

**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.

Docket No. 2:12-CV-00184-WKS

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, individually and as an
agent for RESPONSE UNLIMITED,
INC., VICTORIA HYDEN, f/k/a
VICTORIA ZODHIATES individually
and as an agent for both RESPONSE
UNLIMITED, INC., and LIBERTY
UNIVERSITY, INC., and its related
ministry THOMAS ROAD BAPTIST
CHURCH, INC., LINDA M. WALL,
individually and as an agent for
THOMAS ROAD BAPTIST CHURCH,
INC., and DOUGLAS WRIGHT,

Defendants.

**RE-FILED MOTION FOR CHANGE OF VENUE ON BEHALF
OF DEFENDANTS LIBERTY UNIVERSITY, INC.,
THOMAS ROAD BAPTIST CHURCH, INC. AND VICTORIA HYDEN¹**

Now come Defendants Liberty University, Inc. (“Liberty University”), Thomas Road Baptist Church, Inc. (“TRBC”), and Victoria Hyden in her alleged capacity as an agent of Liberty University or Thomas Road Baptist Church (collectively “Defendants”), by and through their attorneys, Dinse, Knapp & McAndrew, P.C., and hereby move the Court for a Change of Venue pursuant to 28 U.S.C. § 1404(a). Defendants incorporate by reference the Motion to Dismiss for Lack of Personal Jurisdiction, Lack of Venue and Failure to State Claim (“Motion to Dismiss”), which is being filed concurrently with this Motion.

MEMORANDUM OF LAW

If the Court denies Plaintiff’s Motion to Dismiss on the ground that venue is improper in this judicial district, Defendants seek, in the alternative, for a change of venue to the United States District Court for the Western District of Virginia. Defendants seek a change of venue because all of the alleged events pertinent to Plaintiff’s claims occurred outside Vermont and all of the liability witnesses reside outside Vermont.

District courts undertake a two-part inquiry in determining whether transfer is appropriate. First, the court must determine whether the action sought to be transferred is one that could originally have been brought in the transferee district. *See* 28 U.S.C. § 1404(a) (“a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”). Second, the

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

¹ This Motion is identical to the Motion For Change Of Venue filed at ECF No. 55 on behalf of Liberty University, Thomas Road Baptist Church and Victoria Hyden. It is being re-filed on behalf of Liberty University as the University had not been formally joined as a party at the time the Motion was first filed on November 16, 2012. The civil docket sheet presently states that the original Motion to Dismiss (ECF No. 54) was filed on behalf of Liberty University School of Law, as well as Thomas Road Baptist Church and Victoria Hyden. This is incorrect. Liberty University School of Law is a not a party- indeed there is no such legal entity- and the original Motion to Dismiss was not filed on its behalf.

court must evaluate whether transfer is warranted “[f]or the convenience of parties and witnesses [and] in the interest of justice.” *Id.* This two-part inquiry weighs in favor of transferring this civil action to the Western District of Virginia.

1. Venue Lies in Transferee District

As set forth in the accompanying Motion to Dismiss, this action could originally have been brought in the United States District Court for the Western District of Virginia. The allegations in the Amended Complaint relate to the removal of Isabella Miller-Jenkins from Virginia to Nicaragua, via New York, Canada and Mexico, every aspect of which occurred outside the State of Vermont. The significant events material to Plaintiff’s claims arise out of the assistance the defendants allegedly provided to Lisa Miller to enable her to leave the United States, with her daughter, and to remain outside of the United States and in hiding in Nicaragua. The alleged planning for the journey, the departure for Nicaragua, and the mail fraud/money laundering to provide cash assistance to Lisa Miller in Nicaragua, all occurred in Virginia, including specifically the towns of Lynchburg, Stuart’s Draft, Winchester, Waynesboro, and Forest. Am. Complaint, ¶¶ 35, 38, 40, 41. All of these towns are located in the judicial district of the Western District of Virginia. Venue lies in the Western District of Virginia because this is where “a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2).

2. Factors Relating to the Convenience of Parties and Witnesses

Turning to the second part of the inquiry, the ends of justice would be best served by transferring this case to the Western District of Virginia. The Second Circuit recently listed seven factors that courts should consider in deciding whether to grant a motion to transfer: “(1) the plaintiff’s choice of forum, (2) the convenience of witnesses, (3) the location of relevant

documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties.” *Ran-Mar, Inc. v. Wainwright Bank & Trust Co.*, No. 2:08-cv-159, 2008 WL 4559844 (D. Vt. Oct. 9, 2008) (quoting *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 106-07 (2d Cir. 2006)).

