IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action No. 2:12-cv-00184-WKS**
	:	
KENNETH L. MILLER, et al.,	:	
Defendants.	:	

REPLY OF DEFENDANTS LIBERTY UNIVERSITY, INC., THOMAS ROAD BAPTIST CHURCH, INC. AND VICTORIA HYDEN IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

INTRODUCTION

In her Opposition (dkt. 75) to the Motion to Dismiss filed by Defendants Liberty University, Inc. ("Liberty University"), Thomas Road Baptist Church, Inc. ("TRBC") and Victoria Hyden (collectively, "these Defendants"), Plaintiff Janet Jenkins ("Jenkins") attempts to prop up her Amended Complaint with illogical arguments, outdated and discredited authorities which conflict with binding Second Circuit precedent, and brand new conclusory allegations and claims which she has never pled. Plaintiff labors in vain, and what she has constructed simply collapses. There is no doubt now that this Court lacks jurisdiction over these foreign Defendants, that venue does not lie in this district, and that Plaintiff has failed to plead causes of action for kidnapping, violations of RICO or conspiracy to violate civil rights. Neither the amorphous "jurisdictional discovery" nor the leave to amend requested by Plaintiff could change this reality, but either one would help Plaintiff achieve her stated goal of inflicting maximum "financial pressure" on anyone who has ever been lawfully associated with Lisa Miller (dkt. 75, p. 30, n. 7). Neither Plaintiff's claims nor these Defendants belong in this Court. The Amended Complaint should be dismissed, with prejudice.

LAW AND ARGUMENT

A. THIS COURT LACKS JURISDICTION OVER LIBERTY UNIVERSITY.

1. Liberty University is Not Subject to General Jurisdiction in Vermont.

Plaintiff argues that Liberty University is subject to general personal jurisdiction in Vermont, because it receives "nearly one million dollars of revenue" from its 29 residential students originating from Vermont, whom Plaintiff speculates pay $27,218 each for tuition and fees annually. (Dkt. 75, pp. 5-6). Initially, that these students may have originated from Vermont does not make them Vermont residents at present.[1] More importantly, following Plaintiff's math, which ignores scholarships, grants and other offsets, Liberty University's annual revenues from its 12,571 other residential students who are **not** originally from Vermont would be $342,157,478. Thus, the $789,322 in annual revenue which Plaintiff attributes to **former** Vermont residents would amount to **less than one-fourth of one percent (0.23%)** of the total tuition and fees of all Liberty University residential students. Such a minuscule percentage of revenues has never been sufficient for general jurisdiction, even where the raw dollar amount was exponentially larger than what Plaintiff alleges here.[2]

The case principally relied upon by Plaintiff is readily distinguishable and supports Liberty University, not Plaintiff. In *Irving v. Revera, Inc.*, 2:10-CV-153, 2011 WL 5329726 (D. Vt. Nov. 4, 2011) (SESSIONS, J.) this Court indeed found that Revera, a company which earned "several hundreds of thousands of dollars in fees" for services rendered in Vermont, was subject

[1] *See Shivelhood v. Davis*, 336 F. Supp. 1111, 1115 (D. Vt. 1971) ("The fact that a student lives in a dormitory, is unmarried, is supported financially by his parents who live elsewhere … and occasionally visits his parents, even if all these factors occur together, is not alone sufficient to preclude domicile in the town in which the student attends school").

[2] *See e.g.*, *Dearwater v. Bond Mfg. Co.*, 1:06-CV-154, 2007 WL 2745321, *1, 4 (D. Vt. Sept. 19, 2007) (foreign defendant who had 28 Vermont customers, and whose "sales in Vermont ranged between .03% and 2.30% of its total sales" not subject to general jurisdiction in Vermont); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 570-73 (2d Cir. 1996) ($4 million dollars in sales in Vermont over six year period not enough for general jurisdiction without other regular contacts); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 376 (5th Cir. 1987) (sales of $250 million to Texas not sufficient for general jurisdiction without other contacts).

to general jurisdiction in Vermont. *Id*. at *3-5. However, the Court was persuaded by the fact that Revera "owns seven health care facilities in Vermont," "it manages the operations of these centers," has "ultimate authority over their budgets and capital improvements," "manag[es] all expenses of the facilities," "present[s] a united face to the public through the facilities' websites," and places its officers as members of each of the seven Vermont facilities. *Id*. at * 3. In fact, this Court found no personal jurisdiction over two other entities in *Irving* that derived revenue from Vermont but did not have contacts as extensive as those of Revera. *Id*. at *5-6. Unlike Revera, it is now undisputed that Liberty University has zero facilities in Vermont, zero officers as members of any Vermont entity, and zero authority over the operation, budget or expenses of any Vermont entity. Accordingly, *Irving* is an odd place for Plaintiff to seek support, because it demonstrates that Liberty University cannot be subjected to jurisdiction in Vermont.

The only other two Vermont contacts advanced by Plaintiff – Liberty University's website and hockey team schedule (dkt. 75, p. 6) – are equally unavailing. Liberty University has already demonstrated in its initial brief that the operation of an internet website not specifically directed to Vermont residents but equally available worldwide does not trigger personal jurisdiction in Vermont. (Dkt. 66, p. 9).[3] Plaintiff does not offer a single authority for her contrary position. (Dkt. 75, p. 6). Plaintiff's contention that Liberty University has "continuous and systematic" contacts with Vermont because **one** of its **seventy-one** sports teams (Pl. Ex. A,

[3] This district, including this Court, has repeatedly affirmed this well-established principle. *See e.g.*, *Viko v. World Vision, Inc.*, 2:08-CV-221, 2009 WL 2230919, *12-13 (D. Vt. July 24, 2009) (SESSIONS, J., adopting mag. rept.) (charity's website accessible worldwide insufficient for jurisdiction in Vermont, even though it allowed Vermonters to make online donations; "**there is a consensus among the courts that general jurisdiction cannot be founded solely on the existence of a defendant's internet website**") (emphasis added); *Mansfield Heliflight, Inc. v. Heli-One Canada Inc.*, 2:12-CV-46, 2012 WL 4479851, *5, n.8 (D. Vt. Sept. 28, 2012) (maintenance of an interactive website accessible in Vermont does not give rise to general jurisdiction); *Dearwater v. Bond Mfg. Co.*, 1:06-CV-154, 2007 WL 2745321, * 4 (D. Vt. Sept. 19, 2007) (no personal jurisdiction because "[t]he job posting on Careerbuilder.com and Craigslist.com may have reached Dearwater in Vermont, but its advertisement was for a position in the Western United States"). *See also Kloth v. S. Christian Univ.*, 320 F. App'x 113, 116-17 (3d Cir. 2008) (**university that provides online educational program to worldwide audience not subject to jurisdiction in every jurisdiction where it has online students**).

dkt. 76-1, p. 3) played two of its thirty-three games last year in Vermont borders on frivolous. (Dkt. 75, p. 6). Liberty University's "Women's D1 Hockey" team is not even an official NCAA team, but a "club" sport.[4] Plaintiff apparently suggests that a university can be haled into court anywhere its students have ever competed, for reasons entirely unrelated to those competitions. The University of Vermont would surely be surprised to learn that it can now be sued in Georgia for any claim under the sun, because its "Shooting Sports Club Pistol team flew down to Ft. Benning, GA for the Scholastic Pistol Program National Competition."[5]

If the due process requirement of "continuous and systematic" contacts means anything, Plaintiff's argument for general personal jurisdiction over Liberty University must be rejected.

2. Liberty University is Not Subject to Specific Jurisdiction in Vermont.

Plaintiff's argument for specific jurisdiction over Liberty University is equally flawed, and should meet the same fate. Not one of the five badly distorted "facts" offered by Plaintiff is sufficient to trigger specific jurisdiction over Liberty University.

First, Plaintiff asserts, without any explanation, that "this action arose" out of the "numerous contacts" of Lisa Miller's lawyers with Vermont, which Plaintiff attempts to foist upon Liberty University. (Dkt. 75, p. 7). But the only contacts Lisa Miller's lawyers (*i.e.*, Liberty Counsel attorneys) have ever had with Vermont involved lawful representation of their client, consistent with the ethical rules of the Vermont and Virginia Bars. No one, including Plaintiff, has ever suggested otherwise. The only jurisdictional contact between Ms. Miller's lawyers and Vermont alleged by Plaintiff is "the provision of advice, support and counsel to Defendant Lisa Miller **in litigation in the Courts of Vermont**." Amd. Compl., dkt. 59, ¶ 15 (emphasis added).

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[4] *See* "Liberty Club Sports," http://www.liberty.edu/campusrec/clubsports/index.cfm?PID=25958, last visited March 21, 2013. Club sports receive only "limited financial assistance" from the university. *See* "Exploring Clubs vs. NCAA," http://www.liberty.edu/campusrec/clubsports/index.cfm?PID=25954&newsID=60&TeamID=, last visited March 21, 2013.

[5] *See* UVM Club Sports, http://uvm-club-sports.tumblr.com/, last visited March 21, 2013.

Therefore, this action arose **not** out of Liberty Counsel's lawful appearance in "the Courts of Vermont," but out of its former client's subsequent independent decision to leave the country with her daughter. Plaintiff does not, and cannot, explain how Liberty Counsel's lawful appearance and argument before Vermont courts could possibly have given rise to the alleged kidnapping. What specific motion or argument advanced by Liberty Counsel in a Vermont Court caused the kidnapping of Isabella Miller? Although Plaintiff does allege other, supposedly "tortious" conduct by Ms. Miller's lawyers (*e.g.*, creation of a Facebook page, teaching about civil disobedience to law students, receiving a telephone call from co-defendant Philip Zodhiates, intimidating and firing employees, publishing books and appearing on media programs) (Amd. Compl., dkt. 59, ¶¶ 43, 47, 57, 59, 60), **all of those other "contacts" are admitted to have been in and with Virginia, and none with Vermont**. (*Id*.) Even if these other contacts actually occurred and could have given rise to a kidnapping – neither of which is true – they cannot be used to establish **specific** jurisdiction **in Vermont**, because **specific** jurisdiction can only exist where the action arises out of the **specific** contacts **with the forum**. *Balanced Body, Inc. v. Teague Pilates, Inc.*, 1:10-CV-00292-JGM, 2011 WL 1211573, *3 (D. Vt. Mar. 29, 2011) (no specific jurisdiction found over foreign defendant who had minimum contacts with Vermont because litigation did not arise out of those Vermont contacts). Plaintiff's failure on this critical point cripples her entire argument out of the starting gate.

Second, in her futile attempt to demonstrate that "Liberty University [as opposed to Liberty Counsel] employees/agents represented Lisa Miller in Vermont Superior Court," Plaintiff introduces the well-published fact that one of Ms. Miller's former attorneys, David Corry, is now the General Counsel of Liberty University and represents the University "in all legal matters." (Dkt. 75, pp. 7, 9, 10). Plaintiff highlights this fact no fewer than three times in the span of three pages. (*Id*). One problem with Plaintiff's "discovery" is that it is false. Mr. Corry's **previous** representation of Ms. Miller in Vermont occurred entirely **before** he became Liberty University's

General Counsel. (*See* "Liberty University Names New General Counsel," http://www.liberty.edu/index.cfm?PID=18495&MID=28216, last visited March 21, 2013). Mr. Corry became Liberty University's General Counsel in April 2011. (*Id.*) Prior to this new employment, Mr. Corry "served as Senior Litigation Counsel with Liberty Counsel," (*id.*), and it was in **that** capacity, only on behalf of Liberty Counsel, that he represented Ms. Miller. This is confirmed by Mr. Corry's application for admission *pro hac vice* (attached as Exhibit 1), and by every pleading Mr. Corry signed in the litigation (sample signature pages attached as Exhibit 2), all of which he signed as Senior Litigation Counsel for Liberty Counsel. Mr. Corry filed a motion to withdraw in January 2010 (attached as Exhibit 3), and his involvement in that case ceased **more than one year before** he left Liberty Counsel to become Liberty University's General Counsel. Plaintiff's misleading references to Mr. Corry therefore do not support her claim that he acted on behalf of Liberty University while representing Ms. Miller in Vermont.

Third, Plaintiff claims that Mr. Staver has issued press releases on the Vermont litigation "in his capacity as Dean of the Liberty University School of Law." (Dkt. 75, pp. 9-10). In support, Plaintiff attaches but **one** press release, which **was issued by Liberty Counsel from Florida**, not Liberty University in Virginia. (Dkt. 76-8, p.2). In fact, the URL at the bottom of Plaintiff's exhibit demonstrates that Plaintiff had to go to **Liberty Counsel's website**, not Liberty University, to obtain it. (*Id.*) Liberty Counsel's press release identifies Mr. Staver as "Founder of Liberty Counsel," and states (accurately), for purposes of identification, that he is also "Dean of Liberty University School of Law." (*Id.*) Plaintiff's assertion that the press release was issued by Liberty University is at war with reason and reality.[6]

Fourth, Plaintiff submits **three** emails that Rena Lindevaldsen presumably sent over the **eight-year** course of the Vermont litigation, in which she apparently utilized the wrong

[6] Elsewhere in her Opposition, where it suits her argument, Plaintiff correctly refers to the same exact document as "a **Liberty Counsel** Press release." (Dkt. 75, p. 46) (emphasis added). Plaintiff cannot have it both ways.

electronic signature (from her Liberty University faculty position rather than her Liberty Counsel Special Counsel position). (Dkt. 75, p. 9; dkt. 76-7, pp. 2-4). This clerical oversight does not change the now undisputed facts that: (1) Ms. Lindevaldsen initially appeared in the Vermont litigation as Special Counsel to Liberty Counsel (Lindevaldsen Aff., dkt. 66-5, ¶¶ 4, 7; Lindevaldsen PHV App., dkt. 66-6, p. 4); (2) Ms. Lindevaldsen signed every single pleading as Special Counsel to Liberty Counsel (Lindevaldsen Aff., dkt. 66-5, ¶ 5); (3) Ms. Lindevaldsen was paid for her Vermont work by Liberty Counsel, never by Liberty University (*id*. at ¶ 6); and (4) Liberty University has never had any input in, or control over, Ms. Lindevaldsen's representation of Ms. Miller (or any other client). (*Id*.)

