UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOSEPH JEAN-CHARLES, a/k/a JEAN-CHARLES JOSEPH,	:	CIVIL ACTION NO.:
Plaintiff,	:	3:11-CV-00614 (JCH)
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.	:	NOVEMBER 16, 2011

FAIRFIELD UNIVERSITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Fairfield University (the "University") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint ("Complaint" or "Compl.") dated April 18, 2011.

PRELIMINARY STATEMENT

Plaintiff alleges that he was a victim of Douglas Perlitz ("Perlitz"), the former director of Project Pierre Toussaint in Cap-Haitien, Haiti, who has admitted that he sexually molested minor children at the project and is now in jail. The issue on this motion is whether Plaintiff may recover damages for his alleged injuries from Fairfield University, which did not employ Perlitz, had no authority to supervise or retain Perlitz, and had no knowledge or reason to know of Perlitz's criminal activity. Under settled principles of Connecticut law, the answer is no.

Plaintiff's claims against the University are based principally on an alleged failure to supervise Father Paul E. Carrier, S.J. ("Father Carrier"), an employee of the University who, Plaintiff alleges, was aware of and helped to conceal Perlitz's misconduct. But, as the Complaint acknowledges, while Father Carrier was an employee of the University, he was also the chairman and president of Haiti Fund, Inc. ("Haiti Fund"), the organization that funded, managed, directed and controlled Project Pierre Toussaint and Perlitz. Plaintiff does not allege that Father Carrier's alleged misconduct was in his capacity as an employee of the University and does not allege that the University had any reason to know that Father Carrier allegedly was aiding and abetting Perlitz. Plaintiff's allegations fall far short of the pleading necessary to state a claim against the University.

Plaintiff's additional allegations that the University had "placed" employees or other persons in leadership positions at Haiti Fund and sponsored and supported the activities of Haiti Fund do not change this result. Indeed, if such allegations were sufficient to state a claim, organizations would be discouraged from supporting worthy charitable causes, including causes championed by individuals within the organizations, lest they become responsible for misconduct engaged in without their knowledge by employees of the charitable entities.

Accordingly, Plaintiff's claims against the University must be dismissed in their entirety.

ALLEGATIONS OF THE COMPLAINT

A. Background

Perlitz obtained funding from the Order of Malta in about 1997 to start and operate Project Pierre Toussaint, a school for boys in Cap-Haitien, Haiti. (Compl. ¶ 13) Perlitz served as director of Project Pierre Toussaint. (Compl. ¶ 1) Project Pierre Toussaint was funded,

managed, controlled and directed by Haiti Fund, a Connecticut corporation. (Compl. ¶ 7) At all relevant times, the Chairman and President of Haiti Fund was Father Carrier. (Compl. ¶ 5)

While serving as director of Project Pierre Toussaint, Perlitz sexually molested minor boys who attended Project Pierre Toussaint, allegedly including the Plaintiff. (Compl. ¶¶ 1, 18) Plaintiff alleges that in approximately 2006, when he was about 15 years old, Perlitz engaged in explicit sexual behavior with him including but not limited to requiring and then having Plaintiff masturbate Perlitz. (Compl. ¶ 18)

Perlitz was adjudged guilty on one count of violating 18 U.S.C. § 2423(b), travel with intent to engage in illicit sexual conduct, on December 23, 2010. (Compl. ¶ 4)[1] At sentencing, the government alleged, and Perlitz did not dispute, that he had engaged in sexual conduct with at least eight underage boys at Project Pierre Toussaint. (*USA v. Perlitz*, Docket No. 3:09-CR-00207-JBA-1, Docket No. 93). The record, however, did not identify the specific victims. Perlitz was sentenced to a prison term of 19 years and 7 months. (Compl. ¶ 4)

B. Allegations Against Fairfield University

Plaintiff does not allege that the University had any employment relationship with Perlitz. Nor does he allege that the University managed, directed or controlled Project Pierre Toussaint, or any facts that would support his conclusory assertion that the University played any role in the hiring, direction, supervision or retention of Perlitz. Lacking any basis to make such allegations, he makes three allegations in support of his claims against the University.

First, Plaintiff alleges that the University "hired, supervised, directed and retained Defendant Father Carrier" (Compl. ¶ 8), who allegedly became aware that Perlitz was engaged in

[1] Judgment entered on December 23, 2010, rather than on December 21, 2010 as erroneously alleged in the Complaint. *See USA v. Perlitz*, Docket No. 3:09-CR-00207-JBA-1, Docket No. 93.

conduct that endangered minor boys participating in Project Pierre Toussaint and aided and abetted Perlitz in his efforts to sexually abuse minor boys and to conceal that conduct. (Compl. ¶ 17) Father Carrier, in addition to being a religious priest and Chairman and President of Haiti Fund, was University Chaplain/Director of Campus Ministry and Community Service of the University. (Compl. ¶ 8) Plaintiff alleges that Defendants including the University "knew or should have known [that Father Carrier] was of bad character and reputation and was unable to properly manage, supervise, control or direct Defendant Perlitz. (Compl. ¶ 60) Although the Complaint alleges that Father Carrier frequently traveled to Haiti to visit Perlitz and Project Pierre Toussaint (*id.*), it does not allege that such conduct was done in his capacity as an employee of the University. Significantly, Plaintiff also does not allege either that Father Carrier disclosed to the University any information regarding Perlitz's misconduct or that the University otherwise had any reason to know of such misconduct. Nor does he allege any facts to support the allegation that the University should have known of Father Carrier's alleged bad character and reputation or his inability to supervise Perlitz.

