

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

DEFENDANT LIBERTY UNIVERSITY’S (1) MOTION TO RECONSIDER RULING ON MOTION TO DISMISS VICARIOUS LIABILITY CLAIMS FOR FAILURE TO STATE A CLAIM; (2) MOTIONS, IN THE ALTERNATIVE, TO AMEND THE ORDER OF SEPTEMBER 29, 2017 TO CERTIFY FOR INTERLOCUTORY APPEAL AND TO STAY DISCOVERY PENDING DISPOSITION OF THE APPEAL; AND (3) REQUEST FOR ORAL ARGUMENT

NOW COMES Liberty University, by and through its attorneys, Dinse, Knapp & McAndrew, P.C., and moves the Court to reconsider its denial of the University’s Motion to Dismiss Plaintiffs’ vicarious liability claims for failure to state a claim. In the alternative, Liberty University moves the Court to amend its September 29, 2017 Order denying Liberty University’s Motion to Dismiss to certify two controlling questions of law for interlocutory appeal pursuant to 28 U.S.C. § 1292(b):

1. Did the District Court err as a matter of law in holding that Plaintiffs stated an actionable vicarious liability claim against Liberty University based on its employees’ alleged participation in a criminal conspiracy to kidnap a third party, where the Complaint does not allege or plausibly suggest that the University controlled or had the right to control their allegedly tortious conduct?
2. Did the District Court err as a matter of law in holding that Liberty University, a Virginia educational institution, is subject to personal jurisdiction in Vermont based solely on contacts imputed from a public interest law firm, where there is no evidence—and the Court did not find—that the University directed or had the right to direct the activities of the law firm or its attorney-employee in her Vermont legal representation?

In conjunction with this motion to certify, Liberty University moves the Court to stay discovery from the University pending disposition of any interlocutory appeal. Pursuant to Local Rule 7(a)(6), Liberty University requests that the Court schedule oral argument on its motions.

MEMORANDUM OF LAW

The Court's denial of Liberty University's Motion to Dismiss subjects the school to vicarious liability for the allegedly criminal acts of a part-time student employee and a law professor, despite the fact that there is no plausible allegation that the University controlled—or could have controlled—their purportedly tortious actions. It is, to put it candidly, a remarkable and uncharted decision. The primary basis for the Court's ruling, raised *sua sponte* and therefore never briefed by the parties, is that the employees were "aided" in their allegedly tortious conduct by their employment with the school. Although this "aided in" theory of liability has been adopted in limited situations in Vermont, the factual allegations raised here fall far outside of any of the circumscribed categories of actions in which this (or any other jurisdiction) has ever applied that theory. Indeed, the Court's analysis would expand the scope of an employer's vicarious liability to almost any situation in which an employee uses basic and common workplace tools such as email, telephone, and internet in the course of committing an intentional tort. The University urges that the Court reconsider its decision; Plaintiffs have failed to plead an actionable claim for vicarious liability against the University under existing law.

If the Court will not reconsider its vicarious liability ruling, the novelty, breadth, and importance of its legal rulings strongly favor certification of its order for interlocutory appeal. In addition to finding a basis for vicarious liability where none has previously existed, the Court ruled it can exercise specific jurisdiction over the University based on forum contacts imputed from a separate and independent corporate entity, without any showing that the University

directed, or could have directed, the in-forum activities of that entity. As such, the Court's decision runs counter to decades of personal jurisdiction jurisprudence. Together, the two rulings represent substantial alterations in existing law, and their implications stretch far beyond the claims and parties in this case. They are also issues of central and controlling significance to the claims against Liberty University: if the Court ruled incorrectly on either the legal sufficiency of the vicarious liability allegations or the imputation of contacts for personal jurisdiction, the claims against the University must be dismissed, removing a party and an entire set of factual and legal issues from the case. While the decision to certify an order for appeal is "entirely a matter of discretion for the district court," *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30, 36 (2d Cir. 2014), the issues raised here uniquely and compellingly warrant exercise of that discretion. Accordingly, if the Court does not reconsider its Order and dismiss the University from this case, Liberty University respectfully requests that the Court grant its motion and certify the September 29, 2017 Order for appeal.

ARGUMENT

I. Reconsideration Is Necessary to Correct a Clear Error of Law in the Court's Analysis of Vicarious Liability, As It Is Contrary to Controlling Vermont Authority.

