UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-60983-CIV-SEITZ/MCALILEY

NATIONWIDE RELOCATION SERVICES, INC.,

Plaintiff,

v.

TIM WALKER, an individual, et al.,

Defendants.
_____/

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS FIRST AMENDED COMPLAINT FOR IMPROPER VENUE AND FAILURE TO STATE A CLAIM

THIS CAUSE is before the Court on the Motions to Dismiss for Improper Venue and Failure to State a Claim filed by Defendants Tim Walker, Consumer First Corp. ("Consumers") and Farrah Leigh Wanner ("Defendants") [DE 44, 45]. Defendants first argue that venue is not proper in the Southern District of Florida for two reasons: (1) a forum selection clause requires users of the movingscam.com website to agree to venue in Iowa; and (2) a substantial part of the events giving rise to Plaintiff's claims did not occur in this District. Plaintiff, on the other hand, argues that venue is proper because Defendants' tortious activities were directed at Plaintiff and other Florida residents who reside in this District. Defendants also argue that Plaintiff fails to state a claim because each cause of action is lacking a necessary element. Plaintiff contends that the Complaint is sufficient under the notice pleading standard. Having reviewed the motions, the response and the reply thereto, the entire factual record and the relevant legal authorities, both motions are denied.

I. Background

This action arises out of a dispute between Plaintiff, a relocation broker, and Defendants, operators and contributors to the website movingscam.com (the "website"). Plaintiff brings two federal claims: false advertising under 15 U.S.C. § 1125(a)(1)(B) and unauthorized use and service mark infringement under 15 U.S.C. § 1125(a)(1)(A); and two Florida common law claims: defamation and tortious interference with advantageous business relationships, relating to the content of the movingscam.com website.[1] (First Amended

[1] Plaintiff also alleges a conspiracy to commit the underlying offenses against all Defendants.

Complaint ("FAC") ¶ 1.) The two issues to resolve on these motion are whether venue is proper in this District and whether Plaintiff has successfully pleaded the four causes of action in the FAC.

Plaintiff, a Florida corporation with its principal office in Fort Lauderdale, Florida, is in the business of brokering relocation contracts between consumers and moving companies. (FAC ¶ 12.) Defendant Tim Walker, who resides in Warsaw, Illinois, is the president and sole shareholder of Defendant Consumers, which operates the movingscam.com website, and oversees its day-to-day operations.[2] (*Id.* ¶ 13.) Walker is also the principal content provider of the website and has published more than 3,300 opinions, comments and criticisms on the site. (*Id.* ¶¶ 13-14.) Consumers is a Delaware corporation with its principal place of business in Des Moines, Iowa. (*Id.* ¶¶ 18, 19.) Defendant Farrah LeighWanner, a north Florida resident at all times material to the FAC, is a moderator and substantial contributor to the website. (*Id.* ¶¶ 24, 25; Joint Statement ¶ 3.[3])

(a) The Movingscam.com Website

The movingscam.com website purports to be a consumer protection website related to the moving industry, but also sells various types of moving services and supplies. (*Id.* ¶¶ 3, 42.) Defendants generate revenues not only from selling these services directly, but also from third party affiliates, such as moveout.com, that pay Defendants a percentage of sales generated from website users who click on links from the website to the affiliates' sites to make a purchase. (*Id.* ¶¶39-40.) To market the website, Defendants integrate third-party marks, including Plaintiff's, into the website through a tactic referred to as "search engine spam." (*Id.* ¶ 41.) Through this process, Defendants place Plaintiff's mark within key parts of the HTML files that make up the website, such that when a website user types Plaintiff's mark into a search engine, such as Google, he/she is driven to the movingscam.com website. (*Id.* ¶¶ 41-43.) Defendants then seek to profit

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[2] Before the formation of Consumers, Walker owned and operated the website individually. (*See id.* ¶ 13).

[3] To determine the undisputed facts, the Court required the parties to submit a statement of undisputed facts, hereinafter, the "Joint Statement." (*See* DE 105.)

off these users by selling them services or supplies through their third-party affiliates. (*Id.* ¶ 46.)

