

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

JANET JENKINS, for herself and as next)
friend of **ISABELLA MILLER-JENKINS**)
a/k/a **ISABELLA MILLER**,)

Plaintiffs,)

v.)

CIVIL CASE NO. 2:12-cv- 00184-wks

**KENNETH L. MILLER, LISA ANN)
MILLER** f/k/a **LISA MILLER-JENKINS**,)
**TIMOTHY D. MILLER, ANDREW)
YODER**, Individually and as agent for)
**CHRISTIAN AID MINISTRIES, INC.,)
CHRISTIAN AID MINISTRIES, INC.,)
RESPONSE UNLIMITED, INC.,)**

PHILIP ZODHIATES, Individually and as)
agent for **RESPONSE UNLIMITED, INC.**,)
VICTORIA HYDEN f/k/a **VICTORIA)
ZODHIATES**, Individually and as agent)
for both **RESPONSE UNLIMITED, INC.**)
and **LIBERTY UNIVERSITY, INC.**, and)
its related ministry **THOMAS ROAD)
BAPTIST CHURCH, INC., LINDA M.)
WALL**, Individually and as agent for)
**THOMAS ROAD BAPTIST CHURCH,)
INC., and DOUGLAS WRIGHT,**)

Defendants.)

July 1, 2013

**MEMODANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS BY DEFENDANT LINDA M. WALL**

Defendant Linda M. Wall, through the undersigned counsel, in her capacities as an individual and as alleged agent for Thomas Road Baptist Church, hereby submits a memorandum of law in support of her motion to dismiss the complaint pursuant to Fed. R. Civ. P 12(b)(2) for lack of personal jurisdiction; 12(b)(3) for improper venue; and/or 12(b)(6) for failure to state a claim upon which relief can be granted.

INTRODUCTION

This case purports to be a damages action against Defendant Linda M. Wall (“Wall”) and others for allegedly plotting to assist in the alleged kidnapping of a minor child, Isabella Miller (“Isabella”). Plaintiff Janet Jenkins (“Jenkins”) asserts against Wall 1) an unrecognized common law state tort of intentional kidnapping, and 2) a federal claim for conspiracy to violate civil rights. Jenkins asserts a RICO claim against a single defendant (Kenneth Miller) and a conspiracy to commit RICO claim against all other defendants named in this action except Wall and Douglas Wright.

As a threshold matter, the Court lacks personal jurisdiction over Wall and venue is improper in the District of Vermont. Wall has no contacts with Vermont whatsoever and Jenkins *sole* factual assertion for claiming personal jurisdiction over Wall is an alleged agency relationship between Wall and Thomas Road Baptist Church (“TRBC”) which, as shown below, does not now and never has existed. Thus, the Court cannot properly assume personal jurisdiction over Wall without violating due process. Venue is improper in this Court under 28 U.S.C. § 1391(b) because none of the events giving rise to Jenkins’ claims occurred in Vermont. Venue is improper in this Court under 28 U.S.C. § 1965 because the Court lacks personal jurisdiction over *any* defendant named in this suit, and the United States District Court for the Western District of Virginia has jurisdiction over *every* defendant.

Furthermore, none of the claims asserted by Jenkins against Wall can survive even minimal scrutiny. First, Vermont does not recognize a common law tort of intentional kidnapping. Contrary to Jenkins’ presumption, an allegedly criminal action does not *ipso facto* create a private right of action. Therefore, Count One fails as a matter of law. Second, the federal conspiracy to violate civil rights claim not only lacks factual support but also fails to

demonstrate a recognized invidious, class-based animus. In addition, it fails to allege mandatory state action. Thus, Count Three fails as a matter of law. Finally, Jenkins has not alleged a RICO claim against Wall and, even if she did, the facts alleged in the complaint fail to allege a cognizable RICO injury, a RICO civil conspiracy, or even a pattern of racketeering activity. For these and the following reasons the complaint against Wall should be dismissed.

I. THIS COURT LACKS PERSONAL JURISDICTION OVER LINDA WALL.

A. The Legal Standard for Personal Jurisdiction.

As the plaintiff asserting personal jurisdiction, Jenkins “bears the burden of demonstrating contacts with the forum state that are sufficient to give the court jurisdiction over the person of the defendant in a 12(b)(2) motion.” *Country Home Products, Inc. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 566-67 (D. Vt. 2004) (citing *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996)). Prior to discovery, a plaintiff need only make a prima facie showing that jurisdiction exists. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985). But “[t]his prima facie showing ‘must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant.’” *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012) (quoting *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010)).

In considering whether a plaintiff has met her burden of making a *prima facie* showing that personal jurisdiction exists, a court may not draw argumentative inferences in the plaintiff’s favor, nor does it accept as true legal conclusions couched as factual allegations. *Licci ex rel. Licci*, 673 F.3d at 59. Moreover, “[f]actual allegations must be enough to raise a right to relief above the speculative level ... they must be plausible [and not merely] conceivable.” *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). As shown below, the complaint against Wall does not pass the threshold from conceivable to plausible and therefore fails to state a claim.

This action contains both an alleged state law claim brought pursuant to the Court's diversity jurisdiction (perhaps more appropriately supplemental jurisdiction unless all federal claims fail), as well as claims arising under federal law. In the United States District Court for the District of Vermont, the personal jurisdiction analysis is the same for both types of claim.

