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 TO DISMISS BY DOUGLAS WRIGHT

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, hereby oppose the Motion

by Douglas Wright to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim.

In Count Five of the Amended Complaint, Plaintiffs allege that Defendant Wright was in a unique position to stop Isabella Miller-Jenkins' abduction and the violation of Plaintiffs' civil rights, and that he failed to do so. This constitutes a violation of 42 U.S.C. § 1986. Not only did Defendant Wright fail to act when he could have notified the authorities that the abduction was about to occur, but he also helped to cover up his co-defendants' crimes by disposing of Lisa Miller's personal items. For this reason, Plaintiffs allege that Defendant Wright neglected to prevent the torts of his co-defendants and caused substantial harm to Janet Jenkins and Isabella. Plaintiffs do not allege any other claims against Defendant Wright.

I. THE COURT HAS PERSONAL JURISDICTION OVER DEFENDANT WRIGHT.

A. Standard of Review for Personal Jurisdiction.

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), plaintiff bears the burden of establishing the court's jurisdiction over defendants. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). However, if a forum's personal jurisdiction over a defendant is questioned before discovery has commenced, as it is here, the plaintiff only has to establish, *prima facie,* that personal jurisdiction is proper based on information in the complaint as well as supporting documentation in order to defeat the motion. *Ball v. Metallurgie Hoboken-Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir. 1990). This showing may rest solely on plaintiff's own pleadings, affidavits and supporting materials. *Tom and Sally's Homemade Chocolates, Inc. v. Gasworks, Inc.,* 977 F. Supp. 297, 300 (D.Vt. 1997). The court must assume all the factual

allegations in the complaint are true and resolve all doubts in plaintiff's favor "notwithstanding a controverting presentation by the moving party." *A.I. Trade Fin., Inc. v. Petra Bank,* 989 F.2d 76, 79-80 (2d Cir. 1993). Thus, at this early pre-discovery stage in the litigation, although Defendant Wright has submitted an affidavit in opposition to the jurisdictional allegations in Plaintiffs' Amended Complaint, the Court must assume all factual allegations in the Amended Complaint are true and only has to find that Plaintiffs have made a *prima facie* showing of jurisdiction over Defendant Wright. Further, Plaintiffs present evidence along with this Response that directly contradicts the assertion in the affidavit of Defendant Wright that he has had no contact with Vermont. On the contrary, Defendant Wright was a willing participant in the Vermont family court adjudication of custody of Isabella. *See* Plaintiffs' Exhibit A and B. This inconsistency casts doubt on the credibility of Defendant Wright's entire affidavit.

B. Defendant Wright Has Sufficient Minimum Contacts With Vermont For This Court to Assert Jurisdiction.

1. Personal Jurisdiction May Be Either General Or Specific.

A federal court may exercise personal jurisdiction over a foreign defendant if the plaintiff makes a two-part showing: (1) that the defendant is amenable to service of process under the forum state's laws, and (2) that the court's assertion of jurisdiction under these laws comports with the requirements of due process.[1] *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566-567 (2d Cir. 1966). Since Vermont's long-arm statute, 12 V.S.A. § 913(b), permits jurisdiction over foreigners to the full

[1] The same standard applies for cases brought under 28 U.S.C. § 1331, federal question jurisdiction, which applies here because the claim against Defendant Wright is brought under a federal statute. *See, e.g., Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 243-44 (2d Cir. 2007); *Mrs. U.S. Nat. Pageant, Inc. v. Miss U.S. Organization, LLC*, 875 F. Supp. 2d 211, 219 (W.D.N.Y. 2012).

extent of the due process clause, the second prong, due process, is the relevant inquiry. *See Ben and Jerry's Homemade, Inc. v. Coronet Priscilla Ice Cream Corp.*, 921 F. Supp. 1206, 1209 (D.Vt. 1996).

The due process test involves two inquiries relating to minimum contacts and reasonableness. *Metropolitan Life,* 84 F.3d at 567. In analyzing a defendant's contacts with the forum state, the court looks to "some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). The defendant must have certain minimum contacts with the forum state so as to reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980).

