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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MONSTER CABLE
PRODUCTS, INC.,

No. C 04- 02778 WDB

Plaintiff,

OPINION AND ORDER
TRANSFERRING THIS MATTER
TO THE DISTRICT OF OREGON

v.

MONSTER VINTAGE

Defendant.

TO ALL PARTIES AND COUNSEL OF RECORD:

Having considered the oral and written submissions of the parties, and for reasons elaborated in part at the hearing on December 8, 2004, the court GRANTS defendant's motion to transfer venue of this case to the United States District Court for the District of Oregon in Portland.

Under 28 U.S.C. section 1404(a), a district court may transfer a civil action to any other district or division where it might have been brought. In determining whether such a transfer would be appropriate in a given case, the petitioned court first must determine whether the proposed transferee court would have had jurisdiction (subject matter and personal) over the action had it been filed in the transferee court. In the case at bar, neither party suggests that the federal district court sitting in Portland, Oregon, would not have had subject matter or personal jurisdiction had

1 plaintiff chosen to file there. Subject matter jurisdiction would attach because
2 plaintiff is seeking to vindicate rights conferred by a federal statute. Similarly, it is
3 clear that the district court in Portland would have had personal jurisdiction over the
4 defendant, an unincorporated business entity operated as a sole proprietorship out of
5 Portland. The defendant is a commercial resident of Portland, conducts most of its
6 business there, and engaged there in most of the conduct that plaintiff alleges violated
7 its rights.

8 Once it is clear that the proposed transferee court would have had jurisdiction
9 (and that the requirements of the generally applicable venue statutes would be
10 satisfied there¹), the petitioned court must determine whether, in the language of 28
11 U.S.C. section 1404(a), it would serve “the convenience of the parties and witnesses,
12 [and be] in the interest of justice,” to transfer the case. In making these
13 determinations federal courts are instructed, generally, to dislocate the plaintiff’s
14 choice of forum only if the defendant shows, persuasively, that logistical and/or
15 fairness considerations make the proposed transferee court the appropriate place for
16 the action to proceed. Decker Coal Company v. Commonwealth Edison Company,
17 805 F.2d 834 (9th Cir. 1986). Courts should not order a transfer if the effect is merely
18 to shift the inconvenience of litigating from the defendant to the plaintiff. Van Dusen
19 v. Barrack, 376 U.S. 612 (1964).

20 In assessing the defendant’s showing, courts may take into account any factors
21 that, in the case at hand, bear on the logistical or fairness issues. Because this kind
22 of inquiry must be circumstance-specific, it is impossible to develop an exhaustive
23 list of pertinent considerations. There are, however, a number of factors (some
24 partially overlapping) that have been deemed relevant by many courts. These
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26 ¹The requirements of 28 U.S.C. section 1391 clearly would have been met if plaintiff had filed
27 in the United States District Court sitting in Portland: the defendant business entity ‘resides’ there (it is
28 not incorporated, but it does the majority of its business from Portland) and most of the conduct on
which plaintiff bases its complaint occurred there.

1 include: (1) plaintiff's choice of forum, (2) the convenience of the parties – including
2 their relative means and their relative capacities to absorb or withstand the cost and
3 other burdens the litigation will entail, (3) the convenience of the witnesses and the
4 relative cost of securing witness testimony, (4) whether a greater number of the
5 important non-party witnesses are within subpoena range in either of the competing
6 fora, (5) relative ease of access to non-testimonial evidence (documents, exhibits,
7 sites of relevant events, tangibles, demonstrations or experiments, etc.), (6) any other
8 factors that might affect the cost of trying the case, (7) how long it is likely to take to
9 get to trial in the competing fora (or the relative docket pressures/burdens in these
10 courts), (8) the feasibility and desirability of consolidating the case with other, similar
11 cases in either court, (9) any special local interest in the controversy in either fora,
12 and (10) the relative familiarity of the competing courts with the substantive law on
13 which disposition of the case primarily would turn.

