

2003 WL 22909153  
United States District Court,  
S.D. New York.

In re SKI TRAIN FIRE IN KAPRUN,  
AUSTRIA ON NOVEMBER 11, 2000

No. 01 MDL 1428(SAS). | Dec. 9, 2003.

## Synopsis

**Background:** Parents, spouses, and grandparents of eight Americans who died in a ski train fire at an Austrian ski resort brought action against Austrian corporation that operated the resort.

**Holdings:** On corporation's motion to dismiss for lack of personal jurisdiction, the District Court, Scheindlin, J., held that:

1 corporation's marketing activities, including advertising of its ski resort abroad, offering discount promotions to United States ski clubs, and maintaining a Web site accessible in New York, was not "doing business" in New York within meaning of New York's long-arm statute;

2 even if Austrian corporation "transacted business" within meaning of New York's long-arm statute by advertising on interactive websites, corporation was not subject to personal jurisdiction; and

3 neither the International Agreements Claims Act nor the Foreign Claims Act permitted the exercise of personal jurisdiction.

Motion granted.

West Headnotes (6)

### 1 Federal Courts

#### 🔑 Sales, solicitation and advertising

Austrian corporation's marketing activities, including advertising of its ski resort abroad, offering discount promotions to United States ski clubs, and maintaining a Web site accessible in New York, was not "doing business" in New York within meaning of New York's long-arm statute. [McKinney's CPLR 301](#).

[2 Cases that cite this headnote](#)

### 2 Federal Courts

#### 🔑 Sales, solicitation and advertising

Even if Austrian corporation "transacted business" within meaning of New York's long-arm statute by advertising its ski resort on interactive websites that targeted and solicited New York business, as well as business on European military bases, corporation was not subject to personal jurisdiction in action arising from fatal ski train fire at the resort, absent allegation that any of the victims of the fire ever visited the website, let alone used it to make their trip reservations. [McKinney's CPLR 302\(a\)\(1\)](#).

[6 Cases that cite this headnote](#)

### 3 Federal Courts

#### 🔑 Sales, solicitation and advertising

Austrian corporation's use of wholesalers to market its ski resort facilities to English-speaking people was insufficient to confer personal jurisdiction over the corporation under New York's long-arm statute in action arising from fatal ski train fire at the resort; plaintiffs failed to allege that such sales practices rose to the level of "transacting business" in New York either in terms of frequency or revenue and a connection between the victims of the ski train fire and the discounts. [McKinney's CPLR 302\(a\)\(1\)](#).

[1 Cases that cite this headnote](#)

### 4 Federal Courts

#### 🔑 Aliens or alien corporations

Neither the International Agreements Claims Act nor the Foreign Claims Act permitted the exercise of personal jurisdiction over a nondomiciliary defendant whose actions resulted in injury to an American soldier living abroad. [10 U.S.C.A. §§ 2734\(a\); 10 U.S.C.A. § 2734a](#).

### 5 Federal Courts

#### 🔑 Tort cases

Austrian corporation's tortious activities that allegedly caused fatal ski train fire at its ski resort did not cause injury to a person "within New York," as required to exercise personal jurisdiction over the corporation under

New York's long-arm statute; "original event" that caused the injuries occurred in Austria. [McKinney's CPLR § 302\(a\)\(3\)](#).

## 6 Federal Courts

### 🔑 Tort cases

Austrian corporation's alleged spoliation of evidence in violation of district court's orders did not support exercise of personal jurisdiction over it under New York's long-arm statute on ground that the spoliation was a tort committed outside of New York causing injury to persons within New York; orders to preserve evidence explicitly preserved corporation's right to challenge the underlying action on the basis of personal jurisdiction. [McKinney's CPLR § 302\(a\)\(3\)](#).

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## Opinion

### OPINION AND ORDER

SCHEINDLIN, J.

\*1 This Document Relates To: Defendant Gletscherbahnen Kaprun AG

Plaintiffs, the parents, spouses, and grandparents of eight Americans who died in a ski train fire on November 11, 2000 in Kaprun, Austria,<sup>1</sup> have sued numerous individual and corporate defendants for damages and declaratory and injunctive relief.<sup>2</sup> Defendant Gletscherbahnen Kaprun AG ("GBK") now moves to dismiss the action against it on three grounds: (1) lack of personal jurisdiction, (2) improper

service of process, and (3) forum non conveniens.<sup>3</sup> For the reasons set forth below, GBK's motion to dismiss for lack of personal jurisdiction is granted.<sup>4</sup>

## I. BACKGROUND

### A. The Moving Defendant

GBK is a privately held corporation that has its principal place of business in Kaprun, Austria.<sup>5</sup> GBK owns and operates a ski resort located on Kitzsteinhorn Mountain, including the ski train and tunnel involved in the accident.<sup>6</sup> Plaintiffs contend that GBK is responsible for the train and tunnel defects that caused the deaths of their family members.<sup>7</sup>

### B. Jurisdictional Allegations

Plaintiffs allege that this Court has jurisdiction over GBK based on GBK's website advertising, promotional activities, and/or spoliation of evidence.<sup>8</sup>

