UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOSEPH JEAN-CHARLES *A/k/a* JEAN-CHARLES JOSEPH Plaintiff, v. DOUGLAS PERLITZ; FATHER PAUL E. CARRIER, S.J.; HOPE E. CARTER; HAITI FUND, INC.; FAIRFIELD UNIVERSITY; THE SOCIETY OF JESUS OF NEW ENGLAND; JOHN DOE ONE; JOHN DOE TWO; JOHN DOE THREE; JOHN DOE FOUR; JOHN DOE FIVE; JOHN DOE SIX; JOHN DOE SEVEN; JOHN DOE EIGHT; JOHN DOE NINE; JOHN DOE TEN; JOHN DOE ELEVEN; AND JOHN DOE TWELVE Defendants.	*	CIVIL ACTION NO.: 3:11-cv-00614 (JCH) NOVEMBER 16, 2011

DEFENDANT HOPE CARTER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Pursuant to the Federal Rules of Civil Procedure 12 (b) (6), the defendant, Hope Carter (hereinafter "Carter"), herein submits this memorandum of law in support of her motion to dismiss, also filed this date, pursuant to the Federal Rules of Civil Procedure 12 (b) (6).

I. INITIAL STATEMENTB

A. BRIEF STATEMENT OF ISSUE

Whether the plaintiff's federal and state law claims against Carter must be dismissed pursuant to the Federal Rules of Civil Procedure 12 (b) (6).

B. SHORT ANSWER

Yes. As fully briefed, infra, pursuant to the pleading standard set forth in Ashcroft v. Igbal, 129 S. Ct. 1937 (2009):

1. The plaintiff fails to make a plausible claim that Carter aided and abetted Douglas Perlitz in violating 18 U.S.C. § 2423 (b) as alleged in count two.

2. Carter is immune from liability as to plaintiff's state law negligence claims contained in counts seven and nine pursuant to the Volunteer Protection Act. 42 U.S.C. § 14503 (a) and/or Connecticut General Statutes § 52-557m.

3. The plaintiff fails to make a plausible claim of negligent hiring, retention, direction and supervision as to Carter as alleged in count seven.

4. The plaintiff fails to make a plausible claim that there was a fiduciary relationship between the plaintiff and

Carter as alleged in count nine.

5. The plaintiff fails to state a plausible claim for vicarious liability as to Carter as alleged in count ten.

II. FACTUAL AND PROCEDURUAL BACKGROUND

A. PLAINTIFF'S COMPLAINT

The plaintiff, Joseph Jean-Charles (plaintiff), is a Haitian citizen who has brought this lawsuit in the United States District Court against the defendants, Douglas Perlitz (Perlitz); Father Paul E. Carrier, S. J. (Carrier); Carter; Haiti Fund, Inc.; Fairfield University; The Society of Jesus of New England; and John Doe One through Twelve. The plaintiff's case arises out of alleged sexual molestation which took place at the hands of Perlitz at Project Pierre Toussaint in Haiti. According to the plaintiff's complaint, Perlitz "frequently traveled from the State of Connecticut to Haiti to reside for extended periods of time in the Republic of Haiti . . . [and] [o]n December 21, 2010, the United States District Court for the District of Connecticut adjudged Defendant Perlitz guilty of violating 18 U.S.C. § 2423 (b), Travel With Intent To Engage in Illicit Sexual Conduct. Defendant Perlitz was sentenced to 19

years and seven months in federal prison." (Plaintiff's complaint, ¶ 4.)

According to the plaintiff in Section C - "Parties":

> Defendant Hope E. Carter (hereinafter referred to as Defendant "Carter") is an individual who is citizen of the State of Connecticut with a domicile in New Canaan, Connecticut. During the relevant time period, defendant Carter was a member of the Board of Directors of the Haiti Fund, Inc.; Secretary of the Board of Directors of the Haiti Fund, Inc. and at times material hereto, had a duty to hire, supervise, direct and retain defendant Perlitz and a duty not to aid and abet defendant Perlitz in engaging in criminal conduct.

(Plaintiff's complaint, ¶ 6.)

The plaintiff alleges that the defendant, Haiti Fund, Inc., is a Connecticut corporation which funded, managed, controlled and directed Pierre Toussaint of Cap-Haitien, Haiti, a program that provided services for minor boys in and around Cap-Haitien, Haiti. The plaintiff also alleges that the defendant Haiti Fund, Inc. was incorporated in the State of Connecticut and a citizen of the State of Connecticut. Moreover, the plaintiff's complaint alleges that "[a]t all relevant times, project Pierre Toussaint, the program funded, managed, and directed by the Defendant, Haiti Fund, Inc., operated an intake center at one location and

two different residential schools at two different locations; all the locations were in or around Cap-Haitien, Haiti." (Plaintiff's complaint, ¶ 7.)

The plaintiff in Section D entitled "Statement of Facts" alleges that Perlitz, with the assistance of Carrier, Carter, Fairfield University, and John Doe Six through Ten obtained funding from the Order of Malta in approximately 1997 to start and operate Project Pierre Toussaint, a school for boys in Haiti. This project provided services for boys of all ages, with services ranging from meals to basic classroom instructions. (Plaintiff's complaint, ¶ 13.) The plaintiff further alleges that "Perlitz, with the assistance of Carrier, Carter, Haiti Fund, Inc., Fairfield University and John Doe Six through Ten obtained additional funding in 1999 to expand Project Pierre Toussaint to include a residential facility known as the Village." (Plaintiff's complaint § 14.) The plaintiff further claims:

> 15. Through Project Pierre Toussaint, as Defendants Father Carrier, Carter, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order and John Doe One through John Doe Ten knew at relevant times, Defendant Perlitz had access to, authority over, and control over the boys

participating in Project Pierre Toussaint.

