UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS,

Plaintiff,

v.

KENNETH L. MILLER, *et al.*,

Defendants.

No. 2:12-cv-184-WKS

MEMORANDUM IN SUPPORT OF PLAINTIFF JANET JENKINS'S MOTION FOR SUMMARY JUDGMENT ON COUNT 1 AGAINST DEFENDANTS PHILIP ZODHIATES, KENNETH MILLER, AND TIMOTHY MILLER AND FOR PARTIAL SUMMARY JUDGMENT ON COUNT 1 AGAINST DEFENDANTS LIBERTY COUNSEL, RENA LINDEVALDSEN, RESPONSE UNLIMITED, VICTORIA HYDEN, AND LINDA WALL

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Exhibit	Description	Bates Number (if applicable)
2[1]	Transcript of Deposition of Lisa Miller, January 18-19, 2024	
3	Plea Agreement, *United States v. Lisa Miller*, No. 1:14-cr-175 (W.D.N.Y.); Lisa Miller Deposition Exhibit 6	
4	Findings of Fact, Conclusions of Law, and Order, Rutland, Vermont Family Court, dated November 20, 2009	JENKINS15114–34
5	Order, Frederick County, Virginia Juvenile and Domestic Relations Court, dated August 28, 2009	JENKINS06465–70
6	Transcript of Deposition of Timothy Miller, February 7, 2024	
7	Transcript of Grand Jury Testimony of Timothy Miller, October 27, 2011; Timothy Miller Deposition Exhibit 3	007657–007714
8	Transcript of Deposition of Philip Zodhiates, February 28-29, 2024	
9	Transcript of Deposition of Kenneth Miller, January 30, 2024	
10	Transcript of Deposition of Timothy Miller, December 20, 2011; Timothy Miller Deposition Exhibit 4	JENKINS06951–7050
11	Email to Timothy Miller, September 21, 2009; Timothy Miller Deposition Exhibit 9	JENKINS01223–24
12	Email from Philip Zodhiates to Victoria Lee Zodhiates, October 23, 2009; Philip Zodhiates Deposition Exhibit 44	RUL1103–04

[1] Plaintiff does not submit an Exhibit 1 in support of her motion.

13	Email from Philip Zodhiates to Victoria Lee Zodhiates, November 11, 2009; Philip Zodhiates Deposition Exhibit 48	JENKINS00690–92
14	Emails between Philip Zodhiates and John Collmus, November 12-13, 2009; Philip Zodhiates Deposition Exhibit 49	JENKINS00693–94
15	Emails between Philip Zodhiates and Timothy Miller, November 13, 2009; Philip Zodhiates Deposition Exhibit 50	JENKINS00695–99
16	Emails between Philip Zodhiates and Kenneth Miller, April 2010; Philip Zodhiates Deposition Exhibit 53	JENKINS00705–06
17	Emails between Kenneth Miller and Timothy Miller, May 2010; Timothy Miller Deposition Exhibit 21	JENKINS00948–49
18	Email to Philip Zodhiates, November 20, 2007; Philip Zodhiates Deposition Exhibit 16	RUL0799–803
19	Email from Philip Zodhiates, August 7, 2009; Philip Zodhiates Deposition Exhibit 26	JENKINS01333
20	Email from Timothy Miller, September 21, 2009; Timothy Miller Deposition Exhibit 8	JENKINS22254–56
21	Email from Philip Zodhiates, September 21, 2009; Philip Zodhiates Deposition Exhibit 36	JENKINS00672
22	Email from Philip Zodhiates, September 21, 2009; Philip Zodhiates Deposition Exhibit 62	JENKINS00673
23	Judgment, *United States v. Lisa Miller*, No. 1:14-cr-175 (W.D.N.Y.); Lisa Miller Deposition Exhibit LC 45	Lisa_Miller_5876–5882
24	Email to Philip Zodhiates, November 23, 2009; Philip Zodhiates Deposition Exhibit 52	RUL0428

25	Email from Philip Zodhiates to Kenneth Miller, December 22, 2009; Kenneth Miller Deposition Exhibit 11	

Plaintiff Janet Jenkins respectfully submits this memorandum of law in support of her motion for summary judgment on Count 1 of the Revised Second Amended Complaint ("Complaint"), Doc. 223, against Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller,[2] and for partial summary judgment on Count 1 of the Complaint against Defendants Liberty Counsel, Rena Lindevaldsen, Response Unlimited, Victoria Hyden, and Linda Wall.

STATEMENT OF THE CASE

This case arises from the international kidnapping of then seven-year-old Isabella Miller-Jenkins by Lisa Miller, one of her mothers. In September 2009, following years of custody litigation in Vermont and Virginia, Lisa was about to lose primary custody of Isabella to Janet Jenkins, Lisa's former civil union partner and Isabella's other legal parent. Rather than let Plaintiff take custody of Isabella, Lisa, with the assistance of the Defendants in this case, fled the United States and hid Isabella in Central America until Isabella reached the age of majority and was no longer subject to the family court's jurisdiction. In 2012, following the conviction of Defendant Kenneth Miller for aiding and abetting Lisa and the revelation of significant details of what had happened to her daughter, Plaintiff filed the instant suit.

ARGUMENT

The Court must grant summary judgment on "each claim or defense . . . on which summary judgment is sought . . . if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving

[2] If the Court concludes that Plaintiff is entitled to summary judgment on some, but not all, elements of Count 1, then Plaintiff requests partial summary judgment on those elements of Count 1 on which she is entitled to summary judgment.

party.'" *Coppola v. Bear Stearns & Co.*, 499 F.3d 144, 148 (2d Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "An alleged factual dispute regarding immaterial or minor facts between the parties will not defeat an otherwise properly supported motion for summary judgment. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84 (2d Cir. 2004), *opinion corrected*, 511 F.3d 238 (2d Cir. 2004). "Moreover, the existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant." *Id.* (quoting *Liberty Lobby*, 477 U.S. at 252).

The nonmoving party may not rely upon "mere allegations or denials" in their pleadings, but instead "must set forth specific facts showing that there is a genuine issue for trial." *Fonda Grp., Inc. v. Lewison*, 162 F. Supp. 2d 292, 298 (D. Vt. 2001) (Sessions, J.); *see also id.* (nonmoving party "may not 'rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment.'" (quoting *Knight v. United States Fire Ins. Co.,* 804 F.2d 9, 12 (2d Cir.1986))); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) ("The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. Instead, 'the non-movant must produce specific facts indicating' that a genuine factual issue exists." (citations omitted)). "If the evidence [presented by the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Scotto*, 143 F.3d at 114 (quoting *Liberty Lobby,* 477 U.S. at 249–50) (alteration in original).

