

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 KENNETH MILLER

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 Kenneth Miller to Dismiss for Lack of Personal Jurisdiction, Venue, and Failure to State a Claim.

I. THE COURT HAS PERSONAL JURISDICTION OVER KENNETH MILLER.

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, the Court must assume all factual allegations in the Amended Complaint as true and only has to find that Plaintiffs have made a *prima facie* showing of jurisdiction over Defendant Kenneth Miller.

B. Kenneth Miller's Intentional Contacts With Vermont Are Sufficient To Establish Jurisdiction.

Kenneth Miller states in his Motion that Plaintiffs have failed to demonstrate jurisdiction over him because he is a Virginia resident with no contacts with Vermont

other than being forced to attend a trial in this State against his will. (Miller Motion ¶ 2.) Defendant Kenneth Miller ignores, however, Plaintiffs' allegations in the Amended Complaint that he aided and abetted Isabella's kidnapping and that he participated in a RICO conspiracy to kidnap Isabella and conspired to violate Plaintiffs' civil rights. (Amended Complaint ¶¶ 37, 53, 54, 62, 64, 71, 72, 75.) The purpose of these actions was to intentionally harm Plaintiff Jenkins by depriving her of custody of her daughter, causing both emotional and financial damage, and depriving her of her right to equal protection under the law.

When a plaintiff has alleged that a defendant has committed intentional torts, "minimum contacts" for purposes of jurisdiction exists "when a defendant has purposefully directed the harmful effects of his activities at the forum State" and the litigation results from alleged injuries that arise or relate to those activities. *LiButti v. United States*, 178 F.3d 114, 123 (2d Cir. 1999) (citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)). This Court has found minimum contacts to exist where foreign defendants engaged in intentional and allegedly tortious actions expressly aimed at Vermont. *Stuart v. Federal Energy Systems, Inc.*, 596 F. Supp. 458, 462 (D.Vt. 1984) (minimum contacts exist in Vermont over employees of California corporation who committed fraud aimed at plaintiff in Vermont); *Real Good Toys, Inc. v. XL Machine Ltd.*, 163 F. Supp. 2d 421, 424-425 (D.Vt. 2001) (minimum contacts exist where foreign defendants knowingly and willfully infringed on the copyright and trade dress of a Vermont corporation, while knowing that the "brunt of the injury" would be sustained in Vermont); *Audsley v. RBS Citizen, N.A.*, 2011 WL 1397312, *4 (D.Vt. April 11, 2011) (minimum contacts over foreign defendants found where foreign defendants committed

intentional torts aimed at Vermont resident and her business with knowledge that brunt of harm would be felt in Vermont). Here, there is no doubt that the torts alleged by Plaintiffs, in which Kenneth Miller is alleged to have actively participated, were intentional and calculated to injure Plaintiff Jenkins in Vermont by depriving her of her parental rights in Vermont. In aiding and abetting Isabella's kidnapping, Defendant Kenneth Miller knew that the "brunt of the injury" would be sustained in Vermont where Plaintiff Jenkins resides and where the Vermont Superior Court ordered Plaintiff Jenkins to have parent-child contact with Isabella.

For the foregoing reasons, Defendant Kenneth Miller's intentional conduct, known and intended to cause injury in Vermont, is sufficient to give the Court jurisdiction over him. *See Real Good Toys, Inc.*, 163 F. Supp. 2d at 424-425.¹

C. Asserting Jurisdiction Over Kenneth Miller Complies With the Reasonableness Inquiry.

After determining that the exercise of jurisdiction over Kenneth Miller 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, Inc. v. Heli-One Canada Inc.*, 2012 WL 4479851, *9 (D. Vt. Sept. 28, 2012) (quoting *Int'l Shoe v. Washington*, 326 U.S. 310, 320 (1945)). Where the requirement of minimum contacts has been met, "only the unusual case" will not satisfy the reasonableness inquiry. *Id.* (citing *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988)); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 575 (2d Cir. 1966) ("dismissals resulting from the

¹ In addition, as Defendant Kenneth Miller notes in his Motion, he has appeared in Vermont on numerous occasions to defend himself on criminal charges arising from the kidnapping of Isabella. (Miller Motion at ¶ 2).

