

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.

KENNETH L. MILLER, LISA ANN  
MILLER F/K/A LISA MILLER-  
JENKINS, TIMOTHY D. MILLER,  
ANDREW YODER, INDIVIDUALLY  
AND AS AN AGENT FOR CHRISTIAN  
AID MINISTRIES, INC., CHRISTIAN  
AID MINISTRIES, INC., RESPONSE  
UNLIMITED, INC., PHILIP  
ZODHIATES, VICTORIA HYDEN,  
F/K/A VICTORIA ZODHIATES  
INDIVIDUALLY AND AS AN AGENT  
FOR BOTH RESPONSE UNLIMITED,  
INC., AND LIBERTY UNIVERSITY  
AND ITS RELATED MINISTRY  
THOMAS ROAD BAPTIST CHURCH,  
INC., LIBERTY UNIVERSITY, 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.

Docket No. 2:12-cv-00184-wks

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS BY LINDA WALL

Plaintiffs Janet Jenkins, for herself and as next friend of Isabella Miller-Jenkins, a/k/a

Isabella Miller, by and through their attorneys, Sarah Star, Esq., Attorney and Counselor at

Law, P.C. and Langrock Sperry & Wool, LLP, hereby oppose the Motion by Linda Wall to Dismiss for Lack of Personal Jurisdiction, Venue, and Failure to State a Claim.

**I. THE COURT HAS PERSONAL JURISDICTION OVER LINDA WALL.**

**A. Standard of Review for Rule 12(b)(2) Motion to Dismiss.**

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), plaintiff bears the burden of establishing the court's jurisdiction over defendants. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). However, if a forum's personal jurisdiction over a defendant is questioned before discovery has commenced, as it is here, the plaintiff only has to establish, prima facie, that personal jurisdiction is proper based on information in the complaint as well as supporting documentation in order to defeat the motion. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990). This showing may rest solely on plaintiff's own pleadings, affidavits and supporting materials. *Tom and Sally's Homemade Chocolates, Inc. v. Gasworks, Inc.*, 977 F. Supp. 297, 300 (D. Vt. 1997). The court must assume all the factual allegations in the complaint are true, and resolve all doubts in plaintiff's favor "notwithstanding a controverting presentation by the moving party." *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993). Thus, at this early pre-discovery stage in the litigation, the Court must assume all factual allegations in the Amended Complaint as true and only has to find that Plaintiffs have made a prima facie showing of jurisdiction over Defendant Linda Wall.

**B. Linda Wall's Intentional Contacts With Vermont Are Sufficient To Establish Personal Jurisdiction.**

Plaintiffs allege in the Amended Complaint that Linda Wall aided and abetted Isabella's kidnapping and that she participated in a conspiracy to kidnap Isabella and conspired to violate Plaintiff's civil rights in violation of 42 U.S.C. § 1985(3). (Amended

Complaint ¶¶ 26, 54, 62, 64, 75.) In taking these actions, Linda Wall intentionally harmed Plaintiff Jenkins in Vermont by depriving her of custody of her daughter, causing both emotional and financial damage, and depriving her right to equal protection under the law.

