Caution
As of: Aug 17, 2010

MATTEL, INC., Plaintiff, -against- ADVENTURE APPAREL, Defendant.

00 Civ. 4085 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 3179

March 15, 2001, Decided
March 22, 2001, Filed

SUBSEQUENT HISTORY: [*1] As Amended March 26, 2001.

DISPOSITION: Defendant's motion to dismiss denied, cross-motion to amend complaint granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sued defendant under the Lanham Act for cybersquatting, 15 U.S.C.S. § 1125(d), trademark dilution, 15 U.S.C.S. § 1125(c), and trademark infringement, 15 U.S.C.S. § 1114(a), and for common-law unfair competition. Pro se defendant moved to dismiss the complaint for lack of personal jurisdiction, improper venue, and improper service of process. Plaintiff cross-moved for leave to amend the complaint.

OVERVIEW: Plaintiff's investigator ordered allegedly infringing merchandise from defendant over its web site, using his credit card. Defendant shipped the merchandise into New York. This activity not only involved the exchange of payment and shipping information but was a commercial transaction that was actually consummated on line. These activities were sufficient to bring defendant into the category of a person transacting any business, via the internet, in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1), which supported the court's exercise of personal jurisdiction over defendant. Venue was proper based on the same internet sale, because this sale meant that a substantial part of the events giving rise to plaintiff's claims occurred in New York. Accordingly, defendant's motion to dismiss was denied. Plaintiff was allowed to amend its complaint to include defendant's sole proprietor and pro se representative as a defendant, since the sole proprietor had been fully apprised of the suit and was the real party in interest. The court sua sponte raised an issue concerning the appropriateness of transferring venue to another district and directed the parties to brief the matter.

OUTCOME: The court denied defendants' motion to dismiss. It granted plaintiff's cross-motion to amend the complaint. The parties were directed to brief the issue of whether transfer to the United States District Court for the District of Arizona was appropriated.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Challenges
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion
[HN1]The burden on plaintiff at pleadings stage is to establish a prima facie case of personal jurisdiction. The facts gleaned from the pleadings and affidavits are to be construed in the light most favorable to the plaintiff. Ultimately, if a jurisdictional challenge is raised at trial, plaintiff bears the burden of establishing jurisdiction over the defendant by a preponderance of the evidence.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN2]In determining personal jurisdiction a federal court looks first to the law of the forum state. If jurisdiction is proper under the relevant state statute, it must then be determined whether the exercise of jurisdiction comports with due process.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN3]See N.Y. C.P.L.R. 302(a)(1) (McKinney 1990).

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN4]The jurisdictional net cast by N.Y. C.P.L.R. 302(a)(1) (McKinney 1990), reaches only a defendant that purposefully avails itself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its law. New York courts look to the totality of circumstances to determine whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN5]A single transaction of business is sufficient to give rise to jurisdiction under N.Y. C.P.L.R. 302(a)(1) (McKinney 1990), even where the defendant never enters the state, provided that the defendant's activities were purposeful, and that there was a substantial relationship between the transaction and the claim asserted.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements
Computer & Internet Law > Internet Business > General Overview
[HN6]Courts considering the issue of when internet activity provides personal jurisdiction over a defendant have identified a range of fact patterns. At one end of the spectrum are passive web sites, where the defendant merely makes information available on a web site, and in which situation personal jurisdiction is not conferred. At the other end are cases where the defendant clearly does business over the internet, such as by knowingly and repeatedly transmitting computer files to customers in other states, and in which situation there is personal jurisdiction. Occupying the middle ground are cases in which the defendant maintains a web site that is interactive insofar as it permits the exchange of information between users in another state and the defendant, and in which situation whether there is personal jurisdiction depends on the level and nature of the exchange.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN7]Due process requires a defendant's certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Civil Procedure > Venue > Federal Venue Transfers > Improper Venue Transfers
[HN8]Where a case is filed in an improper venue, the court shall dismiss, or if it be in the interest of justice, transfer such case to any district in which it could have been brought. 28 U.S.C.S. § 1406(a).

Civil Procedure > Venue > Multiparty Litigation
[HN9]Venue in trademark cases is governed by the federal venue statute, 28 U.S.C.S. § 1391, which states in relevant part: a civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C.S. § 1391(b)(2).

Civil Procedure > Venue > Individual Defendants
Civil Procedure > Venue > Multiparty Litigation
[HN10]The venue requirement serves the purpose of protecting a defendant from the inconvenience of having to defend an action in a trial that is either remote from the defendant's residence or from the place where the acts underlying the controversy occurred. The burden is on the plaintiff to demonstrate that a substantial part of the events or omissions giving rise to the claim occurred in the forum district.

