UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, ET AL., Plaintiffs, v. KENNETH L. MILLER, ET AL., Defendants.	Docket No. 2:12-cv-00184

MEMORANDUM IN SUPPORT OF DEFENDANTS LIBERTY COUNSEL, MATHEW STAVER, AND RENA LINDEVALDSEN'S MOTION TO DISMISS

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INTRODUCTION

Plaintiff Janet Jenkins ("Jenkins"), individually and as purported next friend of Isabella Miller ("Isabella"), in a false and misleading manner with no supporting facts, paints with a broad brush in a futile attempt to attribute the allegedly tortious actions of numerous other individuals to Defendants Liberty Counsel, Mathew D. Staver ("Staver"), and Rena M. Lindevaldsen ("Lindevaldsen"). Jenkins' claims are based entirely on actions that allegedly took place **over seven years ago** and prior to the time she was given primary custody of Isabella. Jenkins alleges that Liberty Counsel, Staver, and Lindevaldsen were part of an unconnected scheme to deprive her of custody of Isabella and her civil rights based on her alleged protected class status. In her grossly untimely Second Revised Amended Complaint (Dkt. 223, "RSAC"), Jenkins bases her allegations against Liberty Counsel, Staver, and Lindevaldsen on nothing more than a handful of references, all within their lawful representation of Miller and protected speech. The claims against Liberty Counsel, Staver, and Lindevaldsen are not based in fact or reality, and all of them collapse under the weight of indisputable law. Jenkins' claims fail as a matter of law and must be dismissed.

FACTUAL BACKGROUND

I. LIBERTY COUNSEL

Jenkins' RSAC alleges that Liberty Counsel is an "LLC" "affiliated with Liberty University with principal places of business in the City of Lynchburg, Commonwealth of Virginia and in the City of Orlando, State of Florida, having sufficient contacts with the State of Vermont to subject it to jurisdiction in this Court." (RSAC ¶ 16). Liberty Counsel is not an LLC, but is a Florida non-profit corporation, is headquartered in Florida, has its principal place of business in Orlando, Florida (*See* Exhibit A, Affidavit of Mathew D. Staver, "Staver Aff." ¶ 4), and is not a law firm or legal arm of Liberty University. (*Id.* ¶ 9). Liberty Counsel has its own attorneys,

administration, and staff who oversee and manage its day-to-day operations. (*Id.*). Liberty University is incorporated in the Commonwealth of Virginia and began in or about 1971. (*Id.*). Liberty Counsel began in 1989 in Florida and has always been headquartered in that state, and has always been governed by a separate and independent board of directors. (*Id.*). Liberty University is headquartered in Virginia, governed by a separate and independent board of trustees, and has never had governing or management control, supervision, or direction over Liberty Counsel. (*Id.*). Liberty University has never had input on and never exercised, attempted to exercise, and never had the authority to exercise direction or control over Liberty Counsel, case management, or governing decisions. (*Id.*). Liberty Counsel and Liberty University are legally and corporately separate and distinct entities. (*Id.*).

Liberty Counsel does not transact any business in Vermont (Dkt. 213-1, Affidavit of Mathew D. Staver in Response to Plaintiff's Motion to Join Additional Defendants, ¶ 11), and has no contacts in Vermont. (*Id.*). Liberty Counsel has never had an office in Vermont, and does not solicit business in Vermont. (*Id.*).

Jenkins only mentions Liberty Counsel seven times in her RSAC, and virtually all of those references relate to Liberty Counsel's attorneys representing Miller in a previous proceeding. (RSAC ¶ 16) (naming Liberty Counsel as a party); (*id.* ¶ 21) (alleging that Liberty Counsel attorneys represented Miller); (*id.* ¶ 29) (alleging that unidentified attorneys for Liberty Counsel raised money to support their pro bono representation of Miller in the previous proceeding); (*id.* ¶ 41) (alleging that Miller was advised by Liberty Counsel concerning her alleged abduction); (*id.* ¶ 49) (alleging that unidentified Liberty Counsel attorneys filed an appeal in 2009 on Miller's behalf); (*id.* ¶ 57) (alleging that unidentified Liberty Counsel attorneys misled courts concerning the whereabouts of Miller); (*id.* ¶ 60) (alleging that Liberty Counsel had a landline and cell phone

number registered to it that was allegedly called by Zodhiates). The relevant facts alleged by Jenkins concerning Liberty Counsel are alleged to have occurred outside Vermont, and the majority of her allegations deal with Liberty Counsel's lawful and ethical representation of Miller in the previous proceeding.

II. STAVER

Jenkins' RSAC alleges that Staver has sufficient contact with Vermont to subject him to jurisdiction there. (RSAC ¶ 15). Staver is an attorney licensed to practice law in Florida since 1987, and, at all times relevant to this case, was and remains a resident of the State of Florida. (Staver Aff. ¶ 2). Staver is a member of the Florida and District of Columbia Bars, and has been admitted to practice before the United States Supreme Court, the Florida Supreme Court, the District of Columbia, all twelve circuits of the United States Court of Appeals, and other courts. (*Id*. at ¶ 3). He has been board certified since 1995 in Appellate Practice in the State of Florida and is AV rated by Martindale-Hubble. (*Id.*). Staver received a Bachelor of Arts degree *Cum Laude*, a Master of Arts degree *Summa Cum Laude*, and received his Juris Doctor degree from the University of Kentucky College of Law. (*Id.*).

Staver began in private practice in 1987 in the State of Florida and in 1989 opened his own private law practice in the state. (*Id.* ¶ 4). Later in 1989, Staver founded Liberty Counsel, Inc., a Florida nonprofit public interest law firm. (*Id.*). From 1989 until May 2006, Staver was the President and General Counsel of Liberty Counsel. (*Id.* ¶ 5). Beginning on or about May 15, 2006, he transitioned to Founder and Chairman of Liberty Counsel. (*Id.*). In that capacity, Staver maintained his appearances of record in certain active cases and continued to argue some motion hearings and select appellate cases for Liberty Counsel throughout the country. (*Id.*). Staver's appearances and representation were always and only in his role with Liberty Counsel. (*Id.*).

Staver served as Dean and Professor of Law with Liberty University School of Law from May 15, 2006 until the end of 2014. (*Id.* ¶ 6). He committed to working with Liberty University School of Law through all stages of the initial accreditation years. (*Id.*). Staver's resignation as Dean of Liberty University School of Law had nothing to do with anyone or anything associated with Lisa Miller or her case. (*Id.*). In the spring of 2013, Staver communicated with the President of Liberty University that he would transition out of the Dean position after the reaffirmation of accreditation of the law school. (*Id.*). The School of Law obtained provisional accreditation from the American Bar Association (ABA) on or about February 13, 2006. (*Id.*). On or about August 5, 2010, the School of Law was granted full accreditation approval. (*Id.*). A new, fully approved law school must have a follow up site visit three years after obtaining full approval, and thereafter obtain reaffirmation of continuing approval. (*Id.*). The ABA reaffirmation site visit occurred in the fall of 2013, and, on or about October 16, 2014, the ABA notified the law school that the accreditation had been reaffirmed. (*Id.*). On October 17, 2014, Staver provided notice to the President of Liberty University of his transition from the Dean position. (*Id.*). Staver's tenure as Dean and Professor of Law concluded at the end of December 2014. (*Id.*). During the time he served as Dean and Professor of Law, from May 15, 2006 to the end of 2014, Staver continued in his role as Founder and Chairman of Liberty Counsel appearing in a limited capacity on certain cases, primarily at the appellate level. (*Id.*).

Staver does not transact or solicit any business in Vermont. (Dkt. 213-1 at ¶ 11). He has no contacts in Vermont and has never had an office in Vermont. (*Id.*). Staver traveled to Vermont on only one occasion for two days in 2001. (Staver Aff. ¶ 17). His visit sixteen years ago had nothing to do with Miller and occurred several years prior to Staver ever hearing of Miller. (*Id.*). Staver has never appeared telephonically or in person in Vermont regarding the Miller case. (*Id.*).

The threadbare allegations of Jenkins' RSAC also make plain that Staver has no connection whatsoever with Vermont. In fact, Staver is only mentioned six times in the RSAC and not one of those allegations occurred in or has any connection to Vermont. (RSAC ¶ 15) (naming Staver as a party); (*id.* ¶ 21) (alleging that Staver was Dean of Liberty University School of Law and was an attorney for Miller); (*id.* ¶ 31) (alleging that Staver attended a press conference in Virginia); (*id.* ¶ 60) (alleging that Staver splits his time between Virginia and Florida); (*id.* ¶ 61) (alleging that Staver has maintained he has no knowledge of Miller's whereabouts); (*id.* ¶ 62) (alleging that Staver appeared on television and radio for interviews about a book). Under Jenkins' own fanciful narrative, she has not and cannot show that Staver has any contact at all with Vermont.

III. LINDEVALDSEN

Jenkins alleges that Lindevaldsen has sufficient contacts with Vermont to subject her to jurisdiction in this state. (RSAC ¶ 14). Lindevaldsen is an attorney licensed to practice law in New York since 1996, Florida since 2003, and Virginia since 2005. (Exhibit B, Affidavit of Rena M. Lindevaldsen in Support of Motion to Dismiss, "Lindevaldsen Aff." ¶ 2). She was a resident of Florida from January 2003 until March 2005, at which time she moved to Virginia and has remained a resident of Virginia ever since. (*Id.*). Lindevaldsen has never been a resident of Vermont. (*Id.*). Lindevaldsen's only connections with Vermont are two in-person trips to the state to argue before the Vermont Supreme Court on behalf of Miller, a limited number of telephone appearances in the Vermont courts on behalf of Miller, and submissions made to Vermont courts on behalf of Miller, all of which occurred in a previous proceeding. (*Id.*). After eight years in private practice, Lindevaldsen began working at Liberty Counsel in January of 2003. (*Id.* ¶ 3). She remained an employee of Liberty Counsel through July 31, 2006, at which time she became a full-time employee of Liberty University. (*Id.*). During the 2005-2006 academic year, while working

full-time for Liberty Counsel, Lindevaldsen also served as part-time adjunct professor at Liberty University School of Law. (*Id.*). When she became a full-time professor in August 2006, Lindevaldsen continued a limited relationship with Liberty Counsel as an independent contractor. (*Id.*). All of Lindevaldsen's appearances and representation on behalf of Miller in Virginia and Vermont courts were done in her limited role as an independent contractor for Liberty Counsel. (*Id.*). At no time did she represent any clients on behalf of Liberty University. (*Id.*).

Lindevaldsen does not transact any business in Vermont. (Dkt. 66-5, Affidavit of Rena M. Lindevaldsen, ¶ 7). Lindevaldsen has no contacts whatsoever in Vermont. (*Id.*). Lindevaldsen has never had an office in Vermont, and has not solicited business in Vermont. (*Id.*). Lindevaldsen has never represented any other clients in Vermont. (*Id.*).

The allegations in the RSAC concerning Lindevaldsen amount to only six alleged actions, most of which deal entirely with Lindevaldsen's representation of Miller in the previous proceeding. (RSAC ¶ 14) (naming Lindevaldsen as a party); (*id.*¶ 21) (alleging that Lindevaldsen became an attorney for Miller); (*id.*¶ 31) (alleging that Lindevaldsen attended a press conference in Virginia); (*id.*¶¶ 44, 46) (alleging that Defendant Hyden received emails from Zodhiates to give to Lindevaldsen, but notably omitting that Lindevaldsen never received these alleged emails); (*id.*¶ 45) (alleging that Lindevaldsen packed bags at Miller's apartment in Virginia in November 2009); (*id.*¶¶ 50, 61) (alleging that Lindevaldsen has maintained she has no information concerning Miller's whereabouts); (*id.*¶ 62) (alleging that Lindevaldsen wrote a book about her representation of Miller).

IV. FACTUAL ALLEGATIONS OF JENKINS' RSAC

The allegations of Jenkins' RSAC concerning Liberty Counsel, Staver, and Lindevaldsen arise from their lawful representation of Miller and from protected First Amendment activity. The

only other threadbare allegations concerning Liberty Counsel, Staver, and Lindevaldsen intentionally misrepresent Jenkins' own evidence, mislead this Court with material omissions, and are woefully deficient in establishing jurisdiction or any cause of action.

A. Liberty Counsel, Staver, and Lindevaldsen's Lawful and Ethical Representation of Miller in Vermont.

Jenkins falsely alleges that, in 2004, Miller was accepted for representation by Staver and Lindevaldsen while they were working for Liberty University. (RSAC ¶ 21). Jenkins knows that this is not true. Staver and Lindevaldsen began representing Miller in late 2004 while they were employed full-time by Liberty Counsel and resided in Florida, and they never represented her on behalf of Liberty University. (Staver Aff. ¶¶ 7-8). Jenkins alleges Staver appeared at a hearing in Virginia, but never alleges he appeared in Vermont. She also alleges that Liberty Counsel "attorneys" (without specifying who) appeared via telephone at certain hearings in Vermont. (RSAC ¶ 32). Jenkins alleges that Liberty Counsel filed appeals on Miller's behalf and requested a stay of orders from Vermont courts. (*Id.* ¶ 49). Jenkins alleges that Lindevaldsen testified at a hearing on December 22, 2009 concerning the Miller representation. (*Id.* ¶ 50). She also alleges that Staver and Lindevaldsen informed courts in Vermont and Virginia that they did not know of Miller's whereabouts. (*Id.* ¶ 61).

B. Liberty Counsel, Staver, and Lindevaldsen's Protected First Amendment Activity.

Aside from the allegations mentioned above concerning Liberty Counsel, Staver, and Lindevaldsen's representation of Miller in the prior matter, the RSAC alleges that Lindevaldsen published a book (with no reference to any statement), that Staver and Lindevaldsen promoted the book on radio and television (with no specifics) (*id.* ¶62), and the RSAC mentions a Facebook page in which members of the public posted their own comments (without linking Staver or

Lindevaldsen to the Facebook page). (*Id.*). These allegations concern nothing more than protected First Amendment activity and cannot form the basis of a cause of action. Jenkins alleges a Facebook site and other social media solicited donations, but does not specify who allegedly created this Facebook page and certainly does not allege that Staver or Lindevaldsen had anything to do with its creation. (*Id.* ¶ 26). Jenkins alleges that Liberty Counsel attorneys worked with Response Unlimited (RU) to raise funds to support their representation of Miller in the previous proceeding, but does not allege that Staver or Lindevaldsen were involved in such purported efforts. (*Id.* ¶ 29). In fact, RU has never remitted any funds to Liberty Counsel from any fundraising on the Miller litigation. (Staver Aff. ¶ 25). Finally, Jenkins alleges that Staver and Lindevaldsen appeared at a press conference outside of a Virginia courthouse. (*Id.* ¶ 32).

C. Intentional Misrepresentations, Omissions, and Deficiencies In The RSAC.

Aside from Jenkins' allegations concerning Liberty Counsel, Staver, and Lindevaldsen's lawful representation of Miller and their protected First Amendment speech, the only other allegations Jenkins makes concerning these Defendants all contain intentional misrepresentations, material omissions, or fatal deficiencies. Devoid of facts, these few allegations cannot serve as a basis for jurisdiction over Liberty Counsel, Staver, or Lindevaldsen and also fail to support any legally cognizable claim.

1. The Alleged "Personal Option" Email.

While Jenkins alleges that Liberty Counsel was offered a "personal option" for Miller in the event her legal battle failed (RSAC ¶ 29), she intentionally omits the relevant language of that email and sworn testimony presented to this Court and others. Jenkins knows this allegation misrepresents the facts of this alleged email from Philip Zodhiates (Zodhiates). She knows it was allegedly sent to Bill Sidebottom in January 2009, stating that Zodhiates would "like to suggest **to**

[Miller] some personal options, **which LC probably should not or would not want to know about**." (Dkt. 204-3, Exhibit 2 to Jenkins' Proposed Revised Second Amended Complaint, at 2) (emphasis added). Zodhiates did not **offer anything** to Liberty Counsel, as Jenkins falsely alleges. (*See id.*).

Jenkins knows the allegation is false because she herself submitted the email refuting her claim to this Court. (*See* Dkt. 204-3 at 2); *see also* (Staver Aff. ¶ 29) ("Sidebottom never communicated with me regarding the email or communication referenced above until sometime after the Assistant U.S. Attorney Van de Graaf presented this alleged email to him in October 2014. And even then, I never saw the actual contents of the email. The first time I saw a copy of the email was in the fall of 2016 when it was attached to the pleadings for the Plaintiffs' Motion and Proposed Revised Second Amended Complaint."); (Exhibit C, Affidavit of William Sidebottom, "Sidebottom Aff." ¶¶ 9-11) (discussing the alleged email and that he had "no recollection of ever receiving this email, viewing this email, or responding to this email," and that he never responded or sent it to anyone); (Dkt. 213-2 Affidavit of Rena M. Lindevaldsen in Response to Plaintiffs' Motion to Join Additional Defendants, ¶ 2) ("In their Motion to Join Additional Defendants, Plaintiffs allege at ¶ 4 that on January 21, 2009, Phillip Zodhiates sent an email to William Sidebottom. I never saw that email (or any communication referring to a so-called 'personal option') before Attorney Berger sent that email to me with Plaintiffs' Motion and at no time did Mr. Sidebottom (or anyone else) mention it to me.").

2. Liberty Counsel's Alleged Advice To Miller.

Jenkins alleges that, in the fall of 2009, Miller "told Yoder that Liberty Counsel had advised her that it would be in her best interest to disappear." (RSAC ¶ 41). This allegation has no basis in

fact, is inadmissible hearsay, and is conclusively refuted by the sworn testimony presented to this Court:

> Contrary to the Rev. Sec. Amend. Complaint in ¶¶20, 24, 34, 41, 43-44, 64-65, and 67, I have no knowledge of anyone ever receiving any request or information from any source about any intent of Lisa Miller to leave the jurisdiction of the courts or the United States, and have no knowledge of any request or information from any source to plan, assist, devise, or help Lisa Miller evade the jurisdiction of the courts or the United States or to disobey any court order. I rarely communicated with Lisa Miller by phone, in person, or otherwise. The few in-person encounters with her was when I appeared to argue a motion or an appellate matter in Virginia only. Sometime in September 2009, Lisa Miller stopped communicating and did not respond to phone calls or emails. From that time to the present, Lisa Miller ceased all communications with me or anyone associated with Liberty Counsel. I have no knowledge of any communication from Lisa Miller directly or indirectly after September 2009.

(Staver Aff. ¶ 19).

> Contrary to the allegations contained in the Revised Second Amended Complaint, I had no knowledge of Lisa Miller's intent or plan to leave the country or of anyone who encouraged, assisted, or participated in her departure, concealment, or evasion of the law. In fact, as stated in my November 14, 2016 Affidavit, on September 12, 2009, Lisa Miller advised me by email that she had a job interview scheduled for September 15 and if offered the position she would start in October. (Dkt. 213-2, ¶ 4). I never counseled Lisa Miller that she should evade the jurisdiction of the courts, disobey any court order, or disappear. In fact, I frequently advised her of the consequences of noncompliance with the visitation orders. She was well aware that she could face jail time or loss of custody if she persisted in noncompliance with the court orders.

(Lindevaldsen Aff. ¶ 6).

> On September 12, 2009, Lisa [Miller] advised me that she had a job interview scheduled for September 15 and if offered the position she would start in October. She ceased all communication with me and with Liberty Counsel later that month and I had no notice from her (or from anyone else) that she had moved from her apartment in Virginia.

(Dkt. 213-2, Affidavit of Rena Lindevaldsen, ¶ 4).

3. Alleged Emails to Lindevaldsen From Hyden.

Jenkins also alleges that Victoria Hyden (Hyden) sent emails to Lindevaldsen at Liberty University School of Law to request donations and facilitate removing items from Miller's

apartment. (RSAC ¶¶ 44, 46). Jenkins again misleads this Court by intentionally omitting critical facts in the alleged emails from Zodhiates to his daughter, Hyden, which undermine her allegation. One alleged email contains no information at all concerning the individual to which Zodhiates is allegedly referring. (*See* Dkt. 204-7, Ex. 6 Proposed Rev. Sec. Amend. Compl. at 2) (stating that "[s]he knows who has the key," with no reference to Lindevaldsen). Another email merely asks Hyden to "ask Rena" about picking something up from an unidentified apartment. (*See* Dkt. 204-9, Ex. 8, Proposed Rev. Sec. Amend. Compl. at 2). **There is no allegation that Lindevaldsen ever received or saw these emails, or did anything concerning them**.

Moreover, the sworn testimony before this Court conclusively refutes these allegations. (Lindevaldsen Aff. ¶ 7) ("The Revised Second Amended Complaint alleges that Ms. Hyden delivered emails to me to facilitate communications between Lisa Miller and myself and to request donations, supplies, and assistance with moving Lisa Miller's belongings out of her apartment. (RSAC ¶¶ 44, 46). Those allegations are false. As stated previously in my affidavits, I lost contact with Lisa Miller sometime in late September. At no time after mid-September did I directly or indirectly communicate with Lisa Miller. Contrary to the allegations in ¶ 46 of the Revised Second Amended Complaint, Lisa Miller did not communicate with me, directly or indirectly, concerning her case or any "attempt to help her duck service of contempt and enforcement pleadings filed by Janet Jenkins to help locate Isabella."); (*id.* ¶ 8) ("Nor did I receive any emails from Mr. Zodhiates (directly, through Ms. Hyden, or from any other source) concerning Lisa Miller or any other matter. Specifically, I did not receive any emails from Ms. Hyden "requesting donations for supplies and coordinating the removal of items from Lisa Miller's apartment to send to Lisa Miller to enable her to remain outside the country."); (Dkt. 66-3, Affidavit of Victoria Hyden, ¶ 12) (testifying that she did not make such requests to Lindevaldsen or anyone concerning Miller); (Dkt.

66-5, Affidavit of Rena Lindevaldsen In Support of Defendant's Motion to Dismiss, ¶ 10) (testifying the Lindevaldsen rarely saw Hyden at the law school, has not spoken to her at length about any subject, and never received an email from Hyden about Miller).

4. Alleged Phone Call from Zodhiates To Liberty Counsel.

Jenkins alleges that Zodhiates attempted to call a cell phone with an Orlando area code registered to Liberty Counsel and a landline registered to Liberty Counsel. (RSAC ¶ 60). **Jenkins never alleges Staver or Lindevaldsen received the call or that the call was received by Liberty Counsel.** As Jenkins is aware, the sworn testimony before this Court eviscerates any potential suggestion that Liberty Counsel or anyone received such a call. (*See* Dkt. 66-4, Affidavit of Mathew D. Staver in Support of Defendants' Motion to Dismiss, ¶ 17) ("The Amended Complaint at ¶57 states that a cell phone allegedly belonging to Philip Zodhiates made three calls purportedly within a matter of two minutes on September 22, 2009, between 1:28 pm and 1:30 pm to a cell phone with an Orlando area code registered to Liberty Counsel, to a landline registered to Liberty Counsel, and to a landline registered to 'Liberty University School of Law' (as stated in the Complaint) or 'Liberty University' (as stated in the Amended Complaint). The phone registered to Liberty Counsel is a number that had been publicly disseminated on press releases at least since 2003 to literally several thousand media and nonprofit organizations and representatives. I never received such a call from Phillip Zodhiates or anyone associated with him, which is apparently what the Amended Complaint insinuates. I do not know of anyone who received such a call. Indeed, the short duration of time on its face suggests no one answered. On that day I had back-to-back meetings from the beginning of the work day to the end, including a meeting that went from 1:00-1:30 pm and another meeting from 1:30-2:15 pm. My entire day was booked in this manner. I never talked to Phillip Zodhiates or anyone associated with him about the whereabouts

of Lisa Miller or any plan or intent to leave Virginia or the country with her child. The insinuation is absolutely false."); (Dkt. 66-5, Affidavit of Rena Lindevaldsen, ¶ 11) ("If those calls were made, none were to me. I have never had a cell phone that was registered to Liberty Counsel. Since July 2006, I have not had a landline registered to Liberty Counsel. . . . As I mentioned above, if Mr. Zodhiates made those calls on September 22, 2009, none were to me."); *see also* (Staver Aff. ¶ 30) (affirming same testimony and stating that "I received no telephone calls, cellular or otherwise, or any voicemail, text message or other communication from Zodhiates or anyone on his behalf on about September 22, 2009, or at any time regarding Lisa Miller evading the jurisdiction of the courts or the United States or disobeying any court order, her hearings, or any other option.").

5. Alleged Agency Relationship Between Liberty Counsel and Response Unlimited.

Only in the caption (RSAC at 1), not the body of the RSAC, Jenkins alleges that RU is an agent of Liberty Counsel. No alleged facts support the caption, and Jenkins knows an exhibit she submitted herself demolishes her "allegation" in the caption. The RU mail prospecting agreement states: "Response Unlimited is an independent contractor specifically secured to obtain mailing lists for LIBERTY COUNSEL'S new donor acquisition program, and **is not an agent, partner, or representative of LIBERTY COUNSEL**." (*See* Dkt. 204-2, Exhibit 2 to Jenkins Proposed Rev. Sec. Amend. Compl. at 27) (emphasis added); *see also* (Staver Aff. ¶¶ 23-25) (noting that RU was never an agent of Liberty Counsel and was never given authority to act on Liberty Counsel's behalf); (*Id.* ¶ 22) (noting that RU was only one of many vendors that Liberty Counsel worked with and that it had many other clients); (Sidebottom Aff. ¶ 7) ("Neither RU nor Zodhiates were ever agents of Liberty Counsel or acting on behalf of Liberty Counsel, nor were either acting with implied or apparent authority.").

ARGUMENT

I. JENKINS' CLAIMS ARE TIME BARRED.

All of Jenkins' claims must be dismissed because they are time barred, including her custodial interference claims and conspiracy claims under Section 1985. The relation back doctrine does not revive these untimely claims, and they must be dismissed.