#### 1. GBK's Website Activity

GBK engages in marketing activities through its website, which is hosted by an Austrian company—Salzburg-Online.<sup>9</sup> It is undisputed that the website, which has existed for approximately six years,<sup>10</sup> has the same "interactive" features today that it had at the time of the Kaprun ski train fire.<sup>11</sup> These features include website-based email access to GBK representatives<sup>12</sup> and hyperlinks<sup>13</sup> to web pages operated by third parties.<sup>14</sup> Although GBK's website provides detailed pricing information for ski passes, equipment rentals, and lessons, viewers cannot actually purchase anything from GBK through the website.<sup>15</sup> But viewers can click on the hyperlink on GBK's "Accommodations" page, which connects them to a web page operated by Europa-Sportregion Marketing GmbH ("Europa-Sportregion").<sup>16</sup> From Europa-Sportregion's website, visitors can make online reservations for lodging at hotels, resorts, and apartments in Kaprun.<sup>17</sup>

#### 2. GBK's Other Marketing Activities

In addition to web-based advertising, GBK allegedly promotes its products via "wholesalers and agents who market packages to English speaking persons in the U.S. and in the U.S. military in Europe."<sup>18</sup> In particular, plaintiffs allege that a Massachusetts company called "Adventures

on Skis” advertises GBK’s facilities via the Internet<sup>19</sup> to U.S. citizens living in the United States and abroad.<sup>20</sup> Additionally, plaintiffs allege that GBK offered discounts to “U.S. (New York Bases or Business[es]) ski clubs that agreed to purchase lift tickets in bulk.”<sup>21</sup>

GBK is also alleged to have “purposely targeted ... the United States Military bases from which plaintiffs’ decedents came and dozens of others throughout Germany and Italy.”<sup>22</sup> Specifically, GBK “made itself popular with [U.S.] Military personnel by offering ... incredibly attractive vacation packages including flexible reservations ... waiver of cancellation policies, discounted hotel and lift tickets and guaranteed accommodations.”<sup>23</sup>

### 3. GBK's Alleged Spoliation of Evidence

\*2 Finally, plaintiffs allege that GBK has “sought to interfere with, avoid and/or evade its independent and court imposed obligations to preserve, inventory and account for evidence related to the train, tunnel and equipment used therein.”<sup>24</sup> The “court imposed obligations” are contained in orders to preserve evidence as to all defendants in this action.<sup>25</sup> These orders were issued by this Court earlier in the proceedings and, notably, preserved defendants’ right to later assert jurisdictional defenses.<sup>26</sup>

## II. LEGAL STANDARD

Upon motion, a court is obligated to dismiss an action against a defendant over which it has no personal jurisdiction.<sup>27</sup> Plaintiffs bear the ultimate burden of establishing, by a preponderance of the evidence, that the court has jurisdiction over the defendant.<sup>28</sup> However, “[p]rior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith ... legally sufficient allegations of jurisdiction, i.e., by making a *prima facie* showing of jurisdiction.”<sup>29</sup> Plaintiffs “can make this showing through [their] own affidavits and supporting materials, containing an averment of facts that, if credited ..., would suffice to establish jurisdiction over the defendant.”<sup>30</sup> Thus, a court may consider materials outside the pleadings,<sup>31</sup> but must credit the plaintiff’s averments of jurisdictional facts as true.<sup>32</sup>

The determination of whether a federal court has personal jurisdiction over a defendant is a two-step process. *First*, the

court must determine whether the plaintiff has shown that the defendant is subject to personal jurisdiction under the forum state’s laws.<sup>33</sup> *Second*, the court must evaluate whether its assertion of jurisdiction pursuant to the forum state’s laws comports with the requirements of due process.<sup>34</sup> In a MDL proceeding, the forum state determination is governed by “the district court where the action was originally filed, and therefore that state’s law must be applied.”<sup>35</sup> Because GBK was originally sued in cases filed in New York, and because plaintiffs only argue that GBK’s contacts with New York are sufficient to confer jurisdiction over it, this Court will look to New York law to determine whether it has personal jurisdiction over GBK.<sup>36</sup>

## III. DISCUSSION

### A. Section 301<sup>37</sup>

Under New York law, a foreign corporation can be sued for all purposes if it is present or “doing business” in the state.<sup>38</sup> Under this test, “a foreign corporation is amenable to suit in New York if it is ‘engaged in such a continuous and systematic course’ of ‘doing business’ here as to warrant a finding of its ‘presence’ in this jurisdiction.”<sup>39</sup> “The doing business standard is a stringent one because a corporation which is amenable to the Court’s general jurisdiction may be sued in New York on causes of action wholly unrelated to acts done in New York.”<sup>40</sup>

\*3 1 GBK’s alleged marketing activities do not constitute “doing business” in New York. *First*, even if GBK’s advertising abroad constitutes contacts with the United States generally, it does not amount to “doing business” in New York because “United States-based contacts” are insufficient to “allow New York courts to exercise general jurisdiction over a foreign corporation.”<sup>41</sup> *Second*, allegations as to GBK’s offers of discount promotions to New York “Bases or Business[es]”<sup>42</sup> do not rise to the level of “doing business” in New York absent some indication of frequency or volume. *Third*, as this Court has repeatedly held, a defendant’s website alone cannot form the basis for general jurisdiction in New York because “the fact that a foreign corporation has a website accessible in New York is insufficient to confer jurisdiction under CPLR § 301.”<sup>43</sup> Accordingly, plaintiffs have failed to make a “*prima facie* showing of jurisdiction”<sup>44</sup> within the meaning of section 301.