Second, Plaintiff alleges that the University "had placed employees, officers or agents of Defendant Fairfield University in management or leadership positions of Defendant Haiti Fund, Inc." (Compl. ¶ 8) Plaintiff fails to allege how the University "placed" such persons in positions of Haiti Fund, fails to identify any such employees, officers or agents, and fails to offer any reason why that conduct would give rise to any duty on the part of the University with respect to Plaintiff.

Third, Plaintiff alleges that the University represented that Haiti Fund "was engaged in activities supported, managed and sponsored by" the University. (*Id.*) Plaintiff fails to identify the dates or substance of any such representation, except to allege that in about 1999 – seven

years before Plaintiff allegedly was abused – the University assisted Perlitz and others in obtaining funding to expand Project Pierre Toussaint to include a residential facility referred to as the Village. (Compl. ¶ 14)

Based solely on these factual allegations, Plaintiff purports to assert four claims against the University:

(1) that the University and other defendants negligently hired, retained, directed and supervised Perlitz (Count VII);

(2) that the University and other defendants negligently hired, retained, directed and supervised Father Carrier (Count VIII);

(3) that the University and other defendants breached a fiduciary duty to Plaintiff (Count IX); and

(4) that the University and other defendants are vicariously liable for Perlitz's sexual molestation of Plaintiff (Count X).

All of Plaintiff's claims against the University are legally insufficient and must be dismissed.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARD

A complaint must be dismissed under Rule 12(b)(6) when it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim is facially plausible only when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Whitfield v.*

O'Connell, No. 402 Fed. App'x 563, 565 (2d Cir. 2010) (internal quotation marks and citation omitted). Factual allegations in the complaint must be enough to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

Although a court must "accept as true all factual allegations in a complaint, this tenet is 'inapplicable to legal conclusions.'" *Whitfield*, 402 Fed. App'x at 565 (quoting *Iqbal*, 129 S. Ct. at 1949-50). The Federal Rules do not "require courts to credit a complaint's conclusory statements without reference to its factual context," *Iqbal*, 129 S. Ct. at 1954, or "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *id.* at 1949; *see also Missel v. Cnty. of Monroe*, 531 Fed. App'x 543, 545 (2d Cir. 2009) ("[L]egal conclusions in the complaint are not factual allegations entitled to a presumption of truth, and a complaint that merely recites the elements of a cause of action without factual support is insufficient."); *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 128 (D. Conn. 2007), *aff'd*, 312 Fed. App'x 400 (2d Cir. 2009) ("The court need not accept . . . mere conclusions of law or unwarranted deductions . . . ." (internal quotation marks and citation omitted)). Similarly, the Rule 8 pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949.

II. COUNT VII FAILS TO STATE A CLAIM AGAINST FAIRFIELD UNIVERSITY FOR NEGLIGENT HIRING, RETENTION, DIRECTION OR SUPERVISION OF PERLITZ.

A. Fairfield University Did Not Hire, Retain, Direct Or Supervise Perlitz.

Plaintiff's claim against Fairfield University for the negligent hiring, retention, direction and supervision of Perlitz fails for the simple reason that the University did not employ Perlitz.

Fairfield University did not hire Perlitz to work at Project Pierre Toussaint; it did not retain him to work at Project Pierre Toussaint; and Plaintiff fails to plead any basis for his conclusory assertion that the University supervised or directed Perlitz or had any right to do so.

Under Connecticut law, "[t]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. Duty is a legal conclusion about relationships between individuals made after the fact, and [is] imperative to a negligence cause of action. Thus, there can be no actionable negligence unless there exists a cognizable duty of care." *Murdock v. Chroughwell*, 268 Conn. 559, 566 (2004) (quoting *Fraser v. United States,* 236 Conn. 625, 632 (1996) (ellipses omitted)); *see also Seguro v. Cummiskey*, 82 Conn. App. 186, 192 (2004) (citing *Stokes v. Lyddy*, 75 Conn. App. 252, 257 (2003)).

The Connecticut courts have recognized that an employer owes a limited duty of care to third parties with respect to the hiring, retention and supervision of an employee. *See, e.g., Seguro*, 82 Conn. App. at 191; *Chylinski v. Bank of Am., N.A.*, 630 F. Supp. 2d 218, 221 (D. Conn. 2009) (Hall, J.). That limited duty is an exception to the general rule that, absent a special relationship of custody or control, there is no duty to protect a third person from the conduct of another. *Murdock*, 268 Conn. at 566; *Seguro*, 82 Conn. App. at 193 (quoting *Fraser,* 236 Conn. at 632-33 (1996) and citing Restatement (Second) of Torts § 315) (1965)). In recognizing the limited duty, the Connecticut courts have followed the Restatement (Second) of Torts, which identifies the master-servant relationship as a "special relationship" giving rise to a limited duty of care. *See* Restatement (Second) of Torts § 317; *see also* Point III(A) *infra.*

