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1:01cv163

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHISH, INC., a Delaware corporation, and WHO IS SHE? MUSIC, INC., a Delaware corporation,

Plaintiffs,

v.

SEAN KNIGHT, aka WALDO, an individual and doing business as B-SHARP CLOTHING, GLIDE CLOTHING, KNIGHTHOOD CLOTHING, KNIGHTHOOD MERCHANDISE, PORCUPINE GRAPHIX, SURFIN' SAFARI, INC., and TRUE VIBES; KNIGHT-MACKIN, INC., a Delaware corporation doing business as B-SHARP CLOTHING, GLIDE CLOTHING, KNIGHTHOOD CLOTHING, KNIGHTHOOD MERCHANDISE, PORCUPINE GRAPHIX, SURFIN' SAFARI, INC., and TRUE VIBES; AXIS ENTERPRISES; and JOANNE READER, an individual,

Defendants.

CASE NO. C 01 1147 PJH

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE; OR IN THE ALTERNATIVE TO TRANSFER FOR IMPROPER VENUE (28 U.S.C. §1406(A)); OR IN THE ALTERNATIVE TO TRANSFER FOR CONVENIENCE (28 U.S.C. §1404(A)).

Date: May16, 2001
Time: 9:00 a.m.
Courtroom: D

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Defendants Sean Knight ("Knight"), Joanne Reader ("Reader"), and Axis Enterprises (collectively hereinafter, "defendants"), by and through their attorneys, hereby submit this reply to plaintiffs' opposition to defendants' motion to dismiss for lack of personal jurisdiction and improper venue; or in the alternative to transfer for improper venue; or in the alternative to transfer for convenience.

INTRODUCTION

Plaintiffs' opposition brief purports to show, based on selected portions of defendants' depositions, that defendants Knight and Reader have offered "false testimony" to this Court in an effort to evade its jurisdiction. (Plaintiff's Memo., p. 1). Plaintiffs' *ad hominem* argument grossly mischaracterizes the nature of defendants' testimony, and is largely based on a distorted interpretation of the evidence that defendants' voluntarily produced to plaintiffs. Just as plaintiffs showed no hesitation in stooping to manufacture evidence of personal jurisdiction over these defendants, plaintiffs now show no hesitation in manipulating defendants' testimony in an attempt to keep this lawsuit in California. Plaintiffs' skewed representation of the facts in this matter does not prove plaintiffs' arguments, however, but merely underscores plaintiffs' willingness to shade the truth when it suits their purposes.

STATEMENT OF FACTS

Plaintiffs initial mischaracterization of the evidence in this case involves their calculation of the sales figures from defendants' business. Defendants stated in their declarations that their sales occurred almost exclusively outside of California, and that they had made a total of 29 individual sales to California purchasers (excluding the sale made to plaintiffs' private investigator) of products which plaintiffs claim infringe on their copyrights or trademarks. (Knight Decl., ¶14). Any confusion over how defendants arrived at this figure was made abundantly clear when Knight testified that he went into his retail sales database and

looked for sales made into California, (Knight Depo., 24:2-6), and when Reader subsequently testified that this figure was limited to "total Phish-related merchandise that we sold to California." (Reader Depo., 39:12-20).

In an effort to paint defendants' testimony as false, plaintiffs now claim that the sales information provided by defendants shows "over 50 sales" to California, (Plaintiffs' Memo., p. 3), and that this figure reflects roughly "4%" of the defendants' sales by dollar amount. (Plaintiffs' Memo., p. 1). Plaintiffs' own declarations establish, however, that they have identified only 47 invoices which appear to reference allegedly infringing merchandise, MacKay Decl., ¶10), and that the 4% figure plaintiffs refer to was generated by simply reviewing retail sales made by defendants in the last year, as opposed to total sales made by the defendants.[1] (Shepard Decl., ¶4). In addition, a review of the invoices relied on by plaintiffs in support of their argument show that the plaintiffs arrived at their figures by including not only their private investigator's order, but also five invoices for orders that were placed after the issuance of the temporary restraining order in this matter *and that were never filled.* (Knight Depo., 73:16-23). While defendants' may have miscalculated their actual sales to California by claiming that only 29 sales were made, plaintiffs' claim that "over 50 sales" were made also miscalculates the total; in reality, it appears that 41 sales of arguably relevant merchandise were made to California residents.[2] To argue from this evidence that defendants' made false

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[1] Plaintiffs apparently arrived at 4% by taking $1,988 in sales to California and dividing that number by $67,629.40, which is the total of all sales included on the compact disk produced by defendants. Plaintiffs' analysis simply ignores the paper invoices produced to them, which – when added to sales on the compact disk – show that total sales made by defendants since 1997 were $222,381. Properly speaking, $222,381 should be the denominator when determining the percentage of sales to California, which yields a percentage of sales in California of approximately 0.9%.

