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Brief for Plaintiffs-Appellees

Lewis M. Steel '63

88-7600

United States Court of Appeals

for the

Second Circuit

RED BULL ASSOCIATES, GORDON WEISS
and MURRAY WEISS,

Plaintiffs-Appellees,

– against –

BEST WESTERN INTERNATIONAL, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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Decision
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UNITED STATES COURT OF APPEALS
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RED BULL ASSOCIATES, GORDON WEISS
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Plaintiffs/Respondents.

88-7600

-against-

BEST WESTERN INTERNATIONAL, INC.,

Defendant/Petitioner.

QUESTION PRESENTED

Whether the district court abused its discretion in denying defendant's motion for change of venue or to dismiss the complaint.

PRELIMINARY STATEMENT

Plaintiffs-appellees Red Bull Associates, ("Red Bull") and its two general partners, Gordon and Murray Weiss, are the owners of the Red Bull Motor Inn ("the Inn"). They assert that Best Western International, Inc. ("Best Western") cancelled a standard form agreement linking the Inn to Best Western's hotel and motel membership chain because the Inn rented a block of rooms to the Westchester Department of Social Services for occupancy by homeless families, most of whom are black. Red Bull claims that the race of the homeless families occupying these units was the determining factor in Best Western's decision to terminate the contractual relationship, and therefore violates the Fair Housing Law, 42 U.S.C., §3601, et seq., the Public Accommodations Law, 42 U.S.C., §2000a-1, et seq. and 42 U.S.C., §§1981 and 1982.

Best Western moved to dismiss this action or to transfer it to the federal district court in Arizona, based on a forum selection clause in Best Western's standard form affiliation agreement. The district court denied Best Western's motion, and Best Western appeals, challenging the district court's discretion to deny its motion.

The district court's decision is consistent with the standard set forth in Stewart Organization, Inc. v. Ricoh Corp., ___ U.S. ___, 108 S.Ct. 2239 (1988), the controlling Supreme Court decision on transfer of venue, which was decided 17 days after the district court certified its decision in this case for appeal. The district court properly exercised its discretion in considering a variety of factors, including the convenience to the parties and witnesses, the strength of the evidence of discrimination and public policy considerations. The court denied the transfer based on a combination of these factors, finding that plaintiffs raised a plausible and substantial civil rights claim which would be severely impeded by a transfer of venue to Arizona.

In this brief, Red Bull will set forth the evidentiary basis upon which the district court declined to dismiss or transfer the case and will demonstrate that the district court's denial of defendant's motion was a proper exercise of its discretion and should be affirmed.

STATEMENT OF THE CASE

1. Background Facts

The history of the relationship between the parties is undisputed and is set forth in the district court's May 17, 1988 memorandum and order (hereinafter referred to as the "first opinion").[1] Red Bull is a limited partnership which owns and operates a 145 unit motel ("the Inn") in Poughkeepsie, New York, which became affiliated with Best Western in 1978. Pursuant to this affiliation agreement, the Inn participated in Best Western's reservations system and displayed the latter's signs and logos (first opinion, A217-218). The agreement between the parties dated September 4, 1985 and renewed annually thereafter contains a forum selection clause which states that the state or federal courts sitting in Maricopa County, Arizona shall have exclusive jurisdiction to hear and determine disputes between the parties.

2. The Inn's History of Long Term Rentals

The Inn, since its affiliation with Best Western, has occasionally rented blocks of rooms on a long term basis to groups and organizations. For example, from 1978 through 1983, the Inn rented 45 rooms to the IBM Corporation. Best Western gave the Inn permission to reduce its room count for these rentals as these rooms were not under the daily control of Red Bull and room service was not provided. The occupants of the rooms leased to IBM were

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[1] References in this brief are to the Joint Appendix, hereinafter "A_."

virtually all white (A13), and because the IBM rooms were not included in Red Bull's room count, they were not subject to inspection by Best Western. Best Western did not controvert Red Bull's evidence with regard to the IBM rental and the district court noted this rental (first opinion, A220).

3. The Inn's Rental to the Department of Social Services

In April 1986, the Inn entered into an agreement with the Westchester Department of Social Services to provide 35 rooms on a long term basis as temporary housing for displaced and lower income persons. In May 1987, the Inn asked Best Western to reduce its official room count from 145 to 110 units as had been done with the IBM rooms. As with rooms leased to IBM, the 35 rooms involved were not under the Inn's daily control and no room service was provided. From the commencement of this rental agreement to the time of the lawsuit, approximately 80% of the persons occupying these rooms were black or Hispanic (A13). Best Western did not contest the racial composition of the homeless residents and the district court's finding in this regard was consistent with Red Bull's evidence (first opinion, A220).

