

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

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**PLAINTIFF JANET JENKINS'S, LANGROCK SPERRY & WOOL, LLP'S, SARAH
STAR, PC'S, AND THE SOUTHERN POVERTY LAW CENTER'S RESPONSE IN
OPPOSITION TO DEFENDANTS LIBERTY COUNSEL AND RENA M.
LINDEVALDSEN'S MOTION FOR SANCTIONS AGAINST PLAINTIFF JANET
JENKINS AND HER COUNSEL**

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Defendants Liberty Counsel, Inc. and Rena Lindevaldsen (collectively, “Liberty Counsel Defendants”) noticed Plaintiff Janet Jenkins and her counsel this Rule 11 motion the same day they filed their motion for partial summary judgment on Jenkins’s claim as next friend of her kidnapped, still-missing daughter, Plaintiff Isabella Miller-Jenkins. In both motions, they argue the Court lost subject-matter jurisdiction over the claim because Jenkins cannot maintain next-friend standing now that Isabella is eighteen years old. Jenkins declined to withdraw her next-friend claim; instead, she considered all reasonable, nonfrivolous arguments to preserve her daughter’s interests in the thirty days to which she was entitled to respond to the summary-judgment motion. The Rule 11 motion should be denied.

STATEMENT OF THE CASE

Jenkins filed this action on August 14, 2012, the day a jury in this Court convicted Defendant Kenneth Miller for his involvement in the September 2009 kidnapping of then-seven-year-old Isabella from the United States to interfere with Jenkins’s parental rights. In that case and two others against Defendants Philip Zodhiates and Timothy Miller, Jenkins learned that Defendant Lisa Miller, with the help of her co-conspirators, including the Liberty Counsel Defendants, had taken Isabella to Nicaragua, where Lisa could not be extradited. *See, e.g.*, Dep. Tr. 24, ECF 470-1. She hid Isabella among a Beachy Amish Mennonite community, giving her the pseudonym Lydia and clothing her in traditional Mennonite garb. *See, e.g., id.* at 42–43. Zodhiates, Kenneth Miller, and Timothy Miller were adjudicated guilty of conspiring to commit, or aiding and abetting, international parental kidnapping, which makes it unlawful to “remove[] a child from the United States, or attempt[] to do so, or retain[] a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights.” 18 U.S.C. § 1204. *See generally* Mem. in Supp. of Pl. Janet Jenkins’s Mot. for Partial Summ. J. on Count One Against Defs. Philip Zodhiates, Kenneth Miller, and Timothy Miller, ECF 439-27.

According to information available to Jenkins about Isabella's last known whereabouts, on April 27, 2010, Lisa took Isabella from Managua, Nicaragua back to Jinotega, Nicaragua, *see* Dep. Tr. 55, ECF 470-1, where Timothy Miller thought Lisa and Isabella would be less likely to be found, *see id.* at 40.¹ The federal government is continuing its efforts to locate Lisa for prosecution. *See Lisa Miller* Docket Report 4, Ex. 1 to Pl. Janet Jenkins's Resp. in Opp'n to Liberty Counsel Defs.' Mot. for Partial Summ. J. as to All Claims Pl. Janet Jenkins Purports to Bring as Next Friend of Isabella Miller ("Summ. J. Resp."), ECF 519-1 (December 13, 2019 minute entry scheduling status conference for June 18, 2020, ordering updated due diligence affidavit by June 11, 2020, and noting Lisa remains a fugitive).

On April 16, 2020, Isabella's eighteenth birthday, the Liberty Counsel Defendants filed a motion for partial summary judgment on all claims Jenkins brought as next friend of Isabella. *See* Liberty Counsel Defs.' Mot. for Partial Summ. J. as to All Claims Pl. Janet Jenkins Purports to Bring as Next Friend of Isabella Miller, and Incorporated Mem. of Law, ECF 495. They argue that, purely by virtue of Isabella's having reached the age of majority under Vermont law, Jenkins cannot possibly have standing or authority to maintain any claim as next friend of Isabella.

