UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

DEFENDANTS LIBERTY COUNSEL AND RENA M. LINDEVALDSEN'S REPLY IN SUPPORT OF MOTION TO CERTIFY INTERLOCUTORY APPEAL AND TO STAY PENDING APPEAL

Pursuant to L.R. 7(a)(5), Defendants, Liberty Counsel, Inc. ("Liberty Counsel") and Rena M. Lindevaldsen ("Lindevaldsen"), by and through the undersigned counsel, hereby file this Reply in Support of their Motion to Certify Interlocutory Appeal and Stay Pending Appeal (dkt. 280) and Memorandum in Support. (Dkt. 280-1, "Memo").

INTRODUCTION

In her Response in Opposition to Defendants' Motion to Certify Interlocutory Appeal (dkt. 282, "Opp."), Jenkins yet again trots out the same tired argument that Liberty Counsel and Lindevaldsen are seeking to re-litigate issues that have been decided "several times" by this Court. (Opp. at 17). Curiously, Jenkins stands aghast at the notion that Liberty Counsel and Lindevaldsen would "leap to the extraordinary request" that this Court certify its entire Order for interlocutory appeal, as if Liberty Counsel and Lindevaldsen have made a request unknown to federal law. (*Id.* at 10). Yet, Jenkins' visceral objection to Liberty Counsel and Lindevaldsen's Motion is remarkably ill-conceived. Indeed, interlocutory "appellate jurisdiction applies to the *order*

certified to the court of appeals, and is not tied to the particular question." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) (emphasis original); *see also Isra Fruit Ltd. v. Agrexco Agr. Export Co. Ltd.*, 804 F.2d 24, 25 (2d Cir. 1986) ("Section 1292 authorizes certification of *orders* for interlocutory appeal, not certification of *questions*) (emphasis original). Thus, Liberty Counsel and Lindevaldsen's request that this Court certify its Order is precisely what is contemplated by 28 U.S.C. § 1292(b), and Jenkins' objection is without merit.

Jenkins' misunderstanding of Section 1292, however, is but one of the erroneous assertions in her Opposition. Jenkins also ignores long-standing precedent in the Second Circuit concerning the preference for interlocutory appeals when fundamental jurisdictional questions are presented; attempts to thrust Liberty Counsel and Lindevaldsen into discovery when the fundamental and controlling questions of law in this Court's Order are subject to substantial ground for disagreement; and recites an aria of how Jenkins will be prejudiced by not being able to force these two defendants into discovery while such constitutionally significant questions are resolved. This Court should reject Jenkins' erroneous contentions, certify its order for interlocutory appeal, and stay the proceedings pending interlocutory review.

ARGUMENT

I. LIBERTY COUNSEL AND LINDEVALDSEN SATISFY THE REQUIREMENTS FOR INTERLOCUTORY APPEAL.

This Court's jurisdictional findings constitute controlling issues of law warranting interlocutory review. Jenkins' misrepresentations concerning the substantial grounds for disagreement with this Court's Order fail as a matter of law. Interlocutory review is appropriate when reversal would ultimately advance the termination of litigation, such as where several defendants would be dismissed from the litigation and therefore diminish the time required for discovery and a trial on the merits.

A. This Court's Jurisdictional Findings Constitute Controlling Issues Of Law.

Jenkins remarkably contends that there are no controlling issues of law presented by this Court's Order. (Opp. at 12).[1] This assertion ignores long-standing precedent from the Second Circuit. Indeed, questions of law are the textbook examples of matters appropriate for interlocutory review. *See, e.g.*, *Cal. Pub. Emps. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004) (interlocutory appeals are "used to challenge legal determinations"); *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627 (2d Cir. 1991) (questions of law are subject to interlocutory certification); *Gingras v. Rosette*, No. 5:15-cv-101, 2016 WL 4442792 (D. Vt. Aug. 22, 2016) (certification is appropriate for issues involving pure questions of law). Where, as here, the petition for interlocutory review involves pure questions of law, interlocutory certification is warranted.

