

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS,

Plaintiff,

v.

KENNETH L. MILLER, *et al.*,

Defendants.

No. 2:12-cv-184-WKS

PLAINTIFF JANET JENKINS’S RESPONSE IN OPPOSITION TO DEFENDANT LISA MILLER’S MOTION TO STAY PROCEEDINGS

Plaintiff Janet Jenkins opposes Defendant Lisa Miller (“Defendant”)’s motion to stay this civil case pending the resolution of her criminal case. ECF 671. Plaintiff has waited many years to have her rights vindicated while Defendant has been a fugitive from justice. Defendant should not now benefit from the lengthy delay in her criminal case that she herself created.

“The person seeking a stay ‘bears the burden of establishing its need.’” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97 (2d Cir. 2012) (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). As Defendant concedes, staying a civil case pending a related criminal proceeding is not the normal course of events, but rather “an extraordinary remedy.” Mot. 4 (quoting *Louis Vuitton Malletier S.A.*, 676 F.3d at 98). Although a court *may* stay a case in such situations, and “it will sometimes be prudential to do so,” “the Constitution rarely, if ever, *requires* such a stay.” *Louis Vuitton Malletier S.A.*, 676 F.3d at 98. “The existence of a civil defendant’s Fifth Amendment right arising out of a related criminal proceeding thus does not strip the court in the civil action of its broad discretion to manage its docket.” *Id.* at 98–99.

Moreover, and as Defendant also notes, the factors she points to are merely a guide, rather than a definitive test. Mot. 5. Ultimately, the Court must use its judgment to determine

“whether the civil action should be stayed based on the particular facts before it and the extent to which such a stay would work a hardship, inequity, or injustice to a party, the public or the court.” *Louis Vuitton Malletier S.A.*, 676 F.3d at 99. Here, then, there can be no question but that a stay would work an inequity and injustice to Plaintiff and to the Court, regardless of the factors. As noted by Defendant, she was indicted on April 24, 2015—almost six years ago. *See* Mot. 3, ECF 671. However, at that time, and until January 2021, she chose to remain out of the country, having kidnapped Isabella and fled to Nicaragua in 2009. Therefore, for Defendant to argue that she is prejudiced by having to simultaneously defend herself in criminal and civil proceedings is particularly ironic, given that the delay in her criminal case is entirely of her making. She should not benefit from her flight from justice. If she were permitted to do so, it would do a great injustice to Plaintiff, delaying her from vindicating her rights, and to this Court, which has been ready to proceed with this case for some time.

Defendant’s circumstances today are unlike Defendant Philip Zodhiates’s in 2015. The Court decided Zodhiates warranted a stay because his business, Defendant Response Unlimited, Inc., was “also likely a target of investigation,” Op. & Order 3, ECF 192, and because “discovery under the relatively liberal rules of civil procedure, as opposed to the more restrictive rules and procedures governing criminal matters, pose[d] a danger of fundamental unfairness,” *id.* at 3–4. Defendant, however, can invoke her Fifth Amendment privilege against compulsory self-incrimination in response to discovery requests and oral examination in this case—just like some of her co-defendants have done. Although Plaintiff could use those privilege invocations against Defendant, the government obviously could not.

Although the broad principle that Defendant should not be allowed to manipulate the system, as she has done, cannot be overstated and should be the primary consideration when the

Court determines whether to grant a stay, an examination of the factors referenced by Defendant shows that, even considering those factors, her motion should be denied. The factors, each of which will be examined in turn, are as follows: “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 interests of and burden on the defendants; 5) the interests of the courts; and 6) the public interest.” *Louis Vuitton Malletier S.A.*, 676 F.3d at 99.

First, while the issues in the criminal and civil cases overlap considerably, that factor is certainly not dispositive. The case Defendant cites in support of her position that this factor is the “most important” one, Mot. 5, is easily distinguishable, as that civil case involved claims of false arrest and malicious prosecution, among others, and those claims were “dependent upon the outcome of the criminal proceedings.” *Harris v. Nassau Cnty.*, No. 13-cv-4728-NGG-RML, 2014 WL 3491286, at *3 (E.D.N.Y. July 11, 2014). In other words, if the plaintiff in that civil case were criminally convicted, at least some of his civil claims would no longer be viable. Here, by contrast, although a criminal conviction might make Plaintiff’s case even easier to prove, Plaintiff’s civil claims are not in any way *dependent* on the result of the criminal case.

Second, the status of the criminal case does not support a stay here. Although Defendant has been indicted criminally, the resolution of her criminal proceeding is not likely any time soon. Indeed, oral argument on motions in that case is set for August 18, 2021, so trial is nowhere near imminent. See Scheduling Order, *United States v. Lisa Miller*, No. 1:14-cr-175 (W.D.N.Y. Feb. 26, 2021), ECF 265. Therefore, a stay here would involve a delay of more than a

few months. In fact, staying this case until the criminal proceedings are complete could mean a delay of a year or more.

Third, as Defendant herself states, Plaintiff has a “legitimate interest in the expeditious resolution of her case.” Mot. 6. That interest is particularly significant and appropriate here, where Plaintiff has been awaiting her proverbial “day in court” against Defendant and her co-conspirators for over eight years now. For Defendant to deny Plaintiff the resolution she seeks, after having chosen to remain out of reach of the law for these many years, would prejudice Plaintiff’s ability to finally vindicate her rights and would allow Defendant to benefit from her malfeasance.

Fourth, although Defendant claims that the denial of a stay would burden her, that is a problem of her own making. Had she been available for the criminal proceedings upon being indicted in 2015, her criminal trial would be long over now. In addition, a stay would burden Defendant’s co-defendants. Although several of the co-defendants have consented to Defendant’s motion, some of their attorneys have previously expressed their desire to proceed with this case expeditiously. *See* Ex. 1: Mots. Hr’g Tr. 16:5–15 (Attorney Mihet for Defendants Liberty Counsel, Inc. and Rena Lindevaldsen stating, “[M]y clients have been laboring under the yoke of this lawsuit for over five years now ... [and are] relishing the chance for summary judgment to finally bring this litigation to an end as respect[s] my clients”); *id.* at 19:13–23 (Attorney Hochschild for Defendant Linda Wall expressing similar thoughts).

As to the fifth factor, this Court, too, has made clear that it desires for this case to move forward. *Id.* at 17:16–18 (“[T]his case has been going on for so many years. It really needs to move along”). Thus, the interest of the Court weighs against a stay.

Finally, turning to the sixth factor, it would be in the public interest for this case to be resolved sooner rather than later. Should a stay be granted, the lesson to the public at large could well be that defendants can prolong any reckoning and any responsibility for their behavior by fleeing the country and waiting to return until it suits their needs. Surely it is not in the public interest for the Court to send such a message.

In conclusion, Defendant should not be allowed to further benefit from her flight and decade-long avoidance of justice by receiving an indefinite postponement of this case. Plaintiff notes that she would not be opposed to a short extension of the discovery deadline if the Court deems it necessary to allow Defendant to prepare for depositions. Should such an extension be granted, Plaintiff presumes—and would respectfully request that the Court specifically order—that it would not stay or otherwise extend the time for the Parties to produce any outstanding written discovery, so that all Parties can be prepared to proceed with depositions. Such outstanding discovery includes, but is not limited to:

- the documents Timothy Miller initially withheld based upon his assertion of a Fifth Amendment privilege, which the Court has ordered to be produced, *see* ECF 661;
- the phone records and other documents the Court ordered Liberty Counsel and Rena Lindevaldsen to produce, *see* ECF 665;
- the revised privilege logs the Court ordered Liberty Counsel and Rena Lindevaldsen to produce, *see* ECF 665;
- the documents Liberty Counsel and Rena Lindevaldsen have agreed to produce in response to Plaintiff's third set of requests for production; and

- the documents that are the subject of Plaintiff's motion to compel and petition to disclose, *see* ECF 670, should that motion and petition be granted.

Plaintiff will provide all written discovery responses she receives to Defendant and her counsel.

CONCLUSION

Defendant's motion to stay this case should be denied.

Respectfully submitted.

April 8, 2021

/s/ Frank H. Langrock

Frank H. Langrock
Emily J. Joselson
Langrock Sperry & Wool, LLP
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, Vermont 05753-0351
Phone: (802) 388-6356
Fax: (802) 388-6149
Email: flangrock@langrock.com
Email: ejoselson@langrock.com

Sarah Star
Sarah Star, PC
P.O. Box 106
Middlebury, Vermont 05753
Phone: (802) 385-1023
Email: srs@sarahstarlaw.com

Scott D. McCoy
Southern Poverty Law Center
P.O. Box 10788
Tallahassee, Florida 32302
Phone: (850) 521-3042
Fax: (850) 521-3001
Email: scott.mccoy@splcenter.org

Tyler Clemons
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Phone: (504) 526-1530
Fax: (504) 486-8947
Email: tyler.clemons@splcenter.org

Diego A. Soto
Maya G. Rajaratnam
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: (334) 956-8200
Fax: (334) 956-8481
Email: diego.soto@splcenter.org
Email: maya.rajaratnam@splcenter.org

Jessica L. Stone
Southern Poverty Law Center
P.O. Box 1287
Decatur, Georgia 30031
Phone: (404) 221-5837
Fax: (404) 221-5857
Email: jessica.stone@splcenter.org

Counsel for Plaintiff Janet Jenkins

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

JANET JENKINS,

Plaintiff,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, *et al.*,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that, on this date, Plaintiff Janet Jenkins's Response in Opposition to Defendant Lisa Miller's Motion to Stay Proceedings 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

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.

Duncan F. Kilmartin
Rexford and Kilmartin, P.C.
Counsel for Defendant Lisa Miller

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

April 8, 2021

/s/ Diego A. Soto

Diego A. Soto

Counsel for Plaintiff Janet Jenkins

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS

V

KENNETH L. MILLER, et al.

*
*
*
*

* CIVIL FILE NO. 12-184

MOTIONS HEARING
Monday, March 8, 2021
Burlington, Vermont

BEFORE:

THE HONORABLE WILLIAM K. SESSIONS III
Senior District Judge

Appearances.....