Specific jurisdiction may be found if the defendant has engaged in intentional tortious conduct directed at a plaintiff in the forum and causing harm in the forum.<sup>1</sup> *See Calder v. Jones*, 465 U.S. 783, 788 (1984). Under *Calder*, intentional actions “directed at the plaintiff and having sufficient impact upon it in the forum” may give rise to specific jurisdiction. *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 260 (3d Cir. 1998). Jurisdiction under *Calder* is appropriate when the forum state has been the “focal point both of the [alleged tort] and of the harm suffered,” the defendants knew the plaintiff would suffer the “brunt” of the harm there, and they “expressly aimed” their actions at the state. *Chaiken v. VV Pub. Corp.*, 119 F.3d 1018, 1029 (2d Cir. 1997) (citing *Calder*, 465 U.S. at 789-90). When a plaintiff has alleged that a defendant has committed intentional torts, “minimum contacts” for purposes of jurisdiction exists “when the defendant has purposefully directed the harmful effects of his activities at the forum State” and the litigation results from alleged injuries that arise from or relate to those activities. *LiButti v. United States*, 178 F.3d 114, 123 (2d Cir. 1999) (citing *Calder*, 465 U.S. at 787 n.6) (internal quotations omitted). This Court has found minimum contacts to exist where foreign defendants engaged in intentional and allegedly tortious actions expressly aimed at Vermont. *Stuart v. Federal Energy Systems, Inc.*, 596 F. Supp. 458, 462 (D. Vt. 1984) (minimum contacts exist in Vermont over employees of California corporation who committed fraud aimed at plaintiff in Vermont); *Real Good Toys, Inc. v. XL Machine Ltd.*, 163 F. Supp. 2d 421, 424-25 (2001) (minimum contacts exist where foreign

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<sup>1</sup> Plaintiffs do not assert that this Court has general jurisdiction over Linda Wall.

defendants knowingly and willfully infringed on the copyright and trade dress of a Vermont corporation, while knowing that the “brunt of the injury” would be sustained in Vermont); *Audsley v. RBS Citizen, N.A.*, 2011 WL 1397312, at \*4 (D. Vt. Apr. 11, 2011) (minimum contacts over foreign defendants found where foreign defendants committed intentional torts aimed at Vermont resident and her business with knowledge that brunt of harm would be felt in Vermont).

Here, there is no doubt that the torts alleged by Plaintiffs, in which Linda Wall is alleged to have actively participated, were intentional and calculated to injure Plaintiff Jenkins in Vermont by depriving her of her parental rights in Vermont that had been ordered by a court in Vermont. In conspiring for, and aiding and abetting Isabella’s kidnapping, Defendant Wall knew that the “brunt of the injury” would be sustained in Vermont where Plaintiff Jenkins resides and where the Vermont Superior Court ordered Plaintiff Jenkins to have parent-child contact with Isabella.

Although Defendant Wall attempts to make much of challenging the agency relationship between herself and Thomas Road Baptist Church (“TRBC”), this point is not germane to the Court’s analysis. The Amended Complaint alleges sufficient jurisdictional grounds against Defendant Wall directly, outside her agency relationship with TRBC, to establish personal jurisdiction.

For the foregoing reasons, Defendant Wall’s intentional conduct, known and intended to cause injury in Vermont, is sufficient to give the Court jurisdiction over her. *See Real Good Toys, Inc.*, 163 F. Supp. 2d at 424-425.

**C. Asserting Jurisdiction Over Linda Wall Complies With the Reasonableness Inquiry.**

After determining that the exercise of jurisdiction over Linda Wall is appropriate on the basis of her contacts with Vermont, the Court must assess whether the exercise of jurisdiction would be reasonable and in keeping with “traditional notions of fair play and substantial justice.” *Mansfield Heliflight, Inc. v. Heli-One Canada Inc.*, 2012 WL 4479851, at \*9 (D. Vt. Sept. 28, 2012) (quoting *Int’l Shoe v. Washington*, 326 U.S. 310, 320 (1945)). Where the requirement of minimum contacts has been met, “only the unusual case” will not satisfy the reasonableness inquiry. *Id.* (citing *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988)); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 575 (2d Cir. 1996) (“dismissals resulting from the application of the reasonableness test should be few and far between”). In making the reasonableness assessment, the Court looks to (1) the burden on the defendant, (2) the forum State’s interest in adjudicating the dispute, (3) the plaintiff’s interest in obtaining convenient and effective relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies and (5) the shared interest of several states in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (internal quotations omitted).

