UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

DEFENDANT LIBERTY UNIVERSITY'S REPLY IN SUPPORT OF ITS MOTION TO STAY DISCOVERY PENDING DECISION ON ITS MOTION FOR RECONSIDERATION

Although Plaintiffs devote nearly two of their opposition's five pages to recounting the history of this litigation, they omit one crucial fact: that the University was dismissed from the case for lack of personal jurisdiction on October 24, 2013. Upon the issuance of that decision, the University, understandably and reasonably, believed the matter ended as to it. The allegedly tortious activity underlying Plaintiffs' action occurred in 2009, and this Court had issued a comprehensive, detailed opinion outlining why the University could not be subject to personal jurisdiction in Vermont.

The University was thus caught entirely by surprise when Plaintiffs filed a Motion to Join Additional Defendants on October 7, 2016, on the basis of allegedly "new" information raised in the course of Philip Zodhiates' criminal trial. Accordingly, the University filed an Opposition to Plaintiffs' Motion and later a Motion to Dismiss arguing, among other things, failure to state a claim upon which relief could be granted and lack of personal jurisdiction. Although the Court denied the University's Motion to Dismiss, the University strenuously maintains that the denial

was erroneous, based on U.S. Supreme Court, Second Circuit, and Vermont case law, and accordingly has sought reconsideration or, in the alternative, permission to take an interlocutory appeal.

This case is, therefore, in a unique factual and procedural posture—and in considering whether to stay discovery pending the outcome of a dispositive motion, a "case-by-case analysis is required, since such an inquiry is necessarily fact-specific and depends on the particular circumstances and posture of each case." *Hachette Distribution, Inc. v. Hudson Cty. News Co.*, 136 F.R.D. 356, 358 (E.D.N.Y. 1991). Unlike *United States ex rel. Brooks v. Stevens-Henager College, Inc.*, No. 2:15-CV-00119-JNP-EJF, 2017 WL 5241002 (D. Utah Jun. 23, 2017), cited by Plaintiffs, the University is not simply making "typical objections to discovery." *Id*. at *2. Nor has the University asked the Court to "stay [all] proceedings pending before it" or tried to usurp the Court's power to "control its docket." *Id*. at *1 (*citing Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Rather, the University seeks a brief stay of discovery against it where it has already been burdened for years by this litigation—dismissed in 2013 and then pulled in again in 2016 as a defendant—and raised serious questions as to the sufficiency of the claims against it, relying on well-settled principles of Vermont tort law to argue that it may not be held vicariously liable for its employees' alleged participation in a criminal conspiracy where there is no allegation it controlled or had a right to control their alleged conduct.[1] *See Hatchette*, 136 F.R.D. at 358 (observing discovery "should be stayed" when the "issues before the Court are purely questions of law that are potentially dispositive."). This Court recognized the University's Motion raised legitimate and serious issues worthy of a hearing, which, unfortunately, has been

[1] As stated in the Motion, the University believes the Court's decision on personal jurisdiction is contrary to constitutional authorities but recognizes that the Court did not overlook any arguments and that seeking reconsideration would be futile. Thus, as to specific personal jurisdiction, the University moved solely to certify that question for interlocutory appeal.

twice delayed through no fault of the University. Tolling the University's deadline to respond to discovery until after the hearing and issuance of a decision will afford the University appropriate relief, while only minimally inconveniencing Plaintiffs, particularly given that this case has already been pending for six years—again, through no fault of the University. *See Gandler v. Nazarov*, No. 94 Civ. 2272 (CSH), 1994 WL 702004 at *4 (S.D.N.Y. Dec. 14, 1994) (granting stay of discovery where pending motion to dismiss was "potentially dispositive" and "not unfounded in the law" and "plaintiffs ha[d] not presented any evidence to suggest that they w[ould] be unfairly prejudiced by a stay"). In the interim, Plaintiffs will remain free to pursue discovery against the other named defendants and to engage in motion practice as they see fit.

Plaintiffs' suggestion that the requested discovery "would be required of Liberty University whether or not it is a party," rendering a discovery stay "unwarranted," (Doc. 314 at 5), ignores the protections afforded to non-parties under Fed. R. Civ. P. 45. Under Rule 45, if the University is dismissed from the case, the Court may limit where its employees and agents may be commanded to attend trials, hearings, or depositions absent reasonable compensation and protect the University against "significant expense" if it is ordered to produce documents or permit inspections. Fed. R. Civ. P. 45(c)(1), (d)(2)(B)(ii); *see also id.*, Advisory Committee Notes, 1991 Amendment (stating that a "non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court" and that the court may "condition enforcement of a subpoena compelling a non-party witness to bear substantial expense to attend trial," such that the non-party witness "may be entitled to reasonable compensation for the time and effort entailed."); *accord U.S. v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 371 (9th Cir. 1982) ("Nonparty witnesses are powerless to control the scope of litigation and discovery and should not be forced to subsidize

an unreasonable share of the costs of a litigation to which they are not a party."). It would be unfair and wasteful to force the University to incur significant discovery costs now, given it could be dismissed from the case in a matter of weeks or months and then it would be able to share in the expense of responding to Plaintiffs' discovery requests.

In sum, in considering the significant and equitable benefit to the University, weighed against the minimal burden to Plaintiffs, the University should be entitled to a definitive ruling on the dispositive arguments it has raised before it is forced to respond to Plaintiffs' costly, burdensome, and intrusive discovery requests. For that reason, Liberty University requests that the Court grant its Motion and stay discovery as to it until the Court decides the University's Motion to Reconsider.

DATED at Burlington, Vermont, this 27th day of July, 2018.

DINSE, KNAPP & McANDREW, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on July 27, 2018. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

DINSE, KNAPP & McANDREW, P.C.

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