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 Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

Applying these factors to Kenneth Miller shows that exercising jurisdiction in Vermont will not violate traditional notions of fair play and substantial justice, as “the burden of litigating in an out of state forum would be no more for the defendant than it would be for [Plaintiff] if the litigation were in [Defendant’s home state].” *Tom and Sally’s Homemade*, 977 F. Supp. at 301. Here, litigation in Virginia would be an equal burden on Plaintiff Jenkins as litigation in Vermont would be on Kenneth Miller. Kenneth Miller’s ability to litigate in Vermont is demonstrated by the fact that he has already appeared in multiple court proceedings in Vermont and has retained Vermont counsel. *See Mansfield Heliflight*, 2012 WL 4479851 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 craftsman has interest in securing relief in a Vermont court).

With respect to Vermont’s interest in having the dispute litigated here, Janet Jenkins, a Vermont resident, alleges that she was injured by the intentional actions of the

nonresident defendants, including Kenneth Miller. 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)); *see also 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 Lisa Miller with the assistance of Kenneth Miller. Further, this Court is also where the criminal prosecution of Defendant Kenneth Miller occurred.

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 Kenneth Miller’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 Kenneth Miller, such that maintaining this suit against them does not offend the traditional notions of fair play and substantial justice. *See Int'l Shoe*, 326 U.S. at 316. Accordingly, Kenneth Miller's Motion to Dismiss pursuant to F.R.C.P. 12(b)(2) should be denied.

II. PERSONAL JURISDICTION OVER KENNETH MILLER IS PROPER UNDER RICO.

Even if personal jurisdiction were not established as to Kenneth Miller under a traditional minimum contacts analysis, personal jurisdiction and venue would nonetheless be established over Miller pursuant to 18 U.S.C. § 1965, the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs hereby incorporate their response to the Liberty Defendants' Motion to Dismiss with respect to personal jurisdiction and venue under RICO.

With respect to Defendant Kenneth Miller specifically, he was served personally while he was in Vermont. The Second Circuit's immunity from service based on attendance in court is inapplicable here, because the instant lawsuit involves "vindication of the same cluster of rights and interests" as the criminal case in which he appeared here. *Cabiri v. Assaie-Gyimah*, 921 F. Supp. 1189, 1194 (S.D.N.Y. 1996) (approving exception to immunity from service).

Moreover, Kenneth Miller was convicted of having aided and abetted an international parental kidnapping, pursuant to 18 U.S.C. § 1204. The same nexus of facts involved in his conviction supports the RICO predicate crime alleged here of kidnapping in violation of 13 V.S.A. § 2405(a)(2) and aiding in custodial interference in violation of 13 V.S.A. § 2451. It is well-established under Vermont law that custodial interference in

violation of § 2451 can be prosecuted in Vermont despite the fact that the defendant performed no acts in Vermont, so long as the custodial parent improperly deprived of the child lives in Vermont. *State v. Doyen*, 165 Vt. 43 (1996) (Vermont has jurisdiction over defendant in prosecution for violation of 13 V.S.A. § 2451 where custodial parent resided in Vermont, even though defendant did not perform any acts in Vermont); *see also State v. Wootten*, 170 Vt. 485 (2000). Thus, Defendant Kenneth Miller is clearly subject to jurisdiction in Vermont under the RICO statutes.

III. VENUE IS PROPER IN THE DISTRICT OF VERMONT.

Under 28 U.S.C. § 1391(b)(2), venue is proper in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred[.]” Kenneth Miller wrongly contends that Vermont is not a viable venue for this action. On the contrary, a “substantial part” of the events underlying this suit occurred or were felt in Vermont, thus satisfying the venue requirements of § 1391(b)(2). In assessing venue, the Court should not be distracted by trying to determine whether more events occurred in Vermont or elsewhere. “Section 1391(b)(2) does not restrict venue to the district in which the ‘most substantial’ events or omissions giving rise to a claim occurred.” *Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408, 432 (2d Cir. 2005).