A prerequisite to the duty, however, is that the person who committed the tort (*i.e.*, Perlitz) must be an employee of the defendant (*i.e.*, Fairfield University). In *Chylinsky*, this Court, citing applicable state court decisions, set forth the elements of claims for negligent

hiring, supervision or retention. As the Court's discussion makes clear, each such claim is premised on the employer-employee relationship. Thus, in order to establish a claim of negligent hiring, the plaintiff must plead and prove that he was "injured by an employer's own negligence in failing to select an employee fit or competent to perform the services of employment." 630 F. Supp. 2d at 221 (quoting *Maišano v. Congregation Or Shalom*, No. NHCV07402717S, 2009 Conn. Super. LEXIS 215, at *17 (Conn. Super. Ct. Jan. 26, 2009)) (emphasis added). In order to establish a claim of negligent supervision, the plaintiff must plead and prove that he suffered an injury "'due to the defendant's failure to supervise an employee whom the defendant had a duty to supervise.'" *Id.* (quoting *Abate v. Circuit-Wise, Inc.*, 130 F. Supp. 2d 341, 344 (D. Conn. 2001)) (emphasis added). In order to establish a claim of negligent retention, the plaintiff must plead and prove that "during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness and the employer fails to take further action." *Id.* (emphasis added) (quoting *Doe v. Abrahante*, No. CV 97040311 S, 1998 Conn. Super. LEXIS 1177, at *3-4 (Conn. Super. Ct. Arp. 28, 1998)) (emphasis added).[2]

Here, Plaintiff alleges no employer-employee relationship between Fairfield University and Perlitz. *See Maisano*, 2009 Conn. Super. LEXIS 215, at *19 (granting motion to strike negligent hiring claim because "there is no employment relationship between the parties or other legally recognized special relationship"); *Foster v. Westbrook Lodge of Elks # 1784*, No. CV065001631S, 2007 Conn. Super. LEXIS 972, at *17 (Conn. Super. Apr. 11, 2007) (granting motion to strike negligent retention claim against the Elks for conduct of one of its members because "[t]here is no allegation in the complaint that [defendant] was an employee of the Elks").

[2] We are not aware of any Connecticut authority that recognizes a claim for "negligent direction" separate and apart from a claim of negligent supervision.

Thus, he has failed adequately to plead that Fairfield University had a duty of care with respect to the hiring, supervision or retention of Perlitz, and the claim must be dismissed.

B. Plaintiff Fails To Allege Any Breach Of The Purported Duty.

Plaintiff's claim for negligent hiring, retention, direction and supervision of Perlitz fails for the separate reason that Plaintiff fails to allege that the University acted negligently. The existence of a duty, of course, is just one element of a negligence claim. A plaintiff also must plead breach of that duty. Plaintiff fails to allege any actionable conduct or omission by the University with respect to the hiring, supervision or retention of Perlitz. Plaintiff does not allege that the University played any role in the hiring of Perlitz. He does not allege that the University became aware or should have become aware of Perlitz's misconduct in his capacity as director of Project Pierre Toussaint. Nor does he allege any facts that would establish that the University had any supervisory authority over Perlitz. For this additional reason, the Court should dismiss Count VII as to the University. *See Chylinski*, 630 F. Supp. 2d at 221.

III. COUNT VIII FAILS TO STATE A CLAIM AGAINST FAIRFIELD UNIVERSITY FOR NEGLIGENT HIRING, RETENTION, DIRECTION OR SUPERVISION OF FATHER CARRIER.

Count VIII purports to state a claim against Fairfield University for negligent hiring, retention, direction and supervision of Father Carrier who, the Complaint alleges, was University Chaplain/Director of Campus Ministry and Community Service of the University. (Compl. ¶ 5) This claim must be dismissed because the Complaint fails to allege facts sufficient to establish that the University owed a duty to Plaintiff with respect to Father Carrier's alleged tortious conduct, which took place in Haiti and in Father Carrier's capacity as Chairman and President of Haiti Fund. The claim also fails because Plaintiff does not allege any conduct by the University that was a breach of the alleged duty.

A. Fairfield University Owed No Duty To Supervise Father Carrier In Connection With The Alleged Misconduct.

1. The Allegations Do Not Fall Within The Narrow Scope Of Circumstances Where A Party Has A Duty To Prevent Harm To Others.

Connecticut follows the Restatement (Second) of Torts in determining whether a party has a duty of care to protect others from harm resulting from the acts of a third person. *Murdock*, 268 Conn. at 566-71. Section 314 of the Restatement (Second) sets forth the general rule that a party has no duty to aid or protect another person. Section 315 sets forth a limited exception to that rule.[3] Under Section 315, an actor may have a duty to control the conduct of a third person as to prevent him from causing physical harm to another if there is a special relation between the actor (*i.e.*, the University) and the third person (*i.e.*, Father Carrier) which imposes a duty upon the actor to control the third person's conduct. *Id.* § 315(a).[4] The "special relationships" between the actor and the third person that may support a duty are set forth in Sections 316 through 319 of the Restatement (Second). Three of these provisions – Sections 316, 318 and 319

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[3] *See Murdock*, 268 Conn. at 567 (§ 315 "is an exception to the general rule that there is no duty to control the conduct of a third person. The comments to § 315 make this point explicitly, stating that 'the rule stated in this Section is a special application of the general rule stated in § 314.'") (quoting Restatement (Second) § 315, cmt. a.).

