IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOSEPH JEAN-CHARLES, aka JEAN-CHARLES JOSEPH, Plaintiff, vs. DOUGLAS PERLITZ, et al., Defendants	Civ. A. No. 3:11-CV-00614 (JCH)

MEMORANDUM IN SUPPORT OF DEFENDANT PAUL E. CARRIER'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

The complaint alleges that Douglas Perlitz, the lead defendant, sexually abused the plaintiff, Joseph Jean-Charles, when Jean-Charles was a student at the Project Pierre Toussaint school in Cap-Haitien, Haiti. The complaint seeks to hold Father Paul E. Carrier, S.J. ("Carrier"), liable on various theories, yet it alleges no facts that plausibly suggest that Carrier is liable. Moreover, to the extent the complaint alleges that Carrier was negligent, Carrier, a volunteer officer and director with the charity that allegedly ran the school, is immune from liability under both federal and Connecticut law. For these reasons, the complaint fails to state a claim against Carrier on which relief can be granted, and the claims against Carrier must be dismissed.

THE COMPLAINT'S ALLEGATIONS

The complaint makes the following allegations:

Father Paul E. Carrier is a religious priest of the Society of Jesus of New England, the University Chaplain and Director of Campus Ministry and Community Service at Fairfield University in Fairfield, Connecticut, and Chairman and President of the Haiti Fund, Inc. (Compl. ¶ 5).

In approximately 1997, Douglas Perlitz, with the assistance of Carrier, obtained funding from the Order of Malta to operate a boy's school in Cap-Haitien, Haiti, to be known as Project Pierre Toussaint ("the School"). (Compl. ¶ 13). Carrier, along with all of the other defendants, were responsible for "the hiring, retention, direction, and supervision" of Perlitz. (Compl. ¶ 48). The Haiti Fund, Inc., "funded, managed, controlled, and directed" the School. (Compl. ¶ 7). The School served boys of all ages, providing them with meals, access to running water for bathing, classroom instruction, and opportunity to play sports. Many of the School's students were "street children." (Compl. ¶ 13). Carrier knew that the students were "extremely vulnerable minors." (Compl. ¶ 65). Perlitz, with the assistance of Carrier and others, obtained additional funding in

1999 for the purpose of building a residential facility known as the Village at the School. (Compl. ¶ 14). Carrier and others "sponsored and promoted" the School. (Compl. ¶ 65).

Carrier knew that "[t]hrough Project Pierre Toussaint," Perlitz "had access to, authority over, and control over" the School's students. (Compl. ¶ 15). Carrier also knew that "[t]hrough Project Pierre Toussaint," Perlitz "was in a position that [the students] would believe that they could trust" Perlitz, and that they would "have confidence" that Perlitz's conduct "was to further the best interests" of the students. (Compl. ¶ 16).

Carrier frequently traveled to Cap-Haitien to visit Perlitz and the School or to "otherwise participate[]" in activities at the School. (Compl. ¶ 17). Carrier "became aware" that Perlitz was "engaged in conduct that endangered" the students, and "aided and abetted" Perlitz in his "efforts to sexually abuse minor boys participating in Project Pierre Toussaint", and in Perlitz's "efforts to conceal" the abuse. (Compl. ¶ 17).

In approximately 2006,[1] when Jean-Charles was approximately 15 years old, Perlitz sexually abused him. (Compl. ¶ 18). Jean-Charles "is unable at this time to fully disclose in complete detail to what degree Defendant Perlitz did abuse [him] emotionally and physically." (Compl. ¶ 21). As a result of the sexual abuse, Jean-Charles has suffered emotional injuries. (Compl. ¶ 19). Perlitz "misrepresented and concealed" from Jean-Charles the wrongful nature of the abuse and the fact that the abuse could harm him. (Compl. ¶ 20). Perlitz was convicted of violating 18 U.S.C. § 2423(b) in 2010 (Compl. ¶ 4).[2]

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[1] The precise date of the alleged abuse may become important in the case, since the federal statute under which Jean-Charles is suing was significantly amended in July 2006, *see* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 707(b), 120 Stat. 587, 650, and for other reasons, potentially including the statute of limitations. For purposes of this motion, however, the Court should assume that the abuse at the time in 2006 most favorable to the plaintiff's case.