A. The Custodial Interference Claims Are Time Barred.

Jenkins' custodial interference claims are governed by Vermont's statute of limitations for personal injury actions. *Eaton v. Prior*, 58 A.3d 200, 204 (Vt. 2012). In Vermont, personal injury actions must be brought within three years. 12 Vt. Stat. Ann. § 512(4) ("Actions for the following causes shall be commenced within three years after the cause of action accrues and not after . . . injuries to person."). The three-year limitations period begins to run as soon as a plaintiff discovers the existence of an injury or reasonably should have discovered such injury. *Eaton*, 58 A.3d at 254 ("An action accrues so as to trigger the statute of limitations 'when a plaintiff discovers or reasonably should discover the injury, its cause, and the existence of a cause of action.") (quoting *Lillicrap v. Martin*, 591 A.2d 41, 47 (1989)). "**The law does not require absolute certainty for the statute to run**." *Id.* at 255 (emphasis added). Indeed, the statute begins to run as soon as a reasonable plaintiff should have discovered the alleged injury and its purported cause. *See, e.g.*, *id.* (noting that the statute of limitations begins to run under Section 512(4) as soon as a plaintiff should have "suspected" that an injury occurred); *Bull v. Pinkham Eng'g Assocs.*, 752 A.2d 26, 31 (Vt. 2000) (statute of limitations commences when plaintiff should have suspected injury); *Earle v. State*, 743 A.2d 1101, 1108 (Vt. 1999) ("a cause of action accrues when a plaintiff discovers that a particular defendant **may** have breached the duty") (emphasis added).

Jenkins' own allegations make it abundantly clear that she has essentially the same information now regarding Liberty Counsel, Staver, and Lindevaldsen that she had when she filed this suit in 2012.[1] Her knowledge that Isabella was allegedly kidnapped admittedly goes back to December 30, 2009. (RSAC ¶¶ 51-52) (noting that Jenkins became aware that Miller and Isabella were missing, that she saw an Internet post about it, and that she brought that post to the police). But, if this allegation was somehow insufficient to establish that Jenkins had reason to suspect her alleged injuries had occurred by **December 30, 2009**, there can be no dispute that Jenkins had actual knowledge of (and not mere reason to suspect) her alleged injuries in **June 2010**. (*Id.* ¶ 43) (Jenkins had actual knowledge of Miller and Isabella's whereabouts in June 2010). Finally, assuming arguendo that these two allegations did not provide enough information to Jenkins to start the clock on her limitations period, there can be no dispute that Jenkins had actual knowledge of her alleged injuries, including actual knowledge of the cause of her alleged injuries, in **April 2011**. (*Id.* ¶ 34) (noting that Jenkins knew of Miller's and Isabella's whereabouts, and knew of the involvement of the alleged co-conspirators in April of 2011).

Even using the most generous date in the string of allegations establishing her reason to suspect her injuries, Jenkins' cause of action accrued in **April 2011, at the latest**. Yet, despite having more than sufficient information concerning all allegations against Liberty Counsel, Staver, and Lindevaldsen, Jenkins chose to bring her claims in 2012 **without naming them as defendants**, although she referred to them in the original and amended complaints. *Compare* (RSAC ¶¶ 21, 26, 49, 59) (alleging that Liberty Counsel attorneys represented Miller, established

[1] As demonstrated below, Liberty Counsel, Staver, or Lindevaldsen committed no tortious activity, *see infra* Section V.C.1, but Jenkins had sufficient knowledge in 2012 of all the baseless acts she alleges against Liberty Counsel, Staver, and Lindevaldsen. (*See* Dkt. 1, Complaint ¶¶ 22, 31, 41, 43, 47, 57, 58, 59, 60).

a Facebook page, filed appeals, and that Zodhiates called a cell phone registered to Liberty Counsel and a landline with an Orlando area code), *with* (Dkt. 59, Amended Complaint, ¶¶ 22, 27, 57, 59) (**alleging exactly the same things in 2012**). *Compare* (RSAC ¶¶ 21, 31, 32, 60, 61, 62) (alleging that Staver was counsel for Miller, appeared at a press conference with Miller, informed courts he did not know of Miller's whereabouts, and appeared on radio and television to support Lindevaldsen's book), *with* (Dkt. 59 ¶¶ 22, 27, 32, 57, 58, 59, 60) (**alleging the exact same things in 2012**). *Compare* (RSAC ¶¶ 21, 26, 31, 32, 44, 45, 50, 61, 62) (alleging that Lindevaldsen was counsel for Miller, appeared in courts via telephone and in person on behalf of Miller, received emails from Hyden concerning Miller, wrote a book, and appeared on radio and television to support the book), *with* (Dkt. 59 ¶¶ 22, 27, 31, 32, 41, 42, 58, 59, 60) (**alleging the exact same things in 2012**).

Jenkins need not have had absolute certainty that these defendants were allegedly involved, only reason to suspect. *Eaton*, 58 A.3d at 255. Now, 7 years later (arguably 8 years later) and **at minimum** 3 years beyond the expiration of the limitations period, Jenkins seeks to bring her claims against Liberty Counsel, Staver, and Lindevaldsen. Jenkins' own allegations and admitted knowledge prove fatal to her attempts. The statute of limitations has run on her custodial interference claims. The claims are time barred and must be dismissed.

B. The Conspiracy Claims Under Section 1985 Are Time Barred.

Jenkins' conspiracy claims under Section 1985 are likewise time barred. While the Civil Rights Act contains no textual limitations period, actions brought under Section 1985 are subject to the limitations period of the analogous state action. *See, e.g.*, *Meyer v. Frank*, 550 F.2d 726, 728 (2d Cir. 1967) ("An action brought under the federal Civil Rights Act is subject to the statute of limitations the state courts would apply in an analogous state action."). The analogous state action

here is one for personal injury. As this Court has noted, "[t]he Vermont Supreme Court . . . has indicated that civil rights claims brought under the [Civil Rights Act] are governed by the statute of limitations for personal injury actions." *Fellows v. Earth Constr., Inc.*, 794 F. Supp. 531, 535-36 (D. Vt. 1992). As with her custodial interference claim, the conspiracy claim under Section 1985 is therefore subject to the three-year statute of limitations for personal injury actions. *See* 12 Vt. Stat. Ann. § 512(4).

The point at which the cause of action accrues for Jenkins' conspiracy claim is a matter of federal law. *Pearl v. City of Long Beach*, 296 F.3d 76, 80 n.2 (2d Cir. 2002). "Under federal law, which governs the accrual of claims brought under 42 U.S.C. §§ 1982 and 1985, a claim accrues once the 'plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Hoffman v. Ade Software Corp.*, No. 2:04-CV-163, 2005 WL 2428754, *4 (D. Vt. Sept. 30, 2005) (Sessions, J.) (quoting *Morse v. Univ. of Vt.*, 973 F.2d 122, 125 (2d Cir. 1992)). "In analyzing the time of accrual in the context of discrimination claims, the Supreme Court has instructed that 'the proper focus is on the time of the *discriminatory act*, **not the point at which the *consequences* of the act become painful**.'" *Morse*, 967 F.2d at 125 (quoting *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (bold emphasis added; italic emphasis original)). Therefore, the timeliness of Jenkins' conspiracy claim is measured from the date at which she obtained notice of the alleged act giving rise to the claim, not the point at which she understood the full extent of the alleged conspiracy. *See O'Malley v. GTE Serv. Corp.*, 758 F.2d 818, 820 (2d Cir. 1985).

For much the same reason as her custodial interference claim, Jenkins conspiracy claim is untimely. As Jenkins admits in the RSAC, she had actual knowledge of the alleged discriminatory act by December 30, 2009, or no later than April 2011. (RSAC ¶¶ 34, 43, 51-52). Her cause of action under Section 1985 thus accrued by April of 2011, at the latest. The statute of limitations

thus ran in April 2014 at the latest. Jenkins' attempt to bring these claims against Liberty Counsel, Staver, and Lindevaldsen, 3 years after the statute has run, is barred as a matter of law. The conspiracy claims are time barred and must be dismissed.

C. Jenkins' Claims Do Not Relate Back.

Because Jenkins' claims are time barred, she can only resurrect them if she can satisfy the relation back requirements of Fed. R. Civ. P. 15(c). Jenkins does not and cannot satisfy those requirements. Where, as here, an amended complaint (third amendment) seeks to change or add a party, the claims relate back to the time of the original filing only if the party sought to be added "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). The term "mistake" only applies in instances where the new party is added as "the result of an error, such as a misnomer or misidentification." *Barrow v. Westerfield Police Dep't*, 66 F.3d 466, 469 (2d Cir. 1995). Jenkins cannot rely on a "mistake" if she was aware of the identities of potential defendants and simply chose not to name them in the original and amended complaints. *See, e.g.*, *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 n.1 (2000) (if party knew of the new defendants' identity and alleged role, it cannot claim a mistake under Rule 15); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994) (if plaintiff was aware of new defendant's potential involvement in the injury, failure to name that defendant in the original complaint "must be considered a matter of choice, not mistake"); *see also Williams v. United States*, 405 F.2d 234 (5th Cir. 1968) (adding new parties of which plaintiffs were aware at time of original pleading "amounts to assertion of a new cause of action, and if amendment were allowed to relate back in that situation, the purpose of the statute of limitations would be defeated.").

Liberty Counsel, Staver, and Lindevaldsen were indisputably known to Jenkins at the time of the prior complaints. Indeed, Jenkins' initial Complaint specifically referenced Liberty Counsel, Staver, and Lindevaldsen, numerous times. (Dkt. 1, Complaint ¶¶ 22, 31, 41, 43, 47, 57, 58, 59, 60). The identities of Staver or Lindevaldsen were known and stated in the Complaint, along with the same essential allegations as now appear in the RSAC. Jenkins therefore cannot rely on a "mistake." **The allegations of the RSAC concerning Liberty Counsel, Staver, and Lindevaldsen are virtually identical to the original allegations**. *Compare* (RSAC ¶¶ 21, 26, 49, 59) (alleging that Liberty Counsel attorneys represented Miller, that "Miller's attorneys established a Facebook page," filed appeals, and have a phone number called by Zodhiates), *with* (Dkt. 59, ¶¶ 22, 27, 57, 59) (**alleging exactly the same things**). *Compare* (RSAC ¶¶ 21, 31, 32, 60, 61, 62) (alleging that Staver was lead counsel for Miller, appeared at a press conference with Miller, informed courts he did not know of Miller's whereabouts, and appeared on radio and television to support Lindevaldsen's book), *with* (Dkt. 59 ¶¶ 22, 27, 32, 57, 58, 59, 60) (**alleging the exact same things**). *Compare* (RSAC ¶¶ 21, 31, 32, 44, 45, 50, 61, 62) (alleging that Lindevaldsen was lead counsel for Miller, appeared in courts via telephone and in person on behalf of Miller, received emails from Hyden concerning Miller, wrote a book, and appeared on radio and television to support the book), *with* (Dkt. 59 ¶¶ 22, 27, 31, 32, 41, 42, 58, 59, 60) (**alleging the exact same things**).

Jenkins was clearly aware of Liberty Counsel, Staver, and Lindevaldsen at the time she filed the initial and amended Complaint in 2012, and the threadbare acts alleged in the RSAC in 2017 are essentially identical to those in the original Complaint, and thus well known to Jenkins from the beginning. (*See* Dkt. 1, Complaint ¶¶ 22, 31, 41, 43, 47, 57, 58, 59, 60). Jenkins made a choice, not a "mistake." She chose not to name Liberty Counsel, Staver and Lindevaldsen in the

original and amended Complaints, and thus cannot meet the demands of Rule 15. *See Cornwell*, 23 F.3d at 705 (holding that a plaintiff cannot claim mistake when she "knew the identities" of the proposed new defendants and "identified those individuals and set out details of their alleged misconduct" in the original complaint). Jenkins' claims are time barred and do not relate back. They must be dismissed.

II. JENKINS' PURPORTED CLAIMS AS NEXT FRIEND OF ISABELLA PROVIDE NO REFUGE FOR HER TIME BARRED COMPLAINT.

Jenkins' time-barred claims cannot be saved by her purported next-friend claims on behalf of Isabella. Jenkins' purported custodial interference claim as next-friend of Isabella does not save her untimely complaint. Jenkins purported civil conspiracy claims under Section 1985(3) on behalf of Isabella also fail to save her untimely complaint.

A. Jenkins' Purported Custodial Interference Claim As Next Friend Of Isabella Does Not Save Her Untimely Complaint.

Any assertion that Jenkins' time-barred claims survive dismissal because the purported claims on behalf of Isabella might arguably not be time-barred must fail. Under the plain language of the Restatement, this Court's previous opinion, Jenkins' own admissions, and binding Second Circuit precedent, Jenkins cannot bring a custodial interference claim as next friend of Isabella. Standing to bring and recover on such a claim only exists for a parent with custodial rights—**not a minor child**.

This Court has held that Jenkins' kidnapping claim is really a custodial interference claim based on Section 700 of the Restatement (Second) of Torts. *See Jenkins v. Miller*, 983 F. Supp. 2d 423, 451 (D. Vt. 2013). The plain language of Section 700 eviscerates any argument that Jenkins can bring this claim on behalf of Isabella. Section 700 states that "[o]ne who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a

parent legally entitled to its custody or not return to the parent after it has been [sic] left him, is subject to liability **to the parent**." Restatement (Second) of Torts § 700 (emphasis added). Under that provision, no defendant can be liable **to a minor** for such a claim.

This Court's prediction of Vermont law on this issue also demonstrates that Jenkins cannot bring a custodial interference claim on behalf of Isabella.[2] *See Jenkins*, 983 F. Supp. 2d at 452 ("a person who abducts or otherwise compels or induces a minor child to leave a parent who is legally entitled to her custody, with knowledge that the parent does not consent, is subject to liability **to the parent**." (emphasis added)). Under this Court's own construction of this predicted tort, Defendants cannot be liable to Isabella for "custodial interference." Jenkins concedes the fact that the claim is only applicable to a parent with custodial rights. (Dkt. 216, Reply in Support of Motion to Join Additional Defendants, at 4) ("The Court already has made clear that the count styled as 'kidnapping' states a claim under Vermont law for 'wrongful interference with **a parent's custodial rights**.") (emphasis added).

Even if the plain language of the Restatement, this Court's opinion, and Jenkins' own concessions were insufficient to destroy any custodial interference claim by Jenkins as next-friend of Isabella, this Court cannot adopt any construction permitting such liability. Binding Second Circuit precedent puts the final nail in the coffin of Jenkins' next-friend custodial interference claim. *See, e.g.*, *Leonard v. United States*, 633 F.2d 599, 626 n.41 (2d Cir. 1980) ("Technically, and with etymological soundness, it appears that at common law there is no cause of action for abduction **on behalf of the child abducted; that claim belongs to the parent** who has custody

[2] This Court's prediction that Vermont would recognize a tort for custodial interference was then, and certainly is now, in error. *See infra* Section V.A.1.

of the child." (emphasis added)); *Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998) (holding that a child cannot maintain a custodial interference claim).

Simply put, Jenkins cannot bring this claim on behalf of Isabella because Isabella has no standing to bring such a claim. Accordingly, this claim purportedly brought on Isabella's behalf cannot save Jenkins' time-barred custodial interference claims. Dismissal is warranted.

B. Jenkins' Purported Conspiracy Claim Under Section 1985(3) As Next Friend Of Isabella Does Not Save Her Untimely Complaint.

Jenkins also purports to bring a Section 1985 claim as next friend on Isabella, but the threadbare allegations of Jenkins' RSAC are woefully deficient to support any claim on Isabella's behalf. Jenkins cannot maintain a Section 1985 claim on behalf of Isabella. To state a cause of action under Section 1985(3),

> a plaintiff must allege (1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States.

Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 586-87 (2d Cir. 1988).

Claims under Section 1985(3) also require that the allegedly discriminatory animus be focused on **each plaintiff** as a result of **that plaintiff's** membership in some protected class. *See Bray v. Alexandria Women's Health Ctr.*, 506 U.S. 263, 269 (1993) ("class cannot be defined simply as the groups of victims of the tortious action"); *Zhang v. Chinese Anti-Cult World Alliance*, No. 15 CV 1046 (SLT)(VMS), 2016 WL 1128401, *4 (E.D.N.Y. Jan. 28, 2016) (plaintiff must allege discriminatory animus directed at the plaintiff). Failure to allege that Isabella is a member of some protected class and that Defendants focused their alleged conspiracy toward her **because of her membership** in such class makes Jenkins' next friend claims irreparably deficient. (RSAC ¶ 67) (alleging that Defendants performed their purported acts against Jenkins and Isabella "based

on discriminatory animus against same-sex couples and against Janet Jenkins due to her sexual orientation"). Isabella is not (and unquestionably cannot be) alleged to be a member of the purported protected class of "same-sex spouses," nor is she alleged to belong to the purported class of homosexuals. Even if Jenkins' allegations involved a protected class under Section 1985(3), which they do not,[3] she failed to, and cannot, allege that Isabella falls into either of her two categories under Section 1985(3). Jenkins has utterly failed to plead – and cannot possibly plead – discriminatory animus directed at Isabella because of her membership in the alleged suspect class.

The cases are legion where federal courts have dismissed claims brought under Section 1985 by a minor's next friend because the complaint failed to allege that discriminatory animus was **directed at the plaintiff minor**. *See, e.g.*, *Magnum v. Archdiocese of Philadelphia*, 253 F. App'x 224 (3d Cir. 2007) (affirming dismissal of Section 1985 claims because of failure to allege class-based discriminatory animus **directed at the minor**); *Nieves-Ramos v. Gonzalez-De-Rodriguez*, 737 F. Supp. 727 (D.P.R. 1990) (failure to allege some racial or class-based animus directed at a party – including a minor child whose claims were brought by her parent as next friend – fails to state a claim under 1985); *Koenig v. Snead*, 757 F. Supp. 41 (D. Ore. 1991) (failure to allege racial or class-based discriminatory animus – **including towards a minor child represented by father as next friend** – fails to state a claim under 1985); *L.Q.A. by and through Arrington v. Eberhart*, 920 F. Supp. 1208 (M.D. Ala. 1996) (dismissing 1985 claims brought by next friend parent because there no was allegation of discriminatory animus directed at the minor plaintiff); *Hardman v. Lehigh Cnty.*, 613 F. Supp. 649 (E.D. Pa. 1985) (dismissing complaint

[3] Jenkins' assertions that same-sex spouses and homosexuals are protected classes entitled to protection under Section 1985(3) fail as a matter of law. *See infra* Section V.D.2.

brought by parent on behalf of minor child because allegations were insufficient to establish that conspiracy was "**directed *at plaintiff's minor***") (bold emphasis added; italic emphasis original); *Allison v. Shabazz*, No. C 14-04813 JSW, 2016 WL 2957121, *7 (N.D. Cal. May 23, 2016) (dismissing section 1985 claims because of failure to allege discriminatory animus directed against minor children).

The precedent makes abundantly clear that Jenkins cannot maintain a Section 1985(3) action on behalf of Isabella. Her next friend claim under Section 1985(3) must be dismissed, and this claim certainly cannot revive Jenkins' own, time barred conspiracy claim.

III. THIS COURT LACKS PERSONAL JURISDICTION OVER LIBERTY COUNSEL, STAVER, AND LINDEVALDSEN.

Jenkins bears the burden to show that this Court has jurisdiction over **each defendant**. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). While facts are assumed true for purposes of a motion to dismiss, jurisdictional allegations are not afforded the same treatment. *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 185 (2d Cir. 1998) (stating that the Supreme Court has recognized that courts are not required to accept legal conclusions couched as factual allegations). Further, the court will not draw argumentative inferences in favor of the plaintiff. *See Licci ex rel. Licci v. Lebanese Canadian Bank*, 673 F.3d 50, 59 (2d Cir. 2012). Jenkins fails to allege sufficient grounds for the Court to exercise jurisdiction over Liberty Counsel, Staver, or Lindevaldsen. Jenkins cannot make out the requisite prima facie jurisdictional showing because her alleged jurisdictional premises are wholly unfounded and represent nothing more than legal conclusions masquerading as factual allegations.

Whether a federal court can exercise jurisdiction over a foreign defendant "is determined in accordance with the laws of the state where the court sits, with federal law entering the picture

only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." *Metro. Life Ins.*, 84 F.3d at 567.

> [I]n resolving questions of personal jurisdiction in a diversity action, a district court must conduct a two-part inquiry. First, it must determine whether the plaintiff has shown that the defendant is amenable to service of process under the forum state's laws; and second, it must assess whether the court's assertion of jurisdiction under these laws comports with the requirements of due process.

Id. Because courts have interpreted Vermont's long-arm statute to extend as far as due process permits, the Second Circuit recognized that the two prongs of this test merge into one test—*i.e.*, whether due process permits the exercise of jurisdiction over the defendant. *Id.*

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). The first part of this test, articulated in *International Shoe*, requires that the defendant have "certain minimum contacts with [the forum State] that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The minimum contacts element of the analysis requires that defendant's contacts be such that he should "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The second part of the due process analysis requires an inquiry into whether the exercise of jurisdiction satisfies the requirements of fundamental fairness or reasonableness. This inquiry consists of five factors that analyze the reasonableness of "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering

fundamental substantive social policies." *Burger King*, 471 U.S. at 476-77 (citing *World-Wide Volkswagen*, 444 U.S. at 292)).

Jenkins' RSAC fails to carry the burden to establish this Court's jurisdiction over Liberty Counsel, Staver, or Lindevaldsen. Asserting jurisdiction over these Defendants would not comport with due process because neither Liberty Counsel, Staver, nor Lindevaldsen have sufficient contacts with Vermont to reasonably anticipate being forced to litigate there. Moreover, even if these Defendants did have sufficient contacts in Vermont, which they do not, asserting jurisdiction over them would not be reasonable. Jenkins' RSAC should be dismissed.

A. Liberty Counsel, Staver, and Lindevaldsen All Lack Sufficient Contacts With Vermont To Be Subject To Specific Jurisdiction In This Court.

This Court lacks specific personal jurisdiction over Liberty Counsel, Staver, or Lindevaldsen.[4] Lindevalsen is not subject to personal jurisdiction under the *Walden* effects test, and her representation of one client in one matter in the forum state does not suffice to establish sufficient contacts with Vermont. Jenkins' allegations concerning Staver's purported contacts with Vermont are fatally and incurably deficient to establish jurisdiction over him. Staver is also not subject to jurisdiction in Vermont under any cognizable agency theory because Jenkins fails to allege any agency relationship and her allegations are insufficient to infer any such agency relationship sufficient to establish jurisdiction over Staver. And this Court lacks personal

[4] Jenkins does not assert that this Court has **general** jurisdiction over Liberty Counsel, Staver, or Lindevaldsen, and concedes that **specific** personal jurisdiction is her only hook. (*See* Dkt. 204, Motion to Lift Stay and Join Additional Defendants, at 10) (arguing only that specific jurisdiction exists). Jenkins does not assert that general jurisdiction is proper over Liberty Counsel, Staver, or Lindevaldsen, nor could she do so under any cognizable legal theory. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (general jurisdiction is only proper when defendants' "affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State."). Neither Liberty Counsel, Staver, nor Lindevaldsen have such contacts with Vermont to make the assertion of general jurisdiction proper.

jurisdiction over Liberty Counsel because the allegations about its alleged agents are insufficient to establish jurisdiction over it. Finally, even if this Court had jurisdiction over Liberty Counsel, Staver, or Lindevaldsen, which it does not, the assertion of jurisdiction in this matter is unreasonable and would offend traditional notions of fair play and substantial justice.

1. This Court Lacks Personal Jurisdiction Over Lindevaldsen.

Lindevaldsen is not subject to jurisdiction in Vermont under *Calder* and *Walden*. Lindevaldsen's representation of Miller in Vermont litigation does not create a sufficient basis for asserting personal jurisdiction over her.

a. Lindevaldsen is not subject to personal jurisdiction under *Walden*'s modified effects test.

As the Supreme Court recognized in *Calder*, regardless of the theory upon which a plaintiff seeks to establish personal jurisdiction, "[t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Calder v. Jones*, 465 U.S. 783, 788 (1984). "In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Id.* (quoting *Shaffer v Heitner*, 433 U.S. 186, 204 (1977)). In *Calder*, the Court held that a state could exercise jurisdiction over a defendant when the forum state was "the focal point both of the [tort] and of the harm suffered." *Id.* at 789. Notably, the Court highlighted the fact that the defendants were also the "**primary participants** in an alleged wrongdoing intentionally directed at a California resident." *Id.* at 790 (emphasis added). Because the primary effect of the alleged tort occurred in California, the Court held that jurisdiction was proper under the circumstances. *Id.*

In *Walden*, the Supreme Court revisited the so-called "effects test" of *Calder*. *See Walden v. Fiore*, 134 S. Ct. 1115 (2014). There, it reemphasized that "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 1121. In determining the proper scope of a tort-related effects theory of jurisdiction, the Court substantially limited the applicability of any arguments for the exercise of jurisdiction over Lindevaldsen.

First, the primary focus must be on the contacts that Lindevaldsen created with Vermont. *Id.* at 1122 ("the relationship must arise out of contacts that the defendant *himself* creates with the forum State") (internal quotations omitted) (emphasis original). Jenkins' contacts with Vermont are wholly irrelevant. Indeed, "[w]e have consistently rejected attempts to satisfy the defendant-focused minimum contacts inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Id.* (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)).

Second, the minimum contacts analysis "looks to the defendant's contacts with the forum State**, not defendant's contacts with persons who reside there**." *Id.* (emphasis added).

> But **the plaintiff cannot be the only link between the defendant and the forum**. Rather it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him. . . . To be sure, a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. . . . **Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the "random, fortuitous, or attenuated" contacts he makes by interacting with other persons affiliated with the State**.

Id. at 1122-23 (quoting *Burger King*, 471 U.S. at 475) (emphasis added).

The "proper lens" through which to view the jurisdictional inquiry is "whether the *defendant's* actions connect him to the *forum*," not to the plaintiff or the plaintiff's alleged injury. *Id.* at 1124 (emphasis original). Indeed, "**mere injury to a forum resident is not a sufficient connection to the forum**." *Id.* at 1125 (emphasis added). The critical inquiry is the same even in the intentional tort context. *See id.* at 1123; *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016). Thus, *Walden* substantially limited the impact of the *Calder* effects test.

Every circuit court that has addressed this issue post-*Walden* has recognized the change that resulted from its substantial circumscription of the effects test. *See, e.g.*, *Waldman*, 835 F.3d at 335 (defendant's suit-related conduct that allegedly occurred outside the forum not sufficient under *Walden* to support the exercise of jurisdiction in the forum); *Advanced Tactical Ordinance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) ("after *Walden*, there can be no doubt that 'the plaintiff cannot be the only link between the defendant and the forum'" (quoting *Walden*, 134 S. Ct. at 1122)); *id.* (noting that *Walden* "shows the error of [the] approach" claiming that a defendant's ability to foresee injury to a particular plaintiff in the jurisdiction because of his presence there was sufficient to establish jurisdiction); *Rockwood Select Assert Fund XI(6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1180 (10th Cir. 2014) ("*Walden* teaches that personal jurisdiction cannot be based on interactions with a plaintiff known to bear a strong connection to the forum state.").

