

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, et al,)	
Plaintiffs)	
)	
v.)	Docket No. 2:12-cv-184
)	
KENNETH L. MILLER, et al,)	
Defendants)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF
DEFENDANTS PHILIP ZODHIATES AND RESPONSE UNLIMITED,
INC. FOR IMPROPER VENUE AND LACK OF PERSONAL JURISDICTION

Preliminary Statement

Plaintiffs fall short of meeting their burden of establishing that this action may proceed in Vermont on many fronts, but on none more so than venue. Based on the two-part test established by the Second Circuit in *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353 (2d Cir. 2005) and *Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), the claims against Defendants Zodhiates and Response Unlimited, Inc. (“RUL”) (collectively “Movants”) may not be heard in this district. The reason is straightforward: none of the alleged actions of Zodhiates or RUL giving rise to the Plaintiffs’ claims took place here.

Plaintiffs argue that they should receive the benefit of any doubt at this early stage. *See* Opp. at 2. But it is in no one’s interest to go forward in an incorrect forum—including Plaintiffs themselves. If this case proceeds through trial only to be reversed on either venue or jurisdictional grounds, both the parties and this Court will have wasted significant resources. For that reason, it makes sense to determine the matter definitively now. Moreover, if the ruling is adverse to the Plaintiffs, they may obtain immediate review.

Plaintiffs’ claims suffer from other defects as well. They have not and cannot meet their burden of establishing personal jurisdiction over either Movant. General jurisdiction is lacking over RUL, because it does not have “continuous and systematic general business contacts” with Vermont. General jurisdiction over Zodhiates is not alleged. Although Plaintiffs assert that specific jurisdiction is available against both Movants, Plaintiffs have not and could not allege that either was “a *primary* participant in intentional wrongdoing . . . expressly directed at [the] forum.” *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008) (emphasis added). The alleged actions of Mr. Zodhiates and RUL were at least as “secondary” as those of the Saudi princes in *Terrorist Attacks* who funded terrorist organizations vowing to

attack the U.S. Yet the Second Circuit said there that the princes' conduct was "far too attenuated to establish personal jurisdiction in American courts." *Id.* at 95.

Plaintiffs' effort to assert personal jurisdiction and venue based on RICO also fails. Under 18 U.S.C. § 1965(b), nationwide jurisdiction is available only where no single district exists where all defendants may be sued. Plaintiffs have not demonstrated that such is the case here. On the contrary, the allegations in their Complaint suggest that personal jurisdiction would be available over all Defendants in the Western District of Virginia. For all of these reasons, Plaintiffs' Complaint should be dismissed.¹

Discussion

I. VENUE IS NOT AVAILABLE IN THIS DISTRICT WITH RESPECT TO PLAINTIFFS' STATE LAW CLAIMS.

Venue is not available under 28 U.S.C. § 1391(b) in this District under the analysis mandated by the Supreme Court and Second Circuit. None of the acts of Mr. Zodiates or Response Unlimited, Inc. which the Plaintiffs allege give rise to their claims took place here. Contrary to Plaintiff Jenkins' assertion, the allegation that she suffered a "tortious effect" in Vermont does not suffice for venue. *Cf. Opp.* at 17.

As explained in Movants' opening brief, "the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 183-84 (1979) (emphasis in

¹ Plaintiffs suggest that, if this Court deems Plaintiffs' venue and personal jurisdiction allegations insufficient, they should be given jurisdictional discovery. *See Opp.* at 18-19. Plaintiffs' allegations establish that venue is improper in this District with respect to both Movants, however. Accordingly, even if Plaintiffs had raised factual questions relating to personal jurisdiction, which they have not, these questions would not need to be reached. Accordingly, there is no occasion for jurisdictional discovery.

original). As the Supreme Court stressed, the statute does *not* “give the plaintiff the right to select the place of trial which best suits his convenience.” *Id.* at 184; *see also id.* at 185 (in deciding venue, court should consider “the convenience of the defendant (but *not* of the plaintiff)”) (emphasis in original).

