

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.

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

PLAINTIFFS' RESPONSE TO MOTION FOR CHANGE OF VENUE ON BEHALF OF
DEFENDANTS LIBERTY UNIVERSITY, INC., THOMAS ROAD BAPTIST CHURCH,
INC., AND VICTORIA HYDEN

NOW COME Plaintiffs Janet Jenkins, for herself and as next friend of Isabella Miller-Jenkins, a/k/a Isabella Miller, by and through their attorneys Sarah Star, Esq., Attorney and Counselor at Law, P.C., and Langrock Sperry & Wool, LLP, in opposition to the Motion for

Change of Venue filed by Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc., and Victoria Hyden (together, here, “Defendants”).¹

MEMORANDUM

In the alternative to their Motion to Dismiss, Defendants move under 28 U.S.C. § 1404(a) for transfer of this case to the United States District Court for the Western District of Virginia. (Dkt. #55, 67.) In the event that the Court denies Defendants’ motion to dismiss, transfer is unwarranted and the Court should deny this Motion for Change of Venue.

In determining whether transfer of venue is appropriate under § 1404(a), district courts engage in a two-part inquiry: (1) whether the action “might have been brought” in the proposed transferee forum and, if so, (2) whether the transfer promotes convenience and justice. *See Schertenleib v. Traum*, 589 F.2d 1156, 1161 (2d Cir. 1978); *Invivo Research, Inc. v. Magnetic Resonance Equip. Corp.*, 119 F. Supp. 2d 433, 436 (S.D.N.Y. 2000). In effect, the first part asks, “Can we transfer?” and the second part asks, “Even if we can, should we transfer?” The Plaintiffs do not dispute that venue might also lie in Virginia.²

However, the second part of the transfer inquiry asks whether the Court should transfer this action, and the answer is clearly no. Defendants bear the heavy burden of showing by clear and convincing evidence that this action should be transferred, and they cannot meet this burden under the circumstances here. *See James Maroney, Inc. v. Flury & Company, Ltd.*, No. 5:09–cv–252–cr, 2010 WL 3322920, at *10 (D.Vt. May 28, 2010)) (concluding that, in the absence of “clear and convincing evidence that militates in favor of a

¹ Plaintiffs also incorporate by reference their Response to the Motion to Dismiss by Liberty University, Inc., Thomas Road Baptist Church, and Victoria Hyden.

² Plaintiffs do not concede that personal jurisdiction could be maintained over all non-moving Defendants in the Western District of Virginia. Specifically, Plaintiffs do not concede that Virginia would have personal jurisdiction over Defendants Christian Aid Ministries, Andrew Yoder, and Timothy Miller.

transfer of this action,” motion to transfer under § 1404(a) must be denied). A motion to transfer venue “must not be lightly granted.” 15 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 3848 (3d ed. 1998). Indeed, “discretionary transfers are not favored.” *Tom and Sally’s Handmade Chocolates, Inc. v. Gasworks, Inc.*, 977 F. Supp. 297, 302 (D.Vt. 1997) (internal citations omitted).

In deciding whether to grant a transfer under § 1404(a), the court generally considers the following factors:

(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.

D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 106–07 (2d Cir. 2006) (quoting *Albert Fadem Trust v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002)) (internal quotation marks omitted). The Court has “considerable discretion . . . to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.” *Red Bull Associates v. Best Western Int’l*, 862 F.2d 963, 967 (2d Cir. 1988) (internal quotation omitted); see also *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 328 (“The Court has broad discretion in balancing these factors.”).

The first factor, Plaintiffs’ choice of forum, favors venue in Vermont. As also set forth in Plaintiffs’ Response to Defendants’ Motion to Dismiss, venue in Vermont is proper. Moreover, Plaintiffs’ choice of forum “is entitled to substantial weight.” *James Maroney, Inc. v. Flury & Co., Ltd.*, No. 5:09–cv–252–cr, 2010 WL 3322920, *9 (D.Vt. May 28, 2010) (citing *Bridgeport Machines, Inc. v. Alamo Iron Works, Inc.*, 76 F. Supp. 2d 214, 217 (D. Conn. 1999)). “The courts of this Circuit are loath to disturb a plaintiff’s choice of venue absent a showing that ‘the balance of convenience and justice weighs heavily in favor of

transfer.” *National Utility Service*, 857 F. Supp. at 242 (quoting *Somerville v. Major Exploration, Inc.*, 576 F. Supp. 902, 908 (S.D.N.Y. 1983)). Defendants have not satisfied that required showing. Thus, since transfer would simply serve to “shift the inconvenience from one party to the other, ‘the plaintiff’s choice of forum should not be disturbed.’” *Snyder v. Madera Broadcasting, Inc.*, 872 F. Supp. 1191, 1200 (E.D.N.Y. 1995) (quoting *O’Brien v. Goldstar Technology, Inc.*, 812 F. Supp. 383 (W.D.N.Y. 1993)).

