

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADOBE SYSTEMS INC,

Plaintiff,

No. C 14-00388 WHA

v.

ACCOLADIAN RESOURCES, LLC;
VERN CAMERON, an individual and
dba ACCOLADIAN RESOURCES,
WWW.ACCOLADIANS.COM, and
WWW.ACCOLADIAN.COM, and
DOES 1–10, inclusive,

Defendants.

**ORDER DENYING
MOTION TO DISMISS AND
VACATING HEARING**

INTRODUCTION

In this copyright and trademark infringement action, defendants move to dismiss for lack of personal jurisdiction and failure to state a claim for which relief can be granted. For the reasons stated below, defendants' motion is **DENIED**. The July 31 hearing is **VACATED**.

STATEMENT

Plaintiff Adobe Systems Inc. is a Delaware corporation having its principal place of business in San Jose (Compl. ¶ 8). Defendant Accoladian Resources, LLC, is a Florida corporation with its principal place of business in West Palm Beach (*id.* at ¶ 13). Accoladian operates a commercial website through which Internet consumers can purchase computer software. Defendant Vern Cameron is an individual who does business as “Accoladian Resources” and through the company’s websites. Cameron is a resident of West Palm Beach.

1 Adobe alleges that through Accoladian’s websites, www.accoladians.com and
2 www.accoladian.com, defendants sell and distribute unauthorized copies of Adobe software
3 to consumers, including those located in California (*id.* at ¶¶ 13, 18). Adobe alleges that its
4 software, specifically Adobe® Acrobat® XI Professional and other titles, were pirated by
5 defendants “at least in or around November 2013” (Compl. ¶¶ 1–4). Adobe also alleges that
6 defendants use images identical or confusingly similar to Adobe’s trademarks (*ibid.*).

7 In January 2014, Adobe filed this action for copyright infringement pursuant to 17 U.S.C.
8 101, and trademark infringement and false advertising pursuant to the Lanham Act,
9 15 U.S.C. 1051.

10 On June 16, defendants moved to dismiss the complaint for lack of personal jurisdiction
11 and for failure to state a claim for which relief can be granted. Adobe filed a timely opposition.
12 Defendants’ reply brief was due July 7, but was not filed until July 23 (Dkt. No. 37). Pursuant to
13 Local Rule 7-3, “[t]he reply to an opposition must be filed and served not more than 7 days after
14 the opposition was due.” Due to this tardiness, which was without good cause, the reply brief is
15 **STRICKEN.**

16 ANALYSIS

17 1. WHETHER THE COURT MAY EXERCISE 18 PERSONAL JURISDICTION OVER ACCOLADIAN.

19 A. Legal Standards.

20 Defendants move to dismiss the complaint for lack of personal jurisdiction pursuant to
21 Federal Rule of Civil Procedure 12(b)(2). When a nonresident defendant raises a challenge to
22 personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper, but
23 “[u]ncontroverted allegations in the plaintiff’s complaint must be taken as true [and] [c]onflicts
24 between the parties over statements contained in affidavits must be resolved in the plaintiff’s
25 favor.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) (internal citations omitted).

26 According to Rule 4(k)(1)(A), where, as here, no federal statute authorizes personal
27 jurisdiction, the district court applies the law of the state in which the court sits. California’s
28 long-arm statute, California Code of Civil Procedure Section 410.10, “is coextensive with
federal due process requirements, [so] the jurisdictional analyses under state law and federal due

1 process are the same.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800–01 (9th
2 Cir. 2004). For a court to exercise personal jurisdiction over a nonresident defendant consistent
3 with due process, that defendant must have “certain minimum contacts” with the relevant forum
4 “such that the maintenance of the suit does not offend ‘traditional notions of fair play and
5 substantial justice.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting
6 *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

7 **B. General Jurisdiction.**

8 Adobe does not argue that Accoladian or Vern Cameron are subject to general
9 jurisdiction in California. For general jurisdiction, “[t]he standard is met only by ‘continuous
10 corporate operations within a state [that are] thought so substantial and of such a nature as to
11 justify suit against [the defendants] on causes of action arising from dealings entirely distinct
12 from those activities.’” *King v. American Family Mut. Ins. Co.*, 632 F.3d 570, 579 (9th Cir.
13 2011) (quoting *International Shoe*, 326 U.S. at 318).

