IN THE UNITED STATES DISTRCIT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PINOGY CORPORATION	)	
	)	
and	)	
	)	
ROBERT COOK	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 1:11-cv-01100-AJT-TCB**
	)	
CHRIS FLEMING,	)	
MID-AMERICA PET BROKER, LLC, and	)	
JOHN DOE	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS FOR IMPROPER VENUE AND MOTION TO TRANSFER

Plaintiffs Pinogy Corporation ("Pinogy") and Robert Cook respectfully oppose the Motion to Dismiss filed by Defendants Chris Fleming and Mid-America Pet Broker, LLC. Venue is proper in this judicial district because a substantial part of the events giving rise to the claim occurred here in Virginia and because both named Defendants are subject to personal jurisdiction here.

Factual Background

Pinogy, a Virginia corporation based in Sterling, Virginia, owns and operates numerous websites that provide various technology services to the pet industry, including LostMyPet.com, MyPetTrainer.com, and 360pet.com. (Am. Compl. ¶ 1). Pinogy's business consists primarily of pet-recovery services using implanted-microchip technology. (*See* Declaration of Robert Cook ("Cook Dec.") ¶ 4, attached hereto as Exhibit 1).

Defendant Chris Fleming, a Missouri resident, is the CEO of Mid-America Pet Broker, LLC ("Mid-Am"), which is based in Missouri. (Cook Dec. ¶¶ 5-6; Am. Compl. ¶ 3). Both Mr. Fleming and Mid-Am transact business regularly in Virginia. (Cook Dec. ¶ 7). As such, neither Defendant has objected to this Court's jurisdiction over them.

On or about August 25, 2011, someone using Mid-Am's Internet connection (likely Mr. Fleming) sent an email to Pinogy's customers in Virginia, making false and damaging allegations about Mr. Cook and Pinogy, accusing them of sharing confidential customer data with third parties and urging Pinogy's customers to terminate their business relationship with Pinogy. (Cook Dec. ¶ 9). On August 25, 2011, Mr. Fleming knew that Pinogy is based in Virginia, that it had customers located in Virginia who would have received the email, and that Mr. Cook lives and works in Virginia. (*See* Cook Dec. ¶ 8).

Mr. Fleming and Mid-Am have previously made allegations about Pinogy similar to those contained in the August 25th email; namely, accusing Pinogy of sharing confidential customer data. The allegations are baseless. (Cook Dec. ¶ 11).

On information and belief, Mr. Fleming sent the email in question to numerous Pinogy customers in Virginia. Among the Virginia customers receiving the email were Petland (in Fairfax), Burke Pets (in Burke), Pets-N-Pals (in Staunton), and Puppyville (in Virginia Beach). (Cook Dec. ¶ 10). Pinogy knows that these customers received the email because they all contacted Mr. Cook after receiving it to express their concerns about the (false) allegations contained therein. (Cook Dec. ¶ 13).

The Defendants' conduct has harmed Mr. Cook's reputation here in Virginia and has caused damage to Pinogy here in Virginia. (Cook Dec. ¶ 14). At least one Virginia-based Pinogy customer (Petland) has already terminated its business relationship with Pinogy. (*Id.*)

Argument

I. The Eastern District of Virginia is a Proper Venue for This Action.

A civil action founded on diversity jurisdiction may be brought in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C. § 1391(a)(2). Defendants intentionally directed defamatory communications into Virginia, intended to cause harm to Plaintiffs in Virginia. Therefore, a substantial part of the events giving rise to Plaintiffs' tort claims occurred here in Virginia and venue is proper in this judicial district.

Defendants state that "none of the acts that allegedly give rise to Plaintiffs' claims occurred in Virginia" (Memo. Supp. Mot. Dismiss at 1). However, the fact that the defamatory email may have been written in another state does not compel a finding that the case should be transferred to that state. When evaluating venue under Section 1391 in tort cases, courts look to the situs of the ***injury***, not just to where the defendant was located when he committed the tortious act. *Verizon Online Services, Inc. v. Ralsky*, 203 F. Supp. 2d 601, 623 (E.D. Va. 2002) (finding venue in Virginia proper despite fact that claim was based on emails sent by the Defendant from Michigan); *see Minnesota Mining & Mfg. Co. v. Rauh Rubber, Inc.*, 943 F. Supp. 1117, 1125 (D. Minn. 1996) ("A substantial part of the events leading to infringement occurs both in the district where the infringer is located and in the district where the trademark owner is located and confusion is likely to occur."); *Young Again Prods. v. Acord*, 307 F. Supp. 2d 713, 718 (D. Md. 2004) (where Internet traffic was directed into Maryland, venue was proper in Maryland).