[2] Taking plaintiffs admission that they identified only 47 relevant sales as a starting point, one arrives at 41 sales by subtracting the sale made to plaintiffs' private investigator (which did not figure into defendants' calculations) as well as the five orders that were placed but never filled (these are attached as Exhibits A47-A51 to the Shepard Declaration).

statements about the number of sales they made to California ignores plaintiffs' own inability to come up with the actual number of sales made by defendants in California, and utterly fails to acknowledge Knight's statement that it was "possible" that he miscalculated the sales information on the compact disk he provided to plaintiffs. (Knight Depo., 24:7-12).

Plaintiffs' next misstate the facts in this matter by asserting that defendants' have somehow "admitted" that the testimony of the witnesses identified in defendants' declarations regarding "events prior to 1995 or 1996 would be irrelevant." (Plaintiffs' Memo., p. 5). While defendants certainly objected to plaintiffs' discovery requests where they sought information beyond the applicable statute of limitations for plaintiffs' asserted claims, defendants *never* disavowed their rights to present evidence on the affirmative defenses of laches, acquiescence, or an express grant of permission by plaintiffs to engage in the conduct now complained of. Though plaintiffs are precluded from seeking recovery for alleged copyright violations that occurred more than three years prior to the filing of this complaint, defendants are not correspondingly precluded from presenting evidence that in1993 plaintiffs' approved the sale of various of the goods that plaintiffs now claim infringe on their intellectual property rights. Plaintiffs' assertion that the relevant time periods for discovery are identical for both plaintiffs and defendants is facially ridiculous, as is their intimation that defendants have somehow acknowledged the merit of plaintiffs' argument.[3]

Plaintiffs additionally mistate the legal status of the defendants' business by attempting to characterize it as a legal "partnership," and arguing that venue is therefore proper under the relaxed standards applicable to corporations and other business entities. (Plaintiffs' Memo., pp. 21-22). While defendants may consider themselves "partners" in the business of Knighthood

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[3] Similarly absurd is plaintiffs' argument that because defendants' document production only goes back to 1997, defendants intended to limit the relevant inquiry from 1997 to the present. (Plaintiff's Memo., p. 5). As plaintiffs are well aware, defendants produced *all* invoices retained by them. (Knight Depo., p. 14:1-18).

Merchandise, (Reader Depo., p. 6:5-17), no partnership documents have ever been filed by defendants with any state on behalf of Knighthood Merchandise, (Clymer Decl., ¶3), and defendants have been haled into this Court either as individuals or individuals "doing business as" Knighthood Merchandise. Although plaintiffs are well aware that Knighthood Merchandise is not an independent legal entity, plaintiffs' nonetheless attempt to hedge their position by asserting that "***if*** Knighthood Merchandise is in fact a partnership as Knight and Reader have testified," (Plaintiffs' Memo., p. 6)(emphasis added), then venue is proper. Plaintiffs' intimation that there is even a possibility that Knighthood Merchandise is a partnership is, however, both contrary to the evidence and frankly misleading.

Plaintiffs' misstatement of the facts is not limited to issues of central importance in this matter, but extends even to the absurd, as illustrated by their claim that "Knight took a tax deductible business trip to California in 2000 to deal with matters relating to his merchandise." (Plaintiffs' Memo., pp. 4, 7, 11). The deposition testimony which plaintiffs claim supports this assertion is devoid of any mention of the words "tax deductible," and clearly demonstrates the lengths to which plaintiffs are willing to go to in order to spin the facts to suit their needs. A fair reading of the defendant's testimony shows that defendants flew to California to attend several Phish concerts and "go swimming," (Knight Depo., p. 47:16-24), and that Knight did not make any sales calls or attempt to introduce stores to his products during this visit. (Knight Depo., p. 45:18-23). The only business conducted by defendants, if one could call it that, was an impromptu discussion held with an unnamed tie-dyer backstage at a Phish concert about dyeing processes, which was (being impromptu) neither planned nor previously arranged. (Knight Depo., p. 46:7-25; p. 47:1-7).