Count 1 of the Complaint alleges two alternative theories of Defendants' vicarious liability for Lisa's tortious interference with Plaintiff's parental rights in violation of Vermont law: (1) conspiracy and (2) aiding and abetting. Compl. at ¶ 65, Doc. 223; *see Halberstam v. Welch*, 705 F.2d 472, 476–79 (D.C. Cir. 1983) (discussing origin and development of conspiracy and aiding-and-

abetting theories of liability for concerted action); *Freeman v. HSBC Holdings PLC*, 57 F.4th 66, 76 (2d Cir. 2023) ("*Halberstam* has been recognized as a 'leading case regarding federal civil aiding-and-abetting and conspiracy liability, including by the Supreme Court of the United States' and this Court." (quoting Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016)). Plaintiff addresses each theory in turn.

I. Plaintiff Is Entitled to Summary Judgment on Count 1 on the Theory of Civil-Conspiracy Liability.

Plaintiff claims that Defendants are liable for the harm caused to her by Lisa's tortious interference with Plaintiff's parental rights under a civil-conspiracy theory because Lisa committed that "tortious act in concert with [Defendants] or pursuant to a common design with [Defendants]." *Mansfield Heliflight, Inc. v. Freestream Aircraft USA, Ltd.*, No. 2:16-cv-28, 2019 WL 4863013, at *11 n.7 (D. Vt. Mar. 12, 2009) (quoting Restatement (Second) of Torts § 876 (1979)); *accord* Op. and Order at 32 (Sept. 29, 2017), Doc. 277 ("Under Vermont law, 'the crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means. For a civil action, the plaintiff must be damaged by something done in furtherance of the agreement, and the thing done must be something unlawful in itself.'" (quoting *Akerley v. N. Country Stone, Inc.*, 620 F. Supp. 2d 591, 600 (D. Vt. 2009))); Op. and Order: Pls.' Mot. for Partial Summ. J. at 8 (Aug. 31, 2020), Doc. 555. As to all Defendants, there is no genuine dispute that (1) Lisa violated Vermont law by tortiously interfering with Plaintiff's parental rights and (2) Plaintiff was harmed by Lisa's tortious act. Furthermore, there is no genuine dispute that (3) Lisa committed that tortious act in concert with

Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller or pursuant to a common design with them.[3]

A. There is No Genuine Dispute That Lisa Violated Vermont Law by Tortiously Interfering with Plaintiff's Parental Rights.

Liability is triggered for all members of a civil conspiracy when at least one co-conspirator commits an unlawful act in furtherance of the conspiracy. *See* Op. and Order: Pls.' Mot. for Partial Summ. J. at 8 (Aug. 31, 2020), Doc. 555 ("The unlawful act need not be committed by each conspirator; so long as *one* conspirator causes the plaintiff damage by committing an unlawful act to further the conspiracy, *all* conspirators may be held liable for civil conspiracy." (citing *F.R. Patch Mfg. Co. v. Prot. Lodge, No. 213, Int'l Ass'n of Machinists*, 60 A. 74, 80 (Vt. 1905)) (emphasis added)); *see also Sheple v. Page*, 12 Vt. 519, 533 (1840) ("[W]here two or more combine together for the same illegal purposes, each is to be considered as the agent of the others, and the act of one, in pursuance of the object, is, in legal contemplation the act of all."); *Halberstam*, 705 F.2d at 481 ("A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action . . . so long as the purpose of the tortious action was to advance the overall object of the conspiracy.").

Plaintiff seeks to hold Defendants liable for Lisa's tortious interference with Plaintiff's parental rights in violation of Vermont law, and there is no genuine dispute that Lisa committed that tort. "[U]nder Vermont law, a person who abducts or otherwise compels or induces a minor child to leave a parent who is legally entitled to her custody, with knowledge that the parent does not consent, is subject to liability to the parent." Op. and Order at 41–42 (Oct. 24, 2013), Doc. 115.

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[3] Plaintiff is not moving for summary judgment on whether Defendants Liberty Counsel, Rena Lindevaldsen, Response Unlimited, Victoria Hyden, or Linda Wall were members of that conspiracy with Lisa, Philip, Kenneth, and Timothy.

1. There is no genuine dispute that Lisa abducted or otherwise compelled or induced Isabella, a minor, to leave Plaintiff.

In the context of other crimes against children, the Second Circuit has held that "[t]he term[] … 'induce' … [is a] 'word[] of common usage that ha[s] [a] plain and ordinary meaning[],'" *United States v. Broxmeyer*, 616 F.3d 120, 125 (2d Cir. 2010) (quoting *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007)) (interpreting child pornography statute, 18 U.S.C. § 2251(a)), "and we look to the dictionary for [its] common definition[]," *id.* (citing *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 187 (2d Cir. 2010)). "[I]nduce" is a "word[] of causation" that conveys the idea of "'leading or moving' another 'by persuasion or influence, as to some action, state of mind, etc.' or 'to bring about, produce, or cause.'" *Broxmeyer*, 616 F.3d at 125 (quoting The Random House Dictionary of the English Language 726 (unabridged ed. 1971)) (cleaned up). "Induce" also means to "influence [a person] … to do something," *United States v. Waqar*, 997 F.3d 481, 486 (2d Cir. 2021) (quoting Oxford English Dictionary (2d ed. 1989)). To "induce" someone does not require overcoming their will; instead, a person can "induce" someone to do something they are neutral towards, or even already predisposed to do. *Id.*

There is no genuine dispute that Lisa "influence[d]" and "br[ought] about, produce[d], or cause[d]" Isabella, who was then seven years old, to leave the United States—and thus leave Plaintiff—for over eleven years. Lisa admitted that she removed Isabella from the United States in September 2009. *See, e.g.*, Ex. 3, Lisa Miller Dep. Ex. 6 at 3 (agreeing that on September 22, 2009, she "removed [Isabella] from the United States to Canada via Buffalo, New York, and eventually to Nicaragua"); Ex. 2, Lisa Miller Dep.[4] at 109:5–20, 110:14–16 (testifying that Philip drove Lisa and Isabella from Virginia to a New York airport to take a taxi into Canada); *id.* at 114:22–25,

[4] Because significant testimony within Lisa Miller's deposition was orally designated confidential, this exhibit has been temporarily filed under seal.

115:17–19 (testifying that Lisa took Isabella into Canada via taxi); *id.* at 116:20–117:1 (testifying that Lisa took Isabella to Mexico, El Salvador, and Nicaragua via plane). As a young child, Isabella could not make her own decisions about her place of residence, secure transportation, or travel on her own. There can be no genuine dispute that, at the very least, Lisa induced (if not compelled) Isabella to leave the United States, and therefore to leave Plaintiff.

2. There is no genuine dispute that Plaintiff was legally entitled to Isabella's custody.

On June 17, 2004, the Rutland County, Vermont Family Court recognized Plaintiff as a legal parent to Isabella. Ex. 4, November 20, 2009 Vermont Family Court Order at JENKINS15115. The court also granted her the right to liberal, unsupervised parent–child contact with Isabella through at least November 20, 2009, when it granted her sole physical and legal custody of Isabella and parental rights and responsibilities over her, with the physical transfer to occur on January 1, 2010. *See generally* Ex. 4. No court modified that order before Isabella became a legal adult. This Court has already rejected the only defense that has ever been raised by any Defendant challenging Plaintiff's legal entitlement to Isabella's custody, holding (without deciding whether any "superior custody" rule applied) that Defendants could be held liable for their agreement and actions in furtherance of the conspiracy that took place before the family court transferred primary custody to Plaintiff. Op. and Order at 27–30 (Sept. 29, 2017), Doc. 277.

3. There is no genuine dispute that Lisa knew that Plaintiff did not consent.

When Lisa removed Isabella from the United States, she and Plaintiff were in the midst of a five-year, highly contentious, ongoing custody dispute over Isabella. The custody battle raged in two states, with near-constant proceedings at the trial and appellate levels of both Vermont and Virginia. Ex. 2 at 41:15–42:4. Plaintiff unceasingly fought for the right to be a parent to her daughter. When Lisa repeatedly disobeyed court orders and refused to allow Plaintiff visitation with

Isabella, Plaintiff responded by moving for enforcement of the court orders (in two different state courts), moving for contempt for violation of the court orders (in the same two state courts), and eventually moving for primary custody of her daughter in May 2009. Ex. 4 at JENKINS15114–22; Ex. 5, August 28, 2009 Virginia Family Court Order. At a court hearing in August 2009, the Vermont Family Court made clear that unless Lisa began allowing Plaintiff visitation with Isabella, it was likely to transfer primary custody to Plaintiff. Ex. 4 at JENKINS15121; Ex. 2 at 372:12–377:11. At another court hearing in early September 2009, the court, recognizing the pending motion to transfer custody, ordered a visitation with Plaintiff for September 25–27, 2009. Ex. 4 at JENKINS15121; Mem. in Supp. of Def. Timothy Miller's Obj. to Pl. Janet Jenkins's Mot. for Partial Summ. J. (Jan. 27, 2020), Ex. E, Doc. 463-5. Instead, on September 22, 2009, Lisa took Isabella out of the country and did not return until after Isabella reached the age of majority and was no longer subject to the Vermont family court's jurisdiction. No reasonable person could believe that Lisa did not know that Plaintiff would not consent to Lisa's taking Isabella out of the country just days before Isabella was supposed to be with Plaintiff, a visit that was specifically ordered by the court in advance of a decision on Plaintiff's pending motion to transfer primary custody to Plaintiff, especially given that Lisa did not disclose the planned international "trip" to Plaintiff or the family court.

Indeed, Lisa has admitted that she "did not want to allow" that September visit and she "removed [Isabella] from the United States to Nicaragua with the intent to obstruct Janet Jenkin[s]'s court ordered parental right to . . . visitation in late September 2009." Ex. 3 at 2–3. Lisa has also admitted that she was aware, at least as of 2010, that the Vermont court had transferred primary custody of Isabella to Plaintiff and that she did not intend to return to the United States until the day after Isabella turned eighteen because then Isabella would no longer be subject to the

family court's orders. Ex. 2 at 157:25–158:7, 159:10–160:1, 175:12–18, 222:3–19.

That Lisa knew she was acting without Plaintiff's consent is further evidenced by the clandestine manner of the trip and Lisa's conduct thereafter, including the arrangement of her travel itinerary through her co-conspirators; bringing several thousand dollars in cash with her; traveling in disguise; purposely avoiding United States airports; hiding under pseudonyms; and moving around to avoid being located, including fleeing surreptitiously to Costa Rica after Timothy, the first of her co-conspirators to be publicly identified, was arrested, thus revealing her connection to the Mennonite community in Nicaragua. Ex. 2 at 110:1–13, 133:12–15; 135:2–136:2, 145:9–146:13, 169:6–171:3; Ex. 6, Timothy Miller Dep. at 109:23–110:23, 113:17–114:4; Ex. 7, Timothy Miller Dep. Ex. 3 at 007686.

B. Vermont Civil Conspiracy Law Does Not Require Plaintiff to Identify an Unlawful Act That Is Separate From the Purpose of the Conspiracy.

Courts across the country agree that civil conspiracy does not require an unlawful act that is completely distinct from the purpose of the agreement when that purpose is illegal, is carried out, and damages the plaintiff. *See Banc One Cap. Partners Corp. v. Kneipper*, 67 F.3d 1187, 1195 (5th Cir. 1995) (holding underlying legal violation, if proven, could be requisite "unlawful, overt act in furtherance of the conspiracy"); *Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 639 A.2d 173, 178 (Md. Ct. Spec. App. 1994) ("The unlawful conduct may be . . . the achievement of an unlawful end."); *see also Halberstam*, 705 F.2d at 477 ("It is only where means are employed, *or purposes are accomplished*, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable." (emphasis added) (quoting W. Prosser, Law of Torts § 46, at 293 (4th ed. 1971))).

A requirement that the unlawful act be completely distinct from the agreement's illegal purpose would leave a plaintiff without recourse in a case where the only unlawful act was

completion of the illegal purpose of the conspiracy. Take, for example, a conspiracy to murder. It would be a crime under Vermont law for two or more persons to agree to murder someone (an illegal purpose) by purchasing a gun (an act that is often legal). *See* 13 V.S.A. § 1404. For criminal liability, the agreement alone would suffice for the conspirators to be charged with and convicted of a crime; the murder need not be carried out. *See, e.g.*, *State v. Noyes*, 25 Vt. 415, 421 (1853) ("It is well settled, that the unlawful agreement constitutes the *gist* of the offence, and of course it is not necessary to charge the execution of the unlawful agreement . . . The jury may find the conspiracy, and negate the execution, and it will be a good conviction."). However, civil liability requires more, because it is the unlawful act, or completion of the unlawful purpose, that damages the plaintiff, not the existence of the agreement alone. *See Sheple*, 12 Vt. at 533 ("[I]t is well settled that the damage to the plaintiffs is the *gist* of the action – and not the conspiracy.").

