UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

D.M., a minor, by and through her parent and next friend, A.B., and A.B., :

Plaintiffs, :

v. : No. 3:04cv1718(SRU)(WIG)

DESISTO SCHOOLS, INC. (d/b/a The DeSisto School), BUTTERFLY II LAND CORPORATION, FW OF SARATOGA, INC. (d/b/a Four Winds-Saratoga), :

Defendants. :

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RECOMMENDED RULING ON DEFENDANT'S MOTION FOR RELIEF FOR IMPROPER VENUE [DOC. # 48]

Defendant, Butterfly II Land Corporation ("Butterfly"), has moved this Court for an Order, pursuant to 28 U.S.C. § 1404(a), transferring this action to the United States District Court for the District of Massachusetts for the convenience of the parties and witnesses and in the interest of justice or, alternatively, dismissing this action for improper venue pursuant to 28 U.S.C. § 1406(a). Defendant, DeSisto Schools, Inc. ("DeSisto"), has joined in this motion.[1]

[1] While DeSisto may join in the motion to transfer under § 1404, it may not join in the motion to dismiss, having waived that defense once it failed to raise it in a timely manner in its answer to Plaintiffs' complaint. See Rule 12(h)(1), Fed. R. Civ. P. ("A defense of . . . improper venue . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."); Bridgeport Machines,

Defendant Butterfly argues that this action should be dismissed or transferred to the District of Massachusetts for the following reasons:

- Plaintiffs' claims did not arise out of, or have any connection with, any conduct, activities or occurrences in the state of Connecticut.
- This case will involve various questions of Massachusetts substantive law, with which the Massachusetts courts are more familiar.
- The material and necessary witnesses for Defendant DeSisto and Four Winds Saratoga d/b/a Four Winds Hospital ("Four Winds") of Saratoga, New York, are beyond the reach of compulsory process issued by this Court.
- The expense of bringing these witnesses to Bridgeport, Connecticut, for trial, a distance of approximately two and one-half hours from Stockbridge, Massachusetts, would be burdensome and entail a serious loss of time for the witnesses.
- None of the witnesses for either party, with the possible exception of Plaintiffs, lives in Connecticut.
- Massachusetts is the more convenient forum for a trial, which would be less costly and would produce a savings of time for all concerned.

Additionally, Butterfly relies on the Enrollment Contract dated November 30, 2002, between DeSisto and Plaintiff A.B.,[2] which contained the following choice-of-law provision and

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Inc. v. Alamo Iron Works, Inc., 76 F. Supp. 2d 214, 215 (D. Conn. 1999); see generally 2 Moore's Federal Practice § 12.32[2] & n. 2.1 (3d ed. 2005).

[2] Although this Court questions whether Butterfly, which was not a party to the contract, can invoke this forum-selection clause, in light of DeSisto's joinder in the motion to transfer, that issue need not be addressed.

mandatory forum-selection clause:

> 16. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts. The Parent hereby (i) consents to the jurisdiction of the courts of the County of Berkshire, Commonwealth of Massachusetts and the United States District Court for the District of Massachusetts for the purposes of any suit, action or other proceeding arising out of any of the Parent's or the Student's obligations or rights hereunder or under or with respect to any matter contemplated hereby; (ii) expressly waives any and all objections the Parent may have as to venue in any such courts and (iii) expressly agrees that Parent shall not initiate or bring any such suit, action or proceeding (including, without limitation, any such suit, action, proceeding or dispute relating to the payment of tuition, fees or any expenses hereunder, medical or psychiatric treatment of the Student, or to any training and educational techniques and methods used in connection with the Program) except in such courts.

Plaintiffs, joined by Defendant Four Winds of Saratoga, Inc., d/b/a Four Winds Hospital, respond that this action should not be transferred for the following reasons:

- Travel is more inconvenient for Plaintiffs, as they reside in New Haven and must rely on the relatively inexpensive direct rail line between New Haven and Bridgeport. Travel to Massachusetts would obviously be far more burdensome. Defendants are financially more able to shoulder the burden of travel.