1. Straightforward Application of Jurisdictional Questions Are Controlling Questions of Law Appropriate for Interlocutory Review.

Jenkins contends that matters of jurisdiction are "ill-suited" for interlocutory review. (Opp. at 13). This is fundamentally incorrect. As noted, pure questions of law, such as those pertaining to jurisdictional determinations, are the primary example of those matters ripe for interlocutory review. Indeed, there can be no dispute that the question of whether a plaintiff has made the requisite prima facie showing of constitutionally sufficient minimum contact by defendant with the forum state is a pure question of law. *See, e.g.*, *Spiegel v. Schulman*, 604 F.3d 72, 76 (2d Cir. 2010) (whether a plaintiff has satisfied the constitutionally requisite prima facie showing of

[1] Jenkins also erroneously contends that this Court's determination on interlocutory review is essentially "unreviewable." (Opp. at 12). As this Court is aware, decisions concerning vital constitutional matters such as the due process implications of exercising personal jurisdiction over a defendant without sufficient contacts with the forum is unquestionably reviewable, whether by interlocutory appeal or mandamus. *See, e.g.*, *In re Roman Catholic Diocese of Albany, N.Y.*, 745 F.3d 30 (2d Cir. 2014) (issuing writ of mandamus **to this Court** to confine it to the lawful exercise of its prescribed jurisdiction).

sufficient minimum contacts for the lawful exercise of personal jurisdiction is a pure question of law); *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986) (same).

Undoubtedly, this is why the Second Circuit has frequently permitted interlocutory appeals when crucial constitutional matters of personal jurisdiction are involved. *Klinghoffer v. S.N.C. Achille Lauro Ed. Altri-Gestione Motonave Arcille Lauro in Amministrazione Straordianiria*, 921 F.2d 21, 24 (2d Cir. 1990); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1330 (2d Cir. 1972). This practice is universally accepted in other circuits as well. *See, e.g.*, *Cmty. Trust Bancorp, Inc. v. Cmty. Trust Fin. Corp.*, 692 F.3d 469 (6th Cir. 2012) (entertaining interlocutory appeal under Section 1292(b) for order denying a motion to dismiss for lack of personal jurisdiction); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002) (same); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) (same); *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989) (same); *Nehemiah v. Athletics Congress of U.S.A.*, 765 F.2d 42 (3d Cir. 1986); *Army Time Publ'g Co. v. Watts*, 730 F.2d 1398 (11th Cir. 1984) (same); *Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984) (same); *Mid-America, Inc. v. Shamaiengar*, 714 F.2d 61 (8th Cir. 1983) (same); *Interstate Indus., Inc. v. Barclay Indus., Inc.*, 540 F.2d 868 (7th Cir. 1976) (same); *Rebozo v. Washington Post Co.*, 515 F.2d 1208 (5th Cir. 1975) (same).

Indeed, even Jenkins' own authorities recognize the propriety of interlocutory reviews in matters involving personal jurisdiction. (Opp. at 13) (citing. *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863 (2d Cir. 1996)). In *Koehler*, the Second Circuit specifically noted that it has "permitted an appeal to be taken when the interlocutory order involves issues of *in personam* jurisdiction." *Koehler*, 101 F.3d at 866. While the Second Circuit declined to entertain a jurisdictional interlocutory appeal in *Koehler*, the circumstances of that matter were much different. *Id.* It was

not that matters of personal jurisdiction are "ill-suited for interlocutory review," as Jenkins claims. (Opp. at 13). Rather, the Second Circuit declined to entertain the appeal because it was faced with a situation where a remand for additional litigation was going to be required as to the petitioning defendant regardless of any appellate decision. *Koehler*, 101 F.3d at 866 ("[E]ither way we rule, a remand will be required" because the question required "a thorough examination of the facts").

