

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

JANET JENKINS,

Plaintiff,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANT TIMOTHY D.
MILLER'S MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL**

Scott D. McCoy
Southern Poverty Law Center
P.O. Box 10788
Tallahassee, Florida 32302
Phone: (850) 521-3042
Fax: (850) 521-3001
Email: scott.mccoy@splcenter.org

Tyler Clemons
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Phone: (504) 526-1530
Fax: (504) 486-8947
Email: tyler.clemons@splcenter.org

Diego A. Soto
Maya G. Rajaratnam
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: (334) 956-8200
Fax: (334) 956-8481
Email: diego.soto@splcenter.org
Email: maya.rajaratnam@splcenter.org

Frank H. Langrock
Emily J. Joselson
Langrock Sperry & Wool, LLP
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, Vermont 05753-0351
Phone: (802) 388-6356
Fax: (802) 388-6149
Email: flangrock@langrock.com
Email: ejoselson@langrock.com

Sarah Star
Sarah Star, PC
P.O. Box 106
Middlebury, Vermont 05753
Phone: (802) 385-1023
Email: srs@sarahstarlaw.com

Jessica L. Stone
Southern Poverty Law Center
P.O. Box 1287
Decatur, Georgia 30031
Phone: (404) 221-5837
Fax: (404) 221-5857
Email: jessica.stone@splcenter.org

Counsel for Plaintiff Janet Jenkins

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Defendant's reply in support of his motion to disqualify Plaintiff's counsel further illustrates how he is acting solely for tactical reasons. In that reply, he abandons his original argument applying Rule 1.9(a) of the Vermont Rules of Professional Conduct, which governs conflicts of interest in successive representations, and substitutes the new argument that rules governing conflicts of interest in *concurrent* representations apply because the supposed conflict he concocts arose while Isabella was still counsel's client. Defendant makes this new, forfeited argument with no sense of irony, given that he and his co-defendants repeatedly misrepresented the clear text of Isabella's affidavits to insist that she had fired counsel immediately, so counsel no longer represented her and could not claim to still represent her. They would not allow counsel even to sign a voluntary dismissal for Isabella—the very relief they have wanted all along.

This new argument not only clearly is forfeited—because it is made for the first time in a reply brief—but it also is just as wrong as Defendant's original argument. As with conflicts in successive representations, conflicts in concurrent representations require direct adversity—that is, head-to-head opposition. But Plaintiff has never sued Isabella, neither when they were jointly represented in this case nor after Isabella voluntarily dismissed her claims. Defendant's motion tried and failed to create the required direct adversity of legal interests out of Isabella's affidavits and his misinterpretations of those affidavits. His reply tries that again and tacks on a few more inadequate arguments, including speculation about a supposed potential conflict of interest that would arise if Plaintiff were forced to cross-examine Isabella. At bottom, neither Isabella's affidavits nor her voluntary dismissal of her own claims created direct adversity between Plaintiff and Isabella that would justify disqualification of Plaintiff's counsel.

ARGUMENT

I. Defendant’s motion is purely tactical and raises new, forfeited arguments.

“Motions to disqualify opposing counsel ‘are subject to particularly strict scrutiny’ because of their ‘potential for abuse as a tactical device.’” *Muniz v. Re Spec Corp.*, 230 F. Supp. 3d 147, 152 (S.D.N.Y. 2017) (quoting *Scantek Med., Inc. v. Sabella*, 693 F. Supp. 2d 235, 238 (S.D.N.Y. 2008)); accord *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791–92 (2d Cir. 1983) (“[D]isqualification motions ‘are often interposed for tactical reasons.’” (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979))). “[T]he party seeking disqualification must carry a ‘heavy burden,’ and must meet a ‘high standard of proof’ before a lawyer is disqualified.” *Clark v. Bank of N.Y.*, 801 F. Supp. 1182, 1197 (S.D.N.Y. 1992) (first quoting *Vegetable Kingdom, Inc. v. Katzen*, 653 F. Supp. 917, 922 (N.D.N.Y. 1987); then quoting *Evans*, 715 F.2d at 791). “The motion will be granted only if the facts present a real risk that the trial will be tainted.” *Muniz*, 230 F. Supp. 3d at 152 (S.D.N.Y. 2017) (quoting *Revise Clothing, Inc. v. Joe’s Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 388 (S.D.N.Y. 2010)); accord *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 241 (2d Cir. 2016) (“[D]isqualification is called for only where ‘an attorney’s conduct tends to taint the underlying trial.’” (quoting *Nyquist*, 590 F.2d at 1246)).