4. Prior Inspections of the Inn

Best Western motels are inspected twice a year by field representatives. A perfect score is 1000. Properties which receive a score of less than 800 are placed on probationary status and reinspected. If upon reinspection a property receives a score above 800 points, it is removed from probation (A80).

As a result of two inspections by inspector Byrne in 1986 in each of which the Inn scored less than 800 points, Red Bull was placed on probation. On September 30, 1986, Byrne reinspected the Inn and gave it a score of 886 points. As a result, the Inn was removed from probationary status (A80-82).

5. Hammond's May 19, 1987 Inspection

Best Western inspector Les Hammond conducted his first inspection of the Inn on May 19, 1987, approximately seven months after the Inn had received the score of 886 from inspector Byrne. During the intervening period, according to Gordon Weiss, the Inn's partner with direct responsibility for day-to-day operations, the condition of the Inn had improved due to a refurbishing and upgrading program (A14).

According to Weiss and Inn manager Sally Hallett, during Hammond's May 19 inspection, he made negative comments about the Department of Social Services families in the Inn. He stated that a group of black women and children on the grounds looked "terrible" (A14-15), and made specific references to their race (A202). Hammond also expressed the view that the presence of the Department of Social Services families was not conducive to a proper atmosphere in a hotel (A15).

Soon after the inspection, Best Western sent Red Bull a copy of Hammond's May 19, 1987 inspection report in which the Inn received a score of 635 points. Red Bull also received a covering letter from Best Western which outlined various deficiencies found by Hammond, and which invited comment. The covering letter also

stated that Best Western was considering Red Bull's request that the 35 units occupied by the Department of Social Services families be taken off the Inn's room count (A25-28). Neither the Best Western letter nor the Hammond report made any mention of the homeless families. On July 20, 1987, Best Western, without explanation, denied Red Bull's room count reduction request (A160).

Weiss wrote to Best Western on July 24, 1987 specifying the ways in which the Inn was upgrading the property and requesting that a second inspection be postponed until September 30, 1987 so Red Bull would have time to complete its projects (A161-162). On August 14, 1987, Best Western denied the requested postponement and stated it would conduct another inspection within the next ten days (A164).

6. Hammond's August 20, 1987 Inspection

The second Hammond inspection took place on August 20, 1987. The Inn had been extensively upgraded since the time of Hammond's previous inspection (A16, A203). Hammond, however, again focused on the presence of the Social Services families, stating that it looked terrible to see all these people around the property and the children playing in the parking lot. During his inspection of some of the rooms occupied by the homeless families, Hammond commented that the families lived like animals (A17).

On September 17, 1987, Red Bull was sent a copy of Hammond's August 20 inspection report. The Inn received a grade of 677. The covering letter informed Red Bull that the matter would be presented to Best Western's Board of Directors, at which time the Inn

would be given an opportunity to show cause why its membership should not be cancelled (A17). Again, the Best Western letter and the Hammond report concentrated entirely on quality control type violations, such as problems with worn carpets and draperies,[2] but made no mention of the presence of the homeless families (A44-59).

7. Hammond's "Remarks" and the Best Western Hearing

Prior to attending the November 24, 1987 Board of Directors' hearing in Phoenix, Arizona, Red Bull sent the Best Western Board of Directors a detailed letter outlining the errors in Hammond's inspection reports (A60-63).

On November 24, as the Red Bull representatives waited outside the Best Western board room immediately prior to making their presentation, they were handed for the first time a copy of Best Western's file on the Inn. That file contained copies of two supplementary reports submitted to Best Western by Hammond entitled "Remarks." Neither of these supplementary reports had been given to Red Bull when it had received Hammond's regular reports (first opinion, A221, n. 1).

Both of these supplementary reports focused on the Social Services families. In the first supplementary report, following the May 1987 inspection, Hammond stated that he believed, "There are rooms [at the Inn] for welfare or county aid receipiants [sic]." He stated that he looked into only one of the rooms occupied by a homeless family. From that one look, however, he

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[2] The report acknowledged certain improvements to the property (e.g., "front area beginning to look good" [A48]).

generalized that "the rooms look like refugee tents."[3] Hammond further noted, "many children were playing in the back parking lot with no supervision" (A64). The August 20, 1987 "Remarks" concentrated even more on the Social Services families, stating that their rooms were "horrible." Then he noted, "after you take these rooms out of the picture, the property has fair rooms . . ." (A66).

