

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, et al.,	)	
Plaintiffs	)	
	)	
v.	)	Docket No. 2:12-cv-184
	)	
KENNETH L. MILLER, et al.,	)	
Defendants	)	

DEFENDANTS HYDEN AND ZODHIATES’  
MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

Defendants Victoria Hyden and Philip Zodhiates move the Court to certify its Order dated October 24, 2013 (ECF 115), denying their motions to dismiss for lack of personal jurisdiction and venue, as appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). This motion is based on the following grounds:

1. The Order presents controlling questions of law as to which there is substantial ground for a difference of opinion, and an immediate appeal may materially advance the ultimate termination of the litigation.
2. Such questions include what the legal standards are for personal jurisdiction and venue in intentional tort cases, an issue currently pending before the Supreme Court.
3. Additional questions include: (1) whether Defendant Hyden or Defendant Zodhiates was a primary participant in the alleged conduct, such that personal jurisdiction may be based on the injuries alleged by Plaintiff in Vermont; and (2) whether Plaintiff may rely on

allegations which Defendant Hyden has specifically denied by affidavit to establish personal jurisdiction.

Defendants request that the Court either amend the Order or issue a Supplemental Order under 28 U.S.C. § 1292(b) to reflect certification. *See In re Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997).

Dated: Burlington, Vermont  
November 12, 2013

/s/ Norman Williams

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UNITED STATES DISTRICT COURT

FOR THE

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Docket No. 2:12-cv-184

DEFENDANTS HYDEN AND ZODHIATES'  
MEMORANDUM IN SUPPORT OF MOTION FOR INTERLOCUTORY APPEAL

Preliminary Statement

Defendants Victoria Hyden and Philip Zodhiates move the Court under 28 U.S.C. § 1292(b) to certify for interlocutory appeal its Order dated October 24, 2013 (ECF 115) denying their motions to dismiss for lack of personal jurisdiction and venue. Defendants seek to avoid the need for two trials in the event jurisdiction or venue are not proper here.

Certification is appropriate based on the three-part test under section 1292(b). First, personal jurisdiction and venue present controlling questions of law, as the Second Circuit has held. Second, there is substantial ground for a difference of opinion as to what legal standards apply in intentional tort cases such as this one. Indeed, there is a split in the circuits on that point, and the matter is currently before the Supreme Court. In addition, there are substantial grounds for a difference of opinion on two other controlling questions of law: (1) whether Defendants Hyden and Zodhiates were “primary participants,” such that personal jurisdiction over them may be based on the injuries alleged by Plaintiff in Vermont; and (2) whether Plaintiff

may rely on allegations against Defendant Hyden which she has specifically denied to establish personal jurisdiction. Finally, certification could advance the ultimate termination of this litigation by avoiding an additional trial against Mrs. Hyden and Mr. Zodiates, in the event personal jurisdiction or venue is not proper in this District.

### Argument

#### I. PERSONAL JURISDICTION AND VENUE PRESENT CONTROLLING QUESTIONS OF LAW APPROPRIATE FOR CERTIFICATION UNDER 28 U.S.C. § 1291(a).

Interlocutory appeals are available for orders involving “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *See* 28 U.S.C. § 1291(b). A controlling question of law with respect to a defendant exists when “reversal of the district court’s order would terminate the action” against him or her. *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990). The Second Circuit has “granted certification when the order involved issues of *in personam* and subject matter jurisdiction.” *Id.*, citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1330 (2d Cir. 1972). *See also Alexander & Alexander Servs. v. Lloyd’s Syndicate 317*, 925 F.2d 44, 45 (2d Cir. 1991); *United Rope Distr., Inc. v. Line*, 785 F. Supp. 446 (S.D.N.Y. 1992) (holding that “denial of a motion to dismiss on the ground of lack of *in personam* jurisdiction is properly certifiable”).

Orders denying motions to dismiss for improper venue have also been found to present controlling questions of law and certified for interlocutory appeal. *See Effron v. Sun Line Cruises*, 67 F.3d 7, 9 (2d Cir. 1995) (reversing district court’s refusal to enforce forum selection clause); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 900 (5th Cir. 2005); *Bartholomew v. Virginia Chiropractors Assoc.*, 612 F.2d 812, 815 (4th Cir. 1979); *Alliance*

*Health Group, LLC v. Bridging Health Options, LLC*, No. 1:06-cv-1267 HSO-JMR, 2007 Dist. LEXIS 85491 (S.D. Miss. Nov. 8, 2007).

II. THERE ARE SUBSTANTIAL GROUNDS FOR A DIFFERENCE OF OPINION AS TO THE LEGAL REQUIREMENTS FOR PERSONAL JURISDICTION AND VENUE IN THIS CASE.

