UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

DEFENDANTS LIBERTY COUNSEL, MATHEW D. STAVER, AND RENA M. LINDEVALDSEN'S REPLY IN SUPPORT OF SPECIAL MOTION TO STRIKE PLAINTIFFS' CLAIMS PURSUANT TO VERMONT'S ANTI-SLAPP STATUTE

Pursuant to L.R. 7(a)(5), Defendants, Liberty Counsel, Inc. ("Liberty Counsel"), Mathew D. Staver ("Staver), and Rena M. Lindevadlsen ("Lindevaldsen"), by and through the undersigned counsel, hereby file this Reply in Support of their Special Motion to Strike Plaintiff's ("Jenkins") claims pursuant to Vermont's Anti-SLAPP statute. (Dkt. 239).

LEGAL ARGUMENT

I. VERMONT'S ANTI-SLAPP STATUTE APPLIES IN FEDERAL COURT.

Jenkins contends that no binding authority mandates the application of Vermont's anti-SLAPP statute in federal court and that it should not be applied here. (Dkt. 260, Opposition to Special Motion to Strike, "Opp." at 7-14). This contention has no merit and flies in the face of substantial precedent interpreting **and applying** Vermont's anti-SLAPP statute in federal court. *See, e.g.*, *Ernst v. Kauffman*, No. 5:14-cv-59, 2016 WL 1610608 (D. Vt. Apr. 20, 2016) (applying Vermont's anti-SLAPP statute in federal court); *Haywood v. St. Michael's College*, No. 2:12-CV-164, 2012 WL 6552361 (D. Vt. Dec. 14, 2012) (same); *Bible & Gospel Trust v. Twinam*, No. 2:07-

CV-17, 2008 WL 5216845 (D. Vt. July 18, 2008) (same); *Bible & Gospel Trust v. Twinam*, No. 1:07-cv-17, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (affirming that Vermont's anti-SLAPP statute applies in federal court). Notably, too, the Second Circuit has applied several anti-SLAPP statutes in federal appeals. *See, e.g.*, *Chandok v. Klessig*, 632 F.3d 803 (2d Cir. 2011) (applying New York's anti-SLAPP statute); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138 (2d Cir. 2013) (applying California's anti-SLAPP statute); *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014) (applying Nevada's anti-SLAPP statute because provisions closely resembling Vermont's anti-SLAPP statute "seem to us unproblematic" and consistent with a federal court's role sitting in diversity); *id.* at 809 ("Many courts have held that [anti-SLAPP] statutes, including the one here, are to be applied federally in [diversity]."). These cases amply demonstrate that Vermont's anti-SLAPP statute is applicable in federal court and is applicable here.

Jenkins admits that this Court has, on several occasions, applied Vermont's anti-SLAPP statute. (Opp. at 9-10). Nevertheless, Jenkins contends that the statute has no application here because it conflicts with federal procedural rules. (Opp. at 10-15). This Court has already conclusively rejected that precise argument. *Haywood*, 2012 WL 6552361 at *13 (noting that there is no direct conflict between Vermont's anti-SLAPP statute and the Federal Rules of Civil Procedure and that "an anti-SLAPP motion to strike may be brought in federal court"); *id.* at *14 ("Like any case that calls for the application of Vermont law, it is the role of this Court to apply the Vermont anti-SLAPP statute as the Vermont Supreme Court would apply it."); *Bible & Gospel Trust*, 2008 WL 5245644 at *1 ("**Vermont's anti-SLAPP statute, 12 V.S.A. § 1041, does not directly conflict with the Federal Rules of Civil Procedure. 12 V.S.A. § 1041 therefore applies in this diversity action**.") (emphasis added)).

