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' REPLY
MEMORANDUM IN SUPPORT OF MOTION FOR INTERLOCUTORY APPEAL

Preliminary Statement

The institutional efficiency to be gained by granting an interlocutory appeal in this case extends not only to the litigants of this case, but to all courts of the Second Circuit. Plaintiffs concede that there is significant uncertainty concerning the legal standard for personal jurisdiction and venue for intentional tort cases. As to personal jurisdiction, the uncertainty is whether Plaintiffs must have aimed their conduct at the forum state or only at the residents of the forum state. For venue, there is uncertainty as to whether the locus of the injury is a factor to be considered in a venue analysis. These uncertainties will not be entirely resolved by *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) because the test of personal jurisdiction in the Second Circuit not only considers whether the forum or residents of the forum have been targeted, the issue presented by *Walden*, but also whether a defendant was a primary participant in the alleged activity. Regardless of the outcome of *Walden*, the primary/secondary action issue will remain. This case offers a perfect

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opportunity for the Circuit to announce a clear rule for intentional tort that settles the question after *Walden*.

Argument

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

The issues decided in the Court's October 24, 2013 Order (ECF 115) raise controlling questions of law. In their opposition, Plaintiffs combine the controlling question of law prong with the substantial grounds for difference of opinion prong, but do not actually contest that any of the questions raised involve controlling questions of law. Second Circuit authority establishes that orders involving issues of *in personam* jurisdiction and venue present controlling questions of law. (Memo in Supp. of Mot. for Interlocutory Appeal ("Memo.") at 2.)

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

Defendants identified four issues for which there are substantial ground for difference of opinion: (1) the legal standard to apply for personal jurisdiction in intentional tort cases, (2) the legal standard for venue, (3) whether personal jurisdiction is available over secondary actors who had no contacts with the state where the effects of an intentional tort were felt, and (4) whether plaintiffs may rely on factual allegations specifically refuted by affidavit to establish personal jurisdiction over Defendant Hyden. Plaintiffs do not contest that significant circuit splits exist with respect to these issues. (*See* Memo. at 5 n. 2, 6 n.3, 7, and 7 n.5.) Nor do they dispute that circuit and district courts have adopted approaches that differ from those adopted in the Order. (Memo. at 7 & 7 n.5.)

A. There Is Substantial Grounds For Difference Of Opinion Over The Legal Standard To Be Applied For Intentional Tort Cases.

Plaintiffs do not contest that the granting of certiorari in *Walden* means that there are substantial grounds for difference of opinion over the legal standard to be applied in intentional tort cases for personal jurisdiction and venue. Instead, Plaintiffs argue that this Court can simply apply the result after the Supreme Court resolves the *Walden* case. A decision in the *Walden* case, however, will not resolve all of the issues that confront the Second Circuit. In particular, regardless of the outcome in *Walden*, the Second Circuit will have to determine if the "primary participant" rule may co-exist with the result in *Walden*, and if so, how it is to be applied. Only after the *Walden* case is resolved will the Second Circuit be able to clarify its own legal standard for personal jurisdiction.

The Second Circuit has expressed the test for determining personal jurisdiction over alleged intentional tortfeasors in terms that fail to recognize the existence of different tests. In the "Four Princes" case, the Second Circuit stated that "personal jurisdiction is proper where the defendant took 'intentional, and allegedly tortious, actions . . . expressly aimed ***at the forum state.***" *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008) *citing Calder v. Jones*, 465 U.S. 783, 789 (1984) (emphasis added). In that same opinion, the Second Circuit also stated that "plaintiffs must establish that the Four Princes 'expressly aimed' intentional tortious acts ***at residents of the United States.***" *Id.* at 95 *citing Calder,* 465 U.S. at 789 (emphasis added).

The confusion over the proper test continued in another September 11th case, where the Second Circuit quoted its conflicting language from the Four Princes case. *Compare In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013) *citing* 538 F.3d at 95 ("plaintiffs must plead facts to show that a defendant "expressly aimed" intentional tortious acts

at residents of the United States) *with id.* at 676 *citing* 538 F.3d at 95-96 (defendants in Four Princes case "did not expressly aim their conduct ***at the United States***").

The Second Circuit has very recently repeated its position without regard to the nuanced positions before the United States Supreme Court. *Licci v. Lebanese Canadian Bank*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (2d Cir. Oct. 18, 2013). In *Licci*, the Court again stated the rule in terms of both activity aimed at the forum state and activity aimed at residents of the forum state. *Compare id.* at *24 *with id.* at *27.