[4] The Restatement (Second) also imposes a duty where a special relation exists between the actor (*i.e.*, the University) and the other (*i.e.*, Plaintiff) that gives to the other a right of protection. Restatement (Second) of Torts § 315(b). The special relationships between the actor and the other that may support a duty are set forth in Section 314A of the Restatement (Second) and have no conceivable application here. *See* Restatement (Second) of Torts § 314A(1) (duty of common carrier to passengers); *id.* § 314A(2) (duty of innkeeper to guests); *id.* § 314A(3) (duty of possessor of land to invitees); *id.* § 314A(4) (duty of one who takes custody of another under certain circumstances; *see also id.* § 320 (duty of certain persons exercising custodial control over an individual).

- describe relationships that are far off point.[5] The only such possible relationship applicable here is the master-servant, or employer-employee, relationship set forth in Section 317, which provides:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317. By its terms, Section 317 imposes a duty on an employer to control the conduct of an off-duty employee "when the conduct complained of occurs on the employer's premises or utilizes a chattel of the employer's, *if* the employer knows or has reason to know that he can control the employee *and* recognizes the necessity of doing so." *Murdock*, 268 Conn. at 570 (emphasis in original).

In *Murdock*, the Court applied Section 317 to hold that a Hartford police officer who was injured in a physical altercation with another off-duty officer in a restaurant parking lot did not

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[5] Section 316 imposes a duty on a parent to prevent his minor child from intentionally harming a third party; Section 318 imposes a duty on the possessor of land or chattels to control the conduct of a licensee; and Section 319 requires those exercising custodial control over an individual, such as a sheriff or warden, to prevent the individual from causing harm to a third party. *See Murdock*, 268 Conn. at 568-69.

have a negligence claim against the City of Hartford or the chief of police. As the Court explained, "§ 317 does not apply in the present case because the altercation between the plaintiff and [the off-duty officer] occurred off department premises and did not involve any chattel of [the chief of police] or the city." *Id.*

Applying the same analysis, Plaintiff's claim against the University must be dismissed. The alleged tortious activity did not occur on the University's premises. The Complaint here does not allege that Father Carrier acted within the scope of his employment with respect to the alleged misconduct. Rather, Father Carrier was Chairman and President of Haiti Fund (Compl. ¶ 5), a corporation separate and distinct from the University which funded, managed, controlled and directed Project Pierre Toussaint (Compl. ¶ 7). The board of Haiti Fund – and not Fairfield University – had the authority and duty to supervise and control Haiti Fund's officers, including Father Carrier. *See* Conn. Gen. Stat. § 33-1080(b) (all powers of a non-stock corporation shall be exercised by or under the authority of the corporation's board of directors); *id.* § 1002(2) (board of directors is the "group of persons vested with management of the affairs of the corporation"); *see also Beardslee v. Disposal*, No. CV 960324450S, 1999 Conn. Super. LEXIS 2999, at *5 (Conn. Super. Ct. Nov. 4, 1999) (stating that "corporations are separate legal entities, with separate rights and powers conferred and duties and liabilities imposed by law").

Finally, Plaintiff does not adequately plead the further requisite fact that the University could control Father Carrier in his capacity as Chairman and President of Haiti Fund and recognized the necessity of doing so. *Compare Seguro*, 82 Conn. App. at 194 & n.8 (tavern owner liable for failing to supervise employee who became intoxicated while working as the bartender, and distinguishing Section 317 because "[t]he negligence in question did not occur off-site, but rather involved the actions and inactions of the defendant in failing to supervise [the

employee] as to consumption of intoxicating liquor on the job"). For all these reasons, Plaintiff does not adequately allege that the University had a duty to control the conduct of Father Carrier in connection with Father Carrier's meetings with Perlitz.

2. Plaintiff's Allegations Do Not Meet The Foreseeability and Policy Requirements For Imposition Of A Duty.

Not only is the scope of the University's duty in this case proscribed by specific application of the Restatement (Second) of Torts principles laid out in *Murdock*, but the same result is reached under general principles of Connecticut negligence law. As the Supreme Court has explained:

> "Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] has ever been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised."

Perodeaux v. City of Hartford, 259 Conn. 729, 754 (2002) (quoting *Jaworski v. Kiernan*, 241 Conn. 399, 405 (1997) (internal citations omitted); *see also Elbert v. Conn. Yankee Council, Inc.*, No. CV 01 0456879, 2004 Conn. Super. LEXIS 1924 at *38-39 (July 16, 2004) ("Whether the claim is for negligent hiring, negligent supervision or negligent retention, a plaintiff must allege facts that support the element of foreseeability.").

Foreseeability alone is not sufficient, however. "Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed." *Perodeaux*, 259 Conn. at 756 (quoting *Jaworski*, 241 Conn. at 406). The Court has identified four factors that should be considered in determining whether a legal duty should be imposed: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging continued

vigorous participation in the activity, while protecting the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Perodeaux*, 259 Conn. at 756-57 (citing *Jaworski*, 241 Conn. at 407).