It is well settled in Vermont that the right to control an employee's actions is an absolute prerequisite to vicarious liability for acts within the scope of employment. The Court's conclusion that Plaintiffs have stated a colorable claim for vicarious liability in tort, absent any allegation or evidence that the University had the right to control the alleged unlawful conduct of Rena Lindevaldsen and Victoria Hyden, thus represents a sharp departure from Vermont precedent. Not addressing the issue of control, the Court's decision instead posits that vicarious liability may be based on the allegations that Lindevaldsen's conduct incidentally benefited the University—in that she subsequently published a book about her representation of Lisa Miller

(nearly two years after Miller’s flight) and allegedly incorporated her experience with the case into her teaching—and that she and Hyden were “aided in” their alleged misconduct by their employment with the University. There simply is no legal precedent in Vermont, or in any jurisdiction, that would support the imposition of vicarious liability on these bases. Because the Court’s decision overlooks governing precedent on the elements of vicarious liability for acts within the scope of employment, and applied a new theory that has no conceivable application here, Liberty University asks that the Court reconsider its decision and grant its Rule 12(b)(6) motion to dismiss.¹

“The standard for granting a motion to reconsider is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Reconsideration should be granted, however, where “it becomes necessary to remedy a clear error of law or to prevent obvious injustice.” *Walker v. Teachers Ins. & Annuity Ass’n of Am.-Coll. Ret. & Equities Fund*, No. 1:09-CV-190, 2010 WL 3069829, at *2 (D. Vt. Aug. 4, 2010) (quoting *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.R.D. 15, 16 (N.D.N.Y. 1995)). This is the relatively rare case where there exists a clear error of law: the Court’s decision is directly contrary to existing Vermont precedent on vicarious liability. Moreover, while reconsideration is not appropriate to “relitigate” issues already briefed and decided, *id.*, here the Court’s decision relies on an argument never raised by Plaintiffs and therefore not briefed by the parties, so this is

¹ While the Court’s decision on personal jurisdiction is contrary to controlling constitutional authorities, the Court has not overlooked the University’s arguments on personal jurisdiction, as it has done with respect to the vicarious liability analysis. The University thus recognizes that seeking reconsideration on that issue would be futile and instead moves to certify the question of personal jurisdiction for interlocutory appeal. Should the University’s motion to reconsider be granted, the jurisdictional question will be moot.

not an attempt at “relitigation.”

As explained in the University’s Motion to Dismiss, the *Iqbal* and *Twombly* pleading standards require that a plaintiff plead specific facts establishing a facially plausible basis for vicarious liability. *See, e.g., Day v. DB Capital Grp., LLC*, No. CIV.A. DKC 10-1658, 2011 WL 887554, at *21 (D. Md. Mar. 11, 2011) (granting dismissal on ground 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”). It is undisputed that Plaintiffs’ Amended Complaint fails to allege that the University controlled or had a right to control the allegedly tortious conduct by Lindevaldsen and Hyden. The Court’s decision suggests only that it can be inferred from the Complaint that the employees’ actions were “incidental to,” “furthered the purpose of,” and were “aided by” their employment. While Liberty University disputes whether the Complaint may plausibly be read to give rise to such inferences,² even accepting that as true for purposes of argument, Plaintiffs have not carried their burden of pleading vicarious liability under Vermont law.

An employer’s right of control over an employee’s conduct is both the sine qua non and the justification for imposing vicarious liability. *See Minogue v. Rutland Hosp., Inc.*, 125 A.2d 796, 798 (Vt. 1956) (“The really essential element in the relationship of master and servant is the right of control.”); *see also Breslauer v. Fayston Sch. Dist.*, 659 A.2d 1129, 1134 (Vt. 1995) (“To be a master [for purposes of vicarious tort liability], the person for whom the service is rendered must consent to it being performed under his direction and control.” (citation and quotation marks omitted)). The comments to Section 228 of the Restatement (Second) of

² Among other things, it is clear that the alleged participation of a part-time student employee and a professor in a clandestine criminal conspiracy to kidnap a third party unaffiliated with the University could not possibly have furthered the University’s interests.

Agency³ emphasize that 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. Regardless of whether an employee’s actions might be “incidental” to employment or further the employer’s interests in some way, “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.* Accordingly, “[t]he master test is: Who has the right to control the offending servant in the performance of his work at the time in question[?]” *Minogue*, 125 A.2d at 798. In short, the absence of any plausible allegation of control is fatal to Plaintiffs’ claims under Vermont law.