ANNE NICHOLS PIERCE
United States District Court Reporter (ret'd.)
fortherecordinvermont@gmail.com

EXHIBIT

1

APPEARANCES:

DIEGO A. SOTO, ESQ., Southern Poverty Law Center,
400 Washington Avenue, Montgomery, Alabama;
Attorney for the Plaintiff

EMILY J. JOSELSON, ESQ., and FRANK H. LANGROCK,
ESQ., Langrock Sperry & Wool, LLP, 111 South
Pleasant Street, Middlebury, Vermont; Attorneys
for the Plaintiff

J. TYLER CLEMONS, ESQ., Southern Poverty Law
Center, 201 St. Charles Avenue, Suite 2000, New
Orleans, Louisiana; Attorney for the Plaintiff

SARAH STAR, ESQ., Sarah Star, PL, P.O. Box 106,
Middlebury, Vermont; Attorney for the Plaintiff

SCOTT D. McCOY, ESQ., Southern Poverty Law Center,
P.O. Box 10788, Tallahassee, Florida; Attorney
for the Plaintiff

DAVID J. WILLIAMS, ESQ., Jarvis, McArthur &
Williams, LLC, 95 St. Paul Street, Suite 2E,
Burlington, Vermont; Attorney for the Plaintiff

MICHAEL J. TIERNEY, ESQ., Wadleigh, Starr & Peters,
95 Market Street, Manchester, New Hampshire;
Attorney for Defendant Timothy D. Miller

MICHAEL R. HIRSH, ESQ., Hirsh Law Office, LLC, 2295
Towne Lake Parkway, Suite 116-181, Woodstock,
Georgia; Attorney for Defendants Response
Unlimited, Inc., Philip Zodhiates and Victoria
Hyden

ADAM S. HOCHSCHILD, ESQ., Hochschild Law Firm, LLC,
P.O. Box 401, Plainfield, Vermont; Attorney for
Defendant Linda M. Wall

HORATIO G. MIHET, ESQ., and ROGER K. GANNAM, ESQ.,
Liberty Counsel, P.O. Box 540774, Orlando,
Florida; Attorneys for Defendants Mathew D.
Staver, Rena M. Lindevaldsen and Liberty
Counsel, LLC

*** ** ***

ANNE NICHOLS PIERCE
United States District Court Reporter (ret'd.)
fortherecordinvermont@gmail.com

1 MONDAY, MARCH 8, 2021

2 (The following was held in open court at 2:25 p.m.)

3 COURTROOM DEPUTY: Your Honor, this is civil
4 case 12-184, Janet Jenkins versus Kenneth Miller, et al.
5 We are present in the courtroom. For plaintiffs:
6 Attorneys Emily Joselson, Frank Langrock, and Sarah
7 Star. Present by videoconference are Attorneys Diego
8 Soto, Tyler Clemons and Scott McCoy. Present for
9 defendants in the courtroom are Attorneys Michael
10 Tierney, Adam Hochschild and Horatio Mihet. Present by
11 videoconference for defendants are Attorney Michael
12 Hirsch, Attorney Roger Gannam and Attorney -- no, that's
13 it.

14 The matter before the Court is the following
15 motions: a motion to compel defendant Liberty Counsel,
16 Inc. and Rena Lindevaldsen to produce AT&T records, a
17 motion to disqualify counsel for the plaintiffs, and
18 motion to stay all discovery schedule/order deadlines.

19 THE COURT: All right. So I think we begin
20 with the motion to stay discovery and also the motion
21 for an extension of time for service on Linda Miller.

22 Who on behalf of the plaintiffs is going to address
23 those issues?

24 MS. STAR: I will, your Honor.

25 THE COURT: Okay. Hi. Come on up and speak

1 up front.

2 MS. STAR: Good afternoon, your Honor.

3 THE COURT: Good afternoon.

4 MS. STAR: We requested this status conference
5 on January 29th because we were at a loss for how to
6 proceed in light of the developments in this case and
7 the manner in which the defense counsel handled those
8 developments.

9 Can you hear me okay with the mask on?

10 THE COURT: Yes. That's fine.

11 MS. STAR: Okay. And just for clarification,
12 Attorney Scott McCoy, who briefed it, will be arguing on
13 the topic of disqualification, and Diego Soto briefed
14 and he will be arguing on the topic of the AT&T records.

15 THE COURT: Okay.

16 MS. STAR: So with regard to --

17 THE COURT: What I am really interested to
18 know your position in regard to any potential litigation
19 against Lisa Miller.

20 MS. STAR: Well, your Honor, we -- so we just
21 confirmed that the summons has arrived at the jail where
22 she is, so she should be served today. And we are not
23 looking for -- we simply think she should get the
24 regular 21 days to appear, file a *pro se* appearance,
25 hire counsel, and respond to the summons. We are not

1 seeking a stay of the discovery.

2 We have lost -- we are looking to recoup the time
3 that we lost in this month that we have been in a
4 standstill.

5 THE COURT: Well, so let's talk about
6 practically what that means. If she is made a defendant
7 in this case, and she is offered to participate in
8 discovery -- she's facing a criminal indictment in
9 Buffalo -- there is no way that she's going to
10 participate in discovery. There's no way you are going
11 to be able to get a deposition. There's no way that she
12 is going to actually get herself engaged in a civil
13 trial for at least a year but probably a whole lot
14 longer than that. So in practice, when you join her as
15 a litigant, as a defendant, at this particular point,
16 unless she is severed out -- you got a burden to show
17 the need for severance, but unless she is severed out,
18 you are requesting a -- well, at least a year but I
19 would say more likely, if she is ever convicted, you are
20 talking years.

21 MS. STAR: That is absolutely not what we are
22 seeking. We --

23 THE COURT: Well, so then why are you -- why
24 are you -- I guess my question is, have you thought
25 about whether or not you should bring her into this

1 civil case?

2 MS. STAR: Honestly, your Honor, my feeling
3 was that she would just choose not to participate based
4 on her history of absenting herself from proceedings,
5 and so I thought that we should -- because she is the
6 lead defendant really in this case, the central figure,
7 that we needed to at least in good faith serve her and
8 give her a chance to participate, and if she chooses not
9 to do that, which is what we frankly expect, then we are
10 more than happy to move on. We would --

11 THE COURT: Don't you really expect that she
12 would promptly file a motion to stay discovery until her
13 criminal prosecution has been completed?

14 MS. STAR: We would vigorously oppose that
15 because --

16 THE COURT: Well, how do you do that? How do
17 you do that? How do you do that if she is still a
18 participant in the litigation, other than you might have
19 to sever her off completely, in which case, if you were
20 successful to sever her off from the rest of the
21 litigation, then when she comes back into the civil
22 litigation, you have to start discovery all over again
23 because she has never participated in discovery. So you
24 have to go through the whole thing again. And I'm just
25 wondering why?

1 MS. STAR: Well --

2 THE COURT: And what actually brings up the
3 point -- and I am doing probably more talking than I
4 should at this point just because I really want to make
5 sure that you have thought about how you want to
6 proceed. The -- you know, the motion to disqualify and
7 other representations made by the defendants, you know,
8 suggest that there is an inconsistent position between
9 both sets of plaintiffs, Janet Jenkins and Isabella.
10 Right? And that Isabella's interest is at risk or is
11 opposite of Janet Jenkins. And you made the point that
12 you have discussed the case against her -- against
13 Isabella, and you are not going to have her deposed, so
14 there are no -- there are no conflicting positions. But
15 then the defendants come back and say, well, of course
16 there's a conflicting position because you are suing
17 Lisa -- that's her mother -- and she has a position with
18 regard to Lisa, which creates at least in -- according
19 to their argument -- although I am not so sure they
20 literally argued this, but it's logical, if she takes a
21 strong position that Lisa Miller's interest is her
22 interest, then her argument that there's a -- there is a
23 conflict between Janet and Isabella is enhanced. Right?

24 MS. STAR: I disagree with that.

25 THE COURT: Okay.

1 MS. STAR: I think the adult child's standings
2 align her interest with another adult, even if related,
3 is tenuous. I think for the same reasons that Janet
4 Jenkins can't continue to bring a claim on her
5 daughter's behalf now that her daughter's an adult, I
6 think that -- you know, that the general feelings about
7 the litigation by family members is not a basis for a
8 disqualification.

9 THE COURT: Yeah. No, I mean, we will get
10 into that argument. You have somebody else arguing that
11 and you don't necessarily have to engage in argument.
12 What I'm --

13 MS. STAR: No, I'm --

14 THE COURT: -- asking, at least in the context
15 of do you really want to have Lisa Miller served, bring
16 her into the litigation, knowing full well that this may
17 stop this litigation in its tracks?

18 MS. STAR: Well, that is the opposite of what
19 we want. We do not want to stop litigation.

20 THE COURT: Okay.

21 MS. STAR: We wanted to stop the litigation
22 just so that we can get a handle on what was happening.

23 THE COURT: Sure. No, I know that.

24 MS. STAR: And so --

25 THE COURT: Yep.

1 MS. STAR: But, no, we do not want to stop the
2 litigation. I think our concern is that if we don't
3 make any attempts now that Lisa Miller has reappeared,
4 and we did not make any attempt to serve her process and
5 notify her of the proceedings and then just proceeded
6 with the rest of the defendants, then an argument could
7 be made that we are not doing our due diligence in
8 prosecuting our case, so -- you know, with regard to the
9 conduct involved.

10 So, no, I do -- I am more than happy to proceed
11 against these defendants as long as -- that her absence
12 isn't going to be an issue in the case that's used
13 against us, as well, why didn't you try to bring Lisa
14 Miller in.

15 THE COURT: So is it your position that I
16 should grant a motion to stay discovery until she has
17 been served and becomes necessarily an active defendant
18 in the case? Is that what you are asking for?

19 MS. STAR: What I'm asking for is -- the stay
20 was really to just put a hold on the deadlines until we
21 figured out what was happening. We haven't been able to
22 confer with the defendants about any of these issues.
23 We're --

24 THE COURT: Until the motion to disqualify is
25 resolved?

1 MS. STAR: Right. And so obviously --

2 THE COURT: Okay.

3 MS. STAR: -- a lot of the issues that
4 your Honor is bringing up are things we could have
5 discussed about how the case is going to proceed, but
6 because the defendants have refused to speak with us, it
7 obviously hasn't been fleshed out.

8 What I would really like to do is -- hopefully
9 before we leave today, is to address the discovery
10 schedule, brief some of this with opposing counsel, and
11 bring this case forward, and, you know, go from there.

12 THE COURT: Okay. How -- I guess my question
13 is, if Lisa's going to be served and if she is going to
14 become a defendant, how do we set a discovery schedule
15 without having her counsel present? How do we do that?

16 MS. STAR: Well --

17 THE COURT: That's just the first of numerous
18 open questions about how you proceed when you have one
19 defendant under indictment.

