, and are generally owed only to the specific individuals named in the contract").

The USAO-WDNY is not bound by the cooperation agreement as there is no contractual privity between the parties to the agreement. Under contract law principles, a third

party cannot be bound by an agreement absent contractual privity. *United States v. Turner*, 936 F.2d 221, 223 (6th Cir. 1991) (holding that immunity received from a U.S. Attorney was nothing more than a promise not to prosecute, which is not binding on another federal office). *See also United States v. Peister,* 631 F.2d 658, 662 (10th Cir.1980). As the USAO-WDNY was not a signatory to the agreement in question, and had no role in its negotiation, it cannot be bound by the contractual agreement.

The Second Circuit has clearly stated that plea agreements only bind the office for the United States for the District in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction. *See United States v. Gonzalez*, 93 Fed. Appx. 268 (2d Cir. 2004) (citing *United States v. Annabi*, 771 F.2d. 670, 672 (2d Cir. 1985) (per curiam))(affirming decision by United States District Court for the Western District of New York, Richard J. Arcara, Chief Judge to deny defendant's motion to dismiss an indictment.) The only exception recognized by the Court is if "there [is] evidence to show that [a prosecutor] [i]s attempting to evade its own obligations [under the plea agreement] by transferring a prosecution" to another office. *United States v. Alessi*, 544 F.2d 1139, 1154 (2d Cir. 1976) (overruled in part on other grounds); *United States v. Macchia*, 41 F.3d 35, 39 (2d Cir. 1994). The Court confirmed that "[t]he mere use of the term 'government' in the plea agreement does not create an affirmative appearance that the agreement contemplated barring districts other than the particular district entering into the agreement*." United States v. Salameh,* 152 F.3d 88, 120 (2d Cir. 1998). However, citing *United States v. Russo*, 801 F.2d 624, 626 (2d Cir. 1986), the Court held that an" affirmative appearance to bind other districts, nonetheless, 'can be inferred from negotiations between defendant and the prosecutor, as well as from statements at the plea colloquy.'" There is simply no affirmative appearance or evidence in the

agreement, or in any negotiations between the parties, that the agreement is binding on the USAO-WDNY.

In addition, the express terms of the cooperation agreement are dispositive on this question. Paragraph six of the agreement provides, in part, that in return for full and complete performance of the agreement by the defendant, the United States will "(b) not prosecute him in the District of Vermont for any other criminal offenses." *See Dkt. # 48-4, Defendant's Exhibit 1, para. 6.* A plain reading of this provision is clear in that the government promises only to forego prosecution within the District of Vermont, with no mention of agreement by the government to immunize the defendant from prosecution in the Western District of New York or elsewhere. In further support of this, Paragraph Seven reads "[i]t is further understood that this agreement is limited to the Office of the United States Attorney for the District of Vermont and cannot bind other federal, state or local prosecuting authorities." *See Dkt. # 48-4, Defendant's Exhibit 1, para. 7.* The terms of the agreement are not ambiguous in regards to the duties of the government. The agreement clearly states, in Paragraphs Six and Seven, that the agreement not to prosecute is made by the United States Attorney for the District of Vermont, that the government will not prosecute in the District of Vermont, and that the agreement is not binding on other Federal prosecuting authorities, of which the United States Attorney's Office for the Western District of New York is one.

Finally, there is simply no evidence that the prosecution is trying to evade its own obligations under the agreement by transferring prosecution to the Western District of New York. The defendant's decision to breach the agreement does not entitle him to determine which United States Attorney's Office may continue to investigate and prosecute the crimes for

which he may now be charged. The government's decision to investigate and prosecute the case in the Western District of New York was based not on an "attempt to evade its own obligations by transferring a prosecution." *United States v. Alessi,* 544 F.2d 1139, 1154 (2d Cir.1976). Rather, the USAO-WDNY made the decision to pursue the case against the present defendant. While Assistant United States Attorney Paul Van De Graff was appointed as a Special Assistant United States Attorney to assist the prosecution, that appointment is not evidence of evasion of obligations. It is a decision based on the government's commitment to prosecute those responsible for illegally removing and retaining Isabella outside the country.

The defense, implicitly through the filing of the motion to dismiss and for specific performance, is arguing that the cooperation agreement entered into on or about October 27, 2011 between the defendant and the United States Attorney for the District of Vermont is binding upon the USAO-WDNY. The agreement, as stated by its terms, is binding solely on the parties which signed it. This interpretation is supported by both the plain express language of the agreement and case law in this Circuit.

