UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 07-60983-CIV-SEITZ/McALILEY

NATIONWIDE RELOCATION SERVICES, INC.,

Plaintiff,

vs.

TIM WALKER, CONSUMERS FIRST CORP., SHARON BAYOLO, FARRAH LEIGH WANNER, DIANE last name unknown, and DOES 1 through 150 inclusive,

Defendants.
_____/

DEFENDANT FARRAH LEIGH WANNER'S MOTIONS TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE AND INCORPORATED MEMORANDUM OF LAW

Defendant FARRAH LEIGH WANNER ("Ms. Wanner") by and through her undersigned counsel and pursuant to Rules 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure, along with 28 U .S.C. § 1406(a), respectfully requests that this Court dismiss Plaintiff's claims against her for failure to state a claim and for improper venue. Alternatively, pursuant to 28 U.S.C. § 1406(a), Defendant moves to transfer venue. In support of her Motion, Ms. Wanner states the following:

1. On July 11, 2007, Plaintiff Nationwide Relocation Services, Inc. ("Plaintiff") filed this action in the United States District Court for the Southern District of Florida.

2. Despite its length, Plaintiff's Complaint lacks sufficient specificity.

3. Plaintiff fails to state a claim against Ms. Wanner for Florida common law

defamation because it fails to link a particular remark to her, specifically identify the persons to whom the remark was made or the relevant time frame when the statement was made.

4. Plaintiff fails to state a claim against Ms. Wanner for Florida common law tortious interference with advantageous business relationships because Plaintiff fails to allege that she interfered with Plaintiff's relationships with identified specific customers or agreements which in all probability would have been completed but for her interference.

5. Plaintiff fails to state a claim against Ms. Wanner under the Lanham Act, 15 U.S.C. § 1125(a), for trademark infringement because it fails to allege how she allegedly used Plaintiff's mark to the confusion of consumers.

6. Plaintiff fails to state a claim against Ms. Wanner under the Lanham Act, 15 U.S.C. § 1125(a), for false advertising because it fails to allege how she made false or misleading statements of fact.

7. Plaintiff also fails to plead a proper basis for venue. It is neither factually plead that any defendant resides in the Southern District of Florida, nor that a substantial part of the events or omissions giving rise to the claims occurred in the Southern District of Florida.

8. Plaintiff's Complaint should therefore be dismissed.

MEMORANDUM OF LAW

Statement of Facts

Plaintiff is the self-described "largest residential moving and corporate relocation broker in the country." Compl. ¶ 33. It is a Florida corporation having its principal office in Ft. Lauderdale, Florida. Compl. ¶ 12. Since at least 2000, Plaintiff has brokered contracts between consumers and moving companies. Id. Plaintiff alleges that its name has come to

signify it as a preeminent and high quality moving services broker. Compl. ¶ 68.

Plaintiff alleges herein that the Defendants have collectively harmed it through their activities on the website www.movingscam.com. Defendant Walker is alleged to be the principal owner, primary content provider and primary decision maker for the site. Compl. ¶ 13. Defendant Consumers First is possibly also a business operator. Compl. ¶ 17. Defendants Bayolo, Ms. Wanner and "Diane" are alleged to be contributors and moderators, among other things. The roles of "Does 1 through 150, inclusive" are not otherwise specified. Plaintiff claims generally that the website uses its name / service mark without permission, defames it, interferes with its potential customers and otherwise constitutes false advertising.

Plaintiff's Complaint attempts to invoke the Lanham Act, 15, U.S.C. § 1125, as to Count I (false advertising) and II (infringement of its service mark). The remaining Counts III (defamation) and IV (tortious interference with advantageous business relationships) travel under Florida common law. Plaintiff asserts jurisdiction for the Lanham Act claims based on federal question jurisdiction (28 U.S.C. § 1331 & 1338(a) & (b)) and asserts that supplemental jurisdiction (under 28 U.S.C. § 1367) exists for the State law claims. Compl. ¶ 2.

