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

PLAINTIFF JANET JENKINS'S RESPONSE IN OPPOSITION TO DEFENDANT TIMOTHY D. MILLER'S MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL

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Defendant Timothy Miller's motion to disqualify Plaintiff Janet Jenkins's counsel should be denied.[1]

STATEMENT OF THE CASE

Jenkins filed this case eight-and-a-half years ago against those involved in the 2009 kidnapping of her then-seven-year-old daughter Isabella to Nicaragua to keep mother and daughter apart all because Jenkins is a lesbian. *See* Revised Second Am. Compl., ECF 223. Despite years of litigation and investigation resulting in three federal criminal convictions and one pending indictment, Isabella's precise whereabouts remained unknown to the United States government and her grieving family—including her mother Jenkins, who has not seen her daughter in twelve years.

This case and Isabella's kidnapping progressed so long that Isabella, who was just ten years old when it was filed, turned eighteen before discovery even closed. That very day, Defendants moved for summary judgment on Isabella's claim. *See* ECF 495; ECF 497. They argued Jenkins could no longer represent Isabella as next friend because of the fortuitous grace of time; Isabella, wherever she was, had reached adulthood under Vermont law. Defendant Timothy Miller went one step further: he argued by email not only that Jenkins could no longer represent Isabella as a next friend, but also that *counsel* therefore could no longer represent *Jenkins* because they could not get Isabella's written informed consent as required by Rule 1.9 of the Vermont Rules of Professional Conduct, which governs conflicts of interest between current and former clients. *See* Ex. 1: Tierney Emails *1 ("Where you have previously represented both

[1] Defendant also requests, without argument, dismissal of Isabella as a party to this case, *see* Mot. ¶ A, at 3, ECF 636, but his motion is an improper vehicle for dismissal because it is based solely on an unenforceable request by Isabella, in an affidavit, that her attorneys dismiss her claims. But the Court need not decide whether to grant *Defendant's* request to dismiss because Isabella herself moved to dismiss, *see* ECF 641, which Jenkins does not oppose, *see* ECF 642.

Janet and Isabella and Isabella has not given you written and knowing consent to continue to represent just Janet, it appears that your continued representation of just Janet is a violation of Rule 1.9."); *id.* at *5 ("Can attorneys who represented Isabella continue representing someone else in this case without Isabella giving knowing and written consent as required by Rule 1.9?"). On August 31, 2020, the Court denied Defendants' summary-judgment motion, holding Isabella continued to warrant a next friend to press on with her claim against her kidnappers, because she could not access this country's courts from her continued captivity, and allowing her mother Jenkins to stay on as her next friend. *See* Op. & Order 6–11, ECF 556.

Five months later, on or about January 27, 2021, Lisa Miller was finally returned to the United States and arrested. *See United States v. Lisa Miller*, No. 1:14-cr-00175 (W.D.N.Y.); *United States v. Miller*, No. 1:21-mj-02159 (S.D. Fla.). Isabella, however, apparently remained in Nicaragua. Jenkins asked Defendants to confer about how Lisa's arrest would affect the discovery schedule/order. *See* Emails with Defense Counsel *3, ECF 635-1.

Before Jenkins's counsel could even get in touch with Isabella, they received an email on January 29 from Vincent Heuser, Esq., managing partner of the firm Hirsh & Heuser, LLC. *See* Ex. 2: Heuser Correspondence *4; Ex. 3: Hirsh & Heuser Att'y Biographies *1 (describing Heuser as a managing partner). The firm's other managing partner, Michael Hirsh, *see* Hirsh & Heuser Att'y Biographies *1, represents Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc. in this case, *see* Text-Only Order, ECF 545 (admitting Hirsh *pro hac vice* without local counsel).[2]

[2] Hirsh has acted in this case in his capacity as an attorney of Hirsh & Heuser, using his firm email address, *see, e.g.*, Ex. 4: Hirsh Correspondence *1, and listing the firm in his correspondence, *see, e.g.*, *id.* at *1, 3, 5–6, and in filings in this case, *see, e.g.*, ECF 540; ECF 565; ECF 610; ECF 613.

Heuser advised that he represented Isabella in this matter and attached two affidavits purportedly executed by Isabella. *See* Heuser Correspondence *4–13. The affidavits are dated January 25 and 26, before Lisa was returned to the United States. *Id.* at *8, *10. The second one explicitly states that it was prepared by Heuser. *See id.* at *10. In them, Isabella states that she "remain[s] outside the United States of [her] own free will" (without specifying where), nonetheless has "access to U.S. Courts," instructs her attorneys (Jenkins's counsel) to dismiss her from this case, fires them once she has been dismissed, and objects to their further representation of Jenkins in this case. *Id.* at *7–10. Within four hours of Heuser's email, Timothy Miller objected to conferring about the discovery schedule/order, citing Isabella's objection to counsel's continued representation of Jenkins. *See* Emails with Defense Counsel *1–2, ECF 635-1.

Jenkins's counsel, doubting the legitimacy and veracity of the affidavits given Heuser's apparent conflict of interest, responded to Heuser that they "cannot, and will not, take any actions adverse to Isabella's interests, including dismissing her claim, unless and until [they] can communicate with her in confidence or until the Court orders otherwise." Heuser Correspondence *3. Jenkins's counsel requested further information about Hirsh & Heuser's communications with Isabella and explanation of how those communications and the purported simultaneous representation of a plaintiff and three defendants in this case do not violate Vermont's and other applicable states' rules of professional conduct governing communications with represented persons and conflicts of interest. *Id.*

The next day, on January 30, Defendants Liberty Counsel, Inc. and Rena Lindevaldsen produced an email Heuser sent to Defendants on January 29 just minutes after his email to Jenkins's counsel. *See* Ex. 5: Liberty Counsel Produc. In that email to Defendants, Heuser attached a "General Release," signed by Isabella on January 25, by which Isabella releases

Defendants "from all claims and judgments" associated with this case and "all other transactions, actions, failures to act, or any other relationships, in fact or in law, between the [sic] Isabella and Defendants," in exchange for "love, affection, and general appreciation … and good and valuable consideration." *Id.* at *2–5.

Two days later, on February 1, Defendant Timothy Miller filed this motion to disqualify Jenkins's counsel, attaching Isabella's January 25 and 26 affidavits. *See* ECF 636. Defendant Kenneth Miller would later join this motion on February 9. *See* ECF 640.

Four days later, on February 5, Heuser—now on behalf of Heuser Law Office rather than Hirsh & Heuser—responded to Jenkins's counsel's January 29 email, asserting without explanation that Jenkins's counsel are "completely wrong about the nature of [his] practice and [his] relationship with Michael Hirsh," "conced[ing] that [their] advertising gave rise to an apparent conflict of interest," and representing that, "because of the appearance of a conflict of interest, [he] ha[d] advised Isabella that she will need to find new counsel and [he] will withdraw from representing her further." Heuser Correspondence *2.

Later that day, Deborah Bucknam, Esq. entered an appearance for Isabella. *See* ECF 637. The next day, February 6, she informed Jenkins's counsel by email that she was still discussing with Isabella the various options Isabella has and that Isabella had made no decisions. *See* Soto Decl. ¶ 4 (Feb. 8, 2021), ECF 638-3. Four days later, on February 10, she filed for Isabella a motion to dismiss, attaching Isabella's January 25 and 26 affidavits. *See* ECF 641.

SUMMARY OF ARGUMENT

Defendant's purely tactical motion to disqualify Jenkins's counsel warrants the strict scrutiny given to such motions. It is based entirely on two affidavits unethically prepared by a conflicted attorney whose law partner represents three defendants in this case. One of those affidavits conveniently includes Isabella's objection to counsel's continued representation of

Jenkins, which calls to mind Defendant's argument eight months ago that counsel could not continue to represent Jenkins after Isabella turned eighteen without Isabella's written informed consent. With these affidavits in hand, and questions about their legitimacy and veracity then unanswered, Defendant rushed to separate Jenkins from her choice of counsel before party depositions, which defendants had already pushed to the last month of discovery, could begin.

His motion begins and ends with one simple, incorrect argument: Under Vermont's ethics rule governing conflicts of interest between current and former clients, counsel cannot continue to represent Jenkins because her interests are adverse to Isabella's and Isabella has affirmatively objected to the continued representation. To show the required direct adversity, he quotes a single statement Isabella made in one of the affidavits: "All those lawyers who purport to represent me and my wishes are acting contrary to my wishes and desires and in a way to further a cause that is the exact opposite of what my desire and wishes as their client in fact are." But Isabella's mere opposition to a claim brought on her own behalf does not create direct adversity to her mother's independent claim against her daughter's kidnappers. Thus, Defendant fails even to prove a conflict of interest.

Even if he has shown a conflict of interest, disqualification is not automatically required, as Defendant seems incorrectly to assume. The Court will not find this anywhere in Defendant's motion, but the Second Circuit requires a movant to show facts presenting a real risk that the trial will be tainted and usually applies a three-prong test to decide whether to disqualify a conflicted attorney. That test does not, however, apply to cases like this one, in which counsel represented mother and daughter jointly and have not switched sides to suddenly represent a defendant. But even if the test applies, Defendant fails its first prong because he is not a former client of Jenkins's counsel.

The Court can and should easily deny Defendant's tactical but half-baked attempt to disqualify Jenkins's counsel in this long-running case.

ARGUMENT

Defendant fails to meet the high standard of proof required to disqualify Jenkins's counsel. "[D]isqualification is called for only where 'an attorney's conduct tends to taint the underlying trial.'" *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 241 (2d Cir. 2016) (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)). The remedy is so limited because "[t]he objective of the disqualification rule is to 'preserve the integrity of the adversary process,'" *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir. 1983) (quoting *Nyquist*, 590 F.2d at 1246), and "federal and state disciplinary mechanisms suffice for other ethical violations," *Prevezon Holdings Ltd.*, 839 F.3d at 241. *Accord Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) ("Although our decisions on disqualification motions often benefit from guidance offered by the American Bar Association (ABA) and state disciplinary rules, such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification." (internal citations omitted)).