(b) The "Blacklist" and the Message Board

The movingscam.com website contains a "Blacklist" which lists hundreds of moving companies that purportedly have engaged in unethical business practices, including fraud. (*Id.* ¶¶ 47, 59-60.) The first page of the Blacklist states that "multiple sources have confirmed that the following moving companies repeatedly practice the same scams against consumers. The following links will provide a comprehensive report for the respective companies including links to other sites for more information." (*Id.* ¶ 47.) Plaintiff's mark appears on the Blacklist. (*Id.* ¶ 53.) Additionally, the website contains a message board on which it publishes consumer evaluations and complaints and allows users to have discussions with other users and moderators on the website. (*Id.* ¶ 54.) Walker and other moderators specifically respond to website inquiries regarding different moving companies and encourage website users to post comments about moving companies, including Plaintiff.[4] (*Id.* ¶ 43.) Plaintiff alleges that Defendants encourage website users to abandon business relationships with outside moving companies, such as Plaintiff, and to use the services endorsed by the website, through which Defendants receive kickbacks. (*Id.* ¶ 57.) The Terms of Service, which must be agreed to before a website user can access the message board, states that "[a]ny dispute arising here under [sic] 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." (Walker Aff. ¶¶ 17-19; Ex. A.)[5]

(c) Activity in the Southern District of Florida

Plaintiff alleges that Defendants had contacts with the Southern District of Florida through the movingscam.com website. Specifically, Plaintiff enumerates six contacts with this District and argues that such contacts result in proper venue: (1) Plaintiff, the trademark owner, is located in the District (*see id.* ¶

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[4] Walker posted messages on the boards under the name TWalker. (*Id.* ¶ 15.)

[5] The October 5, 2007 affidavit of Tim Walker shall hereinafter be referred to as the "Walker Aff."

12.); (2) Defendants' alleged defamatory statements on the website were accessible and directed at customers in the District (*see id.* ¶ 14); (3) on two occasions, Plaintiff's customers residing in the District canceled contracts with Plaintiff due to Defendants' defamatory statements (*see id.* ¶¶ 72-73.); (4) residents in the District were confused by Defendants' trademark infringement, false advertising, and false and defamatory statements and subsequently cancelled contracts with Plaintiff (*see id.* ¶¶ 54-72.); (5) Defendants' acts are likely to cause confusion in the District (*see id.*); and (6) Plaintiff primarily suffered harm in this District (*see id.* ¶ 73).

II. Venue

A. Standard of Review

On a motion to dismiss based on improper venue, a plaintiff has the burden of showing that the case has a sufficient nexus to the selected forum district that it should be properly litigated in that district. *See, e.g., Wai v. Rainbow Holdings*, 315 F. Supp. 2d 1261, 1268 (S.D. Fla. 2004) (citing cases). A court must accept all allegations of the complaint as true, unless contradicted by the defendants' affidavits. *Id.* (citing *Indymac Mortgage Holdings, Inc. v. Reyad*, 167 F. Supp. 2d 222, 237 (D. Conn. 2001) (citing cases)). When an allegation is so challenged, the court may examine facts outside of the complaint to determine whether venue is proper. *Id.* A court must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff. *Id.* For ease in analyzing whether Plaintiff has met its burden, the Court will first examine Defendants' two arguments.

B. Forum Selection Clause

Defendants first argue that venue is improper due to a forum selection clause. Generally, in analyzing the enforceability of a forum selection clause, a court must address three questions: (1) whether the clause is mandatory or permissive; (2) whether a party can avoid the clause; and (3) whether the clause encompasses the claims charged. *DeJohn v. The .TV Corp. Intern.*, 245 F. Supp. 2d 913, 921-22 (N.D. Ill. 2003). The party resisting the forum selection clause has the burden of showing that it is invalid. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

Here, the Court need not address the first two requirements as it is clear that the forum selection clause does not meet the third criteria in that it does not encompass the claims charged. Defendants attempt to bring Plaintiff's claims within the scope of the Terms of Service by claiming that Plaintiff is a user because it was required to accept the Terms of Service when it visited the website to collect the necessary materials for this case. However, such argument does not address the fact that the dispute at issue did not "arise" under the provisions of the Terms of Service. Neither Plaintiff's federal claims for false advertising and trademark infringement, nor its state law claims for defamation and tortious interference, "arise" under the Terms of Service because Plaintiff is not a "user" of the website. The Terms of Service make countless references to the fact that the agreement is between the site and "users."[6] Indeed, the "Choice of Law" provision itself references that the agreement is between movingscam.com and users, stating "each User agrees to jurisdiction by federal courts of Iowa." (Walker Aff. Ex. A.)