Jenkins contends that this Court's analysis is flawed because it relied on "faulty" analysis

from the Ninth Circuit. (Opp. at 9). Her only refuge for such a contention is that a concurring judge thought the issue should be revisited. (*Id.*). But, Jenkins conveniently ignores the fact that the decision from the Ninth Circuit holding that state anti-SLAPP statutes apply in federal court remains good law and **was applied by the majority in the authority upon which she relies**. *See, e.g.*, *U.S. ex rel. Nesham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (holding that state anti-SLAPP statutes apply in federal court cases brought pursuant to diversity); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013) (applying California's anti-SLAPP statute in federal diversity case based upon *Nesham*'s clear holding). The Ninth Circuit's position represents the clear majority of circuit courts to decide the issue. *See Adelson*, 774 F.3d at 809 (noting the many courts that have applied state anti-SLAPP statutes); *Tobinick v. Novella*, 848 F.3d 935, 944 (11th Cir. 2017) ("the majority of circuit courts have found anti-SLAPP special motions to strike permissible [in federal court]"); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009) (applying Louisiana anti-SLAPP statute); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) (holding that anti-SLAPP statutes do not conflict with the federal procedural rules and that anti-SLAPP statutes apply in federal courts); *id.* at 89 ("We conclude that neither Fed. R. Civ. P. 12(b)(6) nor Fed. R. Civ. P. 56, on a straightforward reading of its language, was meant to control the particular issues under [anti-SLAPP statutes].").

The First Circuit's analysis in *Godin* is particularly instructive here. There, the court noted that the question whether to apply a state anti-SLAPP statute in a federal action is "not the classic *Erie* question" as to where to draw "the line between substance and procedure," but rather "falls into the special category concerning the relationship between the Federal Rules of Civil Procedure and a state statute that governs both procedure and substance in the state courts." *Godin*, 629 F.3d at 86. It concluded that, although the Maine anti-SLAPP statute "has both substantive and

procedural aspects," it does "not attempt to answer the same question" as Federal Rule of Civil Procedure 12, governing motions to dismiss on the pleadings, and Rule 56, governing summary judgment. Accordingly, those federal rules "are not so broad as to cover the issues within the scope of [the anti-SLAPP statute]." *Id.* at 88-89. Rather, "[the anti-SLAPP statute] provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail." *Id.* at 89. "One of the substantive aspects of [the statute] shifts the burden to plaintiff to defeat the special motion." *Id*.[1] The *Godin* analysis is also particularly instructive because the Massachusetts anti-SLAPP statute is similar to Vermont's. *Bible & Gospel Trust v. Twinam*, No. 2:-7-CV-17, 2008 WL 5216845, *2 (D. Vt. July 18, 2008) ("The Vermont anti-SLAPP statute is similar to the anti-SLAPP statutes in California and Massachusetts."); *id.* (noting that both similar statutes have been held applicable in federal court and applying the Vermont anti-SLAPP statute in this Court).

Here, as in *Godin*, the Vermont anti-SLAPP statute deploys a burden-shifting analysis for motions brought pursuant to its provisions. *Chandler v. Rutland Gerald Publ'g*, No. 2015-265, 2015 WL 7628687, *2 (Vt. Nov. 1, 2015) (noting that the burden shifts to the plaintiff if a defendant can make a threshold showing that the claims arise from their protected speech activities). These provisions are substantive. *Godin*, 629 F.3d at 88. Thus, the anti-SLAPP's substantive, burden-shifting provisions do "not attempt to answer the same question" as federal procedural rules, and serve an "entirely distinct function." *Id.* at 88-89. Jenkins' contentions to the contrary collapse under the weight of this substantial precedent. This Court, sitting in diversity, is bound to apply the state anti-SLAPP statute. *Haywood*, 2012 WL 6552361 at *14. Jenkins' claims

[1]"In addition, [the anti-SLAPP statute] allows courts to award attorney's fees and costs to a defendant that successfully brings a special motion to dismiss, a statutory element we have previously determined to be substantive." *Godin*, 629 F.3d at 89. The same is true of Vermont's anti-SLAPP statute. 12 Vt. Stat. Ann. § 1041(f)(1).

against Liberty Counsel, Staver, and Lindevaldsen are therefore subject to Vermont's anti-SLAPP statute and must be dismissed.

II. JENKINS' CLAIMS AGAINST LIBERTY COUNSEL, STAVER, AND LINDEVALDSEN ARISE FROM THEIR PROTECTED SPEECH ON A PUBLIC ISSUE.

Jenkins' claims arise from Liberty Counsel, Staver, and Lindevaldsen's protected speech. Liberty Counsel, Staver, and Lindevaldsen's speech concerning a public issue.