Defendant rushed to use two, convenient affidavits from Isabella to his advantage, despite knowing that Plaintiff had raised then-unanswered concerns that they were unethically obtained by a conflicted attorney. *See* Resp. 9. In those affidavits, Isabella took two actions: *first*, she “order[ed] and direct[ed] [counsel] to file all papers necessary to have [her] removed as a Plaintiff in this case,” Isabella Aff. ¶ 17 (Jan. 25, 2021), ECF 636-1, and *second*, she “fire[d], terminate[d], and discharge[d]” counsel “[o]nce [she] [is] dismissed from this action,” *id.* ¶ 18.

Originally, Defendant and his co-defendants seemed to take the position that counsel still represented Isabella and needed to comply with Isabella’s wishes in her affidavits. *See, e.g.*,

Emails with Defense Counsel 1 (Jan. 29, 2021), ECF 635-1 (“Isabella has ... demanded that her previous attorneys (Diego, Frank, et al) stop representing her in this case”); Liberty Counsel Defs.’ Notice of Rule 11 Mot. *1 (Jan. 29, 2021), ECF 635-3 (“Isabella Miller instruct[ed] you to abandon Janet Jenkins’ purported claims on her behalf”).

But then, just three days later, Defendant shifted position in his motion. He selectively quoted from Isabella’s affidavits to make it seem as if Isabella had fired counsel immediately and not, as the affidavits make clear, contingent on her dismissal from this case. *See* Resp. at 9–10. (She would not be dismissed for another twenty-two days. ECF 650.) He also made it seem as if Isabella generally objected to counsel continuing to represent Plaintiff, and not, as the affidavits again make clear, because she incorrectly believed counsel had access to her personal information. Resp. 10. His co-defendants followed suit. *See, e.g.*, Emails Between Counsel *7 (Feb. 4, 2021), ECF 638-2 (“[O]ne thing is certain: Plaintiff’s counsel does not and cannot represent Isabella. There is no uncertainty about that. Any attempts to represent Isabella, or to maintain her purported claims, against her clearly expressed wishes are unethical and improper.”); *id.* at *5 (Feb. 5, 2021); *id.* at *3 (Feb. 6, 2021) (“None of Jenkins’ current counsel can sign this release for Isabella. She has made it clear that you all are fired. You do not and cannot represent her.”).

With Isabella now supposedly counsel’s former client, Defendant cited only Vermont’s ethical rule regarding conflicts with former clients, Mot. ¶ 7, seemingly arguing that successive-representation principles apply. Plaintiff disagreed that that rule requires disqualification because that rule requires material adversity between Plaintiff and Isabella, of which there is none, Resp. 11–15. She further argued that, even if there is material adversity, their joint representation and counsel’s continued representation of Plaintiff prevent disqualification under *Allegaert v. Perot*,

565 F.2d 246 (2d Cir. 1977), *id.* at 15–19, and in any event, Defendant fails the successive-representation test on its first prong because he is not counsel’s former client, *id.* at 19.¹

Despite his and his co-defendants’ newfound, adamant belief that counsel no longer represented Isabella, Defendant, in his reply, switches back to his original position that counsel continued to represent Isabella when they received her affidavits. He abandons his original argument that *successive*-representation principles apply, ignores Plaintiff’s *Allegaert* argument, and now argues that *concurrent*-representation principles apply, Reply 3–4, 8, because the supposed conflict—Isabella’s opposition, in her affidavits, to her claims—arose “while counsel was still concurrently representing both Janet and Isabella as parties in this case,” *id.* at 2.

