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 ITS MOTION TO DISMISS

Plaintiffs' Opposition essentially ignores Liberty University's arguments, instead presenting a mechanical recitation of legal standards and a recapitulation of a handful of allegations relating to the school. That Plaintiffs reserve their efforts for other issues—and other Defendants—comes as no surprise. Their bid to establish liability and jurisdiction over the University, an entity with no contemporaneous connection to the Jenkins/Miller case, has always been extremely weak, and their Opposition does nothing to change that. Among other things, Plaintiffs do not contest (nor could they) that they have failed to proffer evidence—or even allege—that Liberty University had the right or ability to control the conduct of *any* individual Defendants in connection with that custody case. Absent such control, there can be no basis in law to assert vicarious liability over or impute jurisdictional contacts to the University. To hold otherwise would upend the law of employer liability and contravene fundamental principles of due process. The Court should grant the University's Motion to Dismiss ("Motion").

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A. Neither the Allegations of the Complaint nor the Supplemental Facts Relied upon by Plaintiffs Satisfy Their Burden for Pleading a Vicarious Liability Claim.

Plaintiffs' arguments on vicarious liability fail to address the fundamental problem facing their claims against the University. The purpose of vicarious liability is to ensure that businesses bear the cost of risks inherent and foreseeable in their enterprise, by rendering them liable for acts taken by employees within the scope of their employment. Plaintiffs do not—and cannot—explain how it would serve that policy to subject the University to liability here. To hold an educational institution vicariously liable for its employees' alleged participation in a conspiracy to kidnap an individual (who, moreover, was unaffiliated with the school), arising from a judicial action the employees became involved with outside of their employment, would stretch the doctrine well past its breaking point. And, as the University pointed out in its Motion, the specter of liability under these circumstances is of particular concern in the higher education context, where it is commonplace for faculty members to take on private engagements outside of their academic duties. Plaintiffs are silent on these questions. Their Opposition offers sparse legal authority, little or none of it responsive to the University's arguments, but instead falls back on rehashing the same few allegations—supplemented by inferences drawn (improperly) from documents outside of the Complaint—connecting the alleged conduct of Lindevaldsen, Staver, and Hyden with the University. Those allegations fall far short of carrying Plaintiffs' pleading burden.

As to Lindevaldsen and Staver, Plaintiffs do not directly contend that their representation of Lisa Miller—or, certainly, the alleged conspiracy to kidnap Isabella Miller-Jenkins—fell within the scope of what the University hired them to do. Instead, they make two roundabout arguments for imposing vicarious liability on the University for the professors' alleged conduct. First, they contend that Liberty University was "closely affiliated" with Liberty Counsel, the

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entity that actually employed Staver and Lindevaldsen in their work on the Miller litigation, implying that such affiliation supports the imposition of vicarious liability. Opposition at 9. The only allegation actually found in the Complaint that relates to the entities' relationship is the conclusory statement that Liberty Counsel was a law firm "affiliated with" or "related" to the University, *see* Complaint, ¶¶ 16, 21; any other factual assertions come from outside of the pleadings and are not properly before the Court on a Rule 12(b)(6) motion. Even considering all of the allegations and inferences offered by Plaintiffs, however, the argument is meritless. Plaintiffs do not cite a single authority suggesting that a "close affiliation" with an entity that employs an individual in connection with an alleged tort may provide a basis for vicarious liability, nor is there any legal support for that proposition.

Lacking support in the law, Plaintiffs place great weight on the Court's suggestion (in its March 2017 order on Plaintiff's motion to join additional defendants) that Liberty Counsel and the University operated as a "unified entity." That emphasis is misplaced. The Court's discussion of the entities' affiliation occurred in the context of imputation of contacts for personal jurisdiction,[1] and, as the Court expressly noted, the analysis of "attribution of contacts for jurisdictional purposes" is guided by "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)). Plaintiffs' bald assertion that Liberty Counsel and the University were "affiliated" cannot take the place of specific, plausible allegations establishing that the conduct at issue was of the kind Lindevaldsen and Staver were employed by *the University*—not Liberty Counsel—to perform, that the conduct occurred with authorized time and space limits, and that the conduct was actuated by a purpose to serve *the University*. *See*

[1] As discussed in the University's Motion to Dismiss, the controlling law does not permit an asserted affiliation between two entities such as these to provide a basis for imputing contacts in the personal jurisdiction analysis. That aside, it certainly cannot provide a basis for vicarious liability.