For diversity claims, personal jurisdiction "is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." *Metro. Life Ins. Co.*, 84 F.3d at 567. Accordingly, the district court conducts a two-part inquiry: "First, it must determine whether the plaintiff has shown that the defendant is amenable to service of process under the forum state's laws; and second, it must assess whether the court's assertion of jurisdiction under these laws comports with the requirements of due process." *Id.*

For claims arising under federal law, courts first consider the forum state's long-arm statute and then analyze whether personal jurisdiction comports with the due process clause of the United States Constitution. *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163-64 (2d Cir. 2010). Vermont's long-arm statute, 12 V.S.A. § 913(b), permits jurisdiction over foreign defendants to the full extent permitted by the Due Process Clause. *Northern Aircraft, Inc. v. Reed*, 154 Vt. 36, 40, 572 A.2d 1382, 1385 (1990); *Dall v. Kaylor*, 163 Vt. 274, 275, 658 A.2d 78, 79 (1995). In Vermont, the

Court may exercise personal jurisdiction over any defendant properly subject to service of process under the Vermont long-arm statute, that is, any defendant who has sufficient contact with Vermont that the Court's exercise of jurisdiction does not violate principles of due process. "Thus, the Court can proceed to an application of the [D]ue [P]rocess [C]lause."

Mansfield Heliflight, Inc. v. Heli-One Can. Inc., 2012 U.S. Dist. LEXIS 140191 at *9-10 (D. Vt. Sept. 28, 2012) (quoting *Ben & Jerry's Homemade, Inc. v. Coronet Priscilla Ice Cream Corp.*, 921 F. Supp. 1206, 1209 (D. Vt. 1996)).

The Due Process Clause serves to ensure that a foreign defendant is not subject to the binding judgment of a forum with which she has no significant contacts. *Ben & Jerry's*, 921 F. Supp. at 1209. The due process analysis in the Second Circuit is the same for both diversity claims and federal claims. *See Chloe*, 616 F.3d at 163.

Examining due process involves two inquiries: “minimum contacts” and “reasonableness.” The “minimum contacts” inquiry analyzes whether a defendant’s contacts with the forum state shows that the defendant purposefully availed herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws such that she should reasonably anticipate being haled into court in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980). Only if a defendant is found to have the requisite minimum contacts with the forum does the Court then turn to the reasonableness inquiry to determine whether the assertion of jurisdiction over the defendant would offend “traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

B. Wall Lacks Minimum Contacts With Vermont.

There are two types of personal jurisdiction: general, all-purpose jurisdiction and specific, case-linked jurisdiction. “Specific [personal] jurisdiction exists when ‘a [forum] exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum’; a court’s general jurisdiction, on the other hand, is based on the defendant’s general business contacts with the forum . . . and permits a court to exercise

its power in a case where the subject matter of the suit is unrelated to those contacts.” *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 & nn.8-9 (1984)). The existence of either specific personal jurisdiction or general personal jurisdiction satisfies the “minimum contacts” requirement of the Due Process Clause. *Helicopteros Nacionales*, 466 U.S. at 414-16.

“For the purpose of establishing specific personal jurisdiction, the necessary ‘fair warning requirement is satisfied if the defendant has ‘purposefully directed’ h[er] activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.” *Burger King*, 471 U.S. at 472-73 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and *Helicopteros Nacionales*, 466 U.S. at 414). Put another way, specific personal jurisdiction properly exists where the defendant took “intentional, and allegedly tortious, actions . . . expressly aimed” at the forum. *Calder v. Jones*, 465 U.S. 783, 789 (1984). “[T]he fact that harm in the forum is foreseeable, however, is insufficient for the purpose of establishing specific personal jurisdiction over a defendant.” *O’Neill v. Asat Trust Reg. (In re Terrorist Attacks on September 11, 2001 (Asat Trust Reg.))*, 2013 U.S. App. LEXIS 7671 at *32-33 (2d Cir. N.Y. Apr. 16, 2013) (citing *In re Terrorist Attacks III*, 538 F.3d at 95; *Burger King*, 471 U.S. at 474).

“Unlike specific personal jurisdiction, general jurisdiction is not related to the events giving rise to the suit, and thus, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant’s ‘continuous and systematic general business contacts’ with the forum at the time the initial complaint was filed.” *O’Neill*, 2013 U.S. App. LEXIS 7671 at *33 (quoting *Helicopteros Nacionales*, 466 U.S. 414-16 & n.9).

Jenkins did not and cannot show that Wall had the requisite minimum contacts with Vermont to support personal jurisdiction. Indeed, Jenkins does not allege *any* contacts between Wall and Vermont. Jenkins' sole ground for asserting personal jurisdiction over Wall is that she was an alleged "agent of TRBC in relation to the claims set forth herein, giving her sufficient contacts with the State of Vermont to subject her to the jurisdiction of this court." Am. Compl., ¶ 17. Jenkins alleges that TRBC has sufficient minimum contacts with Vermont because it allegedly solicited donations from residents of Vermont and organized prayer meetings at the Vermont Family Courts. Am. Compl., ¶ 16. Jenkins does not allege, however, that Wall solicited donations on behalf of TRBC or that she organized or participated in any prayer meetings at Vermont Family Court. Therefore, even if, *arguendo*, Wall was an agent to TRBC for some purposes (which she was not), she was not an agent of TRBC for any of the events Jenkins alleges in her attempt to invoke personal jurisdiction over TRBC. Thus, the conclusory allegation of an agency relationship between Wall and TRBC fails as a matter of law and fact.