Plaintiff's claim here fails the foreseeability test and would be inconsistent with application of the factors identified by the Supreme Court. First, Plaintiff does not adequately allege that the alleged harm was foreseeable. A "defendant does not owe a duty of care to protect a plaintiff from another employee's tortious acts unless the defendant knew or reasonably should have known of the employee's propensity to engage in that type of tortious conduct." *Roberts v. Circuit-Wise, Inc.*, 142 F. Supp. 2d 211, 214 (D. Conn. 2001). Plaintiff alleges that Father Carrier engaged in tortious conduct because he allegedly "aided and abetted" Perlitz in Perlitz's efforts to sexually abuse minor boys participating in Project Pierre Toussaint and in Perlitz's efforts to conceal such abuse. (Compl. ¶ 17) The University had no reason to foresee that the director of Project Pierre Toussaint selected by Haiti Fund would engage in criminal misconduct, or that Father Carrier – acting outside the scope of his employment with the University – allegedly would participate in a cover-up of that misconduct. Simply put, Plaintiff fails to allege that the University knew or should have known of any propensity of Father Carrier to engage in such alleged conduct, either when it hired Father Carrier or at any time during his employment by the University. Thus, Plaintiff's claim should be dismissed. *See Dignan v. McGee*, No. 07-cv-1307, 2009 U.S. Dist. LEXIS 30567, at *19 (D. Conn. Apr. 9, 2009) (Hall, J.) (dismissing negligent supervision claim because "there is no evidence on the face of the Amended Complaint that the defendant corporations knew or should have known of [defendant's] 'propensity to engage' in sexual abuse"); *Baker v. Spinney*, No. CV 07 5001737, 2008 Conn. Super. LEXIS 1424 (Conn. Super. Ct. June 2, 2008) (dismissing negligent hiring,

retention and supervision claims finding that it was not foreseeable that a handyman who had prior convictions for burglary, larceny and drug possession would commit such brutal and violent acts as kidnapping, rape and murder).

Second, imposition of a duty on the University to supervise Father Carrier in his role as a volunteer officer of Haiti Fund would be inconsistent with the public policy and other considerations identified by the Supreme Court. Plaintiff does not allege any facts that would support a legitimate expectation that the University would protect him from criminal conduct by Perlitz. Exposing the University to liability on the facts alleged here would unnecessarily increase litigation and would undermine fundamental public policy. Plaintiff's claim is founded on his allegation that the University supported and sponsored the activities of Haiti Fund, which operated Project Pierre Toussaint, a residential school providing basic services – such as meals, access to running water for baths and showers, and classroom instruction and sporting activities – to the poorest children of Haiti. (Compl. ¶¶ 1, 13) Although Perlitz's conduct was reprehensible, Plaintiff does not dispute that the project itself served an important and worthy charitable purpose. Many corporations, educational institutions and other organizations support worthwhile charitable endeavors and encourage their employees to become actively involved in those endeavors. This is a good thing, and finds strong support in public policy.[6] These charitable efforts will be curtailed if an organization, by supporting or sponsoring a charitable project, or by encouraging its employees to seek involvement in charitable activities, assumes liability for misconduct that occurs at the hands of employees of the project or their supervisors. Moreover, imposing liability on the University would do little to protect the safety of persons

[6] For example, Connecticut, like many states, immunizes volunteer directors of a tax-exempt organization from claims for damages so long as the challenged conduct was undertaken in good faith and was not reckless, willful or wanton. *See* Conn. Gen. Stat. § 52-557m.

who receive the benefits of these charitable projects, because such safety is far better protected by the managers of the charitable entity. *See Fischer v. Rivest*, No. X03CV000509627S, 2002 Conn. Super. LEXIS 2778, at *20 (Conn. Super. Aug. 15, 2002) (granting summary judgment to coach, two hockey associations and city on negligence claim brought by injured hockey player, and upholding liability waiver in part because of the public policy benefit of allowing organizations to provide recreational and sports options to youths without the risk of litigation).[7]

In sum, Plaintiff has failed to allege facts supporting a duty of the University to Plaintiff with respect to Father Carrier's conduct as chairman and president of Haiti Fund.

B. The Complaint Fails Properly To Allege A Breach Of The Alleged Duty.

Even if Plaintiff had adequately alleged facts giving rise to a duty to Plaintiff with respect to Father Carrier's activities – which he does not – Count VIII would have to be dismissed because it fails to allege that the University acted negligently in hiring, retaining or supervising Father Carrier.

1. Negligent Hiring.

Plaintiff makes no allegation whatever respecting the University's hiring of Father Carrier. Instead, he simply alleges that "[d]uring the relevant time period Father Carrier was . . . University Chaplain/Director of Campus Ministry and Community Service of Fairfield University. . . ." (Compl. ¶ 5) Plaintiff alleges no facts that would support a finding that at the time the University hired Father Carrier he was not "fit or competent to perform the services of employment," much less any reason for the University to know that Father Carrier was not fit or competent. *Chylinsky*, 630 F. Supp. 2d at 221; *see Abate v. Circuit-Wise, Inc.*, 130 F. Supp. 2d

[7] With regard to the final factor (the decisions of other jurisdictions), it is significant that Connecticut law hews closely to the Restatement (Second) which is reflective of law across many jurisdictions and carefully proscribes a person's duty of care to protect others from harm.