Applying these factors to Linda Wall shows that exercising jurisdiction in Vermont will not violate notions of fair play and substantial justice, as “the burden of litigating in an out of state forum would be no more for the Defendant than it would be for [Plaintiff] if the litigation were in [Defendant’s home state].” *Tom and Sally’s Homemade*, 977 F. Supp. at 301. Here, litigation in Virginia would be an equal burden on Plaintiff Jenkins as litigation in Vermont would be on Linda Wall. Linda Wall’s ability to litigate in Vermont is demonstrated by the fact that she, by her own admission, has raised money in the past for Lisa Miller’s

travel to and from Vermont (Wall Affidavit ¶ 30), and has retained Vermont counsel – in fact, she has hired Norman Smith, the very same Vermont lawyer who represented Lisa Miller in the Family Court and Vermont Supreme Court proceedings. Plaintiff Jenkins, on the other hand, is a resident of Vermont who is a self-employed child care provider and works from home. Requiring her to bring this litigation in another forum would be overly burdensome and would effectively require her to stop working. See Affidavit of Janet Jenkins in support of Plaintiffs’ response to Motion to Dismiss of Defendants Liberty University, et al., ¶ 1; see also *Sollinger v. Nasco Int’l, Inc.*, 655 F. Supp. 1385, 1388 (D. Vt. 1987) (Vermont craftsperson has interest in securing relief in a Vermont court).

With respect to Vermont’s interest in having the dispute litigated here, Janet Jenkins, a Vermont resident, was injured by the intentional actions of the nonresident defendants, including Linda Wall. As this Court has held, Vermont “has an interest in providing a forum for its citizens who have been injured by the intentional acts of nonresidents.” *Audsley*, 2011 WL 1397312, at \*5 (citing *McGee v. Intl. Life Ins. Co.*, 355 U.S. 220, 223 (1957)); *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 24 (2d Cir. 1988). In addition, Vermont has an interest in seeing orders of its own courts enforced. The Vermont Superior Court and Vermont Supreme Court have issued decisions regarding the custody of Isabella that are being consciously evaded by Defendant Lisa Miller with the assistance and encouragement of Linda Wall. Indeed, the Virginia courts have also ruled that Vermont has jurisdiction over the issue of custody of Isabella. See *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (2006).

In assessing whether litigation in Vermont would ensure the efficient administration of justice, courts generally consider where witnesses and evidence are likely to be located.

*Metropolitan Life*, 84 F.3d at 574. Here, Plaintiff is a Vermont resident and her witnesses and evidence are located here. Defendant's witnesses are likely in Virginia so this factor does not favor either party.

Finally, the Court looks to the "common interests of the several states in promoting substantive social policies" to assess the reasonableness of the exercise of jurisdiction. *Metropolitan Life*, 84 F.3d at 575. This factor weighs in favor of maintaining jurisdiction in Vermont as both Vermont and Virginia courts have repeatedly ruled since 2006 that Vermont has jurisdiction over the custody of Isabella. *See, e.g., Miller-Jenkins v. Miller-Jenkins*, 2006 Vt. 78, 912 A. 2d 951 (2006); *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (2006). The basis for this lawsuit arises in part from the Vermont custody order.

As these factors all weigh in favor of jurisdiction, Plaintiffs have made at least a prima facie showing of facts supporting the assertion of personal jurisdiction over Linda Wall, such that maintaining this suit against her "does not offend the traditional notions of fair play and substantial justice." *See Int'l Shoe*, 326 U.S. at 316. Accordingly, Linda Wall's Motion to Dismiss pursuant to F.R.C.P. 12(b)(2) should be denied.

## **II. VENUE IS PROPER IN THE DISTRICT OF VERMONT.**

Under 28 U.S.C. § 1391(b)(2), venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . ." Linda Wall wrongly contends that Vermont is not a viable venue for this action. On the contrary, a "substantial part" of the events underlying this suit occurred or were felt in Vermont, thus satisfying the venue requirements of § 1391(b)(2). In assessing venue, the Court should not be distracted by trying to determine whether more events occurred in Vermont or elsewhere. "Section 1391(b)(2) does not restrict venue to the district in which the 'most substantial'

events or omissions giving rise to a claim occurred.” *Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408, 432 (2d Cir. 2005).