1. Wall has Never had an Agency Relationship with TRBC.

"Agency is a legal concept that depends on the existence of three elements: (1) 'the manifestation by the principal that the agent shall act for him'; (2) 'the agent's acceptance of the undertaking'; and (3) 'the understanding of the parties that the principal is to be in control of the undertaking.'" *Cleveland v. Caplaw Enters.*, 448 F.3d 518 (2d Cir. 2006) (quoting *Cabrera v. Jakobovitz*, 24 F.3d 372, 386 (2d Cir. 1994)). The complaints fails to allege facts demonstrating any of these elements: there is no allegation that TRBC requested or appointed Wall to act for it; no allegation that Wall accepted an appointment as agent for TRBC; and no allegation that TRBC controlled the actions of Wall. Jenkins' failure to allege these critical facts is a fatal flaw in her assertion of an agency relationship between Wall and TRBC.

Moreover, notwithstanding Jenkins' wholly unsubstantiated conclusory allegation that Wall was an agent for TRBC, no such agency relationship has ever existed between the two. Wall has never been an officer, board member, or employee of TRBC. *See* Declaration of Linda Wall, ¶ 36, attached to Motion to Dismiss. She has never even been a member of the congregation or voted in any meeting of TRBC. *Id.*, ¶¶ 37-38. No officer, director, manager, employee, or attorney of TRBC has ever appointed, designated, or authorized Wall to be an agent for TRBC. *Id.*, ¶ 39. No officer, director, manager, employee, or attorney of TRBC has ever controlled Wall or directed her actions. *Id.*, ¶ 40. At no time did Wall ever agree to act as an agent for or on behalf of TRBC or hold herself out as an agent for TRBC. *Id.*, ¶¶ 41-42. And at no time did Wall ever enter into any contractual relationship with TRBC. *Id.*, ¶ 43. *See also* Aff. of Jonathan Falwell, ¶¶ 13, 15 (Doc. No. 66-2). Thus, none of the three prongs of the *Cabrera* agency test are met here. In short, there is no factual basis whatsoever to support Jenkins' bald allegation of an agency relationship between Wall and TRBC that in turn supports Jenkins' allegations of conspiracy. Because agency is the *sole* factual assertion for claiming personal jurisdiction over Wall, this Court may not exercise personal jurisdiction over Wall without violating due process.

2. This Court Lacks General Jurisdiction Over Wall.

Jenkins has alleged no facts demonstrating that Wall maintained any 'continuous and systematic general business contacts' with the forum at the time the initial complaint was filed." *See O'Neill*, 2013 U.S. App. LEXIS 7671 at *33. Therefore, this Court cannot assume general jurisdiction over Wall. Though Jenkins alleges that all defendants "reside, are found, have an agent, or transact their affairs in this district," Am. Compl., ¶ 1, she does not allege even a single

contact between Wall and Vermont. The reason for this simple: Wall does not now nor has she ever had any continuous and systematic contacts with Vermont or anyone living in Vermont.

Wall has never resided or even visited the State of Vermont. *See* Wall Decl., ¶¶ 3-5. She has never owned leased, rented, or used property in Vermont. *Id.* at ¶ 6. She has never worked in Vermont, transacted business in Vermont, or entered into any contract in Vermont. *Id.* at ¶ 7. She never solicited business or sold or leased goods to anyone in Vermont; never had a telephone listing or mailing address in Vermont; never been a party or witness to any lawsuit in Vermont whether at law or in equity; and has never held a driver's license issued by Vermont. *Id.* at ¶¶ 8-11. She has never held a license or other professional certification in the State of Vermont. *Id.* at ¶ 12. She has never registered to do business, appointed a registered agent, or otherwise sought to avail herself of the privilege of doing business in the State of Vermont. *Id.* at ¶ 13. She has never paid taxes, fees, or charges of any kind to the State of Vermont or its subdivisions; never created any obligations or contracts between herself and any Vermont resident; and never transacted any business in Vermont. *Id.* at ¶¶ 14-17.

Though it is true that “[n]o single event or contact connecting defendant to the forum state need be demonstrated,” *Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 166 (2d Cir. 2005) (internal quotation marks omitted), Wall's lack of *any* contacts with Vermont renders general jurisdiction impossible because there is not a scintilla of evidence or even a factual allegation establishing that Wall has purposefully directed activities at the State of Vermont and/or its residents. Having never been to Vermont or having ever created any obligations between herself and any Vermont resident, Wall has insufficient contacts for this Court to assert general jurisdiction over her. *See Anichini, Inc. v. Campbell*, No. 1:05-cv-55, 2005 WL 2464191 (D. Vt. Oct. 4, 2005) (“jurisdiction usually is not proper unless the defendant actively initiate[s] contacts in a state, or

creates continuing obligations between itself and a Vermont resident.”) (citations and quotations omitted). Consequently, the complaint against Wall must be dismissed.

