

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, *et al*,
Plaintiffs,

v.

LISA MILLER, Defendant, *et al*,

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Docket No. 2:12-cv-184

EMERGENCY MOTION FOR STAY OF PROCEEDINGS
(F.R.Civ.P 6(b))

Defendant Lisa Miller, hereby moves to stay this action pending the resolution of parallel criminal proceedings now pending in the United States District Court for the Western District of New York. *See* Superceding Indictment dated April 25, 2015, attached as **Attachment A**.

The *emergency nature* of this Motion is based on the following:

1. The lead attorney for Defendant Miller, Anthony Biller, of Raleigh, North Carolina, has not yet been admitted *pro hac vice*, to act in this matter. As a result he can take no formal action, nor enter into agreements authorized and/or required by the Federal and Local Rules, until he is admitted.
2. Local counsel to Attorney Biller, Duncan Kilmartin, has undertaken the task of “filling the gap” by entering an appearance and seeking, for good cause shown, an extension of time for preliminary disclosure, Rule 12(b) and (c) Motions, and/or responsive pleadings, prior to the expiration of time (March 30, 2021) to file such.
3. Defendant Lisa Miller incorporates herein by reference, her Request for an Extension of Time, Doc 667, and Appendix A, thereto, as if set forth in full herein. Its sets forth multiple reasons justifying the 90-day extension

requested. These reasons also militate in favor of a stay of the proceedings *vis a vis* Defendant Lisa Miller.

4. Neither Attorney Biller, nor Attorney Kilmartin had any reason to believe or project, that within hours of Attorney Kilmartin filing his Appearance and Enlargement Request, that this Court would be issuing a discovery order against Defendants, to be completed in 61 days from Friday, March 26, 2021. Even after reading the order, neither believed it applied to Defendant Lisa Miller. The hearing which resulted in the Discovery Order was held on March 8, 2021, the day before Ms. Miller was served for the first time, March 9, while in federal confinement in western New York State.
5. On March 18, 2021, Attorney Sarah Star contacted counsel of record, and Attorney Biller, on behalf of Plaintiff, and requested approaching the development of a “new discovery plan.” She suggested looking for dates for Party Depositions in April.
6. On Friday, March 26, shortly after being served with Defendant Miller’s Request for an extension, and the Court Order on Discovery, Attorney Star wrote all counsel of record, including Attorney Kilmartin, requested that counsel provide Plaintiff Jenkins with their respective client’s availability for depositions, so that they could be completed before May 26, 2021.
7. On Tuesday, March 30, Attorney Star sent out a grid of proposed dates for 12 party deponents, including Lisa Miller. Attorney Biller communicated with Attorney Star the same concerns expressed in Miller’s Enlargement Request.
8. As a result of the foregoing, and Plaintiff’s strong desire to schedule Lisa Miller’s deposition before Attorney Biller has even had an opportunity to

review the case with his client, and the “spirit” of Local Rule 26(a)(3),¹ counsel for Lisa Miller believe that “earlier is better” for this Motion for a stay of action to be made on an EMERGENCY BASIS.

9. **The emergency nature of this Motion is greatly enhanced by an email just received from Attorney Star, on behalf of Plaintiff Jenkins. The following is the email sent to attorney Biller at 6:17 p.m., Wednesday, March 31, 2021.**

Anthony,

Plaintiff would oppose a stay tied to the conclusion of Ms. Miller’s prosecution and a stay tied to a decision on Ms. Miller’s motions in response to the complaint.

Plaintiff defers to the Court on what limited additional time, if any, Ms. Miller should be afforded to prepare for depositions. If the Court grants a discovery stay, then it is Plaintiff’s position that the stay should be no longer than necessary for Ms. Miller to be ready for depositions and should apply to all parties and not solely to Ms. Miller.

Unless and until the Court orders otherwise, Plaintiff will proceed with discovery, including depositions, against all parties, including Ms. Miller.

Sincerely,

Sarah

Sarah R. Star, Esq.