16. Through Project Pierre Toussaint, as Defendants Father Carrier, Carter, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order and John Doe One through John Doe Ten knew at relevant times, Defendant Perlitz was in a position that the minor boys participating in Project Pierre Toussaint would believe they could trust Defendant Perlitz. Through Project Pierre Toussaint, as Defendants Father Carrier, Carter, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order and John Doe One through John Doe Ten knew at relevant times, Defendant Perlitz was in a position that the minor boys participating in Project Pierre Toussaint would have confidence that the conduct Defendant Perlitz engaged in was to further the best interests of the minor boys.

17. Defendants Father Carrier, Carter, and John Doe One through John Doe Five frequently traveled to Cap-Haitien, Haiti to visit Defendant Perlitz and Project Pierre Toussaint, or otherwise participated in activities at Project Pierre Toussaint. Defendants Father Carrier, Carter and John Doe One through John Doe Five became aware that Defendant Perlitz was engaged in conduct that endangered minor boys participating in Project Pierre Toussaint. In spite of this information, Defendants Father Carrier, Carter, and John Doe One through John Doe Five aided and abetted Defendant Perlitz in Defendant Perlitz's efforts to sexually abuse minor boys participating in Project Pierre Toussaint and in Defendant Perlitz's efforts to conceal Defendant Perlitz's sexual abuse of minors participating in Project Pierre Toussaint.

18. In approximately 2006, when the Plaintiff was approximately 15 years old, Defendant Perlitz engaged in explicit sexual behavior and lewd and lascivious behavior with the Plaintiff, including but not limited to, Defendant Perlitz requiring and then having Plaintiff masturbate defendant Perlitz.

(Plaintiff's complaint, ¶ 15-18.)

1. PLAINTIFF'S CLAIMS AGAINST CARTER

The plaintiff's claims against Carter are found in counts two, seven, nine and ten of plaintiff's complaint. (Plaintiff's complaint, Section E.)

In count two, the plaintiff alleges Carter (as well as Carrier, Haiti Fund, John Doe one through five) is civilly liable pursuant to 18 U.S.C. § 2255.[1] Plaintiff claims that he was a victim of Perlitz's violation of 18 U.S.C. § 2423 (b), Travel With Intent To Engage In Illicit Sexual Conduct and that Carter, Carrier, Haiti Fund, John Doe one through five, aided

[1] 18 U.S.C. § 2255 entitled "Civil Remedy for Personal Injuries" states in relevant part:

> (a) In general – any person who while a minor was a victim of a violation of Section 2241 (c), 2242, 2243, 2251, 2251 (a), 2252, 2252 (a), 2260, 2421, 2422 or 2423 of this title and who suffers personal injury as a result of such violation regardless of whether the injury occurred while the person was a minor, may sue in any appropriate United States District Court and try to recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person described in the preceding section shall be deemed to have sustained damage of no less than $150,000.00 in value.

and abetted Perlitz in violating said statute.[2] (Plaintiff's complaint, count II, ¶ 26, 27.) The plaintiff states he sustained substantial injuries "as a result of the assistance provided by" these defendants to Perlitz for the purposes of aiding and abetting his violation of 18 U.S.C. § 2423 (b). (Plaintiff's complaint, count II, ¶ 28.)

In count seven the plaintiff claims that Carter (as well as Carrier, Haiti Fund, Fairfield University, New England Jesuit Order, John Doe six through ten) is liable to him based on a theory of negligent hiring, retention, direction and supervision of Perlitz. (Plaintiff's complaint, count VII.) According to said count, Carter, as well as these defendants, were responsible for hiring, retaining, directing and supervising Perlitz. (Plaintiff's complaint, count VII, ¶ 48.) The plaintiff dubs Carter and these defendants the "Perlitz Supervisory Defendants." The plaintiff claims that the "Perlitz Supervisory Defendants" knew or should have known that Perlitz would interact with minors, including the plaintiff, and that they had

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[2] 18 U.S.C. Section 2423 (b) entitled "Travel with Intent To Engage in Illicit Sexual Conduct – A Person who travels in interstate commerce or who travels into the United States or a United States citizen or an alien admitted

a special relationship with Perlitz or the plaintiff. (Plaintiff's complaint, count VII ¶ 49-50.) The plaintiff claims the "Perlitz Supervisory Defendants" had a duty of care in the hiring retaining, directing, and supervising individuals to interact with minors in Haiti and that they breached said duty by hiring and retaining Perlitz who they "knew or should have known was of bad character and reputation and unable to properly interact with minors." (Plaintiff's complaint, count VII, ¶ 51-52.)

In count nine, the plaintiff claims Carter (as well as defendants Carrier, Haiti Fund, Inc., Fairfield University, New England Jesuit Order and John Doe One through Twelve) is liable to him under a theory of breach of fiduciary duty. According to said count:

> 64. At all relevant times, Defendants Father Carrier, Carter, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order, and John Doe One through John Doe Twelve knew Project Pierre Toussaint, operated, managed and controlled by Defendant Perlitz was providing services to extremely vulnerable minors in the Republic of Haiti.