A resolution of the dispute in *Walden* will not cure the uncertainty that surrounds the legal standard in the Second Circuit. In the *In re Terrorist Attacks* cases, the Second Circuit outlined a test that evaluates whether a party is a "primary participant" in the intentional wrongdoing to determine whether personal jurisdiction exists. (Memo. in Supp. Interlocutory Appeal at 6). It is not clear if the "primary participant" test is intended to be a substitute for the rule to be announced in *Walden* or a completely different and independent test.

When the Supreme Court issues its decision, the Second Circuit will need to reexamine its own statements on jurisdiction in order to clarify the legal standard. The case before this Court presents the Circuit with an excellent opportunity to do so. That clarification will have an effect not only on the *Jenkins* case, but also on other cases in other courts in the Second Circuit. Because reversals on issues of personal jurisdiction and venue create substantial wasted resources in having to try a case twice, an early clarification by the Second Circuit has the potential of saving vast resources and result in the efficient administration of justice across a number of cases.[1] In their evaluation of whether an appeal is appropriate, Plaintiffs ignore the

[1] For that reason, this case differs from *Shovah v. Mercure*, 2:11-CV-00201-WKS, 2013 WL 5934310 (D. Vt. Nov. 5, 2013). In addition, there is a much higher probability that the Supreme Court's decision will have significant impact on this case. In *Shovah*, the Court turned aside the assertion that

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"system wide costs and benefits of allowing the appeal." *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990).

Plaintiffs suggest that the facts they have alleged would satisfy any standard announced in the *Walden* case. However, it is simply incorrect to say that Plaintiffs have alleged facts showing that Defendants aimed their actions at the forum state. There is no allegation in the Complaint that Defendants were aware of any of the visitation or custody orders. Without such an allegation, there can be no claim that Defendants aimed their alleged conduct at Vermont. The actual factual allegations in the Complaint show that any alleged activity occurred outside the State of Vermont and was not aimed at the forum state, Vermont. (Compl. ¶¶ 29, 37, 41, 42, 53, 54, 56, 57, 59; *see also* Memo. in Support of Mot. to Dism at 20-21.) Nor do Plaintiffs cite any authority establishing that their allegations would be sufficient as a matter of law to satisfy the "primary participant" legal standard. An immediate appeal to the Second Circuit is the only way to test the sufficiency of the jurisdictional allegations before substantial time and resources are expended.

B. The Venue Issues Are Distinct From the Personal Jurisdiction Issues.

Plaintiffs treat the venue issue interchangeably with the personal jurisdiction issue, but the legal issues are distinct. (*See* Memo. at 5-6.) If the Supreme Court in *Walden* reverses on the venue issue, and declares that the locus of the injury is an irrelevant factor in the venue analysis, then the District of Vermont would be an improper venue for the *Jenkins* action. Plaintiffs do not

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comments at oral argument indicated that the Supreme Court might rule in a way that was favorable to one of the parties in the District of Vermont. Here, the Supreme Court granted *certiorari* on the very issues that the parties dispute. It is, therefore, highly likely that the Supreme Court will resolve the issue. Finally, the additional confusion at the Second Circuit that exists in this case does not seem to have been present in *Shovah*.

dispute the venue analysis promoted by Defendants, or the potential results. Nor do they dispute the current circuit split on this issue.

C. Further Factual Development Is Inappropriate.

For the issues of whether Defendants are primary participants and whether it is appropriate to accept as true allegations that are disputed with affidavits, Plaintiffs only argue that further factual development is needed. This response does nothing to contest that there are substantial grounds for difference of opinion on the legal issues. Moreover, further factual development is not needed to determine if Plaintiffs have sufficiently *pled* a case for personal jurisdiction. Plaintiffs have not alleged that Defendants were aware of any orders entered in the State of Vermont and cannot maintain personal jurisdiction if the personal jurisdiction test is that Defendants must have aimed their conduct at the forum state.

Plaintiffs' assertion that further factual development is needed is also undercut by the cases that the Second Circuit has accepted for interlocutory appeal. In *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 23 (2d Cir. 1990), the Second Circuit accepted a request for interlocutory appeal after a district court had denied a Rule 12(b)(1) motion to dismiss for lack of personal jurisdiction. In *Klinghoffer*, the issues briefed by the parties and decided by the Court involved an inquiry at the pleading stage. *See also Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 900 (5th Cir. 2005) (involving interlocutory appeals to the denial of motions to dismiss for lack of subject matter jurisdiction and improper venue).