Attorney and Counselor at Law, P.C.

P.O. Box 106

Middlebury, VT 05753

(emphasis added)

Preliminary Statement

Defendants move for a stay of action in light of Lisa Miller’s April 24, 2015, indictment by a Western United States District Court of New York grand jury.

Based on that indictment, Defendant Miller is now in jail in the Western District of New York awaiting trial on the charges of: conspiracy to obstruct the

¹ Rule 26(a)(3) references 12(b) and (c) Motions, neither of which are due from Defendant Lisa Miller. Notwithstanding that fact, the whole tenor of Rule 26 and 1, is discovery should be sooner rather than later, and “ditto” for Motions for a Stay of Proceedings. Therefore, counsel for Lisa Miller believes it to be in everyone’s best interests to seek a complete stay of proceedings for Lisa, instead of continuing counsel’s due diligence under Rule 11, before filing 12(b) and (c) Motions, only to be potentially followed by asking for a stay of the civil proceedings until the criminal proceedings are completed.

lawful exercise of parental rights in violation of Title 18, United States Code Section 1204; knowingly removing, and aiding and abetting the removal of a child, J1, from the United States, with the intent to obstruct the lawful exercise of parental rights, in violation of 18 United States Code, Sections 1204 and 2. Five of the six factors typically considered by Courts when deciding whether to stay parallel civil proceedings support Defendants' motion.

These parallel criminal proceedings pose overlapping issues with the allegations of the Civil Complaint in this matter. Defendant Miller has been indicted, and judicial economy is served by allowing parallel criminal proceedings to proceed first, and the public interest in maintaining the integrity of criminal proceedings favors entry of a stay.

Background

Plaintiff alleges that Lisa Miller, and other defendants “conspired to kidnap Isabella Miller Jenkins and ensure her detention outside of the United States.” Complaint at 1.

When deciding whether to stay a civil action in light of parallel criminal proceedings, courts consider six factors:

- 1) The extent to which the issues in the criminal case overlap with those presented in the civil case; 2) the status of the case, including whether the defendants have been indicted; 3) the private interests of the Plaintiffs in proceeding expeditiously weighed against the prejudice to Plaintiffs caused by the delay; 4) the private interest of and burden on the Defendants; 5) the interest of the courts: and 6) the public interest.

Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 99 (2d Cir. 2012); (citing *Trustees of Plumbers & Pipefitters, Nat'l Pension Fund v. Transworld Mech, Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y 1995)). Staying a civil case has “been characterized as ‘an extraordinary remedy’” that may be appropriate “when related criminal proceedings are imminent or pending” and entry of a stay would

be prudential. *Id.* at 98 (quoting and citing *Plumbers*, 886 F. Supp. At 1139, 1138 n. 4). The factors typically considered serve as a “rough guide” for the exercise of judicial discretion, rather than a mechanical test. *Id.* This Court has previously entered a stay of civil proceedings in the context of parallel criminal and forfeiture proceedings, see *United States v. 22.3 Acres of Land*, No. 2:08-cv-00047-wks, Docket No. 20 (D. Vt. April 30, 2008), as well as earlier in this case.

Factors 1, 2, 4, 5, and 6, weigh in favor of a stay of this action. The two cases squarely overlap and Ms. Miller has been indicted, and is currently incarcerated. While Plaintiff has an interest in the expeditious resolution of this case, Courts have found this interest trumped by the Fifth Amendment quandary for Defendants associated with post-indictment parallel actions. Courts have also recognized that completing criminal proceedings first favors both judicial economy and the public’s interest in preserving the integrity of criminal proceedings.

1. Overlap of the Issues.

“A stay of civil proceedings is most likely to be granted where the civil and criminal action involve the same subject matter.” *Harris v. Nassau County*, 2014 U.S. Dist. LEXIS 94554 *8 (E.D.N.Y. July 11, 2014) (quoting *Crawford & Sons v. Besser*, 298 F. Supp. 2d 317, 319 (E.D.N.Y.2004)). Indeed, Courts have considered “the degree to which the civil issues overlap with the criminal issues” to be the “most important factor.” *Id.* (quoting *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (S.D.N.Y 1989)).