The Second Circuit "ha[s] made it clear that motions to disqualify are disfavored," *Lankler, Siffert & Wohl LLP v. Rossi*, 125 F. App'x 371, 372 (2d Cir. 2005), and "ha[s] consistently held that the remedy of disqualification rests in the discretion of the district court," *W. T. Grant Co. v. Haines*, 531 F.2d 671, 676 (2d Cir. 1976). Therefore, "the party seeking disqualification must carry a 'heavy burden,' and must meet a 'high standard of proof' before a lawyer is disqualified." *Clark v. Bank of N.Y.*, 801 F. Supp. 1182, 1197 (S.D.N.Y. 1992) (first quoting *Vegetable Kingdom, Inc. v. Katzen*, 653 F. Supp. 917, 922 (N.D.N.Y. 1987); then quoting *Evans*, 715 F.2d at 791). "The motion will be granted only if the facts present a real risk that the trial will be tainted"; "'[m]ere speculation' regarding the reasons for disqualification is

insufficient." *Muniz v. Re Spec Corp.*, 230 F. Supp. 3d 147, 152 (S.D.N.Y. 2017) (first quoting *Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 388 (S.D.N.Y. 2010); then quoting *Gormin v. Hubregsen*, No. 08 Civ. 7674, 2009 WL 508269, at *2 (S.D.N.Y. Feb. 27, 2009)). *Accord Cody v. Cody*, 889 A.2d 733, 738 (Vt. 2005) ("Disqualification questions are intensely fact specific, and it is essential that the court approach such questions with a keen sense of practicality as well as a precise picture of the underlying facts." (quoting *Bieter Co. v. Blomquist*, 132 F.R.D. 220, 224 (D. Minn. 1990))).

"Motions to disqualify opposing counsel 'are subject to particularly strict scrutiny' because of their 'potential for abuse as a tactical device.'" *Muniz*, 230 F. Supp. 3d at 152 (quoting *Scantek Med., Inc. v. Sabella*, 693 F. Supp. 2d 235, 238 (S.D.N.Y. 2008)). The Second Circuit has "noted that disqualification motions 'are often interposed for tactical reasons,' and that 'even when made in the best of faith, such motions inevitably cause delay.'" *Evans*, 715 F.2d at 791–92 (quoting *Nyquist*, 590 F.2d at 1246).

Motions to disqualify are further disfavored because they "impinge on a party's right to employ the counsel of its choice." *Scantek Med., Inc.*, 693 F. Supp. 2d at 238 (quoting *Unique Sports Generation, Inc. v. LGH-III, LLC*, No. 03 Civ. 8324, 2005 WL 2414452, at *13 (S.D.N.Y. Sept. 30, 2005)); *see also Prevezon Holdings Ltd.*, 839 F.3d at 241 ("In exercising this power, the Court must 'be solicitous of a client's right freely to choose his counsel—a right which of course must be balanced against the need to maintain the highest standards of the profession.'" (quoting *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 739 (2d Cir. 1978))). "The Second Circuit has 'indeed been loath[] to separate a client from his chosen attorney,'" and "[t]he delay and additional expense created by substitution of counsel is a factor to which it has attached

considerable significance." *Clark*, 801 F. Supp. at 1196–97 (quoting *In re Bohack Corp.*, 607 F.2d 258, 263 (2d Cir. 1979)).

Defendant moves to "[d]isqualify Plaintiffs' Counsel from representing Janet Jenkins or any other party in this case," Mot. ¶ B, at 3, solely because Jenkins's and Isabella's interests supposedly are now adverse, *id.* ¶ 9, and therefore, he says, Rule 1.9(a) of the Vermont Rules of Professional Conduct prevents counsel from continuing to represent Jenkins because Isabella does not consent, *see id.* ¶¶ 5, 10. His assertion of adversity is based solely on a single sentence in Isabella's affidavits: "All those lawyers who purport to represent me and my wishes are acting contrary to my wishes and desires and in a way to further a cause that is the exact opposite of what my desire and wishes as their client in fact are." *Id.* ¶ 9 (quoting Isabella Aff. ¶ 15 (Jan. 25, 2021), ECF 636-1).

Defendant's purely tactical motion warrants the strict scrutiny required for disqualification motions, and it does not survive that scrutiny. Contrary to Defendant's undeveloped assertion, Jenkins and Isabella do not have directly adverse interests that would create a conflict of interest. Even if they do, disqualification is not automatically required, as Defendant's motion seems incorrectly to assume; the Second Circuit generally has a three-part test to determine whether a conflict of interest warrants disqualification. But that test does not even apply in this case because counsel represented Jenkins and Isabella jointly and have not switched sides in the case. Even if that test applies, Defendant clearly fails its first prong because he is not a former client of Jenkins's counsel. Defendant's motion to disqualify should be denied.

I. Defendant's purely tactical motion warrants strict scrutiny.

Defendant's motion warrants strict scrutiny because it is a perfect example of a disqualification motion made purely for tactical advantage. "Motions to disqualify opposing counsel 'are subject to particularly strict scrutiny' because of their 'potential for abuse as a

tactical device.'" *Muniz*, 230 F. Supp. 3d at 152 (quoting *Scantek Med., Inc.*, 693 F. Supp. 2d at 238). Defendant filed this motion to deny Jenkins her choice of counsel, who have represented her in this case for more than eight years, based on nothing more than Isabella's general statements, in affidavits unethically prepared by counsel for three other Defendants. Conveniently, Isabella—a kidnapping victim who until these affidavits had not been heard from in over a decade—stated not only that Jenkins's counsel "are acting contrary to [her] wishes and desires" and that they are terminated as her counsel, but also that they do not have her consent to continue representing Jenkins in this matter, Mot. ¶ 4–5—exactly what Defendant argued just eight months earlier when Isabella turned eighteen, *see* Tierney Emails *1, *5. Within four hours of obtaining those affidavits, he objected to counsel's continued representation of Jenkins and then, within just seventy-four hours, rushed to get this motion on the docket, even though he knew Jenkins had raised then-unanswered concerns that they were unethically obtained by a conflicted attorney who was ethically barred from communicating with Isabella without permission from Jenkins's counsel. *See* Heuser Correspondence *3 (copying Defendant's counsel). (Jenkins's concerns panned out; the attorney conceded at least an apparent conflict of interest and withdrew, but not before Defendant filed this motion. *See id.* at *1–2.)

Even setting aside that the affidavits were tainted by a conflict of interest, Defendant's motion tellingly leaves out two important parts of the affidavits, which further proves he is just acting to his advantage rather than to enforce professional standards. *First*, Defendant conveniently quotes one paragraph in which Isabella expresses her "want" that Jenkins's counsel be "discharged and withdrawn" as her attorneys, *compare* Mot. ¶ 5, *with* Isabella Aff. ¶ 3 (Jan. 26, 2021), ECF 636-2, but he does not quote another paragraph in which Isabella makes clear that she was terminating counsel only "[o]nce [she is] dismissed from this action," Isabella Aff.

¶ 18 (Jan. 25, 2021); *accord* Isabella Aff. ¶ 8 (Jan. 26, 2021) ("I request, order and direct that I be dismissed and removed as a Plaintiff in this case."). That obviously had not yet occurred before Defendant moved to disqualify and still has not occurred. *Second*, Defendant quotes part of a paragraph in which Isabella "object[s]" to counsel "representing any other person in this matter," Mot. ¶ 5 (quoting Isabella Aff. ¶ 3 (Jan. 26, 2021)), but cuts the quotation short by leaving out that Isabella objects only because counsel supposedly "hav[e] access to [her] personal information," Isabella Aff. ¶ 3 (Jan. 26, 2021), an incorrect assertion that counsel can only assume came from Heuser. Defendant knows Isabella has never given Jenkins's counsel any "personal information" in confidence because they have truthfully maintained all along that they have had no communication with Isabella and represented her through Jenkins as next friend while she was a minor and then pursuant to the Court's order after she became an adult. The only "personal information" concerning Isabella that counsel has access to came from sources other than Isabella and was properly disclosed to Jenkins and Defendants too.

Defendant's motion warrants strict scrutiny because he obviously desires only to prejudice Jenkins by separating her from her freely chosen counsel, who have deep knowledge of the facts and her claims in this complex case, in the middle of discovery before party depositions have even commenced.

II. Defendant fails to carry his heavy burden to justify disqualification.

Defendant fails to show there is any conflict of interest between Jenkins and Isabella or to carry his "heavy burden" of showing that disqualification would be required if a conflict did exist because of a real risk of taint to the trial. *See Clark*, 801 F. Supp. at 1197 (quoting *Vegetable Kingdom, Inc.*, 653 F. Supp. at 922).

A. Jenkins's and Isabella's interests are not directly adverse.

Defendant has not proved a conflict of interest between Jenkins and Isabella because he fails to show how their interests are directly adverse. Under Rule 1.9(a) of the Vermont Rules of Professional Conduct, counsel would have a conflict of interest preventing their continued representation of Jenkins in this case if her "interests [we]re materially adverse to the interests of" Isabella, unless Isabella "gives informed consent, confirmed in writing." Material adversity under Rule 1.9 requires the same direct adversity as under Rule 1.7, which prohibits counsel from representing a client if "the representation … will be directly adverse to another client." *See* Vt. R. Prof. Conduct 1.9 reporter's notes to 2009 amendment (noting that "the principles of [Rule] 1.7 … guide a determination of material adversity");[3] *see also* Am. Bar Ass'n, Standing Comm. Ethics & Prof. Resp., Formal Op. 99-415 (Sept. 8, 1999) (concluding, based on then-present comment 1 to Rule 1.9, "that only direct adversity of interests meets the threshold 'material adversity' sufficient to trigger the prohibitions established in Rule 1.9").

Direct adversity requires head-to-head opposition in the same matter. For example, a lawyer's clients would be directly adverse if one client sues the other, *see* Vt. R. Prof. Conduct 1.7 cmt. 6, or if one client seeks to purchase something from the other, *see* Vt. R. Prof. Conduct 1.7 cmt. 7. *See also* Vt. R. Prof. Conduct 1.9 cmt. 1 ("Nor could a lawyer who has represented multiple clients in a matter represent one of the clients *against the others* in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent." (emphasis added)). "Similarly, a directly adverse

[3] Before the 2009 amendment to the rules, comment 1 to Rule 1.9 read: "The principles in Rule 1.7 determine whether the interests of the present and former clients are adverse." Although this comment was removed in revisions to the Model Rules, Vermont made clear in its reporter's notes when it adopted the revisions in 2009 that the deletion would not change the meaning of "material adversity" under Rule 1.9.

conflict *may* arise" if one client is called as a witness against another client and the "lawyer is required to cross-examine" the testifying client. Vt. R. Prof. Conduct 1.7 cmt. 6 (emphasis added).