III. THE DEFENDANT BREACHED THE TERMS OF THE COOPERATION AGREEMENT

The defendant failed to fulfill his clear obligations under the agreement in two distinct instances and rendered the agreement voidable. First, the United States Attorney for the District of Vermont determined, consistent with the discretion granted to the government in paragraph 3 of the non-prosecution agreement, that the defendant was neither truthful nor complete in giving his recorded deposition. *See Dkt. # 48-4, Defendant's Exhibit 1, para.3.* This constitutes a direct and clear breach of the agreement, which then allows the government to exercise its right to bring the present charges against him. His failure to return to the United

States upon request in order to testify in the trial on Kenneth Miller constitutes another clear and complete breach of the his obligations under the agreement.

The Second Circuit has held that "[t]he terms of the agreement govern both the conditions constituting breach or performance and the remedies available in the event of a breach." *United States v. Aleman*, 286 F.3d 86, 89-90 (2d Cir. 2002) (citing *United States v. Pelletier,* 898 F.2d 297, 301 (2d Cir.1990)). Under these interpretation guidelines, the explicit terms of the non-prosecution agreement are dispositive. In paragraph 3, the agreement plainly grants the government sole discretion in determining whether the cooperating witness, the defendant, has fulfilled his obligations to provide truthful and complete information under the agreement.

> "[I]n the event that the United States, *in its sole discretion*, determines that [the defendant] has made any false statement to investigators or attorneys of the United States or willfully failed to disclose information…the United States will have the right to terminate this agreement and prosecute him for any and all offenses…." (emphasis added). *See Dkt. # 48-4, Defendant's Exhibit 1, para. 3.*

Granting of sole discretion to determine whether the terms of an agreement have been met is consistent with contractual legal principles. *Restatement (Second) of Contracts* § 228, Comment (a) states that a condition of an agreement is not satisfied "if the obligor is honestly, even though unreasonably, dissatisfied [with performance]." This grant of discretion is supported in the Second Circuit as it is well established that the government is often vested with broad discretion in agreements with cooperating witnesses in determining whether the witness has fully obliged by their duties. *United States v. Aleman*, 286 F.3d 86, 91 (2d Cir. 2002). The Second Circuit has held that "because the prosecution often is in the best position to evaluate the quality of a defendant's cooperation…this decision, like other prosecutorial determinations, may be subjected to only limited review." *United States v. Knights*, 968 F.2d

1483, 1487 (2d Cir. 1992) (holding that the government's agreement to move for downward departure in return for testimonial cooperation granted broad prosecutorial discretion).

It is also established, however, that the grant of discretion in the government is not limitless. "[W]here the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the sole discretion of the prosecutor, that discretion is limited by the requirement that it be exercised fairly and in good faith." *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir.1990). *See also United States v. Resto*, 74 F.3d 22, 26 (2d Cir. 1996); *United States v. Rexach*, 896 F.2d 710, 714 (2d Cir. 1990) (holding that a prosecutors determination of satisfaction cannot be made invidiously or in bad faith). In addition, the "government's decision may, of course, never be based on unconstitutional motives, relating, for example, to the race or religion of the defendant." *Wade v. United States,* 504 U.S. 181, 185-86 (1992). Here, as in *Khan*, the government is vested with sole discretion in determining whether the defendant has made any false statements, willfully failed to disclose information, or committed perjury, and as such, must exercise that discretion in good faith. The defendant, in his deposition, provided the government with answers which were incomplete or inaccurate, or both. The government determined, at that time, that the defendant was not being complete or truthful, in violation of his contractual obligation. This is evinced by the fact that the government, in the Kenneth Miller proceedings, filed an objection to defendant's deposition, stating its contention that his testimony was questionable. *See* Government's Objection to the Deposition of Timothy Miller*, Dkt. # 48-10, Government Exhibit 6*. The government has since obtained additional evidence further proving that the defendant was neither truthful nor complete in answering question in the deposition while under oath. The Second Circuit has held that in order "to meet its obligation of good faith, the government need only demonstrate

honest dissatisfaction with the defendant's efforts." *United States v. Reeves*, 296 F.3d 113, 116 (2d Cir. 2002). Here, the government, as established, made an honest determination of dissatisfaction in regards to the defendant's compliance, based on evidence both possessed at that time and obtained subsequent to the deposition. The government's determination in this regard does not constitute bad faith in any way.