Numerous district courts have also recognized the significant ramifications *Walden* had on the personal jurisdiction analysis. *See, e.g.*, *Control Solutions, Inc. v. MicroDAQ.com, Inc.*, 126 F. Supp. 3d 1182, 1191 (D. Ore. 2015) ("*post-Walden*, express aiming at a forum resident is jurisdictionally relevant only insofar as it constitutes a single contact with the forum state, and is insufficient without more to satisfy the express aiming requirement, which requires contacts

created by the defendant directly with the forum state, and not merely with a forum-state resident"); *Younique, LLC v. Youseff*, No. 2:150cv000783-JNP-DBP, 2016 WL 6998569, *7 (D. Utah Nov. 30, 2016) (*Walden* "significantly narrow[ed] otherwise broad readings of *Calder*'s effects test"); *id.* ("After *Walden*, the mere fact that a defendant's conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction. . . . Instead, a defendant's suit-related conduct **must have a broader effect on the forum itself—something *beyond* the effect felt by the plaintiff alone**." (bold emphasis added; italics original)); *id.* (*Walden* "foreclose[s] a broad reading of the *Calder* effects test"); *Norman v. H&E Equip. Servs., Inc.*, No. 3:14-CV-367, 2015 WL 1281989 (M.D. La. Mar. 20, 2015) (holding that a single contact with a forum, even if occurring in the forum state, is insufficient to establish jurisdiction under modified test in *Walden*); *Dillon v. Murphy & Hourihane*, No. 14-cv-01908-BLF, 2014 WL 5408416 (N.D. Cal. Oct. 22, 2014) ("The Supreme Court's unanimous ruling in *Walden,* however, removed any doubt as to the standard courts should apply when engaging in a personal jurisdiction analysis—that the effects test employed by courts must be "forum-focused," and that a plaintiff or third-party's actions cannot drive the jurisdiction inquiry.").

Under the modified effects theory articulated by the Supreme Court in *Walden*, there is simply no basis upon which to exercise jurisdiction over Lindevaldsen. Virtually all of the allegations Jenkins puts forward concerning Lindevaldsen focus on events which occurred, if at all, outside Vermont and have no connection to the **forum state**. (RSAC ¶ 21) (alleging that Lindevaldsen contacted a **Virginia resident** Wall to request "screening" of Miller, **a Virginia resident**, for representation); (*id.* ¶ 31) (alleging that Lindevaldsen attended a hearing **in Virginia** on Miller's behalf and attended a press conference **in Virginia** after that hearing); (*id.* ¶ 44) (alleging that Defendant Hyden delivered emails to Lindevaldsen at Liberty University **in**

Virginia); (*id.* ¶ 45) (alleging that Lindevaldsen packed up belongings of Miller **in Virginia**); (*id.* ¶ 46) (alleging that Hyden delivered communications to Lindevaldsen at Liberty University **in Virginia**); (*id.* ¶ 62) (alleging that Lindevaldsen wrote a book about the litigation published by New Revolution Publications **outside of Vermont**).

None of these allegations have any connection to Vermont. Not one of these events or actions is aimed at or occurred in Vermont. Not one of these allegations connects Lindevaldsen to Vermont. All of these allegations are irrelevant for purposes of establishing jurisdiction over Lindevaldsen **in Vermont**. To the extent Jenkins can claim that these allegations have any effect whatsoever on her fanciful claims against Lindevaldsen, the only possible effect that could be asserted is one felt **by Jenkins** in Vermont. But, as the above precedent makes abundantly clear, the effects felt by Jenkins are insufficient as a matter of law to establish jurisdiction over Lindevaldsen.

b. Lindevaldsen's representation of one client in Vermont does not create sufficient contacts with Vermont to subject her to personal jurisdiction.

Jenkins' only allegations concerning Lindevaldsen's contacts with Vermont that actually occurred in the forum state arise from Lindevaldsen's representation of a single client in a separate matter. (RSAC ¶ 21) (alleging Lindevaldsen became Miller's attorney in the previous matter); (*id.* ¶ 32) (alleging that Miller's attorneys, but not specifically alleging Lindevaldsen, participated in a Vermont court hearing via telephone from outside of Vermont); (*id.* ¶ 49) (alleging that Liberty Counsel attorneys filed an appeal in Vermont); (*id.* ¶ 50) (alleging Lindevaldsen made statements to Vermont courts in the course of her representation of Miller); (*id.* ¶ 61) (same). As the sworn testimony before this Court demonstrates, Lindevaldsen's representation of Miller in Vermont only resulted in two actual visits to the state. (Dkt. 66-5, Affidavit of Rena Lindevaldsen, ¶ 7) ("As

best I can recall, I have twice appeared in person in Vermont on behalf of Lisa Miller. Both of those appearances were at the Vermont Supreme Court, where I was admitted *pro hac vice* to argue on behalf of Lisa Miller."); (*id.*) (noting that all other appearances in the Vermont trial courts were via telephone). Even if *Walden* did not effect a substantial narrowing of the bases upon which this Court could exercise jurisdiction over Lindevaldsen, which it did, Lindevaldsen's representation of **one** client in **one** matter in Vermont with only two personal appearances would have to be a sufficient nexus **by itself** to justify haling her into court in this forum. Representation of one client in one matter does not create a sufficient connection with the forum to subject the attorney to jurisdiction.

In the only case to address this issue post-*Walden*, the Tenth Circuit held that a law firm could not be subject to jurisdiction in the forum based solely on its isolated representation of a single client in the forum state. *See Rockwood*, 750 F.3d 1178. There, lawyers for a firm outside of Utah provided representation to a business in Utah that gave rise to litigation surrounding the representation. *Id.* at 1179. Rockwood Select Asset Fund, a Utah company, required a borrower to obtain an opinion letter from its legal counsel, which was based in New Hampshire. *Id.* The law firm provided the opinion letter, and Rockwood subsequently concluded that the opinion letter contained misrepresentations and falsehoods. *Id.* Based on that conclusion, Rockwood filed suit in Utah federal court against the law firm. *Id.* The only relevant jurisdictional contacts were (1) Rockwood's formation in Utah and transaction of business there, (2) the law firm's act of sending its opinion letter to Rockwood's Utah address, and (3) the law firm's representation of its client in one Utah transaction. *Id.* at 1180. The Tenth Circuit held that these contacts, **including the actual representation of its client while physically present in Utah**, were insufficient under *Walden* to subject the firm to jurisdiction in Utah. *Id.* at 1180-82.

This post-*Walden* conclusion is also consistent with the determinations of every circuit, including the Second Circuit, to decide the issue prior to *Walden*. *See, e.g.*, *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriquez*, 305 F.3d 120 (2d Cir. 2002) (more than mere representation of a client in a forum is required for a court to exercise jurisdiction over the firm); *Mayes v. Leipziger*, 674 F.2d 178 (2d Cir. 1982) (out-of-state attorney not subject to personal jurisdiction by virtue of attorney-client relationship, particularly when the majority of the representation occurred outside of the jurisdiction); *see also Newsome v. Gallacher*, 722 F.3d 1257, 1280-81 (10th Cir. 2013) (out-of-state attorney not subject to jurisdiction in client's home state, even if litigation arises from the representation of that client out-of-state, unless further contacts are established); *Sawtelle v. Ferrell*, 70 F.3d 1381, 1392 (1st Cir. 1995) ("The mere existence of an attorney-client relationship, unaccompanied by other sufficient contacts with the forum, does not confer personal jurisdiction over the non-resident in the forum state; **more is required**." (emphasis added)); *Trinity Indus., Inc. v. Myers & Assoc., Ltd.*, 41 F.3d 229, 231 n.5 (5th Cir. 1995) (federal court does not have jurisdiction over foreign attorney when representation of a single client in one matter is the sole basis for jurisdiction); *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990) (mere representation of a client in forum state by attorneys licensed in foreign jurisdiction does not amount to sufficient minimum contacts, **even when attorney travels to forum jurisdiction during the course of the representation**); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987) (representation of a client in jurisdiction insufficient to confer personal jurisdiction over attorneys or firm).

That Lindevaldsen's representation of a Virginia client in one case in Vermont also involved her seeking admission *pro hac vice* in Vermont courts does not alter the conclusion that she is not subject to jurisdiction in this forum. *See, e.g.*, *E-Z Bowz, LLC v. Prof'l Prod. Research Co., Inc.*, No. 00 CUV 8670, 2003 WL 22064259 (E.D.N.Y. Sept. 5, 2003) (*pro hac vice*

representation of a client in a jurisdiction is insufficient to confer jurisdiction, even when the attorney made numerous personal appearances in the forum for hearings, depositions, and other matters relating to the litigation); *see also Medina v. Medina*, 260 F.3d 622 (5th Cir. 1999) (*pro hac vice* representation of a client in a forum does not confer jurisdiction over the attorney); *Wolk v. Teledyne Indus., Inc.*, 475 F. Supp. 2d 491 (E.D. Pa. 2007) (same).

Lindevaldsen does not have sufficient contacts with Vermont to subject her to jurisdiction in this Court. Lindevaldsen's only contact with Vermont – aside from the jurisdictionally irrelevant connection Jenkins has to Vermont – is her representation of Miller in Vermont. (RSAC ¶¶ 21, 32, 49, 50, 61). Jenkins has not and cannot establish that Lindevaldsen has further contacts with Vermont to subject her to jurisdiction. The exercise of jurisdiction over Lindevaldsen in this matter violates *Walden* and the binding Second Circuit precedent of *Bank Brussels Lambert* and *Mayes*. Lindevaldsen is not subject to personal jurisdiction in Vermont, and the claims against her must be dismissed.

2. This Court Lacks Personal Jurisdiction Over Staver.

Jenkins' allegations concerning Staver's purported contacts with Vermont are also woefully inadequate and cannot support the assertion of jurisdiction over him. Staver is not subject to jurisdiction in this forum under any cognizable agency theory. First, and fatally, Jenkins fails to allege any sufficient agency relationship to establish jurisdiction over Staver. Second, Jenkins' allegations do not and cannot support a legally sufficient basis upon which to infer an agency relationship. Therefore, this Court lacks jurisdiction over Staver.

a. Jenkins' allegations concerning Staver's purported contacts with Vermont are fatally and incurably deficient.

This Court's jurisdiction over Staver must be premised on Staver's alleged contacts with Vermont, but there are none. Indeed, "[t]he requirements of *International Shoe* must be met as to

each defendant over whom a state court exercises jurisdiction." *Rush*, 444 U.S. at 332; *see also Walden*, 134 S. Ct. at 1122 ("the relationship must arise out of contacts that the defendant *himself* creates with the forum State" (emphasis original); *id.* at 1123 ("Due process requires that a defendant be haled into court in a forum State based on his own affiliations with the State."). Jenkins' RSAC unquestionably fails to allege sufficient contacts between Staver and Vermont. The assertion of jurisdiction over Staver would thus violate due process.

As this Court has acknowledged, the threadbare allegations of Jenkins' RSAC are "admittedly weak" as they relate to Staver. (Dkt. 220, Opinion and Order on Motion to Lift Stay and Join Defendants, at 31). They are not just weak, but **nonexistent**. What little allegations there are against Staver are fatally deficient to establish jurisdiction over him. Staver is mentioned in the RSAC only six times, and not a single allegation creates a connection to Vermont. (*See* RSAC ¶ 15) (naming Staver as a defendant and baldly alleging jurisdiction is sufficient); (*id.* ¶ 21) (alleging that Staver became attorney for Miller); (*id.* ¶ 31) (alleging Staver attended a press conference with Miller in **Virginia**); (*id.* ¶ 60) (alleging that Staver splits his time between **Virginia** and **Florida**); (*id.* ¶ 61) (alleging Staver has maintained that he does not know of Miller's whereabouts); (*id.* ¶ 62) (alleging that Staver has appeared on television and radio to support a book written by Lindevaldsen, with no mention of Vermont).

There is no allegation in the RSAC that Staver has ever been to Vermont. There is no allegation that Staver ever appeared at any court hearings in Vermont concerning the Miller representation, and there could not be any such allegation because he never personally or telephonically appeared in any Vermont proceedings on behalf of Miller. (Staver Aff. ¶ 17) ("I never appeared in person or telephonically in Vermont on behalf of Lisa Miller or in any proceeding regarding her case."). There is no allegation that Staver ever spoke to anyone in

Vermont. There is no allegation that Staver did anything establishing any connection to Vermont whatsoever. While Staver did represent a client in Vermont and was admitted *pro hac vice* for that representation, that is insufficient as a matter of law to subject him to jurisdiction, and this Court has so held. (*See* Dkt. 220, Opinion and Order at 31); *see also E-Z Bowz*, 2003 WL 22064259 at *8; *Medina*, 260 F.3d at 622; *Wolk*, 475 F. Supp. 2d at 491. Excluding the four allegations that involve Staver's alleged actions during the course of Miller's representation, there are only two allegations concerning him at all. And, neither allegation has any connection to Vermont. (RSAC ¶ 60) (alleging Staver's split time between **Virginia** and **Florida**); (*id.* ¶ 62) (alleging Staver has engaged in media unrelated to Miller's representation). Staver has no connections whatsoever to Vermont, much less the constitutionally requisite minimum contacts in this forum.

Staver has only been to Vermont once in his life, for two days in 2001. (Staver Aff. ¶ 17). Staver's trip to Vermont occurred several years before he had ever heard of Miller. (*Id.*). In fact, Staver's trip occurred at least one year prior to Isabella's birth (RSAC ¶ 18), at a time when both Jenkins and Miller resided in Virginia, and when Jenkins and Miller were still joined in their previous civil union. (*See* Exhibit D, Amended Complaint in Rutland Family Court, at ¶¶ 1-5). Staver has no connections with Vermont whatsoever. Jenkins has not and cannot put forward sufficient allegations to establish any connection between Staver and Vermont. He is not subject to jurisdiction here, and all claims against him should be dismissed.

b. Staver is not subject to personal jurisdiction in Vermont under any legally cognizable agency theory.

Jenkins' RSAC also fails to establish any other legally sufficient basis for this Court's jurisdiction over Staver. There is no legally cognizable agency theory under which Staver could be subject to jurisdiction in this Court. First, Jenkins has utterly failed to allege any agency relationship sufficient to subject Staver to jurisdiction in Vermont. Second, there is no basis

whatsoever upon which this Court can infer any agency relationship conferring jurisdiction over Staver.

i. The RSAC fails to allege any agency relationship sufficient to subject Staver to jurisdiction in Vermont.

To demonstrate agency, Jenkins is required to plead the three essential elements: "(1) the manifestation by the principal that the agent shall act for him, (2) the agency's acceptance of the undertaking, *and* (3) the understanding of the parties that the principal is to be in control of the undertaking." *Cleveland v. Caplaw Enter.*, 448 F.3d 518, 522 (2d Cir. 2006) (emphasis original). Proving the existence of an agency relationship is Jenkins' burden. *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59, 71 (2d Cir. 2012). To survive a motion to dismiss, Jenkins is required to plead facts sufficient to establish the existence of the agency relationship. *See, e.g.*, *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 276 (2d Cir. 2013) (complaint must "allege[] facts showing an agency relationship"); *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 408 (S.D.N.Y. 2009); *Maung Ng We v. Merrill Lynch & Co., Inc.*, No. 99 CIV. 9687(CSH), 2000 WL 1159835, *5 (S.D.N.Y. Aug. 15, 2000) (dismissing complaint that, while pleading agency relationship, only did so in conclusory fashion without any factual support); *Cumis Ins. Soc'y, Inc. v. Peters*, 983 F. Supp. 787, (N.D. Ill. 1997) (to survive a motion to dismiss, "the plaintiff must sufficiently allege that an agency relationship exists"). Jenkins has failed to even mention an agency relationship, much less allege that jurisdiction is proper over Staver based on any alleged agency relationship. Without ever mentioning an agency relationship, alleging that one existed, or alleging facts sufficient to establish an agency relationship, Jenkins cannot establish jurisdiction over Staver.

ii. There is no basis whatsoever upon which this Court can infer any agency relationship conferring jurisdiction over Staver.

Staver is not subject to jurisdiction in Vermont under any agency theory. Any alleged contacts between Liberty Counsel's alleged agents and Vermont are imputable to **Liberty Counsel**, not Staver. Staver's role as an officer, director, or supervisor does not change this analysis. His role as officer, director, or supervisor does not permit the alleged jurisdictional contacts of Liberty Counsel's alleged agents to be imputed to him. Staver's role as co-counsel in Miller's representation also does not subject him to jurisdiction in Vermont.

(a) Any alleged contacts between Liberty Counsel's alleged agents and Vermont are imputable to Liberty Counsel, not Staver.

Staver is not subject to jurisdiction in Vermont based on the alleged activities of alleged agents of Liberty Counsel, regardless of his role in the organization. In the limited circumstances when the actions of an employee or agent can be attributed to an employer, the contacts are attributed to the employer corporation, not its officers or supervisors. *See, e.g.*, *Carreras v. PMG Collins, LLC*, 660 F.3d 549, 556 (1st Cir. 2011) (contacts of corporation's agent can be attributed to the **corporation, not its officers**); *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1091 (1st Cir. 1991) ("the contacts of a corporation's agent can subject the **corporation** to personal jurisdiction"); *Doe v. Forrest*, 853 A.2d 48 (Vt. 2004) (holding that police officer's conduct could be imputed to his **employer**, the Sherriff's department); *Brueckner v. Norwich Univ.*, 730 A.2d 1086 (Vt. 1999) (holding that employee's conduct could be imputed to his **employer**, the University). Contacts that any alleged agents of Liberty Counsel may have with Vermont – insufficient as they are – can be attributed only to Liberty Counsel, not Staver.

Even if Jenkins had alleged that certain purported agents of Liberty Counsel engaged in sufficient activities in Vermont to subject Liberty Counsel to jurisdiction there, which she has not and cannot allege, the propriety of this Court's exercise of jurisdiction over Liberty Counsel is a separate matter from the exercise of jurisdiction over Staver. "Each defendant's contacts with the forum State must be assessed **individually**." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (emphasis added). This Court must assess Staver's alleged contacts with Vermont independently of any alleged contacts of Liberty Counsel, and any alleged contacts Liberty Counsel may have with Vermont are not imputable to Staver. *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 790 (1984) (employee's contacts "are not to be judged according to their employer's activities there"); *Keeton*, 465 U.S. at 781 n.13 ("jurisdiction over an **employee does not automatically flow from jurisdiction over the corporation which employs him**") (emphasis added); *see also Grynberg v. B.P. P.L.C.*, 855 F. Supp. 2d 625, 645 (S.D. Tex. 2012) ("A defendant's employer's contacts with the jurisdiction cannot be imputed to the defendant."); *Simpson v. Quality Oil Co., Inc.*, 723 F. Supp. 382 (S.D. Ind. 1989) (company's alleged contacts with forum cannot be imputed to employee for purposes of subjecting him to jurisdiction in a forum in which he has no contacts); *Coleman Fin. Servs. v. Charter Equip. Leasing Corp.*, 708 F. Supp. 664, 669 (E.D. Pa. 1989) (contacts of an employer cannot be imputed to individual employee). Staver is not subject to jurisdiction in this forum based on the alleged activities of alleged agents of his employer, Liberty Counsel.

(b) Staver's alleged role as supervisor of Liberty Counsel's alleged agents is insufficient to confer jurisdiction over Staver.

That Staver is an officer or an alleged supervisor of Liberty Counsel does not change this analysis. Staver's alleged role as supervisor of alleged agents is insufficient to confer jurisdiction

over Staver. *See, e.g.*, *Carreras*, 660 F.3d at 556 (contacts of corporation's agents not attributable to its officers); *Myers v. Bennett Law Offices*, 238 F.3d 1068 (9th Cir. 2001) (contacts of a law firm's agents or employees are attributable only to the law firm, not its managing partners, principals, etc.); *Mason v. Sallyport Global Holdings, Inc.*, 987 F. Supp. 2d 707 (E.D. Va. 2013) (holding that even if corporation or its employees have sufficient contacts in a particular forum, an individual's role as supervisor in the corporation is insufficient to impute those contacts to him); *Grynberg*, 855 F. Supp. 2d at 645 (holding that officers, directors, and executives of a corporation cannot be subject to jurisdiction based solely on the employer's contacts); *Corbo v. Laessig*, No. 2:10-cv-316-GMN-LRL, 2012 WL 1068271 (D. Nev. Mar. 28, 2012) (alleged agent or employer's contacts with a forum are not attributable to a supervisor); *Siegel v. Holson Co.*, 798 F. Supp. 444, 446 (S.D.N.Y. 1991) (company's alleged contacts with a forum cannot be imputed to its president or officers for purposes of subjecting them to jurisdiction in a forum where they have no non-professional contacts).

The fact that Staver was Dean of Liberty University School of Law (RSAC ¶ 21), Founder and Chairman of Liberty Counsel (Staver Aff. ¶5), or the purported supervisor of Lindevaldsen, Hyden, or anyone else (dkt. 220 at 34-36) does not subject him to jurisdiction in Vermont, where he indisputably has insufficient **individual** contacts. Whatever contacts may be attributed to Liberty Counsel by virtue of the alleged contacts of its alleged agents in Vermont cannot be attributed to Staver as a matter of law.

Staver's role as alleged supervisor of Liberty Counsel's alleged agents makes him a co-agent, not the principal in the alleged agency relationship. Indeed, "[a]gency is the fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent

manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01. As the comments make clear, it is a corporation's agent who typically provides the direction of the distinct legal person – the corporation. *Id.* § 1.01 cmt. f(1) ("In an organizations, it is often another agent, one holding a supervisory position, who gives the directions [of the principal corporation]."). Thus,

> [a]n actor who is under the immediate control of another person is not that person's agent unless the actor has agreed to act on the person's behalf. For example, a foreman or supervisor in charge of a crew of laborers exercises full and detailed control over the laborer's work activities. The relationship between the foreman and the laborers is not an agency relationship within the foreman's full control. . . . **The foreman and the laborers are coagents of a common employer who occupy different strata within an organizational hierarchy**.

Id. § 1.01 cmt. g (emphasis added); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998) (official acts of a supervisor are performed in his role as agent of the principal corporation, not on his own behalf); *Patton v. United Parcel Serv., Inc.*, 910 F. Supp. 1250 (S.D. Tex. 1995) (a supervisor is an agent of the corporation and is not subject to jurisdiction for acts as agent of the corporation).

Staver's role as alleged supervisor of Liberty Counsel's alleged agents is insufficient to confer upon this Court jurisdiction over him in a forum in which he has no independent contacts. His individual contacts with Vermont are simply insufficient to satisfy the requisite constitutional minimums, and any assertion of jurisdiction over him based upon his alleged role in Liberty Counsel would violate his constitutional right to due process. The claims against Staver must be dismissed.

(c) Staver's role as co-counsel in the representation of Miller does not subject him to jurisdiction in Vermont under any agency theory.

Staver's role as co-counsel in the Miller representation also does not support the exercise of jurisdiction in this forum based on any cognizable agency theory. Abundant precedent

demonstrates that attorneys representing clients are the client's agent, not that of a third party. *See, e.g.*, *Comm'r v. Banks*, 543 U.S. 426, 436 (2005) ("The relationship between client and attorney . . . is a quintessential principal-agent relationship."); *id.* ("the attorney, as agent, is obligated to act solely on behalf of, and for the exclusive benefit of, the client-principal, rather than for the benefit of the attorney **or any other party**.") (emphasis added); *Veal v. Gerraci*, 23 F.3d 722 (2d Cir. 1994) (same); *Prate v. Freedman*, 583 F.2d 42, 48 (2d Cir. 1978) ("an attorney is his client's agent"). As agent of the **client**, the attorney is obligated to work for the benefit of the principal-client. "Indeed, the entire purpose of an agency relationship is to empower the agent to take actions '*on behalf of and for the benefit of the principal—not the agent*.'" *Mouawad Nat'l Co. v. Lazare Kaplan Int'l Inc.*, 476 F. Supp. 2d 414, 423 (S.D.N.Y. 2007) (quoting *Maung Ng We*, 2000 WL 1159835 at *9) (emphasis original). Thus, the work of co-counsel is one of co-agency to the client-principal, not principal and agent. *See, e.g.*, *Saunders v. Weissburg & Aronson*, 87 Cal. Rptr. 2d 405 (Cal. At. App. 1999) (holding that co-counsel for a party to a lawsuit are **not agents of each other**, but are agents of the client and owe duties solely to the client, not each other); *Lawson v. Missouri & Kansas Tel. Co.*, 164 S.W. 138 (Kan. Ct. App. 1914) (co-counsel in a lawsuit are not agents of one another, but co-agents of the client).

That Staver and Lindevaldsen were co-counsel in the Miller representation (along with several other attorneys) does not support an agency theory sufficient to subject Staver to jurisdiction in Vermont. Jenkins' allegation that Staver and Lindevaldsen were lead counsel for Miller in the previous litigation (RSAC ¶ 21) thus has no bearing on the constitutional validity of this Court asserting jurisdiction over Staver. Regardless of whether Staver's name appeared on signature blocks in various pleadings, those pleadings were filed on behalf of the client by the co-

agent, co-counsel attorney with Staver. The assertion of jurisdiction based upon such a co-agency relationship finds no basis in the law. Jurisdiction over Staver is thus improper.

3. This Court Lacks Personal Jurisdiction Over Liberty Counsel.

a. Liberty Counsel does not have the requisite minimum contacts to subject it to jurisdiction in Vermont.

Jenkins has utterly failed to plead any allegations sufficient to establish any connection between Liberty Counsel and Vermont, much less the constitutionally required minimum contacts. Jenkins makes the false assertion that Liberty Counsel, LLC [sic] is a non-profit law firm with principal places of business in Lynchburg, Virginia and Orlando, Florida. (RSAC ¶ 16). Liberty Counsel is never alleged to have any business presence in Vermont. Staver founded Liberty Counsel, Inc., a Florida nonprofit public interest law firm in 1989. (Staver Aff. ¶ 4). Liberty Counsel has always been headquartered in Florida since its inception. (*Id.*). In 2005 and 2007, branch offices were opened in Virginia and the District of Columbia. But, Liberty Counsel's principal place of business has always been Florida. (*Id.*).