Here, Jenkins and Isabella are not directly adverse because neither has brought a claim against the other and Isabella is not a defendant in this case. Jenkins does not intend to depose or call Isabella as a witness in this case. Isabella made clear, in the very affidavits on which Defendant bases his motion, that she does not want to participate in this case and that she will stay outside the United States until she desires to return. *See, e.g.*, Isabella Aff. ¶¶ 10–11 (Jan. 25, 2021); Isabella Aff. ¶¶ 2, 4 (Jan. 26, 2021). Even if Defendants force Isabella to testify at a deposition or trial, Isabella has provided Jenkins's counsel no personal, confidential, or privileged information that they could weaponize against her in a cross-examination, and whatever information they do have came from other sources and was properly disclosed to her then-next friend Jenkins and Defendants. *See, e.g.*, Vt. R. Prof. Conduct 1.9(c)(1) (prohibiting a lawyer who acquired protected information from using that information against a former client unless that information became "generally known").[4]

To concoct direct adversity, Defendant relies solely on Isabella's statement that "[a]ll those lawyers who purport to represent [her] and [her] wishes are acting contrary to [her] wishes

[4] At this time, any alleged conflict arising out of Isabella's witness testimony would be purely speculative and not ripe for review. But if Defendants make Isabella testify and if Jenkins's counsel are required to cross-examine her, there are other measures far short of disqualification to avoid an alleged conflict of interest, such as the hiring of an untainted attorney to cross-examine Isabella independently, and Jenkin's counsel will take any such measures the Court requires. *See, e.g.*, Am. Bar Ass'n, Standing Comm. Ethics & Prof. Resp., Formal Op. 21-497, at 7–8 (Feb. 10, 2021) (hereinafter "ABA Op. 21-497") ("[A] lawyer may avoid the potential conflict altogether by having the current client retain separate counsel to examine the former client, and screen the lawyer with the conflict from participating in the examination of the former client or sharing with separate counsel any information from the prior representation.").

and desires and in a way to further a cause that is the exact opposite of what [her] desire and wishes as their client in fact are." Mot. ¶ 9 (quoting Isabella Aff. ¶ 15 (Jan. 25, 2021)). Defendant fails to articulate how this single statement of Isabella's "wishes and desires" makes Jenkins directly adverse to Isabella because he cannot; one client's negative opinion about another client's case or "cause" does not make the two clients directly adverse. *Cf.* Vt. R. Prof. Conduct 1.7 cmt. 24 ("The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest."). Here, Defendant does not even argue that *Jenkins's* claims would harm Isabella (they would not); instead, he argues only that Isabella believed the "lawyers who purport[ed] to represent [her] and [her] wishes [were] acting contrary to [her] wishes and desires" by continuing to press *Isabella's* claim. Mot. ¶ 9 (quoting Isabella Aff. ¶ 15 (Jan. 25, 2021)).

Even if the Court interprets material adversity under Rule 1.9 more broadly than direct adversity under Rule 1.7, as some courts and bar associations outside of Vermont have done, Defendant still has not identified any concrete legal harm to Isabella's interests from counsel's continued representation of Jenkins that would make mother and daughter's interests materially adverse. In situations where the former client is "not directly involved in the current litigation, [but] may be affected by it in some manner," the court must do a "fact-specific analysis … to evaluate 'the degree to which the current representation may actually be harmful to the former client.'" *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 933 (8th Cir. 2014) (quoting *Simpson Performance Prods., Inc. v. Robert W. Horn, P.C.*, 92 P.3d 283, 288 (Wyo. 2004)). "This analysis focuses on 'whether the current representation may cause legal, financial, or other identifiable detriment to the former client.'" *Id.* (quoting *Simpson Performance Prods., Inc.*, 92

P.3d at 288); *accord* ABA Op. 21-497, at 9 ("'Material adverseness' may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation."). "However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices." ABA Op. 21-497, at 9; *see also Gillette Co. v. Provost*, No. 1584CV00149-BLS2, 2016 WL 2610677, at *4 (Mass. Super. Ct. May 5, 2016) (concluding that, as with direct adversity, material adversity "requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests" (quoting *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 42 N.E.3d 199, 204 (Mass. 2015))). Material adversity arises, for example, when a lawyer, on behalf of a current client, attacks their own prior work done for a former client, *see, e.g.*, ABA Op. 21-497, at 5–7; Vt. R. Prof. Conduct 1.9 cmt. 1 ("[A] lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.").

Jenkins's and Isabella's interests are not materially adverse. Again, to attempt to show adversity, Defendant relies solely on Isabella's disagreement with the supposed "cause" furthered by the claim she has moved to dismiss. But he points to no specific, demonstrable, concrete detriment to Isabella from counsel's continued representation of Jenkins. There is no such detriment. Isabella would not be harmed in any concrete, meaningful way by counsel's continued representation of Jenkins or by Jenkins's success in this case. No legal rights or interests of Isabella would be impaired, and no legal or tangible financial obligations would be imposed on Isabella—and Defendant raises no such rights, interests, or obligations. Defendant's

conclusory assertions in a purely tactical motion fail to establish that there is an actual conflict of interest between Jenkins and Isabella.

B. Even if Jenkins and Isabella have directly adverse interests, disqualification is not automatically required.

Even if the Court concludes that Jenkins and Isabella do have adverse interests, disqualification is not automatically required, and Defendant fails to justify the draconian remedy of disqualification. Disqualification, after all, "is called for only where 'an attorney's conduct tends to taint the underlying trial.'" *Prevezon Holdings Ltd.*, 839 F.3d at 241 (quoting *Nyquist*, 590 F.2d at 1246); *accord Muniz*, 230 F. Supp. 3d at 152 ("The motion will be granted only if the facts present a real risk that the trial will be tainted"; "'[m]ere speculation' regarding the reasons for disqualification is insufficient." (first quoting *Revise Clothing, Inc.*, 687 F. Supp. 2d at 388; then quoting *Gormin*, 2009 WL 508269, at *2)). The Second Circuit generally applies a three-part test to determine whether disqualification is warranted because of an actual conflict of interest between counsel's current and former client. *Hempstead Video, Inc.*, 409 F.3d at 133. Under that test, "[i]n cases of successive representation, … an attorney may be disqualified if:

> (1) the moving party is a former client of the adverse party's counsel; (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

Id. (quoting *Evans*, 715 F.2d at 791). Once the moving party meets the first two prongs, the movant often is entitled to a presumption that the third prong is met—that is, that the attorney received confidential information from the client. *See Prevezon Holdings Ltd.*, 839 F.3d at 239–41. But that test and the presumption do not apply in cases of joint representation, where there is no reasonable expectation of confidentiality between co-parties, and counsel has not switched

sides. *See Trinity Ambulance Serv., Inc. v. G & L Ambulance Servs., Inc.*, 578 F. Supp. 1280, 1282–85 (D. Conn. 1984).

Here, Defendant's purely tactical motion woefully lacks any specific facts or argument that support a real risk of taint to the trial. He does not argue that the successive representation test applies or that all its prongs are met; his argument concludes at best half baked, addressing only whether Jenkins's and Isabella's interests are adverse and hinting, in a footnote, that the receipt of confidential information might be presumed. *See* Mot. ¶ 9 n.1. He seems incorrectly to assume that disqualification therefore is automatically required. That alone warrants denying his motion. But if the Court were to pick up where Defendant left off, the successive representation test does not apply because counsel's joint representation of Jenkins and Isabella prevented any reasonable expectation of privacy between them, and counsel have not switched sides in this case. Even if the successive representation test applies, Defendant fails to satisfy its first prong because he is not a former client of Jenkins's counsel. Thus, there is no basis for disqualification.

1. The successive representation test for disqualification does not apply because counsel jointly represented Jenkins and Isabella and have not switched sides.

The successive representation test does not apply, and therefore Defendant's motion fails, because counsel's joint representation of Jenkins and Isabella prevented any reasonable expectation of privacy between them and because counsel have not "switched sides" in this case. Before the successive representation "test is even implicated, it must be shown that the attorney was in a position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client." *Allegaert v.*

Perot, 565 F.2d 246, 250 (2d Cir. 1977).[5] When two clients are jointly represented by the same attorney in the same case, neither has a reasonable expectation that the information they share with the attorney will be kept secret from the other client. *Trinity Ambulance Serv., Inc.*, 578 F. Supp. at 1285 ("The expectation that information conveyed to a co-party's counsel will be held in confidence from that attorney's client is no more plausible than the expectation that an attorney concurrently representing parties in the execution of a joint venture or franchise agreement will keep information relayed to him by one party secret from the other. In both situations, the party seeking disqualification should have been aware at the time of the previous transaction or proceeding that information garnered by attorneys in the course of furthering the common enterprise would be revealed by those attorneys to the other parties involved.").

The successive representation test would nonetheless apply in a joint representation case if the attorney suddenly switched sides and would then be tempted to use the former clients' confidential information against them. That problem does not arise, and therefore the successive representation test still does not apply, if the *client*, rather than the *attorney*, switches sides or even drops out of the case altogether because whatever information the attorney has about the side-switching client was never secret from the other client. *See Kempner*, 662 F. Supp. at 1277 (applying *Allegaert* rule where the "adversity of interests arose during the pendency of a single litigation and … it is a client, not an attorney, who has 'changed sides'" (quoting *Trinity Ambulance Serv., Inc.*, 578 F. Supp. at 1282)); *Allegaert*, 565 F.2d at 251 ("Integral to our conclusion … is the law firms' continuous and unbroken legal relationship with their primary

[5] Although *Allegaert* refers to the "substantial relationship test," it is the same as the successive representation test. *Compare Hempstead Video, Inc.*, 409 F.3d at 133 (citing *Evans* test for successive representation), *with Kempner v. Oppenheimer & Co., Inc.*, 662 F. Supp. 1271, 1276–77 (S.D.N.Y. 1987) (citing same *Evans* test as substantial relationship test).

clients. In contrast with our earlier cases, the attorneys sought to be disqualified here have not changed sides from a former client to a current, adverse client.").

This exception from the successive representation test for joint representation cases is necessary, otherwise it would incentivize exactly the behavior here: a defendant's attorney could unethically induce a co-plaintiff to release or settle her claims to conflict out the attorney representing the remaining plaintiff, thus delaying or ending the litigation. *Cf. Blanchard v. Edgemark Fin. Corp.*, No. 94 C 1890, 1998 WL 988958, at *13–14 (N.D. Ill. Sept. 11, 1998) (holding no basis for disqualification of class attorney who tried to set aside settlement negotiated directly between defendants and class representative that was prejudicial to class).