20 MS. STAR: I mean, I think that, again, we --
21 you know, we did reach out to Lisa Miller's criminal
22 attorney, who has not -- is not going to be helping her
23 with this case. We tried to talk to the defendants.
24 And, again, if everybody agrees that we should sever
25 Lisa Miller out or just proceed without her, I mean, I

1 think -- I think that that's a totally reasonable way to
2 proceed. I have been working on this case for 12 years.
3 I'd like to move this case towards trial probably more
4 than anybody else, and we have all the depositions
5 scheduled and ready to go. So --

6 THE COURT: Okay. So give me an idea of
7 exactly when you have these depositions scheduled.

8 MS. STAR: So we had them scheduled -- they
9 were pretty much all to occur in the month of March.

10 THE COURT: Okay.

11 MS. STAR: But we -- because of the time that
12 was lost because the case has been at a standstill since
13 January 29th without an ability to -- because the
14 defendants don't agree we even represent our client
15 anymore.

16 THE COURT: Sure.

17 MS. STAR: So what we would ask for is
18 basically for a reset for when either -- I guess either
19 when Lisa Miller is served or if we decide to not -- you
20 know, if we decide to dismiss the claim against her
21 without prejudice. We know that's something we need to
22 discuss with everybody.

23 THE COURT: Okay. So what you are suggesting
24 is that I should probably rule on the motion for
25 disqualification because that's holding up everything.

1 Nobody --

2 MS. STAR: It's holding up everything.

3 THE COURT: -- will talk to you.

4 MS. STAR: And also, your Honor --

5 THE COURT: You can bet the ruling on the
6 motion for disqualification will be made this week.

7 MS. STAR: Thank you, your Honor.

8 THE COURT: So what then you are suggesting
9 after that is that if you are not disqualified, you
10 continue to represent Janet, then what you are
11 suggesting is that I extend the discovery period for a
12 brief period of time, assuming that Lisa's not a part of
13 discovery. If Lisa becomes a part of discovery, then
14 all she has to do is move to stay discovery, and then
15 there's a real delay.

16 MS. STAR: I mean, for purposes -- I hope that
17 it doesn't come to that, your Honor, but for purposes of
18 argument, you know, she has intentionally absented
19 herself. We think it's fair to give her notice of this
20 case, but I don't -- I would not agree to a stay. I
21 think that in civil court we could take her deposition
22 in jail, and she could take the Fifth, and we could then
23 use that in this trial, and then she could participate
24 remotely from jail or through counsel in the remaining
25 part of depositions.

1 I don't think we would need to restart discovery.
2 She could potentially object to prior depositions that
3 were taken without her, but, you know, she made the
4 choice to absent herself, so I don't -- I -- I -- if she
5 were to enter an appearance in the case and ask for a
6 stay, we would vigorously oppose that based on her prior
7 conduct.

8 THE COURT: Okay.

9 MS. STAR: And our --

10 THE COURT: But you are going to think about
11 whether, in fact, you are going to bring her into this
12 litigation, and then advise the Court as to whether she
13 is going to be brought in, and take it step by step
14 after that.

15 MS. STAR: Right. I -- that is definitely
16 something that we will do. And in terms of -- you know,
17 for restarting, when that is resolved, when the
18 disqualification is resolved, we're not looking for an
19 enlargement of time. We had enough time left to do the
20 depositions that we needed to do, so there were -- I
21 think there were 51 days left as of January 29th, so
22 perhaps when the disqualification is decided or, you
23 know, when -- when we have filed a new discovery
24 order --

25 THE COURT: You would be looking at the end of

1 April is the deadline.

2 MS. STAR: With addition --

3 THE COURT: Right. 51 days left --

4 MS. STAR: Right.

5 THE COURT: -- before it was stopped.

6 MS. STAR: Right.

7 THE COURT: So that if you add the 51 days to
8 now, you are just about to the end of April.

9 MS. STAR: Okay.

10 THE COURT: Okay. All right. Let me get the
11 defendants' response to this particular question.

12 That's the question of the stay because the defense did
13 not file a position in regard to the motion for stay.

14 Who's going to argue on behalf of --

15 MR. MIHET: I will have something to say, and
16 maybe some of my other colleagues --

17 THE COURT: Sure.

18 MR. MIHET: -- may speak on behalf of their
19 clients.

20 Your Honor, Horatio Mihet on behalf of Liberty
21 Counsel and Rena Lindevaldsen. And just for point of
22 clarification, I believe my clients have filed an
23 opposition to the motion to stay. It should be on -- on
24 the docket.

25 THE COURT: I thought in your pleadings when

1 you were responding to the motion for disqualification,
2 you said that you intentionally did not file a response
3 to the motion to stay because the litigation, you know,
4 could continue on against Lisa Miller and you were using
5 that as an argument that Isabella and Janet Jenkins were
6 at odds.

7 MR. MIHET: No. I think that may be the
8 position of a different defendant. My clients didn't --

9 THE COURT: Oh, all right. I'm sorry. Maybe
10 it was a different -- maybe it was a different
11 defendant.

12 MR. MIHET: My clients filed an opposition to
13 the motion to stay, and I believe the plaintiff filed
14 a surreply to the opposition.

15 THE COURT: Oh, all right. Okay.

16 MR. MIHET: And when I get back to my
17 computer, I can provide the Court with the document.

18 THE COURT: No. That's fine. Just -- I
19 thought it was your client, but -- anyway, it was
20 somebody, but --

21 MR. MIHET: Your Honor, just very briefly:
22 You know, Lisa Miller, already in the public filings
23 that she has made in the criminal proceedings -- she has
24 asserted her right to remain silent and not to speak, so
25 I don't think anyone can doubt the fact that she knows

1 that this civil case is pending and ongoing. I think
2 your Honor's been very astute in observing that the
3 chance of her willingly participating in this case are
4 slim to none.

5 Your Honor, what that means for my clients, my
6 clients have been laboring under the yoke of this
7 lawsuit for over five years now, and this lawsuit has
8 been every bit as disruptive and burdensome as was
9 advertised and promised, and so we do not want to see a
10 situation where there is an unlimited and unboundless
11 stay, particularly because we were seeing the light at
12 the end of the tunnel. We had 51 days, and we were, you
13 know, relishing the chance for summary judgment to
14 finally bring this litigation to an end as respect to my
15 clients.

16 And what we don't want to see happen, your Honor,
17 is a situation where on -- supposedly on account of Lisa
18 Miller, this litigation is somehow stopped as to her,
19 but in the meantime, the plaintiffs retain freewheeling
20 authority to continue discovery efforts against my
21 clients and against the other defendants. That would be
22 extremely one-sided and unjust, and so that's the reason
23 why we -- we don't think --

24 You know, Lisa Miller, she knows presumably that
25 this case is going on -- ongoing. If she wants to

1 assert herself in this lawsuit, she can, but even the
2 plaintiffs just admitted through Miss Star that they
3 don't expect her to be doing that, and so I don't think
4 that that situation provides any reason for this Court
5 to now impose an unbounded stay, even a one-sided stay
6 that allows my clients or continues to subject my
7 clients to these cease -- unceasing discovery efforts
8 and requests.

9 THE COURT: Okay. I mean, I was just -- just
10 to move this along, because we've got --

11 MR. MIHET: Sure. That's all I was going to
12 say.

13 THE COURT: I think the -- me ordering a stay
14 would be very unlikely --

15 MR. MIHET: Okay.

16 THE COURT: -- because this case has been
17 going on for so many years. It really needs to move
18 along, and I don't know exactly how we do that, but --

19 MR. MIHET: One last thing I'll say is we also
20 had recent history that we learned from which is what
21 happened with the co-defendant Philip Zodiates when,
22 you know, the litigation essentially came to a
23 screeching halt on his account, and I would just --

24 THE COURT: Okay.

25 MR. MIHET: I would hate to see that happen

1 again when my clients are so close to the finish line,
2 your Honor.

3 THE COURT: Right. Okay. All right, does
4 anyone else wish to --

5 MR. MIHET: I think --

6 THE COURT: Okay.

7 MR. TIERNEY: Your Honor, Michael Tierney for
8 defendant Timothy Miller.

9 THE COURT: Okay.

10 MR. TIERNEY: I think your Honor understands
11 my position. I don't object to a stay or whatever time
12 the plaintiffs think is necessary, and I alluded to that
13 in my motion for disqualification. So to the extent the
14 plaintiffs need a certain number of days, I told them
15 tell me how much they need and we'll work with that.

16 THE COURT: Okay. So you are -- you are the
17 one who said, "You know, we're not going to object to a
18 stay. If you want to get a stay, it really goes to show
19 that there is a conflicted position between Isabella and
20 Janet" or -- you know, Isabella. Yeah. And so as a
21 result, you don't object to the stay because it just
22 means that the disqualification argument is enhanced.

23 MR. TIERNEY: Correct.

24 THE COURT: Okay.

25 MR. TIERNEY: Thank you.

1 THE COURT: Thanks.

2 MR. MIHET: And while Mr. Hochschild comes up,
3 I would just point your Honor, docket 643 was our
4 written opposition, Liberty Counsel and Linda Wall
5 written opposition, and I believe 647 is plaintiff's
6 reply.

7 THE COURT: Okay.

8 MR. HOCHSCHILD: Thank you, your Honor.

9 THE COURT: Sure.

10 MR. HOCHSCHILD: Very briefly, your Honor.
11 Adam Hochschild for defendant Linda Wall.

12 THE COURT: Okay.

13 MR. HOCHSCHILD: And I did join in Mr. Mihet's
14 opposition -- very brief joinder in his opposition to
15 the motion to stay, and I'd only add, Mr. Mihet said his
16 clients have been in this case for five years. My
17 client and other clients have been in this case for nine
18 years, back to 2012, and as I said in our joinder, we
19 oppose an indefinite stay in the case. And I believe I
20 agree with Mr. Tierney that I would consent to a
21 reasonable stay to -- for plaintiff to find new counsel,
22 and that assumes that your Honor would grant the motion
23 to disqualify. But that's all I would add.

24 THE COURT: Okay. Thank you.

25 All right. Now, the motion to compel in regard to

1 the AT&T records is the next issue that I thought we
2 should address. Now on behalf of the plaintiff, who is
3 going to argue that?

4 MR. SOTO: I will be arguing that motion,
5 your Honor. Diego Soto for plaintiff.

6 THE COURT: Yes.

7 MR. WILLIAMS: Your Honor, this is Dave
8 Williams on behalf of Mr. Kenneth Miller.

9 THE COURT: Yes.

10 MR. WILLIAMS: I think I was forgotten in that
11 exchange.

12 THE COURT: You were forgotten in that last
13 exchange.

14 MR. WILLIAMS: Yeah, about the motion for a
15 stay?

16 THE COURT: Oh, all right. Okay.

17 MR. WILLIAMS: How are you today?

18 THE COURT: Just fine. So you got --

19 MR. WILLIAMS: Good.

20 THE COURT: Right. You and your partner
21 signed an agreement with -- well, now that was a
22 different issue. So what is your position?