3. This Court Lacks Specific Jurisdiction over Wall.

Specific jurisdiction exists “[w]hen a controversy is related to or ‘arises out of’ a defendant’s contacts with the forum.” *Helicopteros Nacionales*, 466 U.S. at 414 (citing *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The complaint does not even allege that Wall had any contacts with the forum state in connection with this lawsuit. Instead, it attempts to bootstrap Wall to TRBC. Even so, Wall is not now nor has she ever been an agent for TRBC. *See* p. 7, *supra*; Wall Decl., ¶¶ 36-43. Moreover, there are no allegations that Wall “purposefully directed” activities at Jenkins in Vermont. *See Burger King*, 471 U.S. at 472-73. This lawsuit cannot be related to Wall’s contacts with the forum because she has had no such contacts.

Moreover, contrary to the allegations in the complaint, Wall had no involvement whatsoever in Lisa Miller’s alleged removal of Isabella to Nicaragua or elsewhere. Wall has never met or communicated with *any* of the individual defendants¹ other than Lisa Miller. Wall Decl., ¶¶ 44-48. She does not know Kenneth Miller or Timothy D. Miller or Andrew Yoder or Philip Zodhiates or Victoria Hyden. *Id.* Nor has she ever communicated with anyone associated with Christian Aid Ministries or Response Unlimited. *Id.*, ¶¶ 49-50. And though she helped raise money to defray the costs of Lisa Miller’s travel expenses related to the legal defense of the state visitation/custody cases, she did not raise money or supplies for Lisa Miller for any other purpose. *Id.*, ¶¶ 30-35. She has not communicated with Lisa Miller or Isabella since September, 2009, nor has she known their whereabouts since September, 2009. *Id.*, ¶¶ 27-29. And, most importantly, she never suggested or told Lisa Miller what she should do in the event she

¹ Wall sent Kenneth Miller a card of encouragement when he was in jail awaiting trial on criminal charges related to the alleged kidnapping of Isabella. Wall Decl., ¶ 44.

ultimately lost the state visitation/custody cases, and she had no prior knowledge that Lisa Miller intended to leave the United States with Isabella. *Id.*, ¶¶ 25-26.

But even if, *arguendo*, the allegations in the complaint are presumed to be true, specific jurisdiction is still lacking because nothing in the complaint avers that Wall “purposely directed” her actions at Jenkins or Vermont. On the contrary, the complaint concedes that the purpose of the defendants’ alleged activities was to protect Isabella, not harm Jenkins. *See* Am. Compl., ¶ 20 (alleging that Lisa Miller “asserted the belief that homosexuality was sinful and that Isabella should be shielded from exposure to the ‘lifestyle.’”); *id.* at ¶ 27 (“The purpose of the Protect Isabella Coalition (“PIC”) was to prevent court ordered contact between Isabella Miller-Jenkins and Janet Jenkins.”).² Finally, Jenkins’ allegations that Wall approved of Isabella’s removal from the United States after the fact, Am. Compl., ¶ 51, is not evidence of conspiracy or participation in the alleged kidnapping but rather Wall’s criticism of the state courts’ custody orders, which she was constitutionally entitled to express. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (calling liberty to criticize government conduct “the central meaning of the First Amendment”).

4. The Claims Asserted have no Legal Connection to the Forum State.

Not only has Wall not had any contact with Vermont relative to this suit, but the lawsuit itself has no connection to the forum state and therefore no activity related to the lawsuit gives rise to specific jurisdiction in Vermont. The underlying acts in the complaint all relate to the

² The administration and content of the PIC website was controlled exclusively by Debbie Thurman and Rena Lindevaldsen. *See* Wall Decl., ¶ 51; Stipulation, ¶ 3 (Doc. No. 76-11) (identifying Debbie Thurman and Rena Lindevaldsen as the persons responsible for content on the PIC website).

alleged removal of Isabella from Virginia to Nicaragua, via New York, Canada and Mexico, every aspect of which occurred outside the State of Vermont. According to the complaint, the plotting and execution of the alleged kidnapping largely happened in the Virginia towns of Lynchburg, Stuart's Draft, Winchester, Waynesboro, and Forest. *See* Am. Compl., ¶¶ 35, 38, 40, 41. All of these towns are located within the jurisdiction of the United States District Court for the Western District of Virginia. And, although the parentage and custody issues between Jenkins and Lisa Miller were litigated and adjudicated in Vermont, none of the claims in this case seek to adjudicate, modify, overturn, or confirm the jurisdiction or the rulings of the Vermont Family Court (all of which are final as affirmed by the Vermont Supreme Court). Rather, Jenkins seeks damages for the alleged kidnapping of Isabella by Lisa Miller and her alleged co-conspirators, which involved a series of actions that never occurred within or even touched upon Vermont.

