

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**REPLY IN SUPPORT OF
PLAINTIFF JANET JENKINS'S MOTION TO STAY
ALL DISCOVERY SCHEDULE/ORDER DEADLINES**

Plaintiff Janet Jenkins sensibly seeks a stay of the pending deadlines in the discovery schedule/order until the Court resolves issues of paramount importance that currently prevent the continuation of discovery in this case, including an issue Defendants, who oppose this motion, have manufactured: whether counsel may continue to represent Jenkins, and whether Jenkins (apparently unrepresented) must proceed with party depositions without the benefit of discovery from Defendant Lisa Miller, who was finally arrested after over a decade in hiding, and of additional discovery from the Defendants Liberty Counsel, Inc. and Rena Lindevaldsen (collectively, "the Liberty Counsel Defendants"), which is the subject of two pending motions to compel. The Court should grant Jenkins's motion to stay all pending discovery schedule/order deadlines, grant Jenkins's separate motion to serve Lisa by a United States marshal, *see* ECF 639, and order the parties, including Lisa, to propose a final modified discovery schedule/order by a date certain after Lisa has been served process and the Court has decided the motion to disqualify Jenkins's counsel.

First, the Court should stay the pending discovery schedule/order deadlines now that Lisa Miller, whose kidnapping of Isabella over eleven years ago gave rise to this case, was finally

arrested and returned to the United States just twenty days ago. Jenkins can now serve process on her and is entitled to seek discovery from her to support Jenkins's claims against Lisa's co-conspirators, some of whom have denied any involvement whatsoever in the planning, execution, and coverup of the kidnapping. Jenkins has a pending motion asking the Court to order a United States marshal to serve Lisa, given that Lisa is in quarantine pending her transfer from the Southern District of Florida to the Western District of New York. *See* ECF 639. Defendants admit, at the very least, that Lisa "can make a specific and targeted request for an extension of the discovery schedule if and when necessary, if and when she appears in the case." Resp. ¶ 3, ECF 643. They just want to prevent Jenkins from receiving any discovery from Lisa before they swear to tell the truth at their own depositions. It is far more prudent to hold off on party depositions now, to get Lisa up to speed on this case, rather than to create the need to re-open party depositions later.

Second, the parties need the Court to decide whether they must adhere to the current discovery deadlines—including *tomorrow's* deadline to serve any interrogatories and requests for production and the deadline for all discovery in just *forty-three days*—even though Defendants insist that Jenkins's counsel can no longer represent her and two of them have moved to disqualify counsel. *See* ECF 636; ECF 640. Jenkins has not been able to take a single party deposition because Defendants insisted on scheduling all but one of them for March, the last month of discovery. *See, e.g.*, Emails Between Counsel *11, ECF 638-2. The first party deposition had been scheduled for February 8, *see id.*—just twelve days after Lisa's arrest, ten days after Isabella's affidavits were produced, and seven days after Timothy Miller moved to disqualify. Defendants are now united in their position that Jenkins's counsel cannot continue to represent her because Isabella objected to that continued representation in an affidavit prepared

for her by an attorney whose law firm represents three defendants in this case. *See, e.g., id.* at *1–4.

Despite the clear lack of merit in that position, which Jenkins explains at length in her response in opposition to Defendant Timothy Miller’s motion to disqualify, *see* ECF 645, Defendants have objected repeatedly to counsel’s continued representation of Jenkins. Timothy Miller refused to confer with Jenkins’s counsel about how Lisa’s arrest would affect the discovery schedule, *see* Emails with Defense Counsel *1–2, ECF 635-1; Defendants refused to stipulate to a dismissal of Isabella’s claim—something they very much desire—if counsel signed it on Jenkins’s behalf, *see* Emails Between Counsel *1–4, ECF 638-2; and just today Timothy Miller objected to counsel continuing to act on Jenkins’s behalf to oppose his motion to disqualify, *see* Unopposed Mot. for Leave to Exceed Page Limit ¶ 3, ECF 646.

