IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

NETWORK I MANAGEMENT, LLC	:	October Term, 2016
and	:	
LYN TETREAU	:	Case No. 04195
	:	
Plaintiffs	:	
	:	
v.	:	Commerce Program
	:	
AMERICAN TRANSPORT, INC.	:	
	:	Control Nos. 16113245,
Defendant	:	16121979

ORDER

AND NOW, this 3rd day of March, 2017, upon consideration of the preliminary objections of defendant American Transport, Inc., the answer in opposition of plaintiffs Network Management, LLC and Lyn Tetreau, the respective *memoranda* of law, and all the supplemental filings, it is **ORDERED** that the Preliminary objections of defendant are **OVERRULED**.

It is Further **ORDERED** that the preliminary objections of plaintiff to the preliminary objections of defendant are **SUSTAINED**.

BY THE COURT,

MCINERNEY, J.

MEMORANDUM OPINION

The preliminary objections of defendant require this court to determine whether Philadelphia County is the proper venue to the instant action, where defendant, a trucking business, asserts that its trucking deliveries and pick-ups in Philadelphia County constitute only 1.67% of its gross revenues. For the reasons below, the Court finds that venue in Philadelphia County is proper.

In addition, the preliminary objections of plaintiffs to the preliminary objections of defendant require this Court to determine whether defendant may challenge plaintiff's complaint by raising *forum non conveniens* through the device of preliminary objections. For the reasons below, the Court rules that defendant may not raise *forum non conveniens* by means of preliminary objections.

Background

Plaintiff Network I Management, LLC ("Network"), is a Michigan company which recruits truck services, provides financing to trucking companies, and acts as a trucking broker and shipper. Plaintiff Lyn Tetreau ("Tetreau"), is the sole owner of Network. Defendant American Transport, Inc. ("ATI"), is a trucking company based in Pittsburgh, Pennsylvania.

At all times relevant to this action, Network and ATI were engaged in a business relationship as evinced by an Exclusive Agency Agreement (the Agency Agreement"), dated October 31, 2015, and a "Promissory Note" executed on May 9, 2016.[1] In addition, the parties executed a "Security Agreement" dated May 9, 2016, whereby Network and Tetreau granted to ATI a security interest in land located in the State of Michigan.[2]

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[1] Exclusive Agency Agreement, Exhibit A to the complaint' Promissory Note, Exhibit C to the complaint.
[2] Security Agreement, Exhibit B to the complaint.

On October 31, 2015, Network and Tetreau filed the instant complaint in equity against ATI. The complaint alleges that ATI breached the Agency Agreement; accordingly, the complaint avers that ATI should be precluded from asserting any rights under the Security Agreement and Promissory Note.[3]

On November 29, 2016, ATI filed preliminary objections to the complaint of Network and Tetreau. In the preliminary objections, ATI asserts that venue in Philadelphia County is improper; alternatively, ATI avers that if the Court finds venue in Philadelphia County to be proper, the action should be removed to another county under the doctrine of *forum non conveniens*.[4] On December 16, 2016, Network and Tetreau filed their response in opposition to the preliminary objections. Subsequently, the parties exhaustively articulated their respective positions by filing additional *memoranda* of law, briefs, and supplemental *memoranda* of law.[5]

In the meantime, Network and Tetreau, on December 16, 2016, filed preliminary objections to the preliminary objections of ATI.[6] Through this filing, Network and Tetreau argue that ATI improperly raised *forum non conveniens* in its preliminary objections. On January 3, 2017, defendant ATI filed its response in opposition to the preliminary objections of plaintiffs Network and Tetreau.

DISCUSSION

> When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as

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[3] The complaint contains five counts: (I) declaratory relief from any obligations owed under the Security Agreement and Promissory Note, (II) declaratory relief from any obligation due under the restrictive covenants contained in the Agency Agreement, (III) breach of the Agency Agreement, (IV) breach of the covenant of good faith and fair dealing implied in the Agency Agreement, and (V) a demand for an accounting. See specifically ¶¶ 50—51 of the complaint.

[4] Preliminary objections, control no. 16113245.

[5] Some of the additional and supplemental papers appear to have been filed improperly under motion control no. 16121979.

[6] Preliminary objections of Network and Tetreau to the preliminary objections of ATI, control no. 16121979.