341, 344 (D. Conn. 2001) (granting motion to dismiss negligent hiring claim based on "single conclusory statement that defendant failed to exercise reasonable care in selecting and hiring the male supervisors at their facility"); *Abrahante*, 1998 Conn. Super. LEXIS 1177, at *3 (striking negligent hiring claim because "[n]owhere, even by inference, has the plaintiff sufficiently alleged any particular background or misconduct, that the movant knew or should have known about Mr. Abrahante from which the movant knew or should have known that he was reasonably likely to commit the alleged sexual assault.").

2. Negligent Supervision or Direction.

Plaintiff also fails to allege any facts that would support a finding that his alleged injuries were due to the University's failure to supervise Father Carrier. Plaintiff alleges that Father Carrier frequently traveled to Haiti to visit Perlitz and Project Pierre Toussaint, that Father Carrier became aware that Perlitz was engaged in conduct that endangered minor boys participating in Project Pierre Toussaint, and that Father Carrier aided and abetted Perlitz's effort to sexually abuse minor boys participating in Project Pierre Toussaint. (Compl. ¶ 17) Plaintiff does not allege, however, that the University knew of Perlitz's criminal activities or of Father Carrier's alleged participation in those activities. To the contrary, Plaintiff alleges that Father Carrier aided and abetted Perlitz in his "efforts to conceal Defendant Perlitz's sexual abuse of minors participating in Project Pierre Toussaint. (*Id.*) Father Carrier's alleged concealment of Perlitz's abusive conduct is fully consistent with the University's lack of knowledge of improper activity. Plaintiff also fails to allege any basis for his conclusory assertion that the University "knew or should have known [that Father Carrier] was of bad character and reputation and unable to properly manage, supervise and control and direct" Perlitz. (Compl. ¶ 60). Thus, Plaintiff's negligent supervision claim fails.

3. Negligent Retention.

For the same reasons, Plaintiff has not pleaded a claim for negligent retention of Father Carrier. Plaintiff fails to allege that the University "be[came] aware or should have become aware of problems with [Father Carrier] that indicate[d] his unfitness" as an employee. *Chylinski*, 630 F. Supp. 2d at 221 (quoting *Abrahante*, 1998 Conn. Super. LEXIS 1177, at *3-4).

For the foregoing reasons, Count VIII should be dismissed as to Fairfield University.

IV. COUNT IX FAILS TO STATE A CLAIM AGAINST FAIRFIELD UNIVERSITY FOR BREACH OF FIDUCIARY DUTY.

Plaintiff's claim against Fairfield University for breach of fiduciary duty fails because Plaintiff has failed properly to plead that the University owed a fiduciary duty to Plaintiff or that the University breached any such duty.

A. Fairfield University Did Not Owe A Fiduciary Duty to Plaintiff.

"[I]t is axiomatic that a party cannot breach a fiduciary duty to another party unless a fiduciary relationship exists between them." *Biller Assocs. v. Peterken*, 269 Conn. 716, 723 (2004). The question of whether a fiduciary duty exists, in turn, is a question of law. *Bass v. Miss Porter's Sch.*, 738 F. Supp. 2d 307, 330 (D. Conn. 2010) (citing *Biller*, 269 Conn. at 721-22). "It is well settled that a fiduciary or confidential relationship 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." *Id.* (quoting *Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 640 (2002)). Although the Connecticut Supreme Court "has refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations . . . [i]n the seminal cases in which [the] Court has recognized the existence of a fiduciary relationship, the fiduciary was either in a dominant position, thereby creating a relationship of dependency, or was under a specific duty to act for the benefit of

another." *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 38 (2000) (citations and internal quotation marks omitted). Recognizing that the lack of clear definition should not allow plaintiffs to turn everyday tort or contract actions into breach of fiduciary duty claims, the Court has cautioned that "'[a]lthough we have not expressly limited the application of these traditional principles of fiduciary duty to cases involving only fraud, self-dealing or conflict of interest, the cases in which we have invoked them have involved such deviations.'" *Sherwood v. Danbury Hospital*, 278 Conn. 163, 196 (2006) (quoting *Murphy v. Wakelee*, 247 Conn. 396, 400 (1998)).

Plaintiff's claim that the University owed a fiduciary duty to Plaintiff is based solely on his allegations that the University "knew Project Pierre Toussaint, operated, managed and controlled by Defendant Perlitz was providing services to extremely vulnerable minors in the Republic of Haiti" (Compl. ¶ 64); and that the University "sponsored and promoted Project Pierre Toussaint" (Compl. ¶ 65). Those bare allegations fall far short of the facts necessary to establish a fiduciary relationship between the University and Plaintiff.