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for permanent residence in the United States who travels in foreign commerce, for purposes in engaging in any illicit conduct with a person shall be fined under this title or be imprisoned not more than 30 years or both.

65. At all relevant times, Defendants Father Carrier, Carter, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order, and John Doe One through John Doe Twelve sponsored and promoted Project Pierre Toussaint which the Defendants knew was providing services to extremely vulnerable minors in the Republic of Haiti.

66. Defendants Father Carrier, Carter, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order, and John Doe One through John Doe Twelve each had a fiduciary obligation to the Haitian minors participating in Project Pierre Toussaint, specifically including the Plaintiff.

67. Defendants Father Carrier, Carter, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order, and John Doe One through John Doe Twelve each breached their fiduciary duty to the Plaintiff.

(Plaintiff's complaint, count IX, ¶ 64-67.)

In count ten, the plaintiff alleges Carter (as well as co-defendants Carrier, Haiti Fund, Inc., Fairfield University, The New England Jesuit Order, John Doe six through ten) is liable under a theory of vicarious liability. According to said count:

70. At all relevant times Defendant Haiti Fund, Inc. funded, managed, controlled and directed Project Pierre Toussiant. At all relevant times, Defendant Perlitz was Defendant Haiti Fund, Inc.'s agent in the Republic of Haiti managing, controlling and directing Project Pierre Touissant.

71. At all relevant times Father Carrier was Chairman and President of the Haiti Fund, Inc. At all relevant

times, Defendant Carter was a member of the Board of Directors of the Haiti Fund, Inc., and at relevant times Defendant Carter was Secretary of the Board of Directors of the Haiti Fund, Inc. On numerous occasions Defendants Father Carrier and Carter traveled to Haiti to manage and oversee Project Pierre Toussaint. At all relevant times Defendant Perlitz acted as an agent of Defendants Father Carrier and Carter.

74. Through Project Pierre Defendant Perlitz was in a position that the minor boys participating in Project Pierre Toussaint would believe they could trust Defendant Perlitz. Through Project Pierre Toussaint, Defendant Perlitz was in a position that the minor boys participating in Project Pierre Toussaint would have confidence that the conduct Defendant Perlitz engaged in was to further the best interests of the minor boys.

75. Defendant Perlitz used the existence of his agency relationship with Defendants Haiti Fund, Inc., Father Carrier, Carter, Fairfield University, John Doe Six, John Doe Seven, John Doe Eight, John Doe Nine, and John Doe Ten to gain the trust and confidence of Plaintiff so that Defendant Perlitz could sexually molest Plaintiff. As described above Defendant Perlitz using the existence of his agency relationship with Defendants Haiti Fund, Inc., Father Carrier, Carter, Fairfield University, John Doe Six, John Doe Seven, John Doe Eight, John Doe Nine, and John Doe Ten did sexually abuse plaintiff.

(Plaintiff's complaint count X, ¶ 70, 71, 74, 75.)

Carter now moves to dismiss all claims against her contained in the plaintiff's complaint

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW

When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court must take as true the alleged facts and determine whether they are sufficient to raise more than a speculative right to relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). The Court does not, however, accept as true any allegation that is a legal conclusion. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009). The complaint must include "`a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to `give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Twombly, 550 U.S. at 555 (quoting first Fed.R.Civ.P. 8(a)(2) and then Conley v. Gibson, 355 U.S. 41, 47 (1957)) (alteration in original); see also Gregory v. Dillard's Inc., 565 F.3d 464, 473 (8th Cir. 2009) (en banc). Although detailed factual allegations are not necessary, a complaint that contains only "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555; accord Iqbal, 129 S.Ct. at 1949. The complaint must set forth "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; accord Iqbal, 129 S.Ct. at 1949; Brown v. Medtronic, Inc., 628 F.3d 451, 459 (8th Cir. 2010); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S.Ct. at 1949. If the claims are only conceivable, not plausible, the complaint must be dismissed. Twombly, 550 U.S. at 570; accord Iqbal, 129 S.Ct. at 1950. Also, in considering a Rule 12(b)(6) motion, "the complaint should be read as a whole, not parsed piece by piece to determine whether each

> allegation, in isolation, is plausible." Braden, 588 F.3d at 594. The issue in considering such a motion is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of the claim. See Neitzke v. Williams, 490 U.S. 319, 327 (1989).

M.A. v. Village Voice Media Holdings, United States District Court, E.D. Missouri, Case No. 4:10cv7140(TCM) (August 15, 2007) (Attached).

B. THE PLAINTIFF'S CLAIMS AGAINST DEFENDANT CARTER MUST BE DISMISSED

1. THE PLAINTIFF FAILS TO STATE A PLAUSIBLE CLAIM AGAINST CARTER PURSUANT TO 18 U.S.C. § 2255

The plaintiff's only federal claim against Carter is found in count two claiming Carter is liable to him pursuant to 18 U.S.C. § 2255. Plaintiff claims Carter allegedly "aided and abetted" Perlitz in violating U.S.C. § 2423 (b). To be sure, the plaintiff fails to state an actionable claim against her under 18 U.S.C. § 2255 pursuant to the pleading requirements of Ashcroft v. Iqbal, supra.

At the outset, there appears to be no binding authority which holds that a non-abusing individual can be held civilly liable under this statute. Perhaps this issue is a matter of first impression for this Court. That said, the paucity of cases that have examined section 2255 claims premised on an "aiding

and abetting" theory hold that such a claim is examined under the exacting criminal aiding and abetting standard of review as delineated in 18 U.S.C. § 2 (a). See Doe v. Liberatore, 478 F. Supp.2d 742, 755-56 (M.D. Pa. 2007) (Attached.)