Defendant clearly forfeited this new argument by failing to make it in his opening brief. *See, e.g., Hirschmann v. Green Mountain Glass, LLC*, No. 5:15-cv-34, 2018 WL 4896015, at *1 n.2 (D. Vt. Oct. 9, 2018) (Crawford, C.J.) (“It is well settled that courts should not consider arguments first raised in a party’s reply brief which afford no opportunity for response from the opposing party.” (quoting *Haywin Textile Prods., Inc. v. Int’l Fin. Inv.*, 137 F. Supp. 2d 431, 434 (S.D.N.Y. 2001))); *accord Klinker v. Furdiga*, 22 F. Supp. 3d 366, 367 n.1 (D. Vt. 2014) (Reiss, C.J.); *Snider v. Colvin*, No. 2:14-cv-99, 2015 WL 4897871, at *7 n.3 (D. Vt. Aug. 17, 2015) (Conroy, J.). Therefore, the Court should consider only the argument he made in his motion that Rule 1.9(a) supposedly prohibits counsel from continuing to represent Plaintiff—which he practically abandons in reply. But if the Court, in its discretion, considers this new argument, it

¹ Contrary to Defendant’s assertion, Reply 9, this is not an argument that Defendant does not have standing to move for disqualification but a failure of a requirement of the substantive test. *See* Resp. 19 (citing *SMI Indus. Canada Ltd. v. Caelter Indus., Inc.*, 586 F. Supp. 808, 815–16 (N.D.N.Y. 1984)).

should strictly scrutinize it, given that Defendant’s flip-flopping further illustrates he is merely acting tactically to deprive Plaintiff of her chosen counsel.

II. Even if the Court considers Defendant’s new, forfeited arguments, disqualification is not warranted.

A. Plaintiff and Isabella are not directly adverse.

Even if the concurrent-representation test now cited by Defendant applies, disqualification is not required because Plaintiff and Isabella are not directly adverse. Under that test, Defendant says, counsel must “show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation,” Reply at 3 (quoting *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005)).

The concurrent-representation test, like the successive-representation test, still requires direct adversity between Plaintiff and Isabella, which does not exist. *See* Vt. R. Prof. Conduct 1.7(a) (“A concurrent conflict of interest exists if ... the representation of one client will be directly adverse to another client.”); *Hempstead Video, Inc.*, 409 F.3d at 133 (“In cases of concurrent representation, ... it is ‘prima facie improper’ for an attorney to simultaneously represent a client and another party with interests *directly* adverse to that client.” (emphasis added)). Direct adversity requires head-to-head opposition in a legal matter. *See, e.g.*, Resp. 11 (citing Vt. R. Prof. Conduct 1.7 cmt. 6; Vt. R. Prof. Conduct 1.7 cmt. 7; Vt. R. Prof. Conduct 1.9 cmt. 1). Direct adversity can be either actual or apparent, but it still must be direct. *See, e.g.*, *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (holding apparent conflict existed where an attorney was partner at two firms and one firm represented one client in suing the other firm’s client in unrelated litigation). Indeed, every case cited by Defendant for the concurrent-representation test involves direct adversity—an action against a current client on behalf of another current client. *See GSI Commerce Sols., Inc. v. BabyCenter, L.L.C.*, 618 F.3d

204 (2d Cir. 2010) (counsel for plaintiff is simultaneously counsel for defendant’s parent company); *Hempstead Video, Inc.*, 409 F.3d 127 (attorney for plaintiff became associated with defendant’s counsel’s firm); *Cinema 5, Ltd.*, 528 F.2d at 1387.

There is no direct adversity and therefore no conflict of interest, actual or apparent, between Plaintiff and Isabella. Resp. 11–13. Neither has brought a claim against the other and Isabella is not a defendant in this case. *Id.* at 12. Jenkins does not intend to depose or call Isabella as a witness in this case; Isabella made clear, in the very affidavits on which Defendant bases his motion, that she does not want to participate in this case and that she will stay outside the United States until she desires to return. *Id.* (citing Isabella Aff. ¶¶ 10–11 (Jan. 25, 2021); Isabella Aff. ¶¶ 2, 4 (Jan. 26, 2021)).