Not surprisingly, every single pleading served by Plaintiff in the Vermont litigation was sent to **Liberty Counsel**, never Liberty University. (Sample Service Certificates attached as Exhibit 4). And, when an issue arose as to whether Plaintiff's service of a contempt motion against Ms. Miller was effective, Plaintiff emphasized, repeatedly, that: (1) she served "**Liberty Counsel**," (2) Ms. Miller was a client of "**Liberty Counsel**," and (3) Ms. Lindevaldsen was an attorney with "**Liberty Counsel**." (Jenkins Reply to Mot. for Contempt, attached as Exhibit 5). Plaintiff was never confused as to which hat Ms. Lindevaldsen (and Messrs. Staver and Corry) were wearing when they represented Ms. Miller.

As a fifth and final supposed indicator that Liberty University had specific contacts with Vermont, Plaintiff reiterates that "Defendant Victoria Hyden is an employee of Liberty University," (dkt. 75, p. 9), as if somehow that makes Liberty University responsible for all of Ms. Hyden's alleged conduct and contacts. Plaintiff should know the difference between a mere employee (a part-time student worker at that) and an authorized agent with authority to bind a large educational institution. "An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control." *In re Shulman Transp. Enterprises, Inc.*, 744 F.2d 293, 295 (2d Cir. 1984). (*See also* discussion of agency issues *infra* at pp. 11-12).

Plaintiff may attempt to affix a conclusory, one-word designation of "agent" to Ms. Hyden, but that cannot survive dismissal absent the pleading of facts from which agency can at least be inferred. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"; "[t]hreadbare recitals … supported by mere conclusory statements, do not suffice"). Just last week, the Second Circuit affirmed the dismissal of a complaint which attempted to plead an agency relationship without sufficient facts from which agency could be inferred. *Johnson v. Priceline.com, Inc.*, __ F.3d __, 12-1744-CV, 2013 WL 1223326, *3-4 (2d Cir. Mar. 27, 2013) (holding that existence of agency can be resolved as a matter of law where the complaint does not allege "facts showing an agency relationship"). *See also Lee v. Kim*, 97 CIV. 4406 (DC), 1998 WL 20003, *4 (S.D.N.Y. Jan. 20, 1998) (dismissing RICO claim for failure to plead sufficient agency facts). Since agency cannot be inferred merely from employment (let alone student-employment), Plaintiff has utterly failed to plead the requisite agency between TRBC and Ms. Hyden. The same outcome should obtain here.[7]

With her argument that Ms. Miller was represented by "Liberty University" dismantled, Plaintiff next advances the equally faulty notion that "Liberty Counsel and Liberty University are a single functional and organic entity." (Dkt. 75, pp. 10-11). In addition to the same "evidence" regarding attorneys Lindevaldsen, Corry and Staver discredited above, Plaintiff adds that Liberty Counsel has a "physical office" on Liberty University's 7,000 acre campus in Virginia (*id*.), but does not dispute that Liberty Counsel's "physical" **headquarters** are in central Florida, 700 miles away. (Staver Aff., dkt. 66-4, ¶ 10). Neither having offices on the same campus, nor being partners in a third entity unrelated to the events in suit (as Plaintiff alleges is the case with the Liberty Center for Law and Policy) (dkt. 75, pp. 10-11), is sufficient to pierce the corporate veil

[7] Moreover, the unrebutted evidence before this Court is that Ms. Hyden has never been an officer, director, manager or authorized agent of Liberty University. (Jerry Falwell Aff., dkt. 66-1, ¶ 13; Staver Aff., dkt. 66-4, ¶ 14; Hyden Aff., dkt. 66-3, ¶ 4).

between two independent entities that may cooperate together. Were it otherwise, no joint venturers could ever escape the "single functional and organic entity" trap. Plaintiff has alleged no more than a mere relationship between Liberty University and Liberty Counsel, which falls far short of alleging that they are but one, single functional entity.

Once again, the case principally relied upon by Plaintiff strongly refutes her alter ego contention. In *Mansfield Heliflight, Inc. v. Heli-One Canada Inc.*, 2:12-CV-46, 2012 WL 4479851 (D. Vt. Sept. 28, 2012) (cited at dkt. 75, p. 10), this District cautioned that "the mere existence of a relationship between two companies does not establish the presence of the foreign corporation in the state." *Id*. at *6. The court then concluded that the two companies in question met the "single functional and organic entity" test because: (1) "**the essential factor of common ownership is satisfied**" since both companies were subsidiaries of the same corporation (*id*. at *7) (emphasis added); (2) the companies did not have distinct websites (*id*.); and (3) the companies described themselves as just different "offices" of the same company. (*Id*).

In contrast, the evidence here is undisputed that Liberty University and Liberty Counsel are **not** subsidiaries, do **not** have common ownership (Jerry Falwell Aff., dkt. 66-1, ¶ 14; Staver Aff., dkt. 66-4, ¶ 10), and have separate and distinct websites (www.liberty.edu and www.lc.org, respectively), not to mention separate and independent governing bodies. (Staver Aff., dkt. 66-4, ¶ 10). Moreover, Plaintiff has failed to adduce a single instance where the two companies described themselves as just different "offices" of the same entity. Announcing a joint partnership on one project (such as the Liberty Center for Law and Policy) is not nearly the same as announcing that the joint participants are merely different offices of the same entity. In sum, Plaintiff misses the *Mansfield* mark.[8]

[8] The remaining three cases cited by Plaintiff demonstrate, at most, that **a law firm** which handles a case in a foreign jurisdiction may be sued by its client in that jurisdiction **for claims directly arising out of that representation**, such as malpractice or breach of representation contract. (Dkt. 75, pp. 7-8). This might conceivably be relevant only to whether **Liberty Counsel** could be sued in Vermont by one of the clients it represented there, a question wholly outside this lawsuit.

Ultimately, Plaintiff's theory of specific jurisdiction over Liberty University reflects a fundamental misunderstanding of the "well established principle … that [individuals] holding positions with a parent and its subsidiary can and do change hats to represent the two corporations separately." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998). "Even though a person is termed an agent, he may, in fact, act as such in some matters but not in others." *In re Shulman*, 744 F.2d at 295. If this is true in a parent-subsidiary relationship, it is all the more so for separate entities such as Liberty University and Liberty Counsel. When viewed through this proper lens, Plaintiff's theory of specific jurisdiction over Liberty University falls far short.

B. THIS COURT LACKS PERSONAL JURISDICTION OVER THOMAS ROAD BAPTIST CHURCH.

Plaintiff does not dispute, and therefore concedes, that TRBC is not subject to general jurisdiction in Vermont. (Dkt. 75, p. 13-15).

Plaintiff's contention that TRBC is subject to specific jurisdiction in Vermont because of its "purposeful action within the forum during the custody litigation" (*id*. at p. 15), borders on the frivolous. Plaintiff concedes that, to trigger specific personal jurisdiction over TRBC, her claims in this lawsuit must "arise out of or relate to" TRBC's purposeful conduct in Vermont. (*Id*. at p. 13). Plaintiff identifies four – and only four – "voluntary" activities in Vermont, **not by TRBC or any of its authorized agents**, but by a handful of individuals alleged to be among TRBC's 20,000 "members." (*Id*.) Plaintiff concludes her argument by stating, without any explanation whatsoever, that "this litigation results" from those activities. (*Id*.)

Plaintiff's argument fails for two reasons. First, Plaintiff fails to meet the "arise out of or relate to" requirement. **Not one of the four "purposeful" activities alleged by Plaintiff is unlawful or tortious**. On the contrary, it is beyond dispute that TRBC members along with all Americans enjoy a First Amendment right to: (1) "voluntarily attend[] and publicly demonstrate[] at hearings," (2) "travel[] to Vermont … to attend hearings [and] hold prayer

meetings," (3) "provide[] internet updates" of court hearings, and (4) "pray[] in the hallways of courthouses." (*Id*.) Plaintiff's unexplained claim that this litigation "arises out of or relates" to those four activities defies explanation. Plaintiff does not (and could not) sue TRBC or any of its "members" for "attending," "reporting" about, "demonstrating" or "praying" at court proceedings in Vermont. Instead, Plaintiff is suing TRBC for conspiring to kidnap a child. **Not one of the four constitutionally protected activities identified by Plaintiff even remotely involves the kidnapping of a child**. Thus, even if TRBC could somehow be subjected to jurisdiction based upon the **unlawful or tortious** actions of any one of its 20,000 members, no specific jurisdiction could result here from lawful activities which relate to the exercise of free speech rather than kidnapping.[9] *See Dearwater v. Bond Mfg. Co.*, 1:06-CV-154, 2007 WL 2745321, *4-5 (D. Vt. Sept. 19, 2007) (plaintiff cannot use defendant's lawful contacts with Vermont to establish specific personal jurisdiction, because suit does not "arise out of or relate to" those contacts).

Second, even if Plaintiff's lawsuit could somehow "arise out of or relate to" a handful of alleged TRBC members' attendance, speech and prayer at Vermont court proceedings, the idea that TRBC could be haled into a far flung forum based upon the individual contacts of any one of the 20,000 people who occupy its pews is both novel and absurd. It is elementary that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

[9] Plaintiff's own evidence demonstrates that the Vermont activities she identifies have nothing to do with the kidnapping she alleges. For example, Plaintiff cites a Stipulation between the United States and Kenneth Miller, in which those parties agreed that Debbie Thurman, a TRBC member, "provided internet updates" about the Jenkins-Miller child custody litigation in Vermont. (Stipulation, dkt. 76-11, ¶¶ 3-5) (cited by Plaintiff at dkt. 75, p. 13). In that same Stipulation, however, the United States and Kenneth Miller also agreed that Debbie Thurman doesn't even know Philip Zodhiates and Kenneth Miller (dkt. 76-11, ¶ 6), that Lisa Miller never shared with Debbie Thurman any information about a plan to leave the United States (*id*. at ¶ 7), and that Debbie Thurman has had no contact with Lisa Miller since her disappearance. (*Id*.) Thus, if the Stipulation establishes that a TRBC member provided internet reports of public court proceedings in Vermont, a constitutionally protected activity, the Stipulation also establishes that the same TRBC member had nothing to do with the kidnapping alleged by Plaintiff in this case.

Much more is required. A church, like any other organization, is only responsible for the actions of its **agents**, that is, those individuals whose specific actions it controls, and who are acting under its authority. *Boissonnault v. Bristol Federated Church*, 642 A.2d 328, 328-29 (N.H. 1994). And even with agents, only conduct that is within "the scope of employment," can bind the church. *Doe v. Newbury Bible Church*, 933 A.2d 196, 198 (Vt. 2007) (pastor's "conduct … different in kind from that authorized" cannot be imputed to church). (*See also* dkt. 66, p. 44, n. 19). Just as a church cannot be held liable for a member's auto accident, **even while the member performs a volunteer service beneficial to the church**, *Boissonnault*, 642 A.2d at 328-29, so a church cannot be sued in a different state simply because one of its members has visited or even committed tortious conduct in that state. *Ellul v. Congregation of Christian Bros.*, 09 CIV. 10590 PAC, 2011 WL 1085325 (S.D.N.Y. Mar. 23, 2011) (foreign religious organization could not be haled into New York court based upon the alleged contacts and conduct of local affiliate, because "**there is no evidence or allegation that the [affiliate] was acting under the control or authority of the [defendant] when the conduct occurred**") (emphasis added). Only the contacts of designated church agents, **who are controlled and directed by the church**, may be considered for personal jurisdiction. *Cf. Snyder v. Phelps*, CIV.A. RDB-06-1389, 2006 WL 3081106 (D. Md. Oct. 30, 2006) (Maryland court had jurisdiction over Westboro Baptist Church because its principal agents traveled to Maryland to fulfill the Church's mission, the Church directed and controlled their actions, and the Church posted its agents' work and message on its website).

Plaintiff does not even come close to meeting her pleading burden, because she does not, and cannot, allege that TRBC directed or controlled the conduct of its undisclosed alleged "members" who traveled to Vermont to engage in constitutionally protected speech.[10]

[10] Moreover, Plaintiff does nothing to rebut TRBC's evidence that "TRBC has never called for or organized any prayer meetings" in Vermont. (Jonathan Falwell Aff., dkt. 66-2, ¶ 12).

For the same reason, Plaintiff's last argument for personal jurisdiction over TRBC also founders. Plaintiff argues that a handful of "TRBC members" and unnamed "elders" aided and abetted Lisa Miller's disappearance. (Dkt. 75, pp. 13-14).[11] However, Plaintiff points to no allegations in the Amended Complaint that TRBC directed or controlled the actions of these alleged "members" or non-existent "elders" whose allegedly tortious conduct was directed at Vermont. (*Id*.) Plaintiff rests on just four paragraphs in her Amended Complaint – 42, 43, 51 and 54 (dkt. 75 at p. 14) – but **not one of them** contains any allegation that TRBC directed or controlled the alleged actions of these "members" or phantom "elders." (Amd. Compl., dkt. 59, ¶¶ 42, 43, 51, 54). Affixing the conclusory, one-word label of "agent" to "members" of TRBC is insufficient to survive dismissal, because agency cannot be plausibly inferred from mere "membership" in a 20,000 member church. *See*, *Iqbal*, 556 U.S. at 678; *Priceline.com*, __ F.3d __, 2013 WL 1223326 at *3-4.

In sum, the Court should reject Plaintiff's theory of jurisdiction over TRBC.

C. THE *CALDER* EFFECTS THEORY DOES NOT GRANT THIS COURT JURISDICTION OVER VICTORIA HYDEN OR ANY OTHER DEFENDANT.

Plaintiff asserts that this Court has jurisdiction over Victoria Hyden (and TRBC) under *Calder v. Jones*, 465 U.S. 783 (1984), because she allegedly committed an intentional tort whose effects were aimed at Plaintiff in Vermont. (Dkt. 75, pp. 11-12). "It is well established that the *Calder* test applies only to intentional torts." *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007). Plaintiff agrees. (Dkt. 75, p. 4). The only intentional tort Plaintiff attempts to state against these Defendants is "intentional kidnapping." (Amd. Compl., dkt. 59, ¶¶ 63-64). In her Opposition, Plaintiff confirms that she premises her *Calder* theory solely upon her

[11] Plaintiff does not rebut TRBC's evidence that: (1) it does not even have "elders" (Jonathan Falwell Aff., dkt. 66-2, ¶ 18); (2) Tipton Killingsworth "was not an employee, agent or even member of TRBC in January 2010," when Plaintiff says she saw him "endorse the kidnapping" on television (*id*. at ¶ 20); (3) neither Linda Wall, nor Victoria Hyden, nor any of the named defendants have ever been "officers, deacons, authorized agents or even members of TRBC" (*id*. at ¶¶ 11, 13, 22, 26); and (4) no TRBC agent (or even member) ever counseled Lisa Miller to defy court orders, nor helped to pack her belongings, nor assisted her to leave or remain outside the U.S.. (*Id*. at ¶¶ 14, 18, 21, 23, 24). (Dkt. 75, pp. 13-14).

