UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, et al., *Plaintiffs,*	)	
v.	)	DOCKET NO.: 2:12-cv-00184-wks
KENNETH L. MILLER, et al., *Defendants.*	)	

REPLY MEMORANDUM OF DEFENDANT, DOUGLAS WRIGHT, IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

NOW COMES Defendant, Douglas Wright ("Wright"), by and through his attorneys, Paul Frank + Collins, P.C., and hereby replies to Plaintiffs' memorandum in opposition to Wright's motion to dismiss the amended complaint for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted, as follows.

ARGUMENT

Plaintiffs respond to Wright's motion to dismiss with a cavalcade of unfounded arguments that have no support in American jurisprudence, implausible assertions that appear nowhere in the amended complaint, and misstatements of fact that have no support in the record. It is clear that this court lacks the constitutional authority to exercise personal jurisdiction over Wright in this action, and no amount of jurisdictional discovery will change this reality. Furthermore, Plaintiffs' § 1986 claim against Wright is so unmistakably dead on arrival that no amount of factual amplification could possibly save it. For these reasons, Plaintiffs' action against Wright should be dismissed with prejudice, and without further delay.

I. PLAINTIFFS HAVE FAILED TO MAKE A *PRIMA FACIE* SHOWING OF PERSONAL JURISDICTION OVER WRIGHT.

In order to defeat Wright's motion to dismiss for lack of personal jurisdiction, Plaintiffs must make a *prima facie* showing that jurisdiction exists. *Thomas v. Ashcroft,* 470 F.3d 491, 495 (2d Cir. 2006). "A *prima facie* showing of jurisdiction does not mean that plaintiff must show only some evidence that defendant is subject to jurisdiction; it means that plaintiff must plead facts which, if true, are sufficient in themselves to establish jurisdiction." *Tamam v. Fransabank Sal*, 677 F. Supp. 2d 720, 725 (S.D.N.Y. 2010). The factual allegations and affidavits at issue in this case compel the conclusion that Plaintiffs have failed to present "an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *Chloe v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158, 163 (2d Cir. 2010).

Plaintiffs concede, as they must, that general jurisdiction over Wright is lacking in Vermont. (Doc. 79, p. 4.)[1] They claim, however, that Wright's contacts with Vermont are sufficient to confer specific jurisdiction over him because (1) this action arises out of Wright's "involvement" in the underlying custody and criminal proceedings in Vermont, and (2) their amended complaint alleges an intentional tort that passes jurisdictional muster under *Calder*'s "effects" test. (Doc. 79, pp. 6-8). Their argument fails on both counts.

In the supporting affidavit filed with his motion to dismiss, Wright attested that he is a resident of Winchester, Virginia, and an employee (Pastor) of Keystone Baptist Church, Inc.; that he is a resident and citizen of the Commonwealth of Virginia, and has been at all relevant times; that aside from involuntary appearances under subpoena in the federal court located in Burlington,

[1] Plaintiffs make no attempt to argue that Wright's contacts are "so continuous and systematic as to render [him] essentially at home in the forum State." *Goodyear Dunlop Tires Operations v. Brown*, 131 S.Ct. 2846, 2851 (2011).

Vermont, to give testimony in criminal proceedings, he has had no contacts with the State of Vermont at any time; that he has never resided in Vermont, never owned or leased any property in Vermont, never worked in Vermont, never transacted or contracted for any business in Vermont, and has never been a party to any actions at law or equity in Vermont courts; that he has never held a license or other professional certification in the State of Vermont; that he has never registered to do business, appointed a registered agent, or otherwise sought to avail himself of the privilege of doing business in the State of Vermont; that he has never paid taxes, fees, or charges of any kind to the State of Vermont; that he has never created any obligations between himself and any Vermont resident; that in June, 2012, he was subpoenaed by the United States Government to testify in a grand jury proceeding relating to the disappearance of Lisa Miller and her daughter Isabella; that in August, 2012, he was again subpoenaed to testify as a government witness in the criminal prosecution of Reverend Kenneth Miller; that other than the above-referenced court appearances in the federal criminal court located in Burlington, Vermont, he has never even visited Vermont, as a vacationer or otherwise; that he has no affiliation, connection or ties to the State of Vermont or anyone connected to the State of Vermont; and that any contact he ever had with Lisa Miller was restricted to the Commonwealth of Virginia. (Doc. 40-1, pp. 1-3).

Plaintiffs do not dispute any of the specific facts set forth in Wright's affidavit. Instead, they claim that a witness affidavit signed by Wright on September 19, 2007, and submitted by co-defendant Lisa Miller's attorneys in connection with the underlying custody dispute, establishes sufficient "contact" with the State of Vermont. (Doc. 79, pp. 6-7). In that affidavit, Wright expressed four plain and neutral statements of fact: (1) as Pastor of Keystone Baptist Church, he served as administrator and principal of the Keystone Christian Academy situated in Berryville, Virginia; (2) the minor Plaintiff, Isabella Miller-Jenkins, was enrolled in the K-5 class at Keystone

Christian Academy in Berryville, Virginia on a full-time basis; (3) attendance was mandatory for all students; and (4) absences due to out-of-state travel were not excusable. (Doc. 79-1). Moreover, Wright never personally appeared or testified in the Vermont family court proceedings in any capacity, and never submitted or filed the witness affidavit to or with any Vermont court. *Suppl. Aff. of Wright* (attached hereto as **Exhibit A**), and Plaintiffs do not contend otherwise. (Doc. 79-2). Rather, they maintain that this court has specific jurisdiction over Wright because he was "involved" (if only by way of a non-party witness affidavit filed by someone else) in the Vermont family court proceeding, and because their "allegations against [him] arise from that particular involvement." (Doc. 79, p. 7).

A. Plaintiffs Cannot Establish Specific Jurisdiction Over Wright Because He Did Not Purposefully Avail Himself of the Privilege of Conducting Activities in Vermont and Plaintiffs' Action Does Not Arise Out of Wright's Involvement in the Underlying Court Proceedings in Vermont.

Generally, the "exercise of judicial power is not lawful unless the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011)(quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Specific jurisdiction exists only "when a defendant has purposefully directed his activities toward the forum and the litigation arises out of or is related to the defendant's contact with the forum." *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 466-67 (S.D.N.Y. 2008)(emphasis added) *aff'd sub nom. State Universities Ret. Sys. of Illinois v. Astrazeneca PLC*, 334 Fed. Appx. 404 (2d Cir. 2009); *see also Chaiken v. VV Pub. Corp.*, 119 F.3d 1018, 1028 (2d Cir. 1997)("To establish the minimum contacts necessary to justify 'specific' jurisdiction, the [plaintiffs] first must show that their claim arises out of or relates to [defendant's] contacts with [the forum state]"); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011)("Adjudicatory authority is 'specific' when the suit arises out of or

relates to the defendant's contacts with the forum"); *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2788 ("submission through contact with and activity directed at a sovereign may justify specific jurisdiction in a suit arising out of or related to the defendant's contacts with the forum").

