

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF VERMONT

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JANET JENKINS, ET AL.,))	
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Plaintiffs,))	
))	Docket No. 2:12-cv-00184
v.))	
))	
KENNETH L. MILLER, ET AL.,))	
))	
Defendants.))	
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**DEFENDANTS LIBERTY COUNSEL, INC. AND RENA M. LINDEVALDSEN’S
OMNIBUS REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY
JUDGMENT AND REPLY IN SUPPORT OF CROSS-MOTION FOR SANCTION**

Pursuant to Local Rule 7, Defendants Liberty Counsel, Inc. (“Liberty Counsel”) and Rena M. Lindevaldsen (“Lindevaldsen”) (collectively “Defendants”), by and through the undersigned counsel, hereby file their Omnibus Reply¹ in Support of Motion for Partial Summary Judgment as to all claims Plaintiff Janet Jenkins (“Jenkins”) purports to bring as next friend of Isabella Miller (dkt. 495, “MSJ”), and Reply in Support of Motion for Sanctions. (Dkt. 512). For the reasons that follow, this Court should enter summary judgment in favor of Liberty Counsel and Lindevaldsen as to all claims Jenkins purports to bring as next-friend of Isabella Miller, and award Defendants’ Motion for sanctions.

INTRODUCTION

In her response in opposition to Liberty Counsel and Lindevaldsen’s motion for partial summary judgment as to all claims Jenkins purports to bring on behalf of (now adult) Isabella

¹ Defendants have previously requested leave to file this consolidated Reply (dkt. 524), which request remains pending as of this filing.

Miller, Jenkins makes the following remarkable contentions: (1) that the unequivocal rules of next friend standing under Vermont law do not apply to her, despite the fact that Isabella is now indisputably an adult over the age of 18; (2) that, even though her next friend claims would be unquestionably barred under “normal” rules, this Court should grant an exemption to her (and her alone) because the binding laws should not apply to her in this situation; (3) that, despite lacking any evidence whatsoever as to Isabella’s wishes, desires, or interests in this litigation, she should be permitted to maintain her purported next friend claims on behalf of Isabella based on her rank speculation as to what those interests, wishes, and desires are or would be; (4) that, despite lacking any evidence as to Isabella’s status and willingness to avail herself of this Court’s authority, she should be permitted to claim—based on rank speculation—that Isabella would want her to maintain these claims against these defendants; and (5) that, despite lacking any evidence to so prove, Isabella would even want Jenkins to serve in the capacity as next friend for these alleged claims. (Dkt. 519, Response in Opposition to Defendants Liberty Counsel and Lindevaldsen’s Motion for Partial Summary Judgment as to all Claims Plaintiff Janet Jenkins Purports to Bring as Next Friend of Isabella Miller, “MSJ Opp.”).

Similarly, in her opposition to Liberty Counsel and Lindevaldsen’s request for sanctions, Jenkins also makes several remarkable contentions: (1) that Liberty Counsel and Lindevaldsen cannot bring a motion for sanctions because—despite the fact that Jenkins clearly and unequivocally indicated she had no intention of withdrawing her claims—Liberty Counsel and Lindevaldsen filed 9 hours too early and deprived her of the chance to withdraw that which she adamantly refused to withdraw; (2) that despite continuing to this day to press her frivolous claims, including in her opposition to Liberty Counsel and Lindevaldsen’s motion for partial summary judgment filed three days before her opposition to the sanctions motion, she has presented no paper

to this Court continuing her frivolous claims such that Liberty Counsel and Lindevaldsen cannot seek sanctions because they cannot point to anything wherein she maintains her frivolous claim; and (3) despite lacking any evidence upon which to satisfy her clear burden to demonstrate standing, her claims are not patently frivolous. (Dkt. 521, “Sanctions Opp.”).

Each and every one of Jenkins’ contentions in these matters is plainly without merit, contradicts the plain import of unequivocal and binding precedent, and does not survive even cursory review. Liberty Counsel and Lindevaldsen are entitled to judgment as a matter of law as to all of Jenkins’ purported claims brought on behalf of Isabella, and their request for sanctions should be granted.

LEGAL ARGUMENT

I. JENKINS HAS NO STANDING TO MAINTAIN HER PURPORTED NEXT FRIEND CLAIMS ON BEHALF OF ISABELLA.

A. Standing Is a Fundamental Prerequisite to Bringing Any Claim in Federal Court, Must Be Demonstrated as to Each Claim, and Must Be Maintained at All Stages of Litigation.

“Standing is a fundamental prerequisite to a federal court’s power.” *Sasson v. Hachette Filipacchi Presse*, No. 15-CV-00194 (VM)(SN), 2016 WL 1599492, *6 (S.D.N.Y. Apr. 20, 2016). In fact, this Court has “an obligation to assure [itself]’ of litigants’ standing under Article III.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (quoting *Friends of Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). This is because standing to bring all claims “is an essential and unchanging part of the case-or-controversy requirement.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (2006). It is nothing short of a “jurisdictional prerequisite to a federal court’s deliberations.” *Hodel v. Irving*, 481 U.S. 704, 711 (1987).

