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.	)	

LIBERTY UNIVERSITY'S REPLY IN SUPPORT OF MOTIONS TO RECONSIDER OR, IN THE ALTERNATIVE, TO CERTIFY FOR INTERLOCUTORY APPEAL

It is always a difficult task for counsel to tell a judge that he has gotten it wrong, even more so where counsel has great respect for the judge, and from long experience knows him to be careful and thorough. But that is the case here. The Court's ruling subjects the University, which is not alleged to have played a role in any conspiracy to kidnap Isabella Miller-Jenkins, to suit in Vermont simply because it employed two of the alleged co-conspirators (a part-time student employee and a law professor), and even though the Complaint makes no plausible allegation that the school controlled or had a right to control those employees' actions. That is contrary to established law; an employer cannot be held vicariously liable for an employee's intentional torts absent allegations establishing that the specific conduct at issue was within the employer's control.

Plaintiffs contend that the question of vicarious liability has been correctly decided and that the University has pointed to no overlooked facts or law which might alter the Court's conclusion, but those contentions are undercut by Plaintiffs' attempt to backfill support for their claims by attaching sixteen new documentary exhibits in opposition to reconsideration. Those

documents are plainly outside the Complaint, have no place in the context of a Rule 12(b)(6) motion, and should be disregarded. Moreover, the University in fact identified a critical legal issue missed in the Court's analysis: in the profusion of issues briefed by the parties and decided in the September 29, 2017 Order, the Court overlooked the authority cited by the University as to the requirement for plausible allegations of control in order to state a viable claim for vicarious liability. The University therefore asks that the Court correct the oversight and dismiss it from this case. In the alternative, given the unprecedented nature of the Court's rulings on vicarious liability and personal jurisdiction, the University requests that the Court exercise its discretion to certify its Order for interlocutory appeal.

A. Plaintiffs Have Not Plausibly Alleged the University's Control of Lindevaldsen's and Hyden's Alleged Misconduct.

Plaintiffs do not contest the proposition that, under Vermont law, the right of control over a tortfeasor's conduct is "the essential element" in a determination of vicarious liability. *Breslauer v. Fayston Sch. Dist.*, 659 A.2d 1129, 1134 (Vt. 1995) (citation and quotation marks omitted). Although Plaintiffs contend that they have alleged facts showing the University's control over the allegedly tortious actions of Lindevaldsen and Hyden, that is demonstrably not true. There are no such allegations in the Complaint—nor did Plaintiffs argue in their opposition to the University's Motion to Dismiss that they had sufficiently alleged control, even though the absence of allegations of control was one of the bases on which the University sought dismissal. *Compare* Motion to Dismiss (Doc. 237) at 11-12 *and* Reply (Doc. 271) at 5-6, *with* Opposition (Doc. 261) at 8-11. It is only now, for the first time, that Plaintiffs make any argument on the issue, offering two distinct theories that the University controlled Hyden's and Lindevaldsen's conduct. Neither holds water.

Plaintiffs first argue that a right of control can be inferred because Lindevaldsen and

Hyden allegedly "use[d] . . . University resources at their offices on the University campus during work hours to further the alleged conspiracy." Opposition at 4. However, the only allegation in the Complaint that suggests the use of University resources is the claim that Hyden used her status as a student and part-time employee to secretly pass messages from her father concerning the alleged conspiracy to Lindevandsen.[1] *See* Complaint, ¶¶ 44, 46. Plaintiffs have additionally argued—but not alleged in the Complaint—that on occasion Lindevaldsen used her University telephone and email in connection with her representation of Lisa Miller. (*See* Doc. No. 261 at 20.) Effectively, Plaintiffs argue that if two employees choose to communicate about a secret criminal conspiracy while at work, the employer is vicariously liable simply because the employer unknowingly provided the location or means for the communication. That is decidedly not the law in Vermont—or in any other jurisdiction. "The mere fact that an employee has the opportunity to abuse facilities necessary to the performance of his duties does not render an employer vicariously liable for the abuse." *Alma W. v. Oakland Unified Sch. Dist.*, 123 Cal. App. 3d 133, 140 (Cal. Ct. App. 1981); *see also id.* ("[P]resence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior.").

