

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

**MEMORANDUM IN SUPPORT OF DEFENDANT TIMOTHY MILLER'S  
OBJECTION TO PLAINTIFF JANET JENKINS'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON COUNT ONE AGAINST TIMOTHY MILLER**

Michael J. Tierney  
Wadleigh, Starr & Peters, P.L.L.C.  
95 Market Street  
Manchester, New Hampshire 03101  
Phone: (603) 359-2629  
Fax: (603) 669-6018  
Email: [mtierney@wadleighlaw.com](mailto:mtierney@wadleighlaw.com)  
*Counsel for Defendant Timothy Miller*

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Timothy Miller (“Timo”), through his attorneys, Wadleigh, Starr & Peters, P.L.L.C., hereby objects to Plaintiff Janet Jenkins’s Motion for Partial Summary Judgment on Count One of the Revised Second Amended Complaint, ECF #439 dated December 13, 2019, as it applies to Defendant Timothy Miller, for the reasons set forth in this memorandum. Defendant Timothy Miller requests oral argument on this Motion and Objection, pursuant to Local Rule 7(a)(6).

### INTRODUCTION

Plaintiff cannot meet her burden as to Count One against Timo. Accordingly, Plaintiff is not entitled to summary judgment against Timo.

Plaintiff alleges, as is pertinent to Timo, that Timo is liable to her for the Vermont tort of intentional interference with parental rights under the theory of civil conspiracy. Plaintiff alleges that Timo conspired with Lisa Miller, with whom Plaintiff shares the minor child, Isabella Miller, and others to interfere with Plaintiff’s parental rights with Isabella. In 2016, Timo agreed to plead guilty, in the United States District Court for the Western District of New York, to the criminal charge of conspiracy to commit international parental kidnapping. Plaintiff now moves for summary judgment on the basis that there is no dispute of material fact because Timo’s guilty plea collaterally estops him from litigating the elements of the tort.

Timo is not collaterally estopped from litigating the elements of Plaintiff’s civil conspiracy tort claim, which are distinct from those involved in his criminal conspiracy guilty plea, and both the undisputed and disputed facts suggest that Plaintiff is not entitled to summary judgment.

*First*, the Vermont Supreme Court and this Court have been clear that Vermont law views civil conspiracy as distinct from criminal conspiracy. The former requires that not only the purpose of a co-conspirator’s act be illegal, but also that the means by which the co-

conspirator effects the illegal purpose be themselves unlawful. Criminal conspiracy, on the other hand, does not so require. Plaintiff cannot show that the acts Timo allegedly took in furtherance of the alleged tort were themselves unlawful and thus, Plaintiff cannot meet her burden on summary judgment.

*Second*, the elements of the tort of intentional interference with parental rights are materially distinct from the elements of the crime of international parental kidnapping such that the elements of the former were not sufficiently addressed or decided, for the purposes of collateral estoppel, in the proceedings and guilty plea relating to the latter. As such, Timo is not collaterally estopped from litigating the elements of the tort, Plaintiff has not otherwise set forth undisputed facts sufficient to sustain Count One at summary judgment, and Plaintiff's Motion must be denied.

*Third*, at the time period underlying the crime to which Timo plead guilty, Plaintiff did not have custody of the minor child whereas Timo's alleged co-conspirator, Lisa Miller, had full custody of the minor child. Therefore, Lisa Miller could not have committed the alleged tort at the time underlying Timo's guilty plea and, as Plaintiff's Motion is based on the collateral estoppel effect of that guilty plea, Timo could not have been a co-conspirator if there was no commission of a tort. Summary judgment must accordingly be denied.

*Fourth*, even if Plaintiff can rely on Timo's guilty plea for collateral estoppel effect, Plaintiff is not entitled to damages and, even if she is entitled to damages, they are significantly limited. Because the conduct to which Timo plead guilty occurred during a time at which Plaintiff could not recover via a tort action—because she had only parent-child contact, or visitation, rights and the remedy for a violation of those rights is an enforcement or contempt action in Vermont family court—and because Plaintiff has failed to show that she herself

complied with her obligations under the parent-child contact order, she is not entitled to damages. Even if she is entitled to damages based on a grant of the instant Motion, however, they must be limited to those occurring as a result of the conduct to which Timo plead guilty—one missed parent-child contact weekend.

Ultimately, as Plaintiff has failed to meet her burden at summary judgment, her Motion must be denied.

### **ARGUMENT**

For collateral estoppel to apply, “(1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.” *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986). (citing Charles Alan Wright & Arthur R. Miller, 18 *Federal Practice and Procedure* § 4416 (1981)). To evaluate these factors, the court looks to the jury instructions, verdict, and findings of the jury in the prior criminal proceeding. *See, e.g., New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 86–87 (2d Cir. 2000). None of the foregoing are present in this case, as Timo plead guilty.

Thus, for collateral estoppel to apply to the elements of Count One against Timo, and for summary judgment to therefore be appropriate on that Count, not only must the criminal conviction and civil tort be comprised of the same elements and same issues, but, more broadly, the criminal conviction and civil tort must be essentially identical. *See id.; United States v. Guzzone*, 273 F.2d 121, 123 (2d. Cir. 1959) (“It is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding,

but such estoppel extends only to questions distinctly put in issue and directly determined in the criminal prosecution.”).

With respect to an action for civil conspiracy, it is axiomatic that the conspired-to act must be a tort. *See Beck v. Prupis*, 529 U.S. 494, 504 (2000) (noting that “the principle that a civil conspiracy plaintiff must claim injury from an act of a tortious character” is widely accepted and “incorporated in the common understanding of ‘civil conspiracy’” and that “[i]t is the civil wrong resulting in damage, and not the conspiracy which constitutes the cause of action”) (quotation omitted).

**I. Because the Vermont Supreme Court has distinguished between civil and criminal conspiracy, requiring the act of a civil conspirator to itself be unlawful, Timo’s guilty plea does not collaterally estop him from arguing that Plaintiff has failed to prove Count One, as Timo’s alleged acts were not themselves unlawful.**

Plaintiff is not entitled to summary judgment because she cannot show that the means by which Timo allegedly effected the conspiracy to interfere with Plaintiff’s parental rights were themselves unlawful, a distinct requirement to prove civil conspiracy.

The Vermont Supreme Court—and this Court interpreting the Vermont Supreme Court’s opinions—has long “distinguished between the elements of civil and criminal conspiracy.” *Dernier v. U.S. Bank Nat’l Ass’n for CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-3*, No. 2:16-cv-000230, 2017 WL 2483799, at \*7 (D. Vt. June 8, 2017) (citing *Boutwell v. Marr*, 42 A. 607, 609 (Vt. 1899)). As the Vermont Supreme Court stated long ago:

The crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means . . . **But the grounds of recovery in a civil suit are not identical with the elements of the crime.** The law punishes the mere agreement to effect an illegal purpose or to use illegal means. But it is clear that a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement; and it is claimed to be also requisite that **the thing done be something unlawful in itself.** This would **preclude a**

**reliance upon the existence of an illegal purpose, and require that the means used be illegal.** The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement, and resulting in damage, even though not itself a violation of right, would sustain a recovery. But the view suggested is not sustained by the authorities, and we proceed with our inquiry upon the assumption that **there can be no recovery unless illegal means were employed.**

*Boutwell*, 42 A. at 609 (internal citation omitted) (emphasis added).

Accordingly, for a claim based on the theory of civil conspiracy, an agreed-upon illegal purpose is simply not alone sufficient—unlike a criminal charge of conspiracy—to satisfy the elements of a civil conspiracy under Vermont law. *See id.*; *Dernier*, No. 2:16-cv-000230, 2017 WL 2483799, at \*7 (stating that the means allegedly employed by a defendant must be unlawful, even if the means were used to effect an illegal purpose). Plaintiff is required to show that, in this case, Timo’s alleged acts in furtherance of the alleged conspiracy were themselves unlawful.

Plaintiff cannot satisfy this requirement. Although unclear, it appears Plaintiff contends that “the Vermont tort of intentional interference with parental rights” is both the “illegal purpose and the illegal act,” and that because Timo allegedly acted in furtherance of the illegal purpose, his alleged act is itself unlawful. Pl. Brief, at 14, 22. This argument is directly contradicted by the Vermont Supreme Court’s opinions, and this Court’s orders interpreting those opinions, regarding civil conspiracy. *See, e.g., Boutwell*, 42 A. at 609 (rejecting the proposition that “agreeing together to effect an illegal purpose being itself illegal . . . [sustains recovery for] any act done in furtherance of the agreement, and resulting in damage, even though not itself a violation of right”). Simply because Plaintiff alleges that a tort was committed by co-conspirators does not make each co-conspirator’s act unlawful. In other words, there must be an agreement to effect something illegal and “the thing done [by a co-conspirator must] be something unlawful in itself.” *Boutwell*, 42 A. at 609. Plaintiff cannot rely on the existence of

an illegal purpose—here, the alleged intentional interference with Plaintiff’s parental rights—to satisfy the “illegal means” element of a civil conspiracy. *See id.*

Indeed, both this Court and the Vermont Supreme Court have dismissed actions for civil conspiracy to commit a tort because the plaintiffs failed to allege that the act of an individual conspirator was itself unlawful. For example, in *Davis v. Vile*, the plaintiff brought a civil conspiracy claim against the State, arguing that state officials recklessly made public statements regarding an investigation into the plaintiff’s unlawful activity and that they “engaged in extortion by offering to lift the threat of a significant fine if the [plaintiff’s] bank [to which the State’s enforcement action was originally directed] acknowledged that plaintiff’s operation violated the law.” *Davis v. Vile*, No. 2002-465, 2003 WL 25746021, at \*3 (Vt. Mar. 1, 2003). The court stated that the “plaintiff has failed to allege facts that satisfy the ‘illegal means’ element.” *Id.* It found that there was nothing unlawful about the State’s alleged activities and concluded that “[b]ecause plaintiff failed to allege an illegal means used in furtherance of the claimed conspiracy, the [trial] court properly dismissed his civil conspiracy claim against the State.” *Id.*

In *Dernier*, this Court used similar reasoning to dismiss a claim of civil conspiracy to commit forgery and fraud. *Dernier*, No. 2:16-cv-000230, 2017 WL 2483799, at \*7. The plaintiffs argued that the defendants conspired with another entity and “used a legal Ratification to effect the illegal forgery and collect on the stolen instrument, thus using legal means to effect an illegal purpose.” *Id.* The defendants countered that the plaintiffs “do not allege the Ratification is an ‘illegal means.’” *Id.* In framing the question, this Court stated: “Thus, the parties essentially dispute whether, if [the co-conspirator]’s attempt to collect on the note and/or foreclose constitutes an illegal act, [the defendant]’s otherwise-lawful Ratification, intended to

aid [the co-conspirator] in doing so, would amount to conspiracy.” *Id.* After first noting that “[a]lthough the crime of conspiracy may consist of the use of legal means to effect an illegal purpose, civil conspiracy requires that the means used be illegal,” this Court granted the defendants’ motion to dismiss because the act of ratification—even though it was allegedly intended to effect an illegal purpose—was not itself unlawful. *Id.* (quotation omitted).

Here, Plaintiff does not claim—and cannot credibly claim—that the act of purchasing plane tickets, or arranging for the purchase of plane tickets (or anything upon which the September 2009 crime was based), was itself unlawful. Indeed, even if Timo “used a legal [act of purchasing plane tickets or otherwise assisting in Lisa Miller’s travel plans] to effect the illegal [tort of intentional interference with parental rights], thus using legal means to effect an illegal purpose,” *see Dernier*, No. 2:16-cv-000230, 2017 WL 2483799, at \*7, Plaintiff would still fall short of meeting her *prima facie* burden of showing an unlawful means to achieve a tortious purpose. Simply put, Plaintiff has not alleged that anything Timo did was in and of itself unlawful. Because Timo’s alleged act must itself be illegal—not merely intended to effect an illegal purpose—Plaintiff cannot prevail on her civil conspiracy claim against Timo. As such, summary judgment must be denied.<sup>1</sup>

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<sup>1</sup> In fact, Plaintiff cannot even satisfy the less onerous elements of the related claim of aiding and abetting another in the commission of a tort, “which requires only that [the plaintiff] show: (1) the existence of a primary violation; (2) knowledge of this violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation.” *See Montgomery v. Devoid*, 915 A.2d 270, 278 (Vt. 2006) (quotation omitted). Plaintiff would fail, at the least, on the third element. Had Plaintiff brought this claim, she would have had to show that Timo acted for his own benefit and that his conduct was not “too removed and tenuous to provide a necessary causal link for [his] assistance to qualify as substantial.” *See id.* Just as in *Montgomery*, Timo’s role, if true as alleged, was minimal at best and certainly not substantial. Moreover, “the only benefit that [Plaintiff could] claim[] inured to [Timo] is the satisfaction of aiding [another person]. The lack of any monetary benefit undoubtedly stems from [Timo]’s apparent innocence in initiating, and insignificant role in perpetuating, the [alleged tort].” *See id.* Thus, it is clear that Plaintiff would fail on either civil theory relating to Timo allegedly conspiring or aiding in the commission of a tort. Certainly, summary judgment in favor of Plaintiff with respect to such claims must be denied.