Defendant argues that Plaintiff and Isabella are adverse because Isabella wrote that her interests are different from Plaintiff’s, she wrote that her attorneys have been acting contrary to her interests, she instructed counsel to withdraw from representing both herself and Plaintiff, Reply 3, but Plaintiff supposedly contests the legitimacy of that instruction, *id.* at 2–3, and Plaintiff’s claims would supposedly impact Isabella. *Id.* at 2, 6. None of these reasons amount to direct adversity.

1. Isabella’s opposition to her own claims did not make her adverse to Plaintiff.

Defendant failed in his motion, and fails again in reply, to articulate how a conflict of interest arose between Plaintiff and Isabella when Isabella wrote in her affidavits that counsel “are acting contrary to [her] wishes and desires and in a way to further a cause that is the exact opposite of what [her] desire and wishes as their client in fact are.” Mot. ¶ 9 (quoting Isabella Aff. ¶ 15 (Jan. 25, 2021)); *see also* Reply 3 (“Isabella has expressly stated that her interests are different from Janet’s [and] that her attorneys have been acting contrary to her interests.” (citing

Isabella Aff. (Jan. 25, 2021), ECF 641-1; Isabella Aff. (Jan. 26, 2021), ECF 641-2; Bucknam Certificate (Feb. 10, 2021), ECF 641-3)). As Plaintiff explained in her response, one client’s negative opinion about another client’s case or “cause” does not make the two clients directly adverse. Resp. 13 (citing Vt. R. Prof. Conduct 1.7 cmt. 24).

2. Counsel do not need Isabella’s consent to represent Plaintiff.

For the first time in his reply, Defendant now argues “there is an express conflict between [Plaintiff] and Isabella regarding the legitimacy of Isabella’s affidavits ... with regard to Isabella’s raising of conflicts by her former counsel continuing to represent [Plaintiff].” Reply 2–3. But Plaintiff does not dispute the legitimacy of Isabella’s affidavits, including that Isabella “object[s] to [counsel] representing any other person in this matter after having access to [her] personal information.” Isabella Aff. ¶ 3 (Jan. 26, 2021). She merely disagrees with Defendant that Isabella’s affidavits prove direct adversity between her and Isabella and that her counsel need Isabella’s consent to continue representing her.² In other words, Isabella’s affirmative objection does not itself create direct adversity and, without direct adversity, Isabella’s affirmative objection has no legal effect and imposes no obligations on counsel to withdraw from representing Plaintiff.

As Plaintiff explained when she replied to a similar argument by Defendants Liberty Counsel, Inc. and Rena Lindevaldsen in their opposition to her motion to stay, counsel did not immediately withdraw from representing Isabella or Plaintiff when they received the affidavits

² In one paragraph at the very end of his reply, Defendant reverts to his original argument that Rule 1.9(a) regarding former client conflicts requires disqualification, but only to point out that Plaintiff did not address Rule 1.9(a)’s requirement of informed consent. Reply 9. By its terms, Rule 1.9(a) only requires informed consent if there is material adversity between the former and current clients. As Plaintiff explained in her response, there is no material adversity, *see* Resp. 11–15, so Isabella’s informed consent is not required.

because “counsel had a professional, ethical, and moral duty to confirm the veracity of that new information before taking any action whatsoever adverse to Isabella’s interests—especially before dismissing her claims”; “[c]ounsel rightfully questioned Isabella’s new attorney about the circumstances that led to his engagement and about the evident conflict of interest, prompting him to concede an apparent conflict of interest and to withdraw”; and “[c]ounsel acted carefully and responsibly to protect Isabella’s interests, not to act adversely to them.” Reply in Support of Pl. Janet Jenkins’s Mot. to Stay All Disc. Schedule/Order Deadlines 5, ECF 647 (citing *Blanchard v. Edgemark Fin. Corp.*, No. 94 C 1890, 1998 WL 988958, at *14 (N.D. Ill. Sept. 11, 1998) (holding that an attorney’s motion to vacate part of client’s settlement entered into without attorney’s permission was not materially adverse to client because client received the full benefit of the settlement)). Only twelve days later, once Isabella’s new, seemingly unconflicted counsel certified that she had “directly communicated” with Isabella and “verified with her that the affidavits ... accurately reflect[ed] her wishes concerning the prosecution of this matter,” Bucknam Certificate 1, ECF 641-3, Plaintiff filed a response indicating that she did not oppose Isabella’s voluntary dismissal based on the affidavits, *see* ECF 642. Because Plaintiff does not dispute the legitimacy of Isabella’s affidavits, there is no conflict.