In *Day v. DB Capital Group, LLC*, No. CIV.A. DKC 10-1658, 2011 WL 887554 (D. Md. Mar. 11, 2011), for instance, the court dismissed a vicarious liability claim against two banks for failure to state a claim where its employees allegedly conducted a fraudulent scheme "from their offices . . . and during business hours," using their work facilities to call participants in the scheme, "send[] facsimiles and other electronic data," "sign necessary paperwork and

[1] The Court has already acknowledged Hyden was not an agent of the University: "It is undisputed that Hyden has never been an officer, director, manager or authorized agent of Liberty University. There is no indication that Liberty University manifested any consent that a student employee should act as its agent." *Jenkins v. Miller*, 983 F. Supp. 2d 423, 447 (D. Vt. 2013).

agreements, run credit checks, and otherwise conduct the business of" the scheme. *Id*. at *21. Plaintiffs' allegations here present much a more minor and tangential use of work facilities. The primary University facility allegedly used in support of any conspiracy as to Isabella Miller-Jenkins was email. The use of such a ubiquitous communication tool in carrying out a criminal conspiracy, even if access to that tool is provided by an employer, is not in any way probative of an employer's right of control over that conduct. Indeed, under Plaintiffs' theory any employer, even this Court, would be vicariously liable for every illegal or tortious act of its employees committed during work hours or using work phones or email. "To hold employers vicarious liable for every email their employees send from a work email account—whether job-related or not—would risk an avalanche of litigation without serving the policies underlying vicarious liability." *City of Indianapolis v. West*, 81 N.E.3d 1069, 1075 (Ind. Ct. App. 2017) (quotations and alterations omitted). Plaintiffs cannot carry their burden as to the University on the basis that Hyden and Lindevaldsen allegedly communicated while at work or used their work email.

Plaintiffs alternatively argue that they have "plausibly claimed that the University is vicariously liable because it had control over and benefited from the conduct of the Jenkins-Miller case."[2] This too is untrue. Nowhere in the Complaint do Plaintiffs allege that the University "had control over" the conduct of Lindevaldsen's representation of Miller, nor is there the slightest basis to infer such control. It is indisputable that this was a legal representation of a private client unaffiliated with the University[3] that commenced about two years before

[2] As the University previously noted, the idea that the school "benefited" from a law professor's alleged participation in a criminal conspiracy to kidnap a third party is absurd. Were Plaintiffs' allegations concerning Lindevaldsen's conduct true, such actions could not possibly have furthered the University's interests.

[3] Plaintiffs suggest for the first time in their Opposition that Miller was affiliated with the University, contending that the University "employed Lisa Miller at Liberty Christian Academy." Opposition at 9. This is yet another unsustainable stretch. It may be that the Academy and the University were founded by the same individual and have similar missions. But, contrary to Plaintiffs' assertion, Liberty University does not "employ" any of the Academy's staff; they are two legally independent entities, one a private primary and secondary school and the other a

Lindevaldsen was even hired by the University to teach—and, as the Court has observed, plainly she "was not employed primarily to litigate family court cases for the University." (Doc. No. 277 at 68.) Given the nature of the attorney-client relationship and the attorney's duty to act "solely on behalf of . . . the client-principal," *Comm'r v. Banks*, 543 U.S. 426, 436 (2005), there can be no plausible inference that a third-party employer (other than the law firm the attorney appears for) has any right of control over the representation of a client.

Nor does Plaintiffs' Opposition point to any factual support for the claim that the University controlled the Miller case, no doubt because there is none. It focuses instead on the purported pedagogical benefit to the University of Lindevaldsen's incorporation of her experience with the Miller case into her teaching as a professor. Opposition at 4-5. As a matter of law—and logic—the receipt of an incidental benefit from an employee's outside work does not establish that the employer controlled the work. And here, any possible benefit that might have accrued to the University from Lindevandsen's experience representing Miller long postdates the operative facts of the case: Plaintiffs concede that Lindevaldsen's book, which is their primary "evidence" of the claimed "benefit" realized by the University, was not even published by her until 2011. Complaint, ¶ 62. Such an incidental, after-the-fact pedagogical benefit is in no way sufficient to establish a university's control over a professor's outside engagements, otherwise universities would be exposed to vicarious liability for any and all of their professors' extracurricular work.[4] No court has ever recognized such a theory of vicarious

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university, and they have separate employees. Nor, for that matter, is there <u>any</u> allegation in the Complaint that the two entities are one and the same—for they are not. The fact that the Academy employed Miller does not establish in any way that she was affiliated with the University or that the University was involved in her Vermont custody case.

[4] As an illustration of the potential scope of liability, Liberty University has over 2,500 full- and part-time faculty. *See* *https://www.liberty.edu/aboutliberty/index.cfm?PID=6925*.

liability.[5]

Finally, Plaintiffs impermissibly focus on materials outside of the Complaint and argue that Liberty Counsel and Liberty University publicized Lindevaldsen and Staver's work on the Miller case using similar press materials. This is hardly remarkable; practically every law school publicizes its professors' work on high-profile cases. *See, e.g.*, Yale Law School Today, *Professor Ackerman Challenges Presidential War Powers in Court* (Oct. 30, 2017), available at https://law.yale.edu/yls-today/news/professor-ackerman-challenges-presidential-war-powers-court.[6] Even were the Court to consider these non-pleaded arguments, neither the fact of such publicity nor the commonalities between press releases issued by Liberty Counsel and the University are remotely probative of the University's right to control the Miller litigation.