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Bowles v. O'Connell, No. 5:14-CV-00174, 2016 WL 831931, at *7 (D. Vt. Feb. 29, 2016). Plaintiffs have not made such allegations, for there exists no basis to support them.

Second, Plaintiffs suggest that the representation of Lisa Miller was "intertwined" with Lindevaldsen's and Staver's work for the University. Specifically, they allege that (a) the professors at times used their University email and telephones in connection with their work on the Miller case and (b) they later allegedly relied on their experience with the Miller case as a teaching tool at the University's law school.[2] Opposition at 9-10. Neither satisfies their burden of pleading vicarious liability.[3] It is no surprise that Staver and Lindevaldsen, in continuing their representation of Miller after they had been hired by the University, sometimes used their University telephones or email accounts. The same would be true of most law professors who handle or continue to handle private legal engagements after joining a law school faculty; the mere fact that Staver and Lindevaldsen may have fielded communications related to the Miller litigation while at their academic posts does not in any way "indicate that [they] were motivated by a desire to benefit their employers." *Day v. DB Capital Grp., LLC*, No. CIV.A. DKC 10-1658, 2011 WL 887554, at *21 (D. Md. Mar. 11, 2011) (fact that defendants conducted tortious acts at place of employment during business hours did not subject employer to vicarious liability).

Nor would Staver and Lindevaldsen's alleged integration of their experience representing Miller into their teaching establish that the representation itself was conduct "of the kind" the University "employed [them] to perform." *Bowles*, 2016 WL 831931, at *7. The claim that the

[2] Plaintiffs also cite the unremarkable allegation that Staver provided Philip Zodhiates a tour of the University's law school in the context of a fund-raising meeting—an allegation that has nothing to do with the question of whether Staver and Lindevaldsen's representation of Miller arose from within the scope of their employment with the University.

[3] Again, many of the facts relied on here are not found in the Complaint itself, but in materials introduced by Plaintiffs in other submissions. While they are not properly before the Court on a Rule 12(b)(6) motion, it matters not; even taking them into consideration, Plaintiffs cannot meet their burden.

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professors supposedly required their students to read a book written by Lindevaldsen about the case and used the litigation as the basis for an exam question in a class is meaningless to the vicarious liability analysis. Law professors regularly draw on their professional experience to illustrate concepts, as do instructors in any practical profession—and doing so has clear pedagogical benefit, as Harvard Law professor Alan Dershowitz recently observed:

> For 50 years, I litigated and also taught, and I would bring the trial experience into the classroom and bring the classroom into the courtroom. I thought it made me a better teacher and a better litigator to have had that joint experience.

Ashish Joshi, *Taking Offense: An Interview with Alan Dershowitz*, Litigation, Summer 2017 at 30 (Am. Bar Ass'n). To subject a university to the risk of vicarious liability for professors' outside work because they bring their real world experience into the classroom would undeniably chill this beneficial practice. No matter how congruent a professor's private work may be with the subject matter being taught or the overall mission of the school, its use as a teaching tool should not and cannot transform the private representation into work performed for the academic employer.

Plaintiffs' arguments dance around the fundamental deficiency in their claims. The sine qua non for vicarious liability is the right of the employer to direct and control the employee conduct from which liability arises. *See Breslauer v. Fayston Sch. Dist.*, 659 A.2d 1129, 1134 (Vt. 1995). Plaintiffs have not alleged, and do not argue, that the University had any right to control Lindevaldsen and Staver's representation of Miller, which commenced before they worked for the University. Nor have Plaintiffs alleged that the University hired either of them for the purpose of providing private representation to third parties (and, in fact, it did not). They allege only, in effect, that Staver and Lindevaldsen's representation of Miller continued after they were hired, and that their work on an existing case for a private client had (alleged) incidental benefits to the University. Such allegations utterly fail to state a claim for vicarious

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liability.