Moreover, Jenkins has the burden to demonstrate that she has standing for **each** of the claims she seeks to bring and for **all** of the forms of requested relief. Indeed, the Supreme Court’s

“standing decisions make clear that standing is not dispensed in gross.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (internal quotation marks omitted). “Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” *Davis*, 554 U.S. at 734 (internal quotation marks omitted); *see also Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012) (“It is well established that ‘a plaintiff must demonstrate standing for each claim’”); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (same).

That Jenkins may have arguably had next friend standing at the initiation of the instant litigation, is not at all sufficient. It is beyond peradventure that “Article III demands that an ‘actual controversy’ persist **throughout all stages of litigation.**” *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (emphasis added); *see also Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019) (“Although rulings on standing often turn on a plaintiff’s stake in initially filing suit, ‘Article III demands that an “actual controversy” persist throughout all stages of litigation.’” (quoting *Hollingsworth*, 570 U.S. at 705)). Indeed, “[a] **dispute that is live when suit is filed remains so only for as long as the parties continue to have [standing].**” *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 44 (2d Cir. 2015) (emphasis added). Thus, even assuming *arguendo* Jenkins had standing at the beginning to pursue her claims as purported next friend of Isabella,² Jenkins remains obligated to satisfy her burden of proving that she has standing to pursue all claims and all forms of relief in this matter **at this date and this stage**. That is the “indispensable part of the plaintiff’s case,” *Lujan*, 504 U.S. at 561, and she has not and cannot satisfy this burden.

² As Liberty Counsel and Lindevaldsen have maintained since being named as parties to this lawsuit, Jenkins’ purported next friend claims on behalf of Isabella fail as a matter of law, and this Court lacks subject matter jurisdiction to entertain them. (*See* Dkt. 240, Memorandum in Support of Motion to Dismiss, at 20-24, 76-77, 113-114).

B. Circumstances Are Irrelevant to the Fundamental Prerequisite of Standing to Bring Next-Friend Claims, Because Standing Evaporates Upon the Minor Reaching the Age of Majority.

Perhaps sensing that Isabella’s maturation to adulthood is indisputably fatal to her purported next-friend claims on behalf of Isabella, Jenkins retreats to a position that—despite clear and unequivocal precedent under Vermont law that she can no longer maintain such claims—the circumstances are different here (and only here) such that this Court should rewrite Vermont law to permit her to continue her claims against Liberty Counsel and Lindevaldsen. (MSJ Opp. at 9 (arguing that “the normal rule” should not apply to Jenkins despite the fact that Isabella unquestionably reached the age of majority)). This is pure nonsense.

Importantly, despite Jenkins’ request for this Court to remake Vermont law, Article III courts cannot rewrite binding state law. *See, e.g., Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (federal court may not “rewrite a state law”). As Liberty Counsel and Lindevaldsen pointed out (dkt. 495, MSJ at 4), the Vermont Supreme Court has recognized that the authority and standing of a next friend to bring claims on behalf of a minor “**automatically**” expires when that minor reaches the age of majority. *See, e.g., Slaughter v. Savage*, 89 Vt. 352 (1915) (“In August, 1904, Edmund became of age, and **the agency of the next friend ceased automatically.**” (emphasis added)); *Robinson v. Frost*, 54 Vt. 105, 110-11 (1881) (“[T]he father’s rights as natural guardian . . . ceased when the son arrived at full age . . .”). There is no caveat in that unequivocal precedent, regardless of the circumstances. **There is a bright-line rule: once a minor reaches the age of majority, the next friend does not have standing to bring or maintain that minor’s claims under Vermont law.**

No matter, Jenkins claims, because “nothing suggests Isabella’s circumstances have changed such that she could express a desire to continue or dismiss her claim in this suit but has

chosen to remain silent.” (MSJ Opp. at 9). But, Jenkins disregards that **Jenkins alone bears the burden to establish standing**. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envt’l Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (“it is the plaintiff’s burden to establish standing”); *Hedges v. Obama*, 724 F.3d 170, 188 2d Cir. 2013) (“‘The party invoking federal jurisdiction bears the burden of establishing standing.’”). See also *infra* Section II.B.

In fact, Jenkins’ “burden to demonstrate standing increases over the course of litigation,” *Cachillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011), and she “cannot rest on such mere allegations as would be appropriate at the pleading stage.” *Id.* (internal quotation marks omitted) (quoting *Lujan*, 504 U.S. at 561). The reason for this is simple: when a party brings a motion for summary judgment, “[t]he time has come . . . ‘to put up or shut up.’” *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000) (emphasis added). Thus, Jenkins’ contention that, though she has nothing to support her argument that she alone can represent Isabella’s purported interests in this matter, she should be excused from her inescapable burden is plainly incorrect as a matter of law. Rank speculation, baseless assertions without factual support, and the mere *ipse dixit* that Isabella would even want to bring the claims in this litigation, that she would seek to assert such claims against these Defendants, or that she would want Jenkins to serve as her next friend, are all plainly insufficient. The circumstances are thus irrelevant. Under the black letter law of standing, Jenkins has the burden to establish her standing to continue to press her claims on Isabella’s behalf, and she has not met and cannot meet that burden. Liberty Counsel and Lindevaldsen are entitled to judgment as a matter of law, and all of Jenkins’ purported claims as next friend of Isabella must be dismissed.

