

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

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JANET JENKINS, et al.,)	
Plaintiffs,)	Docket No. 2:12-cv-00184
)	
v.)	
)	
KENNETH L. MILLER, et al.,)	
Defendants.)	
)	

**DEFENDANTS LIBERTY COUNSEL, INC. AND
RENA M. LINDEVALDSEN’S POST-HEARING MEMORANDUM
ON ESI SEARCH TERMS, AT&T RECORDS, AND LITIGATION DELAY**

Pursuant to this Court’s leave granted at the end of the March 8, 2021 hearing, Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen (“Defendants”) file this brief to respond to Plaintiff Janet Jenkins’ January 14, 2021 Post-Hearing Memorandum (dkt. 632) (“Post-Hearing Memo I”). In particular, Defendants respond to Plaintiff’s shifting of the target once more, and her submission of yet another, brand-new and previously unaired set of proposed ESI search terms, equally as onerous, unworkable and pointless as her previous submissions. **(Part I)**.

Defendants also respond briefly to some of the points Plaintiff now belatedly makes in her most recent, uninvited and unauthorized *second* Post-Hearing Memorandum (dkt. 658) (“Post-Hearing Memo II”), filed yesterday (March 10, 2021). In particular, Defendants respond to: (1) Plaintiff’s attempt to salvage, and even expand, the fishing expedition into Defendants’ AT&T telephone records, which this Court has already denied **(Part II)**; and (2) Plaintiff’s suggestion that Defendants’ opportunity to swiftly exit this case via summary judgment should be delayed, again, for several more years **(Part III)**.

I. The Court Should Reject Plaintiff's Attempt to Again Shift the Target on ESI Search Terms, and Should Deny Plaintiff's Revised Second Motion to Compel in its Entirety.

Predictably, Plaintiff has done it again. With all of her previous unceasing and ever-changing streams of ESI search terms shown to be unworkable and fruitless, instead of abandoning her efforts and realizing that she has received all of the documents to which she is entitled, Plaintiff in her Post-Hearing Memo I **again** shifts the goal posts. Plaintiff proposes yet another set of brand-new search terms, equally as onerous and unworkable as her previous installments, without any effort to address the demonstrated fact that she has already received everything.

The Court will recall that, prior to the December 21, 2020 discovery hearing, during the briefing of her Revised Second Motion to Compel (dkt. 591), Plaintiff began to propose a series of brand new ESI search terms to the Court that she had never proposed or negotiated in discovery with Defendants. As demonstrated by Defendants, these search terms were wildly overinclusive because they included extremely common first names and nouns in isolation, which would have yielded over **half-million** mostly false hits. (Dkts. 607, 607-1). In her Reply brief, filed just before the discovery hearing, Plaintiff then again shifted tactics and proposed yet another set of brand new ESI search terms that she had never proposed to Defendants in discovery, this time purporting to narrow them with the combination of just two common names in the same search. (Dkt. 618 at 7-8). At the December 21, 2020 hearing, Defendants demonstrated to the Court that this latest installment was still much too broad, and still resulted in an overwhelming majority of false hits.

The Court at the hearing requested Defendants to add an additional, third name, to a two-name combination proposed by Plaintiff, and to file a declaration with the results, so that the Court could assess the feasibility and need for any further ESI searches. (Dkt. 622). Defendants complied with the Court's request, and filed a Declaration (dkt. 630) indicating that the addition of the third name requested by the Court **still** produced 1,610 hits, of which the **overwhelming majority**

(1,459, or **91%**) were false hits. (*Id.*) Of the remaining 9% of positive hits, more than half were privileged post-lawsuit communications. (*Id.*) The remaining 67 hits (positive, pre-lawsuit hits) comprised **only 4%** of the total hits – showcasing just how flawed Plaintiff’s proposed search terms are, even as narrowed by the Court. (*Id.*) More importantly, Defendants had previously produced or privilege-logged **all** of these documents during their previous discovery efforts. (*Id.*)