[2] Notably, the complaint does not allege that the conviction was on account of the abuse of Jean-Charles as opposed to other victims.

While the remainder of the complaint is replete with legal conclusions and with recitations of the elements of various causes of action (including conclusory allegations concerning Carrier's knowledge, a point discussed in greater detail below (e.g., Compl. ¶¶ 49, 52, 53)), the complaint alleges no other *facts* that relate to Carrier or his supposed liability.

ARGUMENT

A. The Complaint Must Be Dismissed Because It Fails To Allege Facts That Allow A Reasonable Inference That The Defendant Is Liable.

Dismissal is required under Federal Rule of Civil Procedure 12(b)(6) when a party fails to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a)(2), which calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). That is, the complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation and internal quotation marks omitted). A claim is plausible on its face if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The complaint must do more than create a "sheer possibility that a defendant has acted unlawfully." *Id.*

While the court must accept as true all allegations of *fact* in the complaint for purposes of a motion to dismiss, it need not accept as true the legal conclusions stated in the complaint. *Id.* at 1949-50. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949. Rather, the plaintiff must show that his allegations "possess enough heft" to establish an entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

The complaint attempts to state a claim against Carrier on four theories, none of which can succeed under the standards outlined above.

B. The Complaint Fails To State A Claim Under 18 U.S.C. § 2255.

Count 2 of the complaint seeks to hold Carrier liable under 18 U.S.C. § 2255(a), which provides:

> Any person who, while a minor, was a victim of a violation of section … 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.

Section 2423(b), the statute under which Perlitz was convicted, provides, in turn:

> A person who travels in interstate commerce or travels into the United States, or a United States Citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

The complaint does not allege that Carrier himself traveled to Haiti for illicit purposes. Instead, Jean-Charles asserts that Carrier is liable under § 2255(a) because he aided and abetted Perlitz's violation of § 2423(b). The claim fails because the complaint contains no allegations of fact that could possibly support a claim of aiding and abetting.

Aiding and abetting is primarily a concept from the criminal law. A person who aids or abets a crime is punishable as a principal. 18 U.S.C. § 2(a). In the criminal law, aiding and abetting requires proof that the defendant acted "with the specific purpose of bringing about the underlying crime." *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990). The defendant must have had knowledge of the crime *and* "some interest in furthering the unlawful act," *and* he must have "consciously assisted the commission of the specific crime in some active way." *Id.* (citations and internal quotation marks omitted). However, it is also possible to be liable for aiding and abetting a tort, *see generally Conn. Nat'l Bank v. Giacomi*, 233 Conn. 304, 329 & n.28 (1995), and for purposes of this motion, we assume *arguendo* that it is possible to be civilly

liable for aiding and abetting the tort Perlitz allegedly committed under 18 U.S.C. § 2255 when he traveled to Haiti "for the purpose of engaging in any illicit sexual conduct," 18 U.S.C. § 2423(b), and then sexually abused Jean-Charles. But the very few cases that have dealt with claims of civil aider and abettor liability under § 2255 have required a showing of the active participation that would be necessary to find that the defendant had criminally aided and abetted the criminal offense under § 2423(b), and there are no such allegations in the complaint in this case.

In *Doe v. Liberatore*, 478 F.Supp.2d 742 (M.D. Pa. 2007), for example, the claim was that a parish priest with a history of past incidents of sexual abuse of others had sexually abused a teenage parishioner. Several diocesan defendants had known of the past instances of abuse, and the bishop had reassigned the priest from the seminary where the earlier incidents had occurred to the parish church where the plaintiff was abused. One of the claims against the diocesan defendants was for aiding and abetting under § 2255. On a motion for summary judgment, the court held that the defendants were not liable. The court concluded that the plaintiff had proved that the *principal* criminal offense that was the predicate for civil liability under § 2255 had been committed, but there was no evidence that the diocesan defendants knew the offense had been committed, or that the defendants acted with the intent to facilitate it. *Id.* at 756.[3] The diocesan defendants had reason to suspect that the priest was abusing the parishioner, but their general suspicion alone was insufficient. And in any case, there was no evidence that the diocesan

[3] The elements of aiding and abetting in the Third Circuit, as recited by the court in *Liberatore*, are substantially similar to the elements in the Second Circuit, noted above.

defendants shared the priest's specific intent to commit the crime, and therefore, they could not be liable under § 2255. *Id.* at 756-57.[4]

The court's approach in *Liberatore* is persuasive and should be applied in this case. Since liability under § 2255 is predicated on liability under one of the criminal prohibitions specified in the statute (in this case, the relevant predicate offense is violation of 18 U.S.C. § 2423(b)), Carrier can be found liable for aiding and abetting under § 2255 only if he aided and abetted the predicate offense, as aiding and abetting are defined in the criminal law.