## B. Section 302(a)(1)

Under section 302(a)(1) of New York's long-arm statute,<sup>45</sup> a court may exercise personal jurisdiction over a nondomiciliary if “the nondomiciliary [ ] transact[s] business within the state, [and] the claim against the nondomiciliary [ ] arise[s] out of that business activity.”<sup>46</sup> A nondomiciliary “transacts business” in New York if it “purposefully avails [itself] of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws.”<sup>47</sup> A court's determination of whether a defendant “transacts business” in New York is based on an assessment of the sum of the defendant's activities.<sup>48</sup> Notably, “[t]he showing necessary for a finding that defendant ‘transacted business’ and is suable on a cause of action arising from that transaction is considerably less than that needed to establish defendant's ‘doing business,’ which renders the defendant subject to suit on even an unrelated cause of action.”<sup>49</sup>

### 1. GBK's Website Activity

2 Plaintiffs allege that GBK “transacted business” through “its advertising on highly interactive websites that target and solicit New York business, as well as business on European military bases.”<sup>50</sup>

“It is well settled that a court must examine the nature and quality of a defendant's activity on its website to determine whether jurisdiction is appropriate in New York.”<sup>51</sup> Courts assessing whether Internet activity permits the exercise of personal jurisdiction “have identified an array of fact patterns.”<sup>52</sup> At one end of the spectrum are “passive” websites, which display, but do not permit an exchange of, information.<sup>53</sup> Passive websites do not confer personal jurisdiction. “At the other end of the spectrum are cases in which the defendant clearly does business over the Internet....”<sup>54</sup> Between these two extremes are “interactive” websites that permit the exchange of information.<sup>55</sup> A defendant's use of interactive websites generally supports a finding of personal jurisdiction.<sup>56</sup>

\*4 Even assuming, arguendo, that the characteristics of GBK's website rise to the required level of “interactivity” needed to support jurisdiction under section 302(a)(1),<sup>57</sup> plaintiffs fail to allege that there is “a ‘substantial relationship’ or some ‘articulable nexus between the business

transacted and the cause of action.”<sup>58</sup> Plaintiffs state that “GBK's use of interactive web advertising directed to military personnel and the user's ability to ‘click on’ to a travel agent and book a trip” constitutes a “strong basis to support, both in New York and worldwide, jurisdiction based upon the concept of specific jurisdiction.”<sup>59</sup> But what plaintiffs fail to allege is that any of the victims of the Kaprun fire ever visited the website, let alone used it to make their November 2000 trip reservations.<sup>60</sup> Absent a substantial relationship between GBK's Internet-based activities and plaintiffs' claims, GBK's website cannot provide the basis for personal jurisdiction under section 302(a)(1).

### 2. GBK's Other Marketing Activities

3 Plaintiffs' allegations regarding GBK's use of (1) wholesalers to market its facilities to English-speaking people and (2) discounts to attract U.S. military personnel<sup>61</sup> are also insufficient to confer jurisdiction over GBK. *First*, plaintiffs fail to allege that the marketing activities of Adventures on Skis “in the U.S.” amount to contacts between GBK and New York. *Second*, even if true, vague allegations of “discounts” to “New York Bases or Business[es],”<sup>62</sup> are insufficient to confer jurisdiction over GBK. This is because plaintiffs fail to allege that such sales practices rose to the level of GBK's “transacting business” in New York either in terms of frequency or revenue and a connection between the victims of the ski train fire and the discounts.

4 Plaintiffs further argue that because GBK directed its advertising to personnel stationed on U.S. military bases abroad, it should be subject to jurisdiction in the United States.<sup>63</sup> This argument appears to be grounded in either the International Agreements Claims Act<sup>64</sup> or the Foreign Claims Act.<sup>65</sup> Specifically, plaintiffs contend that, by statute, the “United States [has] concurrent jurisdiction over the territory [in] which it operates these military bases.”<sup>66</sup> But neither statute contains any language supporting this interpretation.<sup>67</sup> Plaintiffs readily concede that the statute<sup>68</sup> “does not speak to the issue of when such torts are committed against United States Military personnel.”<sup>69</sup> Thus, plaintiffs are asking this Court to expand the reach of either the International Agreements Claims Act or the Foreign Claims Act to permit the exercise of personal jurisdiction over a nondomiciliary defendant whose actions result in injury to an American soldier living abroad. But plaintiffs have offered no basis on which any court could grant this request.