A. Jenkins' Claims Arise From Liberty Counsel, Staver, and Lindevaldsen's Protected Speech.

Jenkins contends that this action does not arise from Liberty Counsel, Staver, or Lindevaldsen's protected speech, but rather that it is based on their alleged participation in her fanciful conspiracy narrative. (Opp. at 16). But, Jenkins' "assertion begs the question by assuming the fact that [she] must prove." *First Mercury Ins. Co. v. 613 N.Y. Inc.*, No. 11 Civ. 2819(PAC), 2013 WL 1732793, *2 (S.D.N.Y. Apr. 22, 2013). Not matter what Jenkins may now argue to avoid application of the anti-SLAPP statute, it is the substance of the allegations on the Complaint that matters. Fatal for Jenkins, an examination of those allegations demonstrates that all of her claims against these Defendants involve protected First Amendment activity.

One allegation involves nothing more than an agreement to represent a client in the attorney-client relationship. (RSAC ¶ 21). The majority of the other allegations arise from their representation of Miller in the family court matter and statements made during the course of such representation. (RSAC ¶ 26) (alleging that an unnamed attorney for Miller established a Facebook page to inform the public of Miller's case and solicit support, but not specifically tying the allegation to either Liberty Counsel, Staver, or Lindevaldsen); (*id.* ¶ 29) (alleging that Liberty Counsel attorneys attempted to raise money to support their pro bono representation of Miller in a judicial proceeding); (*id.* ¶ 31) (alleging that Staver and Lindevaldsen appeared at a press

conference on Miller's behalf outside a Virginia courthouse); (*id.* ¶ 61) (alleging that Staver and Lindevaldsen stated in media appearances that they did not know of their client's whereabouts); (*id.* ¶ 62) (alleging that Lindevaldsen wrote a book about her representation of Miller in a judicial proceeding and that Staver and Lindevaldsen appeared on radio and television to promote the book). These allegations all involve constitutionally protected activity. (*See* Dkt. 239-1, Memorandum in Support of Special Motion to Strike, "Memo" at 4-7).

Jenkins only alleges a conspiracy against Liberty Counsel, Staver, and Lindevaldsen, not actual participation in the alleged kidnapping. (RSAC ¶¶ 65, 67). In her futile attempts to salvage that claim from dismissal, however, Jenkins concedes that all allegations she references relating to Liberty Counsel, Staver, and Lindevaldsen arise directly from the protected First Amendment activity described above. (*See* Dkt. 261, Jenkins' Opposition to Motions to Dismiss, "MTD Opp." at 71-72). The only allegations she contends support the inference of a conspiracy involve: (1) Liberty Counsel published a book, (2) Staver and Lindevaldsen appeared on radio and television to promote the book, (3) that Staver and Lindevaldsen taught about the book, and (4) that Lindevaldsen gave speeches about the book. (*Id.*). She can muster nothing more than protected First Amendment activity to support her allegation that Liberty Counsel, Staver, and Lindevaldsen allegedly participated in the alleged conspiracy. This is fatal to her claims. All Jenkins' claims against these Defendants arise from their constitutionally protected speech and activity. Vermont's anti-SLAPP statute prohibits such claims. (*See also* Memo at 2-7).

B. Liberty Counsel, Staver, and Lindevaldsen's Speech Concerned a Public Issue.

Astoundingly, Jenkins claims that the allegations involving Liberty Counsel, Staver, and Lindevaldsen do not show that their protected speech concerned a public issue. (Opp. at 17). This remarkable contention is belied by her own arguments concerning the instant litigation and ignores

the allegations Jenkins put forward against these Defendants. First, throughout her opposition to the motions to dismiss, Jenkins contends that the alleged conspiracy can be inferred from Liberty Counsel, Staver, and Lindevaldsen's speech, that their alleged speech demonstrates their purported animus towards Jenkins, and the *Obergefell* represented a sea change in the "social policy" of all states. (MTD Opp. at 34, 71-74). Specifically, she notes that the speech she alleges Liberty Counsel, Staver, and Lindevaldsen engaged in was made with specific reference to issues relating to same-sex marriage. (*Id.* at 72) (noting that Lindevaldsen's speech "describes the fight" as one over "same-sex marriage" and the "homosexual agenda").

