IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

FISHER-PRICE, INC. and MATTEL, INC.,

Plaintiffs,

C.A. No. 17-0051-LPS-CJB

v.

DYNACRAFT BSC, INC.,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO TRANSFER

Plaintiffs hereby respectfully file their response to the defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(3), or in the alternative to transfer this case to the Northern District of California under 28 U.S.C. § 1406(a) (D.I. 9). Defendant bases its motion on the Supreme Court's recent decision in *TC Heartland, LLC v. Kraft Foods Group Brands LLC*, No. 16-341, 581 U.S. ___ (May 22, 2017). In light of the defendant's motion and associated declaration, plaintiffs do not oppose the transfer of this case to the United States District Court for the Northern District of California. Plaintiffs do, however, oppose, defendant's request to dismiss this matter outright, and submit that transfer to the Northern District of California is the more appropriate and efficient outcome under the current circumstances. *See Belden Techs., Inc. v. LS Corp.*, 829 F. Supp. 2d 260, 271-73 (D. Del. 2010) (transferring, rather than dismissing, case under Rule 12(b)(3)); *ON Semiconductor Corp. v. Power Integrations, Inc.*, No. CV-16-02720-PHX-SPL (D. Ariz. Jun. 1, 2017) (same); *Pfizer Inc. v. Apotex, Inc.*, C.A. No. 08-948-LDD, 2009 U.S. Dist. LEXIS 82653, *13-14 (D. Del. Aug. 13, 2009) (transferring, rather than dismissing, case under Rule 12(b)(2)).



Despite the parties' agreement that transfer is appropriate (which would make dismissal unnecessary), plaintiffs note for clarity that defendant's submitted proposed order calls for dismissal *with* prejudice. Given that defendant repeatedly states in its brief that the court may transfer the case to the Northern District of California in lieu of dismissal, this may be a typographical error. In any event, dismissal with prejudice is inappropriate. Should the court choose to dismiss this action, rather than transfer it, any such dismissal should be *without* prejudice, so that plaintiffs may re-bring the case in an appropriate forum. *See Univ. of Pittsburgh v. Varian Med. Sys.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009) (An adjudication not on the merits "should not have preclusive effect--i.e. such a dismissal should be without prejudice.").

DATED: June 19, 2017 YOUNG CONAWAY STARGATT & TAYLOR LLP

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CERTIFICATE OF SERVICE

I, Karen L. Pascale, Esquire, hereby certify that on June 19, 2017, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF (which will send notification that such filing is available for viewing and downloading to all registered counsel), and in addition caused true and correct copies of the foregoing document to be served upon the following counsel of record by electronic mail:

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