First, Plaintiff's allegations do not establish any relationship between Plaintiff and the University, much less a special relationship "characterized by a unique degree of trust and confidence between the parties." A school owes no fiduciary duty even to its own students. Thus, in *Bass v. Miss Porter's Sch.*, 738 F. Supp. 2d at 330-31, the Court granted summary judgment on a student's claim for breach of fiduciary duty against the defendants, a boarding school and its Head of School, concluding that the school did not owe a fiduciary duty to its students and that the Head of School also owed no such duty because she had not had "substantial contact" with the student before the events at issue. In reaching that result, the Court observed: "The Court's research has not revealed a single case in any state or federal court within the Second Circuit holding or even suggesting that a secondary school—public or private,

boarding or day-session—or its employees owe a fiduciary duty to its students." *Id.* at 330. *Accord: Pawlowski v. Delta Sigma Phi*, No. CV030484661S, 2009 Conn. Super. LEXIS 170, at *17 (Conn. Super. Ct. Jan. 22, 2009) (holding that university has no special relationship with its own students) (citing *Freeman v. Busch*, 349 F. 3d 582, 587 (8th Cir. 2003) ("since the late 1970s, the general rule is that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students") (emphasis in original); *Leary v Wesleyan University*, No. CV055003943, 47 Conn. L. Rptr. 340, 346-47 (Conn. Super. Ct. Mar. 10, 2009) (granting summary judgment finding there was no fiduciary relationship between the defendant university and the student plaintiff). Given that the University has no fiduciary duty to its own students as a matter of law, it has no fiduciary duty to a resident of a separate residential school thousands of miles away in a different country based on the bare allegation that the University represented that it "sponsored and promoted" the school.

Second, the facts of this case do not demonstrate a relationship of dependency between the University and the Plaintiff or the type of fraudulent, self-dealing or conflict of interest situation in which the Connecticut Supreme Court has recognized a fiduciary relationship. There is no allegation that influence was acquired and abused by the University or that Plaintiff's confidence was reposed in and betrayed by the University. Nor is there any allegation that the University misused a power differential so as to cause Plaintiff's injuries, or abused a professional relationship of trust and deference. *See, e.g., Gonzalez v. Univ. Sys. of N.H.*, No. 451217, 2005 Conn. Super. LEXIS 288, at *58 (Conn. Super. Ct. Jan. 28, 2005) (applying New Hampshire law to reject a fiduciary duty claim arising out of a college's alleged failure to supervise its cheerleading club in the absence "of a misuse of a power differential . . . or abuse of a professional relationship of trust and deference").

Thus, Plaintiff has failed adequately to plead that Fairfield University owed him a fiduciary duty.

B. Plaintiff Has Failed Adequately To Plead A Breach Of Any Purported Fiduciary Duty.

The Complaint is further bereft of any allegation that Fairfield University engaged in conduct that breached any alleged duty to Plaintiff. It does not allege that the University managed or controlled Project Pierre Toussaint, that the University hired, supervised or directed Perlitz, or that the University had any knowledge of Perlitz's misconduct. Thus, even assuming there were some basis to claim that the University owed Plaintiff a fiduciary duty, Plaintiff's claim fails because he does not adequately plead a breach of the duty. Plaintiff's bare assertion that the University and other defendants "each breached their fiduciary duty to the Plaintiff" (Compl. ¶ 67) is insufficient to state a claim. *See Whitfield v. O'Connell*, 402 Fed. App'x 563, 565 (2d Cir. 2010) (the court need not assume the truth of conclusory statements).

V. COUNT X FAILS TO STATE A CLAIM AGAINST FAIRFIELD UNIVERSITY FOR VICARIOUS LIABILITY.

Plaintiff contends that the University should be held vicariously liable for the intentional torts committed by Perlitz because, he alleges, Perlitz gained the trust and confidence of the Plaintiff by using the existence of an alleged agency relationship between Perlitz and numerous defendants including the University. (Compl. ¶ 75) This claim fails both because Plaintiff fails adequately to allege that Perlitz was an agent of the University and because, even if he were, the University would not be liable for intentional torts committed by Perlitz that were not in furtherance of the University's business.

A. The Complaint Does Not Adequately Allege That Perlitz Was An Agent Of Fairfield University.

The doctrine of vicarious liability is most commonly recognized in agency situations where the master is liable for the torts of the servant committed within the scope of his employment. Sufficient evidence must be produced to warrant the finding of an agency relationship. *See* Douglass B. Wright, John R. FitzGerald & William L. Ankerman, *Connecticut Law of Torts*, § 63 (3d ed.) citing *Leary v. Johnson*, 159 Conn. 101 (1970). The existence of agency is ordinarily a question of fact, but if the material facts are uncontested the agency relationship becomes a question of law. *Galland v. Bishop*, No. 088568, 2001 Conn. Super. LEXIS 44 at *7-9 (Conn. Super. Ct., Jan. 9, 2001), citing *Hallas v. Boehmke & Dobosz, Inc.*, 239 Conn. 658, 674 (1997).

"[A]gency is defined as the fiduciary relationship which results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act . . . ." *Wesley v. Schaller Subaru, Inc.*, 277 Conn. 526, 543 (2006) (quoting *Beckenstein v. Potter & Carrier, Inc.*, 191 Conn. 120, 132-34 (1983). The three elements required to show the existence of an agency relationship are: "(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." *Id. See also* Restatement (Second) of Agency § 1, cmt. b.