Argument

This Court should dismiss Plaintiff's Complaint for failure to state a claim for which relief may be granted and for failure to state a claim against Ms. Wanner. Federal Rule of Civil Procedure 8(a)(2) mandates that a pleading setting forth a claim for relief contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Further, Fed. R. Civ. P. 8(e)(1) mandates that "each averment of a pleading shall be simple, concise, and direct." Plaintiff's Complaint contains neither. Instead, it makes a purposeful effort to amalgamate the five individual defendants (setting aside the 150 "Does") into one undifferentiated mass. Plaintiff goes so far as to provide the following definitional allegations solely to address the meaning of other allegations:

> 30. Whenever in this Complaint reference is made to any act of Defendants Walker, Bayolo, Diane or Farrah [sic] (each an "Individual Defendant"), that allegation shall be deemed to mean that said Individual Defendant committed, conspired to commit, authorized, aided, abetted, furnished the means to, advised, or encouraged the acts alleged (a) as a principal, (b) under express or implied agency, or (c) with actual or ostensible authority to perform the acts so alleged, each on behalf of Defendant Consumers.
>
> 31. Whenever reference is made in this Complaint to any act of any Defendant, that allegation shall be deemed to mean the act of such Defendant acting individually and jointly, and as the owner, officer, director, employee, agent, joint venturer or representative of each remaining individual Defendant or the MovingScam.com Business, acting within the course and scope of such owner, officer, director, employee, agent, joint venturer or representative relationship, and with the advance knowledge, acquiescence, or subsequent ratification of each and every remaining Defendant.

It is this bulwark upon which Plaintiff's claims are based. Rather than give a plain statement of its claim against each defendant, Plaintiff improperly alleges, in effect, that every defendant is the agent or principal of the other and every defendant is responsible for

everything anyone else does. It is clear from ¶ 31, however, that Plaintiff refuses to delineate each defendant's role within the joint undertaking, whether it be as owners, officers, directors, employees, agents or joint venturers. As such, Plaintiff's Complaint is neither a short and plain statement of the ultimate facts, nor simple, concise and direct.

I. Plaintiff Fails To State A Claim For Defamation Because It Fails To Link A Particular Remark To Ms. Wanner, Specifically Identify The Persons To Whom The Remark Was Made Or The Relevant Time Frame When The Statement Was Made.

Defamation under Florida common law requires that (1) the defendant published a false statement about the plaintiff; (2) to a third party; and (3) the falsity of the statement caused injury to the plaintiff. ASA Accugrade, Inc. v. American Numismatic Ass'n, 2006 WL 1640698 at *8 (M.D. Fla April 19, 2006, No. 6:05-cv-1285-Orl-19DAB) (*citing* Razner v. Wellington Regional Medical Center, Inc., 837 So.2d 437, 442 (Fla. 4th DCA 2003)). Plaintiff must

> link a particular remark to a particular defendant, and specifically identify the person to whom the allegedly defamatory comments were made, as well as provide a time frame for when such statements were made.

Id (internal quotations omitted); *see also* Jackson v. North Broward County Hospital District, 766 So.2d 256, (Fla. 4th DCA 2000).

Plaintiff seeks to establish its defamation claim based on just a sampling of allegedly defamatory statements without identifying each statement at issue, each author or each recipient. For example, the Plaintiff's quotation of message board posts is preceded by "For example, …". Compl. ¶ 54. Plaintiff does not allege to whom any of the quoted message board postings were made. Compl. ¶ 54. Plaintiff does not allege that any of the quoted

message board postings were made by Ms. Wanner. Compl. ¶ 54. Plaintiff has not linked Ms. Wanner with any defamatory statement published to an identified third party. Furthermore, Plaintiff does not allege who wrote that the parties on the Black List, including itself, "repeatedly practice the same scams against consumers." Compl. ¶¶ 42, 44, 47. Plaintiff does not allege who wrote that Aldo Disorbo, Sr. was running the company. Compl. ¶ 48.

