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

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

**DEFENDANT LIBERTY UNIVERSITY'S MOTION TO DISMISS**

NOW COMES Liberty University, by and through its attorneys, Dinse, Knapp & McAndrew, P.C., and moves, pursuant to Fed. R. Civ. P. Rule 12(b)(2), (3), and (6) to dismiss Plaintiffs' Revised Second Amended Complaint ("Amended Complaint") because it fails to state a legally sufficient claim against the University, Janet Jenkins' action is time-barred by the controlling statute of limitations, the Court lacks personal jurisdiction over the University, and venue is improper in the District of Vermont.

**MEMORANDUM OF LAW**

Plaintiffs seek for a second time to pull Liberty University into this lawsuit, which arises from a private custody dispute between individuals having no affiliation with the school. The single, tenuous strand connecting Liberty, a Virginia university, to this case—and to this jurisdiction—is the alleged conduct of three of the school's employees: two law professors, who took on representation of one of the parties to the custody case before they were employed by the University and continued to work on the case through an outside legal organization after their hire, and a student worker who allegedly delivered messages from her father to one of the

professors. That is far too thin a reed. There are no plausible, detailed allegations, and certainly no evidence, that these three individuals acted as employees or agents of Liberty University in connection with that custody proceeding, such that the school could be held liable for their conduct. Nor could such an attenuated chain of events provide a basis for the Court to exercise personal jurisdiction over a foreign corporation that is not at home in Vermont and has not exerted control over its employees' actions relating to this forum. If the Due Process Clause's limitation on the Court's power over foreign defendants is to have any meaning, it has to bar the exercise of jurisdiction here.

While the particular circumstances of this case are unique, the Court's resolution of the issues of jurisdiction and vicarious liability here could have serious ramifications that extend far beyond this lawsuit. It is common for academics to take on private work for organizations and individuals outside of their institutions, producing positive benefits for society and those academics. To allow a university to be haled into court in a jurisdiction far removed from its home and subjected to potential liability based on alleged acts committed by its employees in connection with such outside engagements—even where the outside engagement unambiguously predated the professors' employment with the school, and was always conducted under the auspices of an independent entity—could not help but chill this socially beneficial practice.

Plaintiffs' Amended Complaint falls far short of the threshold necessary to make out a plausible vicarious liability claim or justify the exercise of jurisdiction over Liberty University; it thus must be dismissed. Dismissal is also warranted for improper venue, and, as to Plaintiff Jenkins, because the statute of limitations has run on her claims.

## ARGUMENT

### A. The Amended Complaint Fails to State a Claim Against Liberty University Because the University Cannot Be Held Vicariously Liable for the Alleged Conduct of Its Employees.

Plaintiffs' claims against Liberty University necessarily rest on a theory of vicarious liability. There is no allegation—nor could there be—that Liberty University itself caused Plaintiffs any harm by its actions or policies. Rather, Plaintiffs seek to hold the University liable based on the alleged actions of three employees: Victoria Hyden, who was a part-time student employee at the time of the alleged events; Rena Lindevaldsen, a law professor for a portion of the period at issue; and Mathew Staver, a law professor and dean of the Liberty University Law School for a portion of the period at issue. Plaintiffs' effort fails for at least three reasons. First, the Complaint neither alleges nor allows any plausible inference that any of these employees acted within the scope of their employment with the University in the alleged events, none of which concerned the business or academic affairs of the University. Second, because the University's employees themselves are not alleged to have directly committed any torts, but only to have been participants in a conspiracy, Plaintiffs effectively seek to hold Liberty University liable for the acts of third parties with no relationship to the University. Such an attenuated chain of responsibility does not comport with the purpose underlying vicarious liability, which is to ensure that employers bear the cost of risks inherent in their operations. Third, vicarious liability does not provide a valid basis for liability on Plaintiffs' § 1985(3) civil rights claims. Therefore, Plaintiffs' claims against Liberty University should be dismissed.

#### 1. The Complaint fails to provide any plausible basis to infer that the alleged misconduct by Liberty University's employees arose from within the scope of their employment.

For Plaintiffs' claims against Liberty University to go forward, the Amended Complaint must lay out a plausible basis for what is, indisputably, an extraordinary claim: that Liberty

University's employees acted as its agents, carrying out the University's purposes, in allegedly conspiring to smuggle the child of an individual wholly unaffiliated with the University out of the country and prevent the authorities from discovering the child's whereabouts. This is an incredibly tall order—and one that Plaintiffs have manifestly failed to meet. Apart from some conclusory allegations that various individuals were acting as the University's "agents," the Amended Complaint fails to include any specific allegations that could support the inference that the alleged misconduct arose from the individual defendants' employment with Liberty University. Plaintiffs' claims against the University fail for that reason as a matter of law.

Vermont law on vicarious liability, which follows the Restatement (Second) of Agency, provides that "an employer may be held vicariously liable for the torts of an employee only when the tortious acts are 'committed during, or incidental to, the scope of employment.'" *Doe v. Newbury Bible Church*, 2007 VT 72, ¶ 6, 933 A.2d 196 (quoting *Brueckner v. Norwich Univ.*, 169 Vt. 118, 122-23 730 A.2d 1086, 1090-91 (Vt. 1999)). Animating this rule is a policy judgment as to the appropriate allocation of risk: that "[t]he losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, [should be] placed upon that enterprise itself, as a required cost of doing business." *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990 (Cal. 1970) (quoting William Prosser, Law of Torts § 471 (3d ed. 1964)) (holding that an employer's liability for employee torts "extends to the risks inherent in or created by the enterprise").

Conduct will fall within the scope of employment only when it is of "the same general nature as, or incidental to, the authorized conduct." *Newbury Bible Church*, 2007 VT 72, ¶ 6 (quoting *Brueckner*, 169 Vt. at 123, 730 A.2d at 1091). Specifically, an action is within the scope of employment where:

(a) it is of the kind [the employee] is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master; and

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

*Bowles v. O'Connell*, No. 5:14-CV-00174, 2016 WL 831931, at *7 (D. Vt. Feb. 29, 2016) (quoting Restatement (Second) of Agency § 228(1)), *aff'd in part, rev'd in part sub nom. Bowles v. U.S.*, No. 16-1375-CV (L), __ F. App'x __, 2017 WL 1187488 (2d Cir. Mar. 30, 2017). Where any one of the foregoing "elements is lacking, the conduct is beyond the scope of employment." *Id.* In other words, an employee's conduct lies outside the scope of employment where it "is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.* (quoting Restatement (Second) of Agency § 228(2)). Whether a given action falls within the scope of employment "is decided by the court if the answer is clearly indicated." Restatement (Second) of Agency § 228, cmt. d.

The Amended Complaint includes precious few specific allegations concerning Liberty University—and none specifically alleging, or even plausibly inferring, that the alleged conduct of the University's employees was of the kind they were authorized to perform, within the authorized time and space, and actuated by a purpose to serve the University. Instead, the Complaint almost exclusively falls back on conclusory allegations that Hyden, Lindevaldsen, and Staver were acting as "agents" of the University. *See* Am. Compl., ¶¶ 57, 65, 67. Such bare assertions cannot satisfy Plaintiffs' pleading burden for vicarious liability.

Where a defendant's liability rests solely on an employment or agency relationship, the complaint must plead specific facts establishing a facially plausible basis for vicarious liability. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (to survive a Rule 12(b)(6) motion, a

complaint must plead "enough facts to state a claim to relief that is plausible on its face"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Neither "labels and conclusions" nor bare assertions unsupported by specific factual allegations will satisfy this burden. *Id.* Thus, in the vicarious liability context, it is not enough to simply allege that the tortfeasor was acting as an "agent" or "within the scope of her employment," because such allegations are "precisely the sort of 'naked assertion devoid of further factual enhancement' or 'formulaic recitation of the elements of a cause of action' that is not permissible." *Day v. DB Capital Grp., LLC*, No. CIV.A. DKC 10-1658, 2011 WL 887554, at *21 (D. Md. Mar. 11, 2011) (quoting *Iqbal*, 556 U.S. at 678) (holding that plaintiff failed to allege specific facts to support claims against employer on respondeat superior theory by simply asserting defendant was "acting within the scope of his employment").

For this reason, federal courts have consistently dismissed vicarious liability claims that, like Plaintiffs' claims against Liberty University, rest on broad assertions of agency but lack support in specific, plausible allegations establishing a basis for vicarious liability. *See Panacci v. A1 Solar Power, Inc.*, No. 15-CV-00532-JCS, 2015 WL 3750112, at *7 (N.D. Cal. June 15, 2015) (dismissing vicarious liability claim where plaintiff failed to plausibly allege that defendant controlled or authorized conduct at issue); *Phaneuf v. Ortlieb*, No. 12-CV-474-JL, 2013 WL 2147850, at *7 (D.N.H. May 16, 2013) (holding naked allegation that tortfeasor was acting "on behalf of" or "for the benefit of" defendant insufficient to state claim against defendant on respondeat superior theory); *Mindlab Media, LLC v. LWRC Int'l LLC*, No. CV 11-3405 CAS FEMX, 2012 WL 386695, at *4 (C.D. Cal. Feb. 6, 2012) (dismissing vicarious

liability claim where the only supporting allegations were that defendants "acted as 'the alter egos, agents, servants, employees, and joint ventures [sic] of each of the other [d]efendants,' and . . . 'were acting within the course and scope of such relationship and/or agreement and with the actual and/or implied knowledge, permission, consent, ratification and approval of the other Defendants'"(citation omitted)); *cf. D/S Norden A/S v. CHS de Paraguay, SRL*, No. 16 CV 2274-LTS, 2017 WL 473913, at *4 (S.D.N.Y. Feb. 3, 2017) ("Although Norden repeatedly asserts in the Petition that CHS was acting as the agent for CHSP as an undisclosed principal, this mere naked assertion of a legal conclusion is insufficient to plead an agency relationship.").

Beyond the general assertion that Hyden, Lindevaldsen, and Staver were acting as Liberty University's "agents," the few factual allegations linking these employees' alleged conduct to Liberty University are insufficient to support vicarious liability claims against the University. The employees are addressed in turn below.

