

Pagination

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Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW WALKER, JR., Plaintiff, -against-
MONICA RICH KOSANN, AMAZON
ADVERTISING LLC, EBAY, INC., FISHER-
PRICE, INC., PROVENANCE GEMS,
WOODROW JEWELERS, NICKELODEON,
DISNEY, WALMART, KMART, and KROGER
COMPANY, Defendants.

23-CV-4409 (AS) (JW)

January 8, 2025, Filed

January 8, 2025, Decided

Andrew Walker, Jr, Plaintiff, Pro se, Culver City,
CA.

For Monica Rich Kosann, Woodrow Jewelers,
Defendants: John Paul Margiotto, LEAD
ATTORNEY, Andrew Nietes, Fross Zelnick
Lehrman & Zissu, P.C., New York, NY.

For Amazon Advertising LLC, Defendant: Robert
Cruzen, LEAD ATTORNEY, Klarquist Sparkman
LLP, Portland, OR.

For Ebay Inc., Defendant: Joshua Lee Raskin,
LEAD ATTORNEY, Greenberg Traurig, LLP,
New York, NY; Kathryn Albanese, Greenberg
Traurig, LLP, Intellectual Property Litigation, New
York, NY.

For Provenance Gems, Defendant: Jeremy D.
Friedman, The Downs Law Group, Coconut
Grove, FL; Paul Hankin, The Downs Law Group,
FL, Miami, FL.

For Fisher-Price, Defendant: John R. Hutchins,
LEAD ATTORNEY, Banner & Witcoff, LTD,
Washington, DC; Yariv Waks, East Aurora, NY.

JENNIFER E. WILLIS, United States Magistrate
Judge. Hon. ARUN SUBRAMANIAN, United
States District Judge.

JENNIFER E. WILLIS

REPORT & RECOMMENDATION

**JENNIFER E. WILLIS, United States
Magistrate Judge**

**to the Hon. ARUN SUBRAMANIAN, United
States District Judge:**

Pro se Plaintiff Andrew Walker, Jr ("Plaintiff")
proceeds *in forma pauperis* in this action. See
Dkt. No. 4. Shortly after filing the original
complaint, Plaintiff filed the First Amended
Complaint ("FAC") on June 3, 2024. Dkt. No. 5.
The FAC alleges patent infringement claims
against Defendant eBay, Inc. ("eBay"), Fisher-

Price, Inc. ("Fisher-Price"), Monica Rich Kosann ("Kosann"), Provenance Gems, LLC ("Provenance") Woodrow Jewelers ("Woodrow"), and Amazon Advertising LLC ("Amazon") (collectively, the "Original Defendants"). Id.

On February 16, 2024, this Court issued a Report and Recommendation recommending that each of the Original Defendants' motions to dismiss be granted and that Plaintiff be granted leave to file a second amended complaint. Dkt. No. 89. On March 4, 2024, even after Plaintiff failed to object, Judge Cronan conducted a *de novo* review and adopted this Court's Report and Recommendation in its entirety. Dkt. No. 90. Judge Cronan also granted Plaintiff leave to file a second amended complaint by April 3, 2024. Id.

On March 26, 2024, Plaintiff filed his Second Amended Complaint ("SAC") against the Original Defendants and added Defendants Nickelodeon, Disney, Walmart, Kmart, and Kroger Company (collectively the "New Defendants"). Dkt. No. 91. The SAC realleges claims for patent infringement. It also alleges new claims for inducement of infringement, contributory infringement, and request a damages enhancement for willful infringement. Id. Now before the Court are Defendants Fisher-Price, Kosann, Provenance, and Woodrow's motions to dismiss the SAC. Dkt. Nos. 97-98, 100.

I. BACKGROUND

The Court assumes familiarity with the facts as detailed in the Court's February 16, 2024, Report and Recommendation (the "February R&R") and therefore only summarizes facts relevant to the instant [*2] motions. Dkt. No. 89.

