UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, for herself and as next friend of ISABELLA MILLER-JENKINS, A/K/A ISABELLA MILLER, Plaintiffs	*	
v.	*	**Civil No. 2:12-cv-184-wks**
KENNETH L. MILLER, LISA ANN MILLER, F/K/A LISA MILLER-JENKINS, TIMOTHY D. MILLER, RESPONSE UNLIMITED, INC., for itself and as an agent of LIBERTY COUNSEL, LLC, PHILIP ZODHIATES, individually and as agent for RESPONSE UNLIMITED, INC., VICTORIA HYDEN, f/k/a VICTORIA ZODHIATES, individually and as agent for both RESPONSE UNLIMITED, INC., LINDA M. WALL, MATHEW D. STAVER, individually and as agent for LIBERTY COUNSEL, LLC, RENA M. LINDEVALDSEN, individually and as agent for LIBERTY COUNSEL, LLC, and LIBERTY COUNSEL, LLC, Defendants	*	

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

On the basis of two affidavits filed by Isabella Miller, a Motion to Disqualify Plaintiffs' Counsel was filed on February 1, 2021. See Doc. 636. Isabella refiled her affidavits with the Court on February 10, 2021. See Doc. 641-1, 641-2 and 641-3. Janet Jenkins filed a Response in Opposition on February 16, 2021. See Doc. 645. Isabella did not file any Opposition. This Reply responds to the arguments raised in Janet Jenkins' Opposition.

I. Both Express and Potential Conflicts Require Disqualification Now

Isabella has expressed her three goals through the documents she has submitted to the Court. First, Isabella releases all defendants. Doc. 645-5. Second, Isabella asserts that Janet's attorneys are acting contrary to Isabella's interests and therefore instructs them to withdraw from representing either her or Janet. Doc. 641-1, ¶¶ 15-20; Doc. 641-2, ¶ 3. Third, Isabella asked to be let out of this case as a plaintiff. Doc. 641-1, ¶¶ 15-20; Doc. 641-2.

There are currently several express conflicts between Isabella and Janet and the potential for more conflicts in the future. First, and most clearly, there is the express conflict about whether this litigation should even continue. Isabella does not want the claims against her mother Lisa and those alleged to have assisted Lisa to continue while Janet wants Isabella's attorneys to continue to litigate against Lisa and the other defendants. This express conflict occurred while counsel was still concurrently representing both Janet and Isabella as parties in this case and continues even after Isabella has had her claims dismissed. This is an express conflict and nothing more is required to support disqualification. Nevertheless, even if there was any doubt as to whether this conflict requires disqualification, the Second Circuit has held that "doubts should be resolved in favor of disqualification." *Cheng v. GAF Corp.*, 631 F.2d 1052, 1059 (2d Cir.1980), judgment vacated on other grounds, 450 U.S. 903 (1981); see also *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975) ("in the disqualification situation, any doubt is to be resolved in favor of disqualification.")

Second, there is an express conflict between Janet and Isabella regarding the legitimacy of Isabella's affidavits. Janet recognizes the legitimacy of affidavits to the extent that they assert a desire to leave the case but Janet disputes the legitimacy of the affidavits with regard to Isabella's raising of conflicts by her former counsel continuing to represent Janet. See

Opposition to Motion to Disqualify, Doc. 645, p. 13-14.[1] Janet cannot have it both ways. Janet's challenge of Isabella's affidavits is itself indicative of the conflict between Janet and Isabella and why concurrent counsel must be disqualified now from representing either.

Third, there is a potential, and even likelihood, of further conflicts to arise in the future. In her Opposition, Janet erroneously argues that the Court should wait until more conflicts arise to disqualify counsel. Doc. 645, p. 17. But, in this case, additional conflicts are nearly certain to occur at Isabella's deposition or trial testimony when Janet/Isabella's counsel cross examines Isabella.