Civil Procedure > Venue > Multiparty Litigation
Trademark Law > Infringement Actions > Jurisdiction > General Overview

[HN11]In trademark infringement claims, courts hold that venue may be proper in each jurisdiction where infringement is properly alleged to have occurred. At a minimum, the defendant must have targeted its marketing and advertising efforts at the district in question, or have actually sold its products there.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Venue > General Overview
Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements
[HN12]The principles which govern the personal jurisdiction inquiry in cases involving infringing activity conducted via the internet are also applicable to the venue issue.

Business & Corporate Law > Sole Proprietorships
Civil Procedure > Parties > Capacity of Parties > General Overview
Trademark Law > Special Marks > Trade Names > General Overview
[HN13]The service upon a trade name with no separate jural existence will not bar a suit against the owner if he was fairly apprised of the suit.

Civil Procedure > Venue > Federal Venue Transfers > General Overview
[HN14]See 28 U.S.C.S. § 1404(a).

Civil Procedure > Venue > Federal Venue Transfers > Convenience Transfers
[HN15]The broad language of 28 U.S.C.S. § 1404(a), seems to permit a court to order transfer sua sponte, and those cases that have arisen suggest such power does exist. District courts within the Second Circuit follow this practice where deemed appropriate. However, as a rule, notice and an opportunity to be heard on this issue should be provided.

COUNSEL: For Mattel, Inc., Plaintiff: WILLIAM DUNNEGAN, ESQ., ANNMARIE CROSWELL, ESQ., Of Counsel, PERKINS & DUNNEGAN, New York, NY.

JEFFREY GROCH, d/b/a ADVENTURE APPAREL, Defendant, Pro se, Tucson, AZ.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINION BY: ROBERT W. SWEET

OPINION

Sweet, D.J.,

Pro se Defendant Adventure Apparel ("Adventure") has moved to dismiss the complaint in this action for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b) (6), for improper venue, pursuant to Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. § 1406(a), and for improper service of process, pursuant to Federal Rule of Civil Procedure 12(b)(5). Plaintiff Mattel, Inc. ("Mattel") has cross-moved for leave to amend the complaint to add Jeffrey Groch ("Groch") as a defendant. For the reasons set forth below, the motion to dismiss is denied, the cross-motion to amend the complaint is granted, and the parties are directed to brief the issue of whether transfer of this action to the United States District Court for the District of Arizona, Tucson Division, is appropriate.

[*2] ***The Parties***

Mattel is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in El Segundo, California.

Adventure is a retail store located in Tucson, Arizona, and of which Groch is the sole proprietor.

Prior Proceedings

This action was initiated by the filing of a complaint on June 1, 2000, by Mattel, asserting claims under the Lanham Act for cybersquatting, 15 U.S.C. § 1125(d), trademark dilution, 15 U.S.C. §§ 1125(c), and trademark infringement, 15 U.S.C. § 1114(a), and a common law unfair competition claim.

On August 8, 2000, an answer to the complaint was filed. On January 15, 2001, the instant motion to dismiss was received by chambers. [1] On January 26, 2001, Mattel's cross-motion was filed. Submissions were received regarding both motions, and the matter was deemed fully submitted on February 7, 2001.

1 The motion to dismiss was not filed directly with the Clerk of the Court, as it should have been. However, in light of the defendant's *pro se* status, and given that Mattel was properly served, this technical error will be disregarded and the Court will ensure that the motion is properly docketed and filed.

[*3] ***Facts***

The facts set forth herein are gleaned from the pleadings and affidavits, and are construed in the light most favorable to Mattel. They do not constitute findings by the Court.

Adventure sells tanning sessions and swim wear and has two locations, both in Tucson, Arizona.

In January 2000, Adventure developed a web site on the internet. The domain name for this site is "adventureapparel.com," and it is hosted by Yahoo, a company located in California.

Groch has also registered the internet domain names "barbiesbeachwear.com" and "barbiesclothing.com." These names are registered with Network Solutions, a firm located in Virginia, and are "parked" at the Adventure site pursuant to that firm's registration requirements. [2] The "barbiesbeachwear.com" and "barbiesclothing.com" names are not registered with any search engine.

> 2 The term "parked" is drawn from Adventure's submissions, and the significance of this term has not been fully explained by Adventure. The implication, however, is that "barbiesbeachwear.com" and "barbiesclothing.com" are not web sites separate and apart from the adventureapparel.com site. In any event, it is immaterial for purposes of the instant motion whether these names represent separate web sites or, rather, can only be accessed through the adventureapparel.com site.

