UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

PLAINTIFFS' RESPONSE TO 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)

Defendant Timothy Miller's post-hearing brief inappropriately attempts to expand the scope of his motion for reconsideration to an issue that is not ripe for review. The Court held that Defendant must comply with Plaintiffs' first set of requests for production because he failed to serve written objections, including the Fifth Amendment privilege against compulsory self-incrimination, and because he failed to show that the privilege applies to Plaintiffs' requests. Defendant's motion seeks reconsideration of that order because, he argues, the Court erred on both grounds. But his post-hearing brief asks the Court to reach further and hold that he may not be compelled to testify either. Defendant cannot ask the Court to decide that issue based on a post-hearing brief on a motion to reconsider an order granting a motion to compel different discovery. Even if the Court were to reconsider its order and hold that Defendant may invoke the privilege in response to Plaintiffs' first set of requests for production, the Court should carefully limit its new order to those document requests and not to any other discovery, including his testimony. Defendant should be required to invoke the privilege in response to specific questions before asking the Court to hold the privilege shields him from answering.

The discovery from Defendant's criminal case has acted as a confusing straw man. Defendant has never invoked the Fifth Amendment privilege in response to Plaintiffs' request for the criminal discovery, only anything *beyond* the criminal discovery; Plaintiffs' requests were never limited to the criminal discovery, they have never moved to compel Defendant to produce the criminal discovery, and they moved to compel Defendant to produce everything *beyond* the criminal discovery; and the Court did not grant Plaintiffs' motion to compel based on the criminal discovery. Instead, Defendant's motion attempts to characterize his then-failed efforts to produce the criminal discovery as somehow overlooked or newly available information warranting reconsideration of the Court's order granting Plaintiffs' motion to compel different discovery. But the Court's order had nothing to do with the criminal discovery, and Defendant's post-briefing production of the criminal discovery did nothing to change the correctness of the Court's order that Defendant must comply with Plaintiffs' first set of requests for production and that he may not invoke the Fifth Amendment privilege in response to that discovery. The Court should deny Defendant's motion for reconsideration and make clear that he must produce all documents responsive to Plaintiffs' first set of requests for production, irrespective of his untimely objections.

STATEMENT OF THE CASE

I. Plaintiffs Successfully Move to Compel Defendant's Compliance with Their Requests for Production

Plaintiffs served Defendant their first set of requests for production on June 27, 2018. *See* Pls.' First Set of Reqs. for Produc., ECF 473-1. The discovery Defendant received from the government in his criminal prosecution for his involvement in Isabella's kidnapping is responsive to Plaintiffs' requests, but Plaintiffs' requests have never been limited to the criminal discovery. Although Defendant agreed that Plaintiffs were entitled to that criminal discovery,

Defendant refused "to engage in discovery, including to serve … written responses and objections to Plaintiffs' requests for production, because his pending motion for reconsideration of his motion to dismiss challenged the Court's personal jurisdiction and because Jenkins had moved for partial summary judgment on her Vermont claim against him." Mot. to Compel 3, ECF 473 (citing Soto Decl. ¶ 6 (Feb. 26, 2020), ECF 473-4). He also "represented that he would object, based on his Fifth Amendment privilege against compulsory self-incrimination, to producing anything beyond the criminal discovery." *Id.*

Plaintiffs' motion sought to compel Defendant "to engage in discovery in good faith, including by promptly serving written responses and objections to Plaintiffs' requests for production, producing documents responsive to requests to which he does not object, producing a privilege log for responsive documents over which he claims a privilege, and conferring in good faith with Plaintiffs to resolve any objections." *Id.* at 1; *see also* Reply Supp. Mot. to Compel 1, ECF 480 ("This discovery dispute is straightforward, which makes the Court's needed intervention unfortunate: Defendant refuses to serve written responses and objections to each of Plaintiffs' requests for production…."). Plaintiffs did not seek to compel Defendant to produce the criminal discovery because the parties were trying to cooperate on acquiring that discovery through a Freedom of Information Act request. *See* Mot. to Compel 3 n.2.

On August 31, 2020, the Court granted Plaintiffs' motion to compel. *See* Op. & Order, ECF 554. The Court held that Defendant was obligated to respond to Plaintiffs' requests because nothing triggered an automatic stay of discovery, he never filed a motion to stay discovery, and the Court never agreed to a stay of discovery. *See id.* at 6–7. Because Defendant did not timely raise objections to Plaintiffs' requests, "he is thus obligated to comply with the requests." *Id.* at 8. The Court further held that "Defendant's Fifth Amendment objection to providing discovery

fails on the merits" because "Defendant ha[d] not successfully shown that the discovery which Plaintiffs seek from a past criminal proceeding would pose any risk of future self-incrimination in light of the case's procedural posture." *Id.* at 9–10. On September 2, Plaintiffs demanded that Defendant produce not only the discovery from his criminal cases, but also any additional documents within his possession, custody, or control that are responsive to Plaintiffs' first set of requests for production. *See* Soto Letter 1 (Sept. 2, 2020), ECF 560-1.