The Liberty Counsel Defendants noticed Jenkins and her counsel this Rule 11 motion a mere twenty-seven minutes after filing their summary-judgment motion, before Jenkins and her counsel could even digest the summary-judgment argument, much less respond on the merits. They demanded that Jenkins voluntarily withdraw or dismiss all claims as next friend of Isabella.

¹ On March 30, 2020, the Liberty Counsel Defendants submitted for *in camera* review a potential communication from Lisa. *See* Notice of Submitting Materials to Court for In Camera Review, ECF 488. Plaintiff has not seen that communication and does not know if it purports to reveal Isabella's recent whereabouts.

Out of an abundance of caution given the noticed Rule 11 motion, Jenkins and her counsel did not advocate for Jenkins's next-friend claim in any paper, including even discovery documents to which Rule 11 does not apply, *see* Fed. R. Civ. P. 11(d), while the Liberty Counsel Defendants' summary-judgment motion was pending.

At 1:00 PM Eastern Daylight Time ("EDT") on May 7, 2020, Jenkins notified the Liberty Counsel Defendants that she would not at that time withdraw her next-friend claim because, among other things, she had thirty days to respond to the merits of their challenge to the Court's subject-matter jurisdiction and she was considering all good-faith options to respond. *See* Ex. A to Mot. 2, ECF 512-1. She also pointed out that neither she nor her counsel had "'presented to the court a pleading, written motion, or other paper, whether by signing, filing, submitting, or later advocating it,' Fed. R. Civ. P. 11(b), that advances her next-friend claim," "[s]ince Liberty Counsel and Ms. Lindevaldsen filed their summary-judgment motion on Isabella's 18th birthday." *Id.*²

At 2:15 PM EDT, the Liberty Counsel Defendants informed Jenkins that they would "file shortly" this Rule 11 motion because Jenkins and her counsel "ha[d] not identified any legal or factual grounds upon which [she] could continue to maintain her purported next friend claims on behalf of Isabella, who is now an adult," and because they "ha[d] a different understanding of the requirements of Rule 11, particularly regarding Plaintiff's obligation to withdraw a pleading (e.g., the Revised Second Amended Complaint) or claims (e.g., the purported next-friend claims) which Plaintiff now knows to be groundless." Ex. A to Mot. 1, ECF 512-1. They filed this Rule 11 motion twenty-one minutes later, at 2:36 PM EDT on May 7, 2020.

² Jenkins and her counsel expressly preserved and did not waive all other arguments against this Rule 11 motion. *See* Ex. A to Mot. 2, ECF 512-1.

On May 18, 2020, Jenkins filed a response in opposition to the Liberty Counsel Defendants' summary-judgment motion, arguing she maintains next-friend standing to assert her claim as next friend of Isabella. *See* Summ. J. Resp., ECF 519.

SUMMARY OF ARGUMENT

The Liberty Counsel Defendants' Rule 11 motion should be denied.

First, Jenkins and her counsel did not violate Rule 11 because it is not patently clear that her next-friend claim has absolutely no chance of success, as shown by her reasonable arguments supporting next-friend standing in her response to the Liberty Counsel Defendants' summary-judgment motion, which this Rule 11 motion preceded by fourteen days. Jenkins reasonably relies on the Supreme Court's test for next-friend standing, Rule 17(c)(2) of the Federal Rules of Civil Procedure's protections for incompetent litigants, and principles of equity and justice to make the nonfrivolous argument that the Court should permit Jenkins to continue advancing her still-missing kidnapped daughter's interests in this case against her kidnappers.

Second, Jenkins and her counsel did not violate Rule 11 because they acted objectively reasonably in declining to withdraw Jenkins's next-friend claim while considering all reasonable options and arguments to preserve Isabella's interests in response to the Liberty Counsel Defendants' summary-judgment motion. Jenkins's counsel reasonably balanced their ethical and professional duties to Isabella with their legal, ethical, and professional obligations to the Court by deciding, on the one hand, not to withdraw the claim while Jenkins still had time to respond to the summary-judgment motion, and on the other hand, not to advocate for Jenkins's next-friend claim in any filing since the Liberty Counsel Defendants challenged the Court's subject-matter jurisdiction. To sanction Jenkins and her counsel for this reasonable decision would invite litigants to notice Rule 11 motions immediately upon the filing of every dispositive motion.