Under Vermont law, the would-be victim of the murder conspiracy could not sue the conspirators for damages if the illegal purpose—murder—was not achieved because he was not injured by anything. He could not rely on the crime of conspiracy for the required illegal act because that criminal conspiracy did not harm him. If, however, the planned murder had been successful (for example, after purchasing the gun, the purchaser shot the victim in the heart, committing no other illegal act in the process), then the victim was clearly injured by something unlawful—murder—done in furtherance of an agreement to murder the victim. It would create an anomaly to require the murder victim's estate to prove some additional illegal act done in furtherance of the murder conspiracy that damaged the victim, separate from the murder itself. In other words, if the unlawful act must be separate, successful murderers who purchased the gun legally and committed no other illegal act could escape civil liability, but successful murderers who purchased the gun illegally would be civilly liable.

Indeed, this Court has already recognized that it is Defendants' actions in concert with Lisa fleeing the country just before she had to turn over custody of Isabella that gives rise to co-conspirator liability. *See* Op. and Order at 106–07 (Sept. 29, 2017), Doc. 277 ("The claims which Plaintiff[] assert[s] . . . center on the support that [Defendants] allegedly provided to Lisa Miller to carry out this wrongful conduct. . . . [I]t is the combination of [Defendants'] acts along with Defendants' alleged agreement with Lisa Miller to support her in unlawfully interfering with [Plaintiff's] custody over Isabella, and Lisa Miller's actions in doing so, which give rise to the claim."). Lisa's successful custodial interference, *see supra* section I.A., suffices as the unlawful act required for civil-conspiracy liability against all Defendants.

However, even assuming for the sake of argument, that the unlawful act requirement of civil-conspiracy liability requires something more than just effectuating the illegal purpose, Lisa's conviction for international parental kidnapping is sufficient to show that *additional* illegal means were employed. Lisa pleaded guilty to violating 18 U.S.C. § 1204, which required more than the Vermont tort of custodial interference. Ex. 3 at 2. Although there is overlap between the elements of Lisa's crime and the tort, *international* kidnapping was not a necessary means to complete the tort. Lisa could have interfered with Plaintiff's custody without removing Isabella from the United States or retaining her outside the United States, as required by 18 U.S.C. § 1204. These particular illegal means, *international* kidnapping, were chosen by Lisa (and Defendants) not because it was a necessary element of the tort of custodial interference or their agreement to hide Isabella to keep Plaintiff from exercising her parental rights, but to make their conspiracy more successful.

No Defendant can genuinely dispute that Lisa committed the tort, or in the alternative that she was convicted of international parental kidnapping, and therefore Plaintiff is entitled to partial summary judgment on this element against all Defendants.

C. There Is No Genuine Dispute That Plaintiff Was Harmed by Lisa's Tortious Act.

Plaintiff was entitled to liberal parent–child contact with Isabella and later sole physical and legal custody of Isabella and parental rights and responsibilities over her. *See supra* section I.A.2. Yet Isabella was hidden thousands of miles away from Plaintiff in Central America for eleven years, from age seven until after she became an adult, thus preventing Plaintiff from exercising her parental rights over her daughter. Ex. 2 at 175:12–176:25. Plaintiff last saw Isabella in January 2009 for court-ordered parent–child contact. Ex. 4 at JENKINS15119–22. Isabella's kidnapping prevented Plaintiff from nurturing a relationship with her daughter and participating in decisions about her daughter's upbringing. Plaintiff spent more than a decade searching for her daughter and worrying about her daughter and the life she was living. Plaintiff did not even know whether her daughter was alive, much less whether she was happy and fulfilled and had access to necessities like education and healthcare. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (the right to parent their children "is perhaps the oldest of the fundamental liberty interests" protected by the U.S. Constitution); *Ms. L. v. U.S Immigr. & Customs Enf't ("ICE")*, 310 F. Supp. 3d 1133, 1146–47 (S.D. Cal. 2018) (discussing both legal and emotional harm of separation of a parent from their child).

No Defendant can genuinely dispute that Plaintiff was harmed, and therefore Plaintiff is entitled to partial summary judgment on this element against all Defendants.

D. There Is No Genuine Dispute That Lisa Committed That Tortious Act in Concert With Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller or Pursuant to a Common Design With Them.

"Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself." *Mansfield*

Heliflight, Inc., 2019 WL 4863013, at *11 n.7 (quoting Restatement (Second) of Torts § 876 (1979)); *accord Halberstam*, 705 F.2d at 477 ("Proof of a tacit, as opposed to explicit, understanding is sufficient to show agreement."); *cf. In re Hyde*, 129 A.3d 651, 659 (Vt. 2015) ("'A prior agreement to commit the crime need not be demonstrated by an express agreement, but may be shown by circumstantial evidence of an implied understanding.' Further, 'it is elementary that a defendant's intent may be inferred from the nature of his acts.'") (citations omitted)). Instead, circumstantial evidence is often used to infer agreement. *State v. Heritage Realty of Vt.*, 407 A.2d 509, 511 (Vt. 1979) ("[I]t is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged." (quoting *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965)); *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 240 (2d Cir. 1999) ("As is true in criminal conspiracies, agreements in civil conspiracies will not easily be shown by direct evidence, but may be inferred from circumstantial evidence.").

To infer agreement from indirect evidence, courts look to whether the alleged co-conspirators "are pursuing the same goal—although performing different functions—and are in contact with one another," as well as "the relationships between the actors and between the actions (*e.g.*, the proximity in time and place of the acts, and the duration of the actors' joint activity)." *Halberstam*, 705 F.2d at 481. "[T]he length of time two parties work closely together may also strengthen the likelihood that they are engaged in a common pursuit. Mutually supportive activity by parties in contact with one another over a long period suggests a common plan." *Id.* (emphasis omitted).