II. Defendant Moves for Reconsideration

On September 10, Defendant served written objections to Plaintiffs' requests for production, in which he continued to object, on the basis of the Fifth Amendment privilege, to producing any documents beyond the criminal discovery. *See* ECF 571-5. He specifically mentioned "one document subject to the Fifth Amendment privilege" in response to sixty-three of the requests. *See id.* at 8–44. That same day, he filed a motion for reconsideration of the Court's order to the extent it held that he forfeited the Fifth Amendment privilege objection and that he failed to show that the privilege applies to the documents sought by the first set of requests beyond those contained in the criminal discovery. *See* ECF 560. His motion also disclosed for the first time that his criminal defense firm's copy of the criminal discovery had been lost in the mail. *See* Tierney Letter 2 (Sept. 10, 2020), ECF 571-4; Smith Decl. (Sept. 10, 2020), ECF 560-2. Defendant argued that the Court erred because it somehow overlooked his belated objections to Plaintiffs' requests and the previously undisclosed information about the criminal discovery, which was not even the subject of Plaintiffs' motion to compel. *See* Mot. 2–4. He further argued that his Fifth Amendment privilege objection has merit because "Plaintiffs' discovery requests clearly seek to implicate [Defendant] in, and concern documents relating to, conduct after that 'Offense Ended' date" that appears on his criminal judgment. Mot. 8 (citing ECF 438-18).

Plaintiffs responded to Defendant's motion by arguing that Defendant failed to point to any overlooked, misunderstood, or newly available facts that might reasonably alter the Court's conclusions, *see* Resp. 12–14, ECF 571; that the Court did not clearly err in holding Defendant forfeited his Fifth Amendment privilege objection, *see id.* at 14–18; and that the Court did not clearly err in holding that Defendant failed to show the Fifth Amendment privilege applies, *see id.* at 18–19. Importantly, Defendant failed to "explain, as is his burden, how he is still in real danger of further prosecution for his involvement in Isabella's kidnapping after September 2009, despite the government's agreement not to prosecute him for 'any other federal criminal offenses' 'in any way involving or related to international parental kidnapping, committed' through November 30, 2016." Resp. 19 (quoting *Timothy Miller* Plea Agreement ¶ 25, ECF 439-16).

In response to Plaintiffs' FOIA request, the government withheld most of the criminal discovery under certain statutory exemptions. *See* Resp. 8–9. After briefing completed on Defendant's motion for reconsideration, Defendant finally was able to obtain another copy of his criminal discovery from the government himself, which he produced to Plaintiffs. Although this resolved the dispute over the request for the criminal discovery, it did not resolve the issue presented in the motion to compel and the motion for reconsideration: whether Defendant timely and appropriately invoked the Fifth Amendment privilege as to the other documents sought by Plaintiffs' first set of requests for production.

III. The Court Hears Argument

On December 21, the Court heard limited argument on Defendant's motion for reconsideration. Defendant explained that he had never invoked the Fifth Amendment privilege "as it pertains to the criminal discovery," which he had since produced; instead, he "asserted a Fifth Amendment privilege to … any potential hypothetical documents or evidence outside the

criminal discovery." Disc. Hr'g Tr. 4:17–5:11 (Dec. 21, 2020). In response to the Court's question about the criminal discovery, Plaintiffs explained that they were able to obtain all the criminal discovery from Defendant. *Id.* at 9:17–15.

The next day, the parties conferred by telephone in response to Plaintiffs' request to depose Defendant in January. Soto Decl. ¶ 2. Defendant explained that it is possible he would invoke the Fifth Amendment privilege in response to deposition questions but that he interpreted the Court's order on Plaintiffs' motion to compel to preclude him from invoking that privilege. *Id.* ¶ 3. The parties agreed to confer further about the propriety of Defendant's invocation of the privilege at his eventual deposition, tentatively scheduled for March 2021.[*] *Id.* ¶ 4. Nevertheless, Defendant subsequently filed a post-hearing brief in which he, for the first time, raises the issue of the application of the Fifth Amendment privilege to testimony and asks the Court to order that "he may properly assert a Fifth Amendment Privilege in the future for matters for which he reasonably believes could lead to future incrimination." Post-Hr'g Br. 7, ECF 623.

ARGUMENT

I. Plaintiffs Do Not Concede that All Document Requests Have Been Resolved

Plaintiffs do not concede, and did not mean to suggest that they concede, that Defendant has complied with or need not comply with Plaintiffs' requests for production beyond the criminal discovery. Contrary to Defendant's assertion that, "[a]t 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," *id.* at 6, Plaintiffs intended only to clarify for the Court that all issues as to the criminal discovery had been resolved. After all, Plaintiffs had not moved to

[*] Although Plaintiffs proposed to depose Defendant earlier, so that the Court would have sufficient time to consider any dispute over his invocation of the Fifth Amendment privilege at his deposition, Defendant is unavailable in January and February. Soto Decl. ¶ 4.

compel Defendant to produce the criminal discovery; instead, Defendant unconvincingly argued that his losing his copy of the criminal discovery in the mail was somehow overlooked or newly available evidence justifying reconsideration of the motion to compel, not the criminal discovery, but all other responsive documents.

