

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.

**DEFENDANTS TIM WALKER, CONSUMERS FIRST CORP.
AND FARRAH LEIGH WANNER'S MOTIONS TO DISMISS
AMENDED COMPLAINT FOR IMPROPER VENUE**

Defendants TIM WALKER (“Mr. Walker”), CONSUMERS FIRST CORP.¹ (“Consumers First”) and FARRAH LEIGH WANNER (“Ms. Wanner”) by and through their undersigned counsel and pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, respectfully request that this Court dismiss Plaintiff’s Amended Complaint [D.E. 32] for improper venue. In support of their Motion, Defendants state 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 against Mr. Walker, Consumers First and Ms. Wanner (collectively, the “Defendants”), along with

¹ Defendants Walker and Consumers First appear specially regarding personal jurisdiction and service. These objections are more specifically set forth in accompanying pleadings. Therefore, this motion is

Sharon Bayolo and numerous unidentified others.

2. In response to Defendant Wanner's Motion to Dismiss, Plaintiff filed its Amended Complaint [D.E. 32] on September 12, 2007.

3. Plaintiff's Amended Complaint fails to plead a proper basis for venue. A substantial part of the events or omissions allegedly giving rise to Plaintiff's claims did not occur in the Southern District of Florida.

4. Plaintiff's Amended 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.² ¶ 36. 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. ¶ 83.

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 also a business operator and the registrant of the movingscam.com website. Compl. ¶ 18. Defendants Bayolo, Ms. Wanner and "Diane" are alleged to be contributors and moderators, among other things. The roles of "Does 1 through

submitted by such defendants in the alternative, should the service or jurisdiction motions be denied.

² Paragraphs of the Amended Complaint are referenced herein as "Compl. ¶ ____".

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; conspiracy) and II (infringement of its service mark; conspiracy). The remaining Counts III (defamation; conspiracy) and IV (tortious interference with advantageous business relationships; conspiracy) 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 Amended Complaint for improper venue. Venue is not properly laid in this District because of all the instances of infringement, false advertising or defamation, only one (1) relates to the Southern District of Florida. Of all of the instances of tortious interference with business advantage, only two (2) instances relate to this District. Thus, even among the specifically plead tortious acts, a substantial part of the events or omissions giving rise to each claim did not occur in this District.

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

A. The Website’s Terms of Service Mandate Venue in Iowa.

Plaintiff’s causes of action are premised solely on the Defendants’ activities on the website, www.movingscam.com. Use of the movingscam.com website is conditioned upon the acceptance of its Terms of Service. Affidavit of Timothy Walker (hereinafter, the

“Walker Aff.”) ¶ 17. Links to the Terms of Service can be seen at the bottom of each of its pages. In fact, several of the screen shots Plaintiff attached to the original complaint show the link to the Terms of Service. A true and correct copy of the Terms of Service is attached to the Walker Affidavit as Exhibit A.

The Terms of Service posed on www.movingscam.com expressly limit the venues in which actions by site users may be undertaken. The mandatory 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.

Further, no party is permitted access to the www.movingscam.com message boards unless they first agree to be bound by the Terms of Service. Walker Aff. ¶ 18. If a party attempts to visit the message board, either through direct navigation on the www.movingscam.com website or through links indexed by search engines, such as Google, access is denied unless the user first agrees to the site’s “clickwrap” agreement. A true copy of that page is attached to the Walker Affidavit as Exhibit B.

A “clickwrap” agreement is one which appears when a user attempts to conduct an internet transaction, or install computer software. Hugger-Mugger, LLC v. Netsuite, LLC, 2005 WL 2206128 at *1, fn 1 (D. Utah September 12, 2005 Case No. 2:04-CV-592TC) (enforcing clickwrap agreement and dismissing action for improper venue). The agreement purports to condition further access upon the user’s consent to the specified conditions. Id. The user consents to the conditions by clicking on a dialog box on the screen, then proceeds

with the remainder of the transaction. Id. Forum selection clauses, including those contained in clickwrap agreements, are presumed valid and enforceable. Eslworldwide.com, Inc. v. Interland, Inc., 2006 WL 1716881 at *2 (S.D.N.Y. June 21, 2006, No. 06 CV 2503 (LBS)) (enforcing clickwrap agreement and dismissing case for improper venue); Davidson & Assocs., Inc. v. Internet Gateway, 334 F.Supp.2d 1164, 1177 (E.D. Mo. 2004) (holding that clickwrap agreements are enforceable under California law).

In Novak v. Overture Services, Inc., 309 F.Supp.2d 446, 449 (E.D.N.Y. 2004), a business owner sued Google, Inc., operator of the popular search engine, for tortiously interfering with his contractual relations and prospective business relations, and for breach of contract. Liability was premised upon Google's alleged failure to remove any material from its online discussion groups deemed objectionable by plaintiff. Id. Google moved to dismiss for improper venue and failure to state a claim. Id. at 450.