The Court has already held that Timothy's "guilty plea establishes his guilt in agreeing and collaborating with others to take Isabella Miller-Jenkins out of the country with intent to obstruct

Jenkins' parental rights" Op. and Order: Pls.' Mot. for Partial Summ. J. at 9 (Aug. 31, 2020), Doc. 555. The same is true for Philip's conviction on an identical charge after a jury trial. *See* Op. and Order: Pls.' Mot. for Partial Summ. J. at 10–11 (Aug. 31, 2020), Doc. 555. Timothy and Philip were both charged with and convicted of conspiracy to commit international parental kidnapping, which necessarily included that they agreed to remove Isabella from the United States and retain her outside the United States "with intent to obstruct the lawful exercise of parental rights." Pl. Janet Jenkins's Mot. for Partial Summ. J. (Dec. 13, 2019), Ex. 14, Doc. 439-14; Ex.16, Doc. 439-16; Ex. 18, Doc. 439-18; Ex. 22, Doc. 439-22. Similarly, although Kenneth was convicted of aiding and abetting, rather than conspiring with, Lisa in her removal of Isabella, his conviction still required proof that he helped Lisa "with the intent to obstruct the lawful exercise of parental rights." Pl. Janet Jenkins's Mot. for Partial Summ. J. (Dec. 13, 2019), Ex. 7, Doc. 439-7; Ex. 10, Doc. 439-10.

Furthermore, it is undisputed that in the weeks leading up to the kidnapping, Philip and Kenneth met with Lisa to discuss whether and how to hide Isabella. Ex. 8, Philip Zodhiates Dep. at 146:4–147:15, 148:23–149:5, 158:21–159:1; Ex. 9, Kenneth Miller Dep. at 133:11–15; Ex. 2 at 66:14–70:19. Then on September 21, 2009, after Lisa and Isabella retrieved their Mennonite disguises from Kenneth, Philip drove Lisa and Isabella to the U.S.–Canada border. Ex. 9 at 139:16–141:11; Ex. 8 at 153:25–154:2, 164:2–18; Ex. 2 at 109:5–20. At the same time, Kenneth was arranging for a person he knew in Canada to pick Lisa and Isabella up from the Canadian side of the border and take them to the Toronto airport. Ex. 9 at 32:1–5, 35:14–36:8. Kenneth also contacted Timothy to arrange for Lisa and Isabella's plane tickets to Nicaragua and for Timothy to pick Lisa and Isabella up at the airport when they arrived. Ex. 9 at 14:25–15:2, 30:14–31:8, 36:23–39:10, 104:15–17; Ex. 6 at 53:21–54:20, 58:22–59:10, 59:20–60:15; Ex. 10, Timothy Miller Dep. Ex. 4

at JENKINS06963–65. Based on guidance from Kenneth, Timothy purchased one-way plane tickets for Lisa and Isabella that purposefully did not include travel through the United States, so as to make it harder to track them. Ex. 6 at 65:20–67:5, 109:23–110:23, 111:17–112:3, 113:17–114:4, 121:1–9; Ex. 10 at JENKINS06971–73; Ex. 11, Timothy Miller Dep. Ex. 9; Ex. 9 at 143:2–14. When Lisa encountered a problem with the tickets in El Salvador—the airline did not want to be responsible for them traveling to Nicaragua without a return flight—Lisa contacted Philip, who in turn contacted Timothy, who resolved the issue. Ex. 2 at 117:25–120:19; Ex. 8 at 300:12–18; Ex. 6 at 114:5–117:8; Ex. 7 at 007676. Timothy had the airline issue a sham return ticket, never to be paid for or used, solely to allow Lisa and Isabella to enter Nicaragua. Ex. 6 at 118:22–120:6; Ex. 7 at 007678–79. Kenneth then reimbursed Timothy's family for the cost of Lisa and Isabella's tickets. Ex. 9 at 143:22–144:16.

After spending several weeks in a different location in Nicaragua in case someone came looking for them, Lisa and Isabella moved to be close to Timothy's family. Ex. 6 at 148:15–21, 149:14–150:5, 158:20–160:2; Ex. 7 at 007680-84. Timothy helped Lisa rent an apartment and often hosted Lisa in his home, where she homeschooled Isabella and Timothy's children. Ex. 6 at 160:7–161:9, 166:9–19; Ex. 7 at 007687. In late October and November 2009, several messages from Lisa requesting items from her home in Virginia were sent through Kenneth to Philip. Ex. 8 at 319:11–14, 323:5–22, 331:1–6, 334:1–20, 347:6–11, 347:21–25, 356:3–18, 374:13–375:3; Ex. 9 at 64:20–65:19; Ex. 12, Philip Zodhiates Dep. Ex. 44; Ex. 13, Philip Zodhiates Dep. Ex. 48. Once the items were collected, Kenneth packed them in suitcases and Philip arranged to have his son's teacher (who was traveling to Nicaragua on unrelated business) transport the items to Lisa. Ex. 9 at 40:15–41:11; Ex. 8 at 338:17–21, 360:25–363:19, 368:12–14; Ex. 14, Philip Zodhiates Dep. Ex. 49. Philip informed Timothy of the timing of the items' arrival, and Timothy informed

Lisa so she could pick them up. Ex. 8 at 368:19–373:11; Ex. 6 at 190:5–191:10; Ex. 15, Philip Zodhiates Dep. Ex. 50. Later, Kenneth arranged for Lisa's Virginia home to be cleaned up and some of her remaining belongings stored. Ex. 9 at 78:5–79:14. Then, in May 2010, Philip purposefully overpaid Kenneth's family business by about $500 for flowers for his daughter's wedding. Ex. 8 at 381:8–383:16; Ex. 9 at 18:25–19:7; Ex. 16, Philip Zodhiates Dep. Ex. 53. Kenneth arranged with Timothy for this money to be transported to Nicaragua for Lisa. Ex. 9 at 41:21–22, 44:18–21, 97:25–99:2; Ex. 6 at 205:3–208:2; Pl. Janet Jenkins's Mot. for Partial Summ. J. (Dec. 13, 2019), Ex. 16, Doc. 439-16 at 3; Ex. 17, Timothy Miller Dep. Ex. 21. Throughout this time, all three Defendants used Lisa and Isabella's pseudonyms rather than refer to them openly and honestly. Ex. 6 at 165:10–15; Ex. 8 at 329:8–20, 334:1–335:1; Ex. 9 at 75:11–22; Ex. 12.