The effects of Defendant Wall’s actions are felt in Vermont, as this is where Plaintiff Jenkins resides and where the Vermont courts ordered Plaintiff Jenkins to have custody of Isabella. These effects are a substantial part of the events alleged in the Amended Complaint and thus support venue in Vermont. *See Astor Holdings, Inc. v. Roski*, 2002 WL 72936, at \*8 (S.D.N.Y. Jan. 17, 2002) (“Venue will usually exist where an act outside the district causes physical injury or other tortious effect inside the district.”); *cf. State v. Doyen*, 165 Vt. 43 (1996); *State v. Wootten*, 170 Vt. 485 (2000). In addition, each of the actions by Defendant Wall in conspiring for the kidnapping of Isabella were intended to interfere with Plaintiff Jenkins’ parental and custodial rights in Vermont.

### **III. THE AMENDED COMPLAINT STATES CLAIMS AGAINST LINDA WALL UPON WHICH RELIEF MAY BE GRANTED.**

Under Rule 12(b)(6), the Court must accept as true all factual allegations, drawing all reasonable inferences in the plaintiff’s favor. *Metallurgie Hoboken–Overpelt, S.A.*, 902 F.2d at 197 (stating that the court assumes the truth of the plaintiff’s factual allegations for purposes of a Rule 12(b)(6) motion). Ultimately, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “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.” *Id.* at 679 (brackets added; citation omitted). Plaintiffs allege two claims against Defendant Wall: intentional tort of kidnapping and conspiracy to violate civil rights in violation of 42 U.S.C. § 1985(3). Although Linda

Wall addresses a RICO claim in her Motion to Dismiss, the Amended Complaint intentionally does not include a RICO claim against her.

**A. Plaintiffs Have Properly Stated and Pled a Common Law Tort of Kidnapping.**

Defendant Wall fails to point to any affirmative law for her position that there is no private right of action for the intentional tort of kidnapping. Rather, Defendant Wall asserts that since criminal statutes do not, in and of themselves, create private rights of actions and since kidnapping is a crime, there is no private right of action. This is a false syllogism. The mere fact that kidnapping is a crime does not mean there is no separate tort. In fact, the overwhelming majority of jurisdictions that have considered the question have found a common law tort for interference with parental rights. The Iowa Supreme Court determined that “the claim for interference with custody rights appears to have been recognized in every jurisdiction which has addressed the issue.” *Wood v. Wood*, 338 N.W.2d 123, 124-125 (Iowa 1983). In *Wood*, the court explicitly recognized that the tort claim was one of a number of tools in the arsenal against “child snatching,” and that it was likely to be more effective than criminal prosecution to “prevent child snatching and to pick up the pieces when it does occur.” *Id.* at 126.

Similarly, in *Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555 (2012) the Virginia Supreme Court recognized tortious interference with parental rights as a cause of action, stating that “[t]he overwhelming majority of the high courts of our sister states that have considered the issue have also recognized such a tort, many of them tracing its evolution in the common law.” *Wyatt*, 283 Va. at 696. The *Wyatt* court recognized that the common law right of a parent to establish and maintain a relationship with a child “necessarily implies a cause of action for interference with that right. To hold otherwise in this case would be to

recognize ‘a right without a remedy – a thing unknown to the law.’” *Id.* at 693 (citation omitted).

The Supreme Court of Florida has also recognized the tort of intentional interference with a custodial parent-child relationship. *Stone v. Wall*, 734 So. 2d 1038, 1047 (Fla. 1999) (“We find that present day conceptions of right and justice compel us to join the overwhelming majority of jurisdictions that have, through decisional law, recognized this common law tort.”). At the time of the *Stone* decision, sixteen other states had recognized the tort of intentional interference with the custodial relationship. *See id.* at 1043 n.6. Similarly, the Supreme Court of West Virginia set forth the following elements for the offense, which were cited with approval in *Stone*, 734 So. 2d at 1042:

(1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent’s parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent’s consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party’s intentional interference caused harm to the complaining parent’s parental or custodial relationship with his/her child; and (4) damages resulted from such interference.