Hammond stated that Weiss was "upfront on discussing the welfare rooms and the problems at the facility." Hammond concluded:

> [The Inn] does not intend to eliminate the lease on the rooms, but as long as this situation exists, the property will not be up to standard (A67).

Shortly after receiving Best Western's file, Red Bull's representatives were called into the Board of Directors' meeting, presented a videotape of the Inn, and advised the Board of the substantial financial expenditures and commitments which had been made to upgrade the Inn. However, Weiss' uncontroverted affidavit states that the questions the Red Bull representatives received from Board members virtually all related to the homeless residents at the Inn. For example, the Red Bull representatives were asked if the homeless families were allowed to walk around the Inn grounds and use the Inn's facilities. Red Bull's representatives were not asked a single question concerning their challenge to

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[3] If Best Western had agreed to remove the Department of Social Services rooms from the count as had occurred with the IBM long term rentals, the rooms would not have been subject to inspection (A160). In any event, according to an interview with a Department of Social Services caseworker responsible for the families living at the Inn, the rooms in question were inspected on a weekly basis and were well kept (A194).

Hammond's inspections, their corrections of deficiencies and their commitment to expend substantial amounts of money to upgrade and improve the Inn (A19-20; first opinion, A223).

One day after the hearing, Best Western sent Red Bull a termination letter (A20, 68). Thereafter, Red Bull wrote to Best Western, seeking to reopen the hearing. The stated basis was Hammond's prejudicial "Remarks" which the Inn's representatives had only received immediately before the hearing and had not addressed (A69-71). This request was denied without explanation (A72).

Thereafter, the complaint in this action was filed in the Southern District of New York and Best Western moved for an order dismissing the complaint pursuant to F.R.C.P. 12(b)(3) or, in the alternative, transferring the action to the United States District Court for the District of Arizona pursuant to 28 U.S.C. §1404(a). Both forms of relief were predicated upon the forum selection clause in the form affiliation agreement.

8. The Effect of the Forum Selection Clause on This Litigation

Red Bull submitted to the district court affidavits which explained that it would be prohibitively expensive for it to maintain this action in Arizona. The affidavit of Red Bull's counsel outlines the necessity of calling multiple local witnesses, including persons with knowledge of the condition of the Inn and the rooms occupied by the homeless (e.g., guests, other persons familiar with the Inn's upkeep, staff, Department of Social Service caseworkers and homeless residents), and motel maintenance experts. Counsel's affidavit concludes that the expense of litigating in

Arizona would be prohibitive (A193-197). Weiss also submitted an affidavit which states that the Best Western affiliation agreement was presented to the Inn on a non-negotiable basis. The Weiss affidavit then focused on the difficulties Red Bull would face if it had to litigate in Arizona and concluded, "it would be extraordinarily difficult, if not impossible, for the plaintiffs to maintain this action in [Arizona]" (A198-201).[4] Additionally, plaintiffs' counsel advised the district court at oral argument that Red Bull would not pursue this action in Arizona should the forum selection clause be upheld (A233).

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[4] On the basis of a New York Times article, Best Western in its brief to this Court states that the Red Bull principals are owners of three other motels (Best Western Br. at 4). Best Western, however, made no attempt before the district court to present evidence of what, if any, ownership interest these principals had in other motels, nor did it dispute that Red Bull would be put to great additional expense if the case were tried in Arizona.

THE DISTRICT COURT OPINIONS

1. The First Opinion

The district court denied Best Western's motions on May 17, 1988 (A216-228).

The court's May 17, 1988 opinion refers extensively to the detailed showing Red Bull made in opposition to the motions. The court stated in reference to this showing: "Plaintiffs have submitted evidence in the form of both documents and affidavits to support their charge of racial bias" (A221). The court further noted that at the Best Western Board of Directors' hearing on November 24, 1987, the Board specifically focused on the homeless families and their freedom to use the Inn's facilities (A223).

After setting forth the facts, the court applied them to the legal principles which emanate from The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972). In evaluating the interests of the parties under that case, the court held that absent the public policy exception of The Bremen case, it would not set aside the forum selection clause.