14 Defendants operated an interactive website which California residents could reach.
15 Our court of appeals has stated, however, that “[i]f the maintenance of an interactive website
16 were sufficient to support general jurisdiction in every forum in which users interacted with the
17 website, ‘the eventual demise of all restrictions on the personal jurisdiction of state courts’
18 would be the inevitable result.” *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066,
19 1075–76 (9th Cir. 2011) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294
20 (1980)).

21 In sum, Accoladian’s activities do not “approximate physical presence” in California, so
22 Accoladian is not subject to general jurisdiction in California.

23 **C. Specific Jurisdiction.**

24 Adobe argues that Accoladian has sufficient “minimum contacts” with California arising
25 out of, or related to, its actions. This order agrees.

26 Specific jurisdiction is analyzed under a three-prong test:

- 27 (1) The non-resident defendant must purposefully direct his
28 activities or consummate some transaction with the forum or
resident thereof; or perform some act by which he purposefully
avails himself of the privilege of conducting activities in the

1 forum, thereby invoking the benefits and protections of its laws;
2 (2) the claim must be one which arises out of or relates to the
3 defendant’s forum-related activities; and (3) the exercise of
jurisdiction must comport with fair play and substantial justice,
i.e., it must be reasonable.

4 *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

5 Adobe bears the burden of satisfying the first two prongs. *Sher v. Johnson*, 911 F.2d 1357, 1361
6 (9th Cir. 1990). If Adobe does so, the burden then shifts to Accoladian to set forth a
7 “compelling case” that the exercise of jurisdiction would not be reasonable. *Burger King Corp.*
8 *v. Rudzewicz*, 471 U.S. 462, 476–78 (1985). In order to determine whether specific jurisdiction
9 exists, this order will now apply the three pronged test, as set out by our court of appeals.

10 (1) ***Purposeful Direction.***

11 The first prong asks whether defendants “purposefully direct[ed] [their] activities or
12 consummat[ed] some transaction with the forum or resident thereof.” *Schwarzenegger*, 374 F.3d
13 at 802. In copyright and trademark infringement actions, the Ninth Circuit has set forth a
14 “purposeful direction” analysis. *Love v. Assoc. Newspapers, Ltd.*, 611 F.3d 601, 609 (9th Cir.
15 2010). District courts must “inquire whether a defendant ‘purposefully direct[s] his activities’
16 at the forum state, applying an ‘effects’ test that focuses on the forum in which the defendants’
17 actions were felt, whether or not the actions themselves occurred within the forum.” *Yahoo!*
18 *Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc). The
19 “effects” test, which derives from the Supreme Court’s decision in *Calder v. Jones*, 465 U.S.
20 783 (1984), requires that “the defendant allegedly must have (1) committed an intentional act,
21 (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be
22 suffered in the forum state.” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124,
23 1128 (9th Cir. 2010). This order, therefore, addresses the three requirements of the *Calder*
24 “effects” test in turn.

25 *First*, the complaint alleges that “defendants through Internet sites, including but not
26 necessarily limited to www.accoladians.com and www.accoladian.com (the “Websites”)
27 have advertised, offered for sale, and distributed unauthorized copies of Adobe software
28 (the “Unauthorized Software Product”) including, but not limited to Adobe® Acrobat® XI

1 Professional (the “Adobe Software”) at least in or around November 2013” (Compl. ¶ 3).

2 These acts constitute “intentional acts” and satisfy the first prong of the test.

3 *Second*, this order holds that Accoladian expressly aimed its actions at the forum state.
4 Our court of appeals has held that “the ‘expressly aimed’ prong of the purposeful direction test
5 can be met where a plaintiff alleges that the defendant individually targeted him by misusing his
6 intellectual property on the defendant’s website for the purpose of competing with the plaintiff in
7 the forum.” *Love*, 611 F.3d at 609 n.4 (citing *Brayton Purcell*, 606 F.3d at 1129–30).

8 In *Brayton Purcell*, our court of appeals found the express aiming prong of the purposeful
9 direction test satisfied where a nonresident defendant law firm plagiarized copyrighted material
10 from the forum plaintiff law firm’s website and republished the material. *Id.* at 1129–31.
11 Because both firms practiced in the relatively specialized field of elder abuse law, our court of
12 appeals concluded that the nonresident defendant “knew of [the plaintiff’s] existence, targeted
13 [the plaintiff’s] business, and entered direct competition with [the plaintiff].” *Id.* at 1130.