In sum, specific jurisdiction cannot be found against Wall because she has had no contacts with Vermont in relation to this suit (or at all) and because the suit itself has no connection to Vermont. Or, to put it another way, Wall has done nothing that should have caused her to “reasonably anticipate being haled into court” in Vermont. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

5. Asserting Jurisdiction over Linda Wall would not be Reasonable.

Not only has Jenkins failed to establish the minimum contacts necessary to establish general or specific jurisdiction over Wall, which in itself ends the personal jurisdiction inquiry, she cannot show that asserting jurisdiction over Wall in Vermont would be reasonable and not offend “traditional notions of fair play and substantial justice”— a separate and independent test for establishing jurisdiction. *Metro. Life*, 84 F.3d at 568 (quoting *International Shoe*, 326 U.S. at

316). The five factors to consider in analyzing reasonableness are: (1) the burden to the defendant; (2) the forum state's interest in the dispute; (3) the plaintiff's interest in convenient and effective relief; (4) the interstate judicial system's interest in efficiently resolving the cases; and (5) the interest of all states in advancing their shared social policies. *Burger King*, 471 U.S. at 476–77 (citing *World– Wide Volkswagen*, 444 U.S. at 292). *See also Gaffney*, 2012 WL 368683 at *4 (setting forth reasonableness inquiry).

First, the burden to Wall in litigating in this forum is substantial because she resides in Virginia and has no connections whatsoever to Vermont. *See Wall Decl.*, ¶¶ 3-17. Wall would suffer significant personal and financial burden litigating a case over 700 miles from her home and family. *Wall Decl.*, ¶ 52. Moreover, all of the key witnesses and evidence in this case are located *outside* of Vermont, primarily in Virginia. *See Am. Comp.* ¶¶ 8-18.

Turning to the second factor, it is reasonable to conclude that Virginia's interest in this dispute is equal to *or greater than* that of Vermont as each has an interest in providing a forum for its citizens. Because only Jenkins resides in Vermont and eight (8) of the twelve defendants reside in Virginia, Virginia arguably has the greater interest in providing the forum for litigation involving its citizens. Third, though it is true Jenkins has an interest in convenient and effective relief, this is best served by bringing her claims where the claimed wrongs allegedly occurred, thereby benefiting from the convenience of having most of the defendants and witnesses in close proximity to the forum. And that forum is Virginia.

Fourth, the interstate judicial system's interest in efficiently resolving the case turns on the location of witnesses, where the alleged wrong in the underlying lawsuit occurred, which forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation. *See OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1097

(10th Cir. 1998). Again, none of the liability witnesses are located in Vermont and the alleged wrongful conduct occurred elsewhere. The substantive law of Virginia should govern this case because that is where most of the activities relating to the alleged kidnapping are claimed to have occurred. *See Verzani v. Costco Wholesale Corp.*, 641 F. Supp. 2d 291, 298 (S.D.N.Y. 2009) (holding that several factors, including the location of the activity at the heart of the dispute, should govern the choice of law). Further, Jenkins need not litigate the case in Vermont to avoid piecemeal litigation and, finally there is no meaningful difference in Virginia and Vermont's social policies towards kidnapping; both condemn it. *See, e.g., Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555, 558 (2012); 13 V.S.A. § 2405. Thus, of the five reasonableness factors, no factors weigh in favor of Vermont, one factor tilts toward Virginia, and the remaining factors all weigh heavily in favor of Virginia. Accordingly, not only are Wall's contacts with Vermont nonexistent but the exercise of personal jurisdiction over her would offend traditional notions of fair play and substantial justice. The complaint should therefore be dismissed.

II. VENUE IS IMPROPER IN VERMONT

Jenkins makes the bald assertion that venue is proper in this District pursuant to 28 U.S.C. § 1391(b). However, her position is unsupported by controlling law as the events central to this lawsuit primarily took place within the jurisdiction of the United States District Court for the Western District of Virginia and none of them took place in the District of Vermont. Section 1391(b)(2) states, in relevant part, that: "A civil action may be brought in ... a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." The Second Circuit has held that the venue statute is to be construed strictly and "district courts [must] take seriously the adjective 'substantial.'" *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353,

357 (2d Cir. 2005).³ Thus, “for venue to be proper, *significant* events or omissions *material* to the plaintiff’s claim must have occurred in the district in question, even if other material events occurred elsewhere.” *Id.* (emphasis in original). The substantial part test is *not* similar to a personal jurisdiction minimum contacts analysis. *Id.* As described in Section I above, and as revealed by the complaint, there are *no* events or omissions material to Plaintiff’s claims that took place in Vermont.⁴ The gravamen of this lawsuit is an alleged kidnapping, every part of which took place outside the District of Vermont and mostly within the jurisdiction of the United States District Court for the Western District of Virginia. *See* Am. Compl., ¶¶ 35, 38, 40, 41.⁵ Thus, venue is improper in this judicial district.⁶

III. PERSONAL JURISDICTION AND VENUE ARE IMPROPER IN THIS FORUM UNDER RICO.

Though it is doubtful that Jenkins sufficiently pleaded or even intended to plead RICO or conspiracy to commit RICO claims against Wall, *see* Am. Compl. ¶¶ 63-73, Wall nevertheless incorporates herein by reference the RICO jurisdictional and venue legal arguments set forth at pp. 20-31 in the Motion and Memorandum submitted by Defendants Liberty University, Thomas Road Baptist Church, and Victoria Hyden on December 6, 2012 (Doc. No. 66), and pp. 13-17 of

³ Although the venue statute was rewritten in 2011, the substantial part test remains the same and district courts continue to apply the *Gulf Insurance* standard. *See, e.g., Sanderson v. Horse Cave Theatre* 76, No. 12-cv-708, 2012 WL 3129485 (S.D.N.Y. Jul. 26, 2012).