Plaintiffs cite no authority for their bald assertion that the remote and tangential act of executing a non-party witness affidavit with the expectation that it may be used by another person in another forum constitutes contact between the affiant and that forum sufficient to confer personal jurisdiction. The "purposeful availment" requirement is designed to protect Wright from being haled into a Vermont court "as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Assuming the Wright witness affidavit, which presumably was filed by Lisa Miller's attorneys in the Vermont family court proceedings, can even be deemed "contact" with Vermont at all, it was, at most, "random, fortuitous, or attenuated" contact, and it was contact that resulted exclusively from the "unilateral activity of another party or a third person," viz., the decision of Lisa Miller's attorneys to file Wright's affidavit in a Vermont court.

Contrary to Plaintiffs' insinuations, Wright did not file or cause to be filed anything in Vermont family court, and he did not interject himself into any part of the Vermont family court proceedings. ***Exhibit A***, *Suppl. Aff. of Wright*. Rather, he merely executed an affidavit, in Virginia, setting forth cold facts. The fact that Lisa Miller's attorneys concluded that the Wright affidavit might be helpful to Lisa Miller's position in the Vermont family court proceedings, is irrelevant to Plaintiffs' specific jurisdiction claim.

Furthermore, Wright's appearance in the prior criminal proceedings in this court was the result of the "unilateral activity of another party," *viz*., subpoenas issued by the U.S. Government. Simply put, Wright's so-called "involvement" in the civil and criminal court proceedings is a

legally insufficient basis on which to exercise jurisdiction over him. *Real Good Toys, Inc. v. XL Machine Ltd.,* 163 F.Supp.2d 421, 424 (2d Cir. 2001)("Due process protects a nonresident defendant from becoming subject to the binding judgments of a forum with which it has had no significant contacts"); *American Telephone & Telegraph Co. v. Maydak*, 1993 WL 812550, Civ. A. No. 93-1824 (W.D.Pa. Nov. 3, 1993)(defendant's appearance in forum state for purpose of testifying in related criminal proceeding insufficient to confer personal jurisdiction under minimum contacts test).

In addition, this action does not arise out of or relate to Wright's "involvement" in the prior custody and criminal proceedings. "[S]ingle or occasional" acts within a state may be sufficient to confer specific jurisdiction "with respect to those acts," but "not with respect to matters unrelated to the forum connections." *Goodyear*, 131 S. Ct. at 2853. A defendant's "in-state activity" may form the basis for specific jurisdiction where "that activity gave rise to the episode-in-suit." *Id.* Plaintiffs' only claim against Wright arises out of a meeting between Wright and co-defendant Lisa Miller within the Commonwealth of Virginia in September 2009. (Doc. 59, ¶ 35). Plaintiffs do not allege, and could not possibly prove, that Wright's limited "involvement" in the underlying court proceedings was a cause in fact or a proximate cause of their alleged injuries.[2] *See, e.g., Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998)("Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts"); *Doe v. Am. Nat. Red Cross*, 112 F.3d 1048, 1051-52 (9th Cir. 1997)("arising out of" requirement of specific jurisdiction test is met if plaintiff's cause of action would not have arisen "but for" the defendant's contacts with the forum);

[2] Wright's "involvement" in the underlying proceedings could not possibly have been a "but for" cause of the injuries alleged in this action because there was nothing unlawful or tortious about his involvement and Plaintiffs prevailed in both proceedings.

Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 35 (1st Cir. 1998) (specific jurisdiction depends on "whether the plaintiff has established cause in fact (i.e., the injury would not have occurred 'but for' the defendant's forum-state activity) and legal cause (i.e., the defendant's in-state conduct gave birth to the cause of action)"); *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 323 (3d Cir. 2007)("specific jurisdiction requires a closer and more direct causal connection than that provided by the but-for test"). Against this backdrop, it is obvious that Plaintiffs' jurisdictional allegations against Wright cannot withstand constitutional scrutiny.

Plaintiffs contend that, because Wright "should have contacted Vermont authorities based on the Vermont family court involvement, his omission occurred in Vermont." (Doc. 79, p. 8). This is a transparent and misguided ploy to trump up jurisdiction where none exists, and it is hardly surprising that Plaintiffs cite no authority in support of it. The amended complaint alleges that Wright breached a duty imposed by § 1986 as a result of a "goodbye" encounter with co-defendant, Lisa Miller, which occurred in Winchester, Virginia on or about September 19, 2009. Plaintiffs' theory that Wright's alleged "tortious omission" in Virginia morphed into Vermont by some form of talismanic teleportation is pure fantasy. Both law and logic compel the conclusion that the alleged tort was committed in Virginia because that is where the alleged "breach" occurred.[3] *Goodyear*, 131 S. Ct. at 2855 (in determining whether personal jurisdiction exists over

[3] Moreover, calling on Vermont authorities to stop co-defendant Miller from carrying out an alleged plan to kidnap her own biological child would have been totally ineffective and nonsensical. Vermont law enforcement agencies would have faced formidable, if not insurmountable, jurisdictional problems given that Miller was in Virginia at that time. While Virginia law enforcement authorities would have been far better situated to act on such information, even they had no legitimate reason to arrest or otherwise restrain Miller from leaving Virginia (or the United States for that matter) because she had legal custody of the minor Plaintiff and was not in violation of any court orders until after she left the country.

Furthermore, even if Wright had submitted or filed the 2007 witness affidavit with the Vermont family court, there would have been no relevant causal nexus between that act and the allegations relating to the 2009 "good-bye" meeting between Wright and Lisa Miller.

manufacturer in products liability cases, tortious act occurs in forum where allegedly defective product was manufactured).

Ironically, Plaintiffs ask this court to find personal jurisdiction over Wright based on his failure to initiate "contact" with Vermont. This is not, and has never been, the law. If personal jurisdiction existed over defendants who "should have" but did not initiate any "contacts" with the forum state, current due process doctrine would be turned on its head.