Plaintiffs' arguments as to Victoria Hyden are equally unavailing. Indeed, one of the allegations highlighted in Plaintiffs' Opposition—that Hyden "helped arrange for Lisa Miller and Isabella's transportation to the Canadian border," Opposition at 10—lacks any nexus whatsoever with Hyden's status as a student-employee of the University. *See* Complaint, ¶ 44 (alleging only that "both Philip Zodhiates and Victoria Hyden communicated with Lisa Miller's father, Terry Miller, in Tennessee to assist in arranging her and Isabella's transportation . . . to Waynesboro, North Carolina, from whence they would depart for Canada"). The remaining allegations concern only Hyden's alleged delivery of emails from her father, at his behest, to Lindevaldsen, and her alleged "use[] [of] her employment at Liberty University to facilitate Lisa Miller's communication with her lawyer." Opposition at 10-11; Complaint, ¶¶ 44, 46. Plaintiffs argue, absurdly, that delivery of communications was within the scope of Hyden's work as an administrative assistant, and thus the University is vicariously liable for Hyden's actions. *Id.* at 11. True, Hyden may have carried out administrative tasks such as conveying messages as part of her student job. But the gravamen of Plaintiffs' claim is not simply that Hyden delivered messages, a ministerial task that could not possibly have formed the basis for liability. Rather, Plaintiffs contend her alleged delivery of messages was an instrumental part of a conspiracy to conceal the smuggling of Miller and her daughter out of the country. Even Plaintiffs do not have the gumption to claim that helping to smuggle third parties unaffiliated with the University from the country was conduct of the kind Hyden was employed to perform, or that it was a foreseeable incident of her employment so as to justify imposing the costs of her alleged misconduct on her employer.

Finally, Plaintiffs insist that they do not seek to hold the University liable for the torts of

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unaffiliated third parties, as the University has argued. *See* Opposition at 11. Their denials do not hold up to scrutiny—and their insistence on the point implicitly recognizes that vicarious liability could not justify so far-reaching a chain of liability. Plaintiffs contend that they seek to impose liability on the University only for the "tortious actions of its own employees." *Id.* The alleged actions by the University's employees, however, are not claimed to be tortious on their own, but rather in connection with a conspiracy: the Complaint alleges that Lisa Miller alone is directly liable for the "intentional tort of kidnapping," Complaint, ¶ 64, and that the remaining Defendants, including Staver, Lindevaldsen, and Hyden, "conspired with" and "aided and abetted" Miller in that tort, *id.*, ¶ 65. Conspiracy and aiding/abetting are themselves a form of vicarious liability for a third party's tort. *See, e.g., McWilliams Ballard, Inc. v. Level 2 Dev.*, 697 F. Supp. 2d 101, 109 n.10 (D.D.C. 2010). Thus, notwithstanding their protestations, Plaintiffs *are* in fact attempting to impose liability on the University that is derivative of the liability of an unaffiliated third party. If there were no potential liability for Miller on the primary tort, Plaintiffs would have no basis to pursue her alleged co-conspirators (or, certainly, their employers). Because allowing so extremely attenuated a claim to proceed against the University would not in any way serve the policies underlying vicarious liability, the Court should grant the University's motion to dismiss. *See Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Assn.*, 298 F.3d 768, 777 (9th Cir. 2002) ("To extend an employer's liability to cover the acts of non-employee . . . conspirators would demolish the equitable balance the doctrine of respondeat superior seeks to achieve.").