*i. Victoria Hyden*

The Amended Complaint includes two specific allegations relating to Victoria Hyden's conduct while an employee of Liberty University, neither of which is alleged to have any nexus with her duties as an employee. First, Plaintiffs allege that in 2009, while she was an employee of Response Unlimited, Inc. (her father's direct mail company) and a "student worker" at Liberty University, Hyden delivered emails from her father to Lindevaldsen "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." Am. Compl., ¶ 44. Plaintiffs do not allege, nor could they, that Hyden's scope of employment as a student worker included delivering email messages for her father. Likewise, there is no suggestion that the alleged delivery of email was actuated by a purpose to serve Liberty University. To the contrary, the Amended Complaint

claims that the alleged delivery of email was at the behest of her father—by whom she was also allegedly employed, according to the Amended Complaint. *Id.*

Second, Plaintiffs allege that Hyden "used her employment at Liberty University" to facilitate communication between Lisa Miller and Lindevaldsen to help Miller avoid service of contempt and enforcement pleadings. *Id.*, ¶ 46. The Amended Complaint does not elaborate on how Hyden allegedly "used" her employment as a student worker to facilitate communication—and, more importantly, it does not provide any specific, factual basis from which it could be inferred that facilitating such communication was within the scope of her employment and was carried out to serve Liberty University.[1] Even if communications relating to Lisa Miller were to have occurred between Hyden and Lindevaldsen at Liberty University, the mere fact that these communications occurred in the workplace would not render the University vicariously liable for harm claimed to have been caused by them. In *DB Capital Group,* for example, where a plaintiff alleged harm caused by a scam carried out by the employees of two banks, a federal district court dismissed vicarious liability claims against the banks, holding that the plaintiff's allegations that the employees "conducted acts relating to the . . . foreclosure rescue scam from their offices . . . and during business hours"—and incidentally helped their employers by obtaining a few new customers—did not provide a basis "to indicate that [they] were motivated by a desire to benefit their employers." *DB Capital Grp., LLC*, 2011 WL 887554, at *21.

In sum, there is no allegation—nor, for that matter, any evidence—that Victoria Hyden acted within the scope of her employment as a Liberty University student worker in purportedly

[1] Plaintiffs' motion papers in support of joining Liberty University as a party suggest that the allegation that Hyden was "facilitating" communication refers to the fact that her father sent her emails asking her to pass along messages to Lindevaldsen. *See* Plaintiffs' Reply in Support of Motion to Join Additional Defendants (Doc. 216) at 19 (citing Exhibits at Docs. 204-9, 204-10, 204-11). The existence of these emails does not indicate that Hyden in fact took any action—and, again, that her father may have asked her to pass along messages to Lindevaldsen does not in any way point to conduct carried out by Hyden in the scope of her employment and on behalf of the University.

passing along messages from her father to Lindevaldsen. Her alleged actions cannot support a vicarious liability claim against the University.

*ii. Rena Lindevaldsen and Mathew Staver*

The Amended Complaint likewise includes no specific allegations that Rena Lindevaldsen and Mathew Staver's alleged misconduct arose from within the scope of their employment by Liberty University or was actuated by the purpose of serving the University. This is unsurprising: their legal representation of Lisa Miller, an individual unaffiliated with Liberty University, began prior to and was wholly independent of their academic roles at the University. That is fatal to Plaintiffs' claim.

The Amended Complaint alleges that Lisa Miller engaged Lindevaldsen and Staver as her attorneys in 2004,[2] and that the two attorneys represented her in child custody proceedings in Vermont and Virginia courts. *See* Am. Compl., ¶¶ 21, 31-32. That representation itself was not, of course, unlawful, nor is it alleged to have caused Plaintiffs injury. Rather, the thrust of Plaintiffs' claim is that after Miller and her daughter left the country in September 2009—a trip with which neither attorney is specifically alleged to have had any involvement or advance knowledge—Lindevaldsen and Staver purportedly misled courts in Virginia and Vermont by falsely claiming they had no knowledge of Miller's whereabouts. *Id.*, ¶¶ 57, 61. The suggestion that the representations to the courts were "false" rests on a handful of additional allegations: (a) that Victoria Hyden supposedly facilitated communication between Miller and Lindevaldsen during the time Lindevaldsen represented she was unable to communicate with her client, *id.*,

[2] The Amended Complaint incorrectly suggests that Lindevaldsen was an attorney with Liberty University at the time Lisa Miller engaged her. *See* Am. Compl., ¶ 21. In fact, Liberty did not hire Lindevaldsen as a professor until 2006 (she was hired as an adjunct to teach a writing course and a single family law course in 2005), *see* Nov. 2, 2012 Affidavit of Rena Lindevaldsen (Doc. 54-5), ¶ 3, but the date of her hiring is not material to this portion of Liberty's motion.

¶ 46; (b) that, in November 2009, "elders of the Thomas Road Baptist Church, specifically Rena Lindevaldsen and Linda Wall, packed up the belongings of Lisa Miller in two bags," which were subsequently picked up by Philip Zodhiates and transported to Nicaragua, *id.*, ¶ 45; and (c) that phone calls were made from Zodhiates' cell phone on September 22, 2009 (following his delivery of Miller and her daughter to the Canadian border) to two phones associated with Liberty Counsel and one with Liberty University, *id.*, ¶ 60.[3]

Absent from the Amended Complaint is any allegation that the supposed actions of Lindevaldsen and Staver were taken within the scope of their employment as faculty members at Liberty University. Indeed, court records[4] from the proceedings in Vermont and Virginia reflect that, in representing Lisa Miller, Staver and Lindevaldsen at all times identified themselves as attorneys with Liberty Counsel, a Florida-based legal organization, and never Liberty University. *See, e.g.*, *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 912 A.2d 951 (identifying Staver and Lindevaldsen as attorneys with "Liberty Counsel, Longwood, Florida"); *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008) (same); *Miller v. Jenkins*, 678 S.E.2d 268 (Va. Ct. App. 2009) (same). Consistent with this, the operative allegation concerning Staver and Lindevaldsen in the Amended Complaint states that "the *Liberty Counsel* lawyers misled courts in two states to

[3] While not material under the Rule 12(b)(6) standard, it should be noted that both Staver and Lindevaldsen have steadfastly denied that they had any knowledge of Lisa Miller's whereabouts or disappearance at they time they represented such to the courts, and have denied receiving any call or voicemail from Zodhiates on September 21, 2009. *See* Nov. 7, 2016 Affidavit of Mathew Staver (Doc. 213-1), ¶¶ 21, 22, 27, 28; Nov. 14, 2016 Affidavit of Rena Lindevaldsen (Doc. 213-2), ¶¶ 4, 8; Nov. 2, 2012 Affidavit of Rena Lindevaldsen (Doc. 54-5), ¶ 11. Lindevaldsen has likewise denied that she ever received any messages from Zodhiates via Victoria Hyden, that she ever visited Miller's apartment for any reason or assisted in packing Miller's belongs, and that she is an "elder" of the Thomas Road Baptist Church. *See* Nov. 14, 2016 Affidavit of Rena Lindevaldsen (Doc. 213-2), ¶¶ 4-7.

[4] "In the Rule 12(b)(6) context, a court may take judicial notice of prior pleadings, orders, judgments, and other related documents that appear in the court records of prior litigation and that relate to the case *sub judice*." *Grega v. Pettengill*, 123 F. Supp. 3d 517, 543 n.6 (D. Vt. 2015) (quoting *Ferrari v. Cnty. of Suffolk*, 790 F. Supp. 2d 34, 38 n. 4 (E.D.N.Y. 2011)).

delay contempt proceedings aimed at locating Isabella."[5] Am. Compl., ¶ 57 (emphasis added). Similarly, the allegation that Lindevaldsen helped pack Lisa Miller's belongings as an "elder[] of the Thomas Road Baptist Church" indicates that Lindevaldsen was allegedly acting as a member of her church, not as an employee of Liberty University. *Id.*, ¶ 45.

It is certainly true that during a portion of the time in which Staver and Lindevaldsen were representing Miller they were also employed as professors (and, in Staver's case, dean) at Liberty University Law School. However, that alone is not enough to give rise to any plausible inference that the representation fell within the scope of their work as university faculty. *See* Restatement (Second) of Agency § 228 cmt. b ("Proof that the actor was in the general employment of the [employer] does not of itself create an inference that a given act done by him was within the scope of employment.") An employer may be vicariously liable only where the conduct of the employee "is subject to the control or to the right to control of the [employer]." *Id.* § 228 cmt. c. "Hence, there is no liability for the conduct of one who, although a[n] [employee] in performing other service, is doing work as to which there is no control or right to control by the [employer]." *Id.*

Courts should be particularly reluctant to infer such a right to control in situations where, as here, the employee at issue is an attorney who is representing a client other than the employer. In an attorney-client relationship, the attorney is first and foremost the agent of the client, and "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." *Comm'r v. Banks*, 543 U.S. 426, 436

[5] The Amended Complaint also loosely refers to the two as "Liberty University attorneys" at other times—including in describing events in 2004, before either Staver or Lindevaldsen were employed by Liberty University. *See* Am. Compl., ¶ 21. This transparent attempt to manufacture an association between Liberty University and the events underlying the lawsuit by identifying Staver and Lindevaldsen with their employer is unavailing; applying the label "Liberty University attorneys" to these law school employees cannot carry Plaintiffs' burden of establishing that their actions were within the scope of their work for the University.