Courts “are required to construe the venue statute strictly.” *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005). The Second Circuit has established a two-part test:

First, a court should identify the nature of the claims and acts or omissions that the plaintiff alleges give rise to those claims. *Gulf Ins.*, 417 F.3d at 357. Second, the court should determine whether a substantial part of those acts or omissions occurred in the district where suit was filed. . . . *See id.*

Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 432 (2d Cir. 2005).

In discussing the test, the *Daniel* court confirmed *Leroy’s* observation that section 1391(b) is designed to protect the defendant. 428 F.3d at 432. It cited a Third Circuit case, *Cottman Transmission Sys. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994), for the proposition that section 1391 “favors the defendant.” *Id.* It also relied on an Eighth Circuit decision, *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995), to explain that “by referring to ‘events and omissions giving rise to the claim,’ Congress meant to require courts to focus on relevant activities of the defendant, not the plaintiff.” *Id.* (emphasis added).²

Applying the two-part test to the facts before it, the *Daniel* court reversed the trial court’s determination that venue was available in the Western District of New York. The lead plaintiff, Dr. Gregory F. Daniel, was an emergency medicine physician in Buffalo, New York. 428 F.3d

² Plaintiffs cite *Daniel* for the proposition that venue does not require a finding that the “most substantial” events occurred in Vermont. *See Opp.* at 17. Movants do not quarrel with that statement. In the instant case, however, Movants engaged in *no* actions at all in Vermont.

at 418. He and other physicians brought an antitrust claim against the American Board of Emergency Medicine (“ABEM”) after it ceased certifying emergency doctors as “specialists” based solely on their experience. *Id.* at 415-16. Rather, ABEM required would-be specialists to complete an approved residency training program. *See id.* at 416. Plaintiffs contended that ABEM had colluded with another defendant, the Council of Emergency Medicine Residency Directors, as well as 28 named hospitals, to monopolize the market for emergency physicians. 428 F.3d at 414.

The Second Circuit concluded that venue did not lie in New York. *See* 428 F.3d at 434. Although ABEM sent rejection letters to Dr. Daniel and others in the Western District, these were “certainly not ‘a substantial part of the events or omissions giving rise to the [plaintiff’s antitrust] claim[s].’” *Id.* Rather, the *Daniel* court emphasized, the “vast majority” of defendants’ challenged actions, including ABEM’s decision to eliminate certification based on experience, its refusal to permit plaintiffs to take the certification exam, and the refusal of defendant hospitals to hire physicians who were not certified, all took place outside of the Western District. *See id.* Accordingly, venue was lacking.

Many courts have followed both *Daniel* and *Gulf Insurance* to find venue improper where the plaintiff failed to establish that a substantial part of the defendant’s actions occurred in the district where suit was filed. *See, e.g., Albergo v. Pearlman*, 07 Civ. 2285 (GBD), 2011 U.S. Dist. LEXIS 2380, *13-15 (S.D.N.Y. Jan. 10, 2011) (finding venue improper under *Daniel* and *Gulf Insurance* where plaintiffs alleged RICO and other claims arising out of a \$118 million Ponzi scheme injuring many New York plaintiffs, but failed to allege that any of the acts of defendants giving rise to the claims occurred in New York); *Jackson v. Am. Brokers Conduit*, 09 Civ. 6045 (RMB), 2010 U.S. Dist. LEXIS 49008, *5-7 (S.D.N.Y. May 13, 2010) (citing *Gulf*

Insurance and finding venue improper in part because the complaint “fail[ed] to identify any substantial acts which occurred” in the proposed forum); *Wolf v. AVX Corp.*, 08 Civ. 934 (WHP), 2008 U.S. Dist. LEXIS 49197, *4-5 (S.D.N.Y. June 27, 2008) (finding venue improper under *Gulf Insurance* where plaintiff’s employment agreement was performed in Florida and plaintiff did not allege that actions of defendant giving rise to his claim occurred in Southern District).

