

**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.	)	
	)	

---

**DEFENDANTS LIBERTY COUNSEL, MATHEW STAVER, AND RENA  
LINDEVALDSEN'S REPLY IN SUPPORT OF MOTION TO DISMISS**

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....v

INTRODUCTION.....1

LEGAL ARGUMENT.....2

I. JENKINS’ FUTILE EFFORTS TO AVOID THE STATUTE OF LIMITATIONS FAILS AS A MATTER OF SETTLED LAW.....2

    A. Jenkins’ Choice In Not Naming Liberty Counsel, Staver, and Lindevaldsen Until After The Expiration Of The Limitations Period Is Fatal To Her Claims.....2

        1. Jenkins Had Actual Knowledge of Liberty Counsel, Staver, and Lindevaldsen’s Alleged Actions during the Limitations Period.....5

        2. Jenkins’ Alleged Lack of Knowledge Concerning Liberty Counsel, Staver, and Lindevaldsen Still Does Not Permit Relation Back.....6

    B. Jenkins’ Reliance On The Continuing Tort Theory Does Not Save Her Time Barred Complaint Against Liberty Counsel, Staver, and Lindevaldsen.....7

        1. Vermont Does Not Recognize the Continuing Tort Theory.....8

        2. The Continuing Tort Theory is Inapplicable to Custodial Interference Claims. ....8

II. JENKINS’ CLAIMS FAIL FOR LACK OF PERSONAL JURISDICTION.....9

    A. The Law Of The Case Doctrine Has No Application To Findings Of Personal Jurisdiction. ....9

    B. Application Of The Law Of The Case Doctrine Against Liberty Counsel, Staver, and Lindevaldsen Would Violate Due Process.....12

    C. This Court Lacks Personal Jurisdiction Over Liberty Counsel, Staver, And Lindevaldsen.....14

        1. Jenkins’ Reliance on Conspiracy Theory of Jurisdiction Fails as a Matter of Settled Law.....14

2.	Jenkins’ Attempts to Evade the Supreme Court’s Limitation on the Effects’ Test Fails as a Matter of Law.....	16
3.	Jenkins’ Agency Arguments against Staver Represent a Fundamental Misunderstanding of Agency Law and Fail as a Matter of Settled Law.....	18
a.	Staver is not Lindevaldsen’s Principal.....	19
b.	The imputation of conflicts in attorney ethical regulations is irrelevant for questions concerning personal jurisdiction over Staver.....	21
3.	Jenkins’ Reliance on Malpractice Cases to Assert the Propriety of Personal Jurisdiction over Liberty Counsel Fails as a Matter of Law.....	22
D.	The Exercise Of Personal Jurisdiction Over Liberty Counsel, Staver, And Lindevaldsen Would Offend Due Process And Work Substantial Injustice.....	24
1.	Isolated Representation of One Client in One Case Does Not Diminish the Burden on Liberty Counsel, Staver, and Lindevaldsen.....	25
2.	<i>Obergefell</i> Does Not Alter the Territorial Limitations on the States and Exercising Jurisdiction Here Would Violate Substantive Policies of Federalism.....	26
3.	<i>Obergefell</i> Did Not Enhance Vermont’s Interest.....	27
III.	JENKINS’ CUSTODIAL INTERFERENCE CLAIMS FAILS AS A MATTER OF LAW.....	27
A.	The Law Of The Case Doctrine Does Not Apply To Liberty Counsel, Staver, And Lindevaldsen.....	27
B.	Jenkins’ Astounding Request That This Court Not Only Adopt A New Tort For Vermont, But To “Adapt It To Changing Times” Ignores Settled Precedent, Runs Roughshod Over Principles Of Federalism And Comity, And Must Fail. ....	28
1.	This Court is Duty Bound to Apply the Law As Announced by the Vermont Supreme Court.....	28
2.	Even if this Court Permits a Custodial Interference Claim, It Cannot Craft a Version that is Wholly Foreign to Settled Law.....	29

C.	Jenkins’ Allegations Are Insufficient To State A Custodial Interference Claim Against Liberty Counsel, Staver, And Lindevaldsen.....	30
D.	Jenkins’ Next-Friend Custodial Interference Claim Fails To State A Claim.....	32
IV.	JENKINS’ CONCLUSORY ALLEGATIONS OF CONSPIRACY FAIL TO STATE A CLAIM AS A MATTER OF LAW. ....	33
V.	JENKINS’ AIDING AND ABETTING CLAIM FAILS TO STATE A CLAIM.....	34
A.	Jenkins Cannot Demonstrate Sufficient Knowledge.....	34
B.	Jenkins’ Allegations Do Not Show Substantial Assistance.....	35
VI.	JENKINS’ SECTION 1985(3) CONSPIRACY FAILS TO STATE A CLAIM.....	37
A.	Jenkins’ Reference To Lawful Activities By Liberty Counsel, Staver, And Lindevaldsen Cannot Support An Inference Of Conspiratorial Agreement.....	37
B.	<i>Obergefell</i> Did Not Modify Section 1985(3), Or Any Other Federal Statute.....	39
C.	Jenkins’ Astounding Claim That She Need Not Allege Membership In The Purported Suspect Class Is Utterly Devoid Of Merit. ....	42
D.	Jenkins’ Failure To Adequately Allege Requisite State Action Is Fatal To Her Section 1985(3) Claim. ....	43
VII.	THERE IS NO PROPER VENUE FOR JENKINS’ CLAIMS AGAINST LIBERTY COUNSEL, STAVER, AND LINDEVALDSEN.....	47
	CONCLUSION.....	48

**TABLE OF AUTHORITIES**

**CASES**

*Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) .....42

*Allen v. James*, 381 F. Supp. 2d 495 (E.D. Va. 2005) .....23

*Anderson v. Sullivan*, 877 F.2d 64 (9th Cir. 1989) .....42

*Anonymous v. Anonymous*, 672 So.2d 787 (Ala. 1995) .....29

*Arkeley v. N. Country Stone, Inc.*, 620 F. Supp. 2d 591 (D. Vt. 2009) .....33

*Armstrong v. Manzo*, 380 U.S. 545 (1965) .....12

*Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938).....44

*Ashby v. State*, 779 N.W.2d 343 (Neb. 2010) .....29

*Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987).....23

*Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120 (2d Cir. 2002).....17

*Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466 (2d Cir. 1995) .....6

*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).....36, 37

*Bertha Bldg. Corp. v. Nat’l Theatres Corp.*, 248 F.2d 833 (2d Cir. 1957).....15

*Black v. JP Morgan Chase & Co.*, No. 10-848,  
2011 WL 4102802 (W.D. Pa. Aug. 10, 2011).....38

*Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993).....43, 44, 45

*Brendle v. Gen. Tire & Rubber Co.*, 505 F.2d 243 (4th Cir. 1974).....28

*Briggs v. Cnty. of Monroe*, No. 09-CV-6147W,  
2016 WL 1296060 (W.D.N.Y. Mar. 29, 2016) .....4

*Bristol-Myers Squibb v. Superior Ct.*, 137 S. Ct. 1773 (2017) .....16, 17, 26

*Brown v. Mewar*, No. 07-CV-00551S(F), 2011 WL 573566 (W.D.N.Y. Feb. 14, 2011).....4

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) .....22

*Burne v. Cnty. of King*, 883 F.2d 819 (9th Cir. 1989) .....42

*Chen-Oster v. Goldman, Sachs, & Co.*, No. Civ. 6950(AT)(JCF),  
2015 WL 4619663 (S.D.N.Y. Aug. 3, 2015).....10

*Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017).....40, 41

*Christianson v. Holt Indus. Operating Corp.*, 486 U.S. 800 (1988).....10

*City of Moundridge v. Exxon Mobile Corp.*, 250 F.R.D. 1 (D.D.C. 2008).....38

*Clark v. Milam*, 830 F. Supp. 316, 325 (S.D.W.V. 1993) .....22, 25

*Coker v. Williams*, 858 F.3d 204 (5th Cir. 2017) .....39

*Comm’r v. Bosch’s Estate*, 387 I.S. 456 (1967) .....28

*Comtel Tech., Inc. v. Paul H. Schwendener, Inc.*, No. 04 C 3879,  
2005 WL 433327 (N.D. Ill. Feb. 22, 2005) .....46, 47

*Coon v. Southwestern Vt. Med. Ctr.*, No. 2:13-cv-182,  
2014 WL 348193 (D. Vt. Jan. 30, 2014) .....33

*Corbell v. Blood*, No. 5:10-cv-56, 2012 WL 12882102 (D. Vt. Apr. 13, 2012).....36

*Cornellier v. Am. Casualty Co.*, 389 F.2d 641 (2d Cir. 1968) .....28

*Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994) .....4, 6, 7

*Cosner v. Ridinger*, 882 P.2d 1243 (Wyo. 1994) .....30

*DCA Servs., Inc. v. Commc’ns III, Inc.*, No. CIV-15-256-D,  
2016 WL 815329 (W.D. Okl. Feb. 29, 2016) .....18

*Decter v. Second Nature Therapeutic Program, LLC*, 42 F. Supp. 3d 450 (E.D.N.Y. 2014).....29

*DeLima v. Trinidad Corp.*, 302 F.2d 585 (2d Cir. 1962) .....36

*DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.3d 327 (9th Cir. 1979).....40, 41

*DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994) .....28

*Enquist v. Oregon Dep’t of Agriculture*, 553 U.S. 591 (2008) .....42

*Erienbaugh v. United States*, 409 U.S. 239 (1972) .....44

*Escude Cruz v. Otho Pharm. Corp.*, 619 F.2d 902 (1st Cir. 1980).....19

*Evans v. Ga. Regional Hosp.*, 850 F.3d 1248 (11th Cir. 2017) .....42

*Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108 (2d Cir. 2001) .....10

*Friends of Falun Gong v. Pac. Cultrual Enter., Inc.*,  
288 F. Supp. 2d 273 (E.D.N.Y. 2003) .....45

*Gaines v. Relf*, 53 U.S. 472 (1851) ..... 1

*Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) .....38

*Gettis v. Green Mtn. Econ. Dev. Corp.*, 892 A.2d 162 (Vt. 2005).....8

*Gracious Living Corp. v. Colucci & Gallagher, PC*, 216 F. Supp. 3d 662 (D.S.C. 2016).....23

*Griffin v. Griffin*, 327 U.S. 220 (1946) .....13

*Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) .....44

*Gyadu v. Hartford Ins. Co.*, 197 F.3d 590 (2d Cir. 1999) .....37

*Hanson v. Denkla*, 357 U.S. 235 (1958) .....26

*Harlow v. Children’s Hosp.*, 432 F.3d 50 (1st Cir. 2005) .....10

*Harris v. Epoch Grp., LLC*, 357 F.3d 822 (8th Cir. 2004) .....41

*In re Holmes*, 160 B.R. 709 (D. Conn. 1993) .....41

*Hassain v. Avianca Airlines*, 872 F. Supp. 1183 (E.D.N.Y. 1995) .....36

*Hernandez v. New York*, 500 U.S. 352 (1991) .....47

*Hill v. Didio*, 191 F. App’x 13, 14015 (2d Cir. 2006) .....33

*Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017).....39, 41

*H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Labs.*,  
384 F.2d 97 (2d Cir. 1967).....14

*Hogan v. Fischer*, 738 F.3d 509 (2d Cir. 2013) .....6

*In re Bulk (Extruded) Graphite Prod. Antitrust Litig.*, No. Civ. 02-6030(WHW),  
2006 WL 1084093 (D.N.J. Apr. 24, 2006) .....11

*In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007) .....38

*In re Verit Indus.*, 7 F. App’x 743 (9th Cir. 2001) .....13

*Ismail v. Ford*, No. SA CV 10-00901-VBF-AJW,  
2014 WL 1681993 (C.D. Cal. Apr. 29, 2014) .....38

*Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*,  
968 F.2d 286 (2d Cir. 1992) .....42

*Johnson v. Holder*, 564 F.3d 95 (2d Cir. 2009). .....9

*Johnson v. Priceline.com, Inc.*, 711 F.3d 271 (2d Cir. 2013) .....19

*Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981).....42

*Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250 (S.D.N.Y. 1995).....38

*Krupski v. Costa Crociere S. p. A.*, 560 U.S. 530 (2010) .....2, 3, 4, 6

*Lane v. XYZ Venture Partners, LLC*, 322 F. App’x 675 (11th Cir. 2009).....10

*Lassiter v. Bessette*, 16 A.3d 580 (Vt. 2010) .....35

*Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87 (2d Cir. 1975) .....34

*Leonard v. United States*, 633 F.2d 599 (2d Cir. 1980) .....9, 33

*Lin v. Joedy*, 214 F. Supp. 3d 207 (W.D.N.Y. 2016) .....7

*Little v. Twentieth Cent. Fox Films Corp.*, No. 89 Civ. 8526,  
1995 WL 404939 (S.D.N.Y. July 7, 1995) .....10

*Litwin v. Am. Express Co.*, 838 F. Supp. 855 (S.D.N.Y. 1993) .....44

*Lucas v. Novogratz*, No. 01 Civ. 5445(GEL),  
2002 WL 31844913 (S.D.N.Y. Dec. 18, 2002) .....9

*Madden v. Abate*, 800 F. Supp. 2d 604 (D. Vt. 2011) .....33

*Maimonides Med. Ctr. v. United States*, 809 F.3d 85 (2d Cir. 2015).....44

*Magnum v. Archdiocese of Philadelphia*, 253 F. App’x 224 (3d Cir. 2007).....46

*Mandell v. Cnty. Of Suffolk*, 316 F.3d 368 (2d Cir. 2003) .....38

*Mansfield Heliflight, Inc. v. Freestream Aircraft USA, Ltd.*, No. 2:16-cv-28,  
2016 WL 7176586 (D. Vt. Dec. 7, 2016) ..... 14

*Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974) ..... 13

*Matthews v. Eldridge*, 424 U.S. 319 (1976) ..... 12

*Mayes v. Leipziger*, 674 F.2d 178 (2d Cir. 1982) ..... 17

*Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) ..... 44

*Metro. Life Ins. C. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996) ..... 21, 27

*Meyer v. Frank*, 550 F.2d 726 (2d Cir. 1967) ..... 2

*Momot v. Dziarcak*, 208 F. Supp. 3d 450 (N.D.N.Y. 2016) ..... 4

*Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)..... 12, 13

*Murray v. Admin. for Child Servs.*, 476 F. Supp. 2d 436 (S.D.N.Y. 2007)..... 9

*Nat’l Commc’ns Sys., Inc. v. Mich. Pub. Serv. Comm’n*, 789 F.2d 370 (6th Cir. 1986)..... 43

*Nat’l Sch. Reporting Serv., Inc. v. Nat’l Sch. of Cal., Ltd.*, 924 F. Supp. 21 (S.D.N.Y. 1996)..... 13

*Neelon v. Krueger*, No. 12-cv-11198-IT, 2015 WL 4576825 (D. Mass. July 30, 2015)..... 11

*Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) ..... 3, 4

*New England Acceptance Corp. v. Nichols*, 8 A.2d 665 (Vt. 1939)..... 19

*Newsome v. Gallacher*, 722 F.3d 1257 (10th Cir. 2013) ..... 23

*Nw. Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981)..... 40

*Parker v. Cone*, 160 A. 246 (Vt. 1939) ..... 19

*Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017)..... 39

*Pittman v. Grayson*, 149 F.3d 111 (2d Cir. 1998) ..... 33

*Plante v. Engel*, 469 A.2d 1299 (N.H. 1983) ..... 30

*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) ..... 40

*Prive v. Vermont Asbestos Group*, 992 A.2d 1035 (Vt. 2010) ..... 20, 21

*Rockwood Select Asst Fund XI(6)-I, LLC v. Devine, Millimet & Branch*,  
750 F.3d 1178 (10th Cir. 2014) .....17, 23

*Rogers v. Valentine*, 426 F.2d 1361 (2d Cir. 1970) .....10

*Rush v. Savchuck*, 444 U.S. 320 (1980) .....16, 22

*Romer v. Morganthau*, 119 F. Supp. 2d 346 (S.D.N.Y. 2000).....37

*Schoolcraft v. City of New York*, 81 F. Supp. 3d 295 (S.D.N.Y. 2015).....7

*Schwartz v. Frankenhodd*, 733 A.2d 74 (Vt. 1999) .....34

*Scott v. Vill. of Spring Valley*, 577 F. App’x 81 (2d Cir. 2014) .....6, 7

*Secretary for Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*,  
705 A.2d 1001 (Vt. 1997) .....20

*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).....38

*Smith v. White*, 92 F.3d 1186 (6th Cir. 1996) .....43

*State v. Atl. Richfield Co.*, 148 A.3d 559 (Vt. 2016) .....8

*State v. Wootten*, 756 A.2d 1222 (Vt. 2000) .....33

*Stone v. Wall*, 734 So.2d 1038 (Fla. 1999) .....30

*Stuart v. Fed. Energy Sys., Inc.*, 596 F. Supp. 458 (D. Vt. 1984).....19

*Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201 (1st Cir. 1994) .....24

*Tilton v. Richardson*, 6 F.3d 683 (10th Cir. 1993) .....45

*Tinker v. Abrams*, 640 F. Supp. 229 (S.D.N.Y. 1986) .....9

*Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972) .....15

*United States v. Casciano*, 124 F.3d 106 (2d Cir. 1997) .....13

*United States v. Freeling*, 31 F.R.D. 540 (S.D.N.Y. 1962) .....44

*United States v. Hill*, 48 F.3d 228 (7th Cir. 1995) .....40

*Vill. of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620 (1980).....38

*Vt. Castings, Inc. v. Evans Prod. Co.*, 510 F. Supp. 940 (D. Vt. 1981) .....15

*Walden v. Fiore*, 134 S. Ct. 1115 (2014) .....16, 17

*Waldman v. Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016) .....26

*Webb v. Goord*, 340 F.3d 105 (2d Cir. 2003) .....37

*Weiss v. Nat’l Westminster Bank PLC*, 176 F. Supp. 3d 264 (E.D.N.Y. 2016).....10

*Weldon v. Ramstad-Hvass*, 512 F. App’x 783 (10th Cir. 2013) .....15

*Westerbeke Corp. v. Diahatsu Motor Co., Ltd.*, 304 F.3d 200 (2d Cir. 2002) .....27

*Wolf v. Wolf*, 690 N.W.2d 887 (Iowa 2005) .....30

*Younique, LLC v. Youssef*, No. 2:15-cv-00783-JNP-DBP,  
2016 WL 6998659 (D. Utah Nov. 30, 2016) .....16

*Ytuarte v. Gruner & Jahr Printing & Publ’g Co.*, 935 F.2d 971 (8th Cir. 1991).....22

*Zhang v. Chinese Anti-Cult World Alliance*, No. 15 CV 1046 (SLT)(VMS),  
2016 WL 1128401 (S.D.N.Y. Jan. 28, 2016).....46

**STATUTES**

42 U.S.C. § 1985(3) .....*passim*

Fed. R. Civ. P. 15.....3, 4, 6

Restatement (Second) of Torts § 700.....32

Restatement (Second) of Torts § 899.....9

Vt. Stat. Ann. § 512(4) .....2

**OTHER**

*Black’s Law Dictionary* 250 (9th ed. 2009) .....36

**DEFENDANTS LIBERTY COUNSEL, MATHEW STAVER, AND RENA LINDEVALDSEN'S REPLY IN SUPPORT OF MOTION TO DISMISS**

Pursuant to L.R. 7(a)(5), Defendants, Liberty Counsel, Inc. ("Liberty Counsel"), Mathew D. Staver ("Staver), and Rena M. Lindevaldsen ("Lindevaldsen"), by and through the undersigned counsel, hereby file this Reply in Support of their Motion to Dismiss (dkt. 238) and Memorandum of Law in Support of their Motion to Dismiss. (Dkt. 240, "MTD").

**INTRODUCTION**

In her Opposition (dkt. 261, Memorandum in Opposition to Defendants' Motions to Dismiss, "Opp."), Jenkins attempts to salvage her untimely and fanciful claims by imploring this Court: (1) to violate the due process rights of Liberty Counsel, Staver, and Lindevaldsen by declining to consider their arguments concerning her remarkable tale, (2) to adopt a tort unknown to Vermont law, (3) to fashion this new tort in a manner heretofore unknown to any jurisdiction in the nation, (4) to craft a remedy based on this newly refashioned tort to predictably fit her precise situation and permit her claims to proceed, (5) to run roughshod over the jurisdictional limitations embedded in long-established principles of federalism, (6) to ignore the utter lack of minimum contacts that Liberty Counsel, Staver, and Lindevaldsen have with this forum, and (7) to rewrite the entire United States Code based upon a decision that neither mentioned nor addressed anything in it. While these propositions are astounding as a matter of law, Jenkins attempts "to do it in such a delicate manner, and with such consummate tact, as to appear to glide naturally towards the truth." *Gaines v. Relf*, 53 U.S. 472, 501 (1851). That appearance is illusory, and the truth is nowhere to be found in her 105-page effort. Neither these Defendants nor Jenkins' claims belong in this Court, and the RSAC must be dismissed with prejudice.

## LEGAL ARGUMENT

### **I. JENKINS' FUTILE EFFORTS TO AVOID THE STATUTE OF LIMITATIONS FAILS AS A MATTER OF SETTLED LAW.**

Jenkins does not contest, and therefore concedes, that under the applicable statutes of limitations for her claims against Liberty Counsel, Staver, and Lindevaldsen, her claims are grossly untimely. (Opp. at 13-17). Knowing that her failure to file her claims against Liberty Counsel, Staver, and Lindevaldsen within the three-year statute of limitations period is fatal to her claims,<sup>1</sup> Jenkins retreats to a two-prong defense of her untimeliness: (1) that her claims relate back to the original complaint (dkt. 1), and (2) that her alleged injuries nevertheless constitute a continuing tort surviving a statute of limitations defense. (Opp. at 15-18). Neither claim has any merit. Jenkins' deliberate choice in not naming Liberty Counsel, Staver, and Lindevaldsen until after the limitations period had expired is fatal to all of her claims, and her reliance on the continuing tort theory does not save her fatally untimely claims against these Defendants. Her claims against Liberty Counsel, Staver, and Lindevaldsen are time-barred and must be dismissed.

#### **A. Jenkins' Choice In Not Naming Liberty Counsel, Staver, and Lindevaldsen Until After The Expiration Of The Limitations Period Is Fatal To Her Claims.**

Jenkins contends that her knowledge of Liberty Counsel, Staver, and Lindevaldsen's alleged involvement in the alleged conspiracy is irrelevant to the relation back rules. (Opp. at 15). This is incorrect. To support her erroneous contention, Jenkins relies on *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 530 (2010). The Supreme Court's pronouncement in that case provides no refuge whatsoever to Jenkins' untimely claims.

---

<sup>1</sup> Jenkins' custodial interference claim is subject to the three-year statute of limitations in Vt. Stat. Ann. § 512(4). Jenkins' Section 1985(3) claim is subject to that same limitations period. (MTD at 16-17) (quoting *Meyer v. Frank*, 550 F.2d 726, 728 (2d Cir. 1967) (holding that the statute of limitation for claims under the Civil Rights Act is governed by Vermont's personal injury action)).

In *Krupski*, the party seeking refuge in Rule 15’s relation back doctrine made a **mistake** concerning the proper defendant’s **identity**, not a deliberate **choice** in not naming them. *Krupski*, 560 U.S. at 554-55 (noting that the plaintiff intended to sue “the company that owned, operated, managed, supervised, and controlled the ship on which he was injured” but mistakenly thought Costa Cruise and not Costa Crociere “performed those roles”). In so holding, the Supreme Court reaffirmed the long-standing principle that a **deliberate choice** cannot and does not permit a plaintiff to seek refuge in the relation back doctrine. *Id.* at 549 (“**We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party’s identity.**” (emphasis added)).

*Krupski* merely reaffirms that Jenkins’ claims against Liberty Counsel, Staver, and Lindevaldsen are grossly untimely and do not relate back. Indeed, if Jenkins was aware – as she unquestionably was – of Liberty Counsel, Staver, and Lindevaldsen’s alleged role and alleged actions at the time of her original complaint but chose not to name them as defendants, her claims do not relate back. This is true even under her own authorities:

When the original complaint and the plaintiff’s conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a **fully informed decision** as opposed to a mistake concerning the proper defendant’s identity, the requirements of Rule 15 are not met.

*Id.* at 551 (emphasis added).

*Krupski*’s holding also did nothing to disturb the Court’s prior decision in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000). In *Nelson*, the High Court noted that if a plaintiff is aware of a defendant’s identity and knew of its alleged role, Rule 15 does not permit relation back. *Nelson*, 529 U.S. at 467 n.1 (plaintiff “knew of [proposed defendant’s] role and existence [but] chose to assert its claims only against [other defendants].”). This principle of black letter law was not altered

in any way by *Krupski*, but was explicitly reaffirmed by that decision: “*Nelson* is entirely consistent with our understanding of the Rule.” *Krupski*, 560 U.S. at 551. The Second Circuit’s understanding of Rule 15 thus also remains binding post-*Krupski*. See *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d. Cir. 1994) (if plaintiff knew of the new defendant’s **potential** involvement and did not name them in the original complaint, it must be “considered a matter of choice, not mistake” and relation back under Rule 15 provides no refuge for that choice).

Numerous courts in the Second Circuit have affirmed that, even post-*Krupski*, a choice in not naming a defendant while having prior knowledge of his identity and alleged role is fatal to a relation back defense. See, e.g., *Momot v. Dziarcak*, 208 F. Supp. 3d 450, 459-60 (N.D.N.Y. 2016) (even after *Krupski*, if plaintiff knows of the alleged conduct of the defendants to be added but chooses not to name them in the original complaint, it is not a mistake but a choice and relation back is inapplicable); *Briggs v. Cnty. of Monroe*, No. 09-CV-6147W, 2016 WL 1296060, \*6-7 (W.D.N.Y. Mar. 29, 2016) (“Plaintiffs’ proposed addition of the new defendants in this case does not seek to cure any mistake of identity; rather, it seeks to cure plaintiffs’ ignorance of the potential culpability of the proposed defendants. That it does so after the expiration of the statute of limitations is fatal to plaintiffs’ motion.”); *id.* (holding that plaintiffs’ claims did not relate back when they had knowledge of the proposed defendants’ alleged actions but chose not to name them in the original complaint); *Brown v. Mewar*, No. 07-CV-00551S(F), 2011 WL 573566, \*6 (W.D.N.Y. Feb. 14, 2011) (even after *Krupski*, when plaintiff is aware of the defendants and their alleged actions prior to filing complaint, failure to name them during the statute of limitations period is not a mistake, but a choice).

Thus, even under Jenkins’ own authorities and the allegations of her RSAC, relation back provides no aid to her fatally untimely claims. Jenkins had actual knowledge of Liberty Counsel,

Staver, and Lindevaldsen's alleged actions and identity during the limitations period. Moreover, her alleged lack of knowledge does not permit relation back in this instance. Her claims therefore do not relate back and must be dismissed as untimely.