14 Thus, the question presented is whether Accoladian engaged in wrongful conduct
15 intended to compete with Adobe in California. Defendants claim that their actions were not
16 aimed at California. The motion to dismiss states that “defendants directed no activities at
17 California, let alone Northern California. Defendant Accoladian is a small-time operation that
18 runs charity campaigns for schools in South Florida. Nothing Accoladian does is directed at
19 California” (Br. 12). And yet, defendants’ motion to dismiss concedes that “[t]he only arguable
20 ‘contacts’ are a handful of sales made by Accoladian in California through a passive website
21 located in Florida” (Br. 10). By defendants’ own admission they sold the allegedly infringing
22 product to California residents.

23 The complaint goes even further in alleging that defendants competed with Adobe in
24 California:

25 [Accoladian] transacts business as www.accoladians.com and
26 www.accoladian.com and does business in California through
27 payment processors located in the State of California. On
28 information and belief, [d]efendants also offer and distribute the
[u]nauthorized [s]oftware [p]roduct in the State of California,
among other places.

1 (Compl. ¶ 13). Plaintiff has satisfied the “express aiming” requirement by alleging that
2 defendant “misus[ed] [plaintiff’s] intellectual property on the defendant[s’] website for the
3 purpose of competing with the plaintiff in the forum.” *Love*, 611 F.3d at 609 n.4.

4 *Third*, the complaint alleges that defendants inflicted “harm that defendants kn[ew] [was]
5 likely to be suffered in the forum state.” *Brayton Purcell*, 606 F.3d at 1128 (quoting *Yahoo!*,
6 433 F.3d at 1206). The complaint alleges economic loss based on defendants’ use of
7 misappropriated software to compete for customers. Our court of appeals has held “that a
8 corporation incurs economic loss, for jurisdictional purposes, *in the forum of its principal place*
9 *of business.*” *CollegeSource, Inc.*, 653 F.3d at 1079 (emphasis added). Because Adobe has its
10 principal place of business in San Jose, defendants would have known that the harm Adobe
11 would suffer would be in the forum state.

12 (2) ***Claim Arising out of, or Related to, Forum Activities.***

13 The complaint alleges copyright infringement, trademark infringement, and false
14 advertising claims arise from the actions of defendants in “sell[ing] and distribut[ing]
15 unauthorized, restricted downloaded copies of Adobe Software and supplying unauthorized,
16 restricted licenses to customers” (Compl. ¶ 16). Defendants once again argue that they have
17 “done little to reach out to the forum state” (Br. 13). As explained above, this order rejects
18 defendants’ contentions and therefore concludes that Adobe’s claims arise out of defendants’
19 activities in California.

20 (3) ***Reasonableness.***

21 Because Adobe has made a prima facie case that the assertion of specific jurisdiction
22 over Accoladian is constitutional, the burden shifts to defendants to “present a compelling
23 case” that the exercise of jurisdiction would be unreasonable and therefore violate due process.
24 *Burger King*, 471 U.S. at 477–78. A court must consider seven factors in determining whether
25 the exercise of jurisdiction comports with “fair play and substantial justice”:

- 26 (1) the extent of the defendants’ purposeful injection into the
27 forum state’s affairs; (2) the burden on the defendant of defending
28 in the forum; (3) the extent of the conflict with the sovereignty of
the defendant’s state; (4) the forum state’s interest in adjudicating
the dispute; (5) the most efficient judicial resolution of the
controversy; (6) the importance of the forum to the plaintiff’s

1 interest in convenient and effective relief; and (7) the existence of
2 an alternative forum.

3 *Dole Food Co. v. Watts*, 303 F.3d 1104, 1114 (9th Cir. 2002).

4 Defendants make the following arguments based on the burden they would face in
5 litigating in California:

6 Since any alternative forum would be within the United States, any
7 conflicting sovereignty interests are best accommodated through
8 choice-of-law rules rather than through jurisdictional rules. There
9 are no compelling policy interests implicated by this run-of-the-
10 mill breach of contract case. . . . Fourth, California does not have
11 a special interest in this run-of-the-mill commercial case against
12 a Florida entity mainly dedicated to servicing Florida schools and
13 charities. . . . Finally, Florida is a far more convenient and
14 efficient forum for resolving this dispute than is California. All of
15 [d]efendants’ employees are located in Florida. The subject
16 transactions that took place upstream from Defendant Accoladian
17 all took place in Florida. Even Adobe’s witnesses, are likely
18 located in Florida. In brief, litigating this case in California would
19 present a substantially greater burden for all the parties and
20 witnesses involved.