The minimum contacts analysis differs for the two types of personal jurisdiction: general and specific. *Gaffney v. Shelton*, 2012 WL 368683, *5 (D. Vt. Feb. 3, 2012). A court may assert general jurisdiction over a foreign defendant when its affiliations with the State are "continuous and systematic." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Specific jurisdiction, on the other hand, relies upon an activity or occurrence that takes place in the forum state and is therefore subject to the State's regulation. *Id.* at 2846. While general jurisdiction addresses all affiliations a party may have with the forum state, specific jurisdiction is confined to the adjudication of issues deriving from or connected with the very controversy that establishes jurisdiction. *Goodyear Dunlop Tires Operations, S.A,* 131 S. Ct. at 2851 (internal citations omitted). Plaintiffs assert that Defendant Wright's contacts with Vermont give rise to specific jurisdiction here.

Specific jurisdiction may also be found even when a defendant has not acted within the jurisdiction if the defendant has engaged in intentional tortious conduct directed at a plaintiff in the forum and causing harm in the forum. *See Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482 (1984). Under *Calder*, intentional actions "directed at the plaintiff and having sufficient impact upon it in the forum" may give rise to specific jurisdiction. *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998). Jurisdiction under *Calder* is appropriate when the forum state has been the "focal point of both the [alleged tort] and of the harm suffered," the defendants knew the plaintiff would suffer the "brunt" of the harm there, and they "expressly aimed" their actions at the state. *Chaiken v. VV Pub. Corp.*, 119 F.3d 1018, 1029 (2d Cir. 1997); *Libutti v. United States*, 178 F. 3d 114, 123 (2d Cir. 1999) (minimum contacts exist when defendant "purposefully directed" harmful effects of its activities at the forum state). This Court has held that minimum contacts for jurisdiction exist under *Calder* where foreign defendants knew that the "brunt of the injury" would be sustained in Vermont. *See Real Good Toys, Inc. v. XL Machine Ltd.*, 163 F. Supp. 2d 421, 425 (2001); *see also Audsley v. RBS Citizen, N.A.*, 2011 WL 1397312, *4 (D.Vt. April 11, 2011).

Once the requisite minimum contacts have been established, the court must then turn to the reasonableness inquiry. Plaintiffs must show that asserting jurisdiction over the defendant would not offend traditional notions of fair play and substantial justice. *Metropolitan Life*, 84 F.3d at 568. The five factors looked to when analyzing reasonableness are: (1) the burden on the defendant; (2) the forum state's interest in the dispute; (3) the plaintiff's interest in convenient and effective relief; (4) the interstate judicial system's interest in efficiently resolving the cases; and (5) the interest of all states

in advancing their shared social policies. *Burger King*, 471 U.S. at 476-477. Where the requirement of minimum contacts has been met, however, "only the unusual case" will not satisfy the reasonableness inquiry. *Mansfield Heliflight, Inc. v. Heli-One Canada Inc.*, 2012 WL 4479851, *9 (D. Vt. Sept. 28, 2012) (citing *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988)); *Metropolitan Life,* 84 F.3d at 575 ("dismissals resulting from the application of the reasonableness test should be few and far between").

C. Defendant Wright's Contacts with Vermont Are Sufficient To Establish Specific Jurisdiction.

Plaintiffs allege in their Amended Complaint that Defendant Wright has sufficient ties to the State of Vermont to subject him to the jurisdiction of this Court. (Amended Complaint ¶ 18.) Those ties include his participation in the criminal trial of Kenneth Miller, with which this Court is familiar. Further, the evidence discovered to date shows that he not only appeared on two occasions in a federal court in Vermont, but also that Defendant Wright has previously and voluntarily involved himself in the Vermont state court family proceedings regarding Lisa Miller and Janet Jenkins. (Plaintiffs' Exhibit A.) Indeed, Wright's involvement with Lisa Miller is alleged to have stretched back to when she first left Vermont and filed in a Vermont Court for dissolution of her civil union in 2004. (Amended Complaint ¶ 20.) As alleged, Lisa Miller discussed her case with Defendant Wright on an ongoing basis between 2004 and 2009. (Amended Complaint ¶ 20.) As a result of this involvement, Defendant Wright was at all times aware of Janet Jenkins' parental rights in Vermont, dating back to 2004.