"kidnapping" claim. (Dkt. 75, p. 12, 22) ("These actions contributed to Isabella's **kidnapping – which is an intentional tort** directed at Plaintiff Jenkins"; *Calder* jurisdiction exists over Kenneth Miller because he "clearly participated in the common law tort of **kidnapping**") (emphasis added). The fatal flaw in Plaintiff's theory, however, is that "kidnapping" is not a recognized tort in Vermont. (*See* Dkt. 66, pp. 32-33; *infra*, pp. 21-23). Plaintiff cannot create an intentional tort out of whole cloth, and then use it to hale foreign defendants into Vermont.

Even if Plaintiff had pled a cognizable intentional tort, she errs in reading *Calder* as holding that jurisdiction could be exercised over Ms. Hyden solely because she allegedly committed "an intentional tort directed **at Plaintiff Jenkins**, a Vermont resident." (Dkt. 75, p. 12) (emphasis added). *Calder* requires much more. 465 U.S. at 789 (holding that California could exercise jurisdiction over Georgia resident because "California is **the focal point both of the [tort] and of the harm suffered**") (emphasis added). Specifically, *Calder* requires that the intentional tort itself be directed **to the forum**, not just to a plaintiff residing in the forum, and to such an extent that **the forum** becomes "the focal point" of both the tort and the alleged harm. *Country Home Products, Inc. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 567 (D. Vt. 2004) (SESSIONS, J.) ("Jurisdiction [under *Calder*] is appropriate when **the state has been the focal point both of the alleged tort** and of the harm suffered, the defendants knew the plaintiff would suffer the brunt of the harm there, and they **expressly aimed their actions at the state**") (emphasis added) (internal quotes and alterations omitted).[12]

[12] The Second Circuit has, at least in dictum, adopted this narrow view of *Calder*. *LiButti v. United States*, 178 F.3d 114, 123 (2d Cir. 1999) ("Supreme Court has also found minimum contacts to exist when the defendant 'purposefully directed' the harmful effects of his activities **at the forum State**") (emphasis added). At least six other Circuits (Third, Fourth, Fifth, Seventh, Eighth and Tenth) have held that an allegation that defendant committed an intentional tort directed at a known forum **resident** is **not** enough to confer jurisdiction under *Calder* if **the forum** is not the focal point of the tort itself, while only two Circuits (Ninth and Eleventh) have found the targeting of the resident alone to be sufficient. The Supreme Court has agreed to resolve this split. *Walden v. Fiore*, 12-574, 2013 WL 776450 (U.S. Mar. 4, 2013) (granting cert.). *See also* Walden Petition for Certiorari, pp. 16-30 (available at http://www.scotusblog.com/case-files/cases/walden-v-fiore/, last visited April 2, 2013) (discussing circuit split and urging High Court to adopt majority view limiting *Calder*).

While Plaintiff has alleged that she is a Vermont resident, and that Ms. Hyden aimed conduct at **her**, she does not and cannot allege that Ms. Hyden (or any other defendant) aimed conduct **at Vermont**, let alone to such an extent that **Vermont was "the focal point" of the alleged kidnapping**. Plaintiff alleges that Ms. Hyden was a "student worker" in **Virginia** at a **Virginia** university; that she solicited donations for Lisa Miller in **Virginia**, from her "co-workers" who were also in **Virginia**; that she assisted with Lisa and Isabella Miller's "transportation **from a Walmart parking lot in Lynchburg, Virginia to Waynesboro, Virginia**, from whence they would depart for **Canada** and **Nicaragua** the next day"; and that she (or at least her family) assisted in sending personal belongings and money from **Virginia** to Lisa and Isabella in **Nicaragua**. (Amd. Compl., dkt. 59, ¶¶ 41-42) (emphasis added).

This is a far cry from *Calder*, where the defendants made California the focal point of their tortious conduct by writing a libelous story about "the **California** activities of a **California** resident," drew information "from **California** sources," and published the story in their publication whose largest circulation was in **California**, knowing that it would be **distributed to over 600,000 California residents**. 465 U.S. at 785, 788-89. Here, the only thing Plaintiff can allege is that Ms. Hyden knew Plaintiff was a resident of Vermont, and knew that Plaintiff would be harmed in Vermont. This harms-only scenario provides a grossly insufficient basis for jurisdiction under *Calder*, as demonstrated by Plaintiff's own authority:

> we … agree with the conclusion reached by the First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits that jurisdiction under *Calder* requires **more** than a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum. Moreover, we agree with the … decisions that **the *Calder* 'effects test' can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity. Simply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet this requirement**. The defendant must manifest behavior **intentionally targeted at and focused on the forum** for *Calder* to be satisfied.

IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998) (italics in original, bold emphasis added) (internal quotes and alterations omitted) (affirming dismissal for lack of jurisdiction) (cited by Plaintiff at dkt. 75, p. 4).[13]

The Court should reject Plaintiff's *Calder* "effects" theory, and should dismiss this action.[14]

D. RICO CONFERS NEITHER JURISDICTION OVER DEFENDANTS NOR VENUE OVER THIS ACTION IN THIS COURT.

Plaintiff invites the Court to adopt the holding of the **Tenth** Circuit in *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226 (10th Cir. 2006), which concluded that the "ends of justice" provision of 18 U.S.C. § 1965(b) does not require a showing that no other district has jurisdiction over all defendants. (Dkt. 75, pp. 24-25). This is a curious invitation, given the **Second** Circuit's clear and binding opposite conclusion in *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65 (2d Cir. 1998). There, the Second Circuit noted that "[t]he district court followed *Butcher's Union*, 788 F.2d at 538-39, in finding 'the ends of justice' to refer to a case in which there is no district with personal jurisdiction over all defendants," and then "**AFFIRMED**" that decision "in the entirety." 138 F.3d at 71 n. 5, 75 (caps and bold emphasis in original). As a result, every single court in the Second Circuit since *PT United* (and there have been many) has

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[13] *See also Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010) (*Calder* effects test not satisfied because libelous publication targeted Missouri **plaintiffs** but was not "uniquely or expressly aimed … at Missouri"); *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.*, 623 F.3d 440, 447 (7th Cir. 2010) ("The cases that have found express aiming have all relied on evidence beyond the plaintiff's mere residence in the forum state … ***Calder* requires more**.") (emphasis added); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 870 (5th Cir. 2001) (exercising jurisdiction under *Calder* over defendant solely because he knew that his target was a Texas resident "**would completely vitiate the constitutional requirement of minimum contacts and purposeful availment**"; "***Calder* 's effects test is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state**") (emphasis added).

[14] To the extent Plaintiff attempts to rely on *Calder* to establish jurisdiction over Liberty University or TRBC, her theory would fail for the same reasons. Moreover, as demonstrated throughout this memorandum, Plaintiff has not alleged any intentional conduct aimed at Vermont by the entities themselves or through **authorized** agents **whom they directed and controlled**. Plaintiff has alleged no facts from which authorized agency could be plausibly inferred between Liberty University and Victoria Hyden, or TRBC and Linda Wall.

applied it to require the same showing. (*See* dkt. 66, pp. 29-30) (collecting **thirteen** cases).[15] This Court should not be the first (and only) court to depart from this precedent.

Moreover, even if this Court could apply Tenth over Second Circuit law, *Cory* is as fatal to Plaintiff's jurisdictional claim as *PT United*. Although it quibbled with the Ninth, and by extension the Second, Circuit's interpretation of "ends of justice," the *Cory* court declined to "offer a competing definition, as the 'ends of justice' is a flexible concept uniquely tailored to the facts of each case." 468 F.3d at 1232. Nevertheless, the Tenth Circuit **affirmed** the district court's dismissal of the RICO claim for lack of jurisdiction, because, whatever "ends of justice" means, it certainly and "as a matter of law" does **not "require nationwide service simply because [plaintiff] has sustained damages and litigation costs in [the forum]."** *Id*. (emphasis added).[16] Plaintiff here advances the same exact theory expressly rejected in *Cory*, that she can hale all foreign defendants in this Court not because they committed tortious acts in Vermont, but because Plaintiff has allegedly sustained damages (or felt the "effects") in Vermont. Plaintiff's reliance on *Cory* is unavailing.

Plaintiff does not seriously argue that Virginia would not have RICO jurisdiction over all defendants.[17] Accordingly, binding precedent forecloses her nationwide RICO jurisdiction claim.

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[15] As further evidence that the language in *PT United* is both clear and mandatory, numerous other courts outside the Second Circuit have also cited and relied upon it for the specific proposition that the "ends of justice" require a showing that no other district has jurisdiction over all defendants. *See, e.g.*, *FC Inv. Group LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1100 (D.C. Cir. 2008); *Hewlett-Packard Co. v. Byd:Sign, Inc.*, 6:05-CV-456, 2006 WL 2822151, *9 (E.D. Tex. Sept. 28, 2006); *Multi-Media Int'l, LLC v. Promag Retail Services*, 343 F. Supp. 2d 1024, 1030 (D. Kan. 2004).

[16] *See also Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 757 F. Supp. 2d 904, 914 (W.D. Mo. 2010) (applying *Cory* and dismissing RICO claim because "ends of justice" cannot "be satisfied solely with allegations that the plaintiff has suffered damage in a particular forum").

[17] Plaintiff does not dispute that Defendants Timothy Miller, Andrew Yoder and Christian Aid Ministries (as well as the others) would be subject to RICO jurisdiction in Virginia under **Fourth** Circuit precedent. (Dkt. 75, pp. 26-27 & n. 4). Instead, Plaintiff suggests that these three defendants would not be subject to jurisdiction there under **Second** Circuit law. (*Id*. at p. 27, n. 4). Once again, Plaintiff is confusing the basic precepts of precedent. It is the **Fourth** Circuit, not the Second, that binds federal courts sitting in Virginia. (The key distinction between the Fourth and Second Circuits is discussed at dkt. 66, p. 31, n.13).

Even if the Court could accept Plaintiff's nationwide RICO jurisdiction argument, it fails here for the separate reason that this Court lacks minimum-contacts jurisdiction over any defendant, as required by 18 U.S.C. § 1965(a). Plaintiff's claim that the Court has jurisdiction over four defendants (Lisa Miller, Timothy Miller, Response Unlimited and Kenneth Miller) is false. Plaintiff rests her claim on the same discredited "effects-only" interpretation of *Calder* (*supra*, pp. 13-16), and the non-existent "tort" of "kidnapping." (*Infra*, pp. 21-23). In addition:

- Defendants Lisa Miller and Timothy Miller have not been served with process (*see* docket sheet), and thus cannot serve as predicates for RICO jurisdiction under § 1965(a). *See In re Kalikow*, 602 F.3d 82, 92 (2d Cir. 2010) (no jurisdiction without service); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 86 F. Supp. 2d 137, 140 (E.D.N.Y. 2000) (finding no RICO jurisdiction over defendant not served with process in United States).

- Plaintiff's assertion of **general** jurisdiction over Response Unlimited solely on the basis that it may have sold (to unknown parties, **not shown to be in Vermont**) a list with the contacts of one Vermont entity, would be meritless even if Response Unlimited had not shown that it stopped using the list "since at least 1999," more than **14 years** ago (dkt. 90, p. 8; dkt. 90-1, ¶ 5). If this constitutes "continuous and systematic contacts," that term has no meaning.

- Plaintiff has not shown that Kenneth Miller was not immune from service at his criminal trial. Neither the federal criminal statute under which he was convicted, nor any of the state criminal statutes cited by Plaintiff (dkt. 75, p. 21) provide a private cause of action, which necessarily means that the **private** rights Plaintiff seeks to vindicate in this suit are not the same as the **government** rights vindicated at Mr. Miller's trial. Moreover, "the mere presence of [a] relationship [between the criminal case and this action] is insufficient to dispel the immunity." *Shapiro & Son Curtain Corp. v. Glass*, 348 F.2d 460, 461 (2d Cir. 1965). The immunity is only lost when "if allowed [it] would so obstruct judicial administration **in the very cause for the protection of which it is invoked** as to justify withholding it." *Id.* (emphasis added) (affirming

order quashing service). Here, the immunity's purpose was to protect the government's criminal case against Mr. Miller, by removing his potential incentives to miss trial. Immunizing Mr. Miller from service in Plaintiff's **civil** suit cannot somehow obstruct the government's already completed criminal trial. Plaintiff's claim must fail here for the same reasons as in *Shapiro*.

Finally, as demonstrated in section G, pp. 23-30, *infra*, Plaintiff has failed to demonstrate that she has standing to bring a RICO claim, and, in any event, has failed to state such a claim. Thus, even if the Court could exercise RICO jurisdiction over these Defendants in a different case – with a well-pled RICO claim and a plaintiff with standing – it cannot do so here.

Plaintiff's Amended Complaint should be dismissed for lack of venue[18] and jurisdiction.

E. PLAINTIFF IS NOT ENTITLED TO JURISDICTIONAL DISCOVERY.

The Court should deny Plaintiff's request for additional jurisdictional discovery. (Dkt. 75, pp. 52-53). "Declining to permit jurisdictional discovery is well within a district court's discretion if [as here] the plaintiff has not made out a prima facie case for jurisdiction." *Catlin Ins. Co. (UK) Ltd. v. Bernuth Lines Ltd.*, __ F.3d __, 12-1773-CV, 2013 WL 406273, *2 (2d Cir. Feb. 4, 2013). Plaintiff says nothing about her asserted need for discovery. (Dkt. 75, pp. 52-53). What information does she hope to discover? Who does she need to depose? On what topics? How will additional information help her establish jurisdiction over these Defendants? This failure alone is fatal to her request. *Gurary v. Winehouse*, 190 F.3d 37, 43-44 (2d Cir. 1999) ("the failure to file such an affidavit [setting forth what facts are sought to resist the motion] is fatal to a claim" that party needs more discovery to oppose a motion to dismiss). Indeed, Plaintiff has not made a proper motion for leave to take discovery, for which reason this Court previously denied jurisdictional discovery. *Viko v. World Vision, Inc.*, 2:08-CV-221, 2009 WL 2230919, *15 (D.

[18] Venue cannot lie where there is no personal jurisdiction, an uncontroversial point that Plaintiff concedes. (Dkt. 75, p. 19, n. 3). Even if the Court had jurisdiction over these Defendants, venue would still not be proper in Vermont, for the reasons detailed by these Defendants in their initial brief (dkt. 66, pp. 18-19), as well as in their alternative Motion for Change of Venue (dkt. 67) and the Reply in support of that motion (dkt. 93).

