

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANTHONY K. McCAGUE and	:	CIVIL ACTION
ANNA-BINNEY McCAGUE	:	
	:	
v.	:	
	:	
TRILOGY CORP., TRILOGY	:	
EXCURSIONS and XYZ CORP.	:	NO. 06-887

NORMA L. SHAPIRO, S.J.	MARCH 15, 2007
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MEMORANDUM AND ORDER

Plaintiffs Anthony McCague and Anna-Binney McCague (“McCagues”), residents of Pennsylvania, filed suit against defendants Trilogy Corporation, doing business as Trilogy Excursions, and XYZ Corporation (collectively “Trilogy”).¹ Trilogy is organized under the laws of Hawaii with its principal place of business in Lahaina, Hawaii. The complaint asserts state law theories of negligence, misrepresentation, and loss of consortium. The court has diversity jurisdiction under 28 U.S.C. § 1332 and admiralty and maritime jurisdiction under 28 U.S.C. § 1333. Trilogy has moved to dismiss McCagues’ complaint for lack of personal jurisdiction and improper venue or, in the alternative, to transfer the action to the District of Hawaii. The parties have also moved for sanctions. For the following reasons, the motion to dismiss will be denied, the motion to transfer to the District of Hawaii will be granted, and the parties’ motions for sanctions will be denied.

I. FACTUAL BACKGROUND

¹ Trilogy claims it does not know of any XYZ Corporation. (Coon Aff. 2.) Since the complaint and subsequent filings treat “Trilogy” as a single entity, and do not allege facts against Trilogy Corporation, Trilogy Excursions, or XYZ Corporation separately, the court need not decide whether XYZ Corporation is a proper defendant in this action.

Trilogy is a charter boat company which operates tour vessels in Hawaii. Trilogy employs personnel in Hawaii only. (Coon Dep. 75:17, Oct. 5, 2006.) It does not have any offices or bank accounts in Pennsylvania. (Coon Aff. 6-7.) Trilogy's marketing efforts consist of two websites, emails to its customer base, promotional materials at Hawaiian hotels, and advertisements in local publications, local cable access channels, and Aloha Airlines in-flight magazine. (Coon Dep. 65-69.)

Trilogy's two internet websites allow users to reserve boat tours, purchase Trilogy merchandise, and view general information. The websites can be accessed from any state. The domain names are <http://www.sailtrilogy.com> and <http://www.visitlanai.com>. Descriptions of each sea tour, such as scuba diving or dolphin watching, are available. In order to reserve tours or purchase merchandise, website users submit their contact and credit card information; they may enter their addresses by selecting their respective states from a drop-down menu. All fifty states and twelve Canadian provinces are listed on the drop-down menu. (Defs.' Supplemental Mem. in Supp. of Mot. to Dismiss 10.) If users make tour reservations, Trilogy sends them email confirmations. Trilogy offers a ten percent tour discount to internet customers. Hotel reservations also may be booked on Trilogy's websites. Trilogy retains customers' email addresses; it sends them emails containing the Trilogy calendar and thanking customers for touring with Trilogy. (Kinkade Dep. 33:6-18, Oct. 10, 2006.) Trilogy's website does not allow users to reserve or purchase tickets for the C and Sea tour on Lana'i on which Anthony McCague was allegedly injured. (Supplemental Coon Aff. 8.)

Trilogy's websites generated 12.09% of its total business in 2003, 14.29% in 2004, 17.8% in 2005, and 19.29% in 2006. (Defs.' Supplemental Mem. in Supp. of Mot. to

Dismiss, Ex. A at 9.) Internet bookings from January 1, 2006 through October 6, 2006, accounted for approximately \$1,350,074.77 in revenue.² (Kinkade Dep. 20:5-7.) But the majority of reservations and sales for Trilogy's sea tours occur at Trilogy's principal place of business in Lahaina, Hawaii. (Supplemental Coon Aff. 14.) Of the last 10,000 tour reservations made on Trilogy's websites, 205 (or 2.05%) were made by Pennsylvania residents. (Defs.' Supplemental Mem. in Supp. of Mot. to Dismiss, Ex. A at 6.) Of the last 403 merchandise purchases from Trilogy's websites, 14 (or 3.47%) were made by Pennsylvania residents. Id.