The inquiry into control is particularly significant in situations where, as in Lindevaldsen’s case, the employee for whose acts the defendant is potentially liable has more than one employer. The governing rule in such circumstances is that “[w]here a servant has two masters, a general and special one, the latter, if having the power of direction or control, is the one responsible for the servant’s negligence.” *Id.* at 798. Thus, in *Minogue*, the Vermont Supreme Court held that a hospital was not vicariously liable for the alleged negligence of a nurse employee during a delivery at the hospital where, at the time of the delivery, the nurse was under the direct supervision of the plaintiff’s doctor (who was not a hospital employee). *Id.* at 800; *see also Weaver v. Brush*, 689 A.2d 439 (Vt. 1996) (affirming judgment that German company was not vicariously liable for actions of its employee taken at a time when the employee was acting within control of local, wholly-owned subsidiary). Here, where the facts establish that Lindevaldsen took on representation of Lisa Miller while she was solely employed by Liberty Counsel, and continued to represent Miller through Liberty Counsel after the

³ Section 228 has been adopted by the Vermont Supreme Court in vicarious liability cases. *See Brueckner v. Norwich Univ.*, 730 A.2d 1086, 1091 (Vt. 1999).

University hired her, there can be no plausible inference that her academic employer had a right to control the representation of her private legal client—nor have Plaintiffs alleged that.⁴

Likewise, there is no plausible basis to infer that Victoria Hyden, a part-time student employee, was acting within the control of the University in allegedly passing secret messages from her father to Lindevaldsen. Indeed, Liberty University has been unable to find a single reported decision holding a university vicariously liable for the intentional tort of a part-time student employee.

The Court's decision raises sua sponte the argument that the University may be vicariously liable for Hyden's and Lindevaldsen's actions, even if not within the scope of their employment, because they were "aided" by their employment with the University, citing § 219(2)(d) of the Restatement and the Vermont Supreme Court's decision in *Doe v. Forrest*, 853 A.2d 48 (Vt. 2004). However, section § 219(2)(d) has no application to the facts alleged here. That provision provides that an employer may be liable for an employee's acts outside of the scope of employment where the employment relationship put the employee in a unique position to cause harm to the plaintiff. *See* Restatement (Second) of Agency § 219 cmt. e (noting that § 219(2)(d) applies where "the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons" or "the manager of a store . . . is enabled to cheat the customers because of his position"). The cases in which § 219(2)(d) have been applied therefore include, for instance, a supervisor's abuse of the authority provided by the employment relationship in sexually harassing subordinates, *see Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); a police officer's alleged use of the power and authority of his office to sexually assault a citizen, *see Forrest*, 853 A.2d 48; and a

⁴ Indeed, there is no allegation that University had the right to control *any* of the details of Lindevaldsen's outside legal work—it did not select or approve the client, set the hours she worked, establish the terms of the engagement, or determine the strategy she employed. *See Weaver*, 689 A.2d at 443.

hotel manager's use of his access to a master key and knowledge of guests' locations to enter the room of a guest in the middle of the night and rape her, *see Costos v. Coconut Island Corp.*, 137 F.3d 46 (1st Cir. 1998).

Read loosely, the language of § 219(2)(d) could apply to most any tort carried out in part during working hours under the theory that use of an office, phone, or other facilities of employment establishes that the employee was "aided in accomplishing the tort by the existence of the agency relationship." Courts have thus been leery of interpreting § 219(2)(d) too broadly, lest it "lead to a rule that makes a principal liable for all intentional torts of an agent in all circumstances." *Forrest*, 853 A.2d at 60.⁵ But that is precisely what the Court's ruling does. While the decision declared that Lindevaldsen and Hyden "[e]ach acted using the authority and resources she had as an employee of Liberty University," Order at 70, the only supporting allegations are that the two occasionally used their University email and telephones and that Hyden passed messages from her father to Lindevaldsen at the workplace. There are no allegations or facts that could establish that the unique authority or opportunities provided by their employment with Liberty University played a facilitating role in the alleged tort (in contrast to the cases of the workplace supervisor, police officer, or hotel manager).