Plaintiff owns the United States Design Patent No. **US D593,191** ("**D191** Patent") titled "Fragrant Oil Burning Lamp." Dkt. No. 91 at ¶ 24. The SAC alleges the Defendants "independently and/or collectively engaged in unauthorized activities that constitute direct infringement, contributory infringement, and/or inducement of infringement of Plaintiff's patent rights." Id. at ¶ 25. Specifically, Plaintiff alleges that Defendant Nickelodeon's animated series "Shimmer and Shine" contains characters and elements that use Plaintiff's patented design or something substantially similar to it. Id. Plaintiff then alleges that Defendant Disney "has been involved in promoting and distributing this infringing content." Id.

The SAC also alleges that Defendant Fisher-Price manufactures and distributes Shimmer and Shine products that infringe upon Plaintiff's patent to retail stores including but not limited to Kmart and Walmart. Id. Lastly, Plaintiff alleges that Defendant Kmart and Walmart sell the products, including but not limited to, "toys and merchandise" related to the Shimmer and Shine animate series. Id. And such products lead to "consumer confusion and diluting the value of Plaintiff's intellectual property." Id.

II. LEGAL STANDARDS

A. Pro Se Litigants

Pro se filings are liberally construed and interpreted to "raise the strongest claims they suggest." See Yerdon v. Poitras, No. 24-1263, [**XS7TVSBG000N**], 2024 WL 4674339, at *2 (2d Cir. Nov. 5, 2024) (citing Sharikov v. Philips Med. Sys. MR, Inc., **103 F.4th 159, 166** (2d Cir.

2024)). Nonetheless, "pro se plaintiffs are not relieved of the requirement that they plead enough facts so that their claims are plausible." Williams v. Breaking Ground Hous. Dev. Fund Corp., No. 22-CV-8715 (AS), [2024 BL 193980], 2024 WL 2882122, at *2 (S.D.N.Y. June 6, 2024) (internal quotations and citations omitted).

B. Sua Sponte Pauperis Action Dismissal of an In Forma

"Where a plaintiff is proceeding in forma pauperis, the court shall dismiss the case at any time if the court determines that the action fails to state a claim on which relief may be granted." Williams v. Plaza Rehab. & Nursing Ctr., No. 23-CV-4438 (PGG) (BCM), [2024 BL 238718], 2024 WL 3385642, at *4 (S.D.N.Y. July 12, 2024) (cleaned up); 28 U.S.C. § 1915(e)(2)(B)(ii).

A Court can also dismiss an action if it is "frivolous or malicious." Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (citing 28 U.S.C. § 1915(e)(2)(B)(i)). "An action is frivolous when either: (1) the factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy; or (2) the claim is 'based on an indisputably meritless legal theory." *Id.* (internal quotations and citation omitted). "A claim is based on an indisputably meritless legal theory when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint. *Id.* (internal citations omitted).

C. Rule 12(b)(2)

"To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a

prima facie showing that jurisdiction exists over the defendant[s]." Am. Girl, LLC v. Zembrka, 118 F.4th 271, 276 (2d Cir. 2024). "A plaintiff can make this showing through his own affidavits and supporting materials containing an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." [*3] Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 208 (2d Cir. 2001) (cleaned up). Prior to discovery, "the plaintiff's prima facie showing may be established solely by allegations." Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 85 (2d Cir. 2013) (quoting Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir.1990)). On a motion to dismiss for lack of personal jurisdiction, the court "construes the pleadings and affidavits in the light most favorable to plaintiff[], resolving all doubts in [his] favor." Oklahoma Firefighters Pension & Ret. Sys. v. Banco Santander (Mexico) S.A. Institucion de Banca Multiple, 92 F.4th 450, 456 (2d Cir. 2024) (Subramanian, J., sitting by designation).

D. Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must include sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." Italian Exhibition Grp. USA, Inc. v. Bartolozzi, No. 23-CV-4417 (AS), [2023 BL 399099], 2023 WL 7301810, at *1 (S.D.N.Y. Nov. 6, 2023) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Williams, No. 22-CV-8715 (AS), [2024 BL 193980], 2024 WL 2882122, at *2. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). A complaint that merely offers "labels and conclusions" or "a formulaic recitation of the

elements of a cause of action will not do." See Ashcroft v. Iqbal, [556 U.S. 662, 678](#), (2009).