(2005) (citing Restatement (Second) of Agency §§ 13, 39, 387). Where the employer is a legal organization that employs attorneys to regularly represent third parties, as a law firm does, it may be reasonable to assume that the employer has the right to control its employees' actions in representing third-party clients. But, where, as here, the employer hires an attorney in another capacity—e.g., as a professor—it cannot be readily inferred that the employer has any right of control in the attorney's representation of third parties, for allowing such control would violate the employee-attorney's duty of loyalty to the client.[6]

The issue of a university's vicarious liability for an academic's outside work also implicates important public policy considerations. It is common for attorneys (and other professionals) working as professors to take on private engagements outside of their academic duties. *See* Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. Tex. L. Rev. 421, 422 (2001) (noting, based on survey conducted by the American Association of Law Schools, that "it is clear that a significant number of professors provide legal services to individuals and entities"). The practice has considerable social benefit, making high-quality counsel available to charitable causes and public policy organizations, and also allows law professors to stay in touch with the practical realities of their profession. Unless work for third parties is performed explicitly at the behest of the employing university (for example, under a contract with a private entity), there is no legal support for the claim that this type of professorial moonlighting is within the scope of a professor's work for the employing university. The idea, for example, of Harvard University being held vicariously liable for claimed misconduct by Alan Dershowitz, longtime professor at Harvard Law School, in any one of the high-profile private cases he has handled as a practicing

[6] As discussed below with respect to personal jurisdiction, Liberty University in fact had no right to control the actions of Staver and Lindevaldsen in their private legal work for Liberty Counsel, and never had any input into matters handled by Liberty Counsel. *See* Nov. 12, 2012 Affidavit of Mathew Staver (Doc. 54-4), ¶ 10.

attorney is nothing short of preposterous.

In short, allowing a claim to proceed against a university for its professors' private engagements without specific, plausible allegations that the work was within the scope of the professors' academic employment would have a significant chilling effect on universities' willingness to allow employees to perform outside legal work. Here, the Amended Complaint contains no specific allegation that the scope of Lindevaldsen and Staver's work as faculty members for Liberty University included representing private clients such as Lisa Miller, and such an inference cannot—and should not—be drawn from the fact that a portion of their representation of Miller happened to temporally coincide with their employment by the University.

**2. Liberty University cannot be held liable for the torts of unaffiliated third parties.**

The Court should also dismiss Plaintiffs' claims against Liberty University because the attenuated nature of the claims against the University is inconsistent with the policy justifications underlying vicarious liability—namely, to make sure that employers bear the costs of their operations and are liable for risks arising from employee conduct from which the employer benefits. Where the employee's liability is itself based on the actions of a third party in which the employee did not directly participate, the employer cannot be made the insurer of the third party's conduct through vicarious liability.

The Amended Complaint contains no allegation that the University's employees directly participated in planning or carrying out the departure of Lisa Miller and her daughter from the United States. Rather, they are alleged to have aided and abetted Lisa Miller after the fact and participated in a conspiracy by allegedly concealing their contact with Miller and by helping gather supplies to send to her. *See* Am. Compl., ¶¶ 65, 67. Conspiracy and aiding and abetting

are themselves a form of vicarious liability, allowing those who assist, but do not directly participate in, a tort to be held liable with the principal. *See, e.g.*, *McWilliams Ballard, Inc. v. Level 2 Dev.*, 697 F. Supp. 2d 101, 109 n.10 (D.D.C. 2010) ("[C]onspiracy . . . and aiding and abetting . . . are a means for establishing vicarious liability for an underlying tort . . ." (quotation marks and citation omitted)). Thus, Plaintiffs' claims against the University not only seek to hold it responsible for the acts of its own employees (which, in any case, lay outside the scope of its employees' work), but, ultimately, to hold it responsible—via two chains of vicarious liability—for the acts of third parties unaffiliated with the University.

Allowing such an attenuated theory of liability has no justification in traditional principles of vicarious liability, as it would shift to employers the cost of risks that go far beyond "the risks inherent in or created by the enterprise." *Hinman*, 471 P.2d at 990. For these reasons, in *Oki Semiconductor Co. v. Wells Fargo Bank, National Association*, 298 F.3d 768 (9th Cir. 2002), the Ninth Circuit considered and rejected an argument for holding an employer vicariously liable for an employee's participation in a RICO conspiracy:

> Essentially, [plaintiff] asks us to craft a rule holding an employer strictly liable for the conduct of its employees' RICO co-conspirators, even if those employees did not participate directly in the conduct which proximately caused loss . . . . We decline [plaintiff's] invitation to create such a mischievous new rule. As it stands, respondeat superior balances the benefits an employer receives from an employee against the liabilities an employer incurs as a result of its employee's actions. An employer can minimize its liability by closely monitoring its employee to ensure that she commits no transgressions during the course of her employment. An employer, however, reaps no benefits from non-employee RICO conspirators, and it cannot monitor their activities to ensure compliance with the law. To extend an employer's liability to cover the acts of non-employee RICO conspirators would demolish the equitable balance the doctrine of respondeat superior seeks to achieve.

*Id.* at 777. The Court should reject Plaintiffs' claims against the University for the same reasons.

### 3. Liberty University cannot be held liable under § 1985(3) on a theory of vicarious liability.

The Court should also dismiss Plaintiffs' claim under 42 U.S.C. § 1985(3) because the Amended Complaint does not allege that Plaintiffs' claimed harm was caused by a policy or custom of Liberty University, as would be necessary to hold it liable on a theory of vicarious liability.

It is well established in the related context of federal civil rights claims under 42 U.S.C. § 1983 that a private employer cannot be "liable . . . for the constitutional torts of [its] employees unless the plaintiff proves that action pursuant to official . . . *policy* of some nature caused a constitutional tort." *Rojas v. Alexander's Dep't Store, Inc.*, 924 F.2d 406, 408 (2d Cir. 1990) (citations and quotation marks omitted) (emphasis in original). The principle was first recognized in the context of claims against municipal corporations in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691-93 (1978), where the Supreme Court concluded, based on close review of the legislative history of § 1983, that Congress could not have intended to create a federal law of respondeat superior—at least as to municipal employees—in enacting the civil rights law. Federal courts have since widely recognized that the same rule applies to § 1983 claims against private employers. *See Rojas*, 924 F.2d at 409 ("Although *Monell* dealt with municipal employers, its rationale has been extended to private businesses.").

Though distinct, sections 1983 and 1985(3) are closely related, both having their roots in the 1871 Ku Klux Klan Act and both "designed to remedy the same types of harms." *McDougal v. Cnty. of Imperial*, 942 F.2d 668, 673 (9th Cir. 1991). Accordingly, it is no surprise that the Second Circuit has extended *Monell* to § 1985(3) claims against municipal defendants. *See Zherka v. City of New York*, 459 F. App'x 10, 12 (2d Cir. 2012) ("Similarly [to § 1983],

municipal liability under § 1985(3) must also be predicated on an 'official custom or policy' of the municipality." (citation omitted)). While the Second Circuit has not directly ruled on whether the same rule applies to such claims against private entities, district courts within and outside of this circuit have evaluated a private employer's liability under § 1985(3) using the same rubric as § 1983 claims. *See, e.g.*, *Thomas v. U.S. Airways*, No. CIV.A. 13-6121, 2014 WL 1910245, at *4 n.6 (E.D. Pa. May 13, 2014) ("A corporation . . . cannot be held liable under § 1985 through a theory of respondeat superior."); *Litras v. PVM Int'l Corp.,* No. 11-CV-5695 JFB AKT, 2013 WL 4118482, at *9 n.8 (E.D.N.Y. Aug. 15, 2013) (evaluating private employer's liability under § 1985 by inquiring whether harm was caused by an official policy or custom of the employer); *Bowen v. Rubin*, 385 F. Supp. 2d 168, 176 (E.D.N.Y. 2005) (same); *but see Scott v. Ross*, 140 F.3d 1275, 1284 (9th Cir. 1998) (allowing § 1985 claim to proceed against private employer on respondeat superior grounds).[7]

Accordingly, Plaintiffs' § 1985(3) claim against Liberty University must be dismissed absent adequate allegation that the University contributed to Plaintiffs' claimed harm through an "official custom or policy." *Zherka*, 459 F. App'x at 12. No such allegation can be found in the Amended Complaint, nor can any plausible inference be drawn that the University "conspired to deprive [Plaintiffs] of their rights by virtue of an official policy or custom." *Bowen*, 385 F. Supp. 2d at 176. In the most favorable light, the allegations of the Amended Complaint suggest only that three individual employees of Liberty University provided peripheral, after-the-fact assistance to a conspiracy to assist Lisa Miller and Isabella Miller-Jenkins in departing the United States—and, as described above, there is no specific, credible allegation that their actions

[7] The Ninth Circuit's decision in *Scott* was driven by a reluctance to "graft § 1983 principles concerning municipal liability onto § 1985(3)." *Scott*, 140 F.3d at 1284. In contrast, the Second Circuit has *already* grafted § 1983's principles on vicarious liability into its § 1985(3) jurisprudence, *see Zherka*, 459 F. App'x at 12, and there is no principled reason to distinguish between municipal and private employers for purposes of applying the statute.

arose from within the scope of their employment with the University. That is not enough. Even if individual alleged actions were to have violated a constitutionally protected right, "isolated incidents" of unconstitutional conduct will not establish that a "defendant[] ha[s] a general policy or a widespread practice of an unconstitutional nature." *Palmer v. Marion Cnty.*, 327 F.3d 588, 597 (7th Cir. 2003); *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."). Without an allegation of an official custom or policy that interfered with Plaintiffs' civil rights, their § 1985(3) claim against Liberty University must be dismissed.

**B. To the Extent Plaintiffs Have Failed to State a Claim Against Liberty University's Employees, Their Claims Against the University Likewise Fail.**

Liberty University joins and incorporates by reference the arguments presented by Mathew Staver, Rena Lindevaldsen, and Victoria Hyden that the Amended Complaint fails to state a legally sufficient claim against them. As discussed in the preceding section, Plaintiffs seek to hold Liberty University vicariously liable for the actions of these three employees, and under no situation can there be vicarious liability for an employee's actions in the absence of a legally sufficient claim against the employee. *See, e.g.*, *Scanlan v. Potter*, No. 1:05-CV-291, 2007 WL 3231623, at *11 (D. Vt. Oct. 31, 2007) ("Because the Court finds no underlying liability on the part of [the] employees, there can be no claim for vicarious liability.").