In *United States v. Resto*, the court found that when the government determines that a testifying witness has not provided truthful or complete testimony, and therefore has not fulfilled their obligations under a contractual cooperation agreement, they are acting in good faith and not in abuse of their discretion granted in the agreement. 74 F.3d 22, 26 (2d Cir. 1996). There, the court held that because the defendant provided false statements to the prosecutor, "[t]here can be no doubt that [the defendant] breached the agreement, and that the prosecutor had ample, good faith grounds" for reneging on their promise. *Id.* at 27. *See also United States v. Fernandez*, 127 F.3d 277, 282 (2d Cir. 1997) (holding that the government may cancel a cooperation agreement when the defendant provided false answers to the Assistant United States Attorneys). In determining whether or not the government did in fact act in bad faith regarding the satisfaction of non-prosecution agreement terms, a number of analogous cases are dispositive, showing that the government did not act in bad faith here. In *United States v. Khan,* the court held that a prosecutor could not lawfully determine that a cooperating witness failed to satisfy the terms of a non-prosecution agreement solely based on the fact that the information provided was not helpful to the government. 920 F.2d 1100, 1105 (2d Cir. 1990). The government has made no contention, and the evidence does not support an argument that its determination of dissatisfaction was based on, even in part, the usefulness, or lack thereof, of defendant's cooperation. Even if a testifying witness does in fact provide some

assistance to the government, their failure to be complete and truthful still permits the government to render the agreement void in a good faith manner. *United States v. Gerant*, 995 F.2d 505, 509 (4th Cir. 1993). Finally, there is no evidence here that the government acted invidiously or based on unconstitutional motives in making its determination.

Secondly, the defendant failed to appear as a testifying witness in the trial of Kenneth Miller. Again, interpreted according to contract law principles, the terms of the non-prosecution agreement are dispositive as to whether the defendant's failure to appear constitutes a breach. Paragraph 1 of the agreement states, in relevant part, that "[Timothy Miller] agrees to testify under oath completely…in trials or other proceedings…as requested by the United States." *See Dkt. # 48-4, Defendant's Exhibit 1, para.1.* The agreement provides the defendant with no exception to this obligation. The Government, by letter to Mr. Conrad, requested on or about July 20, 2012, through Eugenia Cowles, Assistant United States Attorney for the District of Vermont, that the defendant return to the United States and testify in the trial of Kenneth Miller on or about August 9, 2012. He failed to do so in violation of the terms of the agreement. As a result of the defendant's breach, the government is not bound by the agreement and is within its right to bring the present indictment against him. *See United States v. Resto*, 74 F.3d 22, 26 (2d Cir. 1996).

Under contract law, a material breach by a party to the agreement allows the other party to eschew their obligations. *See generally* Restatement (Second) of Contracts § 225 (1981). Here, the defendant was required to return to the United States at the trial of Kenneth Miller. He failed to return to testify on the requested date. The breach is clear, and the government is not bound to its promise within the agreement. The Second Circuit has held as much in analogous situations. In *United States v. Merritt*, the court held that "a defendant who materially

breaches a plea agreement may not claim its benefits." 988 F.2d 1298, 1313 (2d Cir. 1993). *See also United States v. Cimino*, 381 F.3d 124, 127 (2d Cir. 2004) (assuming and accepting that the government, due to the breach of a plea agreement by the defendant, would want to treat the agreement as unenforceable); *United States v. El-Gheur,* 201 F.3d 90, 93-94 (2d Cir.2000) (holding that government's obligation to move for downward departure are terminated upon breach by the defendant).

Finally, as established in *Aleman*, 286 F.3d 86, 89-90, the terms of the agreement are controlling in regards to remedies for breach. Language in both paragraph 3 and 4 of the agreement in question provide that the government, upon failure by the defendant to comply with terms within the agreement, may prosecute the defendant to the fullest extent of the law. Here, the defendant flouts the judicial system by first entering into an agreement with the United States, then reaping the benefits of that agreement in the form of a dismissed indictment, then refusing to fulfill his clear and unambiguous duties under the agreement, and now by calling upon the courts to dismiss the Western District of New York indictment by enforcing the very same agreement which he so clearly breached.

IV. THE DEFENDANT HAS FAILED TO ALLEGE BAD FAITH BY THE GOVERNMENT, AND THEREFORE IS NOT ENTITLED TO AN EVIDENTIARY HEARING

The defendant's allegations of bad faith are baseless and the motion for an evidentiary hearing should be denied. The defendant has failed to allege any facts which show the government acted in bad faith. *See Knights,* 968 F.2d at 1487.

The government, consistent with the discretion clearly granted within the agreement, determined that the defendant was neither truthful nor complete in his testimony during the deposition. The Second Circuit has found that determinations of this nature are clearly made in good faith. That Court established that failure to testify when requested as required under a cooperation agreement specifically constitutes proper grounds for the government to hold the agreement as void. *United States v. Doe*, 314 F. App'x 350, 351 (2d Cir. 2008) (affirming a finding that government acted in good faith when cancelling cooperation agreement after the witness failed to appear after requested for questioning by the government). *See also United States v. Gilmore*, 282 F. App'x 953, 955 (2d Cir. 2008) (holding that when a defendant refuses to attend meetings as requested by the government, *inter alia*, "it is pellucidly clear that the government did not act in bad faith in determining that the appellant had failed to abide by the [a]greement").