On March 3, 2004, Anthony McCague allegedly was injured on a whale-watching trip off the coast of Hawaii while on board the vessel *Manele Kai*.³ According to McCagues, the *Manele Kai* was negligently operated in rough seas. Anthony McCague suffered a fractured back and other injuries. McCagues did not use the internet to reserve their sea tour; they made their reservations in person in Lana'i, Hawaii, the day before they boarded the *Manele Kai*. (Compl. ¶ 9; Hr'g Tr. 8, Aug. 17, 2006.)

II. DISCUSSION

² The calculation included all reservations, some of which were unpaid as of October 6, 2006. (Kinkade Dep. 25.)

³ Trilogy asserts that on the date Anthony McCague was injured, the *Manele Kai* was owned and operated by C and Sea Ocean Sports, Inc. ("C and Sea"), which is not a party to this action. (Supplemental Coon Aff. 9.) But McCagues allege Trilogy was the only company identified with the whale-watching trip. (Anthony McCague Aff. 1, 3.) C and Sea and Trilogy are both owned by Coon Brothers, Inc., and have the same president, Randolph Coon. (Coon Dep. 9, 11; Supplemental Coon Aff. 1.) McCagues decided to take discovery before joining C and Sea as a defendant. (Hr'g Tr. 6, Aug. 17, 2006.) McCagues, later filing a separate complaint in this court, alleged the same facts and claims against Trilogy, C and Sea, and several other corporations trading as Trilogy. (E.D. Pa., Case No. 07-0843.) McCagues have not moved to join C and Sea in this action, so the court will only consider the motion to dismiss or transfer relating to Trilogy.

Trilogy filed a motion to dismiss for lack of personal jurisdiction or improper venue and, in the alternative, to transfer the action to the District of Hawaii. After hearing oral argument on the motion, the court allowed the parties to conduct jurisdictional discovery regarding the extent to which Trilogy conducts business with Pennsylvania residents over the internet. McCagues sent interrogatories to Trilogy and deposed Randolph Coon, Trilogy's president, and Carrie Kinkade, Trilogy's office manager. McCagues then filed a motion for sanctions that would deny Trilogy's motion to dismiss and alternative motion to transfer, strike Trilogy's affidavits, and impose costs, because of Trilogy's failure to respond adequately to McCagues' discovery requests. Trilogy filed a cross-motion for sanctions, seeking imposition of costs, for McCagues' filing an unnecessary and unsupported motion for sanctions.

A. Personal Jurisdiction

Once a defendant asserts lack of personal jurisdiction, the plaintiff bears the burden to prove, with reasonable particularity, sufficient contacts between the defendant and the forum state to support jurisdiction. Provident Nat. Bank v. California Fed. Sav. & Loan, Inc., 819 F.2d 434, 437 (3d Cir. 1987).

A federal court may exercise personal jurisdiction to the extent authorized by the state's long-arm statute. See Fed.R.Civ.P. 4(e). Pennsylvania's long-arm statute extends jurisdiction to the fullest extent allowable under the United States Constitution. 42 Pa.Cons.Stat. Ann. § 5322(b). Constitutional jurisdiction can be established through specific jurisdiction for forum-related activities, where the cause of action arose from the defendant's activities within the forum state, or general jurisdiction for non-forum-related activities, where the defendant has had "continuous and systematic" contacts with the forum state. See Provident,

819 F.2d at 437. McCagues concede there is no specific jurisdiction over Trilogy, so the court will consider only whether there is general jurisdiction. (Hr'g Tr. 12, Aug. 17, 2006.)

Under 42 Pa.Cons.Stat.Ann. § 5301(a)(2), general jurisdiction can be exercised over a corporation in Pennsylvania if the corporation: (a) is incorporated in Pennsylvania; or (b) has consented to jurisdiction; or (c) carries on a continuous or systematic part of its general business in Pennsylvania. The Court of Appeals for the Third Circuit requires a very high showing before general jurisdiction may be exercised. See, e.g., Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985); Molnlycke Health Care AB v. Dumex Med. Surgical Prods., Ltd., 64 F.Supp.2d 448, 451 (E.D. Pa. 1999).