II. BECAUSE JENKINS' STANDING TO BRING CLAIMS ON BEHALF OF ISABELLA BY VIRTUE OF HER FORMER STATUS AS A MINOR HAS AUTOMATICALLY EXPIRED, JENKINS CAN ONLY MAINTAIN HER CLAIMS IF SHE CARRIES HER BURDEN TO DEMONSTRATE WITH EVIDENCE THAT ISABELLA LACKS ACCESS TO THE COURTS, WHICH SHE HAS NOT DONE AND CANNOT DO.

Because Jenkins automatically lost standing to bring her claims on behalf of Isabella by virtue of her status as a minor, *supra* Section I, her only refuge arises from *Whitmore v. Arkansas*, 495 U.S. 149 (1990), and its recognition that some next friends may bring claims on behalf of the real party if the purported next friend has standing to do so. Under *Whitmore*, Jenkins bears the burden to demonstrate **with actual, record evidence** that Isabella lacks access to the courts, and to demonstrate with actual evidence (beyond rank speculation) that she represents the best interests and wishes of Isabella. As a matter of black letter law, Jenkins utterly fails this test.

A. Jenkins Bears the Burden to Demonstrate That Isabella Lacks Access to This Court.

Jenkins correctly notes that the Supreme Court's decision in *Whitmore* (MSJ Opp. at 9) provides the requisite test for next friend standing, but ignores the seminal point of *Whitmore*. "Most important for present purposes, 'next friend' standing **is by no means granted automatically to whomever seeks to pursue an action on behalf of another.**" *Whitmore*, 495 U.S. at 163 (emphasis added). And, it is beyond cavil that "[t]he burden is on the 'next friend' **clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.**" *Id.* at 164 (emphasis added). *See also Ross ex rel. Dunham v. Lantz*, 408 F.3d 121, 123 (2d Cir. 2005) (same); *Bey v. N.Y.C. Dep't of Correction*, No. 13 Civ. 2573(PAE)(KNF), 2013 WL 5405491, *3 (S.D.N.Y. Sept. 20, 2013) (same); *Nelson v. Thompson*, No. 14-CV-3414 (KAM), 2014 WL 3882322, *2 (E.D.N.Y. Aug. 7, 2014) ("'next friend' must demonstrate that he or she has standing to act on the prisoner's behalf"); *Vassel v. Toulon*, No. 18-CV-2238 (KAM), 2018 WL 2766142, *1 (E.D.N.Y. June 8, 2018) (same).

B. Jenkins Has Not Met and Cannot Meet Her Burden to Demonstrate That Isabella Lacks Access to the Court, or That She Is a Captive Against Her Will.

Jenkins baldly contends that Isabella lacks access to the courts because she is being held against her will as a “captive,” and thus cannot bring her own claims. (MSJ Opp. at 5-6). This claim fails for two independent reasons: (1) Jenkins cannot speculate as to what Isabella’s “will” is, or that she is somehow a captive against her will, and (2) precedent makes it abundantly clear that Isabella does not lack access to the courts.

First, Jenkins is not permitted to speculate as to Isabella’s desires or wishes, now that Isabella is an adult. Indeed, as *Whitmore* makes clear, it is Jenkins’ burden “**clearly to establish**” the requisite elements of next-friend standing. 495 U.S. at 164. Rank speculation will simply not suffice to satisfy this burden. *See infra* Section II.C.

Second, as the authorities interpreting inaccessibility to courts make clear, Jenkins must demonstrate **with evidence in the record** that Isabella actually lacks access to the court she is wishing to access, and Jenkins must negate the more likely possibility that Isabella, as an adult, is merely intentionally choosing not appearing in the court because she has no interest in this case, or for other reasons. Indeed, “[t]his Court thus need not accept plaintiff’s bald assertion that his son lacks access to the courts.” *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 17 n.3 (D.D.C. 2010) (emphasis added). *Whitmore*’s requirement that Jenkins demonstrate that Isabella lacks access to this Court compels Jenkins to show that her inaccessibility contentions “have some ‘support in the record,’” and “in the context of ‘next friend’ standing, courts have refused—even at the pleading stage—to accept unsubstantiated allegations that the real party in interest . . . ‘lacks access to the courts.’” *Id.* *See also Idris v. Obama*, 667 F. Supp. 2d 25, 29 (D.D.C. 2009) (noting that “mere speculation that petitioner was mistreated and suffers from debilitating effects from his confinement at Guantanamo Bay is insufficient to demonstrate that petitioner is ‘unable to litigate

his own cause due to . . . lack of access to court”); *Ahmed v. Bush*, No. 05-665 (RWR), 2005 WL 6066070, *1 (D.D.C. May 25, 2005) (“[L]ack of access to this court cannot be presumed, but must be established.”).