21 (Br. 13–14).

22 Adobe, for its part, explicitly rejects “the notion that there are any other witnesses located
23 in Florida” (Opp. 19). Adobe lists several other reasons why it believes jurisdiction should be
24 retained: (1) [t]he Northern District of California has mandatory e-filing procedures that lessen
25 the burden of filing from outside the district; (2) there is no known state sovereignty conflict;
26 (3) California has a significant interest in the litigation because it is the principal place of business
27 of Adobe; and (4) re-filing of this action in Florida would require the duplication of proceedings
28 (Opp. 18–19).

As to the availability of a “suitable alternative forum,” defendants suggest that “Florida is
a far more efficient forum for resolving this dispute than is California” (Br. 14). “Whether
another reasonable forum exists becomes an issue only when the forum state is shown to be
unreasonable.” *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 929 n.19 (9th Cir. 2011).
Defendants have not made that showing.

Upon consideration of all of the *Burger King* factors, this order holds that defendants have
not met their burden of showing that the exercise of jurisdiction in this action would be
unreasonable. Thus, defendants’ motion to dismiss for lack of personal jurisdiction is **DENIED**.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**2. WHETHER THE COURT MAY EXERCISE
PERSONAL JURISDICTION OVER CAMERON.**

Defendants argue that even if personal jurisdiction exists over Accoladian Resources, LLC, this Court does not have jurisdiction over Cameron as an individual. While a court may not have jurisdiction over all members or employees of a corporation solely on the basis of that corporation’s activities, there are key exceptions. “The corporate form may be ignored in two cases: (1) where the corporation is the agent or alter ego of the individual defendant; or (2) by virtue of the individual’s control of, and direct participation in the alleged activities.” *Wolf Designs, Inc. v. DHR & Co.*, 322 F.Supp.2d 1065, 1072 (C.D. Cal. 2004) (Judge S. James Otero) (internal citations omitted).

Here, Adobe alleges that Cameron is not just an employee or member of Accoladian Resources LLC and its associated websites, but that he is in fact “doing business as Accoladian Resources” and these websites. Adobe further alleges that “Cameron also offers and distributes the [u]nauthorized [s]oftware [p]roduct in the State of California,” and that “Cameron profited directly from the infringing activity . . .” (Compl. ¶ 14). In support of these allegations, Adobe submitted in its opposition brief Domain Name System records which show that Cameron is listed as the technical, billing, and administrative contact for the websites www.accoladian.com and www.accoladians.com (Opp. Exh. A at 3, 8). Cameron’s own declaration states that Accoladian does business “primarily though its website Accoladians.com,” and that he is the “managing partner of Accoladian Resources, LLC” (Cameron Decl. ¶¶ 1–2).

Based on the allegations of the complaint and the parties’ declarations, Cameron appears to have been both the moving force behind Accoladian’s infringement, as well as a direct participant in the alleged activities. Accordingly, defendants’ motion to dismiss Cameron for lack of personal jurisdiction is **DENIED**.

3. FAILURE TO STATE A CLAIM.

Alternatively, defendants move to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), alleging that the complaint is “plainly boilerplate” and “omit[s] any true factual allegations that could possibly pertain to the [d]efendants named here” (Br. 16).

1 To survive a motion to dismiss, a pleading must contain sufficient factual matter,
2 accepted as true, to state a claim for relief that is plausible on its face. Lack of a cognizable legal
3 theory or mere conclusory allegations, however, will result in dismissal. *Ashcroft v. Iqbal*,
4 556 U.S. 662, 663 (2009).

5 **A. Copyright Infringement.**

6 Defendants argue that the complaint fails to state a claim for copyright infringement.
7 To state a valid claim, Adobe must allege: (1) ownership of a valid copyright and (2) copying of
8 protected expression by the alleged infringers. *See Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499
9 U.S. 340, 361 (1991). Here, Adobe has pled a plausible claim for copyright infringement:

10 Defendants, through Internet sites, including but not necessary
11 limited to www.accoladians.com and www.accoladian.com . . .
12 have advertised, offered for sale, and distributed unauthorized
13 copies of Adobe software . . . including, but not limited to Adobe®
14 Acrobat® XI Professional . . . at least in or around November of
15 2013.

16 * * *

17 Defendants' use began long after Adobe's adoption and use of
18 Adobe's [t]rademarks, and after Adobe obtained the copyright and
19 trademark registration alleged above.