Third, the Liberty Counsel Defendants fail to allege a Rule 11 violation because they cannot cite any paper presented to the Court after Isabella’s eighteenth birthday that advocates Jenkins’s allegedly frivolous next-friend claim. Had they instead waited to read Jenkins’s response to their summary-judgment motion before noticing or filing this Rule 11 motion, they would have learned that this Rule 11 motion is unwarranted because Jenkins can and does reasonably and nonfrivolously argue that she retains next-friend standing. The Court should decide the standing issue presented by Isabella’s still being missing past her eighteenth birthday in the normal course through their summary-judgment motion, not through this Rule 11 motion.

Finally, the Liberty Counsel Defendants violated Rule 11’s procedural requirements by filing this Rule 11 motion within the rule’s twenty-one-day safe-harbor provision that allows an alleged Rule 11 violator to withdraw or appropriately correct the alleged violation. They noticed this Rule 11 motion on April 16, 2020—meaning Jenkins and her counsel had until midnight EDT on May 8, 2020, to withdraw or appropriately correct the alleged violation—but then filed the motion nine hours and twenty-four minutes before the safe-harbor time expired. Although Jenkins did unambiguously inform the Liberty Counsel Defendants that she would not at that time withdraw her next-friend claim, and she has not withdrawn that claim since they filed this Rule 11 motion, the safe-harbor provision must be strictly adhered to and enforced. To hold otherwise would subvert the rule’s intended purpose of decreasing the number of filed Rule 11 motions. The Liberty Counsel Defendants’ failure to afford Jenkins and her counsel the full twenty-one-day safe harbor requires denial of the motion.

ARGUMENT

Neither Jenkins nor her counsel violated Rule 11(b) of the Federal Rules of Civil Procedure by failing to withdraw Jenkins’s next-friend claim. That rule provides in full:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Rule 11 “seeks to reduce, if not eliminate, the unnecessary expenditure of judicial time and adversary resources” by requiring parties to attempt to resolve alleged Rule 11 violations without judicial intervention. *Lawrence v. Richman Grp. of CT LLC*, 620 F.3d 153, 158 (2d Cir. 2010) (citing *Perpetual Sec., Inc.*, 290 F.3d at 141)); accord Fed. R. Civ. P. 11 advisory committee’s note to 1993 amendment (“The revision ... should reduce the number of motions for sanctions presented to the court.”). Rule 11 motions should not misuse scarce judicial resources. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99 (3d Cir. 1988) (“Rather than misusing scarce resources, timely filing and disposition of Rule 11 motions should conserve judicial energies.”). “Nor should Rule 11 motions be prepared to emphasize the merits of a party’s position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client

privilege or the work-product doctrine.” Fed. R. Civ. P. 11 advisory committee’s note to 1993 amendment.

“Rule 11 sanctions should be ‘made with restraint.’” *Jenkins v. Miller*, No. 2:12-cv-184, 2014 WL 5421228, at *2 (D. Vt. Oct. 24, 2014) (ECF 166) (Sessions, J.) (quoting *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 333 (2d Cir. 1999)). Although “[t]he decision whether to impose sanctions is a matter for the Court’s discretion,” *id.* (citing *Perez v. Posse Comitatus*, 373 F.3d 321, 325 (2d Cir. 2004)), the Court must “be[] careful not to rein in zealous advocacy,” *Kiobel v. Millson*, 592 F.3d 78, 83 (2d Cir. 2010) (quoting *Pannonia Farms, Inc. v. USA Cable*, 426 F.3d 650, 652 (2d Cir. 2005)), and must “resolve all doubts in favor of the” alleged Rule 11 violator, *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986); *accord Rounseville v. Zahl*, 13 F.3d 625, 633 (2d Cir. 1994) (“[A]ll doubts are to be resolved in favor of the signer of the document that is the basis for Rule 11 sanctions”) (reversing sanctions award).