B. The Relationship Between Liberty Counsel and the University Does Not Establish the University's Control over the Miller Case or Lindevaldsen's Alleged Misconduct.

Pivoting from, and attempting to avoid, the crucial question of control, Plaintiffs argue for vicarious liability based on the assertion that Liberty Counsel and the University were "closely connected." Opposition at 6-8. This gambit fails for at least two reasons.

First, despite the fact that the issue before the Court is the sufficiency of the Complaint,

[5] Moreover, to recognize a rule that premises an institution's liability on the manner in which its professors draw upon their outside experience to publish and teach would impose a significant burden on academic freedoms, contrary to bedrock First Amendment precedent. *See e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

[6] *See also, e.g.*, Yale Law School Today, *Dean Gerken Files Amicus Brief in Partisan Gerrymandering Case* (Aug. 30, 2017), available at https://law.yale.edu/yls-today/news/dean-gerken-files-amicus-brief-partisan-gerrymandering-case; University of Virginia News and Media, *Professor A. E. Dick Howard, Scholars File Amicus Brief in Virginia Gerrymandering Case* (June 30, 2017), available at http://content.law.virginia.edu/news/201706/professor-e-dick-howard-scholars-file-amicus-brief-virginia-gerrymandering-case; Stanford Law School Press Release, *Three Stanford Law School Faculty Members Will Present Oral Arguments in the U.S. Supreme Court October 11-12* (Oct. 8, 2011), available at https://law.stanford.edu/press/three-stanford-law-school-faculty-members-will-present-oral-arguments-in-the-u-s-supreme-court-october-11-12/.

almost none of the material cited by Plaintiffs is actually found in, or even referenced in, their Complaint. Plaintiffs refer to purported allegations that "the two entities 'shared common leadership, were located in the same building, and Lindevaldsen . . . used the resources of Liberty University to carry out the business of her representation of Miller," and "'that Liberty Counsel acted as a 'laboratory school' to train Liberty University students.'" Opposition at 7. Not one of these "allegations" comes from the Complaint—nor, plainly, do the new documentary materials Plaintiffs improperly seek to introduce as exhibits via their Opposition. If the Court were inclined to disregard the strictures of Rule 12(b)(6) and consider Plaintiffs' arguments and materials, it should also consider Lindevaldsen's unrebutted affidavits establishing the University played no role in her work for Liberty Counsel or representation of Miller.

Second, even if the Court were to consider materials from outside of the pleadings, the assertion that the University utilized Liberty Counsel to provide its students practical experience provides no basis to hold the school liable for any aspect of Lindevaldsen's representation of Miller. Again, the relevant inquiry is whether Lindevaldsen's work for Miller was "subject to the control or to the right to control of" the University. Restatement (Second) of Agency § 228 cmt. c. Where there are two employers potentially liable—including closely related employers such as a parent and a wholly-owned subsidiary, *see Weaver v. Brush*, 689 A.2d 439 (Vt. 1996)—the determinative question is which employer "has the right to control the offending servant in the performance of his work at the time in question." *Minogue v. Rutland Hosp., Inc.*, 125 A.2d 796, 798 (Vt. 1956) (emphasis added). Relevant factors include, for example, whether the subject employer would have had a right to substitute another employee in conducting the work at issue. *See* Restatement (Second) of Agency § 227 cmt. c. Between Lindevaldsen's two employers, there can be no serious question that Liberty Counsel, not the University, had the

right of control over her legal work for Miller at all relevant times. Liberty Counsel was the law firm through which Lindevaldsen took on and represented Miller: every single notice of appearance, signature line, pleading, and brief filed with the Vermont and Virginia courts identified Liberty Counsel as the entity responsible for Miller's representation. There is no allegation by Plaintiffs that the University directed or had any possible say as to Lindevaldsen's work on Miller's behalf. Nor, certainly, do Plaintiffs even suggest that the University had the right to remove or replace Lindevaldsen in the Miller custody case, *see id.*; that authority lay indisputably with Liberty Counsel.

In short, no matter how "closely connected" the University and Liberty Counsel may have been, the law will permit the imposition of vicarious liability only if the University had a right to control the conduct Plaintiffs complain of. Plaintiffs have made no plausible allegation of such and the University is entitled to dismissal of the claims against it.

C. Plaintiffs Offer No Viable Argument that the University Could Be Liable for Its Employees' Alleged Actions Outside the Scope of Employment.