The second factor, the convenience of witnesses, does not favor transfer. Defendants’ bald assertion that “the principal witnesses” are “primarily located” in Virginia is insufficient to demonstrate that transfer is warranted. (Defendants’ Motion for Change of Venue, p. 5.) For the Court to find that this factor favors transfer, “the movant must provide a detailed list of the witnesses who will be inconvenienced, and the testimony that each witness will provide.” *Allen v. Devine*, 670 F. Supp. 2d 164, 174 (E.D.N.Y. 2009); *see also Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 329 (E.D.N.Y. 2006). Defendants have not done so. Further, an assertion that many witnesses are in Virginia misses the point of this factor. “[I]t is not the prospective number of witnesses in each district that determines the appropriateness of a transfer, but, rather, the materiality of their anticipated testimony.” *Schwartz v. Marriott Hotel Servs., Inc.*, 186 F. Supp. 2d 245, 249 (E.D.N.Y. 2002) (internal quotation omitted). Defendants have neither listed prospective witnesses nor described their likely testimony. Accordingly, this factor does not favor transfer.

The third factor, the location of documents and ease of access to sources of proof, does not favor transfer. Although the location of relevant documents and other sources of proof is entitled to some weight, courts in the Second Circuit recognize that “modern photocopying technology and electronic storage deprive this issue of practical or legal weight.” *Charter*

Oak Fire Ins. Co. v. Broan-Nutone, L.L.C., 294 F. Supp. 2d 218, 221 (D. Conn. 2003). As pointed out by the court in *Allen*, “[p]resumably, all of the relevant documents will be scanned and copied for production regardless of venue.” *Allen*, 670 F. Supp. 2d at 174. Although some documents will likely be in Virginia, many will be electronic, many will likely be in Vermont, some may be in Nicaragua, and some may be elsewhere in the United States. Given the realities of modern technology and the requirements of discovery, this factor does not favor transfer to Virginia.

The fourth factor, the convenience of the parties, favors venue in Vermont. Although some individual Defendants reside in Virginia, Plaintiff Jenkins lives and works in Vermont, and, as entities, Defendants Liberty University and Thomas Road Baptist Church are not capable of being inconvenienced in the way an individual can be. Further, the mere fact that there are numerous Defendants does not affect the analysis of this factor. *See Allen*, 670 F. Supp. 2d at 173 (“Moreover, the Moving Defendants offer no authority that the numerosity of out of state defendants favors transfer. The Court therefore finds that this argument does not weigh heavily in favor of transfer.”). Section 1404(a) is not intended as a way to shift the inherent inconvenience of litigation from Defendants to Plaintiffs. *See Snyder*, 872 F. Supp. at 1200.

The fifth factor, the locus of operative facts, favors venue in Vermont. “The locus of operative facts is an important factor to be considered in deciding where a case should be tried. To determine where the locus of operative facts lies, courts look to ‘the site of events from which the claim arises.’” *MAK Marketing, Inc. v. Kalapos*, 620 F. Supp. 2d 295, 310 (D.Conn. 2009) (quoting *800-Flowers, Inc. v. Intercontinental Florist, Inc.*, 860 F. Supp. 128, 134 (S.D.N.Y. 1994)). The claims here arise from events in Vermont, Virginia, and

elsewhere. Most significantly, however, are the facts that Janet Jenkins and Lisa Miller entered into a civil union in Vermont, that Vermont courts adjudicated their divorce and custody issues, and that Janet Jenkins has custody of Isabella Miller-Jenkins in Vermont. This factor therefore favors venue in Vermont or, at most, is neutral. Given the Defendants' heavy burden for transfer under §1404(a), a balanced or neutral factor favors Plaintiffs' chosen venue. *See Sollinger v. NASCO Intern., Inc.*, 655 F. Supp. 1385, 1390 (D.Vt. 1987) (“[w]here the balance of convenience is in equipoise, plaintiff’s choice of forum should not be disturbed.”).