In support of their argument, plaintiffs rely on cases discussing U.S. jurisdiction over *criminal* conduct committed on U.S. installations abroad.<sup>70</sup> In particular, plaintiffs rely on the Ninth Circuit's decision in *United States v. Corey*.<sup>71</sup> Plaintiffs contend that “[t]he principle that is implicit in *Corey* is that independent nations by virtue of treaties and agreements with the United States have ceded their exclusive control and jurisdiction over United States Military bases and territory and allowed the United States exclusive and concurrent authority therein.”<sup>72</sup>

\*5 Plaintiffs' argument lacks merit for several reasons. *First*, the exercise of jurisdiction over a U.S. citizen who committed a crime on a U.S. military base is quite different from the exercise of jurisdiction over a foreign citizen who commits a tort against members of the U.S. military and their families in a foreign country, but not on a military base.<sup>73</sup> *Second*, even if GBK's activities were treated as contacts with a U.S. territory, they would not amount to contacts with New York sufficient to confer jurisdiction in this forum. Accordingly, GBK's European marketing activities cannot serve as the predicate for jurisdiction under [section 302\(a\)\(1\)](#).

Therefore, personal jurisdiction over GBK under [section 302\(a\)\(1\)](#) is lacking because plaintiffs fail to allege facts sufficient to support a finding that GBK transacts business in New York and that plaintiffs' claims arise out of that business activity.

### C. [Section 302\(a\)\(3\)](#)

Under [section 302\(a\)\(3\)](#), personal jurisdiction may be asserted over a non-domiciliary if the non-domiciliary “commits a tortious act without the state” injuring a person within New York, and either (i) “regularly does or solicits business, or engages in any other persistent course of conduct,” or (ii) derives substantial revenue from interstate commerce and expects or reasonably should expect the tortious act to have consequences in the state.<sup>74</sup>

#### 1. Tortious Activities Causing the Accident

5 Plaintiffs allege that GBK's tortious activities that caused the accident confer personal jurisdiction within the meaning of [section 302\(a\)\(3\)](#). Plaintiffs fail adequately to allege that GBK's purported tortious activities caused injury “within New York.”<sup>75</sup> “Courts determining whether there is injury in New York sufficient to warrant [§ 302\(a\)\(3\)](#) jurisdiction must generally apply a situs-of-injury test, which asks them

to locate the original event which caused the injury.”<sup>76</sup> The “ ‘original event’ occurs ‘where the first effect of the tort ... that ultimately produced the final [ ] injury’ is located.”<sup>77</sup> Thus, the focus of the analysis is where the first effect of the original event is located, not, for instance, the residency of the victims.<sup>78</sup> The “original event” that caused the injuries in this proceeding occurred in Kaprun, Austria. Accordingly, GBK's tortious acts relating to the ski train and tunnel fire in Kaprun did not cause injury to a person “within New York.”<sup>79</sup>

#### 2. Spoliation of Evidence

6 Plaintiffs further allege that “GBK's acts of spoliation of evidence create personal jurisdiction by virtue of GBK's direct violation of the orders of this Court.”<sup>80</sup> Plaintiffs assert that “[r]egardless of whether the claim is framed as ‘a fraud on the court,’ ‘destruction of documents’ or ‘spoliation,’ the Court has jurisdiction over the fraud.”<sup>81</sup> Thus, plaintiffs argue that GBK's spoliation of evidence fits within [section 302\(a\)\(3\)](#) because the spoliation itself is a tort committed outside of New York, causing injury to persons within New York.

\*6 Plaintiffs' argument lacks merit. “Subject to exceptions, a court's in personam order can bind only persons who have placed themselves or been brought within the court's power.”<sup>82</sup> GBK's alleged spoliation does not warrant departure from the general rule. Moreover, the Court's orders to preserve evidence explicitly preserved GBK's right to challenge the underlying action on the basis of personal jurisdiction.<sup>83</sup> A court may not simply exercise jurisdiction by judicial fiat.<sup>84</sup> Because this is precisely what plaintiffs are asking this Court to do, plaintiffs' argument fails.

In sum, plaintiffs have not alleged facts sufficient to establish jurisdiction over GBK on the basis of GBK's alleged commission of tortious activities in Austria because GBK's activities did not cause injury “within New York.” Similarly, GBK's alleged destruction of evidence in violation of a court order fails to satisfy the jurisdictional test under [section 302\(a\)\(3\)](#).

#### IV. CONCLUSION

For the foregoing reasons, GBK's motion to dismiss for lack of personal jurisdiction is granted. The Clerk of the Court is directed to close this motion [docket number 96] and dismiss the case against GBK.