**II. The elements for Plaintiff's Count One differ in several material ways from those involved in Timo's guilty plea, thereby precluding summary judgment on the basis of collateral estoppel.**

As this Court concluded in its Order pertaining to Defendants' Motion to Dismiss, the Vermont Supreme Court would follow the Restatement (Second) of Torts § 700 in evaluating a claim for intentional interference with parental rights. *Jenkins v. Miller*, 983 F. Supp. 2d 423, 451-52 (D. Vt. 2013). The elements of this claim, according to the Restatement, this Court, and Plaintiff, are:

- (1) A person abducts or otherwise compels or induces a minor child to leave a parent;
- (2) The parent is legally entitled to the minor child's custody; and
- (3) The person acted with knowledge that the parent does not consent.

*Jenkins*, 983 F. Supp. 2d at 451-52; RESTATEMENT (SECOND) OF TORTS § 700; Pl. Brief, at 19.

The elements of the crime of international parental kidnapping, on the other hand—accepting Plaintiff's and the Government's rendering of said elements—are:

- (1) The minor child was previously in the United States;
- (2) The defendant agreed with others to assist the taking of the minor child from the United States and retaining the minor child outside the United States; and
- (3) The defendant acted with the intent to obstruct the lawful exercise of parental rights of the parent.

Ex. A, at 2; Pl. Brief, at 5.

For collateral estoppel to apply, in relevant part, “the issues in both proceedings must be identical,” the issues “must have been actually litigated and actually decided,” and “the issue previously litigated must have been necessary to support a valid and final judgment on the merits.” *See Gelb*, 798 F.2d at 44 (citation omitted). Courts have often determined whether these principles are met, in cases such as this, by comparing the elements of the crime with the tort. *See, e.g., Grogan v. Garner*, 498 U.S. 279, 285 (1991); *Samirah v. Sabhnani*, 772 F. Supp. 2d 437, 441 (E.D.N.Y. 2011).

As a preliminary note, the crime to which Timo plead guilty ended in September 2009, well before the Vermont court granted custody to Janet Jenkins. *See Ex. B, Timo Judgment*, at 1; *Ex. D, Order on Motion to Modify Parental Rights and Responsibilities*. As such, no facts, admissions, allegations, agreements, or issues involved or referenced in the Plea Agreement which occurred after September 2009 can be used for collateral estoppel purposes, as they were not necessary to support the guilty plea. *See Gelb*, 798 F.2d at 44 (citation omitted).

Additionally, Plaintiff appears to assume that Timo “admitted” several facts set forth in the Plea Agreement drafted by the Government’s prosecutor. *See, e.g.*, Pl. Brief, at 19; *Ex. A, Timo Plea Agreement*. This assumption is incorrect. The Plea Agreement, drafted by the prosecution, sets forth facts to which the “defendant and the government agree.” *Ex. A*, at 2. In other words, Timo merely agreed that the Government would introduce evidence as set forth in the Plea Agreement to support its case against Timo and, in light of the potential that such evidence would be presented to a jury—but not necessarily in contemplation that such evidence was true—Timo made the intentional decision to plead guilty.<sup>2</sup> If the parties had intended for Timo to admit such facts, they would have so stated. They did not, and it would not be appropriate to now change the plain meaning of the Agreement.

Nonetheless, even without disregarding the unadmitted facts for collateral estoppel purposes,<sup>3</sup> it is clear that Timo’s guilty plea does not collaterally estop him from litigating the elements of the tort here, as the elements of his guilty plea are distinct from the elements of the alleged tort.

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<sup>2</sup> As a more rudimentary example, had Timo “agreed” that the Government would present a certain witness to prove its case against Timo, it certainly could not be said that Timo had “admitted” to whatever that witness would have said at trial. The same principle applies to the facts set forth in the Plea Agreement.

<sup>3</sup> It would still be necessary to disregard fact (d) from the Plea Agreement, however, as it involves alleged conduct after September 2009—the date when the crime to which Timo plead guilty ended—and is thus not “necessary to support a valid and final judgment on the merits” and therefore cannot be used for collateral estoppel purposes. *See Gelb*, 798 F.2d at 44 (citation omitted).

a. Tort Element 1: A Person Abducts, Compels, or Induces a Child to Leave a Parent

Plaintiff contends that because Timo “admitted” that he agreed with others to remove Isabella from the United States, Plaintiff can satisfy this element. Pl. Brief, at 15. Plaintiff cannot. Timo’s guilty plea admitted only, in relevant part, that he agreed with others to remove Isabella from the United States. Timo did not, contrary to Plaintiff’s assertion, admit anything with regard to abducting, compelling, or inducing Isabella to leave Janet Jenkins. Such an inference would be unreasonable and unnecessary to support the guilty plea.

At the time of Timo’s alleged acts, Lisa Miller had full legal and physical parental responsibility for Isabella. Ex. C, *Temporary Order Re: Parental Rights & Responsibilities*. This is equivalent to “custody.” *See Custody* (2), BLACK’S LAW DICTIONARY (11th ed. 2019) (“Custody involves legal custody (decision-making authority) and physical custody (caregiving authority), and an award of custody usu. grants both rights.”). Janet Jenkins did not, at that time, have “custody” of Isabella. Plaintiff’s attempt to draw visitation rights into the definition of “custody,” *see* Pl. Brief, at 16, is unsupported by traditional definitions of “custody,” the relevant parental responsibility order, and Vermont case law. *See Joint Custody & Divided Custody*, BLACK’S LAW DICTIONARY (11th ed. 2019) (providing for alternatives to full custody, by which parents share full legal and physical responsibility at all times or for portions of any given year and allowing for visitation, as distinct from legal and physical responsibility); 15 V.S.A. § 664(1) (stating that legal and physical responsibility “may be held solely or may be divided or shared”); Ex. C (providing that Lisa Miller has legal and physical responsibility and not stating that Janet Jenkins has any shared or divided responsibility, but rather only parent-child contact); *Patnode v. Urette*, 98 A.3d 787, 790 (Vt. 2014) (distinguishing between “parental custody and visitation rights”); *Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768, 774 (Vt. 2010) (noting, in reference to an

order underlying this very case, that there was a “transfer of custody” from Lisa Miller to Janet Jenkins).

In any case, in Vermont, “legal responsibility,” which was, at the time period underlying Timo’s guilty plea, awarded to Lisa Miller, allows for Lisa Miller to, in relevant part, “determine and control a child’s welfare and upbringing . . . religion and travel arrangements.” 15 V.S.A. § 664(1)(A). As such, Lisa Miller, at the time underlying Timo’s guilty plea, could have determined where and when Isabella traveled. Even if Timo knew that there might have been an impending transfer of custody—a fact, to the extent that it was set forth in the Plea Agreement, that Timo did not admit—and even if he plead guilty to acting to obstruct parental rights, on the basis that they might be awarded to Janet Jenkins in the future, those issues do not establish that he conspired to abduct, compel, or induce Isabella to leave Janet Jenkins. It was simply not an issue that was actually litigated or actually decided in Timo’s criminal proceeding.

Lisa Miller could decide, until November 2009—after the crime to which Timo plead guilty ended—where and when Isabella traveled. Thus, Isabella was not, until November 2009, “leaving” Janet Jenkins; she was merely traveling with the parent who had the right to decide where and when she traveled. As the Restatement makes clear, it is necessary that the alleged tortfeasor induces the child to “leave its home” or knows that “the child is away from home against the will of its parent.” RESTATEMENT (SECOND) OF TORTS § 700, cmts. a, b. Isabella’s home, at the time, was with Lisa Miller.

Plaintiff cannot meet her burden by collateral estoppel or otherwise on this element and thus, summary judgment is inappropriate.

b. Tort Element 2: The Parent is Legally Entitled to the Minor Child’s Custody

Again, and for the reasons stated in *supra* Section II(a) above, Janet Jenkins—at the time underlying Timo’s guilty plea—was not entitled to custody of Isabella. At that time, full legal and physical responsibility rested with Lisa Miller. *See* Ex. C. Plaintiff has not introduced any undisputed facts to show that Janet Jenkins was entitled to Isabella’s custody at the time of Timo’s alleged acts or at the time underlying the guilty plea, which ended in September 2009. Although Plaintiff may argue that Janet Jenkins had some form of “custody,” such is an unmerited legal argument; indeed, the undisputed factual evidence—the Vermont court’s parental responsibility order, *see* Ex. C—is that Lisa Miller had, at the time, full “custody” of Isabella. Because Plaintiff cannot meet her burden by collateral estoppel or otherwise on this element, summary judgment is inappropriate.

c. Tort Element 3: The Person Acted with Knowledge that the Parent Does Not Consent

Plaintiff presents no undisputed facts to support her assertion that Timo somehow knew that Janet Jenkins did not consent to Isabella traveling abroad with her mother Lisa Miller, who had sole “custody” of Isabella. Indeed, Plaintiff cannot support any contention that Janet Jenkins’s consent was necessary or required in the first place—it was not, *see* 15 V.S.A. § 664(1)(A)—and Plaintiff cannot present any facts, or even reasonable inferences, that Timo knew Janet Jenkins did not consent to Isabella traveling. The Restatement is very clear that specific knowledge of no consent is a required element of the tort. *See* RESTATEMENT (SECOND) OF TORTS § 700, cmts. a, b. Again, this is an issue that was simply not litigated and not decided in Timo’s criminal proceeding.

Timo’s guilty plea does not state—nor does the crime to which he plead guilty require—that he knew that Janet Jenkins did not consent to Isabella traveling abroad. *See* Ex. A

(containing no reference to such knowledge or nexus between such knowledge and an intent to obstruct Janet Jenkins's parental rights). Plaintiff cites two cases, one regarding sufficiency of the evidence and one pertaining to admission of evidence, in support of her argument that Timo knew Janet Jenkins did not consent. *See* Pl. Brief, at 18. Neither case supports the apparent assertion that intent to obstruct parental rights necessarily requires knowledge that the parent does not consent. Indeed, it is possible for a person to be found guilty of parental kidnapping even though the parent consented to the initial taking of the minor child (*e.g.*, the defendant takes the child with permission of the parent but then refuses to return the child). *See, e.g., In re Extradition of Thi Ha Vu*, No. 15-MJ-1049 (VVP), 2016 WL 8674654, at \*3 (E.D.N.Y. Feb. 5, 2016) (“There is undisputed proof that Vu was aware of the judicial order giving Froger the right to custody of the child, and that she had to obtain his consent to remove the child from France. Although she did obtain his consent to remove the child from France, that consent extended only until August 29, 2015. Thus, she was in violation of Froger’s custodial rights when she failed to return the child to him on and after that date.”). The cases cited by Plaintiff, on the other hand, involve attempts by the Government to rebut the defendants’ assertions that they did not “intend” to obstruct parental rights. *See United States v. Hasan*, 586 F.3d 161, 165-66 (2d Cir. 2009); *United States v. Saliba*, No. 8-CR-792, 2010 WL 1189350, at \*1-2 (E.D.N.Y. Mar. 26, 2010). In Timo’s case, there was no such dispute and therefore, no need to introduce evidence relating to consent.