When Liberty Counsel agreed to represent Miller in 2004, Miller was a resident of Virginia. (*Id.* ¶ 7). At that time, Staver and Lindevaldsen both worked full-time with Liberty Counsel in Florida. (*Id.*). Liberty Counsel did not solicit the representation of Miller in Vermont, nor has it ever solicited business in Vermont. (*Id.* ¶ 17). Liberty Counsel does not transact business in Vermont, has no clients in Vermont, has never had an office in Vermont, and owns no property in Vermont. (*Id.*). In short, aside from its representation of Miller in the prior proceeding, Liberty Counsel has absolutely no contacts with Vermont. Liberty Counsel has not availed itself of the laws of Vermont and has no constitutionally sufficient contacts with Vermont to be subject to jurisdiction there. *See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriquez*, 305 F.3d 120 (2d Cir. 2002) (more than mere representation of a client in forum state is required to subject firm to

jurisdiction there); *Newsome v. Gallacher*, 722 F.3d 1257, 1280-81 (10th Cir. 2013) (defendant not subject to jurisdiction in client's home state "without some evidence that the attorney reached out to the client's home forum to solicit the client's business"); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987) (law firm not subject to jurisdiction in a forum based solely on its isolated representation of a client there, particularly when firm does not maintain an office there, have any attorneys licensed or residing there, and has never solicited business in the forum).

Jenkins alleges no contacts at all except for those specifically related to Liberty Counsel's representation of one client in Vermont in a separate matter, and most of those allegations unquestionably relate to conduct outside of Vermont. In fact, there are only five factual allegations even mentioning Liberty Counsel. (RSAC ¶ 21) (noting that Liberty Counsel attorneys agreed to represent Miller, **a Virginia resident**); (*id.* ¶ 26) (alleging that Miller's attorneys established a Facebook page concerning the representation of Miller); (*id.* ¶ 29) (alleging that Liberty Counsel worked with RU, **a Delaware corporation** with offices **in Virginia**, to raise money to support its representation of Miller, and that Liberty Counsel was supposedly offered a "personal option")[5];

[5] Jenkins also knows this allegation is demonstrably untrue and cannot serve as a basis for the assertion of jurisdiction over Liberty Counsel. Her own evidence submitted to this Court eviscerates such an allegation. (*See* Dkt. 204-3) ("Is there no legal recourse now for Lisa Miller? See the attached article from WND [WorldNetDaily]. If not, I would like to suggest to her some personal options, **which LC should not or would not want to know about**. In other words, if there is nothing else LC can do for her, I would like her contact information." (quoting alleged email from Zodhiates to Sidebottom) (emphasis added)). On its face, the email states Liberty Counsel "should not and would not want to know about" the so-called "personal option." Jenkins is also unquestionably aware that Sidebottom testified he has no recollection of ever receiving this alleged email, viewing this email, or responding to it. (Sidebottom Aff. ¶¶ 9-11) (noting that Sidebottom has no recollection of receiving this email, viewing this email, or responding to it; that he "did not act on or respond to this email;" that he "never communicated to anyone this email or the contents thereof"); (*id.* ¶ 9) ("I have no recollection of ever receiving this email, viewing this alleged email, or responding to it. The first time I recall seeing this email was when it was presented to me by Paul Van de Graaf, Assistant U.S. Attorney for the State of Vermont in October 2014 . . . I did not act on or respond to this email. Prior to the time when Assistant U.S. Attorney Van de Graaf presented this alleged email to me in October 2014, I never communicated to anyone this

(*id.* ¶ 49) (alleging that Liberty Counsel filed an appeal during the course of its attorneys' representation of Miller); (*id.* ¶ 60) (alleging that a phone number registered to Liberty Counsel **in Florida** was called by Defendant Zodhiates while he was allegedly driving back from taking Miller to the Canadian border **in New York**).[6] As theses minimal allegations make abundantly clear, Liberty Counsel does not have sufficient contacts with Vermont to be subject to jurisdiction. Of the five allegations even mentioning Liberty Counsel, four of them all admittedly occurred, if at all, **outside of Vermont**. (*Id.* ¶¶ 21, 26, 29, 60). The one allegation that allegedly occurred in Vermont was Liberty Counsel filing an appeal in its representation of Miller. (*Id.* ¶ 49). These "contacts" cannot and do not support the exercise of jurisdiction over Liberty Counsel in Vermont.

b. Liberty Counsel is not subject to personal jurisdiction in Vermont based on the allegations against Staver and Lindevaldsen.

Liberty Counsel is also not subject to jurisdiction based on the allegations against its alleged agents Staver and Lindevaldsen. While a corporation's alleged agent's contacts with a forum state can be attributed to a corporation in some circumstances, *Carreras*, 660 F.3d at 556, those contacts must still meet the constitutionally requisite minimum to subject the corporation to jurisdiction in a forum where it has no independent contacts. *Walden*, 134 S. Ct. at 1121 ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must

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email or the contents thereof."); *see also* (Staver Aff. ¶¶ 27-29) (discussing same); (*id.* ¶ 29) ("Sidebottom never communicated with me regarding the email . . . The first time I saw a copy of the email was in the fall of 2016 when it was attached to the pleadings for Plaintiffs' Motion and Proposed Revised Second Amended Complaint.").

[6] This allegation also fails to support jurisdiction over Liberty Counsel. (Staver Aff. ¶ 30) (noting that Staver never spoke to Zodhiates, that the duration of the call shows no one answered, and that it is a number that has been disseminated to thousands of email addresses publicly since 2003); (*see also* Dkt. 66-4, Affidavit of Mathew Staver ¶ 17) (same); (Dkt. 66-5, Affidavit of Rena Lindevaldsen ¶ 11) (testifying that she never received any phone calls from Zodhiates).

create a **substantial connection** to the forum State." (emphasis added)). Jenkins has not and cannot allege sufficient contacts with Vermont on the part of Liberty Counsel's alleged agents to subject it to jurisdiction.

Liberty Counsel cannot be subject to jurisdiction based upon Lindevaldsen's alleged contacts with Vermont because her contacts are constitutionally insufficient to subject her to jurisdiction in Vermont. As previously demonstrated, Lindevaldsen does not have sufficient contacts with Vermont to subject her to jurisdiction in this Court. Lindevaldsen's only contact with Vermont is her representation of Miller in Vermont. (RSAC ¶¶ 21, 32, 49, 50, 61). She has no further contacts in Vermont. (Lindevaldsen Aff. ¶¶ 2-3); (Dkt. 66-5, Affidavit of Rena Lindevaldsen ¶ 7). The exercise of jurisdiction over Lindevaldsen in this matter is improper under *Walden*, *Bank Brussels Lambert*, and *Mayes*. *See supra* Section III.A.1. Because Lindevaldsen's contacts are insufficient, even if her contacts are attributable to Liberty Counsel, Liberty Counsel's imputed contacts with Vermont are necessarily insufficient to establish jurisdiction over it.

The same is true of any alleged contacts of Staver. As discussed above, *see supra* Section III.A.2, Staver lacks any connection whatsoever to Vermont. Excluding the four allegations that involve Staver's representation of Miller (RSAC ¶¶ 15, 21, 31, 61), there are only two allegations concerning him at all. And, neither allegation has any connection to Vermont whatsoever. (RSAC ¶ 60) (alleging Staver splits time between Virginia and Florida) (*id.* ¶ 62) (alleging Staver has engaged in media unrelated to Miller's representation). Staver has no connections to Vermont. Any contacts that could be imputed to Liberty Counsel by virtue of Staver's alleged agency relationship with it are necessarily deficient.

In sum, Liberty Counsel is not subject to jurisdiction in Vermont. The only contact Liberty Counsel has with Vermont (or that can be attributed to it by virtue of any alleged agency

relationship) is its attorneys' representation of one client in one matter in the forum. (Staver Aff. ¶ 17) ("Neither I nor Liberty Counsel transact business in Vermont. Neither do we have clients in Vermont, or ever had an office, or a principal place of business in Vermont. Neither I nor Liberty Counsel own property or pay taxes in Vermont."). This is insufficient as a matter of law to subject Liberty Counsel to jurisdiction in Vermont. *Bank Brussels Lambert*, 305 F.3d 120.

c. Response Unlimited's alleged activities cannot be imputed to Liberty Counsel because it is indisputably not an agent of Liberty Counsel.

Liberty Counsel is also not subject to jurisdiction in Vermont based on the alleged acts of its alleged agent RU. To assert that RU is an agent of Liberty Counsel, Jenkins must plead: "(1) the manifestation by the principal that the agent shall act for him, (2) the agency's acceptance of the undertaking, *and* (3) the understanding of the parties that the principal is to be in control of the undertaking." *Cleveland v. Caplaw Enter.*, 448 F.3d 518, 522 (2d Cir. 2006) (emphasis original). Where, as here, agency is an element necessary to prove jurisdiction over Liberty Counsel, proving the existence of an agency relationship is Jenkins' burden. *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59, 71 (2d Cir. 2012). Jenkins must plead facts sufficient to establish the existence of the agency relationship. *See, e.g.*, *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 276 (2d Cir. 2013) (complaint must "allege[] facts showing an agency relationship"). The only mention in the RSAC that Response Unlimited is an agent of Liberty Counsel is a bald and conclusory assertion **in the caption**, **and nowhere else**. (RSAC at 1). There is no **allegation** that RU is an agent of Liberty Counsel, nor is there any allegation that could suggest any agency relationship between the two organizations.

"Under general principles of agency, the authority of an agent 'is the power of the agent to do an act or to conduct a transaction on account of the principal which, with respect to the principal,

he is privileged to do because of the principal's manifestations to him.'" *Minskoff v. Am. Express Travel Related Servs. Co., Inc.*, 98 F.3d 703, 708 (2d Cir. 1996) (quoting Restatement (Second) of Agency § 7 cmt. a (1958)). The existence of an agency relationship depends upon the grant of some authority, but "exists only where the agent may reasonably infer from the words or conduct of the principal that the principal has consented to the agent's performance of a particular act." *Id.*

Jenkins has not and cannot plead the existence of an agency relationship between Liberty Counsel and RU because RU was given **no authority** from Liberty Counsel to act on its behalf. Quite the contrary, **Liberty Counsel has expressly withheld any agency authority from RU**, and Jenkins' own presentations to this Court plainly demonstrate as much. The RU prospecting agreement states: "Response Unlimited is an independent contractor specifically secured to obtain mailing lists for LIBERTY COUNSEL'S new donor acquisition program, and **is not an agent, partner, or representative of LIBERTY COUNSEL**."). (*See* Dkt. 204-2, Exhibit 2 to Jenkins Proposed Rev. Sec. Amend. Compl. at 27) (emphasis added); *see also* (Staver Aff. ¶¶ 22-25) (noting that Response Unlimited was never an agent of Liberty Counsel and was never given authority to act on Liberty Counsel's behalf); (Sidebottom Aff. ¶ 7) (same).

Jenkins' utter failure to allege any agency relationship dooms her claims that RU is an agent of Liberty Counsel, and that RU's contacts could be imputed to Liberty Counsel for jurisdictional purposes. Moreover, since RU was an independent contractor employed to perform a single service for Liberty Counsel (Staver Aff. ¶ 23), Jenkins alleged agency claims also fail as a matter of law. *See, e.g.*, *Rates Tech. Inc. v. Cequel Commc'ns, LLC*, 15 F. Supp. 3d 409, 415 (S.D.N.Y. 2014) ("**Independent contractors or companies that provide services to many clients with no distinct decision-making capabilities are not agents of a defendant for purposes of establishing jurisdiction**.") (emphasis added).

"The bar for a plaintiff to establish agency in the jurisdictional context is set high." *Doe v. Abercrombie & Kent, Inc.*, No. 09 Civ. 7052 (VM), 2010 WL 286640, *3 (S.D.N.Y. Jan. 19, 2010). For jurisdictional agency to exist, "the agent must be primarily employed by the defendant and not engaged in similar services for other clients." *Wiwa v. Royal Dutch Petro. Co.*, 226 F.3d 88, 95 (2d Cir. 2000). Jurisdiction cannot be exercised over Liberty Counsel because Response Unlimited was merely engaged to perform a single service that it provides to numerous other companies and entities. (Sidebottom Aff. ¶ 5) (noting that RU provided services to numerous companies and organizations, including Concerned Women for America, The Bible League, the Republican National Congressional Committee, and others). The fact that RU was an independent contractor and that it is engaged in similar services for many other clients dooms Jenkins claim under *Wiwa*. As such, the alleged contacts of RU cannot be attributed to Liberty Counsel as a matter of settled law. Liberty Counsel is not subject to jurisdiction in Vermont, and Jenkins' claims against it should be dismissed.

B. Subjecting Liberty Counsel, Staver, and Lindevaldsen To Personal Jurisdiction In Vermont Would Not Be Reasonable.

The assertion of jurisdiction over Liberty Counsel, Staver, and Lindevaldsen would also be unreasonable and violate traditional notions of fair play and substantial justice. Even if Jenkins had pled or could plead that Liberty Counsel, Staver, or Lindevaldsen have sufficient minimum contacts with Vermont, which she has not done and cannot do, the assertion of jurisdiction over these three Defendants would still violate due process.

The second part of the due process analysis requires an inquiry into whether the exercise of jurisdiction satisfies the requirements of fundamental fairness or reasonableness. This inquiry consists of five factors that analyze the reasonableness of "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and

effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 476-77 (citing *World-Wide Volkswagen*, 444 U.S. at 292)). "[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], **the less a defendant need show in terms of unreasonableness to defeat jurisdiction**." *Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994) (emphasis added). Jenkins' abysmal showing on minimum contacts thus lessens these defendants' burden to demonstrate unreasonableness. All five factors warrant a finding that jurisdiction is unreasonable in Vermont, and thus violative of the due process rights of Liberty Counsel, Staver, and Lindevaldsen.

1. The Burden on Liberty Counsel, Staver, and Lindevaldsen Necessitates a Finding of Unreasonableness.

The burden on Liberty Counsel, Staver, and Lindevaldsen to litigate in a forum in which they have no sufficient contacts would be tremendous. Staver resides in Florida (RSAC ¶ 15), Lindevaldsen resides in Virginia (*id.* ¶ 14), and Liberty Counsel is a corporation based in Florida. (*Id.* ¶ 16). None of these Defendants have any connection with Vermont, and litigating in Vermont would require them to travel great distances. The burden on the defendant is "always a primary concern." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

> The burden associated with forcing a [Florida or Virginia] resident to appear in a [Vermont] court is onerous in terms of distance, and there are no mitigating factors to cushion the burdensomeness here. Thus burden, and its inevitable concomitant, great inconvenience are entitled to substantial weight in calibrating the jurisdictional scales.

Ticketmaster, 26 F.3d at 210; *see also Benton v. Cameco Corp.*, 375 F.3d 1070, 1078 (10th Cir. 2004) (same).

As the First Circuit has explained, "[t]hese are not empty words, for most cases that have been dismissed on grounds of unreasonableness are cases in which the defendant's center of gravity, be it place of residence or place of business, was located at an appreciable distance from the forum." *Ticketmaster*, 26 F.3d at 210. Indeed, "[o]ne reason that the factor of inconvenience to the defendant weighs heavily in the jurisdictional balance is that it provides a mechanism through which courts may guard against harassment." *Id.*

The financial burden would be substantial. None of these Defendants have witnesses, files, or businesses located in Vermont, which is a critical and "significant factor" in this analysis. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996) ("Significantly, none of [these defendants]' records, files, or witnesses with information about the litigation are located here."). The burden is too onerous to force these Defendants to litigate in Vermont where they have no minimum contacts. The first factor mandates a finding of unreasonableness.

2. The Interests of the Forum Necessitates a Finding of Unreasonableness.

While Vermont has an interest in exercising jurisdiction over one who causes tortious injury within its borders, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984), circumstances such as those here diminish this interest substantially. Indeed, in cases where there are "doubts surrounding whether the defendant's act can be said to have been committed in the forum," the interest of the forum state is "milder than usual." *Ticketmaster*, 26 F.3d at. 211; *see also Metro. Life*, 84 F.3d at 574 (holding that, when the alleged actions of the defendants all took place outside of Vermont, the dispute "implicates absolutely no interest of the State of Vermont").

All of the alleged acts of these Defendants occurred, if at all, outside of Vermont. (RSAC ¶¶ 21, 31, 44, 45, 46, 62) (alleging actions of Lindevaldsen, all of which supposedly happened **in Virginia**); (*id.* ¶¶ 15, 21, 31, 60, 62) (alleging actions of Staver, all of which supposedly occurred

outside of Vermont); (*id.* ¶¶ 21, 26, 29, 49, 60) (alleging actions of Liberty Counsel, all of which supposedly occurred **outside of Vermont**). It is beyond peradventure that none of these alleged actions can be said to have occurred in Vermont. The only allegations concerning Liberty Counsel, Staver, or Lindevaldsen that have anything to do with Vermont relate to their lawful representation of Miller in a previous matter, which is insufficient as a matter of law to confer jurisdiction. *See supra* Section III.A.1.b and Section III.A.2.b.ii.(c). Thus, the forum state's interest in adjudicating this matter are substantially diminished, and this factor counsels in favor of a finding of unreasonableness.

3. The Interest in Convenient and Effective Relief Necessitate a Finding of Unreasonableness.

A plaintiff's interest in obtaining relief in a particular forum is diminished when witnesses or other evidence are not more convenient in that forum. *Metro. Life*, 84 F.3d at 574; *Ticketmaster*, 26 F.3d at 211 (when key witnesses and evidence are located elsewhere, "the plaintiff's *actual* convenience seems to be at best a makeweight" (emphasis original); *Benton*, 375 F.3d at 1079 (unless plaintiff can demonstrate some undue hardship by having to litigate in another forum, this factor does not weigh in his favor).

As shown throughout, none of the alleged actions of Liberty Counsel, Staver, or Lindevaldsen occurred in Vermont. Except for Jenkins, no witnesses are in Vermont. There is no alleged evidence in Vermont. Jenkins has not and cannot demonstrate an undue burden of having to litigate in Virginia. Indeed, Jenkins is a former resident of Virginia. (Ex. D, Amended Complaint in Rutland Family Court at ¶ 5). Jenkins has demonstrated an ability to litigate in Virginia. (*See, e.g.*, RSAC ¶ 31) (noting that Jenkins pursued litigation in Virginia). Jenkins' choice of forum is at best a makeweight consideration. *Benton*, 375 F.3d at 1079. This factor necessitates a finding of unreasonableness.

4. The Efficient Administration of Justice Necessitates a Finding of Unreasonableness.

"The fourth factor in our reasonableness inquiry examines whether the forum state is the most efficient place to litigate the dispute." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1097 (10th Cir. 1998). The focus of this inquiry, like that of the previous two factors, involves the location of witnesses and where the alleged wrong occurred. *Id.*; *see also Metro. Life*, 84 F.3d at 574 ("In evaluating this factor, courts generally consider where witnesses and evidence are likely to be located."). Where, as here, there are "no witnesses or other evidence in Vermont, and defendant is a nonresident," and where the wrongdoing allegedly occurred outside of Vermont, the resolution of the matter is more efficient in a different forum. As was true with the analysis in the previous two factors, all witnesses and evidence are outside of Vermont, and all wrongdoing is alleged to have occurred outside of Vermont. *See supra* Sections Section III.B.2-3. Efficient resolution of this matter is best served outside of Vermont, and the exercise of jurisdiction in Vermont over Liberty Counsel, Staver, and Lindevaldsen would be unreasonable.

5. A Finding of Unreasonableness furthers Substantive Social Policies.

This factor requires the Court to "consider the common interests of the several states in promoting substantive social policies." *Metro. Life*, 84 F.3d at 575. The primary interest at stake in this jurisdictional analysis is the constitutional right of Liberty Counsel, Staver, and Lindevaldsen not to be subject to jurisdiction in a forum in which they have no contacts. Given that "it is always in the public's interest to prevent a violation of a party's constitutional rights," *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. 2013), it can hardly be argued that subjecting these defendants to jurisdiction in violation of their due process rights would further any substantive social or public policies of any state. Requiring plaintiffs, including Jenkins here, to demonstrate sufficient minimum contacts prior to subjecting defendants to

jurisdiction in a forum furthers the substantive policy of every state. This factor requires a finding of unreasonableness.

At the end of the day, for myriad reasons discussed above, this Court cannot constitutionally exercise jurisdiction over Liberty Counsel, Staver and Lindevaldsen. The claims against them should be dismissed.

IV. VENUE IS IMPROPER IN VERMONT.

The allegations of Jenkins' RSAC demonstrate that venue is improper in Vermont. Also, the convenience of the parties and witnesses and the interests of justice require a finding that venue is improper in Vermont. Moreover, because the allegations of Jenkins' RSAC fail to state a claim against any of Liberty Counsel, Staver, and Lindevaldsen, *see infra* Section V, and because all of Jenkins' claims against these defendants are time barred, *see supra* Sections I and II, there is no proper venue in which to hale Liberty Counsel, Staver, and Lindevaldsen.

A. Venue Is Improper In Vermont.

Under both Section 1391(b)(2) and Section 1404(a), venue is improper in Vermont. As the Supreme Court explained, "[i]f when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where (the action) might have been brought.'" *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960) (citation omitted). As Jenkins acknowledges, she had a right to bring a suit in Virginia. (Dkt. 74, at 2). The interests of justice and the convenience of parties and witnesses require that this action be tried in the state in which **all** of the alleged acts took place and nearly all of the parties and witnesses reside, not in a state whose only connection with the action is Plaintiff's residence.

Furthermore, finding venue improper in Vermont would prevent Jenkins from benefitting from her transparent attempt to "forum shop" without regard to the Defendants' constitutional

rights and the interests of justice. *Van Dusen v. Barrack,* 376 U.S. 612, 623 (1964). "The limiting phrase of § 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just." *Id.* at 624. "The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum." *Id.* Venue should be determined according to the interests of justice, not according to Jenkins' preference.

B. The Convenience Of The Parties And Witnesses And The Interests Of Justice Require A Finding That Venue Is Improper In Vermont.

1. Jenkins' Choice of Forum is Not Entitled to Great Weight.

As this Court has previously held, Jenkins' choice of forum is not entitled to great weight where, as here, the balance of conveniences is not in equipoise, and in particular, when the operative facts have "little or no connection with the transferor forum." *Klein v. Domino's Pizza, Inc.*, 769 F. Supp. 152, 153 (D. Vt. 1991); *see also, Invivo Research, Inc. v. Magnetic Resonance Equip. Corp.,* 119 F. Supp. 2d 433, 437 (S.D.N.Y. 2000); *Neil Bros. Ltd. v. World Wide Lines, Inc*., 425 F. Supp. 2d 325, 333 (E.D.N.Y. 2006); *Mitsui Marine & Fire Ins. Co. Ltd. v. Nankai Travel Int'l Co., Inc.*, 245 F. Supp. 2d 523, 525 (S.D.N.Y. 2003). Jenkins' choice of forum is not entitled to great weight when "the balance of several factors is strongly in favor of the defendant." *Kolko v. Holiday Inns, Inc.*, 672 F. Supp. 713 (S.D.N.Y. 1987).

In *Klein*, this Court found that a change of venue was warranted when the state's only connection to the litigation was the plaintiff's residence. *Klein*, 769 F. Supp. at 153. As here, the incidents underlying plaintiffs' claim occurred outside of Vermont and most of the witnesses and documents were located outside of Vermont as well. *Id.* Nor did plaintiff's relative lack of wealth, when compared to that of the corporate defendant, entitle his forum choice to receive great

deference. *Id.*; *see also Kolko*, 672 F. Supp. at 716 ("The relative economic ability of the parties to proceed with a case has rarely been a dispositive reason to grant or deny a venue change").

In *Invivo*, the only connections between the plaintiff's selected forum and the litigation were the sale of a percentage of the products at issue and plaintiff's counsel's offices. *Invivo*, 119 F. Supp. 2d at 438. The court found that there is "such a tenuous connection between the plaintiff's claims and the Southern District of New York, [that] the plaintiff's selection of this forum has an artificial quality that entitles a court to give it less weight." *Id.* at 439. And, in *Neil Bros*., the Eastern District of New York similarly found that a plaintiff's choice of forum was not entitled to deference when the only connections were one transaction and the location of plaintiff's counsel. *Neil Bros.*, 425 F. Supp. 2d at 333-34; *see also Kolko*, 672 F. Supp. at 715 ("**The convenience of plaintiff's attorney, without more, is not decisive**") (emphasis added).

The same outcome should obtain in this case, for the same reasons. The only connection between Vermont and this case is Plaintiff's residence. **All** of the purported activities upon which Jenkins bases her claims occurred, if at all, outside of Vermont. (RSAC ¶¶ 34-63). Except for Miller and Isabella's alleged travel from Virginia to New York and then to Canada and Nicaragua, all of the alleged events occurred in Virginia. (*Id.*). As discussed more fully below, most of the witnesses, documents and other information necessary to litigate Jenkins' claims are located outside Vermont, leaving Jenkins' residence and the residence of her attorneys as the only connection between this action and Vermont. As this Court held in *Klein*, such a tenuous connection cannot overcome the remaining factors that support a finding that venue is improper in Vermont. *Klein*, 769 F. Supp. at 153.

2. The Convenience of the Witnesses Demonstrates that Venue is Improper in Vermont.

Convenience of the witnesses, which is regarded as one of the most important venue factors, demonstrates that venue is improper in Vermont. *Jones v. Walgreen Co.*, 463 F. Supp. 2d 267, 274 (D. Conn. 2006). This court has recognized that the convenience of witnesses is particularly important where, as here, "defendants' fact witnesses greatly outnumber those of the plaintiff." *Klein*, 769 F. Supp. at 154.

District courts in the Second Circuit have routinely transferred claims based solely upon the allegations in the complaint. *See, e.g.*, *Prospect Capital Corp. v. Bender*, 09 CIV. 826 (HB), 2009 WL 4907121 (S.D.N.Y. Dec. 21, 2009); *Pardy v. Gray*, 06-CV-6801 JBW, 2007 WL 1825200 (E.D.N.Y. June 22, 2007). Jenkins' RSAC reveals the names of many prospective witnesses and further reveals that, other than Jenkins herself, none of those individuals reside in Vermont. Jenkins' own allegations indicate that: (1) Jenkins' own parents, Ruth and Claude Jenkins, who are alleged to have had contact with Miller and her daughter, reside in Virginia (RSAC ¶ 23); (2) Deborah Thurman, who allegedly organized a coalition and had interactions with Miller and other defendants, did so in Virginia (*id.* ¶ 26); (3) named and unnamed "members" and "elders" of TRBC, located in Virginia, allegedly helped pack up Miller's things in Virginia (*id.* ¶ 45); (4) the individuals to whom Victoria Hyden supposedly sent an email soliciting funds for Miller are in Virginia (*id*. ¶ 44); and (5) Lindevaldsen is located in Virginia (*id*. ¶ 14).