The district court, however, determined that this case did come within the The Bremen's public policy exception. It pointed out that the plaintiffs were acting as private attorneys general. Quoting from Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972), the court stated that the plaintiffs sought to vindicate a policy that Congress considered to be of the highest priority as "the whole community" had an interest in the development of integrated and balanced living patterns. The district

court noted that this policy could best be effectuated through allowing a local jury to decide whether the alleged discrimination took place rather than submitting the case to jurors living thousands of miles away. The court concluded, "Congress has declared that the entire community has an interest in ensuring fair housing and equal access to public accommodations for its citizens, and the private attorney general is entitled to have the local residents play the part of fact-finder in determining whether or not defendant's actions were inimical to that goal" (A227).

2. The Second Opinion

The district court clarified and expanded upon its reasoning in its second opinion dated June 3, 1988 certifying this matter for appeal (A229-233). This opinion noted that a plaintiff may not avoid a forum selection clause merely by alleging a civil rights violation. To overcome the effect of the clause, the district court held it must find that the civil rights aspect of the claim is plausible and likely to be of substance (A231, n. 1).

The district court then found that Red Bull met this test:

> . . . plaintiffs' version is supported by the circumstance that, while the inspection reports received by plaintiffs relied exclusively on alleged technical deficiencies in maintenance with no reference to the largely minority homeless families, the "Remarks" of Inspector Hammond subsequently found in the file seemed preoccupied with these tenants. Ibid.

The court also accepted Red Bull's representation that it would not pursue the action in Arizona (A233) and further stated:

> When the expense of litigation is weighed against the potential benefits, it may well be that it would not make sense for plaintiffs to pursue this action in Arizona (A230).

Having noted that Red Bull's decision not to proceed in Arizona was rational in light of the economic realities, the court turned to the congressional intent in passing the civil rights laws in question:

> . . . Congress' basic purpose in incorporating the concept of the private attorney general into the civil rights laws was to encourage litigation of civil rights claims. That public policy would obviously be hindered by enforcing a contract which would prevent or seriously discourage the pursuit of such litigation (A230).

Thus, while the court certified the case because it raised an issue of law which could recur in the future, the court based its decision on a highly specific factual analysis of the record with regard to both the strength of plaintiffs' case and the deterrent effect which enforcement of the forum selection clause would have on the litigation. Thus, the court classically engaged in the process of weighing factual submissions and exercising its discretion.

ARGUMENT

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING BEST WESTERN'S MOTION TO DISMISS OR FOR A TRANSFER OF VENUE

The district court, applying The Bremen's public policy exception to enforcement of forum selection clauses, acted well within its discretion in denying Best Western's motion for change of venue.[5] Moreover, the recent Supreme Court decision in Stewart Organization, Inc. v. Ricoh Corp., __ U.S. __, 108 S.Ct. 2239 (1988), substantially increases the authority of a district court to refuse to enforce forum selection clauses.

In The Bremen, as the Supreme Court in Stewart Organization, Inc. explained, ". . . this Court held that federal courts sitting in admiralty generally should enforce forum selection clauses absent a showing that to do so 'would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching' 407 U.S. at 15." 108 S.Ct. at 2243, n. 7.

The Stewart Court stated that while The Bremen case may be instructive in resolving a §1404(a) motion, the standard the district court should apply is found in §1404(a) itself. 108 S.Ct. at 2243. §1404(a) provides: "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."

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[5] Best Western's motion was originally styled as a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(3), or, in the alternate, as a motion for a transfer of venue pursuant to 28 U.S.C. §1404(a). However, Best Western's brief on appeal does not specifically address the former motion, so Red Bull will respond to the §1404(a) motion only.

The Court in Stewart noted that §1404(a) is "intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' A motion to transfer under §1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors." 108 S.Ct. at 2244. One such significant factor is the presence of a forum selection clause, but the existence of such a clause, the Court stated, is by no means dispositive.

The Supreme Court in Stewart emphasized that under §1404(a) the district court must consider more than the private expression of the parties' venue preferences and issues of convenience. The Court stated:

> Section 1404(a) directs a District Court to take account of factors other than those that bear solely on the parties' private ordering of their affairs. The District Court also must 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."
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> * * *
>
> . . . The forum selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in §1404(a). Cf. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) (§1404(a) accords broad discretion to District Court, and plaintiff's

> choice of forum is only one relevant factor for its consideration). 108 S.Ct. at 2244-2245.