The criminal parental kidnapping cases that discuss consent often involve custody orders that require consent from a parent before traveling with a minor child. *See In re Extradition of Thi Ha Vu*, No. 15-MJ-1049 (VVP), 2016 WL 8674654, at \*3; *United States v. Shabban*, 612 F.3d 693, 696-97 (D.C. Cir. 2010). The parental responsibility order in this case did not require

that Lisa Miller, the parent with sole “custody” of Isabella, acquire the consent of Janet Jenkins, the Vermont court, or any other party before traveling with Isabella. Ex. C. As such, and because Plaintiff has presented no facts—disputed or otherwise—that Timo knew Janet Jenkins did not consent to Isabella traveling abroad, summary judgment is inappropriate.

As a final note, this Court has made clear that a civil conspiracy claim in Vermont provides that “[a]ll who aid in the commission of a tort by another, or who approve of it after it is done, **if done for their benefit**, are liable in the same manner as they would be if they had done it with their own hands.” *Wei Wang v. Shen Jianming*, No. 2:17-cv-00153, 2019 WL 3254613, at \*6 (D. Vt. July 19, 2019) (quoting *Montgomery*, 181 Vt. At 164) (emphasis added). Plaintiff has failed to produce any facts which suggest that Timo obtained any benefit for any of the alleged acts underlying his guilty plea and, certainly, this was not an issue addressed or decided in the criminal proceeding. Plaintiff simply cannot satisfy this aspect of a civil conspiracy claim in Vermont based on Timo’s guilty plea or any other facts currently on record.

For the foregoing reasons, it is clear that the elements and issues of the alleged tort are not identical to the elements of the crime to which Timo plead guilty. They were not actually litigated and not actually decided. For those reasons, Timo is not collaterally estopped from litigating the elements of Count One. Moreover, Plaintiff has failed to present undisputed facts to prove the elements of the alleged tort and, if anything, the undisputed facts suggest that Plaintiff cannot meet her burden. Accordingly, summary judgment must be denied.

**III. As the sole custodian of Isabella—with full legal and physical parental responsibility—Lisa Miller could not have committed the tort of intentional interference with parental rights at the time period underlying the crime to which Timo plead guilty and therefore, Timo could not have been a co-conspirator in the commission of a tort.**

At the time underlying Timo’s guilty plea, for the reasons discussed in *supra* Section II(a) above, Lisa Miller was the parent with full “custody,” or legal and physical parental responsibility of Isabella, and Janet Jenkins did not have “custody” or legal or physical parental responsibility. Therefore, Timo is not collaterally estopped, based on that guilty plea, from arguing that he did not conspire to commit the tort of intentional interference with Janet Jenkins’s parental rights, because, at the time, Lisa Miller could not have committed said tort. In other words, Plaintiff cannot show that, at the time Timo was allegedly involved in the conspiracy to commit the alleged tort with regard to the conduct underlying his guilty plea for the crime ending in September 2009, the “tort of intentional interference with parental rights was done.” *See* Pl. Brief, at 19.

In fact, the Restatement—which this Court has stated the Vermont Supreme Court would follow—does not even permit an action for intentional interference with parental rights against a parent with joint custody. RESTATEMENT (SECOND) OF TORTS § 700, cmt. c (“When the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other.”). As is the case here, “[w]hen by law only one parent is entitled to the custody and earnings of the child, only that parent can maintain an action under the rule stated in this Section.” RESTATEMENT (SECOND) OF TORTS § 700, cmt. c. “One parent may be liable to the other parent for the abduction of his own child if by judicial decree the sole custody of the child has been awarded to the other parent.” *Id.* At the relevant time, Lisa Miller was the parent with sole custody of Isabella.

Extrajurisdictional courts agree that no such action is warranted against a parent with at least partial custody or against a third-party by a non-custodial parent. *See, e.g., Pittman by*

*Pittman v. Grayson*, 149 F.3d 111, 121-22 (2d Cir. 1998) (noting that “custodial interference by or at the behest of a parent who had joint custody [may] not be viewed as tortious” and noting the potential to override this principle of a “court order expressly prohibiting one parent from removing the children from the court’s jurisdiction”); *Decter v. Second Nature Therapeutic Program, LLC*, 42 F. Supp. 3d 450, 452-53 (E.D.N.Y. 2014) (“Plaintiffs have not cited authority from New York (or any other jurisdiction) supporting the existence of a tort cause of action by a non-custodial parent against a third party for violation of visitation rights . . .”); *Cosner v. Ridinger*, 882 P.2d 1243, 1247 (Wyo. 1994) (“We are satisfied neither the pertinent authority from other jurisdictions, nor the Restatement (Second) of Torts § 700 supports the cause of action for interference with parental rights in this case. [The plaintiff] is not the custodial parent.”); *Politte v. Politte*, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987) (“Clearly, only a custodial parent can sue for custodial interference when he or she possesses superior custody rights to the child. The father cannot rest his claim on § 700 and ignore those Comments explaining the breadth and meaning of § 700.”); *Owens v. Owens*, 471 So.2d 920, 922 (La. Ct. App. 1985) (citing to, and concluding consistent with, a case that held that “while other remedies, such as contempt proceedings, are available for violation of visitation rights, a suit for damages could not be maintained”).

One Second Circuit decision is particularly helpful in demonstrating why Plaintiff does not have a valid claim against Lisa Miller, Timo, or any other defendant for conduct occurring prior to the transfer of custody. In *Leonhard*, the plaintiff father asserted that certain individuals abducted the children from the plaintiff and continued to harbor them from him for nearly eight years. *Leonhard v. United States*, 633 F.2d 599, 625 (2d Cir. 1980). The court noted that, at the time of the “abduction,” the mother “had lawful custody of the children; [the plaintiff father] did

not have custody but only visitation rights.” *Id.* Custody was later transferred to the plaintiff father. *Id.* at 605. The court stated, however, that, before the transfer of custody and at the time of the “abduction,” the mother “consented to the removal and concealment of the children, along with the removal and concealment of herself, and that the children always resided with her.” *Id.* at 625. The children’s “removal and concealment were entirely voluntary.” *Id.* at 626.<sup>4</sup> The court also collected cases holding that a non-custodial parent could not assert a claim for abduction or interference with parental rights. *See id.* at 626, n. 41. On these bases, the court dismissed the plaintiff’s claim. *Id.* at 626.

At the time of Timo’s involvement as dictated by his guilty plea, Lisa Miller had sole “custody” of Isabella. Janet Jenkins did not have sole custody, was not entitled to the custody and earnings of Isabella, and did not even have joint or divided custody. There are no allegations, and certainly no undisputed facts, that suggest Lisa Miller involuntarily traveled abroad with Isabella. Accordingly, Plaintiff could not have maintained an action against Lisa Miller based on facts or events occurring before the Vermont court transferred custody in November 2009. *See Ex. D.* Timo plead guilty to conduct ending in September 2009. At that time, no action could have been maintained against Lisa Miller and therefore, Timo could not have conspired to commit the alleged tort. Plaintiff has failed to produce any undisputed facts after Janet Jenkins was awarded custody to support summary judgment against Timo on Count One.

Because the crime to which Timo plead guilty ended in September 2009 and thus any issues involved in that proceeding related to any act or event after September 2009 are not

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<sup>4</sup> The claim was technically on behalf of the children for “abduction,” but the court noted that only a custodial parent could assert such a claim, which is essentially interference with custodial rights. *Id.* at 626, n. 41. The court found this claim to be meritless as well, citing, among other authorities, Restatement (Second) of Torts § 700, cmt. c. *Id.*

“necessary” to establish the guilty plea and therefore not subject to collateral estoppel, *see Gelb*, 798 F.2d at 44 (citation omitted)—and further, because Timo did not admit to any facts underlying the guilty plea which may or may not have occurred after the transfer of custody to Janet Jenkins—Plaintiff has failed to present any undisputed facts that would show, at the time of Timo’s involvement, that he could have conspired with Lisa Miller to commit the alleged tort, as Lisa Miller could not have, at the time, committed said tort. For that reason, even if Timo’s guilty plea could somehow imply the truth of the distinct tort elements—and even if Plaintiff could somehow show that Timo’s alleged actions were themselves unlawful, as required under the civil conspiracy doctrine—Timo could not have conspired to commit the tort of intentional interference with parental rights based on a guilty plea for a crime that ended before Janet Jenkins was even awarded custody.<sup>5</sup> Therefore, summary judgment must be denied.

**IV. Even if this Court decides—against the weight of the aforecited authority—that Timo is collaterally estopped from litigating the elements of Count One because of his guilty plea, Plaintiff is still not entitled to any damages. Alternatively, any damages must be limited to those accrued in the time period underlying Timo’s guilty plea.**

As noted above, the crime to which Timo plead guilty ended in September 2009. Ex. B, at 1. At the time of any acts underlying the guilty plea, the only upcoming parent-child contact between Janet Jenkins and Isabella was scheduled for September 25-27, 2009. Ex. E, *Interim Order Regarding Parent-Child Contact*.

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<sup>5</sup> To the extent that Plaintiff relies on an assumption that Timo helped Lisa Miller and Isabella after the transfer of custody—this assumption could only be based on fact (d) of the Plea Agreement, which was not only not admitted, but also does not invoke collateral estoppel, as it was not a fact necessary to support the guilty plea for a crime that ended in September 2009—that assumption does not support this action against Timo, as there is no evidence that Timo induced Isabella to remain away from Janet Jenkins following the transfer of custody. *See* RESTATEMENT (SECOND) OF TORTS § 700, cmt. a (“No action can be maintained, however, against one who merely gives shelter and sustenance to a child known by the actor to have left home without the parent’s permission, if the child is not induced by other means to remain away from its home.”); *see also Boutwell*, 42 A. at 609.

First, Plaintiff is not permitted to recover any damages resulting from a loss of visitation time. *See Owens*, 471 So.2d at 922; *Decter*, 42 F. Supp. 3d at 452-53 (dismissing claim for interference with visitation rights). The proper method of relief for Plaintiff was to file a motion for enforcement in a Vermont family court, seeking enforcement of the relevant parent-child contact order and then a motion for contempt. 15 V.S.A. § 668a. The statute provides several avenues of relief for Plaintiff. *See id.* The statute, however, does not provide for an action for intentional interference with parental rights or visitation and therefore, Plaintiff is not entitled to damages even if the underlying tort is actionable. *See Wise v. Bravo*, 666 F.2d 1328, 1332 (10th Cir. 1981) (“Colorado law provides a remedy for interference with visitation rights between divorced parents . . . . Any interference with this right may be redressed by seeking enforcement of the child custody order in a contempt proceeding.”) (internal citations omitted).

Furthermore, as Lisa Miller had full legal and physical responsibility of Isabell and could decide when and where she traveled, Timo’s alleged act of assisting her in traveling itself caused no damage to Plaintiff. “[I]t is clear that a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement.” *Boutwell*, 42 A. at 609. Timo’s alleged act simply did not itself cause damage to Plaintiff.

Additionally, even if Janet Jenkins could recover damages for a missed weekend of parent-child contact, she has not show that she complied with her own obligations pursuant to the Vermont court’s parent-child contact order pertaining to the September 2009 weekend. *See Ex. E.* That order required Janet Jenkins, via Ruth Jenkins, to pick Isabella up from her home with Lisa Miller in Virginia. *Id.* Plaintiff has presented no evidence that she made such an attempt and as such, she is not entitled to damages for that missed weekend.

Second, even if Plaintiff can somehow meet her summary judgment burden as to Count One and is somehow entitled to damages, those damages must be limited to the sole parent-child contact order in effect at the time of Timo's alleged actions. There were no other scheduled parent-child contacts, no known impending orders, and no transfer of custody. Even if Timo knew that a Vermont court might transfer custody—and, again, this is a disputed fact that was not admitted as part of Timo's guilty plea and not subject to collateral estoppel as it was unnecessary for the guilty plea determination—this possibility is far too speculative to award damages stemming from Timo's insignificant alleged acts.

The case law regarding speculative damages is clear. A plaintiff may not recover when “it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.” *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562–63 (1931) (internal quotation marks omitted). In other words, the plaintiff must show that the claimed damages are the “certain result of the wrong.” *Id.* at 562; *see also Howley v. Kantor*, 163 A. 628, 631 (Vt. 1933) (“Consequences which are contingent, speculative, or merely possible are not entitled to consideration in ascertaining the damages.”). The breach complained of here is that Timo allegedly assisted Lisa Miller and others in taking Isabella out of the United States. Plaintiff seeks to use Timo's guilty plea, and unadmitted facts, to allege, and collaterally estop Timo from arguing, that he assisted Lisa Miller knowing that “she could lose custody of Isabella.” Pl. Brief, at 19-20 (emphasis added).<sup>6</sup> Guessing that a court might possibly transfer custody is the precise type of speculative consequence, damage, or event for which courts have

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<sup>6</sup> Plaintiff also seeks to use the unadmitted fact that Timo “continued to assist” Lisa Miller after Plaintiff was awarded custody. Pl. Brief, at 20. As noted above, (1) no action can be maintained against someone who gives shelter to or assists a child known to have left home without the parent's permission; and (2) this is a disputed fact that was not necessary to establish Timo's guilty plea for conduct occurring and ending prior to the custody order at issue. Thus, this fact is not relevant for summary judgment or collateral estoppel and has no bearing on Plaintiff's potential damages.

routinely denied recovery. Moreover, Plaintiff cannot show that Timo's alleged act of buying plane tickets, or otherwise assisting Lisa Miller and Isabella out of the country, necessarily and immediately resulted in Janet Jenkins being denied custody based on an order that had not yet been issued. *See also Boutwell*, 42 A. at 609.

In sum, Plaintiff is not entitled to any damages based on any conduct allegedly attributable to Timo, even if the underlying tort is actionable and even if this Court were to decide—against the great weight of authority—that Timo is collaterally estopped from litigating Count One. Alternatively, to the extent Plaintiff seeks summary judgment for any acts resulting in any damage beyond the only then-ordered parent-child contact in September 2009, Plaintiff's Motion for Partial Summary Judgment must be denied to the extent that it seeks any damages beyond that sole missed parent-child contact.

### CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment on Count One, as it applies to Defendant Timothy Miller, must be denied.

Respectfully submitted,

Timothy D. Miller

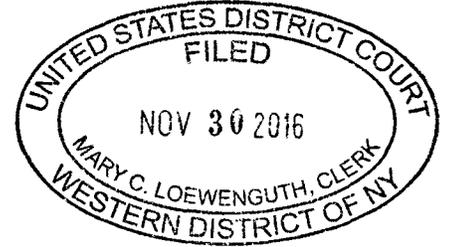
By his attorneys,

WADLEIGH, STARR & PETERS, P.L.L.C.

Dated: January 27, 2020

By: Michael J. Tierney  
Michael J. Tierney – VT Bar No. 5275  
95 Market Street  
Manchester, NH 03101  
(603) 359-4140  
[mtierney@wadleighlaw.com](mailto:mtierney@wadleighlaw.com)

# **Exhibit “A”**



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

14-CR-175-A

TIMOTHY MILLER,

Defendant.

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**PLEA AGREEMENT**

The defendant, Timothy Miller, and the United States Attorney for the Western District of New York (hereinafter "the government") hereby enter into a plea agreement with the terms and conditions as set out below.

**I. THE PLEA AND POSSIBLE SENTENCE**

1. The defendant agrees to plead guilty to Count 1 of the Superseding Indictment which charges a violation of Title 18, United States Code, Section 371 [conspiracy to commit international parental kidnapping] for which the maximum possible sentence is a term of imprisonment of 5 years, a fine of \$ 250,000, a mandatory \$100 special assessment and a term of supervised release of 3 years. The defendant understands that the penalties set forth in this paragraph are the maximum penalties that can be imposed by the Court at sentencing.

2. The defendant understands that the Court may require restitution in the amount not to exceed \$50,000 as part of the sentence, pursuant to Sentencing Guidelines § 5E1.1 and Title 18, United States Code, Section 3663. The defendant understands that

**EXHIBIT**  
**16**

defendant will not be entitled to withdraw the plea of guilty based upon any restitution amount ordered by the Court.

3. The defendant understands that, if it is determined that the defendant has violated any of the terms or conditions of supervised release, the defendant may be required to serve in prison all or part of the term of supervised release, up to 2 years, without credit for time previously served on supervised release. As a consequence, in the event the defendant is sentenced to the maximum term of incarceration, a prison term imposed for a violation of supervised release may result in the defendant serving a sentence of imprisonment longer than the statutory maximum set forth in ¶ 1 of this agreement.

## **II. ELEMENTS AND FACTUAL BASIS**

4. The defendant understands the nature of the offense] set forth in ¶ 1 of this agreement and understands that if this case proceeded to trial, the government would be required to prove beyond a reasonable doubt the following elements of the crime:

- a. That Isabella Miller Jenkins was previously in the United States;
- b. that the defendant agreed with others including Lisa Miller and Ken Miller to assist the taking of Isabella Miller Jenkins from the United States and retaining the child outside the United States; and
- c. the defendant acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins.

## **FACTUAL BASIS**

5. The defendant and the government agree to the following facts, which form the basis for the entry of the plea of guilty including relevant conduct:

- a. That Isabella Miller Jenkins is the daughter of Lisa Miller and Janet Jenkins. Prior to September 22, 2009, Isabelle Miller Jenkins lived in the United States and Janet Jenkins had the parental right to visit Isabella Miller.
- b. That on or about September 21, 2009, the defendant was a Mennonite minister in Managua, Nicaragua when he was contacted by Kenneth Miller. Kenneth Miller told the defendant that Lisa Miller was looking to leave the United States with her daughter Isabella Miller Jenkins as she could lose custody of Isabella to Janet Jenkins.
- c. Based on this information, the defendant agreed to assist in arranging Lisa's and Isabella's departure from the United States. The defendant did also purchase one-way airline tickets on September 21, 2009, for Lisa and Isabella to travel from Canada to Managua, Nicaragua on September 22, 2009.
- d. Lisa and Isabella departed Canada on or about September 22, 2009, and arrived in Managua, Nicaragua. The defendant learned in November 2009 that Janet Jenkins was award custody of Isabella Miller Jenkins. The defendant continued to assist Lisa Miller with assistance up to and including May 2010 when he accepted and provided Lisa Miller with money.

### **III. SENTENCING GUIDELINES**

6. The defendant understands that the Court must consider but is not bound by the Sentencing Guidelines (Sentencing Reform Act of 1984).

#### **BASE OFFENSE LEVEL**

7. The government and the defendant agree that Guidelines § 2J1.2(a) applies to the offense of conviction and provides for a base offense level of 14.

**SPECIFIC OFFENSE CHARACTERISTICS**  
**U.S.S.G. CHAPTER 2 ADJUSTMENTS**

8. The government and the defendant agree that the following specific offense characteristics do apply:

- a. the 3 level increase pursuant to Guidelines § 2J1.2(b)(2) [the offense involved a substantial interference with the administration of justice].
- b. The 2 level increase pursuant to Guideline §2J1.2(b)(3)(C) [extensive in scope preparation or planning]

**ADJUSTED OFFENSE LEVEL**

9. Based on the foregoing, it is the understanding of the government and the defendant that the adjusted offense level for the offense of conviction is 19.

**ACCEPTANCE OF RESPONSIBILITY**

10. At sentencing, the government agrees not to oppose the recommendation that the Court apply the two (2) level downward adjustment of Guidelines § 3E1.1(a) (acceptance of responsibility) and further agrees to move the Court to apply the additional one (1) level downward adjustment of Guidelines § 3E1.1(b), which would result in a total offense level of 16.

**CRIMINAL HISTORY CATEGORY**

11. It is the understanding of the government and the defendant that the defendant's criminal history category is I. The defendant understands that if the defendant is sentenced for, or convicted of, any other charges prior to sentencing in this action the defendant's criminal history category may increase. The defendant understands that the

defendant has no right to withdraw the plea of guilty based on the Court's determination of the defendant's criminal history category.

### **GUIDELINES' APPLICATION, CALCULATIONS AND IMPACT**

12. It is the understanding of the government and the defendant that, with a total offense level of 16 and criminal history category of I, the defendant's sentencing range would be a term of imprisonment of 21 to 27 months, a fine of \$5,000 to \$50,000, and a period of supervised release of 1 to 3 years. Notwithstanding this, the defendant understands that at sentencing the defendant is subject to maximum penalties set forth in ¶ 1 of this agreement.

13. The government and the defendant agree to the correctness of the calculation of the Sentencing Guidelines range set forth above. The government and the defendant, however, reserve the right to recommend a sentence outside the Sentencing Guidelines range. This paragraph reserves the right to the government and the defendant to bring to the attention of the Court all information deemed relevant to a determination of the proper sentence in this action.

14. The defendant understands that the Court is not bound to accept any Sentencing Guidelines calculations set forth in this agreement and the defendant will not be entitled to withdraw the plea of guilty based on the sentence imposed by the Court.

#### **IV. STATUTE OF LIMITATIONS**

15. In the event the defendant's plea of guilty is withdrawn, or conviction vacated, either pre- or post-sentence, by way of appeal, motion, post-conviction proceeding, collateral attack or otherwise, the defendant agrees that any charges dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government and further agrees not to assert the statute of limitations as a defense to any other criminal offense involving or related to international parental kidnapping which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the withdrawal of the guilty plea or vacating of the conviction becomes final.

#### **V. GOVERNMENT RIGHTS AND RESERVATIONS**

16. At sentencing, the government agrees not to oppose the recommendation that the Court sentence the defendant at the lowest point of the Guidelines range determined by the Court.

17. The defendant understands that the government has reserved the right to:
- a. provide to the Probation Office and the Court all the information and evidence in its possession that the government deems relevant concerning the defendant's background, character and involvement in the offense charged, the circumstances surrounding the charge and the defendant's criminal history;
  - b. respond at sentencing to any statements made by the defendant or on the defendant's behalf that are inconsistent with the information and evidence available to the government;
  - c. advocate for a specific sentence consistent with the terms of this agreement including the amount of restitution and/or a fine and the method of payment;

- d. modify its position with respect to any sentencing recommendation or sentencing factor under the Guidelines including criminal history category, in the event that subsequent to this agreement the government receives previously unknown information, including conduct and statements by the defendant subsequent to this agreement, regarding the recommendation or factor;
- e. oppose any application for a downward departure and/or sentence outside the Guidelines range made by the defendant.

18. At sentencing, the government will move to dismiss the open count of the Superseding Indictment in this action as against the defendant.

19. The defendant agrees that any financial records and information provided by the defendant to the Probation Office, before or after sentencing, may be disclosed to the United States Attorney's Office for use in the collection of any unpaid financial obligation.

## **VI. APPEAL RIGHTS**

20. The defendant understands that Title 18, United States Code, Section 3742 affords a defendant a limited right to appeal the sentence imposed. The defendant, however, knowingly waives the right to appeal and collaterally attack any component of a sentence imposed by the Court which falls within or is less than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶12, above, notwithstanding the manner in which the Court determines the sentence. In the event of an appeal of the defendant's sentence by the government, the defendant reserves the right to argue the correctness of the defendant's sentence. The defendant further agrees not to appeal a restitution order which does not exceed the amount set forth in Section I of this agreement.

21. The defendant understands that by agreeing not to collaterally attack the sentence, the defendant is waiving the right to challenge the sentence in the event that in the future the defendant becomes aware of previously unknown facts or a change in the law which the defendant believes would justify a decrease in the defendant's sentence.

22. The government waives its right to appeal any component of a sentence imposed by the Court which falls within or is greater than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶12, above, notwithstanding the manner in which the Court determines the sentence. However, in the event of an appeal from the defendant's sentence by the defendant, the government reserves its right to argue the correctness of the defendant's sentence.

## VII. COOPERATION

23. The defendant will cooperate with the government by providing complete and truthful information regarding the defendant's knowledge of any and all criminal activity, whether undertaken by the defendant or others, in any way involving or related to international parental kidnapping. The defendant's cooperation shall also include submitting to interviews by government attorneys and agents, as well as testifying truthfully and completely before grand juries and at such other proceedings as the government shall deem necessary, including, but not limited to pre-trial hearings, trials, sentencing hearings and forfeiture proceedings, and returning to the United States to testify is so requested.

24. The defendant's cooperation shall also be provided to any local, state or federal authorities designated by the government and who have agreed to abide by the terms of the "Cooperation" section of this agreement. The defendant's obligation to testify truthfully and completely shall extend to proceedings in local, state and federal courts in jurisdictions which have agreed to abide by this agreement.

25. In exchange for the defendant's plea of guilty and cooperation as set forth in this agreement, the defendant will not be prosecuted by the Office of the United States Attorney for the Western District of New York for any other federal criminal offenses committed in the Western District of New York in any way involving or related to international parental kidnapping, committed up to the date of this agreement and about which the defendant provides complete and truthful information.

26. Further, no testimony, statements or tangible objects provided by the defendant in compliance with this agreement (or any information directly or indirectly derived therefrom) will be used against the defendant in any criminal case, except a prosecution for perjury or making false statements.

27. Upon condition that the defendant has fully complied with all terms and conditions of this agreement, should the government determine that the defendant has provided substantial assistance in the investigation or prosecution of other persons who have committed offenses, the government will move the Court at sentencing to depart downward from the Guidelines 3 levels as provided for in Guidelines § 5K1.1, which, if granted by the

Court, would result in a total offense level of 13 and a sentencing range of 12 to 18 months imprisonment. The defendant understands that the decision to make such a motion is within the sole discretion of the government and that the decision to grant such a motion, and the extent of any downward departure, are matters solely within the discretion of the Court.

28. This agreement does not preclude the prosecution of the defendant for perjury or making false statements in the event the defendant testifies falsely or provides false information to the government. This agreement is not contingent upon the filing of charges against, the return of an Indictment against, or the successful prosecution of, any person or entity.

29. It is a condition of this agreement that, up through the date of the defendant's sentencing, the defendant shall commit no further crimes. It is also a condition of this agreement that the defendant must, at all times, give complete, truthful and accurate information and testimony and not withhold information from the government or refuse to testify truthfully and completely. Should the defendant be sentenced prior to the completion of the defendant's cooperation with the government, the defendant's obligation to comply with the cooperation provisions of this agreement extends past sentencing.

30. In the event the government believes the defendant has violated any of the conditions of the "Cooperation" section of this agreement, the government, in addition to its other rights as set forth in the "Cooperation" section of this agreement, reserves the right: (a) to modify any recommendation the government agreed to make in a motion pursuant to

Guidelines § 5K1.1 and/or Title 18, United States Code, Section 3553(e); and (b) to petition the Court, before or after sentencing, for an order declaring that the defendant has breached the “Cooperation” section and relieving the government of its obligations under this section.

31. In the event the government petitions the Court to declare that the defendant has breached the “Cooperation” section of this agreement, whether the defendant has violated any of the conditions of the “Cooperation” section shall be determined by the Court in an appropriate proceeding at which any disclosures and documents provided by the defendant shall be admissible and at which the government shall be required to establish any violation by a preponderance of the evidence. In order to establish any violation by the defendant, the government is entitled to rely on statements and information given by the defendant pursuant to this agreement.

32. If the “Cooperation” section of this agreement is declared breached by the Court:

- a. the defendant shall thereafter be subject to prosecution for any federal criminal violations of which the government has knowledge, including but not limited to, perjury and obstruction of justice;
- b. the government may withdraw any motion filed pursuant to Sentencing Guidelines § 5K1.1, Title 18, United States Code, Section 3553(e) and/or Rule 35(b);
- c. the defendant has no right to withdraw the plea of guilty;
- d. the defendant shall waive all rights under Fed. R. Crim. P. 11(f), Fed. R. Evid. 410 and Sentencing Guidelines § 1B1.8 and the defendant expressly agrees that all statements, testimony and tangible objects provided by the defendant (with the exception of statements made in open court during guilty plea proceedings), whether prior or subsequent to this agreement,

can be used directly and indirectly in any and all criminal proceedings against the defendant; and

- e. the defendant agrees that any charges that were dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government. Furthermore, the defendant agrees not to assert the statute of limitations as a defense to any criminal offense involving or related to international parental kidnapping which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the Court's order declaring the agreement breached by the defendant becomes final.

33. At the time of sentencing, the government will make the nature and extent of the defendant's compliance with this agreement known to the Court. The government and the defendant will request that sentencing be adjourned until full satisfaction by the defendant of the terms of this agreement. In the event the defendant is sentenced prior to the completion of the defendant's cooperation with the government, the government reserves the right to modify any recommendation to be made by the government at sentencing pursuant to Guidelines § 5K1.1.

34. The defendant's attorney is permitted to be present at any time the defendant is questioned or interviewed by government agents regarding the matters set forth in this agreement.

### **VIII. TOTAL AGREEMENT AND AFFIRMATIONS**

35. This plea agreement represents the total agreement between the defendant, Timothy Miller, and the government. There are no promises made by anyone other than

those contained in this agreement. This agreement supersedes any other prior agreements, written or oral, entered into between the government and the defendant.

JAMES P. KENNEDY, JR.  
Acting United States Attorney  
Western District of New York

BY:   
MICHAEL DIGIACOMO  
Assistant United States Attorney

Dated: November 30<sup>th</sup>, 2016

I have read this agreement, which consists of 14 pages. I have had a full opportunity to discuss this agreement with my attorney, Jeffrey A. Conrad, Esq. I agree that it represents the total agreement reached between myself and the government. No promises or representations have been made to me other than what is contained in this agreement. I understand all of the consequences of my plea of guilty. I fully agree with the contents of this agreement. I am signing this agreement voluntarily and of my own free will.

  
\_\_\_\_\_  
TIMOTHY MILLER  
Defendant

Dated: November 30, 2016

  
\_\_\_\_\_  
JEFFREY A. CONRAD, ESQ.  
Attorney for the Defendant

Dated: November 30, 2016

# **Exhibit “B”**

# UNITED STATES DISTRICT COURT

Western District Of New York

UNITED STATES OF AMERICA

v.

Timothy Miller

## JUDGMENT IN A CRIMINAL CASE

Case Number: 1:14CR00175-003

USM Number: 78268-083

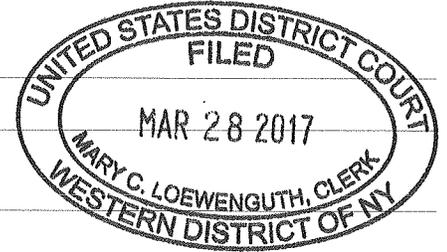
Jeffrey A. Conrad  
Defendant's Attorney

### THE DEFENDANT:

pleaded guilty to count 1 of the Superseding Indictment

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.



The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §371 as it relates to 18 U.S.C. §1204	Conspiracy to Commit International Parental Kidnapping	09/2009	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) \_\_\_\_\_

Count 2 of the Superseding Indictment  is  are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 23, 2017  
Date of Imposition of Judgment

*Richard J. Arcara*  
Signature of Judge

Honorable Richard J. Arcara, Senior U.S. District Judge  
Name and Title of Judge

March 27, 2017  
Date

**EXHIBIT**  
**18**

DEFENDANT: Timothy Miller  
CASE NUMBER: 1:14CR00175-003

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:  
Time Served  
*The cost of incarceration fee is waived.*

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on \_\_\_\_\_

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Timothy Miller  
CASE NUMBER: 1:14CR00175-003

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : One (1) year

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Timothy Miller  
CASE NUMBER: 1:14CR00175-003

### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based upon reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

Travel restriction to the State of Pennsylvania.

DEFENDANT: Timothy Miller  
 CASE NUMBER: 1:14CR00175-003

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 100	\$ 0	\$ 0

- The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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<b>TOTALS</b>	\$ _____	\$ _____
---------------	----------	----------

- Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the  fine  restitution.
  - the interest requirement for the  fine  restitution is modified as follows:

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Timothy Miller  
CASE NUMBER: 1:14CR00175-003

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A  Lump sum payment of \$ \_\_\_\_\_ due immediately, balance due
  - not later than \_\_\_\_\_, or
  - in accordance  C,  D,  E, or  F below; or
- B  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F  Special instructions regarding the payment of criminal monetary penalties:  
The defendant shall pay a special assessment of \$100, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

# **Exhibit “C”**

CONFORMED COPY

STATE OF VERMONT  
RUTLAND COUNTY, SS.

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

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

FILED  
JUN 17 2004  
RUTLAND FAMILY COURT

TEMPORARY ORDER RE: PARENTAL RIGHTS & RESPONSIBILITIES

This matter came on for hearing before the Family Court on March 15, 2004, and again on May 26, 2004, the Honorable William D. Cohen presiding. The Plaintiff was present in Court and represented by her attorney, Judy G. Barone, and the Defendant was present in Court and represented by her attorney, Theodore A. Parisi, Jr. Based on the pleadings and papers on file in this matter, the representations of counsel and the evidence adduced at said hearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Plaintiff is awarded temporary legal and physical responsibility for the minor child of the parties, to wit: Isabella Ruth Miller-Jenkins, DOB 04/16/02.
2. The Defendant is awarded, on a temporary basis, parent-child contact with the minor child as follows:

- a) JUNE 2004: From 06/04/04 through 06/06/04, and again on 06/18/04 through 06/20/04. Both visitations shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact, and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to

EXHIBIT  
1

GOVERNMENT EXHIBIT  
5 adm

LAW OFFICES  
THEODORE A. PARISI, JR.  
RD. BOX 297  
STLETON,  
VONT 05735

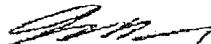
Plaintiff's residence.

- b) JULY 2004: From 07/25/04 through 07/31/04. Visitation shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to Plaintiff's residence.
- c) AUGUST 2004 and THEREAFTER: The Defendant shall have parent-child contact with Isabella in Vermont for the third full week of each month, beginning in August of 2004. Said visitation shall begin on a Saturday morning and end on Sunday evening. The Defendant shall be responsible for transporting the child from the Plaintiff's home in Winchester, Virginia, to her home in Fair Haven, Vermont, and the Plaintiff shall be responsible for transporting the child at the end of the parent-child contact period from Defendant's residence in Fair Haven, Vermont, to her residence in Winchester, Virginia.
- d) OTHER TRANSPORTATION ARRANGEMENTS: Other transportation arrangements may be made by the parties provided that each parent shall equally share the burden of such transportation. This Court has no preference for the mode of transportation and the parties may agree that travel by automobile, plane or train may be appropriate.

e) **TELEPHONE CONTACT:** The Plaintiff shall be permitted to have telephone contact with Isabella while she is with the Defendant once per day. The Plaintiff and Defendant will work out an appropriate time for such telephone contact having in mind Isabella's schedule. The Defendant shall have telephone contact with Isabella on a per-day basis when the child is with the Plaintiff. Similarly, the Plaintiff and Defendant shall work out a time when such contact shall take place and be appropriate considering Isabella's schedule.

3. This Order shall remain in effect until superceded by another Order of this Court dealing with parental rights and responsibilities.

Dated at Rutland, Vermont, this 17 day of June, 2004.

  
\_\_\_\_\_  
Judge(s) - Rutland Family Court

a-m:millerjenkins.to

LAW OFFICES  
EDDORÉ A. PARISI, JR.  
RD. BOX 297  
FLETON,  
ONT 05735

FCSO  
C # 51374  
REC'D 6-24-04

STATE OF VERMONT  
RUTLAND COUNTY, SS.

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

LISA MILLER-JENKINS, <sup>0:21</sup> <sub>6/23/04</sub> )  
Plaintiff )  
 )  
v. )  
 )  
JANET MILLER-JENKINS, )  
Defendant )

RETURN OF SERVICE

On the 25<sup>th</sup> day of June, 2004, I made service of the within Temporary Order Re:

Parental Rights & Responsibilities by delivering to:

Lisa Miller-Jenkins

101 Covington Ln.

Winchester VA. 22601

(Insert name of person to whom delivery is made and address of place of delivery and relationship of such person to person(s) served.)

Service \$  
Attachment \$  
Travel \$  
\_\_\_\_\_ miles one way  
Postage \_\_\_\_\_  
Amount \$

W. R. [Signature]  
Deputy Sheriff  
for R.T. Williamson  
Sheriff

STATE OF VIRGINIA  
COUNTY OF Virginia SS.

Subscribed and sworn to before me this 28<sup>th</sup> June, 2004.

Before me:

Angela Newlin  
Notary Public

My commission expires: 3/31/05

a-m:millertjenkins.ros

LAW OFFICES  
ODORE A. PARISI, JR.  
P.O. BOX 297  
ETON,  
VT 05735

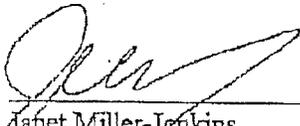
STATE OF VERMONT  
RUTLAND COUNTY, SS.