B. Section 1985 Does Not Provide a Viable Basis for Liability Against the University.

As the University explained in its Motion, the traditional *Monell* rules of entity liability developed under § 1983—which provide that a private employer cannot be held liable for its employees' constitutional torts unless they occurred pursuant to an official policy—should apply

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under § 1985(3) and bar Plaintiffs' claim against the University. Plaintiffs resist application of *Monell*, contending that "neither this Court nor the Second Circuit has adopted such a rule," and point instead to Ninth Circuit precedent that declined to apply *Monell* to a § 1985(3) claim. It is true that the Second Circuit has not decided the issue, but at least two district courts in this Circuit have looked to *Monell* principles to evaluate employer liability under § 1985, *see Litras v. PVM Int'l Corp.,* No. 11-CV-5695 JFB AKT, 2013 WL 4118482, at *9 n.8 (E.D.N.Y. Aug. 15, 2013); *Bowen v. Rubin*, 385 F. Supp. 2d 168, 176 (E.D.N.Y. 2005), and the Ninth Circuit's decision in *Scott v. Ross*, 140 F.3d 1275 (9th Cir. 1998) is neither controlling nor persuasive here. The Ninth Circuit's hesitation to apply *Monell* to § 1985 claims in *Scott* arose from a reluctance to "graft § 1983 principles concerning municipal liability onto § 1985(3)," *Scott*, 140 F.3d at 1284, whereas the Second Circuit has already grafted § 1983's principles on vicarious liability onto its § 1985(3) jurisprudence. *See Zherka v. City of New York*, 459 F. App'x 10, 12 (2d Cir. 2012) ("Similarly [to § 1983], municipal liability under § 1985(3) must also be predicated on an 'official custom or policy' of the municipality.").

The nature of § 1985(3) liability also makes the application of *Monell* principles particularly appropriate—more so even than in the § 1983 context. Section 1985(3) targets conspiracies, not just direct constitutional torts, and authorizes a plaintiff injured by a constitutional tort to bring suit "against any one or more of the [primary tortfeasor's] conspirators." 42 U.S.C. § 1985(3). As discussed above, permitting a plaintiff to bring suit against the employer of a co-conspirator on vicarious liability grounds would effectively impose liability on the employer based on the acts of an unaffiliated third party, and does not fit with traditional justifications for vicarious liability. *See Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Assn.*, 298 F.3d 768, 777 (9th Cir. 2002). Requiring that the employer "participate" in the

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conspiracy via an official custom or policy, as under *Monell*¸ better fits with traditional notions of the extent of conspiracy and vicarious liability—not to mention fairness.

Plaintiffs also argue that, even if *Monell* principles apply, the University may be liable under § 1985(3) for the acts of Staver because he was an "authorized policy maker." Opposition at 12. The problems with this line of argument are several. To begin with, the Complaint does not anywhere allege that Staver was acting in a policymaking capacity for the University in connection with the alleged misconduct. While *Monell* liability may sometimes be premised on the acts of policymakers, such a claim requires specific allegation and proof that the individuals at issue "were acting as the *final policymakers . . . in that aspect of municipal policy that caused the alleged constitutional deprivation*." *See Clayton v. City of Kingston*, 44 F. Supp. 2d 177, 184 (N.D.N.Y. 1999) (emphasis added). Plaintiffs only offering on this point is the bald suggestion—in their Opposition, not the Complaint—that Staver had "policy-making authority with respect to [the Miller] litigation." Opposition at 13. There are no allegations or facts that would support the inference that Staver's responsibilities at the University's law school included overseeing and making decisions regarding private litigation carried out by Liberty Counsel.

Moreover, even if Staver were acting as the final policymaker, the University would be liable for his alleged actions alone, not Lindevaldsen's or Hyden's. The Court has already reviewed the sparse allegations concerning Staver's involvement in the Miller case and found that, "[w]hile the sum of [the proffered] facts suggests that Staver was closely connected to Zodhiates' and Lindevaldsen's strategy to advocate for Lisa Miller's legal position, *they do not demonstrate that Staver himself participated in efforts to assist Miller in fleeing the country*." (Doc. 220 at 31-32 (emphasis added).) In short, because the only viable theory of liability against Staver rests on the alleged acts of his employees, not on his own conduct, there can be no

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§ 1985(3) claim against the University based on his alleged acts as a policymaker for the school.