Red Bull prevailed below under The Bremen standard, which places greater weight than Stewart on the presence of a forum selection clause. Using The Bremen as the basis for its analysis, the district court first evaluated the interests of the parties in remaining in New York or litigating in Arizona. After reviewing the record, including affidavits of plaintiffs and counsel setting forth the difficulties of litigating in Arizona, the court, applying a rigid standard that a forum selection clause must be enforced unless the opposing party can show it would be impossible for it to litigate in the selected forum, declined to deny a change of venue on this basis alone (first opinion, A225). However, the district court recognized the difficulties Red Bull would face if forced to sue in Arizona, stating that in all likelihood plaintiffs would not bother to sue in that forum (first opinion, A225). The court returned to this issue in its second opinion, pointing out: "[w]hen the expense of litigation is weighed against the potential benefits, it may well be that it would not make sense for plaintiffs to pursue this action in Arizona" (A230). Implicit in these opinions is the district court's recognition that an Arizona forum would be so inconvenient to Red Bull that litigation there could well be economically untenable.

The district court also considered public interest factors in determining whether to enforce the forum selection clause. The court noted that a transfer would defeat important public policy objectives by severely impeding plaintiffs' role as private at-

torneys general and interfering with the right of the local community through the jury process to play the part of fact finder in determining whether racial discrimination occurred (first opinion, A225-227). In its second opinion, the court expanded on these concepts, noting that Congress wished to encourage civil rights claims and that the forum selection clause in this case would "prevent or seriously discourage" the claim (A230).

In weighing the public interest factors, the court emphasized that civil rights allegations alone would be insufficient to overcome the effect of a forum selection clause. The court ruled that the civil rights claims "must be plausible and likely to be of substance" (see, e.g., second opinion, A231, n. 1). The court then specifically found that Red Bull's showing met these criteria. Ibid.

In taking into account Red Bull's substantial civil rights claim, the court properly followed decades of case law emphasizing the strong national interest in rooting out discriminatory practices relating to housing and public accommodations. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (fair housing); Daniel v. Paul, 395 U.S. 298 (1969) (public accommodations); United States v. Yonkers Bd. of Education, 837 F.2d 1181 (2d Cir. 1987).

Under both the Fair Housing Act and the Public Accommodations Act, private attorneys general play a critical role as the principal agents of enforcement. In Trafficante, the Supreme Court explained:

> . . . the main generating force must be private suits, in which the Solicitor General says, the complainants act not only on their own

> behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." 409 U.S. at 211.

Similarly in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401 (1968), the Court observed:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only.

In recognizing the importance of civil rights enforcement, the Supreme Court in a variety of contexts has eliminated obstacles which would impede the vigorous prosecution of civil rights claims by private plaintiffs. See, e.g., New York Gaslight Club v. Carey, 447 U.S. 54, 63 (1980) (the purpose of fee shifting statutes is to facilitate private civil rights cases); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (employee's right to federal trial under Title VII of the 1964 Civil Rights Act may not be foreclosed by an arbitration clause);[6] Patsy v. Bd. of Regents, State of Florida, 457 U.S. 496 (1982) and Monroe v. Pape, 365 U.S. 167 (1961) (exhaustion of state administrative remedies is not a prerequisite to action under Civil Rights Act of 1871); Zwickler v. Koota, 389 U.S. 241 (1967) (doctrine of abstention inapplicable to federal court challenge to state penal statute).

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[6] Arbitration clauses and forum selection clauses are of a similar nature, since an "agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause . . ." AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 158 (2d Cir. 1984), quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

While the district court did not rule that it would be impossible for Red Bull to litigate this case in Arizona, the court accepted that the economic realities of litigating in that forum would "prevent or seriously discourage the pursuit of such litigation" (second opinion, A230). Therefore, this lawsuit, which involves issues of special public importance -- the housing of homeless minority persons at a time of crisis -- will go unheard if the case is transferred to Arizona. Given the district court's finding that Red Bull's claim is likely to be of substance, it was entirely appropriate for the district court to conclude that public policy favored the maintenance of this lawsuit in New York, because a transfer would prevent or seriously discourage its prosecution.

The district court also correctly considered the importance to the local community of having the case maintained here. The court stated, "Congress has declared that the entire community has an interest in ensuring fair housing and equal access to public accommodations for its citizens . . ." (first opinion, A227). This ruling follows the teaching of the Supreme Court in Trafficante:

> . . . The person on the landlord's black list is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the [Fair Housing Law], "the whole community," 114 Cong.Rec. 2706, and as Senator Mondale who drafted §810(a) said, the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns." Id., at 3422. 409 U.S. at 211 (emphasis added).

The importance of fair housing litigation to communities undergirds the Court's holding in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). In that case, the Supreme Court held that a village has standing to sue under Title VIII because the discriminatory actions of realtors deprives it and its citizens of the benefits of living in an integrated society. 441 U.S. at 111.