- Defendants ignore the relevance of witnesses from the New Haven Public Schools ("NHPS") to this action. Other relevant witnesses from Connecticut are the Connecticut Department of Children and Families ("DCF"), the Office of the Connecticut Child Advocate, the Yale-New Haven Children's Psychiatric Hospital, and the numerous placements facilitated by NHPS and DCF.

- The Enrollment Contract, on which Butterfly relies, and to which it was not a party, is not binding on Plaintiffs. The minor Plaintiff, D.M., was enrolled at The DeSisto School as part of a stipulated judgment with NHPS in federal court, under which NHPS provided all of the funding for D.M.'s placement. A.B. did not enroll D.M. at The DeSisto School and was not obligated to pay the tuition. Thus, the forum selection clause contained in this unenforceable contract is not controlling.

For the reasons set forth below, the Court recommends that Butterfly's motion to transfer or dismiss should be denied.

Factual Background

A brief overview of the facts, as set forth in the amended complaint, is necessary to a ruling on this motion.

At all times relevant to the complaint, the minor Plaintiff, D.M., a New Haven, Connecticut, resident, was emotionally disturbed and mentally ill. In 2000, D.M. was hospitalized at the Yale-New Haven Hospital, following episodes of suicidal ideation, depression, aggression, and defiant behavior, exhibited both at home and school.

In 2002, D.M. was placed by the New Haven Public Schools at The DeSisto School in Stockbridge, Massachusetts, pursuant to a special education placement under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq. This placement was financed by the New Haven Public Schools. From the time she was admitted to The DeSisto School in 2002 until January 23, 2004, D.M. was taken to two local hospitals on 41 different occasions, and no less than 21 times, she inflicted

serious bodily injury to herself by cutting herself with razor blades and swallowing razor blades and other objects.

On January 22, 2004, while she was unattended in the dormitory at The DeSisto School, D.M. cut her arms with a razor blade and swallowed two razor blades. Plaintiffs allege that DeSisto failed to seek emergency treatment for D.M. in a timely manner and, when D.M. was taken to a local hospital, DeSisto failed to report the full extent of her injuries.

D.M. was transferred to Albany Medical Center in Albany, New York, where she remained hospitalized until January 30, 2004. She was then transferred to the psychiatric care facility at Four Winds Hospital in Saratoga Springs, New York. After Plaintiffs' insurance coverage ran out, Four Winds contacted A.B. on numerous occasions demanding that A.B. remove D.M. A.B., who had been hospitalized for a mild stroke, expressed hesitation and an inability to care for D.M. at home. Four Winds threatened to report A.B. to the Connecticut state child welfare agency for neglect. Thereafter, A.B. contacted the Connecticut State Office of the Child Advocate, the New Haven Public Schools, and the Connecticut State Department of Children and Families, seeking assistance, treatment, education, and services for D.M. On March 4, 2004, without A.B.'s permission, Four Winds returned D.M. to her home in New Haven, Connecticut, where, due to her severe psychiatric condition, she had not resided since December of

2000.

On October 13, 2004, Plaintiffs filed this action, asserting claims of negligence based upon DeSisto's failure to maintain the safety and welfare of its students, DeSisto's negligent hiring and retention, and misrepresentation and fraud by DeSisto. Plaintiffs asserted a claim of negligence against Four Winds based upon its failure to exercise reasonable care in discharging D.M. The complaint was subsequently amended to add Butterfly as a party-defendant, subject to the same claims as DeSisto.

Discussion

This Court's jurisdiction has been invoked pursuant to 28 U.S.C. § 1332(a), based upon the diversity of citizenship of the parties. Plaintiffs allege that D.M. and A.B. are residents of New Haven, Connecticut. DeSisto and Butterfly are Massachusetts corporations, which, at the time the complaint was filed, had their principal offices in Stockbridge, Massachusetts. Since the filing of the complaint, The DeSisto School has closed, and DeSisto is reportedly operating another school in Florida.