III. DISCUSSION

Plaintiff's SAC offers essentially no new facts against the Original Defendants. It also fails to make any attempt to cure the deficiencies of the FAC. Instead, Plaintiff uses the SAC to allege new claims against the New Defendants. See generally Dkt. No. 91. The Court addresses the failure to cure the FAC and the claims against the New Defendants in turn.

A. Defendant Provenance

The February R&R recommended dismissal of the claims against Defendant Provenance for failure to provide "information from which the Court could reasonably conclude that Provenance Gems has minimum contacts with the state of New York such that the exercise of jurisdiction is proper." Dkt. No. 89 at 9.

i. Personal Jurisdiction .

Defendant Provenance argues that the SAC only makes conclusory assertions regarding personal jurisdiction over the Defendant Provenance and should therefore be dismissed for its failure to provide factual support. Dkt. No. 97-1 at 6-7.

Plaintiff's opposition does not argue that he has established the Court's personal jurisdiction over Defendant Provenance. Instead, Plaintiff argues he has sufficiently made a claim for which relief can be granted. Dkt. 108 at 5-8.

The SAC reads:

This Court has personal jurisdiction over each Defendant because they have sufficient minimum contacts with the forum as a result of conducting business in this State and within this judicial district. By engaging in commerce that affects residents of this State and by directly or indirectly offering for sale, selling, and distributing products that infringe upon the Plaintiff's patent rights within this district, Defendants have availed themselves of the privilege of conducting business within this jurisdiction. Therefore, the assertion of personal jurisdiction **[*4]** would not offend traditional notions of fair play and substantial justice.

Dkt. No. 91 at ¶ 10.

The February R&R put Plaintiff on notice that mere conclusory statements or allegations are insufficient to oppose a [12\(b\)\(2\)](#) motion to dismiss. Dkt. No. 89 at 4 (citing Sullivan v. Jersey Strong Licensing LLC, No. 18-CV-7753 (RA), [\[2019 BL 257953\]](#), 2019 WL 3066492, at ***2** (S.D.N.Y. 2019)). Plaintiff has not cured the defects of the FAC by simply alleging more conclusory statements.

Accordingly, the Court recommends that Defendant Provenance's motion to dismiss the SAC be **GRANTED**.

ii. Venue

In the opposition to Defendant Provenance's

motion to dismiss, Plaintiff also requests that, in the alternative, the Court consider transferring the case to a proper venue under [28 U.S.C. § 1406\(a\)](#). Dkt. No 108 at 8.

Defendant Provenance points out that Plaintiff "failed to identify the appropriate location or otherwise include any analysis justifying such relief," and instead relies on the Court to identify and transfer to a proper venue. Dkt. No. 110 at 1. Consequently, Defendant Provenance argues Plaintiff's request to transfer venue is inappropriate and should be denied. Dkt. No. 110 at 1-2.

Whether venue is appropriate in a patent infringement case is governed by [28 U.S.C. § 1400\(b\)](#) and "is an issue unique to patent law and is governed by Federal Circuit law." In re ZTE (USA) Inc., [890 F.3d 1008, 1012](#) (Fed. Cir. 2018). [Section 1400\(b\)](#) provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." [28 U.S.C. § 1400\(b\)](#). If venue is appropriate, a court may transfer under [section 1404\(a\)](#) and if not appropriate, a court can transfer or dismiss under [section 1406\(a\)](#). See Sadiant, Inc. v. Penstock Consulting, LLC, No. 23-CV-7872 (KPF), [[2024 BL 185954](#)], 2024 WL 2847195, at [*9](#) (S.D.N.Y. May 30, 2024) (citing Atl. Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas, [571 U.S. 49, 51](#) (2013)).