C. Neither Relation Back nor the Continuing Tort Doctrine Permit Janet Jenkins to Pursue Her Time-Barred Claims.

Plaintiffs seek to justify Janet Jenkins' pursuit of otherwise time-barred claims against the University under the Federal Rules' provisions on relation back and the continuing tort doctrine. Neither argument has merit.

Plaintiffs' relation-back arguments misapprehend the requirements of Rule 15, which specifically provides that an amendment to a pleading may relate back only if the new defendant "knew or should have known that the action would have been brought against it, *but for a mistake concerning the proper party's identity*." Fed. R. Civ. P. 15(c)(1)(C) (emphasis added). The Rule has been interpreted narrowly. For example, in *Barrow v. Wethersfield Police Department*, 66 F.3d 466 (2d Cir. 1995), the Second Circuit joined its sister circuits to conclude that Rule 15(c) "does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities," given the Rule's "explicit[]" restriction of its application to a " 'mistake' concerning identity." *Id*. at 470.

Plaintiffs argue that the University had notice of their claims against it, but whether the University had notice is immaterial. Notice is but one prong of the Rule 15 test for relation-back; Plaintiffs cannot rely on it absent any indication they had made a mistake regarding the University's identity. *See Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994) ("The requirement that a new defendant 'knew' he was not named due to a mistake concerning identity presupposes that in fact the reason for his not being named was a mistake in identity. [Plaintiff], however, does not allege that she would have named the individual appellants as defendants in her original complaint but for a mistake concerning identity. . . . Plainly, she knew the identities

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of the [] employees who she contended had harassed and discriminated against her."). It is apparent that Rule 15(c) was never meant to protect individuals like Plaintiffs, who are represented by experienced counsel and who, at all times, were free to file suit in a court that had jurisdiction over the University.

To be sure, Plaintiffs resist the conclusion that they could have filed suit elsewhere, arguing that, "[i]n light of" the Court's 2013 decision, "it would have been impossible for Jenkins to state a claim against [the University] in any jurisdiction without additional information." Opposition at 19. This is specious logic. Liberty University was dismissed from the Vermont case in 2013 for lack of personal jurisdiction, not for failure to state a claim. Plaintiffs cannot evade the fact that they could have filed suit in Virginia in 2013 and sought discovery through the normal course of civil litigation. To say that Defendants "would have moved to dismiss that case" if it had been filed is both speculative and beside the point. Opposition at 18. Plaintiffs made a strategic decision not to file in Virginia based on, apparently, the absence of any evidence connecting the University to the alleged kidnapping, and they must live with the consequences of that decision.

Plaintiffs' reliance on the continuing tort doctrine to save Jenkins' untimely claims is no more availing. First, Vermont has never adopted the continuing tort doctrine. *See Gettis v. Green Mtn. Economic Develop. Corp.*, 892 A.2d 162, 169 (Vt. 2005). Second, even if the doctrine were to be adopted by the Vermont Supreme Court, it would require "at least two elements: a continuing wrong, and some action contributing to the wrong that occurred within the limitations period." *Id.* An actual tortious act, "not simply the continuing ill effects of prior tortious acts," must fall within the limitation period. *Id.* at 170. Plaintiffs do not point to any

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tortious acts by the University or its employees within the limitations period,[4] but simply contend that the effects of the alleged prior tortious acts continue to be felt. *See* Opposition at 17 (arguing that "each day Jenkins and Isabella are unable to have a parent-child relationship, they each suffer a new and ongoing injury"). That is insufficient to make Jenkins' claims timely under the continuing tort doctrine. *See Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999) ("We have made it clear that a continuing violation cannot be established merely because the claimant continued to feel the effects of a time-barred . . . act."); *Kashaka v. Baltimore Cty., Md.*, 450 F. Supp. 2d 610, 616-17 (D. Md. 2006) (untimely claims not saved by continuing tort doctrine where plaintiffs failed to "show that [defendant] engaged in at least one act of misconduct during the limitations period"); *Van Heest v. McNeilab, Inc.*, 624 F. Supp. 891, 896 (D. Del. 1985) ("Plaintiff must identify a statutory violation that occurred during the limitation period, however; her action is not timely if the only acts occurring within the limitations period are the inevitable . . . consequences of the alleged [tort]" (quotation omitted)); *cf. Robert L. Kroenlein Trust ex rel. Alden v. Kirchhefer*, 357 P.3d 1118, 1137 (Wy. 2015) (observing that continuing torts doctrine "is not a mechanism to toll the statutes of limitations" but is intended to recognize "the discrete nature" of each continuing tort).