Trilogy is not incorporated in Pennsylvania and has not consented to jurisdiction; McCagues can establish general jurisdiction over Trilogy only if it has conducted a continuous or systematic part of its general business in Pennsylvania. 42 Pa.Cons.Stat.Ann. § 5301(a)(2). Factors used to assess the level of contact include the maintenance of offices, location of assets or employees within the forum state, and direct advertising and sales in the forum state. See Hlavac v. DGG Prods., 2005 WL 839158 at *3 (E.D. Pa. Apr. 8, 2005); see also Corporate Aviation Concepts, Inc. v. Multiservice, 2003 WL 22794693 at *3 (E.D. Pa. Nov. 13, 2003) (listing factors). The amount of business conducted in the state is less important than whether the business dealings are central to the defendant's business and the frequency of such dealings. Cf. Provident, 819 F.2d at 438 (California bank's maintenance of controlled disbursement account at a Pennsylvania bank, with daily accounting of monies, constituted "substantial, ongoing, and systematic activity in Pennsylvania" because it was a central part of the defendant's business, even though less than 1% of defendant's loans and deposits originated in

Pennsylvania); but cf. Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F.Supp. 1048, 1053-54 (E.D. Pa. 1994) (\$231,000 of direct sales to Pennsylvania, less than 1% of Illinois company's sales, was not sufficient to establish jurisdiction because the sales were not central to defendant's business and did not involve substantial continuous regular contact).

Trilogy does not employ any personnel outside of Hawaii. (Coon Dep. 75:17.)

None of Trilogy's offices or bank accounts are located in Pennsylvania. (Coon Aff. 6-7.)

McCagues do not allege that any of Trilogy's marketing efforts, except those occurring through the two websites, reach into Pennsylvania.

The issue is whether Trilogy's websites, accessible in Pennsylvania, constitute a continuous or systematic part of Trilogy's general business sufficient to establish personal jurisdiction over it in this district. There are no United States Supreme Court or Third Circuit Court of Appeals cases deciding whether an internet website can establish general personal jurisdiction over a defendant. One district court has determined this by a sliding scale: personal jurisdiction is proper if a website is "interactive" but not if the website is "passive." See Molnlycke, 64 F.Supp.2d at 451. For example, there would be personal jurisdiction if a defendant clearly does business over the internet by entering into contracts with residents of a foreign jurisdiction involving the knowing and repeated transmission of computer files over the internet. Id. There would be no jurisdiction if a defendant maintains a passive website that only makes information available. Id. If a website is interactive and allows users to exchange information with the host computer, the exercise of jurisdiction would be determined by the "level of interactivity and commercial nature of the exchange of information on the website." Id. The court would consider not only interactivity, but also: (a) whether the websites are targeted

specifically to Pennsylvanians; and (b) whether the websites are central to the defendants' business in Pennsylvania. See Snyder v. Dolphin Encounters, Ltd., 235 F.Supp.2d 433, 440-41 (E.D. Pa. 2002).

In Molnlycke, plaintiff asserted general jurisdiction over defendant because defendant maintained a website through which customers could buy its products. 64 F.Supp.2d at 450-51. The court held that the establishment of a website through which customers could order products did not, on its own, establish general jurisdiction. Id. at 451. To hold otherwise would subject any corporation with such a website to general jurisdiction in every state. Id.

In Snyder, plaintiff asserted general personal jurisdiction over a Florida corporation and a Bahamian corporation that operated interactive websites. One defendant's websites included an on-site reservation form, an on-site souvenir order form, an on-site "ask the trainer" form, and an on-site page allowing correspondence with management. Snyder, 235 F.Supp.2d at 440. During a three and a half month period, Pennsylvania residents contacted the souvenir order form page and the on-line reservation page 500 times. Id. The other defendant's website included an on-line reservation form and an on-site page allowing correspondence with management. Id. Over a three and a half month period, Pennsylvania residents contacted the interactive web pages 44 times. The court found the main purpose of the websites was to provide general information; and the fact that customers could order souvenirs or make reservations through the websites was insufficient to establish general jurisdiction because the websites were not central to defendants' businesses in Pennsylvania and did not target Pennsylvania residents. Id. at 440-41.

In Mar-Eco, Inc. v. T & R and Sons Towing and Recovery, Inc., 837 A.2d 512,

517 (Pa. Super. 2003), the court found general jurisdiction over a motor vehicle dealer. The vehicle dealer's website allowed customers to apply for employment, search the new and used vehicle inventory, apply for financing to purchase a vehicle, calculate payment schedules, and order parts and schedule service appointments. Id. Customers could also request price quotes on specific vehicles and exchange trade-in information with the vehicle dealer. Id. The website stated: "This page allows you to handle nearly all of the financial aspects of a vehicle purchase . . . allowing you to shop and virtually complete the entire transaction via your computer." Id.

