

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, ET AL.,
Plaintiffs,

v.

KENNETH L. MILLER, ET AL.,
Defendants.

Docket No. 2:12-cv-184

PLAINTIFF'S COMBINED RESPONSE TO RENEWED MOTIONS TO DISMISS OF
DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN,
RESPONSE UNLIMITED, INC., AND LINDA WALL

NOW COME Plaintiffs by and through their attorneys Langrock Sperry & Wool, LLP and Sarah R. Star Attorney and Counselor at Law, P.C., and hereby submit this Combined Response to Renewed Motions to Dismiss of Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc. (Dkt. #142), and Defendant Linda M. Wall (Dkt. #143). Because Defendants Philip Zodhiates, Victoria Hyden, Response Unlimited, Inc., and Linda M. Wall raise the same arguments, Plaintiffs will refer to them collectively as "Defendants" for purposes of this Response.

First, procedurally, Defendants' motions are misplaced. These so-called "renewed motions" are actually motions to reconsider. Defendants do not cite any Federal Rule that permits a "renewed motion." Under Local Rule 7(c), motions to reconsider must be filed within 14 days of the original order. Given that the Court's ruling was issued October 24, 2013, well more than 14 days have elapsed. Therefore, Defendants' motions should be rejected as untimely. Further, these "renewed motions" are untimely given the procedural posture of this lawsuit. The parties are still awaiting the Court's ruling on Plaintiffs' pending

Motion for Leave to Amend to file a Second Amended Complaint, and Defendants' arguments could more suitably be made in a motion to dismiss the Second Amended Complaint (so long as the Court grants Plaintiffs' pending motion to amend). With regards to Defendant Response Unlimited, Plaintiffs have sought jurisdictional discovery. After undertaking jurisdictional discovery – again, so long as the Court grants Plaintiffs' pending motion to compel that discovery – the Court will then need to rule on the legal issue of whether the discovered facts support personal jurisdiction over Response Unlimited. At that point, arguments regarding the legal effect of *Walden* will be appropriate. At this juncture, however, a motion to dismiss is misplaced.

Second, *Walden v. Fiore*, ___ U.S. ___, 134 S.Ct. 1115 (2014) does not change the law regarding personal jurisdiction. Where new case law will not change the Court's ruling, a motion to reconsider is not warranted. See *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion [to reconsider] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.). *Walden* clarifies the minimum contacts standard and distills it into two factors, neither of which is new: first, that the relationship between defendant and the forum must arise from contacts created by the defendant (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)), and second, that the contacts must somehow be with the forum State, not only with a person who happens to live there (citing, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Although *Walden* clarifies some aspects of the law, there is nothing new, and therefore nothing that should change the Court's analysis. This Court already analyzed specific

jurisdiction as requiring *more* than the mere fact that Plaintiff Jenkins resides in Vermont, and the Court found this standard was met. Accordingly, the point that Defendants assert that *Walden* most supports – that personal jurisdiction depends on the actions of the defendant, not only the plaintiff – has already been addressed and adjudicated.

Third, the facts of *Walden* are easily distinguished from this case. In *Walden*, the plaintiffs were Nevada residents who passed through Georgia on their way home from travel, and the defendant was a police officer and deputized agent of the Drug Enforcement Agency in Georgia. The defendant searched plaintiffs in Georgia and seized around \$97,000 in case, then he wrote up an allegedly false affidavit regarding the encounter. All of this occurred in Georgia. The only connection to Nevada was that the plaintiffs were Nevada residents, and after the search and seizure in Georgia, they returned home to Nevada.

By contrast, Defendants intentionally interfered with Vermont custody and visitation orders. This creates a relationship between Defendants and the State of Vermont, in addition to between Defendants and Plaintiff Jenkins as an individual. While Defendants intended to cause harm to Plaintiff Jenkins, they also sought to interfere with a Vermont court order.

Walden lacked any such nexus between the defendant and the state of Nevada itself.