It is also undisputed, as evidenced by their criminal convictions on charges that required finding intent to obstruct Plaintiff's lawful parental rights, that Philip, Timothy, and Kenneth undertook these actions to assist Lisa in order to ensure Plaintiff could not exercise her custodial rights over Isabella. All three Defendants were aware when they became involved that Lisa and Plaintiff had been involved in a custody battle over Isabella, that the Vermont family court had recognized Plaintiff as Isabella's legal parent, and that a transfer of custody was possible, if not in fact likely. Ex. 8 at 58:13–59:16, 99:9–25, 114:15–115:4; Ex. 18, Philip Zodhiates Dep. Ex. 16; Ex. 19, Philip Zodhiates Dep. Ex. 26; Ex. 9 at 116:23–117:21, 121:4–12, 129:18–21; Ex. 6 at 56:16–58:15, 65:4–19, 67:7–11, 94:24–96:7; Ex. 10 at JENKINS06971–72; Ex. 20, Timothy Miller Dep. Ex. 8. Philip's testimony that he was motivated by a desire to protect Isabella from Plaintiff further shows that his purpose was to keep her from taking custody of Isabella. Ex. 8 at 385:10–20. Kenneth has admitted that he was aware he was aiding in parental kidnapping but wanted to ensure that the Vermont family court could not transfer custody to Janet because he disagreed that

she was Isabella's mother; and Timothy has testified that he understood that Lisa and Isabella were traveling to Nicaragua because of the possible custody transfer and would stay in Nicaragua if the Vermont court did transfer custody. Ex. 9 at 35:5–11, 129:6–130:5; Ex. 6 at 65:4–19, 67:12–68:14, 121:1–123:3, 140:4–17; Ex. 10 at JENKINS06977–78.

The undisputed actions of Philip, Kenneth, and Timothy are more than sufficient to establish that they, along with Lisa, had an agreement to hide Isabella so that Janet could not exercise custody over Isabella. They were in significant contact with each other at critical points in the conspiracy, with many of their actions occurring close in time to each other's in a way that was complementary and designed to ensure the success of their plan. *See Halberstam*, 705 F.2d at 487 (actions not in the same location but that were "symbiotic" and "pursuing the same object by different but related means" sufficient to infer agreement). Furthermore, Defendants' actions continued over the course of months, until at least May 2010, six months after the family court transferred primary custody to Janet and four months after the transfer of physical custody was supposed to occur.

Philip, Kenneth, and Timothy cannot and do not genuinely dispute the facts material to their involvement and agreement with Lisa, and Plaintiff is entitled to partial summary judgment on this element against them.

II. Plaintiff Is Entitled to Summary Judgment on Count 1 on the Theory of Aiding-and-Abetting Liability.

Following the Restatement (Second) of Torts § 876(b) to establish the requirements of aiding and abetting, Vermont law holds that "a person is subject to liability for harm to a third person from the tortious conduct of another if the person: . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct . . . herself." Op. and Order: Pls.' Mot. for Partial Summ. J. at 13 (Aug. 31, 2020), Doc.

555 (quoting *Concord Gen. Mut. Ins. Co. v. Gritman*, 146 A.3d 882, 887 (Vt. 2016) (quoting Restatement (Second) of Torts § 876)). The elements should be evaluated together such that "the stronger the evidence of substantial assistance, the less evidence of general awareness is required." *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1495 (8th Cir. 1997) (analyzing Restatement (Second) of Torts § 876(b)).

Plaintiff claims that Defendants are liable for Lisa's tortious acts under the aiding-and-abetting theory because "(1) [Lisa] committed the tort of intentional interference with parental rights; (2) . . . [Defendant] knew that the intentional interference constituted a breach of duty; and (3) . . . [Defendant] substantially assisted or encouraged the person who committed the tort." Op. and Order: Pls.' Mot. for Partial Summ. J. at 13 (Aug. 31, 2020), Doc. 555. As an initial matter, Plaintiff is entitled to partial summary judgment against all Defendants on the first element: Lisa's commission of the tort, *see supra* section I.A.

Furthermore, as with the civil-conspiracy theory of liability, Philip, Kenneth, and Timothy's undisputed involvement in helping Lisa commit the tort entitles Plaintiff to summary judgment against them on the remaining elements of the aiding and abetting theory of liability on Count 1.

A. There Is No Genuine Dispute that Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller Substantially Assisted Lisa.

"Closely intertwined with the concept of 'substantial assistance' is the principle of proximate cause." Op. and Order at 36 (Sept. 29, 2017), Doc. 277 (quoting *Montgomery v. Devoid*, 915 A.2d 270, 278 (Vt. 2006)). Courts following the Restatement have analyzed five factors to determine whether a defendant's assistance or encouragement was substantial enough to support liability under an aiding and abetting theory: "(1) the nature of the wrongful act; (2) the kind and amount of the assistance; (3) the relationship between the defendant and the actor; (4) the presence or

absence of the defendant at the occurrence of the wrongful act; and (5) the defendant's state of mind." *Gritman*, 146 A.3d at 888 (citing Restatement (Second) of Torts § 876 cmt. d). Some courts also consider the duration of the assistance provided, noting that it "may afford evidence of the defendant's state of mind." *Halberstam*, 705 F.2d at 484.

Given their extensive, active involvement, *see supra* section I.D., there is no genuine dispute that Philip, Kenneth, and Timothy substantially assisted and/or encouraged Lisa's commission of the tort. Analysis of the five restatement factors supports this conclusion. In this case, most important is the second factor, "the kind and amount of assistance." All three Defendants provided significant assistance to Lisa that, viewed in totality for each individual, made the harm to Plaintiff reasonably foreseeable. In particular, Timothy purchased one-way plane tickets for Lisa and Isabella that did not travel through the United States, and connected Lisa and Isabella to the Mennonite community in Nicaragua, including finding them a place to live and providing Lisa with work in Nicaragua. Ex. 6 at 109:23–110:23, 111:17–112:3, 113:17–114:4, 148:15–21, 153:22–154:14, 160:7–161:9, 166:9–19; Ex. 11; Ex. 10 at JENKINS06977; Ex. 7 at 007687. Kenneth encouraged Lisa to hide Isabella; connected Lisa to the Mennonite community, including Timothy; paid for Lisa and Isabella's airline tickets; and, after they were gone, helped provide them with money and items left behind in the United States. Ex. 9 at 14:25–15:2, 30:14–31:8, 36:23–42:1, 97:25–99:2, 104:15–17, 130:6–14, 143:22–144:16; Ex. 6 at 53:21–54:20. Philip helped connect Lisa with Kenneth, and thus with the Mennonite community that would hide them; drove them to the U.S.–Canada border; and, after they were gone, helped provide them with money and items left behind in the United States. Ex. 8 at 146:4–13, 149:13–14, 153:25–154:2, 158:21–159:1, 164:2–18, 334:1–20, 338:17–21, 356:3–18, 360:25–363:19, 368:12–14, 381:8–383:16. Given the connection between "substantial assistance" and "proximate cause," these admitted acts of Defendants suffice

to meet the standard.