⁴ No issue addressed in the Vermont Family Court proceedings is being adjudicated here.

⁵ The alleged planning for the trip to Nicaragua constitutes a series of significant events material to Jenkins’ kidnapping claim.

⁶ Although Section 1391(b)(3) provides for venue in “any judicial district in which any defendant is subject to the court’s personal jurisdiction,” that is so only “if there is no district in which an action may otherwise be brought as provided in this section.” Because these claims can and should be brought in the United States District Court for the Western District of Virginia under Section 1391(b)(2), this section is not applicable. Given that there is another district where the claims can be brought, Section 1391(b)(3)’s expanded jurisdiction cannot be invoked here.

the Memorandum of Law submitted by Defendants Philip Zoghiates and Response Unlimited, Inc. on November 16, 2012 (Doc. 57-1).

IV. THIS ACTION AGAINST WALL SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. The Standard of Review for Rule 12(b)(6) Motions.

Even if personal jurisdiction and venue were proper in this District, which they are not, this suit should be dismissed because Jenkins has not and cannot state any viable cause of action against Wall. In reviewing a motion to dismiss under Rule 12(b)(6), the Court accepts as true the factual allegations set forth in the complaint, drawing all reasonable inferences in the plaintiff's favor. *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 273 (2d Cir. 2011). This requirement, however, does not apply to legal conclusions, bare assertions or conclusory allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009). To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (citing *Twombly*, 550 U.S. 544). As shown below, the factual allegations in Jenkins' complaint are insufficient to raise a right to relief above the speculative level and therefore should be dismissed. *See Twombly*, 550 U.S. at 555.

B. Count One should be Dismissed Because it is Not Based on a Recognized Private Right of Action.

Count One of the complaint alleges that the defendants conspired with and aided and abetted Lisa Miller in her commission of the criminal offense of kidnapping under Vermont law. Am. Complaint, ¶ 63-64. Even assuming these conclusory allegations are true for purposes of

this motion,⁷ Count One must be dismissed because Vermont does not recognize a private right of action for the crime of kidnapping. Criminal statutes, in and of themselves, do not create private rights of action. *See, e.g., Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994) (“We have been quite reluctant to infer a private right of action from a criminal prohibition alone; for example, we refused to infer a private right of action from ‘a bare criminal statute.’ And we have not suggested that a private right of action exists for all injuries caused by violations of criminal prohibitions.”) (quoting *Cort v. Ash*, 422 U.S. 66, 80 (1975)); *Madden v. Abate*, 800 F. Supp. 2d 604, 606-07 (D. Vt. 2011) (acknowledging that “the existence of a criminal statute prohibiting certain conduct does not in and of itself create a private right of action that may be brought by the victim of that conduct.”); *id.* at 607 (collecting cases from other jurisdictions holding that no civil cause of action may be maintained for violation of criminal offenses).

Similarly, there is no private right of action for violations of the federal Parental Kidnapping Prevention Act. *Monroe v. McNairy County*, 850 F. Supp. 2d 848, 876 (W.D. Tenn. 2012). *Cf. Giano v. Martino*, 673 F. Supp. 92, 95 (E.D.N.Y. 1987) (“Federal Kidnapping Act was never intended to confer rights on the victim of a kidnapping, and does not do so by its language.”); *Esser v. Roach*, 829 F. Supp. 171, 176 (E.D. Va. 1993) (“[T]he PKPA affords no private, federal cause of action.”). As this Court has previously recognized, “[w]here a private litigant asserts a claim that is not based upon any recognized private right of action, the Court may dismiss the claim.” *Madden v. Abate*, 800 F. Supp. 2d 604, 606-07 (D. Vt. 2011) (citing to *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 115 (2d Cir. 2007)). Since Count One of the

⁷ Wall staunchly denies any participation or agreement, active or passive, in the alleged kidnapping of Isabella Miller. Wall Decl., ¶¶ 24-35.

complaint asserts a claim that is not recognized either under Vermont state law or federal law, it should be dismissed with prejudice.

C. Counts Two and Three do not Assert RICO Claims Against Wall.

Fed. R. Civ. P. 8(a)(2) “requires factual allegations that are sufficient to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162 (2d Cir. 2012) (quoting *Twombly*, 550 U.S. at 555). In her complaint and amended complaint, Jenkins identified defendant Kenneth Miller as a person who allegedly committed acts of racketeering against her, and certain other specifically-identified defendants as conspiring with Kenneth Miller to commit acts of racketeering. *See* Comp., ¶¶ 65-73; Am. Comp., ¶¶ 65-73. As the master of her complaint, Jenkins explicitly identified by name those persons she believes committed or conspired to commit acts of racketeering. Wall is not identified among them and therefore has not been given fair notice that RICO claims have been asserted against her. Nevertheless, without conceding that Jenkins pleaded facts sufficient to include her among the RICO defendants Wall, out of utmost caution, incorporates herein by reference the RICO legal arguments set forth at pp. 33-52 in the Motion and Memorandum submitted by Defendants Liberty University, Thomas Road Baptist Church, and Victoria Hyden on December 6, 2012 (Doc. No. 66).

