

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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| JANET JENKINS, ET AL., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Docket No. 2:12-CV-00184 |
| |) | |
| KENNETH L. MILLER, ET AL. |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**SECOND SUPPLEMENTAL DECLARATION OF HORATIO G. MIHET
REGARDING DISCOVERY COMPLIANCE EFFORTS OF DEFENDANTS
LIBERTY COUNSEL, INC. AND RENA LINDEVALDSEN**

I, HORATIO G. MIHET, declare and state as follows:

1) As the Court is already aware, I am Vice President of Legal Affairs and Chief Litigation Counsel at Liberty Counsel, and lead counsel in this case for Defendants Rena Lindevaldsen (“Lindevaldsen”) and Liberty Counsel, Inc. (“Liberty Counsel”) (collectively, “Defendants”).

2) I submit this Declaration in response to the Court’s request at the December 21, 2020 discovery conference. (Dkt. 622).

3) As I advised the Court at that discovery conference, on December 17, 2020, just two business days prior to the discovery conference, Plaintiff filed a Reply brief (dkt. 618) in support of her Revised Second Motion to Compel, in which she suggested—for the first time—a number of brand new proposed ESI search strings, purportedly designed to narrow the over half-million hits yielded by her previous proposals (which contained very common names, individually and in isolation, without any narrowing terms). (Dkt. 618 at 7-8). Plaintiff had never suggested these brand-new search strings in any discovery meet and confer, prior to filing her Reply.

4) To determine the feasibility and usefulness of Plaintiff's new proposals, in the limited time available before the discovery conference I requested an ESI search to be performed on just one of the brand-new search strings: (Lisa AND Janet) AND NOT ("Lisa Miller" or "Janet Jenkins" or "Isabella Miller" or "Isabella Miller-Jenkins"). The full name combinations were excluded from the search by agreement, as proposed by Plaintiff, because they had previously been searched. (Dkt. 618 at 7).

5) As I advised the Court at the discovery hearing, this search string yielded over 5,000 hits, and I spent seven-and-a-half hours over the weekend prior to the hearing to partially review the results. In that limited review, I determined that the overwhelming majority of hits were completely unrelated to the Miller-Jenkins dispute or this lawsuit, and were about donors, constituents, petition signers, email signatories, brief authors, etc. that had the extremely common names of "Lisa" or "Janet." A much smaller subset of the results I had reviewed were privileged communications between Liberty Counsel attorneys and personnel that came **after** the filing of Jenkins' lawsuit, and that were discussing defense issues and strategies. I was able to find in that pre-hearing review only two communications that pre-dated this lawsuit, and I confirmed that both had already been produced or privilege-logged as part of Defendants' earlier comprehensive search and production.

6) In light of the numerous false positives yielded by this search, at the discovery conference the Court requested that Defendants add a third name proposed by Plaintiff—Isabella—to the search string, to determine if using all three names—Lisa AND Janet AND Isabella—would further narrow the results and exclude the numerous false positives.

7) I thereafter requested this ESI search to be performed: (Lisa AND Janet AND Isabella) AND NOT ("Lisa Miller" or "Janet Jenkins" or "Isabella Miller" or "Isabella Miller-

Jenkins”). This search produced 1,610 hits. I have reviewed these hits, and determined the following:

a) The overwhelming majority of these results—1,459—are **still false positives**. These are documents and communications referring to Liberty Counsel donors, constituents, petition signers, and other individuals involved in Liberty Counsel’s litigation work and public interest advocacy, who have the very common first names of “Lisa,” “Janet” or “Isabella,” but who have no relation whatsoever to Lisa Miller, Janet Jenkins or Isabella Miller, or to this case. The very high number and rate of false positives is not surprising, given (i) the use of only first names, which are very common; (ii) the exclusion of “Lisa Miller,” “Janet Jenkins,” and “Isabella Miller” from the search; and (iii) the nature of Liberty Counsel’s work and public advocacy. Liberty Counsel has hundreds of thousands of individual donors, supporters, constituents, petition signers etc., and Liberty Counsel interacts with numerous individuals in its daily operations. On a very regular basis—sometimes daily and sometimes multiple times a day—Liberty Counsel personnel generate numerous database reports that include tens, sometimes hundreds, of thousands of names, about which they then engage in communications with other Liberty Counsel personnel. These reports may include donation tracking, various types of constituent engagement, development and tracking, “do not contact” lists, and similar lists of names. Also on a regular basis, Liberty Counsel receives or generates lists of numerous supporters, including signers of numerous petitions that Liberty Counsel initiates or organizes. When similar reports are generated in subsequent weeks or months, the exact same names appear, with new names added to the lists. Also on a regular basis, Liberty Counsel receives public reports of various organizations or government bodies, which contain numerous names. Because the universe of names involved in all of the above is very large (hundreds of thousands of names), and because

“Lisa,” “Janet,” and “Isabella” are very common first names, **even the combination of all three names together** yields this very large set of false positives, which dwarf the small number of relevant hits. This is one reason (among many) why it is unreasonable to require Defendants to run ESI searches using only first (or only last) names, and why Defendants’ use of first and last name combinations was, and remains, reasonable under these circumstances.

b) Only 151 hits out of 1,610 are not false positives, meaning they actually refer to the three individuals at issue in this case. However, the majority of these hits—84 hits—are privileged communications between Liberty Counsel attorneys and personnel that **post-date** the filing of this lawsuit. Many of these hits are communications dealing with the very searches and issues involved in this Declaration and the recent discovery disputes. Because they post-date the filing of this suit, these documents have not been privilege-logged.

c) The remaining 67 hits are pre-lawsuit communications and documents that refer to Lisa (Miller), Janet (Jenkins) and Isabella (Miller). Some are duplicates of others. I have cross-checked these documents against Defendants’ document production and privilege logs to date, and have confirmed that **each unique document has been produced or privilege-logged**.

8) The above document searches and reviews, including the cross-referencing of hits against Defendants’ previous production and privilege logs, required approximately **37 hours** of staff and attorney time—**almost an entire workweek**.

9) **The above document searches and reviews did not yield a single additional responsive, relevant and non-privileged document that had not already been produced to Plaintiff.** This is not surprising. As I advised the Court at the December 21, 2020 discovery hearing, Liberty Counsel maintains its entire electronic file related to the Miller-Jenkins custody litigation in one master electronic folder on its network drive. This is where all of the electronic

documents related to that litigation are saved. This is also where Liberty Counsel attorneys and staff saved email communications related to that litigation, since they could not remain on the email server, given the space constraints I explained in my previous declaration. As I advised the Court, in addition to searching every document in Liberty Counsel's paper litigation file, and in addition to the ESI searches, Liberty Counsel manually examined each document saved in its electronic master folder for the Miller-Jenkins litigation, and produced or privilege-logged all responsive documents.

10) For this reason, Liberty Counsel's document production was comprehensive and complete, irrespective of the ESI search terms used. This is why using additional search terms at this juncture does not reveal any un-produced or un-logged documents, despite the enormous amount of time and effort involved. This is why Defendants are confident—and the Court can be confident—that Defendants have produced all relevant, non-privileged documents in their custody, possession or control.

11) The remaining brand-new search strings proposed by Plaintiff in her December 17, 2020 Reply brief are even broader than those undertaken here, and would take exponentially more time and effort than described herein. For the reasons described above, such additional weeks'—or months'—worth of effort would not yield any additional relevant documents that have not already been produced or privilege-logged.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Executed on January 7, 2021.

/s/ Horatio G. Mihet
Horatio G. Mihet

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2021, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notice system.

/s/ Horatio G. Mihet

Horatio G. Mihet