14 As long as this list appears, it fails to make explicit a consideration of great
15 potential weight – a consideration that is exposed clearly by the circumstances we
16 confront in the case at bar. Because courts are, fundamentally, in the fairness
17 business, a court considering whether to transfer a case to a different venue should
18 pay careful attention to what effect the proposed transfer would have on the
19 likelihood that the proceedings will be fair to all parties. In considering this issue,
20 courts should ask, among other things: 'Has the defendant made a persuasive showing
21 that if the case is litigated in the forum that plaintiff chose there is an appreciably
22 greater risk that the defendant will not be able to develop or present the evidence
23 relevant to her defense as well as she could if the case were litigated in the forum to
24 which she wants the case transferred? Is there a greater risk of substantial
25 unevenness in the evidentiary playing field in one court than in the other? Stated
26 differently, has the defendant shown that if the case were litigated in the forum of
27 plaintiff's choice there would be a greater threat to the judiciary's interest (which is
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1 really society's interest) in making sure that justice is done, i.e., that the case is
2 decided after all the material evidence is discovered and then presented to the trier of
3 fact in a way that is fair to the real probative significance of that evidence?

4 Before assessing the relevant factors, we feel constrained to point out that only
5 one of the parties to this dispute has filed any competent evidence in support of the
6 factual assertions made on its behalf. That party is the defendant. For reasons best
7 known to it, plaintiff submitted no declarations with its papers. Plaintiff thus has
8 failed to authenticate the three documentary exhibits attached to its Opposition brief
9 – and has failed to support any of its contentions with sworn statements from anyone
10 with personal knowledge. While this failure arguably is a sufficient ground for ruling
11 in defendant's favor here, we will proceed on the assumption that plaintiff could
12 muster evidentiary support for the factual assertions that plaintiff's lawyers have
13 made in their brief.

14 We turn to the pertinent factors. The weight to be ascribed to plaintiff's choice
15 of forum can vary with the circumstances. It can increase, for example, if there is
16 some special connection between the interests of the forum community and the
17 litigation, or if for some other reason the litigation in a real sense 'arises out of' the
18 community in which the court that plaintiff chose is located. Similarly, a plaintiff
19 that is deeply rooted in the forum court's community, or that resides and engages in
20 virtually all of its activities there, has a weightier interest than a plaintiff whose
21 connections with the forum it chose are relatively insubstantial. While we know of
22 no special local interest in this dispute, it is undisputed that plaintiff's principal place
23 of business is in the forum it chose – a locale in which it employs many people and
24 in which, apparently, the work was done that supports the rights plaintiff asserts in
25 this case. These are significant interests and deserve substantial weight – clearly
26 tipping the scales, at the outset of the analytical process, in plaintiff's favor.

1 The balance tips in the opposite direction, however, when we examine the
2 relative convenience of the parties. While litigating this case in northern California
3 clearly would be more convenient for plaintiff than litigating it in Portland, the
4 inconvenience that defendant would suffer if the case were litigated here would be
5 much greater. While the defendant in form is a small business, in reality the
6 defendant is one person. The real defendant is Cathy West.² She is a sole proprietor
7 of a small business and a person of limited means. Plaintiff is a large corporation
8 with ample resources to fly its witnesses and lawyers to Portland; plaintiff could
9 absorb relatively painlessly the costs and other burdens of litigating in Portland.

10 In sharp contrast, the burdens of litigating here could be crushing for
11 defendant. Defendant has no office, no employees, no merchandise, no supplier, and
12 no outlets anywhere in California, let alone in the Northern District. She probably
13 mails vintage clothing occasionally to customers here (in response to orders placed
14 on her website – her only outlet), but she has no other contacts with this jurisdiction.
15 There is no reason to believe she travels here for any purpose – business or personal.
16 So she has no capacity to soften the burdens of travel here for litigation by combining
17 more than one purpose on her trips.