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ARGUMENT

I. JURISDICTION IS IMPROPER IN CALIFORNIA

Though plaintiffs protest that jurisdiction is proper over defendants in California given that defendants' have sold merchandise into this forum, the Court should recognize that plaintiffs' claims about the propriety of jurisdiction in this case were initially predicated on a blatant attempt by plaintiffs to manufacture jurisdiction. Quite conveniently, plaintiffs ignore defendants' argument that plaintiffs had no basis to believe that jurisdiction existed in California at the time they filed suit, but simply chose the forum that was most convenient for their counsel, and then hired a private investigator in California to purchase goods from defendants' website. (*See* Donnelly Decl.). The fact that jurisdictional discovery has uncovered additional sales by defendants into California does not render plaintiffs' filing of suit here proper, but simply validates plaintiffs' speculation that defendants had made additional sales in California. An assertion that jurisdiction exists based on speculation is clearly improper, however, and the Court should not condone fishing expeditions that are intended to prove or disprove plaintiffs' unsupported beliefs about jurisdiction. *See, e.g., Plunkett v. Estate of Conan Doyle,* 2001 U.S.Dist. LEXIS 2001 (S.D.N.Y. 2001).

With respect to plaintiffs' substantive arguments that jurisdiction is proper before this Court, defendants reiterate that jurisdiction is unreasonable here. Defendants have sold a minimal amount of merchandise to a minimal number of California residents – indeed, plaintiffs admit that defendants have made only16 sales to residents in this district. (Plaintiffs' Memo., p. 20). Though plaintiffs claim that the burden on defendants is not unduly harsh given the conveniences of modern technology, it is frankly neither convenient nor effective to conduct numerous depositions telephonically, nor efficient for counsel or witnesses to travel cross-country to conduct these depositions in person. Plaintiffs' reliance on the fact that limited

jurisdictional discovery has already been conducted telephonically in this matter (e.g., two depositions were taken) does not support their claim that litigating this matter in California is convenient – given that defendants' depositions were taken by agreement on extremely short notice, it was simply less burdensome (and substantially less expensive) for California counsel to set up a teleconference than it would have been to arrange for counsel to fly out to Vermont for depositions that were limited, by agreement, to a total of six hours. The rationale for conducting the defendants' limited depositions by telephone does not exist with respect to the twenty-one additional witness that defendants have identified as witnesses for the defense, (Knight Decl., ¶16), nor to the plaintiffs' own witnesses located in Vermont.

In addition, though plaintiffs claim that the exercise of jurisdiction by the Court creates no significant conflict with Vermont's sovereignty, plaintiffs gloss over the fact that all of the defendants reside in Vermont, and that plaintiffs themselves are headquartered in Vermont. While deciding this dispute in California may not directly implicate Vermont's sovereignty, plaintiffs can hardly conclude in good faith that Vermont's interest does not outweigh California's interest in adjudicating a dispute between Vermont plaintiffs and Vermont defendants. Plaintiffs' efforts to bolster California's interest in this dispute by noting that a 1998 survey indicated that California had more internet users than any other state, (Plaintiffs' Memo., p. 13), is a decidedly weak trump card when compared to Vermont's interest in the rights of its citizens. California has a very weak state interest when the plaintiff is a non-resident, as it the case here. *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199 (9th Cir. 1988).

The final factor in the analysis of whether jurisdiction is reasonable – where the case can most efficiently be resolved – also strongly argues in favor of defendants' position. The witnesses identified in Knight's declaration are not, as plaintiffs would have it, irrelevant to the determination of this litigation, but crucial. Although plaintiffs had ample opportunity to

question Knight about these witnesses at his deposition, they opted instead to focus their attention on the rather meaningless fact that Reader – who only joined Knight in this business in March, 2000 – did not have personal knowledge of events that transpired between1993 - 1996. (Plaintiffs' Memo., p. 3). That Reader does not personally know the witnesses that are slated to testify for the defendants, and that Knight spoke to them about their anticipated testimony rather than she herself, does not somehow render these witnesses meaningless. The defendants have been named without distinction as an aggregate unit in every cause of action in the complaint, and these witnesses are identified as persons who will offer testimony as to "any matters raised in the pleadings in this action." (Knight Decl., ¶16). Fifteen of these witnesses live in Vermont, and clearly it would be more efficient to depose them and have them testify in Vermont. Despite plaintiffs' protestations to the contrary, the exercise of jurisdiction by this Court woul in fact be unreasonable.