Sanctions are not warranted here. *First*, Jenkins and her counsel did not violate Rule 11 because it is not patently clear that her next-friend claim has absolutely no chance of success. *Second*, Jenkins and her counsel did not violate Rule 11 because they acted objectively reasonably in declining to withdraw Jenkins’s next-friend claim while considering all reasonable options and arguments to preserve Isabella’s interests. *Third*, the Liberty Counsel Defendants waste the Court’s resources by failing to allege a Rule 11 violation because they cannot cite any paper presented to the Court after Isabella’s eighteenth birthday that advocates Jenkins’s allegedly frivolous next-friend claim. *Finally*, the Liberty Counsel Defendants violated Rule 11’s procedural requirements by filing this Rule 11 motion within the rule’s twenty-one-day safe-harbor provision.

I. Jenkins and her counsel did not violate Rule 11 because it is not patently clear that her next-friend claim has absolutely no chance of success

Jenkins and her counsel did not violate Rule 11 because it is not patently clear that her next-friend claim has absolutely no chance of success, as shown by her reasonable arguments supporting next-friend standing in her response to the Liberty Counsel Defendants' summary-judgment motion.

“[R]ule 11 is violated only when it is ‘patently clear that a claim has absolutely no chance of success,’” *Oliveri*, 803 F.2d at 1275 (quoting *Eastway Const. Corp. v. City of N.Y.*, 762 F.2d 243, 254 (2d Cir. 1985)), “and where no reasonable argument can be advanced to extend, modify[,] or reverse the law as it stands,” *Eastway Const. Corp.*, 762 F.2d at 254. *See* Fed. R. Civ. P. 11(b)(2) (allowing “claims, defenses, and other legal contentions ... warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”); *accord Sorenson v. Wolfson*, 683 F. App’x 33, 35 (2d Cir. 2017) (“Sanctions are not to be imposed for unsuccessful litigation of a cognizable claim.” (quoting *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 454 (2d Cir. 1987))); *Shafii v. British Airways, PLC*, 83 F.3d 566, 570 (2d Cir. 1996) (“[I]t must be clear under existing precedents that there is no chance of success.” (quoting *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990))); *Akerley v. N. Country Stone, Inc.*, No. 2:5-cv-314, 2006 WL 2452640, *2 (D. Vt. Aug. 23, 2006) (Sessions, C.J.) (“[I]t must be patently clear that a claim has absolutely no chance of success.” (quoting *Sussman v. Bank of Israel*, 56 F.3d 450, 457 (2d Cir. 1995))); *cf.* Fed. R. Civ. P. 11 advisory committee’s note to 1983 amendment (“The rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.”). “When divining the point at which an argument turns from merely losing to losing *and* sanctionable,” the Second Circuit has “instructed district courts to resolve all doubts in favor of the signer.”

Associated Indem. Corp. v. Fairchild Indus., Inc., 961 F.2d 32, 35 (2d Cir. 1992) (internal quotation marks and citation omitted). The Second Circuit has affirmed the denial of sanctions even for “meritless” arguments, *Sorenson*, 683 F. App’x at 35, “barely non-frivolous argument[s],” *Int’l Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 86 (2d Cir. 1996), arguments that are “ultimately unsuccessful,” *Shafii*, 83 F.3d at 570, and arguments that are “no doubt ... not persuasive,” *Mareno*, 910 F.2d at 1047.

Jenkins’s reasonable arguments in her response to the Liberty Counsel Defendants’ summary-judgment motion show it is not patently clear that her next-friend claim has absolutely no chance of success. *First*, next-friend standing is proper when the real party in interest lacks access to the Court and the putative next friend is truly dedicated to the best interests of the real party in interest. *Whitmore v. Arkansas*, 495 U.S. 149, 163–65 (1990). Jenkins reasonably argues that she has next-friend standing because Isabella, as a still-missing kidnapping victim, lacks access to the Court to assert claims for herself and because she is Isabella’s mother and has shown dedication to her daughter’s best interests throughout this suit.