A. Defendants' Motion to Transfer - 28 U.S.C. § 1404(a)

Section 1404(a) provides that a district court may transfer a civil action to any other district or division where it might have brought "[f]or the convenience of the parties and witnesses, in the interest of justice." In Stewart Organization, Inc. v. Ricoh Corporation, 487 U.S. 22 (1988), the Supreme Court held

that a federal court sitting in diversity should apply federal law, specifically 28 U.S.C. § 1404(a), in adjudicating a motion to transfer a case to a venue provided in a forum-selection clause. Id. at 28. The Supreme Court emphasized that § 1404(a) gives the district court discretion "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" Id. at 29 (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). "A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause . . . will be a significant factor that figures centrally in to the district court's calculus. . . . The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." Id. at 29-30. The Court reiterated, "The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)." Id. at 31.

In resolving a § 1404(a) motion, the Supreme Court instructed that a district court should address such issues as the convenience of the forum prescribed by the forum-selection clause, the fairness of transfer in light of the forum-selection

clause, and the parties' relative bargaining powers. Id. at 29. The district court must also weigh in the balance the convenience of the witnesses and "those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" Id. at 30. The Court noted that it was conceivable that, because of these factors, a district court acting under § 1404(a) would refuse to transfer a case notwithstanding a forum-selection clause, whereas state law might dictate the opposite result. Id. at 31.

Following these instructions, this Court applies § 1404(a) federal jurisprudence to the question of whether venue of this action should be transferred to the District of Massachusetts. The burden is on Defendants Butterfly and DeSisto, as the movants, to establish that a transfer is appropriate.[3] This is often accomplished through affidavits explaining why the

[3] The Court recognizes a split of authority exists in this District on the question of which party bears the burden of proof on a motion to transfer in a case involving a forum-selection clause. Compare O'Brien v. Okemo Mountain, Inc., 17 F. Supp. 2d 98, 102 (D. Conn. 1998) (holding that the burden is on the movant); United Rentals, Inc. v. Pruett, 296 F. Supp. 2d 220, 228 (D. Conn. 2003) (same); Sherman Street Assocs., LLC v. JTH Tax, Inc., No. 3:03cv1875, 2004 WL 2377227, at *4 (D. Conn. Sept. 30, 2004) (burden is on the defendant); with Lescare Kitchens, Inc. v. Home Depot U.S.A., Inc., No. 3:98cv1354, 1998 WL 720536, at *2 (D. Conn. Sept. 29, 1998) (shifting the burden of proof to plaintiff once forum selection clause is found to be valid), and K. Gronbach & Assoc., Inc. v. Champion Motor Leasing, No. 3:97cv13, 1997 WL 409523, at *3 (D. Conn. June 24, 1997) (same). The Court finds the rationale of the cases placing the burden on the movant, the party seeking the change of venue, to be the more persuasive, particularly in a case such as this, where the movant was not even a party to the agreement.

transferee forum is more convenient, including a list of the anticipated principal witnesses with a description of the substance of their testimony. See Sherman Street Assocs., 2004 WL 2377227, at *5; Indymac Mortgage Holdings, Inc. v. Reyad, 167 F. Supp. 2d 222, 239 (D. Conn. 2001) (citing Schomann Int'l Corp. v. Northern Wireless Ltd., 35 F. Supp. 2d 205, 213 (N.D.N.Y. 1999)); United Rentals, Inc., 296 F. Supp. 2d at 228.

Under § 1404(a), the threshold inquiry is whether the action could have initially been brought in the district to which transfer is proposed. In a diversity case brought under 28 U.S.C. § 1391(a)(2), venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Based upon the alleged facts, there is no question that this action could have been brought in the District of Massachusetts where The DeSisto School is located and where many of the acts and omissions occurred.

Rather, the disputed issue in this case is whether Defendants have carried their burden of showing that the convenience of the parties and witnesses and the interests of justice are best served by a transfer of this action to Massachusetts. In making this determination the courts of this district have generally looked to the following factors: (1) the location of the events giving rise to the suit; (2) the convenience of the parties; (3) the convenience of the witnesses;

(4) the relative ease of access of proof; (5) the availability of process for unwilling witnesses; (6) the plaintiff's choice of forum; (7) a forum's familiarity with the governing law; (8) trial efficiency; and (9) the interest of justice. See Alden Corp. v. Eazypower Corp., 294 F. Supp. 2d 233, 237 (D. Conn. 2003); Indymac, 167 F. Supp. 2d at 239-40; Uses Manufacturing, Inc. v. Rocky Mountain Institute, 94 F. Supp. 2d 218, 223 (D. Conn. 2000); U.S. Surgical Corp. v. Imagyn Medical Technologies, Inc., 25 F. Supp. 2d 40, 46 (D. Conn. 1998); O'Brien v. Okemo Mountain, 17 F. Supp. 2d at 103-04; K. Gronbach & Assocs., 1997 WL 409523, at *2. "[E]ach factor need not be accorded equal weight, and other factors may be considered." Malone v. Commonwealth Edison Co., 2 F. Supp. 2d 545, 547 (S.D.N.Y. 1998). Applying these factors to the facts of this case, this Court concludes that a transfer is not warranted.

(1) The Location of the Events Giving Rise to the Suit: Based upon the allegations of Plaintiffs' amended complaint, the operative facts occurred in Massachusetts, Connecticut, and New York. This factor favors neither Massachusetts nor Connecticut.

(2) The Convenience of the Parties and Witnesses: Although Defendants have in conclusory fashion alleged that Massachusetts would be the more convenient forum for the parties and witnesses, they have failed to provide the Court with any specific information on the names of the material witnesses, their

addresses, and the hardships or difficulties they would encounter in having to travel to Connecticut. The Court notes that The DeSisto School has closed, and DeSisto is now operating a school in Florida. Thus, the whereabouts and employment status of the former school employees, including those mentioned in the complaint, are uncertain. On the other hand, Plaintiffs have listed a significant number of categories of witnesses from Connecticut who presumably would be as inconvenienced in having to travel to Massachusetts as Defendants' witnesses would be in having to travel to Connecticut. Moreover, the Court notes that Four Winds has supported retention of this case in Connecticut.

As for the convenience of the parties, Massachusetts is clearly more convenient for Butterfly, although it is not clear that this would still be true for DeSisto. For Plaintiffs, however, Connecticut is by far the more convenient forum. Both Plaintiffs and Defendants claim financial hardship as a consequence of being required to travel from one state to the other. The Court notes that there is only a fifty-mile difference in distance between Stockbridge and Springfield, Massachusetts, and between Stockbridge and Bridgeport, Connecticut, which the Court does not consider to be significant. It further appears that the hardship to Plaintiffs in requiring them to travel to Massachusetts, particularly given D.M.'s mental illness, would be significantly greater than requiring

representatives of Butterfly, a corporation with significant real estate holdings, to travel to Connecticut. It is not clear whether the principals of DeSisto are in Florida or Massachusetts. If Florida, DeSisto has not demonstrated a significant difference in the hardship involved in traveling to Connecticut, as opposed to Massachusetts. Thus, the Court finds that the convenience of the parties and the relative means of the parties weigh in favor of Plaintiffs.

(3) The Relative Ease of Access of Proof: Presumably The DeSisto School's records are located in Massachusetts (although this may no longer be the case, since The DeSisto School has closed), whereas Plaintiff's records from the NHPS, CDCP, the Office of the Connecticut Child Advocate, and Yale-New Haven's Children's Psychiatric Hospital are located in Connecticut. The records from Four Winds and the Albany Medical Center are located in New York. This factor favors neither forum.