The Doe case is particularly instructive. In Doe v. Liberatore, defendant Liberatore was an ordained priest who sexually abused a minor who had been hired as an alter server. The minor plaintiff ultimately brought an action against Liberatore as well as several defendants, both institutional and individual (the court refers to them as the "Diocesan defendants.") One of the plaintiff's claims against the Diocesan defendants was pursuant to 18 U.S.C. § 2255. The Diocesan defendants moved for summary judgment on the count claiming that the section only subjected an individual who violated one of the enumerated the statutes to civil liability. The Doe court looked at the legislative history of 2255 in conjunction with the only case it found which previously analyzed 2225 i.e., a decision from the Eastern District of Virginia, Smith v. Husband, 376 F. Supp. 2d 603 (E. D. Va. 2005) (Attached). The Doe court held that "in order to be subject to liability under Section 2255, a

defendant must be proven to have violated at least one of the criminal statutes listed in Section 2255 by preponderance of the evidence." Doe v. Liberatore, supra, 755. The Doe court noted that the Diocesan defendants were entitled to judgment on the 2255 claim as the plaintiffs could not prove that the defendants criminally aided and abetted a violation of 18 U.S.C. § 2421, 2422 and 2423 under an 18 U.S.C. § 2(a) analysis. Doe v. Liberatore, supra, 756-57. Per the Doe court:

> In order to establish the offense of criminal aiding and abetting, it must be shown that: (1) the substantive offense has been committed; (2) the defendant knew the offense was being committed; and (3) the defendant acted with the intent to facilitate it. United States v. Cartwright, 359 F.3d 281, 287 (3d Cir. 2004) (citations omitted); *see also United States v. Newman*, 490 F.2d 139, 143 (3d Cir. 1974) (in order to be liable as an aider or abettor, the defendant must have participated in the substantive crime with the desire that the crime be accomplished; unknowing participation is not sufficient to constitute an offense under the aiding and abetting statute). "[A]cting with intent to facilitate the substantive offense requires that one acted with the `intent to help those involved with a *certain* crime.'" United States v. Salmon, 944 F.2d 1106, 1113 (3d Cir. 1991) (quoting United States v. Wexler, 838 F.2d 88, 92 (3d Cir. 1988)). Indeed, "[t]he state of mind required for conviction as an aider and abettor is the same state of mind as required for the principal offense." United States v. Centner, 116 F.3d 473 (Table), 1997 WL

328766, at *2 (4th Cir. 1997); United States v. Loder, 23 F.3d 586, 591 (1st Cir. 1994); United States v. Valencia, 907 F.2d 671, 680 (7th Cir. 1990); United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970).

Id. at 756

In granting summary judgment for the Diocesan defendants, the Doe court stated:

> While Plaintiff's evidence demonstrates that the Diocesan Defendants had reason to suspect that Liberatore was sexually abusing Plaintiff, there is nothing in the record demonstrating that the Diocesan Defendants consciously shared Liberatore's knowledge of the underlying substantive offenses, as well as the specific criminal intent to commit them. *See* Loder, 23 F.3d at 591. Indeed, "[a] general suspicion that an unlawful act may occur is not enough." United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990). While it is possible to infer knowledge from a combination of suspicion and indifference to the truth, *see* United States v. Talkington, 875 F.2d 591, 595 (7th Cir. 1989) (upholding district court's use of the so-called "ostrich instruction," which allows the inference of knowledge if it is found that the putative aider or abettor had a strong suspicion yet shut his eyes for fear of what he would learn), there still remains no evidence even remotely suggesting that the Diocesan Defendants shared Liberatore's specific intent to commit the sexual offenses. While the Diocesan Defendants may have avoided learning of Liberatore's offenses, there is no evidence that the Diocesan Defendants desired that his crimes be accomplished. Also absent from the record is any evidence showing that the Diocesan Defendants actively participated in some manner to assist Liberatore in the commission of his offenses. As such, the Diocesan Defendants' motion for summary judgment will be granted as to

Count I of Plaintiff's Complaint.

Id. at 756-57. [3]

According to the Second Circuit:

> To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about the underlying crime. *See* United States v. Wiley, 846 F.2d 150, 154 (2d Cir. 1988); United States v. Zambrano, 776 F.2d 1091, 1097 (2d Cir. 1985). To prove that the defendant acted with that specific intent, the government must show that he knew of the proposed crime. *See, e.g.*, United States v. Gallishaw, 428 F.2d 760, 763 (2d Cir. 1970); *see also* Nye & Nissen v. United States, 336 U.S. 613, 620, 69 S.Ct. 766, 770, 93 L.Ed. 919 (1949) (aiding and abetting theory supports liability when the defendant "consciously shares in" the underlying criminal act). A general suspicion that an unlawful act may occur is not enough. *See, e.g.*, United States v. Wiley, 846 F.2d at 154; United States v. Zambrano, 776 F.2d at 1097. The government must also show that the defendant had some interest in furthering the unlawful act, *see* United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977), and that he "consciously assisted the commission of the specific crime in some active way," United States v. Dickerson, 508 F.2d 1216, 1218 (2d Cir. 1975). In sum, aiding and abetting is not proven unless it is shown that the defendant joined the specific venture and shared in it, and that

[3] Please note, a motion to dismiss pursuant to Rules of Civil Procedure 12 (b) (6) has also been the proper procedural vehicle to dismiss a claim under 18 U.S.C. § 2255. M.A. v. Village Voice Media Holdings, United States District Court, E.D. Missouri, Case No. 4:10cv7140 (TCM) (August 15, 2007).