> true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists ... it should be resolved in favor of overruling the preliminary objections.[7]

In addition—

> [a] party has a right to file a preliminary objection raising any appropriate defenses or objections which that party might have to an adverse party's preliminary objection.[8]

I. VENUE.

In the preliminary objections, ATI asserts that any business contacts which ATI may have in Philadelphia County do not satisfy the "quality or quantity" requirements necessary to establish venue.[9] In support of this argument, ATI offers the affidavit of its president. The affidavit, dated November 28, 2016, states in pertinent part that—

> [o]f the loads transported by [ATI] ... in 2016 Year-to-Date through November 23, only .35% were transported from Philadelphia County, only .88% were delivered to Philadelphia, and the loads involving Philadelphia County only constituted 1.67% of its gross revenue.[10]

Preliminarily, the Court notes that under the Pennsylvania Rules of Civil Procedure—

> a personal action against a corporation or similar entity may be brought in and only in—
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> (1) the county where its registered office or principal place of business is located;
> (2) **a county where it regularly conducts business**;
> (3) the county where the cause of action arose;
> (4) a county where a transaction or occurrence took place

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[7] Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011).
[8] Ambrose v. Cross Creek Condominiums, 602 A.2d 864, 866 (Pa. Super. 1992).
[9] Preliminary objections of ATI, ¶¶ 11, 8.
[10] Affidavit of David Hartman, President—American Transport, Inc., Exhibit B to the preliminary objection of ATI, motion control no. 16113245.

out of which the cause of action arose, or
(5) a county where the property or part of the property which is the subject matter of the action is located....[11]

In addition, the Court notes that—

Turning to the case at hand, the complaint filed by Network and Tetreau clearly asserts that "[v]enue is appropriate in Philadelphia County pursuant to Pa. R.C.P. 2179(a)(2)."[12] To decide whether venue was established in Philadelphia County, the Court shall determine whether defendant ATI regularly conducts business therein.

In 1965, the Pennsylvania Supreme Court was asked to determine whether Philadelphia County had venue in a case captioned Monaco v. Montgomery Cab Company (the "Monaco" case).[13] Specifically, the Supreme Court was asked to find whether venue had been established under Pa. R.C.P. 2179(a)(2), which is a rule empowering a plaintiff to bring an action against a corporation in a county where that corporation "regularly conducts business." In Monaco, "Plaintiff" was a taxi cab passenger who suffered injury in Montgomery County, Pennsylvania, caused by the negligence of defendant (the "Taxi Cab Company"). Plaintiff sued the Taxi Cab Company in Philadelphia, and the Taxi Cab Company objected to the choice of venue. Evidence in the case disclosed that the Taxi Cab Company, which was based in Montgomery County, Pennsylvania, was allowed to drop-off passengers in, but not pick-up passengers from, Philadelphia County.[14] Furthermore, evidence showed that the drop-off services provided in Philadelphia County by the Taxi Cab Company amounted

[11] PA. R.C.P. 2179(a) (2017) (emphasis supplied).
[12] Complaint, ¶ 7.
[13] Monaco v. Montgomery Cab Company, 208 A.2d 252 (Pa. 1965).
[14] Id., at 256.

to a mere five-to-ten-percent of its total business.[15] Based on the foregoing, the trial court sustained the objections of the Taxi Cab Company and found that venue in Philadelphia County was improper. Plaintiff appealed.

Reversing and remanding, the Supreme Court referred to a 1927 case "only for one purpose –for the light [which that case had shed] on the standard of 'regulary [*sic*] conduct[ing] business' set forth in the corporations *venue* rule, Pa. R.C.P. 2179(a)(2)."[16] Explaining the rationale employed in deciding the 1927 case, the Supreme Court stated as follows:

> [w]e said that, when venue in a particular county depends upon doing business there, the business engaged-in must be sufficient in quantity and quality.
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> ***
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> The term quality of acts means those directly, furthering, or essential to, corporate objects; they do not include incidental acts.
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> ***
>
> By quantity of acts is meant those which are so continuous and sufficient to be termed general or habitual. A single act is not enough.[17]

Based on the facts disclosed through evidence, and in light of the standards above, the Supreme Court found that—

> the acts of driving into Philadelphia County at the request of customers and collecting fares there were acts directly essential to and in furtherance of corporate objects, and therefore were of sufficient **quality**.[18]

In 1967, the Pennsylvania Supreme Court was asked once more to determine whether Philadelphia County had venue in a case captioned Canter v. American Honda

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[15] Id.
[16] Id. (citing and discussing Shambe v. Delaare & Hudson R.R. Co., 135 A. 755 (Pa. 1927)).
[17] Id. at 256.
[18] Id. (emphasis added). In Monaco, the Pennsylvania Supreme Court determined that the "quantity" test for venue was also satisfied.