Here, the defendant arguing against established Second Circuit law, suggests that he should be allowed to violate the agreement because of the extenuating circumstances of his wife's impending childbirth. First, the defendant, who has chosen not to appear in this court to assert these arguments in person, should not be able to avail himself of the judicial process to argue facts in support of his motion. The defendant should be willing to accept the jurisdiction of this court before expecting the court and the government to give credit to his factual assertions in support of his motion. Second, the defendant contends that the potential birth of a child somehow imposed a duty on the government to adjust its behavior and that by failing to do so, the government acted in bad faith. The government's request for testimony was proper under the agreement. Within the agreement, there were no express terms as to notice requirements, but the defendant was given approximately eighteen days of notice, which is

sufficient to show that the request was made in good faith and not to impose hardship on the defendant. The government made a number of efforts to accommodate the defendant to ensure that he could testify after receiving notice from defendant's counsel regarding the potential conflict regarding the birth of his child. As requested by defense, and which they now try to use as proof of the government's knowledge of the defendant's inability to testify, the government filed for a continuance in the trial of Kenneth Miller in order to ensure that the defendant would appear. The continuance was opposed by Kenneth Miller and subsequently denied. The government was willing to arrange the testimony as early as possible in the trial and make travel arrangements which minimized the defendant's time away from home. The government later learned that the actual birth day of the child differed from the date presented by counsel. The government confirmed that the child was not born until August 19, 2012, some ten days after the government required the defendant's testimony. Regardless of these efforts, the defendant refused to appear as required by the terms of the non-prosecution agreement, which therefore constituted a breach. The terms of the agreement were clear.

The defense contends that the government negotiated the agreement in bad faith arguing that it was clear to the government prior to the agreement that the defendant had not been truthful. This bad faith allegation is meritless, irrelevant and defies common sense. The government enters agreements with cooperating defendants with the understanding that, regardless of any information provided prior to that point, the witness will now be truthful and completely forthcoming. Otherwise, there is no benefit to the government to enter such agreements. The very point of the agreement is to turn an uncooperative witness into one who will provide truthful testimony. Furthermore, additional evidence was developed in the

investigation after the defendant entered the agreement and after he was deposed that indicated he gave incomplete and untruthful testimony in his deposition.

Finally, the contention that the government acted in bad faith by seeking an indictment in the Western District of New York rather than re-indicting him in the district of Vermont is meritless. Upon breach of the agreement, the government has the right to prosecute the defendant. The defendant cannot now turn to the agreement in an effort to dictate which court the case is brought within. In the time between the dismissal of the first indictment and the present indictment, Kenneth Miller was convicted. In those proceedings, there was a question as to whether venue was proper in the district of Vermont, a question which is still pending with the Second Circuit. In light of the venue argument, the crimes committed and the ongoing retention of Isabella out of the country, the USAO-WDNY commenced an investigation into individuals who had conspired to commit those crimes. The government did not act in bad faith, but rather was responsible in seeking an indictment in this district in order to avoid any potential future venue issues which could arise upon the ruling by the Second Circuit.

V. THE INDICTMENT IS NOT FACIALLY DEFECTIVE

The defendant urges this Court to dismiss the removal allegations in the superseding indictment because those allegations do not allege an offense. This argument is identical to the one made by co-defendant Phillip Zodhiates and by the defense in the Kenneth Miller case. This response incorporates by reference and restates the government's position and arguments as stated in its response to defendant Zodhiates' motion. *See Dkt. #52.* The Court should deny the motion to dismiss.

In the case of Kenneth Miller, Judge Sessions, in response to an identical argument, denied the motion to dismiss, noting that the issue is more appropriately analyzed through the lens of evidence and jury instructions, not allegations. The government argued in that case – and plans to argue here – that section 1204 criminalizes removals motivated by obstructing not only parental rights existing as of the date of removal but also rights about to be granted.

The Court should deny the motion to dismiss for two reasons. First, whether an indictment alleges an offense turns on the face of the indictment, not the evidence. The superseding indictment tracks the language of section 1204. By tracking the language of the statute and designating the approximate times and places of the offense alleged, the indictment satisfies the pleading requirements of Rule 7(c)(1). *See United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002). Because Federal Rule of Criminal Procedure 12(b) limits pretrial challenges to indictments to those that "the court can determine without a trial of the general issue," such a pre-trial motion to review the evidence should be denied. The indictment is sufficient.

