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-184-wks

**PLAINTIFFS' COMBINED RESPONSE TO DEFENDANTS ZODHIATES AND HYDEN'S MOTION FOR INTERLOCUTORY APPEAL AND DEFENDANT WALL'S MOTION TO CERTIFY ORDER FOR INTERLOCUTORY REVIEW**

NOW COME Plaintiffs herein, by and through their attorneys, Sarah R. Star, Esq., Attorney and Counselor at Law, P.C., and Langrock Sperry & Wool, LLP, and hereby respond to the Motion for Interlocutory Appeal by Defendants Victoria Hyden and Philip

Zodhiates and the Motion to Certify Order for Interlocutory Review by Defendant Linda Wall (together, "Motions").

## ARGUMENT

"A litigant cannot pursue an interlocutory appeal every time he or she disagrees with a decision." *Shovah v. Mercure*, 2:11-CV-00201-WKS, 2013 WL 5934310 at *1 (D. Vt. Nov. 5, 2013) (Sessions, J.). Defendants Hyden, Zodhiates, and Wall (together, "Defendants") have not identified any issues that could or should be certified for interlocutory appeal. Rather, their Motions are merely a tactic aimed at delaying this litigation. Basic principles of judicial efficiency require postponing appellate review until after entry of a final judgment, and only "exceptional circumstances" will justify a departure from that principle. *Coopers v. Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). No such exceptional circumstances are present here. Plaintiffs therefore respectfully request that the Court deny the instant Motions and allow the litigation to proceed at the trial level.

Under 28 U.S.C. § 1292(b), a district court may order an interlocutory appeal if it believes that its decision (1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. None of those requirements are satisfied here. Further, even if the Court concludes that they are satisfied (although it should not), the Court should exercise its discretion to deny the motions on other grounds, including judicial efficiency and the benefit of fully developing the factual record before permitting appeal.

### I. THERE ARE NO CONTROLLING QUESTIONS OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

Defendants attempt to identify several controlling questions of law to justify the instant motions. However, where the Court's decision does not "involve a novel or

unsettled area of law," a request for interlocutory appeal should be denied. *Shovah*, 2013 WL 5934310 at *2.

First, Defendants point to the legal standards for personal jurisdiction and venue in an intentional tort case as controlling issues of law for which there is a substantial ground for difference of opinion. Their primary argument in support is that a case has been certified to the U.S. Supreme Court regarding those issues. *See Walden v. Fiore*, 688 F.3d 558 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3492 (U.S. Mar. 4, 2013) (No. 12-574). While a denial of a motion to dismiss for lack of personal jurisdiction may present a controlling issue of law, there are no substantial grounds for a difference of opinion in this matter. This Court carefully considered and applied existing Second Circuit and other law regarding personal jurisdiction and venue, and correctly concluded that Vermont is the proper venue and that the Court has personal jurisdiction over Defendants. The mere fact that a pending Supreme Court case might affect the legal standard is not sufficient grounds to delay this litigation. Indeed, if the District Courts permitted interlocutory appeals whenever a decision certified to the Supreme Court might affect the applicable law, every case would be subject to numerous interlocutory appeals. As this Court similarly concluded in *Shovah*, if the Supreme Court ruling in *Walden* significantly changes the law regarding personal jurisdiction and venue, this Court may, at that time, reconsider its ruling on the Motions to Dismiss. *See Shovah*, 2013 WL 5934310 at *2 ("Certainly, if the Supreme Court rules as the Diocese suggests, that general jurisdiction applies only to the state of incorporation and principal place of business, this Court will reconsider its ruling. But that does not suggest the matter should be sent to the Second Circuit on an interlocutory basis to await the Supreme Court's ruling in *Daimler*.").

Moreover, Defendants fail to recognize that the allegations in this case and this Court's analysis of personal jurisdiction in the instant case would support personal

jurisdiction even if the Supreme Court were to rule as Defendants would like in *Walden*. The outcome of that matter, therefore, is immaterial to this Court's ruling, and does not create a substantial ground for a difference of opinion. Here, unlike in *Walden*, the Defendants' intentional, tortious actions were not only directed at a Vermont resident but also were directed at obstructing Vermont court orders. Vermont was the focal point of the intentional conduct and of the harm suffered, which distinguishes this matter from *Walden* and greatly diminishes whatever effect the ultimate *Walden* ruling might have.