Defendants cite to numerous cases that purport to support the enforceability of the forum selection clause, however, in each case cited, the party seeking to enforce the clause was a party to the governing agreement. *See Hugger-Mugger, LLC v. Netsuite*, LLC, 2005 WL 2206128, * 1 (D. Utah Sept. 12, 2005) (plaintiff was party to agreement that included forum selection clause); *Eslworldwide.com, Inc. v. Interland, Inc.*, 2006 WL 1716881, * 2 (S.D.N.Y. June 21, 2006) (same); *Davidson & Assocs., Inc. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1177 (E.D. Mo. 2004) (same); *Novak v. Overture Serv's, Inc.*, 309 F. Supp. 2d 446, 449 (E.D.N.Y. 2004) (finding that the plaintiff expressly invoked the terms of the agreement encompassing the forum selection clause). Thus, Defendants' argument on this ground is without merit.

B. "Substantial Part Of The Events Or Omissions Giving Rise To Plaintiff's Claims"

Defendants also argue that a substantial part of the events that give rise to Plaintiff's claims did not

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[6] The following four clauses are examples of the designation of the agreement as being between the user and the website: (1) "The User agrees that the use of the site is entirely at the user's own risk...;" (2) "Under no circumstances shall MovingScam.com be liable to any user...;" (3) The User specifically agrees that MovingScam.com and third party content providers are not liable for any content and conduct by Users associated with the Site...;" and (4) Each User agrees to indemnify MovingScam.com and any third-party content provider...." (Walker Aff., Ex. A.)

take place in the Southern District of Florida. Pursuant to 28 U.S.C. § 1391(b)(2), venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Venue may be proper in more than one district.[7] *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003) ("*Jenkins*"). In considering whether venue is proper, "[o]nly the events that directly give rise to a claim are relevant. And of the places where the events have taken place, only those locations hosting a substantial part of the events are to be considered." *Id.* (quotations omitted). A plaintiff is not required to select the venue with "the most substantial nexus to the dispute," so long as it chooses a venue where a substantial part of the events giving rise to the claim occurred. *Morgan v. North Miss. Med. Ctr., Inc.*, 403 F. Supp. 2d 1115, 1122 (S.D. Ala. 2005) (citations omitted).

The relevant acts or omissions are only those that have a "close nexus to the wrong." *Jenkins*, 321 F.3d at 1372. The "close nexus" reasoning that the Eleventh Circuit adopted in *Jenkins* came from *Woodke v. Dahm*, 70 F.3d 983 (8th Cir. 1995). However, the *Woodke* Court also limited the acts it was willing to consider to those acts committed by the defendant. *Id.* at 985. Some courts have declined to limit the acts they consider to those acts committed by the defendant. *See e.g., In re Enron Corp.*, 317 B.R. 701 (Bankr. S.D. Tex. 2004). The Eleventh Circuit did not expressly adopt the reasoning that would only allow the acts of the defendant to be considered, and this Court does not adopt that reasoning either. As such, all acts that have a "close nexus" to the wrong will be considered.

The Court finds that Plaintiff has alleged sufficient conduct in Florida to withstand Defendants' Rule 12(b)(3) motion. Plaintiff alleges activities in the Southern District of Florida with a sufficiently close nexus to both its federal claims for false advertising and trademark infringement, as well as its state law claims for defamation and tortious interference. Specifically, Plaintiff has alleged that Defendants' website targeted residents in the Southern District of Florida with false and defamatory statements, and such activities