Second, the fact that Lisa Miller had lawful parental rights on September 21 is not a complete defense to a violation of section 1204. Section 1204 prohibits the removal of a child from the United States with the intent to obstruct the lawful exercise of parental rights. 18 U.S.C. § 1204(a). "The term 'parental rights' with respect to a child, means the right to physical custody of the child– (A) whether joint or sole (and includes visitation rights), and (B) whether arising by operation of law, court order, or legally binding agreement of the parties." 18 U.S.C. § 1204(b)(2). As early as June 2004, the Rutland, Vermont family court had issued an order providing Janet Jenkins with visitation rights. *See* Temporary Order Re: Parental

Rights and Responsibilities, Rutland Family Court, *Dkt. # F454-11-03, June 17, 2004*. At the time Lisa Miller kidnapped Isabella in September 2009, Janet Jenkins had parental rights. *See United States v. Miller*, 626 F.3d 682, 688, 690 (2d Cir. 2010) (finding visitation rights were parental rights under IPKA. Lisa Miller's removal of Isabella from the United States in 2009 violated Jenkins's parental rights. Lisa Miller's removal of Isabella also intended to frustrate the anticipated transfer of primary physical and legal custody from Lisa Miller to Jenkins, again violating Jenkins' parental rights.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the court refuse to rule on defendant's pre-arraignment motion to dismiss and deny defendant's motions to dismiss the indictment, for specific performance and for an evidentiary hearing.

WHEREFORE, the above is respectfully submitted.

DATED: Buffalo, New York, July 20, 2015.

WILLIAM J. HOCHUL, JR.
United States Attorney

BY: S/KATHLEEN A. LYNCH
Assistant United States Attorney
United States Attorney's Office
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202
(716) 843-5700 ext. 830
Kathleen.lynch@usdoj.gov

PAUL J. VAN DE GRAF
Special Assistant United States Attorney
United States Attorney's Office
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202

ANDREW G. BESCH
Student Law Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. 14-CR-175-A

TIMOTHY MILLER,

Defendant.

PLEA AGREEMENT

The defendant, Timothy Miller, and the United States Attorney for the Western District of New York (hereinafter "the government") hereby enter into a plea agreement with the terms and conditions as set out below.

I. THE PLEA AND POSSIBLE SENTENCE

1. The defendant agrees to plead guilty to Count 1 of the Superseding Indictment which charges a violation of Title 18, United States Code, Section 371 [conspiracy to commit international parental kidnapping] for which the maximum possible sentence is a term of imprisonment of 5 years, a fine of $ 250,000, a mandatory $100 special assessment and a term of supervised release of 3 years. The defendant understands that the penalties set forth in this paragraph are the maximum penalties that can be imposed by the Court at sentencing.

2. The defendant understands that the Court may require restitution in the amount not to exceed $50,000 as part of the sentence, pursuant to Sentencing Guidelines § 5E1.1 and Title 18, United States Code, Section 3663. The defendant understands that

EXHIBIT
16

defendant will not be entitled to withdraw the plea of guilty based upon any restitution amount ordered by the Court.

3. The defendant understands that, if it is determined that the defendant has violated any of the terms or conditions of supervised release, the defendant may be required to serve in prison all or part of the term of supervised release, up to 2 years, without credit for time previously served on supervised release. As a consequence, in the event the defendant is sentenced to the maximum term of incarceration, a prison term imposed for a violation of supervised release may result in the defendant serving a sentence of imprisonment longer than the statutory maximum set forth in ¶ 1 of this agreement.

II. ELEMENTS AND FACTUAL BASIS

4. The defendant understands the nature of the offense] set forth in ¶ 1 of this agreement and understands that if this case proceeded to trial, the government would be required to prove beyond a reasonable doubt the following elements of the crime:

a. That Isabella Miller Jenkins was previously in the United States;

b. that the defendant agreed with others including Lisa Miller and Ken Miller to assist the taking of Isabella Miller Jenkins from the United States and retaining the child outside the United States; and

c. the defendant acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins.

FACTUAL BASIS

5. The defendant and the government agree to the following facts, which form the basis for the entry of the plea of guilty including relevant conduct:

a. That Isabella Miller Jenkins is the daughter of Lisa Miller and Janet Jenkins. Prior to September 22, 2009, Isabelle Miller Jenkins lived in the United States and Janet Jenkins had the parental right to visit Isabella Miller.

b. That on or about September 21, 2009, the defendant was a Mennonite minister in Managua, Nicaragua when he was contacted by Kenneth Miller. Kenneth Miller told the defendant that Lisa Miller was looking to leave the United States with her daughter Isabella Miller Jenkins as she could lose custody of Isabella to Janet Jenkins.

c. Based on this information, the defendant agreed to assist in arranging Lisa's and Isabella's departure from the United States. The defendant did also purchase one-way airline tickets on September 21, 2009, for Lisa and Isabella to travel from Canada to Managua, Nicaragua on September 22, 2009.

d. Lisa and Isabella departed Canada on or about September 22, 2009, and arrived in Managua, Nicaragua. The defendant learned in November 2009 that Janet Jenkins was award custody of Isabella Miller Jenkins. The defendant continued to assist Lisa Miller with assistance up to and including May 2010 when he accepted and provided Lisa Miller with money.