Under the order of which Defendant seeks reconsideration, Defendant must comply with all of Plaintiffs' requests (with two minor exceptions not relevant here) and may not withhold any responsive evidence on the basis of the Fifth Amendment privilege. Nonetheless, Defendant continues to invoke that privilege and refuses to produce responsive documents beyond the criminal discovery, including at least one responsive document of which he is aware. Therefore, Defendant's long-awaited production of the criminal discovery did nothing to moot the issue in Plaintiffs' motion to compel; it only obviated the need for a separate motion to compel production of the criminal discovery. The Court should deny Defendant's motion for reconsideration and make clear that he must comply with Plaintiffs' first set of requests for production.

II. The Court Should Not Now Decide Whether Defendant May Be Compelled to Answer Future Discovery Based on the Fifth Amendment Privilege

Two-and-a-half months after briefing completed on his motion for reconsideration, Defendant attempts to raise new arguments to support the merits of his Fifth Amendment privilege objection—not to Plaintiffs' requests for production but to future discovery. Specifically, he asks the Court to hold that he may not be compelled to testify (at a deposition or at trial) because he has a reasonable fear of prosecution if his testimony differs from his prior testimony to the government, which might violate the provision of his plea agreement requiring his cooperation. *See* Post-Hr'g Br. 3.

The Court should ignore this new argument because it is irrelevant and not ripe for review. The issue of whether, under the Fifth Amendment, Defendant may be compelled to *testify* is not ripe for decision based on his post-hearing brief on a motion to reconsider an order to produce *documents*; instead, Defendant must invoke the privilege in response to specific questions, so the parties and the Court may determine both whether the privilege applies and, if it does, whether and what adverse inferences may be drawn. *See, e.g.*, *Estate of Fisher v. CIR*, 905 F.2d 645, 649 (2d Cir. 1990) (holding taxpayer properly "invoked the privilege in response to specific questions" so the Court could, "as to each question to which a claim of privilege is directed, … determine whether the answer to that particular question would subject the witness to a 'real danger' of incrimination" (quoting *Rogers v. United States*, 340 U.S. 367, 374 (1951))); *Moll v. U.S. Life Title Ins. Co. of N.Y.*, 113 F.R.D. 625, 628–29 (S.D.N.Y. 1987) ("When a deposition is sought, the availability of the Fifth Amendment privilege does not mean that the witness need not attend the deposition. The proper procedure is for the deponent to attend the deposition, to be sworn under oath, and to answer those questions he can without risking self-incrimination."). At most, the Court should deny Defendant's motion for reconsideration and clarify that its prior order granting Plaintiffs' motion to compel did not address whether Defendant may be compelled to testify.

Pillsbury Co. v. Conboy, 459 U.S. 248 (1983), is not to the contrary. The Supreme Court merely held that "a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of [18 U.S.C.] § 6002, and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege." *Id.* at 263–64. The Court did not further hold,

however, that the deponent therefore may not be *asked* the same questions previously posed with a grant of immunity.

CONCLUSION

Defendant's motion for reconsideration should be denied.

Respectfully submitted.

January 5, 2021

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CERTIFICATE OF SERVICE

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

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January 5, 2021

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No. 2:12-cv-184-WKS

DECLARATION OF DIEGO A. SOTO IN SUPPORT OF PLAINTIFFS' RESPONSE TO 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)

I, Diego A. Soto, declare under penalty of perjury that the following is true and correct:

1. I am a Staff Attorney at the Southern Poverty Law Center and represent Plaintiffs Janet Jenkins and Isabella Miller-Jenkins in this case.

2. On December 22, 2020, Plaintiffs and Defendant Timothy Miller conferred by telephone in response to Plaintiffs' request to depose Defendant in January. I and attorney Scott McCoy were present for Plaintiffs, and attorneys Michael Tierney and Mike Eaton were present for Defendant.

3. Defendant explained that it is possible he would invoke the Fifth Amendment privilege in response to deposition questions but that he interpreted the Court's order on Plaintiffs' motion to compel to preclude him from invoking that privilege.

4. The parties agreed to confer further about the propriety of Defendant's invocation of the privilege at his eventual deposition, tentatively scheduled for March 2021. Although Plaintiffs proposed to depose Defendant earlier, so that the Court would have sufficient time to

consider any dispute over his invocation of the Fifth Amendment privilege at his deposition, Defendant is unavailable in January and February.

Executed on January 5, 2021

/s/ Diego A. Soto
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