The district court also noted the beneficial effect of having a local jury express its views concerning racial discrimination in local housing and public accommodations. The court stated, "[i]t is likely to be of far less immediate concern to jurors living in Phoenix, Arizona whether or not racial discrimination has deprived citizens of another state thousands of miles away of the benefits sought to be protected by the Civil Rights Acts" (first opinion, A227). The court's consideration of the value of having local jurors consider these claims is consistent with the analysis of other courts deciding change of venue motions. See, e.g., Flintkote Co. v. Allis-Chalmers Corp., 73 F.R.D. 463, 466 (S.D.N.Y. 1977); Chance v. E.I. DuPont De Nemours & Co., Inc., 371 F.Supp. 439, 449 (E.D.N.Y. 1974).

As the Supreme Court has noted, "[i]n cases which touch the affairs of many persons, there is a reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947), quoted in, Flintkote, supra, 73 F.R.D. at 466.

The district court, in weighing the above factors along with the forum selection clause, properly exercised its discretion under §1404(a). It is well settled that a motion under this section should be left to the discretion of the district court since it is "peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation." Lykes Bros. Steamship Co., Inc. v. Sugarman, 272 F.2d 679, 680 (2d Cir. 1959). As this Court stated in A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439, 444 (2d Cir. 1966),

> . . . the Courts of Appeals are aware that the trial judge, with his superior opportunity to familiarize himself with the nature of the case and the probable testimony on trial, is better able to dispose of §1404(a) motions; that the statute by its terms, vests broad discretion in the trial judge in considering the convenience of the parties and witnesses and the interest of justice; and that extended review by the appellate courts . . . will prolong litigation and thwart the objectives of speedy and efficient trial which §1404(a) sought to further. For these reasons, dispositions of §1404(a) motions have almost never been overturned for abuse of discretion.

See also, Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987); Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. 1981), cert. den., 456 U.S. 918 (1982).

Best Western, at p. 11 of its brief, has cited a series of Second Circuit cases[7] for the proposition that forum selection

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[7] Karl Koch Erecting Co., Inc. v. New York Convention Center Development Corp., 838 F.2d 656 (2d Cir. 1988); Luce v. Edelstein, 802 F.2d 49 (2d Cir. 1986); AVC Nederland B.V. v. Atrium Partnership, 740 F.2d 148 (2d Cir. 1984); Bense v. Interstate Battery System of America, Inc., 683 F.2d 718 (2d Cir. 1982).

clauses entered into voluntarily will be enforced. In each of the cited cases, this Circuit affirmed a district court's enforcement of the clause in question. These affirmances all were based upon application of The Bremen standards to the facts as found by the district courts.[8] Even under The Bremen, of course, the courts had the authority to decline to enforce forum selection clauses for reasons of public policy. The Bremen, supra, 407 U.S. at 15-18.[9] Under Stewart, whether the district court had the authority to set aside the forum selection clause under The Bremen is no longer relevant, because Stewart gives forum selection clauses less weight and district courts greater discretion than did The Bremen.

The factors the district court considered in retaining venue are consistent with the teachings of Stewart. The court's two opinions make plain that it considered both the interests of justice -- the strong public policy that the fair housing and public accommodations laws be enforced through private actions --

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[8] Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), cited by appellant at p. 21, also adds nothing to the analysis of this case. It involves a franchise agreement containing a choice-of-law provision and merely stands for the proposition that application of a state long-arm statute did not violate due process.

[9] Courts faced with far less serious policy concerns than are presented herein have refused to enforce forum selection clauses under The Bremen exception. The courts have relied upon such factors as the difficulties of litigating in a specified forum, the unequal bargaining powers of the parties, and the fact that the forum selection provision was not the subject of free bargaining. Carefree Vacations, Inc. v. Brunner, 615 F.Supp. 211 (W.D.Tenn. 1985); Couch v. First Guaranty, Ltd., 578 F.Supp. 331 (N.D.Tex. 1984); Cutter v. Scott & Fetzer Co., 510 F.Supp. 905 (E.D.Wisc. 1981); Kolendo v. Jerell, Inc., 489 F.Supp. 983 (S.D.W.Va. 1980).

and the specific facts of this case, including Red Bull's substantial evidence of discrimination. The district court properly exercised its discretion and the decision below should be affirmed.

CONCLUSION

For all of the above reasons, the decision below should be affirmed.

Dated: New York, New York
October 11, 1988

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