The sixth factor, the availability of process to compel unwilling witnesses, does not favor transfer. Defendants make much of the fact that the Western District of Virginia would be able to subpoena witnesses in Virginia that would be beyond the F.R.C.P. 45 subpoena power of this Court. But Defendants only speculate that some witnesses “are likely to reside in Virginia” and provide no evidence that any of these witnesses would be resistant to testifying in Vermont. *See MAK Marketing*, 620 F. Supp. 2d at 311 (“Neither plaintiff nor defendants have provided any information suggesting that these potential non-party witnesses would be unwilling to travel to Connecticut to testify in this matter. . . . Absent detailed information as to these aspects, the court finds that this factor is neutral.”); *see also Pitney Bowes, Inc. v. National Presort, Inc.*, 33 F. Supp. 2d 130, 131 (D.Conn. 1998) (transfer was not warranted where it was not clear that identified non-party witnesses would be unwilling to testify). In addition, in a RICO action the Court has broader subpoena powers than those available under F.R.C.P. 45. *See* 18 U.S.C. § 1965(c); *Azari v. B&H Photo Video*, 2007 WL 13101, at *3 (S.D.N.Y. Jan. 3, 2007) (“The RICO statute generally provides for nationwide

service of process for witnesses[.]” (citing 18 U.S.C. § 1965(c)). Accordingly, this factor does not favor transfer.

The seventh factor, the relative means of the parties, favors venue in Vermont. Plaintiff Jenkins lives and works in Vermont, running her own day-care business. She would be greatly burdened by litigating this case in Virginia, hundreds of miles from her home and place of business. As a sole proprietor, she would be forced to shut down her day-care center to litigate in Virginia, which would result in lost income. The entity Defendants, including Liberty University and Thomas Road Baptist Church, will not be as financially burdened on a relative basis by litigating out-of-state as Plaintiff Jenkins would be. Although some individual Defendants may be inconvenienced by litigating in Vermont, Defendants have failed to demonstrate that this alone would satisfy their heavy burden on a motion to transfer venue. *See Pall Corp. v. PTI Technologies, Inc.*, 992 F. Supp. 196, 202 (E.D.N.Y. 1998) (“The burden on the party seeking a transfer is a heavy one.”).

As a final consideration, the District of Vermont has handled related litigation, namely the criminal cases of Kenneth Miller and Timothy Miller. “There is a strong policy favoring the litigation of related claims in the same tribunal” to avoid duplicative litigation or inconsistent results and to promote judicial efficiency. *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 619 (2d Cir. 1968); *see also Pall Corp.*, 922 F. Supp. at 201 (“The courts of this Circuit favor resolution of related claims in the same forum[.]”). Maintaining this case in this Court would efficiently use, to the extent it is relevant, the Court’s prior familiarity with the underlying facts.

For the reasons set forth above, each of the factors relevant to a motion to transfer under § 1404(a) either affirmatively favors venue in Vermont or does not favor transfer.

Defendants face a very heavy burden here, one that they have not met. Ultimately, after full consideration of “the convenience of parties and witnesses, in the interest of justice,” 28 U.S.C. § 1404(a), this matter should remain in this Court.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants’ Motion for Change of Venue.

DATED at Burlington, Vermont this 15th day of February, 2013.

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UNITED STATES DISTRICT COURT
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ISABELLA MILLER-JENKINS a/k/a ISABELLA
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LISA MILLER-JENKINS, TIMOTHY D. MILLER,
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CHRISTIAN AID MINISTRIES, INC., CHRISTIAN
AID MINISTRIES, INC., RESPONSE UNLIMITED,
INC., PHILIP ZODHIATES, individually and as an
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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 agent for THOMAS ROAD BAPTIST CHURCH,
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CERTIFICATE OF SERVICE

I, Lisa B. Shelkrot, Esq., attorney for Plaintiffs, Janet Jenkins, for herself and as next friend of Isabella Miller-Jenkins, a/k/a Isabella Miller, hereby certify that on February 15, 2013, I electronically filed with the Clerk of the Court Plaintiffs' Response to Motion for Change of Venue on Behalf of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc., and Victoria Hyden using the CM/ECF electronic filing system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

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Brooks G. McArthur, Esq.
Joshua M. Autry, Esq.
Robert G. Cain, Esq.
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DATED AT Burlington, Vermont this 15th day of February, 2013.

/s/ Lisa B. Shelkrot, Esq. _____

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