Motor Corp. (the "Motorcycle Action").[19] In the Motorcycle Action, "Plaintiff" suffered personal injury arising out of a motorcycle accident in Montgomery County, Pennsylvania. After Plaintiff filed suit in Philadelphia County, defendant "Honda" joined in the action its motorcycle dealer based in Montgomery County (hereinafter the "Additional Defendant"), on the theory of joint-and-several-liability. Evidence developed in the Motorcycle Action showed that the Additional Defendant occasionally conducted in Philadelphia County a few car "demonstrations" which resulted in sales constituting only "1 or 2 percent" of its total business.[20] After being joined, the Additional Defendant objected to the venue in Philadelphia County. The trial court sustained the objection and Honda filed an appeal.

On appeal, the Pennsylvania Supreme Court conducted the same quality—quantity test to determine whether the Additional Defendant "regularly conduct[ed] business" [in Philadelphia County] within the meaning Rule 2179(a)(2).[21] Reversing and remanding, the Supreme Court specifically concluded that "1 to 2 percent of the total business was sufficient to satisfy the test set up in Monaco as **quantity**."[22]

The facts in our case are sufficiently similar to those in Monaco. In Monaco, the Supreme Court found that deliveries of taxi-cab passengers "were acts directly essential to and in furtherance of [the] corporate objects" of the party objecting to venue in Philadelphia County.[23] Likewise in the instant case, this Court finds that the 2016 deliveries to, and pick-ups from Philadelphia County, as described in the affidavit of ATI's president, are equally and directly essential to, and in furtherance of, the

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[19] Canter v. Honda Motor Corp., 231 A.2d 140 (Pa. 1967).
[20] Id. at 141.
[21] Id. at 142.
[22] Id. at 143 (emphasis supplied).
[23] Monaco v. Montgomery Cab Company, 208 A.2d at 256 (Pa. 1965).

corporate goals of ATI.

The facts in our case are also strikingly similar to those in the Motorcycle Action. In the Motorcycle Action, the Supreme Court found that "1 to 2 percent of the total business [of the party objecting to venue in Philadelphia County] was sufficient to satisfy the test ... as [to] quantity."[24] Likewise in this case, ATI's president admits that in 2016, 1.67% of its gross revenues was derived from pick-up and delivery activities conducted in Philadelphia County. The percentage of gross revenues received by ATI is consistent with the percentage which our Supreme Court found to have satisfied the "quantity" test necessary in the Motorcycle Action to establish venue in another county. For these reasons, the preliminary objections challenging venue in Philadelphia County are overruled.

II. *FORUM NON CONVENIENS*

ATI also avers in its preliminary objections that trial in Philadelphia would be "vexatious and oppressive" because it would take place more than 300 miles from its principal place of business located in Allegheny County, Pennsylvania.[25] Stated another way, ATI challenges the complaint by raising *forum non conveniens*. Opposing this argument, Network and Tetreau assert in their preliminary objections to the preliminary objections that *forum non conveniens* is not properly asserted.

The Pennsylvania Rules of Civil Procedure state that—

> (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:
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> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a

[24] Canter v. Honda Motor Corp., 231 A.2d at 143 (Pa. 1967).
[25] Preliminary objections of ATI, ¶ 1(e)—(f), motion control 16113245.

complaint;

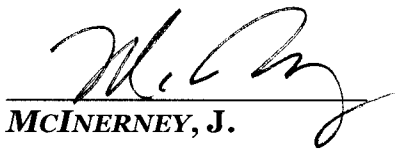
Note: Of the three grounds available to challenge venue, only improper venue may be raised by preliminary objection as provided by Rule 1006(e). ***Forum non conveniens* and inability to hold a fair and impartial trial are raised by petition as provided by Rule 1006(d)(1) and (2)**[26].

In turn, Rule 1006(d)(1) and (2) states:

> (1) For the convenience of parties and witnesses the court **upon petition** of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought.
>
> (2) Where, **upon petition** and hearing thereon, the court finds that a fair and impartial trial cannot be held in the county for reasons stated of record, the court may order that the action be transferred. The order changing venue shall be certified forthwith to the Supreme Court, which shall designate the county to which the case is to be transferred.[27]

The Rules of Civil Procedure clearly instruct that a challenge based on *forum non conveniens* is not allowed through the device of preliminary objections, and for this reason the preliminary objections of plaintiffs to the preliminary objections of defendant are sustained.

BY THE COURT,



***MCINERNEY*, J.**

[26] Pa.R.C.P. 1028(a) (2017) (emphasis supplied).
[27] Pa.R.C.P. 1006(d)(1) and (2) (2017) (emphasis supplied).