Jenkins has not identified a single Vermont witness besides herself. This is not at all surprising, since the alleged events all supposedly took place outside Vermont and involved non-Vermonters. As such, no further showing is required by Liberty Counsel, Staver, and Lindevaldsen on this point, because Jenkins' own allegations demonstrate that the convenience of witnesses militates in favor of finding that venue is improper in Vermont.

3. The Convenience of the Parties Demonstrates that Venue is Improper in Vermont.

The fact that Jenkins is the only party who resides in Vermont also demonstrates that venue is improper in Vermont. Unlike *Maroney*, *Tom and Sally's Handmade Chocolates*, or *Sollinger*, the Defendants and Jenkins here do not face roughly the same inconvenience. *James Maroney, Inc. v. Flury & Company, Ltd.*, No. 5:09–cv–252–cr, 2010 WL 3322920, *10 (D. Vt. May 28, 2010); *Tom and Sally's Handmade Chocolates, Inc. v. Gasworks, Inc.*, 977 F. Supp. 297, 302 (D. Vt. 1997); *Sollinger v. NASCO Int'l, Inc.*, 655 F. Supp. 1385, 1390 (D. Vt. 1987). As was true in *Klein*, Vermont is only convenient for one party, Jenkins, and it is inconvenient for all other parties. *Klein*, 769 F. Supp. at 154. The fact that Liberty Counsel is a corporation does not warrant departing from *Klein*, which also involved an individual plaintiff suing a large corporation. *Id.* In fact, given that Liberty Counsel is a non-profit corporation (Staver Aff. ¶ 4), as opposed to Dominos, a publicly traded, billion-dollar corporation and the second-largest pizza restaurant chain in the world,[7] Liberty Counsel's financial burden carries substantially more weight than found sufficient in *Klein*. This Court has found that the financial burden imposed on defendants in having to litigate away from their home state, including witness transportation and lodging costs, is a compelling factor favoring transfer. *Klein*, 769 F. Supp. at 715; *see also Kolko*, 672 F. Supp. at 716; *Rodd v. J.G. Hook, Inc.*, 534 F. Supp. 237, 238 (S.D.N.Y. 1982).

As this Court found in *Klein*, the disproportionate burden between the numerous out-of-state defendants and the single in-state plaintiff tilts the balance of convenience of the parties solidly against venue in Vermont. *Klein*, 769 F. Supp. at 154.

[7] *See* Dominos, *Dominos Pizza Corporate Facts*, *available at* https://biz.dominos.com/ (last visited April 26, 2017).

4. The Operative Facts Occurred Outside Vermont.

As was true in *Klein,* in this case the operative events are alleged to have occurred entirely outside Vermont, and therefore this factor weighs in favor finding venue improper here. *Klein*, 769 F. Supp. at 154. "To determine where the locus of operative facts lies, courts look to 'the site of events from which the claim arises.'" *MAK Marketing, Inc. v. Kalapos*, 620 F. Supp. 2d 295, 310 (D. Conn. 2009) (quoting *800-Flowers, Inc. v. Intercontinental Florist, Inc*., 860 F. Supp. 128, 134 (S.D.N.Y. 1994)). **The site from which the claim arises is the site from which the actions or omissions constituting the event originated or were transmitted, not the site where the plaintiff felt the effects**. *Id.* In *MAK*, the operative facts were held to have occurred in Michigan, the site of defendant's office, not in Connecticut, where Plaintiff received the allegedly fraudulent messages. *Id.* Similarly, in *Charter Oak*, the operative facts in an insurance subrogation claim occurred in Tennessee, the site of the accident allegedly caused by the defendant's faulty product, not in Connecticut, where the plaintiff's business was located. *Charter Oak Fire Ins. Co. v. Broan-Nutone, L.L.C.*, 294 F. Supp. 2d 218, 220 (D. Conn. 2003).

Jenkins RSAC alleges that the operative facts occurred outside Vermont, primarily in Virginia. (RSAC ¶¶ 19-63). The only connection between Vermont and this case is Jenkins' residence. (*Id.* ¶ 5). While Jenkins may point to the protracted custody battle over Isabella, part of which took place in Vermont, the claims in this action are squarely premised on Miller's alleged "kidnapping," which is alleged to have taken place outside of Vermont. (RSAC ¶ 36). The alleged "conspiracy" leading to the disappearance of Miller and Isabella is also alleged to have occurred entirely outside of Vermont.

Under Second Circuit precedent, this ground alone is dispositive of Jenkins' claim to venue in Vermont. In *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 432 (2d Cir. 2005), the Second

Circuit reaffirmed the Supreme Court's teaching that "the purpose of statutorily defined venue is to protect the *defendant*" not plaintiff. *Id*. (emphasis original) (quoting *Leroy v. Great W. United Corp.,* 443 U.S. 173, 183–84 (1979)). The court then held that venue properly lies in a district where a **substantial** part of the **defendants'** actions or omissions giving rise to the claim are alleged to have taken place. *Id*. at 432-33. Venue does not lie in a district merely because plaintiff resides there and alleges to have felt the effect of defendants' alleged conduct in that district. *Id*. at 434 (rejecting plaintiff's choice of venue in Western District of New York because the acts complained of took place in Michigan, and plaintiff only felt the effects in New York). Numerous other courts within and without the Second Circuit have reached the same result.[8]

Jenkins alleges that the conspiracy and virtually all other acts took place outside of Vermont. (RSAC ¶¶ 19-63). Therefore, venue is improper in this District.

5. The Relative Means of the Parties Does Not Favor Vermont.

In *Klein*, this Court rejected plaintiff's claim that the case should remain in Vermont because of his limited financial means relative to those of the defendant corporation. *Klein*, 769 F. Supp. at 153. The plaintiff argued that he did not have financial means to litigate in California, in contrast to the resources available to the defendant, a large corporation operating nationwide. *Id.*

[8] *Albergo v. Pearlman*, 07 CIV 2285 GBD, 2011 WL 102749, *3 (S.D.N.Y. Jan. 10, 2011) (dismissing claim for improper venue, even though some plaintiffs resided and alleged to have felt the effects of conspiracy in the forum, because the conspiracy was alleged to have taken place outside the forum; "The Second Circuit has cautioned district courts to take seriously the adjective 'substantial.' That means for venue to be proper, **significant** events or omissions **material to the plaintiff's claim** must have occurred in the district in question.") (emphasis added) (quoting *Gulf Ins. Co. v. Glasbrenner,* 417 F.3d 353, 356–57 (2d Cir. 2005)); *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995) (Iowa was improper venue for Lanham Act claim even though plaintiff resided and allegedly felt effects of unlawful conduct in Iowa, because violations allegedly took place outside of Iowa; "Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff."); *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1372-73 (11th Cir. 2003) (Alabama was improper venue for breach of contract claim even though plaintiff resided and allegedly felt effects of breach in Alabama, because contract was formed and breached in Georgia).

This Court cited with approval a New York district court decision holding that plaintiff's status as a student did not militate in favor of maintaining his choice of forum against a national corporation seeking transfer to Florida, where the alleged events occurred:

> While the court is sympathetic to plaintiff's position as a student and the resulting financial burden upon him by transferring this action, defendant would bear a far greater financial burden in transferring and lodging several witnesses in New York if this motion were denied. Plaintiff unconvincingly alleges that because defendant has greater economic resources due to its corporate status, Holiday Inn should therefore bear a greater burden in transporting witnesses than should plaintiff, a college student. **The relative economic ability of the parties to proceed with a case has rarely been a dispositive reason to grant or deny a venue change**. The financial ability of each party to bear the costs of a venue change is but one of several factors for the court to consider.

Id. at 154 (citing *Kolko*, 672 F. Supp. at 716) (emphasis added).

The same is true in this case, particularly since not all the defendants here are corporations, and those which are corporations are primarily non-profit entities.

V. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, **but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions**." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (emphasis added). "[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. The mandate of Rule 8 "requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft*, 556

U.S. at 678 ("**Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice**.") (emphasis added).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl.*, 550 U.S. at 570). Jenkins is required to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Rule 8 demands "more than a sheer possibility that a defendant acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 769 (internal quotations omitted). **"Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement**.'" *Id.* (quoting *Bell Atl.*, 550 U.S. at 557) (emphasis added). Jenkins' RSAC is armed with little more than threadbare allegations, bald assertions, and fanciful conclusions. Her RSAC must be dismissed.

A. Jenkins' Custodial Interference Claim Fails to State a Cause of Action.

Jenkins' custodial interference allegation fails to state a claim upon which relief can be granted and must be dismissed. Respectfully, this Court's previous prediction that Vermont courts would adopt a Section 700 claim was and remains incorrect. Jenkins cannot bring any such claim under Vermont law. But, even if such a claim did exist under Vermont law, which it does not, Jenkins cannot bring such a claim against a custodial parent with superior custodial rights. Jenkins' purported custodial interference claim as next-friend of Isabella fails to state a cause of action as a matter of law. Jenkins custodial interference claims should therefore be dismissed.

1. This Court's "Prediction" Concerning Vermont's Adoption of Section 700 Is Not Correct.

In its previous opinion discussing Jenkins' alleged claim for the "intentional tort of kidnapping," (RSAC ¶¶ 64-65), this Court "predict[ed] that were the Vermont Supreme Court presented with the precise question today it would agree that the elements of a Vermont common law claim of custodial interference are consistent with section 700." *Jenkins v. Miller*, 983 F. Supp. 2d 423, 451 (D. Vt. 2013). This Court's prediction was based in part on the notion that a custodial interference claim has been recognized in every jurisdiction to address the issue. *Id.* (citing *Wood v. Wood*, 388 N.W.2d 123, 124-25 (Iowa 1983)). That prediction, and the authority upon which it was based, was not then, and certainly is not now, correct.

First, the authority on which this Court based its prediction is no longer an accurate statement of the law. Numerous courts since the Iowa Supreme Court's decision in *Wood* have explicitly refused to adopt Section 700 custodial interference claims as separate torts. *See, e.g.*, *Zaharias v. Gammill*, 844 P.2d 137 (Okl. 1992); *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990); *Whitehorse v. Critchfield*, 494 N.E.2d 743 (Ill. App. Ct. 1986); *Matthaeus v. Matthaeus*, No. C.A. 99C-05-177 WCC, 2003 WL 1826285 (Del. Superior Ct. Apr. 7, 2003). These cases are particularly instructive as to why this Court's prediction concerning the claim of custodial interference was in error.

In *Zaharia*s, the court rejected a parent's attempt to establish a new cause of action for custodial interference. *Zaharias*, 844 P.2d at 138 ("we now hold that [custodial interference claims] should not be added to the body of domestic relations/family law in Oklahoma."). The court noted that its primary consideration was the best interest of the child. *Id.* at 139 ("Those courts which have considered the best interests of children have rejected the tort"). "The threat of introducing such children into yet another potentially vicious legal battle between the child's

parents, or one parent and some other relative . . . must be avoided as it would increase the strain and stress the child is already experiencing." *Id.* The court also held that adopting such a tort would only be helpful to parents battling their former spouses and thus "disarmament is needed to limit post-marital warfare, not additional armament to increase it." *Id.* at 140. "We are convinced that the tort of interference with custodial relations would not enhance the scheme of family law in Oklahoma, and we expressly disapprove of it." *Id.*

In *Larson*, the Minnesota Supreme Court also refused to adopt a custodial interference claim. *Larson*, 460 N.W.2d at 44-47. Like Oklahoma, the Minnesota Supreme Court noted that adoption of such a new tort would not be in the best interest of children. *Id.* at 44 ("In deciding whether to create this tort (which is derivative of custodial rights), we must take the interests of the children involved as an important policy consideration . . . This new tort would create a new burden on children who are already dislocated by the dissolution of their parents' marriage."); *id.* at 45 ("For the good of our children, the law should seek to promote such harmony as is possible in families fractured by the dissolution process. **At minimum, the law should not provide a means of escalating intrafamily warfare**." (emphasis added)). The Minnesota Supreme Court's policy considerations factored heavily in its rejection of the custodial interference claim. "It is clear that this tort would be used as a new weapon in [custody] disputes . . . **Creating this new tort would *create* a new wrong.** It would place innocent children of a vigorous, probably vicious, lawsuit between their parents." *Id.* at 46 (bold emphasis added; italics original). Indeed, a custodial interference claim "could be used as a weapon for revenge and continued hostility." *Id.* at 47. Thus, the court rejected the tort. *Id.*

In *Whitehorse*, the Illinois court also refused to adopt a custodial interference claim based on the interests of children. *Whitehorse*, 494 N.E.2d at 745 (noting that recognition of such a tort

has the potential for increased lawsuits in the custodial arena). It also noted that recognition of a new cause of action with significant ramifications was an area better left to the legislature. *Id.* ("As shown by the detail of the criminal statute, the area of custodial interference involves a myriad of considerations and imposes a large possibility of multiplication of lawsuits. For these reasons, the area of civil sanctions for interference with a custodial parent's custody of a minor child is better addressed by the legislature.").

Vermont precedent supports every consideration that has persuaded courts rejecting custodial interference claims. Indeed, Vermont law recognizes that the best interest of the children should be paramount in any such analysis. *See, e.g.*, *Nickerson v. Nickerson*, 605 A.2d 1331, 1334 (Vt. 1992) (decision involving family law matters "should be directed to the needs of the children rather than the actions of the parents"); *Bissonette v. Gambrel*, 584 A.2d 600, 602 (Vt. 1989) (any decision involving family law issues should focus on the best interests of the child rather than on needs or desires of the parents); *Lafko v. Lafko*, 256 A.2d 166, 172 (Vt. 1969) ("the cardinal consideration in custody cases is the welfare of the children involved [and] the **rights of parents and all other considerations must be subordinated**" (emphasis added)). Vermont courts have recognized that custody battles and family law matters already encompass hostile interactions and have the potential to negatively impact children caught in such battles. *Lafko*, 256 A.2d at 172 (courts should not allow "the opposing desires of hostile parents" to negatively impact children caught in the middle of "the often hostile and vindictive atmosphere of a contested divorce proceeding"); *Loeb v. Loeb*, 144 A.2d 825 (Vt. 1958) (same). Vermont has also stated forcefully that care should be taken to ensure that mechanisms of law do not allow parents to use legal proceedings as a weapon against the other parent with no regard for the child's interest. *See Price v. Price*, 541 A.2d 79, 84 (Vt. 1987) (courts should avoid any situation where "[i]t is possible for

angry parents to see the custody determination as a trial of the merits of their interaction with each other and, as a result, to treat the child as a 'shuttlecock' in that battle"); *Ohland v. Ohland*, 442 A.2d 1306, 1309 (Vt. 1982) (condemning a situation where a minor was "dealt with much as a shuttlecock in a game of badminton").

Given these considerations, it is more likely that Vermont courts would reject creation of such a new tort based on the same premises as Illinois, Minnesota, and Oklahoma. Vermont courts have clearly expressed a desire to decrease, rather than increase, the number of weapons hostile and angry parents have in their custody and divorce disputes. Creating a new tort would only hinder that goal and increase the harm that befalls children in such proceedings. Vermont precedent simply does not support the creation of a new tort for custodial interference. This Court's prediction was thus contrary to the precedent.

That this Court's prediction was also anchored in existing Vermont law does not change this analysis. *Jenkins*, 983 F. Supp. 2d at 451 (noting that Vermont already provides certain causes of action for custodial parents). Like Vermont, the states where courts have rejected custodial interference claims also already recognized causes of action in custodial cases. *See Zaharias*, 844 P.2d at 138 (noting that Oklahoma law recognized certain causes of action for custodial parents); *Larson*, 460 N.W.2d at 46 ("The law in Minnesota already provides redress for a custodial parent in such a situation."); *Whitehorse*, 494 N.E.2d at 745 (noting that Illinois law already provides for remedies). Thus, Vermont's recognition of certain causes of action for custodial parents actually militates against expansion of that legal arsenal, because Vermont (like Oklahoma, Minnesota and Illinois) would not want to increase parental warfare at the expense of children.

2. Jenkins' Custodial Interference Claim Fails As A Matter Of Law.

Even if custodial interference claims did exist under Vermont law, which they do not, Jenkins' custodial interference claim fails as a matter of law. Jenkins cannot maintain a custodial interference claim for conduct allegedly occurring prior to January 1, 2010. Jenkins also cannot maintain a custodial interference claim against Liberty Counsel, Staver, and Lindevaldsen.

a. Jenkins Cannot Maintain a Custodial Interference Claim for Conduct Occurring Prior to January 1, 2010.

Even under this Court's prediction that Jenkins has a custodial interference claim under Vermont law, the allegations of the RSAC cannot state a claim for such a tort under Section 700. **Jenkins cannot state a claim for conduct prior to January 1, 2010, because she did not have superior legal custody of Isabella prior to that date**. All alleged actions occurring prior to that date are irrelevant for purposes of Jenkins' custodial interference claim. Custodial interference claims also cannot be brought against another parent with custodial rights.

i. Jenkins cannot state a custodial interference claim prior to January 1, 2010 because she did not have legal custody of Isabella.

Jenkins cannot state a claim for custodial interference based upon actions that allegedly took place prior to January 1, 2010 because she did not have superior legal custody of Isabella at that time. As the Restatement provides, a custodial interference "action may be maintained by the parent **who is entitled to the custody of a minor child**." Restatement (Second) of Torts §700 cmt. a (emphasis added). To maintain her custodial interference claim, Jenkins must have been entitled to superior lawful custody of Isabella at the time of the alleged actions.

Numerous federal courts to address this issue have made it abundantly clear that such an action only lies for a parent having lawful and superior custody rights to the child. *See, e.g.*, *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1018 (3d Cir. 1984) (to maintain custodial interference

claim, parent must have legal right to custody of the child); *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (custodial interference claim may be maintained only by parents with superior custodial rights); *Decter v. Second Nature Therapeutic Program, LLC*, 42 F. Supp. 3d 450, 456-58 (E.D.N.Y. 2014) (parent entitled to only visitation with child, but not primary custody, cannot maintain a custodial interference claim); *Ruffalo v. Civiletti*, 539 F. Supp. 949, 953 n.6 (W.D. Mo. 1982) (Section 700 claims "appear to apply only to parents entitled to full custody," and rejecting claims brought by a parent who was not "the primary custodial parent" at the time of the alleged tort).

Every state to have considered Section 700 claims has agreed that a parent must have lawful and superior custody of the child to maintain a custodial interference claim. *See, e.g.*, *Ashby v. State*, 779 N.W.2d 343, 358 (Neb. 2010) ("we do not believe that a biological father can assert a claim for intentional interference with his parental rights before gaining a custody order"); *id.* ("Because Ashby cannot allege that he was legally entitled to custody at the time of the alleged interference, he cannot allege facts showing this required element of intentional interference with a parental relationship."); *Wolf v. Wolf*, 690 N.W.2d 887, 892 (Iowa 2005) (holding that the word "custody" in Section 700 requires "superior custody rights" and "primary physical care"); *Stone v. Wall*, 734 So.2d 1038 (Fla. 1999) ("The elements of the cause of action include **that the plaintiff had superior custody rights to the child and that the defendant intentionally interfered with those rights**."); *Anonymous v. Anonymous*, 672 So.2d 787, 790 (Ala. 1995) (holding that "a parent who has the right to custody, control, and services of a minor child" may maintain a custodial interference claim); *Cosner v. Ridinger*, 882 P.2d 1243, 1246-47 (Wyo. 1994) (holding that a custodial interference claim may only be asserted by the primary custodial parent and not merely one deprived of visitation privileges); *Plante v. Engel*, 469 A.2d 1299, 1301 (N.H. 1983) (custodial

interference claim may be maintained only by one with lawful custody order); *see also Stewart v. Walker*, 5 So.3d 746 (Fla. Ct. App. 2009) (parent with inferior custodial rights may not bring action against parent with superior custodial rights); *Politte v. Politte*, 727 S.W.2d 198 (Mo. Ct. App. 1987) (only parent with superior custodial rights may bring custodial interference claim against another parent); *Surina v. Lucey*, 214 Cal. Rptr. 509, 512 (Cal. Ct. App. 1985) (parent must be entitled to lawful custody prior to bringing custodial interference claim); *McGrady v. Rosenbaum*, 62 Misc. 2d 182, 188 (N.Y. Sup. Ct. 1970) (parent with only visitation rights may not maintain custodial interference claim).

Jenkins' custodial interference claim based upon actions **prior to January 1, 2010** cannot state a claim for which relief can be granted. There is no dispute that Miller was entitled to superior legal custody at the time she is alleged to have left the country with Isabella. (RSAC ¶ 18) (noting that Miller was the primary custodian of Isabella from 2004, when she petitioned the courts in Vermont to dissolve the civil union with Jenkins, to January 1, 2010, and that Jenkins was only entitled to visitation on certain weekends, holidays, and vacations); (*id.* ¶ 19) (noting that the Vermont courts did not award "full physical and legal responsibility" to Jenkins until **January 1, 2010**); (*id.* ¶ 36) (alleging that Miller and Isabella left the country on **September 21, 2009**, at which time Miller was the primary and legal custodian of Isabella with superior custodial rights to Isabella). When Miller's alleged acts took place on September 21, 2009, the Vermont court had not even entered an order transferring custody to Jenkins. That subsequent order **did not become effective until January 1, 2010**. (RSAC ¶ 47). Under abundant precedent from both federal and state courts to have considered this issue, Jenkins cannot maintain a claim for custodial interference against a parent having superior custody of the child at the time the alleged events took place. Her custodial interference claim, therefore, must rest on allegations concerning overt acts taking place

after January 1, 2010. As to Liberty Counsel, Staver, and Lindevaldsen, Jenkins has not and cannot allege sufficient overt acts post-January 1, 2010. *See infra* Section V.A.2.b. Her claim against these Defendants therefore fails as a matter of law.

ii. Custodial interference claims cannot be brought against another parent having custodial rights.

Jenkins' custodial interference claims arising from alleged actions prior to January 1, 2010 also fail to state a claim because such claims cannot be brought against a parent having custodial rights at the time of the alleged tort. Having custodial rights to a child is explicitly recognized as a defense to any such alleged tort. As the Restatement makes clear, "[w]hen the parents are by law jointly entitled to the custody and earnings of the child, **no action can be brought against one of the parents who abducts or induces the child to leave the other**." Restatement (Second) of Torts § 700 cmt. c (emphasis added). The cause of action is only available "[w]hen by law only one parent is entitled to the custody and earnings of the child," and "only that parent can maintain an action under the rule." *Id.*

Several circuit courts that have addressed this issue have agreed with this limitation on the cause of action. *See, e.g.*, *Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998) (suggesting that "custodial interference by or at the behest of a parent who had joint custody would not have been viewed as tortious" (citing Restatement (Second) of Torts § 700 cmt. c)); *McDougald v. Jenson*, 786 F.2d 1465, 1489-90 (11th Cir. 1986) (holding that a father had failed to state a custodial interference claim because such claim could not be brought against another parent with custody); *Lloyd v. Loeffler*, 694 F.2d 489, 496 (7th Cir. 1982) ("those states that recognize a tort of wrongful interference with custody make no distinction based on the relationship between the abductor and the child, **provided of course that the abductor does not have lawful custody of the child**." (emphasis added).

Countless state courts discussing a custodial interference claim have also recognized that such an action cannot be maintained by a parent against another parent with custodial rights. *See, e.g.*, *Wyatt v. McDermott*, 725 S.E.2d 555, 563064 (Va. 2012) (a claim for custodial interference cannot be brought against another parent having shared custody of the child); *Kessel v. Leavitt*, 511 S.E.2d 720 (W.V. 1998) ("We hold that a parent cannot charge his/her child's other parent with tortious interference with parental or custodial relationship if both parents have equal rights, or substantially equal rights . . . to establish or maintain a parental or custodial relationship with their child."); *Wood v. Wood*, 338 N.W.2d 123, 124 (Iowa 1983) (if parents entitled to joint custody, no action may be maintained for custodial interference); *Politte v. Politte*, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987) (adopting defense articulated in Restatement (Second) of Torts § 876 cmt c and noting that a parent cannot assert such a claim and then ignore the explicit defenses listed in the Restatement's comments); *Kipper v. Vokolek*, 546 S.W.2d 521, 526 (Mo. Ct. App. 1977) ("it has been held that no cause of action based on [custodial interference] would lie in favor of a father against a mother's having lawful custody of the child who removed it from the state to a foreign country"); *Rosefield v. Rosefield*, 34 Cal. Rptr. 2d 431, 436 (Dist. Ct. App. 1963) ("when parents are jointly entitled to a child's custody, no action for abduction can be brought against one by the other").

Even assuming, arguendo, that Jenkins was entitled to some custodial rights prior to January 1, 2010, she still cannot maintain her action against Miller for actions taking place prior to that time. Given that Miller's alleged actions occurred prior to that time, *see supra* Section V.A.2.a.ii, Jenkins cannot state a claim for relief based on those actions. Her claims must therefore be based on alleged activities **after** January 1, 2010. As to Liberty Counsel, Staver, and Lindevaldsen, Jenkins has not and cannot allege sufficient overt acts post-January 1, 2010.

b. Jenkins Cannot Maintain a Custodial Interference Claim against Liberty Counsel, Staver, and Lindevaldsen.

As the above discussion demonstrates, Jenkins cannot state a claim for relief for alleged actions of any defendant prior to January 1, 2010. **Jenkins' complete failure to allege that Liberty Counsel, Staver, or Lindevaldsen engaged in any acts after January 1, 2010, irreparably destroys her custodial interference claim against these defendants as a matter of law.** To state a claim for custodial interference against Liberty Counsel, Staver, or Lindevaldsen, Jenkins must allege that these defendants committed some acts after the Vermont courts had awarded Jenkins custody on January 1, 2010. *See, e.g.*, *Marshak v. Marshak*, 629 A.2d 964 (Ct. 1993), *overruled on other grounds State v. Vakilzaden*, 742 A.2d 767 (Ct. 1999); *Finn v. Lipman*, 526 A.2d 1380 (Me. 1987); *D&D Fuller CATV Const., Inc. v. Pace*, 780 P.2d 520 (Col. 1989); *see also A.H. Belo Corp. v. Copcoran*, 52 S.W.3d 375 (Tex. Ct. App. 2001).