II. The "Successive Relationship Test" Does Not Apply Because Counsel's Conflicting Representations are not in Different Successive Cases But Concurrently in the Same Case

The Second Circuit has recognized that "[t]he standard for disqualification varies depending on whether the representation is concurrent or successive." *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005). When counsel has represented two parties concurrently in the same case, the attorney who is the target of a disqualification motion bears the burden to "show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation.'" *Id*. at 133 (emphasis in the original). Janet cannot satisfy this threshold showing because Isabella has expressly stated that her interests are different from Janet's, that her attorneys have been acting contrary to her interests and because Isabella instructed her concurrent counsel to withdraw. See Doc. 641-1, 641-2 and 641-3. The fact that Isabella has now granted a release to all the defendants for the same claims that

[1] Janet's Opposition has different page numbers on the bottom of the page from the page numbers inserted by the court in the top header. For clarity, we will use only the page numbers in the Court's header.

Janet wishes to continue to pursue makes the concurrent conflict even more clear. See Release at Doc. 645-5.

In her Opposition, Janet argues the wrong standard. Janet argues the Court must apply the "substantial relationship test" otherwise known as the "successive relationship test" and criticizes Timothy for not citing the successive representation test. Doc. 645, p. 21-21. Timothy does not cite the successive relationship test because that test does not apply to the facts of this case. In this case, counsel has represented both Isabella and Janet concurrently ***in the same case***. The cases cited by Janet involve conflicts in different and successive different cases in which the court first had to determine if the issues in the first case and the second case were substantially related and then measure the level of adversity. In this case, counsel has concurrently represented both Janet and Isabella in the same case and desires to continue to represent just Janet ***in this same case***. Therefore, there is not a "successive representation" and the "successive representation test" does not apply in this case.[2] *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005); see also *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (holding that "the 'substantial relationship' test does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the representation of a former client has been terminated

[2] In fact, as of the filing of Janet's Opposition, counsel were still counsel of record for both Janet and Isabella. Isabella specifically demanded, in her affidavit that "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." Second Affidavit of Isabella Miller, ¶ 3 at Doc. 641-2. Isabella's new counsel verified that these are Isabella's directions. See Doc. 641-3. Nevertheless, Sarah Starr, Scott McCoy, Tyler Clemons, Diego A. Soto, Frank H. Langrock, Jessica L Stone, and Maya G. Rajaratnam have specifically ignored Isabella's demands and refused to file withdrawals. The Court dismissed Isabella's claims on February 23, 2021. Doc. 650. Nevertheless, concurrent counsel never filed their withdrawals as directed.

and the parameters of such relationship have been fixed. Where the relationship is a continuing one, adverse representation is prima facie improper.").

Furthermore, Janet argues that under the "successive relationship test" her and Isabella's interests are not "materially" adverse under Rule 1.9 as "[d]irect adversity requires head-to-head opposition in the same matter . . . [and she] and Isabella are not directly adverse because neither has brought a claim against the other and Isabella is not a defendant in the case." Doc. 645, p. 16-17. Even if concurrent counsel had filed their withdrawals, adversity would not require head-to-head opposition. The Vermont Supreme Court has recognized that when counsel seeks to represent different parties in the same matter, the adversity required for disqualification may be just a potential conflict. In the case of *In re L.H.*, 206 VT 596 (2018), the Supreme Court recognized merely the potential for a conflict of interest to arise in the future was sufficient to disqualify an attorney from first representing minor children and then the State in a termination of parental rights proceeding. The Court held "for the purposes of the trial court's disqualification determination, we treat the potential adversity of interest that arises when an attorney has represented the children then represents the State as disqualifying rather than conducting a case by case assessment of the actual material adversity between the parties' interests." *Id*. at 605, ¶ 7. The Court made a bright line rule for all abuse and neglect proceedings but indicated that it should also be applied in other cases similarly involving the parent – child relationship. *Id*. at 611, ¶ 27. Finally, the Court recognized that, contrary to the holdings of other states, counsel should be disqualified on the basis of just the appearance of impropriety even if there is not an ethical violation under Rule 1.9. *Id*. at 609, ¶ 21; *Id*. at 606, ¶ 16, fn. 6. This holding is consistent with Second Circuit precedent that where counsel has represented two parties concurrently in the same case, disqualification should be granted unless

"[t]he attorney [can] show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation.'" *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005)(emphasis in the original).