Simply stated, § 219(2)(d) "requires the existence of something more than the employment relation itself." *Burlington Industries*, 524 U.S. at 760. In *Burlington Industries*, the Supreme Court explained that the "aided in" standard would be satisfied where sexual harassment was carried out in connection with a supervisor's tangible employment action,

⁵ As the Vermont Supreme Court noted in *Forrest*, "application of § 219(2)(d) to a sexual assault on a citizen by a law enforcement officer is probably the strongest application of the core principles behind § 219(2)(d)," 853 A.2d at 67, and yet the Court still struggled to approve the extension of § 219(2)(d) there. The fact that *Forrest* was decided by the Court in a 3-2 split, and that the majority went to great lengths to justify application of § 219(2)(d) to the facts before it and "adopt a rationale as narrow as possible," *id.* at 66, demonstrates that the Court would not approve the application of § 219(2)(d) in circumstances where an employee merely uses the facilities offered by his or her employment in carrying out an intentional tort.

because “when a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.” *Id.* at 761-62. Not so here: the alleged misconduct could just as easily have been carried out by Lindevaldsen and Hyden outside of their employment with Liberty University. Because the employment relationship with Liberty University itself played no unique facilitating role in the alleged tort, there can be no liability under § 219(2)(d), and the Court should reconsider its denial of the University’s Rule 12(b)(6) Motion.

II. If the Court Does Not Reconsider, the Circumstances Strongly Warrant Certification of the Order for Interlocutory Appeal and Grant of a Stay.

Section 1292(b) permits district courts to certify an order for immediate interlocutory appeal when the order (a) involves a “controlling question of law” (b) as to which there is “substantial ground for difference of opinion” and (c) “an immediate appeal from the order may materially advance the termination of the litigation.” “When a ruling satisfies these criteria and ‘involves a new legal question or is of special consequence,’ then the district court ‘should not hesitate to certify an interlocutory appeal.’” *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)). Certification is particularly appropriate where the issue “goes beyond the concerns of the immediate litigants and involves a significant matter of public interest and importance.” *Lechner v. Nat’l Benefit Fund for Hosp. & Health Care Emps.*, 512 F. Supp. 1220, 1222 (S.D.N.Y. 1981) (certifying decision for interlocutory appeal sua sponte); *see also Fox News Network, L.L.C. v. Time Warner, Inc.*, No. 96-CV-4963, 1997 WL 271720, at *1 (E.D.N.Y. May 16, 1997) (holding issue that “pose[d] important public policy questions under state and federal law” appropriate for interlocutory appeal).

In the event that the Court does not grant reconsideration of its Order, Liberty University

seeks certification of two issues for appeal—the legal sufficiency of Plaintiffs’ claims for vicarious liability against the University and the adequacy of Plaintiffs’ jurisdictional showing—that readily satisfy the statutory criteria and present importance public policy issues of broader application. Liberty University therefore requests that the Court amend its Order to permit appeal on these important questions. The University also asks the Court to stay discovery during the pendency of appeal.

A. The Existence of Personal Jurisdiction and the Legal Sufficiency of Plaintiffs’ Claims Against the University Are “Controlling” Questions of Law.

The two questions Liberty University seeks to certify are threshold issues that will determine whether the University is properly a party to this litigation going forward. Because of the importance of these issues to the conduct of this case—as well as their significance for all American colleges and universities—they unmistakably meet the definition of “controlling” questions of law.

To be deemed a “controlling” question of law for purposes of § 1292(b), “the resolution of an issue need not necessarily terminate an action,” nor need it “affect a wide range of pending cases.” *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990). Rather, “[i]t only has to be an issue that could materially affect the outcome of the case.” *N.Y. Racing Ass’n, Inc. v. Perlmutter Publ’g, Inc.*, 959 F. Supp. 578, 583 (N.D.N.Y. 1997) (certifying order for interlocutory appeal where it related to issues “central to the Court’s analysis” and thus was likely to materially affect the outcome of the case). Relevant factors include whether “reversal of the district court’s opinion could result in dismissal of the action; reversal of the district court’s opinion, even though not resulting in dismissal, could significantly affect the conduct of the action, or; the certified issue has precedential value for a large number of cases.” *SEC v. Credit Bancorp, Ltd.*,

103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000).