Jenkins points to *Ali Jaber v. United States*, 155 F. Supp. 3d 70 (D.D.C. 2016) for the proposition that Isabella lacks access to the courts. (MSJ Opp. at 5-6). *Ali Jaber* actually supports the opposite conclusion, and Jenkins ignores the salient point that is utterly lacking here. In *Ali Jaber*, the court found that the real parties actually lacked access to the court because there was a civil war raging in Yemen, travel outside of Yemen was dangerous, they did not have the money to travel to the United States, telephone communication was difficult, and internet access was nearly impossible. 155 F. Supp 3d at 76. And, contrary to here, the assertions were not based on speculation. In fact, **most importantly to the Court, the actual parties submitted sworn testimony as to each of these facts.** *Id.* (noting that the actual plaintiffs—real parties—submitted “sworn statements that their financial hardships and the ongoing civil war in Yemen make it impossible for them to travel to the United States”). The purported next friend did not merely speculate as to the inaccessibility of the courts to the actual parties, but had spoken with them, had received sworn testimony from them, and was aware of their actual situation and desires for the litigation. *Id.* **Thus, the parties themselves testified that they would like to be able to bring their own claims, that they were unable to do so, and that they desired for the next friend to pursue them on their behalf.** *Id.*

Here, by contrast, Jenkins brings to this Court nothing but rank speculation that Isabella does not have access to the Court. Indeed, Jenkins merely contends—without evidence or record support whatsoever—that Isabella “remains a captive” against her will so she cannot access the courts. (MSJ Opp. at 7). But, Jenkins has no evidence suggesting that Isabella does not desire to

remain where she is, that she cannot return to the United States, that she lacks funds to return to the United States, that she lacks the ability to contact legal counsel or relatives concerning her desire to access the courts, or that she has no ability to communicate via the internet, telephone, or mail correspondence. This will not suffice. As Jenkins' own authorities reference, "the Court need not accept plaintiff's 'bald assertion' of inaccessibility." *Ali Jaber*, 155 F. Supp. 3d at 76 (quoting *Al Aulqi*, 727 F. Supp. 2d at 17 n.3).

Contrary to Jenkins' assertions (MSJ Opp. at 7), *Al-Aulqi* is the more salient precedent on this matter. In *Al-Aulqi*, the court noted that the real party on whose behalf the father sought to bring claims as next friend was an enemy combatant, whom the purported next friend claimed was inaccessible because he was "'in hiding under threat of death'" and "any attempt to access counsel or the courts would 'expos[e] him[] to possible attack'" by the United States. 727 F. Supp. 2d at 17 (modifications in original). The court noted that Al-Aulqi did not lack access to the courts because "there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights." *Id.* As the court said, "All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves," *id.* at 18, and the fact that the real party "could be arrested—and imprisoned—if he were to come out of hiding to seek judicial relief in U.S. courts," *id.*, was not a valid reason to find that he lacked access to the courts.

If a declared enemy combatant and terrorist is found to have access to the courts despite the fact that he would be required to surrender and risk arrest and detainment, surely one who faces no similar repercussions has access to the courts where she risks nothing by availing herself of this Court, should she even desire to do so. Jenkins contends that "Isabella's inaccessibility is not by choice." (MSJ Opp. at 7). Yet, it is Jenkins' burden to produce **actual evidence** of Isabella's

alleged involuntary lack of access to the courts. *Ross ex rel. Smyth v. Lantz*, 396 F.3d 512, 514 (2d Cir. 2005) (next friend must show “meaningful evidence” to support the conclusion that the real party cannot access the courts or cannot litigate his own claims). Jenkins’ failure to present actual evidence is fatal to her next-friend standing, and Liberty Counsel and Lindevaldsen are entitled to judgment as a matter of law.

C. Jenkins Has Not Satisfied and Cannot Satisfy Her Burden to Demonstrate That She Has a Special Relationship With Isabella, That She Even Knows Isabella’s Desires Related to This Litigation, or What Is in Isabella’s Best Interest.

1. A purported familial relationship alone is not sufficient to establish a special relationship.

Jenkins rests her special relationship argument on the fact that she is allegedly Isabella’s mother. (MSJ Opp. at 9). But a purported familial relationship is not alone sufficient to justify next friend status. Indeed, as numerous courts have held, the sole fact of being a mother or family member to the real party in interest does not automatically satisfy the next friend standing requirements. *See, e.g., Nelson*, 2014 WL 3882322, at *3 (real party’s mother did not satisfy the requirements of next friend standing); *Ross ex rel. Dunham*, 408 F.3d at 121-24 (sister does not have next friend standing when she cannot satisfy all of the requirements of *Whitmore*); *Al-Aulaqi*, 727 F. Supp. 2d at 20 (father does not have special relationship sufficient to satisfy *Whitmore* when he cannot demonstrate that he knows what the real party’s wishes are). Here, Jenkins cannot simply assert that she is Isabella’s “mother,” and obtain standing to bring claims as a next-friend, when such status has evaporated.

2. Jenkins has not demonstrated and cannot demonstrate that she knows Isabella’s wishes or has the ability to represent her best interests.