> his efforts contributed to its success. *See, e.g.*, United States v. Wiley, 846 F.2d at 154.

U.S. v. Labat, 905 F.2d 18, 23 (2nd Cir. 1990)

Applying the reasoning of Liberatore with the Second Circuit's standard of review as stated in Labat, it is undisputed the plaintiff does not state a plausible claim against Carter for aiding and abetting Perlitz in his claimed violation of 18 U.S.C. § 2423 (b), i.e. Travel With the Intent to Engage in Illicit Sexual Conduct with a Minor.

The plaintiff makes the conclusory statement in count two that "while a minor, he was a victim of the above-referenced violation of 18 U.S.C. § 2423 (b) which defendants Father Carrier, Carter, Haiti Fund, Inc., John Doe One, John Doe Two, John Doe Three, John Doe Four and John Doe Five, aided and abetted Defendant Perlitz in committing." (Plaintiff's complaint, count II ¶ 27.) Reading the complaint as a whole, the plaintiff's complaint claims that Carter helped obtain funding for Project Pierre Toussaint and was aware that Perlitz had access and authority for boys participating in Project Pierre Toussaint. It is also alleged she sponsored and promoted Project Pierre Toussaint. The plaintiff also claims that Carter knew the

minor boys would have confidence that Perlitz's conduct would be in their best interest and they could trust him. Moreover, the complaint claims that Carter (as well as Carrier and John Doe one through John Doe Five) would frequently travel to Haiti to visit Perlitz and Project Pierre Toussaint or otherwise participated in activities in Project Pierre Toussaint, Carter (and the others) became aware that Perlitz was "engaged in conduct that endangered minor boys that participated in Project Pierre Toussaint." Despite this information, the plaintiff's claims that Carter "aided and abetted Perlitz in his efforts to sexually abuse minor boys participating in project Pierre Toussaint and in his efforts to conceal his abuse of minors participated in Project Pierre Toussaint." (Plaintiff's complaint, ¶ 14-17.)

Clearly, the complaint fails on its face to make a plausible claim that Carter aided and abetted Perlitz in his violation of 18 U.S.C. § 2423 (b).

The plaintiff acknowledges Carter is a private citizen who was a member of the Board of Directors/Secretary of the Board of Directors of a charitable organization, i.e., The Haiti Fund,

Inc. There is no allegation that Carter in any way participated in any alleged sexual molestation of the plaintiff and/or any minor. There is no allegation that Carter knew that Perlitz was traveling to Haiti to engage in illicit sexual conduct with the plaintiff, nor can there be. Further, there is no allegation in the plaintiff's complaint that Carter knew that any sexual offense was being committed by Perlitz as to the plaintiff. There is no allegation that Carter "consciously assisted" in any way with Perlitz's violation of 18 U.S.C. § 2423 (b). There is no allegation that Carter had some interest in furthering Perlitz's unlawful acts. There is no allegation that Carter acted with the specific intent to aid Perlitz in violating 18 U.S.C. 2423 (b). To be sure, the plaintiff states no factual basis for his claim that Carter "aided and abetted" Perlitz in violating this statute. This is the exact type of conclusory pleading which is insufficient under an Ashcroft v. Igbal analysis, i.e. a mere legal conclusion unsupported by any facts.

The plaintiff's claim against Carter in count two pursuant to 18 U.S.C. § 2255 must be dismissed. As a matter of law, the plaintiff complaint fails to state a plausible claim that she

aided and abetted Perlitz in violating 18 U.S.C. § 2423 (b).

2. THE PLAINTIFF'S STATE LAW NEGLIGENCE CLAIMS ARE PREEMPTED BY THE VOLUNTEER PROTECTION ACT

It is undisputed, plaintiff's state law claims in count seven and nine are negligence based, i.e. negligent hiring, rentention, direction, supervision and breach of fiduciary duty. The plaintiff claims that Carter was at all relevant times to this lawsuit, a member of the Board of Directors of the Haiti Fund and/or Secretary of the Board of Directors of the Haiti Fund. (Plaintiff's complaint, ¶ 6.)

As such, Carter is entitled to the immunity protections afforded by the Volunteer Protection Act (VPA), 42 U.S.C. § 14501-14503.

The VPA states in relevant part:

> [N]o volunteer of a nonprofit organization or governmental entity 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 or governmental entity at the time of the act or omission;

42 U.S.C. § 14503 (a) (1).

> (4) Nonprofit organization — The term "nonprofit organization" means —
>
> (A) any organization which is described in section 501(c)(3) of title 26 and exempt from tax under section 501(a) of such title and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or
>
> (B) 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 and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).

42 U.S.C. § 14505 (4).

To be sure, the Haiti Fund, Inc. qualifies as a "nonprofit organization" for purposes of the VPA. The plaintiff acknowledges that the Haiti Fund, Inc. "funded, managed, controlled and directed Project Pierre Toussaint." (Plaintiff's complaint, ¶ 7.) 42 U.S.C. § 14505 defines a nonprofit organization as organized pursuant to § 501 (c) (3) of the IRS code an exempt from tax under Section 561 (a) or "any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civil,

educational, religious, welfare or health purposes." 42 U.S.C. § 14505 (4)[4].