III. SENTENCING GUIDELINES

6. The defendant understands that the Court must consider but is not bound by the Sentencing Guidelines (Sentencing Reform Act of 1984).

BASE OFFENSE LEVEL

7. The government and the defendant agree that Guidelines § 2J1.2(a) applies to the offense of conviction and provides for a base offense level of 14.

SPECIFIC OFFENSE CHARACTERISTICS
U.S.S.G. CHAPTER 2 ADJUSTMENTS

8. The government and the defendant agree that the following specific offense characteristics do apply:

a. the 3 level increase pursuant to Guidelines § 2J1.2(b)(2) [the offense involved a substantial interference with the administration of justice].

b. The 2 level increase pursuant to Guideline §2J1.2(b)(3)(C) [extensive in scope preparation or planning]

ADJUSTED OFFENSE LEVEL

9. Based on the foregoing, it is the understanding of the government and the defendant that the adjusted offense level for the offense of conviction is 19.

ACCEPTANCE OF RESPONSIBILITY

10. At sentencing, the government agrees not to oppose the recommendation that the Court apply the two (2) level downward adjustment of Guidelines § 3E1.1(a) (acceptance of responsibility) and further agrees to move the Court to apply the additional one (1) level downward adjustment of Guidelines § 3E1.1(b), which would result in a total offense level of 16.

CRIMINAL HISTORY CATEGORY

11. It is the understanding of the government and the defendant that the defendant's criminal history category is I. The defendant understands that if the defendant is sentenced for, or convicted of, any other charges prior to sentencing in this action the defendant's criminal history category may increase. The defendant understands that the

defendant has no right to withdraw the plea of guilty based on the Court's determination of the defendant's criminal history category.

GUIDELINES' APPLICATION, CALCULATIONS AND IMPACT

12. It is the understanding of the government and the defendant that, with a total offense level of 16 and criminal history category of I, the defendant's sentencing range would be a term of imprisonment of 21 to 27 months, a fine of $5,000 to $50,000, and a period of supervised release of 1 to 3 years. Notwithstanding this, the defendant understands that at sentencing the defendant is subject to maximum penalties set forth in ¶ 1 of this agreement.

13. The government and the defendant agree to the correctness of the calculation of the Sentencing Guidelines range set forth above. The government and the defendant, however, reserve the right to recommend a sentence outside the Sentencing Guidelines range. This paragraph reserves the right to the government and the defendant to bring to the attention of the Court all information deemed relevant to a determination of the proper sentence in this action.

14. The defendant understands that the Court is not bound to accept any Sentencing Guidelines calculations set forth in this agreement and the defendant will not be entitled to withdraw the plea of guilty based on the sentence imposed by the Court.

IV. STATUTE OF LIMITATIONS

15. In the event the defendant's plea of guilty is withdrawn, or conviction vacated, either pre- or post-sentence, by way of appeal, motion, post-conviction proceeding, collateral attack or otherwise, the defendant agrees that any charges dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government and further agrees not to assert the statute of limitations as a defense to any other criminal offense involving or related to international parental kidnapping which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the withdrawal of the guilty plea or vacating of the conviction becomes final.

V. GOVERNMENT RIGHTS AND RESERVATIONS

16. At sentencing, the government agrees not to oppose the recommendation that the Court sentence the defendant at the lowest point of the Guidelines range determined by the Court.

17. The defendant understands that the government has reserved the right to:

a. provide to the Probation Office and the Court all the information and evidence in its possession that the government deems relevant concerning the defendant's background, character and involvement in the offense charged, the circumstances surrounding the charge and the defendant's criminal history;

b. respond at sentencing to any statements made by the defendant or on the defendant's behalf that are inconsistent with the information and evidence available to the government;

c. advocate for a specific sentence consistent with the terms of this agreement including the amount of restitution and/or a fine and the method of payment;

d. modify its position with respect to any sentencing recommendation or sentencing factor under the Guidelines including criminal history category, in the event that subsequent to this agreement the government receives previously unknown information, including conduct and statements by the defendant subsequent to this agreement, regarding the recommendation or factor;

e. oppose any application for a downward departure and/or sentence outside the Guidelines range made by the defendant.

18. At sentencing, the government will move to dismiss the open count of the Superseding Indictment in this action as against the defendant.

19. The defendant agrees that any financial records and information provided by the defendant to the Probation Office, before or after sentencing, may be disclosed to the United States Attorney's Office for use in the collection of any unpaid financial obligation.