3. Plaintiff’s claims would not “impact” Isabella in any legally meaningful way.

In his reply, Defendant raises the new argument that *Plaintiff’s* claims would “impact” Isabella. Reply 6; *see also* Resp. 13 (noting that Defendant did not even argue that *Plaintiff’s* claims would harm Isabella). He says Plaintiff and Isabella have an “express conflict about whether this litigation should even continue”: Isabella’s desire not to sue her mother, Lisa Miller, and Lisa’s co-conspirators, conflicts with Plaintiff’s desire to continue suing Lisa and her co-conspirators. Reply 2; *see also id.* at 6. Crucially, Defendant misrepresents Isabella’s actual

statement to make his assertion. In her affidavits, Isabella never opined about the continuation of Plaintiff's claims; she only requested that her own claims be dismissed and expressed disagreement with the "cause" furthered by *those* claims. *See* Isabella Aff. ¶ 15 (Jan. 25, 2021) ("All the lawyers who purport to represent *me* and *my* wishes are acting[]contrary to *my* wishes and desires and in [a] way to further a cause that is the exact opposite of what *my* desire[s] and wishes as their client in fact are." (emphasis added)); *id.* ¶ 16 ("I want those people who claim to be *my* attorneys to cease their actions that are contrary to *my* wishes and desires." (emphasis added)); *id.* ¶ 17 ("I order and direct them to file all papers necessary to have *me* removed as a Plaintiff in this case." (emphasis added)); *id.* ¶ 18 ("Once *I* am dismissed from this action ... I summarily and without equivocation fire, terminate, and discharge SPLC and all attorneys who have appeared ostensibly on *my* behalf in this litigation from taking any further action in *my* name." (emphasis added)); Isabella Aff. ¶ 6 (Jan. 26, 2021), ECF 636-2 ("I want the claims made in this case on *my* behalf dismissed." (emphasis added)); *id.* ¶ 7 ("All the lawyers who purport to represent *me* ... are acting contrary to *my* wishes and desires and in [a] way to further a cause that is the opposite of what *my* desire[s] and wishes as their client in fact are. I do not want the claims in this continued on *my* behalf." (emphasis added)); *id.* ¶ 8 ("I want those people who claim to be *my* attorneys to cease their actions that are contrary to *my* wishes and desires. I request, order and direct that *I* be dismissed and removed as a Plaintiff in this case." (emphasis added)).

Even if Isabella "wishes and desires" that Plaintiff not sue Lisa or her co-conspirators for violating Plaintiff's rights, contrary to Defendant's assertion, *see* Reply 6, that does not make her *directly* adverse to Plaintiff just because Defendant calls it an "express" or "direct" conflict, *id.* at 2, or just because he says it will "impact" her, *id.* at 6. As explained, that statement does not put

Plaintiff and Isabella in head-to-head opposition in a legal matter; it amounts to nothing more than Isabella’s “wishes and desires” from the sidelines that Plaintiff should not continue to press Plaintiff’s own claims. But Isabella has no say in the continuation of Plaintiff’s claims, and Isabella’s release of her own claims does not affect Plaintiff’s claims. Counsel’s continued representation of Plaintiff would not harm Isabella in any concrete, meaningful way, impair her legal rights or interests, or impose any legal or tangible financial obligations on her, *see* Resp. 14—and Defendant points to no such harm, impairment, or obligation, stating only that the case generally “will impact her,” Reply 6.

B. Vermont’s presumption of adversity in juvenile cases does not govern this case.

Defendant tries to stretch a Vermont Supreme Court case explicitly about the unique circumstances of juvenile cases to this case just because this case arises from Defendants’ interference with Plaintiff’s parental rights. He cites *In re L.H.*, 182 A.3d 612 (Vt. 2018), for the “bright line rule” that, in cases “involving the parent–child relationship,” Reply 5 (citing 182 A.3d ¶ 27), “merely the potential for a conflict of interest to arise in the future [i]s sufficient to disqualify an attorney” from switching sides in the case; the court need not “conduct[] a case by case assessment of the actual material adversity between the parties’ interests,” *id.* (quoting 182 A.3d ¶ 7).