They even object to this request for a stay to allow the Court to resolve this issue without prejudicing Jenkins’s right to discovery; instead, they insist on proceeding with party depositions and threaten to oppose a motion to extend discovery because they “do not have unlimited availability in March, and [Jenkins’s] unilateral cancelling of depositions in February (and March) will make it impossible to complete discovery by the court-imposed deadline.” Emails Between Counsel *7, ECF 638-2. According to Defendants, the discovery clock should tick on until Jenkins acquires new counsel and that new counsel “make[s] a specific and targeted request for an extension of the discovery schedule if and when necessary.” Resp. ¶ 2.

A year ago, Jenkins agreed to Defendants’ request to postpone depositions because Defendants complained “it would be prejudicial to [them] and everyone else to attend depositions that will have to be re-taken” because some parties were not yet represented by counsel, and they threatened to oppose an extension of the discovery deadline if Jenkins “did not

agree to put discovery on hold to protect the rights of unrepresented parties.” Emails Between Counsel *5, ECF 454-1. Yet today, they unironically demand that Jenkins proceed with depositions (unrepresented, as they would have it) or forfeit them—all while the discovery clock ticks away. The Court should not reward Defendants’ tactical gamesmanship.

Third, Defendants’ response in opposition raises yet another reason to stay the pending discovery schedule/order: the Court has not yet decided pending discovery motions. *See* Resp. ¶ 4. Jenkins has two pending motions to compel against the Liberty Counsel Defendants. The first is a revised second motion to compel their compliance with her first set of requests for production, which Jenkins filed on November 11, 2020. *See* ECF 591. The Court heard argument on that motion on December 21, 2020, and ordered the Liberty Counsel Defendants to file a declaration concerning certain of Jenkins’s proposed search criteria. *See* ECF 622. The Liberty Counsel Defendants filed that declaration on January 7, 2021, *see* ECF 630, and Jenkins filed a response on January 14, *see* ECF 632. The second is a motion to compel the Liberty Counsel Defendants to produce records Jenkins subpoenaed from AT&T, which Jenkins filed on October 28, 2020. *See* ECF 582. Briefing on that motion completed on January 15, 2021, when the Liberty Counsel Defendants filed a sur-reply with the Court’s leave. *See* ECF 633. Although Jenkins believes the Court can easily grant her motion based on the briefing, the Liberty Counsel Defendants requested a hearing, which the Court has not yet scheduled. Under Defendants’ position, Jenkins’s current counsel cannot argue in support of that motion. Jenkins should not be unfairly forced to proceed with party depositions, especially of the Liberty Counsel Defendants, without even a decision on whether the Court will compel the production of this discovery.

Three accusations in Defendants’ response warrant reply. Defendants baselessly accuse Jenkins’s counsel of having yet another conflict of interest, this time because counsel did not

recklessly dismiss Isabella’s claims immediately. *See* Resp. ¶ 2; *see also* ECF 645. Jenkins—as Isabella’s mother and next friend—and her counsel have always acted in Isabella’s best interests. Whether Defendants like it or not (and they clearly do not), Jenkins rightfully hired counsel for Isabella to file this case for herself and Isabella. Regardless of Jenkins’s ability to act as Isabella’s next friend, counsel were not magically freed from all their duties and responsibilities to Isabella at the stroke of midnight on her eighteenth birthday or upon the ping of a new email from a conflicted attorney who claimed to represent the victim of a decade-long kidnapping and to have acquired affidavits, ordering the dismissal of her claims against her kidnapers and the termination of her counsel, and a release of all liability from those kidnapers. To the contrary, counsel had a professional, ethical, and moral duty to confirm the veracity of that new information before taking any action whatsoever adverse to Isabella’s interests—especially before dismissing her claims. Counsel rightfully questioned Isabella’s new attorney about the circumstances that led to his engagement and about the evident conflict of interest, prompting him to concede an apparent conflict of interest and to withdraw.* Counsel acted carefully and