Other than Plaintiff's bare allegation that every defendant is liable for the acts of all the others, Plaintiff does not describe how Ms. Wanner is responsible for those statements. As to Ms. Wanner, Plaintiff vaguely alleges that she "jointly operates" the website (Compl. ¶ 22), is a substantial contributor to the website and a "driving force behind the direction and theme of the website" (Compl. ¶ 23). It does not follow that being a contributor or "driving force" makes one liable for actions of others in the same manner that ownership or control would. Further, "joint operat[ion]" of the website is similarly vague, failing to connote definitive responsibility or control over the content.

Count III is also infirm because it interjects unrelated allegations. At ¶ 85, the Complaint alleges that Plaintiff is without an adequate remedy at law. That is not an element of Florida common law defamation and is further contradicted in Plaintiff's Prayer for Relief, ¶ 2(a) and (b), which seek monetary compensation. Allegations of financial injury are inconsistent with having no remedy at law. *See* Palenzuela v. Dade County, 486 So.2d 12 (Fla. 3d DCA 1986). Further, without any grounds, Plaintiff's Count III seeks attorney's fees. Attorneys fees are only available in Florida by statute or contract. Here, Plaintiff has plead entitlement to neither. These allegations should be dismissed from the Complaint.

Based on the foregoing, Plaintiff has failed to state a cause of action for defamation against Ms. Wanner.

II. Plaintiff Fails To State A Claim Tortious Interference With Advantageous Business Relationships Because Plaintiff Fails To Allege That Ms. Wanner Interfered With Plaintiff's Relationships And Fails To Identify The Specific Customers Or Agreements Which In All Probability Would Have Been Completed But For Her Interference.

The Eleventh Circuit has stated that the elements of tortious interference with a business relationship under Florida law are:

> (1) the existence of a business relationship that affords the plaintiff existing or prospective legal rights; (2) the defendant's knowledge of the business relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff.

International Sales & Service, Inc. v. Austral Insulated Products, Inc., 262 F.3d 1152, 1154 (11th Cir. 2002) (citing Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla.1994)). A business relationship need not be evidenced by a contract, but it generally requires "an understanding between the parties [that] would have been completed had the defendant not interfered." Id.

A claim of tortious interference with a business relationship requires a business relationship with identifiable customers. Ferguson Transportation, Inc. v. North American Van Lines, Inc., 687 So.2d 821 (Fla. 1997); Austral, 262 F.3d at 1156. For example, publication of a scab list which allegedly prevented pilots from obtaining work at any other commercial airline failed to indicate an identifiable relationship with a particular party, as opposed to the general business community. Dunn v. Air Line Pilots Ass'n, 193 F.3d 1185, 1191 (11th Cir. 1999).

Plaintiff's Count IV is wholly devoid of specific details. Instead of actually identifying what customers Plaintiff lost, Plaintiff pleads that it entered into business relationships "with multiple specific and identifiable consumers". Compl. ¶ 60 & 87. It is not within the spirit of the law to comply with the requirement of having identifiable customers by simply labeling them as "identifiable". Such conclusory pleading in fact fails to actually identify anything, or to fairly apprise the defendants of the wrongs to which they are charged. Instead, it amounts to no more than a legal recitation of the abstract elements of the claim.

Further, Plaintiff continues its vague pleading by failing to describe the "multiple occasions" in which the collective "Defendants" became aware of and thereafter interfered with Plaintiff's consumers. Because Plaintiff directs this count solely against the "Defendants" without identifying which ones, Plaintiff wholly fails to allege what actions Ms. Wanner or any of the others is alleged to have undertaken in derogation of Plaintiff's rights. As set forth above, Plaintiff has failed to allege what part Ms. Wanner played in the alleged interference or that a basis exists to hold her vicariously liable.

Count IV also interjects the same unrelated allegations as Count III. Plaintiff alleges that it has no adequate remedy at law (Compl. ¶ 85) but requests monetary damages in its prayer for relief. Further, it requests attorneys fees without having established a basis. These allegations should be dismissed from the Count.