As here, access to the Google discussion groups required acceptance of Google's terms and conditions, which provided, inter alia, for exclusive jurisdiction in the District Court for the Northern District of California. Id. at 451-52. After review, the New York court considering Novak's claims enforced Google's terms of service and dismissed the action for improper venue. Id. at 452-53.

Like Novak, Plaintiff accessed the subject message boards and consequently accepted the Terms of Service. Plaintiff could not reproduce the posts it complains about unless it had accepted the Terms of Service. Because the forum selection clause is clear, this action could only be brought in Iowa. Consequently, Plaintiff's Amended Complaint should be dismissed for improper venue.

B. In the Alternative, 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 articulated ground for venue is that a substantial part of the events or omissions giving rise to each claim allegedly occurred in this District. Compl. ¶ 11. 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). Section 1391(b)(2) 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 . . . (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 . . .

Plaintiff specifically alleges that:

11) Venue is proper in this Court for each claim for relief pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to each claim occurred in this District, as:

- (a) The trademark owner, Plaintiff, is located in this District;
- (b) Defendants' false and defamatory statements were accessible in this District through their interactive³ Web site, and were directed at customers located in this District;
- (c) On January 28, 2005 and February 6, 2006, Plaintiffs customers, residing in Miami, Florida and Hollywood, Florida, canceled contracts with Plaintiff due to the false and defamatory statements of Defendants;
- (d) Residents of this District were confused by Defendants' trademark infringement, false advertising, and false and defamatory statements, and such customers cancelled their contracts with Plaintiff due to Defendants' actions. This customer confusion occurred in this District in, among other

³ Interactivity is a consideration with regard to the Zippo factors for personal jurisdiction. It is not known to be a factor with respect to venue. See Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa.1997)

places, Miami, Florida and in Hollywood, Florida;

(e) Defendants' acts are likely to cause confusion in this District;
and

(f) The harm suffered by Plaintiff was felt primarily in this District.

It should be first noted that none of the Defendants reside in this District.⁴

A court in considering where a substantial part of the events occurred should focus on the relevant activities of the defendant, not the plaintiff. Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1371 (11th Cir. 2003) (approving of Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995), a Lanham Act case rejecting venue where the plaintiff resided because, among other things, "if Congress had wanted to lay venue where the plaintiff was residing when he was injured, it could have said so expressly.") Thus, the allegations that the Plaintiff is located in this District (Compl. ¶ 11(a)) and suffered the harm primarily in this district (Compl. ¶ 11(f)) are legally insufficient to support venue in the Southern District of Florida.

Also legally insufficient is the contention that because the defamatory statements were accessible in the Southern District of Florida, venue is proper here. Compl. ¶ 11(b). "The mere fact that Defendant's website is accessible to Florida residents is not enough to give Florida a significant interest in adjudicating the matter. If that were the case, the State of

⁴ According to Plaintiff's returns of service [DE 16 & 17], Mr. Walker resides in Waverly, Iowa, within the geographic boundaries of the District Court for the Northern District of Iowa, Eastern Division (Waterloo). Actually, Mr. Walker resides in Warsaw, Illinois, within the geographic boundaries of the District Court for the Central District of Illinois, Peoria Division. See Walker Aff. at ¶ 2. Consumers First is a Delaware corporation with its principal place of business in Des Moines, Iowa [Compl. ¶ 18], within the jurisdiction of the District Court for the Southern District of Iowa, Davenport Division. 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. Plaintiff believes that Defendant Bayolo is a resident of New York. [Compl. ¶ 20] 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. The locality of residence for the remaining defendants, "Diane" and the other 150 Defendant "Does", is unknown.

Florida would have interest in virtually every lawsuit that arose from an internet site.” Response Reward Systems, L.C. v. Meijer, Inc., 189 F.Supp.2d 1332, 1339 (M.D. Fla. 2002) (finding that personal jurisdiction was not present). While in a sense a website is a continuous presence everywhere in the world, its availability for access by others does not mean by that quality alone that a substantial part of the events underlying Plaintiff’s claim occurred there.⁵

Instead, focusing concretely on the Defendants’ alleged actions, Plaintiff’s remaining venue contentions are that defamatory statements were directed into this District and that Plaintiff lost two (2) customers in this District.⁶ Those allegedly defamatory statements Plaintiff identified amount to only one (1) statement seemingly directed to this District. This is contrasted with the Plaintiff’s allegation that “[t]he MovingScam.com message board is viewed by thousands upon thousands of consumers each month” (Compl. ¶ 55) and contains “thousands upon thousands of postings” (Compl. ¶ 54). Further, it is in stark contrast to Plaintiff’s assertions that the Defendants are collectively responsible for more than 30,300 message board postings (Walker – 3,300 [¶ 13]; Bayolo – 12,300 [¶ 21]; Wanner – 2,200 [¶ 25]; and “Diane” – 12,500 [¶ 30]).

Alleged Defamatory Statements

The alleged defamatory statements identified in the Amended Complaint break down as follows:

⁵ Plaintiff also alleges that once – in 2004 – Defendant Walker traveled to Miami “to pursue a complaint against a moving company and its principal.” Compl. ¶ 17. Aside from the fact that Plaintiff does not allege that the visit related to it, this allegation, as a matter of law, is not a substantial part of the events or omissions giving rise to Plaintiff’s claim.