Moreover, Jenkins makes much of the notion that Isabella is being “held against her will” and that she alone can represent the best interest of Isabella. (MSJ Opp. at 8). This bald assertion

is plainly insufficient to satisfy *Whitmore*'s next friend standing requirements. A purported next friend does not satisfy the burden to demonstrate standing where—as here—she can present no evidence concerning the real party's actual intentions, wishes or desires relating to the lawsuit or where she cannot demonstrate why pursuing such action remains in the best interest of the real party. *See, e.g., Bey*, 2013 WL 5405491, *3 (“Absent any evidence showing Ben Bey's intentions or his wish to apply for the writ, or any reasons why it would be in his best interest to do so, the Court may not speculate about Ben Bey's intentions . . .”). Indeed, “[u]nder the second prong of *Whitmore*, a purported ‘next friend’ may not simply speculate as to the best interests of the party on whose behalf he seeks to litigate.” *Al-Aulaqi*, 727 F. Supp. 2d at 20 (emphasis added); *id.* at *21 (“[P]laintiff cannot base his claim to ‘next friend’ standing on his son's mere failure to expressly disavow this suit.”) (emphasis added); *see also Fenstermaker v. Bush*, No. 05 Civ. 7468 (RMB), 2007 WL 1705068, *6 (S.D.N.Y. June 12, 2007) (purported next friend may not make “‘unsubstantiated assumptions’” about the best interests of the real party in interest); *Does v. Bush*, No. Civ. A 05 313 CKK, 2006 WL 3096685, *5 (D.D.C. Oct. 31, 2006) (purported next friend cannot satisfy second prong of *Whitmore* when claims as to best interest of the real party are “based only on speculation” and not actual evidence as to the intentions, desires, or wishes for the next friend to pursue his claims); *Idris*, 667 F. Supp. 2d at 29 (“because [the purported next friend] has never met with petitioner since his confinement, counsel cannot be certain that [the next friend] represents petitioner's best interests,” because “mere speculation” is plainly insufficient). Jenkins seemingly contends that her purported status as Isabella's mother permits a presumption that she represents Isabella's interest in this matter. But, a next friend's “dedication to advocating for [the real party's] interests **must be established, not merely presumed.**” *Ahmed*, 2005 WL 6066070, at *1 (emphasis added).

Here, Jenkins merely asserts that she “must be allowed to continue as Isabella’s next friend to ensure Isabella’s interests are protected.” (MSJ Opp. at 9). She presents no evidence concerning Isabella’s actual desires, what Isabella’s actual interests in this litigation are, whether Isabella even desires Jenkins to act as her next friend, and whether Isabella has any interest in pursuing an action against any of the Defendants, **including her own mother**. Indeed, Jenkins has not and cannot present any evidence as to what Isabella’s best interests are in this litigation. These shortcomings are fatal to Jenkins’ claims of next friend status. *See Fenstermaker*, 2007 WL 1705068, at *6 (there may be good reasons beyond the purported next friend’s desires that the real party has no interest in pursuing the claims); *Does*, 2006 WL 3096685, at *5 (*Whitmore* cannot be satisfied when the court has no evidence to demonstrate that the real party “want[s] legal representation as a general matter or more specifically by [the purported next friend] in the instant matter”). Put simply, because Jenkins has not presented and cannot present actual evidence that she knows what the wishes or best interest of Isabella (now an adult) are, or that she has any knowledge that Isabella even desires for Jenkins to serve as her next friend. Without such evidence, Jenkins has no standing to maintain her claims in this Court.

III. THIS COURT SHOULD AWARD LIBERTY COUNSEL AND LINDEVALDSEN THE REQUESTED SANCTIONS BECAUSE JENKINS CONTINUES TO WILFULLY PRESS CLAIMS SHE KNOWS SHE HAS NO STANDING TO MAINTAIN.

A. Liberty Counsel and Lindevaldsen Did Not Violate the 21-Day Procedural Requirements Because Jenkins Made It Absolutely Clear She Was Not Going to Withdraw Her Claims.

As the Second Circuit has indicated, strict compliance with the 21-day safe harbor provision of Rule 11 may be excused when it is abundantly clear the party against whom sanctions are sought explicitly confirms that it has no intention of withdrawing the allegedly frivolous claims or pleadings. *See Perpetual Securities, Inc. v. Tang*, 290 F.3d 132, 142 (2d Cir. 2002) (strict

compliance with the 21-day safe harbor requirement may be excused when “there is no indication that [petitioner] would have corrected or amended its frivolous arguments even had it been given the opportunity”). Despite the clear import of this binding Second Circuit authority, Jenkins nevertheless maintains that this Court should be “loath” to “relax” the 21-day requirement. (Sanctions Opp. at 14). But, that is not the way binding precedent works. Even if this Court were to view the 21-day requirement as a strict procedural bar—as Jenkins requests—*Perpetual Securities* mandates that it is excused where, as here, Jenkins made it unequivocally clear she had no intention of withdrawing her claims. See *Malvar Egerique v. Chowaiki*, No. 19 Civ. 3110 (KPF), 2020 WL 1974228, *29 (S.D.N.Y. Apr. 24, 2020) (“Courts have interpreted *Perpetual Securities* to find that the failure to follow the safe harbor provisions perfectly may be excused where there is no indication that a party would have corrected or amended its frivolous arguments even had it been given the opportunity.” (internal quotation marks omitted)); *Watkins v. Smith*, No. 12 Civ. 4635 (DLC), 2013 WL 655085, *6 (S.D.N.Y. Feb. 22, 2013) (“[T]he failure to follow the safe harbor provisions perfectly may be excused where there is ‘no indication that [a party] would have corrected or amended its frivolous arguments even had it been given the opportunity.’” (modification in original) (quoting *Perpetual Securities*, 290 F.3d at 142)); *Sang Lan v. Time Warner, Inc.*, No. 11 Civ. 2870(AT)(JCF), 2015 WL 4469838, *1 (S.D.N.Y. July 13, 2015) (“failure to comply with the letter of the safe harbor provisions may be excused where there is ‘no indication that [a party] would have corrected or amended [the challenged submissions] even had it been given the opportunity.’” (modifications in original) (quoting *Perpetual Securities*, 290 F.3d at 142)).