Questions of personal jurisdiction and the legal sufficiency of the pleadings are precisely the type of issue appropriate for interlocutory appeal, given that their disposition necessarily may result in the end of the litigation as to the moving party. Courts have regularly recognized the suitability of personal jurisdiction determinations for § 1292 certification. *See Alexander & Alexander Servs., Inc. v. Lloyd's Syndicate 317*, 925 F.2d 44, 45 (2d Cir. 1991) (appeal from ruling exercising personal jurisdiction over third-party defendant); *Klinghoffer*, 921 F.2d at 24 (observing that courts “have granted certification when the order involved issues of in personam and subject matter jurisdiction”); *United Rope Distributors, Inc. v. Kimberly Line*, 785 F. Supp. 446, 453 (S.D.N.Y. 1992) (“The denial of a motion to dismiss on the ground of lack of in personam jurisdiction is properly certifiable pursuant to the statute.”); *see also* 16 Charles Alan Wright et al., *Federal Prac. & Proc.* § 3930 (“Among the categories of rulings that may be obviously suited for interlocutory appeal within the general criteria of the statute are those rejecting . . . challenges to . . . personal jurisdiction . . .”).⁶

Likewise, “[a]ppeals have frequently been allowed on the question whether the plaintiff has stated a claim if the problem is a difficult one of substantive law,” as here. Wright, 16 Fed. Prac. & Proc. § 3931; *see also, e.g., Barbera v. Smith*, 836 F.2d 96, 98 (2d Cir. 1987) (reversing denial of motion to dismiss for failure to state a claim on interlocutory appeal from district court pursuant to § 1292(b)); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (same); *Boland v. Consol. Multiple Listing Serv., Inc.*, 868 F. Supp. 2d 506, 516, 519 (D.S.C. 2011) (certifying order denying Rule 12(b)(6) motion to dismiss for immediate appeal where the

⁶ In *Donatelli v. National Hockey League*, 893 F.2d 459 (1st Cir. 1990), for example—a case which, although concerning general and not specific jurisdiction, presented similar complexities to the present case—the First Circuit accepted interlocutory appeal to review (and ultimately reverse) a district court’s exercise of personal jurisdiction over the NHL based on the imputed forum contacts of one of the league’s constituent hockey clubs.

sufficiency of the pleadings was a “close question[] of law”).

If Liberty University prevails on either of the two issues presented, the University would be dismissed from the case going forward. While a successful appeal would not terminate the litigation—Plaintiffs would be left to proceed on their claims against other Defendants—as discussed above, a question need not be dispositive of the entire case to be “controlling.” *Klinghoffer*, 921 F.2d at 24; *see also, e.g., United Rope Distributors*, 785 F. Supp. at 453 (certifying for appeal decision finding personal jurisdiction over a single party). Dismissal of the University would remove from the litigation an entire set of legal and factual issues, and would significantly streamline the case for future motion practice and trial. That—along with the significance of the issues raised here to other educational institutions, as discussed below—suffices to make these questions “controlling.” *See N.Y. Racing Ass’n*, 959 F. Supp. at 583 (issue of law is controlling if it materially affects the outcome of litigation); *Wright*, 16 Fed. Prac. & Proc. § 3930 (suggesting that a question should be deemed controlling “if interlocutory reversal might save time for the district court and expense for the litigants”).

B. The Court’s Personal Jurisdiction and Vicarious Liability Rulings Present Substantial Grounds for a Difference of Opinion.

Determining whether a substantial ground for difference of opinion exists requires the Court to “analyze the strength of the arguments in opposition to the challenged ruling.” *N.Y. Racing Ass’n, Inc. v. Perlmutter Publ’g, Inc.*, 959 F. Supp. 578, 583 (N.D.N.Y. 1997). “Substantial ground for difference of opinion may arise, where . . . the issue is ‘difficult and of first impression,’” among other things. *Edo Corp. v. Newark Ins. Co.*, No. CIV. H-90-951 AHN, 1996 WL 684395, at *3 (D. Conn. May 22, 1996) (quoting *Klinghoffer*, 921 F.2d at 25). The inquiry does not require that the Court entertain doubt about the correctness of its decision, but merely to recognize “room for difference of opinion.” *See N.Y. Racing Ass’n*, 959 F. Supp. at

584 (certifying decision for appeal notwithstanding fact that “the Court [wa]s confident that it ha[d] come to the proper conclusions”). Here, because the Court’s rulings rest on novel applications of personal jurisdiction and vicarious liability jurisprudence, there unquestionably exist substantial grounds for a difference of opinion.

1. The Court’s vicarious liability analysis departs from well settled law and therefore gives rise to substantial grounds for a difference of opinion.

As discussed above, under Vermont law there can be no vicarious liability for an employee’s actions within the scope of employment absent control by the employer. Because the Court’s decision recognizes a claim for vicarious liability absent any allegation of control, and applies an alternative theory under § 219(2)(d) of the Restatement that is wholly inapposite here, it constitutes a significant alteration of existing law. Just as this departure from established law warrants reconsideration on the bases set forth above, it also provides a substantial ground for difference of opinion justifying interlocutory appeal.