Vt. July 24, 2009) (SESSIONS, J., adopting mag. rept.) (dismissing for lack of personal jurisdiction and denying request for discovery).

In *Viko*, this Court addressed some of the same jurisdictional arguments raised here, including jurisdiction based upon internet contacts and the imputation of one charity's contacts to another based upon an alter ego theory. 2009 WL 2230919 at *3. The Court denied plaintiff's request for jurisdictional discovery, because "Viko has not alleged facts that, if further developed with greater detail, could in any realistic likelihood justify" the exercise of jurisdiction. *Id*. at * 16. The same outcome should obtain here. No amount of discovery would allow this Court to exercise jurisdiction over TRBC based upon the lawful contacts its alleged "members" had with Vermont. No amount of discovery would change the fact – plainly evident from public court records – that Lisa Miller was represented in Vermont by Liberty Counsel, not Liberty University, and that Liberty Counsel's only contacts with Vermont were to represent its client. No amount of discovery would establish that Liberty Counsel is so completely controlled by Liberty University that it is its "mere department." And, even if Liberty Counsel's contacts with Vermont could somehow be attributed to Liberty University, which they certainly cannot, those lawful contacts would not support specific jurisdiction because they were mandated by Liberty Counsel's ethical obligation to its client, and wholly unrelated to any kidnapping. *Viko*, 2009 WL 2230919 at *17, n. 23 (discovery into relationship of charities not warranted where contacts of one would not support jurisdiction even if imputable to the other).

Plaintiff has amassed a portfolio of claimed jurisdictional contacts, comprised of 20 exhibits spanning 109 pages (dkt. 76-1 to 76-20), belying any suggestion that she has somehow been handicapped by lack of discovery in making her jurisdictional arguments. Plaintiff does not make that suggestion; rather, she candidly admits that her purpose in haling these defendants into Vermont is to make them "feel financial pressure" for having ever been associated with Lisa Miller. (Dkt. 75, p. 30, n. 7). This Court should not countenance such tactic. "[T]ere is no reason

to waste further time and resources when the case could proceed immediately in [Virginia]." *Viko*, 2009 WL 2230919 at *18.

F. PLAINTIFF CANNOT STATE A CLAIM FOR KIDNAPPING OR INTERFERENCE WITH PARENTAL RIGHTS.

Plaintiff faults Defendants for "fail[ing] to point to any affirmative law" that her intentional kidnapping tort does not exist (dkt. 75, p. 27), as if it were Defendants' burden to sustain the cause of action Plaintiff is attempting to create.[19] Nevertheless, Plaintiff then promptly abandons the "intentional tort of kidnapping" claim she actually pled in her Amended Complaint (dkt. 59, ¶¶ 63-64) in favor of a newly minted claim for "interference with parental rights." (Dkt. 75, pp. 28-30). Plaintiff cannot "plead" a brand new claim in a responsive memorandum to survive dismissal. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) ("party may not amend pleading through statements in briefs"); *Lerner v. Forster*, 240 F. Supp. 2d 233, 241 (E.D.N.Y. 2003) ("New claims not specifically asserted in the complaint may not be considered by courts when deciding a motion to dismiss").

Even if the Court could permit Plaintiff to change horses mid-stream, Plaintiff's new claim is equally flawed. Since Plaintiff purports to bring her claim only "under Vermont law" (dkt. 59, ¶ 63), Plaintiff's exposition of how other jurisdictions have handled "interference with parental rights" (dkt. 75, pp. 28-29) is irrelevant. Also irrelevant is that the Vermont Supreme

[19] Plaintiff's charge is incorrect. In her Amended Complaint, she premised her "intentional tort of kidnapping" count entirely on her claim that "the act or threat of kidnapping [is] chargeable as a criminal offense under Vermont law." (Dkt. 59, ¶ 63). Defendants have shown that criminal laws do not create private causes of action in Vermont and elsewhere, leaving Plaintiff with no other basis for her claim. (Dkt. 66, pp. 32-33). Moreover, although Plaintiff purports to bring her kidnapping claim solely "under Vermont law," (dkt. 59, ¶¶ 3, 63), Defendants have shown that no private cause of action exists under the federal Parental Kidnapping Protection Act. (Dkt. 66, p. 33). *See also Thompson v. Thompson*, 484 U.S. 174, 187 (1988) ("we will not engraft a remedy on a statute [the PKPA], no matter how salutary, that Congress did not intend to provide"). Finally, it is noteworthy that the federal general kidnapping statute, 18 U.S.C. § 1201(a), **expressly exempts parents from criminal liability for kidnapping their own minor children**. *Id*. "[T]he statutory immunity given the parent under section 1201 **extend[s] to the crime of aiding and abetting as well as to conspiracy to kidnap**." *United States v. Boettcher*, 780 F.2d 435, 436 (4th Cir. 1985) (emphasis added). There is, therefore, no basis for Plaintiff's kidnapping tort claim under federal or Vermont law.

Court has "frequently cited … as persuasive authority" various sections of the Restatement (Second) of Torts **other than the one section (§ 700) on which Plaintiff premises her claim**. (*Id*. at p. 30).

What **is** relevant (and dispositive) is that Vermont has never adopted Section 700 of the Restatement, and Plaintiff is not the first parent to entreat this federal Court to adopt it for Vermont. In *Schuppin v. Unification Church*, 435 F. Supp. 603, 609 (D. Vt. 1977) *aff'd*, 573 F.2d 1295 (2d Cir. 1977), parents attempted to use Section 700 and other sections of the Restatement to support a claim against the Unification Church for interfering with their parental rights by causing their daughter to leave home and join the church. *Id.* at 608-09. This District found that **the parents could not state such a claim because the Vermont Legislature had eliminated causes of action for alienation of affections**. *Id.* The elimination of those claims eliminated not only claims brought by spouses, **but also those brought by parents against others for interfering with their relationship with their children**. *Id.*

Even more fatal to Plaintiff's newly-alleged "interference" claim is her candid admission that "the Vermont Supreme Court has not expressly weighed in on this question." (Dkt. 75, p.30). That should be the end of the inquiry, because in a diversity case,[20] "federal court is not the place to press innovative theories of state law." *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 942 (7th Cir. 1986) (POSNER, J.). "[I]n 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." *Maska U.S., Inc. v. Kansa Gen. Ins. Co.*, 198 F.3d 74, 80 (2d Cir. 1999). Indeed, when entreated to create a new tort cause of action under New York law, the Second Circuit declined, because "it is not the role of a federal court ruling in diversity to undertake such an expansion of New York law." *H.L.*

[20] Plaintiff purports to bring her state law claim for "kidnapping" (and now "interference with parental rights") under this Court's diversity jurisdiction. (Amd. Compl., dkt. 59, ¶ 3).

Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1025 (2d Cir. 1989). This is the well-settled rule across the other circuits.[21]

In sum, this Court should not permit Plaintiff to plead a new cause of action in a memorandum of law, and certainly not a cause of action that no Vermont court has ever recognized. Plaintiff's kidnapping claim should be dismissed.

G. PLAINTIFF CANNOT STATE A CLAIM UNDER RICO.

1. Plaintiff Has Not Alleged a Cognizable RICO Injury and Has No Standing to Bring a RICO Claim.

The plain language of 18 U.S.C. § 1964(c) provides that RICO claims may only be brought by a person "injured **in his business or property** by reason of a violation of section 1962." *Id*. (emphasis added). Both the injury to "business or property" and the causation requirement are threshold elements of RICO standing rather than elements of the cause of action. *Hecht v. Commerce Clearing House, Inc*., 897 F.2d 21, 23 (2d Cir. 1990). "The terms 'business or property' are, of course, words of limitation which **preclude recovery for personal injuries and the pecuniary losses incurred therefrom**." *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir. 1992) (emphasis added). "[A]ll other courts construing this language have likewise concluded that a civil RICO action cannot be premised solely upon personal or emotional injuries." *Id*. (collecting cases). The Second Circuit has affirmed a district court's determination that "physical, emotional or reputational harm, **or any economic aspect of such harm**" does not confer RICO standing. *Hollander v. Flash Dancers Topless Club*, 340 F. Supp. 2d 453, 458 (S.D.N.Y. 2004) (emphasis added) *aff'd*, 173 F. App'x 15 (2d Cir. 2006).

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[21] *See, e.g.*, *Taylor v. American Chemistry Council*, 576 F.3d 16, 37 (1st Cir. 2009) (federal court "**cannot in the context of a diversity case expand the tort law of [the forum state] beyond its present state**") (emphasis added); *Leo v. Kerr-McGee Chem. Corp.*, 37 F.3d 96, 101 (3d Cir. 1994) (same); *Rubinstein v. Collins*, 20 F.3d 160, 172 (5th Cir. 1994) (same); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 425 (D.C. Cir. 1988) ("**It is decidedly not the business of the federal courts to alter or augment state law to meet the felt necessities of the case**") (emphasis added).

Plaintiff's Opposition confirms that she seeks to recover only for personal injuries and related pecuniary losses. (Dkt. 75, pp. 45-46). Plaintiff readily admits that all of the four losses she claims are "actual losses that Plaintiff Jenkins **incurred when her daughter was taken from her**," and she specifically lists these alleged losses as **subcategories of her loss of Isabella**. (*Id*. at p. 45) (emphasis added). Parent-child relationships are highly personal, and "are among the most intimate of relationships." *Patel v. Searles*, 305 F.3d 130, 136 (2d Cir. 2002). As a result, in Vermont and elsewhere, "the loss of the comfort and companionship of [a] child is a real, direct **and personal loss**." *Clymer v. Webster*, 596 A.2d 905, 914 (Vt. 1991) (emphasis added). The same is true for false imprisonment, a tort somewhat akin to Plaintiff's non-existent "kidnapping" tort. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995) ("false imprisonment … protects the **personal interest** of freedom from restraint") (emphasis added).

Plaintiff's focus on the pecuniary aspect of her alleged losses is ineffective to trigger RICO standing, in light of her admission that her alleged losses are all derivative of her alleged loss of Isabella and the resulting "extreme emotional distress." (Amd. Compl., dkt. 59, ¶ 78; dkt. 75, pp. 45-46). That admission is fatal to her RICO claim, because "**pecuniary losses flowing from those personal injuries are insufficient to confer standing under § 1964(c)**." *Evans v. City of Chicago*, 434 F.3d 916, 926 (7th Cir. 2006) (emphasis added). *See also*, *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988) ("pecuniary losses are so fundamentally a part of personal injuries that they should be considered something other than injury to 'business or property'") (plaintiffs asserting pecuniary losses from wrongful death have no standing for RICO claim).

> **[W]hether she can show a *financial* loss does not, by definition, establish that she has suffered a *business* or *property* injury within the meaning of § 1964(c)**. Most personal injuries – loss of earnings, **loss of consortium**, loss of guidance, **mental anguish**, and pain and suffering, to name a few – will entail some pecuniary consequences. Perhaps the economic aspects of such injuries could, as a theoretical matter, be viewed as injuries to "business or property," but engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary.

Doe, 958 F.2d at 770 (emphasis added) (loss of earnings from having to stay home from work, cost of security system for personal safety, and legal fees caused by defendant were all derivative of her personal losses, and thus could not provide plaintiff with standing for RICO claim).[22]

Beyond Plaintiff's own admission and characterization of her four alleged damages, each one is, on its face, a personal loss or pecuniary derivative not actionable under RICO. Plaintiff's alleged lost income[23] from having to attend court hearings "**to attempt to locate her daughter**" (dkt. 75, p. 45) (emphasis added), is derivative of her alleged personal injury of losing Isabella:

> The loss of income as a result of being unable to pursue employment opportunities while allegedly falsely imprisoned – similar to monetary losses flowing from the loss of consortium, loss of security and peace, wrongful death and similar claims sounding in tort – are quintessentially pecuniary losses derivative of personal injuries arising under tort law.

Evans, 434 F.3d at 926-27. The same is true for Plaintiff's alleged "legal expenses and court costs." *Id*. at 931; *Doe*, 958 F.2d at 769-70. Moreover, even if these alleged losses were not disqualified as derivative of a personal injury loss, in the Second Circuit they still could not confer RICO standing as a matter of law:

> we have affirmed the dismissal under Rule 12(b)(6) of a RICO complaint where the alleged injuries were proximately caused not by the alleged racketeering violations, but **by the public exposure of those activities or their discovery by the victim and the consequences of that exposure or discovery**.

Hollander v. Flash Dancers Topless Club, 173 F. App'x 15, 17 (2d Cir. 2006) *cert denied* 549 U.S. 829 (2006) (no RICO standing for plaintiff who, like Plaintiff here, alleged "business interruption expenses," "loss of profits from [his] law and consulting business from cessation of

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[22] Plaintiff's own authority cites *Doe* extensively and "agree[s] with the Seventh Circuit." *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (cited at dkt. 75, p. 46). Nevertheless, the Ninth Circuit in *Diaz* ultimately departed from both the rationale and result in *Doe*, for reasons that were subsequently discussed, and **thoroughly discredited** by the Seventh Circuit. *Evans*, 434 F.3d at 930 n. 26 (*Diaz* outcome is based upon "mischaracterization of RICO statute and red herring").

[23] Initially, Plaintiff's allegations gave the impression that she closed her daycare business permanently. (Amd. Compl., ¶ 79). Plaintiff now reveals that the business is fully operational, so she is only claiming lost income for the limited time her attendance was required in court. (Jenkins Aff., dkt. 76-13, ¶ 1).

normal work as a result of [his] ongoing investigation of the [RICO] enterprise").[24] Fidelity to *Hollander* requires dismissal of Plaintiff's RICO claim.

Similarly, Plaintiff's alleged lost "child support," and the alleged inability to collect some $70,000 in "fines" for contempt of child custody orders are in and of themselves quintessential personal losses. *Hibbard v. Benjamin*, CIV. A. 90-10361-WF, 1992 WL 300838, *2-3 (D. Mass. Sept. 21, 1992) (dismissing RICO claim for lack of standing because alimony and child support payments are "personal assets" resulting from personal claims). Moreover, Plaintiff herself claims that these losses stem from Isabella's abduction, so they are admittedly derivative of a personal injury loss and therefore do not confer RICO standing.[25]

Finally, Plaintiff posits that Isabella has lost "her own **personal** property, including toys, pets, [and] clothing." (Dkt. 75, p. 46) (emphasis added). Even if that were true, and even if Plaintiff had standing to bring Isabella's claim, those alleged losses would necessarily stem from the personal tort of false imprisonment or the personal crime of kidnapping, and would not confer RICO standing. *Evans*, 434 F.3d at 926-27. Moreover, if a child's toys were to qualify as "injury to business or property" under RICO, the threshold standing requirement would lose all meaning.