The choice to dismiss or transfer venue lies within the sound discretion of the district court. See New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., [599 F.3d 102, 112](#) (2d Cir. 2010); Mayborn (UK) Ltd. v. Comotomo Inc., No. 22-

CV-694 (PGG), [[2023 BL 528](#)], 2023 WL 22616, at [*8](#) (S.D.N.Y. Jan. 3, 2023)

For the purposes of Plaintiff's request to transfer venue, the Court need not determine whether venue is appropriate because both [section 1404\(a\)](#) and [1406\(a\)](#) require a finding that it is "in the interest of justice" to transfer a case. See [28 U.S.C. §§ 1404\(a\), 1406\(a\)](#). Here, Plaintiff's claims have not been cured in a manner that allows him to state a plausible claim for *any* variation of patent infringement. See *infra* Section II(B) at 9-12.

Therefore, the Court recommends that Plaintiff's request to transfer under [section 1406\(a\)](#) be **DENIED**, as it would not be in the interest of justice for any transferee court to analyze uncurable claims. See TrackThings LLC v. NETGEAR, Inc., No. 21-CV-5440 (KPF), [[2022 BL 252183](#)], 2022 WL 2829906, at [*13](#) (S.D.N.Y. July 20, 2022) ("Dismissal may be appropriate when the case is a 'sure loser on the merits,' so as not to 'waste the time of another court by transferring it.'") (quoting *Moreno-Bravo v. Gonzalez*, [463 F.3d 253, 263](#) (2d Cir. 2006)); Mayborn (UK) Ltd., [[2023 BL 528](#)], 2023 WL 22616, at [*8](#) (same).

Moreover, even if these claims were not "a sure loser on the merits," Plaintiff has not made any effort to suggest any facts that would satisfy the [\[*5\]](#) factors considered when deciding to transfer under [section 1404\(a\)](#). See *New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, [599 F.3d 102, 112](#) (2d Cir. 2010) (discussing the factors considered under a request to transfer under [section 1404\(a\)](#)). For this reason as well, the Court recommends the request to transfer be **DENIED**.

**B. Direct
Infringement
Against the
Remaining**

**Original
Defendants**

FAC. Dkt. No. 101 at 6-9.

Regarding the previously-accused product, Defendant Fisher-Price moves to dismiss arguing Plaintiff should be collaterally estopped as the February R&R already concluded on the merits that there was a lack of substantial similarity between the accused product and the claimed design. Dkt. No. 99 at 15. Defendant Fisher-Price also argues that Plaintiff inadequately attached "a series of images" to the SAC "without explanation." Id. at 10. Defendant Fisher Price avers that the series of images along with the heading "infringing product sold by Nickelodeon, Walmart, and Fisher and its price" are not enough to plausibly state a new claim for patent infringement for anything included in the images. Id. at 10-14.

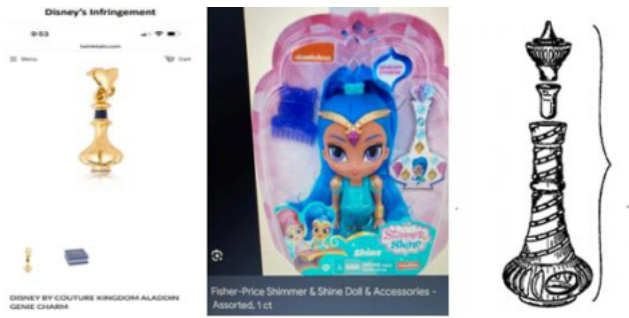
Plaintiff counters that the series of images "meets the pleading requirements by clearly delineating which products are accused, thereby allowing Defendant [Fisher-Price] to understand the basis of the claims against them." Dkt. No. 105 at 5. Plaintiff then argues that when applying the ordinary observer test and considering "the design elements as a whole rather than isolated components," the SAC adequacy shows the overall appearance of the Fisher-Price products[] closely mirrors the patented design." Id. at 6-8. Consequently, Plaintiff suggests that the Court should allow for "substantive examination rather than premature dismissal based on cursory evaluations." Id. at 8.

Defendants Kosann and Woodrow also move to dismiss the Complaint making nearly identical arguments as those in their motion to dismiss the

Plaintiff makes the same counter argument in his opposition to Defendants Kosnann and Woodrow's motion to dismiss as he did in the response to Defendant Fisher-Price. More specifically, Plaintiff again asserts that the side-by-side pictures demonstrate his patented design's "unique aesthetic choices" are mirrored by the accused product "creating an overall visual impression that is misleadingly similar." Dkt. No 104. at 7-8. Again, Plaintiff suggests the fate of his infringement claims is "suited for a jury or trial fact-finding than a pre-trial dismissal, especially when visual comparisons and interpretations of design elements are involved." Id. at 8-9.