Significantly, in 2007, Defendant Wright offered his testimony to the Rutland Family Court in support of an effort by Lisa Miller to frustrate Janet Jenkins' visitation rights in Vermont. The attached Affidavit of Pastor Douglas Wright (Plaintiff's Exhibit

A), shows that it was sent by fax on September 19, 2007 from the Keystone Baptist Church to Lisa Miller's attorneys at Liberty University who were representing her in Vermont. This sworn testimony was in turn submitted to the Rutland Family Court in support of Lisa Miller's motion to prevent Isabella from travelling to Vermont to have visitation with Janet Jenkins. While Plaintiff Jenkins cannot specifically recall the live testimony of Douglas Wright, she does recall employees who were working at Keystone Baptist Church under his supervision testifying on behalf of Lisa Miller to support her efforts to frustrate the visitation orders. (*See* Plaintiffs' Exhibit B.)

Hence, to date the Court is presented with three instances in which Defendant Wright was involved in Court proceedings in Vermont relating to Isabella Miller-Jenkins between 2007 and 2012. While Defendant Wright makes much of the fact that his appearance at Kenneth Miller's trial and before the grand jury was pursuant to a subpoena, his offered testimony in the family court was clearly made of his own free will, and not under compulsion. The allegations in the Amended Complaint, along with the additional evidence presented in the attached affidavits, show that Defendant Wright has systematically involved himself in the custody battle involving Isabella Miller-Jenkins. The allegations against Defendant Wright arise from that particular involvement. Here, Plaintiffs have alleged that Defendant Wright, despite his long-standing awareness of Janet Jenkins' parental rights and attempted interference with those rights, knew of Lisa Miller's plan to abduct Isabella in September 2009, was in a unique position to stop it from happening, yet failed to take any steps to notify law enforcement or Janet Jenkins. The violation for which he is being haled into this Court directly arises from his contact with the Vermont Courts and Vermont litigants. Hence, this case will result in "the

adjudication of issues deriving from or connected with the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A,* 131 S. Ct. at 2851 (internal citations omitted).

Although Defendant Wright contends that his tortious omission of failing to notify law enforcement of Lisa Miller's crime took place in Virginia rather than in Vermont, he is incorrect. Because he should have contacted Vermont authorities based on the Vermont family court involvement, his omission occurred in Vermont. As a result of Defendant Wright's neglect, Janet Jenkins was forced to call the police several months later when it was too late to prevent the abduction of Isabella. Hence, Wright's omission occurred in Vermont, where he had a duty to notify law enforcement and Janet Jenkins but failed to do so. In addition, his tortious omission was directed at Vermont because the harm was felt – and was intended to be felt – in this jurisdiction by Plaintiff Jenkins. *See Calder*, 465 U.S. at 788.

D. Asserting Jurisdiction Over Defendant Wright Complies With the Reasonableness Inquiry.

After determining that the exercise of jurisdiction over Defendant Wright is appropriate on the basis of his contacts with Vermont, the Court must assess whether the exercise of jurisdiction would be reasonable and in keeping with "traditional notions of fair play and substantial justice." *Mansfield Heliflight*, 2012 WL 4479851 at* 9, (quoting *Int'l Shoe*, 326 U.S. at 320). Where the requirement of minimum contacts has been met, "only the unusual case" will not satisfy the reasonableness inquiry. *Id.* (citing *Am. Greetings Corp.*, 839 F.2d at 1170); *see also Metropolitan Life,* 84 F.3d at 575 ("dismissals resulting from the application of the reasonableness test should be few and far between"). In making the reasonableness assessment, the Court looks to the burden

on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of several states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 477 (internal quotations omitted).