Plaintiff's assertion that Perlitz acted as agent of the University is based on his allegation that the University "had placed employees, officers or agents of Defendant Fairfield University in management and/or leadership positions of Defendant Haiti Fund, Inc." and that Project Pierre Toussaint engaged in activities supported, managed and sponsored by the University. (Compl. ¶

72) Those allegations, even if proved, would not be sufficient to establish that Perlitz acted as agent of the University in his service as director of Project Pierre Toussaint.

The Complaint does not allege that Perlitz was an employee of the University. Nor does it allege the general elements of an agency relationship. Plaintiff does not allege that the University ever manifested that Perlitz would act as its agent, or that Perlitz agreed to act as the University's agent. Nor does Plaintiff allege that the University controlled Perlitz's work at Project Pierre Toussaint. To the contrary, the Complaint makes clear that Perlitz's work was "funded, controlled, managed and directed" by Haiti Fund (Compl. ¶ 7 (emphasis added).) Assuming that the University "placed" employees, officers or agents of Fairfield University in management and/or leadership positions of Haiti Fund. (Compl. ¶ 72), any such managers or leaders of Haiti Fund then acted in their capacity as such, subject to the control and direction of Haiti Fund and its board – not the University.

B. Perlitz Was Not Acting Within The Scope Of His Employment And In Furtherance Of Any Business Of Fairfield University.

Plaintiff's vicarious liability claim against the University fails not only because Plaintiff fails adequately to allege that Perlitz acted as an agent of the University, but because Perlitz's tortious conduct in allegedly sexually molesting Plaintiff was not within the scope of his employment and in furtherance of the University's business. *See A-G Foods, Inc. v. Pepperidge Farm, Inc.*, 216 Conn. 200, 208 (1990) (the 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."); *see also Brown v. Housing Auth.*, 23 Conn. App. 624, 628 (1990) ("'A master is liable only for those torts of his servant which are done with a view of furthering his master's business within the field of

this employment -- for those which have for their purpose the execution of the master's orders or the doing of the work assigned to him to do.'"); *Abate v. Circuit-Wise*, 130 F. Supp. 2d at 348.

In *A-G Foods*, the plaintiff, the owner of grocery stores, sued Spinelli, a distributor of Pepperidge Farm bakery goods, for defrauding plaintiff by charging for goods he had not delivered; and sued Pepperidge Farm under theories of vicarious liability. Spinelli pleaded guilty to larceny and paid plaintiff a portion of the amounts stolen pursuant to a restitution order. Plaintiff also sought to recover against Pepperidge Farm under a vicarious liability theory. The principal issue was whether there was sufficient evidence to sustain a jury verdict finding that Spinelli was acting within the scope of his employment and in furtherance of Pepperidge Farm's business when he stole from the plaintiff, and thus that Pepperidge Farm was liable. The trial court granted judgment notwithstanding the verdict.

The Supreme Court affirmed. There was no evidence that Pepperidge Farm had conspired with Spinelli or ratified his actions; and no evidence that Spinelli's thefts were motivated by an intent to serve Pepperidge Farm's interests. 216 Conn. at 206. The Court found that the trial court had reasonably concluded that Pepperidge Farm had not profited in any significant or measurable way from the fraud, notwithstanding plaintiff's claim that the fraud indirectly benefited Pepperidge Farm because the fraudulent sales had the effect to increase Pepperidge Farm's allocation of shelf space within the stores. *Id.* at 207-09. Finally, the Court agreed with the trial court's rejection of plaintiff's argument that vicarious liability could be imposed because the misconduct took place during the hours when Spinelli was engaged in selling Pepperidge Farm products and was mixed in with legitimate business. It emphasized that "there was no evidence that Pepperidge Farm knew of Spinelli's fraudulent activity or received any of the monetary proceeds of Spinelli's fraud." *Id.* at 210.

Plaintiff's claim here is even weaker than the claim rejected in *A-G Foods*, because Perlitz's criminal conduct was so egregious. The University had no knowledge of Perlitz's conduct; did not ratify it; and did not benefit from it in any way. To the contrary, Perlitz's conduct was at odds with the University's mission and reasons for supporting charitable causes, and completely contrary to Project Pierre Toussaint's purpose of advancing the cause of poor Haitian children who resided there. There simply are no pleaded facts from which one could find that Perlitz's sexual molestation of the Plaintiff was within the scope of Perlitz's employment and in furtherance of Fairfield University's business. *See Dignan v. McGee*, 2009 U.S. Dist. LEXIS 30567, at *17-18 ("the theory of respondeat superior advanced by Dignan failed as a matter of law . . . because there was no evidence on the face of the Complaint that [defendant] was acting within the scope of his employment when he committed the alleged sexual abuse").

CONCLUSION

For the reasons set forth above, the Court should dismiss the Complaint against Fairfield University in its entirety.

DEFENDANT,
FAIRFIELD UNIVERSITY

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CERTIFICATION OF SERVICE

I hereby certify that on November 16, 2011, a copy of the foregoing Fairfield University's Memorandum of Law In Support Of Its Motion to Dismiss was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Thomas D. Goldberg
Thomas D. Goldberg