**1. Jenkins Had Actual Knowledge of Liberty Counsel, Staver, and Lindevaldsen's Alleged Actions during the Limitations Period.**

Jenkins seeks refuge in the relation back doctrine because she claims lack of knowledge about Liberty Counsel, Staver, and Lindevaldsen's alleged actions. This claim is utterly devoid of merit and is refuted by Jenkins' own allegations in the Amended Complaint (dkt. 59, filed in 2012) and the RSAC. *Compare* (RSAC ¶¶ 21, 26, 49, 59) (alleging that Liberty Counsel attorneys represented Miller, established a Facebook page, filed appeals, and that Zodiates called a cell phone registered to Liberty Counsel and a landline with an Orlando area code), *with* (Dkt. 59, Amended Complaint, ¶¶ 22, 27, 57, 59) (alleging exactly the same things in 2012). *Compare* (RSAC ¶¶ 21, 31, 32, 60, 61, 62) (alleging that Staver was counsel for Miller, appeared at a press conference with Miller, informed courts he did not know of Miller's whereabouts, and appeared on radio and television to support Lindevaldsen's book), *with* (Dkt. 59 ¶¶ 22, 27, 32, 57, 58, 59, 60) (alleging the exact same things in 2012). *Compare* (RSAC ¶¶ 21, 26, 31, 32, 44, 45, 50, 61, 62) (alleging that Lindevaldsen was counsel for Miller, appeared in courts via telephone and in person on behalf of Miller, received emails from Hyden concerning Miller, wrote a book, and appeared on radio and television to support the book), *with* (Dkt. 59 ¶¶ 22, 27, 31, 32, 41, 42, 58, 59, 60) (alleging the exact same things in 2012).

There can be no dispute that Jenkins had actual knowledge of these Defendants' alleged involvement. The RSAC, which seeks to add Liberty Counsel, Staver, and Lindevaldsen after the expiration of the statute of limitations, thus cannot relate back because Jenkins was fully aware of the alleged role of these Defendants during the limitations period. Indeed, Jenkins specifically

mentions Liberty Counsel, Staver, and Lindevaldsen in the original complaint and includes the same allegations concerning them in the RSAC. Thus, Jenkins “failure to name to prospective defendant in the original complaint was the result of a **fully informed decision** as opposed to a mistake.” *Krupski*, 560 U.S. at 551 (emphasis added); *Nelson*, 529 U.S. at 467 n.1; *Cornwell*, 23 F.3d at 705. Rule 15 does not save her untimely claims.

**2. Jenkins’ Alleged Lack of Knowledge Concerning Liberty Counsel, Staver, and Lindevaldsen Still Does Not Permit Relation Back.**

Even if Jenkins could claim that she did not have actual knowledge of Liberty Counsel, Staver, and Lindevaldsen’s alleged actions, a claim plainly dispelled by her own allegations, relation back still does not permit her to add these Defendants. *See, e.g., Scott v. Vill. of Spring Valley*, 577 F. App’x 81 (2d Cir. 2014) (relation back does not apply to plaintiffs attempting to add **new information** to a complaint that they did not have at the time of the initial complaint because that does not constitute a mistake); *Hogan v. Fischer*, 738 F.3d 509, 518 (2d Cir. 2013) (lack of knowledge that is acquired after the limitations period has expired “does not constitute a mistake of identity” and therefore cannot form the basis of relation back under Rule 15); *Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466, 470 (2d Cir. 1995) (relation back does not permit a plaintiff to add new information after the limitations period had expired).

In *Scott*, the plaintiff knew certain police officers were involved in the alleged incident but lacked knowledge of their specific names. *Scott*, 577 F. App’x at 83. Because he did not know their individual names, he named only the entities for which they worked as defendants. *Id.* Upon learning of the specific officer’s involvement, Scott attempted to add their names to the complaint after the expiration of the limitations period. *Id.* The Second Circuit held that such a “proposed amendment does not correct a mistake of fact . . . but rather seeks to add information—the names

of the officers involved—that he lacked when he filed the complaint.” *Id.* Under such a scenario, the “proposed amendment does not satisfy Rule 15(c).” *Id.*

Here, Jenkins admits that she is attempting to add new information to the RSAC based on information she allegedly obtained after the limitations period. (Opp. at 15) (“As limited discovery proceeded, facts came to light showing the role of even more conspirators”). But, such information does not pertain to the **identities** of Liberty Counsel, Staver, or Lindevaldsen. *See supra* Section I.A.1 (comparing allegations of Dkt. 59 in 2012 and RSAC in 2017). Rather, Jenkins is attempting to camouflage her efforts to add new information that she failed to obtain during the limitations period into her RSAC now. Relation back does not permit such efforts because her lack of knowledge does not constitute a mistake. *Hogan*, 738 F.3d at 518; *see also Lin v. Joedy*, 214 F. Supp. 3d 207, 213-14 (W.D.N.Y. 2016) (when plaintiff has knowledge of proposed new defendants names and alleged roles, Rule 15 does not permit relation back as a mistake); *Schoolcraft v. City of New York*, 81 F. Supp. 3d 295, 301 (S.D.N.Y. 2015) (“Where a plaintiff is aware of the purported misconduct of certain individuals, and where plaintiff was ‘not required to sue them, her failure to do so in the original complaint must be considered a matter of choice, not mistake.’” (quoting *Cornwell*, 23 F.3d at 705)).

**B. Jenkins’ Reliance On The Continuing Tort Theory Does Not Save Her Time Barred Complaint Against Liberty Counsel, Staver, and Lindevaldsen.**

Jenkins also erroneously contends that her custodial interference claim against Liberty Counsel, Staver, and Lindevaldsen is timely because it represents a continuing tort. (Opp. at 16-17). This claim, too, is devoid of merit. First, even assuming custodial interference is a continuing tort (a claim rejected by clear Vermont precedent), Jenkins’ claims would fail because she has not alleged that Liberty Counsel, Staver, and Lindevaldsen committed the alleged continuing tort.

(RSAC ¶ 64). Indeed, only Defendant Lisa Miller is alleged to have committed the tort of custodial interference. (*Id.*). Thus, Jenkins' continuing tort theory fails from the start.

However, even if Jenkins could allege that Liberty Counsel, Staver, and Lindevaldsen actually committed the alleged tort of intentional kidnapping, which she cannot and does not, Jenkins' arguments still fail as a matter of law. Vermont does not recognize the continuing tort theory, so her contention cannot save her untimely complaint against Liberty Counsel, Staver, and Lindevaldsen. The continuing tort theory is also inapplicable to custodial interference claims.

**1. Vermont Does Not Recognize the Continuing Tort Theory.**

Jenkins erroneously contends that there is “no precedent” for her continuing tort theory in Vermont. (Opp. at 16-17). This contention flies in the face of Vermont law. While Jenkins may be correct in stating that there is no precedent on such an assertion in the custodial interference context (a contention not at all surprising given that the Vermont Supreme Court has never recognized such a tort), her contention regarding the continuing tort theory in general is a blatant misrepresentation of Vermont Supreme Court precedent. As the Vermont Supreme Court has unequivocally stated: “**We have never adopted the continuing tort doctrine.**” *Gettis v. Green Mtn. Econ. Dev. Corp.*, 892 A.2d 162, 169 (Vt. 2005); *State v. Atl. Richfield Co.*, 148 A.3d 559, 566 & n.6 (Vt. 2016) (declining to adopt exceptions to the statute of limitations and declining to adopt a continuing tort theory). Thus, as this Court is bound to apply Vermont law to Jenkins' alleged custodial interference claim, no continuing tort doctrine exists as to her claims. Her RSAC is therefore fatally untimely against Liberty Counsel, Staver, and Lindevaldsen.

**2. The Continuing Tort Theory is Inapplicable to Custodial Interference Claims.**

Even if the continuing tort theory had been adopted in Vermont, which it has not, Jenkins' continuing tort theory also fails for the independent reason that binding precedent holds that

custodial interference claims are not continuing torts. *See, e.g., Leonard v. United States*, 633 F.2d 599 (2d Cir. 1980) (holding that the continuing tort theory is inapplicable to father's custodial interference claims); *see also* Restatement (Second) of Torts § 899 (case citations) (discussing *Leonard v. United States*, 633 F.2d 599 (2d Cir. 1980) and noting that the Second Circuit held the continuing injury theory is inapplicable to custodial interference claims) (“The [Second Circuit] court of appeals held that the father’s cause of action accrued at the time that the defendants had first concealed the children and that all subsequent acts were merely in furtherance of the concealment and did not give rise to a new cause of action”). Thus, under binding precedent, Jenkins’ custodial interference claim is not a continuing tort.

Numerous other courts in the Second Circuit have also refused to adopt the continuing tort theory for custodial interference claims. *See, e.g., Tinker v. Abrams*, 640 F. Supp. 229, 232 (S.D.N.Y. 1986) (“**[I]n a case involving a parent’s abduction of a child, the continuing wrong theory should not be applied.**” (emphasis added)); *Murray v. Admin. for Child Servs.*, 476 F. Supp. 2d 436, 441-42 (S.D.N.Y. 2007) (noting that a custodial interference claim is not a continuing tort); *Lucas v. Novogratz*, No. 01 Civ. 5445(GEL), 2002 WL 31844913 (S.D.N.Y. Dec. 18, 2002) (noting that custodial interference claim is not a continuing tort, and holding that for statute of limitations to be tolled for alleged continuing torts, the state law must recognize it as such a tort). Jenkins’ claim of continuing tort fails as a matter of settled law. Her RSAC is untimely and must be dismissed in its entirety as to Liberty Counsel, Staver, and Lindevaldsen.

## **II. JENKINS’ CLAIMS FAIL FOR LACK OF PERSONAL JURISDICTION.**

### **A. The Law Of The Case Doctrine Has No Application To Findings Of Personal Jurisdiction.**

Jenkins contends that the law of the case doctrine bars Liberty Counsel, Staver, and Lindevaldsen’s jurisdictional arguments. (Opp. at 20-21). This contention has no merit. The law

of the case doctrine is not a straightjacket deployed to bind a court's determinations on issues previously arising in litigation. *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009). Indeed, "interlocutory orders . . . remain open to trial court reconsideration and do not constitute the law of the case." *Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005). As abundant precedent demonstrates, this Court is not only permitted to revisit jurisdictional findings, but is **required** to reconsider them. *See, e.g., Christianson v. Holt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (holding that court may revisit jurisdictional issues despite law of the case doctrine, and is required to decline jurisdiction when presented with evidence that it is lacking); *Rogers v. Valentine*, 426 F.2d 1361, 1363 n.2 (2d Cir. 1970) (jurisdictional findings may be revisited despite law of the case doctrine); *Chen-Oster v. Goldman, Sachs, & Co.*, No. Civ. 6950(AT)(JCF), 2015 WL 4619663, \*3 (S.D.N.Y. Aug. 3, 2015) (same).

**It is true that the law of the case generally does not apply to a finding that the court has jurisdiction.** The federal courts are under an independent obligation to examine their own jurisdiction and without jurisdiction the court cannot proceed at all in any cause. . . . **Thus, a court is obligated to reverse a prior finding that it has jurisdiction if it subsequently determines that it does not, notwithstanding the law of the case doctrine.**

*Id.* (emphasis added) (internal citations omitted).

Fatal to Jenkins' contention here, a court's findings concerning personal jurisdiction is not subject to the law of the case doctrine. *See, e.g., Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 111 (2d Cir. 2001) (law of the case doctrine does not foreclose arguments concerning personal jurisdiction); *Lane v. XYZ Venture Partners, LLC*, 322 F. App'x 675 (11th Cir. 2009) (same); *see also Weiss v. Nat'l Westminster Bank PLC*, 176 F. Supp. 3d 264, 275 (E.D.N.Y. 2016) (holding that the law of the case doctrine does not bar revisiting a finding of personal jurisdiction); *Little v. Twentieth Cent. Fox Films Corp.*, No. 89 Civ. 8526, 1995 WL 404939 (S.D.N.Y. July 7, 1995) (holding that prior determinations of personal jurisdiction do not constitute the law of the case);

*Neelon v. Krueger*, No. 12-cv-11198-IT, 2015 WL 4576825 (D. Mass. July 30, 2015) (a court's preliminary findings of personal jurisdiction do not implicate the law of the case doctrine when personal jurisdiction is challenged).

Jenkins willfully ignores the facts of this case. She contends that, despite this Court's discussion in its order permitting leave to amend (dkt. 220), Liberty Counsel, Staver, and Lindevaldsen "seek to relitigate this very same issue." (Opp. at 20). Jenkins' assertion that newly added defendants Liberty Counsel, Staver, and Lindevaldsen (parties who were not added until **5 years** into the litigation) are in the same procedural posture as all other defendants who have been in the case since the beginning is demonstrably fallacious. Liberty Counsel, Staver, and Lindevaldsen are not relitigating anything, as they have never presented **any arguments whatsoever** to this Court. Indeed, until now, they were not parties and could not respond to anything. Liberty Counsel, Staver, and Lindevaldsen's motions to dismiss are therefore the first opportunity they have had to raise any defense in this action, including the substantial constitutional questions concerning the exercise of jurisdiction over them.

Moreover, even if the law of the case applied to previous findings of personal jurisdiction, which it does not, the law of the case doctrine cannot bind parties that have never had any opportunity to challenge the Court's jurisdiction. *See Westerbeke Corp. v. Diahatsu Motor Co., Ltd.*, 304 F.3d 200, 219 (2d Cir. 2002); *Weiss*, 176 F. Supp. 3d at 275 (when defendant had no fair opportunity to raise jurisdictional defenses, law of the case is inapplicable to him); *In re Bulk (Extruded) Graphite Prod. Antitrust Litig.*, No. Civ. 02-6030(WHW), 2006 WL 1084093, \*9-10 (D.N.J. Apr. 24, 2006) (when issues concerning personal jurisdiction were decided in a prior motion by **different** defendants, law of the case cannot be used by plaintiff to assert appropriateness of jurisdiction over **new** defendants). Liberty Counsel, Staver, and Lindevaldsen

are thus not subject to the law of the case doctrine, and their challenges to this Court's jurisdiction are not foreclosed by anything.