III. Isabella, While Seeking Dismissal of Her Own Claims, Will Always Be a Central Part of This Litigation

Janet argues that disqualification is not necessary because Isabella's interests will not be impacted if Isabella is dismissed as a party and Janet agrees not to have their concurrent counsel take a deposition or call Isabella as a witness at trial. Doc. 645, p. 16-20. The argument is a fiction. This entire case is about Isabella and there are a myriad of issues and determinations for which Janet and Isabella's interests have already diverged. Even without Isabella as a party to the case, the case will be about her and will impact her. Isabella does not want the claims against her biological mother and those who allegedly assisted her mother to proceed. It is difficult to conceive of a more direct conflict of interests. As the Vermont Supreme Court recognized, especially in cases involving parents and children, the parties' interests are often dynamic. Therefore, the mere potential for a conflict of interest is sufficient for disqualification. *In re L.H.*, 206 VT 596, 607, ¶ 17 (2018). As Janet admits in her Opposition, in order to avoid a direct conflict, Janet's counsel will need to, at the very least, hire an "untainted attorney to cross-examine Isabella independently" at her deposition. Doc. 645, p. 17, fn 4.[3] A similarly untainted

[3] Janet argues that she could go forward with her current counsel that she shares with Isabella for all aspects of the case except for Isabella's deposition and trial testimony for which she would retain separate "untainted counsel" citing ABA Opinion 21-497, at p. 7-8. The ABA Opinion did not say that this was possible but rather cited a NYC Bar Opinion suggesting that this might be possible. The NYC Bar opinion stated that hiring separate counsel for the limited role of serving discovery on your own former client is only possible with your former client's consent. See NYC Bar Opinion 2017-6 holding that "with the litigation client's consent, another lawyer may be retained for the limited purpose of taking discovery from the client-witness." (available at https://www.nycbar.org/member-and-career-services/committees/reports-

attorney would need to be employed to cross examine Isabella at trial. Given the centrality of Isabella to this alleged conspiracy to kidnap case, the entire trial will be tainted by the confusion over who was representing whom and whether concurrent counsel are acting for Janet's interests and contrary to Isabella's interests. Right now, Isabella had asked concurrent counsel to withdraw and Janet has asked concurrent counsel to stay. Even on such a simple matter, the two different clients' instructions are clearly divided and concurrent counsel have chosen to ignore Isabella's clear instructions in favor of Janet's contrary instructions. As the Third Circuit has recognized, "Conflicts of interest arise whenever an attorney's loyalties are divided, and an attorney who cross-examines former clients inherently encounters divided loyalties." *United States v. Stewart*, 185 F.3d 112, 121 (3d Cir. 1999). Concurrent counsel has a conflict for which disqualification is required now and even after they withdraw from representing Isabella they cannot continue to represent Janet and cross examine Isabella.

IV. Burden of Proof is on Janet Jenkins

In her Opposition, Janet asserts that Timothy carries a "heavy burden" of showing that her counsel's conflict of interest creates a real risk of taint to trial. See Doc 645, p. 11.[4] Again,

listing/reports/detail/formal-opinion-2017-6-issuing-a-subpoena-to-a-current-client). Janet does not have Isabella's consent. Therefore, this would not be an option in this case.