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[24] Defendants provided further authorities on this point in their initial brief. (Dkt. 66, pp. 39-41). Plaintiff has failed to even address, much less rebut, these authorities. Instead, she relies solely on the Ninth Circuit's opinion in *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005). (Dkt. 75, p. 46). But it is the Second Circuit, not the Ninth, that binds this Court. Moreover, besides being persuasively discredited by the Seventh Circuit, *supra* note 22, *Diaz* is also readily distinguishable. There, the plaintiff claimed loss of employment because he was incarcerated, and he claimed that the incarceration itself was an object of the RICO conspiracy. 420 F.3d at 898. Here, Plaintiff claims her business was interrupted not because Defendants conspired successfully to incapacitate her, but because she needed to devote time to legally redress the alleged conspiracy – precisely the kind of "loss" that the Second Circuit found non-actionable under RICO in *Hollander*.

[25] In addition, it is not Lisa Miller's absence from the United States that precludes Plaintiff from collecting these alleged debts. If Plaintiff indeed has valid judgments against Lisa Miller, she could levy against her assets regardless of Lisa Miller's location. Indeed, Lisa Miller's presumed failure to appear to defend against collection should facilitate those efforts by way of default, rather then hinder them. If Lisa Miller has no collectible assets, Plaintiff would not be able to collect her judgments even if Ms. Miller were present in the United States. As such, Plaintiff fails both the proximate and legal causation requirements for RICO standing. (*See* dkt. 66, pp. 37-40).

At bottom, "RICO … was designed as a flexible tool for fighting organized crime." *Doe*, 958 F.2d at 765. Plaintiff's attempt to bring a personal tort claim within RICO's ambit is creative but ultimately futile. "Had Congress intended to create a federal treble damage remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, *all of which will cause some financial loss*, it could have enacted a statute referring to injury generally, without any restrictive language." *Grogan*, 835 F.2d at 847 (emphasis in original) (quoting *Morrison v. Syntex Laboratories, Inc.*, 101 F.R.D. 743, 744 (D.D.C. 1984)). RICO was never intended to federalize child abduction claims between former romantic partners. "It has been uniformly held that federal courts do not adjudicate cases involving the custody of minors." *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (2d Cir. 1967) (citing *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("**The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states**, and not to the laws of the United States") (emphasis added)). The Court should dismiss Plaintiff's RICO claim for lack of standing.

2. Plaintiff Has Failed to Allege a RICO Violation Under Section 1962(c).

Plaintiff's claim against Kenneth Miller under 18 U.S.C. §1962(c) (Count Two) fails for all the reasons explained in these Defendants' initial brief (dkt. 66, pp. 45-52), the most basic of which is Plaintiff's allegation of a narrow, single-purpose scheme. (*Id*. at p. 50). As demonstrated, "schemes involving a single, narrow purpose and one or few participants directed towards a single victim do not satisfy the RICO requirement[s]." (*Id*.) (collecting cases). Plaintiff does not dispute this aspect of RICO law. (Dkt. 75, pp. 34-38). Instead, she attempts to transform the alleged conspiracy to kidnap Isabella into a larger conspiracy to kidnap the children of all (or many) same-sex couples. (*Id*.) But there are no factual allegations in the Amended Complaint that could support even an inference of such a grand scheme. The only allegations Plaintiff offers involve protected First Amendment speech regarding **general sentiments** on same-sex marriage and parenting. (*E.g.*, dkt. 59, ¶¶ 45, 47-49, 51). Even if it actually took place, such speech does

not even come close to the "imminent lawless action" standard that would remove its protection. (*See* note 26, *infra*). An intent to kidnap children of same-sex couples cannot plausibly be inferred from protected speech critical of same-sex relationships. Plaintiff's conclusory allegations of a grand scheme extending to the kidnapping of children other than Isabella do not survive *Iqbal's* pleading standard. *Iqbal*, 556 U.S. at 678. *See Hibbard*, 1992 WL 300838 at *3 (dismissing RICO claim because plaintiff pled "a single allegedly criminal scheme" regarding his own divorce, and pled no facts to support his "attempt to characterize the conduct of defendants … as an ongoing scheme to routinely extort fees from [all] divorcing husbands").

Plaintiff alleges no facts that can plausibly extend her alleged conspiracy beyond a handful of individuals working for the narrow, single purpose of helping Lisa Miller leave the United States with her daughter. All three of the predicate acts alleged by Plaintiff involved alleged assistance to Lisa and Isabella Miller. (Dkt. 59, ¶¶ 66(a)-(c)). The last of those predicate acts allegedly took place in May 2010, almost **three years** ago. (*Id*.) In the more than three years after Lisa Miller's disappearance, no similar incident is alleged by Plaintiff with respect to any other child of any other same-sex couple. This is not a properly pled RICO enterprise.

3. Plaintiff Has Failed to Allege a RICO Conspiracy Under Section 1962(d).

Since Plaintiff cannot plead the necessary prerequisites for violation of Section 1962(c) against Kenneth Miller, she necessarily cannot state a claim for civil conspiracy under Section 1962(d) against these Defendants. *Hecht v. Commerce Clearing House, Inc.* 897 F.2d 21, 25 (2d Cir. 1990). Plaintiff attempts to invoke the **criminal** conspiracy concept that liability can attach for the agreement itself, without any overt act. (Dkt. 75, pp. 38-39, 44). In so doing, Plaintiff forgets that she is pursuing a **civil** conspiracy claim, and overlooks *Hecht's* admonition that "although an overt act by itself … is not a requisite element of a section 1962(d) **criminal** conspiracy violation, we hold that injury from an overt act is **necessary** and sufficient to establish **civil** standing for a RICO conspiracy violation." 897 F.2d at 25 (emphasis added).

In fact, because RICO punishes only "a **pattern** of racketeering activity," 18 U.S.C. § 1962(c) (emphasis added), to state a claim Plaintiff must plead not one, but **two** overt, RICO predicate acts, **and she must plead that each defendant agreed to the commission of each of those two acts**. *Hecht*, 897 F.2d at 25-26 (plaintiff "did not plead a RICO conspiracy with sufficient particularity [because the complaint] does not allege facts implying any agreement involving **each** of the defendants to commit at least **two** predicate acts") (emphasis added).

At first, Plaintiff makes the bald assertion that such a pleading is not required. (Dkt. 75, pp. 44-45 n. 13). The Second Circuit's *Hecht* holding, not Plaintiff, controls. Hedging her bet, Plaintiff then makes an admission that is dispositive of her RICO conspiracy claim:

> Plaintiff does allege sufficient facts to support that the Liberty Defendants, through their employees and agents, did agree to commit the two predicate acts of parental kidnapping **as well as conspiracy to kidnap Isabella Miller-Jenkins**.

(*Id*.) (emphasis added). Assuming that "parental kidnapping" qualifies as one RICO predicate act, "conspiracy to kidnap Isabella" certainly does not qualify as a second, because **that is the very RICO conspiracy claim that Plaintiff seeks to advance**, which requires **two** predicate acts. Plaintiff's fuzzy math (1+0=2) demonstrates that she cannot plead a RICO conspiracy.

The Second Circuit case twice cited by Plaintiff, *U.S. v. Weisman*, 642 F.2d 1118 (2d Cir. 1980) (cited at dkt. 75, pp. 31, 37), does not support her "conspiracy to conspire" theory. *Weisman* did not involve a civil RICO conspiracy, let alone one under 18 U.S.C. **1962(d)** – the only section under which Plaintiff sues these Defendants. Instead, *Weisman* involved a criminal RICO charge, one for a substantive offense **under § 1962(c)**. *Id*. at 1121 ("The RICO count charged that Weisman … violated s 1962(c)"). A holding that conspiracy to commit securities and bankruptcy fraud might count as a predicate act for a violation of RICO's § 1962(c) (**which deals with substantive, non-conspiracy violations**), in no way means that conspiracies would also suffice as predicate acts for violations of § 1962(d), which deals exclusively with conspiracies.

Even with the one predicate act that Plaintiff does put forth – parental kidnapping – Plaintiff fails to allege that Liberty University and TRBC agreed to its commission. Plaintiff's own summary of her conspiratorial allegations reveals that she relies exclusively on Victoria Hyden and Linda Wall to connect Liberty University and TRBC, respectively, to the alleged conspiracy to kidnap Isabella. (Dkt. 75, pp. 40-42). But, as shown above, agency is a factual determination that requires proper pleading of direction, control and servicing the needs of the principal. (*Supra*, pp. 7-8, 12). Agency cannot be plausibly inferred from Ms. Hyden's alleged status as a "student worker" in a large university, or Ms. Wall's alleged status as one of TRBC's 20,000 members, yet those are the only "facts" Plaintiff has pled to support her conclusory allegations. The court should not accept as true Plaintiff's threadbare allegations that either is an "agent." *Iqbal*, 556 U.S. at 678; *Priceline.com*, __ F.3d __, 2013 WL 1223326 at *3-4.

Plaintiff's attempt to tie Liberty University and TRBC to the alleged conspiracy to kidnap Isabella by claiming that they "ratified" the conspirators' conduct through public statements disapproving of same-sex marriage, or through counseling law students on the virtues of civil disobedience is similarly deficient. (Dkt. 75, p. 42; Amd. Compl. ¶¶ 47-49). Even if these allegations were true, and they are emphatically denied (*e.g.*, Staver Aff., dkt. 66-4, ¶ 12; Lindevaldsen Aff., dkt. 66-5, ¶¶ 8, 14; Jonathan Falwell Aff., dkt. 66-2, ¶¶ 15, 19), such statements receive full protection under the First Amendment and are not actionable.[26]

[26] "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (italics in original) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Neither do "**threats of vilification or social ostracism**," which are likewise "**constitutionally protected and beyond the reach of a damages award**." *Claiborne*, 458 U.S. at 926 (emphasis added). Only "advocacy [which] is directed to inciting or producing **imminent** lawless action **and** is **likely** to incite or produce such action" is unprotected. *Id.* at 928 (citing *Brandenburg*, 395 U.S. at 447). But "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id*. (citing *Noto v. United States*, 367 U.S. 290, 297–298 (1961)). Speech that "amount[s] to nothing more than advocacy of illegal action **at some indefinite future time**," cannot be punished. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (state could not punish speaker who exclaimed to police that "we'll take the f----- street **later**," because lawless action being advocated for "later" was not imminent) (emphasis added).

H. PLAINTIFF CANNOT STATE A CLAIM FOR CONSPIRACY TO VIOLATE CIVIL RIGHTS.

1. Plaintiff Has Not Pled and Cannot Plead the Requisite State Action.

Plaintiff recognizes that "a claim under § 1985(3) for conspiracy to deny equal protection is not actionable in the absence of state action." (Dkt. 75, p. 52). Nonetheless, to salvage her conspiracy claim against admittedly non-state actors, Plaintiff contends that sufficient state action exists because the defendants **attempted** to "influenc[e]" the actions of Vermont police and courts. (*Id*.) Plaintiff cites **only** to ¶ 52 of her Amended Complaint (*id*.), where she alleges **only** that one defendant, Linda Wall, "made several phone calls to law enforcement to instruct them that they should not look for Lisa and Isabella." (Dkt. 59, ¶ 52).[27]

Since "the judicial landscape of § 1985(3) was radically altered"[28] by the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), Plaintiff's exclusive reliance on two pre-*Bray* authorities (dkt. 75, p. 52) is misplaced. While a couple of courts prior to *Bray* concluded that private actors' attempts to overwhelm police constituted sufficient "influencing" of state actors for purposes of § 1985, the Supreme Court rejected this notion in *Bray*, 506 U.S. 284, and re-affirmed that § 1985 "**does not apply … to private conspiracies that are aimed at a right that is by definition a right only against state interference**," *id*. at 278 (emphasis added), such as equal protection. Thus, because "*Bray* explicitly held § 1985(3) is not applicable to private conspiracies that aim at rights that by definition only shield against State interference[,] **[i]t is therefore irrelevant whether the aim**

[27] Neither of the only two cases cited by Plaintiff supports her contention. In *United Broth. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, (1983) (cited at dkt. 75, p. 52), the Supreme Court actually held that "[i]t is a commonplace that rights under the Equal Protection Clause itself arise **only where there has been involvement of the State** or of one acting under the color of its authority," and reversed a contrary finding below. 463 U.S. at 831 (emphasis added). In *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 625 (N.D. Cal. 1991) (cited at dkt. 75, p. 52), the court noted disagreement among authorities as to whether private actors' actual interference with state actors could sustain a § 1985 claim, and then concluded that it didn't have to resolve the issue. 765 F. Supp. at 625.

[28] *Town of W. Hartford v. Operation Rescue*, 991 F.2d 1039, 1045 (2d Cir. 1993).

of the private conspiracy was to influence State activity." *Tilton v. Richardson*, 6 F.3d 683, 687 (10th Cir. 1993) (emphasis added).

The Second Circuit affirmed a district court's application of *Bray* in holding that, even if "defendants' protests had the effect of overwhelming law enforcement officials, … such effect was only incidental" to defendants' protesting of abortion. *Upper Hudson Planned Parenthood, Inc. v. Doe*, 836 F. Supp. 939, 954-55 (N.D.N.Y. 1993) (dismissing § 1985 claim for lack of state action) *aff'd*, 29 F.3d 620 (2d Cir. 1994). *See also*, *Johns v. Home Depot U.S.A., Inc.*, 221 F.R.D. 400, 405 (S.D.N.Y. 2004) ("The deliberate giving of false information by an individual to a police officer" is not state action).

The same outcome should obtain here. It stretches credulity to contend that Linda Wall's alleged "several phone calls to law enforcement to instruct them" not to search for Lisa and Isabella so completely co-opted state agencies in the supposed conspiracy against Plaintiff that her alleged "deprivation could be described in all fairness as a state act[ion]." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 433 (2d Cir. 1995). Plaintiff does not even allege that the police answered Ms. Wall's alleged calls, much less that they agreed to her alleged "instruction" or engaged in concerted action with her. (Amd. Compl, dkt. 59, ¶ 52). And, in any event, even if Ms. Wall was successful, Plaintiff does not allege that these Defendants directed, controlled or even knew of her actions. (*Id*.) Plaintiff's Amended Complaint cannot be fairly read as a complaint against the police or any other state actors and, thus, her § 1985 claim for denial of equal protection must fail.