Second, Rule 17(c)(2) of the Federal Rules of Civil Procedure requires the Court to protect an unrepresented incompetent person. Jenkins reasonably argues that Isabella effectively is incompetent because, as a still-missing kidnapping victim, she cannot protect her own interests in court.

Finally, Jenkins reasonably argues that equity and justice require the Court to allow her to maintain her next-friend claim for Isabella. The granting of judgment in favor of Defendants on Jenkins’s next-friend claim, just because Isabella was missing long enough to turn eighteen, would be inequitable and unjust and would incentivize child kidnapers to hold their victims hostage at least until they reach adulthood to avoid liability and redress by and for their victims.

Because these arguments are reasonable and “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law,” Fed. R. Civ. P. 11(b)(2), it is not patently clear that Jenkins’s next-friend claim has absolutely no chance of success, and this Rule 11 motion should be denied.

II. Jenkins and her counsel did not violate Rule 11 because they acted objectively reasonably in declining to withdraw Jenkins’s next-friend claim while considering all reasonable options and arguments to preserve Isabella’s interests

Jenkins and her counsel did not violate Rule 11 because they acted objectively reasonably in declining to withdraw Jenkins’s next-friend claim while considering all reasonable options and arguments to preserve Isabella’s interests. “The standard for granting sanctions under Rule 11 is ‘objective unreasonableness’” *Vt. Right to Life Comm., Inc v. Sorrell*, No. 2:9-cv-188, 2010 WL 11610331, at *3 (D. Vt. Aug. 9, 2010) (Sessions, C.J.) (quoting *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 387 (2d Cir. 2003)).

The Liberty Counsel Defendants first challenged the Court’s subject-matter jurisdiction over Jenkins’s next-friend claim with a summary-judgment motion. Under Local Rule 7(a)(3)(A), Jenkins had thirty days to consider all reasonable options—including nonfrivolous arguments her counsel believed she likely had to maintain next-friend standing³—to preserve her still-missing daughter’s interests in response to that motion. Meanwhile, Jenkins’s counsel had an ethical and professional duty to “act with commitment and dedication

³ The Liberty Counsel Defendants complain that Jenkins and her counsel did “not identif[y] any legal or factual grounds upon which Plaintiff could continue to maintain her purported next friend claims on behalf of Isabella.” Ex. A to Mot. 1, ECF 512-1. Jenkins and her counsel were not required to preview their response to the summary-judgment motion by disclosing protected information about what legal theories Jenkins should and might advance. *See* Fed. R. Civ. P. 11 advisory committee’s note to 1983 amendment (“The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified.”).

to [Isabella's] interests ... and with zeal in advocacy upon [her] behalf," including by "tak[ing] whatever lawful and ethical measures are required to vindicate" those interests. Vt. R. Prof'l Conduct 1.3 cmt. 1.

Jenkins's counsel reasonably balanced these obligations to Isabella with their legal, ethical, and professional obligations to the Court by deciding, on the one hand, not to withdraw the claim while Jenkins still had time under the Court's local rules to respond to the summary-judgment motion, and on the other hand, not to advocate for Jenkins's next-friend claim in any filing since the Liberty Counsel Defendants challenged the Court's subject-matter jurisdiction. Any reasonably competent attorney would have and should have acted the same. To sanction Jenkins and her counsel for this reasonable decision would invite litigants to notice Rule 11 motions immediately upon the filing of every dispositive motion. *Cf. Sateriale v. RJ Reynolds Tobacco Co.*, No. 2:9-cv-8394, 2014 WL 7338887, at *2 (C.D. Cal. Dec. 19, 2014) (denying Rule 11 motion concurrently filed with summary-judgment motion based in part on similarity of arguments and reserving, until conclusion of case, respondent's request for costs from movant).