**B. Application Of The Law Of The Case Doctrine Against Liberty Counsel, Staver, and Lindevaldsen Would Violate Due Process.**

Even if the law of the case doctrine were applicable to questions of personal jurisdiction, which it is not, and even if the law of the case could bar revisiting previous findings concerning personal jurisdiction, which it cannot, the application of the law of the case doctrine in this matter would violate Liberty Counsel, Staver, and Lindevaldsen's right to due process. Despite Jenkins' claims that these new Defendants "failed in their prior attempts to argue this Court lacks jurisdiction" (Opp. at 20), which is a frivolous claim, Liberty Counsel, Staver, and Lindevaldsen have not and, until now, could not raise any defense whatsoever. They were not parties until this Court permitted them to be added, and their motions to dismiss are the first opportunity these Defendants have had to address any of Jenkins' fanciful claims. Jenkins' assertion that Liberty Counsel, Staver, and Lindevaldsen's defenses are foreclosed before they were even able to appear and be heard would eviscerate due process. Indeed, due process would "have little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Regardless of the substance of any proceedings that occurred in this matter before Liberty Counsel, Staver, and Lindevaldsen were joined as defendants, these Defendants have a fundamental right to appear and be heard on their defenses before binding adjudications can be made against them. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, the law of the case does

not and cannot foreclose Liberty Counsel, Staver, and Lindevaldsen's arguments concerning this Court's lack of personal jurisdiction over them.

Jenkins' assertion that this Court's previous discussion of personal jurisdiction somehow forever binds Liberty Counsel, Staver, and Lindevaldsen violates due process and seeks to impose an unconstitutional burden on them. This Court's previous findings concerning jurisdiction do not and cannot bind these new Defendants. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 227 (1946) (court does not have jurisdiction to enter findings against a defendant prior to defendant being given notice and an opportunity to be heard); *id.* (“to the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him . . . there was a want of judicial due process and hence a want of jurisdiction over the person”); *Mullane*, 339 U.S. at 314 (court cannot make binding jurisdictional findings unless defendant is given an “opportunity to present their objections”); *United States v. Casciano*, 124 F.3d 106, 112 (2d Cir. 1997) (before a court can make any findings concerning a defendant, due process requires that defendant be given notice and an opportunity to be heard); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (due process requires that a defendant be given “the opportunity to be heard in his defense” concerning a court's jurisdiction over him); *In re Verit Indus.*, 7 F. App'x 743 (9th Cir. 2001) (reversing a district court's findings against a defendant that “did not have its day in court . . . to challenge the court's exercise of personal jurisdiction”); *see also Nat'l Sch. Reporting Serv., Inc. v. Nat'l Sch. of Cal., Ltd.*, 924 F. Supp. 21, 23 (S.D.N.Y. 1996).

Jenkins claims that this Court's findings in its order lifting the previously imposed stay and permitting joinder of additional defendants binds Liberty Counsel, Staver, and Lindevaldsen. (Opp. at 20-21). But, this Court issued its order on **March 20, 2017**. (Dkt. 220). Jenkins did not file her Revised Second Amended Complaint naming these Defendants until **May 4, 2017**. (Dkt.

223). No counsel appeared on their behalf until **May 12, 2017** (dkt. 226), lead counsel did not appear until **May 26, 2017** (dkt. 231, 232, 233), and the first opportunity for Liberty Counsel, Staver, and Lindevaldsen to present any defenses occurred on **June 5, 2017**. (Dkt. 238, 239). Thus, this Court's March 20th order discussing jurisdiction over these Defendants was made without affording Liberty Counsel, Staver, and Lindevaldsen the opportunity to have legally sufficient notice or any opportunity to be heard. Indeed, this Court explicitly noted that Liberty Counsel, Staver, and Lindevaldsen had no opportunity to be heard on the jurisdictional questions. (Dkt. 220, at 3 n.1) (noting that Liberty Counsel, Staver, and Lindevaldsen had no opportunity to present defenses and that they would "assert jurisdictional and other defenses only if the Court grants the Plaintiffs' motion, and only once it has been properly served"). Thus, any findings concerning this Court's jurisdiction over Liberty Counsel, Staver, and Lindevaldsen were issued in "want of judicial due process and hence a want of jurisdiction over the person." *Griffin*, 327 U.S. at 227. Applying the law of the case doctrine, as Jenkins seeks, would violate these Defendants' constitutional rights. The Court is duty-bound to reject them.

**C. This Court Lacks Personal Jurisdiction Over Liberty Counsel, Staver, And Lindevaldsen.**

**1. Jenkins' Reliance on Conspiracy Theory of Jurisdiction Fails as a Matter of Settled Law.**

Without any citation to any authority, Jenkins contends that Liberty Counsel, Staver, and Lindevaldsen are subject to this Court's jurisdiction because of their alleged participation in a conspiracy with other defendants over whom this Court may have jurisdiction. (Opp. at 24). This contention must be rejected as contrary to settled law. *See, e.g., H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Labs.*, 384 F.2d 97, 98 (2d Cir. 1967) ("the presence of one co-conspirator within the jurisdiction does not give jurisdiction over all who are alleged to be co-conspirators");

*Bertha Bldg. Corp. v. Nat'l Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957) (same); *see also Mansfield Heliflight, Inc. v. Freestream Aircraft USA, Ltd.*, No. 2:16-cv-28, 2016 WL 7176586, \*9 (D. Vt. Dec. 7, 2016) (“the conspiracy theory of jurisdiction **does not confer personal jurisdiction over a non-resident co-conspirator based merely on allegations that a conspiracy existed.**” (emphasis added)); *Turner v. Baxley*, 354 F. Supp. 963, 976-77 (D. Vt. 1972) (same). Thus, Jenkins reliance on her allegations that Liberty Counsel, Staver, and Lindevaldsen were alleged co-conspirators to support the exercise of jurisdiction over them falls far short of the mark and must be rejected.

Moreover, even if the conspiracy theory of jurisdiction could support her claims, a claim contrary to settled law, Jenkins’ conclusory allegations of conspiracy would not suffice to support the exercise of jurisdiction over Liberty Counsel, Staver, and Lindevaldsen. Indeed, “mere allegations of conspiracy, even coupled with the presence of one conspirator within the jurisdiction, do not give jurisdiction over all nonresident co-conspirators.” *Vt. Castings, Inc. v. Evans Prod. Co.*, 510 F. Supp. 940, 944 (D. Vt. 1981); *see also Weldon v. Ramstad-Hvass*, 512 F. App’x 783, 789 (10th Cir. 2013) (“For personal jurisdiction based on conspiracy theory to exist, the plaintiff must offer **more than bare allegations that a conspiracy existed**, and must allege facts that would support a prima facie showing of a conspiracy.” (emphasis added)).

Here, Jenkins allegations of a conspiracy fall far short of this mark. Indeed, her claims of conspiracy on the part of Liberty Counsel, Staver, and Lindevaldsen are wholly conclusory. Jenkins has not plead any agreement on the part of these Defendants (MTD at 77-80), and Jenkins has failed to establish underlying act liability. (*Id.* at 80). Her only allegations related to conspiracy are the conclusory allegations that these Defendants were co-conspirators. (RSAC ¶ 65). Such bare

and unsupported allegations fail to support the exercise of jurisdiction over Liberty Counsel, Staver, and Lindevaldsen. *See also infra* Section V.

**2. Jenkins’ Attempts to Evade the Supreme Court’s Limitation on the Effects’ Test Fails as a Matter of Law.**

Jenkins continues her baseless assertion that the effects test of personal jurisdiction was not fundamentally limited in *Walden v. Fiore*, 134 S. Ct. 1115 (2014). (Opp. at 22). This contention misrepresents the status of personal jurisdiction law post-*Walden*. As the Court held in *Walden*, to constitutionally exercise personal jurisdiction over an individual, the minimum contacts test must focus on the defendant’s actions. *Walden*, 134 S. Ct. at 1122 (“the relationship must arise out of contacts that the defendant *himself* creates with the forum state” (emphasis original)). A plaintiff’s relationship to the forum, not matter how significant, cannot serve as the basis for the assertion of personal jurisdiction over a non-resident defendant alleged to have caused injury, not matter how substantial, in the forum. *Id.* (“Put simply, however significant the plaintiff’s contacts with the forum may be, those contacts cannot be ‘decisive in determining whether the defendant’s due process rights are violated.’” (quoting *Rush v. Savchuck*, 444 U.S. 320, 332 (1980))). “After *Walden*, the mere fact that a defendant’s conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction. . . . Instead, a defendant’s suit-related conduct must have a broader effect on the **forum itself**—something *beyond* the effect felt by the plaintiff alone.” *Younique, LLC v. Youssef*, No. 2:15-cv-00783-JNP-DBP, 2016 WL 6998659, \*7 (D. Utah Nov. 30, 2016) (bold emphasis added; italics original).

In the Supreme Court’s last term, it once again reaffirmed this change. “The primary focus of our personal jurisdiction inquiry is the **defendant’s relationship to the forum** State,” not to the plaintiff or some other third-party. *Bristol-Myers Squibb v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017) (emphasis added). The Court reiterated that “‘a defendant’s relationship with a third party,

standing alone, is an insufficient basis for jurisdiction.” *Id.* at 1781 (quoting *Walden*, 134 S. Ct. at 1123). Discussing *Walden*, the Court noted that when the relevant conduct occurs elsewhere, “the mere fact that this conduct affected plaintiffs with connections to the forum State did not suffice to authorize jurisdiction.” *Id.*

Here, Jenkins asserts that jurisdiction is proper over Lindevaldsen based entirely upon alleged actions that took place outside of Vermont and that create no connection whatsoever between Lindevaldsen and Vermont. (Opp. at 23-24). Jenkins only points to Lindevaldsen’s representation of Miller, a **Virginia resident**, in the unrelated state court family proceeding, to a press conference **in Virginia**, to allegedly received emails at Liberty University **in Virginia**, and to allegedly packed up belongings at an apartment **in Virginia**. (*Id.*). Not one of the allegations creates a substantial connection between Lindevaldsen and Vermont. Indeed, all but one, occurred outside of Vermont. Not one of those alleged actions can provide any support for the exercise of jurisdiction over Lindevaldsen in Vermont. (*See also* MTD at 27-31) (discussing Jenkins’ utter failure to allege any substantial connection between Lindevaldsen and the forum state).

The one alleged contact Lindevaldsen has with Vermont is itself insufficient to establish jurisdiction over her in Vermont. The only thing Jenkins can point to is Lindevaldsen’s representation of Miller in Vermont in the family law custody case. (Opp. at 23-24). As a matter of settled law, representation of one client in one case in the forum State is insufficient to confer personal jurisdiction over the non-resident attorney. This was true pre-*Walden*, *see Bank Brussels Lambert v. Fiddler Gonzalez & Rodriquez*, 305 F.3d 120 (2d Cir. 2002) and *Mayes v. Leipzieger*, 674 F.2d 178 (2d Cir. 1982), and it is certainly true post-*Walden*. *See, e.g., Rockwood Select Asst Fund XI(6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1180 (10th Cir. 2014) (holding that lawyer’s representation of one client in the forum state, without more, is insufficient to confer

personal jurisdiction over the nonresident lawyer, even when some of the representation occurred in the forum state). (*See also* MTD at 31-34). Moreover, even if allegations concerning the representation of a client in the forum state are what give rise to the action, more substantial connections are required with the forum to establish personal jurisdiction over the nonresident attorney. *Id.* at 1180-81; *DCA Servs., Inc. v. Commc'ns III, Inc.*, No. CIV-15-256-D, 2016 WL 815329, \*3 (W.D. Okl. Feb. 29, 2016) (same). Lindevaldsen's representation of Miller in Vermont does not suffice to confer jurisdiction over her in this matter.

Notably, Jenkins does not even attempt to address this fundamental and fatal flaw in her jurisdictional arguments. (Opp. at 23-29). Jenkins' remarkable failure to address binding precedent from the Second Circuit and the universal precedent from every circuit court to address this issue (MTD at 33-34) demonstrates that she cannot do so. Indeed, she has no answer for the extensive precedent evincing that her jurisdictional arguments are riddled with constitutional infirmities. Despite Jenkins' contentions to the contrary, the Due Process Clause demands more than what she has or can allege. This Court lacks personal jurisdiction over Lindevaldsen.

### **3. Jenkins' Agency Arguments against Staver Represent a Fundamental Misunderstanding of Agency Law and Fail as a Matter of Settled Law.**

Jenkins contends that this Court may exercise personal jurisdiction over Staver based on nothing more than Jenkins' allegations against Lindevaldsen, because Staver was Lindevaldsen's "co-counsel, boss, and supervisor." (Opp. at 25). Jenkins' contention fundamentally misrepresents agency law, ignores the shortcomings of her own allegations, and relies upon utterly irrelevant precedent to support her contentions that jurisdiction is proper over Staver. (*Id.*). It is not. Staver is not Lindevaldsen's principal, the imputation of conflicts in ethical regulations is irrelevant to the due process inquiry, and Jenkins' allegations fail to establish jurisdiction over Staver.

**a. Staver is not Lindevaldsen's Principal.**

Jenkins' contentions that Lindevaldsen acted as Staver's agent for purposes of jurisdiction is also fatally and incurably flawed. To survive a motion to dismiss, Jenkins must allege facts showing an agency relationship between Lindevaldsen and Staver. *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 276 (2d Cir. 2013). Jenkins did not even mention any such agency relationship in her RSAC, and that is fatal to her claims of agency here. (*See* MTD at 37).

Given her utter failure to properly plead the requisite elements of the agency relationship she now relies upon for asserting jurisdiction is proper over Staver, Jenkins retreats to the ridiculous position that this Court can exercise jurisdiction over a corporate officer for acts of the corporation's agent. (Opp. at 28). Vermont law recognizes no such jurisdiction here. *See, e.g., Parker v. Cone*, 160 A. 246, 248 (Vt. 1939) (corporate officer is "not personally liable for torts committed by [corporation's employee]" unless there is allegations of **active participation and direct involvement** in the alleged tort); *New England Acceptance Corp. v. Nichols*, 8 A.2d 665 (Vt. 1939) (corporate officer subject to jurisdiction based only on "**his acts** which constitute a tort" emphasis added)). This Court, too, has recognized the flaw in Jenkins' reasoning. *See Stuart v. Fed. Energy Sys., Inc.*, 596 F. Supp. 458, 461 (D. Vt. 1984) (while corporate officer may, in some instances be subject to jurisdiction based on the torts of corporate employees, the officer must have "direct personal involvement," and the "plaintiff must allege sufficient facts to establish that the defendant personally participated in the transaction causing the injury"); *see also Escude Cruz v. Otho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980) ((holding that a corporate officer is subject to jurisdiction where plaintiffs allege that officer had "direct personal participation" or was the "**central figure**" in the challenged corporate activity (emphasis added))).