B. *Calder*'s "Effects" Test Does Not Apply to the § 1986 Claim Plaintiffs Have Brought Against Wright.

Given the lack of any constitutionally sufficient contacts between Wright and Vermont, Plaintiffs turn to *Calder*'s "effects" test for salvation. (Doc. 79, p. 5-8). The Court in *Calder v. Jones*, 465 U.S. 783 (1984) held that a California court could exercise personal jurisdiction over Florida residents in a libel action despite the fact that the defamatory conduct occurred outside of California. The Court, however, sharply circumscribed its holding by emphasizing that (1) the allegedly libelous *National Enquirer* article explicitly targeted the California activities of a California entertainer whose career was centered in that state, (2) the defendants were "not charged with mere untargeted negligence" but rather "intentional, and allegedly tortious actions expressly aimed at California," and (3) the defendants knew that the "brunt of the harm" would be suffered in California where the publication had its largest circulation. *Id.* at 788-90.

Calder carves out a narrow "intentional tort" exception to the "purposeful availment" requirement. *J. McIntyre Mach.*, 131 S. Ct. at 2787. In order to satisfy the "effects" test in this case, Plaintiffs must show that Wright committed an intentional act expressly aimed at Vermont with knowledge that the brunt of the harm would be suffered there. *Real Good Toys, Inc.*, 163 F.Supp.2d at 424 ("Jurisdiction is appropriate when the state has been the focal point both of 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")(quoting *Chaiken v. VV Pub. Corp*., 199 F.3d at 1029); *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008)("personal jurisdiction is proper where the defendant took intentional, and allegedly tortious, actions expressly aimed at the forum state")(quoting *Calder*, 465 U.S. at 789).

As a threshold matter, *Calder* applies only to intentional acts. Like the "purposeful availment" requirement, the "effects" test requires some affirmative conduct or overt action by the defendant. *Real Good Toys, Inc.*, 163 F.Supp.2d at 424 (defendant must "expressly aim [its] actions at the state")(emphasis added); *LiButti v. United States*, 178 F.3d 114, 123 (2d Cir. 1999)(personal jurisdiction exists "when the defendant 'purposefully directed' the harmful effects of his activities at the forum State")(emphasis added); *Schwartzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 806 (9th Cir. 2004)("intentional act" has "specialized meaning in the context of the *Calder* effects test" and refers to "an intent to perform an actual, physical act in the real world")(emphasis added); *Schwartz v. Frankenhoff*, 169 Vt. 287, 293 (1999)(*Calder* "permits the exercise of personal jurisdiction over a party who intentionally acts outside the forum state to cause tortious harm within the forum state")(emphasis added).

It is important to recall that Wright stands apart from all other defendants named in this action. None of the intentional tort claims brought against the other eleven defendants (*viz*., kidnapping, racketeering activity and civil conspiracy) has been brought against Wright. The only claim against Wright is that he failed to prevent the co-defendants from carrying out an alleged conspiracy to violate Plaintiffs' rights. (Doc. 79, p. 2). In contrast to the libel claim at issue in *Calder*, Plaintiffs do not allege that Wright knowingly or intentionally breached a duty owed to them under § 1986. The statute, after all, imposes on bystanders an affirmative "Good Samaritan" duty-to-aid that most laypersons—and probably many seasoned jurists—do not even know exists.

Furthermore, courts have recognized that liability under § 1986 may be based on ordinary negligence. *Clark v. Clabaugh*, 20 F.3d 1290, 1298 (3d Cir. 1994)("we hold that negligence is sufficient to maintain a § 1986 claim"); *Park v. City of Atlanta*, 120 F.3d 1157, 1160 (11th Cir. 1997)(same).

Even assuming, for the sake of Plaintiffs' jurisdictional argument, that the § 1986 claim leveled against Wright involves intentional or deliberate wrongdoing, the claim is, by definition, predicated on an omission (*viz*., neglect or refusal to prevent the commission of an act in furtherance of a § 1985(3) conspiracy), not overt action or affirmative conduct of any kind. Plaintiffs do not contest this point. (Doc. 79, p. 8). The nature of the tort alleged against Wright, even if intentional, is of an entirely different character than the direct, affirmative or overt action required to satisfy the "intentional act" element of the "effects" test.

In declining to extend *Calder* to reach foreign actors (Saudi princes) who knowingly financed terrorist organizations but were not "primary participants" in attacks targeting the United States, the Second Circuit declared:

> [T]he plaintiffs have the burden of showing that the Four Princes engaged in "intentional, and allegedly tortious, actions ... expressly aimed" at residents of the United States. *Calder*, 465 U.S. at 789, 104 S.Ct. 1482. That burden is not satisfied by the allegation that the Four Princes intended to fund al Qaeda through their donations to Muslim charities. Even assuming that the Four Princes were aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and U.S.S. Cole, their contacts with the United States would remain far too attenuated to establish personal jurisdiction in American courts. It may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, but foreseeability is not the standard for recognizing personal jurisdiction. Rather, the plaintiffs must establish that the Four Princes "expressly aimed" intentional tortious acts at residents of the United States. *Calder*, 465 U.S. at 789, 104 S.Ct. 1482. Providing indirect funding to an organization that was openly hostile to the United States does not constitute this type of intentional conduct. In the absence of such a showing, American courts lacked personal jurisdiction over the Four Princes. *In re Terrorist Attacks*, 538 F.3d at 94-95 (emphasis added).

If *Calder* does not apply to intentional acts such as the financing of global terrorism, it should not apply to tortious omissions such as a bystander's failure to perform a little-known and seldom-imposed statutory duty to prevent the commission of acts in furtherance of a civil conspiracy. Conceptually, *Calder* is a decidedly poor fit to the factual allegations against Wright. As the Ninth Circuit has observed, "'express aiming' analysis depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue." *Schwarzenegger*, 374 F.3d at 807. The "express aiming" requirement contemplates positive action such as the pulling of a trigger, the dissemination of a libelous publication, or the infringement of a copyright. Here, Plaintiffs simply allege that Wright "knew that Lisa Miller was planning to abduct Isabella … and did nothing to prevent the abduction or notify the authorities."[4] (Doc. 59, ¶ 77). This type of conduct is closely analogous to the "untargeted negligence" to which *Calder* does not apply.

The federal courts have never held that a defendant may "aim at" or target a forum state by "doing nothing." Application of *Calder* in the broad-sweeping manner proposed by Plaintiffs would be fundamentally at odds with controlling precedent. *See, e.g., J. McIntyre Machinery, Ltd.*, 131 S. Ct. at 2788-90 (New Jersey courts lacked personal jurisdiction over foreign manufacturer in products liability action because manufacturer did not specifically target the forum through marketing, sales or distribution of goods); *In re Terrorist Attacks*, 538 F.3d at 95 (intentional act of providing indirect funding to terrorist organizations openly hostile to forum does not satisfy *Calder*'s "express aiming" requirement). *Calder* and its progeny instruct that a defendant's

[4] Under *Calder*, jurisdiction exists only if the defendant expressly aims a tortious act at the forum state with the knowledge that the resulting harm will be suffered by the plaintiff in that state. *Calder*, 465 U.S. at 788-90. Here, there is no allegation that Wright even knew that Plaintiff, Janet Jenkins, resided in Vermont at the time of his alleged "omission," and there certainly is no factual basis on which one could draw a reasonable inference that Wright's alleged omission was "aimed at" the State of Vermont. *Country Home Products, Inc. v. Schiller-Pfeiffer, Inc.*, 350 F.Supp.2d 561, 567 (D. Vt. 2004)("Jurisdiction [under *Calder*] is appropriate when the state has been the focal point both of 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").

extraterritorial conduct must consist of an intentional, tortious, and positive act "expressly aimed" at the forum with the knowledge that the "brunt of the harm" will be suffered there. "Mere foreseeability of harm in the forum state is insufficient." *In re Terrorist Attacks,* 538 F.3d at 93.

The allegations against Wright do not come close to falling under *Calder*'s narrowly defined and exacting rubric. As such, Plaintiffs have failed to make a *prima facie* showing of personal jurisdiction over Wright.

II. PLAINTIFFS' ALTERNATIVE MOTION FOR JURISDICTIONAL DISCOVERY SHOULD BE DENIED.

"Although the District Court has the discretion to authorize jurisdictional discovery, discovery is not warranted where plaintiff has failed to make a *prima facie* showing of jurisdiction." *Tamam v. Fransabank Sal*, 677 F. Supp. 2d 720, 733 (S.D.N.Y. 2010). Jurisdictional discovery is unwarranted here because the lack of personal jurisdiction over Wright is patent, and the facts set forth in his supporting affidavits are dispositive and not open to question. *A.W.L.I. Grp., Inc. v. Amber Freight Shipping Lines*, 828 F.Supp.2d 557, 575 (E.D.N.Y.2011)("jurisdictional discovery is not permitted where, as here, the defendant submits an affidavit that provides all the necessary facts and answers all the questions regarding jurisdiction"). Moreover, Plaintiffs do not articulate the nature and scope of the jurisdictional discovery they seek, nor do they explain what additional facts, if discovered, would be sufficient to confer jurisdiction over Wright in this case. (Doc. 79, pp. 18-19). This case does not present the kind of close, colorable, plausible, or fairly debatable claim of personal jurisdiction for which discovery has traditionally been allowed. Here, "Plaintiffs have not made an arguable showing of jurisdiction or identified a genuine issue of jurisdictional facts to warrant jurisdictional discovery." *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598 (S.D.N.Y. 2012).

Because Plaintiffs have so clearly failed to construct even the skeletal framework of a viable claim of jurisdiction over Wright, it would be fundamentally unfair and prejudicial to put him

through the time and expense of discovery. *Ins. Co. of State of Pa. v. Centaur Ins. Co.*, 590 F.Supp. 1187, 1189 (S.D.N.Y.1984) ("Since not even a *prima facie* showing of jurisdiction has been made, there is no purpose in further escalating the costs of this lawsuit by granting leave to conduct jurisdictional discovery"). Plaintiffs' motion for jurisdictional discovery with respect to Wright should, therefore, be denied.

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST WRIGHT UNDER 42 U.S.C. § 1986.

A. Plaintiffs Do Not Allege Actual Knowledge of a Conspiracy, an Essential Element of their § 1986 Claim Against Wright.

In their amended complaint, Plaintiffs allege that "Wright knew that Lisa Miller was planning to abduct Isabella in order to violate the Plaintiffs' rights to equal protection, and did nothing to prevent the abduction or notify the authorities." (Doc. 59, ¶ 77). This allegation, if proven, would only establish Wright's knowledge regarding the intentions of a single individual, *viz*., Lisa Miller.[5] It is well-settled that a § 1985(3) conspiracy exists only where there is an agreement between "two or more persons" to achieve an unlawful end. 42 U.S.C. § 1985(3); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 427 (2d Cir. 1995)("Establishment of a § 1985(3) claim requires proof of a conspiracy between 'two or more persons'"); *Clark v. Town of Ticonderoga*, 213 F. Supp. 2d 198, 200 (N.D.N.Y. 2002)("A conspiracy is an agreement between at least two individuals, where the individuals act in furtherance of the objective of the conspiracy, and each individual has knowledge of the nature and scope of the conspiracy"). Despite its considerable prolixity, Plaintiffs' amended complaint does not allege that Wright had any knowledge of a §

[5] Even the allegation that Wright "knew" of defendant Miller's solo plan to "abduct" her own biological child of whom she had lawful custody is factually unsubstantiated and conclusory. Plaintiffs' amended complaint alleges only that Wright "understood that Lisa and Isabella were leaving and he would not be seeing them again," and that he honored Miller's request to dispose of some personal items she left behind. (Doc. 59, ¶ 35). This is a distant cry from actual knowledge of Miller's plan to "kidnap" her daughter and abscond to a foreign country.

1985(3) conspiracy.[6]

Plaintiffs argue that, under § 1986, they need not allege that Wright knew of a conspiracy, but only that he knew of Miller's intention to commit a wrongful act (*viz*., "abduction" of the minor Plaintiff). (Doc. 79, pp. 12-14). This is an incorrect statement of the law. The overwhelming, if not universal, consensus is that actual knowledge of a § 1985 conspiracy is an essential element of a § 1986 claim. *See, e.g., Whitehurst v. 230 Fifth, Inc.,* 11 CIV. 0767 CM, 2011 WL 3163495 *7 (S.D.N.Y. July 26, 2011)("Section 1986 creates a cause of action against anyone who, knowing that equal protection is about to be denied as a result of conspiratorial action, and having the power to prevent such wrong, fails to act")(emphasis added); *Thompson v. State of N.Y.*, 487 F. Supp. 212, 229 (N.D.N.Y. 1979)(plaintiffs stated a claim under § 1986 because they "alleged that defendants were aware of the conspiracy"); *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994)("a § 1986 plaintiff must show that … the defendant had actual knowledge of a § 1985 conspiracy"); *Brandon v. Lotter*, 157 F.3d 537, 539 (8th Cir. 1998)("in order to maintain her § 1986 action, [plaintiff] would have to prove that … [defendant] had actual knowledge of a § 1985 conspiracy"); *Paletti v. Yellow Jacket Marina, Inc.,* 395 F. Appx. 549, 555 (11th Cir. 2010)("To state a § 1986 claim, the