D. Count Four should be Dismissed for Failure to State a Cognizable Claim.

Count Four of the Amended Complaint alleges that the defendants conspired with each other “to violate the civil rights of Jenkins and Isabella on account of gender, and to prevent the courts of Vermont from securing Jenkins and Isabella equal protection of their rights to a parent-child relationship under the law[,]” in violation of 42 U.S.C. § 1985(3). Am. Compl., ¶¶ 74-75.

Assuming for the sake of this motion that the factual allegations against Wall are true—and they are not—Jenkins has failed to state a viable civil rights conspiracy claim as a matter of law.

“The four elements of a § 1985(3) claim are: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States.” *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993) (citing *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 828–29 (1983)). The conspiracy must be motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). “Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.” *American Savings & Loan Ass’n v. Novotny*, 442 U.S. 366, 372 (1979). While § 1985(3) may reach purely private conspiracies, see *Griffin*, 403 U.S. at 97, deprivation of rights under the Equal Protection Clause of the Fourteenth Amendment can arise “only where there has been involvement of the State or of one acting under the color of its authority.” *Carpenters*, 463 U.S. at 831.

The complaint fails to state a civil conspiracy claim pursuant to § 1985(3) because: (1) it fails to plead even minimal factual support for the existence of a conspiracy; (2) it fails to allege or show an invidious, class-based animus; and (3) it fails to allege or show any involvement by a state actor in denying Jenkins equal protection under the law. Any one of these grounds supports the dismissal of Count Four with prejudice.

1. The Complaint Fails to Plead Sufficient Factual Support for a Conspiracy.

Section 1985(3) proscribes certain enumerated conspiracies. Nevertheless, it is well-settled that vague, conclusory or general allegations of conspiracy are insufficient to state a claim under 42 U.S.C. § 1985. *See Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162 (2d Cir. 2012) (“Conclusory allegations of ‘participation’ in a ‘conspiracy’ have long been held insufficient to state a claim.”) (citing *X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 71 (2d Cir. 1999); *Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977)). *See also Gyadu v. Hartford Ins. Co.*, 197 F.3d 590, 591 (2d Cir. 1999) (recognizing that a “complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss.”). “In order to maintain an action under Section 1985, a plaintiff must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end.” *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (citation omitted). Finally, a plaintiff claiming the existence of a conspiracy must also allege, “with at least some degree of particularity, overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy.” *Thomas*, 165 F.3d at 147. *See also Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) (recognizing that dismissal is warranted if the complaint fails to elaborate or substantiate bald claims that defendants conspired with one another).

Jenkins alleges in a conclusory fashion that the defendants conspired but fails to plead sufficient facts to support the existence of a civil conspiracy. The complaint does not allege any concrete facts to support the existence of an agreement, tacit or otherwise, between Wall and the other alleged co-conspirators. The only agreement alleged in the complaint is set forth in

Paragraph 26: “Upon information and belief, [Linda] Wall and [Lisa] Miller decided and agreed as early as June of 2008 that Lisa Miller should flee with Isabella.” The only other inference of any agreement is Plaintiffs’ allegation that “Lisa Miller and her co-conspirators had devised a plan to kidnap Isabella.” Am. Compl., ¶ 34. These are conclusory allegations that fail to allege underlying *facts*: there are no allegations as to a date, time, or place of an alleged meeting; no allegations of fact with respect to the content of communications or discussion; and no allegations of fact with respect to the details of an alleged plan, scheme, or agreement. *See, e.g., Twombly*, 550 U.S. 544, 555 (“[f]actual allegations must be enough to raise a right to relief above the speculative level”) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235–236 (3d ed. 2004)).

The lack of particularity in the complaint, therefore, cannot be said to *plausibly* suggest a meeting of the minds between Wall and any other alleged co-conspirators, or that Wall entered into an agreement to violate Jenkins’ rights. Accordingly, Count Four should be dismissed for failure to state a claim.

2. Jenkins Fails to Allege or Show Invidious, Class-Based Animus.

Although § 1985(3) covers purely private conspiracies under certain conditions, it is not a general federal tort law and requires a plaintiff to demonstrate “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1358 (2d Cir. 1989) (quoting *Griffin*, 403 U.S. at 102). Moreover, “[a] claim under § 1985(3) will not lie where a plaintiff cannot show a causal link between the alleged discriminatory conduct and the plaintiff’s membership in a protected class.” *Hills v. Praxair, Inc.*, No. 11-cv-678S, 2012 WL 1935207 at *7 (W.D.N.Y. May 29, 2012) (citing *Pabon v. N.Y.C. Transit Auth.*, 703 F. Supp. 2d 188, 202 (E.D.N.Y. 2010)).

Consequently, a “complaint must allege facts showing that the defendants conspired against the plaintiff because of her membership in a class, and that the criteria defining the class were invidious.” *Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir.1975). Thus, even if the Court were to conclude that Jenkins has successfully pleaded the existence of a private conspiracy, her claim fails if she cannot show class-based, invidiously discriminatory animus behind Wall’s alleged actions.