**C. The Applicable Statute of Limitations Bars Plaintiff Jenkins' Claims.**

Both of Plaintiffs' claims against Liberty University, for the tort of kidnapping and conspiracy to violate civil rights under 42 U.S.C. § 1985(3), arise from events that are alleged to have occurred in or before 2009. As the statute of limitations for each claim is three years, and

Plaintiffs' Amended Complaint was filed more than seven years after the events giving rise to the asserted claims, the claims are time-barred as to Plaintiff Janet Jenkins.[8]

**1. The controlling three-year statute of limitations bars Jenkins' claims.**

A three-year statute of limitations governs—and bars—each of Plaintiff Jenkins' claims. The limitations period for Plaintiff Jenkins' state-law claim is determined by Vermont law, as it is well settled that a "federal court sitting in diversity must apply the substantive law of the forum state." *Griffith v. White*, 929 F. Supp. 755, 756 (D. Vt. 1996). Plaintiff asserts an intentional tort (kidnapping) subject to 12 V.S.A. § 512, which provides the "general statute of limitations covering . . . intentional torts": specifically, actions for an intentional tort "must be commenced within three years of the accrual of the cause of action." *Aube v. O'Brien*, 433 A.2d 298, 299 (Vt. 1981).

As to Plaintiff Jenkins' federal claim, Congress has not provided a limitations period for § 1985 actions. Courts must thus apply the state limitation period "which seems best to effectuate the federal policy underpinning the claims asserted." *Peterson v. Fink*, 515 F.2d 815, 816 (8th Cir. 1975); *accord Gordon v. Nat'l Youth Work Alliance*, 675 F.2d 356, 358 n.1 (D.C. Cir. 1982). Federal courts have generally agreed that claims under § 1985(3) are most analogous to a personal injury action, and look to the statute of limitations for personal injury torts in determining whether § 1985(3) claims are timely. *See, e.g.*, *Malone v. City of New York*, No. 01 CV 6128 (SLT) (RML), 2005 WL 1892019, at *8 (E.D.N.Y. Aug. 9, 2005) ("Claims under

[8] Liberty University recognizes that the statute of limitation is tolled with respect to Isabella Miller-Jenkins until she reaches the age of majority. *See* 12 V.S.A. § 551(a). Because there is no specifically stated or otherwise relevant federal statute of limitations for the federal substantive claim, the controlling period, including all tolling rules, is also provided by Vermont law. *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 485-86 (1980); *see also Getchey v. Cnty. of Northumberland*, 120 F. App'x 895, 898 (3d Cir. 2005). However, as Defendants Liberty Counsel, Mathew Staver, and Rena Lindevaldsen argue in their motion to dismiss, Isabella Miller-Jenkins lacks any colorable legal claim for custodial interference or conspiracy to violate her civil rights under § 1985(3). Liberty University joins and incorporates by reference those arguments.

Section 1985(3) borrow their statute of limitations from the state statute applicable to personal injury claims." (citing *Meyer v. Frank*, 550 F.2d 726, 728 n. 5 (2d Cir.), *cert denied*, 434 U.S. 830 (1977)); *see also Assur v. Central Vt. Med. Center*, No. 2:06-CV-239, 2012 WL 6951961 at *6 n.8 (D. Vt. Dec. 20, 2012) (same). Again, under Vermont law the limitations period for personal injury claims is three years, and thus the same limitation applies to § 1985(3) claims. *See* 12 V.S.A. § 512.

"A motion to dismiss based on a statute of limitations should be granted 'only if a complaint clearly shows the claim is out of time.'" *Mattson v. Farrell Distrib. Corp.*, 163 F. Supp. 2d 411, 414-15 (D. Vt. 2001) (*quoting Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)). Here, the Amended Complaint comes more than seven years after Lisa Miller and Isabella Miller-Jenkins left the United States, *see* Am. Compl., ¶ 36; Plaintiff Jenkins herself informed the courts that the two were missing in December 2009, *id.*, ¶ 49. Plaintiffs' claims at a minimum accrued prior to August 2012, when they filed the initial complaint in this case alleging substantially identical claims to those presently pursued against Liberty University and others. The Court subsequently dismissed the University for lack of personal jurisdiction, and Plaintiffs made no effort thereafter to timely file claims against Liberty University in another court having jurisdiction over the University. By the time Plaintiffs filed their Amended Complaint in April 2017, Plaintiff Jenkins' claims were well outside of the three-year limitations period, however one might calculate it. Accordingly, Jenkins' claims are time-barred.

**2. Rule 15(c) does not permit relation back because the complaint was not amended to correct a mistake of law or fact.**

Jenkins will likely argue that the April 2017 Amended Complaint should be deemed to relate back under Federal Rule of Civil Procedure 15 to her original 2012 Complaint for purposes of her claims against Liberty University, and that failure to allow relation back would

be unjust. Neither is the case. There is nothing inequitable about holding Jenkins to the statute of limitations. When her complaint against Liberty University was dismissed for lack of personal jurisdiction, she had an obvious option—Jenkins could have promptly filed suit in a court with jurisdiction over Liberty University and proceeded with litigating her claims. She opted not to do so, and, while that was her prerogative, Liberty University should not have to defend a claim that is so manifestly untimely at this late hour because of that strategic choice. More to the point, however, Rule 15 cannot fairly be read to allow relation back under circumstances such as these.

It appears to be undisputed—and, indeed, Plaintiffs could not reasonably dispute—that Liberty University was not a party to this proceeding prior to the filing and service of the Amended Complaint. "Once a court dismisses claims against a party for lack of personal jurisdiction, that party is no longer a defendant before that court." *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 74 (2d Cir. 1998). Hence, prior to filing their present complaint, Plaintiffs properly sought leave from the Court to add Liberty University as a party, and thereafter arranged for service of the complaint and a summons on the University as a newly added party.

Accordingly, Jenkins' claims against the University could only be timely if the Court were to relate the current complaint back to her original 2012 complaint pursuant to Rule 15(c)(1)(C). On its face, Rule 15 does not apply to the circumstances here. The Rule provides that an amendment to a pleading may relate back to the date of the original pleading if the amendment "changes the party or the naming of the party against whom a claim is asserted" and if, within the required period, the new party received notice of the action and "will not be prejudiced in defending on the merits" and "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). The Advisory Committee Notes to the 1991 Amendment to Rule 15 make clear that the purpose of section (c) is to "prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." The Notes specify that complaints may be amended "to correct a formal defect such as a misnomer or misidentification," that the section was revised to address "the problem of a misnamed defendant," and that intended defendants may not defeat the action "on account of a defect in the pleading with respect to the defendant's name." Fed. R. Civ. P. 15, Advisory Committee Notes to 1991 Amendment. The Supreme Court has echoed this, describing the intent of Rule 15(c)(1)(C) as preventing a "windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550 (2010). The Rule responded to a recurring problem in suits against the federal government, where individuals would file a timely lawsuit but fail "to name the party identified in the statute as the proper defendant." *Id.*

The concerns to which Rule 15(c)(1)(C) is addressed are simply not present here. The present Amendment to the Complaint does not remedy a mistake of fact or law as to the identity of a party named in the initial complaint. Plaintiffs did, in fact, identify Liberty University by the incorrect name in their initial complaint, but they amended in 2012 to correct the mistake, and their complaint against the University was subsequently dismissed. That Plaintiffs have since adduced new allegations to support *jurisdiction*, rather than liability, is irrelevant. The plain text of the Rule and the Advisory Committee Notes should not be disregarded in order to

extend the relation-back doctrine to a set of circumstances it was never meant to cover.[9]

In factually similar situations, courts have precluded relation-back in recognition of the fact that the plaintiffs always had another choice: suit against defendants in their home states. For example, in *Wandrey v. Service Business Forms*, 762 F. Supp. 299 (D. Kan. 1991), an Illinois federal district court dismissed claims against two defendants on personal jurisdiction grounds. *Id.* at 301. The case was then transferred to the District of Kansas where the plaintiff was granted leave to amend his complaint to rename the two dismissed defendants. *Id*. However, the District of Kansas concluded that the action against the two defendants, filed outside the statute of limitations, could not be maintained under Kansas' savings statute. *Id*. at 301-02 (citing K.S.A. section 60-518). The plaintiff also argued that his second amended complaint should be permitted under Rule 15(c), as the amended complaint related to the same transaction or occurrence and the two defendants had notice of the pending action. *Id*. at 302. The court disagreed:

> The court finds that plaintiff has failed to satisfy the third element of Rule 15(c). Plaintiff obviously knew of the identity of [the defendants] within the period of the Kansas limitation statute. After these two defendants were originally dismissed for lack of personal jurisdiction in Illinois, it was incumbent upon plaintiff to refile within the 6–month savings period provided by K.S.A. § 60–518. Plaintiff not only failed to do so, but also waited 6 months after the case was transferred to this District before renaming these defendants by amended petition. Defendant SBF had been dismissed almost 17 months, and defendant Ganzer 8 months, before plaintiff decided to refile against them in Kansas. Under these circumstances, defendants were entitled to assume that plaintiff had made a strategic choice not to pursue any further claims against them . . .
>
> The court finds that plaintiff failed to avail himself of the procedural devices applicable to claims dismissed for lack of personal jurisdiction. At the time the Illinois federal court found jurisdiction lacking over SBF and Ganzer, plaintiff

[9] Further, the Advisory Committee Notes also indicate that Rule 15(c) will not preclude any relation back permitted under the applicable state limitations law. Fed. R. Civ. P. 15, Advisory Committee Notes to 1991 Amendment. That is no aid to Plaintiffs, as under Vermont law, Jenkins' claims would still be barred: the governing statute, 12 V.S.A. § 558, permits re-filing for the same cause of action only within one year after the "action is dismissed for lack of jurisdiction of the subject matter or person."

> could have requested a § 1631 transfer of these claims to this District, rather than dismissal. Even after dismissal, plaintiff could have taken advantage of the Kansas 6–month savings statute. Having neglected to do so, the court is unable to resurrect these claims for plaintiff and must find the claims against [the defendants] to be barred by the Kansas statute of limitation.

