

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

ALLIANCE LABS, LLC,
Plaintiff,
vs.
STRATUS PHARMACEUTICALS,
INC., and SONAR PRODUCTS, INC.,
Defendants.



2:12-cv-00927 JWS
ORDER AND OPINION
[Re: Motions at Dockets 12, 16]

I. MOTION PRESENTED

At docket 12, defendant Sonar Products, Inc. (“Sonar”) moves pursuant to Federal Rule of Civil Procedure 12(b)(2) to dismiss the complaint for lack of personal jurisdiction. At docket 16, defendant Stratus Pharmaceuticals, Inc. (“Stratus”) has filed a nearly identical motion. Both defendants move, in the alternative, to dismiss based on improper venue or to transfer the case to an alternative venue for the convenience of the parties and witnesses. Plaintiff Alliance Labs, LLC (“Alliance”) opposes both motions at docket 23. Sonar’s reply is at docket 29. Stratus replies at docket 30. Oral argument was not requested and would not assist the court.

1 **II. BACKGROUND**

2 Alliance is an Arizona company that markets and distributes enema products,
3 including the Enemeez Mini Enema, the Enemeez Plus Mini Enema, and the Docusol
4 Mini Enema. Stratus is a Florida corporation that markets and distributes competing
5 enema products such as the Vacuant Mini-Enema and the Vacuant Plus Mini-Enema.
6 Sonar is a New Jersey corporation that manufactures Vacuant and Vacuant Plus for
7 Stratus.

8 Alliance alleges that Stratus's Vacuant products are "knock-offs" of its Enemeez
9 products. Alliance maintains that Stratus has targeted its customers and represented
10 Vacuant products to be less expensive than the Enemeez products, but equally
11 effective. Alliance alleges that Stratus uses packaging that is virtually indistinguishable
12 from the Enemeez packaging and that Stratus copied substantial portions of the
13 Enemeez brochure to promote Vacuant products. Alliance also alleges that Stratus has
14 misrepresented the number and quantities of active ingredients in the Vacuant products.

15 Alliance has asserted federal claims for false advertising, unfair competition, and
16 trademark infringement under the Lanham Act,¹ and copyright infringement. Alliance
17 has asserted state law claims for unfair competition, trademark infringement, and unjust
18 enrichment.

19 **III. STANDARD OF REVIEW**

20 "Where a defendant moves to dismiss a complaint [pursuant to Federal Rule of
21 Civil Procedure 12(b)(2),] for lack of personal jurisdiction, the plaintiff bears the burden
22 of establishing that a court has personal jurisdiction over a defendant."² Where the
23 motion is based only upon written materials, rather than an evidentiary hearing, the
24 plaintiff is required only to make a prima facie showing of personal jurisdiction.³

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26 ¹15 U.S.C. § 1125(a)(1)(B); 15 U.S.C. § 1125(a)(1)(A); 15 U.S.C. § 1114(a).

27 ²*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

28 ³*Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

1 Uncontroverted allegations in the complaint are taken as true, and conflicts between
2 parties over statements contained in affidavits are resolved in favor of the plaintiff.⁴

3 “Where, as here, there is no applicable federal statute governing personal
4 jurisdiction, the district court applies the law of the state in which the district court sits.”⁵
5 Arizona Rule of Civil Procedure 4.2(a) authorizes the exercise of jurisdiction to the
6 extent permitted by federal due process requirements.⁶ Due process requires that the
7 defendant “have certain minimum contacts with [the forum] such that the maintenance
8 of the suit does not offend traditional notions of fair play and substantial justice.”⁷

9 **IV. DISCUSSION**

10 **A. General Jurisdiction**

11 General jurisdiction arises where a defendant has “substantial” or “continuous
12 and systematic” contacts with the forum and therefore “can be haled into court in that
13 state in any action, even if the action is unrelated to those contacts.”⁸ The defendant’s
14 contacts must “be of the sort that approximate physical presence.”⁹ “Factors to be
15 taken into consideration are whether the defendant makes sales, solicits or engages in
16 business in the state, serves the state’s markets, designates an agent for service of
17 process, holds a license, or is incorporated there.”¹⁰

18 **1. Sonar**

21 ⁴*Brayton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981, 985 (9th Cir. 2009).