A. The Issue Of What Legal Standards Apply For Personal Jurisdiction And Venue In Intentional Tort Cases Is Currently Before The Supreme Court Based On A Circuit Split.

1. A Conflict Exists As To Whether Defendants' Knowledge of Plaintiffs' Presence In The Forum State Is Sufficient For Personal Jurisdiction.

The second part of the section 1292(b) test is also met here. There is a substantial ground for a difference of opinion as to what legal standards apply, as demonstrated by the fact that the Supreme Court is considering that precise question right now based on a split in the circuits. *See Walden v. Fiore*, 688 F.3d 558 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3492 (U.S. March 4, 2013) (No. 12-574).<sup>1</sup> *Walden* presents the same legal question faced by this Court: *viz.*, what legal test applies for personal jurisdiction and venue in an intentional tort case, where the defendant has minimal or no contacts with the forum state and the events giving rise to plaintiff's injury took place elsewhere? If the Supreme Court agrees with the petitioner in *Walden* that

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<sup>1</sup> A grant of certiorari indicates substantial grounds for difference of opinion. Sup. Ct. R. 10; *see generally* 23 James Wm. Moore et al., *Moore's Federal Practice* § 510.06 (3d ed. 2013). As Wright and Miller also point out:

The level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case. If proceedings that threaten to endure for several years depend on an initial question of jurisdiction, limitations, or the like, certification may be justified at a relatively low threshold of doubt.

16 Charles Alan Wright, et al., *Federal Practice and Procedure*, §3930 at pp. 494-95 (3 ed. 2013).

personal jurisdiction or venue is not available in such circumstances, Defendants Hyden and Zodiates would also be entitled to dismissal.

In *Walden*, two residents of Nevada, returning from a gambling trip to Puerto Rico with \$97,000 in cash, were stopped at the Atlanta airport by a DEA agent who confiscated their cash on the grounds that it was drug-related. *See id.*, 688 F.3d at 570-71. After returning home, plaintiffs sent the agent receipts (which had been in checked baggage) showing that the money had been won gambling. *See id.* However, after receiving the receipts the agent filed a false affidavit with the U.S. Attorney's Office in Atlanta in an effort to retain the funds. *See id.* The U.S. Attorney concluded that there was not probable cause to proceed with a civil forfeiture action, however, and returned the money. *See id.*

Plaintiffs brought suit in Nevada against the DEA agent for illegally seizing and retaining their money and filing a false affidavit. *See* 688 F.3d at 572. The district court dismissed for lack of personal jurisdiction (without reaching venue), but the Ninth Circuit reversed. It held that “[i]ntentional torts, in particular, can support personal jurisdiction over a nonresident who has no other forum contacts.” *Id.* at 577. It also held that, in filing the false affidavit, the defendant had “expressly aimed” his conduct at the two Nevada plaintiffs, *id.* at 577-80, and that the harm suffered there was foreseeable. *See id.* at 581-82. The Ninth Circuit also held that venue was proper in Nevada because the economic injuries to plaintiffs were felt there. *See id.* at 587-88.

The dissent asserted that “[t]he majority’s reasoning threatens a substantial expansion of the scope of personal jurisdiction,” 688 F.3d at 594, and “deals the *coup de grace* to any semblance of compliance with Supreme Court precedent.” *Id.* at 597. The dissenting judge would have affirmed the district court’s dismissal, because “there is no allegation that

[defendant] purposefully directed the actions that form the basis of plaintiffs' claim to Nevada." *Id.* at 593. Six additional circuit judges dissented from denial of the defendant's petition for *en banc* review. *See Fiore v. Walden*, 688 F.3d 558, 568 (9th Cir. 2012).

The defendant DEA agent sought, and was granted, certiorari by the Supreme Court on two questions: (1) whether personal jurisdiction is available over a defendant whose sole "contact" with the forum state is his knowledge that the plaintiff has connections with it? and (2) whether venue is proper in the judicial district where the plaintiff suffered injury, even if all of defendant's actions and omissions occurred elsewhere? *See* Petition for Cert. at *i*, *Walden v. Fiore*, No. 12-574 (U.S. Nov. 6, 2012).<sup>2</sup> Those precise questions are also presented here. Neither Defendant Hyden nor Zodiates is alleged to have had any physical contact with Vermont, and all of the acts of which Plaintiff complains took place outside of this jurisdiction. As in *Walden*, an answer of "no" to either of the questions on which certiorari was granted would require dismissal or transfer.