*Id.* at 303-04 (citations omitted). Similarly, in *Nite & Day Power Technologies v. Corporate Capital Resources*, No. CV-89-20298 RMW, 1995 WL 7942 (N.D. Cal. Jan. 5, 1995), the Northern District of California evaluated a case where the defendants the plaintiff sought to rename had been "completely out of the case for three years." *Id.* at *5. Following *Wandrey*, the court noted that the attempt to add the defendants was not based on an earlier mistake as to their identity, precluding relation back. *Id.*; *but see Farr v. Designer Phosphates & Premix Int'l, Inc.*, 804 F. Supp. 1190, 1195-97 (D. Neb. 1992) (distinguishing *Wandrey* and permitting relation back under Rule 15 where plaintiffs had not been dilatory, case had been transferred not dismissed, and initial court had ignored plaintiffs' earlier motion to amend).

For the same reasons, relation back would be inappropriate here. Jenkins made no mistake of law or fact as to the University's identity in the filing of her earlier complaints; the University has been out of the case for years, such that there is a legitimate, reasonable interest in repose; and Plaintiffs could have brought a suit in Virginia following the dismissal of Liberty University from the action in 2013 but elected not to. Accordingly, the Court should find Janet Jenkins' claims time-barred and grant dismissal on that basis.

### D. The Amended Complaint Must Be Dismissed Under Rule 12(b)(2) for Lack of Personal Jurisdiction over Liberty University.

In 2013, the Court granted dismissal of Liberty University from this lawsuit, finding that the meager strands of fact linking the school to Vermont—namely, that two attorneys associated with the school had represented a private client in a case before Vermont's courts—were far too attenuated to support the exercise of personal jurisdiction over Liberty University here. *See*

*Jenkins v. Miller*, 983 F. Supp. 2d 423, 447 (D. Vt. 2013) (dismissing Liberty University and denying jurisdictional discovery in light of the "the dearth of specific facts that connect Liberty University with tortious activity directed against Plaintiffs"). Nothing of substance has changed in the intervening three-and-a-half years. Liberty University has not established a presence in the state since 2013, nor has evidence come to light that changes the nature of the contacts between the University's employees and Vermont as to support a finding of specific jurisdiction. That notwithstanding, the Court recently suggested, in granting Plaintiffs' Motion to Join Additional Defendants, that a finding of personal jurisdiction over Liberty University is warranted on the theory that Liberty University and Liberty Counsel were, effectively, a joint venture, and any contacts of Rena Lindevaldsen and Mathew Staver with Vermont that are imputed to Liberty Counsel must, in turn, be imputed to Liberty University.

Respectfully, Liberty University disagrees that Plaintiffs have presented an adequate basis to hale the University into court in this jurisdiction. The undisputed fact is that Lisa Miller engaged Rena Lindevaldsen and Mathew Staver to represent her in the custody dispute before either had commenced employment with Liberty University. Though both Lindevaldsen and Staver subsequently joined the faculty of Liberty University, there is no evidence whatsoever that the University employed Lindevaldsen or Staver to represent Miller. Rather, both continued to perform that legal work for and through Liberty Counsel. Plaintiffs' attempt to conflate the two organizations, claiming that Liberty Counsel and Liberty University were "one unified entity" for purposes of the events underlying this suit, invites the Court to causally—and improperly—disregard the entirely separate corporate identity of these entities. Further, the imputation of contacts from one to the other finds no support in any relevant authority. For these reasons, and those set forth below, Liberty University moves pursuant to Rule 12(b)(2) to

dismiss the claims against it for lack of personal jurisdiction.[10]

On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating sufficient contacts between the defendant and the forum state to justify the exercise of personal jurisdiction over the defendant. *See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). The jurisdictional analysis comes in two parts: first, the Court must first evaluate whether the state's long-arm statute permits jurisdiction, and second, if so, the court must determine whether the exercise of jurisdiction comports with the Due Process clause of the United States Constitution. *See In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30, 37-38 (2d Cir. 2014). Because Vermont's long-arm statute reaches to the full extent permitted by the Constitution, *id.* at 38 (citing 12 V.S.A. § 913(b)), the dispositive question here is whether the exercise of jurisdiction over Liberty University would satisfy the requirements of due process. *Id.*

The familiar touchstone for determining where personal jurisdiction over a defendant will comport with due process is the existence of "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011) (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). If a foreign defendant is shown to have "continuous and systematic" contacts with the forum state such that the defendant is essentially at home there, the court may exercise general jurisdiction over the defendant to hear any and all claims. *Id.* at 919 (*quoting Int'l Shoe*, 326 U.S. at 317). A lesser quantum of contacts will suffice to support the exercise of specific jurisdiction, provided the case arises from the

[10] Liberty University recognizes that the Court made a preliminary ruling on personal jurisdiction in its Order on Plaintiffs' Motion to Join Additional Defendants. As the University was not a party then and had not been served with the Amended Complaint, it now formally moves for dismissal of the Amended Complaint under Rule 12(b)(2) and offers additional arguments in opposition to the exercise of personal jurisdiction. The Court may also consider this motion as a request to reconsider its March 20, 2017 Order.

defendant's contacts with the forum state and the plaintiff can demonstrate "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Importantly, the defendant's relation to the state "must arise out of contacts that the 'defendant *himself*' creates with the forum state," *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (emphasis in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)), and not the "unilateral activity of another party or a third person." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984); *see also Hanson*, 357 U.S. at 253 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

The Court has already ruled in this case that there is an insufficient basis to exercise general jurisdiction over Liberty University in Vermont, and, as briefly discussed below, Plaintiffs do not offer any challenge to that ruling. Rather, they seek to establish specific jurisdiction over Liberty University on two distinct but related grounds: first, based on the contacts of Hyden, Lindevaldsen, and Staver as purported "agents" of the University, and second, based on the contacts of Lindevaldsen and Staver imputed to the University second-hand via the University's relationship with Liberty Counsel. Both arguments fail. Even agency-based theories of specific jurisdiction require a plaintiff to establish that the defendant at issue "purposefully availed" itself of the forum by directing the actions of its agents there, and there is no evidence that Liberty University did so here. Moreover, even if there were a basis upon which the Court could find that the University purposefully availed itself of the privilege of doing business in Vermont through the actions of its alleged agents, the connection between Liberty University and the state is so extremely attenuated that the exercise of jurisdiction would

do injury to notions of fair play and substantial justice.

**1. Plaintiffs offer no new allegations that could alter the Court's conclusion that there is no general jurisdiction over Liberty University in Vermont.**

The Court's 2013 ruling recognized that Liberty University, an educational institution located and incorporated in Virginia, cannot be held subject to general jurisdiction in Vermont. Its contacts with Vermont, which are limited to the enrollment of a small number of Vermont students, maintaining a website that can be accessed from Vermont, and the occasional participation of its students in athletic competitions in this state, do not approach the level of continuous and systematic contacts necessary to establish general jurisdiction. *See* Oct. 24, 2013 Opinion and Order (Doc. 115) at 19-21. Because Plaintiffs have offered no new allegations that change the Court's analysis, there is no cause to revisit the issue here. *See Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 92 (2d Cir. 1975) ("[T]he burden of proving jurisdiction is upon the party who asserts it and . . . he must show by the complaint and supporting affidavits the essential requirements of the jurisdictional statute.").

**2. The evidence does not support the exercise of specific jurisdiction over Liberty University based on its employees' contacts with Vermont on behalf of others.**

Notwithstanding the general rule the "unilateral activity of another party or a third person" will not suffice to establish personal jurisdiction, *Helicopteros*, 466 U.S. at 417, a party may under some circumstances be subjected to specific jurisdiction based upon the actions of its agents. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (noting that agency relationships "may be relevant to the existence of specific jurisdiction" and that "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there" (emphasis omitted)). Here, Plaintiffs have not established, nor can they, that Hyden, Staver, and Lindevaldsen were acting as Liberty University's agents in connection with the events alleged in

the Amended Complaint, and, in any case, the allegations concerning the three employees are inadequate to support jurisdiction.

Agency relationships "come in many sizes and shapes: 'One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.'" *Daimler*, 134 S. Ct. at 759 (quoting 2A C. J. S., Agency § 43, p. 367 (2013)). Whether to impute a particular act taken by an agent in relation to the forum state to the principal for purposes of personal jurisdiction is thus a particularly context-specific inquiry. An "essential element" is "the principal's right to control the agent's actions." *Cernansky v. Lefebvre*, 88 F. Supp. 3d 299, 307 (D. Vt. 2015) (quoting *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2666 (2013)); *see also Jenkins v. Miller*, No. 2:12-CV-184, 2017 WL 1052582, at *11 (D. Vt. Mar. 20, 2017) ("An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control." (citing *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295 (2d Cir. 1984)); *Levitin v. Sony Music Entm't*, 101 F. Supp. 3d 376, 389 (S.D.N.Y. 2015) ("Plaintiffs cannot base an argument for specific jurisdiction on an agency theory because they have not even attempted to allege that . . . Defendants exert any control over [the putative agent], a necessary element to demonstrate agency for the purposes of specific jurisdiction."). Additionally, "agency requires a 'manifestation by the principal that the agent shall act for [it].'" *Cernansky*, 88 F. Supp. 3d at 307 (quoting *Cabrera v. Jakabovitz*, 24 F.3d 372, 386 (2d Cir. 1994)).

Here, Plaintiffs have failed to establish that Liberty University had any right of control over its employees in connection with the matters alleged in the Amended Complaint. Plaintiffs' claim that Hyden, Lindevaldsen, and Staver were acting as Liberty University's "agents" cannot suffice to satisfy their burden. On a Rule 12(b)(2) motion, a plaintiff's allegations must provide

the "factual specificity necessary to confer jurisdiction"; the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998) (quotation omitted); *cf. D/S Norden A/S v. CHS de Paraguay, SRL*, No. 16 CV 2274-LTS, 2017 WL 473913, at *4 (S.D.N.Y. Feb. 3, 2017) ("Although Norden repeatedly asserts in the Petition that CHS was acting as the agent for CHSP as an undisclosed principal, this mere naked assertion of a legal conclusion is insufficient to plead an agency relationship."). Moreover, allegations in the complaint must only be taken as true for purposes of a Rule 12(b)(2) motion "to the extent they are uncontroverted by the defendant's affidavits." *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993) (quotation omitted).