The complaint and indictment both allege that Lisa Miller conspired with other defendants, to remove Ms. Miller’s daughter from the United States and retain her outside of the United States. The substantial overlap of the issues in the civil and criminal cases “weighs heavily in favor of granting a stay of those proceedings.” *Id.* A stay is particularly appropriate where testimony by a defendant “in the civil

action” would likely be treated as “admissions. . .in their criminal prosecution” *SEC v. Boock*, 2010 U.S. Dist. LEXIS 59481, *5 (S.D.N.Y. June 15, 2010).

2) The Status of the Criminal Case

“Courts consistently hold that ‘[a] stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct.’” *Harris*, 2014 U.S. Dist. LEXIS 94554 *10 (quoting *Plumbers*, 886 F. Supp at 1139). While this factor is not automatically dispositive, “[t]here is considerable authority for the principle that a stay is most justified where a movant. . .is already under indictment for a serious criminal offense and is required at the same time to defend a civil action involving the same subject matter.” *Louis Vuitton*, 676 F.3d at 1010. Indeed, “[t]he weight of authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment.” *Harris*, 2014 U.S. Dist. LEXIS 94554 *10 (quoting *In re Par Pharm, Inc.*, 133 F.R.D. 12, 13 (S.D.N.Y. 1990)); *accord*, *Plumbers*, 886 F. Supp. at 1140 (granting a post-indictment stay); *Volmar Distribs. v. New York Post Co.*, 152 F.R.D. 36, 39-40 (same); *Boock*, 2010 U.S. Dist. LEXIS 59481, at *5-6 (same). This action too should be stayed in light of the indictment of Lisa Miller.

3) Private and Public Interests.

A decision whether to stay “must rest upon a particularized inquiry into the circumstances of, and the competing interests in, the case.” *Louis Vuitton*, 676 F.3d at 99. Cases finding a stay constitutionally required are uncommon, “likely because district courts stay proceedings out of an abundance of caution when there is a serious question as to whether a denial would violate the Fifth Amendment.” *Id.* at 100, n. 15. While Plaintiff has “a legitimate interest in the expeditious resolution” of her case, many district courts have found this interest “trumped” by a defendants “interest[] in avoiding the quandary of choosing between waving their Fifth Amendment rights or effectively forfeiting the civil case, “particularly where

“the subject matter of both cases overlaps to a significant degree.” *Plumbers*, 886 F. Supp. at 1140. These Courts recognize that a “stay will result in inconvenience and delay to Plaintiffs. But under settled authority, the Fifth Amendment is the more important consideration.” *Parker v. Dawson*, 2007 U.S. Dist. LEXIS 63068, *20 (E.D.N.Y. Aug. 27, 2007) (quoting *Volmar*, 152 F.R.D. at 40 and collecting cases).

“Judicial efficiency also weighs in favor of granting a stay” where the defendant has been indicted and will face trial. *Plumbers*, 886 F. Supp. at 1140. Courts have recognized that completing criminal proceedings first may narrow issues and avoid duplicative work. *Harris*, 2014 U.S. Dist. LEXIS 94554, *12 (citing *Crawford*, 298 F. Supp. 2d at 319; *Plumbers*, 886 F. Supp. at 1140; *Parker*, 2007 U.S. Dist. LEXIS 63068).

Finally, the public interest is protected where the issues in the two proceedings are overlapping, such that the criminal prosecution may serve to advance the public interests. *Plumbers*, 886 F. Supp. at 1140. “Furthermore, the public’s interest is best served by ‘preserving the integrity of the criminal case.’” *Harris* 2014 U.S. Dist. LEXIS 94554, *13 (quoting *Crawford*, 298 F.Supp.2d at 319).

