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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

10	MONSTER CABLE PRODUCTS,)	Case No. C 04-02778-WDB
11)	
12	Plaintiff,)	REPLY IN SUPPORT OF
13	vs.)	DEFENDANT'S MOTION TO
14	MONSTER VINTAGE,)	TRANSFER
15)	
16	Defendant.)	
	_____)	

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I. Introduction

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Plaintiff is engaged in a campaign to acquire total rights to the word "monster" for all goods and services, in all channels of trade, and in all markets. Monster Cable sells consumer electronic equipment such as cables. Monstervintage.com sells used clothing over the internet. It is highly unlikely that consumers would confuse consumer electronic applications that are sold in Fry's Electronics, Best Buy, and RadioShack with vintage clothing sold exclusively over the internet, especially in light of the extensive third party use of "monster." Plaintiff therefore endeavors to achieve a monopoly it is not legally entitled to through extortion via the legal system. A key component of this strategy is the acquisition of the established rights of others. The way that Monster Cable acquires the rights of others is to sue and then get them to sign over their rights to their trademarks (with a user back license) in exchange for dismissing expensive and protracted litigation. While traditionally trademark holders seek injunctions

1 against accused infringers, instead Monster Cable wants assignments of rights. Consequently,
2 Monster Cable extorts its way into possession of rights in “monster” for goods and services that
3 Monster Cable itself does not offer. Most smaller users of “monster” will capitulate rather than
4 fight. It is a sad truth that litigation in a federal court is a right that many individuals and
5 entities cannot afford, and with every capitulation, Monster Cable’s ill-gotten rights grow.
6 Thus, Monster Cable trades on its sheer size and power, fueling its drive to monopoly by
7 absorbing the hard earned trademark rights of others.

8 Monstervintage.com cannot defend itself in a foreign forum. Monstervintage.com is a
9 small business that has been targeted by an enormous and infamously predatory adversary. If
10 Monstervintage.com is forced to defend itself against this adversary in a foreign jurisdiction, it
11 will be effectively denied its day in court.

12 II. Legal Standards

13 “For the convenience of parties and witnesses, in the interest of justice, a district court
14 may transfer any civil action to any other district or division where it might have been brought.”
15 28 U.S.C. 1404(a). “Section 1404(a) gives a district court broad discretion to consider case-
16 specific circumstances in adjudicating a motion to transfer venue.” *General Electric Co. v.*
17 *Does 1-100*, 1995 WL 396848(N.D.Cal.).

18 The U.S. Supreme Court has outlined a number of private and public factors to be
19 considered by the trial court in making its decision. The private factors to be considered
20 include: the private interest of the litigants, relative ease of access to sources of proof,
21 availability of compulsory process for attendance of the unwilling, the cost of obtaining
22 witnesses, the need to view the premises, the enforceability of a judgment, and all other
23 practical problems that make the trial of a case easy, expeditious, and inexpensive. *Gulf Oil*
24 *Corp. v. Gilbert*, 330 US 501, 508 (1947). The public factors include the burden of jury duty
25 on the local community, the local interest in having the matter decided at home, congestion in
26 courts, and the difficulty in applying foreign law. *Id.* at 508-09.

27 Defendant acknowledges that it carries a substantial burden of persuasion in moving this
28 case away from the forum of the plaintiff’s choice. However, when considering all the

1 pertinent factors, the balance clearly tips in favor of transfer. Despite plaintiff's presence in
2 California, this dispute is not centered in California. Plaintiff's more than ample resources
3 mean that it can litigate in Oregon nearly as easily as it can in California, while defendant's size
4 means that it is hard pressed to defend itself at all, let alone in a foreign forum. Cathy West, the
5 sole proprietor of Monstervintage.com, is injured and suffers from chronic pain, and cannot
6 travel for medical reasons. Finally, while defendant acknowledges that plaintiff's documents
7 and witnesses are found in California, defendant's documents and witnesses are in Oregon, and
8 while the plaintiff has identified employees as its witnesses, defendant will rely on the
9 testimony of third parties who lie beyond the subpoena power of this court. Taken together,
10 these factors amount to a balance of conveniences that requires transfer of this action to
11 Oregon.