The Amended Complaint does not betray the slightest suggestion that Liberty University controlled or had a right to control Victoria Hyden, as a student-worker for the University, with respect to her alleged conduct. Ms. Hyden has never been an officer, director, or agent of Liberty University. *See* Oct. 23, 2012 Affidavit of Victoria Hyden (Doc. 54-3), ¶ 4. From September 2008 to June 2010—i.e., at all times relevant to this suit—Hyden worked only as a part-time employee of the University while taking classes as a student there. *Id*. She is alleged only to have passed along emails from her father to Rena Lindevaldsen (at his request) and to have "facilitated" communication between Lindevaldsen and Lisa Miller by conveying those emails. *See* Am. Compl., ¶¶ 44, 46; Plaintiffs' Reply in Support of Motion to Join Additional Defendants (Doc. 216) at 19 (citing Exhibits at Docs. 204-9, 204-10, 204-11). Lindevaldsen has denied that she ever received messages through Hyden, and there is no evidence to the

contrary.[11] *See* Nov. 14, 2016 Affidavit of Rena Lindevaldsen (Doc. 213-2), ¶ 4. Regardless, even if Hyden had delivered messages or facilitated communication, the idea that she did so as the "agent" of the University is devoid of support.

The same is true of Lindevaldsen and Staver. The essence of Plaintiffs' claim against them is that they misled the courts as to their knowledge of Lisa Miller's whereabouts, and thus delayed action attempting to locate Miller in connection with the custody and contempt proceedings. However, Lindevaldsen and Staver represented Lisa Miller solely in their capacity as Liberty Counsel attorneys, having taken on that engagement before they were ever employed by the University. There is neither evidence nor even the allegation that Liberty University had a right to control their work on behalf of Miller—and, as previously discussed, providing Liberty University with a right to control the representation would have conflicted with Lindevaldsen and Staver's ethical duties to their client.

Lisa Miller contacted Liberty Counsel in or around June 2004, requesting assistance in connection with custody proceedings in Vermont and a soon-to-be-filed action in Virginia; Liberty Counsel entered the Vermont action as counsel for Miller later that year.[12] Nov. 2, 2012 Affidavit of Rena Lindevaldsen ("2012 Lindevaldsen Aff.") (Doc. 54-5), ¶ 4; Sept. 30, 2004 Motions for Admission Pro Hac Vice (Docs. 54-6, 54-7). At the time, Liberty Counsel had a single office in Florida, where both Lindevaldsen and Staver worked full-time. *Id.*, ¶ 2; Nov. 12, 2012 Affidavit of Mathew Staver ("2012 Staver Aff.") (Doc. 54-4), ¶ 6. Neither Staver, the founder and then-president of Liberty Counsel, nor Lindevaldsen, who served as Senior Litigation Counsel with the organization, had any affiliation with Liberty University. 2012

[11] Plaintiffs have not adduced any sworn testimony of their own contesting these points, and, as noted above, allegations in the complaint must only be taken as true in the context of a Rule 12(b)(2) motion "to the extent they are uncontroverted by the defendant's affidavits." *Seetransport Wiking Trader*, 989 F.2d at 580 (quotation omitted).
[12] Lindevaldsen and Staver filed motions for admission pro hac vice in the Vermont custody proceeding on or about October 1, 2004.

Staver Aff., ¶ 6 ; 2012 Lindevaldsen Aff., ¶¶ 2, 4. Liberty University did not hire Lindevaldsen until August 2005, and at that point only as an adjunct; she was later hired on a full-time basis starting in July 2006. 2012 Lindevaldsen Aff., ¶ 3. The University hired Staver as a dean and professor in May 2006. 2012 Staver Aff., ¶ 5.

After beginning employment with the University, both Staver and Lindevaldsen continued to perform work on cases for Liberty Counsel on a limited basis. 2012 Staver Aff., ¶ 4; 2012 Lindevaldsen Aff., ¶ 3. Their work for Lisa Miller was always and solely performed as Liberty Counsel attorneys. 2012 Staver Aff., ¶¶ 7-8; 2012 Lindevaldsen Aff., ¶ 5. To state it another way, the representation was never carried out in any way on behalf of, at the direction of, or under the control of Liberty University, *see* Nov. 13, 2012 Affidavit of Jerry Falwell, Jr. (Doc. 54-1), ¶ 14, and Liberty University had no input into the handling of Miller's case or any others on which Lindevaldsen and Staver performed work through Liberty Counsel. 2012 Staver Aff., ¶ 10; 2012 Lindevaldsen Aff., ¶ 6. Consistent with this, the pleadings they submitted in connection with both the Vermont and Virginia cases uniformly identified Staver and Lindevaldsen as Liberty Counsel attorneys. 2012 Staver Aff., ¶ 8; 2012 Lindevaldsen Aff., ¶ 5. Liberty Counsel paid Lindevaldsen on a contract basis for her work on the case, 2012 Lindevaldsen Aff., ¶ 6, and fundraising materials soliciting donations to cover the cost of the representation were sent on behalf of Liberty Counsel alone. (*See* Doc. 216-14.)

In *Associated Producers, LTD v. Vanderbilt University*, 76 F. Supp. 3d 154 (D.D.C. 2014), a district court declined to find personal jurisdiction over a university based on its faculty's contacts under facts more favorable to jurisdiction than those above. The suit arose from a planned documentary commissioned by National Geographic (headquartered in the District of Columbia) in which a professor from Vanderbilt was to appear as an expert on early

Christian art. *Id.* at 160. The complaint, filed against both the professor and Vanderbilt University in the U.S. District Court for the District of Columbia, alleged: (a) that the professor "required and received approval from her employer . . . before she could take part in the film project"; (b) that Vanderbilt "expects and requires that, as part of their job duties, its professors . . . will not only teach students in the classroom but also promote and raise the visibility of the university through media appearances"; (c) that the professor signed a release form allowing the documentary to display her likeness and affiliation with Vanderbilt; and (d) that the signature block for certain allegedly defamatory emails the professor sent related to the documentary identified her affiliation with Vanderbilt. *Id.* at 160, 166. On a Rule 12(b)(2) motion, the Court granted dismissal of Vanderbilt, reasoning that "an employer's simple encouragement and approval of an employee's outside activities without any allegation that the employee's activities were in any way subject to the employer's control does not establish an agency relationship." *Id.* at 167. Here, where there is not even any indication that Liberty University formally approved Staver and Lindevaldsen's outside work on behalf of Miller—nor that they needed such approval—there is even less a basis for finding personal jurisdiction over Liberty University on a theory of agency.

Plaintiffs have failed to establish that Liberty University had any right to control Staver and Lindevaldsen's actions in relation to the Miller case—to the contrary, the evidence before the Court shows that such work was not controlled by the University. Plaintiffs thus cannot establish specific jurisdiction over Liberty University based on the employees' alleged contacts with Vermont. *See Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1024–25 (9th Cir. 2017) (holding that plaintiffs failed to establish a basis for specific jurisdiction based on subsidiary's alleged agency relationship with parent where plaintiffs failed to allege or otherwise show that

parent had the right to substantially control its subsidiary's actions in the relevant context).

Moreover, even if the alleged contacts of Liberty University's employees with Vermont could be imputed to the University on a theory of agency, that imputation would be meaningless unless the contacts themselves were sufficient to warrant a finding of specific jurisdiction. Defendants Lindevaldsen and Staver are separately moving for dismissal under Rule 12(b)(2), and Liberty University joins in and incorporates by reference their arguments explaining why, under the governing authorities, the contacts between the two lawyers and Vermont do not satisfy the Due Process Clause's requirements to establish personal jurisdiction.

**3. Liberty University's relationship to Liberty Counsel does not provide a basis to exercise specific jurisdiction over the University.**

Implicitly recognizing the paucity of evidence that any of the individual defendants was acting as Liberty University's agent in connection with the events underlying this suit, Plaintiffs also argue that Liberty University may be subjected to jurisdiction in Vermont based on contacts imputed from Liberty Counsel (which, in turn, are alleged to be imputed from Staver and Lindevaldsen) on the theory that the University and Liberty Counsel were "acting as one unified entity" in 2009. *See* Plaintiff's Motion to Join Additional Defendants at 26. This is pure fiction. There is no evidence that Liberty Counsel and Liberty University—organizations founded at different times, by different individuals, and incorporated in different states—have ever been "one unified entity." The fact that the two entities had a few employees in common and that one of Liberty Counsel's branch offices was located in a building owned by Liberty University does not come close to carrying Plaintiffs' burden of establishing, as constitutional standards require, that Liberty University "purposefully availed" itself of the benefits of doing business in Vermont.

Liberty University, a nonprofit, fully accredited coeducational institution, was founded in

the Commonwealth of Virginia, was incorporated in that state in 1972, and has at all times maintained its principal place of business in Lynchburg, Virginia. *See* Nov. 13, 2012 Affidavit of Jerry Falwell, Jr. (Doc. 54-1), ¶¶ 1, 2, 4. Despite the shared use of the noun "Liberty" in their names,[13] Liberty University does not own or control Liberty Counsel in any fashion. *Id.*, ¶ 14. Rather, Liberty Counsel is a nonprofit public interest law firm, founded in Florida in 1989 by Mathew Staver, a graduate of the University of Kentucky; the organization's headquarters remain in Florida to this day.[14] 2012 Staver Aff., ¶¶ 2, 3. Liberty University did not matriculate its first class of law students until 2004, many years after Liberty Counsel's founding. *Id.*, ¶ 5. Liberty Counsel is governed by an entirely separate and independent board of directors from Liberty University, and has its own staff of attorneys, legal assistants, and administrative staff. *Id.*, ¶ 10. Liberty Counsel is not a law firm of Liberty University, and the University has no input into its cases or management. *Id.* As discussed above, though Staver and Lindevaldsen both were hired while employed by Liberty Counsel into academic positions with the University and continued to perform some legal work for their Liberty Counsel clients, at all times they held themselves out in their litigation practice as attorneys with Liberty Counsel.