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[6] Plaintiffs assert in their Opposition Memorandum that 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." (Doc. 79, p. 14). They even go so far in their Memorandum as to claim that Wright must have known of the conspiracy because "he was a participant in it." (Id.). Both of these statements are demonstrably untrue. First, a careful reading of the amended complaint confirms that it contains no allegation whatsoever that Wright knew of any conspiracy or "kidnapping agreement" between Miller and at least one other person. Second, there is no basis in the amended complaint or in actual fact to support a claim that Wright himself was a co-conspirator. Plaintiffs float these wild allegations for the first time in their Opposition Memorandum; the amended complaint is silent on these subjects. And, even if the amended complaint contained such conclusory allegations, the notion that Wright either knew of or participated in the alleged conspiracy, simply because he was acquainted with Lisa Miller and disposed of some of her personal belongings at her request, must be summarily rejected, particularly under the *Twombly-Iqbal* plausibility standard. *See, e.g., Pinero v. Long Island State Veterans Home*, 375 F.Supp.2d 162, 169 (E.D.N.Y.2005)("complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss"); *Webb v. Goord*, 340 F.3d 105, 100 (2d Cir.2003)(plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end")(emphasis added).

plaintiff must show that the defendant knew of a § 1985 conspiracy and failed to prevent it, despite having the power to do so"); *Hampton v. City of Chicago*, 484 F.2d 602, 610 (7th Cir. 1973)(affirming dismissal of § 1986 claim where complaint failed to allege that defendants "knew of the conspiracy against the plaintiffs"); *Perez v. Cucci*, 725 F.Supp. 209, 254 (D.N.J. 1989)(recognizing that, under § 1986, plaintiff must show that "defendant had actual knowledge of the conspiracy to deprive plaintiff of the rights protected under § 1985"); *Waller v. Butkovich*, 584 F. Supp. 909, 943 (M.D.N.C. 1984)("If the evidence establishes the existence of the § 1985(3) conspiracy and [defendants'] advance knowledge of it, then whether or not they had the power to prevent its effectuation becomes an issue of proof"); *Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288, 1299 (D. Kan. 1997)("a section 1986 claim requires that the defendants have knowledge of the alleged conspiracy"); *Veres v. Monroe County*, 364 F. Supp. 1327, 1332 (E.D. Mich. 1973)(section 1986 "requires actual knowledge by the defendant of the conspiracy"); *Jones v. City of Philadelphia*, 491 F. Supp. 284, 288 (E.D. Pa. 1980)(dismissing § 1986 claim "since the complaint fails even to allege knowledge of the conspiracy on the part of the [defendants]").

Plaintiffs invoke *Buck v. Board of Elections*, 536 F.2d 522 (2d Cir. 1976) and *Rogers v. Mount Union Borough*, 816 F.Supp. 308, 314 (M.D. Pa. 1993), in support of their argument that knowledge of a "wrongful act" is sufficient to state a claim under § 1986. (Doc. 79, p. 13). They seize on the Second Circuit's statement in *Buck* that "[k]nowledge of the acts is a statutory prerequisite to suit under 42 U.S.C. § 1986," 536 F.2d at 524, but fail to mention that the court in *Buck* specifically cited *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973) as authority for its statement regarding the "knowledge" requirement. This is crucial because the court in *Hampton* affirmed a dismissal of a § 1986 claim precisely because the complaint did not allege that defendants "knew of the conspiracy against the plaintiffs." *Id.* at 610 (emphasis added).

Furthermore, the *Rogers* decision—which speaks more generally of knowledge regarding a "§ 1985 deprivation," *Rogers*, 816 F.Supp. at 314—cites *Buck* as authority for the "knowledge" element. In sum, Plaintiffs' authorities flow directly from *Hampton*, which explicitly holds that knowledge of a conspiracy is a necessary element of any § 1985(3) claim. As such, Plaintiffs are left with no decisional authority for their argument that a § 1986 claim may proceed without proof of the defendant's actual knowledge of a § 1985 conspiracy.[7]

Because Plaintiffs fail to allege any facts in support of the essential "knowledge" element of their § 1986 claim, their amended complaint against Wright must be dismissed.

B. Plaintiffs Have Failed to Allege a Facially Plausible Claim of Discriminatory Animus under § 1985(3), a Prerequisite to Recovery under § 1986.

Plaintiffs acknowledge that their § 1986 claim against Wright must be dismissed as a matter of law if they fail to state a claim against the co-defendant "conspirators" under § 1985(3). (Doc. 79, p. 12).[8] In order to state such a claim, Plaintiffs must allege, *inter alia*, "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993)(quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Plaintiffs contend that their amended complaint plausibly alleges

[7] Plaintiffs also misconstrue the statute in asserting that Wright could be found liable for failing to alert the authorities after the "wrongful act" (kidnapping) was committed based on alleged after-acquired knowledge of a conspiracy. (Doc. 79, p. 14). Even if the amended complaint alleged such knowledge (it clearly does not), the plain meaning of the statute fatally undercuts Plaintiffs' continuing-tort theory of liability. By its plain and inescapable terms, § 1986 imposes liability upon one who (1) acquires knowledge of a qualifying conspiratorial act that is "about to be committed," (2) has the "power to prevent or aid in preventing the commission of the same," and (3) "neglects or refuses so to do." 42 U.S.C. § 1986(emphasis added). Finally, liability does not attach unless, in addition to these elements, the "wrongful act be committed." *Id.* The statute, therefore, imposes a limited duty for a finite period of time, *viz.*, from the time the defendant acquires knowledge of a conspiracy until the time the injury-causing wrongful act in furtherance of the conspiracy is committed. Here, Plaintiffs allege that the "kidnapping" of the minor Plaintiff occurred just two days after Wright allegedly became aware of defendant Lisa Miller's plan to "abduct" her. (Doc. 59, ¶¶ 35-36). As discussed above, Wright was not subject to a statutory duty-to-aid in the first place because he did not acquire knowledge of the alleged conspiracy at any time before the "wrongful act" was committed. After-acquired knowledge, if any, would be non-actionable and non-causal as a matter of law.

[8] This is settled law within the Second Circuit. *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir.1999)("a § 1986 claim must be predicated upon a valid § 1985 claim"); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York,*

"discriminatory animus on the basis of gender, religion, and sexual orientation." (Doc. 79, p. 15).