Plaintiffs' cursory argument in favor of vicarious liability under § 219(2)(d) of the Restatement—an argument they never even raised—serves to highlight why that provision has no application here. As discussed in the University's Motion, § 219(2)(d) provides a limited exception to the general rule that there is no vicarious liability for actions outside of an employee's scope of employment, allowing an employer to be held liable where the tortfeasor was "aided in accomplishing the tort by the existence of the agency relation." Plaintiffs contend they have adequately alleged facts establishing liability under § 219(2)(d) because "Hyden's and Lindevaldsen's employment at the University gave them direct, in-person, and frequent access to each other," which "uniquely allowed them" to communicate and coordinate. Opposition at 10. In other words: they happened to receive paychecks from the same employer and work in the

same building—Hyden as a graduate student working part-time in admissions and Lindevaldsen as a professor.

That is not nearly enough to establish vicarious liability for actions outside the scope of employment under § 219(2)(d)'s narrow exception; no court has ever given the provision such sweeping breadth. The fact that two co-workers may have communicated while at work about an alleged conspiracy does not establish that the agency relationship with their employer aided in the conspiracy. Indeed, Hyden and Lindevaldsen could easily have communicated and coordinated outside of working hours—unlike the paradigm § 219(2)(d) case, where the authority or opportunity granted by an employee's position (as supervisor, police officer, etc.) plays a direct and necessary role in the accomplishment of the tort. There is no colorable argument for liability under § 219(2)(d) based on the allegations made in Plaintiffs' Complaint.

D. If Reconsideration Is Denied, the Court Should Certify the Controlling Questions Here for Interlocutory Appeal.

Plaintiffs paint the University's request for certification of the Court's Order for interlocutory appeal as "motivated by a desire . . . to cause further unnecessary delay" rather than speed the termination of this case. Opposition at 17. The accusation is both unfair and untrue. The University seeks quick resolution of central questions going to the legal sufficiency of Plaintiffs' claims and the constitutionality of the assertion of jurisdiction over it—and, indeed, moved for reconsideration and certification as promptly as possible. While resolving these issues might not end the action, elimination of the University as a party will undoubtedly streamline the litigation and simplify discovery and the trial of Plaintiffs' claims.

The University will not burden the Court with a response to each of Plaintiffs' arguments on certification, as most are already briefed in the University's Motion. There are, however, two discrete misconceptions in Plaintiffs' Opposition that demand reply. First, Plaintiffs appear to

suggest that the Court's Order does not present a substantial ground for difference of opinion because the University's arguments "have already been presented to this Court." Opposition at 15. Of course, the fact that the Court has "addressed and rejected" an argument does not mean that there is no substantial ground for difference of opinion; if that were the standard, interlocutory appeal would never be appropriate. The inquiry only requires that there be room for difference of opinion given the arguments that have been made. Thus, interlocutory appeal may be appropriate even where "the Court is confident that it has come to the proper conclusions." *N.Y. Racing Ass'n, Inc. v. Perlmutter Publ'g, Inc.*, 959 F. Supp. 578, 584 (N.D.N.Y. 1997). Here, among other things, the Court imputed jurisdictional contacts from Liberty Counsel to Liberty University absent any evidence (or even any claim) that the University directed the in-forum activities of the former. Given Supreme Court precedent that direction of in-forum conduct is a necessary condition to impute jurisdictional contacts, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014), there is certainly room for difference of opinion about the correctness of the Court's opinion.

Second, while Plaintiffs acknowledge that questions of personal jurisdiction can be appropriate for immediate appeal, they argue that an initial jurisdictional determination is "particularly ill-suited for interlocutory appeal," citing *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863 (2d Cir. 1996). That might be so where jurisdiction is premised on an accepted basis, and the only question is whether the specific facts meet the requisites for jurisdiction, as was the case in *Koehler*. Here, in contrast, the University seeks appellate resolution of a discrete—and novel—question of law: whether, notwithstanding the teachings of *Daimler* and its progeny, imputation of contacts between two independent corporate entities is appropriate based on their degree of involvement with each other, where the entity to which the contacts are imputed did

not direct the in-forum activities at issue. A controlling, threshold legal issue such as this is undeniably well suited for interlocutory appeal. *See, e.g.*, *Landoil Res. Corp. v. Alexander & Alexander Servs. Inc*., No. 87 CIV. 8133 (WK), 1989 WL 234517, at *1 (S.D.N.Y. Nov. 21, 1989) (certifying for interlocutory appeal order novel holding that the maintenance of trust fund at a New York bank subjected syndicate of insurance brokers to personal jurisdiction in New York), *underlying jurisdictional order rev'd sub nom. Alexander & Alexander Servs., Inc. v. Lloyd's Syndicate 317*, 925 F.2d 44 (2d Cir. 1991).

CONCLUSION

For these reasons and those laid out in prior briefing, the University asks that the Court reconsider its ruling on vicarious liability or, alternatively, certify its order for interlocutory appeal and grant a stay of discovery as to the University. Given the importance of these issues, the University reiterates its request for oral argument.

DATED at Burlington, Vermont, this 16th day of November, 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 November 16, 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.