Jenkins, for herself and as next friend of Isabella, hired counsel to represent her and Isabella. Counsel has remained on the same side of this case for more than eight years. Indeed, the situation here is less serious than that encountered in the *Allegaert* line of cases because no one—neither counsel nor Isabella—has switched sides in this case; Isabella is not now a defendant, and Jenkins's counsel does not now represent any defendant. Instead, Isabella merely seeks to be dismissed from the case. That does not now create a conflict of interest justifying disqualification because Jenkins's counsel is not now confronted with the question of whether to use Isabella's confidential information against her. In fact, counsel has never received *any* information from Isabella, much less information they were required to keep secret from Jenkins, precisely because she was kidnapped and was, until just recently, represented through her mother Jenkins as next friend. Even imagining for the sake of argument that Jenkins's counsel received any information from Isabella, she would have had no reasonable expectation that counsel would keep that information secret from Jenkins because counsel was hired to represent them jointly. *See Trinity Ambulance Serv., Inc.*, 578 F. Supp. at 1285 ("Neither [former co-party] has a valid

claim of confidentiality as against the other with respect to information changing hands prior to the realignment of the parties."). But the reality is that, because Jenkins's counsel has never spoken to Isabella or received any information from her, Jenkins's counsel has no information, confidential or otherwise, that could in any way be used against Isabella. There is no reason for disqualification.

2. Even if the test applies, Defendant is not a former client of Jenkins's counsel.

Even if the successive representation test applies, Defendant still cannot disqualify Jenkins's counsel because he is not their former client. The first prong of the successive representation test requires that "the moving party is a former client of the adverse party's counsel." *Prevezon Holdings Ltd.*, 839 F.3d at 239 (quoting *Evans*, 715 F.2d at 791). Because Defendant, as the moving party, is not a former client of Jenkins's counsel, his disqualification argument fails under that first prong. *See SMI Indus. Canada Ltd. v. Caelter Indus., Inc.*, 586 F. Supp. 808, 815–16 (N.D.N.Y. 1984) (holding assignee of assets of former client had standing to move for disqualification but failed first prong because no attorney–client relationship ever existed between movant and counsel).

CONCLUSION

Defendant Timothy Miller's motion to disqualify Plaintiff Janet Jenkins's counsel should be denied.

Respectfully submitted.

February 16, 2021

/s/ Frank H. Langrock

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Counsel for Plaintiff Janet Jenkins

CERTIFICATE OF SERVICE

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

Richard Boyer
Integrity Law Firm, PLLC
Counsel for Defendant Linda M. Wall

Deborah T. Bucknam
Bucknam Law, P.C.
Counsel for Plaintiff Isabella Miller-Jenkins

Anthony R. Duprey
Neuse, Duprey & Putnam, PC
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Roger K. Gannam
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Adam S. Hochschild
Hochschild Law Firm, LLC
Counsel for Defendant Linda M. Wall

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

Brooks G. McArthur
Jarvis, McArthur & Williams, LLC
Counsel for Defendant Kenneth L. Miller

Horatio G. Mihet
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Daniel Joseph Schmid
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Norman C. Smith
Norman C. Smith, PC
Counsel for Defendant Linda M. Wall

Michael J. Tierney
Wadleigh, Starr & Peters, PLLC
Counsel for Defendant Timothy D. Miller

February 16, 2021

/s/ Diego A. Soto
Diego A. Soto
Counsel for Plaintiff Janet Jenkins

Diego Soto

From: Michael Tierney <mtierney@wadleighlaw.com>
Sent: Friday, May 15, 2020 10:24 AM
To: Diego Soto; Horatio Mihet; Brooks McArthur; Anthony Duprey; Daniel Schmid; Roger Gannam; Adam Hochschild; Norman Smith; Richard Boyer; Toddy Ferguson
Cc: Beth Littrell; Claudia Huerta; Emily Joselson; flangrock; Jessica Stone; Maya Rajaratnam; Sarah Star; Scott McCoy; Tyler Clemons
Subject: RE: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Parties' Proposed Modified Discovery Schedule/Order
Attachments: DRAFT Notice of Parties' Inability to Comply with May 15 2020 Deadline v1 mjt.docx

Diego:

I do not think anything needs to be filed and I do not consent to the filing as drafted. Your filing, as drafted, makes it seem as if resolution of RUL will allow all of the parties to the case to decide on a discovery order. That is not accurate. Even if RUL was represented, there would still be disputes as to whether Isabella is in the case and whether you can represent Isabella. Without Isabella, the parties are unable to agree.

The Court's order envisioned the potential that we would not be able to agree and forecasted holding a hearing if the Court did not hear from us by May 15th. I am fine with not filing anything.

Nevertheless, if we must file something, I would only consent if we added a phrase along the lines of " and it is disputed whether undersigned counsel can still represent Isabella or if Isabella is still a party to the case" See attached.

Where you have previously represented both Janet and Isabella and Isabella has not given you written and knowing consent to continue to represent just Janet, it appears that your continued representation of just Janet is a violation of Rule 1.9.

Michael

Michael J. Tierney, Esq.
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EXHIBIT 1

From: Diego Soto <Diego.Soto@splcenter.org>
Sent: Friday, May 15, 2020 11:01 AM
To: Horatio Mihet <hmihet@lc.org>; Brooks McArthur <bmcarthur@jarvismcarthur.com>; Anthony Duprey <anthony@ndp-law.com>; Daniel Schmid <daniel@lc.org>; Roger Gannam <rgannam@lc.org>; Adam Hochschild <adam@hochschildlaw.com>; Norman Smith <norman@normansmithlaw.com>; Richard Boyer <rickboyerlaw@gmail.com>; Toddy Ferguson <cs.fergie@myfairpoint.net>; Michael Tierney <mtierney@wadleighlaw.com>
Cc: Beth Littrell <beth.littrell@splcenter.org>; Claudia Huerta <claudia.huerta@splcenter.org>; Emily Joselson

<ejoselson@langrock.com>; flangrock <flangrock@langrock.com>; Jessica Stone <jessica.stone@splcenter.org>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Sarah Star <sarahstar.esq@gmail.com>; Scott McCoy <Scott.McCoy@splcenter.org>; Tyler Clemons <Tyler.Clemons@splcenter.org>
Subject: RE: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Parties' Proposed Modified Discovery Schedule/Order

Adam and Harry: Thank you for your responses. We agree with Harry's alternative proposal to file a notice that the parties are unable to comply with today's deadline because the RUL Defendants still do not have counsel. Attached is a draft notice for your consideration.

All counsel: Please let me know by 6pm Eastern (5pm Central) today whether you consent to the filing of this notice or whether you would propose another alternative.

Thanks,
Diego

Diego Soto he/him/his
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From: Horatio Mihet <hmihet@lc.org>
Sent: Friday, May 15, 2020 8:38 AM
To: Diego Soto <Diego.Soto@splcenter.org>; Brooks McArthur <bmcarthur@jarvismcarthur.com>; Anthony Duprey <anthony@ndp-law.com>; Daniel Schmid <daniel@lc.org>; Roger Gannam <rgannam@lc.org>; Adam Hochschild <adam@hochschildlaw.com>; Norman Smith <norman@normansmithlaw.com>; Richard Boyer <rickboyerlaw@gmail.com>; Toddy Ferguson <cs.fergie@myfairpoint.net>; Michael Tierney <mtierney@wadleighlaw.com>
Cc: Beth Littrell <beth.littrell@splcenter.org>; Claudia Huerta <claudia.huerta@splcenter.org>; Emily Joselson <ejoselson@langrock.com>; flangrock <flangrock@langrock.com>; Jessica Stone <jessica.stone@splcenter.org>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Sarah Star <sarahstar.esq@gmail.com>; Scott McCoy <Scott.McCoy@splcenter.org>; Tyler Clemons <Tyler.Clemons@splcenter.org>
Subject: RE: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Parties' Proposed Modified Discovery Schedule/Order

Diego:

The Court has explicitly and implicitly repeatedly said that it wants all parties to participate in the scheduling, and that the proposed schedule should be jointly filed by all parties. The Court is aware of the RUL defendants' extension motion and predicament, and knows that the required joint filing is not possible today. The Court is also aware of Plaintiff's motion to stay and other filings. Thus, the Court knows that, until the RUL defendants are able to comply or the Court modifies its previous order requiring a joint filing, the joint filing requested/required is not possible.

Accordingly, we don't believe your proposed filing is necessary. And, we believe your proposed filing is actually in substantial non-compliance with the Court's order and expectation of a joint filing from all parties.

If you must file something again, we suggest that you file a notice that, because of the issues on which the Court has already been briefed, the parties are not able to comply with the May 15 deadline for a joint filing, and request a telephonic status conference with the Court to determine the best way forward.

We do have substantial concerns with your proposal, but we don't believe this is the appropriate time or procedural posture to address them.

Lastly, we regard your position that Isabella remains a proper plaintiff, your contention that you continue to represent her, and the re-incarnation of "Plaintiff**s**" (plural) in your draft filings as a continued violation of Plaintiff's and her counsel's obligations towards the parties and the Court, and will re-visit those issues in other pleadings and contexts.

We are available for further telephone discussions today, if necessary.

Kind Regards,

Horatio G. Mihet, Esq.*
Vice President of Legal Affairs and
Chief Litigation Counsel
Liberty Counsel
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Offices in DC, FL, and VA
*Licensed in Florida and Ohio

From: Diego Soto <Diego.Soto@splcenter.org>
Sent: Thursday, May 14, 2020 12:47 PM
To: Brooks McArthur <bmcarthur@jarvismcarthur.com>; Anthony Duprey <anthony@ndp-law.com>; Daniel Schmid <daniel@lc.org>; Horatio Mihet <hmihet@lc.org>; Roger Gannam <rgannam@lc.org>; Adam Hochschild <adam@hochschildlaw.com>; Norman Smith <norman@normansmithlaw.com>; Richard Boyer <rickboyerlaw@gmail.com>; Toddy Ferguson <cs.fergie@myfairpoint.net>; Michael Tierney <mtierney@wadleighlaw.com>
Cc: Beth Littrell <beth.littrell@splcenter.org>; Claudia Huerta <claudia.huerta@splcenter.org>; Diego Soto <Diego.Soto@splcenter.org>; Emily Joselson <ejoselson@langrock.com>; flangrock <flangrock@langrock.com>; Jessica Stone <jessica.stone@splcenter.org>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Sarah Star <sarahstar.esq@gmail.com>; Scott McCoy <Scott.McCoy@splcenter.org>; Tyler Clemons <Tyler.Clemons@splcenter.org>
Subject: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Parties' Proposed Modified Discovery Schedule/Order
Importance: High

Counsel,

Please let me know your positions on the proposals below. If needed, we are available to confer by telephone today or tomorrow during business hours.

Tomorrow is the deadline for the parties to propose a modified discovery schedule/order. See Order, ECF 474. The Court has not yet acted on the RUL Defendants' motion for an extension of time to secure successor counsel, see ECF 506, or

on Ms. Jenkins's related motion to stay or modify tomorrow's deadline to propose a modified discovery schedule/order, see ECF 508.