18 Of even greater significance, it appears that the cost of reimbursing witnesses
19 (all of whom reside in or around Portland) for their travel expenses to come here to
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21 ²During oral argument on defendant's motion, plaintiff's counsel indicated that his client was
22 actively considering seeking leave to amend its Complaint to add common law defamation claims
23 against the defendant and against Victor Petrucci, who apparently is Ms. West's boyfriend. Plaintiff's
24 counsel urged the court to factor this possibility into its analysis of the venue issues. We have declined
25 that invitation, however, in part because plaintiff, while having had ample time to do so, has not
26 provided us or defendants with the information that is essential to assess the venue implications of such
27 an amendment, and in part because plaintiff has neither filed an amended complaint nor sought leave
28 to do so. It is not appropriate to base a ruling on something that has not happened and that might not
happen. As important, factoring the possible amendment into our analysis would be unfair to defendant,
who cannot be expected to present factual and legal challenges to allegations that have not been framed.

It also is important to bear in mind that, based on plaintiff's summary description of the alleged
conduct that would serve as the basis for the defamation claims, it seems clear that even if they were
added to the litigation mix they would not be the primary focus of the case. Instead, the case would
remain centered on the claims in the current version of the complaint – claims that sound essentially in
intentional infringement of plaintiff's rights under trademark laws.

1 testify would represent a significant percentage of the income that defendant's
2 business generates. This fact might well lead Ms. West to decide not to call some (or
3 even all) of the witnesses whom she would call if the trial proceeded in Portland.
4 Thus, forcing Ms. West to litigate the case here would impose expense burdens on her
5 that would threaten to distort the truth finding process and give plaintiff a potentially
6 unfair advantage. The foreseeability of that advantage could, in turn, unfairly
7 imbalance settlement negotiations, pressuring Ms. West to yield to terms that bear no
8 relationship to her feelings about the merits of the plaintiff's claims. Obviously,
9 these are major concerns. They could be avoided if the case were litigated in
10 Portland, a venue in which plaintiff would suffer under no comparable disabilities.

11 There is an additional dimension of defendant's circumstances that could be
12 a source of even more severe unfairness if the case were litigated here. According to
13 her uncontradicted declaration (supported by a brief statement from her physician),
14 Ms. West suffers from the effects of injuries to her back, hip and knee that require
15 "continuing medical attention" – attention that she receives regularly in the Portland
16 area. More significantly, Ms. West's medical condition makes it impossible for her
17 to travel: she cannot sit for longer than 20 minutes without experiencing pain and
18 risking aggravation of her injuries. Because she cannot travel, she could not
19 participate in person in this district in either court-mandated mediation or in the trial
20 of the case against her. As this court's local rules acknowledge, the purposes of
21 mediation are more likely to be achieved, and the value of mediation to the parties is
22 more likely to be realized, if all the litigants participate in person in the mediation
23 session. See ADR Local Rule 6-9(a). A mediation under this court's ADR program
24 would occur in this district – relegating Ms. West to participation by telephone and
25 depriving her of the full benefits of the ADR process.

26 The fact that Ms. West's medical condition would prevent her from attending
27 trial in this court is a matter of the gravest concern. Plaintiff accuses Ms. West not
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1 just of trademark infringement and unfair business practices, but of intentionally and
2 maliciously abusing plaintiff's mark in order to advance her own business interests.
3 These allegations attack not only Ms. West's business, but also her person – her
4 integrity, her character, her values. A person so attacked has an acute interest in
5 attending the proceedings in which she is to be judged. It is especially important,
6 given the nature of the allegations, that Ms. West have a full opportunity to defend
7 herself. Her opportunity would be far less than full if she could not be present in
8 person during all phases of the trial and could not present her testimony live from the
9 witness stand.

10 Her absence would create a risk that the jury would infer, no matter what was
11 said by way of explanation, that she didn't care enough about the matter to bother
12 attending. The jury might infer that her absence evidenced disrespect not only for the
13 jury and the court, but also for the law and for the plaintiff's rights under the law.