Based on these cases, this suit should not be permitted to proceed in this District. As in *Daniel*, the wrongful actions of which Movants are accused occurred elsewhere—mainly in Virginia. *Cf.* Opp. at 17-18; Cmpl. ¶¶ 19-20, 25-27, 29, 34-37, 39-42, 53-54, 59. Although Plaintiffs argues that the effects of Movants’ actions were “felt” in Vermont, the focus for venue purposes is on where the defendant’s actions occurred. *See Daniel*, 428 F.3d at 432 (“by referring to events and omissions giving rise to the claim, Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff”) (quoting *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995)); *see also Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371-72 (11th Cir. 2003) (noting that Congress “meant to require courts to focus on relevant activities of the defendant, not of the plaintiff”) (quotations omitted); *Gaines, Emhof, Metzler, & Kriner v. Nisberg*, 843 F.Supp. 851, 854 (W.D.N.Y. 1994) (“The phrase ‘events or omissions giving rise to the claim’ in 28 U.S.C. § 1391(b)(2) suggests a focus on the actions of the defendant, not on those of the plaintiff”).³ Because Movants’ actions took place elsewhere, Plaintiffs cannot meet their burden of establishing venue under section 1391(b).

³ Plaintiffs rely solely on *Astor Holdings, Inc. v. Roski*, 2002 U.S. Dist. LEXIS 758, 2002 WL 72936 (S.D.N.Y. 2002), in arguing that venue is available in any district where a “tortious effect” is felt. *See* Opp. at 17. In fact, the court said there that the plaintiffs’ contention that venue was available “solely because ‘plaintiffs were injured in New York’” “overstates the breadth of the law of venue.” 2002 U.S. Dist. LEXIS at *23. *Astor Holdings* held that venue existed not because “effects” were felt in the Southern District, but because “substantial events

II. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF ESTABLISHING PERSONAL JURISDICTION OVER THEIR STATE LAW CLAIMS.

A. Plaintiffs May Not Rely On Conclusory, Unsupported, And Controverted Allegations.

Plaintiffs concede that they bear the burden of establishing personal jurisdiction, but assert: (1) that they can rely on her allegations without regard to the affidavit submitted by RUL and (2) that *Twombly* and *Iqbal* do not apply to jurisdictional pleading. Opp. at 2. As a threshold matter, it is important to recall that Plaintiffs “ultimately bear[] the burden of establishing personal jurisdiction by a preponderance of the evidence, either at an evidentiary hearing or at trial.” *Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 487 (S.D.N.Y. 2011) (citing *A.I. Trade Fin. Inc. v. Petra Bank*, 989 F.2d 76, 79 (2d Cir. 1993)). Neither the parties nor this Court would be well served if this action has to be litigated twice, first in Vermont and then again in Virginia, if Plaintiffs cannot carry that burden at an evidentiary hearing, at trial, or on appeal.

Plaintiffs first suggest that they may rely on their factual allegations, even where specifically controverted by affidavit, and that the contrary Ninth Circuit, Seventh Circuit, and District Court cases cited in Movants’ motion to dismiss “flatly contradict the clearly established precedent, cited herein, from the Second Circuit.” Opp. at 2. Plaintiffs’ emphatic statement notwithstanding, numerous courts in this circuit have expressly found that unsupported

giving rise to the [plaintiffs’ claims]” occurred there. *Id.* at *28-*32. Movants also note that *Astor Holdings* was decided before the two-part venue test established by *Gulf Ins.* and *Daniel*.