D. Plaintiffs Fail to Identify a Legally or Factually Viable Basis for Exercising Personal Jurisdiction over the University.

Plaintiffs' Opposition offers neither new facts nor new argument in support of the exercise of jurisdiction over Liberty University, falling back on the theory that the "close relationship" between the University and Liberty Counsel provides a basis for imputing the

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[4] The recitation of "Facts Relevant to the Statute of Limitations" in Plaintiffs' Opposition references the University and its employees only twice: the (false) allegations that Lindevaldsen was involved in the removal of items from Lisa Miller's apartment after her disappearance and that Lindevaldsen and Staver made misrepresentations to Virginia and Vermont courts to "thwart Jenkins' attempts to locate her daughter." *Id*. at 14-15. These alleged activities took place in October, November, and December 2009. Any claim related to these alleged actions expired in December 2012 at the latest, long before Plaintiffs filed their Amended Complaint in April 2017.

alleged Vermont contacts of Liberty Counsel's attorneys to the University. The Opposition does not respond to or attempt to rebut *any* of the University's arguments as to why that theory fails. Instead, Plaintiffs seek in the first instance to evade the jurisdictional issue by invoking law of the case—a doctrine that provides no refuge here. The University has not had a full and fair opportunity to litigate Plaintiffs' theory of personal jurisdiction, and, in any event, the Court retains discretion to revisit and reconsider its prior decisions throughout the case. The uncontroverted evidence before the Court establishes that the University lacked control over or involvement with the conduct of Lisa Miller's legal representation, regardless of any general affiliation it may have had with Liberty Counsel. Given that, and in light of well established principles of personal jurisdiction, the Court should dismiss the University from this suit.

"Application of the law of the case doctrine is discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment."[5] *Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001) (citation and quotation marks omitted). The 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). Here, the "initial determination" at issue is the Court's finding of personal jurisdiction over the University based on an entirely novel theory—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

[5] For this reason, generally "the law of the case doctrine does not bar a motion to dismiss following a ruling granting a motion for leave to amend," as here. *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.").

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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.[6] Rather, the University's first chance to address the issue came in its present motion to dismiss. The law of the case doctrine does not bar the University from being heard on the merits of a novel argument for jurisdiction that, by virtue of being belatedly raised by Plaintiffs, it has not yet had a chance to litigate.

Moreover, 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). Respectfully, the Court's preliminary finding of jurisdiction was in error and should be corrected. The ruling resulted from the mistaken premise that the Court "must disregard" the affidavits offered by the Defendants in considering a jurisdictional challenge at this stage. (Doc. 220 at 30.) In fact, the Second Circuit has explained that, 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 F.2d 572, 580 (2d Cir. 1993) (citation omitted). Where a defendant rebuts the allegations of the complaint with affidavits, the plaintiff will be able to make out a prima facie case of jurisdiction only if she "present[s] conflicting affidavits." *Id.*; *see also Peterson v. Islamic Republic of Iran*, No. 10 CIV. 4518 KBF, 2013 WL 2246790, at *5 (S.D.N.Y. May 20, 2013) ("Plaintiff must submit affidavits to counter conflicts with defendants' affidavits.").

Here, Defendants rebutted Plaintiffs' allegations with detailed affidavits; Plaintiffs offered no conflicting affidavits in return. Instead, Plaintiffs have submitted a smattering of

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[6] 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, the imputation of jurisdictional contacts under the circumstances of this case finds no precedent in the law. (*See* Doc. 237 at 33-40.)

documentary evidence with their motion papers, and they ask the Court—improperly—to draw from those documents argumentative inferences supporting their bid for jurisdiction. *See Robinson v. Overseas Mil. Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994) (courts "will not draw 'argumentative inferences' in the plaintiff's favor" in determining whether plaintiff has met the prima facie burden for establishing personal jurisdiction); *Wegman v. Grimmke*, No. 03-CV-234S, 2005 WL 563369, at *5 (W.D.N.Y. Mar. 9, 2005) (declining to draw argumentative inference that out-of-state defendants conspired with New York State police for purposes of jurisdictional analysis).