Here, no remand will be required. The issue of Jenkins' allegations of personal jurisdiction do not require any thorough examination of the record. Indeed, Jenkins' factual assertions are the same today, as they were when she first filed her original complaint in 2012. (*See* Dkt. 240, at 19). The pure legal question of whether such threadbare allegations can warrant subjecting Liberty Counsel and Lindevaldsen to jurisdiction in this forum is thus a straightforward application of settled jurisdiction precedent. Interlocutory review is appropriate and warranted.

2. Jenkins' Contention that Timeliness Issues are Not Controlling Questions of Law For Interlocutory Review Lacks Merit.

Jenkins contends that Liberty Counsel and Lindevaldsen's timeliness arguments are not properly suited for interlocutory review because they are not controlling question of law. (Opp. at 13-14). This argument is devoid of merit for several reasons. Statute of limitations issues are pure questions of law for purposes of interlocutory review, and Jenkins' contention that this Court offered multiple grounds for its decision is factually incorrect.

First, there can be no dispute that statute of limitations and timeliness issues are questions of law. *See Bradt v. United States*, 221 F.2d 325, 325 (2d Cir. 1955). Because timeliness issues involve pure questions of law, courts of appeals have routinely entertained them on interlocutory appeal. *See, e.g.*, *S.E.C. v. Rind*, 991 F.2d 1486 (9th Cir. 1993); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990); *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686 (3d Cir. 1990); *Carothers v. Rice*, 633 F.2d 7 (6th Cir. 1980). Courts in the Second Circuit have also routinely

certified questions concerning statute of limitations defenses to the Second Circuit. *See, e.g.*, *United States v. Sampson*, 122 F. Supp. 3d 11, 18 (E.D.N.Y. 2015) (determination of whether a statute of limitations had run is not a factual question, but a question of law); *Ellis v. Gen. Revenue Corp.*, No. 3:09-cv-1089 (CFD), 2011 WL 26669155, *1 (D. Conn. July 6, 2011) ("the statute of limitations question is a controlling question of law"); *id.* (certifying statute of limitations issue to the Second Circuit for interlocutory review under Section 1292(b)); *In re Wingspread Corp.*, 186 B.R. 803, 806 (S.D.N.Y. 1995) ("The issue of when the two-year statute of limitations commences is a question of law."); *id.* (certifying interlocutory appeal concerning the commencement of the statute of limitations). Thus, Jenkins' contention that Liberty Counsel and Lindevaldsen's timeliness defenses are not proper subjects of interlocutory appeal is demonstrably fallacious.

Moreover, Jenkins is factually wrong when she claims that this Court based its timeliness decision on several grounds, so there can be no controlling issue of law. (Opp. at 14). This Court's timeliness decision rested upon one ground only: that the statute of limitations did not accrue when Liberty Counsel and Lindevaldsen assert that it did. (Dkt. 277, at 72-78). The only other issue pertaining to Liberty Counsel and Lindevaldsen's statute of limitations defenses dealt with the relation back doctrine, and this Court explicitly declined to reach the issue. (*Id.* at 75 n.14) ("the Court need not reach the issue" of relation back under Rule 15). Thus, there were not multiple grounds upon which this Court based its timeliness decision, and even under Jenkins' own authorities, the question of law is controlling.[2]

[2] Jenkins' contention that multiple grounds for a decision preclude it from being a controlling question of law is also dubious, at best. Jenkins pulls a single sentence out of the Second Circuit's decision in *Casey v. Long Island R. Co.*, 406 F.3d 142 (2d Cir. 2005), a decision having nothing to do with a statute of limitations defense. *Id.* at 148. In the abundance of precedent concerning interlocutory appeals under Section 1292(b), the analysis of whether a question of law is controlling has nothing to do with whether there were multiple grounds upon which the court based its decision. The dispositive inquiry for whether a question of law is controlling is whether it would