The effects of Defendant Kenneth Miller’s actions are felt in Vermont, as this is where Plaintiff Jenkins resides and where the Vermont courts ordered Plaintiff Jenkins to have custody of Isabella. These effects are a substantial part of the events alleged in the Amended Complaint and thus support venue in Vermont. *See Astor Holdings, Inc. v. Roski*, 2002 WL 72936, at *8 (S.D.N.Y. Jan. 17, 2002) (“Venue will usually exist where an act outside the district causes physical injury or other tortious effect inside the district.”); *cf. State v. Doyen*, 165 Vt. 43 (1996); *State v. Wootten*, 170 Vt. 485 (2000). In

addition, each of the actions by Defendant Kenneth Miller in planning the kidnapping of Isabella were intended to interfere with Plaintiff Jenkins' parental and custodial rights in Vermont.

Venue here is also proper under the more liberal RICO venue provision, 18 U.S.C. § 1965(a) and (b). "Congress intended the civil RICO venue provisions to be a liberalization to the federal venue statute[.]" *City of New York v. Cyco.net, Inc.*, 383 F. Supp. 2d 544 (S.D.N.Y. 2005) (further noting that venue and personal jurisdiction merge into a single inquiry under the RICO venue provision). Indeed, "it is the policy in this Circuit to conflate personal jurisdiction and venue by reading the RICO venue provision to permit adjudication in any district where minimum contacts are established." *Id.* (citing *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 71 (2d Cir. 1998)). Thus, for the reasons this Court has personal jurisdiction over Kenneth Miller regarding the RICO claims, this Court is also the proper venue for this action.

IV. THE AMENDED COMPLAINT STATES CLAIMS AGAINST KENNETH MILLER UPON WHICH RELIEF MAY BE GRANTED.

As Defendant Kenneth Miller has put forth no legal argument or factual support for his Motion to Dismiss pursuant to F.R.C.P. 12(b)(6), other than to join in his co-defendants' motions, Plaintiffs specifically incorporate their substantive response to the Liberty Defendants' Motion under F.R.C.P. 12(b)(6) into this Response.

A. Plaintiffs Have Properly Stated and Pled a Common Law Tort of Kidnapping.

Defendant Kenneth Miller's Motion states in a conclusory manner that kidnapping is not a viable cause of action. (Miller Motion at ¶ 6.) Kenneth Miller provides no law or fact to support this statement. Plaintiffs specifically incorporate their

response to the Liberty Defendants' Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) on this point, which demonstrates the viability of Plaintiffs' claim for kidnapping.

B. Plaintiffs Have Stated Claims under Civil RICO.

Defendant Kenneth Miller's Motion states that Plaintiffs have failed to demonstrate RICO standing and have failed to properly plead a pattern of activity. (Miller Motion at ¶¶ 7-8.) Again, Kenneth Miller's motion provides no law or fact to support its assertions. Contrary to Defendant Kenneth Miller's statements, the RICO counts against Kenneth Miller are adequately pled and Plaintiffs have standing to pursue those claims. Plaintiffs hereby incorporate and rely on their response to the Liberty Defendants' Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) on this point.

C. Plaintiffs Have Stated a Claim for Conspiracy to Violate Civil Rights.

Defendant Kenneth Miller states that Plaintiff has failed to properly plead a civil conspiracy. (Miller Motion at ¶ 9.) For the reasons set forth in Plaintiffs' response to the Liberty Defendants' motion to dismiss, the Amended Complaint adequately alleges a conspiracy, discriminatory animus, a causal link between Defendants' alleged actions and state action to the extent required. Plaintiffs incorporate and rely on their response to the Liberty Defendants' Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) on this point.

V. 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 Kenneth Miller, 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 Kenneth Miller’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.”).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Kenneth Miller’s Motion to Dismiss.

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

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/s/ Frank H. Langrock

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UNITED STATES DISTRICT COURT
FOR THE
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JANET JENKINS, for herself and as next friend of
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and as an agent for both RESPONSE UNLIMITED,
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related ministry THOMAS ROAD BAPTIST
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as agent for THOMAS ROAD BAPTIST CHURCH,
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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 Kenneth Miller 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.
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Peggy J. Schmitz, Esq.
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DATED AT Middlebury, Vermont this 14th day of March, 2013.

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