The “class” against which Jenkins claims “discrimination” is gender. Am. Compl., ¶ 75. Racial animus was the original basis for actions under § 1985(3), *Carpenters*, 463 U.S. at 836, but, with *Griffin*, the Supreme Court specifically left open which other class-based animus may be covered by § 1985(3). *Terry*, 886 F.3d at 1358. Jenkins makes a conclusory allegation that defendants conspired to violate her right to a parent-child relationship with Isabella “on account of Isabella having two mothers instead of a mother and a father,” Am. Compl. ¶ 62, and on account of her gender. *Id.* at ¶ 75. Beyond her conclusory allegation in Paragraph 75 that the alleged conspiracy was on account of her gender, Jenkins has not pleaded with particularity any basis for this assertion. Nor does the complaint allege any facts from which it could be inferred that Wall has an invidious animus against members of her own female class. Rather, the complaint suggests that Wall’s alleged actions were taken because she opposed Plaintiff’s court-determined status as a non-biological parent of a child born during a civil union, not because she is a woman.⁸ See Am. Compl., ¶¶ 20, 22, 27, 45, 47-49, 51, 60-62.

⁸ Gender and sexual orientation are distinct classes that are not interchangeable. To date no court has recognized animus towards homosexuals or same-sex parents as a motive for a § 1985(3) conspiracy. See *Vega v. Artus*, 610 F. Supp. 2d 185, 204 (N.D.N.Y. 2009) (holding that plaintiff was not entitled to protection under § 1985(3) because Congress has not provided homosexuals with special class protection); *Martin v. New York State Dept. of Correctional Services*, 115 F. Supp. 2d 307, 316 (N.D.N.Y. 2000) (finding that plaintiff cannot show he is entitled to protection under § 1985(3) where homosexuality has not been afforded suspect or

In sum, Jenkins has failed to show a causal link between any alleged discriminatory conduct and her membership in a recognized protected class. In fact, she cannot. Thus, her § 1985(3) civil conspiracy claim in Count Four fails and should be dismissed.

3. Jenkins has not Alleged State Action.

Jenkins' failure to allege state action is a fatal flaw that requires dismissal of her civil conspiracy claim. Section 1985(3) is a purely remedial statute aimed at redressing the consequences of private conspiracies that violate clearly established existing rights. The statute does not provide any substantive rights itself and a claimant must identify the federal right that has allegedly been infringed. In order to fall within the remedial purview of § 1985(3), a plaintiff must allege that she has suffered the violation of a right. Whether this requires a showing of state action will turn on the nature of the predicate right: if the right exists as against all actors, private as well as state, then no showing of state action is required. If, on the other hand, the violation alleged is of a right protected only against state interference, such as the rights guaranteed under the Fourteenth Amendment, then the corresponding level of state action must be proven. *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 226 (6th Cir. 1991). "When the asserted constitutional deprivation is based upon a right guaranteed against government interference—for example, rights secured by the Fourteenth Amendment—plaintiffs must demonstrate some 'state involvement.'" *Terry*, 886 F.2d at 1358. "Section 1985(3) does not

quasi-suspect classification); *Segreto v. Kirschner*, 977 F. Supp. 553, 565 (D. Conn. 1997) (same); *Yost v. Board of Regents, University of Maryland*, No. 93-cv-471, 1993 WL 524757 (D. Md. Nov. 19, 1993) (same); *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987) (same); *Jermano v. Taylor*, No. 11-cv-10739, 2012 WL 4009897, *4 (E.D. Mich. Jul. 21, 2012) (same). *United States v. Windsor*, ___ U.S. ___, ___ S.Ct. ___, No. 12-307, slip op. at 18-20 (June 26, 2013) (neither holding nor suggesting that homosexuals are a suspect or quasi-suspect class but instead holding that a state's marriage law identifying an individual's liberty interest justifies subjecting a federal law (DOMA) to heightened equal protection scrutiny).

therefore protect individuals against private efforts to encroach on constitutional shields, such as the first amendment, that protect only against official conduct.” *Roe v. Abortion Abolition Soc.*, 811 F.2d 931, 933 (5th Cir. 1987). “The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals.” *Carpenters*, 463 U.S. at 832 (internal citation omitted). *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) (“the guarantee[] of . . . equal protection guard[s] only against encroachment by the government and ‘erect[s] no shield against merely private conduct[.]’”) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

Jenkins alleges that Wall conspired to violate her civil rights by “preventing the Courts of Vermont from securing Janet Jenkins and Isabella Miller-Jenkins equal protection of their rights to a parent-child relationship under the law.” Am. Compl., ¶ 75. She does not identify any source for her federal conspiracy claim other than this non-specific reference to “equal protection.” Because the Fourteenth Amendment Equal Protection Clause only prohibits government action, Jenkins’ claim fails as a matter of law because she has not alleged that any state actor participated in the alleged civil conspiracy. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277-78 (1993) (§ 1985(3) failed because right to abortion is not protected against private infringement); *Carpenters*, 463 U.S. at 830 (§ 1985(3) failed because First Amendment is not protected against private infringement). Jenkins has not pleaded any sort of state action and, consequently, her § 1985(3) claim must fail and should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Wall respectfully requests that her Motion to Dismiss be granted.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 1, 2013, I electronically filed with the Clerk of the Court the foregoing Memorandum of Law in Support of Motion to Dismiss by Defendant Linda M. Wall. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF counsel of record:

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