More to the point, neither the documents Plaintiffs offer nor any plausible inferences that can be derived from them place in controversy the key material facts relevant to specific jurisdiction over Liberty University. The affidavits already in evidence establish that (1) 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; (2) Liberty Counsel has its own staff of attorneys, legal assistants, and administrative staff[7]; and (3) 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). Plaintiffs do not—and cannot—contest these points. There is no basis in law to disregard this uncontroverted affidavit evidence merely because Plaintiffs have submitted documents that relate to other matters.

Based on the totality of the evidence, including Defendants' affidavits and the documents submitted by Plaintiffs, there is no valid ground upon which to exercise jurisdiction over Liberty University. As the University explained in its motion, imputation of contacts for purposes of

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[7] Indeed, Plaintiffs' own exhibits show that Liberty Counsel's submissions in the Lisa Miller case were submitted by staff for Liberty Counsel, on Liberty Counsel letterhead, and identified counsel solely as attorneys employed by Liberty Counsel. *See, e.g.*, Doc. 204-17.

jurisdiction requires establishing the defendant's control over the actions of the individual or entity from whom contacts are imputed. *See Tan v. SMS Investment Group, LLC*, No. 15-CV-3719, 2016 WL 1171605, at *10 (E.D.N.Y. Mar. 24, 2016) (even accepting as true plaintiff's affidavit evidence that defendants had hired an attorney in New York to help find investors for EB-5 scheme, that would not establish jurisdiction because "there [was] no indication in the complaint . . . or affidavit that the Defendants had control over [the attorney's] activities in New York."); *Huff v. Chandris SA*, No. 93 Civ. 6685, 1994 WL 414467 (S.D.N.Y. Aug. 8, 1994) (Sotomayor, J.) (declining plaintiff's attribution theory of jurisdiction over entities related to primary defendant where "there [was] no evidence that these entities exercised any control over, or participated in any way in" primary defendant's activities in forum state). The necessity of control to justify imputation of contacts was recognized in one of the Supreme Court's seminal personal jurisdiction decisions, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), where the Court observed that "a corporation can purposefully avail itself of a forum by *directing* its agents or distributors to take action there." *Id.* at 759 n.13 (emphasis added)). Plaintiffs have not argued or offered any evidence that the University directed or had control over Liberty Counsel's actions in Vermont—and, indeed, it would be beyond remarkable if the University *had* controlled the conduct of an outside legal organization in representing a private client in a case that began before the two entities had any affiliation.

Plaintiffs' Opposition ignores this critical issue of control, arguing only that the "close relationship" between Liberty Counsel and the University justifies imputation of contacts. In so arguing, they rely exclusively on the *Daynard* and *Mansfield Heliflight* decisions. The University explained in detail in its Motion (and need not burden the Court with repeating) why those cases are entirely dissimilar and have no application here. (*See* Doc. 237 at 37-40.)

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Plaintiffs make no effort to rebut the University's arguments—and their silence is telling. Even if *Daynard* and *Mansfield Heliflight* might justify imputation of contacts between joint venturers in certain circumstances—however doubtful after *Bauman* and its progeny—there can be no viable argument for imputation where, as here, the alleged joint venturers never held themselves out to the plaintiffs as having an affiliation in connection with the conduct underlying the plaintiffs' claims. Neither the law nor the basic, limiting principles of due process allow the exercise of jurisdiction on the attenuated connection Plaintiffs rely on here.