Jenkins' allegations do not demonstrate that Staver was an active participant or the "central figure" in any of the alleged conduct. Indeed, Jenkins' threadbare allegations in the RSAC demonstrate that Staver had no involvement in Vermont whatsoever. (RSAC ¶ 21) (alleging that Staver became attorney for Miller); (*id.* ¶ 31) (alleging Staver attended a press conference with Miller in **Virginia**); (*id.* ¶ 60) (alleging that Staver splits his time between **Virginia** and **Florida**); (*id.* ¶ 61) (alleging Staver has maintained that he does not know of Miller's whereabouts); (*id.* ¶ 62) (alleging that Staver has appeared on television and radio to support a book written by Lindevaldsen, with no mention of Vermont). There are no other allegations against Staver at all. As these allegations demonstrate, Jenkins has not alleged any involvement, much less direct participation or a central role, in any alleged tortious activity. These "admittedly weak" jurisdictional allegations (Dkt. 220, Opinion and Order on Motion to Lift Stay and Join Defendants, at 31) do not establish direct participation, active involvement, or any tortious act on the part of Staver. Staver is not subject to jurisdiction in Vermont.

Jenkins' authorities do not alter this conclusion. Jenkins relies on *Secretary for Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 705 A.2d 1001 (Vt. 1997) ("*SANR*") and *Prive v. Vermont Asbestos Group*, 992 A.2d 1035 (Vt. 2010) for the assertion that corporate officers can be held liable for the acts of the corporation's agents. But, those cases provide no support whatsoever for such a contention. In *SANR*, the issue was whether the corporate officer could held liable for **his own tortious conduct**, in addition to the corporation being liable for its **his** actions, and not those of a different corporate employee. *SANR*, 705 A.2d at 243-244. The issue was not, as Jenkins contends, whether the corporate officer, by virtue of being a corporate officer, can be held liable for the actions of the corporation's agents. *Id.* The Court held only that he could be liable because of his own actions. *Id.* In *Prive*, too, the Vermont Supreme

Court dealt only with an issue of whether a corporate officer could be held liable for his own tortious conduct. *Prive*, 992 A.2d at 1041. The Court held that “a corporate officer is ‘not personally liable for torts committed by an employee while carrying out his instructions unless he specifically directed them to be done or participated or cooperated therein.’” *Id.* (quoting *Parker*, 160 A. at 248). Jenkins’ reliance on these authorities is thus misplaced.

Jenkins has made no allegations that Staver directed the allegedly tortious conduct to take place, that he was an active participant in any of the alleged tortious conduct, or that he played a central role in any of the alleged tortious conduct. Jenkins’ failure to demonstrate such alleged participation with sufficient allegations in the RSAC is fatal to her claims against Staver. This Court lacks jurisdiction over Staver. *Sher*, 911 F.2d at 1366 (“while each partner is generally an agent for the *partnership* for the purpose of its business, he is not ordinarily an agent for his *partner*. Thus, a partner’s actions may be imputed to the partnership for the purpose of establishing minimum contacts, **but ordinarily may not be imputed to the other partners.**” (italics original; bold emphasis added)). (*See also* MTD at 34-43).

**b. The imputation of conflicts in attorney ethical regulations is irrelevant for questions concerning personal jurisdiction over Staver.**

Jenkins also contends that ethical regulations imputing knowledge and conflicts to all members of a law firm supports a finding of personal jurisdiction over Staver based on Lindevaldsen’s alleged knowledge. (Opp. at 27 n.4). This argument is absurd. The question involved here is whether the exercise of personal jurisdiction over Staver “contravenes a constitutional guarantee.” *Metro. Life Ins. C. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). It does. “The Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts,

ties, or relations.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). It is axiomatic that “the requirements of *International Shoe* must be met as to **each defendant** over whom a state court exercise jurisdiction.” *Rush*, 444 U.S. at 332 (emphasis added). Jenkins’ assertion that she can establish jurisdiction based upon some imputed knowledge derived from the irrelevant ethical rules for conflicts of interest runs roughshod over this entrenched constitutional principal. Jurisdiction and potential liability are “distinct and independent” inquiries. *Clark v. Milam*, 830 F. Supp. 316, 325 (S.D.W.V. 1993). In the attorney context, the contacts of one partner cannot, consistent with due process, be imputed to another because “**personal jurisdiction must be established over each partner in a partnership individually.**” *Id.* (emphasis added); *see also Ytuarte v. Gruner & Jahr Printing & Publ’g Co.*, 935 F.2d 971, 972-73 (8th Cir. 1991) (same); *Sher*, 911 F.2d at 1364-65 (same). Staver is not subject to jurisdiction based on the alleged actions or alleged contacts of his fellow lawyers, including Lindevaldsen.

Moreover, even the imputation of conflicts rules were applicable here, which they are not, the application of ethical requirements on attorneys cannot be used in a manner that violates the due process rights of attorneys. *See, e.g., Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539 (7th Cir. 2011). Here, asserting jurisdiction over Staver based on the alleged knowledge of his fellow attorney would violate Staver’s due process rights. Thus, Jenkins’ misplaced reliance on imputed knowledge provides no support for the exercise of jurisdiction over Staver.

### **3. Jenkins’ Reliance on Malpractice Cases to Assert the Propriety of Personal Jurisdiction over Liberty Counsel Fails as a Matter of Law.**

Jenkins does not contest, and therefore concedes, that Liberty Counsel does not have sufficient minimum contacts as a corporation to subject it to jurisdiction in Vermont. (Opp. at 29). In fact, Jenkins does not even attempt to suggest such contacts exists, nor could she. Jenkins’ failure to allege sufficient minimum contacts is fatal to her assertion of jurisdiction over Liberty

Counsel. *See Rush*, 444 U.S. at 332 (holding that each defendant must have minimum contacts for the exercise of jurisdiction to comport with due process). (*See also* MTD at 43-45).

Jenkins has no answer for the mountain of precedent holding that a law firm is not subject to personal jurisdiction in a forum in which its attorneys engaged in isolated representation. *See, e.g., Rockwood*, 750 F.3d 1178; *Newsome v. Gallacher*, 722 F.3d 1257, 1280-81 (10th Cir. 2013) (law firm not subject to jurisdiction in forum in which it has no sufficient minimum contacts, even if attorneys represented client in isolated matter in the forum state); *Sher v. Johnson*, 911 F.2d 1357, 1363 (9th Cir. 1990) (same); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223, 226-26 (8th Cir. 1987) (same); (*see also* MTD at 32-34).

Jenkins' authorities are not to the contrary. (Opp. at 29). Jenkins relies on *Gracious Living Corp. v. Colucci & Gallagher, PC*, 216 F. Supp. 3d 662, 669 (D.S.C. 2016) for the notion that a law firm can be subject to personal jurisdiction in a case involving its attorneys alleged malpractice. *Gracious Living* has no import here. There, the court made it abundantly clear that its exercise of jurisdiction over the firm was based on the fact that the underlying representation occurred in the forum in which the malpractice actions was brought. *Gracious Living*, 216 F. Supp. 3d at 669 ("courts have found personal jurisdiction exists in legal malpractice claims against nonresident law firms **if the legal malpractice claim is filed in the same forum as the underlying actions that serves as the factual basis for the legal malpractice action.**" (emphasis added)). But, if the actions were based on representation of a client in the forum or outside the forum that does not serve as the basis for the litigation in which jurisdiction is challenged, "this Court would follow the *Allen* court's lead and find that there is no personal jurisdiction." *Id.*; *see also Allen v. James*, 381 F. Supp. 2d 495 (E.D. Va. 2005) (holding that litigation in which jurisdiction is

challenged must arise from representation of the plaintiff in that same forum for personal jurisdiction to exist over a nonresident law firm).

Here, Jenkins' fanciful claims do not arise out of Liberty Counsel's representation of her in Vermont. Nor could they. Liberty Counsel has never represented Jenkins in any state. Additionally, and equally fatal to Jenkins' assertion of jurisdiction over Liberty Counsel, the instant litigation does not arise out of Liberty Counsel's representation of Miller in the state custody case, but out of the allegedly tortious conduct of Miller unrelated to Liberty Counsel's representation of Miller. Nevertheless, even if it did arise out of Liberty Counsel's representation of Miller in the state court proceeding, jurisdiction would still not be proper under Jenkins' cited authorities. *See Gracious Living*, 216 F. Supp. 3d at 669; *Allen*, 381 F. Supp. 2d at 495. Jurisdiction is not proper over Liberty Counsel. (*See also* MTD at 43-49).

**D. The Exercise Of Personal Jurisdiction Over Liberty Counsel, Staver, And Lindevaldsen Would Offend Due Process And Work Substantial Injustice.**

Jenkins again attempts to lump other defendants (previous parties who had the opportunity to be heard on their defenses) and Liberty Counsel, Staver, and Lindevaldsen (parties only now having any opportunity to be heard in their defenses) into the same boat as it relates to this Court's previous discussions of reasonableness. (Opp. at 33). Such a specious contention represents an unconscionable assault on the due process rights of Liberty Counsel, Staver, and Lindevaldsen. *See supra* Section II.B. It cannot and must not be countenanced.

The exercise of jurisdiction over Liberty Counsel, Staver, and Lindevaldsen would not be reasonable, and it would grossly offend vital due process concerns. Jenkins' failure to demonstrate minimum contacts of Liberty Counsel, Staver, and Lindevaldsen, *see supra* Section II.C and (MTD at 26-49), diminishes the inquiry relevant for the reasonableness prong. *See Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994) ("The reasonableness prong of the due process

inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction.”). Notably, Jenkins only argues that three of five factors warrant a finding of reasonableness, and therefore concedes the other two do not support such a finding.<sup>2</sup> (Opp. at 33-34) (only challenging Liberty Counsel, Staver, and Lindevaldsen's assertions regarding the burden on the defendant, the forum state's interest, and the shared interests of the states). Nevertheless, Jenkins' contentions regarding the three challenged factors fails to demonstrate reasonableness.

**1. Isolated Representation of One Client in One Case Does Not Diminish the Burden on Liberty Counsel, Staver, and Lindevaldsen.**

Jenkins claims that Liberty Counsel, Staver, and Lindevaldsen cannot demonstrate any burden in being forced to litigate here because they represented a client in Vermont in previous matters. (Opp. at 34). But, representation of one client in one isolated case is not sufficient to demonstrate that these Defendants have no burden in defending themselves here. As several courts have noted, “one-shot representation” does not entail the kind of continuing contact with a forum state that would diminish the burden on a law firm or attorney having to defend in a state with which he has insufficient contacts. *See Sher*, 911 F.2d at 1363 n.3; *Clark*, 830 F. Supp. at 322 n.10 (“one-shot deals” are not the kind of continuous relationship that is necessary for exercise of personal jurisdiction to comport with due process). Here, Liberty Counsel, Staver, and Lindevaldsen had merely a one-shot deal with the one client they represented in Vermont. This is

---

<sup>2</sup> The interests in convenient and effective relief necessitate a finding of unreasonableness here because all the alleged actions took place outside of Vermont and all key witnesses and evidence are located outside of Vermont. (MTD at 52). Additionally, the efficient administration of justice necessitates a finding of unreasonableness because the alleged wrongs occurred outside Vermont. (*See id.* at 53). The two factors, though unchallenged and therefore conceded by Jenkins, warrant a finding of unreasonableness here.

not sufficient to overcome the burden on these Defendants in litigating in this forum with which they constitutionally inadequate contacts.

**2. *Obergefell* Does Not Alter the Territorial Limitations on the States and Exercising Jurisdiction Here Would Violate Substantive Policies of Federalism.**

Jenkins contends that this state has a significant interest in this litigation because of *Obergefell*. (Opp. at 34). But there are overriding concerns of due process that make the exercise of jurisdiction over Liberty Counsel, Staver, and Lindevaldsen unreasonable and constitute a startling departure from entrenched principles of federalism inherent in the due process inquiry. As the Supreme Court recently affirmed, “restrictions on personal jurisdiction ‘are more than a guarantee of immunity from inconvenient or distant litigation. **They are a consequence of the territorial limitations on the power of the respective States.**” *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *Hanson v. Denkla*, 357 U.S. 235, 251 (1958) (emphasis added)). This federalism interest can also be dispositive of the due process, fair play, and substantial justice inquiry. *Id.*

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment

*Id.*

Here, Jenkins has failed to demonstrate that Liberty Counsel, Staver, and Lindevaldsen have constitutionally sufficient minimum contacts. (MTD at 26-49). This is the crux of the due process inquiry, and Jenkins’ failure to satisfy it is fatal to her claims of jurisdiction here. Because Liberty Counsel, Staver, and Lindevaldsen’s alleged suit-related conduct occurred entirely outside of Vermont, the Due Process Clause imposes a territorial limitation on this Court and forbids the exercise of jurisdiction over these Defendants. *See Waldman v. Palestine Liberation Org.*, 835

F.3d 317, 335 (2d Cir. 2016). *Obergefell* said nothing about expanding any jurisdictional interest, and certainly did not change the fundamental inquiry into reasonableness for purposes of personal jurisdiction. It thus did not alter the territorial limitations placed upon this Court when sitting in diversity. Jurisdiction over these Defendants would therefore be unreasonable.