In *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), the Second Circuit again accepted an interlocutory appeal after the district court denied a number of motions to dismiss. Addressing this very subject, Judge Friendly noted: "The story of the circumstances underlying this action, a complicated one at best, is still harder to tell because there has thus far been no trial and the facts have not been determined. Yet the issue of subject

matter jurisdiction and even, in some instances, that of personal jurisdiction depend on what the facts were." *Id.* at 1330. The Court then went on to analyze jurisdiction based on allegations and statements from affidavits. In the end, the Court affirmed most of the orders of the district court, but did reverse and dismiss one of the defendants for lack of personal jurisdiction. *Id.* at 1344.

Defendants' Due Process rights require Plaintiffs to allege the basis for jurisdiction prior to forcing them to defend an action in a remote venue. Despite improving technology, constitutional restrictions against defending in a remote forum still have force. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *see also ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712-715 (4th Cir. 2002) (continuing to apply *Hanson* and *Calder v. Jones*, 465 U.S. 783 (1984) in the context of Internet minimum contacts analysis). The Due Process Clause protects non-resident defendants from discovery in a distant forum when there are insufficient allegations to assert jurisdiction. In *Leasco*, the Second Circuit was concerned with placing burdens on out of forum defendants that exceeded the Fifth Amendment Due Process Clause. *Leasco Data Processing Equip. Corp.*, 468 F.2d at 1340. "[W]here the defendant is not personally present and there is no other demonstrable basis for jurisdiction, it is 'essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id. citing Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The two cases cited by Plaintiffs from the Southern District of New York are distinguishable. *Arnett v. Gerber Scientific, Inc.*, 575 F. Supp. 770, 771 (S.D.N.Y. 1983) concerned whether the court should use the discretion permitted by the antitrust laws to order equitable rescission. It did not deal with the issue of whether rescission was available as a matter of law. *Id.* ("It is clear both as a matter of law and as a matter of antitrust policy that the

equitable remedy of rescission is well within the power of the district court and is available in appropriate circumstances to remedy conduct prohibited by antitrust laws.") *Myers v. New York Community Bancorp, Inc.*, CV-03-5837 (CPS), 2006 WL 2013734 (E.D.N.Y. July 18, 2006) dealt with complex constitutional issues, including the *Matthew v. Eldridge*, 424 U.S. 319 (1976) Due Process Clause balancing test and the Supremacy Clause. These issues went to the merits and did not involve an inquiry into personal jurisdiction.

III. AN EARLY DECISION BY THE SECOND CIRCUIT COULD MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

Plaintiffs do not contest that Second Circuit has held that the avoidance of two trials satisfies the material advancement prong of the test for an interlocutory appeal. (Memo at 8.) Instead, Plaintiffs repeat their argument that there is personal jurisdiction without regard to the legal test for personal jurisdiction. Again, Plaintiffs have not alleged that any of the Defendants were aware of the custody orders entered in the State of Vermont and, as a result, cannot allege that Defendants aimed their conduct at Vermont, the forum state.

In addition, Plaintiffs ignore the separate legal question that exists for determining whether venue is appropriate. If the locus of injury is not a relevant factor in determining venue, then both Plaintiffs and Defendants will benefit by finding out now.

IV. DISCRETIONARY CONSIDERATIONS FAVOR DEFENDANTS.

The Court should exercise its discretion to grant the interlocutory appeal. In any evaluation of discretionary factors, the Constitutional rights of the individual Defendants should weigh heavily. Indeed, it is no accident that the cases accepted by the Second Circuit involve the question whether personal jurisdiction exists. Plaintiffs are also noticeably silent about the system wide benefits that would accrue from a clear statement of the case in this area. That these

benefits would accrue in an area of Constitutional concern only magnifies the importance of granting an interlocutory appeal.

Plaintiffs assert without elaboration that a list of factors favor the exercise of discretion to deny favors denying an interlocutory appeal. The Court should reject these unsupported assertions. Defendants have already established that judicial efficiency on both a case level and Circuit wide level favor an interlocutory appeal. There also is no need for further factual development. There is no need to consider the impact of a stay because this case can proceed without a stay. As a result, the length of the appeal is also irrelevant if proceedings can continue on other fronts.

Plaintiffs also assert that the Court should consider the relative financial resources of the parties without providing any information about Plaintiffs' financial resources and simply speculating on Defendants' financial resources.

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
December 6, 2013

/s/ Matthew B. Byrne

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2013, I caused Defendant Hyden and Zodhiates' 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; Steven J. Shrock, Esq., shrock@ccj.com; Norman C. Smith, Esq., nc.smith@myfairpoint.net; and Michael J. DePrimo, Esq., michaeldeprimo@gmail.com.

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