E. The Law of the Case Doctrine Does Not Shield Plaintiffs' Improper Venue Selection from Review.

Plaintiffs' arguments on venue are equally misplaced. Plaintiff again relies in the first instance on the law of the case doctrine, an argument that fails at the threshold: the Court's 2013 decision on venue applied by its terms only to "[r]emaining Defendants Kenneth Miller, Philip Zodhiates, RUL, Victoria Hyden, and Linda Wall," *Jenkins v. Miller*, 983 F. Supp. 2d 423, 463-64 (D. Vt. 2013), and thus the University is entitled to be heard on its venue arguments. Regardless, even if the law of the case doctrine applied to the University, the doctrine is discretionary and allows a court to depart from prior decisions for "'cogent' or 'compelling' reasons including an intervening change in law, availability of new evidence, or 'the need to correct a clear error or prevent manifest injustice.'" *Johnson v. Holder*, 564 F.3d 95, 99-100 (2d Cir. 2009) (citations omitted). Here, the continuing evolution of the law on venue—as demonstrated by the cases cited in the University's Motion, most of which postdate the Court's 2013 decision—has made plain that this district is not an appropriate venue for Plaintiffs' claims.

Recent decisions by federal appeals courts have construed the venue statute ever more strictly, emphasizing that "for venue to be proper, *significant* events or omissions *material* to the plaintiff's claim must have occurred in the district in question." *Blakely v. Lew*, 607 F. App'x

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15, 17 (2d Cir. 2015) (citations omitted, emphasis in original). In other words, "de minimis acts . . . cannot satisfy [a] Court's 'substantiality' requirement for venue." *Id.* (citations omitted) (venue improper where plaintiffs merely employed attorney within district in connection with some of the underlying events, but "none of the significant events that . . . material to th[e] controversy" took place in district).

Moreover, even where central events occur in a plaintiff's chosen forum, venue will still be improper absent wrongful conduct by the defendants in the forum that gives rise to the claims at issue. *Steen v. Murray*, 770 F.3d 698, 704 (8th Cir. 2014). In *Steen*, the Eighth Circuit rejected the Iowa venue selection of two legal malpractice plaintiffs residing in Iowa who retained a Nebraska law firm to represent them in matters concerning land located in Iowa and controlled by Iowa law. Noting that the "court's *focus* must be on relevant activities of the defendant in the forum state, not on the effect of those activities on the plaintiff in the forum state," *id.*at 703, the court held that the malpractice claims arose from wrongful actions—negligent drafting of option and purchase agreements—that occurred in Nebraska, and thus Nebraska was the appropriate venue for the matter.

Here, there is no evidence that the University undertook substantial, wrongful actions in Vermont. The sole—and indirect—connection between the University and this venue with respect to the events at issue is the fact that two of its professors, while acting in their capacity as attorneys with Liberty Counsel, represented and advocated for Lisa Miller in her Vermont family law proceedings. That Plaintiff Janet Jenkins happened to be a Vermont resident involved in a legal dispute with Lisa Miller that was governed by Vermont law is immaterial for the purpose of venue under *Steen* and *Blakely*. Neither Staver nor Lindevaldsen is admitted to the Vermont bar, nor did they ever maintain an office in the state. To force the University to answer to suits in any

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judicial districts where its professors, who are also affiliated with a national public interest law organization, were admitted *pro hac vice* to represent their clients would be contrary to the purpose of the federal venue statute. *See Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex–Exploración Y Producción*, 832 F.3d 92, 104 (2d Cir. 2016) (purpose of 28 U.S.C. § 1391 is to "save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found" (citation omitted)). Because Plaintiffs have not alleged that substantial tortious activity was undertaken in Vermont by the University within the meaning of the venue statute and recent caselaw, the Court should dismiss the case for improper venue, or, in the alternative, transfer the case to the Western District of Virginia.

Conclusion

Plaintiffs have now had numerous opportunities, over a period of years, to articulate a plausible basis for hauling into this case a Virginia university that had no direct connection with any of the underlying conduct alleged. They have failed to do so. For the reasons set forth above and in the University's Motion, Plaintiffs' claims against the University should be dismissed with prejudice.

DATED at Burlington, Vermont, this 6th day of September, 2017.

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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 September 6, 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
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