2. The Requirements For Venue In Intentional Tort Cases Also Provide Substantial Grounds For A Difference Of Opinion.

The venue issue also raises a legal question for which there are substantial grounds for difference of opinion. In particular, the division among the circuits is whether the legal meaning

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<sup>2</sup> The petition and other filings are available at <http://www.scotusblog.com/case-file/cases/walden-v-fiore>. As the petition explains, only two circuits, the Ninth and Eleventh, hold that "expressly aiming" harmful conduct at a resident of the forum state is sufficient for personal jurisdiction. *See Fiore v. Walden*, 688 F.3d 558, 577 (9<sup>th</sup> Cir. 2012); *Licciardello v. Lovelady*, 544 F.3d 1280, 1286 n. 6 (11<sup>th</sup> Cir. 2008). Six others have reached the opposite conclusion. *See Johnson v. Arden*, 614 F.3d 785, 796 (8<sup>th</sup> Cir. 2010); *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.*, 623 F.3d 440, 445 n. 1 (7<sup>th</sup> Cir. 2010); *Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1072 (10<sup>th</sup> Cir. 2008); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5<sup>th</sup> Cir. 2001); *IMO Indus. v. Kierkert AG*, 155 F.3d 254, 259 (3<sup>rd</sup> Cir. 1998); *ESAB Group v. Centricut, Inc.*, 126 F.3d 617, 625-26 (4<sup>th</sup> Cir. 1997).

of “events” in 28 U.S.C. § 1292(b)(2) includes the alleged injury to the plaintiff.<sup>3</sup> The Ninth Circuit has held that “locus of the injury is a relevant factor.” *Fiore v. Warren*, 688 F.3d at 587 (internal quotations omitted). This Court similarly stated that: “The locus of the injury may be a relevant factor.” ECF 15 at 72. The Petitioners in *Walden* argue that this statement is incorrect as a matter of law. *See* Reply Br. at 23 in *Walden v. Fiore*, No. 12-574 (U.S.). If the Supreme Court were to reverse on this point, it would affect the Ninth’s Circuit’s opinion in *Walden* and this Court’s Order.

B. Significant Grounds For A Difference Of Opinion Also Exist As To Whether Personal Jurisdiction Is Available Over Secondary Actors Who Had No Contacts With The State Where The Effects Of An Intentional Tort Were Felt.

Although the *Walden* case in the Supreme Court does not involve secondary actors, the Second Circuit did squarely address the jurisdictional and venue rules which apply in such situations in *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008). The Court established there that personal jurisdiction based on extraterritorial conduct is proper only “when defendant is a *primary* participant in intentional wrongdoing . . . expressly directed at [the] forum.” *Id.* at 93 (emphasis added). Underscoring that point, it held that the funding of a terrorist organization, with full knowledge of its “public announcements of jihad against the United States,” as well as previous attacks on United States targets including African embassies and the U.S.S. Cole, does not suffice for personal jurisdiction. On the contrary, it said, such contacts are “far too attenuated to establish personal jurisdiction.” *Id.* at 95.

There is substantial grounds for a difference of opinion as to whether *Terrorist Attacks* precludes personal jurisdiction over Defendants Hyden and Zodhiates here. Mrs. Hyden is

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<sup>3</sup> The petitioner in *Walden* describes a three-to-one circuit split on the issue. *See* Pet. for Writ of Cert. at 30-36 in *Walden v. Fiore*, No. 12-574 (U.S.).

accused of “requesting donations for supplies to send to Lisa Miller” after Ms. Miller had left the country, and of calling Lisa Miller’s father in Tennessee in connection with arrangements to drive her from Lynchburg, Virginia to Waynesboro, Virginia, from which Lisa allegedly left to drive to Canada with her daughter Isabella. *See* ECF 1, ¶ 41.<sup>4</sup> Mr. Zodiates is accused of driving Lisa Miller and Isabella from Virginia to Buffalo, New York, and of conspiring with Kenneth Miller in purchasing airplane tickets for them. *See* ECF 1, ¶¶ 36, 37, 43. A reasonable person could conclude that such actions were at least as secondary as funding a terrorist organization which had announced its intention to attack the United States. The Second Circuit should be given an opportunity to decide the question if it wishes.

C. Substantial Grounds For A Difference Of Opinion Exist As To Whether Plaintiffs May Rely On Factual Allegations Specifically Refuted By Affidavit To Establish Personal Jurisdiction Over Defendant Hyden.

There is a third legal issue which also supports certification under 28 U.S.C. § 1292(b): whether Plaintiff may establish personal jurisdiction over Defendant Hyden based on allegations which she has specifically controverted by affidavit. Two circuit courts have held that the plaintiff may not rest on her pleadings in such circumstances but must meet the affidavit with one of her own, or other evidence. *See College Source, Inc. v. Academy One, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011); *Purdue Research Found. v. Sanofi Synthelabs, SA*, 338 F.3d 773, 782083 (7th Cir. 2003). Both cases involved motions to dismiss for lack of personal jurisdiction.<sup>5</sup>

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<sup>4</sup> Mrs. Hyden has filed an affidavit stating that these allegations are false. *See* ECF Doc. 54-3, ¶¶ 12-16. The question of whether Plaintiff may continue to rely on such allegations for personal jurisdiction presents a further basis for interlocutory review, as discussed in Part C below.