The Connecticut Supreme Court's decision in *Marshak* is particularly instructive on Jenkins' claims against Liberty Counsel, Staver, and Lindevaldsen. The *Marshak* court specifically rejected a claim that actions occurring prior to the point at which a plaintiff is entitled to lawful custody could warrant liability on a defendant for custodial interference. *Marshak*, 628 A.2d at 972 ("It would be an overly expansive reading of §700 of the Restatement to impose liability for conspiracy on third parties, such as the defendant, who have agreed to assist or have assisted another in doing something that at the time was not unlawful."). If a defendant's alleged actions occurred prior to any court order removing custody from the parent whom a defendant is alleged to have assisted, then custodial interference liability cannot attach. *Id.* Indeed, "[t]he absence of a specific finding by the trial court that the defendant had conspired with or aided the children's father **at a time after the father had been stripped of any legal entitlement to custody of the children is fatal to the plaintiff's claim**." *Id.* (emphasis added).

In *Finn*, the Maine Supreme Court also dismissed a custodial interference claim against the other parent's attorney for representing a client in a previous custody matter. *Finn*, 526 A.2d at 1380-81. The court noted that the attorney-defendant had not been alleged to have abducted the children, counseled the children regarding the custody issue, or otherwise compelled the children to leave their father's custody. *Id.* at 1383. The court recognized that – like here – the defendant-attorney had done nothing more than advocate the interests of his client in the previous matter. *Id.* ("There is nothing inconsistent in the facts as alleged in Finn's complaint and counter affidavits with an attorney's duty to advocate the interests of his client as required by the Maine Bar Rules."). The Maine Supreme Court rejected the custodial interference claims against the attorney. *Id.*

In *Pace*, the Colorado Supreme Court permitted a custodial interference claim against third parties for actions taken **after** the mother had received a lawful custody order. *Pace*, 780 P.2d at 521. The father kidnapped the child 8 days prior to any custody order being put in place, and continued to keep him away from his lawful custodian mother. *Id.* Her claims against the grandparents were permitted to proceed based on a custodial interference claim, but only because there were sufficient overt acts that occurred **after the mother had primary custody of the minor**. Specifically,

> the grandparents had actual physical custody of Jerritt with knowledge that the father had kidnapped Jerritt and that they were keeping him in violation of court custody orders. The grandparents also provided housing for their son during 1982 and 1983, and helped him remain at large by using an alias for Jerritt. Further, the grandparents refused to divulge the whereabouts of their son and grandson to the Sheriff of Craven County, North Carolina, despite their actual knowledge concerning the matter, and they helped their son flee to avoid apprehension by the sheriff. They also warned the father to hide upon learning that the mother's investigator was searching for him in September 1983.

Id. Additionally, the grandparents had attempted to obtain a duplicate copy of the child's birth certificate to aid in the kidnapping, purchased a vehicle with the intent to assist their son's

kidnapping of the minor, and provided other substantial assistance to the father. All of these acts were alleged to have been committed **after** the court's custody order.

In sharp contrast, Jenkins has made and can make no post-custody interference allegations against Liberty Counsel, Staver, and Lindevaldsen. Jenkins' RSAC fails as a matter of law because she has not alleged and cannot allege that Liberty Counsel, Staver, or Lindevaldsen committed any tortious act **after January 1, 2010**. Jenkins makes only two allegations concerning Liberty Counsel, Staver, and Lindevaldsen that allegedly occurred after January 1, 2010. (RSAC ¶61) (alleging that Liberty Counsel, Staver, and Lindevaldsen pursued appeals after January 1, 2010 that were not exhausted until November 2010); (*id.* ¶ 62) (alleging that Lindevaldsen wrote a book about her representation of Miller that was published in 2011). It cannot be disputed that neither of these allegations involves any tortious activity, even if true.

Pursuing an appeal on behalf of a client is certainly not tortious, nor did it aid in Miller's alleged acts of keeping Isabella away from Jenkins after January 1, 2010. Notably, this appeal was filed in December of 2009, prior to the date when Jenkins was entitled to custodial rights. Also, Jenkins' allegations concerning this appeal are intentionally misleading. As Jenkins is aware, Staver and Lindevaldsen attempted to withdraw from the representation of Miller after she had ceased all communications with them in September 2009, but the Vermont courts did not permit withdrawal. (Staver Aff. ¶ 31) (noting that Liberty Counsel, Staver, and Lindevaldsen attempted to withdraw from the representation, but were denied leave to withdraw); (*id.* ¶ 19) (noting that Miller ceased all communications with Liberty Counsel, Staver, and Lindevaldsen sometime in September 2009); (Lindevaldsen Aff. ¶ 7) ("I lost contact with Lisa Miller sometime in late September. At no time after mid-September did I directly or indirectly communicate with Lisa Miller."). As Staver testifies, the only act he engaged in after January 1, 2010 was that of

informing local law enforcement in **Virginia** of the Vermont order transferring custody and providing Miller's last known address to them. (Staver Aff. ¶ 32). Thus, Jenkins' allegation concerning the appeals that were exhausted in November 2010 represent nothing more than the lawful representation of a client. As the Maine Supreme Court stated in *Finn*, "[t]here is nothing inconsistent in the facts as alleged in [Jenkins' RSAC] with an attorney's duty to advocate the interests of his client as required by the [Vermont] Bar Rules." *Finn*, 526 A.2d at 1383. This allegation, therefore, fails to support any claim of custodial interference against Liberty Counsel, Staver, and Lindevaldsen.

The only other allegation that Jenkins' puts forward also fails to support any claim of custodial interference on behalf of Liberty Counsel, Staver, or Lindevaldsen. (RSAC ¶ 62) (alleging that Lindevaldsen wrote a book about Miller's representation and that Staver and Lindevaldsen allegedly appeared on radio and television to promote the book). First, and fatal to Jenkins, there is no allegation whatsoever (nor could there be) that Lindevaldsen wrote this book in order to assist Miller in her alleged kidnapping. Second, and equally fatal to Jenkins' custodial interference claim, authoring a book and appearing on radio and television are protected First Amendment activities and are not tortious. *See, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (writing and publishing books are protected speech); *Mandell v. Cnty. Of Suffolk*, 316 F.3d 368 (2d Cir. 2003) (media interviews are protected speech).

In sum, the only two allegations concerning Liberty Counsel, Staver, and Lindevaldsen **after January 1, 2010** involve their lawful representation of Miller in a prior proceeding on appeal that was dismissed in 2010, and protected First Amendment activity regarding a book that is not alleged to have aided Miller's alleged kidnapping in any way. As was true in *Marshak*,

"[t]he absence of a specific [allegation] by [Jenkins] that the defendant had conspired with or aided [Miller] **at a time after [Miller] had been stripped of any legal entitlement to custody of the children is fatal to [Jenkins'] claim**." *Marshak*, 628 A.2d at 922 (emphasis added). Jenkins' RSAC is woefully deficient to state a custodial interference claim against Liberty Counsel, Staver, and Lindevaldsen. Her claim against these three Defendants fails as a matter of law and must be dismissed.

3. Jenkins' Purported Custodial Interference Claims as Next Friend of Isabella Fails as a Matter of Law.

Jenkins' alleged custodial interference claim on behalf of Isabella fails to state a claim as a matter of law, and must be dismissed. Next-friend claims are brought on behalf of a minor and represent the claims belonging to the minor. *See* Vt. R. Civ. P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest."); Vt. R. Civ. P. 17(b) ("Whenever an infant or incompetent person has a representative . . . the representative may sue or defend **on behalf of the infant**.") (emphasis added). Because "children do not possess the requisite legal capacity to participate in litigation in their own names," Rule 17(b) permits the court to ensure that the "minor's interests are adequately represented." *In re Willey*, 14 A.3d 945, 953 (Vt. 2010).

Jenkins' claims as next-friend of Isabella are thus Isabella's claims. But, as fully explained in Section II.A, *supra*, liability for custodial interference claims only attaches to a parent with custodial rights—**not to a minor child**. Jenkins' own admissions, the Restatement, this Court's prediction of what Vermont might recognize as a cause of action, and binding precedent from the Second Circuit all point unmistakably to the fact that Isabella has no standing to pursue a custodial interference claim. *See supra* Section II.A. Accordingly, Jenkins' purported next friend custodial interference claims brought on Isabella's behalf fails as a matter of law and must be dismissed.

B. Jenkins Cannot State A Claim For Conspiracy.

Jenkins' allegations of civil conspiracy against Liberty Counsel, Staver, and Lindevaldsen also fail to state a claim. To state a claim for civil conspiracy under Vermont law, Jenkins must plead the existence of an agreement, an unlawful act in furtherance of the agreement, and damage resulting therefrom. *See, e.g.*, *Boutwell v. Marr*, 42 A. 607, 609 (Vt. 1899); *Coon v. Southwestern Vt. Med. Ctr.*, No. 2:13-cv-182, 2014 WL 348193, *10 (D. Vt. Jan. 30, 2014). Jenkins has failed to plead, and cannot plead, the existence of an agreement involving Liberty Counsel, Staver, or Lindevaldsen. Also, Jenkins' conspiracy claim fails because there is no underlying act liability.

1. Jenkins Has Not and Cannot Plead Any Agreement.

To survive a motion to dismiss on her civil conspiracy claims, Jenkins was required to plead the existence of an agreement. Indeed, the existence of an agreement is an essential element of the alleged conspiracy. *See, e.g.*, *Arkeley v. N. Country Stone, Inc.*, 620 F. Supp. 2d 591, 600 (D. Vt. 2009) (to prove existence of conspiracy, plaintiff was required to show an agreement); *Coon*, 2014 WL 348193 at *10 (agreement is essential element of civil conspiracy); *Davis v. Vile*, No. 2002-465, 2003 WL 25746021 (Vt. Mar. 1, 2003) (to show civil conspiracy, plaintiff must allege that an agreement was reached to commit the alleged wrong); *Boutwell*, 42 A. at 609 (same).

Jenkins has not and cannot plead the requisite agreement. Jenkins' only mention of any agreement whatsoever did not involve Liberty Counsel, Staver, or Lindevaldsen. (RSAC ¶ 25) ("Defendant Wall and Lisa Miller decided and agreed as early as June of 2008 that Lisa Miller should flee with Isabella."). In her RSAC, Jenkins never alleges – nor could she allege – that Liberty Counsel, Staver, or Lindevaldsen entered into any agreement to commit wrongful acts. The only other allegations concerning any meeting of the minds or agreement are vague and conclusory, or involve other defendants allegedly conspiring together. (*Id.* ¶ 38) (Lisa Miller and

Zodhiates conspired with Kenneth Miller to facilitate all acts concerning the alleged kidnapping); (*see also id.* ¶¶ 65, 67) (only mentioning Liberty Counsel, Staver, or Lindevaldsen in a conclusory fashion concerning the alleged conspiracy, but failing to mention any agreement).

Jenkins' failure to allege an agreement, on this her third amendment, is evidence that she cannot do so. (Staver Aff. ¶ 20) ("Other than reading their names in the indictment of Timothy Miller, in the Complaint, the Amended Complaint, the Rev. Sec. Amend. Compl., and in news reports about the case, I have no knowledge of Kenneth Miller, Timothy Miller, Andrew Yoder, Christian Aid Ministries, Inc., or the Nicaragua Beachy Amish-Mennonite Christian Brethren. I have never met or communicated with any of these people or organizations or any of their agents or employees. I have never communicated with anyone associated with the Amish or Mennonite communities about Lisa Miller. Lisa Miller was neither Amish nor Mennonite and never mentioned either to me or anyone I know."); (*id.* ¶ 21) ("I have no knowledge of anyone who spoke of Lisa Miller's plan or intent to leave Virginia or the United States before or after she disappeared. I have no knowledge of anyone who aided, abetted, conspired, or had any knowledge respecting Lisa Miller's disappearance before or after the fact."); (*id.* ¶ 35) ("At all times, I instructed Lisa Miller to obey all court orders. I never advised, counseled, or suggested to anyone that Lisa Miller should disobey any court order or that she should flee the jurisdiction of the courts or the United States. In addition to the legal and ethical reasons why I have never advised or encouraged any client to disobey a court order, there are also common sense reasons. A client who disobeyed a court order and was fined or jailed for contempt could later regret the decision and blame counsel for providing such advice. It makes no sense to advise a client to disobey a court order. Neither I nor to my knowledge any attorney working for or on behalf of Liberty Counsel ever advised or encouraged Lisa Miller or any client to disobey a court order."); *see also* (Lindevaldsen Aff. ¶ 6)

("I had no knowledge of Lisa Miller's intent or plan to leave the country or of anyone who encouraged, assisted, or participated in her departure, concealment, or evasion of the law. In fact, as stated in my November 14, 2016 Affidavit, on September 12, 2009, Lisa Miller advised me by email that she had a job interview scheduled for September 15 and if offered the position she would start in October. (Dkt. 213-2, ¶ 4). I never counseled Lisa Miller that she should evade the jurisdiction of the courts, disobey any court order, or disappear. In fact, I frequently advised her of the consequences of noncompliance with the visitation orders. She was well aware that she could face jail time or loss of custody if she persisted in noncompliance with the court orders."); (*id.* ¶ 13) ("In addition, other than reading their names in press or court documents, I have no knowledge of Kenneth Miller, Timothy Miller, Andrew Yoder, Christian Aid Ministries, Inc., or the Nicaragua Beachy Amish-Mennonite Christian Brethren. I have never spoken to, communicated with, or met anyone associated with the Amish or Mennonite communities concerning Lisa Miller."); (*id.* ¶ 17) ("In sum, at no time did Lisa Miller, Mr. Zodhiates, or any other person alert me to Lisa Miller's intent to leave the United States with her child. I did not aid or assist Lisa Miller in leaving the country and I have no personal knowledge of anyone who participated in her leaving the country. Nor did I aid or assist Lisa Miller in remaining outside the country. At all times, Lisa Miller was counseled by me to obey all court orders and advised of the legal implications of a failure to comply with custody or visitation orders. I accurately stated my lack of knowledge as to Lisa Miller's whereabouts to the Vermont Family Court at the December 22, 2009 motion hearing in the custody action. And, I did not participate in obtaining any items from Lisa Miller's apartment to send them to her overseas.").

Because this is an essential element of her claim, Jenkins' failure to allege an agreement on the part of Liberty Counsel, Staver, and Lindevaldsen is fatal to her RSAC. This claim must be dismissed as to these three Defendants.

2. Jenkins Civil Conspiracy Claim Fails Because there is No Underlying Act Liability.

Even if Jenkins had plead an actual agreement involving Liberty Counsel, Staver, or Lindevaldsen, which she has not, and even if she could plead such an agreement, which she cannot, Jenkins' conspiracy claims still fail to state a claim upon which relief can be granted because there is no liability for the underlying acts. The Vermont Supreme Court has expressed grave doubts about whether a claim for civil conspiracy can exist absent an underlying tort. *Davis*, 2003 WL 25746021 at *3 (citing numerous cases holding that civil conspiracy is not an independent tort). This doubt is well-founded. *See, e.g.*, *Wilson v. Dantas*, 746 F.3d 530, 537 n.4 (2d Cir. 2014) (if underlying tort claim fails, the civil conspiracy claim must likewise fail); *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 176 (2d Cir. 2012) (same); *Martin v. Dickson*, 100 F. App'x 14 (2d Cir. 2004) ("civil conspiracy cannot stand alone, but stands or falls with the underlying tort").

This Court, too, has recognized that a civil conspiracy claim must fail unless there is liability stemming from the underlying tort. *See Coon*, 2014 WL 348193 at *10 ("Because there is no underlying tort stemming from the alleged delay, Mr. Coon's conspiracy claim also fails."); *see also Montgomery v. Devoid*, 915 A.2d 270, 278 (Vt. 2006) (an essential element of a civil conspiracy claim is the "existence of a primary violation"); *Milo Indus. Corp. v. Nazzaro*, Civ. No. 3:08CV1026, 2012 WL 3778978, *16 (D. Conn. Aug. 30, 2012) ("To prove a claim for civil conspiracy, a plaintiff must establish that the underlying actions are wrongful."); *Wolk v. Teledyne Indus., Inc.*, 475 F. Supp. 2d 491, 506 (E.D. Pa. 2007) ("There is no liability for civil conspiracy unless there is liability for the act or acts underling the conspiracy.").

Jenkins cannot show that there is liability for the alleged underlying tort. First, there is no liability because Jenkins' custodial interference claims are time barred. *See supra* Sections I and II. Additionally, Jenkins has failed to state a claim upon which relief can be granted under her custodial interference claims. *See supra* Section V.A. Finally, Jenkins' custodial interference claims brought on behalf of Isabella fail as a matter of law. *See supra* Section V.B.3. Because her claims are indisputably time barred and fail to state a claim, there can be no underlying conspiracy liability. *See Wolk*, 475 F. Supp. 2d at 506 (if all claims giving rise to the conspiracy claim are dismissed, the conspiracy claim must also be dismissed).

C. Jenkins' Cannot State A Claim For Aiding And Abetting.

Vermont has adopted Section 876 of the Restatement (Second) of Torts for purposes of aiding and abetting liability. *See Lassiter v. Bessette*, 16 A.3d 580, 583 (Vt. 2010). To state a claim for aiding and abetting against Liberty Counsel, Staver, and Lindevaldsen, Jenkins is required to plead that these defendants

> (1) comitt[ed] a tortious act as part of a common design with the other, (2) [gave] substantial assistance to the other knowing that the other's conduct is a breach of duty, or (3) [gave] substantial assistance to the other to accomplish a tortious result while also acting in a manner that is a breach of duty to the third person.

Montgomery v. Devoid, 915 A.2d 270, 281 (Vt. 2006) (quoting Restatement (Second) of Torts § 876 (1979)).

Jenkins has not and cannot plead these essential elements. Jenkins has not and cannot plead that Liberty Counsel, Staver, or Lindevaldsen committed any tortious act as part of a common design or agreement. Jenkins has not plead and cannot plead that Liberty Counsel, Staver, or Lindevaldsen provided any substantial assistance to Miller or that they knew of Miller's intentions to commit a tortious act. Jenkins has not plead and cannot plead that Liberty Counsel, Staver, or Lindevaldsen provided substantial assistance to Miller's alleged tortious activity or that their

conduct constitutes an independent tort. Jenkins' aiding and abetting claims must therefore fail as a matter of law.

1. Jenkins Has Not and Cannot Plead that Liberty Counsel, Staver, or Lindevaldsen Committed any Tortious Act as part of a Common Design or Agreement.

For Liberty Counsel, Staver, or Lindevaldsen to have any liability for aiding and abetting Miller's alleged tortious acts, Jenkins must plead that these Defendants committed some tortious act as part of some common design. *Montgomery*, 915 A.2d at 281. Thus, Jenkins must allege (a) that Liberty Counsel, Staver, or Lindevaldsen committed some tortious act **and** (2) that they did so as part of a common design or agreement. Jenkins has failed to plead these threshold requirements.

a. Jenkins has not plead that Liberty Counsel, Staver, or Lindevaldsen committed any act as part of a common design or agreement.

Even if Jenkins could plead that Liberty Counsel, Staver, or Lindevaldsen committed some tortious act, which she cannot, she is still required to plead "**evidence of some agreement**" to sustain a claim under the first prong of Section 876. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 841 (2d. Cir. 1992) (discussing the requirements of Section 876); *Pittman v. Grayson*, 149 F.3d 111, 122-23 (2d Cir. 1998) (first prong of Section 876 requires plaintiff to allege agreement); *see also* Restatement (Second) of Torts § 876 cmt. a ("Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct."); *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994) (noting that the first prong of Section 876 requires an agreement); *Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177, (D.S.D. 1984) (same). In fact, the first prong of Section 876 has been found to encompass the requirements of

civil conspiracy. *See Pittman*, 149 F.3d at 122-23 (first prong of Section 876 requires elements of a conspiracy, including agreement); *Ezzone*, 525 N.W.2d at 398 (same).

As was true of Jenkins' civil conspiracy claim, her aiding and abetting claim necessarily fails as a matter of law because she has not and cannot plead the requisite agreement. *See supra* Section V.B.1. Because this is an essential element of her aiding and abetting claim, Jenkins' failure to allege an agreement on the part of Liberty Counsel, Staver, and Lindevaldsen is fatal to her RSAC. This claim must be dismissed as to these three defendants.

b. Liberty Counsel, Staver, and Lindevaldsen have not committed any tortious act.

Even if Jenkins could plead the requisite agreement, her aiding and abetting claim would still fail as a matter of law if she cannot plead any tortious activity on the part of Liberty Counsel, Staver, or Lindevaldsen. A "mere common plan, design, or even express agreement is not enough for liability in itself." Restatement (Second) of Torts §876 cmt. b. Indeed, "there must be acts of a tortious character in carrying it into execution." *Id.* As such, "it is essential that the conduct of **the actor** be in itself tortious." *Id.* cmt. c (emphasis added).

Liberty Counsel, Staver, and Lindevaldsen have not engaged in any tortious act. In fact, nearly all of Jenkins' allegations concerning these three defendants refer to their lawful representation of Miller in a previous matter and thus are **not tortious**. (RSAC ¶¶ 21, 32, 49, 50, 61) (alleging that Liberty Counsel, Staver, and Lindevaldsen represented Miller in the previous family court matter, appeared at court hearings in person and via telephone, and filed an appeal). Not one of these allegations is tortious, and all represent nothing more than Liberty Counsel, Staver, and Lindevaldsen's lawful and ethical representation of a client.

Numerous other allegations concerning these Defendants also represent nothing more than activity unquestionably protected by the First Amendment and thus are also **not tortious**. (*Id.* ¶ 26,

29, 31, 62) (alleging that Liberty Counsel, Staver, and Lindevaldsen raised money to support their defense of Miller, established a Facebook page, attended a press conference in Virginia, wrote a book, and appeared on television and radio to promote Lindevaldsen's book). There can be no doubt that these activities are protected by the First Amendment. *See, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (writing and publishing books are protected speech); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (attorney holding press conference about representation of a client is "pure speech in the political form"); *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (Facebook postings are protected speech and "[t]he First Amendment fully applied to that speech"); *Village of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620, (1980) ("soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech"); *Mandell v. Cnty. Of Suffolk*, 316 F.3d 368 (2d Cir. 2003) (media interviews are protected speech). As protected First Amendment activity, these allegations are not tortious activity sufficient to support Jenkins' aiding and abetting claim.

The only other pertinent allegations of Jenkins' RSAC also fail to demonstrate that Liberty Counsel, Staver, or Lindevaldsen engaged in any tortious activity. (RSAC ¶ 29) (alleging that **in early 2009**, Zodhiates offered Liberty Counsel a "personal option"). But, this allegation demonstrates no tortious activity on the part of Liberty Counsel, and it intentionally misrepresents the actual text of this alleged offer from Zodhiates. The email which Jenkins references in this allegation was sent to Bill Sidebottom in January 2009, and it states that Zodhiates would "like to suggest **to [Miller]** some personal options, **which LC probably should not or would not want to know about**." (Dkt. 204-3, Exhibit 2 to Jenkins' Proposed Revised Second Amended Complaint, at 2). Zodhiates did not **offer anything** to Liberty Counsel in this email, as Jenkins alleges. (*See id.*). Rather, Zodhiates requested to have contact information for Miller so that he

could suggest whatever personal option he was talking about **to Miller**. Jenkins' allegation also omits the critical fact that Zodhiates explicitly states that Liberty Counsel should not or would not want to know about whatever personal option he wanted to suggest to Miller. (*See* Dkt. 204-3 at 2); *see also* (Staver Aff. ¶ 26) ("Plaintiffs fail to mention that the communication was an email allegedly sent to Sidebottom in or about January 2009. Plaintiffs are no doubt aware of Sidebottom's sworn testimony in Zodhiates' 2016 criminal trial in which Sidebottom testified he did not recall receiving the alleged email and he never responded to such a communication. … Plaintiffs must be aware that Sidebottom testified in the Zodhiates trial … that he has no recollection of ever receiving this alleged email, viewing this email, or responding to it. He testified the first time he recalled ever seeing this email was when it was presented to him by Paul Van de Graaf, Assistant U.S. Attorney for the State of Vermont in October 2014. He testified he has no idea what this alleged email was talking about or inferring. Sidebottom testified he did not act on or respond to this email. Prior to the time when Assistant U.S. Attorney Van de Graaf presented this alleged email to Sidebottom in October 2014, he never communicated to anyone this email or the contents thereof."); (Sidebottom Aff. ¶¶ 9-11) (discussing the alleged email and that he had "no recollection of ever receiving this email, viewing this email, or responding to this email," and that he never responded or sent it to anyone).

Jenkins also alleges that Miller "told Yoder that Liberty Counsel had advised her that it would be in her best interest to disappear." (RSAC ¶ 41). This allegation has no basis in fact, and is nothing more than unsupported hearsay. Moreover, it is demonstrably false. (*See* Staver Aff. ¶ 19) ("Contrary to the Rev. Sec. Amend. Complaint in ¶¶20, 24, 34, 41, 43-44, 64-65, and 67, I have no knowledge of anyone ever receiving any request or information from any source about any intent of Lisa Miller to leave the jurisdiction of the courts or the United States, and have no

knowledge of any request or information from any source to plan, assist, devise, or help Lisa Miller evade the jurisdiction of the courts or the United States or to disobey any court order. I rarely communicated with Lisa Miller by phone, in person, or otherwise. The few in-person encounters with her was when I appeared to argue a motion or an appellate matter in Virginia only. Sometime in September 2009, Lisa Miller stopped communicating and did not respond to phone calls or emails. From that time to the present, Lisa Miller ceased all communications with me or anyone associated with Liberty Counsel. I have no knowledge of any communication from Lisa Miller directly or indirectly after September 2009."); (*id.* ¶ 21) ("I have no knowledge of anyone who spoke of Lisa Miller's plan or intent to leave Virginia or the United States before or after she disappeared. I have no knowledge of anyone who aided, abetted, conspired, or had any knowledge respecting Lisa Miller's disappearance before or after the fact."); (*id.* ¶ 38) ("At all times, I instructed Lisa Miller to obey all court orders. I never advised, counseled, or suggested to anyone that Lisa Miller should disobey any court order or that she should flee the jurisdiction of the courts or the United States. In addition to the legal and ethical reasons why I have never advised or encouraged any client to disobey a court order, there are also common sense reasons. A client who disobeyed a court order and was fined or jailed for contempt could later regret the decision and blame counsel for providing such advice. It makes no sense to advise a client to disobey a court order. Neither I nor any attorney working for or on behalf of Liberty Counsel ever advised or encouraged Lisa Miller or any client to disobey a court order."); (Lindevaldsen Aff. ¶ 6) ("Contrary to the allegations contained in the Revised Second Amended Complaint, I had no knowledge of Lisa Miller's intent or plan to leave the country or of anyone who encouraged, assisted, or participated in her departure, concealment, or evasion of the law. In fact, as stated in my November 14, 2016 Affidavit, on September 12, 2009, Lisa Miller advised me by email that she had a job

interview scheduled for September 15 and if offered the position she would start in October. (Dkt. 213-2, ¶ 4). I never counseled Lisa Miller that she should evade the jurisdiction of the courts, disobey any court order, or disappear. In fact, I frequently advised her of the consequences of noncompliance with the visitation orders. She was well aware that she could face jail time or loss of custody if she persisted in noncompliance with the court orders."); (*id.* ¶ 17) ("In sum, at no time did Lisa Miller, Mr. Zodhiates, or any other person alert me to Lisa Miller's intent to leave the United States with her child. I did not aid or assist Lisa Miller in leaving the country and I have no personal knowledge of anyone who participated in her leaving the country. Nor did I aid or assist Lisa Miller in remaining outside the country. At all times, Lisa Miller was counseled by me to obey all court orders and advised of the legal implications of a failure to comply with custody or visitation orders. I accurately stated my lack of knowledge as to Lisa Miller's whereabouts to the Vermont Family Court at the December 22, 2009 motion hearing in the custody action. And, I did not participate in obtaining any items from Lisa Miller's apartment to send them to her overseas.").