In re L.H. in no way governs this case. *First*, this is a federal case, and “[t]he authority of federal courts to disqualify attorneys derives from their inherent power to ‘preserve the integrity of the adversary process,’” *Hempstead Video, Inc.*, 409 F.3d at 132 (quoting *Nyquist*, 590 F.2d at 1246), not from any state disciplinary rule, state law, or state case, *id.*; *see also HLP Properties, LLC v. Consol. Edison Co. of N.Y.*, No. 14 CIV. 01383 LGS, 2014 WL 5285926, at *3 (S.D.N.Y. Oct. 16, 2014) (noting that, although state rules provide guidance, “[t]he ‘only truly binding

authority on disqualification issues’ is the Second Circuit” (quoting *Skidmore v. Warburg Dillon Read LLC*, No. 99 Civ. 10525(NRB), 2001 WL 504876, at *2 (S.D.N.Y. May 11, 2001), *abrogated on other grounds*)).

Second, the Vermont Supreme Court took great pains to emphasize that its holding was limited to “juvenile proceedings,” *In re L.H.*, 182 A.3d ¶ 27, particularly “abuse-and-neglect proceedings,” *id.* ¶¶ 17–18, 22, 27. The court held that, “[a]lthough courts have generally rejected the argument that an appearance of impropriety, standing alone, is a sufficient ground for disqualification of an attorney on the basis of prior representation of a different party,” *id.* ¶ 23, it “decline[d] to leave the disqualification question in this context to case-by-case determination,” *id.* ¶ 17, and instead created “a legal presumption of conflict,” *id.* ¶ 21, “for the purposes of determining whether counsel in an abuse-and-neglect case should be disqualified from subsequent representation of a different party in that same matter,” *id.* ¶ 17. It “recognize[d] that [its] application of Rule 1.9(a) in the context of a motion to disqualify counsel in an abuse-and-neglect proceeding [wa]s broader than the strict requirements of the ethical rule as applied in disciplinary proceedings,” *id.* ¶ 21, which require a case-by-case analysis of the parties’ interests, *id.* ¶ 17 (citing Vt. R. Prof. Conduct 1.9(a)). But it believed the usual case-by-case analysis was too complex in abuse-and-neglect proceedings “given the myriad issues in play in juvenile proceedings, the potentially dynamic nature of the parties’ positions, and the difficulty in discerning the children’s interests.” *Id.*

Third, this is not an abuse-and-neglect proceeding or a juvenile proceeding; it is not about whether Plaintiff’s parental rights over Isabella should be “terminate[d] or not” or whether some other resolution, such as “a post-adoption contact agreement,” should be negotiated, *id.* ¶ 18; Vermont and Virginia courts already held that Plaintiff had parental rights over Isabella, but

Defendants’ eleven-plus-year kidnapping ensured that Plaintiff would never exercise those rights over Isabella.

Finally, the apparent conflict of interest in *In re L.H.* arose from counsel switching sides in the case from representing the children to representing the state, *id.* ¶¶ 1, 7, 15, 17, 22, and there was a risk that counsel might use confidential information against her former clients, *id.* ¶¶ 23, 25. As should be abundantly clear by now, Plaintiff’s counsel have not switched sides in this case and received no information whatsoever from Isabella.

III. Even if Defendants force Isabella to testify, disqualification would be neither required nor necessary.

Defendant also argues that “there is a potential, and even likelihood, of further conflicts to arise in the future ... at Isabella’s deposition or trial testimony when ... counsel cross examines Isabella.” Reply 3. He misrepresents Plaintiff’s response as “admit[ing]” that “to avoid a direct conflict, [her] counsel *will need* to, at the very least, hire an ‘untainted attorney to cross-examine Isabella independently’ at her deposition,” *id.* at 6 (quoting Resp. 12 n.4) (emphasis added). Plaintiff instead argued that whether counsel should be disqualified on this basis is not ripe for review now because it is unclear whether Defendants will even call Isabella to testify, whether she would appear voluntarily, and whether Defendants could successfully compel her testimony, given that she made clear, in the very affidavits on which Defendant bases his motion, that she does not want to participate in this case and that she will stay outside the United States until she desires to return. Resp. 12 (citing Isabella Aff. ¶¶ 10–11 (Jan. 25, 2021); Isabella Aff. ¶¶ 2, 4 (Jan. 26, 2021)). Plaintiff further argued that, even if Defendants force Isabella to testify, disqualification would be neither required nor necessary because Isabella provided counsel no personal, confidential, or privileged information that they could weaponize against her in a cross-examination, *id.* at 12, and because “there are other measures far short of disqualification to