Plaintiffs, in seeking to extend jurisdiction to Liberty University, have highlighted a handful of inconsequential connections between Liberty Counsel and the University, including that Staver and Lindevaldsen were employed by each of the two entities at various times, that a branch office of Liberty Counsel was for a time located in a Liberty University building, and that Lindevaldsen used her University phone and email account for some Liberty Counsel-related work. They have also alleged that Lindevaldsen's book on her representation of Miller was at

[13] Many other organizations and corporations also incorporate the word "liberty" in their names (e.g., Liberty Mutual Insurance Company).
[14] Liberty Counsel has opened two branch offices, one in Virginia in 2005 and a second in the District of Columbia in 2007. 2012 Staver Aff., ¶ 3.

one point required reading for incoming law students. This is not evidence that the two were "one unified entity"—indeed, it is immaterial. Even assuming some level of association between Liberty Counsel and Liberty University, that does not, and cannot, establish jurisdiction over the University for several reasons.

The fact that two distinct corporate entities are associated with each other does not suffice to justify imputing the contacts of one to the other for purposes of personal jurisdiction. This is true even of closely related entities such as a parent and subsidiary. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (noting that jurisdiction over a parent corporation does not establish jurisdiction over a wholly owned subsidiary, as "[e]ach defendant's contacts with the forum State must be assessed individually"); *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1024–25 (9th Cir. 2017) (holding that subsidiary's activities in forum state did not permit jurisdiction over parent corporation). Rather, imputation of contacts requires, at a minimum, a showing that the entity with contacts in the forum acted on behalf of, and within the control of, the related entity in connection with the matter from which the case arises, such that it could be said to have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958); *see also Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) ("[A] corporation can purposefully avail itself of a forum by *directing* its agents or distributors to take action there" (emphasis added)); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 480 n.22 (1985) ("[A]ctivities . . . carried on in behalf of an out-of-state party . . . may sometimes be ascribed to the party, at least where he is a primary participant in the enterprise and has acted purposefully in directing those activities." (citations and quotation marks omitted)); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 532 (5th Cir. 2014) (finding that subsidiary's contacts

with forum were properly imputed to parent for purposes of specific jurisdiction where the parent's "parental control over its agent . . . pervaded [the agent's] dealings with the forum").

Plaintiffs' theory of jurisdiction based on the relationship between Liberty Counsel and Liberty University would effectively—and improperly—read purposeful availment out of the jurisdictional analysis. There is no evidence that Liberty Counsel was acting on Liberty University's behalf in representing Lisa Miller in her Vermont and Virginia cases. Rather, the argument seems to be that because Liberty Counsel and Liberty University had some level of association, and because the representation of Lisa Miller was consistent with the expressed values of both entities, the Court should look past the facts that (1) Liberty Counsel's engagement by Lisa Miller preceded Staver and Lindevaldsen's connection with the University and (2) there is no evidence that Liberty University controlled or had any right to control the representation or Liberty Counsel.

This is an argument without precedent—and it rests, to an unseemly extent, on inferences drawn from the fact that both organizations are avowedly Christian. Plaintiffs contend that the alleged contacts of Lindevaldsen and Staver with Vermont in their work for Liberty Counsel should be imputed to Liberty University because the work "was directly in furtherance of Liberty University's business or education goals as a 'Christian' law school." *See* Plaintiffs' Reply in Support of Motion to Join Additional Defendants (Doc. 216) at 26. Plaintiffs have effectively invited the Court to apply a lens through which religiously affiliated institutions are subject to a different legal standard than institutions with no such affiliation. The fact that there may be some congruence between a university's values or interests and the private legal work handled by its faculty cannot substitute for a showing that a particular legal engagement was actually carried out on behalf of and directed by the university. *Cf. Associated Producers, LTD v.*

*Vanderbilt University*, 76 F. Supp. 3d 154, 167 (D.D.C. 2014) (professor engaging in the kind of work that university encouraged and expected its faculty to perform did not establish that professor's contacts could be imputed to university).

Nor do the authorities cited in the Court's opinion on Plaintiffs' Motion to Join Additional Defendants—*Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42 (1st Cir. 2002) and *Mansfield Heliflight, Inc. v. Heli-One Canada Inc.*, No. 2:12-CV-46, 2012 WL 4479851 (D. Vt. Sept. 28, 2012)—provide any basis for extending jurisdiction over Liberty University based on its alleged relationship with Liberty Counsel. Both cases effectively rested on principles of estoppel, as they involved contractual disputes in which the defendants held themselves out as a single entity or joint venture to the plaintiffs in connection with the underlying transaction. Here, in contrast, Liberty University and Liberty Counsel never held themselves out as jointly responsible for the representation of Lisa Miller—nor, certainly, could Plaintiffs claim they relied on or were harmed in any fashion by an understanding that the two entities were commonly responsible for Lisa Miller's representation in the custody dispute.

In *Daynard*, a Massachusetts law professor filed a breach of contract action in Massachusetts against two law firms, one based in Mississippi and the other in South Carolina, to recover the payment of a fee for his work in connection with tobacco litigation handled by the firms. 290 F.3d at 48. The South Carolina firm conceded jurisdiction but the Mississippi firm objected. *Id.* The *Daynard* court, applying a theory of joint venture or agency by estoppel, held that it was appropriate to impute the South Carolina firm's contacts with the forum to the Mississippi firm for jurisdictional purposes, because the plaintiff alleged that the two firms "led [him] and the public to believe they were joint venturers" with respect to the transactions at issue. *Id.* at 56-57. In so holding, the court relied on allegations that the two firms had publicly

represented they were to "work jointly on all of the state cases," that they had agreed to pay the plaintiff a share of the fees obtained from both firms, that a partner from one of the firms stated that the plaintiff was part of the "team," and that plaintiff provided advice to each of the firms while present in Massachusetts. *Id.* at 58.

As the District of Massachusetts observed in a 2012 case, essential to *Daynard*'s holding was that the defendants had engaged in "overt conduct" toward the plaintiff: they worked personally with him and told him he was part of the team. *See Weinberg v. Grand Circle Travel, LCC*, 891 F. Supp. 2d 228, 242 (D. Mass. 2012). The *Weinberg* court contrasted *Daynard* with the case at bar, where a plaintiff was attempting to impute the in-state contacts of a travel agent to a foreign company that operated a hot-air balloon tour based on representations in a travel handbook. *Id*. at 241-42. The court determined that the alleged apparent authority of the in-state agent to sell tickets on behalf of the tour company did "not amount to the extensive evidence alleged by the plaintiff in *Daynard*"— the plaintiffs "did not make direct contact" with the foreign company, nor were they ever "directly told" by the foreign company that the two were working together, *id*. at 242—and could not support imputation of contacts on the apparent agency theory applied in *Daynard*. *Id*. at 243.

In *Mansfield Heliflight*, a plaintiff brought breach of contract, quasi-contract, and tort claims against a Canadian and Norwegian company for failure to pay for helicopter parts. 2012 WL 4479851 at *2. The Canadian company moved to dismiss for lack of personal jurisdiction; the plaintiff opposed dismissal, arguing that the Vermont contacts of the Norwegian company should be attributed to the Canadian company "where the companies hold themselves out as an integrated whole." *Id*. at *4. Among the factors highlighted by the plaintiff were that the two entities were subsidiaries of a common parent corporation; that the entities did not formally

distinguish themselves as separate corporations, referring to the Canadian corporation as the "Head Office" and the Norwegian corporation as the "Norway Office"; that they did not have separate websites; and that they held themselves out as a unified entity in press releases. *Id.* at *7. The Court found that the plaintiff had succeeded in its prima facie case because, crucially, the companies were connected "both generally and *in the circumstances of this case*." *Id*. at *8 (emphasis added). In other words, the unity of the corporations was "borne out by the conduct of [the] Defendants during the negotiation of the agreement forming the basis of th[e] case," including the fact that the plaintiff corresponded and dealt with employees of both corporations in their negotiations, and those individuals never gave an indication that they were anything other than employees of a common entity. *Id*. at *7-*8.

This case is fundamentally different from *Daynard* and *Mansfield Heliflight*. First, Plaintiffs can point to no overt action taken by either entity (much less the University) towards Plaintiffs *themselves* that would indicate Liberty University and Liberty Counsel were working together or were agents of one another. In *Daynard* and *Mansfield Heliflight,* the companies directly represented to the respective plaintiffs that they were in business together—which in fact they were—during the events that gave rise to the suit itself. Here, nothing Lindevaldsen or Staver did at the time of the events underlying the suit could possibly have led Plaintiffs to believe that they represented Liberty University or that the entities were connected.

Second, *Daynard* and *Mansfield Heliflight* involved an element of reliance by the plaintiffs on the appearance of a unified enterprise, which supported both the imputation of contacts and the plaintiffs' underlying contract and tort claims. In each of these cases, the plaintiff had a contractual relationship with the defendants; the plaintiff justifiably relied on the defendants' representations and entered into contracts on that basis. *See, e.g., Mansfield*

*Heliflight*, 2012 WL 4479851 at *8 (observing that during negotiations and discussions concerning payment, employees of the Canadian company never clarified their employment and implied contractual decision-making authority was vested in an individual employed by the Canadian company).

In this case, in contrast, there could be no plausible contention that Plaintiffs relied in any way on an understanding that Liberty University and Liberty Counsel were a unified entity in connection with the events alleged in the Amended Complaint—nor have Plaintiffs alleged as much. At all times relevant to this lawsuit, Liberty Counsel represented Plaintiff Janet Jenkins' former partner in a difficult and even antagonistic custody dispute. There is no possibility that reliance on a mistaken belief that Liberty University was involved with Lisa Miller's legal representation could possibly have had any material impact on Plaintiffs' actions or decisions. In fact, the vast majority of Plaintiffs' allegations concerning the relationship between Liberty Counsel and Liberty University, including the entities' shared building space, the claim that Zodhiates was given a tour of the law school, and that Lindevaldsen used the facts of the Miller case for an exam question, came to Plaintiffs' attention well after the alleged tortious activity—the representation of Miller—had ended. Plaintiffs thus ask the Court to use a series of after-the-fact realizations, thoroughly unrelated to the suit at bar and never relied upon by them, to impute the Vermont contacts of a Florida-based nonprofit law firm to an unaffiliated Virginia-based university. This is totally at odds with the law of apparent agency and cannot stand.