Therefore, out of an abundance of caution, we propose that the parties substantially comply with the Court's order by filing a proposed modified discovery schedule/order, explaining why the RUL Defendants did not participate, and noting that the parties might need to seek further amendment if the Court grants the RUL Defendants more time to obtain new counsel and they in fact obtain new counsel.

Attached are a proposed modified discovery schedule/order and a proposed notice of filing of that document. As you can see, Plaintiffs propose that discovery close 120 days after the Court enters the new discovery schedule/order and that all other listed deadlines, which are tied to the close of discovery, remain the same.

On the issues Michael raised yesterday, it is our position that these potential issues do not allow the parties to fail to comply with the Court's order to propose a modified discovery schedule/order. Instead, they would be more appropriate in a motion to stay discovery pending resolution of the Liberty Counsel Defendants' summary-judgment motion, which we would oppose. It is also our position that Isabella remains a plaintiff, and that Plaintiffs' counsel continue to represent her, unless and until she is dismissed from the case. Although not currently an issue because Isabella has not been dismissed from the case, Plaintiffs' counsel would not need Isabella's written consent to continue representing Ms. Jenkins just because Isabella's claim was disposed of.

Sincerely,
Diego

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Diego Soto

From: Michael Tierney <mtierney@wadleighlaw.com>
Sent: Wednesday, May 13, 2020 8:57 AM
To: Diego Soto; Brooks McArthur; Anthony Duprey; Daniel Schmid; Horatio Mihet; Roger K. Gannam; Adam Hochschild; Norman Smith; Richard Boyer; Toddy Ferguson
Cc: Beth Littrell; Claudia Huerta; Emily Joselson; flangrock; Jessica Stone; Maya Rajaratnam; Sarah Star; Scott McCoy; Tyler Clemons
Subject: RE: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Plaintiff's proposed call to Elizabeth Evelti, the judge's judicial assistant

Diego:

The requirement to submit a joint discovery schedule applied to the plaintiffs (in the plural) as well as the defendants. See Doc. 450, 456.

Your email suggests that the only issue holding up a discovery schedule is the RUL defendants. But that isn't true, is it?

Aren't there several pending motions that need to be decided before a discovery schedule can be agreed to by the plaintiff***s***? Who is representing Isabella in this case? Is Isabella even in this case anymore? Does the Second Amended Complaint need to be withdrawn as it was filed on behalf of Isabella? Can attorneys who represented Isabella continue representing someone else in this case without Isabella giving knowing and written consent as required by Rule 1.9? Don't these questions need to be answered to even know who the parties currently are?

Are you able to set up a conference call so any interested defense counsel can join you on the line when you call the court?

As I have said previously, my client can live with whatever deadlines work for everyone else but I think we need to know who the plaintiffs are and who is representing them.

Thanks,

Michael

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From: Diego Soto <Diego.Soto@splcenter.org>
Sent: Tuesday, May 12, 2020 12:24 PM
To: Brooks McArthur <bmcarthur@jarvismcarthur.com>; Anthony Duprey <anthony@ndp-law.com>; Daniel Schmid <dschmid@lc.org>; Horatio Mihet <hmihet@lc.org>; Roger K. Gannam <rgannam@LC.org>; Adam Hochschild <adam@hochschildlaw.com>; Norman Smith <norman@normansmithlaw.com>; Richard Boyer

<rickboyerlaw@gmail.com>; Toddy Ferguson <cs.fergie@myfairpoint.net>; Michael Tierney <mtierney@wadleighlaw.com>
Cc: Beth Littrell <beth.littrell@splcenter.org>; Claudia Huerta <claudia.huerta@splcenter.org>; Diego Soto <Diego.Soto@splcenter.org>; Emily Joselson <ejoselson@langrock.com>; flangrock <flangrock@langrock.com>; Jessica Stone <jessica.stone@splcenter.org>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Sarah Star <sarahstar.esq@gmail.com>; Scott McCoy <Scott.McCoy@splcenter.org>; Tyler Clemons <Tyler.Clemons@splcenter.org>
Subject: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Plaintiff's proposed call to Elizabeth Evelti, the judge's judicial assistant

Counsel,

Please let me know by noon EDT tomorrow whether your clients object to Plaintiff's counsel calling Elizabeth Evelti, the judge's judicial assistant, solely for an update from her on the Court's disposition of the RUL Defendants' pending motion to extend the deadline to find new counsel, ECF 506, and Plaintiff's related motion to stay or modify the May 15 deadline for the parties to submit one proposed modified discovery schedule, ECF 508, in light of that upcoming deadline this Friday. If your clients do object, please let me know what alternative you would propose.

As I am sure you are aware, the Court gave the RUL Defendants until April 15 to find new counsel and ordered the parties to submit a joint proposed modified discovery schedule/order by May 15, ECF 474, clearly intending the RUL Defendants' new counsel to participate in negotiations over that schedule. But the RUL Defendants still do not have new counsel and instead have a motion pending to extend the deadline to find new counsel. ECF 506. Therefore, Jenkins filed a motion to stay or modify the May 15 deadline. ECF 508. The Court has not yet acted on either motion.

Sincerely,
Diego

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Diego Soto

From: Vincent F. Heuser Jr. <vheuser@heuserlawoffice.com>
Sent: Friday, February 5, 2021 7:32 AM
To: Diego Soto
Cc: Beth Littrell; Emily Joselson; flangrock; Jessica Stone; Maya Rajaratnam; Sarah Star; Scott McCoy; Tyler Clemons; Brooks McArthur; Cassie Parah; Anthony Duprey; Daniel Schmid; Horatio Mihet; Roger Gannam; Adam Hochschild; Norman Smith; Richard Boyer; Toddy Ferguson; Michael Hirsh; Michael Tierney
Subject: Re: Jenkins v. Miller et al, CASE #: 2:12-cv-00184-wks
Attachments: 20210205082704167.pdf

Mr. Soto,

Attached is a letter response you your email of 1/29.

Vince Heuser

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EXHIBIT 2

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Vincent F. Heuser, Jr.
Admitted in Kentucky
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February 5, 2021

Via email: Diego.Soto@splcenter.org

Diego Soto, Staff Attorney
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104

Re: Jenkins v. Miller et al, CASE #: 2:12-cv-00184-wks

Dear Mr. Soto:

This letter is in response to your email of January 29, 2020. You are completely wrong about the nature of my practice and my relationship with Michael Hirsh, however, after consulting with the Kentucky Ethics Hotline, I will concede that our advertising gave rise to an apparent conflict of interest. That situation is being corrected.

In the meantime, because of the appearance of a conflict of interest, I have advised Isabella that she will need to find new counsel and I will withdraw from representing her further.

If you have any questions or I can be of further assistance, please do not hesitate to call.

Very truly yours,

Vincent F. Heuser, Jr.

VFH/tm
cc: client, other counsel

Diego Soto

From: Diego Soto
Sent: Friday, January 29, 2021 6:52 PM
To: vheuser@hirshandheuser.com
Cc: Beth Littrell; Diego Soto; Emily Joselson; flangrock; Jessica Stone; Maya Rajaratnam; Sarah Star; Scott McCoy; Tyler Clemons; Brooks McArthur; Cassie Parah; Anthony Duprey; Daniel Schmid; Horatio Mihet; Roger Gannam; Adam Hochschild; Norman Smith; Richard Boyer; Toddy Ferguson; Michael Hirsh; Michael Tierney
Subject: RE: Jenkins v. Miller et al, CASE #: 2:12-cv-00184-wks

Vince,

As you are aware, given your firm's representation of certain defendants in this case, the Court held that Janet Jenkins may continue to represent Isabella's interests in this case as her next friend. We cannot, and will not, take any actions adverse to Isabella's interests, including dismissing her claim, unless and until we can communicate with her in confidence or until the Court orders otherwise. We are preparing to file tonight an emergency motion for a status conference to address this development concerning Isabella. **In the meantime, you do not have our permission to communicate with Isabella about this matter, and you must immediately cease all further communication with her.**

Please detail precisely how you and your firm interacted with Isabella, including when, where, how, how often, and who else was involved with and/or present during the communication.

Please explain how your firm's communication with Isabella does not violate Rule 4.2 of the Georgia, Kentucky, and Vermont Rules of Professional Conduct, which prohibit a lawyer from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter." Comment 3 to Kentucky's and Vermont's rules specifically apply that prohibition to when "the represented person initiates or consents to the communication." The comment instructs that "[a] lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule."

Please also explain how your firm's purported simultaneous representation of Isabella on the one hand and Defendants Philip Zodhiates, Victoria Hyden, and RUL on the other does not violate Rule 1.7 of the Georgia, Kentucky, and Vermont Rules of Professional Conduct, which prohibit a lawyer from "represent[ing] a client if the representation involves a concurrent conflict of interest."

Ms. Jenkins reserves her right to seek all appropriate relief—including but not limited to sanctions, ethics complaints, and the revocation of pro hac vice admission—against you, your firm, and all other attorneys acting in concert with you in all applicable courts and jurisdictions.

Sincerely,
Diego

Diego Soto he/him/his
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Admitted in Alabama and the District of Columbia

-----Original Message-----
From: vheuser@hirshandheuser.com <vheuser@hirshandheuser.com>
Sent: Friday, January 29, 2021 2:00 PM
To: adam@hochschildlaw.com; Anthony@DupreyLaw.com; bmcarthur@jarvismcarthur.com; Diego Soto <Diego.Soto@splcenter.org>; dschmid@lc.org; flangrock <flangrock@langrock.com>; hmihet@lc.org; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; mrhirsh@hirshandheuser.com; mtierney@wadleighlaw.com; nc.smith@myfairpoint.net; rberger@dinse.com; rgannam@LC.org; Scott McCoy <Scott.McCoy@splcenter.org>; srs <srs@sarahstarlaw.com>; Tyler Clemons <Tyler.Clemons@splcenter.org>
Subject: Jenkins v. Miller et al, CASE #: 2:12-cv-00184-wks

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Counsel:

Please be advised that I represent Isabella Miller regarding the above matter.
Attached is correspondence regarding her status.
Attached also are two affidavits from her.

Please take appropriate action to fulfill her instructions.

Thank you.