*Kessel v. Leavitt*, 511 S.E.2d 720, 765-66 (W. Va. 1998).

These cases all rely, at least in part, on the recognition of the tort of custodial interference in the Restatement (Second) of Torts § 700 (1977):

Causing Minor Child to Leave or Not Return Home:

One who with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him is subject to liability to the parent.

While the Vermont Supreme Court has not expressly weighed in on this question, it frequently cites the Restatement (Second) of Torts as persuasive authority. *See, e.g., Lay v. Pettengill*, 191 Vt. 141, 150 (2011) (citing Restatement (Second) of Torts §§ 545 and 551); *Kennerly v. State*, 191 Vt. 44, 51-52 (2011) (citing Restatement (Second) of Torts § 324A).

Given the fundamental right of a parent to be free from unreasonable interference with the parent-child relationship, the fact that an overwhelming majority of jurisdictions have found such interference to be actionable, and the long-standing position stated in Section 700 of the Restatement (Second) of Torts that an abduction is a tort, there can be no doubt that Plaintiffs may pursue a tort claim of kidnapping against Defendants here.

**B. Plaintiffs Have Stated a Claim for Conspiracy to Violate Civil Rights.**

**1. The Amended Complaint Adequately Pleads a Conspiracy Between Wall and Lisa Miller.**

For purposes of a Rule 12(b)(6) motion to dismiss, the Amended Complaint sufficiently alleges a conspiracy between Linda Wall and Lisa Miller with regards to Lisa Miller's kidnapping of Isabella. Rule 8(a) simply requires "a short and plain statement of the claim," not the heightened particularity Defendant Wall asserts is necessary. While Rule 9(b) requires particularity in pleading, it applies only to claims of fraud or mistake, neither of which is implicated here.

As the Amended Complaint sets forth in paragraph 26:

[I]n the spring of 2008, Lisa Miller and Defendant Wall met to discuss what Lisa Miller should do "knowing that Virginia" law was not going to prevent Isabella from having contact with Plaintiff Jenkins. At this time, Appellate Courts in Vermont and Virginia had affirmed Janet Jenkins' parental rights. Upon information and belief, Wall and Miller decided and agreed as early as June of 2008 that Lisa Miller should flee with Isabella.

This paragraph clearly alleges conspiracy by Linda Wall for the kidnapping of Isabella. Not only did Linda Wall agree with Lisa Miller regarding the kidnapping, as the Amended Complaint alleges, she took steps in furtherance of the plan as well, including seeking donations for Lisa Miller after January 2010 (Amended Complaint ¶ 54), and Defendant Wall made several phone calls to law enforcement to instruct them that they should not look for Lisa and Isabella (Amended Complaint ¶ 52). Now, Linda Wall claims that she had no role in the kidnapping, but in January 2010, Linda Wall appeared on television to discuss her role in the kidnapping and compared herself to Harriet Tubman (Amended Complaint ¶ 51).

Without citing any law to support her contention, Defendant Wall attempts to assert that the allegation of a conspiracy is conclusory here. Even though Plaintiffs are not required to plead this claim with particularity, the Amended Complaint sets forth the conspiracy in detail, including the events giving rise to the agreement (the decisions of the Virginia and Vermont courts), at least two parties to the agreement (Wall and Lisa Miller), the subject of the agreement (to flee with Isabella), the month and year of the agreement (June 2008), as well as the several activities listed above that Wall undertook in furtherance of the June 2008 conspiratorial agreement. The Amended Complaint plainly sets out enough facts to survive the Motion to Dismiss.