[7] Sections 1391(a)(2) and (b)(2) were amended in 1990. *Jenkins Brick Co.*, 321 F.3d at 1371. The amended provisions contemplate that venue may be proper in two or more districts, thereby relieving courts of having to arbitrarily choose a venue. *Id.* The amendment did not "mean, however, that the amended statute no longer emphasizes the importance of the place where the wrong has been committed. Rather, the statute merely allows for additional play in the venue joints, reducing the degree of arbitrariness in close cases." *Id.*

tortiously interfered with at least two moving contracts in this District: one in Miami, Florida and one in Hollywood, Florida. Additionally, Plaintiff asserts that Defendants' use of Plaintiff's mark in targeting residents in the Southern District of Florida has caused confusion. *See Lisseveld v. Marcus*, 174 F.R.D. 689, 700 (M.D. Fla. 1997) (holding that activities targeting Florida residents in violation of the Lanham Act were sufficient for venue under § 1391(b)(2)). Thus, Defendants' motion to dismiss for improper venue must be denied. *See Id.* (stating that "a plaintiff's choice of forum will not be disturbed unless a defendant can make a clear and convincing showing that venue should be changed").

III. Failure To State A Claim

A. Standard of Review

Until the recent Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, ---- U.S. ----, 127 S.Ct. 1955 (2007), courts routinely followed the rule set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." However, pursuant to *Twombly*, to survive a motion to dismiss, the four corners of the complaint must now contain factual allegations which are "enough to raise a right to relief above the speculative level." 127 S.Ct. at 1965. As under *Conley*, a complaint must be liberally construed, assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in the plaintiff's favor. *Id.* at 1964-65. A complaint should not be dismissed simply because a court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. *Id.* Accordingly, a well-pleaded complaint will survive a motion to dismiss "even if it appears that a recovery is very remote and unlikely." *Id.* at 1965 (citation omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65. Rather, the facts set forth in the complaint must be sufficient to "nudge the[ ] claims across the line from conceivable to plausible." *Id.* at 1974.

In this case, Defendants Walker, Consumers and Wanner move to dismiss the FAC on the grounds that it is both a "shotgun" pleading and because each of the four causes of action lacks a requisite element. For the reasons set forth below, Defendants' motion is denied.

A. "Shotgun Pleading"

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although the Rule encourages brevity, a complaint must allege enough to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, ---- U.S. ----, 127 S.Ct. 2499, 2507 (2007) (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005)).

Shotgun pleadings are those that incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense. *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (per curiam). "[S]hotgun pleadings wreak havoc on the judicial system." *Byrne v. Nezhat*, 261 F.3d 1075, 1130 (11th Cir. 2001). Such pleadings divert already stretched judicial resources into disputes that are not structurally prepared to use those resources efficiently. *Wagner v. First Horizon Pharmaceutical Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006).

In this case, Defendants delineate three alleged defects in the FAC that they argue warrant dismissal: (1) it does not particularize the facts supporting the claims against each separate Defendant; (2) each successive count incorporates the allegations from the preceding counts; and (3) it includes a corresponding claim for conspiracy in each of the four causes of action. With regard to the first two alleged defects, while the FAC is not as succinct as it could be, it more than meets the "notice" requirement of Rule 8. It specifically incorporates a section for each Defendant and devotes several paragraphs to identifying the factual role each one played in the alleged civil conspiracy. (FAC ¶¶ 13-31.) Plaintiff also incorporates a section entitled "The Common Enterprise of Defendants," which further identifies a factual basis for the conspiracy charge. (FAC ¶32-35.) Furthermore, while Plaintiff's incorporation by reference of each previous count in each successive

count is not ideal, the degree of such defect does not warrant dismissal.

As to Defendants' third claim that Plaintiff improperly combined a conspiracy charge into each cause of action, such claim fails because Florida does not recognize an independent action for conspiracy. *Allocco v. City of Coral Gables*, 221 F. Supp. 2d 1317, 1360-61 (S.D. Fla. 2002) (citation omitted). A civil conspiracy derives from the underlying claim that forms the basis of the conspiracy. *Id.* at 1361 (citing *Czarnecki v. Roller*, 726 F. Supp. 832, 840 (S.D. Fla. 1989)) (discussing and applying Florida law). Moreover, the three elements that a plaintiff must allege for a conspiracy claim are that (1) two or more parties (2) agree (3) to commit a common, unlawful plan. *American United Life Ins. Co. v. Martinez,* 480 F.3d 1043, 1067 (11th Cir. 2007). Here, Plaintiff alleged and provided factual support for its FAC allegations that Defendants "work[ed] in cooperation with each other" to commit the unlawful plan to misuse Plaintiff's trademarks, to defame Plaintiff, to unfairly compete with Plaintiff and to tortiously interfere with Plaintiff's business relationships. (FAC ¶¶ 32-35.) Thus, Plaintiff has sufficiently alleged a conspiracy.