Applying these factors to Defendant Wright shows that exercising jurisdiction in Vermont will not violate traditional notions of fair play and substantial justice. In *Tom and Sally's Homemade Chocolates*, the Court found that fair play and substantial justice were not offended when "the burden of litigating in an out of state forum would be no more for the defendant than it would be for Tom and Sally's [a Vermont Corporation] if the litigation were in [defendant's home state]." 977 F. Supp. at 301. Here, litigation in Virginia would be an equal burden on Plaintiff Jenkins as litigation in Vermont would be on Defendant Wright. Further, any burden on Defendant Wright is mitigated because "[w]hile there are always costs to defending a lawsuit, particularly in a foreign state, that burden is far less today than it once was due to advances in communications and transportation." *Mansfield Heliflight,* 2012 WL 4479851 at *9 (quoting *Irving v. Revera*, 2011 WL 5329726, *4 (D. Vt. Nov. 4, 2011)). Defendant Wright's ability to litigate in Vermont is demonstrated by the fact that he has already taken the step of retaining Vermont counsel. *See id.* at *9. Plaintiff Jenkins, on the other hand, is a resident of Vermont who is a self-employed day-care provider and works from home. Requiring her to bring this litigation in another forum would be overly burdensome and would effectively require her to close her business. *See Sollinger v. Nasco Int'l, Inc.*, 655 F.

Supp. 1385, 1388 (D.Vt. 1987) (Vermont craftsperson has interest in securing relief in a Vermont court).

With respect to Vermont's interest in having the dispute litigated here, Plaintiff Jenkins, a Vermont resident, alleges that she was injured by the neglect of the nonresident defendant. As this Court has held, Vermont "has an interest in providing a forum for its citizens who have been injured by the intentional acts of nonresidents." *Audsley*, 2011 WL 1397312 at *5 (citing *McGee v. Intl. Life Ins. Co.*, 355 U.S. 220, 223 (1957)); *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 24 (2d Cir. 1988). In addition, Vermont has an interest in seeing orders of its own courts enforced. The Vermont Superior Court and Vermont Supreme Court have issued decisions regarding the custody of Isabella that are being consciously evaded by Defendant Lisa Miller with the assistance of Defendant Wright in failing to report the crime, and helping Lisa Miller cover her tracks. Further, this Court is also where the criminal prosecutions of some of the individuals involved in the kidnapping of Isabella are pending.

In assessing whether litigation in Vermont would ensure the efficient administration of justice, "courts generally consider where witnesses and evidence are likely to be located." *Metropolitan Life*, 84 F.3d at 574. Here, Plaintiff is a Vermont resident and her witnesses and evidence are located here. Defendant Wright's witnesses are likely in Virginia so this factor does not favor either party.

Finally, the Court looks to the "common interests of the several states in promoting substantive social policies" to assess the reasonableness of the exercise of jurisdiction. *Metropolitan Life*, 84 F.3d at 575. Here, this factor weighs in favor of maintaining jurisdiction in Vermont as both Vermont and Virginia courts have repeatedly

ruled since 2006 that Vermont has jurisdiction over the custody of Isabella. *See, e.g.*, *Miller-Jenkins v. Miller-Jenkins*, 2006 Vt. 78, 912 A. 2d 951 (2006); *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (2006). The basis for this lawsuit arises in part from the Vermont custody order.

As these factors all weigh in favor of jurisdiction, Plaintiffs have made a prima facie showing of facts supporting the assertion of personal jurisdiction over Defendant Wright, such that maintaining this suit against him "does not offend the traditional notions of fair play and substantial justice." *See Int'l Shoe*, 326 U.S. at 316. Accordingly, Defendant Wright's Motion to Dismiss pursuant to F.R.C.P. 12(b)(2) should be denied.

II. PLAINTIFFS STATE A CLAIM AGAINST DEFENDANT WRIGHT.

A. Legal Standard Under Rule 12(b)(6).

Under Rule 12(b)(6), the Court must accept as true all factual allegations, drawing all reasonable inferences in the plaintiff's favor. *See Ball v. Metallurgie Hoboken–Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir. 1990) (stating that the court assumes the truth of the plaintiff's factual allegations for purposes of a Rule 12(b)(6) motion). Ultimately, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (brackets added; citation omitted).