For all of these reasons, *Mansfield Heliflight* and *Daynard* are inapposite, and the contacts of Liberty Counsel cannot be imputed to Liberty University on the basis of apparent agency.

**4. The exercise of jurisdiction over Liberty University would be inconsistent with notions of fair play and substantial justice.**

Finally, even if Plaintiffs were able to establish that Liberty University had sufficient "minimum contacts" with Vermont, dismissal would remain appropriate because the exercise of personal jurisdiction over the University would not comport with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted); *see also RLB & Assocs., Ltd. v. Aspen Med. Pty.*, No. 2:15-CV-123, 2016 WL 344925, at *7 (D. Vt. Jan. 27, 2016) (holding that interests of fair play and substantial justice would warrant dismissing case even if minimum contacts were present).

In weighing whether jurisdiction is consistent with notions of fair play and substantial justice, courts evaluate the following factors: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996). The importance of this "reasonableness" analysis "varies inversely with the strength of the 'minimum contacts' showing—a strong (or weak) showing by the plaintiff on 'minimum contacts' reduces (or increases) the weight given to 'reasonableness.'" *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir. 2002) (*quoting Metro. Life Ins. Co.*, 84 F.3d at 568-69). Here, given the extremely attenuated nature of the contacts between the University and Vermont, the inquiry into reasonableness takes on particular weight—and strongly militates in favor of dismissal.

First, the exercise of jurisdiction over Liberty University would unquestionably burden the University. Not only is Liberty University based in Virginia and lacks any presence in

Vermont, the vast majority of witnesses and documentary evidence in this case are located outside Vermont. This factor has weighed heavily in cases where, as here, defendants had no office, employees, or property in the forum state. *Metro. Life*, 84 F.3d at 574-75; *see also Newsome v. Gallacher*, 722 F.3d 1257, 1273 (10th Cir. 2014) (noting that "the burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction" (quotation omitted)); *accord Terracom v. Valley Nat. Bank*, 49 F.3d 555, 561 (9th Cir. 1995) (observing that "the law of personal jurisdiction is asymmetrical and is primarily concerned with the defendant's burden."); *Hyperkinetics Corp. v. Flotec, Inc.*, No. 1:03cv33, 2003 WL 25278086, at *5 (D. Vt. Sept. 25, 2003) ("Because it is based in Indiana, the defendant will certainly incur some burden litigating in this state . . . . At best, the defendant's contacts with Vermont are indirect, minimal, and insubstantial.").

Second, although the Court determined that Vermont has a strong interest in adjudicating claims involving violations of Vermont court orders and injuries sustained by a Vermont resident, *Jenkins v. Miller*, 983 F. Supp. 2d 423, 450 (D. Vt. 2013), Virginia has at least an equal interest in providing a forum for her citizens and domestic corporations. This is particularly true given that Plaintiffs' claims against Liberty University rest on the actions of an attorney licensed and located in Virginia providing legal counsel to a Virginia resident. Third, while Plaintiffs' interest in obtaining convenient and effective relief is served by bringing this suit in Vermont, *id*., that interest could be equally served by bringing suit in Virginia, where the alleged wrongs occurred and where Liberty University and most of the witnesses and evidence are located. Fourth, the interstate judicial system's interest in an efficient resolution "is not particularly implicated" or served by the selection of Vermont as a forum. *Id*.

Lastly, the shared interest of the states in furthering substantive social policies weighs

sharply against allowing jurisdiction. As in the vicarious liability analysis, the context in which this jurisdictional issue arises warrants special attention: law professors regularly moonlight for outside clients, and universities should be able to avoid getting haled into court in far-flung jurisdictions on account of their academics' extracurricular work.[15] To recognize jurisdiction on these facts would be bad public policy and a dangerous precedent.

### E. Because None of the Actions Material to Plaintiffs' Claim Occurred in Vermont, Venue Is Improper in this District.

Lastly, although the Amended Complaint suggests venue is proper pursuant to 28 U.S.C. § 1391, that position is unsupported by the controlling law, as the events central to this lawsuit primarily took place in the Western District of Virginia and not in Vermont.

Section 1391(b) permits a civil action to be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Like all venue statutes, its purpose is to "save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found." *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex–Exploración Y Producción*, 832 F.3d 92, 104 (2d Cir. 2016) (quoting *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (quotation and citation omitted)). The Second Circuit has emphasized that "*de minimis* acts . . . cannot satisfy this Court's 'substantiality' requirement for venue," as such acts are not "*significant events* . . . *material* to the plaintiff's claim" and run contrary to the requirement that

[15] Indeed, it is difficult to conceive of a court exercising jurisdiction in any reasonably analogous situation. Imagine, as a hypothetical, a staff attorney with the Natural Resources Defense Counsel who is hired by Yale University to teach environmental law. After joining Yale, the attorney continues to work on some of her prior cases under contract with the NRDC, including a water case involving a cattle ranch in Montana, and, although performed in her private capacity, Yale highlights the professor's work in its alumni magazine. In the course of the water case, volunteers of a local Montana environmental group working with the NRDC are accused of trespassing on the ranch land and manufacturing evidence of effluent discharge to be used in the water case, and the cattle ranch sues the professor, the NRDC, Yale, and the local group on civil conspiracy and trespass charges in Montana. It simply cannot be the case that Yale would be subject to suit in Montana in such a case, arising from the outside professional work of a professor on a case that began before her hiring. Nor should Liberty University be subject to suit in Vermont in this case, for the same reasons.

courts "construe the venue statute strictly." *Blakely v. Lew*, 607 F. App'x 15, 17, 18 (2d Cir. 2015) (quotations and citation omitted omitted) (emphasis in original) (concluding that permitting venue wherever plaintiffs retain a lawyer would "make meaningless the obligation to take seriously the adjective 'substantial' " (citation omitted)). The venue inquiry focuses "on relevant activities of the defendant, not of the plaintiff." *Jenkins v. Miller*, 983 F. Supp. 2d 423, 464 (D. Vt. 2013) (quotation omitted). To that end, neither the Second Circuit nor any other federal appellate court has found that extra-territorial acts intended to have a tortious effect within a district can be the basis for a venue selection. *See Steen v. Murray*, 770 F.3d 698, 703 (8th Cir. 2014) (reiterating that court's focus in a venue analysis "must be on relevant activities of the defendant in the forum state, not on the effect of those activities on the plaintiff in the forum state.").[16]

As described above, and as detailed in the Amended Complaint, no events or omissions *material* to Plaintiffs' claims took place in Vermont. Every part of the alleged kidnapping and attendant conspiracy to permit that kidnapping took place in the Western District of Virginia. Even if this Court were to find that Lindevaldsen's representations to the Vermont Family Court regarding Lisa Miller's whereabouts were sufficiently tortious to support Plaintiffs' claims, Lindevaldsen made those representations while physically present in Virginia and made the same representations to a Virginia court. Plaintiffs cannot escape the fact that the only material

[16] The few cases where venue has been deemed proper based on the effects of a complained-of action have involved suits challenging municipal or state government acts. In other words, plaintiffs have sued where the effect of the challenged regulations, rules, or laws were felt, even though the regulations were enacted elsewhere. *See, e.g., Sharif by Salahuddin v. N.Y. State Educ. Dep't*, 709 F. Supp. 345, 358 (S.D.N.Y. 1989); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 1254 (N.D. Ok. 2006), *rev'd in part on other grounds by* 333 F. App'x 361 (10th Cir. 2009); *Emison v. Catalano*, 951 F. Supp. 714, 722 (E.D. Tenn. 1996); *Farmland Dairies v. McGuire*, 771 F. Supp. 80, 82 n.3 (S.D.N.Y. 1991); *Sheffield v. State of Texas*, 411 F. Supp. 709, 713 (N. D. Tex. 1976). That allowance has its roots in the venue statute itself, as § 1391(e) was "enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia." *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971). The policy considerations behind permitting plaintiffs to contest the constitutionality of statutes where their rights have been violated, rather than where legislation is passed or where the Governor or Attorney General maintain official offices, have little application in a suit involving only private defendants who will be considerably burdened if they have to defend a suit in the District of Vermont.

connection between the subject matter of the litigation and the venue is the impact upon Plaintiff Janet Jenkins, an impact felt only because Vermont was her choice of residence. *Compare Sharif by Salahuddin v. N.Y. State Educ. Dep't*, 709 F. Supp. 345, 358 (S.D.N.Y. 1989) (concluding that Southern District of New York was appropriate venue because female students attending New York City schools "are harmed more than elsewhere by the [defendant's] exclusive reliance on SAT scores because they are even less likely to qualify for their scholarships than their female counterparts throughout the state" and because the SAT is administered in the District). It cannot be the case that if Plaintiff Janet Jenkins had moved to Hawaii, received a court order recognizing the initial Vermont custody order, and attempted to exercise her parental rights there, venue would be proper in the District of Hawaii.

Because Plaintiffs have not met their burden of showing venue is proper in this forum, *see Country Home Products, Inc. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 568 (D. Vt. 2004), and because forcing Liberty University and the other Virginia-based Defendants to defend a suit in this district would contravene the spirit and intention of the venue statute, this Court should dismiss this action under Rule 12(b)(3) or, in the alternative, transfer this case to the Western District of Virginia.

## CONCLUSION

Plaintiffs' allegations attempting to link Liberty University to the facts of this case are exceedingly sparse, and the actual evidence even more so. The standards for pleading vicarious liability, as well as the requirements of due process for establishing personal jurisdiction based on the acts of a defendant's agents, demand far more than what Plaintiffs offer. Because Plaintiffs fail to establish a viable foundation upon which their claims could move forward in this

Court, Liberty University submits that the Court should dismiss with prejudice Plaintiffs' claims against it.

DATED at Burlington, Vermont, this 5th day of June, 2017.

DINSE, KNAPP & McANDREW, P.C.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on June 5, 2017. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

DINSE, KNAPP & McANDREW, P.C.

By: /s/ Ritchie E. Berger
Ritchie E. Berger, Esq.