* Despite Defendants’ “doubt[] ... that the mere fact of Isabella’s involuntary representation by ‘next friend’ counsel Isabella did not choose, in and of itself, ever precluded another attorney from accepting Isabella’s voluntary engagement to terminate the involuntary representation,” Resp. ¶ 2 n.2, Rule 4.2 of the Vermont Rules of Professional Conduct is clear: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” That “rule applies even though the represented person initiates or consents to the communication.” Vt. R. Prof. Conduct 4.2 cmt. 3. Isabella, in the very affidavits Defendants rely on for their disqualification argument, concedes that Jenkins’s counsel were her attorneys by ordering them to dismiss her claims and terminating their engagement. *See* Isabella Aff. ¶¶ 15–18 (Jan. 25, 2021), ECF 636-1; Isabella Aff. ¶¶ 3, 7–8 (Jan. 26, 2021), ECF 636-2. Only a disinterested attorney could ethically agree to provide her alternative representation. *See* Vt. Bar Ass’n, Advisory Ethics Opinion 2001-01 (advising that, “[w]here a client seeks alternative representation from an attorney *who otherwise has no interest in the matter concerning which the client seeks representation*, application of the anti-contact rule should not be required” (emphasis added)).

responsibly to *protect* Isabella's interests, not to act *adversely* to them. *Cf., e.g., Blanchard v. Edgemark Fin. Corp.*, No. 94 C 1890, 1998 WL 988958, at *14 (N.D. Ill. Sept. 11, 1998) (holding that an attorney's motion to vacate part of client's settlement entered into without attorney's permission was not materially adverse to client because client received the full benefit of the settlement).

Next, Defendants carelessly accuse Jenkins's counsel of perjury. *See* Resp. ¶ 1. The same day that Isabella's other attorney withdrew, a new attorney, who did not seem to have any conflict of interest, entered an appearance for Isabella. *See* ECF 637. She initially confirmed for Jenkins's counsel that Isabella wished to remove herself from the case, prompting counsel to confirm that information to Defendants. But the very next day, she in no uncertain terms told Jenkins's counsel 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). That was the last Jenkins's counsel heard of Isabella's wishes before filing this motion to stay: Isabella had made no decisions. That Isabella, after consultation with an apparently disinterested attorney and after Jenkins had already moved to stay, ultimately decided to in fact move to dismiss her claims with prejudice does not make Jenkins's counsel liars, perjurers, or peddlers of half-truths.

Finally, Defendants misleadingly accuse Jenkins of seeking an "indefinite" stay of discovery. *See* Resp. 1; *see also id.* ¶¶ 3–4; Def. Linda Wall's Joinder in Defs. Liberty Counsel & Rena Lindevaldsen's Opp'n to Mot. to Stay, ECF 644. Specifically, they raise a concern about the "open-ended ... undefined 'appropriate period' of time" Jenkins separately seeks to serve Lisa. Resp. ¶ 3 n.3 (citing Pl. Janet Jenkins's Mot. for Extension of Time to Serve Def. Lisa Miller & Order that Service Be Made by a U.S. Marshal, ECF 639). As that other motion makes clear, Rule 4(m) of the Federal Rules of Civil Procedure allows the Court to "extend the time for

service *for an appropriate period*,” (emphasis added), and because Jenkins also asks the Court to order that service be made by a United States marshal, given “the obstacles Jenkins may face in having Lisa Miller served,” *id.*, that appropriate period need not extend longer than is necessary for the marshal to serve process—or for Jenkins to overcome those obstacles and serve Lisa sooner. Once Lisa is served process and the Court confirms Jenkins’s counsel can continue to represent her, the parties can negotiate and propose a final discovery schedule/order to move this case to a fair conclusion.

CONCLUSION

Jenkins’s motion to stay all pending discovery schedule/order deadlines, ECF 638, should be granted, and the Court should order the parties, including Lisa Miller, to propose a final modified discovery schedule/order by a date certain after Lisa has been served process and the Court has decided the motion to disqualify Jenkins’s counsel.

Respectfully submitted.

February 16, 2021

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CERTIFICATE OF SERVICE

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

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