avoid an alleged conflict of interest, such as the hiring of an untainted attorney to cross-examine Isabella independently,” *id.* at 12 n.4.

Any alleged conflict that arose at Isabella’s potential, future deposition or trial testimony would clearly be a former-client conflict, subject to successive-representation principles, including the *Allegaert* exception for joint representation. *See* Resp. 15–19. Successive-representation principles, including the *Allegaert* rule, apply once the attorney–client relationship ends, even if the same litigation continues; a co-plaintiff’s decision to drop out or switch sides makes no difference. *See Trinity Ambulance Service, Inc. v. G & L Ambulance Services, Inc.*, 578 F. Supp. 1280 (D. Conn. 1984). Under *Allegaert*, the successive-representation test does not apply, and disqualification is not warranted, when counsel represented co-plaintiffs jointly, thereby preventing any reasonable expectation of privacy between them, and have not “changed sides” in the case. *See* 565 F.2d at 250–51.

In *Kempner v. Oppenheimer & Co.*, 662 F. Supp. 1271 (S.D.N.Y. 1987), for example, counsel jointly defended both a company and its employee against a plaintiff’s suit. 662 F. Supp. at 1273–74. After the employee’s termination, counsel withdrew from representing him but continued representing the company; the ex-employee proceeded *pro se*. *Id.* at 1272, 1275. The plaintiff and the ex-employee moved to disqualify the company’s counsel when counsel tried to cross-examine its former client, the ex-employee, in the same case. *Id.* at 1273, 1276. The court applied successive-representation principles, not concurrent-representation principles, even though the conflict arose in the same litigation. *Id.* at 1276–78. Relying on *Allegaert*, the court denied disqualification because “it is the client, and not the attorney, who has changed position,” *id.* at 1278, and due to the joint representation, the then-employee “could not expect his secrets to be withheld from [the company],” *id.* at 1280, noting that “[i]nformation does not become

more or less confidential because its disclosure is threatened in the same proceeding rather than in a separate, subsequent proceeding.” *id.* at 1278 (quoting *Trinity Ambulance Serv., Inc.*, 578 F. Supp. at 1285) .

Here, like the company and its employee in *Kempner*, Plaintiff hired counsel to jointly represent her and her then-minor, then-kidnapped daughter in this case. Therefore, neither Plaintiff nor Isabella, under normal circumstances, would have had any reasonable expectation that any information she shared with counsel would have been kept confidential from the other. However, because Isabella was kidnapped until just recently, she never shared any information—much less confidential information—with counsel before she voluntarily dismissed her claims and ended her attorney–client relationship with counsel. Therefore, Plaintiff’s counsel have no information from Isabella that they could now use for Plaintiff and against Isabella if Defendants force Isabella to testify. Moreover, like the company’s counsel in *Kempner*, Plaintiff’s counsel have not switched sides to represent a defendant against a former client; only *Isabella* has changed position in this case—to become a nonparty. Indeed, the situation here is less serious than that encountered in many *Allegaert* cases because Isabella has not become a defendant; she has just voluntarily dismissed herself from the case. As in *Kempner*, where the court found disqualification not justified when the company’s counsel needed to cross-examine their former client, the company’s then-employee, Plaintiff’s counsel should not be disqualified based on any speculative conflict that could arise during Isabella’s potential deposition or trial testimony. Furthermore, there are measures far less drastic than disqualification that could be taken to avoid an alleged conflict of interest during Isabella’s deposition or trial testimony, and counsel will take any remedial measures the Court requires. *See* Resp. 12 n.4.