Therefore, Count IV of Plaintiff's Complaint should be dismissed for failure to state a claim.

III. Plaintiff Fails To State A Claim Against Ms. Wanner Under The Lanham Act, 15

U.S.C. § 1125(A), For False Advertising Because It Fails To Allege That She Made False Or Misleading Statements Of Fact.

To succeed on a claim of false advertising under § 43(a) of the Lanham Act, Plaintiff must prove that (1) Defendant's advertisements were false or misleading; (2) the advertisements deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented product or service affects interstate commerce; and (5) Plaintiffs have been, or are likely to be, injured as a result of the false advertising. Swatch S.A. v. New City, Inc., 454 F.Supp.2d 1245, 1251 (S.D. Fla. 2006).

Through repeated use of the undifferentiated plural "Defendants" Plaintiff seeks to obfuscate the individual roles each defendant played in the allegedly false advertising. Plaintiff does not allege who undertook the "search engine spam" referenced in ¶ 41. It does not identify any specific representation which allegedly leads consumers to falsely believe that the website was a consumer protection website. *See* Comp. ¶ 41. Nor does it identify how consumers were allegedly led to believe that the website will provide objective advice. *See* Compl. ¶ 45. Plaintiff does not link Ms. Wanner with any allegedly false statement.

As such, Count I should be dismissed for failure to state a claim.

IV. Plaintiff Fails To State A Claim Against Ms. Wanner Under The Lanham Act, 15 U.S.C. § 1125(A), For Trademark Infringement Because It Fails To Allege How She Allegedly Used Plaintiff's Mark To The Confusion Of Consumers.

To establish trademark infringement under the Lanham Act, Plaintiff must prove that Defendant used the mark in commerce without their consent and that the unauthorized use was likely to deceive, cause confusion, or result in mistake. Swatch S.A. v. New City, Inc.,

454 F.Supp.2d 1245, 1249 (S.D. Fla. 2006) (*citing* McDonald's Corp. v. Robertson, 147 F.3d 1301, 1307 (11th Cir.1998)). As detailed above, Plaintiff's allegations fail to ascribe responsibility for the use of Plaintiff's mark to Ms. Wanner. Therefore, Plaintiff has failed to state a cause of action against her.

V. Venue Is Not Proper In The Southern District Of Florida.

As to venue, Plaintiff alleges simply that:

> Venue is proper in this Court for each claim for relief pursuant to 28 U.S.C. §1391(b) either because each Defendant is located in this District, or because a substantial part of the events or omissions giving rise to each claim occurred in this District.

Compl. ¶ 11.

A. All Defendants Are Not Located In This District.

Plaintiff plainly contradicts its first grounds for venue in the Southern District of Florida when it alleges:

- Defendant Consumers is a for-profit corporation organized and existing under the laws of Delaware, with its principal place of business located in Des Moines, Iowa. [Compl. ¶ 17.]
- On information and belief, Defendant Bayolo is a resident of New York. [Compl. ¶ 20.]

Des Moines is within the jurisdiction of the District Court for the Southern District of Iowa, Davenport Division. The New Hartford locale listed on Ms. Bayolo's return of service [DE 19] is within the District Court for the Northern District of New York, Utica Division.

Plaintiff also does not allege that Ms. Wanner or Defendant Walker reside in the Southern District of Florida. Ms. Wanner resides in Leon County, Florida within the Northern District of Florida, Tallahassee Division. *See* the Affidavit of Farrah Leigh Wanner

(hereinafter, the "Wanner Aff.") at ¶ 2, attached hereto and incorporated herein as Exhibit A. According to Plaintiff's returns of service [DE 16 & 17], Defendant Walker resides in Waverly, Iowa. Waverly is within the geographic boundaries of the District Court for the Northern District of Iowa, Eastern Division (Waterloo). The locality of residence for the remaining defendants, "Diane" and the other 150 Defendant "Does", is nowhere stated.

B. No Substantial Part Of The Events Or Omissions Allegedly Giving Rise To Plaintiff's Claims Occurred In The Southern District Of Florida.