Therefore, Defendants demonstrated that **just one** of the numerous ESI search terms proposed by Plaintiff (even as narrowed by the Court) was sufficient to rob Defendants of almost a full work-week (37 hours), and yet produced not a single additional responsive document that had not already been logged or produced to Plaintiff. (*Id.*) And Defendants explained the logical reason for this unsurprising result: Defendants had previously manually searched every individual document in the network drive where electronic Miller-Jenkins documents and communications would have been saved, such that ESI sampling would not produce additional usable hits. (*Id.*)

Predictably, Plaintiff is still undeterred, and has now proposed yet another slew of brand new ESI search terms that she has never before proposed or negotiated with Defendants. (Dkt. 632 at 3, 7-9). This is just what Defendants feared and predicted at the December 21, 2020 hearing, when the Court asked Defendants to run one more search with a three-name combination. Defendants told the Court that they would comply, but that Plaintiff would merely change the terms again. This is exactly what Plaintiff has now done, again. (Dkt. 632 at 3, 7-9).

However, Plaintiff does not address the fact that her last round of ESI searches was demonstrated to be useless. (*Id.*) Plaintiff acts as if the Court had never asked Defendants to run the demonstrative search at the December 21, 2020 hearing, and Defendants had never run that search and demonstrated that dozens of additional hours produce not a single additional document.

(*Id.*) And, Plaintiff does not explain how any of her new search terms are different from her failed proposals, or why any of them would be expected to produce different results. (*Id.*)

Indeed, and most problematically, Plaintiff makes no effort to address the root problem with all of her ESI searches, and the reason why none of the searches she continually proposes are likely to ever yield relevant, non-privileged and previously unproduced documents. (*Id.*) That is, no matter how many times she changes her proposed ESI search terms, Plaintiff cannot change the fact that Defendants have already manually searched every individual document in the network drive where electronic Miller-Jenkins documents and communications would have been saved, such that ESI sampling would not produce additional usable hits.

The Court can be assured by now that the brand new search terms proposed by Plaintiff would visit countless additional hours, indeed many weeks' worth of work, on Defendants, but yield only false hits, privileged pre-suit communications, and already produced documents. The Court should not impose such a needless burden on Defendants. If the parties are going to proceed to taking the remaining depositions in this case, Defendants will need to devote their time and attention to those depositions, and not waste weeks of legal work on demonstrably fruitless searches. Defendants would be severely prejudiced.

Beyond the improper, unworkable, and ever-changing ESI search terms she advances, Plaintiff again complains about Defendants' search and production of documents regarding the ten specific dates of interest that Plaintiff has identified. (Dkt. 632 at 6-9). Yet Plaintiff cannot deny or change the fact that **Defendants have searched all calendars available to them** (*e.g.*, in their custody, possession, or control), and all communications on those ten dates, and produced hundreds of pages of documents that, unsurprisingly, had absolutely nothing to do with this case. (Dkt. 607 at 22-24). Now, as if that exercise wasn't intrusive and futile enough, Plaintiff is asking

the Court to expand her fishing expedition to include such exceedingly broad terms as “tomorrow,” “yesterday,” “last week,” “Thursday,” and dozens of others. Even confined to the numerous dates and weeks as to which Plaintiff is purportedly asking, these terms will impose upon Defendants a burden of **hundreds** of additional hours to search for responsive records, and then to review each of the thousands of resulting hits to confirm what everyone already knows – the numerous documents containing the extremely common search terms “tomorrow” or “yesterday,” for example, have absolutely nothing to do with any “conspiracy” alleged by Plaintiff.

Finally, the Court should similarly reject Plaintiff’s belated and entirely re-hashed arguments on privilege log “deficiencies” (dkt. 632 at 9-10), and should deny the Revised Second Motion to Compel altogether. Plaintiff still does not address or deny the demonstrated facts that (1) she advised Defendants that she would accept “broad” privilege log descriptions (*i.e.*, stating **only** that a withheld communication was “concerning the Vermont litigation”); (2) Defendants have voluntarily revised and expanded their privilege log descriptions; and (3) Defendants have provided substantially **more** detailed descriptions than what Plaintiff indicated she would accept, and what Plaintiff’s counsel provide in their other cases. (Dkt. 607 at 38-42). The Court should not permit Plaintiff to go back on her word and to needlessly saddle Defendants with more discovery burdens.