3. Matters of Statutory Construction and Interpretation Are Pure Questions of Law.

Jenkins does not contest, and therefore concedes, that the issues surrounding this Court's determination of Jenkins' claims under 42 U.S.C. § 1985(3) are controlling questions of law. (Opp. at 12-13). Her concession is understandable, though, given that there can be no question that such issues are controlling. Indeed, matters of statutory construction and statutory interpretation are indisputably pure questions of law. *See, e.g.*, *United States v. DiCristina*, 726 F.3d 92, 96 (2d Cir. 2013) (a district court's conclusions regarding statutory provisions, "including those interpreting the meaning of a statute" are pure questions of law); *United States v. Powell*, 404 F.3d 678, (2d Cir. 2005) (proper interpretation of a statute is a question of law); *Dunlop Tire & Rubber Corp. v. Interstate Commercer Comm'n*, 724 F.2d 349, 350 (2d Cir. 1983) (same). Thus, the questions surrounding this Court's holding on the Section 1985(3) claims are controlling questions of law.

4. This Court's Determinations on Liberty Counsel and Lindevaldsen's Rule 12(b)(6) Arguments are also Questions of Law, Not Fact.

Jenkins also does not contest, and therefore concedes, that the issues surrounding Liberty Counsel and Lindevaldsen's Rule 12(b)(6) arguments are controlling questions of law. (Opp. at 12-13). This is understandable, because a question involving "the adequacy of a pleading is not a factual issue but the usual Fed. R. Civ. P. 12(b)(6) question of law." *Adelphia Recovery Trust v. Bank of America, N.A.*, No. 05 Civ. 9050(LMM), 2007 WL 2890220, *2 (S.D.N.Y. Sept. 28, 2007); *see also Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 334 (7th Cir. 2012) ("Dismissals under Rule 12(b)(6) are questions of law."); *Nealy v. Hamilton*, 837 F.2d 210, 211

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lead to the ultimate termination of the action, *Klinghoffer*, 921 F.2d at 24, "significantly affect the conduct of the case," *Ryan, Beck & Co., LLC v. Fakih*, 275 F. Supp. 2d 393, 396 (E.D.N.Y. 2003), or have a large impact on the case and precedential value for other cases. *Id.* Not one of these considerations discusses the number of grounds upon which the appealed decision is based.

(5th Cir. 1988) ("District court dismissals for failure to state a claim upon which relief can be granted are questions of law.").

B. Jenkins' Misrepresentations Concerning The Substantial Grounds For Differing With This Court's Opinion Fail As A Matter Of Law.

Jenkins misrepresents the nature of Liberty Counsel and Lindevaldsen's arguments concerning whether there is a substantial basis for differing with this Court's Order on many issues. (Opp. at 14) (arguing that neither Defendants' disagreement with the Court's Order, nor the novelty of the question alone are grounds for disagreement). This argument misses the mark. First, while novelty alone is not sufficient to provide grounds for disagreement, novelty is an important consideration in such analysis. *See Klinghoffer*, 921 F.2d at 25 (noting that questions of first impression certainly fall within the category of those upon which substantial grounds for disagreement may exist). Thus, this Court's determination on matters that are unquestionably novel in the Second Circuit provides grounds for disagreement.

Moreover, Liberty Counsel and Lindevaldsen presented much more than mere novelty as the basis upon which there can be substantial difference of opinion with this Court. As numerous courts in the Second Circuit have held, when a moving party can show that there is conflicting authority on the question at issue, substantial grounds for disagreement exist. *See, e.g.*, *Sussman v. I.C. Sys., Inc.*, No. 12-CV-0181(ER), 2013 WL 5863664, *2 (S.D.N.Y. 2013) (if courts across the nation have come to different conclusions, substantial grounds for difference of opinion exists for interlocutory appeal); *U.S. ex rel. Colucci v. Beth Israel Med. Ctr.*, No. 06 Civ. 5033(DC), 2009 WL 4809863, *1 (S.D.N.Y. 2009) ("Courts have found substantial ground for difference of opinion where there is conflicting authority on the issue or the issue is a particularly difficult one and one of first impression in the Second Circuit."); *In re WorldCom, Inc. v. Securities Litig.*, No. 02 Civ. 3288, 2013 WL 22953644 (S.D.N.Y. Dec. 16, 2003) (certification is appropriate where

handful of courts outside jurisdiction have reached contrary conclusions and other cases indicate doubt about conclusion reached by district court).