This Court's February R&R carefully explained to Plaintiff that his **D191 Patent** "is not so broad as to cover all products in the general shape or style of a genie bottle." Dkt. No. 89 at 11 (citing *Colida v. Sony Corp. of Am*, No. 04-CV-2093 (RJH), 2005 WL 267231, at *3 (S.D.N.Y. Feb 3, 2005) and *OddzOn Products, Inc. v. Just. Toys, Inc.*, **122 F.3d 1396, 1405** (Fed. Cir. 1997)). The February R&R then carefully examined and concluded that, outside of the "general genie bottle shape," none of the side-by-side comparisons with the accused products would deceive an [*6] ordinary observer to purchase the accused products supposing it to be the **D191 Patent**. Id. at 14-19.

Yet, shown below, Plaintiff in his SAC attaches a series of images that resemble the general shape or style of a genie bottle—which this Court already concluded his **D191 Patent** does not cover. Dkt. No. 89 at 11; see also Dkt. No. 91 at 20-28, 30-31, 33-35, 37-38, 42, 44-45, 47-48.



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Plaintiff's SAC makes no attempt to follow the February R&R's guidance regarding the need to sufficiently allege the facts to state a plausible claim of patent infringement. Instead, it makes a few conclusory allegations that the Defendants' actions "include the manufacture, offer for sale, sale, and distribution of products that unlawfully replicate or embody the patented design, or are substantially similar thereto, without Plaintiff's permission." Dkt. No. 91 at ¶ 25. The SAC's only support of the conclusory allegations are the images discussed above. Plaintiff's attempt to show direct infringement by attaching the same images and ones similar to those used in the FAC, fails for the same reasons as his FAC. See Dkt. No. 89 at 10-19.

In light of Plaintiff's blatant failure to cure the defects of the FAC, the Court recommends that Defendant's Fisher-Price, Kosnann, and Woodrow's motions to dismiss be **GRANTED**. The Court also recommends the same claims be **DISMISSED** *sua sponte* against the Defendants Amazon and Ebay. See **28 U.S.C. § 1915(e)(2)(B)(ii)**.

C. Direct Defendants Infringement Against the New

There is no indication on the docket that Plaintiff served any of the New Defendants and therefore

they have not appeared or answered the SAC. Under **Rule 4(m)**, a court may only *sua sponte* dismiss a complaint for failure to serve if prior notice is given to the plaintiff so that he may attempt to show good cause for his failure to serve. See *Moskovits v. Fed. Republic of Brazil*, No. 23-699, [**2024 BL 26201**], 2024 WL 301927, at *1 (2d Cir. Jan. 26, 2024) (citing *Thompson v. Maldonado*, **309 F.3d 107, 110** (2d Cir. 2002)). The Court has not given Plaintiff such notice for his failure to serve the New Defendants. Accordingly, the Court recommends dismissal of the claims against the New Defendants on other grounds.

Plaintiff's claims for direct infringement against the New Defendants fail for the same reasons discussed above and in the February R&R. See *supra* section II(B); Dkt. No 89. Here, Plaintiff merely adds the New Defendants to this case and submits pictures of similarly appearing genie shaped items offered for sale, manufactured, or depicted in some fashion by the New Defendants. See generally Dkt. No. 89. Plaintiff then, under the same theory as before, alleges that these products infringe on his **D191 Patent**. *Id.* Plaintiff's claims against the New Defendants are structurally identical to the claims against the Original Defendants and are equally as legally insufficient. Thus, the Court recommends that all claims for direct infringement be *sua sponte* **DISMISSED** against the New Defendants. **28 U.S.C. § 1915(e)(2)(B)(ii)**; see also *Fitzgerald v. First E. Seventh St. Tenants Corp.*, **221 F.3d 362, 363** (2d Cir. 2000) (under **28 U.S.C. § 1915(e)(2)** a court is required to *sua sponte* dismiss claims that are frivolous or that cannot state a claim on which relief can be granted).