Plaintiff's only remaining ground for venue is that a substantial part of the events or omissions giving rise to each claim occurred in this District. Authority for venue when jurisdiction is not premised solely on diversity, as is the case here, is found at 28 U.S.C. § 1391(b). The Lanham Act, unlike certain other legislation (such as Title VII) does not contain a special venue provision which would derogate from § 1391(b). Section 1391(b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Because not all defendants reside in Florida, subsection (1) of 1391(b) will not apply. Subsection (3) does not apply unless there is no other district in which the action could be brought. FS Photo, Inc. v. Picturevision, Inc., 48 F.Supp.2d 442, 448 (D. Del. 1999) (noting legislative history indicating that § 1391(b)(3) is meant to apply to cases in which no substantial part of the events happened in the United States and in which all the defendants

do not reside in the same state).

Other than the bare conclusion in ¶ 11, Plaintiff wholly fails to establish that a substantial part of the events or omissions giving rise to its claim occurred in the Southern District of Florida. Instead, Plaintiff consistently refers to "Florida residents" throughout the Complaint without establishing that any are residents of the Southern District. Consequently, Plaintiff does not allege that:

- any defamatory statement was issued to a Southern District resident. *See* Compl. ¶ 54.
- any false advertising originated in the Southern District or was directed to it.
- any Southern District resident was confused by false advertising or decided to cancel a contract with Plaintiff because of it.
- any of the "multiple consumers" whose business Plaintiff lost in fact contemplated a move into, out of or within the Southern District. *See* Compl. ¶ 60.

Plaintiff's only specific allegation against any of the defendants relating to the Southern District is that once – in 2004 – Defendant Walker traveled to Miami "to pursue a complaint against a moving company and its principal." Compl. ¶ 16. Aside from the fact that Plaintiff does not allege that Plaintiff was the moving company at issue, this allegation, as a matter of law, is not a substantial part of the events or omissions giving rise to Plaintiff's claim.

Ms. Wanner confirms that she only interacted with the www.movingscam.com website from within Leon County where she resides. *See* Wanner Aff. ¶ 4. To her knowledge, no other defendant undertook actions constituting a substantial part of the events

or omissions giving rise to Plaintiff's claim. *See* Wanner Aff. ¶¶ 5 & 6.

In fact, the Terms of Use posed on www.movingscam.com expressly limit the venues in which actions by site users may be undertaken. The terms provide:

> **Choice of Law**
>
> This Agreement shall be constructed and controlled by the laws of Iowa, without regard to its conflict of law provisions. Any dispute arising here under will be governed by the laws of Iowa and brought under jurisdiction of the courts of Black Hawk County, Iowa. Furthermore, each User agrees to jurisdiction by federal courts of Iowa.

This suggests at least that those using the website did not contemplate being hailed into court anywhere other than Iowa.

If this matter is not dismissed for improper venue pursuant to 28 USC § 1406(a), it should be transferred to either the Northern District of Florida or an appropriate District Court in Iowa.

VI. Conclusion.

Plaintiff's vague allegations fail to plainly state what actions Ms. Wanner allegedly undertook. For defamation, it fails to identify specific communications made to specific individuals at specific times. For tortious interference with business relationships, it fails to identify Ms. Wanner's alleged actions or the specific identifiable customers Plaintiff allegedly lost. For the Lanham Act claims, Plaintiff fails to allege how Ms. Wanner used its mark or created false advertising, or why she is otherwise responsible for others who did.

Plaintiff's venue contentions fail to establish a sufficient nexus with the Southern District of Florida to support venue in that District. No Defendant resides in this District. Plaintiff has not established that a substantial part of the events or omissions giving rise to its

claims occurred within this District. Accordingly, this matter should be dismissed for improper venue.

WHEREFORE, Defendant, FARRAH LEIGH WANNER, moves for an order dismissing this action or, in the alternative, transferring venue.

DATED: August 28, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified as follows, in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing:

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