### **3. *Obergefell* Did Not Enhance Vermont's Interest.**

Jenkins also claims that *Obergefell* enhanced the rationale for exercising jurisdiction in Vermont because it was the forum that issued the orders in the custody dispute. (Opp. at 34). This assertion ignores the pertinent inquiry and binding Second Circuit precedent. When all alleged tortious acts took place outside of the forum state, the dispute “implicates absolutely no interest of the State of Vermont.” *Metro Life*, 84 F.3d at 574. *Obergefell* did nothing to change that, and Jenkins’ reliance on it is misplaced. Exercising jurisdiction over Liberty Counsel, Staver, and Lindevaldsen would not be reasonable.

## **III. JENKINS’ CUSTODIAL INTERFERENCE CLAIMS FAILS AS A MATTER OF LAW.**

### **A. The Law Of The Case Doctrine Does Not Apply To Liberty Counsel, Staver, And Lindevaldsen.**

Jenkins once again erroneously contends that the law of the case doctrine forecloses Liberty Counsel, Staver, and Lindevaldsen’s arguments on her custodial interference claim. (Opp. at 38). As demonstrated *supra* Section II.A, the law of the case doctrine has no application to Liberty Counsel, Staver, and Lindevaldsen because they were not parties to this litigation when any prior determinations were made. The law of the case doctrine cannot bind parties that have never had any opportunity to challenge the Court’s prior determinations. *See Westerbeke Corp. v. Diahatsu Motor Co., Ltd.*, 304 F.3d 200, 219 (2d Cir. 2002). Thus, her claim that the parties have “battled for the court’s decision” (Opp. at 38-39) is utterly devoid of merit.

**B. Jenkins’ Astounding Request That This Court Not Only Adopt A New Tort For Vermont, But To “Adapt It To Changing Times” Ignores Settled Precedent, Runs Roughshod Over Principles Of Federalism And Comity, And Must Fail.**

Jenkins implores this Court to not only adopt a tort heretofore unrecognized by Vermont law, but also to adapt the alleged tort to fit her precise situation and save her claims from dismissal. (Opp. at 42). Jenkins’ remarkable request cannot be countenanced. This Court is mandated to apply the law as announced by the Vermont Supreme Court. Additionally, even if this Court were to recognize a tort wholly foreign to Vermont law, it certainly cannot craft a version of such a predicted tort unrecognized in any jurisdiction to adopt it.

**1. This Court is Duty Bound to Apply the Law As Announced by the Vermont Supreme Court.**

It is axiomatic that district courts sitting in diversity must apply the law of the forum state as announced by the highest court of the state. *See, e.g., Comm’r v. Bosch’s Estate*, 387 I.S. 456, 465 (1967) (“state law as announced by the highest court of the State is to be followed”); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994) (“federal courts sitting in diversity are bound to follow state law”); *Maska U.S., Inc. v. Kansa Gen. Ins. Co.*, 198 F.3d 74, 80 (2d Cir. 1999) (same); *Cornellier v. Am. Casualty Co.*, 389 F.2d 641 (2d Cir. 1968) (same); *Brendle v. Gen. Tire & Rubber Co.*, 505 F.2d 243 (4th Cir. 1974) (“A federal court, sitting in [diversity], must apply the law as announced by the highest court of the state.”). Jenkins’ astounding request to the contrary must be rejected, along with her attempts to have a federal district court craft a remedy out of whole cloth to meet her scenario. This Court is bound to apply state law as announced by the Vermont Supreme Court, which does not recognize a custodial interference claim. (*See also* MTD at 63-66).

**2. Even if this Court Permits a Custodial Interference Claim, It Cannot Craft a Version that is Wholly Foreign to Settled Law.**

If this Court permits the “predicted tort” to continue, which it should not, this Court cannot craft a version of the tort wholly foreign to the settled law concerning its contours. Jenkins requests that this Court not only adopt a new tort for Vermont, but “adapt it to changing times” so that her improper claims can survive dismissal. (Opp. at 41-44). Jenkins’ astounding proposition ignores the fact that this Court is not empowered to craft state policy or modify state law to fit a plaintiff’s claims or save Jenkins’ fanciful claims from dismissal. Indeed, “in a diversity case the federal courts are **not free to develop their own notions of what should be required by the public policy of the state, but are bound to apply state law.**” *Maska*, 198 F.3d at 80 (quoting *Cornellier*, 389 F.2d at 644 (emphasis added)). Jenkins would have this Court fashion, out of whole cloth, a new version of the custodial interference tort because she views her failure to state a claim as based on “outdated notions of custody.” (Opp. at 41). This Court must reject those attempts because it is not free to develop its own notions of what Vermont public policy should be regarding custody and the long-established understanding of it.

Jenkins’ request is even more astounding because she requests that this Court adopt a version of her custodial interference claim that has been explicitly rejected by **every state to consider the issue** and numerous federal courts, including some in the Second Circuit. *See, e.g., Decter v. Second Nature Therapeutic Program, LLC*, 42 F. Supp. 3d 450, 456-58 (E.D.N.Y. 2014) (parent entitled to only visitation with child, but not primary custody, cannot maintain a custodial interference claim); *Ashby v. State*, 779 N.W.2d 343, 358 (Neb. 2010) (“we do not believe that a biological father can assert a claim for intentional interference with his parental rights before gaining a custody order”); *id.* (“Because Ashby cannot allege that he was legally entitled to custody at the time of the alleged interference, he cannot allege facts showing this required element of

intentional interference with a parental relationship.”); *Wolf v. Wolf*, 690 N.W.2d 887, 892 (Iowa 2005) (**holding that the word “custody” in Section 700 requires “superior custody rights” and “primary physical care”**); *Stone v. Wall*, 734 So.2d 1038 (Fla. 1999) (“The elements of the cause of action include that the plaintiff had **superior custody rights** to the child and that the defendant intentionally interfered with those rights.”); *Anonymous v. Anonymous*, 672 So.2d 787, 790 (Ala. 1995) (holding that “a parent who has the right to custody, control, and services of a minor child” may maintain a custodial interference claim); *Cosner v. Ridinger*, 882 P.2d 1243, 1246-47 (Wyo. 1994) (holding that a custodial interference claim may only be asserted by the primary custodial parent and not merely one deprived of visitation privileges); *Plante v. Engel*, 469 A.2d 1299, 1301 (N.H. 1983) (custodial interference claim may be maintained only by one with lawful custody order). (MTD at 67-69) (discussing cases requiring superior custodial rights). Jenkins’ hope for a custodial interference claim fashioned in a heretofore unknown manner tailored specific to her situation collapses under the weight of this precedent.

**C. Jenkins’ Allegations Are Insufficient To State A Custodial Interference Claim Against Liberty Counsel, Staver, And Lindevaldsen.**

Jenkins’ custodial interference claim also fails because she has not and cannot allege that Liberty Counsel, Staver, and Lindevaldsen engaged in any allegedly tortious act **after Jenkins was entitled to full and superior custody of Isabella**. Contrary to the allegations of Jenkins’ RSAC, she now claims that she was entitled to full and superior custody prior to January 1, 2010. (Opp. at 41) (claiming Jenkins was entitled to superior custody beginning November 20, 2009). This contention, however, ignores the allegations of the Rutland Family Court’s Order, the RSAC, and reality. (RSAC ¶ 20) (alleging that “full physical and legal responsibilities for Isabella were transferred to Jenkins” on January 1, 2010). Jenkins litigative legerdemain also ignores her own evidence submitted to this Court. (Dkt. 261-1, at 2, ¶ 10) (noting that full legal and physical

responsibility was given to Miller on June 17, 2004, and that Jenkins was only permitted visitation with Isabella); (*id.* at 4, ¶ 22) (on June 15, 2007, the Rutland Family Court stated that “The Court concludes that it is in the best interest of [Isabella] that Ms. Miller exercise parental rights and responsibilities.”); (*id.* at 5, ¶ 23) (noting that Jenkins was only given “visitation”); (*id.* at 9, ¶ 67) (noting that Jenkins did not have primary custody of Isabella); (*id.* at 12) (noting that Jenkins only had visitation rights); (*id.* at 21) (ordering, on that “sole physical and legal custody” **would transfer to Jenkins on January 1, 2010**).

Thus, Jenkins did not have superior legal custody of Isabella (or anything more than visitation rights) until January 1, 2010. Jenkins has made and can make no post-custody interference allegations against Liberty Counsel, Staver, and Lindevaldsen. Jenkins’ RSAC fails as a matter of law because she has not alleged and cannot allege that Liberty Counsel, Staver, or Lindevaldsen committed any tortious act **after January 1, 2010**. Jenkins makes only two allegations concerning Liberty Counsel, Staver, and Lindevaldsen that allegedly occurred after January 1, 2010. (RSAC ¶ 61) (alleging that Liberty Counsel, Staver, and Lindevaldsen pursued appeals after January 1, 2010 that were not exhausted until November 2010); (*id.* ¶ 62) (alleging that Lindevaldsen wrote a book about her representation of Miller that was published in 2011). Neither of these allegations involves any tortious activity.

Jenkins’ attempts at distorting this reality must fail. Jenkins’ only answer to this critical and fatal flaw is that she alleged that Lindevaldsen packed belongings at Miller’s apartment **in November 2009**. (Opp. at 41). This allegation is demonstrably false. (Dkt. 238-1, Affidavit of Rena Lindevaldsen, ¶ 10) (“I have never even been to Ms. Miller’s apartment.”). Nevertheless, even if the allegation was true, which it is not, Jenkins’ custodial interference claim would still fail against Liberty Counsel, Staver, and Lindevaldsen. Assuming Jenkins’ fanciful contention that she

had primary custody of Isabella prior to January 1, 2010, a contention belied by the plain text of the Rutland Family Court (Dkt. 261-1), the allegations of the RSAC still fail to support a claim against these Defendants. Jenkins contends that the Rutland Family Court order granted her custody at the time it was entered on **November 20, 2009**. (Dkt. 261-1). But, Jenkins' RSAC alleges that Lindevaldsen's purportedly tortious activity occurred in "**early November 2009**" **prior to the Rutland Family Court order**. (RSAC ¶ 45). Thus, even under Jenkins' own allegations and the demonstrably fallacious notion that she had primary custody of Isabella on November 20, 2009, the allegations of the RSAC fail to demonstrate that Liberty Counsel, Staver, and Lindevaldsen committed any tortious act **after Jenkins received primary custody**. This failure is fatal to her RSAC, and the custodial interference claim must be dismissed against Liberty Counsel, Staver, and Lindevaldsen.

**D. Jenkins' Next-Friend Custodial Interference Claim Fails To State A Claim.**

Jenkins also contends that this Court's incorrectly predicted tort gives rise to a cause of actions for Isabella. (Opp. at 46-47). This claim has no merit. Section 700 of the Restatement (Second) of Torts, upon which every court basis this tort when adopting it, states that "[o]ne who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not return to the parent after it has been [sic] left him, **is subject to liability to the parent.**" Restatement (Second) of Torts § 700 (emphasis added). Liability for the children of alleged custodial interference claims has no basis in this plain statement of the tort.

Jenkins contends that because a child has an interest in a relationship with her parents, she can therefore assert a custodial interference claim. (Opp. at 46). Notably, Jenkins admits that, where recognized, the custodial interference tort is based on the common law and specifically

requests this Court to adopt the common law claim. (*Id.*). But, her admission dooms her custodial interference claim as next-friend of Isabella. As binding Second Circuit precedent makes clear, “**at common law, there is no cause of action for abduction on behalf of the child abducted; that claim belongs to the parent who had custody of the child.**” *Leonard v. United States*, 633 F.2d 599, 626 n.41 (2d Cir. 1980) (emphasis added); *Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998) (same). Jenkins’ next friend claims therefore fail as a matter of law.

Jenkins reliance on *State v. Wootten*, 756 A.2d 1222 (Vt. 2000) does not alter the binding precedent of the Second Circuit. In particular, *Wootten* dealt with the **crime** of custodial interference. *Id.* at 1226. Being a victim of a crime, however, does not automatically confer civil standing. *Madden v. Abate*, 800 F. Supp. 2d 604, 606-07 (D. Vt. 2011) (“the existence of a criminal statute prohibiting certain conduct does not in and of itself create a private right of action that may be brought by the victim of that conduct”); *Hill v. Didio*, 191 F. App’x 13, 14015 (2d Cir. 2006) (same). Thus, merely because Vermont may recognize children as victims of **criminal** kidnapping does not automatically create a **civil** cause of action for Isabella. Jenkins’ next-friend custodial interference claim therefore fails as a matter of law.

#### **IV. JENKINS’ CONCLUSORY ALLEGATIONS OF CONSPIRACY FAIL TO STATE A CLAIM AS A MATTER OF LAW.**

Jenkins admits that her RSAC includes no allegations of agreement on the part of Liberty Counsel, Staver, and Lindevaldsen. (Opp. at 48) (noting that she has not put forward allegations of an explicit agreement). The existence of an agreement is an essential element of the alleged conspiracy. *See, e.g., Arkeley v. N. Country Stone, Inc.*, 620 F. Supp. 2d 591, 600 (D. Vt. 2009) (to prove existence of conspiracy, plaintiff was required to show an agreement); *Coon v. Southwestern Vt. Med. Ctr.*, No. 2:13-cv-182, 2014 WL 348193, \*10 (D. Vt. Jan. 30, 2014) (plaintiff must plead

the essential element of agreement to allege a civil conspiracy). Jenkins' failure to allege agreement on the part of Liberty Counsel, Staver, and Lindevaldsen is thus fatal to Jenkins' claims.

Having failed to allege an agreement on the part of Liberty Counsel, Staver, and Lindevaldsen, Jenkins now retreats to the position that the alleged agreement of others (RSAC ¶ 25) somehow demonstrates the agreement of all defendants. (Opp. at 48). This is false. Jenkins' only allegations of any conspiratorial agreement whatsoever concerning Liberty Counsel, Staver, and Lindevaldsen are wholly conclusory (RSAC ¶¶ 65, 67), and this is insufficient as a matter of settled law. *See, e.g., Schwartz v. Frankenhodd*, 733 A.2d 74, 80 (Vt. 1999) (“**No court will accept conclusory allegations of a conspiracy, without more, as sufficient to establish [a conspiracy].**” (emphasis added)); *Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 93-94 (2d Cir. 1975) (“bland assertions of conspiracy” is plainly insufficient). Jenkins' failure to allege any agreement beyond merely conclusions must fail. (*See also* MTD at 77-80).