B. Plaintiffs Have Properly Stated a Claim Under 42 U.S.C. § 1986 Against Defendant Wright.

Plaintiffs state a claim against Defendant Wright for neglect to prevent the violation of Plaintiffs' civil rights, in violation of 42 U.S.C. § 1986. The Amended Complaint adequately alleges knowledge of the wrongful acts, as required by the plain meaning of § 1986. A claim for violation of § 1986 must be premised on a viable claim under 42 U.S.C. § 1985, and Plaintiffs have alleged a violation of § 1985(3) by other Defendants in Count Four of the Amended Complaint. Plaintiffs hereby incorporate by reference their arguments made in response to the motions to dismiss Count Four by other Defendants. Defendant Wright challenges the sufficiency of the § 1985(3) claim that underlies Plaintiffs' § 1986 claim against him by contending a lack of discriminatory animus and a lack of state action. As addressed below, both of these argument fail as to the underlying § 1985(3) claim in Count Four.

1. The Plain Language of 42 U.S.C. §1986 Only Requires that the Defendant Knew of the Wrongful Act, Namely the Kidnapping, Not the Conspiracy.

Defendant Wright argues that to state a claim under § 1986, Plaintiffs must show not only that he had knowledge that Isabella was about to be kidnapped, but that he had knowledge of a conspiracy to do so. This interpretation contravenes the plain language of the statute, which states that

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented[.]

42 U.S.C. § 1986 (emphasis added).

The statute plainly requires knowledge of the wrongs – in this case the kidnapping – not the conspiracy. The first step in any statutory analysis is consideration of plain meaning. *See, e.g., Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004) ("Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there."). The operative word in the section quoted above is "wrongs," which is merely modified by the phrase "conspired to be done." It is therefore not required under the plain meaning of § 1986 for a defendant to have knowledge of a conspiracy, so long as he has knowledge of the "wrongs . . . about to be committed." As alleged in the Amended Complaint, Defendant Wright had knowledge of the planned kidnapping of Isabella, and yet he did nothing to prevent it.

Caselaw supports this plain reading of § 1986. *See, e.g., Buck v. Board of Elections*, 536 F.2d 522, 524 (2d Cir. 1976) ("Knowledge *of the acts* is a statutory prerequisite to suit under 42 U.S.C. § 1986.") (emphasis added); *Rodgers v. Mount Union Borough*, 816 F. Supp. 308, 314 (M.D. Pa. 1993) ("Section 1986, a companion statute [to Section 1985], allows an action against a party who knows that a § 1985 deprivation is going to take place, has the power to prevent it, and fails to do so.")

Although Defendant Wright cites several cases in support of his theory that a § 1986 defendant must know of both the conspiracy and the crime, those cases do not controvert the analysis above. In all of those cases, the court ruled that it was sufficient to know of the conspiratorial agreement even if the defendant didn't know the exact nature of the crime that was about to occur. In other words, these cases simply support the proposition that knowledge of the conspiratorial agreement is *sufficient* for a violation

under § 1986, but not that it is *necessary*. Here, Plaintiffs have adequately pled Defendant Wright's knowledge of the planned wrongful acts.

2. Even Though Not Required to State a Claim, the Amended Complaint Contains Sufficient Facts Alleging Wright's Knowledge of a Conspiracy.

Further, even if the Court finds that knowledge of a conspiracy is necessary for stating a claim under § 1986, the Amended Complaint has adequately done so with regards to Defendant Wright. The Amended Complaint alleges that Defendant Wright knew that Lisa Miller had agreed with at least one other person to kidnap Isabella, and that at least one other person committed an act in furtherance of the crime. Even though Plaintiffs chose not sue Defendant Wright for being part of the conspiracy, the facts would indeed support such a charge. Defendant Wright cannot now argue that he did not know of any agreement when he was a participant in it.