2. The Court’s exercise of specific jurisdiction over Liberty University based on contacts imputed from an independent entity, with no evidence that the University directed that entity’s in-forum conduct, lacks any basis in existing personal jurisdiction jurisprudence and thus presents substantial grounds for difference of opinion.

The Court’s rationale for the exercise of specific jurisdiction over Liberty University likewise goes far beyond the boundaries of existing precedent. Interlocutory appeal has been found appropriate in other cases in which courts have adopted novel theories of personal jurisdiction or extended existing jurisprudence to new fact patterns. *See, e.g., Cmty. Tr. Bancorp., Inc. v. Cmty. Tr. Fin. Corp.*, No. 7:10-cv-062, 2011 WL 2020246 at *4 (E.D. Ky. May 24, 2011) (granting interlocutory review on the issue of personal jurisdiction because there was substantial ground for differences of opinion as to whether the defendants’ act of sending passwords to Kentucky residents to provide them with online banking services established a

prima facie case of personal jurisdiction), *rev'd, reh'g and reh'g en banc denied*, 692 F.3d 469 (6th Cir. 2012) (exercise of personal jurisdiction over the defendants did not comply with due process); *Wellons, Inc. v. Sia Energoremonts Riga, Ltd.*, No. 3:13-CV-05654, 2013 WL 5913266, at *2 (W.D. Wash. Nov. 4, 2013) (granting interlocutory appeal because factors such as “the electronic communications, future obligations . . . and the parties’ respective locations increase the complexity of applying the appropriate legal standards and make this a somewhat novel case” that “raises legal issues not specifically addressed by prior precedent”). Because there is substantial ground for dispute as to whether forum contacts can be imputed under the novel circumstances here, interlocutory appeal is appropriate.

The Supreme Court has recognized that jurisdictional contacts may be imputed to an entity that does not itself conduct any activities in the forum. Those decisions, however, confirm that the exercise of jurisdiction must nonetheless rest on a finding that the defendant “purposefully availed” itself of the forum. Where contacts are imputed from another entity, this means that the defendant must “direct” the actions of the in-forum actor in order to satisfy constitutional standards. *See 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)).

This fundamental proposition—that imputation of jurisdictional contacts requires a showing that the out-of-state defendant directed the in-forum conduct at issue—was recently reaffirmed in *Bertolini-Mier v. Upper Valley Neurology Neurosurgery, P.C.*, No. 5:16-cv-35,

2017 WL 4081901 (D. Vt. Sept. 13, 2017). The question there, in the context of a malpractice suit, was whether the court had specific jurisdiction over a New Hampshire hospital based on evidence that radiologists employed by Valley Radiologists, an independent New Hampshire professional association that interpreted diagnostic imaging studies for the hospital, had read certain radiologic studies from a home office and a hospital in Vermont. The court, observing that “[t]he important question for present purposes is whether [the hospital] *directed* Valley Radiologists or its personnel to take action in Vermont with respect to [plaintiff’s] imaging,” found that there was no evidence that the hospital controlled the radiologists’ actions in Vermont “in any way relevant to [plaintiff’s] treatment.” *Id.* at *5 (“At best, Plaintiffs have shown that [the hospital] knew (and facilitated) that some of the images . . . might be read by Valley Radiologists personnel at other locations, such as the [Vermont] hospital where Valley Radiologists personnel also worked, or at the radiologists’ homes.”). The court thus held that there was no basis for specific jurisdiction over the hospital—a decision that accords with the result reached by many other federal courts in analogous circumstances.⁷

Here, the Court’s decision confirms that its exercise of jurisdiction over Liberty University is premised on the imputation of contacts from Liberty Counsel based on the purportedly “shared mission and views of the organizations’ employees with respect to same-sex couples’ rights, as well as those employees’ use [of] Liberty University’s resources for purposes

⁷ See, e.g., *Winne v. Nat’l Collegiate Student Loan Trust 2005-1*, No. 1:16-cv-00229-JDL, 2017 WL 3573813, at *7 (D. Me. Aug. 17, 2017) (imputation of jurisdictional contacts not justified where there was no indication defendant at issue exercised the “type of control over the actions of the other Defendants that would justify the imputation of their contacts with Maine”); *In re North Sea Brent Crude Oil Futures Litig.*, No. 13-md-02475, 2017 WL 2535731, at *8 (S.D.N.Y. Jun. 8, 2017) (no specific jurisdiction over foreign defendant where there was inadequate evidence that defendant controlled the in-forum actions of related entities); *Katz v. Spiniello Cos.*, 244 F.Supp.3d 237, 254 (D. Mass. 2017) (stating that even where there is a “confused intermingling of activity of [the two corporations] engaged in a common enterprise,” the contacts of one will not be imputed to the other absent the “significant exercise of control” and “evidence of active and direct participation” of one in the affairs of the other (quotations omitted)). Compare *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”).