To prevail, Jean-Charles must ultimately show, by a preponderance of the evidence, that Carrier would have been liable for aiding and abetting under § 2423(b). *Liberatore*, 478 F. Supp. 2d at 755. At the pleading stage, Jean-Charles must allege facts that plausibly suggest he can ultimately make that showing in order to withstand a motion to dismiss.

Jean-Charles cannot meet this pleading burden for two reasons. First, the complaint does not allege facts to support all of the elements of aider and abettor liability. The complaint contains no allegations whatsoever that could even possibly suggest that Carrier had "some interest in furthering the unlawful act," or that he "consciously assisted the commission of the specific crime in some active way," as required under *Labat* for a finding of aiding and abetting liability.

Second, the complaint fails to *adequately* allege that Carrier knew of the abuse of Jean-Charles, which is another of the elements of the aiding and abetting claim. To be sure, the complaint alleges, in a purely conclusory way, that Carrier knew of the abuse. But this kind of allegation of knowledge of misconduct by a subordinate on the part of a superior is precisely the

[4] The other case that has considered an aiding and abetting claim under § 2255, *M.A. v. Village Voice Media Holdings, LLC*, 2011 WL 3607660 (E.D. Mo. Aug. 15, 2011), reached a similar conclusion and cited *Liberatore*, but it did not arise on facts analogous to the facts in this case.

allegation that the Supreme Court found inadequate in *Iqbal.* In that case, Iqbal, a Pakistani Muslim who was arrested and detained in harsh conditions after the 9/11 attacks, sued the Attorney General and the Director of the FBI. Iqbal alleged that the officers "knew of, condoned, and willfully and maliciously agreed to subject" him to the harsh conditions because of his religion, race, and national origin. *Iqbal,* 129 S.Ct. at 1944. The Court held that the allegation was insufficient, specifically rejecting the argument that Fed. R. Civ. P. 9, which allows a plaintiff to plead intent, knowledge, and other states of mind "generally", relieves plaintiffs from the burden to do more than state mere conclusions. *Id.* at 1951, 1954.

The allegations against Carrier are even *more* conclusory than the allegations the Supreme Court found insufficient in *Iqbal.* There, the allegation was not just knowledge as in the present case, but that the defendants "condoned, and willfully and maliciously agreed to subject" Iqbal to the harsh conditions. There are no analogous allegations here. For these reasons, the complaint fails to state a claim of aiding and abetting liability under § 2255 against Carrier and must be dismissed.

C. The Claim For Negligent Hiring, Retention, Direction, or Supervision Must Be Dismissed.

Count 7 of the complaint alleges negligent hiring, retention, direction and supervision. Because the complaint does not sufficiently plead facts to support a claim for negligence, and because Carrier is immune from liability for negligence under both federal and Connecticut law, Count 7 fails to state a claim upon which relief can be granted.

1. The Complaint Fails To State A Claim For Negligence

To make out a claim for negligence, Jean-Charles must show a duty of care, a breach of the duty, causation, and actual injury. *Seguro v. Cummiskey,* 82 Conn. App. 186, 192 (2004). Carrier had no duty to students such as Jean-Charles unless he knew or reasonably should have

known Perlitz had a "propensity to engage in [the] type of tortious conduct" of which Jean-Charles accuses him. *Dignan v. McGee,* 2009 WL 973495, at *6 (D. Conn. Apr. 9, 2009) (citing *Roberts v. Circuit-Wise, Inc.*, 142 F.Supp.2d 211, 214 (D. Conn. 2001)).