Section 1985(3) does not afford a remedy for "all tortious, conspiratorial interferences with the rights of others," and should not be interpreted as "a general federal tort law." *Griffin*, 403 U.S. at 101-02. The United States Supreme Court has never held that this provision of the "Ku Klux Klan Act" reaches anything other than racially motivated conspiracies, and no court in the nation has applied the statute to tortious acts undertaken because of a plaintiff's sexual orientation. (Doc. 40, pp. 14-23). While *Bray* does not foreclose the possibility that gender-based animus may be actionable under § 1985(3), the claim in this case is based solely on sexual orientation, not gender.

Plaintiffs' conclusory allegation that they were deprived of equal protection of the laws "on account of gender" (Doc. 59, ¶ 75) is facially implausible because it is totally at odds with the entire factual foundation of their pleading. The amended complaint alleges a conspiracy aimed at Plaintiff Jenkins because of her sexual orientation, her membership in a same-sex union, and her status as a same-sex parent. (Doc. 59, ¶¶ 45, 47-51, 62-64). Plaintiffs even go so far as to allege that the conspiracy was motivated by a moral disapproval of homosexual relationships, particularly state-sanctioned same-sex marriages, civil unions, and parental rights. (Id.). There is not a single factual allegation in this case that the alleged conspirators targeted Plaintiff because of her womanhood or sex. As such, Plaintiff's "gender" claim should be rejected as facially implausible. *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009)("although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported my mere conclusory statements, do not suffice … only a complaint that states a plausible claim for relief survives a motion to dismiss")(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Such strategic pleading or "bootstrapping" has never been tolerated in this

Inc., 968 F.2d 286, 292 (2d Cir. 1992)("Liability under § 1986 is derivative of § 1985 liability, *i.e.*, there can be no violation of § 1986 without a violation of § 1985").

circuit. *Kiley v. American Society for Prevention of Cruelty to Animals*, 296 Fed. Appx. 107, 109 (2d Cir. 2008)("a plaintiff may not use a gender stereotyping claim to bootstrap protection for sexual orientation into Title VII"); *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 763 (2d Cir. 2006)(recognizing "the faulty logic in viewing what is, in reality, a claim of discrimination based on sexual orientation as a claim of sex stereotyping"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 219 (2d Cir. 2005) ("district courts in this Circuit have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes").

Plaintiffs also argue that they have stated a valid claim for religious animus under § 1985(3) because the alleged conspirators' religious beliefs "dictated that Isabella be shielded from homosexuality." (Doc. 79, pp. 15-16). Plaintiffs cite no authority in support of this theory of liability because none exists. In order to be actionable under § 1985(3), the discriminatory action must have been undertaken because of the plaintiff's religion, not that of the defendant. *See, e.g., Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 291 (2d Cir. 1992). Plaintiffs make no such claim here. The amended complaint does not indicate whether Plaintiff Jenkins even subscribed to a religion, much less that she was targeted because of some religious affiliation, faith, conviction or belief. As with their gender claim, Plaintiffs' religious-animus claim is facially and fatally flawed.

That leaves only Plaintiffs' allegation of discriminatory animus based on sexual orientation. Under existing precedent, discrimination based on sexual orientation cannot form the basis of a § 1985(3) claim.[9] While Plaintiffs give this issue short shrift in their brief, they evidently believe the

[9] *Vega v. Artus*, 610 F.Supp.2d 185, 204-05 (N.D.N.Y. 2009)(sexual orientation not protected under § 1985(3) because "homosexuality has only been afforded rational basis review, and it has not been given special protection by Congress"); *Jermano v. Taylor*, No. 11-10739, 2012 WL 4009897 at *4 (E.D.Mich. July 31, 2012)("Homosexuals are not a protected class for purposes of 42 U.S.C. § 1985(3)"); *Dix v. City of New York*, 2002, No. 01 CIV. 6186, WL

Second Circuit's determination in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) *cert. granted,* 133 S. Ct. 786 (U.S. 2012) that homosexuality is a "quasi-suspect" class entitled to intermediate scrutiny for purposes of equal protection analysis mandates wholesale reversal of this substantial body of § 1985(3) jurisprudence. (Doc. 79, p. 16).

There are fundamental problems with Plaintiffs' reliance on *Windsor*. As an initial matter, the fate of the Second Circuit's heightened scrutiny determination is uncertain. The Supreme Court has granted *certiorari* and held oral argument in the case, and a decision is expected to issue in June. If the Court affirms the Second Circuit's invalidation of DOMA, it will likely do so on the basis of federalism concerns or on the ground that DOMA violates the equal protection clause under rationality review. If the issues raised during oral argument are any indication, the Court does not appear to be poised to ratchet up the level of scrutiny for classifications based on sexual orientation. The fact that the Government itself has joined Windsor in advocating that DOMA be ruled unconstitutional certainly does not bolster the Second Circuit's finding that homosexuals remain a "politically weakened minority" in need of a more exacting form of judicial review. *Windsor,* 699 F.3d at 182.

At oral argument, Windsor's counsel acknowledged that a political and societal "sea change" had occurred in favor of homosexuals in the years since DOMA's enactment. On the whole, the Justices' questions did not reveal any interest in, much less enthusiasm for, the Second Circuit's trailblazing decision that the constitutionality of classifications based on homosexuality must be assessed with the same rigor as that employed for classifications based on sex and gender. Chief Justice Roberts broached the "quasi-suspect" class issue in a roundabout manner, but

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31175251 at *10 (S.D.N.Y. Sept. 30, 2002)("sexual orientation discrimination will not support a 42 U.S.C. § 1985(3) claim"); *Segreto v. Kirschner,* 977 F.Supp. 553, 565 (D.Conn. 1997)("white heterosexual males and homosexuals are not protected classes under Section 1985(3)"); *Yost v. Bd. of Regents, University of Maryland,* No. HAR 93-471, 1993

expressed considerable doubt about that aspect of the Second Circuit's ruling:

> CHIEF JUSTICE ROBERTS: I suppose the sea change has a lot to do with the political force and effectiveness of people representing, supporting your side of the case?
>
> MS. KAPLAN: I disagree with that, Mr. Chief Justice, I think the sea change has to do, just as discussed was Bowers and Lawrence, was an understanding that there is no difference -- there was fundamental difference that could justify this kind of-- categorical discrimination between gay couples and straight couples.
>
> CHIEF JUSTICE ROBERTS: You don't doubt that the lobby supporting the enactment of same sex-marriage laws in different States is politically powerful, do you?
>
> MS. KAPLAN: With respect to that category, that categorization of the term for purposes of heightened scrutiny, I would, Your Honor. I don't -
>
> CHIEF JUSTICE ROBERTS: Really?
>
> MS. KAPLAN: Yes.
>
> CHIEF JUSTICE ROBERTS: As far as I can tell, political figures are falling over themselves to endorse your side of the case.[10]

In his original memorandum, Wright articulated several doctrinal and prudential reasons why the Supreme Court will likely avoid recognition of homosexuality as a "suspect" or "quasi-suspect" class. (Doc. 40, pp. 20-22). In response, Plaintiffs make only passing reference to *Windsor* and do not even attempt to grapple with relevant Supreme Court precedent.

