

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 2:12-cv-00184-WKS
	:	
KENNETH L. MILLER, et al.,	:	
Defendants.	:	

**REPLY OF DEFENDANTS LIBERTY UNIVERSITY, INC.,
THOMAS ROAD BAPTIST CHURCH, INC. AND VICTORIA
HYDEN IN SUPPORT OF THEIR MOTION TO CHANGE VENUE**

INTRODUCTION

If this Court denies the Motion to Dismiss (dkt. 66) filed by Defendants Liberty University, Inc. ("Liberty University"), Thomas Road Baptist Church, Inc. ("TRBC") and Victoria Hyden (collectively, "these Defendants"), then it should grant their Motion to Change Venue (dkt. 67) and transfer this case to the Western District of Virginia. Nothing in the Opposition (dkt. 74) filed by Plaintiff Janet Jenkins ("Plaintiff") requires or warrants a different result. Plaintiff concedes that this action could have been brought in Virginia, and the factors for venue transfer demonstrate that it should be transferred there now. Accordingly, if any portion of this action against these Defendants survives dismissal, it should be transferred pursuant to 28 U.S.C. § 1404(a).

LAW AND ARGUMENT

A. VENUE IS PROPER IN THE WESTERN DISTRICT OF VIRGINIA AND IMPROPER IN THE DISTRICT OF VERMONT.

Plaintiff concedes that venue "might also lie in Virginia." (Dkt. 74, at 2). In fact, under both Section 1391(b)(2) and Section 1404(a), venue is proper in Virginia and improper in Vermont. As the Supreme Court explained, "[i]f when a suit is commenced, plaintiff has a right

to sue in that district, independently of the wishes of defendant, it is a district ‘where (the action) might have been brought.’” *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960) (citation omitted). As Plaintiff acknowledges, she had a right to bring a suit against these Defendants in Virginia. (Dkt. 74, at 2).

As demonstrated in these Defendants' initial brief and below, the interests of justice and the convenience of parties and witnesses require that this action be tried in the state in which **all** of the alleged acts took place and nearly all of the parties and witnesses reside (Virginia), not in a state whose only connection with the action is Plaintiff’s residence (Vermont).

Furthermore, transferring venue to Virginia would prevent Plaintiff from benefitting from her transparent attempt to “forum shop” in hopes of receiving a more favorable result. *Van Dusen v. Barrack*, 376 U.S. 612, 623 (1964). “The limiting phrase of § 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just.” *Id.* at 624. “The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum.” *Id.* The venue for this action should be determined according to the interests of justice, not according to Plaintiff’s preference to litigate in what she perceives as a more favorable forum. 28 U.S.C. § 1404(a).

B. THE CONVENIENCE OF THE PARTIES AND WITNESSES AND THE INTERESTS OF JUSTICE REQUIRE TRANSFER OF THIS ACTION.

As is evident from the complementary motions for change of venue brought by Defendants Phillip Zodhiates and Response Unlimited (dkt. 57) and Kenneth Miller (dkt. 56), the convenience of the parties and interests of justice militate in favor of transferring this case to the Western District of Virginia. The transfer factors outlined in these Defendants' initial brief (dkt. 67 at 3-7) demonstrate that transfer is appropriate here, notwithstanding Plaintiff's argument to the contrary.

1. Plaintiff's Choice of Forum Is Not Entitled to Great Weight.

As this Court has previously held, Plaintiff's choice of forum is not entitled to great weight where, as here, the balance of conveniences is not in equipoise, and in particular, when the operative facts have "little or no connection with the transferor forum." *Klein v. Domino's Pizza, Inc.*, 769 F. Supp. 152, 153 (D. Vt. 1991). *See also, Invivo Research, Inc. v. Magnetic Resonance Equip. Corp.*, 119 F. Supp. 2d 433, 437 (S.D.N.Y. 2000); *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 333 (E.D.N.Y. 2006); *Mitsui Marine & Fire Ins. Co. Ltd. v. Nankai Travel Int'l Co., Inc.*, 245 F. Supp. 2d 523, 525 (S.D.N.Y. 2003). Additionally, Plaintiff's choice of forum is not entitled to great weight when "the balance of several factors is strongly in favor of the defendant." *Kolko v. Holiday Inns, Inc.*, 672 F. Supp. 713 (S.D.N.Y. 1987).