III. The Liberty Counsel Defendants fail to allege a Rule 11 violation because they cannot cite any paper presented to the Court after Isabella's eighteenth birthday that advocates Jenkins's allegedly frivolous next-friend claim

The Liberty Counsel Defendants fail to allege a Rule 11 violation because they cannot cite any paper presented to the Court after Isabella's eighteenth birthday that advocates Jenkins's allegedly frivolous next-friend claim. "Rule 11 applies only to the initial signing of a 'pleading, motion, or other paper'. Limiting the application of [R]ule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule." *Oliveri*, 803 F.2d at 1274; *accord McCain v. United States*, No. 2:14-cv-92, 2015 WL 1221257, at *28 (D. Vt. Mar. 17, 2015) (Sessions, J.) ("Rule 11 only applies to 'a pleading, written motion, or other paper' or other matters represented to the Court." (quoting Fed. R. Civ. P. 11(b))); Fed. R. Civ.

P. 11 advisory committee’s note to 1993 amendment (“The rule applies only to assertions contained in papers filed with or submitted to the court.”); *cf.* Fed. R. Civ. P. 11(d) (making Rule 11 inapplicable to discovery). Jenkins’s and her counsel’s “conduct is to be judged as of the time the pleading or other paper is signed.” *Oliveri*, 803 F.2d at 1274 (citing Fed. R. Civ. P. 11 advisory committee note). Rule 11 was not “meant to impose a continuing obligation on” them. *Id.* “[O]nly conduct explicitly referred to in the instrument providing notice [of an alleged Rule 11 violation] is sanctionable.” *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 175 (2d Cir. 2012) (quoting *Schlaifer Nance & Co.*, 194 F.3d at 334). Because Jenkins did not “present[]” to the Court any “paper” that advocates Jenkins’s allegedly frivolous next-friend claim, “whether by signing, filing, submitting, or later advocating it,” Fed. R. Civ. P. 11(b), between Isabella’s eighteenth birthday and when this Rule 11 motion was filed, the Liberty Counsel Defendants do not and cannot cite any such presentation to adequately allege a Rule 11 violation.

The Liberty Counsel Defendants waste the Court’s resources by having noticed and filed this Rule 11 motion anyway—exactly what Rule 11 aims to prevent. *See Mary Ann Pensiero, Inc.*, 847 F.2d at 99. Had they instead waited (as little as ten days and at most thirty-two days) to read Jenkins’s response to their summary-judgment motion before noticing or filing this Rule 11 motion, they would have learned that this Rule 11 motion is unwarranted because Jenkins can and does argue reasonably and nonfrivolously that she retains next-friend standing. The Court should decide the standing issue presented by Isabella’s still being missing past her eighteenth birthday in the normal course through their summary-judgment motion, not through this Rule 11 motion. *See Sateriale*, 2014 WL 7338887, at *2; Fed. R. Civ. P. 11 advisory committee’s note to 1993 amendment (“Nor should Rule 11 motions be prepared to emphasize the merits of a party’s

position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine.”).

IV. The Liberty Counsel Defendants violated Rule 11’s procedural requirements by filing this Rule 11 motion within the twenty-one-day safe-harbor provision

The Liberty Counsel Defendants violated Rule 11’s procedural requirements by filing this Rule 11 motion within the rule’s twenty-one-day safe-harbor provision. A party seeking sanctions for an alleged violation of Rule 11(b) may file a motion only if “the challenged paper, claim, defense, contention, or denial is [not] withdrawn or appropriately corrected within 21 days after service.” Fed. R. Civ. P. 11(c)(2). They noticed this Rule 11 motion on April 16, 2020, meaning Jenkins and her counsel had until midnight EDT on May 8, 2020, to withdraw or appropriately correct the alleged violation. *See* Fed. R. Civ. P. 6(a)(1), (4). But they filed this Rule 11 motion at 2:36 PM EDT on May 7, 2020—nine hours and twenty-four minutes too soon.