Yet, here, when such arguments demonstrate that her allegations of Liberty Counsel, Staver, and Lindevaldsen's speech unquestionably relate to an issue of public importance, she eschews such descriptions, opting instead to reference their alleged speech as merely related to a family law dispute. (Opp. at 17). Of course, both cannot be true. Fatally for Jenkins, her own allegations and arguments concerning Liberty Counsel, Staver, and Lindevaldsen arise from their speech on matters related to human sexulity, the protection of children, and judicial proceedings. Such issues are unquestionably matters of public importance. (Memo at 7-9). Jenkins concedes, as she must, that such speech relates to public issues. (Opp. at 17).

C. Jenkins Cannot Meet Her Burden to Demonstrate that Liberty Counsel, Staver, and Lindevaldsen's Alleged Spech Lacked Any Factual Support or Arguable Bases in Law or That Liberty Counsel, Staver, or Lindevaldsen Caused Her Actual Injury.

Jenkins contends that she cannot be made to satisfy her burden under Vermont's anti-SLAPP statute because she need only make a prima facie showing at the complaint stage. (Opp. at 18 n.18). Her only refuge for such a specious contention is to assault this Court's holding in *Haywood*. (*Id.*). As this Court has noted, however, the anti-SLAPP statute's burden shifting analysis alters this requirement. *Bible & Gospel Trust*, 2008 WL 5216845 at *2. Under that

"supplemental and substantive rule to provide additional protections," *Godin*, 629 F.3d at 88, Jenkins' burden is altered. And, under this Court's clear holding in *Haywood*, Jenkins "must demonstrate that [her] claim is legally sufficient" to satisfy her burden. *Haywood*, 2012 WL 6552361 at *15. She cannot do so:

- Jenkins' claims against Liberty Counsel, Staver, and Lindevaldsen are grossly untimely and thus must be dismissed against these Defendants. *See* Dkt. 240, Memorandum in Support of Motion to Dismiss at Argument, "MTD Memo" Section I; *see also* Liberty Counsel, Staver, and Lindevaldsen's Reply in Support of Motion to Dismiss, "MTD Reply" at Section I.
- Jenkins' purported next-friend claims against Liberty Counsel, Staver, and Lindevaldsen do not and cannot save her untimely RSAC. *See* MTD Memo at Section II; *see also* MTD Reply at Section III.D.
- This Court lacks personal jurisdiction over Liberty Counsel, Staver, and Lindevaldsen. *See* MTD Memo at Section III; *see also* MTD Reply at Section II.
- This Court is not the proper venue for Jenkins' claims against Liberty Counsel, Staver, and Lindevaldsen. *See* MTD Memo at Section IV; *see also* MTD Reply at Section VII.
- Jenkins' custodial interference claims fails to state a claim as a matter of settled law. *See* MTD Memo at Section V.A.1-2; *see also* MTD Reply at Section III.A-C.
- Jenkins' purported custodial interference claim on behalf of Isabella fails to state a claim as a matter of law. *See* MTD Memo at Section V.A.3; *see also* MTD Reply at Section III.D.
- Jenkins cannot state a claim for civil conspiracy. *See* MTD Memo at Section V.B;

see also MTD Reply at IV.

- Jenkins cannot state a claim for aiding and abetting liability. *See* MTD Memo at Section V.C; *see also* MTD Reply at Section V.
- Jenkins' Section 1985(3) claims against Liberty Counsel, Staver, and Lindevaldsen fail to state a claim. *See* MTD Memo at Section V.D.1-3; *see also* MTD Reply at VI
- Jenkins' purported Section 1985(3) claims on behalf of Isabella fail to state a claim as a matter of law. *See* MTD Memo at Section V.D.4; *see also* MTD Reply at Section VI.

For all these same reasons, Jenkins cannot demonstrate that Liberty Counsel, Staver, or Lindevaldsen caused her any actual injury. Her claims against these Defendants must be dismissed.

CONCLUSION

For the foregoing reasons, Jenkins' claims against Liberty Counsel, Staver, and Lindevaldsen must be dismissed under Vermont's anti-SLAPP statute.

Respectfully submitted,

Dated: September 6, 2017

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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.

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