The allegations of the Amended Complaint indicate that Defendant Wright knew that others were involved in the kidnapping. Plaintiffs allege that not only was Defendant Wright in contact with Lisa Miller regarding disposing of her belongings, but also that after the Rutland Family Court ruled to transfer custody to Janet Jenkins on November 20, 2009, he was in contact with Defendant Kenneth Miller about disposing of more property. (Amended Complaint ¶ 44). Further, even after he learned of Kenneth Miller's involvement with the kidnapping, Defendant Wright still did nothing to prevent the ongoing kidnapping of Isabella Miller-Jenkins. If Defendant Wright had acted, even at this later date, Janet Jenkins would have had a much better chance of locating Isabella and preventing her detention outside the country after the January 1, 2010 transfer of custody date.

3. The Amended Complaint Properly Alleges Discriminatory Animus.

The Amended Complaint properly alleges discriminatory animus on the basis of gender, religion, and sexual orientation, in support of the claim for violation of § 1985(3). As noted above, Count Five against Defendant Wright relies upon the stated violation of § 1985(3) against other Defendants.

The Amended Complaint alleges that the Defendants worked in concert to deprive Plaintiff Jenkins of her lawful custodial rights because they did not accept that a child could lawfully have two mothers, rather than a mother and a father. (Amended Complaint ¶¶ 43, 60.) Had custody been awarded to a male ex-husband of Lisa Miller, regardless of his sexual orientation, the pronouncements of Lisa Miller and the Defendants (*see, e.g.,* Amended Complaint ¶¶ 43, 45, 48) would have been nonsensical. As it was, the fact that the Vermont Family Court awarded visitation and ultimately full custody to Isabella's second *mother* was the basis of the Defendants' outrage and participation in the conspiracy. Taken together, the allegations establish that the Defendants took action because of the gender of Isabella's second parent, Janet Jenkins. The allegations of the Amended Complaint make it plain that the Defendants' concern was not the fact that Plaintiff Jenkins was a non-biological parent; for example, there is no suggestion that the Defendants would have acted similarly if Isabella had an adoptive father. Rather, the Defendants' activities were taken as a result of the fact that Janet Jenkins was a second mother to the child. Thus the motivating animus of the Defendants was the gender of Isabella's second parent.

The Amended Complaint further alleges that Lisa Miller and her co-conspirators refused to obey court orders regarding Isabella because Lisa Miller's religion, which she

did not share with Janet Jenkins, dictated that Isabella be shielded from homosexuality. (Amended Complaint ¶¶ 20, 48.) The co-conspirators' animus based on religion is a separate basis for the conspiracy to violate the Plaintiffs' civil rights.

Finally, the Second Circuit has now held that homosexuality is a status entitled to heightened scrutiny under the Equal Protection Clause. *See Windsor v. United States*, 2012 WL 4937310 (2d Cir. Oct. 18, 2012). Even if the Amended Complaint did not adequately establish unlawful action based on gender, it certainly alleges unlawful action based on sexual orientation.

4. State Action is Not Required to State a Claim Under § 1985(3), And, To the Extent It Is Required, Plaintiffs Have Adequately Alleged State Action.

Both purely private conspiracies and conspiracies involving state action may be unlawful under § 1985(3), so state action is not necessarily required to state a claim for violation of that statute. *See Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971). Whether state action is needed depends on the nature of the right asserted. If the conspiracy involves a constitutional right that protects individuals from government action – such as First Amendment rights – then the claim must allege state action. *See, e.g., United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 830 (1983) (holding that a claim for conspiracy to violate First Amendment rights required state action). However, for constitutional rights that are protected against private impairment, a claim under § 1985(3) need not allege state action. The Supreme Court has recognized rights under the Thirteenth Amendment and the right to interstate travel as being actionable in purely private conspiracies. *See United States v. Kozminski*, 487 U.S. 931, 942 (1988); *United States v. Guest*, 383 U.S. 745, 759-60, n.17 (1966); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274, 278 (1993).