Plaintiffs also point to two state court decisions, *State v. Doyen*, 165 Vt. 43 (1996), and *State v. Wooten*, 170 Vt. 485 (2000). See Opp. at 17. It should go without saying that state court cases cannot provide authority for the interpretation of federal statutes, including 28 U.S.C. § 1391.

allegations rebutted by direct, specific, testimonial evidence may be deemed refuted. *See, e.g., Atmosphere Sciences, LLC v. Schneider Advance Techs., Inc.*, 12 Civ. 3233 (SAS), 2012 U.S. Dist. LEXIS 135099, *7 (S.D.N.Y. Sept. 19, 2012) (Scheidlin, J.); *Desayatnitov v. Credit Suisse Group, Inc.*, 10-CV-1870, 2012 U.S. Dist. LEXIS 41180, *6 (E.D.N.Y. Mar. 26, 2012) (Irizarry, J.); *Merck & Co., Inc. v. Mediplan Health Consulting Inc.*, 425 F. Supp. 2d 402, 420 (S.D.N.Y. 2006) (Chin, J.); *Schenker v. Assicurazioni Generali S.p.A., Consol.*, 98 Civ. 9186, 2002 U.S. Dist. LEXIS 12845, *12 (S.D.N.Y. July 15, 2002) (Mukasey, J.) (collecting cases). Accordingly, conclusory factual allegations controverted by affidavit cannot stand. *Id.*; *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011); *Purdue Research Found. v. Sanofi Synthelabo, SA*, 338 F.3d 773, 782-82 (7th Cir. 2003).

Plaintiffs also proclaim that no district court in this circuit, or circuit court anywhere, has applied *Twombly* and *Iqbal* to jurisdictional pleadings. A number have, however. *See e.g., Mirman v. Feiner*, 10 CV 5330, 2012 U.S. Dist. LEXIS 142557,*2-3 (E.D.N.Y. Sept. 28, 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) for the prospect that the Court was not bound “by conclusory statements, without supporting facts” in the applicable legal standards section of an opinion granting a 12(b)(2) motion); *Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 489 (S.D.N.Y. 2011) (citing *Iqbal* to reject a conclusory allegation that Credit Suisse “directly and/or indirectly owns and controls subsidiaries” in connection with personal jurisdiction; *Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1070 (10th Cir. 2008) (citing *Twombly* for the proposition that, in reviewing personal jurisdiction based on the complaint and affidavits, “all well-pled (that is, plausible, non-conclusory, and non-speculative)” facts alleged are taken as true).

In sum, Plaintiffs may not rely on conclusory or speculative allegations, nor may they rely on factual allegations rebutted by direct, specific, testimonial evidence.

B. Response Unlimited Is Not Subject To General Jurisdiction In Vermont. Plaintiffs Make No Effort To Defend Their Conclusory General Jurisdiction Allegations, And The List Cited By Plaintiffs Has Not Been Used For More Than A Decade.

Plaintiffs make no effort to argue that their conclusory allegation that RUL provides “Christian direct mail and marketing services nationally and internationally, including in Vermont,” Cmplt., ¶ 14, is sufficient to establish general jurisdiction over RUL. They also concede that they have not alleged that RUL sends material to Vermont on behalf of clients. Instead, Plaintiffs suggest that RUL profits by selling or renting a contact list for The Vermont Country Store. That list has not been used in more than a decade, however. Supp. Aff. of Matthew LaPorta, ¶¶ 4-5. The reference to it on the RUL website cannot establish continuous activity of any kind within Vermont, much less the sort of “continuous and systematic general business contacts” necessary to establish general jurisdiction. *Goodyear*, 131 S. Ct. at 2856-57. Briefly put, the conclusory allegations in the Complaint are not sufficient to subject RUL to general jurisdiction in Vermont. The declaration of Plaintiffs’ counsel fails to cure this shortcoming.