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

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

ACCEPTANCE OF SERVICE

At Fair Haven, Vermont, this 23 day of June, 2004, I accepted service of the foregoing Temporary Order Re: Parental Rights & Responsibilities dated June 17, 2004, by accepting a true copy thereof with the same force and effect as though served upon me by a duly qualified officer, and all further and more particular service is hereby expressly waived.

  
\_\_\_\_\_  
Janet Miller-Jenkins

a-m:millerjenkins.ros

LAW OFFICES  
DOORE A. PARISI, JR.  
BOX 297  
LETON,  
VERMONT 05735

# **Exhibit “D”**



2. Janet Jenkins is currently a resident of Fair Haven in Rutland County, Vermont.
3. In December 2000, while Ms. Miller and Ms. Jenkins were residents of Virginia, they traveled to Vermont and obtained a civil union pursuant to Vermont law.
4. Ms. Miller and Ms. Jenkins both changed their last name to "Miller-Jenkins."
5. In June 2007, the Court decreed that both parties were permitted to retake their pre-union names, "Lisa Miller" and "Janet Jenkins."
6. Ms. Miller and Ms. Jenkins have one minor child, IMJ, born April 16, 2002.
7. In August 2002, the Miller-Jenkins family moved to Fair Haven, Vermont.
8. In September 2003, Ms. Miller moved with IMJ to Virginia. Ms. Jenkins helped Ms. Miller and IMJ make the move, and then returned to the home in Vermont.
9. On or about November 8, 2003, Ms. Miller filed a complaint to dissolve the civil union in Rutland Vermont Family Court.
10. On June 17, 2004, this Court awarded temporary legal and physical responsibility for IMJ to Ms. Miller, and granted parent-child contact with IMJ to Ms. Jenkins on a specific schedule.
11. After initially complying with the Contact Order, Ms. Miller refused to allow Ms. Jenkins her court-ordered parent-child contact with IMJ. Ms. Miller was held in contempt of that order, and, after remand from the Vermont Supreme Court, on December 8, 2006, was ordered to pay Ms. Jenkins compensatory sanctions. The Order included an on-going fine for further non-compliance.
12. A trial on the merits was held April 2-5, 2007.

13. At the time of trial in April 2007, Ms. Miller continued to refuse to allow Ms. Jenkins contact with IMJ, although Ms. Miller testified that she would comply with such an order after trial.
14. At the time of trial in April 2007, Ms. Miller had made statements to IMJ critical of Ms. Jenkins's lifestyle, sexual orientation, and religious persuasion. The Court found in its Order of June 15, 2007, that these statements were likely to have an adverse effect on IMJ's relationship with Ms. Jenkins.
15. In the June 2007 Order, the Court found that Ms. Miller had good parenting skills and demonstrated her ability to care for IMJ.
16. The Court also found that Ms. Jenkins had extensive experience and training in caring for children. She demonstrated this ability through her care of IMJ and of other children in her daycare.
17. The Court found that Ms. Jenkins had a commitment to IMJ as demonstrated through her ongoing efforts to exercise her rights to parent-child contact with IMJ in the face of Ms. Miller's obstruction of such contact. Ms. Jenkins incurred substantial expenses in her attempts to visit IMJ and continued to incur such expenses. Her testimony with respect to her attachment to IMJ and commitment to parenting IMJ was credible.
18. The Court found that Ms. Jenkins demonstrated an ability to foster a relationship between Ms. Miller and herself, and Ms. Miller and IMJ. Ms. Jenkins refrained from accusatory statements with respect to Ms. Miller's parenting abilities and indicated a willingness to respect Ms. Miller's religious and moral instruction of IMJ.

19. Pursuant to 15 V.S.A. § 665(b)(4), the Court found that the factor of the quality of IMJ's adjustment to her present housing, school and community and the potential effect of any change, weighed in favor of Ms. Miller. The Court was mindful, however, "of the danger of creating an incentive for one parent to remove a child from her former home and community and to deny parenting time to another parent in order to weight this factor in the moving parent's favor."
20. Pursuant to 15 V.S.A. § 665(b)(5), the Court found that Ms. Jenkins had the ability to foster a positive relationship and frequent and continuing contact between Ms. Miller and herself, and IMJ and Ms. Miller, including physical contact. However, Ms. Miller had demonstrated through her contemptuous refusal to permit to permit parent-child contact and her statements to IMJ regarding Ms. Jenkins that she was not able to foster such a relationship with Ms. Jenkins.
21. The Court found that all other factors weighed evenly between Ms. Miller and Ms. Jenkins.
22. The Conclusions of Law regarding Parental Rights and Responsibilities, issued on June 15, 2007, stated: "The Court concludes that it is in the best interest of IMJ that Ms. Miller exercise parental rights and responsibilities. In the Court's view, the potential harm that would result from uprooting IMJ from the environment to which she has adjusted outweighs the potential harm from Ms. Miller's inability to foster a relationship with Ms. Jenkins. Nevertheless, this is a close case. Continued interference with the relationship between IMJ and Ms. Jenkins could

lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered.”

23. In the June 2007 Order, the Court set forth a reunification plan involving liberal visitation between IMJ and Ms. Jenkins. This plan included initial parenting time in Virginia on June 30, 2007 and July 7, 2007; parent-child contact in Virginia, July 13-15, 2007 and July 27-29, 2007; parent-child contact in Vermont, August 19-25, 2007; after August 25, 2007, parent-child contact every other weekend, alternating between Virginia and Vermont; and parent-child contact during Thanksgiving 2007 in Vermont.
24. Parent-child contact between IMJ and Ms. Jenkins occurred in accordance with the June 2007 Order until August 25, 2007.
25. The parenting time ordered every other weekend, alternating between Virginia and Vermont, did not occur.
26. Ms. Miller was found in contempt for her refusal to allow the alternating contact to occur.
27. On December 31, 2007, the Court issued an Order regarding Modification of the Visitation Schedule. The Court ordered parent-child contact between IMJ and Ms. Jenkins in Vermont, March 28 - April 5, 2008; contact in Vermont, May 31 - June 7, 2008; contact in Vermont, June 14-21, 2008; contact in Vermont, July 5-19, 2008; and contact in Vermont, August 2-9, 2008.
28. None of the parent-child contact ordered by the Court in the December 31, 2007 Order occurred.

29. In its Contempt Order issued April 30, 2008, the Court found that Ms. Miller was not in contempt for the missed contact which was to occur March 28 – April 5, 2008.
30. The Court later found Ms. Miller in contempt for her refusal to allow contact between IMJ and Ms. Jenkins for the periods May 31 – June 7, 2008, and June 14-21, 2008.
31. In the Contempt Order issued April 30, 2008, the Court ordered one week of make up time between IMJ and Ms. Jenkins for the missed days March 28 – April 5, 2008. This contact was to be in Vermont, within 60 days of the Order, in addition to visitations set forth in the December 31, 2007 Order.
32. The one week of make-up time ordered on April 30, 2008, did not occur.
33. On November, 7, 2008, the Court issued an Order regarding Contempt and Parent-Child Contact.
34. In that Order, the Court found Ms. Miller in contempt for her refusal to comply with the ordered make-up time from the April 30, 2008 Contempt Order.
35. The Court also ordered parent-child contact between IMJ and Ms. Jenkins in Virginia for the Thanksgiving holiday, November 26-29, 2008; contact in Vermont, December 27 – January 2, 2009; contact in Virginia, January 17-19, 2009; and contact in Vermont, March 7-14, 2009.
36. The only parent-child contact from the November 7, 2008 Order which occurred between IMJ and Ms. Jenkins was approximately 24 hours of contact in Virginia during the January 17-19, 2009 visitation.

37. The Court found Ms. Miller in contempt for her refusal to allow parent-child contact over Thanksgiving 2008.
38. A hearing regarding parent-child contact was held on January 28, 2009.
39. At the hearing, the Court explicitly warned Ms. Miller that failure to comply with the ordered visits could lead to a transfer of custody. Ms. Miller testified that she would comply with the ordered visits.
40. Subsequently, the Court issued an Order regarding Parent-Child Contact on February 10, 2009. The Court ordered contact between IMJ and Ms. Jenkins to occur as provided in the November 7, 2008 Order regarding the contact in Vermont, March 7-14, 2009.
41. The Court further ordered parent-child contact at Ms. Jenkins's parents' home (IMJ's grandparents, "The Jenkins") in Virginia, May 22-25, 2009, and contact in Vermont for five weeks during the summer, from July 10, 2009 – August 8, 2009.
42. The March 7-14, 2009 parent-child contact did not occur because IMJ was ill.
43. On April 9, 2009, the Court issued an Order regarding Make-Up Parent-Child Contact Time.
44. The Court ordered make-up time for the missed March 2009 visit to occur in Vermont, April 9-13, 2009.
45. The make-up time ordered in Vermont, April 9-13, 2009, did not occur.
46. On May 8, 2009, the Court issued an Order regarding Make-Up Parent-Child Contact Time for the missed March 2009 and April 2009 visits.
47. The Court ordered parent-child contact between IMJ and Ms. Jenkins in Vermont, May 23-29, 2009, in anticipation of the five week visit during the summer, from

- July 10 – August 8, 2009. This ordered visitation superseded the original order for contact in Virginia at Ms. Jenkins's parents' home, May 22-25, 2009
48. The Court also ordered parent-child contact between LMJ and Ms. Jenkins in Virginia, June 6-8, 2009.
49. The parent-child contact ordered from May 23-29, 2009, did not occur.
50. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from May 23-29, 2009.
51. The parent-child contact ordered from June 6-8, 2009, did not occur.
52. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from June 6-8, 2009.
53. The parent child contact ordered for five weeks from July 10 – August 8, 2009, did not occur.
54. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from July 10 – August 8, 2009.
55. At the Status Conference held on September 4, 2009, the Court ordered a three day visit in Virginia the weekend of September 25, 2009.
56. On October 7, 2009, the Court received a letter from Ms. Jenkins's counsel indicating that the visit ordered for the weekend of September 25, 2009, did not occur.

57. In 2008, IMJ and Ms. Jenkins had parent-child contact for approximately 24 hours.
58. Thus far, in 2009, IMJ and Ms. Jenkins have had parent-child contact for approximately 24 hours.
59. Ms. Jenkins has made numerous trips to Virginia to visit IMJ, only to have the ordered parent-child contact not occur due to contemptuous non-compliance by Ms. Miller.
60. Ms. Miller has no justification for denying parent-child contact between Ms. Jenkins and IMJ.
61. Ms. Miller has asked Ruth Jenkins, Ms. Jenkins's mother, to stop referring to herself and Ms. Jenkins's father ("The Jenkins") as "Mom-mom" and "Pop-pop" in front of IMJ.
62. Ms. Miller has also instructed the Jenkins to refrain from contact with IMJ.
63. The Jenkins have seen IMJ a total of four times in 2008 and 2009, despite living nearby in Virginia.
64. Prior to the break-up of the relationship between Ms. Miller and Ms. Jenkins, the Jenkins saw IMJ regularly.
65. IMJ's middle name is Ruth. She was named for Ruth Jenkins, Ms. Jenkins's mother.
66. Ms. Miller changed IMJ's name to eliminate the word "Jenkins." No notice of the name change was provided to Ms. Jenkins.
67. There is no evidence that if Ms. Jenkins were to have primary custody of IMJ, that she would block Ms. Miller or Ms. Miller's family out of IMJ's life.

68. Ms. Jenkins testified that she would allow IMJ to continue to attend church events with Ms. Miller, in addition to regularly scheduled contact.
69. Ms. Jenkins testified that if she were to have primary custody of IMJ, she would continue to allow Ms. Miller to make decisions regarding IMJ's religious education to the greatest extent possible; including making sure IMJ could attend a Baptist Church in the area, even if Ms. Jenkins, herself, was not welcome there.
70. Ms. Jenkins runs a licensed daycare program from her home. She cares for two twin girls in her daycare that are IMJ's age. The girls met IMJ during IMJ's one visit to Vermont.
71. Ms. Jenkins is involved in activities at the local elementary school as a result of her work, and she has knowledge and experience with activities and education of children IMJ's age.
72. Ms. Jenkins's employment arrangement allows her to be available as a full-time parent.
73. Ms. Jenkins has the parenting skills to be able to care for IMJ's educational and developmental needs.
74. Ms. Jenkins has the ability to foster a positive relationship and frequent and continuing contact between IMJ and Ms. Miller, including physical contact.
75. Ms. Miller has demonstrated time and time again, by her willful refusal to comply with parent-child contact ordered between IMJ and Ms. Jenkins, that she does not have the ability to foster a positive relationship between herself and Ms. Jenkins, and IMJ and Ms. Jenkins.