12 **A. This Is Not a California Controversy**

13 "While Plaintiff's choice of forum is to be given great weight, it is not the final word.
14 In determining the weight to be given to this choice, consideration must be given to the extent
15 both of defendant's business contacts with the chosen forum and of the plaintiff's contacts,
16 including those relating to his cause of action." *Jarvis v. Marietta Corp.*, 1999 WL 638231
17 (N.D. Cal.) (internal cite omitted). It cannot be presumed that Monster Vintage harmed
18 Monster Cable in California merely because Monster Cable is a California company.

19 Defendant appeared *pro se* and without contesting personal jurisdiction. Consequently,
20 Monster Cable has never demonstrated that Monstervintage.com has any significant contact
21 with California. Plaintiff addressed this issue in its opposition to defendant's motion to transfer,
22 but only made an unsupported assertion that defendant's website www.monstervintage.com is
23 "interactive to the extent that Defendant is subject to personal jurisdiction in this district."
24 Plaintiff's Opposition at 4. In the Ninth Circuit, an interactive website alone is not sufficient to
25 confer personal jurisdiction, so plaintiff's unsupported statement is legally incorrect. *Cybersell,*
26 *Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). As a practical matter, defendant concedes
27 that it sells used clothing on the web. Regardless, plaintiff has not demonstrated that defendant
28 has any meaningful contact with California.

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1 to litigate in Illinois away from their small businesses for which they have responsibility for day
2 to day operations. Heller, on the other hand, is a large corporation which is qualified to do
3 business in Georgia and better able to bear the expense of litigating in the transferee forum.
4 The inconvenience to the defendants of litigating in the Northern District of Illinois favors
5 transfer.” *Id.* Other courts have looked squarely at relative financial resources in deciding a
6 motion to transfer. “The relative financial strength of the parties to absorb the costs of litigation
7 is a consideration in a transfer of venue analysis.” *Ashmore v. Northeast Petroleum Div. Of*
8 *Cargill, Inc.*, 925 F.Supp. 36, 39 (D.Me.1996).

9 Plaintiff Monster Cable has revenues of \$100,000,000 per year. Plaintiff is a large
10 corporation with an international presence, and is fully capable of prosecuting an action in any
11 venue in the country. In contrast, defendant sells approximately \$30,000 of used clothing per
12 year. West Declaration, ¶ 5. It sells through the internet, but its locus of operations is limited
13 to the Portland metropolitan area. Plaintiff has exponentially superior resources. Plaintiff’s
14 sales income is approximately 3,333 times that of defendant. Put another way, defendant’s
15 income is .03% that of plaintiff’s. It will be difficult for Monstervintage.com to defend itself at
16 all against its far larger challenger. It will be all but impossible for Monstervintage.com to
17 shoulder the burden of litigating in a foreign jurisdiction.

18 Defendant’s size presents a further disadvantage in that trial in a foreign jurisdiction will
19 deprive it of the individuals who operate it on a day to day basis. Plaintiff points out, no doubt
20 correctly, that it expects to call employees as witnesses at trial. However, it does not allege that
21 these witnesses are involved in the day to day operation of Monster Cable such that plaintiff
22 will be prejudiced if they are unavailable due to trial in Oregon. Plaintiff’s size and 700 plus
23 employees undoubtedly mean that those employees who are involved in its trademark matters
24 are not necessary to its day to day operations. In contrast, Monstervintage.com is Cathy West’s
25 assumed business name, and Cathy West is responsible for the day to day operation of her
26 business. West Declaration, ¶ 2. Monstervintage.com would be prejudiced if Ms. West were
27 obligated to remain in California for trial.

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1 **C. Ms. West's Health Will Not Permit Travel**

2 Monstervintage.com is Cathy West's assumed business name, and Ms. West is
3 physically unable to travel due to injuries to her back, hip, and knee that require continuing
4 intensive rehabilitation and cause chronic pain. West Declaration, ¶¶ 13-16. Ms. West cannot
5 appear for court appearances, ADR, or trial in San Francisco. *Id.* This inability to travel fatally
6 impairs her ability to participate in any ADR that requires her presence. *Id.* Any mediation
7 which Ms. West must attend personally must occur in Oregon. Ms. West's condition renders
8 her incapable of defending herself in California. As the sole proprietor of the unincorporated
9 business, no other individual can make decisions for her or defend her in her absence.