C. Philip Zodhiates And Response Unlimited Are Not Subject To Specific Jurisdiction In Vermont.

Plaintiffs have failed to carry their burden of establishing specific personal jurisdiction over Philip Zodhiates and RUL, who Plaintiffs do not allege ever set foot in Vermont. Personal jurisdiction based on extraterritorial conduct is proper only “when defendant is a primary participant in intentional wrongdoing . . . expressly directed at [the] forum.” *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008). “[F]orseeability is not the standard for recognizing personal jurisdiction.” *Id.* at 95. Rather, Plaintiffs must establish

intentional tortious acts “expressly aimed” at the forum. This is a high bar, as illustrated by *In re Terrorist Attacks*. The Second Circuit concluded there that funding a terrorist organization, with full knowledge of its “public announcements of jihad against the United States,” and previous attacks on United States targets including “African embassies” and the “U.S.S. Cole,” resulted in contacts “far too attenuated to establish personal jurisdiction.” *Id.*

Plaintiffs’ allegations are insufficient under *In re Terrorist Attacks*. Plaintiffs allege that Zodhates engaged in the non-tortious act of driving Lisa Miller to Buffalo from Virginia at a time when Lisa Miller had full custody of Isabella. Cmplt. ¶¶ 36, 43. Plaintiffs also allege that in the same time period, Timothy Miller purchased plane tickets for Lisa Miller and Isabella at the instruction of Kenneth Miller and that Zodhates conspired with Kenneth Miller in connection with the purchase. Cmplt. ¶ 37.⁴

In contrast to *In re Terrorist Attacks*, in which the defendants were alleged to have acted knowing the organization they were funding had previously attacked American targets and publicly announced its intention to do so again, 583 F.3d at 95, Plaintiffs do not allege that Zodhates was aware of any specific court orders at the time.⁵ The district court cases cited by Plaintiffs are all also distinguishable on that basis. *See Stuart v. Federal Energy Systems, Inc.*, 596 F. Supp. 458, 461-62 (D. Vt. 1984) (finding personal jurisdiction over individual defendants who allegedly intentionally defrauded a Vermont resident planning to open up a Vermont

⁴ Conspiracy allegations do not suffice to establish personal jurisdiction over alleged co-conspirators. *See, e.g., Stauffer v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1990) (“The cases are unanimous that a bare allegation of conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough”) and other authorities cited on page 11 of the Motion to Dismiss.

⁵ Plaintiffs also do not allege that Zodhates could have foreseen that Lisa Miller would later lose custody of her daughter. Nor would it matter if she did, since “foreseeability is not the standard for recognizing personal jurisdiction.” *In re Terrorist Attacks*, 538 F.3d at 95.

franchise); *Real Good Toys, Inc. v. XL Mach., Ltd.*, 163 F. Supp. 2d 421, 424-25 (D. Vt. 2001) (finding sufficient allegations that defendants knowingly and willfully designed and sold in Vermont an inferior knockoff version of one of plaintiffs' products in violation of its copyright and trade dress); *Audsley v. RBS Citizens, N.A.*, 10-CV-208, 2011 U.S. Dist. LEXIS 39272, *2-5, 10-16 (D. Vt. April 11, 2011) (finding sufficient allegations that an individual bank branch manager who had previously been the manager of a RadioShack used information from a personal loan application submitted by the current manager of that RadioShack in a successful effort to get his old job back at the expense of the current manager). Plaintiffs' allegation that Zodhiates subsequently engaged in a \$500 transaction in Virginia that could have indirectly provided Timothy Miller with funds related to Lisa Miller, Cmplt. ¶ 53, is similarly insufficient. *Id.* (finding inadequate indirect funding of a terrorist organization with the knowledge that it had attacked American targets and publicly announced its intention to do so again in the future).

Plaintiffs' allegations with respect to RUL are equally deficient. Plaintiffs allege that Zodhiates acted as an agent of RUL and that a second RUL employee drove with Zodhiates to Buffalo. Plaintiffs also allege that Victoria Hyden sent an e-mail seeking, indirectly, to enable the provision of supplies to Lisa Miller and that Victoria Hyden and Zodhiates called Lisa Miller's father to assist in arranging her transportation from Lynchburg, Virginia, to Waynesboro, Virginia. Cmplt. ¶ 41. These allegations, like the allegations directed solely at Zodhiates, fail to establish that RUL was "a primary participant in intentional wrongdoing" expressly directed at Vermont. *Id.* 93-95.

