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 FAILURE TO STATE A CLAIM

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)(6) of the Federal Rules of Civil Procedure, respectfully request that this Court dismiss Plaintiff's Amended Complaint [D.E. 32] for failure to state a claim. 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

[1] Defendants Walker and Consumers First appear specially regarding personal jurisdiction and service. These objections and the party's motion to dismiss for improper venue are more specifically set forth in accompanying pleadings. Therefore, this motion is submitted by such defendants in the alternative, should the service, jurisdiction or venue motions be denied.

Mr. Walker, Consumers First and Ms. Wanner (collectively, the "Defendants"), along with 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 fails to state a claim for Florida common law tortious interference with advantageous business relationships because Plaintiff fails to allege that these Defendants interfered with Plaintiff's relationships with identified specific customers or agreements which in all probability would have been completed but for their interference.

4. Further, Plaintiff's Amended Complaint is a typical "shotgun" pleading, in which each count incorporates all allegations of every preceding count. Incorporation of additional conspiracy counts within each count further distances the pleading from being the required short and plain statement of the claim.

5. 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 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 failure to state a claim for which relief may be granted.

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

[2] Paragraphs of the Amended Complaint are referenced herein as "Compl. ¶ ___".

pleading shall be simple, concise, and direct." Plaintiff's Amended Complaint again amalgamates the five individual defendants (setting aside the 150 "Does") into one undifferentiated mass. Plaintiff goes so far as to provide the following definitional allegations addressing the meaning of *other* allegations:

> 35) Whenever in this Complaint reference is made to any act of Defendants Walker, Bayolo, Diane or Wanner (each an "Individual Defendant"), that allegation shall be deemed to mean that said Individual Defendant committed, conspired to commit, and/or aided and abetted the acts on behalf of each other Defendant.

The Amended Complaint returns to a conspiratorial theme:

> 34) On information and belief, the misconduct alleged herein was carried out by each of the Defendants working in cooperation with each other and with knowledge of, and with an intent to advance, the operation of the MovingScam.com Business.

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 ¶¶ 34 and 35, 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 Amended Complaint is neither a short and plain statement of the ultimate facts, nor simple, concise and direct.

I. The Amended Complaint Is An Improper Shotgun Pleading That Pleads Two Causes Of Action In Each Count.

"Shotgun" pleadings are those which contain several counts:

> each one incorporating the by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the fist) contain irrelevant factual allegations and legal conclusions.

Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp., 305 F.3d 1293, 1295 (11th Cir. 2002) (in a lengthy footnote 9, railing against the numerous occasions in which the court has addressed shotgun pleadings "often at great length and always with great dismay.") These shotgun pleadings have been dismissed under Fed. R. Civ. P. 10(b) which has been interpreted to disallow the incorporation of all the factual allegations of all prior counts into each subsequent count. Ferdinand v. Caribbean Air Mail, Inc., 202 WL 1907158 (S.D. Fla May 24, 2002, No. 01-2113-Civ.JORDAN) (dismissing a second amended complaint).

It is also improper pleading form to include multiple distinct causes of action in one count, even if all arise out of the same facts. Tires Inc. of Broward v. The Goodyear Tire & Rubber Co., 295 F.Supp.2d 1349, 1353 (S.D. Fla. 2003) (dismissing a complaint containing four distinct causes of action within one count).

Plaintiff's Amended Complaint is an improper "shotgun" pleading because each count other than the first incorporates every allegation from all preceding counts. *See* Compl. ¶ 81 (Count II, incorporating ¶¶ 1-80), ¶ 94 (Count III, incorporating ¶¶ 1-93) and ¶ 107 (Count IV, incorporating ¶¶ 1-106). The original Complaint did not do so.

The Amended Complaint also attempts to engraft a second cause of action into each count. Each of the original four counts of the Amended Complaint now contains an

additional cause of action for conspiracy, set off by semicolons. The counts of the Amended Complaint are labeled as follows:

Count I

Federal Unfair Competition Comprising False Statements of Fact and False Advertising; [sic] under Section 43(a) of the Lanham Act, 15 USC §1125(a); ***Conspiracy to Commit False Advertising***

. . . .

Count II

Infringement of an Unregistered Trademark and Federal Unfair Competition Comprising False and Misleading Statements of Fact Under Section 43(a) of the Lanham Act, 15 U.S.C. §1125; ***Conspiracy to Commit Infringement of an Unregistered Mark***

. . . .

Count III

Defamation; ***Conspiracy to Defame***

. . . .

Count IV

Tortious Interference with Business Relationships; ***Conspiracy to Interfere with Business Relationships***

(italics added). Each count contains the following new allegations:

> 76) On information and belief, Defendants also entered into an agreement among each other to [infringe Plaintiff's mark, falsely advertise, defame Plaintiff, interfere with Plaintiff's advantageous business advantages, etc…]
>
> 77) Defendants worked together to [infringe, falsely advertise, defame, etc.]
>
> 78) On information and belief, Defendants formed a conspiracy to carry out this misconduct.