Here, Plaintiffs have alleged a conspiracy to infringe upon Isabella's right to interstate travel to spend time with both her parents, in Virginia and in Vermont. Because Lisa Miller and Janet Jenkins resided in different states, interstate travel was necessary for compliance with the court's visitation and custody orders. (Amended Complaint ¶ 19.) It is firmly established that "the right of interstate travel is constitutionally protected . . . and is assertable against private as well as governmental interference." *Griffin v. Breckenridge*, 403 U.S. 88, 106 (1971). *See also Guest,* 383 U.S. at 759-760, n.17 (recognizing a right of interstate travel as protectable under § 1985(3) against individuals as well as governments). The Amended Complaint makes clear that a foundation for this claim is the right to maintain a parent-child relationship, which, in this case, requires interstate travel. As such, it is not necessary to allege state action to support this § 1985(3) claim regarding the rights of Isabella.

In addition, Plaintiffs have alleged that the Defendants and others interfered with her rights of equal protection. Conspiracy claims for violation of Fourteenth Amendment rights have often been found to require state action. *See, e.g., Edmond v. Hartford Ins. Co.,* 27 Fed.Appx. 51, 53 (2d Cir. 2001) ("[A] claim under § 1985(3) for conspiracy to deny equal protection in violation of the Fourteenth Amendment is not actionable in the absence of state action."). However, the state action requirement can be fulfilled in several ways. First, state action can be shown where "the state is involved in the conspiracy." *Carpenters*, 463 U.S. at 830. Second – and more applicable here – state action is shown where "the aim of the conspiracy is to influence the activity of the state." *Id.* In this context, "the conspirators do not need to be state actors in order for there to be state involvement." *Planned Parenthood Ass'n of San Mateo County v. Holy Angels*

Catholic Church, 765 F. Supp. 617, 623, 624 (N.D. Cal. 1991). Here, among other actions, Defendants conspired to prevent the police from attempting to find Isabella. Plaintiffs have alleged, for example, that Defendant Linda Wall as an agent for TRBC urged others to contact the Vermont police, with the purpose of influencing the activity of Vermont state actors. (Amended Complaint ¶ 52.) In addition, Defendants conspired to prevent the Vermont and Virginia courts from enforcing custody and visitation orders, thus seeking to influence state activity. Accordingly, insofar as Plaintiffs' § 1985(3) claims require state action, Plaintiffs have adequately alleged state action.

III. ALTERNATIVE MOTIONS FOR JURISDICTIONAL DISCOVERY AND LEAVE TO AMEND.

In the event the Court finds that Plaintiffs have not presented sufficient allegations and evidence to establish personal jurisdiction over Defendant Wright, Plaintiffs move, in the alternative, for jurisdictional discovery. The Court has "considerable procedural leeway" in determining how to adjudicate a motion to dismiss under Rule 12(b)(2). *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). The Court may make its determination on the "basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." *Id.* Further, even if the Court determines that Plaintiffs have not made a prima facie showing of personal jurisdiction, it should find that Plaintiffs have at least made a sufficient start towards establishing jurisdiction, which is an adequate basis for granting jurisdictional discovery. *See Ayyash v. Bank Al–Madina*, 2006 WL 587342, at *6 (S.D.N.Y. Mar. 9, 2006) (limited discovery ordered before ruling on subject matter and personal jurisdiction where plaintiff had not made prima facie showing of jurisdiction, but had at least made a "sufficient start at making such a showing") (internal quotation marks omitted); *Uebler v.*

Boss Media AB, 363 F. Supp. 2d 499, 506 (E.D.N.Y. 2005) (although plaintiff had not made prima facie showing of personal jurisdiction, discovery was appropriate). Where "the facts necessary to establish personal jurisdiction lie within [Defendants'] exclusive knowledge," jurisdictional discovery may be particularly warranted. *Uebler*, 363 F. Supp. 2d at 506.

In addition, if the Court grants Defendant Wright's Motion to Dismiss under Rule 12(b)(6), Plaintiffs request leave to amend. *See* FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Defendant Wright's Motion to Dismiss.

