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 REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY PENDING DECISION ON ITS MOTION TO DISMISS

Plaintiffs make little effort to disguise that their opposition to a stay of discovery is effectively a bid to pursue a fishing expedition from parties that may not be—and in fact are not—properly before this Court. Indeed, Plaintiffs emphasize that they intend to engage in discovery relating to all of the Defendants whether or not all of them "ultimately remain in the case." Opposition at 7. This is not how the process works. If Plaintiffs wish to engage in discovery from individuals and entities that have little or no relation to the alleged misconduct, they have adequate recourse through the Civil Rules' provisions on third-party discovery, and responses will be provided subject to the Rules' safeguards against unnecessarily burdening third parties. What Plaintiffs cannot do is subject third parties to the burdens of full party discovery in a foreign jurisdiction merely by amending their complaint to assert claims against them that lack an adequate basis in fact or law. To allow discovery to proceed here prior to a ruling on the parties' Rule 12(b) motions would subvert the Rules' carefully wrought discovery procedures and unfairly burden the newly-sued Defendants.

This is particularly true of Liberty University, which is tethered to the facts of this case

by the most slender of threads. The school is alleged simply to have employed three individuals who were involved with Lisa Miller's custody dispute, which had nothing to do with their employment: two law professors, both of whom took on Lisa Miller's representation before they were hired by the University and never appeared on Miller's behalf in their capacity as Liberty University faculty, and a student employee alleged to have passed along messages from her father to one of those attorneys. As explained in the University's Motion to Dismiss, the Amended Complaint does not—and could not—plausibly allege that the University is vicariously liable for its employees' alleged extracurricular actions. The University should not be compelled to engage in party discovery in a matter in which it is not properly joined in the first place.

A. The High Likelihood That Plaintiffs' Claims Against The University Will Be Dismissed Establishes Good Cause For A Stay.

As Liberty University noted in its motion, a stay of discovery should be granted where, as here, a "motion to dismiss is potentially dispositive, and appears to be not unfounded in the law." *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (citation omitted). Plaintiffs, not disputing this general proposition, nonetheless contend that the University's Motion lacks "substantial grounds" warranting a stay for two reasons: that the law of the case doctrine supposedly forecloses "many" of the arguments the University offers and that the Motion to Dismiss relies on factual disputes not properly adjudicated at this stage. Neither argument is correct. The law of the case doctrine has no application, as the University's arguments for dismissal have not been previously addressed, and Plaintiffs' assertion that the University's Rule 12(b)(6) motion relies on disputed facts is not true. In short, Plaintiffs' arguments are an attempt to distract from the fact that the University's grounds for dismissal are not merely "potentially" dispositive: they require dismissal, for the Amended Complaint

manifestly fails to establish a basis upon which this case could proceed against the University. Liberty University should not be subjected to discovery until its motion is decided.

The law of the case doctrine applies only to issues actually addressed in a prior order by the Court—and thus, even if it were applicable, it would not bar adjudication of issues outside the scope of the Court's March 2017 order on Plaintiff's motion to amend. *See Quern v. Jordan*, 440 U.S. 332, 347 n. 18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."); *In re Lynch*, 430 F.3d 600, 604 (2d Cir. 2005) (same); *Soper v. Simmons Co.*, No. 84 CIV. 70 (LBS), 1984 WL 426, at *5 (S.D.N.Y. May 30, 1984) ("[T]he law of the case doctrine does not pertain to questions [a prior decision] did not address."). This includes, most prominently, the University's arguments that Plaintiffs' Amended Complaint fails to state a legally sufficient claim: the Court's Order on amendment of the complaint only analyzed issues of jurisdiction and venue, and did not purport to evaluate the adequacy of Plaintiffs' pleadings.[1] To the contrary, the Court explicitly noted that its analysis of attribution of employee contacts for jurisdictional purposes applied "a less stringent test than that for liability." (Doc. 220 at 44 (quoting *Mansfield Heliflight, Inc. v. Heli-One Canada Inc.*, No. 2:12-cv-46, 2012 WL 4479851, at *6 (D. Vt. Sept. 28, 2012)).

There can be no question that Plaintiffs' Amended Complaint fails that more "stringent" test for establishing a basis for vicarious liability against Liberty University. The few, spare facts Plaintiffs allege concerning the University—which omit, among other things, any assertion that the alleged actions of University employees on behalf of Lisa Miller were of the kind they were employed by the school to perform, or were actuated by a purpose to serve the school—fall far short of what would required to proceed against the University on the basis of vicarious

[1] Plaintiffs, asserting only that "many" of Defendants' arguments are precluded, appear to implicitly acknowledge that the University's Rule 12(b)(6) motion is not barred by the law of the case doctrine.

liability. *See* Motion to Dismiss (Doc. 237) at 3-17. Nor is there any basis for Plaintiffs' argument that the University's Rule 12(b)(6) motion "rel[ies] on facts in dispute." Opposition at 6. It is true that the University cites affidavit evidence in support of its motion to dismiss *for lack of jurisdiction*, *see, e.g.*, Motion to Dismiss (Doc. 237) at 29-31, but its motion to dismiss *for failure to state a claim* rests solely on deficiencies of the Amended Complaint as pleaded, *see id.* at 3-17. Given the absence of any plausible, specific allegations supporting a vicarious liability claim against the University, the Court will not need to look beyond the Amended Complaint to grant dismissal.