These allegations are superfluous to the underlying cause of action for which they were inserted. Even if they arise from the same set of facts, each cause of action should be plead separately.

Therefore, the Amended Complaint should be dismissed because it is an improper "shotgun" pleading and because it inappropriately engrafts conspiracy causes of action into each count.

II. Plaintiff Fails To State A Claim Tortious Interference With Advantageous Business Relationships Because Plaintiff Fails To Allege That These Defendants Interfered With Plaintiff's Relationships And Fails To Identify The Specific Customers Or Agreements Which In All Probability Would Have Been Completed But For Their 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 – analogous to the "blacklist" herein – 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. ¶ 72 & 108. 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 "each Defendant" became aware of and thereafter interfered with Plaintiff's consumers. Because Plaintiff directs this count solely against "each Defendant" without identifying which ones, Plaintiff wholly fails to allege what specific actions any of them is alleged to have undertaken in derogation of Plaintiff's rights. As set forth above, Plaintiff has failed to allege what part any of these Defendants played in the alleged interference.

Count IV is also infirm because it interjects unrelated, contradictory allegations. Plaintiff alleges that it has no adequate remedy at law (Compl. ¶ 115). That is not an element of Florida tortious interference with prospective business advantage 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 IV seeks attorney's fees. Attorneys fees are only available in Florida by statute or contract. Here, Plaintiff has pled entitlement to neither. These allegations should be dismissed from Count IV.

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

III. Plaintiff Fails To State A Claim For Defamation Because It Fails To Specifically Identify The Persons To Whom The Alleged Defamatory Remark 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 allegedly defamatory statements without identifying each recipient. With the exception of one post (Compl. ¶ 60(b)), Plaintiff does not allege to whom any of the quoted message board postings were made. Furthermore, Plaintiff does not allege who wrote that the parties on the Black List, including itself, "repeatedly practice the same scams against consumers." Compl. ¶¶ 47, 50.

Plaintiff does not allege who wrote that Aldo Disorbo, Sr. was running the company. Compl. ¶ 51.

Count III is also infirm because it interjects unrelated allegations. At ¶ 106, the Amended 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 Amended Complaint.

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

IV. Plaintiff Fails To State A Claim Under The Lanham Act, 15 U.S.C. § 1125(A), For False Advertising Because It Fails To Allege That These Defendants 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 "each Defendant" 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. ¶ 48. Plaintiff does not link any specific Defendant with any such allegedly false statement.

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

V. Plaintiff Fails To State A Claim Under The Lanham Act, 15 U.S.C. § 1125(A), For Trademark Infringement Because It Fails To Allege How These Defendants 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)).

After describing how Defendants allegedly defamed Plaintiff and recommended other services to Plaintiff's prospective customers, Plaintiff amazingly alleges that Defendants are "likely to cause confusion or mistake, or to deceive as to the affiliation, connection, or association of the Defendants' goods and services with Plaintiff or Plaintiffs Mark; or as to the origin, sponsorship, or approval of the MovingScam.com Website's goods, services, and commercial activities by Plaintiff under the Mark." Compl. ¶ 88. Plaintiff continues, alleging that Defendants' actions "constitute false designations of origin, passing off, and

unfair competition." Compl. ¶ 89.

It is patently unreasonable to suggest that reasonable consumers could ever possibly believe that a defamatory or critical website might nevertheless be sponsored by or affiliated with the subject of the criticism. If anything, a reasonable consumer would obtain the opposite impression from the circumstances Plaintiff alleges. See Lamparello v. Falwell, 420 F.3d 309 (4th Cir. 2005) (no user of accused website critical of Reverend Falwell's stance on homosexuality would be misled into thinking that it was authorized or sponsored by Reverend Falwell); Taubman Co. v. Webfeats, 319 F.3d 770 (6th Cir. 2003) (finding no possibility of confusion where the cybergriping site incorporated plaintiff's mark, but added "sucks" to the name). Here, the inclusion of "scam" in the subject website similarly dispels any misconception.

Count II should therefore be dismissed because, as a matter of law, the alleged incorporation of Plaintiff's mark in the manners specified cannot confuse as to origin, sponsorship or affiliation.

VI. Conclusion.

Plaintiff's Amended Complaint continues to suffer from ambiguity. Not only is it a shotgun pleading, incorporating in each count all preceding allegations, but each of the four counts received an engrafted conspiracy count, separated only by a semicolon. For tortious interference with business relationships, it fails to identify these Defendants' alleged actions or the specific identifiable customers Plaintiff allegedly lost. For defamation, it fails to identify specific recipient to which the comments were directed. For the Lanham Act claims, Plaintiff fails to allege how these Defendants used its mark or created false

advertising.

WHEREFORE, Defendants TIM WALKER, CONSUMERS FIRST CORP. and FARRAH LEIGH WANNER move for an order dismissing the Amended Complaint for failure to state a claim.

DATED: October 5, 2007

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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:

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