## V. JENKINS' AIDING AND ABETTING CLAIM FAILS TO STATE A CLAIM.

### A. Jenkins Cannot Demonstrate Sufficient Knowledge.

Jenkins does not contest, and therefore concedes, that Liberty Counsel and Staver had no actual knowledge of Miller's allegedly tortious activity. (Opp. at 51). Jenkins' contention that Lindevaldsen had actual knowledge of the alleged tortious activity, at the time it was committed, is demonstrably fallacious and cannot withstand even cursory review. (*Id.*). Jenkins bases her contention on only two allegations. (*Id.*) (citing RSAC ¶¶ 44, 46). Neither of those allegations supports her contention, and each fail as a matter of law to show actual knowledge. Jenkins alleges that Lindevaldsen and Hyden were communicating via email demonstrates actual knowledge of the alleged kidnapping. (RSAC ¶¶ 44, 46). In addition to being demonstrably fallacious and

contrary to the evidence presented to this Court, (*see* dkt. 238-3, Lindevaldsen Aff. ¶¶ 7-8),<sup>3</sup> these allegations do not and cannot constitute actual knowledge of tortious activity at the time alleged. Fatal for Jenkins, the RSAC plainly alleges that such alleged communications took place in **September 2009**. (RSAC ¶ 44). But as demonstrated, *supra* Section III, allegations involving activities prior to January 1, 2010 when Jenkins was given full and superior custody rights do not and cannot support a finding of tortious activity. (*See also* MTD at 72-76). Indeed, for Jenkins' allegations to demonstrate actual knowledge, Lindevaldsen must not only have known about Miller's alleged activity but also have actual knowledge that it was tortious **at the time it was committed**. *See Lassiter v. Bessette*, 16 A.3d 580, 584 (Vt. 2010). Given that Jenkins' allegations of Lindevaldsen's alleged knowledge predate Jenkins' primary custodial rights, the RSAC cannot demonstrate actual knowledge. (*See also* MTD at 89-93).

**B. Jenkins' Allegations Do Not Show Substantial Assistance.**

Jenkins admits that she alleges no facts to support the alleged involvement of Liberty Counsel, Staver, and Lindevaldsen, but still contends that the RSAC alleges substantial assistance. (Opp. at 52). This is nonsense. In her Opposition, Jenkins does not even reference any activities of Liberty Counsel or Staver. (Opp. at 52). She therefore concedes, as she must, that their alleged involvement was not substantial. (MTD at 93-96).

Lindevaldsen's alleged involvement was also not substantial. (*Id.*). Jenkins relies on only two allegations to claim that Lindevaldsen's alleged involvement was substantial. (*Id.*) (citing RSAC ¶¶ 44-46, 57). But, these allegations fail to demonstrate that Lindevaldsen provided

---

<sup>3</sup> It is also worth noting that Jenkins' counsel put forward these same allegations in an bar complaint against Lindevaldsen in 2016, including the emails Jenkins alleges she received in these allegations. The Vermont Professional Responsibility Program dismissed the complaint against Lindevaldsen as insufficiently supported by the evidence. (Dkt. 382-3, Lindevaldsen Aff. ¶ 9).

substantial assistance to the alleged underlying tort. *See Gen. Elec.*, 962 F.2d at 288 (allegations demonstrating that a defendant “took no part” in the underlying tort cannot support aiding and abetting liability). Here, even if true, which they are not, the allegations against Lindevaldsen cannot demonstrate that she took part in the underlying tort because at the time of the allegations—in September 2009—the actions of Miller were not tortious. *See supra* Section III. (*See also* MTD at 83-89).

Moreover, Jenkins makes no argument whatsoever that Liberty Counsel, Staver, and Lindevaldsen were the proximate cause of her alleged injuries. (Opp. at 53). While she does state, without reference to any authority or allegations, that Liberty Counsel, Staver, and Lindevaldsen were the proximate cause of her injuries (*id.*), such a conclusory contention cannot withstand the weight of the law and as a matter of law are not countenanced. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (legal conclusions unsupported by sufficient factual allegations are not accepted as true for purposes of a motion to dismiss). If the alleged underlying tortious conduct would have occurred without the alleged actions of Liberty Counsel, Staver, and Lindevaldsen, they cannot be considered the proximate cause of her injuries. *See, e.g., DeLima v. Trinidad Corp.*, 302 F.2d 585, 588 (2d Cir. 1962) (plaintiff can only demonstrate “proximate cause” if a defendant’s alleged action “produces the result complained of and **without which it would not have occurred.**” (emphasis added)); *Hassain v. Avianca Airlines*, 872 F. Supp. 1183, 1189 (E.D.N.Y. 1995) (same); *Corbell v. Blood*, No. 5:10-cv-56, 2012 WL 12882102, \*7 (D. Vt. Apr. 13, 2012) (“Proximate cause is a cause ‘that directly produces an event and without which the event would not have occurred.’” (quoting *Black’s Law Dictionary* 250 (9th ed. 2009))).

Here, it simply cannot be said that the alleged actions of Liberty Counsel, Staver, and Lindevaldsen, even if true, are so integral that the alleged kidnapping would not have occurred but

for their alleged participation. The RSAC makes it plainly evident that the alleged actions of other defendants, not Liberty Counsel, Staver, and Lindevaldsen, were essential to the underlying tort. (RSAC ¶¶ 36, 38, 40, 42). Liberty Counsel, Staver, and Lindevaldsen’s alleged actions contributed nothing to the actions necessary for the tort to have occurred and therefore cannot be the proximate cause of Jenkins’ alleged injuries. (MTD at 96-99). Jenkins’ aiding and abetting claim fails as a matter of settled law and must be dismissed against Liberty Counsel, Staver, and Lindevaldsen.

## **VI. JENKINS’ SECTION 1985(3) CONSPIRACY FAILS TO STATE A CLAIM.**

### **A. Jenkins’ Reference To Lawful Activities By Liberty Counsel, Staver, And Lindevaldsen Cannot Support An Inference Of Conspiratorial Agreement.**

To maintain an action under Section 1985(3), a plaintiff must make “specific allegations in support of [her] claims.” *Gyadu v. Hartford Ins. Co.*, 197 F.3d 590, 591 (2d Cir. 1999). “In order to maintain an action under Section 1985, a plaintiff ‘must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve an unlawful end.’” *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (quoting *Romer v. Morganthau*, 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000)). Mere “hints at some tenuous link” between the alleged conspirators simply will not do. *Gyadu*, 197 F.3d at 591. Jenkins utterly fails to satisfy this threshold as to Liberty Counsel, Staver, and Lindevaldsen.

Jenkins contends that she has sufficiently pleaded factual allegations from which this Court can infer a conspiracy. (Opp. at 69-70). This contention is false. (MTD at 100-103). But, more fatal for Jenkins, she admits that the allegations she references to support her erroneous contention are protected First Amendment activities. (Opp. at 71 n.12). In the conspiracy context, it is impermissible for courts to infer a conspiratorial agreement when alleged conduct could be consistent with lawful conduct, and not merely an alleged conspiracy. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[L]awful parallel conduct fails to bespeak unlawful

agreement.”); *Id.* (“a conclusory allegation of agreement at some unidentified point,” and based on lawful conduct, “does not supply facts adequate to show illegality”); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007) (if alleged conduct can be consistent with both conspiracy and lawful objective, complaint must be dismissed); *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 256 (S.D.N.Y. 1995) (conspiracy cannot be inferred from arguably lawful actions); *City of Moundridge v. Exxon Mobile Corp.*, 250 F.R.D. 1, 5 n.4 (D.D.C. 2008) (citing *Elevator Antitrust*, 502 F.3d at 50-51 and noting that lawful conduct cannot be used to infer unlawful agreement to engage in conspiracy); *Black v. JP Morgan Chase & Co.*, No. 10-848, 2011 WL 4102802, \*25 (W.D. Pa. Aug. 10, 2011) (“it would be inappropriate . . . to allow a factfinder to infer an unlawful conspiracy from allegations of the lawful [activity of defendants.]”); *Ismail v. Ford*, No. SA CV 10-00901-VBF-AJW, 2014 WL 1681993, \* 16 (C.D. Cal. Apr. 29, 2014) (rejecting plaintiffs’ Section 1985 claims because she failed to plead a conspiratorial agreement based on more than allegations involving arguably lawful activity).

Here, Jenkins’ argument admits that she is attempting to have this Court infer a conspiratorial agreement from allegations based on the lawful activities of Liberty Counsel, Staver, and Lindevaldsen. (Opp. at 69) (referencing allegations that Liberty Counsel, Staver, and Lindevaldsen represented Miller, that Lindevaldsen published a book, the Staver and Lindevaldsen appeared on television and radio to discuss the book, spoke with a fundraising company, and gave speeches). These allegations are all based on lawful activity. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (writing and publishing books are protected speech); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (attorney holding press conference about representation of a client is “pure speech in the political form”); *Vill. of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620, (1980) (“soliciting funds involves interests

protected by the First Amendment’s guarantee of freedom of speech”); *Mandell v. Cnty. Of Suffolk*, 316 F.3d 368 (2d Cir. 2003) (media interviews are protected speech).<sup>4</sup>

As these allegations make plain, Jenkins’ attempts to salvage her fatally deficient allegations of explicit agreement on the part of Liberty Counsel, Staver, and Lindevaldsen also fails to permit the inference of any conspiratorial agreement.

Thus, while [Jenkins] may believe that defendants conspired to [interfere with her custodial rights], **the defendants’ allegedly conspiratorial actions could have equally been prompted by lawful, independent goals which do not constitute a conspiracy.** Therefore even when viewed in a most favorable light as such a motion requires, **[Jenkins’] conspiracy claims must be dismissed for failure to allege a sufficient factual basis.**

*Kramer*, 890 F. Supp. at 256. Jenkins’ Section 1985(3) claim must be dismissed.

**B. *Obergefell* Did Not Modify Section 1985(3), Or Any Other Federal Statute.**

Jenkins contends that *Obergefell* modified Section 1985(3) to include claims based on sexual orientation. (Opp. at 75). This claim, too, fails as a matter of law. Courts that have considered the impact of *Obergefell* on issues not specifically addressing same-sex marriage have squarely rejected the notion that *Obergefell* automatically modified existing law on any unaddressed subjects. *See, e.g., Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350, \*10 (Tex. June 30, 2017) (holding that issues not specifically addressed by *Obergefell* remain open questions and the ramifications of that decision on other statutes are “unstated at best”); *Coker v. Williams*, 858 F.3d 204, 307 (5th Cir. 2017) (same); *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (noting that *Obergefell* did not answer every question and that statutes

---

<sup>4</sup> The only other allegation that is not based on protected First Amendment activity also fails to support an inference of conspiracy because it, too, was not unlawful. (Opp. at 69) (referencing RSAC ¶ 45 and alleging that Lindevaldsen assisted in packing up belonging in “early November 2009”). These allegation is absolutely false. (Dkt. 283-3, Lindevaldsen Aff. ¶ 10). But, even if true, which it is not, the allegation would still not reference **unlawful conduct**. *See supra* Section III.D. It therefore cannot serve as the basis upon which to infer a conspiratorial agreement.

not immediately at issue in *Obergefell* did not automatically change with the Supreme Court's decision). Thus, *Obergefell*'s holding relating to same-sex marriage laws in no way modified Section 1985(3).

Jenkins' attempts to diminish the mountain of precedent specifically dealing with Section 1985(3) must also be rejected. (Opp. at 76-77). Jenkins makes the bald assertion that the Ninth Circuit's decision in *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.3d 327, 333 (9th Cir. 1979) is no longer good law because it was purportedly abrogated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). (Opp. at 76). This proposition has no merit. As the Second Circuit has recognized, *Price Waterhouse* had nothing to do with sexual orientation. See *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200 (2d Cir. 2017) (“**the sexual orientation of the plaintiff in *Price Waterhouse* was of no consequence**”) (emphasis added)). If sexual orientation or homosexuality had nothing to do with the decision in *Price Waterhouse*, as binding precedent indicates, then the explicit holding of *DeSantis* relating specifically to Section 1985(3) was good law when it was issued and remains good law today. Indeed, *Price Waterhouse* did not even address Section 1985(3), so as with *Obergefell*, it does not and cannot serve as a basis to claim cases dealing specifically with Section 1985(3) are somehow abrogated. They are not.

“[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.” *Nw. Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981). Jenkins would have this Court craft a new remedy heretofore unknown to the law of any jurisdiction. The fact remains that **no jurisdiction has applied Section 1985(3) to claims based on sexual orientation**. Not one. For Jenkins to assert that a decision unrelated to and not even mentioning Section 1985(3) somehow modifies existing law on that statute is nonsense. The cases dealing with Section

1985(3), including *DeSantis* and the mountain of other precedents rejecting Jenkins' contentions (MTD at 104-105), remain good law and must be applied as such. *See, e.g., United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995) ("Precedents do not cease to be authoritative merely because counsel in a later case advance a new argument," particularly when the previous precedent "demonstrates that the court considered the ground urged as a basis for overruling it."); *Harris v. Epoch Grp., LLC*, 357 F.3d 822, 826 (8th Cir. 2004) (same); *In re Holmes*, 160 B.R. 709, 711 (D. Conn. 1993) (a higher court's "interpretation of a code provision is obviously binding upon this court . . . **unless the latter interpretation is directly reversed or overruled.**" (emphasis added)). The authority dealing with Section 1985(3)'s application to claims brought based on sexual orientation specifically remains good law, even post-*Obergefell*. Jenkins' contentions to the contrary have no merit.