Defamation cases are evaluated the same as any other tort case, and courts will look to the place of the injury when determining venue. In *Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060 (D. Haw. 2000), the plaintiff was a resident of Hawaii and brought a defamation action

against a New York newspaper that ridiculed the plaintiff's assertion that she was the daughter of Marilyn Monroe. The newspaper (the New York Post) had only two subscribers in the entire state of Hawaii on the date the offending article was published. The article was written in New York by a New York resident, and the newspapers editors were all located in New York. The plaintiff's embarrassment and alleged reputational harm, however, occurred in Hawaii where she lived, and the court found the place of the plaintiff's injury to be the deciding factor in its decision to keep the case in Hawaii. *See Miracle*, 87 F. Supp. 2d at 1072 ("The Court likewise determines that, due to the contacts with Hawaii, and particularly due to the fact that Plaintiff experienced the alleged harm in Hawaii, venue is proper under 28 U.S.C. § 1391").

This Court has previously rejected precisely the same argument Defendants are making here. In *Capital One Bank (USA) N.A. v. Hess Kennedy Chartered, LLC*, 3:08CV147-HEH, 2008 WL 2660973 (E.D. Va. July 3, 2008), the complaint alleged that the defendants, based in Florida, tortiously interfered with the plaintiff's business relationships by encouraging consumers in Virginia to dispute valid debts by sending form letters to the Plaintiff in Virginia. The defendants contested venue on the ground that the tortious conduct they were alleged to have committed took place in Florida. Judge Hudson rejected this argument, reasoning that the primary consideration for venue purposes is where the plaintiff was injured, not where the defendants' actions took place:

> Under 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." Defendants' argument is apparently that since their actions to contact Plaintiffs took place in Florida, the "events...giving rise to the claim" also occurred in Florida. However, as noted above, the letters were received and the injury to Plaintiffs occurred in the forum state. ... The Court therefore finds that venue is proper.

Id.[1] In the case at bar, Plaintiffs do not dispute that Mr. Fleming likely wrote the defamatory email from his office in Missouri. However, the fact that he sent it to numerous Pinogy customers around the country, including several located in Virginia, which resulted in damages to the Plaintiffs here in Virginia, means that a substantial part of the events "giving rise to the claim" took place in Virginia. Because the harm giving rise to Plaintiffs' claims occurred here in Virginia, venue is proper in this district and the Court should deny the Motion to Dismiss.

II. The Court Should Not Transfer Venue to Western District of Missouri.

As an alternative to dismissal, Defendants ask that the case be transferred to Missouri, a forum that would be more convenient for Mr. Fleming, who lives there. The Court should deny this request because it would merely serve to shift the inconvenience to the Plaintiffs, who reside here in Virginia.

Transfer under 28 U.S.C. § 1404(a) is within the discretion of the court following an individualized, case-by-case consideration of convenience and fairness. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988). In determining whether to grant a transfer motion under § 1404(a) in a diversity case, a court should consider and balance (1) the plaintiff's choice of venue; (2) ease of access to sources of proof; (2) the convenience of the parties and witnesses; (3) the cost of obtaining the attendance of witnesses; (4) the availability of compulsory process; (5) the interest in having local controversies decided at home; (6) the court's familiarity with the applicable law; and (7) the interest of justice. *Cognitronics Imaging Sys., Inc. v. Recognition Research Inc.*, 83 F. Supp. 2d 689, 696 (E.D. Va. 2000); *Verizon Online*, 203 F. Supp. 2d at 623.

A plaintiff's choice of forum is entitled to substantial weight in determining whether transfer is appropriate. *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1946); *Nossen v. Hoy*, 750 F.

[1] While *Capital One Bank* was not based solely on diversity and was thus analyzed under 28 U.S.C. § 1391(b), the relevant venue test in diversity cases under § 1391(a) is the same. Both subsections (a) and (b) allow for venue in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

Supp. 740, 742 (E.D. Va. 1990) ("plaintiff's choice of forum should rarely be disturbed unless the balance of hardships clearly favors transfer.") Moreover, the burden is on the moving party to show that transfer to another forum is appropriate. *General Foam Plastics Corp. v. Kraemer Export Corp.*, 806 F. Supp. 88, 89 (E.D. Va. 1992); *see Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007) ("A defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum").