To be sure, Carter is a volunteer pursuant to 42 U.S.C. § 14505 (6) which states:

> Volunteer - The term "volunteer" means an individual performing services for a non-profit organization or governmental entity who does not receive-
>
> (A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or
>
> (B) any such thing of value in lieu of compensation, in excess of $500.00 per year, and such times include a volunteer serving as a director, officer, trustee, or direct service volunteer.

42 U.S.C. § 14505 (6).

There is no allegation Carter was anything more than a volunteer with the Haiti Fund, Inc. To be sure, there is no allegation Carter was employed by the Haiti Fund, Inc. Moreover, it is undisputed the plaintiff makes no allegation Carter was compensated in any way as a member of the Board of Directors/Secretary of the Board of Directors of the Haiti Fund,

[4] Carter asks this Court to take judicial notice of the fact that the Haiti Fund, Inc. is a 501 (c) (3) organization listed IRS Publication 78. See Manning v. Boston Medical Center Corp., United States District Court, D. Mass., Docket No. CV 0911724 (RWZ) (March 10, 2011) (attached).

Inc. As such, Carter is provided immunity under the VPA for state law negligence claims.

Succinctly stated, the VPA preempts state law negligence claims requiring this Court to dismiss counts seven and nine against Carter. As stated by a United States District Court:

> The Court has found no applicable case law discussing preclusion of federal law. However, the plain language of the statute, along with the legislative history, satisfies the Court that the VPA preempts state law and precludes the federal law at issue, the FLSA.[fn4] The text of § 14502(a) cannot be interpreted to prevent the application of the VPA to federal law, though its central focus is preemption of state law.
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> In H.R. REP No. 105-101(I) at 6 (1997), the Committee stated:
>
> It is not enough to leave it to the States to solve this problem. Volunteerism is a national activity and the decline in volunteerism is a national concern. . . . Although every state now has a law pertaining specifically to legal liability of at least some types of volunteers, many volunteers remain fully liable for some actions. Only about half of the states protect volunteers other than officers and directors. Moreover, every volunteer protection statute has exceptions. As a result, state volunteer protection statutes are patchwork and inconsistent. . . . This inconsistency hinders national organizations from accurately advising their local chapters on volunteer liability and risk management guidelines.
> The report also emphasizes, "H.R. 911, as amended, immunizes a volunteer *from liability* for harm caused by ordinary negligence. . . ." No, 105-101(1) at 153

> (emphasis added). This portion is noteworthy because it does not distinguish federal liability from state liability. Concomitantly, the Senate, in accord with the House, stated "[T]he Volunteer Protection Act . . . **covers *all civil* lawsuits** except those involving certain types of egregious misconduct." 145 CONG. REC. 56286 (daily ed. May 27, 1999) (statement of Sen. Abraham) (emphasis added). In addition, a thoughtful article on the issue from the Harvard Journal on Legislation states, "The Volunteer Protection Act *immunizes* those who voluntarily provide services. . . ." "The heart of the legislation involves a *bar to liability* for individual volunteers." Again, the author does not distinguish between federal and state liability. See Andrew F. Popper, *A One-Term Tort Reform Tale: Victimizing The Vulnerable*, 35 HARV J. ON LEGIS. 123, 130-32 (1998) (emphasis added) (discussing the VPA as applying to both state and federal suits).

Armendarez v. Glendale Youth Center, 265 F. Supp.2d 1136, 1140-1141 (D. Ariz. 2003) (Emphasis added) (Attached).

It is undisputed that the VPA preempts state law negligence claims. It is undisputed that the VPA applies to individuals. Armendarez v. Glendale Youth Center, 265 F. Supp. at 1141-1142. See also Foss v. Nadeau, Superior Court, complex litigation docket at Tolland, Docket No. x07-CV-0300816585 (Nov. 14, 2003, Sferazza, J.) (36 Conn. L. Rptr. 23); Gaudet v. Braca, Superior Court, judicial district of Fairfield, Docket No. CV 983519435 (November 27, 2001, Thim, J.) (2001 Ct. Sup. 15851). (Both

decisions attached.)[5] It is undisputed Carter qualifies as a volunteer under the VPA. It is undisputed the Haiti Fund, Inc. is a "nonprofit organization" under the VPA. As such, plaintiff's state law negligence claims against Carter in counts seven and nine must be dismissed.

a. CARTER IS IMMUNE FROM PLAINTIFF'S STATE LAW NEGLIGENCE CLAIMS PURSUANT TO CONNECTICUT GENERAL STATUTES § 52-557m

Plaintiff's state law negligence claims against Carter contained in counts seven and nine must be dismissed on the alternative grounds of immunity afforded under Connecticut General Statutes § 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

[5] As stated by Gaudet, "[t]he VPA preempts Connecticut State law via the commerce clause of the United Constitution." Gaudet v. Braca, supra.

> official functions and duties, unless such damage or injury was caused by the reckless, willful or wanton misconduct of such person.

Conn. Gen. Stat. § 52-557m.

As a matter of law, Carter is entitled to the protections of Connecticut General Statutes § 52-557m. The plaintiff's allegation that Carter was a member of the board of "Directors" and/or "Secretary of the Board of Directors of the Haiti Fund, Inc," a tax exempt entity, squarely puts her under the auspices of this statute. Moreover, there is no allegation Carter was compensated in any manner for her services. As such, Carter is entitled to the immunity protection of Connecticut General Statutes § 52-557m and plaintiff's negligence based claims in counts seven and nine must be dismissed.