22 ⁵*Fred Martin Motor Co.*, 374 F.3d at 800.

23 ⁶Ariz. R. Civ. P. 4.2(a).

24 ⁷*Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted).

25 ⁸*Bancroft & Masters, Inc. v. Augusta Nat., Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)
26 (citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415 (1984)).

27 ⁹*Id.*

28 ¹⁰*Id.*

1 Alliance argues that, because 8% of Sonar’s 2011 sales and 1.64% of Sonar’s
2 sales for the first quarter of 2012 came from Arizona, Sonar is subject to general
3 jurisdiction in Arizona. Without more specific information, the court is unable to
4 conclude that the percentages of sales for 2011 and the first part of 2012 approximate
5 physical presence in Arizona. Because that is the only factor Alliance has used to
6 support its prima facie case, the court concludes that Sonar is not subject to general
7 jurisdiction in Arizona.

8 **2. Stratus**

9 Alliance argues that because 3.2% of Stratus’ 2011 gross sales and 14.25% of
10 Stratus’ gross sales for the first quarter of 2012 came from Arizona, Stratus is subject to
11 general jurisdiction in Arizona. As with Sonar, Stratus’ sales percentages in 2011 and
12 2012 do not approximate physical presence in Arizona. Again, because Alliance has
13 not cited any other factor supporting a prima facie case, the court concludes that Stratus
14 is not subject to general jurisdiction in Arizona.

15 **B. Specific Jurisdiction**

16 Specific jurisdiction exists where “(1) the defendant has performed some act or
17 consummated some transaction within the forum or otherwise purposefully availed
18 himself of the privileges of conducting activities in the forum, (2) the claim arises out of
19 or results from the defendant’s forum-related activities, and (3) the exercise of
20 jurisdiction is reasonable.”¹¹ “The first prong is satisfied by either purposeful availment
21 or purposeful direction . . . which . . . are . . . two distinct concepts.”¹² “Purposeful
22 direction is . . . the proper analytical framework in this case.”¹³

23 Purposeful direction is determined using a three-part test. A defendant has
24 purposefully directed activity towards a forum if the defendant has “(1) committed an

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26 ¹¹*Bancroft & Masters*, 223 F.3d at 1086.

27 ¹²*Brayton Purcell*, 606 F.3d at 1128 (internal quotations omitted).

28 ¹³*See id.*

1 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
2 defendant knows is likely to be suffered in the forum state.”¹⁴

3 **1. Sonar**

4 Sonar maintains that it was only a contract manufacturer and that it did not
5 purposefully direct any action towards Arizona. Sonar states that it “did not develop the
6 labeling, packaging or inserts for the Vacuant products. It merely had the label,
7 packaging, and inserts as supplied to it printed.”¹⁵ Sonar therefore maintains that it did
8 not expressly aim any intentional act towards Arizona.

9 “Express aiming encompasses wrongful conduct individually targeting a known
10 forum resident.”¹⁶ Alliance argues in its response that Sonar and Stratus acted in
11 conjunction and “mimicked Alliance’s labeling.”¹⁷ In its complaint, Alliance alleges that
12 Sonar must have been aware that Stratus was falsely advertising because it
13 manufactured Vacuant and Vacuant Plus.¹⁸ Even if that allegation is true and would
14 subject Sonar to liability, knowledge that Stratus was falsely advertising does not
15 constitute express aiming at an Arizona resident.