23 MR. WILLIAMS: We have no objection.

24 THE COURT: To a stay?

25 MR. WILLIAMS: Correct.

1 THE COURT: Okay.

2 MR. WILLIAMS: Thank you.

3 THE COURT: All right. Thank you,
4 Mr. Williams. Briefly as always.

5 Okay, so now on the AT&T records, who is acting on
6 behalf of the plaintiff?

7 MR. SOTO: Diego Soto for plaintiff.

8 THE COURT: Okay. Good afternoon.

9 MR. SOTO: Your Honor -- good afternoon,
10 your Honor.

11 As the criminal trials with Kenneth Miller and
12 Philip Zodhiates showed, Isabella's kidnappers carried
13 out the planning, execution and coverup of the
14 kidnapping in part by using cell phones to communicate
15 with each other, either directly or through
16 intermediaries, and communicate with witting or
17 unwitting participants. AT&T's records for defendants'
18 four cell phones in the two years surrounding Isabella's
19 kidnapping could show their involvement too.

20 Defendants refused to produce AT&T's records in
21 their entirety because they assert by showing with what
22 phone numbers they were in contact and when, AT&T's
23 records could provide a list of their clients, donors,
24 constituents and supporters and a road map to their
25 mental --

1 THE COURT: These are the records of three
2 lawyers anyway for two years, and my guess is they had
3 many clients totally unrelated to this particular
4 litigation, and I was trying to figure out why do you
5 need all of their telephone records for two years. And
6 then -- you see if I am correct -- what I thought you
7 were arguing is that you have some evidence to suggest
8 that these individuals, the defendants in this case,
9 were using intermediaries, and the only way you could
10 figure out who the intermediaries were was to get all of
11 their AT&T records and to find out if they were
12 filtering phone calls in to one, two, three or four
13 other people.

14 And then I thought, well, how would you find out
15 whether these people who got telephone calls from the
16 three defendants were intermediaries? Well, then you
17 would go out and use these records to try to figure out
18 who is talking to them during this two-year period and
19 then try to figure out if these people were
20 intermediaries.

21 So then I was thinking -- you tell me if this is
22 wrong -- what you are trying to do is get the complete
23 records of these lawyers, and -- and then you are going
24 to try to trace all of these calls to try to find out if
25 some of them were intermediaries or others were not, and

1 that's the only relevance of anything other than tracing
2 the phone calls of people who you know were, according
3 to your theory, engaged in the conspiracy. Right?

4 So the defendants have offered you -- to give you
5 all the records of anybody you name, and they will go
6 through the records and they will say, okay, well, these
7 are all the calls to this particular person and to that
8 particular person.

9 So then I was thinking, what you are trying to do
10 is find intermediaries whom you do not know, but to do
11 that, you are going to go through all of the records of
12 all of the people that these people -- that these
13 defendants represented. And isn't that -- well, isn't
14 that really a pretty significant invasion of privacy and
15 really way above what you really need, which is really
16 just the contacts of people whom you know were
17 participating in this conspiracy, according to your
18 theory.

19 MR. SOTO: So a few points, your Honor. So
20 first of all, your Honor started off raising a concern
21 about the two-year period, and that two-year period is
22 actually really critical.

23 So in the year before the September 2009
24 kidnapping, Lisa Miller was refusing to comply with
25 state court orders allowing Janet Jenkins visitation

1 with Isabella. She kept losing again and again in state
2 court after state court. The Supreme Court refused to
3 step in, and she was running out of options. And we
4 have e-mails showing that she was thinking, "And am I
5 going to continue to disobey? What should I do?"

6 And you have in January 2009, nine months before
7 the kidnapping, Philip Zodhiates reaches out to Liberty
8 Counsel asking to be put in touch with Lisa so he can
9 offer her personal options.

10 THE COURT: Let me respond to that.

11 MR. SOTO: From there --

12 THE COURT: I know that perfectly well. I
13 mean, United States versus Kenneth Miller was right in
14 this courtroom. We went through this in detail.
15 There's no question that two-year period is appropriate
16 both before and then after she left for Nicaragua. No
17 question about that. But my real concern is why do you
18 need all of the records of all of the contacts that the
19 defense counsel had when it's a pretty significant
20 violation of, you know, their privacy and their -- their
21 practice?

22 MR. SOTO: So, again, a few points in response
23 to that concern, your Honor.

24 So, first of all, your Honor is well aware that
25 Liberty Counsel, for example, and Linda Wall, for

1 example, were not on trial for their alleged involvement
2 in the kidnapping. So the information we learned from
3 Kenneth Miller and from his criminal trial and from
4 Philip Zoghiates's trial, that was not targeted at these
5 other defendants who are in our case. So our
6 information is already narrowed in that respect.

7 But just to your point how we would use these
8 records, there are actually a number of different ways
9 we can use them. The most obvious, and we never denied
10 this, is what your Honor has suggested, which is we
11 already know about a number of individuals. Both sides
12 concede that there are individuals that are alleged to
13 have been involved or it came out at these criminal
14 trials that they were involved, and, yes, we can look up
15 do their numbers appear in Liberty Counsel's records.
16 And defendants acknowledge that, but they won't provide
17 those portions itself unless plaintiff goes to the
18 trouble of actually listing them. But, again, that's
19 just one way we would use them.

20 THE COURT: Yeah, but that's --

21 MR. SOTO: Another way we would use them --

22 THE COURT: You need the list, the people whom
23 you know were, at least according to your theory,
24 involved in the conspiracy. That's just a list. You
25 give the list to them, and they have the ability to get

1 the telephone numbers and give you the contacts between
2 the various defendants and those individuals.

3 That -- that seems to be tailor-made right for the
4 discovery that you need without -- without getting off
5 into, you know, you being able to find out who their
6 other clients were and ask their other clients whether
7 they are engaged as an intermediary in this conspiracy.
8 That seems --

9 MR. SOTO: So, your Honor, I would like to get
10 specifically to that concern. So as I said earlier,
11 we're limited in the information we have about who is
12 involved, but another way we could find additional
13 people that we don't know about is to be able to compare
14 Liberty Counsel's records and the records we have for
15 other individuals, like Linda Wall, Lisa Miller, Terry
16 Miller, all these other individuals for whom we have
17 records, and see are there numbers that appear in both,
18 and take a look at when those calls occurred and whether
19 they could have any relevance to this case. So we
20 wouldn't already know to ask about those specific
21 numbers until we see the records and compare them side
22 to side.

23 Related to that, if we see that there are numbers
24 that appear in both, that is where we could find out if
25 they're potential intermediaries, depending on when

1 those calls occur. So on a given day, let's say the day
2 of the kidnapping, at noon, we have -- in a record we
3 already have, it shows that -- and let's say Lisa Miller
4 called Rena Lindevaldsen -- or, I'm sorry, a random
5 person, and then we would see that on Rena's calls a few
6 minutes later she had a phone call with this same exact
7 person, and that would show us a potential intermediary,
8 but we wouldn't be able to figure out that potential
9 intermediary without seeing the records.

10 And then we would also be able see if the
11 defendants themselves acted as intermediaries, if -- if
12 after receiving a call from someone, immediately after
13 that call they called someone else that wasn't even on
14 our radar, until we are able to compare the two sets of
15 records.

16 So -- and I want to be clear, your Honor: To
17 figure out who an intermediary is or potential witting
18 or unwitting participant, it's not about reaching out to
19 them knowing that their client -- because as we say over
20 and over in our briefing, these AT&T records were made
21 by AT&T. AT&T does not know this number belongs to a
22 client, this number belongs to a donor, or this one
23 belongs to a friend. So just looking at the records,
24 which your Honor can see on the docket -- it was filed
25 as an exhibit with our motion -- we would have no idea

1 that this number belongs to a client. So there's no
2 invasion of privacy. There's no invasion of the
3 attorney-client relationship.

4 So there are a number of -- number of uses for
5 these records beyond just what defendants propose about
6 us giving them a list. And as we say in the briefing,
7 forcing us to give them a list would tip them off to
8 exactly what our working theories of the case are as we
9 are developing them during discovery and allow them to
10 control when --

11 THE COURT: I think consistent with what you
12 just said is that both sides know that there are a whole
13 list of people who are involved in the conspiracy. You
14 were suggesting earlier on in your argument that it's
15 almost self-evident everybody seems to know who played
16 some role in this particular case, in light of the fact
17 there have been two criminal prosecutions already
18 stemming out of these facts.

19 So I say is it really --

20 MR. SOTO: Yes, your Honor, but --

21 THE COURT: -- going to be that much of a
22 surprise that there -- well. It would be -- it would be
23 difficult to think that you could be able to identify
24 people that were not already identified by both sides
25 already.

1 MR. SOTO: So let me give you an example,
2 your Honor. It's not perfect, and I acknowledge that,
3 but it could show you that there could very well be
4 fruit for being able to see Liberty Counsel's AT&T
5 records.

6 So, for example, we don't have landline records for
7 anybody's phone numbers. But from the records we
8 already have for Rena Lindevaldsen's AT&T cell phone,
9 which have been available since 2011 when AT&T gave them
10 to the government, we learned, and as it came up in the
11 deposition of Douglas -- Pastor Douglas Wright of
12 Keystone Baptist Church, that Rena Lindevaldsen was in
13 communication with the church's landline phone. We
14 never would have known that without having Rena
15 Lindevaldsen's cell phone records.

16 That shows -- and it turns out Keystone Baptist
17 Church, which your Honor is well aware from the criminal
18 trials -- and that's why I acknowledge that it's not a
19 perfect example, Keystone Baptist Church had involvement
20 in removing Lisa Miller's belongings after the
21 kidnapping, and eventually some of those belongings were
22 transported to her in Nicaragua.

23 So that's an example of how the AT&T records could
24 point us to additional people that we don't know were
25 involved yet but we could learn by looking at those

1 records.

2 And, again, I have to emphasize your Honor, only
3 Kenneth Miller and Philip Zodhiates went to trial.
4 Liberty Counsel, Rena Lindevaldsen, Linda Wall, and even
5 Lisa Miller at this point, have not gone to trial, so we
6 don't have the benefit of a trial to say these people
7 were involved in the kidnapping. We're interested in
8 only these people and just to those phone calls.