The other factors further support a finding that these three Defendants substantially assisted Lisa. For the first factor, the nature of the wrongful act is one that readily lends itself to aiding and abetting liability. Lisa's actions required extensive coordination, organization, and funding to travel, undetected, out of the country and remain outside the country. Regarding the third factor, although the Defendants and Lisa did not have a significant pre-existing relationship, their relationship was necessary to accomplish Lisa's goal of hiding Isabella in a community she previously had no connection with. Fourth, all three Defendants were actively providing assistance during the most crucial days in September 2009 when Lisa fled the United States. Finally, all three Defendants assisted Lisa with the intention of helping her hide Isabella to prevent custody from being turned over to Plaintiff, *see supra* section I.D. All three continued to provide assistance to Lisa in the months after she initially fled the country to ensure that she and Isabella would remain hidden, up to providing Lisa with additional funds in May 2010, four months after physical custody was supposed to be transferred.

B. There Is No Genuine Dispute That Defendants Philip Zodhiates and Timothy Miller Knew That Interfering With Plaintiff's Parental Rights Was a Breach of Duty.[5]

The other aiding and abetting element requires that "the defendant must be generally aware of his role as a part of an overall illegal or tortious activity at the time that he provides the assistance." *Halberstam*, 705 F.2d at 477. Given the extensive evidence of Defendants' substantial assistance detailed above, "less evidence of general awareness is required." *In re*

[5] The Court has already granted summary judgment on two aiding and abetting elements—Lisa's commission of the tort and knowledge of breach of duty—against Kenneth, Op. and Order: Pls.' Mot. for Partial Summ. J. at 13–14 (Aug. 31, 2020), Doc. 555, and therefore, only the final element—substantial assistance—is addressed herein.

Temporomandibular Joint (TMJ) Implants, 113 F.3d at 1495. The Vermont Supreme Court has held that this prong requires each defendant to have "at least some level of knowledge or awareness of the pertinent attendant circumstances" with respect to Lisa's tortious conduct. *See Gritman*, 146 A.3d at 887 (quoting *Lussier v. Bessette*, 16 A.3d 580, 584 (Vt. 2010)). Knowledge can be inferred from the circumstances. For example, in *Gritman*, a case involving a group of teens negligently burning down a house, the Court held that a teen who did not set the fire and left shortly before the party was over nonetheless "knew, or had reason to suspect, that one or more of his peers was or would be negligent in managing and extinguishing the fire" because he was present when the fire was demonstrably burning too hot and had left without taking any steps to extinguish the fire himself or ensure someone else would do so properly. *Gritman*, 146 A.3d at 888.

Here, Philip and Timothy had the requisite knowledge. Both Defendants generally knew that they were part of an overall scheme to hide Isabella to keep Plaintiff from taking custody, *see supra* section I.D. This is further evidenced by the extent of their endeavors to disguise their actions. For example, Timothy took efforts to make it harder to track Lisa and Isabella, including booking one-way tickets that did not travel through the United States; Lisa and Isabella assumed Mennonite dress and false names in Defendants' presence; and Philip drove Lisa and Isabella all the way from Virginia to the U.S.–Canada border but then had Lisa and Isabella actually cross the border in a taxi rather than in his car. Philip also used a cover story of visiting a friend he had no plans to visit before that day and never actually visited. Defendants would not have gone to these efforts unless they knew, or at minimum had reason to suspect, that Lisa's conduct was tortious. Ex. 6 at 62:7–20, 66:4–67:1, 73:15–17, 148:15–150:5, 152:9–21, 164:8–166:2, 173:13–174:13, 195:1–196:2; Ex. 7 at 007668–69; Ex. 10 at JENKINS06973, JENKINS06977; Ex. 11; Ex. 2 at 110:1–13, 145:9–146:10; Ex. 8 at 149:15–150:21, 165:5–17, 168:3–10, 285:13–19, 289:2–292:13,

329:8–330:3; Ex. 21, Philip Zodhiates Dep. Ex. 36; Ex. 22, Philip Zodhiates Dep. Ex. 62.

There is no genuine dispute that Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller's admitted actions constituted "substantial assistance" or encouragement to Lisa or that Philip and Timothy knew that interfering with Plaintiff's parental rights constituted a breach of duty; therefore Plaintiff is entitled to summary judgment on the aiding-and-abetting theory of liability of Count 1 against them.

III. Defendants Philip Zodhiates and Timothy Miller's False Belief that Plaintiff Abused Isabella Provides No Defense to Count 1.[6]

Philip and Timothy[7] attempt to justify their undisputed actions based on their unreasonable and false belief that Plaintiff sexually abused Isabella. Defendants' allegations are insufficient to support any justification defense to Count 1, if such an affirmative defense even exists.[8]

Although no Vermont case has addressed this issue, it is likely that Vermont law would not recognize Defendants' purported affirmative defense in the broad way they have alleged. Vermont criminal law provides an indication of how high a bar is required to assert a justification

[6] Plaintiff disputes the veracity of Defendants' abuse allegations. Nothing in this motion should be read to concede that the allegations are anything more than a fabrication motivated by Defendants' animus against Plaintiff due to her identity as a lesbian.

[7] Kenneth has indicated an intention not to rely on this purported defense because he does not know whether the allegations are true. Ex. 9 at 121:22–123:20.