Here, Liberty Counsel and Lindevaldsen have plainly demonstrated that there is authority conflicting with this Court's Order. (Memo at 6) (noting that this Court's findings regarding the novel claim of custodial interference in Vermont is contrary to the **unanimous conclusion** of other courts considering such issues); (*Id.* at 8-9) (noting that this Court's determination regarding personal jurisdiction under the so-called "effects test" is contrary to binding precedent and in direct conflict with decisions across the country); (*Id.* at 9-11) (noting that this Court's findings concerning Jenkins' Section 1985(3) claims are contrary to the precedent of numerous courts across the country); (*Id.* at 11) (noting that this Court's determinations concerning Liberty Counsel and Lindevaldsen's statute of limitations argument is contrary to numerous court decisions).

Jenkins claims that such disagreement is merely re-litigating points already rejected by this Court. (Opp. at 14). But, as this Court itself has noted, certification is appropriate where – as here – there are "strong argument[s] in opposition to the Court's ruling," particularly where there are appellate courts that have reached the opposite conclusion. *Nat'l Fed'n of the Blind v. Scribd, Inc.*, No. 2:14-cv-162, 2015 WL 3454738, *2 (D. Vt. May 29, 2015) (SESSIONS, J). This is certainly true here. (*See* Memo at 6-11) (noting that numerous courts, including countless appellate decisions, have issued rulings directly contrary to this Court's holding). Moreover, this Court's rejection of Liberty Counsel and Lindevaldsen's arguments in their motions to dismiss in no way negates that substantial grounds exist for disagreement with its conclusions. *See, e.g.*, *Transport Workers Union of Am., Local 100, AFL-CIO v. N.Y. City Transit Auth.*, 358 F. Supp. 2d 347, 353 (S.D.N.Y. 2005) (where binding precedent leaves a question open to "reasonable dispute," fact that district court judge has previously rejected arguments made by party seeking appeal does not

foreclose finding that there is substantial ground for disagreement). Thus, Jenkins' contentions that there can be no grounds for disagreement with this Court's Order is plainly in error. Certification is appropriate.

C. Eliminating Numerous Defendants Advances The Ultimate Termination Of The Litigation.

Contrary to Jenkins' contentions (Opp. at 16), dismissal of Liberty Counsel and Lindevaldsen would materially advance the ultimate termination of this litigation, despite the fact that other defendants may remain. Indeed, an interlocutory appeal does not need to completely terminate litigation to "ultimately advance its termination," as advancing the ultimate termination of the action is also satisfied "when an intermediate appeal promises to advance the time for trial or **to shorten the time required for trial**." *Capital Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 551 (S.D.N.Y. 2013) (emphasis added). This is true because an interlocutory appeal resulting in the dismissal of some defendants would "result in the saving of judicial resources and otherwise avoiding protracted litigation." *Century Pac., Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 372 (S.D.N.Y. 2008).