At issue is the sufficiency of the allegations concerning Carrier's knowledge of any past acts of abuse or criminal propensities on the part of Perlitz, or other factors that should have led Carrier to decide that Perlitz should not be in a position of authority over the School's children.[5] But the complaint is absolutely silent about any prior misconduct by Perlitz or anything at all about Perlitz that would lead Carrier or anyone else to question his suitability. "It is well settled that defendants cannot be held liable for their alleged negligent hiring, training, supervision or retention of an employee accused of wrongful conduct unless they had notice of said employee's propensity for the type of behavior causing the plaintiff's harm." *Loglisci v. Stamford Hosp.*, 2011 WL 1026821, at *8 (Conn. Super. Ct. Feb. 22, 2011). All the complaint does is allege, in a purely conclusory way, without any supporting allegations of fact, that Carrier "became aware that Defendant Perlitz was engaged in conduct that endangered minor boys participating in Project Pierre Toussaint" (Compl. ¶ 17), and that he "knew or should have known" that "Perlitz "was of bad character and reputation and unable to properly interact with minors" (Compl. ¶ 52). These conclusory allegations are insufficient to meet the pleadings standard for pleading knowledge set out in *Iqbal.*

2. The Connecticut Negligence Claim Is Preempted By the Volunteer Protection Act.

According to the complaint, the Haiti Fund, Inc. "funded, managed, controlled and directed Project Pierre Toussaint." (Compl. ¶ 7). Carrier was the chairman and president of the

[5] Contrast this question with the question under Count 2, which, in summary, is whether Jean-Charles adequately alleges that Carrier knew that Perlitz was traveling to Haiti *for the purpose of engaging in illicit sexual conduct with Jean-Charles.*

Haiti Fund, Inc. (Compl. ¶ 5). The complaint does not allege that Carrier was employed by the Haiti Fund, Inc. or that he was anything other than what in fact he was, namely, a volunteer. Because Carrier was a volunteer for the Haiti Fund, Inc., the U.S. entity that allegedly ran the School, the claim against him for negligence is barred by the Volunteer Protection Act of 1997, 42 U.S.C. § 14501 *et seq.*

The Act provides:

> Except as provided in subsections (b) and (d) of this section, no volunteer of a nonprofit organization … shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—
>
> (1) The volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization … at the time of the act or omission;
>
> (2) If appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the non-profit organization …; [and]
>
> (3) The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer …

42 U.S.C. § 14503(a). There are various exceptions to the protections of the statute. For example, the limitations do not apply to misconduct that "involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court." *Id.* § 14503(f)(1)(C). But none of the statutory exceptions apply given the facts alleged in this case. The Act preempts state law except to the extent that state law provides *greater* protection to volunteers. *See* 42 U.S.C. § 14502(a).

Each of the requirements of 42 U.S.C. § 14501 are met in this case. The Haiti Fund, Inc., is a "nonprofit organization" for purposes of the Act. The statute defines a nonprofit organization as an organization described by § 501(c)(3) of the Internal Revenue Code and exempt from tax

under § 501(a), *or* "any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes." 42 U.S.C. § 14505(4). The complaint itself makes it clear that the Haiti Fund, Inc., which allegedly runs the School, is a nonprofit organization as thus defined.[6]

> Carrier is a volunteer for purposes of the Act. The statute defines a volunteer as:
>
> [A]n individual performing services for a nonprofit organization … who does not receive—
>
> (A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or
>
> (B) any other thing of value in lieu of compensation, in excess of $500 per year,
>
> And such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

42 U.S.C. § 14505(6). The complaint does not allege that Carrier received compensation or anything else of value from the Haiti Fund, Inc., nor could it.

The complaint does not allege the purposes of Carrier's alleged hiring of Perlitz, his supervision of Perlitz, his visits to Haiti, and so forth. But given the allegations that the Haiti Fund, Inc. ran the School (Compl. ¶ 7) and that Carrier was an officer and director of the Haiti Fund, Inc. (Compl. ¶ 5), there can be no doubt on the allegations of the complaint, Carrier was acting within the scope of his responsibilities to the Haiti Fund, Inc.