The remaining issues raised by Defendants – such as "whether [Defendant] Wall was a primary participant in the alleged kidnapping" (Dkt. # 119-1) – are all factually based and not suitable to interlocutory appeal. Interlocutory appeal is only appropriate when the "question . . . arise[s] in a sufficiently developed factual context to sharply define the legal issues raised." *Arnett v. Gerber Scientific, Inc.*, 575 F. Supp. 770, 771 (S.D.N.Y. 1983). The factual record here is nascent and discovery has not yet begun. It would be very difficult for the Second Circuit to accurately evaluate Plaintiffs' claims without a factual record developed through discovery. *See Mayers v. New York Community Bancorp, Inc.*, CV-03-5837 (CPS), 2006 WL 2013734 (E.D.N.Y. July 18, 2006) (denying interlocutory appeal after considering that "[b]ecause the parties have not engaged in discovery, the Court of Appeals, in deciding the interlocutory appeal, would have to evaluate plaintiffs' claims without the benefit of an adequately developed factual record.").

For the above reasons, Defendants have failed to satisfy the first two requirements of Section 1292(b), and accordingly their Motions must be denied.

## II. AN IMMEDIATE APPEAL FROM THE ORDER WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

Defendants have also failed to establish that an interlocutory appeal would materially advance the ultimate termination of this litigation. Where a case involves multiple

defendants, as here, an interlocutory appeal by some defendants "will not materially advance but substantially delay the termination of the litigation." *Shovah*, 2013 WL 5934310 at *2. Defendants ignore this key consideration.

Regarding Defendants' primary argument for certification, even if the Supreme Court ultimately agrees with the petitioner in *Walden*, Defendants would still not be entitled to dismissal. The facts supporting personal jurisdiction and venue in this case are broader and more substantial than the facts in *Walden*, so *Walden* is readily distinguishable. As such, an interlocutory appeal based on a possible outcome in *Walden* would have no role in materially advancing the ultimate termination of the litigation, regardless of whether the Supreme Court rules the way Defendants are hoping.

Further, piecemeal appeals will substantially delay the ultimate resolution of this litigation. *See Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) ("Section 1292(b)'s legislative history reveals that although that law was designed as a means to make an interlocutory appeal available, it is a rare exception to the final judgment that generally prohibits piecemeal appeals."); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 1997 WL 458739, at *4 (S.D.N.Y. Aug. 12, 1997) ("[T]he efficiency of both the district court and the appellate court are to be considered, and the benefit to the district court of avoiding unnecessary trial must be weighed against the inefficiency of having the Court of Appeals hear multiple appeals in the same case."). Although issues of personal jurisdiction and venue are important decisions early in litigation, Section 1292(b) is not intended to be a "vehicle to provide early review of difficult rulings in hard cases." *German v. Fed. Home Loan Mortgage Corp.*, 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995).

## III. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DENY CERTIFICATION OF AN INTERLOCUTORY APPEAL.

Finally, even if the statutory criteria of § 1292(b) are met (which Plaintiffs vigorously deny), this Court has discretion nevertheless to deny the Motions. *See Republic of Colombia v. Diageo North America, Inc.*, 619 F.Supp.2d 7 (E.D.N.Y. 2007) ("Whether to certify a question for interlocutory appeal is trusted to the sound discretion of the district court."). Indeed, this Court has "independent and unreviewable authority to deny certification" even when the statutory criteria are met. *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 146 (E.D.N.Y. 1999) (internal quotation marks omitted). In exercising its discretion, the Court may consider any relevant factors, including judicial efficiency; the benefit of further factual development and a complete record on appeal; the time an appeal would likely take; the need for a stay pending appeal and the effect on the litigation, including discovery, that would result from a stay; and the possibility that other issues may moot the need for the interlocutory appeal. *Mayers*, 2006 WL 2013734 at *9. Each of these factors favors denying Defendants' motion. Moreover, Plaintiffs urge the Court to consider the relative financial resources of the parties. The final judgment rule "protects the judicial process and its participants from the delay [of an interlocutory appeal] which can prove advantageous to a well-financed litigant, and fatal to the less well-endowed." *Bryant v. Sylvester,* 57 F.3d 308, 311 n. 4 (3d Cir.1995) (*quoting Lusardi v. Xerox Corp.,* 747 F.2d 174, 177 (3d Cir.1984)) (internal quotation marks omitted).

## CONCLUSION

Defendants present no controlling questions of law as to which there are substantial grounds for differences of opinion, nor will immediate appeal materially advance the ultimate termination of the litigation. Further, the Court should exercise its discretion to

deny the Motions. Accordingly, Plaintiffs respectfully request that the Court deny Defendants' Motions for Interlocutory Appeal.

DATED AT Middlebury, Vermont, this 22nd day of November, 2013

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Civil Action
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**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' Combined Response to Defendants Zodhiates and Hyden's Motion for Interlocutory Appeal and Defendant Wall's Motion to Certify Order for Interlocutory Review*

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 22nd day of November, 2013.

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