

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.,)	ORAL ARGUMENT REQUESTED
Defendants)	

DEFENDANT RESPONSE UNLIMITED’S
OPPOSITION TO PLAINTIFFS’ MOTION TO COMPEL

Preliminary Statement

In its Opinion and Order issued October 24, 2013 (ECF No. 115) (“Order”), the Court acknowledged that the pleadings and submissions by Plaintiff “do not amount to a prima facie showing that this Court has general personal jurisdiction over RUL” (Order at 23). It permitted limited jurisdictional discovery to explore whether Philip Zodiates, alleged to be president and sole owner of RUL, and /or Victoria Hyden, alleged to have been an employee of RUL, acted as agents of RUL in such a way as may make their alleged actionable conduct “attributable to RUL” (Order at 27 – 28). The discovery which Plaintiff then issued, and which is the subject of this motion, goes far beyond the limited scope permitted by the Court, and seeks information about the substance of the claims against Mr. Zodiates and Ms. Hyden – not whether the acts

they are alleged to have participated in were attributable to RUL. For that reason, RUL has objected to a number of questions, and the motion to compel should be denied as to those.¹

In the Order, the Court listed the topics it would consider when it reviewed another motion to dismiss for lack of jurisdiction: (1) “the presence or absence of contacts between RUL and the forum state,” (2) “the existence of an agency relationship between Hyden and RUL,” and (3) “whether Zodiates’ or Hyden’s activity may be attributable to RUL.” (Order at 27.)

Plaintiffs’ discovery requests far exceed the scope of the jurisdictional discovery that this Court ordered and go directly to the merits of the case.

Argument

1. THE DISCOVERY THAT PLAINTIFFS SEEK HAS NO RELEVANCE TO THE PERSONAL JURISDICTION INQUIRY.

(a) This Court Properly Limited Discovery To Issues of Jurisdiction.

The Court must resolve jurisdictional questions prior to reaching the merits. *See Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Consistent with this requirement, courts in and outside the Second Circuit have limited discovery to jurisdictional issues. “[T]he discovery that plaintiffs seek is plainly more aimed at the merits of the case than the issue of in personam jurisdiction. Jurisdictional discovery should necessarily be aimed at defendant’s contacts with the forum state.” *In re Herald, Primeo & Thelma Funds Sec. Litig.*, No. 09 Civ. 289 (RMB)(HBP), 2011 U.S. Dist. LEXIS 102144 (Sept. 8, 2011 S.D.N.Y.) (emphasis in original); *see also Turbon Int’l, Inc. v. Hewlett-Packard Co.*, No. 10 Civ. 4540, 769 F. Supp. 2d 259, 261 (S.D.N.Y. 2011) (“Although Turbon is entitled to some additional discovery to determine whether the relationship between HP and HP-Thailand supports § 301 jurisdiction over HP-

¹ As referenced in Plaintiffs’ motion, following a meet and confer, defendants have agreed to supplement their responses to interrogatories 12 and 18.

Thailand, Turbon’s discovery requests are not sufficiently tailored to documents that are minimally necessary to resolve the jurisdictional issue.”); *Bandag, Inc. v. Michelin Retread Techs.*, 202 F.R.D. 597, 598 (S.D. Iowa 2001) (noting that discovery was limited to “only issues relating to the requisite minimum jurisdictional contact”); (*Crichlow v. Warner Music Group Corp.*, 565 F. Supp. 2d 1, 5 (D.D.C. 2008) (denying jurisdictional discovery where plaintiff did not explain what the discovery might disclose or what information he might obtain through discovery).

(b) Plaintiffs’ Discovery Goes Beyond The Discovery Ordered By This Court.

The Court acknowledged in its Order that plaintiffs “have not pled specific facts showing that RUL, or Zodhiates or Hyden acting as RUL’s agents, aimed intentional tortious acts at Jenkins” (Order at 26). Plaintiffs’ discovery is thus properly limited to that issue: did Zodhiates and/or Hyden act as RUL’s agents when they engaged in allegedly actionable conduct. Under Vermont law, “Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.” *Brueckner v. Norwich Univ.*, 169 Vt. 118, 123 (1999). The business of RUL is the rental and management of mailing lists. Actions taken by Zodhiates or Hyden to advance that business purpose are discoverable. Here, there is no allegation that the alleged kidnapping is conduct in any way was in furtherance of RUL’s business purpose, or would be authorized by RUL.

The actions of an agent may be imputed to the principal for purposes of personal jurisdiction if (1) the agent acted within the scope of actual or apparent authority bestowed by the principal; or (2) the principal ratified the agent’s actions after the fact. *Lakeside Equipment Corp. v. Town of Chester*, 173 Vt. 317, 324 (2002) citing *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1073 (9th Cir. 2001).