## Parallel Citations

Prod.Liab.Rep. (CCH) P 16,850

## Footnotes

- 1 Plaintiffs John and Suzanne Habblett, Clair Goodridge, Harold and Carole Baker, Rudolph and Angela Kern, and Karen Filkil bring this action on behalf of the estates of Jennifer Habblett Goodridge; Michael C., Michael J., and Kyle Goodridge; Carrie Baker; Erich Kern; and Paul and Benjamin Filkil, respectively.
- 2 See 12/21/01 Consolidated Amended Complaint (“Complaint”) ¶¶ 327, 339, 351, 357, 366, 372, 377, 380, 387. Pursuant to 28 U.S.C. § 1407, the individual actions were transferred to and consolidated for pre-trial purposes before this Court by the Judicial Panel on Multidistrict Litigation. See *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 175 F.Supp.2d 1379 (J.P.M.L.2001).
- 3 Earlier in the proceedings, GBK moved to dismiss the action on the grounds of (1) improper service of process, (2) lack of personal jurisdiction, (3) forum non conveniens, and (4) the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1330(a), 1602–1611. On March 1, 2002, GBK withdrew its motion to dismiss on the first three grounds. This Court then denied the motion as to the fourth ground, finding that GBK was not an agent or instrumentality of a foreign state. See *In re Ski Train Fire in Kaprun, Austria on November 11, 2000(GBK)*, 198 F.Supp.2d 420 (S.D.N.Y.2002), *aff’d*, 67 Fed.App. 24 (2d Cir.2003) (unpublished decision).
- 4 Because the motion to dismiss based on lack of personal jurisdiction is granted, I need not address improper service of process or forum non conveniens.
- 5 As of December 2001, GBK’s ownership structure was as follows: 45% owned by Oesterreichische Elektrizitaetswirtschafts AG, 33.98% owned by Gemeinde Kaprun, 27.21% owned by Kapruner Promotion und Lifte GmbH, and 7.18% owned by Fremdenverkehrsverband Kaprun, with the remainder owned by various other investors. See 12/5/01 Declaration of Johann P. Praäuer, Managing Director for GBK (“Praäuer Decl.”), Ex. B to Affidavit of Robert A. Weiner, GBK’s counsel, in Support of GBK’s Motion to Dismiss (“Weiner Aff.”) ¶ 5. Praäuer further notes that none of GBK’s shares are owned by “any U.S. citizen or company.” *Id.*
- 6 See *id.* ¶ 4.
- 7 See Complaint ¶¶ 98–101.
- 8 See Plaintiffs’ Brief in Opposition to GBK’s Motion to Dismiss (“Pl.Mem.”) at 1–2. Plaintiffs also suggest that jurisdiction may be proper because of (1) GBK’s alter ego status as to Verbund–Austrian Hydro Power AG (“AHP”) and its predecessor TKW, see Complaint ¶¶ 98–99, and (2) GBK’s purchase of products and/or component parts from “U.S. companies,” *id.* ¶ 101. These allegations merit only brief attention. *First*, even if GBK were found to be AHP’s “alter ego,” this Court has already held that it lacks jurisdiction over AHP in New York. See *In re Ski Train Fire in Kaprun, Austria on November 11, 2000(AHP)*, MDL No. 1428, No. 01 Civ. 7342, 2003 WL 1807148, at \*8 (S.D.N.Y. Apr.4, 2003) (“*Kaprun AHP*”). *Second*, because plaintiffs fail to allege that any of the “U.S. companies” are located in New York, such purchases cannot confer jurisdiction over GBK in New York.
- 9 See 12/5/01 Declaration of Elfriede Buchner, GBK employee in charge of marketing (“Buchner Decl.”), Ex. A to Weiner Aff. ¶ 10.
- 10 See *id.* ¶ 11.
- 11 See Defendant’s Reply Brief in Further Support of Its Motion to Dismiss (“Def. Reply Mem.”) at 6.
- 12 See Pl. Mem. at 11.
- 13 “A hyperlink is ‘highlighted text or images that, when selected by the user, permit him to view another, related Web document.’” *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 n. 1 (2d Cir.1997).
- 14 See Def. Reply Mem. at 6.
- 15 See Buchner Decl. ¶ 14; 8/23/03 Reply Declaration of Johann P. Praäuer, Managing Director for GBK (“Praäuer Reply Decl.”) ¶ 10.
- 16 See Pl. Mem. at 11–12; see also Praäuer Reply Decl. ¶ 10. GBK does not have a controlling interest in Europa–Sportregion’s stock. See *id.* ¶ 8 (noting that GBK owns only 8.33% of the shares of Europa–Sportregion).
- 17 See <http://www.europasportregion.info/en/winter/>.
- 18 7/24/03 Declaration of Edward D. Fagan, plaintiffs’ counsel, in Opposition to GBK’s Motion to Dismiss (“Fagan Decl.”) ¶¶ 17–18; Pl. Mem. at 12. GBK alleges that it does not advertise in New York, except through its website. See Buchner Decl. ¶¶ 6–8 (stating that GBK’s marketing efforts are focused on local European markets, GBK does not advertise in any English language magazines, and GBK does not disseminate any promotional materials in the United States).
- 19 See <http://www.advonskis.com>.
- 20 Pl. Mem. at 12. GBK states that “[t]his company is not an agent of, nor affiliated in any way with, GBK. GBK was unaware of the existence of this company and the website until we saw Ms. Endl’s affidavit.” Praäuer Reply Decl. ¶ 9.
- 21 Pl. Mem. at 12; see also Fagan Decl. ¶ 19.