3. THE PLAINTIFF'S COMPLAINT FAILS TO MAKE A PLAUSIBLE NEGLIGENT HIRING, RENTENTION, DIRECTION, AND SUPERVISION CLAIM AS TO CARTER

Beyond the fact that plaintiff's state law negligence claims fail as to Carter pursuant to the VPA and/or Connecticut General Statutes § 52-557m, count seven alleging negligent hiring, retention, direction and supervision further fails on

the alternative grounds that it does not state a plausible claim under these legal theories. To be sure, Carter owed no duty to the plaintiff unless she knew or had reason to know Perlitz had a propensity to engage in the conduct alleged by the plaintiff. Elbert v. Yankee Council, Superior Court, judicial district of New Haven, Docket No. CV 01-04568795 (July 16, 2004, Arnold, J.) (2004 Ct. Sup. 11155) (Attached). See also Dignan v. McGee, United States District Court, D. Conn. Docket No. 07 CV 1307 (JCH) (August 9, 2009) (Attached). The plaintiff makes the vague allegation that Carter "became aware that defendant Perlitz was engaged in conduct that endangered minor boys participating in Project Pierre Toussaint" and she knew Perlitz was "of bad character and reputation and unable to properly interact with minors." (Plaintiff's complaint, ¶ 17, 52). Undeniably, there is no allegation Carter knew or should have known of any prior misdeed by Perlitz which would call into question his appropriateness to interact with minors. In sum, there is no allegation that Carter knew or should have known Perlitz had a propensity to engage in the conduct alleged in the complaint.

As a matter of law, the plaintiff's vague and conclusory allegations do not survive an Ashcroft v. Igbal analysis, entitling Carter to have count seven be dismissed.

4. AS A MATTER OF LAW, THERE IS NO FIDUCIARY RELATIONSHIP ALLEGED BETWEEN CARTER AND THE PLAINTIFF

In count nine, the plaintiff claims that Carter (as well as Carrier, Haiti Fund, Inc., Fairfield University, the New England Jesuit Order and John Doe One through John Doe Twelve) breached a fiduciary duty owed to him. Beyond the fact that this state law negligence claim fails pursuant to the preemption of the VPA and/or the immunity provided by Connecticut General Statutes § 52-557m, it also fails on the alternative grounds that plaintiff fails to allege any facts which could conceivably establish a fiduciary relationship between Carter and the plaintiff. As stated by the Connecticut Appellate Court:

> Consequently, under Connecticut law, a fiduciary or confidential relationship will be defined as a relationship that is "characterized by 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 . . . the superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him.

Ahearn v. Kapplaumakkel, 97 Conn. App. 189, 194, quoting Dunham v. Dunham, 204 Conn. 303, 324, 528 A.2d 1123 (1987).

The plaintiff alleges that he attended Project Pierre Toussaint. (Plaintiff's complaint, ¶ 1.) The plaintiff alleges Project Pierre Toussaint was "operated, managed and controlled by Defendant Perlitz." (Plaintiff's complaint, count IX, ¶ 64.) The plaintiff further alleges that the Haiti Fund, Inc. "controlled and directed Project Pierre Toussaint." (Plaintiff's complaint, ¶ 7.) As to Carter, the plaintiff claims that she (as well as Carrier, the Haiti Fund, Inc., Fairfield University, New England Jesuit Order, John Doe One through John Doe Twelve), sponsored and promoted Project Pierre Toussaint, which she knew provided services to minors in Haiti. (Plaintiff's complaint, count IX, ¶ 65.) The plaintiff further claims that Carter is a citizen of the State of Connecticut, who was a member of the Board of Directors of the Haiti Fund, Inc. (Plaintiff's complaint, ¶ 6.) Moreover, it is alleged that Carter frequently traveled to Haiti to visit Perlitz at Project Pierre Toussaint and participated in activities at the Project. (Plaintiff's complaint, ¶ 17.)

Quite simply, there appears to be no legal precedent under Connecticut law that holds that there is a fiduciary relationship between a citizen of Connecticut who is a member of the Board of Directors of a charitable organization based in the United States and a minor who attends a school located in a foreign country which receives funding from said charitable organization. An analysis of the relevant cases concerning claims by minors of a fiduciary relationship in sexual abuse cases are particularly instructive on this issue. First, there is no allegation that the plaintiff was "entrusted to the care" of Carter at any time. Ahearn v. Kapplaumakkel, 97 Conn. App. 189, 197, citing Martinelli v. Bridgeport Roman Cathlic Diocesan Corp., 196 F. 3d. 409, 429 (2d Cir. 1999). There is no allegation that Carter taught, instructed or counseled the plaintiff in any manner, religious or otherwise. Martinelli v. Bridgeport Roman Cathlic Diocesan Corp., supra. There is no allegation that Carter told the plaintiff to trust Perlitz as his caretaker and moral authority. Id. In fact, there is no allegation of any relationship between the plaintiff and Carter or that the plaintiff was even aware of her existence. To be

sure, plaintiff's complaint is silent on any interaction between Carter and the plaintiff. Furthermore, there is no allegation that Carter held any position at Project Pierre Toussaint or was in a supervisory position at the school. In fact, the plaintiff claims that Perlitz "controlled, managed and operated" Project Pierre Toussaint. Furthermore, there is no allegation Carter was Perlitz's employer. As stated by this court:

> Even though we must accept all of plaintiff's factual allegations as true, the plaintiff has not alleged enough to indicate a unique situation that supports a fiduciary duty claim. Unlike Marintelli, there is no indication that the plaintiff attended schools run by the Defendants; was involved with youth programs encouraged by the Defendants; or was in any other way connected to Defendants demonstrating a unique degree of trust and confidence. Although some courts have acknowledged a fiduciary duty between priest and parishioner, a fiduciary relationship between a diocese and a parishioner have only been found in unique circumstances.