Vince Heuser
(502) 458-5879

Vincent F. Heuser, Jr.
Hirsh and Heuser Attorneys
3600 Goldsmith Lane
Louisville, KY 40220
(502) 458-5879

Hirsh & Heuser

Attorneys and Counselors at Law

Vincent F. Heuser, Jr.
Admitted in Kentucky

3600 Goldsmith Lane
Louisville, Kentucky 40220
(502) 458–5879
vheuser@hirshandheuser.com

Of Counsel
Michael R. Hirsh
Admitted in Georgia,
Kentucky and Virginia

2295 Towne Lake Pkwy Ste 116-181
Woodstock, Georgia 30189
(404) 713–4400
mrhirsh@hirshandheuser.com

January 29, 2021

Hon. William K. Sessions III
United States District Court
P.O. Box 928
Burlington, VT 05402-0928

Diego A. Soto , Esq.
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104

Frank H. Langrock
Langrock Sperry & Wool, LLP
111 South Pleasant Street
P.O. Drawer 351
Middlebury, VT 05753-0351

J. Tyler Clemons , Esq.
Southern Poverty Law Center
201 St. Charles Avenue Suite 2000
New Orleans, LA 70170

Jessica L. Stone , Esq.
Southern Poverty Law Center
P.O. Box 1287
Decatur, GA 30031-1287

Maya G. Rajaratnam , Esq.
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104

Sarah Star , Esq.
Sarah Star, PL
P.O. Box 106
Middlebury, VT 05753

Scott D. McCoy , Esq.
Southern Poverty Law Center
P.O. Box 10788
Tallahassee, FL 32302-0788

Re: Jenkins v. Miller et al, CASE #: 2:12-cv-00184-wks

Your Honor and Counsel:

Recently a person whose interests are affected in the above case contacted me for assistance in making her wishes known to the United States District Court and to Counsel of record. Her name is Isabella Miller. I have verified her identity and involvement in the case and am satisfied with her veracity. I am writing to pass on from her certain information she wishes to provide to the Court and parties.

Accompanying this letter are two affidavits from my client, Isabella Miller. I have spoken with her and am satisfied that she is acting freely and voluntarily. In addition, I had her appear before both a U.S. Notary in a U.S. Embassy and before a foreign notary in the country in which she was able to be present to authenticate her story and the documents I provided.

Ms. Miller has given me instructions in accordance with the accompanying affidavits. These instructions are directed primarily to her Next Friend and the attorneys who have purported to represent Isabella through the Next Friend, but the Court is also requested to take notice of her situation.

While I am not a Vermont attorney or expert in the Vermont Rules of Professional Conduct, it appears that Rule 1.2(a) requires following these instructions and that Rule 1.7(a)(1), regarding conflict of interest, Rule 1.9, regarding duties to former clients, and Rule 1.10 regarding imputation, all apply. Please accommodate her request and dismiss her from the case and terminate your representation.

If you have any questions or I can be of further assistance, please do not hesitate to call.

Very truly yours,

Vincent F. Heuser, Jr.

VFH/tm

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

JANET JENKINS, *et al.*,	)	
Plaintiffs	)	
	)	
v.	)	**Docket No. 2:12-cv-184**
	)	
KENNETH L. MILLER, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF ISABELLA MILLER

COMES NOW, Affiant who is also a Plaintiff in the above-captioned action and offers this my sworn Affidavit:

1. My name is Isabella Miller, sometimes referred to as Isabella Jenkins Miller in this litigation.
2. I am at least 18 years of age.
3. I have personal knowledge of the facts asserted in this Affidavit.
4. I offer this Affidavit freely and voluntarily.
5. I am not under any disability or impediment that would interfere with my ability to freely and voluntarily offer this Affidavit.
6. In September 2009 I left the United States with my mother, Lisa Miller.
7. At that time I travelled to Nicaragua where we lived.
8. I was shown tremendous kindness by many people.
9. My life from September 2009 until the present has been happy, safe, healthy, and I have been well cared for.
10. I remain outside the United States of my own free will.
11. If (and when) I desire to return to the United States I will do so.
12. I am operating under no financial or other impediment to voluntarily returning to the United States should I choose to do so.
13. I have been made aware of litigation that has been brought in my name in the U.S. District Court in the state of Vermont (Case #2:12-CV-184).
14. That litigation has been prosecuted by many attorneys, among them several lawyers who are employed by the Southern Poverty Law Center (SPLC).

15. All the lawyers who purport to represent me and my wishes are actingcontrary to my wishes and desires and in way to further a cause that is the exact opposite of what my desire and wishes as their client in fact are.
16. I want those people who claim to be my attorneys to cease their actions that are contrary to my wishes and desires.
17. I order and direct them to file all papers necessary to have me removed as a Plaintiff in this case.
18. Once I am dismissed from this action – whether through their effort, unilateral action of the Court, or the result of any filing from any party – I summarily and without equivocation fire, terminate, and discharge SPLC and all attorneys who have appeared ostensibly on my behalf in this litigation from taking any further action in my name.
19. I authorize any attorneys for the Defendants in this case to utilize this Affidavit in the best interest of your clients.
20. Contemporaneously with this Affidavit, I am also executing a full, unconditional, global, total Release for the benefit of each of the Defendants in this lawsuit together with my deepest appreciations for whatever they did or might have done or didn't do that has helped me to have a happy and safe life.

FURTHER THE AFFIANT SAYETH NAUGHT.

Isabella Miller
Isabella Miller
Date:

Sworn and subscribed before me this 25 day of January, 2021.

Notary

Peter Ritter
Consular Officer
COMMISSION:
Indefinite 22 USC Sec 110

REPUBLIC OF NICARAGUA
CITY OF MANAGUA
EMBASSY OF THE UNITED
STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, *et al.*,	)	
Plaintiffs	)	
v.	)	**Docket No. 2:12-cv-184**
	)	
KENNETH L. MILLER, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF ISABELLA MILLER

Affiant Isabella Miller, solemnly affirm and state as follows:

1. My name is Isabella Miller, sometimes referred to as Isabella Jenkins Miller in the above litigation. I am now over 18 years of age.
2. I am not under any disability, duress or impediment. Nothing is interfering with my ability to freely and voluntarily offer this Affidavit. I do so freely and voluntarily. I remain outside the United States of my own free will, but I have access to U.S. Courts.
3. I want Janet Jenkins removed as my representative and all attorneys, including but not limited to Sarah Starr, Scott McCoy, Tyler Clemons, Diego A. Soto, Frank H. Langrock, Jessica L Stone, Maya G. Rajaratnam and any attorneys working with them, discharged and withdrawn as my attorney and I further object to their representing any other person in this matter after having access to my personal information..
4. If (and when) I desire to return to the United States I will do so.
5. I have been made aware of litigation that has been brought in my name in the U.S. District Court in the state of Vermont (Case #2:12-CV-184). That litigation has been prosecuted by many attorneys, among them several lawyers who are employed by the Southern Poverty Law Center (SPLC).
6. I have contacted Attorney Vincent F. Heuser, Jr., of Louisville, Kentucky, to enable my access to the U.S. Courts and I have instructed him that I do not want my personal appearance entered, but I want the claims made in this case on my behalf dismissed.
7. All the lawyers who purport to represent me, except Vincent F. Heuser, Jr., are acting contrary to my wishes and desires and in way to further a cause that is the opposite of what my desire and wishes as their client in fact are. I do not want the claims in this case continued on my behalf.

IRM

8. I want those people who claim to be my attorneys to cease their actions that are contrary to my wishes and desires. I request, order and direct that I be dismissed and removed as a Plaintiff in this case.

FURTHER THE AFFIANT SAYETH NAUGHT.

Isabella Miller
Isabella Miller
Date:

ACKNOWLEDGEMENT

COUNTRY OF NICARAGUA)
) ss
)

I, a notary public, in and for Managua Nicaragua, do hereby certify that before me this 26 day of January, 2021, the foregoing was subscribed, acknowledged as her free act and deed, and affirmed by Isabella Miller, who appeared to be under no duress and who identified herself to me by:

Harling Carmelo Bobadilla Tremino
Notary

My Commission Expires: August twenty two, 2021
I.D. Nº C.S.J. 15.212

THIS INSTRUMENT PREPARED BY:

Vincent F. Heuser, Jr., Attorney
Heuser Law Office
3600 Goldsmith Lane
Louisville, KY 40220
(502) 458-5879

AUTÉNTICA DE FIRMAS

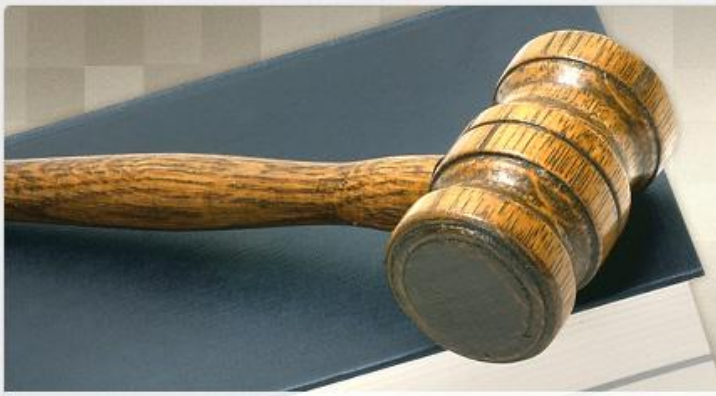
Ante mí **Harling Carmelo Bobadilla Treminio**, Abogado y Notario Público de la República de Nicaragua, debidamente autorizado por la Corte Suprema de Justicia para cartular en un quinquenio que expira el día veintitrés de agosto del dos mil veinticinco. **CERTIFICO Y DOY FE** que la firma que antecede fue puesta en mi presencia y es la que usa en su documento de identidad pasaporte de los Estados Unidos de América No. 720594835 , Documento que firma de su libre y espontánea voluntades. Documento que tuve a la vista, con el cual lo cotejé debidamente.- certifico y sello en la ciudad de Managua Nicaragua a las nueve y quince minutos de la mañana del día veintiséis de enero del dos mil veintiuno.==========

Harling Carmelo Bobadilla Treminio
Abogado y Notario Público
Carnet C.S.J. 15212.

REPUBLICA DE NICARAGUA
Corte Suprema de Justicia

HARLING CARMELO
BOBADILLA TREMINIO
Abogado y Notario Público
Cédula 001-160774-0078F
Carné No. 15212

Secretario



Extraordinary problems require extraordinary Lawyers. If your situation needs extraordinary attention, you have come to the right place. Contact us for a FREE CASE EVALUATION

Attorney Biographies

Michael R. Hirsh is the managing partner for Hirsh & Heuser's Atlanta, Georgia office. Michael is licensed to practice law in Virginia, Kentucky, and Georgia. Additionally, he is admitted in numerous Federal District Courts, Courts of Appeals, and the United States Supreme Court. Mr. Hirsh has litigated cases across the country at both the trial and appellate levels, serving in business, civil rights, criminal, personal injury, and First Amendment cases. Mr. Hirsh has served as lead counsel on numerous complex civil litigation and certain criminal matters in state and federal courts at both the trial and appellate level. His case management responsibilities and supervision duties span the legal spectrum from pre-filing research and negotiations, through extensive discovery, to conclusion at trial or settlement.