- 22 Pl. Mem. at 10.
- 23 *Id.* at 3.
- 24 *Id.* at 15; *see also* Complaint ¶¶ 381–387 (pleading spoliation claim).
- 25 3/7/01 Order Preserving Evidence, No. 01 Civ. 0266(SAS), *superceded by*, 3/29/01 Order Preserving Evidence, No. 01 Civ. 0266(SAS).
- 26 *See* 3/29/01 Order Preserving Evidence, No. 01 Civ. 0266(SAS) ¶ 5.
- 27 *See* Fed.R.Civ.P. 12(b)(2); *see also* *In re Ski Train Fire in Kaprun, Austria on November 11, 2000 (Siemens Austria)*, 230 F.Supp.2d 403, 406 (S.D.N.Y.2002) (“*Kaprun Siemens Austria*”).
- 28 *See Kernan v. Kurz–Hastings, Inc.*, 175 F.3d 236, 240 (2d Cir.1999); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir.1994).
- 29 *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir.1998) (citations and quotation marks omitted); *see also Koehler v. Bank of Berm., Ltd.*, 101 F.3d 863, 865 (2d Cir.1996).
- 30 *Whitaker v. American Telecasting Inc.*, 261 F.3d 196, 208 (2d Cir.2001) (citations and quotation marks omitted).
- 31 *See Hsin Ten Enter. USA, Inc. v. Clark Enter.*, 138 F.Supp.2d 449, 452 (S.D.N.Y.2000).
- 32 *See Metropolitan Life Ins. Co. v. Robertson–Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996).
- 33 *See Bensusan Rest. Corp.*, 126 F.3d at 27; *Met Life*, 84 F.3d at 567.
- 34 *See Bensusan Rest. Corp.*, 126 F.3d at 27; *Met Life*, 84 F.3d at 567. Because GBK is not subject to personal jurisdiction under New York’s jurisdictional statutes, *see infra* Part III, it is unnecessary to address the constitutional requirements for personal jurisdiction.
- 35 *In re Ski Train Fire In Kaprun, Austria on November 11, 2000 (Waagner)*, 257 F.Supp.2d 717, 723 (S.D.N.Y.2003); *In re Ski Train Fire in Kaprun, Austria on November 11, 2000 (Bosch Rexroth)*, 230 F.Supp.2d 392, 399 (S.D.N.Y.2002) (“*Kaprun Bosch Rexroth*”); *see also In re Sterling Foster & Co. Sec. Litig.*, 222 F.Supp.2d 289, 300 (E.D.N.Y.2002) (“In a multi-district litigation, the transferee court must apply the law of the transferor forum in determining issues of personal jurisdiction.”) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 639–40, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)); *In re MTBE Litig.*, 175 F.Supp.2d 593, 606 n. 20 (S.D.N.Y.2001) (“When considering questions of state law the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.”).
- 36 Accordingly, this opinion only addresses whether GBK is subject to personal jurisdiction in New York and does not address, for instance, whether jurisdiction is proper in Texas. This may be relevant because after the original actions were filed against GBK in New York, an additional action was filed by Karen Filkil against GBK and other defendants in the Eastern District of Texas. *See* 6/25/03 Filkil Complaint.
- 37 Plaintiffs fail to identify the statutory provisions on which their jurisdictional arguments are based. Because plaintiffs allude to [section 301](#), *see, e.g.*, Pl. Mem. at 6, and various subsections of [section 302\(a\)](#), *see, e.g., id.* at 10, I will evaluate plaintiffs’ jurisdictional arguments under both.
- 38 *See* N.Y. C.P.L.R. § 301 (McKinney’s 2003) (codifying caselaw that utilizes “doing business” standard); *Aerotel Ltd. v. Sprint Corp.*, 100 F.Supp.2d 189, 191 (S.D.N.Y.2000) (interpreting [section 301](#)).
- 39 *Aerotel Ltd.*, 100 F.Supp.2d at 191–92 (quoting *Frummer v. Hilton Hotels Int’l, Inc.*, 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967)).
- 40 *Jacobs v. Felix Bloch Erben Verlag fur Buhne Film und Funk KG*, 160 F.Supp.2d 722, 731 (S.D.N.Y.2001) (quotation marks omitted). To determine whether a foreign corporation is doing business in New York, courts have focused on a traditional set of indicia, assessing whether the company: (1) has an office in the state; (2) has any bank accounts or other property in the state; (3) has a phone listing in the state; (4) does public relations work there; and (5) has individuals permanently located in the state to promote its interests. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 98 (2d Cir.2000). While it is undisputed that GBK lacks each of these five contacts, this alone does not mean that there is no jurisdiction under [section 301](#). *See Met Life*, 84 F.3d at 570 (“[C]ontacts with the forum state should not be examined separately or in isolation. There is no talismanic significance to any one contact or set of contacts that a defendant may have with a forum state; courts should assess the defendant’s contacts as a whole.”); *Landoil Res. Corp. v. Alexander & Alexander, Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir.1990) (“The Court must [ ] analyze a defendant’s connections to the forum state ‘not for the sake of contact-counting, but rather for whether such contacts show a continuous, permanent and substantial activity in New York.’”) (quoting Weinstein, Korn & Miller, *New York Civil Practice*, ¶ 301.16, at 3–32)).
- 41 *Kaprun Siemens Austria*, 230 F.Supp.2d at 408.
- 42 Pl. Mem. at 12.
- 43 *Kaprun Siemens Austria*, 230 F.Supp.2d at 408 (quoting *In re Ski Train Fire in Kaprun, Austria on November 11, 2000 (Siemens AG)*, 230 F.Supp.2d 376, 383 (S.D.N.Y.2002) (“*Kaprun Siemens AG*”)); *see also Kaprun Siemens AG*, 230 F.Supp.2d at 383