Here, Jenkins made it abundantly clear—**after receiving the motion**—that she had (and still has) no intention of withdrawing her claims as purported next-friend of Isabella. (Dkt 512-1,

at 2). In fact, even now, Jenkins admits that she “unambiguously inform[ed]” Liberty Counsel and Lindevaldsen that she had no intention of withdrawing her claims. (Sanctions Opp. at 13). She was clearly served with notice of the forthcoming motion for sanctions, made aware of the grounds upon which such motion would be made, and yet she unequivocally stated that she would not withdraw her groundless next friend claims. Her refusal was unequivocal, explicit, and in writing. (*Id.*). The notion that—after receiving proper notice and unequivocally refusing to withdraw her motion—she would have had a Damascene conversion in “nine hours and twenty-one minutes” prior to midnight on day twenty-one (Sanction Opp. at 13) is absurd. She refused to withdraw her claims and indicated that she had no intention of ever doing so.

Notably, after Jenkins unequivocally indicated, in writing, her refusal to withdraw her groundless claims on day twenty-one, Defendants’ counsel sent yet another email confirmation, letting her counsel know that, in light of the firm refusal, Defendant “will update the Motion for Sanctions with this new information, attach this correspondence, **and file shortly.**” (Mihet-Clemons email, May 7, 2020, attached hereto as **Exhibit A** (emphasis added)). There was not a peep or protestation from Jenkins or her counsel that Defendants should wait out the rest of day, just in case they change her mind. (*Id.*)

Moreover, Jenkins’ contention that she might have seen the light in the last nine hours of the last day of the safe harbor is also belied by the fact that—to **this day**—Jenkins maintains and is adamantly arguing that she has standing to assert her frivolous claims as next-friend of a former minor who is now an adult, and whom she has not consulted. (*See* MSJ Opp. at 4-5). Indeed, when Defendants received Jenkins’ MSJ Opposition, and saw Jenkins’ argument regarding the safe-harbor provision, Defendants sent Jenkins the following communication, so as to leave no doubt that Jenkins never had any intent to withdraw her groundless claims:

We understand from Plaintiff's filing of these documents that **Plaintiff has no intention, even today, to voluntarily withdraw or abandon her next-friend claims on behalf of Isabella.** Based upon that understanding, we are beginning tomorrow, in earnest, to prepare our further pleadings, and will incur substantial attorney time in doing so, for which we will seek appropriate sanctions. **If we have somehow misunderstood Plaintiff's intentions, and if Plaintiff is willing to voluntarily withdraw her next-friend claims now, please advise immediately so that we do not have to incur this additional time.**

(Mihet-Soto email, May 21, 2020, attached hereto as **Exhibit B** (emphasis added)). Of course, Jenkins has never responded, and has not withdrawn her groundless claims even as of today, requiring Defendants to incur further needless time and expenses to obtain dismissal.

In sum, Jenkins' pretextual 21-day safe harbor argument is a transparent last-ditch effort to avoid accountability for her sanctionable conduct in maintaining groundless claims, and is just as dishonest and groundless as the claims themselves. This Court should not countenance it.

B. Jenkins' Argument That Liberty Counsel and Lindevaldsen Cannot Allege a Rule 11 Violation Because They Can Point to No Paper in Which Jenkins' Continues Her Frivolous Claims Is Absurd.

Jenkins contends that Liberty Counsel and Lindevaldsen cannot point to any pleading in which Jenkins maintains her frivolous next-friend claims on behalf of Isabella. (Sanctions Opp. at 11-12). This contention is remarkable given that—just three days prior to filing her opposition to Liberty Counsel and Lindevaldsen's motion for sanctions—Jenkins submitted to this Court a summary judgment opposition brief adamantly contending that she maintains her standing to bring claims on behalf of Isabella, even while she knows that Isabella is now an adult and knows that Jenkins hasn't communicated with Isabella to ascertain her wishes and desires for this litigation. (MSJ Opp. at 4-5).

Moreover, Rule 11 mandates that Jenkins only bring claims that are "warranted by existing law," and that "the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(2)–(3). That Jenkins may have had a basis to assert next friend claims on behalf of Isabella at the time she

initiated her complaint in 2012 does not excuse her from continuing to monitor the factual contentions for her claims **at this time** and to withdraw claims that are no longer warranted by existing law or that have now lost any factual support. *See, e.g., Galin v. Hamada*, 283 F. Supp. 3d 189, 203 (S.D.N.Y. 2017) (counsel has a continuing obligation under Rule 11 to withdraw claims which “by that point . . . were ‘utterly lacking in support’” (quoting *StreetEasy, Inc. v. Chertok*, 752 F.3d 298, 307 (2d Cir. 2014)); *Carlton Grp. v. Tobin*, No. 02-CV-5065 (SAS), 2003 WL 21782650, *6 (S.D.N.Y. July 31, 2003) (holding that sanctions are appropriate under Rule 11 when an attorney or party refuses to withdraw a claim “‘after learning that [the claim] was groundless’”).