14 At least as important, not being able to testify in person could compromise,
15 seriously, Ms. West's ability to give the jury a fair opportunity to pass judgment on
16 the aspects of her character and the motives for her conduct that plaintiff intends to
17 assail. Plaintiff's allegations make Ms. West's credibility central to the case. Under
18 those allegations, the jury will be called upon to assess what Ms. West knew about
19 plaintiff and its mark at various junctures, how she came to choose the name for her
20 business, and what her motives and intentions were. It is, fundamentally, her person
21 that the plaintiff will be asking the jury to judge. Because her person is the subject
22 of the judgment, being able to present and explain herself in person to the jury might
23 well be critical to her ability to get a fair trial. A party whom the jury sees only
24 through a video-taped deposition is abstracted, less real, easier to condemn than a
25 party or witness whose flesh and blood are present and whose emotions are palpable.

26 Moreover, a party whose evidence is presented in absentia through deposition
27 testimony that was taken before the trial has no opportunity to respond to the
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1 evidence that is admitted during the course of the proceedings, to explain matters not
2 addressed earlier, to clarify material inartfully articulated or to correct honest but
3 erroneous answers previously given. In other words, a party in absentia cannot
4 participate fully in the often non-linear and unpredictable dialectical process that our
5 adversary system of adjudication assumes is essential to equip the jury to determine
6 what the truth is – especially the truth about the character of a human being.

7 Given these considerations, a decision to proceed with the litigation here
8 would risk imposing a fundamental unfairness on defendant. No such risk would
9 attend proceedings in Oregon. And litigating in Portland would impose no
10 disabilities on plaintiff of any remotely comparable character. These considerations
11 are of great weight in our assessment of the interests that are at play in this analytical
12 setting.

13 A somewhat similar picture emerges when we examine the relative
14 convenience of the non-party witnesses. For the most part, plaintiff's witnesses
15 come from the ranks of its employees.³ Travel to Portland to testify would result in
16 some inconvenience to these employees and some interruption of other work, but, on
17 close scrutiny, not a great deal more than travel from Brisbane to Oakland (at least
18 at rush hour). Presumably these employee witnesses would incur no travel expenses
19 – as plaintiff would reimburse them.

20 Again the contrast is striking when we look at plaintiff's side of the case. Her
21 witnesses are not her employees. While full information about their current situations
22 has not been provided, each of them performed services for Ms. West for a limited
23 period and/or on an essentially ad hoc contractual basis. There is no reason to believe
24 that any of them operate substantial companies or have access to substantial
25 resources. It appears likely that traveling to Oakland to testify would impose

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27 ³Counsel for plaintiff advised the court, during oral argument on defendant's motion, that one
28 of plaintiff's anticipated witnesses is no longer in its employ. Plaintiff's counsel conceded, however,
that plaintiff expected that former employee to agree to testify – either in Oakland or in Oregon.

1 burdens on them, and cause disruptions of their work, that are far greater than the
2 burdens and disruptions that would be imposed on plaintiff if the litigation proceeded
3 in Portland and plaintiff had to fly a relatively small number of its employees there.
4 Moreover, there is reason to fear that at least some of the witnesses whom defendant
5 would like to call would not even consider traveling to Oakland to testify unless all
6 their travel expenses were reimbursed – a foreseeable development that would
7 exacerbate the economic burdens on defendant of litigating here.

8 It also is significant in this case that all of the independent witnesses whom
9 defendant would like to call to testify at trial would be beyond this court's subpoena
10 range. Thus, defendant could not be sure, even if she paid all travel and all business
11 disruption costs of each witness, that any of them would appear at a trial here. And
12 given her limited resources, Ms. West might not be able to afford to have the
13 depositions of these witnesses video-taped.⁴ It is not at all likely that she could afford
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15 ⁴Ms. West certainly can't count on plaintiff video-taping deponents who would be motivated to
16 support defendant. But even if Ms. West could afford to video-tape the depositions of all her witnesses,
17 the presentation of testimony at trial through that medium is likely less effective than live testimony –
18 both as a matter of the psychology of the exercise and because there is no opportunity in a video-taped
19 presentation of testimony for the witness to clarify, to adjust to new information or argument, or to
20 respond to challenges (by counsel or from other witnesses who testify live at trial).