10 Moreover, the inclusion of "Does" in Monster Cable's complaint suggests that Monster
11 Cable intends at some point to add Ms. West as a defendant in its suit. While the practical
12 difference between suing Ms. West's unincorporated business and suing Ms. West directly is
13 questionable, the possibility of adding her as a defendant underscores the injustice of trying her
14 in California, where she cannot assist in her defense due to the limitations of her health. *See*
15 *Murphy v. Schneider Nat'l Ins.*, 362 F.3d 1133, 1143 (9th Cir. 2004) (plaintiff's inability to
16 travel to a foreign forum due to physical limitations caused by injuries, along with financial
17 troubles "would bar him from litigating his claim in Wisconsin.").

18 **D. Defendant Will Rely On Non-Party Witnesses Who Reside in Oregon,**
19 **While Plaintiff May Order Participation Of Its Employee Witnesses**

20 In the age of video conferencing and depositions, the presence of a witness
21 outside the subpoena power of the court does not preclude that witness's testimony at trial.
22 However, courts have traditionally considered the effect of the location of the witnesses on the
23 court's power to compel the appearance of unwilling witnesses at trial. *Heller Financial*, 713
24 F.Supp. at 1130. Live testimony is easier to listen to, easier to understand, and more
25 compelling. Monstervintage.com's witnesses are predominantly third parties who reside in
26 Oregon. Their identities, locations and the pertinence of their testimony is described in the
27 West Declaration, ¶¶ 6-11. Defendant has identified seven witnesses, five of whom live in
28 Oregon. A trial in California will involve live testimony from plaintiff's witnesses and almost

1 exclusively videoconferenced testimony, videotaped testimony, or testimony read from
2 deposition transcripts from defendant's witnesses. Thus, while nonparty witnesses residing in
3 Oregon can nonetheless offer testimony, the predominance of taped or read testimony for
4 defendant, contrasted with the live testimony available to plaintiff in California, means that
5 Monster Cable will have a significant advantage in a trial in California. Transfer to Oregon
6 would even the playing field, because Monster Cable's witnesses are employees of Monster
7 Cable who can be asked to testify in Oregon pursuant to their employment. Thus, trial in
8 Oregon would allow both sides to offer live testimony.²

9 **E. Plaintiff's Opposition is Unavailing**

10 In its opposition, plaintiff makes the point that a company cannot receive medical
11 attention and correctly points out that Monstervintage.com inadvertently failed to renew its
12 business registration for a few months. Neither of these points has any bearing on whether or
13 not to transfer this action. Monster Cable correctly points out that Ms. West lives just across
14 the river from Portland, in Camas, Washington. Monster Cable argues that this means that "the
15 jurisdictional limitations with respect to Ms. West, and the documents she possesses, will be
16 the same" for the District of Oregon as they are for this court. Opposition at p. 5. This
17 argument is incorrect. There is no jurisdictional issue with respect to Ms. West or her
18 documents because her business is located in Oregon, and by that virtue Oregon has
19 jurisdiction. There is a convenience issue, and convenience depends on geographic proximity,
20 not jurisdiction. Ms. West lives about 15 minutes from the courthouse in Portland. The
21 District of Oregon is more convenient for her. Ms. West's documents are in Portland. West
22 Declaration, ¶ 12.

23 Monster Cable argues that someone associated with Monstervintage.com flew down to
24 the San Francisco area and rented a truck in order to communicate its position to Monster Cable
25 and those most familiar with Monster Cable. Due to the tremendous disparity in size and
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27 ² Monster Cable states that transfer of this action "might preclude" live testimony of its
28 employee witnesses, but neither names those witnesses nor provides a statement of their
testimony nor explains why it cannot send employee witnesses to a trial in Oregon.