C. Rule 11 Sanctions Are Warranted Because It Is Patently Clear That Jenkins’ Purported Next-Friend Claims on Behalf of Isabella Are Without Merit, as She Has No Standing to Bring Them Under Binding Law.

As demonstrated *supra* Section I, Jenkins’ claims to next-friend standing of behalf of Isabella evaporated when Isabella reached the age of 18. *See also Schuppin v. Unification Church*, 435 F. Supp. 603, 605 (D. Vt. 1977) (holding that next-friend plaintiffs have no standing to litigate claims on behalf of a child who reaches the age of majority). Moreover, Jenkins has not and cannot meet her burden to demonstrate **with actual evidence** that Isabella lacks access to the courts, that she has any desire to pursue the purported claims against Defendants, that she has any desire for Jenkins to serve as her next friend, or that she has any interest in the claims presented to this Court at all. Jenkins knows all of this, yet she refuses to abandon her groundless next friend claims, pressing them instead to needlessly increase Defendants’ litigation burdens and waste the resources of the parties and the Court. Jenkins’ next-friend claims are utterly and patently frivolous.

CONCLUSION

Because Jenkins unquestionably has no standing to maintain her purported next friend claims on behalf of Isabella who is now an adult, has no evidence to support her claims that Isabella involuntarily lacks access to this Court, has no evidence that Isabella has any desire to pursue Jenkins' purported next friend claims in this Court or against these Defendants, and has no evidence to prove that Jenkins can represent the best interest of an adult whom she has not spoken with concerning these claims, Jenkins' next friend claims are not just lacking in merit, but outright frivolous. Liberty Counsel and Lindevaldsen are entitled to judgment as a matter of law as to all claims Jenkins purports to bring as purported next friend of Isabella.

Further, because Jenkins has refused to withdraw her patently frivolous purported claims on behalf of Isabella and continues to maintain her groundless position despite knowingly lacking any basis to do so, Liberty Counsel and Lindevaldsen's motion for sanctions should be granted. Pursuant to Fed. R. Civ. P. 11(c)(1) and (4), the Court should enter an appropriate sanction against Jenkins, her counsel, and their respective firms, jointly and severally, in a monetary amount that "suffices to deter repetition of the conduct or comparable conduct by others similarly situated," and includes the reasonable fees and costs expended to (a) bring about this motion, and (b) obtain dismissal of the offending claims through summary judgment or otherwise (which amounts can be proven by Declaration or other competent evidence following the Court's determination).

Respectfully submitted,

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/s/ Daniel J. Schmid
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*Attorneys for Defendants Liberty Counsel, Inc.
And Rena M. Lindevaldsen*

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2020, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notice system.

/s/ Daniel J. Schmid

Daniel J. Schmid

From: [Horatio Mihet](#)
To: [Tyler Clemons](#); [Diego Soto](#); [Maya Rajaratnam](#); [Scott McCoy](#); [flangrock](#); [Sarah Star](#)
Cc: [Brooks G. McArthur](#); [Michael J. Tierney](#); ["nc.smith@myfairpoint.net"](#); [Adam Hochschild](#); [Daniel Schmid](#); [Roger Gannam](#); [Anthony Duprey](#)
Subject: RE: Rule 11 Motion for Sanctions Against Jenkins and Counsel
Date: Thursday, May 7, 2020 2:15:00 PM

Tyler:

Thank you for your response. Because you have not identified any legal or factual grounds upon which Plaintiff could continue to maintain her purported next friend claims on behalf of Isabella, who is now an adult, we remain firm in our belief that no such grounds exist. And, we have 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.

We will update the Motion for Sanctions with this new information, attach this correspondence, and file shortly.

Regards,

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs and
Chief Litigation Counsel*

Liberty Counsel

PO Box 540774
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From: Tyler Clemons <Tyler.Clemons@splcenter.org>
Sent: Thursday, May 7, 2020 12:00 PM
To: Horatio Mihet <hmihet@lc.org>; Diego Soto <Diego.Soto@splcenter.org>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Scott McCoy <Scott.McCoy@splcenter.org>; flangrock <flangrock@langrock.com>; Sarah Star <sarahstar.esq@gmail.com>
Cc: Brooks G. McArthur <bmcArthur@jarvismcarthur.com>; Michael J. Tierney <mtierney@wadleighlaw.com>; 'nc.smith@myfairpoint.net' <nc.smith@myfairpoint.net>; Adam Hochschild <adam@hochschildlaw.com>; Daniel Schmid <daniel@lc.org>; Roger Gannam <rgannam@lc.org>; Anthony Duprey <anthony@ndp-law.com>
Subject: RE: Rule 11 Motion for Sanctions Against Jenkins and Counsel

Good morning Harry,

Ms. Jenkins will not at this time withdraw her claim as next friend of Isabella. She has good-faith reasons for declining to do so.