[*4] Adventure's web site has produced one sale. On April 11, 2000, Michael Falsone ("Falsone") of New York visited barbiesbeachwear.com and ordered a pair of hosiery with his American Express card. Falsone is an investigator for Mattel. Although the site was listed as "not open for business," the order was honored, and the hosiery were shipped to Falsone at 5 Hanover Square, 12th Fl., New York, NY, 10004, which is an address located within the Southern District of New York. Falsone received a confirmation e-mail regarding his order on April 13, 2000. The sender identified in this e-mail was "adventureapparel@aol.com," and the recipient was Falsone, at "mikestone9@aol.com." The e-mail provided an internet address at which the current status of the order could be checked at any time.

Discussion

I. *This Court Has Personal Jurisdiction* [3]

> 3 The motion to dismiss is addressed to the issue of personal jurisdiction as to both Adventure and Groch, since it is contended that Groch, not Adventure, is the proper party in interest. For the sake of convenience, the defendant will be referred to as Adventure in addressing the challenge to personal jurisdiction and venue.

[*5] [HN1]

The burden on Mattel at this stage of the proceedings is to establish a *prima facie* case of personal jurisdiction. *See Beacon Enters., Inc. v. Menzies*, 715 F.2d 757, 768 (2d Cir. 1983); *Pilates, Inc. v. Pilates Inst., Inc.*, 891 F. Supp. 175, 178 (S.D.N.Y. 1995). The facts gleaned from the pleadings and affidavits are to be construed in the light most favorable to Mattel. *See Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985). Ultimately, if a jurisdictional challenge is raised at trial, Mattel will bear the burden of establishing jurisdiction over the defendant by a preponderance of the evidence. *See Hoffritz*, 763 F.2d at 57; *Levisohn, Lerner, Berger & Langsam v. Medical Taping Sys., Inc.*, 10 F. Supp. 2d 334, 338-39 (S.D.N.Y. 1998).

[HN2]In determining personal jurisdiction a federal court looks first to the law of the forum state. *See Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997). If jurisdiction is proper under the relevant state statute, it must then be determined whether the exercise of jurisdiction comports with due process. *See id.* The [*6] relevant state statute here is New York's long-arm jurisdiction statute. *See* N.Y. C.P.L.R. § 302 (McKinney 1990).

Mattel asserts that personal jurisdiction is proper under the transacting business prong of the New York long-arm statute, which provides:

> [HN3]As to a cause of action arising from any acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent . . . (1) transacts any business within the state or contracts anywhere to supply goods or services in the state.

N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990).

[HN4]The "jurisdictional net cast by CPLR § 302(a) subsection (1) . . . reaches only a defendant that purposefully avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its law." *Viacom Intern., Inc. v. Melvin Simon Prods.*, 774 F. Supp. 858, 862 (S.D.N.Y. 1991) (internal citations and quotation marks omitted). New York courts look to the totality of circumstances to determine whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy. *See* [*7] *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8 (N.Y. 1965).

[HN5]A single transaction of business is sufficient to give rise to jurisdiction under CPLR § 302(a)(1), even

where the defendant never enters the state, "provided that the defendant's activities were purposeful, and that there was a substantial relationship between the transaction and the claim asserted." *Pilates*, 891 F. Supp. at 179; *see, e.g.*, *Student Advantage, Inc. v. International Student Exch. Cards, Inc.*, 2000 U.S. Dist. LEXIS 13138, No. 00 Civ. 1971, 2000 WL 1290585, at *3 (S.D.N.Y. Sept. 13, 2000); *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 564 (S.D.N.Y. 2000) (citing cases); *Kreutter v. McFadden Oil Co.*, 71 N.Y.2d 460, 522 N.E.2d 40, 43, 527 N.Y.S.2d 195 (N.Y. 1988).