Even if the Supreme Court invalidates DOMA by resorting to heightened scrutiny, such a decision would not translate into statutory coverage for sexual orientation under the Ku Klux Klan Act of 1871. As Wright explained in his original memorandum, the Court has never held that all "suspect" or "quasi-suspect" classes fall within the ambit of § 1985(3), and the legislative history does not express any concern for homosexuals as a class. (Doc. 40, pp. 22-23). Tellingly, Plaintiffs do not respond to these points at all in their Opposition Memorandum.

WL 524757 at * 4 (D.Md. Nov. 19, 1993)("courts have consistently held that homosexuals are not a class within the meaning of § 1985(3)").

[10] Transcript of Oral Argument at pp. 107-08 (http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307.pdf).

For the foregoing reasons and the reasons set forth in Wright's original memorandum, Plaintiffs cannot satisfy the essential "animus" element of their § 1985(3) claim. The § 1986 claim against Wright must, therefore, be dismissed. *O'Bradovich v. McGuire*, 325 F.Supp.2d 413, 426 (S.D.N.Y.2004)("Plaintiffs' inability to state a claim for conspiracy under § 1985 is, in turn, fatal to their § 1986 claim").

C. Plaintiffs Have Not Alleged the State Action Necessary to Maintain a § 1985(3) Claim for Deprivation of Equal Protection Rights and They Cannot Allege a Plausible Claim for Deprivation of the Minor Plaintiff's Right of Interstate Travel.

Plaintiffs agree that, because they have alleged a § 1985(3) deprivation of their "equal protection" rights—rights protected only against state infringement[11]—they are required to allege state action in order to maintain a valid conspiracy claim. (Doc. 79, p. 17). In their Opposition Memorandum, Plaintiffs claim they have satisfied the "state action" requirement because co-defendants attempted to prevent Vermont law enforcement officials from finding the minor Plaintiff, and attempted to prevent the Vermont and Virginia courts from enforcing custody and visitation orders.[12] (Doc. 79, p. 18). These allegations are insufficient, as a matter of law, to satisfy the state-action element of § 1985(3).

The state-action requirement is met only upon a showing that a "public entity conspired with the private defendants to deprive plaintiff of his rights," *Peavey v. Polytechnic Institute of New York*, 775 F.Supp. 75, 78 (E.D.N.Y. 1991), or private conspirators actually caused or induced state officials to deprive the plaintiff of some constitutionally guaranteed right. *Friends of Falun Gong v.*

[11] *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").

[12] In their amended complaint, Plaintiffs allege that co-defendant, Linda Wall, "made several phone calls to law enforcement to instruct them that they should not look for Lisa and Isabella." (Doc. 59, ¶ 52). Plaintiffs do not cite any portion of their pleading for the proposition that co-defendants conspired to prevent the courts from enforcing custody and visitation orders. Presumably, their theory is that the alleged kidnapping effectively prevented the courts of Vermont and Virginia from enforcing such orders.

Pac. Cultural Enter., Inc., 288 F. Supp. 2d 273, 281 (E.D.N.Y. 2003)(requiring "correlation" between conspiracy aimed at influencing state actors and actual state-sanctioned deprivation of plaintiff's constitutional rights); *Comtel Technologies, Inc. v. Paul H. Schwendener, Inc.,* 04 C 3879, 2005 WL 433327 (N.D. Ill. Feb. 22, 2005)("a viable § 1985(3) claim involving a private conspiracy to influence state action requires injury at the state's hands")(emphasis added); *Knubbe v. Sparrow,* 808 F. Supp. 1295, 1303 (E.D. Mich. 1992)("state action exists if the defendant … causes the state to enforce an unconstitutional law").

Here, the fact that one or more co-defendants may have attempted to influence state activity is not enough. At a minimum, Plaintiffs must show that private conspirators actually succeeded in influencing the state to deprive them of some constitutionally guaranteed right. Although the state need not be a participant in the conspiracy, it must become the instrument of harm as a result of the conspirators' influence. Plaintiffs do not and cannot possibly make such a claim here. The deprivation, if any, in this case was the product of wholly private conduct. Because Plaintiffs do not, and cannot, allege any § 1985(3) deprivation as a result of state action or official decision-making of some kind, their conspiracy claim is subject to dismissal.

Alternatively, Plaintiffs argue that they need not allege state involvement at all because the alleged conspiracy "infringe[d] upon Isabella's right to interstate travel to spend time with both her parents, in Virginia and in Vermont." (Doc. 79, p. 17). Plaintiffs advance this claim for the first time in their Opposition Memorandum – the amended complaint makes no mention of it. *Lerner v. Forster*, 240 F. Supp. 2d 233, 241 (E.D.N.Y. 2003)("New claims not specifically asserted in the complaint may not be considered by courts when deciding a motion to dismiss"). Even if Plaintiffs were granted leave to amend their complaint once again to add such a clam, however, the

amendment would be futile.[13] While it is true that a wholly private conspiracy to deprive a plaintiff of the right to interstate travel may be actionable because this particular right is constitutionally protected against private (as well as state) infringement, the Court in *Bray* held that a plaintiff may maintain such a claim only upon a showing that "the predominant purpose of the conspiracy is to impede or prevent the exercise of the right to interstate travel, or to oppress a person because of his exercise of that right." *Bray*, 506 U.S. at 275.

All kidnappings adversely affect the victim's freedom of movement, but "it does not suffice for application of § 1985(3) that a protected right be incidentally affected." *Id.* Rather, "[t]he right must be aimed at" and "its impairment must be a conscious objective of the enterprise." *Id.* The statute "demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it." *Id.* at 276.