20 (Compl. ¶¶ 3, 18). Accordingly, defendants' motion to dismiss the copyright infringement claim
21 is **DENIED**.

22 **B. Trademark Infringement.**

23 Next, defendants move to dismiss Adobe's claim for trademark infringement pursuant to
24 Rule 12(b)(6). To plead trademark infringement under the Lanham Act, plaintiff must allege
25 that defendants' commercial use of a "reproduction, counterfeit, copy, or colorable imitation of a
26 registered mark" is likely to "cause confusion." 15 U.S.C. 1114(1). The complaint makes the
27 following allegations regarding trademark infringement:

28 Defendants use, among other things, the [w]ebsites to advertise,
sell and distribute unauthorized, restricted downloaded copies of
Adobe [s]oftware and supplying unauthorized, restricted licenses
to consumers.

* * *

Defendants also use images confusingly similar or identical to
Adobe's [t]rademarks, to confuse consumers and aid in the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

promotion and/or advertising of their unauthorized products. Defendants' use of Adobe's [t]rademarks includes importing, advertising, displaying, distributing, selling and/or offering to sell unauthorized copies of the Adobe [s]oftware. Defendants' use began long after Adobe's adoption and use of Adobe's [t]rademarks, and after Adobe obtained the copyright and trademark registration alleged above. Neither Adobe nor any authorized agents have consented to Defendants' use of the Adobe [t]rademarks.

Defendants' actions have confused and deceived, or threatened to confuse and deceive, the consuming public concerning the source and sponsorship of the unauthorized copies of the Adobe [s]oftware offered and distributed by [d]efendants. By their wrongful conduct, [d]efendants have traded upon and diminished Adobe's goodwill.

(Compl. ¶¶ 16–19). The complaint alleges that Adobe had registered trademarks that defendants imitated or reproduced in order to cause confusion among the consuming public. Accordingly, Adobe has pled a plausible claim of trademark infringement. Defendants' motion to dismiss is **DENIED.**

C. False Advertising.

Defendants move to dismiss Adobe's false advertising claim pursuant to Rule 12(b)(6). Section 43(a) of the Lanham Act forbids the use of false designations of origin and false descriptions or representations in the advertising and sale of goods and service. *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981). Section 1125(a) of Title 15 of the United States Code provides:

Any person who shall affix, apply, or annex, or use in connection with any goods or services a false designation of origin or representation and shall cause such goods to enter into commerce shall be liable to a civil action by any person who believes that he or she is likely to be damaged by the use of such false designation or representation.

The complaint alleges that defendants made false statements in commercial advertisements through the unauthorized use of Adobe's software products (Compl. ¶ 32). Defendants allegedly "failed to disclose" that the unauthorized products they sold were restricted by Adobe's license. These false statements were "inaccurate" and "likely to mislead or confuse consumers." Additionally, the complaint states:

Adobe is informed and believes that the statements actually deceived or have the tendency to deceive a substantial segment of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

consumers into purchasing the [u]nauthorized [s]oftware [p]roduct for which the consumer is not legally qualified to obtain and/or use.

(Compl. ¶ 33). Adobe has adequately pled a claim for relief for false representation in advertising/promotion, at least at the pleading stage. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (1992). Accordingly, defendants’ motion to dismiss Adobe’s claim for relief under the Lanham Act is **DENIED**.

4. VENUE.

Defendants argue that “[t]his Court lacks personal jurisdiction over nonresident defendant Wild Bill’s and, therefore, they should be dismissed from this litigation for improper venue” (Br. 14). “Wild Bill’s” is not a named defendant in this action nor is he mentioned in the complaint. This appears to be sloppy copying from another brief. The argument is rejected.

5. REQUEST FOR AN ORDER TO SHOW CAUSE.


Defendants claim that the operative complaint is “nearly identical” to one that Adobe filed against a third party in 2010. Defense counsel “urges the Court to issue an [o]rder to [s]how [c]ause as to all the [c]omplaints filed by Adobe to determine the differences, if any, between the [c]omplaints filed in each case” (Br. 14–15). No good cause is provided for why this order should issue. The request is **DENIED**.

CONCLUSION

For the reasons stated herein, defendants’ motion to dismiss is **DENIED**. The answer is due on **AUGUST 7, 2014**. The July 31 hearing is **VACATED**. If discovery reveals actual facts that conflict with the main factual allegations at the heart of this order, a fresh motion to dismiss for lack of personal jurisdiction may be filed.

IT IS SO ORDERED.

Dated: July 28, 2014.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE