

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

JANET JENKINS,

Plaintiff,

v.

KENNETH L. MILLER, ET AL.,

Defendant.

Docket No. 2:12-cv-000184-wks

**MOTION TO COMPEL COMPLIANCE WITH
THIRD PARTY SUBPOENA TO INTERNET ARCHIVE**

Plaintiffs, by and through their attorneys, move to compel compliance with their third party subpoena to Internet Archive pursuant to Federal Rule of Civil Procedure 45(g).

Plaintiffs served a subpoena on Internet Archive on August 17, 2018. *See* Ex. A. This subpoena requested communications concerning the removal of Defendant Liberty Counsel's websites from Internet Archive's publicly accessible archive, the Wayback Machine, as well as archived copies of those websites from June 1, 2003, to date. *Id.*

On October 17, 2018, Internet Archive provided Plaintiffs with the subpoenaed communications. At the same time, Internet Archive informed Plaintiffs that it could not access the subpoenaed archived copies of Liberty Counsel's websites without restoring them to the Wayback Machine, thereby making them publicly accessible. Internet Archive further informed Plaintiffs that it does not restore removed websites to the Wayback Machine without permission from the party that requested removal or a court order.

Plaintiffs believe that the archived copies of Liberty Counsel's websites may contain discoverable information, particularly regarding Liberty Counsel and Defendant Rena Lindevaldsen's animus and noncompliance with court orders. *See* Fed. R. Civ. P. 26(b)(1)

(“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense Information within this scope of discovery need not be admissible in evidence to be discoverable.”). Plaintiffs have received assurances from Internet Archive that the websites may be restored temporarily just long enough to capture them and then taken back offline, thereby limiting their public accessibility. *See* Ex. B.

For the foregoing reasons, Plaintiffs respectfully move this Court to order Internet Archive to restore the archived copies of Liberty Counsel’s websites to the Wayback Machine and inform Plaintiffs’ Counsel of the restoration so that the copies may be downloaded.

October 31, 2018

Respectfully submitted.

/s/ J. Tyler Clemons

/s/ Frank Langrock

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing document was filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record, including the following:

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Counsel for Defendant Timothy Miller

October 31, 2018

/s/ J. Tyler Clemons

Exhibit A

UNITED STATES DISTRICT COURT

for the
District of Vermont

Janet Jenkins, et al.

Plaintiff

v.

Lisa Miller, et al.

Defendant

Civil Action No. 2:12-cv-00184-wks

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Internet Archive

(Name of person to whom this subpoena is directed)

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment.

Place: Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104

Date and Time:

09/30/2018 5:00 pm

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 08/17/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Beth Jacob

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Janet Jenkins and Isabella Miller-Jenkins, who issues or requests this subpoena, are:

Beth Jacob | 400 Washington Ave., Montgomery, AL 36104 | beth.jacob@splcenter.org | (334)956-8224

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Attorney Or Party Without Attorney (name And Address) BETH JACOB, ESQ. () SOUTHERN POVERTY LAW CENTER 400 Washington Avenue Montgomery, AL 36104		Telephone: (334) 956-8440		FOR COURT USE ONLY
Attorneys for: PLAINTIFFS		W2698904		
Insert name of court, judicial district and branch court, if any: UNITED STATES DISTRICT COURT DISTRICT OF VERMONT				
Plaintiff: JANET JENKINS				
Defendant: LISA MILLER				
PROOF OF SERVICE	DATE: 9/30/2018	TIME: 5:00 p.m.	DEPT/DIV: SPLC	Case Number: 2:12-cv-00184-wks

I, Stephen Sabol, Under penalty of perjury, hereby declare that I am and was on the dates herein mentioned, over the age of eighteen, and not a party to the within action;

I served: **SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

in this action by personally delivering to and leaving with the following defendant or person on the date set opposite their respective names, a true copy thereof:

Witness : **INTERNET ARCHIVE**

Served: : **ALISON O'CONNOR-KORB Archive Administrator/Authorized to Accept Service of Process**

Address : 300 Funston Avenue, San Francisco, California 94118

Date & Time : Friday, August 17, 2018 @ 3:58 p.m.

Witness fees were : Not demanded or paid.

Person serving:

Stephen Sabol

Wheels of Justice, Inc.

52 Second Street, Third Floor

San Francisco, California 94105

Phone: (415) 546-6000

Fee for service:

☐ not a registered California process server.
☐ exempt from registration under B&P Section 22350(b).
☒ a registered California process server
☐ owner ☐ employee ☒ independent contractor
 County: **San Francisco** Reg No.: **1267**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 17, 2018

Signature: 

Stephen Sabol

**ATTACHMENT
TO SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
TO INTERNET ARCHIVE**

DEFINITIONS

1. “Liberty Counsel” is Defendant Liberty Counsel, the 501(c)(3) organization headquartered in Maitland, Florida.

2. “Document” is defined to be synonymous in meaning and equal in scope to the usage of the term “documents or electronically stored information” in Federal Rule of Civil Procedure 34(a)(1)(A). This definition includes archived copies. A draft or nonidentical copy is a separate document within the meaning of this term.

3. “Website” is a collection of publicly accessible, interlinked webpages that share a single domain name and are made available online by an individual, company, educational institution, government, or organization.

INSTRUCTIONS

1. Provide all information and documents in your possession, custody, or control in response to each Request.

2. Produce each document in its entirety and all drafts and non-identical copies of each document.

3. If you are able or willing to provide only part of the information and documents sought by a Request, provide that partial information and documentation and specify in writing the reason for your inability or unwillingness to provide the remainder.

4. When responding to these Requests, state in writing as to each Request either that:
- a. there are such documents and they will be produced;
 - b. there are such documents and that they already have been produced;

- c. there are such documents, but you refuse to produce them because of a claim of privilege or for some other identified reason; or
- d. the documents requested do not exist.

5. For every objection to a Request, specify in writing the grounds for objecting to the Request, including the reasons, whether any responsive materials are being withheld on the basis of that objection, and the parts of the documents being withheld on the basis of that objection. Produce the parts of the document not being withheld on the basis of an objection.

6. For every document or part of a document withheld from production because of an assertion of privilege, identify the nature of the claimed privilege (including work product) and, if the privilege is governed by state law, identify the state's privilege rule being invoked.

7. If any document sought by these Requests has been destroyed or no longer exists, state as to each such document its date, authors, recipients, contents, and the date and circumstances of its destruction or ceasing to exist.

8. If any answer to these Requests is made upon information and belief, so state and set forth and identify the sources of such information and belief. If you lack the knowledge necessary to answer any of these Requests, so state.

9. If you cannot fully and completely answer any of these Requests, separately respond to each such Request to the extent possible, stating with specificity the reasons for your inability to answer the remainder, the substance of your knowledge, information, and belief concerning the subject matter of the unanswered portion, and the steps taken to locate any responsive documents.

10. Furnish all responsive documents available to you or in your custody or control.

11. The applicable timeframe for these Requests begins on June 1, 2003.

DOCUMENTS TO BE PRODUCED

1. All websites made available by Liberty Counsel, including all documents concerning the domains <http://www.lc.org> and <http://www.libertycounsel.com>.
2. All documents concerning any communications with Liberty Counsel or anyone on behalf of Liberty Counsel concerning your maintenance of archival copies of Liberty Counsel's websites.
3. All documents concerning the decision to remove archival copies of Liberty Counsel's websites from public access.

Exhibit B

Tyler Clemons

From: Chris Butler <butler@archive.org>
Sent: Wednesday, October 17, 2018 2:45 PM
To: Tyler Clemons
Subject: Re: Jenkins v. Miller (2:12-cv-00184-wks)

Any such re-enablement that we would be able to effect could be temporary in that the archives could be again excluded in the typical manner (that process typically takes 10-20 minutes to take effect).

-Chris

On 10/17/18 12:33 PM, Tyler Clemons wrote:

Mr. Butler,

Thanks so much for sending these. To clarify, if SPLC were to obtain a court order for access to the archived copies of the domains identified in the subpoena, could those domains be re-enabled on the Wayback Machine temporarily (i.e., just long enough to obtain copies) or would such a re-enablement be permanent?

Best,

Tyler

J. Tyler Clemons (he/him/his)
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Admitted to practice in Louisiana and Maryland.

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-----Original Message-----

From: Chris Butler [<mailto:butler@archive.org>]
Sent: Wednesday, October 17, 2018 1:15 PM
To: Tyler Clemons
Subject: Jenkins v. Miller (2:12-cv-00184-wks)

Dear Mr. Clemons, Esq.,

Thank you for our phone call earlier today. Please find attached records (original email files) that are responsive to your request in the above-mentioned matter following a diligent search of our communications pertaining to take down requests for the Wayback Machine.

Sincerely,

Chris Butler
Office Manager
Internet Archive
300 Funston Avenue
San Francisco, CA 94118
415.561.6767
archive.org