Because the University's Rule 12(b)(6) motion on its own provides "substantial arguments for dismissal" warranting a stay of discovery, *Hong Leong Fin. Ltd. (Singapore) v. Pinnacle Performance Ltd.*, 297 F.R.D. 69, 72 (S.D.N.Y. 2013) (quoting *Spencer Trask*, 206 F.R.D. at 368), the Court does not have to address the scope of the law of the case doctrine as it pertains to the University's jurisdictional arguments. Nonetheless, Plaintiffs' invocation of that doctrine is equally meritless with respect to the jurisdictional arguments, and cannot justify denying a stay of discovery. This is so for several reasons. First, as a general matter "the law of the case doctrine does not bar a motion to dismiss following a ruling granting a motion for leave to amend," because the doctrine is discretionary and does not limit the Court's power to reconsider or depart from prior holdings. *Hypertherm, Inc. v. Am. Torch Tip Co.*, No. CIV. 05-CV-373-JD, 2007 WL 2695323, at *3 (D.N.H. Sept. 11, 2007); *see also Care Envtl. Corp. v. M2 Techs., Inc.*, No. CV-05-1600 (CPS), 2006 WL 148913, at *8–9 n.9 (E.D.N.Y. Jan. 18, 2006) ("[T]he decision to grant a request to amend a complaint and the decision to deny a motion to dismiss are two different issues, and one cannot constitute the law of the case for the other.").

Second, "the 'law of the case' doctrine may be properly invoked only if the parties had a

full and fair opportunity to litigate the initial determination." *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 219 (2d Cir. 2002) (citation and quotation marks omitted). It is doubtful whether a non-party opposing a motion to amend before being formally joined in a lawsuit could ever be said to have had a "full and fair opportunity" to litigate its jurisdictional defenses, and there was plainly no such opportunity here. The Court's decision on Plaintiffs' Motion to Amend found personal jurisdiction over Liberty University based on an entirely novel theory of jurisdiction—that Liberty Counsel and Liberty University were acting as "a unified entity," such that the contacts of Rena Lindevaldsen and Mathew Staver with Vermont as agents of Liberty Counsel could be imputed secondhand to the University (*see* Doc. 220 at 46)—that was first introduced in Plaintiffs' *reply* brief. (*See* Doc. 216 at 26.) Liberty University had no opportunity to address this new theory of jurisdiction, let alone a "full and fair" one.[2] Thus, the law of the case doctrine does not hinder the University from responding to the merits of Plaintiffs' belatedly proffered basis for jurisdiction in the context of a Rule 12(b)(2) motion.

Third, reconsideration of a prior decision is appropriate, notwithstanding the law of the case doctrine, to correct a clear error or consider new evidence. *Ali v. Mukasey*, 529 F.3d 478, 490 (2d Cir. 2008). The Court's preliminary ruling on jurisdiction was effectively based on its conclusion that it "must disregard" the affidavits offered by the Defendants in considering a jurisdictional challenge at this stage. (Doc. 220 at 30.) Respectfully, that was incorrect. As the Second Circuit has explained, in ruling on a motion to dismiss for lack of personal jurisdiction at the pleadings stage, the allegations of the complaint must be taken as true only "to the extent they are uncontroverted by the defendant's affidavits." *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989

[2] Nor could Liberty University reasonably have predicted that such a theory might be asserted by Plaintiffs or adopted by the Court. As discussed in the University's Motion to Dismiss, the imputation of jurisdictional contacts under the circumstances of this case finds no precedent in the law. (*See* Doc. 237 at 33-40.)

F.2d 572, 580 (2d Cir. 1993) (citation omitted). Where a defendant rebuts the allegations of the complaint with affidavits, the plaintiff will still be able to make out a prima facie case of jurisdiction if she "present[s] conflicting affidavits." *Id.* Here, Defendants rebutted Plaintiffs' allegations with detailed affidavits, and Plaintiffs offered no conflicting affidavits in return. Instead, Plaintiffs asked the Court to draw attenuated inferences based on a small number of documents, none of which directly contradicted Defendants' affidavit evidence. Because the Court erred in disregarding Defendants' affidavits, the law of the case doctrine is no bar to revisiting the question of personal jurisdiction on a Rule 12(b)(2) motion.

Liberty University's Motion to Dismiss offers substantial grounds for dismissal, none of which are precluded by the Court's order granting Plaintiffs' Motion to Amend. Good cause therefore supports a stay of discovery.

B. The Delay In Litigation Of This Case Does Not Justify Subjecting A Third Party To Discovery.

Plaintiffs also cite the slow progress of this case as a factor weighing against a stay, arguing that they should not have to wait out another round of motions to dismiss before beginning discovery. Whatever merit that argument might have with respect to those Defendants who have remained in this case since the outset, it cannot justify imposing discovery on Liberty University and the other newly added Defendants.[3]

In contending that they should not be required to bear further delay, Plaintiffs broadly insinuate that Defendants have pursued a course of dilatory litigation tactics. That accusation is false where the University is concerned. The University is not responsible for any delay incident to the earlier stay of the case, nor for the inevitable delay resulting from Plaintiffs'

[3] Plaintiffs themselves acknowledge that the Defendants are differently situated, as they ask Court, if it grants a stay, to "at least permit partial discovery to proceed regarding the Defendants that were not recently joined." Opposition at 8.

strategic decision to again sue the University and add other parties as defendants in this action. Likewise, Plaintiffs' suggestion that the only purpose of the Defendants' motion practice is to "drown the Plaintiffs and the Court in pleadings and to delay discovery" is offensive and wrong. Liberty University was properly dismissed from this case in 2013 for lack of personal jurisdiction; it certainly cannot be accused of dilatory or improper motives in successfully asserting its Due Process rights. As to the present Rule 12(b) motions, the University expects that it will again be dismissed at the conclusion of briefing, as the University had nothing to do with the custody dispute and it cannot be held vicariously liable for the individual Defendants' actions. The University has zero interest in delay; rather, it seeks to promptly extricate itself from a lawsuit in which Plaintiffs never had a basis to name it as a defendant.

Plaintiffs also suggest that the motion should be denied because the period of the stay might not be for a "short period of time." Opposition at 4 (quoting *Spencer Trask*, 206 F.R.D. at 368). In fact, briefing on the motions to dismiss will be completed by August or, if an extension is necessary for Defendants' replies, September at the latest. That is indisputably a short period in the relative timeframe of litigation. *See, e.g.*, *Integrated Sys. & Power, Inc. v. Honeywell Int'l Inc.*, No. 09 CV 5874 (RPP), 2009 WL 2777076, at *1 (S.D.N.Y. Sept. 1, 2009) (stay warranted where briefing on motion to dismiss would be completed in another month and a half). The only basis for Plaintiffs' contention that a stay would not be "short" is speculation about how long the Court may need to issue a ruling, *see* Opposition at 4, which cannot be an appropriate measure for weighing whether to grant a stay. *Cf. Integrated Sys.*, 2009 WL 2777076, at *1 (basing on consideration of length of stay on remaining time to brief motion, not on time to decision, in

antitrust case involving "multiple, independent arguments for dismissal").[4] Moreover, Plaintiffs cite no specific reason why a small delay would prejudice their litigation of this suit, other than the assertion that Janet Jenkins' daughter is still missing—and there is absolutely no basis to believe that discovery from Liberty University would assist in locating her. *See Mortg. ADR Servicing, LLC v. JPMorgan Chase Bank, N.A.*, No. 15CIV0293LTSJCF, 2016 WL 3906712, at *7 (S.D.N.Y. July 14, 2016) (granting partial stay of discovery on issues relating to pending motion to dismiss where plaintiffs contended that stay would hamstring ability to formulate strategy but "offer[ed] no further discussion of what particular strategic decisions will need to be made prior to the decision on the motion to dismiss").

Requiring the University to engage in discovery, despite the fact that there is no viable claim against it and the prior delays in litigation are not of its making, would not in any way serve the "just, speedy, and inexpensive" determination of this matter. Liberty University's motion for a stay should be granted.

Conclusion

Years into this lawsuit and after numerous amended complaints, Plaintiffs remain unable to allege a viable basis to hold Liberty University liable for the events that gave rise to this suit—events which lack any nexus with the school's business and operation. The University should not be subjected to discovery in the absence of at least some facially viable claim against it, nor should the University be subjected to discovery in a jurisdiction in which it lacks the minimum contacts required by Due Process. *See Bristol-Myers Squibb Co. v. Super. Ct. of California*, No. 16-466, __ S. Ct. __, 2017 WL 2621322, at *7 (2017) ("[R]estrictions on personal jurisdiction

[4] The decision on the motion to dismiss in *Integrated Systems* was ultimately issued in May 2010, nine months after the motion was filed. *See Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc.*, 713 F. Supp. 2d 286 (S.D.N.Y. 2010).

are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." (citation and quotation marks omitted)). For those reasons, and for the reasons set forth in Liberty University's Motion to Dismiss, the Court should stay discovery pending the Court's decision on that motion.

Respectfully submitted,

Liberty University

By its Attorneys,

DINSE, KNAPP & MCANDREW, P.C.

Dated: July 5, 2017

By: /s/ Ritchie E. Berger
Ritchie E. Berger, Esq.
209 Battery Street
Burlington, VT 05401
rberger@dinse.com

CERTIFICATE OF SERVICE

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

Dated: July 5, 2017

By: /s/ Ritchie E. Berger
Ritchie E. Berger, Esq.
209 Battery Street
Burlington, VT 05401
rberger@dinse.com