B. Failure To Allege The Requisite Elements

Finally, Defendants argue that the FAC should be dismissed because Plaintiff failed to allege a requisite element(s) of each of the four causes of action. For the reasons set forth below, Defendants' arguments are without merit.

1. Tortious Interference With An Advantageous Business Relationship (Count IV)

Under Florida law, the elements of tortious interference with a business relationship 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. *Int'l Sales & Serv., Inc. v. Austral Insulated Products, Inc.*, 262 F.3d 1152, 1154 (11th Cir. 2001). A "business relationship," for purposes of the first prong, does not require the existence of a contractual agreement. *Dunn v. Air Line Pilots Ass'n,* 193 F.3d 1185, 1191 (11th Cir. 1999) (citation omitted). It does, however, require a relationship with a particular party,

and not just a relationship with the general business community. *Id.*

Defendants allege that Plaintiff fails to state a claim for tortious interference with an advantageous business relationship because it has not identified (1) the customers it lost; and (2) the occasions on which the interference took place. In making this argument, Defendant's rely on *Dunn*, which held that pilots' alleged interference with the general business community failed to state a claim for tortious interference with an advantageous business relationship. *Id.* That scenario is not applicable here as the FAC does specifically identify the individuals to whom Defendants made disparaging comments and does not claim interference with the "business community" at large. While Plaintiff was unable to identify the potential customers by name, it did include Internet screen names and claims that more specific information will be sought through discovery. Moreover, none of the cases cited by Defendants require Plaintiff to include more specific identifying information at this time. Additionally, Defendants' second argument is not valid as the message board postings in which Defendants allegedly disparage Plaintiff to potential customers include dates on which the statements were made and the screen name of the particular Defendant that made the statement. Thus, Defendants' motion to dismiss Count IV must be denied.

2. Defamation (Count III)

Under Florida law, to state a claim for defamation, a plaintiff must allege that (1) the defendant published a false statement, (2) about the plaintiff, (3) to a third party, and (4) that the falsity of the statement caused injury to the plaintiff. *Holtzman v. B/E Aerospace, Inc.*, 2008 WL 214715, * 3 (S.D. Fla. 2008). Defendants argue that the FAC fails to state a claim for defamation because it fails to identity the persons to whom the defamatory comments were made. While pleading a defamation claim with a certain level of particularity is required under Florida law, *see, e.g., Razner v. Wellington Regional Medical Center, Inc.*, 837 So.2d 437, 442 (Fla. 4 DCA 2002), this requirement is procedural and not applicable in federal courts. *See In re Prudential of Florida Leasing, Inc.*, 478 F.3d 1291, 1299 (11th Cir. 2007) (holding that state law ordinarily does not govern the procedure of federal courts). Thus, in federal court, a defamation claim can

be pled generally, so long as it meets the requirements of Rule 8(a) and *Twombly*. *See Hatfill v. New York Times Co.*, 416 F.3d 320, 329-30 (4th Cir. 2005).

In this case, the FAC alleges that numerous actual and potential customers have viewed the movingscam.com website, including the Blacklist and the message board, which include the alleged defamatory statements. Moreover, the specific references to postings include the screen names of the potential customers to whom Defendants are directing the purportedly disparaging comments. Thus, on the face of the FAC, Plaintiff appears to have alleged sufficient facts to state a cause of action for defamation under the requirements of Rule 8(a) and *Twombly*--Defendants clearly have notice of the basic facts and the crux of Plaintiff's grievances. Therefore, dismissal of this claim is unwarranted.