D. Traditional Nations Of Fair Play And Substantial Justice Preclude The Exercise Of Personal Jurisdiction.

The five fair play and substantial justice factors identified by the Supreme Court also weigh against the exercise of personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). The first, third, and fourth factors all weigh against litigation in Vermont based on the location of virtually all witnesses and all records relevant to the matters alleged in the complaint in Virginia. The location of virtually all relevant evidence in Virginia heightens the already substantial burden on Philip Zodhiates and RUL resulting from their lack of connections to Vermont (the first factor); suggests that Plaintiffs' interest in convenient and effective relief (the third factor) may be better served by litigation in Virginia, and tilts the fourth factor, the efficient administration of justice, strongly against litigation in Vermont. *Tom and Sally's Homemade Chocolates v. Gasworks, Inc.*, 977 F. Supp. 297, 301 (D. Vt. 1997) does not change this analysis, because the location of relevant evidence makes it questionable whether it would be more convenient even for Plaintiffs to litigate in Vermont. In any event, the fact that the witnesses are in Virginia makes the burden on Zodhiates and RUL of litigating in Vermont substantially greater than the burden on Plaintiffs of litigating in Virginia.

The second factor, Vermont's interest in the dispute, and the fifth factor, the interest of all states in advancing their shared social policies, also weigh against litigation in Vermont. Vermont's interest in providing a forum for its injured citizens, *Audsley v. RBS Citizens, N.A.*, 2011 U.S. Dist. LEXIS 39272, *15 (D. Vt. April 11, 2011), is offset by the fact that the "alleged tort did not occur in Vermont" and by Vermont and Virginia's shared common interest and social policy in protecting parental rights from interference. *See Bechard v. Constanzo*, 810 F. Supp. 579, 586 (D. Vt. 1992); *Wyatt v. McDermott*, 725 S.E. 2d 555, 558 (Va. 2012).

III. NEITHER PERSONAL JURISDICTION NOR VENUE IS AVAILABLE WITH RESPECT TO PLAINTIFFS' RICO CLAIMS.

A. 18 U.S.C. §1965(b) Does Not Create Personal Jurisdiction Over RUL Or Zodhiates Because All Defendants Are Subject To Personal Jurisdiction In Virginia.

Plaintiffs' allegation that the Court has personal jurisdiction over Zodhiates and RUL under 18 U.S.C. § 1965(b) "because the ends of justice require that any defendant residing in another District be brought before this Court," Cmpl. ¶ 1, fails because ends of justice jurisdiction is authorized only where a RICO claim could not otherwise be tried in a single action because no district court could exercise personal jurisdiction over all of the defendants. In *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 72 (2d Cir. 1998), the Second Circuit affirmed a district court ruling following, in its entirety, *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 538-39 (9th Cir. 1986). In a footnote, *PT United* observed that the district court had followed *Butcher's Union* to conclude that "the ends of justice" referred "to a case in which there is no district with personal jurisdiction over all defendants" and that that conclusion was not challenged on appeal. *Id.* at 72 n.5.

The Second Circuit went on to affirm the district court's ruling in all respects in which it was challenged stating "We conclude that the natural reading giving to § 1965(b) by the Ninth Circuit in *Butcher's Union* and the district court here was correct. . . ." *Id.* at 72. In the wake of *PT United*, district courts within the Second Circuit have consistently held that ends of justice jurisdiction is authorized only where a RICO claim could not otherwise be tried in a single action because no District Court could exercise personal jurisdiction over all of the defendants. *See* Motion to Dismiss at 15 (collecting cases so holding).