(4) The Availability of Process for Unwilling Witnesses: As for the availability of process to compel the attendance of unwilling witnesses, Defendants have not named a single "unwilling witness" who would not be willing to come to Connecticut.

(5) The Plaintiffs' Choice of Forum: A significant factor weighing in Plaintiffs' favor is their choice of forum, which is to be given great weight, particularly when it is where they

reside. See Clisham Management, Inc. v. American Steel Building Co., 792 F. Supp. 150, 157 (D. Conn. 1992). The Second Circuit has held that generally a plaintiff's choice of forum should not be disturbed unless the movant for change of venue makes a clear showing that the balance of interests weighs in favor of a transfer. See Murray v. British Broadcasting Corp., 81 F.3d 287, 290 (2d Cir. 1996). This factor obviously weighs heavily in Plaintiffs' favor.

(6) The Forum's Familiarity with the Governing Law: Relying on the choice-of-law provision in the enrollment contract, Defendants assert that the venue of this action should be moved to Massachusetts, because the Massachusetts courts have greater familiarity with Massachusetts law, which will govern this case.

Preliminarily, a federal court sitting in diversity must apply the choice-of-law rules of the forum state, in this case Connecticut. Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487, 496-97 (1941); Cap Gemini Ernst & Young U.S., L.L.C. v Nackel, 346 F.3d 360, 365 (2d Cir. 2003). Even if this case is transferred to Massachusetts under § 1404(a), Connecticut's choice-of-law rules would apply. See Ferens v. John Deere Co., 494 U.S. 516, 519 (1990); Sheldon v. PHH Corp., 135 F.3d 848, 852 (2d Cir. 1998); United Rentals, 296 F. Supp. 2d at 230 n.4.

Connecticut follows the Restatement (Second) of Conflict of Laws § 187 (1988 Rev.) with respect to whether to enforce a

choice-of-law provision in a contract. Parties to a contract are generally allowed to select the law that will govern their contract, unless either: "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of the effective choice of law by the parties." Elgar v. Elgar, 238 Conn. 839, 850 (1996) (quoting Restatement § 187). Thus, to the extent that Plaintiffs' claims arise out of the Enrollment Contract, which specifically provides that it is to be governed by and construed in accordance with Massachusetts law, Massachusetts law would most likely apply, as Butterfly argues.

However, in this case, Plaintiffs' claims sound in tort, for which Connecticut applies a different choice-of-law rule. Connecticut has abandoned strict adherence to the traditional doctrine of lex loci delicti, where the rights and obligations arising out of a tort controversy are determined by the law of the place of injury, in favor of the "most significant relationship" test set forth in the Restatement (Second) of the Conflict of Laws §§ 6 and 145. See Williams v. State Farm Mutual

Automobile Insur. Co., 229 Conn. 359, 370 (1994); O'Connor v. O'Connor, 201 Conn. 632, 649-50 (1986). This analysis requires that a court consider which state has the most significant relationship to the occurrence and the parties based on the following factors: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Williams, 229 Conn. at 370 n. 12. Although it appears from the allegations of the complaint that a Connecticut court would most likely apply Massachusetts substantive law to Plaintiffs' negligence claims against DeSisto, it is not as clear with respect to Plaintiffs' claims against Four Winds, where the conduct and injury occurred in Connecticut and New York. However, the determination of whether Connecticut's choice-of-law rule would dictate application of Connecticut or Massachusetts law to Plaintiffs' tort claims is not critical to the resolution of this venue motion. Federal courts in diversity actions are accustomed to applying the laws of different states. Because this case does not appear to involve unique or highly specialized or difficult areas of state substantive law, the Court finds that this factor does not significantly favor one state over the other. See Sherman Street Assocs., 2004 WL 2377227, at *7

(citing Pitney Bowes, Inc. v. National Presort, Inc., 33 F. Supp. 2d 130, 132 (D. Conn. 1998)).