9 And I know your Honor's only focused on relevance
10 at this point, but I also want to emphasize, as we go
11 into briefing, these proposals the defendants have given
12 us all assume that they have any right to withhold this
13 information as privileged under the attorney-client
14 privilege, work product, privacy of the First Amendment,
15 and as we go in our briefing, none of those bases hold
16 any water. They crumble when you look at them.

17 THE COURT: Well, there's no question that I
18 am focusing in upon relevance, frankly, and also
19 prejudice. You know, they have made a representation --
20 the defense has made a representation that your firm,
21 your law -- I don't know if it's called a law firm,
22 but -- is out to destroy Liberty Counsel. Right? And
23 that there seems to be political battle, and I want to
24 tell you that this -- this is a -- this is a civil
25 trial. This is not a political trial. It's not

1 intended to be political in any kind of way.

2 But their argument is that this is all part of an
3 effort for you to get the names of other clients to
4 embarrass them or to follow up with these -- these
5 people. You know, you want to respond to that?

6 MR. SOTO: Certainly, your Honor.

7 So we wholeheartedly, unquestionably deny that we
8 or any of Janet Jenkins' attorneys would ever misuse
9 these records for purposes other than this case, used
10 improperly solely for this case, and that's why in our
11 briefing and in our meet and confer before filing the
12 motion to compel, we offered to subject these records to
13 the exact same protective order that is currently
14 protecting our client's personal, financial, medical
15 information, which limits the use of those documents as
16 confidential documents to this case.

17 And I should -- a few responses to this accusation
18 that SPLC, as Janet Jenkins' attorneys, are out to
19 destroy Liberty Counsel. Liberty Counsel cites a quote
20 from a former -- now former employee who was not even
21 speaking specifically about Liberty Counsel, and he
22 certainly was not speaking on behalf of Janet Jenkins or
23 her attorneys in this case.

24 And the second point, these records, as I said
25 earlier, almost the entirety of the ones we speak about

1 Rena Lindevaldsen, have been public for years. 21 pages
2 were introduced into the public record at Philip
3 Zodhiates's criminal trial in 2016, and we had the
4 remaining 160-something pages since late last year, and
5 still defendants cannot cite to any example, they can't
6 even allege an example of us or anyone else harassing
7 any of their clients or constituents or supporters with
8 that information being out for this long already. And
9 so it's pure speculation without any basis to say that
10 we would misuse this information to harass their clients
11 and donors, et cetera. And again, just --

12 THE COURT: Would you --

13 MR. SOTO: Your Honor can see --

14 THE COURT: Would you disagree with their
15 representation that, you know, apparently there's, as I
16 recall, 70,000 entries, maybe a little more than that --
17 I can't remember the exact number -- and that basically
18 your discovery request would require the disclosure of
19 all communications, at least identification of the phone
20 numbers of all clients that they contacted or talked
21 with during that two-year period?

22 MR. SOTO: I have no basis to dispute that
23 there are those many pages. I believe that sounds
24 accurate to what Mr. Mihet had told us. But, again,
25 your Honor, we have no idea, just by looking at the

1 records -- not even defendants can just, only using the
2 records, ensure a reverse lookup website, figure out
3 which number belongs to a client, which one belongs to a
4 donor. They explain in detail, your Honor, in their
5 briefing, about how it requires multiple steps for them
6 and three separate databases that are solely accessible
7 to them to figure out what their own relationship with
8 each phone number is.

9 We have no interest, your Honor, for our client in
10 figuring out this was a Liberty Counsel client or this
11 was a Liberty Counsel donor. We have no interest in
12 doing that. We're only interested in, again, comparing
13 phone numbers and figuring out who might have been an
14 intermediary. And the records themselves are not going
15 to give us any insight into this person was a Liberty
16 Counsel client or donor.

17 THE COURT: That is the basis.

18 MR. SOTO: And the only reason --

19 THE COURT: You are looking to find out who
20 the intermediaries are, right?

21 MR. SOTO: That's one reason; yes, your Honor.

22 THE COURT: And why wouldn't they fear that
23 you start contacting their clients to figure out whether
24 they are intermediaries in this conspiracy, because
25 that's what you'd -- that's what you'd have to do,

1 right? You would have to go call up some of these
2 numbers and you would have to try to figure out whether
3 they were intermediaries. And that --

4 MR. SOTO: Even --

5 THE COURT: That's a risk -- that's a real --
6 you know, I mean, obviously you can imagine if the shoe
7 were on the other foot and they were asking for all the
8 calls that were being made from your organization, you
9 know, that's a pretty significant invasion of their
10 business.

11 MR. SOTO: Your Honor, in response to that, to
12 me, if we had a reason to be interested in further
13 investigating a particular number that appears on there,
14 that would not be because they are a client of Liberty
15 Counsel, and we would -- they could certainly move to
16 quash a subpoena if we wanted to subpoena them for
17 documents in saying that we have no basis to suspect
18 they had any responsive documents and they were just out
19 to harass us.

20 But that's not even what defendants are complaining
21 about here. What they are complaining about is that
22 supposedly we want to know this person is a client. Has
23 nothing to do with this case, nothing to do with the
24 kidnapping. Just we're supposedly interested in
25 figuring out, you know, this person is a client of

1 Liberty Counsel, and we want to bother them because they
2 are a client.

3 That is not what their -- that's what they are
4 complaining about, not that we would try to reach out to
5 someone that we have a reason to believe might have
6 relevant evidence, and that would certainly be proper.

7 And, again, if the recipient of a subpoena believes
8 that they are just being harassed, there are ample
9 mechanisms for them to challenge that subpoena and to
10 raise arguments that we're simply out to harass them;
11 but that is not what we are intending to do. I have
12 already walked through all the different ways that we
13 could use the records, and I want to emphasize for
14 your Honor, finding intermediaries is just one example.

15 As I laid out with the Keystone Baptist example,
16 Keystone Baptist was not an intermediary but certainly
17 relevant to the kidnapping, and -- and Liberty Counsel
18 and Linda Wall have not been on trial, and so -- or as
19 Liberty Counsel -- we are entitled to discover if
20 there're other outside persons not yet on anyone's
21 radars that have any involvement in the conspiracy to
22 kidnap Isabella.

23 THE COURT: So I want to say I have read all
24 the pleadings and I have considered your argument. And,
25 in general, it could be relevant discovery. I don't

1 think there's any merit in suggesting that you are out
2 to destroy their organization or out to harass the
3 individual clients or -- but I do think that it goes way
4 beyond what is standard discovery and really becomes
5 somewhat abusive to a law firm at Liberty University --
6 Liberty Counsel because you are just going through all
7 of their clients over a given two-year period, and it
8 would seem logical that if you got any suspicions that
9 they may become involved in this particular litigation,
10 or this particular conspiracy, according to your theory,
11 then you are going to explore that contact, you are
12 going to -- you know, go out to that particular client.

13 That is really using somebody's law records, you
14 know, in somewhat of an abusive way. And it seems to me
15 at this particular juncture, after all of this
16 discovery, that if you submitted a list to the
17 defendants of all the individuals whom you want to know
18 as to whether they had a contact with any of the
19 defendants during that two-year period, both the year
20 before and the year after the alleged kidnapping, I
21 think that's suitable discovery. But beyond that, I
22 think it's really tangential, and it's almost a
23 definition of a fishing expedition, and I just -- I
24 think invading a law firm in that kind of way is really
25 inappropriate.

1 And so I'm going to order that you submit a list of
2 names, and the defendants have responded -- I will make
3 sure it's on the record -- responded that they will take
4 those names, run them through their records and see if
5 there's any contact between any of the defendants and
6 any of these particular witnesses during the relevant
7 period, and that would be the extent of the discovery.

8 I do so -- well, I just think that that's
9 appropriate. I am going to do that in writing, but I
10 also really want to get this case moving, so I'm telling
11 you exactly what the writing's going to say.

12 All right. Now, I haven't asked for the response
13 from the defendants, but you won. I'm --

14 MR. MIHET: Your Honor, you made my job
15 exceedingly easy on this particular motion.

16 THE COURT: Right. So usually when you win,
17 you remain quiet.

18 MR. MIHET: I have nothing else to add.

19 THE COURT: Okay.

20 MR. MIHET: Thank you.

21 THE COURT: But there's no objection, when
22 they submit the names of all of these persons, you will
23 run those and check the numbers and give them responses.

24 MR. MIHET: Absolutely, your Honor. That was
25 our first proposal to them months ago. They could have

1 had those names months ago if they had --

2 THE COURT: All right.

3 MR. MIHET: -- assented.

4 THE COURT: Okay. So now to disqualification.
5 You filed a motion for disqualification of counsel, and
6 I will hear you in that regard.

7 MR. TIERNEY: Thank you, your Honor. It's
8 Michael Tierney for the defendant --

9 THE COURT: Yes.

10 MR. TIERNEY: -- Timothy Miller.

11 We were the ones who filed the motion to
12 disqualify, and the motion to disqualify was on the
13 basis of a conflict of interest, and a conflict of
14 interest is clear we need to look no further than
15 Isabella's affidavit where Isabella states that her
16 then-attorneys were acting contrary to her interest and
17 acting the exact opposite of her interests. As
18 your Honor --

19 THE COURT: No. Of her wishes.

20 MR. TIERNEY: She said --

21 THE COURT: Isn't that -- isn't that a
22 difference? In contrast to her wishes. You know, one
23 of the -- one of the really interesting questions -- and
24 maybe you can answer this -- for much of this time,
25 Isabella was essentially not the person in charge of the

1 litigation; it was Janet Jenkins in the place of
2 Isabella and for her. And my question is, it's subtle
3 as to whether she is, in fact, represented -- Isabella
4 is represented directly by plaintiff's counsel or is it
5 really Janet Jenkins?

6 You know, for -- I think the counsel -- Janet
7 Jenkins would have direct relationship with counsel,
8 would be ordering counsel to do one thing or another,
9 and the minor in that circumstance really has no control
10 at all. So are they, in fact, being represented? Or is
11 it, in fact, Janet Jenkins on behalf of the child who
12 is, in fact, the client?

13 MR. TIERNEY: The conflicted counsel has
14 represented to this Court numerous times that they are
15 representing both Isabella and Janet. There are
16 numerous pleadings where they have made that
17 representation to the Court.

18 THE COURT: Yes.

19 MR. TIERNEY: And regardless of what may have
20 occurred while Isabella was still a minor, they had
21 continued to purport to represent Isabella after she
22 reached the age of majority.

23 Now, any time, okay, that you are representing two
24 clients jointly, you are taking a risk, okay. An
25 attorney who is representing two different clients needs

1 to confirm at the outset of the representation that
2 their interests are actually common interests, okay.

3 In their surreply, they cite this case that then
4 gets distinguished by the Fields V Balkcom case, where
5 the court said -- and I would just then quote from the
6 court here, the Southern District of New York,
7 "Accepting a common representation is not a risk-free
8 activity, for the appearance of a common interest may
9 not reflect reality. Thus it is incumbent upon the
10 attorney to learn the essential facts to form both a
11 professional opinion, interest or a fact in common and
12 to fully explain to each client the implications of that
13 common representation."

14 THE COURT: Okay, so let me address that
15 particular question.

16 MR. TIERNEY: Yes.

17 THE COURT: I mean, forgetting this
18 interesting question as to whether the child is, in
19 fact, a client as opposed to the person who is in the
20 client's stead, do you agree that plaintiff's counsel
21 never met with Isabella?

22 MR. TIERNEY: Correct.

23 THE COURT: And do you agree that Isabella
24 never shared any confidentiality or private information
25 with her lawyers?

1 MR. TIERNEY: I agree with that, but
2 disqualification is based on both confidentiality as
3 well as the duty of loyalty, which is why the Third
4 Circuit in the In Re: Corn Derivatives case,
5 recognizing that there was no sharing of any
6 confidential information, still disqualified the
7 attorneys after their joint representation --

8 THE COURT: I'm thinking about that scenario
9 that you were talking about. Let's say you called
10 Isabella. The plaintiff's counsel has said they are not
11 going to call her, they're not going to depose her. She
12 is not -- not going to be a part of the litigation. You
13 might call her.

14 MR. TIERNEY: Correct.

15 THE COURT: Right? If you called her and she
16 testified she had never said anything to the lawyers,
17 she had never shared anything in regard to
18 confidentiality, what's the prejudice to her?

19 MR. TIERNEY: Because the lawyers have not
20 just a duty of confidentiality; they have a duty of
21 loyalty.

22 THE COURT: Well, but that's not absolute,
23 right? It's not absolute that you have a duty of
24 loyalty. You -- the court in this particular situation,
25 at least according to the Second Circuit, and I would

1 suppose the Third as well, looks at all of the relevant
2 factors to make a determination as to whether there
3 should be a disqualification motion granted. And if in
4 fact there is no personal private disclosures, no
5 relationship existing between the client and the lawyers
6 that's being breached, I mean, doesn't that really
7 suggest that -- this is a different situation. This
8 is -- this is not a situation in which there would be an
9 abuse of a relationship between a client and a lawyer
10 because nothing was ever shared.

11 MR. TIERNEY: Your question, your Honor, is
12 presuming that the only basis for disqualification
13 should be the confidential information that is
14 frequently shared between a client and an attorney.
15 And, frankly, that is not the only basis for
16 disqualification. You also have a duty of loyalty,
17 okay. And you have a number of cases in which you have
18 a client who does not share any information whatsoever.
19 They're frequently the employee of a company, okay, and
20 they have not shared any information, but having
21 represented both a company and the employee, okay, you
22 have that duty of loyalty.

23 THE COURT: Okay.

24 MR. TIERNEY: That conflict of interest --

25 THE COURT: Is it absolute?

1 MR. TIERNEY: That conflict of interest is
2 something that can be waived, okay. The rule makes it
3 explicit; the cases make it explicit. You can have a
4 well-drafted retention letter, okay, that waives it in
5 the beginning, or you can have a waiver as you are
6 ending the relationship, and when one joint client
7 decides to leave, okay, if that joint client was to
8 waive the attorney going forward and representing just
9 the remaining client, that is permissible under the
10 rules.

11 THE COURT: And to what extent does the court
12 have discretion to consider such things as violation of
13 privileged communications, just as one example, or just
14 its management of litigation? I mean, this case has
15 been going on for five years, and to suggest that one
16 side would have to disqualify themselves because of a
17 violation of a duty of loyalty when there in fact was no
18 violation of communications between a client and a
19 lawyer, but just a duty, doesn't the court have the
20 ability to say, you know, this -- in this circumstance,
21 it's not -- it's not discrediting the judicial system,
22 and in consideration of all of the factors, doesn't it
23 really suggest that the disqualification should be
24 rejected?

25 MR. TIERNEY: So the court should be looking

1 at all the factors, absolutely, okay. But the burden is
2 on the conflicted counsel, and under the Hempstead case,
3 they have to first show that there is no actual conflict
4 as well as that there is no apparent conflict in
5 loyalties. And so you can't ignore that second part.

6 As a matter of fact, when there is a conflict of
7 this nature that is not waived, the Second Circuit has
8 held, okay, that it is *prima facie* unreasonable and the
9 disqualification should be granted in those cases.

10 THE COURT: Well -- and so what is your
11 conflict here? What's your argument as to the conflict?

12 MR. TIERNEY: The conflict is a conflict of
13 the interests of Isabella and Janet. Now, in
14 Rule 1.7[23] comment, okay, it makes clear, okay, that a
15 conflict may exist by reason of substantial discrepancy
16 in the testimony or incompatibility in the positions in
17 relation to an opposing party.

18 Isabella has granted my client a release and has
19 said that she does not want this case to be going
20 forward at all. She has given everybody a release.
21 Janet wants this case to keep going forward. If that's
22 not a clear incompatibility in positions, I have never
23 seen one, okay, and that is defined in Rule 1.7, comment
24 [23], as a conflict of interest.

25 Now, this is a conflict of interest that could be

1 waived. If it was head-on-head opposition where Janet
2 sued Isabella, okay, then you couldn't have a waiver.
3 And this isn't a nonwaivable conflict, but this is a
4 conflict, and it's a conflict for which disqualification
5 is mandatory because it's *prima facie* improper for them
6 to continue representing Janet having already
7 represented Isabella and Janet together.

8 THE COURT: But I thought you just said that
9 if there was litigation -- for instance, if Janet had
10 sued Isabella, or Isabella sued Janet, what you are
11 suggesting is that that would be a mandatory
12 disqualification conflict of interest.

13 MR. TIERNEY: Both are mandatory. If it was
14 head on head, it would be a nonwaivable conflict of
15 interest. This conflict, which is not head or head on,
16 so it could, okay, be waived by Isabella, but she has
17 already stated she's not waiving it. She does not want
18 the attorneys who have represented her to continue
19 representing anyone, okay, that's where this fits into a
20 different category. If it was direct --

21 THE COURT: Could I ask you --

22 MR. TIERNEY: -- head or head, it wouldn't
23 matter.

24 THE COURT: -- what would you say if
25 plaintiff's counsel said, "I don't necessarily trust the

1 affidavit. Mr. Heuser" -- is it Heuser -- "drafted that
2 affidavit"? There's no reason to believe that Isabella
3 would have known of her right to have Janet Jenkins
4 disqualified, or counsel disqualified for Janet Jenkins,
5 and yet there it is in the affidavit. It would become
6 really fundamental to know exactly what was said between
7 Mr. Heuser and Isabella.

8 MR. TIERNEY: It would actually be irrelevant,
9 your Honor, okay.

10 THE COURT: Oh, really?

11 MR. TIERNEY: Irrelevant, because as
12 conflicted counsel point out in their surreply, they
13 don't challenge the legitimacy of the affidavits, and
14 they even state they don't challenge the legitimacy of
15 the affidavits because of the declaration from Attorney
16 Deborah Bucknam, okay, verifying that she has
17 independently spoken with Isabella and that the
18 affidavits express Isabella's positions, okay.

19 And so the legitimacy of the affidavits, which was
20 something that they had raised in their initial
21 opposition, is something that they affirmatively back
22 off of in their surreply.

23 THE COURT: Yeah. What's interesting about
24 Ms. Bucknam's motion is that she requested that the case
25 against Isabella -- or Isabella's case be dismissed, but

1 she didn't make a request literally for the removal of
2 Janet Jenkins' lawyers. That was just as an after -- a
3 section of a statement in the affidavit by Isabella that
4 she objected to the continued representation. But that
5 wasn't the request that was made by Isabella in court by
6 her counsel.

7 MR. TIERNEY: So the affidavit by Isabella
8 requested that either the counsel that was then
9 representing her withdraw or one of the other parties
10 for the case use her affidavit in order to effectuate
11 the withdrawal, which is what we are doing right now
12 with this motion for disqualification.

13 Now, if the Court was to deny the motion for
14 disqualification on the basis that Timothy is the party
15 bringing the motion, and then force Isabella to bring
16 the motion herself later on, that's only going to delay
17 the case.

18 Likewise, if the Court was to deny disqualification
19 and wait until Isabella's deposition is taken or wait,
20 okay, until we get an affidavit from Isabella, okay,
21 talking about the abuse that she suffered by Janet, and
22 then Janet's attorneys will want to presumably cross
23 examine Isabella even though they have stated that they
24 won't cross examine Isabella or they don't want Isabella
25 to testify at all, but then when we either produce an

1 affidavit or have a -- an actual deposition, that makes
2 the conflict even more clear.

3 There is a conflict now, but it's going to become
4 more clear later on, and so we are going to have
5 disqualification at some point. The question is whether
6 it's going to happen now, when they're already asking
7 for a delay in order to deal with Lisa issues or whether
8 we are going to have to have another delay later on.

9 Bear with me one second, your Honor.

10 THE COURT: Okay.

11 MR. TIERNEY: In their surreply, they cite the
12 Kempner and the Allegaert cases trying to make it seem
13 like this case of joint representation is the same as
14 the Kempner, Allegaert or Trinity Ambulance case, but
15 they're very different, because in the Kempner,
16 Allegaert and Trinity Ambulance case, you had an
17 employee or a co-plaintiff or a co-defendant
18 affirmatively agree, okay, to be jointly represented by
19 their employer's counsel. And then that employee
20 switched sides.

21 That's not what happened here at all, okay.
22 Isabella never affirmatively agreed to be represented;
23 that was done on her behalf by Janet. And she never
24 switched sides. There was no determination of what side
25 she was on. There was a risk taken to represent both of

1 them jointly instead of, say, asking that a JAL be
2 appointed or something of that nature, and by taking
3 that risk, okay, representing them both jointly, they
4 have put themselves in the position they are in now.

5 They point out in the opposition that the position
6 they are in now is something that I myself warned them
7 of back last May, that if they continue to represent two
8 joint clients, then their interests are not common
9 interests, they're going to have to be disqualified, and
10 so they should have withdrawn from representing Isabella
11 or withdrawn from representing both of them, but they
12 have now put us in the position that that's what the
13 Court must do because they have not done it themselves.

14 I mentioned just a minute ago, your Honor, or a
15 couple minutes ago, rather, that the Third Circuit had a
16 case that was really on point as far as when joint
17 representations go awry -- that's the In Re: Corn
18 Derivatives case, 748 F. Second 157 -- where there was
19 no trading of confidential information, okay, but the
20 duty of loyalty, okay, was the basis for the
21 disqualification of counsel.

22 And the court said, quote, A client has an
23 expectation that the attorney will diligently pursue his
24 goals until the matter is completely resolved, absent an
25 effective waiver. In litigation, an attorney may not

1 abandon his client and take an adverse position in the
2 same case. This is not merely a matter of revealing or
3 using the client's confidences and secrets but a duty of
4 continuing loyalty to the client, and you can't have
5 them have a duty of loyalty to two clients who are
6 diametrically opposed.

7 THE COURT: Well, let me just couch this
8 scenario just a little bit differently and you tell me
9 why this isn't appropriate.

10 So first, until Isabella becomes no longer a minor,
11 she -- basically Janet Jenkins is in her place, right?
12 Her actual representation is through Janet Jenkins.
13 There is no conflict. Then after she became 18 years of
14 age, you moved to get the case dismissed, and I
15 ultimately said there's no evidence to suggest that she
16 had access to a court, and that fell within the
17 exception. So because she has no access to a court,
18 nobody knows where in the world she is, no one's had any
19 contact with her, so there can be a procedure by which
20 there's continued representation as if she was a minor.

21 Then, once all of a sudden she is identified and
22 located, she writes an affidavit. The plaintiff's
23 counsel then waits until she has a lawyer who confirms
24 the fact that she does want dismissal of her case, and
25 then dismisses her case. So what is wrong with the way

1 they acted?

2 MR. TIERNEY: What is wrong is they have not
3 withdrawn from representing Janet as well, okay. If
4 this was a simple car accident, okay, and you had two
5 parents, okay, and one parent was driving the car and
6 the other parent, okay, wanted to bring a claim for
7 damages against the driver on behalf of the child who
8 was injured, okay, you couldn't have a parent and a
9 child, okay, be jointly represented because there's a
10 conflict of interest against that other parent, okay.
11 This happens with some regularity, that then the child
12 needs to be separately represented.

13 THE COURT: And the conflict has nothing to do
14 with the lawyer's representation of Isabella. What you
15 are suggesting is because Isabella says, "I want the
16 lawyers to withdraw from Janet Jenkins' case," that's --
17 that's the necessary conflict?

18 MR. TIERNEY: No. The conflict is that they
19 have, okay, sued and have sought damages from myself for
20 my client, okay, from numerous other clients, and from
21 Lisa Miller, okay, when that is the exact opposite of
22 what Isabella, okay, saw as her own interest. And
23 Isabella's able to determine her own interest, okay, and
24 her interests are not in suing her mother, Lisa, or
25 suing Timothy Miller or suing any of the other

1 defendants. That's why she's granted them release.

2 Janet's interests, okay, are in suing Lisa Miller
3 and suing Timothy Miller and suing the other defendants,
4 okay. They are diametrically opposed interests. And
5 the rule prohibits representing someone who has
6 interests that are materially adverse to a former
7 client. Isabella is a former client, has materially
8 adverse interests, okay. It's not head on head and so
9 it's not an unwaivable conflict, but the conflict
10 absolutely exists as recognizing comment [27] to
11 Rule 1.7 -- [23], I'm sorry, and it hasn't been waived.

12 THE COURT: And if the plaintiffs dismissed
13 the case against Lisa, or did not bring the case against
14 Lisa -- Lisa Miller, your position would be the conflict
15 is --

16 MR. TIERNEY: It is --

17 THE COURT: -- because Janet Jenkins is suing
18 your clients?

19 MR. TIERNEY: Correct. And Isabella has
20 expressed that she has no interest in suing my client
21 and has given my client a release.

22 THE COURT: And you think that is a sufficient
23 adverse position?

24 MR. TIERNEY: I absolutely believe it, and
25 it's also explicitly stated in the comments to the

1 rules, okay, where the writers of the rules explicitly
2 stated that a conflict of interest exists when you have
3 two parties, okay, who have a different agenda for
4 dealing with opposing parties or a different agenda for
5 trying to settle the case.

6 THE COURT: Okay.

7 MR. TIERNEY: Okay. And they have a different
8 agenda for trying to settle the case. Isabella gave a
9 release. Janet wants to continue to litigate.

10 THE COURT: All right.

11 MR. TIERNEY: Thank you, your Honor.

12 THE COURT: Is there anyone else who wants to
13 speak on behalf of your joint position?

14 MR. GANNAM: Yes, your Honor. Roger Gannam
15 for defendants Liberty Counsel and Rena Lindevaldsen.

16 THE COURT: Okay.

17 MR. GANNAM: Your Honor, we would join in the
18 arguments made by Mr. Tierney. I would only speak to
19 add a couple of points here.

20 First, on the issue of material adversity, as I
21 think Mr. Tierney covered and I'll just supplement, the
22 standard is no longer, if it ever was, a direct conflict
23 as a -- being directly legal adverse in the lawsuit or
24 an illegal claim, but as recently as February of this
25 year, the ABA issued a formal opinion making it clear

1 that material adversity is much broader than the direct
2 conflict that was asserted by the plaintiff.

3 I would also point out that in the official ABA
4 publication that -- Models Rules with annotations, it
5 includes the annotation on the issue of material
6 adversity that are cases where a -- an indirect
7 financial stake -- the outcome, for example -- is
8 materially adverse. So if you have a business owner who
9 owns a portion of a business, he is represented by an
10 attorney, and now that attorney represents a plaintiff
11 that's suing the business, the material adversity
12 existed because of the initial impact on the value of
13 the holding of the business interest of the former
14 client.

15 This case isn't directly analogous, but certainly
16 as an 18-year-old adult, Isabella Miller is certainly
17 legally independent but as a practical matter has a very
18 real and concrete interest in the financial situation of
19 her mother, and we don't have to speculate that that's
20 the case for an 18-year-old young adult. You know,
21 being -- reaching the age of majority doesn't
22 automatically make someone financially independent.

23 And the fact that the mother being sued or is being
24 alleged to have been the primary actor in this alleged
25 kidnapping is certainly materially adverse both because

1 of the -- just the moral aspect of it as if that
2 necessarily damaged Isabella, which has been the
3 assertions of plaintiffs throughout this case, but also
4 from a financial standpoint where the -- both the
5 financial impact and even liberty impacts to Lisa Miller
6 are certainly relevant to Isabella's life. So the
7 material adversity certainly exists here.

8 And then the final point I would make is on the
9 issue of the potential tainting of the trial. The
10 narrative that was developed by Miss Jenkins and her
11 counsel throughout the case has been about the damage to
12 Isabella. We took the depositions of four expert
13 witnesses for whom the plaintiff paid thousands of
14 dollars to opine on the damage to Isabella as a result
15 of Lisa's and her alleged co-conspirators' actions.

16 There's been such a commitment, a strident
17 commitment in that narrative, I don't think it's
18 possible now for the plaintiff to retreat from that.
19 Even a few moments ago when Mr. Soto had the opportunity
20 to argue about the discovery that plaintiff still seeks,
21 it was couched in terms of Isabella's kidnapping. I
22 think the trial is tainted for all defendants when that
23 continues to be the narrative and so much has been
24 invested in it. I don't think we can reasonably rely on
25 the plaintiff and plaintiff's counsel to retreat from

1 that because the case now only involves Jenkins -- Miss
2 Jenkins' claims for damages for what Lisa and her
3 alleged co-conspirators did. There is no longer any
4 aspect of this case involving any alleged damage to
5 Isabella, but that's been the narrative so far, and I
6 don't think they can simply abandon that or pivot from
7 that.

8 So both in terms of material adversity and
9 potential taint to the trial, both of those issues comes
10 down on the side of disqualification.

11 THE COURT: Why is that relevant to
12 disqualification? Why don't you just file a motion *in*
13 *limine* to exclude the damages to Isabella because she no
14 longer has a claim?

15 MR. GANNAM: Well, your Honor, certainly we
16 would seek such a motion to exclude any discussion of
17 damages for Isabella, but the potential taint to the
18 trial would be statements about the case, statements
19 about what Lisa and her alleged co-conspirators have
20 done, that are infused with this sense of damage to
21 Isabella. We have seen it in every filing and we hear
22 it in every hearing. When that's no longer the case, we
23 don't want to risk having to have a jury hear something
24 improper that technically wouldn't be introduction of
25 evidence about damage to Isabella but just the narrative

1 finding its way through over and over again before the
2 jury where we would have to seek some kind of a -- some
3 remedy for that.

4 It would be better to proceed with different
5 counsel who are not committed to that narrative so that
6 there's less likelihood that stray comments or, you
7 know, the -- that taint of a narrative would seep
8 through before the jury.

9 THE COURT: Okay. All right, is there anyone
10 else who wants to speak? Okay.

11 MR. HOCHSCHILD: Adam Hochschild for Linda
12 Wall.

13 Your Honor, briefly, my client didn't file a formal
14 joinder of the motion, but I would add that plaintiff
15 and plaintiff's counsel has repeated the mantra in the
16 opposition, the surreply, that the motion to disqualify
17 is a tactical device, is some sort of strategic tactical
18 device to -- to insert into this case at a strategic
19 point in time. I would only note that it --

20 THE COURT: Well, that is -- that is because
21 that's linked of strict scrutiny, which is what they
22 wanted to use as the standard.

23 MR. HOCHSCHILD: Understood. And I would -- I
24 would only point out that it was Janet Jenkins and her
25 counsel who made the tactical decision themselves to

1 file this lawsuit on behalf of both Janet and Isabella,
2 and they have -- by that choice, by their own tactical
3 decision, they have put themselves in this position
4 right now.

5 THE COURT: Okay. All right. Who is going to
6 speak on behalf of the plaintiffs?

7 MR. McCOY: Scott McCoy, your Honor.

8 THE COURT: Okay.

9 MR. McCOY: And I apologize. When Mr. Gannam
10 was speaking, there was some echo and it was very hard
11 to hear him, so I am going to do my best to address what
12 I think he said. And I'm still getting a little
13 feedback. I hope you all aren't, but can you hear me
14 okay, Judge?

15 THE COURT: Yes, I can hear you fine.

16 MR. McCOY: Okay, good. You're the only one
17 that matters as far as I'm concerned. So as long as you
18 can hear me, we're good.

19 THE COURT: That's a really -- that's a smart
20 way to start.

21 MR. McCOY: Your Honor, I just want to really
22 go back to remind -- or put this in context: This case
23 was brought in the first instance when Isabella was a
24 minor and her mother was the one that brought the
25 claims, and a mother and her daughter's interests are

1 aligned.

2 The law says that the way that the claims of a
3 minor are brought are through their next friend/parent.
4 Those interests were aligned all through the case. And
5 then as you said, when Isabella became adult, she
6 remained kidnapped, and those interests were still
7 aligned and you allowed Janet to continue as next
8 friend, under the Whitmore case, and then we got to the
9 others.

10 So I don't think that it's fair to suggest that
11 Janet's interests and Isabella's interests in all the
12 time prior to now could be said to be anything but in
13 concert, and I think it's really important to remember
14 that.

15 There's been a lot of discussion in this case so
16 far about whether or not this is a successive
17 representation or a concurrent representation, whether
18 it's 1.7 or 1.9, and I think the way you can cut through
19 all of that is by looking at the one thing that is
20 common to both of those rules, and that is the
21 requirement that there be direct adversity between
22 the -- the clients, and in this case there simply is not
23 that direct diversity -- direct adversity.

24 Janet and Isabella are not on the opposite sides of
25 the V in this case or any other case. And if that is

1 true, regardless of what tests you think you should
2 apply or what rule you should apply, because they both
3 require that direct adversity, there is -- there's no --
4 disqualification is not required or even warranted.

5 I think what you said, you know, there's been
6 discussion of the confidential information. I think
7 it's been admitted by opposing counsel that we have
8 never spoken to Isabella and there has been no
9 confidential information that has been exchanged, so
10 that can't be a basis for disqualification. Then there
11 was discussion of, well, there's the duty -- the duty of
12 loyalty. Well, the duty of loyalty still assumes that
13 there is direct adversity. In other words, the client,
14 like the attorney, can't serve two masters in the same
15 case, and so that simply won't happen here.

16 What's happened here is more in line with joint
17 representation cases like Allegaert, where the case
18 started out as a joint representation, and then there's
19 a realignment of the parties, and -- and then Allegaert
20 says you don't even go to the subsequent representation
21 because it's assumed that the -- any confidential
22 information, if there was any, which we have admission
23 that there wasn't any shared, would have been -- would
24 have been in common anyway. There's not an expectation
25 that would have been kept from the joint representation.

1 And so I think this case really when you look at it
2 is more akin to the Allegaert line of cases in the joint
3 representation context. Counsel has suggested that
4 like, you know, you assume a risk when you enter into a
5 joint representation, and he cites to the Third Circuit
6 case, but Allegaert and Trinity Ambulance are actually
7 binding Second Circuit cases that deal with this very
8 issue of joint representation at the beginning. One --
9 one party then realigns and switches sides. And here we
10 even haven't had a switch side. Isabella has not
11 switched sides in this case. She's just dropped out.
12 Right? And when she drops out, there's no direct
13 adversity.

14 I think -- the other thing that your Honor hit on,
15 and I think this is quite apt, is that the mere wishes
16 and desires of Isabella is not an interest as
17 contemplated by Rule 1.7 or 1.9 and direct adversity.
18 If that were the case, then any clients could -- could
19 basically provide a veto to any of the -- their
20 counsel's clients by simply saying, "I don't agree with
21 what you're doing." And that certainly is not how the
22 law works. The law requires there to be some direct
23 adversity which makes that material, right, and makes
24 the legal interests in conflict.

25 THE COURT: Okay, but defense counsel --

1 MR. McCOY: Here we don't have any legal --

2 THE COURT: Defense counsel -- defense counsel
3 would say that when Isabella said, "I want the lawyers
4 to withdraw from Janet Jenkins' representation," and
5 they refused to do that, that is sufficient adversity.
6 Do you think that's true?

7 MR. McCOY: No, because the adversity as the
8 rule talks about -- and this is in the comments when you
9 look at the comments to Rule 1.7 that we cite in our
10 briefing -- it requires there to -- it requires there to
11 be direct adversity, in other words, that they have to
12 have it be a situation where Isabella is suing or is
13 sued by Janet, and that's not the case here. Otherwise
14 you just have "I don't" --

15 THE COURT: Okay, but let me ask you about --

16 MR. McCOY: -- "agree with what you're doing."

17 THE COURT: Let me ask you about a different
18 adversity.

19 MR. McCOY: Sure.

20 THE COURT: The argument from defense counsel
21 was that Isabella has a real interest in protecting her
22 mother both economically as well as, I guess,
23 physically. And so she wants to protect her mother, and
24 you are suing her mother. And -- or Janet Jenkins is
25 suing her mother. Does it make a difference if Lisa is

1 in the litigation as opposed to not in the litigation?

2 MR. McCOY: No, because Isabella and Lisa are
3 two distinct entities with distinct legal interests that
4 have to be considered. If that were -- first of all,
5 there's no indication that the financial interest of a
6 parent being sued is enough to disqualify. Imagine the
7 mischief that could happen in that circumstance. You
8 know, take it out of this case. But could Isabella say,
9 "Anyone else can't sue my mom because it would affect my
10 interests financially"? I mean, that can't be the rule,
11 and I don't think any of the cases that have been cited
12 contemplate that loose of an interest.

13 And I think in our briefing we actually cited some
14 case that says that a mere economic interest is not
15 sufficient or a financial interest is not sufficient to
16 constitute a conflict of interest, a legal interest, you
17 know, sufficient to give you direct adversity to warrant
18 a required disqualification.

19 THE COURT: All right. So you think that --
20 you think that your choice of bringing Lisa into the
21 litigation, now that she is on the verge of being
22 served, is irrelevant to this argument of
23 disqualification of counsel?

24 MR. McCOY: I think it is, yes, because
25 Isabella's claims have been dismissed, right? They

1 are -- they are gone. The interests -- those were her
2 legal interests associated with this matter. There has
3 been no -- other than a conclusory statement that she
4 has an interest in her mother, or any other interest,
5 there is no interest that is being implicated here.
6 There's no claim or counterclaim or anything like that
7 where Janet and Isabella are adverse. And it can't be
8 that Isabella, you know, gets to say that Janet doesn't
9 have claims against another party in the case. That's
10 not how it works. Janet's claims are independent.

11 And now that Isabella is out, if you follow the
12 Allegaert line of cases, you know, those cases say that
13 Janet can proceed in this litigation against Lisa and
14 all of the other defendants because the interests are
15 separate.

16 THE COURT: Okay. All right. Anything else?

17 MR. McCOY: Sorry, your Honor. I don't
18 think -- no, I think -- I think the discussion you had
19 with counsel was good, and I don't think that there's
20 anything in addition --

21 THE COURT: Okay.

22 MR. McCOY: -- that I would add, and I would
23 submit --

24 THE COURT: All right. Is there anyone else?

25 MR. TIERNEY: May I respond, your Honor?

1 THE COURT: Yes.

2 MR. TIERNEY: Michael Tierney for Timothy
3 Miller.

4 I think Attorney McCoy highlighted the two legal
5 differences between our positions. And one difference,
6 okay, is whether there is a requirement of head-on-head
7 opposition in order for there to be a conflict or not.
8 I believe you read in his pleadings -- we just heard
9 from him -- he believes there is. I don't think that is
10 at all necessary, and I recommend the Court look at Rule
11 1.7, comment [23], which says that incompatibility in
12 the positions as it pertains to opposing parties is
13 conflict enough for the purposes of the rules.

14 The second distinction that I think is just a big
15 difference here the Court needs to determine is whether
16 Isabella can say whom Janet can have -- hire as an
17 attorney, okay. I heard Attorney McCoy say Isabella
18 can't say that, she has no input; and that is not
19 accurate.

20 Isabella has the right under Rule 1.9(a) to either
21 waive them continuing or to object to them representing
22 Janet, and she has refused to waive it.

23 THE COURT: This is despite the fact that
24 there is no confidential communications that Isabella
25 made to counsel, no representations, no insight into her

1 defense. It's just out of this duty of loyalty; is
2 that -- is that your point? Because technically those
3 counsel represented her at one particular point, such --
4 creates a duty of loyalty sufficient that it's automatic
5 that counsel has to be disqualified?

6 MR. TIERNEY: You are correct that the duty of
7 loyalty is sufficient that counsel has to be
8 disqualified, and it is not me saying it. It is the
9 Second Circuit in the Hempstead case that said it, okay,
10 that they said specifically, okay, that an apparent
11 conflict in loyalties, and this is far more than just an
12 apparent conflict in loyalties. This is a clear, very
13 clear conflict in loyalties where they're diametrically
14 opposed as it pertains to either settlement of the case
15 and/or treatment of opposing parties.

16 THE COURT: Okay. All right. Now, my
17 intention is to address this the rest of this week, and
18 I will submit findings this week, findings on the
19 various motions that are outstanding, and an order as to
20 how to proceed.

21 MR. MIHET: Your Honor?

22 THE COURT: Yes.

23 MR. MIHET: Again, Horatio Mihet for
24 Lindevaldsen and Liberty Counsel.

25 THE COURT: Yes.

1 MR. MIHET: There's one outstanding issue as
2 regards to the additional -- that motion that's pending
3 before the Court, and that's dealing with the motion to
4 compel the ESI searches that your Honor heard back in
5 December, just before Christmas.

6 THE COURT: Yes.

7 MR. MIHET: You may recall your Honor asked me
8 to follow up with an affidavit about an additional
9 search that your Honor wanted me to run, and I have done
10 that. And the plaintiffs have since responded to that
11 affidavit. I did not further respond to them because I
12 thought I might have five minutes to sort of bring that
13 issue to a focus before the Court.

14 THE COURT: Well, I am not prepared on that --

15 MR. MIHET: Okay.

16 THE COURT: -- to be perfectly honest, because
17 that was not on the list. So how about if you -- how
18 about if I give you just a couple of days to respond in
19 writing --

20 MR. MIHET: Okay.

21 THE COURT: -- to the response from the
22 plaintiff, and that will be addressed on Friday?

23 MR. MIHET: That would be great. So I'll be
24 traveling back home. Is Thursday too late or --

25 THE COURT: That's fine.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. MIHET: Okay.

THE COURT: Thursday's fine.

MR. MIHET: Thursday. Thank you, your Honor.

THE COURT: Okay. All right? Well, I appreciate -- appreciate the special -- the travel that many people engaged in, so thank you for the argument.

(Court was in recess at 4:00 p.m.)

*** ** ***

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



March 17, 2021

Date

Anne Nichols Pierce