DATED at Middlebury, Vermont this 14th day of March, 2013.

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UNITED STATES DISTRICT COURT
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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, 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 agent for THOMAS ROAD BAPTIST CHURCH, INC., and DOUGLAS WRIGHT,

Defendants.

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

CERTIFICATE OF SERVICE

I, Frank H. Langrock, 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 March 14, 2013, I electronically filed with the Clerk of the Court Plaintiffs' Response to Motion to Dismiss by Douglas Wright 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:

Ritchie E. Berger, Esq.
Brooks G. McArthur, Esq.
Peggy J. Schmitz, Esq.
Steven J. Shrock, Esq.

Joshua M. Autry, Esq.
Robert G. Cain, Esq.
Robert G. Hemley, Esq.
Thomas E. McCormick, Esq.
Norman C. Williams, Esq.
Sophie E. Zdatny, Esq.
Sarah Star, Esq.

DATED AT Middlebury, Vermont this 14th day of March, 2013.

/s/ Frank H. Langrock, Esq.
Frank H. Langrock, Esq.
Langrock Sperry & Wool, LLP
111 S. Pleasant St., PO Drawer 351
Middlebury, VT 05753-0351

Attorneys for Plaintiffs

EXHIBIT A

AFFIDAVIT OF PASTOR DOUGLAS B. WRIGHT

Pastor Douglas B. Wright, having been duly sworn, states under oath:

1. I am over the age of 18, and make this affidavit on my personal knowledge of the facts.
2. I am the Pastor of Keystone Baptist Church and serve as the Administrator and Principal for Keystone Christian Academy in Berryville, Virginia.
3. Isabella Miller is enrolled in the K-5 class at our school. The K-5 is a full day curriculum. The school day begins at 8:20 a.m. and ends at 3:00 p.m. Monday through Friday.
4. Attendance is compulsory. Pre-arranged personal days may be excused, but no more than five (5) such days are permitted the entire school year.
5. Leaving school in order to travel out of state constitutes an unexcused absence. As stated in Keystone's handbook, "Punctuality and attendance are necessary for this program to work properly."

FURTHER AFFIANT SAYETH NOT.

DOUGLAS B. WRIGHT

CERTIFICATE OF NOTARY:

COMMONWEALTH OF VIRGINIA:

CITY OF BERRYVILLE:

The foregoing affidavit was subscribed and sworn before me this 19th day of September, 2007.

Carol M. DeHaven
Notary Public

CAROL M. DEHAVEN NOTARY PUBLIC COMMONWEALTH OF VIRGINIA

My commission expires: 7-31-11

EXHIBIT B

AFFIDAVIT OF JANET JENKINS

I, Janet Jenkins, of Fair Haven, in the County of Rutland in the State of Vermont do hereby swear and affirm that the following is true and accurate.

1. In 2003, Lisa Miller moved to Virginia with our daughter Isabella and joined the Keystone Baptist Church.
2. It was my understanding that Douglas Wright was Lisa's pastor and oversaw a school at the church that Isabella later attended.
3. In 2007, when I started to have visits with my daughter again, Lisa filed a motion with the Rutland Family Court to annul the visits based on various things, including inconvenience to her, and Isabella's school schedule. Isabella was in kindergarten at the time.
4. Pastor Wright submitted an affidavit in support of a Motion to prevent Isabella from visiting me in Vermont. That affidavit is attached as Exhibit A to Plaintiffs' Response to Motion to Dismiss by Douglas Wright.
5. I do not specifically recall if he testified in Vermont.
6. I do recall that in 2009, a teacher at the school Isabella attended at Keystone Baptist named Tammy Davis Canfield testified in support of one of Lisa's Motions to prevent visits. The motions were denied.

DATED AT Middlebury, Vermont this 9 day of March, 2013.

Janet Jenkins

On Feb. 9, 2013., the above named Janet Jenkins did appear before me and sign this affidavit under oath.

Notary Public My Commission expires: 2/10/15