First, Liberty Counsel and Ms. Lindevaldsen base their noticed Rule 11 motion on the same argument they make in their summary-judgment motion challenging the Court's subject-matter jurisdiction on Isabella's claim. Under Local Rule 7(a)(3)(A), Ms. Jenkins has 30 days to respond to the merits of that challenge. She is considering all good-faith options and will on May 18 respond accordingly to the summary-judgment motion.

Second, even assuming, without admitting, that Liberty Counsel and Ms. Lindevaldsen are correct in their summary-judgment motion, neither Ms. Jenkins nor her counsel has violated Rule 11 by declining to withdraw Isabella's claim at this time. Since Liberty Counsel and Ms. Lindevaldsen filed their summary-judgment motion on Isabella's 18th birthday, we have not "present[ed] 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 Isabella's claim. If anything, we have "appropriately corrected," Fed. R. Civ. P. 11(c)(2), the alleged issue by not advancing Isabella's claim in any paper presented to the court while the summary-judgment motion is pending.

We of course preserve, and do not waive, all other arguments against Liberty Counsel and Ms. Lindevaldsen's Rule 11 motion should they still decide to file it.

Best,



Tyler Clemons she/her/hers
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From: Horatio Mihet [<mailto:hmihet@lc.org>]
Sent: Thursday, April 16, 2020 4:01 PM
To: Diego Soto; Tyler Clemons; Maya Rajaratnam; Scott McCoy; flangrock; Sarah Star
Cc: Brooks G. McArthur; Michael J. Tierney; 'nc.smith@myfairpoint.net'; Adam Hochschild; Daniel Schmid; Roger Gannam; Anthony Duprey
Subject: Rule 11 Motion for Sanctions Against Jenkins and Counsel

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Plaintiff's Counsel:

Because Isabella Miller has reached the age of majority, we believe that any further attempts by Janet Jenkins to maintain next friend claims on Isabella's behalf are frivolous. Demand is hereby made that you voluntarily withdraw or dismiss all such claims.

Pursuant to Fed. R. Civ. P. 11(c)(2), please find attached a Motion for Sanctions we will file with the Court on the morning of May 7, 2020, unless Jenkins' next friend claims are voluntarily withdrawn or dismissed before then.

HGM

Horatio G. Mihet, Esq.*
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From: [Horatio Mihet](#)
To: [Diego Soto](#); [Brooks McArthur](#); [Anthony Duprey](#); [Daniel Schmid](#); [Roger Gannam](#); [Adam Hochschild](#); [Norman Smith](#); [Richard Boyer](#); [Toddy Ferguson](#); [Michael Tierney](#)
Cc: [Beth Littrell](#); [Claudia Huerta](#); [Emily Joselson](#); [flangrock](#); [Jessica Stone](#); [Maya Rajaratnam](#); [Sarah Star](#); [Scott McCoy](#); [Tyler Clemons](#)
Subject: RE: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Responses in Opposition
Date: Thursday, May 21, 2020 6:13:00 PM

Thanks Diego. We understand from Plaintiff's filing of these documents that Plaintiff has no intention, even today, to voluntarily withdraw or abandon her next-friend claims on behalf of Isabella. Based upon that understanding, we are beginning tomorrow, in earnest, to prepare our further pleadings, and will incur substantial attorney time in doing so, for which we will seek appropriate sanctions. If we have somehow misunderstood Plaintiff's intentions, and if Plaintiff is willing to voluntarily withdraw her next-friend claims now, please advise immediately so that we do not have to incur this additional time.

Kind Regards,

Horatio G. Mihet, Esq.*
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From: Diego Soto <Diego.Soto@splcenter.org>
Sent: Thursday, May 21, 2020 6:04 PM
To: Brooks McArthur <bmcArthur@jarvismcarthur.com>; Anthony Duprey <anthony@ndp-law.com>; Daniel Schmid <daniel@lc.org>; Horatio Mihet <hmihet@lc.org>; Roger Gannam <rgannam@lc.org>; Adam Hochschild <adam@hochschildlaw.com>; Norman Smith <norman@normansmithlaw.com>; Richard Boyer <rickboyerlaw@gmail.com>; Toddy Ferguson <cs.fergie@myfairpoint.net>; Michael Tierney <mtierney@wadleighlaw.com>
Cc: Beth Littrell <beth.littrell@splcenter.org>; Claudia Huerta <claudia.huerta@splcenter.org>; Diego Soto <Diego.Soto@splcenter.org>; Emily Joselson <ejoselson@langrock.com>; flangrock <flangrock@langrock.com>; Jessica Stone <jessica.stone@splcenter.org>; Maya Rajaratnam <maya.rajaratnam@splcenter.org>; Sarah Star <sarahstar.esq@gmail.com>; Scott McCoy <Scott.McCoy@splcenter.org>; Tyler Clemons <Tyler.Clemons@splcenter.org>
Subject: Jenkins et al. v. Miller et al., No. 2:12-cv-184 (D. Vt.) - Responses in Opposition

Counsel,

Please find attached courtesy copies of [519] Plaintiff Janet Jenkins's response in opposition to [495] the Liberty Counsel Defendants' motion for partial summary judgment, filed Monday, and [521] her response in opposition to [512] their motion for sanctions, filed today.

Sincerely,
Diego



Diego Soto he/him/his
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