In *Klein*, this Court found that a change of venue was warranted when the state's only connection to the litigation was the plaintiff's residence. 769 F. Supp. at 153. In *Klein*, as here, the incidents underlying plaintiffs' claim occurred outside of Vermont and most of the witnesses and documents were located outside of Vermont as well. *Id.* Nor did plaintiff's relative lack of wealth, when compared to that of the corporate defendant, entitle his forum choice to receive great deference. *Id. See also Kolko*, 672 F. Supp. at 716 ("The relative economic ability of the parties to proceed with a case has rarely been a dispositive reason to grant or deny a venue change").

In *Invivo*, the only connections between the plaintiff's selected forum and the litigation were the sale of a percentage of the products at issue and plaintiff's counsel's offices. 119 F. Supp. 2d at 438. The court found that there is "such a tenuous connection between the plaintiff's claims and the Southern District of New York, [that] the plaintiff's selection of this forum has an artificial quality that entitles a court to give it less weight." *Id.* at 439. And, in *Neil Bros.*, the Eastern District of New York similarly found that a plaintiff's choice of forum was not entitled

to deference when the only connections were one transaction and the location of plaintiff's counsel. 425 F. Supp. 2d at 333-34. *See also Kolko*, 672 F. Supp. at 715 (“**The convenience of plaintiff’s attorney, without more, is not decisive**”) (emphasis added).

The same outcome should obtain in this case, for the same reasons. The only connection between Vermont and this case is Plaintiff's residence. **All** of the purported activities upon which Plaintiff bases her claims occurred outside of Vermont, and, except for Lisa and Isabella Miller's alleged travel from Virginia to New York and then to Canada and Nicaragua, all of the alleged events occurred in Western Virginia. (Amd. Compl., dkt. 59, ¶¶ 35, 38, 40, 41). As discussed more fully below, most of the witnesses, documents and other information necessary to litigate Plaintiff's claims are located outside Vermont, leaving Plaintiff's residence and the residence of her attorneys as the only connections between this action and Vermont. As this Court held in *Klein*, such a tenuous connection cannot overcome the remaining factors that support transfer to the Western District of Virginia. 769 F. Supp. at 153.

Plaintiff's assertion that her choice of forum should not be disturbed because transfer of venue would only result in the shifting of the inconvenience from Defendants to Plaintiff does not change this analysis or its result. (Dkt. 74, at 4). *Snyder v. Madera Broadcasting, Inc.*, 872 F. Supp. 1191, 1200 (E.D.N.Y. 1995), upon which Plaintiff relies, is inapposite. In *Snyder*, only one of the defendants sought a change of venue, and that party offered no factual support for its contention that plaintiff's chosen forum was inconvenient. *Id.* Based upon that single, unsubstantiated claim, the court presumed that the moving defendant spoke solely on its behalf and was merely seeking to shift the inconvenience from itself to the plaintiff. *Id.* By contrast, in this case, Defendants have presented affidavits providing factual support for their motion. (Dkt. 66-1 to 66-5). In addition, Defendants Zodiates, Response Unlimited and Kenneth Miller have also filed motions seeking to have the case transferred to the Western District of Virginia, demonstrating that support for transfer is broad based among the parties. (Dkts. 56, 57).

Since the only connection between Vermont and this action is Plaintiff's residence, her choice of forum is neither dispositive nor entitled to deference. *Klein*, 769 F. Supp. at 153.