As a matter of law, Plaintiffs cannot establish that anyone involved in the alleged kidnapping was acting with actual authority on behalf of RUL. The conduct alleged in the Complaint, intentional kidnapping, cannot be done by an agent with the actual authority of the principal. *See, e.g. Tell v. Roman Catholic Bishops of Diocese*, 2010 Del. Super. LEXIS 162, *34 n. 61 (collecting cases); *Tichenor v. Roman Catholic Church*, 32 F.3d 953 (5th Cir. 1994) (holding that priest's sexual misconduct could not be a basis for asserting personal jurisdiction over church based on agency theory); *Kennedy v. Roman Catholic Diocese*, 921 F. Supp. 231 (D. Vt. 1996) (priest's sexual misconduct was not within the scope of agency). Any illegal action done purportedly on behalf of a Delaware corporation is absolutely void. *Kerbs v. California Eastern Airways, Inc.*, 1952 Del. LEXIS 87, *6 (Del. 1952). Likewise, because illegal acts are absolutely void, they cannot be subsequently be ratified. *In re Mesa Ltd. Partnership Preferred Unitholders Litig.*, 1991 Del. Ch. LEXIS 214, *20. Moreover, there is no allegation in the complaint, let alone any factual basis for claiming, that any of RUL's alleged agents was acting with the actual authority of RUL.

Absent actual authority or ratification, plaintiffs must attempt to establish apparent authority. “‘Apparent authority’ derives from conduct of the principal, communicated or manifested to the third party, which reasonably leads the third party to rely on the agent’s authority.” *Lakeside Equipment*, 173 Vt. at 1181. “Apparent authority stems from a manifestation made by the principal.” Restatement (Third) of Agency § 7.08 cmt. a; *see also id.*, Illustrations 4 and 5. The purpose of the doctrine of apparent authority is “to protect an innocent third party from difficulties in dealing with an agent whose actual authority is cut down by limitations unknown to the person with whom he is dealing.” *Lakeside Equipment*, 173 Vt. at 1181.

None of plaintiffs' discovery seeks to determine what RUL said or did that would give the impression of apparent authority or that would have ratified the alleged conduct. Communications that Victoria Hyden and Philip Zodiates had with Lisa Miller cannot give rise to apparent authority because Lisa Miller is not the "third party" that would rely on the agent's authority. Likewise, communications that Victoria Hyden and Philip Zodiates had with other third parties cannot give rise to apparent authority because again they would not rely on the agent's authority. Thus, requests that seek this sort of information are simply irrelevant to the jurisdiction inquiry. *See* Interrog. Nos. 9, 10, 11, 13, 14, 15, 21. For the same reasons, contacts or communications between RUL and its employees cannot give rise to apparent authority. *See* Interrog. Nos. 16, 17, 18, 19, and 20.

The discovery sought also reaches well beyond the scope of the Court's order because the requests and interrogatories are overbroad in seeking all communications from essentially anyone who talked with anyone at RUL. *See, e.g.,* Interrog. Nos. 11 and 14. Based on the allegations of the Complaint, there are a very few people for which communications to them would have any impact on the apparent authority analysis. Any jurisdiction discovery should be limited to correspondents who actually were in a position to be a factor in any apparent agency analysis.

The discovery also seeks communications and contacts that are beyond the scope of authority of Ms. Hyden or Mr. Zodiates. For example, communications that occurred at home after work hours should not be attributed to RUL. Thus, Interrogatory No. 14, which seeks any communication between Philip Zodiates and others, requests any communication regardless of whether that communication was done pursuant to the scope of his agency for RUL.

Notably, in urging the Court to authorize discovery that goes to the merits rather than to the limited jurisdictional areas discussed in the Order, Plaintiffs offer no legal analysis nor support. They simply announce that the information sought is “directly relevant”. On analysis, though, who Philip Zodhiates or Victoria Hyden may have spoken to about Lisa Miller and others does not bear upon the question of whether any action or discussion they took was within the scope of their authority as agents or employees of RUL. Appropriate questions would include:

1. Did RUL have a business relationship with Lisa Miller?
2. Did RUL have contact with Lisa Miller concerning any matter relating to the business of RUL?
3. Did any activity in which RUL engaged concerning Lisa Miller advance the business of RUL?

Instead of asking questions that are truly relevant to the limited jurisdictional issues concerning RUL, Plaintiffs are obviously trying to exploit the Court’s Order and use it as a vehicle to obtain information concerning the merits of the case which they were not authorized to obtain.

Conclusion

This Court should deny Plaintiffs' Motion to Compel because it seeks discovery unrelated to and irrelevant to the jurisdictional questions and instead seeks material related to the merits of the case.

Dated: Burlington, Vermont
January 20, 2014

/s/ Robert B. Hemley

Robert B. Hemley, Esq.
Norman Williams, Esq.
Matthew B. Byrne, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
rhemley@gravelshea.com
nwilliams@gravelshea.com
mbyrne@gravelshea.com
For Defendant Response Unlimited, Inc.

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)	

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2014, I caused Response Unlimited’s Opposition to Plaintiffs’ Motion to Compel 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.

Dated: Burlington, Vermont
January 20, 2014

Robert B. Hemley, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
rhemley@gravelshea.com
For Defendant Response Unlimited