**2. The Amended Complaint Properly Alleges Discriminatory Animus.**

The Amended Complaint alleges that the Defendants, including Linda Wall, worked in concert to deprive Plaintiff Jenkins of her lawful custodial rights because they did not accept that a child could lawfully have two mothers, rather than a mother and a father. (Amended Complaint ¶¶ 43, 60.) Had custody been awarded to a male ex-husband of Lisa Miller,

regardless of his sexual orientation, the pronouncements of Lisa Miller and the Defendants (*see, e.g.*, Amended Complaint ¶¶ 43, 45, 48) would have been nonsensical.

As it was, the Vermont Family Court's awarding visitation and ultimately full custody to Isabella's second mother was the basis of the Defendants' outrage and participation in the conspiracy. Taken together, the allegations establish that the Defendants took action because of the gender of Isabella's second parent, Janet Jenkins. The allegations of the Amended Complaint make it plain that the Defendants' concern was not the fact that Plaintiff Jenkins was a non-biological parent; for example, there is no suggestion that the Defendants would have acted similarly if she had been an adoptive father. Rather, the Defendants' activities were taken as a result of the fact that Ms. Jenkins was a second mother to the child. Thus the motivating animus of the Defendants was the gender of Isabella's second parent. The Amended Complaint further alleges that Lisa Miller and her co-conspirators refused to obey court orders regarding Isabella because her religion, which she did not share with Janet Jenkins, dictated that Isabella be shielded from homosexuality. (Amended Complaint ¶¶ 20, 48.) The co-conspirators' animus based on religion is a separate basis for the conspiracy to violate the Plaintiffs' civil rights.

Finally, the Second Circuit has now held, and the United States Supreme Court has affirmed, that homosexuality is a status entitled to heightened scrutiny under the Equal Protection Clause. *See United States v. Windsor*, 2013 WL 3196928 (June 26, 2013); *Windsor v. United States*, 2012 WL 4937310 (2d Cir. Oct. 18, 2012). Even if the Amended Complaint did not adequately establish unlawful action based on gender, it certainly alleges unlawful action based on sexual orientation.

**3. State Action is Not Required to State a Claim Under § 1985(3), And, To the Extent It Is Required, Plaintiffs Have Adequately Alleged State Action.**

Both purely private conspiracies and conspiracies involving state action may be unlawful under § 1985(3), so state action is not necessarily required to state a claim for violation of that statute. *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Supreme Court in *Griffin* stated, “[i]t is thus evident that all indicators – text, companion provisions, and legislative history – point unwaveringly to § 1985(3)’s coverage of private conspiracies.” *Id.* at 101. Whether state action is needed depends on the nature of the right asserted. If the conspiracy involves a constitutional right that protects individuals from government action – such as First Amendment rights – then the claim must allege state action. *See, e.g., United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830 (1983) (holding that a claim for conspiracy to violate First Amendment rights required state action). However, for constitutional rights that are protected against private impairment, a claim under § 1985(3) need not allege state action. The Supreme Court has recognized rights under the Thirteenth Amendment and the right to interstate travel as being actionable in purely private conspiracies. *See United States v. Kozminski*, 487 U.S. 931, 942 (1988); *United States v. Guest*, 383 U.S. 745, 759-60, n.17 (1966); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274, 278 (1993).

Here, Plaintiffs have alleged a conspiracy to infringe upon Isabella’s right to interstate travel to spend time with both her parents, in Virginia and in Vermont. Because Lisa Miller and Janet Jenkins resided in different states, interstate travel was necessary for compliance with the court’s visitation and custody orders. (Amended Complaint ¶ 19.) It is firmly established that “the right of interstate travel is constitutionally protected . . . and is assertable against private as well as governmental interference.” *Griffin*, 403 U.S. at 105; *see also*

*Guest*, 383 U.S. at 759-760, n.17 (recognizing a right of interstate travel as protectable under § 1985(3) against individuals as well as governments). The Amended Complaint makes clear that a foundation for this claim is the right to maintain a parent-child relationship, which, in this case, requires interstate travel. As such, it is not necessary to allege state action to support this § 1985(3) claim regarding the rights of Isabella.