Last, Count 7 does not allege any facts to support that the alleged harm to Plaintiff was "caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a

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[6] While the Haiti Fund, Inc. need not be a § 501(c)(3) organization in order to be a "nonprofit organization"—a charity set up to fund a school is plainly organized for charitable or educational purposes, which is enough under the statute—in fact the Haiti Fund, Inc. is a § 501(c)(3) organization, listed in IRS Publication 78. The Court can take judicial notice of the Haiti Fund, Inc.'s tax-exempt status on a motion to dismiss where it is relevant to the defendant's claim of statutory immunity. *See, e.g., Manning v. Bos. Med. Ctr. Corp.*, 2011 WL 864798, at *3 n.5 (D. Mass. Mar. 10, 2011).

conscious, flagrant indifference to the rights or safety of the individual." 42 U.S.C. § 14501. Rather, Count 7 of the complaint alleges only negligence. It does not allege willful or criminal misconduct, gross negligence, or any of the other states of mind that could give rise to an exception to the statutory rule of immunity.

Because Carrier is immune from liability under 42 U.S.C. § 14501, Count 7 asserts a claim on which relief cannot be granted. Count 7 therefore must be dismissed.[7]

3. Carrier Is Immune From Liability For Negligence Under Connecticut Law.

A Connecticut statute provides similar, and perhaps even greater, protection to volunteers such as Carrier. Under CGS § 52-557m:

> Any person who serves as a director, officer or trustee of a nonprofit organization qualified as a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, and who is not compensated for such services on a salary or prorated equivalent basis, shall be immune from civil liability for damage or injury occurring on or after October 1, 1987, resulting from any act, error or omission made in the exercise of such person's policy or decision-making responsibilities if such person was acting in good faith and within the scope of such person's official functions and duties, unless such damage or injury was caused by the reckless, willful or wanton misconduct of such person.

The same analysis applies under the Connecticut statute as under the Volunteer Protection Act. Carrier was an officer and director of the Haiti Fund, Inc. The Haiti Fund, Inc. was a tax-exempt corporation.[8] There is not, and could not be, an allegation that Carrier received compensation from the Haiti Fund, Inc., let alone any compensation "on a salary or prorated

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[7] The one Connecticut case dealing with the Act on a negligent supervision claim denied a motion for summary judgment, but there, there was a genuine issue of material fact whether the volunteer's actions were negligent or something worse. *See Maisano v. Congregation Or Shalom*, 2009 WL 4852207, at *3 (Conn. Super. Ct. Nov. 19, 2009). Such reasoning is inapposite here, where the question is not about the evidence, but about the pleadings. Jean-Charles has pleaded only negligence.

[8] The Haiti Fund, Inc., is a § 501(c)(3) organization listed in IRS Publication 78, and the Court may take judicial notice of that fact on a motion to dismiss based on statutory immunity. *See Manning v. Bos. Med. Ctr. Corp.*, 2011 WL 864798, at *3 n.5 (D. Mass. Mar. 10, 2011).

equivalent basis." There is no allegation in the complaint of bad faith, recklessness, willfulness, or wantonness. Given the nature of the negligence claim against Carrier, Jean-Charles is necessarily accusing him of negligence within the scope of his responsibilities for the Haiti Fund, Inc. Therefore, Carrier is immune from liability under the statute and Count 7 must be dismissed.

D. The Complaint Fails To State A Claim For Breach Of Fiduciary Duty.

Count 9, which alleges that Carrier breached a fiduciary duty to Jean-Charles, fails for the same reasons the negligence claim fails: if the facts alleged do not give rise to a plausible inference that Carrier knew or should have known that Perlitz was abusing Jean-Charles or that he was unsuitable for his position, Carrier cannot be liable. *See Iqbal, supra.* Moreover, because the claim is really a claim of breach of the duty of care—that is, a claim that Carrier was negligent or failed to exercise due care— rather than a claim of breach of the duty of loyalty, *see generally Saye v. Old Hill Partners, Inc.*, 478 F.Supp.2d 248, 271 (D. Conn. 2007) (discussing two prongs of fiduciary duty), Carrier is immune from liability for the same reasons he is immune from liability on the claim of negligence.

The claim fails for an additional reason. There are no facts alleged from which the Court could plausibly infer that Carrier had a fiduciary duty to Jean-Charles. A fiduciary relationship requires "a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Ahern v. Kappalumakkel*, 97 Conn. App. 189, 194 (2006). There is no allegation in the complaint that there was *any* relationship between Carrier and Jean-Charles, let alone a fiduciary relationship. There is no allegation that they ever met or that Carrier had any authority or position within the School.