Additionally, Defendants intentionally interfered with the contact Plaintiff Jenkins should have had with her daughter, Isabella Miller-Jenkins, in Vermont. Plaintiff Jenkins resided in Vermont during the entire relevant time period, and Defendants were aware of it. When they acted, they intentionally aimed their tortious conduct at Plaintiff Jenkins *in Vermont*, unlike the *Walden* defendant who acted towards the plaintiffs while they were in Georgia. Further, a key element of the tort of custodial interference occurred in Vermont. *Walden* noted that the particular elements of the libel claim in *Calder v. Jones*, 465 U.S. 783 (1984) were significant

to the analysis of personal jurisdiction in *Calder. Walden*, 134 S.Ct. at 1123-24. A key element here is that Plaintiff Jenkins had custodial rights in Vermont, and Defendants interfered with those rights. Because the rights existed in Vermont, Defendants' interference necessarily occurred in Vermont, just as the *Calder* libel claim's effects occurred in California. *See also State v. Doyen*, 165 Vt. 43, 46 (1996) (Vermont has jurisdiction over defendant "who keeps a child outside of Vermont when the child's lawful custodian is a resident of Vermont" for the crime of custodial interference, even though defendant did not perform any acts in Vermont); *see also State v. Wootten*, 170 Vt. 485 (2000) ("most states have concluded that the state where the wrongfully deprived custodian lives may prosecute for custodial interference").

Fourth and finally, *Walden* has already been distinguished by at least one court, although it was only issued on February 25, 2014. *See Haley v. City of Akron*, 2014 WL 804761, at n.7 (N.D. Ohio, Feb. 27, 2014). Plaintiffs urge this Court not to over-read the impact of *Walden*. In *Haley*, the plaintiff received a black Corvette from a company in Texas in exchange for providing various services, and then he drove the car to Ohio, where it remained. A third party subsequently informed the local Texas police department that he had a court order for return of the Corvette to him in Texas. A Texas police detective, Jeff Freeman, who was a defendant in the lawsuit, took several actions to facilitate the return of the Corvette to Texas from Ohio, one of which was reporting the Corvette as stolen in a national database. These actions were intend to "reach[] out to the [Ohio] police," thus establishing that Freeman was subject to personal jurisdiction in Ohio. *Id.* at *7. The *Haley* court explicitly distinguished *Walden*. Although defendant Freeman was never in Ohio, he "directed the seizure [of the Corvette] to occur in Ohio." *Id.* at n.7. The *Haley* court found

this different from *Walden*, in which the only connection to the forum was that the plaintiffs happened to go there after the activities in Georgia. Just like Defendants here *intended* to harm Plaintiffs and interfere with a court order *in Vermont*, defendant Freeman in *Haley* likewise *intended* to cause the seizure of the Corvette *in Ohio*.

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' renewed motions.

DATED at Middlebury, Vermont this 18th day of March, 2014.

LANGROCK SPERRY & WOOL, LLP

/s/ Katherine B. Kramer

Katherine B. Kramer
PO Drawer 351, 111 S. Pleasant Street
Middlebury, VT 05753
kkramer@langrock.com
Phone: 802-388-6356

/s/ Sarah Star

Sarah Star, Esq.
Sarah R. Star Attorney and Counselor at Law,
P.C.
P.O. Box 106
Middlebury, VT 05753

Attorneys for Plaintiffs

619700.1

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JANET JENKINS, ET AL.,
Plaintiffs,

v.

KENNETH L. MILLER, ET AL.,
Defendants.

Civil Action
Docket No. 2:12-cv-00184-wks

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 *Plaintiff's Combined Response to Renewed Motions to Dismiss of Defendants Philip Zodhiates, Victoria Hyden, Response Unlimited, Inc., and Linda Wall* 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 18th day of March, 2014.

/s/ Katherine B. Kramer
Katherine B. Kramer, Esq.
Langrock Sperry and Wool, LLP
111 S. Pleasant Street, PO Drawer 351
Middlebury, VT 05753-0351

619903.1