16 Meanwhile, each of the “allegedly infringing activities” listed in Alliance’s
17 complaint refer only to conduct by Stratus.¹⁹ With respect to Alliance’s individual claims,
18 the complaint describes conduct by Stratus and then states that Sonar is also liable
19 because it “knows or has reason to know” of Stratus’ conduct.²⁰ In short, Alliance has
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21 ¹⁴*Brayton Purcell*, 606 F.3d at 1128.

22 ¹⁵Doc. 29 at 6.

23 ¹⁶*Bancroft & Masters*, 223 F.3d 1082.

24 ¹⁷Doc. 23 at 11.

25 ¹⁸Doc. 1 at 10.

26 ¹⁹Doc. 1 at 13.

27 ²⁰See, e.g., doc. 1 at 14, 16, 17

1 not supported allegations of any conduct on the part of Sonar that targeted Alliance or
2 any other forum resident. Because Alliance has not demonstrated express aiming, it
3 has not established purposeful direction and Sonar is not subject to specific jurisdiction.

4 **2. Stratus**

5 By contrast, the allegations in plaintiff's complaint state that Stratus has
6 intentionally copied substantial portions of Alliance's brochures,²¹ and "deliberately
7 mimicked [Alliance's] packaging."²² Those allegations constitute intentional acts
8 expressly aimed at Alliance, an Arizona resident.²³ Alliance has also alleged that it has
9 been injured by that conduct.²⁴ Because Stratus would have known that its conduct
10 would injure an Arizona resident, Alliance has made a prima facie case of purposeful
11 direction.

12 Although Stratus argues that Alliance's claims do not arise out of the sale of
13 Vacuant products in Arizona, that argument is both incorrect and immaterial. There is
14 no dispute that Alliance's claims arise, in part, out of the Stratus' alleged copying of
15 Alliance's brochures. The only remaining question, therefore, is whether the exercise of
16 specific jurisdiction over Stratus would be reasonable.

17 Reasonableness depends on seven factors: "(1) the extent of the defendant's
18 purposeful injection into the forum; (2) the defendant's burdens from litigating in the
19 forum; (3) the extent of conflict with the sovereignty of the defendant's forum; (4) the
20 forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution

21 Doc. 1 at 9.

22 *Id.*

23 Alliance also alleges that Stratus uses its trademarks in metatags for its website. *Id.* at
27 13. All of the pertinent jurisdictional allegations are supported by the declaration at docket 24.

24 See, e.g., doc. 24 at 4.

1 of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient
2 and effective relief; and (7) the existence of an alternative forum."²⁵

3 Here, Stratus has injected itself into Arizona via sales. Those sales have
4 recently constituted over 14% of its total sales. Although those sales do not constitute
5 continuous and systematic contacts sufficient to support general jurisdiction, they do
6 represent injection such that this factor weighs in favor of reasonableness. Stratus
7 argues that the burden of defending suit in Arizona is great because most of the
8 witnesses and evidence are in Florida. The burden on a non-resident defendant will
9 always be greater than the burden on a defendant who is a resident of the
10 forum—moreover, this factor is examined “in light of the corresponding burden on the
11 plaintiff.”²⁶ Given that it is just as difficult for Alliance to litigate in Florida as it is for
12 Stratus to litigate in Arizona, and given that Alliance’s witnesses and evidence are in
13 Arizona, the second factor is a wash. The court agrees with Alliance that the exercise
14 of jurisdiction in this instance would not implicate Florida’s sovereignty; the third factor
15 therefore weighs in favor of reasonableness. As with most other states, “Arizona has a
16 strong interest in protecting its residents from torts that cause injury within the state, and
17 in providing a forum for relief.”²⁷ The fourth factor therefore weighs in favor of
18 reasonableness.

19 With respect to the fifth factor, Alliance argues that the only non-party witnesses
20 are found in Arizona. Stratus responds that there are non-party witnesses in Florida as
21 well. The court concludes that this factor is a wash. The sixth factor—which focuses on
22 the plaintiff’s interest—is not as significant as the others, but ultimately weighs, however
23 slightly, in favor of reasonableness. Finally, both New Jersey and Florida represent
24 potential alternative forums, but as Alliance points out, “whether another reasonable
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26 ²⁵*Ziegler v. Indian River Cnty.*, 64 F.3d 470, 475 (9th Cir. 1995).