The Connecticut cases show that the facts Jean-Charles has alleged do not sufficiently allege a fiduciary duty owed by Carrier to Jean-Charles. In *Doe v. Norwich Roman Catholic*

Diocesan Corp., 2010 WL 3720144 (Conn. Super. Ct. Sept. 2, 2010), the parishioner alleged that the priest held himself out as "a religious instructor and counselor" and that he "undertook the religious instruction and spiritual and emotional counseling of the plaintiff." She also alleged that the priest and the other defendants, including her bishop, were "the representative[s] of the Roman Catholic Church responsible for the supervision of the clergy within said church and the care of all the parishioners, including children, within said church." The court rejected these allegations as insufficient to support a claim for breach of fiduciary duty. *A fortiori*, the allegations against Carrier are insufficient, because there is no allegation of any relationship whatsoever between him and Jean-Charles, let alone an allegation that the students of Project Pierre Toussaint were in his care as the children of a diocese are within the bishop's care.

The cases in which the courts have found the allegations or the facts sufficient to support a fiduciary relationship between an alleged victim of abuse and someone in a supervisory position over the alleged abuser show the kinds of facts that Jean-Charles would have to be able to allege in order to state a claim against Carrier. All of the cases emphasize that the supervisor (typically the bishop or the diocese itself) instructed or encouraged the alleged victim to trust and repose faith in the alleged abuser:

1. In *Doe v. Norwich Roman Catholic Diocese Corp.*, 48 Conn. L. Rptr. 59 (Super. Ct. 2009), the parishioner alleged in detail that for eight or nine years, she attended CCD classes sponsored by the diocese, where she was taught that

> as a good Catholic, she was to adhere to the teachings of the Catholic Church, follow the mandates and guidance of the Norwich Diocese and its bishop, and hold its clergy, priests, and bishop in the highest regard

and that she should

> put her trust and faith in the Norwich Diocese and its churches, clergy, priests, and Bishop and that they were to serve as her guide in all matters of Catholic faith, including the catholic Church's role of worship and its teachings about the

> almighty power of God, the goal of eternal salvation in Heaven, and the damnation of hell for living a sinful life.

As a result of these teachings, the parishioner "developed a justifiable trust in" the priest who she alleged abused her and in the diocese. The court focused on these allegations in finding that the parishioner could state a claim for breach of fiduciary duty. But there are no such allegations here. In particular, there are no allegations that Carrier told anyone, let alone Jean-Charles himself, to put his trust in Perlitz. Moreover, though Carrier is a priest, there is no allegation that he was Jean-Charles's priest, or that he held any kind of religious authority or religious instructional role over Jean-Charles.

2. In *Doe v. Norwich Roman Catholic Diocesan Corp.,* 309 F.Supp.2d 247, 252-53 (D. Conn. 2004), the parishioner alleged that she was a member of several church- or diocese-sponsored activities, including the church choir and the Catholic Youth Organization, that the defendants encouraged her to consult with the alleged abuser for "spiritual and religious counseling", and that the defendants encouraged the alleged abuser to involve himself in the church activities in which the parishioner took part. None of these factors are present here. There is no allegation that Carrier encouraged Jean-Charles or anyone else to turn to Perlitz for guidance, and no allegation that Carrier encouraged Perlitz to take part in any activities that put him in contact with Jean-Charles.

3. In *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.,* 196 F.3d 409, 429-30 (2d Cir. 1999), a case decided on an appeal from a renewed motion for judgment as a matter of law rather than a motion to dismiss for failure to state a claim, the evidence was that the victim attended a diocesan school where the teachers were employees of the diocese, that the diocese knew he had a "special and privileged" relationship with the abusive priest and was one of a small group of boys to whom the priest acted "as a mentor and spiritual advisor," and that

the victim's school taught him that his bishop was "his caretaker and moral authority." The diocese had also been "entrusted with reports" from victims stating that they had been abused by the priest. No such facts are alleged here. Carrier did not employ Jean-Charles's teachers generally or Perlitz specifically; there is no allegation that Carrier or anyone for whom Carrier is responsible taught Jean-Charles that Perlitz should be considered as Jean-Charles's advisor or authority. Nor is there any non-conclusory allegation of fact suggesting that Carrier had received any reports of abuse from other students.