In sum, Plaintiff has received all that she is entitled to, and more. Enough is enough. The Court should deny Plaintiff’s Revised Second Motion to Compel.

II. The Court Should Deny Plaintiff’s Motion to Compel Production of AT&T Telephone Records, as the Court Already Indicated it Would Do at the Hearing, and Should Limit Defendants’ Search of the AT&T Records to Names and Phone Numbers that Plaintiff Identifies and Connects to this Case.

In her most recent Post-Hearing Memorandum II, which this Court did not invite or authorize, Plaintiff attempts to undo this Court’s rejection of her fishing expedition into

Defendants' AT&T telephone records, and even to expand it. (Dkt. 658 at 4-6). The Court should reject these attempts and stand by its decision at the hearing to deny Plaintiff's motion.

First, Plaintiff presumes that the Court would or should "grant in part" Plaintiff's motion to compel production of the AT&T records. (*Id.* at 4). But there is no "part" of Plaintiff's motion that the Court has granted or needed to grant. As the Court noted at the hearing, in pre-filing discussions Defendants had already voluntarily offered to search the AT&T records for telephone numbers Plaintiff identifies, belonging to individuals that Plaintiff identifies as having a connection with this case, and to provide Plaintiff with any resulting hits. Plaintiff did not need to file her motion at all. And **Plaintiff did not even ask for the relief offered by Defendants in her motion** – she actually **expressly rejected it**. Thus, there is no "part" of Plaintiff's motion that this Court needs to, or can, "grant," as Plaintiff now presumes. Instead, the Court should **deny** Plaintiff's motion in its entirety, subject to Defendants' on-the-record confirmation that they will do what they had voluntarily agreed to do before Plaintiff filed the ill-advised motion to compel.

These are not inconsequential semantics. Plaintiff has demonstrated a penchant for continually painting Defendants as improperly resisting her discovery efforts, and she has made a habit of asking this Court incessantly for sanctions—even case-ending sanctions—for the non-existent discovery "abuses" of which she continually complains. There is no doubt that if the Court were to "grant" any "part" of Plaintiff's instant motion, the next installment of Plaintiff's narrative of discovery "abuses" and "bad faith" will include references to her imagined "success" on the instant, unnecessary motion.

In concluding that Defendants are not obligated to provide Plaintiff with anything other than what they had voluntarily agreed to provide prior to the filing of Plaintiff's motion, the Court

has rightfully **denied** Plaintiff's motion, not "granted" it in any "part." The Court's forthcoming Order should reflect this fact—not Plaintiff's revised recent history.

Second, Plaintiff attempts now to revive the "fishing expedition" that the Court rejected, by asking the Court for license to dump an untold number (presumably hundreds) of name-less phone numbers in Defendants' lap, without any obligation to connect those numbers **to this case**. (Dkt. 658 at 5-6). This would permit Plaintiff to discover the telephone numbers, and then the identity and home addresses, of numerous Liberty Counsel donors, constituents, clients and supporters, **even if they have absolutely nothing to do with this case**. This is precisely the constitutional harm that Defendants were seeking to avoid; that the Court rejected; and that Plaintiff now attempts to resurrect.

There is no reason for this. After years of endless discovery, including non-party subpoenas to numerous phone companies and alleged "intermediaries," Plaintiff already knows the identity and phone numbers of all alleged "co-conspirators" or "intermediaries." Plaintiff should be allowed to inquire of Defendant's AT&T records **only** as to **names and associated phone numbers** that **Plaintiff** identifies to have a reasonable connection to this case. If there truly is a phone number for which Plaintiff does not have a name that would reasonably connect that number to this case, Plaintiff should still be required to identify an alleged connection between that phone number and this case, before she can discover whether that number appears in Defendants' phone records. Anything less will give Plaintiff the freewheeling fishing expedition she contemplated.