Plaintiffs nevertheless suggest that this Court should follow *Cory v. Aztec Steel Building, Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006), in which the Tenth Circuit expressly disagreed with

Butcher's Union. The Court should decline this invitation. *Cory* has never been followed or even cited with approval in this Circuit. *Cory* rejected the “natural reading given to § 1965(b) by the Ninth Circuit in *Butcher's Union*” which the Second Circuit said is “correct.” Finally, it conflicts with the unanimous holdings of other district courts in this Circuit that “ends of justice jurisdiction” applies only where a RICO claim could not otherwise be tried in a single action, because no District Court could exercise personal jurisdiction over all defendants. *See* Mot. to Dismiss at 15 (collecting cases so holding). Even if it were applicable in the Second Circuit, which it is not, *Cory* would provide little if any helpful guidance, as it declined to define “ends of justice,” stating only that it “is a flexible concept uniquely tailored to the facts of each case.” 468 F.3d at 1232.

Plaintiffs do not allege that this action could not proceed in another district. Their allegations suggest that all defendants are subject to personal jurisdiction in Virginia. Plaintiffs specifically allege that seven defendants, including Zodiates, are residents of Virginia, and Response Unlimited has indicated by affidavit that its place of business is also Virginia. Cmplt. ¶¶ 8, 12, 13, 15-18. Plaintiffs allege that the remaining defendants, Timothy Miller, Andrew Yoder, and Christian Aid Ministries, took part in what she characterizes as RICO predicate acts that could be prosecuted in Virginia. Opp. at 16-17. Plaintiffs’ argument that those acts would be better addressed in Vermont is beside the point. Plaintiffs must show that the Virginia Court District does not have personal jurisdiction over all defendants, but she fails to do so. *See PT United*, 138 F.3d at 72; *Butcher's Union*, 788 F.2d at 538-39; Motion at 15 (collecting cases).⁶

⁶ Zodiates and Response Unlimited also continue to rely on their argument that any construction of § 1965(b) that would provide personal jurisdiction over them would violate their due process rights, which Plaintiffs make no effort to rebut.

B. Plaintiffs Do Not Allege That Any Of The Criteria Of § 1965(a) Are Met And § 1965(b) Is Inapplicable.

The RICO venue provision, 18 U.S.C. § 1965(a), authorizes venue over a defendant in a district where “such person resides, is found, has an agent, or transacts his affairs.” Plaintiffs suggest that venue is proper under 18 U.S.C. § 1965(a) and (b), citing *City of New York v. Cyco.net, Inc.*, 383 F. Supp. 2d 526, 544 (S.D.N.Y. 2005) for the proposition that “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.” *City of New York* stands only for the unremarkable proposition that the “transacts his affairs” prong of section 1965(a) may be satisfied by doing business in a district in a manner that is also sufficient to satisfy the due process minimum contacts requirement in an action arising directly out of that business. *Id.* at 541-544. The *City of New York* Court specifically concluded that two individuals both “transact[ed] their affairs in New York” for purposes of § 1965(a), and had minimum contacts with New York sufficient to satisfy due process, when those individuals were sued by New York City for allegedly directing a scheme to sell cigarettes in New York City while evading city taxes. *Id.* at 541-44. Because Plaintiffs have failed to establish that Zodiates or RUL do any business in Vermont, *City of New York* is inapposite, and Plaintiffs have failed to carry their burden of establishing venue under § 1965(a).

Conclusion

Plaintiffs fail to carry their burden of establishing either venue or personal jurisdiction in this district. Venue is improper because none of the alleged actions of Zodiates or RUL giving rise to Plaintiffs’ claims took place in Vermont. General personal jurisdiction is not available over RUL because it does not have continuous and systematic business contacts with Vermont.

It is not alleged over Zodhiates. Specific jurisdiction is also unavailable because Plaintiffs do not and cannot allege that either RUL or Zodhiates was “a primary participant in intentional wrongdoing . . . expressly directed at [the] forum.” *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008). Finally, Plaintiffs’ attempt to assert personal jurisdiction and venue under RICO fails. Plaintiffs do not demonstrate that there is no single district where all defendants may be sued. On the contrary, personal jurisdiction and venue appear to be available over all defendants in Virginia.