D. Plaintiff's [*7] Claims of Inducement of Infringement, Contributory Infringement,

**and Damage
Enhancement for
Willful
Infringement** **against all
Defendants**

The SAC asserts for the first-time claims of inducement of infringement, contributory infringement, and seeks a damages enhancement for willful infringement based on the conduct Plaintiff alleges caused direct infringement on his **D191 Patent**.

Defendants Kosann and Woodrow argue that "[b]ecause there is no direct infringement, Plaintiff's claims for inducement of infringement and contributory infringement must also be dismissed." Dkt. No. 101 at 9 (citing AquaTex Indus., Inc. v. Techniche Sols., **419 F.3d 1374, 1380** (Fed. Cir. 2005) and Baseball Quick, LLC v. MLB Advanced Media L.P., No. 11-CV-1735 (KBF), [**2014 BL 340883**], 2014 WL 6850965, at ***10** (S.D.N.Y. Dec. 4, 2014), aff'd, **623 F. App'x 1012** (Fed. Cir. 2015)).

The Court agrees with Defendants Kosann and Woodrow that it need not address Plaintiff's claims for inducement of infringement and contributory infringement given the recommended dismissal of the direct infringement claims. See Baseball Quick, LLC, [**2014 BL 340883**], 2014 WL 6850965, at ***10**, aff'd, **623 F. App'x 1012** (Fed. Cir. 2015)). For the same reasons the Court need not address Plaintiff's request for enhanced damages for willful infringement. Thus, the Court recommends that Defendants Kosann and Woodrow's motion to dismiss the claims be **GRANTED** and the claims be **DISMISSED** *sua sponte* against all other Defendants.

IV. LEAVE TO AMEND

Defendants Kosann and Woodrow ask that Plaintiff's claims be dismissed with prejudice as the substance of Plaintiff's claims, shown through pictures of the accused product and the **D191 Patent**, cannot be altered by amendment. Dkt. No. 101 at 10. Defendants Kosann and Woodrow highlight that Plaintiff has already had three chances to state a valid claim and has failed each time, demonstrating the futile nature of any future amendments. Id. at 6-9. Defendant Fisher-Price also asks that the claims be dismissed with prejudice as Plaintiff has now had "the benefit of a ruling" and still "ignored the Magistrates [Judge's] guidance on how to plead a plausible claim of infringement. Dkt. No. 109 at 1-2, 7.³

While these motions to dismiss have been pending, Plaintiff has since filed a third, fourth, fifth, sixth, and seventh request for leave to amend. Dkt. Nos. 111, 119-22. Plaintiff's third through sixth requests attach proposed amended complaints but his seventh request does not. Id.

While a *pro se* plaintiff should be granted leave to amend at least once, a district court is not required to grant leave to amend a second time where a plaintiff fails to cure defects identified by the court. See Ward v. City of New York, **777 F. App'x 540, 544** (2d Cir. 2019). Furthermore, leave to amend is correctly denied where the court determines a plaintiff's failed attempt to cure deficiencies in the amended complaint gives "no indication that a valid claim might be stated." See Williams v. Bronx Cnty. Child Support Customer Serv. Unit, **741 F. App'x 854, 856** (2d Cir. 2018)

The February R&R identified the deficiencies of his FAC for Plaintiff and suggested he be granted leave to file the SAC. Dkt. No. 89 at 9. Judge Conan adopted that recommendation.

Dkt. No. 90 at 2-3. After [*8] having the benefit of a judicial decision, Plaintiff's SAC failed to cure any of the deficiencies of the FAC. Instead, he filed a complaint alleging similar claims against the Original Defendants and added the New Defendants. See generally Dkt. No. 91. Therefore, the Court recommends that plaintiff be **DENIED** leave to amend.

V. RECOMMENDATION

For all the reasons stated above, the Court recommends that Defendants motions to dismiss be **GRANTED** and all other claims be **DISMISSED** *sua sponte*.