of litigating Lisa Miller’s case in Vermont.” Order at 88; *see also id.* at 87 n.18 (noting that jurisdictional holding does not rest on Liberty University’s employment relationship with Rena Lindevaldsen and Mathew Staver). There is no suggestion—nor certainly any evidence or allegation—that Liberty University actually directed or could have directed the actions of Liberty Counsel or its attorneys Rena Lindevaldsen and Mathew Staver in their representation of Lisa Miller in the Vermont custody action. As established by Liberty University’s uncontested affidavit evidence, the University and Liberty Counsel are legally distinct entities that were founded at different times, are headquartered in different states, and are governed by separate boards of directors; Liberty Counsel has its own staff of attorneys, legal assistants, and administrative staff; and Liberty University has had no input into or control over Liberty Counsel’s cases or management. *See* Motion to Dismiss (Doc. 237) at 31, 33-34 (citing supporting affidavits).

The correctness of the Court’s imputation of contacts on these facts is therefore subject to substantial difference of opinion on at least two grounds. First, it is doubtful that the *Daynard* and *Mansfield Heliflight* decisions on which the Court relies are good law, at least to the extent they suggest that contacts may be imputed to an out-of-state defendant without a showing that the defendant directed the in-forum activity that gives rise to jurisdiction. As discussed, other federal courts have held firm in requiring such a showing, even in situations involving companies with a formal legal relationship (as in the case of a wholly-owned subsidiary). *See, e.g., Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1025 (9th Cir. 2017) (no specific jurisdiction over defendant based on wholly-owned subsidiary’s in-forum activities where plaintiffs “neither allege[d] nor otherwise show[ed] that YMC had the right to control YMUS’s activities in any manner at all”). It would be surpassingly odd to hold that two entities with *no*

such formal legal relationship are subject to a more relaxed analysis for imputation of jurisdictional contacts—and, indeed, such a holding would contravene the Supreme Court’s insistence on a showing, for purposes of personal jurisdiction, that each defendant “purposefully availed” itself of the forum.

Second, even if *Daynard* and *Mansfield Heliflight* are valid authority, they presented entirely distinct facts from those here. Both cases 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, and the plaintiffs relied on the appearance of a joint enterprise in their dealings with the defendants. Whether or not the legal theory in those cases was explicitly one of agency by estoppel (a proposition the Court disputes in its decision), that was the unmistakable thrust of the opinions. The extension of *Daynard* and *Mansfield Heliflight* to the facts of this case, where Plaintiffs do not allege they relied on or were harmed in any fashion by an understanding that the University and Liberty Counsel were commonly responsible for Lisa Miller’s representation in the custody dispute—and where the facts that purportedly establish that the organizations were “intertwined,” including Rena Lindevaldsen’s use of the Lisa Miller case in her teaching, post-date the events on which liability is premised—would represent a significant change in the law of personal jurisdiction. Given the uncharted ground broken by the Court’s decision, there can be no question that it presents substantial grounds for a difference of opinion.

C. Certification of the Order on the University’s Motion to Dismiss Will Materially Advance the Ultimate Termination of the Litigation.

Lastly, granting Liberty University’s motion and certifying the rulings on personal jurisdiction and vicarious liability will materially advance the termination of the litigation. As

noted with respect to the “controlling question” criterion,⁸ a resolution of either issue in the University’s favor would help simplify this litigation, removing a party and an entire set of factual and legal questions from the case. *See Lempel & Son Co., Inc. v. Boden*, No. 90 CIV. 0272 (CSH), 1993 WL 300051, at *1 (S.D.N.Y. July 30, 1993) (considering reduction of issues for trial in holding that immediate appeal would materially advance ultimate termination). It is well established that appeal of an issue may advance the ultimate termination of litigation by removing one defendant from the action, even if the appeal would not end the entire case. *See, e.g., New York v. Gutierrez*, 623 F. Supp. 2d 301, 317-18 (E.D.N.Y. 2009) (holding that an interlocutory appeal would materially advance the termination of litigation because a successful appeal would remove one defendant from the case). The Court should thus find and certify that appeal on the questions of personal jurisdiction and vicarious liability would materially advance the termination of this litigation.