In addition, Plaintiffs allege that Wall and others interfered with her rights of equal protection. Conspiracy claims for violation of Fourteenth Amendment rights have often been found to require state action. *See, e.g., Edmond v. Hartford Ins. Co.*, 27 Fed. Appx. 51, 53 (2d Cir. 2001) (“[A] claim under § 1985(3) for conspiracy to deny equal protection in violation of the Fourteenth Amendment is not actionable in the absence of state action.”). However, the state action requirement can be fulfilled in several ways. First, state action can be shown where “the state is involved in the conspiracy.” *Carpenters*, 463 U.S. at 830. Second – and more applicable here – state action is shown where “the aim of the conspiracy is to influence the activity of the state.” *Id.* In this context, “the conspirators do not need to be state actors in order for there to be state involvement.” *Planned Parenthood Ass’n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 623, 624 (N.D. Cal. 1991). Here, among other actions, Defendants conspired to prevent the police from attempting to find Isabella. Plaintiffs have alleged, for example, that Defendant Linda Wall urged others to contact the police, with the purpose of influencing the activity of Vermont state actors. (Amended Complaint ¶ 52.) In addition, Defendants conspired to prevent the Vermont and Virginia courts from enforcing custody and visitation orders, thus seeking to influence state activity. Accordingly, insofar as Plaintiffs’ § 1985(3) claims require state action, Plaintiffs have adequately alleged state action.

**IV. ALTERNATIVE MOTIONS FOR JURISDICTIONAL DISCOVERY AND LEAVE TO AMEND.**

In the event the Court finds that Plaintiffs have not presented sufficient allegations and evidence to establish personal jurisdiction over Defendant Linda Wall, Plaintiffs move, in the alternative, for jurisdictional discovery. The Court has “considerable procedural leeway” in determining how to adjudicate a motion to dismiss under Rule 12(b)(2). *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). The Court may make its determination on the “basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” *Id.* Further, even if the Court determines that Plaintiffs have not made a prima facie showing of personal jurisdiction, it should find that Plaintiffs have at least made a sufficient start towards establishing jurisdiction, which is an adequate basis for granting jurisdictional discovery. *See Ayyash v. Bank Al-Madina*, 2006 WL 587342, at \*6 (S.D.N.Y. Mar. 9, 2006) (limited discovery ordered before ruling on subject matter and personal jurisdiction where plaintiff had not made prima facie showing of jurisdiction, but had at least made a “sufficient start at making such a showing”) (internal quotation marks omitted); *Uebler v. Boss Media AB*, 363 F. Supp. 2d 499, 506 (E.D.N.Y. 2005) (although plaintiff had not made prima facie showing of personal jurisdiction, discovery was appropriate). Where “the facts necessary to establish personal jurisdiction lie within [Defendants’] exclusive knowledge,” jurisdictional discovery may be particularly warranted. *Uebler*, 363 F. Supp. 2d at 506. In addition, if the Court grants Linda Wall’s Motion to Dismiss under Rule 12(b)(6), Plaintiffs request leave to amend. *See* FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend] when justice so requires.”).

**V. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Linda Wall's Motion to Dismiss.

DATED at Middlebury, Vermont this 29th day of July, 2013.

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/s/ Frank H. Langrock

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Defendants.

Civil Action

Docket No. 2:12-cv-00184-wks

**CERTIFICATE OF SERVICE**

I, Katherine B. Kramer, Esq., counsel for Plaintiff Janet Jenkins, for herself and as next friend of Isabella Miller-Jenkins, a/k/a Isabella Miller, hereby certify that I caused the foregoing *Plaintiffs' Response to Motion to Dismiss by Linda Wall* to be filed with the Court

using the CM/ECF electronic filing system, which will provide electronic notification of such filing(s) to Counsel of Record for the Defendants, and to all other registered users.

Dated at Middlebury, Vermont, this 29<sup>th</sup> day of July, 2013.

/s/ Katherine B. Kramer  
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