II. VENUE SHOULD BE TRANSFERRED TO VERMONT

Plaintiffs' arguments that venue is proper before this Court are unfounded. Defendants are neither a corporation nor a partnership, (Clymer Decl., ¶3), and are not subject to the relaxed jurisdictional rules of 28 U.S.C. §1391(c). Moreover, though plaintiffs have have waived any inconvenience they will incur by virtue of litigating this matter in California, (Plaintiffs' Memo., p. 23), the ends of justice and the substantial inconvenience that defendants and third-party witness will suffer in litigating this matter in California support a transfer to Vermont.

Frankly, it is unclear why plaintiffs brought suit in California. Plaintiffs are corporations headquartered in Vermont, (Complaint, ¶¶1,2), and defendants are residents and domiciliaries of Vermont. (Knight Decl., ¶2; Reader Decl., ¶2). None of the parties to this lawsuit have any connection to California, other than the fact that plaintiffs' counsel is officed here. Given

plaintiffs' machinations in attempting to establish jurisdiction by hiring someone to purchase merchandise from defendants' website, rather than simply filing suit in the county in Vermont where jurisdiction would clearly be proper – where plaintiffs and defendants are both located – it is not presuming too much to infer that plaintiffs have intentionally sought to make this litigation as inconvenient as possible for defendants to defend. Plaintiffs are aware, of course, that their own witnesses are primarily located in Vermont, and defendants have identified 21 non-party witnesses who will offer testimony on their behalf – 11 from Vermont, 6 from New York, 1 from New Jersey, 1 from British Columbia, 1 from Oregon, and 1 from North Carolina. (Knight Decl., ¶16). Plaintiffs have in no way rebutted defendants' contention that these witnesses will offer testimony relevant to the issues in this case, nor that it would significantly inconvenience these witnesses to be forced to travel to California for trial. Nor have plaintiffs even bothered to address the issue that these non-party witnesses are not subject to subpoena by this Court, and that their appearances could not therefore be compelled at trial. While plaintiffs' waiver of any inconvenience they will suffer undoubtedly serves their purposes, the manifest inconvenience that plaintiffs' propose to inflict on defendants and their identified witnesses is not something plaintiffs can waive, and plaintiffs offer no convincing argument why this Court should support their choice of venue. Both the interests of justice and reasons of convenience support the transfer of this action to Vermont.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Honorable Court grant defendants' motion to dismiss for lack of personal jurisdiction; or in the alternative dismiss this matter for improper venue; or in the alternative transfer this matter for reasons of convenience.

Dated: May 2, 2001

COLLETTE & ERICKSON LLP

By: _____

Robert S. Lawrence
Attorneys for Defendants
SEAN KNIGHT, JOANNE READER,
and AXIS ENTERPRISES

PROOF OF SERVICE

I, MARCIA L. ZWICK, declare:

I am employed in the City and County of San Francisco, State of California. My business address is 555 California Street, Suite 4350, San Francisco, California 94104. I am over the age of 18 years and not a party to the foregoing action.

On May 2, 2001, I served a copy of the attached documents on the interested parties involved in said action as follows:

1. DECLARATION OF ROBERT S. LAWRENCE;

2. DECLARATION OF WENDY J. CLYMER; and

3. DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO PLAINTIFFS' OPPOSITION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE; OR IN ALTERNATIVE TO TRANSFER FOR IMPROPER VENUE (28 U.S.C. §1406(a)); OR IN ALTERNATIVE TO TRANSFER FOR CONVENIENCE (28 U.S.C. §1404(a)),

___ **(by mail)** by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Collette & Erickson LLP, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of San Francisco, California.

_X_ **(by personal delivery)** by having KING COURIER, a local San Francisco messenger service, personally delivering a true copy thereof to the address listed below.

___ **(by Federal Express)** by depositing a true copy thereof in a sealed packet for overnight delivery, with charges thereon fully prepaid, in a Federal Express collection box, at San Francisco, California, and addressed as set forth below.

___ **(by facsimile transmission)** by transmitting said document(s) from our office facsimile machine (415) 788-6929, to facsimile machine number(s) shown below. Following transmission, I received a "Transmission Report" from our fax machine indicating that the transmission had been transmitted without error.

Lawrence K. Rockwell, Esq.
Andrew MacKay, Esq.
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Oakland, California 94612

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 2, 2001, at San Francisco, California.

Marcia L. Zwick
MARCIA L. ZWICK