Doe v. Norwich Roman Catholic Diocesan Corp., 268 F. Supp. 2d. 139, 149 (D. Conn. 2003). (Attached).

In sum, as a matter of law, the plaintiff does not allege a plausible claim of a fiduciary relationship between himself and Carter. As such, his claim of breach of fiduciary duty as to Carter in count nine must be dismissed.

5. PLAINTIFF'S VICARIOUS LIABIILTY CLAIM AS TO CARTER MUST BE DISMISSED

In count ten, the plaintiff claims Carter is liable to him based on a theory of vicarious liability. (Plaintiff's complaint, count X.)

Again, the plaintiff fails to allege any facts that could conceivably establish an agency relationship between Carter and Perlitz. The plaintiff claims that Carter was on the Board of Directors of the Haiti Fund, Inc. and "[o]n numerous occasions" traveled to Haiti with Carrier "to manage and oversee Project Pierre Toussaint." The plaintiff then makes the sweeping allegation that Perlitz acted as her agent. (Plaintiff's complaint, count X, ¶ 71). To be sure, there is no allegation Carter was Perlitz's employer and/or principal. In fact, the plaintiff acknowledges Perlitz was the "Director in the Republic of Haiti of Project Pierre Toussaint" which he "operated, managed and controlled." (Plaintiff's complaint, ¶ 7, ¶ 64). There is no allegation Carter controlled the activities of Perlitz. Thus, the plaintiff's vicarious liability claim as to Carter fails as a matter of law. See Wesley v. Schaller Subaru, Inc., 277 Conn. 526, 543, 892 A.2d 389 (2006).

Moreover, the plaintiff claims in count ten that Perlitz used his agency relationship with Carter as well as various other defendants to "gain the trust and confidence of Plaintiff so that Defendant Perlitz could sexually molest Plaintiff" is equally fatal to any claim of vicarious liability. (Plaintiff's complaint, ¶ 7.) As a matter of law, sexually molesting minors could not have been in the scope of Perlitz's employment. As stated by a recent Connecticut Superior Court decision:

> The Connecticut Supreme Court has "long adhered to the principle that in order to hold an employer liable for the intentional torts of his employee, the employee must be acting within the scope of his employment and in furtherance of the employer's business . . . But it must be the affairs of the [employer], and not solely the affairs of the [employer], which are being furthered in order for the doctrine to apply." (Citations omitted; internal quotation marks omitted.) A-G Foods, Inc. v. Pepperidge Farm, Inc., 216 Conn. 200, 208, 579 A.2d 69 (1990). "Ordinarily it is a question of fact as to whether a willful tort of the servant has occurred within the scope of the servant's employment and was done to further his master's business . . . [T]here are occasional cases where a servant's digression from duty is so clear-cut that the disposition of the case becomes a matter of law." (Citation omitted; internal quotation marks omitted.) *Id.*, 207. In Nutt v. Norwich Roman Catholic Diocese, 921 F.Sup. 66 (D.Conn. 1995), a federal district court granted summary judgment on all counts based on the doctrine of respondeat superior because it held that as a matter of law, the alleged sexual abuse of two

> altar boys "cannot be said to further the defendant's business and therefore is outside of the scope of employment." *Id.*, 71. The Appellate Court, discussing Nutt v. Norwich Roman Catholic Diocese in Mullen v. Horton, stated that the "facts of *Nutt* clearly represent[ed] a situation in which the priest wholly abandoned his pastoral duties. Thus, *Nutt* represent[ed] one of those exceptional cases in which the servant's digression from duty is so clear that the CT Page 18413 disposition of the case is a matter of law." *Mullen v. Horton*, 46 Conn.App. 759, 770-71, 700 A.2d 1377 (1997).[fn1] "Clearly, [a priest's] sexual assaults on the plaintiff were repugnant to his employer's business and in utter contravention of the employer's aims and rules. Unlike a situation in which a servant performs the master's work poorly or misunderstands what the master wants done, the molestation of children is a total abdication of the master's work so that the pedophile priest can satisfy personal lust." Doe v. Norwich Roman Catholic Diocese, 49 Conn.Sup. 667, 671, 909 A.2d 983 (2006).

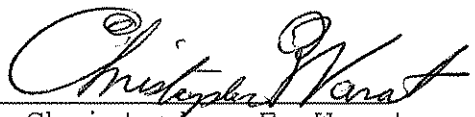
Lara v. Legionaries of Christ, Superior Court, judicial district of Hartford at Hartford; Docket No. X03-HHD-CV10-60169745 (August 30, 2011, Miller, J.) (2011 Ct. Sup. 18408) (Attached).

For the foregoing reasons, plaintiff's claim of vicarious liability as to Carter in count ten fails as a matter of law and must be dismissed.

IV. CONCLUSION

For the foregoing reasons, Carter moves to dismiss the claims against her contained in the plaintiff's complaint.

THE DEFENDANT,
HOPE CARTER

By 

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