Jenkins' reliance on post-*Obergefell* cases dealing with other federal statutes does not compel a different conclusion. (Opp. at 76-77). In fact, the authorities upon which she relies prove these Defendants' point that statutes not directly at issue in *Obergefell* remain intact and valid law post-*Obergefell*. For instance, Jenkins relies on the Seventh Circuit's decision in *Hivley* for support that *Obergefell* automatically changed the legal landscape of federal statutory law. (Opp. at 76). But, *Hivley* explicitly notes that statutes not at issue in *Obergefell* were left unchanged by that decision. *Hivley*, 853 F.3d at 342 (noting that a different federal statute, Title VII, not at issue in *Obergefell* was not addressed by *Obergefell* and thus prior decisions on that case remain valid law until reversed). Other circuits, including the Second Circuit, have also noted that statutes not directly at issue in *Obergefell* remain valid law and must be addressed in their specific statutory context. *See, e.g., Christiansen*, 852 F.3d at 199 (holding that federal statute not at issue in *Obergefell* did not automatically come to encompass protection for sexual orientation by virtue of

*Obergefell*); *Evans v. Ga. Regional Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (even post-*Obergefell*, a federal statute denying protection to individuals based on sexual orientation remains “binding precedent that has not been overruled by a clearly contrary opinion of the Supreme Court”). Section 1985(3) does not protect individuals based on their sexual orientation. (MTD at 104-105). Not one case post-*Obergefell* has altered that conclusion, nor has the Supreme Court, nor did *Obergefell*. Jenkins’ Section 1985(3) claims therefore fails as a matter of settled law.

**C. Jenkins’ Astounding Claim That She Need Not Allege Membership In The Purported Suspect Class Is Utterly Devoid Of Merit.**

Jenkins makes the astounding claim that she need not allege membership in a suspect class on her own behalf or on Isabella’s behalf to state a claim under Section 1985(3). (Opp. at 78, 79 n. 14). This claim is utterly devoid of merit and flies in the face of binding precedent. *See, e.g., Enquist v. Oregon Dep’t of Agriculture*, 553 U.S. 591, 607 (2008) (rejecting plaintiffs claim that she “need not claim discrimination on the basis of membership in some class or group” to state an equal protection claim); *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir. 1988) (affirming dismissal of complaint under the Civil Rights Act because it fails to claim that plaintiffs are **all members** of the alleged suspect class); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 292 (2d Cir. 1992) (noting that plaintiffs cannot bring Section 1985(3) claim unless they can allege that **all** plaintiffs are **members** of the purported racial class); *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981) (“**As all are aware, the Supreme Court has construed [Section 1985] as limiting its availability to serve as a vehicle for a suit to those persons who are members of what has now become known as a suspect class.**” (emphasis added)); *Anderson v. Sullivan*, 877 F.2d 64 (9th Cir. 1989) (“to raise a claim under 42 U.S.C. § 1985, [plaintiff] must be a member of a suspect class.”); *Burne v. Cnty. of King*, 883 F.2d 819, 821 (9th Cir. 1989) (plaintiff “failed to make out a claim under Section 1985” because he failed to

plead that he is a member of a suspect class); *Smith v. White*, 92 F.3d 1186 (6th Cir. 1996) (to raise 1985 claim, plaintiff must allege that he is a member of the suspect class); *Nat'l Commc'ns Sys., Inc. v. Mich. Pub. Serv. Comm'n*, 789 F.2d 370, 374 (6th Cir. 1986) (affirming dismissal of complaint because 1985(3) plaintiff could not allege membership in suspect class).

Jenkins' claim that she can support a Section 1985(3) conspiracy without alleging membership in a suspect class therefore fails as a matter of law and collapses under the substantial weight of this binding precedent. She has not and cannot allege membership in a suspect class. (MTD at 103-108). She also has not and cannot allege membership in a suspect class on the part of Isabella. (MTD at 113-114). This failure is fatal to Jenkins' Section 1985(3) claims.

**D. Jenkins' Failure To Adequately Allege Requisite State Action Is Fatal To Her Section 1985(3) Claim.**

Astoundingly, Jenkins claims that *Obergefell*, which said nothing whatsoever about Section 1985(3) and never even mentioned it, somehow changed the entire landscape of the United States Code (Opp. at 73-78). But, Jenkins then argues that *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), which specifically discussed Section 1985(3), somehow fails to alter any understanding of that provision. (Opp. at 89-91). This remarkable contention has no merit and must be rejected.

While the Supreme Court may not have specifically decided the issue, it certainly indicated that Section 1985(3)'s plain language and its prior precedents reflect an understanding "clearly contrary to the dissent's [and Jenkins'] view" that state action is not required under the Hindrance Clause. *Bray*, 506 U.S. at 282 (noting that the majority disagreed with the dissent's view that the Hindrance Clause covers purely private conspiracies). The Court, however, noted that "the operative language of the two clauses ('equal protection of the laws') is identical" in both the Hindrance and Deprivation Clauses. *Id.* at 283. It correctly noted also that to claim the Hindrance

Clause does not include a state action requirement would require “an interpretation of the statute that concededly gives the same language in two successive clauses completely different meanings.” *Id.* Such an interpretation is absurd and cannot be countenanced.

Of course, to adopt Jenkins’ contentions here would be to interpret a statute to include this absurd result, which this Court is mandated to avoid. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (statutes cannot be interpreted in a manner that produces an absurd result); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) (“to construe statutes so as to avoid results glaringly absurd, has long been a judicial function”); *Litwin v. Am. Express Co.*, 838 F. Supp. 855, 859 (S.D.N.Y. 1993) (“When a litigant would give a statute a meaning that yields absurd results, that is a fair indication that the statute doesn’t mean what that litigant has suggested.”). Jenkins’ contention would require two phrases in the same code provision and subsection with identical operative language be defined in two distinct and wholly irreconcilable manners. *Bray*, 506 U.S. at 282. Such a construction simply is not and cannot be the law.

Moreover, Jenkins’ construction of Section 1985(3) would also run roughshod over the canon of *in pari materia*. “The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context.” *Erienzaugh v. United States*, 409 U.S. 239, 243 (1972); *Maimonides Med. Ctr. v. United States*, 809 F.3d 85, 92 (2d Cir. 2015) (“**language used in one portion of the statute should be deemed to have the same meaning as the same language used elsewhere in the statute.**” (quoting *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 260 (1993) (emphasis added)); *United States v. Freeling*, 31 F.R.D. 540, 549 (S.D.N.Y. 1962) (“statutes which use identical words in the same sense are to be construed *in pari materia*” to give

identical meaning to identical words). Here, because both the Deprivation and Hindrance Clauses operate to protect plaintiffs' equal protection rights, *Bray*, 506 U.S. at 282, that identical operative language must necessarily be construed to have identical meaning. Otherwise, identical language in the same statutory provision and only two phrases apart would have different meaning. Such is not the law.

Jenkins finds it "unclear" why *Tilton v. Richardson*, 6 F.3d 683 (10th Cir. 1993) is instructive of her alleged conspiracy claim. (Opp. at 88). Her contention that *Tilton* "in no way" involved a Hindrance Clause claim is extraordinary. (*Id.*). In *Tilton*, the plaintiff admitted that no private action was involved but asserted that he did not need to assert such action because the aim of the private conspiracy was to influence state actors to prevent him from exercising his constitutional rights. *Tilton*, 6 F.3d at 687. The Tenth Circuit, discussing *Bray*, noted that the Supreme Court had rejected such a reading of the Hindrance Clause and indicated that all clauses of Section 1985(3) require state action. *Id.* In so noting, the court indicated that *Bray* "effected a change in this evolving area of the law." *Id.*; see also *Friends of Falun Gong v. Pac. Cultrual Enter., Inc.*, 288 F. Supp. 2d 273, 281 (E.D.N.Y. 2003) (noting that *Tilton* held "that claims under the hindrance clause must be based upon rights protected against both private and official interference").<sup>5</sup> Thus, despite Jenkins' protestations to the contrary, *Tilton* is instructive of Jenkins' claim here and compels dismissal for lack of state action. That Liberty Counsel, Staver, and

---

<sup>5</sup> Jenkins accuses Liberty Counsel, Staver, and Lindevaldsen of "conveniently ignoring" precedent from the First Circuit on this issue. This is clearly false. (MTD at 110 n.12) (noting that "[o]nly the First Circuit, based on a flawed and erroneous rationale has held that the Hindrance Clause does not require state action."). Had Jenkins taken the time to read Liberty Counsel, Staver, and Lidnevaldsen's assertions in their entirety, she might have avoided blatantly misrepresenting these Defendants' arguments to the Court.

Lindevaldsen are alleged to have sought to influence Vermont or Virginia officials by their lawful representation of Miller in court proceedings is not sufficient to constitute state action. *Id.*

Jenkins also faults Liberty Counsel, Staver, and Lindevaldsen for taking “too much” out of other authorities explicitly holding that the Hindrance Clause requires state action. (Opp. at 90). Jenkins claims that Liberty Counsel, Staver, and Lindevaldsen only “wish” such authorities had held that state action is required under the Hindrance Clause. (Opp. at 90). Contrary to Jenkins’ contentions, however, *Zhang* explicitly stands for the proposition that state action is required. Jenkins attempts to mislead this Court by arguing that the court did not know what defense was applicable to which clause, so it was not specifically addressing the Hindrance Clause issue. (*Id.*). That is nonsense. *Zhang* specifically addressed the “**Defenses Applicable to Both the ‘Deprivation’ and ‘Hindrance’ Clause Claims.**” *Zhang v. Chinese Anti-Cult World Alliance*, No. 15 CV 1046 (SLT)(VMS), 2016 WL 1128401, at \*9 (S.D.N.Y. Jan. 28, 2016) (emphasis original). It then concluded that state action was required under the Hindrance Clause as well. *Id.* (“Thus, where a plaintiff seeks to enforce a right under Section 1985(3) which, by definition, requires state interference, state involvement must be demonstrated.” (emphasis added)).

Jenkins’ criticism Liberty Counsel, Staver, and Lindevaldsen’s reliance on *Magnum* and *Comtel Tech* is also ridiculous. (Opp. at 90-91). First, Jenkins concedes that *Magnum v. Archdiocese of Philadelphia*, 253 F. App’x 224 (3d Cir. 2007) dealt with the Hindrance Clause and that it held that state action was required. (Opp. at 89). Thus, her criticism of Liberty Counsel, Staver, and Lindevaldsen’s reliance on *Magnum* makes no sense, except for her dislike of *Magnum*’s clear condemnation of her fanciful claims. So, too, with her criticism of *Comtel Tech*. There, the court noted that **any claim** under Section 1985(3) “involving a private conspiracy to influence state action **requires** injury at the state’s hands.” *Comtel Tech., Inc. v. Paul H.*

*Schwendener, Inc.*, No. 04 C 3879, 2005 WL 433327, \*8 (N.D. Ill. Feb. 22, 2005) (emphasis added).

Here, Jenkins alleges violations of the right of equal protection at the hands of purely private actors. (RSAC ¶ 67). This is fatal to her claims, because equal protection rights may only be violated by government officials, *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991). State action is thus required for Jenkins to plead a claim under the Hindrance Clause. Her contention to the contrary collapses under the great weight of authority addressing this issue and the plain language of the statute. Jenkins' Section 1985(3) claims therefore fail and must be dismissed.

**VII. THERE IS NO PROPER VENUE FOR JENKINS' CLAIMS AGAINST LIBERTY COUNSEL, STAVER, AND LINDEVALDSEN.**

Jenkins once again asserts that the law of the case doctrine precludes Liberty Counsel, Staver, and Lindevaldsen's challenge to improper venue. (Opp. at 34). As demonstrated *supra* Sections II.A and III.A, the law of the case has no application to Liberty Counsel, Staver, and Lindevaldsen's challenge because they have never been parties to any proceedings in this litigation prior to now. Their challenge is therefore not subject to the law of the case.

Moreover, no venue is proper for Jenkins' challenges against Liberty Counsel, Staver, and Lindevaldsen because they are unquestionably time barred and utterly fail to state a claim. *See supra* Sections I and III-VI. The only appropriate course of action here is dismissal with prejudice. (MTD at 54-61). Jenkins' failure to bring her claims against Liberty Counsel, Staver, and Lindevaldsen—assuming any of her claims are legally cognizable, which they are not—prior to now, years after the statute of limitations has expired on her fanciful and non-existent claims, is incurably fatal and must meet with this Court's dismissal.

## CONCLUSION

For the foregoing reasons, and for all those thoroughly detailed in Liberty Counsel, Staver, and Lindevaldsen's memorandum in support of their motion to dismiss (dkt. 240), this Court lacks personal jurisdiction over Liberty Counsel, Staver, and Lindevaldsen, and Jenkins' claims against these Defendants are grossly untimely and fail to state any claim upon which relief can be granted. This Court must dismiss Jenkins' RSAC with prejudice.

Respectfully submitted,

Dated: September 6, 2017

Anthony R. Duprey  
NEUSE, DUPREY, & PUTNAM  
1 Cross Street  
Middlebury, VT 05743  
Phone: (802) 388-7966  
Fax: (802) 388-9713  
Email: anthony@ndp-law.com

/s/ Daniel J. Schmid  
Horatio G. Mihet\*  
Daniel J. Schmid\*  
Roger K. Gannam\*  
LIBERTY COUNSEL  
P.O. Box 540774  
Orlando, FL 32854  
Phone: (407) 875-1776  
Fax: (407) 875-0770  
Email: dschmid@lc.org

*Attorneys for Defendants Liberty Counsel,  
and Staver and Lindevaldsen (in their  
individual capacities)*

\*Admitted pro hac vice

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of September, 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.

/s/ Daniel J. Schmid  
Horatio G. Mihet\*  
Daniel J. Schmid\*  
Roger K. Gannam\*  
LIBERTY COUNSEL  
P.O. Box 540774  
Orlando, FL 32854  
Phone: (407) 875-1776  
Fax: (407) 875-0770  
Email: dschmid@lc.org