The key fact in these cases is that the supervisory defendant has, in some way, encouraged the victim to put his or her trust in the abuser. Here, there are no such allegations. Jean-Charles has not alleged any facts to suggest that Carrier breached the trust Jean-Charles had in him by allowing Perlitz to work at the School. Indeed, there is no allegation that Jean-Charles *had* any trust in Carrier or even that he knew who he was. For these reasons, the complaint fails to allege the existence of a fiduciary duty. The claim for breach of fiduciary duty accordingly must be dismissed.

E. The Complaint Fails To State A Claim For Vicarious Liability.

Jean-Charles alleges in Count 10 that Carrier is liable for Perlitz's alleged torts on a respondeat superior theory. This claim necessarily fails for two reasons. First, no allegations in the complaint plausibly suggest that Perlitz was Carrier's agent. Second, in any event, no allegations in the complaint plausibly suggest that the alleged sexual abuse could have been within the scope of an agency relationship even if such an agency existed.

1. Jean-Charles Has Not Alleged Facts Suggesting An Agency Relationship.

The complaint does not allege any facts that could support the conclusion that Perlitz was Carrier's agent. The allegation is that Perlitz worked at Project Pierre Toussaint, which was run by the Haiti Fund, Inc. Carrier was an officer and director of the Haiti Fund, Inc. Given these

allegations, at most Perlitz and Carrier were both agents of the Haiti Fund, Inc. Only a principal can be liable for the acts of an agent on respondeat superior grounds; a fellow agent is not liable. There is no allegation that Perlitz was working for Carrier rather than for the Haiti Fund, Inc. or Project Pierre Toussaint.

2. Any Sexual Abuse of Jean-Charles Would Be Outside The Scope Of Any Alleged Agency.

The decisions of this Court on whether a principal can, even in principle, be vicariously liable under Connecticut law for sexual assaults committed by their agents are not unanimous. On the one hand, in *Abate v. Circuit Wise, Inc.*, 130 F.Supp.2d 341, 347-48 (D. Conn. 2001), the court held: "It is well-settled under Connecticut law that an employer is not vicariously liable for the intentional torts committed by an employee, except under limited circumstances . . . ." On the other hand, in *Kilduff v. Cosential, Inc.*, 289 F.Supp.2d 12, 19 (D. Conn. 2003), the court criticized the "*per se* rule" adopted by *Abate* as "not consistent with the fact-intensive inquiry dictated by Connecticut law." But this Court need not decide between the two approaches to conclude that Jean-Charles has failed to plead adequately that the sexual abuse he alleges was within the scope of an agency relationship between Carrier and Perlitz.

If the rule of *Abate* is correct,[9] then the claim plainly fails. But even if some more "fact-intensive inquiry" is required to determine, *on the merits*, whether Jean-Charles's claim succeeds, Jean-Charles has failed to plead facts sufficient to give rise to a plausible claim that the alleged sexual abuse was within the scope of the agency. *Kilduff* was decided under the old pleading regime of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), where the question was whether "it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his

[9] In fact, later Superior Court cases suggest that it is. *See, e.g., Doe*, 2010 WL 3720144 at *3; *Gough v. St. Peters Episcopal*, 2011 WL 2611747, at *2-3 (Conn. Super. Ct. Jun. 2, 2011).

claim which would entitle him to relief." *See Kilduff*, 289 F.Supp.2d at 17 (motion to dismiss should be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"). Under the new standard set out in *Iqbal*, discussed above, Jean-Charles, to survive a motion to dismiss, must plead some facts that allow the court to draw the inference that the alleged sexual abuse was within the scope of the supposed agency relationship. The complaint pleads no such facts, and on the face of the complaint, it is not plausible that it was part of Perlitz's duty as Carrier's supposed agent to sexually abuse Jean-Charles. Accordingly, Count 10 fails to state a claim upon which relief can be granted and must be dismissed.

CONCLUSION

For the foregoing reasons, all of the claims against Carrier must be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted,

PAUL E. CARRIER, S.J.

By his attorneys:

November 16, 2011

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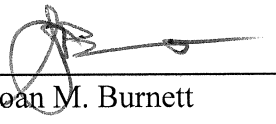
CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2011, a copy of the foregoing Memorandum in Support of Defendant Paul E. Carrier's motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

November 16, 2011
Date



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