Of these seven, the “convenience of the witnesses is generally considered the most important of the factors a court considers in deciding whether to transfer a case.” *Jones v. Walgreen Co.*, 463 F. Supp. 2d 267, 274 (D. Conn. 2006); *U.S. Fid. & Guar. Co. v. Republic Drug Co., Inc.*, 800 F. Supp. 1076, 1080 (E.D.N.Y. 1992). In a RICO case where nearly all of the witnesses, as well as the locus of operative facts, were located in different districts, a District Court in the Eastern District of New York ruled that venue should be transferred to those districts. *Prospect Capital Corp. v. Bender*, No. 09-cv-826, 2009 WL 4907121 (S.D.N.Y. Dec. 21, 2009). *See also, Pardy v. Gray*, No. 06-cv-6801, 2007 WL 1825200 (E.D.N.Y. June 22, 2007) (transferring venue from the Eastern to Southern District of New York in a RICO case where no defendants had sufficient contacts with the forum and several defendants had sufficient contacts with the Southern District, where a substantial portion of the underlying events took place).

The first factor, the plaintiff’s choice, weighs in Plaintiff’s favor only if venue is found to be proper in the District of Vermont. As shown in Defendants’ Motion to Dismiss, however, venue is improper in this District. Where venue does not lie in the transferor district, plaintiff’s choice is not entitled to any weight on a motion to change to venue. *See Gates v. Wilkinson*, No. 01-cv-3145, 2003 WL 21297296, *5 (S.D.N.Y. June 4, 2003) (finding RICO venue to be improper and noting that “where plaintiffs have chosen a forum where venue is not proper, this

Court can not give any weight to their choice.”).

Factors two through five all weigh in favor of changing venue to the Western District of Virginia because nearly all of the liability witnesses, the location of relevant documents, ease of access to proof, and the locus of operative facts are located in there. The alleged planning took place in Virginia and this is where the Millers’ journey began. *See* Am. Complaint, ¶¶ 35, 38, 40, 41. Lisa Miller was a resident of Virginia immediately prior to her disappearance and is alleged to have had extensive and continuous contacts with Virginia. Am. Complaint, ¶¶ 6, 20, 25. Defendants Kenneth Miller, Victoria Hyden, Linda Wall, Douglas Wright, and Phillip Zodhiates are all domiciled in Virginia and their alleged acts or omissions occurred entirely or primarily in Virginia. *Id.* at ¶¶ 8, 12, 13, 17-18. Defendant Philip Zodhiates, a Virginia resident, is also the president and sole owner of Defendant Response Unlimited, Inc. *Id.* at ¶ 12, 36. Defendants Liberty University and Thomas Road Baptist Church are both incorporated under the laws of Virginia. *Id.* ¶¶ 15-16. Timothy Miller, a pastor with the Beachy Amish-Mennonite Christian Brotherhood, is alleged to have aided and abetted in the abduction of Isabella from Virginia by purchasing plane tickets for Lisa Miller and her daughter to Nicaragua, by meeting them on their arrival in Nicaragua, and by employing Lisa Miller in his Managua home. Am. Complaint, ¶ 34, 37, 54. The remaining defendants, Andrew Yoder and his employer, Christian Aid Ministries, Inc., also have ties to Virginia where Yoder allegedly engaged in an incident of money laundering and mail fraud using Millmont Greenhouses, Inc., a garden center in Stuart’s Draft, Virginia. Am. Complaint, ¶ 38, 53, 56, 66.

The allegations in the Amended Complaint show that the principal witnesses, other than Plaintiff herself, are primarily located in Virginia. Documents relevant to Plaintiff’s claims are likely to be in Virginia and access to sources of proof will be easier for all of the litigants in

Virginia, rather than in Vermont. The convenience of the parties also weighs in favor of a change of venue. Although Plaintiff resides in Vermont, most of the defendants and many of the likely witnesses reside in Virginia. Furthermore, the facts as alleged in the Amended Complaint demonstrate that “the locus of operative facts” occurred primarily in Virginia, with none occurring in Vermont.

The sixth factor, the availability of process to compel the attendance of unwilling witnesses, also favors Virginia. Many of the witnesses with information relevant to Plaintiff’s claims are likely to reside in Virginia² and it will be easier for the Western District of Virginia to compel the attendance of these witnesses, rather than this Court. *See* F. R. Civ. P. 45(b)(2)(A) and (B) (providing that a subpoena may be served “(A) within the district of the issuing court; (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection”). *See also, Werner v. Stonebridge Life Ins. Co.*, No. 2:06-cv-174, 2007 WL 602104 at *4 (D. Vt. Feb. 22, 2007) (recognizing that if case were to be tried in Vermont, “there may be witnesses, including medical personnel, who are beyond the subpoena power of this Court”). The Western District of Virginia will be better positioned to compel attendance of unwilling witnesses if this case were to be tried.