Perhaps sensing trouble on her conspiracy to deny equal protection claim, Plaintiff employs the same tactic she previously used with her kidnapping claim. Plaintiff now contends – for the first time – that Defendants have conspired "to infringe upon Isabella's right to interstate travel," which Plaintiff asserts does not require state action. (Dkt. 75, pp. 51-52). Plaintiff did not plead an interstate travel claim in her Amended Complaint. (Dkt. 59, ¶¶ 74-75). The only § 1985

claim pled by Plaintiff is a conspiracy to deny "**the equal protection of the laws**." (*Id*.) (emphasis added). As shown above, Plaintiff cannot plead new claims in a brief to avoid dismissal. (*Supra*, p. 21).

Even if the Court were to consider Plaintiff's interstate travel claim, it is foreclosed by *Bray*. In *Bray*, the Supreme Court held that interstate travel cannot support a private conspiracy under § 1985 unless "the **predominant purpose** of the conspiracy is to impede or prevent the exercise of the right to interstate travel, or to oppress a person **because of his exercise of that right**." 506 U.S. at 275 (emphasis added). "[I]t does not suffice for application of § 1985(3) that a protected right be incidentally affected." *Id*. "The right **must be aimed at** [and] **its impairment must be a conscious objective of the enterprise**." *Id*. (emphasis added) (holding that abortion protesters could not be liable under § 1985 because interstate travel was not the object of their protests). Plaintiff does not and cannot allege that Defendants' "predominant purpose" was to impede Isabella's right to interstate travel "**because of [her] exercise of that right**." 506 U.S. at 275 (emphasis added). Surely Plaintiff does not claim that Lisa Miller refused to comply with visitation orders solely (or even principally) because they required Isabella to travel from Virginia to Vermont. Any such claim would be too fanciful to entertain.

2. Plaintiff Has Not Pled and Cannot Plead Cognizable Discriminatory Animus.

Plaintiff contends that she has alleged the requisite animus, based upon gender, to support a § 1985 claim, because Defendants would not have violated her rights "if she had been an adoptive father" (and therefore a male). (Dkt. 75, pp. 49-50). Critically, however, Plaintiff does not claim that Defendants would not have violated her rights if both she and Lisa Miller had been males, and Isabella had two purported fathers instead of mothers. (*Id*.) Quite the contrary, Plaintiff goes out of her way to allege, both in her Amended Complaint (*e.g.*, dkt. 59, ¶¶ 22, 48, 49, 51, 67) and her Opposition brief (*e.g.*, dkt. 75, pp. 34, 42), that Defendants harbor animus against **all** "same-sex **parents**" and **all** "same-sex **families**" (emphasis added), and that

Defendants would and, indeed, intend to perpetrate the same alleged wrongs against male co-parents as against female co-parents. (*Id*.)

Plaintiff's argument contains the seeds of its own destruction. In *Bray*, the Supreme Court held that, "discriminatory purpose … implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." 506 U.S. at 271-72. A charge of animus against women under § 1985 "demand[s], however, at least **a purpose that focuses upon women *by reason of their sex***." *Id*. at 270 (italics in original, bold emphasis added). The Court thus reversed a § 1985 judgment against abortion demonstrators for failure to demonstrate a cognizable animus against women. *Id*. at 270-74. The Second Circuit also has affirmed the dismissal of a § 1985 claim against abortion protesters, because "the present record does not support a finding that these defendants were motivated by a discriminatory animus against women **in general**," or "that these defendants are acting from an animus **directed at women *qua* members of the female gender**." *Upper Hudson*, 836 F. Supp. at 953 (emphasis added) *aff'd*, 29 F.3d 620 (2d Cir. 1994).

Just as "women seeking abortion is not a qualifying class," *Bray*, 506 U.S. at 269, women seeking to be co-mothers (and men seeking to be co-fathers) are not cognizable classes. Plaintiff's own allegations reveal her belief that Defendants do not focus their conduct upon **all** women "**in general**" "**by reason of their sex**," but instead focus their alleged conduct on both women and men engaged in same-sex co-parenting. Accordingly, Plaintiff's gender animus allegations are wholly insufficient to save her § 1985 claim.[29]

[29] Not wishing to rest upon the gender animus allegations in her Amended Complaint, such as they are, Plaintiff now attempts to "plead" – again, for the first time in her brief – animus against her **religion** and **homosexuality** as well. (Dkt. 75, p. 50). But Plaintiff's § 1985 claim is clearly pled **only "on account of gender."** (Dkt. 59, ¶ 75) (emphasis added). Plaintiff cannot be permitted to keep moving the target. (*Supra*, p. 21). Moreover, Plaintiff only claims that Defendants "refused to obey court orders" because of **Lisa Miller's** religion. (Dkt. 75, p. 50). There is not one allegation in Plaintiff's brief (and certainly not in her Amended Complaint) that Defendants mistreated her because of **her** religion. (*Id*.) In fact, **Plaintiff never even reveals her religion**, and thus never alleges membership in a protected religious class. (*Id*.) As for the alleged homosexuality animus, Plaintiff does not cite a single case that has found such animus

3. Plaintiff Has Not Sufficiently Pled a Conspiracy.

Plaintiff's § 1985 claim also fails because she has not and cannot articulate any actionable conspiratorial conduct. After recounting her conspiracy allegations against **other** defendants (dkt. 75, pp. 48-49), Plaintiff identifies the specific paragraphs in her Amended Complaint which supposedly plead the involvement of Liberty University and TRBC in the alleged conspiracy. (*Id*. at p. 49). The only paragraphs identified by Plaintiff, ¶¶ 27, 43, 45-47, 54 and 60 (*id*.), allege either: (1) action by mere "members" of TRBC or mere "employees" of Liberty University, which cannot be imputed to these entities without the required allegations that they controlled and directed those actions; or (2) constitutionally-protected speech (*e.g.*, "television and radio commercials," Facebook posts, instruction of "Law School students," and a "public declaration") which is not actionable in tort. (*Id*.) The insufficiency of these allegations has been addressed at p. 30, *supra*.

In sum, Plaintiff has failed to state a claim for a section 1985 conspiracy, and Count Four of her Amended Complaint should be dismissed.

I. PLAINTIFF SHOULD NOT BE GRANTED ANOTHER LEAVE TO AMEND.

"[I]t is well established that leave to amend a complaint need not be granted when amendment would be futile." *Hollander*, 173 F. App'x at 19. Plaintiff has already been granted one opportunity to amend. (Dkt. 31). Further amendments would be futile because the defects explained herein, both jurisdictional and substantive, are fatal and incurable.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted, and the Amended Complaint should be dismissed, with prejudice.

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sufficient to sustain a § 1985 claim. (*Id*.) The Second Circuit's recent decision in *Windsor v. United States*, 699 F. 3d 169 (2d Cir. 2012), held only that homosexuality is a quasi-suspect class entitled to intermediate scrutiny. The decision has been accepted for review by the Supreme Court and, in any event, does not address whether or how animus against same-sex co-parents can sustain a § 1985 claim.

Respectfully submitted,

DINSE, KNAPP & McANDREW, P.C.

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Attorneys for Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc., and Victoria Hyden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on April 3, 2013. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

DINSE, KNAPP & McANDREW, P.C.

/s/ Ritchie E. Berger
Ritchie E. Berger, Esq.

Attorney for Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc., and Victoria Hyden

Exhibit One

to
Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint

STATE OF VERMONT
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT
DOCKET NO. 454-11-03 Rddm

LISA MILLER-JENKINS,
Individually,

Plaintiff,

v.

JANET MILLER-JENKINS,
Individually,

Defendant.

PLAINTIFF'S AMENDED SECOND MOTION FOR APPEARANCE PRO HAC VICE

NOW COMES Plaintiff's present local counsel, NORMAN C. SMITH, a member of the Vermont Bar, and pursuant to Vermont Rule of Civil Procedure 79.1(e), Vermont Rule of Family Court Procedure 15 and the Order of this court entered from the bench on February 14, 2007, moves the Court to admit pro hac vice Stephen Crampton and David M. Corry who will also be actively associated with Plaintiff's present local counsel and to permit Attorneys Mathew D. Staver and Rena M. Lindevaldsen to continue their prior pro hac vice admission to practice in this action with an active association with Plaintiff's present local counsel, and in support thereof, states:

1. Mathew D. Staver and Rena M. Lindevaldsen moved for and were granted admission pro hac vice under the pre-2006 versions of Rule 79.1 of the Vermont Rules of Civil Procedure and Rule 15 of the Vermont Rules of Family Court Procedure. They have represented Plaintiff in this matter for over 2 1/2 years, including a pro hac vice admission for the appeal before the Vermont Supreme Court.

2. This Court's oral bench order of February 14, 2007, permitting prior local counsel, Judy Barone, to withdraw required that Mathew D. Staver and Rena M. Lindevaldsen transfer their

pro hac vice appointment by associating with new local counsel within thirty (30) days.

3. Because of the prior obligations of Mathew D. Staver and Rena M. Lindevaldsen, it is necessary to rely on the services of other attorneys to assist Mathew D. Staver with the depositions and trial of this matter. Without assistance, a continuance would be necessary.

4. Attorney Stephen Crampton is a member in good standing of the Bar of the State of Mississippi, has filed a pro hac vice licensing statement form with the Court Administrator and has paid the required fee. Attached hereto as Exhibit "A" is a copy of same.

5. Attorney David M. Corry is a member in good standing of the Bar of the State of Florida, has filed pro hac vice licensing statement forms with the Court Administrator and has paid the required fee. Attached hereto as Exhibit "B" is a copy of same.

6. Stephen Crampton and David M. Corry will be actively associated with local counsel, Norman C. Smith, in this action.

7. Stephen Crampton will be designated as lead counsel in this action.

8. The portion of the prior motion for Gary Kreep and Allison Paino to be admitted pro hac vice is hereby withdrawn.

WHEREFORE, Plaintiff's local counsel respectfully requests that this court permit Stephen Crampton and David M. Corry to appear pro hac vice associated with present local counsel, Norman C. Smith, and approve the association of Mathew D. Staver and Rena M. Lindevaldsen with Norman

C. Smith in accordance with the prior orders of this Court.

Dated this 21st day of March, 2007

Norman C. Smith, Esq.
Vermont License No. 1182
76 Lincoln St
Essex Junction VT 05452
(802) 288-9088 - Telephone
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery and via facsimile this 21st day of March, 2007, to the following:

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Vermont *Pro Hac Vice* Licensing Statement

INSTRUCTIONS: This is a fillable form; to begin, click on a section, then tab to all other sections. Should you experience difficulty, you may print out this form and fill it in by hand. Fill out the form, print and notarize, keeping a copy for yourself. Mail this fully completed form with the appropriate fee to ATTORNEY LICENSING, 2418 Airport Road, Suite 2, Barre, VT 05641 with a Certificate of Good Standing from a licensing state or the District of Columbia. A separate licensing statement for each case must be completed. The fee for each licensing statement is $200. Checks should be made payable to ATTORNEY LICENSING. Please allow two weeks for processing. Questions should be directed to jud-attylicensing@state.vt.us

Name: Stephen M. Crampton

Office Address: P.O. Drawer 2440/100 Parkgate Drive, Suite 2-B

City: Tupelo State: MS Zip Code: 38803/38801

Phone Number: 662-680-3886 Fax Number: 662-844-4234 Email Address: scrampton@afa.net

Licensing State or DC Court: MS Date Admitted: 4/27/95 Current Status: Active

Name of Case: Lisa Miller-Jenkins v. Janet Miller-Jenkins Docket No.: 454-11-203 Court: Rutland Family Court

Name of Sponsoring Vermont Attorney: Norman Smith Sponsor's Vermont License Number: 1182

I request that the fee be waived to enable me to represent an indigent client pro bono. ☐

Please attach a supporting statement.

By my signature, I certify that I am not suspended nor disbarred in any jurisdiction. I certify that I am in good standing and admitted to practice in the licensing state or DC court of:

I understand that I must comply with and am subject to Vermont Statutes and Rules of the Vermont Supreme Court, including the Rules of Professional Conduct and the Rules Governing Establishment and Operation of the Professional Responsibility Program.

Dated this 9th day of March, 2007. Applicant Signature

Subscribed and sworn to before me this 9th day of March, 2007.

DIANE DAVIS O'NEAL, LEE COUNTY, MS NOTARY PUBLIC My Commission Expires December 9, 2010

Notary Public Signature

My Commission Expires 12/9/10

Upon acceptance of this application, you will be mailed a *pro hac vice* licensing card. Please allow processing. The card shall be filed in the court in which the case is pending, along with a motion by Vermont Bar pursuant to V.R.C.P. 79.1(e), V.R.Cr.P. 44.2(b), V.R.F.P. 15(e), V.R.P.P. 79.1(d) or V

EXHIBIT A

The Supreme Court of Mississippi

Certificate of Good Standing

I, Betty W. Sephton, as Clerk of the Supreme Court of Mississippi, do hereby certify that **Stephen M. Crampton** was duly and legally admitted to practice law before the Supreme Court of Mississippi on April 27, 1995, and is now an attorney in good standing of the Bar of this Court, as shown by the records of said Court on file in this office.

I further certify that the Supreme Court of Mississippi is the highest court of record in this state.

Done on September 22, 2006, with the seal of the Supreme Court of Mississippi affixed.

The Supreme Court of Mississippi

Betty W. Sephton
CLERK

Vermont *Pro Hac Vice* Licensing Statement

INSTRUCTIONS: This is a fillable form; to begin, click on a section, then tab to all other sections. Should you experience difficulty, you may print out this form and fill it in by hand. Fill out the form, print and notarize, keeping a copy for yourself. Mail this fully completed form with the appropriate fee to ATTORNEY LICENSING, 2418 Airport Road, Suite 2, Barre, VT 05641 with a Certificate of Good Standing from a licensing state or the District of Columbia. A separate licensing statement for each case must be completed. The fee for each licensing statement is $200. Checks should be made payable to ATTORNEY LICENSING. Please allow two weeks for processing. Questions should be directed to jud-attylicensing@state.vt.us

Name: David Michael Corry

Office Address: Liberty Counsel

P.O. Box 11108

City: Lynchburg State: VA Zip Code: 24506-1108

Phone Number: (434) 592-7000 Fax Number: (434) 592-7700 Email Address: dcorry@LC.org

Licensing State or DC Court: Florida Date Admitted: 9/20/90 Current Status: Active

Name of Case: Lisa Miller-Jenkins v. Janet Miller-Jenkins Docket No.: 454-11-03RcDMd Court: Rutland County Family Court

Name of Sponsoring Vermont Attorney: Norman C. Smith Sponsor's Vermont License Number: 1182

I request that the fee be waived to enable me to represent an indigent client pro bono. [X]

Please attach a supporting statement.