D. The Court’s Decision Raises Issues of Public Policy that Militate in Favor of Certification.

Beyond the statutory criteria for certification, the issues at hand are appropriate for appeal in light of their broader public policy implications. *See Lechner v. Nat’l Benefit Fund for Hosp. & Health Care Emps.*, 512 F. Supp. 1220, 1222 (S.D.N.Y. 1981) (finding questions that “involve[] a significant matter of public interest and importance” appropriate for interlocutory appeal). As the University highlighted in its Motion to Dismiss, it is commonplace for college and university faculty, particularly in professional schools, to carry on private engagements outside of their academic duties, as Rena Lindevaldsen did here. The practice has considerable social benefit, making high-quality professionals available to charitable causes and public policy

⁸ While “the question of whether there is a controlling issue of law is distinct from the question of whether certification would materially advance the ultimate termination of the litigation, in practice the two questions are closely connected.” *SEC v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 228 (S.D.N.Y. 2000).

organizations, and also allows professors to stay in touch with the practical realities of their fields. To hold a university potentially liable for a professor's outside engagements where there is no allegation that the university had any right of controlling that work, and to allow it to be haled into a far-flung jurisdiction with which it has no relevant contacts, would inevitably chill this practice. The outcome in this case is thus of significant interest to the higher education community generally—and it is important that the questions raised by the Court's ruling be determined as quickly as possible and not be allowed to linger unresolved for years while this case proceeds.

E. Staying Discovery Against Liberty University During an Interlocutory Appeal Is Appropriate and Would Promote Judicial Efficiency.

If the Court grants Liberty University's motion and certifies the Order for appeal, it should also stay discovery against the University during the pendency of any appeal. If the University is successful on either question, it would be dismissed from this action altogether—and, indeed, a ruling in favor of the University would establish that it should never have been joined to this suit and subject to discovery in the first place. Staying discovery is thus just and will promote efficiency in the litigation of this action.

The traditional factors to be considered in granting or denying a stay weigh strongly in favor of staying discovery here: (1) whether an applicant for a stay has made a strong showing of likelihood of success on the merits; (2) whether the applicant would be irreparably injured absent a stay; (3) whether the stay would “substantially injure” another party; and (4) whether the stay is in the public interest. *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). As set forth above and in the University's prior filings, Plaintiffs have failed to meet their burdens of pleading claims for vicarious liability and establishing a prima facie basis for the exercise of jurisdiction over the University under existing law. The Court's findings in favor of

Plaintiffs on those issues rest on novel extensions of the law, and, given established precedents, it is likely that the University will prevail on one or both issues on appeal. The University would be injured absent a stay by being forced to expend further resources on discovery where there is no valid basis for the University to be joined as a party. Conversely, a stay that applies to the University alone would do Plaintiffs little harm; Plaintiffs may seek discovery from the other Defendants, who include the relevant University employees and the entity that actually employed Rena Lindevaldsen with respect to the Miller case. Finally, a stay is in the public interest given the considerable public policy concerns implicated by subjecting a university to suit—and discovery—based on the outside activities and professional engagements of its employees.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7(a)(6), and in light of the importance of the questions raised, Liberty University requests that the Court schedule oral argument on its Motions at the earliest available date.

CONCLUSION

It is apparent that, in the flurry of briefing coinciding with Liberty University's Motion to Dismiss, the Court overlooked key principles of law governing vicarious liability. Vermont law simply does not recognize a claim for vicarious liability on the allegations raised here; the Court should therefore reconsider its Order and grant the University's Motion to Dismiss. If reconsideration is not granted, the novel nature of the legal theories adopted by the Court in denying Liberty University's Motion to Dismiss, coupled with the significance of the Court's ruling as a matter of public policy, make the Order uniquely appropriate for immediate review by interlocutory appeal, and the University requests that, in the alternative, the Court amend the September 29, 2017 Order to certify the rulings on personal jurisdiction and vicarious liability

for § 1292(b) appeal. Liberty University further asks the Court to grant it a stay of discovery pending appeal.

DATED at Burlington, Vermont, this 9th day of October, 2017.

DINSE, KNAPP & McANDREW, P.C.

/s/ Ritchie E. Berger, Esq.
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Attorney for Liberty University
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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 October 9, 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.