⁶ Clearly, paragraphs 11(c) and (d) reference the same discreet two customers. Their experiences have

- ¶ 60 [as to Wanner]
 - (a) regarding move from NY to CA;
 - (b) regarding move from WI to Texas;
 - (c) regarding move from NY to CA;
 - (d) unspecified locale;
 - (e) reply to question from CO.
- ¶ 61 [as to Walker]
 - (a) regarding move from CA to NY;
 - (b) regarding move from Ft. Lauderdale to Central FL;
 - (c) unspecified, possibly IL;
 - [d]⁷ Maine;
 - [e] continuation of (b) above, but with 1/6/03 date; and
 - [f] Texas, with 1/6/03 date⁸.
- ¶ 62 [as to Bayolo]
 - (a) regarding move in Texas;
 - (b) unspecified locale, possibly CA;
 - (c) regarding move from CA to VA;
 - (d) regarding move from DC to AL;
 - (e) regarding move from NY to KY;
 - (f) unspecified locale; and
 - (g) regarding a Michigan company.
- ¶ 63 [as to “Diane”]
 - (a) regarding NY, GA & OH companies in response to CA poster’s question;
 - (b) regarding NY intrastate move;
 - (c) regarding move from Texas to VA;
 - (d) regarding move from CA to NV;
 - (e) identical entry to (a) above, but with 10/6/03 date.⁹

The portions of these posts (and those that follow) showing the purported state nexus appear as exhibits to the Walker Affidavit ¶¶ 21-25.

apparently been advanced twice in an effort to make the allegations appear more substantial.

⁷ For convenience of reference, letters have been assigned to the Amended Complaint’s bullet point paragraphs which follow the lettered subparagraphs.

⁸ If this date is accurate, it is outside of the 4 year statute of limitations period.

Alleged Laudatory Statements

The Defendants' enumerated endorsements of Plaintiff's competitors break down as follows:

- ¶ 66 (a) regarding move from CA to NC (Wanner);
- (b) response to question regarding CA (Wanner);
- (c) regarding move from DC or NY to CA ("Diane");
- [d] regarding move from CA to NC (not authored by any Defendant);
- [e] regarding move from RI to CO (Walker); and
- [f] regarding move from RI to CO (Bayolo).

Therefore, of the more than 30,300 posts admittedly available to Plaintiff, it has identified no allegedly defamatory statement seemingly directed into this District, other than that quoted at ¶ 61(b) and continued at ¶ 61[e]. Further, Plaintiff has identified no statement laudatory of Plaintiff's competitors directed into this District. From Plaintiff's own enumeration of wrongs, it is clear that a substantial part of the events or omissions giving rise to its claim did *not* occur in the Southern District of Florida.

Mr. Walker, Consumers First and Ms. Wanner confirm that each only interacted with the www.movingscam.com website from within their home counties or places of business outside of the Southern District of Florida. *See* Wanner Aff. ¶ 4; Walker Aff. ¶ 4. To their 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; Walker Aff. ¶ 5.

II. Conclusion.

Plaintiff's venue contentions fail to establish a sufficient nexus with the Southern

⁹ It is believed that this date is in error because it corresponds to the date "Diane" purportedly joined the

District of Florida. 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. The offending events enumerated by Plaintiff reveal only one possibly relevant defamatory post among thousands and thousands of posts and two possibly lost customers among the thousands and thousands of visitors to the site. Accordingly, this matter should be dismissed for improper venue.

WHEREFORE, Defendants TIM WALKER, CONSUMERS FIRST CORP. and FARRAH LEIGH WANNER move for an order dismissing the Amended Complaint for improper venue.

DATED: October 5, 2007

GEARY & PAYNE, P.A.
120 S. Olive Avenue, Suite 500
West Palm Beach, FL 33401
TEL: (561) 805-9555
FAX: (561) 805-9522

By: s/ Joshua A. Payne
Joshua A. Payne, Esq.
Florida Bar No.: 122378

*Attorneys for Defendants Tim Walker,
Consumers First Corp. and Farrah
Leigh Wanner*

forum.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 5, 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:

Steven I. Peretz, Esq.
KLUGER, PERETZ, KAPLAN &
BERLIN, P.L.
17th Floor Miami Center
201 S. Biscayne Blvd
Miami, FL 33131
Telephone: (305) 379-9000
Facsimile: (305) 379-3428
E-mail: speretz@kpkb.com

Karl S. Kronenberger, Esq.
KRONENBERGER BURGOYNE, LLP
150 Post Street, Suite 520
San Francisco, CA 94108
Telephone: (415) 955-1155
Facsimile: (415) 955-1158
E-mail: karl@kronenbergerlaw.com

Sharon Bayolo
197 Clinton Road, #5
New Hartford, NY 13413

s/ Joshua A. Payne

Attorney