The Court also recommends that Plaintiff be **DENIED** *in forma pauperis* status for purposes of appeal, as any appeal of this recommendation or the adoption would not be taken in good faith. See Gardner v. Koeningsman, No. 21-CV-10185 (PMH), [2022 BL 110009], 2022 WL 1058498, at *4 (S.D.N.Y. Mar. 30, 2022).

FILING OF RECOMMENDATION OBJECTIONS TO THIS REPORT AND

Pursuant to **28 U.S.C. § 636(b)(1)** and **Rule 72(b) of the Federal Rules of Civil Procedure**, the parties shall have fourteen days from service of this Report to file written objections. See also **Fed. R. Civ. P. 6**. Such objections, and any responses to objections shall be filed with the Clerk of Court and on ECF. Any requests for an extension of time for filing objections must be directed to Judge Subramanian. Failure to file objections within fourteen days will result in a waiver of objections and will preclude appellate

review. See Thomas v. Arn, **474 U.S. 140** (1985); Cephas v. Nash, **328 F.3d 98, 107** (2d Cir. 2003).

SO ORDERED.

DATED: New York, New York

January 8, 2025

/s/ Jennifer E. Willis

JENNIFER E. WILLIS

United States Magistrate Judge

fn

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Defendants Amazon, eBay, and all New Defendants failed to answer the second amended complaint.

fn

2

From left to right: Plaintiff's image of Disney's alleged infringement; Plaintiff's image of one of Fisher-Price's alleged infringement; and Plaintiff's **D191 Patent**.

fn






3

In their motion to dismiss and reply briefs, Defendant Fisher-Price often uses the phrase "the Magistrate." Dkt. Nos. 99, 109. This phrase is wholly inappropriate given the Judicial Improvements Act of 1990 changed

the title from "magistrate" to "magistrate judge." See Ruth Dapper, A Judge by Any Other Name? Mistitling of the United States Magistrate Judge, 9 Fed. Courts L. Rev. 1, 5-6 (2015). "Thus, the word 'magistrate' is no longer appropriately used as a noun in federal courts, but only as an adjective indicating the



type of judge to which one is referring. Bormuth v. Whitmer, **548 F. Supp. 3d 640**, **642 n.1** (E.D. Mich. 2021). Counsel for Defendant Fisher-Price is cautioned to use the correct title moving forward.

Case Analysis (0 case)

| Case Analysis Summary | | |
|---|---------------|---|
|  | Positive | 0 |
|  | Distinguished | 0 |
|  | Caution | 0 |
|  | Superseded | 0 |
|  | Negative | 0 |
| Total | | 0 |

No Treatments Found

Direct History

| Direct History Summary | | |
|---|----------|---|
|  | Caution | 0 |
|  | Negative | 0 |
| Total | | 0 |

1.

[Walker v. Kosann, No. 23-CV-4409 \(AS\), 2025 BL 74719, 2025 Us Dist Lexis 41750 \(S.D.N.Y. Mar. 07, 2025\)](#)

affirming the report, granting the motion to dismiss, denying the appeal and dismissing the case in

[Walker v. Kosann, No. 23-CV-4409 \(AS\) \(JW\), 2025 BL 77540 \(S.D.N.Y. Jan. 08, 2025\)](#)
2.

[Walker v. Kosann, No. 23-CV-4409 \(AS\) \(JW\), 2025 BL 77540 \(S.D.N.Y. Jan. 08, 2025\)](#)

report submitted

General Information

| | |
|-------------------|--|
| Case Name | Walker v. Kosann |
| Court | U.S. District Court for the Southern District of New York |
| Date Filed | Wed Jan 08 00:00:00 EST 2025 |
| Parties | ANDREW WALKER, JR., Plaintiff, -against- MONICA RICH KOSANN, AMAZON ADVERTISING LLC, EBAY, INC., FISHER-PRICE, INC., PROVENANCE GEMS, WOODROW JEWELERS, NICKELODEON, DISNEY, WALMART, KMART, and KROGER COMPANY, Defendants. |
| Topic(s) | Civil Procedure; Patent Law |