2. The Convenience of the Witnesses Requires Transfer to Virginia.

Convenience of the witnesses, which is regarded as one of the most important transfer factors, weighs in favor of transfer here. *Jones v. Walgreen Co.*, 463 F. Supp. 2d 267, 274 (D. Conn. 2006). This court has recognized that the convenience of witnesses is particularly important where, as here, "defendants' fact witnesses greatly outnumber those of the plaintiff." *Klein*, 769 F. Supp. at 154.

Plaintiff contends that these Defendants cannot prevail on the witness convenience factor because they have not provided a detailed list of witnesses and prospective testimony. (Dkt 74, at 4). Plaintiff's argument elevates form over substance, and ignores the reality that district courts in the Second Circuit have routinely transferred RICO claims based solely upon the allegations in the complaint. *See e.g., Prospect Capital Corp. v. Bender*, 09 CIV. 826 (HB), 2009 WL 4907121 (S.D.N.Y. Dec. 21, 2009); *Pardy v. Gray*, 06-CV-6801 JBW, 2007 WL 1825200 (E.D.N.Y. June 22, 2007). Plaintiff's Amended Complaint reveals the names of many prospective witnesses and further reveals that, other than Plaintiff herself, none of those individuals resides in Vermont. In particular, Plaintiff's own allegations indicate that: (1) Plaintiff's own parents, Ruth and Claude Jenkins, who are alleged to have had contact with Lisa Miller and her daughter, reside in Virginia (dkt. 59, ¶ 24); (2) Deborah Thurman, who allegedly organized a coalition and had interactions with Lisa Miller and other defendants, did so in Lynchburg, Virginia (*id.* at ¶ 27); (3) unnamed "members" and "elders" of TRBC, located in Virginia, allegedly helped pack up Lisa Miller's things in Virginia (*id.* at ¶ 42); (4) the individuals to whom Victoria Hyden supposedly sent an email soliciting funds for Lisa Miller are all employees of Liberty University in Virginia (*id.* at ¶ 41); (5) Rena Lindevaldsen and Mathew Staver, who represented Lisa Miller in Vermont, are both located in Virginia (*id.* at ¶ 22); and (6)

the law students whom Ms. Lindevaldsen and Mr. Staver allegedly lectured on "civil disobedience" are Liberty University students in Virginia. (*Id.* at ¶ 47).

Plaintiff has not identified a single Vermont witness besides herself. This is not at all surprising, since the alleged events all supposedly took place outside Vermont and involved non-Vermonters. As such, no further showing is required by these Defendants on this point, because Plaintiff's own allegations demonstrate that the convenience of witnesses militates in favor of transferring this case from Vermont.

3. The Convenience of the Parties Requires Transfer to Virginia.

The fact that Plaintiff is the only party who resides in Vermont also militates in favor of transferring this case to Virginia. Unlike *Maroney, Tom and Sally's Handmade Chocolates*, or *Sollinger*, the Defendants and Plaintiff here do not face roughly the same inconvenience. *James Maroney, Inc. v. Flury & Company, Ltd.*, No. 5:09-cv-252-cr, 2010 WL 3322920, at *10 (D. Vt. May 28, 2010); *Tom and Sally's Handmade Chocolates, Inc. v. Gasworks, Inc.*, 977 F. Supp. 297, 302 (D. Vt. 1997); *Sollinger v. NASCO Int'l, Inc.*, 655 F. Supp. 1385, 1390 (D. Vt. 1987). Rather, as was true in *Klein*, Vermont is only convenient for one party, Plaintiff, and it is inconvenient for all other parties. 769 F. Supp. at 154. The fact that TRBC and Liberty University are corporations does not warrant departing from *Klein*, which also involved an individual plaintiff suing a large corporation. *Id.* See also *Kolko*, 672 F. Supp. at 715. This Court has found that the financial burden imposed on defendants in having to litigate away from their home state, including witness transportation and lodging costs, is a compelling factor favoring transfer. *Klein*, 769 F. Supp. at 715. See also *Kolko*, 672 F. Supp. at 716; *Rodd v. J.G. Hook, Inc.*, 534 F. Supp. 237, 238 (S.D.N.Y. 1982).