According to the factual allegations in this case, the alleged conspiracy was "for the purpose of" interfering with Plaintiffs' equal protection rights to a parent-child relationship. (Doc. 59, ¶ 75). Although the minor Plaintiff's right of interstate travel may have been "incidentally affected" by the alleged kidnapping conspiracy, it was not the "conscious objective" or "predominant purpose" of the alleged conspiracy. *Spencer v. Casavilla*, 44 F.3d 74, 78-79 (2d Cir. 1994)(affirming dismissal of § 1985(3) claim where defendants who committed racially motivated assault and murder "interfered with [victim's] right to flee," but did not aim at or act with predominant purpose of depriving victim of right to travel); *Lowden v. William M. Mercer, Inc.*, 903 F.Supp. 212, 220 (D. Mass. 1995)(dismissing § 1985(3) claim because "interference with [plaintiff's] right to travel

[13] *Ellis v. Chao*, 336 F.3d 114, 126 (2d Cir.2003)("It is well established that leave to amend a complaint need not be granted when amendment would be futile"); *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir.1999)(if a plaintiff cannot demonstrate ability to amend complaint "in a manner which would survive dismissal, opportunity to replead is rightfully denied").

interstate to New York was incidental to [defendant's] purpose of preventing [plaintiff] from meeting with corporate officials"); *Collins v. Christie*, CIV.A.06-4702, 2007 WL 2407105 at *10 (E.D. Pa. Aug. 22, 2007)(dismissing § 1985(3) claim based on racially motivated conspiracy to have plaintiff terminated from his job and arrested because even though "his arrest had the effect of preventing him from traveling interstate," there was "no allegation that the conspiring, private defendants intended to impinge on the plaintiffs' rights to interstate travel or to be free from involuntary servitude-the only two rights recognized under § 1985(3) to be protected from private encroachment").

Because Plaintiffs do not and cannot allege the requisite state action in connection with their equal-protection deprivation claim, and because they do not and cannot state a plausible claim based on a deprivation of the minor Plaintiff's right of interstate travel, their § 1985(3) claim against co-defendants is subject to dismissal. As such, the derivative § 1986 claim against Wright must be dismissed.

IV. PLAINTIFFS' ALTERNATIVE MOTION FOR LEAVE TO AMEND THEIR COMPLAINT SHOULD BE DENIED.

As an alternative to dismissal of their claim against Wright, Plaintiffs move for leave to amend their complaint yet again, this time apparently for the purpose of alleging a deprivation of the minor Plaintiff's right of interstate travel. (Doc. 79, p. 19). For the reasons stated above, however, no amendment would alter the conclusion that an alleged deprivation of the right to travel in the context of this case must be deemed "incidental" under *Bray* and, therefore, not actionable as a matter of law. *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)("The problem with [plaintiff's] causes of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied"). Plaintiffs' motion should, therefore, be denied on grounds of futility of amendment. *Ellis*, 336 F.3d at 126; *Hayden*, 180 F.3d at 53.

CONCLUSION

For the foregoing reasons, Wright respectfully requests that his motion to dismiss be granted, and that Plaintiffs' amended complaint be dismissed with prejudice.

DATED at Burlington, Vermont, this 18th day of April, 2013.

DOUGLAS WRIGHT

BY: PAUL FRANK + COLLINS P.C.

By: /s/ Robert G. Cain, Esq.
Robert G. Cain, Esq.
P.O. Box 1307
Burlington, VT 05402-1307

cc: All Counsel of Record

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, et al., *Plaintiffs,*	)	
v.	)	DOCKET NO.: 2:12-cv-00184-wks
KENNETH L. MILLER, et al., *Defendants.*	)	

SUPPLEMENTAL AFFIDAVIT OF DOUGLAS WRIGHT

I, Douglas Wright, on oath depose and say as follows:

1. I am one of the Defendants in the above-captioned action. I hereby incorporate by reference herein the contents of the affidavit (Doc. 40-1) I filed in this matter on November 7, 2012.

2. It is true that, at Lisa Miller's request, I executed a witness affidavit on September 19, 2007, a true and accurate copy of which was filed in this action by Plaintiffs on March 14, 2013, and marked as Doc. 79-1. It is my understanding that that affidavit was submitted by Ms. Miller and/or her attorneys in connection with related family court proceedings which were then pending in both the State of Vermont and the Commonwealth of Virginia.

3. I signed the affidavit in the City of Berryville, Virginia and I submitted it to Ms. Miller in Virginia.

4. I did not attend any family court proceedings in Vermont in any capacity at any time. I also did not present any testimony in those proceedings remotely, whether by telephone, video, or other means.

5. I did not submit or file the witness affidavit with any court in Vermont or any other court. I never interjected myself into any Vermont family court proceedings, and I never offered any testimony to the Rutland Family Court or any other Vermont family court.

6. To my knowledge, no teacher from Keystone Baptist Church and/or Keystone Christian Academy has ever been to Vermont to participate in any part of the *Jenkins v. Miller* family court proceedings.

7. The individual referenced in paragraph 6 of Janet Jenkins' affidavit dated March 9, 2013, Tammy Davis Canfield, has never been a teacher at Keystone Baptist Church or Keystone Christian Academy. Further, I do not recognize that name as anyone having any affiliation with the Keystone Baptist Church ministry.

8. To my knowledge, no employee working at Keystone Baptist Church under my supervision has ever testified in any Vermont family court proceedings, whether to support Lisa Miller or otherwise.

9. The statements set forth in this affidavit are made based upon my personal knowledge and belief, and are true and correct.

Dated at Berryville, Virginia, this 16 day of April, 2013.

Douglas B. Wright

Pastor Douglas Wright

Subscribed and Sworn to before me
this 16th day of April, 2013.

Carol M. DeHaven

Notary Public

My Commission Expires: 7-31-15

CAROL M. DEHAVEN
NOTARY PUBLIC
Commonwealth of Virginia
Reg. #264427

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UNITED STATED 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,*	CIVIL DOCKET NO. 2:12-cv-00184-wks
v.	
KENNETH L. MILLER, LISA ANN MILLER f/k/a LISA MILLER-JENKINS, TIMOTHY D. MILLER, ANDREW YODER, individually and as agent for CHRISTIAN AID MINISTRIES, INC., CHRISTIAN AID MINISTRIES, INC., RESPONSE UNLIMITED, INC., PHILIP ZODHIATES, individually and as agent for RESPONSE UNLIMITED, INC., VICTORIA HYDEN, f/k/a VICTORIA ZODHIATES, individually and as 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.*	

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2013, I electronically filed ***Reply Memorandum of Defendant, Douglas Wright, In Support of His Motion to Dismiss Plaintiffs' Amended Complaint For Lack of Personal Jurisdiction and For Failure to State A Claim Upon Which Relief Can Be Granted*** with the Clerk of the Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

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Dated at Burlington, Vermont, this 18th day of April, 2013.

Respectfully submitted,

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