Even if Jenkins' allegation were not demonstrably untrue, which it is, the allegation still fails to establish that Liberty Counsel, Staver, or Lindevaldsen committed any tortious act. As the allegation states, this alleged communication took place in the "**fall of 2009**." (RSAC ¶ 41); *see also* (Dkt. 204, Motion to Join Additional Defendants ¶ 24) (discussing Yoder's alleged testimony stating that his alleged conversation with Miller took place in November 2009). Fatally for Jenkins, Miller was still the primary custodian of Isabella at that time, and thus any allegation that Liberty Counsel suggested anything still does not constitute a tortious act because the primary custodian cannot commit the alleged custodial interference. *See supra* Section V.A.2.

This fatal flaw is also true of Jenkins' allegations concerning Lindevaldsen allegedly packing bags for Miller. (RSAC ¶ 45). This allegation is also alleged to have taken place in **November 2009**, two months prior to Jenkins being entitled to custody. (*Id.*). Even if this allegation were true, which it is not, it would still not be tortious because it would have taken place prior to the point at which Jenkins can maintain a custodial interference claim. *See supra* Section V.A.2. (*See also* Lindevaldsen Aff. ¶¶ 8, 10, 17); (Dkt. 213-2, Affidavit of Rena Lindevaldsen ¶ 7) ("I never packed up Lisa Miller's personal belongings in November 2009, or at any other time. In fact, **I have not been to Lisa Miller's apartment at any time for any reason**." (emphasis added)).

Finally, Jenkins' allegations concerning the alleged emails of Defendant Hyden also fail to allege any tortious activity. (RSAC ¶¶ 44, 46). Once again, Jenkins omits critical facts from the alleged emails, which undermine her entire allegation. One alleged email contains no information at all concerning the individual to which Zodhiates is allegedly referring. (*See* Dkt. 204-7, Ex. 6 Proposed Rev. Sec. Amend. Compl. at 2) (stating that "[s]he knows who has the key," but including no reference to Lindevaldsen at all). Another email merely asks Hyden to "ask Rena" about picking something up from an unidentified apartment. (*See* Dkt. 204-9, Ex. 8, Proposed Rev. Sec. Amend. Compl. at 2). Even if Hyden had delivered any email to Lindevaldsen, which she did not,[9] this allegation is based on an alleged email sent on November 9, 2009. (Dkt 204-7 at 2). Thus, like the other allegations regarding events that supposedly occurred prior to January 1, 2010, these alleged activities – even if they had taken place, which they did not – would not be tortious. *See supra* Section V.A.2 (demonstrating that acts occurring prior to January 1, 2010 cannot constitute

[9] (Lindevaldsen Aff. ¶¶ 7-10); *see also* (Dkt. 66-3, Affidavit of Victoria Hyden "Hyden Aff.," ¶ 12) (testifying that she never sent any emails to coworkers at the law school to solicit donations or anything else to be sent to Lisa Miller).

custodial interference actions). The same is true of the alleged emails from November 10, 2009 (dkt. 204-10, Ex. 9; dkt. 204-11, Ex. 10) and November 11, 2009. (Dkt. 204-12, Ex. 11).

2. Jenkins Has Not and Cannot Plead that Staver, Lindevaldsen, or Liberty Counsel Knew of Miller's Alleged Actions or Provided Substantial Assistance to Miller for Her Alleged Actions.

Jenkins' aiding and abetting claims also fail to state a claim upon which relief can be granted because she cannot satisfy the second prong of Section 876. Liberty Counsel, Staver, and Lindevaldsen did not know of Miller's alleged plans, nor are they alleged to have sufficient knowledge of the alleged activities. Jenkins has also utterly failed to plead that Liberty Counsel, Staver, and Lindevaldsen provided the requisite substantial assistance to Miller's alleged actions.

a. Liberty Counsel, Staver, and Lindevaldsen did not know of Miller's alleged plans.

For Jenkins to satisfy her burden to plead aiding and abetting liability against Liberty Counsel, Staver, or Lindevaldsen, she must allege facts sufficient to establish that they had knowledge of the alleged tortious activity. *Lassiter*, 16 A.3d at 584 ("at least a minimal knowledge requirement must be met"). If these Defendants "did not have the requisite knowledge," then the aiding and abetting claim must fail as a matter of law. *Id.*; *General Elec. Co. v. AAMCO Transmission, Inc.*, 962 F.2d 281 (1992) (dismissing aiding and abetting claim because defendant did not have requisite knowledge of tortious activity). The knowledge requirement required for aiding and abetting liability requires more than mere awareness. *See, e.g.*, *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1465-66 (2d Cir. 1995) (aiding and abetting liability requires more than mere awareness of potential tortious activity); *El Camino Res. Ltd. V. Huntington Nat'l Bank*, 712 F.3d 917 (6th Cir. 2013) (aiding and abetting liability requires **actual knowledge**, which encompasses a much higher threshold than mere general awareness of allegedly tortious activity); *Failla v. City*

of Passaic, 146 F.3d 149, 159 (3d Cir. 1998) (mere knowledge insufficient for aiding and abetting liability).

Jenkins has utterly failed to plead facts showing that Liberty Counsel, Staver, and Lindevaldsen knew of Jenkins' alleged activities, nor can she do so. While Jenkins alleges – **in wholly conclusory fashion** – that Staver and Lindevaldsen knew of Miller's alleged tortious acts and of the alleged co-conspirators (RSAC ¶ 61), the facts pleaded in her RSAC refute this legal conclusion. (*See id.* ¶ 50) (quoting sworn testimony from Lindevaldsen that she had no idea that Miller had apparently fled her home and that she had tried to contact her with no success). Jenkins admits in the RSAC that "Lisa Miller's attorneys, Matthew [sic] Staver and Rena Lindevaldsen have at all times maintained that they did not know of their client's location to various courts in Vermont (including sworn testimony of Rena Lindevaldsen) and Virginia, and to the press that Lisa Miller simply stopped communicating with them and disappeared." (*See id.* ¶61); *see also* (Staver Aff. ¶ 19) ("I have no knowledge of anyone ever receiving any request or information from any source about any intent of Lisa Miller to leave the jurisdiction of the courts or the United States, and have no knowledge of any request or information from any source to plan, assist, devise, or help Lisa Miller evade the jurisdiction of the courts or the United States or to disobey any court order. I rarely communicated with Lisa Miller by phone, in person, or otherwise. The few in-person encounters with her was when I appeared to argue a motion or an appellate matter in Virginia only. Sometime in September 2009, Lisa Miller stopped communicating and did not respond to phone calls or emails. From that time to the present, Lisa Miller ceased all communications with me or anyone associated with Liberty Counsel. I have no knowledge of any communication from Lisa Miller directly or indirectly after September 2009."); (*id.* ¶ 20) ("Other than reading their names in the indictment of Timothy Miller, in the Complaint, the Amended

Complaint, the Rev. Sec. Amend. Compl., and in news reports about the case, I have no knowledge of Kenneth Miller, Timothy Miller, Andrew Yoder, Christian Aid Ministries, Inc., or the Nicaragua Beachy Amish-Mennonite Christian Brethren. I have never met or communicated with any of these people or organizations or any of their agents or employees. I have never communicated with anyone associated with the Amish or Mennonite communities about Lisa Miller. Lisa Miller was neither Amish nor Mennonite and never mentioned either to me or anyone I know."); (*id.* ¶ 21) ("I have no knowledge of anyone who spoke of Lisa Miller's plan or intent to leave Virginia or the United States before or after she disappeared. I have no knowledge of anyone who aided, abetted, conspired, or had any knowledge respecting Lisa Miller's disappearance before or after the fact."); *see also* (Lindevaldsen Aff. ¶ 7) ("I lost contact with Lisa Miller sometime in late September. At no time after mid-September did I directly or indirectly communicate with Lisa Miller."); (*id.* ¶ 10) ("Contrary to the allegations of the Revised Second Amended Complaint (¶¶ 44, 45, 61), I did not receive any *request* for donations to aid Ms. Miller in leaving the country or remaining out of the country; I did not *solicit* donations to aid Ms. Miller in leaving the country or remaining out of the country; I did not *arrange* for Ms. Miller's belongings to be retrieved from her apartment; and I *did not pack* up any of Ms. Miller's belongings for any purpose and, certainly, not for the purpose of transporting her belongings to Nicaragua. In fact, I have never even been to Ms. Miller's apartment."); (*id.* ¶ 17) ("In sum, at no time did Lisa Miller, Mr. Zodhiates, or any other person alert me to Lisa Miller's intent to leave the United States with her child. I did not aid or assist Lisa Miller in leaving the country and I have no personal knowledge of anyone who participated in her leaving the country. Nor did I aid or assist Lisa Miller in remaining outside the country. At all times, Lisa Miller was counseled by me to obey all court orders and advised of the legal implications of a failure to comply with custody or visitation orders. I accurately stated my lack of

knowledge as to Lisa Miller's whereabouts to the Vermont Family Court at the December 22, 2009 motion hearing in the custody action. And, I did not participate in obtaining any items from Lisa Miller's apartment to send them to her overseas.").

While Jenkins' purports to attribute knowledge to Liberty Counsel, Staver, and Lindevaldsen through the allegations concerning the alleged email sent and phone calls made by Zodhiates (RSAC ¶ 29), for the reasons fully discussed above, *see supra* Section V.C.2.a, these allegations are self-refuted, and they fail as a matter of fact and as a matter of law.

The only other allegations upon which Jenkins could possibly base the knowledge requirement also fail to establish a critical element. "The second prong of the Restatement imposes concerted action liability when a party knows **that another tortfeasor's conduct constitutes a breach of duty** . . . ." *Lassiter*, 16 A.3d at 584 (emphasis added). While Jenkins claims that Lindevaldsen received emails from Hyden soliciting donations, and packed up bags at Miller's apartment (RSAC ¶¶ 44, 45), neither of those allegations are sufficient to satisfy the knowledge requirement. As Jenkins' own allegations make clear, Lindevaldsen allegedly received emails on November 10, 2009 (dkt. 204-10, Ex. 9; dkt. 204-11, Ex. 10), and November 11, 2009. (Dkt. 204-12, Ex. 11). At that time, Miller's alleged actions could not have been tortious because she was still the primary custodian of Isabella and therefore could not have committed the alleged tort of custodial interference. *See supra* Section V.A.2. Even if the underlying activity alleged on the part of Miller was true, Jenkins still cannot demonstrate that Lindevaldsen had knowledge of Miller's alleged **tortious activity**. If Miller's alleged acts were not tortious **at the time they were committed**, then Lindevaldsen necessarily could not know of Miller's tortious activity at the time she allegedly received emails or packed belongings. Jenkins aiding and abetting claim must fail because she cannot establish knowledge on the part of Staver, Lindevaldsen, or Liberty Counsel.

b. Liberty Counsel, Staver, and Lindevalsen did not provide substantial assistance to Miller.

"The second prong of the Restatement imposes concerted action liability when a party 'knows that another tortfeasor's conduct constitutes a breach of duty *and* gives **substantial assistance** or encouragement to the other' tortfeasor" *Lassiter*, 16 A.3d at 585 (quoting Restatement (Second) of Torts § 876) (italic emphasis original; bold emphasis added). If a defendant "took no part" in the underlying tortious act, then aiding and abetting claims must fail. *See General Elec.*, 962 F.2d at 288. Also, to satisfy this element of aiding and abetting liability, there must be evidence that the alleged defendant's actions were a **substantial part** of the underlying wrongful act. *Fletcher*, 68 F.3d at 1465-66 (substantial assistance requires more than mere minimal participation; *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95 (3d Cir. 1999), abrogated on other grounds *Nance v. City of Newark*, 501 F. App'x 123 (3d Cir. 2002) (substantial assistance must be more than "mere assistance"); *Failla*, 146 F.3d at 159 (substantial assistance requires more than merely "some role or involvement"). As the Vermont Supreme Court has indicated, substantial assistance requires that the alleged defendant be an **active participant** in the underlying tortious activity. *Montgomery*, 915 A.2d at 282. This requirement arises from the fact that "[t]he assistance of or participation by the defendant may be so slight that he is not liable for the act of the other." Restatement (Second) of Torts § 876 cmt. d.

In determining whether an individual's participation is substantial enough to satisfy the second prong of Section 876, the Restatement looks to several factors: (1) the nature of the act, (2) the amount of assistance given by the defendant, (3) the defendant's presence or absence at the time of the tort, (4) the defendant's relation to the underlying tortfeasor, and (5) the defendant's state of mind. *Id.* Courts have added an additional factor as well, analyzing the "duration of the

assistance provided." *In re Temporomandibular Joint Implants Prod. Liability Litig.*, 113 F.3d 1484, 1495 (D.C. Cir. 1997).

i. The relevant factors do not support a finding of substantial assistance on the part of Liberty Counsel, Staver, or Lindevaldsen.

All the relevant factors require a finding that Liberty Counsel, Staver, and Lindevaldsen did not provide substantial assistance to Miller's alleged tort.

Neither Liberty Counsel, Staver, nor Lindevaldsen were present or alleged to be present at the time of the alleged kidnapping act. (RSAC ¶¶ 36, 38, 40, 42) (alleging that Miller – along with the assistance of Zodhiates, an anonymous member of the Brotherhood, Timothy Miller, and others – helped Miller travel outside the country to Nicaragua and not return). Jenkins does not and cannot plead or demonstrate that Liberty Counsel, Staver, or Lindevaldsen were present at the time of the actions permitting Miller's departure and hiding. Jenkins' failure, and her indisputable inability, to plead these facts also demonstrate that the nature of the act is such that Liberty Counsel, Staver, and Lindevaldsen's alleged assistance was not "substantial." *See, e.g.*, *Habersham v. Welch*, 705 F.2d 472, (D.C. Cir. 1983) (noting that the analysis of the nature of the act involved "dictates what aid might matter, *i.e.*, be substantial"). According to Jenkins' own allegations, the alleged aid that mattered for Miller's ability to commit the underlying alleged tort was all provided by other actors who were present with her at all stages of the alleged tort. Liberty Counsel, Staver, and Lindevaldsen's alleged "assistance," whatever Jenkins alleges it might have been, was in any event insubstantial under this factor. Indeed, it was non-existent.

The amount of alleged assistance that Liberty Counsel, Staver, and Lindevaldsen are purported to have provided Miller also mandates a finding that their alleged involvement was not substantial. (RSAC ¶¶ 21, 32, 49, 50, 61) (allegations involving nothing more than Liberty

Counsel, Staver, and Lindevaldsen's lawful representation of Miller); (*id.* ¶¶ 26, 29) (alleging that Liberty Counsel, Staver, and Lindevaldsen attempted to raise money to help with the **costs of representing** Miller in the previous custody matter and prior to the alleged tort of Miller, **not attempting to raise money to assist Miller herself**); (*id.* ¶¶ 26, 29, 31, 62) (alleging that Liberty Counsel, Staver, and Lindevaldsen engaged in various activities – **all protected by the First Amendment** – that merely related to their representation of Miller, all but one of which occurred prior to Miller's alleged tort). Given the nature and timing of Liberty Counsel, Staver, and Lindevaldsen's alleged actions, Jenkins simply cannot make a claim that their alleged assistance was substantial. Not one of the above-referenced allegations contributed at all – much less substantially – to Miller's ability to allegedly commit the tortious act.

Liberty Counsel, Staver, and Lindevaldsen have no substantial relation to Miller. Their sole relationship with the alleged tortfeasor was that of legal counsel and nothing more. (RSAC ¶¶ 21, 29, 31, 32, 49, 50, 61).

Jenkins has also failed to and cannot allege that Liberty Counsel, Staver, or Lindevaldsen had the requisite state of mind to render substantial assistance to Miller. Jenkins does not allege **anything** about Liberty Counsel, Staver, or Lindevaldsen's state of mind. The only inference that can be drawn from the actual allegations of Jenkins' RSAC is that Liberty Counsel, Staver, and Lindevaldsen agreed to represent Miller in the previous family law matter and pursued their representation of her vigorously as they were ethically obligated to do. (RSAC ¶¶ 21, 29, 31, 32, 49, 50, 61). This factor mandates a finding that these Defendants' alleged assistance was not substantial.

Lastly, the duration of Liberty Counsel, Staver, and Lindevaldsen's alleged assistance also requires a finding that it was insubstantial. Liberty Counsel, Staver, and Lindevaldsen's alleged

actions, all of which took place during their lawful representation of Miller, began when her custody litigation started and ended when such representation was exhausted. Jenkins admits as much in her RSAC. (RSAC ¶¶ 21-22) (alleging that Staver and Lindevaldsen began representing Miller in 2004 during the course of the proceedings involving the dissolution of her civil union with Jenkins); (*id.* ¶ 61) (noting that Liberty Counsel, Staver, and Lindevaldsen's alleged actions ceased in November 2010 when the appeals were exhausted). Importantly, Liberty Counsel, Staver, and Lindevaldsen's representation would have concluded earlier had the courts in Vermont granted their request to withdraw once Miller had ceased all communications with them. (Staver Aff. ¶ 34).

All factors that Vermont courts analyze in determining whether Liberty Counsel, Staver, and Lindevaldsen provided substantial assistance to Miller's alleged acts require a finding that their alleged "assistance" was insufficient and insubstantial. Indeed, Liberty Counsel, Staver, and Lindevaldsen "took not part" in Miller's alleged tortious actions, which is insufficient as a matter of law to ascribe aiding and abetting liability to them under Section 876. *See General Elec.*, 962 F.2d at 288. In fact, Jenkins' allegations fail to even establish that Liberty Counsel, Staver, or Lindevaldsen even had minimal participation or some involvement in the underlying alleged tort, both of which would also be insufficient as a matter of law under binding Second Circuit and Vermont precedent. *Fletcher*, 68 F.3d at 1465-66; *see also Montgomery*, 915 A.2d at 282. Jenkins' aiding and abetting claims thus fail to state a claim.

ii. Liberty Counsel, Staver, and Lindevaldsen were not the proximate cause of Jenkins' alleged injuries.

Courts in Vermont and elsewhere have held that a showing of substantial assistance cannot be made unless the assistance was the proximate cause of the alleged tort. *See In re Temporomandibular*, 113 F.3d at 1495 ("the alleged substantial assistance must be the proximate

cause of plaintiff's harm"); *Lassiter*, 16 A.3d at 585 ("closely intertwined with the concept of 'substantial assistance' is the principle of proximate cause" (quoting *Montgomery*, 915 A.2d 270)). To prevail on her aiding and abetting claim against Liberty Counsel, Staver, and Lindevaldsen, Jenkins is therefore required to plead that these Defendants were the proximate cause of her injury. *Id.* Jenkins cannot do so.

Liberty Counsel, Staver, and Lindevaldsen "*cannot* be considered a cause of the plaintiff's injury if the injury would probably have occurred without the defendant's [alleged] conduct." *Collins v. Thomas*, 938 A.2d 1208, 1212 (Vt. 2007) (emphasis original); *see also* Black's Law Dictionary 250 (9th ed. 2009) (defining proximate cause as "[a] cause that directly produces an event **and without which the event would not have occurred**." (emphasis added)). The Vermont Supreme Court has indicated that the "essential requirement" of proximate cause is that a defendant's alleged action must "be a necessary condition for the occurrence of the plaintiff's harm." *Wilkins v. Lamoille Cnty. Mental Health Servs., Inc.*, 889 A.2d 245 (Vt. 2005).

Jenkins has not and cannot make a showing that Liberty Counsel, Staver, or Lindevaldsen were the proximate cause of her alleged injuries. According to Jenkins herself, the primary acts giving rise to her alleged injury were all the result of the independent actions of other individuals. Jenkins' alleged injury arising from the alleged tort of custodial interference would have occurred independent of any alleged actions of Liberty Counsel, Staver or Lindevaldsen. (*See* RSAC ¶ 36) (alleging that Zodhiates transported Miller and Isabella to the Canadian border to help them flee); (*id.* ¶ 38) (alleging that Zodhiates worked with Kenneth Miller to purchase tickets for Miller and Isabella to flee, that another member of the Brotherhood transport Miller and Isabella to the airport in Canada for their travel, and that Timothy Miller met Miller and Isabella in Nicaragua to help them hide); (*id.* ¶ 40) (alleging that members of the Brotherhood in Nicaragua facilitated Miller

and Isabella hiding); (*id.* ¶ 42) (alleging that Miller did not return with Isabella). These alleged acts are the only allegations in Jenkins' RSAC that were necessary to bring about her alleged injury. Without any of these alleged actions by other defendants and other individuals, the alleged injury could not have occurred. Notably, too, many of these actions have resulted in criminal prosecutions and convictions for the individuals involved. *See United States v. Phillip Zodhiates*, Case No. 1:14-CR-00175 (D. Vt. 2014); *United States v. Kenneth Miller*, Case No. 2:11-cr-161 (D. Vt. 2011).

Jenkins has not and cannot allege that Liberty Counsel, Staver, or Lindevaldsen committed any act **without which the alleged kidnapping would not have occurred**. The bulk of Jenkins' allegations relate solely to Liberty Counsel, Staver, and Lindevaldsen's lawful and ethical representation of Miller in previous court proceedings, nearly all of which occurred prior to Miller's alleged tortious act. (RSAC ¶¶ 26, 29, 31, 62). The few other allegations reference lawful First Amendment activity that had nothing to do with the alleged actions of Miller and other defendants, and all occurred prior to the alleged tortious activity of Miller. (*Id.* ¶¶ 26, 29, 31, 63). All other allegations concerning Lindevaldsen or Staver were not essential to the commission of the alleged tort by Miller, were also not tortious,[10] and mostly occurred prior to the alleged tortious activity of Miller. (*Id.* ¶¶ 29, 41, 44, 45, 46). There can be no legally cognizable argument that Liberty Counsel, Staver, or Lindevaldsen were the proximate cause of Jenkins' alleged injuries.

The issue of proximate cause "may be decided as a matter of law where 'the proof is so clear that reasonable minds cannot draw different conclusions and where all reasonable minds would construe the facts and circumstances one way.'" *Collins*, 938 A.2d at 1212 (quoting *Estate of Summer v. Dep't of Social & Rehabilitation Servs.*, 649 A.2d 1034, 1036 (Vt. 1994)). In *Estate*

[10] *See supra* Section V.C.1.b.

of Summer, the Vermont Supreme Court concluded that no reasonable mind could conclude that the alleged defendants were a proximate cause of the plaintiff's alleged injury when such injury was caused entirely by the independent and unlawful behavior of other individuals. The same is true here. (RSAC ¶¶ 36, 38, 40, 42). Because Liberty Counsel, Staver, and Lindevaldsen were not active participants in, necessary conditions for, or essential to Jenkins' alleged injury, they cannot be the proximate cause of her injuries. They could not have provided substantial assistance to Miller, and Jenkins' aiding and abetting claims against them must fail as a matter of law.

3. Jenkins Has Not and Cannot Plead That Liberty Counsel, Staver, or Lindevaldsen Provided Substantial Assistance to Miller or that their Actions Separately Constituted Tortious Activity.

"The final prong of Restatement §876 imposes certain concerted action liability where a party 'gives substantial assistance to the tortfeasor in accomplishing a tortious result *and* his own conduct, separately considered, constitute **a breach of duty to the third person**." *Lassiter*, 16 A.3d at 585 (quoting Restatement § 876) (italics emphasis original; bold emphasis added). Jenkins' aiding and abetting claim under prong three of Section 876 also fails as a matter of law for substantially the same reasons as her claim under prongs one and two. As demonstrated in Section V.C.2.b, *supra*, Liberty Counsel, Staver and Lindevaldsen did not provide substantial assistance to Miller's alleged tortious activity. Nor did Liberty Counsel, Staver and Lindevaldsen commit an independent tort by breaching any duty towards Jenkins.

Fatal to Jenkins' aiding and abetting claim is that she cannot show Liberty Counsel, Staver, or Lindevaldsen breached any duty owed to her. Indeed, "[i]t is to be noted that a person may be privileged, and hence be committing no breach of duty, in assisting another who is committing **or later commits a tort**." Restatement (Second) of Torts §876 cmt. e. The allegations of Jenkins' RSAC demonstrate that the only actions Liberty Counsel, Staver, and Lindevaldsen are alleged to

have engaged in all related to their representation of Miller **prior to her alleged tortious activity**. (*See, e.g.*, RSAC ¶¶ 21, 26, 29, 31, 32, 49, 50, 61) (allegations dealing exclusively with Liberty Counsel, Staver, and Lindevaldsen's lawful representation of Miller). It is beyond peradventure that Liberty Counsel, Staver, and Lindevaldsen are privileged in their lawful representation of Miller and thus could not and did not breach any duty owed to Jenkins during such a time. *See, e.g.*, *Schwartz v. Frankenhoff*, 733 A.2d 74, 82 (Vt. 1999) ("An attorney is not liable in tort to a nonclient simply because the lawyer represents a tortfeasor; some independent wrong committed by the attorney rather than the client is a prerequisite to the attorney's personal liability to such a third party.") (citing numerous cases). Liberty Counsel, Staver, and Lindevaldsen committed no independent tort and breached no duty owed to Jenkins. Her aiding and abetting claims under prong three of Section 876 therefore fail as a matter of law.