By my signature, I certify that I am not suspended nor disbarred in any jurisdiction. I certify that I am in good standing and admitted to practice in the licensing state or DC court of: Supreme Court of Florida

I understand that I must comply with and am subject to Vermont Statutes and Rules of the Vermont Supreme Court, including the Rules of Professional Conduct and the Rules Governing Establishment and Operation of the Professional Responsibility Program.

Dated this 20th day of March, 2007.

Applicant Signature

Subscribed and sworn to before me this 20th day of March, 2007.

BELINDA K. WETHERINGTON
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES October 31, 2009

Notary Public Signature

My Commission Expires 10/31/09

Upon acceptance of this application, you will be mailed a *pro hac vice* licensing card. Please allow processing. The card shall be filed in the court in which the case is pending, along with a motion by Vermont Bar pursuant to V.R.C.P. 79.1(e), V.R.Cr.P. 44.2(b), V.R.F.P. 15(e), V.R.P.P. 79.1(d) or V.

EXHIBIT B

Supporting Statements for Vermont *Pro Hac Vice* Licensing Statement

Regarding Indigent Pro Bono Client:

In May of 2004, Plaintiff Janet Miller-Jenkins applied to proceed *in forma pauperis*, which application was granted by the Rutland Family Court. The attorneys representing Plaintiff Janet Miller-Jenkins are working pro bono. Accordingly, I respectfully request the licensing application be approved and the enclosed check be returned or the licensing fee be refunded.

Regarding Certificate of Good Standing:

I have ordered a new Certificate of Good Standing from the Florida Supreme Court which I will forward to supplement this application upon its arrival. In the meanwhile, I submit the enclosed recent Certificate of Good Standing and affirm that I am currently in good standing with the Florida Supreme Court.

3/20/07

Supreme Court of Florida

Certificate of Good Standing

I THOMAS D. HALL, Clerk of the Supreme Court of the State of Florida, do hereby certify that

DAVID MICHAEL CORRY

was admitted as an attorney and counselor entitled to practice law in all the Courts of the State of Florida on **September 20, 1990,** *is presently in good standing, and that the private and professional character of the attorney appear to be good.*

WITNESS my hand and the Seal of the Supreme Court of Florida at Tallahassee, the Capital, this July 18, 2006.

By: Tanya Carroll
Deputy Clerk

Clerk of the Supreme Court of Florida.

Exhibit Two

to
Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint

STATE OF VERMONT
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT
DOCKET NO. 454-11-03 Rddm

LISA MILLER-JENKINS,
Individually,

Plaintiff,

v.

JANET MILLER-JENKINS,
Individually,

Defendant.

AMENDED

NOTICE OF DEPOSITION DUCES TECUM OF JANET JENKINS

Pursuant to Rule 30 of the Vermont Rules of Civil Procedure and Rule 16 of the Vermont Rules for Family Proceedings, you are hereby notified that the deposition of Janet Jenkins will be taken the Hampton Inn, 47 Farrell Road, Rutland, VT, 05701, on Monday, April 28, 2008, beginning at 9:00 a.m. before a court reporter who will administer the oath, continuing said deposition until completed, upon oral examination.

Ms. Jenkins is further requested to produce and permit inspection at the deposition the following documents and records:

1. All receipts, records and documents of whatever kind regarding her travel from Vermont to Virginia and back on or about March 29, 2008.

2. All records and documents of whatever kind reflecting or relating to efforts to contact Ms. Miller and/or her legal counsel regarding the visitation with IMJ scheduled for March 29 - April 5, 2008, including but not limited to e-mail communications from

or to your legal counsel.

3. All phone records and documents of whatever kind for the time period from March 1, 2008 - April 4, 2008 reflecting or relating to: (a) communications to or from your family or legal counsel in Virginia; (b) your efforts to arrange for travel to Virginia on or about March 29, 2008.

Dated this 18th day of April, 2008.

Stephen M. Crampton
David M. Corry
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506-1108
(434) 592-7000 - Telephone
(434) 592-7700 - Telefacsimile

Norman C. Smith
76 Lincoln St
Essex Junction, VT 05452
(802) 288-9088

Attorneys for Plaintiff Lisa Miller

IN THE SUPREME COURT
FOR THE
STATE OF VERMONT

SUPREME COURT DOCKET NO. 2007-271

Lisa Miller-Jenkins,	APPEALED FROM:
Appellant,	Rutland Family Court
v.	Docket No. 454-11-03 Rddm
Janet Miller-Jenkins,	
Appellee.	

INITIAL BRIEF

Norman C. Smith
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Attorneys for Appellant

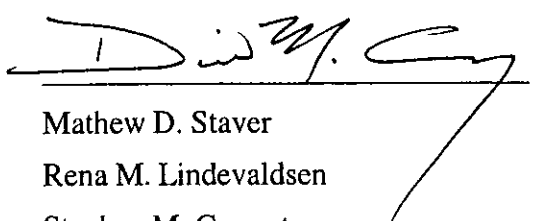
appeal. When an amended complaint merely seeks to clarify plaintiff's litigation position, one that has been understood by Defendant, delay can not be deemed undue and prejudice cannot accrue. *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 615 (3d Cir. 1987).

It simply can not be said to be prejudicial to have to answer a well-pled complaint. It is not unfairly prejudicial to force a litigant to prove their case on the merits without dodging addressing the merits by resorting to uninformed, erroneous forms filled out by a *pro se* litigant. The amended complaint would have ensured the pleadings reflected that Lisa continued to contest the matters she had contested on the interlocutory appeal of the temporary orders. Failure to allow the amendment was an abuse of the family court's discretion. Either this Court should reverse the ruling denying leave to amend and remand the case for new proceedings on the amended pleadings or, alternatively, this Court should render the error harmless by proceeding as if the pleadings had been amended and by not relying upon Lisa's *pro se* filings to reach its conclusions.

CONCLUSION

Appellant respectfully requests this Court reverse the final order of the family court and remand with instructions to dismiss the Complaint and Counterclaim with prejudice.

Dated October 13, 2007



Norman C. Smith
Local Counsel for Appellant

Mathew D. Staver
Rena M. Lindevaldsen
Stephen M. Crampton
David M. Corry
LIBERTY COUNSEL
Attorneys for Appellant

IN THE SUPREME COURT
FOR THE
STATE OF VERMONT

SUPREME COURT DOCKET NO. 2007-271

Lisa Miller-Jenkins,	APPEALED FROM:
Appellant,	Rutland Family Court
v.	Docket No. 454-11-03 Rddm
Janet Miller-Jenkins,	
Appellee.	

REPLY BRIEF

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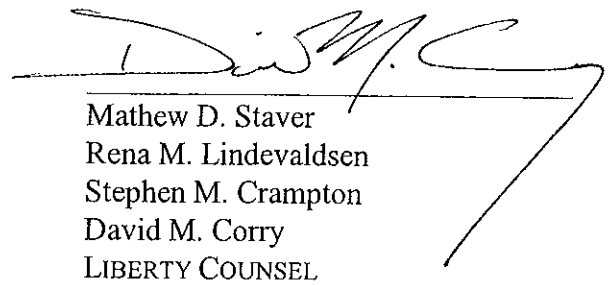
Attorneys for Appellant

Dated: December 6, 2007

Norman C. Smith
Local Counsel for Appellant



Mathew D. Staver
Rena M. Lindevaldsen
Stephen M. Crampton
David M. Corry
LIBERTY COUNSEL
Attorneys for Appellant

STATE OF VERMONT
RUTLAND COUNTY

RUTLAND FAMILY COURT
DOCKET NO. F454-11-03Rddm

LISA MILLER-JENKINS,)
Plaintiff,)
)
v.)
)
JANET MILLER-JENKINS,)
Defendant.)

PLAINTIFF'S OBJECTIONS TO PROPOSED ORDER AND DEFENDANT'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, MOTION TO MODIFY

Plaintiff, Lisa Miller, by and through counsel, files this response in opposition to Defendant, Janet Jenkin's motion for clarification and Defendant's proposed order setting forth additional visitation between Defendant and IMJ. As grounds, Plaintiff states:

1. The Court's findings of fact and conclusions of law were unambiguous after the hearing on January 28, 2009, and did not include an award of attorneys' fees or expenses in favor of Defendant. Accordingly, Defendant's motion is in fact not a motion for "clarification," but in reality a motion for rehearing. There being no legitimate grounds, the motion should be denied.

2. Defendant's proposed order places a virtually impossible logistical burden on Plaintiff, thereby essentially guaranteeing that she will be unable to comply with the Court's order despite her best intentions of doing so.

3. In particular, as Plaintiff has made clear both to Defendant personally and to her counsel, and as Defendant herself testified during the hearing on January 28, travel between IMJ's home in Virginia and Defendant's home in Vermont is over 13 hours, even assuming no adverse weather. Therefore, since IMJ has school on March 6, 2009 until 3:00 p.m., in order for Plaintiff

to travel to Vermont for drop off of IMJ at 9:00 a.m. on March 7, 2009, she will either have to drive through the night on the evening of March 6-7, or will have to drive several hours into the night, stay at a hotel for a few hours' rest, and arise well before sunrise on March 7 in order to have any hope of arriving in Fair Haven by 9:00 a.m.

4. Such a schedule is neither safe nor in any sense in the best interests of the child, who must not only endure a thirteen (13) hour car ride but a woeful lack of adequate rest as well.

5. In the same vein, to pick up IMJ on Sunday afternoon on March 14 at 5:00 p.m. and have her ready for school the next morning at 8:00 a.m. is simply not possible. There are a total of only sixteen (15) hours between the time Plaintiff is to pick IMJ up from Vermont and when school begins the next day. If thirteen (13) of those hours are spent driving, IMJ will almost certainly have to miss a day of school. Missing school cannot be in her best interests.

6. Additionally, as the attorney ad litem suggested after the hearing on January 28 and to which Defendant's counsel seemed to agree, Plaintiff asks this Court to include in the order at least two days' time during the long period of the summer visitation when IMJ can see Plaintiff. IMJ has never been away from Plaintiff for such an extraordinarily long period of time before. Seeing Plaintiff again would be in her best interests, and would likely make the time between Defendant and IMJ all the more pleasant once she was assured of Plaintiff's support and affection.

7. For these reasons, Plaintiff moves the Court to modify Defendant's proposed order by changing the drop off date from March 7 at 9:00 a.m. to March 8, so as to allow all day Saturday for travel, and to change the hour of pick up on March 14 from 5:00 p.m. to 1:00 p.m. Alternatively, the drop off time should be no sooner than 1:00 p.m. on March 7.

8. Plaintiff also moves the Court to include in the order at least two days of visits between Plaintiff and IMJ, preferably Sunday, July 26 and Sunday, August 2, 2009, and for such other and further relief to which she may be entitled.

Respectfully submitted,

Stephen M. Crampton
Rena Lindevaldsen
David M. Corry
Liberty Counsel
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(434) 592-7000

Norman C. Smith
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(802) 288-9088

Attorneys for Plaintiff, Lisa Miller

STATE OF VERMONT
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT
DOCKET NO. 454-11-03 Rddm

LISA MILLER-JENKINS, Individually,

Plaintiff,

v.

JANET MILLER-JENKINS, Individually,

Defendant.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S EMERGENCY MOTION FOR CONTEMPT AND ENFORCEMENT AND MOTION FOR TRANSFER OF BOTH SOLE LEGAL AND PHYSICAL RESPONSIBILITY AND MOTION TO STRIKE DEFENDANT'S AFFIDAVIT

Plaintiff Lisa Miller, by and through counsel, files this response in opposition to Defendant's Emergency Motion for Contempt and Enforcement and Motion for Transfer of Both Sole Legal and Physical Responsibility (dated June 18, 2008). Plaintiff also moves to strike Defendant's affidavit as insufficient as a matter of law. In the interests of judicial economy and efficiency and in light of Defendant's incorporation of her motion of April 11, Plaintiff also hereby incorporates by reference her response in opposition to Defendant's April 11, 2008 motion for contempt.

Defendant asserts without supporting evidence that any failure to comply with the visitation schedule is "willful, wanton and evince[s] an utter disdain for the orders of this Court." Defendant's Motion at ¶ 4. Nothing could be further from the truth. Moreover, this bald assertion constitutes an improper conclusory allegation that should be stricken. Indeed, in her next breath, Defendant refers to an email exchange between attorney Joseph Price and Plaintiff's counsel in which counsel states

unequivocally that Plaintiff "is concerned for [IMJ]'s safety." *See id.* at ¶ 5.[1] Plaintiff has previously gone out of her way to cut through the legal fog in this matter and speak directly with Defendant about the well-being and best interests of IMJ. Plaintiff went so far as to send Defendant a personal letter last November, begging Defendant at a minimum to begin speaking to Plaintiff again. Defendant refused. Again through counsel prior to the most recent scheduled visitation, Plaintiff urged Defendant, for the best interests of the child, to begin a dialog with Plaintiff "to address these concerns." Despite these pleas, Defendant has remained silent.

Under these circumstances, involving as they do the well-being of an innocent child caught in the middle of a hotly-contested, politically-charged legal battle spanning hundreds of miles and countless months, it would be a travesty of justice to find Plaintiff in contempt of court. The motion should be denied.

Additionally, Plaintiff moves to strike the affidavit of Defendant. In her April 11, 2008 motion, Defendant attached a one-page, four-paragraph affidavit stating that the facts in the motion were true "to the best of my knowledge." Apparently in response to Plaintiff's motion to strike that affidavit as insufficient, Defendant now attaches a one-page, four-paragraph affidavit stating that "the facts as stated therein [in the motion] are true." *See* affid. of Janet Jenkins.

As previously shown, however, Rule 4 requires that affidavits "shall *set forth specific facts sufficient to warrant the required findings* and shall be upon the affiant's own knowledge, information, or belief." *Id.* (emphasis added). Defendant's affidavit sets forth no facts, but rather refers broadly to the facts as stated in the motion. But such facts, as demonstrated above, contain

---

[1]Plaintiff also moves to strike Defendant's attachment of an email exchange between counsel on grounds that it constitutes hearsay and lacks authentication.

obvious hearsay, such as the email exchange, about which Defendant can have no personal knowledge. Yet she fails to identify those facts as stated "upon information and belief," but instead asserts that they are true. Therefore, on its face the affidavit is both incomplete and inconsistent. It should accordingly be stricken.

WHEREFORE, Plaintiff prays that Defendant's motions be denied, Defendant's affidavit and exhibit be stricken, and the Court award such other and further relief to which Plaintiff may be entitled.

Respectfully submitted,

Stephen M. Crampton
Rena Lindevaldsen
David M. Corry
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
1-800-671-1776

Norman C. Smith
76 Lincoln St
Essex Junction, VT 05452
(802) 288-9088

Attorneys for Plaintiff, Lisa Miller

Exhibit Three

to
Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint

STATE OF VERMONT
RUTLAND COUNTY, SS

LISA MILLER-JENKINS,
Plaintiff-Respondent

V.

JANET MILLER-JENKINS,
Defendant-Petitioner

RUTLAND FAMILY COURT

DOCKET NO. F454-11-03Rddm

NOW COME Plaintiff's attorneys Liberty Counsel (Mathew D. Staver, Steve Crampton, Rena M. Lindevaldsen, David Corry, and Harry Mihet) and Norman C. Smith, pursuant to V.R.F.P. 15(f) and hereby request permission to withdraw their representation of Plaintiff Lisa Miller in the above-captioned matter in the Rutland Family Court as counsel for Plaintiff are unable to fulfill their duties as officers of the Court. In support of this Motion, Plaintiff's Counsel state as follows:

1. As stated in the accompanying affidavit of Rena M. Lindevaldsen, the last known address of Plaintiff is 203 B Green Tree Drive, Forest, Virginia 24551. However, Plaintiff's counsel has been unable to reach Plaintiff to verify that this is her present address. When asked by this Court during the December 22, 2009 hearing whether Attorney Lindevaldsen or Liberty Counsel had spoken with Plaintiff Lisa Miller since this Court issued its order on November 20, 2009, Attorney Lindevaldsen stated that neither she nor any other attorney in the firm had spoken with her since the order was issued. As set forth in the accompanying affidavit, Attorney Lindevaldsen has left voice mail messages several times for Ms. Miller since November 20, 2009, all of which have been unanswered. Accordingly, Plaintiff's Counsel is unable to provide Plaintiff with notice of this motion and asks that the requirement be waived pursuant to V.R.F.P. 15(f)(4).

2. Counsel request permission to withdraw as Plaintiff's attorney in this matter, while continuing as counsel for purposes of the current, pending appeal from this Court's November 20, 2009 order. As discussed below, in paragraph four, Counsel believe that they can continue as Plaintiff's attorneys for purposes of appealing the November 20, 2009 order.

3. First, Plaintiff's Counsel are no longer able to consult with their client concerning the means of accomplishing the client's objectives in the ongoing, or future, enforcement proceedings before this Court. Rules 1.2 and 1.4 of the Vermont Rules of Professional Conduct require that we (i) "abide by a client's decisions concerning the objectives of representation" and (ii) "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Given our inability to consult with our client, we are unable to consult with her about the means to accomplish her defense in the enforcement proceedings.

4. In contrast, Plaintiff's Counsel believe they are able to continue to represent Plaintiff for purposes of appealing the November 20, 2009 order because clear instructions were given to Plaintiff's counsel shortly after the August 21, 2009 hearing as to Plaintiff's desire to appeal any decision granting Defendant's motion to award her legal and physical custody of IMJ. The means of accomplishing that objective were also discussed – Plaintiff's Counsel would continue to press before the Vermont Supreme Court and United States Supreme Court her arguments that the orders treating Defendant as a parent to IMJ violate Plaintiff's constitutional rights.

5. Second, Plaintiff's Counsel request permission to withdraw as counsel because, aside from pointing out technical deficiencies in the current motion, or any future contempt or enforcement motions, of which this Court can itself consider sua sponte, Plaintiff's Counsel are not able to confer with their client to be able to mount a substantive defense to the motions on

her behalf. For example, this Court does not need the participation of Plaintiff's Counsel to inform it that (i) Defendant's motion for contempt is defective on its face, because the verification of Defendant is legally insufficient (stating that "the foregoing Petition for Expedited Enforcement is true and correct *to the best of my knowledge*"); (ii) the motion was not properly served, as required under Rule 4 (requiring personal service on the party, or at least service by mail); and (iii) the relief sought is futile or without legal authority. *See generally* Vt. Fam. Proc. Rules 4 and 16; *see also Levy v. Town of St. Albans Zoning Bd. of Adjustment* 152 Vt. 139, 145-146, 564 A.2d 1361, 1365 (Vt. 1989) (affidavit based only "upon information and belief" insufficient as a matter of law in summary judgment context); *In re Dobbins* 2007 WL 2501365 (Tex.App.- Dallas 2007) (striking affidavit attesting that facts were true "*to the best of my knowledge*") (emphasis added).

WHEREFORE, Plaintiff's Counsel move this Court to grant their motion to withdraw as Plaintiff's Counsel before the Family Court, and for such other and further relief to which they may be entitled.

Respectfully submitted,

Mathew D. Staver
Rena Lindevaldsen
Stephen M. Crampton
David M. Corry
Harry Mihet
LIBERTY COUNSEL
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1-800-671-1776

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(802) 288-9088

Attorneys for Plaintiff, Lisa Miller

STATE OF VERMONT
RUTLAND COUNTY, SS

LISA MILLER-JENKINS,
Plaintiff-Respondent

RUTLAND FAMILY COURT

V.

JANET MILLER-JENKINS,
Defendant-Petitioner

DOCKET NO. F454-11-03Rddm

AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL

I, RENA M. LINDEVALDSEN, being duly sworn, hereby state as follows in support of the motion by Plaintiff's Counsel to withdraw:

1. Although the last known address of Plaintiff is 203 B Green Tree Drive, Forest, Virginia 24551, I, as counsel to Plaintiff, have not been able to reach Plaintiff to verify that this is her present address. When asked by this Court during the December 22, 2009 hearing whether I had spoken with Plaintiff Lisa Miller since this Court issued its order on November 20, 2009, I explained that I had not. To my knowledge, none of Plaintiff's attorneys has spoken to her since that time. I have left several voice mail messages for Ms. Miller, all of which have been unanswered.

Rena M. Lindevaldsen

Rena M. Lindevaldsen

CERTIFICATE OF NOTARY

STATE OF VIRGINIA:

The forgoing Affidavit was subscribed and sworn before me this 19th day of January, 2010 by Rena Lindevaldsen.

Beverly K. Smith

Notary Public

My commission expires the 31st day of August, 20 11.

BEVERLY K. SMITH
Notary Public
Commonwealth of Virginia
7095081
My Commission Expires Aug 31, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the MOTION TO WITHDRAW AS COUNSEL and the AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL has been furnished by regular U.S. Mail delivery and via facsimile this 20th day of January, 2010, to the following:

Sarah R. Star, Esq.
6 Mill Street
PO Box 106
Middlebury, VT 05753
Facsimile: (802) 419-3600
Attorney for Defendant

Michelle A. Kenny, Esq.
Kenlan Schwiebert Facey & Goss, P.C.
PO Box 578
Rutland, VT 05702
Facsimile: 802-775-1581
Attorney for the minor child

Tara J. Devine, Esq.
Lorentz Lorentz & Harnett
26 Court Street
Rutland VT 05701
Facsimile: 802-775-9896
Guardian ad Litem

Rena M. Lindevaldsen

Exhibit Four

to

Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint

IN THE SUPREME COURT OF THE STATE OF VERMONT

Supreme Court Docket Number 2009-473

LISA MILLER-JENKINS, Plaintiff-Appellant

v.

JANET MILLER-JENKINS, Defendant-Appellee

Appeal
From the
Rutland Family Court
Docket Number 454-11-03 Rddm

BRIEF OF THE DEFENDANT-APPELLEE

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Gay & Lesbian Advocates & Defenders
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jlevi@glad.org

Attorneys for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief of Defendant-Appellee by mailing two copies of the same, postage prepaid, and transmitting an electronic version of the same to:

Stephen M. Crampton, Esq.
Rena M. Lindevaldsen, Esq.
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506

and by mailing one copy of the same, postage prepaid, and transmitting an electronic version of the same to:

Norman C. Smith, Esq.
76 Lincoln Street
Essex Junction, VT 05452

and by mailing two copies of the same, postage prepaid, to:

Michelle A. Kenny, Esq.
Kenlan, Schwiebert, Facey & Goss, P.C.
P.O. Box 578
Rutland, VT 05702

Tara J. Devine, Esq.
Lorentz Lorentz & Harnett
26 Court Street
Rutland, VT 05701

and by transmitting an electronic version of the same to:

Sarah Star, Esq.
P.O. Box 106
Middlebury, VT 05753

Jennifer L. Levi, Esq.

March 26, 2010

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

LISA MILLER-JENKINS,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT
	)	DOCKET NO. 2009-473
	)	
	)	
v.	)	
	)	
JANET MILLER-JENKINS,	)	
	)	
	)	
Defendant-Appellee.	)	

Motion to Limit Issues Raised on Appeal to Matters Authorized by Plaintiff-Appellant Lisa Miller

1. This is an appeal of a decision and order to modify parental rights and responsibilities by the Rutland Family Court on November 20, 2009.

2. Since the filing of the docketing statement with this Court appealing the November 20th order, Lisa Miller's attorneys sought to withdraw from their representation of her as counsel in ongoing matters relating to parental rights and responsibilities being litigated in Rutland Family Court. See Ex. A, "Motion to Withdraw by Plaintiff's Counsel."

3. Although the Rutland Family Court denied Lisa Miller's attorneys' motion to withdraw from representation of her, statements included in a sworn and notarized affidavit submitted in support of that motion are relevant to this appeal insofar as they demonstrate that (1) Lisa Miller's claim they are not able to contact their client; and (2) this appeal raises legal issues which go beyond the scope of matters Lisa Miller's attorneys were authorized by her to pursue prior to them losing all contact with her as they claim in the withdrawal motion filed with the Rutland Family Court.

4. Specifically, in support of the withdrawal motion, attorney Rena Lindevaldsen stated that, "Plaintiff's Counsel are not able to confer with their client;" See Lindevaldsen Affidavit attached to Ex. A, at ¶ 1, and could therefore not meet the Vermont Rules of Professional Conduct 1.2 and 1.4, requiring an attorney to "abide by a client's decisions concerning the objectives of representation;" and

"reasonably consult with the client about the means by which the client's objectives are to be accomplished." See Ex. A at ¶ 3.

5. While Attorney Lindevaldsen stated that Lisa Miller's attorneys could continue to represent her on appeal of the November 20, 2009 order, the reason was because "clear instructions were given to Plaintiff's counsel shortly after the August 21, 2009 hearing as to Plaintiff's desire to appeal any decision granting Defendant's motion to award legal and physical custody of IMJ." See Ex. A at ¶ 4.

6. Notably, however, Attorney Lindevaldsen also stated that "The means of accomplishing that objective were also discussed – Planitiff's Counsel would continue to press before the Vermont Supreme Court and the United States Supreme Court her arguments that the orders treating Defendant as a parent to IMJ violate Plaintiff's constitutional rights." See Ex. A at ¶ 4.

7. In her docketing statement filed in this appeal, plaintiff-Appellant Lisa Miller identified four (4) issues to be raised on appeal, only two of which relate to the objective discussed by Plaintiff-Appellant and her counsel. The other two issues to be raised on appeal are unrelated to the Plaintiff's constitutional rights and exclusively relate to factual matters addressed by the Rutland Family Court.

8. Although Defendant agrees that the issues on appeal relating to factual challenges are properly before this Court, Lisa Miller's attorneys stated in their withdrawal motion before the Rutland Family Court that they were never authorized by their client to pursue them the last time they had any contact with their client shortly after the August, 2009 hearing that resulted in the November 20, 2009 order. See Ex. A at ¶ 4.

9. The affidavit from Attorney Lindevaldsen further demonstrates that since she is no longer able to communicate with her client, she cannot represent her in the pending appeal on the two issues relating to factual challenges to the Family Court's order, which her client has not authorized, consistent with the Vermont Rules of Professional Conduct.

Wherefore, Defendant-Appellant Janet Jenkins, respectfully asks this Court to limit Lisa Miller's appeal to the first two issues raised by her appeal relating to the constitutionality of the November 20, 2009 order, the only two issues which Plaintiff's counsel has been authorized by her client to pursue.

Respectfully submitted this 1st day of February, 2010.

Jennifer Levi
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108
(617) 426-1350
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by first class mail this 1st of February, 2010 to the following:

Michelle A. Kenny, Esq.
Kenlan, Schweibert, Facey & Goss, P.C.
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Rutland, VT 05702

Norman C. Smith, Esq.
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P.O. Box 106
Middlebury, VT 05753

Tara J. Devine, Esq.
Lorentz Lorentz & Harnett
26 Court Street
Rutland, VT 05701

Exhibit Five

to
Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint

STATE OF VERMONT
RUTLAND COUNTY, SS

LISA MILLER-JENKINS

RUTLAND FAMILY COURT

V.

JANET MILLER-JENKINS

DOCKET NO. F454-11-03Rddm

RESPONSE TO PLAINTIFF'S OPPOSITION TO THE MOTION FOR CONTEMPT

NOW COMES the Defendant, Janet Jenkins, by and through her attorney Sarah R. Star, Esq., and hereby responds to Plaintiff's January 21, 2010 filing.

The most recent filings in this matter, while penned as a "Motion to Withdraw" and an "Affidavit" must be treated as what they really are: a response to the Motion for Contempt which Liberty Counsel has received via first class mail, on behalf of their client. Liberty counsel's attempts to name their filing differently demonstrate a clear attempt to assist their client in ducking service by withdrawing, while at the same time presenting arguments to the Court that are in their favor.

Liberty counsel now claims that address provided is appropriate for some documents, but not others. The clarification is interesting, but it was provided only today, one day before the hearing. As of January 4, Liberty Counsel clearly listed an address for Lisa Miller, as c/o Liberty Counsel. The Rules of Family Procedure provide that personal service can be made by mail at an address provided by the Plaintiff. Ms. Lindevaldsen states in her own filing that "the rules require personal service on the party or at least service by mail." As the rule further provides, service by mail can be to "one or more of the addresses supplied by the plaintiff." Liberty Counsel's address was provided by the plaintiff as recently as January 4, 2010, and in reliance on

that information, Defendant personally served Ms. Miller at the address provided. There is no doubt that the document reached the intended destination, as Ms. Lindevaldsen has clearly had time to review it, respond to it, and attempt to point out perceived technical deficiencies arising from her own conduct.

DATED AT Middlebury, Vermont this 21th day of January, 2010.

Sarah R. Star, Esq.
Attorney for Janet Jenkins

c: Rena Lindevaldsen, Esq.
Norman Smith, Esq.
Michelle Kenney, Esq.
Tara Devine, GAL