27 ²⁶*Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988).

28 ²⁷*Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1260 (9th Cir. 1989).

1 forum exists becomes an issue only when the forum state is shown to be
2 unreasonable.”²⁸

3 Because the court has concluded that the exercise of jurisdiction in Arizona is
4 reasonable, Stratus is subject to specific jurisdiction.

5 **C. Venue**

6 **1. Dismissal**

7 Stratus moves in the alternative to dismiss for improper venue. Stratus’
8 arguments in favor of dismissal all hinge on whether it is subject to personal jurisdiction
9 in Arizona.²⁹ The court has already concluded that Stratus is subject to personal
10 jurisdiction in Arizona, and therefore dismissal based on improper venue is not
11 appropriate.

12 **2. Transfer**

13 Stratus argues that this case should be transferred to the Southern District of
14 Florida. Section 1406(a) of Title 28 of the United States Code provides that “[t]he
15 district court of a district in which is filed a case laying venue in the wrong division or
16 district shall dismiss, or if it be in the interest of justice, transfer such case to any district
17 or division in which it could have been brought.”³⁰ Because the court has already
18 concluded that Stratus is subject to personal jurisdiction in Arizona, venue is not
19 improper, and dismissal pursuant to § 1406(a) is inappropriate.

20 Stratus argues that the case should be transferred to the Southern District of
21 Florida pursuant to 28 U.S.C. § 1404(a), which states that “[f]or the convenience of
22 parties and witnesses, in the interest of justice, a district court may transfer any civil
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24 ²⁸*Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 929 n.19 (9th Cir. 2011) (quoting
25 *Sinatra*, 854 F.2d at 1201).

26 ²⁹See doc. 16 at 12. See also 28 U.S.C. § 1391(c)(2) (“For all venue purposes an entity
27 . . . whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district
in which such defendant is subject to the court’s personal jurisdiction . . .”).

28 ³⁰28 U.S.C. § 1406(a).

1 action to any other district . . . where it might have been brought.”³¹ Assuming that the
2 case could have been brought in the Southern District of Florida, whether transfer is
3 appropriate depends on a number of public and private factors. “The defendant must
4 make a strong showing of inconvenience to warrant upsetting the plaintiff’s choice of
5 forum.”³²

6 Among the factors that may be considered are: (1) whether one state is more
7 familiar with the governing law than another; (2) the plaintiff’s choice of forum; (3) the
8 parties’ contacts with the forum; (4) the contacts relating to the plaintiff’s claim in the
9 chosen forum; (5) the differences in the cost of litigation in each forum; (6) the
10 availability of compulsory process to compel attendance of non-party witnesses; and
11 (7) the accessibility to sources of proof.³³

12 The court disagrees with Stratus that “this is not a case where the burden is
13 simply shifted from one party to another.”³⁴ Either party would be inconvenienced by
14 litigation in the other’s preferred forum. Here, neither Arizona nor Florida is more
15 familiar with the law governing Alliance’s federal claims. However, Alliance has chosen
16 Arizona. Some of its claims are based on allegations that Stratus copied its brochures
17 and labels almost verbatim. Those allegations also constitute the defendant’s
18 jurisdictionally significant contacts. The second, third, and fourth factors therefore
19 weigh against transferring the case. Stratus’ argument that compulsory process is more
20 readily available in Florida applies equally to Alliance’s witnesses who reside in Arizona.
21 Finally, the court has already discussed that witnesses and evidence are located in both
22 states. Consequently, Stratus has not made a strong showing of inconvenience
23 warranting transfer.

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25 ³¹*Id.* § 1404(a).

26 ³²*Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

27 ³³*Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000).

28 ³⁴Doc. 16 at 16.