VI. APPEAL RIGHTS

20. The defendant understands that Title 18, United States Code, Section 3742 affords a defendant a limited right to appeal the sentence imposed. The defendant, however, knowingly waives the right to appeal and collaterally attack any component of a sentence imposed by the Court which falls within or is less than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶12, above, notwithstanding the manner in which the Court determines the sentence. In the event of an appeal of the defendant's sentence by the government, the defendant reserves the right to argue the correctness of the defendant's sentence. The defendant further agrees not to appeal a restitution order which does not exceed the amount set forth in Section I of this agreement.

21. The defendant understands that by agreeing not to collaterally attack the sentence, the defendant is waiving the right to challenge the sentence in the event that in the future the defendant becomes aware of previously unknown facts or a change in the law which the defendant believes would justify a decrease in the defendant's sentence.

22. The government waives its right to appeal any component of a sentence imposed by the Court which falls within or is greater than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶12, above, notwithstanding the manner in which the Court determines the sentence. However, in the event of an appeal from the defendant's sentence by the defendant, the government reserves its right to argue the correctness of the defendant's sentence.

VII. COOPERATION

23. The defendant will cooperate with the government by providing complete and truthful information regarding the defendant's knowledge of any and all criminal activity, whether undertaken by the defendant or others, in any way involving or related to international parental kidnapping. The defendant's cooperation shall also include submitting to interviews by government attorneys and agents, as well as testifying truthfully and completely before grand juries and at such other proceedings as the government shall deem necessary, including, but not limited to pre-trial hearings, trials, sentencing hearings and forfeiture proceedings, and returning to the United States to testify is so requested.

24. The defendant's cooperation shall also be provided to any local, state or federal authorities designated by the government and who have agreed to abide by the terms of the "Cooperation" section of this agreement. The defendant's obligation to testify truthfully and completely shall extend to proceedings in local, state and federal courts in jurisdictions which have agreed to abide by this agreement.

25. In exchange for the defendant's plea of guilty and cooperation as set forth in this agreement, the defendant will not be prosecuted by the Office of the United States Attorney for the Western District of New York for any other federal criminal offenses committed in the Western District of New York in any way involving or related to international parental kidnapping, committed up to the date of this agreement and about which the defendant provides complete and truthful information.

26. Further, no testimony, statements or tangible objects provided by the defendant in compliance with this agreement (or any information directly or indirectly derived therefrom) will be used against the defendant in any criminal case, except a prosecution for perjury or making false statements.

27. Upon condition that the defendant has fully complied with all terms and conditions of this agreement, should the government determine that the defendant has provided substantial assistance in the investigation or prosecution of other persons who have committed offenses, the government will move the Court at sentencing to depart downward from the Guidelines 3 levels as provided for in Guidelines § 5K1.1, which, if granted by the

Court, would result in a total offense level of 13 and a sentencing range of 12 to 18 months imprisonment. The defendant understands that the decision to make such a motion is within the sole discretion of the government and that the decision to grant such a motion, and the extent of any downward departure, are matters solely within the discretion of the Court.

28. This agreement does not preclude the prosecution of the defendant for perjury or making false statements in the event the defendant testifies falsely or provides false information to the government. This agreement is not contingent upon the filing of charges against, the return of an Indictment against, or the successful prosecution of, any person or entity.

29. It is a condition of this agreement that, up through the date of the defendant's sentencing, the defendant shall commit no further crimes. It is also a condition of this agreement that the defendant must, at all times, give complete, truthful and accurate information and testimony and not withhold information from the government or refuse to testify truthfully and completely. Should the defendant be sentenced prior to the completion of the defendant's cooperation with the government, the defendant's obligation to comply with the cooperation provisions of this agreement extends past sentencing.

30. In the event the government believes the defendant has violated any of the conditions of the "Cooperation" section of this agreement, the government, in addition to its other rights as set forth in the "Cooperation" section of this agreement, reserves the right: (a) to modify any recommendation the government agreed to make in a motion pursuant to

Guidelines § 5K1.1 and/or Title 18, United States Code, Section 3553(e); and (b) to petition the Court, before or after sentencing, for an order declaring that the defendant has breached the "Cooperation" section and relieving the government of its obligations under this section.

31. In the event the government petitions the Court to declare that the defendant has breached the "Cooperation" section of this agreement, whether the defendant has violated any of the conditions of the "Cooperation" section shall be determined by the Court in an appropriate proceeding at which any disclosures and documents provided by the defendant shall be admissible and at which the government shall be required to establish any violation by a preponderance of the evidence. In order to establish any violation by the defendant, the government is entitled to rely on statements and information given by the defendant pursuant to this agreement.