76. At the present time, Ms. Miller has provided no assurances to the Court that she intends to comply with future visitation orders.
77. At the hearing regarding Modification of Parental Rights and Responsibilities, held August 21, 2009, Ms. Miller chose not to testify. Ms. Miller did not appear in person or by phone.
78. There is currently no evidence before the Court regarding Ms. Miller's employment, schedule, or her present ability to meet IMJ's educational or developmental needs.
79. There is no evidence of abuse of IMJ by either Ms. Miller or Ms. Jenkins.
80. IMJ is currently 7 years old.
81. There is no evidence that IMJ's adjustment to a new town and a new school would present any difficulties which are out of the ordinary for a 7 year old.
82. The ongoing constant non-compliance is extremely harmful to IMJ, and is not in IMJ's best interest, as it deprives IMJ of the opportunity for maximum continuing physical and emotional contact with both parents.

### CONCLUSIONS OF LAW

#### *I. Real, Substantial and Unanticipated Change of Circumstances*

The Court may modify a parental rights and responsibilities order upon a showing of real, substantial and unanticipated change of circumstances where the modification is in the child's best interest. *Sundstrom v. Sundstrom*, 2004 VT 106, ¶ 28, 177 Vt. 577 (mem.) (citing 15 V.S.A. § 668). "The Court must make a threshold finding of a real, substantial and unanticipated change of circumstances before it can examine the merits of the parties' claims and reconsider the best interest of the child." *Id.* (citing *Wells v.*

*Wells*, 150 Vt. 1, 4 (1988)) (internal quotations omitted). There are no fixed standards to determine what constitutes a substantial change in circumstances; the Court is guided by a rule of very general application that the welfare and best interests of the child is the primary concern in determining whether the order should be changed. *Id.* (citing *Wells*, 150 Vt. at 4).

“The moving party bears a heavy burden to prove changed circumstances, and the court must consider the evidence carefully before making the threshold finding that a real, substantial and unanticipated change of circumstances exists.” *Sundstrom*, 2004 VT 106, ¶ 29 (quoting *Spaulding v. Butler*, 172 Vt. 467, 476 (2001)). “Willful, repeated interference with visitation rights may constitute a legally significant change of circumstances.” *Id.* (quoting *Wells*, 150 Vt. at 4).

Ms. Miller has repeatedly interfered with the visitation rights of Ms. Jenkins to the point where Ms. Jenkins is no longer a part of her daughter IMJ’s life. The non-compliance by Ms. Miller has been willful and calculated, and the Court has found her in contempt of numerous orders which set forth specific dates and locations for parent-child contact between Ms. Jenkins and IMJ. There is no justification for Ms. Miller’s interference with Ms. Jenkins’s visitations rights.

Ms. Miller’s willful non-compliance comes in the face of a warning by the Court in its Order of June 15, 2007, that continued interference with the relationship between IMJ and Ms. Jenkins could lead to a change of circumstances, and an explicit warning at the January 2009 hearing that failure to comply with the ordered visits could lead to a transfer of custody. At that hearing, Ms. Miller testified that she would comply with the ordered visits. Ms. Miller has proven this testimony to be wholly untrue; she has

willfully disobeyed every subsequent Court order regarding visitation and there has not been parent-child contact between Ms. Jenkins and IMJ since that hearing date. Also, this issue of non-compliance first appeared as far back as 2004 and has been discussed with both parents, Ms. Miller and Ms. Jenkins, on numerous occasions.

Over ten months have passed since Ms. Miller has complied with an order regarding visitation between Ms. Jenkins and IMJ. During the year 2009, over eight weeks of visitation between IMJ and Ms. Jenkins have been willfully interfered with by Ms. Miller. In calculating this time period, the Court does not count the March visit which was cancelled due to IMJ's illness. As was the case in 2008, Ms. Jenkins and IMJ have had approximately 24 hours of parent-child contact this year.

By her repeated willful non-compliance with Court orders, even in the face of explicit warnings from the Court and her own testimony promising compliance, Ms. Miller has demonstrated that she will not comply with court orders regarding parent-child contact between Ms. Jenkins and IMJ. Thus, the Court finds that it is Ms. Miller's intent to cease all parent-child contact between Ms. Jenkins and IMJ. Ms. Jenkins has carried her burden in showing that a real, substantial and unanticipated change in circumstances exists. See *Sundstrom*, 2004 VT 106, ¶ 29.

#### II. Parental Rights and Responsibilities

When the Court finds that there has been a real, substantial and unanticipated change of circumstances, it must consider if a change in parental responsibilities is in the child's best interest. *Sundstrom*, 2004 VT 106, ¶ 37 (citing 15 V.S.A. § 668). The Court must consider the statutory factors set forth in 15 V.S.A. § 665(b). *Id.* "The moving party bears the burden of showing that a transfer of custody is in a child's best interest,

and due to the value of stability in a child's life, it is a heavy one." *Sundstrom*, 2004 VT 106, ¶ 37 (quoting *Habecker v. Glard*, 2003 VT 18, ¶ 5, 175 Vt. 489 (mem.)) (internal quotations omitted). The Court has broad discretion in determining a child's best interests. *Id.* (citing *Spaulding*, 172 Vt. at 475).

Obstruction of visitation and attempts at parental alienation are not in a child's best interests, and they may form the basis for a change of custody; however, willful interference with court ordered visitations, no matter how deplorable, cannot be made the basis for an "automatic" change of custody. *Id.* at ¶ 38 (citations omitted). "The primary consideration is a child's best interests, and in making its determination, the court must consider all of the relevant evidence, including whether the harm caused by one parent's obstruction of visitation outweighs the harm that could be caused by a change in custody." *Id.* (citing *Wells*, 150 Vt. at 4-5). The relevant factors to guide the Court's analysis of a child's best interests are set forth in 15 V.S.A. § 665(b).

The relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection, and guidance;

IMJ has a good relationship with Ms. Miller and Ms. Jenkins. In the June 15, 2007 Order, the Court found that the relationship between IMJ and Ms. Jenkins had been significantly affected by Ms. Miller's refusal to allow parent-child contact. This situation has only become worse since that time. As the Court did in its previous Order, it views the evidence of Ms. Jenkins's relationship with IMJ from the perspective of the time preceding Ms. Miller's initial termination of parent-child contact.

The evidence indicates that both Ms. Miller and Ms. Jenkins have a loving and nurturing relationship with IMJ. Both cared for her extensively in her infancy and after. Both parents have the ability and disposition to provide her with love and affection. Both

parents have extensive training and experience in child development and care, and have cared for children through their daycare ventures.

However, as the Court noted in the June 2007 Order, Ms. Miller did have issues with enmeshed parenting which could later prove detrimental to the relationship. This concern by the Court has proven to be true. In particular, the Court is concerned with the ability and disposition of Ms. Miller to provide IMJ with guidance in light of her willful and calculated non-compliance with orders which this Court deemed to be in IMJ's best interests, and her willingness to provide false promises of compliance under oath to this Court. As the Vermont Supreme Court has noted, "[t]o deliberately sabotage visitation rights calculated to serve the best interests of children bears adversely on the fitness of the custodial parent, whose conduct most certainly does not go unnoticed by the children." *Wells v. Wells*, 150 Vt. 1, 4 (1988) (quoting *Rosenberg v. Rosenberg*, 504 A.2d 350, 352 (Pa. Super Ct. 1986)). Due to her superior ability to provide guidance for IMJ, this factor weighs in favor of Ms. Jenkins.

The ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, and other material needs and a safe environment;

Both parents have the ability and disposition to assure that IMJ receives adequate food, clothing, medical care, other material needs and a safe environment. The evidence supporting this conclusion is essentially the same as that supporting the previous factor. This factor is evenly weighed between the parents.

The ability and disposition of each parent to meet the child's present and future developmental needs;

Both parents have the ability and disposition to meet IMJ's present and future developmental needs. Both parties have extensive training in caring for children and

meeting their developmental needs. Both parents are disposed to do so. This factor is evenly weighed between the parents.

The quality of the child's adjustment to the child's present housing, school and community and potential effect of any change;

IMJ is well adjusted to her present housing, school and community. Potentially, a change of custody would have an uprooting effect on her. While IMJ may experience difficulties in the short term that any 7 year old would experience with a change in housing, school and community, the Court does not find that such uprooting would cause great harm. This includes a potential change in custody in the mid-point of the school year.

The Court is mindful of the danger of creating an incentive for one parent to entrench a child in that parent's home and community and to deny parenting time to the other parent in order to weight this factor in her favor. Nevertheless, viewing the best interests of IMJ, this factor weighs in favor of Ms. Miller, but only to the same extent it did in the Court's June 2007 Order.

The ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;

Ms. Jenkins has the ability and disposition to foster a positive relationship and frequent and continuing contact with Ms. Miller, including physical contact. Ms. Jenkins would not block Ms. Miller or Ms. Miller's family out of IMJ's life. Furthermore, there is no evidence Ms. Jenkins would not comply with orders that this Court deems to be in IMJ's best interests. Neither Ms. Miller nor Ms. Jenkins has abused or harmed IMJ

Ms. Miller does not have the ability and disposition to foster a positive relationship and frequent and continuing contact with Ms. Jenkins, including physical

contact. Ms. Miller intends that there be no relationship between IMJ and Ms. Jenkins. This is evidenced by Ms. Miller's constant contemptuous refusal to permit parent-child contact. IMJ and Ms. Jenkins have had approximately 48 hours of parent-child contact over the past two years. They have not seen each other in over ten months. Ms. Miller has made no assurances to this Court that she intends to comply with any further orders regarding visitation which this Court deems to be in IMJ's best interests.

The Vermont Supreme Court has repeatedly observed that "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere in the child's relationship with the other casts serious doubt upon the fitness of the offending party to be the custodial parent." *Bell v. Squires*, 2003 VT 109, ¶ 18, 176 Vt. 557 (mem.) (quoting *Begins v. Begins*, 168 Vt. 298, 301 (1998)) (emphasis in original). Accordingly, this factor weighs heavily in favor of Ms. Jenkins.

The quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;

As the Court found in the June 2007 Order, Ms. Miller and Ms. Jenkins are equally IMJ's primary care provider for purposes of this criterion. Prior to their separation, both parents cared for IMJ on an equal basis. Since the separation, Ms. Miller has cared for IMJ almost exclusively.

However, mere custody of the child during the time the parents are separated to satisfy the "living apart" requirement for a divorce does not bestow the status of primary care giver on one parent. *Nickerson v. Nickerson*, 158 Vt. 85, 89-90 (1992). The *Nickerson* Court stated as a rationale for this rule that the opposite holding would encourage primary care givers to uproot the children from the home for strategic

purposes inimical to their best interest. *Id.* at 90. Here, as the Court found in the June 2007 Order, Ms. Jenkins's opportunity to care for IMJ again has been limited by Ms. Miller's contemptuous refusal to allow parent-child contact. Therefore, in keeping with the rationale set forth in *Nickerson*, the Court views this factor from a pre-separation standpoint in regards to Ms. Jenkins.

The Vermont Supreme Court has held that if one parent is the primary caregiver, the additional weight to be accorded to that factor depends on the "likely effect of a change of custodian on the child." *Porcaro v. Drop*, 175 Vt. 13, 17 (2002) (citing *Payrits v. Payrits*, 171 Vt. 50, 55 (2000)). As the Court previously noted, a change in custody may produce difficulties for IMJ in the short term consistent with those that any 7 year old would experience with a change in housing, school and community. However, viewed from a pre-separation standpoint, both Ms. Miller and Ms. Jenkins acted as primary caregivers. This factor is equally weighed between the parents.

The relationship of the child with any other person who may significantly affect the child:

In the June 2007 Order, the Court found that there was no reason to think that IMJ would have more contact with Ms. Jenkins's family if IMJ resided with one party rather than the other. This finding is no longer the case.