Trilogy's websites are neither completely interactive nor completely passive. Trilogy does not "clearly" do business over the internet: Trilogy avers it has never entered into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet.⁴ (Supplemental Coon Aff. 10.) On the other hand, Trilogy's websites are not passive. They are moderately interactive, falling in the middle of the sliding scale described in Molnlycke, because they allow users to reserve some sea tours and purchase merchandise. The court must consider whether the websites target Pennsylvanians and whether they are central to Trilogy's business in Pennsylvania.

Trilogy's websites do not specifically target Pennsylvanians. The websites allow general access from any state. Of the last 10,000 tour reservations made on Trilogy's websites, 205 (or 2.05%) were made by Pennsylvania residents. (Defs.' Supplemental Mem. in Supp. of Mot. to Dismiss, Ex. A at 6.) Of the last 403 merchandise purchases from Trilogy's websites, 14 (or 3.47%) were made by Pennsylvania residents. Id. Pennsylvania residents constitute only a

⁴ Trilogy contracts with Pleasant Hawaiian Holidays and Classic Custom Vacations, California corporations, and with All About Hawaii, an Oregon corporation (Kinkade Dep. 14-15) but McCagues do not allege any of these contracts were performed over the internet.

small percentage of Trilogy's internet customers. McCagues argue the websites target Pennsylvania residents because they allow visitors to enter their address information by selecting "Pennsylvania" from a drop-down menu. But all fifty states and twelve Canadian provinces are listed on the drop-down menu. (Defs.' Supplemental Mem. in Supp. of Mot. to Dismiss 10.) If the court were to give credence to McCagues' argument, it would extend general jurisdiction over Trilogy to every state. The court will not do so.

McCagues have also failed to prove the websites are central to Trilogy's business in Pennsylvania. Trilogy's websites generated 12.09% of its total business in 2003, 14.29% in 2004, 17.8% in 2005, and 19.29% in 2006. (Defs.' Supplemental Mem. in Supp. of Mot. to Dismiss, Ex. A at 9.) Internet reservations from January 1, 2006 through October 6, 2006, accounted for approximately \$1,350,074.77 in revenue for Trilogy.⁵ (Kinkade Dep. 20.) It is clear from these figures that most of Trilogy's business is not generated through the internet. Trilogy avers the majority of reservations and sales for its sea tours occur at its principal place of business in Lahaina, Hawaii. (Supplemental Coon Aff. 14.)

McCagues argue Trilogy's "bread and butter" is running tours and the fact that Pennsylvania residents may reserve the tours online makes Trilogy interactions with Pennsylvania central to its business. They cite Provident, which held there was general jurisdiction over a bank incorporated in California, even though less than 1% of the bank's loans and deposits originated in Pennsylvania, because the bank's "activities relating to Pennsylvania, the borrowing and lending of money, are the bread and butter of its daily business." 819 F.2d at

⁵ The calculation included all reservations, some of which were unpaid as of October 6, 2006. (Kinkade Dep. 25.)

438. McCagues' comparison with Provident is inappropriate because the "bread and butter" of Trilogy's business is sea tours, not internet bookings – just as the "bread and butter" of a hotel is lodging customers, not scheduling reservations, and the "bread and butter" of a bank is borrowing and lending money, not setting appointments to open new accounts. McCagues also cite Mar-Eco, but it is distinguishable because its website allowed defendant to conduct nearly its entire business of selling vehicles over the internet. Trilogy's website does not enable Trilogy to conduct its sea tour business over the internet.

There is no general personal jurisdiction over Trilogy in Pennsylvania.

B. Venue

Trilogy also moves to dismiss for improper venue.⁶ Under 28 U.S.C. § 1391(b), governing actions where jurisdiction is not founded solely on diversity of citizenship:

A civil action may "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 a defendant may be found, if there is no district in which the action may otherwise be brought."