The same is true here, not only in relation to the corporate defendants, but also for the numerous individual defendants who reside in Virginia. As Ms. Hyden attests, it would be a significant hardship for her to travel more than 700 miles to Vermont, pay for lodging and lose

time from her job to defend herself in this Court. (Dkt. 66-3, ¶ 17). Similarly, co-defendants Zodiates, Wall and Wright would face significant costs in traveling from Virginia to Vermont and in securing the attendance of their witnesses at a remote location. As this Court found in *Klein*, the disproportionate burden between the numerous out-of-state Defendants and the single in-state Plaintiff tilts the balance of convenience of the parties solidly in favor of transfer. *Klein*, 769 F. Supp. at 154.¹ Transfer would fulfill Section 1404(a)'s goal "to prevent waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

4. The Operative Facts Occurred Outside Vermont.

As was true in *Klein*, in this case the operative events are alleged to have occurred entirely outside Vermont, and therefore this factor weighs in favor of transfer. *Klein*, 769 F. Supp. at 154. "To determine where the locus of operative facts lies, courts look to 'the site of events from which the claim arises.'" *MAK Marketing, Inc. v. Kalapos*, 620 F. Supp. 2d 295, 310 (D. Conn. 2009) (quoting *800-Flowers, Inc. v. Intercontinental Florist, Inc.*, 860 F. Supp. 128, 134 (S.D.N.Y. 1994)). **The site from which the claim arises is the site from which the actions or omissions constituting the event originated or were transmitted, not the site where the plaintiff felt the effects.** *Id.* In *MAK*, the operative facts were held to have occurred in Michigan, the site of defendant's office, not in Connecticut, where Plaintiff received the allegedly fraudulent messages. *Id.* Similarly, in *Charter Oak*, the operative facts in an insurance subrogation claim occurred in Tennessee, the site of the accident allegedly caused by the

¹ The significant cost on the parties of bringing their witnesses to Vermont also tips the scales in favor of transfer. RICO may permit the issuance of witness subpoenas nationwide in some instances, but that is only part of the equation of whether a party can compel witnesses to attend. The cost of bringing witnesses to trial more than 700 miles from Virginia, including travel costs and lost wages, will mean that certain witnesses will be unavailable to testify on behalf of Defendants in Vermont regardless of whether a subpoena can be issued and served. Similarly, while some documents might be photocopied or digitized and brought to Vermont, other sources of proof, including documents in the custody of third parties, might be inaccessible, either in actuality or because of prohibitive costs in transporting them and their custodial witnesses more than 700 miles.

defendant's faulty product, not in Connecticut, where the plaintiff's business was located. *Charter Oak Fire Ins. Co. v. Broan-Nutone, L.L.C.*, 294 F. Supp. 2d 218, 220 (D. Conn. 2003).

Plaintiff's Amended Complaint alleges that the operative facts occurred outside Vermont, primarily in the Commonwealth of Virginia. (Amd. Compl., dkt. 59, ¶¶ 19-62). Plaintiff alleges that Lisa Miller traveled with Isabella from Lynchburg, Virginia to Winchester, Virginia and then on to New York and Canada, from whence she flew to Central America. (*Id.* at ¶ 35). Plaintiff alleges that Ms. Hyden sent an e-mail while on her job in Virginia to her colleagues in Virginia, and that members of TRBC in Virginia packed up Lisa Miller's belongings in Virginia. (*Id.* at ¶¶ 41, 42). Other alleged actions, including individual free speech activities, all occurred in Virginia. (*Id.* at ¶¶ 56-60). The only connection between Vermont and this case is Plaintiff's residence in Vermont. While Plaintiff may point to the protracted custody battle over Isabella, part of which took place in Vermont, the RICO claims in this action are squarely premised on Lisa Miller's journey, with her daughter, from Virginia to Nicaragua. The "conspiracy" leading to the disappearance of Lisa and Isabella Miller is alleged to have occurred entirely outside of Vermont, which militates in favor of transfer.