3. Unfair Competition And False Advertising Under The Lanham Act (Count I)

To succeed on a claim of false advertising under § 43(a), a plaintiff must prove that (1) a defendant made false and misleading representations of fact in its advertisements; (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) the plaintiff has 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). Without providing any legal support for their contentions, Defendants simply argue that Plaintiff's unfair competition and false advertising claim should be dismissed because the FAC fails to identify the roles played by each Defendant. However, the FAC provides examples of each Defendant's allegedly misleading statements aimed at customers of the website. (FAC 60-63.) Moreover, the FAC provides examples of postings made by each Defendant that purportedly encouraged website customers to use moving companies affiliated with Defendants. (FAC 66.) Thus, Defendants motion as to this count must also be denied.

4. Trademark Infringement Under The Lanham Act (Count II)

To establish trademark infringement under the Lanham Act, a plaintiff must prove that the defendant

used the mark in commerce without the plaintiff's consent and "that the unauthorized use was likely to deceive, cause confusion, or result in mistake." *Id.* at 1249 (citing *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1307 (11th Cir.1998)). Defendants argue that the inclusion of Plaintiff's mark on the movingscam.com website cannot cause confusion to customers because, as Plaintiff alleges, it includes purportedly defamatory statements about Plaintiff. Plaintiff rebuts this argument citing to a doctrine adopted in other circuits, but not addressed by the Eleventh Circuit, known as "initial interest confusion." This doctrine has been defined as follows:

> Initial interest confusion results when a consumer seeks a particular trademark holder's product and instead is lured to the product of a competitor by the competitor's use of the same or a similar mark. Even though the consumer eventually may realize that the product is not the one originally sought, he or she may stay with the competitor. In that way, the competitor has captured the trademark holder's potential visitors or customers.

Australian Gold, Inc. v. Hatfiled, 436 F.3d 1228, 1238-39 (10th Cir. 2006) (internal citations omitted).

None of the cases either party has submitted, however, addressed the issue of initial interest confusion in a motion to dismiss posture. *See Australian Gold, Inc.*, 436 F.3d at 1238-39 (motion for judgment as a matter of law after a jury trial); *Lamparello v. Falwell,* 420 F.3d 309 (4th Cir. 2005) (summary judgment); *Malletier v. Burlington Coat Factor Warehouse Corp.*, 426 F.3d 532, 539 n.4 (2d Cir. 2005) (motion for preliminary injunction); *Playboy Enterprises, Inc. v. Netscape Comm. Corp.*, 354 F.3d 1020, 1024-25 (9th Cir. 2004) (summary judgment); *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 813-14 (7th Cir. 2002) (motion for preliminary injunction); *Checkpoint Systems, Inc. v. Check Point Software Tech.*,269 F.3d 270, 292 (3d Cir. 2001) (non-jury trial).

Presumably, the reason for this fact is that resolution of an initial interest confusion claim requires an intensive factual analysis that should not be addressed without more evidentiary support. *See, e.g. Australian Gold, Inc.*, 436 F.3d at 1239-40 (holding that to evaluate a claim for initial interest confusion, a court analyzes six factual factors: (1) the degree of similarity between the marks; (2) the intent of the alleged infringer in adopting the mark; (3) evidence of actual confusion; (4) similarity of products and manner of

marketing; (5) the degree of care likely to be exercised by purchasers; and (6) the strength or weakness of the marks). Rather, the more appropriate procedure in resolving whether the Court should accept the initial interest confusion argument given that the Eleventh Circuit has not yet addressed the issue, is to allow Plaintiff to develop the record and revisit the issue on summary judgment. Accordingly, Defendants' motion to dismiss Plaintiff's trademark infringement claim is denied.

V. Conclusion

For the reasons set forth herein, it is hereby

ORDERED that

(1) Defendants Tim Walker, Consumer First Corp. and Farrah Leigh Wanner's Motion to Dismiss for Improper Venue [DE 44] is DENIED.

(2) Defendants Tim Walker, Consumer First Corp. and Farrah Leigh Wanner's Motion to Dismiss for Failure to State a Claim [DE 45] is DENIED.

DONE and ORDERED in Miami, Florida, this 29th day of February, 2008.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc:
Counsel of Record

Sharon Bayolo, *pro se*