In his reply, Defendant seems to argue that the concurrent-representation test applies whenever the purported conflict arose during the pendency of the same case. *See* Reply 3–4, 8; *id.* at 4 (“In this case, counsel has concurrently represented Janet and Isabella in the same case and desires to continue to represent just Janet *in this same case*. Therefore, this is not a ‘successive representation’ and the ‘successive representation test’ does not apply in this case.” *Id.* at 4 (emphasis in original)).³ He ignores *Kempner*, which holds that *successive*-representation principles apply when one client ends the attorney–client relationship but the litigation continues for another co-client. Defendant uses contorted language to try to reconcile his error, referring to Plaintiff’s counsel and their representation as “previously concurrent”—in other words, now former. *See id.* at 8–9. The reality is Isabella was a co-plaintiff and she has voluntarily dismissed herself from this case and fired counsel, so she is a former client and any alleged conflict of interest that could arise at Isabella’s potential, future deposition or trial testimony would clearly be subject to successive-representation principles, including the *Allegaert* exception for joint representations which would not require disqualification.

CONCLUSION

Defendant Timothy Miller’s motion to disqualify Plaintiff Janet Jenkins’s counsel should be denied.

³ Despite Defendant’s triple-emphasis of the obvious, uncontested fact that counsel represented Plaintiff and Isabella “*in this same case*,” that makes no difference when deciding between concurrent- and successive-representation principles because both concurrent and successive conflicts of interest can arise in the same case. *Compare, e.g.,* Vt. R. Prof. Conduct 1.7(b)(3) (providing a concurrent conflict of interest cannot be waived if “the representation ... involve[s] the assertion of a claim by one client against another client represented by the lawyer in the same litigation”), *with, e.g.,* Vt. R. Prof. Conduct 1.9(a) (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in *the same* or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” (emphasis added)).

Respectfully submitted.

March 5, 2021

/s/ Frank H. Langrock
Frank H. Langrock
Emily J. Joselson
Langrock Sperry & Wool, LLP
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, Vermont 05753-0351
Phone: (802) 388-6356
Fax: (802) 388-6149
Email: flangrock@langrock.com
Email: ejoselson@langrock.com

Sarah Star
Sarah Star, PC
P.O. Box 106
Middlebury, Vermont 05753
Phone: (802) 385-1023
Email: srs@sarahstarlaw.com

Scott D. McCoy
Southern Poverty Law Center
P.O. Box 10788
Tallahassee, Florida 32302
Phone: (850) 521-3042
Fax: (850) 521-3001
Email: scott.mccoy@splcenter.org

Tyler Clemons
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Phone: (504) 526-1530
Fax: (504) 486-8947
Email: tyler.clemons@splcenter.org

Diego A. Soto
Maya G. Rajaratnam
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: (334) 956-8200
Fax: (334) 956-8481
Email: diego.soto@splcenter.org
Email: maya.rajaratnam@splcenter.org

Jessica L. Stone
Southern Poverty Law Center
P.O. Box 1287
Decatur, Georgia 30031
Phone: (404) 221-5837
Fax: (404) 221-5857
Email: jessica.stone@splcenter.org

Counsel for Plaintiff Janet Jenkins

CERTIFICATE OF SERVICE

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

Richard Boyer
Integrity Law Firm, PLLC
Counsel for Defendant Linda M. Wall

Anthony R. Duprey
Neuse, Duprey & Putnam, PC
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Roger K. Gannam
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Adam S. Hochschild
Hochschild Law Firm, LLC
Counsel for Defendant Linda M. Wall

Michael R. Hirsh
Hirsh & Heuser, LLC
Counsel for Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc.

Brooks G. McArthur
Jarvis, McArthur & Williams, LLC
Counsel for Defendant Kenneth L. Miller

Horatio G. Mihet
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Daniel Joseph Schmid
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Norman C. Smith
Norman C. Smith, PC
Counsel for Defendant Linda M. Wall

Michael J. Tierney
Wadleigh, Starr & Peters, PLLC
Counsel for Defendant Timothy D. Miller

March 5, 2021

/s/ Jessica L. Stone
Jessica L. Stone
Counsel for Plaintiff Janet Jenkins