In this case, the infringing activity alleged by Mattel occurred via the internet. [HN6]Courts considering the issue of when internet activity provides personal jurisdiction over a defendant have identified a range of fact patterns. *See Citigroup*, 97 F. Supp. 2d at 565; *see also, e.g.*, *Student Advantage*, 2000 WL 1290585, [*8] at *4 (discussing range of cases); *National Football League v. Miller*, 2000 U.S. Dist. LEXIS 3929, 54 U.S.P.Q.2D (BNA) 1574, 1575 (S.D.N.Y. 2000) ("One does not subject himself to the jurisdiction of the courts in another state simply because he maintains a web site which residents of that state visit. However, one who uses a web site to make sales to customers in a distant state can thereby become subject to the jurisdiction of that state's courts.") (citations omitted). At one end of the spectrum are "passive" web sites, where the defendant merely makes information available on a web site, and in which situation personal jurisdiction is not conferred. *See Citigroup*, 97 F. Supp. 2d at 565. At the other end are cases where the defendant clearly does business over the internet, such as by knowingly and repeatedly transmitting computer files to customers in other states, and in which situation there is personal jurisdiction. *See id.* Occupying the middle ground are cases in which the defendant maintains a web site that is interactive insofar as it permits the exchange of information between users in another state and the defendant, and in which situation [*9] whether there is personal jurisdiction depends on the level and nature of the exchange. *See id.*

Here, Falsone ordered allegedly infringing merchandise from Adventure over its web site, using his credit card, and Adventure shipped that merchandise into New York. This activity not only involved the exchange of payment and shipping information but, moreover, was a commercial transaction that was actually consummated on line. These activities were sufficient to bring Adventure into the category of a defendant "transacting any business," via the internet, in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1). *See Student Advantage*, 2000 WL 1290585, at *4; *Citigroup*, 97 F. Supp. 2d at 565-66 and n.8. In addition, Adventure e-mailed a confirmation to Falsone and in that e-mail provided him with a web site address where he could obtain information regarding the status of his order. This additional interactive activity further supports the exercise of personal jurisdiction over the defendant. *See Citigroup*, 97 F. Supp. 2d at 565. (discussing middle ground "exchange of information" cases).

Adventure points out that the sale was to [*10] Mattel's investigator, and contends that personal jurisdiction cannot be premised on such trickery. Adventure also maintains that personal jurisdiction cannot be based on a single contact. The fact that the sale was made to an agent of Mattel is irrelevant. The fact that there was only one transaction does not vitiate personal jurisdiction due to the nature of the contact, that is, because Adventure's activities were purposeful and there was a substantial relationship between the transaction and the claim asserted. *See, e.g.*, *Student Advantage*, 2000 WL 1290585, at *3; *Citigroup*, 97 F. Supp. 2d at 564 (S.D.N.Y. 2000).

Adventure also contends that Mattel's claims do not "arise from" the sale to Falsone, as required by the statute, but, rather, relate to Adventure's registration of the allegedly infringing domain names and the parking of those domain names at Adventure's web site. *See* N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990). However, Mattel's causes of action for trademark dilution and infringement and for unfair competition "arise[] from this transaction of business because it is 'precisely the bona fides of these products . . . that [Mattel] [*11] challenges.'" *Citigroup*, 97 F. Supp. 2d at 566 (*quoting Pilates, Inc.*, 891 F. Supp. 175, 179 (S.D.N.Y. 1995)). Therefore, personal jurisdiction is proper.

Finally, there were [HN7]"certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). In reaching this conclusion, the relevant factors have been considered, *see Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567-69 (2d Cir. 1996) (setting forth factors for determining whether exercise of personal jurisdiction reasonable under circumstances of case), as well as Adventure's argument that Mattel's trickery renders the exercise of personal jurisdiction by this Court violative of due process.

II. *Venue Is Proper In This District*

[HN8]Where a case is filed in an improper venue, the court "shall dismiss . . . or if it be in the interest of justice, transfer such case to any district in which it could have been brought." 28 U.S.C. § 1406(a). [*12] [HN9]

Venue in trademark cases is governed by the federal venue statute, 28 U.S.C. § 1391, which states in relevant part:

> a civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . .

28 U.S.C. § 1391(b)(2); *see Pilates*, 891 F. Supp. at 182.

[HN10]The venue requirement "serves the purpose of protecting a defendant from the inconvenience of having to defend an action in a trial that is either remote from the defendant's residence or from the place where the acts underlying the controversy occurred." *Metropolitan Opera Assoc., Inc. v. Naxos of America, Inc.*, 2000 U.S. Dist. LEXIS 9834, *8, No. 98 Civ. 7858, 2000 WL 987265, at *3 (S.D.N.Y. July 18, 2000) (internal quotation marks and citation omitted). The burden is on the plaintiff to demonstrate that a substantial part of the events or omissions giving rise to the claim occurred in this district. *See id.*

[HN11]"In trademark infringement claims, courts have held that venue may be proper [*13] in each jurisdiction where infringement is properly alleged to have occurred." *Metropolitan Opera*, 2000 WL 987265, at *3 (internal citation and quotation marks omitted). At a minimum, "the defendant must have targeted its marketing and advertising efforts at the district in question, *or have actually sold its products there.*" *Id.* (internal quotation marks and citation omitted) (emphasis added).