Here, there can be little dispute that dismissal of Liberty Counsel and Lindevaldsen would save judicial resources and shorten the time required for trial. Subjecting these defendants to discovery, dispositive motion practice, and trial would necessarily complicate and lengthen all aspects of this litigation. Indeed, the nature of any potential discovery, motion practice, and trial in this matter is going to be extraordinarily burdensome to the parties and the Court. Jenkins has sued Liberty Counsel, a law firm, and Lindevaldsen, an attorney, based on nothing more than the actions they allegedly took during their representation of Lisa Miller in a state court custody matter. Any discovery propounded in such an action is likely to seek information squarely covered by attorney-client privilege and thereby be extremely invasive of such privilege. Also, any such

discovery is likely to present significant obstacles concerning work-product issues and other related matters. Permitting intrusive discovery, motion practice, and merits determination when there are numerous and significant controlling questions of law about which there are substantial grounds for difference of opinion makes little sense and throws judicial economy to the wind. Interlocutory review of these important and constitutionally mandated threshold inquires would indisputably advance the ultimate termination of the litigation, avoid protracted litigation, and save this Court's resources. Certification is appropriate.

II. GOOD CAUSE EXISTS FOR THE STAY.

1. This Court Has Not "Repeatedly" Rejected Any Arguments From Liberty Counsel and Lindevaldsen.

Jenkins contends that this Court's "repeated rejection" of Liberty Counsel and Lindevaldsen's arguments indicates that they have no likelihood of success on appeal. (Opp. at 18). This contention is erroneous both factually and as a matter of law.

First, Jenkins' contention ignores the facts of this case. This Court has only been presented with arguments from Liberty Counsel and Lindevaldsen one time, in the Motion to Dismiss that is the subject of the request to certify an interlocutory appeal. Prior to that, Liberty Counsel and Lindevaldsen have never presented **any arguments whatsoever** to this Court, on any matter, including the constitutionally requisite minimum contacts that Jenkins has the burden of demonstrating prior to subjecting them to her claims.

Second, Jenkins' contention regarding the likelihood of success on appeal ignores substantial precedent regarding what Liberty Counsel and Lindevaldsen need to show. The standard is not simply whether Liberty Counsel and Lindevaldsen would prevail on appeal, as Jenkins suggests. Instead, if the stay applicant can demonstrate that "serious questions going to the merits of the appeal" are present, and irreparable injury will occur absent a stay, then a stay pending

appeal is appropriate. *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 640 (S.D.N.Y. 2012); *see also In re A2P Antitrust Litig.*, No. 12-CV-2656, 2014 WL 4247744, *2 (S.D.N.Y. Aug. 27, 2014) (the requirements for "a stay can be satisfied if there are 'serious questions' going to the merits of the dispute" (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010)). "**A serious questions standard is particularly appropriate when a district court is asked to stay its own order**." *Id.* (emphasis added). Here, as demonstrated in Liberty Counsel and Lindevaldsen's original memorandum (Memo at 4-11) and *supra* Section I.B, there are serious questions going to the merits of this Court's decision. A stay is therefore "particularly appropriate" in this matter.

2. Whether Discovery Commences Against Other Defendants Is Irrelevant To Whether This Court Can Subject Liberty Counsel And Lindevaldsen To Such Discovery.

Jenkins also contends that Liberty Counsel and Lindevaldsen would be "heavily involved" in discovery regardless of a stay. (Opp. at 18). This contention ignores fundamental tenets of due process. Whether Liberty Counsel and Lindevaldsen might receive third party discovery requests is wholly irrelevant to whether they should be forced to submit to discovery **as parties** in a jurisdiction in which they have no constitutionally sufficient contacts. *Fox v. Boucher*, 794 F.2d 34, 37 (2d Cir. 1986). Indeed,

> [s]taying discovery pending judicial evaluation of the sufficiency of the complaint is consistent with the entire purpose of the stay provision, which is to avoid saddling defendants with the burden of discovery in meritless cases, and to discourage the filing of cases that lack adequate support for their allegations in the mere hope that the traditionally broad discovery proceedings will produce facts that could be used to state a valid claim.

Kanotwitz v. Broadridge Fin. Solutions, Inc., No. CV 13-649(DRH)(AKT), 2014 WL 1338370, *6 (E.D.N.Y. Mar. 31, 2014) (quoting *Gardner v. Major Auto. Co.*, No. 11-CV-1664(FB), 2012 WL 1230135 (E.D.N.Y. Apr. 12, 2012)).

