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. **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.	CIVIL CASE NO. 2:12-cv- 00184-wks August 12, 2013

LINDA M. WALL'S REPLY TO
PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Linda Wall replies to Plaintiff's Response in Opposition to Motion to Dismiss ("Opposition") as follows.

As threshold matters, Plaintiff concedes (1) that this Court cannot maintain general personal jurisdiction over Linda Wall and (2) Plaintiff has not asserted any RICO claim against Wall. *See* Plaintiff's Response to Motion to Dismiss by Linda Wall ("Opposition") at 3 n.1, 8-9.

A. Specific Jurisdiction is Lacking.

Because Plaintiff concedes that this Court cannot maintain general personal jurisdiction, she must prove the existence of specific personal jurisdiction over Wall. Specific personal jurisdiction 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.))*, 714 F. 3d 659, 674 (2d Cir. 2013). Moreover, "[i] is well established that the *Calder* test applies only to intentional torts." *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007). Plaintiff concedes this point. *See* Opposition at 3 ("Specific jurisdiction may be found if the defendant has engaged in intentional tortuous conduct directed at a plaintiff in the forum and causing harm in the forum."). The only intentional tort Plaintiff attempts to state against Wall is "intentional kidnapping." Amended Complaint, ¶¶ 63-64. However, Vermont law does not recognize a tort of intentional kidnapping. For this reason alone specific jurisdiction over Wall is lacking and the case should be dismissed.

In contending that Wall has sufficient contacts with Vermont, Plaintiff alleges that Wall's actions were "directed at" Plaintiff and "expressly aimed" at Vermont. Opposition at 3. This argument is preposterous. The Amended Complaint alleges—without contradiction—that defendants directed *all* of their activities *away* from Vermont; that is, they sought to keep Isabella outside of Vermont. *See* Amended Complaint, p. 1 (Defendants "intentionally caus[ed Isabella's] continued detention outside the State of Vermont to the present day"); *see also id.* ("the parties conspired to kidnap Isabella Miller-Jenkins and ensure her detention outside of the

United States, beyond the reach of either the Vermont or the Virginia Courts."). Furthermore, Plaintiff tacitly admits that defendants' actions were intended to protect Isabella—not harm Plaintiff. *See* Amended Complaint, ¶ 20 ("At or about the time she petitioned for dissolution of the civil union in 2004, Defendant Lisa Miller was purportedly or actually 'born again', that is, converted to fundamental Christianity and asserted the belief that homosexuality was sinful and that Isabella should be shielded from exposure to the 'lifestyle.'").

Plaintiff relies on *Calder* to support her theory of specific jurisdiction. But *Calder* offers no help. There the Court held that the due process clause did not prevent California from exercising personal jurisdiction over the writer and editor of an article that allegedly defamed a California resident. The Court emphasized that the story appeared in a weekly newspaper with a California circulation of 600,000 copies, was drawn from California sources, and concerned the California activities of a California resident whose career was "centered in" that state. 465 U.S. at 788-89. On those facts the Court found that California was (1) the "focal point both of the story and of the harm suffered," (2) that defendants knew that the "brunt" of the plaintiff's injury would be felt there, and (3) that the defendants' "actions were expressly aimed at California." *Id*. at 789-90. For those three reasons, the Court ruled that defendants could have reasonably anticipated "being haled into court there." *Id*. Here, no reasonable person can conclude that Wall's alleged actions in "shielding" Isabella from a "sinful" homosexual "lifestyle," see Amended Complaint, ¶ 20, were "expressly aimed" at Vermont or that Vermont was the "focal point" of Wall's alleged actions.

Plaintiff fares no better under *Chaiken v. VV Publ. Corp.*, 119 F.3d 1018 (2d Cir. 1997). Despite Plaintiff's dogged insistence to the contrary, see Opposition at 4, any alleged harm caused by the alleged actions of Wall was incidental to, and not intentionally directed toward,

Vermont or the Plaintiff. Incidental harm is insufficient to confer personal jurisdiction. *See id.* at 1026 (concluding that an act committed outside the forum state cannot confer personal jurisdiction even if the effects are felt in the forum state); *Remick v. Manfredy*, 238 F.3d 248, 259 (3d Cir. 2001) (incidental harm caused by tortuous activity insufficient to confer personal jurisdiction). Because this Court cannot lawfully exercise personal jurisdiction over Wall, the case should be dismissed.

B. Venue is Improper in this Court.

As Plaintiff concedes, the venue statute states that venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim *occurred* ...." Opposition at 7 (quoting 28 U.S.C. § 1391(b)(2) (emphasis added). Here, it is obvious that none of events alleged in the Amended Complaint *occurred* in Vermont. Plaintiff therefore posits a heretofore unrecognized "felt" test by asserting that venue is proper because a "'substantial part' of the events underlying this suit occurred or were *felt* in Vermont[.]" Opposition at 7 (emphasis added). Plaintiff cited no case for her novel "felt test;" instead, she cautioned that "the Court should not be distracted by trying to determine whether more events occurred in Vermont or elsewhere." *Id.* Put another way, Plaintiff urges that the Court should not be distracted by the law but rather should demur to Plaintiff's peculiar legal theory.