D. Jenkins' Conspiracy Claims Under Any Provision Of Section 1985(3) Fail To State A Claim Upon Which Relief Can Be Granted.

1. Jenkins Does Not and Cannot Allege an Actual Conspiracy.

To maintain an action under Section 1985(3), a plaintiff must make "specific allegations in support of [her] claims." *Gyadu v. Hartford Ins. Co.*, 197 F.3d 590, 591 (2d Cir. 1999). "**A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss**." *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983) (emphasis added); *Boddie v. Schneider*, 105 F.3d 857, 862 (2d Cir. 1997) ("unsupported, speculative, and conclusory" claims of civil conspiracy must be dismissed); *Contemporary Mission, Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981) (same); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1997) (conclusory allegations concerning a conspiracy "will be dismissed"). Indeed, the Second Circuit "has recognized that certain claims are so easily made and can precipitate such protracted proceedings that . . . **detailed fact pleading is required**

to withstand a motion to dismiss. A claim of a conspiracy to violate civil rights is a clear example." *Angola v. Civiletti*, 666 F.2d 1, 4 (2d Cir. 1981) (emphasis added). Thus, vaguely referring to an alleged conspiracy and providing "hints at some tenuous link" between the alleged conspiracy and a plaintiff's membership in an alleged suspect class is woefully insufficient to withstand a motion to dismiss. *Gyadu*, 197 F.3d at 591.

Jenkins is also required to specifically allege a meeting of the minds concerning the alleged conspiracy. "In order to maintain an action under Section 1985, a plaintiff 'must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve an unlawful end.'" *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (quoting *Romer v. Morganthau*, 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000)). Jenkins' "mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of the motion." *Contemporary Mission*, 648 F.2d at 107 (quoting *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 344 (9th Cir. 1978)).

The allegations in Jenkins' RSAC are plainly inadequate to support a civil rights conspiracy action. First, all of Jenkins' allegations concerning a conspiracy are vague, conclusory, or speculative. (RSAC ¶ 65) (vaguely alleging only that Lisa Miller did "conspire with" Defendants); (*id.* ¶ 67) (same). These allegations amount to nothing more than "[d]iffuse and expansive allegations" that are "insufficient, unless amplified by specific instances of misconduct." *Ostrer*, 567 F.2d at 553. But, there are no such allegations of misconduct, nor could there be. *See supra* Sections V.A-C. Under the unequivocal precedent of the Second Circuit, Jenkins' vague, conclusory, and speculative claims must be dismissed.

Even if Jenkins could allege sufficient factual details to satisfy the demands of Section 1985(3) – which she cannot – Jenkins has failed to allege any agreement or meeting of the minds.

There is not a singled allegation of such an agreement concerning Staver, Lindevaldsen, or Liberty Counsel. Jenkins' only mention of any agreement whatsoever involved other Defendants and excluded Staver, Lindevaldsen, and Liberty Counsel. (RSAC ¶ 25) ("Defendant Wall and Lisa Miller decided and agreed as early as June of 2008 that Lisa Miller should flee with Isabella."). The only other allegations concerning any meeting of the minds or agreement are vague and conclusory, or involve other defendants allegedly conspiring together. (*Id.* ¶ 38) (Lisa Miller and Zodhiates conspired with Kenneth Miller to facilitate all acts concerning the alleged kidnapping); (*see also id.* ¶¶ 65, 67) (only mentioning Staver, Lindevaldsen, and Liberty Counsel in a conclusory fashion concerning the alleged conspiracy).

Jenkins' vague and deficient allegations concerning Liberty Counsel, Staver, and Lindevaldsen are also incurable. (Staver Aff. ¶ 19) ("I have no knowledge of anyone ever receiving any request or information from any source about any intent of Lisa Miller to leave the jurisdiction of the courts or the United States, and have no knowledge of any request or information from any source to plan, assist, devise, or help Lisa Miller evade the jurisdiction of the courts or the United States or to disobey any court order."); (*id.* ¶ 20) ("Other than reading their names in the indictment of Timothy Miller, in the Complaint, the Amended Complaint, the Rev. Sec. Amend. Compl., and in news reports about the case, I have no knowledge of Kenneth Miller, Timothy Miller, Andrew Yoder, Christian Aid Ministries, Inc., or the Nicaragua Beachy Amish-Mennonite Christian Brethren. I have never met or communicated with any of these people or organizations or any of their agents or employees. I have never communicated with anyone associated with the Amish or Mennonite communities about Lisa Miller. Lisa Miller was neither Amish nor Mennonite and never mentioned either to me or anyone I know."); (*id.* ¶ 21) ("I have no knowledge of anyone who spoke of Lisa Miller's plan or intent to leave Virginia or the United States before or after she

disappeared. I have no knowledge of anyone who aided, abetted, conspired, or had any knowledge respecting Lisa Miller's disappearance before or after the fact."); *see also* (Lindevaldsen Aff. ¶ 17) ("In sum, at no time did Lisa Miller, Mr. Zodhiates, or any other person alert me to Lisa Miller's intent to leave the United States with her child. I did not aid or assist Lisa Miller in leaving the country and I have no personal knowledge of anyone who participated in her leaving the country. Nor did I aid or assist Lisa Miller in remaining outside the country. At all times, Lisa Miller was counseled by me to obey all court orders and advised of the legal implications of a failure to comply with custody or visitation orders. I accurately stated my lack of knowledge as to Lisa Miller's whereabouts to the Vermont Family Court at the December 22, 2009 motion hearing in the custody action. And, I did not participate in obtaining any items from Lisa Miller's apartment to send them to her overseas.").

Jenkins has therefore failed to allege any actual conspiracy as it relates to Liberty Counsel, Staver, and Lindevaldsen, and her claims against them must fail.

2. Jenkins Cannot Allege a Sufficiently Discriminatory Animus Directed at a Protected Class.

Even if Jenkins could allege an actual conspiracy sufficient for Section 1985(3), which she cannot, her Section 1985 claims would still fail as a matter of law because she cannot allege discriminatory animus directed at a protected class. *See Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999). Jenkins cannot allege such a claim because homosexuals are not a suspect class under Section 1985(3), even after the Supreme Court's decisions in *Windsor* nor *Obergefell*.

a. Homosexuals are not a protected class for purposes of Section 1985.

As the Supreme Court has recognized, "it is a close question whether §1985(3) was intended to reach any class-based animus other than animus directed against Negroes and those

who championed their cause." *United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 836 (1983). Federal courts throughout the country have been reluctant to recognize additional categories of protected classes for purposes of Section 1985(3). *See Bray*, 506 U.S. at 269 ("Whatever may be the precise meaning of a 'class' … the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the §1985(3) defendant disfavors."). The purpose behind such reticence was that, should expansive categories of persons be included, then a mere "definitional ploy would convert the statute into a 'general federal tort law' it was the very purpose of the animus requirement to avoid." *Id.* Under such an expansive definitional ploy, "innumerable tort plaintiffs would be able to assert causes of action under §1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with." *Id.*

Numerous courts have refused to recognize homosexuals as a protected class for purposes of Section 1985. *See, e.g.*, *Preston v. Hughes*, 178 F.3d 1295 (6th Cir. 1999) (holding that homosexuality is not a protected class under 1985(3)); *Harrison v. KVAT Food Mgmt., Inc.*, 766 F.2d 155, 159 (4th Cir. 1985) (recognizing numerous courts' refusal to recognize 1985(3) claims by purported class of homosexuals); *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 333 (9th Cir. 1979) ("We conclude that homosexuals are not a 'class' within the meaning of § 1985(3)"), abrogated on other grounds *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Vega v. Artus*, 610 F. Supp. 2d 185 (N.D.N.Y. 2009) (section 1985(3) claims cannot be brought on behalf of homosexuals because they are not in the class protected); *id.* ('suspect' or 'quasi-suspect' classifications have not been given to gay males or lesbians. In addition, Congress has rejected attempts to pass legislation providing this group with special protection."); *Dix v. City of N.Y.*, No. 01 CIV 6186(LAP), 2002 WL 31175251 (S.D.N.Y. Sept. 30, 2002) (homosexuals are not "entitled

to protection under 1985(3)"); *Martin v. N.Y. State Dep't of Correctional Servs.*, 115 F. Supp. 2d 307 (N.D.N.Y. 2000) (because homosexuality was never granted suspect or quasi-suspect class or given special protections by Congress, homosexuals cannot state a claim under Section 1985(3)); *Gay Veterans Ass'n, Inc. v. American Legion – N.Y. Cnty. Org.*, 621 F. Supp. 1510 (S.D.N.Y. 1985) ("it is evident that plaintiffs, as a matter of law, will not prevail on their claims brought pursuant to 42 U.S.C. § 1985(3)" because homosexuals are not protected under that statute); *Yost v. Bd. of Regents, Univ. of Md.*, Civ. A. No. HAR 93-471, 1993 WL 524757, *3 (D. Md. Nov. 19, 1993) (holding that the limited scope of 1985(3) and the noted "lack of enthusiasm for expanding categories of protection," mean that "homosexuals are not a class within the meaning of § 1985(3)); *Monitor v. City of Chicago*, 653 F. Supp. 1294 (N.D. Ill. 1987) (holding that 1985(3) does not encompass claims brought by the purported class of homosexuals); *David v. Local 801, Danburry Fire Fighters Ass'n*, 899 F. Supp. 78, 80 (D. Conn. 1995) (granting summary judgement on Section 1985(3) claims because homosexuals do not constitute a protected class for purposes of that statute); *Trigg v. N.Y. City Transit. Auth.*, No. 99-CV-4730, 2001 WL 868336 *12 (E.D.N.Y. July 26, 2001) ("sexual orientation discrimination will not support a § 1985(3) claim").

As this abundant precedent makes clear, Jenkins' Section 1985(3) claims must fail because any alleged discrimination on the basis of her purported sexual orientation is not protected under Section 1985. Even if she could allege that certain individuals may have undertaken certain actions because of her sexual orientation, her claims under Section 1985 still must fail.

b. Neither *Windsor* nor *Obergefell* created protected class status for homosexuals, nor do they provide support for Jenkins' Section 1985 claims.

While the Supreme Court has recently decided two cases involving same-sex marriage, neither of those cases created suspect or even quasi-suspect classifications for homosexuals. *See*

United States v. Windsor, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Neither of these decisions deal with the specific question of whether a Section 1985(3) claim encompasses claims for homosexuals.

In *Windsor*, the Supreme Court specifically declined to address whether strict or intermediate scrutiny was applicable, noting only a vague reference to some "careful consideration." *Windsor*, 133 S. Ct. at 2693. By declining to apply heightened or intermediate scrutiny, the Supreme Court necessarily refused to provide suspect or quasi-suspect classifications to homosexuals. *Id.* Nevertheless, even if the Court had done so, *Windsor* would still be of no benefit because it says nothing about conspiracies to violate civil rights on the basis of homosexuality (or any other basis, for that matter). Instead, *Windsor* holds only that the federal government may not refuse to recognize a same-sex marriage officiated in a State where such marriages are lawful. 133 S. Ct. at 2695-96. In so doing, the Supreme court did **not** hold that homosexuals are part of a suspect or quasi-suspect class entitled to intermediate or heightened scrutiny. *Id*. On the contrary, the Court invalidated the federal statute at issue, the Defense of Marriage Act ("DOMA"), under a **rational basis** review, concluding that Congress has "**no legitimate purpose**" in refusing to recognize same-sex marriages that were valid where officiated. *Id*. at 2696 (emphasis added).[11] By applying rational basis, rather than intermediate or heightened scrutiny review, the Supreme Court implicitly reached exactly the opposite conclusion advanced

[11] Although the Supreme Court in *Windsor* never expressly identified the type of review it was applying to DOMA, we know it was rational basis because that is the only type of review which asks "whether a challenged classification is rationally related to achievement of a **legitimate state purpose**." *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 668 (1981) (emphasis added). In contrast, the intermediate or heightened scrutiny analysis holds that "a statutory classification must be substantially related to an **important governmental objective**." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (emphasis added). And, strict scrutiny requires that the challenged classification "furthers a **compelling government purpose**." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978) (emphasis added).

here by Jenkins – that sexual orientation does **not** belong in a suspect class. *Id*. **No court before, in, or after *Windsor* or *Obergefell* has ever held that a § 1985 claim can be premised upon an alleged discriminatory animus against homosexuality**. *See supra* Section V.B.2.a.

Even if the Supreme Court did somehow confer a suspect or quasi-suspect status upon a certain class of individuals, which it did not do, such holding would be irrelevant here because Plaintiff indisputably does not belong in that class. The *Windsor* Court repeatedly emphasized that "the class" of individuals with which it was concerned "are those persons who **are joined in same-sex marriages** made lawful by the State." *Id*. at 2695 (emphasis added). The Court went even further to expressly state that "[t]his opinion and its holding are confined to those **lawful marriages**." *Id*. at 2696 (emphasis added). It is undisputed that Jenkins was never married to Lisa Miller, and that even their civil union was lawfully dissolved many years before the inception of this litigation. *Windsor* is therefore inapposite in all respects.

Obergefell is likewise inapposite to Jenkins' Section 1985(3) claim. The *Obergefell* Court – like the *Windsor* Court before it – only addressed protections related to a class of individuals **joined in same-sex marriages**. *Obergefell*'s plain language makes it plainly evident that its analysis was focused solely on the alleged category of "same-sex spouses." *Obergefell*, 135 S. Ct. at 2597 (discussing the allegedly protected group as "**same-sex spouses**," not homosexuals in general); *id.* at 2599 (discussing whether protection should be afforded to "**same-sex couples**"); *id.* ("**same-sex couples** may exercise the right to marry"); *id.* at 2600 (discussing the right at issue as one of "**couples**"); *id.* (same-sex couples at issue); *id.* at 2601 ("[e]xcluding **same-sex couples** from marriage thus conflicts with a central premise of the right to marry"); *id.* at 2602 ("same-sex couples are denied the constellation of benefits"); *id.* ("Under the Constitution, **same-sex couples** seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their

choices and diminish their personhood to deny them this right") (emphasis added); *id.* at 2604 ("the challenged laws burden the liberty of **same-sex couples**"); *id.* ("under the Due Process and Equal Protection Clauses of the Fourteenth Amendment **couples of the same-sex** may not be deprived of that right [to marry]"); *id.* at 2605 (holding that the laws were invalid as to **same-sex couples**); *id.* at 2606 ("The issue before the Court here is the legal question whether the Constitution protects the right of **same-sex couples** to marry."). (Emphasis added in all citations).

Like *Windsor*, the *Obergefell* Court did not apply strict scrutiny or intermediate scrutiny, and it did not recognize homosexuals as a suspect or quasi-suspect class. *Obergefell* and *Windsor* said nothing about suspect or quasi-suspect class status for homosexuals. In sum, neither *Obergefell* nor *Windsor* have changed the long, uninterrupted and unanimous court holdings enumerated above which have refused to recognize the cause of action advanced here by Jenkins. This Court should do likewise.

3. Jenkins Cannot Allege the Requisite State Action.

Even if Jenkins had provided sufficient factual allegations to support her claims of conspiracy, which she did not, and even if Jenkins could allege membership in a protected class for purposes of Section 1985, which she cannot, her Section 1985 claims would still fail as a matter of law because she has failed to allege the requisite state action to support her claims. Regardless of whether a Section 1985(3) claim is brought under the Hindrance or Deprivation Clause of the statute, Jenkins' **must** allege state action. Her failure to do so dooms her RSAC to dismissal.

a. The Deprivation Clause requires state action.

Under Section 1985's Deprivation Clause, a plaintiff must plead the requisite state action to support her claim when the rights involved are those protected only against state encroachment. Indeed,

> [i]n *Carpenters*, we rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated § 1985(3). The statute does not apply, we said, to private conspiracies that are 'aimed at a right that is by definition a right only against state interference,' but applies only to such conspiracies that are 'aimed at interfering with rights protected against private, as well as official, encroachment.'"

Bray, 506 U.S. at 278 (emphasis added) (discussing the requirement of state action in Deprivation Clause context).

> **That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others**. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.'

Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971) (emphasis added).

Time and again the Supreme Court has rejected Deprivation Clause claims that aim only at rights that implicate and therefore require government involvement. *See Bray*, 506 U.S. at 278 (rejecting Section 1985(3) claim concerning an alleged conspiracy to interfere with the right to abortion); *id.* (noting that Section 1985(3) does not cover rights that implicate rights protected under the Fourteenth Amendment because the "elements of those more general rights are obviously *not* protected against private infringement."); *Carpenters*, 463 U.S. at 833 (rejecting Section 1985(3) claim concerning an alleged conspiracy to violate First Amendment free speech rights); *id.* ("The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment. Because that Amendment restrains only official conduct, to make out their § 1985(3) case, it was necessary for respondents to prove that the state was somehow involved in or affected by the conspiracy.").

b. The Hindrance Clause requires state action.

As the Supreme Court stated in *Bray*, the proper view of Supreme Court precedent is that claims under both clauses of Section 1985(3) require that a private conspiracy be aimed at rights

that are "constitutionally protected against official (as opposed to private) encroachment." *Bray*, 506 U.S. at 282-83. Indeed, the majority rejected the dissent's view that the Hindrance Clause contains no state action requirement. *Id.* at 282 (noting that *Carpenters* illuminates the point that the Hindrance Clause requires state action as well).

The majority of circuits to address this issue have concluded, correctly, that the Hindrance Clause requires state action for rights whose infringement is protected only against official encroachment, such as Jenkins' equal protection claim. *See Tilton v. Richardson*, 6 F.3d 683 (10th Cir. 1993) (Section 1985(3) claims brought under Fifth and Fourteenth Amendments require state action); *Ramirez v. City of Witchita*, 78 F.3d 597 (10th Cir. 1996) (Section 1985(3) claims brought under the Fourth Amendment require state action); *Sanders v. Prentice-Hall Corp.*, 178 F.3d 1296 (6th Cir. 1999) (Section 1985(3) claims brought under the First and Fourteenth Amendments require state action); *Brown v. Phillip Morris, Inc.*, 250 F.3d 789 (3d Cir. 2001) (Section 1985(3) claims brought under Fifth Amendment require state action); *Magnum v. Archdiocese of Philadelphia*, 253 F. App'x 224 (3d Cir. 2007) (Section 1985(3) claims brought under the Fourteenth Amendment require state action); *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988) (any viable Section 1985(3) claim involving private conspiracy to influence state action requires injury at the hands of the state); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959), *rev'd on other grounds Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962) (Section 1985(3) claims require state action).[12]

The Tenth Circuit's decision in *Tilton* is particularly instructive. Citing *Bray*, the court noted that "[t]here are few rights protected against private, as well as official, encroachment. The Supreme Court has recognized **only** 'the Thirteenth Amendment right to be free from involuntary

[12] Only the First Circuit, based on a flawed and erroneous rationale, has held that the Hindrance Clause does not require state action. *See Libertad v. Welch*, 532 F.3d 428 (1st Cir. 1995).

servitude, and, in the same Thirteenth Amendment context, the right to interstate travel.'" *Tilton*, 6 F.3d at 686 (quoting *Bray*, 506 U.S. at 278) (emphasis added).[13] In the Fourteenth Amendment context – such as Jenkins' claims here – the court noted that "Mr. Tilton's Fifth and Fourteenth Amendment claims likewise fail as these Amendments **do not erect a shield against merely private conduct however discriminating or wrongful**." *Id.* at 687 (emphasis added). Importantly, the Tenth Circuit stated: "*Bray* explicitly held that § 1985(3) is not applicable to private conspiracies that aim at rights that by definition shield only against State interference. **It is therefore irrelevant whether the aim of the private conspiracy was to influence State activity.**" *Id.* (emphasis added). Thus, the court held, the Hindrance Clause also requires state action to maintain a Section 1985(3) claim based on an alleged Fourteenth Amendment right. *Id.*

Numerous district courts, including those in this circuit, have reached a similar conclusion with respect to the Hindrance Clause. *See, e.g.*, *Zhang v. Chinese Anti-Cult World Alliance*, No. 15 CV 1046 (SLT) (VMS), 2016 WL 1128401, *9 (E.D.N.Y. Jan. 28, 2016) (holding that, even under Hindrance Clause, "where a plaintiff seeks to enforce a right under § 1985(3) which, by definition, requires state interference, state involvement must be demonstrated"); *Friends of Falun Gong v. Pac. Cultural Enter., Inc.*, 283 F. Supp. 2d 273 (E.D.N.Y. 2003) (noting that the Supreme Court's decision in *Bray* suggests "that a state action requirement would apply to the hindrance clause as well"); *Comtel Tech., Inc. v. Paul H. Schwendener, Inc.*, No. 04 C 3879, 2005 WL 433327 (N.D. Ill. Feb. 22, 2005) (dismissing Section 1985(3) claim because any viable claim under

[13] Jenkins's RSAC does not assert any claims arising from violations of any rights protected against private encroachment, nor could she do so. Indeed, this Court rejected Jenkins' previous attempt to assert a violation of the right to interstate travel. *See Jenkins v. Miller*, 983 F. Supp. 2d 423, 461-62 (D. Vt. 2013) (dismissing Jenkins' asserted Thirteenth Amendment allegation for failure to state a claim because any interference with a purported right to interstate travel was merely incidental and not the object of the alleged conspiracy).

either clause of that provision "involving a private conspiracy to influence state action requires injury at the state's hands").

c. Jenkins does not and cannot allege the requisite state action.

Jenkins has not and cannot plead the requisite state action sufficient to support her alleged claims that Defendants conspired to violate her civil rights or to prevent or hinder authorities from securing her equal protection of the law. The only allegation concerning this alleged conspiracy only references private parties. (RSAC ¶ 67) (alleging that Liberty Counsel, Liberty University, Response Unlimited, Phillip Zodhiates, Victoria Hyden, Kenneth Miller, Timothy Miller, Linda Wall, Rena Lindevaldsen, and Mathew Staver conspired with Lisa Miller to "violate her civil rights" and prevent them from receiving equal protection). But, fatally for Jenkins' claim, she admits that none of these alleged conspirators are state actors. (*Id.* ¶¶ 7-17) (discussing all the alleged co-conspirators and admitting that all of them are private individuals or private organizations). Because Jenkins' fanciful narrative focuses exclusively on an alleged plot to deprive her of equal protection (*id.* ¶ 67), her claims necessarily require state action. Regardless of the substance of Jenkins' allegations, it is beyond cavil that private actors cannot violate her constitutional rights or deprive her of equal protection. *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (state action is a prerequisite "to show a violation of the Equal Protection Clause"); *id.* at 372-73 (O'Connor, J., concurring) ("An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action."). Because Jenkins "seeks to enforce a right under § 1985(3) which, by definition, requires state interference, state involvement must be demonstrated." *Zhang*, 2016 WL 1128401 at *9. Jenkins has not and cannot do so, and her Section 1985 claims therefore fail as a matter of law.

4. Jenkins' Purported Conspiracy Claims as Next Friend of Isabella Fail as a Matter of Law.

Regardless of which clause of Section 1985(3) Jenkins uses to bring her claim, her purported claims on behalf of Isabella fail as a matter of law. As detailed above, *see supra* Section V.D.2, under either clause, discriminatory animus directed at a member of a protected class is indisputably required.

Jenkins has not and cannot allege such animus directed against Isabella. Indeed, Jenkins' RSAC is devoid of any reference to Isabella as a member of any protected class, and she cannot cure that deficiency. For that reason alone, her next-friend claims on behalf of Isabella fail as a matter of law. *See, e.g.*, *Magnum v. Archdiocese of Philadelphia*, 253 F. App'x 224 (3d Cir. 2007) (affirming dismissal of Section 1985 claims because of failure to allege class-based discriminatory animus **directed at the minor**); *Nieves-Ramos v. Gonzalez-De-Rodriguez*, 737 F. Supp. 727 (D.P.R. 1990) (failure to allege some racial or class-based animus directed at a party – including a minor child whose claims were brought by her parent as next friend – fails to state a claim under 1985); *Koenig v. Snead*, 757 F. Supp. 41 (D. Ore. 1991) (failure to allege racial or class-based invidiously discriminatory animus – **including claims for a minor child by father as next friend** – fails to state a claim under 1985); *L.Q.A. by and through Arrington v. Eberhart*, 920 F. Supp. 1208 (M.D. Ala. 1996) (dismissing 1985 claims brought by next friend parent because there no was allegation of discriminatory animus directed at the minor plaintiff); *Hardman v. Lehigh Cnty.*, 613 F. Supp. 649 (E.D. Pa. 1985) (dismissing complaint brought by parent on behalf of minor child because allegations were insufficient to establish that conspiracy was "**directed *at plaintiff's minor***") (bold emphasis added; italic emphasis original); *Allison v. Shabazz*, No. C 14-04813 JSW, 2016 WL 2957121, *7 (N.D. Cal. May 23, 2016) (dismissing 1985 claims because of failure to allege discriminatory animus directed against minor children).

Jenkins' Section 1985(3) claims on behalf of Isabella thus fail as a matter of law and must be dismissed.

VI. INCORPORATION OF CO-DEFENDANT LIBERTY UNIVERSITY'S MOTION TO DISMISS.

Liberty Counsel, Staver, and Lindevaldsen hereby incorporate in full and adopt as their own the arguments made by co-defendant Liberty University in Sections A.3 and E of its Motion to Dismiss filed with this Court on June 5, 2017. (Dkt. 237).

CONCLUSION

Jenkins' claims for both custodial interference and Section 1985(3) conspiracy are time barred and must be dismissed. Jenkins' attempt to bring these claims on behalf of a minor child does not cure the limitations bar, because Isabella has no standing to bring these claims, and, even if she did, her claims would fail as a matter of law.

This Court lacks jurisdiction over Liberty Counsel, Staver, and Lindevaldsen. Lindevaldsen is not subject to this Court's personal jurisdiction under the modified effects test of *Walden* or by virtue of her representation of Miller in previous family law proceedings. Staver is not subject to this Court's jurisdiction because he does not have sufficient contacts with Vermont and the alleged actions of other individuals cannot be attributed to him under cognizable agency theory. Liberty Counsel is not subject to this Court's jurisdiction because it does not have sufficient contacts with Vermont and the alleged actions of RU are not attributable to it because RU is not and never has been an agent of Liberty Counsel.

The RSAC must be dismissed because it fails to state a claim upon which relief can be granted. Jenkins cannot state a claim for custodial interference, civil conspiracy, or Section 1985(3) conspiracy against Liberty Counsel, Staver, or Lindevaldsen.

For all of these reasons, Jenkins' claims against Liberty Counsel, Staver, and Lindevaldsen must be dismissed in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2017, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

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