In evaluating the convenience of parties and witnesses, the balance of convenience must be "beyond dead center"; a court must not transfer a case unless the balance of convenience "strongly favors the transfer sought." *Mullins v. Equifax Info. Servs., LLC*, No. 3:05CV888, 2006 WL 1214024, at *5 (E.D. Va. Apr. 28, 2006) (citing *Medicenters of Am., Inc. v. T & V Realty Equip. Corp.*, 371 F. Supp. 1180, 1184 (E.D. Va. 1974)). A party challenging venue does not prevail if transfer would do nothing more than merely shift the inconvenience to the other party. *Taltwell, LLC v. Zonet USA Corp.*, 3:07cv543, 2007 WL 4562874 (E.D. Va. Dec. 20, 2007) (citations omitted); *see also Bd. of Trustees v. Sullivant Ave. Properties, LLC*, 508 F. Supp. 2d 473, 478 (E.D. Va. 2007) (noting that "when Plaintiff files suit in its home forum, convenience to parties rarely, if ever, operates to justify transfer").

The Plaintiffs reside in Virginia and suffered harm from Defendants' conduct here in Virginia. Both Defendants concede they are subject to personal jurisdiction here in Virginia. Plaintiffs have opted to bring their tort claims in the Eastern District of Virginia, their home forum, and that decision is entitled to substantial weight and deference. *See Gulf Oil*, 330 U.S. at 508.

Proving Plaintiffs' claims will primarily involve the presentation of evidence obtained from Internet Service Providers (such as Google, located in California) and recipients of the

defamatory email here in Virginia. The sources of proof in this case may likely be found in various states across the country, but Plaintiffs anticipate that they will prove their claims (in particular their damages claim) primarily from sources located in Virginia. Defendants' assertions that various Mid-Am employees in Missouri are likely to be witnesses in this case are disingenuous, unless Defendants are admitting that Mr. Fleming is the author of the defamatory email and that he sent it in the presence of those witnesses or told them about it afterwards. Mr. Fleming has previously denied authoring the email, so this seems unlikely.

"Familiarity with applicable law" is another non-factor. This Court is extremely familiar with the tort claims at the heart of this case. There is no reason to believe that the Western District of Missouri would handle them any more competently. Moreover, contrary to Defendants' allegations, Virginia law will control Plaintiff's claims, not Missouri law. Virginia is a traditional *lex loci* choice-of-law state, meaning the substantive law of the "place of the harm" governs the proceeding. *Loven v. Romanowski*, 204cv00108, 2005 WL 2931996 (W.D. Va. Nov. 4, 2005). In defamation actions, Virginia courts have determined that the "place of the harm" is the place of publication. *See, e.g., Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992) (applying *lex loci delicti* rule and concluding that when defamatory statements occurred in Virginia, Virginia law applied); *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999) (applying Maryland's identical choice of law rules to find that an allegedly defamatory statement heard only in Virginia should be governed by Virginia law). This Court is better equipped to rule on matters of Virginia law than any court in Missouri.

The injured parties are from Sterling, Virginia, within the jurisdiction of this Court, and the interests of justice would best be served by having this Court protect its own citizens.

While transferring the case to Missouri would obviously be more convenient for Mr. Fleming, a transfer would accomplish nothing more than shifting the inconvenience to Mr. Cook. Party convenience, therefore, does not weigh in favor of transfer. *See Taltwell*, 2007 WL 4562874; *Sullivant Ave.*, 508 F. Supp. 2d at 478.

The Defendants here simply cannot meet their heavy burden to show that the balance of convenience "strongly favors" transfer. *See Medicenters of Am.*, 371 F. Supp. at 1184; *Sinochem Int'l*, 549 U.S. at 430. Therefore, the Court should deny the motion.

Conclusion

Defendants' deliberately directed harm to Mr. Cook and Pinogy in Virginia. Because the harm giving rise to Plaintiffs' claims occurred here in Virginia, venue is proper in this district. Therefore, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss. In addition, the Court should deny Defendants' Motion to Transfer because Defendants have failed to meet their burden to show that the balance of hardships strongly favors transfer.

Dated: February 9, 2012

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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