Under 28 U.S.C. § 1391(c), a corporate defendant resides in any judicial district in which it is

⁶ Admiralty and maritime claims are "civil actions" governed by the general venue statutes, including 28 U.S.C. § 1391(b), unless the claims fall under Fed.R.Civ.P. 9(h). See Fed.R.Civ.P. 82; 12 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3142. To invoke admiralty jurisdiction under Fed.R.Civ.P. 9(h), plaintiff must affirmatively insert a statement in the pleadings identifying the claim as an "admiralty or maritime claim." Fedorczyk v. Carribean Cruise Lines, Ltd., 82 F.3d 69, 73 (3d Cir. 1996). McCagues state jurisdiction exists by virtue of both diversity of citizenship and admiralty and maritime jurisdiction. (Compl. ¶ 7.) McCagues have not affirmatively identified any of their claims as an "admiralty or maritime claim" rather than a general civil claim brought under diversity of citizenship. They claim venue is proper in this district under the general venue provisions, 28 U.S.C. § 1391 (a) and (b). Id. Section § 1391(b), and not the admiralty rules of venue, applies.

subject to personal jurisdiction at the time the action is commenced. This district does not have personal jurisdiction over Trilogy, so Trilogy does not reside here. The events or omissions giving rise to McCagues' claims did not occur in Pennsylvania since Anthony McCague was injured during a whale-watching trip off the coast of Hawaii. Finally, this action may be brought in the District of Hawaii, where Trilogy resides. Venue is not proper in the Eastern District of Pennsylvania but, in the interest of justice, the court will not dismiss the action for lack of personal jurisdiction and improper venue.

C. Transfer

In the alternative to dismissal, Trilogy requests transfer of this action to the United States District Court for the District of Hawaii under 28 U.S.C. § 1404(a) and § 1406(a). A district court, in the absence of jurisdiction over the defendant, may transfer an action to another district under 28 U.S.C. § 1406(a). Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962). Section 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

There is personal jurisdiction and venue is proper in the District of Hawaii because Trilogy is a Hawaii corporation with its principal place of business in Hawaii. In the interest of justice, this action will be transferred rather than dismissed, because McCagues' claims might otherwise be barred by the statute of limitations. The court will grant Trilogy's motion to transfer under 28 U.S.C. § 1406(a).

D. Sanctions

McCagues have filed a motion for sanctions against Trilogy under Fed.R.Civ.P.

37. They allege Trilogy provided only limited and selective information in response to their interrogatories and the witnesses Trilogy produced for deposition lacked substantive information regarding the scope of business Trilogy does over the internet. McCagues did not file a motion to compel discovery before filing for sanctions for failing to comply with a discovery order. The court finds Trilogy provided sufficient information to McCagues to resolve whether Trilogy's websites should subject Trilogy to general personal jurisdiction in Pennsylvania. McCagues' motion for sanctions will be denied.

Trilogy has filed a cross-motion for sanctions under Fed.R.Civ.P. 11. It argues McCagues' motion for sanctions created unnecessary cost and is not supported by evidence or existing law. Trilogy's cross-motion for sanctions will be denied.

III. CONCLUSION

Trilogy's motion to dismiss will be denied, Trilogy's alternative motion to transfer will be granted, and the parties' cross-motions for sanctions will be denied. This action will be transferred to the United States District Court for the District of Hawaii where it could have been brought.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**ANTHONY K. McCAGUE and
ANNA-BINNEY McCAGUE**

v.

**TRILOGY CORP., TRILOGY
EXCURSIONS and XYZ CORP.**

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CIVIL ACTION

NO. 06-887

ORDER

AND NOW, this 15th day of March, 2007, upon consideration of defendants' motion to dismiss complaint and alternative motion to transfer, the parties' motions for sanctions, and responses, it is **ORDERED** that:

1. Defendants' motion to dismiss and, in the alternative, to transfer (paper no. 7) is **GRANTED IN PART** and **DENIED IN PART**. Defendants' motion to dismiss for lack of personal jurisdiction or improper venue is **DENIED**. Defendants' motion to transfer under 29 U.S.C. § 1406(a) is **GRANTED**. Defendants' motion to transfer under 29 U.S.C. § 1404(a) is **DENIED AS MOOT**.

2. This action is **TRANSFERRED** forthwith to the United States District Court for the District of Hawaii where it could have been brought.

3. Defendants' motion for leave to file reply to plaintiffs' supplemental brief in opposition to defendants' motion to dismiss and alternative motion to transfer (paper no. 24) is **DENIED AS MOOT**.

4. Plaintiffs' motion for sanctions (paper no. 22) is **DENIED**.

5. Defendants' cross-motion for sanctions (paper no. 27) is **DENIED**.

/s/ Norma L. Shapiro

Norma L. Shapiro, S.J.