The seventh and final factor, the relative means of the parties, also weighs in favor of a change of venue, particularly if the interests of all of the defendants are combined and weighed against those of the Plaintiff. Moreover, the burden to these three Defendants of litigating in this forum would be significant because they all reside in or are based in Lynchburg, Virginia and have no connections whatsoever to Vermont. Victoria Hyden, in particular, will suffer significant personal and financial hardship litigating a case over 700 miles from her home and

² Examples include, but are not limited to, Terry Miller, Deborah Thurman, John Collmus, members of the Thomas Road Baptist Church, employees at Liberty University, and the staff at Millmont Greenhouses, Inc. *See, e.g.*, Am. Complaint. ¶¶ 38, 41-43, 53, 59.

family. *See* Hyden Affidavit, attached as Exhibit 3 to the Motion to Dismiss, ¶ 17.

Taken as a whole, these factors weigh in favor of changing venue in this civil action to the Western District of Virginia. Litigating this suit in Vermont, so far away from where nearly all of the operative events occurred and so far away from where the liability witnesses are located, will increase the expense and time involved for all parties because none of the likely witnesses, other than Plaintiff, have a connection to or reside in Vermont. These considerations, coupled with the fact that venue would be proper in the Western District of Virginia, establish that the interests of justice would be best served by transferring this case to the United States District Court for the Western District of Virginia.

CONCLUSION

For the reasons set forth herein, Liberty University, TRBC and Hyden respectfully move this Court to exercise its discretion and transfer this civil action to the Western District of Virginia.

Dated at Burlington, Vermont, this 6th day of December, 2012.

DINSE, KNAPP & McANDREW, P.C.

By: /s/ Ritchie E. Berger
Ritchie E. Berger, Esq.
Sophie E. Zdatny, Esq.
209 Battery Street, P.O. Box 988
Burlington, VT 05402
(802) 864-5751
rberger@dinse.com
szdatny@dinse.com
*Attorney for Defendants Liberty University, Inc.,
Thomas Road Baptist Church, Inc., and Victoria
Hyden*

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

CERTIFICATE OF SERVICE

I, Ritchie E. Berger, Esq., certify that on November 16, 2012, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

Frank H. Langrock, Esq.
Langrock Sperry & Wool, LLP
111 S. Pleasant Street/P.O. Drawer 351
Middlebury, VT 05753-0351
flangrock@langrock.com

Lisa B. Shelkrot, Esq.
Langrock Sperry & Wool, LLP
210 College Street/P.O. Box 721
Burlington, VT 05402-0721
lshekrot@langrock.com

Sarah R. Star, Esq.,
P.O. Box 106
Middlebury, VT 05753
srs@sarahstarlaw.com

Brooks G. McArthur, Esq.
Jarvis, McArthur & Williams, LLC
95 St. Paul Street, Suite 2E
Burlington, VT 05402-0902
bmcArthur@jarvismcarthur.com

Joshua M. Autry, Esq.
Boyle, Autry & Murphy
4600 Trindle Road, Suite 200
Camp Hill, PA 17011
jmautry@dennisboylelaw.com

Peggy J. Schmitz, Esq.
Critchfield, Critchfield & Johnson, Ltd.
225 North Market Street/ P.O. Box 599
Wooster, OH 44691-0599
schmitz@ccj.com

Steven J. Shrock, Esq.
Critchfield, Critchfield & Johnson, Ltd.
225 North Market Street
P.O. Box 599
Wooster, OH 44691-0599
shrock@ccj.com

Thomas E. McCormick, Esq.
McCormick, Fitzpatrick, Kasper &
Burchard, P.C.
40 George Street/P.O. Box 638
Burlington, VT 05402-0638
tem@mc-fitz.com

Norman C. Williams, Esq.
Gravel and Shea PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
nwilliams@gravelshea.com

Robert B. Hemley, Esq.
Gravel and Shea PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
rhemley@gravelshea.com

Robert G. Cain, Esq.
Paul Frank + Collins P.C.
P.O. Box 1307
Burlington, VT 05402-1307
rcain@pfclaw.com

A copy of the foregoing has also been served upon the following parties by mailing a copy thereof via U.S. first class, postage prepaid mail, to counsel of record at:

None.

DINSE, KNAPP & McANDREW, P.C.

By: /s/ Ritchie E. Berger
Ritchie E. Berger, Esq.