Third, and finally, Plaintiff seeks not only to revive, but also to substantially expand that fishing expedition. In her closing paragraph, she now asks the Court to make Defendants independently search their **other** records (not just the AT&T records before the Court) for **additional** phone numbers connected to individuals she will identify, and then search those

numbers as well in the AT&T records. (Dkt. 658 at 6). This is now **more** relief than Plaintiff would have gotten had she prevailed on her original motion, because that motion was limited only to the AT&T records themselves. As noted, Plaintiff has conducted years of discovery, and has amassed numerous names and telephone numbers which she believes are connected to this case. Searching for **those** phone numbers within the 163,000 entries in the AT&T records is onerous and intrusive enough. The Court should not allow Plaintiff to force Defendants to expand Plaintiff's list even further. The Court should limit the search to only the names and associated phone numbers that **Plaintiff** provides to Defendants (and for which Plaintiff articulates a reasonable connection to this case).

III. The Court Should Not Delay Defendants' Opportunity to Exit this Case at Summary Judgment.

Having recently feigned concern for Lisa Miller's rights in this lawsuit, and having used that purported concern to delay this case until Lisa Miller could be served so she can participate in discovery, Plaintiff now abandons those purported concerns and—with no motion from Lisa to stay this case even pending before this Court—Plaintiff wants the Court to force Lisa to participate in discovery without any regard for the fundamental constitutional rights she possesses with respect to the concurrent criminal indictment. (Dkt. 658 at 1-3). The most troubling aspect of Plaintiff's ruminations about what may or may not happen in the near future is Plaintiff's suggestion that Lisa Miller should be made a part of this case “[e]ven if the Court stays the case pending Lisa's criminal prosecution,” and even if that delays this case for several more years, because Plaintiff wants to hold Lisa and her “co-conspirators” “accountable” all at once. (*Id.* at 3).

In purposefully omitting the term “**alleged** co-conspirators” and presuming that she has already proven her claims, Plaintiff obscures a very important detail: as we approach the end of years of discovery, Plaintiff has not gathered any evidence to prove the “conspiracy” she has

concocted as to Liberty Counsel and Rena Lindevaldsen. While Plaintiff has held this case over these Defendants' heads for over five years, and has forced them to spend **thousands** of hours on intrusive and onerous discovery, these Defendants are now on the verge of being able to shed these unfair and unfounded burdens through summary judgment. Delaying this inevitable result now, for several more **years**, would work a profound prejudice on these Defendants. Under no circumstances should the Court countenance such a result.

Once the disqualification issues are decided, irrespective of who will represent Janet going forward, the Court should set a swift schedule for completion of discovery, so that Defendants can proceed expeditiously to summary judgment. If delays in this case are constitutionally or legally required to protect the rights of the criminally accused, those accused should be severed from this case, so that these delays do not further prejudice these Defendants. As it already stands, and as these Defendants will demonstrate in future briefing, Liberty Counsel and Lindevaldsen have the clear right **not** to be saddled with the Fifth Amendment invocations of any other defendants (and any adverse inferences resulting therefrom), the res judicata baggage of any criminally convicted defendant, or the time delays occasioned by a criminally accused but not convicted defendant. Since Liberty Counsel and Lindevaldsen could not even lawfully be tried alongside other defendants with such prejudicial baggage, it makes no sense to deny Liberty Counsel and Lindevaldsen the opportunity to exit this case through summary judgment at the earliest opportunity possible.

Respectfully Submitted,

Anthony R. Duprey
DUPREY LAW, PLLC
11 Main Street, Suite B110F
Vergennes, VT 05491
802-870-6563
anthony@dupreylaw.com

/s/ Horatio G. Mihet
Horatio G. Mihet*
Roger K. Gannam*
Daniel J. Schmid*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
407-875-1776
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org

*Admitted pro hac vice

Attorneys for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

CERTIFICATE OF SERVICE

I hereby certify that on this March 11, 2021, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notice system.

/s/ Horatio G. Mihet
*Attorney for Defendants
Liberty Counsel, Inc. and
Rena M. Lindevaldsen*