- 44 (“Were it otherwise, every entity or individual that ran a highly interactive website from anywhere in the world could be sued for any reason in New York.”); *Kaprun AHP*, 2003 WL 1807148, at \*6; *Kaprun Bosch Rexroth*, 230 F.Supp.2d at 400.
- 45 *Jazini*, 148 F.3d at 184.
- 46 Section 302(a)(1) reads, in relevant part: “[A] court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state.” N.Y. C.P.L.R. § 302(a)(1) (McKinney’s 2003).
- 47 *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir.1986).
- 48 *Id.* (quoting *McKee Elec. Co. v. Rauland–Borg Corp.*, 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34, 229 N.E.2d 604 (1967)).
- 49 See *Sterling Nat’l Bank & Trust Co. of N.Y. v. Fidelity Mortgage Investors*, 510 F.2d 870, 873 (2d Cir.1975).
- 50 *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 59 (2d Cir.1985).
- 51 Pl. Mem. at 13.
- 52 *Alpha Int’l, Inc. v. T–Reprods., Inc.*, No. 02 Civ. 9586, 2003 WL 21511957, at \*3 (S.D.N.Y. July 1, 2003) (citing *Mattel, Inc. v. Adventure Apparel*, No. 00 Civ. 4085, 2001 WL 286728, at \*3 (S.D.N.Y. Mar.22, 2001) (citing cases)).
- 53 *Hsin Ten Enter. USA, Inc.*, 138 F.Supp.2d at 456.
- 54 See *id.*; see also *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa.1997).
- 55 *Hsin Ten Enter. USA, Inc.*, 138 F.Supp.2d at 456; see also *Zippo Mfg. Co.*, 952 F.Supp. at 1124.
- 56 See *Hsin Ten Enter. USA, Inc.*, 138 F.Supp.2d at 456; see also *Zippo Mfg. Co.*, 952 F.Supp. at 1124.
- 57 See *Alpha Int’l, Inc.*, 2003 WL 21511957, at \*3.
- 58 Because I conclude that there is no nexus between GBK’s website and plaintiffs’ claims, I need not determine whether GBK’s website is “interactive.” I note, however, that such a finding is unlikely for several reasons. *First*, the capability of someone in New York to contact GBK via email from GBK’s website, without more, is insufficient to establish jurisdiction over the defendant. See, e.g., *Phat Fashions, L.L.C. v. Phat Game Athletic Apparel, Inc.*, No. 00 Civ. 0201, 2001 WL 1041990, at \*4 (S.D.N.Y. Sept.7, 2001) (“Mere telephone, mail, or email contacts will normally not suffice to support jurisdiction.”). *Second*, while information on the web page is currently available in both English and German, see <http://www.kitzsteinhorn.at>, Buchner alleges, and plaintiffs do not specifically refute, that at the time of the accident, the homepage was only available in German. See Buchner Decl. ¶¶ 11–12; Pl. Mem. at 11 (noting that GBK currently advertises in English, but not addressing whether GBK advertised in English in November 2000). The fact that the website was not available in English in November 2000 suggests that GBK was not then directing its Internet marketing to U.S. citizens in New York or anywhere else.
- 59 *Ainbinder v. Potter*, 282 F.Supp.2d 180, 187 (S.D.N.Y.2003) (quoting *McGowan v. Smith*, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 419 N.E.2d 321 (1981)).
- 60 Pl. Mem. at 14–15.
- 61 Indeed, Buchner states that during the five years preceding the accident, with the exception of price inquiries from a single California resident, there were *no* queries from the United States attributable to the website advertising. See Buchner Decl. ¶ 16.
- 62 See Pl. Mem. at 12.
- 63 *Id.*
- 64 See *id.* at 11, 437 N.Y.S.2d 643, 419 N.E.2d 321 (“GBK purposely directed its activities to United States residents outside GBK’s Austrian borders and these negligent activities directly resulted in this tragic death of defendants [sic].”).
- 65 10 U.S.C. § 2734a.
- 66 10 U.S.C. § 2734(a). While plaintiffs cite the International Agreements Claims Act as 10 U.S.C. § 2734(a), Pl. Mem. at 7, section 2734(a) is actually part of the Foreign Claims Act. Thus, plaintiffs may have intended to cite the Foreign Claims Act, rather than the International Agreements Claims Act. Because plaintiffs’ argument fails for the same reasons under either Act, it is not necessary to consider these Acts separately.
- 67 Pl. Mem. at 7.
- 68 Section 2734a provides:
- When the United States is a party to an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States done in the performance of official duty, or arising out of any other act, omission, or occurrence for which an armed force of the United States is legally responsible under the law of another party to the international agreement, and causing damage in the territory of such party, the Secretary of Defense ... may—
- (1) reimburse the party ... in accordance with the agreement; or
  - (2) pay the party to the agreement the agreed pro rata share of any claim....
- Section 2734(a) provides:



To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned ... may appoint ... one or more claims commissions ... to settle and pay in an amount not more than \$100,000, a claim against the United States for—

(1) damage to, or loss of, real property of any foreign country ...;

(2) damage to, or loss of, personal property of any foreign country ...; or

(3) personal injury to, or death of, any inhabitant of a foreign country;

if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned ... as the case may be.... In this section, “foreign country” includes any place under the jurisdiction of the United States in a foreign' country.