(7) Trial Efficiency and the Interests of Justice: Neither party has addressed the matter of trial efficiency in one forum versus the other. The Court is not aware of a backlog of cases in this District or the District of Massachusetts that would delay the disposition of this case or, for that matter, any other factor that would indicate that the administration of justice would be served by a transfer.

As to the interest of justice, Connecticut has an interest in protecting the citizens of its state with special education needs, as well as the funds of the municipal and state governments used for such placements. By the same token, Massachusetts has an interest in insuring that schools within its borders properly treat and supervise the students. Again, this factor favors neither forum.

(8) The Forum-Selection Clause: The forum-selection clause, however, weighs to some degree in favor of transfer. Although Plaintiffs dispute whether the Enrollment Contract is enforceable because A.B. was allegedly under no obligation to pay for D.M.'s placement at The DeSisto School, Plaintiffs do not allege that the clause was obtained by fraud or that the result would be unjust if the clause were enforced. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-95 (1991); M/S Bremen v. Zapata

Off-Shore Co., 407 U.S. 1, 15 (1972) (holding that forum-selection clauses are presumptively valid and should control absent a strong showing that enforcement would be unreasonable and unjust or that the clause was invalid for some reason, such as fraud or overreaching). Nevertheless, the Court finds that the forum-selection clause in this case is not as significant a factor as it might be in other cases. Here, Butterfly, the party initially seeking to invoke the clause, was not a party to the contract, nor was Four Winds, which is also a party-defendant. Additionally, the clause was drafted by DeSisto, solely for the benefit of DeSisto, and as part of a contract that is of at least questionable enforceability against A.B. See United Rentals, 296 F. Supp. 2d at 233. The Court has also taken into consideration the unequal bargaining powers of the parties to the contract. See Stewart Organization, 487 U.S. at 29.

Therefore, after undertaking the individualized analysis dictated by the Supreme Court in Stewart Organization, and after balancing all of the factors cited above, the Court concludes that Defendants Butterfly and DeSisto have not carried their burden of showing that a transfer of this action from the District of Connecticut to the District of Massachusetts would serve the convenience of the parties and witnesses and the interest of justice. The Court recommends denying the motion to transfer under § 1404(a).

B. Defendants' Motion to Dismiss - 28 U.S.C. § 1406(a)

Alternatively, Butterfly[4] moves this Court to dismiss this action on grounds of improper venue pursuant to 28 U.S.C. § 1406(a). For the reasons discussed above, the Court recommends denial of the motion to dismiss.

Section 1406(a) provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

As expressly stated in the statute, § 1406(a) is an appropriate vehicle for dismissing or transferring an action only when the venue of the forum initially chosen by the plaintiff is "wrong." See generally 17 Moore's Federal Practice § 111.32[3] (3d ed. 2005). In this diversity case, as discussed above, venue is proper in the District of Connecticut where a substantial part of the events or omissions rise to the claim occurred. 28 U.S.C. § 1391(a)(2). Thus, the Court finds that § 1406(a) does not apply and recommends that Butterfly's motion to dismiss be denied.

Conclusion

Accordingly, the Court recommends that Defendants' Motion for Relief for Improper Venue **[Doc. # 48]** be denied.

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[4] See Note 1, supra.

Any party may seek the District Court's review of this recommendation. See 28 U.S.C. § 636(b). Written objections must be filed within ten days after service of this recommended ruling. See Fed. R. Civ. P. 6(a), 6(e) & 72; D. Conn. L. R. 72.2(a) for Mag. Judges. Failure to object within ten days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; FDIC v. Hillcrest Assocs., 66 F.3d 566, 569 (2d Cir. 1995); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992).

SO ORDERED, this 2nd day of August 2005, at Bridgeport, Connecticut.

/s/ William I. Garfinkel
WILLIAM I. GARFINKEL
United States Magistrate Judge