Dated: Burlington, Vermont
March 28, 2013

/s/ Norman Williams
Norman Williams, Esq.
David A. Boyd, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
nwilliams@gravelshea.com
dboyd@gravelshea.com
For Defendant Philip Zodiates and
Response Unlimited, Inc.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, et al,
Plaintiffs

v.

KENNETH L. MILLER, et al,
Defendants

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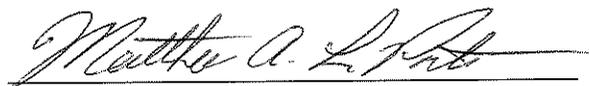
Docket No. 2:12-cv-184

SUPPLEMENTAL AFFIDAVIT OF MATTHEW LaPORTA
ON BEHALF OF DEFENDANT RESPONSE UNLIMITED, INC.

Matthew LaPorta, being first sworn, states as follows:

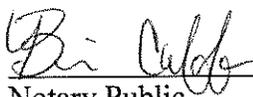
1. I am the Sales Manager at Defendant Response Unlimited, Inc. (“Response Unlimited”), and a resident of Virginia.
2. Response Unlimited is located in Waynesboro, Virginia. I have worked at Response Unlimited since 2006 and am familiar with its business.
3. I previously submitted an affidavit dated November 14, 2012 on behalf of Response Unlimited in this action concerning Plaintiff’s allegation in Paragraph 14 of the Complaint that Response Unlimited “provid[es] Christian direct mail and marketing services nationally and internationally, including in Vermont.”
4. In 1999, Response Unlimited upgraded its computer system. Response Unlimited has kept records regarding the use by Response Unlimited and its customers of the mailing lists maintained by Response Unlimited since that time.

5. I have reviewed Exhibit A to Plaintiff's Response to Motion to Dismiss by Philip Zodiates and Response Unlimited and have specifically reviewed the list referenced in Exhibit A. I have also reviewed the records kept by Response Unlimited relating to that list. The list referenced in Exhibit A has not been used by Response Unlimited, or any of its customers, since at least 1999.


Matthew LaPorta

Sworn to before me this
28 day of March, 2013

BRIANNA LEE FITZGERALD
NOTARY PUBLIC
Commonwealth of Virginia
Reg. #7506124
My Commission Expires Mar. 31, 2015


Notary Public

My Commission Expires: March 31, 2015

County of: Augusta

Reg #: 7506124

* I was commissioned as:
Brianna Lee Fitzgerald *

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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Plaintiffs)	
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v.)	Docket No. 2:12-cv-184
)	
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Defendants)	

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2013, I caused Reply Memorandum in Support of Motion to Dismiss of Defendants Philip Zodiates and Response Unlimited, Inc. for Improper Venue and Lack of Personal Jurisdiction, to be served through the CM/ECF system on Robert G. Cain, Esq., rcain@pfclaw.com; Thomas E. McCormick, Esq., tem@mc-fitz.com; Frank H. Langrock, Esq., flangrock@langrock.com; Brooks G. McArthur, Esq., bmcArthur@jarvismcarthur.com; Joshua M. Autry, Esq., jmautry@dennisboylelaw.com; Ritchie E. Berger, Esq., rberger@dinse.com; Lisa B. Shelkrot, Esq., lshelkrot@langrock.com; Sarah Star, Esq., srs@sarahstarlaw.com; Sophie E. Zdatny, Esq., szdatny@dinse.com; Peggy J. Schmitz, Esq., schmitz@ccj.com; and Steven J. Shrock, Esq., shrock@ccj.com.

Dated: Burlington, Vermont
March 28, 2013

/s/ Norman Williams
Norman Williams, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
nwilliams@gravelshea.com
For Defendants Philip Zodiates
and Response Unlimited, Inc.