32. If the "Cooperation" section of this agreement is declared breached by the Court:

a. the defendant shall thereafter be subject to prosecution for any federal criminal violations of which the government has knowledge, including but not limited to, perjury and obstruction of justice;

b. the government may withdraw any motion filed pursuant to Sentencing Guidelines § 5K1.1, Title 18, United States Code, Section 3553(e) and/or Rule 35(b);

c. the defendant has no right to withdraw the plea of guilty;

d. the defendant shall waive all rights under Fed. R. Crim. P. 11(f), Fed. R. Evid. 410 and Sentencing Guidelines § 1B1.8 and the defendant expressly agrees that all statements, testimony and tangible objects provided by the defendant (with the exception of statements made in open court during guilty plea proceedings), whether prior or subsequent to this agreement,

can be used directly and indirectly in any and all criminal proceedings against the defendant; and

e. the defendant agrees that any charges that were dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government. Furthermore, the defendant agrees not to assert the statute of limitations as a defense to any criminal offense involving or related to international parental kidnapping which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the Court's order declaring the agreement breached by the defendant becomes final.

33. At the time of sentencing, the government will make the nature and extent of the defendant's compliance with this agreement known to the Court. The government and the defendant will request that sentencing be adjourned until full satisfaction by the defendant of the terms of this agreement. In the event the defendant is sentenced prior to the completion of the defendant's cooperation with the government, the government reserves the right to modify any recommendation to be made by the government at sentencing pursuant to Guidelines § 5K1.1.

34. The defendant's attorney is permitted to be present at any time the defendant is questioned or interviewed by government agents regarding the matters set forth in this agreement.

VIII. TOTAL AGREEMENT AND AFFIRMATIONS

35. This plea agreement represents the total agreement between the defendant, Timothy Miller, and the government. There are no promises made by anyone other than

those contained in this agreement. This agreement supersedes any other prior agreements, written or oral, entered into between the government and the defendant.

JAMES P. KENNEDY, JR.
Acting United States Attorney
Western District of New York

BY: _____
MICHAEL DIGIACOMO
Assistant United States Attorney

Dated: November 30th, 2016

I have read this agreement, which consists of 14 pages. I have had a full opportunity to discuss this agreement with my attorney, Jeffrey A. Conrad, Esq. I agree that it represents the total agreement reached between myself and the government. No promises or representations have been made to me other than what is contained in this agreement. I understand all of the consequences of my plea of guilty. I fully agree with the contents of this agreement. I am signing this agreement voluntarily and of my own free will.

TIMOTHY MILLER
Defendant

Dated: November 30, 2016

JEFFREY A. CONRAD, ESQ.
Attorney for the Defendant

Dated: November 30, 2016

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		

CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date DEFENDANT TIMOTHY D. MILLER'S POST HEARING MEMORANDUM REGARDING THE VALIDITY OF HIS FIFTH AMENDMENT PRIVILEGE AND HIS MOTION TO RECONSIDER THIS 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:

David C. Dinielli, Esq.
Diego A. Soto, Esq.
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104

David.dinielli@splcenter.org
Diego.soto@splcenter.org
CMECFLGBT@splcenter.org
(334) 956-8200

Frank Langrock, Esq.
Langrock, Sperry & Wool, LLP
PO Drawer 351, 111 S. Pleasant Street
Middlebury, Vermont 05753
flangrock@langrock.com
(802) 388-6356

Sara R. Star, Esq.
Sarah Star, Esq., P.C.
PO Box 106
Middlebury, Vermont 05753
srs@sarahstarlaw.com
(802) 385-1023

J. Tyler Clemons, Esq.
SOUTHERN POVERTY LAW CENTER
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Tyler.clemons@splcenter.org
(504) 526-1530

Brook G. McArthur, Esq.
Jarvis, McArthur & Williams, LLC
95 St. Paul Street, Suite 2E
PO Box 902
Burlington, Vermont 05402-0902
bmcarthur@jarvismcarthur.com
(802) 658-9411
Counsel for Defendant, Kenneth L. Miller

Norman C. Smith, Esq.
76 Lincoln Street
PO Box 24
Essex Junction, Vermont 05453
Nc.smith@myfairpoint.net
(802) 288-9088
Counsel for Defendant, Linda M. Wall

Anthony R. Duprey, Esq.
Neuse, Duprey & Putnam, PC
1 Cross Street

Middlebury, Vermont 05753-1455
anthony@ndp-law.com
(802) 388-7966
Counsel for Defendants, Liberty Counsel and Rena M. Lindevaldsen

Horatio G. Mihet, Esq.
Daniel J. Schmid, Esq.
Roger K. Gannam, Esq.
LIBERTY COUNSEL
PO Box 540774
Orlando, Florida 32854
hmihet@lc.org
dschmid@lc.org
rgannam@lc.org
(407) 875-1776
Counsel for Defendants, Liberty Counsel and Rena M. Lindevaldsen

Adam S. Hochschild, Esq.
Hochschild Law Firm, LLC
adam@hochschildlaw.com
Counsel for Linda Wall

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

/S/ Michael J. Tierney
Michael J. Tierney

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