68 As noted earlier, plaintiffs do not specify which statute forms the basis of their argument.

69 Pl. Mem. at 8.

70 *See id.* (citing *United States v. Corey*, 232 F.3d 1166 (9th Cir.2000) (asserting jurisdiction over the prosecution of a crime committed by one U.S. citizen against another U.S. citizen on a U.S. installation abroad)). *But see United States v. Gatlin*, 216 F.3d 207 (2d Cir.2000) (finding no jurisdiction on similar facts). Congress resolved the circuit split by accepting the *Gatlin* court's invitation to enact legislation authorizing the exercise of jurisdiction by U.S. courts over members of the armed forces and accompanying civilians who commit *criminal* offenses outside of the United States. *See* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 *etseq.*

71 232 F.3d 1166 (9th Cir.2000).

72 Pl. Mem. at 9.

73 Inasmuch as plaintiffs rely on the International Agreements Claims Act or the Foreign Claims Act for statutory authority, they offer no basis upon which this Court may conclude that Congress, in passing either Act, intended to extend jurisdiction to cover the alleged torts of a foreign citizen committed off-base in a foreign country. *See E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (“Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.... Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction.”). The Second Circuit has explained that “the Supreme Court has long held that courts should apply a presumption against extraterritoriality when interpreting statutes. Thus, absent ‘clear evidence of congressional intent’ to apply a statute extraterritorially, a statute applies only within the territorial United States.” *Gatlin*, 216 F.3d at 211–12 (quoting *Smith v. United States*, 507 U.S. 197, 204, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993)).

74 N.Y. C.P.L.R. § 302(a)(3) (McKinney's 2003).

75 *Id.*

76 *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir.2001) (quotation marks and citation omitted).

77 *Id.* at 84–85 (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 792 (2d Cir.1999)).

78 “An injury ... does not occur within the state simply because the plaintiff is a resident.” *Id.* at 85 (quoting *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir.1990)).

79 Because plaintiffs fail to allege facts sufficient to support a finding that GBK's allegedly tortious acts caused injury within New York, I do not address whether plaintiffs have adequately alleged that GBK regularly does or solicits business in New York, or derives substantial revenue from interstate or international commerce and reasonably should have expected its tortious acts to have consequences in New York.

80 Pl. Mem. at 2.

81 *Id.* at 17.

82 *Doctor's Assocs. v. Reinert & Duree, P.C.*, 191 F.3d 297, 302 (2d Cir.1999); *see also* 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2956, at 335 (2d ed. 1995) (“A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction.”).

GBK appears to argue that defiance of a court order can never create jurisdiction. *See* Def. Reply Mem. at 16–17. This is not precisely true. Where a party has violated a court order directed at the establishment of jurisdictional facts, a court may, pursuant to Federal Rule of Civil Procedure 37(b)(2)(A), enter an order that those jurisdictional facts “shall be taken as established for the purposes of the action,” Fed.R.Civ.P. 37(b)(2)(A). *See Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (finding personal jurisdiction based on defendants' repeated defiance of court orders calling for the production of evidence regarding jurisdictional facts after the court had explicitly warned defendants that it would assume that it had personal jurisdiction based on their failure to comply). That is, where a party has destroyed evidence relating to jurisdictional facts in direct contravention of a court order, the court may presume, pursuant to Rule 37(b)

(2)(A) and consistent with Due Process, that personal jurisdiction over the recalcitrant party has been established. *See id.* at 697, 706. Nonetheless, such extraordinary circumstances are not present here. Even assuming that GBK flagrantly defied the orders to preserve evidence, sanctions under [Rule 37\(b\)\(2\)\(A\)](#) would not confer jurisdiction because the orders did not relate to the establishment of GBK's jurisdictional contacts with the forum state. *See* 3/7/01 Order Preserving Evidence, No. 01 Civ. 0266(SAS), *superseded by*, 3/29/01 Order Preserving Evidence, No. 01 Civ. 0266(SAS).

83 *See* 3/7/01 Order Preserving Evidence, No. 01 Civ. 0266(SAS), *superseded by*, 3/29/01 Order Preserving Evidence, No. 01 Civ. 0266(SAS).

84 In support of their argument, plaintiffs cite a variety of fraud-on-the-court and destruction of evidence cases emphasizing the propriety of powerful sanctions in response to abuses of the judicial process. However, in each of these cases, the sanctioning court had personal jurisdiction over the defendant. *See, e.g., McMunn v. Memorial Sloan-Kettering Cancer Ctr.*, 191 F.Supp.2d 440 (S.D.N.Y.2002) (former employee suing New York employer); *Skywark v. Isaacson*, No. 96 Civ. 2815, 1999 WL 1489038 (S.D.N.Y. Oct.14, 1999) (former client suing attorney and his New York law firm), *aff'd*, No. 96 Civ. 2815, 2000 WL 145465 (S.D.N.Y. Feb.9, 2000).

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