Moreover, because Liberty Counsel and Lindevaldsen have raised serious and substantial questions going to the merits of this Court's Order, *see supra* Section I.A-B, a stay pending appeal is particularly appropriate. This is doubly true when jurisdictional issues are the subject of potentially dispositive motions. *See, e.g.*, *Boelter v. Hearst Commc'ns, Inc.*, 15 Civ. 03934(AT), 2016 WL 361554, *5 (S.D.N.Y. Jan. 28, 2016) (if arguments questioning the court's jurisdiction are not frivolous, a stay of discovery pending resolution of dispositive motions is appropriate); *Kanotwitz v. Broadridge Fin. Solutions, Inc.*, No. CV 13-649(DRH)(AKT), 2014 WL 1338370, *6 (E.D.N.Y. Mar. 31, 2014) (if a defendant makes some showing that the court's jurisdiction **may** be questionable, then a stay of discovery is appropriate pending resolution of defendant's potentially dispositive motion); *Gandler v. Nazarov*, No. 94 Civ. 2272(CSH), 1994 WL 7022004, *4 (S.D.N.Y. Dec. 14, 1994) (same).

3. Jenkins' Contention That The Balance Of Harms Favor Her Because A Stay Would Delay Her From "Receiving Compensation" Is Meritless.

Jenkins also contends that because this case was filed in 2009, any further stay of the matter would only prejudice her and delay her from receiving compensation. (Opp. at 18). This contention also ignores both fact and law. While Jenkins may claim that it is Liberty Counsel and Lindevaldsen that would cause her delay, the simple fact remains that despite knowing of Liberty Counsel and Lindevaldsen's alleged conduct, Jenkins chose not to name them in her original pleadings. (*See* Dkt. 240, MTD Memo at 18-20). That fact cannot serve as the basis for Jenkins' alleged prejudice because a failure to abide by requisite time constraints is a self-inflicted wound that cannot serve as the basis for prejudice. *See, e.g.*, *Public Loan Co., Inc. v. F.D.I.C.*, 803 F.2d 82, 87 (3d Cir. 1986); *Martin v. Yasuda*, 829 F.3d 1118, 1126 (9th Cir. 2016) ("To prove prejudice, plaintiffs must show more than self-inflicted wounds.").

Moreover, the fact that litigation has continued for long periods of time does not justify denying a stay that is otherwise warranted by the law. *See, e.g.*, *Spinelli v. Nat'l Football League*, No. 13 Civ. 7398 (RWS), 2015 WL 7302266, *2 (S.D.N.Y. Nov. 17, 2015) (fact that case was several years old does not warrant a finding that delay pending determination of the potentially dispositive motions would be prejudicial to the plaintiffs). Jenkins' claims of prejudice are therefore legally and factually incorrect. They cannot overcome the substantial burden imposed upon Liberty Counsel and Lindevaldsen by being forced to litigate in a forum in which there are substantial questions going to the heart of the constitutionally requisite due process requirements of personal jurisdiction.

4. The Vindication Of Constitutional Rights Is Certainly In The Public Interest.

Jenkins does make one legally valid point in her opposition to Liberty Counsel and Lidnevaldsen's request, namely that the public has a clear interest in protecting constitutional rights. (Opp. at 18). Indeed, ensuring that Liberty Counsel and Lindevaldsen are not deprived of their constitutional defenses is of the highest order of public interest. *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). Thus, making sure that Liberty Counsel and Lindevaldsen receive the protections of "one of the most important personal rights guaranteed by the Constitution of the United States," due process, is *per se* in the public interest. *United States v. Broncheau*, 759 F. Supp. 2d 694, 697 (E.D.N.C. 2010). A stay is warranted and should be granted.

CONCLUSION

For the foregoing reasons, this Court should certify its Order for interlocutory appeal and stay the proceedings pending the outcome of that appeal.

Dated: November 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2017, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

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