Under Second Circuit precedent, this ground alone is dispositive of Plaintiff's claim to venue in Vermont, and requires a transfer of this action to Virginia. In *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 432 (2d Cir. 2005), the Second Circuit reaffirmed the Supreme Court's teaching that "the purpose of statutorily defined venue is to protect the *defendant*" not plaintiff. *Id.* (italics in original) (quoting *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-84 (1979)). The Court then held that venue properly lies in a district where a **substantial** part of the **defendants'** actions or omissions giving rise to the claim are alleged to have taken place. *Id.* at 432-33. Conversely, venue does not lie in a district merely because plaintiff resides there and alleges to have felt the effect of defendants' conduct in that district. *Id.* at 434 (rejecting plaintiff's choice of venue in Western District of New York because the acts complained of took

place in Michigan, and plaintiffs only felt the effects in New York). Numerous other courts within and without the Second Circuit have reached the same result.²

Plaintiff alleges that the conspiratorial agreement and predicate acts took place outside of Vermont. Therefore, venue is improper in this District and a transfer is necessary.

5. The Relative Means of the Parties Favors Transfer.

In *Klein*, this Court rejected plaintiff's claim that the case should remain in Vermont because of his limited financial means relative to those of the defendant corporation. *Klein*, 769 F. Supp. at 153. The plaintiff argued that he did not have financial means to litigate in California in contrast to the resources available to the defendant, a large corporation operating nationwide. *Id.* This Court cited with approval a New York district court decision holding that plaintiff's status as a student did not militate in favor of maintaining his choice of forum against a national corporation seeking transfer to Florida, where the alleged events occurred:

While the court is sympathetic to plaintiff's position as a student and the resulting financial burden upon him by transferring this action, defendant would bear a far greater financial burden in transferring and lodging several witnesses in New York if this motion were denied. Plaintiff unconvincingly alleges that because defendant has greater economic resources due to its corporate status, Holiday Inn should therefore bear a greater burden in transporting witnesses than should plaintiff, a college student. **The relative economic ability of the parties to proceed with a case has rarely been a dispositive reason to grant or deny a venue change.** The financial ability of each party to bear the costs of a venue change is but one of several factors for the court to consider.

² *Albergo v. Pearlman*, 07 CIV 2285 GBD, 2011 WL 102749, *3 (S.D.N.Y. Jan. 10, 2011) (dismissing RICO claim for improper venue, even though some plaintiffs resided and alleged to have felt the effects of conspiracy in the forum, because the conspiracy was alleged to have taken place outside the forum; "The Second Circuit has cautioned district courts to take seriously the adjective 'substantial.' That means for venue to be proper, **significant** events or omissions **material to the plaintiff's claim** must have occurred in the district in question.") (emphasis added) (quoting *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 356-57 (2d Cir. 2005)); *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995) (Iowa was improper venue for Lanham Act claim even though plaintiff resided and allegedly felt effects of unlawful conduct in Iowa, because violations allegedly took place outside of Iowa; "Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff."); *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1372-73 (11th Cir. 2003) (Alabama was improper venue for breach of contract claim even though plaintiff resided and allegedly felt effects of breach in Alabama, because contract was formed and breached in Georgia).

Id. at 154 (citing *Kolko*, 672 F. Supp. at 716) (emphasis added).

The same is true in this case, particularly since not all of the defendants here are corporations, and those which are corporations are non-profit entities.

CONCLUSION

For the foregoing reasons, if the Court denies these Defendants' Motion to Dismiss (dkt. 66), it should grant their Motion to Change Venue (dkt. 67) and should transfer this case to the Western District of Virginia.

Respectfully submitted,

DINSE, KNAPP & McANDREW, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on April 3, 2013. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

DINSE, KNAPP & McANDREW, P.C.

/s/ Ritchie E. Berger

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