[4] The cases frequently discuss the heavy burden placed on a party seeking his opponent's disqualification to show the similarity of the first action and the second action. The Second Circuit has recognized that courts should grant "disqualification only upon a showing that the relationship between issues in the prior and present cases is "patently clear". . . .. Put more specifically, disqualification has been granted or approved recently only when the issues involved have been 'identical' or 'essentially the same.'" *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 739–40 (2d Cir. 1978). In this case, the issues are identical. Counsel have concurrently represented both Isabella and Janet regarding the claims in the Second Amended Complaint pertaining to the alleged conspiracy to kidnap and now counsel proposes to represent just Janet regarding the claims in the Second Amended Complaint pertaining to the alleged

this may be the standard in successive representation cases but not in cases where counsel concurrently represented both parties. Janet only cites cases involving successive representation where counsel's previous representation in one case is deemed to be a material conflict with representation in successive related cases. The Second Circuit has recognized, however, "[t]he standard for disqualification varies depending on whether the representation is concurrent or successive. In cases of concurrent representation, we have ruled it is 'prima facie improper' for an attorney to simultaneously represent a client and another party with interests directly adverse to that client." *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005). It is prima facie improper for counsel, having concurrently represented Isabella and Janet and receiving contrary instruction, to continue to represent just Janet.

In cases of concurrent representation in the same case, the Second Circuit has placed the burden on the attorney arguing against disqualification to demonstrate why they should not be disqualified. *Id*; See also *GSI Commerce Sols., Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 209 (2d Cir. 2010)(finding attorney with a concurrent conflict between two existing clients could not meet his burden). Janet and Isabella's conflict of interest does not arise from separate successive cases but from their previous concurrent representation in this same case. Counsel concurrently represented Janet and Isabella even though their interests were adverse. Therefore, Janet has the burden of proof of showing that counsel that concurrently represented both her and Isabella in this case should not be disqualified.

A frequent reason for not granting a disqualification motion is the delay and disruption to the pending litigation. *See, e.g. Bd. of Ed. of City of New York v. Nyquist*, 590 F.2d 1241, 1246

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conspiracy to kidnap. Therefore, Timothy has met his burden to show that the relationship between the issues is "patently clear."

(2d Cir. 1979)(noting that because disqualification "motions inevitably cause delay" courts should be reluctant to grant them without good cause). In this case, however, Janet has asked for delays to be able to serve Lisa and then give Lisa time to participate in discovery. See Doc. 638. Defendant Timothy Miller has taken no position on Janet's request for a stay. Therefore, any delay necessary for Janet to obtain new counsel would not prejudice her as she was already asking for a stay to allow Lisa to be served and participate in discovery.

V. Any Party Can Move for Disqualification or the Court Can Disqualify Sua Sponte

Janet makes a passing argument that Timothy does not have standing to move for disqualification. Doc. 645, p. 24. Isabella did not oppose the Motion to Disqualify and in fact asked that one of the parties in the case so move if counsel does not voluntarily withdraw. See Doc. 641-1, ¶¶ 15-20; Doc. 641-2. Regardless, any party can move for disqualification or the court can disqualify *sua sponte*. See *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 168 (2d Cir. 2013)(affirming district court's sua sponte disqualification of counsel).

VI. Janet Does Not Have Isabella's Consent to Continue to Have Previously Concurrent Counsel Go Forward Representing Just Janet

Finally, Janet does not even address the necessity under Rule 1.9 that she needs Isabella's consent to have their previous joint counsel represent just Janet. Pursuant to Vermont Rule of Professional Conduct 1.9 (a):

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client ***unless the former client gives informed consent, confirmed in writing.***

Janet does not have Isabella's consent. See Doc. 641-2. Therefore, the Court should disqualify concurrent counsel from representing Janet and give Janet an appropriate amount of time to find new counsel.

WHEREFORE, Defendant, Timothy D. Miller, respectfully requests that this Honorable Court:

A. Disqualify Plaintiffs' Counsel from representing Janet Jenkins or any other party in this case;

B. Stay the case for not more than 30 days to allow Janet Jenkins to obtain new counsel; and

C. Such other relief as may be just and necessary.

Respectfully submitted,
Timothy D. Miller
By his attorneys,

WADLEIGH, STARR & PETERS, P.L.L.C.

Dated: February 25, 2021

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CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date Defendant Timothy D. Miller's REPLY TO PLAINTIFF JANET JENKINS'S RESPONSE IN OPPOSITION TO DEFENDANT TIMOTHY D. MILLER'S MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL was filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record.

/S/ Michael J. Tierney
Michael J. Tierney

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