[HN12]The principles which govern the personal jurisdiction inquiry in cases involving infringing activity conducted via the internet are also applicable to the venue issue. *See Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F. Supp. 2d 449, 2000 U.S. Dist. LEXIS 18717, 2000 WL 1886583, at *8 (S.D.N.Y. 2000) (citing cases); *Metropolitan Opera*, 2000 WL 987265, at *3-*4 and n.4. Under the personal jurisdiction analysis set forth above, venue is proper in this district based on the internet sale by Adventure to Falsone of an allegedly infringing product, because this sale means that a substantial part of the events giving rise to the claims occurred here. *See id.* Therefore, the motion to dismiss for improper venue is denied.

III. *Amendment Of The Complaint* [*14] *Will Be Permitted*

Mattel does not dispute that Adventure is a sole proprietorship owned by Groch and, therefore, that Adventure is not a separate legal entity capable of being sued. [HN13]However, "the service upon a trade name with no separate jural existence will not bar [a] suit against [the owner] if [he] was 'fairly apprised' of this suit." *Darby v. Compagnie Nat'l Air France*, 132 F.R.D. 354, 355 (S.D.N.Y. 1990) (*quoting Anastasiou v. Fulton Street Pub*, 133 A.D.2d 796, 520 N.Y.S.2d 178 (N.Y. App. Div. 1987)). Groch is the sole proprietor of Adventure and has been representing Adventure *pro se*. Thus, he was fully apprised of the suit and of the fact that he is the real party in interest. Amendment of the complaint to name Groch as the proper defendant is appropriate under Federal Rule of Civil Procedure 15(a).

Adventure opposes Mattel's motion to amend the complaint on the ground that there is no personal jurisdiction over Groch - for the same reasons, it is asserted, that there is no jurisdiction over Adventure, since they are really one and the same. However, as explained above, this court does have personal jurisdiction over the defendant.

[*15] Finally, Mattel maintains that Adventure should remain a named defendant because it is the registrant of the domain names in suit. Mattel cites no authority for the proposition that an entity which is not capable of being sued may nonetheless be maintained as a defendant on this ground. However, it is proper to identify a trade name under which a sole proprietor is doing business. Therefore, Mattel may amend the complaint to substitute "Jeffrey Groch d/b/a Adventure Apparel" as the defendant instead of Adventure.

IV. *The Parties Are Directed To Brief The Issue Of Whether Transfer Is Appropriate*

[HN14]Under 28 U.S.C. § 1404(a),

> for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Although Adventure has not moved in the alternative to transfer venue, the Second Circuit has noted that [HN15]"the broad language of 28 U.S.C. § 1404(a) would seem to permit a court to order transfer *sua sponte* . . . . [and] those [cases] that have arisen suggest such power does exist." *Lead Indus. Ass'n v. Occupational Safety & Health Admin.*, 610 F.2d 70, 79 n.17 (2d Cir. 1979) [*16] (citing cases), and district courts within this circuit have followed this practice where deemed appropriate, *see, e.g., Smith v. City of New York*, 950 F. Supp. 55, 59-60 (E.D.N.Y. 1996). However, as a rule, notice and an opportunity to be heard on this issue should be provided. *See Saferstein v. Paul, Mardinly, Durham, James, Flandreau & Rodger, P.C., and Rodger*, 927 F. Supp. 731, 737 (S.D.N.Y. 1996) (citing cases). Although Adventure's motion to dismiss is premised largely on the

contention that being forced to litigate this action in this forum is unduly burdensome -- an argument which goes directly to whether transfer is warranted -- the transfer issue has not been briefed.

Therefore, Groch shall file and serve any submissions regarding the appropriateness of a transfer to the United States District Court for the District of Arizona, Tucson Division, by March 28, 2001; Mattel shall respond by April 4, 2001; and Groch shall reply by April 11, 2001. The matter will be decided on submission.

Mattel has filed a motion for summary judgment, currently returnable March 28, 2001. The return date for that motion is adjourned until May 1, 2001.

[*17] *Conclusion*

Therefore, for the reasons set forth above, the motion to dismiss is denied, the cross-motion to amend the complaint is granted, and the parties are directed to brief the issue of whether transfer to the United States District Court for the District of Arizona, Tucson Division, is appropriate.

It is so ordered.

New York, NY

March 15, 2001

ROBERT W. SWEET

U.S.D.J.