The sole federal case Plaintiff cites in support of her "felt test" is the unreported case of *Astor Holdings, Inc. v. Roski*, 2002 WL 72936, at *8 (S.D.N.Y. Jan. 17, 2002). But the proposition for which see cites it, *i.e.*, "[v]enue will usually exist where an act outside the district causes physical injury or other tortious effect inside the district," see Opposition at 8, is dicta in a case alleging economic harm in a business dispute. Consequently, *Astor* has no relevance or persuasive effect here. "In venue disputes, the plaintiff bears the burden of proving that venue is

proper." *Country Home Products, Inc. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 568 (D. Vt. 2004). Plaintiff has failed to meet her burden of proving proper venue and the case should be dismissed.

C. Plaintiff is Not Entitled to Jurisdictional Discovery.

Wall incorporates herein by reference the arguments set forth in the Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint, pp. 19-21 (Dkt. No. 93). Having failed to make a prima facie showing of specific personal jurisdiction, Plaintiff's request for jurisdictional discovery should be denied.

D. Vermont Does Not Recognize an Intentional Tort of Kidnapping.

Wall incorporates herein by reference the arguments set forth in the Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint, pp. 21-23 (Dkt. No. 93). Having failed to state a claim for alleged intentional tort of kidnapping, Count One should be dismissed.

E. Plaintiff Has Failed to State a Claim for Conspiracy to Violate Civil Rights.

It is axiomatic that "factual 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).

Plaintiff's meager allegations in the Amended Complaint are insufficient to state a claim for conspiracy. Her centerpiece allegation is that,

> in 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.

Opposition at 11 (quoting Amended Complaint, ¶ 26). A meeting to discuss what to do in the event of an adverse court ruling is not a basis for a civil conspiracy; if it was, nearly every lawyer and client would be liable to their adversaries for discussing legal strategy. It is a huge, speculative leap to suggest that a meeting to discuss an adverse court ruling was in fact a meeting of the minds to plan a kidnapping. Though such a scenario may have been conceivable it certainly is not plausible.

Neither do other allegations in the Amended Complaint meet the plausibility threshold. The allegation that Wall sought donations for Lisa Miller after January 2010, see Amended Complaint ¶ 54, does not plausibly demonstrate participation in a conspiracy four months earlier; it simply demonstrates concern for the financial well-being of a friend and her child. Similarly, making "several phone calls to law enforcement to instruct them that they should not look for Lisa and Isabella," Amended Complaint, ¶ 52, does not plausibly demonstrate participation in a conspiracy four months earlier. On the contrary, it demonstrates an exercise of the First Amendment right to petition the government for redress of grievances. Finally, allegedly appearing on television to *endorse* the kidnapping of Isabella, Amended Complaint ¶ 51, does not plausibly demonstrate participation in a conspiracy four months earlier. Rather, it shows solidarity with a fellow Christian who was shielding her young vulnerable child from exposure to an exceedingly sinful lifestyle. Moreover, such endorsement is speech protected by the First Amendment.

Allegations that Wall provided a willing and sympathetic ear to a friend or openly made public statements in support of allegedly unlawful action after the fact do not create inferences strong enough to make a plausible case for conspiracy, especially considering that Plaintiff has specifically identified those persons who allegedly were active participants in a kidnapping

scheme. Because Plaintiff failed to demonstrate a plausible claim for conspiracy on the facts alleged, Count Four should be dismissed.

In addition to the foregoing, Wall incorporates herein by reference the arguments set forth in the Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of Their Motion to Dismiss Plaintiff's Amended Complaint, pp. 31-35 (Dkt. No. 93), and the Response of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden to Plaintiff's Supplemental Memorandum Regarding U.S. v. Windsor (Dkt. No. 113).

CONCLUSION

For the foregoing reason all claims against Linda Wall should be dismissed.

FOR THE DEFENDANT LINDA WALL

/s/ Michael J. DePrimo
Michael J. DePrimo, CT Fed Bar # 15802
Admitted *pro hac vice*
778 Choate Avenue
Hamden, CT 06518
Tel: 203.893.9393
Email: michaeldeprimo@gmail.com

/s/ Norman C. Smith
Norman C. Smith, Esq.
76 Lincoln Street (Route 2A)
P.O. Box 24
Essex Junction, Vermont 05453
Tel: 802.288.9088
Fax: 802.879.9640
Email: nc.smith@myfairpoint.net

Thomas Brejcha, Esq
Pending admission *pro hac vice*
Peter Breen, Esq.
Pending admission *pro hac vice*
Thomas More Society
29 S. LaSalle Street
STE: 440
Chicago, IL 60603
Tel: 312.782.1680
Fax: 312.782.1887
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org

CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2013, I electronically filed with the Clerk of the Court the foregoing Reply Brief 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:

Ritchie E. Berger, Esq.
Brooks G. McArthur, Esq.
Peggy J. Schmitz, Esq.
Steven J. Shrock, Esq.
Joshua M. Autry, Esq.
Robert G. Cain, Esq.
Robert G. Hemley, Esq.
Thomas E. McCormick, Esq.
Norman C. Williams, Esq.
Sophie E. Zdatny, Esq.
Sarah Star, Esq.
Frank H. Langrock, Esq.
Katherine B. Kramer, Esq.
Lisa B. Shelkrot, Esq.

Dated and signed at Hamden, CT.

/s/ Michael J. DePrimo
Michael J. DePrimo, CT Fed Bar # 15802
Admitted *pro hac vice*
778 Choate Avenue
Hamden, CT 06518
Tel: 203.893.9393
Email: michaeldeprimo@gmail.com

Attorney for Defendant Linda Wall