IMJ's grandparents, the Jenkins, have seen IMJ four times in the past two years, despite also living in Virginia. Prior to their daughter's separation from Ms. Miller, the Jenkins saw IMJ regularly. Ms. Miller requested that the Jenkins stop referring to themselves as "Mom-mom" and "Pop-pop" in front of IMJ. Ms. Miller then further requested the Jenkins to refrain from contact with IMJ. It is the intent of Ms. Miller to cease all contact between IMJ and her grandparents, the Jenkins.

If Ms. Jenkins were to have custody of IMJ, she would not block IMJ from seeing Ms. Miller's family. This factor weighs heavily in favor of Ms. Jenkins.

The ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided;

Neither party has requested shared parental rights and responsibilities. This factor bears no weight in this case.

Evidence of abuse as defined in section 1101 of 15 V.S.A. and the impact of abuse on the child and on the relationship between the child and the abusing parent;

There has been no abuse in the family and the Court does not weight this factor to either parent.

#### Conclusion

Taking into consideration each of the above factors, the Court concludes that it is in the best interest of IMJ that Ms. Jenkins exercise parental rights and responsibilities. In the June 2007 Order, this Court stated that continued interference by Ms. Miller with the relationship between IMJ and Ms. Jenkins could lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered. Ms. Miller's interference with the relationship between IMJ and Ms. Jenkins has become so pervasive that it now outweighs the potential harm that could occur to IMJ by a change of custody.

The Court does not take this change of custody lightly and it is not intended to punish Ms. Miller. See *Renaud v. Renaud*, 168 Vt. 306, 309 (1998) (stating "[c]hildren are not responsible for the misconduct of their parents toward each other, and will not be uprooted from their home merely to punish a wayward parent."). As always, "[t]he best interests of the child remains the paramount consideration." *Id.* at 310. As previously

noted, "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere with the child's relationship with the other casts serious doubts upon the fitness of the offending party to be the custodial parent." *Bell*, 2003 VT 109, ¶ 18.

Both parents are primary care providers. Both are capable of providing love and affection to IMJ. Both can provide a safe environment with proper food, clothing, and medical care for IMJ. Both are able to meet IMJ's present and future developmental needs. However, Ms. Miller no longer has the ability or disposition to foster a positive relationship with Ms. Jenkins, including physical contact. Parent-child contact between Ms. Jenkins and IMJ has ceased to exist and there is no evidence that it will resume while Ms. Miller has custody of IMJ. Contact between IMJ and her grandparents, the Jenkins, has also ceased to exist. Furthermore, Ms. Miller's non-compliance with court orders and willingness to provide false promises under oath, cast doubt upon her ability to provide proper guidance for IMJ. To the contrary, Ms. Jenkins will be able to foster a positive relationship with Ms. Miller and Ms. Miller's family.

The change in custody will affect IMJ as she is well adjusted to her present housing, school and community. However, this disruption will not provide any short term difficulties out of the norm for a 7 year old. As the Vermont Supreme Court has stated, "although stability is undoubtedly important, the short term disruption occasioned by a change of custody may be more than compensated by the long-term benefits of a healthy relationship with both parents." *Renaud*, 168 VT at 310. In the long term, the change in custody will be in IMJ's best interests as she will have the opportunity for maximum continuing physical and emotional contact with both parents. See 15 V.S.A.

noted, "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere with the child's relationship with the other casts serious doubts upon the fitness of the offending party to be the custodial parent." *Bell*, 2003 VT 109, ¶ 18.

Both parents are primary care providers. Both are capable of providing love and affection to IMJ. Both can provide a safe environment with proper food, clothing, and medical care for IMJ. Both are able to meet IMJ's present and future developmental needs. However, Ms. Miller no longer has the ability or disposition to foster a positive relationship with Ms. Jenkins, including physical contact. Parent-child contact between Ms. Jenkins and IMJ has ceased to exist and there is no evidence that it will resume while Ms. Miller has custody of IMJ. Contact between IMJ and her grandparents, the Jenkins, has also ceased to exist. Furthermore, Ms. Miller's non-compliance with court orders and willingness to provide false promises under oath, cast doubt upon her ability to provide proper guidance for IMJ. To the contrary, Ms. Jenkins will be able to foster a positive relationship with Ms. Miller and Ms. Miller's family.

The change in custody will affect IMJ as she is well adjusted to her present housing, school and community. However, this disruption will not provide any short term difficulties out of the norm for a 7 year old. As the Vermont Supreme Court has stated, "although stability is undoubtedly important, the short term disruption occasioned by a change of custody may be more than compensated by the long-term benefits of a healthy relationship with both parents." *Renaud*, 168 Vt. at 310. In the long term, the change in custody will be in IMJ's best interests as she will have the opportunity for maximum continuing physical and emotional contact with both parents. See 15 V.S.A.

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RUTLAND DISTRICT COURT

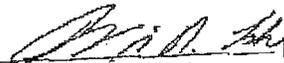
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§ 650.

ORDER

- 1) Defendant Janet Jenkins's Motion to Modify Parental Rights and Responsibilities, filed May 28, 2009, is GRANTED.
- 2) Janet Jenkins SHALL have sole physical and legal custody of the minor child IMJ.
- 3) Transfer of the minor child IMJ SHALL occur at the home of Janet Jenkins's parents in Virginia on January 1, 2010, at 1:00 P.M. The attorney and guardian ad litem for the minor child IMJ shall assist in making an orderly transition.
- 4) Janet Jenkins SHALL submit a plan within 90 days, with the assistance of the attorney and the guardian ad litem for the minor child IMJ, contemplating education, religious and health needs of the minor child IMJ. This plan SHALL include appropriate visitation time for Lisa Miller.

Dated at Rutland, Vermont this 20th day of Nov, 2009.

  
 Hon. William Cohen  
 Superior Court Judge

# **Exhibit “E”**

24

STATE OF VERMONT  
RUTLAND COUNTY, SS.

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

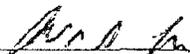
LISA MILLER-JENKINS, )  
 Individually, )  
 )  
 Plaintiff, )  
 v. )  
 )  
 JANET MILLER-JENKINS, )  
 Individually, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**INTERIM ORDER REGARDING PARENT-CHILD CONTACT**

WHEREAS, a Motion to Modify Parental Rights and Responsibilities is under consideration by the Court in this matter, the following interim parent-child contact is hereby ordered:

1. Parent child contact between IMJ and Janet Jenkins will occur in Virginia starting at 9:00 am on Friday September 25, 2009 and ending at 3:00 p.m. on Sunday September 27, 2009. Ruth Jenkins will be responsible for picking up IMJ at her home in Forest, Virginia at the start of the visit and Lisa Miller will be responsible for picking up IMJ at the home of Ruth Jenkins in Falls Church, Virginia at the conclusion of the visit.
2. Lisa Miller will provide confirmation to Janet Jenkins via counsel of her intent to comply with the ordered visit no later than 48 hours prior to the start of the visit.

Dated at Rutland, Vermont this 11<sup>th</sup> day of September, 2009.

  
 \_\_\_\_\_  
 Honorable William Cohen  
 Judge, Rutland Family Court

**EXHIBIT**  
**3**

**GOVERNMENT**  
**EXHIBIT**  
 12 *adu*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

\*\*\*\*\*

JANET JENKINS, for herself and as  
next friend of ISABELLA MILLER-  
JENKINS, A/K/A ISABELLA  
MILLER,

Plaintiffs

v.

Civil No. 2:12-cv-184-wks

KENNETH L. MILLER, LISA ANN  
MILLER, F/K/A LISA MILLER-  
JENKINS, TIMOTHY D. MILLER,  
RESPONSE UNLIMITED, INC., for itself  
and as an agent of LIBERTY COUNSEL,  
LLC, PHILIP ZODHIATES, individually  
and as agent for RESPONSE UNLIMITED,  
INC., VICTORIA HYDEN, f/k/a  
VICTORIA ZODHIATES, individually  
and as agent for both RESPONSE  
UNLIMITED, INC., LINDA M. WALL,  
MATHEW D. STAVER, individually and  
as agent for LIBERTY COUNSEL, LLC,  
RENA M. LINDEVALDSEN, individually  
and as agent for LIBERTY COUNSEL,  
LLC, and LIBERTY COUNSEL, LLC,

Defendants

\*\*\*\*\*

CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date MEMORANDUM IN SUPPORT OF DEFENDANT TIMOTHY MILLER’S OBJECTION TO PLAINTIFF JANET JENKINS’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT ONE AGAINST TIMOTHY MILLER was filed through the Court’s CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record:

David C. Dinielli, Esq.  
Diego A. Soto, Esq.  
Southern Poverty Law Center  
400 Washington Avenue  
Montgomery, Alabama 36104

[David.dinielli@splcenter.org](mailto:David.dinielli@splcenter.org)  
[Diego.soto@splcenter.org](mailto:Diego.soto@splcenter.org)  
[CMECFLGBT@splcenter.org](mailto:CMECFLGBT@splcenter.org)  
(334) 956-8200

Frank Langrock, Esq.  
Langrock, Sperry & Wool, LLP  
PO Drawer 351, 111 S. Pleasant Street  
Middlebury, Vermont 05753  
[flangrock@langrock.com](mailto:flangrock@langrock.com)  
(802) 388-6356

Sara R. Star, Esq.  
Sarah Star, Esq., P.C.  
PO Box 106  
Middlebury, Vermont 05753  
[srs@sarahstarlaw.com](mailto:srs@sarahstarlaw.com)  
(802) 385-1023

J. Tyler Clemons, Esq.  
SOUTHERN POVERTY LAW CENTER  
201 St. Charles Avenue, Suite 2000  
New Orleans, Louisiana 70170  
[Tyler.clemons@splcenter.org](mailto:Tyler.clemons@splcenter.org)  
(504) 526-1530

Brook G. McArthur, Esq.  
Jarvis, McArthur & Williams, LLC  
95 St. Paul Street, Suite 2E  
PO Box 902  
Burlington, Vermont 05402-0902  
[bmcArthur@jarvismcarthur.com](mailto:bmcArthur@jarvismcarthur.com)  
(802) 658-9411  
Counsel for Defendant, Kenneth L. Miller

Norman C. Smith, Esq.  
76 Lincoln Street  
PO Box 24  
Essex Junction, Vermont 05453  
[Nc.smith@myfairpoint.net](mailto:Nc.smith@myfairpoint.net)  
(802) 288-9088  
Counsel for Defendant, Linda M. Wall

Anthony R. Duprey, Esq.  
Neuse, Duprey & Putnam, PC  
1 Cross Street

Middlebury, Vermont 05753-1455

[anthony@ndp-law.com](mailto:anthony@ndp-law.com)

(802) 388-7966

Counsel for Defendants, Liberty Counsel and Rena M. Lindevaldsen

Horatio G. Mihet, Esq.

Daniel J. Schmid, Esq.

Roger K. Gannam, Esq.

LIBERTY COUNSEL

PO Box 540774

Orlando, Florida 32854

[hmihet@lc.org](mailto:hmihet@lc.org)

[dschmid@lc.org](mailto:dschmid@lc.org)

[rgannam@lc.org](mailto:rgannam@lc.org)

(407) 875-1776

Counsel for Defendants, Liberty Counsel and Rena M. Lindevaldsen

Adam S. Hochschild, Esq.

Hochschild Law Firm, LLC

[adam@hochschildlaw.com](mailto:adam@hochschildlaw.com)

And will be sent via first class mail to the following individuals:

Philip Zodhiates

#18649-084

ASHLAND

Federal Correctional Institution

Inmate Mail/Parcels

P.O. Box 6001

Ashland, KY 41105-6001

Victoria Hyden

1212 Saint Cloud Avenue

Lynchburg, Virginia 24502

Response Unlimited, Inc.

c/o William Zodhiates

274 Shalom Road

Waynesboro, Virginia 22980

Respectfully submitted,

Timothy D. Miller

By his attorneys,

WADLEIGH, STARR & PETERS, P.L.L.C.

Dated: January 27, 2020

By            /S/ Michael J. Tierney  
Michael J. Tierney – VT Bar No. 5275  
95 Market Street  
Manchester, NH 03101  
(603) 669-4140  
[mtierney@wadleighlaw.com](mailto:mtierney@wadleighlaw.com)

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