<sup>5</sup> District courts in the Second Circuit and elsewhere have similarly refused to assume the truth of allegations specifically refuted by affidavit for purposes of a motion to dismiss. *See*

(continued on next page)

As discussed in the preceding section, Mrs. Hyden is accused of raising money for supplies for Lisa Miller after she had left the country, and of calling Lisa Miller's father in Tennessee to make travel arrangements on Lisa Miller's behalf. ECF 1, ¶ 41. Mrs. Hyden has specifically denied these allegations under oath, however. See ECF 54-3, ¶¶ 12-16. Plaintiff did not submit a counter-affidavit or any other evidence that her allegations were accurate. This Court denied Mrs. Hyden's motion to dismiss based on Plaintiffs' allegations, without addressing her affidavit. See ECF 115 at 25. There is room for a difference of opinion as to whether personal jurisdiction is available in such circumstances.

III. AN EARLY DECISION BY THE SECOND CIRCUIT ON PERSONAL JURISDICTION AND VENUE TEST COULD MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION.

Certification is also appropriate under the third part of the 28 U.S.C. §1292(b) test. Interlocutory appeals of jurisdictional issues can materially advance the ultimate termination of the litigation. In the context of subject matter jurisdiction, Judge Conner observed that “[p]roceeding with the case where the possibility exists that this Court lacks jurisdiction could force plaintiffs to try this case twice . . .” *Klein v. Vision Lab Telecommns., Inc.*, 399 F. Supp. 2d 528, 537 (S.D.N.Y. 2005). The same is true with cases involving questionable personal jurisdiction. See *Klinghoffer*, 921 F.2d at 24 (“The district court also stated that if we find that there is no jurisdiction over the PLO, that finding will greatly assist the ultimate termination of

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*Atmosphere Sciences, LLC v. Schneider Advance Techs.*, 12 Civ. 3233 (SAS), 2012 U.S. Dist. LEXIS 1350-99, \*7 (S.D.N.Y. Sept. 19, 2012) (Scheindlin, J.); *Desaynitov v. Credit Suisse Group, Inc.*, 10-CV-1870, 2012 U.S. Dist. LEXIS 41180, \*6 (E.D.N.Y. Mar. 26, 2012) (Irizarry, J.); *Merck & Co., Inc. v. Mediplan Health Consulting Inc.*, 425 F. Supp. 2d 402, 420 (S.D.N.Y. 2006) (Chin, J.); *Schenker v. Assicurazioni Generali S.p.A., Consol.*, 98 Civ. 9186, 2002 U.S. Dist. LEXIS 12845, \*12 (S.D.N.Y. July 15, 2002) (Mukasey, J.) (collecting cases).

the litigation. We see no persuasive reason for rejecting the reasoning of Judge Stanton on these matters.”) A reversal for improper venue would also require a second trial.

All parties will benefit from knowing whether the trial in the District of Vermont will be an efficient use of judicial resources. If the Second Circuit were to reverse on the issue of personal jurisdiction or venue after trial, the Court and parties would not be able to recover the time and resources spent in trying the case against Defendants Hyden and Zodhiates.

### Conclusion

The issues of personal jurisdiction and venue with respect to Defendants Hyden and Zodhiates are appropriate for interlocutory review under 28 U.S.C. §1292(b). Defendants respectfully request that the Court certify them for immediate appeal.

Dated: Burlington, Vermont  
November 12, 2013

/s/ Norman Williams

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UNITED STATES DISTRICT COURT  
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Defendants )

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2013, I caused Defendant Hyden and Zodiates' Motion to Certify Order for Interlocutory Appeal and Memorandum in Support of Motion for Interlocutory Appeal to be served through the CM/ECF system on Robert G. Cain, Esq., rcain@pfclaw.com; Thomas E. McCormick, Esq., tem@mc-fitz.com; Frank H. Langrock, Esq., flangrock@langrock.com; Brooks G. McArthur, Esq., bmcarthur@jarvismcarthur.com; Joshua M. Autry, Esq., jmautry@dennisboylelaw.com; Ritchie E. Berger, Esq., rberger@dinse.com; Lisa B. Shelkrot, Esq., lshelkrot@langrock.com; Sarah Star, Esq., srs@sarahstarlaw.com; Sophie E. Zdatny, Esq., szdatny@dinse.com; Peggy J. Schmitz, Esq., schmitz@ccj.com; and Steven J. Shrock, Esq., shrock@ccj.com.

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