21 How much less effective video-taped testimony is than live testimony will vary with many
22 circumstances – not least of which are the subjects on which the testimony will focus and the goals
23 counsel seeks to achieve through the testimony. As noted in an earlier section of this Opinion and Order,
24 issues of paramount importance to defendant in this case may turn on the jury's assessment of the
25 integrity of Ms. West – and of why and how she came to use the mark that plaintiff accuses of infringing.
26 It is especially important to the defendant that the jury end up trusting and believing the witnesses Ms.
27 West calls to testify – for they will be testifying about essential aspects of her character, as well as about
28 what she knew when she selected her mark, about the process that led to its conception, and about the
reasons she chose it.

23 In an opinion I filed about a decade ago I suggested that “with the development of video-taped
24 depositions, and with increasing access to ‘live’ trial testimony by simultaneous electronic transmission
25 to the courtroom from remote sites, the significance of the ‘subpoena’ factor in venue analysis is
26 declining generally.” Linear Technologies Corp. v. Analog Devices, Inc., 1995 WL 225672 (N.D. Cal.
27 1995). Having been forced by the dispute over venue in the case at bar to think through these issues
28 in a different setting, I have concluded that the generalization in the Linear Technologies opinion swept
too broadly and may be subject to significant exceptions. As indicated in the text, above, how much
effectiveness is lost by presenting testimony on video-tape instead of from a live witness will vary with
a large number of circumstances – and will depend in no small measure on what the witness is testifying
about.

1 to pay for the presentation of her witnesses' testimony at trial through simulcast
2 video-conferencing. Thus, Ms. West might be forced to present the testimony of her
3 witnesses by having transcripts of their depositions read to the jury – a notoriously
4 ineffective means of communicating.

5 Plaintiff would suffer from no such disabilities if the case proceeded in Oregon.
6 Plaintiff could order its employee witnesses to fly (at plaintiff's expense) to Portland
7 to give live testimony. And in that live testimony, counsel for plaintiff would have
8 an opportunity to 'adjust' or explain or blunt the impact of any testimony that did not
9 go well during depositions – an opportunity that defendant likely would not have, at
10 least with some of her witnesses.

11 These kinds of considerations implicate values at the center of our system of
12 justice – for they raise the specter of a trial that could be fundamentally unfair to
13 defendant if it were to proceed in Oakland. Trial in Portland, by contrast, raises no
14 such specter. There is virtually no chance that trial in Portland would be unfair to
15 plaintiff – while the odds that the trial would be unfair to defendant are great if it is
16 held there.

17 None of the other factors that courts routinely consider when ruling on motions
18 to transfer under section 1404(a) tip the scales in favor of the plaintiff or in favor of
19 the defendant. The documentary evidence could be used with comparable ease in
20 either venue. Neither party has presented evidence suggesting that it would take
21 appreciably longer to get to trial in either of the two courts. There has been no
22 suggestion that this case could be consolidated with another in either court. And it
23 is appropriate to assume that the judges in the two courts are equally familiar with
24 the substantive legal principles that are central to the case, principles rooted in federal
25 trademark law.

26 Having identified and assessed the relative weight of the pertinent
27 considerations, and having accorded plaintiff's interest in the forum of its choice the
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1 level of deference due under the law, we conclude that defendant has established that
2 the competing logistical and fairness considerations mandate transfer of this case to
3 the United States District Court in Portland, Oregon.

4 We therefore GRANT defendant's motion and ORDER THIS CASE
5 TRANSFERRED TO THE UNITED STATES DISTRICT COURT FOR THE
6 DISTRICT OF OREGON.

7 IT IS SO ORDERED.

8 DATE: December 14, 2004. _____ /s/ Wayne D. Brazil
9 WAYNE D. BRAZIL
United States Magistrate Judge

10 Copies to:

11 All parties,
12 WDB, Stats

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