Conclusion

This action should be stayed pending resolution of the criminal proceeding currently pending in the United States District Court for the Western District of New York. Five of the six factors courts consider when determining whether to stay a civil action in favor of a parallel criminal action support entry of a stay here. The criminal proceeding addresses overlapping issues and has resulted in the indictment of Defendant Lisa Miller. Plaintiff has a legitimate interest in the expeditious resolution of this action. However, Courts have found this interest offset by the tension between a defendant’s interest in preserving constitutional

Fifth Amendment rights and being able to defend a parallel civil action. Courts have also found that both judicial economy, and the public interest in maintaining the integrity of criminal proceedings, weigh in favor of completing parallel criminal proceedings before resolving overlapping civil proceedings.

DISCLOSURE OF PARTIES CONSENTING AND PARTIES OPPOSING

CONSENTING: Philip Zodiates; Victoria Hyden; RUL Inc.; Kenneth Miller; Linda Wall;

OPPOSING: Plaintiff Lisa Jenkins.

Dated: March 31, 2021

/s/Duncan F. Kilmartin

Local Counsel for Defendant Lisa Miller

P.O. Box 10

Newport, Vt 05855

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Exhibit A

IN THE DISTRICT COURT OF THE UNITED STATES

for the Western District of New York

May 2014 GRAND JURY
(Impaneled 5/9/2014)

THE UNITED STATES OF AMERICA

**SUPERSEDING INDICTMENT
14-CR-175-A**

-vs-

Violations:

Title 18, United States Code,
Sections 2, 371 and 1204
(2 Counts)

LISA MILLER

(Counts 1, 2),

PHILIP ZODHIATES

(Counts 1, 2), and

TIMOTHY MILLER

(Counts 1, 2)

COUNT 1

(Conspiracy)

The Grand Jury Charges That:

From in or about September 2009 to on or about the date of the return of this Superseding Indictment, in the Western District of New York, and elsewhere, the defendants, LISA MILLER, PHILIP ZODHIATES, and TIMOTHY MILLER, did knowingly, willfully and unlawfully combine, conspire and agree together and with Kenneth Miller and others, known and unknown to the Grand Jury, to commit an offense against the United States, that is, to remove a child, J1, from the United States and to retain that child, who had been in the United States, outside the United States, with intent to obstruct the lawful exercise of parental rights, in violation of Title 18, United States Code, Section 1204.

Overt Acts

In order to effect the object of the conspiracy, the following acts were committed by the defendants and others in the Western District of New York and elsewhere:

1. On or about September 21, 2009, defendant LISA MILLER, J1, and defendant PHILIP ZODHIATES travelled from Virginia to the Buffalo, New York, area.

2. On or about September 21, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with Kenneth Miller.

3. On or about September 21, 2009, defendant PHILIP ZODIATES had telephone contact from the Buffalo, New York area with an individual in Canada who had agreed to help transport defendant LISA MILLER in Canada.

4. On or about September 22, 2009, defendant LISA MILLER and J1 travelled across the Rainbow Bridge from Niagara Falls, New York, to Canada.

5. On or about September 22, 2009, defendant PHILIP ZODIATES had telephone contact from the Buffalo, New York area with an individual in Canada who helped transport defendant LISA MILLER in Canada.

6. On or about September 22, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with Kenneth Miller.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

(International Parental Kidnapping)

The Grand Jury Further Charges That:

On or about September 22, 2009, in the Western District of New York, and elsewhere, the defendants, LISA MILLER, PHILIP ZODHIATES, and TIMOTHY MILLER, with intent to obstruct the lawful exercise of parental rights, did knowingly remove, and aid and abet the removal of, a child, J1, a person known to the Grand Jury, from the United States.

All in violation of Title 18, United States Code, Sections 1204 and 2.

DATED: Buffalo, New York, April 24, 2015.

WILLIAM J. HOCHUL, JR.
United States Attorney

BY: S/KATHLEEN A. LYNCH for
PAUL J. VAN DE GRAAF
Special Assistant United States Attorney
United States Attorney's Office
Western District of New York
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A TRUE BILL:

S/FOREPERSON