Transferring a skill set developed and honed from his extensive background in sales and marketing - including cold calling and all phases of business development - Michael is able to create, develop, and implement the firm's "Well Business Care" program to assist business decision makers to anticipate, minimize, and prevent civil and criminal exposure in an increasingly complex, volatile, and delicate environment. Consistent with these objectives and seeing the benefits of being proactive rather than reactive, Michael conducts brainstorming sessions and workshops to consider opportunities, business plans for new projects, and to develop ideas and solutions for existing situations.

With his extensive background in accounting as well as decades of experience in sales and marketing, Mr. Hirsh understands business. He is a goal oriented, decisive leader, with a proven record of quick-on-his-feet assessment, strategic thinking, and problem solving who thrives in dynamic environments yet remains focused and practical. Michael provides direction to business owners and integrates extensive business experience in an increasingly complex legal environment. As outside counsel to numerous small business, Mr. Hirsh had demonstrated proficiency at resolving conflicts, identifying and developing contingency plans, and communicating decisions and progress effectively to leaders in industry and business. Mr. Hirsh continuously develops and maintains partnerships with upper management to facilitate understanding and secure the objectives.

EXHIBIT 3

Vincent F. Heuser, Jr. is managing partner for Hirsh & Heuser's Louisville, Kentucky office. Vince is licensed in Kentucky's Courts and in the Uinited States Disctrict Court, United States Court of Appeals for the 6th Circuit, and the United States Tax Court. He has litigated criminal and civil cases in the trial and appellate levels of the district and circuit courts of Kentucky, the United States District Courts in several states and the

US Tax Court. He has served as a Criminal Justice Act Attorney on complex criminal litigation, lead counsel on complex civil litigation and handled numerous civil and criminal matters in state and federal courts at both the trial and appellate level. His case management and supervision duties have included pre-filing research and negotiations, extensive discovery, to conclusion at trial or settlement.

Mr. Heuser was a criminal investigator for the United States Treasury Department, U.S. Customs Service, before being admitted to the Kentucky Bar. With an extensive background in chemical engineering, construction, information technology and all aspects of small business administration, he is able to assist even the most technically complex businesses with the legal aspects of taxation, sales and marketing, business development, intellectual property, contracts and collections including complex tax matters and white collar accusations to anticipate and minimize or prevent civil and criminal exposure in today's increasingly corrosive business environment. Mr. Heuser can work with your engineers, CPA and other experts to protect and advance your business.

Mr. Heuser is also a licensed real estate broker and well versed in commercial and complex residential real estate matters. He is advisor to numerous condominium associations and can assist buyers and sellers with issues in real estate transactions and development issues.

Diego Soto

From: mrhirsh@hirshandheuser.com
Sent: Sunday, January 31, 2021 1:23 AM
To: 'Adam Hochschild'; 'Horatio Mihet'
Cc: Diego Soto; Tyler Clemons; Maya Rajaratnam; Scott McCoy; flangrock; srs; 'Brooks G. McArthur'; 'Michael J. Tierney'; nc.smith@myfairpoint.net; 'Anthony Duprey'; 'Daniel Schmid'; 'Roger Gannam'
Subject: RE: LC and Lindevaldsen Supplemental Document Production

Diego: The 5 pages of Harry's recent supplemental production (LC36970-36974) are responsive to discovery requests directed to my clients, the RUL Defendants, as well. In light of Harry's supplemental production I don't intend to separately produce those 5 pages either.

Michael R. Hirsh
Hirsh & Heuser, LLC
2295 Towne Lake Pkwy
Suite 116-181
Woodstock, Georgia 30189
404-713-4400

From: Adam Hochschild <adam@hochschildlaw.com>
Sent: Saturday, January 30, 2021 9:13 PM
To: Horatio Mihet <hmihet@lc.org>
Cc: Diego Soto <Diego.Soto@splcenter.org>; Tyler Clemons <Tyler.Clemons@splcenter.org>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Scott McCoy <Scott.McCoy@splcenter.org>; Frank Langrock Esq. (flangrock@langrock.com) <flangrock@langrock.com>; Sarah Star <srs@sarahstarlaw.com>; Brooks G. McArthur <bmcarthur@jarvismcarthur.com>; Michael J. Tierney <mtierney@wadleighlaw.com>; nc.smith@myfairpoint.net; Michael Hirsh <mrhirsh@hirshandheuser.com>; Anthony Duprey <Anthony@dupreylaw.com>; Daniel Schmid <daniel@lc.org>; Roger Gannam <rgannam@lc.org>
Subject: Re: LC and Lindevaldsen Supplemental Document Production

Diego: The 5 pages of Harry's recent supplemental production (LC36970-36974) are responsive to discovery requests directed to my client, Linda Wall, as well. In light of Harry's supplemental production I don't intend to separately produce those 5 pages.

EXHIBIT 4

Adam S. Hochschild
Hochschild Law Firm, LLC
314.503.0326
adam@hochschildlaw.com
www.HochschildLaw.com

On Jan 30, 2021, at 8:48 PM, Horatio Mihet <hmihet@lc.org> wrote:

Diego and Counsel:

Please find attached a supplemental document production from LC and Lindevaldsen, consisting of LC36970-36974. These documents are responsive to Plaintiff's document requests seeking communications with or about Isabella Miller.

Kind Regards,

Horatio G. Mihet, Esq.*
Vice President of Legal Affairs and
Chief Litigation Counsel
Liberty Counsel
PO Box 540774
Orlando, FL 32854
(407) 875-1776 phone
(407) 875-0770 fax
LC.org
Offices in DC, FL, and VA
*Licensed in Florida and Ohio

<LC36970-LC36974.pdf>

Hirsh & Heuser, LLC

ATTORNEYS AND COUNSELORS AT LAW

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VHEUSER@HIRSHANDHEUSER.COM

October 22, 2020

Tyler Clemons, Esq.
SPLC
Tyler.clemons@splcenter.org

RE: *Discovery issues in Jenkins v. Miller*

Tyler:

This letter is in response to yours of October 16th.

We served our Discovery Responses for all three of my clients on 09/16. On 9/21 you suggested that there were more documents, not privileged, that were responsive to your Requests for Production. You specifically cited "Mr. Zodhiates'[ ] criminal file" should be produced. You later clarified that the "file" to which you referred was the "file that the government provided to Mr. Zodhiates during his prosecution." Since those documents were not in my custody or control, I reached out to counsel who handled the criminal matter, asking for what you had pinpointed.

I received that file late last week and I am in the process of reviewing it perchance there is some privileged document. Should I find one, I will disclose it. To the extent that Item I and subparts of your 10/16 letter refer to this criminal file, I expect to provide that to you by early next week.

If there is some other component to your follow up on the Requests for Production, please advise.

As to the Requests for Admission (Part II with subparts) of your letter, I understand your characterization of our objections, but respectfully disagree. You refer to many identical responses which should not be particularly noteworthy considering each was asked the identical questions. If the form of the question is objectionable (e.g., impermissibly vague) in one Request it is likewise identically objectionable when it is identically presented in another.

But more to the substance, most of the questions were composed in such a way that my clients were simply unable to either admit or deny. I most certainly agree that "Requests for admissions are a tool used to expedite a trial by establishing certain **material facts** to narrow the range of issues at trial." But the burden of clarity and artfulness is on the party propounding the discovery.

For example, the first Request for Admission (paraphrasing) was *Admit that AT&T headquarters are in Dallas, TX*. Laying aside whether AT&T's headquarters' location is a "**material fact**" and while this may be a minor if not inconsequential point, my clients aren't required to surmise or guess or do an internet search that generates an interior "*Well, I think so,*" as the threshhold for either admitting or denying that assertion.

Another frequent example was a Request to (again paraphrasing) *Admit that document X is a true and correct copy of Y*. It is virtually impossible to respond definitively unless the Respondent has access, possession, or detailed, precise knowledge of what that "true and correct" document is. Though my clients could articulate something like "*It sure looks official*", that is an insufficient basis to admit or deny the Request.

As to your question about reasonable inquiry, you will note that RUL's responses were in fact, *not* identical to Ms. Hyden's as Ms. Hyden has access to fewer documents. For example, RUL "Admits" 136-137 and partially "Admits" 138. In addition, for Request #139 RUL looked through its records and was unable to locate those 11-year-old documents to compare with your exhibit but was able to correspond the amounts paid to that vendor with the amounts mentioned in your documents; again, admitting what it could.

By way of particularity, take RFAs 4-6, just for example. You say in each "*as of 2009*". Should we call each of those numbers and ask for the person or entity referenced if it's been their number since 2009? And while we have them on the phone have them verify the mailing address? Even then, do we really know?

I am totally in favor of narrowing the issues for trial. I'll be happy to stipulate to many of the topics addressed in the RFAs at the appropriate time. (I can't imagine *not* stipulating that AT&T provides both landline and mobile phone services, RFA #3.)

Asking my clients to Admit or Deny that an exhibit "*is a true and authentic copy of the genuine original . . . bank account statements of Defendant Lisa Miller*" (RFA 13) at least as it relates to my clients, is beyond the scope of what they can truthfully do.

Without getting into the specifics of attorney-client conversations, I will represent to you and to the Court if need be, that we painstakingly went through each Request. You may recall that I reached out to you, particularly regarding Mr. Zodhiates.

You propounded nearly 300 Requests, not counting subparts. You heavily referenced your Requests to documents in your repository which consists of approximately 24,000 pages. Since Mr. Zodhiates is unable to access the internet, I reached out to you relatively early on to see if we could modify those requests. When that didn't happen, my client answered what he could without that reference access. Do you have a proposal for *how* to get him the referenced documents, recast some of the Requests, narrow the number?

His incarceration compounded by the facility lockdown (precluding attorney visits), compounded with phone calls that must be scheduled in advance and limited in their duration make alternatives . . . difficult, to say the least. Indeed, you may recall that ***Plaintiffs'*** Counsel in this case presented arguments to this Court enumerating the challenges of obtaining discovery from the incarcerated Mr. Zodhiates.

I believe that I've addressed your concerns and offered examples more fully explaining the factual bases for our objections. We continue to expressly reserve and not waive our respective rights and objections when and as warranted. Having said that, I am more that happy to discuss ways to resolve our disagreement even if we are only able to narrow the scope of it.