The Liberty Counsel Defendants filed this Rule 11 motion a mere twenty-one minutes after voicing their dissatisfaction with Jenkins and her counsel’s response, denying Jenkins and her counsel over nine hours to reconsider or to offer a compromise. Although Jenkins did unambiguously inform the Liberty Counsel Defendants that she would not at that time withdraw her next-friend claim, “[t]he safe-harbor provision is a strict procedural requirement.” *Star Mark Mgmt., Inc.*, 682 F.3d at 175 (citing *Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 142 n.4 (2d Cir. 2002); *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1327–29 (2d Cir. 1995)). “A motion that fails to comply with the safe harbor provision of Rule 11 must be denied.” *Norton-Griffiths v. Wells Fargo Home Mortg.*, No. 5:10-cv-169, 2011 WL 98318, at *3 (D. Vt. Jan. 12, 2011)

(Reiss, C.J.) (quoting *Castro v. Mitchell*, 727 F. Supp. 2d 302, 306 (S.D.N.Y. 2010)) (denying Rule 11 motion filed within safe-harbor provision).⁴

The Court should be loath to relax the safe-harbor provision's strict but simple requirement. A holding that this Rule 11 motion's premature filing should be excused because Jenkins and her counsel refused to withdraw the claim and because it was filed only a few hours too soon would short circuit the process Rule 11 created to force parties to attempt to resolve these sorts of disputes without court intervention and would drag courts into disputes over how far into the safe-harbor provision's twenty-one days is acceptable. *See, e.g., Lawrence*, 620 F.3d at 158 ("Rule 11's safe harbor provision seeks to reduce, if not eliminate, the unnecessary expenditure of judicial time and adversary resources." (citing *Perpetual Sec., Inc.*, 290 F.3d at 141)); Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment ("The revision ... should reduce the number of motions for sanctions presented to the court.").

Besides, these considerations cut both ways. Imagine that the recipient of a noticed Rule 11 motion responds the next day, refusing in no uncertain terms to accede, and the movant

⁴ The Southern District of New York has in some cases created an exception to the safe-harbor provision "where there is 'no indication that a party would have corrected or amended its frivolous arguments even had it been given the opportunity.'" *Malvar Egerique v. Chowaiiki*, 19 Civ. 3110, 2020 WL 1974228, at *29 (S.D.N.Y. Apr. 24, 2020) (quoting *Watkins v. Smith*, No. 12 Civ. 4635, 2013 WL 655085, at *6 (S.D.N.Y. Feb. 22, 2013) (relying on Second Circuit's order in *Perpetual Securities, Inc.*, 290 F.3d at 142, to vacate and remand, rather than reverse, order granting procedurally deficient Rule 11 motion because "there [was] no indication that Perpetual would have corrected or amended its frivolous arguments even had it been given the opportunity"). Yet Rule 11's plain text, which allows a motion to be filed only after twenty-one days, does not allow for such a judicially created exception. Courts must "give the Federal Rules of Civil Procedure their plain meaning." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)) (interpreting former Rule 11's text); *accord Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540 (1991) (same). Nothing in Rule 11's text allows a court to excuse a prematurely filed Rule 11 motion because the recipient of the noticed motion expressed an unwillingness to withdraw the complained-of claim at any point during the safe-harbor period. The Court should not extend that mistaken interpretation of Rule 11 to this District.

files that day. On the one hand, the movant might be able to show it would have suffered actual prejudice from having to wait the remaining twenty days, confident from experience that the respondent would not budge. On the other hand, the respondent was denied twenty days to reconsider or to offer a compromise, and the court is now forced to decide the dispute. Now imagine instead that the motion was filed one minute too soon. True, a last-minute change of heart might have been unlikely, *cf. NXIVM Corp. v. Foley*, No. 1:14-cv-1375, 2015 WL 7776923, at *3 (N.D.N.Y. Dec. 2, 2015) (refusing “to speculate that Plaintiff would not have withdrawn its claims in the remaining six days” of safe-harbor period even after plaintiff continued to argue claims were timely), but the movant would be hard pressed to show actual prejudice from having to wait just one more minute.

Rule 11 saves courts from having to grapple with these tough questions by providing a clear, easy-to-follow rule: no Rule 11 motion may be filed within twenty-one days after service. Nothing prevented the Liberty Counsel Defendants from waiting until midnight before filing this Rule 11 motion. Their decision not to wait requires denial of the motion.

CONCLUSION

The Liberty Counsel Defendants’ Rule 11 motion should be denied.

Respectfully submitted.

May 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record and unrepresented parties through the Court's CM/ECF system:

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