[8] No Defendant raised any affirmative defense of justification due to reasonable belief of abuse in their answers to Plaintiff's complaint. *See* Answer and Defenses of Def. Linda M. Wall to Pls.' Revised Second Am. Compl. (Oct. 10, 2017), Doc. 279; Answer and Affirmative Defenses of Philip Zodhiates to Pls.' Revised Second Am. Compl. (Nov. 3, 2017), Doc. 288; Answer and Affirmative Defenses of Response Unlimited, Inc., to Pls.' Revised Second Am. Compl. (Nov. 3, 2017), Doc. 289; Answer and Affirmative Defenses of Victoria Hyden to Pls.' Revised Second Am. Compl. (Nov. 3, 2017), Doc. 290; Defs.' Liberty Counsel Inc. and Rena M. Lindevaldsen's Answer and Defenses to Pls.' Revised Second Am. Compl. (Apr. 24, 2020), Doc. 502; Def. Timothy D. Miller's Answer to Pls.' Revised Second Am. Compl. (May 5, 2020), Doc. 510. Therefore, all Defendants are procedurally barred from raising any abuse defense now. *See Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir. 1984) ("Failure to plead an affirmative defense in the answer results in the waiver of that defense and its exclusion from the case.") (citation omitted)).

defense. The criminal law equivalent to the tort, the crime of custodial interference by a relative of the child, contains a narrow defense if "the person charged with the offense was acting in good faith to protect the child from real and imminent physical danger." 13 V.S.A. § 2451(c). The law specifically provides that "[e]vidence of good faith shall include the filing of a nonfrivolous petition documenting that danger and seeking to modify the custodial decree in a Vermont court of competent jurisdiction" that must have been "filed within three business days of the termination of visitation rights." 13 V.S.A. § 2451(c). Furthermore, the "defense shall not be available if the person charged with the offense has left the State with the child." 13 V.S.A. § 2451(c). This Court has already acknowledged the relationship between criminal law of custodial interference and the civil tort. *See* Op. and Order at 29 (Sept. 29, 2017), Doc. 277 (citing *State v. Vakilzaden*, 742 A.2d 767, 771 (Conn. 1999), *overruling Marshak v. Marshak*, 628 A.2d 964 (Conn. 1993)). In the referenced cases, the Connecticut Supreme Court in a criminal custodial interference case explicitly overruled a defense previously established by civil tort precedent, rather than distinguishing between the criminal and civil custodial interference claims. *Vakilzaden*, 742 A.2d at 771–72.

Furthermore, this Court previously held, in reference to Count 1, that section 700 of the Restatement (Second) of Torts tracks Vermont common law. Op. and Order at 41 (Oct. 24, 2013), Doc. 115. Comment e to § 700 of the Restatement recognizes only a narrow defense for actors protecting abused children. Comment e states:

> *Privilege to rescue from physical violence.* One is not liable for rescuing a child from physical violence inflicted by its parent in excess of his parental privilege. To entitle the actor to immunity, however, it must appear reasonably probable that the child is about to suffer immediate harm or that it will be subjected to immediate harm if it returns to its home. It is also necessary to the actor's protection that he act for the purpose of saving the child from the threatening danger or of assisting him to escape from it. . . . A private citizen is not privileged, however, to abduct or entice a child from its parent to save the child from what the actor reasonably believes to constitute

> improper surroundings or immoral influences, nor to afford it advantages superior to those available in its home.

Restatement (Second) of Torts § 700.

Few courts have addressed whether an abuse defense to the tort exists and if so, what is required. *See, e.g.*, *D & D Fuller CATV Const., Inc. v. Pace*, 780 P.2d 520 (Colo. 1989) (adopting tort without mention of abuse defense); *Khalifa v. Shannon*, 945 A.2d 1244 (Md. 2008) (same); *Wood v. Wood*, 338 N.W.2d 123 (Iowa 1983) (same); *Lloyd v. Loeffler*, 694 F.2d 489, 496 (7th Cir. 1982) (same). Several courts have adopted a narrow defense along the lines of comment e to the Restatement. *See, e.g.*, *Murphy v. I.S.K. Con. of New England, Inc.*, 571 N.E.2d 340, 351 n.18 (Mass. 1991) (citing comment e); *Stone v. Wall*, 734 So. 2d 1038, 1042 (Fla. 1999). Plaintiff is aware of only two courts that have adopted a broader abuse defense. *See Wyatt v. McDermott*, 725 S.E.2d 555, 564 (Va. 2012) ("[A] party should not be held liable if he or she 'possessed a reasonable, good faith belief that interference with the parent's parental or custodial relationship was necessary to protect the child from physical, mental, or emotional harm.'" (quoting *Kessel v. Leavitt*, 511 S.E.2d 720, 766 (W. Va. 1998) (establishing the same affirmative defense)). It is unlikely that Vermont would follow these outliers that go beyond the Restatement and far beyond the equivalent defense in Vermont criminal law. Recognizing such a broad defense would insulate people who inject themselves in the parent-child relationships of others if they believe "improper surroundings or immoral influences" are likely to cause the child mental or emotional harm, in the way comment e to the Restatement rejects. If any justification defense to Count 1 exists under Vermont law, it requires reasonable belief that the child is in real danger of immediate physical harm if returned to the parent, a standard Defendants have not met and cannot meet here.

Defendants have not put forth any allegations that they had a reasonable belief at the time of their actions that Isabella would be in danger of immediate physical harm if Plaintiff took

custody.[9] There has been no allegation that Plaintiff ever physically abused Isabella, and Defendants' allegations of sexual abuse fall well short of what is required. In particular, there has been no allegation that Plaintiff ever touched Isabella inappropriately in any way. Ex. 8 at 389:18–390:5. Indeed, the limited allegations Defendants raise were litigated in the Vermont family court, the proper forum for such contentions per the justification defense under Vermont criminal law, and the family court concluded that "there was no evidence of abuse of [Isabella,]" a finding that was affirmed on appeal. Ex. 4; *Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768, 776 (Vt. 2010) (finding that the family court "correctly found the allegations of abuse to be wholly unfounded" and Lisa had no "reasonable suspicion of abuse" to justify her actions). Defendants' "abuse" allegations amount only to a belief that Plaintiff's home was "improper" or that Plaintiff would be an "immoral influence" on Isabella and are insufficient to justify Defendants' actions.

CONCLUSION

The Court should grant Plaintiff's motion for partial summary judgment against all Defendants that (1) Lisa committed the tort of custodial interference, which is required both for aiding-and-abetting liability and constitutes an unlawful act as required for civil-conspiracy liability; and (2) Lisa's tortious acts harmed Plaintiff, as required by the civil-conspiracy theory of liability. The Court should also grant Plaintiff's motion for summary judgment against Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller on the remaining elements of both the civil-conspiracy and aiding-and-abetting theories of liability for Count 1 of Plaintiff's Second Amended Complaint.

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[9] Even if sufficient allegations did exist, Timothy cannot state this defense because he did not have any knowledge of alleged abuse at the time he joined the conspiracy and first assisted Lisa, and, therefore, could not have been motivated at the time by such allegations. *See* Ex. 6 at 50:17–51:6, 102:25–103:5 (indicating he had not met or spoken to Lisa when he agreed to help on September 21, 2009).

Respectfully submitted.

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