Very truly yours,
HIRSH & HEUSER, LLC

Michael R. Hirsh
Counsel for Defendants Zodhiates, Hyden, and RUL

Copy:

Adam Hochschild <adam@hochschildlaw.com>
Anthony Duprey <anthony@ndp-law.com>
Beth Littrell <beth.littrell@splcenter.org>
Brooks McArthur <bmcarthur@jarvismcarthur.com>
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Michael Hirsh <mrhirsh@hirshandheuser.com>
Norman Smith <norman@normansmithlaw.com>
Richard Boyer <rickboyerlaw@gmail.com>
Roger Gannam <rgannam@lc.org>
Sarah Star <sarahstar.esq@gmail.com>
Scott McCoy <scott.mccoy@splcenter.org>
Toddy Ferguson <cs.fergie@myfairpoint.net>
Diego Soto <diego.soto@splcenter.org>

Hirsh & Heuser, LLC
ATTORNEYS AND COUNSELORS AT LAW

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(502) 458-5879
VHEUSER@HIRSHANDHEUSER.COM

September 24, 2020

VIA EMAIL ONLY
Tyler Clemons, Esq.
Diego Soto, Esq.
Southern Poverty Law Center

RE*: Document production from Philip Zodhiates*

Tyler and Diego,

I received your email regarding our responses to your Production Requests to Philip Zodhiates.

Your email asks for the "*file from the criminal case.*" I respectfully suggest that is significantly broader, more expansive, and vaguer than your Production Request to which we responded.

I have read the Court's Order regarding another defendant's invocation of a 5th Amendment privilege, which is before the Court on that Counsel's Motion for Reconsideration. Additionally, I think a good faith argument can be made that the facts of Mr. Zodhiates case differ sufficiently from the other defendant's and Mr. Zodhiates' rights under the 5th Amendment are still in place. For purposes of this discussion, however, and to help move your question toward a resolution, we can ignore the 5th Amendment issue for the moment.

Notwithstanding the 5th Amendment issue there are other rights and privileges that exist, among them attorney client privilege and work product, for examples.

As you and I have discussed on email, Plaintiff's document repository, which is heavily referenced in your discovery requests, contains about 24,000 pages of documents. It seems like a very generous portion of them are documents (that obviously you already have) from the criminal case file to which I think you are referring (eg., a vast number of exhibits, transcripts, etc.).

I am trying to discern what else might be in the file that is not either attorney-client communication, work-product, or that you already have in your possession that might exist. After all that, what's left? Indeed, it might full well make an argument about the existence of my client's 5th Amendment privilege a moot point.

I am always happy to discuss this or any other matter with you.

Cordially,

Michael R. Hirsh

Michael Hirsh

Diego Soto

From: Michael Hirsh <mrhirsh@hirshandheuser.com>
Sent: Tuesday, June 11, 2019 4:10 PM
To: Beth Jacob
Cc: Diego Soto; Tyler Clemons
Subject: RE: WD of Virginia Zodhiates

I will be entering an appearance for all three. Waiting on a document from the Eastern District for my entry of appearance. Is it your view that no Answer is due until the Court rules on your motion?

Cordially,

Michael Hirsh
On Jun 11, 2019, at 3:46 PM, Beth Jacob <beth.jacob@splcenter.org> wrote:

> Sorry I missed your call.
>
> The status is that several parties (Liberty University, Liberty Counsel, Rena Lindevaldsen, Mathew Staver, Linda Wall and Timothy Miller) moved to dismiss the complaint with prejudice. Plaintiffs moved to stay the litigation pending the resolution of the Vermont case. Those motions were argued Friday afternoon.
>
> I agreed with Bob Hemley, Vermont counsel for Zodhiates, Hyden and RUL, that they could have an extension of the time to answer or otherwise respond to the complaint in WDVA, he did not feel he could take a position on whether they agreed to stay that litigation. Are you entering an appearance for all three of these defendants?
>
> I have cc'd Diego Soto and Tyler Clemons, two other lawyers here who are working on this case, so you also have their contact information.
>
> Beth D. Jacob
>
> Southern Poverty Law Center
>
> +1-334-956-8224
>
> ---
>
> **From:** mrhirsh@hirshandheuser.com <mrhirsh@hirshandheuser.com>
> **Sent:** Monday, June 10, 2019 12:49 PM
> **To:** Beth Jacob <beth.jacob@splcenter.org>
> **Subject:** WD of Virginia Zodhiates
>
> Beth,
>
> I will be entering an appearance in the WD of Virginia. Jumping through some administrative hoops at the moment.
>
> Just wanted to introduce myself.
>
> Can you advise on the status of the matter? I understand that there was a stipulation on no Answer due for a period. Is that still the case?
>
> Cordially,

Michael R. Hirsh

Hirsh & Heuser, LLC

125 TownPark Drive, Suite 300

Kennesaw, GA 30144

404-713-4400

From:	vheuser@hirshandheuser.com
To:	adam@hochschildlaw.com; Anthony@DupreyLaw.com; bmcarthur@jarvismcarthur.com; Daniel Schmid; Horatio Mihet; mrhirsh@hirshandheuser.com; mtierney@wadleighlaw.com; nc.smith@myfairpoint.net; rberger@dinse.com; Roger Gannam
Subject:	Re: Jenkins v. Miller et al, CASE #: 2:12-cv-00184-wks
Date:	Friday, January 29, 2021 3:23:10 PM
Attachments:	Miller-Isabella-Defendants-Release.pdf

Dear Counsel:

In addition to the documents sent to all Counsel
Miss Miller asked me to send this release to Defense Counsel.
Page 5 is a passport copy and has been redacted.

Thank you.

Vince Heuser
(502) 458-5879

Vincent F. Heuser, Jr.
Hirsh and Heuser Attorneys
3600 Goldsmith Lane
Louisville, KY 40220
(502) 458-5879

EXHIBIT
5

LC36970

GENERAL RELEASE

KNOW ALL MEN BY THESE PRESENTS that this General Release made on the 25 day of January, 2021, given by Isabella Miller (sometimes referred to as Isabella Jenkins Miller; hereinafter "Isabella")who recites as follows:

1. That for and in consideration of love, affection, and general appreciation to each Releasee and good and valuable consideration the amount and sufficiency of which I acknowledge receiving, I, Isabella Miller, irrevocably grant a full, unconditional Release to all the Defendants (Lisa Miller, Ken Miller, Timo Miller, Linda Wall, Liberty Counsel, Rena Lindvaldsen, Philip Zodhiates, Victoria Hyden, Response Unlimited, Inc. and any/all other Defendants; hereinafter "Defendants") in the litigation pending in the United States District Court in the District of Vermont (Case #2:12-CV-184, hereinafter "the Litigation")
2. I, Isabella, completely release Defendants and promise to release Defendants from all claims and judgments, the receipt, value, adequacy, and sufficiency of which good and valuable consideration is hereby acknowledged by Isabella;
3. Isabella does for herself and for her heirs, personal representatives, agents, successors, assigns, insurance companies, insurance agents or representatives, attorneys, and law firms, hereby remise, release, and forever discharge Defendants and their heirs, personal representatives, agents, successors, assigns, insurance companies, insurance agents or representatives, attorneys and law firms, of and from any and all manner of demands, judgments, actions, claims, or causes of action, or damages to property (both real and personal) or injury to their person, which either shall or may have against the other whatsoever, in

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law or in equity, whether in tort or contract or any other theory of law, and whether known or unknown, arising from, or associated with, whether directly or indirectly, and existing now, in the past, or in the future at any time, as measured from the beginning of time up to and including the date of the making of this General Release, associated with the following: (1) all liability referenced in Civil Action Number 2:12-CV-184, currently pending in the US District Court for the District of Vermont; and, (2)all other transactions, actions, failures to act, or any other relationships, in fact or in law, between the Isabella and Defendants.

4. Isabella agrees, without limitation, to completely release Defendants from any claim in the above referenced civil action;

5. Isabella warrants and represents that she knowingly and willingly executes this General Release.

6. Miscellaneous.

   a. This General Release constitutes the entire Agreement between the parties hereto. It is expressly understood and agreed that the terms of this General Release are contractual and are not merely recitals, and that the agreements contained herein and the consideration transferred under this General Release is made to compromise doubtful and disputed claims, to avoid additional litigation and the expense thereof. Nothing in this General Release shall be construed as an admission of liability by either Isabella or Defendants to the other, and any such liability is expressly denied by each party.

   b. The provisions of this General Release shall be governed and interpreted by and under the laws of the State of Virginia.

c. Isabella represents and warrants that in executing this General Release, she did not rely and has not relied upon any representation or statement made by the other party or by the other's agents, representatives or attorneys with regard to the subject matter, basis, and effect of this General Release except as otherwise specifically set forth in this General Release.

d. Should any provision of this General Release be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, provision shall be deemed not a part of this General Release, and the remaining parts, terms or provisions shall be enforceable according to their terms.

e. This General Release may not be modified in any manner nor may any rights herein be waived except by an instrument in writing signed by the party to be charged in such modification.

f. This General Release shall be binding upon and enure to the benefit of the parties in the Litigation and to their respective successors and assigns.

g. As used in this General Release, the masculine or neuter gender, and the singular or plural number, shall be deemed to include the others whenever the context so indicates or requires.

IN WITNESS WHEREOF, the hand and seal of each of the undersigned is set forth below, effective on the 25 day of January, 2021.

Isabella Miller

Isabella Miller

Sworn and subscribed before me this 25 day of January, ~~2020~~. 2021

Peter Ritter
Consular Officer

Notary Public

My commission expires: COMMISSION: Indefinite 22 USC Sec 110

REPUBLIC OF NICARAGUA
CITY OF MANAGUA
EMBASSY OF THE UNITED
STATES OF AMERICA

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

DECLARATION OF DIEGO A. SOTO IN SUPPORT OF PLAINTIFF JANET JENKINS'S RESPONSE IN OPPOSITION TO DEFENDANT TIMOTHY D. MILLER'S MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL

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 Plaintiff Janet Jenkins in this case.

2. Exhibit 1 is a true and correct copy of two emails I received from Michael Tierney, Esq., who represents Defendant Timothy Miller, on May 13, 2020, and May 15, 2020, respectively.

3. Exhibit 2 is a true and correct copy of my email correspondence with Vincent Heuser, Esq. between January 29, 2021, and February 5, 2021.

4. Exhibit 3 is a true and correct copy of *Attorney Biographies*, Hirsh & Heuser, P.C., https://www.hirshandheuser.com/index.php?page=biographies (last accessed Feb. 2, 2021). That website apparently no longer exists.

5. Exhibit 4 is a true and correct copy of my email correspondence with Michael Hirsh, Esq., who represents Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc.

6. Exhibit 5 is a true and correct copy of an email and attachment Defendants Liberty Counsel, Inc. and Rena Lindevaldsen produced with the Bates stamp LC36970–LC36974.

Executed on February 16, 2021

/s/ Diego A. Soto
Diego A. Soto
Counsel for Plaintiff Janet Jenkins